Vol. 1 Feb 2019

WAIVING THE RIGHT TO SET ASIDE AN AWARD

Preena Salgia & Samhith Malladi[*]

Abstract

The need for disputing parties to waive their right to set aside an arbitral award primarily arises out of the necessity to achieve commercial certainty, especially in cases where the judicial system at the seat of arbitration is inefficient and inconsistent. However, various jurisdictions have taken differing positions on whether to allow parties to contractually waive their right to challenge an award, based on a need to either protect rights of disputing parties by providing for judicial review or allow disputing parties the autonomy to make an informed choice to waive their right to set aside an award. This paper discusses the reasons and motivations of parties in choosing to exercise such waiver and the differing issues of enforceability that arise in various jurisdictions. Further, the paper analyses the pitfalls of agreeing to such waivers from a policy perspective. The paper also briefly discusses the viability of a two-tier / appellate arbitration clause as an alternative to a waiving the right to set aside an award.

I. Introduction

Are all rights available to a person under a constitution, statute, contract or common law, capable of being waived? The answer to this varies with jurisdiction and the type of right sought to be waived. For instance, with respect to constitutional rights (including fundamental rights), while some jurisdictions hold on to the inalienable nature of these rights, on account of such rights being conferred on the public at large and not merely on an

[*] The authors are dispute resolution lawyers practising in Mumbai.

individual,[1] other jurisdictions uphold the autonomy of citizens to waive their constitutional rights, provided the different standards set by courts for achieving a valid waiver are met.[2] With respect to statutory rights, some jurisdictions, such as the United States of America, invalidate agreements which waive substantive statutory rights but allow waiver of procedural statutory rights.[3] In other jurisdictions, waiver of statutory rights by the person for whose benefit they have been enacted is recognized as long as it does not involve public interest.[4] In relation to rights created by a contract, the position is more or less consistent in as much as the waiver of contractual rights is recognized by most jurisdictions.

In the context of settlement of legal disputes by way of arbitration, parties often wish to avoid protracted litigation in civil courts and, therefore, attempt to agree in advance that the arbitral award rendered in an arbitration would be final, binding and not subject to further challenge by either party. In this regard, parties may attempt to waive their right to approach an appropriate civil court to set aside an arbitral award, in the hope that such waiver will provide for commercial certainty and stability in relation to the contractual relationship entered into between the parties. However, parties may not always be permitted to do so and, as a result, the practice of international and domestic arbitration may

---

1 For example, in India, fundamental rights cannot be waived by a party by agreement (Basheshar Nath v. Commissioner, AIR 1959 SC 149).

2 For example, the United States of America. (*See:* Berg, Jessica Wilen, *Understanding Waiver* (2006). Faculty Publications. Paper 236, (Oct. 15, 2018) SCHOOL OF LAW, CASE WESTERN RESERVE UNIVERSITY https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1235&context=faculty_publications).

3 For instance, in arbitration agreements. (*See: The Substantive Waiver Doctrine in Employment Arbitration Law*, 10th June, 2017, 130 HARVARD LAW REVIEW 2205, (Oct. 15, 2018) https://harvardlawreview.org/2017/06/the-substantive-waiver-doctrine-in-employment-arbitration-law/).

4 For India *see* Krishna Bahadur v. Purna Theatres, (2004) 8 SCC 229.

require stakeholders to devise alternative methods by which to achieve such a goal of commercial certainty.

At the outset, in Part II, this paper attempts to understand and describe the motivations and objectives of parties when agreeing, in advance, to waive their statutory right to set aside an award. Thereafter, in Part III, this paper highlights the issues in relation to enforceability that such clauses face in various jurisdictions. Part IV of this paper analyses, from a policy perspective, why such waiver clauses should not be made enforceable and why a certain degree of judicial review of an arbitral award is necessary. Part V of this paper takes India as an example of a jurisdiction that restricts such waiver clauses from being enforced and suggests an alternative in the form of appellate arbitration clauses, that seek to achieve, in effect, the same objective sought to be achieved by the parties' waiver of the right to challenge an award. Finally, Part VI concludes the analysis of such waiver clauses and briefly proposes a roadmap to increase efficiency of dispute resolution processes in this regard.

II. Parties' Objectives in Waiving the Right to Challenge an Award

The major reason certain parties wish to opt for waiver of the right to set aside an award is to establish commercial certainty of the dispute within a reasonable period of time, especially in cases where the judicial system at the seat of arbitration is inefficient and plagued with delays, and to avoid double review of the award. To explain, the grounds for challenging enforcement of an arbitral award under Article V of the New York Convention are similar to the grounds for setting aside an arbitral award under Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). This would mean that an award can in parallel be challenged on similar grounds in different proceedings before different jurisdictions, giving rise to

double review of the award and the possibility of conflicting decisions. This could lead to anomalies such as:

While the validity of an award is upheld in setting aside proceedings at the seat of arbitration, the award maybe rendered invalid on similar grounds in enforcement proceedings in another jurisdiction. [For instance, in *Dallah Real Estate and Tourism Holding Co vs. The Ministry of Religious Affairs, Government of Pakistan*[5], while setting aside proceedings were pending in France, the English courts in enforcement proceedings invalidated the award. Soon thereafter, the French courts held the award to be valid.[6]]

Similarly, a situation may arise where while setting aside proceedings are pending at the seat of arbitration, the other jurisdiction declares the award enforceable, and later the award is set aside at the seat. It must be noted that this situation would only arise in case setting aside proceedings are pending in a jurisdiction. If an award is already set aside, under Article V(1)(e) of the New York Convention, it automatically becomes unenforceable.

Several institutional arbitration rules have incorporated rules as to waiver of recourse against arbitral awards, for instance Article 26.8 of LCIA Rules, Article 32.11 of SIAC Rules, Article 35(6) of ICC Rules, Article 34.2 of HKIAC Rules and Article 30.12 of MCIA Rules. While in these rules, waiver is a built-in clause, the UNCITRAL Arbitration Rules provide an option to the parties to include a "possible waiver statement" in their arbitration agreements.

---

5 Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46.

6 Nicolas Bouchardie, Paul Brumpton, Christophe von Krause and Robert Wheal, *Insight: In Dallah, the Paris Court of Appeal and UK Supreme Court Reach Contrary Decisions Applying Same Law to Same Facts*, WHITE & CASE, (Oct. 15, 2018), https://www.whitecase.com/publications/newsletter/insight-dallah-paris-court-appeal-and-uk-supreme-court-reach-contrary.

III. Permissibility Under Applicable Law – Waiver of the Right to Challenge an Award

However, the inevitable question that follows is whether such rules can be contractually enforced? All the default waiver rules mentioned above provide that the rules would apply insofar as a waiver can be validly made. Thus, if a jurisdiction does not permit waiver, these clauses will take no effect.

Certain jurisdictions recognize waiver by enacting statutes allowing parties to waive right to set aside awards.[7] These states provide greater significance to party autonomy in arbitration proceedings.[8] They believe that sophisticated companies, being fully aware of the consequences of such waiver, can freely decide on the appropriate dispute resolution process applicable to them. For instance, Switzerland[9], Belgium[10] and Sweden[11] allow parties which are not domiciled in or which do not have place of business in their territory, to exclude the jurisdiction of their courts to

---

7 Such as: Turkish International Arbitration Law, Article 15(A)(2); Peruvian Arbitration Law, Article 63(8); Tunisian Arbitration Code, Article 78(6); Bahrain Legislative Decree No. 30, Article 25; Article 25 French Code of Civil Procedure, Article 25 [GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3367 (2 ed. Kluwer Law International 2014)].

8 *Id.*

9 Swiss Private International Law Act, Article 192; Daniella Strik, *Growing number of countries allowing exclusion agreements with respect to annulment warrants greater scrutiny of arbitration clauses*, KLUWER ARBITRATION, (Oct. 15, 2018) http://arbitrationblog.kluwerarbitration.com/2012/01/11/growing-number-of-countries-allowing-exclusion-agreements-with-respect-to-annulment-warrants-greater-scrutiny-of-arbitration-clauses/.

10 Belgian Judicial Code: *see* Gautier Matray, *Belgium Adopts a New Law on Arbitration*, KLUWER ARBITRATION (Oct. 15, 2018) http://arbitrationblog.kluwerarbitration.com/2013/07/04/belgium-adopts-a-new-law-on-arbitration/.

11 Swedish Arbitration Act, § 51: *See* Daniella Strik, *Growing number of countries allowing exclusion agreements with respect to annulment warrants greater scrutiny of arbitration clauses*, KLUWER ARBITRATION, (Oct. 15, 2018) http://arbitrationblog.kluwerarbitration.com/2012/01/11/growing-number-of-countries-allowing-exclusion-agreements-with-respect-to-annulment-warrants-greater-scrutiny-of-arbitration-clauses/.

annul awards made in their respective countries. In 2016, the European Court of Human Rights rendered a decision where validity of Article 192 of the Swiss Law on Private International Law, which allows waiver of recourse against an arbitral award, vis-à-vis Article 6(1) of the ECHR, was questioned.[12] The Court confirmed that such a provision did not violate ECHR provided the parties were free to choose arbitration over litigation in courts and the waiver was unequivocal.[13] Even English courts allow waiver to some extent under Section 69(1) of the English Arbitration Act, 1996 whereby parties can choose to "opt out" of the appeal provision against the award.[14]

Certain other jurisdictions where the domestic statutes are silent as to validity of contractual waiver of judicial review, have also upheld such contracts through their judiciary.[15] Most of the jurisdictions permitting waiver require that such a condition in the contract should be expressly and clearly mentioned.[16]

However, several other jurisdictions do not recognize such waivers and some go as far as to statutorily bar such contractual exclusion by parties.[17] The Model Law too is silent on the issue of waiver, which has led to varied interpretations across the world. The primary reason behind this school of thought appears to be the states' belief that some judicial control over the arbitration

---

12 *Supra* note 9.

13 *Id.*

14 Matt Marshall, *Section 69 almost 20 years on….*, KLUWER ARBITRATION, (Oct. 15, 2018), http://arbitrationblog.kluwerarbitration.com/2015/06/24/section-69-almost-20-years-on/.

15 Noble China Inc. v. Lei, [1998] O.T.C. LEXIS 2175 (Ontario Superior Court); Judgment of 18th January 2007, Case No.4674 (Tunisian Cour de cassation) [GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3368 (2 ed. Kluwer Law International 2014)].

16 *Id.* at pp. 3371-3374a.

17 Italian Code of Civil Procedure, Article 829(1); Portuguese Law on Voluntary Arbitration, 2011, Article 46(5); Egyptian Arbitration Law, Article 54(1). [GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3368 (2 ed. Kluwer Law International 2014)].

process is indispensable in the interest of the parties themselves.[18] In the event of arbitrator bias, incorrect application of governing law, irregularity in procedure, etc., such jurisdictions believe that the wronged party should have recourse to a higher neutral forum. Further, some states believe that the jurisdiction to set aside an award rests exclusively with the seat of arbitration, and by depriving the only competent court from exercising jurisdiction, the contract is contrary to public policy. This view could be motivated by the substantive laws of several states which invalidate any contract which places a blanket restriction on parties from approaching courts in that jurisdiction.[19] For example, in India, Section 28 of the Indian Contract Act, 1872, renders void any agreement by which a party is restricted *absolutely* from enforcing his rights under or in respect of any contract, by way of usual legal proceedings in courts or tribunals.

It can also be argued that institutional arbitration rules are merely required to govern the procedure of arbitration and not substantial issues related to the dispute. Thus, by including default provisions which abrogate statutory rights, it may be argued that the institutional arbitration rules go beyond their mandate. Further, in cases of standard form contracts ("SFC") which contain references to institutional arbitration rules, the courts of certain jurisdictions may interpret the condition against the drafter of the SFC and hence against waiver,[20] or in the absence of a higher notice to the other party of such a term in the SFC (which leads to abrogation of a statutory right) [21], the courts may invalidate the waiver.

---

18 *Id.* at pp. 3370-3371.
19 Such as: Indian Contract Act 1872 § 28; Malaysian Contracts Act 1950 § 29.
20 *See* the rule of *contra proferentem*.
21 CHITTY ON CONTRACTS ¶12.0142-12.015 (7 ed.).

IV. Waiver of the Right to Challenge an Award – A Policy Perspective

In light of the above, the question arises as to whether, from a policy perspective, the applicable law should allow party autonomy to prevail and permit parties to waive their right to set aside an arbitral award. This paper would argue that, while an agreement to waive the right to challenge an award, ensconced in the arbitration agreement between the parties, has its merits in terms of reducing the court litigation that typically follows an award, from a policy perspective, the pitfalls appear to be greater.

While it is arguable that when determining their policy approach to allowing waiver of the right of disputing parties to set aside an award, every jurisdiction should be motivated by the specific contexts in which arbitrations are conducted in that jurisdiction, a premium on the correctness of arbitration awards should be placed and prioritized over the overall timeline within which an arbitration is completed. To this end, an award should be subject to a limited degree of judicial review to check lapses in procedure, illegality, arbitrator bias, incorrect application of the applicable law etc.[22] This becomes especially important when the arbitrators are not trained in law, and more so in the law applicable to the dispute. Further, if the losing party has to question the validity of an award, it should not be compelled to wait until the winning party approaches courts in enforcement proceedings to raise its challenge to the award, especially in cases where the award may be enforced in more than one jurisdiction. In such cases, the losing party will have to challenge the validity of the award afresh in all the said jurisdictions, putting the losing party in greater distress. Further, every jurisdiction before which the award will sought to be enforced will apply its own standards for refusing to

---

[22] Michael Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 Int'l & Comp. L.Q. 1, 15 (1985). [*See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3368 (2 ed. Kluwer Law International 2014)].

enforce an award and inconsistent findings will be rendered across jurisdictions, especially when not all the jurisdictions involved are parties to the New York Convention. Thus, the same parties may end up with conflicting verdicts at the time of enforcement.

Such multiplicity of challenges in enforcement proceedings would be prevented, if a party were allowed to mount a challenge to an award at courts located in the seat of the arbitration and have the matter adjudicated at the seat itself. If the award is set aside at the seat of arbitration, every subsequent proceeding would be required to refuse enforcement, as the award then would become a nullity. As far as the parties' apprehension of dilatory tactics is concerned, the parties may choose a seat where the process of setting aside is efficient and the grounds available for review are minimum.

V. Appellate Arbitration Clauses – An Alternative Mechanism for Early Settlement of Disputes

In jurisdictions such as India, where applicable law prevents parties from agreeing to a blanket restriction on initiating court proceedings against an arbitral award, a hybrid solution in the form of an appellate arbitration clause may be considered by disputing parties hoping to avoid protracted litigation in Indian courts. An appellate arbitration clause is, in essence, an arbitration clause that specifies a two-tier structure of resolution of disputes by way of arbitration, wherein the parties agree to refer to an appellate arbitral tribunal any outstanding issues or disputes in relation to the award rendered by the first arbitral tribunal.

While Indian law prevents parties from agreeing to an absolute restriction on the right to institute legal proceedings,[23] such as by way of a binding waiver of the right to challenge an arbitral award,

[23] Section 28 of the Indian Contract Act, 1872 read with Section 35 of the (Indian) Arbitration and Conciliation Act, 1996 (as amended).

the Supreme Court of India has recognized the supremacy of the principle of party autonomy in *Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Limited* and held that appellate arbitration clauses are permissible under Indian law ("Centrotrade").[24] In Centrotrade, the Supreme Court has expressly upheld the validity of two-tier/appellate arbitration clauses and, in effect, has blessed a structure wherein an unsuccessful party is prevented from challenging the award of the first tribunal in Indian courts and is required to refer disputes to an appellate arbitral tribunal. Thereafter, if a party is still dissatisfied with the award of the appellate arbitral tribunal, such party is free to challenge the second award in an appropriate civil court.

Appellate arbitration clauses are a viable alternative to clauses that attempt to waive the parties' rights to challenge an award, as such appellate arbitration clauses have the impact of aligning the respective incentives of the parties to a dispute by keeping the disputes out of courts while having all possible disputes threshed out before more efficient arbitral tribunals. Further, as two-tier arbitration clauses will eventually be subject to limited judicial review by a court, it will not be hit by the bars under Section 28 of Indian Contract Act, 1872. Finally, it may also be argued that if a civil court is eventually faced with reviewing the arbitral award resulting from a two-tier arbitration mechanism, the fact that the said disputes between the parties have been scrutinized by two successive arbitral tribunals, may assuage any doubts the court may have in relation to any alleged infirmities in the second award.

Therefore, while two-tier arbitration mechanisms are yet to become commonplace in commercial contracts in India, the push towards speedier resolution of disputes by of arbitration may make parties see the aforementioned benefits of such a clause.

---

[24] Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited, (2017) 2 SCC 228.

VI. Conclusion

The law and practice of commercial arbitration, both international and domestic, is constantly evolving and newer and more nuanced structures of alternative dispute resolution are constantly being put to test at the altar of judicial review in various jurisdictions. As highlighted above, while most arbitral institutions and certain jurisdictions are accepting of the validity of an agreement to waive the right to challenge an arbitral award, such clauses may face enforceability issues in other jurisdictions such as India, and rightly so. While arbitration, as an alternative dispute resolution mechanism, must be the first port of call when disputes arise between parties to commercial contracts, there is still a case for limited judicial review by courts when arbitration fails to successfully resolve such disputes.

However, this does not mean parties are dispossessed of the contractual means to structure their dispute resolution mechanisms so as to reduce the possibility of arbitral awards eventually being challenged and set aside. In this regard, a two-tier arbitration mechanism is a structure that has the potential to alleviate parties' concerns in relation to any infirmities that may afflict an award rendered in the first instance, while retaining the twin benefits of speedy resolution of disputes and cost efficiency. Only time will tell whether parties to international and domestic commercial contracts explore such nuanced means of resolving their disputes.