

ON THE OPTION OF A CONTRACTUAL EXTENSION OF JUDICIAL REVIEW OF ARBITRAL AWARDS OR: WHAT IS ACTUALLY PRO-ARBITRATION?

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The author analyses the arbitration policy, arguing that international commercial arbitration has become the dominant method of settling international trade disputes. International agreements brought international value of arbitral awards that is actually higher than the international value of court decisions. Furthermore, he stresses the most successful process of international harmonization of arbitration rules and statutes pertaining to arbitration world wide, in which process the UNCITRAL enactments have played a prominent role. The author also takes into consideration the contractual restriction of judicial review and the issue of extension of judicial control by party agreement, pointing out to the certain disorientation and difficulties that could emerge in that regard.

Key words: arbitration policy, UNCITRAL, harmonisation of arbitration rules and statutes, contractual restriction of judicial review, extension of judicial control by party agreement

A) A STRONG POLICY FAVORING ARBITRATION...

It has been known (and repeated quite frequently) that United States courts have espoused a “strong pro-arbitration policy”¹. This principle has often inspired the rhetoric swing of judges and scholars who speak about the “reversal

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¹ The leading case which articulates this policy is the Supreme Court’s decision in *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 25 (1983)

of old hostility” (of courts towards arbitration) and it has also inspired a most considerable number of court decisions in which unclarities and imperfections were disregarded in order to give a chance to the arbitration process. According to the frequently cited words of the Supreme Court decision in the *Moses H. Cone* case: “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”.² The pro-arbitration stance is very much present outside the United States as well. Scholars and practitioners often take a combative pro-arbitration attitude. Sometimes one has the impression that some brave fighters may not have been informed that the war is all but over. We won. There is practically no more hostility, international commercial arbitration has become the dominant method of settling international trade disputes, courts do not view arbitration as an enemy anymore, not even as a rival, but rather as a rescuer who will assume part of the increasingly heavy load of crowded dockets. International agreements (first of all the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards³) have brought about an international value of arbitral awards that is actually higher than the international value of court decisions. We have also witnessed a most successful process of international harmonization of arbitration rules and statutes pertaining to arbitration world wide (in which process the UNCITRAL enactments - the 1976 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Law - have played a prominent role).

Arbitration (and international commercial arbitration in particular) is not an orphan anymore. It is not an infant either. It is still an institution which deserves support and recognition. However, the environment and the context have changed. Within the new setting of a consolidated environment it is sometimes not easy to establish what is support for arbitration, what is “pro-arbitration”. A few decades ago - prior to the adoption of Article II of the New York Convention - when the issue arose whether courts should be **obliged** to refer to arbitration the parties who have executed a valid and viable arbitration agreement, it was not difficult to perceive what was pro-arbitration. Likewise, it was clearly pro-arbitration to push for the recognition of the *clause compromissoire* in addition to the *compromis*. In a similar vein, partisans of international commercial arbitration were practically unanimous in advocating the

² See Note 1)

³ Done in New York, June 10, 1958, ratified by 121 countries according to the UNCITRAL update of June 8, 2000

separability of the arbitration clause from the rest of the contract. Or, to take another example, it was not difficult to tell that the drive to reduce the variety of recourses against arbitral awards to basically two (setting aside and opposition to recognition and enforcement) was, indeed, pro arbitration; and so was the endeavor to restrict within these two recourses the number of possible grounds on which an arbitral award may be challenged.

After the main battles have been won, we are facing today a different world of issues. The separability of the arbitration clause from the rest of the contract is generally accepted, but the question arises should one allow separability **within** the arbitration clause.⁴ Divorcing provisions which endanger the viability of the arbitration agreement might save the basic understanding of the parties to submit their dispute to arbitration; but it might also undermine the confidence of the parties in the arbitration process, because this confidence is based on the understanding that arbitration will only take place if the parties so agree, and it will be conducted in conformity with the provisions of party agreement.

Particularly sensitive issues have recently come to the fore in connection with the range of judicial review. One of the emerging questions is whether it is in the interest of arbitration to disregard annulments pronounced in the country where the award was made. Another issue which has gained prominence (and has given rise to controversies) is the dilemma about the possibility of party-designed judicial control. This manuscript endeavors to investigate problems emerging in connection with the limits of judicial review, focusing in particular on the question whether parties to an arbitration agreement may **expand** judicial review by party stipulation.

After the limited grounds on which recognition and enforcement of an award may be opposed became standardized on the basis of the New York Convention, the question has arisen as to whether it is in line with the interests of international commercial arbitration to recognize awards which were properly annulled in the country where they were rendered?⁵ The *Hilmarton*⁶ cases and the

⁴ See, Varady, *Arbitration Despite the Parties*, in "Law and Reality, Essays on National and International Procedural Law", M. Nijhoff Publ., 1992, 351-376

⁵ Article V(1)(e) of the New York Convention clearly allows refusal of recognition on this ground

⁶ In *Hilmarton v OTV* a Geneva award denied a claim for consulting fees on the understanding that the contract violated Swiss public policy. The award was recognized in

Chromalloy⁷ decision show that the answer is not easy. One could argue that recognition even of those awards the acceptance of which is not mandated by the New York Convention is arbitration-friendly since it gives even more credit to foreign awards than the standard set by the Convention. But there is the other side of the coin. Vacatur in the country of origin of the award allows new arbitral proceedings and a new (possibly different) award in the same case. If the first award were recognized in spite of annulment, we may wind up with two different awards in the same case, both with a chance of world wide recognition. This is one of the lessons from the Hilmarton cases, and this result is not arbitration-friendly. In Hilmarton, the first arbitral award (which went in favor of OTV) was recognized, and this was confirmed by the 1994 decision of the *Cour de cassation*⁸. But the case had many ramifications. While the first recognition proceedings were ongoing, the award was set aside in Switzerland - and later, the Swiss court decision declaring annulment was also recognized in France. After this, a new award (in favor of Hilmarton) was rendered in Switzerland, and this award was also recognized by the Nanterre *Tribunal de grande instance*, which decision was confirmed by the Versailles *Cour d'appel*⁹. The *Cour de cassation* has eventually found a way out of this disarray, and brought about some (belated) consistency. On June 10, 1997, the French Supreme Court dismissed and cancelled both Versailles decisions, based on a recourse submitted by OTV¹⁰. The *Cour de cassation* held that the existence of an irrevocable French decision (that on recognition of the first award) prevents the acknowledgment in France of an incompatible arbitral or judicial decision rendered in the same subject-matter. The story has had, however, further episodes. In 1999, the English Commercial Court recognized and declared enforceable the **second** Hilmarton award - the one that was issued in favor of Hilmarton¹¹. This is clearly at odds with the end-result reached in France,

France in spite of the fact that setting aside proceedings were already initiated in Switzerland. A series of conflicting court decisions followed which shall be mentioned further on.

⁷ Chromalloy Aeroservices v. Egypt, 939 F. Supp. 907 (1996)

In Chromalloy an award rendered in Egypt was set aside by an Egyptian court, but it was nevertheless recognized in the U.S.

⁸ Cass. Ie civ. March 23 1994, Reported in *Revue de l'Arbitrage*, 1994, 327

⁹ The Versailles decision was rendered on June 29, 1995. Reported in *Revue de l'Arbitrage*, 1995, 639

¹⁰ Cass. Ie civ., June 10, 1997, Reported in *Revue de l'Arbitrage*, 1997, 376

¹¹ Mealey's International Arbitration Reports, May 26, 1999

where the **first** award (the one that denied recovery to Hilmarton) was recognized and became *res judicata*. The position taken by the English Commercial court is not incompatible with the New York Convention, since this Convention does not give extraterritorial force to court decisions granting or denying recognition. All court decisions in the Hilmarton case show deference toward arbitration, yet the result is confusing and does not help the reputation of the arbitration process. In hindsight one might ask whether it would not have been more pro-arbitration to show less deference at the outset, to stay the first recognition proceedings in accordance with Article VI of the New York Convention, and to observe the outcome of setting aside procedures in Switzerland.

Voicing doubts about the recognition of annulled awards, W. Park states: *“Deference to good faith annulments often furthers the very same interests as enforcement of the arbitration agreement and award: holding the parties to their bargain. Just as an agreement to arbitrate in London means driving to hearings on the left side of the road, so it means that proceedings are subject to the English Arbitration Act.”*¹² (There is a caveat here, a suggested distinction between “good faith annulments” and other than good faith annulments, but the point remains the same: deference to annulment of an award rendered in a country recognized as relevant country under the New York Convention, may arguably show more loyalty towards the arbitration agreement than deference to the /annulled/ award.)

The pro-arbitration trend is still quite strong in both practice and scholarly writings. Victories scored during the past decades have bolstered (and broadened) the ranks of partisans of arbitration. It appears, however, that issues which are nowadays on the agenda, and which attract wide attention, are typically not issues which yield easy distinctions between partisans and opponents. Most participants in the debates clearly gravitate toward the pro-arbitration side, and identify it as “our side”; but the question emerges “**which side is our side**”?

B) PARTY INTERFERENCE WITH THE SCOPE OF JUDICIAL REVIEW

After the boundaries of judicial review of arbitral awards have been reduced and have become settled (following the norms of the New York Convention

¹² William Park, *Duty and Discretion in International Arbitration*, 93 *American Journal of International Law*, 805, at page 814.

and the standards set by the UNCITRAL Model Law), a situation was created which is basically consistent with the aspirations of international commercial arbitration. There remain, of course, unresolved questions, and some of them still consequential.

B.1) Contractual restriction of judicial review

One of the emerging questions is whether the grounds on which judicial scrutiny of an award may be initiated represent a *numerus clausus*, or whether the grounds set by the *lex arbitri* are subject to party interventions. Most arbitration acts are silent on this matter, but since the pertinent norms are mandatory norms, they appear to be beyond the reach of the parties. Also, when the legislator sets standards of a minimum scrutiny, it clearly marks a territory which cannot be narrowed by party agreement. Still, some legislators have allowed party intervention to a limited extent. The examples are all examples of **further limitation** of judicial scrutiny. The 1987 Swiss Private International Law Act allows the parties to waive or restrict the recourse of annulment, but only if none of the parties have their domicile, habitual residence, or business establishment in Switzerland.¹³ This solution received a mixed response¹⁴. Tunisia followed the Swiss solution.¹⁵ Endeavoring to create a most favorable climate for international arbitration, Belgium went even a step further. It was stated in the 1985 Judicial Code, that a Belgian court may only hear a request for annulment if at least one of the parties had relevant ties with Belgium. (In other words, a possible exclusion of annulment was not left to the parties,

¹³ According to Article 192(1) "If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment, or they may limit it to one or several of the grounds listed in Article 190, subsection 2."

¹⁴ See HEINI, KELLER, SIEHR and others, IPRG Kommentar Zürich 1993. In his comment on Article 192, K. Siehr, states that Article 192 belongs to the "most controversial" (wohl umstrittensten) norms of the Swiss Act. He adds that it is doubtful whether it will achieve its goals. (page 1612)

¹⁵ According to Article 78(6) of the 1993 Tunisian Arbitration Code: "The parties who have neither domicile, principal residence nor business establishment in Tunisia may expressly exclude totally or partially all recourse against an arbitral award."

setting aside was excluded *ex lege*, if none of the parties had Belgian nationality, residence, or seat in Belgium.) While too much judicial control impedes the arbitration process (and discourages the parties to resort to arbitration), **some** judicial control may inspire confidence in the arbitration process¹⁶. On a second thought, the Belgian legislator made a step back, and in the May 19, 1998 modifications of the Belgian Judicial Code it adopted a Swiss type solution (the only difference is that Article 1717(4) of the Belgian Act only allows the parties to waive the action for annulment, it does not foresee a possibility of restricting it to some grounds)¹⁷. The Belgian hesitations show that we have reached a point where it becomes debatable whether less judicial control and more party governance are, or are not in line with the interests of arbitration.

The same hesitations have put forward another proposition the content of which is opposite, but touches upon the same problem, that of the limits of judicial review. The question has arisen whether parties can **expand** judicial review? Here, the framework of the discourse has not been set by legislative initiatives, but rather by court interpretation of party stipulations. The option of expanding judicial review by party agreement is the issue to which I would like to devote more attention in this manuscript.

B.2) Extension of judicial control by party agreement?

B.2.a) A case which prompted wide attention

The possibility of **extending** (rather than restricting) judicial control by party agreements was tested by a sequence of conflicting decisions of Califor-

¹⁶ A most sensitive situation arises with regard to awards denying the relief sought. In this situation - assuming that the arbitration took place in Belgium between non-Belgian parties - setting aside was excluded, and opposition to recognition and enforcement did not offer a last opportunity for judicial control. In the ensuing situation, the winning party is satisfied with the *res judicata* effect and has no reason to seek recognition and enforcement, while the losing party has no recourse available for challenging the award, not even on ground of violation of due process.

¹⁷ According to Article 1717(4): "Les parties peuvent, par une **déclaration** expresse dans la convention d'arbitrage ou par une convention ultérieure, exclure tout recours en annulation d'une sentence arbitrale lorsqu'aucune d'elle n'est soit une personne physique ayant la nationalité belge ou une résidence en Belgique, soit une personne morale ayant en Belgique son principal établissement ou y ayant une succursale."

nia courts in the same case. The case was not the first of this kind in U.S. practice¹⁸, but it presented the options and dilemmas in a ripened form, and it inspired a portentous number of scholarly comments and scrutinies. A dispute between LaPine Technology Corporation (a U.S. corporation) and Kyocera (a Japanese company) was settled by an ICC arbitration award issued on August 24, 1994. Kyocera was ordered to pay \$257 million¹⁹ to LaPine. The winner moved to confirm the award before the U.S. District Court for the Northern District of California. Kyocera opposed confirmation, and moved to “vacate, modify and/or correct” the award. Under the 1925 U.S. Federal Arbitration Act (hereinafter: “FAA”) confirmation may be denied - and a motion to vacate may be granted - on grounds stated in Para. 10. What made this case special was a provision in the arbitration agreement of the parties. Section 8.10(d) of the “Definitive Agreement” of the parties stated:

“The United States District Court for the Northern District of California may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify, or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators’ findings of fact are not supported by substantial evidence, or (iii) where the arbitrators’ conclusions of law are erroneous.” (emphasis supplied)

It is clear that this provision attempted to **expand** statutory judicial review. It added two important grounds on the top of those stated in the FAA. One may argue that such provisions are ill-advised and may jeopardize some comparative advantages of the arbitration process, such as speed or finality.²⁰ The

¹⁸ See *Fils et Cables d’Acier de Lens v. Midland Metals Corp.* 584 F.Supp.240 (S.D.N.Y. 1984); *Gateway Technologies v. MCI Telecommunications Corp.* 64 F.3d 993 (5th Cir. 1995); *Chicago Typographical Union v. Chicago Sun Times*, 935 F.2d 1501 (7th Cir.1991). In *Fils* and in *Gateway* the court allowed party-designed extended judicial review, in *Chicago Typographical* the 7th Circuit held that parties **cannot** contract for judicial review of arbitral awards.

¹⁹ The figure of \$257 million is stated in Mealey’s *Arbitration Reports*, July 1996 (7 Mealey’s Int’l Arb. Rep.9)

²⁰ See T. Cullinan, *Contracting for an expanded scope of judicial review in arbitration agreements*, 51 *Vand.L.R.*395 (1998) Cullinan advances arguments pro and con expanded judicial review, his conclusions are stated at p. 428; Smit takes a strong position against expanded judicial review (H. Smit, *Contractual modification of the scope of judicial review of arbitral awards*, 8 *American Review of International Arbitration*, 147, 1997); Jiang-Schuerger also takes a critical position (*Di Jiang-Schuerger, Perfect Arbitration = Arbitration plus Litigation?* 4 *Harvard Negotiation Law Review* 231,1999);

really difficult question is what serves better the interests of arbitration once the (arguably undesirable) provision is here and it has to be faced. Should it be disregarded? (can it be disregarded?), or should it rather be followed as part of the arbitration agreement.

The U.S. District Court for the Northern District of California came to the conclusion that the parties could not expand the statutory limitations of judicial review because “this would amount to statutory amendment by private person”. In its decision of December 11, 1995²¹ the District Court endeavored to find an interpretation which would foster rather than hamper the cause of arbitration, and decided to disregard the provision which purported to expand statutory judicial review. Judge Ingram stated:

*“It appears to this court that the contractual provisions existing in this case wherein the parties choose and specify the scope of judicial review to pertain in their arbitration is offensive to the public policy which supports arbitration and those aspects of arbitration which are beneficial to the parties as well as to the courts whose responsibilities are eased by alternative forms of dispute resolution.”*²²

Following Judge Ingram’s line of reasoning, the basic benefits of arbitration from the point of view of the parties (and from the point of view of the judicial system as well) are matters of public policy, which deserve protection even against some elements of the party agreement itself. Following this line of thinking the District Court restricted its review to the grounds stated in the FAA, found that those were not infringed, and confirmed the award.

Upon appeal, the 9th Circuit²³ followed the same pro-arbitration inspiration, but it wound up with a different analysis. Kyocera argued that its position was in line with the interests of international commercial arbitration, because the District Court’s decision may place in jeopardy “the ability of parties to multinational arbitrations to rely on the enforceability of their written agreements”. Judge Fernandez held that the FAA does not prevent enforcement of agreements to arbitrate under different rules than those set forth in the Act itself, and

A somewhat different position was taken by Hochman who argues that in some cases - labor cases in particular - an expanded judicial review may be a desirable choice (S. A. Hochman, Judicial review to correct arbitral error - an option to consider, 13 Ohio State Journal on Dispute Resolution 103,1997 - conclusion stated on p.120).

²¹ 909 F.Supp.697

²² 909 F. Supp.697, 705

²³ United States Court of Appeals, Ninth Circuit, Decision of September 18, 1997, 130 F3d 884

concluded: “Indeed, such a result would be quite inimical to the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.”²⁴ In the same vein, Judge Fernandez stressed that court can expand their review if parties so agree. “To do otherwise would make hostility to arbitration agreements erumpent under the guise of deference to the arbitration concept.”²⁵

In his concurring opinion, Judge Kozinski expressed caution, saying “I find the question presented closer than most”. He continued; “In general, I do not believe parties may impose on the federal courts burdens and functions that Congress has withheld.”²⁶ He added, nevertheless, that the Court must enforce arbitration agreements according to their terms. Judge Kozinski found important that the terms of the party-designed extended review were reasonable. He stated: “I would call the case differently if the agreement provided that the district judge would review the award by flipping coin or studying the entrails of a dead fowl.” He concluded that “given the strong policy of party empowerment in the Arbitration Act” the given provision on extended judicial review was probably not against the policy of the Arbitration Act.²⁷

Judge Mayer dissented. In his opinion, parties may specify contractually whether to arbitrate, how to arbitrate, and when to arbitrate, but they cannot dictate how a court must review an arbitral award. In Judge Mayer’s opinion, should the parties desire more scrutiny, they can contract for an appellate arbitration panel, but they cannot contract for an expanded judicial review.²⁸

The case was returned to the District Court, which rendered a new decision on April 4, 2000.²⁹ This time, the Court conducted an extended review of findings of both facts and law in line with the terms of the arbitration agreement, but stated that in its review of the factual conclusions reached by the arbitrators, the Court will apply a deferential “substantial evidence” standard. The District Court held that the arbitrators did not make any errors of law, and their conclusions were supported by facts. The motion to vacate was denied, and the award was confirmed.

This end result has actually averted a host of potential problems. The text of the arbitration clause was fully observed, an enlarged scrutiny was conducted,

²⁴ 130 F.3d 884, 888

²⁵ 130 F.3d 884, 889

²⁶ 130 F.3d, 884, 890

²⁷ 130 F.3d, 884, 890

²⁸ 130 F.3d 884, 890

²⁹ 2000 WL 765556 (N.D.Cal.)

and the original award was not changed. Other possible outcomes may have given rise to more dilemmas. In order to be able to evaluate the impact of a party-designed enlarged scope of review on the arbitration process, more options need to be investigated. On the following pages, I would like to identify some options, and implications of these options, following two basic hypotheses: 1/ party agreement on expanded judicial review is disregarded (as it was by the District Court); and 2/ party designed expanded judicial review is accepted (as held by the 9th Circuit).

B.2.b) Hypothesis 1): Party agreement on expanded judicial review is disregarded

If the provisions of the arbitration agreement on expanded review are being held invalid, the first and biggest question is that of the impact of this finding on the arbitration agreement as a whole. The District Court dwelled on this issue, but did not perceive it as a difficult one. It cites only one case, and this is one in which severance was **denied** on ground that the clauses of the arbitration agreement which were “blatantly illegal” were part of an “integrated scheme” to contravene public policy³⁰. The District Court held that Kyocera was distinguishable, and found that the invalid provision is divorceable, because it deals with review of the arbitration procedure conducted by court, while the rest of the arbitration agreement is devoted to arbitration procedure conducted by the arbitrators. On ground of these considerations, the District Court concluded that “*The contents of Para. 8.10(d)(ii) of the Definitive Agreement are clearly severable.*”³¹

The arguments advanced by the parties suggested another line of thinking which the District Court chose to avoid. Kyocera pointed out that the disputed provision was an integral part of the arbitration agreement, and that there was no basis to suppose that the parties would have agreed to arbitrate at all, absent that provision. In turn, LaPine argued that Kyocera would have agreed to arbitrate even without this provision, rather than to subject itself to the financial liability and hazard of trial by jury. It is difficult to justify the sidestepping of this issue and controversy. It is common ground in most legal systems that an invalid provision may, but need not affect the rest of the contract. Whether it

³⁰ Graham Oil Co. v. Arco Products Co. 43 F.3d 1244 ((9th Cir. 1994)

³¹ 909 F. Supp. 697, 706

will, depends on the rules of contract construction, and guidelines provided by national laws. These guidelines usually invite a scrutiny of the basic purpose of the contract (would it remain the same if the contested clause was separated?), or of the intentions of the parties (would they have concluded the contract without the provision in question?). To cite some examples, in the 1978 Yugoslav Act of Obligations (which has been incorporated into the Croatian legislation with minor changes) a special article has been devoted to the issue of partial nullity. According to Article 105: “Nullity of a contractual provision shall not imply nullity of the entire contract, if it can stand without the null provision, and should such provision be neither a requirement for the contract nor a decisive motive for making it.” The Swiss Code of Obligations focuses on the question whether the parties would have or would not have concluded the contract without the provision which was set aside.³²

Had the question been faced, it would have given rise to a difficult and complex scrutiny. If the parties accept arbitration on the condition that issues of law and fact remain subject to court review³³, can we hold that a consent to arbitrate exists even without this provision? LaPine argues that from Kyocera’s point of view, this is probably still better than trial by jury, which is, in all likelihood, much more alien to a Japanese party. But this is, of course, speculation. Speculating further, one has to note that Kyocera had another option - not to conclude the contract at all, if it did not include an arbitration agreement of his liking. Hans Smit argues that “it would appear appropriate” to conclude that had the parties realized that the provision on scope of review was invalid, they would have accepted the arbitration agreement without it as well. He also offers an alternative reasoning yielding the same result: “*Alternatively, the strong*

³² According to Article 20(2) “ Si le contrat n’est vicié que dans certaines de ces clauses, ces clauses sont seules frappées de nullité, à moins qu’il n’y ait lieu d’admettre que le contrat n’aurait pas été conclu sans elles.”

³³ In Kyocera, the same condition also appeared in the wording of the terms of reference adopted by the ICC Tribunal. This may be relevant considering Article 28(6) of the 1998 ICC Rules (which is essentially identical to Article 24(2) of the 1988 Rules). Article 28(6) states that by submitting the dispute to ICC Rules, the parties “shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”. The argument could have conceivably been made that this provision of the ICC Rules overrides the specific party stipulation on a particular recourse. This argument - a difficult one anyway - lost most of its foothold after the provision on expanded judicial review was repeated in the adopted terms of reference.

policy favoring arbitration embodied in the applicable arbitration statute may be given substance by endorsing that conclusion."³⁴ This logic is contested by Judge Fernandez from the 9th Circuit who stresses that disregarding the clause on expanded review would yield "hostility to arbitration agreements under the guise of deference to the arbitration concept". We are back to the initial question: What is actually pro-arbitration under the given circumstances? Would arbitration become a more appealing or less appealing option if the parties knew that their arbitration agreement would be upheld even if some parts of it were declared invalid?

In a similar case decided by the Paris *Court d'appel* (decision of October 27, 1994. in *Société de Diseno v. Société Mendes*³⁵) the parties inserted into their arbitration clause a provision stating that they retain the right to lodge an appeal against the arbitral award before the court of appeal.³⁶ After the award was rendered, Diseno appealed, but alternatively also moved to set aside on ground of nullity of the arbitration agreement. The 1981 French Code of Civil Procedure limits recourses against awards rendered in France in international arbitral proceedings to setting aside (Article 1504); appeal remains a possibility in domestic cases. Diseno tried to cover all grounds. It suggested the case to be qualified as a domestic case, which characterization would allow appeal. The alternative motion to set aside was based on another theory: the case is an international case, the provision on appeal is void, and thus the arbitration agreement is also void, which yields annulment. The *Cour d'appel de Paris* found that the case was an international case, and held that the parties could not create a recourse outside the Code of Civil Procedure.³⁷ The question arose as to whether the arbitration agreement (and the award) may survive the nullity of the provision of the arbitration agreement on expanded review. The *Cour d'appel* held that the provision on appeal constituted an "essential element" of

³⁴ Smit, Op. cit. 152

³⁵ Reported in *Revue de l'Arbitrage*, 1995, 263

³⁶ The clause read: "les parties se réservent toutefois le droit de faire appel de la sentence arbitrale devant la Cour d'appel".

³⁷ "Considérant qu'en conséquence seul est ouvert contre les sentences rendues en France en matière d'arbitrage international le recours en annulation selon les modalités prévues par les articles 1504 et 1502 du nouveau Code de procédure civile, à l'exclusion d l'appel, les parties a un arbitrage international n'ayant pas le pouvoir de créer une voie de recours que la loi impérative du pays où elles ont entendu situer le règlement conventionnel de leur litige ne prévoit pas;" (*Revue de l'Arbitrage*, 1995, at p.266)

the arbitration agreement by which the parties intended to submit their dispute to “two levels of jurisdiction” (which intention became frustrated), and that under these circumstances the whole arbitration clause was invalid.³⁸

The predicament of the distinction between domestic and international arbitration left its imprint on another French case which reached the *Cour de cassation*. In *Société Buzichelli Holding v. Hennion*³⁹ the dispute arose between two French subcontractors in connection with works executed outside of France. (In *Diseno v. Mendes*, the international character of the dispute was more obvious. One party was French, the other Spanish, while the subject of the dispute was distribution of French goods - products of Yves Saint-Laurent - in Spain.) In the Buzichelli case, **both** parties were French, **both** wanted to qualify the process as domestic arbitration, and were ready to embark, on appeal procedures under articles 1484 and 1485 of the French Code of Civil Procedure which envisage domestic arbitration. The *Cour d'appel* qualified the case ex officio as an international case, and annulled the award. The *Cour de cassation* upheld this qualification, holding that party autonomy does not extend to the qualification of the nature of arbitration process as domestic or international. In his note on this case, Patrice Level⁴⁰ raises the question whether a better solution were to adopt the “souplesse” of the 1987 Swiss Private International Law Act, which allows the parties to choose domestic regime of arbitration (and cantonal law) instead of the regime of the Private International -Law Act itself.⁴¹ (Such a switch, of course, makes only sense if the applicable *lex arbitri* recognizes separate regimes for domestic and international arbitration.)

One could ask whether upholding the contested provision on expanded judicial review in *Diseno* was more or less difficult than following the disputed provision in *Kyocera*. In *Diseno*, the parties did not interfere with the pattern of judicial control, they did not try to rewrite the grounds on which a recourse against arbitral awards may be lodged. Instead the parties relied on a different **type** of recourse, not recognized in international arbitration, but accepted in

³⁸ “Considérant que cette clause est en conséquence frappée d’une nullité qui affecte dans son ensemble la convention d’arbitrage dont elle constitue un élément essentiel, déterminant du consentement des parties qui ont ainsi affirmé leur volonté de soumettre leur litige à deux degrés de juridiction;” (*Revue de l’Arbitrage*, 1995, at p. 267

³⁹ Decision of the *Cour de cassation* of April 6, 1994, Reported in *Revue de l’Arbitrage*, 1995, pp. 263-264

⁴⁰ *Revue de l’Arbitrage*, 1995, 267, at p. 270

domestic arbitration. Suppose the parties did not try to introduce a new type of recourse, but attempted to modify the existing one. Following the gist of the decision of the *Cour d'appel*, the result would probably remain the same. The French court insists on the mandatory nature of the French provisions, and stresses that the only recourse permitted is "setting aside according to the modalities provided in Article 1504 and 1502 of the New Code of Civil Procedure". This implies that the grounds set and limited in Article 1502 are beyond the reach of the parties, different modalities cannot be designed by party agreement.

Another question that may be raised with respect to the Diseno case is, whether reliance on the doctrine of estoppel could have tilted the court toward rescuing the arbitration agreement - and the award. (Diseno was the party who initiated arbitration and the one who tried to rely at the same time both on the validity of the provision on appeal, and on the invalidity thereof.) If estoppel may have rescued the award in this case, it does not provide a general solution. Depending on the circumstances of the case, estoppel may or may not become an issue; and if it becomes an issue, it may or may not influence the decision. The key issue remains the same: can the arbitration agreement survive the annulment of its provision on extended judicial review? In his comments on the Diseno case, Level asks whether priority should be given to the intention of the parties to arbitrate (and to consider as non-existent the provision on appeal) or should one give more weight to the mistrust the parties expressed towards arbitration without judicial supervision.⁴² What is in the interest of the cause of arbitration? The position taken by the District Court in Kyocera may very well be qualified as being more "pro arbitration" in the given case, because it saves an arbitration agreement (although it sacrifices some parts of it). But is it "pro arbitration" in the long run? The confidence of the parties in the arbitration process is very much based on the assumption that the terms of their agreement will be followed. Would parties have more or less confidence in arbitration if they knew that arbitration would validly proceed even if some terms of their bargain could not be observed?

⁴¹ According to Article 176(3): "The provisions of this chapter shall not apply where the parties have agreed in writing that the provisions of this chapter are excluded and that cantonal provisions on arbitration shall apply exclusively."

⁴² Level, Op. cit.273

If one follows the option to disregard party agreement on expanded judicial review (as the District Court in *Kyocera* did), one has to reckon with an uncertain fate of the arbitration agreement proper. The strong policy favoring arbitration may offer some backing, but it will certainly lose at least some of its strength when arbitration which needs support is not the same as the one designed by the parties. It is probably impossible to agree on a firm principle covering all cases. The question boils down to contract interpretation, and the circumstances of the case - along with the rules and policies of the forum - will probably lead to different decisions in different cases within the same country, and even more so in different countries. In other words, in the broad arena of international commercial arbitration, there is no guarantee that the arbitration agreement will survive the invalidity of its provision on expanded judicial review.

Staying with the hypothesis that the District Court's decision remains final, a new jeopardy might emerge if recognition is sought in another country. Suppose *Kyocera's* assets are in Japan, and *LaPine* is compelled to seek recognition and enforcement in Japan. *Kyocera* objects, and states, referring to Article V(1)(d) of the New York Convention, that the arbitration agreement was not observed. (It provided for an extended appeal, and this provision was disregarded.) In this hypo, a strict reading of Article V(1)(d) might provide a narrow escape. The New York Convention permits denial of recognition if the “**arbitral procedure** was not in accordance with the agreement of the parties” (emphasis supplied). In our case, the agreement of the parties was infringed with regard to the “**post arbitral procedure**”. Such a case would represent an interesting challenge to the construction of Article V(1)(d).

B.2.c) Hypothesis 2): Party agreement on expanded judicial review is observed

It appears that the voidance of the provision on extended judicial review reduces the arbitration agreement to a precarious position (unless the applicable *lex arbitri* would explicitly allow a contractual extension of judicial review - and I am unaware of any arbitration act which would do so). Let us follow now the other hypothesis, represented in the position taken by the Ninth Circuit, which allowed review of the arbitral award observing the heightened standard agreed by the parties. The “Definitive Agreement” provided for extended grounds for “**vacating, modifying or correcting the award**” - allowing “vacating, modifying or correcting” not only on grounds stated by the FAA, but

also “where the arbitrator’s findings are not supported by substantial evidence”, or where “the arbitrator’s conclusions of law are erroneous”. Under Paragraph 11 of the FAA, modifications and corrections are only possible in technical matters. This is consistent with the idea of limited review restricted essentially to formal grounds; and confines the outcome of court scrutiny to essentially two options: confirming or setting aside the award. The court is not posited as an appellate level which can change the decision on the merits. The 9th Circuit did not address this point head on, and did not raise the question of a possible modification of the merits of the award. (The problem has not emerged later either, since after rehearing the case, the District Court confirmed the award instead of setting it aside or modifying it). Nevertheless, since the holding of the 9th Circuit approves the whole text of Article 8.10(d) of the “Definitive Agreement”, it follows that modification of the award became one of the contemplated options. This may give rise to a further problem (in addition to the fact that it is difficult to reconcile this position with Article 11 of the FAA). Suppose the District Court modified the award, and held that - instead of \$257 million as awarded by the ICC Panel - Kyocera owes LaPine let us say \$163 million from the moment of the ICC award, and that in turn, LaPine owes Kyocera \$35 million from the moment of the decision of the District Court. How should one qualify the product? Is this still an arbitral award within the purview of the New York Convention, or is it simply a court decision? Could LaPine seek recognition and enforcement of the hypothetical holding of the District Court in another country on the theory that this is an arbitral award? Could Kyocera seek recognition of the part of the “arbitral award” which goes in its favor, or set it off against the portion of the decision which goes in favor of LaPine? Or would in turn the original ICC award still have a chance if submitted for recognition outside the U.S.? Once again, the wording and the concepts of the New York Convention would be put on a difficult trial. Article I(2), recognizing both ad hoc and institutional arbitration, gives (at least indirectly) a definition of arbitral awards:

“The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”

The bottomline is, that - either in an institutional or in an ad hoc setting - arbitral awards are decisions made **by arbitrators**. One could very well argue that this implies that a final decision made by a court (which decision departs from the arbitrator-made award) may not be qualified as an “arbitral award”.

Staying with the issue of the characterization of the “product”, the following question also arises: When does the award become **binding** in case a Kyocera-type stipulation if the arbitration agreement (which provides for extended judicial review) is sustained. Within a standard setting, the fact that annulment remains a possibility does not prevent a party from seeking recognition of the award in a New York Convention country. Recognition cannot be denied on ground of Article V(1)(e) which allows refusal of recognition if “the award has not yet become binding on the parties”⁴³ If, however, the parties agreed on an appellate level arbitration, recognition of the first level award may very well be refused on ground of Article V(1)(e), since the award is not final and binding yet. (At least not before the appeal was dealt with, or before the time limit had expired.) Where does our situation belong? In Kyocera, the parties agreed on an extended judicial control, which converts the standard setting aside examination into a scrutiny of an appellate level. Arguably, considering the provision on expanded judicial scrutiny, the ICC award rendered in Kyocera is not a “binding award”. Again, it is difficult to accommodate the problem within the established conceptual framework of international commercial arbitration, and this gives rise to uncertainties and disorientation.

Let us follow now some other possible implications of the holding of the 9th Circuit. The Appellate Court stated quite emphatically that the FAA does not prevent the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself, and continued; “*Indeed, such a result would be quite inimical to the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.*”⁴⁴ Judge Fernandez relied on the decision of the Supreme Court in *Volt Info. Sciences Inc. v. Board of Trustees of Leland Stanford Junior University*⁴⁵ where it was held with regard to party autonomy: “*Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.*”⁴⁶ But the point is that what we have here, are party-designed rules specifying the modalities of **judicial review**. The contested rules of the arbitration agreement in Kyocera, are not “rules under which arbitration will be conducted”. The

⁴³ Recognition proceedings may possibly be suspended if setting aside proceedings are under way as defined in Article VI.

⁴⁴ 130 F.3d 884, 887

⁴⁵ 489 U.S. 468 (1989)

⁴⁶ 489 U.S. 468, 479

question is whether we have here just “an agreement to arbitrate” defining the powers of the arbitrators, or also an agreement about court proceedings, defining the powers of the judges.

Even if one were to accept such a most extensive (and probably incorrect) interpretation of the “agreement to arbitrate”, extending it to an agreement to design court proceedings as a post-arbitral phase, the question emerges as to what are the limits of party interference with the judicial proceedings. Judge Kozinski was aware of the problem and qualified his concurring opinion by stating that the present terms (review of findings of facts and of conclusions of law) might be acceptable, but flipping a coin or studying the entrails of a dead fowl might not. In this comparison, the provisions of the actual party agreement appear to be quite acceptable. But a host of variations is imaginable between the provision of the “Definitive Agreement” and entrails of a dead fowl⁴⁷. Once you allow the parties to shape the **judicial proceedings**, the question arises against what standards will one compare specific party provisions? Constitutional standards of due process are an obvious touchstone. Is this sufficient?

The “Definitive Agreement” stated that the award may be “vacated, modified or corrected”, where “the arbitrator’s findings of fact are not supported by substantial evidence”. The fact finding mechanism of ICC arbitration is quite different from the fact finding procedures of California courts. The former is essentially arbitrator-driven, the latter one is basically party-driven. Instruments are different, or have different relative values. An appellate review supposes control within a coherent system of compatible values. On rehearing the case, the District Court of the Northern District of California tried to alleviate this problem by applying a deferential “substantial evidence” standard in reviewing facts. This is helpful in the given case, but the general problem of compatibility remains. The standard structure of the whole mechanism is that of party-designed arbitration supplemented with a restricted judicial control carefully drafted by the legislator. Elements of party-designed judicial control may endanger the basic structure and balance.

⁴⁷ In *New England Utilities v. Hydro-Quebec*, 10 F.Supp.2d 53 (D.Mass.1998) the court decided to follow party agreement on expanded judicial review, but also stated - referring to Judge Kozinski - that it need not do so. If the party provision would “require diversion from the court’s normal mode of operation”. In the given case, the court found that issues of law on appeal were “thankfully straightforward”, which tilted the court towards allowing review of these issues.

C) CONCLUDING REMARKS

The conclusion I would like to suggest is very simple. (And not very helpful after an agreement on extended judicial review was already executed.) No matter whether you accept the logic of the first decision of the District Court in *Kyocera*, or whether you endorse the reasoning of the 9th Circuit, uncertainty, disorientation, and serious problems will (or at least might) emerge.

The position taken by the District Court is compatible with the mandatory character of norms on judicial control, and it is congruent with the fact that rules on arbitration contemplate party autonomy regarding the arbitration process, rather than with respect to judicial control of arbitration (unless some autonomy regarding judicial control were explicitly permitted under specific conditions, as stated in the Swiss, Tunisian and Belgian legislative acts). The position taken by the District Court also appears to be closer to realities in the arena of comparative law, as indicated by the French decisions. This position finds further support in the UNCITRAL Model Law which has been setting standards of modern arbitration acts, and which makes clear that the norms on judicial review are mandatory. According to Article 34(1): “Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article”. It follows that the only recourse permitted is setting aside, and this recourse can only be relied upon in accordance with the norms of the Act; i.e. in accordance with paragraph (2) of Article 34 which sets a list of grounds for setting aside, and in accordance with paragraph (3) which defines the time limit within which a motion to set aside may be submitted. The drawback of the logic followed by the District Court is that the arbitration agreement becomes vulnerable. The outcome will depend on the specific content of the provision on extended judicial control, and on subtle and rather unpredictable interpretation of standards like “essential element of the agreement”, “the purpose of the contract”, or “would the parties have concluded the agreement without the contested provision”.

The position taken by the 9th Circuit appears to be more difficult to square with statutory norms, yet it avoids the issue of the severability of the provision on extended judicial control. At the same time, it leads us toward uncharted ground regarding the range and character of possible party interference with the judicial process; and tensions might very well emerge between structural characteristics of arbitration and of judicial decision-making respectively, if courts are posited as an appellate level to arbitration. A *Kyocera* type extension

of judicial control might also yield court ordered modifications of the award, in which case it becomes questionable whether the product is still an award, and whether the benefits of the New York Convention remain available.

In sum, the basic problem is with the contractual provision itself. Party agreements on expanded judicial review of arbitral awards are ill-advised. Pro-arbitration is the omission of this clause.

The Kyocera dilemma prompted further reconsiderations. After this manuscript was submitted for publication, new decisions have been rendered. These decisions have not introduced new options, but they have repeatedly demonstrated how difficult it is to choose between the two existing solutions.

On **July 23, 2002**, the U.S. Court of Appeals, Ninth Circuit, reviewed the April 4, 2000 and October 2, 2000 decisions of the District Court on remand. (In these decisions, the District Court conducted an expanded review as agreed upon in the arbitration clause, yet it confirmed the award nevertheless.) Upon appeal, the Ninth Circuit conducted review within the same setting (expanded review as agreed by the parties) - and it confirmed the award once again (299 F 3d 769 - 2002).

A more consequential new decision of the Ninth Circuit was rendered on **August 29, 2003** (341 F 3d 987). This decision did not follow the established pattern, but reinvestigated once again the basic dilemma regarding party-designed judicial control. Rehearing the case *en banc* (without oral argument) the Ninth Circuit completely reversed its position, and returned to the original (1995) position of the District Court. In its 2003 decision, the Ninth Circuit held: “[f]ederal courts may only review arbitral decisions on the grounds set forth in the Federal Arbitration Act. Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is, accordingly, unenforceable.” (341 F 3d 1000). Having taken this position, the Ninth Circuit had to investigate whether the provision in the arbitration clause on expanded judicial review was separable from the rest of the arbitration agreement. After a more thorough analysis than that of the District Court in 1995, the Ninth Circuit held that the provision on expanded judicial review was separable, because “*the terms of the appellate review did not permeate other portions of the arbitration clause*”. (page 1001) The Ninth Circuit added: “*Although Kyocera asserts that the potential for expansive judicial review was critical to the entire agreement, its briefs cite absolutely no evidence that supports this assertion.*” (page 1002).

There was another attempt to reinvestigate the problem, but the Supreme Court of the United States dismissed the petition for a writ of certiorari (124 S.Ct.980 - **January 5, 2004**).

Thus, the basic problem with provisions on expanded judicial review remains, but the option of recognizing and following such party agreements appears to be sidelined - at least in the Ninth Circuit.

Sažetak

Tibor Várady*

O MOGUĆNOSTI UGOVORNOG PROŠIRENJA SUDSKOG PREISPITIVANJA ARBITRAŽNIH PRAVORIJEKA

Želio bih sugerirati veoma jednostavan zaključak (a koji nije od velike koristi nakon što je sporazum o proširenom sudskom preispitivanju već proveden.) Bez obzira na to prihvaćamo li logiku prve odluke Saveznog okružnog suda (District Court) u Kyoceri (Kyocera) ili se slažemo s rezoniranjem 9. okruga (9th Circuit), pojavit će se (ili bi se barem mogli pojaviti) nesigurnost, dezorijentacija i ozbiljni problemi.

Stav koji je zauzeo Savezni okružni sud sukladan je obvezujućem karakteru normi o sudskoj kontroli te se podudara s činjenicom da pravila o arbitraži imaju u vidu autonomiju stranaka u pogledu arbitražnog procesa, više nego s obzirom na sudsku kontrolu arbitraže (osim ako izvjesna autonomija u pogledu sudske kontrole nije izričito dopuštena pod posebnim uvjetima, kao što je utvrđeno zakonskim aktima Švicarske, Tunisa i Belgije). Pokazalo se da je stav koji je zauzeo Savezni okružni sud također bliži realnosti na području poredbenog prava, kao što pokazuju francuske odluke. Taj stav nadalje podupire UNCITRAL-ov Model zakona koji postavlja standarde modernih arbitražnih akata i koji jasno pokazuje da su norme o sudskom preispitivanju obvezatne. Prema članku 34 (1): "Sudska zaštita protiv arbitražnog pravorijeka može se tražiti samo tužbom za poništaj u skladu sa stavcima (2) i (3) ovoga članka". Iz toga slijedi da je poništaj jedino dopušteno pravno sredstvo te da se to pravno sredstvo može koristiti samo u skladu s normama Zakona; tj. u skladu sa stavkom (2) članka 34. koji navodi popis temelja za podnošenje prijedloga za poništaj. Nedostatak je načina zaključivanja Saveznog okružnog suda što arbitražni sporazum postaje povrediv. Rezultat će ovisiti o specifičnom sadržaju odredbe o proširenoj sudskoj kontroli te o suptilnom i nepredvidivom tumačenju standarda poput "bitan element sporazuma", "svrha ugovora" ili "jesu li stranke zaključile sporazum bez pobijane odredbe".

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Stav koji je zauzeo 9. okrug teže se uklapa u statutarne norme, pa ipak izbjegava pitanje odvojivosti odredbe o proširenoj sudskoj kontroli. Istovremeno vodi prema nezacrtanom terenu u pogledu opsega i karaktera mogućeg uplitanja stranaka u sudski proces; mogu se javiti i tenzije između strukturalnih obilježja arbitraže i sudskog odlučivanja ako su sudovi postavljeni na prizivnu razinu prema arbitraži. Kyocerski tip proširenja sudske kontrole mogao bi također dovesti do izmjena pravorijeka po sudskom nalogu, a u tom slučaju postaje upitno je li rezultat još uvijek pravorijek te ostaju li pogodnosti Newyorške konvencije i nadalje na raspolaganju.

Ukratko, temeljni problem je u samoj ugovornoj odredbi. Sporazumi stranaka o proširenom sudskom preispitivanju arbitražnih pravorijeka nisu preporučljivi. Proarbitraža je izostavljanje te klauzule.

Ključne riječi: arbitražna politika, UNCITRAL, usklađivanje arbitražnih pravila i statuta, ugovorno ograničenje sudske kontrole, ugovorno proširenje sudskog preispitivanja arbitražnog pravorijeka

Zusammenfassung

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ÜBER DIE MÖGLICHKEIT DER VERTRAGSERWEITERUNG DER GERICHTSÜBERPRÜFUNG VON SCHIEDSGERICHTSENTSCHEIDUNGEN

Ich möchte eine ganz einfache Argumentierung suggerieren (was jedoch nicht von großem Nutzen ist, da die Vereinbarung über die Erweiterung der Gerichtsüberprüfung bereits in die Tat umgesetzt worden ist). Ohne Rücksicht darauf, ob wir der Logik der ersten Entscheidung des US-Bezirksgerichts (District Court) in Kyocera zustimmen oder aber eher den Gedankengang der Entscheidung des Neunten Bezirks (9th Circuit) nachvollziehen können, wird dies (oder könnte es immerhin) Unsicherheit, Verwirrung und ernsthafte Probleme nach sich ziehen.

Die Stellungnahme des US-Bezirksgerichts ist in Einklang mit dem verbindlichen Charakter der Regelung über die Gerichtskontrolle und stimmt mit der Tatsache überein, dass die Normen über die Schiedsgerichtsbarkeit die Autonomie der Parteien in Hinsicht

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auf das Schiedsgerichtsverfahren in größerem Maße beachten als in Hinsicht auf die Gerichtskontrolle der Schiedsgerichtsbarkeit (außer wenn eine gewisse Autonomie in Hinsicht auf die Gerichtskontrolle nicht ausdrücklich und unter besonderen Voraussetzungen erlaubt ist, wie dies durch die Gesetzesakte der Schweiz, Tunesiens und Belgiens festgelegt wurde). Es hat sich gezeigt, dass die Stellungnahme des US-Bezirksgerichts der Realität im Bereich des vergleichenden Rechts näher ist, wie die französischen Entscheidungen es beweisen. Dieselbe Einstellung ist auch im UNCITRAL-Modellgesetz vertreten, das die Standards moderner Schiedsgerichtsakten setzt und das ausdrücklich deutlich macht, dass die Normen über die Gerichtsüberprüfung verbindlich sind. Nach Art. 34 Abs.1: "kann der Gerichtsschutz gegen die Schiedsgerichtsentscheidung nur durch die Klage auf Nichtigkeit in Einklang mit Abs. 2 und 3 dieses Artikels geltend gemacht werden." Daraus folgt, dass dieses Rechtsmittel nur in Einklang mit den Gesetzesbestimmungen, d.h. in Einklang mit Art. 34 Abs. 2 eingelegt werden kann, in dem die Nichtigkeitsgründe angeführt sind, sowie in Einklang mit Abs. 3, in dem die Zeitfrist angegeben wird, innerhalb derer der Antrag auf Nichtigkeit gestellt werden kann. Ein Nachteil dieser Argumentierung des US-Bezirksgerichts ist in der Tatsache zu suchen, dass die Schiedsgerichtsvereinbarung infolgedessen anfechtbar ist. Das Ergebnis wird vom spezifischen Inhalt der Bestimmung über die Erweiterung der Gerichtskontrolle abhängen sowie von der subtilen und unvorhersehbaren Deutung der Standards (wie etwa "wesentliches Vertragsselement", "Vertragszweck" oder die Frage, ob "die Vereinbarung ohne die angefochtene Bestimmung geschlossen wurde").

Die vom Neunten Bezirk eingenommene Einstellung, die sich schwerer in statutarische Normen einfügen lässt, weicht jedoch der Frage nach der Trennbarkeit der Bestimmung über die erweiterte Gerichtskontrolle aus. Gleichzeitig begibt sie sich hinsichtlich des Umfangs und des Charakters der eventuellen Einmischung der Parteien in den Gerichtsprozess auf ein nicht fest umrissenes Terrain; es kann auch zu Spannungen zwischen strukturellen Merkmalen der Schiedsgerichtsbarkeit und der gerichtlichen Beschlussfassung kommen, wenn die Gerichte der Schiedsgerichtsbarkeit als Berufungsinstanz gegenübergestellt werden. Die Erweiterung der Gerichtskontrolle nach dem Muster von Kyocera könnte außerdem zur Änderung des Urteilsspruchs von Amts wegen führen, in welchem Fall es fraglich ist, ob es sich um ein Urteilsspruch handelt und ob die Vorteile der New Yorker Konvention weiterhin aufrechterhalten bleiben.

Kurz gesagt, das Grundproblem liegt in der Vertragsbestimmung selbst. Die Vereinbarungen der Parteien über die Erweiterung der Gerichtsüberprüfung von schiedsrichterlichen Entscheidungen sind nicht zu empfehlen. Pro Gerichtsbarkeit heißt Weglassung dieser Klausel.

Schlüsselwörter: Schiedsgerichtspolitik, UNCITRAL, Anpassung der Schiedsgerichtsvorschriften und des Statuts, Vertragseinschränkung der Gerichtskontrolle, Vertragserweiterung der Gerichtsüberprüfung von Schiedsgerichtsentscheidungen Georgia, USA