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***Bowen v. Amoco*¹ Contracting for Expanded Judicial Review under the Federal Arbitration Act**

I. INTRODUCTION

Arbitration is generally defined as “[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.”² Arbitration is intended to yield benefits for both the parties to the dispute and the court. For parties, arbitration is generally less expensive, quicker, less formal, and more private than a trial.³ In addition, parties contracting for arbitration have virtually unlimited control over the arbitration process. For instance, they may select the arbitrator(s) who will decide their dispute,⁴ and may even create their own discovery process and procedural devices.⁵ Courts benefit from arbitration by saving time and expense that would otherwise be spent litigating those disputes.⁶ This is true of federal courts under the Federal Arbitration Act (FAA)⁷ because all disputes pursuant to the FAA must have independent grounds for subject matter jurisdiction.⁸ Thus, disputes that are not arbitrated under the FAA would likely be litigated in the federal district courts,⁹ placing an additional strain on court resources.

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

2. Black's Law Dictionary 70 (abridged 6th ed. 1991).

3. Tom Cullinan, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 Vand. L. Rev. 395, 396-97 (1998).

4. 9 U.S.C. § 5 (1999).

5. Cullinan, *supra* note 3, at 397.

6. Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 Ohio St. J. on Disp. Resol. 343, 345 (1995) (citations omitted).

7. 9 U.S.C. § 1 *et seq.* (1999). The Federal Arbitration Act is the act under which the *Bowen* dispute arose. This note only discusses voluntary arbitration agreements in which parties agree to expanded review under the FAA. Other related issues concerning consumer arbitration agreements, compulsory (involuntary) arbitration, and the extent to which parties can agree to lesser or no review, are beyond the scope of this paper.

8. The FAA does not create an independent source of federal jurisdiction. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32, 103 S.Ct. 927, 942 n.32 (1983).

9. Of course, parties may also choose to litigate their disputes in state courts in the absence of an arbitration agreement. But regardless of whether the parties choose federal or state courts to litigate, in the absence of an arbitration agreement those courts will be burdened by the time and expense to adjudicate the dispute. However, this paper will assume that the parties would litigate in federal court for the sake of simplicity.

In light of these benefits, it is not surprising that commercial arbitration is becoming more popular.¹⁰ Recently however, many parties to arbitration have become frustrated with the outcome of arbitrators' decisions.¹¹ As one scholar has commented, "[i]n several conspicuous, high stakes disputes and untold lower profile arbitrations, arbitrators have rendered decisions that have fallen well outside the reasonable expectations of the parties."¹² The primary problem for parties who have experienced or are concerned about such aberrant awards is the FAA's extremely high standards for review. These narrow standards are set out in Title 9, Section 10(a) of the United States Code which provides:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.¹³

As if these standards to vacate arbitration awards are not high enough, the FAA does not require arbitrators to render written opinions,¹⁴ which further raises the bar for federal district judges to correct anomalous awards. When there is no written opinion, as is

10. Hayford & Peebles, *supra* note 6, at 347.

11. See Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 Alb. L. Rev. 241 (1999) ("In recent years there has been a growing concern over the 'Russian Roulette' nature of arbitration.").

12. *Id.*

13. 9 U.S.C. § 10 (a) (1999).

14. See *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361 (1960).

often the case,¹⁵ it is quite a challenge for a judge to decide whether the FAA's standards have been violated.

As a result, many parties have attempted to contractually expand the extremely limited FAA standards of judicial review in order to avoid unfair results.¹⁶ Parties who purport to expand this standard usually do so by providing in their arbitration contract that the arbitration award may be vacated on the basis of errors of law and/or fact.¹⁷ In addition, more and more parties may consider rejecting arbitration in favor of adjudication for fear of aberrant awards.¹⁸

Thus far, several federal cases have addressed whether parties may contractually agree to expand the judicial standards of review under the FAA. While the Fifth and Ninth Circuits have held that agreements to expand judicial review in arbitration proceedings are permitted,¹⁹ the Seventh and Eighth Circuits have suggested in dicta that they would not enforce such contracts.²⁰ Recently, in *Bowen v. Amoco*, the Tenth Circuit held that parties may not contractually expand the FAA's standards of review,²¹ thus creating a definitive split among the federal circuits.

As this note will demonstrate, parties should be able to contractually expand the scope of judicial review set out in the FAA, subject to only a few practical limitations. Arbitration is essentially a contractual arrangement of dispute resolution that should be honored according to the terms agreed upon by the parties. Contractually expanded review is consistent with Supreme Court precedent and FAA policy. Moreover, allowing expanded review under the FAA benefits the parties to the dispute, as well as the federal judiciary and the legal system as a whole.

15. Hayford & Peeples, *supra* note 6, at 360 (describing the practice of supplying no written opinion as "the prevailing practice").

16. See *infra* Part II(B)(2).

17. For examples of different language in clauses that have attempted to expand judicial review in various reported cases, see *infra* Part II(B)(2).

18. Younger, *supra* note 11, at 248 ("[T]he mere possibility of arbitrator excess has undermined the viability of arbitration in the eyes of some.") (citing Ilan E. Simon, Note, *Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc.: The Eradication of the Mistake of Law Doctrine in Private Sector Arbitration*, 48 Rutgers L. Rev. 533, 571 (1996), Ronald M. Sturtz, *The Debate Heats Up Over Judicial Review of Arbitration Results*, N.J.L.J., Aug. 12, 1996, at S-6).

19. Gateway Tech., Inc. v. MCI Telecomm. Corp., 64 F.3d 993 (5th Cir. 1995); Lapine Techn. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997). See also Syncor Int'l Corp. v. McLeland, 1997 WL 452245 (4th Cir. 1997) (unpublished), cert. denied, 522 U.S. 1110, 118 S.Ct. 1039 (1998), and New England Util. v. Hydro-Quebec, 10 F. Supp.2d 53 (D. Mass. 1998) for agreement.

20. Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991); UHC Mgmt. Co., Inc. v. Computer Sciences Corp., 148 F.3d 992 (8th Cir. 1998).

21. *Bowen*, 254 F.3d at 937.

Part II of this note discusses the legal background surrounding this issue, including a discussion of the FAA's general purpose and cases leading up to *Bowen*. Part III is a brief statement of the *Bowen* case, while Part IV analyzes the Tenth Circuit's reasoning and provides practical limitations concerning the extent to which expanded review should be permitted. Finally, Part V concludes that parties should be allowed to contractually expand the scope of judicial review beyond that provided for in the FAA.

II. LEGAL BACKGROUND

A. The FAA's Primary Purpose

It is well settled that "Congress's intent in enacting the FAA was to ensure judicial enforcement of private arbitration agreements."²² Although arbitration derived from English common law, early American courts often refused to enforce agreements to arbitrate future disputes.²³ While purporting to enforce arbitration awards already rendered, courts would implement virtually unlimited judicial review and often vacated arbitrational awards.²⁴ This practice frustrated the intentions of parties who wished their arbitration award to be final.²⁵

In response to American courts' hostility to honor arbitration agreements, Congress enacted the FAA in 1925.²⁶ The FAA was

22. *Id.* at 933 (citing *Mastrobuono v. Shearson Leahman Hutton, Inc.*, 514 U.S. 52, 57, 115 S.Ct. 1212, 1216 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479, 109 S.Ct. 1248, 1256 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20, 105 S.Ct. 1238, 1242 (1985) (internal citations omitted)). See *supra* note 23.

23. Cullinan, *supra* note 3, at 408-09, and 410 n.98. The House Report for the FAA stated:

The need for the law arises from an anachronism of our American law . . . (B)ecause 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. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced

H.R. Rep. No. 68-96, at 1-2 (1924).

24. Cullinan, *supra* note 3, at 409.

25. *Id.* at 409-12.

26. *Id.* at 410.

designed to make executory agreements to arbitrate legally enforceable.²⁷ Limited judicial review was codified in order to assure the finality of arbitration awards, as finality was important to most, if not all, parties to arbitration agreements in that era.²⁸ Against this backdrop, it is not surprising that the Supreme Court has articulated the FAA's primary purpose as one "of ensuring that private agreements to arbitrate are enforced according to their terms."²⁹

B. Cases Leading up to Bowen

First, a brief summary of the Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*³⁰ will be presented. This decision has been central to the issue of expanded judicial review, and has been discussed by many courts, including the Tenth Circuit in *Bowen*, who have wrestled with this issue. Second, a general discussion of pre-*Bowen* cases on point will be presented for two purposes: to provide examples of contractual language purporting to expand arbitrational judicial review; and to introduce the major arguments made by previous courts on this issue.

1. The Volt Decision

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,³¹ the parties entered into a construction contract that contained an agreement to arbitrate all disputes between the parties arising out of the contract.³² The contract also contained a choice-of-law provision providing that the contract would be governed by the law of California.³³ After a dispute arose concerning the contract, Volt Information Systems (Volt) formally demanded arbitration.³⁴ The Board of Trustees (Stanford) responded by filing actions in California Superior Court against Volt and two other companies involved in the construction project.³⁵ Volt moved to compel arbitration pursuant to Section 4 of the FAA³⁶ and a parallel

27. *Id.* at 410-11.

28. *Id.* at 410-12.

29. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79, 109 S.Ct. 1248, 1255-56 (1989).

30. 489 U.S. 468, 109 S.Ct. 1248 (1989).

31. *Id.*, 109 S.Ct. at 1248.

32. *Id.* at 470, 109 S.Ct. at 1251.

33. *Id.*, 109 S.Ct. at 1251.

34. *Id.*, 109 S.Ct. at 1251.

35. *Id.* at 470-71, 109 S.Ct. at 1251.

36. 9 U.S.C. § 4 provides in pertinent part: "A party aggrieved by the alleged

provision of the California Arbitration Act.³⁷ The court refused to compel arbitration, and instead granted Stanford's motion to stay arbitration pursuant to a California statute that "permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or fact.'"³⁸ The California Court of Appeal affirmed,³⁹ and the California Supreme Court denied Volt's petition for discretionary review.⁴⁰ The United States Supreme Court granted writs.

The United States Supreme Court dismissed Volt's contention that the California Court of Appeal's decision essentially found that Volt had waived its right to compel arbitration under the FAA.⁴¹ While recognizing that the FAA was designed to place arbitration agreements "upon the same footing as other contracts,"⁴² the Court found that Section 4 of the FAA did not grant a right to compel arbitration at any time, but instead grants only "the right to obtain an order directing that 'arbitration proceed in the manner provided for in [the parties'] agreement.'"⁴³ After noting that the interpretation of private contracts is usually a question of state law,⁴⁴ the Court held that the California Court of Appeal found that the parties had agreed that arbitration would only proceed in situations which fell within the scope of the California statute.⁴⁵ Hence, while not waiving their right to compel arbitration, the parties agreed not to proceed with arbitration until related pending litigation was resolved.⁴⁶

The Supreme Court also rejected Volt's contention that the California Court of Appeal's holding would violate FAA policy of favoring arbitration.⁴⁷ Although the Supreme Court acknowledged that such a policy exists, the Court stated, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."⁴⁸ The Court also noted that agreeing to

failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."

37. *Volt*, 489 U.S. at 470-71 n.2, 109 S.Ct. at 1251 n.2.

38. *Id.* at 471, 109 S.Ct. at 1251.

39. *Id.*, 109 S.Ct. at 1252.

40. *Id.* at 472-73, 109 S.Ct. at 1252.

41. *Id.* at 474, 109 S.Ct. at 1253.

42. *Id.*, 109 S.Ct. at 1253.

43. *Volt*, 489 U.S. at 474-75, 109 S.Ct. at 1253 (quoting 9 U.S.C. § 4).

44. *Id.* at 474, 109 S.Ct. at 1253.

45. *Id.* at 475, 109 S.Ct. at 1253.

46. *Id.*, 109 S.Ct. at 1253.

47. *Id.* at 475-76, 109 S.Ct. at 1253-54.

48. *Id.* at 476, 109 S.Ct. at 1254.

state rules of arbitration that are “manifestly designed to encourage resort to the arbitral process” did not offend any FAA policy.⁴⁹

Finally, the Court addressed whether the California statute agreed to was pre-empted by the FAA.⁵⁰ After noting that the FAA contained no express pre-emptive provision nor an intent to occupy the field, the Court turned to whether the agreement at hand would violate FAA policy.⁵¹ The Court held that it would not, and thus the agreement was not pre-empted:

In recognition of Congress’ principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empt[s] state laws which “require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” (citations omitted). But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.⁵²

2. Cases Permitting Contractual Expansion of Judicial Review⁵³

*In re Fils et Cables D’Acier de Lens (FICAL) v. Midland Metals Corp.*⁵⁴ was the first reported federal case to determine whether parties may contractually expand judicial review. In two written contracts for the sale of galvanized wire, the parties in *FICAL* agreed that “the court shall have the power to review (1) whether the findings

49. *Volt*, 489 U.S. at 476, 109 S.Ct. at 1254.

50. *Id.* at 476-79, 109 S.Ct. at 1254-55.

51. *Id.* at 477-78, 109 S.Ct. at 1254-55.

52. *Id.* at 478-79, 109 S.Ct. at 1255-56 (citations omitted).

53. For purposes of brevity, the following less significant cases that have permitted parties to expand arbitral judicial review will not be discussed here: *Syncor Int’l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997) (unpublished opinion); *New England Util. v. Hydro-Quebec*, 10 F. Supp. 2d 53 (D. Mass. 1998). Hence, proponents of contractual expanded judicial review find support in the Third and Fourth Circuits as well as in the cases in the following discussion.

54. 584 F. Supp. 240 (S.D.N.Y. 1984).

of fact rendered by the arbitrator are . . . supported by substantial evidence, and (2) whether as a matter of law based on said findings of fact the award should be affirmed, modified, or vacated."⁵⁵ After a dispute arose concerning the quality of the galvanized wire, the parties arbitrated the issue, and the arbitration panel granted an award.⁵⁶ Midland then contested the award pursuant to the arbitration agreement.⁵⁷

In holding that the parties may contractually expand judicial review in arbitration proceedings, the *FICAL* court first noted that arbitration is a "creature of contract,"⁵⁸ and "wholly dependent upon agreement."⁵⁹ Hence, according to the court, "there appears no reason, absent a jurisdictional or public policy barrier, why the parties cannot agree to alter the standard roles."⁶⁰ The court reasoned that there was no jurisdictional barrier to allowing such agreements since all disputes under the FAA must have independent statutory subject matter jurisdiction.⁶¹ Nor, according to the court, did a public policy barrier exist. While admitting that such agreements "take away much of the efficiency incentive for resort to arbitration," the court agreed that those contracts reduce the burden courts otherwise would have to bear absent arbitration.⁶²

The first federal appellate court to address this issue squarely was the Fifth Circuit in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*⁶³ In *Gateway*, the parties entered into a contract containing an arbitration clause that provided that "errors of law shall be subject to appeal."⁶⁴ After an arbitrator awarded damages to Gateway concerning a dispute as to the above-mentioned contract, MCI filed a motion to vacate the award pursuant to the expanded review provision.⁶⁵

The *Gateway* court stated its holding in strong terms: "When, as here, the parties agree contractually to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract."⁶⁶ The first pillar of the Fifth Circuit's reasoning was FAA

55. *Id.* at 242.

56. *Id.*

57. *Id.* at 243.

58. *Id.*

59. *Id.* at 244.

60. *FICAL*, 584 F. Supp. at 244.

61. *Id.*

62. *Id.*

63. 64 F.3d 993 (5th Cir. 1995).

64. *Id.* at 996.

65. *Id.*

66. *Id.* at 997.

policy. The court relied heavily upon the following quote from *Volt*:⁶⁷ “There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”⁶⁸

Contractual freedom was the second pillar of the Fifth Circuit’s opinion. The *Gateway* court rejected the district court’s reasoning that “the parties have sacrificed the simplicity, informality, and expedition of arbitration on the altar of appellate review” by finding that “[p]rudent or not, the contract expressly and unambiguously provides for review of ‘errors of law;’ to interpret this phrase short of de novo review would render the language meaningless and would frustrate the mutual intent of the parties.”⁶⁹

The Fifth Circuit gained support from the Ninth Circuit in *Lapine Technology Corp. v. Kyocera Corp.*⁷⁰ In *Lapine*, the parties agreed that “[t]he Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators’ findings of fact are not supported by substantial evidence, or (iii) where the arbitrators’ conclusions of law are erroneous.”⁷¹ After a dispute relating to the contract was arbitrated and a decision was rendered by an arbitration panel, Kyocera moved to vacate the award in accordance with the expanded review clause.⁷²

In holding that the court must honor the parties’ agreement, the *Lapine* court, like the Fifth Circuit in *Gateway*, relied upon language in *Volt*⁷³ for the proposition that “the primary purpose of the FAA is to ensure enforcement of private agreements to arbitrate, in accordance with the agreement’s terms.”⁷⁴ The *Lapine* court also relied on both *FICAL* and *Gateway* as persuasive authority.⁷⁵

3. Cases Opposing Contractual Expansion of Judicial Review

While *Bowen* is the first federal appellate court to definitively hold that parties may not contractually alter the judicial standard of review in arbitration proceedings, two other circuits have stated in

67. 489 U.S. 468, 109 S.Ct. 1248 (1989).

68. *Gateway*, 64 F.3d at 997 n.3 (quoting *Volt*, 489 U.S. at 479, 109 S.Ct. at 1256).

69. *Id.* at 997.

70. 130 F.3d 884 (9th Cir. 1997).

71. *Id.* at 887.

72. *Id.*

73. See *supra* note 52 and accompanying text for the language from *Volt* that the *Lapine* court relied upon.

74. *Lapine*, 130 F.3d at 888.

75. *Id.* at 888-89.

dicta that they too would prohibit such agreements.⁷⁶ Although these cases are not binding authority, a brief introduction to them is worthwhile as they are cited by *Bowen* as persuasive authority.⁷⁷

In 1991, the Seventh Circuit in *Chicago Typographical Union v. Chicago Sun-Times, Inc.*⁷⁸ stated in dictum that while "[parties] can contract for an appellate arbitration panel to review the arbitrator's award . . . they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract."⁷⁹ However, as at least two scholars have recently noted,⁸⁰ *Chicago Typographical Union* did not involve the FAA, but rather arose under Section 301 of the Taft-Hartley Act.^{81, 82} This statute, unlike the FAA, creates an independent source of federal jurisdiction.⁸³ Despite this arguably distinguishing feature, the Tenth Circuit in *Bowen* cited *Chicago Typographical Union* as persuasive authority for the proposition that contractually expanded review is prohibited under the FAA.⁸⁴

In 1998, the Eighth Circuit in *UHC Management Company, Inc. v. Computer Sciences Corp.*⁸⁵ stated that, notwithstanding *FICAL*, *Gateway*, and *Lapine*, "we do not believe it is yet a foregone conclusion that parties may effectively agree to compel a federal court to cast aside Sections 9, 10, and 11 of the FAA."⁸⁶ Explicitly stating that it would not reach a decision on the matter until the issue was properly before the court,⁸⁷ the court displayed its contempt for contractually expanding judicial review by emphasizing the plain language of Section 9 of the FAA,⁸⁸ the *Lapine* dissent,⁸⁹ and a quote in *Stroh Container Co. v. Delphi Indus., Inc.*^{90, 91}

76. *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991); *UHC Mgmt. Co., Inc. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998).

77. *Bowen*, 254 F.3d at 936-37.

78. 935 F.2d 1501 (7th Cir. 1991).

79. *Id.* at 1505.

80. Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 Am. Rev. Int'l Arb. 225, 229 n.18 (1997); Cullinan, *supra* note 3, at 406 n.74.

81. *Chicago Typographical Union*, 935 F.2d at 1503.

82. The Taft Hartley Act is found in 29 U.S.C. § 185 (1994).

83. 29 U.S.C. § 185 (1994). See also Rau, *supra* note 80, at 229 n.18; Cullinan, *supra* note 3, at 406 n.74.

84. *Bowen*, 254 F.3d at 936-37.

85. 148 F.3d 992 (8th Cir. 1998).

86. *Id.* at 997.

87. *Id.* at 998.

88. *Id.* at 997.

89. *Id.* at 997-98.

90. *Id.* at 998 (quoting *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986) (stating that "where arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware

III. *BOWEN V. AMOCO*: STATEMENT OF THE CASE

In 1918, the predecessors in interest to both the Bowen family and Amoco Pipeline Co. ("Amoco") entered into a right-of-way agreement containing an arbitration provision.⁹² The arbitration agreement contained a clause allowing either party to appeal any arbitration award to the district court within thirty days "on the grounds that the award is not supported by the evidence."⁹³ In 1998, Mr. and Mrs. Bowen filed a suit in federal district court against Amoco for damages to their land allegedly caused by a leak in Amoco's pipeline.⁹⁴ Amoco moved to order the dispute to arbitration pursuant to the aforementioned agreement, and the district court granted Amoco's motion.⁹⁵

In 1999, a panel of three arbitrators heard the case and granted relief to the Bowens.⁹⁶ The Bowens then filed a motion for confirmation of the arbitration award in district court pursuant to Section 9 of the FAA. Amoco objected and filed a motion to vacate the award. Amoco also filed a notice of appeal of the arbitration award in accordance with the modified arbitration rules.⁹⁷

The district court refused to apply the parties' expanded judicial standard of review and declined to vacate the award.⁹⁸ The district court also granted the Bowens' motion to confirm the award. Amoco then appealed the district court's ruling.⁹⁹

On appeal, the Tenth Circuit held that "parties may not contract for expanded judicial review of arbitration awards."¹⁰⁰ Basically, the court reasoned that "the purposes behind the FAA, as well as the principles announced in various Supreme Court Cases, do not support a rule allowing parties to alter the judicial process by private

that they get what they bargain for and that arbitration is different from adjudication.")).

91. For other cases supporting the position of the Seventh and Eighth Circuits, see *Mantle v. Upper Deck Co.*, 956 F. Supp. 719 (N.D. Tex. 1997), and *Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333 (Ill. App. 2nd Dist. 1982) ("Since a claimed 'gross abuse of discretion' is not a ground for review under Sections 12 and 13 of the UAA, Konicki's petition failed to state a claim for relief on that theory." *Konicki*, 441 N.E.2d at 1338.).

92. This agreement was ratified in 1943 by a second agreement. *Bowen*, 254 F.3d at 928 n.1.

93. *Id.*

94. *Id.* at 928.

95. *Id.*

96. *Id.* at 930.

97. *Bowen*, 254 F.3d at 930.

98. *Id.*

99. *Id.*

100. *Id.* at 937.

contract."¹⁰¹ The specifics of the court's reasoning are set forth in the following paragraphs.

The Tenth Circuit began its analysis by criticizing the Fifth and Ninth Circuits' interpretation of Supreme Court precedent, primarily the *Volt* case. The court stated, "Although the Court has emphasized that parties may 'specify by contract the rules under which . . . arbitration will be conducted,' it has never said parties are free to interfere with the judicial process."¹⁰² In other words, the court found that "no authority clearly allows private parties to determine how federal courts review arbitration awards."¹⁰³

The Tenth Circuit purported to further distinguish *Volt*. According to the court, *Volt* held that parties may agree to non-FAA procedural rules to govern arbitration only to the extent that allowing such an agreement would not "[do] violence" to FAA policy.¹⁰⁴ Stating that the FAA's "limited standards manifest a legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process," the Tenth Circuit held that allowing expanded judicial review "does violence" to that FAA policy, thereby violating the *Volt* decision.¹⁰⁵

The Tenth Circuit also looked to the language of the FAA in distinguishing its decision from *Volt*. "Unlike [Section] 4 of the FAA, which allows parties to petition a federal court for an order compelling arbitration 'in the manner provided for in [the] agreement,' the provisions governing judicial review of awards, [Sections 10 and 11 of the FAA] contain no language requiring district courts to follow parties' agreements."¹⁰⁶

The remainder of the Tenth Circuit's analysis concerned a variety of practical aspects of this issue. First, the court stated that parties have an alternative to expanded judicial review; the arbitration provision can provide for an appellate arbitration panel to settle disputes regarding the arbitrator's award.¹⁰⁷ Second, while noting that "even under expanded standards of review, arbitration reduces the burden on district courts,"¹⁰⁸ the Tenth Circuit stated that "expanded judicial review places federal courts in the awkward

101. *Id.* at 933.

102. *Id.* at 934 (quoting *Volt*, 489 U.S. at 479, 109 S.Ct. at 1248 (citation omitted)).

103. *Bowen*, 254 F.3d at 934 (citing the concurring and dissenting opinions in *Lapine*, 130 F.3d at 891).

104. *Id.* at 934-35 (citing *Volt*, 478 U.S. at 479, 109 S.Ct. at 1248).

105. *Id.* at 935.

106. *Id.*

107. *Id.* at 934. See also *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991).

108. *Bowen*, 254 F.3d at 936 n.6.

position of reviewing proceedings conducted under potentially unfamiliar rules and procedures."¹⁰⁹ Finally, the court asserted that expanded judicial review would "reduce arbitrators' willingness to create particularized solutions for fear the decision will be vacated by a reviewing court."^{110, 111}

IV. ANALYSIS

Contrary to the Tenth Circuit's reasoning, FAA policy and *Volt* do support the allowing of parties to contractually expand judicial review. For the sake of a simple comparison, the analysis below will approach the issues in the same order that the court decided them. Accordingly, the issues explored below will roughly mirror those set out in Part III. Thereafter, pragmatic limitations for enforcing such agreements are discussed as possibilities to cure legitimate concerns regarding possible undue burdens on the district courts.

A. Critiquing the *Bowen* Decision

The Tenth Circuit's criticism of the Fifth and Ninth Circuits' use of Supreme Court precedent was untenable. In *Bowen*, the court stated, "Although the Court has emphasized that parties may 'specify by contract the rules under which . . . arbitration will be conducted,' it has never said parties are free to interfere with the judicial process."¹¹² However, at least some interference with the judicial process was allowed by the Supreme Court in *Volt* itself. In *Volt*, the parties agreed to a state rule of arbitration¹¹³ that directed the federal court to delay arbitration pending the resolution of related litigation.¹¹⁴ The Supreme Court permitted this agreement despite the FAA rule allowing a party to "petition any United States district court . . . for an order directing that such arbitration proceed in the

109. *Id.* at 935-36.

110. *Id.* at 936 (citing Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 151-52 (1997)).

111. While the Tenth Circuit noted the Seventh Circuit's statement that parties may not contract for expanded judicial review because "federal jurisdiction cannot be created by contract," *Chicago Typographical Union*, 935 F.2d at 1505, the Tenth Circuit stated that they need not decide this issue since their opinion rests on the premise that "parties may not interfere with the judicial process by dictating how the federal courts operate." *Bowen*, 254 F.3d at 936 n.8. Therefore, the issue of jurisdiction will not be discussed in this note. For an in depth discussion on this issue, see Rau, *supra* note 80, at 227-30.

112. *Bowen*, 254 F.3d at 934 (quoting *Volt*, 489 U.S. at 479, 109 S.Ct. at 1248 (citation omitted)).

113. Cal. Civ. Proc. Code § 1281.2(c).

114. *Volt*, 489 U.S. at 471, 109 S.Ct. at 1251.

manner provided for in such agreement.”¹¹⁵ Allowing the parties to dictate contractually when the federal district court must compel arbitration is arguably allowing parties to “interfere with the judicial process,” although perhaps to a lesser degree than expanded review. Thus, it is questionable whether interference with the judicial process should be used to distinguish parties who contractually alter judicial review from *Volt*.

The Tenth Circuit also sought to distinguish *Bowen* from *Volt* by the differences in the language between Section 4 and Section 10 of the FAA. Recall that Section 4 contained the clause “in the manner provided for in such agreement” whereas Section 10 did not. However, the statutory language of Section 4 is not necessary to upholding expanded review clauses. The Supreme Court explicitly stated in *Volt* that “[t]here is no federal policy favoring arbitration under a certain set of procedural rules”¹¹⁶ and that parties may agree to arbitrate “under different rules than those set forth in the Act itself.”¹¹⁷

Assuming that such statutory language is necessary to the outcome of the *Bowen* case, the Tenth Circuit was incorrect in assuming that Section 4 is not applicable here. It is true that Section 10 does not include the language “in the manner provided for in such agreement,” as Section 4 does. However, once one recognizes that clauses purporting to expand judicial review are not severable from the agreement to arbitrate, it follows that the issue of expanded review falls under Section 4 of the FAA as well as under Section 10. The following explanation ties up this logic.

Expanded review clauses are not severable from the agreement to arbitrate because once parties include those clauses as part of their arbitration provisions, they then expect and rely on the protection of substantive review that is not otherwise provided for in the FAA. In essence, parties agree upon arbitration contingent upon expanded review because of their fear of the possibility of aberrant awards. Furthermore, waiving the right to seek judicial adjudication should not be taken lightly. Recognition and protection of legal rights by way of adjudication is no doubt highly regarded in our legal system. Therefore, but for the agreed upon expanded standard of review, the parties probably would not have agreed to arbitration. As a result, expanded review clauses should be viewed as non-severable, and should a court decide to strike down such a clause, it should strike the entire arbitration provision.

So what does severability have to do with Section 4 of the FAA? When a party moves to compel arbitration under Section 4, the court

115. 9 U.S.C. § 4 (1999).

116. *Volt*, 489 U.S. at 476, 109 S.Ct. at 1254.

117. See *supra* note 52, and the accompanying text.

must consider whether to grant “an order directing that such arbitration proceed *in the manner provided for in such agreement*.”¹¹⁸ The “manner” in which the parties agree to arbitrate includes the non-severable expanded standard of review. Thus it is necessary at that point for the court to decide the issue of expanded review. Assuming non-severability, there would be no arbitration to compel if the expanded review clause is struck down. This places the issue of expanded review directly under Section 4 of the FAA and *Volt*. Because Section 4 is applicable to the issue of contractually expanded judicial review, the differences between the language of Section 4 and Section 10 are irrelevant.

After emphasizing *Volt*’s statement that the Court “[gave] effect to the contractual rights and expectations of the parties *without doing violence to the policies* behind . . . the FAA,”¹¹⁹ the Tenth Circuit accurately framed the primary issue as whether the rule established by the parties conflicted with FAA policy.¹²⁰ However, the court missed the mark by failing to realize the significance of what the court themselves described as the “essentially contractual nature of arbitration.”¹²¹ The Tenth Circuit contended that:

[t]he FAA’s limited review ensures judicial respect for the arbitration process and prevents courts from enforcing parties’ agreements to arbitrate only to refuse to respect the results of the arbitration. These limited standards manifest a legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process.¹²²

However, as explained in Part II A, Congress’ intent, when enacting the FAA, was to ensure that parties got what they bargained for. In doing so, Congress emphatically recognized the contractual nature of arbitration described above. At the time the FAA was enacted, parties wanted extremely rigorous standards of review in order to assure the finality they contemplated. It was precisely *because* Congress recognized that parties normally *intended* finality in their arbitration awards that Congress codified the limited standards set out in Section 10 of the FAA. Had Congress found that most parties wanted review based on questions of law and fact, it is likely that Congress would have codified those standards in the FAA. Therefore, to the extent that parties agree to a different

118. 9 U.S.C. § 4 (1999) (emphasis added).

119. *Bowen*, 254 F.3d at 934 (quoting *Volt*, 489 U.S. at 479, 109 S.Ct. at 1248).

120. *Id.*

121. *Id.* at 934.

122. *Id.* at 935.

standard, legislative intent demands that Section 10 take a backseat to the parties' intentions. The provisions of Section 10 should be viewed as "no more than a set of 'default rules.'"¹²³

To put it another way, parties contract to arbitrate, but only to the extent of their agreement. Arbitration is a contractually created middle-ground in the wide spectrum of dispute resolution. On one end of the spectrum, parties that would otherwise arbitrate under the FAA have an undisputed right to litigate their case in federal district court¹²⁴ and take full advantage of the court's resources and authority. On the other hand, parties may agree to a settlement that does away with almost all formal involvement of the court¹²⁵ and provides the parties with any resolution they wish within the confines of public policy. Mediation¹²⁶ and arbitration are other forms of dispute resolution somewhere in the middle of the spectrum. In all of the above instances the parties simply agree to a level of court involvement they deem preferable.

Hence, arbitration is nothing more than a bundle of benefits and sacrifices agreed to by parties. Some portion of the benefits of arbitration, such as cost-effectiveness and swiftness of dispute resolution, may be lost to expanded judicial review. However, other benefits remain, such as control over the process, selection of the arbitrator(s), creation of their own discovery process, heightened privacy, and a procedural informality. Furthermore, effectiveness and swiftness will not always be sacrificed in exchange for expanded judicial review. "The combined process of arbitration and appeal can be quicker and less expensive than a full-blown trial, particularly where appeals are allowed only on questions of law."¹²⁷ At any rate, it is the parties' contractual prerogative to forego certain benefits of arbitration in lieu of others, and the parties' intentions should be upheld.¹²⁸

Allowing parties to alter the standard of judicial review would also benefit the judiciary. One of the purposes of the FAA was to

123. Rau, *supra* note 80, at 231.

124. This is because the parties must have independent subject matter jurisdiction. See *supra* note 8.

125. The only involvement of the court concerning settlements is when the court enforces their settlement.

126. Mediation is defined as the "[p]rivate, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties." Black's Law Dictionary 678 (Abridged 6th ed. 1991).

127. Younger, *supra* note 11, at 262.

128. See *Gateway*, 64 F.3d at 997 ("Prudent or not, the contract expressly and unambiguously provides for review of 'errors of law;' to interpret this phrase short of de novo review would render the language meaningless and would frustrate the mutual intent of the parties.").

relieve courts of a burdensome docket.¹²⁹ In *Volt*, the Supreme Court suggested that agreements to rules that "encourage resort to the arbitral process" should be encouraged.¹³⁰ As admitted by the court in *Bowen*, "[e]ven under expanded standards of review, arbitration reduces the burden on district courts."¹³¹ The courts would likely expend less time and fewer resources when reviewing arbitration awards as opposed to trying cases. Moreover, concern for judicial costs has recently become a significant issue since fear of aberrant awards is becoming more prevalent, and is prompting parties to seriously consider litigation in lieu of arbitration.¹³² If contractual expansion of judicial review is not allowed, it is likely that more parties will forego arbitration and opt for adjudication, causing a larger workload on the courts. Furthermore, federal district courts are already equipped to perform as a review body since they already act as a reviewing body in other circumstances. For example, federal district courts frequently review bankruptcy¹³³ and administrative decisions.¹³⁴

Moreover, the legal system as a whole could benefit from allowing expanded review under the FAA. When arbitration is used widely, with no written opinions and under very limited review, the legal system may suffer. For instance, less case law is developed, which is particularly troublesome if one area of the law is almost exclusively arbitrated in lieu of litigation. Less case law hinders the ability to understand the law. As a result, predicting outcomes in order for people and businesses to tailor their behavior accordingly becomes more difficult. Court opinions in certain expanded review proceedings could increase certainty in the law. Greater judicial review would also ensure that the law is applied correctly, which is perhaps the most fundamental goal of the legal system. In short, allowing expanded review could benefit the legal system by helping to develop jurisprudence and ensuring that the law is applied correctly.

The most puzzling and inconsistent aspect of *Bowen* was the court's implementation of the judicially crafted "manifest disregard

129. *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981) ("The purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation.").

130. *Volt*, 489 U.S. at 476, 109 S.Ct. at 1254.

131. *Bowen*, 254 F.3d at 936 n.6. See also *FICAL*, 584 F. Supp. at 244.

132. See Younger, *supra* note 11, at 248 (citing Simon, *supra* note 18, at 571, Sturtz, *supra* note 18, at S-6).

133. 28 U.S.C. §158 (1996).

134. 5 U.S.C. §§701-706 (1996).

of the law" standard of review.¹³⁵ It is certainly inconsistent to hold that parties may not voluntarily agree to an expanded standard of review because it violates FAA policy, while at the same time adopting a judicially created expanded standard of review.¹³⁶ If the Tenth Circuit believed that expanding judicial review violates FAA policy, then they should not have endorsed an expanded review simply because it was judicially created.

Indeed, considering the contractual nature of arbitration, a judicially created expanded standard of review is much more likely to violate the FAA policy of enforcing arbitration according to the terms of parties' agreements than a contractually expanded standard. When parties agree to a judicial review expansion clause, they know what to expect in terms of review: both the FAA's standards and their agreed upon expanded standard. Similarly, when parties agree to submit their dispute to arbitration absent a judicial review expansion clause, they should know what they are getting themselves into: the possibility of vacation under the enumerated FAA standards only. But, when courts invent standards that the parties did not contemplate or agree to, the parties' intent, as well as FAA policy, is frustrated.

The Tenth Circuit also suggested that "if parties desire broader appellate review, 'they can contract for an appellate arbitration panel to review the arbitrator's award.'"¹³⁷ To be sure, there is something to be said of any type of appellate review. However, the perceived risk of poor decision making on the part of arbitrators likely prompts

135. *Bowen*, 254 F.3d at 932 ("Requiring more than error or misunderstanding of the law, a finding of manifest disregard means the record will show the arbitrators knew the law and explicitly disregarded it.") (citations omitted). The "manifest disregard" rule was originally expanded from dictum in *Wilko v. Swan*, 346 U.S. 427, 436, 74 S.Ct. 182, 187 (1953).

136. The "manifest disregard of the law" standard is indeed an expanded standard of review to the extent that it is different from, and therefore adds to the FAA's standards. There is a possibility that this manifest disregard standard may be viewed as a mere lesser and included articulation of one of the standards listed in the FAA. As one scholar recently stated, "The 'manifest disregard' of the law standard is legitimate only if viewed as arising under the [S]ection 10(a)(3) arbitrator misconduct/misbehavior ground for vacatur." Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 839 (1996). However, the Tenth Circuit stated, "[A] court may grant a motion to vacate an arbitration award only in the limited circumstances provided in § 10 of the FAA, 9 U.S.C. § 10, or in accordance with a few judicially created exceptions." *Bowen*, 254 F.3d at 932 (citations omitted, emphasis added). As the "or" here is disjunctive, this statement clearly indicates that the Tenth Circuit treated this standard as a standard different than and separate from the FAA's standards; in essence, an expanded standard.

137. *Bowen*, 254 F.3d at 934 (citing *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991)).

the parties to contractually expand judicial review in the first place.¹³⁸ *Who* makes the final decision may be more important to the parties rather than *how many* decide. Adding another level of arbitrators that some parties perceive as possible poor decision makers may not alleviate the parties' concern. The parties may be worried that the appellate arbitrators will allow the same aberrant awards that the initial arbitrators allowed. Furthermore, there is little difference between adding appellate arbitrators and expanding the already existing panel, since both methods merely expose the case to more arbitrators with the hopes of yielding a fair decision. In the end, this option does not appear to be a viable alternative to alleviate what parties perceive as the problem.

The Tenth Circuit also reasoned that expanded judicial review will "reduce . . . arbitrators' willingness to create particularized solutions for fear the decision will be vacated by a reviewing court."¹³⁹ Of course, this speculation is yet to be proven. Even assuming a risk of decrease in "particularized solutions," expanded review would likely encourage better reasoning from the arbitrator since the arbitrator would have to render a written opinion explaining his or her reasoning in anticipation of judicial review.¹⁴⁰ This approach would encourage the correct application of law and produce fairer results. Furthermore, it should be the parties' prerogative to take the risk that creative solutions will decrease. Parties may be aware of this theory and may consciously forego such a risk in exchange for expanded review.¹⁴¹

B. Possible Limitations

Allowing parties to contractually expand judicial standards of review in arbitration proceedings does not mean that there should be no limit to their agreement. In order to make expanded review feasible and to avoid overburdening the district courts, at least some pragmatic requirements must be met before courts honor agreements for expanded review. The following concerns are not intended to be exclusive, as the prediction of all problematic agreements is not possible. These concerns are set forth merely to demonstrate that contractually expanded review is not wholly without limits.

138. See Younger, *supra* note 11, at 248 (citing Simon, *supra* note 18, at 571 and Sturtz, *supra* note 18, at S-6)).

139. Bowen, 254 F.3d at 936 (citing Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 Am. Rev. Int'l Arb. 147, 151-52 (1997)).

140. See *infra* Part IV(B).

141. For the astute readers who are keeping up with the author's mirrored approach to analyzing Bowen, the Tenth Circuit's argument concerning district courts' potential exposure to unfamiliar rules will be addressed *infra* Part IV(B).

One rather conspicuous limitation is the requirement of a written opinion by the arbitrator(s), as well as a transcript of the arbitration proceedings. Currently, the FAA does not require a written explanation on the part of the arbitrator¹⁴² or a transcript of the arbitration proceedings. This makes it nearly impossible to apply even the FAA's extremely limited standards of review, much less more stringent standards of review.¹⁴³ Consequently, effective review cannot be implemented unless there is a written opinion and transcript.

Another concern, as noted in *Bowen*,¹⁴⁴ relates to the agreed-upon standard of review itself. Noting this issue, Judge Kozinski pointed out in his concurrence in *Lapine*: "I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl."¹⁴⁵ Although these scenarios are unlikely, it is conceivable for parties to agree to invented standards of review that are unfamiliar to the court and, hence, more difficult to implement. For example, if parties contractually created an extremely complex and unfamiliar set of evidence, discovery, and procedural rules, and then provided that the district court would review the entire record to determine if those rules were violated, then perhaps this would be too burdensome for the court. However, judging from the language purporting to expand review in the cases discussed in Part II B, this does not seem likely to be a problem. All of these cases merely provide for review based on errors of law and errors of fact—standards that may be easily applied by federal judges. Nevertheless, parties should agree to a familiar legal standard that courts are readily equipped to implement. Such a familiar standard would help the parties assure an accurate interpretation by the federal courts of their intent.

V. CONCLUSION

Bowen v. Amoco created a split in the circuits that must be resolved. Parties must be able to predict whether judicial review expansion clauses will be enforced in order to shape their agreements according to their wishes. To eliminate this confusion, there must be consistency in the circuits.

142. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361 (1960).

143. *Hayford & Peebles*, *supra* note 6, at 360 (stating that "without a written award, substantive review is next to impossible").

144. *Bowen*, 254 F.3d at 935.

145. *Lapine*, 130 F.3d at 891 (Judge Kozinski concurring).

Arbitration is essentially a contractual arrangement of dispute resolution that must be honored according to its terms, including agreements to expanded review. Congress drafted the FAA with the aim of facilitating contractual intent as to the finality of arbitration awards, while relieving federal courts of a burdensome docket. Allowing contractual expanded review would allow parties to reap many benefits of arbitration while securing outcomes closer to their expectations. In short, Supreme Court precedent, FAA policy, and the practical benefits of expanded review all point in the direction of allowing parties to contractually expand judicial review under the FAA.

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