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No Do-Overs for Parties Who Agree to Limit Review of an Arbitrator's Decision

MACTEC, Inc. v. Gorelick[1]

I. INTRODUCTION

Arbitration is a process used to settle controversies.[2] More specifically, arbitration is a private dispute resolution process based on a contractual relationship in which the parties agree to use a neutral decision maker to resolve issues arising under the contract. An arbitrator renders a decision based on the evidence presented by the parties in a manner similar to a judicial process; however, arbitration is much less formal.[3] The benefits of utilizing arbitration are that it saves money and often produces a result more quickly than judicial adjudication.[4] Many statutes and extensive case law purport to govern the arbitration process, but the Federal Arbitration Act (FAA) sets out the default rules that govern all arbitrations.[5]

Under the FAA, review of arbitration awards is limited to specific circumstances.[6] However, in many instances, these default rules can be modified by contractual provisions including increasing or decreasing the level of review of arbitration awards.[7] Although a broader scope of review is contrary to the main purposes of arbitration, courts have held that a contractual provision expanding judicial review is permissible.[8] Furthermore, in some limited circumstances, courts have held that a contractual limitation on judicial review is permitted by the FAA where the restriction is clearly manifested in the contract and the process will not become unfair as a result of the limitation.[9]

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1. 427 F.3d 821 (10th Cir. 2005).
2. Allen Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 469 (2005).
3. *See* David L. Erickson & Peter Geoffrey Bowen, *Two Alternatives to Litigation: An Introduction to Arbitration and Mediation*, 60-Jan. DISP. RESOL. J. 42, 43-44 (2006).
4. See *id.* at 48; Jennifer Trieshmann, Note, *Horizontal Uniformity and Vertical Chaos: State Choice of Law Clauses and Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 161.
5. *See* 9 U.S.C. §§ 1-307 (2006).
6. *See id.* § 16.
7. *See* Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 Pepp. Disp. Resol. L.J. 419 (2003); Seth Mosebey, *The Fifth Circuit Reaffirms Ability of Parties to Expand the Scope of Judicial Review in Arbitration Agreements in Prescott v. Northlake Christian School*, 3 J. Am. Arb. 275, 281-82 (2004); Allen Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 231-32 (1997).
8. *See* Prescott v. Northlake Christian School, 369 F.3d 491, 498 (5th Cir. 2004).
9. *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931 (10th Cir. 2001) (noting in dicta that "parties to an arbitration agreement may eliminate judicial review by contract"); Aerojet-Gen. Corp. v. Am. Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir.1973) (same).

II. FACTS & HOLDING

Plaintiff-Appellant MACTEC, Inc. (MACTEC) and Defendant-Appellee Steven Gorelick (Gorelick) entered into a written agreement renegotiating the royalty payments made from MACTEC to Gorelick for MACTEC's use of a groundwater decontamination method developed by Gorelick.[10] Gorelick and Haim Gvritzman (Gvritzman), both professors at Stanford University, "developed a new method for removing volatile organic contaminants from groundwater (the NoVOCs technology)."[11] Gorelick and Gvritzman then assigned all of their interest in the NoVOCs technology to Stanford University and, in return, Stanford agreed to assign a one-sixth share of the royalties to both Gorelick and Gvritzman.[12] Stanford applied for and received a patent for the NoVOCs technology.[13]

Subsequently, in 1992, Gorelick formed a company, NoVOCs, Inc., which utilized this new technology.[14] Stanford granted Gorelick an exclusive license for the use of the NoVOCs technology and, in return, Gorelick agreed to pay annual royalties to Stanford.[15] Two years later, in 1994, Gorelick sold all of his interest in NoVOCs, Inc., along with the exclusive license, from Stanford to EG & G in a stock purchase agreement (the Agreement).[16] Under the Agreement, EG & G paid Gorelick $3.3 million up-front and further agreed to make installment payments to Gorelick based on revenue derived from licenses or sub-licenses of the NoVOCs technology as well as payments of "$3000 for each well EG & G drilled using the NoVOCs technology."[17]

Under the Agreement, the parties would go to arbitration under California law for all disputes concerning the agreement.[18] Further, the Agreement provided that any judgment upon the award rendered by the arbitrator would be final and non-appealable and excluded claims of patent infringement or invalidity from the scope of arbitrable issues:

> Two aspects of the stock purchase agreement are particularly relevant to this appeal: First, the agreement specifically excluded from the scope of arbitrable issues any disputes relating to patent invalidity or infringement. Second, the agreement provided that any judgment upon the award rendered by the arbitrator would be final and nonappealable.[19]

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10. MACTEC, Inc. v. Gorelick, 427 F.3d 821, 823-25 (10th Cir. 2005). This new technology was novel because it allowed decontamination of water in situ, while still in the ground, using gas stripping and vapor stripping processes. *Id.* at 824.
11. *Id.* at 824.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* Gorelick was the sole owner of NoVOCs and he held all interest in the exclusive license from Stanford allowing Gorelick to utilize the patented technology. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* The non-appealability clause states that "[j]udgment upon the award rendered by the arbitrator shall be final and nonappealable and may be entered in any court having jurisdiction thereof." *Id.* at 827.

The clause, therefore, stipulated that the arbitrator's ruling could not be challenged by either party once a court with jurisdiction entered a judgment based on the arbitrator's ruling. As a result of the Agreement, EG & G held the exclusive license from Stanford to use the patented NoVOCs technology and assumed the duty to make royalty payments to Stanford as required by the Agreement between Stanford and Gorelick.[20]

In 1997, MACTEC purchased assets from EG & G.[21] The asset purchase included all of EG & G's interest and stock in NoVOCs, Inc., including the exclusive license from Stanford for use of their patented NoVOCs technology.[22] Further, MACTEC assumed "all of EG & G's payment obligations to Stanford and Gorelick."[23]

In 1998, through one if its LLC subsidiaries, MACTEC began using another technology—UBV, or IEG, technology—which supplanted the NoVOCs technology, to treat groundwater.[24] As a result, MACTEC had difficulty determining its royalty obligation to Gorelick, and asked Gorelick to renegotiate the royalty payments.[25] The parties signed a written agreement (the 1998 Agreement) that reduced royalty payments to $1,500 for "remediation wells" installed by MACTEC's subsidiary.[26]

Under the 1998 Agreement, a remediation well included any well that was installed by MACTEC's LLC subsidiary.[27] The classification of a well as a "remediation well" was conditioned on the well being created by MACTEC's LLC subsidiary, and the type of technology used to treat the water was not a factor in the classification.[28] Further, the agreement provided that MACTEC would pay $3,000 to Gorelick for any MACTEC well not made by MACTEC's LLC subsidiary, and therefore not a "remediation well," regardless of the technology used with a specific well.[29] The well classification and payment requirements did not depend on whether the NoVOCs technology or the UBV/IEG technology was used.[30] Gorelick received payments from MACTEC under the 1998 Agreement for two years.[31]

Subsequent to Gorelick receiving his last payment from MACTEC, he learned that MACTEC had terminated its licensing agreement with Stanford.[32] Subsequently, Gorelick contacted MACTEC regarding its missed payments, and MACTEC claimed that no royalty obligations to Gorelick remained because of its

20. *Id.*
21. *Id.*
22. *Id.* at 825.
23. *Id.* at 824-25.
24. *Id.* at 825.
25. *Id.* MACTEC did not know if the use of the new technology would trigger an obligation to pay Gorelick $3000 for the well. *Id.*
26. *Id.*
27. *Id.* The definition, in the new agreement, of a remediation well was stated as "any hole that (i) has been dug, drilled, or otherwise installed, or (ii) which existed and has been converted in use, and that is employed or intended for the partial or complete removal treatment of subsurface contaminants." *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* Gorelick received his final payment on November 15, 2000. *Id.*
32. *Id.*

termination of the licensing agreement with Stanford.[33] However, Gorelick claimed that his separate agreement with MACTEC created a legal obligation that MACTEC must honor.[34] Also, Gorelick believed MACTEC had inadequately accounted for all the wells that would trigger payment and requested specific information from MACTEC regarding the remediation wells.[35] MACTEC did not provide any information to clarify the dispute.[36]

In August 2001, Gorelick filed a demand seeking arbitration to recover royalty payments due under the stock purchase agreement.[37] Through discovery, Gorelick learned that MACTEC had failed to pay royalties on several newly drilled wells, and this issue became the main focus of the dispute.[38] MACTEC claimed that the wells in question were drilled using public-domain technology and therefore it was not obligated to pay royalties to Gorelick.[39] In response, Gorelick cited the 1998 Agreement, which required payment for all wells used by MACTEC and did not differentiate between the technologies used for a specific well.[40]

During the arbitration, MACTEC sought introduction of extrinsic evidence to establish that the parties to the agreement intended a different definition of a "remediation well."[41] The arbitrator excluded the extrinsic evidence because he found no ambiguity in the terms of the agreement.[42] In its hearing brief filed only days before the hearing, MACTEC raised two affirmative defenses claiming that Gorelick's contract interpretation constituted patent misuse and that Gorelick's patent was invalid.[43] Gorelick moved to strike the affirmative defenses because they were not timely "(pursuant to the arbitrator's scheduling order)."[44] The arbitrator granted the motion.[45] After the four-day arbitration, the arbitrator found for Gorelick and awarded him nearly $4.5 million in damages.[46]

MACTEC challenged the decision by filing an application to vacate the arbitrator's award pursuant to section 10 of the Federal Arbitration Act (FAA)[47] in federal district court.[48] Three arguments were raised by MACTEC in support of their challenge: "(1) it was improper for the arbitrator to exclude extrinsic evidence relating to the intent of the parties; (2) the court should not have struck the

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* MACTEC, however, did claim that NoVOCs technology had cost their company $3 million in unspecified damages. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 826. The "MACTEC definition" of remediation wells would support their position that the agreement only required royalty payments for wells utilizing the NoVOCs technology. *Id.*
42. *Id.*
43. *Id.* MACTEC's claim of patent invalidity was based on a ruling by the European Patent Office concluding "that the technology was not based on an 'inventive step.' " *Id.*
44. *Id.*
45. *Id.* The arbitrator struck the defenses for three reasons: (1) the defenses were not received in writing by the required date; (2) after extensive discovery and motions, new defenses can't be raised within a week of the arbitration; and (3) lack of jurisdiction to decide patent issues. *Id.*
46. *Id.*
47. 9 U.S.C. § 10 (2002).
48. *MACTEC*, 427 F.3d at 826. The stock purchase agreement provided for such review. *Id.*

patent misuse defense; and (3) enforcement of the award would be patent misuse and would therefore be illegal."[49] The federal district court, in ruling against MACTEC, held that the arbitrator did not violate section 10 by either striking the defense of patent misuse or by excluding extrinsic evidence of the parties' intent.[50] Further, the court held that enforcing the arbitrator's award was not patent misuse and did not violate public policy.[51]

Two weeks after instituting its action to vacate the arbitrator's award, MACTEC filed another complaint in the same federal district court seeking a declaratory judgment of patent misuse based on the interpretation of the contract by Gorelick and the arbitrator.[52] Gorelick moved to dismiss the complaint because MACTEC failed to state a claim, and because the action was barred by res judicata.[53] The same court dismissed with prejudice MACTEC's petition seeking a declaration of patent misuse, which was one day after the denial of MACTEC's vacatur application.[54] MACTEC then appealed both district court decisions and Gorelick filed a motion to dismiss for lack of appellate jurisdiction.[55] In dismissing the arbitration appeal for lack of jurisdiction and affirming the district court's dismissal of the declaratory judgment action, the Tenth Circuit Court of Appeals held that clear and unequivocal contract language rendering the district court's judgment "final" and "nonappealable" was permissible.[56]

III. LEGAL BACKGROUND

A. Federal Jurisdiction for Reviewing Arbitration Awards

The review of an arbitration award is "grudgingly narrow."[57] A district court reviewing an arbitration award is prohibited from using independent judgment.[58]

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49. *Id.*

50. *Id.*

> [T]he district court held that: (1) the arbitrator did not violate 9 U.S.C. § 10(a)(3) by either (a) granting the motion to strike the defense of patent misuse, or (b) refusing to hear evidence of the parties' intent; and (2) it was not a patent misuse (or a violation of public policy) to enforce the arbitration award.

Id.

51. *Id.*

52. *Id.* at 827.

53. *Id.* Gorelick's motion for dismissal was based on FED. R. CIV. P. 12(b)(1) and (6). *Id.*

54. *Id.* The court based its ruling on its earlier order denying MACTEC's application to vacate and the reasons set forth then. *Id.*

55. *Id.* A portion of the arbitration agreement indicated that a district court ruling on an arbitration award would be "final." *Id.* at 828.

56. *Id.* at 830, 832-33.

57. Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1253 (7th Cir. 1994); Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 662 (3d Cir. 2003); Bargenquast v. Nakano Foods, Inc., 243 F. Supp. 2d 772, 776 (N.D. Ill. 2002); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 954 (1999); Sara Lingafelter, Comment, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum*, 28 SEATTLE U. L. REV. 803, 810 (2005).

58. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 932 (10th Cir. 2001); Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1147 (10th Cir.1982); PeopleSoft, Inc. v. Amherst, L.L.C., 369 F. Supp. 2d 1263, 1267 (D.Colo. 2005).

Under the Federal Arbitration Act (FAA), federal district courts may vacate an arbitration award on four grounds:

> (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.[59]

In *Wilko v. Swan*,[60] the Supreme Court held that an arbitration award also may be vacated if the arbitrator acted with a "manifest disregard" for the law.[61] However, generally, an arbitrator's misinterpretation of law or findings of fact will not warrant reversal.[62] Further, reversal is not appropriate even if the arbitrator's decision is not supported by sufficient evidence.[63] Additionally, the FAA provides, to the extent that justice requires, for modification of an arbitration award upon the motion of any party to the arbitration in three situations:

> (a) 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; (b) Where 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; (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.[64]

Such limited review furthers the benefits of arbitration: a private system of justice; reduced cost and delay; and the prevention of arbitration from becoming a "preliminary step to judicial resolution."[65]

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59. 9 U.S.C. § 10(a) (2002).

60. Wilko v. Swan, 346 U.S. 427 (1953), *overruled on other grounds by,* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989). The "Manifest Disregard" for the law standard is still used by courts to determine when judicial intervention is appropriate. Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc., 442 F.3d 471, 476 (6th Cir. 2006).

61. *Wilko,* 346 U.S. at 436-37.

62. GMS Group, LLC v. Benderson, 326 F.3d 75, 77-87 (2nd Cir. 2003); MCI Telecomms. Corp. v. Matrix Commc'ns Corp., 135 F.3d 27, 36 (1st Cir. 1998); *Eljer Mfg.*, 14 F.3d at 1254; Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957 (7th Cir.1993); Moseley, Hallgarten, Estabrook, & Weeden v. Ellis, 849 F.2d 264 (7th Cir.1988); James Richardson & Sons v. W.E. Hedger Transp. Corp., 98 F.2d 55 (2d Cir. 1938), *cert. denied,* 305 U.S. 657.

63. *Supra* note 62; *Wilko,* 346 U.S. at 431-32; UCO Terminals, Inc. v. Apex Oil Co., 583 F.Supp. 1213 (S.D.N.Y. 1984), *affd,* 751 F.2d 371.

64. 9 U.S.C. § 11 (1947).

65. *Wilko,* 346 U.S. at 431-32; *Eljer Mfg.*, 14 F.3d at 1254 (quoting E.I. DuPont de Nemours v. Grasselli Empoyees Indep. Ass'n., 790 F.2d 611, 614 (7th Cir.), *cert. denied,* 479 U.S. 853 (1986)); Island Creek Coal Sales Co. v. City of Gainesville, Fla., 764 F.2d 437 (6th Cir. 1985), *cert. denied,* 474

Review by the court of appeals of a district court's decision concerning a motion to vacate an arbitration award is limited in that factual findings are examined only for clear errors.[66] However, questions of law are reviewed de novo by the court of appeals.[67]

The United States Court of Appeals has jurisdiction to hear appeals "from all final decisions of the district court of the United States . . . except where a direct review may be had by the Supreme Court."[68] The term "final decision" has a well-established definition that has been applied consistently throughout the federal courts as a decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."[69] A final decision may also include a "narrow class of decisions that do not terminate the litigation," but must be deemed "final" in order to further the pursuit of justice.[70] Further, the FAA authorizes appeals from a court order "confirming or denying confirmation of an award or partial award," or "modifying, correcting, or vacating an award," or "a final decision with respect to an arbitration that is subject to this title."[71]

B. Arbitration Clauses Limiting Review

It is clear that judicial review of arbitration awards is extremely limited, and under the FAA, review is very deferential, creating one of the narrowest reviews in all areas of law.[72] However, while the FAA does indicate when vacatur of an arbitration award is appropriate and provides that such decisions may be appealed to the district court, it does not address whether appeal of arbitration awards may be barred by agreement of the parties.[73]

Several courts have enforced agreements between parties to arbitrate that alter the judicial review of arbitration awards.[74] However, the majority of these agreements increased, rather than decreased, the level of judicial review available under

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U.S. 948; Diapulse Corp. of America v. Carba, Ltd., 626 F.2d 1108, 1110 (2d Cir. 1980); Office of Supply v. New York Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972).

66. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931 (10th Cir. 2001).

67. *Id.*

68. 28 U.S.C. § 1291 (1982).

69. Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999); Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 86-87 (2000); FirsTier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 273 (1991); Stubblefield v. Windsor Capital Group, 74 F.3d 990, 995-96 (10th Cir. 1996); In re Magic Circle Energy Corp., 889 F.2d 950, 953 (10th Cir. 1989).

70. *Id.*

71. 9 U.S.C. § 16(a) (1990).

72. *Id.*

73. §§ 10(a), 16.

74. Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2d Cir. 2003); *see, e.g.*, Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir.2001) (cases increasing the level of judicial review available under the FAA); LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888-89 (9th Cir.1997) (same) (overruled by Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996-97 (5th Cir.1995) (same); *see also* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931 (10th Cir. 2001) (noting in dicta that "parties to an arbitration agreement may eliminate judicial review by contract"); Aerojet-Gen. Corp. v. Am. Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir.1973) (same).

the FAA.[75] There have been relatively few court decisions addressing the enforceability of agreements reducing judicial review of arbitration awards.[76]

Certainly, there is a "fundamental difference" between an agreement to increase and an agreement to decrease the judicial review of an arbitration award.[77] In enacting the FAA, Congress sought to balance the importance of a flexible dispute resolution system with the need to prevent patently unfair arbitration awards by delineating specific safeguards in section 10(a).[78] Therefore, the Second Circuit Court of Appeals, in *Hoeft v. MVL Group, Inc.*,[79] held that parties cannot require a federal court to approve flawed awards by removing the federal court's ability to review the compliance of an arbitration award with section 10(a) of the FAA.[80] Further, the court held that, while arbitration is a contractual creation, the judicial review of an arbitration award is not contractual in nature and cannot be deprived by a private agreement.[81] Specifically, the Second Circuit held that a party seeking to enforce an arbitration agreement in federal court may not eliminate the statutory and common law right of the federal court to review arbitration awards and process under section 10(a) of the FAA.[82]

The Tenth Circuit Court of Appeals, in *Bowen v. Amoco Pipeline Co.*,[83] also addressed the issue of a private agreement limiting the judicial review of an arbitration award.[84] The court noted that section 9 of the FAA requires either express or implied intent from the arbitration parties to allow a court to enter a judgment on the arbitrator's awards.[85] In that case, the district court confirmed the arbitration award; Amoco appealed the decision and sought vacatur of the arbitration award.[86] Subsequently, the plaintiffs moved to dismiss the appeal for lack of jurisdiction based on the arbitration agreement language, which stated that a district court's ruling "shall be final."[87] The court ruled that the arbitration agreement was only a finality clause which permitted the district court to enter a judgment on an arbitration award.[88] Further, the court noted that an arbitration agreement may limit the judicial review of an arbitration award only if the parties clearly and unequivocally express their intention to further limit judicial review.[89]

75. *Supra* note 74.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. Hoeft v. MVL Group, Inc., 343 F.3d 57, 66 (2d Cir. 2003).
82. *Id.* However, the court did not address the issue of limiting appellate review.
83. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931 (10th Cir. 2001).
84. *Id.* at 930.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 931.
89. *Id.*; *see also* U.S. Fid. & Guar. Co. v. Ins. Co. of North America, 149 F.3d 1184 (6th Cir. 1998) (appellate review not limited by language in arbitration agreement that did not expressly limit review).

IV. INSTANT DECISION

In *MACTEC, Inc. v. Gorelick*,[90] the Tenth Circuit Court of Appeals had to decide whether an arbitration agreement, which stated that a judgment entered on the arbitrator's award "shall be final and nonappealable," eliminated appellate jurisdiction and prevented the instant court from deciding an appeal of the arbitration award.[91] In ruling that the Tenth Circuit lacked jurisdiction to hear a challenge to the arbitrator's award, the Tenth Circuit held that parties to an arbitration can limit judicial review if the limitation is expressly stated in the arbitration agreement and the intent of the parties to limit review is clear and unequivocal.[92]

The court, in reaching this decision, first addressed the Tenth Circuit opinion expressed in *Bowen v. Amoco Pipeline Co.*,[93] which held that "parties may not contract for expanded judicial review of arbitration awards."[94] In the instant decision, the court refused to follow the presumption that if judicial review could not be expanded by agreement of the parties to an arbitration, then review could also not be constricted.[95] Also, the present court cited the dicta in the *Bowen* opinion, which stated that judicial review may be eliminated by parties to an arbitration if the provision is clearly and unequivocally stated in the arbitration agreement.[96] This difference in handling contractual provisions to contract and expand judicial review of arbitration decisions was justified by the court in that this duality, while contradictory, does further the fundamental policies behind the FAA of reducing litigation costs and providing efficient dispute resolution forums.[97]

Next, the court focused on the extent to which private restrictions on judicial review of arbitration awards should be upheld.[98] Following the Second Circuit opinion expressed in *Hoeft v. MVL Group, Inc.*,[99] the court noted that an arbitration agreement cannot prohibit federal courts from applying the standards in section 10(a) of the FAA.[100] In distinguishing the present case from *Hoeft*, the court noted a significant difference in that the nonappealability clause in *Hoeft* applied to the district court, while the clause at issue here only eliminates review by the appellate court.[101] Further, the court noted that the present clause preserved review by the district court, and that each party bore the risk of living with the deci-

90. 427 F.3d 821 (10th Cir. 2005).
91. *Id.* at 827.
92. *Id.* at 830.
93. *Bowen*, 254 F.3d at 931.
94. *Id.* at 937.
95. *MACTEC*, 427 F.3d at 829.
96. *Id.*
97. *Id.*
98. *Id.*
99. Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2d Cir. 2003).
100. *MACTEC*, 427 F.3d at 829. The FAA standards for allowing vacatur of an arbitration award are:

> (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.

9 U.S.C. § 10(a) (2002).
101. *MACTEC*, 427 F.3d at 829.

sion of the district court.[102] In support of its decision, the court also noted that the present situation is simply a compromise where the parties have traded the risk of lengthy appellate review for a single review by the district court, and it is common for courts to enforce such agreements waiving appellate review of district court decisions.[103] In conclusion, the Tenth Circuit held that a contractual provision eliminating the right to appeal from a district court judgment concerning an arbitration award is valid as long as the provision is clear and unequivocal.[104]

V. COMMENT

From a careful analysis of the extensive scope of the FAA, one could easily surmise that the rules governing arbitration are fixed and unchangeable. Yet, in most instances, the terms of a contractual agreement between two parties submitting a dispute to arbitration control over the default rules set forth in the FAA.[105] This is because the purpose of the FAA was to provide recognition of the validity of arbitrations and require the courts to enforce such agreements as any other contract would be enforced,[106] and to allow the parties' chosen contract terms to govern the arbitration with the FAA applying only when a gap in the agreement needs to be filled.[107]

Some of the benefits of arbitration are that it should be quicker and less expensive than alternate adjudicative processes, and it is a more relaxed process than formal adjudication.[108] Another key aspect of arbitration is that it "preclude[s] judicial intervention into the merits of a dispute."[109] This important feature of arbitration is reflected in the limited scope of review that is permitted by the FAA.[110] In looking at the purpose of the FAA, which is to further the use of arbitration and enforce arbitration agreements according to their terms, it makes sense that further limitations on judicial review are consistent with the FAA because the "default" FAA rules themselves limit the scope of review available to arbitration parties.[111] Limited review is an essential element of arbitration in that it furthers the advantages of increased efficiency and reduced costs that set arbitration apart

102. *Id.* at 829-30.

103. *Id.* at 830.

104. *Id.*

105. Milana Koptsiovsky, Comment, *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) ("[T]he FAA appears to have been intended as a tool to ensure enforcement of a private contract on its own terms."); *see* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, *in accordance with their terms.*" *Id.* (emphasis added).

106. *Volt*, 489 U.S. 468 at 474-75.

107. Drahozal, *supra* note 7, at 420; Koptsiovsky, *supra* note 105, at 627-28; *see* Gateway Technologies, Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 997 (5th Cir. 1995).

108. Erickson & Bowen, *supra* note 3, at 43-44; William C. Hermann, Note, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697, 721 (1990).

109. John T. Tutterow, Comment, *The Constitution v. Arbitration: Rollings v. Thermodyne and a Proposal for a New Alternative to Arbitration*, 22 OKLA. CITY U. L. REV. 697 (1997).

110. 9 U.S.C. § 10(a) (2002).

111. *See id.*; *Volt*, 489 U.S. at 469.

from a formal adjudicative process and,[112] therefore, further limiting judicial review of arbitration awards should be endorsed by the courts.

It is well settled that parties are able to control the terms of arbitration by specifying their desires in the language of the agreement to arbitrate.[113] In several instances, courts have upheld contractual agreements that expanded the scope of judicial review of arbitration awards.[114] However, expanded judicial review in fact contradicts the purposes of arbitration by lengthening the time to a final resolution, increasing costs, and increasing the level of judicial involvement in the process.[115] Also, expanded judicial review may harm the legitimacy and integrity of arbitration and "undermine[] the status and professionalism of arbitrators."[116] Even so, the courts are still reluctant to alter the mutually agreed upon terms that the parties included in their agreement to arbitrate.[117] It seems clear that as long as the arbitration terms, as agreed to by the parties, are not unconscionable, the courts will enforce those terms and allow the parties to decide the procedure of the arbitration process for their disputes even when the terms of the agreement undermine some advantages of arbitration.[118]

Private agreements to further limit judicial review beyond the limitations provided by the FAA should be upheld by the courts. Limiting, as opposed to expanding, appellate review furthers the interests of arbitration in bringing finality to disputes.[119] Limited review also allows the arbitration parties to minimize the time and expense that they will have to expend in reaching a conclusion to their disputes. However, all judicial review should not be eliminated, even by contract and an absolute limitation would likely not be enforced.[120] The courts have made

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112. *See* Kenneth M. Curtin, *Contractual Expansion & Limitation of Judicial Review of Arbitral Awards*, 56-APR DISP. RESOL. J. 74, 77-78 (2001); *supra* note 108.

113. Roadway Package System, Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001); *see supra* notes 7 & 105-07.

114. *Kayser*, 257 F.3d at 293 (3d Cir. held that parties may opt out of FAA vacatur standards); Syncor Int'l Corp. v. McLeland, 120 F.3d 262 (No. 96-2261) (4th Cir. 1997) (4th Cir. allowed parties to expand judicial review); Gateway Technologies, Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 997 (5th Cir. 1995) (5th Cir. allowed contractual expansion of judicial review); *see* supra note 74; Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171 (2003); Mosebey, *supra* note 7; Margaret Moses, *Can Parties Tell Courts What To DO? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429 (2004).

115. Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003); Drahozal, *supra* note 7, at 427 ("[E]xpanded review may delay a final outcome and increase the costs of the proceeding."); Ilya Enkishev, *Above the Law: Practical and Philosophical Implications of Contracting for Expanded Judicial Review*, 3 J. AM. ARB. 61, 63 (2004).

116. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001); Ilya Enkishev, *supra* note 115, at 63, 94; Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 151-52 (1997); Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 552-53 (2002).

117. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477-79 (1989). "[T]he FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 469.

118. *See generally supra* notes 114 & 115.

119. *See Bowen*, 254 F.3d at 931; Kenneth M. Curtin, *Contractual Expansion & Limitation of Judicial Review of Arbitral Awards*, 56-APR DISP. RESOL. J. 74, 77-78 (2001). *See generally* Drahozal, *supra* note 7, at 427.

120. *See* Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2d Cir. 2003).

it clear that for an arbitration award to be enforced by the courts, the district court must still be able to review the award for "manifest disregard" for the law.[121]

While agreements limiting appellate review of arbitration awards have been endorsed by the courts, the courts will only do so when the agreement clearly and unequivocally indicates the parties express intention to limit review.[122] In *Mactec*,[123] the court did allow the contract provision limiting review because the contract language specifically stated that a judgment entered on the arbitrator's award "shall be final and nonappealable."[124] On the other hand, in *Bowen v. Amoco Pipeline Co.*,[125] the court held that an agreement indicating that the arbitration award "shall be final" did not limit judicial review because the ambiguous phrase did not clearly express the parties' intentions to limit review.[126] Although a court should be willing to enforce an agreement limiting review, it is also fair to the arbitration parties for the courts to do so only in cases where the contract language clearly and unequivocally expresses the parties' intentions to limit appellate review of an arbitration award.

Some arguments are asserted in opposition to reducing judicial review of arbitration awards. One argument raised as to why judicial review should not be reduced is that it will allow erroneous awards that are endorsed by the district court to escape review and therefore be enforced.[127] There is always the possibility of an anomalous case in which the arbitrator hands down a clearly erroneous decision.[128] In these cases, however, the district courts will still have jurisdiction to reverse such a decision, because while appellate review should be able to be eliminated by contract, a district court level review would remain.[129] Further, the FAA itself provides for vacatur only in cases where the arbitration award is "clearly erroneous."[130] Under the FAA, it is possible for erroneous awards that don't reach the level of "clearly erroneous" to be enforced by the courts and a limitation on appellate review will not create results inconsistent with the FAA.

A second argument against limiting judicial review of arbitration agreements is the potential for great disparity in the bargaining power between the parties who have agreed to settle their disputes with arbitration and are essentially "forced" to limit review. It is true that, in many instances, the parties who have agreed to

121. *Id.*; *see also* 9 U.S.C. § 10(a) (2006).

122. *See* MACTEC, Inc. v. Gorelick, 427 F.3d 821, 830 (10th Cir. 2005); *Bowen*, 254 F.3d at 931.

123. *MACTEC*, 427 F.3d at 829.

124. *Id.* at 827, 829-30.

125. *Bowen*, 254 F.3d at 931.

126. *Id.* at 930. The court did, however, note that an arbitration agreement may limit judicial review of an arbitration award if the parties clearly and unequivocally express their intentions to do so. *Id.* at 931.

127. *See* Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2d Cir. 2003).

128. *See* Drahozal, *supra* note 7, at 427. (An erroneous award by the arbitrator would be "aberrational."); Erickson & Bowen, *supra* note 3, at 44. (Parties are generally more satisfied with an arbitrator's decision.); Christi L. Underwood, *Construction Arbitration: The Arbitration Process and Practice Tips for Advocates*, 80-Mar. FLA. B.J. 16, 17 (2006) (Arbitrators take their job seriously and use common sense in evaluating cases.); *see also* Enkishev, *supra* note 115, at 94-95 (Arbitrator's are specifically chosen by the parties and awards are more predictable than judicial awards.)

129. *See supra* notes 120 &121.

130. 9 U.S.C. § 10(a) (2002); *Bowen*, 254 F.3d at 931.

arbitration do have differing levels of bargaining power.[131] However, the federal courts have held that a contract provision limiting judicial review must be "clear and unequivocal" and the parties both must have expressly intended to limit judicial review.[132] If these strict notification requirements are adhered to, there will be no surprise to the weaker party and they will be able to fully appreciate the consequences of such a provision.[133] In a case where a party truly does not wish to limit review and nevertheless must consent to such a provision in order to finalize an agreement with the other party, such a limitation of review will not necessarily prejudice that party.[134] The party will still be allowed to present their case, supporting their position in the dispute, to a neutral arbitrator who will assess all the evidence and hand down a decision to the best of their ability. The party claiming a disadvantage is also free to raise the defense that the contract was unconscionable and a contract of adhesion.[135] For the most part, arbitrators are extremely fair and competent and a party with less influence will typically receive "justice" even if the arbitration agreement limits appellate review of the arbitration award.[136] While arguments against limiting appellate review seem compelling, they miss the big picture and fail to recognize the overall interests in arbitration of reducing costs, time to resolution, and judicial interference in the process, which are all furthered with limited judicial review.

VI. CONCLUSION

Arbitration is a unique alternative dispute resolution process whereby disputing parties engage in a process in which a neutral third party will determine the rights of the parties in a semi-judicial process. This process is aimed at providing satisfactory conclusions to disputes in a process that is quicker and cheaper than pursuing the dispute through a formal judicial proceeding. The FAA establishes extensive guidelines for arbitration; however, those guidelines can be altered by clear language in the contract that mandates arbitration as the process whereby disputes will be settled. Under the FAA, review of arbitration awards is very narrow in an attempt to further the goals of a dispute resolution process intended to be more efficient than the courts. Many courts have allowed arbitration parties to

131. *See* Richard DeWitt & Rick DeWitt, *No Pay No Play: How To Solve the Nonpaying Party Problem in Arbitration*, 60-Apr. DISP. RESOL. J. 27, 31 (2005) (discussing arbitration agreements between parties with differing levels of bargaining power).

132. *Supra* note 126.

133. Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139,199 (2005) (noting that arbitration clauses in contracts of adhesion must be reasonably expected by the parties); *see* Celeste M. Hammond, *The (Pre) (As) sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 650 (2003) (stating that full notice is necessary when large disparities in bargaining power are present).

134. *See* Cole v. Burns Int'l Sec. Services, 105 F.3d 1465, 1469 (D.C. Cir. 1997) (The Supreme Court has held that review under the "manifest disregard" standard is sufficient to ensure statutory compliance in such cases.).

135. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A., 334 F.3d 721, 723-24 (8th Cir. 2003) (The 8th Circuit affirmed the arbitrator's award and determination that agreement was a contract of adhesion and arbitration provision was unconscionable.). *Id.* at 727.

136. *Supra* note 133.

expand judicial review of arbitration awards and some courts have also allowed parties to reduce judicial review to a level less than the default standards set out in the FAA. Therefore, it is clear that contracting parties who clearly manifest their intent to further limit judicial review of an arbitration agreement so as to expedite the dispute resolution process and reduce costs should be allowed to do so because their intentions are consistent with the goals of arbitration and federal courts have shown a willingness to recognize such limitations when they are clearly expressed in the parties' agreement to arbitrate.

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