The Evolution and Future of International Arbitration

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Editor

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Chapter 16

NATIONAL COURT REVIEW OF ARBITRATION AWARDS: WHERE DO WE GO FROM HERE?

*Roman Khodykin**

I. INTRODUCTION

16.1 A court's power to review arbitral awards varies from country to country. Although there has been a general trend of reducing the power of courts to intervene in arbitrations, the approach of a particular country to this issue should be the key consideration when selecting the seat of an arbitration.

16.2 At one end of the spectrum, there are countries where national courts can effectively act as a court of appeal to arbitration, reconsidering the case on the merits. At the other end, there are states which allow no recourse whatsoever against an award.

16.3 As I will explain later, these two extremes are relatively uncommon nowadays. The vast majority of countries provide for some form of a middle ground – allowing limited recourse against an award, be it an appeal on a question of law or a procedure for setting it aside on a limited number of grounds (or both).

16.4 I will deal with each of these issues in turn before turning to the issue of party autonomy and in particular, the parties' ability to either exclude or expand the grounds of review and my proposed way forward in this regard.

II. FULL RECOURSE AGAINST AWARDS

16.5 Historically, it was relatively common for awards to be appealed on issues of fact as well as law: that is now much more of a rarity.

16.6 Only a limited number of countries have retained the statutory right to appeal an award on both issues of fact and law. For example, in Argentina an arbitral award can be appealed to the Court of Appeal on its merits unless otherwise provided in the arbitration agreement.[1]

16.7 More and more countries are not permitting appeals against arbitral awards. Even the limited right to appeal on points of law is disappearing. For example, in New Zealand, in the past, the courts were permitted to assess the fairness and integrity of an arbitral process and also correct alleged mistakes on points of law where a party could point to an arguable error of law on the face of the award.[2]

16.8 New Zealand has now adopted the Arbitration Act 1996 and no longer recognises such a right.

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1. María Inés Corrá, M & M Bomchil, *Arbitration Procedures and Practice in Argentina: Overview*, Practical Law. Multi-Jurisdictional Guide 2014/15. Arbitration, 25.
2. *Manukau City Council v Fletcher Mainline Ltd* [1982] 2 NZLR 142 (CA) at 146; David A R Williams QC, *Defining the Role of the Court in Modern International Commercial Arbitration*, Herbert Smith Freehills – SMU Asian Arbitration Lecture, Singapore (2012).

16.9 As a leading text on arbitration explains:

> The increasingly favourable climate for arbitration has led to arbitration awards being considered final and binding and to a pro-enforcement policy over the last twenty years. Challenge proceedings are generally based on an excess of jurisdiction of the tribunal or some procedural irregularity which has prevented a fair procedure. In some countries the previously existing possibilities to appeal against awards on points of law have largely been abolished. Generally grounds for appeal are interpreted in a restrictive manner. The same applies for the limited grounds to resist enforcement under the New York Convention or national laws.[3]

III. NO RECOURSE TO NATIONAL COURTS

16.10 At the other end of the spectrum are jurisdictions where no recourse whatsoever against an award is permitted to parties to an arbitration. Although scholars and practitioners from time to time discuss whether the setting aside of awards should be abolished altogether,[4] the fact remains that it is only in a limited number of countries that no such right of review exists.

16.11 Abolition of all forms of review is often put in place by countries in order to promote arbitration within the countries' boundaries. But, as history shows, this does not usually have the desired effect. In 1985, Belgium abolished all forms of setting aside procedure for arbitration awards where there was no Belgian party involved.[5] The change appears to have been promulgated by one member of Parliament in an attempt to make Belgium a more arbitration-friendly jurisdiction. The effect was exactly the opposite – parties turned away from Belgium as a seat of arbitration and arbitral institutions blacklisted Belgium as a potential venue.[6] As a result, Belgium reintroduced the possibility of setting aside awards in 1998.[7]

16.12 Another example comes from France where several courts held that they lacked the power to vacate awards made in international arbitrations.[8] This raised concerns about not having the right to have procedurally unfair awards vacated at the situs. This concern resulted in the promulgation and adoption of France's international arbitration decree[9] allowing annulment for procedural irregularity, excess of authority and violation of public policy.[10]

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3. Lew, J. D. M., Mistelis, L. A. and Kröll, S.M., *Comparative International Commercial Arbitration*, 2003, 15–57.
4. See, e.g. Albert van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?* ICSID Review, Vol. 29, No. 2(2014), 284 *et seq.*; Philippe Fouchard, *La Portee internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, 1997 Rev. Arb. 329, 351–352.
5. Arbitration Law 1985 (Belgium), adding a new para to the Judicial Code 1972 (Belgium) Art. 1717.
6. See, for more detail: van den Berg, above n. 4, at 276; William W. Park, *Why Courts Review Arbitral Awards*, Festschrift für Karl-Heinz Böckstiegel (2001), 599–600.
7. Arbitration Law 1998 (Belgium), adding a new para to the Judicial Code 1985 (Belgium) art. 1717 (4).
8. *Gen. National Maritime Transp. Co. v Société Götaverken Arendal*, 21 Feb 1980, Cour d'appel de Paris, 1980 Rev. arb. 524; *AKSA v Norsolor*, 9 Dec. 1980, Cour d'appel de Paris, 1981 Rev. arb. 306, 20 I.L.M. 887 (1981).
9. Decree No. 81500, 12 May 1981, in: 1981 J. Officiel Rép. Française 13981406.
10. Park, above n. 6, 599.

16.13 In Russia during the Soviet era arbitral awards were final and there was no procedure for setting aside an arbitral award. The only exception was for awards of the Maritime Arbitration Commission (the oldest existing arbitration institution in Russia dating back to 1930) which were directly enforceable but could be appealed to the USSR Supreme Court (the highest judicial authority in the entire Soviet Union at the time).[11] This was abolished when the International Commercial Arbitration Act was adopted in 1993. It is understood that the reason for adopting the International Commercial Arbitration Act 1993 (which is based on the UNCITRAL Model Law) was to make Russian law consistent with international law and practice.

16.14 Modern scholars also seem to analyse it from the standpoint of delocalisation, which is definitely a trend in the realm of arbitration. Conceptually, delocalisation seeks to detach an international commercial arbitration from any form of control by the law of the place in which the seat of the arbitral tribunal is located. It therefore contemplates a 'supra-national' arbitral proceeding free from all vestiges of national laws and institutions, including national courts of the seat of arbitration.

16.15 An oft-cited reference for delocalisation is Art. 15(1) of the 1998 ICC Rules granting procedural autonomy to the parties and the tribunal.[12] However, as argued by Professor William W. Park, the trend toward delocalisation does not mean the courts at the place of arbitration should never review awards; an absence of any court scrutiny at the arbitral situs would adversely affect the victims of defective arbitrations, and in some cases the interests of the reviewing state itself.[13]

16.16 So, it is the majority view that safeguards should remain in place to protect the parties from arbitrary awards or misconduct by arbitrators.

16.17 Notwithstanding this, there are examples of arbitrations where no national court review of arbitral awards is possible and I will focus on two such examples below.

16.18 The most well-known example is the ICSID Convention pursuant to which a party has the right to deploy an *ad hoc* annulment procedure but the award is not to be subject to any scrutiny by the national courts in terms of setting aside an award or enforcement.[14] Article 54(1) of the ICSID Convention states:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

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11. See: Roman Khodykin, *Arbitration Law of Russia: Practice and Procedure,* (Juris, 2013), 151; *International Commercial Arbitration: The National Regulatory Experience. 80th Anniversary of the Maritime Arbitration Commission at the USSR/RF Chamber*: collected materials, ed. Alexander I. Muranov, Infotropic-Media, 12–13 (in Russian) (2011).
12. 'The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.' (Article 15(1) of the ICC Rules 1998. This provision is now replicated in Article 19 of the 2012 ICC Rules.
13. Park, above n. 6, 599.
14. In addition to the annulment procedure pursuant to Article 52 of the ICSID Convention, ICSID awards also benefit from two other remedies contained in the ICSID Convention, namely: 'Interpretation' (Article 50) and 'Revision' (Article 51). These remedies permit a party to apply to the Secretary General for an interpretation of the award's scope or meaning (Article 50) or to request revision of the award on the ground of discovery of such a nature as decisively to affect the award (Article 51).

> A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

16.19 It appears that the intention of the World Bank staff who drafted the ICSID Convention along with the executive directors who approved the text was to make sure that an award rendered pursuant to the ICSID convention would be subject to as little resistance in terms of enforcement as possible.[15] The exclusion of any recourse to the national courts clearly reflects the nature of the ICSID system which aims to be "neutral and self-contained".[16] It is also argued that in ICSID arbitration there is no "country of origin",[17] therefore, it is not appropriate to give any national courts power to review the awards. Although generally ICSID awards are enforced through a simple, mechanical procedure in terms of registering an ICSID award against a sovereign state, subject to arguments based on sovereign immunity,[18] there have been at least four instances where the ICSID awards were challenged at the enforcement stage.[19] The problems were well summarised as follows:

> National law standards differ as to the grounds available to resist enforcement of a final judgement. Even though an award is to be treated in the same way as the final court judgement, this does not necessarily mean that it is automatically enforceable as commentators appear to assume. Local law necessarily provides for the circumstances where enforcement is allowed and where it may be refused.[20]

16.20 While ICSID's self-standing recognition and enforcement procedure may be attractive, since the execution of the award is a question governed by national laws (Article 54(3) of the ICSID Convention), such laws may present obstacles to actually obtaining the relief granted (as it might if a sovereign invoked immunity from execution against sovereign assets).

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15. James W Barratt, Margarita N Michael, *The 'Automatic' Enforcement of ICSID Awards: The Elephant in the Room?*, Global Arbitration Review. The European, Middle Eastern and African Arbitration Review 2014; Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID Reports 1 (1993); Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Review 287 (1987).
16. *Ibidem*; Lucy Reed, Jan Paulsson, Nigel Blackaby, *Guide to ICSID Arbitration*, 2nd edition, Kluwer Law International (2010), 13.
17. Alison Ross, *Van den Berg on double control*, Global Arbitration Review, 17 March 2015, http://globalarbitrationreview.com/news/article/33627/van-den-berg-double-control/ (accessed 14 April 2015).
18. See, e.g. recent Judgement of Southern District of New York court in *Mobil Cerro Negro Ltd., et al. v. Bolivarian Republic of Venezuela*, Case No. 14 Civ. 8163 (February 13, 2015).
19. *SARL Benvenuti & Bonfant v People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, (8 August 1980), 1 ICSID Reports 335. See 1 ICSID Reports 369, 371; (1981) 108 Journal du Droit International 843, 845; *Société Ouest Africaine des Bétons Industriels v Senegal*, ICSID Case No. ARB/82/1, Award, (25 February 1988), 6 ICSID Review – FILJ 125 (1991), 2 ICSID Reports 114 (1994). The reports of the decision of the Cour d'appel of Paris dated 5 December 1989 may be found at 2 ICSID Reports 337 and 117 Journal du Droit International 141. The decision of the Court of Cassation of 11 June 1991 is reported at 6 ICSID Review – FILJ 598 (1991), 2 ICSID Rep. 341 and 118 Journal du Droit International 1005; *Liberian Eastern Timber Corporation v Republic of Liberia*, ICSID Case No. ARB/83/2, Award, (31 March 1986), 2 ICSID Reports 346; *AIG Capital Partners Inc and another v Republic of Kazakhstan* [2005] EWHC 2239 (Comm); [2006] 1 WLR 1420.
20. Barratt, Michael, above n. 15.

16.21 Another example comes from the world of sport. Arbitral awards of local sport tribunals may be appealed to the Court of Arbitration for Sport (CAS) only.[21] The applicant can seek to vacate a sports tribunal award before a local court but, in practice, international sports federations, the International Olympic Committee and other sport-related bodies tend not to accept judgments of local courts. For instance, if a disciplinary body found an athlete to have committed a doping-related offence and barred the athlete from competing in international competitions, he or she will not be permitted to partake of any big competitions even if the ban has been successfully challenged in the athlete's home court. The only effective recourse is to appeal the decision to the CAS appeal panel – a recognised arbitration institution.

16.22 The rationale for this is that sport is a truly international and delocalised phenomenon and, as such, it should not be anchored to or dependent upon local courts. Although for practical reasons it was necessary to have a deemed seat of arbitration for all CAS matters in Lausanne, Switzerland, the aim of CAS is to detach sport-related disputes from the country of the athlete's origin. Having said that, arbitration tribunals in sports cases are not free to act as they please. At least two safeguards are in place. Firstly, as discussed above, an award of a local arbitration tribunal can be appealed to the CAS Appeal Panel. Secondly, the CAS awards are also subject to scrutiny by the local Courts of Switzerland, the seat of CAS arbitrations.

16.23 Finally, it is argued that 'anational' awards, i.e. those not connected to any country, may not be challenged. Although it is an extraordinary concept, they exist both in theory and practice.[22]

IV. CHALLENGING AN AWARD IN THE COURSE OF ENFORCEMENT

16.24 The role of national courts at the enforcement stage warrants a separate article, if not a whole book. Constant, but not always significant, changes in various jurisdictions in relation to enforcement has become a fact of today's life.

16.25 In this part I will only touch upon one, albeit the most ambitious, initiative which is to abolish dual control over an award i.e. where there is a review of an award by the courts at the seat of the arbitration (in the form of setting aside and/or appeal) and also by the courts of the country where enforcement is sought.[23]

16.26 Having recourse to local courts both in the country of the arbitration seat as well as the enforcement country is often duplicative, not least because the grounds for setting aside an award and the grounds for refusing to recognise/enforce an award are almost identical under the New York Convention and the UNCITRAL Model law which has become legislation in many parts of the globe (or at the very least, has significantly shaped the form of national legislation, where wholesale adoption of the Model Law has not been achieved). What then are the options on the table if dual control is to be abolished?

16.27 One option is to have the validity of the award adjudicated only in one jurisdiction.[24] This could, potentially, eliminate the inefficiency and waste of resources for challenging an award in two (or, indeed, more) jurisdictions whilst preserving the right of the parties to recourse against an award.

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21. E.g.: Article 61.2 of the Olympic Charter, Article 13.2 of the World Anti-Doping Code.
22. Lew, Mistelis, Kroll, above n. 3, 25–18.
23. For discussion see: van den Berg, above n. 4, at 284 *et seq*.
24. *Ibidem*.

16.28 In order to abolish dual control, all countries would need to agree which courts should retain jurisdiction – those of the seat or those where the enforcement is sought.

A. Option One: Exclusive Judicial Review by the Court of the Seat

16.29 Arbitration scholars tend to support recourse to the courts of the seat only. This is due to the fact that such court scrutiny generally occurs relatively soon after the proceedings, when documents and witnesses are more readily available and before recollections become stale.[25] Another advantage of this approach is that, unlike recourse to the country of enforcement, there is only one set of courts involved whereas a party could be looking to enforce in several countries with the result that you could still end up with different courts scrutinising one award.

16.30 Under German law, as it existed prior to the new Arbitration Law of 1998, a respondent had the right to oppose enforcement only if it had first sought to set aside the award in the country of origin.[26] Since 1998, enforcement of awards in Germany is governed by the New York Convention. Notwithstanding this, some German courts still apply the pre-1998 approach. In 2006 the Oberlandesgericht (Appeal Court) in Karlsruhe held that a respondent was estopped from opposing enforcement on the grounds set out in the New York Convention because the respondent had not first applied to set aside the award in Switzerland (the seat of the arbitration).[27] In 2011 the German Supreme Court took the opposite approach and found that a respondent could oppose enforcement based on the lack of competence of a foreign arbitral tribunal even if the respondent had not first applied to the country of origin to have the award set aside.[28]

16.31 Limiting the review of arbitral awards to a single forum is an interesting approach but one which, I consider unlikely to take off in the immediate future. Albert van den Berg believes that:

> [A] preclusion is not contemplated by the New York Convention. The Convention can be interpreted to imply a possible estoppel in some respects, but not with respect to all grounds for refusal of enforcement. The Convention does not contain a condition precedent for reliance on grounds of refusal of enforcement that setting aside has been applied for in the country of origin.[29]

B. Option Two: Exclusive Judicial Review by the Courts in the Country of Enforcement

16.32 The second option is to leave the scrutiny in the hands of the country of enforcement. Various arguments can be made in support of this approach. For instance, it appears that the country of enforcement is most interested in the outcome of the case, specifically in a situation where the seat was selected for convenience only without any real connection to the dispute or to the parties. This approach has found support in

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25. Park, above n. 6, at 599; another advocate of the place of arbitration approach is Mr Albert van den Berg.
26. See for more detail: van den Berg, above n. 4, at 270.
27. Oberlandesgericht (Court of Appeal) Karlsruhe, 9 Sch 01/06, (3 July 2006); 32 YB Com Arb 358 (2007).
28. Oberlandesgericht Munich (23 November 2009) and Bundesgerichtshof (16 December 2010); (2011) 36 YB Com Arb 273. See for more detail: van den Berg, above n. 4, 270.
29. Van den Berg, above n. 4, 270.

recent practice. For example, the New York Convention explicitly provides that enforcement may be refused if the award has been set aside or suspended by a competent authority of the country of the seat.[30] Despite this, there have been a number of instances where awards set aside in the country of the seat were finally recognised and enforced in a different state.[31] In addition, applications to set aside awards have sometimes been filed with and finally resolved by courts outside the country of origin on the basis that the application should be heard by the state whose law was applicable to the merits of the dispute.[32]

16.33 But we should not throw out the baby with the bathwater. Although the latter approach has its benefits, it inevitably comes with a serious disadvantage (as mentioned above) in that enforcement may be sought in different jurisdictions consecutively or concurrently leading to the situation where the award would still be subject to scrutiny by courts of different countries. It is not hard to think of examples where courts in different jurisdictions have come to somewhat different conclusions.[33]

16.34 One possible solution may be found in the English Court's judgment in *Diag Human SE v Czech Republic*[34] in which it was held that issue estoppel applies to the enforcement of awards under the New York Convention where the same issue has already been determined in enforcement proceedings in another jurisdiction. It is not clear whether other national courts will follow this approach but if they do, it will reduce scrutiny by courts of different countries.

C. Option Three: Review by an Independent International Body

16.35 A third option was summarised by Albert van den Berg:

> If we really want to improve the current situation, States should transfer control over an international arbitration award to an independent international body. The body would have the exclusive jurisdiction to set aside an arbitral award. Enforcement of the award would be automatic in all countries. … the ad hoc

30. Article V(1),(e) of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.
31. *Omnium de Traitement et de Valorisation S.A. (France) v Hilmarton*, Cour de Cassation, 23 March 1994;*Yukos Capital v Rosneft*, Case No. 200.005.269/01 (decided in the Netherlands). However, it is fair to say that as a general rule the courts dealing with enforcement are slow to enforce an award, that has been set aside at the seat, see, e.g.: *Baker Marine v Chevron Ltd* [1999] 191 F 3d 194.
32. *Karaha Bodas Company, L.L.C v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara; et al., Defendants, perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2003) United States Court of Appeals, Fifth Circuit. 335 F.3d 357. June 18, 2003 (the award was vacated by an Indonesian court although the seat was in Switzerland); *Venture Global Engineering v. Satyam Computer Services* The Supreme Court of India. (Arising out of SLP (Civil) No.9238 of 2010). 11 August, 2010 (in this case Indian court vacated award issued abroad); also Russian courts at some point found themselves competent to deal with challenges of awards made under Russian substantive law, for discussion see: Roman Zykov, *Challenging Arbitral Award in a Country Outside the Seat*, New Horizons of International Arbitration. Collection of Essays, Anton A. Asoskov, Nina G. Vilkova, Roman M. Khodykin (eds.), Infotropic-Media (2013), 123–138.
33. See, e.g. *Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company* (Case No. 09/28533); *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs (Pakistan)* UKSC 46 (2010).
34. EWHC 1639 (Comm) (2014).

committee should have a permanent nature and be comprised of professional international judges.[35]

16.36 This idea is not something new. The ICSID Convention is an example of an independent mechanism created by different countries with a view to empowering ICSID to decide investment disputes against them.

D. Concluding Remarks

16.37 The truth of the matter is that although this sounds like a plausible idea, abolition of dual control can only work if it is done by the adoption of a new international treaty. Without the consent of different countries, this approach will not succeed as if only one of the relevant countries has adopted the single control mechanism, the other country would still be able to scrutinize the award. In reality, in light of different countries' competing views on the level of permissible intervention to be granted to their national courts, adopting such a treaty would be near impossible.

16.38 In practice there is a trend, albeit not formally accepted, towards putting lower weight on set aside judgments from the country of origin which is demonstrated by the enforcement of awards which have been set aside in other countries.[36] This trend does not eliminate double control and, in some cases awards can be subject to multiple control (depending on how many countries the applicant is seeking enforcement in). However, it is the trend which appears most likely to remain in place for the foreseeable future.

V. CHALLENGE OF AN AWARD ON A LIMITED NUMBER OF GROUNDS – HAPPY MEDIUM?

16.39 The prevailing approach globally is somewhere in between two extremes so that the parties have safeguards in place to protect due process and public policy, though only on limited grounds.

16.40 In all countries, serious procedural irregularities committed by a tribunal may lead to an award being vacated. Although procedural irregularities are not defined consistently in different parts of the world, irregularities affecting the right to a fair trial or arbitrators exceeding their mandate are among those giving rise to challenge.

16.41 Some countries also allow appeal on points of law. A full-blown appeal on issues of law and fact is difficult to find apart from in Argentina although there are a few countries which allow the parties to expand the grounds for either an appeal or application to set aside to include appeal on a point of fact.

16.42 I will give a helicopter view on some recent trends and ideas in the area of challenging arbitral awards.

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35. Van den Berg, above n. 4, at 287. A similar proposal was advocated in: Howard Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, The Internationalisation of International Arbitration. The LCIA Centenary Conference/Ed by Martin Hunter, Arthur Marriott, V V Veeder, Graham & Trotman/Martin Nijhoff, (1995), 109.
36. See, above 31.

A. Exhaust All Remedies against Award

16.43 One trend is the growing popularity of arbitration appeal mechanisms which affect the courts' jurisdiction to review awards.

16.44 In particular, the AAA adopted the AAA Appellate Rules which parties may opt in to. Apart from the AAA, arbitral appellate review mechanisms can also be found in the GAFTA,[37] FOSFA and ICSID Rules.[38]

16.45 Although the arbitration appeal mechanism is designed to deal with the jurisdiction of arbitral institutions, it may have some impact on the court's powers as well. It is quite common for various arbitration laws to require the parties to exhaust any available arbitral process of appeal or review before appealing and/or challenging an award or, at least, to allow the tribunal to eliminate grounds for challenge.[39] Therefore, the applicant may be prevented from appealing or challenging an award in the court until after the arbitration appeal mechanism is exhausted.

16.46 Although Gross J in *UR Power GmbH v Kuok Oils and Grains Pte Ltd*[40] (a challenge under s. 68 and 69 of the Arbitration Act 1996) expressed the view that the wording in s. 70(3) of the Arbitration Act did not have any application to FOSFA or GAFTA appeal arbitrations, this case was not followed. In particular, Hamblen J in *PEC Ltd v Asia Golden Rice Pte Ltd*[41] (a challenge under s. 67 of the Arbitration Act) disagreed with the comments made by Gross J and said that it was difficult to see how the GAFTA appeal process was not an "arbitral process of appeal".

16.47 Also, the courts have looked into the meaning of the term 'exhausted'. In *A Ltd v B Ltd*[42] Mr Justice Smith found that the language of s. 70 of the Arbitration Act 1996 conveyed the intention that the appellant must have used up any process that was available, so that it was no longer available. The important connotation of the verb 'exhaust' was that the process must be used up completely. What matters is that the process is spent, not how it became spent.

16.48 Turning back to the AAA Appellate Rules, these provide for a more expansive review of arbitral awards than the review permitted by the US Federal Arbitration Act in vacatur proceedings in federal and state courts.[43] In effect, the appeal mechanism provides the parties with a remedy against an award, which they would not otherwise have in the court of law.

B. Jurisdiction of Courts

16.49 What has changed most notably over the past years is the jurisdiction of the courts to deal with challenges against awards. In general, what we have seen over the past decades is a trend towards limiting court intervention by, inter alia, giving jurisdiction to

37. Rule 12(6).
38. Articles 50, 52.
39. Art. 70(2) of the Arbitration Act 1996; Article 34(4) of the UNCITRAL Model Law.
40. [2009] EWHC 1940 (Comm).
41. [2012] EWHC 846 (Comm).
42. [2014] EWHC 1870 (Comm).
43. See: James M. Hosking, C. Diego Guevara, *Appellate Arbitration Mechanisms: the AAA/IDRC Optional Rules – a New Trend in International Arbitration*, New Horizons of International Arbitration. Collection of Essays. Issue 2 (Anton Asoskov, Alexander Muranov, Roman Khodykin, eds), Infotropic (2015), 78 *et seq*.

a higher court in the legal system in respect of issues relating to arbitration rather than a court of first instance.[44]

16.50 In Switzerland the set aside is limited to one instance – the Federal Supreme Court (also known as the Tribunal Fédéral).[45]

16.51 When the Spanish Arbitration Act was amended in 2011 – the competent national courts changed from the 'Audiencia Provincial' to the 'Tribunal Superior de Justicia'. In practice this meant that instead of 50 different courts, there are now only 17 courts competent for annulment proceedings.[46] At the same time, other functions relating to arbitration (such as exequatur petitions) were also conferred on the "Tribunal Superior de Justicia",[47] which has, as a result, become the court specialized in arbitral awards review. The procedure for annulment was also amended. The most relevant change is that there is no longer need for an oral hearing, unless both parties so wish, or witnesses have to be examined.[48] As a matter of practice, most cases are now conducted without oral hearings.

16.52 Indian Arbitration Law also limits the number of appeals that may be filed, in that it makes it clear that "No second appeal shall lie from an order passed under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court".[49] Usually an appeal to the Supreme Court may be allowed on a discretionary basis if an issue of substantive law of public importance is involved.

16.53 Germany and France limit court involvement in a similar way.[50]

16.54 Another way to decrease the number of appeals is by imposing a requirement to obtain leave to appeal. This is the case in England,[51] India and some other countries. Although it does not automatically limit the number of appeals filed, as a matter of practice it serves as a good safeguard to prevent dilatory tactics by *mala fide* award debtors.

16.55 Although certain safeguards must be preserved, in my view, the future lies in limiting the number of appeals available against an award. There is a good reason for this namely, a desire to instil finality into an arbitration award. If it is subject to multiple appeals, the arbitration becomes just a first instance 'court' with no real advantage of speed and cost.

VI. PARTY AUTONOMY

16.56 The most interesting, yet the most controversial, area for development in this field is the role of party autonomy in relation to the court's review of an arbitral award. According to Professor W.W. Park:

> [P]arties should be given options either to contract out of all review or to contract into review on the merits of the dispute. While in domestic transactions

44. Lew, Mistelis, Kroll, above n. 3, 15–15.
45. Article 191 of the Swiss Private International Law Statute 1990.
46. Article 8.5 of the Spanish Arbitration Act (as amended).
47. *Ibid.*, Article 8.6.
48. *Ibid.*, Article 42.
49. Article 37(3) of the Indian Arbitration and Conciliation Act No. 26 of 1996.
50. Germany ZPO, section 1062; France NCPC Art 1486.
51. S. 69(6) of the Arbitration Act 1996, CPR 52.3.

good arguments can be made for uniform arbitration regimes, the special needs of international business call for greater freedom of contract.[52]

16.57 I will now explore this theme further by discussing whether we should be re-considering the scope of party autonomy in the future.

16.58 Currently local legislation in different countries contains an unconditional limitation on the parties' rights to either expand or exclude the grounds for review. However, looking ahead should we not re-consider what should be the scope of the autonomy in the future? Shall we now analyse the pros and cons of amending local laws so as to allow a party to opt out of the review completely or, vice versa, to empower the court to review the case *de novo* on an appeal?

A. Parties' Ability to Exclude Grounds for Review

16.59 The position is slightly different regarding: (i) appeal on points of law; or (ii) a challenge on the procedural and public policy grounds.

16.60 Usually, local laws are more relaxed about the possibility of opting out of an appeal on points of law – yet it is seldom possible for the parties to exclude judicial review completely. It is argued that the parties cannot be left without any safeguards to protect them against fundamental flaws in the arbitral proceedings should these be committed. There remains a limited number of countries where the parties are allowed to opt out of court review completely.

16.61 In countries where appeal on a point of law is allowed, the conventional position is that the parties have a right to appeal the award unless they opt out by agreement or by reference to a set of arbitration rules. Approaches do, however, differ from jurisdiction to jurisdiction. A less conventional position is adopted in Hong Kong, for example, where an appeal from an arbitral award on a point of law may only occur if the parties 'opt-in' pursuant to the local arbitration law when making the arbitral agreement (this route is generally only relevant to domestic arbitrations) or with the leave of the court.

16.62 As to challenges on procedural or jurisdictional grounds, historically, for countries which have adopted the UNCITRAL Model Law, there has been some doubt as to whether parties may contract out of Art. 34 (a right to challenge an award). For example, a Canadian court ruled that they can[53] while the courts of New Zealand decided that they cannot.[54]

16.63 There are only a limited number of countries where the parties can opt out of judicial review completely. In France, since 1 May 2011, the date on which the latest edition of Art. 1522 of the Civil Procedure Code came into force, the parties can opt out of court review completely. There are no limits, so even French parties are at liberty to decide that their award is not subject to court review.[55]

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52. Park, above n. 6, 605.
53. *Noble China Inc v. Lei* (1998) 42 O.R. (3d) 69; 42 B.L.R. (2d) 262; *Food Services of America Inc. v. Pan Pacific Specialties Ltd* (1997) 32 B.C.L.R. (3d) 225.
54. *Methanex Motonui Ltd v Joseph Spellman and Ors* CA 171/03 (17 June 2004).
55. Kirby J., *Finality and Arbitral Rules: Saying an Award Is Final Does Not Necessarily Make It So*, Journal of International Arbitration. 2012. Vol. 29 (1), 127.

16.64 In Russia, the court's position is that it is possible for the parties to contractually exclude the possibility of seeking to have the award set aside.[56] Although initially the courts applied waivers to domestic cases only, some courts have also extended the rule contained in legislation on domestic arbitration to international cases as well.[57] This approach is based on an interpretation of Article 40 of the Private Arbitral Tribunals Act (devoted to domestic arbitration only), which says that an award can be appealed to the state court unless the arbitration agreement provides otherwise.[58] The reforms currently pending in Russia envisage that, where the parties have chosen administered as opposed to *ad hoc* arbitration, they may agree that the award will be 'final', in which case the award may not be challenged on procedural grounds (i.e. lack of valid arbitration agreement, the parties have not been properly notified, etc.) but may be challenged on arbitrability and public policy grounds.[59] Unlike Sweden, Switzerland and Belgium, where it is only possible to contract out of the vacatur if there is no real connection with each respective jurisdiction, the proposed change to Russian law would put Russia alongside France because opt out is available even in cases involving Russian parties, although the difference is that challenges based on arbitrability and public policy grounds would remain in place.[60]

16.65 Other countries, where it is possible to exclude recourse against an award, usually impose one or two conditions.

16.66 The first condition is the absence of any real connection to the seat (apart from the parties' contractual choice). Examples of this approach can be found in Switzerland and Sweden. Art. 192(1) of the Swiss Private International Law Act allows the parties to exclude the possibility of challenging an award if none of them has its domicile in Switzerland. The same provision can be found in Sweden.[61]

16.67 In Germany, it is possible to waive the right of recourse against an award but only after the award is delivered and the parties have had a chance to consider whether it contains any grounds for challenge.[62]

16.68 Further, conditionality may reveal itself by way of a specific requirement on the form of the waiver/agreement, i.e. that the opting out is to be made explicitly and/or unequivocally. In Switzerland, the Swiss Tribunal Fédéral held that wording that the award is "final and binding" does not amount to an exclusion agreement within the meaning of Art. 192(1) of the Swiss Private International Law Act; a specific "express" opinion

56. Clause 9 of the Informational Letter No. 96 of the Supreme Commercial Court of the Russian Federation dated 22 December 2005 'Review of Commercial Courts Practice in Cases on Recognition and Enforcement of Foreign Court Judgements, on Challenging Arbitral Awards and on Issuance of Writs of Execution for the Enforcement of Arbitral Awards.'
57. See: Alexander A. Yagelnitsky, Olesya V. Petrol, *Agreements on Waiver of the Right to Challenge an Award in International Commercial Arbitration*, New Horizons of International Arbitration. Collection of Essays. Issue 2 (Anton Asoskov, Alexander Muranov, Roman Khodykin, eds.), (Infotropic, 2014), 269–278.
58. See: Roman Khodykin, above n. 11, at 151–152.
59. See: Dominic Pellew, *Some Observations on the Current Proposed Reforms to Russian Arbitration Law*, New Horizons of International Arbitration. Collection of Essays. Issue 2 (Anton Asoskov, Alexander Muranov, Roman Khodykin, eds.), (Infotropic, 2014), 67–68.
60. *Ibidem*.
61. See: s. 51 of the Sweden Arbitration Act 1999.
62. Yagelnitsky, Petrol, above n. 57, 268

is needed.[63] However, in 2005 the highest court in Switzerland decided to apply a less stringent approach, in particular, the Tribunal Fédéral was satisfied that reference to the UNCITRAL Rules that "…the parties … exclude all and any right of appeal from and any awards insofar as such exclusion can validly be made…" was a valid waiver of the right to apply for a set aside.[64] Then, in 2008, another landmark decision was delivered by the Tribunal Fédéral, this time in the field of sport arbitration. In the case of *Guillermo Canas v Association of Tennis Professionals (ATP)*, the court held that a "forced renunciation" of the recourse to the Tribunal Fédéral in sport arbitration was not enforceable, even if it was valid pursuant to Art. 192(1) of the Swiss Private International Law Act, noting, *inter alia*, that the validity of such a waiver would be questionable under the European Convention for the Protection of Human Rights and Fundamental Freedoms.[65]

16.69 It is clear from the above that different States approach party autonomy in this field with a different degree of tolerance. The question is whether there is any common ground to be found?

16.70 Party autonomy is the bedrock of international arbitration which gives life to the entire concept. Arbitration would not exist were it not for party autonomy. Therefore, the starting point should be that, unless a good cause is shown, the parties shall be absolutely free to decide the fate of their arbitration.

16.71 France and Russia are two countries which place parties' freedoms over and above the right to a fair trial as long as the parties, at their own initiative, agree to waive or limit their right to challenge an award in court.

16.72 The main reason for limiting the parties' right to waive or exclude recourse against an award is that the parties cannot be left in a legal vacuum without any recourse against an award made through a serious irregularity or violation. At least a minimum set of protections should be preserved – protecting the parties from arbitrariness and misconduct by the arbitrators. The right to a fair trial is a fundamental one and there is no reason to disregard it because a dispute is heard by a private tribunal rather than a State court. Given that the parties cannot exclude their right of appeal in the State court the same should apply to arbitration as well. After all, States are under an obligation to give parties a recourse to a legal remedy.

16.73 The prevailing view – even among the users of arbitration – suggests that the parties prefer at least minimum safeguards to remain in place:

> … sophisticated arbitration users seem more focused on pushing for reforms that speed up the arbitration process and reduce costs, while addressing quality concerns through arbitrator selection. But some corporate users interviewed by the authors expressed a willingness to consider adopting an appellate arbitration procedure for high-value transactions (or disputes) or where one party was reticent to accept arbitration out of fear of a seriously erroneous decision.[66]

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63. Tribunal Fédéral (19 December 1990) ATF 116 II 639 concid 2c, reported in (1991) 9(3) ASA Bulletin 262.
64. Tribunal Fédéral, Ière Cour civile, 4P.236/2004, ATF 131 III 173 (4 February 2005), reported in 23(3) ASA Bulletin 496 (2005).
65. ATF 133 III 235 (22 March 2007) consid 4.3.2.2, (2007) 1(5) Swiss International Arbitration Law Reports 66, 83–87.
66. Hosking, Guevara, above n. 43, 110.

16.74 Surveys of arbitration users have established that by a substantial margin the majority of repeat users value "fairness and justice of the process" over competing features of arbitration such as speed, cost and expertise.[67]

16.75 Therefore, the desire to preserve the court's jurisdiction to intervene where the tribunal committed a serious violation of due process or public policy is not only promulgated by public interests, it is also driven by the underlying clients of international arbitration.

16.76 But what if the parties have considered all potential risks and deliberately decided to accept the risk that their future award would be subject to no court scrutiny at all. What is wrong with this? Professor Park explained it by saying that:

> …in parts of the world lacking a tradition of judicial independence, the business community may prefer no judicial review at all, taking its chances with potential arbitrator misbehaviour as the lesser of two evils.[68]

16.77 As far as I can see, there is nothing wrong with this in theory although, in practice, such a waiver could be given in circumstances where one or more parties do not realise it or have not had its consequences explained to them. This is even more likely in cases involving a consumer or unsophisticated party. The consequences of potentially forfeiting the right to legal remedy are very severe. For this reason, Switzerland, whilst recognising the right to waive recourse against an award imposes specific requirements on the form of the waiver/agreement, i.e. that the opting out is to be made explicitly and/or unequivocally.[69] The Swiss authorities suggest that the waiver shall be free and conscious. Although such an option may lead to a potential injustice in individual cases, in that fundamentally flawed awards would remain valid, this is balanced by the fact that the wording to that effect would confirm, at least prima facie, that the parties have considered potential risks and chosen to accept them. It may be possible to make it even more difficult to waive the right, for instance, by requiring parties to include a waiver clause explaining the consequences in detail and confirming that the parties have read and understood the risks involved. Also, to protect weaker parties, it is prudent to prohibit waivers in consumer contracts. But, subject to these preconditions, sophisticated commercial parties should be given an opportunity to waive or exclude any recourse against an award. There is no need in this case to impose an additional requirement that the waiver can only be done once the dispute has crystallised as long as the court is satisfied that the waiver was deliberate and thought through.

16.78 As I have already explained, Switzerland, Sweden and Belgium exclude recourse against arbitral awards if the case has no real connection to the seat. It seems that the rationale for this is that the parties are able to raise these objections at the enforcement stage in the country of enforcement.

16.79 As arbitration law develops, we may see more countries or institutions allowing parties to opt out of court review subject to the requirement that the waiver should be conscious and free.

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67. See, *e.g.*, Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People,* 30 Int'l Bus. Law 203 (2002) *cited in* Nana Japaridze, *Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration,* 36 Hofstra L. Rev. 1415 (2008).
68. Park, above n. 6, 598.
69. See: above n. 63–65.

B. Parties' Ability to Expand Grounds for Review

16.80 While there are good arguments for limiting the parties' ability to opt out of all grounds for challenge, the question of whether the parties' ability to expand the scope of review should be limited is not so clear. Why should parties not be able to agree that an award should be subject to appeal not only on points of law, but also on the points of fact?

16.81 The prevalent position under most local laws (not least because of the wording of the UNCITRAL Model Law) is that parties may not, by agreement, expand the grounds for vacating the award.

16.82 In a New Zealand case, *Carr v Gallaway Cool Allan,*[70] the parties sought to widen the scope of possible recourse against an award, in particular to give the court power to review "*questions of law and fact*". As a matter of New Zealand law, the parties can opt to allow appeal on the questions of law yet factual appeal is not permissible except on a limited number of statutory grounds. Ellis J held that because words "and fact" could not be severed from the clause, the whole agreement to arbitrate was thus invalid under New Zealand law and he set aside the award made.[71] The judgement of Ellis J was upheld on appeal.[72]

16.83 In a similar vein, the US Supreme Court in *Hall Street Associates v Mattel Inc.*[73] held that arbitrating parties may not expand the grounds of review beyond those established by statute. One commentary says:

> It is evident that the rule in some way restricts parties' freedom of contract in order to ensure expeditious and cost effective arbitration by limiting the hurdles against enforcement of the awards. However, this fact itself makes it difficult to support the rigidity, when the parties wish to compromise those identified objectives and prefer to ensure that the merits of the award is in accordance with the law applicable to the dispute. In this respect this peculiarity also raises the question of whether the U.S. arbitration regime is an effective substitute for litigation.[74]

16.84 The UNCITRAL Model Law provides that an application to set aside is the *only* recourse against an award.[75] In the vast majority of countries which have adopted the Model Law, it is not possible to expand the grounds for appealing an award.

16.85 An opposite approach may be found in the Netherlands, where the parties are at liberty to agree that an award may be appealed with effectively a new full hearing on the merits[76] and in Malta, where an arbitral award of an international commercial nature can be appealed to the Court of Appeal on a point of law if the parties have expressly agreed that a right to appeal is available in addition to the rights of recourse in the UNCITRAL Model law.[77]

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70. [2012] NZHC 1537.
71. See, for more detail: Williams, above n. 2.
72. *Carr v Gallaway Cook Allan* [2012] NZHC 1537; [2012] 3 NZLR 97 (28 June 2012).
73. 552 US 576 (2008).
74. Devrim Deniz Celik, *Judicial Review Under the UK and US Arbitration Acts: Is Arbitration a Better Substitute for Litigation?*, IALS Student Law Review, Volume 1, Issue 1, Autumn 2013, 18.
75. Article 34(1) of the UNCITRAL Model Law.
76. Article 1050 of the Dutch Arbitration Act.
77. See: John Refalo, *Arbitration Procedures and Practice in Malta: Overview*, PLC Country Q&A, s. 25.

16.86 A driver behind limitation of the court's intervention was to promote efficiency of the arbitral process through finality of arbitral awards. Indeed, the fact that the award is final with only limited recourse allowed against the award is a perceived advantage of international arbitration. Subject to certain safeguards being in place to prevent misconduct in arbitration, many businesses want quick and efficient dispute resolution without being dragged into a process that lasts for many years. Every arbitration regime implicates a tension between the rival goals of finality and fairness. Freeing awards from judicial challenge promotes finality, while enhancing fairness calls for some measure of court supervision.[78]

> The importance of speed and finality in large, complex international arbitrations is debatable, but there is no doubt that commercial parties value expedient resolution of their disputes. In fact, significant energy has been spent in recent years on amending institutional rules and national arbitration statutes so as to discourage unsuccessful parties from pursuing review of awards as a strategic ploy.[79]

16.87 Does this mean that the finality of arbitral awards should prevail over the party's freedom? Striving for efficiency, we should not lose sight of a key distinction: it is one thing if a party agrees a binding arbitration which does not, *per se*, envisage any right of appeal; it is another thing if both parties freely and voluntarily agree that an award would be subject to an appeal on the merits. Moreover, by allowing appeal, the legislature enhances fairness because potential mistakes of arbitral tribunals are more likely to be corrected by the courts.

16.88 Now let us look at this from the standpoint of economic considerations for States. By allowing the participants to appeal arbitral awards, the number of cases finding their way to the national courts may well rise. Are the courts prepared to handle a bigger caseload to satisfy parties wishing to have a second bite of the cherry? A legislature may want specifically to ease the workload of cases before State courts. It is even possible that the judiciary does not have capacity to handle appeals from arbitral tribunals. Therefore, in order to give the parties such an opportunity, the government spend on the judiciary will have to increase at a time when governments may have other priorities for their spend. In some instances limitation of party autonomy may be dictated by economic considerations, such as the potential impact on the state courts which will have to deal with such appeals.

16.89 On balance I believe that going forward the parties' ability to expand the grounds for review should not be limited. In particular, relevant laws should be amended so as to allow the parties to provide in their agreement, that future arbitral awards may be appealed on merits (i.e. on issues of both law and fact) to the national court, because:

> First, as a matter of principle, there is nothing wrong with this idea. In this respect I refer to the Court of Appeal of New Zealand that held that "…the inclusion in the arbitration agreement of an appeal right that is contrary to statute does not render the award "contrary to public policy" as those words are to be understood in the context of Art. 34 [of the First Schedule to the New Zealand Arbitration Act 1996]".[80]

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78. Park, above n. 6, 596.
79. Hosking, Guevara, above n. 43, 85.
80. *Carr v Gallaway Cook Allan* [2012] NZHC 1537; [2012] 3 NZLR 97, (28 June 2012) 55.

Secondly, there are some instances where the parties see the benefits of national courts acting as a superior instance to the tribunal. Although this will inevitably have an effect on finality and speed, this is not a problem as long as the parties are prepared to accept it.

Thirdly, if the parties are not prohibited from agreeing on the seat of arbitration in the Netherlands and Malta in order to have recourse to the appellate review by the courts, why is it not possible for them to agree on the same procedure in a different jurisdiction? The net effect is that the parties can easily find a way round this limitation by simply changing the situs.

Fourthly, although it is true that appeals against awards may make the courts work even harder, it is not a good reason to deprive the parties of the option. But for the parties' choice to submit their dispute to arbitration, the courts would have heard the dispute anyway. The courts benefit from the tribunals being at least a first instance court in this case.

C. Concluding Thoughts on Party Autonomy

16.90 In conclusion I would, once again, cite William W. Park who eloquently stated: "Judicial review of arbitral awards constitutes a form of risk management".[81]

16.91 The global financial crisis has highlighted the devastating effects of poor risk management. Since then, the regulators have hit back, penalising the biggest, global institutions with eye-watering levels of fines and penalties. In arbitration, we have seen a lot of risk management even where the risks may not warrant it. Is it now time to ease the grip on arbitration?

16.92 The future of arbitration should bring a greater freedom to the parties, in particular, to sophisticated parties who are capable of managing their own risks.[82] Specifically, the parties should be allowed to exclude any recourse against the award and expand the grounds for appeal, including an appeal on the merits if they so desire (for the reasons I have explained above). The parties' agreement in this regard should override any contrary requirements in national legislation or applicable institutional rules.

81. Park, above n. 6, 595.
82. Although non-sophisticated parties would merit different treatment (i.e. prohibit waiver clauses in consumer contracts).