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Arbitration Survey

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ARBITRATION SURVEY

INTRODUCTION

During the 1993-94 survey period, the Tenth Circuit Court of Appeals decided several cases impacting important arbitration issues. Part I of this Survey focuses on two decisions that addressed traditional labor law matters: unionization and collective bargaining. These cases did not establish new law, but rather reaffirmed existing precedent regarding the limited judicial review of an arbitrator's decision. In *Champion Boxed Beef Co. v. Local No. 7 United Food & Commercial Workers International Union*,[1] the court reinforced the principle that judicial review of an arbitrator's award is extremely narrow and may come into play only if the arbitrator ignores the plain language of the collective bargaining agreement.[2] In *Ryan v. City of Shawnee*,[3] the court affirmed the limited judicial review of arbitration awards, and concluded that prior judicial review of an arbitration award could not preclude a subsequent civil rights action.[4]

In Part II, this Survey addresses two decisions that brought Tenth Circuit law into greater conformity with other appellate courts. In *Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co.*,[5] the Tenth Circuit decided to follow those circuits exercising de novo review of a district court's determination regarding an arbitrator's compliance with statutory requirements.[6] Additionally, in *Adair Bus Sales, Inc. v. Blue Bird Corp.*,[7] the Tenth Circuit followed the majority of other circuits in adopting the view that a district court order to arbitrate can only be final within the meaning of § 16(a)(3) of the Federal Arbitration Act ("FAA"),[8] if arbitrability was the sole issue before the district court.[9]

Together, the cases discussed in Parts I and II illustrate the Tenth Circuit's adherence to precedent with regard to collective bargaining agreements. The court continues, however, to establish new procedures for areas where arbitration provides a less traditional arbitral forum for resolving disputes.

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1. 24 F.3d 86 (10th Cir. 1994).
2. *Id.* at 87.
3. 13 F.3d 345 (10th Cir. 1993).
4. *Id.* at 348.
5. 22 F.3d 1010 (10th Cir. 1994).
6. *Id.* at 1012.
7. 25 F.3d 953 (10th Cir. 1994).
8. 9 U.S.C. § 16 (Supp. 1994). *See generally* Gerald Aksen, *Some Legal and Practical Problems of Labor Arbitrators*, *in* ARBITRATING LABOR CASES 163, 167 (Noel A. Levin et al. eds., 1974) (Corp. L. & Prac. Sourcebook Series No. 6) (providing background information on the history and application of the FAA). For a further explanation of the FAA, see *infra* part II.A.
9. *Adair*, 25 F.3d at 955.

I. ARBITRATION AND LABOR RELATIONS

A. *Background*

1. Evolution of Labor Arbitration

Labor arbitration can be defined as "the referral of a grievance by the parties, union and management, through a voluntary arbitration clause in the collective bargaining agreement, to an impartial third person for a final and binding resolution."[10] The process is uniquely American and does not have a deeply rooted tradition.[11]

In 1935, Congress enacted the National Labor Relations Act ("NLRA" or "Wagner Act"),[12] giving workers the right to organize and bargain collectively, and providing safeguards from management interference.[13] The use of arbitration to settle disputes became widespread in the 1940's as unionization and collective bargaining began to form the basis of industrial labor organizations.[14]

In 1947, with the passage of the Labor Management Relations Act ("LMRA" or "Taft-Hartley Act"),[15] statutorily based grievance arbitration provided guidance for lawsuits by and against labor organizations.[16] Section 185 of the LMRA gave federal courts exclusive jurisdiction over claims involving breach of collective bargaining agreements.[17] In addition, this statute favored arbitration as the means for resolving disagreements associated with collective bargaining agreements because it presumed the dispute arbitrable.[18]

On June 20, 1960, the Supreme Court decided three cases that fashioned the present-day laws of arbitration. These cases, commonly referred to as "The

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10. Gerald Aksen, *History and Development, in* ARBITRATING LABOR CASES 9, 9 (Noel A. Levin et al. eds., 1974) (Corp. L. & Prac. Sourcebook Series No. 6).

11. *Id.*

12. National Labor Relations Act, ch. 372, § 1, 49 Stat. 449-57 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1988 & Supp. V 1993)).

13. Aksen, *supra* note 10, at 10.

14. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 301 (1987); Aksen, *supra* note 10, at 9.

15. Labor Management Relations (Taft-Hartley) Act, ch. 120, § 1, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 141 (1988)).

16. *See* RISKIN & WESTBROOK, *supra* note 14, at 3.

17. 29 U.S.C. § 185(a) (1988) (original version at ch. 120, title III, § 301, 61 Stat. 156 (1947)). Section 185(a) provides in relevant part that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." In Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court held that § 301 embodies a substantive component that authorizes federal courts to develop a uniform national law for the enforcement of collective bargaining agreements. *Id.* at 451. The court also held that collective bargaining agreements that include arbitration clauses are enforceable under § 301 of the LMRA. *Id. See also* Douglas E. Ray, *Court Review of Labor Arbitration Awards Under the Federal Arbitration Act*, 32 VILL. L. REV. 57, 63-64 (1987) (pointing out that the issue had been hotly debated before *Lincoln Mills*). Prior to the decision in *Lincoln Mills*, there was debate over whether § 301 was considered procedural or substantive. Aksen, *supra* note 10, at 15.

18. Jerome Lefkowitz, *The Legal Framework of Labor Arbitration in the Public Sector, in* LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES, 30, 31 (Max Zimny et al. eds., 1990).

Steelworkers Trilogy,"[19] established guidelines for determining the arbitrability of labor disputes and the extent to which arbitration awards would be reviewed and enforced.[20] In *United Steelworkers of America v. American Manufacturing*, the Court, relying in part on the LMRA, held that when a collective bargaining agreement called for arbitration of all grievances, no exception should be read into the grievance clause.[21] In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, the Court established that the federal policy was to promote industry stabilization through collective bargaining agreements.[22] According to the Court in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, therefore, courts must refrain from reviewing the merits of an arbitration award handed down as part of a collective bargaining agreement.[23]

The Steelworkers Trilogy led to continued reliance on arbitration as the preferred method for settling labor disputes under a collective bargaining agreement, replacing the traditional lockout or strike.[24] Arbitration of labor disputes was seen as a substitute for industrial turmoil and a way to increase security and peace in industry.[25] By the 1980s, over ninety percent of collective bargaining agreements between labor and management provided for some form of grievance procedure resulting in arbitration.[26]

2. Role of the Arbitrator

Labor arbitrators function much differently than a traditional judge.[27] Arbitrators for labor disputes are generally chosen for their knowledge and

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19. Theodore J. St. Antoine, *The Legal Framework of Labor Arbitration in the Private Sector*, *in* LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES 18, 21 (Max Zimny et al. eds., 1990).

20. The Steelworkers Trilogy included United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960) (prohibiting federal courts from weighing the merits of a grievance when the parties have agreed by collective bargaining to resolve all questions of contract interpretation through arbitration). The role of the courts is to determine whether the particular claim is governed by the contract. *Id.* at 568. The second case was United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (holding that arbitration of labor disputes is different than arbitration of a commercial agreement). Under the collective bargaining agreement, arbitration is an integral part of the bargaining process distinct from the actual dispute. *Id.* at 578. Although the collective bargaining agreement states the rights and duties of the parties, it is much more than just a contract: it is a complete agreement covering the entire employment relationship, including ways to address unanticipated issues. *Id.* The final case of the Trilogy was United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (defining the scope of the arbitration award as legitimate so long as it "draws its essence" from the collective bargaining agreement). The essence test states that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *Id.* at 597. *See also* St. Antoine, *supra* note 19, at 21 (explaining that a court is to resolve all doubts in favor of arbitration, even frivolous claims).

21. *American Manufacturing*, 363 U.S. at 567; *see also* 29 U.S.C. § 173(d) (1988) (providing that conciliation and mediation services should be used only as a last resort).

22. *Warrior*, 363 U.S. at 578.

23. *Enterprise*, 363 U.S. at 596.

24. AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648 (1986).

25. *Warrior*, 363 U.S. at 578.

26. Mark E. Zelek, *Labor Grievance Arbitration in the United States*, 21 U. MIAMI INTER-AM. L. REV. 197, 197 (1989).

27. *Warrior*, 363 U.S. at 581.

expertise in a specialized field.[28] As described below, arbitrators may rely not only upon their own experience, but upon what has been termed "industrial common law"—practices common to the particular working environment or industry that are not expressly contained within the agreement.[29]

Although the arbitrator has substantial authority, many labor practices remain "strictly a function of management."[30] Management generally hires, fires, pays, promotes and supervises employees,[31] so the arbitrator's role is limited to interpretation and application of the collective bargaining agreement.[32] Although the arbitrator may consult outside sources for guidance, the award must derive from the substance of the bargaining agreement.[33]

3. Judicial Review of an Arbitration Award

The Eleventh Circuit has held that the judicial review of an arbitration award is extremely limited and that the district court should defer to the decision of the arbitrator whenever possible.[34] Recently, the Tenth Circuit approved of this philosophy by stating that judicial review of an arbitration award "is among the narrowest known to the law."[35] In fact, the vast majority of arbitration cases do not require judicial intervention.[36] The proper approach under a collective bargaining agreement, as set forth in the Steelworkers Trilogy, is for a court to refrain from reviewing the merits of an arbitration award.[37] The federal policy favoring arbitration of labor disputes would appear meaningless if the courts could indiscriminately set aside awards.[38]

4. Common Law of the Shop

In *United Steelworkers v. Warrior & Gulf Navigation Co.*,[39] the Supreme Court held, for the first time, that a collective bargaining agreement creates a new common law—the common law of a particular industry or of a particular plant.[40] Except where explicitly limited by contract, an arbitrator is not con-

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28. *Id.* at 582. The American Arbitration Association maintains a National Panel of Arbitrators who are nominated and selected based on their experience, competence, and impartiality. Don A. Banta, *Arbitrator Selection: A Management View*, *in* LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES 93, 94 (Max Zimny et al. eds., 1990).

29. *Warrior*, 363 U.S. at 581.

30. *Id.* at 584 (defining "strictly management function" as any practice in the agreement during which management is permitted to retain complete control and discretion).

31. *Id.* at 583.

32. *Enterprise*, 363 U.S. at 597.

33. *Id.*

34. Robbins v. Day, 954 F.2d 679, 682 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992).

35. Champion Boxed Beef Co. v. Local No. 7 United Food and Commercial Workers Int'l Union, 24 F.3d 86, 87 (10th Cir. 1994) (quoting Litvak Packing Co. v. United Food & Commercial Workers, Local No. 7, 886 F.2d 275, 276 (10th Cir. 1989)).

36. St. Antoine, *supra* note 19, at 18. Out of the approximately 50,000 arbitration cases that are decided annually, traditionally only a few hundred are litigated in court. *Id.*

37. *Enterprise*, 363 U.S. at 596; L. Robert Griffin, *Judicial Review of Labor Arbitration Awards*, *in* ARBITRATING LABOR CASES 193, 194-95 (Noel A. Levin et al. eds., 1974) (Corp. L. & Prac. Sourcebook Series No. 6).

38. *Enterprise*, 363 U.S. at 596.

39. 363 U.S. 574 (1960).

40. *Warrior*, 363 U.S. at 579; *see also* NCR Corp. v. International Ass'n of Machinists &

fined to the express provisions of the contract.[41] The nature of the agreement encourages the arbitrator to consider and rely upon extrinsic evidence as an equal part of the collective bargaining agreement.[42] Prior negotiations between the parties, evidence of past labor practices and the daily routine of the plant all make up the common law of the shop and may factor into the arbitrator's ultimate decision.[43] Labor arbitrators are not selected to further the law, but rather to serve the parties in the collective bargaining agreement.[44] Recent Tenth Circuit opinions have upheld the importance of the common law of the shop in interpreting labor contracts.[45]

5. Arbitrability of a Dispute

Parties cannot be forced to arbitrate a dispute that does not fall within the intended scope of the arbitration clause in their agreement.[46] In *AT & T Technologies Inc. v. Communications Workers*,[47] the Court affirmed the well-established test from the Steelworker's Trilogy for determining the arbitrability of a grievance under a collective bargaining agreement.[48] Four rules govern a court's evaluation of an arbitration agreement and have led to continued reliance on arbitration as the preferred method of resolving labor disputes.[49] First, since arbitration is a matter of contract, a party cannot be required to submit to arbitration any issue the parties have not previously agreed to arbitrate.[50] Second, the question of arbitrability under the agreement is a matter for the court to decide.[51] Third, when deciding whether the parties have agreed to arbitrate on a particular issue, the court may not assess the merits of

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Aerospace Workers, Dist. Lodge No. 70, 906 F.2d 1499, 1501 n.3 (10th Cir. 1990) (noting that the role of the common law of the shop had been "forcefully restated" by the Tenth Circuit).

41. *Warrior*, 363 U.S. at 581.

42. *Id.* at 581-82.

43. Eva Robins, *The Law of the Shop*, *in* LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES 229, 232 (Max Zimny et al. eds., 1990).

44. *Id.* at 230-31.

45. *See NCR*, 906 F.2d at 1501 n.3.

46. Alison B. Overby, Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1143 (1986).

47. 475 U.S. 643 (1986).

48. 475 U.S. 643, 648-51 (1986). In addition to the cases already discussed, the Tenth Circuit decided the arbitrability of a dispute involving an employee grievance system. In Bridgestone/Firestone, Inc. v. Local Union No. 998, United Rubber Workers, 4 F.3d 913 (10th Cir. 1993), Firestone instituted an Employee Suggestion System in the 1920s to give employees incentives to come up with ways to improve safety and efficiency at the plant. *Id.* at 920. One employee, a union member, made a suggestion through the system which the company ultimately adopted. *Id.* The employee was paid $2,250 for his suggestion, but claimed he was owed more. *Id.* When the employee filed a grievance with the union pursuant to the collective bargaining agreement requesting arbitration of the dispute, Firestone refused and brought an action in district court to prevent further processing of the grievance and to obtain a declaration that the grievance did not fall within the collective bargaining agreement. *Id.*

The district court granted summary judgment in favor of Firestone. *Id.* The Tenth Circuit, relying on the *AT & T* four-part test for arbitrability affirmed the district court decision. *Id.* at 921. The court found that the Employee Suggestion System had never been the subject of collective bargaining, and since it provided its own internal procedures for review of grievances related to the Suggestion System, the System was complete in and of itself. *Id.* at 922.

49. *AT & T*, 475 U.S. at 648-49; St. Antoine, *supra* note 19, at 24-25.

50. *AT & T*, 475 U.S. at 648.

51. *Id.* at 649.

the claims.[52] Fourth, where the contract contains an arbitration clause, there is a presumption in favor of arbitrability unless the clause cannot clearly be interpreted in a way that covers the dispute.[53]

Doubts regarding the arbitrability of an issue should be resolved in favor of coverage by the agreement.[54] This presumption "recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements" and advances the federal labor policy of peacefully resolving labor disputes.[55]

B. Champion Boxed Beef Co. v. Local No. 7 Union Food & Commercial Workers International Union[56]

1. Facts

The Champion Boxed Beef Co. ("Champion") sought judicial review of a labor arbitrator's decision.[57] The arbitrator found that Champion lacked sufficient cause to discharge a union employee and ordered his reinstatement.[58] The Champion employee was asked by his supervisor to take time off his usual job, catching and sorting the product as it came off the line, and to take a temporary assignment at the unloading dock.[59] When the employee did not perform the temporary assignment, Champion discharged him for insubordination and refusal to perform reasonable work.[60]

The employee filed a grievance that was referred to arbitration pursuant to the collective bargaining agreement.[61] The arbitrator held that Champion did not have sufficient cause to discharge the employee because the employee's actions did not constitute insubordination or refusal to perform work within the meaning of the collective bargaining agreement.[62]

In federal district court, Champion sought to vacate the arbitrator's award and the union filed a counterclaim to enforce the award.[63] The district court granted Champion's motion for summary judgment and vacated the award, holding that the arbitrator "stray[ed] beyond the four corners of the [collective bargaining] agreement" and, therefore, exceeded his authority.[64]

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52. *Id.*
53. *Id.* at 650.
54. *Id.*
55. *Id.*
56. 24 F.3d 86 (10th Cir. 1994).
57. *Id.* at 87.
58. *Id.* at 87-88.
59. *Id.* at 87.
60. *Id.*
61. *Id.* The relevant portion of the agreement stated "[n]o employee covered by this Agreement shall be . . . dismissed without just and sufficient cause. Sufficient cause of discharge shall include . . . insubordination . . . [and] refusal to perform any reasonable work, service or labor when required to do so by the Company." *Id.* at 88.
62. *Id.*
63. *Id.* at 87.
64. *Id.* at 88.

2. Tenth Circuit Opinion

The Tenth Circuit applied de novo review as it has in other cases where the district court granted summary judgement.[65] The court first looked at the terms of the collective bargaining agreement and the basis of the arbitrator's decision.[66] In making the decision, the arbitrator had examined the language of the agreement and listened to testimony concerning Champion's current practice, the "common law of the shop," regarding times when other employees had declined to accept work assignments.[67] The arbitrator determined that the employee never said he would not perform the requested work.[68] In addition, the arbitrator found that the employee had a physical reason for declining the assignment, of which the company was aware.[69]

The Tenth Circuit explained that an arbitrator may consider and rely on extrinsic evidence, except where expressly limited by agreement.[70] When interpreting provisions of a collective bargaining agreement, an arbitrator may look to past practices in the industry and to the common law of the shop.[71] The court then held that the phrase "reasonable work", as stated in the collective bargaining agreement, was ambiguous, but it refused to confirm or reject the arbitrator's interpretation of the term.[72] The court recognized that it may not overrule an arbitrator's factual finding or contract interpretation simply because it disagrees with it.[73] The court concluded that the award drew its "essence"[74] from the collective bargaining agreement and that the arbitrator was entitled to consider the common law of the shop in his decision.[75] Accordingly, the court reversed the district court order vacating the arbitration award and remanded the case with instructions to enter an order of enforcement.[76]

3. Analysis

In *Champion*, the court did not create new legal principles, but instead followed established precedent. Due to the diminished power of labor organizations today, arbitration in this area often relies on precedent, which contrasts with the approach of other contemporary arbitration fields.[77] The court in

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65. *Id.* at 87.
66. *Id.* at 88.
67. *Id.*; *see supra* notes 39-45 and accompanying text for an explanation of the common law of the shop.
68. *Id.* at 88.
69. *Id.*
70. *Id.*
71. *Id.* at 88-89. Examples of extrinsic evidence may also include the negotiating and contractual history of the parties. *Id.*
72. *Id.* at 89.
73. *Id.*
74. See *supra* note 20 for an explanation of the essence test.
75. *Champion*, 24 F.3d at 89.
76. *Id.*
77. *See* R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1866 (1994) (indicating that while unions are becoming less visible in the American workplace, arbitration will continue to play a role in maintaining individual rights). For examples of other areas where arbitration is used, see Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW J. 183 (1994); Donna Bialik et al., *Higher Education: Fertile Ground for*

Champion recognized and relied upon three essential principles of arbitration in its opinion. First, the court reviewed a well-known standard established over thirty years ago by the Supreme Court that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[78] The importance of this principle cannot be understated, for absent such a standard, the federal policy of settling labor disputes by arbitration would be undermined. The arbitration process is built on a premise of arbitral authority. If courts are allowed to make the final determination on arbitration awards, the entire mechanism becomes frustrated.

The Tenth Circuit also affirmed the essence test for judicial review. The essence test requires a court to examine the parties' mutual intent and recognize their contract to arbitrate disputes.[79] By entering into an agreement that includes an arbitration clause, the parties bind themselves to the arbitrator's decision and, unless a court is convinced the arbitrator committed a serious error, the court should not overturn the arbitral decision.[80] An arbitration award must be enforced if it "draws its essence from the collective bargaining agreement."[81] Although arbitrators must adhere to the interpretation and application of the collective bargaining agreement, they may also look to some outside sources for guidance as long as the award remains principally based on the agreement itself.[82]

In addition to the narrow scope of judicial review and the essence test, the Tenth Circuit's opinion in *Champion* emphasized the importance of the common law of the shop when rendering an arbitral decision.[83] As previously discussed, arbitrators are usually chosen because of their knowledge about a particular industry's practice and custom.[84] The parties assume the arbitrator will take into account any impact his decision might have on productivity and morale.[85] In fact, the industrial common law is "equally part of the collective bargaining agreement although not expressed in it."[86] If arbitrators did not possess the implied authority to reach beyond the four corners of the document, the character of labor arbitration would be severely limited.[87]

Judicial deference to arbitration decisions is extremely beneficial to the process because it allows the arbitrator to maintain governing authority over the dispute. Challenging the arbitral decision involves dragging the controversy into time-consuming and expensive litigation, effectively undermining exactly

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ADR, [49-Mar.] DISP. RESOL. J. 61 (1994).

78. *Enterprise*, 363 U.S. at 596.

79. *See* Litvak Packing Co. v. United Food and Commercial Workers, Local Union No. 7, 886 F.2d 275, 276 (10th Cir. 1989).

80. *Id.*

81. *Id.* (quoting *Enterprise*, 363 U.S. at 597).

82. *Enterprise*, 363 U.S. at 597.

83. *Champion*, 24 F.3d at 88-89.

84. *See supra* note 28 and accompanying text.

85. *Warrior*, 363 U.S. at 582.

86. *Id.* at 581-82.

87. *Id.* at 582. The uniqueness of labor arbitration must be emphasized. The entire collective bargaining effort is a type of industrial self-government. *Id.* at 580. The arbitrator becomes part of the process of "self-government" the parties have created and furthers the common goals of uninterrupted production and specialized solutions. *Id.* at 582.

what the arbitration process seeks to avoid.

C. *Arbitration and Civil Rights*

Although judicial deference is preferred in most instances, the Supreme Court held in three cases that an adverse decision under a collective bargaining agreement does not prevent an employee from instituting an action under a statute creating individual rights.[88] The mid-1980s and early 1990s witnessed a resurgence of Supreme Court confidence in the suitability for arbitration of statutorily based claims.[89] Lower courts, however, remain divided on whether private agreements to arbitrate statutory rights are enforceable.[90] Although arbitration is appropriate for resolving many contractual disputes, it is not an adequate substitute for a judicial proceeding in protecting federal statutory and constitutional civil rights.[91]

In *Alexander v. Gardner-Denver Co.*,[92] the Court rejected the rule of deferral and held that an employee's claim under Title VII[93] was not precluded by a prior arbitral decision against him.[94] The Court stated arbitration was "a

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88. Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728, 745 (1981) (holding that prior submission of a grievance to dispute resolution procedures under a contract would not bar a subsequent claim under the Fair Labor Standards Act); McDonald v. City of West Branch, 466 U.S. 284, 292 (1984) (holding that under 42 U.S.C. § 1983, where a police officer had received an adverse ruling in arbitration, the doctrines of res judicata and collateral estoppel did not apply to bar a civil rights action); Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974) (holding that an adverse award in arbitration would not bar a subsequent action under Title VII of the Civil Rights Act of 1964). *See generally* Robert G. Howlett, *Why Arbitrators Apply External Law, in* LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES 257, 264-68 (Max Zimny et al. eds., 1990) (noting, however, that nothing in the three opinions "supports a conclusion that arbitrators should not apply applicable law").

89. Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 789 (1992). *See* Rodriguez de Quijas v. Shearson Am. Express Inc., 490 U.S. 477, 485-86 (1989) (holding that an agreement to arbitrate disputes arising under the Securities Act is enforceable, overruling Wilko v. Swann, 346 U.S. 427 (1953)). The Court noted that, beginning with the lower courts, judicial hostility to arbitration had decreased over the years. *Rodriguez*, 490 U.S. at 480. This was confirmed when the Supreme Court endorsed arbitration of federal statutory rights in Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987). *Rodriguez*, 490 U.S. at 480. *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that an agreement to arbitrate claims arising under the Age Discrimination in Employment Act is enforceable). The Court's decision in *Gilmer* indicates a shift from restraint to deference with regard to agreements to arbitrate disputes arising under Title VII. *See* Plass, *supra*, at 779-80. Additionally, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which amended Title VII of the Civil Rights Act of 1964, contains language that encourages arbitration.

90. Plass, *supra* note 89, at 789.

91. *McDonald*, 466 U.S. at 290; Howlett, *supra* note 88, at 264-69. As an example of a constitutional right not appropriate for arbitration, *McDonald* pointed to 42 U.S.C. § 1983. 466 U.S. at 285 n.1. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

92. 415 U.S. 36 (1974).

93. 42 U.S.C. § 2000e (1988).

94. *Alexander*, 415 U.S. at 49, 56-59. The Court held that "Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first

comparatively inappropriate forum for the final resolution of rights created by Title VII."[95] In *Alexander*, the Court concluded that the federal policies favoring arbitration of labor disputes and prohibiting discriminatory practices in the workplace should complement one another.[96] Therefore, an employee should be allowed to pursue a remedy through arbitration as provided by the collective bargaining agreement, as well as in court, pursuant to Title VII.[97]

The informality of the arbitration process often contributes to the efficient, inexpensive and expeditious nature of the procedure.[98] These same characteristics, however, make arbitration a less desirable forum for the resolution of individual civil rights claims.[99]

D. Ryan v. City of Shawnee[100]

1. Facts

In *Ryan*, a black firefighter, sued the City of Shawnee, Oklahoma, in federal district court under 42 U.S.C. §§ 1981,[101] 1983,[102] and Title VII,[103] alleging illegal race discrimination.[104] Plaintiff, Nathaniel Ryan, was the city's first and only black firefighter.[105] Mr. Ryan asserted that during his employment "he was subjected to racial slurs and jokes, disciplined more harshly than white employees, subjected to discriminatory promotion practices, and eventually discharged because of his race."[106] Upon termination, Mr. Ryan filed a grievance with the firefighters union, who addressed the matter in arbitration pursuant to the collective bargaining agreement between the union and the city.[107]

During the arbitration proceeding, the union did not pursue the issues of harassment, discipline, and promotions.[108] The arbitrator determined that the

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pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.* at 49. The employee in *Gardner-Denver*, unlike the employee in *Gilmer*, did not choose to limit his rights by agreeing to arbitrate his title VII claims. *See Gilmer*, 500 U.S. at 35; Plass, *supra* note 89, at 790-91.

95. *Alexander*, 415 U.S. at 56. The Court expressed its concern that the factfinding process in arbitration is usually not equivalent to judicial factfinding and stated that an arbitrator's experience encompasses "the law of the shop and not the law of the land." *Id.* at 57. This idea, that the judicial process was superior to arbitration for resolving disputes involving statutory claims, was overturned in *Gilmer*, 500 U.S. at 34 n.5, *noted in* Sacks v. Richardson Greenshield Sec. Inc., 781 F.Supp. 1475, 1481 (E.D. Cal. 1991).

96. *See Alexander*, 415 U.S. at 59-60.

97. *Id.* The cases following *Gilmer*, however, appear to place the burden of showing that Congress did not intend to preclude the statutorily based claim on the individual opposing arbitration. *See* Plass, *supra* note 89, at 790 n.57.

98. *Alexander*, 415 U.S. at 58.

99. *Id.*

100. 13 F.3d 345 (10th Cir. 1993).

101. 42 U.S.C. § 1981 (1988 & Supp. V 1993).

102. 42 U.S.C. § 1983 (1988).

103. 42 U.S.C. § 2000e-5 (1988 & Supp. V 1993).

104. *Ryan*, 13 F.3d at 346.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

city violated the collective bargaining agreement because it failed to afford Mr. Ryan dismissal procedures which were required under the agreement.[109] The arbitrator expressly declined to rule on the merits of the claim and ordered that Mr. Ryan be reinstated with backpay.[110]

Two subsequent lawsuits followed. Mr. Ryan filed a race discrimination claim in federal district court and the city challenged the arbitration award in state court.[111] After the state court affirmed the arbitrator's award, the federal district court granted the city's motion for summary judgment on Ryan's civil rights claims.[112] The court declared that any consequential damages should be resolved under the collective bargaining agreement and that the process was over.[113]

2. Tenth Circuit Opinion

In *Ryan*, the Tenth Circuit relied upon the Supreme Court's decisions in *Alexander*[114] and *McDonald*[115], acknowledging that arbitration is not an adequate substitute for a court proceeding when adjudicating claims under Title VII and § 1983.[116] In addition, the Tenth Circuit looked to these cases in holding that an arbitration award does not bar a subsequent cause of action under § 1981.[117]

The Tenth Circuit declared that because the purpose of arbitration is to avoid court intervention, a court may only intervene to examine whether the arbitrator's decision drew its essence from the collective bargaining agreement.[118] In explaining the concept of issue preclusion, the court said it does not apply "when the party against whom the earlier decision is interposed did not have a 'full and fair opportunity' to litigate the critical issue in the earlier case."[119]

In *Ryan*, the state proceeding was limited to the city's challenge of the arbitration award and did not address Mr. Ryan's civil rights claims.[120] The Tenth Circuit reasoned that because the state judicial proceeding did not afford Mr. Ryan an opportunity to present his civil rights claims, it could not preclude further litigation of his federal claims.[121] Accordingly, the court reversed the district court's grant of summary judgement.[122]

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109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 347.
114. 415 U.S. 36 (1974).
115. 466 U.S. 284 (1984).
116. *Ryan*, 13 F.3d at 347.
117. *Id.* at 347 n.1. In *Alexander*, the Supreme Court held that a plaintiff does not waive the right to a trial de novo by first pursuing arbitration under a collective bargaining agreement. *Alexander*, 415 U.S. at 49.
118. *Ryan*, 13 F.3d at 348.
119. *Id.* (quoting Underside v. Lathrop, 645 P.2d 514, 516 n.6 (Okla. 1982) (quoting Allen v. McCurry, 449 U.S. 90, 95 (1980))).
120. *Id.*
121. *Id.*
122. *Id.* at 346, 350.

3. Analysis

The Tenth Circuit in *Ryan* focused on the limitations of arbitration, maintaining that "arbitration could not provide an adequate substitute for judicial proceedings in adjudicating [civil rights] claims."[123] Although arbitrators are often familiar with the procedures of the workplace, they may not have "the expertise required to solve the complex legal issues presented by the civil rights statutes."[124] In addition, as the court correctly pointed out, the arbitrator is only authorized to interpret the terms of the collective bargaining agreement.[125] A civil rights claim may conflict with this agreement, therefore, making the courtroom the proper forum in which to decide civil rights cases.

However broad the arbitrator's authority, it is by no means exclusive and cannot preclude certain substantive claims by union employees.[126] An arbitrator has no authority to enforce civil rights laws in conflict with rights protected under the collective bargaining agreement.[127] The arbitration process has the potential to deprive an employee of their constitutional rights because it might not be in the union's interest to vigorously pursue such a claim.[128]

An employee's statutory rights exist independent from constitutional rights, even if the same occurrence violates both categories of rights.[129] The federal government has enacted statutory protection for individuals that may not be waived through a collective bargaining agreement.[130] The *Ryan* court properly adhered to well-established precedent in holding that Mr. Ryan may pursue his civil rights claims in a court of law.

II. ARBITRATION AND THE FEDERAL ARBITRATION ACT

A. *Background*

1. Introduction

Although arbitration enjoys widespread use in labor relations, it is recognized in commercial areas as well.[131] In 1925, Congress enacted the United States Arbitration Act, now known as the Federal Arbitration Act ("FAA"),[132] to alleviate judicial hostility towards arbitration and provide judicial enforcement of private agreements to arbitrate.[133] The FAA established a federal policy favoring arbitration by giving courts the power to compel

123. *Id.* at 347 (quoting McDonald v. City of West Branch, 466 U.S. 284, 289 (1984)).
124. *Id.* (quoting *McDonald*, 466 U.S. at 290).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Alexander*, 415 U.S. at 49-50.
130. *See Gilmer*, 500 U.S. at 29 n.3 (Age Discrimination in Employment Act); *Barrentine*, 450 U.S. at 740 (Fair Labor Standards Act); *Alexander*, 415 U.S. at 37 (Title VII of the Civil Rights Act of 1964).
131. *See generally* Overby, *supra* note 46 (discussing the substantive arbitrability of disputes under the FAA).
132. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 1-9 (1988 & Supp. V 1993).
133. Overby, *supra* note 46, at 1141-42.

arbitration, stay proceedings pending arbitration, and affirm arbitral awards.[134] Judicial enforcement of arbitration agreements allowed the courts to achieve the Act's other goal—to provide fast and efficient dispute resolution and lighten the case loads of federal courts.[135]

2. Second Arbitration Trilogy

In 1984, the Supreme Court decided a group of consolidated cases known as the "Second Arbitration Trilogy."[136] In this new trilogy, the Supreme Court approved the federalization of arbitration, established that the FAA applies in state courts, and declared that issues of arbitrability should be decided in accordance with the federal policy favoring arbitration.[137] The cases comprising the Second Arbitration Trilogy sought to strengthen, and even broaden, the scope of the FAA and the federal policy of enforcing agreements to arbitrate absent a ground for revocation.[138]

3. Fundamentally Fair Hearing

The courts have created a basic requirement that both parties to an arbitration be afforded a "fundamentally fair hearing."[139] Arbitration proceedings are not bound by the formal rules of evidence or procedure, unless expressly agreed to by the parties.[140] Although the requirements vary by state, most courts agree that a fundamentally fair hearing requires only notice, the opportunity to be heard and to present evidence, the opportunity to make an argument before the decision makers, and decision makers free from bias.[141] In fact, the FAA allows arbitration to go forward "with only a summary hearing

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134. *Id.* at 1137.

135. *Id.* at 1141.

136. The first case of the Second Arbitration Trilogy was Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) (holding that the FAA requires district courts to compel arbitration of pendent arbitrable claims when one party files such a motion, even if it would mean inefficiency). The Court explained that the Act gave district courts no discretion to decide the arbitrability of issues about which an arbitration agreement has been signed. *Id.* at 218. The second case was Southland Corp. v. Keating, 465 U.S. 1, 10, 14-15 (1984) (pointing out that Congress mandated the enforcement of arbitration agreements and ultimately holding that the scope of the FAA encompasses claims in state court). The Court recognized only two limitations on the enforceability of provisions governed by the FAA. First, "they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce.'" *Id.* at 11. Second, "such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" *Id.* (quoting 9 U.S.C. § 2). The final case of the Trilogy was Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (holding that § 2 of the FAA effectively creates substantial federal law regarding arbitrability and that it overrides any contrary state policy). *See generally* Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985) (tracing the origins and assessing the future application of the FAA).

137. *See* Hirshman, *supra* note 136, at 1306-07. Section 2 of the FAA is the primary substantive provision of the Act and provides that an arbitration agreement "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Cone Memorial Hosp.*, 460 U.S. at 24 (quoting 9 U.S.C. § 2).

138. *See* Hirshman, *supra* note 136, at 1352-53.

139. Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1012-13 (10th Cir. 1994).

140. Robbins v. Day, 954 F.2d 679, 685 (11th Cir.), *cert. denied*, 113 S. Ct. 201 (1992).

141. *Bowles*, 22 F.3d at 1013.

and with restricted inquiry into factual issues."[142]

Despite the fundamentally fair hearing requirements, courts continue to afford the arbitrator wide latitude in making an award.[143] For instance, in *Jenkins v. Prudential-Bache Securities, Inc.*,[144] the court held that errors in the arbitrator's interpretation of the law or findings of fact did not warrant reversal of the decision.[145] "A court can set aside an arbitration award only if one of the statutory or judicial grounds for vacation has been proven."[146]

4. Vacation and Review of Arbitrators Award Under FAA § 10

Under § 10 of the FAA, any party to the arbitration can apply to vacate an arbitration award:

> 1) where the award was procured by corruption, fraud, or undue means. 2) where there was evident partiality or corruption in the arbitrator or either of them. 3) where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. 4) where the arbitrators exceeded their powers . . . . 5) where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.[147]

5. Stay of Proceedings Under FAA § 3

Section 3 of the FAA addresses lawsuits brought in federal court regarding issues that the parties agreed to in writing prior to the dispute.[148] In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[149] the Supreme Court recognized that although § 3 of the FAA refers to a suit "in any of the courts of the United States," both state and federal courts are obligated

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142. *Robbins*, 954 F.2d at 685.

143. *Id.*

144. 847 F.2d 631 (10th Cir. 1988).

145. *Id.* at 635.

146. *Bowles*, 22 F.3d at 1014. See *infra* note 147 and accompanying text for further discussion of the grounds for vacating an arbitration award.

147. 9 U.S.C. § 10 (1988 & Supp. V 1993). The plain language of § 10 suggests the provision is not applicable to an action to vacate brought in state court. The decisions of state courts, however, are divided with regard to the applicability of § 10. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 676 (1994).

148. 9 U.S.C. § 3 provides:

> [If] any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending . . . shall on the application of one of the parties stay the trial until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1988)

The Supreme Court has not clarified whether or not a § 3 claim is applicable to actions in state court. Lower courts have generally held that either § 3 applies to state courts or that the FAA requires state courts to grant comparable stays. BORN, *supra* note 147, at 229.

149. 460 U.S. 1 (1983).

to grant stays of litigation.[150] In most cases, a § 3 stay is enough to adequately protect the right to arbitration, but in special cases a stay of litigation is not enough and the courts must rely on other provisions of the FAA to grant the parties relief.[151]

6. Ex Parte Communications

Reversal of an arbitral decision based solely on ex parte communication with an arbitrator is rare. For example, in *Creative Homes & Millwork, Inc. v. Hinkle*,[152] an arbitrator's ex parte contact with a party's witness, after testimony, to discuss possible employment, was not "misconduct" warranting vacation of the arbitration award.[153] Additionally, in *Vincent Builders, Inc. v. American Application Systems, Inc.*,[154] the plaintiff failed to prove that one of the arbitrators engaged in improper ex parte communications with the defendant's attorney and representatives of the defendant corporation.[155] The court in *Vincent* stated that ex parte communications must involve facts, issues or evidence relevant to the subject of the arbitration.[156] Rule 29 of the American Arbitration Association's Rules and Code of Ethics, however, states that "[t]here shall be no direct communication between the parties and a neutral arbitrator other than at oral hearings."[157] To prevent disputes regarding ex parte communications with an arbitrator, the parties should put an express clause in their contract about the nature of any such contact or prohibit it entirely.

7. Section 16(a)(3) of the FAA

Section 16 of the FAA authorizes immediate appellate review of an order "refusing a stay" of litigation pending arbitration or an order denying a motion to compel arbitration.[158] On the other hand, § 16 of the FAA provides for immediate review of a decision favoring arbitration under only two circumstances.[159] First, when the district court's order represents "'a final decision with respect to arbitration'"[160] and second, "when 28 U.S.C. § 1292(b) provides the means for an interlocutory appeal."[161]

Section 16(a)(3) focuses on the first of the two circumstances: when a

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150. *Id.* at 27 n.34.

151. *Id.* at 27. A state may need to rely on § 4 of the FAA to compel arbitration, where in a case similar to *Moses* the party opposing arbitration is not the one from whom payment or performance is sought. *Id.*

152. 426 S.E.2d 480 (N.C. 1993).

153. *Id.* at 482-83.

154. 547 A.2d 1381 (Conn. 1988).

155. *Id.* at 1386-87.

156. *Id.*

157. *Creative Homes*, 426 S.E.2d at 482 (quoting the American Arbitration Association, Construction Industry Arbitration Rules § 29 (1991)).

158. 9 U.S.C. § 16 (a)(1)(A-C) (Supp. 1993). Section 16 was originally codified at 9 U.S.C. § 51. It was renumbered by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, Title III, § 325 (a)(1), 104 Stat. 5089, 5120 (1990).

159. Humphrey v. Prudential Sec. Inc., 4 F.3d 313, 317 (4th Cir. 1993).

160. *Id.* (quoting 9 U.S.C. § 16(a)(3)).

161. *Id.*

final decision is made regarding arbitration.[162] A decision is final and appealable if it ends the litigation on its merits and leaves nothing for the district court to preside over other than execution of judgement.[163] An order compelling arbitration is final when it results from a proceeding in which the only issue is the arbitrability of the dispute.[164] The court in *Humphrey* held that absent a "final decision" incapable of review at any other point, the court of appeals was precluded from reviewing the district court's decision favoring arbitration.[165]

8. "Embedded" Proceeding and Independent Action

The question of whether a dispute is arbitrable can arise incident to the pending action or as an entirely independent action.[166] If the arbitrable issue is "embedded," a proceeding whereby the issue has been raised pendent to a larger action, then the statute generally allows an immediate appeal only from decisions against arbitration.[167] The statute "bars an immediate appeal when the decision is in favor of arbitration."[168] On the other hand, if the case presents arbitrability as the sole issue, the order is considered final and appellate review is immediately available.[169]

Although the rules governing arbitration proceedings open the door to various areas of litigation, the FAA focuses on ensuring parties a fair hearing and on limiting court intervention in arbitration agreements. These aspects of the FAA are the subject of the following Tenth Circuit opinions on attorney conduct and appellate review.

B. Bowles Financial Group Inc. v. Stifel, Nicolaus & Co.[170]

1. Facts

In *Bowles*, a dispute arose concerning the amount of compensation owed Bowles Financial Company ("Bowles") by Stifel, Nicolaus & Co. ("Stifel") for the nonperformance of financial services.[171] The parties submitted the matter to arbitration in accordance with the terms of an agreement granting the arbitrator sole authority to govern the procedural rules of the dispute.[172] At various times during the proceedings, counsel for Bowles intentionally, affirmatively, and repeatedly communicated to the arbitrators a previous settlement offer made by Stiefel.[173] The district court expressed shock as to the

162. 9 U.S.C. § 16 (a)(3).
163. American Casualty Co. v. L-J, Inc., 35 F.3d 133, 136 (4th Cir. 1994); *Humphrey*, 4 F.3d at 317.
164. *Humphrey*, 4 F.3d at 317.
165. *Id.* at 319.
166. *Id.* at 316.
167. *Id.*
168. *Id.*
169. *Id.* at 317.
170. 22 F.3d 1010 (10th Cir. 1994).
171. *Id.* at 1011.
172. *Id.*
173. *Id.*

counsel's actions, but held that the arbitration hearing was not "fundamentally unfair"[174] and allowed the arbitration award to stand.[175]

2. Tenth Circuit Opinion

The Tenth Circuit Court of Appeals affirmed the district court's decision that the counsel's actions did not warrant vacation of the arbitral award.[176] First, the court discussed several features of arbitration and declared that "by agreeing to arbitrate, a party 'trades the opportunity for review by the courtroom for the [perceived] simplicity, informality, and expedition of arbitration.'"[177] The court noted that the only requirement an arbitrator must grant the parties is a fundamentally fair hearing,[178] and that no evidence was presented to suggest the hearing was not fundamentally fair.[179]

The court then considered the appropriate level of review for evaluating a district court's decision to confirm or vacate an arbitration award. Past Tenth Circuit decisions had reviewed a district court's decision to confirm, vacate or deny a motion to vacate an arbitration award without reference to the standard of review.[180] The court realized, however, that the standard plays an important role in ensuring that arbitrators comply with statutory requirements. Therefore, the court followed the decisions of other circuits[181] and applied de novo review in *Bowles*.[182]

The court went on to emphasize the narrowness of its review,[183] stating that error in the arbitrator's interpretation of law or findings of fact do not merit reversal.[184] Statutory and other legal requirements imposed upon arbitration contracts, proceedings, and awards are the only tools employed when vacating a decision.[185] Although the court expressed dismay at the counsel's conduct, nothing in the arbitration agreement explicitly condemned the communication of settlement offers to the arbitrators.[186] The court does not have

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174. *Id.* at 1013. Courts tend to agree that a fundamentally fair hearing only requires notice, opportunity to be heard and to present evidence before the decision makers, and that the decision makers be free from bias, while the FAA allows arbitration to proceed with only a summary hearing and with restricted inquiry into the factual issues. *Id.*

175. *Id.*

176. *Id.* at 1014.

177. *Id.* at 1012 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29-33 (1991)).

178. *Id.* at 1013 ("[A] fundamentally fair hearing requires only notice, opportunity to be heard, and to present relevant and material evidence and argument before the decisionmakers, and that the decisionmakers are not infected with bias.").

179. *Id.*

180. *Id.* at 1012.

181. *Id.* (citing Atlantic Aviation Inc. v. EBM Group, Inc., 11 F.3d 1276, 1282 (5th Cir. 1994); Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 145 (4th Cir. 1993); Employers Ins. v. National Union Fire Ins. Co., 933 F.2d 1481, 1485 (9th Cir. 1991)).

182. *Id.*

183. *Id.* The FAA allows a reviewing court to vacate an arbitration award in limited circumstances including when the award was procured by fraud, corruption, or undue means; when there is evidence of partiality or corruption by the arbitrators; where there was misconduct by the arbitrators; or where the arbitrators exceeded their powers. 9 U.S.C. § 10 (1988 & Supp. V 1993).

184. 22 F.3d at 1012.

185. *Id.*

186. *Id.*

the power to impose its rules of evidence on the arbitration proceedings. After reviewing the district court decision, the Tenth Circuit affirmed that none of the statutory grounds for vacating an arbitration award existed.[187]

3. Analysis

It is important to limit federal court intervention in arbitration agreements. It would undermine the arbitration process to arbitrate and litigate a dispute. The federal court's hands should, therefore, be tied in such cases so as not to frustrate the process.

a. *De novo Review*

On a hearing de novo, the court reviews the matter as a court of original jurisdiction and not appellate jurisdiction.[188] The court of appeals must, therefore, adhere to the same standards of review that bound the district court. Although de novo review is typically seen as giving the court broad discretion, the limited review available to the district court in arbitration cases carries over to the appellate court. This results in the Tenth Circuit being equally as constrained as the district court in its ability to reverse an arbitral decision.

Federal policy favors judicial deference towards arbitration decisions and mandates that courts do not intrude unnecessarily on contractually imposed arbitration.[189] The Tenth Circuit's decision in *Bowles* follows the precedent of other circuit courts and lends support to the arbitral process by demonstrating judicial respect towards arbitrators. In an arbitration decision, a federal judge cannot make a broad decision which conflicts with the federal policy favoring judicial deference.

b. *Ex parte Communications*

The behavior of Bowles's counsel is generally discouraged in arbitration, although it was within the broad procedural rules agreed to by the parties. In a courtroom, such conduct could result in serious sanctions. Courts, however, do not have the authority to re-draft an arbitration agreement between the parties and must enforce it as written.

The kind of behavior exhibited by Bowles's counsel was not expressly prohibited by the agreement. The integrity of arbitration in the long run, however, depends upon the court's strict interpretation of arbitration agreements in the short run. With their limited authority, courts must control the arbitration process on a daily basis in order to prevent significant obstacles in the future.

Due to their freedom of contract, parties have only themselves to blame for not incorporating an express prohibition against ex parte communications into an arbitration agreement. Parties often choose arbitration because of the broad contractual control over the process, and can avoid unwanted ex parte

187. *Id.*
188. BLACK'S LAW DICTIONARY 721 (6th ed. 1990).
189. *Robbins*, 954 F.2d at 682.

communication by contracting to limit such behavior in advance. By expressly contracting about acceptable ex parte communications, if any, the parties serve the federal policy of keeping arbitration disputes out of court. The ability to settle disputes through good faith and fair dealing is thwarted if the controversy is complicated by excessive delay and costs caused by unwarranted judicial interference.

C. Adair Bus Sales, Inc. v. Blue Bird Corp.[190]

1. Facts

In *Adair Bus Sales, Inc. v. Blue Bird Corp.*, a distributor of school buses ("Adair") brought an action against the manufacturer of the buses ("Blue Bird") for breach of contract.[191] The dispute arose when a Texas school district canceled a substantial order with Adair because it questioned its authority to sell Blue Bird buses in Texas.[192] Adair brought an action against Blue Bird alleging breach of contract and requesting damages.[193] Adair also sought a declaration that the arbitration clause in the arbitration agreement was not applicable to the particular dispute.[194] The district court, finding that the dispute was within the scope of the arbitration clause, ordered the parties to proceed with arbitration pursuant to their prior agreement and dismissed the complaint.[195] However, under § 3 of the FAA, the district court should have granted defendant's motion to stay the action pending arbitration.[196] Section 3 states that on application of either party, the court shall stay the trial until arbitration has been held in accordance with the terms of the agreement.[197]

2. Tenth Circuit Opinion

Due to the procedural error, the Tenth Circuit had appellate jurisdiction. The court corrected the mistake by vacating the district court's order of dismissal and remanding the case for a stay pending arbitration.[198] The opinion began with a discussion of Congress's intent in its 1988 amendment of the FAA to "'promote appeals from orders barring arbitration and limit appeals from orders directing arbitration.'"[199] This fundamental principle locks the parties into the prior arbitration agreement and emphasizes the importance of allowing a hearing on the issue before any court intervention. Although this Congressional policy was not fully implemented,[200] the court reviewed the

190. 25 F.3d 953 (10th Cir. 1994).
191. *Id.* at 953.
192. *Id.*
193. *Id.*
194. *Id.* at 954.
195. *Id.* at 954-55.
196. 9 U.S.C. § 3 (1988).
197. *Id.*
198. *Adair*, 25 F.3d at 955.
199. *Id.* (quoting Filanto, S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58, 60 (2d Cir. 1993).
200. *Id.* ("Section 16(b)(1) and (2) prohibits appeals from interlocutory orders staying an action pending arbitration pursuant to § 3 and from orders compelling arbitration to proceed under § 4.").

general policy of § 16 of the FAA[201] which allows an appeal to be taken from a final arbitration decision.[202]

A majority of the circuits have adopted the view that, within the meaning of § 16(a)(3), an order is final and immediately appealable only if arbitrability is the sole issue before the district court.[203] A minority of courts, on the other hand, hold that dismissal of a complaint raising issues other than arbitrability are final and appealable under § 16(a)(3).[204] Without much discussion behind its holding, the Tenth Circuit agreed with and adopted the majority approach, explaining only that a stay pending arbitration under § 3 will rarely be a final decision within § 16(a)(3).

The court concluded by declining to reach the merits of Adair's breach of contract appeal, since it adopted the majority approach which discouraging immediate appellate review in a proceeding where the arbitrability of the issue is not the only relief sought.[205] In accordance with 9 U.S.C. § 3, the court vacated the district court's order of dismissal and remanded the case for entry of a stay pending arbitration.[206]

3. Analysis

Although recently decided, *Adair* has become a leading case in the area of arbitration appeals. *Adair* stands for the proposition that § 10 of the FAA forecloses appellate review of district court arbitration decisions, unless the

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201. 9 U.S.C. § 16 outlines when an appeal may be taken from a district court ruling involving arbitration:

(a) An appeal may be taken from—
(1) an order—
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title of compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration that is subject to this title.
(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (Supp. V 1993).

202. *Adair*, 25 F.3d at 955.

203. *Id.* (citing Gammaro v. Thorp Consumer Discount Co., 15 F.3d 93, 95 (8th Cir. 1994); Humphrey v. Prudential Sec. Inc., 4 F.3d 313, 317-18 (4th Cir. 1993); S L H S.P.A. v. Miller-St. Nazianz, Inc., 988 F.2d 1518, 1522 (7th Cir. 1993); Filanto, S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58, 61 n.3 (2d Cir. 1993); Thompson McKinnon Sec., Inc. v. Salter, 873 F.2d 1397, 1399 (11th Cir. 1989); Delta Computer Corp. v. Samsung Semiconductor & Telecommunications Co., 879 F.2d 662, 664-65 (9th Cir. 1989).

204. *Id. See* Arnold v. Arnold Corp., 920 F.2d 1269, 1274-76 (6th Cir. 1990).

205. *Adair*, 25 F.3d at 954-55. Plaintiff also sought a declaratory judgement that the arbitration clause in the 1991 distribution agreement between the parties did not apply to this particular dispute. *Id.*

206. *Id.*

order can be characterized as a final decision, or falls within limited exceptions found in the subsections. In *Adair*, the district court dismissed the remaining claims in an embedded proceeding, but the order to arbitrate was not appealable. *Adair* follows the rule adopted in *Humphrey*, "that an embedded proceeding may not give rise to a final decision subject to section 16(a)(3) review, even when all the claims in which the arbitration issue is embedded are resolved."[207]

Regarding the trial court's incorrect procedural ruling, the Tenth Circuit followed correct FAA procedure by refusing to hear the case until arbitration proceedings had been held. By adopting the majority view, which discourages immediate appellate review other than where a determination of arbitrability is the sole issue, the court ensured district court maintenance over the case. This measure furthers the federal policy discouraging court intervention. Under the majority view, only questions as to the arbitrability of the underlying dispute itself are referred to the appellate level, thereby reducing the number of arbitration appeals.

Consistent with the majority decision, an order does not constitute a final decision if issues other than arbitrability are raised. Stays pending arbitration entered pursuant to § 16(a)(3), however, will be few because of the interlocutory effect of § 3.[208] Section 3 encompasses disputes brought on "any issue referable to arbitration under an agreement in writing," and, therefore, the likelihood of issues other than the dispute's arbitrability is inherent.[209] Due to the wide coverage of § 3, a stay pending arbitration will almost always be naturally embedded in the dispute and will be characterized as interlocutory, not as a final decision under § 16(a)(2).

CONCLUSION

Notwithstanding the declining state of labor organizations, labor arbitration remains distinct with "its own traditions and with a common bond of precedent and practice."[210] Relying on the principle of judicial deference, the Tenth Circuit reemphasized the narrow scope of review applied to arbitration awards in *Champion*. However, the court noted that civil rights are one exception to the federal policy favoring arbitration, as illustrated in the *Ryan* decision.

In addition to labor organizations, arbitration is also commonly used in commercial contexts. The cases surveyed reveal the Tenth Circuit's reliance on the FAA to guide its decisions. The court has followed the latest trends by establishing de novo review of district court orders in *Bowles* and by its interpretation of FAA § 16 in *Adair*. In its recent arbitration cases, the Tenth Cir-

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207. Humphrey v. Prudential Sec. Inc., 4 F.3d 313, 318 (1993); *Adair*, 25 F.3d at 955. *See also* American Casualty Co. v. L-J Inc., 35 F.3d 133, 136-37 (4th Cir. 1994) (noting that the result in *Humphrey* is consistent with a majority of other circuits).

208. *Adair*, 25 F.3d at 955.

209. *Id.* (quoting 9 U.S.C. § 3).

210. David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration*, [48-Sep.] ARB. J. 18, 24 (1993).

cuit has exhibited an overall willingness to defer to the arbitration process, contributing to the continued success of arbitration in the future.

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