The Benefits of a Single-Tier Judicial Court Review of Arbitral Awards

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The finality of arbitral awards is one of the advantages which justify recourse to arbitration, in comparison to longer dispute settlement methods, such as traditional court proceedings. However, while this is the desirable outcome, it is difficult and, to a certain extent, undesirable to isolate the arbitral award from any type of judicial interference. Limited interference by a judicial court regarding the arbitral award – if conducted under a clear predetermined framework – should not be seen as an encroachment upon the parties' arbitral affairs. In fact, the arbitral award and the judicial review mechanism should be seen as converging towards aiding the arbitral process in reaching its goal.

Thus, I will demonstrate why a limited judicial control of arbitral awards is desirable for all the parties involved in an arbitration. However, because interference must be limited and proportional, the best outcome is reached through a single-tier judicial review framework.

In this context, I will refer to arbitral decisions and their control in general without differentiating between commercial or investor-state arbitration. The present analysis also does not concern ICSID arbitration, as the review or challenge (and subsequent annulment) of an ICSID award is not judicial review. Nonetheless, this

is not the case with recognition of ICSID awards, where (a form of) judicial review may still occur. For example, one need only look at the recent decision by the English Court of Appeals, where an appeal challenging the stay of enforcement regarding the award in the first *Micula* case was rejected.

The arguments presented in this analysis are most relevant to international commercial arbitration. This type of arbitration involves the possibility of review both at the seat of arbitration and during enforcement proceedings in foreign courts and, thus, is faced with **the highest possible scope of review**.

The benefits of a single-tier court review of arbitral awards:

In order to set the framework for analysis, I will refer to the debate between the finality of the arbitral award – no judicial review – against the fairness of the entire dispute settlement process – presence of judicial review.[fn] Hossein Abedian, *Judicial Review of Arbitral Awards in International Arbitration*, Journal of International Arbitration 28, no. 6 (2011): 589-626, p. 590, hereinafter referred to as *Abedian.*[/fn] Because the best outcome is reached when there is a balance between finality and fairness,[fn] Phillip J. DeRosier, *Judicial Review of Arbitration Awards Under Federal and Michigan Law*, Michigan Bar Journal, February 2013, p. 36.[/fn] a form of judicial review is necessary.[fn] Abedian, p. 608.[/fn] Such review can occur through annulment proceedings and through enforcement proceedings.[fn] Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive. A Perspective from Law and Economics*, Springer International Publishing, Cham, Switzerland, 2017, p. 39.[/fn]

To keep the aforementioned interests in balance, any type of arbitral review should be limited to only a strict number of criteria – mainly based on **procedural considerations**. As such, I will base my arguments on the criteria for review provided for in the New York Convention, which can lead to non-recognition of an arbitral award by a foreign court.

I have chosen this list since it represents a negotiated compromise and it represents a predictable list of review criteria, effectively providing the parties to an international contract with a framework within which they can expect *exequatur* – especially when *exequatur* is sought in states parties to the Convention.

As such, I will demonstrate in the following paragraphs why judicial review is beneficial, and I will conclude that all those benefits can be reached through the mechanism of a one-tier judicial review, as opposed to a multi-tier judicial review.

Firstly, a one-tier judicial review mechanism increases confidence in the arbitral process, because there exists a way of setting aside flawed decisions (for example, a decision characterised by procedural errors such as lack of notice regarding the arbitration proceedings to the party against which the award is invoked). This gives the parties to a dispute the incentive to actually pursue arbitration. They know that a review mechanism which guarantees fundamental principles of fairness exists, censuring any serious abuse of procedural fairness. Moreover, because of the possibility of having their award censured by a judicial third party, arbitrators will be incentivised to approach their decision-making cautiously, being less prone to abuses.

This especially helps the party which holds less power. The review mechanism acts as a balancing framework to the economic power of the other party. Since arbitration is consensual, it is clear that the party which holds negotiating power will try to impose favourable arbitration conditions to it. The existence of a (possible) subsequent judicial review of arbitral awards means that even parties which, from the outset, start with a handicap as regards negotiating power are incentivised to accept arbitration.

However, such confidence vanishes when no form of judicial review exists, because the confidence that flawed decisions can be set aside disappears. And this is supported by practical examples: at one point, both France and Belgium resorted to arbitration frameworks where judicial review was non-existent.[fn]Abedian, pp. 599-600.[/fn] Arbitration actually decreased because of such developments.[fn]Ibid.[/fn] This prompted the two states to change the system to include a system of judicial review. And, while Belgium still kept the possibility of removing judicial review, it effectively gave to **the parties** to the arbitral proceedings the option to do so – provided none of the parties was a Belgian national/ had its normal residence or place of business in Belgium.[fn]Idem, p. 600.[/fn]

According to *Abedian* (p. 599), another advantage of judicial review – only with regard to review at the place of arbitration – is that it fosters recognition of foreign awards. A judicial court which is faced with the recognition of a foreign arbitral

award which has been reviewed at the place of arbitration is much more likely to enforce that award[fn]Idem, p. 593.[/fn] – essentially shortening the recognition and enforcement procedure and, thus, decreasing the costs of the procedure. This argument is especially relevant where there is an international obligation to recognise foreign judgements.[fn]Such as within the E.U., where judgements rendered in an E.U. state must be recognised by the other member states: see Article 36 of Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (*the Brussels I Regulation*).[/fn]

Thirdly, in areas of law where disputes are constantly brought before arbitral tribunals, lack of judicial review may hinder the development of the relevant law. This is because arbitral awards are published according to the will of the parties.[fn]Chang-fa Lo, *On a Balanced Mechanism of Publishing Arbitral Awards*, Contemporary Asia Arbitration Journal, vol. 1, No. 2 (2008), p. 236.[/fn] As such, a one-tier judicial review of arbitral awards has the benefit that the latest issues which arise in arbitration are brought before courts. This leads to the further development of the relevant law. Such evolutions can be considered to be of public interest. And this can happen even if the judicial review does not cover the merits of the case. Knowledge regarding the facts of the case is enough for such development.

Fourthly, judicial review of arbitration awards can correct the information asymmetry which may exist between the parties. While traditional arbitration fields, such as commercial arbitration, may not involve such information asymmetry, other fields which can be subject to arbitration – such as consumer arbitration, if there is no legal prohibition to such arbitration – are more likely to be characterised by information asymmetry. For example, consumer arbitration is prohibited within the E.U. legal system by the Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts.[fn]To this end, see Article 3, 3 of the Directive read together with the Annex contained in the Directive, where it is expressly provided that provisions in consumer contracts which establish that settlement of disputes should be conducted exclusively by arbitration can be considered unfair.[/fn]

Of course, the previous argument implies that the losing party holds at least enough information to challenge the overall unfairness of an arbitral award. However, this level of information is much lower than the level of information

needed to deal on a level basis with the stronger party.

All the aforementioned benefits can be availed of through a one-tier judicial review of arbitral awards. Those benefits are all characterised by one common aspect: the dispute must come (or at least be able to come) before the judicial court and the court must have a degree of limited control over the arbitral award. Everything above this is unnecessary, since it does not generate additional benefits.

Moreover, from a strictly legal perspective, judicial review should be limited to a one-tier review mechanism, since review itself is an exception to the general rule of finality.[fn]Neil Andrews, *Arbitration and Contract Law. Common Law Perspectives*, Springer International Publishing Switzerland, 2016, pp. 5-6.[/fn] Therefore, a multi-tier judicial review of arbitral decisions is unnecessary and contrary to the systemic coherence of any legal system which guarantees the effectiveness of arbitration, while a one-tier judicial review actually creates benefits without unjustifiably encroaching upon the arbitral process.