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Reframing the Dilemma of Contractually Expanded Judicial Review: *Arbitral Appeal vs. Vacatur*

Eric van Ginkel

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Reframing the Dilemma of Contractually Expanded Judicial Review: *Arbitral Appeal vs. Vacatur*

Eric van Ginkel*

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INTRODUCTION

Arbitration is a non-judicial process created by contract between the parties. The parties pretty much determine the rules of the game. Generally, the arbitrator is empowered only with the authority granted to him by that contract. The Federal Arbitration Act¹ (“FAA”) of 1925 was created to ensure enforceability of agreements to arbitrate. The FAA is the centerpiece of the federal arbitration policy as construed by the Supreme Court.

Section 10(a) FAA enumerates grounds on which an arbitral award can be set aside. The central issue discussed herein is whether parties can agree by contract to allow one of the parties to initiate review of the arbitral award by a court that would otherwise have jurisdiction over those parties, or whether the court’s powers are somehow limited to the grounds for *vacatur* enumerated in Section 10(a) FAA.

Put more succinctly, this article analyzes the legitimacy of judicial review of an arbitral award on the basis of a pre-dispute agreement providing that the arbitrator’s findings of fact and/or conclusions of law (as set forth in such award) may be subjected to judicial review, and how such judicial review interacts with §10(a) of the Federal Arbitration Act. The principal focus of this article is on domestic and international commercial arbitration, although I briefly address certain implications for consumer arbitration.²

Whether to allow parties to agree to subject their arbitral award to judicial review has been the subject of a number of recent federal and state court cases. Some courts hold that this practice is *not* valid because private parties cannot determine by contract how federal courts review arbitration awards.³ Other courts, constituting the majority, hold that parties’ contractual freedom

1. 9 U.S.C. §§ 1-14 (1998).
 2. See *infra* notes 268-273 and accompanying text.
 3. Circuits include the 7th, 8th, and 10th.

allows them to enable either party to appeal the arbitral award to the federal court having jurisdiction over the parties.⁴ The U.S. Supreme Court has yet to rule on the issue.

There exists a clear tension concerning the finality of arbitral awards. On the one hand, one of the principal benefits of arbitration is, or at least used to be, that generally the award is final and binding upon the parties. Arbitration can thus be a relatively quick and efficient way to resolve a dispute. On the other hand, as arbitrators are asked to interpret more complex legal issues, that same finality is increasingly felt as the absence of much needed quality control over arbitrators.⁵ This tension is heightened by the fact that the federal Circuits are split on the question of whether a pre-dispute agreement enabling one of the parties to appeal the arbitral award to the appropriate federal court is valid and enforceable.

Part I of this article discusses the leading case holding that a pre-dispute agreement enabling appeal from an arbitral award is invalid, the Tenth Circuit case *Bowen v. Amoco Pipeline Co.*, and the other cases holding the same way. Part II discusses the leading case upholding the validity of an agreement enabling appeal from an arbitral award, the Ninth Circuit case *LaPine Tech. Corp. v. Kyocera Corp.*, and the other cases that hold the same view.

Not unexpectedly, this topic has been the subject of a substantial number of scholarly articles and comments. Part III analyzes the principal issues raised by both the case law and by some of the commentators' observations. These issues include the contractual nature of arbitration agreements, a federal court's jurisdiction to expand judicial review, and the public policy favoring arbitration.

All cases and commentators seem to frame the specific question at issue as one of whether parties can contractually "expand" judicial review beyond the limited statutory grounds of §10(a) of the FAA and (most of the time) beyond certain judicially created non-statutory grounds. Part IV introduces the concept that the issue can be reframed, because there is a fundamental difference between arbitral appeal as contracted for between the parties and the statutory (and non-statutory) grounds for *vacatur*, i.e. to set aside and annul an award.

Part V explores the case for arbitral appeal as a policy decision. Following *LaPine*, but based on a different analysis as a matter of public policy, it

4. Circuits include the 5th and 9th.

5. *Accord*, Ian R. Macneil, *American Arbitration Law, Reformation - Nationalization - Internationalization* 175 (New York 1992) (" . . . tension is inevitable between the freedom of arbitrators to make final decisions and the need for judicial oversight when decisions concern important regulatory legislation").

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is desirable to empower the contracting parties with the choice to provide for arbitral appeal into their agreements, including international commercial arbitration agreements, and even if, as this author believes, that choice may not be a wise one most of the time. The various policy considerations and practical reasons to allow arbitral appeal are then discussed. Part VI deals with the issue of arbitral appeal in international commercial arbitration.

Part VII tackles some of the ramifications of making a distinction between arbitral appeal and *vacatur*. This distinction allows for an independent analysis of the character of the statutory *vacatur* grounds and the desirability of non-statutory grounds to set aside awards. An analysis that is not forced to choose for, or against, non-statutory *vacatur* grounds based on one's opinion as to whether or not parties ought to be able to provide in their contracts for the possibility to submit their arbitral award to judicial review. Such analysis leads this author to conclude that the statutory *vacatur* grounds for setting aside awards ought to be recognized as mandatory and non-waivable. This article urges the United States Supreme Court to rule that the grounds for *vacatur* are limited to those enumerated in § 10(a) FAA, thus doing away with the non-statutory *vacatur* grounds developed by the lower courts.⁶

Part VIII discusses what a system would look like that recognizes the possibility of pre-dispute agreements allowing arbitral appeal combined with mandatory statutory *vacatur* grounds with the losing party no-longer having non-statutory grounds available to challenge the award. The tension between "finality as a benefit" and "finality as a lack of quality control" may be resolved if the Supreme Court adopts a clear policy permitting arbitral appeal if the parties have expressly provided for it in their agreement, while at the same time limiting the grounds for *vacatur* to those enumerated in § 10(a) FAA. That policy would close the "back door" that now causes unnecessary delays the finality of the award, which parties bargained for when they did not expressly agreed beforehand to submit to the possibility of appeal. Part IX makes a few closing observations about the future of the law in this area.

6. The United States Supreme Court has yet to consider the question of whether the system created by the FAA allows for judicially created, non-statutory grounds to set aside an arbitral award that would be in addition to the grounds for *vacatur* enumerated in §10(a) FAA. *But see infra* note 270.

I. CASES REJECTING THE VALIDITY OF PRE-DISPUTE AGREEMENTS ALLOWING JUDICIAL REVIEW

The leading cases dealing with the issue of whether to permit parties to a pre-dispute agreement to validly include a provision that allows either party to appeal the arbitral award to the appropriate federal court are the Tenth Circuit decision in *Bowen v. Amoco Pipeline Co.*⁷ and the Ninth Circuit decision in *LaPine Tech. Corp. v. Kyocera Corp.*⁸ Part I of this article discusses *Bowen* and the other cases that hold that such a clause is invalid. Part II discusses *LaPine* and the other cases that hold that such a clause is valid.

A. *Bowen v. Amoco Pipeline Co.* (10th Circuit, 2001)

On June 20, 2001, the Tenth Circuit Court of Appeals rendered its decision in *Bowen v. Amoco Pipeline Co.* holding that parties may not contract for “expanded judicial review” of arbitration awards.⁹ In doing so, the Tenth Circuit followed the dictum of the Seventh Circuit Court of Appeals in the 1991 case of *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.* (hereinafter “*CTU*”).¹⁰

Ernest and Mary Bowen sued the Amoco Pipeline Company in the District Court of Eastern Oklahoma seeking damages from the contamination of a creek on their property. Amoco moved to compel the matter to arbitration pursuant to a clause contained in a 1918 right-of-way agreement (ratified in 1943) between both parties’ predecessors in interest. Subsequent to the court’s decision to compel arbitration, the parties agreed to use the CPR Rules for Non-Administered Arbitration of Business Disputes,¹¹ but they had also previously agreed to a right of appeal to the district court “on the grounds that the award is not supported by the evidence.”¹² After a panel of three arbitrators had found in favor of the Bowens, Amoco filed a notice of appeal based on this clause, while the Bowens sought confirmation of the award in the district court. The district court refused to review the award beyond the grounds for *vacatur* provided for in § 10(a) of the FAA¹³ and confirmed the award in

7. 254 F.3d 925 (10th Cir. 2001).

8. 130 F.3d 884 (9th Cir. 1997).

9. *Bowen*, 254 F.3d at 937

10. 935 F.2d 1501 (7th Cir. 1991).

11. The CPR Rules for Non-Administered Arbitration of Business Disputes can be found at the website of the Center for Public Resources at, www.cpradr.org/arb-rules.htm (last visited February 11, 2003).

12. *Bowen*, 254 F.3d at 930 (internal quotation marks omitted).

13. Section 10(a) of the Federal Arbitration Act provides in pertinent part:

In any of the following cases the United States court in and for the district wherein the

favor of the Bowens. Amoco appealed to the Tenth Circuit.

Disagreeing with the Fifth and Ninth Circuits¹⁴ (and recognizing the unpublished decision of the Fourth Circuit going the same way¹⁵), the Tenth Circuit affirmed the lower court's decision and held that no legal authority allows contracting parties to determine how federal courts review arbitration awards. "To the contrary," Chief Judge Deanell R. Tacha opined, "through the FAA Congress has provided explicit guidance regarding judicial standards of review of arbitration awards . . . The decisions directing courts to honor parties' agreements and to resolve close questions in favor of arbitration simply do not dictate that courts submit to varying standards of review imposed by private contract."¹⁶ Judge Tacha went on to say:

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, which allows parties to petition a federal court for an order compelling arbitration "in the manner provided for in the agreement," the provisions governing judicial review of awards, 9 U.S.C. §§ 10-11, contain no language requiring district courts to follow parties' agreements.

Not surprisingly, the FAA's narrow standards reflect the Supreme Court's well-established view of the relationship between arbitration and judicial review: "[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" Contractually expanded standards, particularly those that allow for factual review, clearly threaten to undermine the independence of the arbitration process and dilute the finality of arbitration awards because, in order for arbitration awards to be effective, courts must not only enforce the agreements to arbitrate but also enforce the resulting arbitration awards. [citations omitted]¹⁷

award was made may make an order vacating the award upon the application of any party to the arbitration:

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

14. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Gateway Techs. Inc. v. MCI Telecomms.*, 64 F.3d 993 (5th Cir. 1995); *Hughes Training, Inc. v. Cook*, 254 F.3d 588 (5th Cir. 2001).

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

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

17. *Id.* at 935.

As a second ground for rejecting the parties' ability to contractually expand judicial review of arbitral awards, the Tenth Circuit court added, "under expanded legal or factual standards, the reviewing court would be engaging in work different from what it would do if it simply heard the case itself."¹⁸ The court warned that "[p]arties should be aware that they get what they bargain for and that arbitration is far different from adjudication."¹⁹

B. Other Cases Prohibiting "Expanded Judicial Review"

Preceding *Bowen*, there are two cases that appear to follow Judge Posner's dictum in *CTU*:²⁰ *UHC Management Co. v. Computer Sciences Corp.*²¹ and *Crowell v. Downey Cmty. Hosp. Found.*²² These two cases are discussed next.

1. *UHC Management* (8th Circuit, 1998)

In *UHC Management*,²³ the agreement between the parties did not include an express provision that the arbitral award would be subject to appeal by the courts. Computer Sciences had argued that even if federal arbitration law rather than the Minnesota Uniform Arbitration Act applied, "the parties nonetheless effectively contracted for heightened judicial scrutiny when they included the provision that arbitrators should be 'bound by controlling law.'"²⁴

The Eighth Circuit Court of Appeals expressed doubt as to the ability of parties to expand judicial review of arbitration awards contractually: "Should parties desire more scrutiny than the [FAA] authorizes courts to apply, 'they can contract for an appellate arbitration panel to review the arbitrator's

18. *Bowen*, 254 F.3d at 936 (citation omitted).

19. *Bowen* 254 F.3d at 935-936.

20. *See supra* note 9.

21. 148 F.3d 992 (8th Cir. 1998).

22. 115 Cal.Rptr 2d 810. There is also an earlier decision by the Court of Appeals of Michigan in a divorce matter, rejecting under Michigan law the parties' arbitration agreement which allowed for appeal to the Court of Appeals. *Dick v. Dick*, 210 Mich. App. 576 (1995).

23. 148 F.3d at 997 (8th Cir. 1998). The issue before the Circuit court of appeals was whether the district court, in light of (i) a choice-of-law clause providing that the agreement is to be governed by and construed under Minnesota law "to the extent not preempted by . . . federal law" and (ii) the further provision that the arbitrators "shall be bound by controlling law," should have applied the Minnesota Uniform Arbitration Act (rather than the FAA) in conjunction with controlling Minnesota common law regarding judicial review of arbitration awards. *Id.* at 995, 997. The Eighth Circuit court of appeals concluded that the district court properly applied the FAA, holding that the arbitration agreement did not intend to preclude the application of the FAA or to expand judicial review of the arbitration award. *Id.* at 999.

24. *Id.* at 997.

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award[;] they cannot contract for judicial review of that award.”²⁵

The Eighth Circuit Court stressed, however, that “it is [not] yet a foregone conclusion” that parties are able to agree to ignore provisions of the FAA.²⁶ Clearly, the court kept the door open for a future change of mind by adding:

Assuming that it is possible to contract for expanded judicial review of an arbitration award, the parties’ intent to do so must be clearly and unmistakably expressed. Cf. *First Options*, 514 U.S. at 944 (courts should not assume parties intended to arbitrate arbitrability unless there is “clear and unmistakable” evidence they did so). In contrast to the agreements at issue in *Lapine* and *Gateway*, the present agreement does not manifest such an intent.²⁷

The Eighth Circuit Court of Appeals held that the district court correctly reviewed the arbitral award under the narrow standards of the Sections 10 and 11 of the FAA.

2. *Crowell* (CA Court of Appeal, 2d Appellate District, 2002)

Most recently, the Second District Court of Appeal in Los Angeles, California refused to follow the *LaPine* doctrine. In *Crowell v. Downey Cmty. Hosp. Found.*,²⁸ Dr. Ronald Crowell sought a declaration of rights that the arbitration provision in their agreement for Dr. Crowell to furnish emergency services to the Hospital was enforceable. The agreement included a detailed arbitration provision under the California Arbitration Act (“CAA”),²⁹ which included a provision that the award of the arbitrator:

shall be final, binding and enforceable upon both Hospital and Contractor as provided in the arbitration statute, except that upon the petition of any party to the arbitration, a court shall have the authority to review the transcript of the arbitration proceedings and the arbitrator’s award and shall have the authority to vacate the arbitrator’s award, in whole or in part, on the basis that the award is not supported by substantial evidence or is based upon an error of law.³⁰

The court reviewed the legislative history of the CAA, and noted that §1296 of the Code of Civil Procedure expressly allows judicial review for er-

25. *Id.* at 998 (quoting *LaPine*, 130 F.3d at 891 (Mayer, J., dissenting)) .

26. *Id.*

27. *Id.* at 998.

28. 115 Cal. Rptr 2d 810.

29. CAL. CIV. PROC. CODE §§ 1282 *et seq.*

30. 115 Cal. Rptr. 2d at 812 n. 2.

rors of fact or law in Public Construction Contract Arbitration if the parties agree that the arbitrator's award must be supported by law and substantial evidence, but not for any other form of arbitration under the Act. The court concluded that the parties are not able to confer jurisdiction upon this court where none exists through stipulation.³¹

The court explicitly considered and rejected *LaPine*³² as a case that was decided by a sharply divided panel of the Ninth Circuit under the FAA, which allows broader judicial review of arbitration awards than the CAA (referring, curiously, not to any statutory provision in the FAA but to the non-statutory grounds for *vacatur* developed by case law).³³ Interestingly, as a result of holding that appeal from the arbitral award was not permitted under the CAA, the court declared the entire arbitration agreement void, and the case had to be litigated in court.³⁴

Neither the court's majority nor the dissent considered the question whether it should apply federal law rather than state law to determine whether the contractual provision for arbitral appeal was valid and enforceable. In *Southland Corp. v. Keating*,³⁵ the Supreme Court concluded that the Federal Arbitration Act pre-empts state law; and held that state courts cannot apply state statutes that invalidate arbitration agreements.³⁶ Arguably, the Court invalidated an arbitration agreement in *Crowell* based on its analysis of California law when it should have followed federal law (and therefore *LaPine*), especially considering that it drew the (logical) conclusion that the pro-

31. *Id.* at 817 (citing *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 2d 50, 54-55 (1996)).

32. In a probing dissent, Judge Nott showed support for the *LaPine* doctrine and pointed out that the two cases on which the majority put its principal reliance both contemplated the possibility of judicial review of errors of law and/or facts by agreement between the parties, and that "[t]he shortcoming of the arbitration provision in *Old Republic* was not that the parties agreed to greater review of the arbitrator's award than provided in the Act, but that they sought to agree to the jurisdiction of the appellate court and sidestep the trial court." *Id.* at 823.

33. *Id.* at 816.

34. The *Crowell* Court said: "The provision for judicial review of the merits of the arbitration award was so central to the arbitration agreement that it could not be severed." *Id.* at 817. This result was contrary to the finding of severability by the Federal District Court in *LaPine*. See *infra* note 56. It appears to this author that the result reached by the *Crowell* court is the correct one. Absent evidence to the contrary, agreeing to arbitration with the right to appeal the arbitral award to a court is not only central to the arbitration agreement, it would also appear quite possibly to be a negotiated solution "in-between" agreeing to arbitration and agreeing to have disputes resolved by the courts. It seems plausible, therefore, that the parties would not have agreed to arbitration if they had known that the losing party would be prevented from appealing the award.

35. 465 U.S. 1 (1984).

36. *Id.*, at 15-16.

vision allowing for appeal was not severable from the rest of the arbitration clause and thus invalidated the entire agreement to arbitrate.³⁷

Following its decision in *Southland*, the Supreme Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson*,³⁸ analyzed the significance of Congress' use of the words "involving commerce" in § 2 of the FAA.³⁹ The Court first reaffirmed its earlier decisions that the FAA was enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty⁴⁰ and that the FAA was applicable in state courts and pre-emptive of state laws hostile to arbitration. Relying on these background principles and upon the evident reach of the words "involving commerce," the Court interpreted § 2 as implementing Congress' intent "to exercise [its] commerce power to the full."⁴¹ As a result, the Court invalidated the Alabama law that, as the only one in the nation still to do so,⁴² declared pre-dispute arbitration agreements to be void as against public policy.

Given the broad interpretation of "involving commerce" in *Allied-Bruce* and assuming that the pre-emptive effect of the FAA in *Southland* extends to the case law developed under the FAA, *Southland* and *Allied-Bruce* could provide an argument that the question of whether parties can lawfully agree to the judicial review they desire, needs to be answered under federal rather than state law, in which case the *LaPine* ruling would be controlling.

As noted above, the Tenth Circuit expressly disagreed with the holdings of the Fourth, Fifth, and Ninth Circuits.⁴³ The leading case holding differently is the 1997 Ninth Circuit's decision in *LaPine*, which is discussed next.

II. CASES RECOGNIZING THE VALIDITY OF PRE-DISPUTE AGREEMENTS ALLOWING JUDICIAL REVIEW

The Ninth Circuit Court of Appeals in *LaPine* was not the first circuit court to consider the question of whether to allow parties to a pre-dispute

37. See *supra* notes 27-34.

38. 513 U.S. 265 (1995)

39. *Id.*, at 273-277

40. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (Harlan, J., concurring)).

41. *Id.* at 277.

42. Henry C. Strickland et al., *Modern Arbitration for Alabama: A Concept Whose Time Has Come*, 25 CUMB. L. REV. 59, 60-61 (1994 / 1995).

43. See *supra* notes 14 and 15 and accompanying text.

agreement to validly include a provision allowing either party to appeal to the appropriate federal district court. It was preceded by a 1995 decision by the Fifth Circuit Court of Appeals in *Gateway Techs. Inc. v. MCI Telecomms.*,⁴⁴ and an unpublished 1997 decision by the Fourth Circuit Court of Appeals in *Syncor Int'l Corp. v. McLeland*.⁴⁵

A. LaPine Technology Corp. v. Kyocera Corp. (9th Circuit, 1997)

In December 1997, the Ninth Circuit Court of Appeals held that parties to an arbitration agreement could validly agree to include in such an agreement a provision directing the federal District Court with jurisdiction over the parties to vacate, modify or correct the arbitral award “(i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators’ findings of fact are not supported by substantial evidence, or (iii) where the arbitrators’ conclusions of law are erroneous.”⁴⁶ In so doing, the Ninth Circuit followed a 1984 decision by the District Court for the Southern District of New York, *Fils et Cables d’Acier de Lens v. Midland Metals Corp.*,⁴⁷ and the 1995 Fifth Circuit decision in *Gateway Techs. Inc. v. MCI Telecomms.*⁴⁸

Between 1984 and 1986, LaPine, Kyocera and Prudential-Bache Trade Services (“PBTC”) had entered into a series of agreements in connection with a joint venture for the manufacture, marketing, and sale of computer disk drives. Under these agreements, LaPine, which had developed a 10 MB hard disk, would market and sell the drives, Kyocera would provide the manufacturing capability, and PBTC would provide the financing for the venture. When Kyocera refused to comply with one of the agreements, LaPine instituted proceedings in the U.S. District Court for the Northern District of California.

Kyocera moved to compel arbitration pursuant to §4 of the FAA,⁴⁹ in accordance with § 8.10 of the parties’ “definitive agreement,” which provided for arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC”).⁵⁰ The district court granted Kyocera’s motion.

44. 64 F.3d 993 (5th Cir. 1995).

45. 120 F.3d 262 (4th Cir. 1997).

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

47. 584 F. Supp. 240 (S.D.N.Y. 1984). Because of its “advanced age”, this case is not discussed in detail.

48. 64 F.3d 993 (5th Cir. 1995).

49. 9 U.S.C. § 4 (1994).

50. ICC Arbitration Rules, Art. 28(6) (1998, 2001). The Rules are available at <http://www.iccwbo.org/court/english/arbitration/rules.asp>.

Subsection (d) of § 8.10 of the parties' agreement provided in pertinent part that:

[t]he arbitrators shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law. The Court . . . may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous.⁵¹

The issues to be decided in arbitration were agreed upon pursuant to Terms of Reference⁵² that included a confirmation of the court's authority to vacate, modify, or correct the arbitral award on these three grounds.⁵³

The ensuing ICC arbitration resulted in a \$257 million award in favor of LaPine and PBTC. LaPine and PBTC filed a motion in the District Court to confirm the award. Not surprisingly, given the large sum of money involved, Kyocera made a motion to vacate, modify, and correct the arbitral award. The District Court confirmed the award and denied Kyocera's motion,⁵⁴ holding that §§ 8.10(d)(ii) and (iii) of the agreement "assume the prerogative of Congress, in that they presume to direct this court as to the substance and parameters of its exercise of judicial power."⁵⁵ Instead, the District Court reasoned that it had jurisdiction only to consider the grounds for *vacatur* listed in §10 of the FAA.⁵⁶

51. 130 F.3d at 887.

52. Pursuant to Article 18 of the ICC Rules of Arbitration, the Arbitral Tribunal draws up so-called Terms of Reference that include, pursuant to subparagraph (d) of Article 18(1), "unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined." Under Article 18(2) of the Rules, the Terms of Reference must be signed by the parties and the Arbitral Tribunal. The Terms of Reference, together with the Procedural Timetable referred to in Article 18(4), are principally intended as the roadmap for the arbitral proceedings that is agreed to by the parties.

53. LaPine v. Kyocera Corp., 909 F. Supp. 697, 708-09 (N.D. Cal. 1995).

54. *Id.* at 709.

55. *Id.* at 705.

56. Before the District Court could turn to an analysis as to whether any of the grounds for *vacatur* set forth in §10(a) of the FAA applied, it had to address and reject Kyocera's argument that if the court rejected the possibility of appeal, the entire arbitration clause had to be invalid, because "the scope of review clause as included in the Arbitration Agreement is an integral part of the arbitration provision, and there is no basis to suppose that the parties would have agreed to arbitrate at all, absent that provision." *Id.* at 706. The court found that "[m]otivations of the parties in contracting for the defined scope of judicial review are unknown to the court

Kyocera appealed the District Court's decision to the Ninth Circuit Court of Appeals. Judge Fernandez, writing the majority opinion, framed the appeal as boiling down to one issue: "Is federal court review of an arbitration agreement necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?"⁵⁷

Observing that the parties "indisputably contracted for heightened judicial scrutiny" of the arbitrators' award when they agreed that review would be for errors of fact or law, the Ninth Circuit held that it "must honor that agreement."⁵⁸ Quoting at length from the Supreme Court's decision in *Volt Info. Sciences Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.*,⁵⁹ the Ninth Circuit based its holding on what it felt was the principle behind the federal policy as embodied in the FAA, which was to guarantee that courts will enforce private agreements to arbitrate according to their terms.⁶⁰ Quoting *Volt*,

and the parties offer nothing but speculative suggestion on this score. The contents of § 8.10(d)(ii) and (iii) of the Definitive Agreement are clearly severable." *Id.* Interestingly, the District Court did not rely on any severability clause in the contract. Since the Court's finding was irrelevant on appeal, it was not reviewed. In this author's opinion, the District Court's holding is questionable because it would seem entirely possible that, given the enormous sums of money involved in the venture, at least one of the parties felt that they had to choose between a court proceeding (with or without a jury) and arbitration with possibility of appeal, and that if they had known that the latter would be held to be void they would have chosen for the first option. The District Court distinguished *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994), (holding that, "[g]enerally, a clause of a contract is not severable where it is an integral part of an entire contract, that is when the terms of the portion to be severed appear to be interdependent and common to the remaining terms" by finding, rather tautologically, that the arbitration agreement presented "a clear cleavage in its terms between the arbitration procedure to be conducted by the arbitrators and the review of the arbitration procedure to be conducted by the court." *Id.* For a state court decision holding the opposite view, see *Crowell v. Downey Cmty. Hosp. Found.*, 115 Cal. Rptr 2d 810 (2002); see also *supra* note 32 and accompanying text. Perhaps the deciding factor for the *LaPine* District Court was that (contrary to the status of the proceedings in the *Crowell* case) the arbitration had already taken place, and for the Court to accept the view that the arbitration agreement was void would mean that the whole case would have had to be retried in the District Court which would have the undesirable result that the losing party, Kyocera, would have gained much more than it could expect and hope for from the judicial review of the award that it was actually seeking. It would appear that Professor Andreas Lowenfeld thought that for that reason the District Court's decision was the correct one. Andreas F. Lowenfeld, *Can Arbitration Coexist with Judicial Review? A Critique of LaPine v. Kyocera*, 3 ADR CURRENTS 1 (1998). This consequence illustrates the importance of having certainty as to what the law is on this issue. It is hoped that the Supreme Court will soon get (and take) the opportunity to rule on the subject of legality of pre-dispute agreements for arbitral appeal. For an extensive discussion of severability of illegal contract terms under California law (which applied both in *LaPine* and *Crowell*), see *Armendariz v. Found. Health Psychcare Serv., Inc.*, 24 Cal. 4th 83, 122-124 (2000).

57. 130 F.3d at 887.

58. *Id.* at 888.

59. 489 U.S. 468 (1989).

60. *Lapine*, 130 F.3d at 888.

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the court observed that “[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”⁶¹ As examples of the Supreme Court’s application of these rules, the Ninth Circuit Court pointed to cases in which the Supreme Court has enforced contract terms that called for (i) rules other than the FAA,⁶² (ii) punitive damages despite contrary state law,⁶³ and (iii) limiting the scope of the issues submitted to arbitration.⁶⁴

The court also approvingly quoted from the Fifth Circuit’s decision in *Gateway*: “[a]s [the Fifth Circuit] wisely put it: ‘Because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA’s default standard of review and allows for de novo review of the issues of law embodied in the arbitration award.’”⁶⁵ It also approvingly quoted the Fifth Circuit’s conclusion that federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract.⁶⁶

Quoting from *Fils et Cables*,⁶⁷ the Ninth Circuit went on to observe that even if a court’s review of evidence and error of law seems less efficient than the normal scope of arbitration review, it nevertheless reduces the burden on that court below the level that would exist in the absence of any provision for arbitration.⁶⁸

Judge Fernandez rejected Judge Posner’s dictum in the Seventh Circuit’s decision in *CTU* that parties may not by contract expand grounds for review because “federal jurisdiction cannot be created by contract.”⁶⁹ Quoting the Supreme Court in *Volt*, Judge Fernandez emphasized that “[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”⁷⁰

Judge Posner suggested in *CTU* that “[i]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator’s award. But

61. *Lapine*, 130 F.3d at 888 (quoting *Volt*, 489 U.S. at 474).

62. *Id.* at 888 (citing *Volt*, 489 U.S. at 478 (1989)).

63. *Id.* (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995)).

64. *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

65. *Id.* at 889 (quoting *Gateway*, 64 F.3d at 997).

66. *Id.* (quoting *Gateway*, 64 F.3d at 997).

67. 584 F. Supp. at 244.

68. *Lapine*, 130 F.3d at 889 (quoting *Fils et Cables*, 584 F.Supp. at 244).

69. *Id.* at 890 (quoting *CTU*, 935 F.2d at 1505).

70. *Id.* at 888 (quoting *Volt*, 489 U.S. at 478-79).

they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract.”⁷¹ The Ninth Circuit found that “[i]f the court intended to refer to the FAA as a jurisdictional statute, it would have been negating the established principle that the FAA is a regulation of commerce rather than a limitation on or conferral of federal court jurisdiction.”⁷²

Remanding the case⁷³ for review of the decision by the District Court through use of the standard agreed to by the parties, Judge Fernandez concluded by saying:

When parties are able to scry⁷⁴ the possibility of future disputes, they may allow those to be resolved through the normal litigation process in court, or they may agree to remove them from that forum and resort to the use of an arbitral tribunal. When they do the latter, they may leave in place the limited court review provided by §§ 10 and 11 of the FAA, or they may agree to remove that insulation and subject the result to a more searching court review of the arbitral tribunal’s decision, for example a review for substantial evidence and errors of law. In short, the FAA is not an apotropaion⁷⁵ designed to avert overburdened court dockets; it is designed to avert interference with the contractual rights of the parties.⁷⁶

In sum, *LaPine* dictates that courts should enforce private agreements to arbitrate according to their terms even when those terms provide for judicial review of the award. The court dismissed the contention of the *CTU* court that parties would be expanding federal jurisdiction in situations involving review of arbitral awards.

B. Other Cases Allowing Parties to Agree to “Expanded Judicial Review”

The District Court for Massachusetts in the First Circuit followed *LaPine* in *New England Utilities v. Hydro-Quebec*,⁷⁷ as did, albeit tentatively, the

71. *Id.* at 890 (quoting *CTU*, 935 F.3d at 1505).

72. *Id.* at 890 [citation omitted].

73. On remand, on April 4, 2000, the District Court held that the ICC arbitration panel did not make any errors of law, saying that the arbitrators’ conclusions were “not only sound but . . . amply supported by the undisputed facts.” *ICC Arbitrators’ Findings in Kyocera Arbitration Were ‘Legally Sound,’* 15 MEALEY’S INT’L ARB. REP. No. 5 (May 2000). On May 17, 2001, the District Court issued an amended judgment, again confirming the arbitral award. As of that date, *LaPine* was to recover more than \$370 million plus interest from Kyocera, Prudential-Bache was to recover more than \$33 million plus interest, and jointly the companies were to recover an additional \$24 million. On June 21, 2001, the District Court awarded an additional \$3 million plus interest in attorneys’ fees. *\$3 Million in Attorneys’ Fees Awarded to LaPine Technology, Prudential-Bache Trade Services*, 16 MEALEY’S INT’L ARB. REP. No. 7 (July 2001).

74. This is one of several instances in which Judge Fernandez displays his rich vocabulary. “Scrying” appears to be some form of divination. See, e.g., www.paganpath.com/scry.html.

75. The word comes from the Greek *apotropaion*, something that wards off evil.

76. *Lapine*, 130 F.3d at 890-891.

77. 10 F. Supp. 2d 53 (D. Mass. 1998). See also *Mantle v. Upper Deck Co.*, 956 F. Supp.

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State Supreme Court of Rhode Island, in *Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GmbH*.⁷⁸ In addition, the Fifth Circuit Court of Appeals had occasion to confirm the position it espoused in *Gateway* in its 2001 decision in *Hughes Training, Inc. v. Cook*.⁷⁹

Before discussing these cases, the *Gateway* case and the unpublished *Syncor* case of the Fourth Circuit Court of Appeals are worthy of mention. As it was unpublished, and perhaps also because it preceded *LaPine* by only a few months,⁸⁰ it was not considered in the *LaPine* opinion.

1. *Gateway* (5th Circuit, 1995)

In *Gateway*,⁸¹ MCI had successfully bid on a telephone system for the Virginia Department of Corrections that would enable inmates to place collect calls to authorized individuals without operator assistance. MCI subcontracted with Gateway to furnish, install and maintain the necessary equipment and software for this system. When Gateway's system appeared to be defective, MCI installed its own automated system to bypass Gateway's defective one and then sent a default notice to Gateway terminating the contract.⁸²

Gateway initiated arbitration arguing that MCI had not acted in good faith and that MCI's decision to migrate from the Gateway system was primarily motivated by profit motives.⁸³ When the arbitrator found in favor of Gateway, MCI appealed to the Northern District of Texas to vacate the award in accordance with the contractual provision that "the arbitration decision shall be final and binding on both parties, except that *errors of law shall be subject to appeal*."⁸⁴

The Fifth Circuit Court of Appeals (as did the District Court) dealt with the issue concisely, finding that

719, 726 (N.D. Tex. 1997) (holding that since the parties did not expressly provide for expanded judicial review of an arbitration agreement, the court was required to apply the default standard of review specified in the FAA.)

78. 765 A.2d 1226 (R.I. 2001).

79. 254 F.3d 588 (5th Cir. 2001).

80. *LaPine* was decided December 9, 1997, while *Syncor* was decided on August 11, 1997.

81. *Gateway*, 64 F.3d 993.

82. *Id.* at 995-96.

83. *Id.* at 995.

84. *Id.* at 996.

[s]uch a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and ‘the FAA’s pro-arbitration policy does not operate without regard to the wishes of the contracting parties It does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. *Indeed, such a result would be quite inimical to the FAA’s purpose of ensuring that private agreements to arbitrate are enforced according to their terms.* Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.⁸⁵

The Fifth Circuit court concluded that, because the parties contractually agreed to “expand judicial review,” their contractual provision supplemented the FAA’s default standard of review and allowed for a *de novo* review of the issues embodied in the arbitration award.⁸⁶

2. *Syncor* (4th Circuit, 1997)

On August 11, 1997, about four months prior to the Ninth Circuit’s decision in *LaPine*, the Fourth Circuit Court of Appeals followed *Gateway* in an unpublished opinion, *Syncor Int’l Corp. v. McLeland*.⁸⁷ The case involved Syncor’s claim against its former employee, McLeland, alleging that by engaging in competitive activities he had breached his employment agreement and certain secrecy agreements. The arbitration clause in the employment agreement provided that the “arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal.”⁸⁸

Quoting *Gateway* and *Volt*, the Fourth Circuit held that the “contractual modification” was acceptable, supplementing the FAA’s default standard of review.⁸⁹

3. *New England Utilities* (D.C. Mass., 1998)

The District Court for Massachusetts followed *LaPine* and *Gateway* in *New England Utilities v. Hydro-Quebec*.⁹⁰ In this case, New England Utilities (“NEU”) filed a state court action to confirm an arbitrator’s award concerning the international purchase and transportation of electricity under the Massachusetts Uniform Arbitration Act. Hydro-Quebec filed a notice of removal

85. *Id.* (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995)(citation omitted)(Emphasis in original).

86. *Id.* at 997.

87. 1997 U.S. App. LEXIS 21248 (4th Cir. 1997); *cert. den.* 1998 U.S. LEXIS 898.

88. *Id.* at 16.

89. *Id.*

90. 10 F. Supp. 2d 53 (D. Mass. 1998).

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to federal court based on diversity jurisdiction and moved to vacate the award.⁹¹

The agreement between the parties provided for arbitration under specified FAA rules, but provided further 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.”⁹²

In an entertaining and well-written opinion, Judge Patti B. Saris noted that the First Circuit had not addressed a case like this one, wherein parties agreed to expand the scope of judicial review by contract to include review for errors of law.⁹³ Therefore, Judge Saris relied on the fact that three circuit courts of appeals had directly addressed contractual expansion of the FAA’s scope of review, and all three endorsed judicial review in accordance with the agreement of the parties.⁹⁴ As this decision preceded *Bowen*,⁹⁵ the court added that it was “not aware of any federal case which actually interprets a similar arbitration clause and reaches a contrary result.”⁹⁶

Considering in detail Judge Posner’s dictum in *CTU*, the court concluded that his “passing advisory reference to limited judicial review in a different context simply cannot compete with the probing analysis by three other circuits in cases on point.”⁹⁷

Although the First Circuit Court of Appeals had emphasized the narrow scope of review, Judge Saris concluded that there was no reason to assume that the First Circuit would not follow the three Circuits that favor judicial review in accordance with the parties’ agreement, especially since it had approvingly cited *Gateway* for “laying out the scope of judicial review of arbitration awards in the light of *First Options of Chicago, Inc. v. Kaplan*⁹⁸ and the FAA.”⁹⁹ As Judge Saris put it, “[t]he Court’s reading of the First Circuit ouija board supports the conclusion that the Court of Appeals would enforce

91. *Id.* at 55.

92. *Id.* at 57 (emphasis omitted).

93. In a footnote, the court noted that “[i]ncidentally, neither side suggests that Quebec law, which prohibits judicial review of the merits unless parties stipulate to the contrary, governs here.” *Id.* at 62, n.7.

94. *Id.* at 62.

95. *See supra* notes 10-19 and accompanying text.

96. 10 F. Supp. 2d at 62.

97. *Id.* at 63.

98. 514 U.S. 938 (1995).

99. *Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234, 237 (1st Cir. 1995) (citing *Gateway*, 64 F.3d at 996).

the provision at issue in the Contract.”¹⁰⁰ She went on to deal with two additional concerns, as follows:

First, one of the great benefits of arbitration is the efficient resolution of disputes without burdening both the courts and the parties with protracted litigation. Requiring courts to shift from a straightjacketed review of arbitral awards for problems such as corruption or other improprieties to more searching reviews for errors of fact or law could arguably transform arbitration “from a commercially useful alternative method of dispute resolution into a burdensome additional step on the march through the court system”. However, the Supreme Court has unequivocally indicated its preference for accommodation of the intent of the parties over expediency by observing that “the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, . . . but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms. In fact, the Supreme Court could not have been more direct on this point: “We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims.”¹⁰¹

Second, allowing the courts to expand statutory standards of judicial review implicates a prudential question, that is, what control contracts should be permitted to have over the operation of the judiciary. The Ninth Circuit’s concurrence in *Lapine* [sic] raises this concern but was content with the result so long as the contractual standard of review did not require diversion from the courts’ normal mode of operation¹⁰²

Despite these two reservations, the Court feels obliged to follow the thus-far unanimous rule of law in the federal courts.”¹⁰³ [citations omitted]

With this analysis, Judge Saris made two important observations: first, that between accommodating the intent of the parties as it is expressed in their agreement to arbitrate and the expediency of arbitration, the Supreme Court made a clear choice in favor of honoring the parties’ wishes. Second, so long as the nature of the court’s review on the appeal from the arbitral award does not require it to divert from its normal mode of operation, there is no reason not to permit parties to provide for such review by the court. In Part III B below, Judge Saris’s second observation will be discussed in more detail, and more specifically whether this observation is correct.

100. *New England Utilities*, 10 F. Supp. 2d at 64.

101. *Id.* (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

102. Judge Saris went on to say: “Though the Court has not been asked to examine dead animals (except, of course, the fossil fuel) here, review of errors of Quebec law, most of which is written in French and which the Court lacks the computer-assisted or library resources to research independently, is not far off [T]he issues of law here are thankfully straightforward, but it is not hard to imagine a case in which even error of law review is unrealistic, particularly where foreign law is implicated.” She added in a footnote: “My law clerk and a librarian ventured to the nether regions of the Social Law Library, the most comprehensive in Boston, and, after plowing through layers of dust and cracking the spines of untouched tomes of Canadian law, found no reliable compendium of the Quebecois [sic] Code.” 10 F. Supp. 2d at 64, n.10.

103. *Id.* at 64.

4. *Bradford* (Rhode Island Supreme Court, 2001)

Also in the First Circuit, but under state law, in *Bradford Dyeing Ass'n, Inc. v. J. Stog Tech. GmbH*,¹⁰⁴ the Supreme Court of Rhode Island implicitly recognized the right of the parties to agree to judicial review of an arbitral award when it overturned (on the merits) the lower court's judgment vacating an arbitration award in favor of Stog. As will follow from the discussion in the next three paragraphs, it appears that the court's recognition of that right was too tentative in a situation where it would have seemed advisable to take a more explicit position on the issue.

The parties' arbitration agreement had made the arbitration subject to the Rhode Island arbitration provisions, but had also explicitly provided that "[e]ither party may appeal to a court of competent jurisdiction any conclusion of law in the [arbitrator's] decision, provided, however, the findings of fact by the arbitrator shall be absolute."¹⁰⁵

After a brief analysis of the positions of the Fifth and Ninth Circuit on the one hand (respectively in *Gateway*¹⁰⁶ and *LaPine*¹⁰⁷) and observing that the Eighth Circuit had adopted a different viewpoint (in *UHC Management*¹⁰⁸), the Rhode Island Supreme Court said:

This Court, however, has not as yet had occasion to consider whether under our statutory arbitration scheme such enlargement is permitted. Notwithstanding the observation we make concerning the ability of the parties by their private agreement to enlarge the scope of appellate judicial review prescribed in [the Rhode Island state statute's section setting forth the statutory grounds for *vacatur*], we will for purposes of this case assume they may, without deciding the validity of their agreement.¹⁰⁹

The court added in a footnote: "We leave for another day and case whether parties may by private agreement enlarge the scope of the prescribed limitations set out in [that section], at which time the question can be fully briefed and argued."¹¹⁰

104. 765 A.2d 1226 (R.I. 2001).

105. *Id.* at 1229 (emphasis added).

106. *See supra* notes 80-85.

107. *See supra* notes 45-75.

108. *See supra* notes 23-27 and accompanying text.

109. 765 A.2d at 1233.

110. *Id.* at 1233, n.11.

5. *Hughes Training* (2001, Fifth Circuit)

The Fifth Circuit, in *Hughes Training, Inc. v. Cook*¹¹¹ (affirming a decision of the District Court for the Northern District of Texas), recently had the occasion to affirm its holding in *Gateway*. In this employment related case, the agreement provided that “in actions seeking to vacate an award, the standard of review to be applied to the arbitrator’s findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.”¹¹² Holding that parties are generally free to structure their arbitration agreements as they see fit, and that therefore an arbitration agreement may expand judicial review of an arbitration award beyond the scope of the FAA, the Fifth Circuit affirmed the District Court’s vacating the arbitration award and entering judgment in favor of Hughes.

From the above analysis the split between the circuits can be summarized as follows: the view that parties can validly agree to allow appeal to the federal district court that has jurisdiction over the parties (*LaPine*) is supported by the Fourth, Fifth and Ninth Circuits, and by lower courts in the First and Second Circuits. The view that parties cannot validly agree to do so (*Bowen*) is supported by the Seventh and Tenth Circuits and possibly by the Eighth. The uncertainty created by this split raises important issues that will shape the future of arbitral appeal and *vacatur* and, more specifically, future arbitration clauses in contracts.

III. THE ISSUES RAISED BY LAPINE AND BOWEN

LaPine and *Bowen* address the question as to whether the parties to an arbitration agreement can agree to expand the grounds for judicial review. These two cases have been the subject of a great number of articles, the majority of which seem to support *LaPine*,¹¹³ with only a few commentators sid-

111. 254 F.3d 588 (5th Cir. 2001).

112. *Id.* at 590.

113. See, e.g., Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000); *Contractually Expanded Standards ‘Threaten’ Independence Of Arbitration Process, 10th Circuit Rules*, 16 MEALEY’S INT’L ARB. REP. NO. 7 (2001); Rachel C. Corn, *Recent Development: LaPine Technology Corp. v. Kyocera Corp.*, 13 OHIO ST. J. ON DISP. RESOL. 1085 (1998); Stephen A. Hochman, *Judicial Review to Correct Arbitral Error: An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103 (1997); Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration*, 51 VAND. L. REV. 395 (1998); Di Jiang-Schuerger, *Perfect Arbitration = Arbitration Litigation?*, 4 HARV. NEGOT. L. REV. 231 (1999); Leanne Montgomery, *Expanded Judicial Review of Commercial Arbitration Awards — Bargaining for the Best of Both Worlds*, 68 U. CIN. L. REV. 529 (2000);

ing with the *CTU* and *Bowen* decisions.¹¹⁴ Judging from the scholarly articles in this area, the question of whether to enforce expanded judicial review clauses in commercial arbitration agreements rests on contract, jurisdictional, and public policy arguments.¹¹⁵

A. *The Contract Argument Supports LaPine*

Since arbitration plays such a central role in commercial dispute resolution, both domestic and international, the contractual nature of arbitration must play a significant part in the interpretation of both the FAA and applicable state arbitration laws. Thus, § 2 of the FAA, which provides that an agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” has been held to be the primary purpose of the Act and to mandate the enforcement of arbitration agreements.¹¹⁶ Accordingly, Judge Fernandez, in *La-*

James M. Ringer & Martin L. Seidel, *Judicial Review Clauses in Transnational Arbitration Agreements*, 12 *INSIDE LITIG.* 6 (May 1998); Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 *CUMB. L. REV.* 337 (2000/2001); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 *ALB. L. REV.* 241 (1999).

114. See, e.g., Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46 *ST. LOUIS L.J.* 509 (2002); Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 *OHIO ST. J. ON DISP. RESOL.* 337 (2000); Andreas Lowenfeld, *Can Arbitration Co-exist with Judicial Review? A Critique of LaPine v. Kyocera*, 3 *ADR CURRENTS* 1 (Sept. 1998); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 *AM. REV. INT’L ARB.* 147 (1997). See also Revised Uniform Arbitration Act, Section 23B. *Comment on the Concept of Contractual Provisions for “Opt-In” Review of Awards*, available at www.law.upenn.edu/bl/uc/uarba/arbitrat1213.htm (last visited February 11, 2003).

115. Montgomery, *supra* note 113, at 550. See also Jiang-Schuerger, *supra* note 113, at 236-237.

116. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). See also, Dean Whitter Reynolds in which the Court said:

[W]e must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation. Indeed, this conclusion is compelled by the Court’s recent holding in *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), in which we affirmed an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings. That misfortune, we noted, “occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement.” *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220-21 (1985).

Pine, relied on the Supreme Court's elaboration of that principle in *Volt*¹¹⁷ and *First Options*,¹¹⁸ and decided that "the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreements' terms."¹¹⁹

Two commentators argue that the parties' ability to agree on rules that differ from the FAA is conditioned on two limits: first, that the parties must exhibit a clear and unmistakable intent to provide for arbitral appeal, and second, that the parties' agreement cannot undermine the FAA's policy of enforcing agreements to arbitrate.¹²⁰ This author agrees, but would add a third requirement, namely that the parties' agreement cannot undermine other mandatory provisions contained in the FAA.¹²¹

Certain other commentators¹²² note, however, that the line of cases standing for the proposition that the FAA's paramount goal is to honor and enforce the agreement between the parties ought to be distinguished as being purely procedural in nature, whereas the issue of whether there is a contractual right to allow the losing party to appeal from an arbitral award to the court having jurisdiction over the parties ought to be regarded as substantive. They argue that cases such as *Volt*¹²³ (enforcing the parties' agreement concerning the choice of law governing the arbitration process), *Mastrobuono*¹²⁴ (allowing the arbitrator to impose punitive damages), and *First Options*¹²⁵ (allowing the arbitrator to decide the issue of the scope of issues that may be arbitrated) are all procedural in nature, whereas the parties' agreement to allow "expanded judicial review" would be substantive in nature. The underlying reason for the argument is found in the fact that the *vacatur* procedure of § 10(a) FAA relates to the "substantive enforcement of the award," and these commentators believe that allowing the parties to contract with respect to such substantive enforcement would endanger the integrity of the arbitral process.¹²⁶

117. *Volt*, 489 U.S. at 478-479.

118. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (holding "arbitration is simply a matter of contract between the parties.")

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

120. *Montgomery*, *supra* note 113, at 551; *Jiang-Schuerger*, *supra* note 113, at 244 (citing *Mitsubishi Motors*, 473 U.S. at 628).

121. *See infra* notes 525-265, and accompanying text.

122. *See, e.g.*, *Curtin*, *supra* note 114, at 363-364; *Sullivan*, *supra* note 114, at 528.

123. *See supra* note 117.

124. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995).

125. *See supra* note 118.

126. *Curtin*, *supra* note 114, at 364; *Sullivan*, *supra* note 114, at 526 (citing *Mitsubishi Motors*, 473 U.S. 614, 638 where the Supreme Court discussed possible substantive review of an award to be rendered in Japan on the basis of a defense available under Art. V(2)(b) of the New York Convention, which is comparable to a *vacatur* proceeding. *See infra* note 237 and accompa-

This argument seems to contradict the line of cases that holds that the Federal Arbitration Act “creates a body of federal substantive law.”¹²⁷ Nonetheless, the argument appears to be persuasive, but only insofar as the *vacatur* procedure of Section 10(a) is concerned. When, as is discussed in Part IV below, a differentiation is made between *vacatur* and arbitral appeal, the reasoning about procedural versus substantive issues in the context of judicial review of arbitral awards becomes largely meaningless. In any event, if it were relevant to distinguish between procedural and substantive aspects of federal arbitration law, it is suggested that whereas the *vacatur* procedure of Section 10(a) concerns the substantive enforcement of the award, an agreement allowing arbitral appeal is more procedural in nature and is correctly grouped with the cases referred to above and relied upon by the Ninth Circuit in *LaPine*¹²⁸.

The *CTU* and *Bowen* courts, which oppose parties’ ability to include a clause in their agreement providing for “expanded judicial review,” argue that there is a different limit to the parties’ ability to agree on arbitral rules: the parties cannot create federal jurisdiction by contract. Professor Hans Smit, who argued that contractual modification of the scope of judicial review is “wholly incompatible with the essence of arbitration as we know it,”¹²⁹ expanded upon this argument, first voiced by Judge Posner in the now famous dictum in *CTU*.

B. The Jurisdictional Argument Supports Bowen

Judge Posner, writing for the majority in *CTU*,¹³⁰ was the first to suggest that an agreement between parties to submit the award to appeal by a federal district court is tantamount to creating federal subject matter jurisdiction for the court, something that cannot be done by contract.¹³¹ Expanding on this ju-

nying text. *Mitsubishi Motors* did not discuss the issue of substantive review in the context of arbitral appeal.)

127. *Southland*, 465 US 1, 12 (1984) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 1, 25, n. 32 (1983)).

128. See *supra* notes 59-64 and accompanying text.

129. Smit, *supra* note 114, at 149.

130. *Chicago Typographical Union*, 935 F.2d at 1505.

131. Art. III, § 2, cl. 1 of the U.S. Constitution limits the subject matter jurisdiction of the federal courts to certain “cases or controversies.” Pursuant to 28 USC § 1331, “the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Pursuant to 28 USC § 1332, the federal district courts have juris-

isdictional argument, Professor Hans Smit posited that the parties' agreement is irrelevant because they have no authority to determine how public resources are spent and are not free to alter the judicial process. Permitting contractual modification of the scope of judicial review¹³² undermines the public policy of encouraging arbitration and lessens the social desirability of arbitration by causing fewer arbitral awards to be final dispositions.¹³³ The *Bowen*¹³⁴ and *Crowell*¹³⁵ courts also relied on the jurisdictional argument, lending support to this theory by citing Professor Smit's article.

Judge Kozinski, in his concurring opinion in *LaPine*,¹³⁶ also briefly discussed this issue and concluded that, indeed, what the district court is asked to do by an arbitration clause such as the one in *LaPine* is not a subset of what it would be doing if the case were brought under diversity or federal question jurisdiction.¹³⁷ "It's not just less work, it is *different* work."¹³⁸ But even if Congress has nowhere authorized courts to review arbitral awards under the standard adopted by the parties, Judge Kozinski concluded that the Court should nonetheless enforce the arbitration agreement according to its terms, "[g]iven the strong policy of party empowerment embodied in the Arbitration Act."¹³⁹

Judge Kozinski added that he would have called the case differently if the parties' agreement had provided that the district court review the award by flipping a coin or studying the entrails of a dead fowl.¹⁴⁰ In such event, the parties would have called upon the courts to perform a task that is totally different from the one they are accustomed to perform, that of reviewing the findings of fact or conclusions of law set forth in the arbitral award. Here, at least, the district court would perform a duty that is not foreign to it.

dition in cases where there is diversity of citizenship and the amount in controversy exceeds \$75,000. The U.S. Supreme Court has held consistently that Congress enacted the Federal Arbitration Act pursuant to the Commerce Clause, Art. I, § 8, cl. 3, and, by implication, that Congress did not intend to confer independent federal subject matter jurisdiction. Thus, Section 2 FAA is held to be a "body of substantive law" that is "enforceable in both state and federal courts." *Perry v. Thomas*, 482 U.S. 483, 489 (1987). *See also Southland*, 465 U.S. at 12.

132. Smit, *supra* note 114, at 150.

133. *Id.* Professor Smit's point of view is consistent in that he disagrees not only with the cases permitting pre-dispute agreements that provide for arbitral appeal, but he also contends that the FAA provides the exclusive grounds to set aside an arbitral award. Thus, he also rejects the cases creating non-statutory *vacatur* grounds. *Id.* at 148.

134. 254 F.3d 295.

135. 115 Cal. Rptr. 2d 810.

136. 130 F.3d at 891. *See also supra* notes 90-103.

137. 130 F.3d at 891.

138. *Id.* (emphasis in original).

139. *Id.*

140. *Id.*

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An interesting rebuttal to the jurisdictional argument is contained in Judge Nott's dissenting opinion in *Crowell*,¹⁴¹ which distinguishes between the courts' subject matter jurisdiction on the one hand, and courts acting *in excess* of jurisdiction on the other, a phenomenon Judge Nott finds to be not uncommon both in criminal and civil cases. In addition, noting that this case involved a contract between two equal and sophisticated parties, Judge Nott felt the losing party was barred by *estoppel* from complaining about his contractual bargain to have arbitral appeal. Giving an extensive overview of the case law, Judge Nott opined:

[T]he majority has confused the concept of *lack of fundamental jurisdiction* (which this case does not involve) with the concept of *acting in excess of jurisdiction*. Under the latter concept, parties may (under the appropriate circumstances) agree to have a trial court act beyond its statutory authority. If they so agree, they are estopped from later complaining. That is exactly what occurred here. The parties consented to heightened judicial review as a consideration for executing and performing the contract. Neither may now challenge the ability of the trial court to act beyond its statutory authority.¹⁴²

Judge Nott's analysis that the state court acts in excess of jurisdiction is not dissimilar to that of Judge Kozinski in *LaPine* with respect to the federal district court. Ordinarily, the state court, reviewing an arbitral award "on appeal," does not do anything materially different than an appeals court does when it reviews the lower court's judgment. The difference is that it is *the court of first instance* that is asked by the parties' arbitration agreement to sit as an appeals court, which is an activity that it probably is not used to performing, even if in most state court jurisdictions the trial court may sit as an appeals court hearing appeals from limited jurisdiction and/or small claims courts.¹⁴³ Judge Nott is generally correct when he says that the *trial* court does something it does not ordinarily do, and therefore could be said to act in excess of its jurisdiction. Although the distinction may be material, in the end, the activity of review of an arbitral appeal does not ask the court system as a whole to perform a task that is totally different from what courts are ordinarily asked to do.

Professor Sarah Rudolph Cole takes a different approach suggesting that the courts have improperly ignored congressionally and constitutionally im-

141. See *supra* note 28.

142. *Crowell*, 115 Cal.Rptr.2d at 818.

143. For examples where federal district courts heard cases on appeal, see *infra* note 144 and accompanying text.

posed limitations on judicial power.¹⁴⁴ She points out that Judge Posner's analysis in *CTU* confuses jurisdictional limitations with restrictions on the court's power to render decisions.¹⁴⁵ Prof. Cole argues, correctly in this author's opinion, that the FAA does not create an independent basis for federal jurisdiction.¹⁴⁶ A party seeking to challenge an arbitral award in district court must first establish federal question or diversity jurisdiction.¹⁴⁷ Thus, the question is not whether the parties have created federal jurisdiction, but rather whether the court has the judicial power to grant review on bases other than those identified in the FAA. Professor Cole suggests that the courts need to develop a uniform approach for evaluating party requests. She concludes that requests for "expanded" review of arbitral awards should be approved so long as they do not require arbitrary and capricious decision-making by the court.¹⁴⁸

In addition to the notion that Professor Cole raised this so-called jurisdictional issue is actually a question of judicial power, there is an additional point that may make this theoretical obstacle appear less compelling. That is the analogy that can be drawn with the forum selection clause. When parties decide not to opt for arbitration but to resolve their disputes in the courts, it is quite common to include in their agreement a provision that selects a specific court, or a "competent" court in a specified location, before which they want to litigate the dispute to the exclusion of all other courts. The location of that court may have little or nothing to do with the transaction or the domicile of the parties. For example, the contract may specify the federal district court for the Southern District of New York, even though the parties are in California and Germany respectively. Assuming that the jurisdictional requirements are met, the chosen court will generally assume the judicial power to

144. Cole, *supra* note 113, at 1245.

145. *Id.*

146. For a contrary view, see Lowenfield, *supra* note 114. Lowenfield believes the jurisdiction of the district courts under the FAA is precise and limited, as set out in Sections 10 and 11 FAA. *Id.* at 15-16. He also points to the limited jurisdiction of district courts to hear appeals in other areas of federal civil procedure: under 28 U.S.C. § 158, district judges have jurisdiction to hear appeals from final judgments and some interlocutory orders issued by bankruptcy judges; under 42 U.S.C. § 405(g), district judges have jurisdiction to review legal determinations of the Secretary of Health and Human Services under portions of the Social Security Act. *Id.* at 18, n. 31. Lowenfield notes that "[t]here may be a few other instances in which district judges have been authorized to hear appeals, but certainly not many." *Id.*

147. *LaPine*, 130 F.3d at 891 (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25, n. 32).

148. Cole, *supra* note 113, at 1262-1263. Professor Cole refers back to Judge Kozinski's suggestion that he would view the case differently if the district court had been asked to review the award by "flipping a coin or studying the entrails of a dead fowl. See *supra* note 140.

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hear the dispute.¹⁴⁹

Rephrasing Judge Fernandez' words in *LaPine*,¹⁵⁰ Richard Johnston aptly summed up the most practical argument in opposition to the jurisdictional argument put forth in *CTU* (and therefore *Bowen*): "As long as the scope of review in the arbitration agreement provides for a lesser role for the courts than a full trial on the merits, there is no offense to the court system, since without a voluntary agreement to arbitrate the parties would be entitled to a full court trial on the merits in the first place."¹⁵¹

When looking at the issue of whether to permit an arbitral appeal provision in pre-dispute agreements from the jurisdictional perspective, the *CTU* court's fear that contractually expanded judicial review of arbitral awards would have a burdensome effect on the courts may be misplaced. The contrary may even be true, as illustrated by the (logical) consequence of the majority decision in *Crowell*; when the court concluded that the parties' agreement to allow appeal to the courts from the arbitral award was invalid, the entire arbitration agreement became invalid and the case had to be tried in court.¹⁵² Thus, there are both strong theoretical and practical arguments against the jurisdictional argument.

149. The recent case, *Chateau Des Charmes Wines Ltd. v. Sabate USA, Inc.*, 2002 U.S. Dist. LEXIS 4406 (N.D. Cal. 2002), summed up the law concerning forum selection clauses as follows: Forum selection clauses are presumptively valid and will be enforced unless the party opposing the clause can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). The "concern of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" strongly favor enforcement of forum selection clauses in international contracts. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *see also In Re Oil Spill by Amoco Cadiz*, 659 F.2d 789, 795 (7th Cir.1981) (holding "special deference [is] owed to forum-selection clauses in international contracts.").

150. 130 F.3d at 889. *See also* Jiang-Schuerer, *supra* note 113, at 238 (concluding that the FAA is not based on Article III of the United States Constitution but on Congress' power to regulate interstate commerce).

151. Richard Johnston, *Grounding the FAA: Judicial Review of International Arbitration – Lapine v. Kyocera* (citing *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 243-44 (S.D.N.Y. 1984) (*available at* www.student.Richmond.edu/~rjglb/Spring1999.html (hereinafter the "Richmond Symposium"))). *See also LaPine*, 130 F.3d at 889.

152. *See supra* note 34 and accompanying text.

C. The Public Policy Argument

In addition to citing “congressional intent,” Professor Smit also raises public policy concerns that weigh against allowing parties to agree to file an appeal from an arbitral award to the competent court. First, he argues that the law intended to exclude arbitral appeal in order to avoid the “socially most reprehensible” consequence of changing the benefit of arbitration from “adjudication in a single instance” into a “device for adding still another instance to the usual three instances of litigation in the ordinary courts.”¹⁵³ Although allowing arbitral appeal indeed creates the possibility that the losing party in the arbitration will pursue litigation in the ordinary courts in three instances, this concern seems to pertain more to the question of whether contracting for arbitral appeal is a smart decision than whether the parties should be allowed to have that choice available to them.

This issue has since been addressed by Judge Saris in *New England Utilities*¹⁵⁴ in which she discussed what appears to be two sides of the same coin, namely the potential loss of efficiency of arbitration and the loss of arbitration’s contribution to reducing the caseload of the judicial system. Much along the lines of what Professor Smit warned against, Judge Saris reasoned that allowing parties to agree to arbitral appeal could turn arbitration from an alternative method of dispute resolution into simply another step to enter the court system.¹⁵⁵ Judge Saris was mindful, however, of *Dean Witter Reynolds Inc. v. Byrd*,¹⁵⁶ which held that allowing arbitration to go forward would effectively bifurcate the proceeding, permitting one portion of the case to be arbitrated while the other part would end up in court, resulting in an inefficient use of separate proceedings in different forums. Nonetheless, a unanimous Supreme Court made clear that it preferred to honor the parties’ wishes over the FAA’s admitted goal of promoting expeditious resolution of claims.¹⁵⁷ Judge Saris’ reasoning implies, as did the Supreme Court’s in *Dean Witter*, that even if the parties to an agreement may have made an unwise decision by agreeing to submit the arbitral award to judicial review, honoring the wish of the parties takes precedence over the FAA’s goal of promoting expeditious resolution of claims.

Second, Professor Smit discerns the jurisdictional argument in terms of a public policy issue by noting that the extent to which a court may review an

153. Smit, *supra* note 114, at 147-48.

154. 10 F. Supp. 2d 53.

155. *Id.* at 64.

156. 470 U.S. 213, 219 (1985).

157. See generally Sasser, *supra* note 113, at 355.

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arbitral award is a function of the political judgment of a body politic within the context of how judicial resources are to be used. In making this judgment, the body politic may take into account the interests of the parties involved in having the kind of review they wish to have. But, Professor Smit argues, the ultimate decision is not to be made by the parties, but by that body politic.¹⁵⁸ This author agrees with Professor Smit insofar as he implies that the issue comes down to a policy choice.¹⁵⁹

However, it would seem entirely consistent with the extent to which the Supreme Court has reshaped the world of arbitration by construing the FAA in a succession of decisions far beyond what many argue was its originally intended scope,¹⁶⁰ to suggest that while there is no specific provision in the FAA that deals with the issue, it can be decided by the courts and is not within the exclusive province of Congress. As Judge Fernandez suggested in *LaPine*, it is probably more reasonable to find that § 2 of the FAA demands that the primary purpose of the FAA be followed, namely to ensure enforcement of private agreements to arbitrate in accordance with the agreements' terms—even when that agreement provides for the possibility of appealing the arbitral award.

Third, Professor Smit suggests that arbitral appeal would not only undermine the public policy of encouraging arbitration, but would also be socially undesirable, because it would stifle the creative solutions frequently advanced by arbitrators.¹⁶¹ The readiness of party-selected experts to propose such solutions would be adversely affected by allowing the merits of awards made by them to be reviewed by judges not specifically selected for their experience and independence.¹⁶² Although statistical information is lacking on this point, this author believes the number of cases in which there is a real opportunity for the arbitrator (as opposed to a mediator) to propose creative solutions should not be overestimated. Nonetheless, with respect to cases in which such opportunity may foreseeably exist, Professor Smit's argument is persuasive and ought to encourage the parties to decide not to submit the award to arbi-

158. Smit, *supra* note 114, at 150.

159. See *infra* notes 181-183 and accompanying text.

160. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

161. Smit, *supra* note 114, at 138.

162. Smit, *supra* note 114, at 151-52.

tral appeal. This author prefers to see Professor Smit's argument as an element playing a role in the parties' decision whether or not to include an arbitral appeal provision in their contract. It does not appear to address the question of why the law should not permit the parties to make that choice.

Each of the three arguments discussed in Part III (the contractual, the jurisdictional and the public policy argument) support the view permitting parties to agree to submit their arbitral award to review by the court that has jurisdiction over the parties. However, the analysis of the issue becomes more transparent when the issue is no longer seen as a question of "expanded judicial review."

IV. REFRAMING THE ISSUE: ARBITRAL APPEAL VS. VACATUR

In order to be able to analyze how the *LaPine* doctrine interacts with the FAA, the author has found it helpful to reframe the issue.¹⁶³ Instead of framing the issue in terms of "expanded judicial review" and "heightened scrutiny by the courts" beyond the statutory grounds set forth in § 10(a)¹⁶⁴ of the FAA, it is more accurately framed by making a distinction between "vacatur" and "arbitral appeal." Proper nomenclature can refer, on one hand, to the grounds for setting aside an arbitral award found in § 10 of the FAA¹⁶⁵ as "grounds for annulment" (or "vacatur," sought by a party's "challenge" of the award), and, on the other hand, to the parties' agreement to submit the award to judicial review on the legal and/or factual merits as "arbitral appeal."¹⁶⁶

The only thing a *vacatur* procedure has in common with an arbitral appeal is that in both cases the arbitral award may be confirmed or declared to be of no effect. That is where the similarity stops; this is not an issue

163. Judge Fernandez framed the issue in *LaPine* as follows: "Is federal court review of an arbitration agreement necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?" 130 F.3d at 887 (emphasis added).

164. See *supra* note 13 and accompanying text.

165. Whether or not together with the non-statutory grounds developed by case law, including "manifest disregard of the law" and "against public policy." For an extensive discussion of both the statutory and the non-statutory grounds, as well as their respective desirability, see Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998). Professor Hayford distinguishes four non-statutory grounds for *vacatur* of commercial arbitration awards: (i) manifest disregard of the law; (ii) conflict with a clear and well-established public policy; (iii) the award is found to be "arbitrary or capricious" or "completely irrational"; and (iv) failure of the award to "draw its essence" from the parties' contract. *Id.* at 450-51, 461-88.

166. The text of the English Arbitration Act of 1996 may be found at www.hmso.gov.uk/acts/acts1996, last visited on Feb. 16, 2003.

whether or not the statutory grounds for *vacatur* (in the sense of annulling and setting aside an award) can, or ought to, be expanded to include judicial review on the merits. There is a profound difference between (i) reviewing (and setting aside an award) on the basis of allegations of fraud, partiality or corruption, procedural misbehavior, or arbitrators exceeding their powers,¹⁶⁷ and (ii) reviewing (and possibly overturning) an award on appeal on the basis of allegations of error(s) by the arbitrator(s) in the findings of fact and/or the conclusions of applicable law. If the foregoing is true, appeal from an arbitral award needs to be viewed as an avenue of judicial review that is wholly separate and distinct from the *vacatur* procedure.

This distinction is supported by comparing the grounds for challenges of an award set forth in §§ 10 and 11 of the FAA with the grounds upon which a judgment can be set aside pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.¹⁶⁸ Although the grounds for vacating or correcting a judgment are much broader¹⁶⁹ than those for vacating or correcting an arbitral award, they are similar. Obviously, the grounds of FRCP Rule 60(b) are distinguishable and separate from the entire appeals process by which one can take an appeal from a judgment. The distinction between appeal from a judgment and *vacatur* of a judgment played a role in one case where the failure of a party to appeal from a judgment was held not to serve as a bar to a later attempt to vacate the judgment.¹⁷⁰

The differentiation between *vacatur* and arbitral appeal is further supported by comparing the grounds for *vacatur* of an arbitral award with the grounds upon which a foreign judgment can be refused to be recognized,¹⁷¹

167. FAA, § 10(a), (1)-(4), *supra* note 13. A comprehensive review of the case law pertaining to the four statutory grounds for *vacatur* can also be found in Sullivan, *supra* note 114, at 516-19.

168. FED. R. CIV. P. 60(b). For a review of relief from judgments, *see generally*, 47 AM. JUR. 2D *Judgments* §§ 740-872 (providing an overview of the grounds therefor in §§ 775-851).

169. In fact, as a result of item (6) of Rule 60(b), the grounds for vacating a judgment are practically unlimited. In essence, Rule 60(b)(6) provides that on motion and upon such terms as are just, the court may relieve a party from a final judgment for any reason other than the ones enumerated that justifies relief from the operation of the judgment. *See also* 28 U.S.C. § 2106.

170. *Van De Ryt v. Van De Ryt*, 6 Ohio St. 2d 31 (1966). "The remedies of appeal and vacation are 'cumulative' or, more precisely, 'alternative'; a party need not prosecute an appeal as a condition precedent to moving for a vacation of a judgment." *Id.* at 35. *See also* Donaldson v. Donaldson, 1998 Ohio App. LEXIS 5017.

171. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 81 (1982). Generally, the rules of recognition of judgments of courts within the United States, state or federal, derive from the Full

and the language used in the Uniform Foreign Money-Judgments Recognition Act,¹⁷² all of which, as might be expected, are very similar both to each other and to the grounds for *vacatur* set forth in §10(a) FAA.

The distinction is further supported by looking at the arbitration statutes of other countries that list grounds (comparable to §10(a) of the FAA) upon which the arbitral award can be challenged in one section of the statute, and which expressly provide for, or prohibit, the possibility of an arbitral appeal in a different section of that statute. For example, Section 68 of the English Arbitration Act of 1996 enumerates grounds for *vacatur*, whereas Section 69 of the Act provides for “Appeal on Points of Law.”¹⁷³ The same is true for

Faith and Credit Clause of Art. IV, Section 1 of the United States Constitution. A judgment is valid for this purpose if the rendering court had jurisdiction of the subject matter, had territorial jurisdiction and if adequate notice was given to the party assertedly bound by the judgment. *Id.* at Comment a. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 et seq. (1987, 2002); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 92 et seq., § 98 (1971, 1989).

172. Section 4 of the Uniform Foreign Money-Judgments Recognition Act provides as follows:

§ 4. Grounds for Non-recognition.

(a) A foreign judgment is not conclusive if (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) the judgment was obtained by fraud; (3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

(4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

173. Interestingly, Article 45 of the English Arbitration Act of 1996 (and at least some of the Acts — wholly or partially — modeled after it) also continue the English tradition of allowing a party to make an application to the court to determine any question of law arising *in the course of* the proceedings in the event the court is satisfied that it substantially affects the rights of one or more of the parties. This useful feature is somewhat comparable to the judicial system of Art. 234 TEC (formerly Art. 177 EEC), pursuant to which any member — state court can submit a question of EU law to the European Court of Justice in Luxembourg for clarification. In a decision of the European Court of Justice of March 23, 1982, “*Nordsee*,” the court ruled that an arbitrator does not have the authority to submit questions pursuant to what is now Art. 234 TEC to the European Court, and that instead it is up to “the ordinary courts [that are] called upon to examine [the award] either in the context of their collaboration with arbitration tribunals . . . or in the course of a review of the arbitration award” (whether in the event of an appeal, for setting aside, for leave to enforce the award or upon any other form of action or review available under the relevant national legislation) to ascertain whether it is necessary for it to make a reference to the European Court under Art. 234 TEC. *Nordsee Deutsche Hochseefischerei*

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the French New Code of Civil Procedure, which enumerates grounds for *vacatur* in Article 1484, whereas Article 1482 provides for appeal unless the parties have agreed otherwise.¹⁷⁴ Similarly, Part VI of the Belgian *Code Judiciaire / Gerechdelijk Wetboek* distinguishes between a petition for annulment in Article 1704, and Article 1703(2) providing that appeal from an arbitral award may be instituted (only) if the parties have included a provision to that effect in the arbitration agreement. Also, the Netherlands Code of Civil Procedure, in Articles 1064 through 1068, deals with the procedure for annulment (with the possible grounds enumerated in Article 1065), whereas Article 1050 deals with “Arbitral Appeal.”¹⁷⁵

Thus, the distinction between appeal and *vacatur* is amply supported, not only by comparing *vacatur* of arbitral awards with other annulment procedures in our legal system, but also by comparing our system with the arbitration laws of other countries. The relevancy of the distinction will become immediately clear when we look at the court’s analysis of “expanded judicial review” in *Bowen*.¹⁷⁶ Notably, when we review Judge Tascha’s reasoning in the two paragraphs quoted earlier¹⁷⁷ realizing that it is not arbitral appeal that is dealt with in §§ 10 and 11 of the FAA, but rather the (limited) grounds for setting aside an award, the court’s reasoning loses its foundation. Seen in this light, the court’s argument seems supportive of limiting the grounds for *vacatur*.

GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG, Case No. 102/81 (1982) E.C.R. 1095. This holding was confirmed in *Eco Swiss China Time Ltd. v. Benetton International N.V.*, Case No. C-126/97, 20 E.C.R. 392 (1999). This is now seen as unfortunate, since arbitrators are asked more and more to interpret EU law (including, e.g., questions of competition law) as a result of the general tendency to decentralize the administration of the European judicial system. See generally Carl Baudenbacher & Imelda Higgins, *Decentralization of EC Competition Law Enforcement and Arbitration*, 8 COLUM. J. EUR. L. 1 (2002).

174. Art. 1481-91 N.C.P.C.

175. Art. 1050 (1) *Wetboek van Burgerlijke Rechtsvordering* provides: “An appeal from the arbitral award to a second arbitral tribunal is possible only if the parties have agreed thereto.” This section has been held to mean that no appeal is available under Dutch law from the arbitral award to the court system. W. Hugenholtz, *Hoofdlijnen van het Nederlands Burgerlijk Procesrecht* 245 (Utrecht 1994). An English translation of Book Four of the Dutch Code of Civil Procedure may be found at www.tamara-arbitration.nl/English/act.html. Similarly, Article 595 (1) of the Austrian *Zivilprozessordnung* (ZPO) lists the grounds for annulment (“*Aufhebungsrunde*”), whereas Art. 594 (1) provides that between the parties the arbitral award has the effect of a valid court judgment unless the parties have agreed to the possibility of appeal before a higher arbitral tribunal (“*Instanz*”).

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

177. See *supra* note 17 and accompanying text.

tur to the provisions of §10(a) FAA, but has little to do with whether or not to permit the parties to enter into a pre-dispute agreement that submits the award to arbitral appeal before the courts. The relevancy of the distinction and its ramifications are reflected upon in Parts V and VI below.

V. ARBITRAL APPEAL, A POLICY DECISION

A. Whether to Allow Arbitral Appeal is a Policy Choice

While there is no express provision in the FAA that permits parties to agree to arbitral appeal, there is nothing in the Act that prohibits or otherwise prevents the parties from doing so. Even if in 1925 the FAA was considered “a comprehensive integrated modern arbitration law,”¹⁷⁸ compared to the arbitration statutes that have been adopted in the last fifteen to twenty years such as the UNCITRAL Model Law on International Commercial Arbitration¹⁷⁹ and the English Arbitration Act of 1996,¹⁸⁰ the FAA cannot be seen as a complete set of rules governing all aspects of arbitration. Thus, absent an explicit provision in the Act which either allows or prohibits arbitral appeal, and without any help from the legislative history,¹⁸¹ this issue is one of policy.¹⁸²

Which policy to follow depends in large measure on whether one’s preference goes to upholding the original benefit of arbitration as a method for efficient adjudication in a single instance, or whether one prefers upholding the principle of freedom of contract in this instance. It would appear that under the doctrine of contractual freedom in general, and under the FAA in particular (as explained in *Volt*¹⁸³), the better policy favors giving parties a right to choose whether or not to include arbitral appeal in their contracts.

178. Macneil, *supra* note 5, at 102. See also Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002).

179. Counting a total of 36 articles. See *infra* note 200.

180. Counting a total of 84 articles in Part I and another 25 articles in II through IV as well as four schedules. Even so, the English Act was deliberately not intended to be exhaustive. See *infra* note 311.

181. “[Y]et, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an ediface of its own creation.” Hulbert, in *Richmond Symposium*, *supra* note 151, at 9 (quoting *Allied-Bruce Terminix Companies, Inc. v. Dobson*, *supra* note 30, 513 U.S. at 283 (1995)(O’Connor, J., concurring)).

182. *Accord*, Yasuhei Taniguchi, in *Richmond Symposium*, *supra* note 151 at 5; Hulbert, in *Richmond Symposium*, *supra* note 151, at 9.

183. 489 U.S. at 478 (holding that the FAA’s principal purpose is to ensure that private arbitration agreements are enforced according to their terms).

B. More Policy Considerations Favor Allowing Arbitral Appeal

As was noted at the outset of this article, there exists a clear tension concerning the finality of arbitral awards. On the one hand, a principal benefit of arbitration is that generally the arbitral award is final and binding upon the parties. In its ideal form therefore, arbitration has been a relatively quick and efficient way to resolve a dispute. Unfortunately, partly because of the increasing complexity of cases submitted to arbitration, partly because there is a tendency among litigants to use (or abuse, depending on one's point of view) every procedural trick available to them to stall or delay the progress of the arbitration and the execution of the award, nowadays arbitration can sometimes take longer than litigation in the courts, especially when a "fast track" procedure is available in the court system, and is unavailable and not contractually provided for in the arbitration proceeding.

On the other hand, as arbitrators are asked to interpret more complex legal issues, that same finality is increasingly felt as the absence of much needed quality control over arbitrators.¹⁸⁴ A contractual provision allowing appeal to the courts may well be the sort of compromise that persuades a reluctant party to agree to arbitration in the first place. It is submitted here that the policy considerations in favor of allowing parties to include such an appeal clause outweigh the considerations against the possibility of arbitral appeal.

The autonomy of the parties to provide in their contract what they consider to be necessary or desirable¹⁸⁵ supports the idea that they ought to be empowered to choose whether or not to opt for arbitral appeals from the awards made by their chosen arbitrators. As the Australian professor Chukwumerije said, "[c]omplete exclusion of the right of appeal denies them the ability to make this choice."¹⁸⁶

184. *See supra* note 11.

185. The principle of party autonomy is one of the three general principles laid out in Section 1 of the English Arbitration Act 1996 § 1(b) provides: "The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."

186. Okezie Chukwumerije, *English Arbitration Act 1996: Reform and Consolidation of English Arbitration Law*, 8 AM. REV. INT'L ARB. 21 (1997).

C. Practical Reasons to Allow Arbitral Appeal

In addition to the desire to recognize that the core objective of the FAA is to ensure that the parties' arbitration agreement is enforced in accordance with its terms, there are practical reasons why it is desirable to allow the parties this choice. First, as arbitration is used more frequently in complex cases in which arbitrators are asked to interpret questions of statutory law,¹⁸⁷ arbitration has taken on a much more judicial character than the original arbitration between merchants of old. As parties foresee that complex statutory issues may play a role, they may decide that the expertise of the arbitrator(s) whom the parties will eventually agree upon ought not be the only one(s) to be relied upon for the purpose of interpreting such laws.

Second, in more cases than before, the amount potentially in controversy is so high¹⁸⁸ that the commercial risk of submitting a case to the judgment of just one panel of neutrals may appear to the parties to be too high. Third, even if parties are relatively equal in size or bargaining power, one of the parties may be concerned about the risk that the arbitrator will be biased towards one of the parties. The party that is the "outsider" may well prefer arbitral appeal to reduce or eliminate the risk of potential of bias.

Fourth, any such party who only occasionally enters into an agreement to arbitrate, in contrast to the other side that signs a lot of those agreements, may well decide that the costs associated with an erroneous award outweigh considerations of the relative speed and reduced costs of the arbitration.¹⁸⁹ And in certain cases, the combined process of arbitration and arbitral appeal to the courts may still be quicker and less expensive than a full-blown trial, especially when the appeal is limited to questions of law.¹⁹⁰

D. Precedents in the Laws of Other Countries

The arbitration laws of many countries¹⁹¹ expressly provide for the possi-

187. Examples include antitrust, patent, intellectual property, and securities cases.

188. As it was in *LaPine*, see *supra* note 73; *infra* note 287.

189. See generally *Cole*, *supra* note 113, at 1240-1243.

190. *Accord Younger*, *supra* note 113, at 262.

191. *Contra Smit*, *supra* note 114, at 147. Although Professor Smit asserts that "arbitration acts all around the world and all international conventions relating to the recognition and enforcement of arbitral awards permit judicial review only to a very limited extent," a substantial number of arbitration acts do permit, either freely or under fairly broad conditions, arbitral appeal. In addition, the New York Convention, in the wording of Articles V(1)(e) and VI, may well have contemplated the possibility of arbitral appeal. In defense of Professor Smit, it must be noted that his article appears to have been written prior to the adoption of the English Arbitration Act 1996, as he refers to the English situation by referring to the Mustill Report that preceded

bility of arbitral appeal.¹⁹² As discussed in Part IV above,¹⁹³ unlimited appeal exists in countries such as Belgium,¹⁹⁴ and France (domestic only),¹⁹⁵ whereas, for example, England,¹⁹⁶ all states of Australia,¹⁹⁷ Hong Kong (domestic

the adoption of the Act by several years.

192. When the applicable statute makes no distinction between domestic and international arbitration, this would of course include appeal in international arbitration. This is contrary to the suggestion made by Hulbert that there is no disposition in other countries that he knows of to accept the notion of “broadened review” (arbitral appeal) in international arbitration. Hulbert, in *Richmond Symposium*, *supra* note 151. However, the drafters of the new English Arbitration Act 1996 opted for arbitral appeal even in international arbitration. For a discussion of the history of this issue, see Marianne Roth & Tobias Brinkmann, *New Arbitral Legislation: The English Arbitration Act 1996 – A Comparative Assessment*, 5 CROAT. ARB. Y.B. 49, 67-68 (1998).

193. See *supra* notes 173-175.

194. Article 1703 (2) *Code Judiciaire / Gerechtelijk Wetboek* (provided the parties have provided for arbitral appeal in their arbitral agreement). Interestingly, Belgium, in the hope of becoming a more attractive forum for international commercial arbitration, enacted an amendment to the *Code Judiciaire* in 1985 completely eliminating the possibility of challenging arbitral awards on *vacatur* grounds in disputes between foreign parties who were neither residents or had any branch in Belgium. As a result of the very substantial objections to this amendment by the international business community, in 1998 Belgium amended its law for a second time and re-introduced (in Article 1717(4) *Code judiciaire*) as a default rule the possibility of challenging arbitral awards on *vacatur* grounds, but providing for the possibility for such foreign parties to eliminate by contract some or all of the *vacatur* grounds. See generally William W. Park, *Why Courts Review Arbitral Awards*, 2 MEALEY’S INT’L ARB. Q.L.REV. 121, 125 (2001). See also *infra* notes 262-265 and accompanying text.

195. Article 1482 *Nouveau code de procédure civile* (“NCPC”). The appeals procedure is called a “*recours réformation*”, whereas the *vacatur* procedure is called a “*recours en annulation*”. See also *infra* note 239.

196. Section 69 of the English Arbitration Act 1996 reads as follows:

Section 69 - Appeal on point of law.

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.

(2) An appeal shall not be brought under this section except —

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court. The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied —

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award —

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at

only),¹⁹⁸ New Zealand, Singapore, and British Columbia allow appeal to the court on questions of law if the court finds that certain conditions have been met. The most important condition is the court's determination that the question of law will substantially affect the rights of one or more of the parties, or that the point of law is of general public importance.¹⁹⁹

It is true that many countries have adopted some version of the UNCITRAL Model Law on International Commercial Arbitration,²⁰⁰ including Australia "(Commonwealth)," Canada (federal), Egypt, Germany, India, Ireland, and Scotland, which specifically excludes arbitral appeal²⁰¹ by recognizing an

least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order —

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part. The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

197. Section 38 Commercial Arbitration Act for each state and territory.

198. Cap. 341 Arbitration Ordinance, Section 23.

199. See English Arbitration Act 1996, § 69; Commercial Arbitration Act of British Columbia, Article 31; New Zealand Arbitration Act 1996, Second Schedule, Clause 5; Singapore Arbitration Act of 2001, Article 49. The BC, Singapore, and New Zealand arbitration acts are among the acts modeled (at least in part) after the English Arbitration Act of 1996. As the English Arbitration Act of 1996 was heavily influenced by the Model Law (even if it is much more detailed than the Model Law—as defined *infra* note 200), one will also find statements to the effect that the arbitration acts of those countries are adaptations of the Model Law.

200. Hereinafter referred to as the "Model Law." UNCITRAL, www.uncitral.org/English/texts/arbitration/ml-arb.htm (last visited February 11, 2003)(for the text of the Model Law). As of February 19, 2003, the Model Law had been adopted in 38 countries and five states within the United States. See www.uncitral.org/English/status/status-e.htm.

201. For a discussion about the history surrounding the decision not to allow arbitral appeal in the Model Law, see *infra* note 240 and accompanying text.

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“application for setting aside” as the exclusive recourse against an arbitral award.²⁰² Although the Model Law was designed to apply only to international commercial arbitration, several countries have adapted the Model Law so as to apply to both domestic and international arbitration. As a result, several countries have ended up with a domestic system that does not recognize arbitral appeal to the court system as an available option to seek to rectify errors of fact and/or law. The Austrian *Zivilprozeßordnung* and the Dutch *Wetboek van Burgerlijke Rechtsvordering* expressly provide for appeal only to another arbitral tribunal and not to any court.²⁰³

E. Allowing Arbitral Appeal is Consistent with Supreme Court Precedents

Insofar as the United States is concerned, it is submitted that a public policy in favor of permitting arbitral appeal by contracting parties is consistent with the public policy view developed by the Supreme Court’s decisions in *Moses Cone*,²⁰⁴ *Southland*²⁰⁵ and *Mitsubishi*,²⁰⁶ that the FAA regards commercial arbitration as a matter of contract. These cases stand for the view that,

[a]s long as the agreement to arbitrate is apparent, and absent overriding reasons external to the arbitration agreement (rooted either in statutory law or the common law of contracts) justifying judicial reticence to give effect to the unequivocal directive of the FAA mandating enforcement of arbitration agreements, the parties will be held to their contracts, no matter how objectionable they, or a reviewing court, may find them to be.²⁰⁷

As the Supreme Court said in *Volt*, the federal policy under the FAA is one of “simply ensuring the enforceability, according to their terms, of private agreements to arbitrate.”²⁰⁸ Unlike the public policy reasons compelling us to conclude that the grounds for *vacatur* set forth in Section 10(a) of the FAA are mandatory and cannot be deviated from by contract,²⁰⁹ there seem to

202. For example, Germany (Book 10, Code of Civil Procedure) and South-Korea (Arbitration Act of Korea (www.kcab.or.kr/English/M6/M6_S1.asp)).

203. § 594(1) ZPO. 1050(1) *Wetboek van Burgerlijke Rechtsvordering*

204. *Moses H. Cone Mem’l Hosp.*, 460 U.S. 1.

205. *Southland*, 465 U.S. 1.

206. *Mitsubishi Motors*, 473 U.S. 614.

207. Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1, 11 (1996).

208. *Volt*, 489 U.S. at 476.

209. See *infra* notes 254-261 and accompanying text.

be no convincing “overriding reasons external to the arbitration agreement,” whether “rooted in statutory law or in the common law of contracts” not to allow the parties to agree to arbitral appeal. It follows that the Supreme Court’s view of the public policy under the FAA dictates that private agreements to allow appeal of their arbitral awards to the courts need to be enforced according to their terms.

The analysis of the Supreme Court’s public policy view as developed in *Moses Cone*,²¹⁰ *Southland*,²¹¹ and *Mitsubishi*²¹² might well have lead to a different result without recognition of the difference between *vacatur* and arbitral appeal. If, as Professor Hayford surmised in a 1996 pre-*LaPine* analysis of the Supreme Court’s decisions on the subject of the FAA from 1983 through 1995,²¹³ the question of whether to enforce an agreement submitting the arbitral award to judicial review were to come before the Supreme Court, and if it were framed as whether the parties can contractually expand the grounds for *vacatur*, the Supreme Court’s decision would in all likelihood “limit the grounds for *vacatur* of commercial arbitration awards to the four very narrow bases set out in § 10(a) of the Act,”²¹⁴ and proscribe “contractually expanded judicial review.”²¹⁵ Professor Hayford’s prediction may well be accurate with respect to the grounds for *vacatur*.

But once a conceptual separation is made between *vacatur* and arbitral appeal it becomes clear that the Supreme Court’s view of the public policy of the FAA is consistent both with permitting contractual arbitral appeal *and* with limiting the grounds for *vacatur* to the ones enumerated in § 10(a) of the FAA. For all the reasons stated, such public policy should clearly honor an agreement by the parties to subject the arbitral award to an appeal to the competent court, even if the reviewing court finds the parties’ agreement to submit the award to the review by such court to be unwise or otherwise objectionable.

F. Section 9 of the FAA Does Not Preclude Arbitral Appeal

At least one case has suggested that the language of § 9 of the FAA may exclude the possibility of arbitral appeal.²¹⁶ In relevant part, § 9 provides that the court “must” grant an order confirming the arbitral award “unless the

210. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 430 U.S. 1 (1983).

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

212. *Mitsubishi*, 473 U.S. 614.

213. Hayford, *supra* note 207.

214. *Id.* at 38.

215. *Id.*

216. *UHC Management Co. v. Computer Sci. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998).

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award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title".²¹⁷ If interpreted literally, this language appears to exclude the possibility of arbitral appeal.

As Professor Cole suggested, however, it is likely that the drafters of the FAA never contemplated the possibility of a substantive review of an arbitral award resulting from an arbitral appeal, and simply codified the existing common law relating to setting aside an award on the grounds of procedural irregularity.²¹⁸ As Professor Cole noted the 1921 draft of the FAA did not include any provisions dealing with *vacatur*, nor was there any discussion of any other form of judicial review in the legislative history.²¹⁹ It is therefore likely that the drafters of the FAA merely intended to codify the relevant common law which only reviewed arbitral awards for procedural irregularities.²²⁰

G. Courts Are Already Reviewing Awards De Novo Based on Non-Statutory Vacatur Grounds

A contrary policy decision, *i.e.*, that a contractually agreed-upon judicial review of the arbitrator's award ought not be allowed by our system of arbitration law, would appear to be short-sighted and doctrinaire, especially when seen in the light of several courts' current practice of reviewing awards on set-aside applications based on "manifest disregard of the law" and other so-called non-statutory grounds.

For all intents and purposes, non-statutory grounds for *vacatur* require a court to analyze an award in as detailed a manner as when it reviews an award on appeal. Even if non-statutory *vacatur* grounds are an unfounded expansion of the limited grounds enumerated in § 10(a) of the FAA, it would seem illogical to allow the setting aside of an award on these "marginal reviews on the merits" (available without the parties' prior agreement) on the one hand, but not to allow an honest review on the merits when the parties have expressly empowered a court to do so.²²¹

For the law to disallow a court to review a contractually agreed upon arbitral appeal, but to permit it for checking whether there was a manifest dis-

217. 9 U.S.C. § 9 (2002).

218. See Cole, *supra* note 113, at 1255.

219. *Id.*

220. *Id.*

221. Hayford, *infra* note 272, at 834.

regard of the law, whether the award was “arbitrary or capricious,” whether the award was “completely irrational,” or the arbitrator failed in his award to draw the essence from the parties’ contract, rests on a flawed premise.²²² It is flawed in that an award in which the arbitrator *unwittingly* made an egregious error of law (or a grossly inaccurate finding of fact) will be good enough for arbitration and must thus be left standing, — even though the parties had agreed that the court should review the award —, whereas an award in which the arbitrator knowingly made an egregious error of law (or grossly inaccurate finding of fact) would be set aside on the basis of one of these non-statutory grounds, — even though the parties had not agreed that the court review the award.²²³ The point is that the arbitrator made the egregious error in either case, and it does not really matter to the losing party whether he did so knowingly or unknowingly.

Both standards of review, whether based on arbitral appeal or on any of these non-statutory *vacatur* grounds, begin with an assessment of the correctness of the arbitrator’s interpretation and application of the relevant law and both lead to an equally thorough evaluation of the merits of the challenged award.²²⁴ Not to allow one (appeal), but to allow another (non-statutory grounds for *vacatur*) would be both inconsistent and undesirable. This is true even if this author does not support setting aside an award on the basis of any of these non-statutory grounds, which is the subject of Section B of Part VI below.

In conclusion, on the grounds of the doctrines of contractual freedom and party autonomy, as well as the Supreme Court’s doctrine that the FAA views commercial arbitration as a matter of contract pursuant to which the Court serves simply to ensure the enforceability of private arbitration agreements in accordance with their terms, the public policy of the United States should honor an agreement by the parties to subject the arbitral award to an appeal to the appropriate court.

H. Arbitral Appeal to Another Arbitral Tribunal Cannot Replace Appeal to the Courts

Of course, a seemingly convenient compromise solution would be to create the possibility of appeal not to the court but to another arbitral tribunal (either for a review of facts the law, or both), which would sacrifice time and cost, but retain the benefit of confidentiality. It appears that only the Austrian

222. Cf. Hayford, *supra* note 165, at 498-99.

223. Cf. Hayford, *infra* note 228, 30 GA. L. REV. at 813-14.

224. *Id.*

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arbitration statute explicitly provides for this possibility while prohibiting arbitral appeal to the courts.²²⁵ In addition, it is safe to assume that, consistent with the doctrine of contractual freedom, the countries that prohibit arbitral appeal to the courts implicitly allow appeal to another arbitral tribunal. For example, the Explanatory Note by the UNCITRAL Secretariat provides that, while the Model Law excludes arbitral appeal in the courts, “a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties.”²²⁶

Judge Posner, in *CTU*,²²⁷ Judge Mayer in his dissenting opinion in *LaPine*,²²⁸ Judge Wollman in *UHC Management*,²²⁹ and Judge Tascha in *Bowen*,²³⁰ all suggest that if the contracting parties desire broader appellate review, they can contract for an appellate arbitration panel to review the arbitrator’s award. Apparently, they believe that the possibility of appeal to another arbitral panel solves the parties’ desire to have an arbitral appeal, and serves the public interest because these parties will not be bothering the court system.

Of course, there is no statistical information indicating how many contracting parties in the Seventh and Tenth Circuits (who are aware that these Circuits do not permit arbitral appeal to the courts) decide against an arbitration clause altogether; opting instead to litigate any disputes arising from the agreement or the breach thereof in the courts. This increases the burden on the court system rather than diminishes it.

Even if the option of arbitral appeal to another panel of arbitrators has merit and may be a good idea for contracting parties to adopt in the right circumstances, it cannot be said that, simply because this option is available to the contracting parties, the law ought to prohibit arbitral appeal to the courts. Instead, the public policy considerations in support of arbitral appeal to the

225. See § 594(1) ZPO. See also, JAMS Comprehensive Rules, Rule 34.

226. Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, Para. 41, available at <http://www.uncitral.org/english/texts/arbitration/ml-arb.htm> last visited on Feb. 11, 2003.

227. *Chi. Typographic Union v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991); see also *supra* note 69 and accompanying text.

228. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Mayer, J., dissenting) (quoting Judge Posner’s decision in *Chi. Typographical Union*).

229. *UHC Mgmt. Co. v. Computer Sci. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998); see also *supra* note 25 and accompanying text.

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

courts set forth above²³¹ remain unaltered. The importance of the parties' autonomy simply outweighs the fact that certain scholars (as well as certain contracting parties) may prefer appeal to another arbitral tribunal.

The possibility that parties may agree to submit their arbitral award to review by an arbitral appeals panel is not one of those "overriding reasons external to the arbitration agreement, which is rooted either in statutory law or the common law of contracts" justifying judicial reluctance to implement the clear directive of the FAA to enforce arbitration agreements.²³² The parties ought to be held to their contracts, no matter how objectionable they, or a reviewing court, may find those contracts to be. Absent any "overriding reasons," the autonomy needs to be respected.

VI. THERE IS ROOM FOR ARBITRAL APPEAL IN INTERNATIONAL COMMERCIAL ARBITRATION

A. *The Arguments in Favor*

Many commentators believe that there is no place for arbitral appeal in international commercial arbitration.²³³ For example, Professor Smit argues, "it is the universally accepted rule that arbitral awards may not be reviewed on alleged errors of fact or law."²³⁴ Indeed, as noted previously,²³⁵ under the Model Law, which is intended to apply to international commercial arbitration, the only recourse against an award is an Application for Setting Aside,²³⁶ on grounds that are similar to those set forth in Article V(1) of the New York Convention.²³⁷ Also, the French *Nouveau code de procédure civile* distinguishes²³⁸ between domestic and non-domestic arbitration law, allowing arbitral appeal in domestic arbitration,²³⁹ but not in international arbitration.²⁴⁰

231. See discussion *supra* notes 175-190.

232. See *supra* note 207 and accompanying text.

233. See generally *supra* note 114; see also *Richmond Symposium*, *supra* note 151, at 6-7.

234. See Smit, *supra* note 114, at 149.

235. See *supra*, notes 199-200 and accompanying text.

236. Model Law, Art. 34.

237. See *Explanatory Note by the UNCITRAL Secretariat*, following the text of the Model Law, website *supra* note 200, at 16, 24-25. See also Marianne Roth & Tobias Brinkmann, *supra* note 192, 5 *Croat. Arbit. Yearb.* at 68 (1998).

238. Art. 1492 of the *Nouveau code de procédure civile* ("NCPC") simply provides that arbitration is international which concerns international commercial interests. ("Est international l'arbitrage qui met en cause des intérêts du commerce international.")

239. See Art. 1482 *et seq.* of the NCPC. The parties can "opt out" of the possibility of appeal. Arbitral appeal is generally not available if the arbitrator(s) sit as "*amiable(s) compositeur(s)*," i.e. when the arbitrators may ignore the law and decide the dispute on equitable grounds.

The decision to eliminate the possibility of appeal against awards from the Model Law was not without controversy. Notably, the delegation for the United Kingdom pointed out that “[w]hilst thoroughly understanding the point of view that the parties should not be compelled to submit to recourse on questions of law, the United Kingdom suggests that the logical consequence of party autonomy is that they should be allowed to have recourse, if that is what they have agreed.”²⁴¹ It will not go unnoticed that this is the very same argument used by proponents of arbitral appeal in domestic arbitration.

As many commentators before him, Professor Park argues in favor of separate regimes for domestic and international arbitration, but it appears that in his elaboration Professor Park distinguishes not between domestic and international commercial arbitration, but between “consumer sales, employment contracts and international commercial transactions.”²⁴² It is true that the categories of consumer sales, employment and commercial transactions each require different regimes. Domestic and international commercial transactions, however, do not seem to require different regimes except in certain procedural respects, such as are provided in Articles 85 through 88 of the English Arbitration Act of 1996.²⁴³

Professor Park further argues that a “more neutral playing field” is needed in cross-border litigation, “where the perception of judicial bias can cause productive transactions to falter.”²⁴⁴ Isn’t avoiding the perception of judicial bias, or any form of bias for that matter, equally important for domestic litigation?

It has become more, rather than less, fashionable in international arbitration circles to take the view that international arbitration has so many distinct requirements that it demands a separate regime. The arguments in favor of ar-

240. See Art. 1502 *et seq.* NCPC. See generally Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 AM. REV. INT’L ARB. 215 (1999).

241. See F. Davidson, *The New Arbitration Act — A Model Law?*, 1997 J. BUS. L. 101, 125.

242. William W. Park, *Why Courts Review Arbitral Awards*, 2 INT’L ARB Q. L.REV. 121, 128 (2001).

243. See English Arbitration Act, *supra* note 164. Provisions domestic arbitration.

244. See *id.* (Art. 1717 (4) *Code Judiciaire*, discussed *supra* at notes 185-186 and 199, compelled Professor Park to list Belgium as one of the countries having a different regime for domestic and international arbitration. The mere fact that this provision creates the possibility for parties who have no connection with Belgium whatsoever, to renounce all forms of judicial review, including *vacatur* proceedings, does not seem to establish a separate regime for international arbitration.

bitral appeal in domestic commercial arbitration appear to be the same as those in favor of the arbitral appeal in international commercial arbitration. *LaPine*²⁴⁵ involved an international commercial dispute, and is a clear example of the cases in which so much money is involved that the possibility of additional review by the courts makes a lot of sense to those whose money is at stake.

Also, an arbitration clause with the right to appeal to the courts may well be the result of a compromise between negotiating parties where at the outset of the negotiations one party was in favor of arbitration while the other preferred the courts. Those situations are no different whether it concerns domestic or international commercial arbitration.

B. How Frequently Will Parties Use A Clause Providing For Arbitral Appeal?

If parties should be “allowed recourse” to the courts, as the UK delegation to UNCITRAL suggested, and as is largely provided by Section 69 of the English Arbitration Act of 1996,²⁴⁶ for both domestic and international arbitration, how often will parties avail themselves of this opportunity? As far as can be determined, the fear voiced by Professor Taniguchi²⁴⁷ that if we support *LaPine* “we must be prepared to accept the situation that every arbitration agreement has a clause for judicial review on the merits” is not borne out by the experience in countries that explicitly allow arbitral appeal.

However, Richard Johnston shared a different view, when he said that,

[i]n all likelihood, most parties will continue to arbitrate [without a provision allowing for arbitral appeal] for the reasons that have led to development of the arbitration system: they prefer faster resolution of disputes without the labyrinthine appeal process that often accompanies litigation. Only in rare and unusual circumstances will the parties to a contract agree to the *LaPine*-type review.²⁴⁸

The experience under Section 69 of the new English Arbitration Act was expected to be the same, at least with respect to international arbitration.²⁴⁹

245. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997). For the amounts at stake, see *supra* note 73. For an extensive historical account of the facts of this case, see also *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 299 F.3d 769 (9th Cir. 2002).

246. See English Arbitration Act, *Supra* note 164.

247. Prof. Yasuhei Taniguchi, *Introduction*, in *Richmond Symposium*, *supra* note 151, at 1, 5. Similar fears were expressed by Stephen K. Huber & E. Wendy Trachte-Huber, *International ADR in the 1990's: The Top Ten Developments*, 1. Hous. Bus. & Tax. L.J. 184, 206 (2001) and Younger, *supra* note 113, at 261.

248. Johnston, *supra* note 151, at 8.

249. See Roth & Tobias, *supra* note 192, at 67 n.95: “It is expected that at least in international arbitration the opportunity to *exclude* judicial review of the dispute’s merits will be fre-

C. *What Exactly Is International Arbitration?*

There is an additional argument for not making the distinction between domestic and international commercial arbitration: what exactly constitutes international arbitration as opposed to domestic arbitration?²⁵⁰ Clearly, when the parties to the agreement have different nationalities or reside in different countries, the arbitration is international. But what about the arbitration concerning a property in country A that is between two parties both from country B? What about the branch office in Country A of a bank from Country B, arbitrating a dispute with a customer in Country A? What about a tri-partite agreement²⁵¹, where two parties are from Country A and the third party is from Country B, where the main dispute arose between the two parties from Country A? If that started out as a domestic dispute between the first two parties, does it suddenly become international when the party from Country B joins in the proceedings? Should the dispute between the two parties from Country A be governed by the rules applying to domestic arbitration while the dispute with the party from Country B is controlled by the rules applying to international arbitration?²⁵²

quently used." [Emphasis added]. But see Revised Uniform Arbitration Act, *supra* note 109. In Comment B to Section 23 it is noted that the Drafting Committee, after extensive deliberation, decided not to include an "Opt-In" provision principally because it "might lead to the routine inclusion of review provisions in arbitration agreements in order to assuage the concerns of parties uncomfortable with the risk of being stuck with disagreeable arbitration awards that are immune from judicial review."

250. See *supra* note 238 for the French example of drawing the distinction between domestic and international arbitration. Art. 1(3) of the Model Law is more encompassing but would appear to invite litigation as well:

3) An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

251. Such as the agreement at issue in *LaPine*, which was among two US companies, LaPine and Prudential-Bache Trade Services (PBTC), and a Japanese company, Kyocera. See *supra* note 245.

252. This is an issue that may well go beyond the difficulties in interpreting Section 202 FAA, which excludes from the scope of the New York Convention agreements entirely between

In other words, it is not always easy to make the distinction between domestic and international arbitration. So why adopt two different systems if there do not seem to be sufficiently compelling reasons?

It should be noted that the English Arbitration Act of 1996 may well have found a way around the difficulty of defining what constitutes international arbitration: Rather than defining what is international arbitration, in Article 85 (2), the Act defines a domestic arbitration agreement as an agreement to which none of the parties is an individual who is either a national or resident of, or a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom, and under which agreement the seat of arbitration is designated to be the United Kingdom.²⁵³

Unless someone comes forward with a cogent reason to deviate from the policy in favor of arbitral appeal, apart from providing for the obvious provisions required to regulate the applicability of the New York Convention and perhaps certain other procedural issues, it is submitted that international commercial arbitration should not be treated any differently than domestic arbitration.

VII. THE GROUNDS FOR VACATUR

A. *The Right To Challenge An Award Pursuant To §§10(a)(1) — (4) of the FAA Is Mandatory And Non-Waivable.*

Armed with an awareness of the profound difference between arbitral appeal on the one hand, and “challenges” under § 10(a) of FAA on the other, it becomes clear that the grounds for *vacatur* set forth in § 10(a) need to be treated as provisions of mandatory law that cannot be contracted away by the parties. Just as the grounds to set aside a judgment are inherent in the public

U.S. citizens unless the relationship involves property located abroad or envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. Section 202 FAA is discussed in detail by Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17, 35-36 (2002).

253. Art. 85 (2) English Arbitration Act of 1996. Articles 85 through 88 start of Part II of the Act, entitled “Other Provisions Related to Arbitration”, and provide how the provisions of Part I are modified in the case of a domestic arbitration agreement. It should be noted, of course, that the English Arbitration Act does not have separate regimes for international and domestic arbitration, so that it needs only a few provisions to deal with certain special circumstances presented by purely domestic cases. One of the modifications it provides for is that exclusion agreements relating to Sections 45 (determination of preliminary point of law) and 69 (arbitral appeal on point of law) are not effective unless entered into *after* the commencement of the arbitral proceedings. Art. 87 (1) English Arbitration Act of 1996.

policy of ensuring the integrity and trustworthiness of the *judicial* system, so must the grounds for setting aside an arbitral award be deemed to be a matter of public policy of ensuring the integrity of the *arbitral* system²⁵⁴ as conducted in the United States.²⁵⁵

Similarly, Article 68 of the English Arbitration Act of 1996 (setting forth the grounds for setting aside an award under English law) is mandatory pursuant to Art. 4(1) and Schedule I, which lists all provisions in the Act that are mandatory. The Act is based on the non-waivable opportunity to seek judicial review of an arbitration's fundamental procedural regularity.²⁵⁶

The view that the grounds for *vacatur* set forth in § 10(a)(1)–(4) of the FAA are mandatory and non-waivable is consistent with the existing case law

254. Cf. Prof. Park's assessment of the new English Arbitration Act of 1996 noting that "[t]he basic principle of party autonomy is supplemented by both reasonable default rules and *mandatory safeguards for procedural integrity*, in a way that will command the esteem of any thoughtful critic." William W. Park, *The New English Arbitration Act*, 13 Mealey's Int'l Arb. Rep. No. 6, Conclusion (*Emphasis added*).

255. This proposition has another important implication that cannot be ignored: if, the standards set forth in Section 10(a) are indeed mandatory and non-waivable, the Supreme Court's decision in *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) needs to be construed so as not to apply to the mandatory provisions of the FAA. The court in *Volt* held, with respect to a case involving a motion to compel arbitration under either §§ 3 or 4 of the FAA or under CAL. CIV. PROC. CODE § 1282.2, that although federal law pre-empts state law with respect to all commercial arbitration agreements, the FAA's primary purpose is to ensure that private arbitration agreements are enforced according to their terms, even if this results in an arbitration conducted in a manner inconsistent with the *substantive* law of commercial arbitration as set out in the FAA. Construing *Volt* so that it does not apply to the mandatory provisions of the FAA will prevent contractual choice-of-law provisions applying state arbitration laws that would result in making Section 10 FAA inapplicable to the award in question. Such a construction of *Volt* would be consistent with the Supreme Court's holding in *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (holding that the FAA's "substantive provisions—§§ 1 and 2—are applicable in state as well as federal court" 489 U.S. at 477 n.6. See also *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270-72 (1995); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), n.32 and accompanying text; *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, at 931 (10th Cir. 2001) ("Although the FAA does not create independent federal jurisdiction, the Supreme Court has held that the Act creates a body of substantive federal law governing arbitration agreements within its coverage." (Citations omitted)).

256. Park, *supra* note 254. See also § 598(1) ZPO (Austria) which provides, *inter alia*, that the provision dealing with challenging the award (§ 595 ZPO) is mandatory and cannot be waived. As Professor Park notes correctly, in the United States there is "one American decision that suggests in an ill-reasoned dictum that parties could 'opt out of the FAA's off-the-rack *vacatur* standards.'" *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001). See also, William W. Park, *Why Courts Review Arbitral Awards*, 2 MEALEY'S INT'L ARB. Q. LREV. 121, 131 n.11 (2001).

holding that, despite the contractual provision that the award shall be “binding, final and non-appealable,” judicial review of such award is permissible on the grounds set forth in the FAA.²⁵⁷

In the same vein, the defenses set forth in Article V(1) of the New York Convention²⁵⁸ cannot be waived by agreement between the parties and constitute mandatory law.²⁵⁹ In the case of an arbitration held under the Rules of the International Chamber of Commerce (ICC),²⁶⁰ the right to assert the defenses to enforcement of awards in the New York Convention under Article V(1) were held to remain available to parties who are unsuccessful in arbitration proceedings, in spite of language of Article 28(6) of the ICC Rules of Arbitration that the parties are deemed “to have waived their right to any form of recourse insofar as such waiver can validly be made.”²⁶¹

Contrary to the laws of most foreign nations, there are at least three countries where the parties can waive a mandatory minimum of judicial scrutiny. As Professor Varady points out, Article 192(1) of the Swiss Private International Law Act provides that the parties may expressly agree to exclude all *vacatur* proceedings, or may limit such challenges to one or several of the grounds listed in Article 190 of the same Act.²⁶² Essentially the same solution is adopted in Article 78(6) of the Tunisian Arbitration Code of 1993.²⁶³ As Professor Varady points out, however, this is possible only when none of the parties has its domicile, habitual residence, or business establishment in Swit-

257. *Team Scandia, Inc. v. Greco*, 6 F. Supp. 2d 795, 798 (S.D. Ind. 1998); *See also*, *Tabas v. Tabas*, 47 F.3d 1280, 1288 (3d Cir. 1995).

258. Reference herein to the “New York Convention” is to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, which as of this writing has been adopted by 132 countries. The New York Convention was ratified by the United States in 1970, and is implemented by, and incorporated into, Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C.A. § 1 *et seq.*, at §§ 201-208. It should be noted that Article V(1) of the New York Convention does not set forth grounds for *vacatur* but rather grounds for refusing confirmation of a foreign award. *See Karamanian, supra* note 252, at 99.

259. *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992), and cases cited therein. The court opined: “The terms ‘final’ and ‘binding’ merely reflect a contractual intent that the issues joined and resolved in the arbitration may not be tried *de novo* in any court. (Citations omitted.) Furthermore, we have held that even a ‘final’ and ‘binding’ arbitral award is subject to the defenses to enforcement provided for in the New York Convention.” (Citations omitted).

260. *M&C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847 (6th Cir. 1996) (Citations omitted).

261. *Supra* note 49.

262. *See Richmond Symposium, supra* note 151, at 17 for Professor Tibor Varady’s remarks.

263. Article 78(6) *Code de l’arbitrage, Chapitre III: de l’arbitrage international*. The French text of the Tunisian Arbitration Code can be found at www.tgisbserver.com/arbitrage/.

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erland (or Tunisia, as the case may be).²⁶⁴

A similar rule was adopted in 1998 in Belgium, by an amendment of Article 1717 of the *Code Judiciaire* adding a paragraph (4) allowing the contracting parties, by an express and unambiguous declaration in their arbitration agreement, to opt out of all annulment proceedings.²⁶⁵ This provision is, however, subject to the same proviso, that the parties are neither Belgian citizens nor residents, or, as to legal entities, that they have neither their registered office nor a branch office in Belgium. It is at least plausible that the legislatures of the countries in question found that when these conditions are present, there is no national public policy interest justifying a rule that is non-waivable. In contrast, the *vacatur* proceedings in these three countries *are* mandatory and non-waivable if any one party is a national, resident, or company (or branch) of or in the country concerned.²⁶⁶

The manner in which these three countries provide for this narrow possibility of limiting or waiving the right to challenge the arbitral award on traditional *vacatur* grounds supports the view that, whenever the public policy of any country, such as the United States, does apply (because one or more of the parties is a citizen or resident), its laws should provide that such *vacatur* grounds are in fact mandatory and non-waivable.

Not making the fundamental distinction between *vacatur* and arbitral appeal can lead to a false analysis, such as the one propounded by Professor Cole when she suggests that “[i]f FAA 10(a) establishes a mandatory rule, the parties’ agreement to expand judicial review beyond section 10(a) must be rejected because the court does not have the power to enforce it.”²⁶⁷ Obviously, Professor Cole’s suggestion is true only if arbitral appeal and *vacatur* are the same thing. However, once it is seen that they are two unrelated con-

264. *Id.*

265. As amended by the Act of May 19, 1998, effective August 17, 1998.

266. Art. 1717 *Code Judiciaire / Gerechtelijk Wetboek* (Belgium); Article 78(6) *Code de l’arbitrage, Chapitre III: de l’arbitrage international* (Tunisia); Art. 192 (2) *Loi fédérale sur le droit international privé* (Switzerland).

267. Cole, *supra* note 113, at 1251. Professor Cole argues that the language of Section 10(a) FAA, that a federal court “may” vacate an award upon any party’s application on the grounds enumerated therein, suggests that the court’s action is not mandatory. In this author’s opinion, the word “may” is probably not meant to give discretion but rather simply meant to authorize the court to vacate the arbitral award. Even if the language of Section 10(a) intends to confer discretionary authority on the court, this does not mean that it becomes waivable and non-mandatory as between the contracting/litigating parties.

cepts, so that § 10(a) has nothing to do with the question of whether the law allows arbitral appeal, § 10(a) can be analyzed standing on its own.

For reasons of domestic case law, by analogy to the laws of many other countries, and on public policy grounds, the right to challenge an arbitral award on the grounds of § 10(a) FAA must be mandatory and unwaivable.

B. The Supreme Court Needs To Invalidate Non-Statutory Grounds for Vacatur

Once the decision has been made to allow contractually agreed-upon arbitral appeal as part of a system that is compatible with the basic public policy created by the FAA, it is submitted that the Supreme Court can, and should, do away with the non-statutory grounds for *vacatur* developed by most of the circuit courts of appeals²⁶⁸ and hold that § 10(a) of the FAA provides the *exclusive* grounds upon which an arbitral award can be challenged and, if appropriate, set aside.

In developing the non-statutory *vacatur* grounds, most lower courts have relied on what Professor Smit called “an unfortunate Supreme Court dictum”²⁶⁹ in the 1953 case, *Wilko v. Swan*.²⁷⁰ In general, non-statutory *vacatur* grounds have shown to have limited practical use and to easily provide a back-door delay tactic for the losing party.

As previously stated, the circuit courts of appeals adopting non-statutory grounds for *vacatur* have entertained the possibility of vacating an award if it would: (1) be in “manifest disregard of the law,” (2) be in direct conflict with “public policy,” (3) be “arbitrary and capricious,” (4) be “completely irrational,” or (5) “fail to draw its essence” from the parties’ underlying contract.²⁷¹ In his lengthy 1996 article, Professor Stephen L. Hayford made a thorough analysis of the jurisprudence of the federal courts, and concluded

268. *Accord* as to “manifest disregard of the applicable law,” Smit, *supra* note 114, at 148.

269. *Id.*

270. *Wilko v. Swan*, 346 U.S. 427, 436-437 (1953) (overruled on other grounds in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)). It could be argued, as did the Fifth Circuit Court of Appeals in *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 759 (5th Cir. 1999), that the *Wilko* dictum was recognized (albeit again in dictum) by the Supreme Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), when Justice Breyer wrote: “The party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (parties bound by arbitrator’s decision not in “manifest disregard” of the law), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).”

271. Hayford, *supra* note 165, at 461-62.

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that there is much confusion as to which non-statutory *vacatur* grounds are available, and when.²⁷² He found that only the Fourth Circuit has “unequivocally rejected the nonstatutory grounds for *vacatur*,” whereas four circuit courts of appeals could be described as being in a “state of extreme confusion” with regard to the non-statutory grounds for *vacatur*, namely the Fifth, Sixth, Seventh and Ninth Circuits.²⁷³ The remaining circuit courts of appeals “have clearly recognized” at least one non-statutory ground for *vacatur*.²⁷⁴ A cursory review of the federal cases decided since Professor Hayford’s article appears to indicate that little has changed.²⁷⁵

In his 1998 article, Professor Hayford concluded correctly that “[t]he law of *vacatur* must be stabilized and made uniform across jurisdictions by returning it to the unequivocal standards articulated in section 10(a) of the FAA.”²⁷⁶ Professor Hayford made a possible exception for the “manifest disregard of the law” and “public policy” grounds if narrowly construed in the manner he advocates.²⁷⁷ In this author’s opinion, it would be neither necessary nor desirable to save even those if the parties could choose to submit their award to appeal.

Abolishing the non-statutory grounds for *vacatur* is supported by the wording of § 9 of the FAA,²⁷⁸ when it provides that, upon timely application by any party, the court must grant an order confirming the arbitral award “unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”²⁷⁹ It would seem fair to attach this consequence of the language used in § 9 to non-statutory grounds for *vacatur*, at least insofar as such non-statutory grounds are procedural in nature.²⁸⁰

272. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996); See also Hayford *supra* note 165 for a subsequent article concerning the same topic.

273. Hayford *supra* note 272, at 764.

274. *Id.* at 774.

275. See, e.g., *Crye-Leike, Inc. v. Thomas*, 196 F. Supp. 2d 680 (W.D. Tenn. 2002); *Columbia Med. Ctr. of Lewisville, Subsidiary L.P. v. Heller*, 2001 U.S. Dist. LEXIS 2069 (N.D. Tex. 2001).

276. Hayford, *supra* note 165, at 504.

277. *Id.* at 504..

278. See *supra* notes 216-220 and accompanying text.

279. *UFC Management*, 148 F.3d at 997.

280. Therefore, There may be some question as to whether this is a fair and intended consequence with respect to Section 10(a)(4) which, according to most scholars, is more substantive in nature. See, e.g. Younger, *supra* note 113, at 243-244.

There is broad support in foreign statutes for the view that the list of statutory *vacatur* grounds of § 10(a) FAA needs to be viewed as exclusive. For example, Article 34 of the Model Law,²⁸¹ adopted by approximately 35 countries, provides an exclusive list of limited grounds for setting aside an arbitral award.²⁸² Also, Article 1704 of the Belgian *Code Judiciaire*,²⁸³ Article 1484 of the French New Code of Civil Procedure²⁸⁴ and Article 1065 of the Netherlands Code of Civil Procedure,²⁸⁵ all provide exclusive lists of the grounds on which an arbitral award can be set aside.

A distinction needs to be made between (i) the willingness to restrict judicial review on the basis of a set-aside application (and therefore not based upon a prior agreement between the parties) to a system limited to mandatory, non-waivable statutory grounds, and (ii) a certain dissatisfaction with the grounds as available pursuant to § 10(a) FAA. Both Section 23(a) of the Revised Uniform Arbitration Act²⁸⁶ and Section 68(2) of the English Arbitration Act of 1996²⁸⁷ provide for a more extensive list of grounds on which an award can be set aside, and, in a new incarnation of the FAA, a list of grounds similar to either of them (but especially Section 68(2)) would be more desirable.

VIII. PUTTING IT ALL TOGETHER INTO ONE LOGICAL SYSTEM

Combining the possibility of contractually agreed upon arbitral appeal with a clear rule limiting the remedies for setting aside an arbitral award to the grounds enumerated in § 10(a) of the FAA leads to a logical, cohesive system that will create more legal certainty. Additionally, implementing this system would have some other interesting ramifications.

A. A Clear Choice

Adopting the system of allowing arbitral appeal while abolishing all non-statutory *vacatur* grounds would create a clear choice for the contracting parties. The parties would be able to weigh whether or not to include arbitral ap-

281. UNCITRAL Model Law on International Commercial Arbitration, *supra* note 200.

282. See Explanatory Note by the UNCITRAL Secretariat, *supra* note 226, at ¶42.

283. For an English translation of the part of the *Code Judiciaire* dealing with arbitration, see http://www.cepani.be/body_legislation_en.html last visited on Feb. 11, 2003.

284. An English translation of the *Nouveau Code De Procédure Civile* can be found at http://www.legifrance.gouv.fr/html/codes_traduits/somncpca.htm last visited on Feb. 11, 2003.

285. Art. 1065(1) *Wetboek van Burgerlijke Rechtsvordering*.

286. The text of the Revised Uniform Arbitration Act may be found at www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm last visited on Feb. 11, 2003.

287. *Supra* note 192.

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peal in their agreement. The parties will choose in favor of arbitral appeal if they feel it is important to obtain an accurate and correct result,²⁸⁸ and are willing to sacrifice the benefits of a confidential, relatively speedy, and cost-efficient process.

On the other hand, if they find it important that the proceedings remain confidential, the award be truly final, and the costs of the proceedings be relatively contained, they will choose not to include an appeal provision (or to provide for appeal to another panel of arbitrators). In that event, they will be assured that the “back-door” is not available to the losing party, which would remove all the advantages of arbitration without appeal just mentioned. As Judge Posner observed with respect to the non-statutory *vacatur* ground of manifest disregard of the law, “if it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration.”²⁸⁹

Finally, the clear choice offered by this cohesive system will come as close as practically possible to relieving the tension between the desire for a relatively expeditious procedure resulting in a final and binding award, and the uneasiness about the absence of quality control over arbitrators who are asked to interpret increasingly complicated areas of the law in disputes which prior to the Supreme Court’s recent line of cases, were not considered to be arbitrable.

B. Reasoned Awards Will No Longer Be Exposed To Unnecessary Challenges

For the reasons stated by Professor Hayford, a requirement that the award includes findings of fact and conclusions of law would further perfect such a system.²⁹⁰ The statutory grounds for *vacatur*, when correctly interpreted and applied, present no disincentive to substantive reasoned awards.²⁹¹

288. For example, because the issues are perceived to be legally complex, the economic interests involved are, or are expected to be, very substantial. In *LaPine*, the ultimate judgment in favor of claimants LaPine and PBTS exceeded \$430 million. See, “\$3 Million in Attorneys’ Fees Awarded To LaPine Technology, Prudential-Bache Trade Services,” 16 MEALEY’S INT’L ARB. Rep. No. 7 (July 2001).

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

290. Hayford, *supra* note 165.

291. It goes beyond the scope of this article to give a detailed account of the case law relating to the application of Section 10(a) FAA. Professor Hayford gives an excellent analysis of the case law that interprets the narrow circumstances in which the courts have reviewed awards under the four grounds of Section 10(a). See Hayford, *supra* note 273. See also, Hayford, *supra*

As Professor Hayford suggests, § 10(a) of the FAA ensures effective enforcement of agreements to arbitrate, and is therefore consistent with the FAA's primary goal of enforcing the arbitral agreement in accordance with its terms.

Under the first three grounds of § 10(a) a reasoned award will be vacated only if the party challenging the award can show indisputably that (a) one or more proscribed types of party, attorney, or arbitrator misconduct has occurred and (b) the proved misconduct influenced or persuaded the arbitrator's decision on the merits. Under § 10(a)(4) a reasoned award will be vacated only if the party challenging the award demonstrates that, in deciding the controversy before him, the arbitrator either decided an issue not included in the parties' submission to arbitration, or in some other way exercised an authority not delegated to him by the parties' underlying agreement to arbitrate.²⁹²

As Professor Hayford concluded, “[w]ell thought-out, reasoned awards that consistently demonstrate to the parties . . . the manner in which arbitrators decided their disputes are the most effective and efficient device for assuring that competent decisions and accurate, correct results are achieved.”²⁹³ By doing away with the non-statutory grounds for *vacatur*, the perceived risk that reasoned awards are in danger of being vacated would be eliminated.

The arbitration statutes of many countries²⁹⁴ require reasoned awards (for the most part, unless the parties agree to the contrary), and the FAA should do the same. Similarly, Article 25(2) of the ICC Rules of Arbitration requires that the award “state the reasons upon which it is based.”²⁹⁵ The United States thus appears to be one of the few industrialized nations where arbitral awards without any findings of fact and conclusions of law are commonplace.

note 165, at 450-61.

292. Hayford, *supra* note 143 at 461.

293. *Id.* at 506.

294. See, e.g., Art. 31(2) Model Law, *supra* note 199; Art. 52(4) English Arbitration Act 1996; Art. 32(2) *Ley 36/1988, de 5 Diciembre, De Arbitraje* (Spain); Art. 823(3) *Codice di Procedura Civile (Titolo VIII - dell'Arbitro)* (Italy); Art. 1471 *Code de Procédure Civile* (France); Art. 1701 *Code Judiciaire* (Belgium); Art. 1057(4)(e) *Wetboek van Burgerlijke Rechtsvordering* (The Netherlands).

295. See also Art. 29(2) Mediation and Arbitration Rules of the Commercial Arbitration and Mediation Ctr. for the Americas (1996); Art. 27(2) Int'l Arbitration Rules of the Am. Arbitration Assoc. (1997); Art. 26.1 LCIA Rules (London Ct. of Int'l Arbitration) (1998); Rule 14.2 CPR Rules for Int'l Non-Administered Arbitration; Art. 32(3) UNCITRAL Arbitration Rules (Gen. Assembly Resolution 31/98); Art. 32(4) Rules of the Ctr. for Int'l Commercial Arbitration. In contradistinction, Rule R-44 of the (*often used*) Commercial Dispute Resolution Procedures of the American Arbitration Association provides that “[t]he arbitrator need not render a reasoned award unless the parties request such an award in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.”

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A general statutory requirement that awards must include findings of fact and a reasoned analysis followed by conclusions of law would also hopefully eliminate anomalies such as *Sobel v. Hertz Warner & Co.*,²⁹⁶ in which the appeals court felt compelled to overturn the District Court's order remanding the proceeding to the arbitrators for explanation of their decision dismissing a claim against a brokerage firm.²⁹⁷ The court remanded even though, of the two brokers involved, one plead guilty, and the other had been found guilty of, conspiracy charges relating to similar prohibited transactions involving the very same stock.

C. Rules for Consumer Arbitration Will Need to be Updated

Although this article is limited to a discussion of arbitral appeal and *vacatur* in commercial arbitration, there is an implication of abolishing the non-statutory *vacatur* grounds for consumer arbitration²⁹⁸ that merits separate discussion. How would the Supreme Court's invalidating the non-statutory *vaca-*

296. 469 F.2d 1211 (2d Cir. 1972).

297. *Id.*

298. The Cal. Ethics Standards for Neutral Arbitrators in Contractual Arbitration, which became effective on July 1, 2002, define "consumer arbitration" as follows:

(d) "Consumer arbitration" means an arbitration conducted under a predispute arbitration provision contained in a contract that meets the criteria listed in paragraphs (1) through (3) below. "Consumer arbitration" excludes arbitration proceedings conducted under or arising out of public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements.

(1) The contract is with a consumer party, as defined in these standards;

(2) The contract was drafted by or on behalf of the nonconsumer party; and

(3) The consumer party was required to accept the arbitration provision in the contract.

The words "Consumer party" are defined in the next subsection, as follows:

(e) "Consumer party" is a party to an arbitration agreement who, in the context of that arbitration agreement, is any of the following: (1) An individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code; (2) An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of section 1345 of the Health and Safety Code or health-care insurance plan within the meaning of section 106 of the Insurance Code; (3) An individual with a medical malpractice claim that is subject to the arbitration agreement; or (4) An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.

Division VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, at <http://www.courtinfo.ca.gov/rules/2002/appendix/appdiv6.pdf>.

tur grounds affect the arbitration clauses we find in adhesion contracts? It may be recalled that, at least insofar as mandatory *employment* arbitration agreements are concerned, the California landscape changed substantially since the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.*²⁹⁹

In essence, *Armendariz* laid down the conditions with which arbitration clauses in adhesion contracts must comply so they are not held to be unconscionable under the general California law on adhesion contracts. One of these conditions requires a written, reasoned opinion by the arbitrator, which would allow at least a minimum form of judicial review. This is consistent with the discussion herein favoring reasoned awards. The *Armendariz* Court deemed judicial review based on the non-statutory *vacatur* grounds of "manifest disregard of the law" or "public policy" to be adequate.³⁰⁰ As Professor Smit already pointed out, manifest disregard can find application in only the most exceptional circumstances. For an award to be set aside on this ground, current case law requires that the moving party show both that the arbitrator knew what the applicable law was and that he willfully disregarded such law.³⁰¹ Professor Smit correctly stated:

[i]t would truly take an unusually incompetent arbitrator to acknowledge in the award that he knew what the applicable law was, but decided to disregard it. Even an only moderately skilled arbitrator will know how to avoid this trap by finding that the applicable law is what he wants it to be. As long as he does that, he cannot be found to have willfully disregarded the applicable law.³⁰²

Reported case law indicates that a challenge of the award based on "manifest disregard" is therefore rarely successful and must be seen as more symbolic than having real practical meaning.³⁰³ The same conclusions can be drawn with respect to the "public policy" ground for setting aside an arbitral award.³⁰⁴

299. 24 Cal.4th 83 (2000), (following *Cole v. Burns Int'l Security Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997), a case that actually upheld the mandatory employment arbitration agreement at issue.) *Armendariz* was in turn followed by the 9th Circuit's decision in *Circuit City Stores v. Adams*, 279 F.3d 889 (9th Cir. 2002), *on remand from* 532 US 105 (2001).

300. *Cole*, 105 F.3d at 1486-87, *Armendariz*, 224 Cal.4th at 106-07.

301. See Hayford, *infra* note 228, 30 GA. L. REV. at 816.

302. Smit, *supra* note 114, at 148.

303. *Accord* Smit, *supra* note 114, at 148. See also, Hayford, *supra* note 165, at 471-472 ("Despite the frequent scatter-shot" attacks on adverse decisions mounted under the standard's imprimatur, no commercial arbitration award has been vacated on this ground via application of the current "degree of error" inference-based analysis.")

304. Hayford, *supra* note 165, at 476 *et seq.*

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Thus, as applicability of these two grounds is more theoretical than real-world, it will not deprive the consumer of any practical rights if, as advocated herein, the Supreme Court rules that there is no basis in law for recognizing these non-statutory grounds for *vacatur*. At the same time, this makes clear that even before the Supreme Court so decides, a more meaningful condition for the validity of adhesion contracts than the applicability of what turn out to be virtually meaningless non-statutory grounds for *vacatur* is needed. It is submitted that this can be realized by requiring that the adhesion contract provide for the consumer's right to "opt-in" for appeal to the courts, for a review of the award for errors of law, and perhaps even errors of fact.

In sum, the fact that the non-statutory grounds for setting aside an arbitral award provide a more theoretical³⁰⁵ than realistic chance of getting the court to overturn an award, adds a strong argument in favor of abolishing them. The perceived practical value of these non-statutory grounds seems to lie only in the losing party's ability to unduly delay the inevitable execution of the award by seeking a court's review of the award on these non-statutory grounds. Additionally, these non-statutory grounds fail to provide a desirable safeguard for the procedural integrity of the arbitral system.³⁰⁶

Once the Supreme Court (a) recognizes contractually agreed to arbitral appeal, and (b) abolishes the non-statutory grounds, a cohesive system will provide only for the mandatory, non-waivable, procedural safeguards set forth in § 10(a) of the FAA and the contracting parties' freedom to include a clause permitting full arbitral appeal to the courts. Implementing such a system will avoid the abuses of process — such as delay of the execution of the award currently seen when parties invoke these non-statutory grounds. It will also avoid undesirable and unnecessary uncertainty as to whether an agreement to provide for arbitral appeal is valid.

IX. CONCLUDING OBSERVATIONS

If the United States Supreme Court were to decide to invalidate all non-statutory grounds pursuant to which one can currently challenge an arbitral award in the vast majority of the Circuits (and thereby confining the losing party to a possible challenge under the non-waivable provisions of §10(a) of the FAA), *and* at the same time were to recognize the contracting parties'

305. *Supra* notes 303-304 and accompanying text.

306. *Supra* notes 254-255 and accompanying text.

freedom to choose to include in their agreement arbitral appeal to the competent district court, such a decision would not only safeguard the integrity of the arbitral process but also give the parties the largest possible freedom in crafting what they believe to be the most desirable arbitral proceeding to fit the particular aspects of their contractual relationship. Such a decision would create a welcome end to the uncertainty surrounding these two issues, and undoubtedly prevent much unnecessary litigation and delay tactics.

On the whole, however, when the U.S. system, as laid down in the FAA, and the extensive case law developed since 1925 is compared with the statutory laws adopted in a majority of the European countries during the last twenty years, and in particular with the English Arbitration Act of 1996, it becomes clear that the U.S. system is ripe for a serious overhaul. Since 1925, the FAA has barely been amended (other than the amendments in connection with the adoption of the New York and Panama Conventions), and its age is beginning to show. Because it deals only with a limited number of subjects (basically only the enforcement of arbitration agreements and confirmation, vacation, and modification of arbitral awards), the FAA must inevitably share the U.S. arbitration stage with federal common law and varying state laws, leaving an unclear muddle of uncertainty and confusion, especially for the foreign party who needs to (but probably does not like to) arbitrate in the United States.

A number of scholars have pleaded for the adoption of a federal version of the Model Law to resolve these problems for the purpose of international commercial arbitration.³⁰⁷ Although much can be said for adopting the Model Law in a federal adaptation, using the English Arbitration Act of 1996 as a model would provide an even better solution. Rather than resolving the situation just for international commercial arbitration, we need to be bold and resolve the issues for domestic commercial arbitration as well, as the English Act has done so successfully. With some possible exceptions, there appears to be no real justification for treating domestic commercial arbitration differently and separately from international commercial arbitration. Certain special provisions are needed, as now, to legislate the interaction between the new federal arbitration act and the New York and Panama Conventions, but this has proven not to be an obstacle.³⁰⁸ If we were to embark on the perilous road of

307. See, e.g., Daniel M. Kolkey, *Symposium: In Support of International Commercial Arbitration and Litigation: The Need For Federal Legislation: It's Time To Adopt The UNCITRAL Model Law On International Commercial Arbitration*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 3 (1998) and Appendix A, Draft of a U.S. International Arbitration Act.

308. Compare Sections 201 through 208 of the FAA with Articles 100 through 104 of the English Arbitration Act 1996. See also Articles 85 through 88 of the English Arbitration Act

adopting two separate systems for domestic and international arbitration, we would create more problems than we now seek to resolve.

The English Arbitration Act covers both domestic and international arbitration, and in this and other respects, it is more complete and less of a compromise than the Model Law which was written and debated by delegates of some fifty-eight countries and eighteen international organizations.³⁰⁹ This is not intended to take away from the enormous accomplishment the drafters of the Model Law have achieved, nor from the stellar group of scholars who have contributed to the enormous success of the Model Law. But the English Act is written in plain language and codifies the common law development of arbitration law in a manner that is both desirable and not inconsistent with arbitral practice in this country.

It is pleasing to see how the English Arbitration Act begins with spelling out the basic policy principles upon which it is based and how Schedule 1 sums up the provisions of the Act that are mandatory. The English system also grants authority (under certain conditions) to obtain a court's opinion as to the interpretation of a particular law, which, in view of the increasing complexity of legal questions arbitrators are asked to resolve, would be worthy of adopting in the United States all by itself.

Contrary to the provision under the English Arbitration Act for arbitral appeal by leave of the court only on questions of law and only when certain conditions have been met,³¹⁰ a somewhat more open system of appeal may be preferable for the United States. In all other respects, the English Act is well thought out, fairly complete,³¹¹ and accessible, and it promote efficient use of arbitration proceedings accompanied by adequate supervision by the courts.³¹²

This New FAA could also incorporate more clearly the relationship to the state arbitration acts. Once a New FAA has filled the gaps that currently exist in the federal arbitration law, an argument could be made that we no longer need to repeat those provisions at the state level. This may well be true for the mandatory provisions that would be set forth in the New FAA.³¹³

1996, dealing with specific issues relating to domestic arbitration.

309. Kolkey, *supra* note 307, at 14.

310. Section 69 English Arbitration Act of 1996.

311. Certain issues, however, have intentionally been left for the courts to decide. See Chukwumerije, *supra* note 186, at 24.

312. William W. Park, *The Interaction of Courts and Arbitrators in England*, 1 INT'L ARB. L. REV. 54 (1998).

313. See *supra* note 170.

On the other hand, even if the far-reaching interpretation of the interstate commerce clause in *Allied-Bruce Terminix*³¹⁴ and *Perry v. Thomas*³¹⁵ were maintained,³¹⁶ it would seem that some form of arbitration law at the state level will be needed. Accepting that premise, it is desirable to ensure uniformity both between the New FAA and the state arbitration acts, as well as among the state arbitration acts themselves. Thus, the ideal picture may well encompass both a New FAA and a Uniform State Arbitration Act that is in full harmony with the federal act, accompanied by a clear vision of when federal or state law applies.

Until such a new Federal Arbitration Act is adopted, it is hoped that the suggestions made herein will contribute in a small way to the development of a more viable, reliable, and foreseeable system of arbitration in this country.

314. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-72 (1995).

315. 482 U.S. 483 (1987) (holding that the FAA preempts provision of California Labor Law which provided that actions for the collection of wages could be maintained in court without regard to the existence of a private agreement to arbitrate).

316. As Jean Sternlight said, "[t]he Supreme Court, again purporting to rely on legislative history, adopted the broadest possible definition of interstate commerce, concluding that the FAA should be interpreted to cover the full range of Congress' authority and to regulate all 'commerce in fact.'" Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637, 665 (1996).