CONFIRMATION OF ARBITRAL AWARDS: THE CONFUSION SURROUNDING SECTION 9 OF THE FEDERAL ARBITRATION ACT

*Erika Van Ausdall**

TABLE OF CONTENTS

I. INTRODUCTION

The desirability of arbitration as an alternative to litigation arises from its ability to offer disputing parties a more flexible,[1] inexpensive,[2] and speedy[3] dispo-

---

* B.A., Xavier University (1997); J.D., The Ohio State University College of Law (2000). The author is an associate with the law firm of Frost & Jacobs LLP. The author would like to thank Professor Sarah Rudolph Cole of The Ohio State University College of Law for her comments and suggestions in writing this Article. The opinions expressed in this Article are entirely that of the author.

sition than normally enjoyed through the American judicial system.[4] Since the enactment of the Federal Arbitration Act ("FAA") in 1925,[5] parties who choose to

---

1. *See* Boyd A. Byers, *Mandatory Arbitration of Employment Disputes*, 67 J. KAN. B. ASS'N 18, 19 (1998) ("Another difference between arbitration and civil litigation is the arbitrator's potentially broad discretion to decide cases without strict application of legal principles and to fashion broader and more flexible remedies than those available in civil court."); Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 204-05 (1996) (discussing how the flexibility of arbitration is beneficial for medical malpractice disputes); Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 197 (1989) ("The lack of elaborate pre-hearing discovery and the general informality and nontechnical nature of evidence introduction minimizes the opportunities for procedural maneuvers that have little to do with the central issues of the case but that have the potential to cause a great deal of delay, confusion, and expense."). *But see* Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489, 2510 (1997) ("Arbitration is ill-suited for sexual harassment disputes because it lacks both the flexibility of negotiation and the safeguards of litigation.").

2. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (noting that arbitration avoids costliness); Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974) ("[T]he grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices."); Joanne K. Lelewer, *International Commercial Arbitration as a Model for Resolving Treaty Disputes*, 21 N.Y.U. J. INT'L L. & POL. 379, 389 (1989) ("Arbitration is a desirable approach to solving commercial disputes because of its flexibility, efficiency and economy."); Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 AM. REV. INT'L ARB. 267, 271 (1996) (noting how disputing parties can contain costs through arbitration). *But see* Jose A. Cabranes, *Arbitration and U.S. Courts: Balancing Their Strengths*, 70 N.Y. ST. B.J., Apr. 1998, at 22, 24 n.19 ("That arbitration is cheaper than the courts is surely a controversial proposition—or, at least, it ought to be a controversial proposition. No court system . . . assesses the parties significant fees, graduated in relation to the amount in dispute.").

3. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("'The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . .'") (quoting H.R. REP. NO. 97-542, at 13 (1982)); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 29 (1983) (stating that the FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) ("[W]e not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1488 (10th Cir. 1994) (favoring arbitration because of its expeditious nature).

4. *See* Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 2-10 (1990) (discussing the various problems with an overburdened federal judiciary and arguing for reform); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 527 (1989) (providing an overview of the problematic delays associated with litigation and suggesting various proposals for judicial reform); James H. Schropp, *Resolving SEC Enforcement Matters Through Alternative Means of Dispute Resolution*, 5 INSIGHTS 13, 14 (1991) ("In response to the steadily increasing tide of litigation, the

utilize arbitration as a dispute resolution mechanism receive a number of statutory protections, including the opportunity for judicial confirmation of an arbitration award.[6] The availability of judicial confirmation of arbitration awards, which gives arbitration awards the effect of a court judgment,[7] may be why arbitration remains one of the most popular forms of alternative dispute resolution ("ADR").[8] Section 9 of the FAA provides that a court may confirm an arbitration award "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration."[9] Notwithstanding this provision for judicial confirmation of arbitration awards, federal courts are divided with respect to the language necessary in an arbitration agreement to satisfy section 9's "consent to judgment" provision.[10] The debate among the federal courts focuses on whether

---

private sector has increasingly turned to arbitration and other alternative methods of dispute resolution, and numerous dispute resolution programs have been sponsored by courts, state legislatures and non-profit organizations.").

5. *See* 9 U.S.C. §§ 1-16, 201-208, 301-307 (1994).

6. *Id.* § 9. For a discussion of some of the statutory protections available under the FAA, see *infra* notes 21-25 and accompanying text.

7. *See* IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 38.1.1 (Supp. 1995) ("The award, when judgment is entered, becomes a judgment entitled to full faith and credit.").

8. *See* Edward J. Costello, Jr., *ADR: Virtue or Vice?*, 54 DISP. RESOL. J. 62, 67 n.18 (1999) ("Supporters of arbitration [contend] that one of the reasons for its popularity is that arbitration awards are more predictable than judicial decisions in many jurisdictions."); Pedro Menocal, *We'll Do It for You Any Time: Recognition and Enforcement of Foreign Arbitral Awards and Contracts in the United States*, 11 ST. THOMAS L. REV. 317, 354 (1999) ("Arbitration may be the most popular alternate method of resolution of international commercial disputes."); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 403 (1999) ("In recent years, ADR, and especially arbitration, has become exceedingly popular."); Andrew Sagarty, Note and Comment, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. ON DISP. RESOL. 675, 692 (1998) (explaining that arbitration "is the most popular method of resolution of international commercial disputes"). For a discussion of the historical success of arbitration, see STEPHEN B. GOLDBERG ET AL., NEGOTIATION, MEDIATION, AND OTHER PROCESSES 233 (3d ed. 1994) ("Arbitration has been used as an alternative to litigation for hundreds of years. It was used as early as the thirteenth century by English merchants who preferred to have their disputes resolved according to their own customs . . . rather than by public law.").

9. 9 U.S.C. § 9.

10. The FAA sets forth a two-prong jurisdictional test for confirmation of arbitration awards. *See id.* A court must first determine whether it has subject matter jurisdiction over the controversy; and second, whether the parties have satisfied the requirements for judicial confirmation under section 9. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) (stating the FAA requires an independent basis for subject matter jurisdiction); Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co., 868 F. Supp. 1244, 1248 (D. Kan. 1994) ("The unambiguous language of § 9 . . . creates its own level of subject matter jurisdiction for confirmation. . . . [T]here is no federal court jurisdiction to confirm *under the FAA* where such jurisdiction has not been made a part of the arbitration agreement.") (emphasis in original).

Section 1 of the FAA states the federal courts have jurisdiction under the FAA if the controversy involves maritime transactions or interstate commerce. 9 U.S.C. § 1 (1994). After

there must be an explicit consent to judgment entry in the arbitration agreement, or whether evidence that the arbitral award is to be final and binding.[11]

Recently, in *PVI, Inc. v. ratiopharm GmbH*,[12] the Eighth Circuit Court of Appeals held language in an arbitration agreement stating the arbitrator's decision would be "final and binding" did not satisfy section 9's consent to judgment provision.[13] Rather, the *PVI* court held section 9 requires a *clear statement* by the parties in their arbitration agreement that judgment be entered upon issuance of the arbitration award.[14] In an unpublished opinion, the Ninth Circuit has followed a similar approach taken by the Eighth Circuit.[15] By contrast, the Second, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits have concluded that, while some indicia of the parties' intent to be bound by arbitration is necessary, explicit language providing for judicial confirmation is not mandated by the FAA.[16] The Supreme Court has not resolved the conflict among the federal circuits, and thus confusion persists as to what exactly the FAA's consent to judgment provision requires.[17]

This Article addresses confirmation of arbitration awards under section 9 of the FAA. Part II provides a discussion of the FAA, with an emphasis on the statutory text of section 9. Part III sets forth the conflicting interpretations of section 9 and analyzes the federal court jurisprudence concerning the issue of judicial confirmation. Part IV applies methods of statutory interpretation to interpret section 9, including an examination of the legislative history. Finally, this Article concludes that while explicit consent to judgment entry should not be required by section 9, a court should have the authority to confirm an arbitration award if there is sufficient evidence that the parties intended the arbitration award to be final and binding.

---

satisfying the first jurisdictional prong, a court must then determine whether the parties satisfy the jurisdictional requirement set forth in section 9—namely, whether the parties have "agreed" to judicial confirmation of the arbitration award. *See* 9 U.S.C. § 9. How to determine whether the parties have satisfied this second jurisdictional prong is where the federal courts disagree. *See* discussion *infra* Part III.

11. *See infra* Part III.

12. PVI, Inc. v. ratiopharm GmbH, 135 F.3d 1252 (8th Cir. 1998).

13. *Id.* at 1254.

14. *Id.*

15. *See* Commonwealth Enters. v. Liberty Mut. Ins. Co., 1992 WL 59019, at *1 (9th Cir. Mar. 27, 1992) (holding that judicial authority to confirm arbitration awards depends on the consent of the parties to judgment entry as part of the arbitration agreement).

16. *See infra* Part III.A.

17. The Supreme Court seemingly decided the issue shortly after the passage of the FAA, quite some time before the debate among the federal courts began. *See* Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 276 (1932) (holding that "final and binding" language in an arbitration agreement constitutes consent to judicial confirmation of arbitration awards under section 9). Nevertheless, some federal courts have virtually ignored the Supreme Court's decision and have required explicit language for judicial confirmation of arbitration awards. *See infra* Part III.B.

II. THE FEDERAL ARBITRATION ACT

A. *Background and Purpose of the FAA*

Before discussing the confirmation provision of section 9, it is necessary to understand the purpose and context in which Congress enacted the FAA. Congress enacted the FAA in 1925 to put an end to judicial hostility toward agreements to arbitrate.[18] Passage of the FAA occurred during a climate of judicial hostility toward arbitration agreements and awards.[19] Congress determined there was a need to overcome this judicial hostility toward arbitration and concluded the only appropriate means to remedy this judicial opposition was through federal legislation.[20]

The purpose of the FAA is to protect the enforceability of arbitration agreements to arbitrate disputes involving maritime transactions and interstate commerce.[21] Courts have a considerable amount of discretion under the FAA to enforce arbitration agreements and awards.[22] Section 3 grants courts the authority to stay legal proceedings in cases in which there are issues to be resolved through arbitration.[23] Section 4 enables a court to compel the parties to resolve their dispute through arbitration if there is a valid agreement to arbitrate.[24] Sections 9, 10, and 11

---

18. *See* Southland Corp. v. Keating, 465 U.S. 1, 13 (1984) (citing H.R. REP. No. 68-96, at 1-2 (1924)) ("The need for the [FAA] arises from . . . the jealousy of the English courts for their own jurisdiction. . . . This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts."); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 n.14 (1985) ("[T]he Act was designed to overcome anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law."); Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) ("[I]t is our obligation to shake off the old judicial hostility to arbitration.").

19. Judicial opinions prior to the enactment of the FAA reflect the hostility American courts previously held toward arbitration. *See, e.g.*, Meacham v. Jamestown, F. & C.R. Co., 105 N.E. 653, 655 (1914) (Cardozo, J., concurring) (stating that courts should not enforce contracts "where the exclusive jurisdiction has been bestowed, not on the regular courts of another sovereignty, but on private arbitrators"); Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065) ("[I]t cannot be correctly said, that public policy, in our age, generally favors or encourages arbitration.").

20. *See* H.R. REP. NO. 68-96, at 1-2 (1924) ("The need for the law arises from an anachronism of our American law. Some centuries ago because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. . . . The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . . .").

21. *See* 9 U.S.C. § 2 (1994). Such agreements to arbitrate are "valid, irrevocable, and enforceable." *Id.*

22. *Id.*

23. *Id.* § 3.

24. *Id.* § 4.

address post-award judicial proceedings, and grant courts the authority to confirm, vacate, or modify an arbitration award, respectively.[25]

The Supreme Court has consistently recognized a strong federal policy in favor of arbitration and has liberally interpreted the FAA in that direction. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[26] the Court stated that the FAA establishes a "federal policy favoring arbitration."[27] More significantly, the *Moses* Court held that the FAA creates federal substantive law; therefore, under FAA section 3, both state and federal courts are obliged to stay legal proceedings involving disputes the parties agreed to resolve through arbitration.[28] Shortly after the *Moses* decision, the Court decided *Southland Corp. v. Keating*,[29] and struck down a California law invalidating certain arbitration agreements covered by the FAA.[30] In *Gilmer v. Interstate/Johnson Lane Corp.*,[31] the Court expanded upon the national policy in favor of arbitration holding that claims under the Age Discrimination in Employment Act ("ADEA") can be subject to compulsory arbitration.[32] In interpreting an arbitration agreement or the substantive provisions of the FAA, it is important to keep in mind the legislature's and the judiciary's pronounced support of arbitration.

---

25. *Id.* §§ 9-11. Congress later adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which governs arbitration agreements and awards between those parties who are not entirely citizens of the United States. *See* Act of July 31, 1970, Pub. L. No. 91-368, § 1, 84 Stat. 692 (codified at 9 U.S.C. §§ 201-208 (1994)). Subsequently, Congress adopted the Inter-American Convention on International Commercial Arbitration, which also pertains to arbitration agreements in the international context. *See* Act of Aug. 15, 1990, Pub. L. No. 101-369, § 1, 104 Stat. 448 (codified at 9 U.S.C. §§ 301-307 (1994)).

26. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

27. *Id.* at 24.

28. *Id.* at 1. The Court noted that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25.

29. Southland Corp. v. Keating, 465 U.S. 1 (1984).

30. *Id.* at 16. The California Franchise Investment Law provided that "'[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.'" *Id.* at 10 (quoting CAL. CORP. CODE § 31512 (West 1977)). The California Supreme Court held this statute required "judicial consideration of claims brought under the . . . statute and accordingly refused to enforce the parties' contract to arbitrate such claims." *Id.* The statute and the court's holding, therefore, conflicted directly with section 2 of the FAA. *Id.* The Supreme Court held the California statute could not stand because it was in direct conflict with federal law. *Id.* at 16.

31. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

32. *Id.* at 35.

B. *Confirmation of Arbitration Awards Under Section 9*

Section 9 of the FAA governs judicial confirmation of arbitration awards.[33] The pertinent statutory text provides:

> If the parties in their agreement *have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration*, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.[34]

For parties resolving their disputes through binding arbitration, judicial confirmation of the award is crucial because it gives the award the same effect as a court judgment, precluding *de novo* litigation of the issues resolved through arbitration.[35]

Yet it is not clear how parties are to take advantage of this provision in section 9 because courts disagree about what the parties must state in their arbitration agreement to be entitled to judicial confirmation.[36] Section 9 provides the parties must "agree" to judicial confirmation in their agreement, but there is no evidence in the statute, nor in the legislative history to the FAA, regarding what constitutes "agreeing" to judicial confirmation.[37] The precise issue addressed by this Article is

---

33. 9 U.S.C. § 9 (1994).

34. *Id.* (emphasis added).

35. *See* MACNEIL, *supra* note 7, §§ 38.1.1, 38.2. For a general overview of the judicial process for confirming arbitration awards, see Daniel D. Derner & Roger S. Haydock, *Confirming an Arbitration Award*, 23 WM. MITCHELL L. REV. 879, 881-90 (1997), for the step-by-step process for confirmation under the FAA and state law.

36. *Compare, e.g.*, I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424, 426-27 (2d Cir. 1974) (holding that a finality clause is sufficient for judicial confirmation), *with* Place St. Charles v. J.A. Jones Constr. Co., 823 F.2d 120, 124 (5th Cir. 1987) (holding that a finality provision is not required as long as the arbitration agreement states the parties would be "bound").

37. *See* 9 U.S.C. § 9; H.R. REP. NO. 68-96 (1924). Interestingly, neither the Uniform Arbitration Act nor the most recent amendments to the Act contain a consent to confirmation provision. *See* UNIF. ARBITRATION ACT § 11, 7 U.L.A. 264 (1997) ("Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award."); UNIF. ARBITRATION ACT § 22, (amended Aug. 2000) (*available at* <http://www.law.upenn.edu/bll/ulc/uarba/arb00ps.htm>) (accessed Sept. 20, 2000) ("After a party to the arbitration proceeding receives notice of an award, the party may file a [motion] with the court for an order confirming the award. . . .") (brackets in original). Likewise, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") does not contain a provision requiring consent to judgment entry. *See* 9 U.S.C. § 207 (1994) ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.").

whether section 9 requires explicit language in the arbitration agreement consenting to judgment, or whether evidence that the arbitration award would be final and binding is sufficient. The statute and the legislative history are silent on this issue. Thus, the confusion must be resolved through reference to the overall policies of the FAA, as gleaned from legislative history, and through methods of statutory interpretation. Before addressing section 9 from this perspective, however, the following section of this Article examines the various approaches the federal courts have taken thus far in interpreting section 9.

III. THE DEBATE OVER THE STATUTORY CONSTRUCTION OF SECTION 9

As section 9 indicates, Congress envisioned some type of agreement between the parties consenting to judicial confirmation in the arbitration agreement itself.[38] However, as discussed in Part II.B of this Article, it is not clear from section 9 what language in the arbitration agreement is necessary to indicate consent to judicial confirmation.[39] The Supreme Court addressed the issue shortly after the passage of

---

While the Convention does not contain a consent to confirmation provision, an issue that remains unresolved among the courts is whether section 9 of the FAA preempts the Convention. In *McDermott International, Inc. v. Lloyds Underwriters of London*, the Fifth Circuit held that consent to confirmation is not required under the Convention. *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 588 (5th Cir. 1997). Citing the Convention's legislative history, the court found that "[t]he Convention Act incorporates the FAA except where the FAA conflicts with the Convention Act's few specific provisions." *Id.* (brackets in original) (citing S. REP. No. 91-702, at 5 (1970)). The court also noted that one of the goals of the Convention was to unify the standards by which arbitration awards were enforced in the international context, and allowing section 9 to preempt the Convention would be inconsistent with the overall policy. *Id.*; *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) ("The goal of the Convention . . . was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries.").

Other courts have been unwilling to take the same step as the Fifth Circuit and conclude that section 9 does not preempt the Convention. *See, e.g.*, Daihatsu Motor Co. v. Terrain Vehicles, Inc., 13 F.3d 196, 199 n.5 (7th Cir. 1993) ("We note for emphasis that we neither approve nor disapprove of the district court's determination that section 9 applies to the Convention."); Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc., 418 F. Supp. 982, 985 (E.D. Mich. 1976) (holding that it was unnecessary to decide whether section 9 was applicable to the Convention when the parties had already consented to confirmation in their arbitration agreement).

38. *See* 9 U.S.C. § 9 (1994) (indicating judicial confirmation is available if "the parties in their agreement have agreed that a judgment of the court shall be entered upon the reward made pursuant to the arbitration"). One explanation for congressional concern over the parties consent to judgment in their arbitration agreement is that Congress intended to protect those parties who had only agreed to nonbinding arbitration from potential frustration and abuse of judicial confirmation. H.R. REP. NO. 68-96, at 2.

39. *See supra* Part II.B.

the FAA in *Marine Transit Corp. v. Dreyfus*,[40] holding that while an arbitration agreement may not explicitly provide for judicial confirmation, consent can be inferred from language such as "final and binding" in the agreement.[41] Nevertheless, the Court has not confronted the issue since the *Dreyfus* decision in 1932, and conflicting interpretations of section 9 have since developed among the federal circuits.[42] A majority of the federal courts addressing this issue have followed a practical interpretation of section 9 and have concluded that evidence in the arbitration agreement indicating the parties intended the arbitration to be final and binding is sufficient for judicial confirmation.[43] Some federal courts hold, however, that the parties must explicitly grant a court jurisdiction in the arbitration agreement in order to be entitled to judicial confirmation.[44] The following discussion outlines the different approaches followed by the federal courts.

A. *Final and Binding Arbitration Sufficient for Judicial Confirmation*

A majority of the federal circuits addressing this issue hold that explicit consent to judicial confirmation is not required by section 9.[45] Rather, the courts that

---

40. Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932).

41. *Id.* at 267. In attacking an assertion by the petitioner that the parties' agreement did not satisfy the statutory requirements of section 9, the Court noted "the agreement for arbitration stipulated that the award should be 'final and binding.' The award was accordingly binding upon the Marine Transit Corporation . . . ." *Id.* Essentially, the Court focused more on the parties' intent rather than a rigid statutory construction of section 9. *See id.* at 276.

42. *See supra* notes 36 & 37.

43. *See* P & P Indus., Inc., v. Sutter Corp., 179 F.3d 861, 867 (10th Cir. 1999) (holding that a clause in the arbitration agreement was sufficient consent to judicial confirmation because it mandated disputes be arbitrated before the AAA); Booth v. Hume Publ'g, Inc., 902 F.2d 925, 930 (11th Cir. 1990) (holding that provisions in an agreement indicating state arbitration determinations are final and binding are sufficient for judicial confirmation) (citations omitted); Place St. Charles v. I.A. Jones Constr., 823 F.2d 120, 124 (5th Cir. 1987) (holding that because federal policy favors arbitration and the agreement states each party is bound to the arbitration, the court had the power to confirm the award); Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 389-90 (7th Cir. 1981) (upholding arbitration agreement and judicial enforcement of provisions stating that arbitration was final and binding); Kallen v. Dist. 1199, Nat'l. Union of Hosp. & Health Care Employees, 574 F.2d 723, 726 (2d Cir. 1978) (holding that employer, by participating in the arbitration, implicitly agreed to confirmation because the arbitration was, by its terms, final, conclusive, and binding).

44. *See, e.g.*, PVI, Inc. v. ratiopharm GmbH, 135 F.3d 1252, 1253 (8th Cir. 1998) (holding that judicial confirmation under the FAA is unavailable unless the parties explicitly agree); Commonwealth Enters. v. Liberty Mut. Ins. Co., 1992 WL 59019, at *2 (9th Cir. Mar. 27, 1992) (holding that judicial authority to confirm arbitration award depends on the consent of the parties to judgment entry as part of the arbitration agreement); Higgins v. United States Postal Serv., 655 F. Supp. 739, 744 (D. Me. 1987) (holding that an express agreement to judicial confirmation is a prerequisite for relief under section 9).

45. *See supra* note 43 and accompanying text.

have followed this approach focus on whether the parties expected the arbitration award to be final and binding.[46] Using this approach, a court will likely find the arbitration award is binding if there is a finality clause in the contract or the parties have incorporated the American Arbitration Association (AAA) Rules in their agreement.[47] Examination of the arbitration agreement from this perspective places more emphasis on enforcing the intent of the parties rather than the form of the agreement.[48]

1. *Incorporation of a Finality Clause*

A number of courts have held that inclusion of a clause stating the arbitration award will be final and binding satisfies the consent to judgment requirement of section 9.[49] In *I/S Stavborg v. National Metal Converters, Inc.*,[50] the Second Circuit Court of Appeals held language in a contract stating "'[t]he decision of any two of the three [arbitrators] . . . shall be final'" constituted consent to judicial confirmation under section 9.[51] While the clause did not contain any explicit agreement by the parties to judgment entry, the court held section 9 did not require *explicit* consent, and thus the agreement that the award would be final and binding sufficed for judicial confirmation.[52] The court reasoned "[w]hatever 'final' means, it at least

---

46. *See supra* note 43.

47. *See, e.g.*, Rainwater v. Nat'l Home Ins. Co., 944 F.2d 190, 193 (4th Cir. 1991) (holding that reference to the AAA Rules is sufficient to make arbitration binding); Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1273 (7th Cir. 1976) (same); Paley Assocs. v. Universal Woolens, Inc., 446 F. Supp. 212, 214 (S.D.N.Y. 1978) (holding that reference to AAA Rules is sufficient to make arbitration binding). The AAA Rules generally provide the parties are deemed to have consented to judicial confirmation of the arbitration award. *See, e.g.*, AM. ARBITRATION ASS'N COMMERCIAL ARBITRATION RULES 50(c) (2000); *see also infra* note 68 and accompanying text.

48. Judicial confirmation protects the intent of the parties. Without judicial confirmation—the mechanism through which the judiciary recognizes arbitration awards as final and binding—the issues resolved through arbitration could be litigated *de novo*. *See supra* note 7.

49. *See, e.g.*, Am. Centennial Ins. Co. v. Seguros la Republica, S.A., No. 91 Civ. 1235 (MJL), 1996 WL 304440, at *1 (S.D.N.Y. June 5 1996) (holding that final and binding language constitutes consent to confirmation); Penn. Eng'g Corp. v. Islip Res. Recovery Agency, 710 F. Supp. 456, 460 (E.D.N.Y. 1989) (holding that consent to confirmation can be implied from an agreement stating the decision of the arbitrator will be final and binding); Compania Chilena De Navegacion Interoceanica, S.A. v. Norton, Lilly & Co., 652 F. Supp. 1512, 1515 (S.D.N.Y. 1987) (holding that a finality clause is sufficient for judicial confirmation); Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc., 418 F. Supp. 982, 985 (E.D. Mich. 1976) ("Indeed such a conclusion seems inescapable if the 'final and binding' language of the Contract is to be given effect.").

50. I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424 (2d Cir. 1974).

51. *Id.* at 426-27 (quoting clause thirty-seven of party contract); *see also* Kallen v. Dist. 1199, Nat'l Union of Hosp. Care Employees, 574 F.2d 723, 724-26 (2d Cir. 1978).

52. I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d at 426.

expresses the intent of the parties that the issues joined and resolved in the arbitration may not be tried de novo in any court, state or federal."[53]

In *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*,[54] the Seventh Circuit Court of Appeals held that language in an arbitration agreement stating the arbitration "'shall be final and binding upon both parties'" constituted consent to judgment entry.[55] The court concluded that without judicial confirmation, the arbitration award would not be final and binding; therefore, confirmation was necessary to give effect to the terms of the parties' agreement.[56]

The Eleventh Circuit also arrived at a similar conclusion in *Booth v. Hume Publishing, Inc.*[57] *Booth* involved an employment contract that stated any decision rendered through arbitration would be final and binding.[58] Booth made a motion to confirm the arbitration award, and Hume objected, asserting the court did not have jurisdiction to confirm the award under the FAA because the arbitration agreement did not explicitly provide for judicial confirmation.[59] The court rejected Hume's argument, stating "[i]t strikes this court as disingenuous for Hume to argue, now that an award has been issued against it, that it never agreed to enforcement of the results of the arbitration."[60] The court concluded it was the language of the contract,

---

53. *Id.* at 427. The court further concluded that even if there may have been doubt as to the intent of the parties, based strictly upon the language of the contract, the parties' conduct served as corroborating evidence to support judicial confirmation of the arbitration award. *Id.* The court noted:

> [T]he power of a federal court was invoked to secure the appointment of the 'third' arbitrator. After arbitration, appellant moved in federal district court under 9 U.S.C. § 9 to vacate and/or modify that award. Under these circumstances, it seems abundantly clear . . . that both parties in fact consented to the entry of judgment . . . .

Id. It is unclear whether the court would have confirmed the arbitration award based on the parties' post-contractual conduct alone. The uncertainty arises from the fact that section 9 provides for judicial confirmation only if the parties have *agreed in their agreement* the award is to be final and binding. 9 U.S.C. § 9 (1994). However, some courts have confirmed arbitration awards based on post-contractual conduct alone, but have also found support for such decisions irrespective of the FAA. *See infra* Part III.A.3.

54. Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386 (7th Cir. 1981).

55. *Id.* at 390 (quoting section 7 of the parties' collective bargaining contract).

56. *Id.*

57. Booth v. Hume Publ'g v. Inc., 902 F.2d 925 (11th Cir. 1990).

58. *Id.* at 927.

59. *Id.*

60. *Id.* at 930. The court focused on the fact the agreement would be binding and final as well as the fact Hume demanded the arbitration in the first instance. *Id.* ("Hume demanded arbitration and participated fully in the arbitration process. Also, Hume clearly agreed that such arbitration would be final and binding upon it.").

coupled with Hume's full participation in the arbitration process, which warranted judicial confirmation of the award.[61]

The Fifth Circuit took a rather liberal approach to interpreting an arbitration clause in *Place St. Charles v. J.A. Jones Construction Co.*[62] In *Place St. Charles*, the Fifth Circuit held that language in an arbitration agreement simply stating the parties would be "bound" by the arbitration award—but not containing a finality provision—satisfied the consent to judgment requirement under section 9.[63] The case involved a construction contract dispute that contained the following arbitration clause: "In the event of a dispute of difference between [the parties], which [the parties] cannot effectively satisfy, [the parties] may invoke arbitration, and *each agrees to be bound by the result of said arbitration.*"[64] Citing a liberal federal policy in favor of arbitration, the Fifth Circuit concluded this contractual language alone was sufficient to confirm the award under section 9.[65]

2. *Consent to the Use of the American Arbitration Association Rules*

A number of courts have held that agreeing to use the AAA Rules in an arbitration agreement constitutes consent to judgment entry under section 9.[66] The AAA promulgates industry specific rules detailing uniform arbitration procedures for disputes in various industries, including commercial, construction, employment, and patent.[67] In the case of commercial, construction, employment, and patent disputes, the AAA Rules provide that when parties agree to use the AAA Rules they also consent to judgment.[68] Further, the AAA Rules provide that the parties are deemed

---

61. *Id.* The court indicated it would have confirmed the award based on the language of the contract alone, irrespective of the conduct of the parties. *Id.* However, not all courts have held final and binding language alone, without participation in the arbitration process, is sufficient for the consent to judgment requirement of section 9. *See, e.g.*, Higgins v. United States Postal Serv., 655 F. Supp. 739, 744 (D. Me. 1987) (holding that final and binding language alone, without supporting conduct, is insufficient for section 9).

62. Place St. Charles v. J.A. Jones Constr. Co., 823 F.2d 120 (5th Cir. 1987).

63. *Id.* at 124.

64. *Id.* at 122 (emphasis added).

65. *See id.* at 124; *see also* T & R Enter. v. Cont'l Grain Co., 613 F.2d 1272, 1278-79 (5th Cir. 1980) (holding that "final and binding" language in an arbitration agreement is sufficient for judicial confirmation).

66. *See supra* note 47.

67. *See* AM. ARBITRATION ASS'N COMMERCIAL ARBITRATION RULES (2000); AM. ARBITRATION ASS'N CONSTR. INDUS. ARBITRATION RULES (1999); AM. ARBITRATION ASS'N PATENT ARBITRATION RULES (1997); AM. ARBITRATION ASS'N NAT'L RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (1999). The AAA Rules can be accessed through the homepage of the American Arbitration Association. *American Arbitration Association* <http://www.adr.org> (accessed Oct. 18, 2000).

68. AM. ARBITRATION ASS'N COMMERCIAL ARBITRATION RULES 50(c) (2000) ("Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration

to have consented to the Rules in their entirety unless the arbitration agreement states otherwise.[69] Thus, by including the AAA Rules in their arbitration agreement, the parties have, in essence, incorporated a consent to confirmation provision in the contract.[70]

For example, in *Commonwealth Edison Co. v. Gulf Oil Corp.*,[71] the Seventh Circuit held that an arbitration clause in an uranium supply contract, while not explicitly providing for judicial confirmation, met the consent requirement of section 9 by "incorporat[ing] rules of arbitration into their agreement, thereby establishing the requisite consent to entry of judgment, if the rules so provided."[72] The arbitration rules agreed upon by the parties did in fact provide for entry of judgment, and thus the court concluded it could be inferred the parties had consented to judicial confirmation.[73]

---

award may be entered in any federal or state court having jurisdiction thereof."); AM. ARBITRATION ASS'N CONSTR. INDUS. ARBITRATION RULES 48(c) (1999); AM. ARBITRATION ASS'N PATENT ARBITRATION RULES 37(c) (1997); AM. ARBITRATION ASS'N NAT'L RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES 46(c) (1999). The AAA Rules can be accessed through the homepage of the American Arbitration Association. *American Arbitration Association* <http://www.adr.org> (accessed Oct. 18, 2000).

69. AM. ARBITRATION ASS'N COMMERCIAL ARBITRATION RULES 1 (2000) ("The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the [AAA]."); AM. ARBITRATION ASS'N CONSTR. INDUS. ARBITRATION RULES 1 (1999); AM. ARBITRATION ASS'N PATENT ARBITRATION RULES 1 (1997); AM. ARBITRATION ASS'N NAT'L RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES 1 (1999). The AAA Rules can be accessed through the homepage of the American Arbitration Association. *American Arbitration Association* <http://www.adr.org> (accessed Oct. 18, 2000).

70. The same logic should also apply to those parties who agree to use some other rules containing similar provisions that are included in the AAA Rules. The AAA Rules have not always contained a provision whereby the parties are deemed to have consented to judicial confirmation unless otherwise provided in the arbitration agreement. *See* Varley v. Tarrytown Assoc., Inc., 477 F.2d 208, 210 (2d Cir. 1973) (noting that a court shall confirm an arbitrator's decision only when the parties have agreed to such a provision in the agreement). In *Varley*, the appellee contended that incorporation of the AAA Rules satisfied section 9's consent to judgment requirement. *Id.* at 209. However, at the time *Varley* was decided, the AAA Rules did not contain any reference to entry of judgment, and thus the appellee's argument that consent was incorporated by adoption of the AAA's Rules failed. *See id.* at 210. In a subsequent decision, the Second Circuit noted: "*Varley*, of course, did not hold that consent must be explicit within the arbitration clause itself or even in some document incorporated therein by reference." I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424, 426 (2d Cir. 1974) (noting at the time *Varley* was decided, "the AAA had recommended that a separate and distinct clause be written directly into the arbitration agreement to achieve that purpose").

71. Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1976).

72. *Id.* at 1272.

73. *Id.* at 1273; *see also* Weinstein v. Levin-Fricke-Recon, No. 97-11165-PBS, 1999 U.S. Dist. LEXIS 8950, at *3-4 (D. Mass. Apr. 29, 1999). The court held incorporation of the AAA Rules sufficed and noted:

> [M]ost courts have ordered confirmation of an arbitration award even in the absence of an explicit agreement where the parties have agreed that the arbitration would be

The Fourth Circuit has also held that incorporation of the AAA Rules into an arbitration agreement implies consent to judicial confirmation under section 9.[74] In *Rainwater v. National Home Insurance Co.*,[75] the issue before the court was whether the parties had agreed to binding arbitration, or whether the arbitration was merely a dispute resolution mechanism as a condition precedent to litigation.[76] The arbitration agreement between the two parties incorporated the AAA Rules, but it also contained a clause stating that "[t]he voluntary dispute settlement process provided herein shall be a condition precedent to the commencement of any litigation."[77] National Home Insurance Company maintained the arbitration was nonbinding, arguing it was only a condition precedent to litigation and not intended to preclude an action before a court.[78] However, that argument failed because the court concluded the words "condition precedent" were "an artifact left over from the days of hostility toward arbitration" and did not make the arbitration nonbinding.[79] Because the parties had incorporated the AAA Rules into their agreement, the court concluded the arbitrator's decision was binding and could be confirmed under section 9.[80]

The Fourth Circuit is not the only court that has interpreted ambiguous contractual provisions liberally in favor of arbitration. In *St. Lawrence Explosives v. Worthy Bros. Pipeline Corp.*,[81] the court held a clause in a construction contract, which provided the parties would follow the AAA Rules, was sufficient to constitute

---

> final and binding, where the party opposing confirmation has invoked the jurisdiction of the court to compel arbitration on the underlying contract, and where the party has participated fully in the arbitration process.

Id; Broad, Vogt & Conant, Inc. v. Harnischfeger Corp., No. 90C-6526, 1990 WL 205452, at *3 (N.D. Ill. Dec. 13, 1990) (holding that "[t]he parties are deemed to have consented to entry of judgment if their agreement stipulates that arbitration proceedings would be conducted in accordance with the . . . [AAA] Rules which did provide such consent"); Paley Assocs., Inc. v. Universal Woolens, Inc., 446 F. Supp. 212, 214 (S.D.N.Y. 1978) (noting that *Commonwealth* is clearly the law). In *Broad*, Harnischfeger Corp. asserted that the parties, while agreeing to follow the AAA's "procedure," did not agree to adopt the AAA Rules in their entirety and did not consent to the AAA's entry of judgment provision. Broad, Vogt & Conant, Inc. v. Harnischfeger Corp., 1990 WL 205432, at *3. However, the court rejected this argument. *Id.* ("If the parties had intended such an unusual reading of the agreement, they would have drafted the agreement more clearly to reflect their intention.").

74. *See* Rainwater v. Nat'l Home Ins. Co., 944 F.2d 190, 194 (4th Cir. 1991).

75. *Id.*

76. *Id.* at 192.

77. *Id.* at 194.

78. *Id.*

79. *Id.*; *see also* McKee v. Home Buyers Warranty Corp. II, 45 F.3d 981, 984 (5th Cir. 1995) (holding that the words "condition precedent" alone do not make the arbitration nonbinding).

80. Rainwater v. Nat'l Home Ins. Co., 944 F.2d at 194.

81. St. Lawrence Explosives v. Worthy Bros. Pipeline Corp., 916 F. Supp. 187 (N.D.N.Y. 1996).

consent to confirmation.[82] However, the contract also contained the following clause that was simply "crossed out" with an "X": "The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."[83] St. Lawrence made a motion to confirm the arbitration award.[84] Worthy Brothers argued, however, that by crossing out the aforementioned clause, the parties intended the arbitration to be nonbinding and did not agree to judicial confirmation.[85] Despite the strength of this argument, the court held the stricken clause was extrinsic evidence and could not be used in interpreting the contract.[86] Thus, the only evidence left to consider was the fact the parties included the AAA Rules in their agreement.[87] The court held that, while the parties may agree otherwise, "where an arbitration clause refers to AAA Rules a presumption arises that such arbitration was intended to be binding."[88]

In *P & P Industries, Inc. v. Sutter Corp.*,[89] the Tenth Circuit held that incorporation of the AAA Rules in an arbitration agreement satisfies section 9's consent to confirmation provision.[90] The case involved a construction contract dispute between P & P Industries and Sutter Corporation.[91] The contract between the parties provided that all disputes concerning the contract would be resolved through arbitration and in accordance with the AAA Rules.[92] While the contract did not expressly provide for judicial confirmation of arbitration awards, the court held:

> [B]y agreeing to arbitrate before the AAA, and by not specifying an alternative set of arbitration rules in the agreement, P & P and Sutter impliedly agreed they would be bound, in the course of arbitration proceedings, by the procedural rules of the AAA. . . . Thus, P & P and Sutter impliedly agreed

---

82. *Id.* at 190.
83. *Id.* at 189.
84. *Id.*
85. *Id.*
86. *Id.* at 190. The court concluded extrinsic evidence may only be used when a contract is ambiguous. *Id.* (citing Consarc Corp. v. Marine Midland Bank, N.A., 996 F.2d 568, 573 (2d Cir. 1993)). The court found the parties' adoption of the AAA Rules made it quite clear the parties intended for the arbitration to be final and binding, and therefore there was no ambiguity in the contract. *Id.* at 191. Even though the words were left on the paper and simply crossed out with an "X," the court stated "[t]here are many ways of obliterating words on paper, and crossing them out has always been one way." *Id.* However, the court stretched its analysis to reach the conclusion that the parties agreed to judicial confirmation. *Id.* at 189-90. It is not unreasonable to conclude this type of marking in the contract made the terms of the agreement ambiguous, and the court deciding otherwise is a fallacy on its part.
87. *Id.*
88. *Id.* (citation omitted).
89. P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861 (10th Cir. 1999).
90. *Id.* at 867.
91. *Id.* at 863.
92. *Id.* at 864.

'that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.'[93]

3. *Post-Contractual Consent to Judicial Confirmation*

While section 9 states the parties must consent to judgment entry in their agreement, a court may confirm an arbitration award based upon the conduct of the parties after a conflict arises and they begin arbitrating their dispute.[94] For example, in *Smiga v. Dean Witter Reynolds, Inc.*,[95] the Second Circuit held a court that compels arbitration retains jurisdiction over the dispute to confirm the resulting award.[96] *Smiga* involved an employment contract containing an arbitration clause, which simply provided any disputes arising between the parties would be resolved through arbitration but made no mention of the parties' intentions as to whether the

---

93. *Id.* at 867-68 (quoting 9 U.S.C. § 9 (1994)). The *P & P Industries* decision reflects a change in position by the Tenth Circuit regarding what is required for section 9's consent to confirmation provision. Prior to the *P & P Industries* case, the Tenth Circuit addressed the issue in *Oklahoma City Associates v. Wal-Mart Stores, Inc.* *See* Okla. City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 795 (10th Cir. 1991). In *Wal-Mart*, the court held it did not have the authority to confirm the arbitration award because the parties did not consent to judicial confirmation in their arbitration agreement. *Id.* The court focused on the language in section 9 stating a court may confirm an arbitration award where "'the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.'" *Id.* (quoting 9 U.S.C. § 9). Because the parties did not incorporate such a provision in their arbitration agreement, the court held it lacked the authority to confirm the award. *Id.* at 793-94.

One factor that distinguishes *Wal-Mart* from *P & P Industries* is the arbitration agreement in *Wal-Mart* did not contain any language suggesting the decision of the arbitration panel would be final, nor did it explicitly incorporate a reference to the AAA Rules. *Compare id.* at 794 (noting the lack of a finality provision and only a tacit reference to the AAA Rules), *with* P & P Indus. Inc. v. Sutter Corp., 179 F.3d at 867-68 (noting agreement to arbitrate under AAA Rules). While the *Wal-Mart* court found it unnecessary to consider whether a finality clause or incorporation of the AAA Rules into the agreement would have sufficed for judicial confirmation, it criticized the decision of other courts to confirm arbitration awards based on a finality clause alone. Okla. City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d at 794. The court noted: "without more, it is equally plausible that a finality clause could be interpreted to mean the parties intended to have the award enforced in state rather than federal court." *Id.* (emphasis omitted). The *Wal-Mart* court did not discuss whether incorporation of the AAA Rules would satisfy section 9, but the *P & P Industries* court determined the AAA Rules would satisfy section 9. P & P Industries, Inc. v. Sutter Corp., 179 F.3d at 868; *see also* Okla. City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d at 794. While a finality clause was not an issue in *P & P Industries*, the court cited its approval of other courts that have determined reference to final and binding arbitration is sufficient for section 9. P & P Industries, Inc. v. Sutter Corp., 179 F.3d at 867.

94. *See infra* notes 95-108 and accompanying text.

95. Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698 (2d Cir. 1985).

96. *Id.* at 705.

decision of the arbitrator would be final and binding.[97] A series of controversies arose between the parties, and the employee filed suit against Dean Witter under Title VII.[98] Dean Witter scheduled an arbitration hearing pursuant to the clause in the employment contract that did not concern the Title VII claim.[99] The employee subsequently filed a motion with the federal district court to stay the arbitration proceedings, which the judge denied.[100] Upon rendition of the arbitration award, Dean Witter filed a motion to confirm the award, and the district court entered judgment, which Smiga appealed.[101]

The Second Circuit affirmed, holding "the district court's order denying Smiga's motion to stay arbitration was essentially the equivalent of an order by the district court to compel arbitration."[102] By reasoning that denying a motion to stay arbitration proceedings is analogous to a motion to compel arbitration, the court retained jurisdiction over the controversy to confirm the arbitration award.[103] Moreover, the court concluded the employee's filing of a motion to stay the arbitration proceedings indicated the employee understood the arbitration would be binding.[104]

The Tenth Circuit has also stated, in an unpublished decision, that the parties' interaction with a court throughout the arbitration process may indicate the arbitration is to be final and binding, and thus judicial confirmation is warranted upon rendition of the award.[105] In *Public Service Co. of Oklahoma v. Burlington Northern Railroad*

---

97. *See id.* at 701. The arbitration clause provided, in part, "any controversy between [the employee] and any member or member organization . . . or affiliate or subsidiary thereof arising out of [the] employment or the termination of [the] employment shall be settled by arbitration." *Id.* While neither Dean Witter nor the court made the argument, one could interpret "settle" to mean the decision of the arbitrator would be final.

98. *Id.* at 701-02.

99. *Id.* at 702.

100. *See id.* The Second Circuit affirmed the trial court's power and decision to confirm the arbitration award. *Id.* at 705. It found the district court opinion equivalent to an order to compel arbitration. *Id.* Judge Mishler's wrote the opinion of the court, stating:

> We have [a] strong public policy principle and [that] is the strong public policy that favors arbitration. [Plaintiff] signed an arbitration agreement. I am convinced that the arbitration has nothing to do with a Title 7 claim. She still has a claim for sex discrimination, the claim that Dean Witter fired her because of her sex.

Id. at 702 (brackets in original).

101. *Id.* at 705.

102. *Id.* In commenting on the remark by Judge Mishler, the court found "this statement by the district court to be equivalent to an order to compel arbitration and, therefore . . . [held] that the district court herein retained power to confirm the arbitration award." *Id.*; *see also supra* note 100.

103. *See id.* at 705.

104. *See id.*

105. Pub. Serv. Co. of Okla. v. Burlington N. R.R. Co., 1995 WL 640375, at *3 (10th Cir. Apr. 18, 1995).

Co.,[106] the court held pre-award interaction with a court might constitute consent to judgment entry under section 9 of the FAA.[107] The court found there was jurisdiction to confirm the arbitration award in question because "the district court not only appointed the third arbitrator, it expressly assumed continuing jurisdiction over the arbitration, including the receipt of reports and, presumably, enforcement power over payment of the neutral arbitrator's fee at the 'customary' rate required by the court . . . [and] [n]either party objected."[108] The decisions of the Second and Tenth Circuits indicate courts are not simply constrained to the consent provision of section 9, but may also confirm an arbitration award based on the parties' use of judicial authority throughout the arbitral process.

B. *Explicit Consent to Judicial Confirmation Required*

One theory with respect to the statutory interpretation of section 9 is the arbitration agreement must contain explicit language that grants a court authority to confirm an arbitration award. Perhaps the strictest illustration of this statutory

---

106. *Id.*

107. *Id.* at *5.

108. *Id.* The *Smiga* court noted that if the parties had entered into a submission agreement, the court would have the authority to confirm an arbitration award under New York Stock Exchange Rule 628. Smiga v. Dean Witter Reynolds, Inc., 766 F.2d at 705. Smiga contended, likewise, the parties had not entered into a submission agreement, and thus the court did not have jurisdiction to confirm the award. *Id.* Nevertheless, the court found that in denying the motion to stay arbitration proceedings, the court had in essence compelled arbitration. *Id.* Furthermore, a court retains the power to confirm an arbitration award resulting from an arbitration it compels. *See id.*

As noted above, the Tenth Circuit, in *Oklahoma City Associates v. Wal-Mart Stores, Inc.*, held explicit consent by the parties was required for judicial confirmation of arbitral awards under section 9. Okla. City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 793-94 (10th Cir. 1991). The arbitration clause in *Wal-Mart* did not contain a finality clause, and thus the court did not decide whether a finality clause alone was sufficient for consent to confirmation. *Id.* at 794-95. The court did state that, at a minimum, a finality clause was required. *Id.* In *Public Service Co. of Oklahoma*, the Tenth Circuit reiterated once again its refusal to decide whether or not a finality clause alone would suffice under section 9. Pub. Serv. Co. of Okla. v. Burlington N. R.R. Co., 1995 WL 640375, at *3. The court stated the "sufficiency of a finality clause alone to establish the parties' consent to federal jurisdiction was not an issue in *Wal-Mart*, and [was] unnecessary to decide that issue here." *Id.* It should be noted that the Tenth Circuit's decision in *Public Service Co. of Oklahoma* is an unpublished decision and, therefore, is "not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel." *See id.* at *5 & n.*.

More recently, however, the Tenth Circuit held incorporation of the AAA Rules satisfies section 9's requirements. *See* P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 867 (10th Cir. 1999); *see also supra* note 93 (discussing the *P & P Industries* decision). A finality clause was not an issue in *P & P Industries*, but the court acknowledged other cases have held a finality clause to be sufficient under section 9. P & P Indus., Inc. v. Sutter Corp., 179 F.3d at 867. Nevertheless, because there are no Tenth Circuit cases directly on point, it is unclear how the circuit would hold if confronted with an arbitration agreement that only contained language stating the arbitration would be final and binding.

construction is the approach taken by the Eighth Circuit in *PVI, Inc. v. ratiopharm GmbH*.[109] In *PVI*, minority shareholders PVI, Inc. and William G. Skelly sued ratiopharm GmbH for breach of the stockholders' agreement that governed the shareholders' option to sell their stock to ratiopharm.[110] The pertinent clause of the stockholders' agreement provided, in part, that "at any time after five years from the date of the agreement, PVI [and] Mr. Skelly . . . each 'ha[ve] a separate option to require ratiopharm to purchase all, but not less than all, of their stock . . . for the purchase price and upon the terms set forth in [the agreement].'"[111] If the parties were unable to agree upon a purchase price, they were to select a neutral expert to evaluate the fair price of the stock.[112] The decision of the neutral expert would be "final, binding, and conclusive."[113]

PVI decided to exercise its stock option.[114] However, the parties were unable to reach a resolution regarding a fair price for the stock.[115] In accordance with the terms of the agreement, the parties submitted their figures to a neutral who resolved the dispute by choosing ratiopharm's figures "as the closer approximation of the fair market value of the stock."[116] Subsequently, PVI filed an action against ratiopharm for breach of contract.[117] Ratiopharm countered with a motion in district court for confirmation of the neutral's evaluation under section 9 of the FAA.[118] The district court denied ratiopharm's motion for confirmation, and the Eighth Circuit affirmed.[119]

Notwithstanding the fact the parties' agreement provided the neutral's decision would be final, binding, and conclusive, the court held confirmation under the FAA

---

109. *See* PVI, Inc. v. ratiopharm GmbH, 135 F.3d 1252, 1253 (8th Cir. 1998) (denying confirmation of an arbitration award without an explicit agreement stating a court may enter a final judgment).

110. *Id.*

111. *Id.* (quoting agreement clause between the parties).

112. *Id.*

113. *Id.* The agreement required the parties first to attempt to arrive at a purchase price themselves. *Id.* Each party was to simultaneously submit its proposed price to the other "'based on an appropriate multiple of Martec's earnings or sales and other factors deem[ed] appropriate.'" *Id.* (quoting agreement clause between the parties). "If the [figures] were within 10 percent of each other, the purchase price would be the average of the two." *Id.* "If the [figures] were not within 10 percent of each other, the parties were to select a neutral expert who would decide 'which submitted purchase price best approximates the fair market value of the stock.'" *Id.* (quoting agreement clause between the parties).

114. *Id.*

115. *Id.* PVI and Mr. Skelly valued the stock at $36,750,000, while ratiopharm only valued the stock at $545,860—a difference of $36,204,140. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

is unavailable unless the parties *explicitly agree* a judgment of the court may be entered upon rendition of the arbitration award.[120] Recognizing other courts have confirmed arbitration awards containing similar language,[121] the court held section 9's consent to judgment provision requires more.[122] The court stated "[i]t is clear . . . that Congress intended for the substantive provisions of the FAA to apply only when the parties *affirmatively agreed* that they should."[123] Thus, if contracting parties want to ensure a court will confirm an arbitration award, the agreement to arbitrate must explicitly state the parties intend for the award to be entered as a judgment of the court.

While the Eighth Circuit's decision seems to destroy the parties' intent by elevating form over substance, it is not the only court that has required explicit consent to judgment entry. In an unpublished decision—*Commonwealth Enterprises v. Liberty Mutual Insurance Co.*[124]—the Ninth Circuit held the parties must consent to judgment as specified in the arbitration agreement in order for a court to have the authority to confirm an award under section 9.[125] *Commonwealth Enterprises* involved a dispute between two parties that was resolved through arbitration.[126] Commonwealth Enterprises filed a motion in federal district court to have the arbitration award confirmed.[127] The district court denied the motion, and the Ninth Circuit affirmed.[128] The Ninth Circuit held that, at a minimum, the parties' agreement must manifest an intent by the parties to have the arbitration award confirmed.[129]

While the parties' agreement did not indicate the decision of the arbitrator would be final,[130] it did provide that "[t]he arbitrator's decision [is] *appealable* and

---

120. *Id.*

121. *Id.* at 1254. The court noted the Second and Seventh Circuits have not required explicit language for section 9 confirmation. *Id.* The Second and Seventh Circuits have confirmed arbitration awards based upon similar language in an arbitration agreement stating the award would be final and binding. *Id.* (citing Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 389-90 (7th Cir. 1981); I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424, 426-27 (2d Cir. 1974)). Nonetheless, this type of language proved insufficient for the Eighth Circuit. *See id.* at 1253.

122. *Id.* at 1254.

123. *Id.* (emphasis added).

124. Commonwealth Enters. v. Liberty Mut. Ins. Co., 1992 WL 59019 (9th Cir. Mar. 27, 1992).

125. *Id.* at *1.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at *2.

130. *See id.* The court did not indicate whether or not it would confirm an arbitration award based on a finality clause alone, stating only "the agreement did not even specify that the award would be 'final' or 'binding.'" *Id.* This assertion, without more, does not support the conclusion that a finality clause would be sufficient for judicial confirmation. However, it does indicate the court would

Liberty Mutual's participation in these arbitration proceedings is not intended to and does not waive its right to appeal that decision."[131] Commonwealth Enterprises argued that "appealable" indicated the award should be final and binding.[132] However, the court concluded the word appealable alone did not indicate whether or not the parties intended for the arbitration to be final and binding, or nonbinding.[133] Due to the uncertainty surrounding the terms of the agreement, the court concluded the agreement was ambiguous, and thus did not satisfy the statutory requirements for confirmation under section 9.[134]

It remains unclear whether the Ninth Circuit would consider a finality clause or incorporation of the AAA Rules to be sufficient for judicial confirmation under section 9. The court merely noted "[t]he district court found that nothing in the contract indicated that a court judgment would be entered upon the award."[135] The court failed to outline the distinction between explicit and implicit consent to judicial confirmation by not indicating what contractual language is required, and thus left the issue unresolved.

IV. RECONCILING THE CONTRADICTORY INTERPRETATIONS OF SECTION 9

While a majority of the federal courts addressing this issue have held explicit consent to judicial confirmation is not required by section 9,[136] the Eighth Circuit's decision in *PVI, Inc. v. ratiopharm GmbH* indicates the law is not settled among the federal courts.[137] Although most courts are likely to confirm an arbitration award if the agreement indicates it is to be final and binding, section 9 still remains susceptible to more than one interpretation.[138] Thus, the precise issue to address is

---

at least consider a finality clause in examining the parties' intentions with respect to judicial confirmation of their arbitral award.

131. *Id.* (citing the disputed arbitration agreement) (brackets in the original) (emphasis added).

132. *Id.* While the court did not accept this reasoning, there is merit to this argument. If an arbitration award is nonbinding, there is no need to mention it is appealable; the normal course for appealing an arbitration award is through the judiciary, and a court may not review an arbitration award unless it is final and binding. *See* Millmen Local 550, United Bhd. of Carpenters and Joiners of Am. v. Wells Exterior Trim, 828 F.2d 1373, 1374 (9th Cir. 1987) (holding a portion of a labor arbitration award not reviewable by a court because it was not final and binding).

133. Commonwealth Enters. v. Liberty Mut. Ins. Co., 1992 WL 59019, at * 2.

134. *Id.*

135. *Id.*

136. *See supra* note 43.

137. PVI, Inc., v. ratiopharm GmbH, 135 F.3d 1252, 1254 (8th Cir. 1998).

138. *See* Booth v. Hume Publ'g, Inc., 902 F.2d 925, 930 (11th Cir. 1990) (citing T & R Enters. v. Cont'l Grain Co., 613 F.2d 1272, 1278-79 (5th Cir. 1980); Place St. Charles v. J.A. Jones Constr., 823 F.2d 120, 124 (5th Cir. 1987); Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 389-90 (7th Cir. 1981); Kallen v. Dist. 1199, Nat. Union of Hosp. and Health Care Employees, 574 F.2d 723, 726 (2nd Cir. 1978)).

which interpretation of section 9 is correct. Does section 9 require explicit consent to judicial confirmation in the arbitration agreement? Or, does evidence that the parties intended the arbitration award to be final and binding suffice?

In answering these questions, this section of the Article explores various methods of statutory interpretation that can be applied to section 9 to offer more guidance. In addition to applying methods of statutory interpretation, this section of the Article considers section 9 from a pragmatic perspective, suggesting formalistic requirements may be an impediment to carrying out the parties' intent. In the end, applying methods of statutory interpretation and analyzing the issue from a pragmatic perspective both yield the same result: explicit consent to judicial confirmation is not required by section 9.

A. *Methods of Statutory Interpretation*

Statutory interpretation is the process of discerning the meaning of legislation.[139] While in many cases the text of a statute may provide an answer to a particular question, many statutes do not contemplate all the possible interpretive dilemmas that may arise. As a result, courts often employ various methods of statutory interpretation in applying a statute to a particular factual scenario not specifically addressed by the statutory language itself.[140] The most common approaches used by courts in interpreting a statute are textualism, intentionalism, and purposivism.[141] The following discussion applies each of these statutory interpretive approaches to section 9.

---

139. For a comprehensive discussion of methods of statutory interpretation, see generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1995). For further review, see Robert J. Araujo, S.J., *The Use of Legislative History in Statutory Interpretation: A Look at* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57, 64-65 (1992) ("The work of interpretation goes beyond identifying the general tenor of the statute; it frequently involves constructing the specific meaning of broad language so as to apply the statute to the particular factual context."); Sarah Rudolph Cole, *Continuation Coverage Under COBRA: A Study in Statutory Interpretation*, 22 J. LEGIS. 195, 212 (1996) ("[I]f the statutory language does not clearly resolve the dispute, consideration of other interpretive tools may provide an interpretation that more closely resembles what Congress would have wanted or, at the least, what seems more in keeping with the underlying purpose of the statute.") (citation omitted); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 690 (1990) (supporting a statutory interpretive process that begins with the text of the statute rather than resorting to the legislative history from the start); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 503 (1989) ("[T]he statutory text is the foundation for interpretation, but structure, purpose, intent, history, and 'reasonableness' all play legitimate roles.").

140. *See* ESKRIDGE & FRICKEY, *supra* note 139, at 513-15 (discussing the judicial application and theories of statutory interpretation).

141. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990).

1. *Textualism*

The general rule of the textualist approach to statutory interpretation is courts should rely solely on the words of a statute to determine its meaning.[142] Under the textualist approach, questions regarding the application of a statute to a particular case begin and end with the language of the statute itself.[143] Textualists urge that resorting to external sources for interpretation, particularly legislative history, is fallacious because legislators only vote on the text of a statute and not on any accompanying explanatory materials.[144]

A textualist interpretation of section 9 focuses analysis strictly on the statute's text.[145] Section 9 provides in relevant part that "[i]f the parties in their agreement have *agreed* that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . any party to the arbitration may apply to the court so specified for an order confirming the award . . . ."[146] It is unclear from this statutory language, however, what constitutes "agreeing" to judicial confirmation. The statutory language is susceptible to two possible interpretations. First, section 9 could be interpreted to require an explicit provision in an arbitration agreement granting a court the authority to enter judgment upon issuance of the arbitration award, which is the interpretation adopted by the Eighth Circuit in *PVI, Inc. v.*

---

142. *See* Eskridge, *The New Textualism*, *supra* note 139, at 623 ("The new textualism posits that once the court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text."); *see also* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994) ("The critical assumption [of textualism] is that interpretation should be objective rather than subjective; that is, the judge should ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were.").

143. *See supra* note 142.

144. *See* Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 48 (1999) (identifying the three basic premises of textualism). According to Bell, the first premise of textualism is that "the only significant element of the legislative process is the vote of each legislative chamber . . . (and, of course, the signing or veto of legislation by the chief executive)." *Id.* The second premise is that "legislators vote only on the text of the statute, not [on] any accompanying" legislative history. *Id.* Finally, Bell suggests that because legislators rarely share a common subjective intent on a particular statute, it is impossible to ascertain congressional intent simply by examining the legislative history to a statute. *Id.* However, as a number of legal scholars have recognized, a more realistic perspective is that Congress simply cannot explain everything in the text of a statute, and resorting to legislative history when the statute is unclear may provide valuable guidance in tough cases. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306-07 (1990) (arguing that textualism "assumes that Congress can act in its official capacity only when a majority formally assents to a product or even a process by means of a formal vote").

145. *See supra* note 142.

146. 9 U.S.C. § 9 (1994) (emphasis added).

ratiopharm GmbH.[147] This is a rather strict reading of the statutory language of section 9, but it is surely a plausible interpretation. The second possible interpretation of section 9 is that agreement to judgment entry, while not explicitly stated in the arbitration agreement, may be inferred from other contractual language.[148] For example, as several federal courts have held, agreement to judgment entry may be indicated by language in the arbitration agreement stating the arbitration award would be final and binding.[149] The argument follows that the parties have, in essence, agreed to judicial confirmation because an arbitration award is not final and binding until judgment is entered by a court.

In the end, the textualist approach does not resolve the interpretive question presented by section 9. The text of section 9 is susceptible to two possible interpretations, and thus the issue remains unresolved under the textualist approach. Consideration of the legislative history to the FAA, or legislative intent may provide some insight as to which view is the better interpretation. However, use of such interpretive tools is strictly forbidden under the textualist approach.[150]

2. *Intentionalism*

The intentionalist approach to statutory interpretation is the process of interpreting legislation based on congressional intent.[151] Intentionalism considers not only the text of the statute, but also posits one of the most basic interpretive questions: "[W]hat was the 'intent of the legislature' in enacting the statute?"[152] The most common method of discerning legislative intent is through examination of the

---

147. *See* PVI, Inc. v. ratiopharm GmbH, 135 F.3d 1252, 1254 (8th Cir. 1998) (denying confirmation of an arbitration award without an explicit agreement stating a court may enter a final judgment); *see also supra* Part III.B.

148. *See* PVI, Inc. v. ratiopharm GmbH, 135 F.3d at 1254 (recognizing the findings of other courts that interpret contract language to mean an arbitration agreement is final and binding); *see also supra* Part III.A.

149. *See* PVI, Inc. v. ratiopharm GmbH, 135 F.3d at 1254 (citing Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 389-90 (7th Cir. 1981); I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424, 426-27 (2d Cir. 1974)).

150. *See supra* note 142.

151. Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, *supra* note 141, at 325 ("Under this view, the Court acts as the enacting legislature's faithful servant, discovering and applying the legislature's original intent."); *see also* Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837, 842-43 & n.9 (1984) (suggesting that the clear legislative intent of Congress is controlling); Gene R. Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and Will*, 66 IND. L.J. 1, 6 (1990) (defining intentionalism as "a focus on known events leading to passage and possibly . . . on data drawn from the larger historical context on which the legislative enactment took place").

152. Araujo, *supra* note 139, at 81; *see also* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

legislative history of a statute.[153] Critics of intentionalism argue that it is impossible to impute a singular intent to such a large group of legislators.[154]

In examining the legislative history of the FAA, one is left with little direction because Congress did not explain what it means for parties to "agree" to judicial confirmation.[155] The legislative history does not indicate whether the parties must explicitly agree to judicial confirmation or whether such an agreement is inferable from other language in the contract.[156] In short, Congress failed to articulate how a court should interpret section 9 when the parties agree to final and binding arbitration, but neglect to include a consent to confirmation provision in their arbitration agreement.

While the legislative history does not specifically address judicial confirmation under section 9, there is language in a House report that accompanied the FAA that

---

153. The United States Supreme Court first used legislative history to construe congressional intent in *Dubuque & Pacific Railroad Co. v. Litchfield*. *See* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1079 (1991); *see also* Dubuque & Pac. R.R. Co. v. Litchfield, 64 U.S. (23 How.) 66, 82 (1860) (emphasizing the importance of considering legislative intent "where the general principle of law is departed from"). The Court has often resorted to legislative history in cases where the statute is ambiguous or to avoid an absurd result. *See* Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 302 (1982) (finding that since 1938 there has been a continual increase in the usage of legislative historical documents in Supreme Court opinions); *see also, e.g.*, Comm'r v. Engle, 464 U.S. 206, 220-24 (1984) (using legislative history to assess the reasonableness of the various statutory interpretations); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982) ("Resort to the legislative history . . . merely confirms that Congress intended the statute to mean exactly what its plain language says."). Justice Scalia, however, has criticized judicial use of legislative history in a number of Supreme Court opinions. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518-19 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not the intentions of legislators."); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 252 (1989) (Scalia, J., concurring) (criticizing the Court for elevating legislative history to the status of statutory text); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring) (criticizing the Court for devoting four-fifths of its analysis to the legislative history); Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen, . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."); Immigration & Naturalization Serv. v. Cardozo-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (refusing to join the Court's opinion on the grounds that discussion of legislative history was irrelevant); *see also* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992) (describing Justice Scalia's plain meaning approach to interpretation).

154. Araujo, *supra* note 139, at 82-83 (citing Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-70 (1930)). Professor Radin's arguments have merit. He states: "A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs." *Id.* at 82 (quoting Max Radin, *supra*, at 869-70).

155. *See* H.R. REP. NO. 68-96, at 1 (1924).

156. *See id.* at 1-2.

provides some guidance in discerning congressional intent on this issue.[157] When Congress enacted the FAA, it intended to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs."[158] Further, Congress sought to overcome the judicial hostility toward arbitration and require courts to recognize private agreements to arbitrate.[159] Section 9 thus attempts to overcome judicial hostility toward arbitration by placing arbitration awards on the same level as any other court judgment—namely, entitling the parties to appeal the arbitrator's award, but precluding litigation of the issues decided through arbitration *de novo*.[160]

Analysis of congressional intent leads one to the conclusion that explicit language is not required by section 9, so long as it is evident from the arbitration agreement that the parties agreed to final and binding arbitration.[161] In enacting the FAA, Congress intended to protect the enforcement of voluntary agreements to arbitrate.[162] If the parties agreed to final and binding arbitration, the only way to ensure the finality of the issues resolved through arbitration is through judicial confirmation of the award.[163] Without judicial confirmation, the arbitration award is not final and binding.[164] Thus, if the parties agreed the arbitration award would be final and binding, they must be deemed to have consented to judicial confirmation under section 9.[165] This interpretation of section 9 is consistent with congressional intent to require the courts to recognize arbitration agreements as valid contracts and to uphold arbitration awards.

---

157. *See id.* at 1.

158. *Id.*

159. *Id.*; *see also* Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 272 (1995) ("We therefore proceed to the basic interpretive questions aware that we are interpreting an Act that seeks broadly to overcome judicial hostility to arbitration agreements . . . ."); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 225 (1987) ("The Federal Arbitration Act was intended to 'revers[e] centuries of judicial hostility to arbitration agreements.'") (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974)) (brackets in original); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 n.14 (1985) ("The Court previously has explained that the [FAA] was designed to overcome anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law.") (citations omitted).

160. H.R. REP. NO. 68-96, at 1-2.

161. *See id.* There must, at least, be some type of consent between the parties because the consent to confirmation provision cannot simply be read out of the statute. *See, e.g.*, *In re* Kaystar Tarim Urunleri Sanayi Ve Ticaret Ltd., No. 91-Civ. 9392, 1997 WL 160639, at *4 (S.D.N.Y. Apr. 7, 1997) (holding that judicial confirmation is precluded when the agreement does not contain explicit language, a finality clause, nor incorporate the AAA Rules).

162. H.R. REP. NO. 68-96, at 1.

163. *Id.* at 2.

164. Upon confirmation, the arbitration award is final like any other court judgment. *See* MACNEIL, *supra* note 7, § 38.1.1. This is not to suggest there will be no problems with party compliance or the judgment will not be appealed.

165. *See* H.R. REP. NO. 68-96, at 1.

3. *Purposivism*

In employing the purposivism method, the task of the interpreter is to consider the broader, teleological questions: What are the goals of the statute? What is it designed to accomplish?[166] The goal under the purposivism method is to interpret a statute to serve the purpose for which it was enacted.[167] While congressional intent may be relevant in understanding purpose, it is not the sole subject for inquiry. Rather, an interpreter engaging in the purposivism approach "must first look back to the 'legislative intent' and then define the purposes of the statute in the context of a specific case."[168] This approach to statutory interpretation is more dynamic than the intentionalist method because it attempts to harmonize statutory language with factual circumstances not contemplated by the statute.[169]

In analyzing section 9 from this perspective, it is also necessary to examine the legislative history in determining the overall purpose of the FAA. Congress stated that "[t]he purpose of [the FAA] is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts."[170] Thus, under the purposivism approach, section 9 must be interpreted in light of the FAA's purpose to make valid and enforceable agreements to arbitrate.[171]

While intentionalism and purposivism appear to overlap in analysis, a purposivism approach offers an even stronger argument that section 9 does not

---

166. *See* Araujo, *supra* note 139, at 86. While intentionalism and purposivism overlap in their inquiries, intentionalism is distinguishable because it concerns what Congress thought about the issue at the time of enactment. *See id.* On the other hand, purposivism expands upon the inquiry of intentionalism by "concer[n] [with] the *results* of the statute." *Id.* (emphasis added).

167. *Id.* at 86; *see also* United Steelworkers of America v. Weber, 443 U.S. 193, 201-04 (1979) (using legislative history to identify the purpose of Title VII of the Civil Rights Act of 1964); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940). The *American Trucking Associations* court stated:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislature. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.

Id. (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922) (citations omitted)).

168. Araujo, *supra* note 139, at 87.

169. *See id.* at 81-91 (discussing the purposivism and intentionalist methods).

170. H.R. REP. NO. 68-96, at 1.

171. *See* Araujo, *supra* note 139, at 87.

require explicit consent to judgment entry. The statute did not contemplate the factual circumstances of a contract merely providing for final and binding arbitration or incorporating the AAA Rules.[172] Yet it seems contradictory to congressional purpose to allow parties who have agreed to final and binding arbitration to avoid an arbitration award simply because the agreement did not explicitly state the award should be confirmed. The purpose of the statute is to protect arbitration agreements between parties and uphold the terms of those agreements; if an agreement indicates the parties agreed the arbitration award would be final and binding, the parties' intent should be protected through judicial confirmation.[173] This interpretation of section 9 is in accord with the FAA's purpose to make agreements to arbitrate valid and enforceable.

B. *Pragmatic Perspective*

In addition to applying various statutory interpretive tools to section 9, this Article suggests section 9 should also be considered from a pragmatic perspective. Under a pragmatic approach, a court should interpret section 9 from a practical standpoint that best protects the parties' intent with respect to the finality of the arbitration award. In many cases, the arbitration agreement will contain a provision granting a court the authority to confirm the award, and thus there will be no question as to whether the parties agreed to judicial confirmation. But, in cases where the arbitration agreement does not contain a consent to confirmation provision, a court should examine other language in the contract to determine whether the parties agreed the arbitrator's decision would be the last resort for resolving the dispute. If there is other language in the contract indicating the arbitrator's decision would be final and binding, consent to confirmation can be inferred, and confirmation of the award should not be precluded by any language in section 9.

For example, consider the situation in which University X enters into a contract with Builder Y to construct a new stadium on University X's campus. Both parties review and sign a contract that contains an arbitration clause. Subsequently, Builder Y refuses to comply with various terms of the contract, and University X invokes the arbitration clause to resolve the dispute. The parties arbitrate their dispute and the arbitrator renders an award in favor of University X. University X files a motion to confirm the award pursuant to section 9 of the FAA. Builder Y, however, notices that although the agreement states the arbitration award will be final and binding, there is no provision in the contract granting a court the authority to confirm the award. Builder Y then files a motion against confirmation arguing the

---

172. *See* H.R. REP. NO. 68-96, at 1-2.
173. *See id.*

court lacks authority to confirm the award under section 9 because the contract does not contain a consent to confirmation provision.

In this example, upon entering the agreement, the parties most likely envisioned that any decision issued by an arbitrator would be the final resolution of the dispute. Yet, in an attempt to avoid the arbitrator's decision, Builder Y asserts—after both parties had fully participated in the arbitration—the court lacks the authority to confirm the award under section 9. It is obvious Builder Y is asserting this position because it is not satisfied with the final outcome of the arbitration. However, had the arbitrator's decision been in favor of Builder Y, it surely would not assert that the parties did not intend for the award to be confirmed. This example illustrates that focusing on formalities not only has the potential to undermine party intent, but may also prove harmful to the arbitration process by perpetuating challenges to arbitration awards on frivolous issues.[174]

When Congress drafted the FAA, it did not set forth a detailed format by which contracting parties were to construct their arbitration agreements.[175] Rather, the FAA serves as a statutory remedy to protect party intent before the judiciary. If the parties intend for the arbitration to be final, the only means by which that end can be achieved is through judicial confirmation. Moreover, if contracting parties have

---

174. A recent decision by the Eighth Circuit illustrates how focusing on rigid formalities has the potential to undermine party intent in the context of a dispute resolved through mediation. In *Haghighi v. Russian-American Broadcasting Co.*, the court held a mediated settlement agreement, which did not contain a provision stating it was binding, was unenforceable. Haghighi v. Russ.-Am. Broad. Co., 173 F.3d 1086, 1089 (8th Cir. 1999). In *Haghighi*, the parties attempted to resolve their dispute through mediation. *Id.* at 1087. The parties reached an agreement through mediation and signed a mediation agreement. *Id.* However, the Minnesota Civil Mediation Act provides, in relevant part, that "a written mediated settlement agreement is not binding unless it contains a provision that it is binding." *Id.* (quoting the mediation agreement citing Minnesota Civil Mediation Act, MINN. STAT. § 572.35(1) (1998)). But the parties abided by the terms of the agreement and acted as if they were bound by its terms. *Id.* Months later, when additional negotiations were unsuccessful, Haghighi filed a summary judgment motion to enforce the mediated agreement. *Id.* The court granted the motion in favor of Haghighi and stated that despite the language in the Minnesota Civil Mediation Act, "both parties [were] represented by counsel and [were] fully aware of the binding effect of a settlement agreement." *Id.* Thus, the court focused more on the parties' intent in entering the agreement rather than the formal requirements of the statute. *See id.*

The Eighth Circuit reversed, however, and held the plain language of the Minnesota Civil Mediation Act precluded enforcement of the mediation agreement. *Id.* at 1088. The court held it had no authority to enforce the award because the agreement itself did not state it was binding. *Id.* at 1088-89.

While the *Haghighi* case involved a mediated settlement agreement and not an arbitration award, it is illustrative of how a court's focus on rigid statutory formalities can undermine party intent. In *Haghighi*, the parties, both represented by counsel, originally abided by the terms of the agreement. *Id.* at 1087. Yet it was months later that Russian-American invoked the provision in the Minnesota statute to oppose enforcement of the agreement.

175. *See* H.R. REP. NO. 68-96, at 1; 9 U.S.C. § 9 (1994).

agreed to final and binding arbitration, then the underlying presumption is the award will take such an effect as to give meaning to the word "final." The only remedy by which to make an arbitration award final is through judicial confirmation.

V. CONCLUSION

Interpreting section 9 in light of congressional purpose behind enactment of the FAA, and from a pragmatic perspective, leads to the conclusion that explicit consent to judicial confirmation is not required by section 9. While merely agreeing to arbitrate is insufficient, evidence that the arbitration award would be final and binding should suffice. If an arbitration award is to be final and binding, judgment entry is necessary because the award's finality cannot be protected without judicial confirmation. When an arbitration agreement evidences an intent to be final, either through a finality clause or incorporation of the AAA Rules, the parties have, in essence, *agreed* to judicial confirmation, thereby satisfying the requirement of section 9. Conversely, focusing on explicit language permits the invasion of technicalities in interpreting arbitration agreements and creates barriers for judicial enforcement of arbitration awards—marking a deviation from congressional policy in enacting the FAA.[176] As a practical matter, however, practitioners drafting arbitration agreements desiring a court to have authority to enter judgment should ensure that the agreement contains a consent to confirmation provision—especially attorneys representing parties who may appear before a court that adheres to the Eighth Circuit's decision in *PVI, Inc. v. ratiopharm GmbH*.[177]

---

176. *See* H.R. REP. NO. 68-96, at 1; 9 U.S.C. § 9.

177. *See* PVI, Inc. v. ratiopharm GmbH, 135 F.3d 1252, 1254 (8th Cir. 1998) (requiring an explicit provision in the arbitration agreement that judicial confirmation will make the award final and binding).