Proposals to Amend the FAA

by
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December 20, 2007

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. (2000) ("FAA"), enacted in 1925, evidences a strong national policy favoring arbitration.[1] The FAA applies to state and federal courts and, as substantive federal law, preempts conflicting state law to govern agreements affecting commerce, including employment agreements.[2] The FAA further applies to federal statutory claims. Arbitrators are not required to issue written decisions, and judicial review of their awards is limited under the FAA. Although for years Congress has entertained bills proposing to amend such key provisions, nevertheless, Congress has seen fit to preserve these sections untouched since enactment of the FAA. Now, the proposed Arbitration Fairness Act of 2007 ("AFA"), currently before Congress as H.R. 3010 and S. 1782, would amend the FAA in part to provide: "No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power." The AFA also would declare that courts, under federal law, rather than arbitrators, shall determine the validity or enforceability of an agreement to arbitrate.[3] This paper recommends that Congress vote <u>against</u> proposals to amend the FAA to (a) prohibit enforcement of mandatory employment arbitration agreements, as set forth in the AFA bill; (b) prohibit enforcement of pre-dispute agreements to arbitrate federal statutory claims; and (c) provide for judicial review of arbitration awards under the same standards by which federal appeals courts review decisions of federal trial courts. Congress <u>should</u> amend the FAA, however, to require written decisions, including reasons for arbitral awards.

A. Mandatory employment arbitration agreements

The FAA should not be amended to prohibit enforcement of all pre-dispute arbitration agreements that employees are required to accept in order to obtain a job. The FAA, on its face, and consistent with judicial interpretation, applies to all pre-dispute, mandatory employment arbitration agreements, with three exceptions. Section one plainly states: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign and interstate commerce." 9 U.S.C. § 1. Section one does not state that the FAA is inapplicable to all contracts of employment. Accordingly, Congress originally intended the FAA to apply to all employment contracts except for these three categories of employment. Further, Congress, by declining to amend the FAA,[4] has shown continuing legislative intent to apply the FAA to these employment contracts. There is no reason that Congress now should so amend the FAA.

First, our federal courts, who are "continually informed by the insights of practice" and application of the FAA[5] to live parties and cases, have upheld its application to mandatory employment arbitration agreements—and for good reason. Initially, the United States Supreme Court has upheld mandatory employment arbitration agreements under the FAA, even as to ADEA claims. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991) ("*Gilmer*"). Later, applying the rule *ejusdem generic* in *Circuit City,*[6] the Court appropriately found that section one applied to employment agreements generally, and excluded only agreements for seamen, railroad employees, and transportation workers actually engaged in the movement of goods in foreign or interstate commerce. Lower federal courts also consistently have held[7] that section 1 excludes only "employment contracts of workers actually engaged in the movement of goods in interstate commerce."

State courts, too, have upheld application of the FAA to mandatory employment arbitration agreements.[8] In *Armendariz*, for example, the California Supreme Court concluded that discrimination claims were arbitrable under mandatory employment arbitration agreements if employees could vindicate their statutory rights in accordance with the requirements enunciated in *Cole* and *Gilmer*: (1) neutral arbitrator, (2) adequate discovery, (3) written decision revealing essential findings and conclusions on which an award is based, (4) arbitration agreement providing for all types of relief that would otherwise be available in court, and (5) the employee need not pay costs unique to arbitration.[9] Courts also have not hesitated to invalidate mandatory employment arbitration agreements under the doctrine of unconscionability. Thus, "as a practical matter any apparent 'gaps' in the FAA's statutory scheme have largely been filled by a rich case law, spun out of an ongoing process of statutory interpretation in the usual way, and now part and parcel of the meaning of the statute."[10] The current Chair of the Executive Committee of AAA has stated, in support of his position that the FAA should not be amended, that the FAA has achieved quasi-constitutional status, where "practically every word of the Act has been the subject of dozens, and in some cases of hundreds, of court decisions construing and explaining how the Act works and how it relates to the litigation process….The end result of all those court cases may be messy, and it may fall short of the ideal, but it works."[11]

Proponents of the AFA, including Senators who introduced the bill, argue for preclusion of the FAA to mandatory employment arbitration disputes on policy grounds including: employees have "greatly disparate economic power" compared to employers; corporate employers are repeat players, favored in private arbitrations; employees often are unaware that they are giving up rights, and agreeing to unfair provisions; and arbitration is a "poor system for protecting civil rights… because it is not transparent" and does not offer features such as "publicly accountable decision

makers who generally issue written decisions."[12] Legal commentators, the EEOC,[13] and NLRB have voiced concern about potential inequities and inadequacies of arbitration, as opposed to litigation, in employment cases.[14] However, other legal commentators likewise have noted the currently superior nature of arbitration for employment cases,[15] the prohibitive expense, lengthiness, and complication of litigation for employees, and disparate jury verdicts that are "often lottery-like in their results."[16] Furthermore, although reasons for prohibiting all mandatory employment arbitration agreements once were compelling and perhaps justified, they are "no longer sufficient to warrant a general ban against all mandatory agreements." In fact, there is evidence that litigation results do not significantly differ from arbitration results; in addition, there is insufficient substantiation for the notion that arbitration favors employers and is unreliable.[17]

Further, it is illogical and overbroad to say that the FAA should be precluded from all mandatory employment arbitration agreements because some employees have less economic power than employers, and are unaware of rights they are giving up, or arbitration provisions to which they are agreeing. Setting aside the lack of reliable data to support this conclusion, a vast number of employees certainly are aware of the nature of their mandatory arbitration agreements, and do not lack power in entering into these agreements.[18] In any case, as the United States Supreme Court said in *Gilmer,* "mere inequality in bargaining power" is not sufficient to preclude arbitration agreements between employers and employees; rather, any claim of unequal bargaining power is best left for resolution in each case, based on contract law.[19] The Fourth Circuit, in *Hooters of America, Inc. v. Phillips*, for example, rescinded the employment agreement in that case because the mandatory arbitration provisions within the employment agreements that the employee twice signed were so egregiously unfair that Hooters materially breached the arbitration agreement; the court did

not ground its decision on the circumstances of the "weaker" party entering into the agreements, or the party's reasonable expectations in waiving the right to litigate.

It is unnecessary to amend the FAA to protect those employees that in fact suffer from lack of power or choice, or a lack of awareness about rights; these public policy concerns all ready are addressed by courts' invalidation of arbitration agreements for unconscionability and other contract grounds. Even so, employment agreements containing mandatory arbitration provisions cannot compare, from a public policy perspective, to medical adhesion contracts containing mandatory arbitration provisions, presented by physicians to patients during registration for outpatient procedures; such mandatory medical arbitration agreements should be disallowed, given the great disparity of bargaining power and surrounding circumstances, including a patient's inability to bargain, and physical and emotional duress. *See, e.g. Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148 (1992)(holding arbitration agreement unenforceable, without deciding whether it was unconscionable, where physicians provided patient with adhesion contract containing mandatory arbitration provision at the time of registration for an outpatient operation, and waiver of rights was beyond patient's reasonable expectations). Thus, the FAA should not be amended to preclude its application to all mandatory employment arbitration agreements.

B. Pre-dispute agreements to arbitrate federal statutory claims

The United States Supreme Court long has held that federal statutory claims, including Sherman Act, RICO, and Securities Act claims, are subject to compulsory arbitration under the FAA. Since *Gilmer* sixteen years ago, the Court also has affirmed application of the FAA to civil rights claims. The Court specifically found arbitration under the FAA to be an appropriate forum to further the important social policies and purposes of civil rights claims in *Gilmer.*[20] Significantly, the Court in *Gilmer*, as in prior cases involving the FAA and federal statutory claims, rejected

challenges to the adequacy of the arbitration process to preclude arbitration of statutory claims.[21] Although the Court did not identify any statutory claims that might be inappropriate for arbitration, the Court allowed for this possibility, if Congress "evinced an intention to preclude judicial remedies for the statutory rights at issue."[22] However, the Court directed that any inquiry into the inapplicability of arbitration to a statutory claim should be done with "a healthy regard for the federal policy favoring arbitration."[23]

Since *Gilmer* in 1991, federal courts have applied the FAA to federal statutory claims, including the Civil Rights Act of 1991, 42 U.S.C. §1981, and the ADA, 42 U.S.C. §1221.[24] Although some of the statutes were not in existence when Congress passed the FAA, nothing in the FAA indicates that it is precluded from federal statutory claims. Further, Congress, in choosing not to legislate to the contrary, has approved the Court's application of the FAA to federal statutory claims, including civil rights claims.

Nevertheless, there is a growing movement to amend the FAA so as to preclude its application to federal statutory claims.[25] The AFA proposes to invalidate pre-dispute arbitration agreements involving statutory civil rights, and not all federal statutory rights. Proponents of an FAA amendment to invalidate all pre-dispute arbitration agreements involving federal statutory claims argue that only courts, as public institutions, can and should promote public values embodied in substantive and procedural statutes and rules.[26] Some commentators contend that arbitration was not designed to interpret and apply public values expressed in legislation; it lacks procedural protections that courts provide; and arbitrators may not understand the values at stake.[27] Thus, the poor and the weak may not be as protected, and racial and ethnic prejudice may be fostered, in arbitrations.[28] They further opine that public values cannot be sacrificed to private benefit, or to save time and money, all goals of arbitration.

All of these grounds for prohibiting enforcement of mandatory arbitration agreements under the FAA as to federal statutory claims focus on concerns that arbitration is inferior to litigation, and arbitrators are inferior to judges, in enforcing federal statutory rights.[29] Initially, courts have addressed some of these concerns by enunciating procedural requirements set forth in *Gilmer* and *Cole,* including that arbitrators issue written decisions. Moreover, the United States Supreme Court has progressed in a deliberate manner since the enactment of the FAA to now clearly hold that the FAA applies generally to federal statutory statutes, including certain civil rights claims; by so doing, the Supreme Court and lower federal courts have made clear their views and rulings that arbitration as a process is as efficient as litigation to enforce federal statutory rights. [30]

The United States Supreme Court, for example, enunciated that "federal statutory claims can be appropriately resolved through arbitration, and [the Court has] enforced agreements to arbitrate that involve such claims. . . .and. . .likewise rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants'"[31]; even statutes enforcing important social policies, such as civil rights, may be arbitrated so long as a party may "effectively vindicate [his or her] statutory cause of action in the arbitral forum." *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79, 90 (2000), *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 (1985).[32]

The FAA should not be amended to preclude its application to pre-dispute agreements to arbitrate federal statutory claims.

C. Judicial Review

Arbitration is said to further interests of speed, cost, efficiency, and finality.[33] These assumptions, even if unsubstantiated,[34] constitute the foundation upon which the FAA was enacted by Congress and upheld by courts. Limitation of judicial review furthers these interests and is part

of the strong federal pro-arbitration policy.[35] "It is in part because arbitration awards are subject to minimal judicial review that federal courts voice such strong support for the arbitral process."[36] Accordingly, the FAA provides essentially no judicial review of the merits of an award; generally, a court's review of an arbitration award "is among the narrowest known to the law."[37] Indeed, any broader judicial review would be antithetical to interests of speed, efficiency and finality of the arbitral process. Thus, the FAA should not be amended to provide for the broader standards of judicial review that federal appeals courts apply to federal trial court decisions.

FAA section nine states that a court "*must* grant" an application for an order confirming an arbitration award, unless the award is vacated, modified, or corrected under sections 10 and 11. 9 U.S.C. § 9 (emphasis added). This mandate is clear. Under section 10, federal courts "may," or may choose not to, vacate an arbitration award: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption of the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct. . .or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10. These provisions were modeled on the New York Arbitration Act judicial review provisions, interpreted by New York courts to preclude review of arbitrators' legal or factual findings.[38] The Uniform Arbitration Act standards of review mirror those set forth in section 10 of the FAA.[39]

Initially, parties agreeing to arbitrate also agree to this standard of judicial deference to an arbitration award. The fact that arbitrators have issued an award assumes that the parties clearly agreed to arbitrate. The United States Supreme Court, in *First Options of Chicago, Inc. v. Kaplan*, observed that where parties agreed to arbitrate, they relinquished much of the practical value of a

right to judicial review of the merits of a dispute, and therefore agreed to finality of an arbitration award absent very unusual circumstances.[40] *See Wilko v.* Swan, 346 U.S. 427, 438 (1953)(rev. o.g.)(observing that arbitration provides "prompt, economical and adequate solution of controversies. . .if the parties are willing to accept less certainty of legally correct adjustment"). It follows, therefore, that if a court decides that parties clearly entered into an agreement to arbitrate, then it is only fair that they be bound by their arbitration agreement and, if applicable, the FAA, including particular limited standards of review.

Furthermore, expanded judicial review necessarily would eviscerate the essential purposes of arbitration: finality, and efficiency of cost and time. *See Volt*, 489 U.S. at 478 (noting that FAA encourages "expeditious resolution"); *Southland Corp. v. Keating,* 465 U.S. 1, 7 (1984)(noting arbitration as "final" and "binding"). Obviously, for each matter in which a court exercises a broader standard of review, the arbitration process increases in length and cost. Moreover, amending the FAA to require courts to apply standards of review to arbitration decisions as if those decisions were rendered by trial courts, would transform arbitration into a type of litigation. And Congress, in enacting the FAA, did not intend arbitration to be a type of litigation, but rather "an alternative to the complications of litigation."[41]

In addition, the United States Supreme Court consistently has said that "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.[42] Because this limited judicial review is sufficient, courts consistently have refused to expand judicial review and nonstatutory grounds for vacatur beyond their present scope.[43] Congress, since enacting the FAA, has not amended the FAA to broaden judicial review[44] Indeed, like the FAA, other arbitration statutes and model laws provide for limited judicial review. For example, the RUAA provides for limited

judicial review; the Drafting Committee of the RUAA and Committee of the Whole specifically rejected efforts to amend the RUAA to provide for expanded judicial review, or even to include in the statute "manifest disregard" and other standards of court review.[45]

Most important, the FAA should not be amended to provide for judicial standards of review that federal appeals courts use to review decisions of trial courts because it would be logistically difficult, if not impossible, for a court to apply such a judicial standard of review, much less determine the appropriate standard of review, to an arbitration award. Arbitrations do not follow the same procedures and rules of evidence as do judicial proceedings.

Proponents of a broader standard of judicial review for arbitration awards argue that lay arbitrators may not properly apply applicable law, and that parties challenging arbitration awards bear a heavy burden of proof. It is true that arbitration may produce some unsubstantiated or unjust results, but this is true of litigation and any other dispute resolution process. Furthermore, any inequity in the arbitral process is better addressed by changes other than to the applicable standard of review.[46] For example, additional procedural requirements could be adopted. Also, as noted above, there is no firm substantiation for the notion that arbitration as a process is inferior to litigation. Accordingly, the FAA should not be amended to provide for broader judicial review, such as standards used to review federal trial courts' decisions, because such broader standards of judicial review are contrary to interests of speed, efficiency, and finality, and purposes underlying, the FAA.

D. Written arbitration opinions, including reasons for award

The FAA should be amended to require that arbitrators issue written decisions explaining reasons for their awards. Written arbitration awards would promote equity and finality, important goals of the arbitral process. First, if arbitrators issued written decisions, then the equity and

rationality of their decisions and reasoning could be evaluated by the parties, counsel, and any reviewing body. Further, written decisions would assist arbitrators sitting in an appellate capacity to more efficiently and effectively review arbitration awards. Written arbitral decisions also promote finality, an essential purpose of arbitration, by assisting courts to determine issue and claim preclusion, as well as whether arbitrators applied the appropriate law, or manifestly disregarded the law.[47] *See, e.g. Sobel v. Hertz, Warner &Co.*, 469 F.2d 1211 (2d Cir. 1972)(noting the District Court's finding that it could not determine "manifest disregard" absent an explanation of the arbitrators' decision, but holding that arbitrators have no such obligation to explain awards).[48]

Thus, assuming that the judicial standard of review under the FAA remains limited, then written decisions by arbitrators would help obviate irrational, capricious, and arbitrary awards, and awards in which arbitrators "manifestly" ignore the law; without a written decision, a party essentially is hampered in showing manifest disregard, and instead must refute "every possible rational basis for the arbitrator's award."[49] For these and other reasons, major providers of arbitration services, including the AAA, CPR Institute for Dispute Resolution, and JAMS require written opinions.[50] Further, the Uniform Arbitration Act requires that an arbitration award "be in writing and signed by the arbitrators joining in the award."[51] The AFA and Fair Arbitration Act of 2007, bills to amend the FAA, propose a requirement of "a written decision by the arbitrator explaining the resolution of the case and his reasons therefore." [52]

It may be argued that a requirement that arbitrators explain their reasoning would undermine several purpose of arbitration, including speed and informality. The Second Circuit, in *Sobel*, disagreeing with the District Court below, opined that it would be contrary to public interest, manifested in the FAA, to require arbitrators to explain their awards; the Second Circuit felt that "such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick,

efficient and informal means of private dispute settlement."[53] However, it stretches logic to conclude that an amendment to the FAA, requiring arbitrators to issue written opinions giving reasons for their awards, necessarily would result in substantial delay, inefficiency, or far greater formality. There is no evidence that arbitrations conducted by AAA, JAMS, and other providers of arbitration services that require written opinions, are more inefficient and slower than arbitrations conducted by organizations that do not require written opinions. To the contrary, there is every reason to require that arbitrators issue written opinions, giving reasons for their awards, and Congress should so amend the FAA.

E. Conclusion

In sum, Congress should vote to amend the FAA so that arbitrators are required to provide written opinions, including reasons for their award. Congress should vote against amending the FAA to preclude its application to mandatory employment arbitration agreements and pre-dispute agreements to arbitrate federal statutory claims, or to provide for expanded judicial review under the same standard that a federal appeals court reviews a federal trial court's decision.

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[1] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
[2] LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 506, 523 (3d ed. 2005)("RISKIN"); Southland Corp. v. Keating, 465 U.S. 1 (1984); Prima Paint Corp. v. Flood & Conklin Manufacturing Corp., 388 U.S. 395, 400 (1967).
[3] Collective bargaining arbitration agreements would be exempt from the FAA, according to the proposed AFA.
[4] *See, e.g.* AFA, H.R. 2969.
[5] In applying the FAA, courts are more likely than legislators to "get it right." Alan Scott Rau, *Federal Common Law and Arbitral Power,* Remarks at Symposium, *Rethinking the Federal Arbitration* Act, William S. Boyd School of Law, University of Nevada (Jan. 26, 2007).
[6] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); *see* Cole v. Burns Int'l Security Services, 105 F.3d 1465 (D.C. Cir. 1997).
[7] Allied-Bruce Terminix Cos. v. Dobson**,** 513 U.S. 265 (1995); Cole, 105 F.3d 1465.
[8] Armendariz v. Foundation Health Psychcare Services, Inc*.,* 24 Cal. 4th 83 (2000)(affirming basic policy in favor of enforcement of arbitration agreements, but concluding that there was evidence to support the trial court's findings that Kaiser engaged in fraudulent conduct relevant to the question of whether Kaiser waived its right to compel arbitration); Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951 (1997).
[9] Armendariz, 24 Cal. 4th at 90-113 (holding that the mandatory arbitration agreement in that case was unenforceable because it had an unlawful damages provision and unconscionably unilateral arbitration clause, contrary to public policy), *citing* Gilmer, 500 U.S. at 28, and Cole, 105 F.3d at 1482.
[10] Rau, *supra* note 5.
[11] John M Townsend, *The Federal Arbitration Act Is Too Important to Amend,* 4 THE INTERNATIONAL ARBITRATION NEWS 2, 19 (2004).

[12] AFA, sec. 2 Findings.
[13] The EEOC issued a policy statement in 1997 against mandatory binding arbitration agreements for discrimination disputes as a condition of employment.
[14] *Cole*, 105 F.3d at 1487-88.
[15] Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMPL. L. 151, 152 (1999).
[16] RISKIN , *supra* note 2, at 624; Theodore O. Rogers, Jr., *Employment Discrimination,* 63 Fordham L. Rev. 1613, 1617-22 (1995).
[17] Primm, *supra* note 17, at 174-75.
[18] Executives of brokerage and securities firms as in *Gilmer*, for example, are required to enter into arbitration agreements as a condition of employment, and these executives, ranging from rank-and-file brokers to traders to corporate officers, certainly are able to understand their agreements to arbitrate.
[19] Gilmer, 500 U.S. at 33.

[20] Gilmer, 500 U.S. at 38.
[21] *Id*.
[22] *Id.*. at 37, quoting Mitsubishi, 473 U.S. at 628.
[23] *Id.,* quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).
[24] Gilmer, 500 U.S. at 26,
[25] *See, e.g.* Sen. No. 63, H.R. No. 983, 105th Cong., 1st Sess. (1997).
[26] These include the fundamental civil rights of parties as individuals; substantive or social justice, as between rich and poor, or strong and weak; efficiency in use of societal resources; and establishment and articulation of public values that cement society as a whole. Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 4-7 (1989-90)(also noting commentators frequently express that adjudication, as opposed to mediation, is the best tool to protect individual rights and ensure substantive fairness, both of which are important goals of dispute resolution); Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?,* 99 HARV. L. REV. 668, 675-82 (1986), in RISKIN, *supra* note 2, at. 611-13.
[27] RISKIN, *supra* note 2, at 813, 816. *See* Ellen E. Deason, *Symposium: Reflections on Judging: A Discussion Following the Release of the Blackmun Papers: Perspectives on Decisionmaking from the Blackmun Papers: The Cases on Arbitrability of Statutory Claims*, 70 MO. L. REV. 1133, 1141 (2005)
[28] RISKIN, *supra* note 2, at 816.
[29] Even Congress were to pass the AFA as to civil rights claims, nevertheless amendment of the FAA to preclude its application to all statutory claims would be unnecessary and overbroad, in addition to unsubstantiated. There is no substantial argument, based on complexity or importance of claims, between federal statutory and other claims.
[30] Although it may be true that Congress, in initially passing the FAA, did not expect it to apply to certain federal statutory claims, nevertheless Congress and the United States Supreme Court have upheld its application to such claims, including civil rights claims. *See, e.g.* the Civil Rights Act of 1991, 42 U.S.C. §1981, and the ADA, 42 U.S.C. §12212 (2000), cited in RISKIN; Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 4-7 (1989-90).
[31] Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 89-90 (2000).
[32] The Court enunciated a two-part test for determining whether federal statutory claims may be arbitrated: courts must first determine whether the parties' agreement to arbitrate reached the statutory issues, and then whether Congress evinced an intent to foreclose arbitration of those claims. *Mitsubishi*, 473 U.S. at 628; *Gilmer*, 500 U.S. at 26.

[33] RISKIN, *supra* note 2, at 508 (stating that most arbitration clauses specify that a decision is final).
[34] *See* e.g. Deborah Hensler, *A Research Agenda: What we need to know about court-connected ADR*, Dispute Resolution Magazine 15 (Fall 1999); James S. Kahalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act: A Summary*," Dispute Resolution Magazine 4 (Summer 1997).
[35] RISKIN, *supra* note 2, at 607.
[36] *Hoecht v. MVL Group, Inc*., 343 F.3d at 63.
[37] Long John Silver's Restaurants, Inc. v. Cole, 409 F. Supp. 2d 682, 684 (D. S.C. 2006), quoting United States Postal Service v. Am. Postal Workers Union, AFL-CIO, 204 F.3d 523 (4th Cir. 2000)(stating that a court sits only to determine whether the arbitrator did the job, and not whether it was done well, correctly, or reasonably); the Circuits are in *accord*, e.g. Stephens v. Tes Franchising, LLC, 2006 U.S. Dist. LEXIS 46887 (D. Ct. 2006)(noting that courts must

grant an arbitration panel's decision great deference); Lowe Offshore Int'l, Ltd. V. Quality Construction & Production, LLC, 2007 U.S. Dist. LEXIS 70967 (S.D. Tex. 2007).

[38] 2006 U.S. Briefs 989, 31 (2007).

[39] 7 U.L.A. 1, 12 (1997), in RISKIN, *supra* note 2, at 935.

[40] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1965)(noting that although courts resolve doubts as to parties' intention to arbitrate in favor of arbitration, courts nevertheless correctly apply ordinary state-law contracts principles to determine whether in fact parties agreed to arbitrate, and to submit the issue of arbitrability to arbitrators. Thus, a court determines whether parties agreed to arbitrate, and arbitrability, using the same standards as the court would use in any contracts case).

[41] Wilko, 346 U.S. at 431.

[42] Gilmer, 500 U.S. at 41 n. 4, quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987).

[43] **Federal courts also have interpreted section 10 to include as a ground for vacatur arbtrators' "manifest disregard" of the law. Some courts have vacated arbitration decisions for manifest disregard as a nonstatutory ground. Although the definition differs among the circuits, the prevailing definition of manifest disregard of the law follows a two-pronged test: (1) the arbitrator knew of a governing legal principle, yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case. *Sobel* noted that manifest disregard did not include mistake. Without a written decision containing reasons, courts cannot always determine manifest disregard of the law.**

[44] Hall Street Associates, LLC v. Mattel Inc., 196 Fed. Appx. 476, 477 (9th Cir. 2006); last month, the United States Supreme Court heard arguments as to whether parties may agree to greater judicial review than provided for in the FAA. The Ninth Circuit had held that a federal court may not overrule an arbitration award for possible errors of law.

[45] RISKIN, *supra* note 2, at 615, 623.

[46] For example, the FAA may be amended so that it does not apply to certain contracts of adhesion, or health care and consumer "mandatory arbitration" agreements, or certain procedural requirements may be adopted.

[47] RISKIN, *supra* note 2, 620-21.

[48] Federal courts also have interpreted section 10 to include as a ground for vacatur arbtrators' "manifest disregard" of the law. Some courts have vacated arbitration decisions for manifest disregard as a nonstatutory ground. Although the definition differs among the circuits, the prevailing definition of manifest disregard of the law follows a two-pronged test: (1) the arbitrator knew of a governing legal principle, yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case.[48] *Sobel* noted that manifest disregard did not include mistake. Without a written decision containing reasons, courts cannot always determine manifest disregard of the law.

[49] Lowe Offshore Int'l, 2007 U.S. Dist. LEXIS 70967, *7 (S.D. Tex. 2007).

[50] RISKIN, *supra* note 2, at 612.

[51] 7 U.L.A. 1, 9 (1997)(emphasis added), in RISKIN, *supra* note 2, at 934.

[52] Senate Floor Statement of Senator Sessions, April 17, 2007, Http://sessions.senate.gov/pressapp/record (emphasis added).

[53] Sobe*l*, 469 F.2d at 1214