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The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award

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An arbitral tribunal's duty to render an enforceable award is frequently used 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. Its considerable malleability has indeed made it very attractive as conceptual support for practically any argument. However, there is little persuasive evidence that such a duty actually exists to the extent claimed. Furthermore, the supposed duty is at best a conceptual blob, 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. At worst, it can detract from the arbitral tribunal's responsibility to conduct arbitral proceedings in an efficient manner.

Upon first impression, it is difficult to deny that the duty to render an enforceable award expresses a fundamental principle in international arbitration. This is in large part accomplished simply through its reference to the concept of enforceability. A core feature of international arbitration—and one that gives it teeth—is the ability of a winning party to have an award enforced if it is not voluntarily complied with. Julian Lew's assessment that “[t]he *ultimate purpose of an arbitration tribunal is to render an enforceable award*” is in that regard uncontroversial.¹⁾ As a result of this general purpose of arbitration, a duty of the arbitrators to render an enforceable award can be, and often is, easily and almost mindlessly thrown into any submission or commentary, where it would then serve as a (lazy) conceptual underpinning for a discussion or specific argument and would not itself be subject to analysis.

A dispute between two Serbian parties that recently made its way to the Swiss Supreme Court is a case in point. One party argued that the arbitral tribunal in the initial arbitral proceedings, which were seated in Switzerland, had breached its duty to render an enforceable award, as well as Swiss public order, in accepting jurisdiction and deciding on the dispute at hand despite the possibility that the award would be unenforceable in Serbia, as Serbian law does not permit agreements between Serbian parties to subject their disputes to foreign courts or tribunals.²⁾

But while enforceability is an important feature of arbitration, it is a conceptual leap to then claim that the arbitral tribunal is under a legal duty to render an enforceable award. It is not evident that enforceability should serve as the arbitral tribunal's (only) guiding light and thus become an ever-

present source of concern.

An initial thought in that regard is that the “duty” does not appear to actually exist. As concrete evidence in support of the alleged duty, commentators often point to Article 40 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 LCIA Rules is almost identical. However, several clues suggest that these provisions are not intended to establish a general duty: (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*” duty on the arbitral tribunal, a qualifier that does not sit well with the supposedly fundamental nature of the duty. In the past, the provisions have mainly been relied upon to devise procedures in specific situations not provided for in the Rules (*e.g.*, joinder or remission of an award to the arbitral tribunal). As the Rules themselves cover more ground with every revision (including in the case of the revised ICC Rules joinder and remission), these provisions have become even more marginal (a fact that the ICC Secretariat readily acknowledges).³⁾ Based on the above, it is difficult to conclude that the provisions establish any type of general duty. Accordingly, in their textbook on ICC Arbitration, Yves Derains and Eric Schwartz warn against a broad reading of the ICC provision, claiming that it is “*widely misunderstood as imposing a[n] ... obligation on ... the Arbitral Tribunal, in all circumstances.*” They state in particular that it does not impact substantive decision-making.⁴⁾

Moreover, a duty to render an enforceable award is in practice close to impossible to police. Determining what constitutes an “enforceable award” is an impossible task, as an arbitral tribunal cannot conceivably ensure universal enforceability. Nor can it anticipate all potential places in which enforcement may occur in practice, as now more than ever parties often have a presence or relevant assets in a number of jurisdictions and readily and easily move those assets around. The arbitral tribunal would not necessarily be aware of this.

As a final thought, the potential drawbacks of a duty to render an enforceable award can be considerable. The duty’s effect, if it is argued by counsel and has too much sway with the arbitral tribunal—unfortunately, arbitrators often appear to be quite fazed by the argument—is an almost debilitating prudence in the conduct of the proceedings. Arbitrators will be more timid 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 the reins of the proceedings while maintaining faith in their ability to render sound, enforceable awards. The arbitral tribunal in our Swiss example did just that, applying the law as agreed among the parties; it was not paralyzed by the fear of rendering an award that may be unenforceable in Serbia, though it was aware of this possibility. The Swiss Supreme Court rightly acknowledged that this course of action was fully acceptable.

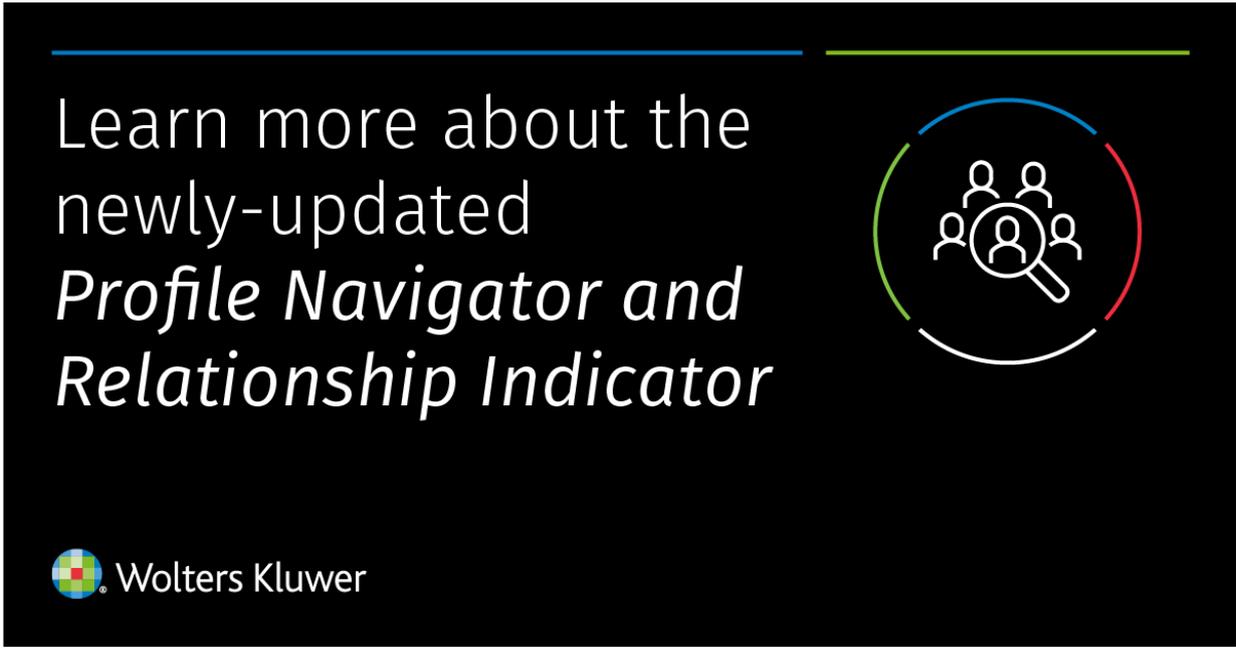
In conclusion, it is self-evident that the arbitral tribunal should make efforts, to the extent it can, to provide for enforceability of its award. But we do not need to, nor could we, capture every practical or common sense responsibility of the arbitral tribunal as a formal duty. In any event, ensuring enforceability is an almost impossible task now that the place of enforcement may often be changed at the click of a mouse. 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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References

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- ?2 Decision 4A_654/2011 dated 23 May 2012 (Swiss Supreme Court).
- ?3 Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC Publishing 2012) at pp. 422-423.
- ?4 Yves Derains and Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International 2005) at p. 384-385.

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