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Marek Szolc

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

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I. Introduction

People and businesses agree on arbitration for a variety of reasons. Arguably, the most important is that only there they can fully exercise their autonomy and right to choose. In the realm of arbitration mutual agreement prevails over rigid domestic codes. Parties' choice is at the centre, as they can select the arbitrators, the rules of procedure, the applicable law, the seat and a vast range of other aspects of their dispute resolution framework. This choice affects the overall quality of arbitration, its language, cost, speed, even the risk of setting aside of the award. Consequently, it should be respected by domestic courts, arbitral institutions and the arbitrators themselves.

Parties' autonomy does not end entirely where the dispute begins. However, once it occurs, the entities involved are rarely able to agree on anything. When a proceedings commences previous choices come into play. Arbitrators, arbitral institutions and ultimately courts are obliged to put them into motion and address arising controversies accordingly. Nevertheless, all three may, on purpose or not, disregard the choice made by the parties, despite the fact in theory they are supposed to fully respect it. It undoubtedly affects the parties' procedural satisfaction, trust in arbitration, principle of party autonomy and even proceedings' result. Thus, the issue of disregard of chosen rules brings about Socratic "who watches the watchmen?" dilemma in the context of arbitration. We have to inquire how these entrusted with upholding the parties' choice depart from it and what are the consequences.

This essay will address three key points. Firstly, what "disregard" actually is and if there are any instances where it is justified. Secondly, what is the threshold that makes it "manifest". Lastly, how and when to control cases where such disregard occurs and what consequences it should bring.

II. The idea of disregard of the applicable rules in the context of arbitration

Parties' will, after they express mutual consent, becomes the law for them. They legitimately attach great importance to the rules they choose, as it is a factor that creates certainty and stability. When this choice is disregarded, the situation is worse than as if it was never made. Such "changing the rules during the game" must surprise both litigants and often detrimentally affects position of one or both of them in their proceedings at the time when they may no longer have the capacity to protect their rights.

"Disregard" in this context means something different and likely, something more serious than an erroneous application of the rules or accepting procedural irregularities. It is a situation where rules are ignored fully or in part and provisions different from what the parties have agreed on or could take into account are applied. It may be done knowingly by an arbitral tribunal, a state court reviewing an award or even an arbitral institution in its exercise of case management.

Due to the crucial role of party autonomy in arbitration disregard in most cases would be unacceptable and subjected to corrective measures. Nevertheless, there are certain situation where it might be necessary. It is the case when the parties agree on solutions that might infringe upon imperative provisions of the law, violate public order or anyhow result in setting aside of the award. For example, it does not seem reasonable to expect of an arbitral tribunal to apply an agreed rule that will certainly lead to a successful challenge or denial of enforcement. Denying application might be justified in the light of the rules, like ICC Art. 41 or LCIA Art. 32.2, that require tribunals to make every reasonable effort to ensure the award they render will be enforceable.

However, lines become blurred when tribunals have to assess whether consent to arbitration was conditioned on application of a certain rule. For instance, in a multi-tier dispute resolution clause, where parties agree to mediate firstly and arbitrate their dispute when amicable resolution fails. In case mediation never took place and one of the parties initiates arbitration straight away, can the tribunal disregard mediation clause and assert jurisdiction over the case? On one hand, the parties gave consent to arbitration, wished to avoid domestic court and took into account their case might be eventually decided by arbitrators. On the other, mediation phase can be seen as a condition precedent that validates arbitration agreement. Such dilemmas, often addressed later by domestic courts, show that the notion of disregard must be treated with caution, especially in particularly serious cases, when it could be described as "manifest".

III. How "bad" is "manifest" – in search for a threshold

Considering the aforementioned role of party autonomy, it is tempting to say that every unauthorised departure from the agreed rules is a "manifest" act unacceptable in an arbitration proceedings. In contrast with a simple misapplication, or even a blatant mistake (made, nevertheless, in the belief that what arbitrators decided is correct), non-application of an agreed rule and replacing it with another will be tainted with a deliberate action contrary to the parties agreement. Nonetheless, arguing in favour of such strict approach seems inconceivable.

Unfortunately, existing case law and doctrine offers little guidance in finding an answer to this question. While defining what "manifest disregard of applicable rules" means, we cannot take into account developments made with regard to manifest disregard of substantive law. The idea developed by US courts, though recently curbed by the Supreme Court, focuses on the potential review and vacation of an award due to an

especially flagrant mistake. "Manifest disregard of the law" is described as a situation where an arbitrator knows the law, yet ignores it. However, the content of this law is something outside the parties' influence and irregularities in this field will be reviewed on different grounds. Thus, comparative analysis in this case is unhelpful and disregard of applicable rules calls for an alternative delimitation.

A feasible solution has to take into account potential outcome of disregard. Disregarding a certain rule may indeed affect jurisdiction of a tribunal, challenge of an allegedly dependent or partial arbitrator and result on merits. Under such circumstances the sheer outcome justifies qualifying the disregard as "manifest". At the same time, for the sake of effective administration of justice, there is no need to attach disproportional consequences to a non-application which does not affect the overall result of arbitration or deprive the parties of their procedural guarantees. It does not mean arbitrators and court should put aside all the rules that do not influence directly the result of the proceedings. Such approach would be too simplistic, as rules provide a comprehensive framework for dispute resolution only as the sum of their parts. Yet, excessive focus on acts of minimal significance just for the sake of sanctioning such misconduct can bring more harm than good.

Therefore, it seems reasonable to speak of a "manifest disregard" only in cases where such action influences the very result of a dispute by affecting jurisdiction or conclusions on merits. Manifest disregard might or might not survive scrutiny of an arbitral institution or a domestic court, but will always require one owing to its impact on the parties' interests.

IV. Control and consequences of a manifest disregard

The idea that "manifest disregard" can happen on various stages of an arbitral and enforcement proceedings, as well as be reviewed, has been already mentioned in this essay. There are at least four actors who come into play here: the arbitrators themselves, the arbitral institution overseeing arbitration, the domestic courts deciding on setting aside and enforcement and the appellate courts.

The first stage where disregard may happen is when arbitrators choose to ignore certain rules. In ad hoc arbitration parties might be left helpless, as not every domestic legislation allows for example recourse for challenge or replacement of an arbitrator on such grounds. On the contrary, arbitral institutions often introduce safeguard provisions to prevent it. As an example, ICC Rules Art. 15(2) allows for an intervention of the ICC Court and replacement in case an arbitrator fails to fulfil its role in accordance with the Rules. Likewise, LCIA Rules Art. 10.2 allow LCIA Court to revoke arbitrator's appointment of its own accord if it acts in deliberate violation of the Arbitration Agreement. In comparison, SCC Rules in Art. 16(1)(iii) wide wording giving grounds to possible replacement if an arbitrator "fails to perform his/her functions in an adequate manner" also seems to apply to such situation. Consequently, an arbitral proceedings, though largely independent, is often subject to control and scrutiny even before application to set aside.

Once the award is rendered in proceedings where certain rules were disregarded, a party dissatisfied with its content will almost certainly use this fact to bring a challenge. Disregard of rules can fit squarely into many grounds for setting aside under Art. 34 of UNCITRAL Model Law or for refusing enforcement under Art. V of the New York Convention depending on the circumstances of the case and nature of a particular rule which was ignored. The task of domestic courts it to review on case by case basis whether disregard, on its own not directly listed there, meets the threshold of less general basis stipulated there.

A real issue arises where domestic courts decide to disregard the parties' agreement despite the fact the arbitral tribunal proceeded in accordance with it. A recently resolved French saga of

Tecnimont provides an excellent example of both application and disregard of the very same set of rules within the legal framework of the same seat. Parties agreed there on ICC arbitration seated in France. ICC Court at certain point of the proceedings dismissed a challenge against the president. This decision was later brought up in the setting-aside proceedings. It took two judgments of the French Supreme Court and two erroneous decisions of different Courts of Appeals to finally establish that choice of ICC Rules and their method of verifying independence of an arbitrator must not be disregarded to the fact the French Code on Civil Procedure also contains applicable standards. In that case, the French Supreme Court acted in the end as a guardian of the agreement of the parties and- confirmed mandatory nature of arbitration rules. Unfortunately, this might not always be the case, especially in jurisdictions less friendly to arbitration or simply without significant experience in it. Thus, the question of disregard lies ultimately in the hands of domestic courts that must analyze it with special diligence.

V. Conclusions

The manifest disregard of the applicable rules chosen by the parties is certainly one of the situation no one wishes to deal with in arbitration. Instances where it is justified are rather extreme and every time it occurs, serious risks are involved. It may, nevertheless, become necessary for the good of the resolution of a dispute. To minimize the risk that the parties will arbitrate in vain, disregard should be discouraged no matter of the tribunal's intentions. If a tribunal finds it necessary to disregard any of the rules, it should consult it with the parties and inform them of potential consequences. Likewise, in case of institutional arbitration, institutions should feel compelled to protect the parties to the widest possible extend. In case they provide the parties with necessary information earlier, they may avoid intervention directly in the proceedings. Finally, state courts have to bear in mind that while deciding such cases, they tread a risky ground and should do everything to reconcile party autonomy with policy considerations and independence of arbitration. Taking into account controversial nature of the

presented problem, it is almost certain different domestic courts will arrive at different conclusions while analyzing specific circumstances. We may only await such developments in the case law that will shed more light on the issue. Yet, the general principle must remain unchanged: disregard of the rules chosen by the parties may happen only in case they consent to it or, subject to scrutiny, when the most essential procedural safeguards are threatened under particular arbitration agreement.