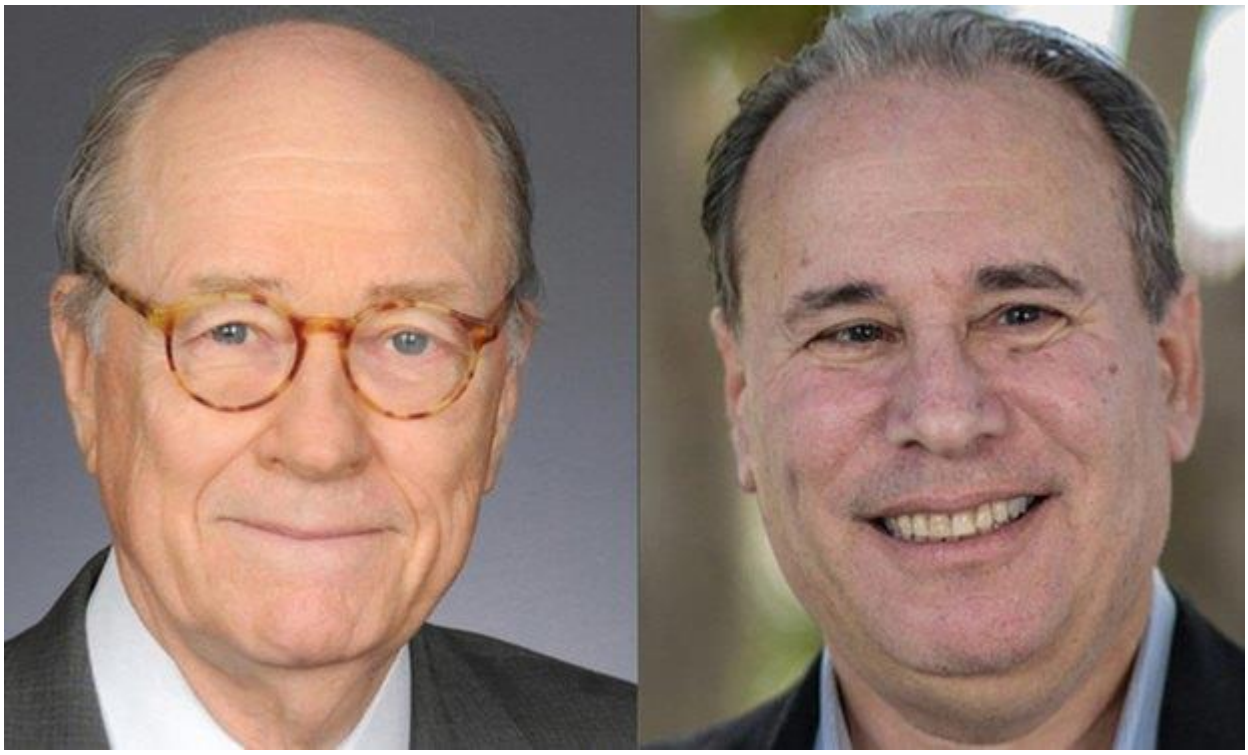
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Waiving the Right To Challenge an Arbitration Award: A Comparative Approach

In their International Litigation column, Lawrence W. Newman and David Zaslowsky present a comparative approach on the issue of whether courts enforce the very common contractual provision that purports to waive challenges to arbitration awards.

By **Lawrence W. Newman and David Zaslowsky** | September 22, 2021 at 12:00 PM



We have all seen them. Provisions in arbitration clauses that say, in substance, that the award is final and cannot be challenged or appealed. Will courts enforce such a clause? The answer in federal courts in the United States is "somewhat." In this column, we look at U.S. case law on the subject, as well as how courts deal with it in certain other countries.

A very recent decision on this issue is *Beckley Oncology Associates v. Rami Abumasmah, MD*, 993 F.3d 261 (4th Cir. 2021). The contract at issue there included an arbitration clause that, among other things, said that the decision of the arbitrator "shall be final and conclusive and enforceable in any court of competent jurisdiction without any right of judicial review or appeal." A dispute arose that was arbitrated and that resulted in an award in favor of Abumasmah for $167,000. Beckley sought to vacate the award in federal district court.

The district court granted Abumasmah's motion to dismiss the complaint and confirmed the award. The court held that the clause prohibiting judicial review of the arbitration award was unenforceable under the Federal Arbitration Act (FAA) because enforcing such clauses would upset the balance between the FAA's mechanisms for enforcing arbitration awards and the courts' statutory authority to review the arbitral process. The court then went on to upheld the arbitrator's award.

On appeal to the U.S. Court of Appeals for the Fourth Circuit, the threshold issue was whether the waiver clause prevented appellate review by the court. The issue was one of first impression in the Fourth Circuit, but the court noted that the Tenth Circuit had previously evaluated such a waiver provision and deemed it enforceable to the extent of forestalling appeal of the district court decision. That case was *MACTEC v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005), in which the clause at issue said, "judgment upon the award rendered by the arbitrator shall be final and nonappealable and may be entered in any court having jurisdiction thereof." The Fourth Circuit also found the waiver clause enforceable at the circuit court level.

Both courts drew a distinction between district court review and appellate court review. Many U.S. courts have held that district court review cannot be waived. See, e.g., *Hoeft v. MVL Group*, 343 F.3d 57 (2d Cir. 2003). The Fourth and Tenth Circuits both accepted that concept. However, as the Tenth Circuit explained, a provision prohibiting appellate, but not district court review, may be seen as "a compromise whereby the litigants trade the risk of protracted appellate review for a one-shot opportunity before the district court." *MACTEC*, 427 F.3d at 829. This was deemed consistent with the fundamental policy behind the FAA to reduce litigation costs by providing a more efficient forum. Furthermore, the Fourth Circuit noted that, outside of the arbitration context, courts of appeals enforce agreements that waive appellate review of district court decisions. Indeed, courts routinely enforce appellate waivers in plea agreements, where the stakes, namely years of lost liberty, are far higher than the monetary award in commercial arbitration cases. *Beckley* 993 F.3d at 265.

The Fourth Circuit also pointed out that a party's right to seek appellate review of a district court's confirmation of an arbitration award is wholly a creature of statute. See 9 U.S.C. §16(a)(1)(D) ("An appeal *may* be taken from … an order … confirming or denying confirmation of an award." (emphasis by Fourth Circuit)). This was another reason that the court held that nothing should preclude a party from waiving appellate review of that decision.

Some other courts in the United States have taken a different approach. They have construed non-appealability clauses as precluding only court review of the *merits* of an arbitrator's decision and not to preclude the parties' right to appeal from the arbitrator's decision under FAA §10, which sets out the grounds for the vacatur of an arbitration award. For example, in *Southco v. Reell Precision Mfg.*, 331 Fed. Appx. 925, 927-28 (3d Cir. 2009) and *Rollins v. Black*, 167 Fed. Appx. 798, 799 n.1 (11th Cir. 2006), the Third and Eleventh circuits, respectively, held that a contract provision stating an award is to be non-appealable signifies that the parties only waive review of the merits of the arbitration award.

We inquired from a number of our colleagues in other countries how their courts deal with the issue of contractual provisions purporting to preclude judicial review of arbitral awards. Under Peruvian law, every award is "final, unappealable and mandatory" (Article 59.1 of Legislative Decree No. 1071 – Peruvian Arbitration Law), meaning that the parties cannot appeal against the award. The only appropriate means of judicial review is annulment against the award (Article 62 LD No. 1071). The distinction is similar to the one made by the Third and Eleventh Circuits, as discussed immediately above. An "appeal," which is impermissible, is a challenge to the award on the merits. An annulment challenge is on grounds like those under the New York Convention, such as lack of due process in the proceeding, and cannot be waived.

There is, however, one statutory instance in which waiver is permitted. Article 63.8 of the Arbitration Law (LD No. 1071) provides: "When none of the parties to the arbitration are of Peruvian nationality or have their domicile, habitual residence or place of main activities in Peruvian territory, the waiver of the annulment remedy or the limitation of said recourse to one or more grounds established in this article may be expressly agreed." In all likelihood, this would also be the only basis on which one could waive the right to seek a "casación" (a challenge to the annulment decision, which can only be brought before the Supreme Court of Justice (article 64.5 of the Arbitration Law)).

Under Canadian law, there is no right to appeal an international arbitration award (i.e., challenge the merits of the decision) but parties may seek to set aside the award under the grounds in the New York Convention (and the

Canadian version of the Model Law). *Lululemon Athletica Canada v. Industrial Color Productions* (2021 BCSC 15) involved a claim to set aside a portion of an arbitration award under §34(2)(a)(iv) of the Model Law. In that case, the respondent sought to bar the petitioner's claim on the grounds that the parties had waived §34(2)(a)(iv) of the Model Law by choosing the ICDR's International Arbitration Rules, since Article 30(1) of those rules allowed the parties, where valid, to waive their rights to any form of appeal, review or recourse to any judicial authority. By choosing these Rules to govern their agreement, the respondent argued, the parties had waived their statutory right to apply to set aside the arbitral award under §34(2)(a)(iv) of the Model Law. The court rejected this argument and emphasized that §34 of the Model Law is a mandatory provision and cannot be waived by the parties to an arbitration agreement.

Under the law in the UAE, there is no right to appeal an international arbitration award (i.e., challenge the merits of the decision) but parties may seek to set aside the award under the grounds in the New York Convention. The courts will not enforce a contractual provision that purports to waive the right to seek to set aside the award. As to whether a waiver of the right to challenge or appeal an award would be construed as an effective waiver of the right to appeal the decision of the first instance court on a set-aside application, that is unlikely to be enforced because it denies a party of its constitutional right of direct recourse to the courts for the protection of its rights.

Under Argentine law, the parties to an arbitration clause may waive their rights to an appeal (meaning a challenge to the merits of the award) but they cannot waive the right to contest the validity of the award with a challenge of nullity (recurso de nulidad). Section 1,656 of the Civil and Commercial Code (CCC), in force as of Aug. 1, 2015, states that "in the arbitration contract the parties cannot waive the right to challenge before the courts an award that is contrary to the legal system." Argentine courts have construed this provision as banning waivers of the challenge of nullity while allowing the parties to waive their right to an appeal. In this regard, in *Sidus S.A. v. Genomma Laboratories Argentina S.A. s/ Ordinario* (2019), the National Court of Appeals on Commercial Matters sitting in the Buenos Aires ruled that a distinction should be made under §1,656 of the CCC between the challenge of nullity as a mechanism that cannot be waived for reviewing the arbitral award and an appeal of the merits of an award. Just as a party maintains its right to "challenge" an award, it also has the right to appeal the nullity decision.

In England, the Arbitration Act 1996 distinguishes among various types of challenges. Section 67 concerns challenges to the substantive jurisdiction of the arbitral tribunal. Section 68 concerns challenges to the award for serious irregularity, such as (1) the tribunal's exceeding its powers, (2) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties, (3) failure by the tribunal to deal with all the issues that were put to it, and (4) the award's being obtained by fraud. Parties may not agree to waive their rights to such challenges. Nevertheless, a party may lose its right to challenge if it takes part in proceedings and fails to timely raise an objection on certain grounds (see §73).

In contrast, §69(1) of the Arbitration Act permits appeals to the court on a question of law arising out of an arbitration award. But the statute also uses the words, "unless otherwise agreed by the parties." This type of appeal may thus be waived.

One final point concerning waiver of appeal clauses. Even in those jurisdictions where waiver clauses will not be enforced, none reported that the enforceability or unenforceability of the waiver agreement would impact the validity of the underlying arbitration agreement. Rather, it is only the waiver provision that would not be enforced.

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