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In Commercial Arbitration, Should Arbitrators Be Exclusively at the Service of the Parties?

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On the ground that arbitration is a consensual and neutral means of dispute resolution, it has been suggested that arbitrators ought to be wholly and exclusively at the service of the parties and that they are not entrusted with a mission to defend public interests.

There may be reasons to call this view into question.

It is true that the selection of arbitration instead of court litigation has an impact on the manner in which the applicable law is identified in the absence of choice of law by the parties: the seat of the arbitration is no forum and reliance on conflict-of-laws rules of the seat is therefore not mandatory. This does not imply, however, that arbitrators are bound to disregard entire categories of laws which may be substantively relevant to settle the parties' claims. In the words of the US Supreme Court,

> "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration" (*Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth*, Inc., 473 US 614 (1985), at 628).

It is, today, beyond question that disputes involving rules which serve public interests – such as disputes over securities issues or disputes involving antitrust laws, "RICO" (US Recketeer Influenced and Corruption Organizatons Act) claims, or economic sanctions – are arbitrable. Accordingly, if such a dispute falls within the scope of matters that parties have agreed to arbitrate, the deciding arbitral tribunal will take these rules into consideration to settle the claims. In fact, just like local courts, arbitrators even have the authority to give effect to rules that both serve public interests and are external to the applicable law – provided, of course, that such rules fit into the category of overriding mandatory rules (or *"lois de police"*). The latter are rules that purport to respond to crucial needs, and therefore proclaim themselves

applicable to all situations falling within their scope irrespective of the law governing each one of these situations.

Provisions such as Article 9(3) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (the "Rome I Regulation") lay down the conditions under which local courts may give effect to overriding mandatory rules foreign to the applicable law. Although such provisions are not directly applicable to arbitration, they are considered to be applicable by analogy or, at least, to set out general guidelines also for arbitrators. Article 9(1) of the Rome I Regulation defines overriding mandatory provisions as *"provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization."* Article 9(3) prescribes, inter alia, that in considering whether to give effect to overriding mandatory provisions that are foreign to the applicable law, *"regard shall be had to their nature and purpose and to the consequences of their application or non-application."*

Guided by these prescriptions, arbitrators may well resolve to give effect to an overriding mandatory rule foreign to the applicable law. They may do so without the parties' consent, perhaps even against their will.

The fact that arbitration is a consensual means of dispute resolution does not imply that the parties may effectively agree that substantively relevant overriding mandatory rules – for instance, antitrust rules – be disregarded, when the purpose of such rules in fact requires that they be taken into account. Similarly, it is not because the jurisdiction of an arbitral tribunal stems from the parties' agreement to arbitrate their dispute that the parties may derogate from mandatory provisions of the applicable law. Otherwise, selecting arbitration as a means of dispute resolution would simply be a freeway for the parties to escape any and all mandatory obligations. In the same vein, interpreting a choice of law by the parties as implying an exclusion of all rules that are not part of the law they have selected amounts to an improper interpretation of party autonomy. Party autonomy only affords the parties room to select the law applicable to matters that stand at their disposal.

As to the fact that arbitration is a neutral (i.e. State-independent) means of dispute resolution, this does not imply that arbitrators are prohibited from giving effect to provisions which serve public interests and which are foreign to the applicable law. What ensures the preservation of arbitration's neutrality is that arbitral tribunals never have an unconditional duty to take into account an overriding mandatory rule merely because of its origin. Unlike domestic courts, which are State organs that must act as guardians of their State's public policy and are bound to give effect to the forum State's overriding mandatory rules, arbitral tribunals owe no allegiance to any State and must subject to the same test all overriding mandatory rules foreign to the applicable law.

This being said, the argument has been made that in order to fulfill their duty to ensure the effectiveness of the award (see, for instance, Article 41 of the ICC Rules of Arbitration, which provides that an arbitral tribunal *"shall make every effort to make sure that the Award is enforceable at law"*), arbitrators ought to give effect to the

overriding mandatory rules of the State where the award is to be rendered and of States where the award may be enforced. Although this assertion is not without merit, it must be tempered.

Under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), recognition and enforcement of an award may be refused if it has been set aside by a competent authority of the country in which or under the law of which that award was made (Article V(1)(e)). If, for instance, the seat of the arbitration is in Switzerland, the award may be set aside if it collides with principles of public policy (Article 190(2)(e) of the Swiss Private International Law Act). Under the New York Convention, recognition and enforcement of an award may also be refused if this would be contrary to the public policy of the State in which recognition and enforcement are sought (Article V(2)(b)). Disregarding overriding mandatory rules of the place of arbitration or of the State where enforcement is sought may therefore lead to enforcement concerns.

The intensity of such concerns, however, does vary. If enforcement of an award is, for instance, sought before a Swiss court, the latter will rely on a narrow concept of public policy (*"ordre public atténué"*) to decide whether the conditions of Article V(2)(b) of the New York Convention are satisfied, and only rarely will enforcement be denied under this provision. Similarly, US courts have interpreted restrictively the concept of public policy under this provision and have in some instances refused to deny enforcement of arbitral awards which were clearly in conflict with the country's foreign policy. In any event, places of enforcement may not be known to the arbitrators at the time the award is rendered. And even if they are, the risk that enforcement be refused is one element among others to be considered, when the benefits of giving effect to a certain overriding mandatory rule that is external to the applicable law are weighed against the benefits of disregarding it. The arbitrators' duty to strive to render awards that are enforceable should therefore not be deemed to imply that all overriding mandatory rules of the place of arbitration or of the State where enforcement could be sought must imperatively be taken into account.

Considering the above, one may conclude the following. The fact that the parties have selected arbitration as their means of dispute resolution does not, by itself, constitute a ground to systematically disregard overriding mandatory rules foreign to the applicable law or, more generally, any rule serving public interests. The inclination to ensure the enforceability of an award may in fact create an incentive for arbitrators to take into account overriding mandatory rules of the place of arbitration as well as those of the States in which enforcement may be sought. The origin of such rules is, however, no sufficient ground to give them effect: their nature and purpose and other possible consequences of their application/non-application must also be considered.

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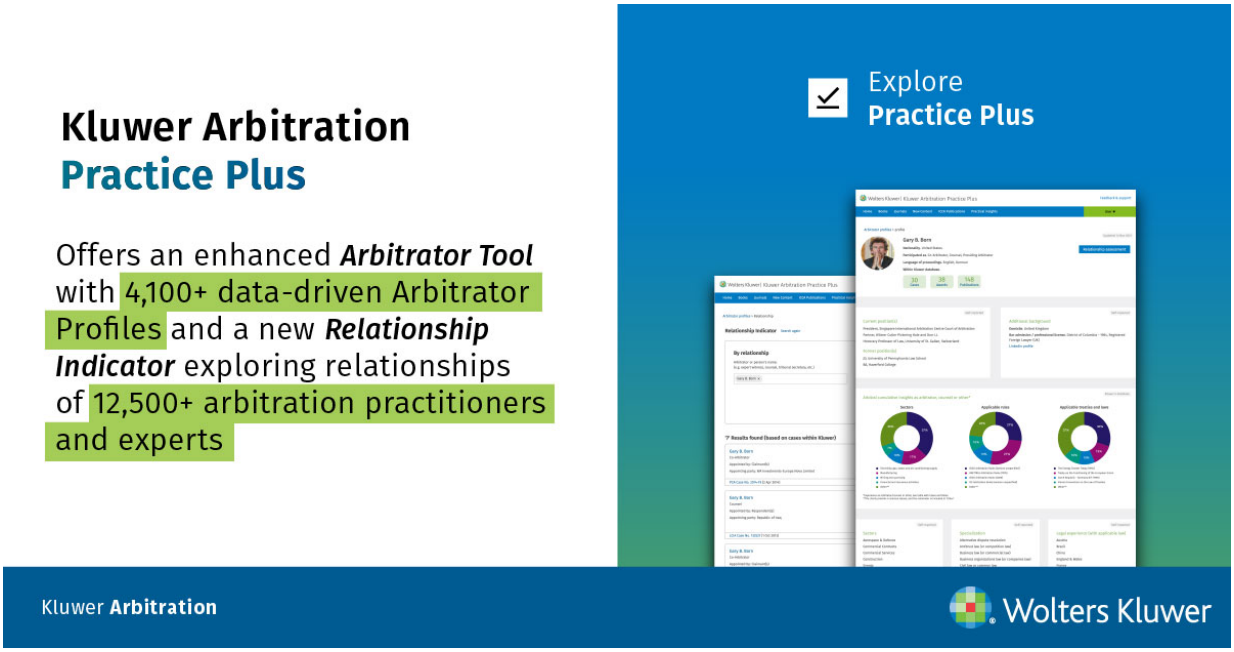

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