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*Expert Analysis*

# Courts Split on Contractual Waiver Of Judicial Review of Arbitration Awards

***By John R. Schleppenbach, Esq., and Howard S. Suskin, Esq.***
***Jenner & Block***

The affordability and expediency of arbitration have long been among its principal attractions.

Arbitration is more cost-effective than litigation in part because it limits the scope of a court's review of the final award. *See Controlotron Corp. v. Siemens Energy & Automation,* No. 09-CV-03112(GBD), 2010 WL 5422520, at *2 (S.D.N.Y. Dec. 23, 2010).

Mindful of the correlation between limited judicial review and lower costs, parties to arbitration have on occasion agreed among themselves to forgo judicial review entirely. *See, e.g., Hoeft v. MVL Group,* 343 F.3d 57, 63 (2d Cir. 2003).

Courts have split, however, as to whether the Federal Arbitration Act allows parties to an arbitration to waive judicial review in whole or in part, leaving the validity of this potential cost-saving move open to serious question. Several divergent cases have addressed this issue recently.

## BACKGROUND

The Federal Arbitration Act, 9 U.S.C. § 10, provides four grounds upon which a federal district court may, upon the application of a party, vacate an arbitration award:

- The award was procured by corruption, fraud or undue means;
- There was evident partiality or corruption in the arbitrators;
- The arbitrators were guilty of misconduct in refusing to postpone the hearing or hear pertinent evidence or other misbehavior by which the rights of any party have been prejudiced; or
- Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

The U.S. Supreme Court has recently recognized that the foregoing are the exclusive grounds upon which a court may review an arbitration award. The parties may not

expand the scope of judicial review by agreement. *Hall Street Assocs. v. Mattel Inc.*, 128 S. Ct. 1396, 1406 (2008).

The Supreme Court has not, however, ruled on whether parties to an arbitration agreement may limit the scope of judicial review or preclude it entirely.

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## A SPLIT IN AUTHORITY

A variety of U.S. courts, including some recently, have found that parties may validly agree to waive judicial review of an arbitration award.

For example, in *Kim-C1 LLC v. Valent Biosciences Corp.*, 2010 WL 4944638 at *4 (E.D. Cal. Nov. 22, 2010), the parties' agreement stated that "[t]he rulings of the [arbitrator] and the allocation of fees and expenses shall be binding, non-reviewable and non-appealable and may be entered as a final judgment in any court having jurisdiction."

The District Court upheld that agreement, finding that it "clearly intend[ed] to limit the parties' ability to seek review," and the court denied a motion to vacate the arbitration award. *Id.* at *6.

Although sympathetic to concerns that enforcing waiver clauses would "turn the federal courts into mere rubber-stamps," the court concluded it had to honor the intention of the parties to preclude review where it was "clear and unequivocal." *Id.* at *4-5.

Similarly, the 3rd U.S. Circuit Court of Appeals enforced a clause stating that "[t]he decision of the arbitrators shall be final and unreviewable for error of law or legal reasoning of any kind and may be enforced in any court having jurisdiction of the parties." *Comm'cns Consultant Inc. v. Nextel Comm'cns of the Mid-Atl.,* No. 04-2750, 2005 WL 1634319, at *2 (3d Cir. July 15, 2005).

Noting that judicial review of arbitration awards under the FAA is already "extremely deferential," the court reasoned that the additional language in the parties' agreement rendered what was already a "high hurdle ... insurmountable." *Id.*

**Rulings enforcing waiver clauses:**
*Kim-C1 LLC v. Valent Biosciences Corp.,* 2010 WL 4944638 (E.D. Cal. 2010)
*Communications Consultant v. Nextel Communications of the Mid-Atlantic,* 2005 WL 1634319 (3d Cir. 2005)

**Rulings rejecting waiver clauses:**
*Hoeft v. MVL Group,* 343 F.3d 57 (2d Cir. 2003)
*Rollins Inc. v. Black,* 2006 WL 355852 (11th Cir. 2006)
*Optimer International v. RP Bellevue LLC,* 2011 WL 116891 (Wash. 2011)
*Team Scandia Inc. v. Greco,* 6 F. Supp. 2d 795 (S.D. Ind. 1998)

Two federal circuit courts have also stated, albeit in dicta, that parties to an arbitration can agree to waive all court review of the proceedings. *Bowen v. Amoco Pipeline Co.,* 254 F.3d 925, 931 (10th Cir. 2001); *Aerojet-Gen. Corp. v. Am. Arbitration Assn.,* 478 F.2d 248, 251 (9th Cir. 1973).

In sharp contrast, the 2nd Circuit rejected the enforceability of agreements to waive judicial review of arbitration awards in *Hoeft v. MVL Group,* 343 F.3d 57, 64 (2d Cir. 2003).

The court noted that "the freedom to contract, like any freedom, has its limits." It further reasoned that "[i]t is in part because arbitration awards are subject to minimal judicial review that federal courts voice such strong support for the arbitral process." *Id.* at 63.

Thus, allowing the parties to an arbitration to opt out of judicial review would "eviscerate" the careful balance Congress had reached between encouraging arbitration and monitoring its basic fairness. *Id.* at 64.

Similarly, in *Rollins Inc. v. Black,* 2006 WL 355852 at *1 (11th Cir. Feb. 17, 2006), the 11th Circuit concluded that "a 'binding, final and non-appealable' arbitral award does not mean that the award cannot be reviewed. It simply means that the parties have agreed to relinquish their right to appeal the merits of their dispute; it does not mean the parties relinquish their right to appeal an award resulting from an arbitrator's abuse of authority, bias or manifest disregard of the law."

***The language used in an agreement to waive judicial review of an arbitration award may make a difference in its enforceability.***

Although the 11th Circuit ultimately disagreed with the conclusions the District Court reached when reviewing the arbitration award, it agreed that judicial review had been appropriate despite the parties' contract to the contrary. *Id.* at *2.

A variety of courts addressing the issue have reached similar conclusions. *See, e.g., Optimer Int'l v. RP Bellevue LLC,* No. 83807-1, 2011 WL 116891 at *1 (Wash. Jan. 13, 2011); *Team Scandia Inc. v. Greco,* 6 F. Supp. 2d 795 (S.D. Ind. 1998).

## PRACTICAL CONSIDERATIONS

The language used in an agreement to waive judicial review of an arbitration award may make a difference in its enforceability.

For example, the language of an agreement declaring that the arbitration award was to be "non-reviewable" and "non-appealable" was held to be "clear and unequivocal" and thus enforceable. *Kim-C1 LLC*, 2010 WL 4944638 at *4-5.

The phrase "final and binding," in contrast, was held not to show a sufficiently clear intent to eliminate all judicial review. *See Aerojet,* 478 F.2d at 251-52.

Thus, the former language is preferable to the latter, although it is also clear that some courts will not uphold waivers of judicial review regardless of the language used. *See, e.g., Hoeft,* 343 F.3d at 64.

Also, parties that wish to foreclose judicial review of their arbitration awards may consider including a choice-of-law clause specifying that their agreement will be governed by the Federal Arbitration Act as interpreted by one of the jurisdictions that enforces waiver clauses.

## CONCLUSION

Courts in the United States are very much divided as to the enforceability of agreements to waive judicial review of arbitration awards.

This split in authority is unlikely to be resolved absent a ruling from the Supreme Court and, thus, the enforceability of such agreements must be considered uncertain at best.

Parties that wish to waive judicial review should therefore draft their arbitration agreements with these considerations in mind.

**John R. Schleppenbach** (left) is an associate, and **Howard S. Suskin** (right) is a partner and co-chair of the class-action practice group at **Jenner & Block** in Chicago.