

The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award

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Arbitration culminates in final and binding awards. Since the Federal Arbitration Act (FAA) was passed in 1925, courts have put aside their hostility to this alternative dispute resolution (ADR) process and followed the congressional dictate to enforce contested awards. Using our database of 152 employment arbitration rulings that were reviewed in 278 federal and state court decisions from 1977 to 2003, we find that courts vacate only 8% of awards when they use the narrow standards under the FAA. Our study includes, however, a recent development—arbitration agreements that provide for expanded judicial review of awards. Typically, these clauses require courts to engage in a de novo review for fact-finding and legal errors. Although only nine appeals courts have engaged in expanded reviews of employment and commercial awards, five have vacated these bargained-for rulings. Only the Tenth Circuit has rejected this approach, concluding that contractually expanded standards are inappropriate because they “clearly threaten to undermine the independence of the arbitration process and dilute the finality of arbitration awards”¹ We suggest that the U.S. Supreme Court resolve this conflict among the circuits and reaffirm its consistent pronouncements to protect arbitration from judicial interference.

I. INTRODUCTION

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 the arbitration of their disputes. It is not clear, however, 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.

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¹ *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

A. Statement of the Research Issue

Arbitration provides benefits that are unavailable in court. It is “an efficient means of settling disputes, because it avoids the delays and expenses of litigation.”² This aim cannot be achieved, however, unless disputing parties agree that the arbitrator’s award is final and binding. But the rendering of an award is a moment of truth. At that point, a party is permitted to challenge an award by suing in federal or state court. The FAA³ and equivalent state laws⁴ authorize courts to vacate arbitrator rulings but only on narrow grounds. Vacatur of awards creates potential to undermine the goals of arbitration.⁵

Our Article identifies a serious, emerging threat to arbitral finality. Arbitration often results from an agreement by the parties to submit their dispute to this forum.⁶ But in some settings, including the employment relationship, these agreements may embody one party’s superior bargaining power.⁷ While courts do not view inequality of bargaining power as an impediment to enforcing arbitration agreements,⁸ they are vigilant for agreements that coerce individuals to forgo access to courts.⁹ The tension between private and public dispute

² KFC Nat’l Mgmt. Co. v. Beauregard, 739 So. 2d 630, 631 (Fla. Dist. Ct. App. 1999).

³ See *infra* note 58 and accompanying text.

⁴ See *infra* note 267.

⁵ See *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (observing that “[a]rbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation”).

⁶ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, (1989). *Volt* understood that “[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.” *Id.* at 479.

⁷ See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 99 Cal. Rptr. 2d 745, 768 (2000) (“Given the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement.”).

⁸ The U.S. Supreme Court has played an active role in drawing the line between enforceable agreements that reflect the inherent inequality in bargaining power between parties, and those that take unfair advantage of the weaker party. Thus, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991), the Court said that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”

⁹ The U.S. Supreme Court has cautioned that “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any

resolution forums is evident in our analysis of employment arbitration awards that undergo judicial review. Most of the 152 arbitration disputes in our database involve employers who compel individuals to waive their right to sue and submit legal claims to arbitration. We identify a new type of clause in these agreements, one that expands the grounds for court review of an arbitrator's award. They require courts to review awards for fact-finding and legal errors. Our empirical research shows that these clauses result in a much higher rate of award vacatur.

This trend is alarming because it significantly undermines arbitral finality. This, in turn, portends a significant shift in the relationship between private and public forms of adjudication.¹⁰ One serious implication is that demand will increase for scarce judicial resources.¹¹ In addition, this pattern threatens to counteract significant due process improvements in employment arbitration systems that have recently occurred.¹² We show that expanded review clauses are drafted by parties with superior bargaining power who are found by arbitrators to have engaged in serious misconduct. The irony here is that these drafters originally insisted that the weaker party in the dispute forgo access to courts. The stronger party, having lost at arbitration, petitions a court to circumvent prescribed deferential standards to review awards. This amounts to re-litigation of the arbitration. We use the metaphor of a revolving door to symbolize this manipulation of access to courts. A growing number of appellate courts give effect to expanded review clauses. If this trend continues, the autonomy granted to arbitration by the U.S. Supreme Court and Congress will erode. As a result,

contract.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 627 (1985) (citation omitted).

¹⁰ On the one hand, arbitration is seen as a substitute for public adjudication. *See Gilmer*, 500 U.S. at 31–32. However, this simple equation is hard to square with the informality and simplicity of many arbitrations. Commenting on this tension between public and private dispute resolution forums, the Eighth Circuit noted:

Arbitration is not a perfect system of justice, nor it is [sic] designed to be. “[W]here arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.”

Hoffman v. Cargill Inc., 236 F.3d 458, 462 (8th Cir. 2001) (citations omitted).

¹¹ This logic is set forth in *National Wrecking Co. v. International Brotherhood of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993):

Judicial review of arbitration awards is narrow because arbitration is intended to be the final resolution of disputes. Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.

¹² *See infra* notes 290 and 293.

the contractual promise for a final and binding award may succumb to “a sham system unworthy even of the name of arbitration.”¹³

B. Organization of this Article

We explain the evolving relationship between courts and arbitration from 1746 to 1925 in Part II.¹⁴ In subpart II.A we document the early tensions between these competing dispute resolution forums and show how courts gradually came to accept arbitration as a legitimate alternative to trials.¹⁵ By 1925, Congress wanted to ensure that courts would put aside their hostility to arbitration, and therefore enacted the United States Arbitration Act (USAA). This important development is explained in subpart II.B.¹⁶

In recent years, courts have debated whether the USAA—later named the FAA—was intended only for commercial arbitrations, or also arbitration of workplace disputes. We analyze this controversy in subpart III.A.¹⁷ We also trace the development of federal common law standards to review labor arbitration awards under the Labor-Management Relations Act (LMRA). This discussion of *Trilogy* standards, in subpart III.B,¹⁸ is relevant today because federal and state courts borrow these principles from the union-management relationship to review individual employment, as well as commercial, arbitrations.

Part IV focuses on arbitration agreements that expand court review of awards.¹⁹ Subpart IV.A²⁰ explores recent rulings upholding expanded forms of judicial review in the Fifth,²¹ Ninth,²² and Third²³ Circuits. By recently rejecting this approach, the Tenth Circuit²⁴ protected arbitrations from broad re-litigation in court. Subpart IV.B examines recent rulings from the Fourth, Fifth, and Sixth Circuits that provide expanded review of employment arbitration awards.²⁵

¹³ *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999).

¹⁴ See *infra* notes 35–70 and accompanying text.

¹⁵ See *infra* notes 35–49 and accompanying text.

¹⁶ See *infra* notes 50–70 and accompanying text.

¹⁷ See *infra* notes 71–81 and accompanying text.

¹⁸ See *infra* notes 82–99 and accompanying text.

¹⁹ See *infra* notes 100–211 and accompanying text.

²⁰ See *infra* notes 102–53 and accompanying text.

²¹ See *infra* note 102.

²² See *infra* note 103.

²³ See *infra* note 104.

²⁴ See *infra* note 106.

²⁵ See *infra* notes 154–211 and accompanying text.

Subpart V.A reviews the academic literature on employment arbitration,²⁶ which is followed in subpart V.B with an explanation of how we created a database of award-challenge court decisions.²⁷ Subpart V.C sets forth our bargaining power theory to explain why parties draft agreements that expand review of an award.²⁸

Part VI reports our research findings. Subpart VI.A²⁹ details sample characteristics—for example, the success rate of individuals in arbitration and the enforcement rate for challenged awards. Subpart VI.B³⁰ compares statistics for awards that were reviewed using traditional FAA and *Trilogy* standards with awards that were recently reviewed using expanded standards for fact-finding and legal errors. In a key finding, we show that judicial enforcement of awards declines when courts use expanded review standards.

We offer our conclusions in Part VII.³¹ First, arbitration agreements that expand court review of awards detract from recent due process improvements in employment arbitrations.³² Second, appellate courts create a revolving door of justice that is biased in favor of parties with superior bargaining power when they give effect to expanded review clauses.³³ We explain why the U.S. Supreme Court should reject expanded review of employment arbitration awards.³⁴

II. JUDICIAL REVIEW OF ARBITRATION AWARDS: 1746–1925

A. *Early Developments: State Common Law*

Although arbitration is viewed as a recent innovation in dispute resolution, it has been utilized in the United States almost from the nation's founding. Pre-industrial courts developed common law rules in support of arbitration.³⁵ Their

²⁶ See *infra* notes 212–23 and accompanying text.

²⁷ See *infra* notes 224–45 and accompanying text.

²⁸ See *infra* notes 246–61 and accompanying text.

²⁹ See *infra* notes 262–68 and accompanying text.

³⁰ See *infra* notes 269–71 and accompanying text.

³¹ See *infra* notes 272–96 and accompanying text.

³² See *infra* notes 291–94 and accompanying text.

³³ See *infra* notes 281–86 and accompanying text.

³⁴ See *infra* notes 287–96 and accompanying text.

³⁵ Based on the materials we present in this section, we disagree with the prevailing consensus that early American courts were hostile to arbitration. As we explain, their central tendency was to support arbitration. We agree, however, that some American courts were adversely affected by the English doctrine of judicial ouster, and as a consequence, pitted themselves as rivals to arbitrations.

deference to arbitration awards is reflected in principles that still have validity.³⁶ Arbitration was preferred for its procedural simplicity³⁷ and efficiency.³⁸ Also, because arbitration often resulted from pre-dispute agreements to avoid court in case of a controversy, individuals were able to select for the arbitrator's ability and judgment.³⁹ Early judges respected the finality of this process.⁴⁰ The

³⁶ These principles include: 1) "[T]he award, if made in good faith, is conclusive upon the parties. . . . Neither will it constitute any defence [sic] . . . to show that after the award had been published, [the arbitrator] dissented from it." *Winship v. Jewett*, 1 Barb. Ch. 173, 184–85 (N.Y. Ch. 1845). 2) "[A]n award may [be] good in part, and bad in part." *Brown v. Warnock*, 35 Ky. (5 Dana) 492, 492 (1837); *see also* *Banks v. Adams*, 23 Me. 259, 261 (1843), stating: "An award may be good for part and bad for part; and the part, which is good, will be sustained, if it be not so connected with the part, which is bad, that injustice will thereby be done." 3) "After an award has been executed, the court will not set it aside, upon the ground that the arbitrators were not sworn." *Johnson v. Ketchum*, 4 N.J. Eq. 364, 369–70 (N.J. Ch. 1843). *But see* *Combs v. Little*, 4 N.J. Eq. 310, 314 (N.J. Ch. 1843) (providing that "as the arbitrators were not sworn, the whole proceeding is void"). 4) "The technicalities and niceties once favored in relation to awards are no longer allowed." *Shockey's Adm'r v. Glasford*, 36 Ky. (6 Dana) 9, 10 (1837). 5) "An award must decide the whole matter submitted to the arbitrators; it must not extend to any matter not comprehended in the submission; and it must be certain, final, and conclusive of the whole matter referred." *Carnochan v. Christie*, 24 U.S. (11 Wheat.) 446, 446 (1826). 6) "Awards being much favored, the Court will intend every thing which the record will warrant, to sustain a judgment rendered or an award." *Tankersley v. Richardson*, 2 Stew. 130, 130 (Ala. 1829). 7) "Where an award upon its face purports to be final, and recites all the matters and things submitted, it is prima facie final, and the party impeaching it must show proof to the contrary." *Campbell v. Western*, 3 Paige Ch. 124, 138 n. 1 (N.Y. Ch. 1832).

³⁷ *See* *Brush v. Fisher*, 38 N.W. 446, 448 (Mich. 1888), expressing this rationale for enforcing arbitration awards:

They are made by a tribunal of the parties' own selection, who are usually, at least, expected to act on their own view of law and testimony more freely and less technically than courts and regular juries. They are also generally expected to frame their decisions on broad views of justice, which may sometimes deviate from the strict rules of law.

³⁸ *See Campbell*, 3 Paige Ch. at 138:

If every party who arbitrates, in relation to a contested claim, to save trouble and expense, is to be subjected to a chancery suit, and to several hundred dollars cost, if the arbitrators happen to err upon a doubtful question as to the admissibility of a witness, the sooner these domestic tribunals of the parties' own selection are abolished, the better. Such a principle is wholly inconsistent with common sense, and cannot be the law of a court of equity. There is, therefore, nothing in the proceedings before the arbitrators which could justify any court in setting aside those proceedings for fraud, or improper conduct, or any other irregularity.

³⁹ *E.g.*, *Neely v. Buford*, 65 Mo. 448, 451 (1877) ("Courts are disposed to regard with favor these tribunals of the parties' own selection. . . .").

Supreme Court of Michigan summarized this supportive philosophy: “[T]here is power in a court of equity to relieve against awards in some cases where there has been fraud and misconduct in the arbitrators, or they have acted under some manifest mistake. . . . But it is evident that there are great objections to any general interference by courts with awards.”⁴¹

However, some courts did not uphold awards. They retained jurisdiction of disputes because private tribunals were not otherwise accountable to the rule of law.⁴² Occasionally, the method of an arbitrator’s appointment caused courts to vacate awards. Even if such selection did not bias the arbitrator, courts perceived conflicts of interest.⁴³

⁴⁰ *Port Huron & N.W. Ry. Co. v. Callanan*, 34 N.W. 678, 679 (Mich. 1887) (“It is not expected that after resorting to such private tribunals either party may repudiate their action and fall back on the courts.”).

⁴¹ *Brush v. Fisher*, 38 N.W. 446, 447–48 (Mich. 1888) (citation omitted). The court elaborated:

It is a well-settled rule in equity . . . that an award of arbitrators of the parties’ own choosing, unless outrageously excessive on the face of it, and such as would induce every honest man at first blush to cry out against it, cannot be set aside, unless there be corruption, partiality, misconduct, or the use of an excess of power in the arbitrators, or fraud upon the opposite party.

Id. at 450 (citation omitted). Knowing that the losing party at arbitration might be tempted to back down from its original promise to abide by the arbitrator’s award, the court observed that “[t]he office of arbitrator is one voluntarily assumed, and is many times a thankless task, and parties often feel aggrieved at their findings.” *Id.*

⁴² *E.g.*, *Hurst v. Litchfield*, 39 N.Y. 377, 379 (1868) (stating that “stipulations [for arbitration] are regarded as against the policy of the common law, as having a tendency to exclude the jurisdiction of the courts”); *see also* *Prince Steam-Shipping Co. v. Lehman*, 39 F. 704, 704 (S.D.N.Y. 1889), remarking that arbitration “agreements have repeatedly been held to be against public policy, and void.” The best explanation for the policy is in *Greason v. Keteltas*, 17 N.Y. 491, 496 (1858) (citations omitted):

It is well settled that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration. To do so, would bring such courts in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration already made. This policy is founded in the obvious importance of securing fairness and impartiality in every judicial tribunal. Arbitrators being selected, not by law, but by the parties themselves, there is danger of some secret interest, prejudice or bias in favor of the party making the selection; and hence the opposite party is allowed, to the latest moment, to make inquiries on the subject.

⁴³ *See generally* *Herrick v. Estate of Belknap*, 27 Vt. 673 (1854). The court determined that a civil engineer employed by a railroad to administer excavation contracts, and who thereby functioned as an arbitrator or umpire, improperly denied payment to a contractor who was to be paid according to the amount of earth he removed. Denying effect to this internal dispute resolution process, the court stated that the “injury has been caused by the fraud or neglect of their officers. . . . It was for the interest of the company to have short

Finally, early courts demonstrated some willingness to expand or narrow their review of arbitrator awards in relation to the parties' contractual arrangements. The boundary between autonomous and court-supervised arbitrations was drawn by key jurisdictional phrases in pre-dispute agreements.⁴⁴ If a contract expressly provided for judgment on the award, courts functioned as appellate tribunals.⁴⁵ But if an agreement submitted the matter to arbitration, this discontinued the right to sue.⁴⁶ In the same way, courts reasoned that

estimates; and under these circumstances no actual fraud need be proved." *Id.* at 676–77. In *Mansfield & Sandusky City Railroad Co. v. John P. Veeder & Co.*, 17 Ohio 385 (1848), the contract provided for a professional engineer employed by a railroad company to exercise impartial and independent judgment in determining whether an excavator's claim for payment on a job should be made. Because the evidence showed that the engineer was mistaken in denying a claim for payment, the court ruled that this contract worker was entitled to equitable relief from Ohio courts.

⁴⁴ This is demonstrated by the technical usage in *Camp v. Root*, 18 Johns. 22, 23 (N.Y. 1820) (emphasis added):

This is plainly a case of *submission* to arbitration; it is, in no respect, a *reference* under the Statute. The parties chose to enter their submission upon the minutes of the court, and to direct the arbitrator to make report to the court; but all this does not vary the rights of the parties, nor authorize the court to give judgment immediately on the award. The submission to arbitration was discontinuance of the suit.

See also *Ex parte Wright*, 6 Cow. 399, 399 (N.Y. 1826): "A general submission of a cause to arbitration is a discontinuance; but not where the parties agree that a judgment may be entered on the report. And in such a case, if the submission be revoked, the court may proceed with the cause to trial, notwithstanding the submission."

⁴⁵ See *Green v. Patchin*, 13 Wend. 293, 296 (N.Y. Sup. Ct. 1839):

[I]n all actions not referrible under the statute, if the parties refer the cause to referees, by stipulation or rule, or both, and merely provide that the referees report, such reference is an arbitration, and operates as a discontinuance. But if the stipulation of the parties provide that a judgment shall be entered upon the report or award, and judgment is entered accordingly, the parties are concluded by their own agreement.

⁴⁶ See *Rogers' Heirs v. Nall*, 25 Tenn. (6 Hum.) 29, 29 (1845), stating: "If parties to a suit in court, by bond, submit the cause to the decision of arbitrators, without making any provision in the submission to continue the jurisdiction of the court over the cause, such reference will work a discontinuance. . . ."

The doctrine appears to have originated in *Larkin v. Robbins*, 2 Wend. 505, 506 (N.Y. 1829):

The reason that the submission operates as a discontinuance, is not because the subject of the suit is otherwise disposed of than by the decision of the court in which it was prosecuted; but because the parties have selected another tribunal for the trial of it. The court will not look to the proceedings of that tribunal to determine whether the suit is gone beyond its jurisdiction. It is sufficient that the parties have selected their arbitrators, and concluded their agreement to submit to them. It is this agreement which withdraws the cause from the court, and effects the discontinuance of the suit.

commencement of a lawsuit counteracted an otherwise binding submission to arbitration.⁴⁷

These courts spurred a backlash. As arbitration gained acceptance in the 1800s, state legislatures directed courts to enforce awards.⁴⁸ Certain courts resisted the rising tide of hostility to arbitration. As losers of arbitrations sued to vacate awards, these judges expressed concern about parties who renege on their promise to be bound by an award. To illustrate, a particularly deferential court treated awards as final even upon evidence that the arbitrator was biased, provided that the arbitrator's partiality was known to the parties during the proceeding and the loser did not withdraw the submission.⁴⁹

B. *The Modern Era: FAA Standards for Judicial Review of Awards*

The results of our empirical study cannot be understood without accounting for the legislative history of the FAA. We compare the rate at which contemporary courts enforce (also called confirm) awards while applying traditional FAA standards with the enforcement rate under expanded standards imposed by an arbitration agreement. Traditional standards are a mix of explicit FAA criteria that embody the goal of Congress to insulate arbitrations from too much interference by courts, and related common law principles that originated in 19th Century court decisions that maintained the autonomy of arbitration.

The FAA's award enforcement standards were meant to neutralize court doctrines that were hostile to arbitration. The paradigm of this antagonism was a 1746 decision, *Kill v. Hollister*, which ruled that an arbitration agreement could not "oust this court."⁵⁰ The English concept of "ouster" influenced American

⁴⁷ *E.g.*, *Van Antwerp v. Stewart*, 8 Johns. 125 (N.Y. 1811).

⁴⁸ *See Henderson v. Beaton*, 52 Tex. 29 (1879) (upholding the constitutionality of a Texas statute enacted in 1879 that provided for a board of referees or arbitrators to dispose of civil actions by the consent of parties); *Howard v. Sexton*, 1 Denio 440 (N.Y. 1845) (arbitration tribunal established under New York law is not defective even if arbitrators fail to take oath as established by law); *Conger v. Dean*, 3 Iowa 463 (1856) (state statute did not provide common law right to submit controversies to arbitration, but prescribed procedures for judicial enforcement of arbitration awards); *Colter v. Frese*, 45 Ind. 96 (1873) (statute provided for arbitration between contractors, workmen, furnishers of materials, and other employees and creditors).

⁴⁹ *Fox v. Hazelton*, 27 Mass. (10 Pick.) 275, 278 (1830) (holding that because objecting party "was content to proceed with the knowledge of the fact, relying upon the strength of his cause, or the capacity and firmness of the other referees, he must be deemed to have waived his exceptions").

⁵⁰ *Kill v. Hollister*, 95 Eng. Rep. 532 (1746).

courts.⁵¹ Congress worried about a persistent rivalry between courts and private tribunals, and therefore passed the FAA “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.”⁵²

The FAA originated in legislation titled the United States Arbitration Act (USAA), which was first introduced in the 68th Congress in the House of Representatives in 1923.⁵³ The purpose of the bill was “to make valid and enforceable written provisions or arrangements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.”⁵⁴ Lawmakers vocalized their concern about persisting judicial aversion to arbitration.⁵⁵ But in committee reports and debates, they barely discussed standards for court review of awards.⁵⁶ The most revealing

⁵¹ Courts from the 1800s quoted Lord Kenyon’s emphatic rejection of a motion to enforce a pre-dispute arbitration agreement: “It having been decided *again and again* that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction.” *E.g.*, *Thompson v. Charnock*, 8 Term R., 134, 139 (N. Y. ed. of 1834, 91) (emphasis added).

⁵² *E.g.*, *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 211 n.5 (1956) (Frankfurter, J., concurring) (quoting *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915)); *see also* *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219–20, 220 n.6 (1985) (explaining that when Congress passed the FAA it was “motivated, first and foremost, by a congressional desire” to reverse long-standing judicial resistance to arbitration). In its pronouncement on this point nearly forty years ago in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court recounted that “English courts traditionally considered irrevocable arbitration agreements as ‘ousting’ the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act.” *Id.* at 510 n.4.

⁵³ United States Arbitration Act, H.R. 646, 68th Cong. (1923). On December 12, 1923, an identical bill was introduced in the Senate. S. 1005, 68th Cong. (1923).

⁵⁴ United States Arbitration Act, H.R. 646, 68th Cong. (1923).

⁵⁵ *See* S. REP. NO. 68-536, at 2–3 (1924); *see also* the comments of Sen. Thomas J. Walsh during floor debate of the bill: “In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced.” 65 CONG. REC. 984 (1924). The same discussion appears from the House in 65 CONG. REC. 1931 (1924) (remarks of Congressman Graham).

⁵⁶ *See* H.R. REP. NO. 68-96, at 2 (1924), stating: “The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.” The 1924 Senate report was only slightly more informative. *See* S. REP. NO. 68-536, 68th Cong. (stating that an award could be set aside if it was secured by corruption, fraud, or undue means; there was partiality or corruption on the part of the arbitrators; an arbitrator has been guilty of misconduct or refused to hear evidence; there was prejudicial misbehavior by the parties; or the arbitrator has exceeded his or her powers.

explanation for the section on reviewing awards came from a brief that was introduced during a Senate hearing.⁵⁷

The law that was finally passed in 1925 vested federal courts with jurisdiction to enforce arbitration agreements.⁵⁸ Section 10 directed courts to enforce these contracts,⁵⁹ while defining very narrow grounds to vacate arbitration awards.⁶⁰ These criteria were limited to the following instances:

⁵⁷ See *Hearings on the Subject of Interstate Commercial Disputes Before the Subcomms. on the Judiciary*, 68th Cong. 36 (1924):

The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.

⁵⁸ United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 2 (2000)). The law applies to the following arbitration agreements:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Section 3 provides jurisdiction in “any suit or proceeding . . . brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration.” 9 U.S.C. § 3 (2000). It is important to note, however, that some courts have declined jurisdiction to review an award, with the effect of leaving the award intact. *E.g.*, *Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 882, 883 (9th Cir. 1993) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)):

The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction. . . . There must be diversity of citizenship or some other independent basis for federal jurisdiction.

⁵⁹ 9 U.S.C. § 10 (2000). After providing federal courts jurisdiction to hear controversies over arbitration agreements, Section 3 of the FAA states that a court “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.” 9 U.S.C. § 3 (2000). Following the arbitration, Section 9 prescribes:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an

(1) where the award was procured by corruption, fraud, or undue means;⁶¹ (2) where there was evident partiality or corruption in the arbitrators, or either of them;⁶² (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;⁶³ or (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.⁶⁴

order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9 (2000) (citations omitted).

⁶⁰ Courts have colorful ways to express the narrow limits of this review. *E.g.*, *Eljer Mfg. Corp. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1253 (7th Cir. 1994) (“grudgingly narrow”).

⁶¹ 9 U.S.C. § 10(a)(1) (2000). In interpreting this standard, courts have said:

For an alleged fraud . . . to constitute grounds for vacatur, (i) the movant must establish the existence of fraud by clear and convincing evidence, (ii) the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration, and (iii) the movant must demonstrate that the fraud materially related to an issue in the arbitration.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros, 1 F. Supp. 2d 1337, 1345 (M.D. Fla. 1998) (citing *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988)), *aff’d*, 214 F.3d 1354 (11th Cir. 2000).

⁶² 9 U.S.C. § 10(a)(2) (2000). Construing this term, courts have vacated an award only when “either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.” *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998). Other courts have added that “[i]n order to vacate on the ground of evident partiality in a nondisclosure case, the party challenging the arbitration award must establish that the undisclosed facts create a ‘reasonable impression of partiality.’” *Lifecare Int’l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982)); *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994). Courts also reason that the “alleged partiality must be ‘direct, definite and capable of demonstration rather than remote, uncertain or speculative.’” *Consol. Coal Co. v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir. 1995) (quoting *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992)). They have rejected a more intrusive standard, the appearance of bias or partiality. *E.g.*, *Health Servs. Mgmt. Corp.*, 975 F.2d at 1264; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984).

⁶³ 9 U.S.C. § 10(a)(3) (2000).

⁶⁴ 9 U.S.C. § 10(a)(4) (2000). Under this provision, challengers to an award contend that “an arbitrator exceeded his powers or so imperfectly executed his powers because the arbitrator disregarded Plaintiff’s evidence.” Courts have rejected these appeals, noting that “[f]actual or legal errors by arbitrators—even clear or gross errors—‘do not authorize courts

These standards did not change when the USAA was codified and renamed the FAA in 1947.⁶⁵ In time, however, courts supplemented statutory grounds for reviewing awards with common law principles. The most typical standard is that the award was made in manifest disregard of the law, but courts have emphasized its exceedingly narrow scope.⁶⁶ Some courts have adamantly refused to adopt this standard.⁶⁷ More activist courts have adopted other standards, all of which have been construed against petitions for vacatur. The common variations are that the award (1) is arbitrary and capricious,⁶⁸ (2) violates public policy,⁶⁹ or (3) manifestly disregards evidence.⁷⁰

to annul awards.” *Gingiss Int’l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) (quoting *Widell v. Wolf*, 43 F.3d 1150, 1151 (7th Cir. 1994)).

⁶⁵ Federal Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codifying the USAA as the FAA).

⁶⁶ *E.g.*, *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000) (“review for manifest disregard is ‘severely limited’”) (quoting *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997)). To find manifest disregard, a court must find that: “(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.” *Greenberg*, 220 F.3d at 28 (citing *DiRussa*, 121 F.3d at 821).

⁶⁷ See *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 n.2 (5th Cir. 1993) (rejecting non-statutory grounds for vacating awards).

⁶⁸ This stringent standard results in vacatur “only if ‘a ground for the arbitrator’s decision cannot be inferred from the facts of the case.’” *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992) (quoting *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1413 (11th Cir. 1990)).

⁶⁹ See *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993) (stating that a court may deny enforcement to an award that “would violate ‘some explicit public policy’ that is ‘well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests’”) (citations omitted).

⁷⁰ For example, “[i]n very limited situations, a court may vacate an award because arbitrators have manifestly disregarded the evidence. . . . A court may only vacate an arbitrator’s award for manifest disregard of the evidence if ‘there is ‘strong evidence’ contrary to the findings of the arbitrator and the arbitrator has not provided an explanation of his decision.’” *McDaniel v. Bear Stearns & Co.*, 196 F. Supp. 2d 343, 351 (S.D.N.Y. 2002) (citations omitted). However, a court is not allowed to “question the credibility findings of the arbitrator.” *Id.* In general, “judicial review of an arbitrator’s factual determinations is quite limited.” *Beth Israel Med. Ctr. v. Local 814, Int’l Bhd. of Teamsters*, No. 99 Civ. 9828, 2000 WL 1364367, at *6 (S.D.N.Y. Sept. 20, 2000). In this vein, “a court may not review the weight the arbitration panel accorded conflicting evidence.” *Sobol v. Kidder, Peabody & Co.*, 49 F. Supp. 2d 208, 217 (S.D.N.Y. 1999).

III. ARBITRATION AGREEMENTS FOR WORKPLACE DISPUTES

A. *The Exclusion of Employment Agreements Under the FAA*

The legislative history of the FAA was at the heart of a recent legal controversy. When this law was passed, the U.S. economy was integrating into a nationwide network spurred by trains and telephones. Interstate commerce was a growing reality. In order to enable distant businesses to cope with this new scale, the FAA federalized a small part of contract law, a field reserved primarily for state regulation. Congress encouraged businesses to use arbitration agreements to avoid lengthy and expensive litigation.⁷¹ Lawmakers worried that state courts would not cede jurisdiction for private dispute resolution forums.⁷² They wanted arbitration agreements enforced like other contracts.⁷³

The skeptics among them wondered aloud, however, about fairness issues—for instance, arbitration agreements required by a party with superior bargaining

⁷¹ See 65 CONG. REC. 1931 (1924) (“It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in *commercial* contracts and in admiralty contracts.”) (emphasis added). When the bill was introduced in the House, its sponsor, Rep. Mills, explained that it “provides that where there are *commercial* contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract.” 65 CONG. REC. 11,080 (1924); H.R. REP. NO. 68-96, at 1–2 (1924); see also H.R. REP. NO. 68-96 (1924) (Congress believed the procedural simplicity of arbitration would “reduc[e] technicality [and] delay, and [keep] expense to a minimum and at the same time safeguard[] the rights of the parties.”); S. REP. NO. 68-536, at 3 (1924) (The FAA, by avoiding “the delay and expense of litigation” would appeal “to big business and little businesses . . . corporate interests [and] . . . individuals.”).

⁷² The House Committee Report explained:

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

H.R. REP. NO. 68-96, at 1–2 (1924).

⁷³ The House Report states that Congress intended to place arbitration agreements “upon the same footing as other contracts, where it belongs.” H.R. REP. NO. 68-96, at 1 (1924).

power as a condition for doing business with it.⁷⁴ Employment contracts raised another fairness issue. Testimony from maritime and railroad union officers suggested that workers would be forced to give up rights by agreeing to unfriendly arbitration procedures.⁷⁵ Sensitive to this concern, Congress enacted a section that excluded the employment contracts of “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁷⁶

This history became relevant in the 1990s. In *Gilmer v. Interstate/Johnson Lane Corp.*,⁷⁷ the U.S. Supreme Court approved a mandatory arbitration agreement that waived an individual’s right to sue under the Age Discrimination in Employment Act and provided arbitration as a substitute for court. As a result, many employers compelled their employees to sign similar arbitration

⁷⁴ Even though there was no serious debate that businesses voluntarily entered into pre-dispute arbitration agreements, Sen. Walsh noted that some businesses did not have real power to negotiate contract terms:

The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract.

Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 9 (1923).

⁷⁵ INT’L SEAMEN’S UNION OF AM., PROCEEDINGS OF THE ANNUAL CONVENTION OF THE INTERNATIONAL SEAMEN’S UNION OF AMERICA 203–04 (1926). Labor union objections were traced to the president of the International Seamen’s Union of America, who addressed the matter at the 1926 annual convention of his union:

[T]his bill provides for reintroduction of forced or involuntary labor, if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the seaman, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in “Interstate and Foreign Commerce.”

Id. (citation omitted). In response, Secretary of Commerce Herbert Hoover suggested that “[i]f objection appears to the inclusion of workers’ contracts in the law’s scheme, it might be well amended by stating ‘but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.’” *Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong. 14 (1924)* (citation omitted).

⁷⁶ *Id.*

It is the same with a good many contracts of employment. A man says, “These are our terms. All right, take it or leave it” Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Id.

⁷⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

agreements.⁷⁸ As some employees sued to gain access to courts, they contended that the FAA exclusion of “any other class of workers engaged in foreign or interstate commerce” applied to them.⁷⁹ Occasionally, this argument thwarted employer motions under the FAA for court orders to compel arbitration of employment law claims.⁸⁰ In 2001, the Supreme Court ended this interpretation of the FAA when it ruled that the general expression “any other class of workers engaged in foreign or interstate commerce” could only mean occupations akin to seamen and railroad employees.⁸¹ This made most employment arbitration agreements enforceable under the FAA, and at the same time, extinguished most individuals’ right to sue.

B. Arbitration in Unionized Workplaces: Federal Common Law Standards to Review Awards Under the Steelworkers Trilogy

The FAA evolved in an unexpected direction by the late 1940s and 1950s, as its coverage expanded to enforce a different kind of employment arbitration award—those involving the voluntary submission of a dispute by labor unions and employers.⁸² Because Congress explicitly excluded only railroad and maritime workers, some courts used the FAA to enforce arbitration agreements involving other kinds of unionized workers.⁸³

Other courts took a very different path in enforcing union-management arbitration clauses. In 1947, Congress passed the Labor-Management Relations Act (LMRA) to curb a national strike wave. Section 301 created federal jurisdiction to enforce collective bargaining agreements (CBA), and by extension, the arbitration provisions in those CBAs. Lawmakers thought that this section would promote industrial peace by moving labor disputes from picket lines to arbitrations, and if necessary, to federal courts.

This created confusing overlap between the FAA and Section 301. Consider an arbitration ruling on a matter of great significance to a particular union and employer—for example, an employer decision to subcontract work performed by

⁷⁸ See *infra* note 277.

⁷⁹ *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1999).

⁸⁰ *Id.*

⁸¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 105 (2001) (citation omitted).

⁸² See generally Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157 (1953); Donald Wollett & Harry H. Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445 (1955); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

⁸³ E.g., *Local 205, United Elec., Radio & Mach. Workers v. Gen. Elec. Co.*, 233 F.2d 85 (1st Cir. 1956).

the union. If the arbitrator ruled for the union and the employer refused to comply, the former would need a court order to enforce the award. The employer would seek to vacate this objectionable award. What criteria would a court use to review this award? The FAA provided useable standards for judicial review of arbitration awards, but apart from its exclusion section, that law had nothing to do with union-management relations. Section 301 was enacted specifically to deal with labor disputes, so a court would naturally use it to assert jurisdiction. The problem with this form of jurisdiction, however, is that the LMRA said nothing about the standards for reviewing awards. The only way to fill this void was to create federal common law standards for this purpose.

The Supreme Court waded into this thicket in *Textile Workers Union v. Lincoln Mills*⁸⁴ by approving the development of federal common law contract principles under Section 301. A short time later, the Court issued three closely related decisions, now called the *Steelworkers Trilogy*, which set forth standards for enforcing labor arbitration agreements. One *Trilogy* decision, *United Steelworkers v. Enterprise Wheel & Car Corp.*, specified principles to guide court review of a labor arbitration award.⁸⁵ Judges were directed to confirm awards because unions and employers bargained for finality to their disputes.⁸⁶ But the *Enterprise* Court also set forth limited grounds to vacate an award: (1) the award fails to draw its essence from the collective bargaining agreement;⁸⁷ or

⁸⁴ *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 456–57 (1957). The Court ruled that federal jurisdiction to enforce collective bargaining agreements under the NLRA, including arbitration provisions, arises under Section 301 of the Labor-Management Relations Act of 1947, and not the FAA. *Id.* at 450–51.

⁸⁵ *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). After the arbitrator's award reduced the termination of several employees to a ten day suspension, the employer refused to comply with the award. *Id.* at 595. The Supreme Court reversed the Fourth Circuit's order that denied enforcement to the arbitrator's award. *Id.* at 599.

⁸⁶ *Id.* at 598–99. In a companion decision, the Court noted that the "function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator" because it is "the arbitrator's judgment . . . that was bargained for." *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960). Another *Trilogy* decision, *United Steelworkers v. Warrior & Gulf Navigation Co.*, observed that the arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. . . . He is rather part of a system of self-government created by and confined to the parties." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (citation omitted). The Court continued that "[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *Id.* at 582.

⁸⁷ *Enter. Wheel & Car Corp.*, 363 U.S. at 597. The Court explained that the arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining

(2) the arbitrator exceeds his authority.⁸⁸ In a companion *Trilogy* decision, the Court presumed that the arbitrator has special insight into workplace disputes: "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."⁸⁹ The *Enterprise* Court also believed that the arbitrator needs latitude and flexibility in adjudicating disputes:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There, the need is for flexibility in meeting a wide variety of situations.⁹⁰

The strong message sent by the *Trilogy* to enforce awards was questioned during the 1970s, as labor arbitration awards touched on subjects that were regulated by public policies distinct from union-management relations. Employment discrimination laws provided a notable complication for labor arbitration.⁹¹ An employer in need of laying off part of its workforce might be

agreement." *Id.* When the arbitrator dispenses "his own brand of industrial justice" contrary to the agreement, the "courts have no choice but to refuse enforcement of the award." *Id.*

⁸⁸ *Id.* at 598. The *Enterprise* Court stated that an award should not be disturbed unless the arbitrator "has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration." *Id.* A court should not vacate an award merely because it disagrees with the arbitrator's construction of the agreement. *See id.* It added that a "mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award." *Id.*

⁸⁹ *Warrior & Gulf Navigation Co.*, 363 U.S. at 581. The Court explained:

The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

Id. at 582.

⁹⁰ *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. The Court added: "The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency." *Id.*

⁹¹ The classic statement of this problem appears in David E. Feller, *The Coming End of Arbitration's Golden Age*, in *ARBITRATION—1976*, at 97, 109 (Barbara D. Dennis & Gerald G. Somers eds., 1976) ("Arbitration is not an independent force, but a dependent variable, and to the extent that the collective [bargaining] agreement is diminished as a source of employee rights, arbitration is equally diminished.").

confronted by conflicting choices: Adhere to a CBA that requires layoffs in reverse seniority order, thereby retaining white men, while laying off more recently hired minorities and women; or comply with a consent decree resulting from a race and sex discrimination lawsuit and ignore the layoff sequence in the CBA.

The employer in *W.R. Grace & Co. v. Rubber Workers* faced this hard choice and complied with a decree to avoid a discrimination lawsuit.⁹² But the arbitrator, whose authority was grounded only in the CBA, ruled that the employer violated the CBA by not following the agreement's prescribed order for laying off workers.⁹³ After the employer refused to abide by the award, the Supreme Court in *W.R. Grace* upheld the arbitrator's ruling. In doing so, the Court stated an additional standard for reviewing awards: The award cannot violate a public policy. But the *W.R. Grace* Court narrowed these grounds to circumstances where "the contract as interpreted by [the arbitrator] violates some explicit public policy."⁹⁴ Before a court vacates any award, it must determine that a public policy is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"⁹⁵

⁹² *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum, & Plastic Workers*, 461 U.S. 757 (1983). The employer had entered into a consent decree with the Equal Employment Opportunity Commission that required the company to maintain its extant proportion of women and blacks in the work force in the event of layoffs to remedy past sex and race discrimination at its Corinth, Mississippi plant. A year after entering into the decree, the employer needed to lay off part of its work force and, consistent with the decree, protected females and blacks by laying off white males. Having more seniority than the protected employees, the white males filed a grievance to vindicate this contractual right. After being compelled by federal courts to arbitrate this grievance, the company lost at arbitration. *Id.* at 759–60, 763–64.

⁹³ The arbitrator ruled that the employer had breached the collective bargaining agreement, in opposition to the consent decree, and awarded the affected employees damages rather than reinstatement. *Id.* at 764.

⁹⁴ *Id.* at 766.

⁹⁵ *Id.* (citation omitted). Some federal courts did not abide by this strong signal to defer to arbitral rulings. Drug testing programs implemented in the 1980s were a flashpoint for judicial intervention. When arbitrators reinstated drug-offenders, courts refused to enforce these awards because these rulings were in tension with laws that penalized the underlying offense. So, just four years after *W.R. Grace*, the Court revisited the public policy exception to the general rule for enforcing awards in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). An arbitrator reinstated a paper mill worker who was fired after he was arrested in the company parking lot on a drug charge. *Id.* at 33–34. The district court vacated the award, and thus, the company did not reinstate the grievant because it believed that reinstatement would violate a public policy against operation of dangerous machinery by drug-users. *Id.* at 34–35. *Misco* reversed these rulings. In doing so, it

Before long, other public policies tempted courts to vacate arbitration awards. Drug abuse was regulated by a wide array of criminal laws. Also, occupational safety laws put employers under a duty to abate workplace hazards. If an arbitrator reinstated an operator of an industrial slitting machine who was fired for possessing drugs on an employer's property, the award would be at odds with penal and safety codes. On the other hand, nothing in these laws would specifically prohibit the employment of a worker who was arrested for drug possession.

This was the problem presented in *United Paperworkers International Union v. Misco*.⁹⁶ The Court reinforced the message to avoid vacating awards on public policy grounds. Its simple message was to leave the fact-finding function entirely to the arbitrator, except in extremely rare instances where arbitrator fraud or other serious misconduct is evident.⁹⁷ *Misco* made an observation that is especially relevant in the context of our research on agreements that expand

articulated an additional *Trilogy* principle for denying enforcement to an award—albeit a narrow basis—when it said that an award may be set aside only if it “would violate ‘some explicit public policy’ that is ‘well-defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”” *Id.* at 43 (citation omitted).

Misco did more than reaffirm the *Trilogy*. The decision dealt explicitly with two other grounds that lower courts use to review awards. In effect, *Misco* enlarged upon the *Trilogy*'s broad ranging consideration of grounds for vacating arbitration awards. Thus, the Court added these grounds for vacatur, but also stressed the main common law rule of confirming awards, even when courts may disagree with these rulings or their reasoning. *See id.* at 38 (stating that “decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced,” but that awards that suffer from serious errors are to be enforced (“as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision”)).

⁹⁶ *Misco, Inc.*, 484 U.S. at 29.

⁹⁷ *Misco* stated a nearly absolute rule against reviewing an arbitrator's fact-findings: When “only improvident, [or] even silly, factfinding is claimed . . . [t]his is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.” *Id.* at 39. The Court elaborated:

Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.

Id. at 40 n.10.

judicial review of an award by requiring courts to examine awards for fact-finding or legal errors: “Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.”⁹⁸ After *Misco* some federal courts still did not get the message to leave awards alone except in very rare instances. This prompted the Supreme Court on two recent occasions to rebuke wayward judges.⁹⁹

To summarize, Congress and the Supreme Court have built separate but parallel roads to arbitral autonomy in the modern era. These roads have taken twists and turns for workplace arbitrations. One barrier was whether to interpret the FAA’s exclusion section so as to remove most employment arbitrations from judicial enforcement. Ruling against this view, the Court’s recent *Circuit City* decision put almost all of these individual agreements on the FAA’s highway of enforceable arbitrations. CBAs presented another obstacle when the LMRA provided federal jurisdiction to enforce them without instructing courts how to review their by-product—arbitration awards. This resulted in the Supreme Court’s building of a highway in the *Trilogy* and its recent progeny that parallels the road taken by the FAA. Both expressways to arbitral autonomy provide narrow turnouts for runaway arbitrator wrecks, while leading all other awards to the same destination—award finality.

IV. CONTRACTUAL EXPANSION OF JUDICIAL REVIEW

In Part IV we identify a recent split among appellate courts concerning agreements that expand judicial review of an arbitration award. This development echoes a theme from our discussion of the FAA in subpart III.A. Expanded review clauses first appeared in commercial arbitration agreements.¹⁰⁰ They also reflect a significant power imbalance in which the party seeking expanded review of an award had superior bargaining power.¹⁰¹ We examine these commercial developments in subpart IV.A. Subpart IV.B analyzes expanded review clauses that migrated a short time later to employment arbitrations.

⁹⁸ *Id.* at 38.

⁹⁹ See *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001).

¹⁰⁰ See *infra* notes 102–04, 106.

¹⁰¹ See *infra* notes 109–12.

A. Conflict Among Federal Circuit Courts of Appeals

In recent decisions involving commercial arbitration disputes, the Fifth (*Gateway Technologies, Inc. v. MCI Telecommunications Corp.*),¹⁰² Ninth (*LaPine Technology Corp. v. Kyocera Corp.*),¹⁰³ and Third Circuits (*Roadway Package System, Inc. v. Kayser*)¹⁰⁴ held that awards can be reviewed under expanded standards that parties set in their agreements. In addition, the Fourth Circuit ruled in a non-precedential decision that parties may agree to expand judicial review of an award.¹⁰⁵ The Tenth Circuit in *Bowen v. Amoco Pipeline Co.*¹⁰⁶ is the only appeals court to reject this approach. In dictum, the Eighth¹⁰⁷ and Seventh¹⁰⁸ Circuits have taken a similar view, stating that they would apply only FAA or *Trilogy* standards to review contested awards.

Several common threads run through these appellate decisions. The first relates to the party who drafted the clause to expand court review. In every case, this party had a clear economic advantage over the other party to the arbitration agreement. In *Gateway Technologies*, MCI, a major telecommunications firm that was outsourcing a project to a smaller vendor, drafted the arbitration clause.¹⁰⁹ *LaPine* presented a similar economic relationship between a large

¹⁰² *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995).

¹⁰³ *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997) (“[W]e fully agree with the Fifth Circuit [in *Gateway Technologies*]. Federal courts can expand their review of an arbitration award beyond the FAA’s grounds, when (but only to the extent that) the parties have so agreed.”).

¹⁰⁴ *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001).

¹⁰⁵ *Syncor Int’l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997).

¹⁰⁶ *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001).

¹⁰⁷ The Eighth Circuit expressed in dicta its concerns about allowing parties to expand the standards for judicial review. *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (“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.”).

¹⁰⁸ See *Chicago Typographical Union No. 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991) (“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; federal jurisdiction cannot be created by contract.”).

¹⁰⁹ MCI was the successful bidder to supply pay phone services for Virginia prison inmates, and later subcontracted to Gateway Technologies the job of installing phones and collect-call technology. *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 995 (5th Cir. 1995). Later, the two companies became involved in a dispute, with MCI complaining that Gateway’s system failed to complete too many calls and Gateway complaining that MCI circumvented Gateway’s technology, depriving that company of anticipated profits. *Id.*

manufacturer, Kyocera, and a small start-up company.¹¹⁰ Likewise, *Roadway* pitted a shipping company with a nationwide distribution system against a small operator that was under contract to deliver a minuscule part of Roadway's packages.¹¹¹ In *Bowen*, Amoco and its corporate predecessor drafted the agreement, and the weaker party was a husband and wife who owned property that was traversed by oil pipelines.¹¹² The second thread reflects a paradoxical intention by the drafter to undermine the finality of the award for which it bargained. The *Bowen* agreement provided for vacatur of an award "not supported by the evidence."¹¹³ The *Gateway Technologies* clause did not focus on evidence, but instead expanded court review for "errors of law."¹¹⁴ *LaPine*, by comparison, expanded review on two fronts: "where the arbitrators' findings of fact are not supported by substantial evidence, or . . . where the arbitrators' conclusions of law are erroneous."¹¹⁵ The arbitration clause at issue in *LaPine* facilitated expansive court review by requiring that an arbitrator decide the matters submitted based upon the evidence presented, the terms of the parties' contract, and California law.¹¹⁶ The arbitration agreement in *Roadway* was more complex and ambiguous than the others. The agreement created potential for expanding the scope of judicial review beyond FAA standards in its choice-of-state-law clause.¹¹⁷ This provision was drafted without specifically defining a private review standard. However, because some states administer arbitration

¹¹⁰ The underlying dispute involved a joint venture between LaPine, a start-up firm with a design for computer disk drives, and Kyocera, a company that was licensed to manufacture these products. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 886 (9th Cir. 1997). Prudential-Bache was the middleman in this joint venture. This arrangement soured after LaPine suffered business setbacks and Prudential ended its participation in the deal. *Id.* Kyocera and LaPine restructured their business relationship in an amended agreement, but when Kyocera refused to comply with it, LaPine sued for breach of contract. *Id.*

¹¹¹ *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001). As an independent contractor for Roadway Package System (RPS) who employed several drivers himself, Kayser bought larger equipment at the request of RPS. The unequal nature of this business relationship is also evident in RPS' evaluation of Kayser's performance, which was eventually rated as unsatisfactory. He was viewed as aggressive with warehouse people in several locations. RPS gave him several verbal warnings before it terminated its shipping agreement with him. This left Kayser with outstanding loans for equipment bought specifically for this shipping agreement. *Id.* at 290.

¹¹² *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 928 (10th Cir. 2001).

¹¹³ *Id.* at 930.

¹¹⁴ *Gateway Techs., Inc.*, 64 F.3d at 996.

¹¹⁵ *LaPine Tech. Corp.*, 130 F.3d at 887.

¹¹⁶ *Id.* at 886–87.

¹¹⁷ *Roadway Package Sys. v. Kayser*, 257 F.3d 287, 289–90 (3d Cir. 2001) (discussing sections 9.3(e)–(f) and section 16 of the Linehaul Contractor Operating Agreement).

laws with vacatur standards that depart from those enumerated in the FAA, the parties' contract made it possible to opt out of FAA review of an award.

In a third common thread, the party with superior bargaining power lost at arbitration, appealed this result to federal court, and invoked the expanded review clause in the arbitration agreement. We now recount specific parts of two awards that involved individuals and large corporations because the arbitrators in these disputes appeared to exceed their authority. When seen in this light, the companies had good reason to appeal their awards. However, the awards also reflect the arbitrators' judgment that the stronger party not only breached an agreement, but also acted unjustly.

In *Bowen*, after Amoco repeatedly denied that its pipeline was leaking (only to be proved wrong at arbitration), the award ordered Amoco to deposit \$3,032,000 in an escrow fund to abate the contamination, and the award further ordered payment to the Bowens of \$100,000 for loss in property value; \$1.2 million for annoyance, inconvenience, and aggravation; \$1 million in punitive damages; and \$41,000 for the costs of investigation and mitigation.¹¹⁸ The large punitive award suggests that Amoco behaved unjustly, but the arbitration agreement did not expressly provide authority for this remedy.

The *Roadway* award had a similar theme. It criticized a local manager for failing to explain and correct performance deficiencies of Kayser, the independent contractor. The award continued:

Based on many years of dealing with industrial relations jurisprudence in American business, I find the RPS system lacking in due process toward [Kayser].

Here the RPS system, which I respect, blinds itself into thinking—as long as we document our side of the business arrangement, that is sufficient. For a reputable business organization that performs an important service in the economy, that is inadequate.¹¹⁹

The arbitrator concluded that *Roadway* improperly terminated its contract with Kayser and ordered the company to pay Kayser \$174,431.15 in damages.¹²⁰ The tone of the award conveys the arbitrator's sense that *Roadway* neglected an important business ethic, but as in *Bowen*, the agreement did not authorize this kind of judgment.

The details of the award in *Gateway Technologies* are not reported. Nevertheless, the Fifth Circuit noted that the arbitrator had found that MCI breached its contract with *Gateway Technologies* and had awarded actual

¹¹⁸ *Bowen*, 254 F.3d at 930.

¹¹⁹ *Roadway Package Sys.*, 257 F.3d at 290.

¹²⁰ *Id.*

damages, attorney fees, and \$2 million in punitive damages.¹²¹ The provisions of attorneys' fees and punitive damages support our thesis that the superior party in this dispute not only breached a contract, but took unfair advantage of its economic power.

In all four commercial award challenges, the federal district court refused to apply the expanded standard in the arbitration agreement. While the district court opinion in *Bowen* is not published, the appeals court noted that the lower court declined to apply an expanded standard and confirmed the award.¹²² The district court in *LaPine* also confirmed the award and refused to apply an expanded standard, noting that "the role of the federal courts cannot be subverted to serve private interests at the whim of the contracting parties."¹²³ The *Gateway* district court confirmed the award, and in a somewhat convoluted decision, implied that its ruling was based on traditional FAA standards.¹²⁴ The *Roadway* district court used FAA standards, but differed from peer courts in *Bowen*, *LaPine*, and *Gateway* by vacating the award.¹²⁵

In three of these award-challenge cases, the appeals court reviewed the arbitrator ruling by using the expanded standard in the arbitration agreement. In *Gateway Technologies*, the Fifth Circuit reversed the district court and vacated the punitive damages portion of the award. The court considered itself bound to the expanded standard of review in the agreement because "arbitration is a creature of contract and the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties."¹²⁶ The Fifth Circuit, noting that the district judge believed that "'the parties have sacrificed the simplicity, informality, and expedition of arbitration on the altar of appellate review,'"¹²⁷ took this contrary view: "Prudent or not, the contract expressly and unambiguously provides for review of 'errors of law'; to interpret this phrase short of de novo review would render the language meaningless and would frustrate the mutual intent of the parties."¹²⁸ The court found legal error in the

¹²¹ *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 995 (5th Cir. 1995).

¹²² *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 930 (10th Cir. 2001).

¹²³ *LaPine Tech. Corp. v. Kyocera Corp.*, 909 F. Supp. 697, 703 (N.D. Cal. 1995), *aff'd in part, rev'd in part*, 130 F.3d 884 (9th Cir. 1997).

¹²⁴ See *Gateway Techs., Inc.*, 64 F.3d at 996 (reporting that the lower court did not interpret the arbitration agreement's standard of "errors of law" as requiring "'a scrutiny as strict as would be applied by an appellate court reviewing the actions of a trial court'" but rather "'under the harmless error standard with due regard to the federal policy favoring arbitration'") (citation omitted).

¹²⁵ See *Roadway Package Sys.*, 257 F.3d at 288.

¹²⁶ *Gateway Techs., Inc.*, 64 F.3d at 996.

¹²⁷ *Id.* at 997 (citation omitted).

¹²⁸ *Id.*

award because Virginia law, under which the agreement was made, does not allow for the imposition of punitive damages for breach of contract.¹²⁹

The appeals court in *LaPine* also reversed the district court, feeling compelled to honor all of the terms of the parties' agreement.¹³⁰ The court explained:

To locate the principle that animates our holding, one need not look very much further than the Supreme Court's decisions applying and interpreting the FAA. Those decisions make it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreements' terms.¹³¹

This led the court to conclude that "[b]ecause these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA's default standard of review and allows for de novo review of issues of law embodied in the arbitration award."¹³² The court specifically considered the possibility that its conclusion undermined the purposes of arbitration to provide speedy and inexpensive dispute resolution, and theorized that "if substantial evidence and error of law review seems less efficient than the normal scope of arbitration review, that should not cause much pause because: 'it nevertheless reduces the burden on the Court below that . . . would exist in the absence of any provision for arbitration.'"¹³³

The panel of *LaPine* judges did not unanimously adopt this reasoning. Judge Kozinski concurred in the result, but doubted that parties could contract for any

¹²⁹ *See id.* at 999–1001.

¹³⁰ *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997). Taking this view into account on remand, the district court applied a substantial evidence standard to the factual determinations made by the arbitrators, and engaged in a detailed review. *LaPine Tech. Corp. v. Kyocera Corp.*, No. C-87-20316, 2000 WL 765556, at *1–*4 (N.D. Cal. Apr. 4, 2000). Next, the court reviewed the award for legal errors. *LaPine*, 2000 WL 765556, at *4–*12. Finding no defects under either review, the court confirmed the award. Still unwilling to accept a losing result, Kyocera appealed a second time to the Ninth Circuit, and in a very lengthy decision requiring much closer review than in ordinary FAA vacatur cases, the appeals court confirmed the award. Kyocera again appealed, for a rehearing en banc, and effectively blocked confirmation of the award when a majority of the Ninth Circuit granted its petition. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 314 F.3d 1003, 1004 (9th Cir. 2002).

¹³¹ *LaPine Tech. Corp.*, 130 F.3d at 888.

¹³² *Id.* at 889 (quoting *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995)).

¹³³ *Id.* (citation omitted).

and all types of judicial review.¹³⁴ His concern was that an unlimited principle of expanded court review could bog down judges in time-consuming, or at least unfamiliar, appellate functions.¹³⁵ In this instance, however, he decided to enforce the arbitration agreement according to its terms because “[t]he review to which the parties have agreed is no different from that performed by the district courts in appeals from administrative agencies and bankruptcy courts, or on habeas corpus.”¹³⁶ In Judge Mayer’s dissent, he acknowledged that “[w]hether to arbitrate, what to arbitrate, how to arbitrate, and when to arbitrate are matters that parties may specify contractually.”¹³⁷ But he concluded that there is “no authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision. Absent this, they may not.”¹³⁸

In *Roadway*, the Third Circuit affirmed the lower court’s vacatur but disagreed in its reasoning by stating “that parties may opt out of the FAA’s off-the-rack vacatur standards and fashion their own.”¹³⁹ However, in a complex ruling, the appeals court declined to construe the choice-of-law clause in the arbitration agreement as clear evidence of intent to incorporate Pennsylvania’s standards for judicial review.¹⁴⁰ The court read the arbitration agreement as a generic contract, one that failed to reflect a specific intention to apply a specific vacatur standard.¹⁴¹

¹³⁴ *Id.* at 891 (“In general, I do not believe parties may impose on the federal courts burdens and functions that Congress has withheld.”).

¹³⁵ *Id.* Judge Kozinski stated:

[E]nforcing the arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication. The rub is that the work the district court must perform under this arbitration clause is not a subset of what it would be doing if the case were brought directly under diversity or federal question jurisdiction. It’s not just less work, it is *different* work. Nowhere has Congress authorized courts to review arbitral awards under the standard the parties here adopted.

Id.

¹³⁶ *Id.* Judge Kozinski reinforced his point that courts cannot be asked to perform any or all kinds of appellate review in this memorable passage: “I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.” *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 294. The court stated, “[C]hoice-of-law clauses are generally intended to speak to an issue wholly distinct from the one with which we are currently faced. Moreover, because few (if any) federal statutes other than the FAA even *permit* parties to opt out of the standards contained in them, we are confident that this particular issue rarely occurs to contracting parties *ex ante*.” *Id.* (emphasis added).

Only the district and appeals courts in the Tenth Circuit uniformly rejected the expanded review approach. Amoco appealed to the district court to vacate its adverse award, contending that the parties contracted for expanded judicial review.¹⁴² The company explained that the award was subject to vacatur if it was “not supported by the evidence.”¹⁴³ The district court refused to apply an expanded standard because it believed that parties cannot alter traditional standards of review by contract.¹⁴⁴ The Tenth Circuit affirmed this ruling.¹⁴⁵

Stating its direct disagreement with the Fifth and Ninth Circuits, the *Bowen* court believed that there were inherent limits to the parties’ contractual powers under the FAA. Recognizing that the Supreme Court held that parties may agree to their own rules for conducting arbitrations, the *Bowen* court added, “it has never said parties are free to interfere with the judicial process.”¹⁴⁶ *Bowen* said that “Congress has provided explicit guidance regarding judicial standards of review of arbitration awards” through the FAA.¹⁴⁷ The court added: “We would reach an illogical result if we concluded that the FAA’s policy of ensuring judicial enforcement of arbitration agreements is well served by allowing for expansive judicial review after the matter is arbitrated.”¹⁴⁸ That is because the “FAA’s limited review ensures judicial respect for the arbitration process and prevents courts from enforcing parties’ agreements to arbitrate only to refuse to respect the results of the arbitration.”¹⁴⁹ *Bowen* made clear that “[c]ontractually expanded standards” are inappropriate because they “clearly threaten to undermine the independence of the arbitration process and dilute the finality of arbitration awards.”¹⁵⁰

In sum, federal appeals courts are divided in their approach to giving effect to expanded review clauses. This split of authority is rooted in the ambiguous facts surrounding the Supreme Court’s decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.¹⁵¹ Courts who apply a contractual standard rely on the Supreme Court’s holding in *Volt* that the FAA requires courts to enforce arbitration agreements, “like other contracts, in

¹⁴² *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 933 (10th Cir. 2001).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 934.

¹⁴⁷ *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 934 (10th Cir. 2001).

¹⁴⁸ *Id.* at 935.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

accordance with their terms.”¹⁵² But notably, *Volt* was premised on voluntary forms of arbitration, stating that “[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”¹⁵³

Our analysis in this section casts doubt on the *Volt* Court’s assumption that arbitration agreements reflect arm’s length bargaining. Instead, expanded review clauses seem designed to insulate the drafting party from an adverse outcome. We note that, in theory, this chance to re-litigate the arbitration is equally available to the weaker party. However, we did not observe this behavior in any of these precedent setting cases. Instead, these decisions leave the impression that the arbitration agreement reflected unfair dealing by the stronger party, as well as an insincere intention to accept the finality of the process they invoked earlier in these disputes.

B. Employment Arbitration Agreements That Expand Judicial Review of Awards

In this section we show that expanded review standards are migrating from commercial to employment relationships. As in our analysis of commercial arbitration agreements, we focus on bargaining dynamics that led to the expanded review clause in employment arbitration agreements. To set the stage for this discussion, we recall the part of the *Gilmer* majority opinion which ignored imbalances in bargaining power between employers who require arbitration and individuals who have little choice but to accept this condition of employment.¹⁵⁴ We are also mindful of the prevailing view by current academic commentators that lumps together all employment arbitration agreements as adhesion contracts.¹⁵⁵ Both types of categorical judgments about bargaining power in the employment relationship are false. Because we cite specific abuses of the employer power to compel employees to agree to arbitration,¹⁵⁶ as well as countervailing evidence of new due process safeguards in employment

¹⁵² *Id.* at 478.

¹⁵³ *Id.* at 479.

¹⁵⁴ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (“Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”).

¹⁵⁵ Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857, 862–63 (“These agreements are typically adhesion contracts and, unfortunately, we are at the point where, at least when the weaker party has no power to negotiate the existence or the terms of the arbitration clause, the weaker party needs some protection from the use of arbitration.”).

¹⁵⁶ See *infra* notes 246–51.

arbitrations for otherwise powerless individuals,¹⁵⁷ we limit our judgment on this bargaining dynamic to specific situations. As we now explain, some expanded review clauses reflect specific instances in which employers take unfair advantage of their bargaining power.

*Collins v. Blue Cross Blue Shield of Michigan*¹⁵⁸ was the first case of expanded review of an employment arbitration award. Irma Collins alleged that her employer violated the Americans with Disabilities Act (ADA) by firing her for a psychiatric disability.¹⁵⁹ Work-related stress caused Collins to seek psychiatric treatment.¹⁶⁰ An evaluation found that she had "homicidal ideation" but was also fit to return to work.¹⁶¹ After this information was shared with Collins' employer, she was fired.¹⁶² Collins arbitrated her ADA claim and prevailed in the award.¹⁶³ The arbitrator found that Blue Cross violated state and federal discrimination laws, and awarded back pay, attorney fees, and reinstatement to a comparable position.¹⁶⁴

Collins sued in state court to confirm the award, but Blue Cross prevailed in its motion for removal.¹⁶⁵ The district court ruled that it had jurisdiction because the arbitration decided an issue of federal law.¹⁶⁶ The court reviewed the arbitrator's analysis, and after finding no legal error or violation of public policy, the court confirmed the award.¹⁶⁷ The Sixth Circuit reversed, however, on jurisdictional grounds.¹⁶⁸ As a result, the appeals court never engaged in the expanded review that the arbitration agreement provided. However, the court's jurisdictional ruling had the effect of denying enforcement to an award rendered in favor of an employee. Thus, it functioned like an order that vacated the award.

¹⁵⁷ See *infra* notes 290 and 293.

¹⁵⁸ *Collins v. Blue Cross Blue Shield of Mich.*, 103 F.3d 35 (6th Cir. 1996).

¹⁵⁹ *Id.* at 36.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 37.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ The Agreement provided for judicial review of the arbitration award "as established by law" and for the arbitrator's "clear error of law" in a "Michigan federal district court or Michigan circuit court of competent jurisdiction." The Sixth Circuit explained that Blue Cross's Notice of Removal characterized the matter as an employment dispute arising under a federal law, the ADA. However, jurisdiction was determined by the actual complaint, which in this case was filed by Collins pursuant only to Michigan's arbitration law. Since the FAA does not independently confer federal jurisdiction, the appeals court ruled that the district court improperly asserted jurisdiction and therefore vacated its order of enforcement.

The Fourth Circuit was presented with an expanded review clause a year later in *Syncor International Corp. v. McLeland*.¹⁶⁹ David McLeland signed an employment agreement that restricted use of his employer's proprietary information and also limited his right to compete against his employer, a producer of nuclear pharmacies. McLeland also agreed to an arbitration clause.¹⁷⁰ After a complex chain of events in which McLeland incorporated a similar business that solicited Syncor clients, his employer filed a demand for arbitration to enforce its restrictive covenants.

McLeland did not attend the arbitration because he believed that this dispute was not arbitrable. An ex parte arbitration was held, and the arbitrator ruled for the Company by awarding it stock from McLeland's competing firm.¹⁷¹ Syncor won a district court order that confirmed the award, but on appeal, McLeland successfully argued that the district court erred by not applying an expanded form of review of the arbitrator's ruling.¹⁷²

The Fourth Circuit ruled that the lower court should have reviewed the arbitrator's legal conclusions de novo. The arbitration agreement specified 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."¹⁷³ Thus, the district court incorrectly applied the principle that an arbitrator's award is entitled to a special degree of deference on judicial review, and may only be overturned where it is in manifest disregard of the law. Nonetheless, the Fourth Circuit reached the same result as the lower court, albeit after conducting a more searching review of the arbitrator's award.¹⁷⁴

More recently, the Fifth Circuit applied *Gateway Technologies* to the employment setting in *Hughes v. Cook*.¹⁷⁵ When Gracie Cook was hired as a senior engineering assistant, she signed an agreement.¹⁷⁶ The contract modified the usual standard for reviewing an award, stating:

Either party may bring an action in any court of competent jurisdiction . . . to vacate an arbitration award. However, in [these] actions . . . the standard of

¹⁶⁹ *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997) (full text available through Westlaw).

¹⁷⁰ *Id.* at *3.

¹⁷¹ *Id.* at *6-7.

¹⁷² *Id.* at *16.

¹⁷³ *Id.* at *15.

¹⁷⁴ *Id.* at *18. ("Our de novo review persuades us that the arbitrator did not commit error, either legal or factual, in issuing his award. Accordingly, we conclude that although the district court applied an incorrect standard of review, that error was harmless.")

¹⁷⁵ 254 F.3d 588 (5th Cir. 2001).

¹⁷⁶ *Id.* at 590.

review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.¹⁷⁷

Cook was assigned to work on computerized topographical maps in guided missiles.¹⁷⁸ Cook's supervisor judged her work as deficient.¹⁷⁹ In response to a lengthy test given to determine her fitness for continued employment, she and her supervisor met with a human resource manager.¹⁸⁰ During this meeting Cook cried, stuttered, and rubbed her arm.¹⁸¹ Her physician concluded that she suffered a series of mini-strokes caused by stressful working conditions.¹⁸² After returning to work from medical leave, and being informed of the need to pass another performance test, she experienced the same symptoms.¹⁸³ Cook quit her job and sued in state court alleging intentional infliction of emotional distress, race discrimination, and loss of consortium.¹⁸⁴ Raytheon's motion to stay the lawsuit pending the outcome of arbitration was granted.¹⁸⁵ The arbitrator awarded Cook \$200,000 in damages for intentional infliction of emotional distress and her husband \$25,000 for loss of consortium.¹⁸⁶

Raytheon sued to vacate the arbitration award, contending that the parties agreed to expand the standard of court review.¹⁸⁷ The Cooks believed that this standard conflicted with the promise to arbitrate disputes and was also unconscionable in light of the parties' bargaining positions.¹⁸⁸ The district court vacated the award, reasoning that the parties agreed to expanded court review of the evidence at arbitration.¹⁸⁹ Since the judge did not believe that Raytheon's performance test for Cook was extreme and outrageous, he ruled that the arbitrator erred in finding the company liable for emotional distress and loss of consortium.¹⁹⁰

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 591.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Hughes v. Cook*, 254 F.3d 588, 592 (5th Cir. 2001).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

On appeal to the Fifth Circuit, Cook contended that her arbitration agreement was not the product of arm's length bargaining. The court recognized that her bargaining power was unequal, but noted that "contracts of adhesion are not automatically void."¹⁹¹ Concluding that it "was not unfair for the arbitration agreement to include a standard of review that allowed the district court to assess the arbitrator's legal and factual conclusions," the Fifth Circuit disallowed the arbitrator's findings.¹⁹²

The Fifth Circuit also applied an expanded standard in *Harris v. Parker College of Chiropractic*, but in this case it confirmed an award. Bertha Harris alleged that their supervisor created a hostile work environment, and their employer did not take effective measures to end this form of race and sex discrimination.¹⁹³ After her discrimination lawsuit was removed to federal court, she was compelled to arbitrate her dispute.¹⁹⁴ The arbitrator for her and awarded damages for lost wages and benefits, mental anguish, and also punitive damages.¹⁹⁵

Because her arbitration agreement provided that the "Award of the Arbitrator shall be binding on the parties hereto, although each party shall retain his right to appeal any questions of law,"¹⁹⁶ the college argued that the court should apply an expanded form of review.¹⁹⁷ After the district court confirmed the award, the Fifth Circuit stated that courts are obligated to apply an expanded form of review to conform to the parties' agreement.¹⁹⁸ Applying the contractual standard, the

¹⁹¹ *Id.* at 593.

¹⁹² Comparing the arbitrator's findings, as well as the arbitral record, with Texas case law on emotional distress, the appeals court upheld the lower court decision to vacate the award. Behaving as if it were the arbitrator, the Fifth Circuit decided the merits of the dispute:

The district court concluded that returning Cook to the 'test bed' evaluation after her absence from work did not constitute extreme and outrageous conduct. The court relied primarily on the fact that Cook's physician did not expressly list any restrictions on her work duties. The court also surmised that by instructing Cook to complete the 'test bed' evaluation within eight days of her return, Raytheon simply resumed her normal work duties.

Id. at 594. The court continued its close focus on the record: "This case does not involve . . . repeated abusive behavior. Cook may have felt ostracized by [her supervisor], but [his] conduct leading up to her return from medical leave was no more than a normal employment dispute over an employee's work performance." *Id.* at 594-95.

¹⁹³ *Harris v. Parker College of Chiropractic*, 286 F.3d 790 (5th Cir. 2002).

¹⁹⁴ *Id.* at 792.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 793.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Fifth Circuit found that its task of reviewing the award for “‘questions of law’” was difficult because of ambiguity in this expression.¹⁹⁹ The phrase could require the court to review the sufficiency of the evidence to support the arbitrator’s findings of hostile work environment and retaliation,²⁰⁰ or mean that the court should review only for pure legal conclusions.²⁰¹ The court concluded that the standard of review to be applied is *de novo* with respect to pure questions of law.²⁰² As for questions of fact and mixed questions of law and fact, the court stated it would apply a default standard, vacating only for manifest disregard of the law or grounds listed in the FAA.²⁰³ The appeals court affirmed the district court’s confirmation of the award.²⁰⁴

Our database includes one additional expanded review case,²⁰⁵ notable for the fact that it was decided only at the district court level. After a CEO in *Bargenquast v. Nakano Foods, Inc.*²⁰⁶ was fired, he arbitrated his dispute and was awarded \$418,775. In denying the employer’s motion to vacate the award, the district court refused to grant expanded review in accordance with the terms of the contract.²⁰⁷ The court reasoned that only Congress can regulate standards

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 794.

²⁰¹ Advocating this approach, Harris contended that if “questions of law” is construed to include a review of the evidence, “then the exception allowing review of questions of law will swallow up the arbitration agreement’s rule that “‘the Award of the Arbitrator shall be binding.’” *Id.* at 793.

²⁰² *Id.* at 794.

²⁰³ *Id.*

²⁰⁴ *Id.* at 795.

²⁰⁵ We note here that a decision in our database approached the threshold for inclusion in our count of expanded review cases. *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003), involved a dispute an employee’s exercise of stock options. The arbitrator ruled in his favor and awarded him \$1.6 million. The employer sued to vacate the award under an expanded review standard or the common law benchmark of manifest disregard for the law. The arbitration clause was ambiguous in its statement of a review standard when it provided: “‘The Arbitrator shall issue an award consisting of findings of fact and conclusions of law . . . The Arbitrator’s decision shall be valid and binding . . . so long as the Arbitrator has not exceeded his or her authority.’” *Id.* at 787 (citation omitted). The district and appeals court confirmed the award using traditional standards. The Eighth Circuit reasoned that because the parties did not expressly put an expanded review clause in the arbitration agreement, the ambiguous language would be resolved in favor of traditional standards. In view of the foregoing, we counted these two decisions as traditional review decisions.

²⁰⁶ *Bargenquast v. Nakano Foods*, 243 F.Supp.2d 772 (N.D. Ill. 2002).

²⁰⁷ *Id.* at 774 (agreement specified that “[t]he arbitrator . . . shall have no power, in rendering the award, to alter or depart from any express provision of this Agreement or to make a decision which is not supported by law and substantial evidence”).

of judicial review.²⁰⁸ Noting that the Seventh Circuit had not yet ruled on this issue under the FAA, the Illinois district court cited a similar situation under the LMRA in which this appeals court reviewed a labor arbitration award.²⁰⁹ In that case, Judge Posner noted that parties may “contract for an appellate arbitration panel to review the arbitrator’s award. But they cannot contract for *judicial* review of that award.”²¹⁰ The *Bargenquast* court also observed that the Seventh Circuit had said in a previous decision that “the same standard of review applies when a federal court is asked to set aside an arbitration award ‘whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States [Federal] Arbitration Act.’”²¹¹

To conclude, employment arbitration agreements that contain expanded review clauses do not appear to reflect as much self-dealing by the party with stronger bargaining power compared to commercial arbitrations in Section IV.A. The employee in *Bargenquast* was a CEO who presumably negotiated terms of his employment contract, including its arbitration provisions. In *Syncor*, the fact that the employee had incorporated a business to compete directly with his employer suggests, if anything, that the person with questionable scruples was the party with ostensibly less bargaining power. Thus, in these two cases, there is no reason to believe that the stronger party included an expanded review clause as part of a pattern to accept only favorable outcomes at arbitration. On the other hand, we doubt that Irma Collins, Gracie Cook, and Bertha Harris came up with the idea to forgo court in favor of arbitration, and also wrote the expanded review clause in their arbitration agreements. Collins and Cook worked for large employers who, it appears, adopted mandatory arbitration programs to avoid going to court over workplace disputes. Thus, we regard the expanded review standards in these cases in the same light as those drafted by MCI, Kyocera, and Roadway—as trapdoors to give these powerful parties a second chance to litigate their arbitration case. This section shows that the emerging judicial policy for business and employment arbitration permits a party to subvert award finality.

V. RESEARCH LITERATURE, METHODS, AND THEORY

A. *Research Literature on Employment and Labor Arbitration*

The *Gilmer* decision ignited a large body of critical legal scholarship. Much of this research disparages the Supreme Court for steering legal claims of

²⁰⁸ *Id.* at 776.

²⁰⁹ *Id.* at 776 (citing *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991)).

²¹⁰ *Id.*

²¹¹ *Id.* (citing *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1194–95 (7th Cir. 1987)).

individuals away from courts and into the more employer-friendly confines of arbitration.²¹² Notably, however, these concerns are not based on an empirical examination of employment arbitrations. A few studies remedy this problem. Lisa Bingham examined 203 employment arbitration cases arising under the American Arbitration Association's Employment Dispute Resolution Rules.²¹³ She concluded that employers who were "repeat players" under this otherwise neutral ADR system enjoyed an advantage over individual employees.²¹⁴ Richard Bales, on the other hand, studied just one model of mandatory employment arbitration, but on an intensive basis. Reaching a very different conclusion, he observed that a private employer's ADR methods can produce net gains to the employer and also its employees.²¹⁵ Samuel Estreicher used an

²¹² Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000); Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857; Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999); Julian J. Moore, Note, *Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572 (2000); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. & EMP. L.J. 1 (1996); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77 (1996); Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001); George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177 (1998). Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671–72 (1986); Arthur Eliot Berkeley & E. Patrick McDermott, *The Second Golden Age of Employment Arbitration*, 43 LAB. L.J. 774 (1992); Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 226–34 (1992); Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990); Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993).

²¹³ See generally Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics on Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

²¹⁴ *Id.* at 258–59.

²¹⁵ See RICHARD A. BALES, *LABOR AND EMPLOYMENT LAW COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* 169 (1997) (examining a progressive arbitration system at Brown & Root, a nonunion construction company with 30,000 employees).

empirical approach to conclude that individual claimants win more employment dispute cases in arbitration than in litigation.²¹⁶ Lewis Maltby found that employees won in 63% of arbitrations but only 14.9% of trials.²¹⁷

We use an empirical methodology to explore how courts rule on challenges to employment arbitration awards. This is based on data that we extracted from a comprehensive sample of court decisions. Information includes the gender of claimants, type of legal claim asserted, winner in the award, amount of remedy, and other characteristics of these disputes. This method follows studies of court review of labor arbitration awards. Experts have long wondered whether courts appropriately defer to labor arbitrator judgments.²¹⁸ Soon after the *Trilogy*, the National Academy of Arbitrators concluded that courts achieved a proper balance in ordering enforcement of labor arbitration agreements²¹⁹ and

Compulsory employment arbitration offers tremendous benefits to both employers and employees. It can reduce significantly the costs and time involved in resolving disputes. It also provides a forum for adjudicating grievances to employees currently shut out of the litigation system. Finally, it presents an opportunity for parties to resolve their differences in a way that promotes, rather than discourages, maintaining the employment relationship.

* * *

Employment arbitration is not, however, a panacea for disputes arising in the nonunionized workplace. The dangers of employer abuse require courts to be vigilant in ensuring that arbitration agreements do not become a vehicle for eliminating employees' legal protections. Nonetheless, given the litigation system's current inability to provide any meaningful forum to so many employees who feel they have suffered legal wrongs in the workplace, compulsory arbitration, properly implemented, can be a significant improvement over litigation.

²¹⁶ Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–65 (2001).

²¹⁷ Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46–49 (1998).

²¹⁸ See, e.g., Frances T. Freeman Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960); Russell A. Smith & Dallas L. Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831 (1966).

²¹⁹ In the 1970s and early 1980s, the Academy concluded that courts practiced deference in accordance with the *Trilogy*. See *Arbitration and Federal Rights Under Bargaining Agreements in 1976*, 30 PROC. NAT'L ACAD. ARB. 265, 288 (1978) (stating that “[i]n general, if the arbitration award is not (in) manifest disregard of the contract and draws its essence from the contract, it will be enforced by the courts in routine fashion”). The Committee applauded courts for being “very sensitive about not usurping the role of the arbitrator in reaching a final and binding decision of a contract dispute.” *Id.* at 309.

confirming arbitration awards.²²⁰ But as more courts vacated labor arbitrator rulings, commentators believed that courts were interfering too much.²²¹ Bringing this research literature up to date, it is skeptical about judicial adherence to the *Trilogy*.²²² Empirical study of individual employment arbitration awards has been very sketchy and almost non-existent because widespread use of this ADR method is so recent.²²³

B. Empirical Research Methodology

For this study, we exhaustively investigated the outcome of court decisions involving an appealed employment arbitration award. Our search identified both employee²²⁴ and employer²²⁵ appeals of adverse rulings. We used a variety of

²²⁰ More recently, Edgar A. Jones concluded that the "courts of appeal have . . . interpret(ed) the 'essence' rationale in such a manner as to implement the determined effort of the Supreme Court to surround labor arbitration and the parties' collective bargaining agreement with the strongest possible measure of insulation from the displacing intrusions of courts." Edgar A. Jones, *A Meditation on Labor Arbitration and "His Own Brand of Industrial Justice,"* 35 PROC. NAT'L ACAD. ARB. 1, 6 (1983).

²²¹ One of the earliest expressions of concern about judicial review of labor arbitration process is David E. Feller. See Feller, *supra* note 91, at 97. This theme was amplified in Eva Robins, *The Presidential Address: Threats to Arbitration*, 34 PROC. NAT'L ACAD. ARB. 1 (1982). For more recent discussions, see Michael H. Gottesman, *How the Courts and the NLRB View Arbitrators' Awards*, 38 PROC. NAT'L ACAD. ARB. 168 (1986); Stephen R. Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, 40 PROC. NAT'L ACAD. ARB. 25 (1988); Jan Vetter, *Enforceability of Awards: Public Policy Post-Misco*, 41 PROC. NAT'L ACAD. ARB. 75 (1989); Michael H. Gottesman, *Enforceability of Awards: A Union Viewpoint*, 41 PROC. NAT'L ACAD. ARB. 88 (1989); William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworkers Trilogy: The Aftermath of AT & T and Misco*, 64 NOTRE DAME L. REV. 464 (1989).

²²² See, e.g., Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83 (2001) (concluding that court review of awards under the public policy exception to finality has invaded the largely self-contained domain of arbitral autonomy); David E. Feller, *Putting Gilmer Where it Belongs: The FAA's Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253, 282 (2000) (concluding that labor arbitration was once put on a higher plane than arbitration of commercial disputes under the FAA, but now the situation is reversed). Cf. Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RESOL. 19 (2001) (finding that court enforcement of labor arbitration awards has remained remarkably consistent over a lengthy period).

²²³ LeRoy & Feuille, *supra* note 222, at 52–57 (reporting on results of 50 award confirmation cases).

²²⁴ The most recent examples include *Mack v. Strategic Materials, Inc.*, 270 F. Supp. 2d 934 (E.D. Mich. 2003), and *In re Arb. between Atherton & Online Video Net, Inc.*, 274 F. Supp. 2d 592 (S.D. N.Y. 2003).

carefully chosen keyword searches on Westlaw's Internet service to generate appropriate cases.²²⁶ A case was selected only if (1) it involved a dispute over some aspect of the employment relationship,²²⁷ (2) in which a party petitioned a court either to vacate or confirm a final award, and (3) the award was reviewed either under the FAA, analogous state arbitration acts, or a contractual standard. A decision was not included if it failed to meet any of these criteria. We now elaborate on these selection criteria.

- The underlying dispute involved an aspect of the employment relationship. A typical dispute involved employer discharge of an individual.²²⁸ However, our search did not limit the kind of employment dispute. Others involved claims of sexual harassment;²²⁹ race,²³⁰ age,²³¹ or pregnancy discrimination;²³² personal injuries²³³ and workers compensation;²³⁴ and family and medical leave.²³⁵ Certain disputes were associated with particular occupations. Professional employees, such as attorneys,²³⁶ surgeons,²³⁷ and dentists,²³⁸ disagreed over

²²⁵ Current examples are *Fountoulakis v. Stonhard, Inc.*, No. Civ.A.3:02-CV-2434-D2003, WL 21075931 (N.D. Tex. May 9, 2003); and *Sawtelle v. Waddell & Reed Inc.*, 754 N.Y.S.2d 264 (2003).

²²⁶ *E.g.*, one search was based on key verbiage from FAA vacatur standards, as applied to the employment setting: VACAT! & ARBITRAT! & "UNDUE MEANS" OR "EVIDENT PARTIALITY" OR "ARBITRATOR MISCONDUCT" OR "IMPERFECTLY EXECUTED."

²²⁷ Issues included terminations (also called discharges or dismissals); lesser forms of discipline; promotion and demotion; reassignment; benefits; pensions; working conditions (a category that included sexual harassment); and pay (including bonuses, commissions, stock options, and equity interests).

²²⁸ *E.g.*, *Madden v. Kidder Peabody & Co.*, 883 S.W.2d 79 (Mo. Ct. App. 1994); *Matthewson v. Aloha Airlines Co.*, 919 P.2d 969 (Haw. 1996); *Green v. Ameritech Corp.*, 200 F.3d 967 (6th Cir. 2000); *Bender v. Smith Barney, Harris Upham & Co.*, 67 F.3d 291 (3d Cir. 1995).

²²⁹ *E.g.*, *Smith v. PSI Services II, Inc.*, No. CIV. A. 97-6749, 2001 WL 41122 (E.D. Pa. Jan. 12, 2001).

²³⁰ *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000).

²³¹ *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).

²³² *E.g.*, *McKenzie v. Seta Corp.*, 238 F.3d 413 (4th Cir. 2000).

²³³ *E.g.*, *Castleman v. AFC Enterprises, Inc.*, 995 F. Supp. 649 (N.D. Tex. 1997).

²³⁴ *E.g.*, *Glover v. IBP*, 334 F.3d 471 (5th Cir. 2003).

²³⁵ *E.g.*, *Rollins v. Prudential Ins. Co. of North America*, No. 99-56834, 2001 WL 537775 (9th Cir. May 18, 2001).

²³⁶ *E.g.*, *Weiss v. Carpenter, Bennett & Morrisey*, 672 A.2d 1132 (N.J. 1996).

²³⁷ *E.g.*, *Vascular and General Surgical Associates, Ltd. v. Loiterman*, 599 N.E.2d 1246 (Ill. App. Ct. 1992).

²³⁸ *Grambow v. Associated Dental Services*, 546 N.W.2d 578 (Wis. Ct. App. 1996) (citing *Grambow v. Associated Dental Services*, No. 94-1735, 1996 WL 5638 (Wis. Ct. App. Jan. 9, 1996)).

restrictive covenants in their employment contracts, or post-separation pay or equity liquidation. Highly paid employees had compensation disputes. These individuals were brokers for securities firms regulated under the auspices of the National Association of Securities Dealers (NASD),²³⁹ and CEOs or other senior executives.²⁴⁰ They quarreled over commissions, bonuses, stock awards, pre-scheduled severance pay, as well as post-employment restrictions.²⁴¹

- The dispute was arbitrated to the point when a sole arbitrator or arbitral panel rendered an award—that is, to the point when the private adjudicator reached a decision on the merits of a claim.

- The award was reviewed either under the FAA,²⁴² analogous state arbitration acts patterned after the FAA,²⁴³ or contractual standards.²⁴⁴ Selected cases were checked against a table of decisions to prevent duplication of results. The search was expanded by KeyCiting each decision. This allowed us to add appropriate cases that our keyword searches overlooked. In sum, this methodology was thorough and redundant. Nevertheless, we make no claim that our sample is the universe of employment arbitration vacatur cases.

We used a lengthy survey to extract information from each court opinion, such as, key facts of the dispute, reasons for the losing party's appeal, the court's ruling, and the basis for this order.²⁴⁵ This information was coded into variables (e.g., vacatur or confirmation of the award), and SPSS was used for statistical analyses of the database.

C. Theory to Explain Contractual Expansion of Award Review

Court adjudication has a reputation for being expensive, time consuming, and wasteful. Arbitration is praised for offering a simpler and less costly method to conclusively resolve a dispute. With this in mind, we ask two questions: (1)

²³⁹ E.g., *Hruban v. Steinman*, No.01-2277, 2002 WL 1723889 (3d Cir. July 25, 2002).

²⁴⁰ E.g., *Int'l Marine Holdings, Inc. v. Stauff*, 691 A.2d 1117 (Conn. App. Ct. 1997).

²⁴¹ E.g., *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E. 2d 1298 (N.Y. 1995).

²⁴² See *supra* notes 61–64.

²⁴³ See *infra* note 267.

²⁴⁴ E.g., *supra* note 198.

²⁴⁵ Our information was limited to the published facts and reasoning in each decision. Thus, we had no access to the parties' contract, the arbitration award (except as summarized by the court decision), any evidence adduced at arbitration, or the record produced in district and/or circuit court. This prevents us from offering our own normative judgments of any arbitration decisions or court rulings (i.e., we are unable to conclude how justified or ill-advised these specific decisions and rulings were). This background is important because it explains our inability to judge whether a particular court decision is consistent or inconsistent with the *Trilogy* standards.

Who would want to limit the finality of an award by exposing it to expanded court review? (2) Why would a party to an arbitration agreement want to open the door to court litigation after avoiding the expense and delay of these proceedings in the first place? In brief, our theory is: (1) The party with more bargaining power may want to limit the finality of an award by exposing it to expanded court review. (2) The same party may have strategic incentives to re-litigate an adverse award.

Expanded review of a final and binding award is a paradox by outward appearances. Part of this mystery may be explained, however, by examining the distribution of bargaining power between disputants. Expanded review clauses reflect an imbalance in the parties' bargaining power. Even if arbitration is nominally voluntary, in reality, one party may want it more than the other party. Moreover, the first party exerts more control over all aspects of the arbitration process. Controversies have recently arisen when individuals felt coerced to arbitrate a dispute,²⁴⁶ or where the employer set one-sided rules for the arbitration,²⁴⁷ selected the arbitrators,²⁴⁸ determined the allocation of forum costs,²⁴⁹ or drafted unconscionable terms in an arbitration agreement.²⁵⁰ A few employers have filled contracts with one-sided provisions only to see courts rule

²⁴⁶ See *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 379–80 (S.D.N.Y. 2002) (company's lawyer used high pressure tactics to coerce the employees into signing the Agreement by giving them no more than fifteen minutes to review a sixteen-page single-spaced document, without mentioning or suggesting that the employees could review the Agreement at home or with an attorney).

²⁴⁷ See *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir.1999) (employer's rules were "so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith," and finding that the only possible purpose of these rules was "to undermine the neutrality of the proceeding.").

²⁴⁸ See *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940 (N.D. Ind. 2000). The employer's roster of arbitrators embedded a conflict of interest that was hidden to individual employees. The court concluded that "all three members of the arbitration panel have an incentive to 'scratch' the back of EDS [the arbitration service] in the hope that EDS will return the favor in the future. . . ." *Id.* at 947.

²⁴⁹ See *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604–10 (3d Cir. 2002) (female claiming sexual harassment asserted financial inability to pay for arbitration).

²⁵⁰ See *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002) ("the EDRP is unreasonably favorable to Bally because . . . its terms allow Bally to unilaterally modify the contract at any time, thus binding employees to a contract they may never have seen. . . .") (citation omitted); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 997–99 (S.D. Ind. 2001) (holding that a one-sided arbitration agreement with high school employees is unconscionable).

that these “numerous elements of illegality permeate the overall agreement to arbitrate.”²⁵¹

When a stronger party inserts an expanded review clause in an arbitration agreement a bias is created. To begin, courts have expressed concern about employer-created contracts that do not clearly communicate important exceptions to or limitation on employee rights.²⁵² Just as in cases where employers make inconspicuous but material changes in employee handbooks,²⁵³ the finality provisions of arbitration may be explained to employees without also explaining the significance of an expanded review clause. This possibility is suggested by recent arbitration cases involving either form contracts or arbitration agreements embedded in handbooks or policies.²⁵⁴ The point is that knowledge of the expanded review clause may not be equally distributed or understood between employers and individuals. That was the sense of the court in *Cooper v. MRM Investment Co.*, observing that “the agreement was still drafted by [the employer], and imposed on a prospective employee precisely at the time that he or she is most willing to sign anything just to get a job. Although the . . . Arbitration Agreement binds both parties, only the [employer] is aware of the ramifications of the agreement.”²⁵⁵

This inequality can be accentuated by delay and expense that attend the arbitration. We found numerous instances of unusually lengthy arbitrations.²⁵⁶

²⁵¹ *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003). Reflecting on the employer's contention that continued work by employees constituted their acceptance of the Company's newly instituted arbitration program, the court said that employees “were presented with its terms without any real opportunity to negotiate. The thirty-day time limitation, the restrictions on relief available to the plaintiffs, and, under the circumstances of this case, the ‘loser pays’ provision for arbitrator's fees and expenses unreasonably favor [the employer] to the [employee's] detriment.” *Id.*

²⁵² *E.g.*, *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257, 1258 (N.J. 1985) (finding that in the absence of a clear disclaimer to the contrary, an employee handbook created an implied employment contract).

²⁵³ *E.g.*, *Durtsche v. American Colloid Co.*, 958 F.2d 1007, 1011 (10th Cir. 1992).

²⁵⁴ *E.g.*, *Kreimer v. Delta Faucet Co.*, No. IP99-1507-C-TG, 2000 WL 962817, at *2 (S.D. Ind. June 2, 2000). The employee challenged the contractual validity of her arbitration agreement because it was only a policy in a handbook. *See also Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *see also Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002) (stating that the employer issued a new handbook that required all employees to arbitrate workplace disputes as a condition of continued employment).

²⁵⁵ *Cooper v. MRM Inv. Co.*, 199 F. Supp. 2d 771, 780 (M.D. Tenn. 2002).

²⁵⁶ The worst of this lot was *Barcume v. City of Flint*, 132 F. Supp. 2d 549, 551 (E.D. Mich. 2001) (involving ten years of litigation followed by an additional five years in arbitration). Turning back the employer's challenge to an adverse award, the exasperated judge commented:

Other cases revealed high arbitration costs.²⁵⁷ Assuming that more employers than employees are able to endure and afford these problems, we theorize that more individuals than employers will be exhausted by the time an award is rendered.²⁵⁸

The instant case is an unfortunate example of how profound delay imperils justice. The Arbitration Award appears to be fair, especially given the number of Plaintiffs who will be compensated, but the amount of time it has taken to arrive at that award is unfair. The parties have endured almost seventeen years of litigation and arbitration. Any further delay in confirming the award would be unjust.

Id. at 557–58. Other time-consuming arbitrations in our sample were *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1177 (D.C. Cir. 1991), where arbitration produced over 7,000 transcript pages and 1,200 exhibits; *Sobol v. Kidder, Peabody & Co., Inc.*, 49 F. Supp. 2d 208, 213 (S.D.N.Y. 1999), where arbitration took sixty-two hearing days from 1994–1998; *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 705 (D.C. Cir. 2001), with nine postponements by the employer in seventy-four hearing dates and conferences from 1994–1999; *Owen-Williams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 96-14421996, WL 688219, at *1 (4th Cir. Dec. 2, 1996), where arbitration took nineteen hearing days; *Kiernan v. Piper Jaffray Companies, Inc.*, 137 F.3d 588, 590 (8th Cir. 1998), where arbitration took fourteen hearing days; *Eisenberg v. Angelo, Gordon & Co., L.P.*, No. 00-7220, 2000 U.S. App. LEXIS 26067, at *1 (2d. Cir. Oct. 17, 2000), where arbitration took ten hearing days; and *Mays v. Lanier Worldwide, Inc.*, 115 F. Supp. 2d 1330, 1337 (M.D. Ala. 2000), where arbitration took nine hearing days.

²⁵⁷ *E.g.*, *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 n.3 (5th Cir. 2002) (revealing that parties spent over \$650,000 in fees and costs related to the arbitration); *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 145 (Fla. Dist. Ct. App. 2000) (prevailing employee was awarded \$160,000 in attorneys fees); *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 820–21 (2d Cir. 1997) (awarding employee \$220,000 in damages but denied \$249,050.10 in attorneys fees); *Campbell v. Cantor Fitzgerald & Co., Inc.*, No. 98-9582, 1999 WL 1424999, at *1 (2d. Cir. Dec. 23, 1999) (charging employee for \$45,000 in forum fees by the arbitration panel for fifteen hearing days).

²⁵⁸ *See generally Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (discussing that the Sixth Circuit carefully considered the high cost of arbitrating employment discrimination complaints). The court observed that a recent study using data from three major arbitrations concluded that a plaintiff who arbitrates a common employment discrimination claim will incur costs “that range from three to nearly fifty times the basic costs of litigating in a judicial . . . forum.” *Id.* at 669 (citing PUBLIC CITIZEN, THE COSTS OF ARBITRATION 40-42 (2002)). The *Morrison* court also noted that as “the monetary stakes rise and more days of hearings are necessary, arbitration’s relative cost increases.” *Id.* at 669. The court illustrated this problem by citing data from the study showing that for an \$80,000 claim, the costs of arbitrating ranged from \$4,350 to \$11,625. *Id.* at 669 (citing PUBLIC CITIZEN, *supra*, at 42). In another study of arbitration cost cited by the *Morrison* court, the American Arbitration Association estimated that the average arbitrator fee was \$700 per day and that an average employment case incurred a total of \$3,750 to \$14,000 in arbitration expenses. *Id.* at 669 (citing Appellant’s Brief at 13). The court used all of these data to conclude that “the default cost-splitting rule in the Circuit City arbitration agreement would deter a substantial percentage of potential litigants from bringing their claims in the

Thus, even though on paper an employee is just as likely as an employer to utilize an expanded review clause to contest an adverse award, we believe that employers who draft this term are more likely to exploit it. While we provide current case law examples to support our theory, we make clear the limits of our charge against employers. First, as we demonstrate with statistics in Section VI.A, only a very tiny fraction of employment arbitration agreements contain this re-litigation feature. Thus, we caution against painting all employers with this unflattering brush. Second, our database shows that employment arbitrations have rapidly evolved from employer dominated systems to more independent forms that yield surprising victories for employees. In particular, our sample contained numerous cases where the arbitrator imposed punitive damages against the employer.²⁵⁹ This trend is ironic considering that the Supreme Court has recently imposed numerical limits on the size of court ordered punitive awards.²⁶⁰

arbitral forum.” *Id.* at 669. If the forgoing is true, this strengthens our claim here that more employers than individual employees are able to withstand the additional cost of litigating an award challenge *do novo* before a court.

²⁵⁹ *E.g.*, *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1177 (D.C. Cir. 1991) (awarding the CEO \$3 million for emotional distress, plus \$1 million for punitive damages as part of overall award of over \$38 million); *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264, 267 (App. Div. 2003) (awarding securities broker \$2 million in compensatory damages and \$25 million in punitive damages); *Eaton Vance Distributors, Inc. v. Ulrich*, 692 So.2d 915, 916 (Fla. Dist. Ct. App. 1997) (awarding \$625,000 in compensatory damages supplemented by punitive award of \$1,125,000); *Siegel v. Prudential Ins. Co. of America*, 79 Cal. Rptr. 2d 726, 729 (Cal. Ct. App. 1998) (adding \$1 million punitive award to actual and compensatory damages totaling \$338,016); *Davis v. Reliance Elec. Ind. Co.*, 104 S.W.3d 57, 60 (Tenn. Ct. App. 2002) (awarding arbitrator \$50,000 for emotional distress claim plus compensatory damages, and in addition, \$520,000 in punitive damages); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 133 (6th Cir. 1996) (awarding employee \$750,000 in punitive damages); *Turgeon v. City of New Bedford, No. CIV. A. 00-0694*, 2000 WL 1804627 (Mass. Sup. Ct. Nov. 30, 2000) (awarding arbitrator unspecified punitive damages in addition to back pay, reinstatement, and damages for emotional distress); *Barvati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (granting punitive award of \$120,000); *Fahnstock & Co., Inc. v. Waltman*, 935 F.2d 512, 514 (2d Cir. 1991) (awarding \$100,000 in punitive damages).

²⁶⁰ *See generally* *State Farm Mutual Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). The Supreme Court ruled that excessive punitive damages violate 14th Amendment due process clause. The Court stated: “We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* at 1524. This followed the Court’s refusal in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 565, 575 (1996), to sustain a \$2 million punitive damages award which accompanied a \$4,000 compensatory damages award.

These improvements in the fairness of arbitration help to explain the motivation by a few employers to preserve the opportunity to re-litigate their arbitrations. Due to court rulings that police gain too much manipulation of the arbitration process, employers are ceding unilateral control over these ADR processes. Ironically, they may feel deprived of a current trend in courts to apply remedial limits on damages.²⁶¹ Meanwhile, as our cases show, arbitrators continue to enjoy very broad remedial powers. Thus, employers may be losing confidence in an ADR process that they initially envisioned as a method to control damage awards.

VI. EMPIRICAL FINDINGS

A. *Sample Characteristics*

Court Decisions: Our sample was comprised of 152 employment arbitration awards that were appealed for vacatur or confirmation. Ninety-five of these awards (62.5%) were reviewed by federal courts, and fifty-seven (37.5%) were reviewed in state courts from 1977 through September 2003. In addition, 117 appellate courts reviewed first-level court rulings to confirm or vacate awards, and nine supreme courts or higher appeals courts ruled on appellate decisions. Altogether, there were 278 court decisions.

Who Won in Awards: Employers entirely won in seventy-seven awards (50.7%). Employees partially prevailed in thirty awards (19.7%), and totally won in forty-five awards (29.6%). In the fifty-four cases won by individuals where the court reported details about the remedy, arbitrators were awarded as little as \$417.75,²⁶² and as much as \$38,233,079.²⁶³ The median award for employees was \$222,500. However, this statistic is potentially misleading because in some cases arbitrators also denied an award of attorney fees to prevailing

²⁶¹ See *Parrish v. Sollecito*, 280 F. Supp. 2d 145 (S.D. N.Y. 2003). A former employee of a New York car dealership prevailed on her retaliation claim under Title VII of the 1964 Civil Rights Act, and was awarded \$500,000 in punitive damages by a jury. *Id.* at 150. On a post-trial motion to reduce the punitive award, the court granted the employer's motion, stating: "[A] punitive award significantly above the \$50,000 cap . . . would reach broadly across the divide between an appropriate award and an unconstitutional penalty." *Id.* at 162-63; see also *Ocheltree v. Scollon Productions, Inc.*, No. 97-2506, 1998 U.S. App. LEXIS 18680, at *1 (4th Cir. Aug. 11, 1998) (explaining that the appeals court vacated jury award of \$400,000 to sexual harassment plaintiff who was also awarded \$72,80 in compensatory damages); *Bell v. Helmsley*, No. 111085/01, 2003 WL 1453108, at *1, *7 (N.Y. Sup. Ct. Mar. 4, 2003) (reducing verdict award of \$10 million in punitive damages to \$500,000).

²⁶² *Unstad v. Lynx Golf, Inc.*, No. C7-96-2259, 1997 WL 193805, *1 (Minn. Ct. App. Apr. 22, 1997).

²⁶³ *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1177 (D.C. Cir. 1991).

complainants, leaving individuals owing more than the amount they received in damages.²⁶⁴ Arbitrators provided monetary awards in favor of employers in thirteen cases. These ranged from \$7,500²⁶⁵ to \$1,164,000.²⁶⁶

Who Challenged Awards: Employees challenged awards in ninety-four cases (61.8%). In the remaining fifty-eight cases (38.2%), employers challenged awards.

Legal Grounds for Challenging Awards: We recorded at least fifteen separate legal grounds to vacate awards or otherwise deny enforcement. In some cases, categorizing these contentions was not automatic and required judgment. For example, we treated awards that were vacated as irrational to be identical as those deemed arbitrary and capricious. In other cases, we separately recorded seemingly identical arguments. Prime examples were an award that violated a public policy, and an award made in manifest disregard of the law. These contentions seem to be synonymous; however, because they refer to different common law standards with distinct legal tests,²⁶⁷ they were coded separately.

With this background in mind, we report the following frequencies for these legal arguments. When a challenger raised several arguments, all were recorded and tabulated. Thus, when the following figures are added they exceed 100%.

One set of arguments were based on the *Trilogy* standards. Awards were challenged on grounds that the arbitrator exceeded her authority in eighteen cases (11.8% of awards); the award failed to draw its essence from the agreement in two cases (1.3%); the arbitrator committed a fact-finding error in one case (0.7%); and the award violated or conflicted with a public policy in twenty-two cases (14.5%).

²⁶⁴ *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 825 (2d Cir. 1997). The arbitration panel awarded the ADEA complainant \$220,000 in compensatory damages, but denied his claim for attorney's fees, a common remedy for a prevailing party under the ADEA. *Id.* at 820. As a result of the appeals court ruling that affirmed the award, *DiRussa* owed \$249,050.10 in attorney's fees for this arbitration. *Id.*

²⁶⁵ *Bender v. Smith Barney, Harris Upham & Co., Inc.*, 67 F.3d 291 (3d Cir. 1995).

²⁶⁶ *See Everen Securities, Inc. v. A.G. Edwards & Sons, Inc.*, 719 N.E.2d 312, 316 (Ill. App. Ct. 1999).

²⁶⁷ *See Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998) (observing that in cases where a court reviews an award for manifest disregard of the law, "the reach of the doctrine is 'severely limited'. . . . [M]anifest disregard clearly means more than error or misunderstanding with respect to the law." *Id.* (citation omitted)). The court stated that in order to modify or vacate an award for manifest disregard, it "must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Id.*

Alternatively, awards were appealed under FAA and related state standards.²⁶⁸ In eighteen (11.8%) cases, challengers claimed that the award was procured by fraud, corruption, or undue means. Awards were also challenged on grounds that the arbitrator was guilty of evident partiality or corruption in thirty-two (21.1%) cases. In addition, arbitrator misconduct during the hearing was alleged in twenty-five (16.5%) cases. The arbitrator was charged with exceeding her powers or imperfectly executing an award in thirty-five cases (23.0%).

Other challenges were based on FAA common law standards. The most frequent variant alleged that the award was made in manifest disregard of the law (sixty-five cases, or 42.8%). Parties challenged awards as punitive (seven cases, 4.6%), excessive (four cases, 2.6%), unconstitutional (two cases, 1.3%), or arbitrary and capricious (ten cases, 6.6%).

Two additional contentions in the common law category merit special discussion. In two (1.3%) cases, a challenger claimed that a court lacked jurisdiction to enforce an award. This was not a direct challenge to an award. Thus, we could have excluded this argument from our tabulation. However, because this contention was clearly meant to deny enforcement to the arbitrator's ruling, we coded it as a type of award challenge. Awards were also challenged on the basis of expanded review clauses in the parties' arbitration contract (e.g., the award must be reviewed for legal or fact finding errors). Five awards (3.3%) were contested on these grounds. Rulings were recorded for five district and four appeals courts (3.2% of all decisions).

Who Won Award Challenges. In the 152 first-level court rulings on an award challenge, employees won fifty-nine (38.8%) times. This means that their motion to vacate a pro-employer award was granted, or their motion to confirm an award that they won in part or in whole was confirmed. As the appellate process continued, the employee win rate remained steady at forty-six of 118 second-

²⁶⁸ The states included in our database are: Alabama (ALA. CODE § 6-6-12 (1975)); California (CAL. CIV. PROC. CODE § 1286.2 (West 1982)); Colorado (COLO. REV. STAT. §13-22-213 (1987)); Connecticut (CONN. GEN. STAT. § 52-418 (1991)); Florida (FLA. STAT. ANN. § 682.14 (West 2003)); Hawaii (HAW. REV. STAT. § 658A-20 (2001)); Idaho (IDAHO CODE § 7-911 (Michie 1998)); Illinois (705 ILL. COMP. STAT. ANN. 5/11 (West 1999)); Louisiana (LA. REV. STAT. ANN. § 9:4209 (West 1997)); Massachusetts (MASS. ANN. LAWS ch. 150, §11(Law. Co-op. 1999)); Michigan (MICH. COMP. LAWS ANN. § 600.5001(West 2000)); Minnesota (MINN. STAT. ANN. §572.18 (West 2000)); Missouri (MO. ANN. STAT. § 435.400 (West 1992)); Montana (MONT. CODE ANN. § 27-5-311 (1995)); New Jersey (N.J. STAT. ANN. § 2A:23A-26 (West 2000)); New York (N.Y. C.P.L.R. LAW § 7511 (McKinney 1998)); Ohio (OHIO REV. CODE ANN. § 2711.09 (Anderson 1999)); Rhode Island (R.I. GEN. LAWS § 10-3-12 (1956)); South Carolina (S.C. CODE ANN. § 15-48-120 (Law. Co-op. 1976)); and Wisconsin (WIS. STAT. ANN. § 788.09 (West 2001)); as well as the District of Columbia (D.C. CODE ANN. § 16-4311 (2001)).

level court rulings (39.0%), and two of nine higher appeals court decisions (22.2%).

B. *Comparing Awards Reviewed Under FAA/Common Law and Contractual Standards*

Table 1 (see Appendix) shows the frequency of court confirmation and vacatur of arbitration awards. The first two rows arise out of court decisions that reviewed employment awards. The first of these rows shows results from first-level courts, while the second row combines findings from second- and third-level appellate courts. The next two rows repeat this pattern, but with data from commercial cases discussed in Section IV.A. Next, consider the columns of data in Table 1. The left data-column shows confirmation and vacatur results for courts that applied FAA or common law standards. The right column shows results for courts that applied expanded review standards as specified in an arbitration agreement.

Courts that use FAA and common law reviewing standards confirm a very high percentage of awards. In employment arbitration challenges, first-level courts fully confirmed 135 of 151 awards (89.4%).²⁶⁹ They partially confirmed four awards (2.6%), and vacated twelve awards (7.9%).²⁷⁰ There were 118 appeals of these court decisions. Second-level appeals courts confirmed ninety-six awards (81.4%), and partially confirmed six awards (5.1%). These courts vacated or denied enforcement to sixteen awards (13.6%). Third-level appeals—for example, to a state supreme court—were uncommon. In these nine cases, courts confirmed only five awards (55.6%), partially confirmed one award (11.1%), and vacated or denied enforcement to three awards (33.3%).²⁷¹

Results for the much smaller number of commercial arbitration cases in Table 1 are similar to employment cases. Cell C of that table shows that courts confirmed three arbitrator rulings (75.0%) and vacated only one award (25.0%). In Cell D, courts confirmed two arbitrator rulings (66.7%) and vacated one award (33.3%).

Courts that apply contractually expanded forms of review confirm a lower percentage of awards compared to courts that review under traditional standards. First-level courts who applied expanded review standards behaved the same as in FAA or common law decisions. Cell E in Table 1, showing employment awards that were reviewed under contractually expanded standards, reports that courts confirmed four awards (80.0%) and denied enforcement to one award (20.0%).

²⁶⁹ A ruling for one of the 152 award review decisions was too ambiguous to code.

²⁷⁰ Partial and full award confirmations are combined, and are reported in Cell A of Table 1.

²⁷¹ Data for both levels of appeals are combined and reported in Cell B of Table 1.

This compares to the results in Cell C. These were also first-level reviewing courts, except that judges here reviewed commercial awards. Like courts in Cell E, they confirmed a very high percentage of awards. The point is that the results in Cell C and E show that first-level courts follow the time-honored practice of deferential review.

The results in Cells F and H depart from this pattern. Cell F shows that four appeals courts reviewed lower court rulings that were based on contractual standards of review, and confirmed only two (50.0%) of the four awards. In similar fashion, appeals courts reviewing commercial awards under expanded standards confirmed just two (40.0%) awards, and vacated three awards (60.0%).

Employers are not strongly committed to arbitral finality. The results for Table 2 provide evidence to test our theory that employers strategically draft expanded review clauses to avoid adverse rulings, and in doing so, exploit their unequal advantage over individual employees in administering the arbitration process. Who challenges awards? We found that fifty-eight (38.2%) of 152 award challenges were initiated by employers in the cases where courts used FAA or common law standards to review awards. Individual employees initiated most challenges (ninety-four cases, or 61.8%). However, the relative frequency of employer appeals of final awards is surprising considering that these parties steered the underlying disputes away from court and on to arbitration.

Employers disregard arbitral finality when the arbitration agreement provides for expanded judicial review of awards. Employers were much more likely to abandon their commitment to award finality in the cases where arbitration agreements provided for expanded review. They challenged awards in 80% of these cases. There was only one instance (20%) where an employee challenged an award that was subject to expanded judicial review.

We found a similar result for the commercial arbitration cases that we discussed in Section IV. When dealing with expanded contractual standards, Cell D of Table 2 reflects our sense of the distribution of bargaining power in such disputes. We inferred that the husband and wife in *Bowen* were the weaker party to this arbitration agreement. They opposed enforcement of the agreement when they filed a lawsuit against Amoco, a large oil company. *Roadway Package System* was similar in the sense that a large transportation company imposed an arbitration agreement on an individual contractor. Thus, we judged Kayser as the weaker party. The individual employee who incorporated a small firm that competed against his larger employer in *Syncor* followed a similar pattern. He, too, was categorized in Cell D of Table 2 as the weaker party.

While it is not quite so easy to determine the identity of the party with less bargaining power in *LaPine* and *Gateway Technologies*, we note that LaPine was a start-up company who entered into an arbitration agreement with a large manufacturing company, and Gateway appeared to be a small sub-contractor who entered into an arbitration agreement as part of a business transaction with the

large telecommunications company, MCI. We therefore classified these small companies as the weaker party in these arbitration agreements. We also infer from these facts that the large companies in *Bowen*, *Roadway Package System*, *LaPine* and *Gateway Technologies* drafted the clause for expanded review of an award. Cell D shows that these four companies initiated challenges to arbitration awards under these clauses. We also believe that the larger corporate entity in *Syncor* drafted the expanded review clause. Cell D reflects the fact that the weaker party in that case, David McLeland, contested the award under this provision. In sum, Cell D reflects the pattern we observed in the employment arena: four out five award challenges were initiated by the drafter of the expanded review clause.

VII. CONCLUSIONS

Our research and analysis has led us to two conclusions:

1. While employment arbitration is improving to produce better outcomes for individuals, some employers are drafting provisions in arbitration agreements, including expanded review clauses, to maximize self-advantage. Expanded review clauses undermine arbitration by creating broad grounds for judicial review of awards that are supposed to be final and binding. Imagine that the fine print in a pre-dispute arbitration agreement identifies a court to review the arbitrator's award, declares the court's jurisdiction over any dispute under this contract,²⁷² and expresses the parties' desire for a de novo review of the arbitrator's ruling. So phrased, this clause would function like the revocation doctrine from the early nineteenth century.²⁷³ By defining the court's jurisdiction in these terms— not for the purpose of enforcing an award, but to conduct a de novo review—this agreement would modernize the 1746 ouster doctrine which the FAA meant to extinguish.²⁷⁴

The contracts that are summarized in Table 3 (see Appendix) do more than expand judicial review of arbitration awards. They eliminate final and binding arbitration. These clauses are designed to litigate a dispute anew in court. In most of the commercial and employment cases in our study, the party who appealed for expanded judicial review had the original idea to substitute arbitration for

²⁷² Cf. *Kill v. Hollister*, 95 Eng. Rep. 532 (K.B. 1746).

²⁷³ *Ex Parte Wright*, 6 Cow. 399 (N.Y. Sup. Ct. 1826) (quoting notes by Attorney Robert Johnstone, "A general submission of a cause to arbitration is a discontinuance; but not where the parties agree that a judgment may be entered on the report. And in such a case, if the submission be revoked, the court may proceed with the cause to trial, notwithstanding the submission").

²⁷⁴ See *supra* notes 50–51 and accompanying text.

court proceedings, and also blocked the other party's initial attempt to litigate the dispute in court. After this party lost at arbitration, it found new enthusiasm for taking its dispute to court.

This is an unhealthy development for employment arbitration. It detracts from model dispute resolution programs instituted by employers to achieve cost-savings, privacy, and expedience for themselves and also their employees.²⁷⁵ Expanded review clauses are similar to recent innovations in which certain employers seek unfair advantages over individuals in the arbitral forum. These include shifting large forum costs to employees,²⁷⁶ designating inconvenient venues,²⁷⁷ placing arbitrary remedial limits on the arbitrator's powers,²⁷⁸ shortening time bars for filing claims,²⁷⁹ and providing for the employer's unilateral selection of the arbitrator.²⁸⁰

²⁷⁵ See *infra* notes 290 and 293.

²⁷⁶ See *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003).

Minimal research will reveal that the potential costs of arbitrating the dispute easily reach thousands, if not tens of thousands, of dollars, far exceeding the costs that a plaintiff would incur in court. Courts charge plaintiffs initial filing fees, but they do not charge extra for in-person hearings, discovery requests, routine motions, or written decisions, costs that are all common in the world of private arbitrators.

Id. at 669.

²⁷⁷ *E.g.*, *Poole v. L.S. Holding, Inc.*, No. 2001-57, 2001 WL 1223748, at *4 (D.V.I. Aug. 20, 2001) (rejecting contention by Virgin Islands employee that Massachusetts is a prohibitively expensive venue to arbitrate claim). *Cf.* *Bailey v. Ameriquet Mortgage Co.*, No. CIV. 01-545(JRTFLN), 2002 WL 100391, at *9 (D.Minn. Jan. 23, 2002) (ruling agreement to compel Minnesota employees to arbitrate claims in California to be unenforceable).

²⁷⁸ *E.g.*, *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998); *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815, 827 (S.D. Ohio 1999) (holding that although Title VII permits up to \$300,000 in punitive damages, there is a \$162,000 limit imposed by arbitration agreement).

²⁷⁹ *E.g.*, *Louis v. Geneva Enterprise, Inc.*, 128 F. Supp. 2d 912, 914–15 (E.D. Va. 2000) (holding that 60 day filing limit in an arbitration agreement unlawfully conflicts with three year statute of limitations for FLSA claims); *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 726 (9th Cir. 2000) (reasoning that because ERISA provides a four year statute of limitations for an action to recover benefits under a written contract, the plan administrator breached its fiduciary duty by adopting a mandatory arbitration clause that set a 60 day time limit in which to demand arbitration).

²⁸⁰ See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (concluding that the employer's rules, which included unilateral selection of the arbitrator, were "so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith," and finding that the "only possible purpose of these rules was to undermine the neutrality of the proceeding"). *Cf.* *Mei L. Bickner et al., Developments in Employment Arbitration*, 52 DISP. RESOL. J. 8, 15, 80 (1997) (researching employment arbitration systems by surveying eighty employers using pre-dispute arbitration

This Article shows, through the use of statistical evidence, that expanded review clauses open broad avenues for employers to escape the arbitrations that they institute. Table 1 (Cell A) shows that 151 awards were appealed to a state or federal court under traditional standards of review. Although employees initiated a majority of these challenges, the remarkable point is that employer appeals comprised nearly 40% of the sample. The surprise here is that a dispute resolution system created and shaped by employers, without statutory interference or bargaining with a union, would prompt so much abandonment by its architects. The result in Cell C of Table 1 adds to this impression. When an arbitration agreement provided for expanded judicial review, the employer rate of challenging awards more than doubled.

Our results also shed light on a new fairness issue. Unless an employee is someone special—a Chief Executive Officer,²⁸¹ a lawyer who is also a partner,²⁸² or a successful securities broker who is able to negotiate specific terms of employment²⁸³—the individual has no way to influence the procedures and methods of an arbitration. Low-bargaining power individuals in our sample worked in jobs that required little formal education or worldly sophistication.²⁸⁴ Others had no legal counsel in their workplace dispute.²⁸⁵ For both types of individuals, we doubt that they knew that the final and binding awards in their agreement were subject to broad re-litigation in court. We also found a third category of individuals: employees in better jobs, who had access to attorneys,

agreements, which showed empirically that about 15% provided for unilateral selection by the employer).

²⁸¹ See *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1176 (D.C. Cir. 1991).

²⁸² *Hackett v. Millbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95, 97 (N.Y. 1995).

²⁸³ *Edward D. Jones & Co. v. Schwartz*, 969 S.W.2d 788, 791 (Mo. Ct. App. 1998) (allowing a securities broker with over six thousand clients to negotiate the size of his Nebraska territory).

²⁸⁴ *E.g.*, *Autrey v. Ultramar Diamond Shamrock Corp.*, No. 05-01-00292-CV, 2002 WL 102198, at *1 (Tex. App. Jan. 28, 2002) (involving an employee who was a store clerk); *May v. First National Pawn Brokers, Ltd.*, 887 P.2d 185, 186 (Mont. 1994) (involving employees who worked in a pawn shop); *Mack v. Strategic Materials, Inc.*, 270 F. Supp. 2d 934, 935 (E.D. Mich. 2003) (involving an employee who worked graveyard shift at a glass recycling center); *Castleman v. AFC Enterprises, Inc.*, 995 F. Supp. 649, 651 (N.D. Tex. 1997) (involving an employee who was an assistant manager at a Kentucky Fried Chicken store); *Bunzl Distribution USA, Inc. v. Dewberry*, No. 00-2325, 2001 WL 649482, at *1 (8th Cir. June 11, 2001) (involving an employee who was a sales representative who sold plastic and paper products to area supermarkets); *Glover v. IBP, Inc.*, 334 F.3d 471, 473 (5th Cir. 2003) (involving an employee who split carcasses as a meatpacker).

²⁸⁵ *E.g.*, *Mendez v. Commercial Credit Corp.*, No. 98-2323, 1999 WL 617672 (10th Cir. Aug. 16, 1999); *Carmel v. Circuit City Stores, Inc.*, No. CIV. A. 99-MC-240, 2000 WL 1201891 (E.D. Pa. Aug. 22, 2000); *Morado v. Service Employees Int'l Inc.*, No. Civ.A.SA01CA0512 FB, 2002 WL 31422374 at *1 (W.D. Tex. July 29, 2002).

and who also encountered costly arbitration hearings and procedures. At the end of these grueling proceedings, they probably lacked resources or fortitude to carry the dispute on to court. These contextual factors explain why many more employers than individuals sought expanded review of an adverse award. We conclude that the opportunity to invoke an expanded review clause in an employment arbitration agreement is not equally distributed between employers and individuals. There is a bias in which losers in employment arbitrations will likely appear at the door of the courthouse seeking review of an award.

2. The Supreme Court should preserve arbitral finality by rejecting expanded review of employment arbitration awards. The *Gilmer* decision led to the closing of courthouse doors to individuals who alleged statutory violations of their employment rights. Although this ruling stirred controversy,²⁸⁶ the Supreme Court justified its approach because arbitration opened a new door to disputants.²⁸⁷ The recent trend expanding judicial review of arbitration is at odds with this foundation principle in *Gilmer* because it supplants forum substitution with forum propagation. This development also contradicts the Court's recent and pointed pronouncements in *Garvey* that, "established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision."²⁸⁸

In the wake of *Gilmer*, many employers have adopted arbitration programs.²⁸⁹ In the past decade, the *Gilmer* majority's vision of employment arbitration as a fair substitute forum has come closer to fulfillment. ADR processes have been revised to include new safeguards for individuals. The securities industry abolished mandatory employment arbitration in 1998.²⁹⁰ Also,

²⁸⁶ See *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998) ("In the aftermath of *Gilmer* . . . mandatory binding arbitration of employment discrimination disputes as a condition of employment has caused increased controversy.").

²⁸⁷ *Id.* at 201 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.") (citing *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 437 U.S. 614, 628 (1985)).

²⁸⁸ *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 511 (2001).

²⁸⁹ See AMERICAN ARBITRATION ASSOCIATION, 2000 ANNUAL REPORT 28 (2001) (reporting that more than five hundred employers and five million employees were covered by its employment arbitration programs in 2000). This figure is more remarkable considering that AAA is just one of several large providers of arbitration services. *Id.* at 11.

²⁹⁰ The Securities and Exchange Commission (SEC) on June 22, 1998 approved a proposed rule change offered by the National Association of Securities Dealers, Inc. (NASD) that abolishes mandatory NASD arbitration of statutory employment discrimination claims. See Order Granting Approval to Proposed Rule Change Relating to the Arbitration of

as some courts ruled that employment arbitration agreements were adhesive or unconscionable,²⁹¹ arbitration agreements were revised so that employees could opt-out of this private process.²⁹² In addition, leading arbitration services adopted comprehensive due process rules specifically for employment disputes to ensure the fairness and neutrality of these specialized arbitrations.²⁹³

In light of these developments, the Supreme Court should protect its investment in employment arbitration by overruling the expanded review approach taken by the Fourth and Fifth Circuits. Expanded review clauses install a revolving door of justice in American courthouses. In *Gilmer* and *Circuit City*, employers closed these courthouse doors to individuals who wanted to litigate their workplace disputes. Those employers who seek expanded review of an award now return to court for what amounts to a 'do-over' of their own private

Employment Discrimination Claims, 63 Fed. Reg. 35,299 (June 29, 1998) (rule became effective on Jan. 1, 1999). In a separate action on December 29, 1998, the SEC amended New York Stock Exchange, Inc. (NYSE) Rules 347 and 600 "to exclude claims of employment discrimination, including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen." See Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration Rules 64 Fed. Reg. 1051 (Jan. 7, 1999).

²⁹¹ *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 694 (Cal. 2000). The California Supreme Court held that a mandatory employment arbitration agreement was unconscionable, violated the State's public policy against employment discrimination, and unlawfully limited recovery for statutory damages. In finding that the arbitration procedure was an adhesion contract, the California Supreme Court contradicted *Gilmer's* broad approval of this ADR method. *Id.* at 689.

²⁹² See *Luong v. Circuit City Stores, Inc.*, No. SA CV 00-763 AHS (EEEx), 2001 WL 935317 (C.D. Cal. Mar. 28, 2001); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1287 (N.D. Ala. 2000); *Circuit City Stores, Inc. v. E.E.O.C.*, No. 3:97CV538, 1998 WL 743937 (E.D. VA. Oct. 1, 1998).

²⁹³ Susan McGolrick, *Arbitration: Revised AAA Arbitration Procedures Reflect Due Process Task Force Scheme*, DAILY LAB. REP., May 28, 1996, at A-1. The American Arbitration Association (AAA) revised its procedures for mediation and arbitration of employment disputes to ensure due process for employees. The new rules resulted from the AAA's one-year pilot program in California, which implemented experimental rules developed by a committee of management and plaintiffs' attorneys, arbitrators, and retired judges. Also, the new rules incorporated due process suggestions from the American Bar Association's Task Force on Alternative Dispute Resolution in Employment. As part of this reform, AAA developed a roster of employment arbitrators who must undergo national training program focusing on substantive and procedural issues. In addition, another leading arbitration service, JAMS/Endispute, adopted similar fairness rules in January 1995. The due process reforms included wide-ranging powers of discovery vested in arbitrators, the right to representation, the same burdens of proof as in courts, and broad remedial powers for arbitrators, including authority to order attorneys' fees. Moreover, "[a]rbitrators must be experienced in employment law, have no conflicts of interest," and "disclose all relevant information affecting neutrality, and be mutually acceptable to the parties." *Id.*

process. When this revolving courthouse door returns the unsuspecting individual to the forum she originally sought, she loses the substantial benefit of trying her case before a sympathetic jury. Instead, this turnstile leads to an anomalous appellate review of an informal record created at the arbitration. Magnifying this problem, there is no requirement to transcribe arbitrations or have written explanations of awards. Thus, review of an award cannot replicate an appellate court's typical experience with a trial record. In addition, by the time an individual goes through this revolving door, she is more likely than her employer to be worn down by an arbitral forum that often fails to provide a prompt, efficient, and low cost result. Failure by the Supreme Court to halt this development will erode its vision that the FAA "declared a national policy favoring arbitration."²⁹⁴ The Court should act on its previous recognition that "there is so much [current] agitation against the costliness and delays of litigation."²⁹⁵ If the Court does not act, arbitration will lose its efficiency and low cost, ability to resolve disputes promptly, and promise to deliver final and binding resolutions.

²⁹⁴ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

²⁹⁵ *Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942).

Table 1		
Awards Reviewed under FAA/Common Law and Expanded Review Standards (1977- September 2003)		
	FAA/Common Law Standard	Parties' Contractual Standard
Employment Award <u>Initial Court Review</u> <i>Confirm</i>	A 139 (92.1%)	E 4 (80.0%)
<i>Vacate</i>	12 (7.9%)	1 (20.0%)
Employment Award <u>Appeals Court Review</u> <i>Confirm</i>	B 102 (86.4%)	F 2 (50.0%)
<i>Vacate</i>	16 (13.6%)	2 (50.0%)
Commercial Award <u>Initial Court Review</u> <i>Confirm</i>	C 3 (75.0%)	G 0
<i>Vacate</i>	1 (25.0%)	0
Commercial Award <u>Appeals Court Review</u> <i>Confirm</i>	D 2 (66.7%)	H 2 (40.0%)
<i>Vacate</i>	1 (33.3%)	3 (60.0%)

Table 2 Who Challenges Awards Under Expanded Review Clauses?		
	FAA/Common Law Standard	Expanded Contractual Standard
Employment Arbitration Award <i>Employee</i> <i>Employer</i>	A	B
	94 (61.8%)	1 (20.0%)
	58 (38.2%)	4 (80.0%)
Commercial Arbitration Award <i>Weaker Party</i> <i>Drafter</i>	C	D
	0	1 (20.0%)
	0	4 (80.0%)

Table 3

Arbitration Clauses That Expand Judicial Review of Awards

Decision	Contract Language Modifying Judicial Standard of Review
<p>LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 890 (9th Cir. 1997).</p>	<p>The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrator’s findings of fact are not supported by substantial evidence, or (iii) where the arbitrator’s conclusions of law are erroneous.</p>
<p>Syncor Int’l Corp. v. McLeland, No. 96-2261, 1997 U.S. App. LEXIS 21248, *15 (4th Cir. Aug. 11, 1997).</p>	<p>“[A]rbitrator 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.”</p>
<p>Collins v. Blue Cross Blue Shield of Michigan, 103 F.3d 35, 36 (6th Cir. 1996).</p>	<p>Judicial review of the arbitration award “as established by law” and for the arbitrator’s “clear error of law.”</p>
<p>Harris v. Parker College of Chiropractic, 286 F.3d 790, 793 (5th Cir. 2002).</p>	<p>“[T]he Award of the Arbitrator shall be binding on the parties hereto, although each party shall retain his right to appeal any questions of law, and judgment may be entered thereon in any court having jurisdiction.”</p>
<p>Hughes Training Inc. v. Cook, 254 F.3d 588, 590 (5th Cir. 2001).</p>	<p>“Either party may bring an action in any court of competent jurisdiction . . . to vacate an arbitration award. . . . [T]he standard of review to be applied to the arbitrator’s findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.”</p>
<p>Bowen v. Amoco Pipeline Co., 254 F.3d 925, 930 (10th Cir. 2001).</p>	<p>“The right to appeal any arbitration award to the district court within thirty days “on the grounds that the award is not supported by the evidence.”</p>
<p>Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996 (5th Cir. 1995).</p>	<p>“[A]rbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal.”</p>
<p>Bargenquast v. Nakano Food, Inc., 243 F. Supp. 2d 772, 774 (N.D. IL. 2002).</p>	<p>“The arbitrator . . . shall have no power, in rendering the award, to alter or depart from any express provision of this Agreement or to make a decision which is not supported by law and substantial evidence.”</p>
<p>Roadway Package System, Inc. v. Kayser, 257 F.3d 287, 288 (3d Cir. 2001).</p>	<p>Agreement “shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania.”</p>

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