‘The parties hereby waive all recourse … but not that one’ Why parties adopt exclusion agreements and why courts hesitate to enforce them

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Introduction

Many major arbitral institutions have rules saying that awards will be ‘final’ and the parties ‘have waived their right to any form of recourse’.[1] Similarly, long before any dispute arises, parties may include text in the arbitration clauses of their contracts stating that the arbitration they opt for is of ‘binding, non-appealable’ character. Yet such agreements are rarely fully effective, as arbitral awards will generally remain subject to judicial review before they can be enforced.

In recent decades, a growing trend in national legislation permits parties to waive annulment proceedings at the seat, at least under certain conditions. Despite this, most countries prohibit the exclusion of all post-award review. Even when national law permits such review to be reduced, courts have been hesitant to find parties have indeed waived their rights to judicial recourse against arbitral awards. This article examines why complete waiver of post-award judicial review may be unattainable and analyses the stakeholder interests that must be balanced between respecting parties’ autonomy and preserving the integrity of the arbitral process.

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1 ICC Rules of Arbitration, art. 35(6) (2017).

The use of waiver clauses

In recent years, parties and institutions have shown an increasing interest in limiting the scope of judicial review of arbitral awards, as it is thought that limiting post-award challenges will increase the efficiency and finality of arbitration. Sometimes, finality clauses are incorporated into the parties' arbitration agreement itself, for example with text stating that the parties opt for 'binding, non-appealable arbitration'[2] or that the award 'shall not be subject to any type of review or appeal whatsoever.'[3]

These clauses – known as waiver agreements or exclusion agreements – may also appear in institutional rules adopted by the parties. When adopting the International Chamber of Commerce (ICC) rules, for example, parties agree that the award will be 'final' and are deemed to 'have waived their right to any form of recourse insofar as such waiver validly can be made.'[4] Most major institutions' rules contain language on finality, although the exact wording varies.

While waiver agreements in institutional rules rarely list each means of recourse the parties intend to forgo, they are typically broad in scope. For example, the waiver clauses contained in the institutional rules of the ICC, the International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA), and the Hong Kong International Arbitration Centre (HKIAC) ask parties to forfeit 'any form of recourse' against the award.[5] The rules of the China International Economic and Trade Arbitration Commission (CIETAC) and the Indian Council of

2 *In re Wal-Mart Wage and Hour Employment Practices Litig.*, 737 F.3d 1262, 1265 (9th Cir. 2013).

3 *Hoeft v MVL Group, Inc.*, 343 F.3d 57, 60 (2d Cir. 2003), overruled on other grounds by *Hall St. Assocs., LLC v Mattel, Inc.*, 552 U.S. 576 (2008).

4 ICC Rules of Arbitration, art. 35(6) (2017).

5 ICC Rules of Arbitration, art. 35(6) (2017) ('Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties … shall be deemed to have waived their right to any form of recourse insofar as such waiver validly can be made.'); ICDR International Arbitration Rules, art. 30(1) (2014) ('The parties … absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made.'); LCIA Arbitration Rules, art. 26.8 (2014) ('the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.'); HKIAC Administered Arbitration Rules, art. 34.2 (2013) ('The parties … shall be deemed to have waived their rights to any form of recourse or defence in respect of enforcement and execution of any award, in so far as such waiver can validly be made.').

Arbitration (ICA) specifically prohibit parties from challenging the award before national courts.[6]

In practice, parties may opt for such clauses because they hope to waive additional proceedings on the merits of their dispute following the tribunal's award.[7] To this end, exclusion agreements are mostly successful at waiving substantive appeals before arbitral tribunals and institutions, as well as national court review of the merits of an arbitrator's decision, insofar as such review exists.[8]

But few waiver agreements speak merely of waiving review on the merits. A waiver of 'any recourse whatsoever' presumably means what it says. In agreeing to waive all recourse against an award, parties would appear also to target post-award judicial review, including set-aside proceedings and challenges to an award's enforcement.[9]

Approaches of national courts

While arbitration is a creature of contract, it has long been considered that courts have a duty to review arbitral awards. Judicial review of arbitral awards is as old as arbitration itself, with one of the first recorded annulment decisions dating from the 13th century, when an English court annulled an award on grounds related to the improper constitution of the tribunal and the tribunal's lack of authority.[10]

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6 CIETAC Arbitration Rules, art. 49(9) (2015) ('The arbitral award is final and binding upon both parties. Neither party may bring a lawsuit before a court or make a request to any other organization for revision of the award.'); Rules of Arbitration of the Indian Council of Arbitration, Rule 70 ('the award made by the arbitrators/s shall be final and binding on the parties and neither party shall be entitled to challenge it in a court of law.').

7 Jennifer Kirby, 'Finality and Arbitral Rules: Saying an Award Is Final Does Not Necessarily Make It So' (2012) 29 J. Int'l Arb. 119, 122 ('[F]inality provisions are perhaps most obviously designed to cut-off recourse to the arbitral tribunal and prohibit parties from asking the tribunal to revisit its decision.').

8 A minority of countries, such as England, permit national courts to review domestic arbitration awards for errors of law. Parties are permitted to opt out of this system, however, and institutional rules containing boilerplate 'finality' language are often considered sufficient for this purpose. See, for example, *Lesotho Highlands Dev Authority v Impregilo SpA*, 1 A.C. 221 (2006) (finding that the parties excluded section 69 by agreeing to the ICC Rules).

9 Queen Mary University of London, *International Arbitration survey: Corporate Attitudes and Practices* (PricewaterhouseCoopers 2006) 15 ('Corporations overwhelmingly favour the finality of arbitration awards, view this as a vital attribute and reject the idea of an appeal mechanism.').

10 Derek Roebuck, 'London Arbitration of Foreign Disputes AD 1281' in 'Historic Documents in Arbitration' (*International Council for Commercial Arbitration*, April 2013) www.arbitration-icca.org/historic-treasures/historic_documents.html#london.

Court review of arbitral awards can be roughly divided into two categories: 1. annulment or set-aside proceedings, in which a court at the seat of the arbitration is asked to declare an award invalid due to fundamental flaws enumerated in national law; and 2. recognition and enforcement proceedings, in which a court will enforce an award issued in another country unless the award is tainted with certain procedural flaws or offends public policy. As explained below, the former review may be waived more easily than the latter, although most jurisdictions are wary of allowing any waiver at all.

Annulment: increasing liberalisation but continued uncertainty

A party's main judicial recourse against an award is to ask a court at the seat of arbitration to annul it. Although the grounds for setting aside an award at the seat vary from one jurisdiction to another, the remedy of annulment is practically universal in national arbitration laws. Historically, such court oversight was considered as mandatory law, part of the courts' fundamental duties to guarantee the integrity of arbitral proceedings. This traditional view is still espoused by most countries, which consequently adopt a restrictive approach to waiver. Although a growing number of countries have passed laws taking a more liberal approach, permitting the exclusion of annulment in certain circumstances, there is no consensus in this regard, and uncertainty continues in many countries regarding the laws in place. Contributing to this uncertainty is the fact that even when there are laws clearly permitting exclusion agreements, courts hesitate to enforce annulment waivers. These different approaches, together with the uncertainty that can arise and the courts reluctance to enforce annulment, are considered in more detail below.

THE RESTRICTIVE APPROACH

Most countries take a restrictive approach to waiver, finding that the availability of annulment proceedings is a necessary and mandatory right. These countries hold that the right to ask for annulment of an award cannot be waived in advance, although parties remain free to decline to challenge the award once it is issued.

In the United States, federal statutes do not explicitly address exclusion agreements. Weighing in on a related topic in 2008, the Supreme Court held in *Hall Street v Mattel* that the parties could not, by contract, expand the grounds for vacating awards set out in the Federal Arbitration Act (FAA). In line with the reasoning of the Supreme Court that the FAA reflects

'a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway,'[11] multiple US courts have held that the parties may not exclude the grounds for seeking annulment.[12] The draft US Restatement (Third) of International Commercial Arbitration, a treatise directed at judges and practitioners, reflects this trend, stating that '[p]arties may not by agreement reduce or eliminate the grounds for vacating or denying confirmation of a U.S. Convention award.'[13]

Over the past two decades, numerous other countries have adopted restrictive waiver laws in response to growing interest in exclusion agreements on the part of parties and institutions. Argentina,[14] Brazil,[15] Croatia,[16] Egypt,[17] England,[18]

11 *Hall St. Assocs., LLC v Mattel, Inc.*, 552 U.S. 576 (2008).

12 *In re Wal-Mart*, 737 F.3d at 1262 (9th Cir. 2013); *Hoeft*, 343 F.3d at 64–65; *Rearick v Clearwater 2008 Note Program, LLC*, No. 4:15-CV-02265, 2017 WL 2362484, at *7 n 7 (M.D. Pa. May 31, 2017); *cf. Roadway Package Sys., Inc. v Kayser*, 257 F.3d 287, 293 (3d Cir. 2001) ('parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own.'); *MACTEC, Inc. v Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005) cert. denied, 126 S.Ct. 1622 (2006) (citing *Bowen v Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001) ('although parties to an arbitration agreement may eliminate judicial review by contract, their intention to do so must be clear and unequivocal').

13 Draft Restatement (Third) of International Commercial Arbitration, Council Draft No. 6, § 4-24(a); see also Lee. H Rosenthal, David. F Levi, and John K Rabiej, Federal Civil Procedure Manual 806–07 (2018).

14 Codigo Civil y Commercial, art. 1656 ('*En el contrato de arbitraje no se puede renunciar a la impugnación judicial del laudo definitivo que fuera contrario al ordenamiento jurídico.*'); Francisco Amallo and José Martínez de Hoz, 'The Arbitration Review of the Americas: Argentina' (2017) Global Arbitration Review.

15 Luiz Gustavo de Oliveira Ramos and Michel Schifino Salomão, 'Arbitration procedures and practice in Brazil: overview' (2016) Thompson Reuters Practical Law; Fernando Eduardo Serec and Antonio Marzagao Barbuto Neto, 'Commercial Arbitration 2017: Brazil' (2017) Global Arbitration Review.

16 Law on Arbitration (2001), art. 36(6) (*'The parties cannot derogate in advance their right to contest the award by an application for setting aside.'*); Hrvoje Spajic and Ivana Ostojić, 'Croatia' in Steven Finizio and Charlie Caher (eds) *The International Comparative Legal Guide to International Arbitration 2017* (Global Legal Group 2017).

17 Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, art. 54 (stating that the admissibility of the action for annulment shall not be prevented by an agreement, prior to the issuance of the award, to renounce annulment rights); Mohamed Shelbaya and Yasmine El Maghraby, 'Arbitration in Egypt – Lexology Navigator Q&A' (9 December 2016) Lexology.

18 In addition to the traditional grounds for annulment, English courts may review awards issued in England and applying English law for errors of law. While such review can be waived in advance, parties may not exclude the availability of set-aside proceedings for lack of jurisdiction or irregularity affecting the tribunal, the proceedings, or the award. See English Arbitration Act 1996, s. 4(1), 67–69.

Germany,[19] India,[20] Italy,[21] Jordan,[22] Greece,[23] Lebanon,[24] Oman,[25] Panama,[26] Portugal,[27] Romania,[28] Saudi Arabia,[29] Serbia,[30] and the United Arab Emirates[31] all take restrictive approaches, with national laws and jurisprudence reflecting that set-aside proceedings cannot be waived in advance. In these countries, a losing party will be permitted to seek annulment of an award notwithstanding a contractual exclusion of such recourse.

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19 Claudia Krapfl and Stephan Wilske, 'Arbitration procedures and practice in Germany: overview' (2017) Thomson Reuters Practical Law; Boris Kasolowsky and Carsten Wendler, 'Commercial Arbitration 2017: Germany' (2017) Global Arbitration Review.

20 Dipen Sabharwal, Aditya Singh, and Sindhu Sivakumar, 'Arbitration in India' (2017) Lexology; Sameer Parekh, 'Arbitration procedures and practice in India: overview' (2016) Thomson Reuters Practical Law.

21 Italian Code of Civil Procedure, art. 829(1) (providing for annulment 'notwithstanding any waiver') (own translation).

22 Law No. 31 of 2001, art. 50 (stating that annulment actions are admissible even if a party has sought to waive such right before the issuance of the arbitral award) (English translation available at www.newyorkconvention.org/11165/web/files/document/2/1/21022.pdf).

23 Greek Code of Civil Procedure, Book VII, art. 900 (as amended by Law 2331/1995); Charalampos Kondis and Christina Petra Grigoriadou, 'Arbitration awards in Greece' (19 October 2017) Lexology.

24 Nayla Comair-Obeid and Ziad Obeid, 'Commerical Arbitration 2017: Lebanon' (April 2017) Global Arbitration Review; Nayla Comair-Obeid, 'Lebanon' (February 2012) IBA Arbitration Committee Arbitration Guide.

25 The Omani Law of Arbitration in Civil and Commercial Disputes, Royal Decree 47/97, art. 54-1 (English version available at www.newyorkconvention.org/11165/web/files/document/2/1/21103.pdf); Abdelrahman El Nafie, 'European and Middle Eastern Arbitration Review 2012: Oman' (2011) Global Arbitration Review.

26 Decision of 7 October 2005 of the Panama Supreme Court, Official Gazette No. 25,508 of 22 March 2006, 30.

27 Portuguese Law on Arbitration, art. 46(5) ('Without prejudice to the provisions of the preceding paragraph, the right to apply for the setting aside of an arbitral award cannot be waived.') (English version available at http://arbitragem.pt/legislacao/2011-12-14–lav/lav-english.pdf).

28 Romanian Code of Civil Procedure, article 609 (amended 2017) (unofficial translation: '(1) In their arbitration agreement the parties cannot waive the right to introduce an annulment action of an arbitral award. (2) The waiver/renounciation of this right may be made only aftter the arbitral award was rendered.'); Cosmin Vasile and Violeta Saranciuc, 'Arbitration in Romania' (10 August 2017) Lexology.

29 Kingdom of Saudi Arabia Law of Arbitration, Royal Decree No. M/34 (24/5/1433H), 16 April 2012, art. 51(1) (English version available at www.newyorkconvention.org/11165/web/files/document/2/1/21112.pdf).

30 Serbian Arbitration Act, Official Journal of the Republic of Serbia, No. 46/2006, art. 62 ('The parties may not waive in advance their right to apply for setting aside of the arbitral award.'), English translation provided by Privredna Komora Srbije [Serbian Chamber of Commerce] www.pks.rs/SADRZAJ/Files/Law%20on%20Arbitration.pdf.

31 Abdul Hamid El Ahdab, 'The Draft Arbitration Law of the United Arab Emirates' (2010) 2(1) Int'l J. of Arab Arb. 53–103.

The liberal approach

In contrast to this restrictive approach, in recent decades, a number of jurisdictions have adopted rules permitting parties to opt out of annulment review through exclusion agreements.

Discussion on the possibility of limiting annulment can be traced back to the 'Belgian experiment', a 1985 law that eliminated the possibility of setting aside any award issued in Belgium involving non-Belgian parties.[32] Despite initial hopes that the removal of annulment would result in more efficient enforcement proceedings, the result was that foreign parties fled Belgium as an arbitration venue, and the law was ultimately abandoned in 1998.[33]

While the Belgian law was still in place, Switzerland adopted its own waiver law in 1987, taking a different approach from the Belgian experiment and forming the model for many subsequent laws on annulment waiver. Unlike the Belgians, who excluded annulment in all cases involving foreign parties, the Swiss maintained the possibility of annulment proceedings, but permitted non-Swiss parties to contract out of annulment if they desired.[34] The effect was to permit non-Swiss parties to diminish the review of their awards by Swiss courts and have their awards treated as foreign awards even when Switzerland is chosen as the seat. Though it is seldom invoked, the law remains popular in Switzerland. Thirty years after its passage, in May 2017, the Swiss Arbitration Association (ASA) encouraged legislators to consider extending it to parties domiciled in Switzerland and to additionally allow parties to opt out of judicial revision of arbitral awards.[35]

32 Code Judiciaire, art. 1717 (1985) (Belgium); see Matthew Blome, 'Contractual waiver of Article 52 ICSID: a solution to the concerns with annulment?' (Oxford University Press 2016) 32 Arb. Int'l 601, 611–12.

33 Bernard Hanotiau and G. Bock, 'The Law of 19 May 1998 Amending Belgian Arbitration Legislation' (1999) 15 Arb. Int'l 97, 98; Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?' (2014) 29 ICSID Rev. 263, 276.

34 Federal Private International Law Act [PILA], art. 192. Waivers are interpreted on a case-by-case basis, but the test generally applied to determine whether they are valid under article 192 is that 'it is necessary, but sufficient, that the express declaration of the parties reveals, indisputably, their common intention to waive their right to any challenge of the award. Whether this is the case is a matter of interpretation and will always remain so, which means that it is impossible to lay down rules that are applicable with respect to all conceivable situations.' BGer. 4 February 2005 BGE 131 III 173 s. 178 consid. 4.2.3.1 (own translation) (original text: '*Il est nécessaire, mais suffisant, que la déclaration expresse des parties manifeste, sans conteste, leur commune volonté de renoncer à tout recours. Savoir si tel est bien le cas est affaire d'interprétation et le restera toujours, de sorte qu'il est exclu de poser à cet égard des règles applicables à toutes les situations envisageables.*') ; see also BGer 21 March 2011, Arrêt 4A_486/2010, consid. 2.1 ('*Il suffit que la déclaration expresse des parties fasse ressortir de manière claire et nette leur volonté commune de renoncer à tout recours.*') ; BGer 4 January 2011, Arrêt 4A_238/2011, consid. 2.1 (same).

35 Association Suisse de l'Arbitrage, *Position Paper: Proposed Revision of Swiss International Arbitration Law (Chapter 12 of the Private International Law Act)* (12 May 2017) www.arbitration-ch.org/en/publications/asa-position-papers/index.html.

The Swiss law has also attracted notice abroad, with foreign legislators following suit and adopting laws in the past three decades permitting waiver of set-aside actions. Following the Swiss example, most of these countries allow waivers of annulment only when none of the parties to the arbitration have any ties – such as nationality, domicile, or place of business – to the relevant country. Such is the case for Colombia,[36] Mauritania,[37] Peru,[38] Sweden,[39] and Tunisia.[40] When Belgium abandoned its experiment with eliminating annulment proceedings in 1998, it also followed the Swiss model, permitting optional waiver of set aside for non-Belgian parties.[41] In each of these countries, waiver can only impact the availability of annulment proceedings. The award will thus be treated as a foreign award and will be subject only to the post-award judicial review accorded to awards issued abroad (ie, the threat of non-recognition).

The French waiver law, which came into effect in May 2011, goes further than many others, permitting annulment opt-outs even by parties domiciled in France, so long as the arbitration is 'international.'[42] Despite initial concerns surrounding the law, its effect has been relatively limited, and the power available to French parties to waive annulment appears to be seldom used.[43] As in other countries, when annulment is excluded, French courts will treat the award as if it had been issued abroad. In those circumstances, parties may not directly apply to have an award annulled, but if the court grants the prevailing party's request for enforcement, the losing party retains the right to appeal the enforcement decision.[44]

Most recently, Russia's waiver law, which appears to arise independently from the trend started by Swiss-era legislation, has come under revision. Under the new law, which came into effect in September 2016, annulment may be waived in both domestic and international arbitrations, regardless of the domicile of the parties. But annulment may be waived only if the arbitration is administered by an approved arbitral institution; waiver is prohibited for ad hoc arbitrations.[45]

36 Law No. 1563, art. 107 §2 (2012).

37 Loi n° 2000-06 du 18 janvier 2000 portant Code de l'Arbitrage, 981 Journal Officiel 550, art. 59(4)(b) (2000).

38 Legislative Decree No. 1071 of 28 June 2008, art. 63(8).

39 Swedish Arbitration Act (1999), s. 51(1).

40 Code de l'arbitrage, art. 78(6) (Promulgated by Law No. 93-42 of 26 April 1993); Sami Kallel, 'The Tunisian Draft Law on International Arbitration' (Kluwer Law International 1992) Journal of International Arbitration.

41 Code Judiciaire, art. 1718 (Belgium).

42 Code de Procédure Civile, Liv. 4, Titre 2 (L'arbitrage international), arts. 1504 *et seq.*

43 See Julien Burda, 'La renunciation au recours en annulation dans le nouveau droit français de l'arbitrage' (2013) RTD Com. 653.

44 Code de Procédure Civile, art. 1522 alinéa 2.

45 Russian Federal Law No. 382-FZ of 29 December 2015 'On Arbitration (Arbitral Proceedings) in the Russian Federation' art. 40; International Commercial Arbitration Law of the Russian Federation, art. 34(1).

Areas of uncertainty

In many countries, the permissibility of advance annulment waivers has not yet been addressed by legislators or courts. Lack of clear national law on exclusion agreements gives rise to uncertainty as to how waiver agreements will be interpreted and what post-award review will be available in these countries.

Where national law neither explicitly permits nor prohibits exclusion agreements, courts must determine whether the grounds for annulment form part of mandatory law, incapable of modification by private agreement. For example, the UN Commission on International Trade Law (UNCITRAL) Model Law on arbitration, which has been incorporated into national arbitration laws in many countries, is silent on whether parties may exclude the availability of set-aside actions.[46] Courts in Canada and New Zealand have thus grappled with the permissibility of exclusion agreements, with differing results. In Canada, one Ontario court determined in 1998 that Article 34 of the Model Law, setting out the grounds for annulment, could be excluded by party agreement.[47] But a New Zealand court examining a similar case years later concluded the opposite, finding that parties did not have the right to derogate from Article 34.[48]

Even when countries have passed laws addressing whether annulment can be waived, uncertainty may also arise from challenges to such laws. In Panama, the Supreme Court in 2005 struck down the country's waiver law, finding it violated due process.[49] Meanwhile, the Swiss waiver law survived a similar challenge, with the European Court of Human Rights (ECtHR) concluding in March 2016 that a Swiss court's enforcement of an exclusion agreement did not constitute a denial of the right to access the courts.[50] It is likely that the courts will continue to address these issues in coming years, since many waiver laws remain untested before them, having neither been challenged nor applied in contentious proceedings.

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46 UNCITRAL Model Law on International Commercial Arbitration, 2006.

47 *Noble China Inc. v Lei* (1998) 42 O.R. (3d) 69; 42 B.L.R. (2d) 262. Another Ontario trial court has nonetheless suggested that Article 34 cannot be waived, finding that the parties had not agreed to waive Article 34, but stating that even if they had, such a waiver would not be effective to eliminate the application of the mandatory provisions of the arbitration law or public policy grounds. *Popack v Lipszyc*, 2015 CarswellOnt 8001, 2015 ONSC 3460.

48 *Methanex Motonui Ltd. v Joseph Spellman & Ors*, 171/03 of 17 June 2004.

49 Laudo del Corte Suprema de Justicia, No. 25,508, 7 October 2005, *Gaceta Oficial*, 22 Mar. 2006.

50 *Tabbane v Switzerland*, App no. 41069/12 (ECtHR, 1 March 2016).

COURTS' RELUCTANCE TO ENFORCE WAIVERS OF ANNULMENT

Despite the proliferation of national waiver laws, there have been few court cases upholding party exclusion agreements. Even in countries where waiver of annulment is permitted, in practice, courts have only rarely found this right to be invoked. There is of course no consistent approach in how waiver clauses are interpreted in different countries. But across jurisdictions, cases in which parties have validly waived annulment are few and far and between.

This is in part due to the geographic conditions contained in many waiver laws, which can only be invoked if none of the parties has a connection to the arbitral seat. Waiver laws may also contain further conditions on their applicability, such as requiring that the exclusion of annulment proceedings be set out in a separate written agreement, using unambiguous terms.[51] These requirements have often formed a basis for courts to retain the possibility of annulment notwithstanding party agreement.

Across jurisdictions, when parties simply agree that an award is 'final', courts typically have not found evidence that the parties sought to waive annulment.[52] Even when parties use stronger language, opting out of 'any and all recourse,' the result is often the same.

While France's waiver law was introduced in 2011, to date, French courts have not found a single party to have validly opted out of annulment.[53] As described in one commentary, 'this new rule would seem to be more of a symbolic reform than a change in practice, since, if foreign experiences are to be believed, the rule has been used only rarely, and is not likely to be used more frequently in France since, after all, it worries people.'[54] Consensus has emerged among French commentators that the incorporation of institutional rules containing waiver provisions

51 See, eg, Code de Procédure Civile [CPC], art. 1522 (France).

52 See, eg, Bundesgericht [BGer] [Federal Supreme Court], 7 Sept. 2006, Arrêt 4P.114/2006, 1/ 2007 ASA Bull. 123, 138, consid. 5.3, 138; BGer. 15 February 2010, Arrêt 4A_464/2009, 28 ASA Bull. 282, 286, consid. para. 3.1.1; BGer. 1 March 2011, Arrêt 4A_514/2010, consid. 4.1.1; *SARL Farmex Tech. v Rep. Armenia, FFPMC*, Cour d'appel de Paris, 3 April 2014, No. 13/22288.

53 Code de l'arbitrage commenté, CPC art. 1523, p. 227.

54 Code de l'arbitrage commenté, CPC art. 1523, p. 227 (own translation) (original text: '*cette nouvelle règle relève certainement davantage du symbole que d'un changement des pratiques car, si l'on en croit les expériences étrangères, elle n'a été que peu utilisée, et ne devrais pas l'être tellement plus en France car, à juste titre, elle inquiète.*').

is insufficient to waive annulment,[55] and courts have noted that broadly worded waivers in arbitration agreements are not sufficiently specific for the purposes of waiver.[56]

In the 2014 case *SARL Farmex Technologies v Republic of Armenia*, the Paris Court of Appeal found no waiver on the basis of a clause stating that the award would be 'definitive, binding, and fully and immediately enforceable', with the parties waiving 'the right to make any appeal and/or challenge the award […] before any jurisdiction unless criminal or other similar interference is proven.'[57] In the view of the French court, an exclusion agreement must specifically mention the right to seek annulment, and cannot carve out any objections such as the right to challenge the award if there is criminal interference.[58] While this first decision on France's waiver law offers a glimpse at what courts will not accept, in the absence of further case law, it remains to be seen what specific language will suffice.

Swiss courts have been similarly hesitant to enforce waiver clauses. From 1987 to 2004, the Swiss Federal Supreme Court examined nine cases in which it was alleged that parties had waived their rights to seek annulment. In each case, the court allowed annulment challenges to proceed, finding that the language the parties had adopted did not clearly waive their rights to seek annulment. In its case law, the Swiss Federal Supreme Court has held that agreements to the effect that awards that are 'final and binding' or 'non-appealable' are not enough to establish waiver.[59] It has also held that adoption of institutional rules containing waivers is insufficient to satisfy the requirements of the Swiss waiver law.[60]

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55 See, eg, Emmanuel Gaillard and Pierre de Lapasse, 'Commentaire analytique du décret du 13 janvier 2011 portant réforme du droit français de l'arbitrage' (2011) 2 Cahiers de l'Arbitrage 328; Sylvain Bollée, 'Le droit français de l'arbitrage international après le décret n° 2011-48 du 13 janvier 2011' (2011) 3-2011 Revue critique de droit international privé, 553, para. 26; Christophe Seraglini, 'L'efficacité et l'autorité renforcées des sentences arbitrales en France après le décret n° 2011-48 du 13 janvier 2011' (2011) 2 Cahiers de l'Arbitrage 375, para. 32.

56 *SARL Farmex Tech. v Rep. Armenia, FFPMC*, Cour d'appel de Paris, 3 April 2014, No. 13/22288.

57 *Ibid.* (own translation) (original text: '*la sentence du DAB sera définitive, obligatoire et pleinement et immédiatement exécutoire entre les Parties et les Parties seront irrecevables à interjeter un quelconque appel de et/ou contester la Sentence du DAB devant une quelconque juridiction, cour ou un tribunal arbitral (sauf si des interférences pénales ou d'autres interférences similaires en relation avec la Procédure devant le DAB sont prouvées)*.').

58 *SARL Farmex Tech. v Rep. Armenia, FFPMC*, Cour d'appel de Paris, 3 April 2014, No. 13/22288.

59 BGer 4 February 2005, BGE 131 III 173 s. 181.

60 BGer 1 December 2004, Arrêt 4P.62/2004, consid. 1.2; BGer 19 December 1990, BGE 116 II 639 s. 640, consid. 2c.

Since 2005, the Swiss Federal Supreme Court has grown slightly more accepting of waiver, admitting its occurrence in a handful of cases. In 2005, the Federal Supreme Court upheld an exclusion agreement for the first time, finding that the parties' agreement that the award 'shall be final and binding' and the parties' agreement to 'exclude all rights of appeal from all and any awards' was sufficient to waive annulment proceedings.[61] In subsequent decisions, the Swiss Federal Supreme Court has confirmed this, holding that parties need not refer to the Swiss waiver law or even the remedy of annulment specifically. Nonetheless, waiver clauses containing only generic finality language or those incorporated by reference to institutional rules appear to remain insufficient.[62]

Russia, perhaps the only other country with significant case law surrounding its waiver law, had in the past established a more permissive approach than the Swiss and French courts. Russian courts had held that the mere agreement that an award will be 'final' was sufficient to waive annulment, and even allowed such finality agreements to be established by reference to institutional rules.[63] But the recent reform, which came into force on 1 September 2016, calls this case law into question. The new law provides that reference to institutional rules is insufficient to waive annulment. Furthermore, it prohibits parties from excluding annulment if they do not arbitrate under the auspices of an approved institution, rendering many 'finality' clauses ineffective.[64]

In summary, due to courts' reluctance to enforce exclusion agreements contained in institutional rules or drafted in broad terms, the typical language employed by parties and institutions appears unlikely to result in the exclusion of annulment proceedings in most jurisdictions. Although parties and institutions are increasingly adopting exclusion agreements, and despite the growing trend of national laws permitting the exclusion of annulment, the effect of such changes has been limited, and annulment proceedings remain generally available.

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61 BGer 4 February 2005, BGE 131 III 173 s. 181.

62 BGer 31 October 2005, Arrêt 4P.198/2005; BGer 6 March 2008, Arrêt 4A_500/2007; BGer 21 Mar. 2011 Arrêt 4A_486/2010; BGer 4 January 2012, Arrêt 4A_238/2011.

63 Leonila Guglya, 'Waiver of Annulment Action in Arbitration: Progressive Development Globally, Realities in and Perspectives for the Russian Federation' in Alexander J Bělohlávek & Naděžda Rozehnalová (eds) *Czech (& Central European) Yearbook of Arbitration* (Juris 2012) Vol II, 81.

64 Russian Federal Law No. 382-FZ of 29 December 2015 'On Arbitration (Arbitral Proceedings) in the Russian Federation' art. 7(12); Russian International Commercial Arbitration Law, art. 7(13).

Opposing enforcement: the last holdout

All the laws discussed above deal with the exclusion of annulment actions only. But just because an award cannot be set aside does not mean that it will be enforced. To make an arbitral award truly final and definitive, excluding all judicial review, parties would have to ensure that courts at the place of enforcement will agree to recognise and execute it without objection.

At present, no major jurisdiction permits such an exclusion agreement. Most, including Switzerland, France and other jurisdictions that permit parties to waive the right to seek annulment, hold that parties cannot waive in advance their right to oppose enforcement of an award.

If the right to annulment can be waived, at least in certain territories, one might wonder why opposition to recognition and enforcement proceedings should be treated any differently. While some commentators have argued that the same policy concerns should apply to both annulment and opposition to enforcement,[65] many legislators and commentators accept that the two avenues of judicial recourse should be treated differently.[66]

As explained below, the waiver of objections to enforcement implicates different stakeholder interests than the exclusion of annulment due to the nature of the procedural rights at stake, the role of local courts, and differing potential efficiency gains. While forgoing annulment puts domestic awards on the same footing as awards issued abroad, allowing waiver of objections to enforcement would eliminate parties' ability to mount any objection to the award's execution.

Consequently, even in countries that permit waiver of annulment proceedings, the continued right to oppose recognition and enforcement is generally viewed as a stopgap safeguard of the arbitral process. In Russia, where waiver of annulment is perhaps most broadly permitted, courts consider that the continued availability of objections to enforcement guarantees parties'

65 See Kirby, above at n 8 at 126 ('The same public policy concerns that usually bar prospective waivers to seek set aside would also presumably bar prospective waivers of parties' rights to resist recognition and enforcement of foreign arbitral awards under the New York Convention.'); Gary Born, *International Commercial Arbitration* (Kluwer 2d ed. 2014) 3440 ('The same rationale would arguably extend by analogy to agreements not to raise objections to recognition of an award: if parties are permitted to waive rights to seek annulment, there is some force to the proposition that they should be free similarly to agree not to oppose recognition.').

66 See Born, above at n 62, at 3443 n 249 ('A waiver of the right to seek annulment of an award does not, in principle, evidence a waiver of the right to resist recognition of the award. Annulment and recognition are fundamentally different acts and the waiver of rights with respect to one does not entail or logically require waiver of rights with respect to the other.') (parentheses and cross-references omitted).

due process rights.[67] In *Tabbane v Switzerland*, the case upholding Switzerland's waiver law, the ECtHR emphasised the continued ability of parties to object to enforcement proceedings after waiving annulment, which ensured that some essential review would still be available.[68]

Regardless, then, of what the parties have agreed, it is clear that no arbitral award can be truly 'final', as it will remain possible in most cases for losing parties to object to the enforcement of the award.

Stakeholders' interests

On the face of things, there would seem to be a significant gap between what parties seek out of exclusion agreements and what courts are willing to give. While party autonomy is a key feature of arbitration, not even the most liberal countries are willing to allow parties fully to contract their way out of court.

In the interest of bridging this gap, it is worth examining the interests of various stakeholders – parties, institutions, courts and legislators – in either refusing or allowing waiver of judicial recourse. The full consideration of these interests provides insight into how courts and legislators have approached this issue, as well as guidance for future developments in the law.

Party autonomy and à la carte national review

One of the main driving forces behind national waiver laws is the encouragement of party autonomy. The desire, as stated by a US court of appeals that recognised the permissibility of such waivers, is to allow parties to 'opt out' of 'off-the-rack vacatur standards' provided under national law, consistent with parties' ability to contract for the procedural rules under which their arbitration will be conducted.[69]

But national support for party autonomy has its limits. Courts and legislators restrict party autonomy in two ways: (1) by refusing to allow parties to waive all judicial review; and (2) by declining to enforce waiver clauses based on boilerplate language.

First, courts may limit waiver outright, drawing a line that parties may not cross. While the approach of restrictive jurisdictions is often described

67 See Guglya, above at n 60 at 92 (citing 'Overview of the Practice of Consideration by the Arbitrazh Courts of the Cases Related to the Recognition and Enforcement of Foreign Court Decisions, Challenge of the Arbitral Awards and Recognition and Issuance of the Bills of Enforcement for Enforcement of Arbitral Awards' attached to the information letter of the Presidium of the Higher Arbitration Court of the Russian Federation, 22 December 2005, No. 96, Sec. 9)

68 *Tabbane v Switzerland*, App no. 41069/12 (ECtHR, 1 March 2016).

69 *Roadway Package Sys. Inc. v Kayser*, 257 F.3d 287, 292–93 (3d Cir. 2001).

as imposing limits on party autonomy, it will rarely be the case that such laws prevent parties from waiving annulment of an award if they so desire. After all, parties can avoid local rules prohibiting exclusion agreements by choosing to arbitrate in jurisdictions that permit waiver. While almost all jurisdictions prohibit advance waiver of objections to enforcement, parties may also limit the role of national courts in enforcement by delegating to the tribunal the determination of its own jurisdiction (which often prevents the national court from re-examining the arbitrators' jurisdiction) or, of course, by complying with arbitral awards voluntarily. Parties therefore retain significant control over post-award review notwithstanding limits and prohibitions on advance waiver.

The second way jurisdictions arguably limit party autonomy is by declining to enforce waiver clauses that are insufficiently specific. This includes, in particular, boilerplate finality clauses and waiver agreements contained in institutional rules.

Yet the courts' hesitance to find waiver based on boilerplate 'finality' provisions may in fact reflect attentiveness to party autonomy. If waiver provisions are imprecise, and a specific intent to waive annulment cannot be discerned, it is reasonable that courts should take pause. If a court is asked to parse the language of a potential exclusion agreement, it is necessarily because the parties disagree on what was waived.

After all, anecdotal evidence suggests that parties do indeed desire to retain annulment proceedings despite the proliferation of 'finality' clauses. In practice, many losing parties resist enforcement of the award or seek to have it set aside at the seat, regardless of whether they agreed that the award would be 'final'. And there are indications that parties may fear losing the minimum controls imposed by judicial review of arbitral awards. When Belgium in the 1980s excluded annulment for foreign parties, they abandoned Belgium as a seat of arbitration, apparently concerned about the prospect of unchecked abuses by the arbitral tribunal. 'What might be taken away from the Belgian experience of users fleeing from Belgium as a situs is that commercial parties were reluctant to give up any right of review. Giving up the right to review in advance was considered too risky and setting aside proceedings were ultimately considered valuable.'[70]

Given the potential uncertainty as to parties' intent in adopting finality clauses, it is unsurprising that waiver can usually only be found when there is unequivocal evidence of an intent to forgo annulment review. This is even more the case given that finality clauses are typically adopted long before a dispute arises and post-award challenges often attack the very content of

70 Matthew Blome, 'Contractual waiver of Article 52 ICSID: a solution to the concerns with annulment?' (2016) 32 Arb. Int'l 601.

the agreement to arbitrate. If the party is claiming that it did not even agree to arbitrate in the first place, or that the proceedings administered were not those it agreed to apply, the party would presumably also object that any agreement not to challenge the resulting award is inapplicable.[71] It is accordingly important to party autonomy to ensure that any advance waiver is given freely and with full understanding of the rights being surrendered. In this regard, the ECtHR has held that advance waiver of annulment should be made freely, legally, and unequivocally and be surrounded by a minimum of guarantees corresponding to its gravity.[72]

Recognising that many national laws only permit foreign parties (who are presumably less familiar with local law) to waive annulment, special care must be taken to respect the parties' wishes. On the one hand, as the Swiss Federal Supreme Court has emphasised, foreign parties are often unfamiliar with local law, and requiring them to cite the precise laws governing waiver would therefore be unreasonable.[73] On the other hand, excessive eagerness to fill in the blanks for the parties can be dangerous, as parties unfamiliar with local law risk waiving their rights unknowingly if their finality clauses are read too broadly.

Ultimately, however, the imposition of strict conditions on the form of waiver agreements is not likely to significantly offend party autonomy. In Switzerland, following the courts' clarification of what language was required to exclude annulment, an increasing number of cases have upheld such agreements. This trend demonstrates that parties are adapting their arbitration agreements to comply with the Swiss courts' case law. As other jurisdictions provide similar guidance, it is likely that parties will follow suit

71 Born, above at n 62 at 3442 ('where a party disputes having made any agreement to arbitrate, there is seldom any scope for arguments that that party waived its rights to resist recognition of an award ... if a party denies having agreed to arbitrate, it also necessarily denies having agreed not to challenge recognition of an arbitral award.').

72 *Tabbane v Switzerland* (see above at n 68) para. 27 ('En souscrivant à une clause d'arbitrage, les parties renoncent volontairement à certains droits garantis par la Convention. Telle renonciation ne se heurte pas à la Convention pour autant qu'elle soit libre, licite et sans équivoque… De plus, pour entrer en ligne de compte sous l' angle de la Convention, la renonciation à certains droits garantis par la Convention doit s'entourer d'un minimum de garanties correspondant à sa gravité.').

73 DFSC 131 III 173, 4 February 2005 (characterising the Swiss law as 'a legal provision, the very existence of which [foreign parties] are probably unaware'); see also Domitille Baizeau, 'Waiving the Right to Challenge an Arbitral Award Rendered in Switzerland: Caveats and Drafting Considerations for Foreign Parties' (2005) Int. Arb. L.R. 69, 71 ('This provision only applies where parties have no connection with Switzerland, i.e. precisely where the parties are unlikely to have been fully familiar with the provisions of the PIL Act when drafting the arbitration clause and, specifically, of (1) what might constitute a valid exclusion agreement for the purpose of Art.192; and (2) its effect on a possible review of the award by any state court.').

and modify their waiver text accordingly.

Due process protections by national judges

The counterpoint to party autonomy is due process review, which consists in the duty of courts to review arbitral awards to ensure that they do not contravene basic guarantees of fairness. As one US appeals court stated, 'the freedom to contract, like any freedom, has its limits. […] It is in part because arbitration awards are subject to minimal judicial review that federal courts voice such strong support for the arbitral process.'[74] The waiver of post-award review naturally decreases the role that courts play in promoting the legitimacy of arbitration. This impacts both the protections designed for parties and the protections afforded to the legal system itself.

First, due process review protects parties from bad arbitral awards, such as those rendered by tribunals that are biased, lack jurisdiction, exceed their authority, deny a party the right to be heard, issue awards procured by corruption or fraud, or otherwise fail to apply the procedures agreed to by the parties. By ensuring that arbitration complies with minimum guarantees of procedural fairness, courts ensure that parties' arbitration agreements are being enforced as intended.

This aspect of due process inures primarily to the benefit of the parties themselves, and as such, there is reason to believe that parties could waive it. After all, the courts' oversight is not mandatory in every case. Even in countries that take a restrictive approach to advance waiver of judicial review, courts regularly bar parties from raising challenges to arbitral awards if the parties fail to comply with procedural rules. Furthermore, parties can and do exclude annulment in their country of origin by choosing to arbitrate in other jurisdictions.

Although courts will thus not review every arbitral award, the continued availability of some review may be a necessary due-process guarantee. In the ECtHR's decision in *Tabbane*, for example, the court noted that the waiver of recourse provision did not, under Swiss law, exclude the losing party's right to object to enforcement on the grounds enunciated in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), which continued to provide 'a supplemental review exercised by national courts over arbitral tribunals.'[75] Although the ECtHR did not address whether national laws could permit parties to waive both annulment and opposition to enforcement, its

74 *Hoeft*, 343 F.3d at 63 (citing *Gilmer v Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 30 n 4).

75 *Tabbane v Switzerland* (see above, n 68) at para. 35 (own translation) (original text: '*un contrôle supplementaire exercé par les tribunaux ordinaires sur les tribunaux arbitraux*').

reliance on the continued availability of enforcement objections suggests that they provide an essential guarantee. This is consistent with the ECtHR's indication in *Suovaniemi v Finland* that '[w]aiver may be permissible with regard to certain rights but not with regard to certain others.'[76]

Second, due process review protects the legal system itself and prevents it from being contorted into an instrument of injustice. As one US court of appeals stated, 'judicial review is not a creature of contract, and the authority of a federal court to review an arbitration award — or any other matter — does not derive from a private agreement.'[77]

Such concerns are particularly salient at the enforcement stage, when judges reduce an arbitration award to an order from the court itself. The concern is that removing objections to enforcement would turn courts into mere 'rubber stamps' for execution, requiring them to order compliance with awards that might be tainted by fundamental flaws or run contrary to public policy.[78]

This vision of review as a protection for the legal system itself is thus often reflected in the obligation of courts to raise certain objections *sua sponte*, which may persist even when the parties' rights to seek annulment are waived.[79] When awards are flawed for reasons that are particularly egregious, for example, because the dispute is non-arbitrable or the award runs contrary to public policy, the integrity of the legal system itself is affected, and private contract should not, in the view of many countries, suffice to remove the oversight of national courts.[80]

Many have also worried that without such checks by national courts, it is not only the parties and the arbitration community that would suffer. In Russia, concerns have been raised that parties could use arbitration to

76 *Suovaniemi and others v Finland*, App no. 31737/96 (ECtHR, 23 February 1999).

77 *Hoeft*, 343 F.3d at 66; see also *Kyocera Corp. v Prudential-Bache*, (9th Cir. 2003) 341 F.3d 987, 1000 ('Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is, accordingly, legally unenforceable.').

78 *Hoeft*, 343 F.3d at 64–65 ('Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards.').

79 See Born, above, at n 62 at 3442 ('There is nonetheless a substantial basis for concluding that the parties' autonomy to waive defenses to recognition of an award may properly be limited by national law. In particular, the parties' autonomy would likely not extend to non-recognition on the basis of public policy and nonarbitrability, to claims that no valid arbitration agreement was ever concluded, or to defenses to recognition based on fraud or similar claims') (citations omitted); but see *ibid.* at 3312, 3334 (arguing that the 'better view' is that such objections should be capable of waiver if they are not raised by the parties within a reasonable time, and suggesting that such waiver could also be established by agreement).

80 See Born, above, at n 62 at 3539 ('some courts have correctly concluded that at least some egregiously unfair procedures cannot be the subject of advance waivers (with fraud or corrupt, grossly biased tribunals being good examples)').

carry out corrupt transactions or conceal transfers of funds and could also insulate such activities from legal oversight by waiving judicial review.[81] Russia's revised law, which prevents parties from waiving annulment unless they have arbitrated under an approved institution, aims to crack down on this possibility.

Another concern expressed by commentators is that in certain cases, waiving annulment could exclude the only available means to review arbitral awards.[82] Although many commentators have identified this possibility, most national laws do not address it, and, luckily, it does not seem to have arisen frequently in practice. Russian case law on exclusion agreements, much of it predating the 2016 reform, carved out exceptions to finality agreements, allowing annulment challenges to proceed notwithstanding waiver agreements when there was no opportunity to object in enforcement proceedings (either because enforcement was not requested or because an interested third party was excluded from such proceedings).[83] The German waiver law also aims to ensure that some recourse will always remain available, by excluding public policy and non-arbitrability objections from the scope of objections that can be waived. Notably, however, it does not address the harm to the legal system that could be caused by excluding other procedural objections, such as that the award was procured by fraud or corruption, or that a party was denied an opportunity to participate in the arbitration process.

Reinforcing the power of institutions and arbitrators

The interests of institutions and arbitrators, often overlooked, should also be kept in mind. Many institutions appear interested in limiting judicial review, as attested to by the number of institutional rules that have

81 See Guglya, above, at n 60 at 87; Elena Burova, 'New Rules of the Game for Arbitral Institutions in Russia: Two Recent Governmental Authorizations' (*Kluwer Arbitration Blog*, 23 May 2017) http://arbitrationblog.kluwerarbitration.com/2017/05/23/new-rules-game-arbitral-institutions-russia-two-recent-governmental-authorizations/; Nata Ghibradze & Alexander Dolgurokow, 'The Russian Arbitration Reform – a Road to More Certainty?'(*Kluwer Arbitration Blog*, 25 October 2016) http://arbitrationblog.kluwerarbitration.com/2016/10/25/the-russian-arbitration-reform-a-road-to-more-certainty/; Daria Astakhova, 'Russian Arbitration Reform: A Leap into the Unknown?' *(Kluwer Arbitration Blog*, 14 August 2015), http://arbitrationblog.kluwerarbitration.com/2015/08/14/russian-arbitration-reform-a-leap-into-the-unknown/.

82 Such is the case, for example, when an award rejects all claims. As such awards are unlikely to be presented for enforcement, annulment is often the only means to challenge them.

83 Mikhail Ivanov & Inna Manassyan, 'Russia' in James H Carter (ed) *The International Arbitration Review* (The Law Reviews 8th ed. 2017) 388, 396 (citing Ruling of the Supreme Court No. 305-ES16-1103 of 25 March 2016); Noah Rubins & Alexey Yadykin, 'Russia' in Steven Finizio and Charlie Caher (eds) *The International Comparative Legal Guide to International Arbitration 2017* (Global Legal Group, 24 July 2017)https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2017/russia.

incorporated finality and waiver provisions.

Waivers of recourse in institutional rules are usually found within sections dealing with the finality and the enforceability of the award. Thus, waivers seem to be included to reinforce parties' obligations to comply with arbitral awards, and to discourage dilatory tactics and collateral proceedings.

While institutions may hope that waiving post-award review promotes a more efficient arbitral process, there is still value to be had in the oversight imposed by annulment and enforcement proceedings. For ad hoc arbitrations and institutions without internal review processes, judicial review may be the only check on arbitrators' conduct. The threat that an arbitrator's award could be set aside for misconduct promotes the integrity of arbitral proceedings, emphasising the importance of due process and encouraging arbitrators to conduct the arbitration with care. This, in turn, benefits arbitrators and institutions. As commentators have characterised, 'an exclusion agreement is also likely to decrease the degree of the pressure on the arbitrators[,] which may to some extent be regarded as a guarantee for the quality of the arbitration proceedings.'[84]

As more institutions begin to craft internal scrutiny processes, however, the need for national court review diminishes. The ICC, which asks parties to waive all judicial recourse against awards, has its own review process that it applies before awards are issued. This process is aimed at identifying and correcting flaws that could result in the award being set aside or denied enforcement. This process, which the ICC considers to be a 'distinctive feature of ICC arbitration,' is mandatory, and the court has rejected parties' efforts to opt out of the review. As the Secretariat's Guide explains, '[i]n the Court's experience, it is rare that an award will not benefit from some scrutiny and some awards benefit enormously.'[85] In practice, few ICC awards are approved without any suggestions whatsoever from the Court. From 2007 to 2011, only 5 per cent of the final awards scrutinised by the ICC escaped comments and received unconditional approval.[86]

In investment arbitration, unlike in commercial arbitration, it may even be possible for institutional-recourse mechanisms to stand in place of judicial review. For example, the International Centre for Settlement of Investment Disputes (ICSID) has created its own annulment procedure,

84 Paolo Michele Patocchi & Cesare Jermini, 'Commentary on Article 192 PIL Act' in Heinrich Honsell, Nedim Peter Vogt, Anton Schnyder, & Stephen Berti (eds) *Basler Kommentar – Internationales Privatrecht* (2d ed. 2007) para. 57 (cited in Domitille Baizeau, 'Commentary on Chapter 12 PILS, Article 192 [Waiver of annulment]' in Manuel Arroyo (ed) *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law 2013).

85 Jason Fry, Simon Greenberg, and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC 2012) 3-1182.

86 *Ibid* at 3-1205.

which permits ICSID awards to be set aside by an annulment committee if it is shown that the tribunal was not properly constituted, exceeded its powers, or was tainted by corruption; if there was a serious departure from a fundamental rule of procedure; or if the award fails to state the reasons on which it is based.[87] This system replaces any annulment or enforcement review by signatory states, which are instead required to recognise ICSID awards as if they were final judgments of the nation's own courts. The ICSID model of delocalised annulment by the institution itself has been an experiment in efficiency, as it consolidates objections in a single proceeding before a specialised committee, rather than fracturing them into separate local court proceedings on annulment and enforcement.

Presently, national and international laws do not permit a similar delocalisation of due process review to be applied to commercial arbitration. Yet many institutions still apply their own review processes, creating to some degree a redundancy with the work performed by national courts. To the extent that these institutions believe that they are better placed than national courts to review challenges to a tribunal's conduct, they may have a greater interest in encouraging parties to opt out of annulment proceedings before national courts.

This interest is recognised in the Russian reform of its arbitration law, which represents an interesting experiment in trusting institutions to regulate themselves, while acknowledging that when no institutional control exists, oversight from national courts is more needed. Parties can opt out of annulment if they are arbitrating with an approved institution, but if the arbitration is ad hoc, with no institution providing oversight, courts will nonetheless hear annulment challenges.

In this respect, the revised 2010 UNCITRAL Arbitration Rules provide an interesting perspective, as they are frequently used in ad hoc arbitrations. In adding an optional new provision for waiver of recourse against the award in Article 34 of the Rules, the Working Group stated explicitly that such waiver should under no circumstances extend to grounds for non-recognition or setting aside of awards.[88] As stated in the *travaux préparatoires*, the Rules 'should not result in such waiver being given automatically or merely (and possibly inadvertently) through the submission of a dispute to the Rules.'[89]

Naturally, institutional perspectives may differ. Consequently, institutional rules could be well served by clarification, as the UNCITRAL Rules have undertaken. While many institutional rules are quick to declare the award's 'final and binding' nature, they generally make no explicit mention of the

87 ICSID Convention art. 52(1) 14 October 1966.

88 David Caron & Lee Caplan, *The UNCITRAL Arbitration Rules* (OUP 2d ed. 2013) 743.

89 *Ibid.*

specific rights to be waived. Disturbingly often, such rules are broad and vague and are unaccompanied by text explaining to parties what they might be waiving.

The ICC rules, for example, while requiring the parties to 'waive[...] their right to any form of recourse insofar as such waiver validly can be made,'[90] do not specify whether they ask the parties to surrender their right to annul an award made contrary to public policy. The Secretariat's Guide offers no elucidation, merely informing the parties that '[i]t will be a matter of law for the relevant national court to determine whether [the ICC waiver article] is sufficient to waive any waivable form of recourse. Accordingly, parties should seek expert advice on local interpretations of [this article].'[91]

If the interests of institutions in affecting post-award review are to be taken into account, and if institutions expect the waiver and finality provisions in their rules to be taken seriously, further clarification will be needed. By incorporating clear guidance into their waiver clauses, institutions can better communicate to both parties and national courts the scrutiny that the institution itself intends to apply, as well as the complementary review that they would like national courts to provide.

Increasing efficiency of post-award review

One goal shared among stakeholders is to render arbitration more efficient. When laws permitting the waiver of annulment are adopted, it is often thought that they will increase the efficiency of enforcement proceedings by eliminating 'double review' of awards both at the seat of arbitration and in the place of enforcement.[92]

The Swiss legislature, in adopting PILA 192 permitting waiver of annulment, sought to increase the efficiency of arbitration, hoping to free parties and courts from the duplication of having to pursue annulment and also oppose recognition.[93] Some have argued that permitting exclusion agreements could paradoxically add to the courts' workload by giving them the new task of determining whether waivers are validly made.[94] In practice, the limited case law involving exclusion agreements suggests that these laws have had a minimal impact on the courts' dockets. As exclusion agreements gain in popularity and further case law on the exact language needed to waive annulment decreases uncertainty, courts' workloads could be expected to decrease.

90 ICC Rules of Arbitration, art. 35(6) (2017).

91 Fry, Greenberg, and Mazza, see above, at n 83 at 3-1252.

92 BGer 22 Mar. 2007, ATF 133 III 235.

93 BGer 31 Oct. 2005, Arrêt 4P_198/2005, consid. 2.1.

94 Joachim Knoll, 'Waivers of Recourse in International Arbitration – Where Switzerland and Tunisia Meet' (2012) 4 Int'l J. Arab. Arb. 5, 24 n 91.

In individual cases, whether exclusion agreements improve efficiency depends on the circumstances of each case. Waiving annulment may best promote efficiency in two categories of cases: (1) when the award is issued in a country where it will not be executed; and (2) when enforcement is only sought in one jurisdiction.

First, when the award will be enforced in a different country than where it was issued, allowing review only in the country of execution (in the form of objections to enforcement and recognition) will generally serve efficiency, as it will eliminate duplicative proceedings at the seat.[95] As in Switzerland, Colombia, and Tunisia, the requirement that the parties have no links to the seat of arbitration is a good proxy to determine that the award will likely be enforced elsewhere. Parties with no domicile or assets in the country hosting the arbitration are unlikely to seek to enforce the award there. As the report to the French Prime Minister accompanying the country's waiver law states, waiver will be most useful in cases where parties choose France as the seat of arbitration, without necessarily needing to execute the award there.[96] Removing such geographic limitations on who can waive annulment, as the French and Russians have done, and as has been proposed in Switzerland, could thus extend waiver into cases in which there is less of an efficiency advantage.

Second, waiving annulment best promotes efficiency when enforcement is sought in only one place. When execution is sought in one country and annulment is waived, post-award proceedings can be consolidated in a single court's hands. Conversely, if enforcement is likely to be sought in multiple jurisdictions, eliminating annulment proceedings at the seat will have less of an effect on the efficiency of post-award review. To the contrary, excluding annulment could result in objections to enforcement being raised in multiple countries, rather than consolidated in annulment proceedings, where valid objections could result in a single set-aside order.[97]

Although national waiver laws do not address this second efficiency consideration, it is certainly something that parties and institutions would do well to reflect on when drafting exclusion agreements. Parties that consider in advance where the award will be enforced could then determine whether it would expedite post-award review to consolidate objections there.

95 Under the New York Convention, awards do not need to be confirmed in the country where they are issued in order to be executed abroad.

96 Report of the Prime Minister concerning Decree No 2011-48 of 13 January 2011 reforming arbitration law.

97 A number of jurisdictions do permit awards to be enforced, even if they are set aside at the seat, and in these cases the consolidation of objections in annulment proceedings may not provide a significant efficiency advantage. This is the minority approach, however, and in general it can be assumed that the annulment of an award will halt or at least decrease attempts to enforce the award abroad.

Increasing a forum's appeal to foreign nationals

Another legislative aim in adopting annulment waiver laws has been to encourage foreign residents to choose the country as a seat of arbitration. Somewhat ironically, legislators reason that foreign parties will be more likely to arbitrate in a country if they can be assured that the nation's courts will not be involved. Parties' desires to decrease the role of local courts can arise either out of distrust of the local judiciary or simply a desire to elevate arbitration beyond any national legal order.

The French law permitting advance waiver of annulment proceedings fully espouses this latter motivation to 'delocalise' arbitration. The current French approach favours treating awards as products of an international legal order rather than as offshoots of the French judicial process.[98] By waiving annulment, the award is delocalised in the sense that no single national court has the definitive power to set the award aside.

The idea behind such initiatives is that parties – particularly those with no ties to the seat of arbitration – should be able to remove their awards entirely from the review of national courts at the seat and instead consolidate review before courts at the place of enforcement (generally the country where assets are located), which is likely to have more of a link to the parties' dispute. It is perhaps then no surprise that two countries that have led the charge on liberalisation of annulment waivers – France and Switzerland – are frequently chosen as seats of arbitration due to convenience or their perceived neutrality, even when assets are not located in those territories.[99]

Conclusion

Waiver laws have gained popularity over the past 30 years and continue to evolve, with countries increasingly examining their practices to balance the concerns of party autonomy, due process, the interests of institutions and arbitrators, efficiency, and the attractiveness of the forum.

The balancing of these concerns may, in some circumstances, weigh in favour of permitting parties to opt out of set-aside proceedings, particularly for foreign parties who intend to enforce their award in a country other than the seat of arbitration. However, the balancing of the various interests at stake arguably weighs in favour of preserving minimal judicial review of arbitral awards, particularly in enforcement proceedings, even if parties have agreed otherwise.

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98 Christophe Seraglini, 'L'efficacité et l'autorité renforcées des sentences arbitrales en France après le décret n°2011-48 du 13 janvier 2011' (2011) 2 Cahiers de l'arbitrage 375 (2011).

99 Burda, see above, n 41.

Increased communication between parties, lawyers, institutions, judges, and legislators is essential to the path forward. The status quo has given rise to uncertainty, in large part because key stakeholders have not been clear about their interests: parties adopt exclusion agreements with vague wording; institutions ask parties to 'waive all recourse' without specifying what that will mean; and there is limited legislative and judicial guidance as to the seemingly magical words needed to waive review. As exclusion agreements gain acceptance, all stakeholders would be well served by adopting clear guidance to increase the predictability of post-award litigation and ensure that all stakeholder views are taken into account.