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Growing number of countries allowing exclusion agreements with respect to annulment warrants greater scrutiny of arbitration clauses

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After the 2011 Decree which reformed French arbitration law, the number of countries having arbitration acts expressly providing for the possibility of waiving setting aside proceedings at the seat has increased. In view of the fact that arbitration rules of some institutions provide for a waiver of "any form of recourse" against awards rendered under such rules, the topic of waiver of setting aside proceedings is becoming of increasing importance for practitioners.

Article 1522 of the French Code of Civil Procedure, which applies to international arbitrations, provides that *"by way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside"*. For more information on the new French Arbitration Act, see here. Other European jurisdictions that permit parties to waive or exclude judicial review of an award are: Switzerland (Article 192(1) of the Swiss Private International Law Act), Belgium (Article 1717(4) of the Belgian Judicial Code) and Sweden (Article 51 of the Swedish Arbitration Act). In contrast to the relevant provisions in these jurisdictions, Article 1522 of the French Code of Civil Procedure permits the exclusion of an application to set aside an award in any arbitration which qualifies as "international" within the meaning of the Code, regardless of the nationality of parties. The parties' waiver will not affect, however, their rights to appeal any decision to enforce an award in France.

National courts in some countries have reached different conclusions with respect to the validity and enforceability of a waiver of the right to bring an application to set aside an award where the *lex loci arbitri* does not expressly allow such a waiver. Moreover, in a number of countries, this question has not yet been submitted to courts, leaving the position uncertain. Article 34 of the UNCITRAL Model Law ("Model Law"), which sets out the grounds for setting aside an award, is silent on the issue of waivers. A waiver by parties of the right to challenge an award at the seat in jurisdictions that have adopted the Model Law therefore constitutes a waiver of Article 34 of the Model Law. Examples of such Model Law countries are Canada and New Zealand.

In the Canadian case of *Noble China Inc v Lei* (1998) 42 O.R. (3d) 69; 42 B.L.R. (2d) 262, the parties, a Hong Kong resident and a Toronto listed company, attempted to settle a dispute by means of a settlement agreement, in which the parties had included the following arbitration clause: "No matter which is to be arbitrated is to be the subject matter of any court proceeding other than a proceeding to enforce the arbitration award". The Ontario Court (General Division) held that parties may exclude the grounds for setting aside an award, provided that their agreement

does not conflict with a mandatory provision of the Model Law or principles of public policy. The Court took the view that Article 34 of the Model Law was not a mandatory provision, largely on the basis of an earlier draft of the Model Law and the fact that Article 34 of the Model Law did not contain any of the usual mandatory language, such as the word of "shall".

Six years later, a New Zealand court had to consider this issue in a more or less similar case, *Methanex Motonui Ltd v Joseph Spellman and Ors* CA 171/03 of 17 June 2004. The court took a different approach and concluded that there was "no contemplation that parties to arbitral proceedings could seek to limit further the rights of review contemplated by Article 34". In the view of the New Zealand court, Article 34 of the Model Law was of fundamental importance and therefore parties could not exclude this provision. The same position was taken by the District Court of New York in the case Hoeft v MVL Group 343 F.3d 57 (2003)(2d Cir (US)). In this case, the parties had tried to waive Article 10 of the US Federal Arbitration Act ("FAA"), a provision similar to Article 34 of the Model Law, which also does not provide for a waiver of applications to set aside an award. The District Court of New York held that the grounds for setting aside an award contained in Article 10 of the FAA were the "floor" for judicial review of arbitration awards "below which the parties cannot require the courts to go". However, not all U.S. courts have decided accordingly: a limited number of (older) U.S. authorities have held that parties are able to waive Article 10 of the FAA.

The jurisdictions that allow a waiver to set aside an award require the waiver to be express and sufficiently clear. Parties should not be held to have taken this step absent evidence that they really meant to do so. In view of the mixed results in countries that do not expressly allow for parties to agree to a waiver, parties that want to ensure that such a waiver will be effective would be well advised to choose a seat of arbitration in jurisdictions like France, Switzerland, Sweden or Belgium.

Nevertheless, a waiver of annulment proceedings is not desirable in all cases. By excluding setting aside proceedings at the seat, parties try to avoid lengthy and costly challenges to awards before state courts. Where an arbitral award contains a serious flaw, opposition to enforcement can be expected – despite the exclusion of the remedy of annulment. If enforcement proceedings are expected to be initiated in a number of countries, the investment of time and costs associated with multiple challenges to enforcement is likely to be quite burdensome for both parties. In such a situation, it may be more efficient to have the the main debate on the validity of the award take place in the context of annulment proceedings at the seat, although this will not necessarily prevent an enforcement court from taking a different view as the cases *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 and Amsterdam Court of Appeal 28 April 2009, JOR 2009, 208 (*Yukos Capital v Rosneft*) have shown. For more information on these cases, see here and here.

Moreover, parties are not likely to agree to a waiver of the right to bring annulment proceedings at the seat in "bet-the-company" type claims. With respect to such claims, parties may want to keep open all of their options to challenge an award, given the importance of the proceedings. In other cases, there may be a greater need for a quick and less costly resolution of the dispute. In such circumstances, a waiver could be a viable option.

Another point of view is that a waiver may have added value in cases where the law of the country in which enforcement of the award will be sought provides for grounds for refusing enforcement that are less strict than the grounds for setting aside an award at the *lex loci arbitri.* In this respect,

agreements which provide for punitive damages come to mind. Courts in certain civil law jurisdictions have repeatedly held that punitive damages constitute a penalty rather than compensation for losses and thus violate public policy. Courts in common law countries tend to enforce awards for punitive damages. Yet such considerations do not often play a role when parties are deciding whether or not to opt for a waiver of annulment proceedings.

In conclusion: for each individual arbitration agreement, the merits of the relevant legal relationship and potential claims should be the leading considerations when deciding whether a waiver of the right to set aside an award is desirable. Particular attention should be given to draft (international) arbitration clauses which refer to institutional arbitration rules and provide for a seat of arbitration in a country where the national law allows a waiver of setting aside proceedings. Whereas, for example, the UNCITRAL Rules and Stockholm Chamber of Commerce Arbitration Rules do not contain waiver clauses, article 34(6) of the ICC Rules (2012) provides that: "[…] By submitting the dispute to arbitration under the Rules, the parties […] shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." Article 24(2) of the CEPINA Rules contains a similar waiver, but states that it does not apply where an explicit waiver is required by law. Article 26(9) of the LCIA Rules contains such a waiver for "appeal, review or recourse". Whether a general reference to the ICC, LCIA and CEPINA Rules would satisfy an "express provision" as required for a valid waiver in these jurisdictions is still unclear. Some Swiss courts have held that a general reference to the ICC Rules does not suffice to constitute a valid waiver of setting aside proceedings. How French courts will rule on this issue under the recently amended French Code of Civil Procedure remains to be seen. Therefore, where parties to an international arbitration are contemplating the selection of the ICC or LCIA Rules, with a seat of arbitration in a city such as Paris, to avoid arguments as to the availability of the right to seek annulment of any award, it is advisable to state expressly in the arbitration agreement that parties will retain that right.

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