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AGREEMENTS LIMITING OR EXPANDING GROUNDS FOR ANNULLING INTERNATIONAL ARBITRAL AWARDS

Within the traditional framework of international arbitration, an arbitral tribunal produces a final and binding award, which can be only exceptionally annulled based on the narrowly tailored grounds available under the law of the seat. However, parties sometimes seek to limit or expand the grounds for annulment, hoping to increase the chances for successful resolution of their dispute. As the clauses modifying the scope of judicial review become more popular, important questions come to the fore with respect to their validity, application and usefulness. This paper will analyse the compatibility of these clauses with the nature of arbitration, by examining their compliance with the principles of party autonomy and finality. Main characteristics and application of these arbitration clauses will be also discussed. In addition, the author will explore how the stipulation of these clauses affects the quality of awards, integrity of arbitral proceedings and enforceability of awards abroad.

Key words: *Annulment of arbitration awards. – Expanded judicial review. – Finality of arbitration awards. – Limited judicial review. – Party autonomy.*

1. INTRODUCTION

Arbitration is a contractual method of resolving disputes by which parties themselves charter a private tribunal to render a final and binding decision in accordance with neutral procedures affording each party an

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opportunity to present its case. A central feature of international arbitration is party autonomy, which enables parties to adopt flexible procedures and tailor them to their business needs. Other equally important attraction of international arbitration is the finality of the arbitral process.

In accordance with the principles of party autonomy and finality, the arbitral tribunal produces an arbitral award, subject only to narrow grounds for annulment[1] available under the law of the seat. Nevertheless, parties sometimes seek to modify the statutory grounds for setting aside arbitration awards. They may wish to reduce the number of available post-award challenges or to preclude judicial review altogether. Oppositely, they may agree to expand the grounds on which an award may be set aside in order to mitigate the risk of a tribunal falling into error.

As arbitration agreements increasingly include clauses reducing, excluding or expanding possibilities for judicial review, important questions come to the fore with respect to the nature, application and usefulness of these clauses. Is party autonomy wide enough to completely preclude post-arbitration review of awards? Can parties agree on any type of additional grounds of review? Do national laws recognise contractual provisions modifying the grounds for annulment as valid? If so, what language should be used when drafting such provisions and how do courts interpret them? How would exclusion and expansion provisions affect the quality of arbitral awards, integrity of arbitral proceedings and enforceability of awards abroad if they become regular ingredients of arbitration agreements?

This paper will attempt to answer these questions by discussing policy, regulatory and practical aspects of the contractual provisions whose purpose is to alter the statutory grounds for judicial review. In order to gain an overview of the existing annulment mechanisms, section 2 of the paper will focus on the prevailing law on judicial review of arbitral awards worldwide. Section 3 will explore whether arbitration clauses modifying the statutory set-aside mechanisms are compatible with the nature of arbitration. This will be measured by analysing the compliance of these clauses with the principles of party autonomy and finality. In order to further analyse the validity of agreements limiting or expanding grounds for setting aside, section 4 will discuss the current position of national laws on such agreements. Section 5 will canvas the main characteristics of agreements limiting or expanding grounds for setting aside, focusing on their language, scope and impact on other parts of arbitration agreements. Section 6 asks what the main benefits and

[1] In this paper, the terms ‘annulment’, ‘setting aside’ and ‘vacatur’ will be used interchangeably.

drawbacks of customised judicial review of arbitral awards are when it comes to the quality of awards, integrity of arbitral proceedings and enforceability of awards. Finally, the discussion on validity, availability, enforceability and utility of arbitration agreements modifying judicial review of arbitral awards will be concluded in section 7 of this paper.

2. ANNULMENT OF INTERNATIONAL ARBITRATION AWARDS

Annulment of international arbitration awards presupposes a decision of a local court to invalidate an award rendered by a tribunal on grounds available under the law of the seat of arbitration, in order to eliminate defective awards from the legal system. On a wider level, the possibility of judicial sanction of improper conduct of arbitrators enhances the integrity of arbitration and promotes confidence within the business community that arbitration will not become 'a lottery of erratic results' (Park 2001, 599).

In principle, each country enjoys the unrestrained freedom to decide what standards of judicial control over awards will be applicable within its territory. However, as a result of the efforts to harmonise international commercial arbitration, the majority of national jurisdictions permit actions to vacate international arbitral awards only on a limited set of grounds, analogous to those prescribed in Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law') and, indirectly, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').[2]

With the ultimate goal of 'combin[ing] party autonomy in international arbitration with minimal judicial intervention in international arbitration as well ensuring the independence of the arbitral tribunal and fairness of procedure' (Raghavan 1998, 123–24), Article 34 of the UNCITRAL Model Law, titled 'Application for Setting Aside as Exclusive Recourse against Arbitral Award', contains the following list of grounds for annulment:

(1) Validity of the arbitration agreement and capacity of parties to conclude an arbitration agreement[3]

[2] Up to the present, arbitration laws based on or influenced by the UNCITRAL Model Law have been adopted by 84 states, in a total of 117 jurisdictions, including Serbia. For a detailed list of legislations based on the UNCITRAL Model Law see: UNCITRAL 2020.

[3] UNCITRAL Model Law, Art. 34(2)(a)(i): 'a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under

(2) Denial of the opportunity to present case[4]

(3) Excess of authority[5]

(4) Irregular procedure or irregular constitution and appointment of the tribunal[6]

(5) Non-arbitrability of the dispute,[7] and

(6) Violation of public policy.[8]

As it can be seen, the UNCITRAL Model Law provides an exhaustive list of grounds, the first four of which must be proven by a party. In contrast, the arbitrability and compliance with public policy are examined *ex officio* by judges.

Although the global trend has been towards mirroring the list of grounds enumerated in Article 34 of the UNCITRAL Model Law, which represents 'a sort of a global consensus on what seems to be the "golden middle" of permissible scope of control over the award' (Pavić 2010, 136), this pattern has not been followed unanimously.

One of the most controversial grounds for judicial vacatur absent from the UNCITRAL Model Law is substantive review of awards.[9] In general, national laws that allow judicial review of merits stipulate very

the law to which the parties have subjected it or it or, failing any indication thereon, under the law of this State'.

[4] UNCITRAL Model Law, Art. 34(2)(a)(ii): 'the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'.

[5] UNCITRAL Model Law, Art. 34(2)(a)(iii): 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside'.

[6] UNCITRAL Model Law, Art. 34(2)(a)(iv): 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law'.

[7] UNCITRAL Model Law, Art. 34(2)(b)(i): 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State'.

[8] UNCITRAL Model Law, Art. 34(2)(b)(ii): 'the award is in conflict with the public policy of this State'. Public policy is to be understood as 'serious departures from fundamental notions of *procedural* justice' (emphasis added). See UNCITRAL Secretariat 2008, para. 46.

[9] Other commonly encountered grounds for annulment not contained in the UNCITRAL Model Law are mostly related to procedural and jurisdictional issues whose application is far less controversial than annulment on the ground of error of law (e.g. uncertainty or ambiguity of award, violations of form requirements for award, criminal acts of parties or arbitrators).

strict requirements that could be satisfied only in the event of particularly egregious errors of law made by arbitrators.[10] Section 69 of the English Arbitration Act, governing an appeal on point of law in arbitration, is a perfect example of a 'long-stop provision' that should be exercised only extraordinarily.[11] New Zealand,[12] Hong Kong,[13] the British Virgin Islands,[14] and the Cayman Islands[15] have adopted similar restrictive appeal mechanisms. The probability of a success in the United States of America ('US') is equally narrow.[16] More extensive judicial review of the merits is generally permitted only in less developed national arbitration laws. For example, the arbitral award in Libya may be appealed in accordance with the rules applicable to appeals against court judgments.[17]

In contrast, more arbitration-friendly countries have adopted statutory grounds for vacatur narrower than those set forth by the UNCITRAL Model Law. In particular, Switzerland and France have created a very favourable legal environment in which courts cherish the tradition of accepting challenges for annulment only exceptionally.[18] A more drastic approach was taken by Belgium in 1985, when the government adopted the law that automatically and imperatively precluded any kind of judicial review of international awards in disputes between

[10] It is also possible that in jurisdictions which do not explicitly allow for substantive review of awards courts effectively engage in such practice when assessing other grounds for annulment (e.g. public policy or excess of authority).

[11] Firstly, Section 69 of the English Arbitration Act only applies to matters of English law. Secondly, it cannot be invoked without the agreement of all parties to the proceedings or without the leave of the court. Thirdly, the court must be persuaded that the contested issue substantially affects the rights of at least one party in arbitration and that the question is one which the tribunal was asked to determine. Fourthly, the facts should show that the decision of the tribunal on the issue is obviously wrong, or that the issue is one of general public importance and that the decision of the tribunal is at least open to serious doubt. Finally, the court must find that it is 'just and proper' to rule on the issue despite the agreement of the parties to resolve the matter by arbitration.

[12] New Zealand Arbitration Act (1996), Schedule 2, Section 5.

[13] Hong King Arbitration Ordinance (2013), Schedule 2, Provisions 5–7.

[14] British Virgin Islands Arbitration Act (2013), Schedule 2, Part IX, Art. 79(1).

[15] Cayman Islands Arbitration Law (2012), Art. 76.

[16] In an attempt to subject arbitration awards to substantive review, the US courts have come to recognise several common law grounds for vacatur, including the 'manifest disregard' standard, the 'completely irrational' standard, the public policy ground, and the 'essence of the contract' test. However, it is very seldom that the courts actually vacate arbitral awards on the basis of these grounds.

[17] Libyan Code of Civil and Commercial Procedure (1953), Art. 767.

[18] See Art. 190(2) of the Swiss Private International Law Act (1987) and Art. 1520 of the French Code of Civil Procedure (2011). Note that in France a domestic arbitration award can be challenged on the merits if parties agree to pursue the appeal. Such possibility does not exist in regard to international arbitration awards. See French Code of Civil Procedure (2011), Art. 1489.

non-Belgian parties.[19] The purpose of abolishing the annulment stage was to attract foreign companies to arbitrate in a newly-formed 'arbitration nirvana' in Belgium (Hulea 2003, 346). However, these expectations had proven to be over-optimistic because, in effect, multifaceted policy concerns and practical problems created an 'arbitral anarchy' in Belgium (Park 2006, 18). As a result, the government relaxed its position in 1998, when it provided the option for parties to freely decide on limitation of the right to seek annulment.[20] After further amendments were made in 2013, the applicable provision of the Belgian Judicial Code now reads as follows: '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'.[21]

3. COMPATIBILITY OF AGREEMENTS LIMITING OR EXPANDING GROUNDS FOR ANNULMENT WITH THE NATURE OF ARBITRATION

As explained above, national arbitration laws generally permit parties to challenge arbitral awards only on a limited number of statutory grounds, which typically deal with jurisdiction, procedural irregularities, and public policy issues. Even if permissible, the challenges to arbitral awards, based on their merits, are rarely successful.

This classic dispute resolution model—consisting of separate arbitration and judicial stages, with limited possibilities of courts to set aside arbitration awards—is a result of the compromise between the parties' choice to avoid protracted judicial proceedings and the state's desire to exercise at least some control over arbitration. If the parties want to exclude, reduce or expand the scope of review of awards available under the law of the seat of arbitration, the question arises as to whether this right would disturb the established balance between arbitral and judicial powers in the current international arbitration system. In order to answer this question, it is essential to assess the compatibility of the agreements limiting or expanding grounds for annulling arbitration

[19] Belgian Judicial Code (prior to 1998 amendment), Art. 1717(4): 'Courts of Belgium may hear a request for annulment only if at least one of the parties to the dispute decided by the award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a Belgian branch or other seat of operation'.

[20] See Belgian Judicial Code (prior to 2013 amendment), Art. 1717(4).

[21] Belgian Judicial Code (2013), Art. 1718.

awards with two core principles of arbitration: the principle of party autonomy and the principle of finality of arbitration awards.

3.1. Compliance with the Principle of Party Autonomy

The consensual nature of arbitration agreements has been widely perceived as a cornerstone of arbitration. Nearly all arbitration law bodies have recognised the crucial importance of party autonomy in arbitration.[22] The parties' freedom to mould arbitral procedures as they see fit provides a significant advantage over litigation and other forms of dispute resolution. In fact, such freedom is widely perceived to be the driving force behind the parties' decision to arbitrate.

The parties' freedom to fashion a system of judicial review by changing the codified grounds for annulment may be explained away on grounds of party autonomy. Simply stated, if parties have absolute confidence in the arbitration process and decision-makers of their choice and want to avoid any judicial interference in their dispute, or they simply want to avoid the time waste, additional costs and publicity deriving from the post-award court proceedings, there is no principal reason why they should be prohibited from putting themselves entirely at the mercy of arbitrators. Indeed, if parties can freely 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, it is unclear why parties would not be allowed to forego any review in annulment proceedings, save in the most extreme circumstances (Born 2014, 3368).

Similarly put, if parties want to introduce a heightened judicial review of an award, including a substantial review, they should be allowed to do so. As Gary Born argues, 'it is difficult to see why parties should not be permitted as a matter of policy to contract for "ordinary" judicial review, of the sort that would apply if the arbitral award was a first instance judgment. This accords with principles of party autonomy, and does not detract from (but enhances) the parties' "judicial" protections ... [R]espect for party autonomy and the basic objectives of the arbitral process argue decisively for permitting parties to contract for heightened judicial review of arbitral awards (provided that this does not impose undue or inappropriate obligations on national courts)' (Born 2014, 3376–78).

There is a noteworthy opposite view that party autonomy has its limits and that it cannot serve as a basis for unrestricted modifications of the judicial review process. As suggested by Vikram Raghavan (1998, 122–23), the parties' ability to agree on arbitral proceedings is confined to the arbitration process itself, excluding the post-arbitration conduct of

[22] See, for example, Art. 19(1) of the UNCITRAL Model Law and Art. V(1)(d) of the New York Convention.

courts, which is an entirely separate and different process. Therefore, while parties may enjoy relative 'free play in the joints' with respect to arbitral proceedings, party autonomy should not stretch as far as to change the statutorily determined role of courts in the arbitral process. This is because arbitration does not proceed in a legal vacuum. Instead, its very existence, validity and effectiveness are grounded in the legal order determined by the state. This order expects arbitral tribunals to resolve disputes in accordance with the principle of finality.

3.2. Compliance with the Principle of Finality of Arbitration Awards

It is no secret that parties especially value the efficiency, expediency and finality of arbitration. When parties choose arbitration over litigation, they primarily want to avoid the costs and delays typical for litigation. They tend to favour the straightforward annulment process in arbitration, based on a limited number of grounds, over the burdensome appeal proceedings in litigation offering a plethora of possibilities to challenge a judgment often leading to lengthy *de novo* trials. In other words, parties choosing arbitration over litigation are willing to put a high value on the finality of the arbitral award at the expense of the right to appeal against badly wrong arbitral decisions on the merits.

The right of the parties to limit or completely preclude annulment of arbitral awards seem to be in accordance with the principle of finality. Without the additional layer of protection available in the annulment process, parties would expeditiously proceed to the enforcement stage after obtaining the award. However, as discussed below, the stipulation of clauses limiting judicial review does sometimes comes with a price, because, for the award to be truly final, parties would have to ensure that the award would be executed outside the seat of arbitration without objection.

On the other side, expanded judicial review has the potential to seriously undermine the principle of finality and even blur the line between arbitration and litigation. In effect, the comprehensive judicial redress regime would transform at least some arbitrations into a form of ordinary first instance litigation proceedings. Therefore, parties would face those problems that they probably wanted to avoid when opting for arbitration in the first place. What is more, if expanded review were to become ordinary practice, the most pessimistic predictions (Hulea 2003, 353) envisage that the standard one-stop arbitration might transform into lengthy multi-step adjudication system, thus completely subverting the arbitral process and impairing confidence of the business community in the ability of arbitration to efficiently produce final and binding awards.

3.3. Effects of Interplay Between Party Autonomy and Finality

It is indisputable that party autonomy is and should remain an essential feature of arbitration. At the same time, the equally important principle of finality of arbitral awards enhances the efficiency of arbitration as one of its key features. It also ensures that, once an award has been rendered, it will be enforced swiftly and without additional expenses. However, according to the prevailing view in literature, when parties contract modified judicial review, these two bedrock principles of arbitration clash with each other and create the tension between the parties' desire for the substantial correctness of awards with the equally powerful desire for the effectiveness of arbitration, threatening to undermine the use and popularity of international arbitration as a viable alternative to litigation.

Regarding reduced judicial review, excessive deference to the decision-making of arbitrators, based on party autonomy, may bring into question the value of finality of arbitral awards. In particular, if the losing party would be prevented from obtaining any redress in the seat of arbitration when the first and final decision is obviously defective, the winning party may experience difficulties in enforcing the award abroad, and, in extreme cases, it would be unable to use the arbitral award at all. In this way, the advantages of the straightforward and expeditious arbitration process would be neutralised by the inability to execute an award outside the seat of the tribunal. In the case of expanded review, as argued above, the unrestrained freedom of parties to expand the grounds for annulment, including the freedom to contract review on the merits, is in contravention with the principle of finality to the extent that it may endanger the current international arbitration system.

In contrast, some other authors insist that the tension between party autonomy and finality is a mere illusion and that those elevating the value of efficiency above freedom are 'putting the cart before the horse'. From their perspective, efficiency and finality are not the ultimate goals of arbitration, but rather its by-products (Mitzner 2009, 189). Therefore, the contractually tailored mechanisms for judicial review should not be regarded as 'Procrustean bed[s] to which the parties must adapt themselves even at the cost of amputated limbs' (Rau 2006, 480). Rather, both limited and expanded judicial reviews should be legitimate choices that could help parties to resolve their disputes in accordance with their needs. Thus, fast and final decisions may be a desirable effect of arbitration if parties so choose in a concrete case. In contrast, if they want to hedge against the risk of gravely erroneous arbitration awards when choosing arbitration, they should enjoy the right to a more elaborate review process.

4. VALIDITY OF ARBITRATION AGREEMENTS LIMITING OR EXPANDING GROUNDS FOR ANNULLING INTERNATIONAL ARBITRAL AWARDS UNDER NATIONAL LAWS

The Gordian knot of party autonomy and finality has resulted in a split among countries regarding whether parties to an arbitration agreement can contractually exclude or vary grounds for judicial review of an arbitral award and, if so, to what extent.

4.1. National Legislations Based on the UNCITRAL Model Law

In the absence of any explicit rule in national laws based on the UNCITRAL Model Law on the parties' freedom to modify the instances according to which an award may be set aside, the main dilemma is whether these statutory provisions may be interpreted as being outside the realm of arbitration agreements.[23] National courts in the UNCITRAL Model Law jurisdictions have come to divergent conclusions regarding the validity of agreements limiting or expanding the grounds for annulment. Although some national courts found these agreements to be acceptable,[24] judges in a large number of cases have refused to give effect to these agreements.[25]

In general, it appears that the application of Article 34 of the UNCITRAL Model Law is mandatory and incapable of modification by private agreement. The history of negotiations indicates that the original intent of its drafters was to draw the line with respect to the matters that cannot be narrowed down by private parties and set this rule in stone (Várady 2006, 460). Similarly, the language of Article 34 of the UNCITRAL Model Law clearly states that the grounds for annulment are mandatory and exclusive.[26]

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[23] Please note that Article 62 of the Serbian Arbitration Act (2006) explicitly prohibits exclusion agreements: 'The parties may not waive in advance their right to apply for setting aside of the arbitral award'. To the best of the author's knowledge, to date no case law exists pertaining to whether parties may agree to expand the scope of judicial review under the Serbian Arbitration Act.

[24] See, for example, *Noble China Inc. v. Lei Kat Cheong*, (1998) 42 O.R.3d 69, [1998] O.T.C. LEXIS 2175 (Ontario Superior Court of Justice); and *Methanex Motunui Ltd v. Spellman*, [2004] 3 NZLR 454 (Court of Appeal in Wellington).

[25] See, for example, *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, [2006] 2 SCC 628 (Supreme Court of India); *Tang Boon Jek Jeffrey v. Tan Poh Leng Stanley*, [2001] 3 SLR 237 (Court of Appeal of Singapore); and *Uniprex S.A. v. Grupo Radio Blanca*, Case No. 178/2006–4/2004 (Madrid Court of Appeal).

[26] UNCITRAL. Secretariat 2008, paras. 45–46: 'The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside ... As a further measure of

Another strong argument in favour of a conservative interpretation is the unambiguous position of the UNCITRAL Model Law regarding the possibility of modifying the recommended judicial review mechanism. Specifically, Article 5 of the UNCITRAL Model Law strictly prohibits the intervention of national courts except in cases where provided in the UNCITRAL Model Law itself.[27] This rule excludes any residual powers that courts may have in arbitrations, including the power to annul awards on the grounds outside Article 34 of the UNCITRAL Model Law.

For all these reasons, it may be expected that the prevailing practice in jurisdictions inspired by the UNCITRAL Model Law—in which this issue has not been regulated by legislators and have not yet been considered by the courts—will be that contracts limiting or expanding the grounds for setting aside awards are not compatible with the rules stipulated in the UNCITRAL Model Law and that the recognition of the parties' capacity to alter the standard of review would undermine the balance between the bedrock principles of arbitration achieved in the UNCITRAL Model Law.

4.2. National Legislations Allowing Parties to Limit Statutory Grounds for Annulling International Arbitral Awards

Despite the considered attempt by the UNCITRAL to create universal rules for setting aside of awards, a considerable number of countries have allowed parties to, at least to some extent, customise national legal standards of judicial review. These countries either intend to bolster their well-established image of arbitration-friendly jurisdictions or want to experiment with their arbitration laws to gain a more prominent role in international arbitration.

One group of national arbitration statutes explicitly permit parties to waive their right to set aside an award before or after arbitration proceedings, either partially or entirely, provided that the beneficiaries of this possibility are not nationals of the country in which the award is made. This rule has been applied in various jurisdictions across the globe, including Switzerland and France. Other jurisdictions (e.g. Germany, England) are supportive of arbitration agreements limiting only specific grounds for annulment, while keeping others out of the reach of parties to arbitration.

As mentioned previously, Switzerland has long been recognised as a prominent example of an arbitration-friendly jurisdiction. This attitude has been strongly reflected in the rules governing annulment of international

improvement, the Model Law lists exhaustively the grounds on which an award may be set aside'.

[27] UNCITRAL Model Law, Art. 5: 'In matters governed by this Law, no court shall intervene except where so provided in this Law'.

arbitration awards. Specifically, Article 192 of the Swiss Private International Law Act ('PILA') expressly allows non-Swiss parties either to entirely exclude the means of recourse against any international award or to limit the recourse to one or more grounds enlisted in Article 190 of the PILA.[28] Tunisian,[29] Swedish,[30] and Columbian[31] laws also allow foreign parties to preclude or narrow down the application of statutory grounds for setting aside an award. As noted above, this right is also available in Belgium, whereas the law explicitly mentions only total waiver of annulment. Similarly, the parties to international arbitrations seated in France can waive at any time their right to bring an action to set aside an arbitral award.[32] In contrast to Swiss and Belgian laws, the right to renounce annulment, can be executed by any party, whether foreign or not.

Another group of countries is content to leave matters solely in the hands of arbitrators as long as they do not affect the rights and interests of third parties. For example, in Germany, Austria and Liechtenstein, parties are precluded from eliminating non-arbitrability and public policy grounds either before or after the conclusion of the arbitration. Other grounds can be waived only after the rendering of the arbitral award (Kroll, Kraft 2015, 6–7; Weber, Kitzberger 2019, 10.2; Walser, Sartor 2020, 10.2).

English law does not permit waivers of the right to set aside an award due to lack of substantive jurisdiction (under Section 67) or serious irregularity affecting the tribunal, proceedings or award (under Section 68). However, the English Arbitration Act permits parties to prohibit, prior to the dispute, the court to review an arbitral award on issues of law in accordance with the above-mentioned Section 69 of the Arbitration Act.[33] The identical option is available in other jurisdictions that allow the appeal on the merits.[34]

[28] PILA, Art. 192(1): 'If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2)'. Note that Article 192 was confirmed by the European Court of Human Rights as being compatible with the European Convention on Human Rights. See *Tabbane v. Switzerland*, [2016] Case No. 41069/12 (E.C.H.R.).

[29] Tunisian Arbitration Code (1993), Art. 78(6).

[30] Swedish Arbitration Act (2019), Section 51(1).

[31] Columbian Arbitration Law (2012), Art. 107.

[32] French Code of Civil Procedure (2011), Art. 1522(1): 'By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside'. Please note that if the parties have waived their right to challenge the award, they can appeal the order granting recognition or enforcement of the award in France, on the grounds for annulment.

[33] *Ibid.* Section 2.2.2.

[34] *Ibid.* Section 2.2.2.

Finally, it is worth mentioning that the US courts are split on the issue of whether parties may agree to narrow down the grounds for judicial review of awards. Several decisions have held that waivers of vacatur are unenforceable under the US Federal Arbitration Act ('FAA')[35] because the integrity of the judiciary and the arbitration process as a whole would be compromised.[36] Otherwise, the US courts would become a mere 'rubber stamp' that could be required to enforce the awards tainted by partiality, a lack of elementary procedural fairness, corruption, and similar misconduct.[37] Other courts have permitted parties to restrict judicial review, citing the parties' freedom to contract the arbitration procedure they desire, provided they do so clearly and explicitly.[38]

4.3. National Legislations Allowing Parties to Expand Grounds for Annulling International Arbitral Awards

In contrast to agreements that purport to restrict or eliminate set-aside proceedings, agreements expanding grounds for annulling awards are regarded with disfavour by most jurisdictions, irrespective of whether they adopted the UNCITRAL Model Law rules. Only a small number of countries allow contractual stipulations expanding the grounds for annulment, primarily to include merits review. A separate category of jurisdictions provides for solutions that are comparable to expansion agreements. Finally, for a long time the US courts were split on the issue of whether parties can agree on non-statutory grounds for review, but it appears that the predominant view today is that the expansion agreements are invalid under federal law.

In accordance with the trend of further limiting the control function of the courts in international arbitration, broad models for expanded judicial review are not a commonplace, although they do exist in less developed arbitration jurisdictions. For example, the default rule in Angola is that arbitral awards rendered in the context of international arbitration are not appealable, unless parties have agreed on the possibility of appeal and have set the terms of that appeal.[39]

Other arbitration laws allowing expansion of judicial review accept that party autonomy should prevail over the principle of finality of arbitration awards, but do not accept that the parties' freedom should be

[35] The list of grounds for vacatur is stated in Section 10 of the FAA.

[36] See, for example, *Hoeft v. MVL Group, Inc.*, 343 F.3d 57 (2d Cir. 2003).

[37] *Ibid*, 64.

[38] See, for example, *Aerojet-Gen. Corp. v. Am. Arbitration Ass'n*, 478 F.2d 248 (9th Cir. 1973); *Swenson v. Bushman Inv. Props., Ltd*, 870 F.Supp.2d 1049 (D. Idaho 2012); and *Kim-C1, LLC v. Valent Biosciences Corp*., 756 F.Supp.2d 1258 (E.D. Cal. 2010).

[39] Angolan Voluntary Arbitration Act (2003), Art. 44.

limitless. An illustrative example is Italian law, which allows a challenge of an award for violation of the rules of law on a contractual basis: '[T]he recourse [for nullity] for violation of the rules of law relating to the merits of the dispute shall be admitted if so expressly provided by the parties or by the law'.[40]

Another country that allows expansion agreements is Israel, where the parties who have agreed that arbitrators should be bound by the law may additionally agree that an award would be subject to appeal before a court 'if a fundamental error had occurred that has the potential of a miscarriage of justice'.[41] In cases where an appeal has been filed, the court cannot simultaneously entertain an application for setting aside the award, but in the appeal the parties may raise arguments concerning the setting aside pursuant to any of the grounds for annulment.[42] However, Israeli judges hear and approve appeals on awards only exceptionally, as their general tendency is not to interfere in arbitration (Kapeliuk-Klinger 2019, 35).

Although many jurisdictions do not allow parties to broaden the scope of annulment of awards, they provide parties with an additional layer of control of awards through which they may achieve a similar effect. For example, parties may have the right of appeal before a second arbitral tribunal (e.g. in The Netherlands[43]) or an arbitral institution offering an appeal mechanism (e.g. the American Arbitration Association[44]). If parties agree to this type of appeal clauses or clauses allowing for referral to a second tribunal in jurisdictions that offer two-tier arbitration systems, they may face additional delays and costs.

Another, far more controversial alternative is offered in Germany, where the grounds for vacatur do not allow for any merits review of awards. However, parties may agree upon *de novo* litigation, rendering any preceding arbitration baseless. In particular, the German Supreme Court found that a clause according to which an award would become final and binding only under the condition that parties do not start *de*

[40] See Italian Code of Civil Procedure (2006), Art. 829(3). According to Art. 829(4) of the Italian Code of Civil Procedure, the review based on an error of law is always admitted in employment disputes and in cases where the violation of the rules of law concerns the solution of preliminary matters which are not arbitrable (e.g. matter concerning the status of individuals).

[41] Israeli Arbitration Act (2008), Art. 29(B)(a): 'Parties to an arbitration agreement which stipulated that the arbitrator should rule according to the law, may agree that the arbitration award could be appealed, with the Court agreement if a fundamental error had occurred that has the potential of a miscarriage of justice'.

[42] *Ibid*, Art. 29(B)(c).

[43] See Code of Civil Procedure of The Netherlands (2014), Arts. 1061a–1061l.

[44] See Optional Appellate Arbitration Rules of the American Association Arbitration (2013).

novo litigation within a prescribed period of time is an expression of party autonomy that should be respected by both arbitrators and judges.[45] In *de novo* proceedings, where both the law and facts would be reviewed, an award debtor may submit arguments and evidence that would otherwise be rejected in annulment proceedings, therefore, indirectly achieving a similar effect to the effect of the expansion agreements.

Finally, whether parties can contractually customise the legal standard of review for arbitration awards by giving more power to the courts was an issue of sharp contention in the US, where the court practice perfectly illustrates the tension between arbitral and judicial powers, as well as party autonomy and finality of arbitration awards. The courts—on one end of the spectrum—have upheld the parties' efforts to expand the standard of judicial review, holding that the legislative intent of the FAA is to ensure that arbitration agreements are enforced according to their terms, i.e. in accordance with party autonomy.[46] However, other US courts refused to recognise the right to expand judicial review of arbitral awards because the parties' freedom to expand the grounds for annulment would allow private individuals to illegally grant the jurisdiction to federal courts.[47] The opponents of contractually expanded judicial review also argued that this option would sacrifice the simplicity, expediency and cost-effectiveness of arbitration.[48] They warned that, 'rather than providing a single instance of dispute resolution with limited review, arbitration would become yet another step on the ladder of litigation'.[49]

The US Supreme Court was given an excellent opportunity to resolve this direct split among the courts in the famous *Hall Street* case.[50] The Court in this case departed from its historic preference of the freedom-of-contract rationale by deciding that the grounds for vacatur under the FAA are mandatory and exhaustive, and that any agreement expanding the reasons for annulment would be declared invalid under the FAA. Finality trumped autonomy because any other outcome would not be acceptable due to the fact that it would endanger the institution of arbitration itself and transform it into 'a prelude to a more cumbersome and time-consuming judicial review process'.[51] Not unexpectedly, this

[45] See Judgment of 1 March 2007, III ZB 7/06 (German Supreme Court).

[46] See, for example, *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997), 6; *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995), 995; *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, 584 F.Supp. 240 (S.D.N.Y. 1984), 242; and *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468 (U.S. S.Ct. 1989), 489.

[47] See, for example, *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991), 1505.

[48] *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001), 936 n.7.

[49] *Ibid*.

[50] See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (U.S. S.Ct. 2008).

[51] *Ibid*, 563.

ground-breaking case has been the subject of a substantial number of scholarly articles and comments calling for its immediate reassessment (see, for example, Rau 2006). Until this has been done, the parties wishing to forego the *Hall Street* ruling may choose to arbitrate their dispute under the laws of the US states that provide for a more *laissez-faire* standard of review (e.g. New Jersey,[52] California[53]). Alternatively, the *Hall Street* judgment left open another venue to achieve the effects of expansion clauses in the US: '[i]f the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award'.[54] This approach resembles the above-discussed two-tier arbitration model.

5. MAIN CHARACTERISTICS OF AGREEMENTS LIMITING OR EXPANDING GROUNDS FOR ANNULLING INTERNATIONAL ARBITRAL AWARDS

As demonstrated in the above overview of national arbitration legislation, there is no clear-cut solution regarding the desirability and utility of contractual variations of the grounds for annulling international arbitration awards. As businesses continue to experiment with the language and scope of their arbitration agreements, the dichotomy between freedom of contract and finality in arbitration may become further pronounced. To prevent such negative outcomes, courts should engage in a process of legal fine-tuning of what parties require from them, how much they can interfere in their mandate, and, finally, whether arbitration agreements may survive the invalidity of clauses modifying statutory grounds for review.

5.1. Language of Agreements Limiting or Expanding Grounds for Annulling International Arbitral Awards

In jurisdictions that consider agreements to modify judicial review of awards as valid, the first question arises as to what language parties should use to ensure that such agreements are be enforceable. In general, national courts have required clear language in order to give effect to absolute or partial waivers of the right to challenge an award.

[52] See New Jersey Statute, 2A:23B-4(c): '[N]othing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a record'.

[53] See *Cable Connection, Inc. v. DirecTV, Inc.* 190 P.3d 586 (Cal. 2008). The Supreme Court of California ruled that parties may provide for review of the merits in the arbitration agreement under the state arbitration statute. The court concluded that policies favouring efficiency in arbitration should be outweighed by the freedom of contract, which is fundamental to arbitration.

[54] *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991), 1505.

For example, the Swiss courts only accept the express language of agreements. A mere declaration of compliance with an award, in the arbitration agreement, does not constitute a valid waiver.[55] Similarly, the references to an award being 'final' or 'final and binding' are not enough to exclude the possibility of vacatur.[56] In contrast, an express reference to the specific arbitration rules or the provision contained therein providing for a waiver should suffice.[57] The express reference to the relevant provisions of the PILA is also desirable, but 'it is not essential ... that the parties cite such or such provision or that they use such or such expression'.[58] If parties want to exclude judicial review only partially, they must explicitly state the specific grounds for challenge that they want to exclude, either by indicating the corresponding sub-paragraph of Article 190(2) of the PILA, by reproducing its content, or by any other formulation that allows clear identification of the excluded grounds for challenge.[59] Similar rules have been applied by the English courts.[60]

In contrast to Swiss and English approach, some Canadian courts have held that the parties' agreement on 'final and binding' award is deemed an acceptable waiver.[61] The better view is that implied waivers should not be admitted. Born (2016, para. 134) suggests that a clause along the following lines can be used to exclude judicial review: 'The arbitrators' award will be final and binding. The parties expressly exclude any and all rights to appeal, set aside, or otherwise challenge any award by the arbitrators, insofar as such exclusion can validly be made'.[62]

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[55] See Judgment of 10 October 2008, DFT 4A_224/2008 (Swiss Federal Tribunal).

[56] See Judgment of 2 June 2004, DFT 4P.64/2004 (Swiss Federal Tribunal); and Judgment of 15 February 2010, DFT 4A_464/2009 (Swiss Federal Tribunal).

[57] See Judgment of 19 December 1990, DFT 116 II 639 (Swiss Federal Tribunal). Note that the majority of institutional arbitration rules, including ICC Rules, SIAC Rules and LCIA Rules, contain limitations on judicial review of arbitral awards.

[58] See Judgment of 4 February 2005, DFT 131 III 173 (Swiss Federal Tribunal), 4.2.3.1.

[59] *Ibid*.

[60] In England, the exclusion agreement may be implied through the selection of a set of procedural rules containing the limitations on judicial review of awards. At the same time, a statement that an award shall be 'final, conclusive and binding' does not suffice to preclude the application of Section 69 of the English Arbitration Act. See *Marine Contractors Inc. v. Shell Petroleum Development Co. of Nigeria Ltd* [1984] 2 Lloyd's Rep. 77 (English Ct. App.); and *Shell Egypt W. Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm) (English High Ct.).

[61] See *Labourers Int'l Union of N. Am. v. Carpenters & Allied Workers*, (1997) 34 O.R.3d 472 (Court of Appeal for Ontario).

[62] In its landmark decision, the Swiss Federal Court upheld an arbitration agreement having the similar wording: 'All and any awards or other decisions of the Arbitral Tribunal shall be made in accordance with the UNCITRAL Rules and shall be final and binding on the parties who exclude all and any rights of appeal from all and any

Alternatively, McIlwrath, Savage (2010, 331) proposes the following clause: 'The award will not be subject to any right of appeal, challenge, or action to set aside, which the parties hereby irrevocably waive'.

An example of a partial waiver, valid under Swiss law, reads as follows: 'The parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL tribunal itself or before any national courts'.[63]

In contrast to partial and absolute waivers, the interpretation of agreements expanding judicial review is less controversial. In general, parties may either ensure the general right to seek expanded judicial review in accordance with the rules applicable to challenges to judicial judgements or they may state specific grounds in their agreement.

Born (2016, 137) provides an example of the agreement limiting the expansion of judicial review to the reasons of appeal before a court: 'The arbitrators' award shall be final and binding, but any party hereto shall have the right to seek judicial review of such award in the courts of the place where the award is made in accordance with the standards of appellate review applicable to decisions of courts of first instance in that place'.

If parties want to challenge the award because of errors of law, which is the most common ground for judicial vacatur of arbitral awards not contained in the UNCITRAL Model Law, they can include the following clause in their arbitration agreement: 'The arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error'(Hamlin 1998, 51).

These and similar clauses should not instil doubt in parties, arbitrators and judges as to their meaning.

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awards insofar as such exclusion can validly be made'. Judgment of 4 February 2005, DFT 131 III 173 (Swiss Federal Tribunal), para. 4.2.3.2.

[63] The full text of the limitation clause reads as follows: 'The parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL tribunal itself or before any national courts. For the avoidance of doubt, the parties and Y. do not hereby waive their right to challenge any award in the UNCITRAL Arbitration in the place where the award is made or to resist enforcement thereof in the country or countries where enforcement is sought on the grounds contained in the applicable arbitration laws of those countries, save that the parties will not do so on the ground that the UNCITRAL Tribunal lacked jurisdiction to consider one or more of the issues before it'. Judgment of 10 November 2005, DFT 4P.98/2005 (Swiss Federal Tribunal), 148.

5.2. Scope of Agreements Limiting or Expanding Grounds for Annulling International Arbitral Awards

As seen above, some countries allow parties to completely exclude their right to challenge awards in advance, despite the threat of potential misuse of arbitration by one of the parties. Others allow only those waivers that do not endanger the interests of the public or third parties. An even more protective approach has been suggested by some commentators. They argue that stricter control over agreements excluding review of decisions on jurisdiction is advisable because it is difficult to accept that arbitrators would be able to make an award without any possibility of judges to review their status (Born 2014, 3371). Others suggest that, in addition to the jurisdiction, parties should not be allowed to waive the grounds concerning the fundamental procedural fairness and international public policy (Park 1989, 707). Although these proposals have been made in the interest of integrity of the arbitral system, they have not been accepted by the national legislatures that recognise exclusion agreements, who tend to primarily protect non-partisan interests when limiting the right of the parties to deviate from statutory grounds for annulment.

In sum, the Swiss arbitration law and court practice may serve as a prototype for other countries if they decide in the future to grant parties the right to partially or completely exclude the statutory grounds for annulment. If they wish to protect not only their national interests, but also the interests of third parties, they may follow in the footsteps of Austria. Others, who would prefer to take a less lenient approach towards annulment of awards, may, perhaps, provide additional safeguards aimed at preserving the jurisdictional and procedural correctness of arbitration.

On the other side, giving parties the absolute freedom in crafting expanded grounds for annulment would be overwhelming because private entities should not be allowed to require judges to apply unfamiliar standards of judicial review. Such unrestricted interference with judicial independence should not be tolerated. As famously stated by a US court, any request to a court to review an arbitral award 'by flipping a coin or studying the entrails of a dead fowl' should be decisively rejected by any court.[64]

A better solution is to only allow agreements stipulated to facilitate expanded review of the sort which would apply if an arbitral award was a first instance judgment. At least in theory, such a measured approach not only accords with the principle of party autonomy, but it may also enhance the judicial protection available to parties before local courts. However, as described above, only less developed arbitral jurisdictions

[64] *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), 891.

provide for such a model. Instead, practice has shown that national arbitration laws mostly allow parties to agree only upon a limited number of grounds for appeal regularly available in litigation proceedings, of which the review on the merits has primacy over other available reasons for annulment.

5.3. Impact of Invalid Agreements Limiting or Expanding Grounds for Annulling International Arbitral Awards on the Remaining Elements of Agreements

Another legitimate concern regarding agreements providing for customised judicial review is their impact on the survival of entire arbitration agreements in cases of their impermissibility. Namely, following a court ruling that the parties' agreement for judicial review is invalid, a dissatisfied party can argue that it agreed to arbitrate only on the condition of modified judicial review. In response to this assertion, the court may take one of two different paths.

First, a court may find an invalid provision to be divorceable. Consequently, an arbitration agreement survives as if parties did not change the scope of judicial review. For example, in *Kyocera* the US court found that the invalid provision was severable because it pertained to the review of the arbitration procedure that should have been conducted by the court, while the rest of the agreement was related to the arbitration procedure conducted by the tribunal.[65]

Second, if a court finds that a party would not arbitrate at all without the possibility of modified judicial review, the entire arbitration agreement becomes unenforceable. In contrast to *Kyocera*, a different US court ruled that '[t]he provision for judicial review of the merits of the arbitration award was so central to the arbitration agreement that it could not be severed. To do so would be to create an entirely new agreement to which neither party agreed ... The parties to the contract here agreed to arbitration with judicial review of errors of law and fact. Without that provision, a different arbitration process results'.[66] The Supreme Court of New Zealand similarly found an entire arbitration agreement invalid when it struck down the clause stipulating the appeal on questions of law and fact, because the parties indicated in their arbitration agreement the degree of importance that they attributed to the scope of their ability to challenge the award on appeal and because the factual matrix at the time the parties entered into the arbitration agreement showed that the clause

[65] See *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).

[66] *Crowell v. Downey Community Hospital Foundation*, 95 Cal.App.4th 732 (Cal. Ct. App. 2012), 740.

stipulating the expanded judicial review was a key element of the agreement to arbitrate.[67]

In principle, in cases dealing with waiver clauses, the parties' clear intent to constrain or completely exclude judicial control may be a strong indication that the parties may well have preferred no arbitration rather than arbitration followed by regular annulment proceedings. In regard to expanded judicial review, the courts may be expected to keep an arbitration agreement alive and proceed to examine an award on the basis of the statutory grounds of review, assuming that the parties would have consented to arbitration with the possibility of the review available under applicable law rather than not arbitrate at all.

Considering the complexity of this matter, it is improbable that a universal solution covering all potential cases can be found. Rather, different combinations of the facts of the case, rules of contract interpretation, and variety of general principles of law in each country have the potential to result in diverse outcomes in each individual case. Nonetheless, in accordance with the principle of severability, it may be argued that, to the extent possible, the arbitration-friendly attitude of the courts should favour continuity of arbitration agreements.

6. ADVANTAGES AND DISADVANTAGES OF ALLOWING PARTIES TO LIMIT OR EXPAND GROUNDS FOR ANNULLING INTERNATIONAL ARBITRAL AWARDS

As can be seen from the discussion above, there is no magic formula for designing an ideal party-dependant system of judicial review that could overcome all policy and practical issues related to its legal nature and application. Despite such uncertainty, many countries, including some key common and civil law jurisdictions, recognise the value of the parties' freedom to tailor the post-award judicial review as they see fit. They offer businesses the choice that would serve their interests best, knowing that certain parties may prioritise the quality of arbitral awards, while others may appreciate fast resolution of their dispute. Many prospective parties in arbitration also take into consideration the prospect of enforcement of arbitral awards abroad. Since exclusion and expansion agreements have a decisive impact on each of these aspects of arbitration, their availability, stipulation and application significantly affect the whole arbitration system itself.

[67] See *Ewan Robert Carr and Brookside Farm Trust Ltd. v. Gallaway Cook Allan*, [2014] NZSC 75 (Supreme Court of New Zealand).

6.1. Quality of Arbitral Awards

One of the main advantages of international arbitration is that it provides its users the opportunity to select arbitrators with the technical and commercial expertise that is tailored to the unique needs of parties in each dispute. However, it is no secret that at least some arbitrators, especially those who are untrained in the law, are sometimes more driven by a tendency to search for business-oriented solutions rather than to strictly apply the governing law to the facts. As a result, the incompetence of such arbitrators to decide complex statutory issues in cross-border disputes may result in obviously aberrant decisions, which would serve no purpose to parties.[68] When viewed through this prism, the prospect of heightened judicial control could put pressure on arbitrators to weigh the issues at stake more carefully, knowing that their decisions could be subject to strict scrutiny and rigorous sanction. Thus, it appears that arbitration users may benefit if they can contract expanded judicial review to improve the odds of obtaining a correct and just outcome of their dispute. As a result, parties who might otherwise not agree to arbitrate may be more willing to use arbitration if appellate courts might have the final say in the dispute in case their expectations that the arbitral tribunal could be composed of impartial, competent, and independent arbitrators prove to be false.

In contrast, it would not be always prudent for international parties to restrict the grounds for vacatur without second thought. Arbitration agreements to take matters out of courts may lift the weight off the arbitrators' shoulders and thus make them more open to rendering awards of questionable quality, with the serious potential to impede justice in arbitration—especially if their decisions would not be subject of judicial control abroad in cases in which the winning party is seeking to execute the arbitration award only in the seat of arbitration.

6.2. Integrity of Arbitral Procedures

While expanded judicial review can presumably improve the quality of awards, it may at the same time threaten the integrity of arbitral proceedings. As explained above, this model of judicial control may negate the advantage of the typically swift resolution of disputes through arbitration. Therefore, parties contracting for more comprehensive judicial review should be mindful of the additional delays, costs, possible obstructions of proceedings and other unwelcomed frustrations. In addition, the appeal on the merits would most likely eliminate confidentiality, which is another major advantage of arbitration.

[68] Such awards are known as 'maverick arbitral decisions', 'knucklehead awards', 'Russian Roulette awards' or 'roll-the dice' arbitration awards.

Although the drawbacks of expended judicial review are obvious, they are not insurmountable. For example, national laws can limit parties to elect only one or several additional grounds for review, with which local courts are well familiar. Parties are also free to save time and costs by further narrowing the contested issues before the court. They can also give up their claims at any time. In any case, the benefits of arbitration would still be retained in connection with those issues that are finally settled by arbitrators (Montgomery 2000, 552). Since reviewing arbitration decisions based on errors of law or substantial evidence would be less burdensome than a full trial, a further argument can be made that expanded review does not completely undermine efficiency of arbitration, but instead 'lessens the distance on the expeditiousness spectrum, between full-blown litigation and non-reviewable arbitration' (Hulea 2003, 358). This view is in accordance with the above explained theory of false conflict between the principles of party autonomy and finality.

On the other side, the abolishment or reduction of judicial post-award review may open the floodgates for blatant attempts to abuse the procedural rights or jeopardise public and private interests of third parties by an unscrupulous party, who may 'contaminate' proceedings to the extent that such behaviour would irrevocably taint an arbitration award. However, in the absence of such harmful practices, the potential advantages of reduced review may appear rather obvious, especially for the parties who prefer an efficient resolution of their dispute. For example, a full waiver could be very useful in time-sensitive cases, either because of the type of dispute (e.g. in disputes involving perishable or seasonal goods), or the amount potentially in dispute (e.g. in low-value disputes), or remedy sought in arbitration (e.g. declaratory relief affecting future contractual obligations). In these cases, parties can maximise informality, flexibility, speed, simplicity, reduction of expenses and other benefits of arbitration by minimising the interference of the courts through arbitration. Furthermore, they can quickly move to the enforcement stage after an award is made—to ensure the prompt recovery of the fruits of successful resolution of their dispute.

6.3. Enforceability of Awards

Although optional limited judicial review may be the ideal option in some cases—because of its anticipated positive impact on the quality of awards and integrity of arbitral procedures—it might also prove unwelcome in practice when it comes to enforceability of awards. Its wider application might provoke a global tsunami of judgments denying recognition and enforcement of awards. Such tectonic movements within the current arbitration system would seriously undermine the bedrock principles of modern international arbitration, embodied in the New York Convention and the UNCITRAL Model Law.

First, the lack of possibility to annul an award in the situs would raise fears of refusal to enforce such 'floating award' in other jurisdictions because such stateless awards are deemed unenforceable under the New York Convention. If this is the correct interpretation, as it has been vigorously argued by numerous scholars, the chances of a winning party benefitting from an award would drop dramatically if parties agreed to completely preclude judicial review of arbitration awards (Van den Berg 1986, 213). Similarly, there would be no guarantees that the award would be enforced abroad if parties limit domestic courts to review awards only on one or several available grounds, since the grounds for enforcement mirroring the excluded grounds for annulment may be non-waivable in the country of enforcement.

Second, the benefits of a 'neutral nationality' of the arbitral forum could be lost if a country of enforcement, as it is often the case, is the country of one of the parties. Namely, it is assumed that parties choose international arbitration because they do not trust each other's courts. Instead, they want to resolve their dispute before a neutral third-party forum that is unlikely to appear biased. The abovementioned unsuccessful attempt to reform Belgian arbitration law illustrates all the dangers of shifting judicial control away from courts of the seat of arbitration to those of the countries responsible for enforcement of awards. In an attempt to attract non-Belgian parties and ease the caseload of the courts by excluding review of awards 'which do not at all concern our country, and which at present are often used for purely dilatory purposes',[69] the government in fact drove the foreign parties away from Belgium who were reluctant to give up any right of review in the seat of arbitration. A similar outcome may occur if the optional complete exclusion of judicial review before neutral courts of the situs is constantly triggered by the parties.

Similar complications, although to a much lesser extent, might arise if a foreign court enforces an award that was vacated on non-statutory grounds chosen by parties. Namely, if a local court sends an award to a tribunal for reconsideration and the new tribunal renders a different decision, the situation could create the two-awards problem of inconsistent court decisions in countries of annulment and enforcement. Similarly, if a court of the seat simply reverses an award, confusion may arise regarding the status of the original award. In order to reduce this risk, it has been suggested that parties simply contract a clause authorising the original tribunal to retain jurisdiction in case of vacatur of its award (Barceló 2009, 4).

Another potential concern is the refusal of enforcement of an award by a foreign court, after a local court rules that the award is correct on the

[69] Legislative history concerning Article 1717 of the Belgian Judicial Code, cited by Vanderelst (1986, 86).

merits. A discontented party may argue that the clause allowing for a substantial review is also applicable in the enforcement stage. If the foreign court accepts the jurisdiction to review the award on the merits—which is unlikely but still possible—its conclusion on the validity of the award may differ from the original ruling of the court of the seat. To avoid this situation, it is best to clarify in the arbitration agreement that the expanded grounds for review do not refer to the grounds for enforcement (Moses 2003, 321–22).

7. CONCLUSION

The discussion presented in this paper has indicated that the traditional judicial review of international arbitral awards is the process by which a court reviews an award on a limited number of narrowly circumscribed grounds. As explained, in national systems that cherish the classic judicial review mechanism, the core virtues of party autonomy and finality in arbitration are, among others, safeguarded by the strict prohibition of judges reviewing errors of law made by arbitrators. This default position, laid down in the UNCITRAL Model Law, prohibits private parties from conferring or tampering with the jurisdiction of national courts. Thus, parties can choose between a one-tier arbitration system offering efficiency—ensured by limited judicial review—and a classic judicial appeal mechanism designed to favour the quality of decision-making. Yet, it was argued that, instead of choosing between these two extremes, a sensible middle way approach might be to allow parties greater freedom to streamline a more flexible dispute resolution process, provided that it does not inflict undue burdens on the national courts, infringe the rights of non-parties, or threaten public interests.

Although no system can perfectly reconcile the principles of party autonomy and finality, it appears that arbitration agreements limiting and expanding the statutory grounds for setting aside of awards are, in principle, compatible with the nature of arbitration. As seen in section 4 of the paper, a significant number of the most important jurisdictions for international commercial arbitration—including Switzerland, England, France and, arguably, the US—explicitly or implicitly allow parties to modify the grounds for annulment.

In order to ensure enforcement of arbitration clauses modifying the statutory grounds for vacatur under national laws that permit them, parties should express their will with definiteness and precision. It was further suggested that the parties' unreasonable and unrestrained requests for review or its exclusion should be rejected. Instead, a sensible middle ground may be to allow parties to freely limit the grounds for annulment, provided that they do not exclude the possibility to set aside an award on

the basis of its harmful impact on the interests of third parties or public policy—and, perhaps, wrongfully determined jurisdiction by the tribunal. Their freedom to agree on additional grounds for review should be limited only to the substantial review of arbitral awards or to one or more reasons for appeal available under the applicable national law. Otherwise, arbitration agreements containing an exclusion or expansion clause may become entirely unenforceable.

The paper further discusses the circumstances under which it would be beneficial for parties to minimise or increase judicial review of arbitral awards. The parties to time-sensitive cases might consider agreeing to partially or entirely waive their right to challenge the award, especially if there is no need to enforce the award outside the seat of arbitration. In contrast, the possibility of increased judicial review would be desirable in arbitrations involving complex legal issues, in which the substantial correctness of the final decision is presumably more important than the effectiveness of decision-making process. In any case, the parties should be aware that any modifications to the setting-aside proceedings might affect the certainty and predictability of the enforcement of arbitral awards.

The struggle to reconcile the values of party autonomy and finality of awards, in combination with the practical considerations presented above, boils down to the ultimate dilemma of whether agreements modifying the grounds of annulment increase or undermine public confidence in arbitration. As discussed above, the possibility of concluding such agreements seems to be more sensitive to the diverse interests and expectations of arbitration users than the currently predominant system of mandatory statutory grounds for annulment. In any case, whether arbitration clauses limiting or expanding the scope of judicial review will become a more common practice (if permitted by more jurisdictions in the future) will ultimately depend on the circumstances of each dispute, such as the type of claim, the complexity of the issues at stake, the value of potential claims, the possible time constraints, the risk of dilatory tactics, and the prospects of enforcement of award in other jurisdictions.

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