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Waiver of Right in the Context of same-neutral Hybrid Procedures

ABSTRACT

The idea of combining arbitration and mediation in resolving commercial disputes as parallel, sequential and integrated processes is a highly debated issue both in legal theory and in practice.

The present contribution focuses on the execution of a waiver of rights in the context of hybrid procedures in which, among the same parties to the dispute, the same individual will serve as mediator and arbitrator. The purpose of this contribution is to discuss how to apply a waiver of right in the arena of international commercial arbitration in the context of same-neutral hybrid procedures. It is a critical aspect since same-neutral hybrid procedures are presumed to result in a higher level of efficiency in terms of saving cost and time during the dispute resolution. How different variations of the institution of waive of right to object can help the disputants and the neutral to reach this goal and preserve the integrity of combined procedures? My purpose with this study is to find answers to these questions.

KEYWORDS: international commercial arbitration, mediation, combining procedures, waiver of right to object, commercial dispute resolution, impartiality

I. INTRODUCTION

The idea of combining arbitration and mediation in resolving commercial disputes as parallel, sequential and integrated processes (hereinafter “hybrid procedures”) is unknown to legal theory nor in practice.

Articles available on this subject matter primarily focus on the advantages and disadvantages attributed to hybrid procedures compared to mediation or arbitration. Among the range of problems associated with hybrid procedures, scholarly as well as professional writing mostly focus on issues related to keeping the requirement of

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confidentiality throughout the procedure, the impact of culture and legal traditions on the application of hybrid procedures and preserving the impartiality of the arbitrator¹ serving both as a mediator and arbitrator, as well as introducing mediation techniques which might be advantageous for arbitrators.

In this contribution, I chose to focus on the execution of a waiver of rights in the context of hybrid procedures in which, among the same parties to the dispute, the same individual will serve as mediator and arbitrator (hereinafter “same-neutral hybrid procedure”).²

It is a critical aspect, both at a theoretical and a practical level, since same-neutral hybrid procedures are presumed to result in a higher level of efficiency in terms of saving cost and time during the dispute resolution. There are certain well-established as well as recently discussed solutions and recommendations for ensuring the efficiency and fairness of same-neutral hybrid procedures.

Taking everything into consideration, the purpose of this contribution is to discuss only one possible measure, namely how to apply a waiver of right in the arena of international commercial arbitration in the context of same-neutral hybrid procedures.

This contribution is divided into four main sections. Section II briefly explains what the otherwise well-established institution of the waiver of right to object in international commercial arbitration has to do with same-neutral hybrid procedures, what the special condition of this waiver of right situation is, and why there is a need to execute an “appropriate” waiver. Section III provides a brief overview of different variations of waiver of right and how it may function in the context of same-neutral hybrid procedures. Section IV, from the variations referred to above, explores in detail the significance of a waiver agreement with the collection of some best practices. Section IV is followed by a discussion of certain limitations on the effectiveness of waiver provisions. Finally, the contribution is completed with a separate conclusion.

¹ As a main rule, the terms arbitrator and arbitral tribunal are used interchangeably, where no further comment will be added.

² For the purpose of the current contribution, same-neutral hybrid procedures would cover same-neutral *Med-Arb*, *Arb-Med-Arb*. In *Med-Arb* the neutral functions first as a mediator, assisting the parties in reaching a settlement agreement. If mediation fails (or the parties only partially reach a settlement), the same neutral can then serve as an arbitrator. *Arb-Med-Arb* is the process where mediation is integrated into ongoing arbitration. The arbitrator conducts the mediation and consults with all of the parties to the arbitration together (only joint session mediation). A variation of this arbitrator-conducted mediation is when the arbitrator consults with each of the parties separately (mediation with private session).

II. WAIVER OF RIGHT AND THE SAME-NEUTRAL HYBRID PROCEDURE

Taking into consideration the advantages and the overall benefit of the same-neutral hybrid procedure: bringing together party self-determination and safety ensured by arbitration (because the mediation phase provides the parties with the opportunity to control the process and its outcome, knowing that if they do not reach a settlement in the mediation then the mediator turned arbitrator will render an arbitral award as a final and binding), saving time and cost due to having a knowledgeable neutral capable of shifting from one role to the other – same-neutral hybrid procedures may cause many problems.

The main concern for a mediator-arbitrator is that the parties might later claim that, due to their participation in the mediation and settlement discussion with the parties, they have lost their impartiality as decision-maker, which is claimed to be reflected in not treating the parties equally and committing procedural irregularities that trigger their removal or a challenge of the arbitral award. Closely related to this issue but a slightly different scenario is when the parties might claim that, even if the mediator-arbitrator preserved their impartiality throughout the arbitration procedure, their conduct is not in accordance with the agreement of the parties and/or applicable law. As a practical matter, the latter scenario is quite unusual and unrealistic. Thus, except for a few remarks to be added below, I will focus on claims based on lack of impartiality.

1. Lack of impartiality

Discussing the same-neutral hybrid procedures, we cannot avoid a brief overview of the substance of impartiality, emphasising that the issue of impartiality and independence is a separate and extensive field in domestic and international commercial arbitration. Concerning the dual role, the lack of impartiality or the loss of impartiality is a justified worry. It seems that, while trying to understand the function of a hybrid procedure, we start to worry intensively about the arbitrator's impartiality. Where does this worry come from? Some possible answers: gaining confidential information in the private session³

³ Electing for a *private session* (sometimes called caucus) is a well-recognised tool of mediators, especially in commercial disputes. The objective of the mediator regarding the private session is to allow the parties and their legal representatives to talk candidly and reveal the possible weaknesses in their position. It also gives the opportunity for the mediator to perform a reality check and ask questions that help the parties to see their position more critically and reasonably. The private session can be an efficient tool, since the mediator may serve as a communication channel without sharing confidential information without the consent of the party. The mere fact that they go from one room to the other and tries to shape the parties' and their legal representatives' dialogue towards a productive direction can be enough to reach a settlement. A private session is also an opportunity for the mediator to ask for each party's bottom line and conduct.

or developing sympathy toward one party/position while the parties know that this can happen in both a private and joint session. We should add that it is not necessarily true that any arbitral award rendered by the mediator-arbitrator will be influenced by information gained in the private session, but such a result is certainly possible.

The meaning of impartiality, independence and neutrality of the arbitrator in general and the relation of these requirements to each other occupies an important place in the overall discussion regarding the duties of the arbitrator. Since there are many approaches⁴ to differentiate these concepts from each other, I need to clarify the approach I consider exemplary for the purpose of further discussion and reference.⁵ The concept of impartiality invites an abstract level of thinking and requires that the arbitrator neither favours one of the parties, nor is predisposed as to the issues and questions involved in the dispute,⁶ adding that impartiality sometimes needs to be assessed in a given cultural and social environment. Hence, the arbitrator is expected to have an objective attitude in general. The following observation demonstrates the connection as well as different purposes of these principles: “[...] impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done.”⁷ In order to ensure compliance with the duty of independence and impartiality, some guidelines or institutional arbitration rules might serve as orientation points. The IBA Rules of Ethics and Guidelines on Conflict of Interest in International Arbitration (2014) (hereinafter “IBA Guidelines”)⁸ are not laws but a set of rules that are frequently recognised and used

⁴ As an example, these concepts might be interpreted as follows, in T. Várady, J. J. Barceló III and A. T. von Mehren, *International Commercial Arbitration: A Transnational Perspective*, (Thomson Reuters, 4th ed., 2009) 282–283. Neutrality, in fact, is “an exterior sign or an indication of likely impartiality; it is easier to recognise and easier to translate into standards”. Neutrality has two dimensions, a personal-direct and a general-indirect one. On the personal level, neutrality means that the arbitrator is connected neither through family nor through business ties to any of the parties (and their legal representatives). The general level, on the other hand, covers a broader range of affiliations, such as nationality, religion, and ethnic background. In arbitration, neutrality and impartiality are prerequisites to independence and should be tested in each individual case, since independence is the correct consequence if neutrality and impartiality are kept. On recent attitudes towards the neutrality and impartiality of the arbitrator, see Várady T., *Választottbírói semlegesség és pártatlanság a XXI. században*, in Nochta T., Fabó T. and Márton M. (eds), *Ünnepi Tanulmányok Keckés László Professor 60. születésnapja Tiszteletére*, (Pécsi Tudományegyetem Állam- és Jogtudományi Kara, Pécs, 2013).

⁵ Neutrality as a concept is mostly applicable in the case of party-appointed arbitrators and neutrality in relation to the nationality of arbitrators. The concept of independence requires that there should be no relationship between an arbitrator and one of the parties, neither through financial connections or otherwise, since such relationships would affect or at least would appear to affect the arbitrator’s freedom of judgement.

⁶ J. D. M. Lew, L. A. Mistelis and S. M. Kröll, *Comparative International Commercial Arbitration*, (Kluwer Law International, 2003) 258–261.; A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (Sweet&Maxwell, 3rd ed., 1999) 210–214.

⁷ Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 261.

⁸ *Guidelines on Conflict of Interest in International Arbitration adopted by resolution of the IBA Council on Thursday 23 October 2014*, <https://www.ibanet.org/MediaHandler?id=e2fe5c72-eb14-4bba-b10d-d33dafce8918> (Last accessed: 31 December 2020).

in the arbitration community. The IBA Guidelines provide a framework and determine general standards for evaluating and assessing situations raising the issue of impartiality, including when an arbitrator should disclose potential conflicts, as well as when they should simply not accept an appointment. Taking into consideration that the parties may also have their own views on what constitutes mistrust for them, it is important to require the arbitrators, based on arbitration laws and rules, to disclose any circumstances which may give rise to justifiable doubts as to their impartiality.⁹

2. Claiming lack of impartiality – Waiver of right

The lack of impartiality and misconduct of the arbitrator can be claimed at three different points in time.

First, during the arbitration procedure, challenging the arbitrator and initiating their (in accordance with the applicable institutional arbitration rules and/or interlocutory judicial removal at the seat of arbitration) removal promptly after the arbitrator's nomination or after learning of the basis for challenge. Due to Art. 12(2) of UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006)¹⁰ (hereinafter "Model Law"), which has served as a model and guideline for most of the national legislations on arbitration law, an arbitrator can be challenged if there are justifiable doubts as to their impartiality. In a same-neutral hybrid procedure, the mediator-arbitrator may learn information that they would not have obtained in an arbitration. As has been pointed out above, the mediator-arbitrator can learn confidential and prejudicial information during the private session which might compromise their impartiality.

It is important to emphasise that directly challenging the arbitrator is the primary recourse against the lack of impartiality of the arbitrator. This also means that, as a main rule, if a party does not object to a particular non-compliance or procedural irregularity committed by the arbitrator during the arbitration, it will waive their right to object for the purpose of annulment or resisting recognition and enforcement of the arbitral award. As explained by Gary B. Born, this principle is incorporated in some institutional arbitration rules, and is applied by national courts even in the absence of express agreements to this effect.¹¹

⁹ Várady, Barceló III and von Mehren, *International Commercial Arbitration: A Transnational Perspective*, 283.

¹⁰ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (Last accessed: 31 December 2020).

¹¹ G. B. Born, *International Commercial Arbitration*, (Kluwer Law International, 2nd ed., 2014) 390., 470., 476. As one court put it, "A party with an objection to an arbitration panel has an affirmative

Second, lack of impartiality can be claimed in annulment of the arbitral award procedures. Here three possible legal bases can be distinguished.¹² As an explanation, I will again refer to the respective provisions of the Model Law. First, claims of a lack of impartiality can be based on Art. 34(2)(a)(ii) of the Model Law, arguing that a partial arbitrator denies a party an opportunity to present its case. Besides the regular lack of impartiality allegation to be referred in relation to this ground for annulment, in the case of a same-neutral hybrid procedure a further argument can be made; namely, the conduct of the mediator-arbitrator caused procedural unfairness and violated the principle of equal treatment of the parties, especially if holding a private session during the mediation and the party only discovers this after the arbitral award was made. As an example, from the reasoning of the arbitral award, the party concludes that the arbitrator has favoured one party over the other without any legal justification.

A discussion on the relationship between impartiality and the equal treatment of the parties is needed, since understanding this correlation will help us understand subsequently the sensitivity and difficulty of preserving impartiality in a same-neutral hybrid procedure, especially in the case of having private sessions with the parties. Equal treatment of the parties to the arbitration procedure is not only one of the guiding principles of arbitration but vital in order to preserve the arbitrator's impartiality and independence. On a more practical level, a biased arbitrator will not be able to treat the parties fairly and equally, since impartiality is a precondition for equal treatment. An arbitrator is a judge by virtue of contract. Under this contract, they have promised the parties (and possibly the arbitration institution) that they will carry out a clearly defined task, which is usually remunerated. They are obliged to behave impartially and equitably and is obliged to treat the parties equally during the process.

The arbitrator's contract and its terms are critical for the purpose of the current discussion, because, besides the applicable laws (law of the seat of arbitration) and respective institutional arbitration rules, it governs the scope and limitations of the arbitrator's power and duties, which are critical considering their involvement in hybrid procedures.

There is no discussion or publication on the duties of an arbitrator without warning the arbitrator that *ex parte* communication with any of the parties is prohibited, although only a few of them give a detailed explanation of the reasons

obligation to raise that objection with the arbitrators or else that objection shall be waived." *Avraham v. Shigur Express Ltd*, 1991 U.S. Dist. LEXIS 12267 (S.D.N.Y. 1991). For further discussion on waiver and preclusion in the context of Art. V(1)(b) and Art. V(1)(d) of the New York Convention, see Born, *International Commercial Arbitration*, 470 and 474.

¹² Born, *International Commercial Arbitration*, 393. Besides pointing to these three possible correlations between lack of impartiality of the arbitrator and grounds for annulment, Born also points out that "Even absent express statutory authorization, almost all national courts regard an arbitrator's lack of independence or impartiality as a potential basis for annulling an award. The impartiality of the tribunal is central to the arbitral process, and it is unacceptable in most jurisdictions that awards by biased arbitrators be enforced."

for such a limitation. With the involvement in an *ex parte* communication, the arbitrator may compromise their position as an arbitrator and what is going to happen with impartiality if they are seen to be talking with the parties? The *ex parte* communication, including a discussion on the particular case, is problematic from many viewpoints. First, as a result of such an interaction, the arbitrator's impartiality might be compromised. Second, participating in an *ex parte* communication may violate the principle of due process.¹³ The arbitrator, despite the flexibility of the procedure, is still obliged to follow the mandatory rules of the seat of arbitration. However, due process also includes that the arbitrator conducts the hearing in a way that enables the parties to be treated equally and ensures their right to be heard. The right to be heard includes the parties' right to deliver their evidence and to have the opportunity to comment on what the other party submits and argues. Then where is the correlation? – the duty of the arbitrator not to become engaged in communication with one party in the absence of the other party is directly related to the right to be heard.¹⁴

In other words, both the opportunity to present one's case and the principle of impartiality require that every communication between a party and the arbitrator is made in the presence of all the parties, allowing an immediate answer and comment. It is important that this is applicable to any and all communication, thus it is not a question of relevance or substance.¹⁵ Therefore, on the level of the parties, all arguments and evidence invoked by a party must be communicated to the other party, who must be given an opportunity to answer them and, when applicable, react to the possible accusations.¹⁶

Second, parties might argue, with reference to Art. 34(2)(a)(iv) of the Model Law, that the composition of the arbitral tribunal or the arbitral procedure with the involvement of a mediator-arbitrator was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this applicable law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the applicable law.

Finally, a claim of lack of impartiality can be based on Art. 34(2)(b)(ii), arguing that the involvement of a partial arbitrator – more precisely the arbitral award as the

¹³ A. Philip, The Duties of an Arbitrator, in L. W. Newman and R. D. Hill (eds), *The Leading Arbitrator's Guide to International Arbitration*, (Juris Publishing, 2004) 67–70. It is important to see that the prohibition of *ex parte* communication exists throughout the arbitration procedure. It is certainly applicable from the arbitrator's appointment and on a certain level it is applicable before the appointment of the arbitrator. However, this prohibition does not stand for those discussions which aim to contact the arbitrator in relation to the appointment and to inform them of the nature of the dispute or to discuss with them the selection of the third arbitrator, but the substance of the case should not be discussed with the arbitrator and the arbitrator should not ask in detail about the case and give a preliminary evaluation, since such a revelation and assessment would directly compromise their impartiality.

¹⁴ Philip, The Duties of an Arbitrator, 75.

¹⁵ M. S. Kurkela and H. Snellman, *Due Process in International Commercial Arbitration*, (Ocean Publications, 2005) 165. Adding that a significant exception may be the election of the chairman.

¹⁶ Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 527.

outcome of the same-neutral hybrid procedure – violates the concept of procedural public policy of the annulment forum.¹⁷

The third point in time when lack of impartiality can be claimed is the stage of recognition and enforcement of the arbitral award. Similar to the annulment of international commercial awards, claims for lack of impartiality can be based on denial of the opportunity to present the party's case under Art. V(1)(b) of the 1958 New York Convention on the Recognition of Foreign Arbitral Awards (hereinafter "New York Convention")¹⁸ and Art. V(1)(d) of the New York Convention governing irregular procedural conduct. Adding that the violation of procedural public policy of the country where the recognition and enforcement of the arbitral award is sought is also a ground for refusing to recognition and enforcement based on Art. V(2)(b) of the New York Convention.¹⁹

It can be concluded that there are certain well-established grounds for challenging the arbitrator's impartiality in practice. The grounds are the same, although some authorities have pointed out that a higher standard must be applied to have the arbitral award annulled or preclude its recognition and enforcement than that in the case of removal of the arbitrator.²⁰

An efficient measure to avoid the risks associated with challenges to the arbitrator and arbitral award²¹ are to obtain the appropriate waivers from the parties to the arbitration.

Losing impartiality is a justified concern in connection with the same-neutral hybrid procedures. The inconvenience inherent in such a procedure is so great that many arbitrators decline to engage in it and view the risk of claiming lack of impartiality by an unsatisfied or disappointed party arising from their dual participation as a problem that is difficult to overcome. As a result, a forward-looking arbitrator-mediator encourages the parties to waive their rights in this regard.²²

¹⁷ Art. 34(2)(b)(ii) of the Model Law states that: "[...] An arbitral award may be set aside by the court specified in article [...] only if [...] (b) the court finds that [...] (ii) the award is in conflict with the public policy of this State. This wording (this State) indicates that this should be the public policy of the forum dealing with the annulment action. Nevertheless, as it is explained by Born as well, there are authorities stipulating that public policy exceptions in the context of annulment procedures rather cover international public policy or the public policy of another foreign state."

¹⁸ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958, United Nations Treaty Series, Vol. 330, No. 4739, 3., https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en (Last accessed: 31 December 2020). To be enforceable internationally an award should also comply with the requirements of the New York Convention.

¹⁹ The cited provisions of the New York Convention are equally explicit in Arts 36(1)(a)(ii), 36(1)(a)(iv) and 36(1)(b)(ii) of the Model Law.

²⁰ Born, *International Commercial Arbitration*, 475.

²¹ Challenging the award for the purpose of the present discussion would cover two categories, such as annulment of the arbitral award and resisting the recognition or enforcement of the arbitral award.

²² J. Rosoff, Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings, (2009) 26 (1) *Journal of International Arbitration*, 89., 90–91. <https://doi.org/10.54648/JOIA2009004>

III. VARIATIONS OF WAIVER OF RIGHT TO OBJECT

The idea of waiver of right in common law is rooted in the concept of estoppel and is connected to the principle of *venire contra factum proprium*. With respect to civil law, we may connect it to the principle of good faith.²³ In the context of arbitration, especially international commercial arbitration, the institution of waiver is particularly important, since the conduct of the proceedings and the expectations of the parties might vary from arbitration to arbitration.²⁴

To understand how waivers operate in the framework of commercial arbitration, three variations of waiver should be distinguished.

First, as well as the primary meaning of waiver of right, is the omission of objecting to breaches of the arbitration agreement (including applicable institutional arbitration rules, if any) and any rules applicable to the proceedings (such as the law of the seat of arbitration and any relevant procedural agreements reached by the parties).²⁵ The implicit waiver is the most well-known and mirrored in most national arbitration laws and institutional arbitration rules.

In order to understand this variation of waiver in international commercial arbitration, and more closely with respect to the same-neutral hybrid procedures, the Model Law and the UNCITRAL Arbitration Rules (as revised in 2010) (hereinafter “UNCITRAL Arbitration Rules”) must be viewed. According to the UNCITRAL Model Law

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating their objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.²⁶

Meanwhile, the waiver of right provision of the UNCITRAL Arbitration Rules prescribes that “A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.” Similar provisions to those of Art. 32 of the UNCITRAL Arbitration Rules may be found

²³ T. H. Webster and M. W. Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, (Sweet & Maxwell, 3rd ed., 2014) 599.

²⁴ Webster and Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 600.

²⁵ The scope of the waiver depends on applicable national laws and institutional rules. As an example, LCIA Arbitration Rules (2020) covers only the arbitration agreement, while under ICC Arbitration Rules (2017) any rules applicable to the arbitration procedure are covered.

²⁶ Art. 4 Model Law.

in other institutional arbitration rules. Likewise, domestic legislation also sometimes contains provisions to the same effect.²⁷

The purpose of these provisions is to ensure that the arbitration procedure will not be disrupted or delayed by unjustifiable late complaints submitted by a disappointed or merely tardy party. In other words, the institution of waiver is critical both for maintaining the efficiency and the fairness of the procedure. Is the objection to be deemed as waived if the time-limit is not met or may the objection be raised in a challenge to the arbitral award or on enforcement proceedings? This question has not been resolved definitively. The better view is that non-compliance with the time-limits on policy grounds should bar any attack of the arbitral award, meaning a party may not “lie in ambush” with an objection to await the decision of the arbitral tribunal.²⁸

Therefore, the application of waiver of right provisions aims to protect the integrity of the arbitration procedure from late objections.²⁹ An example of that is a typical situation when a dissatisfied and disappointed party challenges the award, arguing that their due process rights have been violated. An additional accusation is that the arbitrator exceeded their authority by deviating from the initially agreed procedural rules.

However, the wording of Art. 32 of the UNCITRAL Arbitration Rules gives the impression that, under particular circumstances, the waiver of right provision is automatically applicable; in reality, it is more complicated. Whether a real waiver of right situation occurs will depend on the circumstances and the importance of the procedural right at stake. As will be explained in Section V, in the case of fundamental procedural rights, it tends to be rare and difficult to block the claims based on waiver

²⁷ Art. 32 UNCITRAL Arbitration Rules. For waiver provisions see also: ICC Arbitration Rules (2017), Art. 40, HKIAC Administered Arbitration Rules (2013) Art. 31, Swiss Rules of International Arbitration Art. 30; CIETAC Arbitration Rules (2015) Art. 10; AAA Commercial Arbitration Rules and Mediation Procedure R-41. The corresponding Art. 30 of the 1976 UNCITRAL Arbitration Rules provides “A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.”

Even though both versions of the UNCITRAL Arbitration Rules serve the same purpose, there are significant differences in their approach. First, Art. 32 abolishes the requirement of the original Art. 30, saying that the waiving party has actual knowledge of the incident of procedural non-compliance at issue while Art. 32 places the burden on the waiving party to prove its failure to object in reasonable time was justified under given circumstances. In addition to that, Art. 32 eliminates the requirement that the waiving party “proceeds with the arbitration” after failing to object promptly. In contrary to that, under the 1976 Arbitration Rules, in addition to having knowledge of the non-compliance, the waiving party is obliged to have moved to the next stage of the arbitration procedure. Continuing the arbitration is, for example: appearing at the hearing, and submitting documents. However this does not mean that the party is allowed to avoid the effect of a waiver by deliberate and calculated efforts not to go ahead with the arbitration. D. D. Caron and M. L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, (Oxford University Press, 2013) 695.

²⁸ Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 211.

²⁹ Várady, Barceló III and von Mehren, *International Commercial Arbitration: A Transnational Perspective*, 578.

of right because of late objection. However, if there is supporting evidence, preferably in the record, that the parties' intention was to modify the procedural rules, we then have a stronger and more justified case to prove that the waiver of right has occurred. An arbitrator should pay particular attention to have all deviation from the procedural rules and the parties' corresponding reaction recorded. In practice, the arbitrator would rather document their findings, orders, and determination in waiver of right situations and they may also document the absence of any objections by the disputing party. The Caron and Caplan Commentary suggests that there should be a description in the record of the nature of the procedural objection and the reaction and resolution to that objection and the reason behind a particular reaction or resolution.³⁰

Applying this first variation of waiver of right in the context of same-neutral hybrid procedures, reasonably assuming that a party would participate in such a procedure with their explicit agreement, it would be difficult to object to the intervention of the arbitrator as mediator by claiming that the arbitrator failed to comply with parties' agreed procedure. As Born explains: "[...] a party's failure to object to departure from agreed procedure will virtually always waive any objection".³¹

From the other perspective, a same-neutral hybrid procedure (with or in extreme cases, without the express consent of the parties) requires a special and unusual conduct of the procedure, which would be apparent even to non-professional parties without a legal representative (which is rarely the case in arbitration). Consequently, should they wish to object to the arbitrator, they could and should have done it promptly after observing that the neutral wears both hats without the consent of the parties (provided that such an agreement of the parties would not violate mandatory provisions of law of the seat of arbitration) or which has led to their loss of impartiality, otherwise they will be deemed to have waived their right to challenge. In fact, if the parties agree to a same-neutral hybrid procedure, they have implicitly agreed to waive their rights to challenge the arbitrator-mediator for their participation as a mediator. While this interpretation of the implicit waiver is justified and has a rationale, as will be demonstrated below, it is still advisable to ensure, as an arbitrator, that there is an explicit waiver.

Under the second scenario of waiver situations, the waiver of right results from the applicable arbitration rules (and laws). This variation has two types: enforceability of the arbitral award provisions and express provisions on same-neutral hybrid procedures including stipulations on waiver of right in this context.

Regarding the first category, the forms of possible recourse against the award³² and the extent to which a waiver thereof is permitted varies from jurisdiction to jurisdiction.

³⁰ Caron and Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 692.

³¹ Born, *International Commercial Arbitration*, 391.

³² As an example of express waivers in institutional arbitration rules, see Art. 35(6) of ICC Arbitration Rules (2017): "Every award shall be binding on the parties. By submitting the dispute to

As a standing-point, the UNCITRAL Arbitration Rules makes the following suggestion with regard to possible waiver statements: “If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect, as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.” The suggested wording is “The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.”³³

Three categories, namely appeal against the arbitral award, annulment of, and resisting recognition or enforcement of the arbitral award, can be distinguished. Explained by Park, the theory behind this rule is that parties to arbitration seek a reasonable measure of finality.³⁴

The question is whether institutional arbitration rules, providing that the arbitral award is final and binding and waiving their right to any form of recourse, would cover waiving the right to seek annulment and non-recognition of the award. Scholars generally provide a negative answer to this question, arguing that a waiver of right to seek annulment of the arbitral award must be specific and express. Therefore, “enforceability” provisions of institutional arbitration rules would not suffice to waive the right to seek the annulment or non-recognition of the arbitral award.³⁵

Turning to the second category, there are limited number of jurisdictions with specific provisions on same-neutral hybrid procedures. There are both national laws and institutional arbitration rules that suggest a combination of mediation followed by arbitration, or mediation to be integrated during the arbitration procedure. These institutional frameworks cannot and should not force parties into a hybrid procedure but let parties know that it is an available process for them and the institution is willing to help in administering such procedures.

arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.” An almost identical provision is to be found under Art. 26.8. of the LCIA Arbitration Rules (2020).

³³ UNCITRAL Arbitration Rules, Annex.

³⁴ W.W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice*, (Oxford University Press, 2006) 282.

³⁵ Gary Born, for example, when discussing the interpretation of agreement to exclude or limit annulment, observes that “Most jurisdictions have required that such waivers be relatively unequivocal and specific. In Switzerland, it is clear that a waiver of rights to seek annulment of an award must be express: Swiss courts have held that an agreement to arbitrate under institutional rules providing that the award is »final and binding« or »without appeal« does not suffice to waive judicial review in an annulment proceeding. Australian and Canadian courts have reached similar results. Those U.S. courts which permit waiver of rights to seek vacatur of an award have also required clear language effecting such a result.” Born, *International Commercial Arbitration*, 405. See also M. Scherer, L. M. Richman and R. Gerbay, *Arbitrating under the 2014 LCIA Rules: A User’s Guide*, (Kluwer Law International, 2015) 348–349 on forms of possible recourse against the award and the interpretation of concerned provision of LCIA Arbitration Rules.

The Hong Kong Arbitration Ordinance of 2011 (hereinafter “Hong Kong Ordinance”) and the Singapore International Arbitration Law as well as Arbitration Act for domestic disputes (hereinafter jointly “Singapore Arbitration Law”)³⁶ are good examples of legislative frameworks with specific rules on same-neutral hybrid procedures. Both the Hong Kong Ordinance and Singapore Arbitration Law³⁷ provide that, if an arbitration agreement provides the appointment of a mediator and further provides that the person so appointed is to act as an arbitrator in the event that no settlement is acceptable to the parties or can be reached in the mediation proceedings, no objection may be made against the person acting as an arbitrator or against the person’s conduct of the arbitral proceedings, solely on the grounds that the person had acted previously as a mediator. Both the Hong Kong Ordinance and Singapore Arbitration Law include a provision on mandatory waiver, stating that no objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the grounds that the arbitrator had acted previously as a mediator in accordance with the provisions governing the situation when an arbitrator acts as a mediator.

Japan’s Arbitration Law of No. 138 of 2003 and the Commercial Arbitration Rules of the Japan Commercial Arbitration Association effective as of 1 January 2019 (hereinafter “JCAA Arbitration Rules”) also provide for the opportunity for the arbitrator to act as the mediator. The JCAA Arbitration Rules state that parties shall not challenge the arbitrator based on the fact that they served as a mediator.³⁸

Reflecting on legislative example from the Western tradition as well, based on the Commercial Arbitration Act of Australia, an arbitrator may act as a mediator in proceedings relating to a dispute between the parties to an arbitration agreement in two cases.³⁹ First, if the arbitration agreement provides for the arbitrator to act as mediator in mediation proceedings (whether before or after proceeding to arbitration, and whether or not continuing with the arbitration). Second, if each party has consented in writing to

³⁶ Hong Kong Arbitration Ordinance, Cap. 609 (H.K.) (amended 2011), Part 4, Division 2., Secs. 32 and 33 on the appointment of the mediator and power of arbitrator to act as a mediator, https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1438403521102_00 (Last accessed: 31 December 2020). Singapore Arbitration Act Cap. 10 (2002 Revised Edition), §§. 62 and Art. 63 provision on the appointment of the mediator and power of arbitrator to act as a mediator, <https://sso.agc.gov.sg/Act/AA2001> (Last accessed: 31 December 2020); Singapore International Arbitration Act, Chapter 143/A, §§ 16 and 17 on provision on the appointment of the conciliator and power of arbitrator to act as a conciliator, <https://sso.agc.gov.sg/Act/LAA1994#pr16-> (Last accessed: 31 December 2020).

³⁷ Ordinance Sec. 32(3), (a); Singapore Arbitration Law [Singapore Arbitration Act § 62(3)(a)], Singapore International Arbitration Act § 16(3)(a).

³⁸ JCAA Arbitration Rules Art. 59(1), https://www.jcaa.or.jp/en/common/pdf/arbitration/Interactive_Arbitration_Rules2019_en.pdf?211223 (Last accessed: 31 December 2020).

³⁹ Commercial Arbitration Act 2012 (No. 23 of 2012) regulates domestic arbitration. Sec. 27D on the power of arbitrator to act as mediator, conciliator or other non-arbitral intermediary, https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a146897_currencies.html (Last accessed: 31 December 2020). For further discussion on practice in Australia, see A. Limbury, *Making Med-Arb Works in Australia*, (2009) 2 (1) *NYSBA New York Dispute Resolution Lawyer*, 84.

the arbitrator so acting. The parties, after giving their consent to this process sequence, waive their right to object to the conduct of the arbitrator in the subsequent arbitration procedure solely on the grounds that they have acted previously as a mediator, although if the parties do not consent to this then the arbitrator's mandate is terminated, and a substitute arbitrator shall be appointed.⁴⁰

According to Art. 30 of the International Commercial Arbitration Act of British Columbia, it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. Moreover, according to the Arbitration Act of Alberta, the members of an arbitral tribunal may, if the parties consent to it, use mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute. Added to that, after the members of an arbitral tribunal use any of the referred techniques, they may resume their roles as arbitrators without disqualification. Therefore, similar to the previously-mentioned legislation, the parties shall not challenge the arbitrator based on the fact that they served as a mediator.

This legislation on same-neutral hybrid procedures⁴¹ and rules is critical since there is no equivalent in the Model Law and UNCITRAL Arbitration Rules.

Finally, the third variation is the execution of an express and written waiver agreement. In the case of a waiver agreement, the parties acknowledge and approve the same-neutral hybrid procedure and with this the parties waive their right to object to the conduct of the arbitrator based on the fact that they also served as a mediator.

Below I will discuss in detail the possible content and role of a waiver agreement.⁴² General waiver provisions (not those particularly addressing same-neutral hybrid procedures) provided for in institutional arbitration rules will not suffice if the parties wish to waive their right to seek annulment and non-recognition of the arbitral award.

⁴⁰ CAA, Sec. 27D(5)–(6).

⁴¹ These pieces of legislation cover the most detailed rules and regulate many critical and problematic issues associated with (same-neutral) hybrid procedures (such as dealing with confidential information, gained in mediation, in subsequent arbitration, renewal of consent to the dual role of the neutral following the failure of mediation to produce settlement). For the purpose of the current contribution, I mentioned only those provisions which govern waiver of right-related issues in the context of hybrid procedures.

⁴² A Waiver agreement can either be part of an arbitration agreement as a waiver provision or in a subsequent separate agreement.

IV. WAIVER AGREEMENT

1. Content of the waiver agreement

When neutrals have to decide whether to participate in a same-neutral hybrid procedure, even with the consent of the parties, it is important as a matter of best practice to ensure that the dual roles are pursued with further protection.

The purpose of the waiver agreement is to ensure that the neutral's participation in settlement discussions and their involvement as mediator will not be asserted by any party as grounds for challenging the appointment of the arbitrator or any arbitral award rendered by the arbitrator. A waiver agreement is especially recommended if the parties agree to have the arbitrator engage in mediation with private sessions with individual parties.

In terms of the content of the waiver agreement, the parties should acknowledge, understand, agree and stipulate certain issues in relation to participation in a same-neutral hybrid procedure.

In such a procedure, the arbitrator wants the parties to agree explicitly that they, as the arbitrator, according to the rules of a particular arbitration institution (lacking corresponding rules, due to the contractual arrangement directly regulating the procedure) shall endeavour to assist the parties in settling the controversy and act as a mediator.

Even though the parties to a same-neutral hybrid procedure would certainly know what a mediator does in general and what is the role and aim of their intervention, it is still essential to clarify it in the waiver agreement. A wording like this would be sufficient: "The mediator is an impartial, neutral intermediary, whose role is to assist the parties in reaching a settlement of their controversy or claim by negotiation between or among themselves. The mediator cannot impose a settlement but will assist the parties towards achieving their own settlement. The mediator has no liability for any act or omission in connection with the mediation." In addition, similar to any mediator's agreement, it is beneficial to clarify that the mediator, as neutral third party, will not act as an advocate of any of the parties and will not give legal advice to any party and, as a mediator, they are not entitled to render any legal or other professional advice or decision. Such a wording in a waiver agreement would ensure that the parties and the neutral share the same understanding and expectations towards the procedure.

The critical situation is when the mediation process fails to produce a settlement. A further aim of the arbitrator-mediator is to ensure that if the controversy is not settled during the mediation phase, the parties agree that the mediator-arbitrator shall proceed as the arbitrator and then render an arbitral award, since the main duty of an arbitrator is to render an enforceable arbitral award, having stepped back into the arbitrator's position. Moreover, it is essential to have provisions that cover the worst-case scenario

and the method that the parties as well as the arbitrator can use to opt out of the procedure and ensure the informed consent of the parties.

The principle of party autonomy requires that the arbitrator makes sure that the express consent is not only the express consent of the legal representatives but that of the parties as well. The most critical question here is “to be informed about what”? About the process itself, including its advantages and disadvantages? Some argue that written consent of the parties is essential not only when the arbitrator acts as a mediator but also prior to any promotion of settlement negotiation.

As the conclusion of a waiver agreement, the arbitrator may want to have a provision that demonstrates that they advised them and their legal representatives and that they could choose someone other than him to act as the mediator or that, if they decide that they should act as the mediator, someone else might then be appointed as the arbitrator if the mediation fails. The arbitrator is responsible for introducing and discussing the different options available to the parties, as well as precisely informing them about specific procedural issues associated with a same-neutral hybrid procedure.

It is important to ensure that the parties have a firm understanding of the procedural rules: that they understand the structure, stages, possible outcomes and not only the advantages but the disadvantages of the process as well. By drafting an explicit agreement, we do not need to rely on the assumption that competent businessmen would anyway understand the drawbacks of the process.

Unfortunately, it often happens that parties to a same-neutral hybrid procedure are informed of the transformation, the dual role with two processes conducted by one individual, but on a substantive level they are not briefed on the ground rules of the procedure. In my opinion, in any dispute resolution method, it is critical, especially for the parties, to have a predictable process. Neither party, nor their legal representatives want to participate in a process that they do not adequately understand. In addition to that, the arbitrator should explain the rules governing the procedure and the impact of a possible settlement on costs, including the situation that the mediation fails to produce settlement, and then the remainder of the arbitration must take place. In fact, we need to see the qualitative difference between consent and informed consent to the process.

Furthermore, another critical aspect of informed consent is the use of the information learnt in the mediation process. The mediator needs to advise the parties that, in the course of the mediation process, they and their legal representative may and most likely will disclose to him, while they act as the mediator, their respective settlement position, their opinions on the strengths and weaknesses of their position and other issues that may not be admissible during the arbitration. In order to ensure that the consent was not only informed but had really taken place as part of the waiver agreement, the parties should acknowledge that. In the long term, this is important since, if the mediation is not successful then, as I have stated earlier, the arbitrator is required to render a decision in the case.

Concerning confidential information,⁴³ Gerald F. Phillips, a distinguished ADR professional with extensive knowledge and practical experience in the field of hybrid procedures, submitted that the mediator should explain that, during the mediation process, all statements made by the parties of the counsel are confidential unless the parties give permission to disclose them to the other side. They add that there are some general exceptions, according to law, to confidentiality on which the mediator should suggest that the parties ask their legal representative to counsel them. Interestingly, Mr. Phillips also suggests that the legal representative would need to advise the parties that, should the case not be settled during the mediation and the dispute proceeds to arbitration, some of the confidential information the mediator heard in the private session may influence the arbitrator in the course of rendering an award.

As a conclusion, before the execution of a waiver agreement, the parties must acknowledge, and understand certain issues and aspects of the same neutral-hybrid procedure in order to ensure a productive and smoothly conducted process rather than a confusing and easily objectionable procedure. As it turned out from the discussion on the second variation of waiver of right to object situation, the key provisions of the waiver agreements are those that stipulate waiving the right to challenge the mediator-arbitrator or the arbitral award.

2. Best practices

I have collected some best practices below in order to provide practitioners with some guidelines in relation to formulating a waiver agreement in the case of a same-neutral hybrid procedure.

As discussed above, numerous arbitration institutions turn to the IBA Guidelines in order to decide if a particular situation gives rise to justifiable doubt as to the arbitrator's impartiality. In accordance with the IBA Guidelines, an arbitrator's involvement as a mediator for the parties is a "waivable conflict". The waivable red list of the IBA Guidelines includes the scenario when the arbitrator was previously involved in the case; the arbitrator as a mediator is definitely an example of that. The waivable red list covers the situations in which, by definition, the arbitrator should not serve as an arbitrator. Albeit under given circumstances, they can still serve as an arbitrator

⁴³ Please note that different variations of dealing with confidential information (full disclosure, disclosing only material information, non-disclosure, authorisation of the arbitrator to base their arbitral award on information obtained in the mediation) to be obtained in the mediation part of the same-neutral hybrid procedure in subsequent arbitration procedure is a separate subject matter, not to be covered in the present contribution. Like the present subject matter, it is also an important aspect of ensuring the efficient and fair operation of same-neutral hybrid procedures. Here only those aspects which are relevant to the waiver agreement are indicated.

or continue their work as an arbitrator. According to the IBA Guidelines, first of all, all parties, arbitrators, and the arbitration institution or other appointing authority must have full knowledge of the conflict of interest. Second, all parties must expressly agree that such a person may serve as an arbitrator despite the conflict of interest. The explanation to the general standard of the IBA Guidelines highlights a critical and important aspect of informed consent: “Informed consent by the parties to such a process prior to its beginning should be regarded as effective waiver of a potential conflict of interest. Express consent is generally sufficient, as opposed to a consent made in writing which in certain jurisdictions requires a signature.” From the explanation, it also turns out that the express waiver can be manifested in minutes or transcripts. The wording of the explanation is crystal clear when directly referring to a possible situation where the parties would use such a hybrid procedure to disqualify the arbitrator who had previously served as mediator. In order to avoid this tactic, according to the general standard, the waiver should remain effective if the mediation is unsuccessful. As a result, the parties assume and bear the risk of what the arbitrator may learn in the settlement process.

Having a further example directly from a practitioner: mediator-arbitrator practicing in the U.S., an acceptable waiver provision would be thus framed:

The parties agree that Mr. XY may undertake the role both of mediator and arbitrator, and the parties, by and through their lawyers forever, waive and relinquish any claim or objection to their serving in both capacities, and the parties, by and through their lawyers, waive any claim they may have of prejudice resulting from the arbitrator undertaking to act in both capacities as a mediator and as the arbitrator and waive any conflict or impropriety in this regard.

In terms of annulment actions: “The parties, by and through their attorneys, agree that they will not challenge the determination, outcome and decision of the arbitrator on the basis that they have requested the arbitrator to act as both the mediator and arbitrator in this matter.”

An informed consent and waiver together ensure that the issue of violation of natural justice will not come up as long as the arbitrator *de facto* remains impartial. As a consequence, the rule is still the same; the arbitrator must be and remain independent and impartial during the process and this is not a matter of negotiation or execution of a waiver agreement, neither in regular arbitration, nor in a hybrid procedure.

Turning to waiver language explicitly proposed by institutions, the CPR Commission on the Future of Arbitration in its report proposed:

The parties and their counsel must expressly agree in writing or on the record that the arbitrator’s participation in settlement discussions will not be asserted by any party

as grounds for disqualifying the arbitrator or for challenging any award rendered by the arbitrator (unless, for example, on the face of it, it is apparent that the award is based prima facie in material part on information outside the record and learned by the arbitrator during settlement discussions).⁴⁴

According to the Final Report of the CEDR Commission on Settlement in International Arbitration (November 2009) (hereinafter “CEDR Guidelines”): “The Parties agree that the Arbitral Tribunal’s facilitation of settlement in accordance with these Rules will not be asserted by any Party as grounds for disqualifying the Arbitral Tribunal (or any member of it) or for challenging any award rendered by the Arbitral Tribunal.”⁴⁵ The consent should include a statement that the parties will not at any later time use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).⁴⁶

With reference to the above, it is important to keep in mind that each variation of a waiver of right to object scenario functions differently depending on the country in which an arbitration is conducted, or the enforcement and recognition of the arbitral award is sought. As I will discuss below, the effectiveness of waiver of right provisions in institutional arbitration rules and waiver agreements have some limits, and parties and arbitrators are also expected to be aware of the relevant provisions – of the seat of arbitration and those jurisdictions where seeking the enforcement and recognition of the arbitral award can reasonably be expected – that may result in the waiver of right provisions being superseded.

⁴⁴ CPR Commission on the Future of Arbitration, Protocol 8. The first effort to set forth practice guidance regarding med-arb and the role of arbitrators in settlement was made as a part of the 2001 Final Report of the CPR Institute for Dispute Resolution Commission on the Future of Arbitration, a group composed of more than fifty leading commercial advocates and arbitrators. T. J. Stipanowich, Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators, *Pepperdine University Legal Studies Research Paper*, No. 2020/25, 74–75. See also H. I. Abramson, Protocols for International Arbitrators Who Dare to Settle Cases, (1999) 10 (1) *Am. Rev. Int’l Arb.*, 1–17.

⁴⁵ CEDR Guidelines, Appendix 1 Art. 3.3., <https://www.cedr.com/wp-content/uploads/2021/04/Arbitration-Commission-Document-April-2021.pdf> (Last accessed: 31 December 2020).

⁴⁶ CEDR Guidelines, Appendix 2, Art. 7.7.5.

V. LIMITS OF CONCEPT OF WAIVER: BALANCING PARTY AUTONOMY AND PUBLIC INTEREST

1. Waiver of annulment action

Is it rational and possible to waive the right to challenge the award, and if so, why? The waiver of annulment action in front of the national courts and challenging the arbitral award on the recognition and enforcement stage – with derogation from otherwise applicable national law and the New York Convention – certainly demonstrate a high level of party autonomy.

With the annulment action, the party leaves the area of private judging in order to gain a limited amount of control of the national judiciary over the justice rendered by the arbitrator. In fact, the annulment action is a “last” opportunity for the parties, who voluntarily gave up having their dispute resolved through the state court system, to receive final control over the fairness of the arbitration procedure by the national judiciary. Therefore, while arguing the inconsistency between party autonomy and public interest, we must recognise that this kind of protection, even if it is counter-productive, in certain cases also serves the interests of the disputants.

This is why generally and specifically waiving the right of annulment action is an extreme and still disputable question in both domestic and international commercial arbitration.⁴⁷

I will discuss the non-waivable nature of only those grounds of annulment and non-recognition which could be applicable in the given same-neutral hybrid procedure scenario.

As has been discussed above, the claim of lack of impartiality can be based on three annulment grounds of the Model Law. In a few jurisdictions, courts have found that parties are not entitled to waive their right to initiate the annulment of an arbitral award by claiming the arbitrator’s lack of impartiality.⁴⁸

Regarding the procedural guarantees (discussed in detail above)⁴⁹ stipulated under Art. 34(2)(a)(ii) of the Model Law and reflecting fundamental procedural requirements⁵⁰ imposed by national law on locally-seated arbitration, the prevailing

⁴⁷ L. Guglya, Waiver of Annulment Action in Arbitration: Progressive Development Globally, Realities in and Perspectives for the Russian Federation (Different Beds–Similar Dreams?), in A. J. Belohlávek and N. Rozehnalová (eds), *Party Autonomy versus Autonomy of Arbitrators 2012, Czech & Central European Yearbook of Arbitration*, Vol. 2. (JurisNet, 2012) 81–82.

⁴⁸ Born, *International Commercial Arbitration*, 394.

⁴⁹ As a reminder: right to equal treatment, right to present one’s case, right to non-arbitrary procedure.

⁵⁰ Born, *International Commercial Arbitration*, 389. As also explained by Born, with reference to related court practice, application of local law does not mean that all procedural rules applicable in local litigation must be complied with in international commercial arbitration, but only those fundamental

opinion among international commercial arbitration practitioners and scholars is that equal treatment is mandatory and cannot be waived or excluded by the parties.⁵¹ Therefore, in a same-neutral hybrid procedure, should an unambiguous violation of principle of equal treatment occur, then claiming lack of impartiality would be possible even if the parties have executed a waiver agreement.

Notwithstanding a comparative study⁵² elaborately discussing annulment actions in international commercial arbitration, a growing number of jurisdictions enable the parties to exercise the right of waiver of the grounds of annulment of arbitral award.

Some states provide for such an opportunity in full, some only in part. In Mauritania, Peru, Sweden,⁵³ Switzerland, Belgium,⁵⁴ Tunisia,⁵⁵ and Turkey, it is possible to waive the right of annulment with some limitations and under given circumstances, while, for example in Panama, the parties are permitted to do that in full.

The waiver of annulment currently used in international commercial settings is the Swiss model, to which the Belgium legislation is similar. Its main purpose

requirements of fairness which would be included in respective national constitutions. In relation to fundamental rights (equal treatment, opportunity to present one's case – of administration of justice) see commentary on Act LX of 2017 on Arbitration (hereinafter “Hungarian Arbitration Act”) regarding 29. § A feleket a választottbírószági eljárás során egyenlő elbánásban kell részesíteni, és mindegyik félnek meg kell adni a lehetőséget arra, hogy az ügyét előadhassa. Harmadik rész, A polgári per alternatívája: A magánjogi választottbírószági eljárás-XIII. fejezet: A magánjogi választottbíráskodás belső jogi szabályozója: a 2017. évi LX. törvény a választottbíráskodásról, in Varga I. (ed.), *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja III/III.* (HVG Orac, Budapest, 2018) 2921.

⁵¹ S. Luttrell, *Bias Challenges in International Arbitration: The need for a ‘real danger’ test*, (Kluwer Law International, 2009) 261.

⁵² See Guglya, *Waiver of Annulment Action in Arbitration...*

⁵³ Sweden also decided to follow the Swiss approach. since Art. 51 of the Swedish Arbitration Act 1999 reads as follows, “Where none of the parties is domiciled or has its place of business in Sweden, such parties may in a commercial relationship through an express written agreement exclude or limit the application of the grounds for setting aside an award [...]”

⁵⁴ Art. 1718 of the Belgian Judicial Code Provisions, Chapter 6: Arbitration, “By an explicit declaration in the arbitration agreement or by a later agreement, the parties may exclude any application for the setting aside of an arbitral award, where none of them is a natural person of Belgian nationality or a natural person having their domicile or normal residence in Belgium or a legal person having its registered office, its main place of business or a branch office in Belgium.” Therefore, the limitation is in connection with the parties concerned, for non-Belgian parties, regardless of the grounds on which annulment might be sought, the waiver agreement is presumably valid and enforceable, <https://www.cepani.be/wp-content/uploads/2019/12/Schedule-IV.pdf> (Last accessed: 31 December 2020). The Belgian legislation is a good example of demonstrating the difficulty of this aspect of waiver of right. First, the 1985 Belgian Arbitration Act took a radical position, as it stated under Art. 1717: “Courts of Belgium may hear a request for annulment only if at least one of the parties to the dispute decided by the award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a Belgian branch or other seat of operation.” Várady, Barceló III and von Mehren, *International Commercial Arbitration: A Transnational Perspective*, 743–744.

⁵⁵ In accordance with Art. 78(6) of the Tunisian Arbitration Code, “The parties who have neither domicile, principal residence nor a business establishment in Tunisia, may expressly exclude totally or partially all recourse against an arbitral award.”

is to foster expediency and efficiency. According to Art. 192 of the Swiss Private International Law Act⁵⁶

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 it to one or several of the grounds listed under chapter 12 of the Swiss Private International Law Act.⁵⁷ If the parties have waived fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.

In other words, in some situations Swiss law does allow waiver of the right to challenge an arbitral award that extends to matters of procedural irregularity and public policy. Although, for this to be valid, neither party may be resident or have a branch in Switzerland.

Finally, particular states do not allow their annulment competences to be ousted. As examples, according to the Egyptian Arbitration law and the Romanian and the Greek Civil Codes of Civil Procedure, the parties are not allowed to exercise the waiver *ex-ante* and to give up their right in advance to vacate award by initiating a setting aside procedure. Meanwhile, there are certain states where this is prohibited entirely. This means that a waiver agreement either limiting or excluding the parties' right to seek annulment of the award is unenforceable and would invalidate such a waiver agreement. For instance, in Italy, Hungary, Estonia, Spain, and Canada, the waiver of annulment is completely forbidden.⁵⁸

Interestingly, all the states that allow the parties to waive the right of annulment on an international arbitration level, with the exception of Turkey, expressly provide in relevant laws that, in the case of a full waiver, the award will be treated as a foreign award subject to the respective rules and procedures of recognition and enforcement. The opportunity of partial waivers of annulment, which means that only certain grounds can be eliminated but not all of them, should be expected to produce the

⁵⁶ <https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws> (Last accessed: 23 November 2020).

⁵⁷ Art. 190(2) of Swiss Private International Law Act, Chapter 12: The award may only be annulled:
 a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
 b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
 c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
 d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
 e) if the award is incompatible with public policy.

⁵⁸ Guglya, Waiver of Annulment Action in Arbitration..., 84–87.

same effect as far as the renounced grounds are concerned. The importance of the non-domestic nature of the award is that it should be subject to the application of the New York Convention, assuming that the states are Contracting States and the reciprocity reservation is not made. Concerning the issue of waiver, it is important to keep in mind that three states from those that allow the waiver have made a reciprocity reservation, namely Belgium, France and Turkey. But what is the aim of these types of waivers? I aim to find an answer for this question, first in general, then I will apply it to our particular hybrid procedure setting. On a general level, it is certainly true that it reduces the workload of the arbitration-related courts and chambers. In addition, among many advantages of arbitration, this leads to eliminating the influence of the local court even more. On the other hand, the annulment actions, among many other advantages, have an *erga omnes* effect.

According to the *erga omnes* effect, the award annulled at the seat of arbitration due to Art. V(1)(e) of the New York Convention may not be granted enforcement in another state. Nevertheless, even if the award was annulled in the seat of arbitration, in some of the Contracting States it is still possible to execute the recognition of the award and permit enforcement of the award.⁵⁹ On the other hand, recognition and enforcement have a limited effect, only for the state where enforcement is granted.

2. Challenging the award in the recognition and enforcement procedures

Besides the place of arbitration, the place of enforcement is the other jurisdiction which is usually relevant and needs to be taken into account when analysing the limits and requirements of an effective waiver.

I will introduce a few aspects of due process under the New York Convention.

In fact, due process appears twice on the list of defences; first in Art. V(1)(b) of the New York Convention with the purpose of guaranteeing a minimum requirement for a fair arbitral procedure. Under this provision, a court may refuse to recognise or enforce an arbitral award if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case. The whole idea of procedural fairness with the

⁵⁹ P. Nacimiento, Article V(1)(d), in H. Kronke, P. Nacimiento, D. Otto and N. Christine Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 285. See N. Darwazeh, Article V(1)(e), in H. Kronke, P. Nacimiento, D. Otto and N. Christine Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (Kluwer Law International, 2010) 326–344. in connection with discussion on territorial (once the award has been set aside, no more award to be enforced) and delocalised (enforcing court is free to enforce annulled award) approach. For further discussion see also Born, *International Commercial Arbitration*, 406–409.

right to be heard and present their case form the fundamental basis of dispute resolution and, as a result, it is not surprising that when it comes to challenging the arbitral award it is one of the most frequently invoked grounds for non-recognition or non-enforcement. It is not easy to prove it, and the courts seldom accept due process violations as defence.⁶⁰ Second, violation of due process may overlap with the international public policy defence. This is because fairness and observance of due process are often seen as the international public policy of many states. However, according to Art. V(2)(b) of the New York Convention, for the purpose of denying execution and enforcement, the only relevant public policy is that of the enforcing state.

In order to understand the correlation between the due process and the public policy defence, it must be noted that the aim of this provision was to establish a uniform international standard deriving from an autonomous interpretation.⁶¹ As a result, the courts, in the course of applying the New York Convention, are expected to follow more of a comparative view and analyse how the due process defence has been developed under the New York Convention rather than turn to the application of *lex fori* and merely focus on their domestic procedural fairness.

In the context of a hybrid procedure, it is especially relevant if we think about conducting private sessions in the mediation phase. Besides the already discussed problems associated with a private session (that enables the mediator to have unilateral communication regarding the case with each party), here it is important to emphasise that the fundamental principles of the right to be heard, to present one's case and the equal treatment of the parties presume that the parties are provided with the opportunity to defend themselves in the event of being accused by the counter party.⁶² On a more general level, a party to an arbitration is entitled to respond to the submission of the counterparty and, in the case of a private session (provided that it is considered as a communication with the parties in the arbitration), these principles might be infringed.

As stated earlier, it is possible to waive the right to challenge the arbitrator based on the fact that they served both as a mediator and arbitrator. On a more concrete level, how can we stipulate explicitly the waiver of grounds for refusal before commencing the arbitral procedure, especially in the arbitration agreement? It is possible to waive this right under given circumstances with particular consequences.⁶³

According to Art. V(1)(d) of the New York Convention, the recognition and enforcement of the award may only be refused at the request of the party against whom

⁶⁰ Nacimiento, Article V(1)(d), 279–280.

⁶¹ Nacimiento, Article V(1)(d), 286.

⁶² Further examples of violation of due process: party has not been able to participate in the taking of evidence, (ii) or discovery procedure, where applicable (iii) or comment on expert report submitted to the tribunal (Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 711.).

⁶³ Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, 254.

it is invoked if that party furnishes, to the competent authority where the recognition and enforcement is sought, proof that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. As such, the New York Convention does not define the level of “irregularity”; it merely stipulates that the award can be set aside provided that the arbitral procedure was not in accordance with the agreement of the parties. Kurkela and Snellman explain that the materiality or serious irregularity may be supplied by the contract law governing the arbitration agreement. They also suggest that sanction of nullity and denying enforcement, setting aside, are often subject to the test of materiality. Consequently, the *de minimis* rule is applicable in the case; the award will not be set aside but it would entitle the party to claim damages or even specific performance from the arbitrator or institution depending on with whom the parties concluded the “arbitrator’s contract”. Provided that the institution concludes the arbitrator’s contract, the parties will be able to recover damages from the arbitration institution for breaching the terms of the contract between the parties and the institution.⁶⁴

Turning to same-neutral hybrid procedures, we assume that if the arbitrator turning into/having been mediator deviated from the arbitration agreement, this procedural irregularity would be clarified as material and serious instead of the application of the *de minimis* rule and the arbitral award would be set aside. Therefore, waiver of right is especially critical in this context. The parties may waive – expressly or by implication – their right to any and all sanctions in relation to a procedural act that is a serious deviation from or breach of the arbitration agreement, provided that the given right is waivable. Otherwise, the award could be set aside.⁶⁵

As a result, due to Art. V(1)(d) of the New York Convention, first of all, the court concerned is required to interpret and consider the parties’ agreement and should turn to the analysis of the law of the seat of arbitration if the parties fail to reach an agreement on the relevant issue. Hence, this provision of the New York Convention promotes the priority of party autonomy over the law of seat of arbitration.⁶⁶ In the context of Art. V(1)(d) of the New York Convention, it means that it is applicable only in the absence of the parties’ agreement, or where the parties’ agreement has a gap. In the case of hybrid procedures, it can be challenging to identify what the agreement was regarding the conduct of the arbitration procedure. Certainly, thorough interpretation of the agreement and the individual circumstances of the case can help us determine the content of the agreement. Applying this to an agreement to a same-neutral hybrid

⁶⁴ E. Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, (2001) (12) *American Review of International Arbitration*, 156.

⁶⁵ Kurkela and H. Snellman, *Due Process in International Commercial Arbitration*, 192–193.

⁶⁶ Nacimiento, Article V(1)(d), 282.

procedure, the interpretation can be even harder.⁶⁷ Although this provision does not express this directly, in order to challenge the arbitral award successfully based on these grounds, the causality between the procedural defect made by the tribunal and the award must be demonstrated. This means that the procedural defects achieved such a level that without them the decision would have been substantially different.⁶⁸ In this way we can observe a direct correlation between the procedural defect and the outcome of the arbitration.

One aspect of improper composition of the arbitral tribunal is also telling for us. Namely, the fact that one of the arbitrators was not impartial can lead to the refusal of the recognition and enforcement of the arbitral award under Art. V(1)(d) of the New York Convention.

However, as I have discussed earlier, the challenges as to the impartiality of the arbitrator have to be discussed and claimed during the arbitration procedure. As a conclusion, the partiality allegation must be so grave that it can be proved that it has affected the arbitral award and it was rendered contrary to public policy.

This way of thinking leads to Art. V(2)(b) of the New York Convention.⁶⁹ In fact, while discussing these issues, the courts apply high standards while it tries to figure out whether partiality was real or only assumed.⁷⁰

While it seems confusing and difficult to argue that the constitution of the arbitral tribunal or the arbitration procedure and impartiality of the arbitral tribunal has a connection with public policy, we need to take into consideration that the national legal systems take diverse views on these questions.

There is no consensus on whether or not the parties' right to influence the arbitral tribunal's constitution equally forms part of the procedural public policy.⁷¹ In terms of impartiality of the tribunals, it seems more obvious that it falls under the public policy exemption. There is also an undisputed procedural public policy in favour of procedural fairness and equal treatment of parties in legal proceedings.⁷²

As we have discussed earlier, timing is critical when it comes to challenging an arbitrator. For these reasons, it is understandable that a party cannot raise the public policy concern in the course of the recognition and enforcement procedure; they

⁶⁷ Nacimiento, Article V(1)(d), 344.

⁶⁸ Nacimiento, Article V(1)(d), 345.

⁶⁹ New York Convention Art. V(2)(b), "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: [...] (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

⁷⁰ R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary*, (C.H Beck, Hart and Nomos, München, 2012) 339.

⁷¹ Wolff, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary*, 419.

⁷² Luttrell, *Bias Challenges in International Arbitration...*, 274.

should have done it earlier. As a result, the key point here is that they lose this right only if they could have raised it as a challenge in the course of the arbitration procedure. Furthermore, in some jurisdictions, the expectations are higher, and there is no general standard regarding impartiality. There are jurisdictions where the standard of partiality for violation of public policy is higher than the standard of partiality for arbitrator challenge or the demand that the award has been affected by their partiality.

As an example, the *ex parte* communication between the arbitrator and a party can recall the public policy defence.⁷³

Finally, the defences according to Art. V(2)(b) of the New York Convention, which are examined *ex officio* by the exequatur court, cannot be waived insofar as they deal with issues covering public interest. As they have been accepted in general, public interest issues are not placed at the parties' disposition.⁷⁴ As a consequence, they cannot be waived by mutual agreement concluded between the particular parties to an arbitration agreement. Concerning *ex-post* waivers, it is not surprising that the parties are permitted to waive defences under Art. V of the New York Convention, given that the parties are aware of the defect that has already occurred. However, the exception (where introduced), namely the waiver of a defence that has a public interest aspect, is not allowed. While arbitration as a dispute resolution method is a creation of contract and the parties are free to form the arbitration procedure, party autonomy has its own limitations in this field as well.

In relation to the relevant provisions of the Model Law, leading scholars of the international commercial arbitration community express the opinion that only those parts of the Model Law that concern non-arbitrability or are expressive of public policy cannot be waived by the parties.⁷⁵

In accordance with the above, there are certain categories of lack of impartiality and arbitrator's misconduct, such as outright corruption or similar onerously abusive procedural arrangements, which are not waivable irrespective of the provisions of the applicable institutional arbitration rules or waiver agreement. In other words, such a waiver is not valid even when a party does not object to them at the time.⁷⁶ According to Luttrell, many states recognise that, in the public policy clash between finality and fairness at the enforcement stage, finality should win unless the breach of procedural

⁷³ Wolff, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary*, 421–422.

⁷⁴ According to commentary on waiver of right provision of the Hungarian Arbitration Act, the violation of mandatory provisions of law can be objected anytime and they are not waivable. 5. § Lemondás a kifogás jogáról, in Varga I. (ed.), *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja III/III.* (HVG Orac, Budapest, 2018) 2861–2863.; H. Kronke, P. Nachimiento, D. Otto and N. Christine Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010).

⁷⁵ Luttrell, *Bias Challenges in International Arbitration...*, 262.

⁷⁶ Born, *International Commercial Arbitration*, 476.

justice is found to have been egregious.⁷⁷ According to Petrochilos,⁷⁸ procedural public policy will only be offended and the arbitral award exposed when the breach is manifest. As framed by Luttrell the breach is manifest when the court does not need the assistance of counsel to see it.

VI. CONCLUSION

This article has aimed to contribute to the discussion of how waiver of the right to challenge the arbitrator and arbitral award based on their dual role can serve as a legal and practical measure ensuring efficiency in a same-neutral hybrid procedure.

With reference to the discussion above on variations of waiver and their possible implication in the context of same-neutral hybrid procedure it can be concluded:

First, each variation and level of waiver of right (failure to object, institutional arbitration rules-national laws, waiver agreement) is relevant and can be applicable in the context of same-neutral hybrid procedure. In the case of such a procedure, the execution of a waiver agreement would be preferable, unless there is an express provision of law on waivers in this context.

Second, lack of impartiality should primarily be claimed in the course of the arbitration in the form of challenging the arbitrator. After rendering an arbitral award – in the form of an annulment action and seeking non-recognition and enforcement – lack of impartiality can be claimed on the basis of denial of the opportunity to present the party's case, procedural irregularity (failure to comply with the parties' agreed procedure or procedure prescribed by law of the seat of arbitration) and violation of public policy, arguing that the party discovered the circumstances concerned after the award was made. In the context of a same-neutral hybrid procedure, violation of procedural guarantees, especially the violation of the right to equal treatment, is relevant.

Third, the parties should expressly agree in writing and give their informed consent to participate in a same-neutral hybrid procedure, and such an agreement should cover the advantages and disadvantages of such a procedure and the parties' understanding of the role of the mediator.

Fourth, the parties should expressly agree in writing that the arbitrator's participation in the settlement discussion and mediation will not be asserted by any party as grounds for challenging the arbitrator or for challenging the arbitral award (unless the award is based *prima facie* in material part on information gained outside the record of the arbitration procedure and obtained in the course of the mediation).

⁷⁷ Luttrell, *Bias Challenges in International Arbitration...*, 273.

⁷⁸ G. Petrochilos, *Procedural law in international arbitration*, (Oxford University Press, Oxford, 2004) 99.

Finally, taking into consideration all the above, it is still critical for both the parties concerned (and their counsel) and the arbitrator to keep in mind that, whether it be a waiver clause, agreement or provision of the applicable arbitration rules, their effect in the domestic courts will vary from case to case and from jurisdiction to jurisdiction, since it depends on the applicable national law. Some legal systems may take the view that certain serious procedural irregularities (serious breaches of principle of equal treatment of the parties) are not capable of being waived by a party. Ultimately, what can or cannot be waived is a matter for the domestic legislator and judge to decide but very few grounds for annulment or non-recognition appear to be non-waivable.

