ARTICLES

Contractual Stipulation for Judicial Review and Discovery in United States-Japan Arbitration Contracts

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I. INTRODUCTION

There is a growing tendency in transnational contracting to include an agreement that the parties will arbitrate any disputes that may arise. This trend has "increased significantly over the past several decades" to the point where it is seemingly universal in transnational contracts. The parties usually assume that, in the unlikely event a dispute arises, arbitration will be a faster and cheaper process resolution than civil litigation. While arbitrations in the United States and Japan are without doubt faster than litigation, parties are generally not aware of numerous serious problems that they should be aware of before they agree to arbitrate any disputes.

The single most critical problem in both Japan and the United States is the lack of judicial review of arbitrators' reasoning, their conduct of the arbitration, or the legal or factual basis for the award. Under United States' law there are a few strictly construed statutory

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2. This article looks primarily at federal, California, and New York law because the Federal Arbitration Act, 9 U.S.C. §§ 1–307 (1999), will apply to all international arbitration contracts, and parties to transnational contracts normally specify that the law of California or New York will apply to the extent not preempted by the Act.
and case law exceptions that will allow only a very limited amount of judicial review. Under Japanese statutory law there is no right to judicial review whatsoever. This can result in the legal anomaly, if not absurdity, of courts enforcing an award yet coming very close to declaring on the record that the award is not just or equitable. This problem may be somewhat, although never completely, ameliorated by including in the arbitration agreement a provision that the award will be subject to judicial review for errors of fact and law.

The second problem in arbitration is that discovery is extremely limited. By design, the statutory arbitration provisions in the United States and Japan allow for little discovery in order to expedite the process and reduce expenses. Paradoxically, however, all manner of evidence that would not be admissible in civil litigation can be, and frequently is, admitted into evidence by the arbitrator in the United States. Discovery under Japanese law is also very limited (common law type discovery is not normally allowed in Japan in litigation or arbitration), and what little may be done is subject to approval and control by the arbitrators and courts. This paper suggests that the difficulty in obtaining and presenting relevant evidence in both Japanese and United States arbitrations may be mitigated by the inclusion of a clause detailing a discovery scheme in the arbitration agreement.

These problems in American arbitrations should be of great concern for Japanese legal professionals for several reasons. First, Japanese parties will usually negotiate contracts without participation of legal counsel who are knowledgeable in American contract law. Japanese parties will be even less knowledgeable regarding the peculiarities of American arbitration law and procedure. Second,

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4. There is an inherent discomfort in American jurisprudence with a judicial procedure that will not admit of a disinterested appellate review of the initial hearing or trial even in cases that are considered outside of the usual civil litigation system. This is well illustrated by the creation of the United States Court of Appeals for the Armed Forces in 1950, which was designed to provide civilian review of court-martial sentences (traditionally considered an internal process to maintain order and discipline in the armed services and outside the normal judicial system). This Court of Appeals replaced what was considered an inherently suspect internal review by the defendant’s commanding officer and the Judge Advocate General of that particular service. See generally JONATHON LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES 1775-1980 (2001). As described below, in Japan the lack review of the arbitrator’s award by the courts can be construed as a deprivation of a party’s constitutional right of access to the judiciary.
6. This reflects the normal civil law tradition of judges actively participating in the fact-finding process.
Japanese parties may view arbitration as less confrontational than litigation and believe that they will be culturally comfortable in arbitration. Thus, after a dispute has developed, Japanese parties may find themselves bound to submit the controversy to arbitration when, in retrospect, arbitration may not have been the wisest choice for resolving that particular dispute.

In the event the arbitration is conducted in Japan under Japanese law, the American party is at a similar disadvantage. It goes without saying that there are relatively few American attorneys who are knowledgeable in Japanese contract or arbitration law. For American counsel to agree to an arbitration in Japan or to stipulate that the contract will be governed by Japanese law may well be flirting with malpractice. For American parties and counsel who are familiar with arbitration in the United States, Japanese arbitration procedure itself is not entirely dissimilar in general outline. However, there are significant differences that American counsel should be aware of. Whether the arbitration is in the United States under American law, or in Japan under Japanese law, there are two important aspects of arbitration that are very similar as noted above: the lack of judicial review and the very limited discovery.

As most transnational arbitration hearings in the United States are in New York and California, this paper focuses on the law of arbitration in those states, with comparative comments on Japanese law. Special attention is given to the conflict between California and New York arbitration law and the Federal Arbitration Act, the latter of which applies to transnational contracts as a matter of law. Although generally critical of American and Japanese arbitration law, it is not the position of the author that the basic premise of either American or Japanese arbitration law is fundamentally flawed and should be abandoned. There are circumstances where arbitration is entirely appropriate and in the best interests of all parties. However, there are situations where litigation is clearly preferable because of the facts of the dispute, or the inherent problems of the arbitration system in either the United States or Japan. This article will describe some of the above-cited problems in American and Japanese arbitration

7. Although obvious upon reflection, it bears repeating that if American counsel is not familiar with Japanese law it is impossible to advise the American party how to properly perform the contract. To blithely assume that Japanese and American contract law is sufficiently similar such that adequate performance under one law will be adequate in the other is to invite disaster.
8. Another reason for focusing on the United States’ law is that Japanese arbitration law, enacted in 1890 with no essential revisions since that time, was substantially modified in July of 2003, and, moreover, there is a paucity of case law interpreting the old arbitration law.
procedure that can lead to a flawed and unjust award. The contracting parties should be aware of these issues prior to entering into a contract containing an arbitration clause and determine if, on balance, the potential areas and subject matters of potential disputes that may arise under that particular contract indicate whether arbitration or litigation is the best dispute resolution mechanism.

Upon the determination that arbitration is the preferred method of dispute resolution (despite the pitfalls of arbitration in both the United States and Japan), parties should carefully consider the advisability of including clauses that would detail additional discovery in the event of a dispute, when such clauses are permitted in the jurisdiction where the arbitration will be conducted.10 Likewise, parties should seriously consider the advisability of including a provision for a wider scope of judicial review than is provided for under Japanese and American law. It is highly unlikely that the inclusion of such provisions would be a "deal breaker" any more than a bare arbitration clause would. Moreover, such clauses give both parties the ability to create a specific dispute resolution system that will best suit the particular nature of the contract and the business relationship of the parties.11 Thus, the parties can, at their pleasure, provide for the amount of discovery they deem proper, and for judicial review if they deem it in their best interest.

The fundamental reason arbitration, as an alternative to litigation, has grown in popularity is that it holds the promise of a fast, economical and (in theory) reasonably predictable means of dispute resolution. It is certainly the case that arbitration is faster and, on the surface, less expensive than litigation, but these factors should not be the sole determining considerations. The "less expensive" arbitration may, in the final analysis, be far more expensive for a party who lost the case but should have won under the law and facts, or a party who

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10. The author experienced one situation where an arbitration clause provided that the place of the arbitration was either in Japan under Japanese substantive law or in California under California substantive law, wherever the request for arbitration was first filed. This kind of alternative jurisdiction provision must be avoided at all costs as parties cannot know under which substantive law their performance of the contract will be judged, or under which arbitration law.

11. The contract formation process is, as the nomenclature "private law" indicates, a mutual agreement of the parties to govern their acts in a certain manner. If private contract law can define the mutual civil obligations and rights of the parties as to the substantive nature of the contract, it makes no sense that the parties cannot alter, as they see fit, the process of dispute resolution under that private law contract.

This ability to tailor the level of discovery should be effective in eliminating the abuse of the civil discovery system that was an important factor in the growth of arbitration. This, with the inclusion of a wider scope of judicial review, can result in a private dispute resolution system that has the potential to combine the predictability and reliability of the civil system with the cost and time saving attributes of the arbitration system.
won but was not able to present its entire case. The reason is simple: arbitrators in both the United States and Japan are given virtually unchecked powers in conducting the arbitration proceeding. First, in order to make the arbitration process faster and cheaper, discovery is curtailed severely and controlled by the arbitrators, which may prevent a party from discovering critical evidence. Second, arbitrators are not required to apply the correct substantive law or even the provisions of the contract itself, and may even enact their own personal concept of the law as they see fit. Finally, the arbitrator may refuse to admit relevant evidence, ignore relevant evidence if it is admitted, or admit irrelevant evidence, all at their discretion. All of these abuses are virtually immune from judicial review; much less will such acts be grounds to vacate arbitrators' awards. Consequently, the uniformity and predictability of arbitration hearings, even with similar factual and legal claims, cannot be assured.

Part II of this article discusses in detail how the arbitration process in both the United States and Japan can very often result in injustice to both parties. This Part describes how limitations on discovery can cause vital information necessary to either prosecute or defend a claim to never appear before the arbitrator. The article then discusses the possibility of including provisions that might ameliorate this problem. Next, this Part examines specific examples of situations where the arbitrators can ignore the civil rules of evidence and admit evidence that would be inadmissible in a court of law. Finally, this Part concludes with a discussion of the very limited scope of judicial review of arbitral awards that is allowed by statute in the United States and Japan. Part III introduces the concept of including a provision in arbitration contracts for judicial review of arbitrators' errors of law or fact, and, most important, identifies the jurisdictions where such a provision will be recognized. Part IV offers some conclusory thoughts regarding the practical implications of the limitations on arbitration.

When counsel discusses with clients whether or not to include an arbitration clause in a contract, the power of the arbitrators needs to be accurately described. The various arbitration statutes and arbitration association rules grant the arbitrator near dictatorial powers over the arbitration process. This article will illustrate how, in the United States and Japan, arbitrators can, and on occasion will, exercise law-making imperium powers more extensive than that of those of the Präetors in ancient Rome.12 Arbitrators can misinterpret the applicable

12. Imperium was the law-making power vested in officials called Präetors, who could loosely be termed judges, by the authority of the Consuls in the Republic and the Emperor in the Empire. See generally BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 3-4, 23-27
law, or simply disregard it by making their own version of the law.\footnote{13} Arbitrators can grossly misconstrue the facts, or simply disregard them entirely in making a decision, and they can determine what evidence to admit irrespective of the long established rules of evidence, even if by doing so the parties cannot test the validity of the evidence through cross-examination. Arbitrators can even misinterpret the provisions of the underlying contract dispute, and misinterpret conditions and restrictions in the arbitration agreement itself. If the arbitrator does any of these things, there will be no remedy as there is generally no judicial review of arbitrators’ acts, and the courts will not vacate the award. Even in Imperial Rome no Praetor would have dared exercise his power in such an undisciplined and arbitrary manner,\footnote{14} and certainly no common law or civil law judge today would dream of possessing, much less actually using, such power. Yet in arbitration the parties grant this ungoverned imperium to the arbitrators.

(1962); J.A. CROOK, LAW AND LIFE OF ROME, (1967), 68-74. Although the Praetors did not try the cases (this was done by laymen called the iudex) they made law in the sense that they enunciated the legal issues the parties litigated (much like the old English common law pleading forms), and when they did so, it was firmly based on long established legal doctrines and Greek philosophy. \textit{Id.} at 74. A new pronouncement of law was never based on the whim of the Praetor, and the Praetor could no more ignore the facts than a judge can today.

Papinianus, one of the more renowned Roman jurists, wrote the following on the relationship of the power of the Praetors to make law and the traditional sources of Roman law:

\begin{quote}
The Civil Law is that which is derived from statutory enactments, plebiscites, decrees of the Senate, edicts of the Emperors, and the authority of learned men. (1) The praetorian law is that which the Praetors introduced for the purpose of aiding, supplementing, or amending, the Civil Law, for the public welfare; which is also designated honorary law, being so called after the "honor" of the Praetors. \textit{Digest of Justinian} [hereinafter Dig.] 1.1.7 (Papinianus, Definitions 2), in Corpus Juris Civilis: The Civil Law, Volume 1 & 2, at 210 (S.P. Scott ed. & trans., AMS Press 1973).

Marcianus stated: "For honorary law itself is the living voice of the Civil Law." Dig. 1.1.8 (Marcianus, Institutes 1), in id.
\end{quote}

13. Indeed, at times the arbitrators may feel that they have more power than civil judges, and can write statutory law as they please. The author participated in one arbitration in California where the lead arbitrator demanded that a Japanese corporation produce as witnesses individuals living in Japan who were retired from the corporation, and produce other individuals living in Japan who were not even employees of the party. Upon the Japanese company’s declining to do so under substantive California law, the arbitrators made a point of making a negative inference.

This is, perhaps, one of the most mischievous aspects of the arbitrator’s power. There is no possible way for the parties to anticipate during the performance of the contract how the substantive law may be changed by the arbitrator. For example, in one arbitration involving the author, the arbitrators added the requirement of consideration in a Uniform Commercial Code sale governed by California Commercial Code section 2-209.

14. This would be an intolerable affront to the Greek ideas of \textit{aequitas} and corrective or rectificatory justice.
In civil litigation in both the United States and Japan, the trial judges (and the parties) know that if the judges deviate from established civil procedure statutes, play fast and loose with the facts, ignore or misinterpret the contractual obligations of the parties, or misconstrue and fail to apply the correct law, the appellate courts will reverse or remand the case. In arbitration, the prophylactic role of a supervising higher authority is not present and there is no reason to assume, as the United States and Japanese arbitration systems appear to do, that the arbitrators are more judicially responsible than duly appointed judges; thus, precluding the need for appellate review. In arbitration, judicial review will only be granted when the parties allege that the arbitrators made mistakes in the procedure that are statutorily recognized as grounds for vacation of the award.\footnote{15}{See Alexander v. Blue Cross of California, 106 Cal. Rptr. 2d 431, 435 (Cal. Ct. App. 2001).} In both the United States and Japan those grounds are exceedingly narrow and do not include errors of fact or law.\footnote{16}{There are no provisions in the Federal Arbitration Act 9 U.S.C. § 10 (1993), the California Code of Civil Procedure §1286.2 (1982), the New York Civil Practice Law and Rules § 7511 (1998), nor in the 2003 Japanese Arbitration Act that provide for judicial review of errors of fact or law.}

In the United States, the usual grounds to vacate an award (and trigger limited judicial review), are exemplified by the Federal Arbitration Act.\footnote{17}{9 U.S.C. § 10 (1993).} Specifically, a reviewing court will vacate the award for the following reasons: (1) the parties did not have notice of the arbitration or were otherwise unable to participate in the arbitration; (2) the matter arbitrated was not covered by the arbitration agreement; (3) the arbitrators refused to accept relevant evidence or refused to postpone the hearing for good cause; (4) the arbitrators were guilty of corruption, fraud or other misconduct; (5) the arbitrators were partial to a party; or (6) if the award is so imperfect that it cannot be deemed definitive.\footnote{18}{See Federal Arbitration Act, 9 U.S.C. § 10 (1993); CAL. CODE. CIV. PROC. § 1286.2 (1982); N.Y. C.P.L.R. § 7511(b) (1998).} In Japan, the grounds are even narrower. Japan’s 2003 Arbitration law provides that the award may be set aside if: (1) a party was legally incapacitated; (2) a party did not have notice of the arbitration or the selection of the arbitrators; (3) a party was not able to defend the action; (4) there was no enforceable agreement to arbitrate that particular issue; (5) the arbitration was not conducted in accordance with the agreement; (6) the matter could not be arbitrated under Japanese law; or (7) if the arbitration process or award is
contrary to public order.\textsuperscript{19} The Commercial Arbitration Rules of the Japan Commercial Arbitration Association are totally silent on this issue. As can be observed, the Japanese statute looks exclusively at procedural matters, and does not address any evidentiary issues, as do the various United States rules.

Anecdotal evidence and a review of appellate cases indicate that unjust arbitration awards almost invariably result from the arbitrator’s errors of law or fact.\textsuperscript{20} The law of both Japan and the United States deem that an enforceable arbitration contract divests the civil courts of jurisdiction, but the law also holds that arbitration procedure is governed by statutes that are strictly construed and applied.\textsuperscript{21} These statutes, which are designed to expedite the process and reduce expenses, do not include judicial review of the award for errors of fact or law; thus, \textit{ipso facto} precluding judicial review of the award. The judiciary, various state legislatures, the Congress of the United States, and the Diet in Japan, it may be reasonably concluded, have deliberately chosen to sacrifice justice in the interests of time and money.\textsuperscript{22}

\textsuperscript{19} In addition to the following provisions, paragraphs 50 through 55 provide for criminal penalties against the arbitrators for corruption and bribery. \textit{See} Japan Arbitration Act, 2003 (unpublished), ch. X, paras. 50–55 (draft on file with author) [hereinafter 2003 Japan Arbitration Act]. As Ishida notes, these criminal provisions are unique to Japan. \textit{See} Kyoko Ishida, Judicial Control of Arbitration in Japan: Enforceability of Contractual Expansion of Judicial Review of Arbitration Awards 17–18 (2003) (unpublished LL.M. thesis, University of Washington School of Law) (on file with author). Although the 2003 Arbitration Act does not directly tie paragraphs 50 through 55 to the grounds for vacation of the award under these circumstances, without doubt any such award would be vacated.

\textsuperscript{20} Errors of fact are usually based on the claim that the arbitrator unduly restricted discovery as in \textit{Sunshine Mining Co. v. United Steelworkers of America}, 823 F.2d 1289, 1295 (9th Cir. 1987) (upholding arbitrator’s order for a post-hearing psychiatric examination without opportunity for cross-examination). Errors of law are based on the arbitrator’s misinterpretation of applicable law, as in \textit{Revere Copper and Brass Inc. v. Overseas Private Investment Corp.}, 628 F.2d 81, 83 (D.C. Cir. 1980), \textit{cert. denied}, 446 U.S. 783 (1980) (arbitrators ignored the contract formation doctrine of \textit{contra preferentem} that requires that any ambiguities in the contract are to be construed against the drafter).

Anecdotal “evidence” is important in understanding arbitration cases for the simple reason that due to the extremely limited grounds for appeal there is relatively little appellate case law describing the extent and nature of arbitral misconduct.

\textsuperscript{21} In Japan, the 2003 Arbitration Act, chapter I, article 4, specifically provides that the courts will not have jurisdiction to hear the case unless otherwise provided in the Act. 2003 Japan Arbitration Act, supra note 19, ch. I, art. 4. In the United States, this is deemed to occur based on the agreement of the parties to arbitrate.

\textsuperscript{22} It can be well argued that the American state legislatures and Congress have made this choice by omitting these grounds to vacate the award. This point is weak; as it will be pointed out below, there is no concrete legislative indication that the statutory grounds to vacate the award are exclusive. As for Japan, given a much stricter adherence of the courts to the language of statutes generally it would be unfair to take to task the Japanese judiciary with failure to judicially expand the statute.
II. IN ARBITRATION, SPEED AND ECONOMY OUTWEIGH JUSTICE

One of the most attractive aspects of arbitration is that a dispute may be resolved much faster than in civil litigation. An arbitration matter can be initiated in as short a time as it takes to choose the arbitration panel, whereas litigation may take up to a year or much more depending on the jurisdiction. The other attractive characteristic is that arbitration can be considerably less expensive because there is far less discovery than is generally permitted in litigation.  

When describing the essential nature of arbitration and referring to it as authority for the courts' inability to correct even egregious evidentiary, legal or procedural problems, the courts repeatedly say that the process is designed for "simplicity, informality, and expedition" and that "judgment be swift and economical," thus precluding judicial review.

If speed and economy in dispute resolution is the primary concern of the parties, then arbitration may be the preferred dispute resolution method. However, if parties choose arbitration they must recognize that they will be sacrificing many procedural and legal safeguards. Arbitrators in the United States and Japan can, and sometimes will, act as described, and even if a party has been severely prejudiced, no appeal and no remedy is possible. It is important for counsel to keep in mind the following observation by a judge when discussing with a client a proposal to include an arbitration clause:

>[O]ne of the worst positions an attorney can be in is to recommend binding arbitration and then have to explain to a bewildered (and angry) client an unexplainable adverse result that cannot be remedied. Anecdotal stories abound where an arbitrator has made an award contrary to the facts or the law.

All dispute resolution processes, whether civil litigation in a court of law, arbitration, or even mediation, are ultimately decided on the quality of the facts that the parties can place before the judge,

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23. For arbitrations in Japan, this lack of discovery is very similar to litigation within the civil law litigation system. Although the Japanese Code of Civil Procedure was substantially amended in 1996 (with some minor subsequent additions) to include some additional discovery mechanisms, extensive discovery as in the United States is not permitted. Hence, a Japanese party would accept this as normal, whereas an American party would doubtless take this as a serious impediment.


arbitrators, or mediators. In litigation, discovery mechanisms can assure the parties that even though the discovery process may be expensive, the process assures the parties that most of the relevant facts will be discovered and can be presented to the court. This is certainly not true in arbitration. Indeed, the primary raison d'être for the arbitration system is to eliminate as much discovery as possible.  

None of the various American Arbitration Association rules or statutes provides for any guarantee of discovery beyond arbitrators requiring parties to produce a list of witnesses and documents they intend to rely on in the arbitration. In Japan, under both the original 1890 Code and the 2003 Amendments to the arbitration law there is no statutory right to any discovery whatsoever, with the sole exception of the right to receive the documents and evidence the opposing party submits to the arbitrators. This limitation of discovery is touted as one of the best aspects of arbitration in that it saves the parties considerable expense. There is no question but that it does, but there is a heavy price to pay.

A. Limitations on Discovery

One feature of arbitration that reduces costs is the severe limitation on discovery. Indeed, it is the cost of discovery that caused the alternative dispute resolution movement to gain popularity. However, a brief reflection on this issue should cause the parties to pause and consider the ramifications of their ability to conduct very limited discovery after a dispute arises. No party can possibly know all of the relevant facts in a case at the time the arbitration demand is filed, particularly if the opposing party actively hides them. Under

27. The goal of a swift economic arbitration process that virtually eliminates the parties' ability to discover the relevant facts is in perpetual tension with the obvious necessity of discovery to enable the parties to put all the relevant facts before the arbitrator. It is most improbable that a party will have all the relevant facts at its disposal before the dispute arises, and in arbitration it will be virtually impossible to discover them regardless of how critical they are to the just resolution of the case.


29. 2003 Japan Arbitration Act, supra note 19, ch. V, art. 32(4) requires that a party disclose to the other party all such documents and evidence at the time of the submission of their statement of the claim. This, however, can hardly be termed discovery. As will be described infra, all discovery in Japan is by grace of the arbitrators: the parties may not demand it as a matter of right.


31. See id. at 1182–83.

32. Where fraud or bad faith is a cause of action, without aggressive common law type discovery it may be impossible to obtain the evidence to support such a claim, as evidence must be extracted from the party whom, presumably, was deceitful throughout the entire business relationship.
the Federal Arbitration Act, there are no provisions regarding discovery whatsoever, but case law holds that the documents a party intends to rely on must be timely produced. In California, arbitrators are obliged to order the parties to disclose their witnesses and documents, and arbitrators must also order the parties to make the documents available to opposing parties in a timely manner. In New York, the New York Civil Practice Law and Rules make no mention of any duty of the arbitrators to order document production or to approve of any other discovery mechanisms.

Consequently, if the arbitration is held under state law in New York or California, neither California nor New York provides other means for discovering facts that the parties may use as a matter of right. The parties cannot propound interrogatories or conduct depositions without the express approval of the arbitrators, and approval will usually be denied as such discovery is inimical to the goals of the arbitration process. If a party does not have all of the relevant facts they need to know to arbitrate the matter at the commencement of the arbitration, that party cannot force the arbitrators to allow discovery from the opposing party absent "special circumstances," which do not include the normal requirements for litigation. Absent these special circumstances, the refusal of the arbitrator to allow discovery will not be subject to judicial review or

33. 9 U.S.C. § 1 (2003). And note, the Federal Arbitration Act is applied generally to transnational arbitration contracts. Id.

34. In Chevron Transport Corp. v. Astro Vencedor Compania Naviera S.A., 300 F. Supp. 179, 180 (S.D.N.Y 1969), Chevron moved to set the award aside on the basis that the arbitrators "refused to order timely production of the port logs [the ship's official record of all acts regarding the ship while in the port]." Chevron obtained the logs (in Greek) after the hearings were closed and only four days before the submission of the briefs (in English). Id. at 180. The Court held as follows: "The absence of statutory provisions for discovery techniques in arbitration proceedings obviously does not negate the affirmative duty of arbitrators to insure that relevant documentary evidence in the hands of one party is fully and timely made available to the other side." Id. at 181. Failure to do so would mandate a vacation of the award under 9 U.S.C. § 10. Id. As discussed infra subsection II.A.1, discovery that is allowed will be severely limited in scope under the "exceptional circumstances" rule.


36. Id. § 1282.2(a)(2)(C).


39. See Penn. Tanker Co. of Delaware v. C.H.Z. Rolimpex, Warszawa, 199 F. Supp. 716 (S.D.N.Y. 1961). There will be no "judicially imposed and controlled discovery as to the merits of a controversy . . . except, perhaps, upon a showing of true necessity because of an exceptional situation . . . ." Id. at 718.
vacation of the award, even if relevant evidence is rendered unavailable.40

The benchmark case for the federal rule that arbitrators control the scope of discovery is Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.41 In Commercial Solvents, a party sought approval for depositions under Federal Rule of Civil Procedure 81(a)(3), which the arbitrator denied.42 The reviewing court held that arbitration's "main object' [is the] the avoidance of formal and technical preparation of a case . . . for trial."43 The Commercial Solvents court went on to conclude that "[t]he fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pre-trial discovery in the one and its superfluity and utter incompatibility in the other."44 The Commercial Solvents court stated that arbitrators could accept hearsay, make decisions against the weight of the evidence, make decisions that needed no support form the evidence, and rely on their personal knowledge.45 In other words, the court advanced a non-sequitur rationale for the rule that discovery is to be curtailed in arbitration; that is, that the arbitrators can exercise their imperium pretty much as they please.

1. The Special Circumstances Rule

The rather restrictive rule of Commercial Solvents is relaxed somewhat under the federal and New York "special circumstances" rule. Under this judicially created rule, arbitrators are required to allow discovery "where a party's ability to properly present its case to the arbitrators will be irreparably harmed absent court ordered discovery."46 The very narrow scope of this doctrine is well demonstrated in Bergen Shipping Co. v. Japan Marine Services, Ltd.47

40. Burton v. Bush, 614 F.2d 389, 390 (4th Cir 1980) (holding that the parties in arbitration "relinquish the right to certain procedural niceties. . . . One of these accoutrements is the right to pre-trial discovery.").
42. Id. at 360–61.
43. Id. at 360.
44. Id. at 362.
45. This reasoning justifying the lack of discovery is common, but unacceptable. There is no possibility that any of the reasons cited would enable a party to discover facts relevant to the action known by one party but unknown and otherwise unknowable to the other party. For example, if the dispute involves allegations of faulty or negligent manufacture of goods that are not in conformance with contract specifications, the factual reasons for the manufacturing of the non-conforming goods may only be discovered from data in the possession of the opposing party.
and *Bigge Crane and Rigging Co. v. Docutel Corp.* In Bergen, the defendant contracted to provide a crew for the plaintiff's ship and certain controversies arose as to living conditions on board. Bergen then sought leave to depose the crew on the basis that the ship was about to depart U.S. territorial waters. Once the crewmen left the United States, obtaining their live testimony at the hearing would be difficult and costly. The Bergen court ordered the deposition to go forward, stating:

Moreover, the Court does not view with favor an attempt [to prevent the defendant's deposition] to achieve a result which would not only be wasteful but would also suppress evidence which, because the seamen who were deposed have since become dispersed, might, as a practical matter, never again be available.

In Bigge, the defendant refused to pay for work that was done and refused to indicate why it would not pay. The plaintiff moved for a court order compelling the deposition of the defendants under the Federal Rules of Civil Procedure and moved to postpone the arbitration hearings if necessary. The Bigge court ordered limited discovery to enable the plaintiff to discover the reasons the defendant refused to pay. The court reasoned that the arbitration hearings would not be delayed by conducting the discovery and the cost of the depositions were minor compared to the amount in controversy. It should be noted that the Bigge court indicated that any discovery for the convenience of the plaintiff, that is discovery that would have normally been done in civil litigation, was not allowed.

The definition of "exceptional circumstances" as "situations where a party's ability to properly present its case to the arbitrators will be irreparably harmed absent court ordered discovery" could authorize wider discovery in almost all cases, but it will not. Taken as a whole, cases allowing limited discovery are clearly on the very edge where the parties asking for discovery know virtually nothing about the opposing party's position, as in Bigge, or where the witness with

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50. Id.
51. Id. at 435.
52. 371 F. Supp. at 242-43.
53. Id. at 242.
54. Id. at 246.
55. Id.
56. Id.
information is not a party and a deposition was ordered to preserve their testimony, as in Bergen. Consequently, a party considering arbitration must assume that there will be no discovery beyond the production of documents the opposing party intends to rely upon. These, naturally, will be of little if any utility in challenging the opposing party’s claim and of no assistance whatsoever in establishing a claim against the opposing party.  

2. Japanese Discovery in Arbitration

Obtaining discovery in Japan under the Arbitration Act is somewhat different from obtaining discovery under the Commercial Arbitration Rules of the Japan Commercial Arbitration Association, with the former resulting in less discovery. Parties are free to conduct whatever independent investigation they please with cooperative third parties, but opposing-party or coerced discovery is very much curtailed. In order to obtain documents or to preserve a witness’

58. The unfettered discretion of the arbitrators to accept evidence that violates all established evidentiary and procedural rules may lead to inequitable results. If a party refuses to make discovery the arbitrator has unreviewable power to sanction, or refuse to sanction, the truculent party’s refusal to make discovery. In the hearing the arbitrators may admit the evidence the party refused to produce, and this will not be a basis to vacate the award. Alexander v. Blue Cross of California, 106 Cal. Rptr. 2d 431 (Cal. Ct. App. 2001). In Alexander, the arbitrator allowed Alexander to propound interrogatories and requests for admissions, which Blue Cross did not respond to in a timely manner. Id. at 434. The arbitrator then ordered Blue Cross to respond without objection, but refused to hold the requests for admission admitted as required in a court of law under C.C.C.P. § 2003(k). Id. In the event a party refused to make discovery, based on the arbitrator’s unfettered discretion in admitting all arguably relevant evidence (see infra, Section B, Admissibility and Reception of Evidence), the arbitrator’s so doing would most likely be immune from judicial review, much less a basis to set aside the award.

In one arbitration in which the author participated, during the discovery phase one party refused to produce any documents on multiple issues stating on the record that the subject matter of each issue was irrelevant. In the hearing, however, in violation of the arbitrators’ prior order that all documents the parties intended to use in the hearing were to be disclosed, that party introduced into evidence literally hundreds of documents regarding the issues it claimed on the record to be irrelevant to support its case-in-chief. This also violated the arbitrators’ prior ruling that all documentary evidence a party intended to rely on was to be disclosed to the opposing party prior to the hearings. Nonetheless, the arbitrators allowed all the evidence in over repeated objections on various grounds including failure to make discovery, estoppel, surprise and the inability to prepare cross-examination, and violation of the arbitrators’ evidentiary ruling. The arbitrators then based their award in favor of the party who refused to produce the evidence on that very evidence. This tactic of sandbagging and ambushade would never have been tolerated in a court of law. The author believes this experience was an anomaly, but counsel and parties contemplating arbitration should be aware that this can occur, and if it does there is no remedy.


60. In the 2003 Act, there is nothing outside of subsections 32(4), (5) that require that a party disclose all documents it intends to rely on in the hearings. Id. art. 32. Article 10 of the 2003 Act provides that the Japanese Code of Civil Procedure also be used in arbitration, but it is
testimony\textsuperscript{61} (including expert witnesses), the party must first seek permission from the arbitrators.\textsuperscript{62} If the arbitrators decide that the sought after information is relevant and necessary, the arbitrators or the party must then apply to the district court that has in personam jurisdiction over the witness or the custodian of the documents, and the court will conduct the discovery.\textsuperscript{63} It is important to note that the judge and the arbitrator will question the witness and examine the evidence, not the parties.\textsuperscript{64} Consequently, under Japanese law discovery is very limited and the discovery that is available is subject to the approval of \textit{both} the arbitrators and the court. As in the United States, there is no remedy if either the arbitrators or the courts improperly refuse to assist in the discovery process.\textsuperscript{65}

There is the possibility that, under the new 2003 Arbitration Act, the parties may petition the court through the arbitrators to conduct additional discovery as permitted in the Japanese Code of Civil Procedure.\textsuperscript{66} Assuming this is a correct interpretation, the additional discovery is, compared to the practice in the United States, quite inadequate.\textsuperscript{67} Common law interrogatories, with sanctions for a failure to respond, are only approximated in the Japanese Civil Code, which permits the parties to submit "inquiries" to each other.\textsuperscript{68}

\textsuperscript{61} American counsel must note that this provision for witness examination is not the equivalent by any means of common law type discovery. These witnesses are direct witnesses only, whose testimony is more similar to the common law practice of preserving testimony for trial, not for furthering discovery purposes.

Because of the vague language in article 213 of the Japanese Code of Civil Procedure there is the possibility that the parties may be able to have the court conduct other discovery besides document production and preservation of witness testimony similar to that in civil litigation. \textit{MINJI SOSHO\textsuperscript{5}SOKA} [MINSOHO\textsuperscript{5}H] art. 213 (Japan). However, the author believes that this is unlikely to occur in practice.

\textsuperscript{62} 2003 Japan Arbitration Act, \textit{supra} note 19, ch. 5, art. 35(2) states, "A party who files a motion under the preceding paragraph [for the court to conduct the discovery] must obtain the consent of the arbitral tribunal." Under the Japanese Arbitration Association Rules, rule 36 provides for the same procedure. The Japan Commercial Association, Commercial Arbitration Rules, ch. IV, § 1, R. 36(1)(2) (on file with author) [hereinafter Japan Commercial Arbitration Rules].

\textsuperscript{63} 2003 Japan Arbitration Act, \textit{supra} note 19, ch. V, art. 35(3).

\textsuperscript{64} See \textit{id}. In civil litigation practice attorneys for the parties do actively participate in the examination of witnesses, and it is probable that the parties in arbitration invoking this provision would also participate.

\textsuperscript{65} See \textit{id}. art. 35.

\textsuperscript{66} Id. art. 35(1); MINSOHO art. 163.

\textsuperscript{67} This interpretation is suspect because subsection (5) provides that the court, and not the arbitrator, is to conduct the discovery under article 35. 2003 Japan Arbitration Act, \textit{supra} note 19, art. 35(5). Moreover, this would be time consuming and directly involve courts in the pre-hearing activities, which would be inimical to the basic concept of arbitration.

\textsuperscript{68} MINPO [Japanese Civil Code] art. 163 (Japan).
Moreover, the statutory limitations on the scope of the questions seem to negate their usefulness. The questions (i) must be particular; (ii) cannot insult or embarrass; (iii) cannot be duplicative; (iv) cannot elicit an opinion; (v) cannot require undue expense or time to answer; and (vi) cannot involve a statutory privilege not to testify.69 While (iii), (iv) and (v) appear reasonable, questions touching on the other grounds (particularly subsection (iv)) would be very easy to evade. There are no provisions providing effective sanctions for a party's failure to respond or for a party's inadequate response.

With the exception of depositions (not available in Japan except for the preservation of witness testimony under Code of Civil Procedure article 234), one of the most effective litigation techniques in the United States is the ability of a party to compel the production of documentary evidence with severe sanctions in the event the opposing party does not comply.70 This is not the case in Japan. In Japan a party may request that the opposing party produce documentary evidence.71 The responding party cannot refuse to produce the document if it is in their possession and the party requesting it has a legal right to it, or if the document was drafted for the benefit of the requesting party.72 However, if the document is related to a statutory privilege, or if the "document is in the possession of the holder for the sole use of the holder" (moppara bunsho no shojisha no riyō ni kyōsuru tame no bunsho) it is exempt from production.73

If the party refuses to produce a document, the requesting party may make a motion to compel the production of the document, and must identify the document, provide the gist of the document, identify the holder of the document, identify the fact or facts to be proved by the document, and state the grounds for the holder to produce it.74 In the event the requesting party cannot identify the document or give the gist of it, the requesting party may be able to sufficiently identify the document in a hearing thereby enabling the responding party to

69. Id.
71. MINSOHÖ art. 219.
72. Id. art. 220.
73. Id. art. 220(d). This provision, apparently based on German law notions of protecting the privacy of third parties and not allowing a party's own documents to be used to attack that party, nullifies the efficacy of most of the document production scheme. The most obvious example is that under this rule all internal corporate documents would be non-discoverable simply by virtue of the fact that they are for corporate use.
74. MINSOHÖ art. 221.
produce it.\textsuperscript{75} If the responding party refuses to produce the document pursuant to a court order, the court may deem the requesting party's allegations as to the contents of the document to be true.\textsuperscript{76}

As can be seen, the ability of the parties in Japan to obtain documents is limited as to the scope of the documents a party may request is very narrow. Moreover, the party must have some general idea as to the nature of the document. Without this knowledge, it will be impossible, even under the relaxed rules in article 222 of the Code of Civil Procedure, to procure relevant documents of which the party might not be aware, or simply cannot "sufficiently" identify. More importantly, any document that "is solely for the sake of the use of the holder" is exempt from discovery.\textsuperscript{77} This exemption is not only susceptible to abuse by the parties,\textsuperscript{78} but could prevent an opposing party from gathering critical evidence that would support its claim. Taken together, these structural aspects of Japanese document production make the process problematic at best.

3. Enforcement of Arbitration Clauses Permitting Discovery

A partial solution to the limited amount of statutory discovery in the United States and Japan is to include provisions that specifically detail the amount and scope of discovery the parties feel comfortable with in the event of a dispute in the arbitration agreement.\textsuperscript{79} There are no reported cases directly on point, but there is little doubt that in the United States such a provision should be enforced as a matter of

\textsuperscript{75} Id. art. 222.
\textsuperscript{76} Id. art. 224.
\textsuperscript{77} Id. art. 220(iv)(c).
\textsuperscript{78} Such as a self-serving interpretation that the document was for internal use, which is much like the tobacco producing corporation's routine strategy in the United States of labeling sensitive correspondence and scientific data indicating the health hazards of tobacco consumption as attorney work product to protect it from discovery.
\textsuperscript{79} The discovery provisions must be clear and unambiguous. Even so, if the arbitrator "misinterprets" the discovery provision and refuses to allow discovery as contemplated by the arbitration agreement, the arbitrator's ruling is not reviewable, nor will it be a basis to vacate the award. Employer's Ins. Co. of Wasau v. Nat'l Union Fire Ins. of Pittsburgh, 933 F.2d 1481, 1485-86 (9th Cir. 1991).

In \textit{Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.}, 20 F.R.D. 359 (S.D.N.Y. 1957), the Court stated as follows:

The more enthusiastic of those sponsors [of arbitration] have thought of arbitration as a universal panacea. We doubt whether it will cure corns [calluses on the feet due to ill-fitting shoes] or bring general beatitude [a universal state of harmony and bliss in the world following the Second Coming of Christ]. Few panaceas work as well as advertised. Kulukundis Shipping Co. v. Amtorg Trading Co., 126 F.2d 978, 987 n.32 (2d Cir. 1942) \ldots Arbitration sometimes involves perils that surpass the 'perils of the seas.'

20 F.R.D. at 361 n.4. The lack of any effective discovery is one of those perils.
simple contract law. In California, *Mercuro v. Superior Court* was an employment discrimination case where the arbitration agreement included provisions limiting discovery to “30 discovery requests,” including three depositions. The enforceability of the stipulated discovery was not challenged, and the court appears to accept the validity of the discovery provisions as a matter of course. However, as a cautionary note, *Mercuro* was arbitrated pursuant to the California Fair Employment and Housing Act, under which California courts hold that additional discovery is allowed in arbitrations. As for standard commercial arbitration, the universal acknowledgment that arbitration agreements are contracts would tend to compel the conclusion that the arbitrator would have to allow whatever additional discovery is stipulated in the arbitration agreement. Nonetheless, if the arbitrator refuses to order the contractually stipulated discovery, a reviewing court might uphold the arbitrator because expanded discovery is not specifically sanctioned by any of the rules or statutes and is inherently inimical to the “speedy and inexpensive” arbitration system.

In Japan, oddly enough, a provision for contractual discovery might be possible under the 2003 Japan Arbitration Act (“2003 Act”) even though there are no Code sections that expressly permit any type of common law discovery. The 2003 Act states that the parties are free to determine the procedure followed by the arbitral tribunal, as long as it does not offend public policy. This would appear to allow the parties to include a contractual provision calling for more extensive discovery. If the arbitrators refuse to allow a contractual agreement for discovery, the award might be vacated on the basis that the

81. Id. at 683 (plaintiff objected to the limited amount of stipulated discovery, claiming that it was insufficient to enable him to prove his case).
82. See id. In addition, California Code of Civil Procedure section 1283.1(b) provides that “[o]nly if the parties by their agreement so provide, may the provisions of section 1283.05 [regarding depositions] be incorporated into, made a part of, or made applicable to, any arbitrations agreement.” Note, however, that this statutory provision that allows the parties to take depositions if they so agree does not explicitly include other discovery mechanisms such as interrogatories and requests for admissions. In *Alexander*, the parties included both interrogatories and requests for admissions and the enforceability of these were never even discussed. 106 Cal. Rptr. 2d at 437.
84. These are the general arguments the courts cite when disallowing the contractual expansion of judicial review as discussed at length below. See also *Moncharsh v. Heily* and Blase, 832 P.2d 899 (Cal. 1992).
85. 2003 Japan Arbitration Act, supra note 19, ch. V, art. 26(1). It is highly unlikely that contractual discovery would violate public policy as this standard requires an act that is against the fundamental mores and conventions of society (*shakai kannen*) or is an affront to public morals.
arbitrators failed to comply with the express provisions of the arbitration agreement.\textsuperscript{86} However, it is also reasonable to expect that a motion to vacate would be opposed on the basis that no such discovery is allowed in civil cases. Therefore, the provision could be construed as contrary to the law and expressly excluded.\textsuperscript{87} The resolution of this issue must await judicial determination.

To summarize, if the arbitration is to occur in either the United States or Japan, and a party can be sure that it will have all the necessary facts and documentation it may need before the commencement of the arbitration, arbitration may be a viable option. If there is the possibility that the party will not have all, or at least most, of the evidence it will need to arbitrate a potential dispute, that party should reconcile itself to the probability that without such a contractual stipulation it will never get the necessary discovery.

\subsection*{B. Admissibility and Reception of Evidence}

All of the American arbitration statutes at issue in this article provide that the arbitrator shall determine the relevancy and admissibility of the facts offered by the parties, and that the usual rules of evidence will not apply.\textsuperscript{88} These provisions are similar to those in Japan, where the Arbitration Act provides that in the absence of a contrary agreement of the parties, "the power of the tribunal includes the power to determine the admissibility, necessity of investigation and weight of the evidence."\textsuperscript{89} Consequently, as will be seen in detail below, in the United States the arbitrators tend to admit as evidence facts that no court would ever entertain, much less base a decision upon. These loose rules of evidence are designed to allow the

\textsuperscript{86} Id. ch. VII, art. 44(1)(vi).
\textsuperscript{87} See id. Likewise, if the aggrieved party sought a court order compelling the additional discovery while the arbitration is pending, the opposing party would doubtless raise the same arguments. The author anticipates that such a discovery provision would be invalidated as incompatible with the goals of arbitration and the lack of any such process in the Japanese Code of Civil Procedure in litigation. However, until there is a definitive court decision, detailed discovery provisions should be routinely included in the arbitration agreement.

\textsuperscript{88} E.g., CAL. CODE CIV. PRO. § 1282.2(c) (1982) ("The neutral arbitrator shall ... rule on the admission and exclusion of evidence ... "); N.Y. C.P.L.R. § 7506(c) (1998) (gives parties the right to submit evidence, but the arbitrators are not bound by the rules of evidence). See Silverman v. Benmor Coats, Inc., 461 N.E.2d 1261, 1266 (N.Y. 1984).

This rule does not, however, imply that the arbitrators will in fact relax the rules of evidence. In one arbitration the author was involved in, the arbitrators insisted on applying strict rules of evidence (excluding hearsay) despite the fact that no such requirement was in the arbitration agreement. Naturally, this improper demand of the arbitrators adversely impacted the parties' preparation for the arbitration as they quite reasonably assumed that hearsay would be allowed within limits.

\textsuperscript{89} 2003 Japan Arbitration Act, supra note 19, ch. V, art. 26(3).
parties to present evidence without undue worry about the formal rules of evidence in order to facilitate the hearings, and to give the arbitrator a general feel for the case.\textsuperscript{90}

The problems regarding evidence that can arise from such rules may cause the American party and counsel more conceptual difficulty than they will Japanese parties. In Japan there is no comparable “Evidence Code” or similar rules of evidence as in the United States, except for several simple provisions in the Code of Civil Procedure that provide that only relevant evidence will be admitted.\textsuperscript{91} As for arbitrations in the United States, counsel must be aware that arbitrators in the United States can admit evidence that is directly contrary to what they have learned to be admissible and involve activities they may even consider unethical. The following subsections are exemplary of common situations where evidence was admitted in an arbitration that would not have been entertained in a court of law.

1. Hearsay Evidence

Cases in American law are in accord that the arbitrators can accept hearsay evidence as substantive proof of the matter asserted.\textsuperscript{92} The potential for mischief inherent in the acceptance of hearsay evidence can result in unsubstantiated or unreliable evidence forming the factual basis for the award, or even a completely unanticipated re-ordering of contractual obligations. A typical case is \textit{Farkas v. Receivable Financing Corp.},\textsuperscript{93} where the arbitrator allegedly exceeded his power when he admitted both parole and hearsay evidence that changed the contract language of an employment contract.\textsuperscript{94} The challenge to this arbitral re-writing of the contract failed.\textsuperscript{95} Under 9 U.S.C. § 10(d) and Virginia Code Ann. 8.01-581.010, the Court held as follows:

\textsuperscript{90} Harvey Aluminum v. United Steelworkers of Am., 263 F. Supp. 488, 491 (C.D. Cal. 1967).

\textsuperscript{91} There is no Code section that puts it that precisely. The Japanese Code of Civil Procedure art. 180(1) states that the evidence offered must specify the fact to be proven. Civil Procedure Rule 99, on offering evidence, states, “Evidence shall be offered by clearly and concretely indicating the relation between the facts to be proved and the evidence.” \textit{MJNI SOSHÔ KISOKU} [Japanese Rules of Civil Procedure] art. 99. Under Civil Procedure Rule 114, the questions put to witness must be “relevant to such matters” to be proved. \textit{Id.} art. 114. And under Civil Procedure Rule 115(2)(iv) the witness may not be asked questions that “are not relevant to the point at issue.” \textit{Id.} art. 115(2)(iv).

\textsuperscript{92} See, \textit{e.g.}, Sapp v. Barenfeld, 212 P.2d 233, 238–39 (Cal. 1949). The formal rules of evidence do not apply in arbitration, thus hearsay is allowed. \textit{Id.}

\textsuperscript{93} 806 F. Supp. 84 (E.D. Va. 1992).

\textsuperscript{94} \textit{Id.} at 85.

\textsuperscript{95} \textit{Id.} at 87.
Arbitrators do not exceed their powers by admitting or considering hearsay evidence. The American Arbitration Association rules... provide in pertinent [sic]: "The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to understanding and determination of the dispute." 96

Hearsay "evidence" by its nature is difficult if not impossible to challenge as the one asserting the statement is not available for cross-examination; the reason, of course, why hearsay is not admissible in a court of law. 97 As Farkas illustrates, if the arbitrators modify the contractual obligations of a party at the time of the arbitration hearing (either sua sponte based on a clearly erroneous interpretation of the contract or based on erroneous hearsay evidence), the injured party is placed in a position where their best good faith efforts to comply with the original contract obligations have been nullified.

As for the law regarding hearsay in Japan, there is no equivalent to the common law rule in the Japanese Code of Civil Procedure. However, a witness may not be asked a question that "is related to a fact that the witness has not experienced directly." 98 Although the 2003 Act specifically states that the Code of Civil Procedure will apply to all arbitration proceedings, 99 the 2003 Act does not indicate that the arbitrators or the arbitration process is subject to the Civil Procedure Rules. Regardless, the arbitrators have the statutory power to conduct the hearings as they see fit and to "determine the admissibility, necessity of investigation and weight of any evidence." 100

2. Ex parte Communications

The acceptance of ex parte communications may have the same disruptive effect, leading to an unjust arbitration procedure, as the admission of hearsay evidence. In the United States, the arbitrators' ex parte communication with the parties themselves, while absolutely forbidden in civil litigation, is not a basis to set an arbitration award

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96. Id.
97. See, e.g., CAL. EVID. CODE § 1200(b) (1995). The primary reasons for the non-admission of hearsay is that such statements are not under oath and there is no cross examination. See generally People v. Durarte, 12 P.3d 1110 (Cal. 2000).
99. 2003 Japan Arbitration Act, supra note 17, ch. 1, art. 10.
100. Id. ch. V, art. 26(2)–(3).
Also, ex parte communication with third parties is not considered misconduct in arbitration, and will not be a basis to vacate the award even if the information was critical in the arbitrators' decision.\textsuperscript{102} In \textit{Sapp v. Barenfeld},\textsuperscript{103} a building construction dispute, the arbitrator solicited construction cost information from a third source outside of the hearing without the presence or knowledge of the parties, precluding cross-examination and rebuttal.\textsuperscript{104} The Court held that "'[t]here is no error in such a procedure."\textsuperscript{105} In \textit{American Almond Products Co. v. Consolidated Pecan Sales Co.},\textsuperscript{106} involving the breach of a contract for the sale of pecans, the parties failed to include adequate price data in the briefs or hearing, so the arbitrator sought it elsewhere.\textsuperscript{107} Judge Learned Hand held that this was permissible, stating, "... [the parties] may not hedge [the arbitration] about with those procedural limitations which it is precisely its purpose to avoid."\textsuperscript{108}

In Japan, the 2003 Act requires arbitrators to give all the parties sufficient notice of the time and place if they intend to inspect documents or take the testimony of witnesses.\textsuperscript{109} However, it should be noted that the 2003 Act also provides that arbitrators are obligated to give the parties copies of documents or other evidence "that forms the basis for the arbitral award," but this section does not indicate that the documents or other evidence must be submitted to the parties at the same time the arbitrators receive it.\textsuperscript{110} In arbitrations conducted under the Japan Commercial Arbitration Rules the arbitrators have considerably more power. The arbitrators may "examine evidence that a party has not applied to present," but if they do so, "[s]uch examination of evidence may be made other than at a hearing."\textsuperscript{111} If the arbitral tribunal decides to examine evidence other than at a hearing, "the parties shall be given the opportunity to be present."\textsuperscript{112}

\textsuperscript{101} Case law holds that ex parte communications with a party will not be a basis for setting an award aside, if the arbitrators deny it had any influence on the decision. Barcume v. City of Flint, 132 F. Supp. 2d 549, 555–58 (E.D. Mich. 2001).

\textsuperscript{102} \textit{Id.} at 557–58.

\textsuperscript{103} 212 P.2d 233 (Cal. 1949).

\textsuperscript{104} \textit{Id.} at 236.

\textsuperscript{105} \textit{Id.} at 238.

\textsuperscript{106} 144 F.2d 448 (2d Cir. 1944).

\textsuperscript{107} \textit{Id.} at 450.

\textsuperscript{108} \textit{Id.} at 451.

\textsuperscript{109} 2003 Japan Arbitration Act, \textit{supra} note 19, ch. V, art. 32(3).

\textsuperscript{110} \textit{Id.} art. 32(5). There is no comparable provision in the 1890 Arbitration Code; thus, it is unknown if in practice the arbitrators would be required to disclose that information in a timely manner to the parties.

\textsuperscript{111} Japan Commercial Arbitration Rules, \textit{supra} note 62, ch. IV, § 1, R. 35(2), (3).

\textsuperscript{112} \textit{Id.} R. 35(3).
However, "[t]he arbitral tribunal may, when it deems it necessary or when there has been a petition from a party, refer inquiries to, and request responses from, public or private bodies." The fact that the rule goes on to state that "[t]he arbitral tribunal shall disclose responses thus obtained to the parties" clearly indicates that the arbitrators may conduct the inquiry ex parte.

3. Lack of Cross-Examination

In the United States, because the arbitrators' refusal to accept relevant evidence is a statutory ground to vacate the award, arbitrators will usually err on the side of accepting a wide variety of evidence. However, as can be surmised from the discussion above, the arbitrator does not have to allow the parties to cross-examine a witness or examine documentary evidence. Obviously, if arbitrators solicit information ex parte from a third party the parties have been deprived of any chance to conduct cross-examination. If the arbitrators' decision is based on their opinion that cross-examination is not necessary, the lack of any cross-examination will not be deemed misconduct and will not be grounds to set the award aside.

As under American law, the 2003 Act contains no provisions regarding a party's express right to cross-examine witnesses. The most serious problem occurs when the court or arbitrators examine witnesses or documents and there is no provision for the parties to actively participate in the proceedings. Moreover, as indicated above in the discussion of Commercial Arbitration Rule 35(5), it is clear that when the arbitrators conduct an ex parte inquiry of "public or private bodies" there will be no opportunity for cross-examination at the time of the inquiry. It must be noted, however, that when the arbitrators hold oral hearings under the 2003 Act and Commercial

113. Id. R. 35(5).
114. Id.
115. See Sunshine Mining Co. v. United Steelworkers of Am., 823 F.2d 1289, 1295-96 (9th Cir. 1987) (arbitrator determined that cross examination of a doctor who conducted a medical exam was not necessary). The arbitrator's ability to declare that cross-examination is not needed is directly in conflict with the idea that all possible evidence be admitted. It cannot be reconciled, but may only be tentatively explained by the courts' consistent declaration that the arbitrator has the sole power to determine what evidence is relevant or unnecessary. How the arbitrator is to reach that conclusion without actually hearing the evidence is never explained.
117. Sunshine Mining Co. v. United Steelworkers of America, 823 F.2d. 1289, 1295-96 (9th Cir. 1987).
118. See 2003 Japan Arbitration Act, supra note 19, ch. V, art. 35.
120. See 2003 Japan Arbitration Act, supra note 19, ch. V, art. 32(3).
Arbitration Rules, the arbitrators must give adequate notice of the hearing in order to allow the parties to attend and participate. This should not be confused with the problem of the arbitrators receiving ex parte evidence without the parties' participation.

In the United States, the arbitrators' ex parte communication with witnesses can even occur after the hearings are closed. In Sunshine Mining Co. v. United Steelworkers of America, the employer terminated an employee due to mental instability, behavioral problems, and insubordination resulting from severe head trauma. The arbitrator ordered an independent medical evaluation after closing the case to determine the prognosis of the claimant's condition. No cross-examination of the physician was allowed. On motion to quash the physical examination, the Court held that the lack of the petitioner's ability to cross-examine the doctor was not a violation of its due process rights if the hearing was "fundamentally fair." The Court, citing Ficek v. South Pacific Co., then held that a "fundamentally fair" hearing was one in which the parties had notice of the action, a hearing on the evidence, and an impartial decision. Thus, according to case law, when considering that private justice is a goal of both arbitration and litigation, we may reach the inconsistent conclusion that the lack of cross-examination will not affect the fairness of an arbitral proceeding, but will be fatal in civil litigation.

4. Evidence of Settlement Negotiations or Mediation

Evidence concerning negotiations or mediations is an area that all American and Japanese counsel representing clients contemplating an arbitration agreement providing for arbitration in the United States must be familiar with because it is counter intuitive to lawyers that deal exclusively with American civil litigation. In civil litigation, all settlement offers and mediation statements by the parties are, as a

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121. See Japan Commercial Arbitration Rules, supra note 62, ch. 4, § 1, R. 35(3).
122. 823 F.2d 1289 (9th Cir. 1987).
123. Id. at 1291.
124. Id. at 1292.
125. Id. at 1293.
126. Id. at 1295. See also Bell Aerospace Co. Div. of Textron, Inc. v. Local 516 Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., 500 F.2d 921, 923 (2d Cir. 1974).
127. 338 F.2d 655, 657 (9th Cir. 1964), cert. denied, 380 U.S. 788 (1965).
128. Sunshine Mining, 823 F.2d at 1295. These elements of a supposedly "fundamentally fair" arbitration process keep resurfacing when the courts are confronted with such problems. The argument is specious on its face. In any one given case the elements for a "fair" hearing, as narrowly defined by the courts, may be in place, but any such fairness can be eviscerated by any number of matters that would not be tolerated in a court of law.
matter of law, inadmissible for sound public policy reasons.\textsuperscript{129} It is not uncommon for the parties who find themselves in arbitration to have engaged in prior mediation efforts wherein the parties may offer to settle the case or otherwise make statements that are contrary to their interests. The California Evidence Code states uncompromisingly as follows:

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantive rights of the party requesting relief.\textsuperscript{130}

Needless to say, in the event an attorney is foolish enough to try and introduce such evidence in a civil trial, in addition to a new trial, judicial sanctions and professional censure would surely follow. This doctrine is so well known that it simply would not occur to trial counsel or corporate counsel to be concerned with it. However, if a party does attempt to mediate a dispute and if there is a significant possibility that the mediation will fail, sending the dispute into arbitration, counsel must be aware that these statements may be admitted and the award may be based on such statements. This possibility exists because the formal rules of evidence do not apply, and the arbitrator may admit those statements.\textsuperscript{131}

In theory, arbitration has the same exclusionary rule with regard to mediation statements as do civil actions. The California Code of Civil Procedure provides that in international arbitrations the confidentiality of conciliation statements is supposedly assured: "Evidence of anything said or of any admission made in the course of the conciliation is not admissible in evidence."\textsuperscript{132} The Code goes on to state: "In the event that [anything] is offered in contravention of this section, the arbitration tribunal or the court shall make any order which it considers to be appropriate . . . including, without limitation,

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\textsuperscript{129} CAL. EVID. CODE § 1128 (Supp. 2004).
\textsuperscript{130} Id.
\textsuperscript{131} Sapp v. Barenfeld, 212 P.2d 233, 238 (Cal. 1949). In one arbitration the author participated in, opposing counsel attempted to introduce a mediator's written report that was prejudicial to the author's client under circumstances that clearly indicated that opposing counsel was fully aware he was violating California Code of Civil Procedure Section 1297.371. Although the arbitrators did not accept the mediator's report into evidence, they refused to impose any sanctions on opposing counsel. Nevertheless, the damage was done and there was no remedy.
\textsuperscript{132} § 1297.371 (2003).
\end{flushright}
orders restricting the introduction of evidence, or dismissing the case without prejudice."133

In practice, this statutory rule can be trumped by the doctrine that the arbitrator is the judge of relevant evidence and the rule that the arbitrator may choose to ignore any or all evidence and civil procedural rules.134 However, because there is no judicial review for errors of law, the arbitrators can ignore this statute and accept statements and documents made in mediation as evidence with impunity. There are no California or New York cases directly on point, but a case from Oklahoma is instructive.135 In Bowles, the attorney for plaintiff "deliberately, intentionally, affirmatively and repeatedly" introduced evidence regarding offers of settlement and argued that all such offers constituted an admission of liability.136 The arbitrators then gave the plaintiff an award higher than the defendant offered in the mediation.137 Upon motion to set the award aside based on the violation of a statute explicitly prohibiting such conduct, the District Court expressed its dismay at the attorney's unprofessional conduct, as did the Court of Appeals, but the award was nonetheless ultimately upheld.138

The Court of Appeals stated that "[a]rbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system."139 The Court went on to note that "[o]ne choosing arbitration should not expect the full panoply of procedural and substantive protection offered by a court of law."140 The Court reluctantly justified letting the award stand, stating that "[t]he rules of arbitration agreed to by the parties do not explicitly condemn the communication of settlement offers to the arbitrators."141 This was expanded upon in a footnote where the Court stated as follows:

Within the procedural rules of arbitration, Bowles's counsel was not bound by the condemnation of disclosure of settlement offers found in the judicial rules of evidence. Had Bowles's counsel done so before a court of law what he did before the

133. Id.
134. Sapp, 212 P.2d at 239.
136. Id. at 1010. There is no indication in the reporter that defendant's attorney objected, but based on the fact that the court's acceptance into evidence of the mediation statements was the gravamen of the appeal, an objection must have been lodged. See id. at 1010–11.
137. Id. at 1011.
138. Id. at 1011, 1013–14.
139. Id. at 1011.
140. Id.
141. Id. at 1013.
arbitrators, significant sanctions would have been imposed and a mistrial ordered. But however well-established may be the judicial rules of evidence, they legitimately did not apply to this arbitration.142

The Court went on to conclude that where the hearing was "fundamentally fair," that is if there was notice, an opportunity to be heard, and an unbiased decision maker,143 the clearly improper references to the mediation were not sufficient to vacate the award.144

To summarize, counsel must bear in mind and communicate to their clients that in arbitration the opposing party may be able to submit evidence of a prior mediation or other settlement efforts that they could never do in litigation. Based on the doctrine that the arbitrator, and not the evidence code, will determine the admissibility of such evidence, it is most likely that California and New York, as well as the federal courts, will follow Bowles and allow the arbitrator to let such evidence in. This possibility alone may be an intolerable risk.

5. Improperly Excluded Evidence

Neither the original Japanese Arbitration Code nor the 2003 Act contain provisions for the occurrence of improperly excluded evidence. Thus, if Japanese arbitrators exclude relevant evidence, there is no remedy. The 2003 Act sets forth the grounds upon which an award may be vacated, and there is nothing in this section regarding the arbitrator's refusal to accept relevant evidence.145 The only possible provision under Japanese law that might apply is one stating that the parties "shall be given a full opportunity to explain their case during the arbitral proceedings."146 Even so, if the arbitrators or the courts refuse to assist in the production of evidence as described above under section 35 of the Commercial Arbitration Rules, which results in a deprivation of a party's right to fully present their case under section 25 of the 2003 Act, there is no statutory remedy and, therefore, no judicial review. The omission in the

142. Id. at 1012 n.1. This conclusion cannot stand any degree of scrutiny. The fact that the arbitration statutes do not "explicitly" preclude such egregious misbehavior is no excuse for a judicial sanction in arbitration, however reluctantly, of conduct that is in fact "explicitly" prohibited by statute and is fatally prejudicial in civil litigation.

143. Sunshine Mining Co. v. United Steelworkers of Am., 823 F.2d 1289, 1295 (9th Cir. 1987).

144. Bowles, 22 F.3d at 1012. Note also that the Oklahoma statute on this issue is similar to that of California. OKLA. STAT. 12 § 1824(6) (2003) ("No admission, representation, statement or other confidential communication . . . shall be admissible."). And, such statements or representations are not subject to discovery. Id.

145. 2003 Japan Arbitration Act, supra note 19, ch. V, art. 25(2).

146. See id. ch. VII, art. 44.
Japanese statute to include the refusal of the arbitrators to accept evidence is remarkable.

In contrast, in the United States, the rule that the arbitrator’s refusal to hear relevant evidence will be grounds to vacate the award is firmly established. In the event the arbitrator refuses to postpone a hearing to enable a party to acquire evidence, this too will be valid grounds to vacate an award. In Robbins, the plaintiff claimed that PaineWebber violated security regulations by unauthorized trading of options, excessive trading, and “churning” certain stock to inflate the price. The arbitrator refused to accept critical evidence as to these issues. The Court held that when this occurs, judicial review will be proper, but will be “severely limited” because of the public interest in preserving the “efficiency of the arbitration process.” Citing Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., the Court held that it can “vacate an arbitrator’s award . . . only if the arbitrator’s refusal to hear pertinent and material evidence prejudices the rights of the parties and denies them a fair hearing.”

The arbitrator’s power to control the presentation of evidence can include the arbitrator’s refusal to hear witnesses. In Harvey Aluminum v. United Steelworkers of America, an employee was discharged on the allegation that he had damaged company property during a strike. The arbitrator refused to accept the testimony of an exculpatory rebuttal witness because, in his opinion, the rebuttal witness should have been a direct witness. The reviewing court upheld the arbitrator’s decision based on the principle that the arbitrator is the sole judge of the relevance of the proffered facts and

149. Robbins, 954 F.2d. at 681.
150. Id. at 683.
151. Id. at 682.
152. Id. This conclusory declaration is a common one: that the speed and efficiency of the arbitration is deemed to be of a higher societal value than that of a just resolution of the dispute. This is an inherently flawed and irresponsible concept. For arbitration to be credible, it must aspire to render justice, not merely provide a cheap resolution of the dispute. Indeed, Ishida points out that the current Japanese reluctance to embrace arbitration is because arbitration is not seen to be as reliable as litigation. See Ishida, supra note 19, at 4–5. The credibility of arbitration in Japan, as well as in the United States, must rest on its ability to render justice, not justice subverted by concerns of speed and economy.
153. 903 F.2d 1410, 1412, n.2 (11th Cir. 1990).
154. Robbins, 954 F.2d at 685.
156. Id. at 489.
157. Id. at 490.
that "conformity to legal rules of evidence shall not be necessary."158 However, the ruling of the arbitrator had the effect of precluding critical evidence and was deemed to violate California Code of Civil Procedure 1286.2 and the Federal Arbitration Act, 9 U.S.C. § 10(c).159

The practical effect of the arbitral rules allowing a much broader spectrum of evidence than is admissible in civil cases is often to ultimately cause more problems than it solves. Unless the parties stipulate in the clearest possible language in the arbitration agreement that the civil rules of evidence will apply, there is no assurance that these difficulties can be avoided. Even then, counsel and the parties should be aware that the stipulation will not guarantee that the arbitrator will abide by the provisions of the arbitration contract. If the arbitrator makes a "mistake" in allowing in evidence not available under the rules of evidence or in excluding ordinarily admissible evidence, those mistakes will not be subject to judicial review, nor will they be a basis to vacate the award.

C. Limited Judicial Review of the Award or Arbitral Process

1. Mistakes of Law and Fact

One of the most contentious areas of American arbitration law is where the arbitrator makes gross errors of either law or fact and the prejudiced party seeks to set the award aside. If such an error occurs, there is generally no appeal or remedy, regardless of how severe the prejudice.160 Likewise, the Japanese 2003 Arbitration Amendments contain no provisions for the vacation of the award when mistakes of law or fact occur.161

American case law is unanimous that arbitrators' mistakes of law or fact are not reviewable.162 The reasons are simple: the arbitration statutes and rules provide specific grounds upon which the award may be vacated and errors of law or fact are not amongst any of them.163 The absence of such a provision is deemed to imply, even in the absence of specific language, that the state legislatures and Congress intended to exclude judicial review of the arbitration award for errors

158. Id. at 491.
159. Id. at 493–95.
161. See 2003 Japan Arbitration Act, supra note 19, ch. VII, art. 44.
162. As described infra, the limited exceptions are the "manifest disregard of law" doctrine under the Federal Arbitration Act and those federal circuits that recognize a contractual stipulation for judicial review. 9 U.S.C. § 10 (1993).
of law or fact. In Refino v. Feuer Transportation, Inc., the Court concluded that there can be no review for errors of fact or errors of law because, under 9 U.S.C. § 10, "[t]hese grounds [to vacate the award] do not include mistakes of fact, errors of law, inadequate reasoning or even arbitrary determinations." In the 1895 case of Patton v. Gannett, the Court succinctly summed up the law and rationale that is still in effect today as follows:

If an arbitrator makes a mistake either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the court has no power to revise the decisions of "judges who are of the parties' own choosing."

Case law in California is in complete accord. As recently as 2002, in Oakland-Alameda County Coliseum Authority v. CC Partners, the Court held that a reviewing court will never review the sufficiency of the evidence, whether the arbitrator made any errors of fact, or whether the arbitrator made any errors of law. Regardless of the prejudice to the party caused by the arbitrator's error of law or fact, even if the error is on the face of the award, courts will not review the award under any other basis than is provided for in the California Code of Civil Procedure.

The benchmark California case on this issue is Moncharsh v. Heily and Blase, where an associate attorney left his law firm and took several clients with him. According to Moncharsh's employment contract, should such an event occur, the law firm would be entitled to 80 percent of the client's fees. Moncharsh attempted to get the 80/20 fee structure declared invalid in arbitration and lost. However, the arbitrator did exclude one client from the 80/20 fee formula who had only recently retained the firm and had gone with Moncharsh. Moncharsh appealed under California Code of Civil Procedure § 1286.2 claiming that the arbitrator erred in his interpretation of the employment contract. Moncharsh's argument

165. Id. at 565.
166. 21 S.E. 679 (N.C. 1895).
167. Id. at 682.
169. See id. at 370.
172. Id. at 901.
173. Id.
174. Id.
175. Id. at 901-02.
176. Id. at 902.
was that the split fee agreement was contrary to public policy and, moreover, that the agreement was contrary to the State Bar Rules and case law.\textsuperscript{177} The Court held that there was no relief for a mistake or misreading of the plain words of the contract, stating as follows:

In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable for two reasons. First, by voluntarily submitting to arbitration, the parties have agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute.\textsuperscript{178}

The Court went on to justify this rule in language that is not quite convincing:

[T]he Legislature has reduced the risk to the parties of such a decision by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process. . . . In light of these statutory provisions, the residual risk to the parties of an arbitrator's erroneous decision represents an acceptable cost—obtaining the expedience and financial savings that the arbitration process provides—as compared to the judicial process.\textsuperscript{179}

The underlying assumption in Moncharsh and similar cases denying judicial review of errors of law under the Federal Arbitration Act is that the various arbitration statutes do not specifically provide for any such judicial review. Thus, courts reason, state legislatures and Congress intended, by implication, to exclude judicial review for errors of law or fact under any circumstances. The Moncharsh Court cited the findings of a special commission constituted to study proposed legislative revisions to the arbitration statute\textsuperscript{180} stating:

(2) Merits of an arbitration award either on questions of fact or of law may not be reviewed except as provided in the statute in the absence of some limiting clause in the arbitration agreement.

(5) Statutory provisions for a review of arbitration proceedings are for the sole purpose of preventing misuse of the proceedings where corruption, fraud, misconduct, gross error or mistake has

\begin{footnotes}
\item[177] Id. at 901 (citing Fracasse v. Brent, 494 P.2d. 9 (Cal. 1972)).
\item[178] Moncharsh, 832 P.2d at 904.
\item[179] Id. at 905.
\end{footnotes}
been carried into the award to the substantial prejudice of a party to the [arbitration] proceedings.\textsuperscript{181}

Consequently, as the 1961 revision of the California arbitration statute did not include any express provisions allowing courts to vacate an award based on errors of law or fact, the Court held that such a remedy was unavailable by implication.\textsuperscript{182} The better reasoned dissent in \textit{Moncharsh} notes that there is no indication in the California statute or the legislative history that judicial review for errors of law or fact was precluded.\textsuperscript{183} The dissent’s reasoning is in conformance with

\textsuperscript{181} \textit{Moncharsh}, 832 P.2d at 913 (footnote and emphasis omitted).

\textsuperscript{182} \textit{See id.} at 914–16.

\textsuperscript{183} \textit{See id.} at 920 (Kennard, J., dissenting). Judge Kennard, although agreeing with the conclusion of the majority opinion, vehemently disagreed with the reasons, writing:

I cannot join the majority opinion. I will not agree to a decision inflicting on this state’s trial courts a duty to promote injustice by confirming arbitration awards they know to be manifestly wrong and substantially unjust. Nor can I accept the proposition, necessarily implied although never directly stated in the majority opinion, that the general policy in favor of arbitration is more important than the judiciary’s solemn obligation to do justice . . . . Worst of all, the majority has forsaken the goal that has defined and legitimized the judiciary’s role in society—to strive always for justice.

\textit{Id.} Judge Kennard rejected the idea that the agreement to arbitrate included an agreement to abide by “an award that on its face is manifestly erroneous and results in substantial injustice. . . . [This] conclusion defies both logic and experience. Reasonable contracting parties would never assume a risk that is so unnecessary and self-destructive.” \textit{Id.}

Judge Kennard indicates that in pre-code common law arbitration the arbitrators were not obliged to follow the law, but if they did, or were to do so under the arbitration agreement the court would review for errors of law and vacate the award. \textit{Id.} at 921 (citing Muldrow v. Norris, 2 Cal. 74 (1852)).

The judge then reviewed the benchmark case \textit{Crofoot v. Blair Holdings Corp.}, 260 P.2d 156 (Cal. Ct. App. 1953), which held that the statutory scheme was exclusive. The \textit{Crofoot} Court held that, “Under the law as it presently exists there is no field for a common law arbitration to operate where the agreement to arbitrate is in writing.” 260 P.2d at 169. The \textit{Crofoot} Court went on to hold:

The effectiveness, operation and enforcement of a common law arbitration differ in almost every respect from a statutory arbitration. We conclude that by the adoption of the 1927 statute, the Legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate, and that in such cases the doctrines applicable to a common law arbitration were abolished. . . . Under these cases [as cited above] it must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided by statute.

\textit{260 P.2d} at 169, 172.

The \textit{Crofoot} Court does not explain how, outside of the statute, it found that the common law rule was expressly expunged. Judge Kennard notes that there is no reference in \textit{Crofoot} to the accepted common law judicial review for legal error under \textit{Muldrow}, and he notes that the statute does not indicate it is exclusive. \textit{See Moncharsh}, 832 P.2d at 922. Finally, the judge refers to the 1960 Commission that stated, “Nothing in the California statute defines the permissible scope of review by the courts. . . . And no good reason exists to codify into the California statute the case law as it presently exists.” \textit{Id.} at 923. Judge Kennard best summarized his position when he stated as follows:
the fundamental common law doctrines that statutes are to be strictly construed according to the express language of the statute and that implied statutory rules are disfavored in interpretation. 184

The harsh rule that errors of law or fact may never be reviewed by the courts certainly cannot withstand critical scrutiny as this rule often results in substantial injustice. The Federal and New York courts have recognized this failure in particularly serious cases. Where the arbitrators have egregiously ignored the law or facts the courts have the obligation to step in and set the award aside. 185

a. The Limits of the Federal "Manifest Disregard of Law or Fact" Doctrine

The federal courts, despite consistently holding that the only grounds for vacation of an award were solely within the statute, recognize that justice cannot be served and confidence in the arbitration system cannot be maintained if the arbitrators exercise their imperium in ways that are legally and socially unacceptable. Thus, in an attempt to place at least some limits on arbitrators, courts created the "manifest disregard of law or fact" doctrine, which, incidentally, has no statutory basis in either Federal or New York law. 186

Where the arbitrators render an award that is "completely irrational" the arbitrators will be deemed to have exceeded their powers and the award will be vacated. 187 Simple error of interpreting the law, no matter how bad, however, will not be grounds to vacate the award. 188 Under this concept, even if the parties present a correct interpretation or statement of the law and the arbitrators determine, in gross error, that the legally correct interpretation or statement is not accurate or applicable, that mistake will not be sufficient grounds for the court to vacate the award.

Because the relevant statute, Code of Civil Procedure section 1286.2, does not say in so many words that an arbitration award may be challenged for obvious error causing substantial injustice, the majority concludes that a court may not vacate an award on this ground. But this conclusion is wrong. Our statute does not, by negative implication or otherwise, mandate injustice.

Id. at 922.
184. Id. at 920.
185. This raises the interesting philosophical question as to just how much error may be tolerated before the courts will intervene.
The manifest disregard of law doctrine originated in obscure dicta in Wilko v. Swan,189 which raised the issue of whether a claim under the Securities Act of 1933 could be arbitrated. The Wilko Court held that the claim could not be arbitrated.190 The Court began by noting that the Securities Act mandated certain judicial and legal standards in litigating this statutory claim, and went on to hold that the "burden of proof" and the determination of "reasonable care" and "material fact(s)" under these claims were more stringent than those standards in arbitration proceedings.191 Because there was no requirement for a record in arbitrations, there was no possible way for reviewing courts to determine whether the arbitrators complied with the statutory requirements or whether the lower arbitration standards were applied.192 Recognizing that a court could not vacate the award outside of the Federal Arbitration Act provisions in 9 U.S.C. § 10, the Court stated: "In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."193

If Wilko is read in its entirety, it is readily apparent that the Court's dicta relies on a non sequitur argument: there was no claim before the Court that the arbitrators had manifestly disregarded the law in any way. Essentially, the Court was speculating that courts could review an arbitration proceeding if such a claim was made. The Wilko Court did not cite any authority for this observation, and, indeed, it may have been a simple judicial slip of the pen. Case law indicates that reviewing courts, while acknowledging the existence of the Wilko dicta, steadfastly refused to vacate any awards on this reasoning for many years.194

The standard under the manifest disregard of the law doctrine is very high. The award must be truly irrational. This requirement is set out in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,195 involving a securities Rule 10(b)(4) controversy, as follows:

Manifest disregard of the law by arbitrators is a judicially-created ground for vacating their arbitration award... Although the bounds of this ground have never been defined, it

190. Id. at 438.
191. Id. at 436.
192. Id. at 346–47.
193. Id.
195. 808 F.2d 930 (2d Cir. 1986).
clearly means more than error or misunderstanding with respect to the law . . . . The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore it or pay no attention to it . . . . To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method for settling disputes when agreed to by the parties . . . . Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. [T]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.  

Courts are very reluctant to find that even a gross misinterpretation of applicable law or the application of inapplicable law will rise to this level. In O.R. Securities, Inc. v. Professional Planning Ass'n, 197 the Court held that the error must be so egregious that the average arbitrator would instantly perceive it, and that the arbitrator was actually aware of the legal standard but ignored it anyway. 198 Moreover, the movant may not simply rely on the outcome of the arbitration, as "there must be some showing in the record, other than the results obtained, that the arbitrator knew the law and expressly disregarded it." 199 However, in egregious cases the mere record of the proceedings may suffice. For example, in Wallace v. Buttar 200 the plaintiff sought to hold the supervisors of a stockbroker who had defrauded the plaintiff liable under the "control doctrine" provided for in 15 U.S.C. § 78(t)(a). 201 In order to apply this provision, the statute required that the supervisors must have known of the fraud and personally intended to defraud the plaintiff. 202 There was nothing

196. Id. at 933-34.
197. 857 F.2d 742 (11th Cir. 1988).
198. Id. at 747. See also Flexible Mfg. Sys. Prop., Ltd. v. Super Prod., Corp., 86 F.3d 96 (7th Cir. 1996); Robbins v. Day, 954 F.2d 679, 685 (court will "vacate . . . only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties and denies them a fair hearing").
199. O.R. Sec., Inc. v. Prof'l Planning Ass'n, 857 F.2d 742, 747 (11th Cir. 1988). See also Sheldon v. Vermonty, 269 F.3d 1202 (10th Cir. 2001).
201. Id. at 391.
202. Id.
in the record to that effect and the award as to the supervisor’s liability was vacated.203

It is important for counsel with clients contemplating an arbitration agreement with foreign parties to realize that in conjunction with federal common law under the Federal Arbitration Act, New York recognizes, at least in principle, the manifest disregard of the law doctrine.204 In contrast, there are no California cases that recognize this doctrine. Given the emphatic position of the Moncharsh Court that the only grounds for vacation of an award are those expressly set forth in the arbitration statute, it is highly unlikely that California will adopt the manifest disregard of law doctrine in the future.

The main problem with applying the manifest mistake of law doctrine is that without a documented record (which arbitrators are under no obligation to produce), reviewing courts will be compelled by default to uphold the award regardless of an incomprehensible result.205 Moreover, even when the arbitrators do provide a record, but that record is insufficient to fully explain the thinking or reasoning of the arbitrators, courts generally will not compel the arbitrators to fully explain the decision in the interests of speed and efficiency. For example, in Sargent v. Paine Webber Jackson & Curtis, Inc.,206 the Court held that under the Federal Arbitration Act a reviewing court does not have the authority to remand the case to the arbitrators for a detailed explanation of the damages accounting.207 The Court went on to state, unconvincingly, as follows:

More generally, it is simply not true that insistence on an explanation of the decisionmaker’s thought process is an automatic requirement of “effective judicial review.” In the context of arbitration, where there is no statutory requirement that the panel state its reasons, and (as here) none imposed by the institution under whose auspices the arbitration occurred, it would seem to turn on a balance between the interest in rooting out possible error and the interest in assuring that judgment be swift and economical. We agree with the Second Circuit [Sobel v. Hertz, Warner & Co., 469 F.2d 1211, (2d Cir. 1972)] that the latter must generally prevail. As the record here fails to indicate

203. Id. at 394.
205. O.R. Sec., 857 F.2d at 747.
206. 882 F.2d 529 (D.C. Cir. 1989).
207. Id. at 531.
the probability of "manifest disregard" of the law, there is no basis to insist on an explanation.\textsuperscript{208}

2. The Narrow Public Policy Defense to Enforcement of the Award Exception

Of particular interest to those dealing with transnational contracts is the relationship of the manifest disregard of law doctrine in federal common law and the provision in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards\textsuperscript{209} that states:

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 . . . . (b) [t]he recognition or enforcement of the award would be contrary to the public policy of that country.\textsuperscript{210}

In the event that the arbitrators' disregard of the law rises to the level of a breach of this public policy exception to recognition and enforcement of a foreign arbitral award, recognition of the award may be denied.\textsuperscript{211} This rule is severely restricted, and as set forth in Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), this defense will be only be viable in the following context:

We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.\textsuperscript{212}

Clearly, for this defense to be effective the arbitrators must make more than a legal or factual error. In Revere Copper and Brass Inc. v. Overseas Private Investment Corp.,\textsuperscript{213} the Jamaican government

\textsuperscript{208} Id. at 533.

\textsuperscript{209} Both the United States and Japan are signatories to this Convention. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp (last visited Mar. 7, 2004). The United Nations maintains a list of all participant nations including dates of treaty ratification, accession, and succession. Id.


\textsuperscript{211} Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

\textsuperscript{212} Id. The court refused to re-examine the facts or law, stating that this was "a role which we have emphatically declined to assume in the past and reject once again." Id. at 977.

\textsuperscript{213} 628 F.2d 81, 83 (D.C. Cir. 1980), cert. denied, 446 U.S. 783 (1980).
confiscated plaintiff's property worth, according to the plaintiff, $64 million, for which the arbitrators awarded only $1 million. Revere claimed the arbitrators violated the rule of *contra proferentem*, requiring that ambiguities in a contract must be construed against the drafter. As a matter of contract law Revere was correct, but the reviewing court concluded: "[The public policy defense] is not available for every party who manages to find some generally accepted principle which is transgressed by the award. Rather, the award must be so misconceived that it compels the violation of law or conduct contrary to accepted public policy." 

A good example of a successful use of the public policy defense to the enforcement of the arbitrators' award was noted in dicta in *Interinsurance Exchange of Automobile Club v. Bailes.* In Bailes, the Court observed that the award cannot give legal life to a void contract, as "there is a vast difference between the enforcement of a void contract and the mere misunderstanding or misapplication of rules of law . . . ."

### III. CONTRACTUAL EXPANSION OF JUDICIAL REVIEW

As described above, the procedural safeguards provided for in civil litigation by statute and common law, intended to assure that a dispute will be fully and fairly resolved, are not present in arbitration. Arbitrators may admit hearsay and other legally inadmissible evidence, hear testimony from witnesses that are not subject to cross examination, communicate with third parties ex parte, and restrict the ability of the parties to conduct discovery. Moreover, the arbitrators may make findings of fact that are not in harmony with the evidence and may grossly misinterpret or misapply the law; exercising their *imperium* power by ignoring the law and applying their own sense of justice. With the exception of the rare cases falling into the federal and New York manifest disregard of law doctrine, judicial review of arbitration is not possible.

The rationales espoused by the courts justifying this state of affairs—that the parties have assumed the risk that the arbitrators might err in evaluating the facts or misinterpret the law, or even make

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214. *Id.* at 82.
215. *Id.* at 82–83.
216. *Id.* at 83. Under the Federal Arbitration Act, the mere misapplication of the law is not grounds to set aside the award. *Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d. 805 (2d Cir. 1960). "[T]he misapplication . . . of such rules of contract interpretation does not rise to the stature of a "manifest disregard" of law." *Id.* at 808.
218. *Id.* at 538.
new law based on their own sense of justice—defy simple logic under analysis. To the contrary, the parties should have the right to assume that the arbitrators will take great care to properly evaluate the facts, and that the arbitrators will assiduously apply the correct law. The parties certainly should not be expected to assume that arbitrators might act as a rogue legislature and ignore facts.

Obviously, it is the duty of the arbitrators to apply the law stipulated in the agreement for the simple reason that during the negotiation, performance and execution of the contract the parties have (ideally) regulated their actions to comply with the dictates and principles of that law. When arbitrators misinterpret the law the parties are operating under, or make new law, it is impossible for the parties to know how they should have acted during the contractual relationship, and it destroys the predictability of the law, which is an indispensable foundation of all legitimate legal systems. From this viewpoint, the lack of the courts’ ability to review the arbitrators’ compliance with the law, as restricted by either statute or case law, is one of the most serious problems with the current arbitration system.

Likewise, it is just as obvious that arbitrators should have the duty to learn all of the facts of the case. A review of the California, New York and Federal appellate cases suggests that arbitrators’ mistakes of fact, although potentially serious, do not appear to be litigated as often as mistakes of law. The parties and their counsel are generally aware that discovery will be limited in arbitration, but they might not be aware of the mischief the loose rules of evidence and the arbitrators’ unfettered power to determine the relevant evidence may cause. As noted above, the arbitrators can, and will, accept evidence that no judicial court would accept, and the arbitrator may ignore the facts in making his award. This power, the power to ignore the facts of a case, was beyond even the imperium power of the Roman Prætors. Federal and New York law provides that if the arbitrator makes an award that is “completely irrational,” the award may be vacated, but without a documented record of the evidence and testimony this may be an impossibly high burden to meet.

220. This does not mean that mistakes of fact are not in reality a problem. Because of the lack of a comprehensive discovery scheme in U.S. and Japanese arbitration, critical facts upon which the determination of a case might turn may not be discovered, much less placed before the arbitrator.
221. See supra note 12.
Consequently, parties operating in the United States have attempted to include language in the arbitration agreement that provides for judicial review for errors of law or fact in the award. The following sections describe how contractual stipulations have received a mixed reception in the courts, and why counsel contemplating such a provision should be aware of which jurisdictions will recognize and enforce such provisions and which will not. There are no cases in Japan where the courts have decided whether to recognize and enforce such stipulations. Under California state law, the courts will not enforce a contract stipulation for judicial review of either law or fact. New York case law on this issue is absent, but would most likely follow California for the reasons explained below. In contrast, the federal courts dealing with arbitrations under the Federal Arbitration Act, which includes jurisdiction over transnational contracts, are split. The Ninth Circuit (including California), the Second Circuit (including New York), and the Fourth and Fifth Circuits will recognize contractual expansion of judicial review, whereas the Seventh, Eighth and Tenth Circuits will not.

A. California Case Law

Arbitration case law in California has an internal inconsistency that is never reconciled by the courts. There is general agreement that arbitration is a creature of contract and that the parties have the power to choose whatever specific arbitration process they desire. In *Ramirez v. Superior Court*, the Court held that "a proceeding to compel arbitration is in essence a suit in equity to compel specific performance of a contract."224

It would appear that under *Ramirez* contractual provisions for judicial review ought to be enforceable.225 Recently, however, California courts have taken a radically different approach that rigorously precludes the possibility of contractual judicial review and exhibits an unseemly willingness to re-write contracts regardless of the intent of the parties. For example, in *Crowell v. Downey Community Hospital Foundation*,226 an emergency room doctor sought a declaratory order compelling the hospital, with which he had an employment contract, to arbitrate under the terms of the agreement which included the following language:

223. Platt Pacific, Inc. v. Andelson, 862 P.2d 158, 161 (Cal. 1993) ("Private arbitration is a matter of agreement between the parties and is governed by contract law.").
225. *Cf. id.*
[U]pon the petition of any party to the arbitration, a court shall have the authority to review the transcript of the arbitration proceedings and the arbitrator’s award and shall have the authority to vacate the arbitrator’s award, in whole or in part, on the basis that the award is not supported by substantial evidence or is based upon an error of law.227

The Crowell Court held that the arbitration agreement had to be construed in its entirety, including the arbitration clause provisions, stating:

The provision for judicial review of the merits of the arbitration award was so central to the arbitration agreement that it could not be severed. To do so would be to create an entirely new agreement to which neither party agreed. . . . Without that provision, a different arbitration process results.228

However, instead of meeting the contractual expectations of the parties, the Court held that they could not as a matter of law contract for the expansion of judicial review, and struck the entire arbitration contract.229 “Expanding the availability of judicial review of such decisions ‘would tend to deprive the parties to the arbitration agreement of the very advantages the process is intended to produce.”230 The Court cited Crofoot v. Blair Holdings Corp.231 as authority for the proposition that the statute does not allow any other basis for judicial review,232 and went on to cite Old Republic Insurance Co. v. St. Paul Fire and Marine Insurance Co.233 as authority that courts do not have jurisdiction as to contractual judicial review.234 As noted above, the Crofoot Court’s conclusion that the statute enumerated the exclusive grounds for judicial review is specious at best.235

The Court’s reliance on Old Republic was misplaced, as the facts of that case were not on point. In Old Republic, the arbitration contract called for the Court of Appeals to review the arbitrator’s actions, skipping over the trial court.236 The Court of Appeals held

227. Id. at 812.
228. Id. at 817.
229. Id.
230. Id. at 814 (quoting Moncharsh, 832 P.2d at 903). However, Moncharsh had no such contractual expansion of judicial review. See id. at 919.
232. Crofoot, 115 Cal. Rptr. 2d at 815.
234. Crofoot, 115 Cal. Rptr. 2d at 817.
235. See supra note 183 for related discussion.
236. Old Republic, 53 Cal. Rptr. 2d at 54.
that it only had jurisdiction to hear cases appealed from the trial court and could not hear cases as a court of first instance.\textsuperscript{237}

The dissent by Judge Nott in \textit{Crowell} is more in harmony with the principles that statutes should be strictly construed so that private parties may contract at will.\textsuperscript{238} He noted that, pursuant to California Code of Civil Procedure § 1281, an arbitration contract is as enforceable as any other contract.\textsuperscript{239} Further, he observed, "[N]either do [the statutes] state that the statutory grounds are exclusive or that parties cannot agree to additional grounds."\textsuperscript{240} In conclusion, with regard to California Code of Civil Procedure § 1286, Judge Nott noted that "there is nothing in sections 1286.2 and 1286.6 or the Act which prohibits the parties from agreeing to an expanded form of judicial review."\textsuperscript{241}

In a subsequent case, a different California Court of Appeals upheld the principle that an arbitration contract must be construed as a whole, but also held that the Code of Civil Procedure would not permit any judicial review except as expressly provided in the statute.\textsuperscript{242} In \textit{Oakland-Alameda}, a dispute arose over how much a professional basketball team was to pay for the use of a sports facility.\textsuperscript{243} The arbitration agreement included a provision stating that the questions of law would be subject to judicial review.\textsuperscript{244}

Citing \textit{Crowell}, CC Partners sought to strike the entire arbitration clause.\textsuperscript{245} In the main body of the contract, unlike the contract in \textit{Crowell}, the parties included a severance clause that provided that in the event any part of the contract was declared invalid, the remainder would not be affected.\textsuperscript{246} Consequently, the Court severed the judicial review clause.\textsuperscript{247} Under the Court's reasoning, to effectuate the contractual intentions and expectations of the parties, the Court had no choice but to sever just the judicial

\begin{itemize}
\item \textsuperscript{237} \textit{Id.}
\item \textsuperscript{238} \textit{Crowell}, 115 Cal. Rptr. 2d at 818 (Nott, J., dissenting).
\item \textsuperscript{239} \textit{See id.} at 819.
\item \textsuperscript{240} \textit{Id.}
\item \textsuperscript{241} \textit{Id.} at 826. Judge Nott hints that this type of judicial oversight of the growing arbitration industry is necessary because of the natural inclination of the arbitrators to favor those parties (such as insurance companies) that will give the arbitrators more business in the future. \textit{See id.} at 827. For those representing foreign parties, parties who will not be a source of future business for the arbitrators, this admittedly uncomfortable point should be kept in mind.
\item \textsuperscript{242} \textit{Oakland-Alameda County Coliseum Auth. v. CC Partners}, 124 Cal. Rptr. 2d 363, 370 (Cal. Ct. App. 2002).
\item \textsuperscript{243} \textit{Id.} at 366–67.
\item \textsuperscript{244} \textit{Id.} at 370.
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.} at 371.
\item \textsuperscript{247} \textit{Id.} at 372.
\end{itemize}
review clause and not strike the entire arbitration agreement as in Crowell.\textsuperscript{248} Although the result in Oakland-Alameda appears to be consistent with Crowell on the surface, it is highly questionable that the parties actually intended to forgo a critical element of the arbitration procedure.

\textit{B. New York Law is Likely to Follow California's Prohibition}

As mentioned above, New York does not appear to have case law addressing the contractual expansion of judicial review in arbitration issue. However, it is relatively easy to predict that New York will reach the same conclusion as did California and disallow the contractual expansion of judicial review. The New York arbitration statute, Civil Practice Law and Rules ("C.P.L.R.") § 7511, identifies the usual basis for the vacation or modification of arbitration awards: the occurrence of "corruption, fraud or misconduct,"\textsuperscript{249} if the arbitrator was biased,\textsuperscript{250} or if the hearings were "so imperfectly executed [that] a final and definite award was not made."\textsuperscript{251} No other grounds are mentioned.

Generally, as in California, New York courts are reluctant to disturb the arbitration process, fearing that the "value" of the process will decline.\textsuperscript{252} As is usual, the arbitrator is not required to exclude hearsay, is not bound by the rules of evidence, and is not bound by substantive law unless required in the arbitration contract.\textsuperscript{253} Even so, if he misconstrues the applicable law, or misreads the contract, there is no appeal.\textsuperscript{254} In \textit{In re Arbitration of Gleason v. Michael Vee Ltd.},\textsuperscript{255} the Court held: "It is well settled that judicial review of an arbitrator's award is severely limited and may not be vacated unless it is violative of a strong public policy, is totally irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator."\textsuperscript{256}

\textsuperscript{248} \textit{Id.} The court explained: "[W]e would be ignoring the parties' intent that the remainder of their agreement 'shall not be affected' by the invalidity of any particular provision."


\textsuperscript{250} \textit{Id.} § 7511(b)(1)(ii).

\textsuperscript{251} \textit{Id.} § 7511(b)(1)(iii).

\textsuperscript{252} \textit{In re Goldfinger v. Lisker}, 500 N.E.2d 857, 859 (N.Y. 1986).

\textsuperscript{253} Silverman v. Benmor Coats, Inc., 461 N.E.2d 1261, 1266 (N.Y. 1984) (holding that "[the arbitrator] may do justice as he sees fit, applying his own sense of law and equity to the facts as he finds them").

\textsuperscript{254} \textit{Id.}


\textsuperscript{256} \textit{Id.} (citing \textit{In re New York State Dep't of Tax and Fin.}, 661 N.Y.S.2d 301, 302 (N.Y. App. Div. 1997)). The facts of this case are illustrative of the extent of an arbitrator's power to form an award that is very unconventional. Here, a Tax Compliance Agent for the State of New York was suspended due to allegations of nine counts of misconduct involving false filings and
The New York cases on the exclusivity of the grounds upon which judicial review may be based are short and contain very little explanatory material beyond the conclusory holding in *Reale v. Healy New York Corp.*, 257 where the Court stated that "the grounds enumerated... [in C.P.L.R. § 7511] for vacation of an award are exclusive." 258 There is no question, however, that the New York case law is very emphatic that the statutory scheme is exclusive. 259 As in the California statute, there is no express language in the New York statute to the effect that the statutory grounds are exclusive. 260

Based on the fact that both New York and California case law hold that the statutory provisions for judicial review are exclusive, together with the expressed reluctance of the judiciary to intervene in the arbitral process, it is reasonable to conclude that New York would likewise find that a contractual expansion of judicial review will not be allowed.

C. Contracting for Judicial Review Under Federal Law

1. Federal Law Under the Federal Arbitration Act

The Federal Arbitration Act contains no provisions for the contractual expansion of judicial review beyond the grounds provided for in the statute itself. 261 Federal case law on the contractual expansion of judicial review is split along interesting lines. On the one hand, the two most influential Circuits, the Second on the East Coast (including New York state) and the Ninth on the West Coast (including California), as well as the Fourth and Fifth Circuits, will recognize and enforce a contractual provision for judicial review. On the other hand, the Seventh, Eighth and Tenth Circuits will not allow contractual provisions for judicial review. There are no Supreme Court cases on point, but given the pervasive influence of the Second

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was in the process of challenging the suspension in arbitration. *Id.* The claimant died before the conclusion of the arbitration. *Id.* The arbitrator determined that he was guilty of eight of the nine allegations and that dismissal was warranted. *Id.* at 302–03. However, despite the finding that he was guilty of eight violations, the arbitrator posthumously reinstated the claimant in order to allow his estate to collect death benefits. *Id.* at 303. The New York Supreme Court refused to find that the posthumous reinstatement of the claimant was improper, indicating that unless the arbitrator's conduct was expressly prohibited it will not be contrary to public policy. *Id.*

258. *Id.* at 691.
and Ninth Circuits it seems likely that their view will ultimately prevail.


The Federal Arbitration Act provides that an arbitration award may be vacated by a federal court on the limited grounds enumerated in the statute, which are similar to those in the various state statutes and arbitration rules. Specifically, the arbitration contract is void because of corruption, fraud, or misconduct of the arbitrator, including bias, refusal to postpone the hearing for good cause, or refusal to hear relevant evidence. There is no provision in the Federal Arbitration Act regarding review for errors of fact or law, and the federal courts have consistently declined to create a general judicial exception, reserving review only under the "manifest error of fact or law" doctrine, as first described in Wilko. Consequently, if the arbitrator's error of fact or law seriously prejudices the interests of a party, but the award does not rise to the "completely irrational" level, any right that party has to judicial review must be found in the arbitration contract itself.

b. Supreme Court Cases on Enforcement of Arbitration Contracts

The split in the Circuits on the contractual expansion of judicial review is based on different interpretations of two Supreme Court cases dealing with the implementation of express contractual provisions in arbitration agreements. Neither of the Supreme Court cases deals directly with the question of the enforceability of a contractual stipulation for judicial review. Rather, both focus on the issue of whether an arbitration agreement is to be enforced in all its particulars. Essentially, the Supreme Court has repeatedly held that arbitration agreements subject to the Federal Arbitration Act are to be enforced according to their terms.

In Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University, the underlying dispute involved several parties, most of whom had not entered into the arbitration agreement. One party that was not obligated to arbitrate the dispute sought to

262. Id. § 10(a).
263. Id. § 10(a)(1), (3).
stay the arbitration proceedings and move forward with the civil litigation claims, as authorized by California Code of Civil Procedure. However, the Federal Arbitration Act has no similar provision for a stay of legal proceedings, and the Supreme Court proceeded to address the issue of whether the California law was preempted by the Federal Arbitration Act. The Supreme Court noted that there is no express preemption clause in the Federal Arbitration Act, but express preemption language is not needed in cases for the following reason:

[W]hen Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Supreme Court found that the California rule that stayed the arbitration until the legal claim is concluded did not hinder the operation or the intent of the Federal Arbitration Act. Addressing the broader issue of the parties' ability to modify the statutory procedural rules of the arbitration in the contract, the Court held that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure enforceability, according to their terms, of private agreements to arbitrate." The Court then stated that such a contract provision will be valid unless it is vitiated under other legal grounds that would invalidate any other type of contract. "Section 2 of the [Federal Arbitration] Act therefore declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"

The Court then held that the Federal Arbitration Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms," and that the Federal Arbitration Act's primary purpose is "ensuring that private

268. Id. at 471.
269. CAL. CODE CIV. PROC. § 1280 (1982).
270. Volt, 489 U.S. at 474–79.
271. Id. at 477 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
272. Id.
273. Id. at 476.
274. Id. at 474.
275. Id.
276. Id. at 478.
agreements are enforced according to their terms. . . . [P]arties are generally free to structure their arbitration agreements as they see fit."277 Finally, the Court noted that "[b]y permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the Federal Arbitration Act."278

The second case cited to with regularity by courts dealing with this issue is Mastrobuono v. Shearson Lehman Hutton, Inc.,279 where the arbitration agreement included a provision that punitive damages could be awarded.280 The arbitration was held under the rules of the National Association of Securities Dealers, Board of Directors of the New York Stock Exchange, applying New York law.281 There was no statutory or case law authority in New York for granting punitive damages in arbitrations,282 yet punitive damages were awarded in conformance with the arbitration provisions of the contract.283 On appeal, the District Court struck the punitive damages on the basis that only the courts, and not arbitrators, could assess punitive damages under New York law.284 The Supreme Court reversed.285

In Mastrobuono, the Court held that the Federal Arbitration Act did preempt state law because the state law would have thwarted the Federal Arbitration Act's policy favoring enforcement of arbitration contracts according to their express terms. Citing Volt, the Court stated as follows:

We have previously held that the Federal Arbitration Act's proarbitration policy does not operate without regard to the wishes of the contracting parties. . . . We think our decisions in Allied-Bruce,286 Southland287 and Perry288 make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule

277. Id. at 479.
278. Id. at 479 (citation omitted).
280. Id. at 53–54.
281. Id. at 54.
282. Id. at 53.
283. Id. at 54.
284. Id.
285. Id. at 55.
of state law would otherwise exclude such claims from arbitration.\textsuperscript{289}

c. The Second, Fifth, and Ninth Circuits’ Recognition of Contractual Judicial Review

The repeated language in \textit{Volt} and \textit{Mastrobuono} holding that the clear intent of Congress was that arbitration agreements are to be enforced in accordance with their terms led the influential Second and Ninth Circuits, as well as the Fourth\textsuperscript{290} and Fifth Circuits, to recognize contractual provisions that expanded judicial review.

In the Second Circuit, \textit{In re Fils et Cables d'Acer de Lens (FICAL) v. Midlands Metal Corp.}\textsuperscript{291} involved the enforcement of a foreign arbitral award. The arbitration agreement included a provision stating:

Upon an application to the court for an order confirming said award, the court shall have the power to review (1) whether the findings of fact rendered by the arbitrator are, on the entire record of said arbitration proceedings, supported by substantial evidence, and (2) whether as a matter of law based on said findings of fact the award should be affirmed, modified or vacated.\textsuperscript{292}

The court held that, as the obligation to arbitrate is a creation of a contract, the parties may include a provision including judicial review for error of law or fact as part of the entire arbitration process.\textsuperscript{293} The court held that allowing courts to strike the expanded judicial review clause would be to improperly judicially re-write the agreement in a manner contrary to the expressed intent of the parties, stating as follows:

It nevertheless remains that arbitration is wholly dependent on agreement. It is well settled . . . that a party cannot be compelled to submit to arbitration any dispute which he has not agreed to so submit . . . and . . . that a court is precluded from considering any issue that the parties have voluntarily agreed to arbitrate. . . . From this it follows logically that a party cannot

\textsuperscript{289} \textit{Mastrobuono}, 514 U.S. at 57–58 (footnotes added).

\textsuperscript{290} The Fourth Circuit agreed with the Fifth Circuit decision in an unpublished opinion. \textit{See} Syncor Int’l Corp. v. McLeland, 120 F.3d 262, 1997 WL 452245 at *6 (4th Cir. Aug. 11, 1997). As an unpublished opinion, \textit{Syncor Int’l} cannot be cited as authority and will not be discussed.


\textsuperscript{292} \textit{Id.} at 242.

\textsuperscript{293} \textit{See id.} at 244.
be compelled to submit his dispute to arbitration under rules to which he has not assented. . . . Here, absent the judicial review provision, the parties to this action did not agree to arbitrate their disputes.\textsuperscript{294}

The court further found that there was no public policy in the Federal Arbitration Act that would prohibit the inclusion of the expanded judicial review.\textsuperscript{295} The court acknowledged that the efficiency of the arbitration process would be somewhat lessened, but this inefficiency would be by the agreement of the parties and thus unobjectionable.\textsuperscript{296} The court next noted that the burden of review placed on the courts would be substantially similar to the standard used by the courts in reviewing agency decisions under the Social Security Act.\textsuperscript{297} As for the substantial evidence standard to be applied to the review process, the court held that "[s]o long as the arbitrators' conclusions are within the realm of reasonableness, they will not be set aside . . . ."\textsuperscript{298}

A similar Fifth Circuit case, Gateway Technologies, Inc. v. MCI Telecommunications Corp.,\textsuperscript{299} involved the installation of telephone service for the use in inmates in a state prison. The arbitration agreement stipulated that the award was to be binding, but that "errors of law shall be subject to appeal."\textsuperscript{300} The District Court rejected the enforceability of the provision in the interests of "simplicity, informality, and expedition."\textsuperscript{301} Citing Mastrobuono and Volt, the Fifth Circuit reversed, stating:

Such a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and the F[ederal] A[rbitration] A[ct]'s pro-arbitration policy does not operate without regard to the wishes of the contracting parties . . . . [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite iminical to the FAA's purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit. Just as they might limit

\begin{footnotesize}
\begin{enumerate}
\item Id. at 244 (Internal citations omitted).
\item Id.
\item Id.
\item Id.
\item Id. at 245.
\item 64 F.3d 993 (5th Cir. 1995).
\item Id. at 995.
\item Id. at 997.
\end{enumerate}
\end{footnotesize}
by contract the issues they may arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.302

A later Fifth Circuit case, Hughes Training Inc. v. Cook,303 involved an employment arbitration where the employee claimed that she suffered emotional distress as a consequence of the employer's efforts to improve her work performance.304 The arbitrators awarded Cook $200,000, which Hughes challenged as unsupported in the record.305 The employment contract included the following language:

Either party may bring an action . . . to vacate an arbitration award. . . . [T]he standard of review to be applied to the arbitrator's finding of facts and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.306

The District Court cited Mastrobuono and Volt, and concluded that the expanded judicial review provision was enforceable.307 The District Court then vacated the award, as the emotional distress claim was not supported in the record.308 Notably, the District Court never mentioned the usual judicial deference to the arbitrator's findings of fact, and simply applied a purely legal standard to vacate the award.309

The most influential case in the Ninth Circuit is LaPine Technology Corp. v. Kyocera Corp.,310 involving the sale of computer components made by Kyocera, a Japanese company, together with a financing agreement for the manufacture of the components. The District Court refused to enforce the arbitration agreement that mandated that there would need to be a written record of the proceedings and that the District Court had jurisdiction to vacate, modify or correct the award based on the Federal Arbitration Act or "[w]here the arbitrator's finding of facts are not supported by substantial evidence, or (iii) where the arbitrator's conclusions of law are erroneous."311 The District Court based its refusal to recognize and enforce to the specific language of the arbitration agreement on the grounds that the parties to the contract were seeking to alter the

302. Id. at 996 (emphasis and alterations in original).
303. 254 F.3d 588 (5th Cir. 2001), cert. denied, 534 U.S. 1172 (2001).
304. Id. at 592.
305. Id.
306. Id. at 590.
307. Id. at 593.
308. Id. at 592.
309. Id. at 594.
310. 130 F.3d 884 (9th Cir. 1997).
roles of the court as set forth by the Federal Arbitration Act, and that judicial review was contrary to the general principles of arbitration.\textsuperscript{312}

The District Court went on to cite Judge Posner's opinion in \textit{Chicago Typographical Union #16 v. Chicago Sun-Times, Inc.},\textsuperscript{313} to the effect that the parties may not contract for review by the federal courts, but were free to contract for an arbitral appellate board.\textsuperscript{314} The District Court declined to follow the Fifth Circuit's reasoning in \textit{Gateway} on the basis that the cases \textit{Gateway} relied upon, \textit{Mastrobuono} and \textit{Volt}, do not deal with the specific issue of expanding judicial review by contractual stipulation of the parties.\textsuperscript{315} The District Court also found a public policy ground for refusing to exercise judicial review on the rather questionable basis that the record was lengthy, unlike that in the Second Circuit's \textit{Fils}, and thus would consume more judicial time to review.\textsuperscript{316}

The Ninth Circuit Court of Appeals reversed, stating: "We hold that we must honor that [judicial review] agreement. We must not disregard it by limiting our review to the Federal Arbitration Act grounds."\textsuperscript{317} The court cited the \textit{Volt} decision to the effect that the federal policy is to ensure that the arbitration contract will be enforced

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312. \textit{Id.} at 702, 705.
313. 935 F.2d 1501 (7th Cir. 1991). The court's reliance here on \textit{Chicago} was ill founded. In \textit{Chicago}, the issue of contractual expansion of judicial review was never before the court. An employer made changes in the underlying contract that the union felt were contra to other agreements with the union. \textit{Id.} at 1503. There was a split award when the arbitrator held that some additions were proper, and others not. \textit{Id.} The issue before the \textit{Chicago} Court was whether it had the power to review the meaning and interpretation of the contracts by the arbitrator. \textit{Id.} at 1504-05. There was no agreement in the arbitration clause regarding expanded judicial review over anything, be it law, fact or contract interpretation. \textit{Id.} at 1505. Judge Posner stated as follows:

An agreement to submit a dispute over the interpretation of a labor or other contract [is an agreement] to abide by the arbitrator's interpretation [of the contract]. If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract.

\textit{Id.} at 1505 (emphasis omitted). Essentially, it is apparent that Judge Posner was only speculating as to what the parties might do, and to claim that this out of context dicta is a studied and briefed holding rejecting contractual expansion of judicial review is irresponsible.

Judge Posner's concept of an arbitration appellate review board is interesting, but unsatisfactory. The review board would have the same unfettered and ungoverned imperium as the arbitrators, and could in their turn make errors of fact and law. The entire purpose of an appeals system, as Judge Posner well knows, is to act as a judicial control mechanism to assure that the lower decision is at least rational as to the finding of fact, and to likewise assure that lower decision is based on the appropriate law. There would be no assurance that the review board would act in such a manner or would simply function as a second arbitration session.

315. \textit{Id.} at 705.
316. \textit{Id.} at 706.
317. 130 F.3d at 888.
\end{flushright}
according to its terms. The court went on to state: "We perceive no sufficient reason to pay less respect to the review provision than we pay to the myriad of other agreements which the parties have been pleased to make." The court criticized the District Court's reasoning in rather harsh terms, stating that “[the District Court’s ruling] would turn the F[ederal] A[rbitration] A[ct] on its head,” and that “[b]y confirming an award without the searching review that the parties have earlier agreed to, a court goes against the parties’ wishes and does the opposite of what Congress intended.”

d. The Seventh, Eighth and Tenth Circuits’ Rejection of Contractual Judicial Review

In contrast to the Second, Fourth, Fifth, and Ninth Circuits, the Seventh and Tenth Circuits have held that neither Volt nor Mastrobuono are sufficient authority on which to base contractual expansion of judicial review, with the Eighth Circuit not quite decided. The following discussion describes the reasoning that has led these Circuits to reject the contractual expansion of judicial review. Given the better reasoning and adherence to the express language in Volt and Mastrobuono that arbitration agreements are to be enforced according to their terms, it is reasonable to predict that when the Supreme Court takes up this issue directly, it will sanction contractual expansion of judicial review.

In the Tenth Circuit, Ernst Bowen v. Amoco Pipeline Co. involved arbitration over an underground oil leak in a pipeline under plaintiff's property in a right of way granted in 1943. There was an arbitration clause in the right of way agreement to which the parties added a clause that facts “not supported by the evidence” would be subject to judicial review. Amoco lost and appealed on the basis that the facts as found by the arbitrator were not supported by the evidence.

The court refused to enforce the judicial review provision for two reasons. First, the court relied on the familiar grounds that the Federal Arbitration Act does not specifically provide for contractual expansion of judicial review, holding that “[t]hese limited standards manifest a legislative intent to further the federal policy favoring

318. Id. at 889.
319. Id. at 889, 890.
320. 254 F.3d 925 (10th Cir. 2001).
321. Id. at 928 n.1.
322. Id. at 931.
323. See id. at 933.
arbitration by preserving the independence of the arbitration process."

The holdings in Volt and Mastrobuono that arbitration contracts must be enforced according to their terms were held inapplicable when it came to recognizing a contractual provision for heightened judicial review.

Second, the court rejected contractual expansion of judicial review reasoning that it would be contrary to the public policy favoring expedited dispute resolution in the arbitration process, stating as follows:

Contractually expanded standards, particularly those that allow for factual review, clearly threaten to undermine the independence of the arbitration process and dilute the finality of arbitration awards because, in order for arbitration awards to be effective, courts must not only enforce the agreement to arbitrate but also enforce the resulting arbitration awards.

Finally, the court raised the argument that courts would be placed in an "awkward position" if they had to review the facts. Citing the concurring opinion by Judge Kozinski in LaPine, the court stated that "[u]nder either expanded legal or expanded factual standards" the job of the reviewing courts is different than the regular job of the courts, thus justifying the rejection of the contract provision for expanded judicial review. This line of reasoning is presented without explanation, probably because the majority's result—that is the rejection of contractual expansion of judicial review—is exactly the opposite of what Judge Kozinski decided. Judge Kozinski found that that difference in the duties of the court as between that provided for in the Federal Arbitration Act and that provided for in the contract was, in the final analysis, irrelevant. He found that although there was no express authority for the federal courts to review arbitration awards outside the parameters of the Federal Arbitration Act, that alone did not prohibit federal courts from doing so, given the strong Congressional intent that arbitration contracts are to be fully enforced according to their express terms. Consequently, Judge Kozinski

324. Id. at 935.
325. Id. at 934 ("The decisions directing courts to honor parties' agreements and to resolve close questions in favor of arbitration simply do not dictate that courts submit to varying standards of review imposed by private contract.").
326. Id. at 935.
327. Id. at 935-36.
328. Id. at 936.
329. See LaPine, 130 F.3d at 891.
330. See id.
331. Id.
found that there was sufficient authority in the Federal Arbitration Act to recognize and enforce contractual expansion of judicial review beyond that provided for in the statutory language. Judge Kozinski stated in full as follows:

Thus, enforcing the arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication. The rub is that the work the district court must perform under this arbitration clause is not a subset of what it would be doing if the case were brought directly under diversity or federal question jurisdiction. It's not just less work, it is different work. Nowhere has Congress authorized courts to review arbitral awards under the standards the parties here adopted.

Nevertheless, I conclude that we must enforce the arbitration agreement according to its terms. The review to which the parties have agreed is no different from that performed by the district courts in appeals from administrative agencies and bankruptcy courts, or on habeas corpus. . . . Given the strong policy of party empowerment embodied in the Arbitration Act, I see no reason why Congress would object to enforcement of this agreement. This is not quite an express congressional authorization but, given the Arbitration Act's policy, it's probably enough.

The Ernst Bowen Court also cited the Eighth Circuit's UHC Management Co. v. Computer Sciences Corp. and the Seventh Circuit's Chicago Typographical Union #16 v. Chicago Sun-Times, Inc. as other circuits rejecting LaPine and Gateway. As indicated above, Chicago Typographical cannot be valid authority for rejecting the parties' right to contractually expand judicial review. The same can be said for the Ernst Bowen Court's reliance on UHC. The UHC dicta is quite misleading, as UHC did not specifically reject LaPine with regard to contractual expansion of judicial review. Indeed, the claims in UHC did not concern that issue, but rather the contractual selection of controlling substantive law.

332. Id.
333. Id.
334. 148 F.3d 992 (8th Cir. 1998).
335. 935 F.2d 1501 (7th Cir. 1991).
336. Bowen, 254 F.3d at 936, 937.
337. See supra note 313.
338. UHC, 148 F.3d at 994.
339. Id.
In *UHC*, Computer Sciences was retained to process health care claims for UHC. The arbitration contract provided that the arbitral award would be "bound by controlling law" without specifying which law—the Federal Arbitration Act, Minnesota or any other state law—applied. After the arbitrators issued their award in favor of UHC that was in conformance with the Federal Arbitration Act rules, Computer Sciences appealed on the basis that Minnesota substantive law, not the Federal Arbitration Act, was the "controlling" law as to damages. The Court found that the stipulation did not clearly identify Minnesota law as the law of choice, and held that as a matter of law this was insufficient to exclude the application of the Federal Arbitration Act. Citing *First Options of Chicago, Inc. v Kaplan*, the Court held that had the parties desired to have Minnesota law apply, they would have needed a very specific contract provision stating just that. If the arbitration contract merely contains a vague statement that state law will generally apply, such a statement will not supplant Federal Arbitration Act control. In *UHC*, there was no specific provision stating that damages would be subject to Minnesota law, just a provision that the decision was "bound by controlling law."

Thus, *UHC* really recognizes the common-sense proposition that if the parties desire to include a specific arbitration procedure or standard of law, any such provision must be "clear and unmistakable" to be enforceable and recognized, as courts cannot make any assumptions as to the intent of the parties. As to the issue concerning the contractual expansion of judicial review, the *UHC* Court only referred in passing to *LaPine*, and certainly did not reject *LaPine* as the *Ernst Bowen* Court indicates, for the simple reason

340. *Id.*
341. *Id.* at 995–96.
342. *Id.* at 994–95.
343. *Id.* at 997.
344. 514 U.S. 938 (1995). *First Options* involved the question of the arbitrability of the arbitration agreement itself. *Id.* at 941. There the owners of a corporation claimed that they, as individuals, could not be bound by an arbitration agreement signed by the corporation. *Id.* The *First Options* Court held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear[er] and unmistakabl[e] evidence that they did so." *Id.* at 944 (alterations in original). The Court went on to hold that, as individuals, the owners were not bound by the act of the corporation. *Id.* at 949.
345. *UHC*, 148 F.3d at 998.
346. *Id.* at 996 (citing Ferro Corp. v. Garrison Indust., Inc., 142 F.3d 926, 936–38 (6th Cir. 1998)).
347. *Id.* at 997.
that the issue of contractual expansion of judicial review was not before the Court.350

2. Federal Jurisdiction for Transnational Contracts

Transnational contracts are subject to federal jurisdiction and the Federal Arbitration Act.351 The Federal Arbitration Act does not in itself provide an independent basis for jurisdiction, and neither can the parties merely contract for Federal Arbitration Act jurisdiction—there must be an independent constitutional basis for Federal Arbitration Act jurisdiction.352 Jurisdiction under the Federal Arbitration Act is based on the text specifically stating that the Act will apply to arbitration contracts between parties that are "among the several States or with foreign nations."353 Jurisdiction for transnational contracts may also be found in transnational cases arbitrated under pendant state court actions. The United States Supreme Court may review when the highest court of a state makes a decision under that state’s law that is claimed to be repugnant to federal law, statutes, or the Constitution, is in conflict with the purpose of a federal law, or will hinder or frustrate the intent of federal law.354 For counsel with clients engaged in international commerce, that fact alone will be sufficient for Federal Arbitration Act jurisdiction.355

Although there is no express provision in the Federal Arbitration Act that preempts state law, it will do so in most instances. Where a state law actually conflicts with the federal law, or is an obstacle to the express purposes of the federal law and the objectives of Congress, state law will be preempted to eliminate that hindrance.356 Thus, in the event that an arbitration dispute involving foreign commerce is being heard in a state court with the Federal Arbitration Act claim under pendant jurisdiction, the state court must apply Federal Arbitration Act common law rather than state law if there is any conflict.357 Consequently, if the arbitration agreement contains a contractual provision that provides for more extensive judicial review of the arbitrator’s award than is permitted under state law, the state

350. UHC, 148 F.3d at 994–95.
353. 9 U.S.C. § 1 (1993) (This is the familiar basis for federal diversity jurisdiction.).
court must apply federal, not state law. As state law in California, and probably New York, conflicts with the Federal Arbitration Act in the Ninth and Second Circuits, those state courts will be bound to recognize contractual expansion of judicial review.

D. Contractual Judicial Review in Japan

There are no provisions in the 2003 Act or the Commercial Arbitration Rules that expressly permit or prevent the parties from contracting for judicial review of the award for errors of fact or law. Moreover, there is no case law on this issue under the pre-2003 Act that we can use for guidance. Consequently, an analysis of the possibility of including a contractual expansion and under Japanese law must be based on an analysis of the 2003 Act itself.

The 2003 Act does not define the arbitration agreement as a contract (keiyaku), but rather a document expressing mutual agreement (gōi) to submit a matter to arbitration. A mutual agreement that is a juristic act is the very definition of an enforceable contract in Japanese law. Although the Japanese Civil Code ("J.C.C.") does not define the nature of a juristic act that creates a bilateral contract, it is accepted that the mutual declaration of the parties' intention to be bound by the terms of the agreement constitutes such an act. A reading of the 2003 Act leaves no doubt that an arbitration agreement is considered a binding contract.

Although there are no provisions in the J.C.C. that define exactly what a juristic act or contract is, the J.C.C. does provide that "[i]f the parties to a juristic act have declared an intention which differs from any provisions of laws or ordinances which are not concerned with


360. 2003 Japan Arbitration Act, supra note 19, ch. I, art. 2(1).

361. The exact nature of a contract in Japan is not expressly set forth in any statute, but is based on civil law principles of mutual consent.

362. See generally WARREN L. SHATTUCK & ZENTRARO KITAGAWA, UNITED STATES-JAPANESE CONTRACT & SALE PROBLEMS 97, 98 (1973), regarding the Roman law concept of a juristic act, defined roughly as a step in the process of creating a duty or a dispositive act, a legal requisite (hōritsu yōken, Rechtstatbestand), that brings about certain legal effects (hōritsu kōka, Rechtsfolge). This is a legal device used to implement the idea of party autonomy (shiteki jichi), which permits an individual to freely create a legal relation in the area of private transactions, save where public policy would be violated. Party autonomy contemplates free exercise of intention, and a declaration of intention is an essential element in a juristic act. Id. at 104.

363. 2003 Japan Arbitration Act, supra note 19, ch. I, art. 2(1).
public order, such intention shall prevail." The J.C.C. also states that "[a] juristic act which has for its object such matters as are contrary to public order or good morals is null and void." Accordingly, the focus should not be whether the 2003 Act specifically allows the contractual inclusion of judicial review (because it is silent on the issue), but rather whether a contractual modification of the arbitration agreement to include judicial review would be contrary to public policy or good morals.

The 2003 Act recognizes, in many unrelated sections, that the parties have the right to modify the provisions of the 2003 Act as they see fit; thus, contractual modification of the Act generally cannot be considered a violation of either public policy or good morals. Specifically, the parties are "free" to decide as they please regarding the provisions on the number of arbitrators, the procedure used to choose the arbitrators, the procedure to challenge the arbitrators, the procedure to be followed in the arbitration, the place of arbitration, the language of the arbitration, the rules concerning the arbitration award, and the allocation of the costs of arbitration. The 2003 Act further recognizes that the parties may change specific provisions of the 2003 Act by stating that, "unless otherwise agreed," the provisions of the 2003 Act apply. Specifically the 2003 Act addresses the appointment of a succeeding arbitrator after a successful challenge, interim measures to protect the subject matter of the arbitration, the date of the commencement of the arbitration process, the oral hearing process, the arbitration panel process, any additional award, and the deposit of the arbitration costs. Based on the foregoing, it is clear that the 2003 Act contemplates that the parties will seek to modify the application of the 2003 Act by

364. MINP art. 91.
365. Id. art. 90.
366. 2003 Japan Arbitration Act, supra note 19, ch. III, art. 16(1).
367. Id. art. 17(1).
368. Id. art. 19(1).
369. Id. ch. III, art. 26(1).
370. Id. art. 28(1).
371. Id. art. 30(1).
372. Id. ch. VI, art. 36(1).
373. Id. ch. IX, art. 49(1).
374. See, e.g., id. ch. I, art. (12)(1).
375. Id. ch. III, art. 22(1).
376. Id. ch. IV, art. 24(1).
377. Id. ch. V, art. 29(1).
378. Id. ch. V, art. 32(2).
379. Id. ch. VI, art. 37(4).
380. Id. ch. IX, art. 47(1).
381. Id. ch. IX, art. 48(1).
including special provisions in the arbitration agreement. Most important to this analysis, the 2003 Act clearly anticipates the parties having the legal right to agree to different arbitration procedures than are provided for in the 2003 Act, and that the parties may agree that the arbitrators will not have discretion to determine the admissibility of evidence.

The absence of any statutory provision regarding judicial review in light of the numerous express provisions recognizing the parties' right to alter the provisions in the 2003 Act could be interpreted to indicate that such a right is not included. This is the approach taken in the United States by the California Supreme Court, as well as the Seventh, Eighth and Tenth Circuit Courts. However, the Second, Fifth and Ninth Circuits have reached the contrary conclusion on the basis that arbitration agreements are contracts to be enforced as the parties intended, and that the parties are free to include judicial review contract provisions because such provisions are not specifically prohibited by statute. In Japan, the conclusion that contractual expansion of judicial review is permissible could be based on the identical reasoning of the Second, Fifth and Ninth Circuits as well as two specific provisions in the Act.

The 2003 Act provides that "[t]he parties are free to agree on the procedure to be followed by the arbitral tribunal in the arbitral proceedings" if consistent with law and public policy. If there is no agreement to the contrary, the arbitration tribunal will then implement such procedures as it sees fit under the circumstances. The key provision states that "[f]ailing an agreement under paragraph (1), the power of the arbitral tribunal includes the power to determine the admissibility, necessity of investigation and weight of any evidence." This subsection clearly allows the parties to contractually agree that the arbitral tribunal will not have the sole power to "determine the admissibility, necessity of investigation and weight of any evidence" by providing that a court of law shall have the final say on the matter. By inference, this subsection should enable the parties to stipulate that, in order for the court to make such a

382. As for the public policy aspect, as indicated above, public policy objections under Japanese Civil Code articles 90 and 91 must be based on the fact that the proposed change would offend the most closely held notions of morality and justice. Neither this nor the "good morals" proviso in article 90 are applicable in the least.
383. See id. art. 26(1).
384. Id. art. 26(2).
385. Id. art. 26(3).
386. Id. note 19, ch. V, art. 26(1).
387. Id. art. 26(3).
388. Id.
determination, the court must be able to exercise judicial review over the arbitrator’s decisions on the evidence and the award.

The 2003 Act also states that “[t]he parties are free to agree on the rules to be applied to the arbitral award by the arbitral tribunal.”389 This language does not mean that the parties are free to create their own law after the fact, but that they are to indicate the national law that the arbitrators are to apply. Thus, in essence, the 2003 Act compels the conclusion that the parties may contract for judicial review.390 The 2003 Act suggests that arbitrators are bound by substantive law to implement the provisions of the arbitration agreement, stating: “The arbitral tribunal shall, if there is a contract regarding the civil dispute referred to the arbitral tribunal, decide in accordance with the terms of the contract.”391 One could argue that this section of the 2003 Act simply requires the arbitrators to enforce the terms of the substantive contract and not the subsidiary or auxiliary arbitration agreement. Such an interpretation is, in part, correct. However, by doing so the 2003 Act is really indicating that the contract is to be enforced in its entirety. This, of course, is exactly the reasoning of the Second Circuit in In re Fils, the Fifth Circuit in Gateway Technologies, and the Ninth Circuit in LaPine Technology Corp.

There is one additional argument that would support Japan’s recognition and enforcement of a contract provision for contractual review of the arbitration award. Article 32 of the Japanese Constitution states that “[n]o person shall be denied the right of access to the courts.”392 Thus, every person has the constitutional right to seek redress in the civil courts of law in regard to any contract dispute. Under the 2003 Act, when the parties agree on arbitration, that arbitration agreement acts to divest the civil courts of jurisdiction to entertain a civil lawsuit on the subject matter of the arbitration agreement.393 In Kinari Corp. v. Miyashita,394 a contractor appealed an adverse arbitration award on the basis that the section 14 of the Arbitration Act, divesting the court of jurisdiction, violated section 32 of the constitution. The appeal was denied on the sound reasoning that although the parties did have the right to access to the courts, the juridical act of entering into the arbitration agreement was a voluntary

389. Id. ch. VI, art. 36(1).
390. See id. art. 36(4).
391. Id.
394. 1194 HANREI JIHO 92 (D. Tokyo 1985).
relinquishment of that right. However, in the event that the parties do not relinquish all of their rights of access to the civil courts by specifically reserving the right to appeal errors of fact or law, the right to access to the civil courts should be preserved as a constitutional matter under the reasoning in Kinari.

This conclusion is reinforced by the normal Japanese practice of using “litigation contracts” (soshō keiyaku), wherein the parties may agree to relinquish their constitutional rights to sue in the first instance or to relinquish their rights to appeal. The rights to sue and appeal are considered personal rights (kanri shobun ken), and these rights may be waived or otherwise released if doing so does not violate the J.C.C. provision that forbids a juristic act that violates public order or good morals. These litigation contracts, by their very definition, modify the parties’ respective rights and duties under substantive law, as well as under the provisions of the J.C.C. Consequently, an arbitration agreement including a provision for judicial review would appear to be consistent with the practice of using litigation contracts.

IV. CONCLUSION

Counsel representing clients who are contemplating binding arbitration as a substitute for litigation have the obligation to inform their clients that arbitration cannot be considered a mere short-cut to a full and fair resolution of possible disputes. The clients must be fully aware that in arbitration, whether under the 2003 Japanese Arbitration Act, the Federal Arbitration Act, or individual state law, the arbitrators will restrict discovery. Thus, the client must anticipate arbitrating the dispute without any additional information. Further, they must also realize that even if a comprehensive discovery scheme is agreed upon within the arbitration agreement, the arbitrator may well ignore it and improperly restrict the scope of discovery. Moreover, the arbitrator will accept as evidence all manner of testimony and documents that may not be reliable, and may not be subject to cross-examination, such as hearsay. Arbitrators might also deem settlement negotiations and admissions in those negotiations admissible.

The client must be aware that there is the very real possibility that the arbitrators might, for whatever reason, misinterpret the provisions of the contract, misinterpret or misapply the provisions of substantive law, or even make their own law as they see fit. The client

395. See Ishida, supra note 19, at 22–23 (citing Kinari Corp., 1194 HANREI JIHO at 97).
396. MINPO art. 90.
must be fully informed that, absent a contractual provision for judicial review, neither the United States' federal or state courts, nor Japanese courts, will review arbitrators' award for errors of fact or law.

Then the client must evaluate the potential liability they may incur under the contract if a potential dispute is arbitrated (in light of the above problems) and determine if a loss would be financially acceptable. The client must also evaluate the non-economic repercussions of losing a dispute with this particular business partner. Only then can the client determine if the drawbacks of arbitration, in lieu of civil litigation, are an acceptable risk.

Counsel must avoid putting themselves in such a mortifying position, as described by Judge Kott in Crowell,397 of explaining to an angry client (and presumably soon to be an ex-client) why they cannot appeal an arbitration hearing that they should have won on the legal and factual merits, but lost because the arbitrator made gross error of fact and law. In arbitrations under the law of California and New York this is a risk that the client must knowingly assume. For those arbitrating transnational contract disputes in the Second, Fifth and Ninth Circuits under the Federal Arbitration Act, this risk can be mitigated with a contractual provision to expand judicial review. For those arbitrating in Japan, there is currently no case law on the issue of contractual provisions for judicial review, although it appears that such a provision ought to be recognized. Thus, such a provision should be in the arbitration agreement as a matter of course.