Absence of the set-aside action under Latvian law: a comparative and historical perspective

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INTRODUCTION

As aptly put by Prof. William W. Park more than 30 years ago:

> [T]he arbitral situs bears a duty to provide the loser of an arbitration with a non-waivable right to challenge an award for an arbitrator's disregard either of his mission or of fundamental due process in the proceedings. This obligation springs from the active and passive support that the country of the proceedings gives to the arbitration. Elimination of any and all grounds for challenge of awards is an intriguing but misguided experiment, likely to do more harm than good to fair and efficient international dispute resolution.[1]

At the time of Prof. Park's observation, i.e., in 1989, elimination of any or all grounds for challenge of arbitral awards was indeed an intriguing experiment. In 1985 Belgium amended its national arbitration law, doing away with the set-aside action for arbitral awards issued in Belgium unless one of the parties to arbitration proceedings was Belgian. In 1989 Switzerland, albeit in a somewhat not as drastic manner as in Belgium, amended its Private International Law Act (PILA) and provided arbitrating parties with a right to voluntary exclude the opportunity to challenge an arbitral award at the post-award stage. Both approaches drew much attention from the wider arbitration community. The former was criticized as going a bit too far; the latter, on the other hand, served as an example and role model for a handful of other jurisdictions, such as France, Sweden, and, indeed, also the same Belgium that in 1998 amended its arbitration law to align it with that of the Switzerland. Nowadays, the possibility to voluntary exclude the right to challenge an arbitral award before national courts is a relatively common phenomenon, available to arbitrating parties in plenty of fora.

However, only few jurisdictions go as far to exclude the set-aside action altogether. One of such jurisdictions is Latvia where the law is simply silent upon the possibility to apply for the setting-aside of arbitral awards. In fact, Latvia is the only Member State of the Council of Europe that does not provide in its national law a mechanism for challenging arbitral awards. Although in recent years there have been vivid academic discussions about the necessity of setting-aside proceedings as such,[2] apart from the somewhat unsuccessful, and later also abandoned Belgium's attempt to eliminate the set-aside action, only a handful of States have endeavored to do away with the setting-aside action altogether. Currently this is the case in Latvia and also Kyrgyzstan, formerly – in Belgium and Malaysia. That, in turn, suggests that the set-aside action is a continuously prevalent method of judicial control over arbitration proceedings that States are generally reluctant to give up. Due to the severe consequences that even a voluntarily

[1] Park WW (1989), pp. 231-232.
[2] See, among other sources, Van den Berg AJ (2014).

exclusion of the set-aside action entails, also arbitrating parties are generally cautious and hesitant to exclude their right to challenge an arbitral award.[3]

This contribution addresses the absence of the set-aside action under Latvian law from a comparative and a historical perspective. Following the re-establishment of independence in early 1990s, all three Baltic countries were in a profound need to reform their legal systems. This naturally included also the applicable regulation on arbitration. In Latvia, the new arbitration law came into force only in 1999 ('1999 Arbitration Law')[4] – much later than arbitration laws in the neighbouring Estonia and Lithuania where new arbitration laws were introduced in 1991 and 1996 respectively. And it was not only the timing of introduction of new arbitration laws that differed among the three countries – it was also the substance and approach that each legislator employed in drafting its new arbitration law. Although all three Baltic countries drew inspiration from the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ('Model Law') and the 1976 UNCITRAL Arbitration Rules, neither the 1991 Law on the Arbitration Court of the Estonian Chamber of Commerce and Industry (ECCI),[5] nor the Lithuanian 1996 Law on Commercial Arbitration,[6] or the Latvian 1999 Arbitration Law resembled the UNCITRAL Model Law to the extent that the respective States could be labelled as 'Model Law countries.'[7] In Estonia and Lithuania that, however, changed in 2005 and 2012, respectively, when both States enacted new arbitration laws based on the UNCITRAL Model Law. This, however, is still not the case in Latvia.

In Lithuania and Estonia, arbitrating parties are also given the opportunity to challenge arbitral awards. In Lithuania, this is possible under Chapter VIII of the 2012 Lithuanian Law on Commercial Arbitration; in Estonia – under Chapter 76 of the Estonian Code of Civil Procedure. Again, this, however, is not the case in Latvia. Despite the set-aside action being universally recognized as a prevalent method of judicial control over arbitration proceedings, Latvia's attempts to introduce the mechanism in its national law have been unsuccessful. Given that recently more and more States have introduced in their national laws a statutory possibility for parties to voluntarily exclude the set-aside action, Latvia's extreme example raises the question – to what extent the non-existence of the set-aside action under national law is beneficial to arbitration both from the perspective of the State at the seat and, more importantly, the users of arbitration, in particular arbitrating parties. Is the set-aside action indeed an unwanted creature of the past, serving as an unnecessary mecha-

[3] For Switzerland, see ibid, p. 15 and Dasser F (2007), p. 471. For Sweden, see, e.g., Heuman L, Jarvin S (eds) (2006), p. 536.

[4] It was included as a separate section in the Latvian Code of Civil Procedure (LCCP). Until the entry into force of the 2015 Arbitration Law, arbitration was regulated by Part D of the Latvian LCCP.

[5] The 1991 Law on the Arbitration Court of the ECCI (in an amended version still applicable as the ECCI institutional rules. https://www.koda.ee/sites/default/files/content-type/content/2019-06/Reglement%202019%20ENG.pdf Accessed 12 July 2021)) was replaced by the 2005 Estonian Code of Civil Procedure, secs. 712-757 of which are now the applicable law on arbitration in Estonia. www.riigiteataja.ee/en/eli/513122013001/consolide. Accessed 12 July 2021.

[6] The 1996 Law on Commercial Arbitration (https://www.e-tar.lt/portal/lt/legalAct/TAR.952D5CAC35AC Accessed 12 July 2021) was replaced by a new Law on Commercial Arbitration in 2012. www.newyorkconvention.org/11165/web/files/document/2/1/21090.pdf . Accessed 12 July 2021.

[7] It is said that initially the draft of the 1999 Arbitration Law was based on the UNCITRAL Model Law, however, during negotiations certain provisions, especially in relation to court assistance to arbitration proceedings, were deleted and not contained in the final version. See Ūdris and Kačevska (2004), p. 212. The Lithuanian 1996 Law on Arbitration was drafted in accordance with the UNCITRAL Model Law, however, only the 2012 Law on Arbitration is considered as being based on the UNCITRAL Model Law. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status. Accessed 12 July 2021.

nism of double-control over arbitration, or does it still serve as a continuously significant and needed tool for the safeguarding of both the State's and also arbitrating parties' rights interests?

I. THE SET-ASIDE ACTION – IN BRIEF

Judicial review of an arbitral award by means of setting-aside proceedings is often expressed in different terms – recourse against an award, challenge, action for an annulment of award, application to set aside, vacatur of an arbitral award, and sometimes even an *appeal*.[8] What in essence the setting aside of an arbitral award entails is a decision of a national court at the seat of arbitration to the effect that the arbitral award has no legal force.[9] It is a review by a national court of an arbitral award in order to confirm that the arbitral award (and the underlying arbitration process) complies with, on the one hand, certain fundamental procedural principles and rules and, on the other hand, that State's overriding mandatory provisions and public policy. Generally, the setting aside of an arbitral award is understood as not entailing any review on the substance of an arbitral award.[10]

The setting aside of an arbitral award is considered as the mirror action of recognition and enforcement of an arbitral award. It is said that the setting aside of an arbitral award developed as a separate action due to two main factors – (i) the losing party`s unwillingness to wait until the other party will bring an enforcement action and (ii) the growing internationalization of arbitration in a sense that enforcement of an arbitral award is no longer confined to the State where the arbitral award is made.[11] Since every State could decide on the recognition and enforcement of an arbitral award differently, the losing party had an incentive to obtain a declaration that the award is null and void from the State where such an award was made.[12]

Setting aside of an arbitral award is possible only on very limited grounds. It is seen as a form of risk management whereby courts remedy violations of fundamental procedural rights during arbitration proceedings.[13] Traditionally every national arbitration law contained different grounds upon which an arbitral award could be set aside. To some extent this is true also in contemporary arbitration world – each State can decide for itself on which grounds an arbitral award should be annulled.[14] Nevertheless, with the introduction of the UNCITRAL Model Law in 1985 the annulment grounds have been somewhat uniformed.[15] Until now, the UNCITRAL Model Law has been adopted in 85 States in a total of 118 jurisdictions.[16]

Article 34(2) of the UNCITRAL Model Law provides for an exhaustive list of annulment grounds. Considering that these grounds generally represent a common consensus of the available means of recourse against arbitral awards, they serve as an illustration of the nature of setting-aside proceedings. The said grounds can be summarized as follows:

(i) Incapacity of a party or invalidity of the arbitration agreement under the law chosen by the parties or the law of the seat of arbitration;

[8] For examples of the different expressions used in national arbitration legislations see, e.g. Poudret JF, Besson S (2006), p. 703.

[9] Jaksic A (2002), p. 168. See also Born G (2014), p. 2905.

[10] See, e.g. Born G (2014), p. 3186. In some jurisdictions, for example, England, it is possible to also appeal the arbitral award *stricto sensu*. This is provided for in s. 69 of the 1996 English Arbitration Law.

[11] Van den Berg AJ (2014), p. 3.

[12] Ibid.

[13] Park WW (2001), p. 595.

[14] See Craig WL (1988).

[15] The UNCITRAL Model Law, Explanatory note, para. 44.

[16] See Status of the Model Law. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status. Accessed 12 July 2021.

(ii) Violation of due process (improper notice of the appointment of arbitrator or the arbitral proceedings, inability to present one's case);

(iii) Excess of authority (the award deals with a dispute or contains decisions on matters beyond the scope of the submission to arbitration);

(iv) Irregularities in the arbitral procedure (composition of the tribunal or the arbitral procedure inconsistent with the agreement between the parties or with the applicable *lex arbitri*);

(v) Arbitrability (the subject-matter of the dispute is not capable of settlement by arbitration under the law of the seat of arbitration);

(vi) Public policy (the award violates the public policy of the seat of arbitration).

Since setting-aside proceedings are considered as the mirror action for recognition and enforcement of an arbitral award, the annulment grounds in Article 34(2) of the UNCITRAL Model Law essentially mirror the grounds for refusing recognition and enforcement under Article 36(1) of the UNCITRAL Model Law. The latter, in turn, were inspired by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') and virtually repeat the grounds for refusing recognition and enforcement of an arbitral award under Article V of the New York Convention.[17]

The principal source of setting-aside proceedings is the national arbitration law applicable to arbitration proceedings.[18] Although each State is free to specify its own grounds for annulment, generally, such grounds to a large extent are very similar from one State to another. This is mainly due to the broad recognition and adoption of the UNCITRAL Model Law.

An arbitral award may be annulled only by a court at the place where arbitration proceedings are located, i.e., at the arbitral seat.[19] The annulment of an arbitral award is in the exclusive competence of courts at the seat of arbitration and therefore cannot be done anywhere else, e.g., at the State where recognition and enforcement of an arbitral award is sought. The specific court at the seat of arbitration to which an action for annulment must be filed and the procedure, including a possibility to appeal the decision on annulment, will differ from one State to another.[20] There are States where the annulment of an arbitral award can be potentially decided in three court instances.[21] There are also States where the action for annulment is submitted to and decided only in one instance.[22] The most wide-spread approach, however, is to provide a two-tier mechanism for reviewing arbitral awards by first submitting the application to an appellate court and then having a possibility to appeal that decision before the Supreme Court.[23]

[17] The UNCITRAL Model Law, Explanatory note, para. 46. See also Born (2014), p. 3187.

[18] For a general overview of setting-aside proceedings in international arbitration see, e.g. Born G (2014), pp. 3163-3393.

[19] Ibid, p. 2905, Gharavi HG (2002), pp. 11-17.

[20] For example, under the UNCITRAL Model Law, each State is competent to specify the court or courts which will perform functions referred, inter alia, in art. 34(2) of the UNCITRAL Model Law. See art. 6 of the UNCITRAL Model Law.

[21] Until 2013, this was the case in Austria. In 2013 Austria reformed its arbitration law and now, similarly to Switzerland, provides only for one instance setting-aside proceedings. See sec. 615 of the Austrian Arbitration Act.

[22] This is the case, e.g. in Switzerland, where actions for annulment of arbitral awards are submitted to and decided only by the Swiss Federal Tribunal (art. 191 of the Swiss PILA). Recently, other countries have followed the Swiss and amended their arbitration laws to make the setting-aside proceedings more effective. Such countries include, e.g. the Netherlands, Austria, Poland. See, e.g. Orecki M (2015) One Instance for Setting Aside and Enforcement Proceedings in Poland as of the Start of 2016. Kluwer Arbitration Blog, 3 November 2015. http://kluwerarbitrationblog.com/2015/11/03/one-instance-for-setting-aside-and-enforcement-proceedings-in-poland-as-of-the-start-of-2016/. Accessed 12 July 2021.

[23] See, e.g. art. 50(1) and (7) of the 2012 Lithuanian Law on Commercial Arbitration; sec. 43 of the 1999 Swedish Arbitration Act; art. 9 of the 2008 Slovenian Law on Arbitration; sec. 1065 of the German Code of Civil Procedure and other arbitration laws.

As to the time-limit for parties to file for the annulment of an arbitral award,[24] the UNCITRAL Model Law provides that a such a request should be filed within 3 months from the date on which the party making that application had received the award. This is also the most common time limit required by many national arbitration laws.[25] There are, however, also States that specify a shorter period of time for filing an action for annulment, e.g., one month[26] or even shorter.[27] Moreover, not all decisions of an arbitral tribunal or an arbitral institution may be challenged at the seat of arbitration. It is generally understood that only arbitral *awards* (as opposed to procedural orders and mere decisions of either an arbitral tribunal or a supervising arbitral institution) issued by an arbitral tribunal may be subject to setting-aside proceedings at the seat of arbitration.[28]

To sum up, States providing for judicial review of arbitration process and arbitral awards by means of setting-aside proceedings differ in terms of assigning jurisdiction to their State courts, providing time limits for parties to apply for the setting aside of an arbitral award, and also in prescribing which decisions of an arbitral tribunal can be submitted for challenge before state courts. Apart from these procedural divergences, States also differ as regards the available grounds pursuant to which an arbitral award can be challenged. For the purposes of further analysis, the UNCITRAL Model Law provides a good overview of such grounds, representing the common consensus of not only States that have implemented the UNCITRAL Model Law in their national arbitration law, but also other States that provide for generally similar grounds of annulment. This is explained by the fact that most contemporary legal systems 'all address the same international arbitral process and all generally share the same objectives (of facilitating that process).'[29]

Judicial review of arbitration proceedings and the resulting arbitral award has been perhaps the most widely debated aspect of court involvement in arbitration proceedings. The fact that States are free to 'apply whatever measures of judicial control'[30] of arbitration they deem necessary has generated various approaches and attitudes towards regulating arbitration. On the one hand, there are States that favour minimal court control over arbitration; on the other hand, there are States where arbitration is subjected to very strict State and judicial intervention, as opposed to mere support and control, thus undermining the whole essence of arbitration.[31]

It is said that 'an absence of any court scrutiny at the arbitral situs would adversely affect the victims of defective arbitration, and in some cases the interests of the reviewing State itself.'[32] At the other extreme, 'excessive judicial intervention [..] may undermine international arbitration as a private dispute settlement mechanism.'[33] What is necessary, however, for a truly efficient functioning of arbitration, is

[24] Generally see, e.g. Poudret JF, Besson S (2006), p. 713-719; Born G (2014), pp. 3379-3385.

[25] See, e.g. sec. 1059(3) of the German Code of Civil Procedure (ZPO); sec. 34 of the 1994 Czech Law on Arbitration; art. 37(4) of the 2005 Danish Arbitration Act; art. 1064(a)(2) of the 2015 Dutch Arbitration Act; sec. 41(3) of the 1999 Finnish Arbitration Act; art. 34(3) of the 1994 Ukrainian Law on Arbitration; art. 1717(4) of the Belgian Code of Judicial Procedure and many others.

[26] See, e.g. art. 1510 of the French Code of Civil Procedure.

[27] See sec. 70(3) of the 1996 English Arbitration Act.

[28] Born G (2014), p. 3385.

[29] Ibid, p. 3187.

[30] Craig WL (1988), p. 174.

[31] See, e.g. Sattar S (2010) where the author discusses problems caused by illegal interference in arbitration by state courts and gives examples of such interference in India, Bangladesh and Pakistan.

[32] Park WW (2001), p. 599.

[33] Abedian H (2011), p. 589.

a careful legislative balance between the two opposing objectives of arbitration – finality and fairness. Before looking whether or not such a balance is achieved in Latvia, a concise overview of other States' approaches to regulating the set-aside action, in particular the exclusion thereof, will be given.

II. AN OVERVIEW OF APPROACHES TO EXCLUDING THE SET-ASIDE ACTION

Approaches to excluding the set-aside action in *lex arbitri* may be categorized as liberal (providing a possibility to voluntarily exclude the set-aside action), restrictive (prohibiting the exclusion of the set-aside action) or intermediate (providing a conditioned possibility to exclude the set-aside action).

2.1. LIBERAL APPROACH

The phenomenon of excluding the set-aside action is commonly referred to as the *exclusion* of setting-aside proceedings or *waiver* of setting-aside proceedings or simply parties' right to conclude an *exclusion agreement*. In essence, exclusion of setting-aside proceedings is a statutorily provided possibility for arbitrating parties to exclude the applicability of setting-aside proceedings at the post-award stage.

While each jurisdiction permitting the exclusion of setting-aside proceedings has its own reasons behind doing so, the main reason in favour of providing a statutory possibility to exclude the annulment mechanism is to attract more arbitrating parties and thus international arbitrations to the particular jurisdiction. It is also said that the exclusion of setting-aside proceedings provides parties with an increased finality of an arbitral award, decreases costs and time associated with the filing of a claim for annulment of an arbitral award before State courts and possibly also avoids dilatory challenge requests.

However, even though a handful of jurisdictions have given parties the autonomy to exclude setting-aside proceedings, judicial control by means of setting-aside proceedings is still considered as one of the two most prevalent methods for exercising control over arbitration proceedings in most jurisdictions (the other being recognition and enforcement proceedings). As will be seen below, in many countries, exclusion agreements are even unenforceable and considered to be incompatible with mandatory provisions of law and principles of public policy.

States permitting voluntary exclusion of setting aside proceedings include, e.g., Switzerland, France, Belgium and many others.[34] Switzerland is one of the very first countries that introduced in its arbitration law an express provision providing arbitrating parties with a possibility to exclude the application of setting-aside proceedings.[35] The Swiss PILA of 1989 in this regard can be considered as the pioneer and prototype legislation – an example and role model later followed by many other jurisdictions, such as France, Sweden, Belgium and others. According to Article 192(1) of the PILA, if none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit to one or several of annulment grounds.

Exclusion of the set-aside action in Switzerland is subject to certain preconditions. Not only parties must not have their domicile, habitual

[34] Such States include, among others, Columbia (Article 107 of the Columbian Arbitration Act), Mauritania (Article 59(4)(b) of Mauritian Code of Arbitration), Peru (Article 63(8) of the Peruvian Arbitration Act), Tunisia (Article 78(6) of the Tunisian Code of Arbitration), Turkey (Article 15 of the International Arbitration Law No. 4686 of 21 June 2001).

[35] Generally on exclusion of setting-aside proceedings in Switzerland see, among others, Gaillard (1988), pp. 25-31, Lalive (1988), pp. 2-24, *Poudret (1988), pp. 278-299, Samuel (1991),* Mayer (1999), Blessing (1988), Girsberg and Voser (2016), pp. 42-424, Geisinger and Mazuranic (2013), pp. 255-258, Krausz (2011), Baizeau (2013).

residence, or a business establishment in Switzerland,[36] but the exclusion must be made by an express statement in the arbitration agreement or by a subsequent written agreement.[37] Moreover, it is possible under Article 192(1) of the PILA to exclude setting-aside proceedings in full or limit such proceedings to one or more grounds listed in Article 190(2) of the PILA. In case of a partial exclusion, parties must explicitly state the ground(s) that they wish to exclude.[38]

Parties who exclude form application the set-aside action will not be able to able to challenge the arbitral award before the Swiss Federal Tribunal. Article 192(1) of the PILA concerns only the possibility to exclude the setting-aside proceedings and does not embrace renunciation of court assistance in general. Thus, parties can still benefit from the assistance of Swiss courts in, e.g., the taking of evidence (Article 184 of the PILA), challenge of arbitrators (Article 180 of the PILA) or issuing of interim measures (Article 183 of the PILA).[39] Notably, Article 192(2) of the PILA stipulates that in case parties have excluded the right to challenge an arbitral award and the enforcement takes place in Switzerland, the New York Convention applies *mutatis mutandis*.[40]

Whether or not Article 192(1) of the PILA achieves enhanced efficacy in arbitration proceedings and decreases dilatory requests before the Swiss courts is debated. Although there are certain perceived advantages of excluding setting-aside proceedings (e.g., increased finality of arbitral awards, confidentiality, saving time and costs), most legal commentators doubt that parties would be better-off when concluding an exclusion agreement of setting-aside proceedings.[41] Moreover, it also seems that parties rarely make use of the right to exclude setting-aside proceedings.[42]

Similar approaches to permitting the exclusion of the set-aside action are found in Belgium and France. For example, in Belgium, such a possibility was introduced in 1998 and it replaced the previous mandatorily applicable exclusion of setting-aside proceedings for foreign parties arbitrating in Belgium with a more lenient system of a possibility of opting-out.[43] Conditions for excluding the set-aside action in Belgium are similar to those in Switzerland – parties must not have any connection with Belgium and the exclusion must be explicit.[44] In practice, however, it is said that foreign parties very rarely make use of such a right.[45] Also legal commentators consider that due to the severe consequences that renunciation of setting-aside proceedings entail parties should be cautious with excluding such a right before the issuing of the final award and are advised to conclude exclusion agreements only in exceptional circumstances.[46]

In France, a statutory possibility to exclude the annulment mechanism was introduced relatively recently. It was introduced in the new French Law on Arbitration, adopted on 13 January 2011

[36] In more detail on this requirement please see, e.g. Baizeau (2013), p. 283, Girsberg and Voser (2016), p. 421, Geisinger and Mazuranic (2013), p. 255, Berger and Kellerhals (2010), p. 1673, Mayer (1999), pp. 197-198.

[37] See, e.g., Mayer (1999), p. 199.

[38] Girsberg and Voser (2016), p. 421, Krausz (2011), pp. 148-149.

[39] Krausz (2011), p. 150.

[40] Geisinger and Mazuranic (2013), p. 257, Baizeau (2013), pp. 290-291, Girsberg and Voser (2016), p. 423, Krausz (2011), pp. 153-154. For a more comprehensive overview of art. 192(2) of the PILA please see, e.g., Kaufmann-Kohler and Rigozzi (2015), pp. 508-535.

[41] See, e.g., Baizeau (2005), p. 76, Van den Berg (2014), p. 15, Geisinger and Mazuranic (2013), p. 257, Girsberg and Voser (2016), pp. 424-430. See also Jermini and Arroyo (2009).

[42] Van den Berg (2014), p. 15.

[43] Hanotiau and Block (1999), p. 98. Generally on the Law of 19 May 1998 see, e.g. Demeyere (1999), p. 308.

[44] See, e.g., Verbruggen (2016), p. 490-491.

[45] Verbruggen (2016), p. 492.

[46] Ibid, p. 491.

and being part of the French Code of Civil Procedure ('FCCP').[47] Before its entry into force the annulment mechanism was considered as being part of public policy and therefore could not be excluded.[48] Contrary to Belgium and Switzerland, Article 1522(1) of the FCCP applies to any arbitration which qualifies as *international* within the meaning of the FCCP, regardless of parties' domicile, habitual residence or business establishment.[49] Therefore, provided the arbitration qualifies as international, also French parties can exclude the application of the set-aside action. Exclusion must nevertheless be specific.[50] Also in France the practical effects of the statutory availability to opt for exclusion of setting-aside proceedings is somewhat limited as such possibility appears to be seldom used.[51]

Requirements for a valid and effective exclusion of the set-aside action in State permitting such exclusion are generally similar, though there exist certain differences. States that allow parties the option to exclude the annulment action position themselves as very arbitration friendly and give parties the greatest autonomy to tailor arbitration proceedings to their particular needs. After all, party autonomy is one of the most profound characteristics of contemporary international commercial arbitration.[52] However, it is also evident, especially considering the somewhat scarce practical use of exclusions agreements, that parties nevertheless want to retain certain judicial oversight of arbitration proceedings, even if it results in giving up a share of their party autonomy. Therefore, before opting for an exclusion of setting-aside proceedings, parties should carefully consider whether their particular relationship and the potential future dispute would benefit from alleged rapidity and economy in case of no setting-aside proceedings or, on the other hand, legal certainty that the setting aside of a defective arbitral award can achieve.

2.2. RESTRICTIVE APPROACH

States adopting a restrictive approach vis-à-vis the possibility to exclude the set-aside action can be put in two categories – on the one hand there are those States that are silent upon whether or not they permit arbitrating parties to renounce their right to apply for the setting-aside of an arbitral award, albeit at the same time in practice it is recognized that such exclusion is not permissible; on the other hand, an increasing number of States around the globe expressly stipulate in their *leges arbitri* that arbitrating parties cannot exclude the possibility to apply for the setting-aside of an arbitral award at the post-award stage. Irrespective of the adopted approach, the main reason behind such a restrictive attitude towards permitting exclusion of setting-aside proceedings is the fact that the annulment mechanism is being considered either as a mandatory provision of law or part of the particular States broader public policy.

Arbitrating parties are prohibited from voluntarily excluding the application of the set-aside action at the post award state in countries such as Argentina,[53] Brazil,[54] Cro-

[47] Decree No. 2011-48 of 13 January 2011, reforming the law governing arbitration. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023417517&categorieLien=id. Accessed 12 July 2021. An unofficial translation in English is available at http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf. Accessed 12 July 2021.

[48] Gaillard (ed) (2010), p. 87.

[49] Strik D (2012) Growing number of countries allowing exclusion agreement with respect to annulment warrants greater scrutiny of arbitration clauses. Kluwer Arbitration Blog, 11 January 2012. http://kluwerarbitrationblog.com/2012/01/11/growing-number-of-countries-allowing-exclusion-agreements-with-respect-to-annulment-warrants-greater-scrutiny-of-arbitration-clauses/. Accessed 12 July 2021.

[50] Gaillard and de Lapasse (2011), p. 119

[51] Burda (2013), p. 653.

[52] Born G (2009), p. 1004.

[53] Regarding international arbitration, please see Corra MI, Peña SL (2019) Argentina: International Arbitration 2019. International and Comparative Legal Guide to International Arbitration 2019 (Global Legal Group 2019). https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/argentina. Accessed 12 July 2021. Regarding national arbitration, please see Article 1656 of Argentinian Civil and Commercial Code.

atia,[55] Egypt,[56] India,[57] Italy,[58] Greece,[59] New Zealand,[60] Portugal,[61] Romania,[62] Serbia[63] and many others. Also in Lithuania, it is said that arbitrating parties are not permitted to exclude from application their right to challenge an arbitral award before Lithuanian courts since, as a matter of public policy, such a right cannot be excluded (waived) as it would be considered to be a restraint on the constitutional right to apply to court.[64]

To sum up, States adopting a restrictive approach to permitting exclusion agreements are still in the majority when compared to those handful of States that allow arbitrating parties to exclude the annulment action *ex ante*, i.e., at the time of conclusion of an arbitration agreement. Setting-aside proceedings are viewed as an important mechanism of judicial controls over arbitration that not only protects parties' procedural rights of due process, but also functions as a safety net for the respective States to guarantee that their mandatory provisions of law and public policy is duly observed during arbitration proceedings.

2.3. INTERMEDIATE APPROACH

In addition to States adopting liberal and restrictive approaches to regulating exclusion of the set-aside action in *leges arbitri*, there are also a few States that try to balance the interests of increased party and arbitral autonomy, on the one hand, and protection of parties' due process rights and the interests of the respective State, on the other hand.

One such example is Sweden that differs in its *lex arbitri* between grounds of invalidity (Section 33 of the Swedish Arbitration Act (SAA)) and grounds for challenge of an arbitral award (Section 34 of the SAA) – while the former can in no way be validly excluded, foreign parties are entitled to exclude fully or partially the grounds for challenge of an arbitral award. The grounds of invalidity under Section 33 of the SAA include (i) non-arbitrability of a dispute under Swedish law; (ii) violation of Swedish public policy, and (iii) failure to fulfil certain formal requirements with regard to the written form and signature on the arbitral award.[65] Such grounds have been justified on the basis of public and third-party interest, consequently being mandatory and not subject to exclusion by arbitrating parties.[66]

A similar distinction between grounds of invalidity and grounds for challenge of an arbitral award appears to made also in Finland.[67]

[54] Bianco RC et al, Arbitration procedures and practice in Brazil: overview. Thompson Reuters Practical Law. https://uk.practicallaw.thomsonreuters.com/w-025-0922?transitionType=Default&contextData=%28sc.Default%29 . Accessed 12 July 2021.

[55] Article 36(6) of the Croatian Arbitration Act.

[56] Article 54(1) of the Egyptian Arbitration Act.

[57] Kachwaha S, Rautray D (2020) India: International Arbitration 2020. International and Comparative Legal Guide to International Arbitration. Global Legal Group. https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/india. Accessed 12 July 2021.

[58] Section 829(1) of the Italian Code of Civil Procedure.

[59] Article 900 of the Greek Code of Civil Procedure.

[60] Kalderimis D (2018) IBA Arbitration Committee Arbitration Guide, New Zealand. International Bar Association, p. 23. https://www.ibanet.org/MediaHandler?id=278729D0-AAA9-4D8B-A7D8-A27F2E3F711D Accessed 12 July 2021.

[61] Article 46(5) of the Portuguese Voluntary Arbitration Law.

[62] Article 609 of the Romanian New Civil Procedure Code.

[63] Article 62 of the Serbian Arbitration Act.

[64] Pavan VV, Aukstuoliene G (2018) IBA Arbitration Committee Arbitration Guide, Lithuania. International Bar Association, p. 19 where the authors stress that as a matter of public policy the right to apply for the setting aside of an arbitral award cannot be waived as it would be considered to be a restraint on the constitutional right to apply to court. https://www.ibanet.org/MediaHandler?id=E8DF3800-DB62-44C7-8F32-C40967BCBE36 . Accessed 12 July 2021.

[65] Sec. 33 of the SAA. More generally see, e.g., Hober (2011), pp. 301-309.

[66] Madsen (2016), p. 191.

[67] Section 40(1) of the Finnish Arbitration Act. https://www.finlex.fi/fi/laki/kaannokset/1992/en19920967.pdf. Accessed 12 July 2021.

However, the distinction between the Swedish and Finnish approaches to differentiating between grounds of invalidity and grounds for challenge lies in the fact that, unlike in Sweden, the grounds for challenge cannot be excluded in advance under the Finnish Arbitration Act.[68] *Ex post* exclusion agreements, however, seem admissible under Finnish law.[69] A similar approach to permitting also *ex post* exclusion agreements is adopted also in a handful of States that generally view exclusion agreements impermissible under their law. This can be explained by the fact that after the issuing of an arbitral award arbitrating parties must have been already aware of any possible inconsistencies in the arbitral procedure that may lead to the challenging of the award. Therefore, in case after the issuing of an arbitral award both parties wish to agree on the exclusion of annulment mechanism, States generally tend to make way for such unequivocal expressions of party autonomy. At the same time, it is somewhat hard to imagine a situation where an arbitrating party, being aware of potentially defective arbitral proceedings or an arbitral award after its issuing, would nevertheless agree on the exclusion of setting-aside proceedings. This possibility seems more of a theoretical rather than of a practical nature.

Another noteworthy example is Germany that, somewhat similarly to Sweden, adopts an intermediate approach to permitting the exclusion of setting-aside proceedings and divides the grounds for setting aside of an arbitral award between waivable and non-waivable grounds.

On the one hand, Section 1059(2)(1) of the German Code of Civil Procedure (ZPO) lists grounds that 'are deemed to be in the interest of the parties, and thus can be waived by them under certain conditions.'[70] The grounds listed in Section 1059(2)(1) of the ZPO essentially mirror those of Article 34(2)(a) of the UNCITRAL Model Law. However, on the other hand, Section 1059(2)(2) of the ZPO contains grounds (non-arbitrability and public policy) that are considered to be in the public interest and consequently cannot be excluded by arbitrating parties under any condition.[71] This is due to them being based on notions of non-derogable public policy.[72] However, even in the case of the waivable grounds for setting aside an arbitral award, the parties are permitted to exclude such grounds only if they have knowledge of the potential defect of the arbitral award.[73] In essence this means that the exclusion of grounds for setting aside an arbitral award under Section 1059(2)(1) of the ZPO can be made only after the award is issued (or in rare circumstances also before if the particular facts underlying the excluded defect are known to the parties).[74]

This division of different grounds for setting aside an arbitral award, and more importantly the imposed limitation regarding time of the exclusion of such grounds, creates a healthy balance between the needs of party autonomy and the interests of the State to maintain the review mechanism of possibly defective arbitral awards. Moreover, by stipulating that the waivable grounds of setting aside an arbitral award can be excluded only *after* the relevant facts pertaining to the defectiveness of an arbitral award

[68] Hentunen M et al. (2018) IBA Arbitration Committee Arbitration Guide, Finland. International Bar Association, p. 22. https://www.ibanet.org/MediaHandler?id=74DDFD18-657A-4373-9F32-03A602C5160B. Accessed 12 July 2021.

[69] Ibid.

[70] Scherer (2016), p. 444.

[71] Ibid.

[72] Kreindler R et al. (2018) IBA Arbitration Committee Arbitration Guide, Germany. International Bar Association, p. 20. https://www.ibanet.org/MediaHandler?id=72111D60-6585-412C-B239-189ABF22108F. Accessed 12 July 2021.

[73] Ibid. See also Kröll and Kraft (2015), sec. 1059 at 7. It is said that exclusion of setting-aside proceedings in advance, i.e. prior the award being made, is violating the constitutionally required minimum control. See Cordero-Moss G (2013), p. 182.

[74] Kröll and Kraft (2015), sec. 1059 at 7.

have become known to the parties, due process, and, in particular, the balance of the parties, is maintained on an equal level.

III. ABSENCE OF THE SET-ASIDE ACTION UNDER LATVIAN LAW

In addition to States adopting liberal, restrictive or intermediate approaches to permitting the exclusion of the set-aside action, there also those States that go a step further and exclude the set-aside action from their leges *arbitri* altogether. One of such States is Latvia.

Latvia, however, is not the only State that adopts this rather unique approach to judicial controls of arbitration. Belgium is perhaps the most notoriously known example that, with a view to attract more international arbitrations to Belgium, in 1985 introduced an absolutely unique and unprecedent solution to limiting judicial review of arbitral awards – where both parties to the arbitral proceedings were not of Belgian nationality or did not have residence in Belgium, setting-aside proceedings were excluded altogether and such parties had no possibility to challenge the arbitral award in Belgium at all. It was an utterly novel approach that immediately resonated in significant amount of legal writings concerning its alleged usefulness and efficacy.[75] With minor exceptions,[76] Belgium's approach generally witnessed severe criticism labelling it as 'radical'[77] and 'too extreme'.[78] Commentators, and more importantly also arbitrating parties, were worried about the practical consequences of not having setting-aside proceedings at the seat of arbitration.[79] Parties were not eager to choose a State as their seat of arbitration where court control by way of the setting aside of an arbitral award was automatically excluded.[80] Reportedly, the number of arbitrations in Belgium even decreased.[81] It is said that, for example, the ICC avoided Belgium as a seat for arbitration whenever the task of choosing a seat for arbitration proceedings was in the hands of the ICC International Court of Arbitration.[82] Considered the severe criticism, in 1998 Belgium amended its law to align it with the Swiss example, provide parties solely with a voluntary possibility to exclude the set-aside action.

In 1980 a similar approach was adopted in Malaysia. With amendments to the Malaysian Arbitration Act it created 'an odd divide based on the choice of regime dictated by the arbitration agreement',[83] i.e., the set-aside action was excluded for arbitration held not only under the Convention on the Settlement of Investment Disputes Between States and Nationals of the States 1965 (ICSID Convention), but also under the 1976 UNCITRAL Arbitral Rules and the Rules of the Regional Centre for Arbitration, Kuala Lumpur. Whenever arbitration was held under the said rules, Malaysian courts' jurisdiction to arbitration-related submissions, including annulment actions, was ousted altogether.

[75] See, e.g., Van Houtte (1986), Matray (1986), Paulsson (1986), Hampton (1985), Storme (1986), Vanderelst (1986), Gaillard (1986).

[76] See, e.g., Storme (1986).

[77] Vanderelst (1986), p. 84.

[78] Van den Berg (1992), p. 269. See also Piers (2006), p. 156 et seq. More recently see, e.g. Verbruggen (2016), p. 489.

[79] For particular objections see, e.g. Vanderelst (1986), p. 85, Gaillard (1986), p. 726, Van den Berg (1994), p. 160, Park (1989), p. 23, Jaksic (2002), p. 289.

[80] Verbruggen (2016), p. 489. See also Demeyere (1999), p. 308.

[81] Hanotiau and Block (1999), p. 99, Correll Jr. and Szczepanik (2012), p. 595, , 565, Van den Berg (1992), p. 273. See also Van den Berg (2014), p. 14 where the author indicates that '[p]arties turned away from Belgium as place of arbitration. Belgium was also black-listed by arbitral institutions as place of arbitration'. See also Poudret and Besson (2006), p. 30.

[82] Demeyere (1999), p. 308. On the opposite see, e.g. Paulsson (1986), p. 71 where the author argues that whenever arbitral institutions or arbitral tribunals would be given a power to select a seat of arbitration, they will be tempted to choose Belgium, knowing that their awards could not be set aside.

[83] Rajoo S (2019) Arbitration in Malaysia. Arbitration.ru 2019(5), p. 27. https://journal.arbitration.ru/upload/medialibrary/ff2/Arbitration.ru_N5_9_2019_stranitsy_25_35.pdf. Accessed 12 July 2021.

Although contrary to the Belgian approach, Malaysian approach did not follow the divide between domestic and international arbitration proceedings (or arbitrating parties), but simply the choice of the applicable arbitration regime in the arbitration agreement,[84] it also faced criticism and in with amendments in 2005 was abandoned altogether.

Belgium and Malaysia are examples of past. Kyrgyzstan, on the other hand, similar to Latvia, serves as a contemporary example of a State not providing for the setting-aside of arbitral awards at all. In Kyrgyzstan, it is simply impossible for arbitrating parties to apply before the Kyrgyz courts with an action to set aside an arbitral award issued by an arbitral tribunal seated in Kyrgyzstan. Kyrgyz courts have no competence to decide on the annulment of arbitral awards, following such application by a party to arbitration proceedings. [85] As will be explained below, the very unusual approach in Kyrgyzstan with regard to regulation of the set-aside action (or absence thereof) has its commonalities with the approach (and reasons thereof) in Latvia.

3.1. THE SET-ASIDE ACTION UNDER LATVIAN LAW UNTIL 1940

Total lack of the set-aside action characterizes only contemporary Latvian arbitration law, i.e. the previously in force 1999 Arbitration Law and the currently applicable 2015 Arbitration Law. Interestingly, in the period between 1918 until 1940, the possibility of challenging arbitral awards was explicitly regulated by the then applicable procedural law in Latvia. Until 1940 domestic arbitration was governed by the Russian Civil Procedure Law of 1864 ('Pre-war CPL') that in an amended and modified form continued to be used as the main source of civil procedural law in Latvia during the 1920s and 1930s.[86] Under the heading 'Arbitration', its Articles 1488-1521[87] regulated domestic arbitration proceedings in Latvia.

Articles 1518-1521 of the Pre-war CPL explicitly regulated the annulment of arbitral awards. Generally, the Pre-war CPL did not permit the appeal of arbitral awards *stricto senso* (Article 1514 of the Pre-war CPL),[88] however it nevertheless permitted the challenging of arbitral awards on the basis of certain formal violations. To some extent, the grounds for challenge in the Pre-war CPL were similar and can be compared to grounds for challenge found in contemporary national and international arbitration instruments, e.g., the UNCITRAL Model Law. The Pre-war CPL distinguished between grounds that could be invoked by any of the arbitrating parties and grounds that could be invoked by State courts *ex officio*. Article 1518 of the Pre-war CPL provided for the former:

[84] See the decision in *Jati Erat Sdn Bhd v City Land Sdn Bhd*, [2002] 1 CLJ 346 that confirmed that the exclusion applied to any arbitration held under the then Rules of the RCKAL irrespective of whether the parties were local or international. Reported in Rajoo S (2019) Arbitration in Malaysia. Arbitration.ru 2019(5), p. 28. https://journal.arbitration.ru/upload/medialibrary/ff2/Arbitration.ru_N5_9_2019_stranitsy_25_35.pdf. Accessed 12 July 2021.

[85] Sabirov N (2020) Chapter on Kyrgyzstan. In: International Arbitration. Global Legal Insights, p. 201. http://www.k-a.kg/sites/default/files/gli_ia_kyrgyzstan.pdf. Accessed 12 July 2021.

[86] After the establishment of the Republic of Latvia as an independent State in 1918, a temporary decree issued by the People's Council of Latvia (a predecessor of the Latvian Provisional Government (1918-1920)) on 6 December 19 stipulated that all previously in force laws (i.e. those in force until the October Revolution of 24 October 1917) shall be recognized as sources of procedural law. These 'previously in force laws' included also the Russian Civil Procedure Law of 1864 that during the 1920s and 1930s was locally referred to simply as the Civil Procedure Law. See e.g. Blūzma et al. (2000), pp. 209, 256 and 277.

[87] In the amended numbering as referred to in the very first official issue of the then applicable Civil Procedure Law in Latvian in 1932. Supplemented by brief commentaries of the Civil Cassation Department of the Latvian Senate, i.e. the Supreme Court of the Republic of Latvia at that time, it provided a very comprehensive overview of the Civil Procedure Law itself and its interpretation by the Civil Cassation Department of the Latvian Senate. See Konradi and Walter (1933).

[88] Art. 1514 of the Pre-war CPL stated that 'An appeal of an arbitral award is not permissible'. See also *Bukovskis (1933), pp. 574-575.*

> Arbitral awards, upon a party's motion, are considered invalid and may be annulled only in cases where they have been issued after the expiry of the said term, or on the basis of an agreement that has not been signed by all persons taking part in its drafting, or the terms of the agreement are not adhered to at all.[89]

The first ground referred to arbitrators' obligation to observe a time-limit for issuing an arbitral award;[90] the second ground referred to the invalidity of an arbitration agreement and addressed a situation where the statutorily required *ex post* arbitration agreement was not signed by all future arbitrating parties;[91] the third ground referred to irregularities in the arbitral procedure and can be compared to Article 34(2)(a)(iv) of the UNCITRAL Model Law.

In addition, Article 1519 of the Pre-war CPL provided certain annulment grounds that could have been invoked by State courts *ex officio*:

> Arbitral awards shall be considered non-existent and they have no force and effect as regards: (i) such persons that have not taken part in the drafting of the arbitration agreement; (ii) such matters that fall outside the scope of submission on the basis of the arbitral agreement; and (iii) the matters stipulated in Article 1489.[92]

The first ground concerned the also nowadays well-recognized issue of third-party non-signatories in arbitration proceedings and protected such parties from consequences of the arbitral award. The second ground referred to another well-recognized matter, i.e., the excess of arbitrators' authority (*arbiter nihil extra compromissum facere potest*).[93] Such a ground is also provided for in the UNCITRAL Model Law and many national arbitration laws. Lastly, the Pre-war CPL also permitted the annulment of an arbitral award if it violated the applicable norms of arbitrability, i.e., Article 1489 of the Pre-war CPL that laid down specific rules on non-arbitrability of certain matters, such as matters pertaining to public law, family law, criminal law etc.[94]

An application for setting aside of an arbitral award had to be submitted to State courts within one month from the issuing of an arbitral award.[95] If a State court annulled the arbitral award, parties were back to *status quo ante*, meaning that they had a right to repeatedly submit their dispute to an arbitral tribunal on the basis of a new arbitration agreement or to a state court.[96]

To sum up, the Pre-war CPL provided for several grounds of challenge that were deemed sufficient for the protection of arbitrating parties' rights during arbitration proceedings. The procedure for annulment was not entirely different from the challenge procedure in, e.g., the UNCITRAL Model Law or contemporary national arbitration laws. There were certain grounds for challenge that could be invoked by either one of the arbitrating parties or State courts *ex officio*. Moreover, the possibility of applying for the setting aside of arbitral award was not merely theoretical – case-law of the former

[89] Art. 1518 of the Pre-war CPL.

[90] As provided for in Article 1493 of the Pre-war CPL. It is reported that the legislator's justification behind this ground was that an arbitral award cannot be considered valid if arbitrators had failed to issue it in the said term, because, pursuant to the arbitration agreement, the arbitrators' jurisdiction is limited to a certain time, beyond which it shall not extend. See Pommers (1938), p. 23.

[91] This ground can generally be compared to the ground of invalidity of arbitration agreement contained in, e.g. Article 34(2)(a)(i) of the UNCITRAL Model Law.

[92] Art. 1519 of the Pre-war CPL.

[93] *Bukovskis (1933), p. 576. More specifically on the excess of authority in this regard see* Konradi and Walter (1933), pp. 486-487.

[94] More in detail see, e.g., Pommers (1938), pp. 13, 15-17.

[95] Art. 1520 of the Pre-war CPL.

[96] *Bukovskis (1933), p. 576.*

Latvian Senate and several commentaries on the subject matter evidence that such a possibility was often used by arbitrating parties.

3.2. (ABSENCE OF) THE SET-ASIDE ACTION UNDER LATVIAN LAW POST 1990

Considering that the set-aside action was not alien to pre-war Latvia and the legal environment of that time, a question arises why the setting-aside mechanism did not find its way into the negotiations of the 1999 Arbitration Law when Latvia regained its independence in 1991.

3.2.1.THE 1999 ARBITRATION LAW

The official *travaux preparatoires* of the 1999 Arbitration Law do not contain any references to setting-aside proceedings. There is no discussion in preparatory acts of the 1999 Arbitration Law of whether or not the possibility of challenging arbitral awards should be included in the text of the 1999 Arbitration Law. Interestingly, however, the *travaux preparatoires* do contain, references to the Pre-war CPL and its provisions on, e.g., the formalities of arbitral procedure.[97] Moreover, the *travaux preparatoires* contain also multiple references to the UNCITRAL Model Law and the need of the draft 1999 Arbitration Law to comply with and reflect the general principles of arbitration established therein.[98]

Despite the repeated references to the UNCITRAL Model Law during the drafting process of the 1999 Arbitration Law, the first draft of the 1999 Arbitration Law resembled the UNCITRAL Model Law only to a very limited extent and could not as such be considered to be 'based' on the UNCITRAL Model Law.[99] The same is true also for later drafts adopted by the Latvian Parliament.[100] If looking only at the aspect of court assistance, neither of the drafts contained provisions on court involvement in the appointment and challenge of arbitrators, summoning and hearing of witnesses, taking of evidence, issuing interim measures (except prior the establishment of an arbitral tribunal) and, most importantly, the setting aside of arbitral awards. To understand why this was the case, one must take a short step back.

Generally, the 1999 Arbitration Law can be seen as an unfortunate continuation of the former State arbitration, i.e., State *arbitration courts* that existed as part of the judicial system in the Latvian Soviet Socialist Republic ('LSSR') during the Soviet occupation, and had little to do with arbitration as it was known in the West. Organization and procedure of the LSSR State arbitration was regulated by very brief 20 Articles in the LSSR Civil Procedural Codex. The procedure was relatively straightforward, there was no involvement of courts of ordinary jurisdiction whatsoever, apart from the recognition and enforcement stage. The main idea behind State arbitration was to provide swift resolution of disputes and speedy enforcement. It was not possible to either appeal *stricto sensu* or request annulment of arbitral awards issued by an arbitral tribunal under the LSSR State arbitration.

Knowledge of principles of arbitration as they were known in the rest of the world was very poor at that time in Latvia. The LSSR and its legal environment, including academia and practice, was even more isolated and distanced from the Western world than the Soviet State itself. Legal practitioners and scholars for almost 50 years lived and worked according to perception of law and the general organization of society utterly alien to the Western world. There was very little or no scholarly literature

[97] Letter from the chairman of the committee for the development of the draft 1999 Arbitration Law, Mr. Z. Špengelis, addressed to the Legal Affairs Committee of the Latvian Parliament, 15 December 1997. Unpublished.

[98] Explanatory letter No. 4-2/119 accompanying the first draft 1999 Arbitration Law, the Ministry of Justice of the Republic of Latvia, 8 January 1997. Signed by the State Secretary A. Maldups. See also Letters from the chairman of the committee for the development of the draft 1999 Arbitration Law, Mr. Z. Špengelis, addressed to the Legal Affairs Committee of the Latvian Parliament, dated 1 December 1997, 15 December 1997 and 18 December 1997.

[99] Draft 1999 Arbitration Law, adopted by the Cabinet of Ministers on 8 July 1997. Unpublished.

[100] Draft 1999 Arbitration Law, adopted by the Latvian Parliament (2nd reading), 10 June 1998. Unpublished. Draft 1999 Arbitration Law, submitted for approval by the Latvian Parliament (3rd reading), 6 October 1998. Unpublished.

at all available on international law, let alone on international arbitration, wherefrom one could learn how law, in particular arbitration law, was organized outside the Soviet Union. When in the beginning of the 1990s the entire State apparatus, including the judiciary, witnessed considerable reforms, alternative dispute resolution by means of arbitration was seen as a somewhat logical continuation of the former State arbitration, including all its drawbacks and inconsistencies that it had when compared with the understanding of arbitration in the Western world. Arbitration after 1991, just like its predecessor State arbitration in the former LSSR, needed to provide swift resolution of commercial disputes, exclude any court involvement and guarantee quick enforcement. Considering it was alien to the former State arbitration, the annulment mechanism neither found its way into the 1999 Arbitration Law.

The non-inclusion of the set-aside mechanism in the 1999 Arbitration Law (and the more general hesitation to provide for court involvement in arbitration proceedings per se), can be seen as a *logical* result of various interlinked factors – the unfortunate legacy of the former LSSR State arbitration, general lack of knowledge of international law, in particular, international arbitration law at that time, strong lobbying from various interested parties, including large companies and banks, to minimize court involvement and provide for quick enforcement of arbitral awards, and the fact that some of the very same *arbitrators* who sat in the former LSSR State arbitration were in charge of developing and adopting the draft 1999 Arbitration Law. Taken together, these factors seemingly explain why the final text of 1999 Arbitration Law contained almost no provisions on court involvement in arbitration proceedings, including provisions on setting-aside proceedings.

Despite the *travaux preparatoires* of the 1999 Arbitration Law containing multiple references to the UNCITRAL Model Law and stipulating that it was based on the UNCITRAL Model Law, in reality it was not. To the contrary, the 1999 Arbitration Law was a severe disregard of the UNCITRAL Model Law and such references were only artificial. Reportedly already back in 1997 this was pointed out by international experts, invited to comment upon the draft law.[101]

3.2.2. INITIAL CRITICISM OF THE 1999 ARBITRATION LAW

After the entry into force of the 1999 Arbitration Law, the arbitration environment in Latvia embarked on a very thorny road. As if it was not enough that the adopted law was of a very poor quality, it also allowed any legal person to establish a permanent arbitral institution.[102] This decision opened a floodgate of permanent arbitral institutions and is seen as the main reason for the disproportionately high number of such institutions in Latvia.[103]

The 1999 Arbitration Law as a whole and, in particular, the non-existence of setting-aside proceedings, witnessed severe criticism from arbitration practitioners and scholars soon after the adverse effects of the distorted 1999 Arbitration Law were felt in practice.[104] Only few years after entry into force, the 1999 Arbitration Law had started to produce its adverse consequences

[101] Hacher D. et al. (1997) Comments on the Draft law on Arbitration of the Republic of Latvia, Strasbourg, 10 July 1997. Unpublished (reported in Kačevska I (2010) *Starptautiskās komerciālās arbitrāžas tiesības* [International Commercial Arbitration Law]. Doctoral thesis at the University of Latvia, p. 84). It was noted that '[p]rovided that Latvia does not base its arbitration law on the UNCITRAL Model Law, it will not be considered a 'Model Law country'; therefore, one may anticipate that the majority of international arbitration specialists will not suggest Latvia as a seat for international arbitration.'

[102] Kačevska (2004). Art. 486(3) of the LCCP (1999 version) stated that 'a permanent arbitration institution may be established by legal persons that notify the Ministry of Justice of such an establishment.'

[103] Ibid.

[104] See, e.g., Ūdris and Kačevska (2004), p. 220; See also Kačevska (2004). For more criticism on the 1999 Arbitration Law see also Torgāns (2005).

– the number of *arbitration courts* in less than 5 years had reached 110 and in 2004 more than 5000 requests for recognition and enforcement of arbitral awards were received by State courts.[105] The growing number of pocket *arbitration courts* had created a perception that any additional court involvement in arbitration proceedings, whether in the form of assistance in appointment or challenging of arbitrators, hearing of witnesses or setting aside arbitral awards, would require additional human resources and be a disproportionate financial burden, creating court overload.

3.2.3. LATVIAN CONSTITUTIONAL COURT'S *OBITER DICTUM* TO INTRODUCE THE SET-ASIDE ACTION

The year of 2005 witnessed a very important development for arbitration in Latvia. The Latvian Constitutional Court delivered a judgment in the very first arbitration-related case before it. The so-called *Asmers* case concerned a challenge of the constitutionality of the then in force Articles 132(1)(3) and 223(6) of the LCCP, providing that a judge refuses to accept a statement of claim if parties have agreed to settle their dispute by means of arbitration. Essentially, the constitutional complaint sought to determine whether State courts' duty to refer parties to arbitration was consistent with the right of access to a court. Apart from being the first arbitration case before the Latvian Constitutional Court, the *Asmers* case did not per se add any additional value to the topic of dichotomy between arbitration and human rights. The Latvian Constitutional Court generally reflected and referred to the arbitration-related practice established by the European Court of Human Rights (ECtHR), and found that the conclusion of arbitration agreement as such does not violate parties' rights of access to a court.

However, the added value, at least vis-à-vis the understanding of the necessity of the set-aside action, lies in the Latvian Constitutional Court's *obiter dictum* where it suggested the Latvian legislator to introduce in law the annulment mechanism:

> [T]he Constitutional Court sees certain existing problems pertaining to arbitration proceedings that recently have been emphasized in Latvian legal doctrine and practice [...] Currently in the LCCP and its draft amendments there are no provisions that would provide a mechanism for challenging an arbitral award even if no enforcement request is submitted. Considering the often-expressed critique as to the work of arbitral institutions and the prima facie flaws in regulating the enforcement proceedings, the internationally recognized mechanism for setting aside arbitral awards would be of particularly great significance in Latvia.[106]

The *Asmers* case, in particular the Latvian Constitutional Court's reference to the necessity of setting-aside proceedings in Latvian arbitration law, was an important step towards understanding reasons behind the need of introducing setting-aside proceedings. Unfortunately, due to the non-binding nature of the Latvian Constitutional Court's suggestion, no decision in this regard was taken in the coming years.

3.2.4. ATTEMPTS TO AMEND THE 1999 ARBITRATION LAW

The immediate aftermath of the *Asmers* case saw little, albeit short-lived, positive developments and attempts to introduce setting-aside proceedings in Latvian arbitration law. In 2007 the Ministry of Justice introduced a new draft arbitration law. Although the new draft law contained provisions utterly hostile to the nature of arbitration[107] and received severe criticism,[108] it also saw the first attempts to introduce in Latvian law the set-aside action.

The initiative to introduce the set-aside action came from within the Ministry of Justice, supposedly as a response to the criticism of

[105] Torgāns (2005).
[106] *Asmers* case, No. 2004-10-01, the Constitutional Court of the Republic of Latvia, 17 January 2005, para. 10.
[107] Tipaine (2014), Volkova (2007).
[108] See, e.g., Repšs (2007), Lapsa (2007), Kačevska (2008), p. 32.

the 1999 Arbitration Law and its adverse consequences, as well as the Latvian Constitutional Court's obiter dictum in the 2005 judgment. However, soon after the first draft of the 2007 arbitration law was presented, provisions on the set-aside action were scrapped, seemingly due to the unfortunate use of terminology – provisions permitting *setting-aside proceedings* in the 2007 draft arbitration law referred to *appeal* rather than setting-aside, annulling or challenging of arbitral awards. Allegedly, the drafting committee mistook setting-aside proceedings for an appeal of arbitral awards *stricto sensu*.[109]

It seems that what was a sound initiative, i.e., to adhere to the Constitutional Court's *obiter dictum* to introduce setting-aside proceedings in Latvian arbitration law, eventually turned into another fiasco simply due to lack of knowledge and understanding of the distinction between the appeal *stricto sensu* and a mere challenge of arbitral awards. After deleting from the 2007 draft arbitration law provisions on the unfortunately worded *setting-aside proceedings*, a broader discussion on the introduction of setting-aside proceedings resumed only in 2012.

3.2.5. THE LEGISLATIVE DEVELOPMENT OF THE 2015 ARBITRATION LAW

The legislative development of the currently in force 2015 Arbitration Law dates back to 2012 when discussions on the need to nevertheless develop a new arbitration law finally resumed.

The outset of discussions was again promising – a working group composed of academics, members from the largest law firms in Latvia, arbitral institutions and the LCCI, developed a new draft arbitration law. It managed to take into account the peculiarities of the Latvian arbitration environment and still come up with a draft law that was based on the UNCITRAL Model Law providing, inter alia, also for the annulment of arbitral awards. However, when the first draft arbitration law reached the corridors of the Ministry of Justice, for unknown reasons it was disregarded. Instead, the Ministry of Justice developed its own draft arbitration law on the basis of the poorly drafted 2007 and 2008 versions that, as explained previously, had been subject to heavy criticism from local and international arbitration experts.[110]

The draft arbitration law developed by the Ministry of Justice (eventually being the draft 2015 Arbitration Law) was again a severe disregard of generally recognized arbitration practices and failed to contain principles vital for the smooth functioning of arbitration, most notably – provisions on court assistance, including the annulment action. Ironically, and here again parallels can be drawn with the legislative process of the 1999 Arbitration Law, the Explanatory report accompanying the draft 2015 Arbitration Law contained multiple references to the UNCITRAL Model Law and the fact that allegedly the UNCITRAL Model Law has been taken into account when developing the draft 2015 Arbitration Law.[111] In reality, however, despite certain aspects of the UNCITRAL Model Law were indeed *taken into account*, the draft 2015 Arbitration Law as a whole was very far from being in conformity with the UNCITRAL Model Law and as such could not have been considered to be based on it.

For someone distant from the particularities of the arbitration environment in Latvia, it must be very hard to understand why the Latvian legislator, in particular the Ministry of Justice, has consistently drifted away from the simple act of adopting the UNCITRAL Model

[109] The Constitutional Court in its 2005 judgment referred to 'challenging' as opposed to 'appeal' of arbitral awards. The unfortunate use of terminology was pointed out also by a leading Latvian scholar shortly after the adoption of the 2007 draft arbitration law. See Torgāns (2007). See also Torgāns (2008), pp. 41-51.

[110] See Tipaine (2014), Born (2008), Mistelis (2008), Salans (2008), Knieper (2008).

[111] The Draft 2015 Arbitration Law, Preliminary impact assessment report (Explanatory report), sec. 2. http://titania.saeima.lv/LIVS11/saeimalivs11.nsf/0/A182DD228B4DAF6CC2257C4E003D7B1B?OpenDocument#b Accessed 12 July 2021.

Law and instead tried to develop its own arbitration law from scratch – an arbitration law that almost fully excludes any court assistance to arbitration proceedings, lacks provisions on setting-aside proceedings and contains other anomalies. It is certainly clear why this was the case when developing the 1999 Arbitration Law – the Latvian State, including its legislature, academia and practitioners had little, if any, knowledge of arbitration, not in the sense of the former State *arbitration*, but arbitration as a mechanism of alternative dispute resolution known in the rest of the world. As explained, echoes of the former State *arbitration* materialized into the finally adopted 1999 Arbitration Law.

The aftermath of the 1999 Arbitration Law, leading mainly to efforts to deal with its adverse consequences and eagerly denying the need for court assistance in arbitration proceedings, can be best explained by the fact that the 1999 Arbitration Law allowed any legal person to establish a *permanent arbitral institution*, thus leading to a skyrocketing of the so-called *pocket arbitration courts*. When the draft 2015 Arbitration Law was being developed, the number of these *pocket arbitration courts* had reached its peak – 214(!). Every time the legislator had to consider improvements in the defectively functioning arbitration system, including the introduction of increased court assistance and setting-aside proceedings, one could not possibly shy away from the fact that if there are 214 arbitral institutions and more than 8000 enforcement requests per year, then introduction of the UNCITRAL Model Law-type court assistance in arbitration proceedings and statutory provision of setting-aside proceedings would possibly indeed overburden national courts with various requests from arbitral institutions and arbitral tribunals.

Possible court overload as the main reason for not adopting the UNCTRAL Model Law in full was also put forward by the Latvian legislator in the Explanatory report to the 2015 Arbitration Law.[112] Considering the then existing number of permanent arbitration courts, the legislator was afraid that imposing additional obligations (UNCITRAL Model Law-type court assistance) on part of ordinary jurisdiction courts would result in court overload. This, in turn, suggests that the continuous unwillingness to adopt the UNCITRAL Model Law is due to the legislator's own mistake to allow any legal person to establish permanent arbitral institutions – a mistake that eventually lead to an enormous amount of *pocket arbitration courts*. The main, if not the sole, goal during deliberations of the 2015 Arbitration Law, was not to accept and remedy the said mistake, but to aim to improve the damaged reputation of the already existing arbitration system (e.g. by introducing strict qualification requirements for arbitrators) and to find a compromise solution with regard to the high number of arbitral institutions, rather than a complete overhaul.

The draft 2015 Arbitration Law received considerable criticism from local arbitration practitioners. Among other deficiencies, many pointed to the continuous non-availability of the annulment action in the draft 2015 Arbitration Law.[113] Nevertheless, none of them were eventually taken into account. The 2015 Arbitration Law was adopted on 11 September 2014 and entered into force on 1 January 2015.[114] It is not based on the UNCITRAL Model Law and is the law currently in force governing arbitration in Latvia.

3.2.6. LATEST ATTEMPTS TO INTRODUCE THE SET-ASIDE ACTION AND THE CURRENT STATE OF AFFAIRS

Shortly after the adoption of the 2015 Arbitration Law (but before its entry into force) the need to introduce the set-aside action in Latvian arbitration law was repeatedly stressed also by the Latvian Constitutional Court in its second

[112] Ibid.

[113] See, e.g. Ūdris (2014); See also Kačevska (2014) and Tipaine (2014).

[114] The official publication of the 2015 Arbitration Law is available at https://likumi.lv/ta/id/269189-skirejtiesu-likums. Accessed 12 July 2021.

arbitration-related case, i.e., the *Hiponia* case.[115]

The 2014 *Hiponia* case concerned the interpretation of the well-known principle of *kompetenz–kompetenz*, i.e., an arbitral tribunal's competence to decide on its own jurisdiction. Before the entry into force of the 2015 Arbitration Law, the *kompetenz–kompetenz* principle was enshrined in Article 495(1) of the LCCP providing that 'an arbitral tribunal shall decide on its own jurisdiction, also in cases when one of the parties challenges the existence or validity of the arbitration agreement.'[116]

However, unlike, e.g., Article 16(3) of the UNCITRAL Model Law or provisions of various national arbitration laws,[117] the LCCP did not contain any further reference to subsequent court involvement in finally determining the existence or validity of an arbitration agreement and thus also the jurisdiction of an arbitral tribunal. Moreover, the Latvian Supreme Court had consistently interpreted Article 495(1) of the LCCP very restrictively and refused to hear applications regarding the existence or validity of arbitration agreements.[118] Taking into account that the 1999 Arbitration Law hardly provided any court assistance in support of arbitration, there was no possibility to challenge an arbitral award, and the fact that courts *controlled* arbitration proceedings only formally during the enforcement proceedings,[119] arbitrating parties had no effective remedy to challenge the jurisdiction of an arbitral tribunal.

The Latvian Constitutional Court in the *Hiponia* ruling changed the then exist practice and ruled that Article 495(1) of the LCCP, insofar it did not provide for a right to challenge the jurisdiction of an arbitral tribunal before ordinary jurisdiction courts, was incompatible with Article 92 of the Latvian Constitution and the right of access to a court. Although it was held that the restriction on the access to ordinary courts pursues a legitimate aim – decrease of court overload, such a restriction is not proportionate to the aim pursued – as held by the Latvian Constitutional Court, the increase of court workload per se cannot justify restrictions on a person's right of access to a court to the extent that the essence of such a right would be impaired.[120] In a situation where interests of national courts' procedural efficiency collide with a need to protect persons' fundamental rights, the latter must be given precedence.[121]

Since the now applicable 2015 Arbitration Law was already passed by the Latvian Parliament, Article 24(1) of the 2015 Arbitration Law was also declared incompatible with Article 92 of the Latvian Constitution. It is due to the Latvian Constitutional Court's *Hiponia* ruling that arbitrating parties in Latvia have a statutory right to challenge the existence or validity of an arbitration agreement and thus also the jurisdiction of an arbitral tribunal before Latvian courts.

As to the set-aside action, also in the *Hiponia* case, similarly as in the 2005 *Asmers* case, the Latvian Constitutional Court repeatedly urged, albeit again in an *obiter dictum*, the Latvian Parliament to take legislative steps and introduce a mechanism for challenging arbitral awards in Latvian arbitration law:

[115] *Hiponia* case, No. 2014-09-01, the Constitutional Court of the Republic of Latvia, 28 November 2014. www.satv.tiesa.gov.lv/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf. Accessed 12 July 2021.

[116] Currently, the *kompetenz–kompetenz* principle is contained in art. 24(1) of the 2015 Arbitration Law.

[117] See, e.g., art. 11(2) of the 2012 Lithuanian Law on Commercial Arbitration; art. 730(6) of the Estonian Code of Civil Procedure; sec. 2 of the SAA; sec. 1040(3) of the ZPO and many others.

[118] See, e.g., Case No. SKC-213, the Supreme Court of the Republic of Latvia, 14 May 2008; Case No. SKC-1037, the Supreme Court of the Republic of Latvia, 13 October 2010; Case No. SKC-514, the Supreme Court of the Republic of Latvia, 26 September 2012.

[119] See *Asmers* case, No. 2004-10-01, the Constitutional Court of the Republic of Latvia, 17 January 2005. www.satv.tiesa.gov.lv/wp-content/uploads/2004/05/2004-10-01_Spriedums_ENG.pdf. Accessed 12 July 2021.

[120] *Hiponia* case, No. 2014-09-01, the Constitutional Court of the Republic of Latvia, 28 November 2014, para. 20.2.1. www.satv.tiesa.gov.lv/wp-content/uploads/2014/03/2014-09-01_Spriedums_ENG.pdf. Accessed 12 July 2021.

[121] Ibid.

> In certain cases, in order to have an arbitral award enforced, there is no need to turn to a national court and seek a writ of execution; and there may be such situations where an arbitral award is to be recognized or enforced in a foreign state. Similarly, the LCCP does not stipulate what happens with an arbitral award if a national court has refused the issuing of a writ of execution for its compulsory enforcement. In such a case, a person has no legal remedies against a possibly defective arbitral award; it, in fact, remains in force and a party to the proceedings may try to repeatedly seek its enforcement, for example, in a foreign state.
>
> Considering also, inter alia, the deficiencies, as indicated by the summoned persons, in both the functioning of arbitral institutions and the legal framework for issuing writs of execution, the internationally recognized mechanism for challenging arbitral awards would be of particularly great importance in Latvia. Therefore, the Constitutional Court repeatedly draws the Saeima's [the Latvian Parliament's] attention to the necessity of stipulating the grounds and procedure for challenging arbitral awards.[122]

Nearly 10 years had passed since the initial Latvian Constitution Court's *obiter dictum* observation in the *Asmers* case, however, nothing, apart from several discussions and short-lived initiatives, had changed in this regard. In 2014 the Latvian Constitutional Court repeatedly urged the Latvian Parliament to introduce the set-aside action in Latvian arbitration law, however, to this date the set-aside action has still not been introduced. The 2015 Arbitration Law as it currently stands, and Latvian law more generally, is still silent upon the possibility of challenging arbitral awards before State courts. Latvia remains as one of those few unique jurisdictions that omit regulation of the set-aside action altogether. As matters currently stand, nothing suggests that reforming of the Latvian arbitration system, in particular introducing the set-aside action, would be in the Latvian legislator's current legislative and working schedule.

CONCLUSION – THE SET-ASIDE ACTION IN CONTEMPORARY ARBITRATION: *QUO VADIS*?

Some 8 years ago Prof. Albert Jan van den Berg in the 2nd Karl-Heinz Böckstiegel Lecture of 13 November 2013 posed a question – should the setting-aside of the arbitral award be abolished? In a subsequent publication Prof. van den Berg identified the various issues that arise out of the set-aside action, such as the possibility of double control and conflicting decisions, and nevertheless answered the said question in negative, at least within the present legal framework. At the same time, he answered the same question in positive for the future, noting that the present legal framework is unsatisfactory because it has an unnecessary potential double control over the award on essentially the same grounds and the potential of conflicting decisions.[123]

The necessity of judicial controls in arbitration proceedings, in particular by means of setting-aside proceedings, in recent years has been perhaps one of the most widely debated aspects of court involvement in arbitration proceedings. The issue of double-control, potential parallel proceedings, conflicting decisions, enforcement of annulled arbitral awards etc. – the list of seeming or actual concerns behind the somewhat perpetual discussion on the necessity of a general overhaul of the judicial controls system over arbitration proceedings goes on and on. Despite the said concerns, the annulment mechanism continues to serve as a globally recognized and established form of judicial control over arbitration, available to the users of arbitration in nearly all jurisdictions permitting arbitration as an alternative method of dispute resolution.

[122] Ibid, para. 22.
[123] Van den Berg AJ (2014), p. 25.

A broader discussion on the necessity of the set-aside action in contemporary arbitration per se is unimaginable without looking also more specifically at the different approaches that States have adopted towards excluding the said action.

As seen, the majority of jurisdictions adopt a restrictive approach in that regard and either directly or impliedly prohibit arbitrating parties from excluding the application of the set-aside action. The rationale behind this is two-fold: one the one hand, protection of arbitrating parties' interests and, on the other hand, the interests of third parties and the general public.[124]

The set-aside action generally serves to guarantee the solution of disputes in fair and just arbitration proceedings and to protect arbitrating parties from unreasonable interferences with their fundamental procedural rights. Party autonomy and freedom of contract is therefore limited by matters of fundamental law reflecting the basic values of a society, such as the right to a fair hearing and the right to an independent and impartial tribunal.[125] The majority of grounds on the basis of which an arbitral award may be set aside relate to procedural rights that are in the interests of arbitrating parties.

If arbitration as an alternative means of dispute resolution is made available by a State, it is in the interests of that State to guarantee that the provided means are subject to certain minimum safeguards protecting the very fundamental rights of arbitrating parties. Generally, States guarantee this by both (i) regulating arbitration proceedings and statutorily setting certain general requirements for arbitration proceedings, as well as providing court assistance to arbitration proceedings, on the one hand, and (ii) providing for the possibility to eventually invalidate a defective arbitral award, on the other hand. Arbitration laws of most States contain explicit provisions on, inter alia, party equality, fairness of arbitration proceedings and independence and impartiality of arbitrators.

Parties are generally not advised to exclude the possibility of challenging an arbitral award exactly for these reasons. As explained, the automatic exclusion of setting-aside proceedings formerly in Belgium reportedly even decreased the number of arbitrations in Belgium because parties simply did not wish to exclude their possibility to attack an arbitral award at a post-award stage on grounds that are at heart of their fundamental rights and freedoms. The Swiss Federal Tribunal summarized in the *Cañas* case that exclusion of setting-aside proceedings under Article 192(1) of the PILA deprives a party from the possibility of attacking a future arbitral award, even if it violates fundamental principles pertaining to the rule of law, such as public policy, or essential procedural safeguards, such as the regular composition of the arbitral tribunal, its jurisdiction, the equality of the parties or the right of those parties to be heard in adversarial proceedings.[126] Therefore, parties should be fully aware and understand the significant consequences that exclusion of setting-aside proceedings entails for the protection of their fundamental interests.

As to the latter perspective, i.e., interests of third parties and the general public, judicial review by means of setting-aside proceedings acts as also as a guardian for the protection of interests of third parties and those of the public. States have an equal interest to limit party autonomy and contractual freedom due to considerations of public policy and the need to protect third parties. On a practical level, the protection of the interests of third parties and the general public may only be reflected in the minority of grounds of review, i.e., the non-arbitrability and public policy exceptions.[127] Generally, States

[124] See, e.g. Scherer (2016), pp. 448-449.
[125] Paulsson J (2013), p. 105.
[126] Decision of the Swiss Federal Tribunal in case No. ATF 133 III 235, 22 March 2007, para. 4.3.2.2.
[127] Scherer (2016), p. 452.

have an *ex officio* right to set aside an arbitral award if the subject-matter of arbitration proceedings is considered by the relevant State as non-arbitrable due to considerations of third parties, public rights or governmental authority. Similarly, as seen, States have an *ex officio* right to invalidate an arbitral award on the basis of public policy considerations if the arbitral award entails a gross violation of that State's, or as the case may be if the State is an EU Member State – also the EU's, most fundamental principles.

It is argued that the importance of the need to protect the interests of third parties and those of the public by means of setting-aside proceedings is somewhat diminished due to the fact that States permitting exclusion agreements still exercise certain control over arbitration (including issues of arbitrability and public policy) if the respective arbitral award is recognized and enforced in that State.[128] A State permitting exclusion agreements will nevertheless verify compatibility of the arbitral award with the interests of third parties and those of the public if the arbitral award is submitted for recognition and enforcement in that State. However, in case recognition and enforcement is sought in another State, the arbitral seat simply shifts the required check to the State of enforcement.

The issue of whether or not, in addition to recognition and enforcement proceedings, judicial control is also required by setting-aside proceedings at the arbitral seat boils down to the difference between the two set of judicial proceedings.[129] Generally, a court's judgment on the validity of an arbitral award has an *erga omnes* effect – if an arbitral award is set aside at the arbitral seat it will be barred from recognition and enforcement in other States.[130] A court's judgment on the recognition and enforcement of an arbitral award, on the other hand, has no such *erga omnes* effect – if refused, parties may seek recognition and enforcement of an arbitral award in other States.[131] Lack of setting-aside proceedings in national arbitration law therefore creates imbalance between arbitrating parties – while the winning party may seek recognition and enforcement of allegedly defective arbitral award in as many States it wishes, the losing party is stripped of its right to defend against a defective arbitral award, independently of the other party's intentions to recognize and enforce the arbitral award. Lack of a possibility to invalidate a defective arbitral award at the seat of arbitration becomes particularly problematic in cases where the arbitral issues a declaratory award or an award dismissing all claims. The aggrieved party, who believes that its rights to a fair hearing or to an independent and impartial tribunal have been violated by such an award, has no effective remedy since there is nothing to be subjected to exequatur procedure.

Despite the said, a growing number of States have introduced in their *leges arbitri* a possibility for arbitrating parties to voluntarily exclude the application of the set-aside action. Such States have put forward many reasons seemingly in favour of providing a possibility to exclude the set-aside action. For example, the Swiss legislator's officially communicated reasons for introducing Article 192(1) of the PILA included, e.g., promotion of the attractiveness of international arbitration in Switzerland and assurance of the efficacy of dispute resolution by means of arbitration and alleviation of the Swiss Federal Tribunal of its workload. With the adoption of the amendments to the Belgian Code of Civil Procedure in 1985 the Belgian legislator sought to achieve similar aims – to establish and promote Belgium as an attractive seat of arbitration and to exclude judicial review

[128] Scherer (2016), p. 452. As seen, art. 192(2) of the PILA and, e.g. its counterpart in French law – art. 1522(2) of the FCCP, provide that arbitral awards, in respect of which an exclusion agreement is concluded, are still subject to review by courts at the recognition and enforcement stage if so requested by parties in that state.

[129] Ibid, p. 452.

[130] Art. V(1)(e) of the New York Convention.

[131] See, e.g., Van den Berg (2010), p. 182.

of arbitral awards that have no connection with Belgium. Introduction of exclusion agreements in Sweden and, more recently, also in France has been driven by similar reasons, generally aiming to establish themselves as attractive seats of arbitration. Additionally, other perceived advantages of exclusion agreements include, e.g., increased finality of arbitral awards, confidentiality (i.e. absence of need to subject an arbitral award to scrutiny by public state courts), lower costs and saving of time.

Putting aside the various more or less similarly tailored policy considerations behind the introduction of a possibility to limit or, as the case may be, exclude in full the available means of judicial review over arbitral awards in the respective national arbitration laws, the overarching argument in favor of exclusion agreements is the fact that arbitration is based on party autonomy, and parties should be free to determine not only the particularities of the arbitration proceedings, but also the scope of judicial review of the resulting arbitral award.[132] Arbitration is a creature of contract – it cannot exist without a prior agreement between parties to submit their controversies for final resolution before an arbitral tribunal. Party autonomy undoubtedly is the guiding principle, endorsed both by national laws and international instruments, for determining the procedure to be followed in international commercial arbitration.[133]

However, the argument of party autonomy and contractual freedom to, 'regulate their mutual relations as they see fit'[134] as the source of their power to exclude judicial review of arbitral awards is intrinsically linked to the more broader and theoretical discussion on the source of not only party autonomy in arbitration, but arbitration as a means of alternative dispute resolution itself. The different views on the very legal basis of international commercial arbitration are directly resembled also in the attitudes of States towards regulating the set-aside action, including the issue of whether or not parties should be provided a possibility to exclude it.

Arbitration does not derive its legitimacy solely from party autonomy and contractual freedom, despite the fact it undoubtedly plays significant aspect. In other words, party autonomy is not unlimited. Party autonomy and the freedom to establish private justice has limits.[135] It is said that the self-sufficiency of arbitration as a system of dispute resolution may seem a realistic goal, provided the legal relationship remains within the borders of the closed circuit.[136] However, this may not always be the case. Arbitration is heavily dependent and, at the same time, derives its legitimate force from the underlying system of law that explicitly provides for the possibility to arbitrate, regulates and also provides the necessary court support to arbitration proceedings. Arbitration is therefore characterized by a relative party autonomy that, depending on various circumstances, is limited to a greater or lesser extent both by external and also internal considerations.[137] The same is true for an argument that the power to limit or exclude the right to judicial control over an arbitral award altogether has its roots in the party autonomy. Parties' freedom to exercise their autonomy over the fate of the set-aside action must be balanced against other interests and policy considerations that limit parties' autonomy to fully regulate their relations as they deem fit.[138] These interests and policy considerations were briefly touched upon above.

States adopting a restrictive approach achieve this balance by simply not permitting arbitrating

[132] See, e.g., Scherer (2016), pp. 447-448. See also decision of the Swiss Federal Tribunal in case No. 4A_238/2011, 4 January 2012, para. 3.2.

[133] Redfern A et al. (2004), p. 265.

[134] *Axelsson and others v. Sweden*, App. No. 11960/86, ECmHR, 13 July 1990.

[135] Paulsson J (2013), p. 105.

[136] Cordero-Moss (2015), p. 186.

[137] Ibid.

[138] Scherer (2016), pp. 448-449.

parties to exclude from application the set-aside action. Parties are free to exercise their party and arbitral autonomy only to a certain extent; when it comes to having a say over judicial review over arbitration process and the resulting arbitral award, such States are reluctant to give up this essential power and allow arbitration to operate in a legal vacuum.[139] States adopting a liberal approach attempt to achieve this balance by imposing certain imperative prerequisites for excluding the set-aside action and providing in their *leges arbitri* various minimum safeguards that, in the words of the ECtHR, commensurate to the importance of excluding the set-aside action.[140] States adopting an intermediate approach to excluding the set-aside action, such as Sweden and Germany, achieve this balance by limiting arbitrating parties' ability to exclude the set-aside action to certain annulment grounds only. In Germany, parties are additionally required to have knowledge of the specific defect in the arbitration process or the resulting arbitral award before they exclude the particular annulment ground.

The question, however, is whether balance, if any, is achieved when a State excludes the set-aside action from its *lex arbitri* altogether. Following Belgium's attempt to do so, it soon became evident that total exclusion of the set-aside action leads to more problems than solutions. Being afraid that arbitral awards would not be subject to any judicial review, both arbitrating parties and also arbitral institutions avoided Belgium as a seat for arbitration. As a result of this backlash, in 1998 Belgium discontinued its failed experiment and aligned its approach vis-à-vis exclusion of the set-aside action with that of the Swiss.

Latvia's case, however, is somewhat different. Unlike in Belgium, where the set-aside action per se existed under Belgian law and the legislative step to exclude it in certain cases altogether was seen as an attempt to make Belgium a more attractive seat of arbitration, in Latvia no such policy considerations have ever been behind the total non-existence of the set-aside action. Arbitration as an alternative dispute resolution method and, in particular, the set-aside action were simply non-existent legal mechanisms under the 50-year long Soviet occupation period in Latvia. Together with a number of other unfortunate legislative twists and turns during the adoption of the 1999 Arbitration Law (such as allowing any legal person to establish a permanent arbitral institution), the notorious legacy of the Soviet concept of "arbitration" and general lack of understanding of basic principles of arbitration as it was known in the West, are the main reasons why the set-aside action has not been introduced in Latvian law. The moment people started to realize the fundamental nature of the set-aside action, it was seemingly too late to introduce it due to the already excessively high number of pocket *arbitration courts* in Latvia. Fears of court overload have since taken precedence over the increasing need to introduce UNCITRAL Model law-type court involvement in arbitration, including the set-aside action.

One must agree with Prof. van den Berg that in the present legal framework of international arbitration, the set-aside action, with all its seeming drawbacks, has an important role for safeguarding not only the arbitrating parties' rights and interests, but also those of the State at the

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[139] See Paulsson (2013), p. 30 where the author aptly notes that arbitration does not exist in a legal vacuum - even though arbitration, as a private dispute settlement mechanism, in its nature endeavours to free itself from the constraints of public authorities, the great paradox of arbitration is in the fact that it also seeks the cooperation of the very same public authorities.

[140] See, e.g. *Tabbane v. Switzerland*, App. No. 41069/12, ECtHR, 1 March 2016, para. 27 ('De plus, pour entrer en ligne de compte sous l'angle de la Convention, la renonciation à certains droits garantis par la Convention doit s'entourer d'un minimum de garanties correspondant à sa gravité (Pfeifer et Plankl c. Autriche, 25 février 1992, § 37, série A no 227).')

seat of arbitration. As explained, also the Latvian Constitutional Court has repeatedly emphasized the important character of the set-aside action, and the necessity of introducing the set-aside action also in Latvian law. In the contemporary legal framework of arbitration where the set-aside action and the recognition and enforcement action continue to exist in parallel, both actions have their own unique ends. Displacing of one action for whatever reasons is certainly doing more harm than good for the overall effectiveness and attractiveness of arbitration in the eyes of its users. At least in the current legal framework of international arbitration.

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