

The Tension between Choice of Law and Mandatory Rules in International Employment and Agency Arbitration

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Party Autonomy in International Arbitration

- ✦ Party Autonomy is a basic principle of international arbitration
- ✦ The right of the parties to select the forum to decide their dispute
- ✦ The right of parties to select the law to govern the determination of the dispute
- ✦ Are there limits to party autonomy?
- ✦ That is the focus of this presentation.



Employment and Agency Law

- In most jurisdictions, employees are entitled statutory protection: termination rights, pay in lieu of notice, severance, maternity rights, hours of work, overtime, right to unionize.
- Employees are deemed to be “weaker” and in need of statutory protection against their employers.
- Minimum termination rights are mandatory – a contract which provides inferior benefits is typically not binding on the employee.



European Agency Law #1

- In the European Union, “commercial agents” are deemed to be a group in need of protection from their principals.
- In 1986, EU passed the Commercial Agents (Council Directive) Regulations.
- These Regulations are now enacted into law in all EU countries.
- A commercial agent is an independent operator who sells goods of a principal in EU. Commercial agent can even be a corporation.



EU Commercial Agents Regulation

- In Germany and France, commercial agents have traditionally received indemnity or compensation upon termination of their agency
- It was compensation for having developed and expanded market for principal's goods. Compensation of two years' commission was typical.
- Commercial Agents Regulations protect right of commercial agents to receive compensation on termination of their agency – even a fixed term agency contract.
- Regulation is mandatory under Reg. 19.



Examples to demonstrate the conflict: What law applies?

- Calif. principal hires an agent to sell its goods in UK. Agency agreement provides for CA law. Agent is terminated and sues in England for compensation.
- NY perfume wholesaler hires commercial agent to sell its goods in France and Israel. NY law applies to contract. Business is sold. New owner dismisses agent. Agent sues in France.
- Belgian agent is fired by Italian mfg. Belgian law applies. There is a mandatory arbitration clause.
- US manufacturer hires Italian distributor to sell its product in the EU. What happens when contract is terminated? Is a distributor a commercial agent?



Before giving the answers . . . A little law

- In 2005, Supreme Court of Canada affirmed that party autonomy is a key principle of international arbitration. Courts defer to parties' choice of forum and implicitly, also choice of law.
- The only exception is overriding public policy. Public policy means local mandatory law must be applied.
- Mandatory foreign law? . . .well, it depends.

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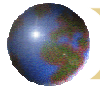
USSC: Judicial Deference to Choice of Law is not a new concept

- US Sup Ct in *Bremen v. Zapata (1972)* stated "*We cannot have trade and commerce in world markets and international matters exclusively on our terms, governed by our own laws, and resolved in our own courts*".
- The USSC upheld the parties' choice of law on the basis that international commerce requires certainty as much as reasonably possible.

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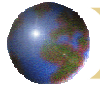
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USSC: Judicial Deference to Choice of Law is not a new concept #2

- ◆ *AT & T Technologies Inc v Communications Workers of America*, the USSC (1986): “[absent] an express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration could prevail.”



UK HL: Strong recent language for judicial deference to arbitration

- In *Fiona Trust and Holding Corp et al. v. Privalov* (2007), UK House of Lords: “ validity, existence or effectiveness of the arbitration agreement is not dependent upon effectiveness, existence or validity of underlying substantive contract unless parties have agreed to this.” Even where contract was procured by bribery or fraud, arbitration clause still valid.
- UKHL approved USSC in *Prima Paint Corp v Flood & Conklin Mfg* (1967): Arbitration procedure, when selected by parties, should be speedy and not subject to delay and obstruction in the courts.”



Deference to party autonomy in employment law in Canada

- In 2002 decision, *Ross v. Christian & Timbers Inc.*, Ontario Superior Court stayed employee's action for wrongful dismissal pending completion of arbitration in Ohio as called for by mandatory arbitration clause.
- Employee worked in Toronto for Ohio executive recruiter. Agreement called for arbitration in Ohio on termination and for termination at will.
- ⊕ But Ontario law had to be applied in arbitration because employee had worked in Ontario.
- If arbitration failed to apply Ontario law, employee may have additional redress in Ontario courts.



But party autonomy has its limits

- In *Houston v. Exigen Canada Inc.*, [2006] service employee of New Brunswick Tel Co was terminated. NBTel had sold part of business to Exigen of Calif.
- ⊕ Exigen hired all NBTel employees but had them sign agreements requiring arbitration in Santa Clara, CA. Exigen sought a stay of NB court action.
- Judge found arbitration clause abusive of employee. She would have to travel to CA to have her contract interpreted under NB law, which Exigen admitted to be applicable. Arbitration clause not applied.
- We don't know if the result will be enforceable in CA.



In EU and UK Courts, a choice of law clause does not override commercial agency law

- Calif. principal hires an agent to sell its goods in UK. Agency agreement provides for CA law. Agent is terminated and sues in England for compensation.
- This is the oft-cited case of *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*, decided by UKCA in 2001.
- The UK CA applied advisory opinion of EU Court of Justice that desirability of harmonizing mandatory EU commercial agents' termination rights meant that agency rights cannot be overridden by choice of law.
- The termination rights of the agent still applied but many have criticized the reasoning.

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France is also in the EU --- "Vive la difference" for party autonomy

- NY perfume wholesaler hires commercial agent to sell its goods in France and Israel. NY law applies to contract. The business is sold. New owner dismisses the agent. Agent sues in France.
- Two weeks after *Ingmar*, the Cour de Cassation heard the case of *Allium Inc. v. Alfin Inc.* The French court came to the opposite conclusion.
- French court held commercial agents' termination rights were only "*ordre public interne*" not "*ordre public international*". Certainty of international commerce required agreements as to choice of law freely entered into to be respected by the Court.
- Neither *Ingmar* nor *Allium* cases refer to one another.

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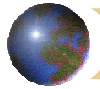
Do judges and arbitrators differ in applying foreign mandatory rules?

- ⊕ Belgian distributor is fired by Italian manufacturer. Belgian law applies. There is a mandatory arbitration clause. Seat of arbitration is Cologne, Germany.
- ⊕ ICC Case No. 6379, (1992): Mandatory Belgian law provides termination compensation for distributors.
- ⊕ 1980 Rome Convention Art. 7, which provides for application of mandatory rules of the place with which situation has a close connection, did not apply as Italy was not a signatory yet.
- ⊕ Arbitrators did not apply Belgian law. Unlike courts, arbitrators owe allegiance primarily to agreement of parties to apply a particular governing law.



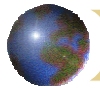
Do judges and arbitrators differ in applying foreign mandatory rules? #2

- ⊕ *Ingmar* and *Case No. 6379* show difference in approach between Court and arbitrator.
- ⊕ Courts consider internal or “essential” public policy and comity between nations. Courts have a “*parens patriae*” obligation to state.
- ⊕ Arbitrators are bound by arbitration agreement, by the UNCITRAL Model Law and Arbitration Rules to respect the choice of the parties with very limited exceptions . . .



What are the public policy exceptions?

- An unenforceable award is an arbitrator's nightmare.
- Under 1958 *NY Convention on Recognition and Enforcement of Arbitral Awards*, Court can refuse enforcement if award contravenes public policy.
- If mandatory law in place of enforcement is not applied, it could be a breach of public policy.
- If choice of law is made for fraudulent or nefarious purposes, public policy is breached: e.g. where parties choose law of a third country to avoid application of penal, tax or commercial laws, such as EU Competition law – See Marc Blessing's article.
- The question is: Is it international public policy?



What are the public policy exceptions? #2

- "Ordre Public" (Public Policy) is hard to pin down - not easily defined
- It could be "*mandatory norms that comprise a state's most basic notions of morality and justice.*"
- An important factor is the connection with mandatory law and the situation.
- Some choice of law clauses exclude conflicts of law rules – so connection may not always apply.
- Does Rome Convention apply? US and Canada not in.
- Arbitrators must be vigilant to avoid being drawn into a scheme to avoid impact of mandatory foreign law.



A few worthwhile points about the EU Commercial Agents' Regulations

- Example: US manufacturer hires Italian distributor to sell its product in EU. What happens when contract is terminated?
- 1999 UK CA case of *AMB Imballaggi Plastici v Pacflex* holds that Regulation does not apply to distributors, where the distributor purchases goods with a right of refund and has no authority to act for the seller.
- Regulation applies only to goods not services.
- Compensation has not been uniform across EU. UK HL in *Lonsdale v. Howard & Hallam* (2007) provides a "made in UK" way to calculate compensation.



Bottom Line

- Judges have a greater allegiance to national public policy than arbitrators.
- Arbitrators are required to respect party autonomy unless there is a clear public policy reason to apply the essential mandatory law of a third country.
- Arbitral awards which contravene public policy of the enforcing state may not be enforceable in that state.



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- J. Erauw, *Observations about mandatory rules imposed on transatlantic commercial relationships*, Houston Journal of International Law, Winter, 2004



Another Important Public Policy. . .

- When time is up, the speaker must sit down.
- Thank you for your attention.
- If you have any questions which cannot be answered today, please call or email.

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