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Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements

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NOTES

Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements

I. INTRODUCTION

Arbitration is generally defined as a process in which parties voluntarily agree to submit a dispute to an impartial third person called an arbitrator,[1] who is often selected by the parties[2] and is empowered to make a decision based on the evidence and the parties' arguments.[3] Because of its contractual nature, arbitration claims a central role in settling today's commercial disputes.[4] By structuring the agreement to fit their needs, parties can tailor the arbitration agreement to provide significant advantages over other forms of dispute resolution.[5] For example, arbitration is generally faster,

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1. *See* GABRIEL M. WILNER, 1 DOMKE ON COMMERCIAL ARBITRATION § 1:01, at 1 (rev ed. 1995) (hereinafter DOMKE). To be voluntary, the parties must specifically and expressly agree to arbitrate their disputes. Such agreements can be accomplished in one of two ways. First, the parties may include an arbitration clause in an initial contract, identifying the types of future disputes that will be arbitrated. Second, the parties may agree to arbitrate as a reactionary measure, when a dispute has arisen and either the parties did not originally agree to arbitrate or their agreement did not cover the type of dispute at issue. *See id.*

2. The parties may select the arbitrators themselves or provide a method for their selection. If this process fails, most courts are directed by statute to provide an arbitrater. *See* The Federal Arbitration Act, 9 U.S.C. § 5 (1994) [hereinafter FAA].

3. *See* DOMKE, *supra* note 1, § 1:01, at 1.

4. *See* Stephen J. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 79 (1985). According to then American Arbitration Association President Robert Coulson, "more commercial claims are arbitrated than tried before a jury." *Id.* The arbitration boom has shown no sign of remission, as the volume and dollar amount of arbitration filings has continued to expand considerably in recent years. *See* Stephen Hayford & Ralph Peebles, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 348 & n.9, 355 & n.40 (1995). The unprecedented number of recent Supreme Court opinions concerning arbitration also indicate the vitality and continuing evolution of arbitration. *See, e.g.*, Doctors Assocs., Inc. v. Paul Casarotto, 116 S. Ct. 1652, 1656, (1996) (finding that the FAA preempted a Montana law aimed specifically at arbitration agreements); Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Roefer, 515 U.S. 528, 541 (1995) (finding that the Carriage of Goods by Sea Act does not nullify foreign arbitration clauses contained in maritime bills of lading); First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (determining when circumstances require the court or the arbitrator to decide whether the parties intended to arbitrate); Mastruobono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58-64 (1995) (finding that an arbitrator was within his power to award punitive damages when state law was to the contrary); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270-82 (1995) (determining the breadth of the FAA under Congress's Commerce Clause powers).

The scope of arbitration is quite broad. It is used in a variety of contexts ranging from "traditional commercial transactions such as the sale and purchase of commodities and manufactured goods" to controversies arising from inter-insurance company subrogation claims. DOMKE, *supra* note 1, § 1:01, at 3. Arbitration is also found in relatively new areas of law, such as uninsured motorist accident claims and medical malpractice. *See id.*

5. *See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276-77 (1982); *see also* Meyerowitz, *supra* note 4, at 78-79. Congress also recognized some of these advantages in a report from a committee of the House of Representatives when it passed legislation on voluntary patent arbitration found in 35 U.S.C. § 294 (1994). *See* Patent and Trademark Office—Authorizations, Amendments, Schedule of Fees, H.R. REP. No. 97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777.

cheaper, and more private than litigation.[6] The parties can also create their own discovery process and procedural devices.[7] In addition, the arbitrator, who is usually better informed than judges or juries about trade customs and technologies, can conduct the proceedings in an informal setting at a non-stressful pace.[8] Moreover, arbitration reduces hostility and is, therefore, less disruptive of current and future dealings between the parties.[9] Perhaps most importantly, though, arbitration is fully capable of dealing with today's complex business situations[10] and can provide a wide range of relief.[11]

To retain these advantages, and thus provide incentives for its use, arbitration must render a final and binding determination.[12] While this requirement does not absolutely foreclose the availability of judicial review, it does require extremely circumscribed limits on its use.[13] Such a narrow level of review is crucial for two reasons. First, if arbitration awards were subject to greater judicial review, arbitration would become a mere stepping-stone to litigation. Losers unhappy with the determination and victors believing they were undercompensated would not hesitate to challenge in court what they perceived as inappropriate awards.[14] Supplementing the arbitration process with non-deferential judicial review would eliminate many of the advantages originally gained using arbitration.[15] Second, a

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6. *See* Meyerowitz, *supra* note 4, at 79-80.
7. *See id.* at 80.
8. *See* Burger, *supra* note 5, at 277.
9. *See* H.R. REP. No. 97-542, at 13.
10. *See* Burger, *supra* note 5, at 277.
11. Arbitrators often have more remedies available for their use than do courts. *See generally* Michael F. Hoellering, *Remedies in Arbitration*, 20 FORUM 516 (1985) (analyzing various forms of remedies available in nonlabor arbitration).
12. *See* Burger, *supra* note 5, at 277. The subject matter of this Note deals with voluntary commercial, binding arbitration. Other forms of dispute resolution are often referred to as arbitration, even though they are compulsory or nonbinding. *See, e.g.*, RICHARD J. MEDALIE, COMMERCIAL ARBITRATION FOR THE 1990S 18 (1991) (discussing compulsory, nonbinding judicial arbitration). Arbitration should also not be confused with mediation or conciliation, which are often referred to as nonbinding arbitration. *See* Lawless v. Cedar Vale Reg. Hosp., 850 P.2d 795, 800 (Kan. 1993); DOMKE, *supra* note 1, § 1:02, at 4-5.
13. *See* National Wrecking Co. v. International Bhd. of Teamsters Local 731, 990 F.2d 957, 960 (7th Cir. 1993) ("Judicial review of arbitration awards is narrow because arbitration is intended to be the final resolution of disputes.").
14. Of course, such a result only occurs if the dissatified party expects the benefits of such action to outweigh its costs.
15. *See* Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) (noting that limited judicial review avoids undermining arbitration's twin goals of efficient dispute resolution and avoidance of costly litigation); Robbins v. Day, 954 F.2d 679, 682 (11th Cir. 1992) (observing that arbitration eases court congestion and provides an efficient alternative to litigation); E.I. DuPont de Nemours v. Grasselli Employees Indep. Ass'n, 790 F.2d 611, 614 (7th Cir. 1986) (stating that "an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution"). As one court statod:

system that constantly provided for a "second bite at the apple" would do little to establish the faith and confidence that any system of dispute resolution requires.[16] Parties must believe that the award will be final, or arbitration loses its appeal as a true alternative to litigation. The Federal Arbitration Act ("FAA") satisfies this requirement by narrowly circumscribing judicial review of arbitration awards.[17] Specifically, the FAA commands the courts to confirm all arbitration awards,[18] unless certain limited grounds for vacatur, modification, or correction are found to exist.[19]

Some parties have attempted to expand contractually upon the limited judicial review available for an arbitrator's decision,[20] however, by agreeing before arbitration that the award can be reviewed

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> Where parties have selected arbitration as a means of dispute resolution, they presumably have done so in recognition of the speed and inexperiences of the arbitral process; federal courts ill serve these aims and that of the facilitation of commercial intercourse by engaging in any more rigorous review than is necessary to ensure compliance with statutory standards.

Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 164-65 (D.C. Cir. 1981).

16. *See* Remmey v. Painewebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (finding that parties would cease to use arbitration if courts did not resist the temptation to redecide arbitral decisions); Richmond Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union, 973 F.2d 276, 282-83 (4th Cir. 1992) ("Nothing would be more destructive to arbitration than the perception that its finality depended upon the particular perspectives of the judges who review the award."). This premise is based on the same policy considerations that support res judicata. That doctrine has been found to rest on "reason, justice, fairness, expediency, practical necessity, and public tranquillity. Public policy, judicial orderliness, economy of judicial time, and the interest of litigants, as well as the peace and order of society, all require that stability should be accorded judgments . . . ." 46 AM. JUR. *Judgments* § 515, at 776-77 (1994) (citations omitted); *see also* G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 664 (1988) (finding res judicata to be "an essential doctrine if any agreement to be bound by the arbitrator's award is to have meaning").

17. 9 U.S.C. §§ 1-16 (1994). For a more comprehensive description of the FAA and its interpretations, see *infra* Part III.

18. *See* 9 U.S.C. § 9.

19. The FAA allows for vacatur:

> (a) Where the award was procured by corruption, fraud, or undue means.
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> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) 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.
>
> (d) 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.

Id. § 10. The grounds for modification or correction are also extremely limited and will be discussed along with the importance of the FAA in Part III.

20. *See* Gateway Techs., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 996 (5th Cir. 1995); LaPine Tech. Corp. v. Kyocera Corp., 909 F. Supp. 697, 702 (N.D. Cal. 1995); Fils Et Cables d'Acier De Lens v. Midland Metals Corp., 584 F. Supp. 240, 242 (S.D.N.Y. 1984).

on grounds beyond those provided by the FAA.[21] Contractually increasing the scope of available judicial review creates a tension in the law. On the one hand, arbitration is a creature of contract, and the parties should be allowed to bargain for whatever they want. This characteristic is the driving force behind arbitration and provides the incentive for parties to arbitrate. The contractual adaptability of arbitration, which allows it to meet the parties' needs in an efficient manner, is the bedrock upon which all of the above-mentioned advantages are based. On the other hand, allowing parties to use this contractual power to increase the available level of review potentially undermines efficiency and confidence in the system. Allowing parties to increase the scope of review may lead to increased costs, a longer dispute resolution process, and additional reductions in other advantages originally gained by avoiding litigation. Increasing the judicial role may also diminish the parties' confidence in the ability of arbitration to produce final and binding awards. Moreover, whether parties have the power to change the limited role the FAA confers upon the courts is unclear.

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21. The judicial review clause for which the parties contracted in *LaPine* provides a clear example of a contractual expansion upon the proscribed level of review in the FAA:

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

LaPine Tech. Corp., 909 F. Supp. at 702.

These clauses are most likely a fearful reaction to a perceived unpredictability in arbitration, which results from the arbitrator's enormous power. For instance, an arbitrator can fashion almost any relief, including specific performance. Unless contracted for, the arbitrator's award need not even be accompanied by a written opinion explaining her reasoning. *See* Meyerowitz, *supra* note 4, at 80. That reasoning may not be what the parties had in mind, since an arbitrator "may fashion law to fit the facts of a particular case . . . may intentionally disregard traditional rules of law; or reach a decision contrary to law." Paul D. Pearlstoin, *The Tao of Arbitration*, 6 COM. L. BULL. 22, 23 (1991) (citations omitted).

Of course, placing limits upen the arbitrator may result in increased predictability. This approach may not always provide the answer, however. The parties may believe that expanded judicial review is the only acceptable safety net to make arbitration feasible. For example, in securities or franchise agreements, customers or franchisees may question the impartiality of industry arbitrators. *See* Hugh R. Combs & Jeffrey W. Sarles, *Courts Examine Whether Judicial Review of Arbitration Awards Can Be Expanded by Contract*, NAT'L L.J., Aug. 19, 1996, at B5. Placing an award limitation upon a biased arbitrator will not change the outcome, as the limitation only dictates that the amount or type of award be within a specified range. Arbitration remains a viable, if somewhat less efficient, altornative, however, if bias-fearing parties are allowed to contract for expanded judicial review.

The resolution of this issue is critical to the evolution of arbitration.[22] As arbitration continues to move to the forefront of dispute resolution,[23] the creation of a standardized framework becomes essential.[24] The increasing complexity and volume of arbitration cases have forced many parties to consider adopting additional procedural safeguards to protect against unpredictable results.[25] Parties must know if they can rely on the courts to give effect to these procedural safeguards. If courts begin to limit the contractual adaptability of arbitration to changing circumstances, party confidence in the arbitration process may suffer. This Note focuses on only one procedural safeguard, the propriety of contracting for an expanded level of judicial review in arbitration agreements. The resulting analysis, however, may be applicable to other questions concerning the extent to which parties may alter the typical arbitration procedure.[26]

Part II develops the issue by discussing cases that have addressed the question, but arrived at conflicting answers. Part III provides additional background with an historical inquiry into the purposes behind the FAA and a look at how the act is interpreted today. An analysis of two Supreme Court decisions in which the contractual nature of arbitration was found to outweigh other considerations follows in Part IV. Part V concludes that the contractual nature of arbitration, coupled with policy considerations, dictates that parties be allowed to expand the available scope of judicial review.

II. LEGAL BACKGROUND: CONTRADICTORY RULINGS

The propriety of parties' contractually increasing the court's role in the arbitration process is not clear. Strong arguments exist

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22. *See* Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1, 37-38 (1996) (finding that the one significant arbitration issue open for the Supreme Court concerns the nature and scope of judicial review of the merits of commercial arbitration awards).

23. *See supra* note 4.

24. *See* Hayford & Peebles, *supra* note 4, at 346-50.

25. *See* John F.X. Peloso & Stuart M. Sarnoff, *Appellate Review of Arbitration Decisions*, 213 N.Y. L.J. 3 (1995) (discussing arbitration arising out of securities agreements); *supra* note 21.

26. The broader question concerns the limits on what parties can contract for in arbitration agreements while still expecting judicial enforcement. Clearly some limit must exist. For example, if parties were to enter into an agreement, which contained an arbitration clause, to commit a crime, and upon a dispute an arbitrator ordered one party to commit the crime, it is inconceivable that the judiciary would enforce the award, regardless of the FAA's direction. While this Note is not intended to explore such limitations, it may provide a framework to help answer questions concerning the extent to which parties may alter the arbitration process itself.

both for and against allowing such alterations. These arguments are highlighted in the following federal cases,[27] which have arrived at conflicting resolutions.

A. Let the Parties Contract for Whatever They Want

1. *In re Fils et Cables d'Acier de Lens v. Midland Metals Corp.*

In re Fils et Cables d'Acier de Lens (FICAL) v. Midland Metals Corp. was the first federal case to address whether parties to an arbitration agreement could contractually increase the scope of judicial review provided by the FAA.[28] In *FICAL*, Midland Metals

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27. The focus of this Note is on the FAA, since it governs most arbitration agreements. *See infra* Part III.B. The decision to focus on federal cases was based on the assumption that federal courts are better equipped than their state counterparts to interpret a federal statute. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (comparing the abilities of federal and state courts in adjudicating constitutional claims). This decision is not meant to imply that a look into state court decisions would be fruitless. Most arbitration claims brought in a state court will also be governed by the FAA. *See infra* Part III.B. Even when the claim is one of the few that is not governed by the FAA or when a state court erroneously applies state law, the analysis will most likely be the same, since most state statutes are largely similar to the FAA, and many provide virtually identical grounds for judicial review. See, for example, the Uniform Arbitration Act (UAA) which provides for vacatur when:

> (1) The award was procured by corruption, fraud, or other undue means;
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
> (3) The arbitrators exceeded their powers;
> (4) The arbitrators refused to postpone the hearing upon sufficient cause shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising an objection. . . .

UNIFORM ARBITRATION ACT § 12, 7 U.L.A. 140 (1985 & Supp. 1995). Thirty-five states have adopted the UAA. *See id.* at 1. Only the fifth ground presents any substantive departure from the FAA, and it is merely a codification of standard judicial procedure. *See also* GEORGE GOLDBERG, A LAWYERS GUIDE TO COMMERCIAL ARBITRATION 62 (1983) ("The grounds for judicial vacatur of an arbitration award are surprisingly uniform throughout the United States—more uniform, in fact, than any other aspect of arbitration law."). Thus, when a state court is confronted with the parties' contractual attempt to alter its role in the arbitration process, it will often face the same difficulties. Should the court honor the contractual nature of arbitration by undermining its inherent advantages? In finding an answer, state courts, which have fared no better than the federal courts examined in this Part, are split. *Compare, e.g.*, Dick v. Dick, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995) (finding no authority in the state statute that would permit the parties to appeal substantive matters after completing arbitration) *with* NAB Constr. Corp. v. Metropolitan Transp. Auth., 579 N.Y.S.2d 375, 375 (N.Y. App. Div. 1992) (allowing the parties to alter judicial review of arbitration awards to determine if an award was arbitrary, capricious, or so grossly erroneous as to evidence bad faith).

28. 584 F. Supp. 240 (S.D.N.Y. 1984).

Corporation entered into two contracts for the purchase of galvanized wire from FICAL.[29] Both contracts contained arbitration clauses that provided for an expanded level of judicial review should either party seek confirmation of an arbitration award.[30] A dispute arose over the wire's specifications, and the parties entered into arbitration.[31] An arbitration panel entered an award, which Midland Metals challenged.[32]

Faced with the issue that is the subject of this Note, the court recognized that review of arbitration awards is normally quite limited, encompassing only a search for a violation of one of the grounds enumerated in sections 10 or 11 of the FAA.[33] Although the court noted its obligation to confirm the award pursuant to section 9 absent the existence of one of the enumerated grounds,[34] it recognized that arbitration is a "creature of contract" entirely dependent upon agreement.[35] Expounding upon this contractual nature, the court noted that it could not consider any issue that the parties had agreed to arbitrate and that a party who had not agreed to arbitrate could not be compelled to do so.[36] The court then concluded that a party could not be forced to arbitrate under a set of rules for which it had not contracted.[37]

Applying this logic, the court found that not only had the parties agreed to modify the standard role of the court and the arbitrator in the arbitration process, but that they were wholly within their contractual rights to do so.[38] The court argued that only a jurisdic-

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29. *See id.* at 242.

30. *See id.* The portion of the agreements pertaining to the level of judicial review read as follows:

> The arbitrator shall make findings of fact and shall render an award based thereon and a transcript of the evidence adduced thereat shall, upon request, be made available to either party. Upon an application to the court for an order confirming said award, the court shall have the power to review (1) whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by substantial evidence, and (2) whether as a matter of law based on said findings of fact the award should be affirmed, modified, or vacatod. Upon such detormination, judgment shall be entered in favor of either party consistent therewith.

Id.

31. *See id.*

32. *See id.* at 242-43.

33. *See id.* at 243. See *supra* note 19 and *infra* note 103 and accompanying text for a description of the contents of sections 10 and 11 of the FAA.

34. *See FICAL*, 584 F. Supp. at 243. See note 100 and accompanying text for a description of the contents of section 9.

35. *See FICAL*, 584 F. Supp. at 243-44.

36. *See id.* at 244.

37. *See id.*

38. *See id.*

tional or public policy barrier should serve to prevent the parties from contracting in such a fashion to alter the standard roles.[39]

Focusing first on the jurisdictional question, the court found that since the FAA does not in itself supply jurisdiction, it does not preclude parties from increasing the role of the courts.[40] Before a party can seek to confirm an arbitration award in federal court, the court must have subject matter jurisdiction arising from the claim itself.[41] Because the diversity of the parties supplied jurisdiction in this case, jurisdiction was not an impediment to the parties' agreement.[42]

According to the court, public policy also did not preclude the parties from increasing the level of review.[43] Noting that the parties' agreement removed much of the incentive to resort to arbitration because of a reduction in efficiency, the court still found such an agreement to be beneficial because of the resulting reduction in the court's burden.[44] Even with an increased level of review, the court was only asked to "review the arbitrator's findings for substantial evidence and legal validity," which was "clearly a far less searching and time-consuming inquiry than a full trial."[45]

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

An arbitration agreement in which the parties had contractually agreed to expand the standard level of judicial review was also the subject of controversy in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*[46] MCI and Gateway had entered into a contract that included a binding arbitration clause that expanded the typical grounds for judicial review, allowing appeal for errors of law.[47] A disputo arose and the parties entered into arbitration.[48] The arbitrator found in favor of Gatoway and ordered an award of punitive

39. *See id.*
40. *See id.*; *infra* note 130 and accompanying text.
41. *See FICAL*, 584 F. Supp. at 244.
42. *See id.*
43. *See id.*
44. *See id.*
45. *Id.*
46. 64 F.3d 993 (5th Cir. 1995). Gateway would serve as MCI's subcontractor on a job that MCI had obtained from the Virginia Department of Corrections. Under the contract, Gateway was te install and maintain a prison telephone system over lines secured by MCI. *See id.* at 995.
47. *See id.*
43. *See id.* at 995-96.

damages and attorney's fees.[49] Gateway then asked the District Court for the Northern District of Texas to confirm the award, while MCI simultaneously filed a motion to have it vacated.[50] The district court interpreted the "errors of law" language included in the parties' arbitration agreement as requiring it to apply a "harmless error standard, with due regard for the federal policy favoring arbitration."[51] The district court's refusal to review errors of law de novo was apparently based on its concern that such an increased level of review would sacrifice the "simplicity, informality and expedition" of arbitration.[52] Under the harmless error standard, the court confirmed the award.[53]

Finding the harmless error standard applied by the district court to be an insufficient level of scrutiny under the arbitration agreement, the Fifth Circuit reviewed the award de novo.[54] The appellate court recognized that judicial review of arbitration awards is normally quite narrow since it is circumscribed by the grounds listed in the FAA.[55] The Fifth Circuit held, however, that the contractual nature of arbitration takes precedent over that limitation and that the parties' contractual modification of the level of review was acceptable.[56] Finding that the FAA's purpose is to enforce contractual agreements, the Fifth Circuit noted that failure to uphold the parties' contractual arrangement would be inimical to that purpose.[57] Thus, because arbitration is a creature of contract, the court argued that parties can contract for the rules governing it, just as they can contract for what disputes they wish to have arbitrated.[58]

Unfortunately, the opinion did not address the district court's assertion that this type of agreement would undermine the inherent benefits of arbitration. Instead, the Fifth Circuit found only that the

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49. *See id.* at 997-98.
50. *See id.* at 996.
51. *Id.*
52. *Id.* at 997.
53. *See id.* at 995.
54. *See id.* at 997.
55. *See id.* at 996.
56. *See id.*
57. *See id.* The court referenced *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995), for much of its discussion on the contractual nature of arbitration, and then cited other Supreme Court cases in which the Court noted its reliance on the contractual nature of arbitration in making decisions. *See Gateway Tech., Inc.*, 64 F.3d at 996-99. Supreme Court interpretations of the FAA are examined in Parts III.B and IV.
58. *See Gateway Tech., Inc.*, 64 F.3d at 996. The court vacated the punitive damages portion of the award, finding it to be inconsistent with Virginia law, thus making this decision outcome determinative. *See id.* at 998-1001. Presumably, if the parties had not agreed to the increased level of review, the Fifth Circuit would have been powerless to vacate the award under the narrow standards supplied by the FAA.

contractual nature of arbitration allowed the parties to alter the judicial review rules of the FAA. It did not address any public policy concerns.

B. What Happened to All Those Benefits?

In *LaPine Technology Corp. v. Kyocera Corp.*, the District Court for the Northern District of California declined to follow *FICAL* and *Gateway*,[59] and refused to apply the expanded scope of review for which the parties contracted.[60] According to the court, the parties did not have the right to alter the role of the court as provided by statute, and such an agreement violated public policy.[61]

LaPine and Kyocera had entered into a series of contracts in which LaPine was to provide the technology that Kyocera required to manufacture certain computer parts.[62] Kyocera was then supposed to sell the completed parts to LaPine according to a production schedule.[63] Subsequent financial difficulties forced Lapine into a restructuring, and Kyocera took part ownership.[64] As part of the restructuring, the parties signed an agreement containing an arbitration clause.[65] The arbitration agreement allowed for judicial review of awards for substance and errors of law in addition to the FAA's standards.[66]

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59. 909 F. Supp. 697 (N.D. Cal. 1995). As of the writing of this Note, the *LaPine* decision was before the Ninth Circuit on appeal.

60. *See id.* at 701-06. The *LaPine* court is not the first district court to refuse to expand its role in the arbitration process at the parties' request. The Fifth Circuit's decision in *Gateway* was a reversal of such a refusal hy the District Court for the Northern District of Texas. *See infra* Part II.A.2.

61. *See LaPine Tech. Corp.*, 909 F. Supp. at 701-06.

62. *See id.* at 699. Note that this summary is a simplified version of the agreements. Only the background necessary to supply the context for the arbitration agreement has been provided.

63. *See id.*

64. *See id.* at 700.

65. *See id.*

66. The relevant portions of the agreement read as follows:

> The arbitrators shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law. The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting any 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.

Id. at 702.

A dispute arose over Kyocera's compliance with the production schedule.[67] The parties entered into arbitration conducted before a panel of the International Court of Arbitration of the International Chamber of Commerce.[68] The arbitrators issued a final award in favor of LaPine, who then filed a motion with the district court asking for confirmation.[69] Kyocera opposed the confirmation and asked the court to review the award under the agreement's expanded judicial review clause and for vacatur or modification.[70]

Kyocera urged the court to accept the reasoning of *Gateway* and *FICAL*, which had found that parties may contractually alter the court's role in the arbitration process.[71] Addressing the *FICAL* decision first, the district court noted that while the *FICAL* court had enforced such an agreement, the court had also acknowledged that jurisdictional or public policy considerations might dictate a different outcome.[72] Using this language, the district court then disagreed with *FICAL*'s conclusions on the effects of those considerations.[73]

Relying on language in *Chicago Typographical Union No. 16 v. Chicago Sun-Times*,[74] the *LaPine* court strongly asserted that parties

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67. *See id.* at 701.

68. *See id.* at 698-99.

69. *See id.* at 699.

70. *See id.*

71. *See id.* at 701-02. *See supra* Part II.A.

72. *LaPine*, 909 F. Supp. at 702 (quoting Fils Et Cables d'Acier DeLens v. Midland Metals Corp., 584 F. Supp. 240, 244 (S.D.N.Y. 1984) (*"[T]here appears to be no reason, absent a jurisdictional or public policy barrier, why the parties cannot agree to alter the standard roles."*) (emphasis added by the *LaPine* court); *supra* Part II.A.1.

73. *See LaPine*, 909 F. Supp. at 702.

74. 935 F.2d 1501 (7th Cir. 1991). The text on which the *LaPine* court relied is as follows: "If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract." *Id.* at 1505.

Kyocera claimed that Judge Posner, the author of the *Chicago Typographical* opinion, had changed his stance in two later opinions, *DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163 (7th Cir. 1994), and *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994). The *LaPine* court disagreed. *See LaPine Tech. Corp.*, 909 F.Supp. at 703. A careful reading of those cases shows that the *LaPine* court was correct. Nothing in either case indicates any change in Judge Posner's position.

Moreover, Judge Posner's statements in *Chicago Typographical* were probably not what might be termed a "slip of the pen," since it was not the first case in which he expressed such sentiments. *See* Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 184 (7th Cir. 1985). Judge Posner's statements were nothing more than dicta, however.

Chicago Typographical concerned a union's appeal from an arbitration award arising out of a collective bargaining agreement. *See Chicago Typographical Union No. 16*, 935 F.2d at 1503-11. Because of a prior contractual agreement between the parties, neither party asked the court to consider expanding its involvement. Thus, the issues in *Chicago Typographical* were not legally or factually similar to the subject matter of this Note. Furthermore, federal jurisdiction in *Chicago Typographical* was based on section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1994), which gives the courts jurisdiction to hear labor disputes. The FAA probably does not

to an arbitration agreement could not alter the role of the court as provided by statute.[75] The court argued that while a court may have subject matter jurisdiction over the cause subject to arbitration, its power to exercise that jurisdiction, particularly when conferred by statute as here, cannot be altered by the parties' agreement.[76] Thus, "the role of the federal courts cannot be subverted to serve private interests at the whim of contracting parties."[77] While noting that the dispute resolution function of arbitration is nonjudicial by nature, the court stated that the confirmation or vacation of such awards requires a judicial act permitted by statute.[78] The court asserted that allowing the parties to alter the court's role would usurp Congress's right to determine the level of judicial review.[79]

The district court also departed from the reasoning of *FICAL* by finding the agreement offensive to public policy.[80] Noting that the arbitration process in the case before it took four years and "produced a record of substantial magnitude, including hundreds, if not thousands, of exhibits," the court found that an increased level of review would undermine the benefits contemplated by parties who see "arbitration as an effective form of alternative dispute resolution."[81] Thus, the court found that the attempted alteration of the court's role

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apply to labor disputes. *See* 9 U.S.C. § 1 ("[N]othing [in the FAA] shall apply to contracts of employment . . . ."); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36-43 (1991) (Stevens, J., dissenting). Although the Supreme Court has acknowledged that federal courts have relied on the FAA for guidance in hearing labor disputes, it has never indicated whether this practice is correct. *See* United Paperworkers v. Misco, Inc., 484 U.S. 29, 40 n.9 (1987). Why the *LaPine* court would place so much reliance on dicta is curious, considering it did not find the Supreme Court's opinions on the ability of parties to specify arbitration rules contractually helpful for that very reason. *See infra* text accompanying note 85.

75. *See LaPine Tech. Corp.*, 909 F. Supp at 703. Whether parties to an arbitration agreement have the power to alter the court's role is a novel question, which must be kept conceptually separate from the question of whether the parties *should* have that power. Since the statements in *Chicago Typographical* are only dicta, the only federal authority addressing whether parties can alter the court's role in arbitration remains the three cases discussed in this Part.

76. *See id.*

77. *Id.* Note that the *LaPine* court makes its argument under the umbrella of the jurisdiction exception mentioned in *FICAL*. Yet, the *LaPine* argument is not really about jurisdiction. Like the court in *FICAL*, the *LaPine* court never denied that it had subject matter jurisdiction. The argument is really about the power conferred upon the court by statute.

78. *See id.* at 705.

79. *See id.*

80. *See id.* at 705-06. The court conceded the possibility that such a public policy barrier might not have existed in *FICAL*. The *FICAL* court found that public policy was not offended because, even though the court's role in reviewing the award had been expanded, that role was still less than what would have been required in a trial absent arbitration. *See id.*; *supra* Part II.A.1.

81. *Id.* at 706.

reduced the expected benefits of arbitration for both the public and the courts.[82]

Although admitting the factual similarity, the court paid scant attention to the *Gateway* decision.[83] Finding the *Chicago Typographical* dicta more compelling than the *Gateway* holding, the court completed its dismissal of *Gateway* by finding it inconsistent with the public policies supporting arbitration.[84] The court also dismissed the precedential value of Supreme Court decisions concerning the parties' power to specify arbitration rules, because the decisions did not focus on the courts' role in the process.[85] After refusing to alter its role, the court examined the arbitration award for compliance with the FAA.[86] Finding compliance, the court confirmed the award.[87]

III. HISTORY AND DEVELOPMENT OF AMERICAN ARBITRATION

Obtaining an understanding of the FAA's purposes and functions is necessary to consider whether parties to an arbitration agreement should be allowed to alter contractually the FAA's scope of judicial review. This understanding can best be accomplished through historical inquiry and judicial interpretation.

A. The FAA: A Response to Judicial Hostility toward Arbitration

Seventeenth century American arbitration law found its origin in the English common law.[88] By adopting the English law, American courts were infected with a hostility toward arbitration not normally

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82. *See id.*

83. *See id.* at 704. The court did take judicial notice of the parties' briefs in *Gateway* and in the unpublished district court decision. This notice was only to address LaPine's contention that the issue of judicial review was not really before the appellate court and that the Fifth Circuit's decision should therefore have no precedential value. The court summarily dismissed LaPine's argument. *See id.*

84. *See id.* at 704-05.

85. *See id.* at 705. Nevertheless, Parts III.B and IV examine Supreme Court interpretations.

86. *See id.* at 706-09. The court also dismissed Kyocera's argument that the court's refusal to honor the full terms of the agreement rendered the entire agreement unenforceable. *See id.* at 706.

87. *See id.* at 709.

88. *See* Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 270 (1995); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 612 (1928). The English were not the first to use arbitration, however. Its use has been traced back as far as ancient Greece and Rome. *See* Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 242-46 (1928); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132-33 (1934).

found in other cultures.[89] The ultimate effect of this hostility was the courts' refusal, with few exceptions, to force parties to fulfill executory agreements to arbitrate.[90] While this hostility did not include judicial refusal to enforce the award of an arbitrator,[91] such awards were subject to virtually unlimited judicial review, potentially eliminating any advantages derived from the use of arbitration.[92]

By the beginning of the twentieth century, the commercial world had begun to realize the potential value of judicially enforceable arbitration,[93] and in time, the legal community also began to see the

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89. *See Kulukundis*, 126 F.2d at 983-84; John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 223-25 (1986). The English bias against arbitration seems to have been the result of several factors. Foremost was the concern that allowing parties to contract for arbitration would oust the courts of jurisdiction. *See* United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008-09 (S.D.N.Y. 1915); S. REP. NO. 68-536, at 2 (1924); Burger, *supra* note 5, at 277. The courts proclaimed such ouster to be against public policy. *See Kulukundis*, 126 F.2d at 983. Considering the general acceptance of arbitration in other developed cultures, this claim was dubious at best. *See id.* The real reason for the courts' jealous protection of jurisdiction was most likely their complete dependence on case fees for income. *See id.* at 983 n.14; Allison, *supra*, at 224. The American courts originally followed the public policy reasoning, but soon developed their own reasons to justify the hostility toward arbitration. *See United States Asphalt Ref. Co.*, 222 F. at 1008-12.

Another adopted fear was that arbitrators could not provide a proper recourse for valid legal grievances. *See Kulukundis*, 126 F.2d at 983; S. REP. NO. 68-536, at 2-3. Curiously, this fear seemed to be greater for lawyers than for businessmen. *See* Jones, *supra* note 88, at 256. The courts believed that arbitrators were not well suited to decide either questions of law or fact. This attitude became quite porvasive and the American courts retained it well into the twentieth century. *See* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 223-24 (1995) (describing the Court's distrust of arbitration's capabilities); *see also* Wilko v. Swan, 346 U.S. 427, 432-38 (1953) (finding that the standards of arbitration were insufficient to protect a claimant's federal securities claim). Only in the last few decades did the Court change its opinion of arbitration and overrule *Wilko*. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 431-86 (1989); *infra* Part III.B.

Another factor in the legal community's hostility toward arbitration was the bar's attempt to professionalize. *See* Allison, *supra*, at 224-25. If arbitration became a viable alternative to litigation, the fear was that lawyers with specialized expertise in litigation would be displaced. As a result, lawyers had little incentive to promote arbitration. *See id.*

90. *See* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120-22 (1924); The Atlanten, 252 U.S. 313, 315-16 (1920); *Kulukundis*, 126 F.2d at 985; Bulk Carriers Corp. v. Kasmu Laeva Omanikud, 43 F. Supp. 761, 762 (S.D.N.Y. 1942). While not specifically enforceable, executory agreements were found to be valid, and upon breach, an action for damages would lie. *See Red Cross Line*, 264 U.S. at 121. Only nominal damages could be recovered, however. *See Kulukundis*, 126 F.2d at 984; Atlantic Fruit Co. v. Red Cross Line, 276 F. 319, 322 (S.D.N.Y. 1921).

91. *See Red Cross Line*, 264 U.S. at 120-21; Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270-71 (1926).

92. *See* Allison, *supra* note 89, at 224; Cohen & Dayton, *supra* note 91, at 270.

93. *See Atlantic Fruit Co.*, 276 F. at 322; Rebert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406-07 (2d Cir. 1959). *See generally* Carl F. Taeusch, *Extrajndicial Settlement of Controversies: The Business Man's Opinion: Trial at Law v. Nonjudicial Settlement*, 83 U. PA.

sensibility in enforcing such agreements.[94] Unfortunately, not all courts agreed on the propriety of judicial enforcement.[95] Even those courts willing to enforce the agreements suffered from the constraints of precedent and thought that making executory arbitration agreements enforceable was the province of the legislature.[96]

In response to the lack of judicial enforcement at common law, legislatures enacted statutes placing agreements to arbitrate on equal footing with other contracts.[97] The most important of these statutes was the FAA, enacted by Congress on February 12, 1925.[98] The FAA's

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L. REV. 147 (1934) (stating that the business world would determine how extensively commercial arbitration will be used based upon its usefulness in meeting business objectives).

94. *See Atlantic Fruit Co.*, 276 F. at 321; Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 50 N.Y. 250, 258-59 (1872) ("The better way, doubtless, is to give effect to [arbitration agreements], when lawful in themselves, according to their terms and the intent of the parties; and any departure from this principle is an anomaly in the law . . . ."). The courts were probably most concerned with clearing their overcrowded dockets. *See* Jones, *supra* note 88, at 257-58. Lawyers realized that their role merely changed from that of litigater to that of advisor. *See id.* at 258; Taeusch, *supra* note 93, at 148. Even the English, from whom the American courts inherited their hostility, had recognized the benefits of arbitration by enacting legislation making such agreements enforceable. *See* Jones, *supra* note 88, at 246.

95. *See Kulukundis*, 126 F.2d at 983; Meacham v. Jamestewn, F. & C.R. Co., 105 N.E. 653, 656 (N.Y. 1914) (Cardozo, J., concurring) ("It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary.").

96. *See* S. REP. NO. 536, at 3 (1924); *see also Atlantic Fruit Co.*, 276 F. at 322-23; United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1010-1012 (S.D.N.Y. 1915).

97. *See* Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 270-71 (1995) (explaining the purpose of the FAA was te overcome courts' refusals to enforce agreements to arbitrate).

The first states to make arbitration agreements valid, enforceable, and irrevocable were New York in 1920 and New Jersey in 1923. *See* Jones, *supra* note 88, at 248-49. Today, all states except Alabama, Mississippi, and West Virginia have modern arbitration statutes. *See* DOMKE, *supra* note 1, § 4:01, at 28. The essential elements of a modern arbitration statute are:

1. irrevocability of any agreement to submit future disputes te arbitration;
2. power of a party, pursuant te a court directive, to compel a recalcitrant party te proceed te arbitration;
3. provision that any court action instituted in violation of an arbitration agreement may be stayed until arbitration in the agreed manner has taken place;
4. authority of the court to appoint arbitrators and fill vacancies when the parties do not make the designation, or when arbitraters withdraw or become unable to serve during the arbitration;
5. restrictions on the court's freedom to review the findings of facts by the arbitrator and his application of the law;
6. specification on the grounds on which awards may be attacked for procedural defects, and of time limits for such challenges.

Id. at 1-2.

98. *See infra* Part III.B for a discussion on the importance of the FAA.

The FAA was enacted in direct response to judicial hostility. *See Robert Lawrence Co., Inc.*, 271 F.2d at 406-08. The legislative histery of the FAA provides additional insight into its purpose. The House Report stated:

> The need for the law arises from an anachronism of our American law. . . . [B]ecause of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle

major components make written arbitration agreements valid, irrevocable, and enforceable;[99] provide mechanisms to enforce such agreements;[100] allow the parties, or the court if the agreed selection process fails, to select the arbitrators;[101] give arbitrators the power to summon witnesses and subpoena documents;[102] and severely curtail judicial review of arbitration awards.[103]

While the FAA made numerous changes to the legal community's treatment of arbitration, two changes are particularly noteworthy. First, executory agreements to arbitrate became legally enforceable.[104] Previously, only awards resulting from completed arbitration

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became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced . . . .

H.R. REP. NO. 68-96, at 1-2 (1924). The Senate Report similarly voiced concern over judicial hostility, and noted that "practical justice in the enforced arbitration of disputes [exists] where written agreements for that purpose have been voluntarily and solemnly entered into." S. REP. NO. 68-536, at 3.

The original proponents and drafters of the FAA found the statute to be directed at three "evils" inherent in litigation: delay, expense, and unjust results when measured by the standards of the business world. *See* COMMITTEE ON COMMERCE, TRADE AND COMMERCIAL LAW, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155-56 (1925).

99. *See* 9 U.S.C. § 2 (1994). Section 2 states that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

100. *See id.* §§ 3-4, 9. Section 3 allows a party to any suit or proceeding in any court of the United States to stay such suit or proceeding if the issue concerned is by written agreement referable to arbitration. *See id.* § 3. Section 4 instructs courts to order parties into arbitration when one party has been aggrieved by the failure, neglect, or refusal of another to arbitrate under a written arbitration agreement, unless the making of the agreement or the failure to comply is itself at issue. *See id.* § 4. Section 9 directs the courts to issue an order confirming an arbitration award upon any party's application, if such application is made within one year after the award was made, and the award has not been vacated, modified, or corrected under the level of judicial review proscribed in sections 10 or 11. *See id.* § 9.

101. *See id.* § 5.

102. *See id.* § 7.

103. *See id.* §§ 10-11. For the full text of section 10, see note 19. Section 11 allows a court to modify or correct an award in the interest of justice so as to effect the true intent of the award. Specifically, upon the application of any party to the arbitration agreement, the court may modify or correct an award when an obvious miscalculation of figures or an evident error in the description of any item referred to in the award is present; when the arbitrator made an award upon a matter not submitted to him, and the matter affected the merits of the decision upon the matter submitted; or when the award's form is imperfect and does not affect the controversy's merits. *See id.* § 11.

104. *See id.* § 2.

were normally enforceable.[105] Second, the courts could vacate or modify an award procured through a valid arbitration process only under a very narrowly defined set of conditions.[106] This second modification of the law is the focus of this Note.

The FAA protects the efficiency of arbitration and gives the parties confidence in the final award by providing only extremely narrow grounds for judicial review.[107] By creating an exclusive list of grounds for review, Congress completed the task of putting arbitration agreements on an equal footing with other contracts.[108] Merely making agreements to arbitrate enforceable would not have been a satisfactory solution. Without the limitations on judicial review, parties compelled to arbitrate under the FAA could easily circumvent the result by challenging the arbitrator's award.

B. Judicial Developments: A Brief Look at What the FAA Means Today

The FAA governs all arbitration agreements "evidencing a transaction involving commerce."[109] Congress enacted the FAA using its powers under the Commerce Clause.[110] The substantive provision, section 2, makes arbitration agreements valid, irrevocable, and enforceable.[111] The Act applies in both federal and state courts, and state law contrary to its substantive provision is preempted.[112]

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105. *See supra* notes 90-92 and accompanying text.

106. *See* 9 U.S.C. §§ 10, 11.

107. *See id*; *supra* note 19 and accompanying text. Note that the FAA's grounds for vacatur, modification, and correction found in sections 10 and 11 are not substantive in nature. They serve as procedural devices for ascertaining implied limits to which the parties contracted. The parties contracted for the final arbitration award, unless it was procured by fraud, collusion, or one of the other grounds. The procedural grounds serve te define the scope of the parties' contractual obligation. *See infra* Part V.A; *cf.* Volt Info. Sciences Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

108. Although the statute seems clear in its limitation of judicial review, many courts have created their own additional mechanisms for determining when arbitration awards should be vacated. *See generally* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 833-38 (1996) (finding that while these grounds exist, the majority of them are not valid exercises of judicial power under the FAA). While the merits of these mechanisms are beyond the scope of this Note, other commentators have addressed their propriety. *See generally* Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241 (1993); Brett F. Randall, Note, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759.

109. 9 U.S.C. § 2. The FAA also governs all maritime transactions. *See id.*

110. *See* Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967).

111. *See* 9 U.S.C. § 2.

112. *See* Southland Corp. v. Keating, 465 U.S. 1, 10-16 (1984).

The constitutional definition of "evidencing a transaction involving commerce" is quite broad. "Involving" is the equivalent of "affecting," and as such reaches to the full extent of Congress's powers under the Commerce Clause.[113] "[E]videncing a transaction" does not require the parties to have contemplated a transaction affecting commerce; instead it merely requires that effect to have in fact occurred.[114] Such a broad definition of commerce will include a substantial number of arbitration agreements.[115]

Federal policy also favors arbitration.[116] According to the Supreme Court, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," whether the issue is the construction of the contract language or an allegation of waiver, delay, or other defense to arbitrability.[117]

The only limitation on the enforceability of arbitration provisions governed by the FAA is that an arbitration agreement can be "revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' "[118] These grounds are typical contract defenses such as fraud, duress, and unconscionability.[119] Even this limitation is dampened, however, by two criteria. First, these defenses must be aimed at the agreement to arbitrate itself.[120] In other words, the arbitration clause is examined in isolation when determining whether an agreement to arbitrate existed in the first place.[121] Second, these defenses must be arbitration neutral. States harboring some hostility to arbitration cannot enact legislation aimed to defeat arbitration agreements solely on the basis of their identity. State law is valid as

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113. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-77 (1995).

114. *See id.* at 279-81.

115. *See* Janet M. Grossnickle, Note, Allied-Bruce Terminix Cos. v. Dobson*: How the Federal Arbitration Act Will Keep Consumers and Corporations Out of the Courtroom*, 36 B.C. L. REV. 769, 789-91 (1995); *see also Allied-Bruce Terminix Cos.*, 513 U.S. at 282 (O'Connor, J., concurring) (finding that such a broad reading will displace many state statutes).

116. *See* Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 25 (1982).

117. *See id.* Typically, the court has the power to determine if the parties intended to arbitrate. If the parties agreed te leave the question of arbitrability to the arbitrator, however, then the arbitrater decides the issue, and the court's review is limited by the grounds enumerated in the FAA. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-43 (1995).

118. *See* Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1982) (quoting 9 U.S.C. § 2). The Court found that the requirement that the agreement be part of a written maritime contract or a contract affecting interstate commerce te be another limitation on enforceability under state law. *See id.* This requirement does not limit enforceability, however, because it defines the coverage of the Act.

119. *See* Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652, 1656 (1996).

120. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967).

121. For example, if a party te an arbitration agreement alleges fraud in the inducement of the contract generally, the issue must proceed to arbitration. If the claim is fraud in the inducement of the arbitration clause, however, a court may decide the claim. *See id.*

to arbitration agreements only if the purpose behind the law is to govern the validity, revocability, and enforceability of contracts generally.[122]

While the FAA's substantive command and the federal policy favoring arbitration cannot be contradicted by state law,[123] the applicability of the FAA's procedural devices to state court proceedings has never been determined.[124] One aspect of procedure is certain, however. Parties to an arbitration agreement can choose not to have the FAA's procedural provisions apply by including a choice-of-law provision in their contract.[125] If the parties agreed to such a clause, and the court finds that the parties intended the provision to result in the governance of state procedures, the FAA will be preempted.[126] This flexibility is constrained by two limitations. First, the parties must make their intention to have state law govern absolutely clear.[127]

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122. *See* Perry v. Thomas, 482 U.S. 483, 492-93 n.9 (1987). The Court explained:

> A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Id. at 492-93.

123. *See supra* note 111, *infra* notes 131-32 and accompanying text.

124. The FAA compliments section 2, which makes arbitration agreements enforceable, with two procedural enforcement provisions that speak only of "courts of the United States" and "United States district court[s]." 9 U.S.C. §§ 3, 4 (1994). The Supreme Court has not determined whether those provisions nonetheless apply to state court proceedings. *See* Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477 n.6 (1989).

125. *See Volt Info. Sciences, Inc.*, 489 U.S. at 472-79. The choice-of-law clause need only be included within the contract as a whole. It does not have to be within the arbitration clause itself. The court's determination of whether the parties intended to have the state law procedural devices govern is what is important. *See id.* The *Volt* decision is examined in Part IV.

126. *See id.* Determining the parties' intent may not be an easy task, however. *See* Arthur S. Feldman, Note, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University: *Confusing Federalism with Federal Policy Under the FAA*, 69 TEX. L. REV. 691, 711-19 (1991) (examining the difficulty that a court may face in determining the parties' intent as te what law governs when they have agreed to a choice-of-law clause).

127. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 53-64 (1995). In *Mastrobuono*, the Court used a dubious contract interpretation to uphold an arbitrator's award of punitive damages. The parties had incorporated a New York choice-of-law clause into their agreement, but New York law prohibited arbitrators from awarding punitive damages. The Court found the agreement ambiguous, and as such, any doubts were to be resolved in favor of arbitration. The Court then upheld the arbitrator's award. *See id.* at 62-63.

One commentator has read *Mastrobuono* as establishing:

> [C]hoice-of-law provisions are properly interpreted to exclude a particular matter from arbitration, or to limit the arbitration proceeding in a manner inconsistent with the FAA, only when the parties' contract clearly and unequivocally evidences a mutual intent to that effect. Given the "boilerplate" nature of and vague wording of the typical contractual choice-of-law provision, that result seems unlikely in most cases.

Second, state procedures can never undermine the federal policy favoring the enforceability of arbitration agreements.[128] Whether courts can turn to state law procedures instead of the FAA for governance absent such a choice-of-law clause is uncertain. Presumably, as long as the state procedures do not frustrate the federal policy, they could govern.[129]

Typically, parties wishing to confirm, modify, or vacate an arbitration award will find themselves in state court because of arbitration's contractual nature.[130] Most states have passed arbitration statutes that supply their courts with the authority to hear these requests.[131] But these state statutes, when in conflict with the FAA's substantive commands, should only govern those few agreements not concerning interstate commerce or a maritime transaction. Unfortunately, many state courts still mistakenly examine arbitration agreements for compliance with their own state statutes when the FAA should govern.[132]

Hayford, *supra* note 22, at 21.

128. *See Volt Info. Sciences, Inc.*, 489 U.S. at 477-78; Doctor's Assos., Inc. v. Casarotto, 116 S. Ct. 1652, 1655-57 (1996). Evidently, the Court will not allow the states to use this opening to undo the decades of Court jurisprudence favoring arbitration. To what extent the Court will allow states to enact procedural provisions that do not substantively conflict with the FAA is beyond the scope of this Note. *See* Feldman, *supra* note 126, at 720-27 (arguing that states should only be allowed to gap-fill or update the FAA when such provisions would further the federal policy favoring arbitration); *see also* Dwight F. Pierce, Note, *The Federal Arbitration Act: Conflicting Interpretations of Its Scope*, 61 U. CIN. L. REV. 623, 634-51 (1994) (analyzing conflicting cases in judicial attempts to follow *Volt*).

129. While a definitive answer is beyond the scope of this Note, other authors have addressed the question. *See generally* Jon R. Schumacher, Note, *The Reach of the Federal Arbitration Act: Implications on State Procedural Law*, 70 N.D. L. REV. 459, 482-84 (1994) (finding that no practical reason against upholding state statutes that do not conflict with the federal policy favoring arbitration exists); Feldman, *supra* note 126, at 725-26 (reaching the same conclusion).

130. The FAA does not create independent federal question jurisdiction. *See* Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1982). The Court explained further:

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction under 28 U.S.C. § 1331 (1976 ed., Supp. V) or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue. Section 3 likewise limits the federal courts to the extent that a federal court cannot stay a suit pending before it unless there is such a suit in existence. Nevertheless, although enforcement of the Act is left in large part to the state courts, it nevertheless represents federal policy to be vindicated by the federal courts where otherwise appropriate.

Id. (citation omitted).

131. *See* DOMKE, *supra* note 1, § 4:01, at 2 (noting that only Alabama, West Virginia, and Mississippi do not have modern arbitration statutes).

132. As one leading commentator has noted:

In summary, the FAA governs a substantal number of arbitration agreements. The federal policy favoring arbitration subjects tlie enforcement of those agreements to few limitations. States are bound by the substantive command of section 2 of the FAA, which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[133] State law contrary to this command, whether procedural or substantive, is preempted. This requirement should prevent state law expansion of the courts' role in judicial review, because displacing finality undermines the FAA's command of enforcement.[134] Merely following federal policy in holding arbitration agreements enforceable is not sufficient if the losing party can challenge arbitration awards in a court acting under an expanded role. Whether *parties* can contractually expand the judicial role will be determined in Part V.

IV. JUDICIAL INTERPRETATIONS: FOR WHAT CAN PARTIES CONTRACT?

This Part focuses on two Supreme Court decisions that answer two critical questions. First, under what circumstances may parties contract for variations on the statutory rules governing arbitration? Second, is enforcing the parties' agreement to the letter more important than increasing tlie efficiency of the process? In answering these questions, the opinions slied light on tlie Court's willingness to enforce arbitration agreements to the letter.

A. Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Umversity

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, Volt Information Sciences ("Volt") entered into a construction contract with the Board of Trustoes of

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Although the state arbitration statutes appear te be an impressive body of law and are accompanied by very extensive judicial interpretation, the arena of their applicability has been vastly reduced by recent decisions of the Supreme Court of tlie United States. Indeed, it is likely tliat they now apply only to tlie fringes of economic activity, those rare fringes not affecting interstate commerce in its constitutional sense. It is extremely important to recognize wliat has happened, as there are still many arbitration cases being decided under state law that are quite clearly governed by the FAA.

IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 5.4.4, at 5:13-14 (1995) (citations omitted).

133. 9 U.S.C. § 2 (1994).

134. *See* Zhaodong Jiang, Note, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 527-28 (1990). The point is somewhat moot, however, in light of the current statutory uniformity in grounds for vacatur or modification of arbitration awards. *See supra* note 27 and accompanying text.

Stanford University under which Volt was to install an electrical system.[135] The contract contained an arbitration agreement that covered disputes arising from the contract and a choice-of-law clause that effectively provided that California law governed.[136] A dispute arose, and Volt demanded arbitration.[137] Stanford, however, filed an action in California Superior Court against Volt and two other companies with whom it had not made arbitration agreements.[138] Volt asked the court to compel arbitration, but the court refused.[139] In doing so, the court relied on a California statute that permitted it to stay arbitration "pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, when 'there is a possibility of conflicting rulings on a common issue of law or fact.' "[140] The California Court of Appeal affirmed, even though it recognized that the contract came within the purview of the FAA.[141] The California Supreme Court denied Volt's petition for discretionary review.[142]

The Supreme Court rejected Volt's argument that the California Court of Appeal essentially found that Volt had waived a federally guaranteed right to compel arbitration.[143] Noting that the FAA was designed to place arbitration agreements on equal footing with other contracts, the Court held that the FAA did not confer an automatic right to compel arbitration in all situations.[144] Rather, the FAA only gives the right to compel arbitration in the manner provided by the agreement.[145] Recognizing that it was bound by the contractual interpretation of the California Court of Appeal, the Court found that, by incorporating California law, the parties had agreed not to proceed with arbitration until related pending litigation, pursuant to the California statute, was resolved.[146] The Court then found that this conclusion was not a finding of a waiver, but a finding that the parties

135. 489 U.S. 468, 470 (1989).
136. *See id.* The choice of law clause provided that the law of the place where the project was located would govern. The project was located in California. *See id.*
137. *See id.* at 470-71.
138. *See id.* at 471.
139. *See id.*
140. *Id.* (quoting Cal. Civ. Proc. Code Ann. § 1281.2(c)).
141. *See id.* at 471-72.
142. *See id.* at 472-73.
143. *See id.* at 474.
144. *See id.*
145. *See id.* at 474-75.
146. *See id.* at 475.

had not agreed to arbitrate until the California statute's requirements had been met.[147]

The Court also rejected Volt's contention that such a finding would be contrary to the federal policy favoring arbitration.[148] While agreeing that such a policy exists, the Court did not find that the Court of Appeal's interpretation of the choice-of-law provision was offensive to it.[149] Instead, the Court asserted that the federal policy of enforcing agreements to arbitrate according to their terms does not extend to favoring enforcement under a certain set of procedural rules.[150]

Last, the Court explored the preemptive effect of the FAA. Noting that the FAA governed the contract, the Court found no language within the FAA that would allow a court to stay arbitration.[151] The Court stated that preemption turned on the answer to one critical question—whether the state law, as applied under the terms of the agreement, would undermine the goals and policies of the FAA.[152] The Court concluded that the FAA's primary goal was the enforcement of parties' agreements by their terms and that the expeditious resolution of disputes was secondary.[153] Consequently, parties can contract for their own procedural rules so long as they do not undermine the FAA's substantive command of making the agreement enforceable.

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147. *See id.*
148. *See id.* at 476.
149. *See id.*
150. *See id.*
151. *See id.* at 476-77.
152. *See id.* at 477-78.
153. *See id.* at 478. The Court continued:

> [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements te 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 they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts te "rigorously enforce" such agreements according to their terms, we give effect te the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.

Id. at 479 (citations omitted).

B. Dean Witter Reynolds, Inc. v. Byrd

In *Dean Witter Reynolds, Inc. v. Byrd*, the Supreme Court determined whether a district court should compel arbitration of an arbitrable claim when arbitrable and nonarbitrable claims are pleaded in the same complaint.[154] More importantly for purposes of this Note, the Court was forced to weigh the efficiency of arbitration against the goal of enforcing arbitration agreements.

The issue arose when Byrd invested with Dean Witter and signed a contract agreeing to arbitrate future disputes.[155] A large portion of his investment was lost within the year, and he filed suit in the District Court for the Southern District of California, alleging violations of various federal and state law provisions.[156] Dean Witter, assuming the federal claims were not subject to arbitration and as such could only be resolved in federal court, asked the court to compel arbitration of only the state law claims.[157] The district court refused to compel arbitration, and the Ninth Circuit affirmed.[158]

In addressing the issue, the Court resolved a split among the circuits. The Fifth, Ninth, and Eleventh Circuits had relied on the "doctrine of intertwining," which gave district courts the discretion to deny arbitration and to try both the arbitrable and nonarbitrable claims together in federal court when the claims arose out of the same transaction and were sufficiently factually and legally intertwined.[159] These courts acknowledged the strong federal policy in favor of arbitration, but argued that compelling arbitration would reduce efficiency because the claims would result in bifurcated proceedings and duplicate litigation.[160] The Sixth, Seventh, and Eighth Circuits, however, had found that no such discretion could exist in light of the strong federal policy favoring arbitration and the plain wording of the FAA.[161] These courts refused to substitute their own views of efficiency for those of Congress and would always compel arbitration under the agreement.[162] The Supreme Court agreed with the latter

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154. 470 U.S. 213 (1985).
155. *See id.* at 214-15.
156. *See id.* at 214.
157. *See id.* at 215.
158. *See id.* at 215-16.
159. *See id.*
160. *See id.* at 217.
161. *See id.* The FAA provides in section 4 that the district "court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (1994) (emphasis added).
162. *See Dean Witter Reynolds, Inc.*, 470 U.S. at 217.

perspective and held that district courts do not have discretion to refuse to compel arbitration when both arbitrable and nonarbitrable claims exist, even though inefficiencies may result.[163] Finding that the parties had agreed to arbitrate, the Court proceeded to compel arbitration.[164]

In reaching its decision, the Court was confronted with the argument that Congress's primary intent in enacting the FAA was to maximize efficiency in dispute resolution and that the goal of enforcing private arbitration agreements should be subservient to that intent.[165] Delving into the legislative history of the FAA, the Court rejected the argument that expeditious dispute resolution was Congress's primary goal.[166] Quite the opposite, the Court found that Congress was principally motivated by a desire to enforce parties' agreements.[167] The Court noted that "the fortuitous impact of the Act on efficient dispute resolution [should not be permitted] to overshadow the underlying motivation."[168] Agreements must be enforced even if the result is "piecemeal" legislation.[169] Thus, the Supreme Court found that congressional policy favors sacrificing efficiency when necessary to honor the parties' agreement.

V. ANALYSIS: PUTTING IT ALL TOGETHER

Examining the propriety of parties' contractual attempts to expand the limited grounds for judicial review requires a two-step approach. First, whether parties have the *power* to alter the court's role as defined by the FAA must be determined. *Can* parties contractually expand the limitations placed upon judicial review by statute? Second, the question of whether parties *should* be allowed to make such agreements must be resolved. Would enforcing the agreement undermine the goals of judicially enforceable arbitration?

A. Can Parties Contract for Judicial Review?

Do parties to arbitration have the power to alter a court's role as established by the FAA? The *LaPine* court made a strong argu-

163. *See id.*
164. *See id.* at 223-24.
165. *See id.* at 218-21.
166. *See id.*
167. *See id.* at 220.
168. *Id.* (citation omitted).
169. *See id.* at 220-21.

ment that they do not.[170] That court concluded that parties usurp Congress's authority to determine the judiciary's role when they contractually alter that role.[171] That court was also concerned with the resulting loss in efficiency.[172] Both the *FICAL* and *Gateway* courts, however, found that the contractual nature of arbitration took precedence over the statutory limitatious on the courts' role.[173] A look at Supreme Court interpretations of the FAA and a look at the purpose of the limited grounds for judicial review in the FAA reveal that *FICAL* and *Gateway* were correct—parties can contract for an increased scope of judicial review.

In *Volt*, the Supreme Court noted that the FAA was not intended to occupy the entire arena of arbitration law.[174] Finding parties generally free to specify by contract the rules under which they will conduct arbitration, the Court did not hesitate to sacrifice procedure or efficiency in favor of honoring the contractual agreement.[175] Thus, no per se rule that parties must use the procedural devices of the FAA exists. Instead, only two discernable limitations exist on the extent to which parties may contract for procedural rules: (1) the intent to do so must be clear and (2) the rules for which the parties contract cannot undermine the FAA's policy of enforcing agreements to arbitrate.[176] The arbitration agreements discussed in Part II do not violate either limitation. The agreements are clear in their intent to expand upon the level of judicial review[177] and the expanded judicial review does not challenge the enforceability of the agreement.

Arguably, increasing the scope of judicial review substantively undermines enforceability. By allowing parties to take an arbitration award to a court acting under a de novo (or other increased) standard, the finality of the arbitration process has, at least indirectly, been compromised. Compromising finality could be understood to mean a

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170. *See supra* notes 74-79 and accompanying text. Of the three federal cases that have addressed the question, only *LaPine* attempts to provide its reasoning. Moreover, only *LaPine* citos any precedent for its conclusion. Its heavy reliance on that precedent was misplaced, however, as it was only dicta. Thus, the only real authority for the answer to the question is these three cases.

171. *See id.*

172 *See* LaPine Tech. Corp. v. Kyocera Corp., 909 F. Supp. 697, 705-06 (N.D. Cal. 1995).

173. *See supra* notes 35-39 and 54-58 and accompanying text.

174. *See* Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

175. *See id.* at 475-79.

176. *See supra* notes 125-28 and accompanying text.

177. *See supra* notes 30, 47, 66 and accompanying text. Each agreement expands upon the level of review provided by the FAA. *See supra* note 19.

corresponding undermining of enforceability. Such a conclusion, however, would be erroneous. First, federal policy favors enforcing arbitration agreements according to their terms,[178] and an expanded judicial review clause is part of those terms. Second, the grounds for vacatur enumerated in the FAA actually are only codified forms of contractual interpretation.[179] They serve only to aid the court in determining exactly for what the parties contracted, by representing implicit limitations on the contractual obligation. In this regard, the arbitration award can be viewed as the arbitration contract *itself*, with the FAA's provisions only helping to define the agreement's scope. When the parties have clearly and unequivocally contracted for additional grounds, these grounds become part of the agreement, and as such, must be enforced. Since the grounds in the FAA serve only to determine for what the parties really contracted, the FAA should not invalidate clear agreements that define the scope of the obligation.

The *LaPine* court was unpersuaded by the argument that parties can contract for their own procedural rules when the procedures affect the court's role in the process. This ignores the facts of *Volt* itself.[180] The challenge in *Volt* also concerned a contractual alteration of the court's role in the arbitration process.[181] Section 4 of the FAA states that the "court *shall* make an order directing the parties to proceed to arbitration."[182] Section 3 directs a court to stay litigation when an issue is referable to arbitration.[183] Yet the court in *Volt* held that the parties were within their rights to contract for a rule that would allow the court to stay arbitration pending the outcome of related litigation.[184] Thus, under *Volt*, parties have the right to alter a court's role in the arbitration process.

Volt can also be read as holding that a reduction in benefits expected from arbitration does not preclude expansion of the judicial role. The Court's holding allowed one of the parties to stay arbitration until related litigation with other nonparties to the arbitration agreement was complete. At the very least, this decision will result in some delay before the parties enter arbitration and will carry some additional cost. The Supreme Court's holding in *Dean Witter* also

178. *See Volt Info. Sciences, Inc.*, 489 U.S. at 475-79.
179. *See supra* note 107.
180 *See LaPine Tech. Corp.*, 909 F. Supp. at 705.
181. *See supra* Part IV.A for a discussion of *Volt*.
182. 9 U.S.C. § 4 (1994) (emphasis added).
183. *Id.* § 3.
184. *See supra* Part IV.A.

makes clear that the sacrifice of efficiency does not mandate a finding that the parties have exceeded their contractual authority.[185] Thus, a reduction in expected benefits does not limit the parties' contractual power. Whether it *should* limit that power is examined in Part V.B.

This approach makes sense from an efficiency standpoint. If the parties had not agreed to arbitrate, they could have taken their disputes to court, and the court would have been forced to hear the substance of the claim. By agreeing to arbitrate, however, the parties legitimately bypassed the court.[186] Should arbitration fail, or if the parties want to expand the court's role, they will only end up where they could have gone initially. No logical reason to penalize the parties for choosing to arbitrate exists.[187]

In summary, parties do have the power to alter contractually the judicial role. The Supreme Court has clearly established that the FAA's procedural devices are not set in stone. Agreements that alter these devices at the expense of some expected benefits do not exceed the parties' contractual power. Instead, increasing the judicial role represents a contractual obligation that the FAA is meant to define and enforce, not invalidate.

B. Should Parties Be Allowed to Contract for Increased Judicial Review?

Having determined that arbitration parties *can* contract for increased judicial review would seem to end the analysis. Both the district court in *LaPine*[188] and the district court in *Gateway*,[189] however, argued that public policy must be a factor in deciding whether to allow parties to increase contractually the court's role.[190] Those courts

185. *See supra* Part IV.B.

186. Of course, the judiciary will still play a role should either party seek enforcement.

187. *See infra* Part V.B for an analysis of why parties *should* be allowed to increase the role of the court.

188. *See supra* notes 80-82 and accompanying text.

189. *See supra* notes 56-58 and accompanying text.

190. Admittedly, practical limits exist regarding for what arbitration parties can contract while still expecting the courts te enforce the agreement by limiting their review to the grounds in the FAA. For decades, courts have recognized these limitations and have often stretched their role to include examinations of awards for "manifest disregard of the law" or violations of public policy. Hayford, *supra* note 108, at 739. Practically, policy influences must play some role. When confronted with potential public policy violations, some commentators have suggested that courts be permitted to make ad hoc determinations rather than be confined to the statutory standards of review. *See* Francis E. Jones, Jr., *The Nature of the Court's "Jurisdiction" in Statutory Arbitration Post-Award Motions*, 46 CAL. L. REV. 411, 411-19 (1958); Note, *Judicial Review of Arbitration: The Role of Public Policy*, 58 NW. L. REV. 545, 548 (1963). Commentaters have also argued that courts often exceed their authority and undermine the

claimed that the loss of expected benefits resulting from such agreements violated public policy, and therefore, precluded their enforcement. For a complete analysis, these concerns must be addressed. The question, then, is *should* parties be allowed to contract for increased judicial review?

To analyze whether parties should be allowed to increase the courts' role, a list of expected benefits that support the public policy rationale must be established. The drafters of the FAA promoted the statute as combating three main "evils," all related to efficiency. First is the delay incident to a proceeding in the courts.[191] In centers of commercial activity where the court calendars are frequently congested, the delay often amounts to several years.[192] Factors contributing to this delay are preliminary motions and other steps that litigants may take and the appeals that are open to them.[193] The second evil that the FAA was designed to combat is the expense of litigation.[194] The last evil is the failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world.[195] This failure may result either because the courts necessarily apply general rules that do not fit all cases or because the judge or jury is not, and cannot be made, familiar with the peculiarities of the given controversy.[196] A judgment by individuals experienced in the relevant field is one of the greatest advantages of arbitration.[197]

Other expected benefits of arbitration include privacy, adaptability, the parties' control over the process, reduction in hostilities, and lack of disruption of current and future dealings between the parties.[198] According to the Supreme Court, however, all of these benefits are *secondary to the primary benefit of enforceability. Dean Witter* clearly established that the FAA's primary goal is to enforce arbitration agreements.[199] Enforceability itself allows parties to adapt arbitration to meet their needs and generate expected benefits. While Congress may have had potential efficiencies in mind when passing the FAA, those motivations were secondary to the

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FAA when engaging in such review. *See* Hayford, *supra* note 108, at 739. Whether or not courts should have this discretion is beyond the scope of this Note. In practice, though, courts exercise such discretion, and any analysis must account for it.

191. *See* COMMITTEE ON COMMERCE, *supra* note 98, at 155.
192. *See id.*
193. *See id.*
194. *See id.*
195. *See id.* at 155-56.
196. *See id.*
197. *See id.*
198. *See supra* notes 5-11 and accompanying text.
199. *See supra* Part IV.B.

primary goal. Thus, sacrificing efficiency[200] in favor of enforceability does not undermine the FAA's primary purpose. Enforcing an arbitration agreement that provides for expanded judicial review promotes the primary goal of enforcement, even if it sacrifices some efficiency and other benefits. In light of the Supreme Court's view of the goals of the FAA, such an agreement *should* be enforced, regardless of other considerations. The Supreme Court's view may not coincide with that of the parties, however, so the effect of such agreements on other expectations still must be considered.

When analyzing public policy factors, the *LaPine* court concentrated on the expected benefits to the parties and courts. For simplicity, this Note will work within that framework. From the individual party's perspective, enforcement of agreements that increase the court's role fulfills her expectations. Arbitration is beneficial to individual parties *because* it allows them to structure the process to fit their needs. Clauses establishing an expanded level of judicial review exist for a reason, most likely to offer some protection from unpredictable or biased results.[201] The parties who have made the agreement expect it to be enforced. Failure to do so may force the parties to forego any attempt at arbitration, thus removing *all potential benefits*. While the district courts in *LaPine* and *Gateway* may have been justified in their concern over the loss of benefits in the individual cases before them, those courts failed to perceive the effect that their holdings might have on future parties. Future parties may head straight to court rather than arbitration, not wanting to risk having the court invalidate a necessary portion of their arbitration agreement.

Enforcing agreements to expand judicial review of arbitration awards, as done in *FICAL* and *Gateway*, fulfills the parties' expectations. Admittedly, a reduction in individual efficiencies may occur. The process may be longer and more costly than had such an agreement not been enforced. Giving the court an increased voice in the final solution may also remove much of the efficiency that the arbitrator's expertise creates. Enforcement does not necessarily lead to the complete reemergence of the three "evils," however. Arbitration may still save time and expense by narrowing the contested issues. The court's role will also be limited to that established by the parties. As long as the parties do not contract for unconstrained judicial review,

200. The same analysis should apply to other expectod benefits, such as the parties' control over the process.

201. *See supra* noto 21 and accompanying text.

some efficiency will still be retained. Other advantages and expected benefits can also be retained to some extent. The parties retain control over the arbitration process, and the agreement continues to provide the context for any increased judicial review. Moreover, limiting the matters before the court will result in increased privacy and reduced hostility.

In considering the parties' expectations, then, some benefits may be lost in individual cases in which the parties have agreed to increased judicial review and actually end up in court. This result is exactly what they expected, however. On a broader level, enforcing the agreement to the letter gives other parties the confidence that their agreements will be upheld. The public must know that it can contract for what it wants without having to worry about subsequent court intervention. Judicial enforcement will, therefore, lead to increased, or at least sustained, use of arbitration, with a corresponding increase in expected public benefits.

This conclusion leads to the second question: Would increasing the courts' role derail expected judicial benefits? Providing confidence in the process also alleviates the *LaPine* court's concern regarding additional burdens on the judiciary. If individuals know that their agreements will be upheld, they will be more likely to arbitrate, and therefore, less likely to end up in court. As a result, enforcing the agreement to expand judicial review will actually lead to a less crowded court docket. In addition, as noted in *FICAL*, even if the parties arrive in court after years of arbitration, at least the court does not have to start from the beginning.[202] It will only have to review an award for compliance with the additional grounds for which the parties contracted. The arbitration process will also likely have forced the parties to narrow the issues to be contested in court.

In summary, public policy, as defined through expected benefits to the parties and the courts, supports the conclusion that parties should be allowed to contract for expanded judicial review of arbitration awards. While some benefits may be lost to both the courts and the parties in individual cases, the process will still produce some benefits over litigation. Enforcing the agreements will also lead to public confidence and increased use of arbitration, generating future benefits.

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202. *See supra* notes 44-45 and accompanying text.

C. Exploring Other Options

This analysis has shown that parties have the power to increase contractually the scope of judicial review, albeit at the cost of some expected benefits in individual cases. This conclusion is not meant to imply, however, that such agreements should be encouraged. Arbitration's nature can give rise to substantial efficiencies, which are reduced with expansion of the judicial role. Parties should explore other alternatives and turn to the courts only as a last resort.

For instance, the parties could limit the arbitrator's power by providing parameters for her award.[203] If the award were outside the parameters, it would have no effect.[204] The parties could remove any possible influence this might have on the arbitrator by agreeing that she would not be informed of the limitation. While providing parameters gives the parties greater direction in planning for the outcome, it does not alleviate the fear of bias. Thus, this procedure is best-suited for those parties who are more concerned with unpredictability than partiality. Regardless, parameters may only provide a partial solution. If the award is outside the parameters and the parties do not find a way to settle their dispute, they will be forced to arbitrate again or turn to litigation. The original efficiency gained by turning to arbitration will be reduced in any subsequent litigation or arbitration.

Parties could also agree to expand the available scope of judicial review, but provide for potential penalties for its use.[205] While still undermining efficiencies, allowing for penalties will dissuade parties from running to court in all but the most egregious of circumstances. Another option is for the parties to agree to have an appellate arbitration panel hear appeals.[206] While this option would add to overall cost, many of the other efficiencies of arbitration might remain because the parties would still retain control over the process.

Although some combination of these methods may be helpful, the parties may decide that an expanded level of judicial review is the only acceptable procedural protection. If that is the case, their agreement should be enforced, and the court should conform its review to the scope established contractually by the parties.

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203. *See* Meyerowitz, *supra* note 4, at 80.
204. *See id.*
205. *See* Burger, *supra* note 5, at 277.
206. See Hayford & Peebles, *supra* note 4, at 405-06.

VI. CONCLUSION

The contractual nature of arbitration allows parties to mold it into a procedure that provides many benefits over other forms of dispute resolution. For these benefits to occur, arbitration must provide a binding and final determination. Otherwise, the benefits will be lost through subsequent litigation. To be binding and final, arbitration must preclude substantial judicial review of resulting awards. The FAA has met this need and allows for vacatur by judicial review only on specific, limited grounds.

When parties contract to increase this limited scope of judicial review, they may sacrifice some of the benefits originally gained by avoiding litigation. Nevertheless, the primary goal of arbitration statutes is to enforce the parties' agreements to the letter, lending confidence to the process. As such, these agreements should be upheld, regardless of any loss in expected benefits.

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