

“Expanded” Judicial Review Revisited: Kyocera Overturns LaPine

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Just when you thought you could validly add a clause to your client’s arbitration agreement providing that the losing party may take an appeal from the award to the district court having jurisdiction over the parties, think again.

What was the law of the Ninth Circuit since December 1997, when a three-judge panel of the Ninth Circuit Court of Appeals decided *LaPine Technology Corporation v. Kyocera Corporation*¹ (“*LaPine I*”), has just been reversed by the Ninth Circuit Court of Appeals sitting *en banc*. In its decision, on a rehearing of what the court refers to as “*LaPine II*”², the court overruled *LaPine I*, affirming the district court’s 1995 conclusion³ and holding that a “federal court may only review an arbitral decision on the grounds set forth in the Federal Arbitration Act.”⁴

In analyzing *Kyocera*, this article discusses (i) why the rehearing *en banc* was improvidently granted with respect to the issue of whether parties can include an appeal clause in their pre-dispute arbitration agreement; (ii) why the *en banc* court in rehearing that issue asked the wrong question; and (iii) having found the appeal provision to be illegal, on what principal ground the court should have severed the appeal provision from the rest of the arbitration clause.

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1. *LaPine Tech. Corp. v. Kyocera Corporation*, 130 F.3d 884 (9th Cir. 1997) (honoring the parties’ agreement to subject the arbitral award to review by the district court having jurisdiction, for errors of fact or law because the principle behind the federal policy as embodied in the Federal Arbitration Act is to guarantee that courts will enforce private agreements to arbitrate according to their terms)

2. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 299 F.3d 769 (9th Cir. 2002) *appeal dismissed per stipulation* *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 124 S. Ct. 980; 157 L. Ed. 2d 810 (2004).

3. *LaPine v. Kyocera Corp.*, 909 F. Supp. 697 (N.D. Cal. 1995) (holding that the appeal clause in the parties’ arbitration agreement improperly presumed to direct the court as to the substance and parameters of its exercise of judicial power)

4. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (*en banc*).

1. Should the en banc court have reconsidered the LaPine I ruling?

Before deciding the main issue of whether to let stand or overrule *LaPine I*, Judge Stephen Reinhardt, writing for the 9-2 majority, had to justify why the court should reconsider a nearly six-year-old holding of its own court. Judge Pamela Ann Rymer filed a “separate statement” that as to the question whether the *en banc* court should have reconsidered the *LaPine I* ruling amounted to a dissenting opinion. In her separate statement, Judge Rymer wrote that she would have dismissed the rehearing of *LaPine II* as “[i]mprovidently granted because the parties have no interest in reconsidering *LaPine I* and doing so has no effect on the outcome of this appeal.”⁵ Both parties had agreed that *LaPine I* should not be overruled after all this time. They filed supplemental briefs on the issue only after the *en banc* court had ordered the parties specifically to address the question of “whether a contract between private parties may bind a federal court to apply a different or less deferential standard of review than the standard specified in the Federal Arbitration Act”.⁶

The majority opinion and the separate statement were in agreement that the court had the *ability* to overrule *LaPine I*.⁷ The separate statement pointed out, however, that it is not a question whether the *en banc* court *could* do so but rather whether it *should*.⁸ Whereas the parties did not raise the issue and thus afforded minimum opportunity for “current input” to the *en banc* court, Judge Rymer noted that “absent a genuine adversary issue between ... parties, a federal court may not safely proceed to judgment.”⁹

Admitting that it “could have” taken up the issue *en banc*¹⁰ following the December 1997 decision in *LaPine I*, the majority justified its decision to proceed with its review thereof at this time on the ground that “whether private parties may impose on a federal court a standard of review beyond that approved by Congress remains a ‘question of exceptional importance’....,¹¹ the answer to

5. *Kyocera*, 341 F.3d at 1004 (Rymer, J., separate statement).

6. *Id.* at 1004 n.2. Judge Rymer added that the parties’ “discussion of *LaPine I* is abbreviated and unhelpful, no doubt because the parties themselves have spent a ton of money, and six years of time and effort, in reliance upon it and couldn’t care less about it now.” *Id.* Quoting from the parties’ briefs, Judge Rymer reported that *Kyocera* thought it was “jurisprudentially inappropriate and manifestly unfair for the Court *en banc* to consider overruling *LaPine I*....[S]ound reasons militate against disturbing that ruling now”. *LaPine*’s position was the same: “This case ... is not the right vehicle for [overruling *LaPine I*].” *Kyocera*, 341 F.3d at 1004.

7. *Kyocera*, 341 F.3d at 995-96, 1004.

8. *Id.* at 1004.

9. *Id.* at 1005 (internal citations omitted).

10. Could have — possibly implying that it should have? The *en banc* court would have had to take the case *sua sponte*, since neither party sought a rehearing *en banc* at the time. See *Kyocera*, 341 F.3d at 996.

11. Being one of the grounds upon which a circuit court can take a case *en banc* under Fed. R. App. P. 35(a)(2).

which may well affect large numbers of parties with critical contractual and statutory rights and billions of dollars at stake”.¹² Judge Rymer responded to this argument that even if this is true in general, it cannot be a question of exceptional importance *in this case* in light of the parties’ concession that they do not care about *LaPine I* and that *LaPine I* does not affect the outcome of the controversy between these parties.¹³ Thus, Judge Rymer correctly found that the majority was not justified deciding this question “in a vacuum — particularly when the issue is not dispositive, does not matter to the parties, was not identified as an issue on appeal, was not thoroughly vented in oral or written argument, is not inconsistent with Ninth Circuit precedent, and does not resolve a circuit split.”¹⁴

2. The Court Raised the Wrong Question

More problematic than the procedural issue as to whether it should have even reconsidered *LaPine I* is that in doing so the *en banc* court raised the wrong question. Similar to Judge Fernandez’s decision in *LaPine I*,¹⁵ the court’s analysis centered on the question whether the Federal Arbitration Act (“FAA”)¹⁶ grants private parties the power to dictate the grounds for judicial review of an arbitration award beyond the grounds for *vacatur* specified in Section 10(a) of the FAA.¹⁷ The court concluded that the FAA enumerates limited grounds on which a federal court may vacate, modify or correct an arbitration award and therefore precludes parties from agreeing to arbitral appeal.¹⁸

12. *Kyocera*, 341 F.3d at 996 (internal citations omitted).

13. *Id.* at 1006.

14. *Id.* Following the *en banc* decision, *Kyocera* did file a writ of certiorari with the Supreme Court. On January 5, 2004, the writ was dismissed under Rule 46.1 of the Rules of the Supreme Court pursuant to agreement between the parties, *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 124 S. Ct. 980; 157 L. Ed. 2d 810 (2004). The parties settled the case before the Supreme Court could decide whether or not to grant the writ. However, since resolution of the issue (whether a pre-dispute agreement permitting arbitral appeal is legal under the FAA) is not necessary to a resolution of the parties’ current dispute, it would have been highly unlikely that the Supreme Court would have granted it. *Cf. Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) and the other cases cited in Judge Rymer’s separate statement. *Kyocera*, 341 F.3d at 1005-06.

15. Judge Fernandez framed the issue as whether “federal court review of an arbitration agreement [is] necessarily limited to the grounds set forth in the FAA or [whether] the court [can] apply greater scrutiny, if the parties have so agreed”. *LaPine Tech. Corp.*, 130 F.3d at 887.

16. 9 U.S.C. §§ 1-16 (2003) (hereinafter “FAA”).

17. *Kyocera*, 341 F.3d at 997.

18. *Id.* See also *id.* at 1000. The phrase “arbitral appeal” is used herein as a shorthand reference to appeal from an arbitral award to the competent district court pursuant to a specific clause in the arbitration agreement between the parties, as distinguished from “judicial appeal” meaning appeal from a judgment of a lower court to the appeals court competent to hear such an appeal. In

In framing the issue in this manner, the *en banc* court failed to recognize the fundamental difference between *vacatur* pursuant to Section 10(a) of the FAA (which need not have been contractually agreed to) and *appellate review* pursuant to a contractually agreed-upon appellate procedure. As a result, the court formulated the issue in terms of whether private parties can impose on the federal courts a “broader standard of review than the grounds authorized by statute”¹⁹ and analyzed the issue by construing Sections 9, 10 and 11 of the FAA. Instead, the court should have looked at the question of whether parties can validly agree to arbitral appeal as an issue separate and distinct from the *vacatur* remedies provided for in Section 10(a) FAA.

The two remedies differ both in character and purpose: *vacatur* is intended to preserve the integrity of both the judicial system (as pertaining to judgments) and the arbitral system (as pertaining to awards). Thus, under most legal systems *vacatur* provisions cannot be contracted away by the parties.²⁰

On the other hand, appeal from a court’s judgment (provided as of right in a court proceeding) serves to allow the losing party to have a higher court review whether or not the lower court has correctly interpreted the law (and, sometimes, also the facts). Appeal from an arbitral award is no different, but since the parameters of the arbitral procedure must be specified in the agreement between the parties, there is no appeal unless the parties’ contract specifically provides for it.²¹ Viewed from this perspective, there is no material distinction between

this context, therefore, “arbitral appeal” is not intended to include appeal from an arbitral award to another panel of arbitrators.

19. *Id.*

20. Eric van Ginkel, *Reframing The Dilemma of Contractually Expanded Judicial Review: Arbitral Appeal vs. Vacatur*, 3 PEPP. DISP. RESOL. L.J. 157, 206-08 (2003). *Accord* Hoeft v. MVL Group, Inc., 343 F.3d 57 (2d Cir. 2003) (“This balance [between the importance and flexibility of private resolution mechanisms and barring federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct] would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons, must nevertheless be blessed by federal courts.” 343 F.3d at 64, emphasis added). See also, e.g., Team Scandia, Inc. v. Greco, 6 F. Supp. 2d 795, 798 (S.D. Ind. 1998). But see Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001) (suggesting that parties could “opt out of the FAA’s off-the-rack *vacatur* standards.”) Professor Park referred to this quote as “ill-reasoned dictum.” William W. Park, *Why Courts Review Arbitral Awards*, 2 MEALY’S INT’L ARB. Q.L. REV. 121, 131 n.11 (2001). The *en banc* court in *Kyocera* also contained such ill-reasoned dictum when Judge Reinhardt wrote that “the decision to contract for a narrower standard of review than the courts generally apply in the absence of a statutory command is a decision that may be less troublesome than the attempt to contract for a broader standard of review than that authorized by Congress, although we need not resolve that question here.” 341 F.3d at 999 n.16 (emphasis in original).

21. Section 69 English Arbitration Act of 1996, and the laws of those countries that have adopted a similar provision, employ a different system. Generally, pursuant to Section 69 of the English Act, an appeal to the court on points of law is available as of right (unless contracted away by the parties, which pursuant to Section 4(3) is accomplished even by a simple reference to institutional arbitration rules such as the ICC Rules of Arbitration providing that the award is final), pro-

providing for arbitral appeal in the arbitration agreement and the elements of the arbitration agreement that are permissible according to Judge Mayer's dissenting opinion in *LaPine I*, approvingly quoted by the *en banc* court: "[w]hether to arbitrate, what to arbitrate, how to arbitrate, and when to arbitrate are matters that parties may specify contractually".²²

As I pointed out in an article published just prior to the *Kyocera* decision²³, there is a profound difference between (i) reviewing (and possibly setting aside) an award on the basis of allegations of fraud, partiality or corruption, procedural misbehavior, or arbitrators exceeding their powers, and (ii) reviewing (and possibly overturning) an award on appeal on the basis of allegations of error(s) by the arbitrators in the findings of fact and/or the conclusions of applicable law.²⁴ The distinction is evident not only when comparing an appeal from a judgment with a motion to vacate a judgment,²⁵ but also when looking at the arbitration statutes of many other countries, in which one provision deals with arbitral appeal and a different provision with *vacatur*.²⁶

Once we are aware of the distinction, any analysis of the provisions of the FAA dealing with *vacatur* becomes simply irrelevant to the issue of whether or not to allow arbitral appeal.

The *en banc* opinion set up the framework for its decision on the question whether or not to allow private parties to agree to arbitral appeal by using a narrow interpretation of Section 9 of the Federal Arbitration Act.²⁷ Section 9 states

vided that all other parties agree, or leave of the court is obtained and certain conditions have been met. See Van Ginkel, *supra* note 20, at 195-96.

22. *Kyocera*, 341 F.3d at 992, citing *Volt Info. Scis. Inc. v. Bd. of Trs. of Lcland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989).

23. Van Ginkel, *supra* note 20, at 188-192.

24. *Id.* at 189.

25. *Id.* (citing *Van De Ryt v. Van De Ryt*, 6 Ohio St. 2d 31, 35 (1966) ("The remedies of appeal and vacation are "cumulative" or, more precisely, alternative"). This analogy was also used by the Second Circuit Court of Appeals in *Hoelt*, *supra* note 20, when the court held that private parties cannot contract away *vacatur* grounds (including the non-statutory ground of 'manifest disregard of the law'): "Just as the Supreme Court held in *Bonner Mall* that private parties may not dictate to a federal court when to vacate another court's judgment, we hold today that private parties may not dictate to a federal court when to enter a judgment enforcing an arbitration award." 353 F.3d at 19. Although still seeing an agreement to allow appeal to a federal court through the lens of "raising the level of judicial review", the *Hoelt* court did also note "that there is a fundamental difference between an agreement to increase the scrutiny that courts apply when considering whether to confirm or vacate an arbitration award and an agreement to prevent courts from reviewing [pursuant to the 'manifest disregard' *vacatur* ground] the substance of an arbitration award at all." 353 F.3d at 16.

26. Van Ginkel, *supra* note 20, at 190-91.

27. *Kyocera*, 341 F.3d at 997.

that if a party seeks a judicial order confirming an arbitration award, “the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”²⁸ The court emphasized “*as prescribed in*”, and then launched into an exposé of the limited grounds on which section 10 of the FAA permits *vacatur*.²⁹

It is true that, if taken literally, the language of Section 9 FAA could be interpreted to exclude arbitral appeal. It is equally clear, however, that when the Federal Arbitration Act was drafted for the principal purpose of compelling the courts to enforce agreements to arbitrate (as set forth in Section 2 of the Act), in all likelihood the issue of whether or not to allow arbitral appeal was never considered, just as the 1921 draft did not even include provisions dealing with *vacatur*.³⁰

In addition, as Professor Goldman suggested correctly, Section 9³¹ could just as easily be interpreted as allowing contractually agreed upon arbitral appeal, given the introductory sentence of Section 9 which indicates that confirmation of an award is compelled “*if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration...*”³² As Professor Goldman went on to say, one can easily argue that a contract providing for arbitral appeal “does not agree to court confirmation unless supported under the standard provided for in the agreement.”³³

The *en banc* court’s analysis would have been excellent for the purpose of arguing that there should not be any so-called non-statutory grounds for *vacatur*. As Professor Goldman noted, Sections 9 and 10 of the FAA, when read together, indeed suggest that confirmation of an award is compelled, except if one (or more) of the limited grounds for *vacatur* set forth in Section 10(a) apply.³⁴ Instead, the *en banc* court conveniently included the “completely irrational” and “manifest disregard of the law” standards to fall within the purview of arbitrators’ “exceeding their powers”, the *vacatur* ground of Section 10(a)(4) of the

28. 9 U.S.C. §9. See *infra* note 31.

29. *Kyocera*, 341 F.3d at 997.

30. Van Ginkel, *supra* note 20, at 198-99.

31. Section 9 of the FAA reads in pertinent part:

“If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”

32. *Id.* (emphasis added); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 181 (2003).

33. *Id.*

34. *Id.* at 180-181.

FAA, even though in the minds of most commentators and case law these are generally considered to be court-made, “non-statutory” *vacatur* grounds.³⁵

Sections 9, 10 and 11 of the FAA have to do with *vacatur* and have nothing to do with a contractually agreed-upon appellate review by the courts. Thus, the court’s analysis has little relevance for the question as to whether the law allows or should allow parties to agree in a pre-dispute agreement to permit an appeal from the arbitral award to the appropriate district court.

Given the incompleteness of the Federal Arbitration Act and the extensive case law developed since its adoption, especially in the last 25 years, which expanded federal arbitration law far beyond the original concepts of the FAA, and given the almost complete absence of legislative history, it is more than a little disingenuous to now argue that Congress did not intend to include arbitral appeal.³⁶ The *en banc* court cited as justification arbitration’s “potential for speed and informality,”³⁷ arguing that broad judicial review of arbitration decisions could well jeopardize the very benefits of arbitration.

Although the court cited Professor Lee Goldman’s article³⁸ in support of the proposition that “arbitration can be faster, cheaper and more private than litigation”, the court failed to discuss the more important issue raised by Professor Goldman that there has been a growing concern in recent years about the risks presented by arbitration’s limited scope of review. As Professor Goldman went on to say, “[t]o offer protection against ... unpredictable or biased decision-making, without sacrificing all the benefits of arbitration, parties have begun to include clauses in their arbitration agreements seeking to expand the scope of judicial review.”³⁹

Much in the same vein, I discussed the tension that exists between the benefit of the finality of the award and the perceived absence of much needed quality control over arbitrators as they are asked to interpret increasingly more complex legal issues.⁴⁰ I argued that this tension can be relieved, at least in part, by adopting a system that both (i) strictly limits *vacatur* grounds to the ones that are

35. See, e.g., Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 450-51, 461-88 (1998). See also *Hoelt*, 343 F.3d at 64 (“The Supreme Court has supplemented the FAA with an additional ground not prescribed in the statute: manifest disregard of the law.” citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) and other cases). See also *supra* note 20.

36. See Van Ginkel, *supra* note 20, at 192 (notably n.181).

37. *Kyocera*, 341 F.3d at 999.

38. Goldman, *supra* note 32.

39. Goldman, *supra* note 32, at 173.

40. Van Ginkel, *supra* note 20, at 160, 193 and 213.

enumerated in Section 10(a), — thus avoiding that the losing party can successfully delay execution of the award through the “back door” of non-statutory *vacatur* grounds — and (ii) recognizes that the freedom to contract as confirmed in Section 2 of the FAA and as interpreted by the Supreme Court in *Volt*,⁴¹ dictates that the parties may choose (for whatever reason) to submit the award to an appeal by the appropriate district court.⁴²

As the *en banc* court pointed out,⁴³ the *LaPine I* panel, as well as the Third and Fifth Circuits that agree with the *LaPine I* court’s holding⁴⁴, generally emphasize that the purpose of the Federal Arbitration Act is to enforce the terms of private arbitration agreements, as provided in Section 2 of the FAA. This provision is often called the Act’s “primary substantive provision.”⁴⁵ The Supreme Court emphasized its significance in *Volt*, by determining that “[j]ust as [private parties] 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

In response to this argument, the *en banc* court agreed with the Seventh, Eighth and Tenth Circuits⁴⁷ that “private parties have no power to determine the rules by which federal courts proceed, especially when Congress has explicitly

41. *Volt*, 489 U.S. at 468.

42. Van Ginkel, *supra* note 20, at 212-213.

43. *Kyocera*, 341 F.3d at 999.

44. In addition, the Fourth Circuit in an unpublished opinion, as well as lower courts in the First and Second Circuits hold the view that private parties can validly agree to allow appeal to the federal district court that has jurisdiction over the parties. See Van Ginkel, *supra* note 20, at 174-78. The *Kyocera* court’s reference to the Third Circuit’s decision in *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001) is ambiguous in that *Roadway* is simply a case in which the Circuit court of appeals held that the parties’ generic choice-of-law clause could not be construed to mean that the parties had intended that the narrower state law *vacatur* grounds would apply to the arbitral award, and affirmed the district court’s decision to vacate the arbitral award pursuant to § 10(a)(4) of the FAA because the arbitrator exceeded the scope of his powers as spelled out in the agreement to arbitrate. The arbitration agreement did not include an arbitral appeal provision.

45. See, e.g., Gilmer v. Interstate/Johnson Lanc Corp., 500 U.S. 20, 24 (1991). See also, e.g., Karon A. Sasser, *Comment: Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 346 (2000) [The FAA does not prevent the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. A different result “would be quite inimical to the FAA’s primary purpose of ensuring that agreements to arbitrate are enforced according to their terms.” (emphasis added)]

46. *Volt*, 489 U.S. at 479. See *supra* note 41.

47. In fact, only the Tenth Circuit rendered a reasoned opinion on the issue, in *Bowen v. Amoco Pipeline*, 254 F.3d 925 (10th Cir. 2001), whereas the Seventh and Eighth Circuits refer to the issue only in dictum: Judge Posner, writing for the Tenth Circuit, voiced his opposition to allowing arbitral appeal in dictum in *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991). The Eighth Circuit, in a case in which the agreement did not include a provision allowing arbitral appeal, and thus also in dictum, expressed doubt as to the ability of parties to expand judicial review of arbitration awards contractually, but clearly kept the door open for a future review of the issue. *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 998 (8th Cir. 1998). See generally, Van Ginkel, *supra* note 20, at 162-65, 175.

prescribed those standards."⁴⁸ The court admitted that "[p]ursuant to *Volt*, parties have complete freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs — including review by one or more appellate arbitration panels."⁴⁹ Judge Reinhardt went on to say that "[o]nce a case reaches the federal courts, however, the private arbitration process is complete, and because Congress has specified standards for confirming an arbitration award, federal courts must act pursuant to those standards and no others."⁵⁰

The implication of distinguishing between *vacatur* and arbitral appeal is: (i) Congress did specify standards for *vacatur*, but (ii) (outside the general rule of Section 2) said nothing about allowing the parties to contract for arbitral appeal.

Whether or not to allow arbitral appeal then becomes a matter of policy.⁵¹ As I have argued extensively, both policy considerations and practical reasons favor allowing arbitral appeal.⁵² In addition, not only does precedent in case law and statutes of other countries support this position,⁵³ more importantly, allowing arbitral appeal is entirely consistent with the major Supreme Court decisions⁵⁴ that developed the view that effect should be given to the unequivocal directive of the FAA mandating enforcement of arbitration agreements, absent overriding reasons of statutory law or the common law of contracts external to the arbitration agreement.⁵⁵ In fact, the Supreme Court's view of the public policy of the FAA is consistent with both permitting contractual arbitral appeal and limiting the *vacatur* grounds to those enumerated in Section 10(a).⁵⁶

3. Severability

Having found that the parties could not agree to include arbitral appeal in their arbitration clause, the *en banc* court had to consider whether the invalidity

48. *Kyocera*, 341 F.3d at 1000. The court's choice of words is clearly inspired by the wording of Section 9 FAA.

49. *Id.*

50. *Id.*

51. Van Ginkel, *supra* note 20, at 192-202.

52. *Id.* at 193-94.

53. *Id.* at 194-97.

54. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). See generally Van Ginkel, *supra* note 20, at 197-98.

55. Van Ginkel, *supra* note 20, at 197-98 (quoting Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1, 11 (1996)).

56. Van Ginkel, *supra* note 20, at 198.

of such a clause rendered the entire arbitration clause unenforceable or whether it could simply sever the illegal clause and declare the rest of the arbitration agreement valid. Kyocera argued, as it had before the original district court that had found the appeal clause to be invalid,⁵⁷ that it would never have agreed to arbitrate at all if appeal to the courts were precluded.⁵⁸

The *en banc* court, noting that severability is a question of state law, followed the California Supreme Court's recent decision in *Little v. Auto Stiegler Incorporated*,⁵⁹ a case that in turn followed the extensive review of the question of severability by that same court in *Armendariz v. Found. Health Psychcare Services, Inc.*⁶⁰

Judge Reinhardt approvingly quoted *Little*, where the California Supreme Court explained that “[i]f the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance and restriction, then severance or restriction is appropriate.”⁶¹ Judge Reinhardt went on to say that “[a]s in *Little*, the flaw manifest in the terms of appellate review does not permeate any other portion of the arbitration clause, and the review provisions are not interdependent with any other.”⁶²

Finding support in this second quote from *Little*, which in turn quoted *Armendariz*, may prove to be somewhat questionable because this language is derived from Comment 2 of the Legislative Committee on Civil Code section 1670.5,⁶³ which relates to the issue of unconscionability. In contrast, the *Kyo-*

57. *LaPine Tech. Corp.*, 909 F. Supp. at 706 (finding the appeal clause invalid).

58. *Kyocera*, 341 F.3d at 1000.

59. *Little v. Auto Stiegler, Inc.*, 130 Cal. Rptr 2d 892 (2003).

60. *Armendariz v. Found. Health Psych. Servs., Inc.*, 99 Cal. Rptr.2d 745 (2000).

61. *Kyocera*, 341 F.3d at 1001.

62. *Id.* at 1001-02. Similarly, the original district court's opinion in *LaPine I*, *supra* note 57, found that “The instant case ... presents a clear cleavage in its terms between the arbitration procedure to be conducted by the arbitrators and the review of the arbitration procedure to be conducted by the court. ... Motivations of the parties in contracting for the defined scope of judicial review are unknown to the court and the parties offer nothing but speculative suggestion on this score. The contents of § 8.10(d)(ii) and (iii) of the Definitive Agreement are clearly severable.” *LaPine Tech. Corp.*, 909 F. Supp. at 706.

63. The California Civil Code reads in pertinent part:

“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” Cal. Civ. Code § 1670.5 (Deering 2003).

Comment 2 of the Legislative Committee comment on section 1670.5, states:

“Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.” [emphasis added]

cera court had to deal with a question of illegality, which is governed by Civil Code sections 1598 and 1599. Although the basic principles of severability that emerge from Civil Code section 1599 and the case law of illegal contracts are held to be fully applicable to the doctrine of unconscionability,⁶⁴ the reverse is not necessarily true. Whereas Civil Code section 1670.5 by its terms gives the trial court some discretion as to whether to sever or restrict the unconscionable provision or whether to refuse to enforce the entire agreement,⁶⁵ no such discretionary authority is apparent from Civil Code sections 1598⁶⁶ and 1599.⁶⁷

As the *Armendariz* court pointed out with respect to severability of *illegal* contract terms, the California Supreme Court in *Keene v. Harling*⁶⁸ explained:

Whether a contract is entire or separable depends upon its language and subject matter, and this question is one of construction to be determined by the court according to the intention of the parties. If the contract is divisible, the first part may stand, although the latter is illegal. It has long been the rule in this state that when the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the law divides according to common reason; and having made that void that is against law, lets the rest stand.⁶⁹

The *en banc* court observed that *Kyocera* failed to support with any evidence whatsoever its assertion that the potential for expansive appellate review was critical to the entire agreement.⁷⁰ The intention of the parties thus being impossible to determine, the court could not construe the arbitration agreement on that basis.⁷¹

On the other hand, it should be noted that the *Keene* court, *infra* note 68, does refer to an 1888 case, *Mill & Lumber Co. v. Hayes*, 76 Cal. 387 (1888), in which the court, in invalidating the agreement opined: "The good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good..." *Hayes*, 76 Cal. at 393 (emphasis added).

64. *Armendariz*, 24 Cal. 4th at 124.

65. *Id.* at 122.

66. The California Civil Code reads in relevant part:

"Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void." Cal. Civ. Code § 1598 (*Deering* 2003).

67. The California Civil Code reads in pertinent part:

"Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Cal. Civ. Code § 1599 (*Deering* 2003).

68. 61 Cal. 2d 318 (1964).

69. *Id.* (internal quotes, citations and footnote omitted) (*quoted in Armendariz*, 24 Cal. 4th at 122). See *supra* note 60.

70. *Kyocera*, 341 F.3d at 1002.

71. See also *LaPine Tech. Corp.*, 909 F. Supp. at 706.

At this stage of the proceeding, the result would have been the same, even if Kyocera had been able to support its assertion that but for the appeal clause it would never have agreed to an arbitration agreement in the first place: it would be unfair to allow Kyocera to gain the undeserved benefit of being able to relitigate the case in court simply because an, albeit crucial, element of the arbitration clause is held to be invalid.⁷² Instead of implying that this is only a secondary ground for not severing the offending clause from the rest of the contract, the *Kyocera* court should have made this the principal ground for doing so.

Such a holding is consistent not only with *Armendariz*,⁷³ but also with the 2002 appellate case, *Crowell v. Downey Community Hospital Foundation*.⁷⁴ *Armendariz* held⁷⁵ that the two reasons implicit in case law for severing or restricting *illegal* terms rather than voiding the entire contract are (i) “to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement — particularly when there has been full or partial performance of the contract,” and (ii) attempting “to conserve a contractual relationship if to do so would not be condoning an illegal scheme.”⁷⁶ However, in *Crowell*, the issue of whether an arbitral appeal procedure agreed upon in the parties’ arbitration agreement is illegal under the California Arbitration Act was adjudicated before the arbitration proceedings took place. Holding that such an appeal procedure was illegal under California law, the *Crowell* court opined:

The provision for judicial review of the merits of the arbitration award was so central to the arbitration agreement that it could not be severed. To do so would be to create an entirely new agreement to which neither party agreed. Whether a contract is entire or separable depends upon its language and subject matter, and this question is one of construction to be determined by the court according to the intention of the parties. The parties to the contract here agreed to arbitration with judicial review of errors of law and fact. Without that provision, a different arbitration process results. Courts reform contracts only where the parties have made a mistake, and not for the purpose of saving an illegal contract.⁷⁷

Thus, the *Crowell* court, at least by implication, found that this was not a case in which severance would lead to an undeserved benefit of one party relitigating the case.⁷⁸ The case simply had not yet been litigated.

72. *Kyocera*, 341 F.3d at 1002.

73. *Armendariz*, 99 Cal. Rptr. 2d at 745.

74. 95 Cal. App. 4th 730 (2002).

75. *Following Kccne v. Harling*, 61 Cal. 2d 318, 320-321 (1964).

76. *Armendariz*, 24 Cal. 4th at 123-24.

77. *Crowell*, 95 Cal. App. 4th at 740 (citations and internal quotation marks omitted) (quoting *Armendariz*, 24 Cal. 4th at 123-24).

78. See also Van Ginkel, *supra* note 20, at 166 n.34 and at 169-70 n.56.

4. Conclusion

The reversal of *LaPine I* by the *Kyocera* case changes the line-up considerably on the issue whether or not parties can agree in a pre-dispute arbitration agreement to allow appeal from an arbitral award to the competent district court. As stated previously, the Ninth Circuit now joins the Tenth Circuit⁷⁹ in declaring such a provision illegal, along with dictum by the Seventh Circuit⁸⁰ and preliminary dictum by the Eighth Circuit.⁸¹ On the other hand, the Fourth⁸² and Fifth Circuits⁸³, as well as lower courts in the First⁸⁴ and Second⁸⁵ Circuits favor contractual provisions enabling arbitral appeal.

In order to provide legal certainty, the Supreme Court should take up this issue as soon as it is given the opportunity to conclusively resolve the split among the circuits. As I have argued elsewhere,⁸⁶ the Supreme Court should (i) invalidate the various non-statutory grounds (including the “completely irrational” and “manifest disregard of the law” grounds) pursuant to which arbitral awards can currently be challenged in most of the circuits, thus confining the losing party to seeking *vacatur* of the award under the non-waivable provisions of Section 10(a) of the FAA; and (ii) recognize the contracting parties’ freedom to include in their arbitration agreement a clause giving the losing party the right of appeal from the award to the competent district court. Limiting the grounds for *vacatur* to those enumerated in Section 10(a) of the FAA would safeguard

79. Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001)

80. Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501 (7th Cir. 1991)

81. UHC Mgmt. Co. v. Computer Sciences Corp., 148 F.3d 992 (8th Cir. 1998). On the one hand the court said: “Should parties desire more scrutiny than the [FAA] authorizes courts to apply, ‘they can contract for an appellate arbitration panel to review the arbitrator’s award[;] they cannot contract for judicial review of that award’” (*Id.* at 998 [quoting *LaPine I*, 130 F.3d at 891 (Mayer, J. dissenting)]). On the other hand, it stressed that “it is [not] yet a foregone conclusion” that the parties are able to agree to ignore provisions of the FAA. “In contrast to the agreements at issue in *LaPine* and *Gateway*, the present agreement does not manifest such an intent [to contract for expanded judicial review].” *Id.*

82. Syncor Int’l Corp. v. McLeland, 1997 U.S. App. LEXIS 21248 (4th Cir. 1997; cert. den. 1998 U.S. LEXIS 898 (unpublished decision)).

83. Hughes Training, Inc. v. Cook, 254 F.3d 588 (5th Cir. 2001) (following *Gateway v. Tchcs. Inc. v. MCI Telecomm.*, 64 F.3d 993 (5th Cir. 1995)).

84. New England Utilities v. Hydro-Quebec, 10 F. Supp. 2d 53 (D. Mass. 1998).

85. Fils et Cables d’Acier de Lens v. Midland Metals Corp., 584 F. Supp. 240 (S.D.N.Y. 1984).

86. Van Ginkel, *supra* note 20, at 217-18.

the integrity of the arbitral process without opening the “back door”⁸⁷ for the losing party to unduly delay enforcement of the award, whereas allowing arbitral appeal clauses in pre-dispute arbitration agreements would give contracting parties the largest possible freedom in crafting what they believe to be the most desirable arbitral proceeding in light of the particular aspects of their contractual relationship.

87. The expression was coined in this context by Judge Posner in *Bavarati v. Josphal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (stating “If [the ‘manifest disregard of the law’ standard] is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration”).