

## The Analysis of the Human Rights Approach Regarding the Exclusion of Setting Aside the Arbitral Award with Emphasizing on Procedure of the European Court of Human Rights

*Reza Maboudi Neishabouri\**

*Seyyed Alireza Rezaee \*\**

DOI: 10.22096/HR.2023.547324.1431

[Received Date: 22/01/2022 - Accepted Date: 22/10/2022]

### Abstract:

The right to a trial as one of the types of human rights has been emphasized in various international instruments and most countries' domestic laws and possibility of challenging a decision issued by dispute resolution authority is one example of a right to a trial. Considering relationship of this right to human rights, the validity of such an agreement is questionable. Regarding the arbitration, some regulations recognize the exclusion agreement about setting aside the arbitral award. An important question arises about whether this situation is contrary to the parties' right to a trial as one of the examples of human rights or not. This question has been examined in the current study and finally the present article concludes that in order to respect the human rights of the parties, the validity of said agreement is conditional on "being explicit", "freely" and "concluding after the award and knowing the reasons for the objection" and in case of violation of the principle of fair trial and lack of independency and impartiality in the arbitrator, the said agreement has no effect. In Iranian law, due to the lack of legal explicitness and human rights considerations, only in the presence of all the above criteria, exclusion agreement about setting aside the arbitral award is valid and effective.

**Keywords:** Relationship Between Human Rights and Arbitration; Right to Free Access to Justice; Violation of Human Rights; Right to Trial; Independence and Impartiality of Arbitrators.

---

\*Assistant Professor, Department of Private Law, Faculty of Law and Political Science, Ferdowsi University of Mashhad, Mashhad, Iran.

Email: [maboudi@um.ac.ir](mailto:maboudi@um.ac.ir)

\*\*PhD student of private law, Faculty of Law and Political Science, Ferdowsi University of Mashhad, Mashhad, Iran.

Email: [alirezarezaee4771@mail.um.ac.ir](mailto:alirezarezaee4771@mail.um.ac.ir)



### Bibliography

- Benedettelli, Massimo. "Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience." *Arbitration International* 31, no. 4 (2015): 631-659. <https://dx.doi.org/10.1093/arbint/aiv036>.
- Besson, Sébastien. "Arbitration and Human Rights." *ASA Bulletin* 24, no. 3 (2006): 395 – 416. <https://dx.doi.org/10.54648/asab2006051>.
- Born, Gary. *International commercial arbitration*. New York: Kluwer Law International, 2014.
- Bray, Devin, and Heather Bray. *International Arbitration and Public Policy*. New York: JurisNet, 2014.
- Briner, Robert, and Fabian Von Schlabrendorff. "Article 6 of the European convention on human rights and bearing upon international arbitration." in *Law of International Business and Dispute Settlement in the 21st Century*, edited by Robert Briner. Köln: Liber Amicorum Karl-Heinz, 2014.
- Caron, David, and Lee Caplan. *The UNCITRAL Arbitration Rules*. London: Oxford University Press, 2009.
- Cordero-Moss, Giuditta. "Limits to Party Autonomy in International Commercial Arbitration." *Penn State Journal of Law and International Affairs* 4, no. 1 (2015): 186-212. <https://dx.doi.org/10.22059/10.5617/oslaw979>.
- Grabenwarter, Christoph. *European Convention on Human Rights: commentary*. London: Beck/Hart, 2014.
- Hörnle, Julia. *Cross-border internet dispute resolution*. Cambridge: Cambridge University Press, 2009.
- Jakšić, Aleksandar. *Arbitration and Human Rights*. Frankfurt: Peter Lang Verlag, 2002.
- Krausz, Nora. "Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR, Article 6." *Journal of International Arbitration* 28, no. 2 (2011): 137-162. <https://dx.doi.org/10.54648/joia2011013>.
- Kreindler, Richard. *Competence-competence in the face of illegality in contracts and arbitration agreements*. Paris: Martinus Nijhoff, 2013.
- Krūmiņš, Toms. *Arbitration and Human Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR*. New York: Springer, 2020.

- Landrove, Juan Carlos. "European convention on human rights' impact on consensual arbitration." in *Human rights at the center*, edited by Samantha Besson, 73-101. Zürich: Schulthess, 2006.
- Luttrell, Sam. *Bias challenges in international commercial arbitration: the need for a 'real danger' test*. New York: Kluwer Law International, 2009.
- Malintoppi, Loretta. "Remarks on Arbitrators' Independence, Impartiality and Duty to Disclose in Investment Arbitration." *The Law and Practice of International Courts and Tribunals*, no. 7 (2008): 351-356. <https://dx.doi.org/10.1163/157180309X399663>.
- Mantilla-Serrano, Fernando. "Towards a transnational procedural public policy." in *Towards a uniform international arbitration law*, edited by Emmanuel Gaillard. New York: Juris Publishing, 2005.
- Mayer, Pierre, and Audley Sheppard. "Final ILA Report On Public Policy As A Bar To Enforcement Of International Arbitral Awards", *Arbitration International* 19, no. 2 (2003): 249-263. <https://dx.doi.org/10.1093/arbitration/19.2.249>.
- Paulsson, Jan. *The idea of arbitration*. London: Oxford University Press, 2013.
- Petrochilos, Georgios. *Procedural law in international arbitration*. United Kingdom: Oxford University Press, 2004.
- Redfern, Alan, and Martin Hunter. *Law and Practice of International*. London: Sweet & Maxwell, 2004.
- Rezaee, Ali. "Party Autonomy in Judicial Review of International Commercial Arbitral Awards", *International Law Journal* 37, no. 62 (2020): 307-334. [In Persian]
- Scherer, Maxi. "Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?." *Journal of International Dispute Settlement* 4, no. 3 (2013): 587-628. <https://dx.doi.org/10.1093/jnlids/idt013>.
- Scherer, Maxi. "The Fate Of Parties' Agreements On Judicial Review Of Awards: A Comparative And Normative Analysis Of Party-Autonomy At The Post-Award Stage." *Arbitration International* 32, no. 3 (2016): 437-457. <https://dx.doi.org/10.1093/arbint/aiw018>.
- Shiravi, Abdolhossein. *International Commercial Arbitration*, Tehran: Samt, 2012. [In Persian]
- Vahed, Shaghayegh, and Reza Maboudi Neishabouri. "The 'Independence' and 'Impartiality' of Arbitrator; Synonymy or Distinction? (A

Comparative Study in International Commercial Arbitration)",  
*Comperative Law Journal* 6, no. 1 (2015): 393-412. [In Persian]

Van den Berg, Albert Jan. "Should the Setting Aside Of The Arbitral Award Be Abolished?." *ICSID Review Foreign Investment Law Journal* 29, no. 2 (2014): 263-288. <https://doi.org/10.1093/icsidreview/sit053>.

Van Dijk, Pieter, Fried Van Hoof, Arjen van Rijn, and Leo Zwaak. *Theory And Practice Of The European Convention On Human Rights*. Cambridge: Intersentia, 2006.