HOUTHOFF BURUMA

THE UNITED STATES AND ITS PLACE IN THE INTERNATIONAL ARBITRATION SYSTEM OF THE 21ST CENTURY: TRENDSETTER, OUTLIER OR ONE IN A CROWD?

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"MANIFEST DISREGARD OF THE LAW" OVERSEAS

A brief synopsis of the prevailing views outside the US in respect of 'manifest disregard of the law by the arbitral tribunal in rendering an award

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1. Manifest disregard of the law as ground for setting aside an award or refusing recognition or enforcement of a foreign award

1.1. Manifest disregard of the law as ground for setting aside or refusing recognition or enforcement is akin to a form of public policy analysis: the tribunal is aware of a controlling legal authority and deliberately chooses to disregard the rule.

1.2. 'Manifest disregard of the law' as a term of art will usually not be found in non-US decisions to set aside or to refuse to recognize or enforce an arbitral award. However, in particular countries that do not apply a very limited review seem to refuse recognition or enforcement or to set aside arbitral awards because of such manifest disregard, albeit under a different name or heading.

1.3. There is a delicate balance between the desire to safeguard against arbitrary or fundamentally unjust awards on the one hand and at unnecessary delay on the other. See Jan Paulsson, 'Thinking simply about public policy' in: Liber Amicorum Serge Lazareff, 2011, p. 473-489.

2. Outline of the issues open for discussion

2.1. The following issues can be distinguished:

- Limited and broader review: a matrix
- May parties limit or expand the grounds of review and may such limitation or extension exclude manifest disregard of the law?
- How should such clause be drafted?

3. Grounds for setting aside and a matrix

3.1. Different countries hold different views when it comes to the question how thorough the review may be when scrutinizing an arbitral award in proceedings for setting aside or refusing recognition and enforcement thereof. In countries that adhere to a limited review (to the substance), such limited review tends to get somewhat less limited when it comes to the testing of the public policy ground. Nonetheless, even then the award must have manifest severe shortcomings for the court to set aside the award.

3.2. Most national laws provide for the following grounds to have an award set aside:

(i) No valid arbitration agreement

(ii) Award debtor was not awarded due process (adequate opportunity to present its case)

(iii) Arbitration was not in accordance with the arbitration agreement and/or applicable procedural rules of an institute or pursuant to local law, depending on the case

(iv) Arbitrators went beyond the dispute submitted to them

(v) Matters of the dispute are not capable for settlement by arbitration

(vi) The award is contrary to public policy

In addition, grounds are discernible that in other countries probably would be categorized under public policy

(vii) The tribunal lacked impartiality or independence

(viii) The award was procured by fraudulent or illegal behavior

(ix) The award is internally contradictory/ lacks reasoning

In some states, the following ground sometimes appears

(x) The tribunal's award was seriously wrong on the merits.

Question of facts are hardly ever open to a review.

3.3. See also Article 34 of the Model Law on Commercial Arbitration, which has been adopted by over 60 countries, including Germany, Denmark, Hungary, Australia (in 5 States), Canada (in 13 provinces), US (in 7 states), the UK (in Bermuda and Scotland), Hong Kong and Macao, India, Japan, Singapore, Spain, and Turkey. The Model Law provides for a limited review only.

3.4. In many countries, such as the Netherlands, part of these grounds are deemed to have been waived if they were not raised in the arbitration itself. This however has no bearing on the current discussion with regard to the place of manifest disregard of the law, which will only be evident after the award is made.

3.5. Countries' national laws can roughly be divided into two groups (as case law plays the overall important role, this is only a starting point, something which can no doubt be easily refuted by referring to a specific court case where a different position is demonstrated): limited review as starting point, or a broader review. The following matrix provides some examples of some of these countries.

Limited review	Broader review/more grounds
France: French Supreme Court: 'the claim of contradiction in reasoning constitutes necessarily a criticism of the award on the merits, which is not subject to judicial review'	UK (section 69 AA 1996 (appeal on points of (English) law), which however may be excluded, which limits the review)
The Netherlands	Australia (points of law)(although made more strict; *Gordian Runoff Limited v. Westport Insurances Corporation* [2010] NSWCA 57)
Belgium	Egypt
Switzerland (after entry into force of the new Swiss Federal Code of Civil Procedure, as per 1 January 2011).	China (perverted the law in the arbitration of the case (Article 58 Arbitration Law of people's Republic of China)
Germany	Argentina (all means of recourse available against court decisions can be raised against an arbitral award, if not waived in the terms of reference (art. 758 Argentina national Code of Civil and Commercial procedure)
Spain	UAE (for DIFC-LCIA awards this is less true and is the review much more limited))
US	US (manifest disregard of the law)?

4. Manifest disregard of the law outside the US

4.1. The term as such does not appear in the case law of non-US countries. However, one can imagine that such manifest disregard of the law by a tribunal could lead to the setting aside of the award on grounds (iv) arbitrators went beyond the dispute brought before them and (vi) the award is contrary to public policy, which grounds are present in the Model Law and in nearly every country in the world. Countries whose arbitration laws provide for more extensive grounds, such as 'internal inconsistency', or even 'seriously wrong on the merits' and the possibility in English law of appeal on a point of law could probably categorize such manifest disregard of the law under one of those grounds.

4.2. The case of *B. v. A* [2010] EWHC 1626 (Comm), decided in England, seems to give food for the above thoughts, although the appeal was unsuccessful. In that case the court ruled that it needs to be proven that the arbitrators deliberately disregarded the governing law before a challenge could even have a likelihood of success. In this case the parties had excluded appeals on points of law (Section 69 AA 1996), leading one of the parties to try and circumvent this exclusion by arguing that since (the majority of) the arbitrators had ignored the applicable Spanish law a serious

irregularity had occurred (annulment of ground under Section 68 AA 1996) caused by the tribunal having exceeded its powers. The Court rejected this argument.

4.3. An award may be contrary to public policy due to procedural or material shortcomings. In the Netherlands, for instance, an award is contrary to public policy if the contents or the enforcement of the award violates mandatory rules that are of such a fundamental nature that compliance therewith may not be made dependent on limitations of procedural nature (Dutch Supreme Court 21 March 1997, Dutch Case Law Digest 1998, 207 (*Eco Swiss v. Benneton*). In the same case (C-126/97), the European Court of Justice made it clear that Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of Treaty on the Functioning of the European Union) must be regarded as a matter of public policy. That means that an award that does not take these articles into account or in which they are applied wrongly, must be set aside where national rules on setting aside based on a violation of public policy so require. However, in the end it depends on the depth of the review of the award. This ECJ decision seems to suggest that the court must look to the merits of the case. An argument against a broad review is that matters of competition law are in fact declared non-arbitrable, which is currently not the case. Common opinion says that they are in fact arbitrable. In Dutch legal literature it has been suggested that a manifest, or rather willful, disregard of mandatory applicable law, could lead to the conclusion that the award is against public policy and has to be set aside or refused recognition (G.J. Meijer/H.A.M. van Roessel, TvA 2010/28, § 4.2.4 and conclusion). The Dutch Supreme Court will not lightly decide such is the case if there is any opening that the arbitrators have not ignored the rule but merely did not apply it for good reasons lying in the facts or the law (Dutch Case Law Repertorium 2010/169).

4.4. Another ruling having regard to mandatory EU rules, this one from England, in *Accentuate Ltd. V. Asigra Inc.* [2009] EWHC 2655 (QB), led to a similar result. In this case the court held that an arbitration agreement that stipulated as Toronto as place of arbitration was invalid, due to the mandatory effect of the EU Regulations (in this case the Agency Directive). On the same ground the arbitral award could not be recognized. The arbitral tribunal had decided that it did not need to apply the Agency Directive, even though the English claimant was to perform its part of the agreement in Europe.

5. May parties validly agree to extend or limit grounds for setting aside/vacation?

5.1. G.B. Born, *International Commercial Arbitration*, Chapter 15: Annulment and revision of International Arbitral Awards, Kluwer law International, p 1047-1123, 1092/3, raises the issue whether or not the New York Convention imposes restraints on what

local laws may allow as grounds for setting aside awards made locally, or whether or not such grounds may conflict with the New York Convention. (see US Appellate Court in *Toys "R" Us*, 126 F,. 3d at 22 and 23. promoting the first argument).

5.2. Article 34 of the UNCITRAL Model Law ("Model Law"), which sets out the grounds for setting aside an award, is silent on the issue of waivers. A waiver by parties of the right to challenge an award pronounced in jurisdictions that have adopted the Model Law raises questions as to whether this constitutes a waiver of Article 34 of the Model Law.

5.3. Article 34(6) of the ICC Rules (2012) provides that: "[…] By submitting the dispute to arbitration under the Rules, the parties […] shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." Article 24(2) of the CEPINA Rules contains a similar waiver, but states that it does not apply where an explicit waiver is required by law (for instance in the UK, article 69 AA, an appeal on a point of law). Article 26(9) of the LCIA Rules contains such a waiver for "appeal, review or recourse".

5.4. The UNCITRAL Arbitration Rules, the NAI (*Nederlands Arbitrage Instituut)* Rules and Stockholm Chamber of Commerce Arbitration Rules, to name some examples, do not contain waiver clauses.

5.5. Swiss, Belgian and Swedish law: **if both parties are foreign**, the grounds for a vacation of the award may be limited. Switzerland (Article 192(1) of the Swiss Private International Law Act) (except for CAS arbitrations), Belgium (Article 1717(4) of the Belgian Judicial Code by express declaration and Sweden (Article 51 of the Swedish Arbitration Act). In Switzerland applied restrictively: it must have been agreed explicitly. The general statement that the award shall be binding and final is not enough. Also, referring to the rules of an arbitral institute which preclude annulment is not sufficient.

5.6. French arbitration law was recently changed by the 2011 Decree. Article 1522 of the French Code of Civil Procedure, which applies **to international arbitrations**, provides that *"by way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside".* The parties' waiver will not affect, however, their rights to appeal any decision to enforce an award in France. Also if the case is not international a waiver will not have effect.

5.7. In **England** it is possible to exclude an appeal on a point of English law (Article 68 Arbitration Act 1996).

5.8. In **The Netherlands** the situation is unclear. The law does not contain waiver clauses. There is virtually no discussion on this topic. It is typically assumed that the

grounds for setting aside (Article 1065 Dutch Code of Civil Proceedings) are not eligible for any waiver and it is also highly doubtful whether these may be extended. The US is equally indecisive, albeit that the general rule that the award shall not be subject to any type of review or appeal whatsoever has been held to be insufficient (*Hoeft v. MVL Group Inc.,* 343 F. 3d 57, 60, 66 (2nd Cir. 2003).

5.9. In some countries, all waivers are explicitly forbidden: **Egypt**, **Italy**, **Portugal**.

5.10. National courts in some countries have reached different conclusions with respect to the validity and enforceability of a waiver of the right to file an application to set aside an award where the *lex loci arbitri* does not expressly allow such a waiver. However, since this topic is hardly ever debated in court, it is not possible to draw any conclusion.

5.11. In view of the fact that the arbitration rules of some institutes provide for a waiver of "**any form of recourse"** against awards rendered under such rules, as set out above, the topic of waiver of setting aside proceedings as a whole is becoming increasingly important for practitioners of law.

5.12. Does the sentence 'shall not be subject to any type of review or appeal whatsoever', indeed prevent a review, including any test of manifest disregard of the law? Clearly, in *Hoeft* (see above) this did not result in waiving the right to request the setting aside of the award under the FAA.

5.13. Some Swiss courts have ruled that a general reference to the ICC Rules does not suffice to constitute a valid waiver of setting aside proceedings. How French courts will rule on this issue under the recently amended French Code of Civil Procedure remains to be seen.

5.14. To avoid arguments as to the availability of the right to seek annulment of any award, it is advisable to state expressly in the arbitration agreement that parties will retain that right in the cases where rules seem to block that as far as law permits.

5.15. An extension of the grounds is equally vague. For instance, in *Hall Street Associates v. Mattel Inc. (2008)* the US Supreme Court ruled that the grounds for vacatur in §10 of the FAA were the minimum and maximum norm and could neither be limited nor expanded (older rulings did not seem to object against expansion; see Born, *ICA* (as cited above), p. 1107.

5.16. **Canadian (Ontario)** court: *Noble China Inc v Lei* (1998) 42 O.R. (3d) 69; 42 B.L.R. (2d) 262 (1998 CanLII 14708 (ON SC). The parties, a Hong Kong resident and a Toronto listed company, had included the following arbitration clause: "**No matter which is to be arbitrated is to be the subject matter of any court proceeding other than a proceeding to enforce the arbitration award"**. The Ontario Court

(General Division) ruled that parties may exclude the grounds for setting aside an award, provided that their agreement does not conflict with a mandatory provision of the Model Law or with principles of public policy. The Court took the view that **Article 34 of the Model Law was not a mandatory provision**, largely on the basis of an earlier draft of the Model Law and the fact that Article 34 of the Model Law did not contain any of the usual mandatory language, such as the term “shall”.

5.17. **New Zealand** court: *Methanex Motonui Ltd v Joseph Spellman and Ors* CA 171/03 of 17 June 2004. This court took a different approach and concluded that there was **no contemplation that parties to arbitral proceedings could seek to limit further the rights of review contemplated by Article 34** (of the First Schedule of the Arbitration Act 1996 of New Zealand) (which clause is substantially Article 34 of the Model Law)**.** The parties were, however, allowed to limit the scope of natural justice challenge.