“Tribunals with women arbitrators make better decisions.” As is well known, in a relationship, one person is always right and the other person is male – surely, this must be good counsel when selecting an arbitrator, where judgment and perceptiveness are crucial attributes.

The YSIAC Debate held on 2 March 2018 sought to challenge this received wisdom. The moderator for the debate was Mr Chelva Rajah, SC (Member, SIAC Board of Directors, Managing Partner, Tan Rajah & Cheah). Arguing for the motion – and ostensibly with the “easier” task – was the duo of Mr Toby Landau QC (Member, SIAC Court of Arbitration; Barrister and Arbitrator, Essex Court Chambers) and Mr Paul Tan (Partner, Rajah & Tann Singapore LLP), with brains and beauty to spare. Arguing against the motion were the formidable team of Ms Deborah Barker, SC (Managing Partner, Withers KhattarWong) and Ms Jae Hee Suh (Associate, Allen & Overy), who persuaded the packed audience of 128 attendees with impassioned advocacy (and song).

This debate was a timely one, coming slightly less than two years after the arbitration community drew up the Equal Representation in Arbitration Pledge, with signatories committing to diversify the pool of arbitrators and improve the profile and representation of women in arbitrations.

Mr Tan fired the opening salvo with the central thesis that women outperform men in personal qualities that were relevant to arbitral decision making – women tended to have more initiative and creativity, and displayed honesty and social awareness. Citing various statistical studies (as well as anecdotal evidence that women were smarter and live longer), Mr Tan presented a compelling case in favour of the participation of women on arbitral tribunals to improve decision making.

Mr Tan’s arguments were met with a confident rebuttal from Ms Jae Hee Suh, who challenged the underlying assumption in the motion that women arbitrators had to make...
“better” decisions to justify their appointments to arbitral tribunals. She argued that gender should make no difference to decision-making: expertise and efficiency bore little correlation to one’s gender. Women arbitrators should be appointed on an equal opportunity basis, and not because of their gender. Ms Jae concluded that supporting the motion would harm, instead of support, women, by perpetuating gender stereotypes and suggesting that the participation of women in arbitral tribunals was no more than a form of tokenism.

Following on the heels of Ms Jae’s challenge to the idea that woman had to show that they have a “right” to be there, Mr Landau presented yet another perspective that focussed on the importance of diversity in group decision-making. Quite apart from the fact that women might have specific personal qualities and characteristics that lent themselves to the process of decision-making, the individual skills of a diverse group collectively contributed to greater group intelligence and translated to greater collaboration in making sense of evidence and submissions. Mr Landau explained that “better” might not just mean right or wrong, but whether a decision was regarded by users as legitimate and acceptable. Gender diversity was a fact of the modern world, and the composition of tribunals should reflect this.

Ms Barker responded, to rapturous applause from the audience, by breaking out the ukulele and in song with the aptly titled song “Man Smart, Woman Smarter”. The lyrics speak for themselves: “And not me but the people they say; That the men are leading the women astray; But I say, that the women of today; Smarter than the man in every way.” Ms Barker asked, rhetorically: how would the inclusion of females improve decision making? The oft-quoted description of arbitrators as a “male, pale and stale” group that would somehow benefit from the participation of women undermined the wider issues of unconscious bias and lack of equal opportunities that have contributed to the imbalance.

At the end of this spirited debate, the audience spoke, and awarded the debate to Ms Barker and Ms Jae. What appeared at first to be a straightforward motion reflected the nature of the complex and multi-faceted debate on inclusivity in the community. Whilst the concept was widely supported, the unconscious bias in the system cannot be changed by the mere assertion that tribunals with woman arbitrators are “better”. The women were still right on this score.
SIAC, in conjunction with YSIAC and the International Bar Association’s Arb 40 Subcommittee, held an Award Writing Workshop designed around the Toolkit for Award Writing published by the International Bar Association’s Arb40 Subcommittee, on 18 May 2018 in Singapore.

The workshop featured a prominent line-up of speakers and trainers: Dr Michael Pryles AO PBM (Founder President & Member, SIAC Court of Arbitration; Independent Arbitrator), Mr Richard Tan (Independent Arbitrator), Mr Hiroyuki Tezuka (Member, SIAC Court of Arbitration; Partner, Nishimura & Asahi), Mr Daryl Chew (Partner, Shearman & Sterling LLP) and Ms Koh Swee Yen (Co-Chair, YSIAC Committee; Partner, WongPartnership LLP).

Welcome Remarks and Introduction to the Toolkit and Training Programme

The workshop kicked off with an introduction by Ms Koh to the Toolkit for Award Writing. Ms Koh, who was a co-chair of the IBA Arb40 Subcommittee at the time that the Toolkit was published, explained that the Toolkit was designed to act as a guide for young arbitration practitioners when approaching the drafting of their first awards. This was timely as various arbitral institutions have taken steps to increase the diversity of arbitrators appointed.

Keynote Speech

In his keynote speech, Dr Michael Pryles encouraged the participants at the workshop to consider that, even though an arbitral award would likely be read only by a handful of individuals, an arbitral award would be legally binding and enforceable in almost 160 jurisdictions under the New York Convention. This was in contrast to most judicial decisions, which would be typically enforceable in fewer countries. It would therefore be important for arbitrators to ensure that their awards satisfied the conditions for enforceability under the arbitration agreement signed by the parties and the relevant laws governing the arbitration.

Dr Pryles took the participants through his five “Cs” in award writing: Clarity, Coherence, Conciseness, Comprehensiveness, and Certainty. A useful test to apply to the writing of an award, according to Dr Pryles, was to ask whether a person who knew nothing about the case could comfortably read the award and understand what had taken place in the proceedings. When explaining the importance of certainty in drafting awards, he emphasised that it was an arbitrator’s duty to make findings and determinations that were definitive and mandatory, and not merely to provide an opinion on matters or vague comments on the case. Dr Pryles also recommended preparing a list of issues to be agreed to by the parties, if possible, which would then be addressed and determined in the award.

Formal and Procedural Requirements of Arbitral Awards

Mr Richard Tan then addressed the participants on the formal and procedural requirements of arbitral awards. Mr Tan led a comprehensive discussion on the necessary elements of a valid and enforceable arbitral award. He spoke on the importance of the place where the award was made (especially where the arbitral seat was not a Model Law jurisdiction) and discussed the various titles commonly used by arbitrators to label their awards at different stages of the arbitral proceedings.

According to Mr Tan, it would ultimately be incumbent on every arbitrator to consider the enforceability of awards.
rendered because an invalid award would, simply, not be useful to anyone. While it might not be possible for an arbitrator to take into account the specific requirements for enforcement in every jurisdiction, it would be important for an arbitrator to keep in view, when drafting an award, the question of where the award might eventually be enforced.

(The second half of the event was reported by Kate Apostolova, Senior Associate, Freshfields Bruckhaus Deringer.)

To get ahead of the game called “arbitration”, there was also a session on best practices in drafting an arbitral award. This session was not only useful for the younger first-time arbitrators, but also the more seasoned arbitrators seeking a refresher.

What would be the focus of this session, I asked myself? Practically speaking, the parties mainly read the last page of the award, the dispositif, to check whether their clients won or lost or if the baby was split. I expected this would be a short session focusing on the drafting of the last page of an award.

Obviously, this is an oversimplification. There is no doubt that the writing of a well-reasoned award is critical. It becomes especially important if the award is challenged—through a set-aside or challenge to enforcement procedure—so there is a lot more that goes into an award. Surprisingly, there are very few practical guides available to assist arbitrators in the drafting process. This session sought to fill this gap.

**Practical Considerations for Drafting an Award**

In her presentation, Ms Koh Swee Yen stressed the importance of several key practical considerations for drafting an award. She recommended that arbitrators start planning at the appointment stage and start the drafting early, especially the procedural history section of the award.

Ms Koh highlighted that the main consideration arbitrators should keep in mind was to protect the award. The key question to ask was: “How to draft an enforcement-proof award?”. She further explained that one of the most common grounds for challenging an award was breach of natural justice or due process violations, a very broad category (as evident by court jurisprudence). To avoid a successful challenge on this ground, Ms Koh recommended ensuring that all parties have an equal opportunity to present their case.

Ms Koh also noted that care should be taken when using Tribunal secretaries to draft arbitral awards. She used one case to illustrate this point. In *P v Q & Ors* [2017] EWHC 148, the Chairman had sent an email, which was intended for the Tribunal secretary, by mistake to one of the Claimant’s lawyers (who had on the previous day emailed a letter to the Tribunal on one of the interlocutory decisions). The email attached the Claimant’s lawyer’s cover email and asked: “Your reaction to this latest from [the Claimant]?”. The Claimant filed a challenge with the LCIA Court on various grounds, including that the Tribunal improperly delegated its role to the secretary.

For additional practical considerations for drafting an award, you can refer to the IBA TOOLKIT FOR AWARD WRITING, Chapter 3: Practical Considerations for Drafting an Award.

**Content of the Award**

Mr Daryl Chew started his presentation on the content of the award with a picture of a box of chocolates. He then asked: “What do arbitral awards have in common with chocolate?” The audience was baffled. Mr Chew reminded the audience of the 1994 movie “Forrest Gump”, where the lead character Forrest Gump (played by Tom Hanks) said: “My mom always said life was like a box of chocolates. You never know what you’re gonna get.” Mr Chew likened arbitral awards to a box of chocolates—some were sweeter than expected, some were bittersweet and some “you just do not like”.

The main question Mr Chew answered during this session was: What should be included in an award? He discussed certain mandatory requirements, without which the award would be at risk of being set aside. Mr Chew noted
that an arbitrator should include in the award the basis of jurisdiction, the applicable laws and the procedural rules.

Mr Chew also said that an award should adequately record the procedural history. A sentence to the effect: “The procedural history is set out in the Tribunal’s Procedural Orders Nos. 1 through 25” is not likely to be sufficient. A detailed procedural history would help demonstrate compliance with due process and equal treatment. It would also be especially important if there were a non-participating party. The arbitrator should make sure that the non-participating party has had ample opportunity to appear and present its case, and meticulously document in the award the efforts the Tribunal made to notify the party, to give the party extensions of time, etc.

There was also some discussion about the dispositif. Mr Chew emphasised that the goal of the dispositif would be for a person to immediately understand what the Tribunal had decided. It should be clear so the enforcement authorities would know what to do and generally, should not impose conditions.

For more information on the content of the award, you can refer to the IBA TOOLKIT FOR AWARD WRITING, Chapter 4: Content of the Award.

**Tips and Techniques for Drafting**

On tips and techniques for drafting, Mr Hiroyuki Tezuka started by setting the record straight and noted that in his view there would not be any such checklist a Tribunal could look at right before it started to draft the award. There would only be a checklist with the steps to be taken before starting to draft the award.

For example, it is critical that the Parties’ positions are clarified before the Tribunal closes the proceedings. Imagine a case where the contract provides: “Liquidated damages imposed unless owner is solely attributable for the delay.” Each party alleges that the other party is solely responsible for the delay. What if the Tribunal found that both parties are responsible? What would be the logic/theory for reduced liability? Contributory negligence? What if the parties had not pleaded contributory negligence?

Mr Tezuka also provided some tips on expert evidence. He recommended considering joint reports from the experts from both sides and expert conferencing, which might help narrow down the issues on which the experts disagree. The Tribunal also might, upon consent by the Parties, direct the damages experts to work jointly, as the Tribunal’s experts, and to calculate damages based on the Tribunal’s instructions.

For other useful sources of information, Mr Hiroyuki Tezuka referred the audience to resources such as the IBA TOOLKIT FOR AWARD WRITING, Chapter 5: Tips and Techniques for Drafting, and “How to Draft Enforceable Awards under the Model Law”, Michael Hwang SC & Joshua Lim.
Practical Group Exercise

The participants were divided up into small groups for this segment of the workshop.

Mr Chew was the moderator for my group, where we discussed the mock award in the case of Gatsby Wines v Domaine Tresbonvin, SIAC Arb No. 256 of 2016.

The group’s overall impression of the award was that it was not well drafted, the bias in favor of the Respondent was blatant, it was rather emotional and personal when it should be neutral, based on the record and on logical reasoning.

The group noted there were at least two issues in the cover page of the award: (i) it was not appropriate to call the award a “decision”; rather, it should be called an “award”; and (ii) it was not appropriate for the Tribunal to mention the Tribunal secretary to the parties for the first time on the cover page of the award.

The group also noted there was no procedural history. The arbitrator tried to set out the procedural history in “Section I. The Arbitration Proceedings”, but (i) he failed to say when he was appointed as an arbitrator; (ii) he did not mention the day of closing of the proceedings; (iii) he did not mention the Tribunal secretary; and (iv) he did not mention the fact that these were expedited proceedings.

The arbitrator also tried to set out the facts in “Section III. The Parties and Their Conflicting Claims”. However, it was not clear from that section (i) what the agreed facts were; (ii) what the disputed facts were; and (iii) what he found the established facts to be. Typically, the group acknowledged that it would be best to have separate sections summarising the Respondent’s arguments, the Claimant’s arguments and the Tribunal’s findings.

Finally, “Section IV. Jurisdictional Challenge” was very conclusory and not very clear. The arbitrator also stated: “Had Respondent hired counsel with legal skills equal to Tresbonvin’s wine-making expertise, Respondent would have realised that many Tribunals and courts have found jurisdiction under clauses misnaming the intended arbitral institutions.” This was an example of the arbitrator getting inappropriately personal.

In terms of structure, the group thought the award was difficult to follow as there was no table of contents and there were hardly any headings. The arbitrator was also not consistent in his use of terms and phrases and party names.

Finally, the dispositif was quite deficient as well: (i) it did not specify interest rate; (ii) it failed to decide on cost claims; and (iii) it did not specify which claims are dismissive. The arbitrator also switched the Claimants and Respondents in the dispositive.

Closing Remarks

In his succinct concluding remarks, Mr Tezuka left the young arbitrators with two excellent points: (i) aim high; and (ii) be patient.

First, Mr Tezuka advised participants that even though they might be young and the first case they might get as arbitrator may be small, they should be aware that this still involved a final award. As arbitrator, one’s responsibility is very serious and so Mr Tezuka’s advice was that young practitioners should not set their target so low as to simply draft an award that will not be set aside. Their role as arbitrators would be to write an award that was persuasive and acceptable to even the losing party – that should be the target.

Second, for those participants who had not previously acted as an arbitrator, Mr Tezuka’s advice was to seek out an opportunity to work as a Tribunal secretary, so as to observe how experienced arbitrators handled cases. This would provide them with the chance to observe the tribunal’s deliberations to understand what it takes to be a good arbitrator. Mr Tezuka noted that it would be very difficult to think about what one should do without having good examples. Even though the work as Tribunal secretary would at times be administrative, including proofreading, printing, etc., one would certainly be rewarded for such work by being given a very practical opportunity to see how arbitrators handled cases.
Can or Should Parties Waive the Right to Set Aside an Award?

by Tan Jun Hong, Supreme Court of Singapore

Introduction

1. Finality is an important consideration of parties' when choosing to arbitrate. The shared understanding of parties in an arbitration is that the arbitral award puts a definitive end to the parties' dispute. In the usual case, there is, therefore, no extensive appellate review of the award. Instead, after the award is rendered, parties may only choose to set aside the award at the seat or resist enforcement wherever the award is sought to be enforced. In recent years, several jurisdictions have enacted national laws allowing parties to waive their right to seek annulment of arbitral awards (such jurisdictions including Belgium, France, Russia, Sweden, and Switzerland), even on the narrow list of grounds set out in the New York Convention (“NYC”) and the UNCITRAL Model Law (“Model Law”). The question that arises is this: should parties be allowed to waive, subject to some conditions.

The arguments for waiver

2. Permitting parties to waive their right of annulment comports with the importance accorded to party autonomy. The ability to choose one’s arbitrators, arbitral rules and how to govern procedural aspects of arbitration, is of particular significance in arbitration. This freedom to contract is especially essential where the agreement has been carefully negotiated by the parties; absent a compelling and countervailing reason, the agreement should be honoured.

3. If party autonomy is to hold such central importance, an agreement to waive the right to set aside the award? This essay will examine the reasons for upheld. One would go further to say that such a decision may be sensible when considerations of time and costs are taken into account. Permitting such waivers wards off unmeritorious annulment applications; and further, where an increasing number of countries are willing to recognise and enforce awards that have been set aside at the seat (even though it is arguable that they should not do so: see [6] below et seq), parties might take the view that applications to set aside would very well be an exercise in futility and that it might be more fruitful to focus on the enforcement stage.

4. From the perspective of the seat, the enactment of national laws allowing for the waiver of the right to set aside has been said to enhance the jurisdiction’s attractiveness as a seat of choice. This is supported by the positive reception to the reforms to the French Arbitration Act – specifically, the introduction of Article 1522, which expressly allows agreements to waive to be made.

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3 See, eg, Yukos Capital S.A.R.L v OAO Rosneft, Amsterdam Court of Appeal (28 April 2009).

4 Vaisanen, n 1, p 750.
The arguments against waiver

5. Despite the paramountcy of party autonomy, there is no international consensus that such waivers ought to be allowed. In fact, when the Working Group considered incorporating a waiver provision in Article 34 of the 2010 UNCITRAL Arbitration Rules (which is intended to represent a harmonised legal framework), there was broad agreement that any waiver to recourse post-award would not cover set-aside actions.5 Similarly, while the rules of other leading arbitral institutions containing a waiver provision that parties are deemed to have “waive[d] their right to any form of [recourse] insofar as such waiver can validly be made”,6 these have been uniformly interpreted to cover only waiver of any review on the merits, and not a waiver of the right to set aside.7

6. This may be explained on the basis that the removal of the option to set aside an arbitral award upsets the distinction between primary and secondary fora (the seat and the jurisdiction where enforcement is sought, respectively), which is enshrined in the NYC. The critical difference between the two is that a decision of the seat court to set aside an arbitral award nullifies the award erga omnes, whereas the radial effect of the enforcement court to refuse enforcement is restricted to only the enforcement jurisdiction. The interaction between primary and secondary fora can be gleaned from Article V(1)(e) of the Convention, which states that the enforcement of an award may be resisted if the award had been set aside at the seat.

7. Professors W Michael Reisman and Brian Richardson explain that this distinction and the corollary distribution of jurisdictional competences are central to the “international control system” envisioned by the NYC.8 If no primary forum had “nullificatory power” with universal effect, then the loser of a defective award would never be able to obtain terminal annulment, and would have to resist the winner at each and every jurisdiction the award is sought to be enforced in. The waiver of (or any fetter placed on) the right to set aside would therefore endanger the operational finality of arbitral awards in general, and increase the net burdens of all potential secondary jurisdictions, upsetting the balance struck in the NYC.9

8. That said, it should be acknowledged that Professors Reisman and Richardson’s argument is premised on arbitration being a “public legal creation whose operation and effectiveness is inextricably linked to prescribed actions by national courts”.10 This is at odds with an understanding of arbitration (supported by leading figures in arbitration such as Professor Gaillard) as an autonomous legal regime free of national law, and of arbitral awards as free-standing, unanchored in any national legal order. To this, two points are made. First, the conception of arbitration as a transnational legal order goes beyond the consensus encapsulated by the NYC,11 and it is doubtful whether the untethering of arbitration from the seat will find similarly widespread approval. Secondly, the debate takes nothing away from the practical consequences of

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5 David Caron and Lee Caplan, The UNCITRAL Arbitration Rules (OUP, 2013), p 743. Difficulty in finding the right terminology led them to introduce an optional draft waiver statement instead.

6 See, eg, r 32.11 of the SIAC Rules 2016; Article 35(6) of the ICC Rules 2017.


9 Ibid, p 52.

10 Ibid, p 17

11 Ibid, pp 30- 31
9. A related rationale for not permitting waivers of the right of annulment is that for so long as the arbitral seat continues to be regarded as the juridical centre giving effect to the arbitration proceedings, national courts would not, as a matter of judicial policy, wish to give up their supervisory role and become mere rubber stamps. Indeed, it is one thing to be pro-arbitration and impose minimal judicial review; it is another to relinquish control altogether. Even in arbitration-friendly jurisdictions like Singapore, courts would enforce minimal standards of review. In CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] 4 SLR 305, the Court of Appeal held (at [26]) that:

... [I]t has also been said (correctly) that no State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award, or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings.

This was also the position taken in Hoeft v MVL Group 343 F 3d 57 (2nd Cir, 2003), where the parties tried to waive Article 10 of the US Federal Arbitration Act (“FAA”), which was similar to Article 34 of the Model Law. The court, while acknowledging that parties had a freedom to contract, held that such freedom must have limits, and it is precisely because there is some form of minimal judicial review that courts have expressed approval for the arbitral process. The court therefore held that Article 10 was a “floor” for judicial review below which parties could not require the courts to go, regardless of how clear parties’ intentions were (at 64).

10. On the issue of minimal standards, the 2016 European Court of Human Rights (“ECtHR”) decision
of Tabbane v Switzerland (App No 41069/2012) ("Tabbane") stands for the proposition that even though a waiver simpliciter would not amount to a breach of Article 6 of the European Convention of Human Rights, a breach of the rules of natural justice would not be countenanced. On the facts, the applicant, Mr Tabbane had entered into an arbitration agreement which also waived the possibility of submitting disputes to “any court of law”. Notably, there was a provision under Swiss Law (Article 192 of the Swiss Private International Law Act (“SPILA”)) that permitted such waivers. The ECtHR held that the waiver was “surrounded by minimum safeguards appropriate to its gravity” – there was no indication that Mr Tabbane had not given his consent freely, he was able to appoint an arbitrator of his own choice, and he was also able to take part freely in the arbitration process. Although this is not a decision issue by an arbitral seat, it appears that the parties' agreement to waive can never trump the principles of natural justice – if so, it would mean that there can never be a right to waive a right of annulment exercised based on a breach of natural justice.

11. Another facet to the control exerted by the seat court is that there is, generally, a principle that no one may, by his or her own private stipulation, oust the court of its jurisdiction in a matter that properly belongs to them (The Fehmarn [1958] 1 WLR 159 at 162). Article 34(b) of the Model Law stipulates that an award may be set aside if the court at the seat finds that the subject matter of the arbitration is not capable of settlement by arbitration under its own laws or if the award is in conflict with its public policy. Such matters appear to be properly within the remit of national courts, and it may be especially objectionable to strip the seat court of control over these matters.

12. A final consideration to be had is that the availability of the option to waive the right to set aside an award might be used to shut the door on appeals in meritorious cases, especially where there is an inequality of bargaining power, such as in standard form agreements involving consumers or less commercially savvy parties. This was a concern expressed by the Singapore Ministry of Law in a call for public consultation in 2011, although the waiver provision did not make it to the list of amendments. In Case 4P.172/2006, the Federal Supreme Court of Switzerland ("Tribunale Federale") delivered a judgment on 22 March 2007 that addressed this precise concern in respect of an arbitration between the Association of Tennis Professionals ("ATP") and a tennis player ("Mr Cañas"). In order to join the association, Mr Cañas agreed to the procedural regulations of ATP, which contained an arbitration clause before the Court of Arbitration for Sport ("CAS"), and a clause excluding the possibility to challenge any decision by the CAS. After challenging a suspension before the CAS in vain, Mr Cañas tried to set aside the award before the Tribunale Federale, and ATP sought to invoke the exclusion. The Tribunale Federale held, at para 4.3.2.2, that in the world of sport, an athlete is confronted with two choices – he or she must either agree to adhere to the statutes of the sports federation in question or resign to practise the sport as a mere amateur. Foreshadowing what was considered in Tabbane, the Tribunale Federale held that Mr Cañas’ weaker negotiation position meant that he had not accepted the exclusion of his free will. Although this decision does not stand for a blanket exclusion of the possibility of waiver, it does, at least, highlight its concomitant dangers.

The way forward

13. This essay posits that the way forward might be to recognise
a narrower conception of waiver that might strike a balance between party autonomy, the seat’s interests in the arbitration process, and the need to uphold the standards of natural justice.

14. First, as a preliminary point, any agreement to waive must be made expressly (see, eg, Article 192 of the SPILA). This would ensure that parties are not subject to the vagaries of the doctrine of implied waiver, such as waiver by conduct.

15. Secondly, agreements to waive the right to set an award should only be permitted after the award has been rendered (see, eg, Article 364 of the Romanian Civil Procedure Code). Such an arrangement might circumvent the problem of parties entering into arbitration agreements containing waiver provisions by entering into standard form contracts. Parties can also make a decision as to waiver after the arbitration proceedings and after scrutinising the award – they can then agree to waive if they have been assuaged that they have been given a reasonable opportunity to be heard, and that the arbitrator, in rendering the award, had not violated the doctrine of non ultra petita.

16. Finally, the parties’ right to waive recourse to set-aside applications cannot extend to grounds of public policy and arbitrability, both of which are matters that should properly be decided by the seat court. There is a delicate balance to be struck between party autonomy and public interests, and in this respect, greater deference ought to be given to the national courts.

17. Should these suggestions be implemented, the final argument against waiver of such a right – an argument that goes towards the very international legal system of arbitration – may be rendered merely academic. One would be hard-pressed to find a case where parties have freely and voluntarily agreed to waive the right to set aside, and where there is a defective award not touching on issues of policy that would make the distinction between primary and secondary fora necessary.
Can or Should Parties Waive the Right to Set Aside an Award?

by Wilson Koh, Drew & Napier LLC

A. INTRODUCTION

1. In 1985, Belgium “went as far as [it] possibly could go and dispossessed the Belgian courts of all authority to review domestic awards in a setting aside procedure”. Some expected this to make Belgium a “paradise” and “the promised land” for international commercial arbitration. But that was not to be. By 1998, the law excluding the right to set-aside awards was removed. For reasons not clearly known, people were wary of seating their arbitrations in a jurisdiction where no setting-aside was possible.

2. The Belgium experience suggests that parties value the right to set-aside. This essay discusses why this might be so. I observe that although a defining characteristic of arbitration is its laissez-faire nature, this freedom can be intoxicating and parties should be slow to waive the right to set-aside awards just because they can.

B. CAN PARTIES WAIVE THE RIGHT TO SET-ASIDE AN Award?

3. The effectiveness of agreements to waive the right to set-aside awards (“set-aside waivers”) depends on the applicable lex arbitri. While the New York Convention (“NYC”) recognizes the concept of setting-aside, it does not govern the setting-aside of awards. As a result, since some jurisdictions permit set-aside waivers and parties are free to seat their arbitrations in those jurisdictions, the short answer to this question is yes.

4. At the time of writing, countries that allow set-aside waivers include France, Switzerland, Sweden, Belgium, Turkey, Peru and Tunisia. The European Court of Human Rights has also confirmed that set-aside waivers are not incompatible with the right of access to a court, the right to a fair hearing and the right to an effective remedy.

5. The more complicated question is whether set-aside waivers are permitted in jurisdictions whose legislation does not expressly address the issue. This will likely depend on how each jurisdiction balances competing policy considerations. For example, a Canadian court held that parties may agree to set-aside waivers because Article 34 of the UNCITRAL Model Law (“Model Law”) is not mandatory, but a New Zealand court held that Article 34 of the Model Law could not be excluded because it was of

2 Ibid.
5 See e.g. Caron, The UNCITRAL Arbitration Rules (2013) at 742.
7 French Code of Civil Procedure, Article 1522.
8 Swiss Private International Law Act, Article 192.
9 Belgian Judicial Code, Article 1718.
10 Turkish International Arbitration Law, Article 15.
11 Peruvian Arbitration Law, Article 63(8).
12 Tunisian Arbitration Code, Article 78(6).
13 Tabbane v Switzerland (No. 41069/12) (1 March 2016).
fundamental importance.\textsuperscript{16} One American court held that judicial review of awards was not contractual in nature such that there was a “floor” below which parties could not go,\textsuperscript{17} but another American court upheld the clear intention of the parties.\textsuperscript{18}

6. To avoid being a test case, parties keen on set-aside waivers should seat their arbitration in one of the jurisdictions mentioned at paragraph 4.

C. SHOULD PARTIES WAIVE THE RIGHT TO SET-ASIDE AN AWARD?

7. Whether parties should agree to set-aside waivers must be distinguished from whether parties should be allowed to agree to set-aside waivers. This essay only answers the former.\textsuperscript{19}

8. I focus only on validly obtained pre-dispute set-aside waivers. Although set-aside waivers raise concerns where there is unequal bargaining power,\textsuperscript{20} those cases reveal more about the abuse of unequal bargaining power than the utility of genuine set-aside waivers. Furthermore, courts can arguably review whether a set-aside waiver was validly agreed to.

9. It is difficult to provide a categorical answer because regard must be had to each party’s preferences and risk appetites. For instance, parties that find the lack of an avenue for appeal to be a leading concern\textsuperscript{21} will probably consider set-aside waivers to be out of the question. Bearing this in mind, I will focus only on three potential deal-breakers:

(a) Is the right to set-aside unnecessary because recognition/enforcement can be challenged?
(b) What benefits do set-aside waivers confer?
(c) Do set-aside waivers diminish the perceived legitimacy of an award?

Setting-aside is different from challenging recognition/enforcement

10. One argument for set-aside waivers is that the right to set-aside is unnecessary because parties can challenge the recognition/enforcement of awards.\textsuperscript{22} This is expressly provided for under French\textsuperscript{23} and Swiss\textsuperscript{24} law and will logically apply elsewhere if the set-aside waiver is tightly drafted. Where the Model Law is concerned, the “choice of remedies” policy means that a waiver of the active remedy of setting-aside does not prejudice a party’s recourse to a later passive remedy of resisting recognition/enforcement.\textsuperscript{25} Furthermore, Article V(2) of the NYC confers a discretion on enforcing courts to refuse recognition/enforcement in two situations, which parties arguably cannot contract out of.\textsuperscript{26}

11. The trouble with this argument is that it glosses over significant differences between setting-aside proceedings and recognition/enforcement proceedings. I discuss three.

12. First, resisting recognition/enforcement is a passive remedy. If the best defence is a good offense, parties to set-aside waivers surrender a tactical manoeuvre that they do not yet know whether they will need. A questionable award

\textsuperscript{16} Methanex Motunui Ltd v Spellman [2004] 3 NZLR 454.
\textsuperscript{17} Hoeft v MVL Grp., 343 F.3d 57 (2d Cir. 2003).
\textsuperscript{18} Kim-C1 v Valent Biosciences Corp, 756 F. Supp. 2d 1258.
\textsuperscript{20} Singapore Ministry of Law, “Review of the International Arbitration Act” (21 October 2011) at [24].
\textsuperscript{22} Scherer (n19) at 451.
\textsuperscript{23} French Civil Procedure Code, Article 1522(2).
\textsuperscript{24} Swiss Private International Law Act, Article 192(2).
\textsuperscript{25} PT First Media v Astro Nusantara [2014] 1 SLR 372 at [26].
\textsuperscript{26} PT First Media v Astro Nusantara [2014] 1 SLR 372 at [26].
Can or Should Parties Waive the Right to Set Aside an Award?

A durable Chief Justice Sundaresh Menon
& Tann Asia

Mr Wilson Koh and Ms Lexi Menish

15. An award is also res judicata once rendered. The right to challenge recognition/enforcement may be inadequate if a party wants to commence fresh arbitration proceedings. Although the tribunal in the fresh proceedings could theoretically refuse recognition of the old award if the NYC grounds are fulfilled and proceed with the fresh arbitration, this would not be ideal because it would lead to a situation where two conflicting awards exist.

16. Second, the grounds for setting-aside may be more extensive than the grounds for challenging recognition/enforcement. Therefore, parties cannot presume that rights given up in set-aside waivers will always be preserved by the right to challenge recognition/enforcement.

30 Ibid
31 Aloe Vera of America v Asianic Food [2006] 3 SLR(R) 174 at [48].
17. Third, judgments setting-aside awards may have extraterritorial effect but judgments refusing recognition/enforcement do not. This is significant because worldwide enforcement actions are a real possibility given the globalization of commerce. Without centralizing control at the seat via setting-aside proceedings, an errant award would be almost impossible to kill. Parties who agree to set-aside waivers in the interest of avoiding national courts may thus find that they have taken one step forward but two steps back. This is also relevant to the purported cost savings that set-aside waivers bring, which I discuss next.

**The benefits of set-aside waivers appear illusory.**

18. On the surface, set-aside waivers may appear to bring cost savings, finality and enforceability. However, things are not always what they seem.

19. Set-aside waivers arguably do little to reduce costs. Although no costs will be incurred for setting-aside proceedings, costs will still be incurred for recognition/enforcement. In fact, costs incurred for recognition/enforcement may even increase. As mentioned above, a party seeking to recognise/enforce a questionable award may initiate worldwide recognition/enforcement proceedings in the hope of succeeding in at least one country. This possibility of having to defend worldwide enforcement actions is arguably reduced if the award had been set-aside.

20. It is also unlikely that set-aside waivers will significantly diminish the finality of an award. Setting-aside proceedings must be distinguished from appeals on the merits. The right to set-aside can only be successfully exercised under highly limited and specific circumstances that are carefully defined. For example, it has been said that setting-aside an award in Singapore is “far from commonplace” and a “near-Herculean” task. The Singapore courts have stated that even “perverse” and/or “manifestly unreasonable and irrational” awards cannot be set-aside per se. Although courts elsewhere may possibly be more interventionistic, the paradigm in most jurisdictions is that of minimal curial intervention. Thus, any impact that set-aside waivers have on finality would likely be marginal.

21. Finally, the effect that set-aside waivers have on enforceability should be scrutinized before one concludes that enforceability is enhanced in a desirable manner. It is arguable that set-aside waivers only enhance the enforceability of questionable awards because legitimate awards are unlikely to be set-aside even if set-aside proceedings were commenced. Such enhanced enforceability of questionable awards may not be desirable.

22. Furthermore, enforcing courts may potentially review awards that are made without any control by the courts at the seat more strictly than they would otherwise. If so, set-aside waivers may potentially have a negative impact on enforceability. This is related to my final point below on the impact of set-aside waivers on legitimacy.

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32 Born (n28) at 3390.
34 van den Berg (n6) at 355.
37 Ibid at [56].
40 E.g. UNCITRAL Model Law, Article 5.
Set-aside waivers may diminish the perceived legitimacy of awards

23. It has been suggested that arbitration unchecked means arbitration abused.\(^{42}\) In this vein, there is a burgeoning perception that arbitral tribunals are akin to “private, global super court[s]”\(^{43}\) accountable to no one but perhaps their paymasters. Tempting as it may be to dismiss such criticism as mere sensational journalism, the reality is that no system is perfect and parties ignore the limits of arbitration’s self-regulatory processes at their peril. Guerrilla tactics including bribery, threats of violence and intimidation are not unheard of in arbitration,\(^{44}\) and it is not inconceivable that even the most virtuous of arbitrators may bend under extreme pressure.\(^{45}\)

24. Against this backdrop, set-aside waivers have the potential to diminish the normative and sociological legitimacy of arbitration and arbitral awards because the grounds for setting-aside arguably embody the circumstances in which the legitimacy of the arbitral process has been undermined.\(^{46}\) The right to set-aside is one of the few checks and balances against a tribunal’s powers, and the exclusion of this right may be perceived as an ouster clause that puts tribunals beyond judicial supervision for nefarious reasons. As the saying goes, power tends to corrupt and absolute power corrupts absolutely.\(^{47}\)

25. Although much of the conversation on legitimacy may appear to take place at the level of lawmakers and theorists, it is the parties that are the ultimate users and stakeholders of the arbitration system and who have the most to lose if they are deprived of their day in court and forced into a dysfunctional adjudicatory process.\(^{48}\) Any drop in the perceived legitimacy of arbitral awards will affect the parties most, whether they be the winners or losers of each arbitration. Those who receive adverse awards rendered under questionable circumstances will directly suffer injustice, and those who receive favourable awards rendered under questionable circumstances may find themselves deprived of what would otherwise be an honourable victory and a true sense of justice. Attempts to enforce a questionable award may also lead to reputational damage.

26. Rightly or wrongly, set-aside waivers have the potential to diminish the perceived legitimacy of an award and thus should be approached with caution.

D. CONCLUSION

27. Professor Paulsson once observed that the great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself.\(^{48}\) Inasmuch as some parties may feel that arbitration should be a pure one-stop shop unfettered by officious courts, set-aside waivers should not be entered into based solely on soaring ideals but should include more down-to-earth considerations including those discussed above. Even Belgium’s decision to exclude the right to set-aside in 1985 was not motivated purely by the desire to actualize a completely laissez-faire system, but also by the more practical goal of reducing judicial backlog.\(^{49}\)

28. In summary, although set-aside waivers are possible, they appear to be ill-advised in most cases. Safety nets are not a bad idea if one considers that even Homer nods and if men were angels no arbitration would be necessary.

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\(^{44}\) See Horvath, Guerrilla Tactics in International Arbitration (2013).


\(^{46}\) Menon (n36) at [32] & [56].


\(^{49}\) De Ly (n27) at 1033.
Can or Should Parties Waive the Right to Set Aside an Award?

by Parth Jain, Research Assistant at George Washington University Law School

Introduction

This essay argues that parties to an international arbitration should have a right to waive setting aside proceedings at any stage after the dispute has arisen but not prior thereto. The benefits of this proposition are manifold. Firstly, it would be consistent with the “guiding principle” of arbitration-party autonomy. Secondly, annulment proceedings are critical for preserving the legitimacy of arbitration as a means of dispute resolution and should only be excluded by a voluntary and explicit choice of the parties. By permitting parties to waive setting aside proceedings only after a dispute has arisen, both parties would have to agree to the waiver in express, unambiguous terms. Finally, in international arbitration, enforcement proceedings provide a safety net in the absence of annulment proceedings, as the grounds for refusing enforcement mirror the grounds for setting aside an award under the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”). Thus, parties can expect to receive a similar level of review at the enforcement stage.

This proposition is inspired by the Swiss approach as reflected in Article 192 of Switzerland’s Federal Statute on Private Law (“SPIL”). There are, however, two main differences which set apart the proposition under discussion from the Swiss approach. One, the ability to waive annulment proceedings should be made available to parties irrespective of their connections to the seat, and two, waiver should be recognized and enforced only by an express agreement of the parties, made after the dispute has arisen. To be sure, judicial review is vital to preserve the legitimacy of arbitration as a means of dispute resolution and the award should be subjected to at least one level of court review. Therefore, in order to cover those cases where enforcement of the award might be sought at the seat of the arbitration (and enforcement proceedings under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”)) are unavailable), the Swiss approach as reflected in Article 192 (2) of the SPIL should be adopted in conjunction with the proposition advanced in this essay, to create a balanced framework for setting aside proceedings. The principal espoused here is that setting aside proceedings are important in international arbitration but they should be subservient to party autonomy, in light of the potential for double control.

The essay is divided in three parts. Section I highlights the importance of annulment proceedings. The reason for doing this is two-fold. One is to demonstrate that the scope of annulment proceedings overlaps with the enforcement proceedings under the Convention and therefore, setting aside proceedings may be waivable in international arbitration. Finally, Section III argues that parties should be permitted to exclude annulment proceedings only as they would at the annulment stage.

1 Setting aside proceedings are also referred to as annulment proceedings, vacatur and vacating an award at the seat. These terms are used interchangeably in this essay.
Can or Should Parties Waive the Right to Set Aside an Award?

I. Importance of annulment proceedings.

The purpose of annulment proceedings is to allow the courts at the seat to review an arbitration award for “lack of jurisdiction, procedural irregularity, or violation of public policy.” The availability of these proceedings and the grounds for vacating an award are determined by the *lex loci arbitri* i.e. the municipal law of the seat of arbitration. The supervisory role of *lex loci arbitri* and of the courts at the seat of arbitration is implicitly recognized in Article V(1)(e) of the Convention, which allows courts in the enforcing jurisdiction to refuse recognition and enforcement of the award, if furnished with proof that “[the award] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

As a practical matter, the law of the seat generally governs the arbitration agreement as well, as parties are rarely explicit about the governing law for their arbitration agreement. Therefore, courts at the seat are better placed to decide the proper effect and application of the countries’ laws with regard to not only the arbitration proceedings, but also the formation, effect, performance and termination of the arbitration agreement.

Moreover, in the absence of a decision confirming an award at the seat, a court in the enforcing jurisdiction may have to review challenges to the award *de novo*. This would undoubtedly make the enforcement process lengthy and expensive, as courts generally rely on experts to decide issues under foreign law. Furthermore, if the award is later sought to be enforced in a different country, the second enforcing country would likely conduct a similar *de novo* review, in the absence of a confirmation at the seat of arbitration. Therefore, as recognized in Article V(1)(e), it may be prudent to debate an awards’ validity at the seat rather than in an enforcing jurisdiction.

This approach is supported by international public policy, which promotes deference to the decision of the court at the seat, unless exigent circumstances exist which require the enforcing court to disregard the annulment of the award at the seat. The instances of courts enforcing an annulled award, however, are rare.

In the absence of setting aside proceedings, another compelling problem may arise when all claims of the claimant are dismissed. In such a case, the respondent would be satisfied with the res judicata effect of the award and would have no reason to pursue enforcement proceedings. This would leave the claimant without any remedy.

The importance of setting aside proceedings is further underscored by the legislative experiment in Belgium. In 1985, Belgium amended its arbitration law to exclude the right to seek annulment of an award in all arbitrations held in Belgium where no Belgian party was involved. This was intended to promote Belgium as a hub for international arbitration. However, it had the opposite effect, with arbitration institutes even black-listing Belgium. The Belgian legislature did away with the mandatory exclusion of setting aside proceedings by an amendment in 1998 and adopted the Swiss approach.

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9 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs (Pakistan)* [2010] UKSC 46 (in the absence of confirmation by French courts, the English courts relied upon experts on French law to decide the validity of the arbitration agreement under French law.).


This incident highlights the discomfort of parties in excluding setting aside proceedings under all circumstances. Despite the possibility of double control (discussed below), it is clear that users of arbitration desire the availability of setting aside proceedings and may be better served if permitted to decide its applicability and availability for themselves.

II. Setting aside proceedings in international arbitration should be waivable.

Generally, courts can review an arbitration award at two stages, one is during setting aside proceedings and the second is at the time of enforcement. Article V of the Convention dictates the grounds for refusal of recognition and enforcement of a foreign award covered by the Convention. These grounds are mirrored in Article 34 of the Model Law, which provides grounds for setting aside an award at the seat. Additionally, the objective of both the proceedings is the same, which is, to allow the courts to review an arbitration award for “lack of jurisdiction, procedural irregularity, or violation of public policy”.

Thus, there is a clear overlap in the scope of setting aside proceedings and enforcement proceedings. This overlap has also been referred to as “double control” over the award.

The possibility of double control has resulted from the proliferation of the Convention and the Model Law. As stated above, the grounds for setting aside an award under the Model Law mirror the grounds for refusing recognition and enforcement of a foreign award under the Convention. In turn, a significant number of signatories to the Convention have either adopted the Model Law with little or no modification, or have modeled their arbitration laws to closely resemble the Model Law. This has created a global consensus as to the appropriate grounds for challenging an award at both, the enforcement and annulment stages.

The result is that the protections offered by setting aside proceedings are also offered by enforcement proceedings, as courts at both these stages are required to make similar enquiries before setting aside (or confirming) or enforcing an award. Furthermore, the confirmation (or even setting aside) of an award, does not result in finality of proceedings. A confirmed award when sought to be enforced in a foreign country, would again be subjected to judicial review under Article V of the Convention. Although, a confirmed award would likely be easier to enforce than an award which has not yet been confirmed. There is also a risk of inconsistent awards at the seat and at the enforcing jurisdiction, as a court in an enforcing jurisdiction is not compelled to stay enforcement proceedings, even when annulment proceedings are pending.

Lastly, even when an award has been set aside at the seat, it may still be enforced in another jurisdiction. This is however a rare occurrence.

In international arbitration, in contrast with its domestic counterpart, enforcement is generally sought in a jurisdiction different from where the arbitration is held. This is partly due to parties’ preference to select a neutral place for arbitration. This increases the chances of enforcement being sought under the Convention; making the possibility of double control, almost a certainty.

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14 Supra n 5.
15 Supra n 6.
16 Currently, there are 159 signatories to the Convention (See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (accessed 9 April 2018).
18 Supra n 5 at Article VI.
Equally important is the enforcing jurisdictions’ interest in ensuring that only legitimate awards are enforced within its borders. This is because enforcement of an award gives the award-holder access to the public remedies of the enforcing jurisdiction.\(^{19}\)

It is therefore submitted that in the absence of annulment proceedings, parties can expect to receive a similar level of review at the enforcement stage as they would at the annulment stage. Additionally, a valid waiver would result in a speedier resolution of the dispute while preserving due process objections, if any, for the enforcement stage.

**III. Waiver should be permitted only after a dispute has arisen but not prior thereto.**

It is important to clarify that the position taken in Section II above is not to suggest that setting aside proceedings serve no purpose or are merely duplicative in nature. On the contrary, annulment proceedings are integral to maintaining the legitimacy of arbitration as indicated in Section I. The default position is to retain them, but in practice, not every dispute needs annulment proceedings. Therefore, in light of the reasons explained in Section II, setting aside proceedings should be waivable in international arbitration, but only when the exclusion is mutual, explicit, and calculated.

A few general concerns surrounding exclusion agreements in international arbitration are as follows. One, at the time of entering into a transaction, parties rarely apply their mind to an arbitration clause, much less to the exclusion language. Two, parties may have incorporated rules or law by reference which

\(^{19}\) *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir.2003).
It is also unlikely that parties will be able to foreclose public policy and the subject-matter-incapable-of-arbitration challenges to the award by use of exclusion agreements.

provide for waiver of annulment proceedings, with at least one party being unaware of such waiver. Three, at the time of formation of contract, parties cannot, with certainty, envisage the specific dispute that may arise in future (although they may have a general idea of the nature of the dispute that may arise, given their dealings). The existing framework adopted by majority of jurisdictions is unsatisfactory in dealing with the above concerns, either because they do not allow parties to waive setting aside proceedings under any circumstances, or they allow waiver but without providing sufficient safeguards to protect parties’ interests.

These issues can be adequately addressed when parties decide to waive annulment proceedings after the dispute has arisen. Such a provision would allow parties to assess the nature of the dispute, and the merits of their respective cases. If parties are able to agree on the waiver, they should be permitted to exclude setting aside proceedings. It is primarily in such situations, where parties can agree on nonessential issues, that there exists a genuine desire for speedy resolution of the dispute.

It is equally true that waiver of annulment proceedings may not turn out to be a prudent decision, but parties should, at the very least, have the right to choose. Once a conscious and calculated choice has been made, all risks flowing therefrom lay with the parties. However, when faced with allegations of serious and egregious misconduct, like fraud in obtaining the award, or corruption, courts at the seat are likely to scrutinize them, even if an express exclusion agreement exists. It is also unlikely that parties will be able to foreclose public policy and the subject-matter-incapable-of-arbitration challenges to the award by use of exclusion agreements.

**Conclusion**

In conclusion, annulment proceedings lend legitimacy to arbitration as a means of dispute resolution. However, enforcement proceedings under the Convention, and the Swiss approach under Art. 192 (2) of SIPLA provide similar safeguards, making annulment proceedings of an optional nature. Parties’ intention to exclude annulment proceedings must, however, be mutual, explicit, and calculated. This can be achieved if parties first assess the dispute before mutually agreeing to a waiver. The effort of stakeholders in international arbitration has been to reduce costs and length of proceedings and seek speedier resolution of disputes which result in a binding award. This framework would be a step in that direction.
To What Extent Does SIAC’s Proposal on Cross-Institution Consolidation Protocol Mitigate the Perceived Weakness of Arbitrations in Effectively Resolving Multi-Party, Multi-Contract Disputes?

by Kshama A. Loya, Nishith Desai Associates

Introduction

The contemporary commercial age is witnessing a surge of complex intertwined transactions. Identical parties may perform different roles under a single contract having multiple layers or under multiple contracts. Conversely, multiple parties may play varying roles under multiple contracts. Such multi-dimensional and interdependent contracts are prevalent in industries involving execution of large projects, such as maritime and construction. These related contracts and legal relationships present a complex mesh of issues on several fronts such as performance of contracts, rights and liabilities of parties, and dispute resolution. As much as business projects frequently work under the umbrella of a parent agreement or in sync with ancillary agreements- tending towards consolidated performance, divergent dispute resolution clauses in related contracts can disrupt the contractual equilibrium and hamper consolidation of disputes. Distinct dispute resolution clauses can reduce a singular body of dispute into oft-futile fractions – challenging to resolve, difficult to harmonize.

A legal framework fostering consolidation of disputes in related contracts is not just important for effective adjudication, but necessary to bind the large transaction together and to achieve attainable resolution for stakeholders.

I. Current Consolidation Regime

Commercial agreements today readily choose arbitration as a means to resolve disputes. Arbitral institutions have emerged as active assistants to arbitrations – facilitating effective administration of arbitral proceedings. The rules introduced by arbitral institutions provide a procedural framework that reflects, if not mirrors, the procedural intricacies contained in national laws governing conduct of arbitral proceedings. As a result, parties are increasingly adopting institutional rules to walk hand in hand with the curial law, save for the mandatory provisions.

In majority of institutional rules, consolidation is permissible only when parties either consent to consolidate; all claims arise under the same arbitration agreement; or if not so, the varying arbitration agreements are compatible. While party consent and same arbitration agreement serve as visible grounds for consolidation, compatibility requires some delving into. It is now a settled position that arbitration agreements are considered incompatible if the difference relates to a fundamental element of the arbitration agreement, such as institutional or ad hoc nature of an arbitration.

1 2017 ICC Rules, Article 10; 2016 SIAC Rules, Rule 8; 2013 HKIAC Rules, Article 28; 2017 SCC Rules, Article 15; 2015 CIETAC Rules, Article 19

2 B. Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions (Kluwer Law International, 2006), at para. 296 (“Clauses will be considered incompatible if the difference relates to a fundamental element of the arbitration agreement: the institutional or ad hoc nature of the arbitration, the seat, the number of arbitrators, the appointment procedure. If, on the other hand, the difference relates to a secondary element (law applicable to the merits, steps to be taken before the initiation of the procedure, etc.), the clauses will be considered compatible.”). In other words, incompatibility is typically found when “the seat, the constitution of the arbitral tribunal or the applicable procedure differ.”
contracts containing choice of different institutional rules are not compatible, and hence, are not eligible for consolidation.  

II. Perceived Weakness of Arbitration in resolving related disputes:

Rejection of consolidation on the ground of choice of divergent institutional rules by parties is a setback for present day multi-party, multi-contract arrangements. Proponents against consolidation argue that arbitration is a creature of contract; and contract is a product of consent. Parties agreeing to administration by rules of institution ‘A’ may not welcome consolidation resulting in imposition of administration by institution ‘B’ - merely by virtue of an underlying thread of related contractual relationship. Whether parties are identical or otherwise, legal relationships inform consent, and consent is the epicenter of arbitration. Therefore, the fundamental basis for incompatibility is found in lack of party consent.

However, proponents in favor of consolidation (irrespective of institutional divergence) can argue that related disputes which would otherwise qualify for consolidation ought not to be denied consolidation merely for choice of divergent procedural rules. They may contend that choice of differing procedures does not affect the fundamental nature of the dispute, so as to make arbitration agreements incompatible for consolidation. According to this line of thought, while consent forms the backbone of contracts, it can also be an Achilles’ heel in effective resolution of related disputes.

Some relevant questions emerge from the existing regime. Is it ‘effective’ to have fractions of related disputes resolved in a piece-meal manner by different arbitral institutions? Is it ‘fair’ to permit consolidation in set of contracts A in an industry - for their choice of identical institutional rules; while an identical set of contracts B in the industry fails consolidation due to divergent institutional rules? Is it cost-effective? While consolidation is a unifying term, why should choice of different institutional rules fetter harmonization of commercial disputes? Is engagement of multiple institutions to administer related disputes resourceful? Most significantly, aren’t parties willingly opening doors to inconsistent decisions through a window of varying institutional rules in related contracts? However, if two or more arbitral institutions are permitted to consolidate the particular disputes, how will the inter-play be regulated? Would all institutions jointly administer the disputes or would one be chosen over the other? When administration by one institution is imposed on parties contrary to their consent, would the resultant award be amenable to challenge? Would enforcement be stalled?

The aforesaid questions suggest that the current regime of institutionalized arbitration suffers from critical infirmities. Whilst contentious issues of joinder of parties, intervention by third parties and consolidation have been recognized and catered to by majority institutional rules, there is no existing mechanism to consolidate and bring together disputes prescribing different institutional rules. In such a scenario, there is an emerging need to create a legal framework to consolidate multi-party, multi-contract disputes with multi-institutional rules. The fundamental answer lies in the question: if disputes can ‘otherwise be consolidated’, why must consolidation be refused solely on the ground of differing choice of institutional rules?

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3 Gary Born, International Commercial Arbitration (Kluwer Law International, 2nd ed., 2014), at p. 2584 by selecting divergent arbitration procedures (e.g., ICC Rules in one arbitration and CIETAC Rules in another), arbitral seats and/or appointing authorities, the parties (wisely or unwisely) expressed their preference for incompatible dispute resolution mechanisms, which ordinarily do not admit the possibility of mandatory consolidation...“).
To What Extent Does SIAC’s Proposal on Cross-Institution Consolidation Protocol Mitigate the Perceived Weakness of Arbitrations in Effectively Resolving Multi-Party, Multi-Contract Disputes?

III. SIAC Proposal on Cross-Institution Consolidation Protocol:

The SIAC’s Proposal on Cross-Institution Consolidation Protocol (‘SIAC Proposal / Consolidation Protocol’) provides a breakthrough in the existing regime. It is one of the most innovative mechanisms, simple in rationale yet carefully designed to plug gaps that have so far prevented cross-institution consolidation from seeing the light of the day.

Honoring every party choice in related disputes would make it difficult, almost impossible, to achieve consolidation. Cases of consolidation certainly take a bite off party autonomy from some angle, if not entirely.

The SIAC Proposal recognizes that consent is important to arbitration. To that extent, the SIAC Proposal provides two options for cross-institutional consolidation.

In Option 1, SIAC proposes that the Consolidation Protocol could be a set of new rules arrived at jointly by institutions to decide consolidation applications. The consolidation applications would be decided upon by a joint committee with cross-institutional representation. In Option 2, it provides that the Consolidation Protocol could be a set of objective criteria (such as number of disputes under particular institutional rules, aggregate value of disputes, timing of application amongst others). This criteria would then lead to selection of one out of the existing choice of institutional rules to govern consolidation.

IV. Does SIAC Proposal mitigate weakness of arbitration?

It can be argued that the SIAC Proposal removes a stumbling block in consolidation of related disputes. Option 1 endeavors to bring the institutions together. As a first step, it seeks to achieve consolidation of institutions to remove incompatibility. The second step is consolidation of disputes. Constitution of a joint committee involving members of institutions is a plausible way to respect party choice. It is akin to equal representation from institutions chosen on behalf of parties for deciding consolidation applications.

Proponents of Option 2 can contend that it is easier to continue with the existing regime that arriving at a multi-lateral arrangement as in Option 1. Option 2 makes consolidation less cumbersome than Option 1. As a first step,
Option 2 envisages the criteria for selection of one institution over the other. It then allows the selected institution to proceed with the consolidation application, and administer related disputes. The criteria refers to logical standards such as highest number of disputes under a particular institution, aggregate value of disputes with each chosen institution, timing of application, amongst others. The introduction of criteria and the objectivity thereof helps place sufficient confidence in the mechanism. Option 2 therefore appears to be an objective solution to the issue at hand.

In terms of applicability of the Consolidation Protocol under Option 1 or Option 2, SIAC suggests that the Protocol be applied only to arbitration agreements signed by parties after entry into force of the Protocol. This is fair, and offers a sense of predictability. In addition, the Proposal recommends that the Protocol be made part of institutional rules and be accorded contractual force. As such, when parties make a choice of institutional rules, they also choose the Consolidation Protocol.

In this regard, it is argued that an opt-out mechanism must be offered to parties, rather than imposing the Consolidation Protocol through choice of institutional rules. However, an opt-out mechanism has greater potential to create chaos. It can result in partial consolidation, or removal of some disputes from consolidation where parties have not exercised the opt-out option. Situations involving implied exercise of opt-out options might emerge, necessitating additional level of arguments or preliminary evidence to prove the same, depending on the peculiarities of the case. Also, granting an opt-out mechanism to parties brings the situation to square-one position, where consolidation could be precluded again by way of consent. The SIAC Proposal has not made room for an opt-out mechanism, than leave it to the individual institutional rules.

Majority of national laws provide that an award can be challenged by a party if it furnishes proof that the “composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of (this Part) from which the parties cannot derogate, or, failing such agreement, was not in accordance with (this Part).”

The same ground also exists as objection to enforcement of arbitral award under the Convention for Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).

This ground of challenge and objection has two limbs. One

V. Issues deserving express inclusion in Consolidation Protocol

It is imperative that any form of consolidation – even through the SIAC Proposal- will place some fetter on party autonomy. The natural corollary to arbitral proceedings conducted with lack of consent is challenge to the resultant award, and roadblocks in enforcement. This could render the arbitration proceedings futile and ultimately, bring resolution to a standstill. Consolidation of proceedings without party consent can thus place a hanging sword on the arbitral award. The Consolidation Protocol must expressly cater to this contingencies, than leave it to the individual institutional rules.

4 UNCITRAL Model Law, Section 34; Indian Arbitration & Conciliation Act, 1996, Section 34
is appointment of arbitrator, and second is arbitration procedure. Some institutional rules provide that consolidation of proceedings may result in waiver of party right to appoint an arbitrator, when not so appointed. Some institutional rules also provide that consolidation would result in revocation of the mandate of arbitrators already appointed. As a consequence, consenting to such institutional rules would prevent parties from challenging the award on the ground that the composition of the tribunal was not in accordance with the parties’ agreement.

The second limb is conduct of arbitration proceedings in accordance with the agreed procedure. Adoption of the SIAC Protocol i.e. selecting a single arbitral institution over the other chosen rules to decide consolidation application is certainly contrary to arbitration procedure originally agreed upon by the parties. It can therefore be amenable to challenge or objection to enforcement. In such cases, it would be helpful to have express terms in the Consolidation Protocol to the effect that parties waive their right to challenge the validity and enforcement of the resulting award on grounds emanating from decision to consolidate, on adoption of the Consolidation Protocol. This would sufficiently safeguard the resultant awards from challenge or objection to enforcement. Such provisions are prevalent in certain existing institutional rules.

Thus, the Consolidation Protocol ought not to leave certain key issues such as status of arbitrator appointment, safeguard from challenge and objection to enforcement to individual institutional rules. These issues are fundamental to the workability of the Consolidation Protocol and must be incorporated in the same either with the new stand-alone mechanism suggested in Option 1, or the objective criteria suggested in Option 2. The most optimal solution would be to have the best of both options. A joint committee represented by members of each chosen institution must decide on the consolidation application as under Option 1 on the basis of a basic Consolidation Protocol covering the aforesaid issues. It must then use the objective criteria in Option 2 to select an individual institution to administer the arbitral proceedings.

VI. Conclusion

The Consolidation Protocol is practical and futuristic. If adopted, it would remove a major stumbling block in present day complex arbitrations. Consolidation may affect free flow of consent in a limited manner. However, the impact on efficiency of arbitral proceedings would be significant and certainly, worthy of the limitation on party autonomy. The SIAC Protocol serves as a promise to adjudicate disputes in an effective and harmonized manner. If adopted with certain fundamental safeguards, it would immensely mitigate the risk of inconsistent decisions and challenges that frequent multi-party, multi-contract dispute resolution. The Consolidation Protocol is a promising, pioneering mechanism. Innovations such as these could significantly propel the commercial arbitration regime towards streamlined, consolidated performance of transactions and resolution of disputes. The SIAC proposal recognizes that while consent, neutrality and finality constitute pillars of arbitration, so do efficiency, consistency and harmonization in an increasingly complex global arena.

5 2013 HKIAC Rules, Article 28.6
6 2017 SIAC Rules, Rule 8.10
7 HKIAC, SIAC, ICC