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"The manifest disregard of the applicable rules chosen by the parties"

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Introduction

Arbitration has been praised for its flexibility, because it offers market participants the opportunity to design its own dispute resolution system. With arbitration, has been said, parties have autonomy not only to define the rules governing their contract but also the rules governing the settlement of potential disputes.

While this proposition is correct, it overemphasizes the role of party autonomy and obscures some of its limits. Indeed, the classical characterization of arbitration as a flexible dispute settlement mechanism where the principle of party autonomy is only restricted by public policy, results incomplete in the light of less theoretical limits to party autonomy.

In this essay I argue that although arbitration is a type of private adjudication, it is subject to limits not easily detectable in theoretical studies. In doing so, I first address the issue of manifest disregard as a ground for annulment of arbitral awards. I then briefly discuss instances in which manifest disregard of the rules chosen by the parties is considered an acceptable (and even good) practice.

I start by stating that as a matter of principle arbitral tribunals shall apply the rules of law chosen by the parties. This principle is established in all the most commonly used arbitration rules and in numerous arbitration laws. Therefore, instances of manifest disregard of parties' chosen rules would constitute a violation of party autonomy.

However, manifest disregard of the law (chosen by the parties) is not listed in any of the major arbitration laws as a ground for annulment of the award. There are different ways to explain this absence. One is that manifest disregard of substantive law is a concept whose contour is difficult to define, because in some cases may be confused with the

acceptable arbitrator's role in interpreting the law which the system does not want to limit. Another explanation is that accepting manifest disregard of the law as a ground for review may open the door to accept appeals against arbitral awards, which is something generally avoided by arbitration laws. A different explanation is that most arbitration laws already include grounds of annulment in case of arbitrations conducted in discordance with procedural laws chosen by the parties or arbitrations in which arbitrators misbehave or exceed their powers, which would already capture the essence of "manifest disregard of the law"

The country where manifest disregard of the law in arbitration as a ground for annulment has received more attention from the courts has been the United States of America. There have been constant dialogue and some departures between the circuit courts and the US Supreme Court. Although the Federal Arbitration Act does not include manifest disregard of the law as a ground for annulment, by way of interpretation U.S. courts traditionally annulled awards rendered in manifest disregard of the law. This changed when the U.S. Supreme Court decided in Hall Street Associates, L.L.C. v. Mattel, Inc. that parties could not expand the limited scope of judicial review of awards. This decision removed also the basis for judicially created grounds for annulment. Nevertheless, some circuit courts by way of jurisprudential construction have continued to affirm that manifest disregard of the law warrants an annulment because it constitutes a case of excess of powers by the arbitrators, which is one ground specified in the Federal Arbitration Act.

The limited remedies available to the parties that have been affected by the disregard by the tribunal of the substantive rules chosen by them confirms that the scope of party autonomy in arbitration cannot be simplistically defined. At the core of this limitation is

the tension between the role of the parties in a dispute and the role of the tribunal. While party autonomy plays a central role before the start of the arbitration, once the arbitration commences party autonomy decreases in importance in favour of the role of the tribunal as governing authority of the proceedings.

As flexible as it may be, arbitration remains an adjudication system and therefore it escapes from the absolute control by the parties in favour of efficiency, independence and impartiality. In the same way in which one arbitrator should not serve the interest of the appointing party, tribunals exercise a function that cannot merely depend on parties' instructions. This tension increases in those rare cases in which tribunals manifestly disregard the rules chosen by the parties, because they reveal an internal clash in the system, which mandates for the tribunals' adherence to parties' chosen rules but does not provide an automatic remedy for annulment.

The exposure of this tension allows us to transition to a broader discussion on limitations to party autonomy in the context of arbitration. In order to set the discussion I explore three types of limitations to party autonomy related to manifest disregard of the applicable rules chosen by the parties.

1. Disregard of rules that are contrary to mandatory rules.

These are instances in which a tribunal may manifestly disregard rules chosen by the parties which if followed would constitute a violation of mandatory rules. These instances are closely connected to public policy limitations and to the principles governing arbitration. On procedural aspects this is captured by article 19.1 of the UNCITRAL Model Law (the "Model Law"), which subjects parties' choice to the provisions of the Model Law.

Article 19.1 refers to a choice of the parties that collides with a mandatory rule of law. One of these rules would be the rule that establishes the right of each party to be heard, provided for in article 18 of the Model Law. If the parties' agreement limits the right of one of the parties to fully present her case such agreement would be contrary to law and therefore the tribunal would be authorized to disregard such an agreement and continue with proceedings with a method adjusted to law.

This is one of the less controversial cases of manifest disregard given that it is accepted that party autonomy ends when public policy starts. Disregard in this case may affect the parties but contributes to legitimate arbitration as an adjudication system.

2. Disregard of rules in order to protect the adjudication system.

This is more characteristically visible at the post award stage, when national legal systems disregard the parties' choices on expansion and restrictions of judicial review of arbitral awards. This is the affirmative complement of our discussion on manifest disregard as ground for annulment of awards in the United States. This is not a case in which manifest disregard is a ground for judicial review but a case in which courts manifestly disregard parties' rules that create additional grounds for review.

There is no country that grants full consideration to party autonomy in this matter. Countries who may be flexible regarding restriction of review may not be as flexible when party autonomy refers to expansion of review. Even France, with one of the most arbitration friendly systems considers unenforceable parties' rules providing for expansion of review.

3. Disregard of rules in order to protect the institutional arbitration system

This is arguably the most prolific category of disregard of parties' chosen rules. I refer in this case to all those instances in which parties have submitted to institutional arbitration but have also provided for specific rules that should modify the institutional arbitration rules.

One of these parties' chosen rules could be a rule removing scrutiny of awards by the International Court of Arbitration in arbitrations conducted under the ICC rules. Accepting that parties have autonomy to decide on the rules governing their arbitration, tribunals and the ICC itself would disregard a rule limiting this scrutiny because it would collide with the system created by the institution to conduct arbitrations.

Similarly, arbitral institutions assign to tribunals the responsibility for the adequate conduct of proceedings. This confers authority to tribunals to depart from specific rules that the parties may have agreed upon and that would create unnecessary delay. Article 14 of the LCIA Arbitration Rules reflects this authority in different sections, vesting the arbitral tribunal with the authority to decide on the rules to be applicable, where the role of the parties is generally seen as collaborative and in good faith.

A conclusion for this discussion on the manifest disregard of the rules chosen by the parties is that party autonomy should be assumed as a guiding principle, which finds limitations in the actual operation of the system. An inevitable consequence of the expansion of arbitration is that party autonomy will find more limitations but the system will gain stability.