

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



International Academy for Arbitration Law

**2015 Runner Up
Laureate of the Academy Prize**

Junjie Li

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

1988 words

Introduction

The morphosis of arbitral procedure is characterized by the shift of control over arbitral procedure from the parties to the tribunal. For the efficient and effective conduct of the arbitration process, the tribunal should be empowered with widest discretion to execute its mandates as conferred by the parties or by operation of law. However, the tribunal’s disregard of parties’ chosen applicable rules may, in certain circumstances, be deemed proper or even necessary, but in other situations may render the award unenforceable. Hence, flexibility in arbitral proceedings must be balanced against procedural fairness and the enforceability of the award.

The present essay seeks to demarcate the legitimate limit of, and analyze the justifications for the tribunal’s (“sole arbitrator” or “arbitral tribunal” will hereafter simply be addressed as “tribunal”) disregard of parties’ chosen applicable rules.

The definition of the “manifest disregard”

“Manifest” literally means “clear or obvious to the eye or mind”, nevertheless, manifest also connotes illegality or inappropriateness since the law gives no countenance to “manifest disregard”. The author thus suggests the “manifest” be defined as:

Positive element: manifest must be both (1) serious in law, and (2) obvious to percept;

Negative element: a mere error in the interpretation or application of the parties’ chosen rules will not qualify.

“The manifest disregard of the applicable rules chosen by the parties”

Hence, the tribunal’s “disregard” is not *per se* “manifest”, but it is “manifest” where such disregard is so egregious that the law will not bear it.

For a further analysis, on one hand, the doctrine of party autonomy denotes parties’ freedom to choose for themselves the applicable rules. Though tribunal has wide discretion, since parties’ chosen rules are an important source of tribunal’s power, thus the tribunal must respect them, and only be justified to disregard them in exceptional cases.

On the other hand, since generally national legislations follow the trend of *favor arbitrandum*, and the obligation to enforce foreign awards under New York Convention is mandatory rather than discretionary, an award is presumed final, and the tribunal’s disregard of parties’ chosen rules is presumed “non-manifest”.

Therefore, the tribunal’s disregard which is not grave enough as to violate procedural justice and to affect the arbitration result will not be deemed “manifest” enough as to render the award unenforceable, accordingly, in fact, the tribunal possesses wider discretion than it seems.

Tribunal’s disregard as justified by mandatory requirements

Though party autonomy should be respected, it is not absolute, and it shall not derogate the mandatory requirements of *lex causae*, the law governing the arbitration agreement, or *lex arbitri*. Where the parties’ chosen rules would lead to an award contrary to the mandatory provisions (e.g. fraud, due process) of *lex arbitri* or the law governing the arbitration agreement, such mandatory requirements shall prevail. Moreover, mandatory provisions of *lex arbitri* shall prevail over parties’ chosen rules even if such choice is allowed under the law governing the arbitration agreement. Therefore, the mandatory

“The manifest disregard of the applicable rules chosen by the parties”

requirements justify the tribunal’s disregard of parties’ chosen rules, and such disregard shall not be deemed “manifest”.

Specifically, almost all arbitration legislations or rules demand due process of arbitral proceedings, including equal treatment of parties, the right to be heard, and the right to non-arbitrary procedures. The tribunal must adhere to due process, and parties’ chosen rules which in violation of due process could be safely disregarded.

However, each country may have different requirements of “due process”, where parties agreed to deviate from the dogmatic application of equality between their respective national law, and such choice does not prejudice the other party’s right to be heard or the substantive justice of arbitration, in that case, such agreement should be respected by the tribunal.

Also, mandatory provisions of parties’ chosen arbitration rules shall prevail (e.g. the exchange of written submissions) and not be derogated by the parties’ agreement.

Very limited review for the tribunal’s disregard of substantive rules

Generally, mistake of law is not by itself a ground of review, but some national legislations provide it as a restricted ground to challenge the award, such as the mistake is of “general public importance” and “open to serious doubt” on the tribunal’s integrity, which is akin to public policy analysis.

Based on minimum of judicial interference, the public policy ground is construed narrowly and the tribunal’s disregard will only be deemed to violate public policy when it violates the forum’s “most basic notions of morality and justice”, such as the tribunal is aware of prevailing legal requirement but disregard it deliberately.

“The manifest disregard of the applicable rules chosen by the parties”

Moreover, the award will not be unenforceable for the tribunal’s application of the “wrong” law or “wrong interpretation” of law, if the tribunal applied the proper law.

The disregard as the tribunal’s excess of power

In most cases, the tribunal’s disregard of parties’ chosen rules connotes the tribunal’s excess of power, under the heading of the “tribunal composition in violation of parties’ chosen rules” or the “irregularities of arbitral procedure”.

Though parties’ choice should be respected, in exceptional circumstances where the imperatives for expeditiousness and effectiveness of the arbitral proceedings prevail over the requirements to respect party autonomy, the parties’ chosen applicable rules could be disregarded. Such as the attempts to establish the tribunal according to the parties’ chosen rules were proven practically impossible, or the appointment of arbitrator would give rise to justifiable doubt on the impartiality or independence of the appointee or any other candidates. In the same vein, the more specific provisions of parties’ chosen set of rules shall prevail over the general rules explicitly chosen by parties.

Also, the tribunal could conduct the proceedings other than parties’ chosen language, by considering parties’ subsequent communications to see if there was a modification to the language requirements.

Moreover, the reviewing body (“institutional/judicial body to review the request for annulment, recognition or enforcement of the award”) generally treat manifest disregard with more leniencies. For *ultra petita*, the reviewing body will only annul or refuse to enforce the wronged part of the award; for *infra petita*, the reviewing body would prefer to address the tribunal to make an additional award, than to annul the award *in toto*.

Tribunal’s duty of information and give reasons for the disregard

“The manifest disregard of the applicable rules chosen by the parties”

There is an obligation for the tribunal to state the reasons for rendering the award, and to make its best endeavour to ensure the enforceability of the award. Since the reviewing body can only review the tribunal’s reasoning against the grounds for annulment or non-enforcement, the best practice of the tribunal is to provide clear and sound reasons to justify such disregard, and to convince the reviewing body.

The author suggests, even if arbitration legislation allows parties to waive giving reasons in the award, and parties did so, in the event the tribunal decides to disregard parties’ other chosen rules, this waiver as a chosen rule should also be disregarded. Because to state reasons despite parties’ will is not sufficiently serious *per se*, rather, the imperatives to provide justifications for the disregard of parties’ chosen rules prevail over party autonomy, as the reviewing body can only reply on the reasoning to dispel doubts on the tribunal’s non-compliance with its mandate and law.

Still, the tribunal must inform the parties if it would decide to disregard their chosen rules and base its reasoning on other considerations or rules, or on a different interpretation as agreed by the parties, as not to surprise the parties by such disregard.

Risk management where the tribunal can either disregard parties’ chosen rules or not

There might be partial and non-fundamental conflicts between the parties’ chosen substantive rules and *lex arbitri*, such as where *lex arbitri* forbids the payment of interests but *lex causae* allows so. Here, the weights to defer party autonomy or *lex arbitri* is roughly equal, thus the tribunal could chose either way.

In the author’s view, since an award that complies with the parties’ agreement would be deemed credible, and most awards are voluntarily performed with no further disputes, the tribunal may decide to award interests base on the specific circumstances of the case, but it entails risks of the award being annulled or unenforceable. Generally, the reviewing body only

“The manifest disregard of the applicable rules chosen by the parties”

annuls or refuses to enforce the defected parts of the award, but it may deny the entire award if the defected part is not severable from other parts. Thus, any part of award that entails the risk of annulment or non-enforcement, such as interests, must be clearly separated from other parts of the award; if this part is not severable, the tribunal should disregard parties’ choice on that part and state the reasons.

Estoppel in challenging or resisting the award

Since the tribunal needs to consider any objections in a timely fashion, a party should raise an objection promptly. Thus, there is a presumption that the tribunal has duly performed its mandate, and, by the doctrine of estoppels, if a party has knowledge of irregularities in the arbitral proceedings and did not raise it in the beginning, s/he would be prohibited to profit from invoking this ground.

Disciplines for the manifest disregard as a result of misconduct

In many countries, wilful or reckless disregard as a result of gross misconduct would disqualify the person to act as arbitrator in the future, subject the arbitrator to cost and damages derived from such misconduct, or even subject the arbitrator to criminal charges such as fraud and bribery.

Party autonomy to restrict or extend grounds of review

If permitted by *lex arbitri*, parties could waive the grounds to annul awards by agreement, and the review of disregard will only exist with the enforcement forum. Here, if the tribunal’s excess of power is not grave and it can be distinguished from non-excess of power, partial enforcement is still possible, otherwise the award may be refused enforcement *in toto*.

“The manifest disregard of the applicable rules chosen by the parties”

For extended grounds of review such as to permit the annulment of the award on the tribunal’s disregard of parties’ chosen rules, though there were cases allowed so, the current trend is to prohibit such practice.

Conclusion

Since an award is presumed final, for challenging the award, the burden of proof is generally borne by the losing party, and the ground of review is exhaustive and narrowly-interpreted, consequently, the tribunal’s disregard is presumed to be “non-manifest” and the threshold of rebuttal is high.

The tribunal could, and sometimes should, by considering the situations of the case, disregard parties’ chosen rules. In summary, for the tribunal’s disregard of parties’ chosen:

- I. Substantive rules, the tribunal possesses wide discretion and subject to very limited review;
- II. Procedural rules, the author proposes a two-step test—firstly, whether there is a *prima facie* manifest disregard; and secondly, whether such disregard is justifiable and should be deemed *non-manifest*, with special notices.

1. *Prima facie* “manifest disregard”

- (1) The parties’ chosen applicable rules must be clearly defined; and
- (2) The tribunal’s ruling and/or conduct of arbitration is in violation of such rules.

2. “Disregard” justified to be “non-manifest”

- (1) Such rules are in violation of the mandatory requirements of the rules themselves, *lex causae*, *lex arbitri* or the law of the recognition and enforcement of the award, or;

“The manifest disregard of the applicable rules chosen by the parties”

- (2) Such rules are excessively disproportionate to the expeditiousness and effectiveness of the arbitral proceedings.
- (3) The tribunal informed the parties if it would decide to disregard their chosen rules or interpretation;
- (4) The tribunal must provide reasons for the disregard in the award, and;
- (5) Parties have knowledge of procedural irregularities and did not raise it in the beginning may be estopped to raise it in challenging or resisting enforcement of award.

Nota bene

- (1) The tribunal must clearly separate any part of the award which entails risk of annulment or non-enforcement, such as interests; if that part is not severable, the tribunal should disregard parties' choice on that part and state the reasons, and;
- (2) If the manifest disregard is a result of gross misconduct, the arbitrator may be disqualified to act as arbitrator in the future, and be subjected to civil liabilities or criminal charges.