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

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Introduction

While it is a truism to note that *"*arbitral awards are final and binding*"*, this very phrase gives rise to a set of questions that merit consideration. Considering the judicial review they are subject to, are arbitral awards actually final (**I**)? Should national courts be responsible for the review of arbitral awards and, if not, who should assume that responsibility (**II**)? Which should be the scope of that review (**III**)? And finally, can the purpose of finality coexist with, or even better, be attained through a system of arbitral review (**IV**)? By dealing with these questions, this paper aims at examining the following vexing issue*: "Should an International Court in charge of the review of arbitral awards be created?"*

I. Are arbitral awards actually final?

a. Finality v. Fairness

Finality constitutes one of the main reasons private parties choose to resolve their disputes through arbitration. Finality as such entails the absence of review of arbitral awards. However, the expectations of the parties when choosing this dispute resolution method are not confined to the issuance of a final award but extend to the adherence to, at least, some basic standards of fairness. As a matter of fact, after the issuance of the award, the finality seems to be the main concern of the winning party, while the losing one clamors for fairness. These expectations coupled with the undeniable fact that arbitrators do make mistakes lead to one inexorable conclusion: at least some degree of review of arbitral awards is necessary and desirable.

The very efficiency of arbitration as a method of alternative dispute resolution hinges on the maintenance of equilibrium between the conflicting considerations of finality and

fairness. Yet, the current judicial review of arbitral awards - in case of requests to set aside at the place of the arbitral seat and/or at the enforcement stage- has failed to strike such a balance.

b. The problem(s) of judicial review

The judicial review of arbitral awards is fraught with a variety of problems. The scope of judicial review reserved for the courts differs from jurisdiction to jurisdiction. Some countries permit a review limited to procedural irregularities and questions of public policy along the lines of UNCITRAL Model Law and New York Convention (NYC), and others have extended the review to points of fact or law. Some jurisdictions reject the very idea of annulment of arbitral awards at the place of the arbitral seat leading to a divergent application of Art.V(1)(e) NYC and to a "floating" enforceability of awards depending on the state where enforcement is sought. Others tend to exercise extraterritorial jurisdiction over actions to set aside. Even laws with identical provisions tend to be interpreted differently by national judges, the concept of public policy being only one of the examples. The possibility of parallel proceedings in different national courts when the losing party seeks to set aside the award and the winning party to enforce it, represents another threat to the effectiveness of international arbitration.

The effectiveness and attractiveness of international arbitration are also threatened by the potential loss of confidentiality when subjecting the award to judicial scrutiny; for, neither an arbitrator's order nor the parties' confidentiality agreement bind the domestic courts. The intervention of national courts has also raised some concerns regarding the effects on the neutrality of the process.

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Furthermore, the absence of a mechanism for appealing arbitral awards does not mean that the court decisions dealing with requests for setting aside or enforcement are not subject to appeal. In light of this, the submission of arbitral awards to judicial review may lead to years and years of challenges rendering the "finality of arbitral awards" just another bullet-point in the scholarly "Why choose arbitration" list.

II. Who should be responsible for the review of arbitral awards?

a. *Judicial Scrutiny v. International Court of Arbitral Review*

The shortcomings of judicial review seem to deal a severe blow to the effectiveness of international arbitration as an alternative dispute resolution method. These very shortcomings reflect the reasons why a unified system of arbitral review should be established. Many scholars have argued in favor or against the creation of an International Court responsible for the review of arbitral awards setting forward various proposals.

Despite the arguments against it – mainly relating to the finality of awards, an International Court responsible for the review of arbitral awards would promote consistency and predictability in decision-making and enforcement, and would uphold the reliability and integrity of the international arbitration system. Unlike judicial review, the "internationalization" and "institutionalization" of review could also provide the necessary guarantees for confidentiality and neutrality

Many of the problems of judicial review, as described above, emerge from the constant battle between the territoriality and delocalization approach. This debate is not only theoretical but has practical consequences, interjecting unpredictability into the arbitral process. While the delocalization approach strongly opposes national annulment

proceedings as contrary to the international character of the arbitration, the territoriality approach favors judicial review of arbitral awards aiming at achieving a certain degree of control. The establishment of this transnational body, which, on the one hand, will provide for arbitral review and, on the other, will be independent from national legal orders does not favor one of the two approaches, but can rather act as an integrative factor, reaching the happy medium between independence and control, finality and fairness.

b. Constitution and Structure

This International Court can be formed under the auspices of a new International Convention (the drafting of which can be entrusted to UNCITRAL) or *via* an addition to, and revision of the New York Convention. Regardless of the form it may take, this Convention will need the states' ratification and should provide for:

a) the replacement of national annulment proceedings;
b) the automatic exequatur of the reviewed award, which will be treated by all signatories as a final judgment issued in their own state;
c) the independence from all existent institutions

As to the appointment of the International Court's members, inspiration can be drawn from the WTO appellate system or the ICSID Annulment Procedure, which provide for a standing organ of 7 members appointed for 4 years and for the appointment of ad hoc Committees, respectively. In order to be more consistent with the international arbitration regime, this body could appoint itself, or with the aid of the parties, three arbitrators to review the award, on a case-by-case basis.

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III. Which should be the scope and limits of the review?

a. Limited v. Full Review of the Merits

Upon hearing the word review, one of the first questions that come to mind is which will be the scope of that review. As mentioned above, the grounds for annulling an award vary from jurisdiction to jurisdiction. Should review be limited to the validity of the arbitration agreement, the incapacity of the parties, procedural irregularities and public policy issues, or should extend to a review of the merits of the dispute?

While both views have been supported with tenacious arguments, in the author's opinion the scale tilts in favor of the review of the merits of the dispute. The existence of a second instance tribunal entitled to correct the eventual flaws of the initial arbitral award (including errors of law and of application of facts to the law) significantly reduces the risk of rendering an award that does not abide by basic standards of fairness and legal justice and safeguards the integrity of the international arbitration system. While the speedy resolution of the dispute is one of the priorities in arbitration, it should not be at the expense of quality and fairness.

b. Will the parties be able to exclude this review by agreement?

In order to answer this question, one should take into account the equilibrium of interests at stake; on the one hand, the party autonomy that pervades arbitration points towards the freedom of the parties to exclude an eventual review. On the other hand, states are highly unlikely to accept the absence of any review, considering that the new transnational body will replace the national setting aside and enforcement proceedings, something that will affect the acceptance of the above-mentioned International Convention. In case the International Court is entitled to review the merits of the dispute,

it is argued that the parties should be able to exclude by agreement this full review, but not a minimum standard of review, as portrayed in the New York Convention or UNCITRAL Model Law.

c. The Public Policy Headache

The uniform interpretation and application of the concept of public policy as reflected in Art.V(2)(b) NYC and many national arbitral laws -based on UNCITRAL Model Law or not- has caused not only endless debates among scholars but also many headaches to national judges called to decide on requests to set aside or recognize and enforce arbitral awards. While the idea of applying, not a national, but an international public policy is gaining more and more ground, the difficulty in delineating this vague notion remains; for, even if called "international or transnational or universal", it effectively refers to the understanding of that public policy by the national judges. It seems that an international mechanism of reviewing arbitral awards, which will replace the national challenge proceedings, has the potential to solve the above problem by applying an "international conception of international public policy".

d. Will the same regime apply to investment arbitration?

The majority of the foregoing proposals concern international commercial arbitration and should not be used as a yardstick for investment arbitration. Despite the similarities, several reasons, such as the incompatibility with the ICSID Annulment procedure (Art. 52 ICSID Convention), prescribe a separate discussion for the establishment of a transnational body responsible for the review of investment awards.

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IV. Can the purpose of finality be attained through a unified system of review of arbitral awards?

It has been argued that in case of an International Court responsible for the appeal of arbitral awards, the purpose of the arbitration (*i.e.* finality) will be defeated. In the author's view, irrespective of the scope of the arbitral review, the creation of that International Court, would not thwart, but instead favor finality.

Beyond the fact that the second instance tribunal will generally not hear new evidence, a solution that has been proposed (*by Prof. Rubino-Sammartano*) is the introduction of a leave to appeal; the party applying for a review of the award should put the amount awarded or another amount to be determined by the International Court, at the disposal of the latter. The Court will be entitled to transfer it to the winning party upon the conclusion of the review proceedings. This will enable an automatic exequatur, will significantly limit the duration of the proceedings by eradicating long-lasting national enforcement proceedings, will avert the use of appeal as a means to delay enforcement, and will favor finality and speedy resolution of disputes by ensuring enforcement.

It is not the *stricto sensu* finality of the first award that matters, but the finality of the dispute resolution as a whole. The replacement of all national challenges by recourse to a single "court", the harmonization of the level of review and the self-execution of the reviewed award can render the resolution of the dispute more time- and cost-efficient than the issuance of a final award that has to endure multiple levels of judicial review.

Conclusion

The idea of establishing an International Court in charge of the review of arbitral awards is not new. This paper argues that international commercial arbitration, not only is

consistent with, but needs such a unified review mechanism in order to avoid the pitfalls of the current system of judicial review. While this paper addresses some questions, there are certainly many more to be answered, many more problems to be solved, many more ideas to be brought up. The creation of an International Court of Arbitral Review will be an arduous task. It will not be a panacea for all arbitration's problems. But it will be a step forward.