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THE MYTH OF AN ARBITRATOR'S DUTY TO RENDER AN ENFORCEABLE AWARD: THEORETICAL FOUNDATION AND THE EXTENT

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ABSTRACT

Impressively, the stakeholders in modern times are resorting to international arbitration to resolve commercial disputes as it is often perceived as cheaper; more confidential; and less time-consuming than court proceedings, and the award is easier to enforce than a court decision. Hence, it would go into the vein if the arbitral awards- the result of such arbitral proceedings- render it unenforceable. As such, there is a robust proposition that it is incumbent on the Arbitrators to render an award enforceable. Thus, following a qualitative approach to legal research, this paper aims to explore the existence of such duty conferred upon the Arbitrator — especially in the case of international commercial arbitration, either by way of contract or vested automatically or legally. Moreover, it looks at the ancillary factors that should an arbitrator take into consideration while making a decision. This article has been designed in parts for a clear segregation of topics that have been

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covered. Following a glimpse of the integral issues in the introduction section in Part I, Part II roots the foundation of the myth of an arbitrator's duty to render an enforceable award. Part III elucidates the nature of such duty, while Part IV explores the sources that confer such a duty upon the arbitrators. In furtherance, Part V portrays some light on the factors ancillary to rendering an enforceable award and Part VI explains the Arbitrator's duty to comply with an enforceable order followed by the concluding remarks of the author as envisaged in the last part of the paper.

INTRODUCTION

Prologue:

"[t]he ultimate purpose of an arbitration tribunal is to render an enforceable award."

— Julian Lew (1999)

Modern global actors are resorting to international arbitration in order to resolve commercial disputes -which generally occur according to an arbitration agreement between the parties (Born, 2010). Comprehensively, the principal justifications for increased resort to international arbitration are neutrality and enforceability (Born, 2010). To that end, a well-drafted arbitration agreement influences the efficiency, fairness, and ultimate result of the dispute resolution proceedings (Blackaby et al., 2011). Consequently, an arbitrator, appointed to resolve a dispute, is required to make the award –the decision of the arbitrators, enforceable. Although the majority of arbitration awards are complied with voluntarily (Moses, 2012), an award may indeed be set aside and denied enforcement if it contains decisions on matters that have not been submitted by the parties or are unenforceable otherwise (Albanesi and Jolivet, 2013); as was observed in several cases such as *Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd & Ors* [1999]; *Honeywell International Middle East Ltd v. Meydan Group LLP* [2014]; *Société European Gas Turbines SA v. Société Westman International Ltd*(1994). However, the notion of the Arbitrator's duty to make an enforceable award and its plausibility has indeed made it very attractive as conceptual support for practically any argument, though with little persuasive evidence to support the existence to the extent claimed. This paper aims to explore the existence of such duty conferred upon the Arbitrator — especially in the case of international commercial arbitration, either by way of contract or vested automatically or legally. Moreover, it looks at the ancillary factors that should an arbitrator take into consideration while making a decision.

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THE MYTH OF AN ARBITRATOR'S DUTY TO RENDER AN ENFORCEABLE AWARD

Notion of the Duty to Render an Enforceable Award: Foundation & Basis

An arbitrator's duty to render an enforceable award is referred to in arbitral awards, national laws, institutional rules, ethical codes, and scholarly writing (Horvarth, 2001). It embodies the idea that an arbitral tribunal should, to the extent it is deemed reasonable, (Catrer, 1995) seek to ensure that its award is enforceable in relevant jurisdictions. Pertinently, this can be done, by fulfilling essential requirements of form (Nelson, 2003). Furthermore, the supposed duty is at best a conceptual point, appealing to the notion of enforceability as a broad objective in international arbitration while providing little in the way of helpful guidance to the arbitral tribunal on the part of the Arbitrators (Nelson, 2003).

Does this obligation really exist or not?

Arguably, it is a conceptual leap to the claim that the Arbitrator must make their best efforts to render an enforceable award (Boog, Moss, and Wittmer, 2013) Objective arbitrability, in light of Article V(2)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention") is one issue in the context in which this purported obligation may appear in practice (Boog and Moss, 2013). As concrete evidence in support of the alleged duty, commentators often point to Article 41 of the ICC Rules, which specifies in part that "*the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law*". Article 32.2 of the 1998 LCIA Arbitration Rules is almost identical. Peculiarly, the word "duty" does not appear to actually exist. However, an arbitral tribunal's duty to render an enforceable award is frequently urged by commentators and counsel alike in support of positions on myriad matters ranging from procedural fairness and jurisdiction to the application of mandatory foreign law (Boog, Moss, and Wittmer, 2013). Comprehensively, Julian Lew's statement, which this paper holds at its top, is in that regard uncontroversial (Boog and Moss, 2013). However, in their *magnum opus* on ICC Arbitration, Yves Derains and Eric Schwartz claimed that it is "*widely misunderstood as imposing a[n] … obligation on … the Arbitral Tribunal, in all circumstances*." Accordingly, it does not impact substantive decision-making (Derains and Schwartz, 2005). Thus, Derains prefers to allow arbitrators to give enforcement concerns weight only if they can envisage the probable place or places of enforcement (Derains 1987). Additionally, several clues suggest that these provisions are not intended to establish a general obligation of the Arbitral Tribunal to render an enforceable award: (i) the provisions are placed at the very end of the Rules among other "miscellaneous" provisions; (ii) their applicability is limited to "all matters not expressly provided for in the[se] Rules"; and (iii) they merely impose a "best efforts" obligation on the arbitral tribunal, a qualifier that

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does not sit well with the supposedly fundamental nature of the alleged obligation — as C. BOOG, B. MOSS noted.

NATURE OF THE ARBITRATOR'S DUTY TO RENDER ENFORCEABLE AWARD: THREE-DIMENSIONAL VIEW

There are at least three schools of thought that demonstrate the nature of the arbitrator's duty to make an enforceable award. Different propositions of these schools can be folded under the following three headings

1. Ethical duties;
2. Legal duties; and
3. Contractual duties

Ethical Duties

The arbitrator has few ethical duties in case of making an arbitral award. Such as; An arbitrator should uphold the integrity and fairness of the arbitration process. An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality; avoid impropriety or the appearance of impropriety in communicating with parties; conduct the proceeding fairly and diligently; make decisions in a just, independent and deliberate manner; be faithful to the relationship of trust and confidentiality in that choice; adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expense; engage in advertising or promotion of arbitral services is truthful and accurate. It was the ethical duty of arbitrators to get impartial and independent and not to have *ex-parte* communications with parties, except when a party is choosing its arbitrators pursuant to an agreement. Moreover, The Arbitral tribunals can and should address applicable provisions of international public policy *sua sponte*.

Legal Duties

The arbitrator's duties are first of all such duties the breach of which may cause consequences for the validity and enforceability of the award. The primary and first and foremost duty of an Arbitrator, as stated in Article 35 of the ICC Arbitration Rules, is "to make sure that the Award is enforceable at law." There may also be duties which, depending on any rules of immunity of the arbitrators, may have other legal consequences if breached, such as the breach of a rule of confidentiality. Thus, these were the legal duties of an Arbitrator in the Arbitration Tribunal.

Contractual Duties

The duties of an arbitrator's contractual part in a particular case are the arbitration clause and the arbitration rules, if any, to which it refers. The clauses and rules will reveal several matters that may imply duties of the arbitrators, such as the duty to go to the particular place which is the seat of arbitration unless the parties dispense with it; the duty to use a particular language; the duty to administer the proceedings in accordance with particular rules; and the duty to plan the proceedings and the arbitrators'

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available time in such a way that the award can be made within the prescribed time limit or within a reasonable time. The parties may, in the arbitration agreement or by reference to a specific set of arbitration rules or a specific arbitration institution, have prescribed other duties of the arbitrators.

SOURCES THAT CONFER THE DUTIES UPON THE ARBITRATORS TO RENDER AN ENFORCEABLE AWARD

There are commonly two sources of rights and obligations of an Arbitrator, such as

Statutes/ Law

The theory states that the duties of an Arbitrator are quasi-judicial derived from the applicable law and *lex arbitri*, which is similar to the position of judges (Brekoulakis, 2009). Courts in several jurisdictions however have leaned towards the relationship is contractual. English courts have held that the relationship is a conjunction of contract and status. However, most national Arbitration Legislations are silent on the status of the arbitrator or their duties. The UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) also contains very few references to the duties of arbitrators (Holtzmann and Neuhaus 1989; Kreindler, 2006).

Contractual Basis

The contractual theory sees arbitration as contractual in nature. The entire arbitral process — from setting up the tribunal to the arbitrators' powers and the binding effect of the award — is seen as a product of the parties' agreement (Naón 1992). This agreement is separate from the party's arbitration agreement and defines the rights and obligations of the parties and arbitrators face-to-face with each other. In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University,* the US Court focused upon the parties' freedom to contract with complete autonomy, including agreements to submit any disputes to arbitration, to select a specific forum for the arbitration, or to allow some claims to be decided by arbitration and some by judicial proceedings, that may create such an obligation upon the arbitrators. Moreover, when institutional arbitration is agreed upon, the institutional rules are incorporated into the arbitrator's contract. Most institutional rules prescribe certain procedures to follow as a part of the arbitrator's duties, such as confidentiality, disclosing conflicts, related to timetables, and maintaining impartiality and independence.

FACTORS ANCILLARY TO RENDERING AN ENFORCEABLE AWARD

To get an enforceable and appropriate award, the Arbitrators need to be more fearful and conventional, rejecting bold decisions; that could reduce the time and cost of the proceedings, or otherwise lead to a more effective resolution of the dispute. Arbitrators should instead be encouraged to seize

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the conditions of the proceedings while maintaining faith in their ability to render sound, enforceable awards. Thus, to render an enforceable award, the arbitrator has to follow two stages of proceedings; which are-

Enforceable Jurisdiction

Even though the arbitrator is under an obligation to render an enforceable award, it lets him assume the jurisdiction of the arbitral tribunal to hear the dispute, and hence, firstly, for the reason that no one can challenge the jurisdiction of the arbitral tribunal under Article II of the NYC (Pietro & Platte, 2001), whereas, UNCITRAL Model Law, art 16 requires that the arbitral tribunal has to satisfy its jurisdiction to hear the dispute; otherwise, it can never provide with an enforceable award, as per Art. 34 of the UNCITRAL.

Additionally, while it is fair that the arbitrator should not be deaf to the enforceability of his award considerations, it would be completely unfair for an arbitrator to assign the question a weight that it does not merit.

In furtherance, the tribunal was questioned in (*Interim award*) *ICC case 4695*, on the ground that the judgment in Brazil's home jurisdiction of the respondent would not be enforceable because Brazilian law did not authorize arbitration provisions such as the one in the case in question. In both the "*Serbian Case*" and the "*Bulgarian Case*" - recent decisions of the Swiss Federal Supreme Court ("Supreme Court") arising from Court of Arbitration for Sport ("CAS") proceedings, it was observed that the arbitral tribunal did not have jurisdiction over the dispute, as foreign mandatory provisions at the likely place of enforcement (Serbia and Bulgaria respectively) rendered the dispute in question inarbitrable and therefore unenforceable (Berger & Kellerhals 2010).

5.2 Proper Proceedings

Arbitrators only must make every effort, concerning ICC Rules, Art 35 and LCIA, Art 32. The arbitrator's this duty is not absolute, but rather a commitment to use every effort; which has been agreed by literature as well (Craig et al, 1992).

Apart from this, all major multilateral treaties and national arbitration laws specify that an award can be set aside in case the arbitral process does not conform with the agreement of the parties or, in the absence of such an agreement, the arbitral status law; they also provide for vacation or refusal of compliance in situations where a party loses notification of the appointment of a tribunal or is otherwise unable to present its case – as it has been reflected in NYC, Art V,1(b); Washington Convention, Art 52(1)(d); UNCITRAL Model Law, Art 34(2)(a)(ii); Moscow Convention, Art V.1.(b); Panama Convention, Art 5.1.(b); English Arbitration Act, Art 68(2)(a). Likewise, in *Guandong Overseas Shenzen Co Ltd vs Yao Shun Group International Ltd* (1998) it was observed that the failure to comply with such proceedings has led to the rejection of awards, particularly if the court has not kept a party aware of correspondence or changes in the arbitration.

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ARBITRATOR'S DUTY TO COMPLY WITH AN ENFORCEABLE ORDER

While conducting proceedings or drafting an award, an arbitrator has to keep in mind the formal-essential requirements and conduct of the arbitration, and also several grounds of the award. Howbeit, the arbitrator's duty to comply with the award, is basically based on two principles; which are namely:

Place of Arbitration:

Brekoulakis notes that the *lex arbitri* has always been significant in an arbitral tribunal's determination of arbitrability. There are two reasons for this. First, the *lex arbitri* is expressly mentioned in Article V(1)(a) of the NYC on the Recognition and Enforcement of Foreign Arbitral Awards. Second, and more importantly, applying the *lex arbitri* allows arbitral tribunals to avoid having their awards subsequently annulled by a court at the place of arbitration (Brekoulakis, 2009). But despite this apparent consensus about the *lex arbitri,* certain commentators have urged arbitral tribunals and courts to adopt a different approach to arbitrability, such as Bernard Hanotiau, who suggested that arbitral tribunals should determine arbitrability based on the law governing the arbitration agreement (Hanotiau, 1996).

Comprehensively, if the arbitrator fails to comply with 'all the requirements of the place of arbitration' (Paulsson, 1981); the award of arbitration can be unenforceable (Paulsson, 1996; Rivkin, 1999), because of being set aside under the Art 34 of the UNCITRAL Model Law. However, setting aside an award in the country of origin does not automatically render it unenforceable in another country, as pertinent from *Baker Marine Ltd vs Chevron Ltd* and *Spicer vs Calzaturificio Teanica S.P.A.* Moreover, an international arbitrator cannot look into all possible applicable laws, especially where the execution of an award can be sought (Derains & Schwariz 1998).

Importantly, the Author Martin in his opinion, found it to be absurd if the arbitrator tries to comply with all requirements since all applicable rules may potentially conflict with each other (Platte, 2003).

Place of Enforcement

In order to make an enforceable award, the arbitrator must comply with two issues, and these are- a.) *lex arbitri,* b.) Art. II and V of the NYC enshrines the formal and essential requirements of the New York Convention; which have to be respected, for the enforcement of an award. (Craig 1985).

Albeit, if an arbitral tribunal issues an award that is enforceable in the countries of the New York Convention, it should not be adequately blamed for failing to take into account a provision that is specific to the rule of the world that turns out to be the country of compliance (Redfern & Hunter 1999). Concisely, complying with these two elements is the duty of the arbitrator to render an enforceable award. Prominently, Art. 35 of the ICC

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Rules of Arbitration requires that the arbitrator has to make an award that is undisputable and he has to make sure that the award is enforceable by law. Moreover, Art. V of the NYC stresses that the grounds for refusal of compliance in many bilateral and multilateral treaties include grounds that rely on the law of the place of enforcement (as opposed to the law of the place of arbitration or substantive law covering the dispute). Among the most general are clauses specifying that a court may reject compliance if an award is contrary to public policy under the laws of that country or is unable to be settled by arbitration (Horvath, 2001).

Apparently, arbitrators also take into consideration the conformity of the grant with the statute of the possible location of compliance. *The ICC tribunal in The Hague***,** for example, foresaw the application of the eventual award in South Korea in one situation and thus found the enforceability of the award under South Korean public law.

CONCLUDING REMARKS

With that note, we would like to conclude that an arbitral tribunal should, as a matter of principle, strive to render an enforceable award. Ultimately, while the expectation that an arbitrator should render an enforceable award is a widely held belief, it is more of a guiding principle than a binding obligation. The evolving nature of international arbitration and the interplay of diverse legal systems suggest that the most effective approach is for arbitrators to remain cognizant of enforceability concerns while maintaining their fundamental duty of impartial and fair adjudication. In doing so, they contribute to the legitimacy and reliability of arbitration as a preferred mechanism for international dispute resolution. In any event, ensuring enforceability is an almost impossible task now that the place of enforcement may often be changed at any moment. Against this backdrop, there is no reason for an Arbitral Tribunal to be overly concerned by the issue each time it is faced with a party referring to the concept.

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