

**POSSIBILITY OF EXPANDING JUDICIAL REVIEW MECHANISM IN
ARBITRATION BY PARTY AGREEMENT**

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ABSTRACT

Arbitration is an alternative dispute resolution mechanism that provides for speedy and efficient settlement of disputes. Arbitral awards are viewed as final and binding. However, parties sometimes try to expand judicial review mechanism by agreement. This paper analyzes such a possibility, by assessing the compatibility of expanded judicial review with the nature of arbitration, especially given the fact that parties increasingly want to have an appeal mechanism in international commercial arbitration. Also, the validity of arbitration agreements containing expanded judicial review is discussed in the light of case law from different jurisdictions, emphasizing that arbitration agreements containing expanded judicial review mechanism are invalid. Analysis is concluded by evaluating pros and cons of allowing expanded judicial review, as well as it gives suggestions on how parties could contract for appeal and review mechanism on merits.

TABLE OF CONTENTS

Abstract	i
Table of Contents	ii
Chapter 1: Introduction	1
Chapter 2: Compatibility of Expanded Judicial Review Mechanism with Arbitration Proceedings	3
2.1 Finality of the Arbitral Award vs. Party Autonomy.....	5
2.1.1 Finality of the Arbitral Award as an Essential Feature of Arbitration.....	5
2.1.2 Contractual Nature of Arbitration Agreement as a Cornerstone of Arbitration ..	8
2.2 National Laws Regulating Parties’ Stipulations Regarding Expansion of Judicial Review of Arbitral Awards	10
Conclusion	14
Chapter 3: Validity of Arbitration Agreements Containing Expanded Judicial Review Mechanism – Comparative Case Law Analysis	14
3.1 U.S Approach	15
3.1.1 Expanded Judicial Review Allowed	18
3.1.2 Expanded Judicial Review Disallowed.....	20
3.1.3 States that allowed expanded judicial review after Hall Street.....	21
3.1.4 Was Hall Street Decided Correctly?	24
3.2 European Perspective and other jurisdictions	28
3.2.1 Germany.....	28
3.2.2 France.....	30
3.2.3 New Zealand	31
Conclusion	31
Chapter 4: Should Judicial Review Mechanisms be Always Allowed in Arbitration by Party Agreement?	32
4.1 Advantages of Allowing Appeal Mechanism in Arbitration	33
4.2 Disadvantages of Allowing Appeal Mechanism in Arbitration	35
4.3 Solutions Enabling Parties to Appeal Arbitral Awards.....	37
Chapter 5: Conclusion	39
Bibliography	39

CHAPTER 1: INTRODUCTION

Arbitration is an alternative dispute resolution mechanism that enables parties to shape their arbitration agreements as they see fit.¹ Thus, party autonomy is viewed as one of the main advantages in international commercial arbitration.² Parties to arbitral proceedings are generally free to select the factors like the composition of arbitral tribunal, the applicable law to the substance of the dispute, the place of arbitration.³ However, arbitration is often viewed as desirable by businesses not only because parties can tailor their arbitration agreements to their needs, but also because once an arbitral tribunal renders an award it becomes final and binding, precluding parties from seeking a review of an award on merits.⁴

Nevertheless, the virtues of party autonomy and finality pose a dilemma. Given the fact that parties are free to agree on arbitration proceedings as they see fit, can parties expand judicial review of awards more than is normally available under the law of the seat of arbitration? Are parties able to agree on non-final arbitration?⁵ If one views the arbitration as a private and flexible procedure, indeed such an expansion should be possible. However, at the same time, by allowing expansion of judicial review of arbitral awards, the virtue of finality of arbitral awards is undermined. If awards rendered by arbitral tribunal are not final and subject to appeal to state courts, then not only finality as a feature of arbitration is undermined, but also speed of the proceedings is reduced, as well as cost of the proceedings is increased.⁶

It can be thus asked whether parties can validly contract for heightened judicial scrutiny in their arbitration agreements. Is such a step compatible with the nature of arbitration? This thesis will

¹ Gary B. Born, *International Commercial Arbitration*, (Kluwer Law International 2009) 82-3.

² Born (n 1), 82-3.

³ *ibid* 82-3.

⁴ *ibid* 81-2.

⁵ Reinmar Wolff, 'Party Autonomy to Agree on Non-Final Arbitration?', *ASA Bulletin*, (Kluwer Law International 2008, Volume 26 Issue 3) pp. 626 – 641,

⁶ Wolff (n 5) 639.

answer these questions by looking into the foundations of arbitration and assessing the relationship between party autonomy on one hand and finality on the other hand (Chapter 2). The relationship will be looked at not only on a theoretical level (2.1), but also the current position of countries in different jurisdictions will be discussed, by drawing a conclusion as to the possibility for the parties to expand judicial review mechanism by agreement when looking into national laws regulating parties' stipulations regarding expanded judicial review (2.2). Furthermore, the validity of parties' contractual stipulations expanding judicial review mechanism will be also analyzed in the light of case law from US, civil law jurisdictions and common law countries like New Zealand (Chapter 3). Comparative case analysis will allow conclusions to be drawn not only as to the validity of heightened judicial review, but also to look at the rationale and problems behind decisions to enforce or to invalidate such contractual stipulations in arbitration agreements, whilst at the same time concentrating on compatibility of expanded judicial review mechanism with principles of party autonomy and finality. It will also suggest potential path that courts might take in the future regarding this matter. Finally, pros and cons of expanded judicial review will be discussed (Chapter 4). The discussion will be concluded by possible solutions to the problems that expanded judicial review mechanism can raise.

Before any meaningful discussion regarding expansion of judicial review mechanism by party agreement, it is important to describe the meaning of the key concept to be used in this thesis. It is wise to start with the concept of "expanded judicial review". This concept will be used interchangeably with other expressions having the same meaning. There is no single definition for parties' agreement to expand the statutory grounds on the basis of which courts will have to review the award rendered by the tribunal. Some authors refer to it as to "expanded judicial

review mechanism”,⁷ however, in this paper this concept will also be sometimes referred to as simply “appeal and review mechanism”. For the purposes of this thesis, it must be noted that different expressions used for the expanded judicial review have the same meaning – expanding the judicial review beyond what is provided in arbitration respective laws. It is also important to note, that typically expanding judicial review means contracting for the court’s review of an arbitral award on merits⁸, since usually the only recourse available to parties against an arbitral award is setting aside proceedings that involve procedural impropriety rather than review on merits.⁹

⁷ John J. Barceló III, ‘Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective’ (2009), Cornell Law Faculty Working Papers. Paper 67.; Tom Swoboda, ‘De Novo a No No: Contractually Expanded Judicial Review Clauses Do Not Preclude FAA Application in State Court Unless the Parties Make It Intentionally Clear the FAA Does Not Apply in Their Agreement - Raymond James Fin. Servs., Inc. v. Honea’, 2011 J. Disp. Resol. (2011)

⁸ Barceló (n 6) 1.

⁹ Born (n 1), 81.

CHAPTER 2: COMPATIBILITY OF EXPANDED JUDICIAL REVIEW MECHANISM WITH ARBITRATION PROCEEDINGS

This chapter will analyze the relationship between two competing forces in international commercial arbitration – party autonomy and finality of arbitral awards.¹⁰ (2.1). In assessing the inter-relation between these concepts, it will be evaluated and discussed, whether expansion of judicial review mechanism by party agreement is compatible with the nature of arbitration. Compatibility of arbitration with expanded judicial review will be also measured by an overview of national arbitration laws. Thus, the legal position taken by different countries regarding such an expansion will be assessed by drawing conclusions as to the prevailing position in different jurisdictions. It is accepted principle in international arbitration that both party autonomy and finality are principles of vital importance to arbitral proceedings.¹¹ However, the underlying problem with this concept is an uneasy one. Can parties by virtue of their autonomy circumvent the finality of arbitration award? Are there limits to their contractual freedom? This section will answer these questions by analyzing the conflict between party autonomy and finality with a special focus on parties' possibility to expand judicial review mechanism by agreement.

The chapter will start from a discussion regarding finality as a cornerstone of arbitration proceedings, highlighting the underlying rationale for the finality of arbitration awards in arbitration. (2.1.1) After the discussion on finality, the principle of party autonomy will be evaluated, emphasizing the contractual nature of arbitration as a private method of dispute resolution (2.1.2). Furthermore, pro-arbitration policy considerations will be also taken into account, by ascertaining what is pro-arbitration – is it a party freedom to agree on their

¹⁰ Wolff (n 5) 626.

¹¹ Born (n 1), 81-83.

arbitration as they see fit, or are there limitations to their arbitration agreements? (2.2) Finally, national laws regulating parties' stipulations will be overviewed by drawing conclusions as to the current position taken in different jurisdictions regarding expanding judicial review by party agreement.

2.1 Finality of the Arbitral Award vs. Party Autonomy

The conflict between finality of arbitral award and party autonomy is a long-discussed topic among various scholars¹², especially in the context of expanded judicial review mechanism. As explained above, the party autonomy enables parties to contract for their arbitration proceedings as they want.¹³ However, another core principle in any arbitration proceedings is finality.¹⁴ Once an award is rendered by arbitral tribunal, it is final and binding. Thus, courts have limited powers of intervention, and those powers are usually limited to procedural issues.¹⁵ It is thus important to analyze in turn the two concepts – their meaning and compatibility with each other, in order to see whether expanded judicial review is in principle compatible with arbitration.

2.1.1 Finality of the Arbitral Award as an Essential Feature of Arbitration

For a long time arbitration has been viewed by selecting parties as advantageous, since it provides for limited court intervention.¹⁶ As a result of limited court intervention, parties are able to resolve their disputes relatively quickly, since no appeal on the merits of awards is

¹² Mark D. Wasco, 'Why Less is More: The International Split Over Expanded Judicial Review in Arbitration', (62 Rutgers Law Review 599, 2009-2010); Tibor Várady, 'On the Option of a Contractual Extension of Judicial Review of Arbitral Awards', Zbornik PFZ, 56 (2-3) 455-478 (2006); Kristen M. Blankley, 'Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?', 2 Seton Hall Cir. Review, 391 (2005-2006); Margaret L. Moses, 'Can Parties Tell Court What to Do? Expanded Judicial Review of Arbitral Awards', 52 U. Kan. L. Rev. 429 (2004).

¹³ Born (n 1), 82-3.

¹⁴ *ibid* 82-83.

¹⁵ *ibid* 81.

¹⁶ *ibid* 82-83.

possible.¹⁷ In order to show that finality is indeed the core of the arbitration, it is important to give several examples that reflect the importance of finality and thus, the potential incompatibility of expanded judicial review.

Firstly, the finality of arbitral awards and exclusion of appeals against arbitration is reflected by the fact that even in Roman arbitration law the appeals against arbitral awards were excluded.¹⁸ Parties that chose arbitration ‘explicitly declared in advance (*ex ante*) that they would be bound by the arbitral award and expressed their promise not to contest it once it was rendered’.¹⁹ Thus, the fact that even ancient Roman law considered arbitration as final and gave no opportunity for the parties to appeal the award²⁰, clearly shows that the concept of finality is at the heart of arbitration proceedings. As a result, parties’ expansion of judicial review mechanism seems incompatible with the nature of arbitration.

Secondly, UNCITRAL Model Law (the Model Law), designed for states’ adoption as uniform procedural rules of arbitration²¹, also indicates the importance of finality. Article 34 (1) of Model Law stipulates that ‘recourse to a court against an arbitral award may be made only by an application for setting aside [...]’.²² Thus, as the language of the Model Law suggests, the only available resort for the party that is dissatisfied with the award rendered by the tribunal is setting aside procedures, which, according to various commentators, exclude review on merits.²³ It is also important to note Article 5 of the Model law, which states that ‘in matters governed by this Law, no court shall intervene except where so provided by this Law.’²⁴ The

¹⁷ *ibid* 82.

¹⁸ Ivan Milotic, ‘Exclusion of Appeals in Roman Arbitration’, (Croat. Arbit. Yearb. Vol. 20 (2013), pp. 241 - 258), 241

¹⁹ Milotic (n 17) 242.

²⁰ *ibid* 257.

²¹ UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments adopted in 2006, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed on 24 March 2014.

²² Model Law 1985, Art. 34 (1).

²³ UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 140; Wasco (n 11) 613.

²⁴ Model Law 1985, Art. 5.

mandatory nature of the Model law, as shown by Article 5, is a reflection of the fact that expansion of judicial review would not be possible in the Model Law countries, since the only permissible interference by the court is in setting aside proceedings.

Thirdly, most institutional rules do promote finality of arbitral awards by restricting parties' ability to appeal to state courts.²⁵ A good example of such a prohibition are the rules of the London Court of International Arbitration (LCIA) Article 26(9) stating that 'the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority.'²⁶ Provisions to the same effect can also be found in the rules of ICC²⁷ or CEPANI.²⁸ Therefore, parties that choose to submit their disputes for institutionally administered arbitration are usually automatically precluded to seek any review on merits. It is thus possible to draw a conclusion, that expansion of judicial review mechanism by party agreement is neither compatible with the nature of arbitration, nor possible, in the most cases, when parties opt for institutional rules.²⁹

Fourthly, NY Convention³⁰ sets out limited grounds on which basis arbitral awards can be set aside.³¹ NY Convention's 'very purpose was to allow foreign parties in a dispute to obtain an award and have it recognized in another country without interference.'³² Consequently, it is suggested that no review on merits is possible under NY Convention,³³ showing that finality is the prevalent idea behind arbitration, which is incompatible with expanded judicial review.

²⁵ Wasco (n 11) 612-3.

²⁶ Rules of the London Court of International Arbitration Art. 26(9), effective as of 1 January 1998

²⁷ Rules of International Court of Arbitration of the International Chamber of Commerce Art. 34(6), effective as of 1 January 2012.

²⁸ Rules of the Belgian Centre for Arbitration and Mediation Art. 32(2), effective as of 1 January 2013

²⁹ Wasco (n 11) 612-3.

³⁰ New York Convention on the Regulation and Enforcement of Foreign Arbitral Awards, June 10, 1958

³¹ *ibid* 612.

³² Wasco (n 11) 611.

³³ ICCA Commentary on NY Convention, 'ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, 2011', 78

To sum up, the historical roots as well as rules and laws created for the state adoption indicate that finality of arbitral awards is one of the core principles of arbitration, limiting courts' power to review arbitral awards on merits. For these reasons, one may conclude to state that expanding judicial review by party agreement is incompatible with the nature of arbitration and not possible as a result.

Nevertheless, before drawing a final conclusion as to whether expansion of judicial review mechanism is compatible with the nature of arbitration, it is of importance to address another principle of international commercial arbitration – party autonomy.

2.1.2 Contractual Nature of Arbitration Agreement as a Cornerstone of Arbitration

In discussing compatibility of expanded judicial review mechanism with arbitration, it is important to overview and evaluate another virtue of arbitration, namely, party autonomy. Party autonomy plays an important role in any arbitration proceedings. Parties that resort to arbitration have much more freedom than they would otherwise have if they chose to litigate.³⁴ Firstly, it is accepted practice in international arbitration that parties can appoint their own arbitrators, choose the language of arbitral proceedings, the location of arbitration, applicable laws to the merits of dispute etc.³⁵ In addition, commentators suggest that 'an integral part of parties' ability to determine the structure and form of the dispute resolution process is the scope of judicial review.'³⁶ The arbitration agreement is a creature of contract by its very nature, and thus should be respected³⁷, even if it encompasses expansion of judicial review beyond statutory grounds.

³⁴ Born (n 1), 82-3.

³⁵ Wasco (n 11) 610-1.

³⁶ Dan C. Hulea, 'Contracting to Expand the Scope of Review of Foreign Arbitral Awards: An American Perspective', Brooklyn Journal of International Law, Vol. 29, 313, 2003-2004, 355

³⁷ Hulea (n 35) 355-6.

Secondly, party autonomy finds support in NY Convention.³⁸ Article V(1)(d) of NY Convention stipulates that award might be not enforced if ‘the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties[...].’³⁹ Thus, even if an award is rendered in the country of the seat of arbitration, but it is rendered after severing appeal and review mechanism from the arbitration agreement, it might be still be non-enforceable, since parties originally agreed on arbitration with the review mechanism in place.⁴⁰ Therefore, at the first glance, contractually expanded judicial review seems compatible with the nature of arbitration, especially given the fact that arbitration agreements should be enforced as drafted by parties.⁴¹

However, it seems that even though it is undoubted that party autonomy plays a huge role in arbitration, can parties nevertheless agree on arbitration that is not final? It seems that parties’ ability to contractually agree on their arbitral proceedings, as suggested by Professor Várady⁴², is confined to the arbitration process itself, rather than ability to regulate the court behavior after arbitration.⁴³ Parties’ power to appoint arbitrators, choose the language and applicable laws to the dispute, is a power to dictate the procedure of arbitration, but not a procedure after the arbitral award is rendered. Thus, it seems that party autonomy does not stretch as far as to allow parties to contract for courts’ review that is not prescribed by the law.⁴⁴ Nevertheless, the question needs more elaboration by looking into national laws regulating parties’ stipulations regarding expansion of judicial review by party agreement.

³⁸ Wasco (n 11) 609.

³⁹ NY Convention, Art. V(1)(d).

⁴⁰ Barceló (n 6) 4.

⁴¹ Hulea (n 35) 334.

⁴² Várady (n 11) 470.

⁴³ Barceló (n 6) 4.

⁴⁴ Wolff (n 5) 640.

2.2 National Laws Regulating Parties' Stipulations Regarding Expansion of Judicial Review of Arbitral Awards

In assessing whether expansion of judicial review mechanism by party agreement is possible, one needs to look at the laws governing the arbitration, in order to see a clearer picture regarding such a possibility. In this section, arbitration laws of several countries will be assessed, by drawing implications as to the possibility for parties to expand the grounds for judicial review.

When it comes to the UK, it is first important to emphasize that the laws governing both international and domestic arbitration provides parties with a possibility to have their arbitral award appealed on questions of law⁴⁵, if parties so agree.⁴⁶ It is also important to note that section 1(c) stipulates that 'in matters governed by this Part the court should not intervene except as provided by this Part.'⁴⁷ It thus follows that, as prescribed by section 68 of the English Arbitration Act 1996 (EAA), the only possible recourse for parties against an award is setting aside proceedings based on procedural irregularities.⁴⁸ As a result, it is possible to state, that in the UK, parties can indeed expand judicial review by their agreement, but on points of law only. Absence party agreement to review the award on points of law, the only recourse available to discontent parties is setting aside proceedings, as prescribed in section 1(c) and section 68 of the English Arbitration Act 1996.⁴⁹ However, it must be noted, that parties' possibility to expand the grounds for judicial review is prescribed by law and thus, any further expansion of grounds to review (i.e. review on facts) would be most likely struck down by the court. Also, it has to be emphasized that appeal on points of law is available only on the

⁴⁵ The English Arbitration Act 1996 (EAA), s. 69.

⁴⁶ Hulea (n 35) 342-3.

⁴⁷ EAA 1996, s. 1(c).

⁴⁸ EAA 1996, s. 68.

⁴⁹ Hulea (n 35) 343.

questions of English Law⁵⁰, further limiting the possibility for parties to expand the ground of judicial review. To conclude, by looking into section 69 of the English Arbitration, the expansion of judicial review mechanism by party agreement is possible, but that expansion itself is governed by law and is highly restrictive. Thus, the English approach to the issue is a balanced one – allowing parties to have an appeal on points of law if they so agree, but limiting the circumstances in which they could so agree.

New Zealand takes comparable approach. Second schedule, section 5A of the Arbitration Act of New Zealand 1996 (NZAA), stipulates that parties may start an appeal on points of law, if they so agree.⁵¹ However, it must be noted, that as in the English Arbitration Act 1996, the parties' stipulations regarding expansion of judicial review are limited to the points of law only⁵², and also the court has to give a leave for the appeal.⁵³

Similar approach is taken in Switzerland, where parties are free to agree on expanded judicial review of merits (facts and law) of the case, when the seat of arbitration is located in Switzerland.⁵⁴ Thus, parties having an international arbitration are able to opt for the Inter cantonal Arbitration Convention, which states that review of points of law and fact is allowed, if parties so agree.⁵⁵ Italy has a similar provision, since Art. 829(2) of Italian Code of Civil procedure⁵⁶ states that parties can agree on judicial appeal on points of law regarding arbitral awards.⁵⁷ But again, the appeal can be started only under prescribed circumstances.⁵⁸ Thus, it seems that as in the case of UK, some countries' laws do provide parties with a

⁵⁰ Barceló (n 6) 13.

⁵¹ The New Zealand Arbitration Act 1996 (NZAA), Sch. 2, s. 5A (1)(a).

⁵² NZAA 1996, Sch. 2, s. 5A (1)(a).

⁵³ NZAA 1996, Sch. 2, s. 5A (1)(c).

⁵⁴ Barceló (n 6) 11.

⁵⁵ *ibid* 12.

⁵⁶ Legislative Decree of 2 February 2006, No. 40 amending the Code of Civil Procedure as to Supreme Court (Corte di Casazione) proceedings and arbitration, in accordance with Article 1, para. 2, of Law No. 80, 14 May 2005

⁵⁷ Barceló (n 6) 12.

⁵⁸ Italian Code of Civil Procedure, Art. 829(2).

possibility to contract for expanded judicial review. However, as mentioned, the available expansion of judicial review is prescribed by law and is limited thereof. As a result, in countries like UK, Switzerland or Italy, if parties would contract for the review of facts, such contractual stipulations would be hardly upheld, as national laws strictly regulate the grounds and parties' stipulations regarding expansion of those grounds. One may conclude that the arbitration laws of countries allowing expansion of judicial review show that party autonomy shall be respected, even if it conflicts with the principle of finality of arbitral award. But it must be emphasized that such expanded judicial review mechanisms are regulated by law, still limiting parties' freedom of contract.

Another country worth mentioning regarding expansion of judicial review is France. Despite the fact that in French domestic arbitration parties have unlimited right to have their arbitral award appealed on merits, unless they waived their right of appeal⁵⁹, it is accepted position that in international arbitration the list of grounds for the recourse against arbitral award in France is exhaustive, as confirmed in the case of *Southern Pacific Properties Ltd v. Republique Arabe d'Egypte*⁶⁰, stating that grounds listed for court's review of arbitral awards are confined to French Code of Civil Procedure(CPC).⁶¹ Article 1502 of CPC states that the only recourse against arbitral award is possible just on the grounds of procedural impropriety.⁶² Thus, it is clear that French position is not as permissive as to allow parties to expand judicial review mechanism by their agreement and is more restrictive than, for example, England, indicating the incompatibility of expanding judicial review mechanism by party agreement.

⁵⁹ Alexis Mourre and Janice Feigher, 'Can the Statutory Grounds for Review of Arbitral Awards be Changed by the Parties? A French Perspective', *The American Review of International Arbitration* 2007, Vol. 18, pp. 279-288, 280; Erik van Ginkel, 'Reframing the Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur', 3 *Pepperdine Dispute Resolution Law Journal* (2003), 195.

⁶⁰ Cour de cassation, Cass. Civ. 1, Jan. 6, 1987, No. 84 -17.274.

⁶¹ Laurence Franc, 'Contractual Modification of Judicial Review of Arbitral Awards: The French Position', *The American Review of International Arbitration* 1999, Vol. 10, pp. 215 -224, 218.

⁶² Mourre and Feigher (n 58) 283.

Finally, another arbitration act that must be discussed and will also be addressed in following chapter is the United States Federal Arbitration Act (FAA) of 1925. FAA allows for a court only to confirm, modify, vacate or correct arbitral awards.⁶³ The act is silent on whether parties can expand the ground of review by agreement. However, some commentators suggest that it is indeed possible⁶⁴, even though the latest case law proved that the grounds for court review enumerated in FAA are exclusive.⁶⁵ However, it seems that given the wording of FAA section 9 ('the court must grant such an order unless the award is vacated, modified or corrected'⁶⁶), and following the latest case law⁶⁷, FAA shows that any expansion of judicial review by party agreement is incompatible with the nature of arbitration. Nevertheless, as regards the US, attention must also be drawn to the arbitration act of New Jersey, which allows for parties to expand the grounds of judicial review, if parties so agree.⁶⁸ The New Jersey Arbitration Act stipulates that 'nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record.'⁶⁹ Thus, the arbitration act of New Jersey expressly provides parties with an option to expand the grounds of judicial review. This provision must be contrasted with provisions of other countries, like section 69 of the English Arbitration Act, which allows for parties to expand grounds of judicial review, but only on the point of law, and only in limited circumstances.⁷⁰

To conclude this chapter, it must be observed that countries allowing expansion of judicial review of arbitral awards (like England or New Zealand), do so by virtue of prescribed statutory grounds. Thus, if parties would like to expand the grounds of court review more than the statute allows it, they would be precluded from doing so, since national laws that allow recourse

⁶³ Federal Arbitration Act 1925 (FAA), § 9-11.

⁶⁴ Ginkel (n 58) 192; Blankley (n 11) 426.

⁶⁵ *Hall Street Associates v. Mattel, Inc.*, 170 L. Ed. 2d 254 (2008).

⁶⁶ FAA 1925 § 9; Wolff (n 5) 630.

⁶⁷ *Hall Street* case (n 64).

⁶⁸ Barceló (n 6) 7.

⁶⁹ New Jersey Statutes, 2A:23B-4.

⁷⁰ EAA 1996, s. 68.

against arbitral awards on merits are mandatory and cannot be expanded more than provided in the statute. Thus, it seems that with an exception of New Jersey, expanded judicial review by party agreement is valid as long as it complies with the statutory grounds regulating the standard of that expansion. Furthermore, arbitration laws of the countries like France make it clear, that grounds prescribed for a recourse against the award are exhaustive and no modification of those grounds by party agreement is permissible.

CONCLUSION

By assessing national laws regarding expansion of judicial review mechanism by party agreement, it is possible to draw a conclusion that arbitration laws around the globe do not let parties to expand the grounds for judicial review, and even if they do, that expansion is highly regulated.⁷¹ Even though finality seems to be in conflict with party autonomy, it seems that in the arbitration context, party autonomy means freedom to contract for certain procedures during the arbitral process, but not freedom to contract for post-arbitration procedures. However, in order to look at the issue more closely, case law analysis is needed, especially in the context of FAA, which is not explicit on whether parties can expand the grounds of judicial review.

⁷¹ Model Law 1985, Art. 34 (1), EAA 1996, s. 68.

CHAPTER 3: VALIDITY OF ARBITRATION AGREEMENTS CONTAINING EXPANDED JUDICIAL REVIEW MECHANISM – COMPARATIVE CASE LAW ANALYSIS

This chapter will evaluate the validity of arbitration agreements, where parties contractually expand judicial review mechanism. The analysis will be conducted by looking into relevant case law and drawing implications accordingly. The first part of the chapter will critically address U.S. decisions on parties' possibility to expand judicial review mechanism (3.1), while the second part will discuss the cases related to contractually heightened court scrutiny in Europe (3.2). Also, cases dealing with the same matter in other jurisdictions will also be evaluated. Analysis of case law will help to determine not only validity of arbitration agreements with expanded judicial review, but will also discuss the rationale behind courts' decisions.

It is also of importance to pinpoint, that for the purposes of this thesis, the validity of arbitration agreement means validity of arbitration agreement without separating provisions on expanded judicial review. In other words, the thesis will not touch upon severability of arbitration agreements.

3.1 U.S Approach

The question of validity of parties' agreement to expand judicial review mechanism in arbitration proceedings that take place in the US is a highly debated topic by various scholars and commentators.⁷² Nevertheless, after the Supreme Court decision of *Hall Street Associates v. Mattel*⁷³, the court stated that the grounds for the court's review of arbitral awards in FAA are exhaustive and cannot be modified, since the language of section 9 of FAA indicates that

⁷² Barceló (n 6) 7; Blankley (n 11); Ginkel (n 58).

⁷³ *Hall Street* case (n 64)

the court must confirm the award except in the situations prescribed by law.⁷⁴ Thus, it seems that arbitration agreements containing expanded judicial review mechanism (i.e. appeal on merits) would not be upheld in US.

However, in order to critically analyze the validity of such contractual expansion of judicial review, it is important to analyze other cases dealing with the expansion of judicial review.

Before any coherent analysis, it is important to briefly overview the FAA, which governs the grounds of court intervention into arbitral proceedings in US. FAA applies to international arbitration seated in the US⁷⁵ or when arbitration involves inter-state commerce.⁷⁶ As it is suggested by commentators, one of the main purposes of FAA was to ‘make arbitration agreements valid, irrevocable, and enforceable.’⁷⁷ It is true that FAA does not address the issue whether parties can contractually expanded the grounds of review provided in FAA.⁷⁸ However, by looking at the legislative intent of FAA, it is clear that the purpose of FAA was to limit court intervention and to minimize the long-standing hostility to arbitration.⁷⁹ At the same time, it is suggested that ‘Congress’ intent in enacting the FAA was to permit parties’ arbitration agreements to be enforced according to their terms, like any other contract.’⁸⁰ Also, it has to be noted that FAA preempts state arbitration laws only if those state laws are hostile to arbitration or, in other words, does not enforce parties agreements to their terms.⁸¹ Thus, if parties to international arbitration choose state laws to govern their arbitration proceedings in

⁷⁴ Barry Leon and Laila Karimi, ‘The Canadian Position: Can Parties to An Arbitration Agreement Vary the Statutory Scope of Judicial Review of the Award’, *ILSA Journal of International and Comparative Law*, 4.

⁷⁵ Jeremy Wilson and William Lowery, ‘Arbitration in New York’, *CMS Guide to Arbitration Vol. 1*, 523.

⁷⁶ Gavin J. Gadberry and Dan L. Schaap, ‘Federal Arbitration Act (FAA) Preemption of State Law’, 13 May 2004, 4.

⁷⁷ Eric Chafetz, ‘The Property of Expanded Judicial Review Under the FAA: Achieving a Balance Between Enforcing Parties’ Agreements According to Their Terms and Maintaining Arbitral Efficiency’, 8 *Cardozo J. Conflict Resolution*. 1 (2006 – 2007), 6

⁷⁸ Chafetz (n 77) 8.

⁷⁹ *ibid* 5-8.

⁸⁰ Moses (n 12) 465.

⁸¹ Gadberry (n 76) 4.

US, those state laws will not be preempted by FAA, as long as they allow ‘enforceability of arbitration agreements to arbitrate.’⁸²

Case law analysis and reasoning behind the court decisions regarding expansion of judicial review mechanism is helpful in order determine whether agreements with heightened court scrutiny are valid.

It is important to start with the well discussed case that does not directly deal with the parties’ possibility to expanded grounds of court review, but rather illustrate the fact that FAA promotes party autonomy⁸³ and is not exhaustive.

In the case of *Volt Information Sciences, Inc v. Board of Trustees of Lealand Stanford University*⁸⁴, parties agreed to arbitrate all disputes arising between them, specifying that the contract must be governed by the law of the place of the project.⁸⁵ The place of the project was in California.⁸⁶ However, even though the dispute concerned interstate commerce and thus, FAA should govern the dispute compelling parties to arbitration, the Court of California stayed arbitration pursuant to Californian laws, even though under FAA, arbitration would be compelled.⁸⁷ The court’s reasoning was that arbitration agreements have to be enforced to their terms, and since parties chose different arbitration rules then FAA, their agreement to arbitrate should be enforced as that is one of the purposes of FAA itself.⁸⁸ Thus, by looking at the decision of *Volt*, it seems that the primary purpose of FAA is to enforce parties’ arbitration agreements according to their terms, even it that encompasses expanded judicial review.

⁸² Barceló (n 6) 8.

⁸³ Chafetz (n 77) 10.

⁸⁴ 489 US 468 (1989)

⁸⁵ Blankley (n 12) 411.

⁸⁶ *ibid*

⁸⁷ *ibid*

⁸⁸ Chafetz (n 77) 11.

However, despite the fact that after the Supreme Court decision of *Volt* it seemed that parties can agree on their arbitration agreements as they see fit, before the decision of *Hall Street*, courts in different circuits took different approaches with different reasoning, that are worth considering. For the purpose of case analysis, it is practical to separate the cases that allowed expanded judicial review from the cases that struck down party agreements on expanded judicial review mechanisms.

3.1.1 Expanded Judicial Review Allowed

Before the groundbreaking Supreme Court decision of *Hall Street* was rendered, there were courts that allowed to enforce arbitration agreements that contain expanded judicial review. In the case of *Gateway Technologies, Inc. v. MCI Telecommunications*⁸⁹, the parties contracted for arbitration with a possibility to appeal.⁹⁰ The court held that federal policy demands to enforce parties' agreements to their terms, even if those arbitration agreements expand the grounds of judicial review.⁹¹ Thus, by looking into the case of *Gateway*, it seems that court interpreted FAA as simply a set of default rules, permitting for parties to contractually expand the ground of court review.⁹² Another set of decisions that allowed expansion of judicial review were the cases of *LaPine Technology Corp. v. Kyocera*⁹³ and *Fils et Cables d'Acier de Lens v. Midland Metal Corp.*⁹⁴ In allowing expanded judicial review mechanism, the judges in the latter case mainly relied on the fact that expanded judicial review should be allowed (appeal on merits), since arbitration with the appeal option still saves courts' time in comparison with the full trial proceedings.⁹⁵ The reasoning in the case of *LaPine* was similar, stressing the fact

⁸⁹ 64 F 3d 993 (5th Cir 1995)

⁹⁰ Chafetz (n 77) 17.

⁹¹ *ibid* 18.

⁹² *ibid* 18.

⁹³ 130 F 3d 884 (9th Cir 1997)

⁹⁴ 584 F Supp. 240 (DCNY 1984)

⁹⁵ Chafetz (n 77) 20.

that FAA promotes the fact that arbitration agreements must be enforced to their terms.⁹⁶ Furthermore, another case that has to be mentioned in this section is *Wilko v. Swan*⁹⁷. This case is important since it creates non-statutory grounds for setting aside arbitral awards on the basis of “manifest disregard of law”.⁹⁸ Thus, since judicially created ground for setting aside the award exists outside FAA, why then parties could not expand the grounds of judicial review too?⁹⁹

By looking at the decisions rendered before *Hall Street*, it seems that courts allowing to contractually expand the grounds of judicial review, mainly relied on the fact, that FAA promotes the enforceability of arbitration agreements according to their terms. However, as suggested by at least one commentator¹⁰⁰, it seems that courts, in reliance on the cases like *Volt*, when deciding to allow heightened judicial review, failed to acknowledge that arbitration agreements can be enforced to their terms only regarding the arbitral procedure itself, rather than post-arbitration procedures, that are regulated by statutory grounds. Even when it comes to *Wilko v. Swan* and its non-statutory and expansive “manifest disregard of law” standard, it must be noted that this standard was created by the courts, and not by a ‘private expansion by contract.’¹⁰¹ In other words, as suggested by Professor Moses, parties cannot tell courts what to do.¹⁰² This approach is exactly the same, as taken by the courts that disallowed expanded judicial review mechanism.

⁹⁶ *ibid* 20.

⁹⁷ 346 US 427 (1953)

⁹⁸ *Wilko* case (n 97)

⁹⁹ Wolff (n 5) 628.

¹⁰⁰ Blankley (n 12) 425.

¹⁰¹ Wolff (n 5) 629.

¹⁰² Moses (n 12).

3.1.2 Expanded Judicial Review Disallowed

One of the cases that rejected expansion of judicial review mechanism is *Bowen v. Amoco Pipeline Company*.¹⁰³ In this case, parties provided for appeal mechanism in their arbitration agreement. The court did not uphold such expanded judicial review for several reasons. Firstly, it stated that parties cannot tell to courts what to do.¹⁰⁴ Secondly, it was stated by the court that if the expanded judicial would be allowed, the review court would be forced to apply the procedures that are not familiar to it.¹⁰⁵ Thirdly, the court stated that if expanded judicial review would be allowed, arbitration would become more like litigation.¹⁰⁶ The reasoning in the case of *Bowen*, indicates that FAA was designed to promote enforceability of arbitration agreements according to their terms, but was not designed to vary the statutory grounds of the court review of arbitral awards.¹⁰⁷ Thus, according to *Bowen* case, arbitration agreements containing appeal mechanism allowing courts to review the merits of the case, are invalid.

Other cases that disallowed parties' contractually expanded judicial review provisions are similar. In the case of *Chicago Typographical Union No. 16 v. Chicago Sun-Times*¹⁰⁸, it was held that parties cannot contract for expanded judicial review, as otherwise they would create federal jurisdiction by agreement.¹⁰⁹ Also, the court stressed the fact that if parties actually wanted to review their award, they could have contracted for appellate arbitration panel.¹¹⁰ Thus, again, the main idea behind the rationale of this case is that parties simply cannot dictate courts how to act.¹¹¹ Parties are generally free to agree on the procedure contained within the

¹⁰³ 254 F 3d 925 (10th Cir 2001)

¹⁰⁴ Chafetz (n 77) 26.

¹⁰⁵ *ibid* 28.

¹⁰⁶ *ibid* 28.

¹⁰⁷ *ibid* 26.

¹⁰⁸ 935 F 2d 1501 (7th Cir. 1991)

¹⁰⁹ Blankley (n 12) 423.

¹¹⁰ Chafetz (n 77) 36.

¹¹¹ Moses (n 12).

framework of arbitration proceedings, but cannot impose grounds of review higher than those enacted by the Congress.

The main case in discussing the validity of expanded judicial review mechanism by party agreement in US is *Hall Street*, where it was held that FAA grounds for the court review are mandatory and exclusive.¹¹² Thus, the position regarding heightened judicial review was finally resolved by US Supreme Court, affirming that arbitration agreements, which provide for the appeal of arbitral awards on merits are invalid.

However, it is important to stress that even if expanded judicial review is not valid in U.S, the effect of heightened judicial review might be still achieved in certain states by drafting the arbitration agreement carefully.¹¹³ (3.1.3)

3.1.3 States that allowed expanded judicial review after Hall Street

Several cases decided after Hall Street allowed expanded judicial review by party agreement. However, it must be noted that in these cases, expanded judicial review was allowed only because it complied with the statutory grounds prescribed in relevant statutes. In the Californian Supreme Court case of *Cable Connection, Inc. v. DIRECTV, Inc.*¹¹⁴, it was held that parties' stipulation in their arbitration agreement, stating that 'arbitrators shall not have the power to commit errors of law'¹¹⁵, was upheld, since according to Californian arbitration law, arbitrators cannot exceed the powers delegated to them.¹¹⁶ Thus, the court held that since parties provided that arbitrators do not have power to commit errors of law, appeal on the points of law was allowed. Similar effect was reached in the Texas Supreme Court case of *Nafta Traders*,

¹¹² Leon and Karimi (n 74) 4.

¹¹³ Blankley (n 12).

¹¹⁴ 44 Cal. 4th 1334; 190 P 3d 586 (2008)

¹¹⁵ *Cable Connection* case (n 114) 1341.

¹¹⁶ Californian Code of Civil Procedure, § 1286.2, subd (a)(4).

*Inc. v. Quinn*¹¹⁷, where the parties to arbitration agreed that arbitrator appointed ‘does not have authority (i) to render a decision which contains a reversible error of state or federal law.’¹¹⁸

The court reasoned that since Texas Arbitration Act permits vacatur of arbitral award ‘when the arbitrators exceeded their powers’¹¹⁹, parties’ stipulation that arbitrator does not have authority to commit legal errors can be upheld, since such a judicial review would be then compatible with the arbitration laws of Texas.¹²⁰

The cases of *Cable Connection* and *Nafta Traders* show that, when parties want to have their arbitral awards review by the court on merits, careful drafting of the arbitration clause may permit such expansion of the grounds of judicial review. In both cases, parties achieved the effect of an expansion of judicial review by agreement (review of points of law), by simply prescribing defined powers to arbitrators that were appointed to hear the disputes. Most of arbitration laws of states in US, as well as section 10 (4) of the FAA, provide for the vacatur of arbitral awards, where arbitrators exceed their powers.¹²¹ Thus, by giving well-defined powers to arbitrators, parties can achieve the same effect, as would be achieved if expansion of judicial review grounds would be allowed.¹²²

Another interesting case that reached effects similar to expanded judicial review is *Raymond James Financial Services, Inc. v. Honea*.¹²³ In this case parties provided for “de novo” review of arbitral award ‘if the arbitrators did or did not award damages in excess of \$100,000 or if they awarded punitive damages.’¹²⁴ When the dispute arose between the parties, Honea moved

¹¹⁷ 339 S W 3d 84, 87 (Tex. 2011)

¹¹⁸ *Nafta* case (n 117) 91.

¹¹⁹ *ibid* 97.

¹²⁰ Mary Massaron Ross and Josephine DeLorenzo, ‘Arbitration in Today’s Global World: The Lawyer’s Role in Obtaining Meaningful Appellate Review’, DRI Today, <<http://dritoday.org/feature.aspx?id=476>> accessed on 29 March 2014

¹²¹ Blankley (n 12) 428.

¹²² *ibid* 427.

¹²³ 2010 WL 2471019 (Ala. June 18, 2010)

¹²⁴ Swoboda (n 7) 240.

for a “de novo” review of arbitral award, as stipulated in arbitration agreement between parties.¹²⁵ The court upheld the “de novo” review, stating that even though the arbitration should be governed by FAA as prescribed in the arbitration agreement, the common law of Alabama preempted the application of FAA.¹²⁶ Since common law of Alabama respects the principle that arbitration agreements must be enforced to their terms, the Supreme Court of Alabama allowed “de novo” review of arbitral award.¹²⁷ Even though the decision in the *Raymond* case is held as legally erroneous by some commentators¹²⁸, it shows that another possible way for parties to expand judicial review (by allowing review on merits), is to contract for “de novo” review under common law of a state in U.S. However, several points regarding this case need to be made. First of all, “de novo” review is not the same as appeal. Thus, if parties contract for “de novo” review, arbitration becomes more similar to conciliation.¹²⁹ It is possible to hold “de novo” review of arbitral awards not as an expansion of judicial review, but simply as litigation proceedings that are started in the case when parties are dissatisfied with the arbitral award. Therefore, it is doubtful whether such “de novo” review stipulations should be regarded as part of the arbitration whatsoever.¹³⁰ On the other hand, one could also argue that parties, by submitting their arbitral award to “de novo” review, are simply agreeing on non-final arbitration¹³¹, meaning that “de novo” review has the same effect as if parties would contract for “appeal on law” mechanism. The question of whether “de novo” review means expansion of judicial review mechanism by party agreement, or simply means an agreement to have non-binding arbitration, largely depends on interpretation what is “de novo” review. Secondly, the court reviewing “de novo” would not necessarily know which standard of review

¹²⁵ *ibid* 241.

¹²⁶ *ibid*

¹²⁷ *ibid* 252.

¹²⁸ *ibid* 257-8.

¹²⁹ Wolff (n 5) 633.

¹³⁰ Barceló (n 6) 4.

¹³¹ Wolff (n 5).

to apply.¹³² For example, ‘if the parties do not mention specific provisions in the agreement, courts could become confused on whether they are supposed to make findings of fact and conclusions of law or only conclusions of law and findings of fact.’¹³³ Thirdly, arbitration is not compatible with full-scale trial, and thus, it is not clear whether “de novo” review can be compatible with the arbitration proceedings.¹³⁴

To sum up, some US decisions after *Hall Street* allowed expansion of judicial review by party agreement. Nevertheless, it must be noted that the expansion was achieved indirectly, either through narrow construction of arbitrators’ powers (*Cable Connection* and *Nafta Traders*), or through “de novo” review, which can hardly be even considered as being a part of arbitration. However, decision of *Cable Connection* and *Nafta Traders* show, that if parties really want to avoid errors of law, they need to be as specific as possible in their arbitration agreements, by giving defined powers to arbitrators. Still, after the decision rendered in *Hall Street* case, parties cannot expand the grounds of judicial review by simply stipulating in their arbitration agreement, that appeal on merits of the award can be started in the state courts. Parties have to look for a way around, if they want their arbitral award reviewed more than provided in the statutory grounds. The question then arises, whether *Hall Street* was decided correctly, especially given the fact that appeal mechanism is more and more desired in arbitration?¹³⁵

3.1.4 Was *Hall Street* Decided Correctly?

As discussed above, in the case of *Hall Street*, it was held that the statutory grounds in FAA cannot be modified and are exclusive. The court came to its decision mainly relying on the language of section 9 of FAA. However, given the fact that arbitration proceedings become

¹³² Swoboda (n 7) 255.

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ William H. Knull, III and Noah D. Rubins, ‘Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?’, *The American Review of International Arbitration*, 2000/Vol. 11 No. 4, 531.

more complex and sometimes involve very high amounts of money, more and more parties would like to have their arbitral award be subject to court's jurisdiction for appeal and review.¹³⁶ Therefore, in some situations, allowing parties to expand judicial review mechanism would not be a bad idea. Thus, taking into account that appeal possibility is more and more attractive for parties to arbitration, there is a presumption that strict approach taken by the Supreme Court in *Hall Street* case is flawed and unbalanced.

The judges in *Hall Street* relied on the language of FAA, stating that courts must confirm arbitral awards, except in the situations, where the court may vacate, modify or correct the award.¹³⁷ Thus, the court stated the grounds for review under FAA are exhaustive and do not allow review on the merits of the case.¹³⁸ However, the court's interpretation of FAA is not necessarily correct.¹³⁹ Nothing in FAA actually precludes parties to expand judicial review grounds, if the grounds of court intervention set out in FAA, are looked at as grounds exclusively for *vacatur*.¹⁴⁰ Section 10 of FAA simply sets the grounds on which basis the arbitral awards can be vacated. Thus, it is possible to interpret FAA as simply regulating the court's behavior and grounds upon which the award can be vacated.¹⁴¹ By looking at FAA in this way, it seems that the question whether to allow for parties to expand judicial review by allowing appeal on merits of the case, is a matter of policy choice¹⁴², since FAA is silent on whether the appeal on points of law is allowed or not. As suggested by Professor Ginkel, 'appeal from an arbitral award needs to be viewed as an avenue of judicial review that is wholly separate and distinct from the *vacatur* procedure.'¹⁴³ Professor also gives an example of the English Arbitration Act 1996, where grounds for *vacatur* are enshrined in section 68, while

¹³⁶ Knull and Rubins (n 135) 3.

¹³⁷ *Hall Street* case (n 64) 264-5.

¹³⁸ *ibid*

¹³⁹ Ginkel (n 59) 118.

¹⁴⁰ *ibid*

¹⁴¹ *ibid*

¹⁴² *ibid* 192.

¹⁴³ *ibid* 189.

appeals are regulated in section 69¹⁴⁴ and thus making differentiation between *vacatur* and *appeal*. Thus, it seems that judges in *Hall Street* could have interpreted the FAA section 9-11 as simply regulating vacatur procedures and allow expansion of judicial review of merits of the award. If that would have happened, the court would have been more considerate to the fact, that parties to arbitration sometimes are not willing to ‘bet the farm’¹⁴⁵ and want an appeal mechanism in place.

It is suggested that when determining whether expanded judicial review should be allowed or not in a particular case, courts could do so on a case by case basis, balancing different factors.¹⁴⁶ In this way, the court would permit (or not) expanded judicial review by taking into account the fact, that appeal mechanism in arbitration is not necessarily a bad idea. The factors that court could take into account when deciding whether to allow expanded judicial review include, for example, the amount of time the case is pending.¹⁴⁷ Thus ‘the longer a case has been open, the more arbitral efficiency is negatively impacted’¹⁴⁸ and therefore courts should be less inclined to uphold the clause with expanded judicial review mechanism.¹⁴⁹ Furthermore, another factor that could be taken into account by courts when deciding whether to uphold parties’ stipulations of expanded judicial review, is the standard of review prescribed by the parties in their arbitration agreement.¹⁵⁰ For example, ‘the more work a clause requires a court to do, the more negative effect there is on arbitral efficiency and the less likely a court should be to construe this factor in favor of enforcing the clause.’¹⁵¹ By balancing factors like standard of review or the length of time the case was open, courts could still preserve the efficiency of arbitral proceedings, whilst at the same time taking into account the fact that parties

¹⁴⁴ *ibid* 190-1.

¹⁴⁵ Knull and Rubins (n 135).

¹⁴⁶ Chafetz (n 77) 57.

¹⁴⁷ *ibid*

¹⁴⁸ *ibid*

¹⁴⁹ *ibid* 57-8.

¹⁵⁰ *ibid* 59.

¹⁵¹ *ibid*

increasingly want to contract for expanded judicial review, in order to have a safeguard against incompetent arbitrators.¹⁵²

To sum up, by looking into the US case law, it is possible to draw a conclusion that despite various courts' attempts to uphold the validity of expanded judicial review in relying on the principle of party autonomy, such attempts failed with the Supreme Court decision of *Hall Street*. The failure of party autonomy to vary the grounds of court review is mainly a result of another principle of arbitration – finality of arbitral awards. The courts that allowed expanded judicial review, failed to assess that party autonomy in arbitration means party ability to regulate the proceedings within the arbitration framework itself, rather than party ability to regulate post-arbitration proceedings. Nevertheless, even though expanded judicial review is invalid in US under FAA, parties can still achieve the effect of appeal on merits, by simply construing their arbitration agreements narrowly and giving clearly defined powers to arbitrators that they cannot exceed. Another way for parties to have expanded judicial review, is to rely on the state laws that allow expansion of judicial review (like New Jersey Arbitration Act) or rely on common law grounds, that allow expanded judicial review, as illustrated in *Raymond James* case. However, even though parties can achieve the same effect by, for instance, narrow construction of their arbitration agreements, expanded judicial review is invalid as such. Thus, given the fact that appeal is wanted in arbitration more and more, the correctness of *Hall Street* case is doubtful.

¹⁵² Knull and Rubins (n 135) 16.

3.2 European Perspective and other jurisdictions

After discussing the validity of expanded judicial review mechanism in US, it is important to assess whether parties' stipulations regarding heightened judicial review are valid in Europe, as well as in other jurisdictions.

3.2.1 Germany

It is accepted position in Germany, that parties cannot expand judicial review more than it is provided in the statutory grounds.¹⁵³ Thus, since German Arbitration Law does not differentiate between domestic and international arbitration¹⁵⁴, domestic or international parties that choose Germany as a seat of arbitration cannot expand the grounds of judicial review. The grounds provided in the German arbitration law are exhaustive, and thus 'in Germany [...], expanded review of arbitral decisions is probably not available even if parties had contracted for it.'¹⁵⁵ However, the decision that was rendered in Germany and attracted a considerable attention is *III ZB 7/06*¹⁵⁶, where the parties in their arbitration agreement contracted that if one of the parties is dissatisfied with the arbitral award, it can initiate "de novo" legal proceedings against it.¹⁵⁷ According to the agreement, the award became final and binding only if parties did not start litigation within prescribed period of time.¹⁵⁸ The court reasoned that since party autonomy is the cornerstone of arbitration, parties can condition their award as they see fit.¹⁵⁹ The German Supreme Court decision is comparable to the case of *Raymond James* discussed in section 3.1.3 above, where "de novo" review was also allowed. Thus, the German Supreme Court, as in *Raymond James* case, does not allow parties to expand the grounds of judicial

¹⁵³ Hulea (n 35) 345.

¹⁵⁴ Karl-Heinz Böckstiegel and Stefan Michael Kröll, *Arbitration in Germany: The Model Law in Practice*, (Kluwer Law International 2007), 7.

¹⁵⁵ Hulea (n 35) 345.

¹⁵⁶ Federal Court of Justice (Bundesgerichtshof), 1 March 2007.

¹⁵⁷ Wolff (n 5) 628.

¹⁵⁸ *ibid*

¹⁵⁹ *ibid* 627.

review prescribed in the statute, but rather conditions the award's finality. It is thus clear that in Germany, if parties contract for expanded judicial review, such agreements will be invalid, unless parties will try to go around, as in the German Supreme Court case, and will contract for "de novo" review conditioning the award's finality. However, as already discussed above, such non-final arbitrations resemble more of a conciliation¹⁶⁰ or simply a litigation (since the awards are reviewed "de novo"), if the parties move to courts after arbitration. Another factor that shows that "de novo" review hardly falls within the ambit of arbitration, is the fact that Germany has adopted UNCITRAL Model Law, which disallows judicial review on merits. According to section 1059 (1) of the German Arbitration Act 1998 'recourse to a court against an arbitral award may be made only by an application for setting aside.'¹⁶¹ Thus, if the German Supreme Court would have regarded a "de novo" provision as part of the arbitration, it would have been definitely invalidated, since the German Arbitration Law (ZPO) does not allow review of arbitral awards on merits. On the other hand, the German decision is considered legally erroneous by at least one commentator.¹⁶²

To sum up, the German Supreme Court decision that upheld "de novo" review of arbitral awards can be looked at as a way (as in *Raymond James*) for parties to expand the grounds of judicial review in arbitration. However, it is doubtful, whether such a contractual stipulation is a part of arbitration at all. Expanding judicial review by allowing for parties to contract for the possibility to appeal the award on merits seems to be much more compatible with the arbitration, since the reviewing court only reviews the award, leaving the substantial part of the proceedings to be conducted in arbitration. However, a "de novo" review means that litigation is started from the beginning, rendering any arbitration that happened before it, virtually almost useless. Thus, it is possible to conclude that in Germany, parties do not have a possibility to

¹⁶⁰ *ibid* 633.

¹⁶¹ The German Arbitration Act 1998, s. 1059(1).

¹⁶² Wolff (n 5) 639.

expand the grounds of judicial review more, than those provided in the statute, but can condition the finality of arbitral awards.

3.2.2 France

When it comes to France, it is first important to note, that France (unlike UK) differentiates between domestic and international arbitration. According to Articles 1483 and 1484 of the French Code of Civil Procedure (CPC) parties to a domestic arbitration, always have a right to appeal on merits of the arbitral award, unless they expressly waive it.¹⁶³ However, parties to an international arbitration cannot appeal awards on merits, since the grounds enumerated in the statute governing international arbitration are mandatory and exhaustive.¹⁶⁴ Not only the statute indicates that parties cannot expand judicial review mechanism by agreement in international arbitration, but also case law reaches the same conclusion. In the French Supreme Court case of *Southern Pacific Properties Ltd v. Republique Arabe d’Egypte*¹⁶⁵, the court stated that parties cannot modify the grounds of court review, since those grounds are prescribed the statute.¹⁶⁶ Decisions to the same effect were reached in another cases, such as *Société de Diseno v. Société Mendes*¹⁶⁷, *Societe Binate Maghreb v. Soc Screg Routes*¹⁶⁸ and *Societe Buzichelli Holding c. Hennion et Autres*¹⁶⁹, where it was held that ‘freedom of the parties does not give them the power to create a means of recourse unavailable under the French law applicable to international awards.’¹⁷⁰ Thus, by looking at the cases decided in France, it is possible to conclude that arbitration agreements containing expanded

¹⁶³ Mourre and Feigher (n 59) 280.

¹⁶⁴ *ibid* 283.

¹⁶⁵ Cour de cassation, Cass. Civ. 1. Jan. 6 1987, No. 84 – 17.274

¹⁶⁶ Mourre and Feigher (n 59) 284.

¹⁶⁷ Cour d’appel de Paris (1re Ch. C), 27 octobre 1994

¹⁶⁸ Cour d’appel de Paris, Dec. 12, 1989.

¹⁶⁹ Cour de cassation (1 re Ch. Civ.), 6 avril 1994.

¹⁷⁰ Franc (n 61) 217.

judicial review will be invalidated (save where severability is possible), if the seat of international arbitration is in France.

3.2.3 New Zealand

The recent case in New Zealand, which showed that parties cannot expand judicial review mechanism more than it is provided in statutory grounds is *Gallaway Cook Allen v Carr*.¹⁷¹ In this case parties provided in their arbitration agreement that if one of the parties is dissatisfied with the arbitral award, it can appeal the award in court on the points of law and facts.¹⁷² The court stated that since New Zealand arbitration laws allow only appeal on law, parties cannot modify the grounds set out in the statute and expand judicial review on points of facts.¹⁷³ Despite the fact that arbitration agreement survived and was not invalidated by severing the appeal on facts¹⁷⁴, the case is illustrative of the fact, that if the seat of arbitration is in New Zealand, expansion of judicial review mechanism will not be allowed and arbitration agreements containing such stipulations will not be upheld.

CONCLUSION

After assessing cases dealing with expanded judicial review of arbitral awards in US and other jurisdictions, it is possible to make a conclusion that parties cannot expand judicial review mechanism by agreement. Not only most of the statutes governing the grounds of judicial review are exhaustive, but also case law around the globe indicates, that arbitration agreements containing provisions with heightened court scrutiny are invalid. This is position in US as well as in European jurisdictions like UK, Germany and France. Usually, as illustrated by

¹⁷¹ [2013] NZCA 11.

¹⁷² Arbitrators' and Mediators' Institute of New Zealand, 'New Zealand: Appeal Court Confirms Pro-Enforcement Approach', < https://www.aminz.org.nz/Story?Action=View&Story_id=1592 > accessed on 29 March 2014.

¹⁷³ *ibid*

¹⁷⁴ *ibid*

UNCITRAL Model Law, appeal of arbitral awards on merits is not available to parties. However, some countries (i.e. New Zealand, UK) allow for parties to agree on appeal of arbitral awards on points of law. Thus, one may conclude that limited expanded judicial review is nevertheless available in some countries. However, it must be born in mind that such a review is still regulated by law. Thus, when it comes to expanded judicial review that is not regulated by the statute, it seems that generally accepted position is that parties cannot contract for a court scrutiny that is not envisaged in arbitration laws. The crucial point behind disallowing expanded judicial review by party agreement is that finality is at the heart of arbitration, while another virtue of arbitration, namely party autonomy, enables parties to dictate the course of arbitration, but not the work to be done by the courts.

However, even though usually arbitration agreements containing judicial review are invalid, there are commentators arguing that appeal and review mechanism is indeed needed in international commercial arbitration.¹⁷⁵ On the other hand, there are opinions, that court appeal and review mechanism is unnecessary.¹⁷⁶ Next Chapter will discuss the advantages and disadvantages of expanded judicial review.

¹⁷⁵ Knull and Rubins (n 135) 3.

¹⁷⁶ Di Jian-Schuerger, 'Perfect Arbitration = Arbitration plus Litigation?', 4 Harv. Negot. L. Review (1999).

CHAPTER 4: SHOULD JUDICIAL REVIEW MECHANISMS BE ALWAYS ALLOWED IN ARBITRATION BY PARTY AGREEMENT?

In this chapter the advantages and disadvantages of expanded judicial review will be discussed. It will be first argued that allowing parties to contract for appeal mechanism would make arbitration more attractive (4.1). After a discussion of pros of expanded judicial review, disadvantages of appeal mechanism will be explained (4.2). The chapter will be concluded by proposed solutions that could enable parties to have their arbitral awards appealed.

4.1 Advantages of Allowing Appeal Mechanism in Arbitration

There are number of advantages in having expanded judicial review in arbitration proceedings. By having an appeal on points of law, parties to arbitration can benefit in a number of ways.

First of all, final arbitration is only good if arbitrators would never make mistakes.¹⁷⁷ However, this is impossible. Thus, if appeal and review mechanism would be allowed, parties would be able to safeguard themselves from mistakes of law, and thus, from losing high amounts of money.¹⁷⁸ As expressed by Knolls and Rubins, finality of arbitral awards is not necessarily always a virtue, since ‘savings in procedural costs mean little when measured against potentially significant error in a high stake dispute.’¹⁷⁹ A possibility of irrevocable error is one of the main factors why appeal mechanism should be allowed in arbitration proceedings. Secondly, if appeal and review mechanism would be allowed in international arbitration, more parties would potentially choose arbitration, since they would have a right to appeal.¹⁸⁰ According to statistics in the article of Knolls and Rubins, ‘in a recent survey of 606 corporate lawyers from America’s largest corporations, 54,3% of those who chose not to opt for

¹⁷⁷ Knoll and Rubins (n 135) 3.

¹⁷⁸ Blankley (n 12) 404.

¹⁷⁹ Knoll and Rubins (n 135) 14.

¹⁸⁰ *ibid* 3.

arbitration said that choice was made largely because arbitration awards are so difficult to appeal.¹⁸¹ Thus, if countries would pass laws allowing expanded judicial review, arbitration would become much more attractive to parties as an institution.¹⁸²

Thirdly, by allowing expanded judicial review, the efficiency of arbitral proceedings would be increased. As suggested by Professor Moses, ‘by not allowing parties to contract for expanded review, parties will be forced to choose other less efficient means to insulate themselves from any future dispute [...] parties may choose to forgo arbitration as means to govern their disputes or parties may take out more insurance in order to protect themselves against “maverick” decisions.’¹⁸³ Therefore, expanded judicial review mechanism would not only reduce the probability of mistakes and monetary losses, but would also make arbitration proceedings more efficient.

Fourthly, expanded judicial review would make the arbitral award better reasoned, which, in turn, would satisfy parties more, since they would know better why arbitrator decided in a certain way.¹⁸⁴ As put by Blankley, ‘parties who wish for the courts to have a more meaningful judicial review of their award will invariably have to require the arbitrator to actually provide a written, reasoned award.’¹⁸⁵ Thus, expanded judicial review would enable parties to have more transparency.

Fifthly, it might seem to be unreasonable not to allow expanded judicial review. The fact that usually parties are not allowed to appeal their arbitral awards, does not mean that there will not be any litigation¹⁸⁶, since ‘arbitral awards require confirmation of a national court at the place of enforcement in order to attach assets in the face of resistance from a losing party, and

¹⁸¹ *ibid.*

¹⁸² Jian-Schuerger (n 176) 246.

¹⁸³ Wasco (n 11) 615.

¹⁸⁴ Blankley (n 12) 407.

¹⁸⁵ *ibid* 406.

¹⁸⁶ Knull and Rubins (n 135) 17.

international arbitration treaties provide legitimate bases upon which awards can be challenge.¹⁸⁷ Thus, allowing expanded judicial review could be a reasonable step, since after arbitral award is rendered, in no way means absolute finality.

Despite the possible advantages of arbitration that would allow expanded judicial review of arbitral awards, it is possible to see potential disadvantages of such an arbitration.

4.2 Disadvantages of Allowing Appeal Mechanism in Arbitration

Firstly, one of the main disadvantages of allowing for parties to contract for expanded judicial review mechanism (i.e. appeal on points of law), is that by referring the arbitral award to court for the review on merits, parties would substantially reduce the benefits of arbitration, since the proceedings would become lengthy and more costly.¹⁸⁸ It can be even said that ‘perhaps if the parties calculated the potential cost of post-arbitration litigation, those parties may decide that they would rather take their chances in litigation, instead.’¹⁸⁹ It is therefore clear, that if expanded judicial review would be allowed, parties would be exposed to more lengthy and costly arbitration proceedings. This is especially harmful, given the fact that one of the main advantages of arbitration is speedy and less expensive method of dispute resolution.¹⁹⁰

Secondly, another reason why expanded judicial review should not be allowed is that parties to arbitration can appoint arbitrators. However, if parties could contract for the appeal and review mechanism in courts, the case would be reviewed by judges.¹⁹¹ As illustrated by Professor Wolff, ‘the parties far-reaching influence on the identity of the persons resolving the dispute vanishes if at the end of the day state court judges [...] decide on the merits.’¹⁹² In

¹⁸⁷ *ibid*

¹⁸⁸ Blankley (n 12) 407.

¹⁸⁹ *ibid* 408.

¹⁹⁰ Wolff (n 5) 638.

¹⁹¹ *ibid* 638.

¹⁹² *ibid*

allowing parties to contract for expanded judicial review, the benefit of arbitration that enables parties to appoint arbitrators would be substantially diminished.

Thirdly, by allowing expanded judicial review, the parties appealing arbitral awards would be put in a position, where they could not tailor their proceeding anymore.¹⁹³ It is possible to state that ‘when courts are drawn into the review of arbitration awards, the parties lose the ability to tailor the proceedings to their own needs’.¹⁹⁴ Thus, one can argue that expanded judicial mechanism is against the nature of arbitration, since it precludes parties from tailoring the proceedings as they see fit.

Fourthly, another important drawback in allowing expanded judicial review is the fact, that parties would lose the ability to stay in confidentiality.¹⁹⁵ One of the main advantages of arbitration is the fact, that arbitral proceedings are confidential.¹⁹⁶ However, by contracting for appeal and review mechanism, parties would probably loose this virtue, since ‘it is practically certain in most countries that the identity of the parties and the exact wording of the award will become publicly available when a judicial appeal is filed.’¹⁹⁷ Thus, bearing in mind this consideration, expanded judicial review should not be allowed.

Fifthly, if expanded judicial review would be allowed, court would be simply overloaded¹⁹⁸, since probably each arbitral award could be appealed. Thus, the court would be engaged not only in litigation, but also in reviewing arbitral awards on merits. On the other hand, arbitration together with judicial appeal mechanism might be considered to be a better option than a full-trial.¹⁹⁹

¹⁹³ Knull and Rubins (n 135) 26.

¹⁹⁴ *ibid* 26.

¹⁹⁵ *ibid* 27.

¹⁹⁶ Born (n 1), 86.

¹⁹⁷ Knull and Rubins (n 135) 26.

¹⁹⁸ Jian-Schuerger (n 176) 247.

¹⁹⁹ *ibid*

Despite the advantages and drawbacks in allowing expanded judicial review, it is possible to offer several solutions that would allow parties to appeal their arbitral awards. The next section will briefly address these solutions.

4.3 Solutions Enabling Parties to Appeal Arbitral Awards

One of the solutions that would enable the parties to appeal their arbitral awards despite the invalidity of arbitration agreements containing expanded judicial review mechanism, would be a creation of “The International Arbitration Appeal Board”.²⁰⁰ Such an appeal board could serve as an institution that parties could use in order to appeal their arbitral awards.²⁰¹ Given the fact that nowadays, when arbitration proceedings involve more complex and higher, the need for finality might be considered as secondary matter, while the appeal and review possibility for the parties might be more important than ever.²⁰² Thus, the creation of The International Arbitration Appeal Board could be a useful resort for the parties that would like to contract for expanded judicial review mechanism, which is unavailable to them in national jurisdictions (see Chapter 3).

In addition, arbitration institutions could also offer internal appeal and review mechanism of arbitral awards, if parties would agree on such a mechanism.²⁰³ It is true that some institutions already offer appeal mechanisms (ICSID, CPR²⁰⁴), however, most of the institutions (CEPANI, LCIA) still stick to the idea of finality, stipulating that parties, by submitting their disputes to institutional rules, waive their right to appeal. Thus, as recently shown by the new rules of

²⁰⁰ Knull and Rubins (n 135) 40; Wasco (n 11) 620.

²⁰¹ Wasco (n 11) 620.

²⁰² Knull and Rubins (n 135) 45.

²⁰³ Irene M. Ten Cate, ‘International Arbitration and the Ends of Appellate Review’, 44 N.Y.U.J. Int’L & Pol. 1109 (2011-2012), 1164

²⁰⁴ The International Centre for the Settlement of Investment Disputes (ICSID) and Center for Public Resources.

American Arbitration Association²⁰⁵, appeal and review mechanism could be a good solutions for parties willing to have their arbitral award appealed.

It must be noted, however, that the solutions proposing that parties should be allowed to expand judicial review mechanism by agreement might simply undermine arbitration as it is.²⁰⁶ It can be said that ‘a two-tier process would insert unnecessary inefficiency into arbitration.’²⁰⁷ Parties that really want to have appeal and review mechanism could simply litigate. In other words, parties that opt for arbitration should accept the fact that after arbitration, only limited court intervention is allowed and thus, parties might not expand the grounds of judicial review by agreement.²⁰⁸ Therefore, it seems that the question of possibility for parties to expand judicial review mechanism in arbitration by agreement, is actually a question of parties’ understanding about the essence of arbitration. Parties choosing arbitration should accept it as it is, or resort to either litigation or other means of alternative dispute resolution like conciliation or mediation.

²⁰⁵ AAA/ICDR Optional Appellate Arbitration Rules, effective as of 1 November 2013

²⁰⁶ Ten Cate (n 203) 1164.

²⁰⁷ *ibid*

²⁰⁸ Jian-Schuerger (n 176) 247.

CHAPTER 5: CONCLUSION

To conclude, after assessing competing forces in international commercial arbitration – finality and party autonomy, as well as national laws regulating parties’ stipulations regarding expansion of judicial review and cases around the globe dealing with expanded judicial review provisions in arbitration agreements, it is possible to conclude that parties are generally not able to provide for heightened judicial scrutiny of arbitral awards in their arbitration agreements. Party autonomy in arbitration means ability to govern arbitration procedures by selecting arbitrators, applicable laws etc., but it does not mean that parties can dictate court’s behavior after arbitral award is rendered. However, even despite the fact that arbitration agreements containing expanded judicial review will be held invalid in most of the jurisdictions, parties can still achieve similar effect to that of appeal, by construing the powers of arbitrators narrowly. Unfortunately, this might not be always enough for parties to be safe from clearly wrong arbitral awards. Thus, despite the fact that if expanded judicial review would be allowed the arbitration proceedings would not be as quick and efficient, it seems that expanded judicial review should be allowed if parties so agree, since arbitration nowadays becomes more and more complex, involving high amounts of money. Thus, appeal and review mechanism in arbitration might be seen as a positive future development, which is worth of further consideration and deliberation. This paper gives a preliminary overview of a possibility of expanded judicial review by party agreement, allowing interested parties to ascertain the scope of review of arbitral awards available in different jurisdictions.

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