BALANCING JUSTICE AND EFFICIENCY: ANALYSING THE WAIVER OF NULLITY REMEDY IN THE POST-AWARD STAGE AND ITS COMPATIBILITY WITH DUE PROCESS

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Abstract

*There are a considerable number of legislations that expressly admit the possibility for parties to exclude, by mutual agreement, the right to submit an application for setting aside a future award. Instead, other jurisdictions have chosen to expressly deny this possibility. However, the reality indicates that most legal systems in comparative law, including the United Nations Commission on International Trade Law Model Law ["**Model Law**"], still do not contain an explicit normative solution regarding the validity of these agreements. Therefore, in cases where we do not find an express solution to this matter, should we admit the validity of these agreements?*

The question of the validity of agreements waiving the right to challenge arbitral awards is a complex issue that touches upon fundamental principles of party autonomy, public policy, and international human rights. Through a careful analysis of jurisprudential and doctrinal arguments, both for and against such agreements, this note seeks to shed light on the delicate balance between justice and efficiency in international arbitration.

I. Introduction

It is common to refer to arbitration by alluding to its essentially contractual nature, a characteristic that has led certain national courts to the extreme position of maintaining that it "*is a creature that owes its existence to the will of the*

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parties alone."[1] These ideas reflect the importance of party autonomy as the cornerstone of arbitration,[2] allowing parties to shape the arbitral procedure to fit their needs as a tailor-made mechanism to resolve disputes.

There are extensive doctrines regarding the influence of party autonomy throughout the arbitration process. However, there is not as much doctrine on the value of party autonomy in the post-award stage. It is perfectly possible, and indeed occurs in arbitral practice, for parties to agree to waive the recourse of nullity before the courts of the arbitral seat. This would logically imply the exclusion of judicial control over the award, at least in the nullity stage.

The existence of such agreements has led the arbitral community into a legal and theoretical debate about their validity and effectiveness, reflecting an ontological tension between party autonomy and judicial control over awards, and between party autonomy and an effective pursuit of justice.

This note aims to delve into this debate with the objective of providing a critical analysis of the validity and effectiveness of such agreements.

II. A brief summary of the international experience

In comparative law, there are a considerable number of legislations which expressly grant parties the power to exclude, in advance and by mutual agreement, the right to seek the annulment of a future award.

Undoubtedly, France stands out as a prime illustration where the emphasis on the legal significance of party autonomy permits a renunciation of the right to contest the nullity of the award. The reform of the French arbitration law in 2011 granted parties this right through Article 1522 of the

1 Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, ¶¶ 13-16 (Can.).

2 NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & J. MARTIN H. HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 12 (7d ed. 2022).

French *Code de procédure civile*, which states: *"By special agreement, the parties may expressly waive the right to challenge the award at any time*."[3]

As mentioned above, France is not alone in this regard. Other States have adopted similar solutions, although they condition the validity of such agreements to certain requirements, that are absent in the French law. This is the case with Belgium,[4] Switzerland,[5] and Peru,[6] where these regulations require that the parties have no connection to the country of the arbitral seat for the waiver to be enforceable. In other words, they will be valid if the parties are not nationals or residents of those countries, or if they do not have a branch in the said country.

Other jurisdictions take an intermediate stance, as is the case with England. While advanced agreements excluding the right to annul arbitral awards are allowed when expressly agreed upon by the parties, it is limited to specific grounds. In fact, only the ground provided in Section 69 of the English

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3 CODE DE PROCEDURE CIVILE [C.P.C.] [Civil Procedure Code] art. 1522 (Fr.). It states, "*Par convention spéciale, les parties peuvent à tout moment renoncer expressément au recours en annulation*."

4 Code Judiciaire [C.Jud.] art. 1718 (Belg.). It states, "*By an explicit declaration in the arbitration agreement or by a later agreement, the parties may exclude any application for the setting aside of an arbitral award, where none of them is a natural person of Belgian nationality or a natural person having his domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium*."

5 Bundesgesetz über das Internationale Privatrecht [IPRG], Loi fédérale sur le droit international privé [LDIP], Legge federale sul diritto internazionale privato [LDIP] [Federal Act on Private International Law] Dec. 18, 1987, SR 291, art. 192(1) (Switz.). It states, "*If none of the parties has their domicile, habitual residence or seat in Switzerland, they may, by a declaration in the arbitration agreement or by subsequent agreement, wholly or partly exclude all appeals against arbitral awards; the right to a review under Article 190a paragraph 1 letter b may not be waived.".* Article 190a paragraph 1 letter b states: "*A party may request a review of an award if: b. criminal proceedings have established that the arbitral award was influenced to the detriment of the party concerned by a felony or misdemeanour, even if no one is convicted by a criminal court; if criminal proceedings are not possible, proof may be provided in some other manner*." The ground prescribed in article 190a paragraph 1 letter b cannot be waived.

6 Legislative Decree No. 1071, art. 63(8) (Peru). It states, "*When neither of the parties involved in the arbitration is of Peruvian nationality or has their domicile, habitual residence, or main business activities within Peruvian territory, an express agreement can be reached to waive the annulment recourse or to restrict such recourse to one or more grounds established in this article*." (free translation).

Arbitration Act,[7] which refers to substantive issues of the matter, can be excluded.

In contrast with the above-mentioned jurisdictions, there are other jurisdictions that expressly stipulate that agreements excluding the right to annul arbitral awards are not valid and, therefore, are unenforceable. Examples of these include Argentina,[8] Portugal[9], Italy,[10] and India.[11]

The rationale behind these provisions, that allow the waiver of the recourse of nullity before the courts of the arbitral seat, lies in party autonomy. It has been argued that, just as parties can waive their right to access national courts through an arbitration agreement or decide that the arbitral dispute be resolved *ex aequo et bono*,[12] they should also be allowed to waive judicial review of the award in a nullity proceeding, if they express it unequivocally in the arbitration agreement.

In this regard, Gary Born states:

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7 Arbitration Act 1996, c. 23, § 69 (Eng.).

8 CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 760 (Arg.). It states, "*If the appeals have been waived, they shall be denied without any substantiation. However, the waiver of the appeals shall not prevent the admissibility of the request for clarification and annulment, based on a fundamental procedural defect, the arbitrators having ruled beyond the deadline, or on issues not submitted for arbitration*." (free translation).

9 Law on Voluntary Arbitration No. 63/2011, art. 46(5) (Portugal). It states, "*Without prejudice to the provisions of the preceding paragraph, the right to request the annulment of the arbitral award is non-waivable*." (free translation).

10 Codice di procedura civile [C.p.c.] [Code of Civil Procedure] art. 828 (It.). It states, "*The appeal for nullity is admissible, notwithstanding any prior waiver, in the following cases*." (free translation).

11 *See* Indian Contract Act, 1872, No. 09, Acts of Parliament, 1872, § 28.

12 The possibility for the Tribunal to decide *ex aequo et bono* when there is an agreement between the parties is recognised by Article 28(3) of the UNCITRAL Model Law: "*The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so*." *See* United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), art. 28(3) [*hereinafter* "UNCITRAL Model Law"].

> "*[I]n particular, there seems to be little question that commercial parties are – and long have been – free to agree to arbitration ex aequo et bono, and to arbitration without a reasoned award, both of which effectively exclude any meaningful right of judicial review. If this is permitted, then there is little justification for holding that parties cannot waive judicial review of a tribunal's substantive decision, reasoning, procedures and other actions*." [13]

In conclusion, given that arbitration, as mentioned before, is a "*contractual creature*,"[14] parties have the right to waive their right to annul the award in the local courts of the seat of the arbitration, as long as the waiver is free, lawful, unambiguous, and agreed unequivocally by both parties.

III. Wait a minute: Are these clauses compatible with due process? The problems posed by the enforceability of these agreements.

Most legal systems in comparative law do not contain an explicit normative solution regarding the validity of these agreements. The UNCITRAL Model Law has made no mention of them.[15] It becomes imperative, therefore, to analyse their validity in the absence of an explicit legal authorisation. And precisely, that is the case in most jurisdictions.

It has been claimed that judicial control through annulment is an essential element for the legal protection of the parties, the national legal system, and of the respect and enforceability of the fundamental right to due process.

In this regard, Kerr states:

> "*[judicial review of awards is a necessary] bulwark against corruption, arbitrariness, bias, ... and ... sheer incompetence, in relation to acts and decisions*

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13 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3664 (3d ed. 2020).

14 Hall Street Associates, L.L.C. v. Mattel, Inc., 128 U.S. 1396, 1399 (2008).

15 *See* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 86 (2004) ("*The preparatory materials of the Model Law would surely discuss the possibility of exclusion agreements had the drafters contemplated it. And the drafters did not contemplate that possibility, because in the system of the Model Law the imperative procedural provisions reflect procedural public policy*").

> *with binding legal effect for others. No one having the power to make legally binding decisions in this country should be altogether outside and immune from this system.*" [16]

Indeed, the absence of judicial control in the annulment stage can lead, for example, to the parties themselves determining the concept of arbitrability. It is entirely possible for parties to submit a matter to arbitration that is not arbitrable under the laws of the seat, but due to the effect of such a clause, no judge would be able to review that award. Thus, in such cases the concept of arbitrability is not defined by the law of the seat, rather it is defined by the parties themselves. In these cases, a clause of this nature could permit parties to modify public laws to their convenience, excluding judicial control in the post award stage, at least excluding the nullity stage.

Regarding this point, it could be argued that this argument is invalid, as it would be the arbitral tribunal itself, and not the courts of the seat of the arbitration, responsible for recognising such a situation by ruling on a plea of lack of jurisdiction and declaring itself incompetent due to the dispute not being capable of resolution through arbitration. Although the authors concur that these should invariably be the prescribed steps, it remains conceivable that the arbitral tribunal may overlook this circumstance and still rule that it has jurisdiction. This position finds support in Article 34(2)(b)(i) of the UNCITRAL Model Law,[17] which stipulates that an arbitral award may be set aside if it is determined that "*the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State*." Thus, the inclusion of such a ground for annulment in the Model Law acknowledges the possibility that the arbitral tribunal may have failed to recognise that the object of the dispute was not arbitrable.

The same could be said in the case of a manifest violation of due process or an award contrary to public policy, in the sense that it is theoretically

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16 Michael Kerr, *Arbitration and the Courts: The Uncitral Model Law*, 34(1) INT'L & COMP. L. Q. 1, 15 (1985).

17 UNCITRAL Model Law, art. 34(2)(b)(i).

possible that an award rendered by an arbitral tribunal that violates due process could never be attacked, and 'lives' *ad eternum* as a valid decision, binding the parties.

In other words, emphasising that an award is characterised as final and binding, we could be facing an arbitral award that has been rendered in violation of a fundamental right, such as due process, but which would still be valid due to the absence of any judicial control that remedies such a violation.

This argument has been countered by pointing out that waiving judicial control in the annulment stage does not intrinsically imply the absence of judicial control over the proceedings, and that could be true. The protection of public policy and the rights of the parties will also be protected in the enforcement stage of the award,[18] considering the symmetry between Article V of the New York Convention which sets forth the grounds for refusal of recognition and enforcement of foreign arbitral awards, and Article 34 of the UNCITRAL Model Law which sets forth the grounds for annulment of the award.

To wit, the contention is that the existence of these agreements does not entail the absence of judicial oversight, but rather, it facilitates the consolidation of the two judicial controls, i.e., those of annulment and enforcement into a single entity. Given the near-perfect symmetry between the grounds for annulment and those for refusal of recognition and enforcement, the notion that one of these two controls would be entirely redundant gains even greater strength, as there already exists the prior possibility to resort to an alternative review mechanism that has precisely examined these identical elements. The role of the second control would be to simply reexamine what was already analysed in the first control, thus rendering the existence of a dual control dispensable and unnecessary.

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18 Maxi Scherer, *The fate of parties' agreements on judicial review of awards: a comparative and normative analysis of party-autonomy at the post-award stage*, 32(3) ARB. INT. 437, 452 (2016) [*hereinafter*, "Scherer"].

Consequently, eliminating one of the two controls results in the arbitration process being characterised by greater efficiency and expediency, while still maintaining a judicial oversight mechanism.

However, this argument does not completely resolve the aforementioned conflicts. It is a partial and insufficient solution, as it is based on a flawed logical premise: that there is always an award to be enforced. Indeed, it is possible for the tribunal to dismiss all claims and for there to be no enforceable award. In such cases, we are faced with an arbitral award that has no judicial control, continuing to exist even when the subject matter of the award is non-arbitrable or even when blatant violations of due process have occurred in the arbitral process.

It has been argued that these situations rarely occur and are not frequent.[19] However, the mere fact that these situations do not occur frequently does not solve the problem. This argument, which is undoubtedly pragmatic, does not resolve the ontological problem in dispute: How do we resolve those situations where the recourse of nullity of the award is excluded and, likewise, there is no award to be executed?

That these situations do not occur often in practice is not a valid response to the problem at hand. However, this problem could be fixed by specific statutory provisions,[20] that contemplate this particular situation.

In connection with the aforementioned, to always ensure the existence of at least one control mechanism regarding the validity of the award, one potential solution is to include a specific statutory provision. This provision would stipulate that when there is no award to be enforced, the agreement wherein parties have agreed to waive the right to challenge the award would not be seen as valid. Another solution could also involve including a different statutory provision, such as creating a special legal remedy—specifically designed for these particular situations—that ensures there will

19 *Id.* at 451.
20 *Id.*

still exist the possibility to analyse the validity of the award when no award is to be enforced.

IV. What about human rights? Are these clauses compatible with international human rights law regarding due process?

The possibility for the parties, through express agreement, to exclude judicial review of awards has raised issues regarding its compatibility with the fundamental right of due process. It should be noted that this right is recognised by various international treaties, which is part of international human rights law.[21]

There is a highly relevant precedent from the European Court of Human Rights ["**ECtHR**" or "**Court**"]. In the case of *Tabanne* v. *Switzerland*,[22] the ECtHR held that an agreement by which the parties freely waive their right to exclude in advance the remedy of annulment before local courts at the seat of arbitration does not violate the right to a fair trial guaranteed by Article 6(1) of the European Convention on Human Rights ["**ECHR**" or "**Convention**"]. This decision is an important endorsement of international arbitration, taking into account the significance that the ECtHR has in international human rights law. Also, it could have a relevant effect on future political decisions of European countries, as there is now a precedent that states that this kind of agreements are compatible with due process and Article 6(1) of the ECHR.

At first, the Court recalled that the right of access to courts, as recognised by Article 6(1) of the ECHR, is not absolute.[23] Therefore, the contracting States, in this case Switzerland, have the possibility to impose certain limitations on this right. The ECtHR also emphasises that parties, by freely agreeing to an arbitration clause, voluntarily waive certain rights guaranteed

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21 *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 8; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 6.

22 Noureddine Tabbane v. Switzerland (Dec.), no. 41069/12, Mar. 01, 2016.

23 *See id.*, at § 24.

by the Convention. Such a waiver does not conflict with the ECHR as long as it is made freely, lawfully, and unequivocally.[24]

Moreover, the Court observed that if the parties choose to exclude all recourse against an award in accordance with Article 192(1) of the Swiss Private International Law Act (PILA), paragraph 2 of which stipulates that if the"*awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.*"[25] As it can be seen, this provision guarantees to the parties that even if they have chosen to waive their right to recourse, there will still be at least some judicial control over the arbitral process.[26]

This decision may be questionable, given that one of the key characteristics of human rights is that they are inalienable. Nevertheless, in support of those who uphold this position, it can be argued that parties generally have a specified time limit, i.e., three months in the case of the Model Law to submit an application for setting aside an award.[27] From this perspective, it could be understood that once the interested party allows this period of time to lapse without submitting a set aside application, they are effectively waiving that possibility without it constituting a violation of due process.

However, regarding the last point, it could also be contended that the situation is different in practice. When we refer to these types of agreements, the waiver is made by the parties before any irregularities that could jeopardise the effective application of the right to due process arise.

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24 *See id.*, at § 27.

25 Bundesgesetz über das Internationale Privatrecht [IPRG], Loi fédérale sur le droit international privé [LDIP], Legge federale sul diritto internazionale privato [LDIP] [Federal Act on Private International Law] Dec. 18, 1987, SR 291, art. 192(2) (Switz.). It states, "*Where the parties have excluded all setting aside proceedings and where the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.*"

26 *See* Noureddine Tabbane v. Switzerland (Dec.), no. 41069/12, § 35, 1 Mar. 2016.

27 Article 34(3) of the UNCITRAL Model Law states, "*An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.*"

In other words, there is a distinction between waiving the possibility of setting aside an award with full awareness of the defects that affect the award and doing so at a prior stage when the extent and significance of such waiver are unknown. The issue then shifts from a substantive aspect to the moment in which the waiver takes place. In this context, it could be argued that the waiver would not be valid, not because renouncing the right to bring an action to set aside a future award inherently affects due process, but rather because it would be impermissible to allow parties to waive something they are unaware of. At that moment, before the arbitration procedure even commences, it is impossible to foresee the potential grounds for annulment that may arise.[28]

In this way, the agreements excluding the right to annul arbitral awards evoke a sense of stepping into uncertainty because both parties are unaware of what they are relinquishing. This lack of clarity further casts doubts on the validity of these clauses.

V. Conclusion

As discussed throughout this work, there are both arguments in favour and against allowing parties to exclude judicial control of the annulment of an award when there is no legislative pronouncement on the matter.

It is argued in favour that the essence of arbitration lies in the principle of party autonomy. By waiving the possibility of bringing an action for annulment, the parties seek to ensure that the final solution to the dispute will be none other than the one reached by the arbitral tribunal, preventing judicial courts from altering it. In this sense, these agreements would become crucial to fully respect and ensure the enforcement of the 'negative effect' attributed to arbitration and developed in the principle of *kompetenz-kompetenz*.

[28] Manuel de Lorenzo Segrelles, *La renuncia anticipada a la impugnación del laudo*, 27 SPAIN ARB. REV. 95, 98-101 (2016).

However, granting such power to the parties, in an effort to protect their private interests, can lead to the unintended consequence of an arbitral award that is theoretically invalid, such as when it is rendered in violation of procedural guarantees for one of the parties. But that this invalidity, under the argument that the parties have agreed to it, can never be applied in practice unless it is raised in the refusal of enforcement. And there is a chance, as we have previously seen, that no enforcement proceedings take place, as the arbitral tribunal could dismiss all claims.

It can also be held that the issue of admitting agreements of this kind does not lie in the possibility of admitting or denying the existence of an award subject to annulment that still produces legal effects, but rather in the moment in which the waiver takes place. When the parties agree to waive the possibility of filing a nullity action, they do so without fully understanding the extent of what they are giving up, as it is impossible to anticipate all possible irregularities that may occur during the arbitration procedure. This is why it could be said that the analysis when determining the invalidity or validity of these agreements does not hinge on a substantial element in relation to whether it is appropriate or not to give the parties such power, but rather on the moment when the waiver is executed.

As a final conclusion, it can be seen that in order to determine whether these agreements should be valid or not, there are arguments both against and in favour, all of which are equally valid. The solution the authors offer in this debate will strictly depend on personal points of view. From a pro-arbitration perspective, it could be said that the wise choice is to accept these kinds of agreements because they contribute to the goals of arbitration. From a state perspective, it could be argued that, due to a matter of public policy, there always needs to be judicial control, regardless of the circumstances. Finally, it still remains a main priority to analyse whether these clauses are compatible or not with international human rights law regarding due process, highlighting the difficulty of doing so when these agreements take place prior to the commencement of the arbitral

procedure, at a moment when the parties cannot even imagine what they are waiving.