

Waiver of Right of Recourse Against Arbitral Award: a Global Perspective

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Abstract³

This article considers the concept of waiver in arbitration and the relationship between Article V of the New York Convention and articles 34 and 36 of the UNCITRAL Model Law 1985. Further, it asserts that (i) the Convention does not permit a foreign arbitral award to be set aside for error of fact and/or law but the award can be set aside if the arbitral process was defective on one of the grounds set out in Article V of the Convention; (ii) Article V is a Convention obligation for all Contracting States to ensure compliance through their State courts to preserve the integrity of the arbitration process at the enforcement stage; (iii) any attempt by a waiver clause in an arbitration agreement or a waiver provision incorporated into the parties' agreement through institutional rules to avoid the challenge under Article V will be in breach of the Convention and in consequence the enforcement court would be obliged not to recognise the waiver; (iv) the Model Law attempts to provide a procedural mechanism to ensure an award made at the seat of the arbitration, in the case of international commercial arbitration,⁴ is not in breach of any of the grounds in Article V in order that it will be enforceable in the state of the seat or in another state; (v) where the enforcement is in the State of the seat, Article 34 repeats the provision of Article V of the Convention to ensure the Convention obligation of the State is met; and (vi) when a foreign award is sought to be enforced in a Model Law state other than the State of the seat, Article 36 of the Model Law repeats Article V of the Convention to ensure that the Convention obligation of the state is met.

In essence, this article asserts that any attempt by a party, or parties, to arbitration proceedings to tinker with Article V of the Convention by agreement or through institutional rules may not be welcome by the enforcement court. It may also be against public policy for

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⁴ When an international arbitration award is enforced through the seat court, the award is referred to as 'domestic international arbitration' award. The new phrase 'domestic international arbitration' appears to originate from the decision of Belinda Ang Saw Ean J, judge of the High Court of Singapore, in *Astro Nusantara International BV v. PT Ayunda Prima Mitra & Others* [2012] SGHC 212 (*Astro I*). On appeal, it received endorsement by the by the Court of Appeal Singapore, reported as *PT First Media TBK v Astro Nusantara Internationalo BV & Ors* [2014] 1 SLR 372 (*Astro II*).

the court to recognise such a waiver clause in an agreement or in the institutional rules under which the parties have agreed to conduct the arbitration proceedings when the waiver provision blatantly impinges on Article V of the Convention.

Introduction to Concept of Waiver

‘Waiver’ is a generic term. In the legal context, the consequences of waiver relating to contract may differ from country to country. In essence, the law relating to the concept of waiver may not be uniform in all countries. The concept of waiver, its application and acceptability may be complex when it relates to a statute or constitution.

‘Waiver’ often relates to the voluntary relinquishment or surrender of some known right or privilege. There are authorities to suggest that there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of the facts which would have enabled him to make an effective election as to the waiver⁵.

Introduction to New York Convention and UNCITRAL Model Law

The New York Convention, 1958 (“Convention”) is the foundation of modern international commercial arbitration. The Convention, *inter alia*, requires the States that have subscribed to it⁶ to enact laws in their respective jurisdictions to recognise an arbitral award made in a foreign State⁷ as binding and to enforce it⁸, subject to conditions laid down in the Convention⁹.

Art. III of the Convention provides as follows:

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Articles. ...

However, the Convention did not gain much popularity until the introduction of the UNCITRAL Model Law, 1985¹⁰ (“Model Law”), because the Convention did not provide for the mechanism or procedure by which an award enforceable under the Convention could be obtained. This gap was filled by the Model Law¹¹, which provided a template for a fully-fledged arbitration statute, for Contracting States to adopt with desired modification, to facilitate an effective arbitral process that would result in an award enforceable under the Convention theme.

⁵ See P. Ramanathan Aiyer, *Law Lexicon*, 2nd edn, p. 1970.

⁶ At present, there are about 167 countries which have subscribed to the Convention. They are called “Contracting States”.

⁷ The Convention allows Contracting States to limit the application of the Convention to other contracting States on grounds of reciprocity (Article I(2) of the Convention).

⁸ Article III of the Convention.

⁹ Article IV of the Convention.

¹⁰ Amended in 2006.

¹¹ At present, about 85 states in a total of 118 jurisdictions have substantially adopted the Model Law and enacted it as their local law with desired modification. These countries are called Model Law countries.

It must be observed that the terms of the Convention constitute a sovereign obligation of the Contracting States. The integrity of the system of arbitration provided by the Convention lies in Art. V, which guarantees the due process of arbitration. Art. V of the Convention provides as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that —

- (a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or
- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) the award has not yet become binding on the parties, or 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that —

- (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Without the guarantee of due process contained in Art. V, Convention arbitration would not appeal to the commercial world. The Convention arbitration theme must be understood. It

gives a free hand to the parties in the appointment of arbitrators and in the procedure at arbitration. There is no restriction as to who can be the arbitrator and as to the procedure to be adopted. There is no necessity for the parties to have their disputes arbitrated under any institutional rule or through any institution and parties may opt for *ad hoc* arbitration. Under the Convention theme, even a tribal leader can be appointed by the parties to arbitrate a dispute between them and make a Convention award enforceable worldwide in the Contracting States. Having given such freedom and flexibility, the control mechanism (or the check and balance device) is implanted into the system only through Art. V, which upholds the integrity of the system of Convention arbitration.

The Convention did not expressly make provision for setting aside of an award at the seat court. However, such setting aside was within the envisagement of the Convention. Art. V(1)(e) refers to such setting aside as well as Art. VI. The Art. VI reads as follows:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

The Model Law, in its Art. 34, made provision for the setting aside of an award at the seat court. The grounds for setting aside provided in the Art. 34 are materially the same as the grounds for refusing recognition and enforcement in Art. V of the Convention. Whilst Art. 34 of the Model Law makes provision for the setting aside of an award, Art. 36 materially mirrors Art. V of the Convention, i.e. provision for refusing to recognise and enforce an award.

In effect, the check and balance mechanism in Art. V of the Convention is reflected in articles 34 and 36 of the Model Law. At the outset, it must be noted that both the articles 34 and 36 of the Model Law clothe the court with a discretion¹² to set aside or refuse enforcement of an arbitral award, when materially one or more of the Art. V grounds are established, as opposed to placing a duty on the court to set aside or refuse enforcement, as the case may be.

It is important to understand the relationship between the articles 34 and 36 of the Model Law, and how they reflect Art. V of the Convention. First, Art. 34 of the Model Law is an expression of the setting-aside envisaged in Art. V(1)(e)¹³ of the Convention.

Second, Art. 34 is an amplification of Art. V of the Convention and thus also of Art. 36 of the Model Law. When an award is unenforceable within the terms of the Convention, it may be prudent to have it set aside at the seat. Without such setting aside, an award may be taken around the world, particularly in the case of an award debtor with assets in many jurisdictions, to jurisdiction after jurisdiction, until full satisfaction of the award sum.

¹² Like art. V of the Convention.

¹³ And article VI of the Convention.

The Trend: Waiver of the Rights of Recourse against Award

A trend has been evidenced whereby the rules of some arbitral institutions pave the way for the rights of recourse to be waived. The recourses against an arbitral award or its enforcement are those found in articles 34 and 36 of the Model Law, rooted in Art. V of the Convention. An application to set aside under Art. 34 will always be made to the seat court¹⁴. A request or plea to refuse recognition and enforcement under the art. 36 will be made at any court where enforcement is sought¹⁵.

The starting point of the institutional waiver clause was the UNCITRAL Arbitration Rules (as revised in 2010) [“UNCITRAL Arbitration Rules”], which also serve as model rules that have been subsumed, with desired modifications, into the arbitration rules of many institutions worldwide¹⁶. The said Rules provide, in their Annex entitled: “Model Arbitration Clause for Contracts”, that parties, if they wish to exclude recourse against an arbitral award, may agree to a waiver of ‘their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law’. The provision reads as follows:

Possible waiver statement

Note: If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.

Waiver

The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.

A close reading of the said Annex to the UNCITRAL Arbitration Rules will reveal that the model waiver clause therein was intended to be adopted by the parties into their agreement, if they desired, and not for adoption by the arbitral institutions into their rules as a default clause. However, various arbitration institutions took it a step further by including in their arbitration rules a clause waiving the parties’ rights of recourse.

¹⁴ For example, in the UK, an application will be made by invoking the jurisdiction of the court under ss. 67 and/or 68 of the Arbitration Act 1996. In Singapore, it will be under ss. 3 and/or 24 of the International Arbitration Act. In Malaysia, the jurisdiction will be invoked under s. 37 of the Arbitration Act 2005. In Hong Kong, it will be by s. 81 of the Arbitration Ordinance which *per se* incorporates art. 34 of the Model Law.

¹⁵ In the UK, such a request will be made under s. 103 of the Arbitration Act 1996. In Singapore, under ss. 3 and/or 31 of the International Arbitration Act. In Malaysia, it is under s. 39 of the Arbitration Act 2005. In Hong Kong, the same will be made by virtue of s. 83 of the Arbitration Ordinance which *per se* incorporates art. 36 of the Model Law and ss. 86, 89, 95 and 98D of the Ordinance as applicable.

¹⁶ Including KLRCA in Malaysia.

The ICC Arbitration Rules, at Art. 35(6), provide that, by agreeing to arbitrate under the ICC Arbitration Rules, parties ‘shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made’. LCIA¹⁷ Arbitration Rules¹⁸, in its article 26.8, provides that, by agreeing to arbitrate under these rules, ‘[t]he parties also waive irrevocably their rights to any form of appeal, review or recourse to any state court ... insofar as such waiver shall not be prohibited under any applicable law’.

The Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules)¹⁹, at Art. 32.11, provides for waiver in almost identical terms as that in LCIA Arbitration Rules. AIAC²⁰ Arbitration Rules 2018 is not an exception to the trend. It provides for waiver in its rule 12(10)²¹ in almost identical terms to that of LCIA Arbitration Rules and SIAC Rules.

Art. 34.2 of 2013 HKIAC²² Administered Arbitration Rules provides for the waiver of recourse in a slightly different style, namely ‘[t]he parties ... shall be deemed to have waived their rights to any form of recourse or defence in respect of enforcement and execution of any award, in so far as such waiver can validly be made’. It must be observed that in all the institutional rules providing for the waiver a caveat has been placed to say that parties may so waive their rights only insofar as such waiver can validly be made.

The reason why arbitral institutions include such waiver clause may be to earn themselves a competitive edge in commercialising their institution²³. However, inclusion of waiver clauses in institutional arbitration rules raises two crucial issues. The first is the question of public policy affecting waiver of the rights of recourse against arbitral award and its enforcement. The second is the question of degree of notice required to incorporate such waiver clauses into the parties’ agreement by reference.

¹⁷ London Court of International Arbitration.

¹⁸ Effective 1st October 2014.

¹⁹ 6th Edition.

²⁰ Asian International Arbitration Centre (Malaysia).

²¹ The same provision was found in rule 11(7) in the previous version of the KLRCA Arbitration Rules (Reprint 2014) and rule 12(11) of the AIAC Arbitration Rules 2017.

²² Hong Kong International Arbitration Centre.

²³ In ECtHR, *Tabbane v Switzerland* (application no. 41069/12), 1st March 2016, the European Court of Human Rights (“ECtHR”) held that a law allowing waiver of recourse against an arbitral award was not contrary to Art. 6(1) of the European Convention on Human Rights (“ECHR”), which guaranteed the right of access to court and right to a fair hearing. In this case, the parties entered into a share related agreement which contained an arbitration clause. The arbitration clause stipulated that the right of recourse to court against the award was waived. Upon a dispute between the parties, arbitration was conducted with seat in Switzerland. Following the finding of the arbitral panel, the losing party applied to the Supreme Court of Switzerland to set aside the award. Art. 192 of the Swiss Private International Law Act (“PILA”) expressly allows recourse against an arbitral award to be waived by agreement of parties when the parties thereto are non-Swiss. In view of the waiver agreement and Art. 192 of PILA, the Supreme Court refused to entertain the application to set aside. The losing party took Switzerland to ECtHR on the question of whether its right of access to court, guaranteed in Art. 6(1) of ECHR, was thereby compromised. The ECtHR held that the law allowing parties to agree on such waiver did not offend Art. 6(1) of ECHR. The ECtHR also noted that the aim of Art. 192 of PILA was to facilitate Switzerland’s policy to appear as an attractive venue for arbitration and to reduce the caseload of its Supreme Court. Such statutes allowing waiver are also found in a few other jurisdictions including France, Belgian and Sweden. It appears that the ECtHR did not consider Art. V of the New York Convention which was in the nature of fundamental guarantee applicable to all arbitrations, the awards whereof are intended to be enforced under the New York Convention theme. It also appears that the ECtHR did not consider the common sovereign obligation undertaken by Contracting States by subscribing to the New York Convention. In any case, the authorities on this issue from jurisdictions where there is a statutory provision allowing the waiver agreements will not be applicable to jurisdictions where there is no such statutory provision.

The general jurisprudence relating to waiver of legal rights and the general jurisprudence relating to incorporation of terms by reference will first be dealt with below. That will be followed by a discussion of the application of those general principles to the waiver clauses in question.

Waiver of Legal Rights: General Jurisprudence

A promise, made orally or by conduct, to waive a right may operate as an estoppel. It is important to distinguish the principle of estoppel from that of waiver. Estoppel is not a cause of action but it relates to a rule of evidence²⁴.

Waivers may arise in relation to constitutional, statutory or contractual rights. Courts may be more ready to recognise a waiver when it has no nexus to a statute and stands purely as contractual in nature only²⁵, i.e. the waiver relates only to a right conferred by terms of the contract. However, courts are extremely reluctant to allow a waiver when it relates to a constitutional and fundamental right²⁶. The Courts have also said that a right arising from requirements and conditions imposed by a statute for the benefit of a party can only be waived by the party if no public interest is involved in such waiver²⁷. Even when a waiver relates only to a contractual right, the question of waiver may become complex in the presence of a ‘non-waiver clause’, which is common in financial facility documents²⁸.

A waiver clause in a standard form agreement may be harsh to a party who did not indeed intend to waive his rights. Generally, to avoid inadvertent waiver of any rights in the course of a contract, it is not uncommon to find a ‘non-waiver clauses’ in agreements.

Incorporation of Terms by Reference: General Jurisprudence

The law relating to incorporation by reference of terms found in one document into a parties’ agreement may vary from jurisdiction to jurisdiction. Generally, the more onerous a term is, the better the notice of it required to incorporate it by reference. This has been a measure of safeguard the courts have taken to protect contracting parties from being bound by terms which they do not know or cannot be expected to know.

There are English authorities that support the proposition that onerous clauses sought to be incorporated by reference require a higher or specific notice of the clause, called ‘Red Hand Clause’. In *Thornton v Shoe Lane Parking*²⁹, the English Court of Appeal held that the more onerous the clause, the better notice of it needed to be given.

²⁴ See *Municipal Corporation of Greater Bombay v Dr. Hakimwadi Tenants Association & Ors*, AIR 1988, SC 233.

²⁵ See *Miranda v Arizona* 384 U.S. 436.

²⁶ See *Basheshr Nath v Commissioner* AIR 1959 SC 149.

²⁷ See *Krishna Bahdur v M/s Purna Theatre & Ors* AIR 2004 SC 4282.

²⁸ See *Tele2 International Card Company SA and Others v Post Office Limited* [2009] EWCA Civ 9.

²⁹ [1971] 2 WLR 585.

In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*³⁰, the respondent hired 47 photos from the appellant at a rate of 50 pence³¹ per photo per day. The delivery note *inter alia* included a term that if the photos were held for more than 14 days, a holding charge of £5.00³² per photo per day would be charged, which was 10 times the original rate. The respondent held the photos for 14 days beyond the initial 14 days. The appellant billed the respondent a sum of £3,290.00³³ for the additional period. The English Court of Appeal said, as a guideline, that in deciding whether a clause was incorporated into the contract between the parties, regard should be had to the nature of the transaction, the character of the parties, the sufficiency and proportionality of the notice, and whether it would be fair to hold the parties to the condition in question. Having taken these factors into consideration, the court held that the onerous term in that case was not incorporated into the contract. The court also said that ‘particularly onerous or unusual’ terms require special notice and that when a term is particularly onerous the person seeking to rely on the term must take greater measures to bring it to the attention of the other party.

Waiver of Rights of Recourse against Award: Public Policy considerations

Effectiveness of an agreement to waive the right of recourse against an arbitral award or its enforcement depends on public policy considerations affecting such waivers, which are discussed below.

(i) Convention perspective

An agreement between parties to waive all of their rights of recourse to court against an arbitral award is contrary to the terms of Art. V of the Convention, which constitutes a sovereign obligation of Contracting States. Any attempt to remove the jurisdiction of the court to check the due process of arbitration as provided by Art. V of the Convention will hit the very foundation of the system of Convention arbitration, the integrity of which is upheld only by the provision in Art. V, i.e. the check and balance mechanism.

A distinction must be made between the other rights entrenched in the Model Law, such as a right of appeal against a preliminary ruling as to jurisdiction made by an arbitral tribunal under art. 16 of the Model Law, and the right arising from the guarantee of due process embedded in Art. V of the Convention. A waiver of such other rights may not strike public policy as would a waiver of Art. V of the Convention do. For example, if the right of appeal against a preliminary ruling as to jurisdiction is waived in the interests of speeding arbitral proceedings, it may not compromise the integrity of the system of Convention arbitration as any award made will still be subject to scrutiny as to due process guaranteed by the Art. V of the Convention.

³⁰ [1989] QB 433.

³¹ Plus VAT at 15%.

³² Plus VAT at 15%.

³³ Plus VAT at 15%.

Unlike other rights entrenched in the Model Law, like the right of appeal under art. 16 of the Model Law referred to above, the requirements in Art. V of the Convention are fundamental in character, which cannot by their very nature be excluded or waived. For instance, the ground provided for in Art. V(1)(a) *inter alia* is that the parties did not have capacity to enter into the contract, eg. one of the parties was a minor. If a minor enters into an agreement, without capacity, and such agreement includes an arbitration clause coupled with the waiver clause incorporated by reference to rules of some arbitral institution, will the courts deny the ability of the minor to challenge the award?

Art. V(1)(b) *inter alia* provides a ground for challenge when a party was not given proper notice of the arbitral proceedings. If a claimant obtains an award without notice to the respondent, which will be in fundamental breach of natural justice, will the courts deprive the respondent of his ability to apply to set aside or refuse recognition and enforcement of the award?

The ground provided in Art. V(1)(d) *inter alia* is that the composition of the arbitral tribunal was not in accordance with agreement of parties. For example, if an agreement provides for arbitration by a panel of three arbitrators, one to be appointed by each party and the third one to be appointed by two arbitrators, and one of the parties appoints a sole arbitrator and procures an award, will the courts refuse to set aside or be unwilling to refuse recognition and enforcement?

The ground in Art. V(2)(a) is that the subject matter of the difference between parties is not capable of settlement by arbitration. Some good examples of such differences were given in the Singapore Court of Appeal case of *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in compulsory liquidation)*³⁴. They were disputes over citizenship, legitimacy of marriage, grant of statutory licences, validity of registration of trade-marks and patents, copyright, winding-up of companies, bankruptcy and administration of estates. Again, will the party be restrained from challenging an award made on such matters?

Art. V(2)(b) provides the ground for challenge when the award is contrary to public policy. Will a court close its mind to public policy because the parties agreed to waive their right of recourse against an award? It cannot be denied that no court can be asked to recognise and enforce an award that is against public policy.

It has to be reiterated that the requirements in Art. V of the Convention, by their very nature, cannot be waived. Any attempt to disable the check and balance mechanism in Art. V, if allowed, would result only in a miscarriage of justice.

(ii) *Ousting of court's jurisdiction*

³⁴ [2011] SGCA 21, [2011] 3 SLR 414.

A waiver clause in the context of recourse against an arbitral award or its enforcement is in the nature of an agreement to oust the jurisdiction of the court which has been conferred by statute. An agreement to arbitrate is a private matter between the parties affecting them only. However, an agreement to oust the jurisdiction of the court is one related to administration of justice and is a matter between the parties and the court. Parties submit to arbitration by agreement, but they submit to the court by exercise of court's jurisdiction under the statute. An enactment subsuming art. 34 of the Model Law has nothing to do with any agreement of the parties. Hence, it may not be a matter for agreement or choice of parties. The court, in exercising its jurisdiction and discretion under a specific statute, may not be bound or limited by an agreement of the parties.

Lord Denning in *The Fehmarn*³⁵ said "the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them". In a similar line, the Court of Appeal in *Tan Kok Cheng & Sons Realty v Lim Ah Par*³⁶ held "there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants".

The above cited authorities support the general proposition that jurisdiction of the court cannot be ousted by agreement of parties. If the courts are barred from exercising their jurisdiction and discretion, administration of justice will be compromised. Such a usurpation of the court's function and role will not find favour when considered in light of public policy³⁷.

In the context of arbitration, an old English case, *Czarnikow v Roth Schmidt & Co*³⁸, would support the proposition that the jurisdiction of the court cannot be ousted by the parties' agreement. In this case, an arbitration clause stipulated that the arbitrator might not make a reference to the High Court on any point of law, which otherwise the arbitrator would have had authority to make. The court held the restriction to be contrary to public policy.

(iii) *Inequality of bargaining power*

When dealing with policy issues in relation to waiver clauses, it must also be taken into account that many standard form contracts contain arbitration clauses with reference to some institutional rule, such as an insurance contract. The institutional rule may include the waiver clause.

In such cases, there will be no equality in bargaining power. In the above example, the insured may not have any commercial choice but to accept the whole of the standard form including the arbitration clause, which in turn imports by reference the unexpected institutional

³⁵ [1958] 1 AER 333.

³⁶ [1995] 3 MLJ 273.

³⁷ In the Malaysian context, any agreement which "(b) it is of such a nature that, if permitted, it would defeat any law" is unlawful and void under s. 24(b) of the Contracts Act 1950 and any agreement which "the court regards it as immoral, or opposed to public policy" is unlawful and void under s. 24(e) of the Act.

³⁸ [1922] 2 KB 478.

waiver clause. This may be a factor to be taken into account when considering public policy issues affecting waiver clauses incorporated by reference into standard form contracts³⁹.

Waiver of Rights of Recourse against Award: Incorporation by Reference

Apart from public policy considerations affecting the waiver clauses discussed above, another question that arises in relation to institutional waiver clauses purported to be incorporated only by general reference to the institutional arbitration rules is whether such a clause can be incorporated merely by general reference to the institutional arbitration rules.

The general principle, as stated above, is that the more onerous a term is the higher the notice required. The basic function of institutional arbitration rules is to provide the *procedure* for arbitration conducted under the rules and to make provisions relating to the fees of the arbitrators and of the institution. The right of recourse is not a matter of procedure. In fact, recourse against an award or its enforcement is not a matter which is part of *arbitral proceedings*, as they come into play only after completion of arbitration.

Thus, it will be beyond the scope of, and anomalous for, a procedural rule to state that parties waive their rights of recourse to the courts, post award, which will not ordinarily be expected by any party or possibly even its legal representative.

In fact, arbitration clauses are also said to be ‘midnight clauses’, because it is usually one of the last items to be written into the agreement after all the commercial and substantive matters have been dealt with, and not much thought may have been given to the drafting of the clause. It has also not been uncommon to find poorly drafted arbitration clauses being held ‘pathological’⁴⁰ and not having the intended effect. Given this condition, a court may have to be more cautious when dealing with a waiver clause incorporated only by a reference made in an arbitration clause and to ensure sufficient notice if such a clause is to be incorporated into the parties’ agreement.

Taking into account the onerous nature of the waiver clause regarding recourse to a court against an arbitral award or its enforcement and the fact that such a waiver clause is anomalous in procedural rules, a court may require that the parties or their legal representatives are actually aware of the clause before it may be incorporated into the parties’ agreement by reference.

³⁹ Swiss Supreme Court in BGE 133 III 235 (*Cañas v ATP Tour*), 22 March 2007, ASA Bull. 3/2007 dealt with a standard form sports contract incorporating an arbitration clause with the waiver provision, where athletes had little bargaining power against the sports institution. The court held the waiver clause to be invalid.

⁴⁰ See *Mangistaumunaigaz Oil Production Association v. United World Trading Inc.* [1995] 1 Lloyd’s Rep. 617; *Shagang South-Asia (Hong Kong) Trading Co. Ltd. v. Daewoo Logistics* [2015] EWHC 194 (Comm); *Kruppa v Benedetti & Anor.* [2014] EWHC 1887; *Swiss Supreme Court in X Holding AG and Ors v Y Investments NV*, 25 Oct 2010; and *Seeley Int Pty Ltd v Electra Air Conditioning BV* [2008] FCAFC 169.

Conclusion

The Model Law waiver clause appearing in the UNCITRAL Arbitration Rules as a clause that may be optionally agreed on by the parties and the inclusion of the waiver clause in various arbitral institutional rules give rise to complex legal issues. Arbitral institutions, by inclusion of such a waiver clause, purport to compromise the right of parties to have access to courts for redress against an award which is made in breach of the Convention terms. They purport to shut down a party's right to the fundamental defence and guarantee entrenched in Art. V of the Convention.

It is important to appreciate that the intention of the Model Law was to pave the way for the arbitral tribunals to deliver an award that would not breach the Convention terms, and was therefore enforceable in the Contracting States, and for the courts to play a supervisory role over the arbitral process and the consequent award. It could not have been the intention of a legislature adopting the Model Law to allow a party to be deprived of the benefits of obligations that the State has subscribed to under the Convention.

Hence, institutional arbitration rules which purport to deprive parties of their ability to rely on Art. V of the Convention to set aside the award or request refusal of recognition and enforcement may be a challenging issue for the courts of Contracting States to deal with. The subject of institutional waiver clause may become a fertile area of litigation in jurisdictions which have subscribed to the Convention and have subsumed the Model Law.