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Expanded Judicial Review in International Commercial Arbitration: Which Jurisdictions Offer the Optimal Approach from the Private Parties' Perspective?

The article at hand delves into the topic of 'expanded judicial review' in international commercial arbitration. The phrase 'expanded judicial review' refers to the situation when the parties in their arbitration agreement stipulate that, in addition to the available statutory grounds (which are generally extremely narrow), the court should set aside an arbitral award for the arbitral tribunal's misapplication of law and/or errors of fact. Several years ago, the question of whether the contractual stipulations calling for an expanded judicial review ought to be honoured was fervently debated both by the courts (especially in the United States) and the scholarly community. Eventually, at least in the international context, the approach perceiving the statutory grounds for setting aside an arbitral award as being exhaustive seems to have won the battle. After exploring the topic of 'expanded judicial review' from the private parties' perspective (and by employing the law and economics analysis), this article reaches the conclusion that is in discord with the current situation on the ground; i.e., it is the jurisdictions that would have the narrow grounds for setting aside as the default solution, but would allow the parties to expand them freely that would offer the optimal approach from the private parties' perspective. At least among the jurisdictions that are considered to be major arbitration hubs, these are nowhere to be found. While acknowledging the reasons in favour of disallowing expanded judicial reviews, this article suggests that the strong dominance of such an approach should be reduced by at least having one or two major arbitration jurisdictions to enable the parties to exercise an expanded judicial review.

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I Introduction

When an arbitral award is rendered, the losing party may decide to embark on a tantalising journey to have the award set aside. More often than not, this effort will remain a Sisyphean one. The mainstream approach, at least in the international context, has been to limit the grounds on which the arbitral awards may be set aside to a great degree. A quintessential illustration of this approach can be found in the UNCITRAL Model Law on International Commercial Arbitration (Model Law), where setting aside is only permitted on grounds that encompass the validity of the arbitration agreement, due process violations, exceeding of powers on the part of the arbitral tribunal, and procedural defects.¹ In addition, the Model Law lists two more grounds, by stating that the award may be set aside on the basis that the matter arbitrated was not arbitrable by law, and when the rendered award stands in contradiction with public policy.²

Up until now, 83 states and 116 jurisdictions have adopted the Model Law.³ Therefore, no particular justification is necessary as to why the Model Law's approach to setting aside an arbitral award is designated as *mainstream*. However, this also necessarily implies the existence of other approaches. These other approaches are mostly in line with the idea underlying the Model Law; i.e. that the enumerated grounds for challenging an arbitral award ought to be narrow, in a sense that they (generally) do not empower courts to review matters of law and fact. There may be variations in scope and wording, but the gist remains the same. For example, in the United States, the Federal Arbitration Act (FAA) was enacted in 1925; i.e. 60 years before the Model Law was adopted. While it also puts forth narrow grounds for setting aside an arbitral award, they are certainly not a mirror image of those grounds found in the Model Law.⁴ And while in Finland one can ask that the award be annulled because it was not made in writing, or because it is so vague or incomplete that it is impossible to

¹ *UNCITRAL Model Law on International Commercial Arbitration* (United Nations 1985) <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 20 June 2018. Article 34 of the Model Law puts forth the grounds on which the arbitral award may be set aside, and it treats these grounds as exclusive. In other words, once the award is rendered, it is only on these narrow grounds that the party seeking to set aside the award may rely.

² *Ibid.*

³ 'Status – UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006' (UNCITRAL, 2008) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 26 May 2020.

⁴ Federal Arbitration Act 1925 (US). The FAA uses different terminology than the Model Law. Instead of setting aside, the FAA talks about vacating an award. The FAA grounds for vacating the arbitral award can be found in 9 U.S. Code § 10:

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
- (1) where the award was procured by corruption, fraud, or undue means;
 - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
 - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or

determine how the arbitral tribunal reached its conclusions, these grounds, although somewhat broader in scope compared to the mainstream approach of the Model Law, are still considered as being narrow enough, as they do not call for the review of facts and law.⁵ However, some jurisdictions envision in their respective arbitration laws a more intrusive judicial review, an example being the English Arbitration Act of 1996 (EAA). A losing party under the EAA might succeed in appealing the arbitral award to the court on points of law, but not on factual points.⁶

In recent years, the issue of whether the grounds for setting aside an arbitral award are exhaustive and final or whether they can be varied contractually by the parties has been entertained both by the courts and scholarly community.⁷ In seeking to alter the setting aside grounds through their arbitral agreement, the parties may head in one of the two general directions. On the one hand, they may seek to further limit the judicial review of the prospective arbitral award.⁸ On the other, they may wish to do the opposite; i.e. to expand the scope of judicial review, and try to enable the courts to review the factual and/or legal aspects of the award as well.⁹ While both of these directions have proven to be quite divisive, the latter seems to be of a more controversial nature,¹⁰ and the article at hand is an attempt to make a contribution to the still on-going debate.

Most of the scholarly discussion thus far has focused on whether that the grounds for setting aside (in the US and in several other jurisdictions) are mandatory and exhaustive, and are therefore not subject to variation through contract, or whether the law permits the

(4) 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.

⁵ Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficiency System of Judicial Review' (2011) 28 (6) *J. Int'l Arb.* 596.

⁶ Sec. 69 of the 1996 English Arbitration Act provides as follows:

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

⁷ *LaPine Technology v Kyocera* 130 F.3d 884 (1997); *Kyocera v Prudential-Bache Trade Services, Inc.* 341 F.3d 987 (2003); *Hall Street Associates, L.L.C. v Mattel, Inc.* 552 U.S. 576 (2008); J. Keaton Grubbs, Justin R. Blount and Kyle C. Post, 'Arbitration Agreements, Expanded Judicial Review, and Preemption—Hall Street Associates and NAFTA Traders, Inc. – A National Debate with International Implications' (2014) 24 (Spring) *Southern Law Journal* 8.

⁸ Tibor Várady, 'On the Option of a Contractual Extension of Judicial Review of Arbitral Awards or: What Is Actually Pro-Arbitration?' (2006) 56 *Collected Papers of Zagreb Law Faculty* 460.

⁹ *Ibid.*, 461.

¹⁰ *Ibid.*, 460. Further limitation of the grounds for setting aside an arbitral award through the exercise of party autonomy is more widely accepted than the attempts that try to do the reverse; i.e. expand the scope of judicial review that is available under law.

exercise of party autonomy, and therefore their expansion when the parties so agree.¹¹ The scholars have also fervently debated whether endorsing the expanded judicial review is more pro-arbitration, or whether it is actually vice versa, i.e. whether strictly limiting the scope of judicial review, without the possibility of invoking party autonomy, is more pro-arbitration.¹² Reasons for and against tend to be given from the viewpoint of the international arbitration regime as a whole. In other words, the scholars have sought to test whether allowing the expanded judicial review of arbitral awards would somehow have an adverse impact on international arbitration, or whether it would allow the parties even more freedom to tailor their dispute-resolution process as they see fit.¹³

This article will take a somewhat different approach to the topic of expanded judicial review. It will not construe the texts of various national arbitration laws so as to argue which camp got it right, the one that argues that there is nothing in the respective text to prevent the parties from asking a heightened judicial review, or the one which sees that same text as being a nail in the coffin for the parties' aspirations to have a court take a closer look at the award. By the same token, the article at hand will not engage itself in the discussion as to whether favouring or disfavouring expanded judicial review is more pro-arbitration. Instead, it will strive to determine which approach would be the optimal solution from the viewpoint of the parties to the arbitration agreement. To this end, the primary endeavour in this article is twofold:

¹¹ Ibid, 474. It is generally accepted that Model Law does not allow the parties to contract for the expanded judicial review. Margaret Moses, 'Can Parties Tell Court What to Do? Expanded Judicial Review of Arbitral Awards' (2003) 52 U. Kan. L. Rev. 465. In her discussion on the possibility to contractually expand the grounds for vacating the arbitral award under the FAA, Moses concludes that the '[l]egal and policy reasons on the whole seem stronger for permitting rather than refusing expanded judicial review if the parties want it'. Sarah Rudolph Cole, 'Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards' (2007) 8 (1) Nev. LJ 214. On the state of the debate before the US Supreme Court decision in *Hall Street Associates, L.L.C. v Mattel, Inc.*: 'The raging debate about whether section 10 [of the FAA] contains mandatory or default rules [...]' John J. Barceló III, 'Expanded Judicial Review of Awards After Hall Street and in Comparative Perspective' in Yehuda Elkana, Nenad Dimitrijević, Peter Hay, Lajos Vékás, *Resolving International Conflicts – Liber Amicorum Tibor Várady* (Central European University Press 2009), 17. Barceló cites Franke as arguing that in Sweden '[t]he Act does not provide for any appeal on the merits to the courts. However, there [are] no restrictions for parties to make an arrangement to such effect, although this happens very rarely, if, indeed ever.'

¹² Várady (n 8) 455. After summarising both sides of the argument, Várady concludes that '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.' Moses (n 11) 434. Moses notes as follows: Commentators and courts which oppose expanded judicial review of arbitral awards assert that the FAA does not permit expanded judicial review. They further claim that expanded review would obliterate the distinction between arbitration and litigation, thereby destroying the great advantage of arbitration, which is to provide a speedy and efficient process for completing the '[a]djudication of disputes in a single instance[']'. Tom Ginsburg, 'The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration' [2010] The University of Chicago Law Review 1023. Ginsburg notes as follows:

By preventing courts from policing arbitral interpretations of law, Hall Street may end up reducing the number of cases sent to arbitration and, perversely, shifting contract disputes to the courts, precisely because there is no alternative way for parties to ensure that arbitrators do follow the law. The Hall Street logic may end up sacrificing judicial economy in an attempt to preserve it, and hurting arbitration in the name of helping it.

¹³ Ibid.

- (1) first, to categorise the jurisdictions based on the grounds that they have for setting aside an arbitral award, and based on the degree to which they allow the parties to expand the scope of judicial review; and
- (2) to test which category of jurisdictions provides the most optimal approach from the viewpoint of the private parties who decide to settle their dispute through arbitration.

A conclusion put forth in this article is that the category of jurisdictions that have narrow grounds for setting aside an arbitral award, but allow the parties to freely expand the scope of judicial review, offers the optimal solution from the private parties' perspective. The article at hand reaches this outcome by employing the law and economics analysis; i.e. it supposes that the parties entering into arbitration agreements have traits equivalent to that of a *homo economicus*. When faced with different options, and when they are in possession of sufficient information, the parties will make a choice that best suits their interests.

The article is divided into three sections. Section one explains why parties may decide to expand the scope of judicial review of their prospective arbitral award. Section two categorises jurisdictions based on two criteria: (1) the broadness (or narrowness) they take in relation to the issue of setting aside an arbitral award, and (2) their position on expanded judicial review. On this basis, the article then proceeds to group the jurisdictions into one of the following categories: (1) jurisdictions with narrow grounds for setting aside an arbitral award that bar the parties from contractual expansion of judicial review, (2) jurisdictions with narrow grounds for setting aside an arbitral award that allow the parties to contractually expand the scope of judicial review, (3) jurisdictions with narrow grounds for setting aside an arbitral award in which expanded judicial review is possible only when the arbitration clause is drafted in a specific way, and (4) jurisdictions which already envision in their arbitration laws a review that is broader in scope, as compared to the mainstream approach. Section three then provides an analysis that seeks to determine which of the enumerated jurisdictions offers the optimal solution from the viewpoint of the parties. Last but not least, the article provides concluding remarks.

II Why Do Parties Resort to Expanded Judicial Review?

What is it that drives some parties to provide in their arbitration agreement for a heightened judicial review of their prospective arbitral award? Why do they attempt to sacrifice the holy grail of arbitration, which is the easy enforceability and finality of arbitration awards? The answers to these questions primarily lie in what some parties see as the claustrophobic nature of arbitration as a dispute-resolution mechanism. As noted earlier, the vast majority of jurisdictions (at least in the domain of international arbitration) only envision very narrow grounds on which the arbitral award may be set aside. This usually means that the court, if there is an attempt to challenge the award, will generally be barred from extending its scrutiny over the matters of law and fact. Therefore, a danger exists that an arbitral tribunal might render an award that is flawed in its application of law and/or determination of fact, and the

losing party will be confined to such an award and unable to have another adjudicator take a (detailed) second look at it.¹⁴

Arbitrators are, after all, only human, and thus are not immune to making mistakes. On the one hand, occasional inadvertent mistakes could hardly be a justification for the parties to resort to expanded judicial review. This is so because the parties can themselves minimise the room for mistakes by appointing renowned specialists with the relevant skills to serve as arbitrators. On the other hand, what the parties could potentially find problematic is the (more than occasional) methodical manner in which the arbitrators do not seek to resolve disputes strictly in accordance with the applicable legal norms.¹⁵ Instead, what quite often happens is that arbitrators gravitate towards the middle ground.¹⁶ If a strict application of the law might lead to a winner-takes-all result, the arbitrators will tend to engage themselves in interpretative gymnastics in order to avoid ‘humiliating’ the losing party, and will thus render a so-called compromise award.¹⁷ Why would they do that? An explanation has been put forth that arbitrators strive to avoid the winner-takes-all approach because it is not in accord with the prospect of their future appointments.¹⁸ Namely, if they get a reputation for handing out awards that are severely one-sided, this could make the parties reluctant to appoint them once the dispute arises.¹⁹ *Ex ante*, some parties might be worried about this trend, and hence might be inclined to stipulate in their arbitration agreement that the courts will have the power to scrutinise the prospective award for errors of law and/or fact:

Parties negotiating a complicated international transaction with elaborate terms and a specific choice of law clause will understandably want these contract terms and legal rules applied strictly to resolve any disputes.²⁰

It is important to note, however, that an arbitration clause providing for an expanded judicial review has the potential of causing numerous difficulties. Namely, such an arbitration clause might bring into question its own viability,²¹ because if the parties insert such a clause in their contract, and the jurisdiction which they chose to serve as the seat of their arbitral proceedings is opposed to the expanded judicial review, the arbitral clause might not be honoured.²² In the alternative, the problematic part of the arbitral clause might be severed, but difficulties may then be encountered at the enforcement stage.²³ For instance, if the court

¹⁴ Mark D. Wasco, ‘When Less Is More: The International Split Over Expanded Judicial Review in Arbitration’ (2009) 62 (2) Rutgers L. Rev. 614.

¹⁵ Barceló III (n 11) 7.

¹⁶ *Ibid.*, 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.*; Richard A. Posner, ‘Judicial Behavior and Performance an Economic Approach’ (2004) 32 (4) Fla. St. UL Rev. 1261.

¹⁹ *Ibid.*

²⁰ Barceló III (n 11) 8.

²¹ Várady (n 8) 465.

²² *Ibid.*

²³ *Ibid.*

at the arbitral *situs* does indeed sever the portion of the agreement that envisions the expanded judicial review then, at the enforcement stage, there is a possibility that the enforcement of the award might actually be denied in accordance with Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention):²⁴

The composition of [...] the arbitral procedure was not in accordance with the agreement of the parties [...]

As a matter of fact, it is the enforcement part that is the most problematic aspect of the expanded judicial review, even when, at the arbitral *situs*, the agreements calling for the heightened judicial scrutiny are recognised and enforced.²⁵ If neither party seeks the court at the *situs* to set aside the arbitral award, on the ground that the arbitral tribunal erred in the application of law and/or determination of fact, then one can naturally expect that the enforcement in the international setting will proceed smoothly. However, if the court at the *situs* does end up reviewing the facts and/or application of law, there is a genuine possibility that the enforcement stage will be fraught with problems. Namely, the court at the *situs* may correct the award, and then the question arises of whether the corrected award is still an award, or if it is now a court judgement.²⁶ This is a major issue, as the New York Convention only enables the enforcement of arbitral awards, and not court decisions. In the alternative, the court at the *situs* might remand the case to the arbitral tribunal for reconsideration.²⁷ When this occurs, the culmination is the so-called two-awards problem.²⁸ This is because, at the enforcement stage, it is not certain that the second award will be enforced. That is, there are jurisdictions (an example being France) that might actually proceed with the enforcement of the first award despite the fact that the court at the *situs* required the arbitral tribunal to produce another one.²⁹ However, it is important to note that, in spite of all these potential difficulties that might arise with an arbitration clause calling for an expanded judicial review, some parties were still willing to take their chances and have inserted such a clause in their contract.³⁰

²⁴ Ibid, 470.

²⁵ Barceló III (n 11) 5.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid, 6.

²⁹ Ibid, 5.

³⁰ As evidenced by the cases that ended up before the courts. See (n 7).

III **Quadrumvirate of Possible Approaches**

Four groups of jurisdictions can be identified, based on how they approach the parties' attempts to expand, by contract, the statutory grounds for review of arbitral awards:

- (1) Jurisdictions with narrow grounds for setting aside an arbitral award that bar the parties from contractual expansion of judicial review,
- (2) Jurisdictions with narrow grounds for setting aside an arbitral award that allow the parties to contractually expand the scope of judicial review,
- (3) Jurisdictions with narrow grounds for setting aside an arbitral award in which expanded judicial review is possible only when the arbitration clause is drafted in a specific way, and
- (4) Jurisdictions that already envision, in their arbitration laws, a review that is broader in scope as compared to the mainstream approach.

1 **Jurisdictions with Narrow Grounds for Setting Aside an Arbitral Award That Bar the Parties from Contractual Expansion of Judicial Review**

An example of a jurisdiction that both has narrow grounds for setting aside an arbitral award and disallows their expansion through contract is, unsurprisingly, France.³¹ It has to be noted first, however, that France, in this regard, has diametrically opposed approaches to domestic arbitration as compared to the one that is international.³² For the former, the parties will be able to provide for a heightened judicial scrutiny of the prospective award, while a categorical 'no' awaits if such a course of action is undertaken in relation to the latter.³³ Another example would be the Model Law, the text of which is also perceived as barring the parties from expanding the grounds on which the court at the arbitral *situs* may set aside an arbitral award.³⁴

2 **Jurisdictions with Narrow Grounds for Setting Aside an Arbitral Award That Allow the Parties to Contractually Expand the Scope of Judicial Review**

As for the jurisdiction that has narrow grounds for setting aside an arbitral award but at the same time allows the parties to contract freely for a heightened judicial scrutiny, the author has not managed to locate an example of such practice, at least not in jurisdictions that are considered to be major hubs for international arbitration. One could, however, divide this category of jurisdictions into two subcategories, and then Italy would qualify. The sub-

³¹ Laurence Franc, 'Contractual Modification of Judicial Review of Arbitral Awards: The French Position' (1999) 10 (2) *Am. Rev. Int'l Arb.* 215.

³² Barceló III (n 11) 16.

³³ *Ibid.*

³⁴ Várady (n 8) 474.

categorisation would be as follows: 1) jurisdictions that allow expansion to encompass matters only of law or fact, and 2) jurisdictions that allow expansion to encompass both matters of law and fact. Italy would fall under the former subcategory, as Article 829 of the Italian Code of Civil Procedure provides that the award may be challenged before the court for violations of the rules of law when parties agree so in their arbitration agreement.³⁵ The Italian Code of Civil Procedure, however, does not contain the same provision regarding factual matters.

The United States had the potential of falling within the latter subcategory. Namely, in the United States, there was a sharp division between the federal courts on whether the grounds for the review of arbitral awards contained in § 10 of the FAA were exclusive, or whether the parties could expand them contractually.³⁶ This state of affairs was present until the US Supreme Court took up the issue in *Hall Street Associates, L.L.C. v Mattel, Inc.*, deciding that the grounds for vacating (setting aside) an arbitral award under the FAA were indeed exclusive, thus barring the parties from heightening them through the exercise of party autonomy.³⁷ However, the fact that three Supreme Court Justices dissented³⁸ and that several federal courts³⁹ and some scholars⁴⁰ have advocated the opposite stance is an indication, in and of itself, that a situation in which the parties can contractually expand the grounds for review of arbitral awards is not unimaginable, at least not under the FAA. Moreover, commentators in several other jurisdictions have also argued that the arbitration laws in place there do not prevent the parties from contracting for a more intrusive judicial review.⁴¹ While these views have not been transposed into practice, the fact that they are not followed today is no guarantee they will not be heeded in the future. Hence, we will make an assumption that there are two jurisdictions which allows the parties to expand the scope of judicial review of arbitral awards freely – State X and State Y. The existence of such jurisdictions is necessary to carry out the present analysis.

³⁵ Italian Code of Civil Procedure (IT). Article 829 in its relevant part provides as follows: *L'impugnazione per violazione delle regole di diritto relative al merito della controversia è ammessa se espressamente disposta dalle parti o dalla legge.*

³⁶ Moses (n 11) 433.

³⁷ *Hall Street Associates* (n 7).

³⁸ 'Hall Street Associates, L.L.C. v. Mattel, Inc.' (Oyez, 2008) <<https://www.oyez.org/cases/2007/06-989>> accessed 21 June 2018.

³⁹ Moses (n 11) 433.

⁴⁰ Ibid, 465; David K. Kessler, 'Why Arbitrate: The Questionable Quest for Efficiency in Arbitration after Hall Street Associates' (2009) 8 Florida State University Business Review 77.

⁴¹ Barceló III (n 11) 17.

3 Jurisdictions with Narrow Grounds for Setting Aside an Arbitral Award in Which Expanded Judicial Review is Possible Only When the Arbitration Clause is Drafted in a Specific Way

It has to be noted that jurisdictions do exist where the expanded judicial review is available to the parties, but only if they are very creative when drafting their arbitral clause. In other words, putting forth the following arbitral clause will not allow for a heightened judicial review to take place in those jurisdictions (while in State X it would):

In addition to the grounds for setting aside listed in the Arbitration Act, the court shall also annul the award if it finds errors of law or fact.

Examples of such jurisdictions are the United States and Switzerland. In the United States, the Supreme Court only determined that the expanded judicial review was not allowed under the FAA.⁴² Consequently, if any arbitration laws at the state level allow for it, the parties will be free to pursue it.⁴³ And, as it happens, the expansion of statutory grounds for setting aside an arbitral award is allowed in (at least) three states, New Jersey, California and Texas.⁴⁴ In New Jersey, its arbitration law explicitly provides the parties with the ability to expand the scope of judicial review:

[N]othing 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.⁴⁵

In California, the Arbitration Act is not as explicit as the one in New Jersey, but the California Supreme Court in *Cable Connection, Inc. v DIRECTV, Inc.* read it as allowing the parties to contract for the expanded judicial review so long as this is done expressly.⁴⁶ Therefore, if the parties wish to have a heightened judicial scrutiny of an arbitral award in the United States, they would have to (1) specifically place the seat of their arbitration in either New Jersey or California and (2) explicitly provide that the governing arbitration law shall be the state arbitration act (of either New Jersey or California).⁴⁷ Only then will their arbitral clause calling for an expanded judicial review be honoured by the courts. Another option would be to place the seat of arbitration in Texas, bearing in mind the fact that, in 2011 '[i]n *NAFTA Traders*,

⁴² Ibid, 11, 15.

⁴³ Ibid, 11.

⁴⁴ Ibid; Grubbs, Blount and Post (n 7) 1.

⁴⁵ New Jersey Statutes Annotated 2A:23B-4 (US).

⁴⁶ Barceló III (n 11) 11. While in *Cable Connection, Inc. v DIRECTV, Inc.* the dispute was between two US parties, Barceló notes that

[...] nothing in California or New Jersey law would prevent parties to an international transaction from placing the seat in either state [footnote omitted] and explicitly choosing that state's arbitration act as the *lex arbitri*. If the parties also expressly opt for expanded judicial review and litigate the set-aside action in state court, presumably the expanded review clause would be honored. *DIRECTV* so holds.

⁴⁷ Ibid, 15.

Inc. v Quinn [footnote omitted] the Texas Supreme Court held that the Texas Arbitration Act does not preclude the parties from supplementing judicial review by contract.⁴⁸

And as for Switzerland, the parties will be able to enjoy the heightened judicial review (the seat of arbitration, naturally, has to be in Switzerland), provided that they explicitly exclude the application of the Swiss Private International Law Act and, in lieu of it, choose the Inter-cantonal Arbitration Convention (better known as the Concordat) which provides the following ground for annulment in its Article 36⁴⁹:

f. [T]he award is arbitrary in that it was based on findings which were manifestly contrary to the facts appearing in the file, or in that it constitutes a clear violation of law or equity.⁵⁰

4 Jurisdictions That by Default Envision in Their Arbitration Laws a Review Broader in Scope as Compared to the Mainstream Approach

In some jurisdictions, the heightened judicial scrutiny (as compared to the mainstream approach) will be called for by the arbitration law itself. The best-known example of this approach can be found in England, since the EAA envisions a judicial review of an arbitral award on points of law.⁵¹ However, the path to obtaining a judicial review of this kind in England is quite strenuous. For the parties to invoke Article 69 of the EAA, which actually makes the review for errors of law possible, several cumbersome criteria must be met. First, the arbitrators must have erred in applying the law of England and Wales, or that of Northern Ireland (hence, the parties cannot ask the court to react to errors in the application of, for instance, German law).⁵² Second, judicial review on points of law is not available as of right, but a leave of appeal must be sought, for which specific conditions must then be satisfied.⁵³ Moreover, the parties must first exhaust any possible recourses available to them within the realm of their arbitral process (e.g. correction of the award).⁵⁴ Therefore, while in theory England is a jurisdiction that automatically enables a judicial review that is broader in scope as compared to the mainstream approach, in practice the parties might find it extremely difficult to obtain it.⁵⁵

Another example of a jurisdiction that, in contrast to the mainstream approach, envisions a broader judicial review of arbitral awards is Ethiopia.⁵⁶ Namely, Article 351 of the Civil

⁴⁸ Grubbs, Blount and Post (n 7) 1.

⁴⁹ *Ibid.*

⁵⁰ *International Arbitration Convention 1969* (CH).

⁵¹ English Arbitration Act, sec. 69.

⁵² Abedian (n 5) 596.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 597.

⁵⁵ *Ibid.*

⁵⁶ Hailegabriel G. Feyissa, 'The Role of Ethiopian Courts in Commercial Arbitration' (2010) 4 (2) *Mizan Law Review* 325.

Procedure Code makes it possible for the parties to challenge the award on the ground that it is ‘inconsistent, uncertain or ambiguous or is on its face wrong in matter of law or fact.’⁵⁷ Interestingly enough, when the seat of their arbitration is in Ethiopia, the parties can also contractually further expand the scope of judicial review of their prospective arbitral award.⁵⁸

IV Which Category of Jurisdictions is Optimal from the Private Parties’ Perspective?

An attempt will be made here to pinpoint the category of jurisdictions (see Section 2) that offers the optimal solution from the private parties’ perspective to the issue of expanded judicial review. The underlying foundation of the analysis at hand will be the premise that the parties to the international arbitration agreement are rational parties who, when in possession of sufficient information, will seek to further their interests in the optimal way.⁵⁹ Moreover, an assumption will be made that the major consideration for the parties with access to sufficient information when choosing an arbitral seat is the possibility to have an expanded judicial review within that jurisdiction. These parties may seek it, or may be entirely against it. As for the parties with insufficient information who, for whatever reason, include in their arbitration agreement a stipulation calling for an expanded judicial review, the present analysis *vis-à-vis* them will determine the optimal category of jurisdictions based on the extent to which that particular category enables the arbitral process to render a final and easily enforceable arbitral award. This is because these considerations are widely known as the underlying advantages of arbitration, and even parties with insufficient knowledge regarding the issues surrounding the expanded judicial review must be aware of them.

1 Preferred Category for the Parties with Sufficient Information

Let us assume that Party A and Party B have sufficient information. They are completely aware of the problems that arise when an arbitration clause calls for the expanded judicial review. In spite of that, these parties value the advantages of the expanded judicial review (e.g. strict and court-like application of legal rules)⁶⁰ over the advantages that are present (e.g. simple and straightforward enforceability of an arbitration award)⁶¹ when no such review is

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Alessio M. Paces and Louis T. Visscher, ‘Methodology of Law and Economics’ in Bart van Klief, Sanne Taekema, *Law and Method: Interdisciplinary Research into Law* (Mohr Siebeck 2011) 85–107.

⁶⁰ Barceló III (n 10) 8.

⁶¹ Edna Sussman and John Wilkinson, ‘Benefits of Arbitration for Commercial Disputes’ <https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5_authcheckdam.pdf> accessed 31 July 2018.

envisioned. It follows that these parties will seek to place the seat of their arbitration in one of the jurisdictions that allows them to contract for the post-arbitration judicial input on factual and/or legal matters of the dispute. They can either opt for the jurisdiction that allows them to expand the scope of judicial review freely, or for the jurisdiction in which they must be creative with their arbitration clause in order to have things their way. As the latter seems to involve more uncertainty and potentially a more complicated process for drafting the arbitration clause, the natural tendency of the parties will be to opt for the former. There is also a possibility for Party A and Party B to place the seat of their arbitration in a jurisdiction that envisages, in its law, additional and broader grounds for reviewing the arbitral award, provided that these correspond to what they are seeking. However, the alignment of this kind will not always be present and, if these additional and broader grounds cannot be varied contractually by the parties themselves, this leads to the conclusion that, from the private parties' perspective, jurisdictions that have narrow grounds on which the arbitral award may be scrutinised as a starting point, but allow for contractual expansion of the judicial review, are the most efficient ones. They are the ones that allow the highest level of freedom for the parties to regulate their arbitration process in the way they see fit.

Let us now assume that Party A and Party B are averse towards the expanded judicial review, and they value more highly the advantages that come to fruition with limited judicial scrutiny. More precisely, these parties place emphasis on finality and simple enforceability of the arbitration award. Consequently, they will tend to stay away from the expanded judicial review, and the majority of jurisdictions are at their disposal to satisfy this need of theirs. These parties will have their preferences met if they simply do not call for the expanded judicial review in their arbitration clause. In the alternative, in jurisdictions that provide for a more intrusive court scrutiny by operation of law, these parties will have their needs met by contractually excluding a more invasive judicial review, provided that this is allowed by law. As only this category of jurisdictions requires the parties to dedicate their time and efforts to ensure a limited judicial review, it is the only one that is inefficient from the parties' perspective. All other jurisdictions stand on an equal footing in enabling Party A and Party B to achieve the optimal solution for themselves; i.e. not to allow the courts to review their arbitral award for errors of law and/or fact.

The parties described in the previous two paragraphs are those who are in possession of sufficient information to bring an informed decision. They would, obviously, prefer the approach of those jurisdictions that allow the parties to expand the scope of judicial review contractually to be the default approach. This is so because these jurisdictions allow them a higher level of autonomy that they can then use to their advantage and achieve the optimal result for themselves. Does the preference of the parties with sufficient information for jurisdictions that allow them to expand the scope of judicial review contractually render these jurisdictions as the ones that are more efficient from the parties' perspective? For these parties, the answer is yes. To answer this question at the general level, one has to determine first which approach would be best suited for the parties that do not have sufficient information at their disposal.

2 Preferred Category for the Parties Who Lack Sufficient Information

The point of departure of this analysis has to be identifying the basic catalyst for the parties to enter into an arbitration agreement in the first place. The answer to this question most probably lies in the general traits of arbitration that are widely known. Therefore, one has to assume that even parties who do not have access to sufficient information on issues surrounding the expanded judicial review, and are thus unable to make an informed decision on whether to opt for it or not, must be in the know about the basic characteristics of arbitration, i.e. a speedy resolution of the dispute that is (usually) more economical than litigation, finality of the award, and easy enforceability.⁶² One aspect of arbitration, that the arbitrators tend to be predisposed to make a compromise award instead of upholding the strict rule of law, is not touted as one of the general traits of arbitration, and is not widely known. Hence, the parties with insufficient information as regards the expanded judicial review are likely either not to be in the know about this aspect of arbitration, and are more likely to have opted for arbitration due to its highly-familiar general traits.

Let us assume that Party A and Party B, without possessing sufficient information, still decide, for whatever reason, to include in their agreement an arbitration clause calling for the expanded judicial review. If they place the seat of arbitration (without any particular consideration, as they do not have access to sufficient information) in the jurisdiction that bars the parties from contractually expanding the limits of judicial review (and that at the same time has narrow grounds for setting aside an arbitral award), their arbitration clause will most probably be declared either invalid or the court will sever the problematic part of the arbitration agreement. In the event of the former, there is a clear conflict between the finding that the clause is invalid and the parties' mutual intent that was based on the available (although not sufficient) information. In other words, the parties wanted to utilise arbitration due to its general characteristics, but were unable to do so (i.e. no final award that is easily enforceable was rendered). In the case of the latter, the eventual award might be refused enforcement in accordance with the NY Convention.⁶³ This result is again evidently in conflict with the parties' mutual understanding at the time of concluding the arbitration agreement.

Now, let us assume the same situation from the previous paragraph, but with one important difference; this time around the parties (without any particular consideration, as they do not have access to sufficient information), who have placed the *situs* of their arbitration in the jurisdiction that allows them to expand the scope of judicial review contractually (and at the same time provides for narrow grounds for setting aside an arbitral award). If so, when the court confirms the award in the expanded review process, the chances are high that the award will be enforced, and this is in line with the parties' original intent (i.e. to get a final award that

⁶² Ibid.

⁶³ Barceló III (n 11) 5.

is easily enforceable). However, if the court finds errors of law and/or fact then the situation becomes more complicated (i.e. two awards problem, judgement correcting the award, etc.).⁶⁴ Nevertheless, these controversies are at least somewhat less problematic because, when they are present, the chances are still there that the arbitral award will be enforced. In the two awards scenario, some jurisdictions might allow the enforcement of the first award, some might prefer the second award, but the possibility of enforcement still remains open.⁶⁵ And the same holds true when a court issues a judgement correcting the award; enforcement remains a possibility. Contrast this with the situation described in the previous paragraph; when the parties call for expanded judicial review and place the seat of their arbitration in a jurisdiction that does not allow such an expansion through the contractual mode, there is every possibility that the entire arbitration clause will be deemed invalid.⁶⁶ In this scenario, no award is rendered, and hence there is nothing to be enforced. Out of two evils, it is only natural to choose the lesser one.

Therefore, when the parties opt for an arbitration clause calling for the expanded judicial review, and without possessing sufficient information on the matter, it seems that a better choice for them is to place the seat of their arbitration in the jurisdiction that freely allows them to do so (and that at the same time has narrow grounds for setting aside an arbitral award). This is so because the final result that is attained in this jurisdiction is more in line with the information that the parties have and with their intent that was present at the time the arbitration agreement was entered into.

In the case of a jurisdiction that requires specific drafting of the arbitration clause calling for an expanded judicial review, it would be impossible to argue that the approach nourished by this category of jurisdictions would be more efficient from the perspective of the parties who do not have access to sufficient information. This is so because of the complexities involved in drafting an arbitral clause. It would be unrealistic to expect the parties with insufficient information regarding the expanded judicial review to possess the knowledge and skills needed to draft an arbitral clause in a specific way so that it would be enforced. As these difficulties are not present in the jurisdictions that allow the parties to expand the scope of judicial review freely, one has no choice but to conclude that this latter category of jurisdictions is superior from the efficiency perspective.

Naturally, Party A and Party B, without possessing sufficient information regarding the expanded scope of judicial review, might also end up in a jurisdiction that already envisions in its arbitration law a scrutiny that is substantially broader compared to the mainstream approach. However, even for this category of jurisdictions, it would be quite arduous to contend that it trumps the other categories. It is highly unlikely that Party A and Party B will seek to place the seat of their arbitration in one of the jurisdictions with broad grounds for

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Várady (n 8) 465.

setting aside an arbitral award, because these actually correspond to their needs, because if they operated in this way then Party A and Party B could not be characterised as parties with insufficient information, but only with its sufficiency regarding the possibility to expand the scope of judicial review through a contract. What parties who lack sufficient information might do is to simply, for whatever reason, seek to expand the scope of judicial review contractually, irrespective of the fact that their arbitration seat already enables a judicial review that is substantially broader when compared to the mainstream approach. However, if Party A and Party B call for expanded judicial review encompassing both factual and legal matters while the seat of their arbitration only envisions one of the two, they might then encounter similar problems to those faced by the parties who place the *situs* of their arbitration in a jurisdiction that does not allow the parties to expand the scope of judicial review contractually (and at the same time has narrow grounds for setting aside). That is, if the jurisdiction chosen by Party A and Party B does not allow for further expansion of the grounds for setting aside, the risk exists that the problematic part will be severed or that the validity of the arbitration clause will come into question. The implications of this state of affairs have been discussed above. However, if the expansion of the judicial review by Party A and Party B entirely corresponds to the setting aside grounds already enshrined in the arbitration law, or if the said jurisdiction allows further expansion through contractual means, then the result might be the same as when the *situs* is placed in a jurisdiction that has narrow grounds for setting aside, but allows the parties to broaden them freely by contractual means. Nevertheless, this small niche is not sufficient to upstage the category of jurisdictions that have as a starting point the narrow grounds for setting aside the arbitral award, but at the same time allow the parties to contract freely for a heightened judicial scrutiny. For it is this category, as shown by the present analysis, that is the only one that achieves to be the intersection area for the parties in possession of sufficient information and for those parties who are not.

V Conclusion

The analysis above has shown that, from the perspective of private parties, the most efficient solution is offered by jurisdictions that put forward narrow grounds for setting aside an arbitral award, but at the same time allow the parties to expand them freely on a contractual basis so as to encompass matters of law and fact. There is a discord between this conclusion and the situation on the ground, namely the overwhelmingly pervasive approach among the jurisdictions that are traditionally seen as major hubs for international arbitration (e.g. France, US, Switzerland, Sweden) has been to take a rigid stance on the matter by supporting the position that the grounds for setting aside are not subject to party autonomy. Hence, in relation to the expanded judicial review, it is the paternalistic approach that prevails. This is not without merit, as policy considerations support this state of affairs. It is difficult to dispute that, at least in the international setting, it is advisable for the parties to stay away from the expanded judicial review, because it has the potential to muddle up the key stages of arbitration,

i.e. from the recognition and enforcement of the arbitral clause to the recognition and enforcement of the arbitral award itself.⁶⁷

In spite of the policy considerations, the article at hand concluded that the optimal approach, from the private parties' point of view, is actually offered by those jurisdictions that enable the parties to expand the narrow grounds for setting aside an arbitral award freely. As the author has not managed to locate one single jurisdiction among those that are considered to be important hubs for international arbitration that allows a judicial review to encompass matters of fact and law, an assumption was made in the present article that two such jurisdictions exist – State X and State Y. This fiction was necessary in order to carry out the analysis from the law and economics perspective.

However, it is not the aim of this author to advocate in the article at hand that the approach nourished by State X and State Y ought to be adopted uniformly across all jurisdictions. The difficulties surrounding the expanded judicial review speak against this position, even though, from the perspective of private parties, the possibility of such an expansion would be welcomed. Nevertheless, at the same time, it must be noted that, for other categories of jurisdictions, the author did not need to make assumptions and reach for fictions. The examples of all of the following jurisdictions could be pinpointed on the ground: (1) jurisdictions with narrow grounds for setting aside an arbitral award that bar the parties from contractual expansion of judicial review; (2) jurisdictions with narrow grounds for setting aside an arbitral award in which expanded judicial review is possible only when the arbitration clause is drafted in a specific way; and (3) jurisdictions that already envision in their arbitration laws a review that is broader in scope compared to the mainstream approach. The conclusion that the jurisdictions that allow the parties to expand the narrow grounds for setting aside an arbitral award are the most efficient from the private parties' perspective serves to lament the total dominance of the paternalistic approach. While barring the parties from freely expanding the scope of judicial review might be justified on policy grounds, there still exist strong arguments in favour of allowing it. Therefore, it is the opinion of this author that it would be advisable to have at least one or two jurisdictions that are considered as major hubs for international arbitration change their approach and allow the parties to ask for a heightened judicial scrutiny of their prospective arbitral award with no strings attached. In such a scenario, the parties who want expanded judicial review and are sufficiently informed about its pros and cons will have a jurisdiction where their needs will be met. For parties who do not wish such judicial input, this jurisdiction will still remain a viable option as their preferences will be satisfied if they simply do not call for an expanded judicial review in their contract. And last but not least, parties who are not in possession of sufficient information regarding the expanded judicial review, but for whatever reason opt for it in their arbitration agreement, might even have a better chance of getting an enforceable award than if they placed the *situs* of their arbitration elsewhere. All this serves as a solid justification for the reduction of the indisputable dominance of the approach that bars the parties from expanding the narrow grounds for setting aside an arbitral award.

⁶⁷ Várady (n 12) 465.