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Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective

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CONTRACTING TO EXPAND THE SCOPE OF REVIEW OF FOREIGN ARBITRAL AWARDS : AN AMERICAN PERSPECTIVE

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INTRODUCTION

In recent years, commercial arbitration has become the instrument of choice for participants in international trade seeking “a workable mechanism for swift resolution of day-to-day disputes.”¹ The reason for this development lies in more than the fact that arbitration presents parties with a viable alternative to the typically expensive, lengthy, and complex litigation proceedings.² Since arbitration is always the result of an agreement, the parties also benefit from wide latitude in setting the ground rules of the decision-making process. As a result, the dispute resolution process, as well as the arbitrator’s decision, can be tailored to the wishes of both parties, increasing their confidence in the impartiality of the decision-maker and of the expected outcome. Secondly, arbitrators are generally experts in the field and thus inspire a great deal of confidence as effective and impartial decision-makers. Finally, as a result of the widespread accession of United Nations (“UN”) member states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”),³ in most cases international arbitral awards are much easier to enforce across international jurisdictional lines.

Realizing that arbitration brought relief to overcrowded judicial dockets, the Supreme Court of the United States (“Supreme Court”) has embraced arbitration as a valid alternative to judicial resolution of disputes, but not “without regard to the wishes of the contracting parties.”⁴ Rather, in offering its endorsement, the Supreme Court has relied upon principles of contract law to prevent state and federal interference with the arbitral process.⁵ However arbitral awards still need judicial sanction in order to

1. *See Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2nd Cir. 1983).

2. THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTIONS: MELTING THE LANCES AND DISMOUNTING THE STEEDS* 1, 4, 134 (1989).

3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun.10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (effective in the United States on December 29, 1970).

4. *Mastrobuono v. Shearson Lehman-Hutton, Inc.*, 514 U.S. 52, 56–57 (1995); *Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468, 479 (1989).

5. *See Mastrobuono*, 514 U.S. at 57.

be enforced.⁶ The latter step of the process can be a source of extensive dispute in cases involving enforcement of foreign awards.

One of the most important issues that has recently arisen in reviewing arbitral awards is to what extent parties can rely on freedom of contract to expand the scope of judicial review beyond the provisions of the Federal Arbitration Act (the “FAA”), which incorporates the New York Convention.⁷ As a result of the lack of guidance from the Supreme Court, the circuits which have considered the issue have arrived at diametrically opposed conclusions.⁸ However, these decisions share a common methodology in arriving at their results. All circuits have recognized that any resolution of this proposition necessitates a balancing act between two sets of competing interests: the integrity of the judicial or arbitral institution, pitted against the freedom of contracting parties to tailor a private dispute resolution system to their particular needs. This Note, in weighing the same concerns, will attempt to illustrate why several circuits that have allowed for expanded review of arbitral awards, have reached the correct result. In support of this argument, this Note will

6. See Edward C. Okeke, *Judicial Review of Foreign Arbitral Awards: Bane, Boon or Boondogle?* 10 N.Y. INT’L L. REV. 29, (1997) (stating that the “role of the judiciary in arbitral process admits of no controversy; this, perhaps, accounts for the paucity of decisional law on the subject”).

7. 9 U.S.C. §§ 1 *et seq.* (1994). The scope of this Note is restricted to the issue of expansion of judicial review. While many of the same arguments can be advanced in support of restricting judicial review, a discussion of that issue necessarily implicates several additional problems, which are not addressed here. One commentator has correctly noted that “as a matter of logic, it is difficult to see why parties may agree to expand judicial review but not to eliminate it. Assuming an arms-length transaction, there is no reason why the parties should not be allowed to put themselves entirely at the mercy of private arbitrators. ... If the strong federal policy in favor of arbitration requires enforcement of private agreements to expand judicial review, it would seem to apply a fortiori to agreements restricting or eliminating judicial review.” James B. Hamlin, *Contractual Alteration of the Scope of Judicial Review – The US Experience*, 15 J. INT’L ARB. 47, 56 (1998).

8. In favor of expansion of review, see *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995). Opposed to expansion of review, see *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *Chicago Typographical Union No. 16 v. Chicago Sun–Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991), and, most recently, *LaPine Technology Corp., v. Kyocera Corp.*, 2003 WL 22025130 (9th Cir. 2003).

discuss both the public policy considerations at play in this debate, and the available Supreme Court and circuit court decisions.

Part I of this Note discusses the FAA and the New York Convention, and the public policy considerations they encompass. Part II will present a synopsis of the decisions in which federal appellate courts have addressed expansion of judicial review in the domestic setting, and the justifications they offered in reaching their respective outcomes. First, this part will present the views of the circuits that have adopted the institutional integrity viewpoint and concluded that expansion of judicial review is intolerable based on its impact on the role of the courts in resolving disputes. Second, this paper will present a synopsis of the decisions where courts focusing on freedom of contract principles have chosen to defer to the wishes of the parties and enforce agreements for expanded review. Part III will provide a brief summary of the conclusions reached by some foreign jurisdictions in addressing the issue of expanded judicial review. Part IV will then present an analysis of the arguments advanced by the institutional integrity and freedom of contract advocates, address the public policy interests raised by the issue of expanded review, and discuss their application to the issue of federal court jurisdiction. Finally, this Note will examine the international implications of expanded review and offer some conclusions as to the likely future developments regarding expanded judicial review of arbitral awards.

I. STATUTORY BACKGROUND: THE FEDERAL ARBITRATION ACT AND THE NEW YORK CONVENTION

In discussing the issue of expanded review of arbitral awards, an analysis of the underlying statutes is a *sine qua non* prerequisite of any complete examination. Such an analysis is warranted for several reasons. First, the substantive law in this area is statutory. Secondly, the legislative, rather than common law, origin of the current law on arbitration is of particular significance because it provides evidence of the difference in objectives pursued by the Federal Arbitration Act and the New York Convention. While the FAA and New York Convention were both enacted to eliminate judicial reluctance toward arbitration by guaranteeing the enforceability of agreements to arbitrate, the New York Convention also had an additional objec-

tive, namely the unification of the world-wide enforcement standards for international arbitral awards.⁹ Since the New York Convention takes precedence when applied to the enforcement of international arbitral awards, U.S. courts must keep in mind both the objectives of the FAA and the New York Convention.

A. *The Federal Arbitration Act*

1. Legislative History

The Federal Arbitration Act was enacted in 1925, and it constituted the entire arbitration law of the U.S. until the ratification of the New York Convention.¹⁰ Chapter I still constitutes the law affecting U.S. domestic arbitration, i.e. arbitration cases involving U.S. interstate commerce, where the arbitration was conducted under domestic law, or the award was made in the U.S.¹¹ As discussed in detail below, the New York Convention governs in arbitrations deemed to be “foreign” pursuant to the statute, and Chapter I of the FAA acts merely as a gap-filler.

2. Public Policy Considerations

One of the main motivations of Congress in enacting the FAA was to reverse the long-standing reluctance of U.S. courts to accept arbitration as a legitimate form of dispute resolution, and to rectify the failure of state statutes to mandate enforcement of arbitration agreements.¹² It was also enacted “to make arbitration a more viable option to parties weary of the ever-increasing cost and delays of litigation.”¹³ Thus, there is ample

9. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

10. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (1994). Note that for the purposes of this part, the designation “FAA” will refer strictly to Sections 1–16 of Title IX of the U.S. Code, rather than the current format of Title IX, which incorporates the New York Convention (in Chapter II) and the Inter-American Convention on International Commercial Arbitration (in Chapter III). For a full discussion of the reasons for this distinction, see *infra* Part IV.C.

11. See THOMAS H. OEHMKE, COMMERCIAL ARBITRATION 3A:04 (rev’d ed. 2002).

12. See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 266 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 14–16 (1984).

13. See H.R. Rep No. 96, 68th Congress, 1st Sess. (1924).

evidence, that the FAA reflected a heavy pro-arbitration bias on the part of Congress from its very inception.¹⁴ Furthermore, it is also clear that this bias applied with particular force in the realm of international commerce, a point addressed in detail later in this Note.¹⁵

However, the FAA accomplished more than simply establishing a universally recognized right to arbitration. The Act amounts to “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”¹⁶ Furthermore, the strong pro-arbitration language in the statute was interpreted by the Supreme Court to evince congressional intent that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”¹⁷ The Supreme Court’s decision in *Allied-Bruce*, in which the court upheld the position that the FAA extends to the full reach of Congress’ powers under the Commerce Clause, best illustrates the reason for this very expansive and highly deferential view toward arbitration.¹⁸

In defining the nature of arbitration under the FAA, the Supreme Court has repeatedly emphasized that arbitration is a creature of contract.¹⁹ In recognizing the contractual nature of arbitration, the Supreme Court noted that the wishes of the parties must be respected even if at times the terms of the underlying contract may work against some of the specific benefits

14. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

15. See H.R. Rep. No. 1181, 91st Cong., 2nd Sess. (1970); See also *Allied-Bruce Terminix*, 513 U.S. at 265.

16. See *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24.

17. *Id.*

18. See *Allied-Bruce Terminix*, 513 U.S. at 274. The Court reached this conclusion by examining the language of the statute (“involving” commerce), and finding it to be the functional equivalent of “affecting.” The Court continued by stating that when used in the phrase “affecting commerce,” this word or its equivalents evince “a congressional intent to exercise its Commerce Clause power to the full.” *Id.*

19. See *AT&T Tech., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986); see also *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960).

which arbitration grants.²⁰ In the Court's opinion, "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, ... but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms.

B. The New York Convention

Identical concerns regarding the viability of arbitration and the enforcement of arbitral agreements and awards eventually surfaced in the international context. In these cases, however, matters were further complicated by the reluctance of parties to entrust the resolution of disputes to the judicial systems of their business partners' home countries because of potential bias and lack of familiarity with foreign judicial systems.²¹ However, a fair and effective system of dispute resolution became a paramount need with increased international economic expansion and globalization of the world economies.

In order to achieve this end, several international conventions were drafted during the twentieth century. The first such document was the Geneva Protocol on Arbitration Clauses of 1923, followed by the Geneva Convention of 1927. While these treaties were laudable first attempts at uniform rules of enforcement, they still contained serious deficiencies, such as provisions placing the burden of proof on the party seeking enforcement of the arbitral award.²² Furthermore, the Convention

20. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995). See also *Mastrobuono*, 514 U.S. at 57 (holding that federal policy favors enforcement of arbitration terms which the parties agreed to).

21. RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* 1146 (4th ed. 1999) (citing Nelson, *Alternatives to Litigations of International Disputes*, 23 INT'L LAW 187 (1989)).

22. The two treaties referenced above failed to effectively meet the demands of international commerce, and were thus unsuitable for the purposes desired by private actors. For example, the Geneva Convention in Article I required signatory countries applying local rules to enforce awards made in other signatory countries. However, the Geneva Convention did not apply to the enforcement of awards made in non-signatory countries, thus impeding the international enforceability of arbitral awards. The New York Convention cured this defect in Article I(1) by extending its application to all awards foreign to the jurisdiction where enforcement of the award was sought. However, the reservation in Article I(3) of the New York Convention allows countries to reserve the right, upon ratification of the Convention, to only apply

of 1927 lacked the expected impact on international dispute settlement because neither the United States nor the Soviet Union ratified it.²³ The New York Convention followed in 1958, bringing some much-needed improvements. To date, one hundred and thirty-three countries, including the United States, have ratified the New York Convention.²⁴ The New York Convention was designed to make enforcement of arbitral awards almost automatic; to a large extent, it has accomplished its goal.

1. Legislative History

The treaties in place before the New York Convention did not effectively mandate enforcement at the international level. In 1953, in order to remedy this situation, the International Chamber of Commerce submitted to the Secretary General of the UN a report and a preliminary draft convention to replace the previous treaties.²⁵ The proposal was reviewed and revised by an ad-hoc committee of the UN Economic and Social Council. Additional revisions were made pursuant to the comments submitted by member governments of the UN, non-member governments and interested international organizations. Finally, a conference on the subject was convened in New York. Working parties established at this conference made further amendment proposals, and the conference resulted in the Convention in its current form. The U.S. Congress ratified the New

the Convention to awards rendered "in the territory of another Contracting State." Given the widespread ratification of the New York Convention, however, this point has become largely moot. Also, the Geneva Convention contained the requirement of *double exequatur*, which restricted a party from seeking enforcement of the award in another jurisdiction until the award was confirmed in the country of origin. For a full discussion of the problem of *double exequatur* see Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 1, 54-55 (2002).

23. See PHILIPPE FOUCHARD ET AL., FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 122 (Emmanuel Gaillard & John Savage eds., 1999).

24. An up-to-date list can be found on the United Nations Commission for International Trade Law ("UNCITRAL") web site, which is regularly updated as new information becomes available, see <http://www.uncitral.org/en-index.htm> (last visited Sept. 25, 2003).

25. Report and Preliminary Draft Convention, U.N.Doc. E/2704 and Corr. (1958).

York Convention in 1970, and included it in the FAA in the same year by enacting Chapter II of Title Nine of the U.S. Code.²⁶

2. Public Policy Considerations

The purpose of the New York Convention was “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts, and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”²⁷ The tenets of the Convention constituted a major improvement over existing treaties.

Chapter II of Title Nine implements the New York Convention, and provides as follows: Section 201 provides that the New York Convention “shall be enforced in United States courts in accordance with this chapter.”²⁸ Section 203, in contrast with Chapter I of the FAA,²⁹ confers subject matter jurisdiction on the federal courts for proceedings where parties seek enforcement or review of arbitral awards under the New York Convention.³⁰ Section 207 adopts the grounds for refusal or deferral of enforcement of awards from the Convention into the FAA.³¹ Finally, Section 208 establishes the relationship between the New York Convention and the former parts of the FAA.³² Thus, pursuant to principles of statutory interpretation, in cases where arbitral awards are sought to be enforced pursuant to the New York Convention (FAA Chapter II) or the Inter-American Con-

26. H.R. Rep. No. 1181, 91st Cong., 2nd Sess. (1970).

27. See *Scherk*, 417 U.S. at 520 n15.

28. 9 U.S.C. § 201 (1994).

29. 9 U.S.C. §§ 1–16 (1994).

30. 9 U.S.C. § 203 (1994). In relevant part, this section provides that “An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.” See *infra* Part IV.C. for a further discussion of the issue of jurisdiction.

31. Provides that “the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.” 9 U.S.C. § 207 (1994).

32. “Chapter I applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.” 9 U.S.C. § 208 (1994).

vention on International Commercial Arbitration (FAA Chapter III), Chapter I serves only to fill in the gaps.³³

The New York Convention also contains some potentially inconvenient provisions, but, as the widespread ratification of the Convention indicates, these provisions have not raised significant hurdles. Two potential problems arise from the reservations allowed to signatory states by Article I(3).³⁴ First, the so-called "reciprocity reservation" allows signatory states to declare that they will apply the Convention only to awards rendered in the territory of another contracting state.³⁵ This reservation initially increased the degree of uncertainty regarding the enforcement of arbitral awards rendered in non-signatory countries. Given the widespread ratification of the Convention, however, this restriction has become almost entirely moot.³⁶ Secondly, the Convention allowed states to declare that they would only apply the Convention to "differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the State making such declaration."³⁷ This provision subjected the enforceability of foreign arbitral awards to a measure of domestic review in the country where enforcement is sought, by subjecting these awards to the domestic interpretation of the concept of "commerce."

The most attractive feature of the Convention lies in Article V, which lists the exclusive grounds for refusing recognition and enforcement of arbitral awards. The grounds presented in Article V are generally very clear, and provide a valuable framework for actors in international commerce to structure their agreement so as to avoid denial of enforcement. In relevant part, Article V provides:

33. See THOMAS H. OEHMKE, COMMERCIAL ARBITRATION 3A:04 (rev'd ed. 2002). (Referring to the principle of statutory interpretation stating that "the specific controls the general.")

34. The United States has ratified the Convention but has maintained both reservations. See UNCITRAL web site at <http://www.uncitral.org/en-index.htm> for a complete list of reservations maintained by all signatory states.

35. See New York Convention Art. I(3), *supra* note 3.

36. See *supra* note 24.

37. See New York Convention Art. I(3), *supra* note 3.

1. Recognition and enforcement of the award may be refused...only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The importance of the Article V provisions lies in their precision and their ability to restrict judicial interference to a limited number of scenarios. Thus, paragraph one addresses potential grounds for review with regard to procedural problems. In al-

lowing the losing party minimal recourse against enforcement of awards, this paragraph limits the grounds for review to a very narrow, defined set of circumstances. Paragraph two, especially its latter provision, seems to expand the scope of possibilities for invalidation, and works against the precision of the previous paragraph. This dichotomy is not as strong as it might appear, however. In the United States, for instance, in keeping with the pro-enforcement bias of the Convention, the language of paragraph (2)(b) was interpreted to apply only to cases jeopardizing "the forum state's most basic notions of morality and justice," a very rigorous standard.³⁸

In contrast to the preceding two Geneva conventions, under the New York Convention the party advocating denial of enforcement bears the burden of proof.³⁹ Furthermore, the language of the Convention does not require that enforcement be denied if sufficient proof is presented. Rather, it is permissive, granting the reviewing judge leeway to proceed with enforcement in spite of the proof presented.⁴⁰ Neither the New York Convention nor the FAA contemplate situations in which parties contract to expand the scope of judicial review of arbitral awards. Because of this omission the national courts have addressed this problem with mixed results, as the following section will illustrate. Unfortunately, as a result of the lack of statutory guidance or Supreme Court direction, the outcomes have not been as uniform in the U.S. domestic arena as one might hope. The federal appellate courts have reached different results based on differing levels of emphasis placed on institutional integrity and the parties' freedom of contract.

38. See *Parsons & Whittemore Overseas Co. v. Société Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2nd Cir. 1974).

39. See *supra* Part I.B. (On the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention of 1927).

40. See New York Convention, *supra* note 3, art. V (The chapeau of Article V(1) provides that "Recognition and enforcement *may be refused*, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof...." (emphasis added)).

II. FEDERAL APPELLATE COURT DECISIONS AND UNDERLYING CONSIDERATIONS

The tension that permeates the issue of expanded review of arbitral awards is evident from the sheer volume of scholarly articles that address the topic.⁴¹ Furthermore, the disparity in the decisions on this issue among the various districts speaks loudly as to the validity of both points of view in this debate. Given the lack of Supreme Court guidance, reasonable minds may disagree as to the legality of such expanded review. Nevertheless, this Note will contend that contractual expansion of judicial review is not only warranted, but indeed mandated, by the nature of the arbitral process and its underlying policy objectives. The following sections will illustrate why the only outcome consistent with long-standing public policy in the field of arbitration is the one allowing such expanded review.

Several circuits have ruled on the issue of the legality of expanded judicial review of domestic arbitral awards in recent years, and have arrived at opposing conclusions.⁴² The decisions of the various circuits have polarized around two main trains of thought. The first is illustrated by decisions of the Seventh and Tenth Circuits, which have refused to allow expanded judicial review out of concern for the integrity of the judicial system.⁴³

41. See, e.g., Tom Cullinan, *Contracting for an Expanding Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395 (1998); Kenneth M. Curtin, *An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards*, 15 OHIO ST. J. ON DISP. RESOL. 337 (2000); Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 43, 44 (2002); Kenneth R. Davis, *When Ignorance of the Law is No Excuse; Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49 (1997); James B. Hamlin, *Contractual Alteration of the Scope of Judicial Review — The US Experience*, 15 J. OF INT'L ARB. 47 (1998); Alan S. Rau, "Arbitrability" and *Judicial Review: A Brief Rejoinder*, 13 WORLD ARB & MEDIATION REP. 71 (2002); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147 (1997); Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509 (2002); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241 (1999).

42. See *supra* note 8.

43. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *Chicago Typographical Union No. 16 v. Chicago Sun-Times*, 935 F.2d 1501 (7th Cir. 1991).

The second viewpoint is exemplified by decisions of the Fifth and Ninth Circuits, which have taken a freedom of contract approach and have chosen to move away from a restrictive interpretation of statutory language, allowing expanded review of arbitration agreements.⁴⁴

In illustrating the arguments made by the various circuits, this paper will dissect the *LaPine I* decision of the Ninth Circuit Court of Appeals in late 1997.⁴⁵ This case provides an excellent example of the polarization of the various circuits, because the decision of the United States District Court for the Northern District of California (the “Northern District of California”) in *La Pine Technology Corporation v. Kyocera Corporation*⁴⁶ aptly presents the arguments against expanded review, while the decision of the *LaPine I* panel illustrates the freedom of contract approach.

A. *The Institutional Integrity Model*

1. Underlying Considerations

According to the institutional integrity viewpoint, expanded judicial review is impermissible because it intrudes into the court’s role as designated by statute. The arguments raised by the scholars and the various courts in supporting this view, once cleansed of rhetorical discourse and fact-specific twists, can be summarized as follows:

Institutional integrity advocates consider the role of the courts in reviewing arbitral awards immutable and strictly defined. They argue that Congress, by passing Title Nine of the U.S. Code, has provided a clear set of boundaries for the courts in reviewing both domestic and international arbitral awards. Therefore, if parties were allowed to ignore the statutes and draft their own rules as to judicial review, the role of the courts and the arbitration process would be negatively impacted in several significant ways.

44. *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995).

45. *LaPine Tech.*, 130 F.3d 884.

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

First, the courts would be asked to perform a review based on a standard agreed to by the parties, with which the reviewing courts may or may not be familiar. Thus, requiring the courts to apply differing standards of review in every dispute would undermine the expected predictability of outcomes in award enforcement proceedings. Such a scenario, it is argued, would give rise to concerns regarding potential injustice due to the differing interpretations which the various courts might give to standards of review fashioned by agreement between the parties to the dispute.⁴⁷ This concern was aptly expressed by Judge Kozinski in his concurring opinion in the *LaPine I* decision.⁴⁸

Secondly, the advantageous nature of arbitration would be damaged if the courts were to allow the parties to set the boundaries of judicial review by agreement.⁴⁹ In performing this expanded review, courts would unnecessarily extend the duration, scope and expense of reaching a resolution to the dispute presented. Such a process would diminish the qualities which make arbitration of disputes attractive, and significantly reduce the value of arbitration as an effective means of extra-judicial dispute resolution.

Finally, the argument presented holds that expanded review would violate specific statutory provisions of the FAA.⁵⁰ Such a course of action would impermissibly substitute the will of parties to the arbitration in place of the will of the legislature, as expressed in the FAA. Specifically, the institutional integrity advocates hold that the grounds for review mentioned in the FAA are the exclusive grounds available to a reviewing court in examining arbitral awards, and that congressional intent in this matter was to specifically preclude any review under differing, more expansive, standards. These arguments were adopted by several federal appellate courts and were discussed in detail by the Northern District of California opinion in the *LaPine* case.⁵¹

47. *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 543 (1995) (Stevens J., dissenting).

48. *LaPine Tech.*, 130 F.3d at 891.

49. Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 151 (1997).

50. *Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333 (Ill App. Ct. 1982).

51. *LaPine Tech.*, 909 F.Supp 697.

2. The Northern District of California Decision in
LaPine Tech. v. Kyocera

LaPine Technology Corporation ("LaPine") was formed in 1984 in order to design, market and share computer disk drives.⁵² Since it did not have the necessary facilities to manufacture these drives, LaPine entered into an agreement with Prudential Trade (a partnership the general partner of which was an affiliate of Prudential-Bache Trade Corporation) and Kyocera Corporation ("Kyocera").⁵³ The contemplated transaction structure provided that Kyocera, acting as LaPine's licensee, would manufacture the drives, and that financing for production would be provided by Prudential Trade.⁵⁴ Subsequent agreements were completed in 1985, outlining the structure of the transaction: LaPine would order the drives from Kyocera pursuant to a negotiated quantity and delivery schedule. Another subsidiary of Prudential Trade would then purchase the product from Kyocera and resell it at a markup to Prudential Trade, which would finally sell it to LaPine on credit.

In January 1986, LaPine, Kyocera and Prudential Trade, through its subsidiary KK PB Trade Corporation, ("KK Trade"), agreed to certain actions to be taken by the parties in 1986.⁵⁵ However, later that year Kyocera experienced severe production problems. LaPine was in turn plagued by management problems, and failed to make payments to Prudential Trade, but still requested that Prudential Trade make payments to Kyocera for product delivered by Kyocera. Kyocera requested assurances that it would be paid for goods manufactured and shipped by it.⁵⁶ Due to the impasse, a reorganization of LaPine became imperative in order to continue the production and sale of the disk drives, and several formulae were contemplated by the parties.⁵⁷

The agreed upon solution provided for a "merger" by which LaPine would become the wholly owned subsidiary of a newly formed LaPine Holding Company ("LaPine Holding"). Two

52. *Id.* at 699.

53. *Id.*

54. *Id.*

55. *Id.* at 700.

56. *Id.*

57. *Id.*

thirds of LaPine Holding's voting stock would be owned by Prudential Trade and one third by Kyocera, in exchange for additional capital contributions by Prudential Trade and Kyocera.⁵⁸ An agreement detailing these arrangements was executed by all the parties on December 18, 1996.⁵⁹ This Definitive Agreement provided that the parties bound themselves to present executed copies of various other, more specific, agreements, such as the Amended Trading Agreement, by the closing date.⁶⁰ However, after signing the Definitive Agreement, Kyocera declined to sign the Amended Trading Agreement, which provided for a direct sale of the products from Kyocera to LaPine, without the intervening sales to KK Trade and Prudential Trade, and notified its business partners of its refusal.⁶¹ On December 29, 1986, the closing date, counsel for LaPine and Prudential Trade notified Kyocera of its breach of the Definitive Agreement by reason of its failure to execute the Amended Trading Agreement.⁶²

In May 1987, LaPine sued in the Northern District of California, in an attempt to compel Kyocera to continue supplying drives under the terms of the Definitive Agreement. Pursuant to the section of the Definitive Agreement regarding dispute resolution, Kyocera moved to compel arbitration, and the district court granted the motion in September 2, 1987.⁶³ The dispute was submitted to arbitration before a panel of the International Chamber of Commerce, which found in favor of LaPine.⁶⁴ After the issuance of the arbitral award, La Pine moved to confirm the award under Chapter I of the FAA, the domestic arbi-

58. *Id.*

59. The agreement (known as the Definitive Agreement) was executed by all parties, including Kyocera, and then filed with the California Corporations Commissioner in order to comply with California law regarding corporate reorganizations. *Id.*

60. *Id.* at 701.

61. Kyocera's counsel advised other parties that Kyocera would not sign the Amended Trading Agreement at a meeting on December 17 and 18, 1986. *Id.*

62. *Id.*

63. *Id.* Section 8.10(b) of the Definitive Agreement provided that "the arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC") and the Federal Arbitration Act, 9 U.S.C. sections 1 *et seq.*" *Id.*

64. *LaPine Tech.*, 909 F.Supp at 698.

tration statute.⁶⁵ In turn Kyocera moved to vacate, modify and correct the award. The crux of the dispute was contained in Section 8.10(d) of the Definitive Agreement, stating the role of the arbitrators and that of the federal court of first instance:

The arbitrators shall issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law. The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrator's findings of fact are not supported by substantial evidence, or (iii) where the arbitrator's conclusions of law are erroneous.⁶⁶

The significance of this paragraph as the bone of contention between these parties is plainly visible from the text of the agreement, as subsections (ii) and (iii) include grounds of review above and beyond those customary under the FAA. Section (ii) explicitly asks the federal district court to review the arbitral award in light of the evidence presented. Such review can pose significant problems, since arbitration proceedings rarely produce a record of the proceedings.⁶⁷ Furthermore, the evidentiary and disclosure rules of arbitral processes are tailored to the needs of the parties, and constitute a far cry from the rigors of litigation.⁶⁸ Thus, a review of the factual support of the arbitral award invites extensive debate over the veracity and comprehensiveness of the facts presented. Moreover, the "supported by substantial evidence" standard agreed to by the parties is sufficiently vague to allow for a wide range of approaches by the reviewing court. Section (iii) invites judicial review of the arbitrator's conclusions of law. This process can also be difficult and likely to give rise to extensive debate, because in most

65. 9 U.S.C. §§ 1–16 (1994). It is unclear to this author why LaPine did not opt to seek enforcement of the award under the New York Convention, since the award in this case clearly qualified as "foreign" within the meaning of the statute.

66. *Id.*

67. RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 14 (2000).

68. *Id.*

cases arbitrators do not render opinions detailing their interpretation and application of the law.⁶⁹ Furthermore, arbitrators are not always obligated to follow the law very closely in rendering a decision, but rather are granted wide powers to decide the dispute before them in accordance with general principles of fairness, equity and justice.⁷⁰ Thus, the combined language of these provisions in fact almost mandated *de novo* review by the Northern District of California.

In deciding the case, the court discussed several issues, but acknowledged that the central issue of the case was the validity of the scope of review clause. In support of its pro-enforcement position, Kyocera made several arguments based on previous decisions on the subject. However, the Northern District of California was not persuaded, and chose to follow the language of Seventh Circuit opinion in *Chicago Typographical*, and to take a restrictive institutional integrity approach to the case.⁷¹

In *Chicago Typographical*, the union representing the composing-room employees of both the Chicago Sun-Times (the “Sun-Times”) and the Chicago Tribune (the “Tribune”) had signed a collective bargaining agreement with the Tribune.⁷² In reliance on a clause in its own agreement with the union which entitled the Sun-Times to any concessions the union granted the Tribune, the Sun-Times subsequently changed some of the terms and conditions of employment in its composing room.⁷³ The matter was submitted to arbitration by the union, with a mixed result.⁷⁴ In early 1990 the union filed suit in federal district court challenging the arbitral award, based on Section 301 of the Taft-Hartley Act, creating federal jurisdiction over suits to enforce labor contracts.⁷⁵ The district court upheld the arbitral award, and the union appealed to the Seventh Circuit.

Judge Posner began his discussion on behalf of the Seventh Circuit by stating that the role of the courts was not “to review the soundness of arbitration awards, [because] agreement to

69. See *Chicago Typographical*, 935 F.2d at 1506.

70. See GARNETT ET AL., *supra* note 67, at 26.

71. *Chicago Typographical*, 935 F.2d 1501.

72. *Id.* at 1503.

73. *Id.*

74. *Id.* The arbitrator found that some of the changes were authorized by the “most favored nation” clause, and that some were not. *Id.*

75. *Id.*

submit a dispute ... to arbitration is a contractual commitment to abide by the arbitrator's interpretation."⁷⁶ Thus, the court recognized the possibility that parties could resort to an appellate arbitration panel to review an arbitrator's award.⁷⁷ But the Seventh Circuit then went on to categorically deny the possibility of federal judicial review of that award, by stating: "they [the parties] cannot contract for judicial review of that award: federal jurisdiction cannot be created by contract."⁷⁸ In support of its holding, the opinion went on to state that the court was not allowed to "substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong."⁷⁹ Judge Posner further explained that in-depth scrutiny of arbitrator opinions would be detrimental, because it might discourage arbitrators from writing opinions at all.⁸⁰ The court reasoned that while arbitrators were not required to write opinions, the practice of doing so was very beneficial, as "writing disciplines thought," and therefore the courts should not "create disincentives for their doing so."⁸¹ This, however, is as far as the Seventh Circuit opinion went in, undoubtedly obliquely, speaking to the issue of expanded review of arbitral awards.

First, it is important to note that the entire discussion mentioned above is dicta, as expanded judicial review was not an issue before the Seventh Circuit in that instance, and therefore the precedential value of the opinion is limited.⁸² As the *LaPine I* panel later correctly noted, there was no indication that the parties had bestowed appellate jurisdiction upon the Seventh Circuit, nor had they asked the reviewing court to utilize some unfamiliar standard of review.⁸³ Second, in cases involving international arbitration awards, the federal courts undoubtedly have subject matter jurisdiction by explicit statutory authoriza-

76. *Id.* at 1504–05.

77. *Id.* at 1505.

78. *Id.*

79. *Id.*

80. *Id.* at 1506.

81. *Id.*

82. Tom Cullinan, *Contracting for An Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395, 407 (1998).

83. *LaPine Tech.*, 130 F.3d at 889–90.

tion.⁸⁴ Third, the *Chicago Typographical* decision failed to address the issue squarely, since neither of the parties in this case asked the court to expand the scope of its involvement. Nevertheless, relying on the reasoning in the Seventh Circuit dicta, the Northern District of California held that where federal jurisdiction was clearly established, and the guidelines for review were provided by statute, the extent of review could not be altered by contractual understandings among the parties.

Since the Northern District of California decision in *LaPine*, the Tenth Circuit Court of Appeals has also addressed the issue of expanded review of arbitral awards in *Bowen v. Amoco Pipeline Company*, and has also refused to uphold expanded review, becoming the first federal court of appeals to explicitly do so.⁸⁵ In 1998 the Bowens filed suit against Amoco in tort and breach of contract. Amoco's pipeline, which extended over the Bowens' property pursuant to an easement agreement, had been found to be leaking by an investigation of the Oklahoma Corporate Commission. Amoco moved to compel arbitration pursuant to the easement agreement which had been executed by both parties' predecessors in interest. The Bowens and Amoco agreed to arbitration, provided that the scope of judicial review of the arbitral award would be enlarged.⁸⁶ Specifically, the reviewing court had the power to review the award "on the grounds that the award was not supported by the evidence."⁸⁷ The arbitrator found for the Bowens, and they filed a motion for confirmation of the award.⁸⁸ Amoco simultaneously filed a motion to vacate the award, as well as a notice of appeal of the arbitration award pursuant to the modified arbitration rules.⁸⁹ The lower court refused to apply the expanded review of the arbitration clause, and confirmed the award.⁹⁰

In a unanimous decision, the Tenth Circuit affirmed the decision of the lower court.⁹¹ The appellate court offered only a curt

84. *See infra*, Part IV.C.

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

86. *Id.* at 930.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

nod to the decisions of the Fourth,⁹² Fifth and Ninth Circuits, and chose to disregard their holdings.⁹³ The Tenth Circuit disagreed with these courts, stating that the Supreme Court language they invoked did not specifically address the issue of parties' interference with the judicial process. Specifically, the Tenth Circuit looked to the underlying policy of the FAA, and held that the widespread support for arbitration was a result of the fact that it provided an expeditious and cheap method of dispute resolution. Thus, the opinion stressed the speed and cost-effectiveness of arbitration and found that these attributes must trump any agreement of the parties which would diminish them. As mentioned above, however, the Ninth Circuit subsequently reversed the decision of the Northern District of California in *LaPine I*, and instead emphasized the freedom of contract approach.

B. The Freedom of Contract Model

1. Underlying Considerations

Freedom of contract proponents view this dilemma of expanded review from a slightly different perspective. In their opinion, the foremost feature which attracts parties to arbitration as an option for effective dispute resolution is not the expeditiousness and cost-effectiveness of the process, but rather the ability to have the dispute resolved within a framework which the parties themselves can establish by agreement, and the ability to have their wishes enforced by the courts. Thus, although speed of resolution and significant reduction in expenses are significant advantages, they lose their luster if imposed paternalistically by a rigid judicial system and an inflexible legislature. In other words, substituting the formalistic, procedure-laden system of in-court litigation with another structure of dispute resolution which, while somewhat cheaper and faster, still takes the decision-making ability away from the parties with regard to key issues, is contrary to the fundamental pre-

92. In an unpublished opinion, the Fourth Circuit court joined the Fifth Circuit, concluding that the district court should have applied the expanded standard of review agreed to by the parties. See *Syncor Int'l Corp. v. McLeLand*, 120 F.3d 262, (4th Cir. 1997).

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

cepts of arbitration. After all, arbitration, along with other alternative dispute resolution methods, was intended to allow parties to circumvent the strictures of litigation by designing a resolution process fitted to their specific needs.⁹⁴ While the judicial system can not be circumvented entirely, because awards still need judicial sanction in order to be enforced, the exposure to potential unexpected results at the review level was minimized by the legislature through enactment of the FAA, and by the international community by enactment of the New York Convention. However, proponents of the freedom of contract model argue that there is no indication that these documents were intended to thwart the wishes of the parties to arbitration to do so.

2. The Ninth Circuit Decision in *LaPine I*⁹⁵

Subsequent to the district court decision, Kyocera appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reached a decision on the matter in December 1997.⁹⁶ The three-judge panel was divided on the outcome of the case, with each of the judges on the panel submitting an opinion. The opinions of Judges Fernandez, Kozinski and Mayer will be discussed in turn.

The majority opinion⁹⁷, written by Judge Fernandez, identified the major issue of the case: "Is federal court review of an arbitration agreement necessarily limited to the grounds set forth in the FAA or can the court apply greater scrutiny, if the parties have so agreed?"⁹⁸ The majority agreed with Kyocera in finding that parties could, by agreement, stipulate to expand judicial review of arbitration decisions.⁹⁹ In reaching this conclusion, the court departed from the rule it had announced in *Todd Shipyards*, which held that in the absence of contractual terms with respect to judicial review, a federal court could vacate or modify arbitral awards only if the respective award ex-

94. Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 *BUFF. L. REV.* 49, 51 (1997).

95. See *LaPine Tech.*, 130 F.3d 884.

96. *Id.*

97. As will be pointed out, the deciding vote of Judge Kozinski offered only reserved support to the majority position.

98. *LaPine Tech.*, 130 F.3d at 887.

99. *Id.* at 888.

hibited a manifest disregard for the law, was completely irrational, or otherwise fell within one of the grounds enumerated in 9 U.S.C. §§ 10 or 11.¹⁰⁰

The deciding factor in the Ninth Circuit's opinion was the Supreme Court's *Volt Info. Sciences* decision.¹⁰¹ In *Volt*, in an opinion by Chief Justice Rehnquist, the Supreme Court had reiterated "the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms."¹⁰² In deferring to congressional intent, the Supreme Court held that the FAA does not prevent enforcement of agreements to arbitrate under rules different from those set out in the FAA.¹⁰³ In further defining the approach which courts should adopt in reviewing arbitration agreements, the Court stated that "arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."¹⁰⁴

Judge Fernandez then addressed, but explicitly declined to follow, the Seventh Circuit's *Chicago Typographical* opinion, arguing that the Seventh Circuit had not explained "what had evoked that pronouncement, nor did it further explain the reasoning behind it."¹⁰⁵ The majority explained that the *Chicago Typographical* opinion had not indicated that the parties in the

100. See *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991). Beside the "manifest disregard" and "completely irrational" standard, the FAA also allows vacatur of an award procured by corruption, fraud or undue means, where there was evident partiality or corruption in the arbitrators, where the arbitrators were guilty of misconduct in refusing to postpone hearings, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, and, finally, where the arbitrators exceeded their powers or used them so imperfectly so that a mutual, final and definite award was not rendered on the subject matter. See Federal Arbitration Act, 9 U.S.C. § 10 (1924). Furthermore, the FAA allows federal courts to modify or correct an award where there was evident material miscalculation or an evident material mistake in a description of a person or thing, where the arbitrators awarded on matter not submitted to them, or where the award is imperfect in of form not affecting the controversy. See Federal Arbitration Act, 9 U.S.C. § 11 (1924).

101. See *Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468 (1989).

102. *Id.* at 478.

103. *Id.*

104. *Id.* at 479.

105. *La Pine Tech.*, 130 F. 3d at 889–90.

action had intended to bestow “appellate jurisdiction” on that court, nor had that opinion indicated that the parties had asked the court to utilize some “exotic” standard of review.¹⁰⁶ In light of these considerations, the Ninth Circuit opted to treat the “cryptic assertion” of the Seventh Circuit as dicta.¹⁰⁷ Instead, the majority chose to follow the prescription of the Supreme Court, holding that there is an “established principle that the FAA is a regulation of commerce rather than a limitation on or conferral of federal court jurisdiction.”¹⁰⁸

In reaching its decision, the *LaPine I* majority also relied on the precedent set by the Fifth Circuit in *Gateway Technologies v. MCI Telecommunications Corp.*¹⁰⁹ In *Gateway* the Fifth Circuit had held that the provisions of the FAA could be superseded by terms of the contract because the contractual provisions arose from the agreement of the parties.¹¹⁰ MCI had won a bid for a contract with the Virginia Department of Corrections, which it then subcontracted to Gateway.¹¹¹ The contract with Gateway called for dispute resolution by arbitration, stipulating, however, that “errors of law shall be subject to appeal.”¹¹² Pursuant to a dispute over the design of the system, the contract with Gateway was terminated, and arbitral proceedings ensued. The arbitrator found MCI to have breached the contract. Gateway moved to confirm the award, and MCI moved to vacate the district court decision confirming the award.¹¹³ The Fifth Circuit also relied on the Supreme Court decision in *Volt* in approving of the enlarged scope of judicial review embodied in the parties’ agreement.¹¹⁴ The court held that “because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA’s default standard of review and allows for *de novo* review of issues of law.”¹¹⁵ The court also explicitly stated that it would uphold ex-

106. *Id.*

107. *Id.*

108. See *Allied–Bruce Terminix*, 513 U.S. at 269.

109. See *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir., 1995).

110. *Id.* at 996–97.

111. *Id.*

112. *Id.* (discussing Art. 9 of the contract between Gateway and MCI).

113. *Id.*

114. *Id.*

115. *Id.* at 997.

panded judicial review even if doing so would in effect “sacrifice the simplicity, informality and expedition of arbitration on the altar of appellate review.”¹¹⁶ The Fifth Circuit concluded that the intent of the parties trumps, because “federal arbitration policy demands that the court conduct its review according to the terms of the arbitration agreement.”¹¹⁷

Finally, in addressing the loss of efficiency argument with respect to enlarged judicial review, the Ninth Circuit cited arguments which the Southern District of New York had found to be persuasive in a previous case.¹¹⁸ In *Fils*, the Southern District had discussed the efficiency issue, and concluded that even with the enlarged review the resulting inquiry is “far less searching and time-consuming than a full trial” and therefore approved of expanded judicial review of arbitral awards in spite of the loss of speed and cost-effectiveness.¹¹⁹

The *La Pine I* dissent adopted and reiterated the arguments of the Seventh Circuit in *Chicago Typographical* in refusing expansion of judicial review.¹²⁰ Judge Mayer’s opinion recognized that parties were free to contractually agree to the procedures to be followed during the arbitration process. However, he insisted, the appellants had cited no authority explicitly authorizing them to dictate how an Article III court was to review an arbitration decision.¹²¹ Consequently, if the parties wished more expansive scrutiny than granted under the FAA, they could agree to appellate review of an arbitration decision by another arbitration panel.¹²² They could not, however, stipulate by agreement to expanded judicial review of their initial arbitration award.¹²³

Judge Kozinski, the third judge sitting on the *LaPine I* panel, was somewhat reserved in his concurrence with the majority opinion, and found the question presented was not one that

116. *Id.*

117. *Id.*

118. *Fils et Cables D’Acier de Lens v. Midland Metals Corp.*, 584 F.Supp 240 (S.D.N.Y. 1984).

119. *Id.* at 244.

120. *LaPine Tech.*, 130 F.3d at 891.

121. *Id.*.

122. *Id.*

123. *Id.*.

could elicit an easy answer.¹²⁴ He accurately noted that the quoted Supreme Court cases failed to address the specific issue at the center of the dispute.¹²⁵ His objection was specifically addressed to the “different work” which the federal courts could be required to perform under the text of such an agreement for expanded review, work that might not be authorized by Congress.¹²⁶ Nevertheless, Judge Kozinski joined the majority opinion, because the standard of review stipulated by the parties’ agreement was identical to the one used by federal courts in appeals from administrative agencies or bankruptcy court decisions.¹²⁷ In the judge’s opinion, given the strong policy favoring enforcement of agreements to arbitrate, Congress would probably approve of the court’s decision. And while this did not constitute “express congressional authorization ..., given the Arbitration Act’s policy, it’s probably enough.”¹²⁸

Pursuant to the *LaPine I* decision, the case was remanded to the Northern District of California.¹²⁹ The Northern District confirmed the award of the arbitration panel, and Kyocera Corporation appealed, without disputing the issue of expanded review. On re-appeal, the Ninth Circuit affirmed the judgment of the lower court, as well as the award of damages.¹³⁰ However, in an interesting twist, a majority of the non-recused regular active judges of the Ninth Circuit Court of Appeals recently voted to re-hear the case *en banc*, and pursuant to the rules of the

124. *Id.* (Kozinski J., concurring) (stating that he found the issue before the court “closer than most”).

125. *Id.*

126. *Id.*

127. *Id.* In Judge Kozinski’s words:

Nevertheless I conclude that we must enforce the arbitration agreement according to its terms. The review ... is no different from that performed by the district courts in appeals from administrative agencies and bankruptcy courts I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.

Id.

128. *Id.*

129. *Id.*

130. *Kyocera Corporation v. Prudential-Bache Trade Services, Inc. et. al.*, 299 F.3d 769 (2002) [hereinafter *LaPine II*].

court¹³¹ an order to that effect was entered by Chief Judge Mary M. Schroeder.¹³² Prior to the *en banc* hearing the Ninth Circuit received additional briefing on the issue of whether private parties may contractually bind a federal court to apply a less deferential standard of review than the standard specified in the FAA.¹³³ On August 29, 2003, the Ninth Circuit issued a decision, reversing the three-judge panel decision in *LaPine I*. Although Kyocera set forth over twenty-five grounds to vacate or correct the decision of the arbitral panel, and explicitly declined to address expanded review, the Ninth Circuit considered the issue of expanded review as dispositive of the case. In raising the issue *sua sponte*, the court held that Congress, through the FAA, had provided the exclusive grounds of review of arbitral decisions. The arguments raised by the Ninth Circuit in support of its reversal, are identical to those raised by Judge Posner in *Chicago Typographical*, and state that while parties may dictate the rules regarding the arbitration proceedings themselves, they may not establish the ground rules of judicial review. Thus, the Ninth Circuit recently aligned itself with the Seventh, Eighth and Tenth circuits in denying expanded review, without raising any new arguments in support of its position.

The ultimate outcome of the case is irrelevant for purposes of this Note, because the arguments made by the majority in *LaPine I* remain just as valid, and until the Supreme Court addresses the issue, the problem remains unresolved. The outcome is of some importance to practitioners, however, because the circuits have reached different conclusions on this issue, and thus identical proceedings would yield different outcomes depending on the circuit in which they were brought.

III. RESPONSES OF FOREIGN JURISDICTIONS

The views of foreign jurisdictions on the issue of expanded judicial review do not necessarily carry a lot of weight in U.S.

131. Circuit Rule 35-3, available at <http://www.ca9.uscourts.gov/ca9/Documents.nsf/FRAP+and+Circuit+Rules?OpenView.htm>.

132. *Kyocera Corp. v. Prudential-Bache Trade Services, Inc. et al.*, 314 F.3d 1003 (2002).

133. *Kyocera Corporation v. Prudential-Bache Trade Services, Inc., et al.*, 2003 WL 22025130, at 5 (9th Cir. 2003).

courts. However, it is important to observe how various countries, some with a legal system very similar to our own, have chosen to resolve this issue, given the above mentioned goal of the Convention, namely uniformity in enforcement of foreign arbitral awards.¹³⁴

A. UNCITRAL Model Law

Before delving into an analysis of the various legislative frameworks of other major actors in the field of international commercial arbitration, it is important to take a brief look at the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration (the "Model Law").¹³⁵ The reason for this preliminary examination is that the Model Law has served as a blueprint for many of the legislative acts which created the modern national arbitration frameworks, and in some cases, the Model Law has simply been adopted by the respective nations.¹³⁶ Article 5 reflects one of the most important objectives of the Model Law, limiting the interference of national courts in the arbitral process, by specifically holding that courts could intervene only in specific circumstances.¹³⁷ The language of Article 5 seems to unequivocally prohibit interference by the courts in situations not specifically listed in its provisions, and also seems to exclude any residual powers which the courts may have had.¹³⁸ Further clarifying the standards of review, Articles 34 and 36 of the Model Law provide the list of criteria for review of arbitral determinations, largely based on Article V of the New York Convention.¹³⁹ The intent to specifically curtail the involvement of the courts is further confirmed by the legislative history of

134. See *Scherk*, 417 U.S. at 520 n.15.

135. UNCITRAL Model Law on Int'l Commercial Arbitration, UNCITRAL Model Law, available at <http://www.uncitral.org/en-index.htm>. Thus far 39 countries have enacted laws based on the UNCITRAL Model. *Id.*

136. Vikram Raghavan, *Heightened Judicial Review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and the English Arbitration Act of 1996 on Some US Developments*, 15 J. INT'L ARB. 103, 123 (1998).

137. See Model Law, *supra* note 135, art. 5.

138. *Id.* (stating "In matters governed by this Law, no court shall intervene except where so provided in this Law.")

139. See Model Law, *supra* note 135, art. 34 and 36 (Art. 34 states that an application to set aside is the only recourse against an arbitral award and Art. 36 lists the exclusive grounds for refusing recognition or enforcement).

Articles 34 and 36, which reveals that after extensive debate of additional proposals, the drafters agreed to limit the grounds of review to only those mentioned in the New York Convention.¹⁴⁰

Thus, it would seem that under the UNCITRAL Model Law contractually expanded judicial review would not be available, given the very restrictive language of Articles 5, 34 and 36. However, the Model Law is not binding, rather it only constitutes a guide for national legislation, and one which has been adopted by countries around the world with varying degrees of alteration.¹⁴¹ One alternative to the Model Law is provided by the English Arbitration Act of 1996.

B. United Kingdom

The United Kingdom ("U.K.") is one of the foremost centers of international commercial arbitration, and has a long-standing tradition of accepting arbitration as a valid means of dispute resolution, dating back to as early as the 17th century.¹⁴² The current arbitration law framework in the U.K. was established by the entry into force of the Arbitration Act of 1996 (the "Arbitration Act").¹⁴³ The Arbitration Act aligned the country's legislation with the modern standards in arbitration law, and while it did not derive from the UNCITRAL Model Law, the influences of the Model Law are certainly visible. The Arbitration Act generally establishes the same regime for both domestic and international awards, but maintains certain specific provisions pertaining solely to recognition and enforcement of foreign arbitral awards.¹⁴⁴ Specifically, Section 1 of the Arbitration Act lays out the "founding principles" pertaining to the construction of Part I of the law, and states that in matters covered by Part I, the court should not intervene except as provided within the Part.¹⁴⁵ In this respect, Section 1 of the Arbitration Act strongly

140. See Raghavan, *supra* note 136, at 125–26 (citing HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 912–15 (1989)).

141. *Id.* at 125 n.87, 126 n.92 (discussing changes made by Australia, Singapore, New Zealand, Egypt, Hong Kong, etc.).

142. HANS SMIT & VRATISLAV PECHOTA, NATIONAL ARBITRATION LAWS, UK A–1 (2002).

143. *Id.* at UK A–2.

144. *Id.*

145. Raghavan, *supra* note 136, at 131.

resembles Article 5 of the Model Law. Article 103 of the Arbitration Act covers awards sought to be enforced pursuant to the New York Convention.¹⁴⁶ Under this section, recognition or enforcement of these awards may not be refused except in a specified number of cases, based largely on the grounds set forth by the New York Convention, and which are considered to be exhaustive.¹⁴⁷

However, one major departure from the Model Law is embodied in Section 69 of the Arbitration Act. This section allows the parties to arbitration to bring an appeal on questions of law arising from an arbitration award.¹⁴⁸ If, however, the parties agree otherwise, this right to appeal is precluded, and a challenge may be raised only under the grounds specifically listed in Section 68 of the Arbitration Act.¹⁴⁹ Thus, under English Law, the parties to the arbitration can agree prior to the dispute whether the English courts will have the power to review the arbitral award on issues of law. In this respect, England's Arbitration Act has parted in a significant way with the precepts of the Model Law. Thus, nowadays England offers parties to arbitration the possibility to expand judicial review beyond the grounds listed in the New York Convention, provided enforcement is not sought under the New York Convention, but rather under Articles 68 and 69 of the Arbitration Act.

C. France

The host nation of the International Chamber of Commerce, France, plays a leading role in the development and advancement of international commercial arbitration. Furthermore, the French legal system tends to be very similar to the U.S. system with respect to the approach to international arbitration. Like the U.S., France shares a policy of favoring arbitration, has extensive case law on enforcement of arbitral awards, and gives great deference to party autonomy in the arbitration process.¹⁵⁰

146. *Id.* at 133.

147. *Id.*

148. James B. Hamlin, *Contractual Alteration of the Scope of Judicial Review — The US Experience*, 15 J. INT'L ARB. 46 (1998).

149. *Id.*

150. Laurence Franc, *Contractual Modification of Judicial Review of Arbitral Awards: The French Position*, 10 AM. REV. INT'L ARB. 215, 216 (1999).

However, unlike courts in the United States, French courts have not thus far been asked to decide whether to give effect to arbitration agreements expanding ulterior judicial review.¹⁵¹

In spite of this situation, scholars have argued that even if presented with the issue, the French courts would most likely decline enforcement of such an agreement.¹⁵² The main reason for this assertion lies in the nature of the French provisions governing judicial review of such awards. The Decree of 1980 reformed the provisions regarding French domestic arbitration and became part of the New Code of Civil Procedure ("NCPC") through the addition of Articles 1442 to 1491.¹⁵³ The Decree of 1981 completed the picture by adding Articles 1492 to 1507 to the NCPC, provisions specifically applicable to international arbitration.¹⁵⁴ Overall, these reforms have had a positive impact on French arbitration law. Since the enactment of the new NCPC provisions, the Paris Court of Appeals has developed a liberal stance toward arbitration agreements, arbitral procedure, the substance of awards made abroad, and towards the removal of international arbitrations from the effects of choice of law rules and national legal systems, within the limits of international public policy.¹⁵⁵

Both decrees contain very specific provisions for setting aside arbitral awards, listed in NCPC Articles 1484 and 1502 respectively, and make it abundantly clear that the setting aside of an arbitral award is available only in those cases.¹⁵⁶ Thus, should parties invoke any other grounds,¹⁵⁷ the reviewing court will simply not take those grounds into consideration because, quite

151. *Id.* at 218.

152. *Id.*

153. Decree no. 80-354 of May 14, 1980, J.O., May 18, 1980; 1980 AM. REV. INT'L ARB. 725.

154. Decree no. 81-500 of May 12, 1981, J.O., May 14, 1981; 1981 AM. REV. INT'L ARB. 317.

155. See FOUCHARD ET AL., *supra* note 23, at 68.

156. Franc, *supra* note 150, at 216-17; FOUCHARD ET AL., *supra* note 23, at 916.

157. See *Société GL Outillage c/ Soc. Stankoimport*, CA de Paris 1e civ., July 10, 1992, REV. ARB. 1994, 142, note P. Level (Paris Court of Appeal refused to take into account the lack of jurisdiction of the Paris court); *Southern Pacific Properties Ltd. c/ Republique Arabe d'Egypte*, Cass. 1e civ., Jan. 6, 1987, REV. ARB. 1987, 468 (Cour de Cassation held that the mission of the Court of Appeals was to examine the grounds enumerated in Article 1502 of the NCPC).

literally, they are not “on the list.”¹⁵⁸ Nevertheless, as mentioned above, this proposition has not yet been tested in the context of a pre-dispute agreement to expand judicial review.¹⁵⁹ However, a recent decision of the Cour de Cassation on a similar issue seems to indicate that should the situation arise, the French courts would decline to grant the desired expanded review. In *Soc. Buzicchelli Holding v. Hennion*, the French high court held that the freedom of contract of the parties does not grant them the power to create a means of recourse, which is not available under French law applicable to international awards.¹⁶⁰

D. Germany

The recent reform of the German Code of Civil Procedure (“ZPO”) was long in the making since no major revisions of the ZPO had been undertaken since 1879.¹⁶¹ The changes enacted in 1997 reformed German arbitration law completely. The new Book X of the ZPO is essentially based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, and does not distinguish, in principle, between domestic and international arbitration.¹⁶² Unlike the Model Law, however, the new law is not restricted to “commercial” arbitration, but instead governs all arbitrations.¹⁶³

Similar to the French NCPC, the German statute provides a definite and exclusive list of grounds on which an award may be challenged.¹⁶⁴ Thus, in Germany as in France, expanded review of arbitral decisions is probably not available even if parties had contracted for it.

158. Franc, *supra* note 150, at 217.

159. *Id.*

160. Franc, *supra* note 150, at 218 (*citing* the Cour de Cassation decision in *Société Buzicchelli Holding c/ Hennion et autres*, Cass. 1e civ., Apr. 6, 1994, REV. ARB. 1995, 263, note P. Level).

161. FOUCHARD ET AL., *supra* note 23, at 75.

162. *Id.*

163. SMIT & PECHOTA, *supra* note 142, at GER A-2.

164. *Id.* at GER B(2)–15 (translation of ZPO Chapter VII, Sections 1059 (2) and (3)).

E. Belgium

In order to accommodate and encourage the development of international arbitration in Belgium, in 1985 this country revised Article 1717 of its Code Judiciaire.¹⁶⁵ The revision constitutes a major development in the area of international arbitration, due to its rather drastic character.¹⁶⁶ Specifically, paragraph 4 of Article 1717 completely denies Belgian courts the authority to review international awards where the parties are non-Belgian, even if the situs of the arbitration was Belgium.¹⁶⁷ As a result, non-Belgian parties to international arbitration can no longer bring set-aside proceedings, even where there is clear evidence that the arbitrator or the arbitral tribunal acted fraudulently or *ultra vires*.¹⁶⁸ This provision is clearly revolutionary, and has in effect turned Belgium into an “arbitration nirvana” for those who are most interested in finality when submitting disputes to arbitration.¹⁶⁹

However, while the Code Judiciaire now precludes the use of judicial review as a sword in setting aside a foreign award, it still allows for its use as a shield to defend against enforcement.¹⁷⁰ This situation raises the question of whether the New York Convention is applicable to foreign awards not subject to review at the seat of arbitration.¹⁷¹ It has been argued that such awards have an “anational” character, and therefore the Convention does not apply.¹⁷² If that were the case, there would be no reason why courts would refuse to implement the scope of judicial review desired by the parties. The reason for the previous assertion is the fact that the Convention contemplates judi-

165. See Okeke, *supra* note 6, at 44.

166. *Id.*

167. Jay R. Sever, Comment, *The Relaxation of Inarbitrability and Public Policy Checks on United States and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661, 1686 (1991).

168. Okeke, *supra* note 6, at 44–45, (citing Lee D. Neumann, *Limiting Judicial Review in International Commercial Arbitration: The New Swiss and Belgian Laws Offer Less Than They Promise*, 1 AM. REV. INT'L ARB. 435, 442–47 (1991)).

169. *Id.* at 45.

170. *Id.*

171. Neumann, *supra* note 168, at 447.

172. Okeke, *supra* note 6, at 45.

cial review of the award at the arbitral situs, but does not mandate such a review.¹⁷³

Thus, an arbitral award is binding under the New York Convention even if review is precluded at the situs of the arbitration.¹⁷⁴ Some commentators have argued that, while limiting the scope of review may be a desirable method of ensuring the finality of the arbitral process, eliminating review altogether, as in this case, may be a troublesome proposition.¹⁷⁵ The fear expressed is that such provisions may transform the arbitration process into an arbitrary proposition, thus deterring business actors from opting for it as a means of effective dispute resolution.¹⁷⁶ The statute forces parties to seek judicial review during enforcement proceedings, which generally happen in the country of one of the parties, thus raising the possibility of bias and subverting one of the main advantages of international arbitration, neutrality of the forum.¹⁷⁷ By completely precluding the power of its courts to review the types of awards described above, Belgium has effectively barred any possibility of expanded judicial review. The most troubling aspect of preclusion of judicial review at situs of arbitration is that it does not result from the choice of the parties to the arbitration, but rather it is imposed by the legislature.

F. Switzerland

Similar to the U.K. and France, Switzerland is a very popular situs for arbitration proceedings because Swiss law grants the parties “almost complete autonomy in selecting arbitrators, choosing applicable law, and determining rules for the arbitral procedure.”¹⁷⁸ With respect to judicial review of foreign arbitral awards, Switzerland adopted legislation that is different from the laws applicable to its domestic disputes, when it enacted

173. See New York Convention, *supra* note 3, Art. V(1)(e); Neumann, *supra* note 168, at 448. See also Sever, *supra* note 167, at 1661, 1690.

174. William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 707 (1989) (“The place of the arbitration gives the arbitrator’s decision a presumptive validity in any of the countries that have ratified the Convention.”).

175. Okeke, *supra* note 6, at 45.

176. *Id.*

177. *Id.*

178. SMIT & PECHOTA, *supra* note 142, at SWI A-1.

Chapter 12 of the Swiss Private International Law Act, entitled "International Arbitration."¹⁷⁹ The provisions enacted in Chapter 12 are very similar to previously mentioned legislative frameworks, but are of a more moderate vintage. Article 190 lists the exclusive grounds for non-recognition of an award. However, Article 192 of the same law expressly allows parties to agree whether or not to exclude any means of recourse against the award, or to limit their recourse to one of the grounds of Article 190.¹⁸⁰ It is important to mention that Article 192 applies only to instances where none of the parties to the arbitration has its domicile, residence, or principal place of business in Switzerland.¹⁸¹

Thus, Article 190 of the Swiss law seems similar to the French law on judicial review of awards, allowing it only in a limited and specific number of situations. The provisions of Article 192, granting parties the option of foreclosing review almost entirely, seems to reflect a policy similar to the one advanced by the Belgian parliament. Thus, while a more restrictive form of review is available to parties to arbitration under Swiss law, expansion of judicial review is also seemingly unavailable.

IV. ANALYSIS

The validity of contractual expansion of judicial review remains to be settled by the United States Supreme Court, if and when the Court chooses to address it. In the meantime, this Note has attempted to illustrate the results achieved by the various U.S. districts and several foreign jurisdictions in reviewing the issue. The U.S. cases present the two main trains of thought. The first, the so-called institutional integrity approach, is illustrated by the Seventh, Eighth, Tenth, and Ninth Circuit decisions, which categorically deny parties to arbitration the ability to contractually influence court review of arbitration awards. The two main arguments advanced in support of this proposition, as illustrated above, are the concerns regarding subject matter jurisdiction, as a practical matter, and the integrity of the judicial process, as a policy argument. The second

179. *Id.* at SWI B(1)-1.

180. *Franc*, *supra* note 150, at 221.

181. *Id.* at 222.

school of thought on the issue, and the one this author believes to be more consistent with the pro-arbitration legislative bias, is the freedom of contract model. This approach is reflected in the decisions of the Third, Fourth and Fifth Circuits, and embraces expanded review when it reflects the will of the parties. This section will first discuss the debate between the two models adopted by the courts, and analyze the competing public policy interests at play. This section will subsequently review the often-advanced debate over the jurisdiction of federal courts. Finally, this section will turn to the international implications of expanded review, and offer some conclusions.

A. Institutional Integrity vs. Freedom of Contract

1. The Institutional Integrity Argument

The Institutional Integrity Argument is perhaps the argument most often advanced in supporting a denial of expanded judicial review. It comes as no surprise that institutional integrity and freedom of contract collide quite frequently when analyzing contractual provisions allowing for expanded judicial review. After all, the two models emphasize completely different aspects of arbitrated disputes, and, again not surprisingly, arrive at diametrically opposed conclusions. Thus, a pre-dispute arbitration agreement providing for expanded judicial review would likely be enforced according to its terms in the Third,¹⁸² Fourth,¹⁸³ Fifth¹⁸⁴ Circuits, but would be denied the same treatment if enforcement was sought in the Ninth,¹⁸⁵ Seventh,¹⁸⁶ Eighth,¹⁸⁷ and Tenth Circuits.¹⁸⁸ As for the remaining Circuits, the outcome is truly unpredictable.¹⁸⁹

182. *Roadway Packaging Sys. v. Kayser*, 257 F.3d 287 (3d Cir. 2001).

183. *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262, 1997 WL 452245 (4th Cir. 1997).

184. *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995).

185. *LaPine Technology Corp. v. Kyocera Corp.*, 2003 WL 22025130 (9th Cir. 2003).

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

187. *UHC Mgmt. Co., Inc. v. Computer Sci. Corp.*, 148 F.3d 992 (8th Cir. 1998).

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

189. *See Hamlin, supra* note 148, at 54.

The argument regarding arbitral and institutional integrity has been advanced with vigor by a number of scholars and while its tenets are admittedly nebulous, the key element seems to be freedom of the adjudicatory forum from external forces that may affect the authority of the adjudicator and the impartiality of the process.¹⁹⁰ With respect to arbitral institutions, the argument is the need to shield against undue interference by the judiciary.¹⁹¹ In the case of the courts, institutional integrity presumably dictates that the courts “neither be captured by majoritarian forces nor by the whims of particular litigants, who are ill-positioned to protect the interests of the federal judiciary.”¹⁹² The arguments in favor of denying expanded review based on this precept can effectively be reduced to a select few, which will be discussed in turn.

First, scholars and practitioners who embrace this viewpoint have argued that a distinction must be drawn between the parties’ ability to influence the arbitral process, and their ability to prescribe the conduct of reviewing courts.¹⁹³ In other words, the freedom of parties to set the ground rules in arbitration does not extend beyond the arbitral process itself. The proponents of this argument rely on the absence of any specific language to the contrary in the Supreme Court cases discussing arbitration, as well as on the particularity with which the statutes describe judicial scope of review. Specifically, they discuss the fact that the extensive freedom to shape arbitral procedure has never been held to explicitly apply to the ulterior judicial review.¹⁹⁴ Rather, they claim that the limited judicial review provided by statute is an indication of the defined and limited role the courts are intended to play in the arbitration arena, notwithstanding any contrary understanding of the parties.

190. Victoria L. C. Holstein, *Co-Opting the Federal Judiciary: Contractual Expansion of Judicial Review of Arbitral Awards*, 12 *WORLD ARB. & MED. REP.* 276 (2001).

191. *Id.* at 279 (citing *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983)).

192. *Id.* at 279 (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986)).

193. See *UHC Management*, 148 F.3d at 997 (1997); *Bowen*, 254 F.3d at 934; *LaPine Tech.*, 130 F.3d at 891; *Chicago Typogr.*, 935 F.2d at 1504.

194. See Smit, *supra* note 49, at 151.

However, the statutes are just as susceptible to interpretation as default rules, which can be replaced or eliminated by private agreements of the parties.¹⁹⁵ The latter interpretation can be derived from the same statutory and common law scheme on which the proponents of the judicial integrity model rely. The absence of any specific statutory or case language to the contrary opens the door just as widely for a “default rules” approach.¹⁹⁶ When approached through this prism, the statutory scheme creates a rebuttable presumption, susceptible to change, and which “grants the ultimate power of decision-making to the parties.”¹⁹⁷ In support of this interpretation, one might turn, as Professor Rau has, to the similar provision in the English Arbitration Act, which allows parties to appeal questions of law without leave of the court, if they have so agreed.¹⁹⁸ When examined from a purely domestic viewpoint, this issue is clearly not resolved by the statute because there is no explicit language on the issue in the FAA. Consequently, the underlying policy objectives of the statute must be taken into account in suggesting a solution. This is precisely what Professor Cole did, and her conclusion finds the default rule scheme to be the preferable alternative, due to the significance of the pro-arbitration freedom of contract policy.¹⁹⁹ In her Article, Professor Cole holds that the legislature likely intended to simply codify what they perceived to be the consensus regarding judicial review at the time, without contemplating that parties might be interested in expanding review.²⁰⁰ Thus, the statute does not address expansion of judicial review at all, and arguments both in favor of and against expanded review have been founded on this apparent loophole. However, as Prof. Cole rightly points out, the default rule approach which would allow parties a greater degree of

195. This opinion was adopted by the Fifth Circuit in *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995).

196. Alan S. Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT’L ARB. 225, 231 (1997).

197. *Id.*

198. *Id.* at n.33.

199. Sarah R. Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1258 (2000) (stating that interpreting the statute as a default scheme is preferable “given the importance of freedom of contract and the presumption in favor of finding that the FAA creates a set of default rules.”).

200. *Id.* at 1254.

authority in setting the terms of the arbitration, seems to be more in tune with the past and current policies regarding arbitration.

Second, proponents of the institutional integrity argument advance the notion that expanded judicial review would in fact be a wasteful allocation of judicial resources. As one commentator stated, the extent to which a court reviews a decision made by an adjudicatory body is a function of a judgment as to the extent to which judicial resources should be made available for this purpose.²⁰¹ In making this decision, Professor Smit continues, the body politic considers the interests of the parties with respect to the type of review they wish to have. Ultimately, however, the decision is up to the body politic not the parties, and an agreement by the parties on that question is irrelevant because the parties have no authority to determine how public resources are to be spent.²⁰² While the rationale behind this argument is conceptually very elegant, the argument still does not resolve the issue, because it departs from a flawed premise. The premise for Professor Smit's argument is the assumption that society or the body politic have a choice in the matter, and can therefore opt not to allocate judicial resources. Upon closer scrutiny, this premise turns out to be unfounded.

It is, in this author's opinion, beyond argument that parties have a right to resort to the judicial system to resolve their civil disputes. It is equally clear that this right entitles them to either pursue an action in the court system in the form of litigation, or, where the option is available,²⁰³ to circumvent the judicial system and engage in arbitration in order to resolve their disputes. Furthermore, it has been conceded by institutional integrity advocates that arbitration, even in a form which permits expanded review, saves judicial resources, because the burden on the reviewing court is much smaller than that of a

201. See Smit, *supra* note 49, at 150.

202. *Id.*

203. There are hardly any areas of the law where arbitration is not available as a means of adjudication. See Kenneth M. Curtin, *Judicial Review of Arbitral Awards*, 55 DISP. RESOL. J. 57 (2001) (discussing cases in which the Supreme Court has sanctioned arbitration as a means of dispute resolution where the subject matter of the dispute implicated fundamental issues of public policy, such as securities violations, RICO claims, anti-trust causes of action, employment discrimination and civil rights cases.)

full trial.²⁰⁴ In sum, since recourse to the civil courts is a matter of right, and arbitration, even with expanded judicial review, serves to conserve judicial resources, it follows that individuals are entitled to engage in such arbitration because by their actions they would impose a lesser burden on judicial resources.

Third, proponents of the institutional integrity model argue that expanded judicial review would work against some of the very attributes making arbitration a viable and desirable alternative to litigation, namely finality, speed and cost-effectiveness.²⁰⁵ Consequently they propose that upon expanding judicial review arbitration will become merely a form of first instance adjudication. The wide opportunity for review will be abused by the parties, the argument continues, and one-step adjudications will be transformed into four-step adjudications.²⁰⁶

The possibility that expanded review will have the effect of prolonging proceedings in the manner described above can not be disputed in good faith. However, proponents of this argument fail to address one detail which, in this case, completely changes the perspective, namely that the parties have agreed to this expanded form of judicial review. Therefore, the argument that the arbitral process is no longer as advantageous does not withstand scrutiny. Clearly, all parties to an arbitration who have even a modicum of sophistication realize that the effect of expanding judicial review is to potentially prolong the dispute resolution process. However, the extension of these proceedings is but one factor in the wide array of considerations parties take into account at the time of negotiating the agreement, and thus their choice to forego a speedy and final arbitration should not be underestimated or dismissed as perfunctory by outsiders unfamiliar with all aspects of the dispute. A further argument could be made that the lack of court deference to the parties' wishes might, while preserving the finality and efficiency of ar-

204. *Bowen*, 254 F.3d at 936 n.6 (“We recognize, of course, that even under expanded standards of review, arbitration reduces the burden on the district courts....Reviewing an arbitration award is certainly less work than hearing the entire case pursuant to diversity or federal question jurisdiction.”).

205. *See Smit*, *supra* note 49, at 151.

206. *Id.* (discussing the possibility that awards would be reviewed by courts of first instance, then subjected to review by appellate courts, and finally by the courts of highest instance).

bitration, cause an even greater disservice to the institution of arbitration. The Supreme Court has clearly recognized that when engaging in arbitration the parties give up some of the security of in-court procedures in favor of a dispute resolution process tailored to their desires.²⁰⁷ Efficiency and finality are the byproducts of such tailor-made processes. It stands to reason that such degrees of finality and efficiency are desirable effects only if the parties actually want them to occur. If parties do not desire this, they should be able to opt for a more elaborate process. If the courts preclude their ability to opt for a process with more extensive judicial review, parties might think twice before relinquishing the procedural safeguards of litigation. Since the promotion of arbitration is clearly established federal policy, it is easy to recognize how court imposition of strict review standards might violate the interests promoted by this policy.

Finally, some commentators have argued that expanded review is socially undesirable. They argue that arbitration implies decision making by arbitrators specifically selected for their expertise in a particular field, in a manner which might not necessarily meet with approval in the lower courts because arbitrators are free to stray from the rigors of the law in rendering awards.²⁰⁸ In other words, having experts decide arbitrable disputes is of paramount importance to society, and their ability to fashion creative solutions which best address the presented problems in the interest of the common good should not be limited by the constraints of applicable law.²⁰⁹ This proposition is largely true, but with one important distinction. It is indisputable that the arbitration process gives experts a needed voice, and that having them render decisions advances the state of the law for all of us. However, if courts are reduced to the function of merely enforcing or denying arbitral awards, without an op-

207. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (stating that parties have the right to a judicial decision on the merits, but “where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right’s practical value”). See also *Mitsubishi Motors Corp.*, 473 U.S. at 628 (holding that when agreeing to arbitrate, a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration”).

208. See Smit, *supra* note 49, at 151–52.

209. *Id.* at 152.

portunity to discuss the reasoning for the arbitral decision, the advancement of the law is stalled, as arbitral decisions carry no precedential value.²¹⁰ Thus, expansion of judicial review gives the courts of first instance the opportunity to establish a record, and to include the reasoning of expert arbitrators into the body of the law in the form of written decisions. This procedure better advances the state of the law and facilitates the necessary beneficial input from experts in the field.

2. Freedom of Contract

The Freedom of Contract, or party autonomy, viewpoint is a lot more concise by comparison, and much more direct. It maintains the ability of participants in arbitration proceedings to negotiate and agree upon the manner in which these proceedings will unfold, setting the time, place, procedure, etc. Proponents of this approach further hold that an integral part of the parties' ability to determine the structure and form of the dispute resolution process is the scope of judicial review. Thus, the argument goes, without a mutually agreeable judicial review of the arbitral decision, the power to define the arbitral process is meaningless.

This argument flows naturally, given the unequivocally contractual nature of the arbitration process.²¹¹ As one commentator noted, "heightened judicial oversight of arbitration awards finds support in the philosophical underpinnings of contract law."²¹² The reason advanced for this proposition goes to the very core of fundamental property rights, namely that the right

210. See GARNETT ET AL., *supra* note 67, at 14 n.31.

Confidentiality...has had a negative impact on the development of standardization of commercial practices. Confidentiality prevents the dissemination of rulings and reasons, and because arbitration awards do not lead to any official precedent or newly established legal principle, it may remove a highly valued feature underlying commercial relationships, namely certainty and consistency.

Id.

211. LEONARD RISKIN & JAMES WESTERBROOK, DISPUTE RESOLUTION AND LAWYERS 228 (2d ed. 1998) ("Arbitration is a contractual process. With few exceptions, parties arbitrate because they have agreed to do so, either in a contract entered into before the dispute arose or in an ad hoc agreement after the dispute arose.").

212. See Davis, *supra* note 94, at 130.

to enter into contracts is derived from the individual's fundamental right to own property.²¹³ It stands to reason that without the freedom to dispose of property in the way one sees fit, the right to property ownership itself becomes meaningless.²¹⁴ In a society which holds the right to property ownership in such high regard, it is difficult to find a reason to justify the interference of the government, even in its incarnation as the judicial branch, with the express will of the owner in disposing of his or her property. At a very basic level, the expression of individual desires as to the disposition of property takes the form of freely negotiated agreements among property owners.²¹⁵ Thus, inasmuch as arbitration is fundamentally a creature of contract, and contracts are the result of property ownership rights, the conclusion can be drawn that property ownership rights give rise to the arbitral resolution of disputes. This conclusion is not necessarily novel, but its application to the issue of expanded judicial review has some significant implications.

Since it is the right to freely dispose of property that gives rise to agreements to arbitrate, it becomes increasingly difficult to argue that the judicial branch should refuse to give due course to some of these wishes, i.e., expanded judicial review. Nevertheless, some argue that expanded review of arbitral

213. *Id.*, citing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1715 (1976) ("the rationale for contract law is derivative from that of property ... [because] one who breaches deprives the promisee in a sense no less real than the thief").

214. *Id.*, citing JOHN LOCKE, *TWO THEORIES OF GOVERNMENT*, 287 (Peter Laslett ed., 2d ed. 1967), reprinting JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT* (3d ed. 1698). ("All Men are naturally in...a State of perfect Freedom, to...dispose of their Possessions as they see fit...Property rights are worthless unless the owner may dispose of his property without governmental interference. Otherwise, all free and voluntary Contracts cease, and are void, in the World...and all the Grants and Promises of man in power, are but Mockery and Collusion.").

215. *Id.* at 130 n.435, (discussing the Kantian interpretation of societal Justice as an aggregate of free wills freely joined [in contract]: "Justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom"; IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 34 (John Ladd trans., 1965) (1797)). See also Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 559 (1933) ("free contract assures the greatest amount of liberty for all").

awards alters the very features that confer upon arbitration its most fundamental advantages: expeditiousness, cost-effectiveness, etc. The reasoning behind this assertion is that the limited, statutorily prescribed, judicial review is what assures the binding nature and unequivocal enforcement of arbitral awards. Hence, subjecting these awards to the scrutiny of the courts would undermine the character of the awards, thus negating the advantages of the entire arbitration process, and transforming it into an imperfect precursor to extended litigation. These worries, however, are sorely misplaced.

First, the previously narrow scope of review has not prevented litigators from challenging arbitral awards with gusto.²¹⁶ Thus, the argument that the current review of arbitral decisions preserves the expeditiousness of arbitration is significantly flawed. Second, because arbitration is a contractual endeavor, the courts would do more to promote arbitration if they were to heed the parties' instructions as expressed in their contracts, rather than impose a heavy-handed reading of the applicable statutes. This way, parties could be assured that not only the arbitral tribunal, but also the reviewing courts, would take their concerns into account and heed their directives. This outcome would encourage more parties to submit their disputes to arbitration, lightening the case load of the courts. Third, those who argue that the benefits of arbitration ought to be protected in spite of the desires of those who would submit to arbitration, make a fundamental mistake as to the character of arbitration itself. It is true that expeditiousness and cost-effectiveness are significant attractive features of arbitration.²¹⁷ However, most parties submit to arbitration in order to resolve disputes according to their wishes in an extra-judicial framework.²¹⁸ Speed and

216. Richard S. Bayer & Harlan S. Abrahams, *The Trouble With Arbitration*, 1985 LITIG. J. 30 (1985).

217. See Davis, *supra* note 94, at 51.

218. *Id.*

The central element of arbitration is the intention of the parties as expressed in the arbitration agreement. The agreement determines the process. Informality may flow from the agreement, but it need not, for the parties may insist to adhere to arcane rules of evidence or on wearing powdered wigs during the hearing. Privacy may flow from the agreement, but it need not, for the parties may broadcast the proceedings on public access television.

lesser costs are the effects of choosing private tribunals, but they are not necessarily ends in themselves. They are desirable attributes, to be sure, but their desirability does not fundamentally carry the load of the argument against expanded review. Also, expanded review does not completely do away with the speed of arbitration, but instead lessens the distance on the expeditiousness spectrum, between full-blown litigation and non-reviewable arbitration. Furthermore, other important advantages of arbitration, such as confidentiality of the proceedings, remain in force even if expanded review is allowed. Thus, in this author's opinion, while expanded review may somewhat prolong the dispute resolution process, it confers other significant advantages upon the parties, such as increased certainty that awards would conform with the applicable law and principles of justice and equity.

Yet another advantage may be that such review could force arbitrators to approach their positions as decision-makers with more seriousness, and to weigh the matters to be decided more carefully, because they would be fully aware of the specter of judicial review. These advantages are not negligible to participants in international commerce. Therefore, if the courts forced parties to choose between two very narrow alternatives, full-blown litigation, or arbitration with almost no judicial review, it would likely cause great harm to the arbitral institution. After all, the more the dispute resolution processes reflect the wishes of the parties, the more likely the parties are to choose them over litigation. Finally, it is worth reiterating that expanded review exists in such scenarios because it represents the express wish of the parties to the arbitration agreement. Thus, as a matter of common sense, denying parties the opportunity to have their wishes respected would do more to push the arbitration process towards the rigorous and inflexible nature of litigation, instead of the expanded review which the parties desire.

Another interesting point is raised by the arguments of some institutional integrity advocates who point to the tradition of limited review expressed in U.S. statutes and international convention as proof positive of the desirability of denying expanded review. As Professor Rau aptly notes, this argument merely begs the question to be asked of any long-standing tra-

dition which potentially impedes development and achievement of the greater good, why?²¹⁹ The answer Professor Rau cites to this question is that the legislature had intended to “insulate from parochial or intrusive judicial review awards that the parties intended in the usual sense to be binding.”²²⁰ However, this is not the end of the inquiry, and the question must be asked again why? The logical answer is that the “primary impetus... was precisely to encourage resort to arbitration by creating a safe harbor for the results of a contractually-agreed process.”²²¹ Following the argument to its logical endpoint, the result is clear: the rationale for restricted review falls apart when the parties to arbitration want to do away with this protection of the statute and opt for expanded review.²²² The public policy considerations expressed by the Supreme Court in connection with expanded review support the freedom of contract approach.

B. Public Policy Debate

The importance of the policy favoring enforcement of arbitration clauses, especially in international arbitration, was unequivocally reaffirmed by the Supreme Court in the *Mitsubishi Motors vs. Soler Chrysler–Plymouth* decision.²²³ In that decision

219. Allan S. Rau, “Arbitrability” and Judicial Review: A Brief Rejoinder, 13 WORLD ARB. & MEDIATION REP. 71, 72 (2002).

220. *Id.*

221. *Id.*

222. *Id.*

223. In the words of Justice Blackmun,

The Bremen and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation=s accession in 1970 to the [New York] Convention, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.

Mitsubishi Motors v. Soler Chrysler–Plymouth, 473 U.S. 614, 620 (1985). See generally *Vimar Seguros Y Rasegueros, S.A. v. M/V Sky (REEFER)*, 515 U.S. 528 (1995); *Rodriguez de Quijas v. Soler Chrysler–Plymouth, Inc.*, 490 U.S. 477 (1988) (discussing the “current strong endorsement of the federal statutes favoring [arbitral] method of resolving disputes”); *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1982) (noting a “liberal federal policy favoring arbitration agreements”).

the Court had relied on its previous language to reiterate the pro-arbitration bias to be applied by the U.S. courts in reviewing arbitral awards. In *Bremen v. Zapata Off-Shore Co.* the Court stated that "the expansion of American business and industry will hardly be encouraged, if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."²²⁴ This strong bias, reaffirmed in the *Mitsubishi* case, was reiterated by the Supreme Court in its decision in *Vimar Seguros*, where the Court announced that "if the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting domestic legislation in such manner as to violate international agreements."²²⁵ The Court went on to warn U.S. courts that skepticism regarding the competence of foreign arbitrators "must give way to contemporary principles of international comity and commercial practice."²²⁶

Justice Stevens' dissent in *Vimar Seguros* brought up an interesting point, namely that submitting disputes to independent and separate fora for dispute resolution might result in a lack of uniformity which could interfere with international trade by increasing the level of uncertainty.²²⁷ While this is a valid concern, most important for the purpose of our discussion is the fact that the Supreme Court, in a seven to one decision overwhelmingly chose to ignore the concerns raised by Justice Stevens in favor of a liberal, freedom of contract approach to arbitration. The Court clearly opted to disregard potential uncertainty as to the outcome of disputes in favor of the certainty that the parties' wishes, as expressed in the freely negotiated terms of the contract, would be respected by national courts. The lesson to be drawn is that in reviewing arbitral awards the terms of the contract should take precedence over any considerations of expeditiousness, judicial economy, or any other advantages which arbitration in its purest form might bring to the gamut of methods of dispute resolution. Thus, judging by the language in the Supreme Court's previous decisions, if the

224. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

225. *Vimar Seguros*, 515 U.S. 528, 539 (1995).

226. *Id.*

227. *Id.* at 542.

Court were to address the issue in the future, it would most likely endorse expanded judicial review of arbitral awards.

It is important to note that the appellate court cases discussed above all involved domestic arbitrations, or awards sought to be enforced under the domestic federal arbitration law.²²⁸ Thus, in none of these cases have the courts had the opportunity to consider the implications of expanded judicial review on an award sought to be enforced under the New York Convention. Nevertheless, the domestic decisions provide us with important clues as to the potential outcomes of such cases. The current domestic arbitration law reflects a very strong pro-arbitration bias on the part of the legislature and the federal courts. This bias applies with particular force in the international context. Therefore, it is reasonable to assume that in situations involving international awards, the U.S. courts would be even more likely to respect the wishes of the parties, as expressed in freely negotiated arbitration agreements.

C. Jurisdiction

One of the main arguments of the Seventh Circuit in *Chicago Typographical*, and of institutional integrity advocates in general, in opposing expanded review is the viewpoint that the agreement of the parties attempted to create federal jurisdiction.²²⁹ Presumably, what the Seventh Circuit meant by “jurisdiction” in *Chicago Typographical* was not the classical interpretation given to the expression by the federal courts, because the Seventh Circuit had clearly recognized that federal subject matter jurisdiction existed in that case due to federal question.²³⁰ Rather, what Judge Posner likely meant was that the parties could not contract to enlarge the scope of review set forth by the statute within the exclusive parameters of the court’s jurisdiction to review arbitral awards. In Judge Posner’s opinion, such a course of action was legally unacceptable because “federal courts do not review the soundness of arbitration

228. See 9 U.S.C. §§ 1–16 (1994).

229. *Chicago Typographical*, 935 F.2d at 1501 (1991).

230. *Id.* at 1503. (“The basis of federal jurisdiction was section 301 of the Taft–Hartley Act, 29 U.S.C. § 185, which creates federal jurisdiction over suits to enforce labor contracts. There is no doubt of the applicability of section 301.”).

awards, [and] an agreement to submit a dispute...to arbitration is a contractual commitment to abide by the arbitrator's interpretation."²³¹

It is clearly the case that an alternative source of subject matter jurisdiction is always necessary in cases where parties seek to enforce domestic awards under Chapter I of the FAA. There is ample precedent on the issue, which indicates that Chapter I of Title Nine of the U.S. Code does not by itself act as a source of federal subject matter jurisdiction. This issue was resolved by a footnote in the United States Supreme Court decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*.²³² The *Moses* holding has not been revisited by the Court, and therefore constitutes valid precedent.²³³ It is also undisputed that a federal court would have subject matter jurisdiction to decide a dispute if the parties can establish that federal question jurisdiction arises.²³⁴ However, as the Second Circuit noted, "simply raising a federal issue in a complaint will not automatically confer federal question jurisdiction."²³⁵

231. *Id.* at 1504–05.

232. *See Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983). In relevant part, the footnote provides:

The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction under 28 U.S.C. 1331 [granting jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States] or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue.

Id.

233. *See e.g. Perpetual Securities, Inc. v. Tang & Hua Yu Chen*, 290 F.3d 132, 136 (2nd Cir. 2002), *aff'g* *US v. Am. Soc. of Composers, Authors & Publishers*, 32 F.3d 727, 731 (2nd Cir. 1994); *International Insurance Company v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 395 (7th Cir. 2002) *aff'g* *Jain v. de Mere*, 51 F.3d 686, 688 (7th Cir. 1995).

234. Federal jurisdiction exists where a well-pleaded complaint "establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983).

235. *See Perpetual Securities*, 290 F.3d at 136.

Nevertheless, while Chapter I of Title Nine does not create subject matter jurisdiction, the situation is quite different in the case of international awards sought to be enforced under the New York Convention.²³⁶ With respect to foreign arbitral awards, the New York Convention is the law applicable to the review and enforcement of foreign arbitral awards. Thus, the New York Convention constitutes the definitive document with respect to the enforcement of foreign arbitral awards, and plays an important role in the jurisdiction analysis because the New York Convention, as enacted by Chapter II of Title Nine, explicitly confers subject matter jurisdiction on the federal courts.²³⁷ In relevant part, Section 203 provides that “an action or proceeding falling under the [New York] Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States...shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.”²³⁸ Section 202 explains the issue further, defining which actions or awards fall under the New York Convention:

An arbitration agreement or arbitral award arising out of a legal relationship...which is considered as commercial...falls under the Convention. An agreement...which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad,

236. It is important when discussing the lack of federal court subject matter jurisdiction under the FAA, that the reader only consider Chapter I of Title Nine of the United States Code. *See* 9 U.S.C. §§ 1–16. Although at times the “FAA” designation has often been applied to all of Title Nine, federal appellate courts have generally used the designation to refer only to Chapter I of that title. (*See e.g.* *International Insurance Company v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 395 (7th Cir. 2002); *Beiser v. Weyler, et. al.*, 284 F.3d 665, 666 (5th Cir. 2002); *Daihatsu Motor Co. Ltd. v. Terrain Vehicles, Inc.* 13 F.3d 196, 198 (7th Cir. 1993). *But see* *Jain v. Mere*, 51 F.3d 686, 688–689 (7th Cir. 1995) (referring to Convention implementing legislation as “Chapter 2” of the FAA); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478, n.13 (9th Cir. 1991)). Therefore, for purposes of this Note’s discussion of subject matter jurisdiction, this author will assume that the “FAA” denomination refers only to Chapter I of Title Nine. *See* 9 U.S.C. §§ 1–16 (1994).

237. 9 U.S.C. §§ 201–208 (1994).

238. 9 U.S.C. § 203 (1994).

or has some other reasonable relation with one or more foreign states.²³⁹

Finally, Section 208 establishes the relationship between Chapter I of Title Nine and the New York Convention, namely that Chapter I provides the gap-filler provisions in case the respective issue is not covered by the Convention.²⁴⁰ Pursuant to the clear statutory language, the existence of federal subject matter jurisdiction in arbitrations involving the New York Convention has been recognized by the federal courts.²⁴¹ Hence, while in arbitrations applying U.S. law and involving only U.S. parties, the FAA or state arbitration statutes may apply, all other arbitral awards can be enforced pursuant to the New York Convention, thus conferring subject matter jurisdiction on the federal courts. Thus, when it comes to awards rendered or sought to be enforced under the New York Convention, the explicit grant of subject matter jurisdiction in Title Nine of the U.S. Code resolves the issue of subject matter jurisdiction conclusively.

However, this explicit grant of subject matter jurisdiction does not do away with the objection that expanded review attempts to impermissibly enlarge the role of the courts. Like Chapter I of Title Nine, the New York Convention also contains a specific list of reasons for which the courts can vacate or modify awards, in Article V.²⁴² Thus, if the parties were to contract for expanded review, the jurisdiction of the courts would, in the view of judicial integrity advocates, be confined only to the pro-

239. 9 U.S.C. § 202 (1994).

240. *See* 9 U.S.C. § 208 (1994). (“Chapter I applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the [New York] Convention as ratified by the United States.”).

241. *See* *Base Metal Trading v. OJSC et al.*, 283 F.3d 208, 212 (4th Cir. 2002) (“the Convention and its implementing legislation...give federal district courts original jurisdiction over actions to compel or confirm foreign arbitral awards”); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1119 (9th Cir. 2002) (“Convention Provides Subject Matter Jurisdiction Over Glencore Grain’s Action To Enforce Its Arbitral Award”); *Trans Chemical Limited v. China National Machinery Import and Export Corp.*, 161 F.3d 314 (5th Cir. 1998) (affirming the decision of the U.S. District Court for the Southern District of Texas, 978 F. Supp. 266, 292 (S.D. Texas 1997)); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998); *Productos Mercantiles e Industriales v. Faberge USA, Inc.*, 23 F.3d 41, 44 (2nd Cir. 1994).

242. *See supra*, Part I.B.2.

visions of Article V. In response, freedom of contract proponents could present the same arguments as in the domestic debate with regard to expanded review, illustrated in Part II of this paper. In cases where the New York Convention is involved, the argument of freedom of contract proponents is strengthened further by the various U.S. Supreme Court decisions which emphasize the strong policy in favor of enforcement of arbitral agreements in the international context.²⁴³ The previously discussed cases have illustrated the way some of the federal circuits are likely to respond to a request to expand judicial review in the domestic setting. However, it stands to reason that when asked to do the same in a context involving the New York Convention, these courts would grant wider deference to the desires of the parties.

D. International Implications

Undoubtedly, in the near future U.S. courts will be asked to decide whether expansion of judicial review is a viable option in cases involving enforcement under the New York Convention. Similar concerns might arise in cases where American parties seek enforcement of international awards in other jurisdictions, pursuant to the New York Convention. Interestingly enough, however, it seems that many jurisdictions have not yet had to deal with the question at all.²⁴⁴ However, given the legislative framework in place in many of these jurisdictions, it seems likely that even when presented with the issue, many would likely deny the parties' request for expanded judicial review. In this regard, it seems that the courts of the U.S., U.K., and the few other jurisdictions which permit expanded review for domestic arbitrations, have reached a paradoxical impasse. In granting wide deference to the parties' freedom of contract, they would seem to have arrived at a result that is inimical to the underlying purpose of the New York Convention, which had attempted to achieve of a high level of homogeneity in the enforcement of foreign arbitral awards.²⁴⁵

In this regard, institutional integrity advocates would most likely argue that such a result would only add to the confusion

243. *See supra*, Part IV.B.

244. *See supra*, Part IV.B.

245. *See Scherk v. Alberto-Culver*, 417 U.S. 506 (1974).

and reticence of international commercial actors to engage in arbitration.²⁴⁶ However, this conclusion would be superficial for several reasons. The New York Convention was adopted during a time when international arbitration was developing rapidly but independently in the various jurisdictions, and thus uniformity in enforcement was of paramount importance if arbitration was to function effectively over jurisdictional lines. Furthermore, at the time many of the jurisdictions were still very reticent toward enforcement of foreign arbitral awards, and therefore a list of the acceptable grounds of review provided much needed clarity and restraint for the national courts. Since then, however, the situation has changed dramatically. International arbitration has become commonplace and the sophistication of international actors and their counsel has also increased significantly. Furthermore, national courts have become much more adept at recognizing and enforcing international awards. As a result, the uniformity of procedures, which was of paramount importance in the years preceding the adoption of the New York Convention, is no longer a cardinal consideration, because courts all over the world have come to respect the institution of arbitration as a viable and just means of dispute resolutions.

The New York Convention's fundamental goal was the promotion of arbitration as a viable means of resolution of international disputes. Yet the Convention may potentially diminish the willingness of parties to submit to arbitration if its provisions are enforced without due regard to the primary impetus of decisions to arbitrate — freedom of contract. It is therefore very important that the New York Convention remain in place as a default framework with respect to international arbitration, as a safeguard against potential attempts by governments or courts to encroach on the arbitral process. However, in situations where the parties explicitly agree to circumscribe the precepts of the Convention and stipulate for expanded review, there is no reason why the courts should decline heeding their wishes.

246. See *Vimar*, 515 U.S. at 542.

CONCLUSION

It is uncertain whether the Supreme Court will resolve the debate over expanded review in the near future. However, when presented with the issue the Supreme Court will most likely support the freedom of contract viewpoint and allow for expanded judicial review. In the past the Supreme Court has recognized the importance of the public policy protecting the provisions of agreements to arbitrate, and has therefore granted parties wide deference in establishing the ground rules for arbitration. This policy is further enhanced in the sphere of international commerce by the Supreme Court's respectful stance towards the needs of international commerce, and of the general principles of comity among nations. Therefore, it stands to reason that the only outcome consistent with the Court's prior decisions and the policy interests at play in the debate surrounding international arbitration would be reached by granting the express wishes of the contracting parties and endorsing expanded judicial review.

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