

Contractual Modifications of the Scope of Judicial Review of Arbitral Awards

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Scope of Judicial Review

- ▶ Federal Arbitration Act (FAA) Section 10
- ▶ Case Law Additions to FAA Grounds
 - ▶ **Manifest disregard of the law and irrational standard**
- ▶ State Arbitration Statutes
- ▶ Convention on the Recognition and Enforcement of Arbitral Awards
(FAA §207)

Contractual Modifications

- ▶ Arbitration Clauses Providing for More Expansive Judicial Review
- ▶ Arbitration Clauses Providing for Narrowing/Waiver of Judicial Review

Contractual Expansion- Clause Language

- ▶ “In actions seeking to vacate an award, the standards of review to be applied to the arbitrator’s findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury.” (Hughes Training, Inc. v. Cook, 254 F.3d 588, 590 (5th Cir. 2001), cert. den., 534 U.S. 1172 (2002))
- ▶ “The arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal.” (Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 996 (5th Cir. 1995))

Enforcement of Clauses
Calling for Expanded
Judicial Review
Divided Authority

YES

3rd, 4th, 5th Cir.
and NJ statute

NO

7th, 8th,
9th, and 10th Cir.

Expanded Review Under the FAA

- ▶ 3rd Cir.- Roadway Package Systems, Inc. v. Kayser, 257 F.3d 287 cert den. 534 U.S. 1020 (2001)
- ▶ 4th Cir.—Syncor Int’l Corp. v. McClelland, 1007 U.S. App. LEXIS 21248 (1997)
- ▶ 5th Cir.—Gateway Technologies Inc. v. MCI Telecommunications Corp., 64 F.3d 993 (5th Cir. 1997)
- ▶ N.J. Stat. Sec. 2A:23B-4(c)(2003)(parties can expand the scope of judicial review)

No Expanded Review Under the FAA

- ▶ *Kyocera v. Prudential-Bache Trade Services*, 341 F.3d 987 (9th Cir. 2003) (en banc) writ of cert. dismissed, 2004 U.S. LEXIS 1 (2004)
- ▶ *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001)
- ▶ *UHC Management Co. v. Computer Services Corp.*, 148 F.3d 992 (8th Cir. 1998)
- ▶ *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991)
 - ▶ - *Bargenquast v. Nakano Foods, Inc.*, 243 F.Supp.2d 772 (N.D. Ill. 2002)

No Expanded Review Under State Statutes

- ▶ Parties cannot dictate or reach a private agreement on the role of public institutions
- ▶ North Dakota, Michigan, Illinois - tracks the FAA grounds for vacatur of Awards.
- ▶ California courts add different grounds for vacatur by a court- yet has not vacated Awards.

Narrowing/Waiver of Judicial Review

▶ Eg:

“a decision in such matters [arbitrations] shall be binding and conclusive upon each of the parties hereto and shall not be subject to any type of review or appeal whatsoever.”

Enforcement of Clauses Upholding Narrowed Judicial Review

Divided Authority

Yes

3rd, 9th, 10th

WA State Ct. of App.

No

2d Cir.

Narrowing/Eliminating Judicial Review

Yes

- ▶ Parties to an arbitration agreement may eliminate judicial review by contract (cases decided under the FAA)
- ▶ The intention to eliminate judicial review must be explicitly provided for in the contract

No

- ▶ The Second Circuit: Private Parties may not dictate judicial standards

Pros of Judicial Review Expansion by the Parties

Pros:

- ▶ Parties' ability to have greater control over the dispute
- ▶ Increase the percentage of “correct” decisions
- ▶ Increased use of arbitration

Cons of Judicial Review Expansion by the Parties

Cons:

- ▶ Comprises the finality of Awards
- ▶ More costly
- ▶ More time consuming
- ▶ Infringe on arbitrator's creativity

Pros of Narrowing the Scope of Judicial Review

Advantages:

- ▶ Awards will be “even more” final
- ▶ Courts will have greater control over their calendars and police awards less
- ▶ Arbitrator creativity will be encouraged/fostered

Cons of Narrowing the Scope of Judicial Review

Disadvantages

Parties will assume greater risks on “bad” awards