2002

Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis

Amy J. Schmitz
University of Missouri School of Law, SCHMITZAJ@MISSOURI.EDU

ENDING A MUD BOWL:* DEFINING ARBITRATION'S FINALITY THROUGH FUNCTIONAL ANALYSIS

*Amy J. Schmitz***

> Arbitrations provide an alternative method of dispute resolution to legal proceedings. . . . Mixing the two only produces mud—not the sort of stuff we willingly tread in.[1]

Arbitration is losing its significance. This statement may seem surprising or even false. It seems to contradict current proclamations of "pro-arbitration" policies and the Supreme Court's strict enforcement of arbitration agreements, even in traditionally nonbusiness contexts such as employment and consumer disputes.[2]

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* Most football fans remember at least one game as "The Mud Bowl." Certainly, many games can be characterized as nothing less than a "mud bath." *See* Pete Dougherty, *Packers Return to Super Bowl*, GREEN BAY PRESS-GAZETTE, Jan. 12, 1998, *available at* http://greenbaypressgazette.packersnews.com/97season/v49ers0111/-112defe.shtml (recounting "a mud bath at Lambeau Field"). That is football. However, it need not be arbitration.

** Associate Professor, University of Colorado School of Law. I would like to thank Christopher Drahozal, Sarah Krakoff, Jean Sternlight, Stephen Ware, Mark Loewenstein, Hiroshi Motomura, Dale Oesterle, Nancy Levit, and Arthur Travers for their helpful and insightful comments, and Lisa Teesch-Maguire, Kevin Dehring, and Mike Roseberry for their early research assistance, as well as Eric Anderson and Vito Racanelli for their help in verifying references before publication.

[1] Nat'l Union Fire Ins. Co. v. Nationwide Ins. Co., 82 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1999) (declaring "[t]here is *no* such creature as a 'binding arbitration with a right to appeal,'" because arbitrations and judicial proceedings are "as distinct in their elementary structure as dirt is to water," and further warning that parties must refrain from drafting such muddy "incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration").

[2] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The Supreme Court has reaffirmed strict enforcement of arbitration agreements in recent decisions. *See* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000) (finding that "liberal federal policy favoring arbitration agreements" supported enforcement of arbitration agreement although agreement was silent with respect to arbitration costs and fees); *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 105-07 (2001) (holding that FAA applies to arbitration agreements in employment contracts despite Act's exclusion for "workers engaged in . . . interstate commerce"); E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 67 (2000) (holding labor arbitration award reinstating employee who failed his second drug test was not contrary to public policy because it did not violate explicit, well-defined, and

The problem is that courts caught up in an "ADR-frenzy"[3] have eagerly applied statutory remedies, meant only for binding arbitration, to a wide variety of dispute resolution procedures without stopping to ask whether the procedures qualify as "arbitration" under the statutes that provide these remedies.[4] The desire to clear court dockets may in part motivate courts' haste.[5] But the irony is that the same pro-arbitration impulses that have driven expansion of arbitration are also fueling courts' misapplication of arbitration remedies, which actually dilutes the significance of arbitration and threatens the integrity of the functional scheme underlying arbitration statutes. This Article explores one component of arbitration that is losing its significance—finality.[6]

The Federal Arbitration Act (FAA)[7] and Uniform Arbitration Act (UAA)[8] prescribe a nearly identical "arbitration law," or remedial

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dominant positive law); Richard E. Speidel, *ICANN Domain Name Dispute Resolution, The Revised Uniform Arbitration Act, and the Limitations of Modern Arbitration Law*, 6 J. SMALL & EMERGING BUS. L. 167, 177 (2002) (noting that Court's "pro-arbitration" stance has led courts to enforce arbitration agreements broadly in traditionally nonbusiness contexts).

[3] "ADR" refers to Alternative Dispute Resolution, a problematic label that itself raises definitional issues, but that generally refers to private means for resolving disputes outside of court. Traditional arbitration is distinct from the "currently chic ADR" because "it has been around too long to be fashionable in this year's Easter Parade." IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 10 (1992).

[4] Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 831-35. Professor Stipanowich suggests that parties should adapt dispute resolution to their goals, but warns that courts have applied arbitration laws to various types of ADR "willy-nilly without discussion." *Id.* at 834-37, 858. He therefore invites more careful analysis of "the inherent differences" between binding arbitration governed by the Federal Arbitration Act (FAA) and Uniform Arbitration Act (UAA), and other contractual dispute resolution mechanisms. *Id.*; *see also* Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 97-98 (discussing confusion among various forms of ADR and possible implications). This Article continues and extends that discussion.

[5] *See, e.g.*, IDS Life Ins. Co. v. SunAmerica, Inc., 103 F.3d 524, 528 (7th Cir. 1996) (Posner, J.) (noting "Congress's emphatically expressed support for facilitating arbitration in order to effectuate private ordering and lighten the caseload of the federal courts").

[6] It is worth mentioning that other components of statutory arbitration, such as its voluntariness, also have been diluted. *See infra* note 211 (noting debate regarding arguably "mandatory" arbitration provisions). Such discussion is beyond the scope of this Article.

[7] 9 U.S.C. §§ 1-16 (as amended May 7, 2002, Pub. L. No. 107-169, § 1, 116 Stat. 132).

[8] UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 6-469 (1997). Although much of the discussion focuses on proper application of the FAA, the discussion equally implicates application of the FAA's state law twin, the UAA, which has been adopted or is substantially similar to the law in fifty jurisdictions. *See infra* notes 148-76 and accompanying text

scheme for enforcing arbitration agreements and awards.[9] Arbitration law creates a special scheme in that it goes beyond traditional contract law by mandating that courts specifically enforce executory agreements to arbitrate,[10] and providing further remedial and procedural protections that include liberal venue provisions, immediate appeal from orders adverse to arbitration, limited review of arbitration awards, and treatment of awards as judgments.[11] In addition, although the acts do not directly define "arbitration,"[12] most have read the acts to apply to consensual proceedings that "settle" or end disputes through final and binding third party determinations.[13] Furthermore, this finality under the acts generally is understood to forbid appeal of determinations on

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(discussing UAA).

[9] There are varied laws governing different dispute resolution procedures labeled "arbitration," including nonbinding and court-annexed procedures. In addition, state courts continue to recognized diverse notions of common law arbitration. However, for the sake of convenience, this Article refers to the uniform remedial scheme under the FAA and UAA as "arbitration law."

[10] Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931-32 (10th Cir. 2001) (emphasizing FAA's special remedial scheme). An arbitration agreement is considered "executory" when it has not been performed, in that the parties to the agreement have not submitted their dispute to an arbitrator for final resolution and no award has been rendered. Under contract law, it is within a court's discretion to grant such equitable relief as specific performance, and courts will only exercise that discretion to remedy a breach of contract when ordering damages would be inadequate, and equitable relief is appropriate in light of all facts and circumstances. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 357-69 & Introductory Note (1981) (indicating discretionary nature of remedy and factors for determining its applicability).

[11] *See infra* notes 233-50 and accompanying text (discussing FAA's broad remedial scheme).

[12] Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1207 (9th Cir. 1998); *see also* Karthaus v. Yllas y Ferrer, 26 U.S. (1 Pet.) 222, 226-31 (1828) (wrestling with meaning of arbitration). The revisors of the UAA also opted not to define "arbitration." *See* Speidel, *supra* note 2, at 189.

[13] *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 7 (1992) (defining characteristics of arbitration to include "a binding award" with arbitrator's decision "subject to very limited grounds of review, final and enforceable by State law in the same manner as a judgment"); *see also* 9 U.S.C. § 2 (2000) (directing application of FAA to written agreements "to settle by arbitration" disputes arising out of transactions involving interstate commerce); UNIF. ARBITRATION ACT § 1, 7 U.L.A. 6-7 (1997) (prescribing UAA's application to agreements requiring parties to "submit" disputes to arbitration); Wesley A. Sturges, *Arbitration—What Is It?*, 35 N.Y.U. L. REV. 1031, 1032 (1960) (emphasizing arbitration as conclusive process); 1 GABRIEL M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 1:01, at 1 (3d ed. 1989) (citations omitted) (similarly defining arbitration).

the merits.[14] This is because both acts prescribe strict enforcement of awards, subject only to very limited judicial review,[15] which, in turn, preserves self-contained arbitration that is free to be more flexible, equitable and efficient than litigation. Furthermore, the finality of arbitration distinguishes arbitration from mediation and other nonbinding dispute resolution procedures[16] and prevents arbitration from becoming simply a precursor to litigation.[17]

Some courts have ignored this finality requirement, and have focused on contractual liberty as justification for applying the FAA and UAA to any proceedings that parties deem "arbitration," including proceedings that are subject to substantive judicial review on grounds outside the limited review prescription of the acts.[18] This Article proposes that expanded review procedures are not "final" as defined by the FAA and UAA.[19] As a policy matter, some

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[14] *See* William H. Knull & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 531-34 (2000) (acknowledging that "finality" under arbitration law means "the lack of appeal on the merits of the dispute," and arguing that best mechanism to correct erroneous awards would be to provide private, arbitral appeal rather than judicial appeal).

[15] 9 U.S.C. § 10 (as amended May 7, 2002, Pub. L. No. 107-169, § 1, 116 Stat. 132); UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280-81 (1997).

[16] *See* 1 WILNER, *supra* note 13, § 1:02, at 4 ("Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides.") (citation omitted); *see also* MODEL RULES OF PROF'L CONDUCT R. 2.4 cmt. 5 (2002) (recognizing finality of arbitration as key distinguishing characteristic in differentiating lawyer's duty of candor in binding arbitration versus other dispute resolution processes); Lucy V. Katz, *Enforcing an ADR Clause—Are Good Intentions All You Have?*, 26 AM. BUS. L.J. 575, 589-90 (1988) (noting limited review as key to arbitration's "specific meaning" under arbitration statutes).

[17] Nathan Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929, 930-37 (1927). At the time of the FAA's enactment in 1925, Isaacs proposed that there are two views of arbitration, as follows: the "legalistic view" that arbitration is purely a mode of trial and the "realistic view" that it is "a means of reaching results essentially different from those reached by a trial." *Id.* at 929. He emphasized that judicial review of awards would foster legalistic, "trial-like" arbitration complete with formal procedure, records and opinions. *Id.* at 934-35. His concerns remain true today.

[18] *See infra* note 343 (invoicing cases holding expanded review agreements enforceable under FAA and UAA).

[19] The discussion in this Article is limited to the meaning of "arbitration" governed by the FAA and UAA and what it means for arbitration to be "final" in the context of current statutory policy. A different but related question is what types of disputes should be arbitrable. There is a great deal of commentary on this issue, especially in the employment and consumer contexts. *See, e.g.*, Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 462-67 (1996) (suggesting that only disputes between parties with similar negotiating incentives should be subject to arbitration). It seems a more clear

may not agree with the definition of finality in the acts, and some countries have chosen to define arbitration's finality more broadly in their arbitration statutes by allowing for substantive judicial appeal of awards.[20] Perhaps the FAA and UAA *should* be revised to provide options for expanded judicial review of awards, especially in disputes involving statutory or public policy issues.[21] However, the acts currently do not provide such options. Instead, the acts prescribe limited judicial review of arbitration awards, and therefore it is within the domain of the legislatures, not that of courts and private parties, to vary such review.[22] In other words, the FAA/UAA limited review provisions are mandatory rules in that they must apply to a procedure for the procedure to be arbitration within the acts' purview.[23]

Why does it matter whether a procedure qualifies as arbitration governed by the FAA/UAA statutory scheme? Some argue that arbitration law merely directs enforcement of contracts.[24] It is true that under contract law, parties are free to craft varied dispute resolution agreements that courts may enforce through damages and other remedies they deem appropriate under contract and equity principles.[25] Accordingly, courts may apply contract law to order participation in nonbinding dispute resolution[26] or compliance

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definition of arbitration would sharpen this debate.

[20] *See infra* note 82 and accompanying text (discussing English Arbitration Act).

[21] It is fair to ask whether public policy should support different treatment of dispute resolution agreements based on their degree of "finality," and saying that expanded review agreements are not arbitration does not answer this policy question. *See* Speidel, *supra* note 2, at 189 (asking policy question and noting inadequacy of saying agreements that "opt-out" of arbitration law are not arbitration). However, Congress has made the policy decision in the FAA to provide special enforcement remedies for binding, limited-review arbitration.

[22] *See* Peter Bowman Rutledge, *On the Importance of Institutions: Review of Arbitral Awards for Legal Errors*, 19 J. INT'L ARB. 81, 81-82, 113-16 (2002) (discussing limited judicial review as "distinctive feature of arbitration" and concluding that "legislatures, rather than courts or parties, should decide whether (and to what extent) courts should review arbitral awards for errors of law").

[23] *See infra* note 273 (discussing mandatory/default rule distinctions and debate).

[24] *See infra* notes 30-31 and accompanying text (discussing focus on contractual liberty).

[25] Common law remedies—other than damages—include not only specific performance, but also restitution of losses suffered in reliance on a promise, reformation of an agreement to comport with the parties' intent, and rescission or cancellation of an agreement. RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. c (1981).

[26] *Id.* Specific enforcement of executory ADR agreements may be proper under contract law where damages would be inadequate and such enforcement is otherwise equitably

with dispute determinations that parties have accepted as final.[27] However, the FAA and UAA direct a much stronger specific enforcement remedy than that provided under common contract law.[28] Furthermore, the acts direct remedial procedures aimed to benefit both private parties and public courts. Asking whether a procedure is sufficiently final to be arbitration under the acts is important because the answer determines whether these statutory remedies should apply to the procedure's enforcement.[29]

Nonetheless, when pushed to determine the effect of arbitration agreements calling for expanded judicial review of awards, courts and commentators generally have not framed their analysis in terms of whether such awards are sufficiently final under the FAA and UAA to be governed by the acts.[30] Instead, most have relied on

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appropriate. *See* AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 461 (S.D.N.Y. 1985) (holding nominally nonbinding dispute resolution mechanism specifically enforceable under *both* FAA *and* court's "equity jurisdiction" because procedure in fact would end dispute); *see also* Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745, 750 n.10 (E.D. Va. 2001) (characterizing *AMF Inc.* court's enforcement of agreement as based in part on contract law and in part on court's "equitable powers").

[27] Courts generally enforce valid settlement agreements under contract law. *See* Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985) (recognizing enforcement of settlement agreements in adhering compliance with consent decree regarding eligibility of certain aliens for supplemental social security income). Furthermore, contract law may require enforcement of other terms in a dispute resolution agreement. *See* Doo Wop Shoppe Ltd. v. Ralph Edwards Prods., 691 N.Y.S.2d 253, 258-62 (N.Y. Civ. Ct. 1998) (holding that although The People's Court was not "arbitration," claimant could have sought specific performance of contract provision requiring to pay him amount awarded by Judge Koch). *But see* Kabia v. Koch, 713 N.Y.S.2d 250, 253-56 (N.Y. Civ. Ct. 2000) (holding that The People's Court is arbitration primarily because judge's determination is "final and binding").

[28] *See* UNIFORM MEDIATION ACT (UMA) § 5 (Reporter's Notes), 35-38, *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (Annual Meeting Draft, July 23-30, 1999) (last visited Oct. 8, 2002). Policymakers considered but rejected proposals to require summary enforcement of executory agreements to mediate in recent revisions of the UAA, noting that this equitable remedy is not mandatory for enforcement of mediation, although it is for arbitration under the FAA and UAA. *Id.* Instead, courts will order parties to participate in mediation only when it is appropriate under contract law because failure to mediate would cause irreparable harm. *Id.* at 37. The UMA Reporter noted, "[t]he courts here grapple with whether there is irreparable harm in failing to mediate, because unlike arbitration, mediation does not always provide a resolution." *Id.* Furthermore, courts generally enforce arbitration under the UAA in an expedited manner, but that may not be appropriate for enforcement of mediation. *Id.*

[29] *See, e.g.*, Harrison v. Nissan Motor Corp., 111 F.3d 343, 347-52 (3d Cir. 1997) (refusing Nissan's attempt to use FAA section 16 to obtain immediate appeal of nonfinal order because ADR mechanism was not arbitration governed by FAA).

[30] Commentators implicitly accept that awards subject to expanded review are within the purview of the FAA and UAA by enforcing such expanded review agreements under the acts.

contractual liberty in assuming that the FAA/UAA statutory remedies apply to enforcement of expanded review procedures.[31] This Article questions the assumption that the FAA and UAA apply to these procedures, by focusing on the meaning of finality as defined literally and functionally under the acts.

The functional analysis this Article proposes is quite simple.[32] It focuses on the language, goals and practical realities of the FAA/UAA statutory scheme in order to determine what level of finality fits the statutory goals and functions of the acts.[33] Such analysis is appropriate because the meaning of arbitration goes beyond contract interpretation to implicate the content and application of legislative remedies. Furthermore, a functional approach seems to underlie policymakers' evaluations of new legislation,[34] as well as prominent legislation scholarship, including

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See infra note 31. However, they generally do not explicitly consider the precise meaning of "finality" under the FAA/UAA comprehensive scheme. *Id.*

[31] *Id. See also infra* notes 343-44 (citing cases focusing on contractual liberty to support enforcement of parties' definitions of arbitration); *see also* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 39-41, 45-52 (1999) (proposing that "contract model" of arbitration should replace "folklore model," allowing parties to define arbitration as masters of their contracts); Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 428 (1998) (finding that expanded review of arbitration would sacrifice benefits of avoiding litigation, but nonetheless relying on contractual liberty to conclude that expanded review contracts should be enforced under arbitration law); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 256-61 (1997) (supporting enforcement of expanded review provisions under Arbitration Act); Stephen J. Ware, *"Opt-in" for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act*, 8 AM. REV. INT'L ARB. 263, 263 (1997) (supporting Revised UAA's inclusion of "opt-in" provision for judicial review of legal errors).

[32] "Functional analysis" is not a technical term; I use that label to describe the analytical approach this Article proposes.

[33] Without using the term, a few commentators seem to use a functional approach in denouncing expanded review arbitration. *See, e.g.*, Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. ON DISP. RESOL. 337, 339 (2000) (focusing on goals of arbitration law to reject enforcement of agreements attempting to expand judicial review of arbitration awards); Di Jiang-Schuerger, Note, *Perfect Arbitration = Arbitration Litigation?*, 4 HARV. NEGOT. L. REV. 231, 232 (1999) (suggesting in title, but not exploring or explicitly concluding, that expanded review procedures are not arbitrations governed by FAA); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 147-52 (1997) (opposing expanded review as "wholly incompatible with the essence of arbitration").

[34] *See Uniform Arbitration Act*, 1954 Proceedings of the Nat'l Council of Comm'rs on Unif. State Law 1, 44H—76H (1954) (focusing on functions of arbitration in debating proposals to provide for judicial review of legal errors in UAA, and ultimately rejecting these proposals by

that of Professors Henry Hart and Albert Sacks.[35] Furthermore, defining arbitration under the FAA and UAA with reference to goals and functions of the acts leads back to the statutory text, in that the limited judicial review provisions prescribed in the FAA and UAA serve the acts' goals and functions and therefore should define arbitration's finality under the acts. Legislators have continued to reject proposals for expanded judicial review of awards, making policy choices to deny substantive judicial review of awards in order to promote perceived flexibility, efficiency and independence of arbitration, and to protect courts from onerous and awkward tasks.[36] In addition, the Supreme Court has emphasized that arbitration should be free from substantive judicial oversight,[37] and that courts should interpret the FAA in a manner that gives meaning to all its provisions, which seemingly would include the Act's limited review prescriptions.[38]

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wide margin); *see also* John A. Spanogle, *A Functional Analysis of the EBRD Model Law on Secured Transactions*, 3 NAFTA: L. & BUS. REV. 82, 82 (1997) (presenting functional analysis of proposed legislation, noting that it is "the primary presentation method of the common law tradition in evaluating proposed legislation"); Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 710 (1952) (advocating modern arbitration legislation and challenging professors to train students "to use analytical tools functionally rather than by rote").

[35] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 709 (1987) (discussing Hart's and Sacks' "purpose-of-the-statute" approach). *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9-80 (1994) (analyzing and critiquing approaches to statutory interpretation and noting the Supreme Court's reflection on statutory purpose when interpreting laws).

[36] *See infra* notes 140-47 and 160-75 and accompanying text (discussing rejection of proposals for expanded review by drafters of FAA and UAA, and recent refusal by revisors of UAA to include provision allowing parties to "opt-in" to judicial review for factual and legal error).

[37] E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 161 (2000) (reiterating that awards must be confirmed "as long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," and "the fact that a court is convinced he committed serious error does not suffice to overturn his decision"); *see also* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 510-12 (2001) (per curiam) (reversing Ninth Circuit for inappropriately vacating arbitration award for factual error).

[38] In holding that the exemption in the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce" applies only to transportation workers' contracts and not to all employment contracts, the Court emphasized that it seeks to give meaning to all provisions of the FAA. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112-15 (2001). The Court further reasoned that it should interpret the exclusion narrowly in order to give meaning to the section 2 scope provision in

Indeed, the finality of arbitration under the FAA and UAA is defined by the limited judicial review provisions in the acts. Part I of this Article explores the development of the FAA and UAA and explains how goals and practical realities of arbitration led drafters to define the finality of arbitration through limited judicial review provisions.[39] Drafters purposely crafted review provisions that precluded courts' substantive second-guessing of arbitration awards and limited their oversight to ensuring basic procedural fairness of arbitration.[40] Part II explains that despite the expansion of arbitration since adoption of the FAA and UAA, policymakers have not altered the limited review prescriptions in the acts because they are still necessary to promote the acts' goals and functions.[41] Accordingly, some courts have moved toward recognition of a functional definition of finality in their analysis of "arbitration-like" procedures such as appraisals, arbitration subject to trial de novo, and the dispute resolution scheme of the Uniform Domain Name Dispute Resolution Policy (UDRP).[42]

These procedures, however, have not pushed courts to determine precisely what it means for arbitration to be "final" under the FAA and UAA.[43] Part III tackles the paradigm inquiry for defining the finality of arbitration under the acts by asking whether arbitration-like procedures subject to substantive judicial review are sufficiently inconsistent with the acts' goals and functions that they should not be enforced through the acts' statutory scheme.[44] In other words, are these expanded review procedures sufficiently final to be "arbitration" governed by the FAA and UAA? The inquiry seems to highlight tension between contractual liberty and legislative goals. However, this Article proposes the following truce: Substantive review transforms would-be arbitration into a dispute resolution

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the FAA that it previously had interpreted broadly to cover all contracts affecting interstate commerce, including those in employment contexts. *Id.* at 117-19.

[39] *See infra* notes 107-76 and accompanying text.

[40] *See id.*

[41] *See infra* notes 177-212 and accompanying text.

[42] *See infra* notes 213-68 and accompanying text.

[43] *See id.*

[44] *See infra* notes 269-368 and accompanying text.

procedure governed by common law, but not by the FAA/UAA statutory scheme.[45]

I. STATUTORY CONCEPTION OF FINALITY BASED ON THE GOALS AND PRACTICAL NEEDS OF ARBITRATION LAW

Arbitration developed as a means for providing private and self-contained dispute resolution. It was similar to judicial resolution in that it culminated in a third-party determination, but was independent from the judiciary and therefore free to be more efficient and flexible than litigation. As arbitration gained momentum, courts began to distrust and envy arbitration, but they nonetheless recognized that substantive review of arbitration awards would render arbitration a meaningless precursor to litigation, and would burden courts with an awkward task due to unclear distinctions between fact and law, as well as fundamental differences between arbitration and litigation.[46] Common law courts, therefore, broadly enforced awards and limited their review of arbitrator's determinations.[47] Accordingly, when the FAA and UAA were enacted, they not only mandated specific enforcement of executory arbitration agreements, but also expressly limited judicial review of arbitration awards to procedural grounds.[48] The drafters

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[45] *See infra* notes 370-73 and accompanying text. Exploration of the precise legal treatment of non-arbitration dispute resolution agreements is beyond the scope of this Article, but raises important issues worth further consideration.

[46] Early commentators asserted that appellate judicial review would merely add a superfluous "fifth wheel to the wagon." Wharton Poor, *Arbitration Under the Federal Statute*, 36 YALE L.J. 667, 676-78 (1927) (emphasizing finality as essential to protecting benefits of arbitration, but noting that arbitration "can by no means be relied upon as a solution of all litigious matters"); *see also* Burchell v. Marsh, 58 U.S. (17 How.) 344, 349-50 (1854) (finding that substantive appeal of arbitration awards would allow arbitration to become "the commencement, not the end, of litigation"); O.R. Sec., Inc. v. Prof'l Planning Assocs., 857 F.2d 742, 747-48 (11th Cir. 1988) (highlighting importance of finality to effectuate functions of modern arbitration); WESLEY ALBOR STURGES, A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS 792-97 (1930) (discussing judicial struggle to retain power to vacate awards for legal mistake without causing arbitration to become superfluous extra step in litigation).

[47] *See* MACNEIL, *supra* note 3, at 19 (emphasizing that courts enforce arbitration awards due to their understanding that arbitration involves trading-off rules, formality, and arguably accuracy for cheaper and convenient private trial).

[48] *See* Poor, *supra* note 46, at 674-75 (explaining drafters' rejection of English model that allowed judicial review of arbitration awards for legal questions, and their insistence that "once the parties have agreed upon arbitration, they must accept the result the arbitrator

of these acts concluded that substantive review would threaten the unique role of arbitration as an effective alternative to litigation and would leave arbitration vulnerable to traditional judicial distrust that hindered enforcement of arbitration agreements under common law.[49] Substantive review also would perpetuate practical difficulties courts had faced in attempting such review under common law. Indeed, the drafters sought to contain judicial oversight and preserve the independence of arbitration by purposely crafting a uniform state and federal remedial scheme based on a unique brand of finality defined through limited judicial review.[50]

A. HISTORICAL TENSIONS AMONG FUNCTIONS OF ARBITRATION AND JUDICIAL ATTITUDES TOWARD ENFORCEMENT OF AGREEMENTS AND AWARDS

Finality has been the functional cornerstone of arbitration, in that it has allowed arbitration to develop as a private, flexible, and self-contained process regarded as more efficient than litigation both in terms of time and expense.[51] Nonetheless, the finality of arbitration historically has threatened courts' assertion of power, causing them to refuse to order parties' compliance with executory arbitration agreements.[52] In addition, courts proclaimed power to vacate awards for legal or factual error under agreements calling for such review, although they rarely, if ever, exercised such power due to practical and functional tensions it created.[53] Courts developed

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reaches no matter how obviously and plainly wrong it appears").

[49] *See* EEOC v. Waffle House, Inc., 122 S. Ct. 754, 761 (2002) (reiterating that FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts") (citing and quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Modern courts continue to recognize the competition among private arbitration administrators and public courts. *See, e.g.*, Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983) (Posner, J.) (explaining "the American Arbitration Association is in competition not only with other private arbitration services but with the courts in providing . . . an attractive form of dispute settlement").

[50] See *infra* notes 107-76 and accompanying text.

[51] *See, e.g.*, Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 188-90 (1965) (emphasizing advantages of arbitration as efficient, economical, and private adjudicative alternative to litigation).

[52] *See infra* note 76 and accompanying text.

[53] *See infra* notes 87-106 and accompanying text.

a "love/hate" relationship with finality in that they hated to give arbitrators final power over cases at the outset, but once arbitrators exercised that power and rendered an award, they loved to enforce the award to avoid burdensome and uncomfortable reassessment of equitable proceedings.[54] Functional and practical tensions therefore led to enactment of uniform federal and state arbitration laws that insist on limited, nonsubstantive judicial review of awards.

1. Arbitration's Roots as a Self-Contained Dispute Resolution Process. Arbitration "took its rise in the very infancy of Society" as a private and self-contained process, unique from litigation, and not as a postscript to development of public courts.[55] Communities created arbitration systems designed to determine disputes efficiently in accordance with local norms and customs[56] and to provide private and equitable determinations that fostered peace preservation necessary to "avoid interruption of the traffick" of the community.[57] These self-contained arbitration systems served community and judicial needs for efficient, economical, equitable and private proceedings because disputants and courts treated them as final.[58]

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[54] *See infra* notes 83-89 and accompanying text.

[55] JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 25 (1918) (quoting JOHN MONTGOMERIE BELL, TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND 1 (2d ed. 1877)).

[56] *Id.* at 22-27 (emphasizing special utility of arbitration despite development of reputable judicial system in mercantile cases in which arbitrator expertise in technical matters is essential); *see also* James A.R. Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357, 375-76 (2001) (demonstrating communal concepts of arbitrations based on equity, norms and standards in modern international sports arbitrations). *See generally* Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for World Sports Disputes*, 35 VAL. U. L. REV. 379 (2001) (endorsing, within sports arena, use of unifying body for arbitration with uniform rules to ensure fairness and integrity for all members).

[57] Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 144 (1934) (quoting MALYNES, LEX MERCATORIA 303 (1622)).

[58] *See* F. Kellor, AMERICAN ARBITRATION, ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 3 (1948):

> Of all mankind's adventure in search of peace and justice, arbitration is among the earliest. Long before law was established, or courts were organized or judges had formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes.

Id.; *see also* COHEN, *supra* note 55, at 25 (explaining one type of arbitration that Aristotle described in "Rhetoric," that did not provide rigid applications of law or opportunity to

Merchant and trade groups are prime examples of communities that have relied on arbitration to provide an efficient and economical means for adjudicating disputes in accordance with local norms, standards and rules.[59] By the early twentieth century, nearly every trade or profession had developed its own machinery for arbitration,[60] and commercial contracts within certain industries routinely began to include arbitration clauses.[61] The oldest and most prominent merchant group in colonial America, the New York Chamber of Commerce, immediately established an arbitration system when it was founded in 1768.[62] The Chamber's arbitration panels were independent from the judiciary and protected from government strife.[63] This allowed arbitration panels to efficiently

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appeal); WILL DURANT, THE STORY OF CIVILIZATION: PART 1 OUR ORIENTAL HERITAGE 795-97 (1954) (describing arbitration systems in early Chinese civilization that provided means for "a wholesome compromise" and means for people to end "minor" disputes in accordance with face-saving compromise); Margit Mantica, *Arbitration in Ancient Egypt*, 12 ARB. J. 155, 155-59 (1957) (noting scarcity of records of early arbitrations because arbitrations generally involved purely private disputes that had little public significance); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597 (1928) (tracing origin of arbitration, as part of common law, to work of Ecclesiastical).

[59] COHEN, *supra* note 55, at 25-38, 71-72, 78; Wolaver, *supra* note 57, at 134-35; *see also* LUJO BRENTANO, ON THE HISTORY AND DEVELOPMENT OF GILDS AND THE ORIGIN OF TRADE-UNIONS 33-39 (1870) (emphasizing governance by "guild law" in England during Anglo-Saxon times for protection of rights and preservation of liberty from neighboring nobles).

[60] Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. REV. 238, 247 & n.42 (1930). Baum and Pressman reported that the following trade associations had active arbitration facilities: automotive industry; bottlers association; clothing and dry goods; construction industries; cotton and by-products; financial organizations; food industries; fuel, heat, light and power; fur; grain; hay and seed; hardware; import and export; jewelers; leather hides and skins; lumber and allied industries; manufacturers; medical; motion pictures; music; paint, oil and varnish; paper and pulp; printing and engraving; real estate; rubber; silk; theatre; transportation; warehousing; and wool. *Id.* Professional communities with arbitration mechanisms included the following: dental, rotary, international, legal aid, civil engineers, and the American Institute of Accountants. *Id.*

[61] SAMUEL ROSENBAUM, A REPORT ON COMMERCIAL ARBITRATION IN ENGLAND 13-14 (1916). A book of legal forms published in 1627 included a special section on "Compromise and Arbitration," and another in 1655 contained a brewhouse lease that required the parties to submit disputes to a four-member arbitration panel composed of two members from each party's company. *Id.* at 13.

[62] William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 207 (1930).

[63] *See id.* at 208-09 (noting continuation of arbitration during British occupation).

end a deluge of disputes between American and British merchants during and after the American Revolutionary war.[64]

In addition, merchant groups preferred arbitrators' equitable determinations and specialized understanding of commercial issues and industry norms.[65] Arbitrators recognized communal ways of "doing business" in diversified markets and respected groups' differences from one another and the community as a whole.[66] Indeed, since at least 427 A.D., arbitrators have captured community respect and acceptance of their determinations through their specialized, field-specific, expertise.[67] For example, construction arbitration has thrived since the 1800s, and continues to thrive primarily because those in the industry desire to have disputes decided by technicians in the field.[68]

Another goal of arbitration has been to provide procedures that are more flexible than judicial rules. Arbitrators historically were

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[64] Chamber arbitrations continued during the British occupation in 1779, after the Chamber's need for arbitration prompted a special meeting that produced a letter to the British commander requesting arbitrations to resolve mercantile disputes. *Id.* at 208. The commander acquiesced in the request, and arbitration served as the only means of resolving civil disputes during the British occupation. *Id.* at 208-12. Arbitration continued to thrive after the revolution in both England and North America. *Id.* at 209-12; *see also* ROSENBAUM, *supra* note 61, at 14-15 (documenting post-war arbitrations by Liverpool Cotton Association's arbitration committee of disputes between factors in Liverpool cotton market and American cotton shippers). Even when the courts closed on September 11, 2001, due to the destruction of the World Trade Center in New York and the attack on the Pentagon in Washington, D.C., arbitrations continued to proceed in the offices of the American Arbitration Association (AAA). Interview with Lance Tanaka, Vice President, American Arbitration Association of Denver, Colorado in Boulder, Colo. (Sept. 12, 2001).

[65] COHEN, *supra* note 55, at 71-72. Judge Buller reported that, before Lord Mansfield became England's Chief Justice in 1756, "[m]ercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves." *Id.* (citation omitted).

[66] *See, e.g.*, Jones, *supra* note 62, at 211-12 (describing arbitration among North American mercantile communities). From 1800 to 1920, the vast majority of arbitrations involved real estate and construction contracts. *Id.* at 212.

[67] In arbitrations dating back to the Oxyrynchus Papyri from 427 A.D., traders willingly accepted as final the decisions of fellow traders with knowledge and expertise in the relevant field. Mantica, *supra* note 58, at 160-61. The most successful arbitrators were experts and leaders of the community. *Id.* The growth of arbitral schemes among merchant and trade groups has relied on arbitrator expertise as essential to disputants' acceptance of awards. *See* Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TULANE L. REV. 42, 43 (1982) (explaining that arbitration thrived among commercial groups that preferred to keep their differences "in the family").

[68] Jones, *supra* note 62, at 212-15.

not "hemmed in" by legal precedents.[69] Instead, they were free to order equitable remedies, regardless of legal limitations on remedies applicable in court.[70] Furthermore, flexible and informal arbitration procedures generally were less adversarial than trials,[71] and they fostered repaired business relationships.[72] Moreover, the private and self-contained process of arbitration protected disputants from the public embarrassment of litigation.

Accordingly, the functions of arbitration as a private, flexible, efficient, and independent process fueled its popularity. This popularity, however, sparked courts' envy and distrust of arbitration systems, which in turn lead to inconsistent and confused judicial treatment of arbitration agreements and awards.[73]

2. Common Law Courts' "Love/Hate" Attitude Toward the Finality of Arbitration.

a. Judicial Jealousy and Distrust of Arbitration. Courts perceived the growing prominence of arbitration as a preferred means for resolving business disputes as a threat to their power.[74] Although courts strictly enforced arbitration awards they deemed final and binding,[75] they refused to enforce executory agreements to arbitrate.[76] In 1609, Lord Coke espoused in *Vynior's Case* the

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[69] Baum & Pressman, *supra* note 60, at 149-50.

[70] *See* Oregonian Ry. Co. v. Or. Ry. & Nav. Co., 37 F. 733, 734 (C.C.D. Or. 1885) ("As a general rule a contract to build or repair will not be specifically enforced by a court of equity."); Cartwright v. Or. Elec. Ry. Co., 171 P. 1055, 1056 (Or. 1918) (emphasizing general rule that denies specific performance of contracts for building and construction, and of contracts to make repairs); *cf.* Dixon v. City of Monticello, 585 N.E.2d 609, 619-20 (Ill. App. Ct. 1991) (ordering specific performance of home sales contract and reimbursement from purchaser for interest accrued to date of closing).

[71] *See* Baum & Pressman, *supra* note 60, at 250.

[72] *See id.* at 239. Flexibility fosters creativity and allows for awards that may contribute to renewed relations. For example, Professor Lisa Bernstein found in her study of the cotton industry, that arbitrators sometimes crafted awards calculated to encourage relationship restoration, such as partial decisions that left issues for parties' later agreement. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1785 (2001).

[73] *See infra* notes 74-82 and accompanying text.

[74] COHEN, *supra* note 55, at 83. Arbitration threatened a significant source of judicial business, as well as judicial jobs linked to the courts' caseloads.

[75] *See* Baum & Pressman, *supra* note 60, at 242-45 (explaining that even before adoption of arbitration laws, arbitration awards were binding once they were rendered).

[76] COHEN, *supra* note 55, at 150-52. Prior to enactment of the FAA, the usual remedy for breach of an executory arbitration agreement was damages, which were nearly impossible to determine and could not be quantified in reference to an award one might have received in

"revocability doctrine," which common law courts used as the basis for their refusal to enforce executory arbitration contracts on the theory that arbitrators are merely agents at the will of the parties who appoint them.[77] The revocability doctrine seemed to mask hostility toward arbitration, because the doctrine was unsupported by contract or agency law. It disregarded the contractual basis of arbitration agreements, and misapplied agency theory by ignoring that arbitrators are summoned to decide disputes impartially and are not subject to the parties' control.[78]

Eventually, courts replaced the revocability doctrine with the "ouster" doctrine to support their refusal to enforce executory arbitration agreements. Under the ouster theory, courts held that parties could not, by contract, oust the court of jurisdiction.[79] Again, the ouster theory appeared to be a pretext for judicial hostility to arbitration,[80] especially because courts continued to enforce proverbial "ousters," including settlement agreements, antisuit

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arbitration, because such amount likely would be void as a penalty. *Id.* at 150-51. At most, a party's damages would be limited to nominal expenses incurred preparing for the arbitration. *Id.* at 151. In contrast, final arbitration awards were more easily enforceable through damages or specific performance. WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS, 679-80, 701-02 (1930).

[77] Vynior's Case, 77 Eng. Rep. 597, 599 (K.B. 1609). Lord Coke's dictum is now widely known among arbitration students and scholars, but has gained infamy for its "unsoundness." COHEN, *supra* note 55, at 126-27.

[78] Sayre, *supra* note 58, at 598-604 (noting *Vynior's Case* decision did not rely on "revocability," but instead rested on enforcement of bond securing submission to arbitration; plaintiff in fact recovered greater damages on bond than he would have obtained on underlying claim). It was not until later that the Statute of Fines and Penalties precluded recovery of the face value of bonds unless justified by actual damages, and thus courts limited recovery on bonds to nominal damages securing submission to arbitration on the theory that parties suffered no actual injury from being forced to litigate in the King's courts. *Id.* at 604.

[79] Kill v. Hollister, 95 Eng. Rep. 532, 532 (K.B. 1746).

[80] Cohen surmised that the "ouster of jurisdiction" doctrine arose primarily from judicial language in *Kill v. Hollister*, in which the court held an arbitration agreement unenforceable because "the parties cannot oust this court." *Id.*; COHEN, *supra* note 55, at 153. The "ouster" rule quickly lost steam, and courts frowned on attempts to "revoke" an arbitration submission after an award was rendered. COHEN, *supra* note 55, at 165-69. Lord Campbell opined in 1857 that the ouster doctrine developed "in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction." Scott v. Avery, 10 Eng. Rep. 1121, 1138 (H.L. 1856); *cf.* Sayre, *supra* note 58, at 610. Sayre questioned perceived judicial jealousy, and proposed that courts merely were protecting common law rights by refusing to enforce arbitration agreements in which arbitration would not assure due notice and fair hearing. Sayre, *supra* note 58, at 610.

covenants, and even arbitration awards.[81] The doctrine therefore created a "defect in the law," first cured by English legislators in 1854, long before the enactment of the FAA.[82]

b. Courts' Reluctant Enthusiasm Toward Finality of Arbitration Awards. Although common law courts were reluctant to allow arbitrators to assert power over a controversy at the outset, they generally declared that courts should treat final awards as final in light of "every consideration of public policy."[83] Courts imposed a strict brand of finality, refusing to "presume anything against an award" and remaining "reluctant to permit one of the parties to defeat or vacate an award or otherwise reopen the case."[84] Courts therefore seemed to equate the finality of awards with preclusion of judicial redetermination of arbitrated disputes.[85] They generally limited review of awards to whether the arbitrators exceeded their authority or to whether the procedure was fundamentally unfair, essentially foreshadowing the limited review that survives in the FAA and UAA.[86] Courts recognized that finality

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[81] Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 121 (1924). Justice Brandeis recognized the confused state of the law before the enactment of the FAA, stating, "[i]f executory, a breach will support an action for damages. If executed—that is, if the award has been made—effect will be given to the award in any appropriate proceeding at law, or in equity." *Id.*

[82] English legislation cured this "defect" by requiring specific enforcement of arbitration agreements. Poor, *supra* note 46, at 667. The initial British arbitration law was superseded by the Arbitration Act of 1889, which again required specific enforcement of arbitration agreements. *Id.* With enactment of the FAA, Congress finally followed the British lead by requiring specific enforcement of arbitration agreements, but rejected the allowance in the English Act for judicial review of legal issues referred by arbitrators. *Id.* at 674-75. Instead, Congress insisted that awards "should stand unless fraud or misconduct can be shown." *Id.* at 674; *see also infra* notes 133-39 and accompanying text (discussing FAA limited judicial review provisions).

[83] Brazill v. Isham, 12 N.Y. 9, 15 (1854). The court emphasized that awards, like court judgments, estop parties from pursuing further litigation. *Id.*

[84] STURGES, *supra* note 46, at 613 (citations omitted).

[85] *Id.* at 613-19 (citing various judicial declarations of conclusiveness of awards).

[86] *Id.* at 760-62. Courts generally precluded parties from using extrinsic evidence to challenge an award. *Id.* at 760. Nonetheless, extrinsic evidence was admissible to impeach awards on the basis that a party was denied notice and an opportunity to be heard in an arbitration, an arbitral board exceeded its authority or refused to decide matters submitted, an arbitral board did not concur in an award under the common law rule requiring unanimity unless agreed otherwise, or the submission agreement itself was invalid under contract law. *Id.* at 760; *cf. infra* notes 133-39, 166 and accompanying text (discussing grounds for challenging arbitration awards under FAA and UAA). Regardless, some courts did not even allow challenges for fraud or bias based on evidence extrinsic to the award. STURGES, *supra*

was necessary to prevent arbitration from becoming a superfluous "commencement, and not the end, of litigation,"[87] and rejected substantive review of awards as a threat to the efficiency, flexibility and privacy of arbitration.[88] In effect, the courts seemingly espoused the functional understanding of binding arbitration that modern courts and commentators emphasize in refusing to review arbitration awards for legal and factual errors.[89]

Nonetheless, judicial jealousy and distrust of arbitration tempered apparent enthusiasm for the finality of arbitration awards.[90] Although states adopted varied statutory enforcement schemes[91] and common law allowed parties to enforce awards through contract remedies,[92] the meaning of the "finality" of arbitration was not clear. Because courts retained final control over awards, as one commentator explained, they "naturally tended to

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note 46, at 760.

[87] White Star Mining Co. v. Hultberg, 77 N.E. 327, 336 (Ill. 1906) (quoting Burchell v. Marsh, 58 U.S. 344, 349-50 (1854)). In *White Star Mining Co.*, the Illinois Supreme Court narrowly interpreted an arbitration agreement requiring that the arbitrator decide "according to law" and refused to vacate the award, because otherwise, the parties would have been "no nearer [to] a settlement after the award than before." 77 N.E. at 337.

[88] Poor, *supra* note 46, at 676-78 (emphasizing finality as essential to protecting benefits of arbitration); *see also* Burchell v. Marsh, 58 U.S. 344, 349-50 (1854) (finding that substantive appeal of arbitration awards would allow arbitration to become "the commencement, not the end, of litigation").

[89] WILNER, *supra* note 13, § 1:01, at 1; *see also infra* notes 133-39, 166-69 and accompanying text (discussing court's limited review under FAA and UAA).

[90] Commentators have popularized the so-called "doctrine of judicial jealousy" that refers to courts' encroachment upon the prerogatives of arbitrators. Frances T. Freeman Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519, 526 (1960). It took some time for the FAA to control the judicial distrust of arbitration that continued during the early years after enactment of the FAA. Courts applied varied state statues mixed with common law instead of a clear, uniform scheme, and therefore found creative ways to substitute their judgment for that of arbitrators. *See id.* at 526-32 (noting cases in which courts seemed to encroach on arbitrators' domain); Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 185-86 (1965) (explaining that states began expanding applicability of arbitration legislation in early 1960s, and by 1965, fifteen states had statutes similar to 1955 revision of UAA).

[91] *See* STURGES, *supra* note 46, at 708-52 (discussing award enforcement procedures under states' arbitration statutes before adoption of UAA).

[92] *Id.* at 678. Actions generally were categorized as "on a contract," or "upon a specialty" like a judgment, although pleadings varied in particular cases. *Id.* For example, parties could bring actions to enforce money awards by assumpsit, while actions to enforce awards ordering transfer of property often were categorized as replevin or trover. *Id.* at 678-81. Furthermore, courts of equity generally would grant specific performance of awards in proper cases, for example, when there was no adequate remedy "at law." *Id.* at 701.

overstep their bounds, especially where they regard[ed] themselves as equally, or perhaps even better, qualified to settle the controversy."[93] For example, some courts applied common law to find awards were not adequately final to enforce because they were not sufficiently definite and left issues for future determination.[94] Courts also questioned whether awards were complete and mutual, in that they clearly showed the parties' intent to have their dispute finally determined outside of the courts.[95] In addition, courts used public policy and contract interpretation to prevent arbitration and enforcement of awards under varied state laws that applied before uniform acceptance of the FAA/UAA model.[96]

Courts also attempted to retain control over arbitration by declaring varied levels of authority to review awards for "mistake" of fact and law.[97] It was entirely unclear, however, what standards courts could or would apply in reviewing for mistakes.[98] Most courts would not review errors of "judgment," regardless of whether a court would have reached a different conclusion, due to concern that such substantive review would render arbitration "useless and vexatious, and a source of great litigation."[99] This rule was difficult to apply, however, because "judgment" errors often were indistinguishable

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[93] Jalet, *supra* note 90, at 531. Although Jalet ultimately concluded in her 1960 article that "the charge of judicial intolerance has been carried too far," she recognized that courts continued to intrude inappropriately in arbitration by disregarding the "independent nature" of arbitration and inappropriately holding arbitrators to strict application of legal principles. *Id.* at 556-57.

[94] *See* STURGES, *supra* note 46, at 580-885 (stating general rules and unclear application in example cases under common law).

[95] *Id.* at 548-49. The certainty standard was essentially uncertain in that it was difficult to apply. *See* Clark Millinery Co. v. Nat'l Union Fire Ins. Co., 75 S.E. 944, 949 (N.C. 1912) (acknowledging that "certainty is an essential of a good award," but finding it difficult to apply and therefore confining inquiry to whether award was sufficiently uncertain that it would be avoidable under contract law).

[96] Jalet, *supra* note 90, at 527-35. Courts appeared to substitute and question arbitrators' judgment under the guise of "public policy" and contract interpretation. For example, the California Supreme Court applied public policy to vacate an award requiring reinstatement of a worker who was a member of the Communist Party. Black v. Cutter Labs., 278 P.2d 905, 916 (Cal. 1955).

[97] STURGES, *supra* note 46, at 787.

[98] *See id.* at 787 ("What are the standards of perfection or correctness by which to measure the judgments of arbitrators? Only a negative and incomplete answer is available.").

[99] *Id.* at 789 (citing Underhill v. VanCortlandt, 2 Johns Ch. 340, 361 (N.Y. Ch. 1817)).

from "mistakes" that rendered awards void.[100] Confusion therefore led courts to apply contradictory rules. In California, for example, courts applied varied "mistake" standards such as "palpable and material," "gross error," or "substantial justice," and had varied views on whether a mistake must appear on the record.[101] The California legislature finally squelched its courts' confusion by prescribing limited, nonsubstantive review of arbitration awards.[102]

Courts also struggled with the task of substantively reviewing arbitration awards pursuant to parties' agreements. Courts claimed power to review awards for legal error if the parties' arbitration agreement clearly stated that the award must comply with governing law, reasoning that an award based on an error of law would be outside the scope of the arbitrators' contractual authority.[103] However, courts rarely construed agreements to require arbitrators to comply with the law, and they nearly never vacated awards for legal error.[104] Furthermore, courts did not develop any uniform approach to the incongruent task of substantively reviewing an arbitrator's legal determinations, and some courts limited review to mistakes of law "manifest" on the face of the award, or clearly contrary to an arbitrator's intent to follow the law.[105] Indeed, any substantive review standards were unclear and difficult to decipher, let alone apply, and seemed to contradict the independent nature of arbitration and its goals of efficiency, economy, privacy, and flexibility. Functional and practical concerns sparked creation of uniform arbitration legislation to ensure

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[100] *Id.* at 792 (citing Am. Screw Co. v. Sheldon, 12 R.I. 324 (1879)).

[101] Moncharsh v. Heily & Blase, 832 P.2d 899, 905-15 (Cal. 1992) (en banc) (citations omitted).

[102] Finally, with statutory delineation of judicial review, courts began to treat these grounds as exclusive, thereby saving judicial and party time and resources debating and applying legal error standards. *Id.* at 911-15. The California Law Revision Commission emphasized that arbitration must be final in the sense that "ordinary concepts of judicial appeal and review are not applicable to arbitration awards," and noticeably revised the state's arbitration law with no mention of judicial review for legal error on the face of an award. *Id.* at 913-14 (citations omitted).

[103] STURGES, *supra* note 46, at 793.

[104] *Id.* at 794. For example, the Supreme Court of Massachusetts refused to review an award for legal error despite a provision in an agreement that arbitrators were required "to determine all questions according to the rules of law and equity, the same as though the matter was to be tried in a court of law and equity." *Id.* (citations omitted).

[105] *Id.* at 795-98 (citations omitted).

protection and understanding of arbitration's role in dispute resolution.[106]

B. ADOPTION OF A STATUTORY DEFINITION OF FINALITY AIMED TO PROMOTE ARBITRAL AND JUDICIAL POLICIES

1. Conception of a Uniform Statutory Scheme Governing Arbitration. In this atmosphere of confusion, merchant and commercial groups sought adoption of a uniform legislative scheme to govern enforcement of arbitration. In the late 1600s, England enacted arbitration legislation,[107] and some American colonies soon followed its lead.[108] Nonetheless, American arbitration systems that developed throughout the eighteenth and nineteenth centuries failed to provide a uniform approach for the enforcement of arbitration.[109]

Finally, in the early 1900s, the New York Chamber of Commerce and the Association of the Bar of the City of New York developed the New York Arbitration Law, which became the prototype for modern state arbitration statutes and the United States Arbitration Act,

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[106] *See, e.g.*, Jalet, *supra* note 90, at 523-24 (emphasizing that FAA and UAA creation of "a uniform routine" for enforcing arbitration was essential to goals of arbitration in order to provide certainty and predictability that was missing under common law and antiquated statutes).

[107] In 1698, the English Parliament enacted a statute authorizing courts to enter judgment on parties' arbitration awards if the parties agreed in their arbitration submission that judgment could be entered. Jones, *supra* note 62, at 198. Later came the Arbitration Act of 1889 and the Arbitration Act of 1996; both required specific enforcement of arbitration agreements and awards. *See supra* note 82 (discussing English arbitration laws).

[108] In some colonies, courts enforced arbitrations pursuant to judicial or legislative rules. For example, the minute books of the Court of Assizes in New York City from 1680 to 1682 report a case compelling arbitration of a dispute involving the sale of goods and enforcing two arbitration awards. *Id.* at 199-200; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 45 (2d ed. 1985) (reporting Quakers' establishment of arbitration system to resolve citizen disputes in colonial Pennsylvania); Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 246-47 (1927) (noting New Amsterdam's 1647 ordinance establishing "The Board of Nine Men" to resolve disputes outside of courts in order to avoid "the great expense, loss of time and vexation" of litigation); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 456-63 (1984) (describing colonial arbitration rules governing private disputes, including trespass squabbles).

[109] Jones, *supra* note 108, at 248. Trade and merchant groups branched off into many organizations with their own arbitration rules and means for enforcement. *Id.*

now known as the FAA.[110] Drafters of the legislation aimed to preserve the efficiency and simplicity of arbitration, and to protect its self-contained process based on equity, norms and custom.[111] To that end, they sought to ensure the independence of arbitration from the judiciary by crafting legislation that would require strict enforcement of not only arbitration agreements, but also awards.[112] Based on this conception of arbitration as a final and independent process, New York enacted its Arbitration Law in 1920,[113] and Congress followed suit only five years later by enacting the FAA, which was essentially the same as the New York law.[114]

"Arbitration law" began to take shape as "a distinct body of principles" that promoted final arbitration, and was not a mere subcategory of contract law.[115] The federal legislation and New York legislation mandated specific enforcement of executory agreements to arbitrate, and established a remedial scheme for summarily enforcing awards and protecting the process from judicial intrusion.[116] The legislation was revolutionary because it required

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[110] Baum & Pressman, *supra* note 60, at 243.

[111] *Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomm. of the Comms. of the Judiciary*, 68th Cong. 7 (1924) [hereinafter *Joint Hearings*] (statement of Charles L. Bernheimer); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 285-86 (1926); Ogden Mills, *Address Before Chamber of Commerce of the State of New York* (Apr. 2, 1925), *in* THE ARBITRATION FOUND. INC., THE UNITED STATES ARBITRATION LAW AND ITS APPLICATION 21; *see also* DANIEL BLOOMFIELD, SELECTED ARTICLES ON COMMERCIAL ARBITRATION 1-16 (1927) (discussing generally growth of arbitration).

[112] FAA policy mandates "no contemplation of resort to outside means" for enforcing awards in order to preserve the efficiency and finality of arbitration. BLOOMFIELD, *supra* note 111, at 16 (citing Julius H. Barnes, INTERNATIONAL CHAMBER OF COMMERCE, DIGEST NO. 44 (Apr. 1923)); *see also* Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 291 (N.Y. 1921) (warning courts that if arbitration does not end disputes, it is merely expensive and superfluous step in litigation).

[113] Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 8037.

[114] Jones, *supra* note 108, at 249-50. Although the Senate passed over the bill on December 30, 1924, because an objecting senator was not present, they later discussed and amended the bill. On February 12, 1925, President Coolidge signed the United States Arbitration Law. ABA Comm. on Commerce, Trade and Commercial Law, *The United States Arbitration Law and its Application*, 11 A.B.A. J. 153, 153 (1925). The law is now known as the Federal Arbitration Act. *See* 9 U.S.C. §§ 1-16 (2000) (covering domestic arbitration); *id.* §§ 201-208 (implementing Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)).

[115] Jalet, *supra* note 90, at 526 n.42 (explaining arbitration law became accepted as its own body of law as it outgrew contract law).

[116] ABA Comm. on Commerce, Trade and Commercial Law, *supra* note 114, at 154-56.

courts to mandate parties' compliance with executory arbitration agreements instead of merely assessing any damages resulting from a breach.[117] Congress designed the law's "very simple machinery" for enforcement of arbitration agreements and awards to rescue private disputants from the inefficiencies of cluttered courts, and to "leave the courts free to handle the business that ought to be handled with dispatch."[118] Moreover, in order to protect the private, flexible, and independent process of arbitration, the law directed courts to enforce arbitration awards strictly with very limited review.[119]

2. FAA's Scheme to Ensure Independence and Finality of Arbitration. The enforcement scheme of the FAA has remained essentially the same since 1925 and continues to endorse final and binding arbitration.[120] Indeed, the recent May 2002 amendment of the Act correcting grammatical errors in section 10, clarified and

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Arbitration was meant to be independent from the judiciary, and in effect oust the courts from the process. *Joint Hearings*, *supra* note 111, at 14-16 (statement of Julius Henry Cohen).

[117] ABA Comm. on Commerce, Trade and Commercial Law, *supra* note 114, at 154-56. Again, although courts enforced arbitration by ordering nominal damages under contract law, "real jealousy on the part of the courts for their jurisdiction" prevented courts from specifically enforcing such agreements. *Id.* at 155.

[118] *To Make Valid and Enforceable Certain Agreements for Arbitration*, S. REP. NO. 68-536, at 17-18 (1st Sess. 1924) (reporting testimony before subcommittee emphasizing that court's only role should be to ensure that parties have agreed to arbitrate, thereby waiving any right to trial by jury and ending the court's substantive involvement in arbitration process).

[119] FAA award enforcement "is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." Florasynth, Inc. v. Pickholtz, 750 F.2d 171, 176-77 (2d Cir. 1984). Section 10 of the FAA prescribes limited grounds for judicial review focused on preservation of basic procedural fairness, and section 11 allows for judicial modification or correction of certain apparent errors in an award. *Id.* at 175. The FAA does not, however, permit a court to question the merits of an arbitration award. *Id.* at 176.

[120] 9 U.S.C. §§ 1-16 (2000). There have been only minor revisions of the FAA since it was first enacted as the United States Arbitration Act on February 12, 1925. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (1925). In 1947, the Act was codified in Title 9 of the United States Code Act of July 30, 1947, ch. 392, 61 Stat. 669, 669-74. The Act was amended in 1954. Act of Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233, 1233. In 1970, Congress added chapter 2 in order to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, now codified at 9 U.S.C. §§ 201-208 (2000). Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692, 692-93. Section 15, dealing with inapplicability of the Act of State doctrine, and section 16, dealing with appeals, were added in two acts in November 1988. Act of Nov. 19, 1988, Pub. L. No. 100-702, tit. X, § 1019(a), 102 Stat. 4642, 4670; Act of Nov. 16, 1988, Pub. L. No. 100-669, § 1, 102 Stat. 3969, 3969. In 1990, section 15 was renumbered to become section 16. Act of Dec. 1, 1990, Pub. L. No. 101-650, tit. III, § 325(a)(1), 104 Stat. 5120, 5120-21. Finally, section 10 was amended to correct grammatical errors. See *infra* note 122.

thereby reinforced the limited list of grounds for vacating an arbitration award.[121] Like its state counterpart, the UAA,[122] the FAA prescribes a fairly simple enforcement and remedial scheme aimed to minimize judicial involvement in arbitration.[123] It requires courts to enforce written arbitration contracts[124] by staying any judicial proceedings[125] and ordering arbitration to proceed[126] with few procedural formalities.[127] Furthermore, if parties agree that judgment may be entered on an arbitration award, "the court *must* grant such an order unless the award is vacated, modified, or

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[121] 9 U.S.C. § 10 (as amended May 7, 2002, Pub. L. No. 107-169, § 1, 116 Stat. 132). The 2002 amendment corrected grammatical errors and was referred to in Congress as the "comma bill," with Representative Sensenbrenner exclaiming, "[s]ome may try to diminish the importance of this bill, but one should never underestimate the importance of a comma. . . . To my colleagues here and on the other side of the Capitol who have previously loaded up this bill with unrelated legislation, I say free the comma." 147 CONG. REC. H901-02 (daily ed. Mar. 14, 2001).

[122] *See* UNIF. ARBITRATION ACT (UAA) §§ 5, 8, 7 U.L.A. 173, 202 (1997); *see also* Revised Uniform Arbitration Act (RUAA). The RUAA is accessible on the National Conference of Commissioners on Uniform State Laws (NCCUSL) website at http://www.nccusl.org. The UAA and RUAA provisions closely resemble the FAA procedural scheme. *See infra* notes 251-68 and accompanying text (discussing development of UAA and RUAA).

[123] From its inception, the FAA was intended to ensure enforcement of arbitration agreements and awards with minimum "technicality, delay, and expense" and "without interference by the court." H.R. REP. NO. 68-96, at 2 (1924) (submitted by Rep. Graham from the Committee on the Judiciary).

[124] 9 U.S.C. § 2 (2000). The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

[125] 9 U.S.C. § 3 (2000). Once the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement," the court must stay judicial proceedings until completion of arbitration. *Id.*

[126] 9 U.S.C. § 4 (2000). If a valid arbitration agreement exists, any issues going to the validity of the underlying contract are for the arbitrators to decide. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) (announcing "separability doctrine" that deems arbitration clause separable from main contract, thereby requiring that court compel arbitration of underlying issues once it determines there is arbitration agreement). Furthermore, if the parties do not empanel an arbitrator, the court will do so to get arbitration underway. 9 U.S.C. § 5 (2000).

[127] The FAA mandates simple motion procedures to request a stay of judicial proceedings or an order directing parties to proceed to arbitration, rejecting technicalities, delay and expense of filing a lawsuit under the usual civil procedure rules. *See* 9 U.S.C. § 6 (2000) (stating that applications to court to modify, vacate, or confirm arbitration award "shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided"); Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 46 (2d Cir. 1994) (holding section 6 of FAA does not require compliance with pleading requirements of Federal Rule of Civil Procedure 12(b)); *cf.* FED. R. CIV. P. 4-10 (setting out federal rules of process, service and filing of pleadings).

corrected as prescribed in sections 10 and 11 of [the Act]."[128] If the parties do not agree that judgment may be entered on an award, the FAA does not apply to enforcement of the award.[129] If the FAA applies to the proceeding, the parties may enjoy other benefits of the broad remedial scheme of the Act, including liberal venue provisions,[130] and immediate appeal from orders adverse to arbitration.[131] In addition, courts generally have deemed arbitrators immune from civil liability for acts within an arbitral process.[132]

If the parties' contract requires binding arbitration, then the sole means for challenging the award is a motion to vacate on the grounds listed in section 10:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;

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[128] 9 U.S.C. § 9 (2000) (emphasis added). The Act directs courts to enter judgment on awards "as a matter of course." *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: J. Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 36 (1924) (brief on arbitration statute submitted by Julius Henry Cohen).

[129] Most arbitration agreements expressly, or through incorporation of American Arbitration Association (AAA) or other arbitration rules, require that judgment be entered on any award. *See* P&P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 866-68 (10th Cir. 1999) (finding that parties implicitly consented to judicial confirmation of their arbitration award by agreeing to arbitrate before AAA, which promulgates rules requiring that parties allow judgment to be entered on any arbitration award). However, the FAA does not apply to an award rendered pursuant to an agreement that does not implicitly or explicitly provide for consent to judgment. Oklahoma City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 795 (10th Cir. 1991).

[130] *See* 9 U.S.C. § 9 (supplementing general venue options); Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 195 (2000) (holding FAA venue provisions are permissive and therefore expand venue options for federal motions to confirm, vacate, or modify arbitration awards).

[131] 9 U.S.C. § 16 (2000) (specifying appeal provisions); *see* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 86-87 (2000) (reiterating that section 16 expands traditional immediate appeal provisions).

[132] *See* Austern v. Chicago Bd. Options Exch., Inc., 898 F.2d 882, 886 (2d Cir. 1990) (holding arbitrators absolutely immune from liability for damages for all acts within scope of arbitral process); Kabia v. Koch, 713 N.Y.S.2d 250, 253-56 (N.Y. Civ. Ct. 2000) (holding Judge Koch was arbitrator entitled to immunity from liability for statements made on The People's Court because his determinations were "final and binding").

> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[133]

Some courts deem these grounds exclusive,[134] or indicate that parties should not "have any say in how a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such a review is to occur."[135] Other courts have indicated that there may be limited cases in which the court may vacate an award if clear evidence exists that the award was based on an arbitrator's "manifest disregard of the law"[136] or the

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[133] 9 U.S.C. § 10 (as amended May 7, 2002, Pub. L. No. 107-169, § 1, 116 Stat. 132). *See also supra* note 121 (discussing amendment). The UAA and RUAA provide essentially the same limited grounds for judicial review of arbitration awards. UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280 (1997); REVISED UNIF. ARBITRATION ACT § 23(a)(1)-(6).

[134] Some courts have indicated that "grounds for setting aside arbitration awards are exhaustively stated in the [FAA]." Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994); *see also* Remmey v. Painewebber, Inc., 32 F.3d 143, 149 (4th Cir. 1994) (viewing skeptically any attempt to vacate award on nonstatutory grounds); McIlroy v. Painewebber, Inc., 989 F.2d 817, 820 n.2 (5th Cir. 1993) (rejecting challenge of arbitration award "to the extent that they rely upon standards of review outside the scope of the Arbitration Act"). *But see* George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580-81 (7th Cir. 2001) (acknowledging that "manifest disregard of the law" may be basis for vacating award if award directs parties to violate law). Indeed, courts have not been consistent. Steven R. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, 51 DISP. RESOL. J. 22, 25-26 (Oct. 1996).

[135] UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997 (8th Cir. 1998) (holding that Minnesota choice of law provision did not supplant application of FAA to require judicial review of award for legal errors, and therefore not reaching precise issue of whether it may enforce contract calling for expanded review of arbitration awards, but stating in dicta, that "Congress did not authorize *de novo* review of such an award on its merits; it commanded that when the exceptions do not apply, a federal court has no choice but to confirm"). Indeed, it is not "a foregone conclusion that parties may effectively agree to compel a federal court to cast aside sections 9, 10, and 11 of the FAA." *Id.*

[136] Some courts have recognized a "manifest disregard for the law" ground for judicial review of an arbitration award that may apply where it is clear that the arbitrator knew the governing law but refused to apply it, although the law was well defined, explicit, and clearly

award violates clear and established public policy.[137] However, it is questionable whether these grounds in fact are statutory, and courts have very rarely applied them to vacate an award.[138] Moreover, courts agree that they must narrowly apply any grounds for challenging an award in order to protect the independence and finality of arbitration.[139]

These limited review provisions did not serendipitously appear in the FAA. Instead, drafters debated whether awards should be subject to substantive judicial review for error of fact and law, and decided limited review was integral to the goals and functions of arbitration.[140] The drafters therefore rejected review provisions in

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applicable to the case. *See* Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 203-04 (2d Cir. 1998) (vacating arbitration award when arbitrator failed to follow clear applicable law that was presented to him, even though parties agreed to apply it).

[137] Courts also have recognized a very narrow "public policy" exception, that may allow a court to vacate an award that violates an "explicit," "well-defined," and "dominant" positive law. E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 67 (2000) (noting possible exception but holding that labor arbitration award that conditionally reinstated employee after failing his second drug test was not contrary to public policy).

[138] Even federal circuit courts that have recognized the "manifest disregard" standard very rarely have vacated awards on that ground. *See* Dawahare v. Spencer, 210 F.3d 666, 670 (6th Cir. 2000) (identifying only two United States Court of Appeals cases vacating arbitration awards under "manifest disregard" standard). Moreover, courts have no clear conception of so-called nonstatutory standards. *See* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 471-76 (1998). *See generally* Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117 (discussing and critiquing application of "manifest disregard" for legal and other nonstatutory standards). Some have argued that any manifest disregard standard must be delineated in section 10 of the FAA in order to clarify and properly narrow judicial authority. Marcus Mungioli, Comment, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY'S L.J. 1079, 1121-22 (2000).

[139] *See* IDS Life Ins. Co. v. Royal Alliance Assocs., Inc., 266 F.3d 645, 649 (7th Cir. 2001) (emphasizing finality and refusing to vacate award although record "suggest[ed] that the arbitrators lacked the professional competence required to resolve the parties' disputes"); *see also* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (directing that arbitrator's decision should be set aside "only in very unusual circumstances"); Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1253 (7th Cir. 1994) (highlighting that "the scope of review of a commercial arbitration award is grudgingly narrow"). Strict notice and time limitations for asserting any challenge to an arbitration award further curtail limited review under the FAA. 9 U.S.C. § 12 (2000); *see also* Florasynth, Inc. v. Pickholz, 750 F.2d 171, 174-75 (2d Cir. 1984) (holding three month limit for challenging award is mandatory).

[140] History has repeated itself, in that drafters of the RUAA considered but rejected a provision permitting parties to contract for greater judicial review of arbitration awards, opining that such review would defeat the goals of arbitration and may be preempted by the

England's Common Law Procedure Act of 1854[141] and its Arbitration Act of 1889,[142] which expressly allowed arbitrators to resubmit legal issues to a court in their discretion or pursuant to the parties' arbitration agreement.[143] The FAA therefore diverged from English law and "made it clear that errors of law were not grounds for setting aside an arbitration award."[144] The drafters recognized that such review would clash with an election of nonjudicial settlement because it would shift ultimate decisionmaking authority from an arbitrator to a court.[145] Finality as defined by the judicial review limitations of the FAA sought to insulate arbitration from courts' "Monday morning quarterbacking" and protect the allocation of power in the Act between arbitrators and courts.[146] The conception

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FAA. UNIF. ARBITRATION ACT (2000) ("RUAA") § 23 cmt. B, 7 U.L.A. 43-46 (Supp. 2002-2003) (commenting on concept of contractual provisions for "opt-in" review of awards).

[141] 17 & 18 Vict., c. 125, § 5 (Eng.).

[142] 52 & 53 Vict., c. 49, § 7 (Eng.).

[143] The English law allows judicial determination of legal questions arising during arbitration proceedings, and allows appeal on points of law under certain circumstances. Arbitration Act, 1996, c. 23, §§ 45 & 69 (Eng.). A court may only determine preliminary legal issues pursuant to the parties' agreement or arbitrators' submission "without delay" where judicial determination would "produce substantial savings in costs." *Id.* § 45. The post-award appeal provision is more restricted, allowing appeal only with agreement of all parties or leave of the court, where the question decided by the arbitrators "substantially affect[s] the rights" of a party, the arbitrators' decision is "obviously wrong" or open to "serious doubt" and of public importance, and judicial determination is "just and proper" under the circumstances. *Id.* § 69 (providing further restrictions and procedures for appeal); *see also* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 855-56 (1961) (noting current English law that allows arbitrators to submit issues of law presented at arbitration to court for judicial determination).

[144] Mentschikoff, *supra* note 143, at 856.

[145] *See* Michael P. O'Mullan, Note, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 FORDHAM L. REV. 1121, 1155 (1995) (arguing that judicial review of awards for legal error creates "fundamental conflict" with role of arbitration as alternative to litigation). Courts are "not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles." Stroh Container Co. v. Delphi Indus., 783 F.2d 743, 751 n.12 (8th Cir. 1986).

[146] *See Arbitration of Interstate Commercial Disputes, Joint Hearings Before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 36 (Jan. 9, 1924) (brief submitted by Julius Henry Cohen) (emphasizing that there should be "delay only of a few days" between application and entry of judgment on arbitration award, and that defects warranting vacation, correction, or modification of award were those "so inherently vicious that, as a matter of common morality, [they] ought not to be enforced"). Arbitration "aims to avoid the formal features of the law," and "the award should give no reasons for the decision." *Id.* at 156–58; *see also* Kabia v. Koch, 713 N.Y.S.2d 250, 255 (N.Y. Civ. Ct. 2000) (noting that "[s]uch limits are the essence of arbitration and allow for its economical and expeditious

of finality in the FAA therefore directed courts to presume enforcement of arbitration awards with limited procedural review.[147]

3. States' Eventual Endorsement of a Parallel Prescription for Finality. While Congress adopted the FAA, the American Bar Association (ABA) and the Conference of Commissioners on Uniform State laws (now known as the National Council of Commissioners on Uniform State Laws, or NCCUSL) negotiated and drafted a model arbitration law to be recommended to the states for adoption—the first UAA.[148] This first model law, however, was unsuccessful, largely because it rejected the progressive enforcement scheme of the federal act and failed to further the original legislative goal of providing parallel federal and state arbitration laws that would "dovetail and fit each with the other" to promote private, flexible, efficient, and independent arbitration.[149] The ABA originally had supported a strong state act that mimicked the federal law, but after less than two hours of discussions, it reversed its position and approved the so-called "Illinois idea," which diverged significantly from the FAA.[150] This model law greatly differed from the federal act and the arbitration statutes of at least

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resolution of disputes"); Carl F. Taeusch, *Extrajudicial Settlement of Controversies, The Business Man's Opinion: Trial at Law v. Nonjudicial Settlement*, 83 U. PA. L. REV. 147, 156 (1934) (emphasizing "businessman" view of finality as "distinctive virtue" of arbitration).

[147] *See* Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 121-22 (1924) (recognizing that before passage of FAA, even without federal legislation, United States courts could enforce arbitration awards "by any appropriate process"); Karthaus v. Yllas y Ferrer, 26 U.S. (1 Pet.) 222, 228-30 (1828) (concluding that once made, "[a]n award is regarded as final," and therefore limiting review of arbitration to defects apparent from face of award); *see also* Tobey v. County of Bristol, 23 F. Cas. 1313, 1320-21 (C.C.D. Mass. 1845) (No. 14,065) (noting that courts are reluctant to compel parties to submit to arbitration precisely because award "shall be final" and shall "close against [the parties] the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs").

[148] Wesley A. Sturges, *Arbitration Under the New North Carolina Arbitration Statute—The Uniform Arbitration Act*, 6 N.C. L. REV. 363, 363-407 (1928) (explaining and analyzing first UAA, which North Carolina legislature enacted in 1927 as Laws of North Carolina, 1927, chapter 94).

[149] *Id.* at 365 (quoting comments of ABA Committee on Commerce, Trade, and Commercial Law regarding proposed arbitration laws).

[150] *Id.* at 368-69. The Illinois act, unlike the New York model and the FAA, only applied to post-dispute arbitration agreements and allowed judicial determination of legal questions. *Id.* at 369, 407. There is a question as to whether the Commission's pivotal meeting in Chicago under the gaze of Chicago's Chamber of Commerce drove the determination that "the unanimous opinion of the merchants" required the drafters to throw out the first draft based on the New York model and opt for the Illinois idea. *Id.* at 370-72.

seven states at the time by requiring enforcement of agreements to arbitrate existing, but not future, disputes.[151] Moreover, the model starkly departed from the federal act and the contemporary arbitration statutes of *all* the states except Illinois, by allowing arbitrators to submit questions of law for judicial determination pursuant to a party's request or on the arbitrators' motion.[152]

The allowance in the state model for substantive judicial determination of legal issues raised significant finality concerns, and highlighted not only the importance of finality to the goals of arbitration, but also the practical difficulties of allowing substantive judicial oversight of arbitration. Accordingly, the model's legal review provision "promise[d] much litigation."[153] It was unclear whether the law permitted parties to foreclose judicial determinations to preserve the effectiveness of arbitration, and the provision raised practical questions regarding how courts should distinguish questions of fact and law for purposes of the act.[154] Were contract interpretation, and even credibility and admissibility, issues determinable by a court?[155] Did the provision allow courts to review legal issues after the parties had presented the case to the arbitrators?[156] Would such judicial oversight transform an arbitrator's role in the process from final arbiter of law and fact into

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[151] *Id.* at 364. In 1927 when the UAA was adopted, there were two classes of arbitration statutes: those that applied to future and existing disputes, like the FAA and arbitration statues of New York, New Jersey, Massachusetts, Oregon, Hawaii, California, and Pennsylvania, and those that only embraced existing disputes, like the UAA and arbitration statutes of Nevada, Utah, Wyoming, North Carolina, and Illinois. *Id.* at 363-64.

[152] *Uniform Arbitration Act, in* 1924 HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 369, 371 (1924). Section 13 of the first UAA allowed arbitrators, on their own motion or by request of a party to the arbitration, to do the following:

> (a) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the Court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in making of their award;
>
> (b) State their final award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing.

Id. The UAA went beyond even the English act and other state laws that allowed some judicial determination of legal issues, by allowing either party to invoke such procedure regardless of the other parties' wishes. Sturges, *supra* note 148, at 406-08 & n.99.

[153] Sturges, *supra* note 148, at 407.

[154] *Id.* at 407-08.

[155] *Id.*

[156] *Id.*

"that of a jury or referee in a civil action?"[157] In addition, the limited application of the model law to existing disputes and its provision for judicial determination of legal issues seemed to codify judicial distrust and "jealousy" of arbitration that the FAA sought to control.[158]

Functional, practical and theoretical flaws in the model law led to its demise. Most states refused to adopt it, and instead opted for arbitration laws that mimicked the federal act and protected the finality and independence of arbitration.[159] State legislators seemed to recognize that the benefits of arbitration flow from its finality.[160] Accordingly, many states approved statutes that limited judicial review of arbitration to the same procedural grounds prescribed in the current FAA and UAA.[161] Ultimately, NCCUSL withdrew the act from states' consideration in 1934 and adopted a revised UAA in 1955, which replaced the "Illinois idea" with a progressive FAA-like model.[162] The 1955 UAA has been enacted in thirty-five states and

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[157] *Id.* Sturges was not the only commentator posing these questions and critiquing judicial determination of legal questions in cases submitted to arbitration. *See, e.g.*, Isaacs, *supra* note 17, at 929 (criticizing judicial involvement in arbitration that transforms process into trial-like process).

[158] Sturges, *supra* note 148, at 369-70. The UAA drafters decided to reject the federal and New York model. *Id.* at 368. They believed that the states would never accept it, due to fear that arbitrators would render unfair or unskilled decisions, thereby leaving individuals "robbed" of their rights. *Id.* at 369-70. Although much of the common law distrust was unsupported, it flowed from legitimate concerns that still resonate today regarding relinquishment of rights by those without practical experience who are lulled into signing "the fine type of contracts." *Id.* at 69. Indeed, adhesion arbitration agreements raise genuine concerns, but courts have decided that these concerns should be decided based on contract principles and a determination of whether parties in fact have voluntarily agreed to arbitrate. *See, e.g.*, Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1090 (2000) (advocating more searching judicial analysis of whether parties knowingly and voluntarily agreed to arbitrate at outset, instead of allowing substantive judicial review that would threaten finality and thus functions and goals of arbitration).

[159] *See* Sturges, *supra* 148, at 406-08 & n.99 (indicating first UAA was less protective of arbitration than arbitration statutes in most states).

[160] *See* Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 188-90 (1965) (emphasizing benefits of arbitration to courts and to disputants, and advocating greater use of process).

[161] 9 U.S.C. § 10 (as amended May 7, 2002, Pub. L. No. 107-169, § 1, 116 Stat. 132); UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280-81 (1997).

[162] UNIF. ARBITRATION ACT, §§ 1-25, 7 U.L.A. 1-3 (1997) (historical notes).

is substantially the same as the arbitration statutes in fourteen other jurisdictions.[163]

The 1955 UAA, like the FAA, requires specific enforcement of valid agreements to submit both existing and future disputes to arbitration by allowing courts to stay litigation and compel participation in arbitration.[164] In addition, the UAA allows arbitrators to decide issues of fact and law, and requires courts to enter judgment on arbitration awards that parties agree will be binding.[165] Moreover, the UAA carbon-copies the FAA prescription for finality, and allows a court to vacate an award only on limited procedural grounds of fraud, partiality, action beyond the scope of an arbitration agreement, or arbitrator misconduct that has substantially prejudiced the rights of a party.[166] In addition, the UAA expressly states "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground

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[163] The current UAA was approved by the NCCUSL and the ABA in 1955, and superseded the prior, withdrawn model. UNIF. ARBITRATION ACT, §§ 1-25, 7 U.L.A. 6-469 (1997) (historical notes); *see also Record of Passage of Uniform Model Acts, As of September 30, 1994*, 1994 HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1451 (indicating 49 of 53 jurisdictions have adopted UAA or substantially similar laws); Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 475 n.7 (1990) (invoicing state arbitration statutes).

[164] UNIF. ARBITRATION ACT, § 1-2, 7 U.L.A. 6-7, 109-10 (1997).

[165] UNIF. ARBITRATION ACT, § 8, 7 U.L.A. 202 (1997).

[166] UNIF. ARBITRATION ACT, § 12(a), 7 U.L.A. 280-81 (1997). The UAA provides that a court shall vacate an award where:

> 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 hearings upon sufficient cause being 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 the proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection[.]

Id.

for vacating or refusing to confirm the award,"[167] and a court's confirmation of an award is enforceable like any judgment.[168]

The 1955 UAA, therefore, provided the missing piece of the envisioned unitary body of arbitration law, and reemphasized the finality and independence of arbitration by precluding substantive judicial review of arbitration awards.[169] Indeed, the limited review provisions did not fortuitously appear in the 1955 Act, but instead reflected the drafters' considered judgment. Some members of the drafting committee seriously questioned this type of finality that foreclosed substantive appeal, and they urged that the act should state that awards may be reviewable by a court on questions of law.[170] However, the motion failed by a wide margin, and commissioners voiced strenuous opposition to legal review because it would destroy the functions of arbitration and create practical difficulties for reviewing courts.[171] As one commissioner stated, "If the parties can go to court on questions of law, then, it seems to me,

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[167] *Id.* Furthermore, section 12 was amended in 1956 to omit provisions allowing vacation of an award where it is "contrary to public policy," too indefinite to be performed, or "so grossly erroneous as to imply bad faith on the part of the arbitrators." UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280-81 (1997) (amendment notes).

[168] UNIF. ARBITRATION ACT, § 14, 7 U.L.A. 419 (1997).

[169] Mentschikoff, *supra* note 143, at 856 (emphasizing that UAA, like FAA, reaffirmed American position that "errors of law were not grounds for setting aside arbitration award").

[170] *Uniform Arbitration Act*, 1954 PROCEEDINGS OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW 1, 44H-76H. A motion was presented to revise the draft to provide for judicial review for legal error, and in cases calling for such review, to require that the award state the basis for legal determinations. *Id.* at 63H-64H, 46H-76H. One committee member who supported legal review prefaced his arguments with his confession that he was "an avowed enemy of arbitration." *Id.* at 46H. Another supporter of the motion explained in debate that legal review would only be necessary in a small number of cases and therefore would not create great difficulties, but that review must be available for those who seek "protection" after they realize "what a mess they have gotten into" by agreeing to arbitrate their dispute. *Id.* at 66H. Furthermore, supporters of the failed motion believed that requiring that the award state the basis for legal determinations in only those cases in which parties will pursue legal review would solve the procedural problems. *Id.*

[171] The motion failed by a nearly unanimous vote. *See id.* at 65H (noting informal poll during debate indicating "unanimous" opposition); *id.* at 76H (reporting "16 voting in favor," and "adverse votes were not counted, but the Chairman declared the motion obviously lost"). Commissioners recognized that review for legal error of arbitration would "fly[ ] in the face of the entire purpose" of an arbitration law. *Id.* at 56H (statements of Mr. Llewellyn). In addition, although it seemed that requiring findings in awards would cure procedural problems, it was apparent that questions would remain regarding what findings or record would be sufficient for review and how courts should parse legal and factual questions. *Id.* at 60H-76H.

you would have added just one more step to your ordinary trial procedure and you would defeat the whole purpose of this quick and relatively inexpensive proceeding."[172]

Although the use of arbitration has expanded greatly since 1955, analysis of its goals of privacy, flexibility, efficiency and independence, and functions of allocating power and protecting courts from practical difficulties, once again have led NCCUSL to define the finality of arbitration through provisions for limited, procedural review. The drafters of the year 2000 Revised Uniform Arbitration Act (RUAA) debated a proposal to add a provision to the Act that would have permitted parties to "opt-in" to judicial review for factual and legal error.[173] The proposal was rejected by a wide margin, however, at the first reading of the Act before NCCUSL in 1999.[174] Policymakers determined that substantive review would eviscerate the function of arbitration as a true alternative to litigation and threaten its goals of efficiency and finality.[175] Indeed, a functional approach to defining the finality of arbitration again led NCCUSL back to the limited grounds in the FAA for judicial review.[176]

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[172] *Id.* at 50H (statement of Mr. Davis).

[173] Stephen L. Hayford, Symposium, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 84-87.

[174] *Id.* at 84.

[175] RUAA § 23 cmt. B.1 at 78, cmt. B.4 at 82 (Comment on the Concept of Contractual Provisions for "Opt-In" Review of Awards); Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 84-85 (reporting the drafters' concern that expanded review "effectively eviscerates arbitration as a true alternative to traditional litigation," and that opt-in provisions "virtually guarantee that, in cases of consequence, losers will petition for vacatur, thereby robbing commercial arbitration of its finality and making the process far more complicated, time consuming, and expensive").

[176] Hayford, *supra* note 175, at 85 (noting also that expanded review conflicts with goals of arbitration by obliging arbitrators to provide detailed legal and factual findings, making transcripts and briefs common, and subjecting process to "a backlash of sorts" from courts that "are not likely to view with favor the parties exercising freedom of contract to gut the finality of the arbitration process and throw disputes back into the courts for final decision"); *see also* Christopher H. Hoving, *NCCUSL Finishes First Reading of Revised Arbitration Act*, ADR REP., Aug. 4, 1999, at 2; Karon A. Sasser, Comment, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 364-66 (2001) (focusing on freedom of contract to advocate enforcement of expanded review arbitration, but nonetheless recounting and accepting RUAA drafters' conclusion that expanded review transforms arbitration into "stepping-stone to litigation" that is "more time consuming, expensive, and complicated"). *But see* Stephen J. Ware, *"Opt-in" for Judicial Review of Errors of Law Under*

II. CONTINUED CENTRALITY OF LIMITED REVIEW FINALITY TO GOALS AND FUNCTIONS OF ARBITRATION LAW

A. MODERN QUEST TO PRESERVE THE PRIVACY, EFFICIENCY, FLEXIBILITY AND INDEPENDENCE OF ARBITRATION

Federal and state legislators purposely created and maintained a uniform remedial scheme based on strict finality that precludes substantive judicial review of arbitration in an effort to promote the goals of arbitration and clarify the courts' role in the arbitration process.[177] Although arbitration has outgrown its historical merchant roots in many respects, its underlying and perhaps redeeming functions still rely on strict finality and limited judicial review.[178] Arbitration continues to thrive because it is separate and independent from the judiciary, and therefore may provide a more private, flexible and efficient process than litigation. Furthermore, the independence of arbitration from substantive judicial review preserves its self-contained process, which eases judicial caseloads and fosters the efficiency of arbitration by protecting flexibility of proceedings and limiting judicial appeals. Indeed, courts have stressed the continuing goal of the FAA to promote efficient dispute resolution, and not to allow arbitration to become an expensive precursor to litigation.[179]

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the Revised Uniform Arbitration Act, 8 AM. REV. INT'L ARB. 263, 271 (1997) (advocating inclusion in RUAA of "opt-in" provision for judicial review of legal errors).

[177] *See supra* notes 107-19 and accompanying text.

[178] *See infra* notes 180-268 and accompanying text. *But see* Brunet, *supra* note 31, at 84-86 (proposing contract model of arbitration and emphasizing party autonomy as thrust of FAA). Professor Brunet questions a "folklore" model of "speedy, cheap, informal, and equitable" arbitration that developed within merchant communities, but often is replaced by more specialized models due to market forces. *See id.* at 40-46. Professor Brunet proposes that a contract model of arbitration has become more prevalent, as parties have opted to incorporate trial-like procedures in their arbitration agreements. *Id.* at 45-47. He concludes that this contract model supports enforcement of parties' efforts to judicialize their arbitrations. *Id.* at 84-86.

[179] *See, e.g.*, Bowen v. Amoco Pipeline Co., 254 F.3d 925, 935-37 (10th Cir. 2001) (holding expanded review of arbitration violates FAA policy in part because it thwarts efficiency function of arbitration); UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 998 (8th Cir. 1998) (stating in dicta that FAA may prevent expanded review because it would thwart FAA policy and allow arbitration to become expensive and inefficient "trial run" prior to judicial determination). *But see* Ware, *supra* note 31, at 271 (arguing that main goal of arbitration law is contract enforcement over any efficiency costs); Kenneth R. Davis, *When Ignorance of*

1. Privacy and Efficiency of Arbitration. The independence of arbitration from the judiciary protects its privacy and fosters its efficiency. Arbitration long has been valued for its privacy because it allows parties to resolve disputes off the public record and outside of a public forum.[180] Accordingly, the privacy of arbitration allows parties to protect business and other confidences, regardless of whether the confidences would qualify for special protection under judicial procedures. Furthermore, the privacy of arbitration allows losing disputants to "save face" and avoid public defeat. In addition, this privacy protects not only corporate parties, but also employees and consumers, from disclosure of embarrassing information that otherwise would have been publicly revealed in trial.

The privacy of arbitration also promotes its efficiency goals, in that procedures remain unconstrained by judicial rules and oversight and therefore free to be more streamlined and "to-the-point" than litigation.[181] Indeed, the Supreme Court has emphasized the cost and time savings benefits of arbitration in advancing its "pro-arbitration" policy in recent years.[182] Historically and today, arbitration has been touted as a means for avoiding prolonged financial and personal strife caused by onerous judicial procedures and appeals.[183] Substantive review of awards, however,

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the Law Is No Excuse: Judicial Review of Arbitration Awards, 45 BUFF. L. REV. 49, 135-38 (1997) (focusing on contract enforcement as primary goal of FAA, above efficiency and finality).

[180] *See* N. Sue Van Sant Palmer, *Lender Liability and Arbitration: Preserving the Fabric of the Relationship*, 42 VAND. L. REV. 947, 967 (1989) (noting privacy aspects of arbitration).

[181] *See* Harry J. Dworkin, *Arbitration: An Obvious Solution to a Crowded Docket*, 29 CLEV. B. ASS'N J. 167, 167-68 (1958) (advocating binding arbitration as means to resolve disputes in much less time than two to three years it took from litigation commencement to trial in state and federal courts).

[182] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (basing pro-arbitration policy on assumption arbitration is "usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices") (quoting H.R. REP. NO. 97-542, at 13 (1982)); *see also* Smoothline Ltd. v. N. Am. Foreign Trading, 249 F.3d 147, 148 (2d Cir. 2001) (emphasizing arbitration as "speedy and relatively inexpensive trial before specialists") (quoting Conticommodity Serv. v. Philipp & Lion, 613 F.2d 1222, 1224 (2d Cir. 1980)); Ariz. Elec. Power Coop. v. Berkeley, 59 F.3d 988, 992 (9th Cir. 1995) (touting efficiency and simplicity as key benefits of arbitration); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 152 (4th Cir. 1993) (describing same benefits).

[183] *See Allied-Bruce Terminix Cos.*, 513 U.S. at 280 (noting arbitration as means for easing

injects delay and expense into the process by adding a postaward judicial layer that both the FAA and UAA seek to preclude.

Furthermore, arbitration procedures subject to substantive review necessarily must be "judicialized," meaning they must incorporate formal judicial procedures that add significantly to the delay and expense of an arbitration hearing.[184] There is vigorous debate regarding the proper enforcement of arbitration agreements imposed on "little guys,"[185] such as employees and consumers, and some scholars argue that arbitration imposed on these little guys in adhesion contracts amounts to unfair "mandatory" arbitration.[186] Nonetheless, some of these same scholars recognize that expanded review is particularly detrimental to little guys because it erodes key efficiency benefits of arbitration.[187] Indeed, it seems parties with few financial resources to fund expenses of judicialized arbitration procedures, let alone to launch a substantive post-award

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hostility and disruptions).

[184] The "judicialization" of arbitration has been widely debated. *Compare, e.g.*, Bruce Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433, 1454-56 (1996) (questioning overjudicialization of securities arbitration through increased discovery, written opinions, and other added procedures), *with* Brunet, *supra* note 31, at 39-41, 45-52 (1996) (arguing that perceived judicialization of securities arbitration would improve process; but nonetheless indicating discomfort with directing court to substantively review arbitration awards).

[185] Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996) (discussing companies' inclusion of arbitration clauses in their contracts with consumers, employees, and other "little guys").

[186] *See id.* at 686-93 (noting how suppliers may impose arbitration clauses that take advantage of consumers because consumers are unlikely to be informed about existence or meaning of arbitration provisions); *see also* Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 769 (2001) (proposing that employees likely do not expend limited resources reading, understanding or negotiating arbitration clauses); Geraldine Szott Moohr, *Opting In or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087, 1093 (1999) (discussing unfairness of arbitration in traditionally nonmerchant contexts). Concerns regarding one-sided arbitration agreements are not new, and in fact arose at common law. *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 68-71 (1992) ("[C]oncern about one-sidedness in agreeing to arbitrate future disputes arose early in the reform movement."). "One-sided" and "mandatory" arbitration agreements raise important concerns regarding the consensuality of arbitration. Again, it seems this debate would benefit from a clarified understanding of the finality of arbitration under the current FAA/UAA scheme.

[187] Moohr, *supra* note 186, at 1093 (noting that expanded judicial review of arbitration results in "expensive hybrid" ADR that may be too burdensome for noncommercial disputants).

appeal, often would be those most harmed by substantive judicial review of arbitration awards.[188] Moreover, even if there are cases in which a little guy would benefit from judicialization of a particular arbitration, that same little guy, along with the rest of the populace, may suffer lower wages or higher prices flowing from increased expenses of judicialized arbitration.[189]

2. The Flexibility and Independence of Arbitration. Like efficiency and privacy, flexibility and independence also remain key benefits of arbitration and are not merely antiquated FAA goals that no longer deserve protection. The independence of arbitration from the judicial system is central to the role of arbitration as a means for easing judicial caseloads and sparing expenditure of public resources that otherwise would be allocated to resolution of private disputes.[190] This independence also makes it possible for arbitration proceedings to be more flexible and equitable than litigation. Arbitration is distinguishable from litigation because its procedures may be tailored to a particular dispute and may produce determinations based not on strict legal rules, but on equity, norms, and customs.[191] However, as the line between arbitration and litigation fades due to expanded judicial review of awards,

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[188] *See id.*; *see also* Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 842-43 (2000) ("Non-individuals—especially corporate parties—possess, on average, greater access than individuals to the economic resources necessary to . . . litigate with more vigor and for a longer period of time."). A 1992 United States Department of Justice, Bureau of Justice Statistics survey of state courts indicated that involvement of nonindividual defendants in litigation generally resulted in longer trials. *Id.*; *see also* Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RES. 633, 633-43 (2001) (comparing costs and benefits of arbitration and litigation in employment cases, and concluding that there are "real advantages for employees in the arbitral process" but that employers may nonetheless opt for arbitration because it offers more certainty).

[189] *See, e.g.*, Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 93 (noting proconsumer aspects of arbitration and explaining that attempts to make arbitration more "fair" to consumers through judicialization of proceedings often result in increased business costs that are passed on to populace through higher prices).

[190] *See, e.g.*, Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp., 88 F.3d 129, 133 (2d Cir. 1996) (emphasizing that one key advantage of arbitration is that it helps to relieve crowded court dockets); Mobile Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd., 372 N.E.2d 21, 23 (N.Y. 1977) (stressing that judicial intrusion in arbitration must be limited in order to conserve time and resources of both courts and parties).

[191] *See* Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 852-54 (1961) (emphasizing application of trade rules and standards in trade group arbitrations).

arbitrators are likely to spend less time focusing on efficient resolution of disputes and more time producing court-like records created to withstand substantive appeals.[192] Furthermore, arbitrators fearful of judicial oversight may be apprehensive to render awards based on equity, or to fashion creative remedies that may not be available in court.[193]

Many modern arbitration systems expect and rely on arbitrators' power to apply trade rules and determine disputes in accordance with essentially private law.[194] Trade associations, for example, continue to value arbitration as a means of fostering self-regulation and determining disputes in accordance with field-specific standards.[195] More recent arbitration systems, such as the Court of Arbitration for Sport (CAS), also provide "unifying" institutions for disputants in a common field in large part because the arbitrators

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[192] *See* Isaacs, *supra* note 17, at 934-35 (recognizing at time Congress enacted FAA, judicial review of arbitration would infect arbitration with formal procedure, records and opinions); *but see* ALAN SCOTT RAU ET AL., ARBITRATION 134, 152-53, 156-60 (2d ed. 2002) (noting "the essential point about judicial deference to arbitral awards still appears to be valid," but nonetheless supporting enforcement of expanded review agreements under arbitration law).

[193] One may argue that substantive review is positive because it forces arbitrators to more meticulously analyze cases and apply legal rules. Instead, arbitrators may view their work as merely advisory and devote less attention to cases because their determinations are subject to judicial correction. Moreover, nonlawyers may refuse to arbitrate judicially reviewable arbitrations, diminishing disputants' access to valuable expert arbitrators.

[194] *See* Bernstein, *supra* note 72, at 1731-34 (explaining application of industry-specific terms and rules in cotton industry arbitration, and even application of damage measures that differ from those applied in courts).

[195] Arbitration has gained prominence in the labor industry, for example, as a means of fostering self-government and peace preservation. *See, e.g.*, Textile Workers Union of Am. v. Lincoln Mills of Alabama Goodall-Sanford, Inc., 353 U.S. 448, 462-63 (1957) (Frankfurter, J., dissenting) (observing that judicial intervention in arbitration threatened "the going systems of self-government"). Likewise, trade associations have relied on the private and independent process of arbitration. *See* Bernstein, *supra* note 72, at 1725-33 (discussing cotton industry's creation of private legal system (PLS) through its arbitration scheme). Although Professor Bernstein concludes that industry arbitrators have applied written trade association rules instead of field-specific norms, she emphasizes the importance of privacy and independence of the arbitration system in reducing transaction, error, legal system, and collection costs. *Id.* at 1725; *cf.* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 81-84 (2000) (offering empirical rejoinder in international arbitration context to Professor Bernstein's critique of reliance on commercial norms in understanding parties' agreements).

are knowledgeable in the relevant area and apply industry standards and customs.[196]

Application of field-specific knowledge and understanding to resolve disputes has become increasingly appropriate in specialized areas that employ technical language that juries and judges often do not understand.[197] Over time, expert arbitrators have cornered some dispute resolution markets in specialized fields, such as construction, in which specific engineering or architectural knowledge often is essential.[198] Although some have voiced concerns regarding impartiality of "insider" arbitrators who have knowledge as well as political connections in a particular area, many disputants nonetheless value so-called insiders due to their knowledge and expertise.[199] Courts generally have approached

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[196] The CAS, established by the International Olympic Committee (IOC) to resolve private sports-specific disputes, has been described as "a unifying institution that can help deliver sport back to its origins," and "can be the unifying body that ensures fairness and integrity in sport through sound legal control and the administration of diverse laws and philosophies." Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379, 381 (2000). The CAS arbitral scheme applies through association requirements and contractual incorporation, and is based on widely accepted principles that may some day be recognized as the "*lex sportiva*." *Id.* The CAS serves communal goals in a manner similar to that of traditional merchant arbitration systems. *See supra* notes 59-68 and accompanying text (discussing growth of arbitration among merchant and trade groups).

[197] *See supra* notes 65-68 and accompanying text (discussing merchant groups' historic preference for arbitrators who were technicians in field). One emerging market for arbitration has been in patent disputes. Patent claims now may be subject to final and binding arbitration, as is true for copyright infringement claims. 35 U.S.C. § 294 (2000); Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1199 (7th Cir. 1987); *see also* Camille A. Laturno, Comment, *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 TRANSNAT'L LAW. 357, 369-71 (1996) (discussing evolution of arbitration in intellectual property disputes, and emphasizing that arbitration is particularly appropriate for resolution of such disputes because they involve specialized and technical issues); *see generally* Christine Lepera, *New Areas in ADR*, *in* WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR, 709, 709-28 (Practicing Law Institute 1998) (describing increased use of arbitration to resolve disputes involving intellectual property rights, online technology, and entertainment issues).

[198] Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 565-67 (noting "binding arbitration, long the mainstay of construction dispute resolution, will probably remain the preferred alternative to litigation," with arbitrator quality as most important factor in determining participant satisfaction); *see also* Bernstein, *supra* note 72, at 1728 (reporting arbitrator selection in cotton arbitration based on experience and reputation for fairness).

[199] An arbitrator's status as an industry "insider" usually connotes expertise, but it also has been questioned in arbitrations involving disputants with unequal industry savvy and bargaining power, such as in securities, employment, and medical cases. *See* Stephen J.

these concerns as contract validity questions, or as grounds for vacating an award due to an arbitrator's evident partiality.[200]

Strict finality and freedom from judicial constraints also protect equitable determinations in arbitration. Arbitrators unconstrained by strict legal controls are free to order equitable and creative remedies that may not be available in court.[201] Modern institutional arbitration rules expressly permit arbitrators to order broad equitable remedies, provided that parties have not limited available remedies in their agreement.[202] For example, arbitrators may order broad remedies in construction cases,[203] including directing a builder

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Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1021-22 (1996); *see also infra* note 211 (citing articles discussing arbitration of employment disputes). However, much of the debate in employment and other areas focuses on concerns that statutory claims should not be subject to arbitration because arbitration hinders development of the law necessary to further statutory goals. *See id.* This Article does not tackle questions regarding what types of disputes should be arbitrated, but instead focuses on whether a procedure is sufficiently final to be "arbitration" governed by the FAA and UAA.

[200] *See* Harter v. Iowa Grain Co., 220 F.3d 544, 553-58 (7th Cir. 2000) (analyzing and rejecting argument that arbitrators were biased because they were insiders in relevant grain elevator business where Harter had not shown arbitrator's "evident partiality" under section 10(a)(2) of FAA); Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013, 1016-18 (Ariz. 1992) (holding adhesive arbitration agreement unenforceable as beyond reasonable expectations in part because it required medical malpractice claims to be arbitrated by licensed obstetrician/gynecologist); Chenz-Canindin v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867, 875-77 (Cal. Ct. App. 1996) (holding procedure was not "arbitration" under FAA because hotel personnel served as arbitrators, thereby eliminating requisite assurance of impartiality).

[201] Advanced Micro Devices, Inc. v. Intel Corp., 885 P.2d 994, 1001 (Cal. 1994) (holding that arbitrators may order remedies not available in court). The California Supreme Court stated, "[w]ere courts to reevaluate independently the merits of a particular remedy, the parties' contractual expectation of a decision according to the arbitrators' best judgment would be defeated." *Id.*

[202] AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL DISPUTE RESOLUTION PROCEDURES R-45 *Scope of Award* (July 1, 2002), *available at* http://www.adr.org (last visited Sept. 1, 2002) (allowing arbitrators to "grant any remedy that the arbitrator deems just and equitable and within the scope of the agreement of the parties"). The Rule expressly allows an arbitrator to order specific performance of a contract to "make other decisions, including interim, interlocutory, or partial rulings, orders, and awards," and to assess fees, expenses, and compensation. *Id.* In addition, the award may include interest and attorneys' fees. *Id.*; *see also* CPR INSTITUTE FOR DISPUTE RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION 10.1 & 10.3 (2000) (empowering arbitrators to "apply such law(s) or rules of law as [they] determine to be appropriate" unless parties expressly mandate application of particular law in their arbitration agreement).

[203] *See, e.g.*, David Co. v. Jim W. Miller Constr., Inc., 444 N.W.2d 836, 840 (Minn. 1989) (affirming arbitrator's award ordering builder to purchase defective housing units from owner regardless of whether relief would not have been appropriate in court).

to complete construction of a house.[204] Furthermore, the CAS actively encourages arbitrators to exercise their discretionary power to provide relief "where an injustice is committed through a strict application of the law."[205] Indeed, the FAA and UAA do not allow a court to vacate an award merely because it would not have ordered the particular relief that an arbitrator awarded.[206]

In addition, the independence and flexibility of arbitration benefits not only traditional trade disputants, but also "little guy" consumers and employees with equitably strong, but legally weak, cases.[207] Flexibility allows arbitrators to reach past legal confines to order remedies that a court may deny.[208] Lewis Maltby, for example, found in his study of employment arbitration that employees are more likely to survive summary judgment on their claims and obtain some recovery in arbitration than in litigation, presumably because an arbitrator need not strictly apply legal standards.[209] Professor Maltby concluded that, even taking into account lower arbitration awards along with higher employee-win rates, employees collect higher adjusted awards in arbitration than in litigation.[210] Furthermore, it seems employers increasingly

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[204] Bradigan v. Bishop Homes, Inc., 249 N.Y.S.2d 1018, 1019 (1964).

[205] McLaren, *supra* note 56, at 403-05 (recognizing that CAS is limited by "the appropriate legal framework"); *see also* Lindland v. United States Wrestling Ass'n, 230 F.3d 1036, 1037-39 (7th Cir. 2000) (ordering USA Wrestling Association to certify Lindland as its nominee for Olympic Games in accordance with arbitrator's order).

[206] 9 U.S.C. § 10 (as amended May 7, 2002, Pub. L. No. 107-169, § 1, 116 Stat. 132); UNIF. ARBITRATION ACT § 12, 7 U.L.A. 280-81 (1997).

[207] *See* Harris v. Parker Coll. of Chiropractic, 286 F.3d 790, 793-94 (5th Cir. 2002) (enforcing expanded review provision in employment contract at employer's insistence, but narrowly construing clause against employer who drafted it in order to apply clause to encompass only pure questions of law and thus preserve arbitrator's factual, equitable determination); Hughes Training Inc. v. Cook, 254 F.3d 588, 594 (5th Cir. 2001) (vacating $200,000 arbitration award for employee on emotional distress claim pursuant to clause in arbitration agreement calling for substantive judicial review of award); Collins v. Blue Cross Blue Shield of Mich., 916 F. Supp. 638, 641-42 (E.D. Mich. 1995) (heeding employer's request that court review arbitration award in favor of employee for legal errors pursuant to employer's boilerplate arbitration clause, thus requiring "judicialized" arbitration procedures that increased costs and delays).

[208] *See supra* note 72 (explaining arbitrator discretion and benefits of arbitration as means to obtain equitable and creative relief not otherwise available in court).

[209] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46-49 (1998) (finding that employees won 63% of their claims in arbitration and only 14.9% of their claims in litigation).

[210] *Id.* at 48-49; *see also* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the*

include expanded review provisions in employment agreements, arguably in an attempt to squelch equitable awards while retaining protection from class actions and jury trials.[211] In addition, recent reports concerning National Association of Securities Dealers (NASD) arbitration of investors' fraud claims also have indicated that arbitration may be more fruitful than litigation for investors suing to collect losses, because arbitrators have been "concerned about treating plaintiffs equitably, even if it means appearing to go beyond the law to do it."[212]

Dispute resolution has changed a great deal since 1925, and the application of arbitration has expanded beyond that which the drafters of the FAA and UAA imagined at the time the acts were adopted. Nonetheless, arbitration continues to serve goals of providing private, efficient, flexible and independent dispute resolution. Furthermore, modern courts benefit from FAA and UAA assistance in relieving overcrowded judicial dockets, and in clarifying courts' limited role in arbitration. FAA/UAA arbitration continues to be a distinct dispute resolution device that neither depends on, nor overly burdens, courts. These goals and functions of arbitration under the acts rely on finality of arbitration as prescribed by the FAA/UAA limited review provisions.

Debate Over Predispute Employment Arbitration Agreements, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-65 (2001) (compiling timing and win rate information in employment arbitration and concluding that evidence suggests claimants win more cases in arbitration than in litigation).

[211] *See generally* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) (exploring defeat of jury trial rights through arbitration); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) (discussing defeat of class relief through arbitration).

[212] Gretchen Morgenson, *Why Investors May Find Arbitrators on Their Side*, N.Y. TIMES, Aug. 19, 2001, § 3, at 1. To the surprise of brokers who believed that arbitration would curb investor claims, it has been reported that arbitrators' flexibility and focus on equity has benefited some investors. *Id.* For example, an investor must prove intent on the broker's part to establish a fraud claim in federal court, while in arbitration, panels have ruled against firms for recommending poor investments to clients or for failing to supervise brokers, without requiring proof of intent to defraud. *Id.* In addition, in federal court, only investors that have bought or sold based on a broker's recommendation may sue for fraud, whereas arbitrators have allowed investors to bring claims because they held on to stock due to an analyst's call. *Id.* Morgenson concludes that in arbitration, many claimants receive at least some portion of their demands in cases that probably would have failed in court. *Id.*

B. COURTS' MODERN RECOGNITION OF THE IMPORTANCE OF FINALITY TO THE GOALS AND FUNCTIONS OF ARBITRATION

As the "pro-arbitration" bandwagon has spawned broadened use of arbitration to resolve different types of disputes, it also has fueled a confusing and varied expansion of what procedures parties call "arbitration." This has led courts to search for some guiding principles for defining "arbitration."[213] Generally, most define arbitration as a private consensual process that ends a dispute with a final third party determination.[214] Nonetheless, courts and commentators have debated the precise meaning of this finality, and therefore have disagreed on whether the FAA and UAA should apply to nonbinding procedures.[215] Amidst this confusion, however, courts seem to be moving toward recognition of a functional definition of arbitration. Courts have looked to the goals and functions of arbitration to guide them in determining when to apply arbitration law to "arbitration-like" procedures, albeit without expressly adopting a functional approach.[216] Furthermore, such functional analysis has led courts to emphasize that "arbitration" must be de facto final, bringing an end to litigation.[217]

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[213] *See* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 973-80 (2000) (emphasizing array of ADR mechanisms and their expansion); Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 831-33 (discussing current expansion of ADR methods and "made-to-order issue resolution clause[s]").

[214] *See, e.g.*, Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 699 (1952); *see also* MACNEIL, *supra* note 13, at 7 (discussing general meaning of arbitration).

[215] *See* Wolsey Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1208-09 (9th Cir. 1998) (finding that FAA governed enforcement of nonbinding arbitration, although basing its application of FAA on its finding that procedure likely would end dispute because it was to be conducted by AAA, which generally administers binding arbitration, and agreement did not expressly permit judicial recourse); AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460-61 (S.D.N.Y. 1985) (applying arbitration law to nonbinding procedure for resolving advertising disputes). *But see* Harrison v. Nissan Motor Corp., 111 F.3d 343, 349-51 (3d Cir. 1997) (refusing to apply FAA to nonbinding dispute resolution).

[216] *See, e.g.*, *infra* notes 223-32 and accompanying text (discussing courts' approach toward appraisals).

[217] *See Harrison*, 111 F.3d at 349 (finding procedure was not arbitration to which FAA applies because procedure realistically would not settle dispute); *cf. AMF Inc.*, 621 F. Supp. at 460-62 (finding National Advertising Division (NAD) resolution procedure was arbitration under FAA because, historically, disputants had accepted its decisions by known experts, and therefore NAD procedure likely would end dispute); *but see* Parisi v. Netlearning, Inc., 139

Three procedures that have been subject to courts' seemingly functional scrutiny in determining application of arbitration law, include: (1) appraisal procedures; (2) arbitration subject to trial de novo; and (3) the Uniform Domain Name Dispute Resolution Policy (UDRP) procedure.[218] Perhaps without recognizing their approach, courts have focused on the importance of the finality of arbitration to the goals and functions of the FAA/UAA remedial scheme in determining the effect of the acts on these procedures.[219] Judicial application of this approach, however, has been neither precise nor perfect. In some trial de novo cases, for example, courts arguably have misapplied arbitration law to truly nonfinal procedures,[220] thereby ignoring contract language allowing for secondary substantive judicial determination of "arbitrated" disputes.[221] Nonetheless, at least one court analyzing a UDRP procedure has recognized that the FAA/UAA scheme simply does not apply to a procedure that is not sufficiently final under arbitration law.[222]

1. Appraisal Procedures. The role of finality in preserving the function of arbitration as an independent process has guided courts in assessing whether appraisal procedures should be treated as arbitrations governed by arbitration law. In determining whether an appraisal is arbitration, some courts have focused solely on whether the appraisal decision is "final, conclusive and binding" under the parties' agreement.[223] One court, for example, found that a procedure labeled "appraisal" was arbitration, and thus governed by the FAA, where the procedure was intended to provide a conclusive third-party determination of a dispute.[224] Another court

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F. Supp. 2d 745, 750 n.10 (E.D. Va. 2001) (construing *AMF Inc.* as relying in part on court's "inherent equitable powers," and not merely FAA, to compel participation in nonbinding procedure that "would 'settle' disputed issues").

[218] *See infra* notes 223-68 and accompanying text.

[219] *See id.*

[220] *See infra* notes 238-43 and accompanying text.

[221] Again, this Article proposes that procedures not sufficiently final to be arbitration should be governed by contract, not arbitration law.

[222] Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745, 479-53 (E.D. Va. 2001).

[223] Wailua Assocs. v. Aetna Cas. & Sur. Co., 904 F. Supp. 1142, 1147-49 (D. Haw. 1995). Finding no definition of arbitration in the FAA, the court looked to the meaning of arbitration under Hawaiian law as a final and binding process to determine whether the appraisal contract was an agreement to arbitrate governed by the FAA. *Id.*

[224] The *Wailua Associates* court found that an agreement required arbitration because it bound the parties to submit all disputes regarding property value and amount of loss under

exalted finality over other arbitration characteristics in holding that an appraisal determination deemed final under the parties' agreement should be treated as an arbitration and thus subject only to limited judicial review, regardless of whether the procedure involved any hearing formalities.[225]

Again focusing on the function of arbitration as a dispute resolution process independent from the judiciary, other courts have refused to apply arbitration law to an appraisal procedure where the procedure would not dispose of the entire controversy between the parties under their agreement.[226] These courts have emphasized that arbitration is unique from other dispute resolution processes because it fully resolves the parties' case and produces an award upon which judgment may be entered.[227] Appraisals, in contrast, generally resolve specific issues of value and amount of loss, but not other contract issues such as insurance coverage.[228] Historically, in fact, appraisals did not evoke judicial hostility as did arbitration agreements precisely because appraisals did not exclude the courts from resolution of entire controversies.[229]

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the insurance policy to final and conclusive determination by a third party. *Id.* In their cross-motions for judicial declaration of the scope of the appraisal and what procedures the appraisers must follow, the parties had requested the court's determination of whether the procedure was arbitration. *Id.* Although determination that the procedure was arbitration was not necessary to the court's conclusion that the agreement governed the scope and procedures of the appraisal, the court's labeling the procedures arbitration would matter in dictating enforcement and review of appraisal determinations. *Id.*

[225] *See, e.g.*, Hirt v. Hervey, 578 P.2d 624, 627 (Ariz. Ct. App. 1978); *see also* WILNER, *supra* note 13, §§ 1:02–1:03, at 5-12.

[226] *See, e.g.*, Rastelli Bros. v. Netherlands Ins. Co., 68 F. Supp. 2d 440, 446 (D.N.J. 1999); *see also* Hartford Lloyd's Ins. Co. v. Teachworth, 898 F.2d 1058, 1061-62 (5th Cir. 1990) (finding that validity of insurance appraisal would be tried under contract law because appraisal would not dispose of parties' controversy and therefore was not arbitration governed by FAA review limits); Kelley v. United States, 19 Cl. Ct. 155, 163-64 (1989) (holding that FAA provisions and policies did not apply to enforcement of appraisal provision in option contract because parties did not consider appraiser's decision binding and final, but instead treated procedure as condition precedent to exercise of option that failed).

[227] *Rastelli Bros.*, 68 F. Supp. 2d at 446 (quoting Elberon Bathing Co., Inc. v. Ambassador Ins. Co., 389 A.2d 439, 440 (N.J. 1978)).

[228] *Rastelli Bros.*, 68 F. Supp. 2d at 446. The court in *Rastelli Bros.* concluded that the FAA did not govern enforcement of the appraisal provision of a property insurance policy that applied to disputes over the amount of loss due to fire, but not to coverage disputes. *Id.* at 445-46. In reaching its conclusion, the court derived the meaning of arbitration from New Jersey law because, although application of the FAA is a question of federal law, a court may borrow from state law to the extent it does not conflict with the goals of the FAA. *Id.* at 445.

[229] Portland Gen. Elec. Co. v. United States Bank Trust Nat'l Ass'n, 218 F.3d 1085, 1090

Some courts assessing the legal effect of appraisals seem to recognize the significance of labeling a procedure "arbitration" under the FAA and UAA. Although such labeling often does not affect a court's treatment of an appraisal contract where judicial treatment would be the same under both arbitration and contract law,[230] it is central to a court's determination that it may apply venue, collateral appeal, and other features of the acts' remedial and procedural scheme.[231] Under contract law, courts may enforce valid appraisal agreements and determinations by ordering damages, specific performance, or other contract remedies.[232] Courts should not, however, apply the FAA/UAA enforcement scheme to appraisals that will not end a case and therefore are not sufficiently final to be arbitration under the acts.

2. Arbitration Subject to Trial de Novo. So-called "arbitration"—with provision for trial de novo if the award exceeds a certain amount—has become popular for resolution of uninsured motorist

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(9th Cir. 2000) (quoting Budget Rent-A-Car v. Todd Inv. Co., 603 P.3d 1199, 1201 (Or. Ct. App. 1979)). The court in *Portland General Electric Co.* held that state contract law, and not the FAA or other arbitration law, governed confirmation of an appraiser's determination of the fair market value of two turbine generators under a lease agreement. *Id.* at 1085-90. In determining the appraisal procedure was not "arbitration" under the FAA, the court relied on Oregon law that distinguished between appraisals and arbitrations because the former required "ministerial determinations" of property value, whereas the later permitted third-party resolution of "ultimate liability." *Id.* at 1090.

[230] *See Rastelli Bros.*, 68 F. Supp. 2d at 445 (refusing to label appraisal as arbitration). It seems that the *Rastelli Bros.* court's refusal to label the appraisal as arbitration governed by the FAA did not affect the outcome of the case. The insured's claim for specific performance of the appraisal provision in the insurance contract would have failed under both arbitration and contract law because the provision covered only disputes regarding the amount of loss, and the parties' sole dispute concerned coverage. *Id.* at 442-43. Under both arbitration and contract law, the appraiser had no power to decide coverage issues outside the scope of the dispute resolution agreement. *Id.* at 446-47; *see also supra* note 224 (noting that labeling appraisal as arbitration was not integral to the *Wailua Assocs.* court's disposition of case).

[231] *See supra* notes 120-47 and accompanying text (outlining FAA remedies applicable to arbitration); *see also* Stipanowich, *supra* note 4, at 856 (discussing complex statutory framework applicable to arbitration, including special enforcement and appeal remedies). Professor Stipanowich cautions courts to only apply arbitration law to nonbinding ADR "with a clear appreciation of the significant differences among ADR processes and the danger of misapplying specific provisions of arbitration statutes and associated case law." *Id.* at 863.

[232] *See* Cap City Prods. Co. v. Louriero, 753 A.2d 1205, 1210 (N.J. Super. Ct. App. Div. 2000) (refusing to review third-party valuation for legal error regardless of whether procedure was labeled arbitration or appraisal, where parties had agreed valuation would be "binding").

disputes.[233] Courts have struggled with enforcement of these provisions, often dodging whether a procedure is arbitration governed by arbitration law.[234] Nonetheless, many courts have focused on preserving the benefits of arbitration in holding these trial de novo "escape hatch" provisions unenforceable.[235] These courts have emphasized that finality is essential to promoting the efficiency and independence of arbitration, and saving courts from awkward burdens of judicial oversight.[236] As one court emphasized,

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[233] *See, e.g.*, Parker v. Am. Family Ins. Co., 734 N.E.2d 83, 84-86 (Ill. Ct. App. 2000) (stating that provision for trial de novo is common in insurance policies).

[234] *Id.* (explaining the dissension among courts that have considered validity of provisions in uninsured motorist policies that allow trial de novo after arbitration if arbitration award exceeds certain amount).

[235] *See Parker*, 734 N.E.2d at 84-86 (holding trial de novo clause in uninsured motorist policy violated public policy because it harmed value of arbitration and unfairly favored insurers); *see also* Field v. Liberty Mut. Ins. Co., 769 F. Supp. 1135, 1140-42 (D. Haw. 1991) (finding trial de novo would destroy value of arbitration, and thus striking provision and requiring limited judicial review under Hawaii's arbitration statute); Saika v. Gold, 56 Cal. Rptr. 2d 922, 923-27 (Cal. Ct. App. 1996) (voiding trial de novo provision in physician's contract with his patient); Goulart v. Crum & Forster Pers. Ins. Co., 271 Cal. Rptr. 627, 627-28 (Cal. Ct. App. 1990) (holding insurance code arbitration provision prevented either party from seeking trial de novo); Huizar v. Allstate Ins. Co., 952 P.2d 342, 346-49 (Colo. 1998) (en banc) (holding that insurance agreement allowing either party to request trial de novo if award exceeded $25,000 was against public policy); Schaefer v. Allstate Ins. Co., 590 N.E.2d 1242, 1244-51 (Ohio 1992) (holding nonbinding "arbitration" is not enforceable as true arbitration because core purpose of arbitration is to finally determine disputes without court involvement); Spalsbury v. Hunter Realty, Inc., No. 384050, 2000 WL 1753436, at *3 (Ohio Ct. App. Nov. 30, 2000) (unpublished opinion) (concluding that, even if Hunter Realty had been party to arbitration agreement, nonbinding clause was void as against public policy); Zook v. Allstate Ins. Co., 503 A.2d 24, 25-27 (Pa. Super. Ct. 1986) (finding trial de novo provision ambiguous and thus unenforceable, especially because "court of competent jurisdiction is only empowered to disturb the arbitration award if there is evidence of fraud, misconduct, corruption or some other irregularity which caused the rendition of an unjust, inequitable or unconscionable award"); Slaiman v. Allstate Ins. Co., 617 A.2d 873, 873 (R.I. 1992) (holding trial de novo provision violates public policy); Godfrey v. Hartford Cas. Ins. Co., 16 P.3d 617, 623-24 (Wash. 2001) (en banc) (holding trial de novo provision unenforceable because parties "cannot submit a dispute to arbitration only to see if it goes well for their position before invoking the courts' jurisdiction"); Petersen v. United Servs. Auto. Assoc., 955 P.2d 852, 854-56 (Wash. Ct. App. 1998) (voiding trial de novo provision because "[t]he purpose of arbitration is to avoid the courts to resolve a dispute").

[236] *See Godfrey*, 16 P.3d at 621-23 (discussing importance of binding arbitration under Washington's "Code of Arbitration"). The Washington Supreme Court emphasized that parties are free to decide whether to submit issues to arbitration. *Id.* However, once they invoke the courts to facilitate and enforce arbitration, they waive their right to judicial resolution of their claims, and review will be limited to the narrow grounds provided by statute. *Id.* The court emphasized that arbitration law "does not contemplate nonbinding arbitration," and courts will not "condone what amounts to a waste of judicial resources." *Id.*

"[A] non-final arbitration is, in the last analysis, an oxymoron."[237] Nonetheless, instead of holding that these trial de novo procedures are not arbitration subject to the FAA and UAA, many of these courts have struck the trial de novo clauses and have treated the procedures as arbitrations subject to statutory limited judicial review.[238]

The Supreme Court of Colorado in *Huizar v. Allstate Insurance Co.*,[239] for example, refused to enforce a clause in an uninsured motorist provision of an automobile insurance policy that permitted a party to demand trial de novo after arbitration if the award exceeded a specified limit.[240] The court found that the trial de novo clause violated Colorado's constitutional policy favoring timely resolution of claims, and its legislative policy favoring arbitration as "a convenient, speedy, and efficient alternative to litigation."[241] The trial de novo clause defied limited judicial review of arbitration under the state's enactment of the UAA, and violated public policy by thwarting the "efficient procedure for court review of arbitration"

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[237] *Saika*, 56 Cal. Rptr. 2d at 923. The court held that a trial de novo provision in a doctor-patient agreement violated public policy, further explaining that the provision was particularly inequitable because it allowed litigation if a malpractice claim exceeded $25,000. *Id.* at 925-27; *see also Schaefer*, 590 N.E.2d at 1244-46 (holding that nonbinding arbitration is not enforceable as arbitration because it thwarts finality). The court emphasized that arbitration is unique because it is final and thus excludes substantive judicial involvement. *Id.* The court recognized "that the real problem lies in the imprecise use of the term 'arbitration,'" and stated that arbitration necessarily "must be final, binding and without any qualification or condition as to the finality of an award whether or not agreed to by the parties." *Id.* at 1245. The court concluded that by creating an "escape hatch," the ADR provision was "not a provision providing for true arbitration," and therefore was unenforceable. *Id.* at 1248.

[238] Again, full discussion of the treatment of nonfinal arbitration under contract law is beyond the scope of this Article. It seems, however, that if the arbitration laws do not apply to a procedure, then under contract law, the parties would be free to litigate their claims in court. *See Schaefer*, 590 N.E.2d at 1248-49 (concluding that trial de novo provision left parties "with no valid alternative-dispute-resolution procedure and either party may seek access to the courts for the settlement of their disputes").

[239] 952 P.2d 342 (Colo. 1998) (en banc).

[240] *Id.* at 343-50. The policy required that disputes regarding damages were to be "settled by arbitration," but if the award exceeded $25,000, either party could request a trial on all issues within sixty days of the award. *Id.* at 343-44.

[241] *Id.* at 348-49. The court explained that arbitration in insurance cases may minimize risks that insurers would use their superior economic resources to out-litigate insureds. *Id.* at 347-48. Substantive judicial review of arbitration awards, however, would reopen the door to undue litigation. *Id.* at 346-48. The court stressed "unproductive delay is entirely inconsistent with the public policy in favor of a speedy resolution of disputes." *Id.* at 348.

provided under the Act.[242] Accordingly, the court nullified the trial de novo clause.[243]

At the same time, some courts have failed to expressly address the significance of the finality of arbitration, but have simply enforced trial de novo clauses, generally without indicating whether enforcement was under arbitration or contract law.[244] Nonetheless, a few of these courts seemed to recognize that the determinations under these procedures were not final arbitration awards governed by arbitration legislation.[245] The court in *Roe v. Amica Mutual Insurance Co.*, for example, stressed that although courts must presume the validity of arbitration awards under statutory limits of review, these limits do not apply to a dispute determination subject to trial de novo because such a procedure is not "binding

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[242] *Id.* at 349. The court was concerned that the clause "effectively changes the limited jurisdiction of the court to conduct a review by giving it general jurisdiction to conduct a trial de novo." *Id.* The court recognized that the UAA, like the FAA, permits parties to craft procedures that apply *within the arbitration*. *Id.* However, private parties may not dictate the court's substantive work by expanding its duties in a private dispute resolution process. *Id.*; *see also* COLO. REV. STAT. § 13-22-202 (1997) (stating that purpose of UAA is "to validate voluntary written arbitration agreements, make the arbitration process effective, provide necessary safeguards, and provide an efficient procedure when judicial assistance is necessary"). In addition, the court also recognized that the "escape hatch" provision likely was imposed by the insurer on a "take-it-or-leave-it basis," and contrary to claims that judicial escape from arbitration awards would protect "weaker" parties forced into arbitration, the court recognized that such provisions usually are imposed by the financially stronger party that will have the resources to continue the dispute in court after the arbitration award is rendered. *Huizar*, 952 P.2d at 344-48.

[243] *Huizar*, 952 P.2d at 350.

[244] *See* Hayden v. Allstate Ins. Co., 5 F. Supp. 2d 649, 651-53 (N.D. Ind. 1998) (holding insurance contract provision allowing either party to request trial de novo if award exceeded Indiana financial responsibility limits was not against public policy because the court "is not required to favor arbitration over the unambiguous term of the contract"); Liberty Mut. Fire Ins. Co. v. Mandile, 963 P.2d 295, 296-300 (Ariz. Ct. App. 1997) (allowing appeal of arbitration award under contract incorporating appeal provision that was part of state's statutory compulsory arbitration system and therefore properly could be part of contractual arbitration procedures); Kaplan v. Conn. Pleasure Tours, No. 557609, 2001 WL 528123, at *1-*3 (Conn. Super. Ct. May 1, 2001) (unpublished opinion) (ordering trial de novo under arbitration agreement that required requesting party to pay all costs of arbitration); Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla. 1988) (finding Florida's enactment of UAA did not apply to nonbinding arbitration award rendered pursuant to arbitration agreement allowing either party to seek trial de novo); Cohen v. Allstate Ins. Co., 555 A.2d 21, 23 (N.J. Super. Ct. App. Div. 1989) (finding trial de novo clause in uninsured motorist contract was enforceable in order to effectuate intent of parties); Bruch v. CNA Ins. Co., 870 P.2d 749, 751-52 (N.M. 1994) (enforcing trial de novo clause in insurance arbitration provision although courts "strongly encourage final settlement by arbitration").

[245] *See Roe*, 533 So. 2d at 280-81 (holding UAA as adopted in Florida did not apply).

arbitration."[246] Essentially, the court rejected application of arbitration law and instead enforced the provision under contract law.

Furthermore, the *Roe* court's enforcement of a trial de novo provision demonstrates how contractual enforcement of these provisions differs from that of substantive review clauses. The court's specific enforcement of the trial de novo clause allowed the parties to file suit and litigate anew after completion of arbitration, but did not allow the parties to transform a trial court into their private appellate panel.[247] In contrast, specific enforcement of a clause calling for judicial review of an award for legal and factual error, forces a district court to undertake an incongruent and onerous task of substantively reviewing an arbitration proceeding without the benefits of a judicial trial record.

Courts' treatment of trial de novo clauses is not consistent or clear. Nonetheless, most courts explicitly or implicitly have recognized that the essence of FAA/UAA arbitration is its finality and freedom from substantive judicial reassessment.[248] Arbitration is unique from other dispute resolution procedures precisely because it is final and precludes courts from second-guessing its determinations.[249] Courts recognize that judicial oversight of

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[246] *Id.* at 281. The court read the trial de novo clause to provide for "binding arbitration as to any award up to $10,000 and to nonbinding arbitration as to any award exceeding that limit." *Id.* The parties thereby opted out of the state's arbitration statute, leaving the agreement enforceable under contract law. In addition, the court found that the agreement would not harm public policy because it "at least resolves claims of less than $10,000 and provides an objective indication of the value of larger claims, making the settlement process easier." *Id.*

[247] *See infra* notes 269-368 and accompanying text (discussing arbitration subject to substantive judicial review).

[248] *See, e.g.*, Field v. Liberty Mut. Ins. Co., 769 F. Supp. 1135, 1141-42 (D. Haw. 1991) (emphasizing that limited judicial review of arbitration awards in Hawaii's enactment of UAA evidenced public policy that precludes substantive judicial oversight of arbitrations that "would frustrate the very purpose of arbitration, which is to provide speedy and inexpensive resolution of disputes"). *But see* Liberty Mut. Fire Ins. Co. v. Mandile, 963 P.2d 295, 299-300 (Ariz. Ct. App. 1997) (approving trial de novo clause, but distinguishable from other trial de novo cases because state legislature had adopted statute expressly condoning appeal of uninsured motorist arbitration awards).

[249] *See* Schaefer v. Allstate Ins. Co., 590 N.E.2d 1242, 1248-49 (Ohio 1992) (emphasizing that finality distinguishes arbitration from mediation and other types of ADR).

arbitration threatens the finality of arbitration and welcomes judicial intrusion that denigrates key objectives of arbitration.[250]

3. UDRP Procedures. Although courts have been moving toward functional analysis of appraisal and trial de novo procedures, most courts generally have not gone so far as to declare procedures not sufficiently final to be "arbitration" governed by FAA and UAA remedies.[251] At least one court, however, has concluded that the nonfinal dispute resolution procedure that the Internet Corporation for Assigned Names and Numbers (ICANN) prescribes—the Uniform Domain Name Dispute Resolution Policy (UDRP)—is not arbitration governed by the FAA.[252] Furthermore, commentators generally have agreed that statutory arbitration law does not apply to UDRP determinations.[253]

The UDRP, as incorporated in domain name registration agreements, provides an administrative procedure for trademark owners to quickly and cheaply retrieve trademark names from "cybersquatters" that have sought to profit by reserving and later reselling or licensing domain names back to those that rightfully deserve their trademark names and the accompanying goodwill.[254] Under the policy, cybersquatting complaints are submitted to an impartial panel that conducts online dispute resolution

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[250] *See* Petersen v. United Servs. Auto Ass'n, 955 P.2d 852, 855-56 (Wash. Ct. App. 1998) (finding arbitration law policy necessarily precludes courts' substantive oversight of arbitrators' awards and precludes parties from "alter[ing] the court's authority" by creating their own boundaries of review).

[251] *See supra* notes 223-50 and accompanying text.

[252] Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745, 749-53 (E.D. Va. 2001); *see also* Virtual Countries, Inc. v. Republic of South Africa, 148 F. Supp. 2d 256, 259-61, 265 n.10 (S.D.N.Y. 2001) (explaining development of UDRP and doubting that ICAAN would amend nonbinding administrative procedure of UDRP to provide for binding arbitration); Lockheed Martin Corp. v. Network Solutions, Inc., 141 F. Supp. 2d 648, 651-52 (N.D. Tex. 2001) (explaining purpose and process of UDRP and noting that average time from filing to decision is fifty-two days).

[253] *See* Speidel, *supra* note 2, at 188-90 (concluding that RUAA does not apply to UDRP determinations and aptly noting other important limitations of unitary approach of RUAA to complex arbitration issues in public policy contexts).

[254] *See* Jason M. Osborn, Note, *Effective and Complementary Solutions to Domain Name Disputes: ICANN's Uniform Domain Name Dispute Resolution Policy and the Federal Anticybersquatting Consumer Protection Act of 1999*, 76 NOTRE DAME L. REV. 209, 210-21 (2000). ICANN adopted the UDRP on August 26, 1999, and approved the implementation documents on October 24, 1999. Internet Corp. for Assigned Names and Numbers (ICANN): Rules for Uniform Domain Name Dispute Resolution Policy, 39 I.L.M. 952, 952 (2000) [hereinafter *UDRP Rules*].

proceedings.[255] The panel then must provide each party "a fair opportunity to present its case," after which the panel produces a written decision on the parties' claims.[256]

At first glance, the UDRP procedure resembles arbitration. However, the UDRP process is not sufficiently final to be "arbitration" under the FAA and UAA because it does not supplant litigation and will not necessarily end disputes between the parties. The parties cannot obtain any remedies outside of return or cancellation of a domain name through the UDRP procedure,[257] and any judicial determination of a respondent's appeal will trump the panel's decision, provided that ICANN receives documentation regarding the lawsuit within ten days after it is notified of the decision.[258] Furthermore, the World Intellectual Property

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[255] The panel consists of one or three "arbitrators" at the election of either party. *UDRP Rules*, *supra* note 254, at 957-58. Panelists must be impartial and independent, and all communications between panelists and the parties must be made through a case administrator appointed by the dispute resolution provider. *Id.* at 958-59. These rules mimic those of the AAA. *See* AAA COMMERCIAL ARBITRATION RULES R-2, R-3, R-12, R-13 (Sept. 1, 2000), *available at* http://www.berkeley.edu/faculty/ddcaron/courses/rpid/fpo4048.html (last visited Oct. 5, 2002). The UDRP forbids "in-person hearings (including hearings by teleconference, videoconference, and web conference)" unless the panel specifically determines that it is "an exceptional matter" and therefore "such a hearing is necessary for deciding the complaint." *UDRP Rules*, *supra* note 254, at 959.

[256] *UDRP Rules*, *supra* note 254, at 959-60 (borrowing heavily from traditional arbitration rules, such as those of AAA).

[257] The UDRP is mandatory for domain name registrants. *See id.* at 952 (stating that UDRP is now in effect); *see also* Luke A. Walker, Note, *ICANN's Uniform Domain Name Dispute Resolution Policy*, 15 BERKELEY TECH. L.J. 289, 299-302 (2000) (explaining UDRP policy). However, the UDRP only covers abusive forms of domain name registration, and even in covered cases, a complainant seeking damages or injunctive relief other than return of a domain name must file suit. Osborn, *supra* note 254, at 221. The panel has power only to order cancellation and transfer of the domain name. *Id.* (explaining trademark holders "should keep federal court dockets busy hearing domain name disputes for years to come"); *see also eresolution:* Noodle Time, Inc. v. Max Marketing, 39 I.L.M. 795, 797 (2000) (finding, in UDRP panel proceeding, that Max Marketing had acquired "benihanaoftokyo.com" domain name in violation of UDRP cybersquatting rules and ordering transfer of domain name to complainant, noting that sole remedy is either cancellation or transfer).

[258] Osborn, *supra* note 254, at 220 (citing UDRP Procedure ¶ 4k).

Organization (WIPO)[259] has acknowledged that the process is not binding arbitration because it is subject to de novo judicial review.[260]

In light of these factors, the court in *Parisi v. Netlearning, Inc.* correctly concluded that a UDRP determination is not an arbitration award governed by the review and enforcement provisions of the FAA.[261] The court therefore rejected a claim that the FAA restrictions on judicial review of arbitration awards applied in an action challenging a UDRP panel decision.[262] The court recognized that the "liberal federal policy favoring arbitration" does not call for the application of the FAA to nonbinding dispute resolution.[263] The

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[259] WIPO is a specialized agency of the United Nations that administers international treaties concerning intellectual property protection and has been instrumental in developing and implementing the UDRP procedure. *See generally* WIPO, *Domain Name Dispute Resolution Service, at* http://www.arbiter.wipo.int/domains (last visited Oct. 15, 2002) (providing access to WIPO's resources, procedures, cases filed, and decisions). In addition, it provides dispute resolution services for challenges to abusive registration and use of domain names. *Id.*

[260] WIPO, *Final Report of the WIPO Internet Domain Name Process* ¶¶ 134, 138, 150, 196, *available at* http://wipo2.wipo.int/process1/report/index.html (last visited Oct. 15, 2002). Advisors for WIPO clearly distinguished the UDRP "administrative procedure" from "arbitration," emphasizing that the latter is governed by "a well-established international legal framework" that "recognizes the choice of the parties to submit a dispute to arbitration as excluding the jurisdiction of the court in respect of the dispute . . . [and thus the award] is not just binding, but also final, in the sense that the courts will not entertain an appeal on the merits of the dispute." *Id.* ¶ 230. The advisors therefore concluded that the UDRP does not require "arbitration" although parties are encouraged to voluntarily agree to arbitrate disputes in order to reap the finality and efficiency benefits of arbitration. *Id.* ¶ 230-35; *see also* BroadBridge Media, L.L.C. v. Hypercd.com, 106 F. Supp. 2d 505, 508-09 (S.D.N.Y. 2000) (refusing to dismiss plaintiff's Internet domain name lawsuit despite plaintiff's ongoing UDRP proceeding to retrieve domain name, and finding UDRP does not prohibit parallel litigation but instead allows complainant to bring suit before, during, or after administrative proceeding). As of May 2001, the WIPO Arbitration and Mediation Center alone had completed 3,364 cases filed under the UDRP. WIPO, *Case Results: gTLDs, at* http://arbiter.wipo.int/domains/statistics/results.html (last visited Aug. 26, 2002).

[261] 139 F. Supp. 2d 745, 749-53 (E.D. Va. 2001).

[262] *Id.* at 753. Netlearning prevailed in its UDRP proceedings challenging Parisi's registration of the "netlearning.com" domain name, and Parisi subsequently filed a declaratory judgment action seeking a declaration of lawful use under the Anti-Cybersquatting Consumer Protection Act and a Lanham Act declaration of noninfringement. *Id.* at 748. Arguing that the UDRP procedure was "arbitration" governed by the FAA, Netlearning moved to dismiss on the ground that the motion was time-barred under the three month time limit of the FAA. *Id.* at 749.

[263] *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The court distinguished between enforcement of an agreement to submit disputes to a resolution procedure "as a prerequisite" to litigation and "binding arbitration" that requires parties to accept the award as final. *Id.* The court correctly concluded that the award enforcement scheme of the FAA, 9 U.S.C. §§ 9-12 (2000), only applies to final and

court emphasized that if an agreement requires binding arbitration, then the limited review scheme of the FAA is the "sole method to challenge" the award.[264] In contrast, the contractual arrangement of the UDRP precludes application of the FAA remedial scheme by allowing substantive judicial challenges instead of limited procedural review of UDRP decisions.[265]

Courts have recognized that a strict brand of finality in arbitration is required to promote arbitral functions of efficiency, flexibility, privacy, and independence, and to protect courts from awkward and onerous tasks.[266] The FAA and UAA mandate enforcement of final arbitration characterized by these virtues, and not dispute resolution procedures that are subject to substantive judicial determination to end a dispute.[267] Accordingly, through their limited judicial review provisions, the acts prescribe the finality necessary for a procedure to be arbitration under their statutory scheme.[268] Court-dependent procedures such as arbitrations subject to trial de novo and UDRP proceedings, therefore, are not FAA/UAA arbitrations. Similarly, would-be arbitration subject to substantive judicial review for factual or legal review is not arbitration within FAA and UAA purview because it also depends on a court's substantive determinations to end a controversy.

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binding arbitration. *Id.* at 752.

[264] *Parisi*, 139 F. Supp. 2d at 750 (quoting *ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 496 n.1 (4th Cir. 1999)).

[265] *Parisi*, 139 F. Supp. 2d at 750-52. The court emphasized that arbitration awards subject to the FAA may only be reviewed for procedural soundness, while the UDRP contemplates parallel litigation and de novo review of administrative proceedings. *Id.* at 752. Indeed, it has been assumed that UDRP proceedings are not governed by either the FAA or its treaty counterpart, the New York Convention. E-mail from Kevin Dehring, Research Assistant, University of Colorado School of Law, to Pauline Mazu, WIPO Arbitration and Mediation Center (June 19, 2001) (on file with author).

[266] *See supra* notes 87-89 and accompanying text.

[267] *See supra* notes 13-17 and accompanying text.

[268] *See id.*; *see also id. supra* note 133 and accompanying text (setting forth FAA/UAA limited review scheme).

III. TACKLING A PARADIGM INQUIRY FOR DEFINING THE FINALITY OF ARBITRATION GOVERNED BY THE FAA AND UAA: ARE EXPANDED REVIEW PROCEDURES "ARBITRATION" UNDER THE ACTS?

Agreements calling for arbitration subject to judicial review for factual and legal error provide paradigmatic examples for clarifying what it means for arbitration to be final under the FAA and UAA. Indeed, these expanded review agreements are currently a subject of judicial dissention and academic debate, as parties seek enforcement of these agreements under the acts.[269] Nonetheless, most courts generally have avoided opportunities to define the finality of arbitration. Instead, they have assumed that the FAA and UAA apply to expanded review procedures, and have relied on the acts to enforce expanded review clauses according to their terms.[270]

Courts' assumed application of the acts to enforce expanded review clauses, however, undermines the acts' text, goals, and functions. The FAA and UAA specify limited review of awards.[271]

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[269] *See supra* note 31; *infra* note 270.

[270] Harris v. Parker Coll. of Chiropractic, 286 F.3d 790, 794 (5th Cir. 2002); Hughes Training Inc. v. Cook, 254 F.3d 588, 593 (5th Cir. 2001); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 292-93 (3d Cir. 2000); LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 889 (9th Cir. 1997); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (unpublished opinion); Gateway Tech., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996-97 (5th Cir. 1995); New England Utils. v. Hydro-Quebec, 10 F. Supp. 2d 53, 63-65 (D. Mass. 1998); Fils et Cables d'Acier de Lens v. Midland Metals Corp., 584 F. Supp. 240, 244 (S.D.N.Y. 1984); Collins v. Blue Cross Blue Shield of Mich., 579 N.W.2d 435, 567 (Mich. Ct. App. 1998); Primerica Fin. Servs., Inc. v. Wise, 456 S.E.2d 631, 633-34 (Ga. Ct. App. 1995); *see also* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 77-86 (1999) (arguing that FAA supports contract model of arbitration and thus condones enforcement of arbitration contracts requiring courts to review arbitration awards on grounds beyond those stated in FAA). *But see* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931-33 (10th Cir. 2001) (refusing to enforce expanded review clause); UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997-98 (8th Cir. 1998) (questioning enforceability under FAA of expanded review provisions); Chicago Typographical Union v. Chicago Sun-Times, 935 F.2d 1501, 1504-05 (7th Cir. 1991) (stating in dicta that parties cannot contractually expand FAA standard for judicial review of arbitrator's award); Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810, 816-17 (Cal. Ct. App. 2002) (refusing to enforce expanded review clause under California's arbitration act, and stating that most states have reached same conclusion under UAA); Godfrey v. Hartford Cas. Ins. Co., 16 P.3d 617, 620-24 (Wash. 2001) (refusing to enforce expanded review clause).

[271] 9 U.S.C. § 310 (as amended May 7, 2002, Pub. L. No. 107-169, § 1, 116 Stat. 132); UNIF.

Furthermore, these limited review provisions foster statutory promotion of the privacy, efficiency, flexibility, and independence of arbitration, but expanded review frustrates and threatens these legislative goals.[272] In addition, expanded review robs courts of judicial benefits provided by the acts by burdening courts with awkward and onerous work that is different and greater in volume than the work the acts prescribe. Indeed, the FAA/UAA limited review standards are "jurisdiction-like," and thus mandatory, in the sense that parties may not expand them and still enjoy benefits of the statutory remedies and procedures the acts provide.[273] These statutory mechanisms only support "arbitration" that comports with the definition of finality as prescribed by the limited review

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ARBITRATION ACT § 12, 7 U.L.A. 280-81 (1997).

[272] Other commentators have recognized "the potentially onerous consequences of expanded judicial review" of arbitration. Stipanowich, *supra* note 4, at 886. Others have stated outright disapproval of expanded review agreements. *See, e.g.*, Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 150 (1997) (arguing that parties should be bound by decision of arbitrators they have chosen, and emphasizing efficiency costs of expanded review); *see also supra* note 33 (discussing articles criticizing expanded review of arbitration). This Article does not necessarily denounce all contracts requiring expanded review of arbitration, but instead proposes that expanded judicial review transforms would-be "arbitration" into a process that is governed by common contract law and not the FAA and UAA.

[273] *See* 28 AM. JUR. 2D *Estoppel and Waiver* § 214 (2000) ("When a statute contains provisions that are founded upon public policy, such provisions cannot be waived by a private party if such a waiver thwarts the legislative policy which the statute was designed to effectuate."). Private parties may not contractually threaten legislative policy and waive statutory protections "designed to protect the public as well as individuals." *Id.* Some debate the "mandatory" nature of the FAA section 10 limited review provisions—asking whether section 10 is a mandatory rule parties cannot circumvent by contract, or a default, "gap-filler" provision parties may contractually alter because it merely represents the parties' hypothetical bargain. *See* Christopher R. Drahozal, *Standards for Judicial Review of Arbitral Awards in the United States: Mandatory Rules or Default Rules?*, 16 MEALEY'S INT'L ARB. REP. 27, 27-32 (2001) (discussing arguable inconsistencies of courts' condoning contractual expansion but rejecting contractual elimination of judicial review under 9 U.S.C. § 10); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 232-34 (1997) (labeling section 10 of FAA as default rule). *See also* Ian Ayres, *Default Rules for Incomplete Contracts*, 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 585-89 (Peter Newman ed., 1997) (generally discussing default and mandatory rules and proposing that certain legal rules should be subject to private reordering). This Article's proposal arguably falls outside this mandatory/default dichotomy in the sense that it accepts parties' freedom to contract for varied dispute resolution procedures. However, parties that contract for nonfinal dispute resolution must seek enforcement of their agreement under contract law, and not through FAA/UAA statutory procedures and remedies. *See supra* notes 107-76 and accompanying text (discussing remedial scheme). Of course, this raises additional questions regarding such treatment under contract law—issues worthy of further exploration.

provisions of the acts. Expanded judicial review therefore transforms would-be arbitration into a contract procedure governed by common law, not the FAA and UAA.[274]

This transformation is somewhat ironic in that courts tout freedom of contract in enforcing expanded review clauses under the acts. Proper respect for contractual liberty, however, does not justify specific enforcement of expanded review clauses that amount to private directions of judicial authority in defiance of legislative policy and provisions.[275] Instead, contractual freedom may urge judicial enforcement of valid dispute resolution agreements by awarding monetary damages for injuries caused by breach of an agreement, or by ordering parties to participate in a dispute resolution procedure where awarding damages would be inadequate and specific enforcement is otherwise equitably appropriate.[276] Nonetheless, it seems that common law would not allow courts to apply the FAA/UAA special remedial and procedural scheme where it does not belong, and would not condone courts' compliance with expanded review clauses that improperly direct judicial work.

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[274] *See* Nat'l Union Fire Ins. Co. v. Nationwide Ins. Co., 82 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1999) (emphasizing that there "is no such creature as a 'binding arbitration with a right to appeal' ").

[275] *Bowen*, 254 F.3d at 935. Furthermore, contract law does not require specific enforcement of nonfinal awards subject to substantive judicial determination. *See* Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745, 752-53 (E.D. Va. 2001) (refusing to apply FAA or contract law to specifically enforce UDRP determination subject to de novo judicial review).

[276] *See* RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981) (discussing enforcement by specific performance and factors affecting adequacy of damages); *see also* Annapolis Prof'l Firefighters Local 1926, IAFF, AFL-CIO v. Annapolis, 693 A.2d 889, 895 (Md. Ct. Spec. App. 1994) (holding that "a written agreement to submit either an existing or a future dispute to a form of alternative dispute resolution that is not otherwise against public policy will be enforced" under common law). *Compare* Oglebay Norton Co. v. Armco, Inc., 556 N.E.2d 515, 520-21 (Ohio 1990) (ordering parties to negotiate or mediate under ADR agreement "given the unique and long-lasting business relationship between the parties, and given their intent to be bound and the difficulty of properly ascertaining damages in this case"), *with* Wells v. Chevy Chase Bank, F.S.B., 768 A.2d 620, 630-31 (Md. 2001) (refusing to compel parties' performance of agreement that required parties to mediate, and if necessary arbitrate, "at the request and expense of" the credit card holder where cardholder had not requested mediation).

A. INCONSISTENCIES OF EXPANDED REVIEW WITH GOALS AND FUNCTIONS OF ARBITRATION UNDER THE FAA AND UAA

The FAA/UAA limited judicial review provisions are integral to the legislative policy promoting arbitration as a private, flexible, efficient, and self-contained procedure.[277] Furthermore, the drafters of the acts crafted a limited judicial review scheme that has fostered arbitration as a device for easing judicial burdens and sparing courts the difficulties they historically experienced at common law attempting to decipher arbitration proceedings and review the merits of arbitrators' awards.[278] Indeed, these functional benefits of arbitration have prompted courts' so-called "pro-arbitration" policies, including their strict enforcement of arbitration agreements and awards.[279] Accordingly, this "pro-arbitration" agenda does not justify application of the FAA/UAA special remedial scheme to expanded review proceedings that thwart key goals and functions of the acts.

1. Pollution of Policies Promoting Privacy, Flexibility, and Efficiency. UDRP, trial de novo, and appraisal procedures that leave significant issues for judicial resolution may aspire to end disputes without recourse to litigation. However, these schemes are not binding arbitration under the FAA and UAA when they leave parties free to obtain substantive judicial determination of their claims, thereby creating costly and time-consuming two-tiered proceedings that begin with private procedures but give way to public "do-overs."[280] Expanded review agreements similarly create

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[277] *See supra* notes 107-76 (discussing FAA and UAA drafters' development of limited review scheme).

[278] *See supra* notes 83-106 and accompanying text (discussing common law courts' struggle to avoid difficult practical problems of reviewing merits of private, equitable proceedings).

[279] *See supra* notes 2, 182-83 (discussing "pro-arbitration" policy). This policy also has contributed to courts' application of arbitration statutes in nontraditional, nonmerchant contexts. *See id.*; *see also infra* note 369 and accompanying text (noting arbitration of employment and consumer disputes). Again, whether these types of disputes should be subject to binding arbitration as a policy matter is a different question from whether a procedure is "arbitration" under the FAA and UAA, and therefore is beyond the scope of this Article.

[280] *See* Habick v. Liberty Mut. Fire Ins. Co., 727 A.2d 51, 56-57 (N.J. Super. Ct. App. Div. 1999) (refusing to review arbitration award for "substantial credible evidence" because such review would threaten finality of PIP insurance arbitration and would increase delay and expense by requiring verbatim record of arbitration and other procedures, thereby

hybrid, two-step procedures that waste public and private resources and are inconsistent with FAA and UAA goals and functions.[281]

Even courts that have enforced expanded review clauses have recognized the inconsistency of expanded review with arbitration law policy. For example, the court in *New England Utilities v. Hydro-Quebec*[282] reluctantly reviewed an arbitration award for legal error pursuant to the parties' agreement in light of federal circuit court precedent, but warned that such review transforms "arbitration 'from a commercially useful alternative method of dispute resolution into a burdensome additional step on the march through the court system.' "[283] Finality drives the streamlined process of arbitration in that it alleviates burdens of applying judicial rules or creating detailed records for appeal, and it ensures an end to expenditures of time and money associated with dispute resolution procedures.[284] It is not simply any definition of finality that furthers the goals and benefits of arbitration, but instead it is limited review finality that enables parties to minimize the costs of dispute resolution procedures and allows arbitrators freedom to

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"defeat[ing] the overall purpose of, and public policy behind, PIP arbitration").

[281] *See* Andreas F. Lowenfeld, *Can Arbitration Coexist with Judicial Review? A Critique of* LaPine v. Kyocera, 3 ADR CURRENTS (American Arbitration Ass'n, New York, N.Y.), Sept. 1998, at 12-17 (disagreeing with enforcement of expanded review contracts because substantive review transforms arbitration into "hybrid regime" that offends arbitration policy and inappropriately burdens courts; concluding, "I hope 'arbitration plus' does not catch on generally . . . and the Supreme Court will relegate it to a footnote and not a milestone in the history of arbitration").

[282] 10 F. Supp. 2d 53 (D. Mass. 1998).

[283] *Id.* at 64 (quoting Flexible Manuf. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96, 100 (7th Cir. 1996)) (emphasizing "obvious" policy problems with expanded review); *see also* Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) (emphasizing that FAA limited review is necessary to preserve benefits of arbitration and prevent it from becoming "junior varsity trial court").

[284] Richard P. Ryder, *Arbitration Award Results and Post-Award Proceedings, in* SECURITIES ARBITRATION 1992, at 433, 460 (PLI Corp. Law and Practice Course, Handbook Series No. 782, 1992). Many who use and understand arbitration emphasize the value of the finality of arbitration. Richard Ryder lamented in his review that there had been an increase in challenges to securities arbitration awards, although he found solace in the very limited success of these challenges. *Id.* at 473-77. He warned that "[t]he principle of finality, which secures, in good part, the qualities of efficiency and simplicity in arbitration, may be compromised . . . [by] direct judicial oversight of Award results." *Id.* at 477. Ryder opined that substantive judicial involvement in arbitration threatens the process because it creates a "two-step process, where only one step counts." *Id.*

order flexible and equitable remedies that may not be available in court.

On the surface, it may seem that judicial review for legal or factual error would not overly affect arbitration. Such review, however, sparks a chain reaction that transforms the arbitration process. For example, a court cannot substantively review an arbitration award without a detailed transcript of the hearing. Therefore, the parties must bear the high costs of hiring a court reporter and ordering transcripts.[285] In addition, because a reviewing court requires a written record of legal and factual arguments presented in arbitration, parties must hire attorneys and pay legal fees for time devoted to researching legal issues, drafting briefs and memoranda, and building a detailed record for appeal. Parties anticipating appellate-type review also must clutter and prolong arbitration proceedings with objections and offers of proof pursuant to judicial procedural and evidentiary rules in order to preserve the record.[286] Accordingly, substantive judicial review of arbitration judicializes the process, thereby eroding the cost and time savings that have been among the primary benefits of arbitration.[287]

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[285] For example, telephone interviews with court reporters in the Denver, Colorado area indicated average weekly costs of $4,800 to $8,000. *See* Telephone Interview with Judy Stevens, Court Reporter, Stevens Koenig Reporting, Denver, Colo. (Nov. 5, 2001) (estimating weekly appearance costs alone to be $4,800 to $4,900, and estimating $3.50 per page for transcripts); Telephone Interview with Becky Jackson, Court Reporter, Boverie Jackson, Busby & Spera, Inc., Denver, Colo. (Nov. 5, 2001) (estimating average weekly costs of $6,000 to $8,000 and $5 to $6 per page for transcripts); Telephone Interview with Jennifer Spee, Intern, Express Court Reporters, Los Angeles, Cal. (Nov. 5, 2001) (estimating average weekly costs in Los Angeles to be $5,600 to $7,500 and $5 to $6 per page for transcripts).

[286] Although the opinion was vacated for lack of federal subject matter jurisdiction, *Collins v. Blue Cross Blue Shield of Mich.*, 916 F. Supp. 638, 641-42 (E.D. Mich. 1995), *vacated by* 103 F.3d 35 (6th Cir. 1996), exemplifies the burdens of applying substantive review. In reviewing an arbitration award in favor of an employee for legal error, pursuant to an employer's boilerplate arbitration clause calling for expanded review, the court parsed the legal requirements for an ADA claim and meticulously reviewed the arbitration records and factual findings, as well as the parties' arguments and briefs, in order to conclude that the arbitrator did not commit legal error. *Id.* at 642-44. It appears that these "judicialized" procedures increased the costs and delays of the arbitration, and in effect allowed the employer to attempt a "litigation ambush" to force retreat of the prevailing employee. *See infra* notes 291-307 and accompanying text (discussing courts' onerous duty of disposing of cases through substantive review).

[287] *See* Ethyl Corp. v. United Steel Workers of Am., 768 F.2d 180, 183-84 (7th Cir. 1985) (noting that "for judges to have taken upon themselves to determine the correctness of the

Arguably, courts should enforce parties' choice to judicialize their arbitration, even if judicialization adds delay and expense to the process.[288] Arbitration law, however, is not synonymous with contract law. FAA/UAA statutory remedies need not support and endorse burdensome procedures that are inconsistent with the goals and functions of the acts. Indeed, special legislative remedies should be reserved for truly final arbitration, as defined by the FAA/UAA limited review provisions.

2. Dangers of Invitations to Invade the Independence of Arbitration. Likewise, the FAA/UAA enforcement scheme seeks to preserve the independence of arbitration from the judiciary. This independence depends on limited judicial review of awards because limited review protects an arbitrator's role as the final judge of both law and fact.[289] Drafters of the FAA and UAA therefore limited the courts' role and oversight authority to ensuring basic procedural fairness of arbitration proceedings.[290] Expanded judicial review reallocates authority between arbitrators and courts by inviting a court to assume substantive responsibility for disposing of a dispute and creating opportunity for a court to misuse the invitation. Substantive review opens a Pandora's box of legal and factual judicial oversight in arbitration that conflicts with the power allocation prescribed by the FAA and UAA, and thus the meaning of finality under the acts.[291]

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arbitrator's award would inevitably have judicialized the arbitration process"); Kirby Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 PUB. CONT. L.J. 66, 88 (1986) (noting that cost savings of arbitration "is negated if the parties to an arbitration demand judicialization").

[288] *See* BRUNET, *supra* note 31, at 85-86 (approving enforcement of expanded review arbitration agreements).

[289] *See* W. Oil Fields, Inc. v. Rathbun, 250 F.2d 69, 71 (10th Cir. 1957) ("Arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside because of a mistake of the arbitrator in either."); *see also supra* notes 74-82 and accompanying text (discussing traditional judicial hostility to arbitration).

[290] By design, FAA/UAA review is a nearly perfunctory process, limited to ensuring basic procedural fairness. *See* Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co., 119 F.3d 847, 850 (10th Cir. 1997) (emphasizing that courts do not have "authority to second-guess arbitrator's findings or conclusions"); John T. Brady & Co. v. Form-Eze Sys., Inc., 623 F.2d 261, 264 (2d Cir. 1980) (declaring courts may not "second guess an arbitrator's resolution of a contract dispute").

[291] *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), exemplifies the onerous judicial exploration of an arbitration that results when a court applies expanded review for legal or factual error. After the Court of Appeals reversed the original district

In *Bowen v. Amoco Pipeline Co.*, the United States Court of Appeals for the Tenth Circuit agreed with that conclusion and recognized the inconsistency of substantive judicial review with final and independent arbitration.[292] Accordingly, the court refused to enforce a provision in an arbitration agreement that required judicial review of an award on grounds it was "not supported by the evidence."[293] The court emphasized that when parties agree to arbitrate, they necessarily agree to accept an arbitrator's decision as final and forfeit any opportunity for substantive judicial review of the result of the arbitration.[294] The court recognized that finality in the arbitration context precludes expanded judicial review because such oversight would thwart FAA policy to protect the independence of arbitration.[295] In effect, parties who agree to arbitrate accept a "deal" in which they agree to forego judicial recourse and have their dispute fully and finally determined in a private, self-contained arbitration procedure in exchange for benefits of the FAA/UAA special remedial scheme.[296]

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court decision refusing to enforce an expanded review arbitration agreement, the case was remanded to the district court for legal and factual review. *Id.* at 890-91. The parties renewed the pleadings, and the court held hearings on the issues of law and fact. *LaPine Tech. Corp.*, Nos. C-87-20316 WAI, C-91-20159 WAI, 2000 WL 765556, at *1 (N.D. Cal. Apr. 4, 2000) (unpublished opinion). The district court confirmed the award, but only after rehashing the arbitration and substantive arguments in a thirteen page opinion. *Id.* at *1-*13.

[292] 254 F.3d 925, 936-37 (10th Cir. 2001).

[293] *Id.* at 933-36. In *Bowen*, landowners filed an arbitration demand claiming that Amoco's oil pipeline leaked, causing damage to their property. *Id.* at 933. The arbitrator found in favor of the landowners, and the district court confirmed the award under the limited review standard prescribed by the FAA. *Id.* at 931-33. Amoco appealed, arguing that the court should have applied the expanded review provided in the parties' arbitration agreement. *Id.* at 934-35.

[294] *Id.* at 935.

[295] *Id.* at 935-36.

[296] *Id.* at 935 (quoting Supreme Court's well-established view that "[b]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration'") (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)); *see also* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37-38 (1987) (explaining that parties to arbitration agree to accept arbitrator's determinations of law and fact as final, and thus courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts").

Substantive judicial review also threatens the independence of arbitration because it deflates the obligatory nature of an arbitrator's determinations and erodes common understanding that a controversy ends with the arbitrator's award. Parties generally have treated arbitration awards under the FAA and UAA as final because they understand that awards are final and not subject to judicial redetermination.[297] Recent cases enforcing expanded review agreements under the acts, however, are now eroding that understanding.[298] Consequently, some predict that availability of expanded review will nearly ensure that a losing party will challenge the award.[299] Some even have forecast that expanded review clauses will become the norm, and legal counsel routinely will add them to arbitration agreements regardless of whether such review would be appropriate for a particular case, because failure to opt for enhanced review may be perceived as malpractice.[300] Limited review and acceptance of the finality and independence of arbitration would become the exception.

Furthermore, review for legal and factual error has special significance in the arbitration context because such review allows a court to reassess an equitable and flexible procedure under a new, previously inapplicable, set of legal and procedural rules.[301] Substantive judicial review of an arbitration award therefore is much different than traditional appellate review of a trial judgment.[302] The former opens a new "can of worms," whereas the

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[297] *See* Pierre Laline, *Enforcing Awards*, *in* 60 YEARS OF ICC ARBITRATION 317, 319 (1984) (noting that 90% of International Chamber of Commerce arbitration awards are accepted as final and not challenged in courts).

[298] *See supra* note 270 (gathering cases enforcing expanded review arbitration under FAA or UAA).

[299] *See* LaLine, *supra* note 297, at 319 (noting that losing parties do not inevitably use *private*, as opposed to judicial, appeals procedures).

[300] COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 290 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) [hereinafter Stipanowich & Kaskell].

[301] Parties contractually may require an arbitrator to apply certain legal or procedural rules although arbitrators generally need not follow strict formalities of litigation. Indeed, a key benefit of arbitration is its flexible and equitable process. *See supra* notes 179-82 and accompanying text (discussing flexibility and efficiency goals of arbitration).

[302] United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) (emphasizing that courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts"); Bowen v. Amoco Pipeline Co., 254 F.3d

latter views the same can of worms under essentially the same type of lens. Substantive review of arbitration allows parties not only to reassert arguments preserved during the hearing, but also to repackage, and perhaps assert for the first time, legal and factual arguments pursuant to judicial rules. With such judicial recourse available, parties to an expanded review arbitration agreement may not take their arbitration proceeding seriously.

In addition, allowance for expanded review thwarts consistency and efficiency of arbitration law, because it unleashes courts from familiar review limits and sends them into uncertain territory, where they may be tempted to over-step contractual review boundaries. Even "legal error" review easily may be applied to encompass mixed questions of fact and law, and render meaningless a seemingly narrow provision requiring that an award should be binding.[303] Also, parties who agree to judicial review for legal error may be unhappily surprised when a distrusting court uses the expanded review provision as an excuse for engaging in even more searching review of an arbitration than the parties expected. Although modern courts are no longer "jealous" of arbitration,[304] many are critical of arbitration and reveal attitudes reminiscent of distrusting common law courts.[305] Furthermore, the FAA as interpreted by the Supreme Court precludes modern courts from

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925, 932 (10th Cir. 2001) (stating FAA review is "among the narrowest known to the law" because parties that agree to arbitration under FAA necessarily forego court procedures and opportunity for judicial review).

[303] Harris v. Parker Coll. of Chiropractic, 286 F.3d 790, 794 (5th Cir. 2002) (emphasizing that "if all mixed questions of fact and law were reviewed *de novo*, none of the arbitrator's findings would be final," and concluding that if " 'questions of law' were read broadly to encompass mixed questions of law and fact, then the provision that the arbitrator's award should be binding would become meaningless").

[304] *See supra* notes 74-82 and accompanying text (discussing courts' historical "jealousy" of arbitration).

[305] *See, e.g.*, Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 640 A.2d 788, 793 (N.J. 1994) (holding that, although expanded judicial review of arbitration is waste of resources, it should be available "for those who think parties are entitled to a greater share of justice, and that such justice exists only in the care of the court"). It seems that distrust of arbitration often is based on perceptions that arbitrators render rogue awards without legal basis, or merely "split the baby" in order to appease parties who may hire or refer arbitrators in the future. It is far from clear, however, that these perceptions are reality. Stipanowich & Kaskell, *supra* note 300, at 276-77 & n.24 (reporting results of 1986 AAA study of 100 randomly selected cases, indicating arbitrators awarded between 40% and 60% of amount demanded in only 13% of cases).

refusing to direct parties to proceed to arbitrate under a valid submission agreement, and therefore judicial review of awards may become the primary means for second-guessing arbitration. This especially will be true if expanded review becomes the norm.[306] In addition, although overreaching of a reviewing court beyond a contractual review provision may be reversible error, the error just as likely would be ignored or undetected on appeal.[307]

One may hope that expanded review agreements would be rare, that parties would continue to treat arbitration proceedings and awards seriously, and that courts would not be tempted to overreach under the guise of expanded review.[308] Nonetheless, even if none of these things occur, why should the FAA/UAA special remedial scheme support a practice that defies the judicial review prescriptions in the acts aimed to protect legislative policy? FAA/UAA limited judicial review of arbitration awards seeks to protect arbitrators' authority and prevent even the *temptation* to revert back to common law practices motivated by distrust of arbitral systems.[309]

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[306] A recent publication mainly directed to practitioners and consumers of arbitration services provides a list of five options for "lower[ing] the risk of unacceptable compromise awards or other abuses of arbitral discretion," and the most discussed option is expanded review agreements. Stipanowich & Kaskell, *supra* note 300, at 275-98 (noting likely popularity of expanded review agreements as insurance against rogue awards).

[307] In the first place, a district court must struggle to decipher an expanded review clause—often facing the same problems common law courts endured attempting to parse questions of law and fact—and apply that standard to an arbitration proceeding unsupported by a judicial record. An appellate court then must suffer compounded difficulties of attempting to review the trial court's awkward review. In this context, overreaching may go unnoticed or appear permissible under the parties' agreement.

[308] The popularity of expanded review agreements is unclear. *See* Interview with Lance Tanaka, Vice President, American Arbitration Association of Denver, Colo., in Boulder, Colo. (Dec. 10, 2001) (reporting that his review of all arbitration agreements filed with AAA in Denver from January 2000 until November 2001 revealed no agreements that included expanded review clauses); *but see* Drahozal, *supra* note 273, at 4 n.39 (finding, in his study of franchise agreements filed pursuant to Minnesota state law that more than 10% of arbitration clauses provide for expanded judicial review). *See also supra* note 300 and accompanying text (discussing some commentators' prediction that expanded review will become norm). Any rarity of these agreements, however, may be due in part to their unclear enforceability, and therefore they are likely to become more common if condoned by more courts. Nonetheless, even if these clauses currently are rare, such rarity does not solve concerns regarding private direction of judicial authority and anti-FAA judicial action.

[309] *See supra* notes 74-82 and accompanying text (discussing courts' traditional distrust of arbitration and FAA's protection of arbitration's independence).

Therefore, dispute resolution is not sufficiently final and binding to be arbitration simply because it culminates in "a decision by a third party."[310] Instead, the level of finality necessary to further the legislative policy protecting the independence of arbitration goes beyond this definition.[311] Indeed, "finality" as applied to FAA/UAA arbitration has a distinct functional meaning delineated by the limited judicial review provisions of the acts.

B. AWKWARD AND ONEROUS BURDENS ON COURTS CAUSED BY EXPANDED REVIEW OF ARBITRATION AWARDS

Regardless of whether one accepts that expanded judicial review of arbitration awards thwarts privacy, flexibility, efficiency and independence of binding arbitration, or one believes that review is beneficial despite any harm to these arguable benefits, the FAA/UAA limited review scheme represents a legislative policy choice to define the finality of arbitration to preclude substantive judicial appeal. Again, contractual freedom should allow parties to craft arguably unwise dispute resolution agreements, and reasonable people are free to debate whether arbitration law should provide for expanded review. However, the current FAA/UAA scheme does not provide an expanded review option, and recent revisors of the UAA again chose not to provide for such an option.[312]

One may argue that the FAA/UAA limited review provisions are merely default terms, subject to parties' alteration, because the provisions are merely provided for the parties' benefit. Furthermore, it seems tempting to allow individuals to mix statutory arbitration with judicial protections in order to "have it all." However, it is inappropriate for parties to, in effect, abuse a statutory scheme to reap its benefits while refusing to accept the

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[310] *See* AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460 (E.D.N.Y. 1985) (seeming to define arbitration in this simplistic manner); *but see supra* notes 26, 217 (explaining facts of *AMF Inc.* indicating that dispute resolution procedure likely would end dispute, and therefore dispute resolution procedure was de facto final).

[311] *See supra* notes 233-50 and accompanying text (discussing cases holding trial de novo clauses in arbitration agreements unenforceable because they destroy binding character of any award and render it truly nonbinding).

[312] *See supra* notes 175-76 and accompanying text (discussing FAA, UAA, and RUAA rejection of review).

limitations of those remedies. That is especially true with expanded review agreements that burden courts with work that is not merely more, but is also different, than the work the legislature has assigned to them under the FAA/UAA limited review scheme.[313] Limited review is integral to the function of the acts to protect courts from awkward burdens and temptations. Therefore, although limited review may not be jurisdictional *per se*, it is "jurisdiction-like" in the sense that it limits statutory remedies and defines the authority a court will exercise in applying those remedies under the arbitration acts. In other words, the FAA/UAA limited review scheme benefits not only private parties, but also courts, and therefore parties may not waive or alter this scheme and still enjoy the other remedial and procedural benefits the scheme provides.[314]

1. Judicial Imposition of More and Different Work. In enforcing an expanded review agreement, the court in *LaPine Technology Corp. v. Kyocera Corp.* emphasized that review of arbitration for factual and legal error requires fewer judicial resources than trial.[315] While this may be true, such review is more onerous and is qualitatively different than FAA/UAA limited review. The enforcement scheme under the acts limits a court's pre-arbitration oversight to determining whether the parties have agreed to arbitrate a dispute, and confines a court's post-arbitration work to ensuring the basic procedural fairness of the arbitration process.[316] The courts' narrow review of arbitration awards under the acts therefore conserves judicial time and resources in a manner and to a degree that is different from any judicial savings a court would experience by conducting an appellate-type review instead of trial.

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[313] *See supra* notes 107-76 and accompanying text (discussing FAA/UAA limited review scheme); *see also* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (acknowledging that expanded review imposes "different work" on courts, and that private parties may not "impose on the federal courts burdens and functions that Congress has withheld").

[314] *See supra* note 273 and *infra* note 336 and accompanying text (discussing mandatory and default rules).

[315] *LaPine Tech. Corp.*, 130 F.3d at 889.

[316] *See supra* notes 120-76 and accompanying text (describing enforcement schemes of FAA and UAA); *see also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 420 (6th Cir. 1995) (describing FAA judicial review standards as "grounds relating to a breakdown in the integrity of the arbitration process itself").

Indeed, this degree of conservation provided by limited review finality has contributed to courts' enthusiastic enforcement of arbitration through the FAA/UAA strict remedial scheme.[317]

Substantive appellate-type review requires work that is different than that required for FAA/UAA limited review. In contrast to limited statutory review, substantive review requires a court to second-guess an arbitrator's award based on hearing transcripts, detailed findings, and a full factual record.[318] In addition, judicial review for legal error requires a court to conduct thorough legal research. A trial court therefore becomes the parties' personal appellate panel and must take on the attendant burdens of substantively assessing an appeal.[319] Moreover, because FAA review begins at the trial court level, expanded review creates higher costs and lost efficiency for courts at all levels.

The courts' workload in *LaPine Technology Corp.* exemplifies these burdens imposed on courts by substantive review of arbitration awards.[320] In that case, the United States Court of Appeals for the Ninth Circuit held enforceable under the FAA a clause in the parties' arbitration agreement that directed a court to vacate an award "where the arbitrators' findings of fact are not supported by substantial evidence, or . . . where the arbitrators' conclusions of law are erroneous."[321] Accordingly, the district court was required to reassess over 1,500 pages of transcript, seventy-two boxes of documents, and an award containing "hundreds of findings of fact and conclusions."[322] In addition, the district court examined renewed pleadings and conducted hearings before finally confirming

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[317] *See* Dworkin, *supra* note 181, at 167-68 (advocating arbitration legislation as "provid[ing] a simple and obvious solution to our crowded court dockets").

[318] *See* Stipanowich, *supra* note 4, at 886 (noting that substantive review is more onerous than limited review, even if court would need to examine only portions of record cited by party); *see also* New England Utils. v. Hydro-Quebec, 10 F. Supp. 2d 53, 64-65 (D. Mass. 1998) (emphasizing difficulties of reviewing awards for legal error, especially where foreign law is implicated).

[319] *See, e.g.*, Allen-Myland, Inc. v. Int'l Bus. Machs. Corp., 33 F.3d 194, 198 n.2 (3d Cir. 1994) (emphasizing that, although appellate review concentrates on errors, it is "no easy task," especially when court must review voluminous trial transcripts and exhibits).

[320] LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887 (9th Cir. 1997).

[321] *Id.* at 887.

[322] Allen Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 248 (1997) (approving enforcement of expanded review provisions, but noting judicialized arbitration procedures in *LaPine Tech. Corp.*).

the award in a very lengthy opinion.[323] This was thirteen years after the arbitration was initiated and three years after the Ninth Circuit directed the district court to apply expanded review.[324] Of course, the district court was only the first stop in the review process, and the parties were still free to appeal the district court's determination and impose similar substantive review burdens on appellate courts.

LaPine also reveals other onerous effects on arbitration's efficiency and flexibility caused by imposition of judicial procedures and formalities due to substantive judicial review. The expanded review clause in the case made it necessary for the arbitrators to provide detailed findings of fact and conclusions of law and for the parties to create an extensive record.[325] The parties were compelled to judicialize their proceedings. In addition, judicial appellate review relies on legal opinions and detailed records that assume application of procedural and evidentiary rules calculated to assure reliability, but it is unclear in *LaPine* whether the arbitrators followed and applied court-like procedural and evidentiary rules.[326]

Furthermore, an arbitrator's written opinion may not be sufficient or correctly tailored for a court's review. Even when arbitrators provide a written opinion, it may be very difficult for a court to substantively decipher the opinion, especially when it assumes factual, equitable and legal predicates that are not well documented in a record or would be improper for a court to consider under formal judicial rules.[327] For example, the district court in

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[323] LaPine Tech. Corp. v. Kyocera Corp., Nos. C-87-20316 WAI, C-91-20159 WAI, 2000 WL 765556, at *13 (N.D. Cal. Apr. 4, 2000) (unpublished opinion).

[324] *Id.*; *see also supra* note 291 (further discussing burdens of expanded review on district court in *LaPine Technology Corp.*).

[325] *See LaPine Tech. Corp.*, 2000 WL 765556, at *3-*13 (reflecting that court could not have performed such in-depth review without requisite record); *see also LaPine Tech. Corp.*, 130 F.3d at 887-88 (indicating that, at minimum, contract required that arbitrators issue written findings of fact and conclusions of law).

[326] *LaPine Tech. Corp.*, 2000 WL 765556, at *4-*13 (showing court's continual reliance on the arbitrators' stated findings, but providing no assurance that parties followed judicial rules); *see also* Stipanowich & Kaskell, *supra* note 300, at 289-90 (emphasizing concerns regarding burdens of expanded review, including lost efficiency and cost-savings caused by need for adequate record and detailed opinion, as well as onerous delay due to courts' substantive assessment of appeal).

[327] Stipanowich & Kaskell, *supra* note 300, at 285-89 (emphasizing that written opinion may not solve difficulties of applying expanded review). *But see* Stephen J. Ware, *"Opt-In"*

New England Utilities reluctantly reviewed an award for errors of Quebec law pursuant to its "reading of the First Circuit ouija board" to require enforcement of expanded review provisions.[328] However, the court lamented that in most cases such review is awkward and unrealistic because the arbitration record and opinion will not be sufficient for a court's substantive review.[329]

Arbitration and litigation are fundamentally different games played according to different rules. A court's substantive review of an arbitration award may be compared to a soccer referee's reassessment of an American football game under soccer rules. The soccer referee unfamiliar with the rules and norms of football likely will misread, or least fail to fully comprehend, a seemingly adequate game tape.

In addition, even the very limited substantive review that is nominally permitted by some courts under a "manifest disregard" standard has been greatly limited and rarely used because it is awkward, if not impossible, to apply.[330] A court may be forced to guess what witnesses said, attorneys argued, and arbitrators found in an arbitration proceeding, or to remand the case to the arbitrators for their *ex ante* recount of evidence and legal arguments presented in the hearing. Furthermore, depending on the parties' stylized expanded review provision, a reviewing court faces burdens of parsing the meaning of a contract standard, distinguishing factual and legal findings, and determining what law to apply in

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for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT'L ARB. 263, 263-65 (1997) (proposing that arbitrators' failure to apply law is one reason parties seek expanded judicial review of awards and that such agreements should be enforceable to calm parties' fear of wayward awards).

[328] New England Utils. v. Hydro-Quebec, 10 F. Supp. 2d 53, 64-65 (D. Mass. 1998).

[329] *Id.*; *see also supra* note 318 (discussing court's difficulty in reviewing award).

[330] Even minimal substantive review of an award is nearly impossible when an arbitrator does not adequately specify reasons for the result. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 420-22 (6th Cir. 1995) (emphasizing difficulty of reviewing award under manifest disregard standard without reasoned opinion); O.R. Sec., Inc. v. Prof'l Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988) (noting review under manifest disregard standard without arbitration record amounts to "relitigation of the claim, in violation of the basic purposes of arbitration"); Thompson v. Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms, 533 F. Supp. 90, 97 (D. Utah 1981) ("If the court has before it only a decision maker's findings and ultimate decision, but not the raw data forming the basis for these conclusions, how can it possibly ascertain whether the findings and decision are the product of a rational process?").

making those determinations and in performing the review.[331] Indeed, these practical problems and burdens created by courts' substantive review of arbitration prompted policymakers to prescribe limited judicial review in the FAA, as well as in the 1955 and 2000 revisions of the UAA.[332]

Some argue courts could substantively review arbitration awards where parties and arbitrators provide "clear" review standards and "sufficient" records, transcripts, findings, and opinions to perform the review. Again, that only raises questions regarding when a standard is "clear," especially in the private contract realm, which is currently unguided by rules regarding parties' creation of expanded review standards.[333] In addition, even if parties provide for a fairly narrow "legal error" review, how should a court distinguish legal and factual issues in conducting the review, especially considering that these issues often are "inextricably intertwined"?[334] Courts following *LaPine* in fact have begun to struggle with interpreting and applying this "legal error" standard, and already have announced fear that such seemingly narrow review will, in effect, nullify the parties' agreement that an arbitration should be "binding."[335]

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[331] *See LaPine Tech. Corp.*, 2000 WL 765556, at *1-*3 (analyzing (1) definition of "factual finding," (2) what law to apply to that determination, and (3) whether arbitrators' inferences were questions of law or fact, as prelude to applying expanded review standard, although parties had at least agreed that findings of fact should be reviewed under substantial evidence standard, that conclusions of law should be accorded *de novo* review, and that California law should apply to latter task).

[332] *See supra* notes 83-106 and 148-76 and accompanying text (discussing difficulties common law courts experienced in applying even limited substantive review, and policymakers' decisions to statutorily preclude such review).

[333] Stipanowich & Kaskell, *supra* note 300, at 291-98 (emphasizing complete lack of standards and onerous difficulties accompanying arguably viable options, such as legal error, clearly erroneous, and substantial evidence standards).

[334] *Id.* at 293 (quoting Rau, *Contracting Out of the Arbitration Act*, *supra* note 31, at 248).

[335] Harris v. Parker Coll. of Chiropractic, 286 F.3d 790, 793 (5th Cir. 2002). The *Harris* court held an arbitration agreement allowing parties to "appeal any questions of law" was enforceable under Fifth Circuit precedent. *Id.* at 793. Accordingly, the court sought to apply the standard in an employer's appeal of an award in favor of an employee on hostile work environment and retaliation claims. *Id.* at 793-94. However, due to the "difficulty" of determining the "meaning of 'questions of law' " and concern that review of mixed questions of fact and law would gut the finality of the award, the court struggled to narrowly review what it deemed to be a " 'pure' question of law." *Id.* at 794.

Furthermore, when is a record "sufficient" for legal or factual judicial review? Must a court have verbatim transcripts of the arbitration proceedings? Must a record reflect that the arbitrator applied judicial evidentiary and procedural rules? Moreover, how far may parties go in crafting review standards before public policy draws the line and precludes private direction of judicial work and authority? Indeed, courts should not be obliged to extend the FAA and UAA to support dispute resolution procedures that burden them with more and different judicial work than what they expect and enjoy per the acts' limited review prescription.

2. "Jurisdiction-Like" Quality of FAA Limits on Judicial Review. Limited review is integral to the goals and functions of the FAA and UAA, and is "jurisdiction-like," or mandatory, in that it limits and defines the role of courts in applying the acts' statutory scheme.[336] The Supreme Court has indicated that the FAA does not create federal jurisdiction, and most assume the Court likewise would hold that the Act does not limit jurisdiction.[337] Nonetheless, the FAA

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[336] *See supra* note 273 (discussing debate regarding mandatory nature of FAA limited review provisions). Professor Rau proposes that FAA section 10 is a default rule subject to contractual alteration because it is not "an imperative command of public policy," and concludes that private autonomy should overcome "paternalistic grounds" that have been advanced for precluding contractual alteration of these limited review provisions. RAU ET AL., *supra* note 192, at 152-53 (2d ed. 2002); *see also* Rau, *supra* note 31, at 232-34. The proposal in this Article also supports contractual liberty and autonomy by advancing enforcement of agreements as appropriate under common contract and remedy law. However, the proposal also argues that FAA/UAA statutory remedies and procedures should not apply to expanded review "arbitrations" that are not sufficiently final to be the type of arbitration governed by the acts. This means that FAA/UAA motion, venue, timing, and appeal provisions should not apply to a nonfinal procedure outside the acts' purview. *See* RAU ET AL., *supra* note 192, at 156 & n.73 (noting determination of whether an agreement for nonbinding dispute resolution falls within the FAA can have practical significance when party seeks to invoke procedures under Act).

[337] Southland Corp. v. Keating, 465 U.S. 1, 15 (1984) (explaining that "[w]hile the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C § 1331 or otherwise"). *But see id.* at 21-36 (O'Connor, J., dissenting) (arguing that FAA intends for federal courts, and not state courts, to uphold arbitration agreements); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 282-84 (1995) (O'Connor, J., concurring) (calling on Congress to change result in *Southland*); Perry v. Thomas, 482 U.S. 483, 494-95 (1987) (O'Connor, J., dissenting) (questioning Court's conclusion in *Southland*). The debate over *Southland* continues, as states claim the opinion is an affront to federalism. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120-21 (2001) (noting various amici, including attorneys general of twenty-two states, objecting to Court's narrow reading of FAA § 1 to exclude only transportation workers because this reading, in conjunction with Court's direction that state

limits courts' *authority*, and directs their role in the remedial and functional scheme of the Act.[338]

The text of the FAA itself dictates that if the parties have agreed that judgment may be entered on an arbitration award, then a court *must* enter judgment on the award in a summary proceeding and may *only* vacate an award on the very limited grounds delineated in section 10(a).[339] Furthermore, the strict enforcement of awards under the FAA is supported by broadened venue options, liberalized motion procedures, and a limited window for challenging awards.[340] In addition, the limited review provisions of the FAA apply in both state and federal court to enforcement of arbitration agreements within Congress's broad Commerce Clause power as a key component of the substantive scheme of the Act, and the FAA review provisions preempt state law allowing for broader judicial review of awards.[341] Accordingly, regardless of one's views on the UAA, it seems that the FAA limited review provisions are

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court apply FAA under *Southland*, "intrudes upon the policies of the separate States" and "pre-empts those state employment laws which restrict or limit ability of employees and employers to enter into arbitration agreements").

[338] *See* Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (Posner, J.) (stating in dicta that parties "cannot contract for *judicial* review of [an arbitration] award; federal jurisdiction cannot be created by contract"). The FAA does not provide an independent basis for federal jurisdiction, but it seems that Judge Posner's dicta is nonetheless correct in that parties should not be permitted to contractually dictate, and thus create, judicial authority where Congress has imposed limits on that authority based on considered legislative policy. *See also* Stipanowich & Kaskell, *supra* note 300, at 286-87 (explaining that term "jurisdiction" is sometimes loosely used to describe courts' authority more generally, and therefore "jurisdiction" concerns regarding expanded review may reflect concerns that statutory standards should not be contractually altered where "to do so would conflict with the legislature's reasons for specifying the standard").

[339] *See supra* note 133 (discussing recent clarification of section 10 grounds for vacating awards as a grammatically correct list stated in exclusive "or" terms); *see also supra* notes 128-39 and accompanying text (explaining FAA enforcement remedies applicable to arbitration awards).

[340] *See supra* notes 124-39 and accompanying text (discussing FAA award enforcement procedures). In addition, Congress amended the FAA in 1988 to reinforce the streamlined statutory regime by allowing immediate appeal from orders, including interlocutory orders, that hinder arbitration. 9 U.S.C. § 16.

[341] *See* M & L Power Servs., Inc. v. Am. Networks Int'l, 44 F. Supp. 2d 134, 141-42 (D.R.I. 1999) (holding FAA section 10 preempted state law allowing review for "complete irrationality," opining that such ground for review frustrated FAA policy by allowing broader review than that prescribed under the Act); *see also* Eurocapital Group Ltd. v. Goldman Sachs & Co., 17 S.W.3d 426, 431-32 (Tex. App. 2000) (viewing FAA sections 10 and 12 as fundamental to integrated federal enforcement scheme).

"jurisdiction-like," in that they should control when the FAA applies to enforcement of an arbitration contract within federal commerce clause power.

Limited review defines the level of finality essential to the goals and functions of the arbitral plan of the FAA. Even before passage of the FAA, disputants understood that arbitration would be a less efficient, and indeed different, type of process if awards were not final. Moreover, the drafters of the FAA and UAA defined finality through limited review in order to promote perceived benefits of arbitration and prevent substantive judicial oversight that they deemed incompatible with the acts' policies.[342] Limited review, therefore, is an integral component of the acts' policy plan, and parties should not be permitted to shun this component of the acts and still reap all the acts' other statutory benefits.

Furthermore, proponents of expanded review arbitration argue for its enforcement under the FAA based on the Supreme Court's statement in *Volt Information Sciences v. Board of Trustees* that the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[343] The Court's pronouncements of FAA policy, however, emphasize enforcement of *arbitration*, not simply any procedure.[344] Moreover, contractual freedom does not justify application of FAA/UAA remedies to so-called arbitration agreements that thwart the policies and directives of the acts. The FAA and UAA should not

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[342] *See supra* notes 107-76 and accompanying text (discussing development and evolution of arbitration laws).

[343] 489 U.S. 468, 470 (1989); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) ("First, the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate."). The Court's statement in *Volt* has been read to incorporate in the FAA notions of contractual liberty that endorse FAA enforcement of any terms parties provide in their arbitration agreements, including expanded review provisions. *See, e.g.*, Hughes Training Inc. v. Cook, 254 F.3d 588, 593 (5th Cir. 2001); LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 887-90 (9th Cir. 1997); Syncor Int'l Corp. v. McLeland, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (unpublished opinion); New England Utils. v. Hydro-Quebec, 10 F. Supp. 2d 53, 64-65 (D. Mass. 1998).

[344] See Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 470 (1989) (requiring enforcement of agreements "to arbitrate").

become vehicles for subverting the legislative policies they represent.

Again, proper respect for contractual freedom may prompt courts to enjoin litigation or order parties' participation in a dispute resolution procedure under general contract remedy and equity principles.[345] However, under these principles, it is within a court's discretion to order such specific relief.[346] Furthermore, contract law generally should not justify specific enforcement of quasi-final, or conditional, settlement agreements and awards subject to substantive judicial approval.[347] In addition, contract principles generally do not permit a court to order a stranger, not bound by an agreement, to specifically perform that agreement, especially when the stranger is a public body.[348] By refusing to hold the EEOC

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[345] *See* RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981) (discussing enforcement by specific performance and factors affecting adequacy of damages); *see also supra* note 276 (further discussing specific enforcement of agreements to submit disputes to private dispute resolution procedures); *supra* note 28 (noting UMA drafters' decision to leave specific enforcement of agreements to mediate for determination under contract law).

[346] *See id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. c (1981) (discussing discretionary nature of equitable relief such as specific performance and injunctions).

[347] Contract law only requires performance of final, unconditional settlement agreements. *See, e.g.*, Hur v. City of Mesquite, 893 S.W.2d 227, 234 (Tex. App. 1995) (explaining that voluntary agreements reached through mediation are binding and enforceable by suit upon the contract). Some states' laws direct specific enforcement of mediated settlement agreements only when the agreements provide that they are final and binding. *See* Haghighi v. Russian-American Broad. Co., 173 F.3d 1086, 1087-89 (8th Cir. 1999) (refusing to enforce mediated settlement agreement that failed to state it was binding, as required by plain language of Minnesota Civil Mediation Act). In effect, parties who agree to arbitration subject to expanded review truly have not agreed to be bound by an award, and thus have not agreed to a final and binding settlement. *Compare* Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745, 752-53 (E.D. Va. 2001) (refusing to apply FAA or otherwise specifically enforce UDRP determinations subject to *de novo* judicial review), *with* Cap City Prods. Co. v. Louriero, 753 A.2d 1205, 1210 (N.J. Super. Ct. App. Div. 2000) (holding appraisal determination specifically enforceable under FAA or contract law precisely because parties had agreed valuation would be final and binding).

[348] *See* Brucker v. McKinlay Transp., Inc., 557 N.W.2d 536, 540 (Mich. 1997) ("In locating an alternative means of dispute resolution, the parties are generally free to craft whatever method they choose. . . . What parties are *not* able to do, however, is reach a private agreement that dictates a role for public institutions."); *cf. LaPine Tech. Corp.*, 130 F.3d at 891 (Kozinski, J., concurring) (acknowledging burden that expanded review places on courts, but nonetheless requiring their enforcement where review mimics judicial review of agency and bankruptcy actions). Judge Kozinski's reasoning in *LaPine Tech. Corp.* merely raises the question of *when* parties' dictation of judicial review is beyond what he considers acceptable or believes Congress would accept. Furthermore, his acceptance of expanded judicial review of arbitration where it resembles courts' review of agency and bankruptcy actions seems to overlook that Congress, and not private parties, dictates agency and bankruptcy hearing

bound by an arbitration agreement between an employee and his employer, the Supreme Court recently confirmed that the FAA does not require specific performance of an executory arbitration agreement by a nonparty to the agreement.[349]

Moreover, it is one thing for contracting parties to "privately order" their own lives, and quite another for them to order judicial life.[350] "[A]ction by the court can be neither purchased nor parleyed by the parties."[351] Private parties may not contractually direct courts to exercise authority in a manner contrary to codified congressional policy, thereby accomplishing in arbitration agreements feats they otherwise could not achieve by contract.[352] It is for this reason that courts generally refuse to honor parties' attempts to stipulate legal standards or conclusions.[353] For example, courts will not enforce private agreements attempting to

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procedures and review standards. *See* 5 U.S.C. § 706 (2000) (delineating review standards courts must apply in reviewing agency action); 28 U.S.C. § 158 (2000) (directing process and review applicable to bankruptcy orders); *see also In re* Excalibur Auto. Corp. v. Robinson, 859 F.2d 454, 457 (7th Cir. 1988) (noting that district courts must review bankruptcy findings of fact for clear error and review legal conclusions *de novo*).

[349] EEOC v. Waffle House, Inc., 122 S. Ct. 754, 762 (2002) (holding that, as stranger to arbitration agreement, EEOC was not precluded from seeking victim-specific relief in court under ADA, and also reiterating that "[t]he FAA does not mention enforcement by public agencies").

[350] *See* DDI Seamless Cylinder Int'l, Inc. v. Gen. Fire Extinguisher Corp., 14 F.3d 1163, 1165-67 (7th Cir. 1994) (holding federal magistrate could not serve as arbitrator pursuant to parties' stipulation because "arbitration is not in the job description of a federal judge," and it would be inappropriate for judge to toggle litigation and arbitration "hats" at whim of parties).

[351] Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127, 129-30 (3d Cir. 1991) (refusing to honor parties' settlement agreement provision directing that judgment be vacated because parties may not dictate court's substantive disposition of case or its exercise of precedential power).

[352] The FAA places arbitration agreements "upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lance Corp., 500 U.S. 20, 24 (1991). It does not exhault them above contract law.

[353] Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 285-89 (1917). Justice Brandeis emphasized that private parties may not direct legal conclusions. *Id.* at 289. He said, "If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law." *Id.*; *see also* Sanford's Estate v. Comm'r, 308 U.S. 39, 50-51 (1939) (finding that court is "not bound to accept, as controlling, stipulations as to questions of law" and thus rejecting stipulated definition of tax administrative practice); Technicon Instruments Corp. v. Alpkem Corp., 866 F.2d 417, 420-22 (Fed. Cir. 1989) (rejecting parties' attempted stipulation that Technicon had monopolized in violation of Sherman Act because stipulation was void agreement on legal question).

direct a court to apply a burden of proof that is contrary to governing law.[354] Likewise, courts may reject stipulated judgments that violate public policy or incorporate erroneous legal rules.[355]

It is difficult to reconcile these accepted limits on contractual liberty with judicial obedience to parties' demands for review of arbitration awards on grounds beyond the prescriptions of the FAA.[356] The United States Court of Appeals for the Tenth Circuit in *Bowen v. Amoco Pipeline Co.*[357] recognized this tension in refusing to enforce an expanded review agreement in part because the FAA curtails judicial authority to oversee arbitration.[358] The court emphasized that, although the Supreme Court has held that parties may contractually specify procedures that will apply in their private arbitration proceedings, the Court "has never said parties are free to interfere with the judicial process."[359] Expanded review agreements constitute attempts to accomplish precisely this type of interference.[360] The Seventh[361] and Eighth[362] Circuits have

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[354] *See* Compagnie de Reassurance D'ile de France v. New England Reinsurance Corp., 57 F.3d 56, 72 n.17 (1st Cir. 1995) (holding "clear and convincing evidence" standard did not apply to prove fraud regardless of parties' acquiescence to its application at trial); United States Aluminum Corp. v. Alumax, Inc., 831 F.2d 878, 879-80 (9th Cir. 1987) (holding that courts are not bound "by stipulations as to the substance of law," and therefore parties' stipulation to application of "clear and convincing evidence" standard for establishing malicious prosecution did not bind court).

[355] *See* Cal. State Auto. Ass'n Inter-Ins. Bureau v. Superior Court, 788 P.2d 1156, 1159 (Cal. 1990) (emphasizing that court is not "mere puppet" of parties) (quoting *City of Los Angeles v. Harper*, 48 P.2d 75, 77 (Cal. 1955)).

[356] *See* James B. Hamlin, *Defining the Scope of Judicial Review by Agreement of the Parties*, 13 MEALEY'S INT'L ARB. REP. 25, 27-28 (1998) (recognizing difficulty of attempting to reconcile enforcement of expanded judicial review clauses with well-established jurisprudential principles that reject private parties' attempts to direct judicial application of legal standards and judgments).

[357] 254 F.3d 925 (10th Cir. 2001).

[358] *Id.* at 930-36.

[359] *Id.* at 934.

[360] *Id.* at 934-35. The court further explained that the FAA provides "explicit guidance" from Congress regarding judicial review of arbitration awards, which private parties may not contractually alter. *Id.* at 934.

[361] *See* Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1504-05 (7th Cir. 1991) (indicating in dicta that court would not approve parties' attempts to direct exercise of judicial authority in contravention of FAA, and suggesting if parties seek appellate review, "they can contract for an appellate arbitration panel to review the arbitrator's award").

[362] *See* UHC Mgmt. Co. v. Computer Scis. Corp., 148 F.3d 992, 997 (8th Cir. 1998) (questioning in dicta whether "parties may effectively agree to compel a federal court to cast

intimated in dicta that they would agree with the Tenth Circuit's conclusion, and several state courts also have emphasized that private parties should not be permitted to direct judicial authority.[363]

Judicial reliance on contractual freedom to require application of the FAA to enforce expanded review arbitration undermines the centrality of limited review to the literal and functional meaning of finality under the policy-driven scheme of the Act. Congress has not empowered private litigants to direct how Article III courts must conduct their business, let alone how courts must review arbitration decisions under the FAA.[364] To the contrary, Congress has directed in section 10(a) of the Act that federal courts must limit their review of arbitration awards to ensuring basic procedural fairness.[365] Under states' enactments of the UAA, state legislatures have

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aside sections 9, 10, and 11 of the FAA").

[363] *See* Barnett v. Hicks, 829 P.2d 1087, 1089-94 (Wash. 1992) (en banc) (emphasizing that parties had arbitrated their dispute and thus any judicial review was limited to grounds that Washington's arbitration statute provided, which were essentially UAA review limits like those in FAA). The *Barnett* court rejected the parties' attempt to "create their own boundaries of review" and obtain broader review than the statute provided. *Id.*; *see also* Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co., 53 Cal. Rptr. 2d 50, 54-55 (Cal. Ct. App. 1996) (refusing to honor parties' stipulation for appealability that was attempt to empower court to review legal correctness of arbitration award in contravention of "primary purposes of arbitration, quicker results and early finality"); S. Wash. Assocs. v. Flanagan, 859 P.2d 217, 219-22 (Colo. Ct. App. 1993) (refusing to honor parties' attempt to direct substantive judicial review of their arbitration award because parties may not "define and prescribe the powers of a court of law"); Schneider v. Seltzer, 872 P.2d 1158, 1160-62 (Wash. Ct. App. 1994) (citing *Barnett* and applying same rules in holding that parties to statutory arbitration could not, by stipulation, waive trial de novo provided in mandatory scheme in order to obtain immediate appellate review).

[364] *See* LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (Mayer, J., dissenting) (disagreeing on conclusion but nonetheless agreeing that parties may not tell federal court how to conduct its business). *See also id.* (Mayer, J., dissenting) ("Kyocera cites no authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision. Absent this, [a court] may not."); *id.* (Kozinski, J., concurring) (agreeing expressly with Judge Mayer's key legal conclusion). The three separate opinions in *LaPine Tech Corp.* are difficult to decipher. Furthermore, some question why the *LaPine* court did not consider the case under the New York Convention because the case involved an international contract dispute and therefore the court arguably enforced private direction of *treaty* standards. *See generally* Thomas J. Brewer, *Challenging Awards Is No Simple Task*, NAT'L L.J., Oct. 29, 2001, at B13 (noting Ninth Circuit's failure to consider application of New York Convention, and arguing that expanded judicial review of arbitration is especially suspect in international cases because it allows United States courts to vacate on merits awards that would be confirmed elsewhere under Convention).

[365] 9 U.S.C. § 10(a) (as amended May 7, 2002, Pub. L. No. 107-169, § 1, 116 Stat. 132).

similarly limited review of arbitration by state courts.[366] It would create chaos if parties had free reign to craft judicial review standards and define courts' authority under the FAA and UAA as they please.[367] Even in approving enforcement of an expanded review contract in *LaPine Technology Corp.*, Judge Kozinski nonetheless voiced concerns about private direction of authority and warned that he would reject standards akin to "flipping a coin or studying the entrails of a dead fowl."[368] Assuming courts would agree that there must be limits on parties' direction of judicial review standards, what should the limits be? The answer under the FAA and UAA is provided in the acts' limited review scheme.

IV. CONCLUSION

Arbitration has acquired new significance in the sense that it has outgrown its merchant roots and has become an accepted means for settling disputes in traditionally non-business contexts, such as employment and consumer cases, in which the drafters of the FAA likely never contemplated arbitration would apply.[369] At the same time, the "arbitration" label has been used for various types of procedures that generally are outside the purview of the FAA and UAA, including court-annexed, labor, and nonbinding arbitrations. Arbitration governed by the FAA/UAA scheme is a distinct statutory

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[366] UNIF. ARBITRATION ACT § 12, 7 U.L.A. 281-83 (1997).

[367] *See, e.g.*, Reuben, *supra* note 158, at 1088-91 (shunning expanded review because it creates practical and functional problems and thwarts legislative policy).

[368] 130 F.3d at 891 (Kozinski, J., concurring). *See also supra* note 364 (discussing apparent agreement by *LaPine* concurrence and dissent on governing legal principles). Presumably, standards not nearly as bizarre also would be unenforceable under Judge Kozinski's reasoning. Nonetheless, other courts applying the FAA to justify enforcement of expanded review arbitration clauses have failed to even consider that there may be limits on private definition of judicial review standards. *See, e.g.*, Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 292-93 (3d Cir. 2001) (concluding in one paragraph without reasoned explanation "that parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own (including by referencing state law standards)").

[369] *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 462-67 (1996) (finding common law courts likely would not have enforced agreements to arbitrate noncommercial disputes and noting FAA legislative history that "establishes that only disputes arising out of commercial contracts were to be arbitrable").

procedure that assumes finality, in the sense that it ends with an award subject to limited judicial review.

The FAA/UAA scheme built on this finality, represents policy choices aimed to serve functions of promoting privacy, flexibility and independence of arbitration, and of protecting courts from awkward burdens. This is true regardless of whether one agrees with these functions or policy choices. In addition, despite evolution of the uses of arbitration, these FAA/UAA goals and functions have remained central to the core meaning of arbitration under the acts.

Nonetheless, some courts have overlooked this meaning of FAA/UAA arbitration, and have applied the acts to any procedures that resemble arbitration, including nonfinal procedures subject to substantive judicial review. This is inappropriate because it dilutes the significance of FAA/UAA arbitration by using the acts' statutory scheme to enforce procedures that are contrary to the acts' goals. This Article, therefore, proposes a functional approach for redirecting courts' application of FAA/UAA remedies to serve the acts' policies. Furthermore, this functional analysis seeks to clarify current confusion regarding the finality of arbitration under the FAA and UAA by leading back to statutory text. Indeed, the acts' limited review provisions define the finality of arbitration under the acts, and therefore procedures subject to judicial review beyond these limits are not sufficiently final to be FAA/UAA arbitration.

Why does any of this matter? Determination that a procedure is governed by the FAA and UAA matters because the acts do not merely direct enforcement of contracts. Instead, the acts provide enforcement remedies and procedures that are broader than those available under common contract law.[370] Furthermore, although common law may provide basis for specifically enforcing an executory agreement to arbitrate, it generally would not justify a courts' obedience to parties' private direction of judicial authority. Disputants may not disregard judicial rules and procedures and demand that a trial court review their tentative settlement to ensure that it is not based on legal or factual error. Expanded review clauses therefore may be unenforceable pursuant to contract

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[370] *See supra* notes 119-33 and accompanying text (delineating extraordinary enforcement remedies provided by FAA and UAA, including liberal venue, motion, and appeal procedures).

principles or public policy.[371] Nonetheless, full discussion of the proper enforcement under contract law of dispute resolution procedures outside the FAA/UAA purview is beyond the scope of this Article.[372]

It is true that parties may be disappointed if a court refuses to comply with an expanded review clause and instead allows a party who refuses to accept such a non-final award to litigate anew. However, it is the parties' decision to craft such an agreement and reject an award, much like parties agree to mediation but resort to litigation after they fail to reach a settlement. Furthermore, parties should be on notice that they must forego substantive judicial review of a so-called "arbitration" in order to enjoy statutory enforcement of the procedure under the FAA and UAA. Moreover, a clear conception of what constitutes FAA/UAA arbitration may sharpen current debate regarding what types of disputes and claims should be subject to arbitration governed by the acts.[373]

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[371] *See, e.g., supra* notes 233-50 and accompanying text (discussing trial de novo clauses that have been held void in insurance cases where their application would cause improper hardship to insureds).

[372] *See supra* notes 25-28 and accompanying text (discussing contract remedies); *see also supra* notes 213-68 and accompanying text (demonstrating and discussing courts' struggle to decide what law to apply to procedures that look like arbitration but are open to judicial oversight or redetermination that transcends limited judicial role envisioned by FAA and UAA). How dispute resolution agreements should be enforced under contract law is an important issue worth further analysis.

[373] Again, discussion of proper application of FAA arbitration in certain *contexts* (such as employment and consumer disputes), and to particular *claims* (such as statutory claims), is beyond the scope of this Article. Nonetheless, clarification of what procedures constitute "arbitration" would inform that discussion by aiding determination of whether a given procedure is adequately equipped to fairly resolve a particular dispute.