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"Should an International Court in charge of the review of arbitral awards be created?"

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I. Introduction: Identifying needs

It is hard to dispute the fact that international arbitration is, despite its remarkable development in recent years, a perfectible mechanism for settling disputes.

By admitting its perfectibility, we are assuming two things: first, that arbitration is constantly experiencing improvements; and second, that such improvements are incorporated in pursuit of a certain goal.

Perfecting arbitration thus depends on the identification of needs that would move arbitration towards the achievement of its ultimate goal: the administration of justice. Indeed, while domestic courts and arbitrators depart from different sources and apply significantly different methods for dispute resolution, their product is (or it is expected to be) not only comparable, but rather identical, since both court decisions and arbitral awards are meant to reflect a just result for the matter at stake.

Parties submitting their disputes to arbitration are not stepping away from domestic courts in search for arbitrary decisions resulting from the unquestionable discretion of the arbitrators. In fact, since the power of arbitrators to administer justice derives from the consent of the parties, it might be said that arbitrators are even more compelled than domestic judges to issue a truly fair decision.

Thus, arbitration is and should always be a method to achieve justice.

Consolidation of arbitration as the jurisdiction *par excellence* in international transactions in recent years was based precisely upon the understanding that arbitral tribunals would serve as a neutral and flexible forum for the settlement of disputes between traders without the undesirable restrains of domestic rules that might unbalance the equation in favor of their nationals.

Drawbacks were nevertheless relevant at the earlier stage of the consolidation process, when the most pressing need was to shape the dynamics between domestic courts and arbitral tribunals, especially in terms of guaranteeing the independence of arbitrators in the performance of its jurisdictional duties.

A significant development in this sense was the acceptance, at least to a certain extent, of the principle of *finality* of arbitral awards, meant to prevent domestic courts from reviewing arbitral awards unless specific grounds for setting them aside were raised and proven by one of the parties in a regulated procedure.

Nowadays, independence of arbitral tribunals is a recognized feature in most national legal systems. However, the debate on the finality of arbitral awards still raises controversy, and it is actually gaining relevance for a serious reason: the increase in the quantity of claims submitted to arbitration is not accompanied by an increase in the quality of arbitral awards. This has led many specialists to sustain that arbitration is currently in a "race to the bottom" in terms of administration of justice, once again raising the question as to whether private justice can be exempt from arbitrariness, and what are the proper means to achieve it.

This takes us to the purpose of this essay, which is to offer an opinion regarding the need for the creation of an international court in charge of the review of arbitral awards. In order to do so, two main points will be addressed. Firstly, it will be discussed whether arbitral awards should be reviewed and to what extent, and secondly, based on the previous assessments, we will address the question of whether an international court of review is (or is not) a suitable tool for assisting international arbitration in the achievement of its goal.

II. A Trojan Horse in arbitration: Extent of review of arbitral awards

For the purposes of this work, review of arbitral awards is only deemed to include the control of the final award by a jurisdictional body other than the arbitral tribunal.

Having said this, we must depart from the idea that, although finality of arbitral awards is the default rule, their review is not contradictory *per se* to the goal of arbitration. As in any jurisdictional activity, the ruling of the decision makers may be subject to scrutiny from another competent body. In arbitration, such scrutiny finds its basis on two essential features:

First, the parties' choice: As in most aspects, parties' autonomy determines and shapes the arbitral procedure, even when it comes to the review of arbitral awards. Thus, in principle, parties are free to include review mechanisms and define their extent. However, it should be noted that despite its regular practical usage, only few national laws, such as the French Arbitration Act (art. 1489) have expressly recognized the parties' power in that regard.

Second, the dependence on domestic courts: The unavoidable dynamics we referred to above have led to the acceptance of a certain degree of scrutiny on arbitral awards, even before their localization into a national legal system for recognition and enforcement. Accordingly, review of arbitral awards is admissible and in some circumstances even desirable. However, the troublesome issue does not actually lie on whether this scrutiny should be admitted, but rather on the extent of such scrutiny.

As previously stated, the principle of finality is meant to preserve arbitral awards from judicial interference. This is obviously not an easy endeavor, since all arbitral awards eventually depend on domestic courts –and thus, on national legal systems– for their

full effectiveness. However, the balance of forces is essential to maintain arbitration as a valid jurisdictional alternative capable of administering justice.

Taking this into account, national arbitration acts have addressed the issue by setting specific review mechanisms of arbitral awards. A commonly accepted alternative is the recourse for setting aside awards, expanded across the UNCITRAL Model law countries. Exceptionally, as in the case of the English Arbitration Act (art. 69), broader grounds for review are admitted, but the general trend is to make such mechanisms as restricted as possible.

Limited extent of review thus serves as a balance before national courts. But in addition to that, it also reaffirms the relevance of the parties' agreement to submit disputes to arbitration.

When agreeing upon arbitration, parties are making an important decision with consequences for their future relations. By doing so, they accept to rely on the ruling of persons whose main qualifications are, in principle, having been appointed by the parties themselves to solve their disputes pursuant to a defined set of rules. In this sense, as previously mentioned, arbitrators are even more compelled to achieve real justice for the parties who appointed them.

Now, if review of arbitral awards is always available and unlimited, regardless of who is to conduct such review, it is highly questionable that the parties will perceive arbitral proceedings as conducive to a fair and rather definitive solution to their disputes.

An illustrating example *mutatis mutandi* can be found in Sports law. Under the current rules applicable to sports-related arbitration (in force as of 1 March 2013), the Court of Arbitration for Sport (CAS) panel, acting as an appeal instance of decisions rendered by

certain sports federations (such as FIFA), has full power to review the facts and the law *de novo.*

In the opinion of specialists, this feature has devaluated proceedings before sports federations, where parties only limit themselves to superficial discussions, taking into account that all decisions rendered by these bodies might be fully reviewed before CAS, thus turning this first instance into a mere formality before going to the actual decision maker.

Differences between both systems cannot be underestimated, but it seems likely that international arbitration would face the same result if full extent of review on arbitral awards is permitted. In consequence, allowing for full revision of arbitral awards represents a high risk of opening the gates for a "Trojan Horse" in arbitration, as it might lead to the counterproductive effect of turning arbitral proceedings into an inconsequential step before taking the dispute to the actual decision maker, whoever that might be.

Limiting the extent of review of awards thus goes to the very essence of arbitration as a method based on the parties' reliance on arbitrators as administrators of justice.

III. A "one size fits all" solution? The creation of an international court of review and its implications

It is now time to address the heart of the matter, regarding whether an international court of review is a suitable tool for addressing the current need in arbitration towards the achievement of its goal.

The idea of an international court of review implies the creation of a body with broad powers of scrutiny over international arbitral awards, under a specific set of rules that

somehow unifies, in a second instance, the various *ad hoc* and institutional arbitration rules available in the international arena.

Under this premise, the court would control arbitral awards submitted to its jurisdiction, and at the same time would act as a harmonizer of standards in international arbitration.

From that perspective, the creation of this body would certainly move international arbitration a step closer towards the yearned certainty and uniformity that currently lacks, and therefore might *prima facie* serve to the need previously identified.

However, it should not be forgotten that the goal is not to alienate arbitration, but instead strengthening it as an effective method for administration of justice and maintaining its essence at the same time.

In that regard, the real question should be: *Are higher levels of certainty and uniformity actually needed in international arbitration?*

International transactions are conducted in an essentially flexible, changing and disharmonized environment. As such, they are usually subject to more than one set of rules, positive or customary, national or transnational. Arbitration found great acceptance in this field precisely due to its ability to adapt, to understand changes and to move at the same pace with commerce, while maintaining at least a "ground wire" in its necessary interaction with domestic courts and national legal systems.

Assuming that the creation of a court of review for international awards would only make sense if this body operates under a uniform set of rules capable of harmonizing the enormous variety of rules of procedure and substance applied by arbitral tribunals worldwide, then the potential outcome is that harmonization would lead to rigidity, which in turn will diminish the positive diversity offered by arbitration.

On the other hand, it is difficult to imagine the way in which the addition of a "third player" in the dynamics between domestic courts and arbitral tribunals might be of any use. Review by domestic courts, albeit limited, will be necessary as long as arbitral awards require recognition and enforcement. With this in mind, it seems unlikely that domestic courts will treat a "standardized" award from a second instance with less suspicion than it currently treats varied international awards.

In consequence, a "one size fits all" alternative for a higher scrutiny of arbitral awards, despite its advantages, might end up affecting positive features of international arbitration without really dealing with the real issue of making awards effective instruments for administering justice.

IV. Conclusions

At the outset, international arbitration requires improvements for making it a more reliable tool for administering justice, especially taking into consideration that as a dispute resolution mechanism based on the parties' trust it is even more compelled than domestic courts to offer fair decisions.

Review of arbitral awards should be permitted, provided that by doing so arbitration can still comply with its ultimate goal. To that end, scrutiny of awards should in principle be limited, unless parties expressly agree upon a broader extent of review.

The creation of an international court for the review of arbitral awards appears as a valid alternative if the goal is to standardize international arbitration. However, this is opposite to certain features that make it an ideal method for dispute settlement in international transactions, and might create some tension in the dynamics with domestic courts.

Higher quality of awards should nonetheless be a predominant concern for arbitrators and for the entire arbitration community in order to preserve credibility in this dispute resolution method.