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Sure and Expedited Resolution of Disputes: The Federal Arbitration Act and the One-Year Requirement for Summary Confirmation of Arbitration Awards, A

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"A SURE AND EXPEDITED RESOLUTION OF DISPUTES":* THE FEDERAL ARBITRATION ACT AND THE ONE-YEAR REQUIREMENT FOR SUMMARY CONFIRMATION OF ARBITRATION AWARDS

INTRODUCTION

Arbitration is a "highly favored" mode of dispute resolution throughout the American judicial system.[1] Generally, arbitration presents an opportunity for parties to settle their differences using an independent third-party arbitrator.[2] The arbitrator serves as the trier of fact, and conducts hearings in lieu of a judicial proceeding.[3] As a result, arbitration offers disputing parties "speedy and inexpensive trial[s] before specialists," while also "eas[ing] the workload of the courts."[4]

In order to further the purposes of arbitration at the national level, Congress enacted the Federal Arbitration Act ("FAA") in 1925.[5] The overall purpose of the FAA is to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."[6] The FAA governs commercial arbitration and provides parties with a series of

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* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003) (quoting *In re* Consol. Rail Corp., 867 F. Supp. 25, 31 (D.D.C. 1994)).

[1] Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 152 (4th Cir. 1993).

[2] *See* Daniel D. Derner & Roger S. Haydock, *Confirming an Arbitration Award*, 23 WM. MITCHELL L. REV. 879, 880 (1997) ("With arbitration, parties can resolve their disputes fairly and privately by having an arbitrator issue a binding award following a hearing.").

[3] *See* Martin A. Frey, *Does ADR Offer Second Class Justice?*, 36 TULSA L.J. 727, 761 (2001) (identifying the arbitrator's role as both trier of fact and trier of law).

[4] *See Sverdrup*, 989 F.2d at 152 (alterations in original) (quoting, inter alia, Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222, 1224 (2d Cir. 1980)).

[5] United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2006)). The statute is now known as the Federal Arbitration Act.

[6] EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (quoting Gilmer v. Interstate/ Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

guidelines and procedures for any disputes that are submitted for resolution.[7] In effect, the FAA creates a body of "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]."[8] By doing so, the FAA guarantees that "arbitration has the same power and ability to decide cases as traditional court litigation."[9]

As a part of these provisions, the FAA provides for summary confirmation of arbitration awards.[10] This confirmation process, governed by 9 U.S.C. § 9, allows a prevailing party to file an application with a court to confirm an arbitration award. In relevant part, section 9 states:

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

Thus, if a party applies for award confirmation under section 9, the court must confirm it unless the award is "vacated, modified, or corrected" pursuant to other provisions of the FAA.[12] This process has the effect of a summary proceeding, which disposes of the award's confirmation in a prompt and efficient manner.[13] Section 9 is critical to arbitration's goals because confirmation of an award renders the arbitrated issue res judicata.[14] As a result, judicial

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[7] Teresa L. Elliott, *Conflicting Interpretations of the One-Year Requirement on Motions to Confirm Arbitration Awards*, 38 CREIGHTON L. REV. 661, 661 (2005) (citing 9 U.S.C. §§ 1–16 (2000)).

[8] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("[Q]uestions of arbitrability . . . [should] be addressed with a healthy regard for the federal policy favoring arbitration.").

[9] Elliott, *supra* note 7, at 661.

[10] *See* 9 U.S.C. § 9 (2006).

[11] *Id.*

[12] *Id.*

[13] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1400, 1402 (2008) (explaining that summary confirmation is an expedited and streamlined process).

[14] *See* Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261, 266 n.6 (2d Cir. 1997) ("[R]es judicata is applicable to arbitration awards and may serve to bar the subsequent relitigation of a single issue or an entire claim." (quoting *In re* Claim of Ranni, 444 N.E.2d 1328, 1329 (N.Y. 1982)) (internal quotation marks omitted)); *see also* Erika Van Ausdall, *Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 DRAKE L. REV. 41, 47 (2000) ("[J]udicial confirmation of the award is crucial because it gives the award the same effect as a court judgment, precluding *de novo* litigation of the issues

confirmation establishes a sense of finality in matters resolved by arbitration.

While the confirmation process appears relatively straightforward, the language of section 9 has been subject to conflicting interpretations at the federal level. In particular, circuit courts are split over the time period during which a party may file for judicial confirmation under section 9. As noted above, the provision provides that "at any time *within one year* after the [arbitration] award is made any party to the arbitration *may apply* to the court . . . for an order confirming the award."[15] The courts have struggled over whether this language creates a one-year statute of limitations for summary award confirmation under the FAA.

The Fourth and Eighth Circuits have adopted a permissive interpretation of section 9, holding that the provision does not create a mandatory one-year limitations period.[16] On the other hand, the Second Circuit follows a mandatory interpretation of the statute, holding that section 9 does impose a one-year statute of limitations.[17]

In support of their interpretation, the Fourth and Eighth Circuits argue that a permissive reading of section 9 not only comports with the statute's normal reading[18] but also promotes judicial economy, a key objective of arbitration.[19] The courts argue that if faced with a strict one-year limitations period, parties will be discouraged from utilizing the FAA's devices and will instead file a separate action at law to enforce an award.[20]

Such a permissive interpretation has several important weaknesses. First, the Supreme Court has repeatedly held that the mere presence of permissive language in a statute does not render the provision itself permissive.[21] Instead, courts must look to the statute's structure and legislative purpose for guidance.[22] Second, while a permissive

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resolved through arbitration.").

[15] 9 U.S.C. § 9 (emphasis added).

[16] *See* Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 581 (8th Cir. 1998) ("We hold that § 9 is a permissive statute and does not require that a party file for confirmation within one year."); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993) (holding that section 9 "must be interpreted as its plain language indicates, as a permissive provision which does not bar the confirmation of an award beyond a one-year period").

[17] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003).

[18] *See Sverdrup*, 989 F.2d at 151 (asserting that an examination of the language "gives rise to the inference that Congress understood the plain meaning of 'may' to be permissive").

[19] *See Val-U*, 146 F.3d at 581; *Sverdrup*, 989 F.2d at 155.

[20] *See Sverdrup*, 989 F.2d at 155 (noting that a mandatory interpretation will encourage parties to file actions at law to confirm arbitration awards to the detriment of judicial economy).

[21] *See, e.g.*, Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198–99 (2000); United States v. Rodgers, 461 U.S. 677, 706 (1983).

[22] *See Cortez Byrd*, 529 U.S. at 199.

interpretation may encourage parties to submit disputes to arbitration, the Fourth and Eighth Circuits seem to assume that such a decision will be based solely on the type of time limitation imposed by section 9.[23] Finally, a permissive interpretation will essentially leave the FAA's summary confirmation process without a statute of limitations. The Supreme Court has held that in such situations, courts are to utilize analogous state statutes of limitations.[24] The states, however, are not uniform in the necessary time period for summary confirmation.[25] The obvious result is that the availability of section 9 confirmation will be inconsistent on a national scale.

In light of these weaknesses, a permissive interpretation of section 9 is neither appropriate nor necessary. Instead, the mandatory one-year statute of limitations proposed by the Second Circuit better fulfills the intent of Congress and the purposes of FAA arbitration,[26] while also promoting consistency in the availability of summary confirmation on a national scale. Therefore, this Note proposes that the mandatory interpretation should be adopted to impose a one-year statute of limitations for summary confirmation under section 9.

Part I of the Note will provide a brief history of the FAA and the purposes behind the statute's enactment. In addition, it will examine the current circuit split over the interpretation of section 9. Given this Note's advocacy for the Second Circuit's mandatory interpretation, the remaining sections will discuss several reasons in support of this reading. Part II will explain why a mandatory one-year limitations period best fits the language and structure of section 9. Part III will demonstrate that this interpretation is more effective in not only fulfilling section 9's purpose as an expedited confirmation process but also in promoting both of the primary goals of FAA arbitration: judicial economy and finality.

Part IV will discuss how a mandatory one-year limitations period ensures that section 9's procedures are consistently available on a national scale. Finally, Part V argues that, in light of the ability to toll

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[23] *See Sverdrup*, 989 F.2d at 155 (observing that construing section 9 as a statute of limitations will frustrate judicial economy); *see also Val-U*, 146 F.3d at 581 (adopting the Fourth Circuit's rationale in *Sverdrup*).

[24] *See* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158 (1983) (observing that, in the absence of a statute of limitations for a federal law, the Court "has generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law").

[25] *See, e.g.*, CAL. CIV. PROC. CODE § 1288 (West 2007) (allowing four years for summary confirmation); CONN. GEN. STAT. ANN. § 52-417 (West 2005) (imposing a one year limitations period); IND. CODE ANN. § 34-11-2-12 (West 1999) (giving parties twenty years for satisfaction of a court judgment).

[26] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 157–58 (2d Cir. 2003).

a statute of limitations, a permissive interpretation of section 9 is simply not necessary to fulfill the objectives of the FAA.

I. BACKGROUND

A. History and Purpose of the FAA

Before examining the dispute over section 9's time limitations, it is important first to understand the history and purpose behind the FAA. By enacting the FAA in 1925, Congress intended to curb traditional judicial animosity toward arbitration agreements.[27] The American courts inherited this hostility from their English predecessors at common law.[28] Viewing such animosity as a serious problem, Congress passed the FAA to replace "judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"[29]

In furtherance of this policy, Congress intended for the FAA to protect the enforceability of arbitration agreements,[30] as well as ensure their "rapid and unobstructed enforcement."[31] To do so, Congress crafted the FAA to include sixteen General Provisions,[32] which govern nearly every stage of an arbitration brought under the FAA. For example, the General Provisions allow for a party to petition a court to compel arbitration,[33] permit a court to stay judicial proceedings if a matter can be referred to arbitration,[34] and allow a court to "vacate, modify, and correct" awards in limited instances.[35] The comprehensive nature of these provisions manifests "a liberal

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[27] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements . . . .").

[28] *See* Van Ausdall, *supra* note 14, at 45 n.18 ("[T]he Act was designed to overcome anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 n.14 (1985))).

[29] Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) (alterations in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

[30] *See* Van Ausdall, *supra* note 14, at 45; *see also Buckeye Check Cashing*, 546 U.S. at 443–44 (noting that Congress enacted the FAA to ensure that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . [is] *valid, irrevocable, and enforceable*." (emphasis added) (quoting 9 U.S.C. § 2 (2000))).

[31] Karyn A. Doi, *Recent Developments:* Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co., 16 OHIO ST. J. ON DISP. RESOL. 409, 409 (2001) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (1983)) (internal quotation marks omitted).

[32] 9 U.S.C. §§ 1–16 (2006).

[33] *Id.* § 4.

[34] *Id.* § 3.

[35] *Id.* §§ 10–11.

federal policy favoring arbitration"[36] and seeks to resolve disputes "as quickly and easily as possible."[37]

Summary confirmation of arbitration awards is another device used to further the FAA's policies and objectives and its goal of rapid and efficient enforcement.[38] Section 9 governs the confirmation of arbitration awards,[39] and provides an expedited process through which parties may seek confirmation of an arbitration award as a court judgment.[40] Section 9's language, however, also creates a possible barrier to summary confirmation. Section 9 provides that "at any time *within one year* after the award is made any party to the arbitration *may apply* . . . for an order confirming the award."[41] The federal circuit courts are split over whether this language imposes a mandatory one-year statute of limitations. The circuits' conflicting interpretations are discussed in more detail below.

B. Conflicting Interpretations of Section 9

The circuit dispute centers around whether the phrase "may apply" imposes a one-year statute of limitations for filing an application to confirm an arbitration award.[42] On one side are the Fourth and Eighth Circuits, which hold that use of the word "may" makes section 9 merely permissive.[43] However, the Second Circuit differs and finds that section 9 imposes a mandatory one-year filing period.[44]

1. The Permissive Interpretation

The Fourth Circuit first set forth the permissive interpretation in *Sverdrup Corp. v. WHC Constructors, Inc.*[45] In that case, a dispute arose during the construction of a package development center.[46] Pursuant to an arbitration clause in the parties' contract, Sverdrup and

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[36] *Cone*, 460 U.S. at 24.

[37] *Id.* at 23.

[38] *Id.* at 22.

[39] 9 U.S.C. § 9.

[40] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1400, 1402 (2008) (explaining that summary confirmation is an expedited and streamlined process); BLACK'S LAW DICTIONARY 1242 (8th ed. 2004) (defining a summary proceeding as "[a] nonjury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner").

[41] 9 U.S.C. § 9 (emphasis added).

[42] *See* Elliott, *supra* note 7, at 662 ("The circuits are split over whether the word 'may' means that an application to confirm need not be filed within one year or if § 9 imposes a one-year statute of limitations on applications to confirm an arbitration award.").

[43] *See* Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 581 (8th Cir. 1998); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993).

[44] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003).

[45] 989 F.2d 148.

[46] *Id.* at 149.

WHC submitted their dispute to arbitration.[47] In September 1990, the arbitrator issued an award in favor of Sverdrup in the amount of $419,456.07.[48]

Sverdrup, however, did not file for section 9 summary confirmation of the award until October 8, 1991, roughly thirty-eight days after the one-year anniversary of the arbitrator's award announcement.[49] In denying confirmation of the award, the United States District Court for the District of South Carolina interpreted section 9 as a mandatory one-year statute of limitations and held Sverdrup's motion to be time-barred.[50] The court then dismissed the claim and Sverdrup appealed.[51]

The Fourth Circuit recognized that other circuits had interpreted section 9's time limit as permissive.[52] The court also noted that a permissive interpretation is supported by section 9's language, recognizing that "[t]he word [m]ay in a statute . . . "normally confers a discretionary power, not a mandatory power, unless the legislative intent, as evidenced by the legislative history, evidences a contrary purpose."[53] In examining the language at issue, the court determined that Congress intended "may" to be permissive within section 9.[54] The court found it critical that the provision "states that any party 'may apply' for a confirmation order but the court 'must grant' the order absent a modification or vacation under §§ 10 or 11."[55] Because both permissive and mandatory language appeared throughout the statute, the court concluded that Congress intended for the word "may" to be permissive.[56]

In deciding how to interpret section 9, the court also considered the purposes behind arbitration and the FAA.[57] The court

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[47] *Id.* at 149–50.

[48] *Id.* at 150.

[49] *Id.*

[50] *See id.* (citing Sverdrup Corp. v. WHC Constructors, Inc., 787 F. Supp. 542 (D.S.C. 1992), *rev'd*, 989 F.2d 148 (4th Cir. 1993)).

[51] *Id.*

[52] *See id.* at 150 ("Sverdrup relied heavily on cases from other jurisdictions which have addressed § 9 and have held that the one-year time period for application to a district court is permissive rather than mandatory."). The court cited to, among others, the Sixth Circuit's decision in *Kentucky River Mills v. Jackson*, 206 F.2d 111, 120 (6th Cir. 1953). *See Sverdrup*, 989 F.2d at 151.

[53] *Id.* at 151 (second alteration and omission in original) (quoting Dalton v. United States, 816 F.2d 971, 973 (4th Cir. 1987)) (internal quotation marks omitted).

[54] *See id.*

[55] *Id.* (citing 9 U.S.C. § 9 (1988)).

[56] *See id.* ("Congress was cognizant of the difference in meaning between 'may' and 'must' and intended the term 'may' to be construed as permissive.").

[57] *See id.* ("Under the circumstances, it is necessary to inquire into the legislative intent of the FAA to determine which proposed construction is most compatible with the purposes of the Act." (citing Blackfeet Tribe of Indians v. Montana, 729 F.2d 1192, 1194 (9th Cir. 1984))).

acknowledged arbitration's status as a favored method of dispute resolution, both in terms of judicial economy and the benefit to the parties involved.[58] It also recognized that confirmation under the FAA is not the sole means of enforcing an arbitration award,[59] since parties may always resort to an action at law.[60] In light of these factors, the Fourth Circuit reasoned that imposing a one-year statute of limitations under section 9 would "be an exercise in futility";[61] parties who failed to meet the deadline would simply file an action at law.[62] Because an action at law does not involve the summary process invoked under section 9,[63] the court cautioned that limiting the availability of summary confirmation would hurt judicial economy and "inevitably lead to inefficiency, delay and court congestion."[64] Furthermore, the court warned of the potential for a "proliferation of confirmation motions," which it believed would result from a mandatory limitations period.[65]

Following the Fourth Circuit's lead, the Eighth Circuit also adopted a permissive interpretation of section 9 in *Val-U Construction Co. of South Dakota v. Rosebud Sioux Tribe*.[66] The parties in *Val-U* had executed a construction contract in 1989 to build housing units on the Rosebud Sioux Indian Reservation.[67] Like *Sverdrup*, the contract contained an arbitration clause.[68] When a dispute arose and Val-U demanded arbitration, the Tribe refused

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[58] *See id.* at 152 ("[The FAA's] chief benefits lie in providing 'speedy and inexpensive trial[s] before specialists' and in 'eas[ing] the workload of the courts.'" (quoting, inter alia, Conticommodity Servs., Inc. v. Phillip & Lion, 613 F.2d 1222, 1224 (2d Cir. 1980))); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (noting that arbitration should enable parties to "be speedy and not subject to delay and obstruction in the courts").

[59] *See Sverdrup*, 989 F.2d at 155 ("The FAA supplemented rather than extinguished any previously existing remedies.").

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Unlike § 9's summary process, an action at law to enforce an arbitration award not only places the burden of proof on the party seeking enforcement but also potentially allows for virtually any common law contract defense. *See* Robert J. Gruendel, *Domestic Law and International Conventions, the Imperfect Overlay: The FAA as a Case Study*, 75 TUL. L. REV. 1489, 1504 (2001).

[64] *Sverdrup*, 989 F.2d at 155 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967)).

[65] *Id.*; *see also id.* at 156 ("If § 9 was given the effect of a statute of limitations, individuals would be forced to protect their awards gained through arbitration by filing motions to confirm in every case.").

[66] 146 F.3d 573 (8th Cir. 1998).

[67] *Id.* at 575.

[68] *Id.*

under a claim of sovereign immunity and instead filed a separate suit in federal court.[69]

While the litigation was pending, the parties went to arbitration and, on June 18, 1991, the arbitrator granted an award in favor of Val-U.[70] At the subsequent trial, the federal district court in South Dakota found that the Tribe enjoyed sovereign immunity, dismissed Val-U's various claims, and refused to enforce the arbitration award.[71] Val-U appealed and the Eighth Circuit held that the arbitration clause waived the Tribe's right to sovereign immunity, and remanded to the district court to determine the validity of the arbitration award.[72]

On remand, the district court held that the Tribe was barred from challenging the arbitration award under the doctrine of res judicata and ordered enforcement of the award.[73] The Tribe again appealed to the Eighth Circuit, arguing, among other things, that confirmation of Val-U's arbitration award was time-barred under section 9.[74]

In a brief discussion, the Eighth Circuit cited the Fourth Circuit's permissive interpretation with approval.[75] The court agreed that construing section 9 to be a mandatory statute of limitations "would merely encourage, at the expense of judicial economy, the use of another analogous method of enforcing [arbitration] awards."[76] In addition, the court reasoned that Congress would not have used the permissive term "may" if it had intended for section 9 to be a statute of limitations.[77] For these reasons, the Eighth Circuit held that section 9 is a merely permissive provision and does not prohibit a party from seeking summary confirmation of an arbitration award after one year.[78]

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[69] *Id.*

[70] *See id.* at 575–76 (noting that the Tribe was absent during the arbitration and that the arbitrator rendered an award for Val-U in the amount of $793,943.58, plus interest, fees, and costs).

[71] *See* Rosebud Sioux Tribe v. Val-U Constr. Co., Civ. No. 91-3019, slip op. at 1 (D.S.D. Mar. 30, 1994).

[72] *See Val-U*, 146 F.3d at 576 (citing Rosebud Sioux Tribe v. Val-U Constr. Co., 50 F.3d 560 (8th Cir. 1995)).

[73] *See id.*

[74] *See id.* at 580 ("The Tribe asserts that . . . [the] motion [to confirm] was not made until August 10, 1993, more than two years after the award was entered.").

[75] *See id.* at 581.

[76] *Id.* (quoting Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 155 (4th Cir. 1993)) (referring to the use of an action at law as an alternative means of obtaining award enforcement).

[77] *See id.* ("If Congress intended for the one year period to be a statute of limitations, then it could have used the word 'must' or 'shall' in place of 'may' in the language of the statute.").

[78] *Id.*

2. The Mandatory Interpretation

Despite the positions of the Fourth and Eighth Circuits, the Second Circuit adopted the opposing view and embraced a mandatory interpretation of section 9. In *Photopaint Technologies, L.L.C. v. Smartlens Corp.*,[79] the Second Circuit held that section 9 imposes a strict one-year statute of limitations for confirmation of an arbitration award.[80] Under this view, a motion to confirm an award filed after the one-year period is time-barred.[81]

In *Photopaint*, the parties entered into a license agreement that contained an arbitration clause in which each party agreed to submit any dispute arising under the contract to binding arbitration.[82] When a dispute arose in October 1999, the parties went to arbitration where the arbitrator ultimately granted an award in favor of Photopaint.[83] The award provided that the license agreement was voidable and that either party could rescind the agreement within thirty days of receipt of the final award.[84] The award also stated that if Smartlens voided the agreement first, it would pay Photopaint the sum of $384,000; if Photopaint rescinded first, Smartlens would pay $320,000.[85]

After learning of the final award, the parties agreed to continue private settlement negotiations,[86] as well as extend any time limitations during negotiations.[87] Through these agreements, the negotiations continued past the one-year anniversary of the arbitrator's award decision.[88] The negotiations eventually broke down and Photopaint rescinded the license agreement, demanding the $320,000 payment provided for in the final award.[89] When Smartlens refused to pay, Photopaint filed an application to confirm the award under section 9.[90] The United States District Court for the Southern District of New York dismissed Photopaint's application, holding that

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[79] 335 F.3d 152 (2d Cir. 2003).

[80] *Id.* at 154.

[81] *See id.* at 160 ("[A] party to an arbitration is entitled to the benefits of the streamlined summary proceeding only if, as it may do, it files at any time within one year after the award is made.").

[82] *Id.* at 154.

[83] *See id.*

[84] *Id.*

[85] *Id.*

[86] *See id.* at 155 (describing a series of subsequent letter agreements between the parties that allowed them to continue negotiations).

[87] *See id.*; *see also* Jeffrey R. Babbin et al., *Developments in the Second Circuit: 2002–2003*, 36 CONN. L. REV. 1187, 1196 (2004) ("[T]he parties . . . entered into a series of letter agreements extending all applicable time limitations while their discussions continued.").

[88] The Final Award was issued on May 26, 2000, but negotiations continued until July 2001. *See Photopaint*, 335 F.3d at 154–55.

[89] *Id.* at 155.

[90] *Id.*

it was time-barred under section 9 because it was filed after expiration of the provision's one-year time period.[91]

On appeal, the Second Circuit recognized that the principal issue was "whether [the] wording [of section 9] creates a one-year statute of limitations."[92] Photopaint argued that because the statute used "may," a permissive verb, instead of "must" when referencing the one-year period, section 9 did not create a mandatory statute of limitations.[93] The court acknowledged that in other situations, "when the same [statute] uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory."[94] Despite the Fourth and Eighth Circuits' reliance on this inference in holding section 9 to be permissive,[95] however, the *Photopaint* court declined to do so and instead found section 9's one-year period to be mandatory.[96]

The Second Circuit relied in part on the Supreme Court's decision in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*,[97] which analyzed whether the use of "may" in the FAA's venue provisions rendered the provisions mandatory or permissive.[98] The Second Circuit noted that, although the Supreme Court found the venue provisions to be permissive, "it expressly declined to rely on the permissiveness of 'may' as a matter of plain meaning."[99] Instead, the *Cortez Byrd* Court reasoned that such permissive language "is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority."[100] Relying on its own precedent, the Supreme Court stated that the normal meaning of

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[91] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 207 F. Supp. 2d 193, 202, 209 (S.D.N.Y. 2002), *rev'd on other grounds & vacated*, 335 F.3d 152 (2d Cir. 2003).

[92] *Photopaint*, 335 F.3d at 156. The court announced that the issue was one of first impression for the Second Circuit. *See id.*

[93] *Id.* ("As Photopaint emphasizes, the permissive verb 'may,' rather than the mandatory verb 'must,' is used in the clause affording one year to the party wishing to confirm an award, while 'must' is used elsewhere in the same section and in other sections of the FAA.").

[94] *Id.* (alteration in original) (quoting Weinstein v. Albright, 261 F.3d 127, 137 (2d Cir. 2001)); *see also* Rastelli v. Warden, Metro. Corr. Ctr., 782 F.2d 17, 23 (2d Cir. 1986) (declaring, in the context of a federal statute governing review of parole decisions, that "[t]he use of a permissive verb—'may review' instead of 'shall review'—suggests a discretionary rather than mandatory process").

[95] *See Photopaint*, 335 F.3d at 156 ("Both the Fourth and the Eighth Circuits have relied on this 'normal inference' in holding that 'may' in section 9 is permissive only . . . ." (citing, inter alia, Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151–56 (4th Cir. 1993))).

[96] *See id.* at 159–60.

[97] 529 U.S. 193 (2000).

[98] *See id.* at 195.

[99] *Photopaint*, 335 F.3d at 157 (citing *Cortez Byrd*, 529 U.S. at 199, 204).

[100] *Cortez Byrd*, 529 U.S. at 198.

permissive language in a statute can be defeated by legislative intent or inferences from the structure and purpose of the statute.[101]

In light of *Cortez Byrd*, the Second Circuit declined to rely solely on the general permissive meaning of "may" for purposes of determining whether section 9 imposes a one-year statute of limitations.[102] Instead, the court looked to the purposes of the FAA, as well as available indications of congressional intent, for evidence to support a mandatory interpretation.[103] The court found the presence of the phrase "at any time within one year" to be a clear indication of legislative intent to impose a mandatory one-year time limit, reasoning that unless it "creates a time limitation within which one 'may' apply for confirmation, the phrase lacks incremental meaning."[104] Because of this, the court concluded that while the word "may" in section 9 is itself permissive, it is only so "within the scope of the preceding adverbial phrase: '[a]t any time within one year after the award is made.'"[105] The court reasoned that this interpretation is an intuitive one and cited the filing of tax returns as an analogous example.[106]

As a final point, the Second Circuit reasoned that a mandatory one-year limitations period best promotes the underlying policies of the FAA. In particular, the court stated that a mandatory interpretation furthers the value of finality in the resolution of disputes:

> One of the FAA's purposes is to provide parties with an effective alternative dispute resolution system which gives litigants a sure and expedited resolution of disputes while reducing the burden on the courts. Arbitration should therefore provide not only a fast resolution but one which establishes conclusively the rights between the parties. A one

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[101] *See id.* at 198–99 (citing United States v. Rodgers, 461 U.S. 677, 706 (1983) and Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35, 38 (1977)).

[102] *See Photopaint*, 335 F.3d at 157 ("We therefore consider the text of section 9 without affording decisive effect to the ordinary permissive meaning of 'may.'").

[103] *See id.* (stating that the normal meaning of a word "can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute" (quoting *Rodgers*, 461 U.S. at 706) (internal quotation marks omitted)).

[104] *Id.* ("We read statutes to avoid rendering any words wholly superfluous." (citing, inter alia, Connecticut *ex rel.* Blumenthal v. U.S. Dep't of the Interior, 228 F.3d 82, 88–89 (2d Cir. 2000))).

[105] *Id.* at 158 (alteration in original) (quoting 9 U.S.C. § 9 (2000)).

[106] *See id.* ("Our construction of the text is not inevitable, but it is intuitive: for example, tax returns *may* be filed anytime up to April 15, but one senses at once that the phrase is permissive *only up to a point*." (emphasis added)).

year limitations period is instrumental in achieving this goal.[107]

Interestingly, while imposing this mandatory interpretation, the Second Circuit concluded that Photopaint's motion to confirm the arbitration award was nonetheless timely.[108] The court stated that, by entering into a series of written agreements to extend time limitations during their settlement negotiations, the parties effectively "tolled" the FAA's one-year limitations period.[109] This holding, as well as the possibility of other time extensions, will be examined in more detail in Part V.

II. THE LANGUAGE AND STRUCTURE OF SECTION 9

As discussed in Part I, federal circuit courts have differed over the significance of "may apply" in relation to the remaining language of section 9. While the Fourth and Eighth Circuits' permissive interpretation initially seems plausible, a close evaluation of the language and structure of section 9 clearly favors the Second Circuit's contrary interpretation that section 9 was meant to impose a one-year statute of limitations.

A. Cortez Byrd *and Permissive Statutory Language*

The basis of the permissive interpretation is section 9's statement that a party "may apply" for confirmation of an arbitration award. The Fourth and Eighth Circuits reasoned that when "may" is used in a statute, it "normally confers a discretionary power, not a mandatory power."[110] Because section 9 utilizes both "may" and "shall," the courts concluded that each word carries its normal meaning and "may" is therefore permissive.[111]

This rationale, however, was rejected by the United States Supreme Court in *Cortez Byrd*, which was decided after *Sverdrup* and *Val-U*.[112] In *Cortez Bird*, the Supreme Court contemplated the meaning of the FAA's venue provisions, which provide that the federal court for the district in which an arbitration award is

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[107] *Id.* (quoting *In re* Consol. Rail Corp., 867 F. Supp. 25, 31 (D.D.C. 1994)).

[108] *See id.* at 160 (upholding the parties' agreement to alter the one-year period).

[109] *Id.* ("Smartlens and Photopaint agreed to toll any applicable limitations periods imposed under the FAA.").

[110] Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151 (4th Cir. 1993); *see also* Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 581 (8th Cir. 1998).

[111] *See Sverdrup*, 989 F.2d at 151.

[112] *See* Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193 (2000).

made is the proper venue for the confirmation,[113] vacation,[114] or modification[115] of an award. Each of these provisions contains language that suggests a permissive reading. Section 10, for example, provides that "the United States court in and for the district wherein the [arbitration] award was made *may make* an order vacating the award."[116] Similarly, section 11 states that the court "*may make* an order modifying or correcting the award."[117]

Despite this permissive language, the Supreme Court in *Cortez Byrd* held that the use of "may" in the venue provisions "is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority."[118] While recognizing that "may" usually carries a discretionary meaning, the Supreme Court, citing its own precedent, announced that this normal meaning can be defeated by legislative intent or inferences from the structure and purpose of the statute.[119]

The Court proceeded to examine the history and purpose of the FAA. Prior to the FAA's enactment in 1925, the general venue statute applicable to arbitration was much more restrictive than the current provisions in sections 9, 10 and 11 of the FAA.[120] Unlike the earlier statute, the FAA venue provisions are much more liberal and provide parties to arbitration with more venue options for post-arbitration disputes.[121] In addition, the Supreme Court determined that the FAA is designed to promote the "rapid and unobstructed enforcement of arbitration agreements,"[122] and that permissive venue provisions will further such a policy.[123] Accordingly, the Court held that the history and purpose of the FAA, and not solely the language, supports an interpretation that the FAA's venue provisions are permissive.[124]

In subsequent cases, federal courts have repeatedly applied the Supreme Court's analysis to ambiguous language in other federal

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[113] 9 U.S.C. § 9 (2006).

[114] *Id.* § 10(a).

[115] *Id.* § 11.

[116] *Id.* § 10(a) (emphasis added). Section 10(a) outlines four scenarios where vacating an award is proper. *See id.*

[117] *Id.* § 11 (emphasis added).

[118] Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198 (2000).

[119] *See id.* at 198–99 (citing United States v. Rodgers, 461 U.S. 677, 706 (1983) and Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35, 38 (1977)).

[120] *See id.* at 199; *see also* 28 U.S.C. § 112(a) (1926) (stating that a civil suit can only be brought in the district where the defendant resided).

[121] *See Cortez Byrd*, 529 U.S. at 200 ("The enactment of the special venue provisions in the FAA . . . had an obvious liberalizing effect . . . .").

[122] *Id.* at 201 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (1983)).

[123] *See id.*

[124] *See id.* at 204.

statutes. These include the Wilderness Act,[125] the Wiretap Act,[126] and the Prompt Payment Act.[127] In each case, the courts looked beyond the statutory language and examined the context and history of the specific statutes.[128] This widespread application of *Cortez Byrd* demonstrates that the mere presence of "may" in a statutory provision does not make it permissive; instead, courts must look to context, statutory history, or legislative intent to determine the meaning of a provision's language.

In light of *Cortez Byrd*, the mere use of "may" in section 9 is not sufficient for determining whether section 9's one-year time period for summary confirmation is permissive or mandatory. As a result, the Fourth and Eighth Circuits' reliance on the normal meaning of "may" is effectively outdated.[129] Instead, the structure and purpose of section 9, together with the FAA as a whole, must be examined to determine the proper meaning of the statute's limitations language for summary confirmation.

B. The Structure of Section 9

While words certainly influence how a statute is interpreted, they are not the sole determinants of a law's overall meaning. Instead, like everything else, words must be considered in context. This is the backbone of the rule set forth by *Cortez Byrd* and its progeny. While interpreting the word "may" as permissive certainly makes sense, this interpretation can be rebutted by contrary inferences from the context and structure of a statute.[130] Section 9 provides a perfect example.

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[125] 16 U.S.C. § 1133(d)(1) (2006) ("Within wilderness areas designated by this chapter the use of aircraft or motorboats, where these uses have already become established, *may be permitted* to continue . . . ." (emphasis added)).

[126] 18 U.S.C. § 2520(c)(2) (2006) ("In any other action under this section, the court *may assess* as damages . . . ." (emphasis added)).

[127] 31 U.S.C. § 3901(d)(2) (2006) ("A claim for an interest penalty not paid under this chapter *may be filed* in the same manner as claims are filed with respect to contracts to provide property or services for the District of Columbia Courts." (emphasis added)).

[128] *See* DIRECTV, Inc. v. Brown, 371 F.3d 814, 817–18 (11th Cir. 2004) (examining the history and language of other provisions of the Wiretap Act); Isle Royale Boaters Ass'n v. Norton, 330 F.3d 777, 784–86 (6th Cir. 2003) (scrutinizing the overall purpose and context of the Wilderness Act); Roth v. D.C. Courts, 160 F. Supp. 2d 104, 109 (D.D.C. 2001) (analyzing the context of the use of "may" in bringing claims for unpaid interest under the Prompt Payment Act).

[129] For this reason, the United States District Court for the District of Maryland disregarded the Fourth Circuit precedent of *Sverdrup*, instead adopting the Second Circuit's interpretation of section 9. *See* Md. Transit Admin. v. Nat'l R.R. Passenger Corp., 372 F. Supp. 2d 478, 483–84 (D. Md. 2005) ("The court adheres to its view that *Sverdrup Corp.* is a candidate for reconsideration by the Fourth Circuit . . . .").

[130] *See* Cortez Byrd Chips v. Bill Harbert Constr. Co., 529 U.S. 193, 199 (2000); United States v. Rodgers, 461 U.S. 677, 706 (1983); *see also* Calderon v. Witvoet, 999 F.2d 1101, 1104

In relevant part, section 9 states that "at any time *within one year* . . . any party to the arbitration *may apply* . . . for an order confirming the award."[131] The Fourth and Eighth Circuits seemingly disregard the presence of the language "within one year," and instead focus on the statute's use of "may" over "must" or "shall."[132] As a result, these circuits hold that parties may apply for summary confirmation beyond the one-year period in section 9.

This interpretation, however, leaves the phrase "within one year" without any meaning. The Second Circuit made this same argument in *Photopaint*, where the court found that if section 9 does not contain a time limitation, the phrase "at any time within one year" becomes devoid of any meaning within the overall statute.[133] This position is buttressed by the well-established rule that courts should disfavor interpretations that render statutory language superfluous.[134] Under a permissive interpretation of section 9, a party is not barred from applying for summary confirmation beyond one year.[135] In other words, a party could completely disregard the language "within one year" and apply for confirmation at any time. Such a reading deprives the phrase "within one year" of any real purpose. By rendering this language meaningless, the permissive interpretation violates an established rule of statutory interpretation.[136] Instead, interpreting section 9 to impose a mandatory one-year statute of limitations is more appropriate in light of the provision's concurrent use of "within one year" and "may apply." Thus, while a party is not required to pursue summary confirmation of an arbitration award under the FAA, the privilege to do so only lasts for one year.[137] Unlike the permissive

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(7th Cir. 1993) ("English offers so many possibilities that . . . [a]ll depends on context.").

[131] 9 U.S.C. § 9 (2006) (emphasis added).

[132] *See* Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 581 (8th Cir. 1998) ("If Congress intended for the one year period to be a statute of limitations, then it could have used the word 'must' or 'shall' in place of 'may' in the language of the statute."); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151 (4th Cir. 1993) ("Congress was cognizant of the difference in meaning between 'may' and 'must' and intended that the term 'may' be construed as permissive.").

[133] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 157 (2d Cir. 2003).

[134] *See, e.g.*, Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992); *In re* Bateman, 515 F.3d 272, 278 (4th Cir. 2008); Connecticut *ex rel.* Blumenthal v. U.S. Dep't of the Interior, 228 F.3d 82, 88 (2d Cir. 2000); United States v. DBB, Inc., 180 F.3d 1277, 1285 (11th Cir. 1999); United States v. Voigt, 89 F.3d 1050, 1087 (3d Cir. 1996).

[135] *See Sverdrup*, 989 F.2d at 156.

[136] *See* cases cited *supra* note 134 and accompanying text.

[137] *Photopaint*, 335 F.3d at 158 ("[E]ven though section 9's language [is] permissive, 'the privilege conferred by section 9' [is] a privilege 'to move "at any time" *within the year.*'" (quoting The Hartbridge, 57 F.2d 672, 673 (2d Cir. 1932) (per curiam))); *see also* Kerr-McGee Refining Corp. v. M/T Triumph, 924 F.2d 467, 471 (2d Cir. 1991) ("Under the [Federal] Arbitration Act, a *party has one year* to avail itself of summary proceedings for confirmation of

reading, this interpretation gives practical meaning to both of the statutory phrases at issue.

First, "may apply" will grant litigants the right to apply for summary confirmation of the award under section 9, but does not limit them to such a remedy.[138] It is well recognized that apart from summary confirmation, a party is also free to file an action at law to enforce an arbitration award.[139] As a result, the purpose of section 9's use of "may apply" is to give a party the choice to either pursue the FAA's summary confirmation process or seek the traditional common law remedy.[140]

Second, the phrase "within one year" simply imposes a time limit on a party's right to pursue summary confirmation under section 9. While a party has the option of summary confirmation, such a privilege exists for only one year.[141] This interpretation is intuitive and, as the Second Circuit observed, can apply to other time periods limiting the exercise of a statutory right.[142] The entitlement to summary confirmation under section 9 is similarly not absolute. Absent a timely application for confirmation, a party is simply deprived of section 9's remedy and must instead resort to common law enforcement.

Unlike a permissive interpretation, imposing a one-year statute of limitations for summary award confirmation gives effect to all of the language in section 9. As the Supreme Court has stated, "a legislature says in a statute what it means and means in a statute what it says

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an award." (emphasis added)).

[138] *See Photopaint*, 335 F.3d at 159 ("In section 9 . . . 'may' *can* be read to reflect a party's discretion as to *whether* to 'apply to the court . . . for an order confirming the award.'" (quoting 9 U.S.C. § 9 (2000))); *see also* Ky. River Mills v. Jackson, 206 F.2d 111, 120 (6th Cir. 1953) ("A party may . . . apply to the court for an order confirming the award, but is not limited to such remedy.").

[139] *See Sverdrup*, 989 F.2d at 155 ("The FAA supplemented rather than extinguished any previously existing remedies. Thus, an action at law remains a viable alternative to confirmation proceedings under § 9."); *see also Ky. River Mills*, 206 F.2d at 120 (citing Red Cross Line v. Atl. Fruit Co., 264 U.S. 109 (1924)) (noting that prior to the FAA, a common law action was the proper means of enforcing an arbitration award).

[140] *See Photopaint*, 335 F.3d at 159.

[141] *See id.* at 158; *In re* Consol. Rail Corp., 867 F. Supp. 25, 32 (D.D.C. 1994) ("[A] party may use § 9's summary confirmation process . . . only if it does so within one year after the arbitration.").

[142] *See, e.g.*, *Photopaint*, 335 F.3d at 158 (observing that while tax returns *may* be filed at any time *before* April 15, this phrase is permissive only up to a point, since tax returns *must* be filed *by* April 15). Outside of the statutory context, a prime example of this interpretation is something that people deal with on a daily basis: paying bills. A homeowner receives various billing statements each month (electricity, cable, water, etc.), and each statement contains a "payment due date." The homeowner *may* pay a bill at any time *before* the payment due date. However, they *must* pay *by* the payment due date, or else they incur late fees or other penalties.

there."[143] While the FAA certainly contains permissive elements, the language and structure of section 9 as a whole demonstrates Congress's intent to impose a one-year statute of limitations for summary confirmation of arbitration awards.

III. PROMOTING THE GOALS OF THE FAA

The purpose of section 9 as a part of the FAA provides further support for a mandatory reading of the provision's one-year limitations period. The FAA is designed to enforce arbitration agreements, as well as promote "settling disputes efficiently and avoiding long and expensive litigation."[144] As a part of this overall goal, section 9 provides a simple means of enforcing arbitration awards that requires minimal expenditure of time and resources.[145] By setting a definite time limit for summary confirmation, a one-year statute of limitations better promotes not only section 9's expedited process but also the overall purposes of FAA arbitration.

A. An Expedited Confirmation Process

By including section 9, the FAA provides for an expedited process of arbitration award enforcement. As the Supreme Court recently observed in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[146] an application for judicial confirmation "will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce . . . an arbitral award in court."[147] As a result, judicial review is extremely limited and a court "must grant" an order enforcing the award, unless grounds exist for vacation, modification, or correction under sections 10 and 11.[148] In other words, section 9 is designed to provide an efficient avenue for award enforcement and furthers the FAA's overall purpose of promoting "rapid and unobstructed enforcement of arbitration agreements."[149]

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[143] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

[144] Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (quoting Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993)) (internal quotation marks omitted); *see also* Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) ("Arbitration does not provide a system of 'junior varsity trial courts' offering the losing party complete and rigorous *de novo* review. It is a private system of justice offering benefits of reduced delay and expense." (citation omitted)).

[145] *See* Elliott, *supra* note 7, at 668.

[146] 128 S. Ct. 1396 (2008).

[147] *Id.* at 1402.

[148] *See id.* at 1405 ("There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies.").

[149] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (1983).

As part of section 9, a one-year statute of limitations is instrumental to this process of expedited award confirmation and enforcement. By definition, "expedite" means "to execute promptly" or "to accelerate the process or progress of."[150] A one-year limitations period achieves this effect by forcing parties to promptly apply to the court to receive the benefit of summary confirmation. As a result, arbitral disputes will be conclusively settled on an accelerated basis and the parties will avoid "delay and obstruction in the courts."[151]

This result makes sense when comparing section 9's confirmation procedure to the remedy available at common law. Under the common law, a party must file a separate cause of action for award enforcement.[152] This process is much different from section 9's summary proceeding. First, while section 9 affords a party a summary right to confirmation,[153] an action at law places the burden of proof on the party seeking enforcement.[154] It is well established that a successful party to common law arbitration must treat award enforcement as if he or she were enforcing an ordinary contract.[155] Since the burden of proof rests on a party bringing the contract action,[156] this burden also applies to a party obtaining common law enforcement of an arbitration award.[157] Compared with the simplicity of filing an application for confirmation under section 9,[158] a common law action is much more burdensome to the party seeking enforcement.

Second, section 9 requires a court to immediately confirm the award unless certain limited statutory exceptions apply.[159]

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[150] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 408 (Frederick C. Mish et al. eds., 10th ed. 2002).

[151] Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 152 (4th Cir. 1993) (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967)) (internal quotation marks omitted).

[152] *See* Ky. River Mills v. Jackson, 206 F.2d 111, 120 (6th Cir. 1953).

[153] *See Hall St. Assocs.*, 128 S. Ct. at 1400.

[154] *See* Gruendel, *supra* note 63, at 1504.

[155] *See* Chillum-Adelphi Volunteer Fire Dep't, Inc. v. Button & Goode, Inc., 219 A.2d 801, 805–06 (Md. 1966) (observing that at common law, the arbitration award "could be sued on as a contract" and the court's role would be to determine if the award "was entitled to be enforced as a judgment of court"); Reith v. Wynhoff, 137 N.W.2d 33, 35 (Wis. 1965) ("[A]t common law the entire proceeding of arbitration and award merely constituted a contract between the parties and the successful party could only enforce the award as he could an ordinary contract.").

[156] *See* Ferranti Int'l, P.L.C. v. Jasin, 47 F. App'x 103, 107 (3d Cir. 2002) (noting that the burden rests on the party alleging breach of contract and must be satisfied by a preponderance of the evidence); *see also* Gruendel, *supra* note 63, at 1504 (stating that the burden of proof traditionally lies with the plaintiff in a common law action).

[157] *See, e.g.*, Gruendel, *supra* note 63, at 1504.

[158] *See Hall St. Assocs.*, 128 S. Ct. at 1402 (observing that an application under section 9 receives "streamlined treatment as a motion").

[159] *See* 9 U.S.C. § 9 (2006) (stating that a court must confirm an award unless the exceptions under §§ 10 or 11 apply).

Conversely, in an action at law, any common law defense to a contract action is theoretically available to the party opposing confirmation of the award.[160] Since arbitration is a creature of contract,[161] a court may be free to apply contract principles in reviewing an award.[162] The public policy exception, for example is so "rooted in the common law[ ] that a court may refuse to enforce contracts that violate law or public policy."[163] Thus, much like a party opposing enforcement of a contract, a party opposing an arbitration award can challenge its validity on public policy grounds and avoid common law enforcement.

Apart from public policy concerns, a common law arbitration award may also be attacked if it is "fraudulent or arbitrary or the result of gross mistake of fact, or if it appears that the arbitrators intended to follow the law and then based the award on a clear misapprehension concerning the law."[164] Other recognized defenses include situations when an award is not supported by facts or law,[165] clearly results from defective reasoning,[166] is "mistakenly based on a crucial assumption that is concededly a non-fact,"[167] or "fails to draw its essence from the contract."[168] Compared with the limited grounds for vacation or modification under the summary FAA process,[169] a party utilizing the common law route faces a broader spectrum of roadblocks to enforcement of an award.[170] As a result, common law enforcement of an arbitration award is a much more burdensome and time-consuming process than section 9's summary procedure.[171]

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[160] *See* Gruendel, *supra* note 63, at 1505; *see also Hall St. Assocs.*, 128 S. Ct. at 1406 (noting that common law enforcement arguably involves a different scope of judicial review than confirmation under § 9).

[161] *Hall St. Assocs.*, 128 S. Ct. at 1404.

[162] *See generally* Gray H. Miller & Emily Buchanan Buckles, Essay, *Reviewing Arbitration Awards in Texas*, 45 HOUS. L. REV. 939, 957–61 (2008) (discussing common law review of arbitration awards and arguing for expanded review under principles of contract law).

[163] Lewis v. Circuit City Stores, Inc., 500 F.3d 1140, 1151 (10th Cir. 2007) (alteration in original) (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987)).

[164] Rueda v. Union Pac. R.R. Co., 175 P.2d 778, 788 (Or. 1946).

[165] *See* Kashner Davidson Sec. Corp. v. Mscisz, 531 F.3d 68, 74 (1st Cir. 2008).

[166] *See id.*

[167] *Id.* (quoting Advest, Inc. v. McCarthy, 914 F.2d 6, 8–9 (1st Cir. 1990)) (internal quotation marks omitted).

[168] Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., L.L.C., 519 F.3d 200, 207 (4th Cir. 2008).

[169] *See* 9 U.S.C. §§ 10–11 (2006) (listing limited grounds for vacation or modification of an arbitration award, all of which require some form of misconduct, material mistake, or lack of authority by the arbitrator).

[170] *See* discussion *supra* notes 163–68 and accompanying text; *cf.* Miller & Buckles, *supra* note 162, at 958–60 (noting that contract law provides for expanded judicial review of arbitration awards).

[171] *See* Gruendel, *supra* note 63, at 1504–05.

These differences show that it makes little sense to grant a party an indefinite period of time in which to seek summary confirmation under section 9. The permissive interpretation of the Fourth and Eighth Circuits, however, seemingly grants this unlimited period.[172] The logical consequence is that resolution of arbitral disputes under the FAA could be delayed indefinitely.[173] This would render section 9's confirmation process anything but expeditious, since it would result in the same delay and obstruction that occurs in an action at law. Not only does this go against the fundamental purpose of the FAA,[174] but it can hardly be said to align with the expedited confirmation process contemplated by the Supreme Court in *Hall Street Associates*.[175]

A mandatory one-year statute of limitations, however, avoids this problem of delay and stands in accord with section 9's purpose. First, a statute of limitations sets a definite time period during which a party is permitted to move for summary confirmation.[176] It thus avoids the potential for indefinite delay associated with the permissive interpretation.[177] Second, the summary confirmation process is meant to be rapid and simple, and requires prompt action.[178] A one-year limitations period will achieve this rapidity, since it forces parties to promptly file with the court in order to enjoy the benefits of summary confirmation and avoid the increased burdens of common law enforcement.[179]

The permissive interpretation adopted by the Fourth and Eighth Circuits leads to the same problems that section 9 is designed to help eliminate: delay and obstruction in the enforcement of arbitration awards.[180] This result is contrary to what the Supreme

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[172] *See* discussion *supra* Part I.B.1.

[173] The Fourth and Eighth Circuits do not identify any definite limitation to their permissive interpretations of section 9. *See* Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 581 (8th Cir. 1998); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993).

[174] *See supra* notes 144 & 149 and accompanying text.

[175] *See* 128 S. Ct. 1396, 1400, 1402 (2008).

[176] *See, e.g.*, Kerr-McGee Refining Corp. v. M/T Triumph, 924 F.2d 467, 471 (2d Cir. 1991) ("Under the [Federal] Arbitration Act, a party has one year to avail itself of summary proceedings for confirmation of an award.").

[177] *See* Elliott, *supra* note 7, at 681 (noting the potential for significant delay in the filing of summary confirmation motions under a permissive interpretation of section 9).

[178] *See Hall St. Assocs.*, 128 S. Ct. at 1402.

[179] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 160 (2d Cir. 2003) ("[A] party to an arbitration is entitled to the benefits of the streamlined summary proceeding only if, *as it may do*, it files at any time within one year after the award is made." (emphasis added)).

[180] *Cf.* Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 152 (4th Cir. 1993) (acknowledging that the goal of arbitration under the FAA and summary confirmation under section 9 is to avoid "delay and obstruction in the courts").

Court envisioned as the "streamlined" process offered by section 9 for confirmation of arbitration awards.[181] The Second Circuit's mandatory interpretation, however, has the opposite effect and allows it to better achieve section 9's ultimate purpose.

B. Promotion of Finality and Judicial Economy

Section 9's expedited confirmation process plays a fundamental part in the FAA's overall goal of "settling disputes efficiently and avoiding long and expensive litigation."[182] Thus, the arbitral process invokes important principles of both finality and judicial economy.[183] Despite arguments to the contrary, a one-year statute of limitations under section 9 best promotes these twin aims of FAA arbitration.

1. A True Sense of Finality

Perhaps the chief benefit of a one-year limitations period is that it provides true finality to parties in arbitration, thereby achieving one of the FAA's primary goals.[184] Finality requires arbitration to "provide not only a fast resolution but one which establishes conclusively the rights between the parties."[185] This not only distinguishes arbitration from other forms of dispute resolution, but also prevents arbitration from simply becoming an initial step to litigation.[186]

The Fourth Circuit reasoned, however, that a mandatory one-year statute of limitations would undermine the finality of arbitration.[187] The court believed that "[i]f the prevailing party failed to obtain a confirmatory decree within the [one-year] period, the award would become unenforceable."[188] As a result, the court deemed a one-year statute of limitations to be "repugnant to the intent of the FAA."[189] Notwithstanding the Fourth Circuit's concerns, a strict one-year

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[181] *See Hall St. Assocs.*, 128 S. Ct. at 1402.

[182] Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (quoting Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993)) (internal quotation marks omitted).

[183] *See Photopaint*, 335 F.3d at 158 (noting that arbitration gives parties "a sure and expedited resolution of disputes while reducing the burden on the courts" (quoting *In re* Consol. Rail Corp., 867 F. Supp. 25, 31 (D.D.C. 1994))).

[184] *See id.*

[185] *Id.* (quoting *Consol. Rail Corp.*, 867 F. Supp. at 31).

[186] *See* Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 126 (2002).

[187] *See* Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 155 (4th Cir. 1993).

[188] *Id.* at 156 (quoting Derwin v. Gen. Dynamics Corp., 719 F.2d 484, 489–90 (1st Cir. 1983)). The Fourth Circuit believed that a strict deadline would force parties to "protect their awards gained through arbitration by filing motions to confirm in every case." *Id.*

[189] *Id.*

limitations period would not render an award completely unenforceable; instead, it would merely make it unenforceable under the FAA if a party misses the filing deadline.[190] A party could still seek common law enforcement of the award through an action at law.[191] Given this alternative enforcement mechanism, a one-year statute of limitations cannot be said to undermine the finality of arbitration.

Quite to the contrary, imposing a mandatory time limit for summary confirmation under section 9 would actually play an instrumental part in promoting finality. The Second Circuit recognized that a crucial requirement for achieving this finality is the existence of an arbitration mechanism that creates certainty as to the rights of the parties.[192] Unlike a permissive time period, a concrete one-year limitations period would fulfill this requirement, while also achieving one of the core purposes of a statute of limitations: to create certainty about a party's opportunity for recovery.[193] This mandatory time limit would provide a clear guideline as to when parties may seek summary confirmation under the FAA and when they must pursue common law enforcement.[194] The permissive interpretation defines no such limits. Instead, it seemingly "open[s] the door to a motion to confirm years after entry of the arbitration award."[195] Without any time limit for obtaining summary confirmation, uncertainty will surely result. First, a party seeking confirmation will be uninformed about the limits of his or her ability to use section 9.[196] Second, a party opposing confirmation will not know when his or her potential liability on an arbitration award ceases to exist.[197] This can hardly be seen as

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[190] *See Consol. Rail Corp.*, 867 F. Supp. at 31 ("[A]wards that are confirmed within one year have the effect of a court judgment and awards not confirmed are *unenforceable under the FAA*." (emphasis added)).

[191] *See Sverdrup*, 989 F.2d at 155 (acknowledging that "an action at law remains a viable alternative to confirmation proceedings under § 9"); Ky. River Mills v. Jackson, 206 F.2d 111, 120 (6th Cir. 1953) ("A party may . . . apply to the court for an order confirming the award, but is not limited to such remedy.").

[192] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003) (citing *Consol. Rail Corp.*, 867 F. Supp. at 31).

[193] *See* Young v. United States, 535 U.S. 43, 47 (2002) (describing the "basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and *certainty about a plaintiff's opportunity for recovery* and a defendant's potential liabilities." (alterations in original) (emphasis added) (quoting Rotella v. Wood, 528 U.S. 549, 555 (2000))).

[194] *See Photopaint*, 335 F.3d at 159–60 (recognizing that a one-year limitations period helps establish when section 9 confirmation is available and when it is not).

[195] Elliott, *supra* note 7, at 681.

[196] In fact, the very purpose of a statute of limitations is to create certainty about a plaintiff's opportunity to pursue a claim and seek recovery under a statute. *See Young*, 535 U.S. at 47.

[197] *See id.* (stating that another purpose of a limitations period is to create certainty about a

a resolution that "establishes conclusively the rights between the parties."[198] Instead, it leaves open critical questions regarding the parties' rights and liabilities under the FAA, as well as the res judicata effect of the arbitration award.[199]

By imposing virtually no limit on when a party can seek summary confirmation, a permissive interpretation of section 9 does nothing to promote the desired finality in FAA arbitration. A mandatory one-year statute of limitations, however, creates certainty as to the availability of summary confirmation under section 9. As a result, section 9 will guarantee the finality of arbitration and prevent it from becoming "merely [a] prologue to prolonged litigation."[200]

2. *Ensuring Judicial Economy*

A mandatory one-year statute of limitations also has important implications for judicial economy. FAA arbitration provides an efficient means of dispute resolution and reduces the burden on the courts.[201] By submitting their disputes to arbitration and subsequently pursuing summary award confirmation under section 9, parties effectively avoid "inefficiency, delay and court congestion."[202]

The Fourth and Eighth Circuits relied on notions of judicial economy in adopting a permissive interpretation of section 9. The Fourth Circuit recognized that a common law enforcement remedy exists independently of section 9's confirmation process.[203] Seeking this remedy involves filing an action at law to enforce the award as a contract and is subject to a state's statute of limitations for contract actions,[204] which is typically longer than one year.[205] The court

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defendant's liabilities).

[198] *Photopaint*, 335 F.3d at 158 (quoting *In re* Consol. Rail Corp., 867 F. Supp. 25, 31 (D.D.C. 1994)).

[199] *See generally* William H. Hardie, *Arbitration: Post-Award Procedures*, 60 ALA. LAW. 314, 316 (1999) (noting that one reason to obtain judicial confirmation is to eliminate any question of the award's res judicata effect).

[200] Md. Transit Admin. v. Nat'l R.R. Passenger Corp., 372 F. Supp. 2d 478, 482 (D. Md. 2005) (quoting Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994)) (rejecting *Sverdrup*'s permissive interpretation).

[201] *See Photopaint*, 335 F.3d at 158 (observing that the FAA seeks to provide "an effective alternative dispute resolution system which . . . reduc[es] the burden on the courts" (quoting *Consol. Rail Corp.*, 867 F. Supp. at 31)); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 152 (4th Cir. 1993) (noting that one of arbitration's chief benefits is "eas[ing] the workload of the courts" (quoting, inter alia, Conticommodity Servs., Inc. v. Philipp & Lion, 613 F.2d 1222, 1224 (2d Cir. 1980))).

[202] *Sverdrup*, 989 F.2d at 155.

[203] *See id.*

[204] *See generally* Elliott, *supra* note 7, at 687 (observing that an arbitration award is enforceable under basic contract law).

therefore concluded that a strict statute of limitations under section 9 "would be an exercise in futility . . . [because] it would merely encourage, at the expense of judicial economy, the use of another analogous method of enforcing awards."[206] In other words, the court believed that a one-year statute of limitations would discourage the use of section 9's summary process. According to the court, such a result is contrary to the purposes of the FAA.[207]

The Fourth Circuit's argument seems to assume that section 9 confirmation and common law enforcement are one and the same. Under this theory, a party's decision regarding which process to pursue will be based solely on the applicable time limitations. This argument, however, ignores the glaring differences between the two processes. Confirmation under section 9 is a summary procedure, which means that it does not involve the formalities of a full court proceeding.[208] Conversely, an action at law not only imposes the burden of proof on the party seeking confirmation but also allows for virtually any common law contract defense.[209]

Given these differences, it cannot be automatically assumed that a party will choose common law enforcement simply because it allows more time for filing with the court. Instead, a party will likely weigh the differences between section 9 and the common law remedy in deciding which enforcement option to pursue. On one side is a simple process that requires confirmation in virtually every case.[210] On the other end of the spectrum is a remedy that imposes a more stringent burden of proof and allows for innumerable defenses.[211] Thus, while

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[205] *See, e.g.*, IND. CODE ANN. § 34-11-2-11 (West 1999) (allowing ten years for contract enforcement); N.Y. C.P.L.R. 213(2) (McKinney 2003) (providing a six-year limitations period for contract actions); OHIO REV. CODE ANN. § 2305.06 (West 2004) (allowing fifteen years to enforce a contract).

[206] *Sverdrup*, 989 F.2d at 155. In support of its conclusion, the court reasoned that "[t]o obtain their awards, individuals who prevailed in arbitration and failed to confirm within the one-year time limit would simply resort to filing actions at law." *Id.*

[207] *See id.*

[208] *See* BLACK'S LAW DICTIONARY 1242 (8th ed. 2004) (providing the definition of a "summary proceeding"); Susan Wiens & Roger Haydock, *Confirming Arbitration Awards: Taking the Mystery Out of a Summary Proceeding*, 33 WM. MITCHELL L. REV. 1293, 1294 (2007) ("[W]hen parties seek confirmation, they do not relinquish the efficiency they gained through arbitration because the confirmation process is as simple and straightforward as arbitration itself . . . .).

[209] *See* Gruendel, *supra* note 63, at 1504–07.

[210] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1405 (2008) ("There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies.").

[211] *See* Gruendel, *supra* note 63, at 1505 ("In an action at law, any defense theoretically available under common law to a contract claim should be available . . . ."); Miller & Buckles, *supra* note 162, at 958–60 (noting that contract law allows more for extensive judicial review of

section 9 would impose a stricter time deadline, it offers the substantial benefit of a simpler and faster confirmation process. Faced with this choice, parties should not be dissuaded from utilizing section 9's confirmation process simply because of a shorter time period.[212] Instead, they may be encouraged to file timely applications in order to take advantage of section 9's confirmation shortcut[213] and avoid the drawn-out process of common law enforcement.

The Fourth Circuit also believed that a mandatory one-year statute of limitations would discourage private settlement of disputes in a post-award setting, and instead lead to a flood of section 9 confirmation motions.[214] As a result, there would be an increased burden on the court system,[215] and the FAA's goal of promoting judicial economy would be effectively frustrated.[216]

Despite the Fourth Circuit's concerns, a mandatory limitations period would not frustrate private settlement or lead to a drastic increase in the burden on courts for two reasons. First, the Fourth Circuit seemingly overlooks the summary and expedited nature of confirmation under the FAA. Section 9 provides that a court *must confirm* the award unless one of the limited grounds exist for modification, correction, or vacation, "as prescribed" in sections 10 and 11.[217] Accordingly, judicial review is very limited[218] and the confirmation process is a simple one for the court.[219] Compared with the alternative—facing a common law enforcement action or even going to trial—the burden on the courts will be at worst minimal.[220]

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arbitration awards).

[212] *Cf.* Wiens & Haydock, *supra* note 208, at 1301 (suggesting that "the careful practitioner will seek to confirm an award under the FAA within a year after the award is made").

[213] *See Hall St. Assocs.*, 128 S. Ct. at 1403 (describing the FAA as providing a shortcut to confirmation).

[214] *See* Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 155–56 (4th Cir. 1993).

[215] *See id.* at 155.

[216] *See id.*

[217] 9 U.S.C. § 9 (2006); *see also Hall St. Assocs.*, 128 S. Ct. at 1402 ("Under the terms of § 9, a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11.").

[218] *See* Wiens & Haydock, *supra* note 208, at 1307 (asserting that the FAA does "not permit the court to reconsider the merits of the dispute"); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("[T]he courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.").

[219] *See, e.g.*, *In re* Consol. Rail Corp., 867 F. Supp. 25, 31 (D.D.C. 1994) ("Under the FAA, the confirmation process is a *ministerial task* for a court." (emphasis added)).

[220] *See id.* at 32 (finding that the burden on courts facing motions for summary confirmation "would be less than it would be if the court had to settle the disputes through dispositive motions or trials").

Second, the Second Circuit's decision in *Photopaint* demonstrates that parties will still engage in private post-arbitration settlement, even with a one-year statute of limitations. In *Photopaint*, the parties continued to negotiate a settlement of their dispute even after the arbitrator had entered his final award.[221] To do so, the parties made a series of agreements to extend any applicable time limitations.[222] The Second Circuit found that, "as a matter of law," the agreements had tolled section 9's one-year limitations period.[223] As a result, summary confirmation was still possible under section 9, even though more than one year had passed.[224] Thus, *Photopaint* shows that it is still entirely possible, and actually quite easy, to conduct post-award settlement negotiations without running afoul of section 9's one-year limitations period.

By simply agreeing amongst themselves, parties may pause section 9's clock and attempt to resolve their differences before going to court. Such a possibility, together with the minimized burden on the courts, shows that a mandatory interpretation of section 9 will not lead to the delay or inefficiency feared by the Fourth Circuit. Instead, it will achieve the exact opposite.

IV. PROMOTING CONSISTENCY

The interplay between the FAA and state arbitration acts lends further support to a need for a one-year statute of limitations under section 9. While the FAA governs the majority of arbitrations,[225] parties have the option to instead apply a state arbitration act to their agreement.[226] Each of the fifty states and the District of Columbia has its own arbitration statute.[227] Much like section 9, eleven of these

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[221] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 160 (2d Cir. 2003).

[222] *Id.*

[223] *Id.*

[224] *See id.* at 161.

[225] *See* Wiens & Haydock, *supra* note 208, at 1298 ("The FAA governs almost all arbitrations because it controls awards issued in cases involving interstate commerce, a broad standard encompassing virtually all transactions and relationships."); *see also* 9 U.S.C. § 2 (2006) (providing for the enforceability of arbitration agreements that involve interstate commerce); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274–75 (1995) (stating that the FAA's scope should be read broadly to reach the limits of congressional power under the Commerce Clause).

[226] The scope of arbitration is determined by contract, so parties are free to agree on the law governing their arbitral disputes. Parties typically provide that the FAA governs arbitration, but retain the option of choosing an applicable state law. *Cf.* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008) (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985)) (stating that the general purpose of arbitration statutes is to enforce parties' contractual agreements).

[227] *See* Wiens & Haydock, *supra* note 208, at 1294 n.5 (listing the arbitration acts for all fifty states and the District of Columbia).

states provide a one-year limitations period for summary confirmation of arbitration awards.[228] The remaining thirty-nine states and the District of Columbia, however, set different limitations periods,[229] or rely on a state's general statute of limitations for the execution on a judgment.[230]

Under a permissive interpretation of section 9, the FAA is effectively left without a statute of limitations for summary confirmation of arbitration awards.[231] Consequently, courts considering motions to confirm under the FAA will likely be forced to apply the statute of limitations of the applicable state arbitration act.[232] The result is that a party's application for confirmation under section 9, for purposes of a time limitation, will be treated as if it were brought under state law. A party will therefore be subject to different limitations periods depending on the state in which the motion for summary confirmation was made.[233]

For instance, suppose a party seeks confirmation under the FAA in a federal district court in Ohio. Absent a statute of limitations in

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[228] *See* CONN. GEN. STAT. ANN. § 52-417 (West 2005); DEL. CODE ANN. tit. 10, § 5713 (1999); GA. CODE ANN. § 9-9-12 (2007); LA. REV. STAT. ANN. § 9:4209 (2009); MISS. CODE ANN. § 11-15-21 (West 2008); N.H. REV. STAT. ANN. § 542:8 (LexisNexis 2006); N.Y. C.P.L.R. 7510 (McKinney 1998); OHIO REV. CODE ANN. § 2711.09 (West 2006); R.I. GEN. LAWS § 10-3-11 (1997); WIS. STAT. ANN. § 788.09 (West 2001). The eleventh state, Michigan, codifies the one-year requirement in its state court rules. *See* MICH. CT. R. 3.602(I).

[229] *See, e.g.*, CAL. CIV. PROC. CODE § 1288 (West 2007) (imposing a four-year statute of limitations); D.C. CODE § 12-301(8) (2001) (providing a three-year statute of limitations); IND. CODE ANN. § 34-11-2-12 (West 1999) (allowing twenty years for satisfaction of a court judgment).

[230] The majority of states utilize the Uniform Arbitration Act, which declined to include the one-year language of the FAA. Instead, the drafters felt that a state's general statute of limitations for executing on a judgment was appropriate. *See* UNIF. ARBITRATION ACT § 22 cmt. 2 (2000); *see also* Wiens & Haydock, *supra* note 208, at 1299 (stating that thirty-eight states have adopted the Uniform Arbitration Act and the remaining twelve have adopted it in part); *id.* at 1301 (noting that for states utilizing the Uniform Arbitration Act, "the general statute of limitations for filing and executing on a judgment determines the question of timing").

[231] Courts adopting the permissive interpretation clearly indicate that section 9 does not have a statute of limitations. *See, e.g.*, Val-U Constr. Co. v. Rosebud Sioux Tribe, 146 F.3d 573, 581 (8th Cir. 1998) (finding that "the one-year period is not a statute of limitations"); Paul Allison, Inc. v. Minikin Storage of Omaha, Inc., 452 F. Supp. 573, 575 (D. Neb. 1978) ("[T]he 'one year' provision of § 9 of the [Federal] Arbitration Act is not tantamount to a statute of limitations.").

[232] The Supreme Court has repeatedly held that when a federal statute is silent as to a statute of limitations, a court should apply the most closely related statute of limitations under state law. *See, e.g.*, DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158 (1983); *see also* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 60 (1981) (applying a state statute of limitations to a claim under § 301 of the Labor Management Relations Act); Cope v. Anderson, 331 U.S. 461, 463–64 (1947) (applying Ohio and Pennsylvania statutes of limitations to claims under the National Bank Act); O'Sullivan v. Felix, 233 U.S. 318, 322 (1914) (applying a Louisiana statute of limitations to the Civil Rights Act of 1871).

[233] *See, e.g.*, CAL. CIV. PROC. CODE § 1288 (allowing four years); CONN. GEN. STAT. ANN. § 52-417 (permitting one year for filing); IND. CODE ANN. § 34-11-2-12 (allowing twenty years for satisfaction of a court judgment).

section 9, the court would apply the Ohio Arbitration Act's confirmation provision.[234] The Supreme Court of Ohio, however, has held the statute to impose a one-year statute of limitations for obtaining summary confirmation.[235] As a result, the federal district court would be required to impose a one-year statute of limitations for confirmation of the award.[236] On the other hand, if the same party files for FAA summary confirmation in Indiana, a federal district court would apply the confirmation provision of Indiana's version of the Uniform Arbitration Act, which does not include a statute of limitations.[237] In this situation, Indiana federal courts have applied Indiana's general statute of limitations for enforcing court judgments,[238] which currently imposes a twenty-year limitations period.[239] Accordingly, a party seeking confirmation in Indiana would have twenty years to do so; yet, by crossing state lines into Ohio, that same party has only a one-year window to invoke section 9 for the *same* arbitration award.

As this example illustrates, a permissive interpretation of section 9's limitations period would lead to different applications of the provision on a state-by-state basis. In a sense, a party's ability to obtain summary confirmation under the FAA would depend entirely on state law, since the timeliness of a section 9 application would be determined by state statutes of limitation. This idea is in clear conflict with one of the core purposes of the FAA: "to create a body of *federal substantive law* of arbitrability, applicable to any arbitration agreement within the coverage of the [federal] Act."[240]

Interpreting section 9 to create a one-year statute of limitations, on the other hand, does not create this inconsistency. First, section 9 would not be silent as to a statute of limitations, thus obviating the need to apply a state's confirmation deadline.[241] As a result, the

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[234] *See* OHIO REV. CODE ANN. § 2711.09 (West 2006) ("At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award.").

[235] *See* Warren Educ. Ass'n v. Warren City Bd. of Educ., 480 N.E.2d 456, 459 (Ohio 1985) (holding that "the motion to confirm *must be made* within one year after the award is rendered" (emphasis added)).

[236] *See DelCostello*, 462 U.S. at 158.

[237] *See* IND. CODE ANN. § 34-57-2-12 (West 1999); Williams v. U.S. Steel, 877 F. Supp. 1240, 1245 (N.D. Ind. 1995) ("The uniform act does not . . . provide a limitations period for [arbitration award] enforcement."), *aff'd*, 70 F.3d 944 (7th Cir. 1995).

[238] *See Williams*, 877 F. Supp. at 1245 (noting that the ten-year limitations period of Indiana's prior statute of limitations for enforcing court judgments, former IND. CODE ANN. § 34-1-2-2, would normally be applied to actions to enforce arbitration awards).

[239] *See* IND. CODE ANN. § 34-11-2-12.

[240] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (emphasis added).

[241] *See DelCostello*, 462 U.S. at 158 (stating that an analogous state statute of limitations is

availability of summary confirmation would not depend on the state where the application is made, and would be consistent on a national scale. Not only does this promote consistency, it also furthers the establishment of a "federal substantive law" of arbitration under the FAA.[242] In addition, creating a mandatory one-year limitations period would align section 9 with comparable state summary confirmation provisions, each of which have been interpreted to impose a one-year statute of limitations.[243] This would have the added bonus of producing parity between federal and state arbitration law. The result would be both certainty as to the availability of summary award confirmation and an overall sense of finality in the arbitration process.[244]

A permissive interpretation of section 9's limitations period would lead to serious inconsistencies in the availability of FAA summary confirmation on a national scale. Since a firm one-year statute of limitations eliminates this problem, a mandatory interpretation is necessary not only to ensure consistent application of section 9 but also to promote the larger goals of the FAA and arbitration.

V. TOLLING THE ONE-YEAR LIMITATIONS PERIOD

Imposing a one-year statute of limitations for summary confirmation is the most logical and appropriate reading of section 9, in light of both the purposes of FAA arbitration and the established canons of statutory interpretation. Like any other statute of limitations, section 9's one-year period would be subject to "tolling," which suspends the running of a statute of limitations under certain circumstances.[245] In other words, parties would be able to file for summary confirmation beyond one year if the court hearing their

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applied only if the federal law is silent as to a limitations period).

[242] *Cone*, 460 U.S. at 24.

[243] *See* FIA Card Servs. v. Gachiengu, 571 F. Supp. 2d 799, 805 (S.D. Tex. 2008) (interpreting DEL. CODE ANN. tit. 10, § 5713 (2008)); Suwanchai v. Int'l Bhd. of Elec. Workers, 528 F. Supp. 851, 857, 861 (D.N.H. 1981) (interpreting N.H. REV. STAT. ANN. § 542:8 (1981)); Spearhead Constr. Corp. v. Bianco, 665 A.2d 86, 91–92 (Conn. App. Ct. 1995) (interpreting CONN. GEN. STAT. ANN. § 52-417 (West 1995)); Hardin Constr. Group v. Fuller Enters., Inc., 462 S.E.2d 130, 131 (Ga. 1995) (interpreting GA. CODE ANN. § 9-9-12 (1995)); Patenaude v. John Hancock Prop. & Cas. Ins. Cos., 785 A.2d 563, 564–65 (R.I. 2001) (interpreting R.I. GEN. LAWS § 10-3-11 (2001)).

[244] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003).

[245] *See generally* BLACK'S LAW DICTIONARY 723 (3d pocket ed. 2006) (defining "toll" as "to stop the running of," "tolling agreement" as an agreement "to extend the statutory limitations period," and "tolling statute" as "[a] law that interrupts the running of a statute of limitations"); *see also* Babbin et al., *supra* note 87, at 1197 (observing that "the *Photopaint* court also held that the one-year statutory period [in section 9] can be waived or tolled." (citing *Photopaint*, 335 F.3d at 160)).

dispute determines it to be appropriate or necessary under the circumstances. As a result, a permissive interpretation is simply not necessary to give effect to the policies surrounding the FAA.

A. Contractually "Pause" the Running of Section 9's One-Year Summary Confirmation Period

One of the concerns of the Fourth and Eighth Circuits was that a mandatory one-year statute of limitations would adversely affect parties' ability to privately settle their dispute after an arbitrator renders an award.[246] In light of courts' ability to toll section 9, however, this concern is clearly not warranted.

Because arbitration is a creature of contract,[247] parties are generally free to "specify by contract the rules under which [an] arbitration will be conducted."[248] Included is the ability to tailor the procedure by which arbitration is conducted under the FAA.[249] Parties can therefore contractually agree to toll section 9's one-year limitations period in order to conduct settlement negotiations. This is precisely what the Second Circuit did when it held section 9 to impose a one-year limitations period.[250] In *Photopaint*, the parties agreed in writing to toll any limitations periods imposed by the FAA.[251] The Second Circuit indicated that ordinary common law principles allow parties to make such tolling agreements,[252] and therefore concluded that their motion to confirm was timely.[253]

Much like the parties in *Photopaint*, individuals involved in arbitration can easily suspend section 9's one-year confirmation deadline to engage in post-award settlement negotiations.[254] A

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[246] *See, e.g.*, Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993) (expressing concern that a mandatory one-year statute of limitations would force parties to file motions to confirm in every case).

[247] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008) (noting that arbitration is contractual in nature); Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent . . . and parties are generally free to structure their arbitration agreements as they see fit.").

[248] *Volt Info.*, 489 U.S. at 479.

[249] *See Hall St. Assocs.*, 128 S. Ct. at 1404 (observing that the FAA allows parties to tailor many features of arbitration by contract).

[250] *See* Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 160 (2d Cir. 2003); Babbin et al., *supra* note 87, at 1197.

[251] *See Photopaint*, 335 F.3d at 160 ("[T]he undisputed record establishes, as a matter of law, that Smartlens and Photopaint agreed to toll any applicable limitations periods imposed under the FAA.").

[252] *See* Babbin et al., *supra* note 87, at 1197; *see also Photopaint*, 335 F.3d at 161 ("[T]he letter agreement was drafted by counsel for [the defendant], and we generally interpret contractual ambiguities against the drafter.").

[253] *Photopaint*, 335 F.3d at 161.

[254] *See id.* at 160; *see also* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) ("[W]e give effect to the contractual rights and expectations of the parties, without doing

permissive interpretation of section 9 is simply not necessary to enable parties to protect their ability to privately settle their dispute in a post-award setting before resorting to summary confirmation.

B. Equitable Tolling When Justice Requires

Common law notions of equity further demonstrate that a permissive interpretation of section 9 is unnecessary to promote private settlement or other underlying policies of arbitration. All federal statutes of limitations are subject to equitable tolling, which suspends the running of the statute in the interest of fairness to a party[255] and allows that party to file an action beyond a statutory period if required by equitable principles.[256] Section 9's one-year confirmation period is no exception.

Proponents of the permissive interpretation express concern that a one-year statute of limitations will encourage a losing party to avoid voluntarily honoring an arbitration award.[257] The argument goes that a losing party may mislead the prevailing party or adopt a "wait and

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violence to the policies behind . . . the FAA.").

[255] *See* Young v. United States, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute . . . ." (citation omitted) (internal quotation marks omitted)); Hallstrom v. Tillamook County, 493 U.S. 20, 27 (1989) (observing that time requirements are often subject to waiver, estoppel, and equitable tolling); *see also Young*, 535 U.S. at 49–50 (applying equitable tolling to section 507(a)(8)(A)(i) of the Bankruptcy Code); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (applying equitable tolling to the charge-filing period in Title VII of the Civil Rights Act of 1964); Riddle v. Kemna, 523 F.3d 850, 857–58 (8th Cir. 2008) (applying equitable tolling to the one-year limitations period for habeas relief under the Anti-Terrorism and Effective Death Penalty Act); Jackson v. Astrue, 506 F.3d 1349, 1353 (11th Cir. 2007) (holding that equitable tolling can be applied to the limitations period for challenging a denial of benefits under section 405(g) of the Social Security Act); Doherty v. Teamsters Pension Trust Fund, 16 F.3d 1386, 1393–94 (3d Cir. 1994) (holding that equitable tolling is applicable to the arbitration time limits of the Multiemployer Pension Plan Amendments Act).

[256] *See* Haekal v. Refco, Inc., 198 F.3d 37, 43 (2d Cir. 1999) (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990)) (stating that in lawsuits between private litigants, time requirements are subject to equitable tolling when necessary to prevent unfairness). One situation where the Supreme Court has found equitable tolling to apply is when parties have failed to assert a claim within a statutory deadline under the mistaken belief that they have been included in a class action that was timely filed. *See* Honda v. Clark, 386 U.S. 484, 499–501 (1967) (holding that a sixty-day filing deadline for Japanese-Americans to reclaim assets seized during World War II was equitably tolled because the plaintiffs had mistakenly believed they were included in a timely class action, due to an ambiguous class definition, and they would otherwise be precluded from asserting their right to reclaim assets).

[257] *See, e.g.*, Kolowski v. Blatt, Hasenmiller, Leibsker & Moore, L.L.C., No. 07 C 4964, 2008 U.S. Dist. LEXIS 22935, at *12 (N.D. Ill. Mar. 20, 2008) (predicting that Illinois courts would interpret section 9 as permissive and reasoning that a mandatory interpretation "might also encourage a losing party to delay compliance [with the award] in the hope that the winning party would fail to timely recognize" the need to file for summary confirmation).

see" approach to "wait and see if the other party will file the motion to confirm in a timely manner and let that determine if they will honor the arbitration award."[258] These proponents believe such a practice would frustrate judicial economy and defeat the purposes of the FAA.[259]

However, this "wait and see" approach, as well as other misleading conduct, would likely justify equitably tolling section 9's one-year limitations period. Courts often permit equitable tolling when a party has been induced or tricked by an opposing party's conduct into allowing a filing deadline to pass, or where one party has otherwise purposefully misled his opponent regarding the cause of action.[260] Under this theory, a "wait and see" approach, or other misleading conduct[261] adopted by a party opposing confirmation, would invoke equitable tolling and permit summary confirmation beyond the one-year period.[262] A party opposing confirmation therefore loses any incentive to trick or induce a prevailing party into missing section 9's deadline. As a result, a losing party would be dissuaded from avoiding voluntary settlement of the arbitration award and judicial economy would be fulfilled.

This principle finds support from analogous state arbitration provisions. Ohio courts, for example, have consistently applied equitable tolling to the confirmation provision of the Ohio Arbitration Act.[263] Much like section 9, the Ohio provision provides that "[a]t any time within one year after an award in an arbitration proceeding is made, any party to the arbitration *may apply* to the court . . . for an order confirming the award."[264] While Ohio courts interpret this

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[258] Elliott, *supra* note 7, at 688.

[259] *See id.* (arguing that a "wait and see" approach defeats the national policy favoring arbitration).

[260] *See* Fradella v. Petricca, 183 F.3d 17, 21 (1st Cir. 1999) (stating, in the context of 9 U.S.C. § 12, that equitable tolling is allowed where "the claimant [is] materially misled into missing the [statutory] deadline"); *Doherty*, 16 F.3d at 1393 (finding equitable tolling appropriate where "the defendant has actively misled the plaintiff respecting the cause of action").

[261] Suppose the losing party agrees to enter settlement negotiations after an award is rendered but has no intention of voluntarily honoring the award. Instead, the sole purpose is to deceive the prevailing party into allowing the one-year period to elapse. Such conduct would likely qualify as "inducing" or "tricking" the prevailing party, and thereby invoke equitable tolling.

[262] Summary confirmation beyond one year would be permitted because equitable tolling would suspend the running of section 9's one-year statute of limitations in the interest of fairness. *See* cases cited *supra* note 260 and accompanying text; *see also* Young v. United States, 535 U.S. 43, 49–50 (2002) ("Congress must be presumed to draft limitations periods in light of [the equitable tolling] principle.").

[263] OHIO REV. CODE ANN. § 2711.09 (West 2006).

[264] *Id.* (emphasis added).

language to impose a one-year statute of limitations,[265] they also find that it gives courts the "discretion to permit summary application within a reasonable time beyond one year for *good cause shown*."[266] Much like equitable tolling, this "good cause" interpretation permits application for summary confirmation beyond one year if equity and fairness so require. While the specific terminology of the Ohio exception is different, it achieves the same result: losing parties have no incentive to avoid settlement of arbitration awards and courts are able to maximize judicial economy.

By permitting summary confirmation beyond one-year if justice so requires, equitable tolling serves as a safeguard to a party's ability to obtain judicial enforcement of an arbitration award. This doctrine, together with the availability of contractual tolling, not only encourages parties to voluntarily honor arbitration awards but also promotes the principle of judicial economy in arbitration, thereby negating any need for a permissive interpretation of section 9.

CONCLUSION

Imposing a mandatory one-year statute of limitations for summary confirmation under the FAA is both the necessary and the most logical interpretation of section 9. Such a reading gives effect to all of the statutory language and stands in accord with the established rule that language alone does not always govern.[267] Apart from the statutory language itself, a one-year limitations period best promotes the important values of finality and judicial economy—the backbones of arbitration in the American judicial system.[268]

Absent a firm time limit for summary confirmation, parties will be faced with inconsistent application of the FAA on a national scale, as well as uncertainty about their rights in a post-award setting. These realities stand in direct conflict with the very purposes of the FAA: to both "create a body of federal substantive law of arbitrability"[269] and provide for "settling disputes efficiently and avoiding long and expensive litigation."[270] A mandatory one-year limitations period not

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[265] *See* Warren Educ. Ass'n v. Warren City Bd. of Educ., 480 N.E.2d 456, 459 (Ohio 1985) (holding that under the Ohio Arbitration Act, a motion to confirm *must* be made within one year after an award is made).

[266] Russo v. Chittick, 548 N.E.2d 314, 317 (Ohio Ct. App. 1988) (emphasis added); *see also* Ayers v. R.A. Murphy Co., 839 N.E.2d 80, 81 (Ohio Ct. App. 2005) (following the interpretation established in *Russo*).

[267] *See* Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198 (2000).

[268] *See* discussion *supra* Part III.B.

[269] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[270] Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (quoting Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993)) (internal quotation marks

only promotes these dual purposes but also serves to conclusively establish the rights of parties in arbitration. As a result, section 9 will do its part to ensure that arbitration retains its status as a favored form of alternative dispute resolution and does not become "merely [a] prologue to prolonged litigation."[271]

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omitted).

[271] *Id.*

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