ARBITRATION IN THE CORPORATE CONTEXT

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I. INTRODUCTION

Those involved in corporations easily perceive the efficiency and cost advantages in arbitration over litigation.[1] Efficiency is gained through informality of procedural and evidentiary rules, as well as limited discovery.[2] Unlike a judge, the arbitrator or arbitration panel is selected by the parties and typically will be an expert in the relevant field, saving the costs of educating a judge or jury about the factual setting and increasing the parties' confidence that a sensible result will be reached.[3] Arbitration can be particularly effective when the parties have an ongoing relationship, as it avoids the entrenchment created by the adversarial stance of protracted litigation.[4] Parties may also have a sense that any unfairness in a given arbitral award will be equalized over the life of the relationship.[5]

Less apparent, however, is that most of these advantages have substantial negative implications as well.[6] In the interest of speedy adjudication, an arbitral decision is normally rendered without an opinion.[7] Experts chosen by the parties for their familiarity with the subject matter are rarely experts in the law, and in any event are not bound to follow the

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[1] *See* John S. Murray et al., Processes of Dispute Resolution: The Role of Lawyers 506 – 07 (2d ed. 1996).

[2] *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235–40 (1979).

[3] *See* Lon Fuller, *Collective Bargaining and the Arbitrator*, 1963 WISC. L. REV. 3, 11– 12, 17 (1963).

[4] *See* MURRAY, *supra* note 1, at 507.

[5] *See* R. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 922-23 (1979).

[6] One federal court has observed that arbitration is an "inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law." Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 751 n.12 (8th Cir. 1986).

[7] *See* MURRAY, *supra* note 1, at 514. In fact, the American Arbitration Association actively discourages arbitrators from writing reasoned opinions. *See id.*

law at all.[8] Though limited discovery saves time and money, it hinders a party's ability to develop facts. This can be critically important. Furthermore, judicial review is extremely limited in scope and extraordinarily deferential to arbitrators.[9] This lack of meaningful recourse to the courts after binding arbitration greatly increases the threat of permanent harm from repeat player bias and other fairness concerns.[10]

Further complicating arbitration is a series of Supreme Court rulings that interpret the Federal Arbitration Act ("FAA" or "Act") [11] to be a substantive body of law,[12] carrying presumptions that apply to all arbitration clauses and preempting state laws.[13] As Part II will demonstrate, these decisions are far from intuitive, and must be studied carefully to avoid the disasters that await the uninitiated.

With such conflicting and complicated considerations, inclusion of an arbitration clause in a contract is a difficult decision. It is nevertheless a critically important one, as often litigation and arbitration will yield dramatically different results. Furthermore, because arbitration is a matter of con-

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[8] *See, e.g.*, Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961) (reporting that 80% of arbitrators thought they should reach their decisions "within the context of the principles of the substantive rules of law," but that nearly 90% believed they were free to ignore these rules whenever they felt a more "just" ruling was possible in the absence of the rules).

[9] *See, e.g.*, Edgar A. Jones, Jr., *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 UCLA L. REV. 1241, 1296 (1966) (stating that of "the overwhelming majority of that miniscule portion which are appealed, only an infinitesimal few have ever been vacated").

[10] For discussion of the tendency to use the same arbitrator in multiple proceedings, see Bognanno & Smith, *The Demographic and Professional Characteristics of Arbitrators in North America*, Proceedings, 41st Annual Meeting, Nat'l Academy of Arbitrators 266, 269, 277-79 (1988).

[11] 9 U.S.C. §§ 1-11 (1925).

[12] *See, e.g.*, Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956).

[13] *See* Southland Corp. v. Keating, 465 U.S. 1 (1984).

tract between the parties, a careful drafter must be aware not only of *whether* to include an arbitration provision, but also *what* should be included. Arbitration leaves such matters as the scope of issues, remedies, location, timing, choice of law and choice of arbitrator open to the discretion of the parties. As many litigants have found to their dismay, poor drafting of an arbitration provision can give away the game before a dispute ever arises.[14]

It is difficult to understand the courts' current stance on arbitration without first understanding the schizophrenic history of arbitration in the United States, particularly focusing on the federal common law that is being created by the Supreme Court's interpretation of the FAA. An understanding of this history, discussed in Part II, is vital to understanding more recent Supreme Court jurisprudence, which is presently reshaping the face of arbitration. Part III examines judicial review of arbitration awards, underscoring the need to get it right the first time. Part IV spotlights three recent Supreme Court cases. Part V then predicts the outcome of two circuit court splits. Examination of these issues should enable a corporate decision-maker to come to an informed decision about arbitration.

II. ARBITRATION IN CONTEXT: BRIEF HISTORICAL SURVEY

From judicial hostility to a federal presumption in favor of arbitration, the history of the enforcement of arbitration agreements in the United States has undergone a remarkable sea-change.[15] This section examines that history, considering the rationales for the initial judicial hostility and the enactment of the FAA in 1925. The section then ad-

[14] *See, e.g.*, discussion *infra* Part IV concerning employees whose executory agreements to arbitrate resulted in what is arguably a forfeiture of their statutory rights and remedies under Title VII.

[15] *See, e.g.*, Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 827-864 (2000).

dresses the steady increase in positive treatment of arbitration by the Supreme Court, which is dramatically increasing the use of arbitration clauses in contracts.

A. Arbitration: Simply a Contract for Dispute Resolution

At its heart, an agreement to arbitrate is simply a contract between two or more parties to settle disagreements in a specific forum.[16] In exchange for any rights at law or equity they might have, parties agree instead to accept whatever remedy an arbitrator thinks appropriate.

In the typical situation, for example, two merchants with a good faith disagreement about the interpretation of a contract term might agree that they will be bound by whatever a selected third party determines the correct interpretation to be. Often this third party is another merchant, expert in the customs of the trade, though lacking more than a sophisticated layperson's grasp of the law. The agreement to abide by the arbitrator's decision will be memorialized in an arbitration agreement and, once the decision is issued, the winning party expects to be able to enforce it in court, just as with any other contract.[17]

Agreements such as the one outlined above were very common, even as far back as the Colonial period.[18] In New York, for example, arbitration was used to settle merchant disagreements and land boundary disputes, as well as to distribute the proceeds from privateering expeditions.[19] In fact, individuals advertised their willingness to arbitrate in the newspapers, suggesting that arbitration was seen as a social

[16] For contractual analysis demonstrating that the Supreme Court views arbitration agreements as contracts, even before the FAA, see Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924).

[17] *See* MURRAY, *supra* note 1, at 553.

[18] *See* William C. Jones, *Three Centuries of Commercial Arbitration in New York: a Brief Survey*, 1956 WASH. U. L.Q. 193, 209-210, 218-19 (1956).

[19] *See id.*

good, supplying a final stage in negotiations between disputants.[20]

B. Pre-FAA Hostility to Arbitration

Despite this widespread use, the development of commercial arbitration was thwarted by a judicial hostility to arbitration carried over from English common law.[21] From as early as 1609, English courts refused to enforce executory agreements to arbitrate.[22] An agreement to arbitrate remained executory until the final decision was rendered; until that point, either party could revoke the agreement and bring suit in the courts instead.[23] There were several reasons for this judicial hostility. First, arbitration was seen as an illegitimate effort to "oust the jurisdiction of the courts."[24] Some courts characterized this issue as a refusal to enforce arbitration because it deprives litigants of access to the courts.[25] More cynically, some commentators suggest that the hostility stemmed from competition, at a time when judges' salaries were partially derived from litigants' fees.[26]

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[20] *See id.*

[21] *See, e.g.*, MURRAY, *supra* note 1, at 552-53. For a summation of the situation during the common law era, see also Judge Frank's opinion in *Kulukundis Shipping Co. S/A v. Amtort Trading Corp.*, 126 F.2d 978 (2d Cir. 1942).

[22] *See* Vynoir's Case, 77 Eng. Rep. 595 (K.B. 1609) (regarded as establishing the rule that arbitration agreements may be revoked at any time before the arbitration award is issued).

[23] *See, e.g.*, Hayford, *supra* note 15, at 827.

[24] *See, e.g.*, Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1310 (1985) (citing many examples of state court opinions which relied on the "ouster of jurisdiction" principle to refuse enforcement of executory arbitration agreements).

[25] *See, e.g.*, Tobey v. County of Bristol, 23 F.Cas. 1313, 1320-21 (C.C.D. Mass. 1845) (stating that courts, when deciding whether to compel arbitration, must consider whether "they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and redress wrongs").

[26] *See* MURRAY, *supra* note 1, at 553.

This refusal to enforce arbitration agreements until an arbitration decision had been reached was amplified by both common law[27] and state statutes.[28] Pro-arbitration reformers first sought to alleviate the problem through state laws, but these were held by state courts to be remedial and procedural in nature.[29] This enabled a federal district court to hold that state laws declaring agreements to arbitrate enforceable did not create a substantive right of enforceability, but rather established a "remedy for the enforcement of the right that is created by the agreement of the parties."[30] The effect of this holding was to allow a party to sue for damages for breach of an arbitration agreement, but still withhold a court order directing arbitration to proceed.[31]

To the dismay of pro-arbitration reformers, the Supreme Court upheld this holding in *Red Cross Line v. Atlantic Fruit Co.*, where the Court stated:

> The federal courts -- like those of the States and of England -- have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance, or to stay proceedings on the original cause of action. They have not given effect to the executory agreement as a plea in bar; except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action.[32]

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[27] See, for example, Hayford, *supra* note 15, at n.207, for a sampling of common law decisions based on this rule.

[28] *See, e.g.*, 710 Ill. COMP. STAT. ANN. 5/1 (West 1993); VT. STAT. ANN. tit. 12, § 5652 (2000).

[29] *See, e.g.*, Atlantic Fruit Co. v. Red Cross Line, 276 F. 319, 323 (1921) (citing Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 289-90 (1921)).

[30] *See id.*

[31] *See* Hayford, *supra* note 15, at n.216.

[32] 264 U.S. 109, 120-21 (1924) (citations omitted).

C. The Federal Arbitration Act of 1925

Pro-arbitration reformers, led by the American Bar Association, reacted to *Red Cross Line* by launching an effort to create federal legislation to end the judicial refusal of enforcement. This four-year effort culminated in the passage of the United States Arbitration Act ("USAA"), now known as the FAA, on February 12, 1925.[33]

Section 2 is the key provision of the FAA.[34] It provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving interstate 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.[35]

The remaining sections of the FAA outline a comprehensive scheme for carrying out the directive of Section 2. A few provisions are spotlighted here, in order to shed light upon subsequent interpretations of the Act by the Supreme Court. Section 1 of the FAA sets the scope of the Act by defining "maritime" and "commerce," excluding from coverage only contracts of employment for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." [36] As will be seen, this definition permitted the Court to hold that Congress intended the scope of the FAA to

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[33] A thorough description of the historical passage of the FAA is beyond the scope of this paper. For a description of the passage of the FAA with an analysis of the legislative history, see IAN R. MACNEIL, AMERICAN ARBITRATION LAW 84-121 (1992).

[34] Hayford, *supra* note 15, at 830; Federal Arbitration Act, 9 U.S.C. § 2 (1994).

[35] 9 U.S.C. § 2.

[36] *Id.* at § 1.

be at the full limit of its powers under the Commerce Clause.[37]

Sections 3 and 4 direct courts, on application of either party to an agreement, to stay any suit and to compel arbitration.[38] Notably, Section 4 does not create independent federal jurisdiction for the party seeking to enforce arbitration. Instead, the party may bring petition in "any district court which, save for such agreement, would have jurisdiction . . . of a suit arising out of the controversy between the parties."[39] In other words, the underlying case must already be within the ambit of the district court before motions to compel and stay may be heard. As will be discussed *infra*, this failure to create independent jurisdiction has been used to argue that Congress saw the FAA as limited in purpose -- only designed to force courts to view arbitration agreements in the same light as other contracts.[40]

In a substantial departure from traditional arbitration rules, three sections provide court-like powers to arbitrators. Section 5 allows the *court* to appoint arbitrators if required to carry out an agreement.[41] More startlingly, Section 7 grants the arbitrator subpoena powers -- the ability to force participants *and witnesses* to appear before the arbitrators -- and the ability to punish with contempt any person who disregards such a summons.[42] Section 10 provides circumstances under which an arbitral award may be vacated or a rehearing ordered.[43] This section will be discussed at length in Part III, *infra*.

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[37] Allied Bruce Terminix v. Dobson, 513 U.S. 265 (1995). *See also* discussion *infra* Parts II-E and IV-B.

[38] 9 U.S.C. §§ 3-4.

[39] *Id.* at §4.

[40] *See infra* Part IV-A.

[41] 9 U.S.C. § 5.

[42] *Id.* at § 7.

[43] *Id.* at § 10.

D. Post-FAA Jurisprudence: Setting the Stage

During the first sixty years after the passage of the FAA, the statute was virtually ignored by courts.[44] Indeed, the opinions written for seminal labor arbitration law cases of the late 1950s and early 1960s did not even mention it.[45] Today, scholars agree that this neglect primarily occurred because, at that time, the FAA was seen as simply a procedural, remedial statute that permitted federal courts to hear suits for the enforcement of commercial arbitration agreements if they were brought under diversity jurisdiction.[46] The substantive law of arbitration was to be found in state common law and state statutes, which remained hostile to arbitration in all states except New York, New Jersey and Massachusetts.[47]

The "rediscovery" of the FAA that began in the 1980s was made possible by three Supreme Court decisions, handed down over a period of twenty-nine years. First, in *Erie v. Tompkins*, the Court held that federal courts must apply federal procedural law when sitting in diversity.[48] The *Erie* doctrine meant that litigants should not receive "substantially different results" based on whether a claim was heard

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[44] Hayford, *supra* note 15, at 831.

[45] Labor arbitration existed in "quarantine" from commercial arbitration, developing its own set of rules under the authority of the Labor Management Relations Act ("LMRA"). Courts viewed labor arbitration very differently from commercial arbitration, considering it an alternative to strikes and a promoter of peaceful labor relations rather than an ousting of the courts' jurisdiction. *See e.g.* United Paper Workers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987). Discussion of the labor arbitration cases is beyond the scope of this paper, but for a full discussion and comparison to commercial arbitration, see ARCHIBALD COX, LAW AND THE NATIONAL LABOR POLICY 77-81 (1960) (distinguishing the two types of arbitration on five major grounds); *see also* H. David Kelly, Jr., *An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 U. DET. MERCY L. REV. 1, 26-27 (1997).

[46] *See* Hayford, *supra* note 15, at 831.

[47] *See id.* at 832.

[48] 304 U.S. 64 (1938).

in a federal or state court.[49] Accordingly, if a rule of law would be outcome-determinative, that law was deemed to be substantive and the relevant state law should be applied.[50]

Nearly ten years later, the Court in *Bernhardt v. Polygraphic Co. of America* ruled that enforceability of an arbitration provision is outcome-determinative.[51] Therefore, the Court applied relevant state law to hold the arbitration clause unenforceable even though the case had been brought under Section 2 of the FAA.[52]

Finally, in *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, the Court completed the foundation for the recent resurgence of arbitration litigation.[53] The Court held that the FAA represented Congress' attempt to direct the behavior of lower federal courts, something congress clearly had the power to do.[54] Without addressing the substantive or procedural nature of the Act, the Court ordered the district court to comply with the FAA and to compel arbitration, notwithstanding *Bernhardt*.[55]

E. Post-FAA Jurisprudence: The Substantive Federal Law of Arbitration

Taken together, these three cases created jurisprudence under the FAA that stands as a legitimate exercise of Congressional power to regulate arbitration substantively. Later cases began to define the scope and reach of this power, and a consistent pattern of "pro-arbitration" decisions began to emerge. A series of decisions in the 1980s completed the shift from judicial hostility of arbitration to a federal policy

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[49] Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

[50] *See id.*

[51] 350 U.S. 198, 199 (1956).

[52] *See id.*

[53] 388 U.S. 395 (1967).

[54] *See id.* at 405.

[55] *See id.* at 406-07.

favoring arbitration, a policy that now preempts any state laws to the contrary.[56]

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court stated for the first time that questions about enforcement of arbitration must be decided with a "healthy regard for the federal policy favoring arbitration."[57] This "federal policy" is embodied in the FAA. In *Moses Cone*, one litigant brought suit in federal court to compel arbitration while the other sought to have the agreement declared unenforceable in state court.[58] The district court abstained from deciding the suit, deferring to the parallel state action.[59] The Court first determined that there were no extraordinary circumstances to abstain from taking federal jurisdiction.[60] It then found the district court's deferral to the state proceedings to be "plainly erroneous" and in conflict with Congress' intent, made plain in the FAA, to move parties "out of court and into arbitration as quickly and easily as possible."[61]

The *Moses Cone* Court also indicates a literal reading of Section 2 of the FAA -- parties who agree to enter into arbitration should not be permitted to evade their contracts by filing actions in state courts.[62] This set the stage for *Southland Corp. v. Keating*,[63] handed down the following year. In *Southland*, the claim at issue arose under the California Franchise Investment Law,[64] which declared that the rights created by the statute were not the proper subjects of arbitration proceedings.[65] The California Supreme Court found

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[56] See, for example, Hayford, *supra* note 15, at 836-47, for a more complete discussion of these seminal cases and their holdings.

[57] 460 U.S. 1, 24 (1983).

[58] *Id.* at 7.

[59] *See id.*

[60] *Id.* at 13-19.

[61] *Id.* at 22.

[62] *See id.* at 24.

[63] 465 U.S. 1 (1984).

[64] Cal. Corp. Code §§ 31000-31516 (West 1977).

[65] *See Southland Corp.*, 465 U.S. at 4-5.

no conflict between this provision of the law and the FAA,[66] but the Supreme Court reversed.[67] The Court relied on *Moses Cone's* policy favoring arbitration, and stated that "[i]n enacting §2 of the federal Act, Congress . . . withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[68] Citing its decision in *Prima Paint*, the Court further held that the FAA created a "substantive body of law" that governed arbitration agreements, whether brought in the federal or state court.[69]

This decision is fascinating in that it denies state legislatures the right to control the vindication of rights they themselves have created by statute. This seems at odds with the public policy that prohibits "contracting away" one's statutory rights, which is precisely what happens when, by an arbitration *contract*, a party agrees to give up legal and equitable remedies in favor of the arbitration award. Any doubt about the Court's meaning was clarified one year later in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which dealt with a claim based in the Sherman Act.[70] In *Mitsubishi*, the litigants were a Japanese corporation and a Puerto Rican corporation, proceeding under the Convention on the Enforcement and Recognition of Foreign Arbitral Awards and the FAA.[71] Reiterating its holdings from *Moses Cone* and *Southland Corp.*, the Supreme Court ordered arbitration and stated that:

> There is no reason to depart from [the presumption in favor of arbitration] where a party bound by an arbitration agreement raises claims founded on statutory rights . . . . We are well past the time when judicial suspicion of the desirability of arbitration

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[66] *See* Keating v. Superior Court of Alameda County, 645 P.2d 1192, 1203-04 (Cal. 1982).

[67] *See Southland Corp.*, 465 U.S. at 17.

[68] *Id.* at 10.

[69] *Id.* at 11-12.

[70] 473 U.S. 614 (1985).

[71] *See id.*

> and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.[72]

Perhaps even more significant, however, is the Court's holding that no substantive rights are lost when a statutory claim is decided in an arbitral forum. The Court stated that:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution an arbitral, rather than judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[73]

Two further cases serve to demonstrate the astonishingly broad reach of the FAA as it now is interpreted. In *Perry v. Thomas*,[74] the Court specifically held that while Section 2 mandates that state contract law govern arbitration agreements, only laws that govern contracts generally, rather than arbitration agreements specifically, can be applied.[75] In other words, the state cannot, without offending the FAA, create laws that are in any way "targeted" at arbitration contracts.

The Supreme Court further clarified the scope of Section 2 in *Allied-Bruce Terminix Cos. v. Dobson*.[76] In *Allied-Bruce*, the Court reversed a decision of the Alabama Supreme Court that held that the contract at issue was not sufficiently related to interstate commerce to fall within the reach of the

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[72] *Id.* at 626-27.

[73] *Id.* at 628.

[74] 482 U.S. 483 (1987).

[75] *See id.* at 492 n.9.

[76] 513 U.S. 265 (1995).

FAA.[77] The Court examined the language of Section 2 and concluded that although it used the phrases "involving commerce" and "evidencing a transaction," rather than the more familiar "affecting interstate commerce" formulation, Congress nevertheless intended to give expansive reading of the FAA to all cases that it can reach by use of its Commerce Power.[78] The Court chose to expand the scope of the FAA to Congress' present reach under the Commerce Power, a reach that the Congress of 1925 could have scarcely imagined.[79]

The outcome of this jurisprudence is that parties who create a contract for arbitration are in actuality creating a private law that will govern their disputes. Parties decide which issues can be resolved, what the rules for the proceedings will be, who will serve as arbitrator and the available remedies. It seems there may be no practicable limits on the parties' control of the process (and thus the outcome) of arbitration. Apparently, the Seventh Circuit spoke prophetically when it declared that "indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes."[80]

III. JUDICIAL REVIEW OF ARBITRATION AWARDS

Even in light of these rules, parties not acquainted with the federal law of arbitration might be comforted by thoughts of judicial review. However, under the FAA, judicial review of arbitration decisions is extremely limited. The FAA out-

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[77] *See id.* at 268-69 (citing Allied-Bruce Terminix v. Dobson, 628 So.2d 354, 355 (Ala. 1993)).

[78] *Allied-Bruce*, 513 U.S. at 273-74.

[79] When confronted in *Circuit City v. St. Clare Adams* with the question of whether the *exceptions* to the FAA's coverage had likewise expanded, the Court reverted to a formulaic, literal interpretation of the Act without acknowledging this inconsistency. For further discussion, see *infra* Part IV-B, discussing *Circuit City*, 532 U.S. 105 (2001).

[80] Baravati v. Josephthal, Lyon & Ross, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.).

lines four reasons for vacating an arbitral award.[81] The common law provides a few more.[82] Short of meeting one of these conditions, however, parties are simply stuck with the outcome of arbitration, regardless of the justice of the decision.

A. Statutory Grounds for Vacatur Under the FAA

The FAA's scheme lays out four "extremely narrow" grounds for vacatur of an arbitration award.[83] The public policy that underlies the FAA has been held to demand a "presumption" that arbitral awards will be confirmed.[84] Accordingly, courts are free to examine arbitrators' decisions only to the extent necessary to determine "whether the arbitrators did the job they were told to do -- not whether they did it well, or correctly, or reasonably, but simply whether they did it."[85]

To issue an order vacating an award, a district court must find that either: (1) the award was procured by corruption, fraud, or undue means;[86] (2) there was evident partiality or corruption in the arbitrator(s);[87] (3) the arbitrators were guilty of certain types of prejudicial misconduct, such as improperly refusing to postpone the hearing or refusing to hear

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[81] *See* 9 U.S.C. § 10(a) (1997).

[82] Summarized *infra* Part III-B.

[83] For instance, the Seventh Circuit has stated that "an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative." Moseley, Hallgarten, Eastabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988) (internal quotation marks omitted). *See also* Forsythe Int'l S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) ("Judicial review of an arbitration award is extraordinarily narrow . . . .").

[84] *See* Lifecare Int'l, Inc. v. CD Med., Inc., 68 F.3d 429, 433 (11th Cir. 1995).

[85] *See* Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (quoting Richmond, Fredricksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union, 973 F.2d 276, 281 (4th Cir. 1992) (quoting Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry. Co., 768 F.2d 914, 921 (7th Cir. 1985))).

[86] Federal Arbitration Act, 9 U.S.C. § 10(a)(1).

[87] *Id.* at § 10(a)(2).

material evidence;[88] or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a definitive award was not made.[89]

The grounds set forth in subsections (1), (2) and (3) center on the arbitration process and focus on fairness in the proceedings.[90] The standard of proof under these subsections is "specific facts that indicate improper motives on the part of the arbitrator,"[91] a standard that requires clear and convincing proof of misconduct.[92] To have an award vacated under this standard, a party would have to show specific facts that demonstrate, to a clear and convincing degree, that the proceedings were tainted by fraud, corruption, or impartiality of some sort.[93] The party must also show that the improper conduct is related to the award itself.[94]

Subsection (4) focuses on the award itself, but again, the court is not to weigh the merits of the dispute. The test for whether vacatur is proper under subsection (4) is whether the arbitrator exceeded his or her authority under the arbitration agreement.[95] Examples include ruling on an issue not submitted by the parties,[96] deciding a claim not properly submitted to arbitration,[97] deciding an issue involving a non-

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[88] *Id.* at § 10(a)(3).

[89] *Id.* at § 10(a)(4).

[90] *See, e.g.*, Hayford, *supra* note 15, at 866.

[91] *See* Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993).

[92] *See e.g.*, A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992).

[93] *See* Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147 (1968) ("Sections 10(a)(1), (2) and (3) show a desire of Congress to provide not merely for any arbitration but for an impartial one."). *See also* Hayford, *supra* note 15, at 865-68 and accompanying notes.

[94] *See, e.g.*, Forsythe Int'l S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022 (5th Cir. 1990).

[95] *See* Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1255-56 (7th Cir. 1994).

[96] *See, e.g.*, Fahnestock & Co. v. Waltman, 935 F.2d 512, 515-16 (2d Cir. 1991).

[97] *See, e.g.*, DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 824 (2d Cir. 1997).

party to the arbitration agreement,[98] or directing one remedy when another is clearly specified in the agreement.[99] A judge may not review the decision for errors of law or fact. If the award is made based on the parties' agreement and to the issues they submitted, it cannot be vacated under Section 10(a)(4).[100]

B. Common Law Grounds for Vacatur

In addition to the grounds for vacatur specified under the FAA, twelve United States Circuit Courts of Appeals, all except the Federal Circuit, have applied at least one common law doctrine to vacate an arbitral award.[101] These doctrines include finding that an award was made with a manifest disregard of the law; conflicts with public policy; fails to reflect the essence of the parties' agreement; is arbitrary and capricious; or is completely irrational. These doctrines are summarized briefly below.

The first non-statutory ground for vacatur is taken from dicta by the Supreme Court in *Wilco v. Swann*, which suggested that arbitral awards are not subject to judicial review in the absence of a "manifest disregard of the law."[102] The party must show more than error or misunderstanding with respect to the law or failure to apply the correct law. Rather, they must satisfy a two-part inquiry. The arbitrator must be shown to "understand and correctly state the law, but proceed to disregard the same."[103] This first prong requires a showing that there has been a gross error of law, apparent

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[98] *See, e.g., Eljer Mfg.*, 14 F.3d at 1256-57.

[99] *See, e.g.*, Coast Trading Co. v. Pacific Molasses Co., 681 F.2d 1195, 1198 (9th Cir. 1982).

[100] *See* Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1194 (11th Cir. 1995).

[101] *See* Hayford, *supra* note 15, at 870.

[102] 346 U.S. 427, 436-37 (1953). When it reversed *Wilco* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court did not address the "manifest disregard" dictum. 490 U.S. 477 (1989).

[103] *See* San Martine Compania De Navegacion S.A. v. Saguenay Terminals, 293 F.2d 796, 801 (9th Cir. 1961).

on the face of the award.[104] The second prong requires a mens rea-type showing that the arbitrator was aware of the correct law but made a deliberate, knowing decision to ignore it.[105] This state-of-mind requirement is especially difficult to meet where, as is most commonly the case, the arbitrator does not render a written opinion.[106] Only two cases have been vacated on this ground, both since 1997. In both cases the courts permitted parties to meet this prong by using party briefs to create a presumption that the arbitrator was aware of the law.[107]

The second common law ground for vacatur is a finding that the arbitral award conflicts with public policy. Taken from labor arbitration law, public policy vacatur requires that the policy at issue be clearly defined and dominant as the undisputed rule of law.[108] Once the public policy itself has been identified, the award may be held to violate that policy in one of two ways. Some courts have required a showing that the award explicitly conflicts with or violates the policy at issue.[109] This standard would be met, for example, if the award interpreted the parties' agreement in a way that conflicted with public policy.[110] Other courts require a showing

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[104] *See, e.g.*, Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991).

[105] *See* M & C Corp. v. Erwin Behr GMBH & Co., 87 F.3d 844, 851 n.3 (6th Cir. 1996) (failing to find a manifest disregard of the law because errors were likely inadvertent rather than a "conscious decision to ignore the relevant law").

[106] *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995) ("Where ... the arbitrators decline to explain their resolution of certain questions of law, a party seeking to have the award set aside faces a tremendous obstacle.").

[107] The two cases are *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997) and *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998). For a discussion of these two cases and their approach to the manifest disregard standard, see Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: Key to Stabilizing the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 128-32 (1998).

[108] *See* PaineWebber v. Agron, 49 F.3d 347, 350 (8th Cir. 1995).

[109] *See id.*

[110] *See id.*

that the *enforcement* of the award would require one or both parties to violate public policy.[111]

The "essence of the agreement" standard is also borrowed from labor arbitration law and permits the reviewing court to delve most deeply into the merits.[112] Under this standard, the court examines the arbitral award to see if it embodies the essence of their agreement. This requires examination of the underlying agreement.[113]

The remaining common law grounds for vacatur, "arbitrary and capricious,"[114] and "completely irrational,"[115] appear to have a common grounding in the idea that an award may be vacated if a reason for the arbitrator's decision cannot be inferred from the facts of the case.[116]

Given the FAA's policy of upholding arbitral decisions, the narrow statutory grounds that exist for vacatur and the difficulty of meeting even the common law tests, it is clear that a party will most likely be stuck with the arbitral award once it is made. In light of this paucity of review, it is even more alarming that the Supreme Court has continued to expand the scope of arbitral issues. As the next section will demonstrate, recent jurisprudence permits employers to force employees to sign binding pre-dispute arbitration agreements that encompass even statutory claims, without regard to whether arbitration provides equivalent remedies or reimbursement of costs. Furthermore, as demonstrated

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[111] *See, e.g.*, Arizona Elec. Power Coop., Inc. v. Berkeley, 59 F.3d 988, 992 (9th Cir. 1995).

[112] *See* Hayford, *supra* note 15, at 875-76.

[113] *See, e.g.*, Anderman-Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990).

[114] *See* Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 (11th Cir. 1990); U.S. Postal Serv. v. National Assoc. of Letter Carriers, 847 F.2d 775, 778 (11th Cir. 1988).

[115] *See* French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986) (quoting Swift Indus. v. Botany Indus., 466 F.2d 1125, 1131 (3d Cir. 1972)).

[116] Both are relatively new devices, which at least one commentator feels are being used by Courts of Appeals to examine the merits of the underlying claim. *See* Hayford, *supra* note 15, at 878-79.

by Part V, the potential exists for even more expansive readings of the FAA, with consequential loss of protections.

IV. RECENT SUPREME COURT JURISPRUDENCE

Recent Supreme Court decisions have expanded the boundaries of the FAA while undercutting the statutory rights of employees. These decisions also serve as notice to corporate attorneys that inclusion of an arbitration provision in the employment contracts of their clients may work to corporate clients' advantage in ways that would have been thought impossible a short while ago.

A. Arbitration of Statutory Rights: The *Gilmer* Decision

Alexander v. Gardner-Denver Co.,[117] decided in 1974, stands as a monument to the law on arbitration of statutory claims as it existed before the Supreme Court's "resurrection" of the FAA. In *Alexander*, a black male employee was discharged from his job as a drill operator, where the company alleged he was producing numerous defective products.[118] Alexander filed a grievance as required by his collective bargaining agreement.[119] After a hearing, the arbitrator agreed with the company and found that Alexander had been discharged for "just cause."[120]

Alexander then filed a Title VII[121] action against his employers in the federal district court, which awarded summary judgment to the employer on the grounds that the suit sought a review of already-decided facts.[122] The Tenth Cir-

[117] 415 U.S. 36 (1974).

[118] *Id.* at 38.

[119] *Id.* at 39.

[120] *Id.* at 42.

[121] Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994 & Supp. IV 1998).

[122] *See* Alexander v. Gardner-Denver Co., 346 F.Supp. 1012 (D. Colo. 1971).

cuit affirmed the opinion,[123] but the Supreme Court granted certiorari and reversed.[124]

The Supreme Court found that Title VII's purpose was to "supplement rather than supplant, existing laws and institutions relating to employment discrimination."[125] The Court reasoned that Alexander should not have to choose between the grievance procedures of the collective bargaining agreement and litigation under Title VII. Instead, the Court ruled that Title VII was considered a "statutory right independent of the arbitration process."[126]

The Court further found that, unlike collective rights such as the right to strike, "there can be no prospective waiver of an employee's rights under Title VII."[127] It also noted that the arbitration panel would be interpreting the collective bargaining agreement, not Title VII law, to render its opinion.[128] In the final pages of the opinion, the Court suggests that the lower courts may admit the arbitral decision and accord it whatever weight seems appropriate, in light of a list of factors that seem to be addressing the similarity of the arbitral proceedings to the Title VII claim.[129]

Until the revival of the FAA, it was believed that *Alexander* forbade courts to compel arbitration of statutory rights. Because a concurrent Title VII claim was permitted to go forward, it was widely assumed that statutory rights could not be decided exclusively by arbitration. The first suggestion that this might not be the case came in 1985, with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[130] Re-

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[123] Alexander v. Gardner-Denver Co., 446 F.2d 1209 (10th Cir. 1972).

[124] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[125] *Id.* at 48, 49.

[126] *Id.* at 52, 54.

[127] *Id.* at 51.

[128] *Id.* at 53-54.

[129] For a discussion of these factors and how lower courts have since interpreted them, see generally Lynlee Wells Palmer, *Trying it Again for the First Time: Judicial Treatment of Arbitral Decisions in Subsequent Title VII Cases*, 52 ALA. L. REV. 1077 (2001).

[130] 473 U.S. 614, 614 (1985). For additional discussion of *Mitsubishi*, see *supra* Part II-E.

call from Part II-E that the Court in *Mitsubishi* declared that:

> There is no reason to depart from [the presumption in favor of arbitration] where a party bound by an arbitration agreement raises claims founded on statutory rights . . . . By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum . . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[131]

Despite *Mitsubishi*, the presumption remained that employees, who were not in an equal bargaining position with their employers, could not be forced to arbitrate statutory claims. *Mitsubishi* was distinguished from *Alexander* because it involved two large, sophisticated parties who stood in equal bargaining positions, rather than an employment relationship.

This presumption was destroyed, however, by *Gilmer v. Interstate Johnson Lane Corp.*[132] In *Gilmer*, the employee was required by his employer to register as a securities representative with the New York Stock Exchange.[133] The registration application contained an agreement to arbitrate any disputes "arising out of [a registered representative's] employment or termination of employment."[134] When Gilmer was terminated at the age of 62, he filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging his discharge was in violation of the Age Discrimination in Employment Act of 1967 ("ADEA").[135] The employer then moved to compel arbitration of the claim, relying on

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[131] *Mitsubishi*, 473 U.S. at 626-28.

[132] 500 U.S. 20 (1991).

[133] *Id.* at 23.

[134] *Id.* (citing NYSE Rule 347).

[135] *Id.* at 23-24.

Gilmer's registration application and the FAA.[136] The district court refused to compel arbitration, citing *Alexander* and holding that the ADEA was also intended by Congress to be resolved in a judicial forum.[137] The Fourth Circuit reversed, finding nothing to preclude enforcement of valid arbitration agreements.[138] The Supreme Court affirmed.[139]

The Court explicitly declined to overrule *Alexander*, finding it distinguishable because Gilmer had himself agreed to arbitrate all claims, whereas Alexander's agreement to arbitrate was based on a collective bargaining agreement.[140] Instead of referring to *Gilmer's* statutory rights analysis, the Court found that Gilmer had failed to meet his burden of establishing that Congress intended to preclude a waiver of the judicial forum through the Act itself, the legislative history, or an "inherent conflict" between the purpose of the Act and arbitration.[141]

The Court further rejected challenges to the adequacy of the arbitral forum that seemed to underlie the decision in *Alexander*, finding that such an attack was far out of line with the by now well-established federal policy favoring arbitration.[142] Similarly rejected were suggestions that the inequity of bargaining power between employees and employers should weigh against arbitration. The Court instead stated that, because the FAA places arbitration agreements on the same footing as other contracts, an agreement is void if it is obtained by fraud or other means which "at law or in equity" would suffice to void a contract.[143] There was nothing to support the idea that Gilmer, as a sophisticated businessman, was defrauded or coerced into signing the agreement.[144]

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[136] *Id.* at 24.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 35.

[140] *Id.* at 34-35.

[141] *Id.* at 26-27.

[142] *Id.* at 30.

[143] *Id.* at 33.

[144] *Id.* The Court sidestepped the issue of whether the FAA applied to employment contracts by refusing to classify the registration application

After *Gilmer*, it was clear that statutory rights, even those that arose out of a protective statute designed to govern the employment relationship, were arbitral.[145] The last remaining question was whether the sweeping provisions of the newly-revived FAA would be applied to all employment contracts.

B. Arbitration Arbitrarily of Employment Contracts: The *Circuit City* Decision

The question that *Gilmer* acknowledged but left open was whether the FAA governed contracts of employment.[146] Recall that the FAA applies to "any maritime transaction or a contract evidencing a transaction involving commerce."[147] The Court has interpreted the phrase "involving commerce" to be co-terminus with the more commonly used "affecting commerce" that designates Congress' intent to rely upon its Commerce Power.[148] However, when confronted with the argument that the *exclusions* of Section 1 ought to be read expansively as well, the Court reverted instead to a literal, formulaic reading of the FAA.[149]

In *Circuit City v. St. Clair Adams*, Mr. Adams filled out an employment application with Circuit City that included an arbitration provision.[150] Adams was hired as a sales coun-

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as such. This issue is raised squarely and decided in *Circuit City*, *infra* Part IV-B.

[145] For discussion of arbitration of statutory claims in light of the limited judicial review available, see Julian J. Moore, Note, *Arbitral Review (Or Lack Thereof): Examining The Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572 (2000). *See also* Paulette Delphene Hardin, *Sacrificing Statutory Rights on the Altar of Pre-Dispute Employment Agreements Mandating Arbitration*, 28 CAP. U. L. REV. 455 (2000).

[146] *See Gilmer*, 500 U.S. at 25 n.2.

[147] 9 U.S.C. § 2 (1925).

[148] *See* Allied Bruce Terminix v. Dobson, 513 U.S. 265 (1995). *See also* discussion *supra*, Part II-E.

[149] *See* Circuit City v. St. Clair Adams, 532 U.S. 105, 149 L. Ed. 2d 234 (2001). (Page numbers for this opinion are subject to change after publication. Numbers given herein are for the L. Ed. 2d.).

[150] *Id.* at 243.

selor in a Santa Rosa, California store where he worked for two years.[151] At that time, he filed an employment discrimination claim against Circuit City in state court, alleging violations of the California Fair Employment and Housing Act[152] and state tort law.[153] Circuit City filed suit in the district court, seeking an order to compel arbitration, which was granted.[154] While the case was on appeal before the Ninth Circuit, that court issued its opinion in *Craft v. Campbell Soup*,[155] which held that the FAA does not apply to contracts of employment.[156] Following its ruling in *Craft*, the Ninth Circuit concluded that the arbitration clause at issue in *Circuit City* was in a contract of employment and therefore not subject to the FAA.[157] Noting that every other circuit court to examine the issue had concluded that the FAA covers contracts of employment,[158] the Supreme Court granted certiorari.[159]

Adams first argued that the meaning of the exclusion need not be reached because his contract of employment was not a contract "evidencing a transaction."[160] His argument was essentially that the term "transaction," as used in 1925, was intended only to apply to commercial contracts or merchant sales. The majority found that such a construction would render the exclusion clause superfluous.[161] Justice Stevens' dissent, however, noted legislative history that strongly suggests the exclusion clause was added as mere re-

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[151] *Id.* at 244.

[152] CAL. GOV'T CODE ANN. §§ 12900-12996 (West 1992 and Supp. 1997).

[153] *Circuit City*, 149 L. Ed. 2d at 244.

[154] *See id.*

[155] 177 F.3d 1083 (9th Cir. 1999).

[156] *Circuit City*, 149 L. Ed. 2d at 244.

[157] 194 F.3d 1070 (9th Cir. 1999).

[158] *Circuit City*, 149 L. Ed. 2d at 244, citing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth and D.C. Circuits.

[159] *Circuit City*, 149 L. Ed. 2d at 252.

[160] *Id.* at 245-46.

[161] *Id.*

inforcement of Congress' intent to exclude employment contracts generally.[162]

Turning to the exclusion clause itself, Adams argued that by excluding "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"[163] Congress was effectively removing all classes of employees that it had the power to regulate under its Commerce Power, as understood in 1925, from the coverage of the FAA.[164] Therefore, Adams argued that the exclusion clause ought to be broadened to mirror the expansive reading given to the phrase "involving interstate commerce."[165] That is, if the Court was going to assign to Congress the intent to use the full scope of its Commerce Power, it should likewise read the exclusion to have been intended to remove all employment contracts from the scope of the Act.

Inexplicably, the Court instead chose to revert to a formalistic reading of the FAA, relying on the canon of statutory interpretation *ejusdem generis*.[166] The Court then found that the phrase "any other class of workers engaged in foreign or interstate commerce" must be read in light of the preceding list of seamen and railroad employees, and concluded that "transportation workers" were the type of workers to be excluded from the FAA.[167] The majority reasoned that excluding these contracts was logical because they were already regulated through other federal legislation.[168]

By including all employment contracts within the coverage of the FAA, the Court has now created a situation in which employees may be virtually forced into arbitration, despite their employers' statutory obligations, as a condition of

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[162] *Id.* at 253-55.

[163] Federal Arbitration Act, 9 U.S.C. § 1.

[164] *Circuit City,* 149 L. Ed. 2d at 246.

[165] *Id.*

[166] *Id.* at 246-47.

[167] *Id.*

[168] *Id.*

employment.[169] Effectively, employers are permitted to require employees to give up statutory rights as a condition of employment, something that would never be permitted if done directly.

C. Arbitration Without Regard to Costs: The *Green Tree* Decision

The Supreme Court has noted that certain minimum safeguards should be met before compelling arbitration of a statutory claim.[170] Until the 2000 term, many lower courts regarded costs as one such safeguard. In many protective statutes, plaintiffs are permitted to bring claims at no cost in order to encourage the vindication of the policies that underlie the various statutes. Decisions by the D.C.,[171] Tenth,[172] and Eleventh[173] Circuits have held that it would undermine the intent of Congress to make plaintiffs pay for arbitration when they would not be required to pay for judicial relief.

The Court granted certiorari on the issue in the Eleventh Circuit case, *Green Tree Financial.* The plaintiff in *Green Tree*, Randolph, signed an arbitration agreement with Green Tree in the course of securing a loan for a mobile home.[174] She later brought suit under the Truth in Lending Act, claiming that the company failed to disclose certain finance charges.[175] The district court granted Green Tree's motion to compel and dismissed Randolph's claims with prejudice.[176]

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[169] For discussion of how these changes are affecting employee rights under the various protective federal statutes, see Rebecca Tyre, *Arbitration: An Employer's License to Steal Title VII Claims?,* 52 ALA. L. REV. 1359 (2001).

[170] Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991).

[171] *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).

[172] *See* Shankle v. B-G Maintenance Mgmt. of Colorado 163 F.3d 1230 (10th Cir. 1999).

[173] *See* Randolph v. Green Tree Fin. Corp., 178 F.3d 1149 (11th Cir. 1999).

[174] *See* Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 83 (2000).

[175] *See id.*

[176] *See id.*

Randolph requested a rehearing, arguing that the risk of steep arbitration costs deterred her from bringing her claim.[177] The district court denied reconsideration[178] and Randolph appealed.[179] The Eleventh Circuit reversed, holding that because the arbitration agreement was silent as to the costs issue, there was a risk that Randolph effectively would forfeit her statutory protections if the arbitration agreement were enforced.[180]

In a five-to-four decision the Supreme Court reversed the Eleventh Circuit.[181] In light of the federal policy favoring arbitration, the majority held that an agreement to arbitrate is enforceable even when it is silent with respect to costs, because any risk of burdensome expense is too speculative to invalidate the agreement.[182] The Court refused to decide how much proof of prohibitive expense would be required to invalidate such an agreement, because Randolph had presented *no* evidence and therefore clearly did not meet *any* burden of proof.[183]

The outcome of these recent decisions suggests strongly that the Court is taking the "federal presumption in favor of arbitration" to its extreme and will broadly construe the FAA to reach virtually all contracts. This paper posits that this trend will continue should the Court take up any of the remaining circuit court splits that still plague this rapidly changing area of the law.

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[177] *See id.*

[178] *See* Randolph v. Green Tree Fin. Corp., 991 F.Supp. 1410, 1425-26 (M.D. Ala. 1997).

[179] *Green Tree*, 531 U.S. at 84.

[180] *See* Randolph v. Green Tree Fin. Corp., 178 F.3d 1149 (11th Cir. 1999).

[181] *See Green Tree*, 531 U.S. at 91.

[182] *See id.* at 91-92.

[183] *See id.* at 92, citing *Gilmer* and comparing the burden of proof on the issue of prohibitive expense to the burden of proof of a party seeking to invalidate an agreement on the ground that Congress intended to preclude arbitration of the claims at issue.

V. THE FUTURE OF ARBITRATION LAW: PREDICTING THE OUTCOME OF CURRENT CIRCUIT SPLITS

In this Part, an attempt is made to predict the outcome of two existing circuit court splits in light of the jurisprudence discussed *supra*. Each will be examined to define the question at issue and to predict how the Supreme Court is likely to rule, should they take up the issue.

A. Can Judicial Review be Expanded by Contract?

It is well established that "just as the parties may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration may be conducted."[184] One remaining issue is whether this ability to contract for the terms of the arbitration includes being able to contract for expanded judicial review of the arbitral decision.

In *Gateway Technologies, Inc. v. MCI Telecom.*,[185] the Fifth Circuit held that such contractual provisions are acceptable because arbitration is a creature of contract, and the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties. In that case, the parties' contract specified that errors of law would be subject to judicial appeal, and the clause was upheld. The Ninth,[186] Fourth,[187] and Third[188] Circuits have upheld similar contract language.

The Tenth[189] Circuit, following dicta from the Eighth[190] and Seventh[191] Circuits, has expressed the contrary view.

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[184] *See* Volt Information Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ., 489 U.S. 468 (1989).

[185] 64 F.3d 993 (5th Cir. 1995).

[186] *See* Lapine Tech. Corp. v. Kyocera, 130 F.3d 884 (9th Cir.1997).

[187] *See* Syncor v. McLeland, 120 F.3d 262 (4th Cir. 1997).

[188] *See* Roadway Package System v. Kayser, 257 F.3d 287 (3rd Cir. 2001).

[189] *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001).

This view argues that while parties are free to contract for further arbitral review of arbitral decisions, they cannot "create federal jurisdiction" by contract.

In light of the firm stance taken by the Supreme Court that judicial review is to be extremely limited, this paper predicts that, if confronted with the issue, the Supreme Court will uphold the Tenth Circuit and prohibit the expansion of judicial review. This outcome seems more consistent with the Court's underlying goal to keep arbitration cases out of the courtroom.[192]

B. Can Arbitration of Title VII Claims be Compelled in Light of the Civil Rights Act of 1991?

Echoing its solitary stance in *Craft* and *Circuit City*, in the case of *Duffield v. Robertson Stephens & Co.* the Ninth Circuit found, within the Civil Rights Act of 1991, a congressional intent to preclude arbitration of Title VII claims.[193] The court based its decision in *Duffield* on legislative history that the court viewed as evidencing a congressional intent to enlarge substantive rights. It also pointed to the private right of action added to Title VII as further evidence of this intent.[194] Therefore, the court reasoned that this intent also shows that Congress intended the claims to be resolved in the judicial forum, as the Supreme Court articulated in *Alexander*.[195]

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[190] *See* UHC Mgmt. Co. v. Computer Sciences Corp., 148 F.3d 992 (8th Cir. 1998). The question was not presented here because the court found that the agreement lacked any clear intent to expand review; however, dicta strongly suggests that parties' preferences would be trumped by the FAA.

[191] *See* Chicago Typographical Union v. Chicago Sun-Times, 935 F.2d 1501 (7th Cir. 1991) (Posner, J.).

[192] *See* Gilmer v. Interstate Johnson Corporation, 500 U.S. 20 (1991). For further discussion of this split, see Karon A. Sasser, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 COLUM. L. REV. 337 (2000/2001).

[193] *See* 144 F.3d 1182 (9th Cir. 1998).

[194] *Id.* at 1190-91.

[195] *See* Part IV-A, *supra*.

All other Circuits to consider the question have rejected *Duffield*, as have state courts within the Ninth Circuit itself.[196] These courts rely on language within the Civil Rights Act of 1991 itself, stating that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under" these acts.[197]

In light of the pro-arbitration policy repeatedly expressed by the Supreme Court, this paper predicts that the Court would reverse *Duffield* if presented with the question.[198] The express language of the statute, as shown above, would make this an easy disposition.

VI. CONCLUSION

Few corporate scholars or attorneys have any idea how far the courts have gone in allowing arbitration to trump the right to court review of contracts and contractual issues. That this trumping covers not only choice of forum but also the giving up of statutory rights is surprising. Even more surprising is the fact that those in dominant positions, such as prospective employers in the usual situation, can force those on the other side of contracts of adhesion to give up essentially all statutory and procedural rights they otherwise would have. Understandably, this typically works to a corporation's benefit.

However, when a business is faced with a decision to include or exclude an arbitration clause in a contract with another business or to agree to arbitrate an existing business dispute, there can be both beneficial and detrimental consequences to arbitration. In these situations, both parties need to consider carefully the problems with arbitration. It is

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[196] *See, e.g.*, Kindred v. Second Judicial District Court of Nevada, 996 P.2d 903 (Nev. 2000).

[197] Pub. L. 102-166, § 118.

[198] For further discussion of *Duffield* and an alternative rationale for the result, see Eduard A. Lopez, *Mandatory Arbitration of Employment Discrimination Claims: Some Alternative Grounds for Lai, Duffield and Rosenberg*, 4 EMP. RTS. & EMPL. POL'Y J. 1 (2000).

quicker and cheaper than litigation, but these factors limit the ability of the arbitrator to render a just result. For example, there is no judicial review of a bad decision based on the law. Perhaps the best example, however, is the inability to force necessary discovery, because in arbitration one gets only what one bargains for. In many situations, it will be wise to bargain for a specified procedure for discovery and for court review of purely legal questions.