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CONTRACTING FOR JUDICIAL REVIEW OF ARBITRATION AGREEMENTS: SIDESTEPPING THE FAA WEAKENS ARBITRATION VIABILITY

I. INTRODUCTION

Arbitration agreements play an important role in our increasingly litigious society.¹ Arbitration offers a convenient and expeditious resolution to conflicts between parties that may otherwise result in costly, time-consuming litigation.² In order to govern such agreements, Congress enacted the Federal Arbitration Act (“FAA” or “Act”) in 1925, which listed the duties of an arbitrator, the acceptable boundaries of such agreements, and the scope of judicial review.³ The United States Supreme Court has interpreted the FAA broadly, recognizing the importance of judicial enforcement of arbitration agreements.⁴ The Supreme Court’s treatment of the FAA reinforces Congress’ intent in passing the Act.⁵ Both the Supreme Court and Congress have confirmed that when parties, acting in good faith, contract to settle disputes without traditional litigation, such contracts are valid, binding, and enforceable.⁶

Despite strong federal support, the future of arbitration agreements still remains a hotly debated issue.⁷ An important element of arbitration is that the arbitrator’s final determination is binding and non-appealable.⁸

¹ See Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: the Arbitration Experience*, 38 HASTINGS L.J. 239 (1987).

² See Senator Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 284-85 (2002) (citing H.R. REP. NO. 68-96, at 2 (1925)). This article states that Congress’ dual intent in passing the FAA was first, to encourage cost-saving arbitration, and second, to combat judicial reluctance to enforce arbitration agreements. *See id.*

³ Federal Arbitration Act, 9 U.S.C. §§ 1-15 (2002).

⁴ See *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (noting FAA enacted to overcome judicial reluctance to enforce arbitration agreements).

⁵ See *supra* note 2 and accompanying text.

⁶ See *supra* notes 2 and 4 and accompanying text (citing article and case supporting proposition).

⁷ See FEINGOLD, *supra* note 2, at 286-89 (citing several contested arbitration issues).

⁸ 9 U.S.C. § 10 (2002). Section 10 of the FAA lays out the only four grounds pursuant to which an aggrieved party may challenge an arbitration decision or award. *See id.* These grounds are as follows:

The FAA provides limited grounds for seeking judicial review of an arbitrator's decision.⁹ The Circuit Courts are currently split, however, as to whether parties to an arbitration agreement may contract around the limited judicial review standard under the FAA and instead open up the agreement to further review by a court.¹⁰ The issue is important because allowing for increased judicial review not only contradicts the Act's clearly established scope, but also calls into question the practical viability of arbitration agreements in the future.¹¹ Allowing parties to open arbitration to extensive judicial review will change the arbitrator's role and drastically alter the courts' role in the arbitration process.¹²

This Note will advocate that parties should not be allowed to contract for expanded judicial review outside the FAA. The current disagreement among the Circuit Courts results from the Supreme Court's historical approach to arbitration agreements vis-à-vis its mandate that they be interpreted as contracts between the parties.¹³ The Seventh, Eighth and Tenth Circuit Courts opine that the federal policy favoring arbitration supersedes any contractual elements of arbitration agreements, if such elements would violate the provisions of, or policies behind, the FAA.¹⁴ In contrast, the Fifth and Ninth Circuit Courts hold that the contractual elements of individual arbitration agreements should survive, including clauses providing

(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; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

Id.

⁹ *See id.*

¹⁰ *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *UHC Mgt. Co., Inc. v. Computer Sci. Corp.*, 148 F.3d 992 (8th Cir. 1998); *Chi. Typographical Union v. Chi. Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991). *See contra LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Gateway Technologies, Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995).

¹¹ *See Bowen*, 254 F.3d at 935 (noting federal policy favoring arbitration respects process' integrity and independence).

¹² *See id.* at 935-36 (noting potential burden on courts if required to review arbitration proceedings and findings).

¹³ *See Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (reemphasizing FAA's mandate to enforce arbitration agreements according to agreement terms).

¹⁴ *See Bowen*, 254 F.3d at 935 (noting judicial respect for arbitration agreements compels courts to avoid substantive review); *UHC Management*, 148 F.3d at 997 (citing clear review procedures laid out in FAA); *Chi. Typographical*, 935 F.2d at 1505 (holding parties can not contract for judicial review other than under FAA prescriptions).

for expanded judicial review, because of the Supreme Court's mandate that the courts adhere to valid agreement terms.¹⁵

II. HISTORY

Congress enacted the FAA to compel the judiciary to enforce arbitration agreements.¹⁶ The Act mandates that where parties enter into agreements to arbitrate, such agreements should be treated as independent contracts and enforced according to the agreed upon terms.¹⁷ Congress specified the legal grounds and judicial procedures to be followed with respect to a party's failure to arbitrate, a party's desire to compel arbitration, judicial power to vacate an arbitral award, and judicial power to modify or correct an arbitral holding.¹⁸

A. Arbitration Agreement as Contract

In accordance with the Act's mandate, federal courts consider arbitration agreements to be contracts and therefore construe them according to contract law – subject to FAA provisions.¹⁹ When the FAA is silent on an issue, the courts regularly endorse special arbitration provisions commonly formulated by parties that delineate the scope of the arbitrator's power, the issues to be covered, proceeding formalities, and choice of law.²⁰ This

¹⁵ See *LaPine Tech.*, 130 F.3d at 888 (citing Supreme Court's interpretation of arbitration agreements as contracts); *Gateway Technologies*, 64 F.3d at 996 (acknowledging agreed upon judicial review clauses are in accord with Supreme Court arbitration jurisprudence).

¹⁶ See *Volt*, 489 U.S. at 474 (noting judicial reluctance to enforce arbitration agreements); *Roadway Package Sys., Inc. v. Scott Kayser*, 257 F.3d 287, 292 (3rd Cir. 2001) (citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995)) (noting previous judicial refusal to enforce arbitration agreements).

¹⁷ 9 U.S.C. § 2 (2002). The statute provides in pertinent part that, "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*; see also *I.S. Joseph Co., Inc. v. Josco Crown Int'l, Ltd.*, 803 F.2d 396, 399-400 (8th Cir. 1986) (recognizing judicial role as limited by four corners of arbitration agreement).

¹⁸ 9 U.S.C. §§ 3, 4, 10, 11 (2002).

¹⁹ See *Volt*, 489 U.S. at 479 (recognizing contractual rights of parties within FAA context); *I.S. Joseph Co.*, 803 F.2d at 399 (noting judicial function to determine validity of existing arbitration provisions in contracts); *Bristol Farmers Mkt. and Auction Co. v. Arlen Realty & Development Corp.*, 589 F.2d 1214, 1217 (3rd Cir. 1978) (noting limited role courts play in interpreting arbitration provisions contained within contracts).

²⁰ See *Volt*, 489 U.S. at 476 (noting FAA's silence regarding choice of law leaves it to parties' agreement); see also *Bowen*, 254 F.3d at 934 (recognizing parties' freedom to structure arbitration agreements); *I.S. Joseph Co., Inc.* 803 F.2d at 399 (noting scope of arbitrator's power determined by parties' agreement). *But see Roadway Package Sys., Inc.*, 257 F.3d at 289 (holding general choice of law provision not enough to eliminate FAA application).

contractual freedom is limited, however, by the FAA's governing principles; and where agreed upon provisions contradict either the Act's words or policies, they are not upheld.²¹

Because federal policy favors arbitration, courts hesitate to intercede in disputes governed by an arbitration agreement.²² Where an arbitration provision exists, the court's involvement is limited to answering the question of whether or not the arbitration provision in the contract is valid.²³ Courts will not consider substantive issues within a contract if a viable arbitration agreement exists.²⁴

B. Federal Policy Favoring Arbitration

Congressional and judicial support for arbitration pursuant to the FAA has led to a very low threshold of review under which the courts construe arbitration clauses broadly.²⁵ The federal courts have fostered a strong policy favoring arbitration agreements.²⁶ In most cases, federal

²¹ See *Volt*, 489 U.S. at 479. In *Volt*, the Supreme Court held that because there was no "federal policy favoring arbitration under a certain set of procedural rules," presumably because the FAA is silent on this point, parties could set out choice of law provisions in their arbitration agreements. See *id.* at 476. The Court noted that enforcing these provisions "g[a]ve effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *Id.* at 479.

²² See *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395, 402 (1967) (asserting arbitration provisions should be evaluated separately from whole contract); *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 277 (7th Cir. 1992) (relying on *Prima Paint* and deferring to arbitrator after finding valid arbitration provision).

²³ See *Prima Paint*, 388 U.S. at 404 (calling for strict judicial deference towards arbitration agreements). The preference for arbitration in a contract is so strong that courts acknowledge the arbitrator's power to determine the validity of the very contract that provided for the arbitration in the first place, provided the arbitration provision was not entered into fraudulently. See *Flender*, 953 F.2d at 277.

²⁴ See *Prima Paint*, 388 U.S. at 394-95 (noting FAA's purpose to limit judicial intervention and expedite arbitration process); see also *Flender*, 953 F.2d at 277 (holding judicial involvement limited to arbitration provision's validity); *I.S. Joseph Co.*, 803 F.2d at 399 (calling for strict deference to arbitral process where valid arbitration provision exists); *Bristol Farmers*, 589 F.2d at 1217-18 (confining court's role to determination of whether asserted issues are covered in agreement).

²⁵ See *U.S. Fire Ins. Co. v. Nat'l Gypsum Co.*, 101 F.3d 813, 816 (2nd Cir. 1996) (noting strong presumption of arbitrability); see also *Flender*, 953 F.2d at 278. "Arbitration is an alternative to the judicial resolution of disputes, and an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true resolution." *Id.* (quoting *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 267 (7th Cir. 1988)).

²⁶ See *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (noting federal law mandates arbitration questions decided in favor of arbitration); *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 643 (7th Cir. 1981). In *Dickinson*, the court asserted, "the established federal policy that, when construing arbitration agreements, every doubt is to be resolved in favor of arbitration." See *Dickinson*, 661 F.2d at 643.

courts acknowledge the importance of arbitration by restricting their own involvement and generally deferring to arbitrators.²⁷

C. Judicial Review of Arbitration Agreements Under the FAA

The FAA strictly curtails the level of review a court has over an arbitration agreement.²⁸ Although federal courts may have jurisdiction over the substantive disputes, the courts may not reach them if the parties previously agreed to settle these disputes through arbitration.²⁹ Courts may only review the agreement for questions of arbitrability and/or egregious violations by the arbitrator.³⁰ By deferring to the arbitrators' judgments in most cases, courts reinforce the federal policy favoring arbitration and encourage parties to settle disputes without judicial involvement.³¹ Furthermore, in two recent cases, the Circuit Courts determined that arbitration agreements could serve to forfeit a party's right to litigation.³²

²⁷ See *Volt* 489 U.S. at 475 (reasserting strong federal policy favoring arbitration); *Flender*, 953 F.2d at 274 (noting low threshold of review prevents arbitration from becoming another step in litigation); *Dickinson*, 661 F.2d at 643 (stating "every doubt is to be resolved in favor of arbitration."); see also *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967) (highlighting FAA policy to enforce arbitration agreements and "ease court congestion").

²⁸ See *Dickinson* 661 F.2d at 645 (limiting permissible review of arbitration agreements); *Conticommodity Services, Inc. v. Philipp & Lion*, 613 F.2d 1222, 1224 (2nd Cir. 1980) (recognizing temptation of courts to go beyond permissible scope of review).

²⁹ See *Conticommodity*, 613 F.2d at 1224 (noting courts violate FAA policies by reaching substantive issues).

³⁰ 9 U.S.C. § 10 (2002). The FAA states that a court may review an award *only if*:

- (1) . . . 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 which prejudiced the rights of one of the parties; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. See also *Volt*, 489 U.S. at 480 (limiting court's role regarding arbitration agreements to enforcement only).

³¹ See *Volt*, 489 U.S. at 474-76 (citing federal policy favoring arbitration); see also *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395, 404 (1967). In *Prima Paint*, the Court noted "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." *Id.*

³² See *Sydnor v. Conseco Fin. Servicing*, 252 F.3d 302, 307 (4th Cir. 2001). "[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Id.* (quoting *Pierson v. Dean, Witter Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984)); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 492 (6th Cir. 2001) (noting moving party must prove Congress intended certain litigation rights non-waivable). *But see Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding certain statutory claims are never waivable).

Arbitration agreements are governed by contract law and therefore are driven by the parties' intent.³³ Agreements can be broad or narrow, vesting the arbitrator with a wide range of discretion.³⁴ In cases where arbitrators have wide discretion, the court's role is strictly limited to the terms laid out in the FAA.³⁵ In some cases, however, an arbitrator will have narrow discretion.³⁶ In these situations, arbitrable issues and non-arbitrable issues will be linked together in the same case.³⁷ The arbitrator will be empowered to arbitrate certain narrow issues that the parties agree to submit to arbitration, while other issues will lie outside of the arbitrator's power to decide.³⁸ In these situations, the courts will not review the dispute as a whole and will leave arbitrable issues in the arbitrator's hands before taking up any judicially reviewable issues.³⁹ Accordingly, narrowly

³³ See *Volt*, 489 U.S. at 476 (noting FAA's silence regarding choice of law leaves it to parties' agreement); see also *Bowen*, 254 F.3d at 934 (recognizing parties free to structure arbitration agreements); *I.S. Joseph Co., Inc.*, 803 F.2d at 399 (noting scope of arbitrator's power determined by parties' agreement). But see *Roadway Package Sys., Inc.*, 257 F.3d at 289 (holding general choice of law provision not enough to eliminate application of FAA).

³⁴ See *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 277 (7th Cir. 1992) (stating broad arbitration clause may place question of contract validity within arbitrator's jurisdiction); see also *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 696 (2nd Cir. 1965) (stating some arbitration clauses can be so broad as to submit questions of arbitrability to the arbitrator).

³⁵ See *Necchi*, 348 F.2d at 696. The court in *Necchi* noted that the breadth of the arbitration agreement dictates how far a court may intercede in determining issues of arbitrability in the first instance. *Id.*

³⁶ See *Dean, Witter Reynolds, Inc.*, 470 U.S. at 217-18 (arbitration agreement governing specific issues but not all issues of the claim).

³⁷ *Id.* This case settled the circuit split regarding how to treat cases where arbitrable and nonarbitrable issues (i.e., "intertwining issues") exist in the same case. *Id.* at 216-17. The Ninth, Fifth and Eleventh Circuits employed the 'doctrine of intertwining' whereby they tried all the issues in the same federal court, taking the case entirely out of arbitration. *Id.* Conversely, the Sixth, Seventh and Eight Circuits bifurcated cases containing intertwining issues, leaving arbitrable issues out of federal jurisdiction and subject to arbitration. *Id.*

³⁸ See *Dean, Witter Reynolds, Inc.*, 470 U.S. at 216-18 (noting intertwining issues arising in same case).

³⁹ See *id.* at 217-18. In settling the circuit split, this case mandated that where arbitrable and non-arbitrable issues exist in a contract, arbitration must be enforced. See *id.* The Court stated "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* The Court noted that despite the possible inefficiency of bifurcating the process, the federal policy favoring arbitration dictates this result. *Id.* at 218; see also *Flender*, 953 F.2d at 278 (asserting dissatisfied parties cannot bring arbitrable issues for review on merits); *Bristol Farmers*, 589 F.2d at 1221 (1978) (asserting parties cannot by-pass arbitration by claiming issues are counterclaims to pending suit). But see *Alexander*, 415 U.S. at 42-54. In *Alexander*, the Court took up a Title VII discrimination case that the lower courts refused to review because it had been ruled on in arbitration proceedings. See *id.* The Supreme Court's opinion was careful to note that the Title VII claim had an independent statutory claim separate from the contractual claim provided for in the arbitration agreement and that as such, it was subject to judicial remedy. See *id.* The Court was clear that by reviewing the issue it was

constructed arbitration clauses can not be used as a ruse to submit the entire agreement to judicial review.⁴⁰

III. FACTS

The federal policy favoring arbitration was recently challenged by cases in which the parties included a provision for expanded judicial review in the arbitration agreements.⁴¹ These provisions allowed for judicial review of the arbitration agreement on grounds not mentioned in the FAA.⁴² The parties agreed that in the event one party believed the evidence did not support the arbitrator's decision, or in the event that the arbitrator committed an error of law, the arbitration could be appealed in a court of law.⁴³ The parties laid out these grounds for review; they are not valid bases for review under the FAA.⁴⁴ The central disagreement among the circuit courts is whether to enforce these provisions as contractual elements pursuant to past Supreme Court mandates, or whether to invalidate them as contradicting the FAA's clearly established judicial review provisions.⁴⁵

The Tenth Circuit was the most recent court to analyze this issue in *Bowen v. Amoco Pipeline Co.*⁴⁶ In *Bowen*, the arbitration provision in question stated that the parties had "the right to appeal any arbitration award to the district court 'on the grounds that the award is not supported by the evidence.'"⁴⁷ The Tenth Circuit ruled that allowing parties to con-

not effectively giving the petitioner a chance to review the arbitrator's holding, but was affording the petitioner a forum for his valid and independent statutory claim. *Id.*

⁴⁰ See *Dean Witter Reynolds, Inc.*, 470 U.S. at 217 (requiring district courts to compel arbitration); see also *Flender*, 953 F.2d at 278 (noting parties may not bring actions to review arbitrator's discretion as a ruse for substantive review) (quoting *Burkart Randall v. Lodge No. 1076*, 648 F.2d 462, 467 (7th Cir. 1981)).

⁴¹ See *Bowen*, 254 F.3d at 930 (agreeing to appeal where decision not supported by evidence); *LaPine*, 130 F.3d at 887 (agreeing to appeal where findings not supported by substantial evidence); *Gateway*, 64 F.3d at 995 (agreeing to appeal where arbitrator commits error of law).

⁴² See *Bowen*, 254 F.3d at 930; *LaPine*, 130 F.3d at 887; *Gateway*, 64 F.3d at 995. *But see* 9 U.S.C. § 10 (2002) (laying out grounds for arbitration review).

⁴³ See *Bowen*, 254 F.3d at 930; *LaPine*, 130 F.3d at 887-89; *Gateway*, 64 F.3d at 995.

⁴⁴ See 9 U.S.C. § 10; see also *Bowen*, 254 F.3d at 932 (citing FAA's strict review procedures).

⁴⁵ See *Bowen*, 254 F.3d at 934-35 (stating parties not free to dictate appeal process); *UHC Mgt. Co., Inc.*, 148 F.3d at 998 (stating no authority grants parties power to dictate appeal process); *Chi. Typographical Union*, 935 F.2d at 1504-06 (asserting parties can not create jurisdiction by contract). See *contra LaPine*, 130 F.3d at 888 (citing importance of enforcing private agreements); *Gateway*, 64 F.3d at 996-97 (holding contractual provisions supplement FAA procedure).

⁴⁶ 254 F.3d 925 (10th Cir. 2001).

⁴⁷ 254 F.3d at 930. The parties went on to agree that the ruling of the district court would be final. *Id.* The court found this provision to be lacking in substance, however,

tract for expanded judicial review contradicts the FAA's intention and policies, places courts in an awkward position not contemplated by the FAA, and interferes with the judicial process.⁴⁸

The court held that in entering into arbitration agreements, the parties make an informed trade of judicial review in favor of arbitration, which is simpler and more expedient.⁴⁹ The court explained that considering the nature of arbitration, Congress provided a limited basis for judicial review under the FAA, thereby preventing arbitration proceedings from dragging on and ensuring the integrity of the arbitration process itself.⁵⁰ The *Bowen* court noted that the FAA also intended to preserve the independent nature of arbitration.⁵¹ Specifically, FAA provisions requiring courts to enforce arbitration agreements and final arbitration decisions would be wholly contradicted if courts were allowed to review issues after an arbitrator's ruling.⁵²

The *Bowen* court was also concerned that judicial review of arbitration proceedings would place an undue burden on courts unfamiliar with the rules and procedures of arbitration.⁵³ In addition, the independent nature of arbitrators would be threatened if they were forced to issue written opinions defending their decisions: arbitrators would then be concerning themselves with the potential of judicial review instead of freely formulating original solutions.⁵⁴ The *Bowen* court understood that these issues di-

because all final determinations of a district court are reviewable by appellate courts pursuant to their jurisdiction under 28 U.S.C. § 1291. *Id.* In theory, the arbitration provision in question could be appealed all the way to the Supreme Court. *See id.*

⁴⁸ *Bowen*, 254 F.3d at 934-35. "The 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." *Id.*

⁴⁹ *Id.* (stating proposition that arbitration trades formalities of litigation and judicial review).

⁵⁰ *Id.* The court also noted the absurdity of requiring courts to enforce arbitration agreements if they retained power to overturn these decisions. *Id.*

⁵¹ *See Bowen* 254 F.3d. at 935 (stating FAA's purpose to preserve independent arbitration).

⁵² *See id.* at 935. The court decided that "contractually expanded standards, particularly those that allow for factual review, clearly threaten to undermine the independence of the arbitration process and dilute the finality of the arbitration award . . ." *Id.*

⁵³ *See Bowen*, 254 F.3d at 935-36 (noting line between arbitration and litigation would be blurred if judicial review interfered); *see also UHC Mgmt. Co.*, 148 F.3d at 998. "We have served notice '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 that they get what they bargain for and that arbitration is far different from adjudication.'" *Id.* (quoting *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986)).

⁵⁴ *See Bowen*, 254 F.3d at 935-36 (noting sacrifice of simplicity, expediency and cost-effectiveness with requiring written opinions).

rectly contradicted the policies of arbitral autonomy and judicial non-interference that underlie the FAA.⁵⁵

Finally, the *Bowen* court displayed concern with potential interference in the judicial process.⁵⁶ Although the court acknowledged that parties are free to structure agreements and are even free even to make choice of law determinations within their arbitration proceedings, “no authority clearly allows private parties to determine how federal courts review arbitration agreements.”⁵⁷ In essence, deference to the agreement of parties must stop short of violating the FAA and the judicial process.⁵⁸ The court asserted that by enacting the FAA, Congress did not vest courts with independent jurisdiction pursuant to Congress’ Article II power but instead created a statutory scheme to guide and govern arbitration agreements.⁵⁹

By asserting that parties to an arbitration agreement can not dictate federal jurisdiction, the *Bowen* court echoed a previous holding in the Seventh Circuit and an assertion made in dicta by the Eighth Circuit.⁶⁰ In *Chicago Typographical Union v. Chicago Sun-Times, Inc.*⁶¹ the Seventh Circuit clearly asserted, “federal jurisdiction cannot be created by contract.”⁶² The court cited the FAA’s provisions as the only feasible means by which a federal court may review an arbitration award.⁶³ The Seventh Circuit pointed out that even if parties could not obtain federal judicial review, they were free to contract for an appellate arbitration panel to review the award.⁶⁴

⁵⁵ *See id.*

⁵⁶ *See id.* at 934 (noting parties can not dictate federal judicial jurisdiction).

⁵⁷ *Id.* Indeed, the court went on to say: “to the contrary, through the FAA Congress has provided explicit guidance regarding judicial standards of review of arbitration awards.” *Id.*

⁵⁸ *See id.* at 934-35 (distinguishing case from *Volt*). The *Bowen* court acknowledged the Supreme Court’s holding in *Volt*, but differentiated the case at hand by stating that the FAA is in fact not silent on the issue of judicial review, but is in fact quite clear, whereas choice of law is not mentioned within the Act. *Id.*

⁵⁹ *Id.* at 931-32. The court noted that the FAA’s review scheme is “among the narrowest known to the law.” *Id.* at 932 (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1997)).

⁶⁰ *See Chi. Typographical Union*, 935 F.2d at 1504-05 (noting “federal jurisdiction can not be created by contract”); *UHC Mgmt. Co.*, 148 F.3d at 994-96 (FAA not a source of jurisdiction, but a set of procedures).

⁶¹ 935 F.2d 1501 (7th Cir. 1991).

⁶² *See Chi. Typographical Union*, 935 F.2d at 1505.

⁶³ *Id.* In addition, the court noted that courts are not allowed to look into the substantive findings of an arbitrator, even where the court may disagree with an arbitrator’s findings. *Id.* *But see Pike v. Freeman*, 266 F.3d 78, 86 (2nd Cir. 2001). In *Pike*, the court noted that an arbitrator’s decision may be vacated if the arbitrator has shown “manifest disregard of the law.” *Id.*

⁶⁴ *See Chi. Typographical*, 935 F.2d at 1505 (stating proposition).

Similarly, in *UHC Management Co., Inc. v. Computer Sciences Corp.*,⁶⁵ the Eighth Circuit stated in dicta that parties are not free to contract for expanded judicial review where Congress clearly limited the instances in which judicial review is available.⁶⁶ Like the *Bowen* court, the Eighth Circuit recognized the Supreme Court's holding in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,⁶⁷ in which the Court held that parties may include choice of law provisions in their arbitration agreements.⁶⁸ Both the *UHC Management* and *Bowen* decisions were careful to distinguish choice of law provisions from provisions that directly contradict the FAA mandates and interfere with the Act's limited review scheme.⁶⁹ The Eighth Circuit cautioned against enforcing a contract between two parties when doing so contradicts the clear statutory scheme laid out in the FAA.⁷⁰ Although this statement was not incorporated into the case's final holding, it clearly indicates the Eighth Circuit's opinion of judicial review of arbitration agreements.⁷¹

On the other side of the circuit split are two cases decided within the past seven years, in which the Fifth and Ninth Circuits held that parties to an arbitration agreement can in fact contract for expanded judicial review.⁷² In *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,⁷³ the Fifth Circuit held that a clause in the arbitration agreement providing for judicial review of any "errors of law" committed by the arbitrator was valid and enforceable.⁷⁴ Similarly, the Ninth Circuit came to the

⁶⁵ 148 F.3d 992 (8th Cir. 1998).

⁶⁶ See *UHC Mgmt.*, 148 F.3d at 997. The Eighth Circuit stated plainly, "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." *Id.*

⁶⁷ 489 U.S. 468 (1989).

⁶⁸ *UHC Mgmt.*, 148 F.3d at 997 (agreeing with *Volt*, but distinguishing case at hand); see also *Bowen*, 254 F.3d at 934 (disagreeing with holdings of other circuit courts on this issue).

⁶⁹ See *UHC Mgmt.*, 148 F.3d at 997. The court in *UHC Mgmt.* stated that though parties may choose a particular state's law to govern their arbitration agreement, "[i]t is not clear, however, that parties have any say in how a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such a review is to occur." *Id.*; see also *Bowen*, 254 F.3d at 934 (stating that Supreme Court has never said parties may interfere with judicial process).

⁷⁰ See *UHC Mgmt.*, 148 F.3d at 997 (noting the clearly spelled out review provisions of FAA).

⁷¹ See *id.* at 998 (leaving question unresolved until "time when circumstances require [resolution]").

⁷² See *LaPine*, 130 F.3d at 887 (allowing agreement to appeal where findings not supported by substantial evidence); *Gateway*, 64 F.3d at 995 (allowing agreement to appeal where arbitrator commits error of law).

⁷³ 64 F.3d 993 (5th Cir. 1995).

⁷⁴ See *Gateway*, 64 F.3d at 995-97 (holding parties free to agree to judicial review terms not contemplated in FAA).

same conclusion in *LaPine Technology Corp. v. Kyocera Corp.*⁷⁵ In *LaPine*, the parties had agreed that an arbitrated decision could be reviewed where that decision was not “supported by substantial evidence, or where the Tribunal’s conclusions of law are erroneous.”⁷⁶

Gateway and *LaPine* relied heavily on the Supreme Court’s holding in *Volt*.⁷⁷ The essence of the Supreme Court’s decision in *Volt* was that parties to an arbitration agreement may contract choice of law issues, even if it would remove the agreement from the FAA’s jurisdiction.⁷⁸ The Supreme Court reinforced the strong federal policy favoring arbitration, but noted that the federal policy does not promote arbitration governed by one set of rules over another.⁷⁹ There is no provision in the FAA regarding choice of law issues.⁸⁰ The Supreme Court, however, held that the choice of law agreement did not “do violence to the policies behind the FAA” and could therefore be enforced.⁸¹

The Fifth and Ninth Circuits interpreted *Volt* to mean that *all* agreed upon provisions in an arbitration agreement should be enforced.⁸² In accordance with *Volt*, the courts in *LaPine* and *Gateway* held that the FAA’s foremost goal is to uphold the contract between the parties and all provisions therein.⁸³ The Fifth and Ninth Circuits held that a logical extension of the holding in *Volt* would also apply to judicial review clauses.⁸⁴ By

⁷⁵ 130 F.3d 884 (9th Cir. 1997).

⁷⁶ See *LaPine*, 130 F.3d at 887 (describing parties’ agreement). The court in *LaPine* went on to hold that the importance of respecting the parties’ agreement required allowing the expanded review provisions. *Id.* at 888. The court relied on the Supreme Court’s holding in *Volt* in reaching this decision. *Id.*

⁷⁷ See *LaPine*, 130 F.3d at 888 (interpreting *Volt* as requiring strict adherence to parties’ agreement); *Gateway*, 64 F.3d at 997 (holding federal arbitration policy to require adherence to parties’ agreement).

⁷⁸ See *Volt*, 489 U.S. at 478-79. Indeed, the Court noted that even if state law dictated suspension of the arbitration proceedings, whereas the FAA would permit arbitration to go forward, the state law should be respected if the parties chose to submit their agreement to that state’s law. See *id.*

⁷⁹ See *Volt*, 489 U.S. at 476 (noting silence of FAA on choice of law issue).

⁸⁰ See *id.*

⁸¹ See *id.* at 479 (noting consistency between parties’ agreement and FAA policies).

⁸² See *LaPine*, 130 F.3d at 888 (correlating FAA policies with enforcement of all agreement terms); *Gateway*, 64 F.3d at 996 (noting arbitration as creature of contract). *But see Bowen*, 254 F.3d at 934. In *Bowen*, the court disagreed with the *LaPine* and *Gateway* courts in finding that the main thrust of the *Volt* decision was that all contractually agreed upon terms not violating the underlying policies of the FAA should be enforced and those contravening the intention of the FAA should be excluded. See *id.*

⁸³ See *LaPine*, 130 F.3d at 888 (noting Congress principally intended FAA to enforce arbitration contracts); *Gateway*, 64 F.3d at 996 (citing *Volt*, 489 U.S. at 478-79).

⁸⁴ See *supra* note 82 and accompanying text (noting difference between *LaPine*, *Gateway* holdings versus holding in *Bowen*).

analogy, courts should enforce agreements for judicial review just as the Supreme Court enforced the parties' agreement for choice of law in *Volt*.⁸⁵

IV. ANALYSIS

The current circuit split over expanded judicial review boils down to different interpretations of the Supreme Court's decision in *Volt* and the policies behind the FAA.⁸⁶ The Seventh, Eighth, and Tenth circuits assert that the Supreme Court's intention in *Volt* was not to call for strict contractual interpretation and enforcement of arbitration proceedings.⁸⁷ Instead, they argue that *Volt* called on courts to review the disputed provision to determine if it is in accordance with the FAA's policies.⁸⁸ If such provision does not "do violence to the policies of the FAA," then it should be enforced.⁸⁹

The Fifth and Ninth Circuits concede that the Supreme Court's intention in *Volt* was to preserve the FAA's policies, but these circuits assert that the most important FAA policy is the strict judicial enforcement of arbitration contracts.⁹⁰ These circuits find the contractual element of arbitration more compelling than other FAA mandates, and this interpretation would allow parties to agree to terms not mentioned in the FAA even where the terms do not comport with the Act's clear mandates.⁹¹

The *Bowen* court had a more expansive reading of *Volt* and one that is more in line with Congress' intent in passing the FAA.⁹² Stating that the federal policy toward arbitration does not favor the application of one set of rules over another, the Court in *Volt* effectively stated that where the

⁸⁵ See *LaPine*, 130 F.3d at 888 (holding courts should enforce judicial review clauses); *Gateway*, 64 F.3d at 996 (holding judicial review terms in agreement prevail over FAA mandates). But see *LaPine*, 130 F.3d at 891 (Mayer, J., dissenting). Justice Mayer noted the jurisdictional problem necessitated by the majority's holding. *Id.* That is, "*Kyocera* cites no authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision." *Id.*

⁸⁶ See *LaPine*, 130 F.3d at 888 (noting Congress principally intended FAA to enforce arbitration contracts); *Gateway*, 64 F.3d at 996 (citing *Volt*, 489 U.S. at 478-79). These courts determined that *Volt* stood for the principle that parties' agreement overrides FAA prescriptions. See *LaPine*, 130 F.3d at 888; *Gateway*, 64 F.3d at 996.

⁸⁷ See *supra* notes 60, 68 and 69 and accompanying text (noting problem of expanding judicial review).

⁸⁸ See *supra* notes 60, 66 and 69 and accompanying text (noting federal policy favoring arbitration does not allow private parties to dictate federal judicial jurisdiction).

⁸⁹ See *supra* notes 21, 52 and 57 and accompanying text (citing cases stating proposition).

⁹⁰ See *supra* notes 76-77, 82-83 and accompanying text (asserting federal policy favoring arbitration dictates adherence to parties' agreement).

⁹¹ See *supra* notes 76, 85 and accompanying text (reinforcing overarching contractual nature of arbitration agreements).

⁹² See *supra* notes 48, 52, 59 and accompanying text (noting the narrow judicial review provisions of FAA).

FAA is silent on certain issues, i.e. choice of law, the parties are free to contract as they wish.⁹³ This holding respects the FAA's parameters by not violating any of its specific mandates.⁹⁴ Another effect of the holding is to reinforce the independent nature of arbitration and the freedom parties enjoy in contracting for arbitration proceedings.⁹⁵ The Court, however, did not say that parties were free to contract regarding any and all arbitration provisions.⁹⁶ The Court clearly stated that in allowing parties to insert choice of law provisions into their arbitration agreements, parties would not be violating the policies behind the FAA.⁹⁷

The clear intention of expanded judicial review clauses is to override the limited review provided under the FAA and should therefore be considered a violation of the FAA.⁹⁸ It is a reasonable inference that where the Court was concerned with violating the policies behind the FAA they would likewise not favor contractual provisions that would violate the specific directives of the statutory scheme.⁹⁹

The FAA provisions call on courts to interpret and enforce arbitration agreements as contracts.¹⁰⁰ However it must be pointed out that the FAA is still a statutory scheme, with specific applications and rules for handling the enforcement and review of arbitration agreements and holdings.¹⁰¹ Congress stated in the FAA that contract law is the tool of interpretation for courts in looking at arbitration provisions.¹⁰² Contract law is not, however, the source from which arbitration agreements derive their validity under federal law.¹⁰³ Instead, the source of federal arbitration law is the FAA itself.¹⁰⁴ Contract law is merely a source that courts may rely on where the FAA is silent and parties have contracted in good faith.¹⁰⁵ The

⁹³ See *supra* notes 20-21, 79 and accompanying text (observing silence of FAA on choice of law issues).

⁹⁴ See *supra* notes 21, 81 and accompanying text (holding need for symmetry between FAA policies and parties' agreement).

⁹⁵ See *supra* notes 27, 52 and accompanying text (cases noting independent and unique nature of arbitration compared to litigation).

⁹⁶ See *supra* notes 21, 79 and accompanying text (*Volt* decision notes FAA's silence on choice of law issues, leaving it up to parties agreement).

⁹⁷ See *supra* note 21 and accompanying text (case stating proposition).

⁹⁸ See *supra* notes 45-57 and accompanying text (citing problems attendant on allowing parties to dictate federal jurisdiction).

⁹⁹ See *supra* notes 11, 21, 50-52 and accompanying text (citing federal policy favoring arbitration and noting contradiction of allowing parties to contract around FAA).

¹⁰⁰ See *supra* note 17 and accompanying text (citing FAA).

¹⁰¹ See *supra* notes 3, 8 and 17 and accompanying text (citing to specific statutory provisions of FAA).

¹⁰² See *supra* note 17 and accompanying text (citing § 2 of FAA calling for arbitration agreements to have same force and effect as all contracts).

¹⁰³ See *supra* note 3 (citing specific U.S.C. provisions embodying FAA).

¹⁰⁴ See *supra* note 3.

¹⁰⁵ See *supra* notes 13, 17, 19 and accompanying text (noting federal judicial treatment of arbitration agreements as contracts).

explicit FAA provisions should always override agreements between parties that violate the FAA, including expanded judicial review.¹⁰⁶

Congress wanted to protect the independence of the arbitration process in crafting the FAA.¹⁰⁷ Under the FAA, federal courts should only be involved in the arbitration process at two points in time: initially in bringing parties into arbitration and at the end to enforce the arbitrator's official decision.¹⁰⁸ Other judicial involvement is strictly curtailed under the FAA, which allows arbitration to prevail on its own merits and be used by parties as a truly independent source of non-judicial dispute resolution.¹⁰⁹ To allow parties to bring arbitrated disputes into federal court on appeal would weaken the arbitration process and further burden courts with cases they would not normally hear.¹¹⁰ The arbitration process would be weakened because the findings of arbitrators would no longer have a binding and final quality.¹¹¹ Inevitably, the losing party would seek an appeal and arbitration would become a first step in litigation, rather than an expedient decision-making tool.¹¹²

V. CONCLUSION

Since Congress enacted the FAA in 1925, arbitration agreements have become a common and useful tool in resolving disputes outside of traditional litigation. The reason that arbitration continues to flourish as an alternative dispute resolution method is largely due to the FAA and the statutory protections it affords. The FAA ensures the independence of arbitration by curtailing the intervention of federal courts into such disputes and by calling on courts to enforce arbitration.

Through the FAA, Congress developed a scheme whereby courts, in reviewing arbitration agreements, remain outside the agreements and do not reach the case's merits except in extreme cases. This neutrality was ensured by the FAA mandate for courts to interpret arbitration agreements

¹⁰⁶ See *supra* notes 48, 50, 57, 59 and accompanying text (cases citing clear and narrow focus of FAA judicial review scheme).

¹⁰⁷ See *supra* notes 48-52 and accompanying text (noting *Bowen* court's focus on independent arbitration process).

¹⁰⁸ See *supra* notes 8, 17 and accompanying text (FAA provisions requiring judicial enforcement and laying out conditions for judicial review).

¹⁰⁹ See *supra* notes 23-25 and accompanying text (cases citing strong preference for independent arbitration process and judicial non-interference).

¹¹⁰ See *supra* notes 12, 53, 85 and accompanying text (cases noting jurisdictional, as well as procedural issues involved with expanded judicial review).

¹¹¹ See *supra* notes 53-54 and accompanying text (cases stating that when parties submit to arbitration, they trade the formalities and review procedures of litigation).

¹¹² See *supra* notes 25, 47, 54 and accompanying text (cases noting importance of distinguishing arbitration from traditional litigation).

as contracts and to interpret them according to the FAA and the parties' terms. In *Volt*, the Supreme Court illustrated a roadmap for navigating the FAA. Essentially, where the FAA is silent on an issue -- choice of law, for example, parties will be free to contract that issue and will be able to choose what law will govern their agreement. Parties may not, however, contract where such agreements would violate the FAA's provisions and the policies behind it. It is therefore clear that judicial review clauses that allow parties to circumscribe the FAA's clear statutory scheme should not be enforced.

Judicial review clauses do more than violate the FAA. In allowing parties to appeal arbitral decisions, the essential nature of arbitration is weakened. Arbitration will no longer be an independent and binding tool of dispute resolution, but will become the first step in a potentially lengthy litigation process. This outcome was not the intention of the FAA's drafters, it is not the Supreme Court's intention, and it should not be the reality of arbitration agreements in the future.

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