

2004

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Recommended Citation

Moses, Margaret L. Can Parties Tell Court What to Do? Expanded Judicial Review of Arbitral Awards, 52 U. Kan. L. Rev. 429 (2004).

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Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards

Margaret Moses*

I. INTRODUCTION

Arbitration is a private system of justice, made possible by the parties' consent.¹ Once parties have agreed to arbitrate, their arbitration agreement must be enforced according to its terms, just like any other contract.² In the United States, a court's ability to interfere with this private adjudicatory process or to set aside an arbitral award has been severely limited by the United States Federal Arbitration Act ("FAA").³

Because an arbitration award is not easily overturned,⁴ parties sometimes harbor fears that a maverick arbitrator will render an egregious award, which cannot be challenged even though wrong on the facts and the law.⁵ In the past few years, parties to arbitrations held in the United States have sometimes, by mutual agreement, asked for judicial review of an award for errors of law or fact—similar to judicial review of an administrative agency decision.⁶ Such an expanded judicial

* Assistant Professor of Law, Loyola University Chicago School of Law. This research was supported by a grant from the Loyola University Chicago Internal Research Awards Program. The author gratefully acknowledges the comments of Professors Christopher R. Drahozal and Michael J. Zimmer.

1. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

2. *Id.* at 478; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); H.R. REP. NO. 68-96, at 1 (1924).

3. See 9 U.S.C. § 10 (2000) (stating four grounds for vacating an award).

4. In this Article, the terms "overturn," "vacate," "set aside," and "annul" will be used interchangeably.

5. For some examples of arbitrator excess, enforced by the courts, see Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 248-53 (1999). Mr. Younger expressed concern that "arbitration poses a danger of an excessive or irrational award which cannot, in the vast majority of cases, be set aside on appeal." *Id.* at 253. Professor Christopher Drahozal refers to parties' fears of "knucklehead awards," or "roll-the dice" or "Russian roulette" arbitration," citing respectively Carroll E. Neesemann, *Contracting for Judicial Review*, 5 DISP. RESOL. MAG. 18, 18 (1998), and Stephen A. Hochman, *Judicial Review to Correct Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 104 (1997). *Standards for Judicial Review of Arbitral Awards in the United States: Mandatory Rules or Default Rules?*, 16 MEALEY'S INT'L ARB. REP. 27, 28 (2001).

6. *E.g.*, *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Syncor*

review of an arbitral award exceeds the usual role of the courts in the arbitration process, and goes beyond the parameters of the FAA, which does not provide for setting aside an award on errors of fact or law. Rather, the FAA grounds for setting aside awards are limited to narrow, procedural grounds, essentially to abuse of the arbitral process.⁷ When the FAA was adopted in 1925, these very restrictive grounds were specifically intended by Congress to limit a court's ability to interfere with the arbitral process, and "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate."⁸

The question raised by expanded judicial review is whether the parties have the right, by agreement, to expand the grounds on which a court can review an arbitral award. The answer depends on the proper interpretation of the FAA. Are the FAA grounds for review merely default rules, which the parties can contract around, or do they establish mandatory minimum grounds for review but permit the parties to contract for more review? Or, are the FAA rules mandatory and exclusive, thereby prohibiting courts from reviewing an award on any grounds other than the narrow grounds listed in the statute?⁹ In the United States, courts have answered these questions quite differently,

Int'l Corp. v. McLeland, No. 99-2261, 1997 WL 452245 (4th Cir. Aug. 11, 1997) (unpublished opinion); *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984). In his concurrence in *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997), *aff'd in part, vacated in part, remanded in part*, 341 F.3d 987 (9th Cir. 2003), Judge Kozinski noted that even though reviewing an arbitration award on the merits is different work from conducting a trial, it is not different from the review that district courts perform in appeals from administrative agencies and bankruptcy courts, or on habeas corpus.

7. Under the FAA, a court may annul an award for the following reasons:

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

9 U.S.C. § 10. Courts have, however, created an additional ground for annulment where an arbitrator has "manifestly disregarded the law." See *infra* note 55 and accompanying text.

8. *Dean Witter Reynolds*, 470 U.S. at 219-20 (citing H.R. REP. NO. 68-96, at 1-2 (1924)).

9. Courts opposing expanded judicial review tend to characterize the statutory standards as mandatory, at least to the extent that an alternate rule "conflicts with federal policies furthered by the FAA." *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001). There are, however, non-statutory standards of review under the FAA that have been developed over time by judges. See JACK J. COE, JR., *INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT* 303-06 (1997) (discussing several non-statutory theories of vacatur, including violation of public policy, arbitrary and capricious award, and manifest disregard of the law).

creating a split in the circuits yet to be resolved by the Supreme Court. Commentators are also divided.¹⁰

This Article will focus on the various policies behind the two different interpretations of the FAA's grounds for review. It concludes that while both positions raise important questions, the better interpretation of the FAA permits expanded judicial review. However, that does not end the analysis. From a practical perspective, until the Supreme Court resolves the issue, and even if it decides that the FAA permits expanded judicial review, there are a number of pitfalls that parties need to consider before they seek expanded judicial review of domestic or international arbitral awards.¹¹

Part II will consider the conflicting circuit court positions regarding the proper scope of judicial review under the FAA, with an analysis of the rationales supporting each position. Part III will then examine domestic enforcement issues which arise when parties have agreed to expanded judicial review, including different approaches which may be taken by state and federal courts. Part IV will consider the complexities of international enforcement of arbitral awards, particularly the tendency of some courts to enforce awards even though they have been vacated in the place where made, and will focus on problems of enforcement internationally when expanded review has been sought. The Article concludes that even though the better legal arguments support expanded judicial review, the practical problems with enforcement of awards

10. See, e.g., Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395 (1998) (favoring expanded judicial review); Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. ON DISP. RESOL. 337 (2000) (opposing expanded judicial review); Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 AM. REV. INT'L ARB. 215 (1999) (opposing expanded judicial review); William H. Knull, III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531 (2000) (discussing disadvantages of expanded judicial review and favoring arbitral appellate review); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225 (1997) (favoring expanded judicial review); Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337 (2001) (favoring expanded judicial review); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147 (1997) (opposing expanded judicial review); Younger, *supra* note 5 (favoring expanded judicial review).

11. Most of the cases in which American courts have focused on the issue of expanded review have been cases involving only domestic parties, although *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003), involved a Japanese party (Kyocera), and *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 243 (S.D.N.Y. 1984), appears to involve a French party. The courts have not indicated that under the FAA it makes any difference for purposes of narrow judicial review of an award made in the United States whether the parties are foreign or not, or whether the arbitration is considered a domestic or a non-domestic arbitration. In either case, a party has the right to challenge the award under the FAA, or, if the forum court agrees, to obtain expanded judicial review in accordance with the agreement of the parties.

subjected to expanded judicial review remain significant. Parties to domestic or international arbitrations held in the United States should exercise great caution, and should only agree to seek expanded judicial review of their arbitral award if they are fully aware of the enforcement issues. They should also provide in their arbitration agreements, to the extent possible, a means for ensuring that enforcement decisions will not undercut what they intended to accomplish with expanded judicial review.

II. SCOPE OF JUDICIAL REVIEW OF ARBITRAL AWARDS: PARTIES' CHOICE OR STATUTORY RULE?

A number of courts in the United States have enforced agreements to have arbitral awards reviewed on the merits.¹² In seeking expanded judicial review of an award, parties have asked for either review of errors of law¹³ or of both law and fact.¹⁴ In *Lapine Technology Corp. v. Kyocera Corp.*,¹⁵ for example, the arbitration clause provided that “[t]he Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators’ findings of fact are not supported by substantial evidence, or (iii) where the arbitrators’ conclusions of law are erroneous.”¹⁶ The parties’ underlying assumption in this clause was that the court would enforce the arbitration agreement by reviewing any arbitral award not

12. See *supra* note 6 and accompanying text. The Third Circuit, in *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (2000), held that “parties may opt out of the FAA’s off-the-rack vacatur standards and fashion their own (including by referencing state law standards),” *id.* at 293. The court was not dealing with expanded judicial review, however, but rather with the question of how clearly parties needed to indicate their intent to opt out of FAA standards in favor of state law standards.

13. See *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (discussing an agreement which dictated that “[t]he arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal”); *Syncor Int’l Corp. v. McLeland*, No. 99-2261, 1997 WL 452245, at **6 (4th Cir. Aug. 11, 1997) (discussing an agreement which dictated that “[t]he arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error”).

14. See the arbitration agreement in *Fils et Cables d’Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984), in which the parties agreed that:

[u]pon an application to the court for an order confirming said award, the court shall have the power to review (1) whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by substantial evidence, and (2) whether as a matter of law based on said findings of fact the award should be affirmed, modified or vacated. Upon such determination, judgment shall be entered in favor of either party consistent therewith.

Id. at 242.

15. 130 F.3d 884 (9th Cir. 1997).

16. *Id.* at 887.

only in accordance with the narrow standards of the FAA, but also on the facts and the law.

Two circuit courts—the Fifth Circuit¹⁷ and the Fourth Circuit¹⁸—have enforced the parties' agreement for expanded judicial review of an arbitration award. The Tenth Circuit,¹⁹ on the other hand, has refused to do so, and the Eighth Circuit²⁰ has indicated in dicta that it is unlikely to permit such review. The Ninth Circuit, which had lined up with the Fifth Circuit in its decision in *LaPine Technology Corp. v. Kyocera Corp.*,²¹ recently did an unexpected flip-flop in an en banc decision, *Kyocera v. Prudential-Bache Trade Services Inc.*,²² reversing its position on expanded judicial review, and ending up in the Tenth Circuit's camp.

This split of opinion in the circuit courts will undoubtedly continue until resolved by the Supreme Court. Thus, parties that want expanded grounds of review of their awards would do well to ensure that their arbitration and any enforcement action takes place in one of the complying circuits. Nonetheless, until the question is resolved by the Supreme Court, parties will not know for certain whether their request for review on the merits will be honored, or whether the Supreme Court will, at some point prior to such review, limit it to existing narrow statutory and non-statutory grounds for vacating an award.²³

There are legitimate policy grounds supporting both sides of this issue, which makes a Supreme Court decision on this point difficult to predict. Courts and commentators who favor permitting expansion of the grounds on which a court may act in reviewing an arbitral award emphasize freedom of contract, noting that one of the principal selling points of the arbitration process is that parties can "tailor the scope of

17. *Gateway Techs.*, 64 F.3d at 996.

18. *Syncor Int'l Corp. v. McLeland*, No. 99-2261, 1997 WL 452245, at **6 (4th Cir. Aug. 11, 1997).

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

20. *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (citing with favor the *LaPine* dissent, 130 F.3d at 891, and stating that "we do not believe it is yet a foregone conclusion that parties may effectively agree to compel a federal court to cast aside sections 9, 10, and 11 of the FAA").

21. 130 F.3d 884 (9th Cir. 1997), *aff'd in part, vacated in part, remanded in part*, 341 F.3d 987 (9th Cir. 2003). A number of cases involving multiple parties, including, in addition to the parties named above, *Prudential-Bache Trade Services Inc.*, *Prudential Capital and Investment Services, Inc.*, and *LaPine Holding Co.*, were consolidated in this action.

22. 341 F.3d 987 (9th Cir. 2003). This case will hereinafter be referred to as *Kyocera*, while the three judge panel decision it vacated in part will be referred to as *LaPine*. The change of position was unexpected, to say the least, since the en banc panel in *Kyocera*, during an appeal of a second three judge panel decision in the same case, reached back to the first panel decision from six years before (*LaPine*), partially vacated it, and reinstated a district court decision from eight years before.

23. For examples of non-statutory grounds, see COE, *supra* note 9, at 303-06.

'arbitrable issues' to fit their own particular needs, circumstances, or desires."²⁴ This view holds that under the FAA, a provision for expanded judicial review is part of a private agreement to arbitrate, which the FAA requires to be enforced according to its terms.²⁵ The Fifth Circuit found that the limited FAA grounds for vacatur of an arbitral award are essentially default grounds, which the parties are free to contract around.²⁶

[T]he FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties It does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. *Indeed, such a result would be quite inimical to the FAA's purpose of ensuring that private agreements to arbitrate are enforced according to their terms.* Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.²⁷

The Fifth Circuit thus focused on the FAA's grounds for review as a default standard, and relied upon Congress' and the Supreme Court's strong pro-arbitration views as support for upholding the parties' agreement for expanded judicial review.²⁸

Commentators and courts which oppose expanded judicial review of arbitral awards assert that the FAA does not permit expanded judicial review. They further claim that expanded review would obliterate the distinction between arbitration and litigation, thereby destroying the great advantage of arbitration, which is to provide a speedy and efficient process for completing the "adjudication of disputes in a single instance."²⁹ In *Bowen v. Amoco Pipeline Co.*,³⁰ the Tenth Circuit, which

24. Rau, *supra* note 10, at 234.

25. *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995).

26. *Id.* at 997 ("Because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA's default standard of review and allows for de novo review of issues of law embodied in the arbitration award.")

27. *Id.* (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995), which was quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989)).

28. *Gateway Techs.*, 64 F.3d at 996-97 (discussing the Supreme Court's pro-arbitration holdings); *Syncor Int'l Corp. v. McLeland*, No. 99-2261, 1997 WL 452245, at **7 (4th Cir. Aug. 11, 1997).

29. Smit, *supra* note 10, at 147-48.

30. 254 F.3d 925 (10th Cir. 2001).

was the first circuit court to hold against expanded judicial review, disagreed with the Fifth Circuit and the Ninth Circuit decision in *LaPine* on two fundamental grounds. First, the Tenth Circuit asserted that parties do not have the power to determine the scope of judicial review.³¹ Second, it found that the FAA's grounds of review are mandatory, based on important policies underlying the FAA.³²

With regard to party empowerment, the court rejected any right by parties to dictate to courts the scope of review, noting that "parties may not force reviewing courts to apply unfamiliar rules and procedures."³³ It further noted that "the purposes behind the FAA, as well as the principles announced in various Supreme Court cases, do not support a rule allowing parties to alter the judicial process by private contract."³⁴ According to the Tenth Circuit, none of the Supreme Court's decisions on arbitration state that parties "are free to interfere with the judicial process."³⁵ In other words, parties cannot tell courts what to do. The court emphasized its position in a footnote, where it reiterated, "we hold that, in the absence of clear authority to the contrary, parties may not interfere with the judicial process by dictating how the federal courts operate."³⁶

More fundamentally, the Tenth Circuit concluded that expanded judicial review was impermissible under the FAA. Unlike the Fifth Circuit and the Ninth Circuit *LaPine* decision, the Tenth Circuit in *Bowen* concluded that the FAA is more than a collection of default rules.³⁷ It held instead that FAA standards are mandatory if the alternate rule would conflict with federal policies furthered by the FAA.³⁸ The court then determined that a party-agreed expansion of judicial review of arbitral awards was an alternate rule that would conflict with the policies of the FAA.³⁹ Those policies, according to the court, are to limit

31. *Id.* at 934 ("no authority clearly allows private parties to determine how federal courts review arbitration awards").

32. *Id.* at 935.

33. *Id.* at 935–36. The Court also cites dicta which appears to support its position, such as Judge Posner's statement in *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504–05 (7th Cir. 1991), that "if parties desire broader appellate review, 'they can contract for an appellate arbitration panel to review the arbitrator's award.'" *Bowen*, 254 F.3d at 934. It also expressly noted that "[i]n dicta, both the Seventh and Eighth Circuits have expressed disapproval of contractually expanded standards of review." *Id.* at 936.

34. *Id.* at 933.

35. *Id.* at 934.

36. *See id.* at 936–37 n.8 (explaining why the court did not decide whether contractually created standards of review create federal jurisdiction).

37. *Id.* at 935.

38. *Id.* at 934–35.

39. *Id.* at 935.

statutory standards for reviewing an arbitral award, in order to “further the federal policy of favoring arbitration by preserving the independence of the arbitration process.”⁴⁰ Thus, according to the court, the FAA’s narrow standards for review of an arbitral award are mandatory because they support the important policy of independence of arbitration from interference by the court.⁴¹

The Tenth Circuit relied on statements by the Supreme Court in earlier cases for support of its position, as well as legislative intent presumed from statutory language. It cited, for example, the statement from the Supreme Court’s decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*⁴² that “[e]nforcing the parties’ contract therefore ‘[gave] effect to the contractual rights and expectations of the parties *without doing violence to the policies* behind . . . [t]he FAA.’”⁴³ The Tenth Circuit then asserted that expanded judicial review, unlike the issue in *Volt*, “threatens to undermine the policies behind the FAA.”⁴⁴ But the policies referred to by the Supreme Court in *Volt* were simply the policies of enforcing the parties’ agreement as written. In *Volt*, the parties had chosen California law as the governing law, and the Supreme Court affirmed a California Court of Appeal decision that such a choice included California arbitration rules, rather than the FAA.⁴⁵ Using the California rules, pursuant to the parties’ choice, did not, in the Court’s view, do violence to the policies of the FAA, which were to ensure that private agreements to arbitrate are enforced according to their terms.⁴⁶ Those policies appear to support expanded judicial review as the parties’ choice, and would seem to be undermined by a refusal to enforce the parties’ agreement. Thus, there does not appear to be support in *Volt* for the Tenth Circuit’s position.

The Tenth Circuit’s reliance on a second Supreme Court case also seems misplaced. It cited *Southland Corp. v. Keating*⁴⁷ for the position that when state laws contravene the policies behind the FAA, those laws are pre-empted by the FAA.⁴⁸ While true, this does not support the Tenth Circuit’s position that expanded judicial review violates policies of

40. *Id.*

41. *See id.* (stating that the FAA’s limited review ensures judicial respect for arbitration).

42. 489 U.S. 468 (1989).

43. *Bowen*, 254 F.3d at 934 (emphasis added) (quoting *Volt*, 489 U.S. at 479).

44. *Id.* at 935.

45. *Volt*, 489 U.S. at 472–73.

46. *Id.* at 479.

47. 465 U.S. 1 (1984).

48. *Bowen*, 254 F.3d at 934–35.

the FAA. In fact, the same point in *Southland*—that state laws are preempted when in violation of FAA policies—was cited by the Supreme Court in *Volt* as being necessary to uphold Congress's principal purpose of ensuring that private arbitration agreements are enforced according to their terms.⁴⁹ Thus, the point of the Supreme Court's holding in *Southland* was to enforce the parties' choice in accordance with congressional intent.

The Tenth Circuit did not deal with the possibility that the policy it relied on—independence of the arbitration process—may be in direct conflict with the primary concern of Congress—that courts should enforce the parties' agreement according to its terms. The conflict occurs because if a court denies expanded judicial review in order to preserve the independence of the arbitral process, the parties' agreement will not be enforced according to its terms. In another context, when two goals of the FAA were said to conflict, the Supreme Court had no hesitation in finding that enforcement of the parties' agreement trumped the competing goal. In *Dean Witter Reynolds, Inc. v. Byrd*,⁵⁰ the Court held that state claims should be arbitrated even though federal claims would be litigated separately, rejecting the argument that bifurcated proceedings would thwart the FAA's goal of speedy and efficient decision making.⁵¹

We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that [courts] rigorously enforce agreements to arbitrate⁵²

Thus, even though the policy of independence of the arbitral process may well be an important goal of the Act, there is no authority for finding that it takes precedence over the goal of enforcement of private agreements, which is the preeminent concern of Congress.

The Tenth Circuit's finding that the grounds for review under the FAA are mandatory is also problematic in light of congressional intent

49. *Volt*, 489 U.S. at 478.

50. 470 U.S. 213 (1985).

51. *Id.* at 217, 219.

52. *Id.* at 221.

that arbitration agreements under the FAA are to be “placed upon the same footing as other contracts.”⁵³ Contracts scholars assert that mandatory rules “are justifiable only to the extent the restriction on contractual freedom is needed to protect (1) parties within the contract, or (2) parties outside the contract.”⁵⁴ The Tenth Circuit’s finding that the FAA grounds for review are mandatory does not appear necessary to protect the parties within the contract, who have chosen expanded review, or any third parties. If an arbitration agreement is to be treated the same as other contracts, as Congress intended, courts should respect the parties’ choice, absent justifiable reasons for restrictions.

Curiously, although the Tenth Circuit asserted various rationales in support of limiting federal review of an arbitration agreement to the grounds set forth in the FAA, the court accepted without question *judicially* created exceptions to the FAA’s statutory grounds, such as “the manifest disregard of the law” standard for vacating an award. After holding that the “parties may not contract for expanded judicial review of arbitration awards,” the court announced that it would review the arbitration award “under the FAA and ‘manifest disregard of justice’ standards.”⁵⁵ Despite noting that Congress, through the FAA, provided “explicit guidance regarding judicial standards of review,”⁵⁶ the court, by applying an additional, judicially created exception to that “explicit guidance,” undercuts its position that the FAA’s statutory grounds for review were intended to be mandatory. Apparently, the court views the grounds in the statute as mandatory for parties, but not for judges.

With respect to the language of the statute, the court noted that although section 4 of the FAA allows parties to seek an order from the court compelling arbitration “in the manner provided for in [the] agreement,” there is no similar language in sections 10 and 11 requiring district courts to follow parties’ agreements in confirming or vacating awards.⁵⁷ The argument, which is essentially that Congress did not intend for courts to comply with parties’ agreements as to grounds for judicial review of an award, is not persuasive in light of the legislative

53. H.R. REP. NO. 68-96, at 1 (1924).

54. Drahozal, *supra* note 5, at 28 (quoting Ian Ayres, *Default Rules for Incomplete Contracts*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 586 (Peter Newman ed., 1998)).

55. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001). The *Bowen* court explained that manifest disregard of the law means “the arbitrators knew the law and explicitly disregarded it.” *Id.* at 932 (citing *Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234, 240 (1st Cir. 1995)).

56. *Id.* at 934.

57. 9 U.S.C. § 4 (2000).

history of the FAA. The legislative concern at the time the FAA was adopted was to prevent undue interference by the courts, which were refusing to enforce the parties' agreements.⁵⁸ Given the context of such judicial hostility to arbitration, one would not expect the legislators in 1925 to envision that parties would agree to additional participation by the courts to review the arbitral result. This does not mean, however, that Congress intended to prohibit the parties from making such an agreement. The FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate"⁵⁹ and to require courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.⁶⁰ Because nothing in the FAA limits parties' ability to agree that they want broader judicial review of their arbitral award than that provided in the FAA, the Tenth Circuit's position is not persuasive.

The Tenth Circuit attempted to justify its restriction on the parties' freedom of contract by asserting that parties simply do not have the power to tell courts what to do. The court asserted that this is a different question from whether there is jurisdiction for parties to seek expanded review.⁶¹ It claimed that the Seventh Circuit in dicta, in *Chicago Typographical Union No. 16 v. Chicago Sun Times*,⁶² disapproved of contractually expanded judicial review, because "federal jurisdiction cannot be created by contract."⁶³ Although the Tenth Circuit appeared sympathetic to the Seventh Circuit's position, it stated that it would not rule on jurisdictional grounds because of its holding that "in the absence of clear authority to the contrary, parties may not interfere with the judicial process by dictating how the federal courts operate."⁶⁴

It may be that the court declined to assert a lack of jurisdiction because the argument was weak. If there is a ground of federal jurisdiction, such as diversity, such jurisdiction should permit courts to enforce the parties' agreement.⁶⁵ As the Ninth Circuit noted in *LaPine*,

58. See H.R. REP. NO. 68-96, at 1 (1924).

59. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985) (citing H.R. REP. NO. 68-96, at 1 (1924)).

60. *Id.* at 219.

61. *Bowen*, 254 F.3d at 936-37 n.8.

62. 935 F.2d 1501, 1505 (7th Cir. 1991). Any reliance on this case, even as dicta, is surprising, since it did not involve the FAA. The arbitration was pursuant to a collective bargaining agreement under § 301 of the National Labor Relations Act. Moreover, the parties had not agreed to seek expanded judicial review.

63. *Bowen*, 254 F.3d at 936-37 n.8 (quoting *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991)).

64. *Id.*

65. If the federal court had jurisdiction to provide narrow judicial review, it would clearly have

“an arbitration issue would not be in the federal courts at all were it not for the fact that they would have jurisdiction over and the obligation to decide the whole matter in the absence of arbitration.”⁶⁶ If the argument is that there is no jurisdiction to review the award on grounds other than the FAA’s statutory grounds, one would think that same argument would exclude the judicially created ground of “manifest disregard of the law.” Moreover, even assuming an absence of authority to review an arbitral award on the merits because of a lack of statutory authority, in appropriate circumstances, parties can consent to a court’s act that is in excess of its statutory authority.⁶⁷

Although the Tenth Circuit’s decision seems at times almost disingenuous, and not well supported by the law cited, the recent en banc decision of the Ninth Circuit in *Kyocera*, vacating *LaPine*, makes no new arguments in opposition to expanded judicial review.⁶⁸ Much of the court’s opinion is an attempt to justify its decision to vacate a three-judge panel decision made six years earlier, on an issue which the parties did not present to the en banc panel for review.⁶⁹ The court’s rehearing en banc of the panel decision permitting expanded judicial review was not only highly unusual, but, according to Judges Rymer and Trott, in a separate statement, improvidently granted because the issue “is not dispositive, does not matter to the parties, was not identified as an issue on appeal, was not thoroughly vented in oral or written argument, is not inconsistent with Ninth Circuit precedent, and does not resolve a circuit split.”⁷⁰

The Ninth Circuit put forth only two reasons for reversing the six-year old panel decision that had permitted expanded judicial review. First, it asserted that Congress intended to preclude more expansive review to preserve speed and flexibility.⁷¹ While Congress may have intended to preserve speed and flexibility under the FAA, this does not establish that it intended to preclude expanded judicial review if it was

a jurisdictional basis for expanded review. However, the FAA itself is considered a regulation of commerce and does not confer federal jurisdiction. Any case properly in the district court under the Federal Arbitration Act must have an independent jurisdictional basis. See 9 U.S.C. § 4 (2002) (providing that independent federal jurisdiction is required when a party seeks to have a federal court enforce its arbitration agreement).

66. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997), *aff’d in part, vacated in part, remanded in part*, 341 F.3d 987 (9th Cir. 2003).

67. *Crowell v. Downey Cmty. Hosp. Found.*, 115 Cal. Rptr. 2d 810, 823–26 (Cal. Ct. App. 2002) (Nott, J., dissenting).

68. 341 F.3d 987 (9th Cir. 2003).

69. See *id.* at 994–98.

70. See *id.* at 1006.

71. See *id.* at 998.

sought by the parties in their arbitration agreement, or even that Congress ever foresaw the possibility. Preserving speed and flexibility was not the primary intent of Congress.⁷² The Ninth Circuit ignores the critical fact that at the time the FAA was passed, Congress's primary intent was to prevent courts from thwarting the parties' arbitration agreement in order that agreements to arbitrate would be enforced according to their terms just like any other contract.⁷³ Where there is a conflict of goals between (1) speed and flexibility and (2) enforcing the parties' agreement according to its terms, the Supreme Court, as noted earlier, has had no hesitation in finding that enforcement of the parties' agreement trumped efficiency, since "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements."⁷⁴

The Ninth Circuit's only other argument was simply that parties cannot tell courts what to do. [B]ecause Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and not others. Private parties' freedom to fashion their own arbitration process has no bearing whatsoever on their inability to amend the statutorily prescribed standards governing federal court review. Even when Congress is silent on the matter, private parties lack the power to dictate *how* the federal courts conduct the business of resolving disputes.⁷⁵

The cases the Ninth Circuit cites as support for its position that parties cannot contract for expanded judicial review provide little comfort. Like the Tenth Circuit, the Ninth Circuit refers to "standards" rather than "grounds" for review.⁷⁶ The Ninth Circuit then cites to cases that say parties cannot make the decision for the courts as to whether a plain error, abuse of discretion standard or a *de novo* standard of review applies.⁷⁷ These are not, however, the standards used when a district court reviews an arbitral award. That standard of review, according to most courts, including the Ninth Circuit,⁷⁸ is "extremely narrow and exceedingly deferential."⁷⁹ The reason it is extremely narrow and deferential, according to the Supreme Court, is because the parties "have

72. See text accompanying notes 46–52.

73. See text accompanying notes 46–52.

74. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

75. *Kyocera*, 341 F.3d at 1000.

76. *Id.*

77. See *id.* (citing *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996), *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001), and *United States v. Vonsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992)).

78. *Hawaii Teamsters & Allied Workers Union v. UPS*, 241 F.3d 1177, 1180 (9th Cir. 2001).

79. See *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321 (1st Cir. 2000).

contracted to have disputes settled by an arbitrator” and thus “it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept.”⁸⁰ Thus, the scope of the standard of review is *determined by the parties’ contract*. It therefore follows that if the parties change their contract to provide that the dispute will not be finally settled by an arbitrator, there is no longer the need for a narrow and deferential standard of review. This is not a question of parties telling courts what to do, but of parties changing the underlying basis on which courts make the determination of the proper standard of review.

The parties who seek expanded judicial review are not trying to dictate to the courts the standard of review. They are simply asking the courts to consider, as provided in the parties’ arbitration agreement, whether an arbitrator erred as to the law, or as to the law and the facts. This is similar to what district courts do when they review decisions from administrative agencies or bankruptcy courts.⁸¹ By conflating “standards” of review and “grounds” of review, both the Ninth and Tenth Circuits are misstating the issue. It is not a question of whether parties can dictate to the courts which standard of review applies—for example, the plain error standard, the *de novo* standard or the abuse of discretion standard. Rather, the question is whether the grounds of review in the FAA are default grounds which the parties can contract around, as the Fifth Circuit asserts, or are mandatory and exclusive grounds, as the Tenth Circuit claims. In conflating “standards” and “grounds,” both the Ninth and the Tenth Circuits seem to be trying to draw attention away from the existing judge-created grounds of review that go beyond the statutory grounds in the FAA. While claiming that the FAA statutory grounds are mandatory and exclusive, both the Tenth Circuit and the Ninth Circuit acknowledge that “manifest disregard of the law is a non-statutory ground of review,” and the Ninth Circuit adds yet another non-statutory ground, “completely irrational.”⁸² While one might favor having such grounds to provide at least a small safety net against arbitrator abuse, their existence undercuts the courts’ arguments that the

80. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987). In *Hawaii Teamsters*, the Ninth Circuit also notes that “[b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept.” 241 F.3d at 1181.

81. In his concurring decision in *LaPine*, Judge Kozinski noted that even though reviewing an arbitration award is different work from conducting a trial, it was not different from the review that district courts perform in appeals from administrative agencies and bankruptcy courts, or on habeas corpus. *LaPine*, 130 F.3d at 891.

82. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003).

FAA's statutory grounds for review of an arbitral award are mandatory and exclusive.

Neither the Ninth nor the Tenth Circuit meets head-on the critical issue of treating the parties' agreement like any other contract. Parties only get to an arbitral forum by consent. When they opt for expanded judicial review, they have, in essence, only given partial consent to arbitration—consent to have the first, or trial stage, of their dispute handled by an arbitrator rather than a judge. They have not consented to have the arbitral decision become final and binding without full judicial review on either the law, or, depending on their agreement, on both the law and the facts. The FAA does not prohibit parties' partial consent to arbitration.⁸³ Because the FAA was passed in order to encourage arbitration, permitting parties who otherwise would not choose to arbitrate at all, to choose "partial arbitration" by providing for expanded judicial review would seem to encourage arbitration. One has the impression, however, particularly in the Ninth Circuit opinion, that the court assumes that if parties are permitted to have expanded judicial review, they will all opt for expanded review and therefore burden the courts and clog court dockets.⁸⁴ But the opposite is probably more likely to be true. First of all, not all parties will want expanded judicial review. Many, if not most, who want to arbitrate, will prefer to have a final and binding arbitration that is not reviewable on the facts or the law. The benefits of speed, flexibility and informality that have already caused many parties to choose arbitration continue to carry persuasive value. However, for those who want expanded judicial review, and are not permitted to have it, their most likely course of action will be to try their entire dispute in the court system. Thus, if courts prevent parties from having "partial arbitration" as an option, they will lose the opportunity to have more parties choose arbitration for the very time-consuming trial stage of the dispute resolution process.

In sum, the differing viewpoints of courts that have considered expanded judicial review essentially express two different perspectives.

83. There is no statutory language prohibiting "partial" consent to arbitration. Whether there can be expanded judicial review, of course, depends upon whether the grounds for review in the statute are considered default standards, which parties can contract around, or whether they are considered mandatory and exclusive.

84. The Ninth Circuit appeared quite concerned by the burden that would be placed on it if it had to review the issues on which the parties sought review, which, according to the court, "would require a detailed examination of California law and the application of that law to a factual record spanning several years and many thousands of pages." *Id.* at 994. The Tenth Circuit, on the other hand, acknowledged that "[r]eviewing an arbitration award is certainly less work than hearing the entire case," and that "even under expanded standards of review, arbitration reduces the burden on district courts." *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 n.6 (10th Cir. 2001).

The first view holds that the parties' choice to expand judicial review is a matter of consent just like any other part of their arbitration agreement, and therefore entitled to enforcement under the FAA's policies favoring enforcement of the agreement according to its terms. That means the grounds for review found in the FAA are default grounds which can be changed by contract of the parties. The opposing view is that the agreement to expand judicial review is in conflict with the FAA because it fundamentally changes the nature of the arbitral process and creates new and different obligations for the courts, which impinge on the intended independence of the arbitral process. That means the FAA grounds for review are mandatory and exclusive, and parties cannot change them by contract.

The conflicting positions of the various circuit courts represent different approaches to interpreting the statute. The courts permitting expanded review look at the underlying congressional intent, and find that enforcement of the parties' agreement according to its terms is the most important goal of the statute. The courts opposing expanded review look only at the language of the statute, and find that the statutory grounds are restrictive and that parties have no power to go beyond the statute to require additional review by the court. Interestingly, the more technical and formalistic approach of the Tenth Circuit and the recent Ninth Circuit en banc panel appear to parallel the position of courts that, prior to the passage of the FAA, jealously guarded their own prerogatives by refusing to enforce arbitration agreements. Like the Ninth and Tenth Circuits, those courts did not think parties could tell courts what to do. It took congressional action before parties to an arbitration agreement could have some assurance that their agreement would be enforced.

Although it is difficult to predict which view of expanded judicial review will prevail in the Supreme Court, the Fifth Circuit's position that the FAA permits expanded judicial review appears more consistent with both legislative intent and Supreme Court decisions emphasizing the importance of enforcing arbitral agreements in accordance with their terms. On the other hand, there are a number of reasons, which will be discussed in the next Part, why parties and their counsel, in either a domestic or an international arbitration held in the United States, should be cautious about agreeing to expanded judicial review of an arbitration award at the present time.

III. PROBLEMS OF DOMESTIC REVIEW AND ENFORCEMENT

Once an arbitral award has issued, parties may simply agree to comply with the award.⁸⁵ If payment by the losing party is not forthcoming, however, the winning party will seek to confirm the award in order to obtain enforcement, and the losing party may attempt to have the award vacated. Choice of the court where enforcement or vacatur is sought can be critical, given the split in the circuit courts over whether to permit expanded judicial review. Parties who have agreed to expanded judicial review should, of course, have also agreed to conduct their arbitration within a judicial circuit that permits such review. However, even when the parties have chosen a complying jurisdiction, the sailing will not necessarily be smooth. This Part discusses some of the various problems which could arise in domestic arbitrations if expanded judicial review is sought by the parties.

The first, and perhaps most obvious problem is that the Supreme Court could, at an inopportune moment for the arbitrating parties, come down with a decision that essentially adopts the view of the Ninth and Tenth Circuits—i.e., that the FAA prohibits expanded judicial review. The effect on the parties would be to deny the judicial safety net they had sought. Moreover, there is a risk that if a court refused to review the award in the expanded manner agreed on by the parties, it could also decide to invalidate the entire arbitration agreement. The basis for invalidation would be that since the parties' consent to arbitrate depended on having a judicial safety net, which was now unavailable, their original consent to arbitrate was no longer valid. The Tenth Circuit avoided that result in *Bowen* by noting specifically that the losing party had "petitioned the district court to compel all claims to arbitration before agreeing to an expanded judicial standard of review."⁸⁶ That meant that the agreement to have expanded judicial review was not the basis of the agreement to arbitrate. On the other hand, if the agreement to have expanded judicial review is contained within the original arbitration clause, invalidation of the agreement would be quite possible.

Two California state court decisions applying state law suggest two different paths a court might take after finding that an agreement for expanded judicial review was not enforceable. In *Crowell v. Downey*

85. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 704 (2d ed. 2001) ("Many international arbitral awards do not require either judicial enforcement or confirmation, because they are voluntarily complied with."); COE, *supra* note 9, at 295 ("Awards are often complied with voluntarily.").

86. *Bowen*, 254 F.3d at 941.

Community Hospital Foundation,⁸⁷ the California Court of Appeal invalidated, under the California Arbitration Act, an arbitration agreement that sought expanded judicial review.⁸⁸ The arbitration clause required the arbitrator to prepare findings of fact and conclusions of law and provided for judicial review on the merits.⁸⁹ Prior to beginning any process of arbitration, Ronald Crowell, M.D., a professional corporation, brought an action for declaratory relief against Downey Community Hospital Foundation (“DCHF”), “seeking a judicial determination that the arbitration agreement was ‘valid and enforceable,’” and that DCHF was obligated to arbitrate.⁹⁰ The trial court dismissed the complaint on the grounds that the right of judicial review of the merits was not permissible under California law and, therefore, the entire underlying arbitration agreement was unenforceable.⁹¹ Crowell argued on appeal that the trial court had erred in not letting him sever the unenforceable provisions of the arbitration agreement—the provisions providing for expanded judicial review.⁹² However, the Court of Appeal found no error. In affirming the lower court’s judgment, it held as follows:

[t]he provision for judicial review of the merits of the arbitration award was so central to the arbitration agreement that it could not be severed. To do so would be to create an entirely new agreement to which neither party agreed. . . . The parties to the contract here agreed to arbitration with judicial review of errors of law and fact. Without that provision, a different arbitration process results.⁹³

In a strongly worded dissent, Judge Michael G. Nott noted that refusing expanded judicial review and invalidating the arbitration agreement resulted in the “worst of all worlds.”

The express intent of the parties has been thwarted and, rather than having most of the costly and time-consuming aspects of the litigation resolved by the arbitrator with the trial court merely providing an

87. 115 Cal. Rptr. 2d 810 (Cal. Ct. App. 2002).

88. *Id.* at 810.

89. The arbitration clause provided in pertinent part that a court shall have the authority to review the transcript of the arbitration proceedings and the arbitrator’s award and shall have the authority to vacate the arbitrator’s award, in whole or in part, on the basis that the award is not supported by substantial evidence or is based upon an error of law.

Id. at 812.

90. *Id.*

91. *Id.* at 813.

92. *Id.* at 817.

93. *Id.*

oversight function, the case will now be fully litigated and tried in court.⁹⁴

A few months later, a California Court of Appeal in a different appellate district followed *Crowell* in refusing to grant expanded judicial review, but did not invalidate the entire arbitration agreement. In *Oakland-Alameda County Coliseum Authority v. CC Partners*,⁹⁵ the court specifically agreed with the primary holding in *Crowell* that the court did not have the power to review questions of law decided by the arbitrator.⁹⁶ However, it did not find the arbitration agreement void and unenforceable. Rather, it severed as unenforceable the provision for expanded judicial review.⁹⁷

In distinguishing *Crowell*, the *Oakland-Alameda* court noted that the *Crowell* court was not dealing with an arbitral award, but rather the dismissal of a complaint seeking declaratory relief.⁹⁸ The *Oakland-Alameda* court then observed that in the case before it, unlike *Crowell*, there was an arbitral award, and concluded that the award could not be vacated because the parties' "improper attempt to expand the scope of judicial review is not among the statutory grounds for vacating an arbitration award."⁹⁹ This is a clever argument because it focuses on vacating the award, rather than on invalidating the underlying arbitration agreement, which would have the effect of rendering the award void. It thus appears consistent with the court's position that the statutory grounds for vacating an arbitration award are exclusive. The counter argument, however, is simply that for an arbitrator to make a valid award, she must have the consent of the parties to arbitrate, and if that consent is lacking because it was contingent on expanded judicial review, then rendering an arbitration award is itself an act which exceeds the powers of the arbitrator. An arbitrator's act in excess of her powers is a statutory ground for vacating an award.¹⁰⁰

The *Oakland-Alameda* court next distinguished *Crowell* on the ground that in the case before it the agreement containing the arbitration clause also contained a broad severance clause, which was not the case in *Crowell*.¹⁰¹ The court found the language of the severance clause

94. *Id.* at 827.

95. 124 Cal. Rptr. 2d 363 (Cal. Ct. App. 2002).

96. *Id.* at 371.

97. *Id.* at 371-72.

98. *Id.* at 371.

99. *Id.* (citing CAL. CIV. PROC. CODE § 1286.2).

100. 9 U.S.C. § 10(a)(4) (2000); CAL. CIV. PROC. CODE § 1286.2(a)(4) (West Supp. 2003).

101. *Oakland-Alameda*, 124 Cal. Rptr. 2d at 371.

unambiguous and the intent of the parties clear: all provisions were to be enforced except to the extent they were invalid.¹⁰² The court also relied on principles of equity to support severance rather than voiding the entire agreement.¹⁰³ However, the *Oakland-Alameda* court did not squarely focus on the *Crowell* court's view that the agreement for expanded judicial review could not be severed because judicial review on the merits was integral to the parties' consent to the arbitration agreement, that is, "[t]o [sever] would be to create an entirely new agreement to which neither party agreed."¹⁰⁴

Similarly, the Ninth Circuit, in its en banc decision in *Kyocera*, came up against the same issue, but did not deal with the effect that severing an expanded judicial review clause would have on the parties' consent. The *Kyocera* case did not involve a situation like *Bowen*, where the Tenth Circuit was able to dodge the bullet because the losing party had petitioned to compel arbitration *before* the parties agreed to expanded judicial review.¹⁰⁵ Instead, the Ninth Circuit had to deal with an arbitration agreement that included an agreement for expanded judicial review in a matter that had begun sixteen years before, in 1987, with a motion to compel arbitration. The arbitration award, which was issued in 1994 (1) had been affirmed in 1995 by a district court under the narrow grounds of the FAA, (2) had been appealed to the Ninth Circuit, (3) had been remanded to the district court to reconsider under the broader judicial review agreed upon by the parties, (4) had been affirmed by the district court under the expanded judicial review sought by the parties,¹⁰⁶ (5) had been appealed to a second Ninth Circuit panel, which affirmed, and (6) was now being reviewed by the en banc panel. To invalidate the award after sixteen years of intensive effort and activity by the parties and their counsel would have undoubtedly brought forth significant criticism,¹⁰⁷ particularly when the parties never sought en banc review of this issue. Moreover, the losing party did not appear to be disadvantaged, because the award had been affirmed at the district court level under both the narrow FAA grounds and (on remand) under the expanded judicial review grounds, and was affirmed at the appellate

102. *Id.*

103. *Id.* at 371–72.

104. *Crowell v. Downey Cmty. Hosp. Found.*, 115 Cal. Rptr. 2d 810, 817 (Cal. Ct. App. 2002).

105. *See* text accompanying note 87.

106. The district court vacated only one finding of fact that did not affect the damages award. *Kyocera Corp. v. Prudential-Bache Trade Svcs., Inc.*, 341 F.3d 987, 993 (9th Cir. 2003).

107. The court noted that attorneys' fees of \$14,500,000 were awarded to LaPine and Prudential as part of the arbitration award, before any of the subsequent appeals and remands. *Id.* at 990 n.3.

level under the expanded grounds, which included the narrower FAA grounds.

Nonetheless, Kyocera argued that it would never have agreed to arbitrate at all if expansive review were precluded, and urged the court to invalidate the entire arbitration clause.¹⁰⁸ Rather than determining that the arbitration agreement need not be invalidated because Kyocera suffered no harm, the Ninth Circuit based its decision to sever the provision for expanded judicial review on the severability doctrine. It turned to California law, finding that the severability of particular contract terms is a matter of state law.¹⁰⁹ However, the Ninth Circuit's reliance on the particular California cases it cited seems misplaced. The major cases, *Amendariz v. Foundation Health Psychcare Services*,¹¹⁰ *Saika v. Gold*,¹¹¹ and *Little v. Auto Stiegler, Inc.*,¹¹² all deal with unconscionable provisions, which courts permit to be severed unless the provisions permeate the agreement such that it cannot be cured by the severance.¹¹³ In *Amendariz*, the California Supreme Court found the unconscionable provisions could not be severed, because the arbitration agreement was permeated by unconscionability.¹¹⁴ In *Saika*, the California Court of Appeal found unconscionable, and severed, a provision in a doctor-patient agreement that permitted either party to reject an arbitration award of \$25,000 or greater, and to request a trial de novo in superior court.¹¹⁵ The court found this provision unconscionably favored the doctor, even though on its face it applied to both parties. The court did not, however, invalidate the underlying arbitration agreement, because it was not unconscionable.¹¹⁶ In *Little*, the California Supreme Court severed a provision for review by a second arbitrator if an award exceeded \$50,000, because it was so one-sided as to be unconscionable.¹¹⁷ The court found that the second proceeding was geared toward giving the arbitral defendant, an employer, a substantial opportunity to overturn a sizeable arbitration award, and that the award was unlikely to be increased against the employer.¹¹⁸ Although the appeal provision was too one-sided to be enforced, the court found it

108. *Id.* at 1000.

109. *Id.* at 1001.

110. 24 Cal. 4th 83 (2000).

111. 49 Cal. App. 4th 1074 (1996).

112. 29 Cal. 4th 1064 (2003).

113. *Amendariz*, 24 Cal. 4th at 124.

114. 24 Cal. 4th 83 at 124–27.

115. 49 Cal. App. 4th at 1080.

116. *Id.*

117. 29 Cal. 4th 1064 at 1073–74.

118. *Id.*

could be severed from the arbitration agreement, which was not otherwise unconscionable.

The Ninth Circuit cited *Little* as support for severing the expanded judicial review clause, stating:

We also note that the *Little* court severed a term providing for *arbitral* review of an arbitration award; if internal arbitral review was not sufficiently central to the purpose of an arbitration process to defeat severability, then surely the external scope of *judicial* review is not sufficiently central to the arbitration clause to defeat severability.¹¹⁹

This suggests that the Ninth Circuit completely missed the point of the California Court's decision, which focused on fairness. The *arbitral* review process was severed because it unfairly disadvantaged one party, while the basic arbitration clause was not unfair. Therefore, severance was possible because severing the offending clause did not affect the underlying arbitration agreement. In *Kyocera*, on the other hand, neither party, nor the court, had asserted there was any unfairness in the expanded judicial review clause, which was a perfectly symmetrical clause equally benefiting both parties. The decision with respect to severance, however, should consider the impact that severing the expanded judicial review clause has on the parties' consent to arbitration. The point raised in *Crowell*, and completely ignored by the Ninth Circuit, is that the expanded judicial review provision was central to the arbitration agreement; without it, the parties would not have agreed to arbitrate, and arbitration can only occur if the parties consent. For that reason, according to the *Crowell* court, the expanded judicial review provision could not be severed, because to sever it would be "to create an entirely new agreement to which neither party agreed," and cause "a different arbitration process."¹²⁰

Although the Ninth Circuit mentioned *Oakland-Alameda* as a "see also" cite, curiously, it failed to mention the other pertinent California appellate court decision, *Crowell*. It also did not state whether there was a broad severance clause in the *Kyocera* contract, which was one of the ways *Oakland-Alameda* had distinguished *Crowell*.¹²¹

119. *Kyocera*, 341 F.3d at 1002.

120. *Crowley*, 115 Cal. Rptr. 2d at 817.

121. The reasoning in *Oakland-Alameda* suggests that if parties want to preserve an award even though expanded judicial review is denied—and they may not want this at all—they should include a broad severance clause in their agreement. The parties may not want to preserve the award without expanded judicial review if that was the primary reason they were willing to consent to arbitrate in the first place.

The Ninth Circuit's finding that severing expanded judicial review provisions is analogous to severing unconscionable clauses is not persuasive because it does not consider whether severance of the judicial review provision vitiates the parties' consent. After discussing the California cases, the court ultimately fell back on equity, citing *Little* for the proposition that in deciding whether to sever, courts should look to the overall "interests of justice."¹²² The Ninth Circuit then held that "the offending clauses must, in the interests of justice, be severed from the remainder of the contract."¹²³

It is not difficult to agree that an arbitration agreement should probably not be invalidated seven years after the award issued, during which time the award was repeatedly affirmed after court review, remand, and more review. However, there was perhaps a better way to deal with Kyocera's assertion that there was no valid consent to the underlying arbitration because its consent to arbitrate depended upon expanded judicial review of any award. The Ninth Circuit's en banc panel could have pointed out that since appellate courts had upheld the arbitration award under both the narrow and the broader grounds for review, Kyocera had suffered no harm. Although the en banc panel itself did not review the award on the merits, Kyocera could not argue that the clause guaranteed en banc review, because an en banc hearing only occurs if a majority of circuit judges vote to order such a hearing or rehearing.¹²⁴

On the other hand, by treating severance of the expanded judicial review provision as though it were parallel to a situation where a clause was unconscionable, the Ninth Circuit does not persuade, because the unconscionable clauses are not analogous; they are one-sided and do not necessarily affect the parties' consent to the underlying agreement to arbitrate. Moreover, it remains unclear whether other federal courts or even other California courts will use severance as a way to save an arbitral award if expanded judicial review is rejected. Instead, courts may focus on the consent of the parties and find, like the *Crowell* court, that there was no consent to the arbitration agreement without the expanded judicial review agreed upon by the parties. Therefore, if parties know they want the arbitration agreement or award to be valid even if the provisions for expanded judicial review are not enforced, they should specifically state in their arbitration agreement that they still agree

122. 341 F.3d at 1001 (citing *Little*, 29 Cal. 4th at 1074).

123. *Id.* at 1002.

124. 28 U.S.C. § 46(c) (2003).

to arbitrate even if the expanded judicial review provisions are found to be unenforceable.¹²⁵ On the other hand, if their consent to arbitrate depends upon the availability of expanded judicial review, they should state that the arbitration agreement is invalid if the expanded judicial review provisions are found to be unenforceable.

A second problem for domestic enforcement is that parties who seek expanded judicial review need to be sure that they have proper jurisdiction to be heard in a federal court that permits such review, particularly if they are in a state where states courts have either denied judicial review on the merits, or have not made that decision and could go either way. Parties cannot automatically go into federal court under the FAA. Although the FAA creates a body of federal substantive law, it does not provide a basis for independent federal question jurisdiction.¹²⁶ Thus, parties must have some independent basis for federal jurisdiction, such as diversity.

Assume the parties have arbitrated in Texas and have included an expanded judicial review clause in their arbitration agreement. If there is a basis for federal court jurisdiction, the federal district courts, being part of the Fifth Circuit, would enforce the provision for expanded judicial review. However, if there is no jurisdictional basis for getting into federal court, enforcement can only be had in state court.¹²⁷ If the parties end up in state court in Texas, questions may arise as to whether the FAA or Texas arbitration law applies to the agreement, and if the FAA applies, whether the Texas state court will permit expanded judicial review.¹²⁸

125. See Ronald M. Greenberg, *Uncertain Appeal: Both Opponents and Advocates of Expanded Judicial Review of Arbitration Decisions Invoke the Intent of the Federal Arbitration Act*, 25 L.A. LAW. 35, 41 (2002) (advising that parties who now have agreements for arbitration that contain an enhanced judicial review provision should, if they still want arbitration in the event the judicial review provision is found unenforceable, so specify in an amendment to their arbitration agreements).

126. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). ("Section 4 [of the FAA] provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.")

127. See *id.* at 26 ("[E]nforcement of the Act is left in large part to state courts . . .").

128. It appears that the question of expanded judicial review has not been decided by the Texas Supreme Court. In *Mariner Financial Group Inc. v. Bossley*, 79 S.W.3d 30, 40 (Tex. 2002), in a concurring opinion in which three justices joined, Justice Owen noted that "[i]t is not at all clear whether parties can, by their agreement, expand the standards for judicial review of arbitral awards that are specified in section 10(a) of the FAA." One Texas Court of Appeals case, however, indicated that if there were an express provision in the arbitration agreement providing for expanded judicial review, such provision would apply rather than "the FAA's default standard." *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Folded, L.L.P.*, 105 S.W.3d 244, 252 (Tex. App. 2003).

As to the question of whether the FAA or Texas law applies to the agreement, if the parties clearly stated that the FAA applies to their arbitration agreement and the basic contract “evidenc[es] a transaction involving commerce,”¹²⁹ a court should apply the FAA. If parties did not state any governing law, the FAA may nonetheless apply, again assuming the transaction involved commerce.¹³⁰ The phrase “involving commerce” has been broadly construed, and would probably cover most commercial contracts.¹³¹ On the other hand, if the parties have agreed that Texas law governs the contract, then the Texas Arbitration Act,¹³² rather than the FAA, may govern¹³³ and the Texas court would have to decide whether the Texas Arbitration Act permits expanded judicial review.

If the FAA, rather than Texas law, applied, but the case was determined in state court, would the Texas court feel bound by the Fifth Circuit’s decision to permit expanded judicial review? Or could it consider the question of expanded judicial review as an independent interpreter of federal law? With respect to the Fifth Circuit’s holding, Texas courts, like many state courts, do not consider decisions on federal law by federal courts, other than the United States Supreme Court, as binding on them.¹³⁴ Rather, these decisions are only persuasive.¹³⁵ Where the federal appellate courts are divided, then a Texas court, like most state courts, may consider itself free to make its own

129. 9 U.S.C. § 2 (2000).

130. There may be a question as to whether § 10 of the FAA, which provides the grounds for judicial review, applies in state court. See generally Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Indiana L.J. (forthcoming 2004).

131. See, e.g., *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 277 (1995) (interpreting “involving commerce” of section 2 of the FAA as implementing Congress’s intent “to exercise [its] commerce power to the full”). See also *In re L & L Kepwood Assoc.*, 9 S.W.3d 125, 127 (Tex. 1999) (stating that the FAA applied to “any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach”).

132. TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.001–171.098 (Vernon 1997 & Supp. 2001).

133. See *Volt Info. Sciences v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989) (“[A]pplication of the California statute is not pre-empted by the [FAA] in a case where the parties have agreed that their arbitration agreement will be governed by the law of California.”). For a discussion of FAA preemption generally, see Drahozal, *supra* note 130.

134. See, e.g., *J.M. Huber Corp. v. Santa Fe Energy Resources*, 871 S.W.2d 842, 846 (Tex. App. 1994) (“Although a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding.”). For a good discussion of the standards various state courts use to interpret and apply federal law, see Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143 (1999).

135. See *Lee M. Bass, Inc. v. Shell Western E & P*, 957 S.W.2d 159, 162 n.4 (Tex. App. 1997) (“Although we agree . . . that we are not bound by federal precedent, such precedent may be persuasive.”)

determination.¹³⁶ Because a Texas court would not see itself as bound by the Fifth Circuit's holding, it could interpret the FAA similarly to the way the Tenth Circuit did—that is, to reject expanded judicial review. Moreover, the Texas court might also determine that the question of whether to grant expanded judicial review was a procedural question. In that case, even though the FAA would govern substantive legal issues, the court would apply the Texas Arbitration Act to the question of expanded judicial review, since this issue was procedural.¹³⁷ It could, therefore, deny expanded judicial review.¹³⁸

Thus, the question of whether the parties' agreement for expanded judicial review will be respected by a court will depend on a number of factors. First, it will depend on whether enforcement is sought in a federal court within one of the federal circuits that have permitted expanded review. If the award will be not reviewed in federal court, but in a state court under state law, the question is how the state court will decide the issue under state arbitration law. If review of the award is in state court but under the FAA, the decision whether to permit expanded review may well depend on the state court's interpretation of federal law, or on its determination that a provision for expanded review is procedural and thus determined by state procedural law. All of these various possibilities suggest that parties should try to clearly provide in their agreement whether state or federal law applies, and that they should try to ascertain in advance whether there will be jurisdiction to seek review in a court which permits expanded judicial review.

A third problem concerning expanded judicial review involves the permissive character of the venue provisions of the FAA.¹³⁹ Assume the parties, who have agreed to expanded review and meet the jurisdictional requirements of the federal court, hold their arbitration in Texas, which is

136. See *Rohr Aircraft Corp. v. County of San Diego*, 336 P.2d 521, 524 (Cal. 1959), *rev'd on other grounds*, 362 U.S. 628 (1960) ("Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law."); *Zeigler*, *supra* note 134, at 1154 ("Most state courts facing [divided opinions in lower federal courts] consider themselves free to make their own independent determination.")

137. See *Brooks v. Pep Boys Auto. Supercenters*, 104 S.W.3d 656, 659 (Tex. App. 2003) ("Even when applying the FAA, however, a Texas court must apply Texas procedural law and not federal procedural law.")

138. Presumably the state court could, based on the substantive-procedural distinction, refuse to apply an expanded judicial review provision even if the Supreme Court would hold such provisions enforceable as federal procedural law. But there is language in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), suggesting that the FAA represents "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," so it is not entirely clear that state courts can apply state procedural law in FAA cases, *id.* at 24.

139. 9 U.S.C. §§ 9–11 (2000).

in the Fifth Circuit. When the award is granted, the winning party, who suspects the award might be overturned under expanded review, races back to confirm the award in his home state, which is in the Tenth Circuit. The award is then confirmed under narrow standards, since courts following the Tenth Circuit's decision will not permit expanded review.

The party's act of going to a state other than the site of the arbitration for a confirmation order does not violate the venue provisions of FAA, even though section 9 appears to limit venue. That section states that, unless the parties have named a specific court, "application [for confirmation] may be made to the United States court in and for the district within which such award was made."¹⁴⁰ However, the Supreme Court made clear in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*¹⁴¹ that the venue provisions of the FAA are permissive.¹⁴² It found that the intent of Congress was to liberalize venue provisions by expanding them and that Congress did not intend to foreclose suit in locations which would otherwise be considered a proper venue, such as the residence of the defendant.¹⁴³ The winning party could thus confirm in his home district, under a narrower standard than the parties agreed to. He takes the risk, however, that a district court that would refuse to apply the broader standard of review might invalidate the underlying arbitration agreement and vacate the award because the parties had not agreed to arbitrate except with expanded judicial review. The losing party, who would generally want broader judicial review in order to expand his chance that the award could be overturned, would probably move to vacate the award in the Texas court, but could conceivably (assuming proper venue), move to vacate in a jurisdiction that denies expanded judicial review, in the hope that the entire agreement would be vacated.

To deal with the permissive venue problem, parties should draft an arbitration agreement that provides that the party will only seek to confirm, vacate, modify, or correct the award in the jurisdiction where

140. *Id.* § 9. Similarly, section 10(a), governing motions to vacate arbitration awards, provides that "the United States court in and for the district wherein the [arbitration] award was made may make an order vacating the award upon the application of any party to the arbitration [in any of five enumerated situations]." Section 11, on modification or correction, provides that "the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration."

141. 529 U.S. 193 (2000).

142. *Id.* at 195.

143. *See id.* at 200 (stating that Congress made no suggestion textually or otherwise that the venue provisions foreclosed suit where the defendant resided).

the arbitration is held. Further, assuming there is federal jurisdiction, the parties should include a provision that any such action will only be brought in federal court.

IV. COMPLEXITIES INVOLVED IN INTERNATIONAL ENFORCEMENT

In an arbitration that takes place in the United States between a foreign party and a U.S. party, the U.S. party, if it wins the arbitration, may need to go to the foreign jurisdiction where the opposing party's assets are located to enforce the award. At the same time, the losing party may bring an action to vacate the award in the United States. This Part will look at some of the complexities of international enforcement of arbitral awards and will consider some of the problems with trying to enforce an award internationally when the parties have sought expanded judicial review.

A. *Grounds for Non-Enforcement under the New York Convention*

The place where the U.S. party will bring an enforcement action is likely to be a Contracting State under the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention" or "the Convention"),¹⁴⁴ which has been adopted by most trading nations. It is important, therefore, to focus on the Convention in order to understand the framework it provides for the international enforcement of arbitration awards.

The goal of the Convention is to make arbitration awards easily enforceable internationally.¹⁴⁵ The Convention requires Contracting States to recognize non-domestic arbitral awards as binding and to enforce them without imposing more onerous conditions than are imposed on domestic awards.¹⁴⁶ The Convention then provides seven different grounds which permit the enforcing court, in its discretion, to refuse recognition and enforcement.¹⁴⁷ The grounds for non-enforcement

144. June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. The New York Convention has been adopted by 134 countries. UNCITRAL Website, <http://www.uncitral.org>. The Inter-American Arbitration Convention, Jan. 30, 1975, I.L.M. 336, has a similar enforcement scheme.

145. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (stating that the Convention's goal is to encourage international recognition and enforcement).

146. The New York Convention, *supra* note 143, art. I, III, 21 U.S.T. at 2519, 330 U.N.T.S. at 38, 40.

147. Article V provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

are narrow. They do not permit non-enforcement for errors of fact or law, because the merits of an arbitral award are not subject to review. Rather, enforcement may be denied for deficiencies in the fairness of the process, the validity of the agreement, the scope of the arbitration, and the arbitrability of the subject matter, or if enforcement of the award would contravene the public policy of the enforcing nation. If none of the grounds for non-enforcement is present, the Contracting State “shall recognize arbitral awards as binding and enforce them.”¹⁴⁸ There is thus a strong presumption in favor of enforcement.¹⁴⁹

Even though the narrow bases for refusal to enforce are meant to encourage and harmonize international enforcement, the specific statutory grounds are not completely independent of local law.¹⁵⁰ Perhaps the strongest example of interaction with local law is found in

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Id. art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40–42.

148. *Id.* art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40.

149. Indeed, the ease with which enforcement of awards is obtained is considered one of the major advantages of international commercial arbitration. See COE, *supra* note 9, at 61 (“[B]ecause the grounds for declining enforcement tend to be narrowly construed, awards enjoy predictable enforceability. Judgments, by contrast, are subject to no similar global regime, thus making arbitration relatively advantageous in a critical respect.”); RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 12 (2000) (“Enforcement under the New York Convention creates an advantage of arbitration over litigation because of the absence of a similar universal international convention covering litigation judgments.”).

150. Under the New York Convention, local law can determine incapacity of the parties, validity of the agreement, proper notice, proper composition of the arbitral authority, the proper arbitral procedure, and vacatur. The New York Convention, *supra* note 143, art. V(1), 21 U.S.T. at 2520, 330 U.N.T.S. at 40–42.

Article V(1)(e), which provides in pertinent part that recognition and enforcement of the award may be refused if the award has been set aside “by a competent authority in the country in which, or under the law of which, that award was made.”¹⁵¹ Thus, if the arbitration loser can persuade a court at the place of arbitration to vacate the award based on that jurisdiction’s domestic law, he can then come into the enforcing jurisdiction, establish that the award has been set aside by the courts in the rendering jurisdiction, and thereby most likely prevent the winner from enforcing the award.¹⁵²

It is important to note that the Convention does not provide a court with the authority to vacate or set aside a foreign arbitral award.¹⁵³ The court can refuse to recognize and enforce a foreign award under the Convention, but that is not the same as annulling or setting aside the award, which is a procedure reserved for the court in the jurisdiction where the award was made.¹⁵⁴ The difference lies in the consequences of the two proceedings.¹⁵⁵ Denial of enforcement does not make the award

151. Note that while theoretically, “under the law of which, that award was made” could lead to a law of a different jurisdiction than that of the seat of the arbitration, this would rarely be the case. See *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 21 n.3 (2d Cir. 1997) (acknowledging that an award could be rendered under the arbitral law of a state other than the state where the arbitration is held, but commenting that “[t]his situation may be so rare as to be a ‘dead letter’”) It is generally agreed that the law referred to here is the procedural law, not the substantive law, and the procedural law is almost always the law of the seat of the arbitration. See *Int’l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Indus. Y Comercial*, 745 F. Supp. 172, 177–78 (S.D.N.Y. 1990) (citing several foreign court decisions). Also, although the clause “where the award was made” could mean where signed, or where arbitrators met for some of the hearings, it is generally agreed to mean the arbitral situs. See BORN, *supra* note 85, at 760–61 (discussing various definitions of “made”). For simplicity’s sake, in this Article this clause will be referred to as meaning the seat of the arbitration, or the jurisdiction where the arbitration took place (which will be assumed to be the same).

152. However, the loser is not assured of this result since Article V states that the enforcing court “may” refuse enforcement on the grounds listed, not that it “shall” do so. Some courts have enforced awards which were previously annulled by courts in the place of arbitration. See *infra* text accompanying notes 162–69.

153. In *Toys “R” Us*, 126 F.3d 15 (2d Cir. 1997), the court noted that “many commentators and foreign courts have concluded that an action to set aside an award can be brought only under the domestic law of the arbitral forum, and can never be made under the Convention.” *Id.* at 22. The only action permitted a court with respect to a foreign arbitral award under the Convention is to recognize the award, and enforce it, or refuse to do so. *Id.*

154. As commentators have noted, “grounds of annulment are conceptually and jurisdictionally distinct from grounds of nonrecognition or nonenforcement.” Ray Y. Chan, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy*, 17 B.U. INT’L L.J. 141, 160 (1999).

155. Another difference is that the grounds for vacating an award are determined by the domestic law of the country where the arbitration was held. Grounds for denial of enforcement are limited to those set forth in the Convention. ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 265 (1981).

void.¹⁵⁶ If assets of the losing party are available in more than one jurisdiction, the winning party can seek to enforce the foreign award in a second jurisdiction if the first jurisdiction fails to enforce.¹⁵⁷ The only place an award may be set aside or vacated, according to the Convention, is in the place where it was made.¹⁵⁸ The traditional view of an annulled award is that once it is set aside, it no longer exists and is not capable of being enforced anywhere.¹⁵⁹ The award certainly ceases to have any legal effect in the jurisdiction which annulled it.¹⁶⁰ Thus, if an award is made in the United States, even if it is considered a non-domestic award, the American court can set aside or vacate that award under domestic law and it will have no further legal effect in the United States.¹⁶¹ However, as will be discussed, some courts have enforced awards even though they have been vacated at the place of arbitration.¹⁶²

Thus, although the grounds for non-enforcement are quite narrow under the Convention, Article V(1)(e) permits vacatur under local law, which then becomes a basis for non-enforcement. This creates a loophole that could greatly expand the grounds for non-enforcement.¹⁶³

156. See BORN, *supra* note 85, at 774 (“[S]ignificantly different consequences may flow from: (i) a national court’s refusal to enforce an international arbitral award, and (ii) a national court’s decision setting aside or vacating the award If an award is denied recognition in a national court, it nonetheless remains a ‘binding’ award. It can be taken to other jurisdictions, and efforts can be made to enforce it anew.”).

157. *Id.*

158. Theoretically, under the New York Convention, it can also be set aside in the country, the (procedural) law of which governed the arbitration. The New York Convention, *supra* note 144, art. V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 42. Although the language of Article V(1)(e) could theoretically lead to a law of a different jurisdiction than that of the seat of the arbitration, this would rarely be the case. See *supra* note 150 and accompanying text.

159. Albert Jan van den Berg, *Annulment of Awards in International Arbitration, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS JUDICIALIZATION AND UNIFORMITY* 133, 137 (Richard B. Lillich & Charles N. Brower eds., 1994).

160. See BORN, *supra* note 85, at 774 (“If an award is ‘vacated’ or ‘annulled,’ then it ceases to have legal effect (at least under the laws of the state where it was vacated) . . .”).

161. A non-domestic award is one which is subject to the Convention not because made abroad, but because a foreign law applies or because one or more of the parties has their principal place of business in a foreign country. See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983). In the *Toys “R” Us* case, 126 F.3d 15 (2d Cir. 1997), the arbitration was between an American company and a Kuwaiti company, and the award was made in the U.S. The winning party, the Kuwaiti company, was permitted to move to confirm the award under the Convention because the award was non-domestic, based on the location of one of the parties in Kuwait and because the contract involved performance in the Middle East. *Toys “R” Us* was permitted to cross-move to vacate the award under the FAA because the award was made in the U.S. *Id.* at 18. However, there is some authority for the position that only Article V grounds are available in an action in the arbitral situs to vacate a non-domestic award. BORN, *supra* note 85, at 727–28.

162. See *infra* text accompanying notes 147–51.

163. *Toys “R” Us*, 126 F.3d at 22. The *Toys “R” Us* court cited W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT’L L.J. 1, 11 (1995) for this point. “What the Convention did not do . . . was provide any

If, for example, an award is vacated on a ground of local law that would not be a valid ground to prevent enforcement under the Convention, the award in most cases will still not be enforced because it was vacated in the place where made. Nonetheless, the Convention's provisions make possible the enforcement of a vacated award. First, Article V(1)(e) states that enforcing courts "may" deny enforcement of a vacated award, thereby appearing to allow discretion to enforce an award even if it has been set aside in the place where it was made.¹⁶⁴ Second, Article VII provides that the provisions of the Convention "shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."¹⁶⁵ This clause, referred to as the "more favorable right" provision, allows a party to take advantage of any local law of the enforcing jurisdiction that would provide a greater right to enforcement than the rendering state. Although it is not clear that the Convention drafters intended this provision to permit the enforcement of an annulled award, commentators have noted that nothing in the language appears to preclude this interpretation.¹⁶⁶

international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration." *Id.* The *Toys "R" Us* court concluded that

the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief . . . However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.

Id. at 23.

164. The New York Convention, *supra* note 144, art. V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

165. *Id.* art. VII(1), 21 U.S.T. at 2520-21, 330 U.N.T.S. at 42.

166. Gary H. Sampliner, *Enforcement of Foreign Arbitral Awards after Annulment in their Country of Origin*, 11 MEALEY'S INT'L ARB. REP. 22, 22 (1996). A U.S. district court, in *In re Chromalloy Aeroservices*, 939 F. Supp. 907 (D.D.C. 1996), enforced an award that had been vacated by the Egyptian Court of Appeal. Other U.S. courts have refused to enforce vacated awards. See *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Technic, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999), *reargument denied*, 77 F. Supp. 2d 405 (S.D.N.Y. 1999). For further discussion of this issue, see generally Chan, *supra* note 154; Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451 (2002); Georgios C. Petrochilos, *Enforcing Awards Annulled in their State of Origin under the New York Convention*, 48 INT'L & COMP. L.Q. 856 (1999).

In France, a number of annulled awards have been enforced. France's national law governing international arbitrations lists only five specific grounds on which an appeal can be brought against a decision granting recognition or enforcement.¹⁶⁷ Vacatur of an award by the court in the rendering state is not one of those grounds. Thus, the narrower French grounds for appeal of an enforcement decision, and Article VII of the Convention, provide a party whose award was vacated with the opportunity nonetheless to use the more favorable French law to enforce its award in France. France simply does not recognize the foreign annulment of an award as a basis for non-enforcement, unless that annulment was made on the basis of one of the grounds listed in the French national law.¹⁶⁸

How then might this state of affairs affect an award that was vacated on the merits in the United States, by an American court, under expanded jurisdiction agreed to by the parties, or that was vacated because the American court refused expanded jurisdiction, and invalidated the arbitration agreement? The next sub-Part will discuss these issues, as well as the issues arising in connection with awards confirmed after expanded judicial review.

167. Article 1502 of the French New Code of Civil Procedure provides as follows:

An appeal against the decision which shall confer recognition or enforcement shall be open only in the following cases:

1. where the arbitrator has ruled upon the matter without an arbitration agreement or where this agreement is null or has lapsed;
2. where the arbitration tribunal has been unlawfully constituted or a sole arbitrator unlawfully appointed;
3. where the arbitrator has ruled upon the matter contrary to the assignment given to him;
4. where the adversarial principle has not been respected;
5. where the recognition or enforcement shall be contrary to public international order.

N.C.P.C. art. 1502 (Fr.).

168. See Cour de Cassation, Cass. 1e civ., Oct. 9, 1984, translated in XI Y.B. COM. ARB. 484, 489-91 (1986) (holding that a judge cannot refuse enforcement when his own national legal system permits it). The French ease in enforcing annulled awards has been strongly criticized, particularly after a series of decisions in the case of *Hilmarton v. OTV*. An award made in Switzerland was enforced in France, despite its annulment in Switzerland. Cour de Cassation, Mar. 23, 1994, translated in XX Y.B. COM. ARB. 663, 664-65 (1995). After the annulment, a second award was made in Switzerland to the party who had lost under the first award. That party's attempts to enforce the award in France were at first successful in the lower courts, but were ultimately rejected by the Cour de Cassation, which held that enforcement of the second award was barred by recognition of the first award. Cour de Cassation, June 10, 1997, translated in XXII Y.B. COM. ARB. 696, 697-98 (1997). See generally Hamid G. Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention*, 6 J. TRANSNAT'L L. & POL'Y 93 (1996) (stating that an award may be enforced although set aside basis provided in Article IX).

B. Treatment Under the New York Convention of Awards Which Have Been Subjected to Expanded Judicial Review

If parties to an international arbitration held in the United States chose expanded judicial review of an arbitrator's decision, certain problems could arise in the enforcing jurisdiction. First, the parties would normally be able to seek judicial review in federal court under diversity jurisdiction, assuming one of them is from a foreign country. However, if the parties are in a federal jurisdiction opposed to expanded judicial review, or if the Supreme Court has in the meantime decided against expanded judicial review, an American court asked to review an award on the merits under the FAA could refuse to provide expanded review and could, as in a domestic arbitration, decide to vacate the award on the grounds that the underlying arbitration agreement was invalid. The court's rationale would be that since the parties arguably would not have consented to arbitration unless judicial review on the merits was available, in the absence of the agreed-upon review, there was no valid consent to arbitrate.

Given this result, assume the party in whose favor the award—now vacated—had originally been made, nonetheless tried to enforce the award in a foreign jurisdiction. It is unlikely that a foreign court would enforce the award. It would probably find under the New York Convention that it should not enforce the award because the agreement was “not valid under the law to which the parties subjected it.”¹⁶⁹ Thus, if parties choose expanded judicial review and an American court refuses to grant it, and invalidates the agreement, they may end up having totally wasted the effort of arbitrating.

A second kind of problem could arise if the American court grants review on the merits and confirms the award. Assume the prevailing party then seeks enforcement in the foreign jurisdiction where the losing party's assets are located. It is possible that in the foreign court the losing party would assert a right of appeal on the merits based on a clause in the arbitration agreement, which provided that the arbitral award was final and binding on both parties, “except that errors of law shall be subject to appeal.”¹⁷⁰ This kind of clause could subject the

169. The New York Convention, *supra* note 144, art. V(1)(a), 21 U.S.T. at 2520, 330 U.N.T.S. at 40.

170. See the arbitration clause used in *Gateway Techs., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 995 (5th Cir. 1995). Another arbitration clause which might be interpreted as applying to the enforcing court as well as the court in the rendering state is the following one from the agreement in *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984), an early

parties to yet another appeal on the merits before the enforcing court.¹⁷¹ Even though most foreign courts that are subject to the New York Convention would probably not agree to review the award on the merits,¹⁷² the assets could be located in a state that has not adopted the Convention, or one that might be persuaded to follow the parties' agreement. Parties that choose expanded review should, therefore, be careful to draft a clause that limits any judicial review to the court in the state where the award was made. The clause used in the agreement at issue in *LaPine Technology Corp. v. Kyocera Corp.*¹⁷³ would accomplish this purpose:

The arbitrators shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law. The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous.¹⁷⁴

By specifically naming the situs court as the court with expanded jurisdiction, parties can avoid the risk that the enforcing court would find that the agreement granted it expanded review on the merits at the enforcing stage. It is important to be clear on this point because the foreign enforcing court, which is unlikely to grant expanded review,

example where the district court upheld the provision and reviewed the award in accordance with the parties' expressed intent:

Upon an application to the court for an order confirming said award, the court shall have the power to review (1) whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by substantial evidence, and (2) whether as a matter of law based on said findings of fact the award should be affirmed, modified or vacated. Upon such determination, judgment shall be entered in favor of either party considered therewith.

Id. at 242.

171. See Younger, *supra* note 5, at 261 ("A judicial review clause may subject United States parties to substantive appeals in foreign courts.").

172. Albert Jan van den Berg notes that:

It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake of fact or law by the arbitrator.

JAN VAN DEN BERG, *supra* note 155, at 269.

173. 130 F.3d 884 (9th Cir. 1997), *aff'd in part, vacated in part, remanded in part*, 341 F.3d 987 (9th Cir. 2003).

174. *Id.* at 887.

could nonetheless refuse to enforce the award on validity grounds. As in the first example above, the foreign court could find that if the parties had known that *either* the situs court *or* the enforcing court would not review for errors of law, they would not have consented to arbitration. It might therefore hold that there was no valid consent to arbitrate.¹⁷⁵

A third kind of problem could arise if the American court granted review on the merits and then vacated the award on the merits. The losing party on appeal, in whose favor the arbitration award had been granted, could nonetheless seek to enforce the award. If it was able to bring the action in France or a country with similar rules, such as Germany, it might succeed in obtaining enforcement, even though the award was vacated in the United States, because it was not vacated on one of the narrow grounds for non-enforcement permitted by French or German law.¹⁷⁶ Thus, choosing expanded review on the merits would not be prudent for a party who has assets in France, Germany, or a country with similar arbitration laws. Even if the award was an aberrant one vacated under expanded judicial review because it was in violation of applicable law, the judicial safety net of the court at the situs might not protect a party against enforcement in certain jurisdictions.

If expanded judicial review is desired by the parties, but assets of at least one of the parties are located in a jurisdiction likely to enforce an award set aside on the merits, the parties should probably reconsider their decision to seek expanded review. If they want to go forward, however, it might be prudent to put into the arbitration clause an agreement that neither party will seek to enforce an award that has been vacated on the merits. While this might not effectively protect the party opposing enforcement, it would at least provide that party with an argument against enforcement on public policy grounds—i.e., that it is against public policy for the enforcing court to use its power to enforce an award presented for enforcement in willful and deliberate breach of the petitioner's promise not to seek enforcement.

175. See Knoll & Rubins, *supra* note 10, at 546–47 (“The potential invalidity of such clauses [for expanded judicial review] in Europe raises the possibility that a court there could find the entire agreement to arbitrate invalid, on the ground that the parties would not have made the agreement had they known the grounds for review would be limited.”).

176. Laurence Franc notes that Article 1507 of the French New Code of Civil Procedure “rejects review on the merits of arbitral awards and the decisional French law has never allowed review of awards on the merits.” *Contractual Modification of Judicial Review of Arbitral Awards*, *supra* note 10, at 219. He further notes that if an award was vacated on the merits in the United States, “such an award could be enforced in France even though set aside in the United States on error of law or fact.” *Id.* at 223. Like French law, German arbitration law provides a definite and exclusive list of grounds on which an award may be challenged. See Hans Smit & Vratislav Pechota, National Arbitration Laws, GER B(2)-15 (2002).

As can be seen from these various examples, there are a number of practical problems relating to the international enforcement of awards subject to expanded judicial review. Even if the uncertainty of the law in the United States is resolved by a Supreme Court decision permitting expanded judicial review, the problems of enforcing such awards internationally will remain.

V. CONCLUSION

In sum, the difficulty in persuading a court to set aside an arbitration award that is plainly wrong has caused some parties to seek a safety mechanism against maverick arbitral decisions by agreeing to judicial review of an arbitral award on the facts, the law, or both. Legal and policy reasons on the whole seem stronger for permitting rather than refusing expanded judicial review if the parties want it. Congress' intent in enacting the FAA was to permit parties' arbitration agreements to be enforced according to their terms, like any other contract.¹⁷⁷ Moreover, if parties who want this safety net are denied it, they will simply impose the full burden of their disputes on the courts. Expanded judicial review may not, however, be the best choice for parties at the present time. The current uncertainty in the United States of whether courts will agree to provide such review, the potentially different results depending on whether parties end up in state or federal court, as well as the uncertain reception internationally of awards which have been reviewed on the facts or the law, make expanded judicial review a choice which must be made carefully, if at all, in order to avoid ending up with a result that could completely undercut the safety net the parties sought.

177. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (stating that passage of the Act "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered" and that "[the Act] requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

