Journal of Dispute Resolution

Volume 1996 | Issue 1 Article 12

1996

Scope of Review for Orders Confirming, Vacating, or Modifying Arbitral Awards: An End to Deferential Standards - First Options of Chicago, Inc. v. Kaplan

Michael G. Munsell

NOTES

Scope of Review for Orders Confirming, Vacating, or Modifying Arbitral Awards: An End to Deferential Standards

First Options of Chicago, Inc. v. Kaplan[1]

I. INTRODUCTION

Congressional intent to make arbitration a viable alternative to traditional litigation is codified in the Federal Arbitration Act[2] ("FAA"). Although the FAA and the subsequent case law have settled most questions about the details of the arbitration process, the United States Supreme Court in *First Options* took up the narrow issue of what standard of review should be used by an appellate court reviewing a district court decision vacating, confirming or modifying an arbitrator's order.[3] Facing the Court were two competing policies: the Court's own policy of keeping standards of review simple and rational against the Congressional policy of assuring that arbitration does not become a stopping point on the way to court.[4]

II. FACTS AND HOLDING

First Options of Chicago, Inc., a firm that cleared trades on the Philadelphia Stock Exchange, cleared the trading account of MK Investments, Inc. ("MKI"), an investment firm wholly owned by Manuel Kaplan and his wife, Carol.[5] In 1989, the parties entered into a "workout" agreement to alleviate the debts owed to First Options by MKI and the Kaplans.[6] The debts were not paid and in 1989, First Options demanded immediate payment of the entire MKI debt and further that the

1. 115 S. Ct. 1920 (1995).
2. FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 *et seq.* (1988) [hereinafter FAA].
3. First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1923 (1995) [hereinafter *First Options*].
4. *Id.*
5. *Id.* at 1922.
6. *Id.*

Kaplans be held personally responsible for any deficiency.[7] When the demands went unsatisfied, First Options filed for arbitration by a panel of the Philadelphia Stock Exchange.[8]

Although MKI accepted arbitration because one of the documents it signed as part of the "workout" agreement included an arbitration clause, the Kaplans claimed that they had not personally signed that document and thereafter filed written objections with the arbitration panel claiming that the dispute was not arbitrable.[9] First Options argued that Mr. Kaplan was bound to arbitrate under Exchange rules on several grounds: he was a member of the Exchange, was an associated person of a member, or was MKI's alter ego.[10] The panel, finding that they had the jurisdiction to rule on the merits of the dispute, ruled in favor of First Options.[11]

The Kaplans filed a petition in a Pennsylvania federal district court seeking to vacate the arbitration award.[12] The district court confirmed the award in a memorandum opinion, basing its decision on the consent given in the "workout" agreement document, despite the fact that the Kaplans had not personally signed the document, or alternatively, on the Kaplans' counsel's participation in arbitration discovery.[13] The Kaplans and MKI appealed.[14]

The Court of Appeals for the Third Circuit reviewed the motion to vacate the commercial arbitration award de novo,[15] despite First Options argument that the court should adopt the standard of the Eleventh Circuit and review decisions denying petitions to vacate arbitration awards only for abuse of discretion.[16] The court declined to apply this standard.[17] The court reversed the district court and held that the Kaplans did not waive their jurisdictional objection,[18] nor did they

---

7. *Id.*

8. *Id.*

9. *Id.*

10. Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1508 (3rd Cir. 1994) [hereinafter *Kaplan*].

11. *Id.*

12. *See* FAA § 10 (1994).

13. *Kaplan,* 19 F.3d at 1508.

14. *Id.* at 1509.

15. *Id.* (citing Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 331 (3d Cir. 1991)); Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co., 868 F.2d 52, 56 (3d Cir. 1989) ("In reviewing the district court's denial of appellants [sic] motion to vacate the arbitration award, this Court will stand in the shoes of the district court and determine whether appellants were entitled to vacate the arbitration award pursuant to 9 U.S.C. § 10(d)."). *See also* R.M. Pereq & Assocs. v. Welch, 960 F.2d 534, 540 (5th Cir. 1992); Moseley, Hallgarten, Estabrook & Weeden v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988).

16. *Kaplan,* 19 F.3d at 1508. *See* Robbins v. Day, 954 F.2d 679, 681-82 (11th Cir.), *cert. denied,* 113 S. Ct. 201 (1992).

17. *Kaplan,* 19 F.3d at 1509. The court noted that even if it had wanted to change the standard of review, it was prohibited by Third Circuit Internal Operating Procedure 9.1 (1993) ("[N]o subsequent panel overrules the holding in a published opinion of a previous panel."). Only the court en banc could change the circuit's standard of review. *Id.*

18. *Id.* at 1512.

consent to arbitrate their individual liability by signing the "workout" agreement document.[19]

The United States Supreme Court upon granting certiorari, narrowed their focus to two questions: (1) what standard of review should courts apply in reviewing an arbitrator's decision on arbitrability when the objecting party submitted the issue to the arbitrators for decision, and (2) whether the court of appeals should have reviewed the district court's denial of the motion to vacate the arbitration award "de novo."[20] The United States Supreme Court, in affirming the appellate court's decision, determined that courts should not assume that parties have agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence to the contrary.[21] In the present case, the Court found no evidence that the Kaplans agreed to arbitrate arbitrability.[22] The Court further determined that the reviewing attitude of an appellate court should depend on the institutional advantages of trial and appellate courts, and not on the standard of review that will most likely produce a particular substantive result.[23] Thus, the Supreme Court held that the arbitrability issue is subject to independent review by the courts and that the appellate courts should apply "ordinary" standards when reviewing district court decisions upholding arbitration awards.[24]

III. LEGAL BACKGROUND[25]

The FAA establishes strict guidelines for district courts reviewing arbitration awards.[26] An award may be vacated, modified or corrected only upon grounds set by the statute.[27] However, the FAA does not provide what standard of review an appellate court should use to review a district court decision concerning arbitration awards.

---

19. *Id.* at 1523.

20. *First Options*, 115 S. Ct. at 1922.

21. *Id.* at 1924.

22. *Id.* at 1924-25.

23. *Id.* at 1926 (citing Salve Regina College v. Russell, 499 U.S. 225, 231-33 (1991)).

24. *Id.* at 1924, 1926.

25. THE COURT DECIDED THREE ISSUES ON APPEAL. THE FIRST ISSUE WAS WHETHER AN ARBITRATOR HAS THE PRIMARY POWER TO DECIDE WHETHER THE PARTIES AGREED TO ARBITRATE A DISPUTE'S MERITS. THE COURT FOUND THAT THE ISSUE TURNS ON WHETHER THE PARTIES AGREED TO SUBMIT THE ARBITRABILITY QUESTION TO AN ARBITRATOR. THE COURT GROUNDED ITS DECISION IN THE FACT THAT ARBITRATION IS SIMPLY A MATTER OF CONTRACT BETWEEN THE PARTIES. THE SECOND ISSUE WAS WHETHER ON THE FACTS OF THE CASE, THE PARTIES SUBMITTED ARBITRABILITY TO THE ARBITRATOR, AND THE COURT FOUND THAT ONE OF THE PARTIES DID NOT. THIS CASENOTE FOCUSES ON THE THIRD ISSUE: THE STANDARD OF REVIEW THE COURTS OF APPEALS SHOULD APPLY WHEN REVIEWING DISTRICT COURT DECISIONS UPHOLDING ARBITRATION AWARDS. *FIRST OPTIONS*, 115 S. CT. AT 1921-22.

26. *See* FAA §§ 10-11 (1994).

27. *Id.*

Courts have long noted that the FAA establishes a liberal federal policy favoring arbitration agreements, so that when a court is in doubt as to the scope of arbitrable issues, it should be resolved in favor of arbitration.[28] In accord with this policy, courts in general have established that a district court should review an arbitrator's decision very narrowly.[29] Although the circuits may use different language to describe the standard, it is clear that the district and appellate courts give great deference to an arbitrator's decisions.[30]

While the standard of review for a district court reviewing an arbitrator's decision has been thoroughly discussed, the standard of review employed by appellate courts to subsequently review the district court's decision has been discussed infrequently and the approaches taken by the various circuits have lacked uniformity.[31]

A. The Hybrid Standard of Review

In *Bonar v. Dean Witter Reynolds, Inc.*,[32] the Eleventh Circuit Court of Appeals stated that it was employing a "narrow abuse of discretion" standard to review a district court's refusal to vacate an arbitration award.[33] The court did not discuss its reasons or cite any authority for the new found "abuse of discretion" standard.[34] The court nonetheless overturned the district court's refusal to vacate because the prevailing party's expert witness committed perjury during the arbitration proceeding.[35]

Without citing *Bonar*, the Eleventh Circuit Court of Appeals later affirmed the "abuse of discretion" standard in *Raiford v. Merril Lynch, Pierce, Fenner & Smith, Inc.*[36] In a footnote, the court simply stated that "[a] district court's disposition of a motion to vacate an arbitration award under the Arbitration Act . . . is reviewed only for abuse of discretion."[37] Later in the opinion, the court mentioned the national policy favoring arbitration and the need for expeditious proceedings.[38] However, the court appeared to draw its standard for evaluating

---

28. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

29. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987). Errors in the arbitrator's interpretation of law or findings of fact do not warrant reversal, nor does an insufficiency of evidence supporting the decision. *Id.*

30. Osceola County Rural Water Sys. v. Subsurfco, Inc., 914 F.2d 1072, 1075 (8th Cir. 1990) ("narrow in scope"); Federated Dep't Stores Inc. v. J.V.B. Indus., 894 F.2d 862, 866 (6th Cir. 1990) ("extremely limited"); Maine Cent. R.R. v. Brotherhood of Maintenance of Way Employees, 873 F.2d 425, 428 (1st Cir. 1989) ("among the narrowest in the law").

31. Bowles Fin. Group, Inc. v. Stifel Nicolaus & Co., 22 F.3d 1010, 1013 (10th Cir. 1994).

32. 835 F.2d 1378 (11th Cir. 1988).

33. Bonar v. Dean Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988).

34. *Id.*

35. *Id.* at 1383-84.

36. 903 F.2d 1410, 1412 n.2 (11th Cir. 1990).

37. Raiford v. Merril Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 n.2 (11th Cir. 1990).

38. *Id.* at 1413.

the district court from the district court's standard of review of an arbitrator's decision.[39]

The Eleventh Circuit clarified its reasoning and changed the standard two years later in *Robbins v. Day*.[40] The court of appeals, in altering its standard of review, emphasized that "[t]he purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation."[41] Under this new standard, an appellate court reviewing a grant of a motion to vacate an arbitration award reviews the decision de novo, while the denial of a similar motion would still be reviewed under an abuse of discretion standard.[42] The court reasoned that this standard emphasized the uniqueness of arbitration and promoted the speed and finality of the process.[43] The court was also influenced by a law review article that appeared shortly after the *Raiford* decision.[44] The article noted the Eleventh Circuit's abuse of discretion standard in *Raiford*,[45] and suggested the hybrid standard of review on the grounds of section 15 of the FAA, in which interlocutory appeals are allowed where the district court's order disfavors arbitration, but not where the district court order favors arbitration.[46]

The Eleventh Circuit expanded on its reasoning in *Schmidt v. Finberg*,[47] where the court of appeals was faced with reviewing a trial court's denial of a motion to vacate an arbitration award.[48] The court, citing *Raiford*, employed the "abuse of discretion" standard.[49] The court noted that the basic policy behind

---

39. *Id.* at 1412-13.

40. 954 F.2d 679 (11th Cir. 1992).

41. Robbins v. Day, 954 F.2d 679, 682 (11th Cir. 1992) (quoting Booth v. Hume Publishing, Inc., 902 F.2d 925 (11th Cir. 1990)).

42. *Id.* at 681.

43. *Id.* at 682.

44. *Id. See also* Stephen H. Kupperman & George C. Freeman III, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys Fees and Costs*, 65 TUL. L. REV. 1547 (1991).

45. Kupperman, *supra* note 44, at 1604.

46. *Id.* at 1605. The Kupperman article stated the reasoning for the standard as follows:

> The standard most likely to reflect the strong federal policy favoring arbitration is a hybrid standard--one that requires an appellate court to review confirmation of an award for an abuse of discretion and to review vacation of an award de novo. Such a standard would be even more deferential than the Fifth Circuit's standard since it would require rigorous review of rulings vacating awards but only limited review of rulings confirming awards. It would also mirror the structure of section 15 of the Arbitration Act. [footnote omitted] Section 15 permits interlocutory appeals of orders favoring litigation over arbitration but not vice-versa. More specifically, it permits interlocutory appeals of orders denying motions to compel arbitration and motions to stay litigation pending arbitration but forbids interlocutory appeals of orders granting motions to compel and motions to stay.

Id.

47. 942 F.2d 1571 (11th Cir. 1991).

48. *Robbins*, 954 F.2d at 681.

49. *Id.*

arbitration was to relieve congestion in the courts and to give parties a speedy and less costly alternative to litigation.[50] Furthermore, the policy favoring arbitration requires that the courts rigorously enforce agreements to arbitrate.[51] The court thus reasoned that this policy is furthered by the hybrid standard of review, in which the appellate court can assess whether a district court gave the proper deference when it vacated the arbitration award.[52] Where the district court denied the motion to vacate, the deference is presumed and an "abuse of discretion" review is adequate.[53]

B. De Novo Review

In contrast to the Eleventh Circuit, the Third, Fourth, Fifth, Ninth, and Tenth Circuits have adopted a fairly uniform de novo standard of review of district court decisions vacating or confirming an arbitration award.[54] Although the Seventh Circuit initially appeared to adopt this de novo standard, its precise standard has recently been in doubt.[55]

A particularly clear argument in favor of de novo review is found in *Forsythe International, S.A. v. Gibbs Oil Co. of Texas*.[56] Consistent with earlier Fifth Circuit decisions,[57] the court declined the appellee's request to affirm the district court's vacatur of an arbitration award barring abuse of discretion by the district court.[58] The court adopted the de novo standard while emphasizing the unique context of arbitration, which conditions judicial review by compelling deference to the findings that precede the district court.[59] The court found that employing the abuse of discretion standard would risk forgetting the prior and critical deference due the findings of the arbitration panel and thus cripple

---

50. *Id.* at 682.

51. *Id.* (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

52. *Id.*

53. *Id.*

54. *Kaplan*, 19 F.3d at 1509; Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 145 (4th Cir. 1993); Atlantic Aviation, Inc. v. EBM Group, Inc., 11 F.3d 1276, 1282 (5th Cir. 1994); Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1485 (9th Cir. 1991); *Bowles Fin. Group*, 22 F.3d at 1012.

55. *Bowles Fin. Group*, 22 F.3d at 1012.

56. 915 F.2d 1017, 1020-21 (5th Cir. 1990).

57. Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, 111 S. Ct. 148 (1990) (expressly reviewing de novo whether award grounded in collecting bargaining agreement); Folger Coffee Co. v. International Union, Local 1805, 905 F.2d 108, 110-12 (5th Cir. 1990) (implicitly reviewing de novo whether award drew essence from collective bargaining agreement); Antwine v. Prudential Bache Sec. Inc., 899 F.2d 410, 413 (5th Cir. 1990) (implicitly reviewing de novo district court's refusal to vacate award based on panel's alleged noncompliance with securities arbitration rules); Container Prod., Inc. v. United Steelworkers of Am., 873 F.2d 818, 819 (5th Cir. 1989) (implicitly reviewing de novo whether arbitrator exceeded his authority).

58. *Forsythe*, 915 F.2d at 1021.

59. *Id.*

appellate review of whether the district court accorded sufficient deference in the first judicial review.[60]

The Fifth Circuit decision in *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*[61] is a further example of the de novo standard. In *Anderman*, the Fifth Circuit affirmed the de novo standard where the district court granted a motion to confirm an arbitration award.[62] Again, the appellate court noted that the Congressional policy of promoting arbitration mandates that district courts leave an arbitrator's decision alone wherever possible, but this deference does not require that appellate courts give that same deference to the district court.[63] While judicial deference in general is necessary, using an abuse of discretion standard toward the district court would in effect add an extra layer of unnecessary deference to the decision.[64]

As previously indicated, the Seventh Circuit has not been as clear about its review of district courts in these circumstances.[65] While the Seventh Circuit explicitly stated in *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*[66] that it was in the same position as the district court, and thus would determine on its own whether the appellant was entitled to vacation or modification of the arbitration award,[67] its standard has been unclear in a more recent decision.[68] In *Eljer Manufacturing, Inc. v. Kowin Development Corp.*,[69] the Seventh Circuit emphasized the deference owed the arbitrator,[70] yet failed to mention explicitly that it owed no deference to the district court.[71] More importantly, the Tenth Circuit in *Bowles Financial Group, Inc. v. Stifel Nicolaus & Co.*, in determining its own standard of review to be de novo, interpreted the *Eljer Manufacturing* decision to mean that the Seventh Circuit employs a deferential standard similar to the Eleventh Circuit.[72]

Although the balance of the circuits have not expressly stated their standard of review, they implicitly use the same standard employed in the ordinary review

---

60. *Id.*

61. 918 F.2d 1215 (5th Cir. 1990).

62. Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990).

63. *Id.*

64. *Id.*

65. *Supra* note 55.

66. 849 F.2d 264 (7th Cir. 1988).

67. Mosley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988). The court also noted the Eleventh Circuits "abuse of discretion" standard in the *Bonar* decision. *Id.* at 264.

68. *See* Eljer Mfg., Inc. v. Kowin Dev. Corp., 849 F.2d 264 (7th Cir. 1988).

69. 14 F.3d 1250 (7th Cir. 1993).

70. *Eljer Mfg., Inc.*, 14 F.3d at 1254. "A restrictive standard of review is necessary to preserve these benefits and to prevent arbitration from becoming a 'preliminary step to judicial resolution.'" *Id.* (quoting E.I. DuPont de Nemours v. Grasselli Employees Indep. Ass'n, 790 F.2d 611, 614 (7th Cir. 1986)).

71. *Id.*

72. *Bowles Fin. Group*, 22 F.3d at 1012.

of district court decisions that do not pertain to arbitration.[73] For example, the Second Circuit in *Lyeth v. Chrysler Corp.*,[74] simply stated, without any elaboration, the standard of review employed by any court, trial or appellate, in reviewing a compulsory arbitration award under the New York Lemon Law.[75] The court therein did not discuss its reviewing stance towards the district court decision confirming the award, although it implicitly reviewed the arbitrator's decision directly on the evidence in record.[76]

IV. INSTANT DECISION

In the instant case, the Court first clarified the terms for the standard of review.[77] Although the Third Circuit, in prior decisions, used the words "de novo" to describe the standard, the United States Supreme Court summarily stated that all circuits except for the Eleventh Circuit believe that the standard of review of district court decisions should be uniform even in the context of arbitration review.[78] Thus, the proper standard in cases involving arbitration is that where a district court has found an agreement between parties, the appellate court is to accept findings of fact that are not "clearly erroneous" while deciding questions of law de novo.[79]

The Court then briefly acknowledged the standard of review which the petitioner, First Options, requested, that of the lone dissenting Court of Appeals, the Eleventh Circuit.[80] The Court stated that the Eleventh Circuit relied on "federal policy favoring arbitration" to apply the hybrid approach, citing *Robbins* as an example of this approach.[81]

The Court proceeded to give its rationale for agreeing with the majority "ordinary" standard.[82] First, the Court held that it was undesirable to complicate the law with numerous review standards that lacked logical precedent.[83] Second, and more importantly, the standard of review employed by an appellate court reviewing a district court decision should depend upon the "respective institutional

---

73. *See, e.g.*, Lyeth v. Chrysler Corp., 929 F.2d 891, 896 (2nd Cir. 1990).

74. 929 F.2d 891 (2nd Cir. 1991).

75. *Lyeth*, 929 F.2d at 896. "The applicable standard of review for a compulsory arbitration award under the Lemon Law is whether the award is supported by adequate evidence in the record and whether it is 'rational and satisf[ies] the arbitrary and capricious standards of CPLR article 78.'" *Id.* (quoting Motor Vehicle Mfrs. Ass'n v. New York, 550 N.E.2d 919, 925 (N.Y. 1990)).

76. *Id.*

77. *First Options*, 115 S. Ct. at 1920. Recall that the Court decided three issues on appeal, but this note focuses only on the issue regarding appellate standards of review.

78. *Id.* at 1926.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

advantages" of trial and appellate courts.[84] Therefore, according to the Court, the appellate court should not employ a standard of review that it believes will be more likely to produce a particular substantive result.[85] The Court illustrated the "institutional advantages" concept with the example of judicial review of administrative agencies.[86] The law requires that all courts (trial and appellate), give those administrative agencies a degree of "legal leeway" when reviewing certain interpretations of the law.[87] But this "leeway" does not extend, in any jurisdiction, to appellate review of district court decisions upholding an agency decision.[88] Thus, although the judiciary gives "leeway," each part of the judiciary, trial and appellate court, gives the administrative decision the same scrutiny. Accordingly, although district courts may give "leeway" to arbitrator's decisions upon initial review, this fact does not warrant an appellate court giving a district court "leeway" simply because the district court made the favored decision of upholding an arbitrator.[89]

Finally, the Court dispensed with First Options' argument that the hybrid review was justified by the uniqueness of the FAA.[90] First Options argued that because the FAA allowed appellate courts to conduct interlocutory review of some anti-arbitration district court rulings, while forbidding interlocutory review of orders upholding arbitration, the hybrid standard of review was justified.[91] The Court rejected this argument on the grounds that because the cited rule governed the timing of review, it was too weak to support the claim that the appellate court should use a different standard when reviewing this type of district court decision.[92] Moreover, according to the Court, the FAA says nothing specifically about standards of review.[93] Thus, the Court concluded that the Third Circuit Court of Appeals was correct when it used the traditional standard of review for reviewing the district court's arbitrability decision.[94]

---

84. *Id.* (quoting *Salve Regina College*, 499 U.S. at 231-33).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* (citing FAA § 16). This is the section cited earlier by Kupperman, *supra* note 46, which allows interlocutory appeals of orders denying motions to compel arbitration and motions to stay litigation pending arbitration but forbids interlocutory appeals of orders granting motions to compel and motions to stay.

92. *Id.*

93. *Id.*

94. *Id.*

V. COMMENT

The instant decision is consistent with the Court's stated policy of basing standards of review on the institutional advantages of trial and appellate courts.[95] However, the competing policy of ensuring that arbitration does not become a preliminary step in litigation must be considered as well. The Court gives short shrift to the latter policy and dismisses with little discussion the Eleventh Circuit's rationale for the hybrid standard of review. Furthermore, the Court fails to discuss the inconsistent standard of review among the circuits, especially for mixed questions of fact and law.

The policy favoring arbitration is well established, and is embodied in, among other statutes, FAA section 16.[96] Congress therein codified judicial deference to the arbitration process, a preference reflected by the fact that the statute provides for interlocutory appeal only when the district court order disfavors arbitration.[97] This extreme favoritism towards the arbitration process reflects congressional confidence in the arbitration process to make the right decision in the large majority of cases and to reduce the caseload in federal courts. Allowing interlocutory appeals only where the district court denies arbitration puts judges on notice that if they deny an arbitration motion, they had better have a sound reason because the decision will likely be reviewed immediately. In contrast, after the matter is arbitrated, there is less possibility of successful appeal on the order to arbitrate. Thus, district courts err on the side of granting motions to compel arbitration.

The *First Options* court found that section 16 did not adequately support the premise of a hybrid standard of review because section 16 governs the timing of review.[98] The Court attempted to compartmentalize the issues, implying that a hybrid standard of review cannot logically relate to the congressional intent regarding timing of review. However, the basis of the hybrid standard should not have to come from a statute, but can be supported by the congressional intent to favor arbitration. The hybrid standard of review is simply a reflection of congressional intent that litigants should not be allowed two separate stages of rigorous review, first by a district court, and again by an appellate court. Allowing an appellate court to take a fresh look at the arbitration proceedings gives the losing party a ray of hope. Even though the party has twice lost, an appellate court, owing no deference to the district court, will take a rigorous look at the arbitrator's decision. This extra step is in opposition to Congress' intent that the arbitration process be an efficient forum to resolve differences with little court involvement. The hybrid standard does favor an outcome, but no more so than other standards appellate courts employ.

---

95. *Id.*
96. FAA § 16.
97. *See supra* note 46.
98. *First Options*, 115 S. Ct. at 1926.

For example, many appellate courts employ a type of "hybrid" standard of review to district court decisions regarding new trial motions in the context of jury trials.[99] Those appellate courts state that their abuse of discretion standard of review is less rigorous for a denial of a motion for a new trial than for a grant of the same motion.[100] "Hybrid" standards are also used to review denials of leave to amend pleadings more strictly than grants.[101] Obviously, these standards reflect policy concerns regarding overriding juries and easy amendment of pleadings.[102] The appellate courts grant more deference where the district court arrived at the favored outcome because, for instance, the jury verdict is presumed to be correct. Likewise, the hybrid standard of review used by the Eleventh Circuit reflects the federal policy favoring arbitration of disputes. The presumption is that arbitration awards are enforceable.[103] The appellate courts should grant more deference to a district court that confirms an award because that decision is presumed to be correct.

Beyond the policy arguments, it is also troublesome that the *First Options* opinion failed to discuss the division among the circuits on the proper standard, especially the division over mixed questions of law and fact in motions to confirm, modify or vacate an award. Although the Court states that all but the Eleventh Circuit were using an "ordinary" standard of review,[104] it is not clear that this is true. As previously noted, the Seventh Circuit was a moving target on this issue.[105] The Seventh Circuit stated they were using a de novo standard, then seemed to use a deferential standard in a more recent case.[106] Moreover, the circuits were unclear as to which standard to use when there is a mixed question of law and fact, which is a difficult issue in this context.[107] The Fifth Circuit, in reviewing a district court order confirming an award, held that the de novo standard should be used where the order is a mixed question of law and fact.[108] The Fourth Circuit, reviewing the same type of order, reviewed the order partly

---

99. Reply Brief at 17, First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920 (1995) (No. 94-560).

100. *Id.* (citing 1 S. CHILDRESS & M. DAVIS, FEDERAL STANDARDS OF REVIEW 5-82 (2d ed. 1992))

101. *Id. See, e.g.*, Mayes v. Leipziger, 729 F.2d 605, 608 (9th Cir. 1984).

102. *Id.*

103. Kupperman, *supra* note 44, at 1603.

104. The Court stated the "ordinary" standard of review: "accept[] findings of fact that are not 'clearly erroneous' but [decide] questions of law de novo." *First Options*, 115 S. Ct. at 1926.

105. *See* discussion *supra* notes 66-72.

106. *Id.*

107. 4 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 43.6 (1994). The authors submit that most lower court decisions regarding the grounds for challenging arbitral awards will be mixed questions of law or fact. They advocate the hybrid standard of *Robbins* be used on these mixed questions, so that the integrity of the process is protected where a district court rebuts the presumption that an arbitration award is enforceable.

108. McIlroy v. PaineWebber, Inc., 989 F.2d 817, 819-820 (5th Cir. 1990), relying on Forsyth Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990). MACNEIL, *supra* note 107, at 43:13 n.16e (1994).

de novo and partly under the clearly erroneous standard.[109] As the United States Supreme Court noted in the *First Options* opinion, the Third Circuit sometimes used the word "de novo" to describe its standard. The Court dismissed this ambiguity as unimportant, but the imprecision in terms indicates that the Third Circuit was unsure of what standard to employ. Nonetheless, the Court found that all circuits believed that only the "ordinary" standard of review applied.[110]

Additionally, the Court failed to consider the effects of the deferential standard in the Eleventh Circuit. The Court did not discuss whether the standard was causing incorrect arbitration awards to slip through the system. A cursory inspection of the several decisions that have applied the hybrid standard of review would have found that at least one decision, *Bonar*, reversed the district court's order to confirm even under the appellate court's deferential standard of review.[111] The hybrid standard of review is not going to deprive deserving parties of a just result. In the rare instance where both the arbitrator and the district court are incorrect, even an abuse of discretion standard can correct the error.[112] But under the standard set forth by the Court, the higher court is forced to take a fresh look at the arbitration record, a redundant procedure that undermines the efficiency of the arbitration process.

VI. CONCLUSION

The *First Options* decision makes clear that the United States Supreme Court's main factor in determining standards of review is based on uniformity, not the peculiar needs of the arbitration process. Despite clear Congressional intent to make the arbitration process efficient and allow little court involvement, the Court refused to diverge from its policy to keep standards of review simple. Since Congress, however, has prescribed the narrow grounds for a court to overturn an arbitrator, in the future Congress may also prescribe the standard of review an appellate court uses to review a district court that confirms, modifies or vacates an arbitration award.

MICHAEL G. MUNSELL

109. Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F. 2d 141, 145 (4th Cir. 1993); MACNEIL, *supra* note 107, at 43:13 n.16e (1994).

110. *First Options*, 115 S. Ct. at 1926.

111. *Bonar*, 835 F.2d at 1383-84.

112. *Id.*