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Kevin A. Sullivan

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**THE PROBLEMS OF PERMITTING EXPANDED JUDICIAL REVIEW  
OF ARBITRATION AWARDS UNDER THE FEDERAL  
ARBITRATION ACT\***

I. INTRODUCTION

The main advantage of the arbitration process is that it allows parties to settle their disputes without having to resort to courts. Permitting parties to contract for expanded judicial review of arbitration awards would take away this advantage by allowing a party back into court for a “second bite at the apple.” Generally, parties to an arbitration agreement are trying to avoid the costs and delays inherent in the court system. These goals are abandoned by expanded judicial review. A clause in an arbitration agreement expanding judicial review of awards would place the dispute into the litigation process, resulting in parties seeking efficient dispute resolution to “[a]bandon hope, all ye who enter here,”<sup>1</sup> when faced with arbitration with expanded court review.

Arbitration is defined by the Dictionary of Conflict Resolution as:

[A] term for a range of dispute resolution processes involving the referral of a dispute to an impartial third party who, after giving the parties an opportunity to present their evidence and arguments renders a determination in settlement of the dispute . . . [and] is characterized as an informal, inexpensive, fast, and private adjudicative process that may consider custom as well as principles of fairness and equity to reach an outcome that is final and subject to very limited appeal.<sup>2</sup>

Arbitration may be best described as a “creature of contract.”<sup>3</sup> Parties in federal court, who have agreed to submit their dispute to arbitration, are governed by the Federal Arbitration Act<sup>4</sup> (hereinafter referred to as the “FAA” or “Act”). A valid and enforceable arbitration agreement has the effect of “oust[ing]” a court of its jurisdiction to resolve the dispute.<sup>5</sup> Arbitration, as a

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\* This Comment, by Kevin A. Sullivan, was selected as the Best Student Work to appear in Volume 46 of the *Saint Louis University Law Journal*.

1. DANTE ALIGHIERI, *THE DIVINE COMEDY* 5 (Lawrence Grant White trans., Pantheon Books 1948).

2. *DICTIONARY OF CONFLICT RESOLUTION* 28, 33 (Douglas H. Yarn ed., 1999).

3. *U.S. Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan J., concurring).

4. 9 U.S.C. §§ 1-16 (1994).

5. *Prudential-Bache Secs., Inc. v. Fitch*, 966 F.2d 981, 987 (5th Cir. 1992) (citing *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

whole, is an important function of the law at the turn of the second millennium as more and more parties agree to arbitrate in areas such as general commercial disputes, employment disputes, securities laws and even consumer purchases, to name just a few.

In June 2001, a split among the United States Circuit Courts of Appeals developed over the issue of whether parties to an arbitration agreement could agree to federal court appellate review of an arbitration award in federal court beyond the level of review Congress set forth in the FAA.<sup>6</sup> A clause expanding judicial review of an award may be as simple as giving either party the right to appeal an award in district court “on the grounds that the award is not supported by the evidence,”<sup>7</sup> may provide for de novo review for “errors or law,”<sup>8</sup> or may do both and set out the specific scope of review.<sup>9</sup> The Tenth Circuit held parties are not permitted to expand the scope of review beyond the tenets of the Act.<sup>10</sup> This position departs from that of the Fourth, Fifth and Ninth Circuits, which have held that parties can contract for expanded judicial review of arbitration awards.<sup>11</sup> This conflict between the Circuits centers on two countervailing policies: on the one hand, the FAA’s guarantee of enforcement of arbitration agreements by the courts according to the terms of the parties’ agreement<sup>12</sup> and, on the other hand, the policy that parties cannot, by contract, alter the way that the courts review arbitration awards.<sup>13</sup>

This Comment will explore the courts’ reasoning in endorsing or rejecting the expanded review of arbitration awards and will ultimately conclude that parties should not be permitted to expand judicial review of arbitration awards beyond the grounds for vacating or modifying awards under the FAA.<sup>14</sup> Part II will describe how the Act operates and the reasons behind its enactment. Special attention will be given to the grounds for vacating or modifying awards. Part III will provide an overview of pertinent Supreme Court cases dealing with aspects of the FAA with an eye towards how the Supreme Court might rule on the issue of expanded judicial review of arbitration awards. Part IV is divided into two subparts. Subpart A will examine the evolution of the courts allowing expanded judicial review through an analysis of *In re Fils Et*

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6. See *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 933 (10th Cir. 2001); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 887-88 (9th Cir. 1997).

7. *Bowen*, 254 F.3d at 930.

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

9. For examples of possible clauses permitting expanded judicial review of awards, see Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider, Appendix B, Other Provisions Permitting Appellate Review of Arbitration Awards*, 13 OHIO ST. J. ON DISP. RESOL. 124 (1997).

10. *Bowen*, 254 F.3d 925.

11. See, e.g., *Gateway*, 64 F.3d 993; *LaPine*, 130 F.3d 884.

12. *LaPine*, 130 F.3d at 888.

13. *Bowen*, 254 F.3d at 933.

14. See 9 U.S.C. §§ 10-11 (1994).

*Cables D'Acier de Lens*,<sup>15</sup> *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,<sup>16</sup> *Syncor International Corp. v. McLeland*<sup>17</sup> and *LaPine Technology Corp. v. Kyocera Corp.*<sup>18</sup> Subpart B will analyze *Bowen v. Amoco Pipeline Co.*<sup>19</sup> and the opinions upon which the *Bowen* court relied in rejecting expanded judicial review.<sup>20</sup> Part V presents an argument for rejecting party-created expansion of judicial review on two grounds: first, that expansion of judicial review will threaten the integrity of the arbitration process because the additional costs and delays inherent in the court system will lead to arbitration becoming just another rung on the ladder of federal court litigation and, second, that parties cannot alter the process of federal court adjudication solely by their agreement and without express Congressional assent. Part VI will conclude with an overview of the arguments against expansion of judicial review and give some alternatives to purely accepting or rejecting expanded judicial review.

## II. THE FAA AND JUDICIAL REVIEW

The primary aim of the enactment of the FAA in 1925 was to “overcome courts’ refusals to enforce agreements to arbitrate.”<sup>21</sup> The legislative history of the Act focuses on two benefits derived from it: the enforceability of arbitration agreements and the desirability of arbitration. According to the House Judiciary Committee Report, the Act was to “declare[] simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.”<sup>22</sup> Congressman Graham expressed the opinion that the proposed bill neither created new legislation nor granted new rights, but provided a remedy for parties to enforce “that which they have already agreed to.”<sup>23</sup> Herbert Hoover, then Secretary of Commerce, sent a letter to the judiciary committees urging that the Act was needed due to the

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15. 584 F. Supp. 240 (S.D.N.Y. 1984) (endorsing, for the first time, expanded judicial review of arbitration awards pursuant to the parties’ agreement). See Part IV.A.1 *infra* for a full discussion of the case.

16. 64 F.3d 993 (5th Cir. 1995). See *infra* Part IV.A.2 for a full discussion of the case.

17. 120 F.3d 262, No. 96-2261, 1997 WL 452245 (4th Cir. Aug. 11, 1997) (unpublished table case). See *infra* Part IV.A.3 for a full discussion of the case.

18. 130 F.3d 884 (9th Cir. 1997). See *infra* Part IV.A.4 for a full discussion of the case.

19. 254 F.3d 925 (10th Cir. 2001). See *infra* Part IV.B.1 for a full discussion of the case.

20. See *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992 (8th Cir. 1998). See *infra* Part IV.B.2 for a full discussion of these cases.

21. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995).

22. H.R. REP. NO. 96, at 1-2 (1924), reprinted in IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 98 (1992).

23. 65 CONG. REC. 1931 (1924), reprinted in MACNEIL, *supra* note 22, at 98.

“clogging of our courts.”<sup>24</sup> Congressman Dyer felt the Act would “do away with a lot of expensive litigation.”<sup>25</sup> The House Committee Report further stated that the “costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration, if [such] agreements are made valid and enforceable.”<sup>26</sup> Amazingly, because of the courts’ hostility towards arbitration, there was no opposition to the proposed FAA.<sup>27</sup> In fact, the Act and its amendments passed easily in both Houses of Congress and were signed into law by President Coolidge on February 12, 1925.<sup>28</sup>

As to any legislative history available to shed light on the drafters’ intent regarding judicial review of awards, there is none. Professor Sarah Cole has posited that the drafters of the FAA did not think “parties would ever be interested in expanding judicial review of arbitration awards.”<sup>29</sup> Professor Cole found that the lack of a discussion in the legislative history of judicial review meant Congress “intended to codify the common law, which limited review to examination of the arbitral award for procedural irregularities.”<sup>30</sup>

#### A. *Application of the FAA*

The FAA sections discussed in this Part of the Comment will give a brief overview of how the Act operates and how difficult it is for a party to gain vacatur or modification under the FAA. The main focus, however, will be on section 10, wherein Congress gave the grounds for vacating an arbitration award.<sup>31</sup>

Section 2 of the FAA provides that a “written provision” or “an agreement in writing” to settle a dispute arising out of a contract or “transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>32</sup> For example, an arbitration

24. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S.1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 21 (1924), reprinted in MACNEIL, *supra* note 22, at 92.

25. 65 CONG. REC. H11081 (1924), reprinted in MACNEIL, *supra* note 22, at 101. In *Wilko v. Swan*, 346 U.S. 427, 431 (1953), the Supreme Court found that the Congressional reports on the FAA “stress the need for avoiding the delay and expense of litigation . . . .”

26. H.R. REP. NO. 96, at 2 (1924), reprinted in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

27. MACNEIL, *supra* note 22, at 115 (1992).

28. *Id.* at 101.

29. Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1255 (2000).

30. *Id.*

31. 9 U.S.C. § 10 (1994).

32. 9 U.S.C. § 2 (1994). See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (“Of course, courts should remain attuned to well-supported claims that the

agreement is void and unenforceable if there is a lack of “mutual obligation to arbitrate.”<sup>33</sup> Section 2 has been held to be “a congressional declaration of a liberal federal policy favoring arbitration agreements” creating “a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”<sup>34</sup> Therefore, a party must satisfy section 2 if it hopes to compel arbitration or to confirm, vacate or modify an award.

If one party has already filed an action in a federal district court, section 3 of the FAA permits a party seeking arbitration to apply for a stay of the action in the court until arbitration is completed pursuant to the parties’ agreement.<sup>35</sup> The district court must simply be “satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement . . . .”<sup>36</sup> In effect, the granting of the stay takes the dispute out of the hands of the court and places it into the hands of an arbitrator.<sup>37</sup>

Section 4 of the FAA sets forth the procedural requirements a party must meet to have a federal district court compel arbitration.<sup>38</sup> If one party fails or refuses to arbitrate, the aggrieved party can petition any district court having jurisdiction (through either diversity or federal question), unless a court is agreed upon in the arbitration agreement, for an order directing the non-complying party to submit to arbitration.<sup>39</sup> At this stage, the non-complying party has the opportunity to prove that the arbitration agreement is not valid or

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agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’” (quoting 9 U.S.C. § 2)).

33. *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1549 (11th Cir. 1985). The Eleventh Circuit held “that the consideration exchanged for one party’s promise to arbitrate must be the other party’s promise to arbitrate at least some specified class of claims. Mere presence of an arbitration clause is insufficient to enforce the arbitration agreement.” *Id.* at 1550.

34. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Court further stated: “The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 24-5. *Moses H. Cone* is discussed further *infra* Part III.

35. 9 U.S.C. § 3 (1994). See *Contracting Northwest, Inc. v. City of Fredericksburg*, 713 F.2d 382 (8th Cir. 1983). In *Contracting Northwest*, the Eighth Circuit held that “the district court [has] the inherent power to grant the stay in order to control its docket, conserve judicial resources, and provide for a just determination of the cases pending before it . . . .” *Id.* at 387 (citing *Am. Home Assurance Co. v. Vecco Concrete Constr. Co.*, 629 F.2d 961, 964 (4th Cir. 1980)).

36. § 3.

37. However, the dispute can easily be brought back into the district court after the arbitration is completed if the party prevailing at arbitration seeks confirmation of the award, if the losing party seeks vacatur of the award or if either party seeks modification or correction of the award. See 9 U.S.C. §§ 9-11 (1994). Each of these sections will be discussed *infra* Part II.B.

38. 9 U.S.C. § 4 (1994).

39. See *id.*

that it is not in default of the agreement and can even request that a jury decide the issue.<sup>40</sup> If the court, or jury if one is demanded, finds that the agreement to arbitrate is valid, the court will order an arbitration to proceed “in accordance with the terms of the agreement.”<sup>41</sup> In interpreting an arbitration agreement, “due regard must be given to the federal policy favoring arbitration” and any ambiguities in the arbitration clause are to be “resolved in favor of arbitration.”<sup>42</sup> The FAA requires the compelling of arbitration, even if the result would be an “inefficient maintenance of separate proceedings in different forums.”<sup>43</sup>

Section 5 of the Act allows a party, in the absence of a method for choosing an arbitrator in the parties’ agreement or if the parties fail to name an arbitrator, to apply to a court for the naming of an arbitrator.<sup>44</sup> Unless stated otherwise in the parties’ agreement, a single arbitrator will preside over the arbitration.<sup>45</sup>

Section 9 of the Act states that a party, upon a final entry of an arbitration award, may petition a district court to enter judgment on the award within one year of the date of the award.<sup>46</sup> This confirmation mechanism operates only if the parties have expressly stated in their agreement that a judgment is to be entered on the arbitrator’s award.<sup>47</sup> The court must confirm the award and enter judgment on it “unless the award is vacated, modified, or corrected as proscribed in sections 10 and 11 of [the Act].”<sup>48</sup> A straight-forward interpretation of the language in section 9 leads to the conclusion that a party opposing confirmation of an award must challenge the award through the machinery for vacatur, modification or correction as provided in sections 10

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40. *See id.*

41. *Id.*

42. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

43. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). In *Byrd*, the Supreme Court rejected the approach taken by the Fifth, Ninth and Eleventh Circuits when faced with the situation in which a party seeks to compel arbitration of a pendent state law claim, while a federal court would still have jurisdiction over a federal law claim. *Id.* at 216. These Circuits held that federal district courts could use discretion in “deny[ing] arbitration as to the arbitration claims and try all the claims together in federal court” if the “arbitrable [state] and nonarbitrable [federal] claims arise out the same transaction, and are sufficiently intertwined factually and legally.” *Id.* at 216-17. The *Byrd* Court reversed the decision of the district court and court of appeals that applied this doctrine in refusing to compel arbitration of the pendent state claims. *Id.* at 223-24.

44. 9 U.S.C. § 5 (1994).

45. *Id.*

46. 9 U.S.C. § 9 (1994). *See Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980) (“[A] district court is without authority to review the validity of arbitrators’ rulings prior to the making of an award. Where . . . arbitrators make an interim ruling that does not purport to resolve finally the issues submitted to them, judicial review is unavailable.”).

47. § 9.

48. *Id.* The confirmation can be entered in a court specified by the parties. *Id.*

and 11 of the FAA. Courts have varying interpretations about how parties can invoke section 9, the main issue being whether express language is needed or if the agreement for confirmation can be implied by a “final and binding” term.<sup>49</sup>

Section 11 of the Act allows an aggrieved party to apply to the district court in the district where the arbitration award was granted for an order modifying or correcting the award to “promote justice between the parties.”<sup>50</sup> As with section 10, the grounds for modification or correction are very limited in scope.<sup>51</sup> The first ground is where an arbitrator miscalculates figures in the award or makes a material mistake in describing “any person, thing, or property referred to in the award.”<sup>52</sup> One example of an arbitrator’s miscalculation leading to court modification is where “an arbitration award orders a party to pay damages that have already been paid or which are included elsewhere in the award . . . .”<sup>53</sup> The second and third grounds are where the arbitrator makes an award on “a matter not submitted to them” or the arbitrator’s “award is imperfect in matter of form not affecting the merits of the controversy.”<sup>54</sup> The Second Circuit Court of Appeals has warned that “[§] 11 . . . is limited . . . [and] does not license the district court to substitute its judgment for that of the arbitrators.”<sup>55</sup>

Section 16 of the FAA is a catchall authorizing parties to appeal a court order regarding refusal of a stay (§ 3), denying a petition to compel (§ 4), and confirming (or refusing to confirm) (§ 9), modifying (§ 11), or vacating (§ 10) an award.<sup>56</sup> Section 16 prohibits an appeal from an interlocutory order

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49. Erika Van Ausdall, *Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 DRAKE L. REV. 41, 47-48 (2000).

50. 9 U.S.C. §11 (1994).

51. Section 10 of the Act is discussed *infra* Part II.B.

52. § 11(a).

53. *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994). In *Eljer Mfg.*, two corporations entered into joint venture requiring a \$2,500,000 loan for which each entity guaranteed \$1,250,000. *Id.* at 1252. After the joint venture failed and arbitration ensued, the arbitrator included in his award to the prevailing party the entire amount of the loan (\$2,500,000) even though the losing party had already repaid the loan to the bank. *Id.* at 1253. The entire amount of the loan was included again in the award to calculate the amount the losing party had been unjustly enriched. *Id.*

54. § 11(b)-(c). However, the award will not be modified if “it is a matter not affecting the merits of the decision upon the matter submitted.” *Id.* § 11(b).

55. *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). The dispute in *Diapulse* arose out of a distributor agreement between American and Swiss companies. *Id.* at 1109. The American company demanded arbitration alleging that the Swiss company violated a non-compete clause in the agreement. *Id.* The arbitration award enjoined the Swiss company from competing with the American company, but the district court found that the award violated public policy in restraining trade and modified the award by limiting the injunction in time and geographic area. *Id.* at 1110. The Second Circuit held that the district court erred by modifying the award in this manner. *Id.*

56. 9 U.S.C. § 16 (1994).



granting a stay, compelling arbitration or “refusing to enjoin an arbitration that is subject to this title.”<sup>57</sup>

*B. Statutory Grounds for Vacating Arbitration Awards*<sup>58</sup>

In essence, expanded judicial review of an award is a license for a court to vacate or modify an award pursuant to the terms of the parties’ agreement. The traditional forms of vacatur are found in the FAA.<sup>59</sup> Additionally, there exist several grounds outside of the Act created by the judiciary. Section 10 of the FAA is at the heart of the controversy over whether parties may contractually expand federal judicial review of arbitration awards. A party to the arbitration can apply to the court “in and for the district wherein the award was made” for an order vacating the award on four separate grounds.<sup>60</sup> Where an arbitration award is vacated on these grounds, the court has the option to remand the matter to an arbitrator for rehearing.<sup>61</sup>

The first ground is “where the award was procured by corruption, fraud, or undue means.”<sup>62</sup> Vacatur on this ground is difficult to obtain. For example, to vacate an award due to fraud, the challenging party must show that due diligence prior to the arbitration would not have uncovered the fraud, that the fraud was a material issue, and establish by “clear and convincing evidence” that there was a fraud.<sup>63</sup>

The second ground is “evident partiality or corruption” on the part of an arbitrator.<sup>64</sup> One example of the application of this ground is a Supreme Court decision which held that an arbitrator’s failure to disclose to a party that he had a long financial relationship with the opposing party was “evident partiality” or even “undue means” and ordered vacatur.<sup>65</sup> Another example of “evident

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57. *Id.*

58. See Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996), for an in-depth discussion of the grounds for vacating a commercial arbitration award.

59. 9 U.S.C. § 10 (1994).

60. *Id.* § 10(a).

61. *Id.* § 10(a)(5).

62. *Id.* § 10(a)(1).

63. *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992) (per curiam). In *McCollough*, the district court rejected the investors’ claim that the award was the result of a fraud because the brokerage firm raised “meritless defenses,” which knowingly misstated the law. *Id.* at 1402, 1404. See also *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986) (“The party asserting fraud must establish it by clear and convincing evidence . . . and must show that due diligence could not have resulted in discovery of the fraud prior to arbitration.”).

64. *Id.* § 10(a)(2).

65. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 147-48 (1968). In *Commonwealth Coatings*, the arbitrator who was found to be evidently partial was an engineering consultant who had rendered services to one of the parties over four or five years and been paid \$12,000 over that period. *Id.* at 146. See also *Morelite Constr. Corp. v. N.Y. City Dist. Council*

partiality” was found in a case where the arbitrator reduced the loss documented by one party by ninety-five percent without any basis for the reduction in the facts.<sup>66</sup>

The third ground for vacatur under section 10 of the Act is where the arbitrators are guilty of “misconduct in refusing to postpone the hearing . . . or in refusing to hear” pertinent and material evidence or “any other misbehavior” resulting in a party’s rights being prejudiced.<sup>67</sup> An award may only be overturned if an arbitrator suppressed evidence that was decisive in light of the case or which resulted in serious harm, not merely if the suppression was an error of law.<sup>68</sup> One illustration of arbitrator misconduct is when an arbitrator refused to adjourn a hearing because of the sudden illness of a key representative of a party.<sup>69</sup> Professor Stephen Hayford has stated that “in absence of substantial, direct proof that one or more of the types of misconduct addressed in [the first three grounds] has transpired, coupled with a

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Carpenters Benefits Funds, 748 F.2d 79, 84 (2d Cir. 1984) (holding that “evident partiality” was present where the arbitrator was the son of a vice president of the union which was a party in the dispute). Nonetheless, the Second Circuit refined the “evident partiality” standard in hopes of avoiding an expansive application of it, by stating:

[W]e read Section [10(a)(2)] as requiring . . . more than the mere “appearance of bias” to vacate an arbitration award. . . . [W]e hold that “evident partiality” within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.

*Id.* at 83-84.

66. *Tinaway v. Merrill Lynch & Co.*, 658 F. Supp. 576, 579 (S.D.N.Y. 1987) (“The Court . . . is unable to infer a ground for arbitrators’ decision from the facts of this case. . . . Under these circumstances, reduction of the amount of the award by ninety-five percent can only represent ‘evident partiality’ on the part of the arbitrators towards Merrill Lynch.”).

67. 9 U.S.C. § 10(a)(3) (1994).

68. *Newark Stereotypers’ Union v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968). The union, in *Newark Stereotypers’ Union*, sought vacatur because the arbitrators refused to consider evidence that its expert witness had been intimidated into not testifying by the other party. *Id.* at 596. The district court refused vacatur of the award and the appellate court affirmed because the union’s claim of intimidation “was peripheral to the issue of fact which was before the arbitrators for decision.” *Id.* at 600. *See also* *Washington-Baltimore Newspaper Guild v. The Washington Post Co.*, 442 F.2d 1234, 1238 (D.C. Cir. 1971) (holding that “an award will not be vacated even though the arbitrator may have made, in the eyes of judges, errors of fact and law unless it ‘compels the violation of law or conduct contrary to public policy’”) (quoting *Gulf States Tel. Co. v. Local 1692, Int’l Bhd. of Elec. Workers*, 416 F.2d 198, 201 (5th Cir. 1969)).

69. *Allendale Nursing Home, Inc. v. Local 1115 Joint Board*, 377 F. Supp. 1208, 1212-13 (S.D.N.Y. 1974). In *Allendale Nursing Home*, the arbitrator refused to adjourn the proceeding after an employer’s representative became visibly ill at the arbitration, raising even the arbitrator’s concern, and requiring her to be hospitalized. *Id.* at 1212. The district court vacated the award and remanded the dispute to arbitration because it found the arbitrator’s refusal to be an abuse of discretion when the representative was important to the employer’s case. *Id.* at 1214.

demonstrated link between that untoward behavior and the challenged arbitral result, the prospects for vacatur of the arbitration award are doubtful.”<sup>70</sup>

The fourth ground for vacatur is “[w]here the arbitrators exceeded their powers, or so imperfectly executed them that” a true award on the matter submitted “was not made.”<sup>71</sup> An example of a situation where a court will vacate an award due to arbitrators exceeding their authority is when the award included punitive damages when the parties’ agreement did not permit the awarding of them.<sup>72</sup> Another example is where an arbitrator exceeds his authority by deciding issues and rights of parties not submitted to him by the parties.<sup>73</sup> Courts have rejected several grounds for vacatur lying outside of the FAA simply because they were not specifically included in the Act, particularly: lack of proper notice of the arbitration,<sup>74</sup> the failure of an arbitrator to explain the reasoning of an award<sup>75</sup> or an arbitrator’s faulty fact-finding or errors of law.<sup>76</sup> Courts will also not allow a party to collaterally

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70. Hayford, *supra* note 58, at 749.

71. 9 U.S.C. § 10(a)(4).

72. *See* *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 122 (2d Cir. 1991) (“Since the arbitrators were not entitled to award punitive damages due to the choice-of-law provision in the parties’ Agreement, it is manifest that the Panel exceeded its authority in awarding punitive damages.”).

73. *See* *NCR Corp. v. Sac-Co, Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995). In *NCR*, the Sixth Circuit affirmed vacatur of an award that awarded punitive damages not just to the dealer who brought the claim, but to all of the manufacturer’s dealers throughout the country. *Id.* at 1078. The court held “the arbitrator exceeded his authority by resolving a dispute which may or may not have existed between [the manufacturer] and its other nonservicing dealers, and by determining the rights of individuals who were not parties in the arbitration proceedings.” *Id.* at 1080.

74. *See* *Gingiss Int’l, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995) (“We have repeatedly held that 9 U.S.C. § 10(a) provides the exclusive grounds for setting aside an arbitration award under the FAA. Inadequate notice is not one of these grounds, and the [challenging party’s] claim therefore fails.”).

75. *See* *In re Sobel*, 469 F.2d 1211, 1211, 1215 (2d Cir. 1972) (“We hold that in the circumstances of this case the arbitrators have no such obligation to explain their award. . . . [F]orcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency [arbitration] now achieves.”). *See also* *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743 (8th Cir. 1986). In *Stroh Container*, the award contained a discussion of the issues, but the arbitrators did not outline the laws they used nor did they describe their reasoning or analysis. *Id.* at 750. In affirming the district court’s refusal to vacate, the Eighth Circuit held: “Arbitrators are not required to elaborate their reasoning supporting an award . . . and to allow a court to conclude that it may substitute its own judgment for the arbitrator’s whenever the arbitrator chooses not to explain the award would improperly subvert the proper functioning of the arbitral process. . . .” *Id.*

76. *See* *Office of Supply Gov’t of the Republic of Korea v. N.Y. Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972) (“An award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law.”). *See also* *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals, Ltd.*, 293 F.2d 796, 801-02 (9th Cir. 1961) (“[T]he statutory grounds for vacating or modifying the award of arbitrators are stated in [§§ 10 and 11 of the FAA] and

attack an arbitration award by filing a separate lawsuit or seeking another arbitration, leaving the grounds for the challenging an award firmly within sections 10 and 11 of the FAA.<sup>77</sup>

Numerous courts have acknowledged that the review of arbitration awards are extremely limited and “among the narrowest known to the law.”<sup>78</sup> An arbitration award is not subject to review except for the grounds set out in sections 10 and 11 of the FAA and the deference to these awards almost approach the deference “given to a jury decision.”<sup>79</sup>

### C. *Judicially Created Grounds for Vacating Awards*

Several federal circuit courts have created further grounds for vacating arbitration awards beyond section 10 of the FAA. These include the manifest disregard of the law standard, the “completely irrational” or “arbitrary and

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neither section authorizes the setting aside of an award ‘on grounds of erroneous finding of fact or misinterpretation of law.’”).

77. *See, e.g.*, *Decker v. Merrill Lynch*, 205 F.3d 906 (6th Cir. 2000). In *Decker*, an aggrieved investor who lost at arbitration filed a lawsuit and a second claim for arbitration alleging that the brokerage firm “improperly interfered with the arbitration.” *Id.* at 907. The Sixth Circuit affirmed the dismissal of the lawsuit and the injunction against arbitration finding that the investor’s “claims collaterally attack the arbitration award and the FAA provides the exclusive remedy for challenging acts that taint an arbitration award.” *Id.* at 908. *See also* *Corey v. N.Y. Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982) (“To allow a collateral attack against arbitrators and their judgments would also emasculate the appeal provisions of the [FAA].”).

78. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001) (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)); *Richmond, Fredricksburg & Potomac R.R. Co. v. Transp. Communications Int’l Union*, 973 F.2d 276, 278 (4th Cir. 1992) (quoting *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978)). *See also* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (holding that courts should set aside arbitrator awards only in the narrow circumstances of § 10); *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 650 (7th Cir. 2001) (“The grounds on which the plaintiffs can attack the award are limited to those set forth in the [FAA].”); *Bavarati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (“The grounds for setting aside arbitration awards are exhaustively stated in the [FAA].”); *Mosely, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 267 (7th Cir. 1988) (“Sections 10 and 11 of the Act set forth the exclusive grounds for vacating or modifying a commercial arbitration award.”); *John T. Brady & Co. v. Form-Eze Sys., Inc.*, 623 F.2d 261, 264 (2d Cir. 1980) (courts generally refuse to second guess arbitration awards and accord “the narrowest of reading to [the Act’s] authorization to vacate awards”); *Gingiss Int’l, Inc.*, 58 F.3d at 332 (FAA § 10(a) gives the exclusive grounds for vacating an award); *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 120 (2nd Cir. 1991) (“It is well settled that judicial review of an arbitration award is narrowly limited.”); *Foster v. Turley*, 808 F.2d 38, 41-42 (10th Cir. 1986) (“The [FAA] provides the exclusive remedy for challenging conduct that taints an arbitration award within the Act’s coverage.”).

79. 2 STEVEN A. CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* 16-21 (3d ed. 1999). *But see* *Corey*, 691 F.2d at 1209 (“We believe that determinations made by the panel of arbitrators in the case on appeal are functionally comparable to those of a judge or an agency hearing examiner . . .”).

capricious” award standard, the public policy standard and the essence of the contract test. Yet, these judicially created grounds rarely result in parties being successful in persuading a court to vacate an arbitration award.<sup>80</sup>

The manifest disregard of the law standard comes from dicta in the Supreme Court’s decision in *Wilko v. Swan*.<sup>81</sup> This standard has several definitions,<sup>82</sup> but the easiest to comprehend seems to be that the arbitrator had knowledge of the applicable law, but decided to ignore it.<sup>83</sup> The standard considers the mental state of the arbitrator, not the magnitude or consequence of the arbitrator error.<sup>84</sup> This ground for vacatur “clearly means more than error or misunderstanding with respect to the law.”<sup>85</sup> The manifest disregard standard has been both praised<sup>86</sup> and heavily criticized as a source of confusion<sup>87</sup> and as being impossible to prove.<sup>88</sup>

The “completely irrational” or “arbitrary and capricious” standard calls for vacating arbitration awards that are “unsupported in the record.”<sup>89</sup> This standard is applicable to findings of fact and does not allow a reviewing court to replace the arbitrator’s judgment with its own.<sup>90</sup> The “completely irrational” standard centers on the “magnitude and quality of the error,” but can only be invoked if an arbitrator explains her award.<sup>91</sup>

Like the manifest disregard standard, the public policy standard for vacating arbitration awards has no black letter definition. Generally, courts will vacate awards that are detrimental to public interests such as health or safety, awards that enforce rights in an illegal contract or that require

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80. Rachel C. Corn, *Recent Development*, *LaPine Technology Corp. v. Kyocera Corp.*, 13 OHIO ST. J. ON DISP. RESOL. 1085, 1086 (1998).

81. 346 U.S. 427, 436-37 (1953) (“In unrestricted submission, . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”).

82. See Marcus Mungioli, Comment, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY’S L.J. 1079, 1097-1102 (2000).

83. Gerald F. Rath & Richelle S. Kennedy, *Judicial Review of Arbitration Awards*, 1062 PLI/Corp. 513, 523-24 (1998).

84. Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 100 (1997). The manifest disregard ground for vacatur is different than bias in that the arbitrator need not favor or show malice towards one party, she only needs to disregard the law in an unacceptable manner.

85. 1 GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 33.08, at 24 (rev. ed. 2001).

86. See generally Mungioli, *supra* note 82.

87. See Adam Milam, Comment, *A House Built on Sand: Vacating Arbitration Awards for Manifest Disregard of the Law*, 29 CUMB. L. REV. 705 (1999).

88. Davis, *supra* note 84, at 94.

89. *Id.* at 102.

90. *Id.* at 103.

91. *Id.* at 107.

performing an illegal act, and awards that grant relief reserved to the courts such as punitive damages.<sup>92</sup> Vacating an award under the public policy standard demands more than an error or misconstruction of the law by the arbitrator.<sup>93</sup> A good example of an arbitration award that violates public policy would be one that reinstates an employee who was discharged for sexually harassing a customer's employee without the arbitrator investigating the alleged sexual harassment.<sup>94</sup>

The essence of the contract test focuses on whether the arbitrator, in her interpretation of the contract, ignored the parties' intent as set forth in the arbitration agreement.<sup>95</sup> It is argued that placing the intent of the parties above "finality and efficiency harmonizes with the legislative intent behind the FAA."<sup>96</sup> However, it is difficult to see how much this standard truly departs from the statutory ground set forth in section 10(a)(4) of the Act.<sup>97</sup> The essence of the contract standard, along with the completely irrational standard, have been criticized both for rarely being effective in vacating an award and in the way the courts define the standards in a vague and complex manner.<sup>98</sup>

Nonetheless, the party asserting the judicially created ground for vacating an award has "a staggeringly heavy burden" in showing justification for vacatur and courts have interpreted these grounds narrowly and have applied them sparingly.<sup>99</sup> It should always be remembered that "[t]he conventional wisdom is that successful challenges to arbitration awards [under any standard, whether created by courts or the legislature,] are rare."<sup>100</sup>

### III. SUPREME COURT DECISIONS REGARDING THE ACT

The United States Supreme Court has yet to weigh in on whether parties may contractually expand judicial review beyond the grounds set forth in section 10 of the FAA. Even before the Circuit split over this issue occurred,

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92. *Id.* at 109.

93. *See* Hayford, *supra* note 58, at 782.

94. *See* Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1438 (3d Cir. 1992). In *Stroehmann*, the arbitrator refused to investigate the alleged harassment and, instead, found that the employer had not investigated the incident sufficiently to warrant a firing for just cause. *Id.* at 1440. The district court vacated the reinstatement award and remanded the case to a different arbitrator. The Court of Appeals agreed holding "an arbitrator's award reinstating an employee accused of sexual harassment without a determination regarding the merits of the allegation violates well-established and dominant public policies concerning sexual harassment in the workplace." *Id.* at 1438.

95. *See* Hayford, *supra* note 58, at 795.

96. Davis, *supra* note 84, at 126.

97. *See supra* Part II.B for a discussion of § 10(a)(4).

98. *See* Hayford, *supra* note 58, at 823.

99. *See* Rath & Kennedy, *supra* note 83, at 523.

100. JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 624 (2d ed. 1996).

two commentators thought that, barring a Congressional amendment of the Act, the Supreme Court might need to resolve the issue.<sup>101</sup> This Comment will look to several Supreme Court decisions interpreting the FAA for guidance on how the Court might resolve the Circuit split over expanded judicial review of arbitration awards.

A. *Cases Interpreting Section 4 of the FAA*

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Supreme Court dealt with the issue of whether a court or an arbitrator should resolve a claim of “fraud in the inducement” of an agreement covered by the FAA when the arbitration agreement was silent on the issue.<sup>102</sup> The Court held that, under section 4 of the FAA, a federal court could adjudicate the issue of whether there was fraud involved the “making” of the arbitration clause, but that it could not, under the FAA, “consider claims of fraud in the inducement of the contract generally.”<sup>103</sup> In finding that a court could only consider a contract if the arbitration clause was induced by fraud, the Court honored “the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.”<sup>104</sup>

This decision in *Prima Paint* is important with respect to expanded judicial review because the Supreme Court acknowledged that once parties agree to arbitrate they should be free from the “delay and obstruction” of the courts.<sup>105</sup> Courts in favor of enforcing agreements that expand the review of arbitration awards may be ignoring the “unmistakably clear congressional purpose” that arbitration should be a quick and efficient form of dispute resolution because these courts are reviewing arbitration awards beyond what is set forth in the FAA. Therefore, these courts would be reviewing awards not intended by Congress to be reviewed and prolonging the final resolution of the parties’ dispute. Finally, the *Prima Paint* Court stated:

the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and

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101. See Laird E. Lawrence & Christopher R. Ward, *The Availability and Scope of Appeal of Arbitration Awards Under the Federal, Uniform, and State Acts*, THE BRIEF, Spring 2000, at 36.

102. 388 U.S. 395, 396-97 (1967). In *Prima Paint*, the dispute arose out of a consulting agreement (and later purchase agreement) signed by the two parties. *Id.* at 397. *Prima Paint* claimed that Flood & Conklin had induced its assent to the consulting agreement by representing that it was solvent, while, in truth, Flood & Conklin was planning on filing for bankruptcy. *Id.* at 398.

103. *Id.* at 403-04.

104. *Id.* at 404.

105. *Prima Paint*, 388 U.S. at 404.

confined to the incontestable federal foundations of “control over interstate commerce and over admiralty.”<sup>106</sup>

By applying this corollary to the issue in this Comment, the unavoidable conclusion is that individuals do not have this plenary power to direct courts how to act in cases under the FAA, since the Act is a regulation of commerce and individuals, obviously, are not granted the same power to regulate commerce in the Constitution as Congress is.<sup>107</sup> The power to control the jurisdiction of federal courts is Congress’ alone, as the Supreme Court recognized in *Sheldon v. Sill*, by stating that:

Congress, having the power to establish the courts, must define their respective jurisdictions. . . . Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies [in Article III of the Constitution]. Courts created by statute can have no jurisdiction but such as the statute confers.<sup>108</sup>

In *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, the Court answered the question of whether a district court properly stayed an action to compel arbitration under section 4 of the FAA pending resolution of state court action involving the issue of arbitrability.<sup>109</sup> The Supreme Court held the district court’s staying of the action “was plainly erroneous” because of the clear Congressional intent in the FAA to move a dispute out of litigation

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106. *Id.* at 405 (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1 (1924); S. REP. NO. 536, 68th Cong., 1st Sess., 3 (1924)). See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538-39 (1995) (“The FAA requires enforcement of arbitration agreements in contracts that involve interstate commerce . . . and in maritime transactions, including bills of lading . . . where there is no independent basis in law or equity for revocation. . . .”). The Supreme Court has similarly explained that in the area of admiralty and maritime law Congress has broad powers, much like Congress’ Commerce powers:

After the Constitution went into effect, the substantive law theretofore in force was not regarded as superceded or as being only the law of the several states, but as having become the law of the United States—subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.

*Panama R. Co. v. Johnson*, 264 U.S. 375, 393-94 (1924).

107. See 9 U.S.C. § 2 (1994); U.S. CONST. art. I, § 8.

108. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

109. 460 U.S. 1, 7 (1983). In *Moses H. Cone*, the dispute arose over a construction company’s demand for payment of its costs due to delay and inaction by the hospital. *Id.* at 6. After negotiations failed, the hospital filed an action for declaratory judgment asking for a declaration that it was not liable and that the construction company’s claims were not arbitrable. *Id.* at 7. The construction company then demanded arbitration and, subsequently, filed an action to compel arbitration per § 4 of the FAA in federal district court. *Id.* The district stayed the action to compel pending resolution of the hospital’s state court lawsuit because both lawsuits involved the issue of whether the claims were arbitrable. *Id.* at 8.



and “into arbitration as quickly and easily as possible.”<sup>110</sup> Applying this holding to expansion of review of arbitration awards is difficult, but not impossible. Since the Supreme Court found that Congress intended to move an arbitrable matter out of court as soon as possible, *a priori*, there must have been Congressional intent to not allow arbitrable matters back into court for a review of the merits of an arbitration award.

In *Dean Witter Reynolds Inc. v. Byrd*, a unanimous Supreme Court held “that a court must compel arbitration of otherwise arbitrable claims,” rejecting the notion that the main goal of the FAA was to urge quick resolution of disputes.<sup>111</sup> The Court went on to state that the main concern of Congress in enacting the FAA “was to enforce private agreements into which parties had entered, and that concern requires that [the Court] rigorously enforce agreements to arbitrate, even if the result is ‘piecemeal’ litigation, at least absent a countervailing policy manifested in another federal statute.”<sup>112</sup> At first blush, this holding seems to endorse the view that the Court would enforce a clause in an arbitration agreement requiring expanded judicial review. However, such a rendering of the Court’s language proves illusory.

The Court will enforce an agreement to arbitrate in accord with Congressional intent, but a “countervailing policy” can be found in the limited grounds for judicial review set forth in section 10 of the FAA.<sup>113</sup> If faced with the issue of whether to permit a party-created standard of review, the Court would not need to look for a countervailing policy in another statute because the plain language of section 10 of the FAA explicitly provides instructions to the courts on when an award should be vacated. These limited grounds “impose[d] upon the judicial review of arbitration modifies the general jurisdictional powers of federal courts.”<sup>114</sup> Limited judicial review of awards maintains the integrity of arbitration and guarantees quick settlement of disputes—the preeminent goal of an arbitration agreement.<sup>115</sup>

#### B. Cases Dealing with the Reach and Scope of the FAA

In *Southland Corp. v. Keating*, the Supreme Court found that a California statute requiring court consideration of claims brought under it ran afoul of

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110. *Id.* 460 U.S. at 22.

111. 470 U.S. 213, 219 (1985). In *Byrd*, a brokerage firm client sued in federal court for several violations of federal securities law and various state law claims. *Id.* at 214. The firm then sought to sever the state law claims and compel arbitration, which was denied by the district court and affirmed by the Court of Appeals. *Id.* at 215-6.

112. *Id.* at 221 (citation omitted).

113. 9 U.S.C. § 10(a) (1994).

114. Di Jiang-Schuerger, *Perfect Arbitration = Arbitration + Litigation*, 4 HARV. NEGOT. L. REV. 231, 239 (1999).

115. Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. ON DISP. RESOL. 337, 339 (2000).

section 2 of the FAA and violated the Supremacy Clause.<sup>116</sup> In finding that the California statute nullified a valid agreement to arbitrate and was adverse to the FAA, the Court stated: “Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.”<sup>117</sup> The Court further stated that the FAA “rests on the authority of Congress to enact substantive rules under the Commerce Clause”<sup>118</sup> and that the Act is applied in not only federal, but state courts as well.<sup>119</sup>

*Southland*, at first glance, supports the proposition that parties may expand judicial review contractually with its militant defense of the enforceability of arbitration agreements in the face of state judicial action. Yet *Southland* can be construed to show the Court’s reluctance in allowing a dispute into court where it would be bogged down in costs and delay, when the dispute can be decided fully in arbitration pursuant to the parties’ wishes. Additionally, if the Supreme Court were willing to hold that the FAA preempts an inconsistent state law, then it would be difficult to imagine that the Court would allow an inconsistent arbitration clause to trump the express directive found in section 10 of the Act.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court confronted the issue of whether statutory claims under the Sherman Anti-Trust Act could be arbitrated.<sup>120</sup> The Court held that parties could arbitrate these statutory claims stating that in an agreement

to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.<sup>121</sup>

The Court went on to find that “adaptability and access to expertise are hallmarks of arbitration” and that parties choose the “streamlined proceedings” of arbitration to avoid the extra “effort and expense” of litigation.<sup>122</sup> This language illustrates the Supreme Court’s understanding that parties must give

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116. 465 U.S. 1, 10 (1984). The Court held that “[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Id.*

117. *Id.* at 7.

118. *Id.* at 11.

119. *Id.* at 14-15.

120. 473 U.S. 614, 616 (1985). The anti-trust claim arose out of Mitsubishi’s refusal to allow its dealer, Soler, to divert shipment of some vehicles to other locations. *Id.* at 618. Soler claimed Mitsubishi “had conspired to divide markets in restraint of trade.” *Id.* at 620.

121. *Id.* at 628.

122. *Id.* at 633.

up the advantages of the judicial process, such as full review of an award, to reap the benefits of arbitration. Creating a litigation-arbitration hybrid by contracting for expanded judicial review harms the integrity of both processes. Finally, and perhaps most importantly to the issue of expanded review, Justice Blackmun wrote that the effectiveness of arbitration “requires that substantive review at the award-enforcement stage remain minimal . . . .”<sup>123</sup> The plain meaning of Justice Blackmun’s quote is that the Court will be reluctant to review arbitration awards for errors of law or fact, as the review of such awards should remain limited in order to protect the integrity of the arbitration process.

In *Allied-Bruce Terminix Cos. v. Dobson*,<sup>124</sup> the Supreme Court faced the issue of how far the FAA reached. A state court had refused to stay a consumer’s lawsuit and compel arbitration under the FAA, finding no connection between interstate commerce and an exterminator contract.<sup>125</sup> The Supreme Court found such a nexus by applying a “commerce in fact” test and again held that the primary purpose of the FAA was enforcement of parties’ agreements to arbitrate.<sup>126</sup> More important is the Court’s statement that arbitration is favorable to parties like individual consumers who have relatively small claims and “need a less expensive alternative to litigation.”<sup>127</sup> Expanding judicial review beyond the narrow grounds set forth in the FAA would increase costs by allowing more appeals and, therefore, an unassuming consumer would have no inexpensive forum for dispute resolution if an expanding clause were placed in a consumer arbitration agreement.

In *First Options of Chicago, Inc. v. Kaplan*, the Supreme Court decided who had the power to decide the arbitrability of a dispute under the FAA: an arbitration panel or the courts.<sup>128</sup> The Court, in a unanimous decision, held that because one party had not agreed to allow the question of arbitrability to be decided by an arbitrator, the dispute over arbitrability should be decided by the courts. The Court found that when a party agrees to arbitrate, the right to have a court decide the matter is greatly diminished, although “[t]he party still can ask a court to review the arbitrator’s decision, but the court will only set

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123. *Id.* at 638.

124. 513 U.S. 265 (1995).

125. *Id.* at 269.

126. *Id.* at 277-79.

127. *Id.* at 280.

128. 514 U.S. 938, 942 (1995). In *First Options*, the Kaplans had not signed the document requiring arbitration, but their wholly-owned investment company, MK Investments had. *Id.* at 941. The arbitrators decided that they had the authority to resolve the dispute on the merits and did so against the Kaplans. *Id.* The district court refused to vacate the award and confirmed it, but the Court of Appeals reversed holding that the dispute with the Kaplans was not arbitrable. *Id.*

that decision aside in very unusual circumstances.”<sup>129</sup> The Court said that when reviewing an arbitrator’s decision regarding arbitrability, “the court should give a considerable leeway to the arbitrator, setting aside his decision only in certain narrow circumstances.”<sup>130</sup> With this language, the Court firmly stated that it will vacate an arbitration award only in narrow, very unusual situations. Therefore, the threshold question for expanded judicial review is whether it is a “narrow” or “unusual” circumstance? By the word “narrow,” the Court implied that the grounds for modification and vacatur were found in the Act and that reviewing awards for errors of law or fact was not a ground for vacatur. By the word “unusual,” the Court stated grounds where the arbitrator’s misconduct tainted the arbitration process but, as the old adage goes “to err is human,” so it cannot be unusual for an arbitrator to misinterpret a law or make some kind of procedural mistake.<sup>131</sup> Hence, by analyzing expanded judicial review through the Court’s language, it seems doubtful that such expanded review dictated by the parties is permissible.

### C. Choice-of-Law Clause Cases

*Volt Information Sciences, Inc. v. Board of Trustees*<sup>132</sup> is of paramount importance to the issue at hand as its language is cited as authority in the *Gateway Technologies* and *LaPine* cases to support expanded review of arbitration awards through freedom of contract.<sup>133</sup> In *Volt*, the Supreme Court held that a California statute permitting a court to stay arbitration until related litigation was resolved was not preempted by the FAA because the parties had stipulated in their arbitration agreement that the arbitration would be governed by California law.<sup>134</sup> Chief Justice Rehnquist’s majority opinion contained strong language favoring enforcement of the parties’ agreement by its terms:

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129. *Id.* at 942. The Court stated that these narrow circumstances are found in § 10 of the FAA and the manifest disregard standard. *Id.*

130. *Id.* at 943.

131. See *Wilko v. Swan*, 346 U.S. 427, 436 (1953), where the Supreme Court stated:

As [the arbitrators’] award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact’ . . . cannot be examined. Power to vacate an award is limited.

*Id.* See also *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993) (“In order to advance the goals of arbitration, courts may vacate awards only for an overt disregard of the law and not merely for an erroneous interpretation.”).

132. 489 U.S. 468 (1989).

133. *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997).

134. *Volt*, 489 U.S. at 470. The dispute arose out of *Volt*’s claim for extra compensation it incurred in installing an electrical system on the campus of Stanford University. *Id.* The construction contract had an arbitration clause and a choice-of-law clause providing that California law would govern any disputes. *Id.* *Volt* demanded arbitration to resolve its claim and

[I]t 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 primary 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.<sup>135</sup>

However, this holding giving "effect to the contractual rights and expectation of the parties"<sup>136</sup> can be limited to parties agreeing to which laws will rule their arbitration. A choice-of-law clause is an aspect of an arbitration agreement that will be enforced per its terms because there is no uniform set of arbitration procedures or rules and its enforcement does not violate any other FAA policy.<sup>137</sup>

It is important to note that the dispute in *Volt* was over when or if arbitration was to occur, not whether the arbitrator made a correct award. Clauses that expand judicial review involve substantive, not procedural, aspects of the arbitration.<sup>138</sup> A fair reading of the FAA would lead to the conclusion that, once an arbitrator makes an award, the FAA takes control by applying the sections permitting confirmation, modification or vacatur if the parties had agreed to allow this.<sup>139</sup> Allowing parties to expand judicial review of awards beyond the grounds in section 10 of the FAA would definitely offend a policy in the FAA—section 10 itself. Furthermore, the Supreme

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Stanford responded by filing a lawsuit in state court for fraud and breach against Volt and seeking indemnity from two others companies with whom Stanford had no arbitration agreement. *Id.* at 470-71. Volt motioned to compel in the state court and Stanford motioned for a stay pursuant to a California statute that permitted a stay of an arbitration pending resolution of a lawsuit if parties to the lawsuit were not bound by the arbitration agreement. *Id.* at 471.

135. *Volt*, 489 U.S. at 479. The Court further stated unequivocally that:

[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.

*Id.* at 476.

136. *Id.* at 479.

137. *Id.* at 476.

138. One commentator felt that

while parties are free to contract as to the procedure, scope, and forum of an arbitration, parties are not necessarily free to contract as to the extent of judicial review of an arbitral award. An expansion of judicial review would go beyond merely contracting as to the scope or procedure of the arbitration and would be contracting as to the substantive enforcement of the award.

Curtin, *supra* note 115, at 363.

139. *See* 9 U.S.C. §§ 9-11 (1994).

Court in *Volt* said parties are “generally free” in molding their own agreements. To read this language as stating that the Supreme Court has given parties free reign over how their arbitration will be conducted before, during and after, would be to ignore a limiting adjective. What the word “generally” implies is that there may be circumstances where the Court would refuse to enforce the parties’ agreement to arbitrate by its terms, yet the question remains if expanded judicial review would be one of these circumstances.

*Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>140</sup> is another case concerning interpretation of a choice-of-law clause in an arbitration agreement. An arbitrator had included punitive damages in his award, but the district court vacated the award finding that the arbitrator had exceeded his powers.<sup>141</sup> However, the Supreme Court, in an eight-to-one decision (Justice Thomas dissenting), overruled the vacatur finding that the choice-of-law or arbitration clauses did not intend to preclude the awarding of punitive damages.<sup>142</sup> Finding the contract ambiguous, the Court applied the common law rule of construing the ambiguous language against the drafter and reinforced the principle that a contract should be read to give effect to all terms and to make all the terms consistent with one another.<sup>143</sup>

This type of contractual construction may be necessary in the context of a clause calling for expanded judicial review. For instance, consider an arbitration clause stating that “the decision of the Arbitrator shall be final and binding on all parties except that any party may petition a court of competent jurisdiction for *review of errors of law*.”<sup>144</sup> This clause appears to be ambiguous and misleading on its face by stating that the arbitration award will be final and binding, but that it can be appealed for any error of law. This broad discretion in allowing a dispute into court directly conflicts with the final and binding language. Which phrase should be given more importance? It seems that the final and binding language rules the clause as “the judiciary is reluctant to interfere with arbitration awards because the very goal of binding arbitration is to avoid lengthy litigation.”<sup>145</sup> Moreover, final and binding decisions are “crucial if arbitration is to result in the same legal rights as judicial litigation.”<sup>146</sup>

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140. 514 U.S. 52 (1995). The clause at issue stated that New York law would govern any arbitration and the law of that state allows only judges, not arbitrators, to award punitive damages. *Id.* at 53.

141. *Id.* at 54-55.

142. *Id.* at 62.

143. *Id.* at 62-63.

144. *New England Utils. v. Hydro-Quebec*, 10 F. Supp. 2d. 53, 57 (D. Mass. 1998).

145. Brian T. McCartney, *Contracting for Judicial Review of Arbitration Awards: Can an “Errors of Law” Clause Provide Two Bites of the Apple?*, 1997 J. DISP. RESOL. 151, 160 (1997).

146. 4 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 39.1.1 (1999).

*D. Cases Regarding Economic Factors of Arbitration*

Two recent Supreme Court cases, *Green Tree Financial Corp. v. Randolph*<sup>147</sup> and *Circuit City Stores, Inc. v. Adams*,<sup>148</sup> are probative on the issue of expanded review in that the Court raised the concerns it had about the cost effectiveness of arbitration. In *Green Tree Financial Corp.*, a party attempted to have an arbitration agreement silent on the issue of costs invalidated due to the prohibitive expense of the arbitration.<sup>149</sup> The Court rejected the party's argument because the party failed to show why the arbitration was expensive and held that such an invalidation of an agreement based on costs goes against the federal policy of encouraging arbitration.<sup>150</sup> This precedent is important in illustrating that the Court will look to economic factors in interpreting an arbitration agreement. Therefore, it might not be outside the realm of reality for the Supreme Court to weigh the economic detriment that parties would suffer in submitting awards to heightened judicial review with the advantages of contractual freedom.

The *Circuit City* case addressed whether employment contracts are beyond the grasp of the FAA.<sup>151</sup> After finding that the FAA applied to all employment contracts except those for transportation workers, the Supreme Court stated:

Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship.<sup>152</sup>

With this pronouncement, it could be difficult for the Court not to take into consideration the economic burden on parties and the docket burden on the courts if parties were allowed to expand judicial review beyond what is set forth in the FAA.

#### IV. THE CIRCUIT SPLIT OVER EXPANDED JUDICIAL REVIEW OF ARBITRATION AWARDS

This Comment takes the position that courts should not allow parties to contractually expand judicial review of arbitration awards beyond the narrow grounds in the FAA.<sup>153</sup> Before further expounding on the reasoning for this

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147. 531 U.S. 79 (2000).

148. 532 U.S. 105 (2001).

149. *Green Tree*, 531 U.S. at 92.

150. *Id.* at 91-92.

151. *Circuit City*, 532 U.S. at 109.

152. *Id.* at 123.

153. *See* 9 U.S.C. § 10(a) (1994).

stance<sup>154</sup> and before examining the cases that support the limited review as established in the FAA, however, those cases that support contractually expanded judicial review of arbitration awards must be examined.

A. *Cases Allowing Expanded Judicial Review*

1. *In re Fils et Cables D'Acier De Lens*

*In re Fils et Cables D'Acier De Lens*<sup>155</sup> was the first case to allow parties to contract for expanded judicial review. The arbitration provision at issue, as quoted by the Court, provided in part, that

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.<sup>156</sup>

An arbitration panel issued findings of fact and an award in favor of Fils et Cables, which sought confirmation in court while Midland Metals sought vacatur or modification of the damages portion of the award.<sup>157</sup> The court recognized the key issue to be whether parties can contractually alter a federal court's part in the arbitration process.<sup>158</sup> The court then went through a short laundry list of reasons why contractual expansion of judicial review should not be allowed.<sup>159</sup> However, the opinion moved on to say that arbitration is a "creature of contract"<sup>160</sup> leading to a conclusion that a party will not be forced to enter into arbitration "under rules to which he has not assented."<sup>161</sup>

The court then shifted its analysis to determine if there is "a jurisdictional or public policy barrier" to parties being able to expand judicial review.<sup>162</sup> The court found no jurisdictional barrier existed as the parties were in court based on diversity jurisdiction<sup>163</sup> and then summarily dismissed any possible public policy impediment by holding that the process the parties agreed upon would be far less taxing on the court than a full trial and then reviewed the arbitration

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154. *See infra* Part V.

155. 584 F. Supp. 240 (S.D.N.Y. 1984).

156. *Id.* at 242 (quoting paragraph 13(c) of the parties' contracts).

157. *Id.* at 243.

158. *Id.*

159. *Id.* at 243-44. The court pointed to the limited grounds for vacatur and modification in the FAA, arbitration as a less expensive and less complicated alternative to adjudication, arbitration awards cannot be vacated for misinterpretation of the law, and that requiring arbitrators to explain awards diminishes the efficiency of arbitration. *Id.*

160. *In re Fils et Cables D'Acier De Lens*, 584 F. Supp. 240, 243 (S.D.N.Y. 1984).

161. *Id.* at 244.

162. *Id.*

163. *Id.*



award under the parties' contractually dictated standard.<sup>164</sup> Through its review, the court confirmed part of the award, modified another part and remanded yet another issue to the arbitration panel for further consideration.<sup>165</sup>

This decision should have little or no precedential value for several reasons. First, the court cites no authority to support its conclusion that parties should be free to alter the roles of courts in arbitration. By the court's permissive reasoning, as long as no public policy or jurisdictional barriers existed, parties could provide for judicial review of an award "by flipping a coin or studying the entrails of a dead fowl."<sup>166</sup> Second, the court failed to consider that sections 10 and 11 of the FAA, itself, are formidable public policy barriers to allowing contractual expansion. Third, although *Fils et Cables* has not been expressly overruled, the Second Circuit Court of Appeals has strongly stated its preferences for adhering to the limited grounds for vacatur and modification in the FAA when reviewing awards.<sup>167</sup>

A relatively recent decision from the Second Circuit, *Westinghouse Electric Corp. v. N.Y. City Transit Authority*,<sup>168</sup> is cited by *Domke on Commercial Arbitration* for the proposition that "parties may contractually provide for a court's scope of review of an arbitration award."<sup>169</sup> The clause of the arbitration agreement at issue in *Westinghouse* read, as follows: "the review of the Court shall be limited to the question [sic] of whether or not the [arbitrator's] determination is arbitrary, capricious or so grossly erroneous to

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164. *Id.* at 244-45.

165. *In re Fils et Cables*, 584 F. Supp. at 247.

166. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

167. *See* *Office of Supply v. N.Y. Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972) ("An award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law."); *In re Sobel*, 469 F.2d 1211, 1214 (2d Cir. 1972) ("It is a truism that an arbitration award will not be vacated for a mistaken interpretation of law."); *John T. Brady & Co. v. Form-Eze Sys., Inc.*, 623 F.2d 261, 264 (2d Cir. 1980) ("This court has generally refused to second guess an arbitrator's resolution of a contract dispute . . . [and] accorded the narrowest of readings to the [FAA's] authorization to vacate awards. . . ."); *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110(2d Cir. 1980) ("[I]t is a well-settled proposition that judicial review of an arbitration award should be, and is, very narrowly limited."); *Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefits Funds*, 748 F.2d 79, 82 (2d Cir. 1984) ("Section 10 of the Act delineates the grounds upon which a court may vacate an arbitrator's award."); *Barbier v. Shearson Lehman Hutton, Inc.*, 948 F.2d 117, 120 (2d Cir. 1991) ("The award may be vacated only if at least one of the grounds specified in 9 U.S.C. §10 is found to exist."); *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993) ("Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation."); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (quoting *Folkways Music Publishers, Inc.*, 989 F.2d at 111, for the limited grounds for vacatur).

168. 14 F.3d 818 (2d Cir. 1994).

169. 1 DOMKE ON COMMERCIAL ARBITRATION, *supra* note 85, § 34.15, at 27.

evidence bad faith.”<sup>170</sup> The court held this arbitrary and capricious standard was permissible, finding it went against no public policy.<sup>171</sup> However, this decision does not mean that the Second Circuit will enforce a clause expanding judicial review by an error of law standard. First, the “arbitrary and capricious” standard has already been recognized as a judicially created ground for vacatur, so the parties were merely incorporating this standard into their agreement.<sup>172</sup> Second, the court rejected Westinghouse’s argument that the court should apply an “error of law” standard pursuant to New York law.<sup>173</sup>

## 2. Gateway Technologies, Inc. v. MCI Telecommunications Corp.

In *Gateway Technologies*, the Fifth Circuit Court of Appeals became the first federal circuit to endorse the parties’ right to contractually expand judicial review of an arbitration award and applied the parties’ standard of de novo review for errors of law.<sup>174</sup> MCI had won a bid for a contract with the Virginia Department of Corrections to implement a phone system that would allow prisoners to make collect calls without the need of operator assistance.<sup>175</sup> MCI then subcontracted with Gateway, who agreed to furnish all the necessary technology for the system.<sup>176</sup> The contract called for binding arbitration “except that errors of law shall be subject to appeal.”<sup>177</sup> A dispute arose over the design of the system, resulting in MCI implementing its own system and terminating the contract with Gateway, and arbitration ensued.<sup>178</sup> The arbitrator found MCI had breached the contract and awarded Gateway actual and punitive damages, leading MCI to file a motion to vacate the award in district court, while Gateway simultaneously filed a motion to confirm.<sup>179</sup> The district court confirmed the award, but applied a “harmless error standard” of review rather than the more scrutinizing “errors of law” standard, leading to MCI’s appeal.<sup>180</sup>

The Fifth Circuit began its opinion by admitting that judicial review of arbitration awards is usually very narrow and can only be vacated on the grounds set out in section 10 of the FAA.<sup>181</sup> However, citing both

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170. *Westinghouse Elec. Corp.*, 14 F.3d at 821-22 (quoting Article 8.03(c) of the parties’ contract).

171. *Id.* at 824.

172. For a discussion of the “arbitrary and capricious” standard, see *supra* Part II.C.

173. *Westinghouse Elec. Corp.*, 14 F.3d at 822.

174. 64 F.3d 993, 995 (5th Cir. 1995).

175. *Id.*

176. *Id.*

177. *Id.* (quoting Article 9 of the parties’ contract dated Apr. 29, 1991).

178. *Id.* at 995-96.

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

180. *Id.*

181. *Id.*

*Mastrobuono* and *Volt*, the court stated that parties may expand judicial review through their contract.<sup>182</sup> The Fifth Circuit went on to say that “[b]ecause these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA’s default standard of review and allows for de novo review of issues of law embodied in the arbitration award.”<sup>183</sup> The Fifth Circuit found that, by not reviewing the award pursuant to the parties’ agreement, the district court had erred and, therefore, frustrated the intent of the parties.<sup>184</sup> Relying once again on *Volt*, the court held that when parties contract “to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract.”<sup>185</sup> From this bold proclamation, the court applied the “errors of law” standard of review to the actual and punitive damages awards and confirmed the actual damages award, while the punitive damages of \$2,000,000 was vacated because the arbitrator failed to apply Virginia law properly.<sup>186</sup>

*Gateway Technologies* raises several noteworthy issues. First, the court does not address the apparent ambiguity in the contract’s arbitration clause. The clause stated that the parties agreed to binding arbitration; however, except that the award was subject to appeal for “errors of law.” This clause appears to be self-contradictory. According to the Dictionary of Dispute Resolution, “binding” is defined as “[o]bligatory; creat[ing] a legal or social indebtedness of obligation . . . .”<sup>187</sup> By calling for the review of a “binding” award, the parties sought the proverbial second bite at the apple of arbitration. In essence, the parties appeared to be contracting for non-binding arbitration, which would mean that the award did not create an obligation. Therefore, the parties should have filed a regular lawsuit, rather than motions to confirm and vacate the award.

Second, expanding the scope of review to include “errors of law” ignores the FAA’s intent to provide for a quick and efficient dispute resolution process.<sup>188</sup> Clauses such as “errors of law” included in arbitration agreements would permit a party unsatisfied with an arbitration award (like MCI) to claim an “error of law,” which would place the dispute into court and result in parties spending more time and money to resolve the dispute than if they had simply filed a lawsuit in the first place.<sup>189</sup> If parties are primarily concerned with

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182. *Id.*

183. *Id.* at 997. See *id.* at 997 n.3 for a reference to *Volt*.

184. *Gateway*, 64 F.3d at 997.

185. *Id.*

186. *Id.* at 997-99.

187. DICTIONARY OF CONFLICT RESOLUTION, *supra* note 2, at 59.

188. See *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 22 (1983).

189. See *McCartney*, *supra* note 145, at 162.

“avoiding irrational or excessive results” rather than “finality and efficiency,” they “may be better off in conventional litigation.”<sup>190</sup>

The third concern was recognized by the *Gateway Technologies* court: the great disparity in financial resources between the parties, albeit in the context of Gateway’s fiduciary claim against MCI.<sup>191</sup> Perhaps the court should have focused on this aspect of the case in a different way. The telecommunications giant subcontracted with a smaller organization, Gateway, to implement the phone system and only when MCI determined that it could make more money by not using Gateway’s system did MCI terminate the contract.<sup>192</sup> It is not difficult to imagine that the party with more financial resources and bargaining power will want, first, an arbitration clause to protect itself from litigation costs and jury awards and, second, an expanded judicial review of an award if it suffers huge losses at the arbitration level like MCI did. Adherence to the limited grounds for vacatur or modification of the FAA<sup>193</sup> may be the only safeguard against a party using this strategy to cover itself from all angles.

Finally, did the *Gateway Technologies* court properly apply *Volt*? It seems it may not have. *Volt* dealt solely with whether the FAA preempted California law, which was the choice-of-law in the arbitration agreement.<sup>194</sup> In *Volt* the Supreme Court found that there was no preemptive provision in the FAA<sup>195</sup> and that parties were free to contract for any arrangement they desired provided that the terms did not do “violence to the policies behind the FAA.”<sup>196</sup> While there is no provision regarding preemption in the FAA, there are two sections establishing grounds for vacatur, modification, and correction. Furthermore, the Fifth Circuit’s labeling of the grounds for vacatur in the FAA as “a default standard of review” has no basis in the statutory language or the legislative history of the FAA.<sup>197</sup> The *Gateway Technologies* court quoted *Volt* to support its statement that parties may “specify by contract the rules under which [the] arbitration will be conducted.”<sup>198</sup> This reliance on *Volt* is misplaced. Without a doubt, the Supreme Court in *Volt* held that parties could

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190. Steven P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 261-62 (1999).

191. *Gateway*, 64 F.3d at 1001. To illustrate this disparity, MCI’s 1999 revenues totaled \$37,120,000,000. THE NEW YORK TIMES ALMANAC 2001: THE ALMANAC OF RECORD 347 (John W. Wright ed., 2000) (citing Fortune Magazine).

192. *Gateway*, 64 F.3d at 995.

193. 9 U.S.C. §§ 10-11 (1994).

194. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989).

195. *Id.* at 477.

196. *Id.* at 479.

197. *See* 9 U.S.C. §§ 1-16 (1994).

198. *Gateway*, 64 F.3d at 996 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)).

contract for the rules that would govern the arbitration;<sup>199</sup> however, the Court stated nowhere that parties were free to contract as to how a federal court would conduct its proceedings. The Fifth Circuit found that the contractual expansion of judicial review supplements the standards set forth in the FAA,<sup>200</sup> yet what this expansion actually does is supercede the FAA grounds by replacing what Congress found to be the grounds for vacatur. Due to its importance, this point shall be discussed further both in this subpart and in Part V.

### 3. Syncor International Corp. v. McLeland

*Syncor International Corp. v. McLeland*, an unpublished opinion from the Fourth Circuit Court of Appeals, cited the *Gateway Technologies* decision as guidance when that court was confronted with the question of expanded judicial review.<sup>201</sup> The dispute in the case arose out of McLeland's employment with Syncor International, a pharmaceuticals distributor and owner and operator of pharmacies.<sup>202</sup> As a result of the employment, which ended in 1994 only for him to be rehired shortly thereafter on a temporary basis, McLeland signed three separate agreements each promising that he would not compete against Syncor, solicit any Syncor customers or encourage other Syncor employees to leave the company.<sup>203</sup> While employed with Syncor, McLeland started his own pharmacy, sought and received investment capital from a Syncor employee, solicited the business of Syncor's two largest accounts in the area, and successfully recruited an employee from a pharmacy related to Syncor.<sup>204</sup>

As a result of McLeland's conduct, Syncor demanded arbitration pursuant to an agreement signed by the parties.<sup>205</sup> This agreement stated that the "arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for such error."<sup>206</sup> The arbitrator entered an award for Syncor, which included all of the stock in McLeland's new enterprise, and Syncor filed a motion in district court for confirmation.<sup>207</sup> The award was confirmed over McLeland's

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199. See *supra* note 135 and accompanying text.

200. See *supra* note 183 and accompanying text.

201. 120 F.3d 262, No. 96-2261, 1997 WL 452245, at \*6 (4th Cir. Aug. 11, 1997) (per curiam).

202. *Id.* at \*1.

203. *Id.* McLeland had been a Regional Manager for Syncor but, after being terminated for business reasons, was rehired as a temporary pharmacist. *Id.*

204. *Id.* at \*2.

205. *Id.* at \*1-2.

206. *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262, No. 96-2261, 1997 WL 452245, at \*6 (4th Cir. Aug. 11, 1997).

207. *Id.* at \*3.

objections and he appealed, claiming the arbitration was invalid because it was conducted *ex parte*, the dispute was non-arbitrable, and the district court applied the wrong standard of judicial review in confirming the award.<sup>208</sup>

After ruling against McLeland on the first two issues, the Fourth Circuit agreed with him that the district court erred in not reviewing the arbitration award under the arbitration agreement's heightened *de novo* standard.<sup>209</sup> However, in applying that heightened standard, the court found "that the arbitrator did not commit error, either legal or factual," and since the district court's error was harmless, the Fourth Circuit refused to remand the case.<sup>210</sup>

The *per curiam* opinion of the Fourth Circuit relied exclusively on *Gateway Technologies* in holding that the expanded judicial review set out in the parties' contract was permitted.<sup>211</sup> As this Comment has argued, the *Gateway* decision has its flaws, which do not bear repetition; however, there are additional reasons why the *Syncor* decision should not be given much weight. First, and most obviously, it is an unpublished opinion, so it is of little, if any, precedential value,<sup>212</sup> and, likewise, it should not be assumed that the Fourth Circuit has definitively ruled in favor of allowing expanded judicial review of arbitration awards. Similarly, the opinion was *per curiam*, which suggests that no judge wanted to take credit for such a tenuous holding.

The second major analytical issue in *Syncor* is the construction of the review-expanding clause. The first part of the clause stated, "[t]he arbitrator shall not have the power to commit errors of law or legal reasoning . . ."<sup>213</sup> By denying the arbitrator this power, this clause attempted to shoehorn its expanded standard for judicial review into section 10(a)(4) of the FAA, which allows vacatur "[w]here the arbitrators exceeded their powers . . ."<sup>214</sup> It should raise eyebrows that the parties sought to deny an arbitrator a power no parties would ever agree that he has—the power to commit legal errors. It should also be noted that this would establish an extraordinarily high standard for arbitrators, which few would be able to meet. No human judgment is perfect and this type of perfection-seeking clause could result in frivolous

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208. *Id.*

209. *Id.* at \*6.

210. *Id.* at \*7.

211. *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262, No. 96-2261, 1997 WL 452245, at \*6 (4th Cir. Aug. 11, 1997).

212. *See* 4TH CIR. R. 36(a) ("[T]his Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments . . . within this Circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case."). *But see* *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) ("We hold that the portion of [8th Circuit Local] Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'").

213. *Syncor*, 1997 WL 452245, at \*6 (quoting arbitration agreement).

214. 9 U.S.C. § 10(a)(4) (1994).

attempts to vacate an award for any mistake, even a harmless one, which the arbitrator could make during the course of arbitration.<sup>215</sup>

The second part of the clause stated “the award may be vacated or corrected by judicial review for any such error.”<sup>216</sup> Here, the parties made the mistake of placing the standard back outside of section 10 of the FAA by allowing for review of the “error” (a standard not mentioned in section 10), instead of review of an arbitrator overstepping his powers. Furthermore, the second part of the clause also violated section 11 of the FAA by allowing correction for errors of law, a ground not mentioned in that section.<sup>217</sup> Therefore, the court could have found that the standard of review was the “exceeding powers” of section 10(a)(4), but that the negative power put forth in the agreement was a cornerstone assumption in all arbitration contracts, and need not be mentioned, leading to a regular limited review under the FAA.

#### 4. LaPine Technology Corp. v. Kyocera Corp.

The last, and possibly most persuasive, decision permitting the expanded judicial review of arbitration awards is *LaPine Technology Corp. v. Kyocera Corp.*<sup>218</sup> The facts of this case revolved around complicated commercial transactions involving the manufacturing and marketing of computer disk drives.<sup>219</sup> The arbitration clause at issue directed that “[t]he Court shall vacate, modify, or correct any award: (i) based upon any of the grounds referred to in the [FAA], (ii) where the arbitrators’ findings of fact are not supported by the substantial evidence, or (iii) where the arbitrators’ conclusions of law are erroneous.”<sup>220</sup> LaPine filed an action in district court alleging a breach of a trade agreement, and although Kyocera was successful in compelling arbitration, the resulting awards were in favor of LaPine.<sup>221</sup> LaPine subsequently petitioned the district court for confirmation of the awards, while Kyocera sought vacatur or modification of the awards.<sup>222</sup>

The district court confirmed the award and refused to review the award “for errors of law or fact.”<sup>223</sup> In doing so, the district court refused to apply

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215. See Jiang-Schueger, *supra* note 114, at 247 (“Parties, who would not otherwise expand judicial review, may use such a provision for safety in case they lose arbitration.”).

216. *Syncor*, 1997 WL 452245, at \*6 (quoting arbitration agreement).

217. See 9 U.S.C. § 11 (1994).

218. 130 F.3d 884 (9th Cir. 1997).

219. *Id.* at 886. For a more detailed statement of the facts of the case, see *LaPine Tech. Corp. v. Kyocera Corp.*, 909 F. Supp. 697, 699-701 (N.D. Cal. 1995) [hereinafter *LaPine I*].

220. *LaPine*, 130 F.3d at 887.

221. *Id.* at 886-87.

222. *LaPine I*, 909 F. Supp. at 699.

223. *LaPine*, 130 F.3d at 887.

both *In re Fils et Cables de Lens* and *Gateway Technologies*.<sup>224</sup> The court, with the help of a Seventh Circuit Court of Appeals case,<sup>225</sup> held that “its power to adjudicate in the exercise of . . . jurisdiction, particularly where conferred by statute as here, cannot be changed or altered by the agreement of the parties.”<sup>226</sup> The district court distinguished *Gateway Technologies* from *Mastrobuono* and *Volt* by showing that the latter two dealt with the powers of parties to dictate “the subject matter and rules of arbitration,” not with the powers of parties to expand judicial review of arbitral awards.<sup>227</sup> The district court noted “that while arbitration is non-judicial dispute resolution, confirmation or vacation is not part of such a proceeding, but is a judicial act provided for by statute.”<sup>228</sup>

Kyocera appealed the district court decision, and the Ninth Circuit boiled the issue down to whether “federal court review of an arbitration agreement [is] necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?”<sup>229</sup> The court held that the parties’ agreement must be honored by reviewing the award according to the agreed upon standard pursuant to several Supreme Court decisions making “it clear that the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with agreements’ terms.”<sup>230</sup> The court failed to make the distinction, as the district court had,<sup>231</sup> that *Volt* dealt with rules of arbitration and not the parties’ powers to direct court review. *Volt* and the other cases the court relied upon<sup>232</sup> were interested with “the scope and procedural regulations of the arbitral process, not the substantive enforcement of awards or of the arbitration agreement itself.”<sup>233</sup> In response to this procedural argument, the Ninth Circuit

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224. *LaPine I*, 909 F. Supp. at 705 (“This court is satisfied that the parties may not by agreement alter by expansion the provisions for judicial review contained in the [FAA].”).

225. *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991). This case and other Seventh Circuit cases will be discussed *infra* Part IV.B.2.

226. *LaPine I*, 909 F. Supp. at 703.

227. *Id.* at 705.

228. *Id.*

229. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 887 (9th Cir. 1997). The court seems to make a textual error in saying review of agreements is at issue, when, in fact, the review of arbitration awards is at issue. Nonetheless, this Comment will assume the court meant to state that the review arbitrator’s award and not the agreement was the main issue of the case.

230. *Id.* at 888. Shortly after this statement the court cites a rather lengthy quote from *Volt Information Sciences* to support its position that freedom of contract is the overriding goal of arbitration. *Id.*

231. *LaPine I*, 909 F. Supp. at 705.

232. See *LaPine*, 130 F.3d at 888. The court cites cases such as *Mastrobuono*, *First Options of Chicago*, *Mitsubishi Motors* and *Prima Paint* for the general proposition that arbitration is run by the parties and a court must enforce the parties’ agreement. *Id.* For a discussion of these cases, see *supra* Part III.

233. Curtin, *supra* note 115, at 362.



recognize[d] that agreeing to the scope of review by a court is not precisely the same as agreeing to the scope of the arbitration itself. Nevertheless, the standards against which the work of the arbitrator will be measured are inexorably intertwined with the arbitration's scope, affect its whole structure, and may even encourage the arbitrator to adhere to a high standard of decision making.<sup>234</sup>

Despite its persuasive reasoning, the court failed to address three problems that will arise when federal courts agree to enforce parties' agreements to expand judicial review of awards. First, forcing a judge to adjudicate based on the parties' private contracts presents serious implications for the institutional integrity of the judiciary.<sup>235</sup> Secondly, petitions seeking expanded review outside of the FAA will end up in the crowded court system before busy and perhaps uninterested judges, which frustrates the party winning at arbitration seeking award enforcement and encourages stubborn parties bent on delay.<sup>236</sup> Finally, only through the limited standards of review in the FAA "can the integrity of the arbitral process be maintained and the quick resolution of disputes be assured, which, in the end, is the ultimate goal of any contractual provision involving the resolution of disputes."<sup>237</sup>

The *LaPine* court argued that if courts refuse to apply the parties' "searching review" of an award, then the court is ignoring the wishes of the parties in defiance of what Congress had intended.<sup>238</sup> However, what did Congress intend by enacting the limited standards of review of awards in section 10 of the FAA? Since the legislative history is silent on the intent, it would be safe to assume that Congress meant to limit judicial intervention in the arbitration process by allowing parties to attempt to vacate awards only in very specific, restrictive circumstances.<sup>239</sup> The *LaPine* court then rejected the

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234. *LaPine*, 130 F.3d at 889.

235. Cole, *supra* note 29, at 1203. Professor Cole further stated:

requests for non-traditional judicial intervention present the possibility of significant threats to the courts' institutional integrity. Imagine, for instance, that the parties have agreed that a court will have the power to review an arbitral award, but that the review must be accomplished by flipping a coin, or by casting lots.

*Id.* While this may seem like a far-fetched hypothetical, the language in *LaPine* places no limitation on the parties' power to direct how courts can review awards.

236. Stanley McDermott, III, *Expanded Judicial Review of Arbitration Awards Is a Mixed Blessing That Raises Serious Questions*, DISP. RESOL. MAG., FALL 1998, at 21.

237. Curtin, *supra* note 114, at 339.

238. *LaPine*, 130 F.3d at 890. The court then cited *First Options of Chicago v. Kaplan* as support that the Supreme Court has spurned courts from ignoring parties' intentions. *Id.* However, *First Options* dealt with the issue of whether courts should review an arbitrator's decision regarding arbitrability in the same manner that it reviews other arbitration decisions. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1985).

239. See 9 U.S.C. § 10 (1994).

dicta found in *Chicago Typographical Union v. Chicago Sun-Times, Inc.*<sup>240</sup> concerning creation of jurisdiction by contract by saying that the FAA was not a jurisdictional statute limiting or conferring power on federal courts, but “a regulation of commerce.”<sup>241</sup> The Ninth Circuit concluded its opinion by holding that the Act encourages agreements that expand judicial review and that “the FAA is not an apotropaion designed to avert overburdened court dockets; it is designed to avert interference with the contractual rights of the parties.”<sup>242</sup> Yet there is a good amount of legislative history that refutes the court’s claim and states one of the purposes of the Act was to reduce the burden on courts.<sup>243</sup>

Judge Kozinski’s concurrence in *LaPine* acknowledges that Congress was silent on whether courts could apply parties’ standards of judicial review, but finds, due to the strong policy of freedom of contract, that Congress would probably not object to enforcement of the parties’ agreement.<sup>244</sup> The concurrence makes an interesting point that what district courts would be doing in reviewing arbitration awards would be no different than what district courts already do in hearing appeals regarding decisions from bankruptcy courts or administrative courts.<sup>245</sup> There is one important distinction. Appeals from those bodies are granted by Congress, while appeals of arbitration agreements are granted by the parties to the arbitration.

Besides possibly misconstruing Congressional intent, Supreme Court rulings and the public policies underlying arbitration, the question remains of whether the Ninth Circuit ignored its own precedent in allowing contractual expansion of judicial review. In *A.G. Edwards & Sons, Inc. v. McCollough*,<sup>246</sup> the Ninth Circuit stated that “various policy arguments urging tighter judicial review of arbitration awards are not persuasive. Such a course would undermine the strong federal policy encouraging arbitration as a ‘prompt, economical and adequate’ method of dispute resolution for those who agree to it.”<sup>247</sup> Stronger language cutting against the expansion of judicial review can be found in *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*<sup>248</sup> In this decision, the Ninth Circuit stated:

[T]he statutory grounds for vacating or modifying the award of arbitrators are stated in [sections 10 and 11 of the Act] and neither section authorizes the

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240. *Chicago Typographical Union No.16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

241. *LaPine*, 130 F.3d at 890.

242. *Id.* at 890-91.

243. *See supra* text accompanying notes 22-26.

244. *LaPine*, 130 F.3d at 891.

245. *Id.*

246. 967 F.2d 1401 (9th Cir. 1992).

247. *Id.* at 1404 n.2.

248. 293 F.2d 796 (9th Cir. 1961).

setting aside of an award “on grounds of erroneous finding of fact or misinterpretation of law” . . . Had Congress contemplated that any different rule should now become operative, or that a mere error of law should be a basis for setting aside an award, it would have no difficulty in drafting a separate subdivision of sections 10 or 11 which would say that.<sup>249</sup>

The *LaPine* decision goes completely in the opposite direction and finds that parties, not Congress, may expand the grounds for review under the FAA. It is strange that the *LaPine* court chose not to directly distinguish or overrule either of these cases, which seemingly conflict directly with *LaPine*’s holding.

In conclusion, *LaPine* raises the question of whether the FAA is a license for parties to interfere with the federal judicial process. The *LaPine* district court opinion may have answered this question best: “The role of the federal courts cannot be subverted to serve private interests at the whim of contracting parties.”<sup>250</sup>

### B. Cases Rejecting the Notion of Party Created Expanded Review

#### 1. Bowen v. Amoco Pipeline Co.

The Tenth Circuit Court of Appeals officially created a split among the circuits in June 2001 with its decision in *Bowen v. Amoco Pipeline Co.*<sup>251</sup> In 1993, Bowen, on several occasions, saw an “oily sheen” on a creek located on his property.<sup>252</sup> After an independent study and an Oklahoma Corporate Commission investigation, it was determined that an Amoco pipeline was

249. *Id.* at 801-02.

250. *LaPine Tech. Corp. v. Kyocera Corp.*, 909 F. Supp. 697, 703 (N.D. Cal. 1995).

251. 254 F.3d 925 (10th Cir. 2001). The term “officially” is used as there already existed strong indications that the Second, Seventh, Eighth and District of Columbia Circuit Courts of Appeals would not allow expanded judicial review of arbitration awards. *See, e.g.*, *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (“[Parties] cannot contract for *judicial* review of [an] award; federal jurisdiction cannot be created by contract.”); *Bavarati v. Josephthal, Lyon & Ross Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (The grounds for vacatur “are exhaustively stated in the [Act].”); *DDI Seamless Cylinder Int’l, Inc. v. Gen. Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1994) (“[A]n arbitrator’s award is not appealable. It is, however, subject to limited judicial review.”); *Gingiss Int’l, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995) (“We have repeatedly held that 9 U.S.C. § 10(a) provides the exclusive grounds for setting aside an arbitration award.”); *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 650 (7th Cir. 2001) (“The grounds on which the plaintiffs can attack the award are limited to those set forth in the [FAA].”); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (“[W]e do not believe it is yet a foregone conclusion that parties may effectively agree to compel a federal court to cast aside [§§ 9-11] of the FAA.”); *Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 84 (D.C. Cir. 1980) (“The strong federal policy in favor of voluntary commercial arbitration would be undermined if the courts had the final say on the merits of the award.”). For a listing of the Second Circuit decisions endorsing limited review, see *supra* note 167.

252. *Bowen*, 254 F.3d at 927.

leaking and caused the contamination.<sup>253</sup> Due to Amoco's continued failure to admit responsibility, Bowen filed a lawsuit in federal district court seeking damages for tort, breach of contract and exemplary damages.<sup>254</sup> Amoco responded by filing a motion to compel arbitration, which the district court granted pursuant to the original easement agreement signed by both of the parties' predecessors in interest.<sup>255</sup> Just prior to arbitration, Amoco was ordered to uncover portions of its pipeline showing, with the help of expert analysis, that over 1,000 feet of pipeline had been replaced in 1950, that the soil around the pipeline was contaminated and that it was a leak in the pipeline that resulted in the contamination of Bowen's creek.<sup>256</sup> Bowen and Amoco agreed that the arbitration would be governed by the Rules for Non Administered Arbitration of Business Disputes with one modification: expanded scope of judicial review of the arbitration award.<sup>257</sup> More to the point, they agreed that either party had the power to appeal an award within thirty days to the district court "on the grounds that the award is not supported by the evidence."<sup>258</sup> The arbitration panel awarded Bowen over \$3,000,000 payable to an escrow fund to clean up the creek, \$100,000 for damage to property value, \$1,200,000 for nuisance, \$1,000,000 in punitive damages and \$41,000 for investigation costs.<sup>259</sup> Bowen filed a motion for confirmation per section 9 of the FAA, and Amoco, in turn, filed a motion for vacatur of the award pursuant to the arbitration agreement.<sup>260</sup> The district court refused to apply the expanded scope of judicial review and confirmed the arbitration award in favor of Bowen.<sup>261</sup> Amoco then appealed seeking vacatur and remand to the arbitrator or vacatur and remand to the district court to review the award pursuant to the expanded review provided for in the arbitration agreement.<sup>262</sup>

The Tenth Circuit's opinion began by making it clear that the FAA does not create federal jurisdiction or any new rights, but creates a body of law governing arbitration agreements.<sup>263</sup> The court then stated that its review of arbitration awards was "strictly limited" and "highly deferential" to the arbitrator under the FAA.<sup>264</sup> The reason, the court stated, for the employment

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253. *Id.* at 928.

254. *Id.*

255. *Id.* at 928 n.1.

256. *Id.* at 928-29.

257. *Bowen*, 254 F.3d at 930.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Bowen*, 254 F.3d at 930.

263. *Id.* at 931 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-72 (1995)).

264. *Id.* at 932.

of this strict review and use of caution in reviewing awards is that the “purpose behind arbitration agreements is to avoid the expense and delay of court proceedings.’ A court may not, therefore, independently judge an arbitration award.”<sup>265</sup> The court unequivocally stated that an award may only be vacated under the limited statutory or judicially created grounds and that the reasoning behind the FAA “do not support a rule allowing parties to alter the judicial process by private contract.”<sup>266</sup> The court recognized, through Supreme Court decisions, that parties have the contractual freedom to structure arbitration agreements to their own liking and that the court’s decision “must further the FAA’s primary policy ensuring judicial enforcement of private agreements to arbitrate.”<sup>267</sup>

The court identified the *LaPine* and *Gateway Technologies* decisions allowing expanded judicial review, but disagreed with those decisions’ conclusions that Supreme Court precedent obliged the enforcement of contractually expanded judicial review.<sup>268</sup> The Tenth Circuit noted that the Supreme Court “has never said parties are free to interfere with the judicial process . . . [and] no authority clearly allows private parties to determine how federal courts review arbitration awards.”<sup>269</sup> The court pointed out that *Volt* and other cases favoring party crafted arbitration “simply do not dictate that courts submit to varying standards of review imposed by private contract.”<sup>270</sup> The court found that allowing enforcement of expanded judicial review would be illogical because:

The FAA’s limited review ensures judicial respect for the arbitration process and prevents courts from enforcing parties’ agreements to arbitrate only to refuse to respect the results of the arbitration. These limited standards manifest a legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process. Unlike § 4 of the FAA, . . . the provisions governing judicial review of awards, 9 U.S.C. §§ 10-11, contain no language requiring district courts to follow parties’ agreements.<sup>271</sup>

This explanation is why the *Bowen* court’s analysis is superior to the opinions in *Gateway Technologies* and *LaPine*—it takes into account the actual language of the FAA and is able to recognize that the Supreme Court had not yet even come close to weighing in on the issue. Without specific direction from the Supreme Court, the Tenth Circuit looked to the next strongest

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265. *Id.* (citation omitted) (quoting *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986)).

266. *Id.* at 932-23.

267. *Bowen*, 254 F.3d at 934.

268. *Id.*

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

270. *Id.*

271. *Id.* at 935.

possible authorities for guidance: the language Congress used in the Act and the nature of arbitration itself. The court cited with favor *Chicago Typographical Union* and *UHC Management Co.*—two cases from the Seventh and Eighth Circuits, respectively, that have expressed disapproval of expanded review through dicta.<sup>272</sup>

The Tenth Circuit then went on to explain why expanded judicial review would undermine the independence of the arbitration system through practical consideration. First, for awards to be effective, courts must first enforce the arbitration agreements and then enforce the awards resulting from the arbitration.<sup>273</sup> Next, the court stated that applying expanded standards of judicial review would put a court in the untenable position of having to review proceedings that may have been guided by “unfamiliar rules and procedures,” which parties are not permitted to do.<sup>274</sup> The court gave another reason why the independence of arbitration would be threatened by expanded review and, therefore, would blur the distinction between arbitration and litigation. Arbitrators are chosen for their ability to create innovative remedies, but expanded review would force courts to review “that which it would not do,” and would reduce an arbitrator’s eagerness to sculpt customized solutions “for fear the decision will be vacated by a reviewing court.”<sup>275</sup> The court held that parties are not permitted to contract for expanded review of awards beyond the grounds set forth in the FAA and judicially crafted standards, but that they could contract for an appellate arbitration panel as the Seventh Circuit suggested.<sup>276</sup>

The strength of the *Bowen* opinion lies in its ability to balance the variety of interests involved in the issue of expanded judicial review of arbitration awards: the parties, the courts and the arbitration system in general. The Tenth Circuit is on strong footing in finding that the FAA’s limited grounds of review are as significant as the Act’s instruction to courts to enforce arbitration agreements since these limited grounds ensure “that the outcome of arbitration would be as binding and as unassailable as the promise to participate in the [arbitration] process.”<sup>277</sup> The court’s fear that expanded review of arbitration awards would threaten the independence of the arbitration process is on equally solid ground because of the dangers of arbitration becoming entangled in the process of litigation. As Professor Hans Smit has so ably stated:

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272. *Bowen*, 254 F.3d at 936-37.

273. *Id.* at 935.

274. *Id.*

275. *Id.* at 936.

276. *Id.* at 936-37 (citing *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991)).

277. Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1950 (1996).

Exclusion of judicial review of arbitral awards for errors of fact or law is one of the foundations on which the social desirability . . . of arbitration is firmly built. For if arbitral awards could be reviewed for errors of law or fact, arbitration would easily degenerate into a device for adding still another instance to the usual three instances of litigation in ordinary courts. It is exactly to avoid this socially most reprehensible consequence that the law straightforwardly excludes review of arbitral awards for errors of fact or law. . . . [T]his would not be the case if arbitration created merely a preliminary instance to ordinary court proceedings.<sup>278</sup>

## 2. Cases from the Seventh and Eighth Circuits

The Seventh Circuit weighed in on the issue of expanded review through *Chicago Typographical Union*, where Judge Posner stated:

An agreement to submit a dispute over the interpretation of a . . . contract to arbitration is a contractual commitment to abide by the arbitrator's interpretation. If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract.<sup>279</sup>

In *LaPine*, the majority opinion criticized this statement almost to the point of incredulity by saying the Seventh Circuit failed to explain its reasoning and felt "the court's cryptic assertion about jurisdiction [was] dicta."<sup>280</sup> The *LaPine* court further criticized the Seventh Circuit's stance on jurisdiction by claiming that the FAA was not a jurisdiction granting statute, but a regulation of commerce.<sup>281</sup> Yet *Chicago Typographical* was not a case asserting any rights under the Act, but was a dispute over labor arbitration.<sup>282</sup> When faced with the union's challenge of an arbitration award, the Seventh Circuit replied:

Federal courts do not review the soundness of arbitration awards . . . [The arbitrator's] interpretation of the contract binds the court asked to enforce the award or to set it aside. The court is forbidden to substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong.<sup>283</sup>

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278. Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 149 (1997).

279. *Chicago Typographical*, 935 F.2d at 1505.

280. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 890 (9th Cir. 1997).

281. *Id.*

282. *Chicago Typographical*, 935 F.2d at 1503. In this case, the *Sun-Times* unilaterally changed some terms of the union's collective bargaining agreement, which led to the union filing a grievance submitted to arbitration. *Id.* The arbitrator found that some of the changes were warranted by the agreement and that others were not, but the union persisted and filed a lawsuit challenging the arbitration award. *Id.*

283. *Id.* at 1505.

Hence, the language in *Chicago Typographical* was directed at an argument made by the union and, while dicta, was a strong argument against allowing expanded judicial review through the parties' fiat. The *Bowen* court cited *Chicago Typographical* mainly for the language suggesting that parties who agree to have expanded review should, instead, contract for an appellate arbitration board. However, in a footnote, *Bowen* sheds light on this jurisdictional issue by recognizing the dilemma courts would face in having to vacate awards that courts would not usually vacate under federal statutory or common law.<sup>284</sup> The *Bowen* court then avoided deciding the jurisdictional issue by holding parties cannot interfere with the judicial process.<sup>285</sup>

More recent decisions by the Seventh Circuit have further illustrated that Circuit's unwillingness to allow expanded judicial review of awards.<sup>286</sup> Perhaps the strongest indication of how the Seventh Circuit would rule if faced with a clause expanding judicial review is found in *Bavarati v. Josephthal, Lyon & Ross, Inc.*, in which Judge Posner declared:

Judicial review of arbitration awards is tightly limited; perhaps it ought not be called "review" at all. By including an arbitration clause in their contract the parties agree to submit disputes arising out of the contract to a nonjudicial forum, and we do not allow the disappointed party to bring his dispute into court by the back door, arguing that he is entitled to appellate review of the arbitrators' decision.<sup>287</sup>

It is, therefore, safe to say that the Seventh Circuit would limit review of arbitration awards to the grounds found in the FAA and the judicially-created exceptions.

Support for rejecting the party-created, expanded standards for judicial review can also be found in the Eighth Circuit's decision in *UHC Management Co. v. Computer Sciences Corp.*<sup>288</sup> In this case, the losing party at arbitration

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284. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 n.8 (10th Cir. 2001).

285. *Id.* at 937.

286. *See, e.g.*, *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995) ("We have repeatedly held that 9 U.S.C. § 10(a) provides the exclusive grounds for setting aside an arbitration award under the FAA."); *DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1994) ("One of the big differences between arbitration and adjudication is that unless the parties provide otherwise, an arbitrator's award is not appealable. It is, however, subject to limited judicial review.").

287. *Bavarati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

288. 148 F.3d 992 (8th Cir. 1998). Strong language by the Eighth Circuit against expanded judicial review can also be found in *Stroh Container Co. v. Delphi Industries, Inc.*, in which the court stated:

an arbitrator's conclusions on substantive matters may be vacated only when the award demonstrates a manifest disregard of the law where the arbitrators correctly state the law and then proceed to disregard it, if the award is otherwise irrational, or if any of the explicit grounds for vacation or modification set forth in sections 10 and 11 of the Act



claimed that the term in the arbitration clause saying arbitrators would be “bound by controlling law” meant that the parties had agreed to expanded judicial review of the award.<sup>289</sup> In response to this claim, the court held it is murky as to whether parties have input into the way “a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such review is to occur.”<sup>290</sup> The Eighth Circuit then stated that section 9 of the FAA is a Congressional command to courts to confirm an award when the grounds in sections 10 and 11 of the Act do not apply.<sup>291</sup> The court went on to doubt whether parties may agree to force a federal court to ignore the FAA, citing the dissent in *LaPine* as support and raising its concerns over possible harm that expanded review could have on the integrity of the courts and the arbitration process.<sup>292</sup> However, the court warned it would reserve its judgment on this subject because the parties’ arbitration agreement did not clearly express the intent to have an expanded standard applied.<sup>293</sup>

The statement of the Eighth Circuit that it would wait until it sees a clause expressly expanding review of awards to rule on its enforceability seems to bring the above quoted passages into the realm of obiter dictum. However, this may not weaken the strength of the court’s analysis. The court could have simply started off with its analysis that the clause did not show the parties’ intent, found it was unclear, and disposed of the case. Instead, the court handed down a strong statutory and policy based argument, albeit with guarded language, against expanded review. The court’s intent may have been that, in not wanting to rock the boat by expressly disagreeing with *Gateway Technologies* and *LaPine*, it was sending a message to parties in the Eighth Circuit that if they attempted to contract for expanded judicial review they would have a difficult time convincing the court.

#### V. WHY REJECTION OF EXPANDED JUDICIAL REVIEW OF AWARDS IS THE CORRECT APPROACH

While this section of the Comment may take several turns, or even detours, it will attempt to stay on the road to show that allowing parties to expand judicial review of awards by agreement is unacceptable for two broad reasons.

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are present. . . . These grounds have often been deemed the exclusive grounds for vacation or modification.

783 F.2d 743, 749 (8th Cir. 1986).

289. *UHC Mgmt.*, 148 F.3d at 997.

290. *Id.*

291. *Id.* The pertinent clause of § 9 states: “[T]he court must grant such an order [of confirmation] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” 9 U.S.C. § 9 (1994).

292. *UHC Mgmt.*, 148 F.3d at 997-98.

293. *Id.* at 998.

First, it will threaten the integrity of the arbitration process because of additional costs and time, and will lead to arbitration becoming another form of adjudication rather than the alternative to litigation that it is supposed to be. Second, parties cannot alter the federal court process or create federal jurisdiction solely by their contract without Congress stating that they may do so.

A. *Endangering the Integrity of the Arbitration Process*

In 1965, Professor Martin Domke, the eminent scholar of arbitration, wrote:

Courts do not wish to reopen an arbitration proceeding in another forum, by reviewing the merits of an award. Such a review would lead to a second proceeding with legal technicalities that the parties intended to avoid. It would substitute the court's judgment for that of the arbitrators and destroy the very aim of arbitration, which is to have a speedy determination of the issues submitted to experts in whom the parties had expressed confidence.<sup>294</sup>

This passage still rings true today. Expanded judicial review frustrates the whole process of arbitration to the extent that arbitration would no longer look like arbitration at all. A long-standing platitude of arbitration is that parties agreeing to settle their dispute by arbitration enter into a quid pro quo: a limited right of appeal of the award in exchange for a cheap and quick resolution of the dispute.<sup>295</sup> Therefore, expanded judicial review would wreck the advantages of arbitration by adding costs and delay. A powerful reason for allowing judicial review only under the limited aspects of the FAA is that parties will receive a resolution in a "speedy and efficient manner."<sup>296</sup>

Consider, for instance, the dispute in *LaPine*. The arbitration award was entered in August 1994 and the motion to vacate was filed in November of the same year.<sup>297</sup> The district court denied this motion thirteen months later in December 1995.<sup>298</sup> The appellate decision, which reversed and remanded to the district court, was handed down in December 1997, almost two years to the day after the district court decision.<sup>299</sup> If the parties did not settle and the case went back to the district court on remand, it would be safe to assume that it would take another year for the district court to decide the case. Taking this line of reasoning a step further, if the district court vacated the award and ordered a new arbitration, where would the parties be? They would have spent five years of their time on the dispute, spent an untold amount of money on

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294. MARTIN DOMKE, COMMERCIAL ARBITRATION 99 (1965).

295. Younger, *supra* note 190, at 241.

296. Smit, *supra* note 278, at 147.

297. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 887 (9th Cir. 1997).

298. *LaPine Tech. Corp. v. Kyocera Corp.*, 909 F. Supp. 697, 697 (N.D. Cal. 1995).

299. *LaPine*, 130 F.3d at 884.

court fees and attorneys and they would not be one iota closer to a resolution. In fact, due to the added time and expense, the parties would have been better off filing suit in a court of law rather than seeking arbitration under their expanded standard.<sup>300</sup>

The fact that arbitration has made headway into many areas of the law means that more and more people and businesses are affected by the process. The consumer, employee or small business may sign an arbitration agreement unwittingly or with the knowledge that the party with superior bargaining power (manufacturer, employer, large company) could simply walk away if the weaker party did not agree to its terms.<sup>301</sup> It would be a manifest injustice to then make the process that the weaker party agrees to more expensive with the specter of expanded judicial review hanging above the process. Not only was Congress concerned with providing a cheaper and quicker means of dispute resolution in 1925,<sup>302</sup> but today Congress is still concerned with providing parties, especially employees and consumers, the great benefits of arbitration.<sup>303</sup>

An example of how beneficial arbitration can be to an individual is in the area of employment disputes—an aspect of the law that cuts across all classes. A conservative average of the length of civil cases is two and one-half years (with some taking as long as eight years) with the length only expected to grow in our litigious system.<sup>304</sup> By contrast, the average time for resolution of arbitration cases is 8.6 months.<sup>305</sup> In litigating an employment dispute, the costs are at a minimum \$10,000 even if the case does not go to trial, but if the case is fully adjudicated the cost rises to a minimum of \$50,000.<sup>306</sup> Although

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300. See Younger, *supra* note 190, at 261-62.

301. See Carbonneau, *supra* note 277, at 1956.

302. See *Allied Bruce-Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (“We agree that Congress, when enacting [the FAA], had the needs of customers, as well as others, in mind . . . Indeed, arbitration’s advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation.”).

303. In the debate over The Consumer and Employee Arbitration Bill of Rights, Senator Sessions said:

Arbitration is one the best means of dispute resolution and one that most consumers and employees can afford. Consumers and employees generally cannot afford a team of lawyers to represent them. And their claims are often not big enough so that a lawyer would take the case on a . . . contingent fee. . . . If [the consumer or employee] can afford to pay the [attorney’s] hourly rate, he must decide whether it makes financial sense to pay a lawyer several thousand dollars to litigate a claim in court for a broken television that cost \$700 new. If this is what consumers and employees are left with, many will have no choice but to drop their claim. This is not right. It is not fair.

146 CONG. REC. S10624 (daily ed. Oct. 17, 2000) (statement of Sen. Sessions).

304. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998).

305. *Id.*

306. *Id.* at 56.

there is no definitive study of employment arbitration costs, one study posits that costs could be as low as \$3,000.<sup>307</sup> Consequently, allowing expanded review in this area would completely erase the time and money saved by an employee wishing to settle his dispute by arbitration.

Since arbitration is faster, more cost effective and more definite than litigation, more parties are able to seek justice by utilizing arbitration than they would in the world of litigation.<sup>308</sup> Expanding judicial review would add “another tier to the time-consuming litigation process, rather than avoiding that process.”<sup>309</sup> American Arbitration Association Consumer Rules require small-claim consumers to pay no filing fee and only a nominal \$125 fee to the arbitrator with the businesses paying the remainder of the costs.<sup>310</sup> This advantage would be eliminated if that company could then appeal an award and force the matter into court. Further studies show that arbitration when the amount in controversy is less than \$50,000 takes, on average, six months from the filing to the rendering of an award.<sup>311</sup> Furthermore, by submitting the claim to arbitration the parties gain access to a resolution process much faster than in litigation with the American Arbitration Association (AAA) reporting that the time for resolution averages about 110 days from the date of submission.<sup>312</sup>

The Supreme Court has supported the premise that Congress intended arbitration to be a quick process not subject to the delay inherent in the court system.<sup>313</sup> One study shows that in the period between 1960 and 1994 filings in federal district courts rose 216% while filings in courts of appeals rose an astounding 1,139%.<sup>314</sup> Since arbitration is less expensive than litigation, parties are free to spend the money saved on “more socially productive purposes” and arbitration helps the judiciary by lightening its load of cases and

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307. *Id.* at 54-55.

308. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 678 (1996).

309. Younger, *supra* note 190, at 261.

310. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 95 (2000) (Ginsburg, J., dissenting).

311. *Allied Bruce-Terminix Cos. v. Dobson*, 513 U.S. 280, 280-81 (1995). *See also* Tom Arnold, *Booby Traps in Arbitration Practice and How to Avoid Them*, ALI-ABA COURSE OF STUDY, Mar. 19, 1998, at 104.

312. THOMAS E. CROWLEY, *SETTLE IT OUT OF COURT* 171 (1994).

313. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (“We not only honor the plain meaning of the [FAA] but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay . . .”).

314. Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 25 (1996).

freeing judicial resources for concentration on fewer cases.<sup>315</sup> The time saving aspects and cost-effectiveness of arbitration cherished by parties and the legal community would evaporate with expanded judicial review of arbitration awards.<sup>316</sup>

Besides ruining arbitration's advantage over litigation in costs and time, expanded judicial review would also compromise the integrity of the arbitration system by taking away traditional advantages of arbitration: parties choosing an expert as arbitrator, the awarding of alternative remedies that courts cannot usually grant, and the lack of a need for a written opinion or discovery. The *Bowen* court stated: "Arbitrators are chosen for their specialized experience and knowledge, which enable them to fashion creative remedies and solutions that courts may be less likely to endorse."<sup>317</sup> If arbitration was subject to expanded judicial review for errors of law or fact, the arbitrator would most likely have to be a lawyer (which is not always the case) because the district court reviewing the award would certainly need an extensive record to make a fair and informed adjudication. Therefore, the arbitrator and parties would have to make sure that an extensive record exists, which could only be accomplished through discovery, and a written and reasoned award granted. These requirements would add cost and, more importantly, would blur the line between arbitration and litigation. Also, and more significantly, "arbitrators faced with heightened judicial scrutiny might ultimately come to focus less on the merits of the particular dispute, or the relationship between the parties, and more on the task of producing opinions or building a record that would enable their awards to survive later challenge."<sup>318</sup>

One of the main disadvantages of litigation is that it sometimes fails to render a decision within the standards of the business involved; therefore, resolution by a party with expertise in the area of dispute "is one of the greatest advantages of arbitration."<sup>319</sup> In addition, an arbitrator chosen for his

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315. Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 255 (1987).

316. See BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (Federal Judicial Center 1990) (providing an example of how lawyers, parties, and judges value arbitration). In this extensive study of arbitration programs in federal courts, 60% of lawyers felt the arbitration program saved them time, 62% felt that it saved costs, and 65% felt the arbitration saved time for their clients. *Id.* at 85. Sixty-five percent of parties agreed that the costs were reasonable, while 71% agreed that personal time requirements were reasonable. *Id.* at 89-92 tbls.26-27. Ninety-six percent of judges described their level of support for the program as "very positive" (78.9%) or "somewhat positive" (17.5%). *Id.* at 112 tbl.33. Perhaps most significant is that almost 97% of the judges surveyed agreed that the arbitration program reduced their caseload burden. *Id.* at 115 tbl.36.

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

318. MURRAY, *supra* note 100, at 623.

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

knowledge and experience in the area “will know more about the disputed subject than ordinary judges or juries” thereby giving parties more confidence in the award handed down.<sup>320</sup> As stated above, if an arbitrator has to worry about ensuring that her award will not be overturned by spending more time preserving a record or refereeing discovery, then her focus will be shifted away from the task she has to complete—coming to a just and efficient resolution of the dispute.

The flexibility of arbitration allows an arbitrator to come up with a more equitable solution to the dispute.<sup>321</sup> Instead of “promoting enlightened development of the law” through arbitration’s specially crafted solutions, expanded judicial review would deter arbitrators from crafting “reasonable solutions if they had to worry that courts might not be willing or able to endorse the legal bases on which they rest.”<sup>322</sup>

The expanded standard of judicial review is also unsettling due to the fact that a court may be asked to review an award without a complete record or arbitrator opinion, which could put the court in the untenable position of appearing to be an “unprincipled decisionmaker” and damaging its integrity.<sup>323</sup> An extensive record could solve this with an opinion fueled by discovery, but again cost considerations would arise thereby making arbitration a less attractive form of dispute resolution.

Traditionally, except in labor and international arbitrations, arbitrators rarely issue opinions, but render awards that may just state who won and what remedies were granted to the prevailing party.<sup>324</sup> Furthermore, arbitrators are not required to explain the reasoning behind their awards.<sup>325</sup> *Stare decisis* or precedent does not apply to arbitrators without party agreement, so arbitrators can inject their own notions of justice as long as this does not result in a party

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320. Kanowitz, *supra* note 315, at 255.

321. DOMKE, *supra* note 294, at 11.

322. Smit, *supra* note 277, at 152.

323. Cole, *supra* note 29, at 1259.

324. Marc S. Dobin, *Appealing the Unappealable: Vacating Arbitration Awards*, THE BRIEF, Fall 1996, at 69. For examples of what forms arbitration awards can take, see JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS 461-63 (2d ed. 1996). But see Josef Rohlik, *Arbitrators Should Write Opinions for Parties and for Courts*, 44 ST. LOUIS U. L.J. 933, 940 (2000), for examples of how the absence of an arbitrator opinion can result in vacatur of awards.

325. See, e.g., *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (“[A]n arbitrator is simply not required to state the reasons for his decision . . . Such a requirement would serve only to perpetuate the delay and expense which arbitration is meant to combat.”); *In re Sobel*, 469 F.2d 1211, 1214 (2d Cir. 1972) (“Obviously, a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement.”).

being treated unfairly.<sup>326</sup> One of the pitfalls of litigation that leads to it becoming expensive is that parties take great pains to secure a complete record for any appeal that could follow.<sup>327</sup> Therefore, parties in an arbitration with expanded judicial review will do the same thing, leading to additional costs like a stenographer, written opinion (arbitrators charge by the hour sometimes), or lawyers obsessing over technicalities resulting in the arbitration becoming nothing more than a step in the ladder of litigation.

Courts recognize that a major distinction between litigation and arbitration is that the latter does not require discovery and reject arbitral discovery because it “is generally regarded as inconsistent with arbitration’s goal of speed, efficiency and reduced cost.”<sup>328</sup> With the requirement of a complete record for judicial review, heightened discovery would be required in the arbitration process. Delay and inefficiency could arise in arbitration because many arbitrators are not lawyers and do not have the legal training essential to conduct the complicated process of discovery.<sup>329</sup>

The greatest danger is that enforcing parties’ agreements that expand judicial review of arbitration will hurt the integrity of the process by making arbitration just another rung in the ladder of federal court adjudication. Arbitration is an act of self-governance by which the parties choose their own judge, set their own rules and avoid the trappings of litigation like costs and delay by keeping the government out of their dispute.<sup>330</sup> Expanded review would bring the courts back into the process beyond the limited functions they perform under the FAA and cause a “flood of appeals” tossing arbitration “into a litigation-like quagmire.”<sup>331</sup> Adhering to the limited review in the FAA keeps the integrity of arbitration intact for two reasons: first, expanded judicial review would lead to arbitration becoming “a mere-stepping stone to litigation”<sup>332</sup> and, second, a process allowing a “second bite at the apple” would do little to establish the faith and confidence that any system of dispute resolution requires.<sup>333</sup> Allowing expanded review for errors of fact or law would transform arbitration into “a preliminary step to litigation, a mere advisory process, or simply a private trial court whose awards will be reviewed

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326. 1 CHILDRESS & DAVIS, *supra* note 79, at 6-9.

327. Younger, *supra* note 190, at 248.

328. Mary A. Bedikian, *Discovery in Arbitration*, in ARBITRATION & THE LAW 1993-94: AAA GENERAL COUNSEL’S ANNUAL REPORT 24 (1994).

329. Wendy Ho, Comment, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199, 220-21 (1997).

330. Davis, *supra* note 84, at 130-31.

331. *Id.* at 132.

332. Cullinan, *supra* note 319, at 397. *See also* Younger, *supra* note 190, at 261 (“Contractual expansion of judicial review may thus simply add another tier to the time-consuming litigation process, rather than avoiding that process.”).

333. Cullinan, *supra* note 319, at 398. *See also* Carbonneau, *supra* note 277, at 1958 (“[Y]ou get only one bite at the apple in arbitration, and the result is only as good as your arbitrator.”).

by an appellate [judge].”<sup>334</sup> Allowing arbitration to become just a step towards litigation cannot be what Congress or the Supreme Court intended by giving parties the opportunity, through their agreement, to mold their own procedures for dispute resolution.

*B. Parties Cannot Alter the Judicial Process*

The Supreme Court has stated that the FAA’s “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”<sup>335</sup> Enforcing an agreement expanding judicial review is not sanctioned by the FAA and could initiate a resurrection of the judiciary’s “historical anti-arbitration sentiment. . . .”<sup>336</sup> In addition, the FAA was meant to guarantee the enforcement of arbitration agreements just like other contracts, but it would be incredulous to think that Congress intended that arbitration agreements could direct a court how to conduct itself. There is no precedent of the Supreme Court that can be cited to support the proposition that parties may contractually dictate to courts how they must decide disputes. The Supreme Court cases interpreting the FAA give parties free range on formation of arbitration agreements,<sup>337</sup> but mention nothing about contracting as to how a federal court must review the arbitration award. As Judge Mayer so aptly put it in his *LaPine* dissent: “Kyocera cites no authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision. Absent this, they may not.”<sup>338</sup>

The Supreme Court has given great deference to what parties contract for beyond the cases examined in Part III of this Comment. In *M/S Bremen v. Zapata Off-Shore Co.*, the Court held that the parties’ forum selection clause choosing the High Court in London as the forum for the dispute should be honored and that the claim that enforcing the clause would “oust” the federal courts of jurisdiction was a legal fiction.<sup>339</sup> Similarly, in *Carnival Cruise Lines, Inc. v. Shute*, the Court upheld a forum selection clause against a party

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334. Olivier Antione, *Judicial Review of Arbitral Awards*, 54 DISP. RESOL. J. 23, 24 (Aug. 1999).

335. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

336. Jiang-Schuenger, *supra* note 114, at 250-51.

337. *See generally* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (upholding a choice of law provision); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (holding the Court had to enforce a clause that excluded punitive damages); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985) (upholding an agreement even if it would result in bifurcation).

338. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Mayer, J., dissenting).

339. 407 U.S. 1, 12-17 (1972).



claim that the forum was inconvenient and unfair.<sup>340</sup> Nevertheless, both of these cases involve a federal court divesting itself of the case in deference to the parties' agreements while the expanded judicial review would require a federal court to enter judgment on a matter it could not have ruled on absent the agreement. Thus, courts allowing parties to contract for expanded review of awards would mean one of two things: that the parties have the power to dictate how the judiciary operates or that the court can be utilized by parties as a kind of super-arbitrator.

There is no doubt that parties possess the freedom to sculpt their arbitration process as they see fit. Yet the key word is "process," meaning the parties decide how the procedure of their arbitration is run. Contracting for expanded review involves the parties attempting to dictate how the judicial process must be run. As the First Circuit Court of Appeals recently stated: "Section 10 [of the FAA] sets forth a restricted list of grounds on which a court may entertain a motion to vacate an award; those grounds are directed primarily to fundamental errors *within* the arbitration process itself (for instance, fraud, misconduct) . . ."<sup>341</sup> Parties may direct the procedure of the arbitration, but cannot contract for how a court decides the substantive issue of whether vacatur is appropriate.

Professor Alan Scott Rau "see[s] the provisions of § 10 [of the Act], not as an imperative command of public policy, but as no more than a set of 'default rules' intended to reflect the traditional historical understanding concerning the binding effect of arbitral awards."<sup>342</sup> However, there is no language in the FAA indicating that its provisions are "default rules," that parties may supplement the sections of the Act by contract, or that parties are free to ignore the grounds for vacatur set forth in section 10 if they please to do so.

Article III, Section 1 of the Constitution states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>343</sup> Article I gives Congress the power "[t]o constitute Tribunals inferior to the Supreme Court."<sup>344</sup> Article III, Section 2 provides a list of federal court subject matter jurisdiction.<sup>345</sup> Professor John Leubsdorf wrote: "The article III courts . . .

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340. 499 U.S. 585, 593-94 (1991). The plaintiffs, in *Shute*, filed suit in district court in Washington against the cruiseline claiming its negligence caused their injuries, but the contract the plaintiffs signed clearly stated that any disputes would be heard before a court in Florida (the cruiseline's primary place of business). *Id.* at 588.

341. *Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp.*, 271 F.3d 6, 8 (1st Cir. 2001).

342. Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 231 (1997).

343. U.S. CONST. art. III, § 1.

344. *Id.* art. I, § 8, cl. 9.

345. *Id.* art. III, § 2.

limit the powers of Congress and the President by construing statutes and judging the constitutionality of legislative and executive action.”<sup>346</sup> Courts following the directives of parties in reviewing awards would, in fact, be misconstruing the FAA without declaring it unconstitutional.

Nowhere in the Constitution did the framers say private parties could create jurisdiction or dictate judicial power. In *American Fire & Casualty Co. v. Finn*, the Supreme Court stated: “The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties.”<sup>347</sup> In *Community Futures Trading Commission v. Schor*, the Supreme Court elaborated this point by stating that “the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III . . . . When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.”<sup>348</sup> Courts and parties adopting the party-driven expansion of review of awards would be in conflict with the Supreme Court because the courts would be deciding cases that they would not normally have the power to decide.

However, the FAA is not a jurisdictional statute and an independent ground for jurisdiction must be present for parties to take advantage of the FAA. Judge Posner, in *Chicago Typographical*, stated: “federal jurisdiction cannot be created by contract.”<sup>349</sup> The *LaPine* court attempted to refute this statement by claiming “that the FAA is a regulation of commerce rather than a limitation on or conferral of federal court jurisdiction.”<sup>350</sup> Beyond the fact that sections 10 and 11 of the FAA appear to be a limitation on the judiciary’s power to vacate or modify an arbitration award, the question must be asked as to how can Congress effectuate its power to regulate commerce? The simple answer is by giving courts jurisdiction to enforce the policies of its legislation. When parties begin to impose their own standards on the courts, they are usurping the power granted exclusively to Congress, even more so when Congress has already definitively spoken on the subject as it has concerning arbitration.

One scholar went as far as to state that if courts did enforce parties’ agreements to expand judicial review beyond the FAA, the court would be

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346. John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181, 196 (1987).

347. 341 U.S. 6, 17-18 (1951).

348. 478 U.S. 833, 851 (1986).

349. *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

350. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 890 (9th Cir. 1997).

ignoring Congress and violating the separation of powers doctrine.<sup>351</sup> To allow this would be a dangerous precedent, indeed. The Supreme Court has stated: “Some [problems] will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.”<sup>352</sup> No inventiveness is needed for the problem of vacating arbitration awards since there already is an express Congressional directive which controls—the FAA.

While not as onerous as the above constitutional implications, a court acting as a super-arbitrator is not permissible. Under expanded review, courts would be acting as the parties’ arbitrator of last resort because, if the parties’ agreements must be followed exactly according to their terms, the court should have to conduct its review under any rules or laws that the parties had agreed upon. This would put the court into “the awkward position of reviewing proceedings conducted under potentially unfamiliar rules and procedures.”<sup>353</sup> The court is not required to denigrate itself in this manner by blurring the distinct lines between arbitration and adjudication. At least one Circuit Court of Appeals has ruled that any federal judge or magistrate may not act as an arbitrator. In what Judge Posner described as a “procedurally remarkable case,” the parties in *DDI Seamless Cylinder v. General Fire Extinguisher Corp.* asked a federal magistrate who was assigned their case to act as arbitrator for them and he agreed to fill that role.<sup>354</sup> To avoid having to subject the magistrate judge’s decision under the strict review of the FAA and thus avoid the discomfort of one judge confirming or vacating the award of another, the court characterized the situation as a case of the magistrate and parties agreeing to a shortened procedure “rather than an unauthorized arbitral one.”<sup>355</sup>

When parties contract for expanded judicial review of arbitration awards, they are, in effect, asking the federal district court to act as a super-arbitrator, not a judge. Only when parties petition for confirmation, vacatur, or modification are they seeking an order permitted by federal law. By agreeing to review the award under the standard of expanded review, the judge has taken off his “judge’s hat” and put on his “arbitrator’s hat”<sup>356</sup> since there is no statutory basis allowing the judge to review the cases in the manner dictated by the parties.

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351. McCartney, *supra* note 145, at 162. See also Jiang-Schuerger, *supra* note 114, at 248 (“Courts should not expand the grounds of vacatur of an arbitration award because such expansion is beyond the power Congress granted to the court.”).

352. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957).

353. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001).

354. 14 F.3d 1163, 1164 (7th Cir. 1994).

355. *Id.* at 1168.

356. *Id.* at 1165-66.

One last argument not addressed by the courts against permitting expanded judicial review of arbitration awards is that arbitration with this new standard for vacatur would no longer be arbitration at all. An arbitration clause, in effect, ousts the court of its jurisdiction<sup>357</sup> and allows the arbitrator to resolve the dispute independently. An arbitration agreement expanding judicial review beyond the grounds set forth in section 10 of the FAA would not oust the court of its jurisdiction, but would permit the dispute to get into court through the back door. Therefore, it can be argued that a clause expanding review would be unenforceable as a result. A court could easily invalidate the entire arbitration agreement, or the expanding clause, because the agreement would be self-contradictory. On one hand, contracting for dispute resolution through arbitration and, on the other hand, ultimately calling upon the court system to give the final word on the resolution of the dispute.

## VI. CONCLUSION

This Comment does not refute that arbitration is a process operated pursuant to the wishes or whims of the parties who contracted for arbitration. Parties are free to contract as to what law will govern their arbitration, who will hear their controversy, where the arbitration will be held, and the list goes on and on. Yet a court reviewing an arbitration award pursuant to expanded judicial review created by the parties goes against the precise word of Congress as laid down in the FAA. Once a decision is made and a party wishes to have that award confirmed or vacated in federal court, to paraphrase President Harry S. Truman, the buck stops there. The party is then invoking federal jurisdiction under the FAA and courts should be obliged to follow what Congress enacted, not what the parties contracted. As the Supreme Court in *Shearson/American Express, Inc. v. McMahon* stated: “Like any statutory directive, the Arbitration Act mandate may be overridden by a contrary congressional command.”<sup>358</sup> Through the FAA, Congress “codified judicial deference to the arbitration process . . . reflect[ing] congressional confidence in the arbitration process to make the right decision in the large majority of cases and to reduce the caseload in federal courts.”<sup>359</sup> Furthermore, allowing expanded judicial review through freedom of contract principles is a reactionary exercise reviving the “judicial hostility towards arbitration that the FAA sought to remedy.”<sup>360</sup>

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357. *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 987 (5th Cir. 1992) (citing *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2nd Cir. 1942)).

358. 482 U.S. 220, 226 (1987).

359. Michael G. Munsell, *Scope of Review for Orders Confirming, Vacating, or Modifying Arbitral Awards: An End to Deferential Standards*, 1996 J. DISP. RESOL. 213, 222 (1996) [sic].

360. Curtin, *supra* note 115, at 368.

There are several alternatives to a flat out rejection of expanded judicial review of arbitration awards. First, Congress could follow the lead of states like New Jersey and amend section 10(a) of the Act to permit vacatur for errors of law or fact.<sup>361</sup> Second, parties could follow Judge Posner's advice in *Chicago Typographical* and "contract for an appellate arbitration panel to review the arbitrator's award."<sup>362</sup> This would allow parties to avoid having to enter the federal court system, hence avoiding added costs and delay, and permit the parties to still control the scope of review and who would conduct the review. Third, if parties are concerned with the possibility of an arbitrator applying the law incorrectly, they can make sure the arbitrators they select are competent, establish unambiguous criteria for how the arbitration shall be conducted, limit the damages or remedies that an arbitrator can award, and obligate the arbitrator to provide his reasoning for the award thereby avoiding the hazard that a court may not enforce an expanded review of the award.<sup>363</sup>

Since expanded judicial review of awards would lead to an assault on the integrity and effectiveness of the arbitration process and because there is no basis for allowing parties to alter the federal court process by agreement, *Bowen* should be viewed as the correct approach in denying parties this awesome power, which they granted to themselves. Allowing party-created, expanded judicial review would harm the integrity of the courts by forcing them to follow the directions of private citizens and making the clear line separating arbitration and litigation disappear leading to arbitration becoming just another step in the litigation process.

KEVIN A. SULLIVAN\*

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361. The New Jersey statute, N.J. STAT. ANN. § 2A:23A-13(c)(5) (West 2000), provides, in part:

c. The award shall be vacated on the application of a party . . . if the court finds that the rights of that party were prejudiced by:

(5) The [arbitrator's] committing prejudicial error by erroneously applying law to the issues and facts presented for alternative resolution.

362. *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

363. COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 277 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001).

\* J.D. Candidate, Saint Louis University School of Law; B.A., Boston College. I would like to thank Professor Josef Rohlik for his keen insight and comments; Associate Dean Joel K. Goldstein for his advice; my parents and family for making me who I am; and Erin Cleary for her enthusiasm, inspiration and, above all, love.