

Be More Specific!
Can Writing a Detailed Arbitration Agreement
Expand Judicial Review Under the Federal
Arbitration Act?

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I. INTRODUCTION

Parties choose to arbitrate, rather than litigate, their disputes for myriad reasons. One reason commonly cited is the benefit of finality.¹ Presumably, parties choose to arbitrate claims rather than litigate them in an effort to resolve their dispute outside of a courtroom, thus turning to an alternative method of dispute resolution. As an alternative, many of these parties arbitrate in the hopes of avoiding the lengthy appellate process and other delays often associated with traditional litigation.²

¹ See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 210 (4th ed. 2003) (“The courts will nearly always respect a provision that the arbitrator’s decision is final and binding. This serves to discourage appeals to the courts and to make provisions for finality meaningful.”); see also, e.g., Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91, 93 (2000) (“Finality of arbitration awards is one of the substantial virtues of the arbitral system.”); Paul J. Krause, *Disregarding Manifest Disregard: Watts Shifts Standard for Vacating Arbitrators’ Decisions*, 72 DEF. COUNS. J. 79, 79 (2005) (“Arbitration can offer advantages over traditional litigation, including speed, economy, finality, confidentiality, flexibility, arbitrator expertise and neutrality of forum.”); Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator*, 60-OCT DISP. RESOL. J. 10, 12 (2005) (recognizing the finality of awards is a “clear benefit” of arbitration); Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 153 (2002) (“State legislators seemed to recognize that the benefits of arbitration flow from its finality” and have passed legislation providing only limited judicial review of arbitral awards); Jennifer M. Rhodes, Comment, *Judicial Review of Partial Awards Under Section 10(a)(4) of the Federal Arbitration Act*, 70 U. CHI. L. REV. 663, 668 (2003) (“In an effort to promote arbitration, the FAA purposefully limits the ability of courts to review arbitral awards. The less involved the courts are in the process, the more parties will see arbitration as a viable alternative to litigation.”).

Not only do commentators tout the benefits of finality but also courts recognize this virtue of arbitration as well. See, e.g., *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001) (“Contractually expanded standards [of judicial review], particularly those that allow for factual review, clearly threaten to undermine the independence of the arbitration process and dilute the finality of arbitration awards because, in order for arbitration awards to be effective, courts must not only enforce the agreements to arbitrate but also enforce the resulting arbitration awards.”); see also *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1063 (9th Cir. 2005) (recognizing “finality and judicial efficiency” as benefits of arbitration); *St. John’s Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884 (8th Cir. 2005) (noting the court is “mindful of the strong federal policy favoring certainty and finality in arbitration”); *Exxon Corp. v. Local Union 877*, 980 F. Supp. 752, 760 (D.N.J. 1997) (“Deference to arbitration awards serves to promote the benefits of . . . arbitration—speed, flexibility, informality and finality.”) (internal quotation marks and citation omitted).

² See Todd B. Carver, *ADR—A Competitive Imperative for Business*, 59-OCT DISP. RESOL. J. 67, 71 (2004) (“Both federal and state laws strictly limit the grounds upon which arbitration awards can be challenged, thus deterring (and avoiding the expense and other burdens of) frivolous or wasteful appeals.”); Merryn B. DeBenedetti, Note, *Show Me the Money?: Washington Adopts the Cost Prohibitive Defense to Arbitration Clauses in Consumer Contracts*, 27 SEATTLE U. L. REV. 899, 930 (2004) (“Washington’s policy

Finality would, indeed, be a great virtue of arbitration—provided the parties could be assured the arbitrator will always make the right decision. However, arbitrators—as with all other decision-makers—are not infallible, and they do make mistakes. Yet the structure of the Federal Arbitration Act (“FAA”) favors finality over correct decision-making by imposing stringent standards of review of arbitral awards.³

The limited review available under the FAA⁴ has caused some parties to enter arbitration with hesitation,⁵ especially if the claims to be arbitrated are complex.⁶ In response to the fears that the arbitrator will

favoring arbitration is grounded on the proposition that arbitration allows litigants to avoid the formalities, expense, and delays inherent in the court system.”) (quoting *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 604 (Wash. 2002)); Jeremy Delibero, Note, *Copyright Arbitration Royalty Panels and the Webcasting Controversy: The Antithesis of Good Alternative Dispute Resolution*, 5 PEPP. DISP. RESOL. L.J. 83, 109 (2005) (“The whole purpose of arbitration is to avoid the courtroom and all the negatives that follow . . .”).

³ See *infra* Section II.

⁴ See *infra* Section II.

⁵ See Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1204 n.285 (2004) (“The benefit of the bargain for expedient adjudication carries with it the prospect that expectations of procedural and substantive fairness will be frustrated, without the possibility of further recourse, when the arbitrators’ adjudicatory conduct is disappointing or unprofessional.”) (quoting THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 4 (2d ed. 2000)); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 172 (2003) (“In recent years, there has been ‘growing concern’ about the ‘risks presented by arbitration’s limited scope of review.’”) (citation omitted); Jared S. Gross, *In Search of Wiley: Struggling to Bind Successor Corporations to Their Predecessor’s Collective Bargaining Agreement*, 29 OKLA. CITY U. L. REV. 113, 118 n.34 (2004) (“The finality of the arbitrator’s ruling belies much of the benefits of arbitration, and as long as the arbitrator’s award draws its essence from the contract, a reviewing court will not overturn [the] result.”) (citations omitted); Marrow, *supra* note 1, at 12 (noting some attorneys may be hesitant to recommend arbitration as an alternative to their clients because of the risk that the arbitrator may incorrectly apply the law in the case at hand or otherwise decide the case wrongly); Noah Rubins, *“Manifest Disregard of the Law” and Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT’L ARB. 363, 363 (2001) (“Parties will likely be wary of a regime that completely eliminates judicial review, because they need assurance that such serious procedural defects as fraud on the arbitrators, excess of powers, or improper constitution of the tribunal will be corrected.”).

⁶ See Eric Van Ginkel, *“Expanded” Judicial Review Revisited: Kyocera Overturns LaPine*, 4 PEPP. DISP. RESOL. L.J. 47, 53 (2003) (recognizing “the tension that exists between the benefit of the finality of the award and the perceived absence of much needed quality control over arbitrators as they are asked to interpret increasingly more complex legal issues”).

Part of the problems stem from the fact that the FAA was enacted in 1925 and has remained relatively unchanged over the past eight decades. There is no evidence Congress imagined, much less prepared for, the widespread use of arbitration in employment and consumer claims involving issues of statutory construction. See Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*,

incorrectly decide certain issues of law or fact, parties have begun to include standards of review within their agreement to arbitrate. For example, an agreement to arbitrate may attempt to order a district court to vacate any award not supported by “substantial evidence” or including faulty “conclusions of law.”⁷ Although “state courts have generally refused to enforce contractual provisions expanding the scope of review,”⁸ parties have had significantly more luck in convincing federal appellate courts to abide by privately selected standards of heightened judicial review.⁹ However, because not all circuits enforce the parties’ desired standard of review,¹⁰ there exists a split among the circuits as to the treatment of these clauses. A common thread in these cases deals with parties trying to dictate to the *courts* the proper standard of review, rather than detailing to the *arbitrator* the scope of his or her powers under the contract.

This Article will begin by examining the text of the FAA to determine the exact nature of arbitral review.¹¹ It will also examine some judicially-created standards of review which have surfaced as a result of the limited textual bases for review.¹² The Article will then delve into the reasons why expanded judicial review may be beneficial to parties, as well as reasons parties may wish to confine review to the standards set forth in the FAA.¹³ Because the issue of expanded judicial review is essentially one concerning the parties’ right to contract, an examination

18 OHIO ST. J. ON DISP. RESOL. 151, 193-94 (2005) (noting employment and statutory claims have only been found arbitrable by the Supreme Court within the past three decades). Even as arbitration remains viable within commercial industries, the changing nature of the claims brought before arbitrators has also created a strain on some decision-makers. See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1242 (2000) (“Today, arbitrators often are not considered experts in the subject matter of the dispute they arbitrate because many disputes involve statutory and legal claims rather than claims that can be resolved by examining industry customs.”).

⁷ In *Kyocera Corp. v. Prudential-Bache Trade Services Inc.*, 341 F.3d 987, 990-91 (9th Cir. 2003) (en banc), the parties’ agreement required the arbitrator to “issue a written award which shall state the bases of the award and include detailed findings of fact and conclusions of law,” and the agreement further instructed the district court to “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.” The *Kyocera* case will be discussed in more detail in Section V.B.2.

⁸ *Trombetta v. Raymond James Fin. Servs., Inc.*, No. GD04-015418, 2005 WL 1595280, at *26 (Pa. Ct. Com. Pl. Mar. 2, 2005).

⁹ See *infra* Section V.A.

¹⁰ See *infra* Section V.B.

¹¹ See *infra* Section II.

¹² See *infra* Section II.C.

¹³ See *infra* Section III.

of two seminal Supreme Court cases¹⁴ impacting the decisions of the circuit courts is warranted.¹⁵ As much of the current law deals with the parties' ability to tell the courts how to review their individual arbitrations, this Article suggests the possibility that more careful instructions to the arbitrator could perhaps lead to increased judicial review under the FAA.¹⁶ However, the willingness of the federal courts to embrace this approach may depend on the instructions given to the arbitrator and how much those instructions appear to be an "end run" around existing circuit precedent.¹⁷ Ultimately, this Article suggests giving more detailed instructions to the arbitrator—not the courts—should increase judicial review without infringing on Article III courts.¹⁸

II. JUDICIAL REVIEW UNDER THE FAA

The Federal Arbitration Act accomplishes three important tasks not available before its passage: 1) it sought to reverse the long-standing judicial hostility towards agreements to arbitrate;¹⁹ 2) it placed agreements to arbitrate on equal footing with all other contracts;²⁰ and 3) by enforcing agreements to arbitrate, Congress recognized the benefits involved in the efficient disposition of disputes outside of the court system.²¹ As such, the provisions of the FAA deal largely with issues on

¹⁴ These two cases are *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). These cases will be discussed *infra* Section IV.

¹⁵ See *infra* Section V.

¹⁶ See *infra* Section VI.

¹⁷ See *infra* Section VII.

¹⁸ This Article is limited to the attempts by parties to expand judicial review. Thus, the question of whether the parties can further limit the court's ability to review an award is beyond the scope of this work. However, note 225 briefly addresses why the recommendation set forth in this Article can only serve to expand, rather than limit, judicial review or arbitral awards.

¹⁹ See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate."); see also Sarah Rudolph Cole & Kristen M. Blankley, *Arbitration*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 320 (Michael L. Moffitt & Robert C. Bordone, eds. 2005); William F. Kolakowski III, Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171, 2187 (1995).

²⁰ See *Maggio & Bales*, *supra* note 6, at 160-61 ("Congress' specific intent in enacting the FAA was to guarantee judicial enforcement of private agreements."); Kolakowski, *supra* note 19, at 2187. The very text of the FAA states agreements to arbitrate would become "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000).

²¹ Kolakowski, *supra* note 19, at 2187-88 (citing legislative history of the FAA); see also *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-80 (1989) (recognizing the FAA "strongly favors the enforcement of agreements to arbitrate as a

the “front end” and “back end” of arbitration, with few provisions governing the arbitration itself.²² Accordingly, the courts are only involved in an arbitration at these two points—either determining whether the case should be arbitrated (also known as arbitrability) and determining whether the award rendered should stand.²³

Three provisions essentially deal with court involvement with arbitration awards. Under Section 9 of the FAA, the parties can have their award confirmed, i.e., transformed into an order of the court.²⁴ According to Section 9, the award will be confirmed by a court, provided it is not “vacated, modified, or corrected” pursuant to Sections 10 and 11 of the FAA.²⁵ Section 10 of the FAA allows the courts to review and vacate arbitration awards under very specific circumstances,²⁶ and Section 11 allows the courts to modify arbitration awards under equally specific circumstances.²⁷ The federal courts, however, have created common law allowing for a slightly broader standard of review, perhaps because the statutory review is so limited.²⁸ While the circuits have developed different names for this new standard of review, it is most

means of securing prompt, economical and adequate solution of controversies”) (internal quotation marks and citation omitted).

²² Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000); *see also* Maggio & Bales, *supra* note 6, at 162-63 (discussing the provisions of the FAA).

²³ Cole & Blankley, *supra* note 19, at 322. According to Cole and Blankley:

Under the FAA, court involvement occurs, if at all, in two situations: prior to the start of arbitration and after the completion of arbitration. First, pursuant to the FAA, a party with a valid arbitration agreement may obtain a stay of litigation from a court where the arbitration proceeds. . . . Second, the FAA enables enforcement of an arbitration agreement by authorizing a party to an arbitration agreement to file in federal district court a motion to compel the party to arbitrate. . . . The FAA also contains provisions for limited judicial review of arbitration awards, together with provisions articulating the process for vacation or modification of arbitral awards.

Id.

²⁴ 9 U.S.C. § 9. This section provides: “If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, [the parties] . . . may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected.” *Id.*

²⁵ *Id.*

²⁶ *Id.* § 10(a); *see also* Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 BAYLOR L. REV. 753, 764 (2004) (“[C]ontemporary arbitration law is characterized by a highly deferential standard of review. Once an arbitration award has been issued, only limited grounds for challenge are available.”).

²⁷ 9 U.S.C. § 11.

²⁸ In discussing the review of arbitration awards, the Sixth Circuit has noted, “A court’s review of an arbitration award [under the FAA] ‘is one of the narrowest standards of judicial review in all of American jurisprudence.’” *Way Bakery v. Truck Drivers Local No. 164*, 363 F.3d 590, 593 (6th Cir. 2004) (quoting *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 514 (6th Cir. 1999)).

commonly referred to as review for “manifest disregard of the law.”²⁹ These two sections of the FAA and the judicially-created standards of review will be discussed in more detail below.

A. FAA Section 10 — Vacatur of Arbitral Awards

Section 10 of the FAA is usually cited as the standard for judicial review of arbitration awards. However, the text of the statute does not speak to judicial review or a standard, such as *de novo* review, under which the courts should examine the resulting award. Instead, this section allows the courts to vacate an award, provided the circumstances leading up to the award meet enumerated criteria. Under Section 10, the court can vacate an 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; 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.³⁰

None of the first three of these grounds for vacatur even address the merits of the case; they only look to the actions of the arbitrator and the parties to determine whether the procedure was fair.³¹ Even when the

²⁹ Goldberg, *supra* note 1, at 274. Goldberg notes that the “circuit courts have adopted nonstatutory grounds, such as ‘manifest disregard of the law,’ to review arbitration decisions. Other nonstatutory grounds for vacatur include that the award was: completely irrational, in direct conflict with public policy, arbitrary and capricious, or inconsistent with the essence of the parties’ underlying contract.” *Id.* (citation omitted).

³⁰ 9 U.S.C. § 10(a).

³¹ See Stephen L. Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 BERKLEY J. EMP. & LAB. L. 521, 544 (2000) (“The first three of those statutory standards sanction vacatur of awards for certain types of party, advocate, and/or arbitrator misconduct or misbehavior that can taint the arbitration proceeding and prejudice the rights of a party.”); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 243-44 (1999) (“The first three of these grounds are essentially procedural in nature: their concern is not with the context or merit of the award, but with the means used by the arbitrators (and, in the case of Section 10(a)(1), the parties) in reaching the award.”).

court reviews to determine whether the arbitrator exceeded the powers bestowed upon him or her, the court does not examine the merits of any of the issues, properly or improperly heard.³²

Plainly missing from this statute is review over whether the decision was correctly decided. The Seventh Circuit has explicitly noted that it is “forbidden to substitute its own interpretation [of an agreement to arbitrate] even if [it is] convinced that the arbitrator’s interpretation [is] not only wrong, but plainly wrong.”³³ Even if the arbitrator committed serious errors of law or misapplied the facts, the reviewing courts will only rarely overturn an award. The Supreme Court has held, “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”³⁴ While such deferential review may be unsettling, there is no indication that the courts or Congress are willing to create a greater standard of review. In fact, the National Conference of Commissioners on Uniform State Law, in drafting the Revised Uniform Arbitration Act (“RUAA”), recommended the states enact a provision almost identical to Section 10 of the FAA.³⁵ Thus, expanded judicial review of the merits of the arbitration award, if possible at all, must be premised on a legal theory other than the vacatur section of the FAA.

³² Younger, *supra* note 31, at 243-44 (“Section 10(a) does address the substance of the award, but in a somewhat oblique fashion. Pursuant to this provision, courts may strike down awards when the arbitrators decided issues not submitted to them or grant relief not authorized by the parties. However, where the subject matter or remedy is deemed within the arbitrator’s authority, a reviewing court will generally not second-guess the merits of the arbitrator’s decision.”).

³³ Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991).

³⁴ United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

³⁵ REVISED UNIFORM ARBITRATION ACT § 23(a) (2000). Under the RUAA, vacatur is warranted in the following circumstances: 1) “the award was procured by corruption, fraud, or other undue means;” 2) “evident partiality” on the part of an arbitrator or arbitrator misconduct; 3) the arbitrator refused to postpone the hearing, thus causing substantial prejudice to one party; 4) “the arbitrator exceeded the arbitrator’s powers;” 5) the parties did not have a valid agreement to arbitrate; or 6) the hearing was conducted without giving sufficient notice to a party. *Id.*

The drafters considered, but specifically rejected, the possibility of opting into a broader standard of judicial review. The drafters refused to include this optional standard of judicial review for the following reasons: “(1) the current uncertainty as to the legality of a state statutory sanction of the ‘opt-in’ device, (2) the ‘disconnect’ between the Act’s purpose of fostering the use of arbitration as a final and binding alternative to traditional litigation in a court of law, and (3) the inclusion of a statutory provision that would permit the parties to contractually render arbitration decidedly non-final and non-binding.” REVISED UNIFORM ARBITRATION ACT, Prefatory Note. As an alternative, the RUAA suggests the parties could simply include in their agreement to arbitrate the use of an arbitral appellate panel. *Id.*

B. FAA Section 11 — Modification of Arbitral Awards

While Section 10 of the FAA allows for the complete vacatur of an award, under Section 11, other types of errors can be corrected, and some awards modified, provided the parties can show the circumstances surrounding their award meet specific criteria.³⁶ The statute provides three grounds under which the award may be corrected or modified. First, the court can change an award “where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.”³⁷ Second, the court can modify an award “[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.”³⁸ Finally, the court is free to change an award that is “imperfect in matter of form not affecting the merits of the controversy.”³⁹ The purpose of these provisions is to allow the court to modify or correct an award “so as to effect the intent thereof and promote justice between the parties.”⁴⁰ As with the section on vacatur, the RUAA contains a provision almost identical to FAA Section 11.⁴¹

This section regarding correction or modification of awards is relatively uncontroversial. As with the section on vacatur, this provision contains only the most limited reasons for court interference with an arbitration award. Both of these provisions evidence Congress’s intent to enforce agreements to arbitrate according to the terms the parties have

³⁶ See Jonathan R. Bunch, Note, *Arbitration Clauses Should Be Enforced According to Their Terms—Except When They Shouldn’t Be: The Ninth Circuit Limits Parties’ Ability to Contract for Standards of Review of Arbitration Awards*, 2004 J. DISP. RESOL. 461, 464 (“Similarly, section 11 of the FAA permits modification of arbitral awards in only three narrow situations.”).

³⁷ 9 U.S.C. § 11(a) (2000).

³⁸ 9 U.S.C. § 11(b). This grounds for modification is quite similar to the “exceeding powers” grounds for vacatur under 9 U.S.C. § 10(a)(4). In both situations, the award will be reviewed to determine if the arbitrator ruled upon an issue not properly before him or her. Presumably, the same grounds for review is mentioned in both sections because Section 10 and Section 11 offer different remedies. If the party challenging the award hopes the court will vacate it in its entirety, it would seek review under Section 10; however, if the same party only wishes to have the award modified to eliminate the portions dealing with matters not properly before the arbitrator, such could be accomplished by making a motion to the court under Section 11(b).

³⁹ *Id.* § 11(c).

⁴⁰ *Id.* § 11.

⁴¹ REVISED UNIFORM ARBITRATION ACT § 24(a) (allowing modification or correction of an award on the basis of: miscalculation or improper description, an arbitrator deciding issues not properly before him or her, or correcting imperfections in the award not affecting the merits of the decision).

set forth for themselves.⁴² By allowing review primarily to determine whether the arbitrator performed his or her duties as specified under the contract, the courts preserve the principle of freedom of contract. These two review provisions demonstrate the importance of careful drafting of arbitration agreements and beg the question of whether courts will more carefully review or scrutinize the decision of an arbitrator who has been given very specific powers and instructions through a meticulously drafted agreement to arbitrate.

C. “Manifest Disregard” and Other Standards — Creatures of Federal Common Law

For reasons never explicitly stated in their opinions,⁴³ the federal courts have allowed a limited expanded judicial review under a variety of different titles. The authority for expanding judicial review is grounded in dicta from the case *Wilko v. Swan*.⁴⁴ In *Wilko*, the Supreme Court noted, “Power to vacate an award is limited. . . . In unrestricted submissions [of cases to arbitration], the interpretations of the law by the arbitrators in contrast to the manifest disregard are not subject, in the federal courts, to review for error in interpretation.”⁴⁵ More than four decades later, the Supreme Court noted a “party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances.”⁴⁶ After citing FAA Section 10, the Court cited *Wilko* for the proposition that “parties bound by arbitrator’s decision not in ‘manifest disregard’ of the law” would be upheld on review.⁴⁷ Thus, the Supreme Court appears to have paved the way for judicially-created expanded review of arbitration awards.

⁴² As the Supreme Court noted in *Volt*, the intent of the contracting parties is paramount because “[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.” *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). See also *Puerto Rico Tel. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 27 (1st Cir. 2005) (“Passage of the FAA ‘was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.’”) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)).

⁴³ Presumably, the courts feel constrained by the limited nature of statutory review. See Milana Koptsiovsky, Note, *A Right to Contract for Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?*, 36 CONN. L. REV. 609, 615 (2004) (“Because the four instances addressed by § 10 are limited, the courts have created two additional grounds for vacatur: manifest disregard of the law and public policy.”).

⁴⁴ 346 U.S. 427 (1953).

⁴⁵ *Id.* at 436.

⁴⁶ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

⁴⁷ *Id.* In 1989, the Supreme Court overruled *Wilko v. Swan*. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 477, 477 (1989). Thus, when the *First Options*

Although most reviewing courts employ the “manifest disregard of the law” standard, this nomenclature is hardly universal.⁴⁸ No matter the title given to the standard of review, even this “expanded” review is still quite limited. One common definition of the “manifest disregard” inquiry asks whether “the arbitrators clearly identify the applicable, governing law and then proceeded to ignore it.”⁴⁹ Although the “manifest disregard” standard would allow courts to correct some errors of law, the review is strict and a “mere mistake of law by an arbitrator cannot serve as the basis for judicial review.”⁵⁰ Because this standard of review requires one party to show the arbitrator both knew the applicable law and then refused to apply it, the party seeking review will often have difficulty in meeting its burden of proof. In *Montes v. Shearson Lehman Brothers, Inc.*, the Eleventh Circuit refused to vacate an arbitral award for manifest disregard of the law despite evidence one party encouraged the arbitrator to rule on the basis of equity, rather than strictly following the law.⁵¹ Yet despite the urgings of one party, the court found no manifest disregard of the law because there was “nothing in the award or elsewhere in the record to indicate” the arbitrators heeded the party’s plea to disregard the law and decide the case on equitable grounds.⁵²

Rulings in cases such as *Montes* demonstrate just how limited this “expanded” review actually is in practice. Proving the arbitrator was both aware of governing law and intended to ignore it will be difficult even in

Court cited to it favorably, it resurrected the legitimacy of the “manifest disregard” standard.

⁴⁸ See *supra* note 28 and accompanying text.

⁴⁹ *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003) (quoting *Boise Cascade Corp. v. Paper Allied-Indus. Chem. & Energy Workers (PACE)*, Local 7-0159, 309 F.3d 1075, 1080 (8th Cir. 2002)); see also *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 32 (1st Cir. 2005) (noting the “manifest disregard” standard “implies that the arbitrators appreciated the existence of a governing legal rule but willfully decided not to apply it”) (citation omitted).

⁵⁰ *Puerto Rico Tel. Co.*, 427 F.3d at 32 (citing *Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234, 239 n.6 (1st Cir. 1995)).

⁵¹ 128 F.3d 1456, 1459 (11th Cir. 1997). Specifically, the attorney for Shearson urged the arbitrator: “I know, as I have served many times as an arbitrator, that you as an arbitrator are not guided strictly to follow case precedent. That you can also do what’s fair and just and equitable and that is what Shearson is asking of you in this case.” *Id.* During closing arguments, the attorney again urged the arbitrator to follow the equities of the case, rather than the stricture of case law, and stated: “The law says one thing. What equity demands and requires and is saying is another. What is right and fair and proper about this? You know as arbitrators you have the ability, you are not strictly bound by case law and precedent. You have the ability to do what is right, what is fair and what is proper, and that’s what Shearson is asking you to do.” *Id.* (emphasis omitted).

⁵² *Id.* at 1461.

cases involving the most meticulous records.⁵³ Additionally, a party could only hope to prove “manifest disregard” by pointing to portions of a *written, reasoned award*, outlining the arbitrator’s knowledge of the law and the arbitrator’s decision to disregard it. Without such a written opinion, review under this standard may well be impossible.⁵⁴

Although the “manifest disregard” standard is employed in most, if not all, circuits, additional grounds for review have also been created.⁵⁵ Some courts will also vacate an award if that award is “completely irrational,” meaning the award “fails to draw its essence from the agreement.”⁵⁶ The Eighth Circuit will uphold an agreement under this standard of review if it determines “the award is derived from the agreement, viewed in light of the agreement’s language and context, as well as other indications of the parties’ intention.”⁵⁷ However, despite its new name, the review for “complete irrationality” may actually be a review under FAA Section 10(a)(4) to determine if the arbitrator exceeded his or her powers under the agreement.⁵⁸

⁵³ See *infra* notes 83-93 and accompanying text for a discussion as to the financial ramifications for expanded judicial review, such as the additional costs of transcripts and increased arbitrator costs for issuing written opinions.

⁵⁴ The First Circuit has held, as “arbitrators need not explain their award, and did not do so here, it is no wonder appellant is hard pressed to satisfy the exacting criteria for invocation of the [‘manifest disregard’] doctrine.” *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990). With respect to review of an award without written reasoning, the Second Circuit recently noted:

Absent an explanation [for the award], the reviewing court must attempt to infer from the record whether the arbitrators appreciated and ignored a clearly governing legal principle. The arbitration decision must be confirmed if there is any basis for upholding the decision and [i]f there is even a barely colorable justification for the outcome reached.

Bear, Sterns & Co., Inc. v. 1109580 Ontario, Inc., 409 F.3d 87, 91 (2d Cir. 2005) (citation omitted). Although no written arbitration award is required, the presence of a well-reasoned award as well as a transcript of the arbitration proceedings would significantly aid the party seeking vacatur.

⁵⁵ The review available in each circuit is different, and the standards of review are not consistent from circuit to circuit. See *Barabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 382 n.6 (5th Cir. 2004) (outlining which circuits utilize the following standards of review: arbitrary and capricious; completely irrational; violation of public policy; denial of fundamentally fair hearing; and modified versions of manifest disregard).

⁵⁶ *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003) (quoting *Boise Cascade Corp. v. Paper Allied-Indus. Chem. & Energy Workers (PACE)*, Local 7-0159, 309 F.3d at 1080); see also *U.S. Life Ins. Co. v. Ins. Comm’r of Cal.*, No. 05-55588, 2005 WL 3150272, at *3 (9th Cir. Nov. 28, 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 292 n.2 (3d Cir. 2001).

⁵⁷ *McGrann v. First Albany Corp.*, 424 F.3d 743, 749 (8th Cir. 2005).

⁵⁸ In *Brabham*, 376 F.3d at 382 n.6, the Third Circuit suggests this review is “simply a subset of a statutory ground for vacatur,” i.e., review for whether the arbitrator exceeded his or her powers.

The Eleventh Circuit stands alone in allowing review of an arbitrator's award under the "arbitrary and capricious" standard. The "arbitrary and capricious" standard asks whether the grounds "for the arbitrator's decision can[] be inferred from the facts of the case."⁵⁹ Although this review appears to be more searching because it examines not only the law of the case but also the underlying facts, the court is mindful that the standard review is "very difficult" to meet, especially in light of the fact that "the award is presumptively correct."⁶⁰ Whether this review is a viable alternative to the FAA remains to be seen, especially because three circuits have rejected it, albeit implicitly.⁶¹ Finally, some circuits allow review of an award to determine if the award violates notions of public policy.⁶²

The presence of so many federally created standards of judicial review evidences the circuit courts' dissatisfaction with the review available under the FAA. However, even these "expanded" forms of review are quite limited as the courts appear to be wary of chipping too far away from the statutory standards of review.⁶³ Although the courts are split as to whether they honor party-dictated standards of review,⁶⁴

⁵⁹ *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 435 (11th Cir. 1995).

⁶⁰ *Id.* The Eleventh Circuit will also review an arbitration award under the "manifest disregard" standard. See *B.L. Harbert Int'l, L.L.C. v. Hercules Steel Co.*, No. 05-11153, 2006 WL 462368, at *5 (11th Cir. Feb. 28, 2006). Review under the "manifest disregard" standard is also difficult, and to date only one arbitration award was vacated under this standard. *Id.* (citing *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461 (11th Cir. 1997)).

⁶¹ *Brabham*, 376 F.3d at 382 n.6.

⁶² *Ace Elec. Contractors v. Int'l Bros. of Elec. Workers*, 414 F.3d 896, 900 (8th Cir. 2005) (allowing review for violations of public policy even if the award "draws its essence" from the collective bargaining agreement); *Paper Allied-Indus. Chem. v. Sandvik Special Metals Corp.*, 132 F. App'x 149, 150 (9th Cir. 2005) (acknowledging an "extremely narrow" review for violations of public policy); *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004) ("Besides the four statutory grounds, manifest disregard and contrary to public policy are the only nonstatutory bases recognized by this circuit for vacatur of an arbitration award."); *Way Bakery v. Truck Drivers Local No. 164*, 363 F.3d 590, 595 (6th Cir. 2004) (recognizing a very limited review of awards for violation of public policy but noting that the courts do "not possess a broad power to set aside an arbitration award as against public policy") (citation and internal quotation marks omitted).

Review for violations of public policy most often surface in the employment context under a collective bargaining agreement. These cases usually involve an arbitrator's decision to reinstate an employee who has engaged in nefarious behavior such as sexually harassing a co-worker or being a transportation worker who has tested positive for use of controlled substances. See *Way Bakery*, 363 F.3d at 595-96 (citing cases).

⁶³ See *Maggio & Bales*, *supra* note 6, at 166 ("Although the net result of these safeguards is that the arbitrators must grant a fundamentally fair hearing to all parties, the standards for vacatur are invariably high.") (footnote omitted).

⁶⁴ See *infra* Section V.

perhaps working with the statutory and common law standards of review will ensure greater review. Under the case law one thing is clear: the greater discretion given to the arbitrator, the more likely the decision of the arbitrator will be found to be made within that discretion. Thus, by specifically dictating the terms of arbitration in the initial agreement, parties may have greater success in trying to either vacate or modify the resulting award if the appointed arbitrator fails to abide by the terms of his or her contract.⁶⁵

III. EXPANDED JUDICIAL REVIEW — DO THE BENEFITS OUTWEIGH COSTS?

Given the limited review available under the plain language of the FAA and the only slightly more expansive additional federal grounds under which courts can review arbitration awards, parties have attempted to write into their contract additional grounds under which courts can review resulting awards.⁶⁶ Whether or not the courts will ultimately abide by the terms of the contract, parties should seriously consider the advantages and disadvantages of expanded judicial review. At its most basic level, some people may be drawn to the idea of finality while others may yearn for a more searching review.⁶⁷ Even beyond finality, parties may wish to consider other aspects of increased judicial review, such as increased costs, time, and the possibility of encroaching on the province of the judiciary, before crafting an arbitration agreement purporting to give the courts *de novo*—or other—review over the arbitrator's award.

A. The Potential Benefits of Expanded Review

The most obvious reason parties would like to expand judicial review is to correct arbitration decisions that are plainly wrong.⁶⁸ As

⁶⁵ See *infra* Section VI.A.

⁶⁶ See *infra* Section V.

⁶⁷ As noted by Di Jiang-Schuerger, “finality of an arbitral award may be either a benefit or a drawback of arbitration, depending on the parties’ interests. Some parties may appreciate a fast and final decision, while others would rather have the assurance that any possible legal or factual mistakes can be brought to a court for correction.” Di Jiang-Schuerger, Note, *Perfect Arbitration = Arbitration + Litigation?*, 4 HARV. NEGOT. L. REV. 231, 246 (1999); see also Maggio & Bales, *supra* note 6, at 155 (“Parties attracted to the speed, efficiency and economy of the arbitration process are often disturbed about the finality of the decision.”).

⁶⁸ Recall, the Seventh Circuit explicitly held it could not overturn an arbitration award simply because it was “plainly wrong.” *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991). See also Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 429 (2004) (“Because an arbitration award is not easily overturned,

noted above,⁶⁹ the limited review offered under the plain language of the FAA and the federal common law may be unsatisfying. Indeed, no party should hope to challenge an arbitral award only to have the court explain: “In contracting for arbitration of disputes . . . the parties bargained for a decision by the arbitrator, not necessarily a good one, and that is what they received.”⁷⁰ Certainly the parties do not enter arbitration hoping for or even expecting a mediocre performance by the decision-maker. Thus, parties may understandably contract for increased judicial review as a means of achieving greater control over the quality of the arbitrator.⁷¹ Even if increased judicial review is not meant to improve the quality of the arbitration or ensure proper reasoning in the award, some parties may be drawn to this concept as a means of “hedging their bets” or trying to obtain a second bite of the proverbial apple.⁷²

While some parties may be concerned that the arbitrator may arrive at the wrong decision by incorrectly applying the law, other parties may be concerned about arbitrator bias not significant enough to warrant vacatur under FAA Section 10.⁷³ Bias may be most evident in situations involving arbitration between an institutional party, usually a “repeat player,” and a “one shot” party such as a consumer or an employee. The institutional “repeat player,” by virtue of its repeated dealings with the arbitral process, “may develop informal relationships with the arbitrator, creating an incentive for the arbitrator to find in its favor.”⁷⁴

parties sometimes harbor fears that a maverick arbitrator will render an egregious award, which cannot be challenged even though wrong on the facts and the law.”).

⁶⁹ See *supra* Section II.

⁷⁰ *Saint Mary Home, Inc. v. Serv. Emp. Int’l Union*, Dist. 1199, 116 F.3d 41, 45 (2d Cir. 1997). The Second Circuit went on to note, “It is not for us to second-guess [the choices exhibited in the arbitration contract] or judicially rewrite the agreement because one party now wishes it were different.” *Id.*

⁷¹ Admittedly, using increased judicial review as an arbitrator quality-control device seems counter-intuitive. If the parties are seriously concerned about quality control, they should expend their energy in choosing the correct decision-maker on the “front end” of arbitration, rather than expending significant resources challenging the award on the “back end.”

⁷² *Maggio and Bales*, however, contend there is no true “second bite of the apple” phenomenon in the realm of expanded judicial review because both parties have the opportunity to petition the courts for expanded review, “thereby sharing the risk and, at the same time, ensuring the fairness of the process.” *Maggio & Bales, supra* note 6, at 156.

⁷³ See *Cole, supra* note 6, at 1243 (“[M]any parties now believe that the limited review outlined in FAA § 10(a) creates a risk of arbitrary and capricious, or even biased decision-making. Groups interested in reform of the arbitral process often advocate the requirements of written opinions and expanded judicial review of those opinions as a means to achieve the fairness they believe is currently missing from the process.”).

⁷⁴ *Id.* at 1242. The “informal relationship” between the arbitrators and the institutional parties is multi-faceted. On one level, the arbitrator may become familiar and develop a friendly rapport with the attorneys and officers of the institutional party, thus

Additionally, the “one shot” players arguably have more invested in each individual arbitration because the institutional party, who will likely participate in many arbitrations, can hope any losses in an individual arbitration are evened out over the long run.⁷⁵ The “one shot” player, however, has much to lose in the event the arbitrator decided the case wrongly or in a biased manner.⁷⁶ Thus, increased judicial review could help ensure fairness in situations involving repeat versus one-shot players.⁷⁷

Parties who wish for the courts to have a more meaningful judicial review of their award will invariably have to require the arbitrator to actually provide a written, reasoned award.⁷⁸ Although there are some

creating the potential for a personal bias in favor of the institutional party. On another level, the arbitrator may realize it would be more likely to be hired again and again by an institutional party, provided the arbitrator rules favorably towards it. *See also* Maggio & Bales, *supra* note 6, at 155 (“Concerned that the neutral [arbitrator] may in fact be biased toward one party, especially in the employment or consumer context where arbitrators with specialized knowledge may be well known to one of the parties who has utilized their services in the past, or perhaps simply comfortable with the traditional judicial litigation route of dispute resolution where one appeal is normally a matter of right, parties have increasingly written into their arbitration contracts clauses expanding the scope of judicial review statutorily provided.”).

⁷⁵ Cole, *supra* note 6, at 1242-43.

⁷⁶ *Id.*

⁷⁷ Because the institutional parties possess increased bargaining power over the “one shot” players, the ability for “one shot” players to bargain for increased review may be limited. While increased review may ultimately benefit the employees and consumers, the ability for those groups to effectively bargain for these terms in their agreement to arbitrate is beyond the scope of this Article.

Conversely, at least two commentators suggest increased judicial review actually favors the party with increased bargaining power. Michael L. LeRoy & Peter Fueille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861, 901 (2004). Under this theory, the party with greater bargaining power and resources would be less affected by the delay associated with judicial review. *Id.* Conversely, the party in the weaker position may be in more desperate need to resolve the dispute and collect an award. *See id.* Additionally, the institutional party almost always has greater financial resources and will be less affected by the increased costs of post-arbitration litigation. Lee Goldman, too, urges against the use of expanded-review clauses in consumer claims, in part, on the basis of increased costs to the “one shot” player. Goldman, *supra* note 5, at 194.

⁷⁸ *See* Maggio & Bales, *supra* note 6, at 166 (“Reviewing courts are further constrained by the lack or dearth of written findings by the arbitrator.”); Lynn Katzler, Comment, *Should Mandatory Written Opinions Be Required in All Securities Arbitrations?: The Practical and Legal Implications to the Securities Industry*, 45 AM. U. L. REV. 151, 169 (1995) (“Without a written opinion, however, a court is unable to review meaningfully an arbitration decision, because it is difficult to uncover potential problems such as bias or mistake.”). At least one commentator has suggested arbitrators purposely write terse awards in order to prevent courts from overturning their rulings on appeal. Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 446-47 (1998) (“Thus, it is generally believed that in order to

potential drawbacks to requiring arbitrators to issue reasoned awards,⁷⁹ parties may feel more satisfied about the process if they know why the arbitrator decided to rule in a particular manner.⁸⁰ Additionally, the requirement for a reasoned award could serve to encourage the arbitrator to fully develop the reasoning behind his or her ultimate decision.⁸¹ Even if the parties do not ultimately challenge the award in court, they should be satisfied knowing the reasons for the award.⁸²

Thus, contracting for increased judicial review has benefits other than the ability to correct errors of law or fact present in an arbitral award. The potential for increased review may ease parties' fears and apprehensions, guard against arbitrator bias, and give the parties the satisfaction of knowing the reasoning behind the award issued.

B. Drawbacks of Contracting for Expanded Review

Yet despite the benefits expanded review offers, certain drawbacks exist for parties and perhaps even the institution of arbitration. First and foremost, Congress never intended for expanded judicial review because arbitration was meant to be an *alternative* to litigation.⁸³ Indeed, the limited review provisions of the FAA have been described as “integral to

preclude judicial usurpation of arbitrators' contractual authority to resolve the merits of the controversies submitted to them, arbitrators should keep commercial awards as brief as possible and reveal little, if any, of the analytical process leading to the result reached.”).

⁷⁹ See *infra* note 93 and accompanying text.

⁸⁰ If there is no written award, the parties “are provided no reliable indicia of whether the arbitrator's decision was founded on a full understanding of the material facts and a proper interpretation and application of the relevant provisions of their contract and the applicable law.” Hayford, *supra* note 78, at 447.

⁸¹ See Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 *BUFF. L. REV.* 49, 137 (1997) (“Beyond facilitating review, mandatory opinions would provide a bonus, fostering clarity of thought.”); Katzler, *supra* note 78, at 191 (noting parties and arbitrators would benefit from written awards especially when complex damages calculations are at issue).

⁸² See Frank E. Massengale & Karen Kaler Whitfield, *Arbitration: Be Careful What You Wish For*, 44 *LA. B.J.* 120, 123 (1996) (“While reasoned arbitral awards may increase exposure to judicial reversal, the absence of reasoning in awards often increases frustration of the losing party and prompts attempts to obtain judicial reversal.”). Even if the award provides nothing more than peace of mind for the parties, this may be more than they receive in a one- or two-line opinion simply dictating the winner of the controversy.

⁸³ The very limited means of judicial review under the FAA evidences Congress's intent to ensure arbitration remained a viable, speedier alternative to litigation. See also *supra* note 21 and accompanying text. Additionally, expanded judicial review has the potential to “obliterate the distinction between arbitration and litigation, thereby destroying the great advantage of arbitration, which is to provide a speedy and efficient process for completing the adjudication of disputes in a single instance.” Moses, *supra* note 68, at 434.

the legislative policy promoting arbitration as a private, flexible, efficient, and self-contained procedure.”⁸⁴ By allowing for increased judicial review, arbitration may serve as a mere “stepping stone” to judicial litigation of the arbitral award, and arbitration no longer serves as a “self-contained” procedure.⁸⁵ Instead, the arbitrators are essentially converted into district courts while the federal district courts are converted into single-judge courts of appeals reviewing all of the awards. Thus, increased judicial review may actually serve to transform arbitration proceedings into nothing more than litigation where initial fact-finding determinations are made in the private sphere thereby reducing the efficiency of the arbitral procedure.

In a similar vein, engaging in a series of post-arbitration procedures in court ameliorates many of the traditional benefits of arbitration: namely the benefits of efficiency, both in terms of time and cost. Obtaining judicial review by a federal district court, and perhaps even an appellate court, exponentially adds to the time and cost associated with the arbitration.⁸⁶ Thus, expanded judicial review has the potential to require the same amount of cost and time as traditional litigation, if multiple appeals are sought.⁸⁷ Perhaps if the parties calculated the potential cost of post-arbitration litigation, those parties may decide that they would rather take their chances in litigation, instead.⁸⁸ However, arbitration may still be appropriate for parties who do not anticipate judicial review but would still prefer the protections expanded review

⁸⁴ Schmitz, *supra* note 1, at 181; *see also* Davis, *supra* note 81, at 135 (noting some commentators believe requiring “written opinions and verbatim records would heap even more inefficiency onto the process”).

⁸⁵ *See* Anthony J. Longo, Comment, *Agreeing to Disagree: A Balanced Solution to Whether Parties May Contract for Expanded Judicial Review Beyond the FAA*, 36 J. MARSHALL L. REV. 1005, 1025 (2003) (noting some circuit courts are concerned “contractual expansion [of judicial review] would turn arbitration into a step-ladder to appellate litigation on the legal merits”).

⁸⁶ Jiang-Schuerger, *supra* note 67, at 246-47 (“The FAA does not contemplate arbitration as a preliminary step to judicial resolution. Instead, one underlying goal of the FAA is 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.”) (internal quotation marks and citations omitted).

⁸⁷ William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Shifting Attorney’s Fees in Litigation Attacking Commercial Arbitration Awards: A Disincentive for Meritless Motions for Correction, Modification or Vacatur*, 35 AM. BUS. L.J. 515, 518 (1998) (“If the parties agreed to submit to binding alternative dispute resolution, then such post-arbitration litigation is offensive to arbitration’s goals of speed, efficiency, and cost-containment.”).

⁸⁸ *See* Ilya Enkishev, Comment, *Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review*, 3 J. AM. ARB. 61, 93 (2004) (commenting that if the parties wish to contract for *de novo* review of their arbitration award, they may be better served by simply litigating their claim in the first instance).

would provide in the unlikely event the arbitrator incorrectly decides the case.

Not only does increased judicial review add to the cost of arbitration because the parties will have to pay for the additional appeals but also the parties will have to incur costs for things such as a transcript of the proceeding, a court reporter, and a written award in order to assure the courts will actually have something to review on appeal.⁸⁹ If the parties are serious about the possibility of expanded judicial review, they must have the foresight to have a court reporter present at the proceedings and then have a transcript made to preserve the record.⁹⁰ On top of these costs, the party may also have to bear the added attorney fees associated with submission of pre- and post-hearing briefs because the submission of the brief may preserve issues for appeal and serve to prove the arbitrator was aware of the existing law.⁹¹ A final additional cost is the cost of requiring the arbitrator to write a written award.⁹² Because the

⁸⁹ Without, at the very least, a reasoned award, the reviewing court will be left with nothing to review under either the statutory standards of review or the federally created nonstatutory grounds for review. *See supra* notes 78-82 and accompanying text. As noted above, *see id.*, the courts will rarely, if ever, disturb an arbitrator's decision simply because it is unsupported by a reasoned award. Furthermore, without the reasoned award, the courts are left with nothing to review, and the award will not be reversed on appeal.

⁹⁰ Schmitz, *supra* note 1, at 183. Schmitz recognizes that the desire for expanded judicial review "sparks a chain reaction that transforms the arbitration process. For example, a court cannot substantively review an arbitration award without a detailed transcript of the hearing. Therefore, the parties must bear the high costs of hiring a court reporter and ordering transcripts." *Id.*; *see also* Kenneth R. Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards*, 32 AM. BUS. L.J. 583, 623 (1995) ("With the benefit of a verbatim transcript the reviewing court can evaluate in meticulous detail whether the facts justify the award. If the parties choose to forego arranging for a court reporter, they have manifested their intent to forego an in depth review of the award.").

⁹¹ Schmitz, *supra* note 1, at 183 ("In addition, because a reviewing court requires a written record of legal and factual arguments presented in arbitration, parties must hire attorneys and pay legal fees for time devoted to researching legal issues, drafting briefs and memoranda, and building a detailed record for appeal.").

Just as parties may be required to submit pre- and post-hearing briefs in order to preserve arguments for appeal, the parties, too, will have to be diligent in making objections during the course of the proceeding. *Id.* ("Parties anticipating appellate-type review also must clutter and prolong arbitration proceedings with objections and offers of proof pursuant to judicial procedural and evidentiary rules in order to preserve the record."). Although the cost of making objections for the record may be negligible, the practice of preserving every possible issue for appeal could significantly lengthen the proceedings. For parties whose attorneys charge by the hour, the additional time could become quite costly.

⁹² *See* Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 552 (2002) (noting effective judicial review would require "the arbitrator and parties [to] have to make sure that an extensive record exists, which could only be accomplished through discovery, and a written and reasoned award granted[, and t]hese requirements

arbitrator is paid for the amount of time he or she actually spends working on a case, the arbitrator will certainly charge the parties for the time taken to fashion the award. Not only does a written award add to the total cost of arbitration but also it adds to the time taken to resolve the dispute.⁹³ These types of costs may not be obvious, but they certainly exist.

Because expanded judicial review has both benefits and drawbacks, hopefully the parties will consider these various policies to determine whether they may prosper from the additional proceedings. Perhaps the parties may determine arbitration with increased judicial review is actually a “middle ground” between litigation in court and traditional arbitration.⁹⁴ Perhaps increased judicial review would be appropriate if the arbitration at issue is particularly complex.⁹⁵ Indeed, the attorneys in many complex cases would plan to submit pre- and post-hearing briefs and engage in extensive discovery in any event, so the possibility of expanded judicial review may not add significant time or expense for the parties involved. In contrast, the parties to a relatively simple case could see their expenses rise exponentially if they were truly serious about preserving their ability to review. Thus, depending on the circumstances of the case, increased review could benefit the parties involved. In other words, the issue may be one of the parties’ freedom to contract, and hopefully the parties will make this decision after being apprised of both the benefits and drawbacks of expanded review.

IV. *VOLT* AND *MASTROBUONO*: SUPREME COURT PRECURSORS AND FREEDOM OF CONTRACT

Because the possibility of increased judicial review may be considered a matter relating to the parties’ freedom to contract, this section will briefly examine the Supreme Court’s decisions in *Volt*⁹⁶ and

would add cost” to the proceeding); Stanley McDermott, III, *Expanded Judicial Review of Arbitration Awards is a Mixed Blessing that Raises Serious Questions*, 5 No. 1 DISP. RESOL. MAG. 18, 21 (1998) (stating expanded review could only be accomplished through a “thorough and often expensive record of the arbitration proceedings, with the added expense of the arbitrators’ time and effort to prepare a written opinion to meet anticipated judicial scrutiny”).

⁹³ See Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 469 (1988) (noting the issuance of written awards increases both the time to resolve the arbitration and the time to resolve the entire controversy if the award is later appealed).

⁹⁴ Maggio & Bales, *supra* note 6, at 192.

⁹⁵ See McDermott, *supra* note 92, at 21 (“Such an opportunity [for expanded judicial review] might be desirable in large or complex arbitrations.”).

⁹⁶ *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

Mastrobuono,⁹⁷ two seminal cases dealing with this issue. Although neither of these cases directly speaks to the issue of judicial review, they do speak to the parties' right to contract and choice-of-law issues.⁹⁸ The circuit courts allowing expanded judicial review rely heavily on these precedents,⁹⁹ so an examination of these two cases will illuminate the discussion on the right to contract for broader judicial review.

In *Volt*, the parties agreed to arbitrate all disputes arising out of their relationship, noting the contract "shall be governed by the law of the place where the Project is located."¹⁰⁰ When a dispute arose, Volt made a demand for arbitration, but the Board of Trustees instead filed an action in California state court.¹⁰¹ The state court denied Volt's motion to compel arbitration, and the California Court of Appeal affirmed on the basis of a California law that allows a court to stay the arbitration in the event "there is a possibility of conflicting rulings on a common issue of law or fact."¹⁰² In affirming the ruling below, the Supreme Court enforced the choice-of-law provision, finding it consistent with the FAA and the strong policy in favor of enforcing private agreements to arbitrate.¹⁰³

The *Volt* Court recognized "Congress' principal purpose [in enacting the FAA was to ensure] that private arbitration agreements are enforced according to their terms."¹⁰⁴ Provided the state law chosen does not mandate a judicial, rather than arbitral, forum for the ultimate resolution of their dispute, the clearly worded choice-of-law provision should be enforced and the underlying state law should not be deemed pre-empted by the FAA.¹⁰⁵ Because the California law at issue only required the parties to arbitrate "under different rules than those set forth in the [FAA]," not enforcing the agreement according to the terms of the

⁹⁷ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

⁹⁸ At first blush, the choice-of-law issue appears to have little, if anything, to do with judicial review. However, choice-of-law becomes an important issue when parties argue the substantive law of the chosen state actually allows for greater review than provided under the FAA. For reasons explained in more detail below, the courts of appeals deciding this issue have universally held a simple choice-of-law provision is not sufficient to expand judicial review. See *infra* notes 146-49, 156-57 and accompanying text.

⁹⁹ See *infra* Section V.A.

¹⁰⁰ 489 U.S. at 470. This construction contract required Volt to perform electrical work on the Stanford University Campus, and, therefore, pursuant to California arbitration law. *Id.*

¹⁰¹ *Id.* at 470-71.

¹⁰² *Id.* at 471 (citing CAL. CIV. PROC. CODE ANN. § 1281.2(c) (West 1982)).

¹⁰³ *Id.* at 478.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 478-79. The *Volt* decision is based both on freedom-of-contract principles as well as pre-emption principles, the latter of which is beyond the scope of this Article.

agreement “would [have been] quite inimical to the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.”¹⁰⁶ Arbitration “is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”¹⁰⁷ Thus, the Court enforced the parties’ choice-of-law provision which did not conflict with the terms or the policies of the FAA.¹⁰⁸ While the holding in *Volt* allowed the parties to litigate their claim pursuant to their arbitration agreement, because the California law was not diametrically opposed to arbitration, the intentions of the parties—as evidenced through their contract—was upheld.

Six years after the Court decided *Volt*, it considered whether an arbitration agreement contained in an agreement for the purchase of securities properly permitted an arbitrator to award punitive damages against defendant Shearson Lehman Hutton (“Shearson”).¹⁰⁹ The arbitration agreement expressly provided it “shall be governed by the laws of the State of New York”; however, New York law only permitted courts, not arbitrators, to award punitive damages.¹¹⁰ Shearson successfully petitioned the New York state courts to vacate the award based on the award of punitive damages,¹¹¹ but the Supreme Court reversed.¹¹²

Although the Court reversed, it recognized: “We have previously held that the FAA’s proarbitration policy does not operate without regard to the wishes of the contracting parties.”¹¹³ Where in *Volt*, the Court determined the choice-of-law provision was a clear statement of the parties’ intent, in *Mastrobuono*, the Court determined the “choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would

¹⁰⁶ *Id.* at 479; see also Koptsiovsky, *supra* note 43, at 617-18 (“Freedom of contract notions formed the entire basis for the holding.”).

Because the choice-of-law provision in the arbitration agreement essentially required the parties to litigate certain issues under California law, “the Court effectively treated the FAA as a default statute for situations when parties have failed to negotiate a clause governing a specific issue, such as choice-of-law.” Koptsiovsky, *supra* note 43, at 617.

¹⁰⁷ *Volt*, 489 U.S. at 479.

¹⁰⁸ See Cole, *supra* note 6, at 1248 n.220 (“The Court cautioned that the enforcement of the parties’ agreement was appropriate because it effectuated the contractual rights and expectations of the parties ‘without doing violence to the policies behind the FAA.’”).

¹⁰⁹ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

¹¹⁰ *Id.* at 53.

¹¹¹ *Id.* at 54-55.

¹¹² *Id.* at 55.

¹¹³ *Id.* at 57 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

determine what law to apply to disputes arising out of the contractual relationship.”¹¹⁴ If read in this manner, the Court indicated the limitation on punitive damages would be preempted by the FAA.¹¹⁵ The Court continued to note that even if the choice-of-law provision was read more broadly, the punitive damages award would still stand because the clause at issue was “not, in itself, an unequivocal exclusion of punitive damages claims.”¹¹⁶ Thus, the reference to New York law was not sufficient to incorporate the prohibition on the inclusion of punitive damages in arbitral awards.

The Court further determined that the parties did not intend to prohibit the possible award of punitive damages because a reading of the arbitration agreement, as a whole, evidences the possibility punitive damages could be awarded.¹¹⁷ “At most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards[,]” and, under *Volt* and other Supreme Court precedent, the “ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration.”¹¹⁸ In considering the parties’ intent, the Court stated:

As a practical matter, it seems unlikely that petitioners were actually aware of New York’s bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners.¹¹⁹

While in *Volt*, the choice-of-law provision evidenced the parties’ intent to follow the California procedural rules regarding arbitration, in *Mastrobuono*, the same type of provision was insufficient to incorporate New York law prohibiting an arbitrator from issuing an award containing punitive damages.¹²⁰ Against this backdrop, the circuit courts have

¹¹⁴ *Id.* at 59.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 60.

¹¹⁷ *Id.* at 61. The arbitration at issue was conducted pursuant to National Association of Securities Dealers (NASD) rules. Those rules specifically state: “The issue of punitive damages may arise with great frequency in arbitrations. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy.” *Id.*

¹¹⁸ *Id.* at 62 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

¹¹⁹ *Id.* at 63.

¹²⁰ Melissa Brockett, Comment, *Party Autonomy and Freedom of Contract in Securities Arbitration: The Dangers of Expanding Judicial Review of Arbitral Awards*, 2 J. AM. ARB. 77, 85 (2003) (noting the holding in *Mastrobuono* is that “the choice of law provision governed only the substantive rights of the parties, not the authority of the arbitrator”).

attempted to determine whether parties can contract for greater judicial review, either through a choice-of-law provision or more explicitly.

V. THE CIRCUIT SPLIT ON EXPANDED REVIEW

Of the eight circuits examining the issue of whether parties can contract around the FAA to expand judicial review, four have held the parties may do so while four decided the opposite. Despite the split, there is no indication whether the Supreme Court will grant certiorari to settle the controversy.¹²¹ The circuits that have decided that parties can contract around the FAA to increase judicial review have largely done so on the basis of freedom of contract, determining the federal law is simply a set of default rules.¹²² Conversely, the circuits holding judicial review cannot be proscribed by the parties have so held on one of two bases. First, some courts have determined private parties do not have the authority to dictate to the Article III courts the standard of review to apply.¹²³ In many ways, this argument is one of judicial sovereignty and independence. Second, at least one circuit has decided the issue on the theory that parties cannot create federal jurisdiction by simply contracting for greater review. This argument rests less on judicial independence and more on statutory construction and the limited jurisdiction of Article III courts.

A. Expanded Review is Simply a Matter of Contract

In 1995, the Fifth Circuit became the first appellate court to decide this issue. In *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,¹²⁴ the court was asked to honor a clause in an arbitration agreement stating that the decision of the arbitrator “shall be final and binding on both parties, except that *errors of law shall be subject to appeal.*”¹²⁵ The Fifth Circuit determined the “contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and the FAA’s pro-arbitration policy does not

¹²¹ In January 2004, the Supreme Court declined to issue a writ of certiorari in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1098 (2004). The most recent circuit court decision on the issue was handed down in October 2005. *Puerto Rico Tel. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005). At this time, it is unclear whether the losing party will seek review by the Supreme Court. *See also* Maggio & Bales, *supra* note 6, at 155 (noting the uncertainty and tension on this issue due to the “silence of the Supreme Court, coupled with the inconsistent lower court decisions”).

¹²² *See infra* Section V.A.

¹²³ *See infra* Section V.B.1.

¹²⁴ 64 F.3d 993 (5th Cir. 1995).

¹²⁵ *Id.* at 996.

operate without regard to the wishes of the contracting parties.”¹²⁶ In holding the parties could displace the review provisions of the FAA, the Fifth Circuit essentially treated the federal statute as nothing greater than a default rule.¹²⁷ Because the district court failed to apply the parties’ standard of review, the Fifth Circuit reversed and analyzed the award to determine if the arbitrator made any “errors of law.”¹²⁸

Not only will the Fifth Circuit enforce a party-created standard of judicial review but also it will scrutinize both the arbitration agreement and the surrounding circumstances to determine whether the parties actually contracted for greater review than available under the FAA. In *Prescott v. Northlake Christian School*,¹²⁹ the employment contract at issue provided for arbitration and contained a general choice-of-law provision, but no specific provisions regarding the exact standard of review to be applied on appeal.¹³⁰ In a handwritten additional paragraph, the parties agreed no “party waives appeal rights, if any, by signing this [arbitration] agreement.”¹³¹ In light of the fact the contract also provided that the reviewing court should examine the record evidence and that one party paid to have a court reporter transcribe the arbitration hearing, the Fifth Circuit determined some evidence existed showing the parties intended to contract for expanded judicial review.¹³² However, because the court found the review provisions ambiguous, it remanded the case for additional fact-finding into the parties’ intent.¹³³

¹²⁶ *Id.* (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)) (internal quotation marks omitted).

¹²⁷ *Id.* at 997 (“Because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA’s default standard of review and allows for de novo review of issues of law embodied in the arbitration award.”). In a footnote, the Court acknowledged it would be forced to apply the FAA had the contract been silent on the issue of expanded judicial review. *Id.* at 997 n.3. The *Gateway* court, however, did not address the issue of whether a choice-of-law provision would be sufficient to show the parties’ intent of expanding judicial review.

¹²⁸ *Id.* The Fifth Circuit directly applied *Gateway Technologies to Harris v. Parker College of Chiropractic*, 286 F.3d 790 (5th Cir. 2002), because the arbitration at issue in *Harris* included the following language: “[t]he Award of the Arbitrator shall be binding on the parties hereto, although each party shall retain his right to appeal any questions of law, and judgment may be entered thereon in any court having jurisdiction.” *Id.* at 793.

¹²⁹ 369 F.3d 491 (5th Cir. 2004).

¹³⁰ *Id.* at 497.

¹³¹ *Id.* The district court interpreted this phrase as meaning the appeal rights the parties already had, rather than determining this paragraph expanded judicial review.

¹³² *Id.* at 497-98.

¹³³ *Id.* at 498. On remand, the district court affirmed its position and held the parties only contracted to retain the appeal rights they already possessed under the applicable law. *Prescott v. Northlake Christian Sch.*, No. 01-475, 2004 WL 2434997, at *5 (E.D. La. Oct. 29, 2004). The Fifth Circuit later held the district court did not clearly err in making this determination. *Prescott v. Northlake Christian Sch.*, 141 F. App’x 263, 268 (5th Cir. 2005).

In an unpublished table decision in 1997, the Fourth Circuit cited *Gateway* and followed the lead of the Fifth Circuit in upholding party-dictated expanded standards of judicial review.¹³⁴ In *Syncor International Corp. v. McLeland*, the arbitration agreement between the parties provided that the “arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error.”¹³⁵ The Fourth Circuit was persuaded by the *Gateway* discussion regarding the freedom of contract, and it held the district court below erred in not reviewing the legal conclusions of the arbitrator under a *de novo* standard of review.¹³⁶ The Fourth Circuit, however, has never cited this case as precedent and has never revisited this issue.

In 2001, the Third Circuit joined the Fifth and the Fourth Circuits,¹³⁷ holding private parties may contract for greater judicial review than allowed under the FAA. In *Roadway Package System, Inc. v. Kayser*,¹³⁸ the parties entered into an arbitration agreement containing a generic choice-of-law provision incorporating the laws of the state of Pennsylvania.¹³⁹ As an initial matter, the Third Circuit held it would now “join with the great weight of authority and hold that parties may opt out of the FAA’s off-the-rack vacatur standards and fashion their own (including by referencing state law standards).”¹⁴⁰ Once the court made this ruling, it turned to decide the “truly difficult question” of whether the parties had actually contracted for expanded judicial review.¹⁴¹

Although *Roadway Package* was decided under federal law and did not turn on a conflicts-of-law analysis, the presence of the choice-of-law provision in the contract was important in trying to determine the parties’

¹³⁴ *Syncor Int’l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ At the time the Third Circuit decided the issue, the Ninth Circuit, too, had determined parties could contractually expand judicial review of arbitration awards. See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997) [hereinafter *LaPine*] (noting the Ninth Circuit “fully agree[d] with the Fifth Circuit”). This decision, however, was overruled when the case was reheard en banc in 2003. *Kyocera Corp. v. Prudential-Bache Trade Serv., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) [hereinafter *Kyocera*] (stating the Ninth Circuit “agree[d] with the Seventh, Eighth, and Tenth Circuits that private parties have no power to determine the rules by which federal courts proceed, especially when Congress has explicitly prescribed those standards”). The Ninth Circuit decisions will be discussed in more detail *infra* in Section V.B.2.

¹³⁸ 257 F.3d 287 (3d Cir. 2001).

¹³⁹ *Id.* at 290.

¹⁴⁰ *Id.* at 293.

¹⁴¹ *Id.*

intent.¹⁴² In analyzing the parties' intent as evidenced by the choice-of-law provision, the Third Circuit relied heavily on *Mastrobuono*. Just as the Supreme Court held in *Mastrobuono*, the Third Circuit decided the mere choice-of-law provision in the arbitration agreement "evidence[d] no clear intent to displace the FAA's default standards for judicial review and to replace them with those borrowed from Pennsylvania law."¹⁴³ In relying on *Mastrobuono*, the court needed to distinguish the situation at hand from the facts in *Volt*. It stated, "We do not view *Volt* as offering guidance as to how generic choice-of-law clauses *should* be interpreted; rather the Court [in *Volt*] merely followed its obligation to defer to the state court constructions of private agreements in cases where no federal rights are at stake."¹⁴⁴ Furthermore, it joined six other circuits in concluding "*Volt* is inapposite when a federal court is constrained by the need to defer to state court constructions."¹⁴⁵

The Third Circuit bolstered its holding "that a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards" with three policy reasons.¹⁴⁶ The first reason is to "minimize the frequency with which parties will be found to have opted out of the FAA's default regime when they did not intend to do so."¹⁴⁷ Second, requiring a showing of clear intent to opt-out of the FAA's standards should simplify the proceedings for both the arbitrators and the courts.¹⁴⁸ Finally, this rule would not add significant transactional costs for those parties who truly do wish to be bound by standards other than those articulated in the FAA.¹⁴⁹ Thus the Third Circuit determined it would

¹⁴² *Id.* at 294 ("The only reason we must decide whether to apply federal or state standards in this case is because the FAA permits parties to 'specify by contract the rules under which . . . arbitration will be conducted.'") (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

¹⁴³ *Id.* at 295.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 296.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 296-97. The court noted that to hold otherwise would impose two burdens: "(1) it would make cases harder to decide for both arbitrators and judges; and (2) the resulting legal uncertainty might deter settlements." *Id.* at 297. Although this opinion stresses the need to clearly indicate an intent to opt-out of the FAA's default rules, the court noted the case might have been decided differently had the "contractual language or *other evidence* suggested that the parties intended to be bound by standards borrowed from state law." *Id.* at 297 n.5 (emphasis added). Thus, extrinsic evidence could be used to show the parties' intent; however, it is unclear whether the Third Circuit would follow the lead of the Fifth Circuit and begin remanding cases for additional fact-finding to determine the exact circumstances surrounding the formation of the agreement.

¹⁴⁹ *Id.* at 297.

allow for contractually-expanded judicial review, provided the parties specifically contracted for such review.

Most recently, the First Circuit in *Puerto Rico Telephone Co. v. U.S. Phone Manufacturing Corp.*¹⁵⁰ determined parties could contract for greater judicial review than is provided in the FAA. As in *Roadway Package, Puerto Rico Telephone Company* involved an arbitration agreement with a generic choice-of-law provision.¹⁵¹ The First Circuit also relied on *Mastrobuono*, citing it for the following proposition: “In other words, a choice-of-law clause, standing alone, generally will not be interpreted to require the application of state law restricting the authority of arbitrators.”¹⁵² With respect to *Volt*, the First Circuit examined the fact that the stay provision in California law was not necessarily inconsistent with the stay provision in the FAA, thus “*Volt* establishes that application of state law rules is appropriate only when there is no conflicting federal policy.”¹⁵³ Overall, the First Circuit determined that “this case is closer to *Mastrobuono* than to *Volt*, because here, the policies of the FAA are implicated.”¹⁵⁴ Thus, relying on this Supreme Court precedent, the First Circuit joined the holding of “every circuit that has considered the question” and held “the mere inclusion of a choice-of-law clause within the arbitration agreement is insufficient to indicate the parties’ intent to contract for the application of state law concerning judicial review of awards.”¹⁵⁵

While perhaps unnecessary under the circumstances, the First Circuit additionally considered the question of whether parties could contract for expanded judicial review. After reviewing the arguments on both sides of the issue, the court determined “parties can by contract displace the FAA standard of review, but that displacement can be achieved only by clear contractual language.”¹⁵⁶ This standard preserves

¹⁵⁰ 427 F.3d 21 (1st Cir. 2005).

¹⁵¹ *Id.* at 26. The contract provided it would be “governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico.” *Id.*

¹⁵² *Id.* at 28 (internal quotation marks omitted).

¹⁵³ *Id.* at 28-29. In order to distinguish between *Volt* and *Mastrobuono*, the Third Circuit must read the limitations on punitive damages as being a special rule “limiting the authority” of the arbitrator and, thus, a provision which would have otherwise been preempted by the FAA. *See id.* at 28. On the other hand, nothing in the FAA speaks to the availability of punitive damages, so the New York law could arguably have been read consistently with the FAA.

¹⁵⁴ *Id.* at 29. Following the reasoning above, once the court characterizes *Mastrobuono* as a case involving a conflict between state and federal public policy, this becomes an easy case. Unlike the punitive damages issue involved in *Mastrobuono*, the issue in *Puerto Rico Telephone* deals with judicial review, an issue explicitly covered by the FAA.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 31.

the parties' right to contract for standards other than those provided in the FAA without overly burdening arbitrators and courts who will have to decide the parties' intent.¹⁵⁷

Thus, the courts allowing greater judicial review rely heavily on the characterization of the FAA as default rules and on the right for parties to dictate in their agreements to arbitrate the procedures under which the arbitration will occur. By not allowing generic choice-of-law clauses to supplant the FAA's review procedures, these courts are ensuring only parties who actually want a greater judicial review would receive it. Additionally, the courts presume sophisticated repeat players are the most likely to negotiate for and take advantage of the opportunity for increased judicial review.¹⁵⁸ These circuits value party autonomy, provided the parties express their intent clearly.

B. Expanded Review Cannot Be Enforced

Two circuits have explicitly held parties cannot contractually create judicial review greater than that provided in the FAA.¹⁵⁹ Two other circuits have expressed doubt as to whether parties could contract for greater judicial review, but they have reserved for another day the right to answer the question definitively.¹⁶⁰ Unlike the decisions allowing contractually expanded judicial review, the courts deciding the opposite have relied on different principles in determining that parties have no right to displace the FAA with their own standards. While the Tenth Circuit decided the case on the grounds of judicial independence and the policies of the FAA, the Ninth Circuit based its ruling on judicial independence and jurisdictional grounds.

The Tenth Circuit, in 2001, was the first federal appellate court to explicitly rule that parties cannot contract for more judicial review than the FAA already provides. In *Bowen v. Amoco Pipeline, Co.*,¹⁶¹ the parties at issue arbitrated an environmental dispute concerning a potential oil leak into a creek on Bowen's property.¹⁶² To conduct the

¹⁵⁷ Unlike the Fifth and Third Circuits, the First Circuit did not address the types of evidence or the amount of evidence needed to sufficiently prove the parties' intent. The opinion, however, by its reference to "clear contractual language" casts doubt on whether any extrinsic evidence could be used to prove the parties intended on utilizing a standard other than the one set forth in the FAA.

¹⁵⁸ See *supra* note 74-77 and accompanying text for a discussion on whether repeat or one-shot players are actually better served through expanded judicial review.

¹⁵⁹ The Ninth and the Tenth Circuits have so held.

¹⁶⁰ The Seventh and Eighth Circuits have not explicitly decided the issue.

¹⁶¹ 254 F.3d 925 (10th Cir. 2001).

¹⁶² *Id.* at 928. Interestingly, the arbitration agreement was contained in a 1918 right-of-way agreement, which was later ratified by a 1943 agreement. *Id.* at 928 n.1.

arbitration, the parties agreed to use the Rules for Non Administered Arbitration of Business Disputes, but included in their agreement a clause purporting to expand judicial review and have the right to appeal “on the grounds that the award is not supported by evidence.”¹⁶³ After the panel awarded damages to Bowen, he moved to have the award confirmed in district court.¹⁶⁴ Amoco opposed confirmation and sought judicial review under the contract.¹⁶⁵ The district court, however, refused to apply the expanded judicial review and upheld the award under the FAA.¹⁶⁶

In discussing the judicial review of arbitration awards, the court stated, “Mindful of the strong federal policy favoring arbitration, 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.”¹⁶⁷ The *Bowen* court acknowledged that the Fifth Circuit and the Ninth Circuit—at the time—had allowed expanded judicial review on the basis of “ensuring that private agreements to arbitrate are enforced according to their terms.”¹⁶⁸ It also noted “the Supreme Court has repeatedly acknowledged that Congress’s intent in enacting the FAA was to ensure judicial enforcement of private arbitration agreements,”¹⁶⁹ and part of that enforcement includes allowing parties “to conduct arbitration under procedural rules different from the FAA.”¹⁷⁰

However, the Tenth Circuit disagreed with the conclusion reached by the Ninth and Fifth Circuits “that the Supreme Court precedent emphasizing the FAA’s primary purpose compels enforcement of contractual modifications of judicial review.”¹⁷¹ Indeed, the court held no Supreme Court precedent should be read to allow parties to “interfere

¹⁶³ *Id.* at 930.

¹⁶⁴ *Id.*; see also 9 U.S.C. § 9 (2000) (regarding procedures for confirmation of arbitral awards).

¹⁶⁵ *Bowen*, 254 F.3d 930.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 932. The court went on to list the four statutory grounds for vacatur and noted that the Tenth Circuit allows review for “manifest disregard of the law,” which is defined as “willful inattentiveness to governing law.” *Id.* (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995)).

¹⁶⁸ *Id.* at 933 (quoting *LaPine*, 130 F.3d 844, 888 (9th Cir. 1997)).

¹⁶⁹ *Id.* (citing *Mastrobuono v. Shearson Lehman Mutton, Inc.*, 514 U.S. 52, 57 (1995)).

¹⁷⁰ *Id.* at 934 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989)).

¹⁷¹ *Id.* The court suggested that parties who wanted additional judicial review of their arbitration awards should simply contract for an appellate arbitration panel to review the award before the award is challenged in a federal district court under the FAA.

with the judicial process.”¹⁷² The court then interpreted *Volt* as treating the FAA as a set of default rules which could be displaced, provided the rule supplanted conforms with the overall policies of the Arbitration Act.¹⁷³ Unlike *Volt*, the Tenth Circuit determined that contracting for expanded judicial review was contrary to the purposes of the FAA, namely the “legislative intent to further the federal policy favoring arbitration by preserving the independence of the arbitration process.”¹⁷⁴ As a practical matter, the Tenth Circuit was concerned it would be required to judicially review arbitration awards under unfamiliar standards, if the parties so desired.¹⁷⁵ Additionally, because “parties may not force reviewing courts to apply unfamiliar rules and procedures,” contracting for a standard of review other than that provided in the FAA would “threaten the independence of arbitration and weaken the distinction between arbitration and adjudication.”¹⁷⁶

The Tenth Circuit, in holding parties may not contract for a broader standard of judicial review, appears to rule in this manner for a variety of reasons. The foremost reason for this outcome is to uphold the policies of the FAA.¹⁷⁷ The court was also concerned about the ability of parties to

¹⁷² *Id.*

¹⁷³ *Id.* at 935.

¹⁷⁴ *Id.* In this regard, the court stated:

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

Id. Some commentators debate whether *Volt* actually supports the view taken by the Tenth Circuit. See Moses, *supra* note 68, at 436 (noting the policies of the FAA “appear to support expanded judicial review as the parties’ choice, and would seem to be undermined by a refusal to enforce the parties’ agreement. Thus, there does not appear to be support in *Volt* for the Tenth Circuit’s position”).

¹⁷⁵ *Bowen*, 254 F.3d at 935-36. Practically speaking, the court stated “expanded judicial review would require arbitrators to issue written opinions with conclusions of law and findings of fact, further sacrificing the simplicity, expediency, and cost-effectiveness of arbitration.” *Id.* at 936 n.7. See *supra* notes 92-93 and accompanying text for a discussion on the drawbacks of requiring written opinions in arbitration. Additionally, rather “than providing a single instance of dispute resolution with limited review, arbitration would become yet another step on the ladder of litigation.” *Bowen*, 254 F.3d at 936 n.7. See *supra* notes 83-84 and accompanying text for a discussion of arbitration incorporating aspects of litigation.

¹⁷⁶ *Bowen*, 254 F.3d at 936.

¹⁷⁷ See Enkishev, *supra* note 88, at 84 (“According to the Tenth Circuit, an arbitration agreement calling for an expanded judicial review of arbitration would threaten and undermine the policies of the FAA.”). Thus, the policies of efficiency, speed, and cost-savings would all be jeopardized if the parties could contract around the provisions ensuring finality of arbitration awards.

utilize unfamiliar standards of review.¹⁷⁸ Although never directly stated in the opinion, the court appears concerned about private parties interfering with the sovereignty of the courts and telling them how to do their job. In other words, party empowerment does not extend so far as to infringe on the realm of the courts.¹⁷⁹

Originally, the Ninth Circuit held parties could contract for expanded judicial review.¹⁸⁰ However, the court revisited this issue en banc and reversed its prior ruling.¹⁸¹ In so doing, the court relied on many of the same grounds as the Tenth Circuit did in *Bowen*. For example, the *Kyocera* court recognized expanded judicial review would “well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming

¹⁷⁸ While all of the cases to date have involved “familiar” standards of review, it is unclear what any of the courts would do if faced with a strange or unusual standard of review.

¹⁷⁹ See *Moses*, *supra* note 68, at 435 (“With regard to party empowerment, the court rejected any right by parties to dictate to courts the scope of review, noting that parties may not force reviewing courts to apply unfamiliar rules and procedures.”). In a similar vein, allowing for expanded judicial review breaks down the distinction between arbitration and litigation. See *Schmitz*, *supra* note 1, at 184 (noting the independence of the courts “depends on limited judicial review of awards because limited review protects an arbitrator’s role as the final judge of both law and fact.”).

No judge has made the judicial-sovereignty argument so explicitly as Judge Mayer in his dissent in *LaPine*. He stated, “Whether to arbitrate, what to arbitrate, how to arbitrate, and when to arbitrate are matters that parties may specify contractually. However, *Kyocera* cites no authority explicitly empowering litigants to dictate how an Article III court must review an arbitration decision. Absent this, they may not.” *LaPine*, 130 F.3d 884, 891 (9th Cir. 1997) (Mayer, J., dissenting).

¹⁸⁰ The original panel in *LaPine* supported its view by determining “the primary purpose of the FAA is to ensure the enforcement of private agreements to arbitrate, in accordance with the agreements’ terms.” *LaPine*, 130 F.3d at 888. Thus, the court focused on the language in *Volt* concerning party autonomy and the freedom to contract. The court noted that to do otherwise would be to act in a manner hostile to arbitration. *Id.* at 889.

Judge Kozinski, writing separately, provided the second vote in this two-to-one decision. Although he was concerned about the lack of precedent stating “private parties may tell the federal courts how to conduct their business,” he was sufficiently convinced the FAA requires parties to enforce arbitration agreements according to their terms to hold in favor of allowing for expanded judicial review. *Id.* at 891 (Kozinski, J., concurring). However, his concurrence was based, in part, on the fact that the parties contracted for a standard of review already familiar to the courts. *Id.* He noted, “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.” *Id.*

¹⁸¹ *Kyocera*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (“We therefore overrule *LaPine I*, affirm the district court’s 1995 conclusion, and hold that a federal court may only review an arbitral decision on the grounds set forth in the Federal Arbitration Act. Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is, accordingly, legally unenforceable.”).

process.”¹⁸² It also expressed concern about allowing “private parties [to] dictate how federal courts shall conduct their proceedings.”¹⁸³

The Ninth Circuit then proceeded to distinguish *Kyocera* from *Volt*. It determined *Volt* stands for the proposition that “parties have complete freedom” to contract which disputes would be arbitrated, under which rules they would be arbitrated, and which procedures would best suit the parties and their particular dispute.¹⁸⁴ “Once a case reaches the federal courts, however, the private arbitration process is complete, and because Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and no others.”¹⁸⁵ Additionally, it did not believe Congress, in enacting the FAA, was giving private parties the “power to dictate *how* the federal courts conduct the business of resolving disputes.”¹⁸⁶ As with the *Bowen* decision, the Ninth Circuit’s decision in *Kyocera* echoes the concerns of judicial sovereignty and independence.

The *Kyocera* decision also quoted favorably the Seventh Circuit’s dicta indicating an expansion of judicial review would confer upon the federal courts jurisdiction they did not previously possess. In *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*,¹⁸⁷ the court stated that parties “cannot contract for *judicial* review of that [arbitration] award; federal jurisdiction cannot be created by contract.”¹⁸⁸ The court determined FAA Sections 10 and 11 are jurisdictional in nature, and any expansion of judicial review would necessarily create federal jurisdiction where none existed prior. The Seventh Circuit then recommended parties contract for an appellate arbitral panel rather than expanded judicial review.¹⁸⁹ The *Kyocera* opinion also noted the Eighth Circuit, in favorably reciting Judge Mayer’s dissent in *LaPine*, would likely hold

¹⁸² *Id.* at 998.

¹⁸³ *Id.* at 999.

¹⁸⁴ *Id.* at 1000.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* In her article, Moses claims parties who contract for expanded judicial review are not “trying to dictate to the courts the standard of review,” but “simply asking the courts to consider, as provided in the parties’ arbitration agreement, whether an arbitrator erred as to the law, or as to the law and the facts.” Moses, *supra* note 68, at 442. Indeed, she argues the courts are conflating the issues of *standards* of review and *grounds* for review. *Id.* The FAA does not specifically state how the courts should review an arbitral award, and FAA Sections 10 and 11 merely give reasons for either vacatur or modification, rather than setting forth the standard under which the courts review for these grounds.

¹⁸⁷ 935 F.2d 1501 (7th Cir. 1991).

¹⁸⁸ *Id.* at 1505.

¹⁸⁹ *Id.* This idea of contracting for an arbitral appellate panel has been voiced by many other courts as well. *See, e.g.*, *SI V, L.L.C. v. FMC Corp.*, 223 F. Supp. 2d 1059, 1063 n.4 (N.D. Cal. 2002); *Mariner Fin. Group, Inc. v. Bossley*, 79 S.W.3d 30, 46 (Tex. 2002).

judicial review cannot be expanded by contract if the court has the opportunity to directly decide the issue.¹⁹⁰

Thus, the Ninth Circuit approach draws heavily on the idea that parties cannot tell the courts how to conduct their review. Indeed, the language in *Kyocera* on the theory of judicial independence is often more strongly worded than in *Bowen*. Unlike *Bowen*, the Ninth Circuit approach is less based on the policies underlying the FAA than on judicial sovereignty. Additionally, the *Kyocera* court, by quoting at length from *Chicago Typographical*, appears to endorse the theory that expanded judicial review actually increases the amount of jurisdiction bestowed upon the federal courts by the FAA.

C. Which is Correct?

Although commentators have written extensively on both sides of this issue, the approach taken by the Ninth and Tenth Circuits appears to be more sound than the approach followed in the First, Third, Fourth, and Fifth Circuits. The plain language of the FAA sheds little, if any, light on the issue.¹⁹¹ The statute does not indicate whether it is meant as a default or mandatory set of rules.¹⁹² Even if some of the rules—such as those regarding procedures in arbitration—could be classified as default rules, it is unclear whether the provisions regarding judicial involvement—such as the enforcement and judicial review provisions—could ever be waived.¹⁹³ The legislative history and policies underlying

¹⁹⁰ *Kyocera*, 341 F.3d at 999 (citing *UHC Mgmt. Co. v Computer Scis. Corp.*, 148 F.3d 992 (8th Cir. 1998)). In *UCH Management*, the Eighth Circuit recognized it was not clear “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.” 148 F.3d at 997. After discussing the circuit split on the issue, the court noted, “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,” and quoted extensively from Judge Mayer’s dissent in *LaPine. Id.* In 2003, the Eighth Circuit praised the “persuasive reasoning” of *Bowen* and reiterated its skepticism of the approach taken by the Fifth and Third Circuits. *Schooch v. InfoUSA, Inc.*, 341 F.3d 785, 789 n.3 (8th Cir. 2003). However, because the court, again, was not squarely presented with the issue of the enforceability of contractually expanded judicial review, it reserved for another day the ultimate disposition of the issue. *UCH Mgmt.*, 148 F.3d at 998.

¹⁹¹ See Goldman, *supra* note 5, at 182 (describing the statutory language as “indeterminate” on this issue).

¹⁹² In concluding the FAA is a set of default rules to be contracted around, Maggio and Bales take cues from the legislative history of the FAA providing that contracts to arbitrate should be enforced as any other contracts and be enforced according to the terms set forth by the parties. Maggio & Bales, *supra* note 6, at 181.

¹⁹³ While it is unclear why anyone would do so, parties to an arbitration agreement probably cannot contract around the enforcement provisions of the FAA. See 9 U.S.C. §§ 3, 4. To do so would be to prohibit the courts from enforcing the arbitration agreements, something clearly contrary to the purposes of the FAA.

the FAA appear to cut in favor of both approaches. On the one hand, Congress sought to enforce agreements to arbitrate according to the terms chosen by the parties.¹⁹⁴ On the other hand, Congress also intended arbitration to be a cost-efficient, self-contained procedure resulting in final and binding awards.¹⁹⁵ Thus, depending on which view of congressional intent a court finds persuasive, it can determine the policies of the FAA support either side. Thus, the true question is one of party autonomy versus judicial independence.

Despite language in *Volt*, judicial independence should prevail. Nothing in either the FAA or in Supreme Court precedent has ever suggested parties, in crafting their arbitration agreements, can dictate to the courts how they do their jobs.¹⁹⁶ *Volt*, too, is distinguishable because the parties in *Volt* were not attempting to tell the court what to do. The parties in *Volt* were merely contracting for arbitral procedures, including one that allowed the court to order a stay in the arbitration pending judicial resolution of collateral litigation.¹⁹⁷ The effect of *Volt* was to allow the parties to choose between two sets of arbitration procedures, both of which involved ways in which the judiciary could become involved in the arbitration. The procedures chosen in *Volt* did not change the manner in which the court interacted with the parties.¹⁹⁸ In contrast, contractually expanded judicial review changes the nature of the interaction between the court and the parties, and no Supreme Court precedent has even suggested such a change in the relationship between the courts and the parties is permissible.

Additionally, parties should not be able to tell the judiciary how it should proceed in reviewing their arbitration award. Although parties thus far have chosen to expand judicial review using review procedures familiar to the courts, the day will soon come when the parties ask the court to review their award under an unfamiliar standard.¹⁹⁹ Indeed,

¹⁹⁴ See *supra* notes 40-42 and accompanying text.

¹⁹⁵ See *supra* notes 21-25 and accompanying text.

¹⁹⁶ This is the primary argument of Judge Mayer in the dissent in *LaPine*. See *supra* notes 179 and accompanying text.

¹⁹⁷ *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

¹⁹⁸ See Sullivan, *supra* note 92, at 555 (“In addition, the FAA was meant to guarantee the enforcement of arbitration agreements just like other contracts, but it would be incredulous to think that Congress intended that arbitration agreements could direct a court how to conduct itself.”). Sullivan also notes the purpose of the FAA is to allow the parties to contract the process governing their arbitration, not “the substantive issue of whether vacatur is appropriate.” *Id.* at 556.

¹⁹⁹ For example, the parties could ask the court to review the award to determine if it is “reasonable,” “rational,” “sound,” or even “good.” It is unclear how the courts would review an arbitration award under any of these standards.

Judge Kozinski's worst fears may one day be realized when a reviewing party asks the court to review their award by examining "the entrails of a dead fowl."²⁰⁰ Simply because parties have been sensible in requesting expanded review does not mean the Article III—or even the state courts—have to abide by the parties' wishes. In no other area of law can the parties dictate to the courts how the courts should proceed to do their jobs, so it follows that private citizens cannot tell the judiciary how to review their contracts.

While the Seventh Circuit's assessment of contractually-expanded judicial review as involving an impermissible expansion of Article III jurisdiction is an attractive theory, it is legally flawed. The FAA does not create federal jurisdiction. It has been described as "an anomaly in the field of federal jurisdiction because it does not create any independent federal question jurisdiction under 28 U.S.C. § 1331 or otherwise."²⁰¹ Because the FAA does not create jurisdiction, it is unclear how parties could expand the court's jurisdiction through their agreements to arbitrate. Despite the flawed reasoning underpinning the jurisdictional argument, the reasons and policies concerning judicial independence are sound. The courts benefit by maintaining their authority and employing familiar procedures. The parties benefit—albeit unwillingly—from the virtues of finality and effectiveness. And the institution of arbitration benefits by being a separate procedure distinct from litigation—an *alternative* form of dispute resolution.²⁰²

VI. CAN MORE CAREFUL DRAFTING CREATE EXPANDED REVIEW?

Determining that parties do not have a right to expand judicial review, however, may be unsatisfying for parties who truly wish to have a more searching review of their arbitral award than is currently allowed

²⁰⁰ *LaPine*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring); *see also supra* note 180 and accompanying text.

²⁰¹ *Cole*, *supra* note 6, at 1245 n.205 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)); *see also Goldman*, *supra* note 5, at 188 ("Quite simply, there is no independent constitutional argument against expanding judicial review."); *Maggio & Bales*, *supra* note 6, at 161 ("The FAA does not create independent federal jurisdiction, however, and a federal court may act only when jurisdiction has been established under Title 28.")

²⁰² In concluding that the Supreme Court should resolve the question of expanded judicial review by taking a "middle ground" approach, Longo acknowledges adopting the position of the Fifth Circuit could lead to "a very real practical concern, namely the survival of binding arbitration as a meaningful alternative method of dispute resolution." Longo, *supra* note 85, at 1028. He continues by noting the wholesale adoption of the position of the Tenth Circuit would be "inherently more dangerous" because it rejects the parties' right to contract according to their own choosing. *Id.* at 1029.

under the FAA.²⁰³ As noted by many courts and some commentators, the parties could simply contract to have an arbitral appellate panel review the award under any standard the parties see fit.²⁰⁴ This process, however, may be deemed too cumbersome or expensive for the parties and an unattractive option.²⁰⁵ How, then, can parties contract for expanded review? Perhaps they can do so by being more specific in their arbitration agreements and giving the arbitrator limited powers. Presumably, if the arbitrators are given strict confines within which to work, the courts will be forced to examine the arbitration award in the context of these restrictions.

Thus, parties may be able to achieve the same result as if they had expanded judicial review, except that by focusing on the rights and responsibilities of the *arbitrator*, they will not be impeding on the independence of the courts. Under this theory, expanded judicial review would be available in any circuit under the standards already proscribed by the FAA and the judicially-created grounds for review.

A. The FAA Section 10(a)(4) Theory

As noted above,²⁰⁶ the FAA allows the courts to review arbitration decisions in order to determine if the arbitrators “exceeded their powers.” Most often, arbitrators are determined to have exceeded their powers if they resolve an issue or they have decided an issue not submitted to them;²⁰⁷ but the statute is not written to so limit its scope.

²⁰³ See *supra* Section III.A.

²⁰⁴ See, e.g., *Dexter Axle Co. v. Int’l Assoc. of Machinists & Aerospace Workers*, Dist. 90, Lodge 1315, 418 F.3d 762, 771 (7th Cir. 2005); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 934 (10th Cir. 2001); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998); *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir. 1991); *Bargenquast v. Nakano Foods, Inc.*, 243 F. Supp. 2d 772, 776 (N.D. Ill. 2002); *Ball-Foster Glass Container Co. v. Am. Flint Glassworkers Union, AFL-CIO*, 354 F. Supp. 2d 839, 845 (N.D. Ind. 2002); *William H. Knull, III & Noah D. Rubins, Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option*, 11 AM. REV. INT’L ARB. 531, 550-51 (2000); *Sullivan, supra* note 92, at 560.

²⁰⁵ Adding a level of appellate arbitral review will add another level of expense to the proceedings. The parties may not wish to undertake this additional expense, especially if they are already planning on seeking judicial review of any award and appealing any adverse judgment made by the district court. Furthermore, the process can become exceedingly cumbersome if the parties have the ability to choose the arbitrator. Many parties spend considerable time and effort choosing the person to sit as the original arbitrator, and with an arbitral appellate system, they would have to choose another one or possibly three arbitrators to conduct the appellate procedures. The appellate procedure would, of course, also take additional time, and the parties may rather spend that time in court rather than in another arbitral procedure.

²⁰⁶ See *supra* Section II.A.

²⁰⁷ See, e.g., *Metromedia Energy, Inc. v. Ensearch Energy Servs., Inc.*, 409 F.3d 574, 578 (3d Cir. 2005).

Perhaps if the arbitrators are given very specific powers, the court will have to engage in a more searching review to determine if those powers were, indeed, exceeded. Take, for example, a labor arbitration over the issues of back-pay and other employment-related benefits. Assume, too, the agreement to arbitrate specifies a certain formula to determine the available damages or specifies the base pay under which back-pay and other income-determinate benefits are determined. If the arbitrator, who is now constrained in determining the available damages, decides to award more or less than is allowed under the contract, the losing party should have a meritorious claim that the arbitrator exceeded his or her powers in awarding damages by a scale other than that agreed upon by the parties.²⁰⁸ By specifying acceptable remedies or remedies calculations, the courts are given concrete bases under which to review the resulting award.²⁰⁹ In determining if the arbitrator has exceeded his or her powers in making a remedies calculation, the court will essentially perform a *de novo* review of the calculation, even though no party or court would characterize the review as being done *de novo*.

In some situations, parties may wish for an arbitrator to solely make a determination of rights or otherwise rule on an issue without making a damages determination. In *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*,²¹⁰ the arbitration agreement specified that the parties would not be liable to each other for damages under various legal theories; the arbitrator awarded damages under a legal theory not specified.²¹¹ The Tenth Circuit determined that the arbitration panel did not exceed its powers under the contract because the panel was “fully briefed on the issue and it concluded that the provision did not preclude

²⁰⁸ Courts have held in the absence of such restrictive remedy provisions, the determinations of the arbitrator will likely be upheld as made within the arbitrator’s discretion. *Airline Pilots Ass’n v. Pan Am. Airways Corp.*, 405 F.3d 25, 31 (1st Cir. 2005) (quoting *Kraft Foods, Inc. v. Office & Prof’l Employees Int’l Union*, 203 F.3d 98, 102 (1st Cir. 2000) (“Where, as here, the agreement neither requires nor bars particular remedies, the arbitrator’s discretion is at its zenith.”)). It is unclear how the First Circuit would have ruled had the contract at issue stated the pay rate at which the employee could receive an award of back-pay.

²⁰⁹ By placing strictures on remedies, the arbitration may be characterized as either a “high low” arbitration or an arbitration involving an acceptable range of damages. However, parties in a variety of disputes may be benefited in characterizing their agreements as such. While most employment agreements to arbitrate are generally not considered agreements to conduct their arbitration under a “high low” system or a system involving a range of remedies, by making issues such as pay rate a concrete number, the parties will be better served in obtaining vacatur in the event the arbitrator does not heed the contractual mandates.

²¹⁰ 430 F.3d 1269 (10th Cir. 2005).

²¹¹ *Id.* at 1277.

the award of damages.”²¹² The *Dominion Video* case, then, could be read as involving bad drafting. If the parties truly intended on not being liable to each other for damages, they could have drafted a clause precluding an award of any damages to either party.²¹³ In other situations, parties could wish for an arbitrator to make a determination of rights and duties owed to each other; if so, inserting a clause precluding a damages award would be beneficial, and review for compliance would be relatively simple. Furthermore, if the parties wished to arbitrate an issue involving non-monetary damages, the parties could specify the types of remedies available and specifically exclude a monetary award from the realm of a damages calculation. If the arbitrator did not follow the constraints on the award, the parties could likely make a successful challenge to the award under Section 10(a)(4).

B. Potential Pitfalls

1. Using Section 10(a)(4) as an “End Around”

Remedies’ specifications are the most concrete and most obvious way to limit an arbitrator’s power and have the limitations scrutinized on judicial review. Courts reviewing a clear limitation on remedies should have little difficulty in determining an arbitrator exceeded his or her powers by not fashioning an award within the acceptable scope. Whether other powers, such as the power to dictate an applicable law or burden of proof, will be scrutinized with such detail is a more difficult question.

In *Kyocera*, the arbitration agreement specified the arbitrator must “decide the matters submitted based upon the evidence presented, the terms of this Agreement . . . and the laws of the State of California.”²¹⁴ After the court determined the parties could not contractually expand judicial review, it claimed the arbitrator exceeded his powers by rendering a “decision premised on unsubstantiated facts or legal conclusions that constitute errors of California law.”²¹⁵ The Ninth Circuit determined the requested review under Section 10(a)(4) was “in reality simply a recasting” of the previous arguments concerning contractually expanded judicial review.²¹⁶ In so holding, the court stated:

²¹² *Id.*

²¹³ On the other hand, the agreement could have reflected the intentions of the parties at the time, and only later did one party realize it did not benefit from the contract as written.

²¹⁴ 341 F.3d 987, 1002 (9th Cir. 2003).

²¹⁵ *Id.*

²¹⁶ *Id.*; see also Goldman, *supra* note 5, at 181-82 (“The language of [FAA § 10(a)(4)] should not be so inflexible that the legality of clauses with identical meaning and intent depends upon how cleverly they are drafted.”).

The risk that arbitrators may construe the governing law imperfectly in the course of delivering a decision that attempts in good faith to interpret the relevant law, or may make errors with respect to the evidence on which they base their rulings, is a risk that every party to arbitration assumes, and such legal and factual errors lie far outside the category of conduct embraced by § 10(a)(4).²¹⁷

Thus, general statements requiring the arbitrator to apply the correct law in the correct manner are insufficiently specific to confer upon the arbitrator powers that could be exceeded.²¹⁸ Indeed, this result seems correct in light of the fact that courts are already reviewing legal error for “manifest disregard” and other common-law standards.²¹⁹ To allow review under Section 10(a)(4) for simple compliance with the law would be contrary to the “manifest disregard” standard and, thus, the policies and purposes underlying the FAA.

Although parties probably cannot rely on a clause requiring an arbitrator to “follow the law” or even to “follow the law of X State,” a closer question exists as to whether a detailed statement of the law to apply could be later reviewed under Section 10(a)(4). Under *Kyocera*, the purpose of review under Section 10(a)(4) is to determine if the arbitrator performed the intended duties under the contract.²²⁰ Assume parties decided to arbitrate an environmental dispute, as in the *Bowen* case. If the parties specified a statute or a series of statutes to govern their dispute, a court may review the arbitrator’s decision to apply a law other than the one specified. The decision as to whether more searching review will be applied may turn on how clearly the parties intend the arbitrator to follow the law referenced.

These same concerns could be expressed over an infinite number of ways in which the parties could dictate the terms of the arbitration. For example, the arbitration contract could specify rules of evidence, burdens of proof, rules of discovery, or any number of other constraints on the arbitrator. Whether a court will review the arbitrator’s compliance with these types of rules may depend on how clearly these duties are specified in the contract and whether the court can determine the parties actually intended for the arbitrator to be bound within these strictures.

²¹⁷ *Kyocera*, 341 F.3d at 1003.

²¹⁸ *Id.* The Ninth Circuit also explained that review under Section 10(a)(4) was intended to apply “only when arbitrators purport to exercise powers that the parties did not intend them to possess or otherwise display a manifest disregard for the law.” *Id.* at 1002-03.

²¹⁹ See *supra* Section II.C for a more thorough discussion of the “manifest disregard” standard and other judicially created standards of review.

²²⁰ See *supra* note 212 and accompanying text.

However, the more explicit the provisions in an agreement, the more likely a court would review the arbitrator's compliance with the terms under Section 10(a)(4).²²¹

2. Party Foresight

As a practical matter, parties to an arbitration may not know exactly how they would like the arbitration to proceed. The parties may not even know what law they would like to apply or how to craft a meaningful cap on available damages. If the parties cannot negotiate their contract with the amount of specificity required to show intent, they may not be able to take advantage of review under Section 10(a)(4). While some parties are certainly drawn to arbitration because of the flexibility it embodies and the discretion it gives the arbitrator, this system's virtue does not serve a party's intention of increasing judicial review through the use of Section 10(a)(4). What is clear is that arbitrators who are given discretion are almost always found on review to have acted within that discretion.²²² Thus, what the parties gain in flexibility they lose in the ability to have their award reviewed, and vice versa.

As with any contract, the parties must draft it carefully to keep from creating legal "holes" or other room for discretion. For example, in *Dominion Video*, the parties agreed no damages would be awarded to either party for claims involving third-party liability.²²³ When the parties later arbitrated their breach-of-contract claim, the arbitrator awarded damages, and this holding was upheld on appeal because the arbitration agreement appeared silent on the issue of a damages award in a breach-of-contract claim.²²⁴ Perhaps the parties intended to allow damages in this situation; perhaps they did not. In either event, this case serves as a teaching tool for parties to be explicit and thorough in their drafting as to not create discretion by remaining silent on an issue that later becomes critical.²²⁵

²²¹ See *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005). The court noted an arbitrator is bound by the contract as written and is not permitted to "dispense his own brand of industrial justice." *Id.* (citation omitted). Additionally, the scope of the arbitrator's authority "generally depends on the intention of the parties, and is determined by the agreement or submission." *Id.* (citation omitted).

²²² See *supra* Section II.C. Indeed, some arbitrators need only keep from acting in a manner that is "completely irrational." See also *187 Concourse*, 399 F.3d at 526 (noting an arbitrator need only offer a "barely colorable justification for the outcome reached" to be upheld on appeal).

²²³ 430 F.3d 1269, 1277 (10th Cir. 2005).

²²⁴ *Id.*

²²⁵ As a final note, the theory that parties can "create" judicial review by explicitly specifying the arbitrator's duties quite obviously cannot be used to limit judicial review. Whether limitations on judicial review are desirable or enforceable is beyond the scope of

VII. CONCLUSION

By carefully drafting arbitration agreements to specifically define the powers of the arbitrator, the parties may actually be contracting for expanded judicial review. For large corporate parties who contract with entities in many different states, this method of directing the arbitrator to perform specific duties may serve to expand judicial review even in the circuits that currently do not allow contractually-expanded review dictated towards the courts. To be safe, arbitration agreements should also include a general statement expanding review, but if found unenforceable, the parties could then rely upon § 10(a)(4) and the detailed nature of their contract to ensure they receive review of the very duties the arbitrator was required to follow. Although this theory may not be adopted by every circuit, placing all burdens on the arbitrator preserves judicial independence and may make review of the arbitrator's actions more palatable to the courts.

this Article. However, expanding judicial review under Section 10(a)(4) does not appear to have a counterpart that could be used to limit judicial review. Under this Article's theory, by giving the arbitrator specific instructions as to how to proceed during the hearing, the parties can refrain from imposing on the independence of the judiciary and dictating how the courts should proceed in reviewing an award. Any limitation on judicial review would necessarily involve telling the *courts* not to do something. As such, the theory presented in this Article could not also be used to limit judicial review.