

# CONTRACTUALISTS VERSUS JURISDICTIONALISTS: WHO IS WINNING THE MANDATORY LAW DEBATE IN INTERNATIONAL COMMERCIAL ARBITRATION?

*Josh B. Martin\**

## INTRODUCTION

The role of mandatory rules within international commercial arbitration is a highly complex subject fraught with great difficulty and uncertainty. It has been described as one of commercial arbitration's most challenging issues<sup>1</sup> where "[m]ost relevant questions, including notion, relevance and applicability are not settled."<sup>2</sup> This article intends to bring some energy into the debate on how to deal with mandatory rules in international arbitration. In conducting a review of existing literature, it argues that in cases of uncertainty, on balance, arbitrators are safer sticking to their contractual mandate. It also provides practical proposals to assist in the development of the mandatory rules doctrine, including the propositions that rules to protect parties of weaker bargaining power should be granted international mandatory status, that arbitrators should provide detailed reasoning in their awards when approaching mandatory laws and that practical guidelines should be drafted for use by arbitrators, courts and legislatures when addressing mandatory rules of law in arbitration practice.

The article will first (Section I) introduce the concept of mandatory rules, explaining their general nature, before then (Section II) detailing some of the key theoretical issues they raise. It will then (Section III) provide some discussion on the diverse approaches taken by arbitrators and courts dealing with mandatory rules in practice, before finally (Section IV) concluding.

## I. EXPLAINING MANDATORY RULES OF LAW

Mandatory rules are "an imperative rule of law that cannot be excluded by agreement of the parties."<sup>3</sup> In private international law they are seen as a rule of law which the court must apply even if under choice-of-law rules they must apply another body of law.<sup>4</sup> They are thus

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\* Josh B. Martin LLB PgDip LLM, Teacher in Law and Politics, University of Exeter Law School

<sup>1</sup> MARC BLESSING, *INTRODUCTION TO ARBITRATION – SWISS AND INTERNATIONAL PERSPECTIVES*, SWISS COMMERCIAL LAW SERIES, Vol. 10 at 299 (1999).

<sup>2</sup> Loukas A. Mistelis, *Mandatory Rules of Law in International Commercial Arbitration: Too Much Too Early or Too Much Too Late? Concluding Remarks*, 18 AM. REV. OF INT'L ARB. 217, 217 (2007).

<sup>3</sup> Pierre Mayer & Audley Sheppard, ILA, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 249,261 (2003).

<sup>4</sup> George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 AM. REV. INT'L ARB. 1, 1 (2007). According to Prof. Bermann, this distinction remains to be better understood, for the latter definition does not necessarily reject explicit derogation by party consent. *Id.* at 2.

essentially non-waivable rules of law that are typically designed to protect broader public rights.<sup>5</sup> Such rules can be found in the various legal systems potentially applicable in an international arbitration such as the governing law, the law of the seat, the parties' domicile or place of business, the place of performance, place of enforcement, supranational law and international law.

In a sense, mandatory rules of law could be seen as a by-product of arbitrability: certain subject matter (or object matter if relating to parties' capacity to arbitrate) are accepted by states as arbitrable on the condition that arbitrators take into account any of those states' explicit mandatory public policy rules intended to address those particular issues.<sup>6</sup> In this way, their existence in commercial arbitration is often traced back to the notion of the "second-look" doctrine in the landmark *Mitsubishi* case,<sup>7</sup> where states began accepting arbitrability with the corollary of judicial review of arbitral decisions taking place at the enforcement or set-aside stage to ensure that arbitrators took "cognizance" of any mandatory rules.<sup>8</sup> This led then to Mayer's seminal 1986 article on mandatory rules which laid the groundwork for discussion.<sup>9</sup> Correspondingly, as the arbitrability of certain matters has grown over the years, so, too, has the relevance of mandatory rules,<sup>10</sup> with one well-known statement estimating that arbitrators confront mandatory rules in over 50% of international arbitration cases.<sup>11</sup> This is a misleading statistic however, as while mandatory rules may be relevant in the majority of international arbitrations, the instances where their application has a serious bearing on the end result are likely far more rare.<sup>12</sup> Nevertheless, it will still be a very uncertain, challenging and delicate situation

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<sup>5</sup> Alexander K.A. Greenawalt, *Does International Arbitration Need a Mandatory Rules 'Method'?*, 18 AM. REV. INT'L ARB. 103, 103 (2007).

<sup>6</sup> Jeff Waincymer, *International Commercial Arbitration and the Application of Mandatory Rules of Law*, 5(1) ASIAN INT'L ARB. J. 1, 9 (2009); Bermann, *supra* note 4, at 13-14.

<sup>7</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

<sup>8</sup> *Id.* at 638-39; Greenawalt, *supra* note 5, at 106; Luca G. Radicati Di Brozolo, *Mandatory Rules and International Arbitration*, 23 AM. REV. INT'L ARB. 49, 50-51 (2012).

<sup>9</sup> Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 Arbitration International 274 (1986)

<sup>10</sup> Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Applicable Law in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319, 320 (1996); Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 Melbourne J. INT'L L. 205, 207-208 (2005).

<sup>11</sup> Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14(4) J.INT'L ARB. 23, 23-24 (1997); Cf. Laurence Shore, *Applying Mandatory Rules of Law in International Commercial Arbitration*, 18 AM. REV. INT'L ARB. 91, 95-96 (2007) – "It is not apparent from this article how he derived his statistical determinations and the time period that he used as a starting point."

<sup>12</sup> For example Fouchard, Gaillard and Goldman said in 1999 that they know of "virtually no cases where the arbitrators have relied on the application of a mandatory rule to justify a decision other than that would have resulted from the application of the law chosen by the parties." FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 856-57 (Emmanuel Gaillard & John Savage eds., 1999) Kluwer Law International, 1999); Donald F. Donovan & Alexander K.A. Greenawalt, *Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators*, in PERVERSIVE PROBLEMS IN INTERNATIONAL ARBITRATION 1, 54 (Loukas A. Mistelis & Julian D.M. Lew eds., 2001); Waincymer, *supra* note 6, at 7; Greenawalt, *supra* note 5, at 108.

each time an arbitrator is faced with even a mildly persuasive claim for the application of a mandatory law.<sup>13</sup>

Regardless, the concept and practical role of mandatory rules within international arbitration provides a perfect platform on which legal scholars can proudly display their theories on the fundamental notions of arbitration under the guise of seeking pragmatic solutions. Mandatory rules, as a concept, invite endless discussion on a dichotomic question that goes to the very heart of arbitration: are arbitrators under a *jurisdictional* duty to the states that support arbitration or under a *contractual* duty to the parties that appoint them?<sup>14</sup> Whilst this is a concise expression of the overall debate, it should be obvious that between these polarized viewpoints lies a continuum in which there is plenty of scope for wider issues to be debated.<sup>15</sup> Indeed, as is well known, since “its inception, international commercial arbitration has raised tensions between party autonomy and state rights.”<sup>16</sup> And, as will become clear, the primary discourses on the theory of mandatory rules raised throughout this article can usually be placed along this *jurisdictional v. contractual* continuum.

#### A. *Typography of Mandatory Rules*

There is no exhaustive list of the kinds of municipal laws that could be considered mandatory. Nonetheless, it may be helpful to distinguish mandatory rules into a number of types. Firstly, there are procedural rules that relate to arbitral procedure (such as due process laws) and then there are substantive rules of law. By logic it is often the substantive mandatory rules that create the most controversy and with which we are most concerned.<sup>17</sup> These substantive rules can often be seen as those that reflect “states’ internal or international public policy, and generally protect economic, social or political interests.”<sup>18</sup> They can therefore often form part of a state’s international politics or trade, such as export/import controls, boycotts, embargoes, environmental protection; or, alternatively, can be more clearly intended to protect a state’s internal market, such as competition laws, securities trading laws and foreign exchange controls. Another distinction can be made between those non-waivable rules that are intended to protect third parties unrelated to the contract (e.g. competition laws) and those intended to redress imbalances in contractual

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<sup>13</sup> Alan S. Rau, *The Arbitrator and ‘Mandatory Rules of Law,’* 18 AM. REV. INT’L ARB. 51, 62-63 (2007).

<sup>14</sup> Barraclough & Waincymer, *supra* note 10, at 243 “The reason for the complexity of this issue is that mandatory rules leave arbitrators tangled up in arbitration’s identity crisis.”

<sup>15</sup> This makes mandatory rules of law “one of the most burning issues in... daily international arbitration practice.” – MARC BLESSING, IMPACT OF THE EXTRATERRITORIAL APPLICATION OF MANDATORY RULES OF LAW ON INTERNATIONAL CONTRACTS 70 (1999).

<sup>16</sup> Waincymer, *supra* note 6, at 9.

<sup>17</sup> Barraclough & Waincymer, *supra* note 10, at 206.

<sup>18</sup> *Id.*..

negotiations for weaker parties (e.g. consumer, employment and agency laws).<sup>19</sup> All of these distinctions remain to be better understood and the literature that addresses mandatory rules can often fail to highlight the potentially important differences in legislative intent between these alternative types of mandatory rules.<sup>20</sup>

### B. Mandatory Rules Devised To Protect Weaker Parties

One question that still needs to be addressed is whether laws intended to protect weaker parties are to be included as a category of international mandatory law. In the past, Mayer has said they are,<sup>21</sup> Kessedjian said they may be,<sup>22</sup> and Voser has said they are not.<sup>23</sup> The premise of Voser's argument is that such laws are not *international*, but purely domestic, and therefore should instead be invoked through developed conflict rules,<sup>24</sup> and furthermore that such rules do not have a paramount *public* importance.<sup>25</sup> Similarly Waincymer suggested caution when approaching this difficult question, but hinted that because such rules are not intended to protect third parties, but solely the parties to the contract, they could be analyzed under a consent and choice-of-law approach, i.e. be deemed waivable.<sup>26</sup>

Surely there is a significant public importance in protecting weaker parties in international contract law and such laws are intended to account for their lack of bargaining power; they are therefore devised to *avoid* reliance on choice of law and consent. Kessedjian determined that the matter has probably now been put to bed by virtue of the Rome I Regulation,<sup>27</sup> which removed employment and consumer contracts from the status of “overriding mandatory provisions” and gave them separate treatment; however, that separate treatment was to increase their mandatory nature, not to negate it.<sup>28</sup> Furthermore, laws governing distributorship

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<sup>19</sup> Trevor C. Hartley, *Beyond the Proper Law: Mandatory Rules Under Draft Convention on the Law Applicable to Contractual Obligations*, 4 *European Law Review* 236, 238 (1979)

<sup>20</sup> Waincymer, *supra* note 6, at 27.

<sup>21</sup> Mayer, *supra* note 9, at 275.

<sup>22</sup> Catherine Kessedjian, *Mandatory Rules of Law in International Commercial Arbitration: What Are Mandatory Rules of Law?*, 18 *AM. REV. INT'L ARB.* 147, 149 (2007).

<sup>23</sup> Voser, *supra* note 10, at 325.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 349.

<sup>26</sup> Waincymer, *supra* note 6, at 41.

<sup>27</sup> Kessedjian, *supra* note 22, 149; *see also* ALEXANDER J. BELOHLÁVEK, *ROME CONVENTION, ROME I REGULATION – COMMENTARY* 1492 (2009).

<sup>28</sup> Under Article 6(1) of the Rome I Regulation, consumers are given separate rules to ensure that Member States invoke the consumer's home laws and permit jurisdiction in the consumer's domicile. Council Regulation 593/2008, Art. 6(1), 2008 O.J. (L 177) 6, 12 (EC). The EU's position on upholding mandatory consumer laws is clear. For example, Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 1980 O.J. (C 282) 1, 28, state that the types of domestic rules which Member States were anxious to preserve as overriding rules under the Rome Convention 1980 included consumer laws; Hannah L. Buxbaum, *Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization*, 18 *AM. REV. INT'L ARB.* 21, 23 (2007); JULIA HÖRNLE, *THE JURISDICTIONAL DILEMMA OF THE INTERNET, in LAW AND THE INTERNET*, 127-28 (Lilian Edwards & Charlotte Waelde eds., 3d ed. 2009); Art 6(2) of the Unfair Terms Directive similarly requires mandatory observation of the pro-consumer Directive even if the contract has a choice-of-law

agreement are surely equally intended to protect weaker parties, yet their mandatory attachment seems to attract less controversy than the promotion of internationally mandatory consumer laws.

### C. *Lois de Police*

It should be clear by now that what we are concerned with here is a state's international mandatory laws (*lois de police*), rather than its domestic mandatory laws (*disposition imperatives*).<sup>29</sup> For an arbitrator to determine whether he or she needs to apply a mandatory law, would in fact require considering the state's intended spatial reach of the law in question and determining whether it is intended to have extraterritorial effect. This is often not clear.<sup>30</sup> Therefore the transnational scope of the law in question often needs to be determined by interpretation,<sup>31</sup> and just as would a court,<sup>32</sup> the arbitrators work by "identifying the policy underlying the domestic rule and assessing whether the contacts of the situation are such that the non-application of the rule would seriously frustrate this purpose."<sup>33</sup>

In terms of extraterritoriality, such analysis requires questioning whether the state has a "strong and legitimate interest" in seeing its laws applied.<sup>34</sup> It is worth noting that, considering the pro-enforcement attitudes of courts interpreting the New York Convention,<sup>35</sup> the majority of national mandatory rules are unlikely to achieve this international status; it can often therefore depend on the attitudes of the state or region involved. A significant case, for example, is *Eco Swiss China v. Benetton*,<sup>36</sup> in which the European Court of Justice determined that EU

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clause pointing to the law of a non-member country as long as the contract has a close connection with a Member State. Council Directive on unfair terms in consumer contracts, 93/13/EEC, Art. 6(2), 1993 O.J. (L 95) 29, 31.

<sup>29</sup> Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT'L ARB. 175, 181 (2007); Voser, *supra* note 10, at 321; Audley Sheppard, *Mandatory Rules in International Commercial Arbitration – An English Law Perspective*, 18 AM. REV. INT'L ARB. 121, 126 (2007).

<sup>30</sup> Buxbaum, *supra* note 28, at 25-26; Kessedjian, *supra* note 22, at 150.

<sup>31</sup> Bernard Audit, *How Do Mandatory Rules of Law Operate in Civil Litigation*, 18 AM. REV. INT'L ARB. 37, 38 (2007); Sheppard, *supra* note 29, at 141-42; Voser, *supra* note 10, at 348.

<sup>32</sup> Bjorklund, *supra* note 29, at 181.

<sup>33</sup> Audit, *supra* note 31, at 40; Bermann, *supra* note 4, at 6-7; Sheppard, *supra* note 29, at 143-44.

<sup>34</sup> Rau, *supra* note 13, at 56.

<sup>35</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958), 21 U.S.T. 2517, 33 O.U.N.T.S.. See generally Mayer & Sheppard, *supra* note 3.

<sup>36</sup> Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, 1999 E.C.R. I-03055 (referring to Articles 81 and 82 of the EC Treaty as they were then (now Art 101 and 102 of the Treaty of the Functioning of the European Union (TFEU) as amended by the Lisbon Treaty 2007)); Julian D.M. Lew, *Competition Laws: Limits to Arbitrators' Authority*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 241, 256 (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009):

This decision provides protection (if such is needed) that arbitrators in the EU, or in respect of awards having effect in the EU will apply EU competition law and will do so properly. It is a recognition that arbitrators will and are obliged to apply applicable and especially mandatory rules where appropriate. Any failure to do so, or doing so wrongly, could result in the award being set aside or enforcement refused.

See also Christoph Liebscher, *Arbitral and Judicial Decision: European Public Policy after Eco Swiss*, (1999), 10 AM. REV. INT'L ARB. 81 (1999); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 483-84 (2003).

competition law is to be regarded as a mandatory law in any member state whenever a contract has a close connection to the European internal market.

However sympathetic one is to the *contractualist* ideology, it is important to remember that the concept of having laws that protect public policy which cannot be derogated from by private agreement is universally accepted across all national legal systems:<sup>37</sup> so why, one could ask, should this attitude be any different simply by virtue of the parties conveniently transacting in the transnational rather than domestic space? Is it only because an applicable single legal system, replete with substantive public policy laws, might be less apparent? Alternatively, what justification is there for one state seeing its own self-determined public values applied beyond its own territory? These questions go to the heart of the mandatory law debate and seem forever unsettled.

#### D. *Public Policy*

Just as with the concept of arbitrability, there is often an assumption that mandatory rules of law are just another aspect of public policy.<sup>38</sup> However, the two can and should be distinguished. First, mandatory rules are usually a positive obligation on an arbitral tribunal to act in a certain way, whereas public policy, working more as a *shield*, is a negative obligation to ensure contracts working against common public values are not endorsed.<sup>39</sup> Second, therefore, mandatory rules are usually more explicit and set out in statutes or conventions, whereas public policy is based more on general attitudes and is detectable from a broader array of sources.<sup>40</sup> However, mandatory rules can often be an expression of, and included within, a state's public policy.

#### E. *Private International Law*

Mandatory rules of law also play an integral role within private international law. In fact, as with international arbitration, they form a relatively new subject in the field of private international law.<sup>41</sup> Therefore many of the methodologies that authors propose and which

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<sup>37</sup> Charles H. Brower, *Arbitration and Antitrust: Navigating the Contours of Mandatory Law*, 59(5) BUFFALO L. REV. 1127, 1142 (2011); Radicati Di Brozolo, *supra* note 8, at 52.

<sup>38</sup> Sheppard, *supra* note 29, at 125; Bermann, *supra* note 4, at 3.

<sup>39</sup> Kessedijan, *supra* note 22, at 151.

<sup>40</sup> Mistelis, *supra* note 2, at 217; Voser, *supra* note 10, at 322; Stavros Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, *supra* note 36, at 19, 29-30 (making the additional point that for this reason there should be less concern that arbitrators will apply mandatory rules incorrectly as they are more explicit and less prone to incorrect interpretation).

<sup>41</sup> A popular English text on Private International Law stated in 1999 that "the concept of mandatory rules has only recently been introduced into English law." PETER NORTH & JAMES FAWCETT, CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW 150 (13th ed. 1999).

arbitrators employ in dealing with potential mandatory rules of law are those contained within conflict-of-laws methodologies, usually of the seat of arbitration or governing law.<sup>42</sup> There is one key difference, however, which must be emphasized: A court approaching questions of foreign mandatory laws is required to do so with regard to ensuring that its *own* mandatory rules of the *lex fori* are applied.<sup>43</sup> In determining whether a foreign law takes precedence over its own mandatory laws a court is constrained by its own conflict-of-laws methodologies which often do not generously lend too much deference to foreign mandatory laws, so will often ultimately apply those of the forum or the *lex causae* (applicable law) and very rarely those of any *third* state.<sup>44</sup> The primary argument supporting any such deference is usually merely that of judicial comity.<sup>45</sup> Conversely, as is well-known, an arbitrator is in the unique position of having no *lex fori*: to her all substantive mandatory laws outside the governing law and all procedural laws outside the seat are essentially foreign.<sup>46</sup> Her mandate is complicated by her unique position of being contractually appointed to deliver an enforceable decision for the parties, but having neither a recognized duty nor system for determining which mandatory rules are relevant, if any.<sup>47</sup>

## II. THEORETICAL DILEMMA

Where one stands along the jurisdictional v. contractual continuum impacts widely on one's predisposition towards the inclusion of mandatory laws into arbitration practice: If arbitration is anational and separated from state controls (i.e. "delocalized") and arbitrators are operating solely under their private contractual obligation to the parties, then surely they only need to consider the *lex causae*. In this instance, the substantive laws at the seat of arbitration and any other third state's laws would become irrelevant.<sup>48</sup>

Alternatively, if arbitration is given its force by virtue of the states surrounding it, either by procedurally supporting arbitration within their territory or enforcing its resulting awards, then the public interests of those states would need to be considered.<sup>49</sup> Not surprisingly, and unhelpfully, the consensus is that arbitration is a hybrid of the two, although it is probably closer

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<sup>42</sup> Brower, *supra* note 37, at 1158; Bjorklund, *supra* note 29, at 185.

<sup>43</sup> Radicati Di Brozolo, *supra* note 8, at 54.

<sup>44</sup> Voser, *supra* note 10, at 330.

<sup>45</sup> Mistelis, *supra* note 2, at 227; Audit, *supra* note 31, at 45; Buxbaum, *supra* note 28, at 28 ("Comity, even less concrete as a basis for applying foreign law, also operates as a discretionary principle.").

<sup>46</sup> Mistelis, *supra* note 2, at 221-22.

<sup>47</sup> Bjorklund, *supra* note 29, at 184; Rau, *supra* note 13, at 61.

<sup>48</sup> Sheppard, *supra* note 29, at 121-22; Waincymer, *supra* note 6, at 16-17.

<sup>49</sup> Bjorklund, *supra* note 29, at 184.

to the contractual side.<sup>50</sup> This prompts the usual question “whether arbitrators have a duty to apply mandatory rules or whether they merely have discretion to do so.”<sup>51</sup> It seems that overall, however, arbitrators do enjoy very wide discretion when addressing mandatory rules. In fact, as will be discussed, often their approach to such rules in practice might simply come down to: (A) their own perceptions of their role along the jurisdictional/contractual continuum;<sup>52</sup> and (B) how strongly they interpret their duty to the parties to include the duty to render an enforceable award.<sup>53</sup>

#### A. *Uncontroversial Applications*

There are now some applications of mandatory law within commercial arbitration that are generally considered to be uncontroversial. The first and most simple of these are the procedural mandatory rules at the place of arbitration.<sup>54</sup> Such application fits neatly within the framework of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and the 1985 UNCITRAL Model Law, as well as the reasonable expectations of the parties.<sup>55</sup> These rules are of course designed to uphold the due process values of arbitration, thus providing it with its very basis of legitimization.

Another instance where mandatory laws are accepted, appearing in private international law generally, are when foreign laws are treated as facts, such as deeming the performance of the contract impossible through illegality or some other type of *force majeure*.<sup>56</sup> However, conceptually, it is important to note that this is not the *application* of a foreign mandatory law, but rather using such laws as *evidence* of fact under the parties’ chosen law.<sup>57</sup>

Finally, it is “uniformly accepted that arbitrators must apply any mandatory rule that reflects *transnational public policy* in order to maintain minimum standards of conduct and behavior in international commercial relations.”<sup>58</sup> This, as an even more narrow concept than *international public policy*, comprises “fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by

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<sup>50</sup> Rau, *supra* note 13, at 53; Barraclough & Waincymer, *supra* note 10, at 210; Waincymer, *supra* note 6, at 9-10.

<sup>51</sup> Waincymer, *supra* note 6, at 22 (emphasis added).

<sup>52</sup> Mayer, *supra* note 9, at 283.

<sup>53</sup> Shore, *supra* note 11, at 92; MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL ARBITRATION* 82 (2d ed. 2012).

<sup>54</sup> Bermann, *supra* note 4, at 5; Waincymer, *supra* note 6, at 23; Shore, *supra* note 11, at 91.

<sup>55</sup> Waincymer, *supra* note 6, at 25-26; Rau, *supra* note 13, at 74-75.

<sup>56</sup> Bermann, *supra* note 4, at 13; Rau, *supra* note 13, at 70-74; Barraclough & Waincymer, *supra* note 10, at 218; Waincymer, *supra* note 6, at 6.

<sup>57</sup> Blessing, *supra* note 11, at 33-34.

<sup>58</sup> Barraclough & Waincymer, *supra* note 10, at 218 (emphasis added); Audit, *supra* note 31, at 43; Rau, *supra* note 13, at 53-54; Mistelis, *supra* note 2, at 227.



what are referred to as ‘civilised nations’.”<sup>59</sup> Such mandatory laws could also include human rights or *bonos mores*<sup>60</sup> and can naturally be determined from observations of international consensus and cooperation.<sup>61</sup> Furthermore, given their apparent transnationality and ubiquity, arbitrators will find it easier to establish a “connection” between the contract in dispute and a principle of transnational public policy. However, the justification for such an approach lies not in the mandatory rules doctrine, but more generally within international public policy<sup>62</sup> and perhaps also within the arbitrator’s own moral compass.

### B. *Challenging the Contractualist Viewpoint*

If the parties elected a governing law for their contract then surely they anticipated that the mandatory rules of that law would apply to their dispute. Similarly, if they elected a certain location as the forum for their arbitration, they would have anticipated that substantive mandatory norms of that forum might apply. These two notions tend to sit in the middle ground in terms of the mandatory law controversy: In reality, an arbitrator applying mandatory rules from the *lex contractus* or even those from the place of arbitration (where not directly conflicting with the former), would most likely be acting in accordance with the legitimate expectations of the parties and, save for rare and exceptional cases, such applications are the least likely to be controversial.

However, not everyone can agree with even this relatively modest notion. For example, can it be said with any certainty that the parties did not select the arbitration forum out of pure convenience, quite reasonably not anticipating that local public policy rules could interfere with their contractual dispute? Or, further still, can it be said that the parties’ choice of law was intended simply to deal with the contractual “micro-matters” or private matters, and was not intended to include the wider public policy rules dealing with “macro-matters”?<sup>63</sup> Overall, however, most could probably accept that such public policy rules probably would be within the reasonable expectations of the parties and that their avoidance by arbitrators, perhaps more seriously, runs the risk of set-aside at the place of arbitration or the denial of enforcement under the catch-all public policy defense under Article V(2)(b) of the New York Convention.

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<sup>59</sup> INTERNATIONAL LAW ASSOCIATION, ILA INTERIM REPORT ON PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS 7 (2000).

<sup>60</sup> Such as opposition to slavery, corruption, terrorism, genocide, pedophilia or racial, sexual and religious discrimination; Barraclough & Waincymer, *supra* note 10, at 218.

<sup>61</sup> Voser, *supra* note 10, at 349-353; Lew et al., *supra* note 36, at 423-424.

<sup>62</sup> Gaillard et al., *supra* note 12, at 850.

<sup>63</sup> Voser, *supra* note 10, at 339-347; Bjorklund, *supra* note 29, at 184; *supra* note 65.

Therefore, the *contractualist* argument, with its philosophy firmly grounded in the highly regarded notion of party autonomy, perhaps seems like the safest rationale for arbitrators to observe. However, there are a number of key considerations that swing the mandatory law debate back toward the *jurisdictionalist* side, such as: the extent to which arbitrators are expected to maximize the enforceability of their awards; the concern that arbitrability can be removed at the will of states; and general concerns over the standing of arbitration as a reputable and legitimate means of resolving international disputes considering the potential impact that arbitral decisions could have on the wider public.

### C. Duty to Render Enforceable Awards

As has been asked previously, are arbitrators obliged to render the “correct” decision or an “enforceable” decision?<sup>64</sup> Alternatively, under what situation might arbitrators feel duty-bound to consider mandatory rules at the likely place of enforcement? The reality is that arbitrators will approach this question in highly pragmatic terms based on the facts. For example, the more obvious the likely place of enforcement is, the more likely that arbitrators will consider that state’s mandatory laws.<sup>65</sup> That said, it is widely accepted that arbitrators owe no *explicit* duty to the parties to render an enforceable award;<sup>66</sup> there are only modest duties to make “every reasonable effort” to render an enforceable award under common institutional rules.<sup>67</sup> In addition, it is well accepted that the majority of arbitration awards are voluntarily complied with.<sup>68</sup>

Above all, an arbitrator is not likely to be heavily criticized for staying solely within his/her explicit contractual obligations. In fact, far worse than this, if an arbitrator oversteps his mandate he is at risk of acting in excess of jurisdiction and having the award denied on arguably

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<sup>64</sup> Günther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18(2) J. INT’L ARB. 135 (2001); Mistelis, *supra* note 2, at 227; Brower, *supra* note 37, at 1138; Blessing, *supra* note 11, at 30-31.

<sup>65</sup> Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA CONGRESS SERIES NO. 3 at 227, 255 (Pieter Sanders ed., 1987); Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, 11(2) ARB. INT’L 137, 140-41 (1995); Rau, *supra* note 13, at 82; Voser, *supra* note 10, at 335; Brekoulakis, *supra* note 41, at 31; Waincymer, *supra* note 6, at 42-43.

<sup>66</sup> Barraclough & Waincymer, *supra* note 10, at 215; Waincymer, *supra* note 6, at 14-15; Mistelis, *supra* note 2, at 7 (“The duty towards the parties to render an enforceable award only exists as long as the parties have not renounced it.”).

<sup>67</sup> ICC ARBITRATION RULES, Rule 41; LCIA ARBITRATION RULES, Rule 32.2; In fact, the ICC has a generally pro-mandatory law viewpoint (Brower *supra* note 37, at 1155-1157), for example, the ICC explicitly states in Article 6 of its Internal Rules relating to internal appeals (contained in Appendix II of its standard rules) that it will consider “the requirements of mandatory law at the place of arbitration.” Interestingly, however, recently the ICC Secretariat stated that the “best efforts” rule is becoming increasingly marginal. JASON FRY, SIMON GREENBERG & FRANCESCA MAZZA, *THE SECRETARIAT’S GUIDE TO ICC ARBITRATION*, 422-23 (ICC Publication 729E, 2012).

<sup>68</sup> See e.g., Arthur Taylor von Mehren, *Limitations on Party Choice of the Governing Law: Do they Exist for International Commercial Arbitration*, 24 (The Mortimer and Raymond Sackler Institute on Advanced Studies, 1986); Christopher Boog & Benjamin Moss, *Arbitrability, Foreign Mandatory Law and the Lazy Myth of the Arbitral Tribunal’s Obligation to Render an Enforceable Award*, 31(3) ASA Bull. 647, 656 (2013); Moses *supra* note 54, at 73.

more serious due process grounds.<sup>69</sup> The safest option still seems therefore to stick to the contract unless the mandatory law in question is so obviously relevant that it needs to be applied.<sup>70</sup> To evaluate which rules are of the most concern, regard could be had to existing case law and arbitral award reports; for example, in light of the EU's well-known protectionist attitudes towards its competition policy,<sup>71</sup> it would be imprudent for an arbitrator to ignore a credible allegation of breach of mandatory EU competition policy, where the EU might be a likely place of enforcement.<sup>72</sup>

#### D. *Ex Officio Application*

Another practical concern for arbitrators relates to their obligations to raise mandatory law matters *ex officio*, i.e. if the matters are not raised by one of the parties as a basis of claim or defense. Much has been written on this subject<sup>73</sup> and again the reality in practice is that it comes down to arbitral discretion, although once again, one would imagine the easiest option for arbitrators is to simply to limit themselves to matters raised *inter partes*. Only when the likely place of enforcement is patent and the mandatory law in question is one that the state is likely to defend, might arbitrators be advised to raise the matter at the outset.<sup>74</sup> This is all the more so if the matter relates to transnational public policy.<sup>75</sup> This is a delicate balancing act, however, as most often the law in question is likely to favor one party, which could create the unwelcome appearance of bias or, again, accusations of overstepping jurisdiction. It would thus appear that given the relatively large amount of freedom arbitrators have in applying mandatory rules, they

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<sup>69</sup> Greenawalt & Donovan, *supra* note 12, at 57; Excess of jurisdiction is covered by Article V(1)(d) of the New York Convention and Article 36(1)(a)(iii) UNCITRAL Model Law.

<sup>70</sup> Greenawalt *supra* note 5, at 160; Lazareff, *supra* note 70, at 140-141; Shore, *supra* note 11, at 100; *cf.* Julian D.M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, in *IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION*, ICCA CONGRESS SERIES NO. 9 at 114, 115 (Albert J. van den Berg ed., 1998) (“The ultimate purpose of an arbitration tribunal is to render an enforceable award.”).

<sup>71</sup> *See e.g.*, GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 650 (4th ed. 2007); Brower, *supra* note 37, at 1131-1132.

<sup>72</sup> Hans van Houtte, *The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission*, 19 EUR. BUS. L. REV. 63, 65 (2008); The EU could also be said to be protectionist under its agency and consumer laws. *See e.g.*, Ingmar v. Eaton Leonard, Case C-381/98, Judgment of the Court (Fifth Chamber), Nov. 9 2000, [2000] ECR I-9305; Blessing, *supra* note 1, at 132-133; Italian Principal v. Belgium Distributor, Final Award in ICC Case No. 6379 of 1990, in *Collection of ICC Arbitral Awards 1991-1995*, 134 (Kluwer Law International, 1997); EEC Council Directive 93/13/EEC (April 5, 1993) Article 6(2) suggesting as a general rule European courts are more likely to require as mandatory those laws developed to protect certain classes or groups of citizens within its internal market. *See also* Sheppard, *supra* note 29, at 141-42).

<sup>73</sup> *See, e.g.* Radicati Di Brozolo, *supra* note 8, at 72; Karim Y. Youssef, *The Death of Inarbitrability*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 56 (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009); Alexis Moure, *Arbitration and Criminal Law: Jurisdiction, Arbitrability and the Duties of the Arbitral Tribunal*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES*, *supra*, at 227; Shore *supra* note 11, at 97; Voser *supra* note 10, at 355-356; SA Thalès v. GIE Euromissile (Paris Court of Appeals, Nov. 18, 2004, Case No. 2002/60932).

<sup>74</sup> Shore, *supra* note 11, at 97; Voser, *supra* note 10, at 355-56.

<sup>75</sup> Bermann, *supra* note 4, at 15; Blessing, *supra* note 11, at 35-38.

may simply seek to avoid them as far as possible, both because the rules are likely unfamiliar to them and because they may just add unnecessary complexity.<sup>76</sup>

#### E. *Concerns over Arbitrability and the Reputation of Arbitration*

The other primary arguments supporting the consideration of mandatory laws in arbitration relate to the potentially important public function undertaken by arbitrators as international legal decision-makers. Firstly, issues are only arbitrable by consent of the state. Thus, there is nothing to prevent states from denying the arbitrability of certain subject matter or altering their enforcement-bias, where they feel their public interests are being consistently ignored. Whether this is likely in reality, post-*Mitsubishi*, is perhaps questionable, however.

Similarly there is a relatively plausible argument that arbitrators, in dealing with disputes between large economic powers, collectively affecting billions of dollars worth of transactions and countless millions of people, have a duty to the wider public.<sup>77</sup> Whether this is sufficient reason to override party autonomy of course always depends on the facts. For example, supporting transnational public policy is certainly justifiable, but what of a state's apparently parochial extraterritoriality? Furthermore, whether arbitrators look to the long-term prosperity and reputation of arbitration as an institution, over and above their professional reputation and contractual obligation to the parties, is also uncertain.<sup>78</sup> Nevertheless, it should not be forgotten that arbitrators, whatever their duty, will want their awards to be legally enforceable. However, in terms of self-interest, some suggest arbitrators are better off avoiding mandatory laws except in the most exceptional of cases because future parties are, on the balance, likely to prefer arbitrators who stay within their contractual mandate to those who appear vulnerable to hearing wider public policy matters.<sup>79</sup>

### III. MANDATORY RULES OF LAW IN PRACTICE

#### A. *The Practice of Arbitrators*

Since Mayer's seminal article several "methods" have been proposed for application by arbitrators when approaching questions of mandatory law. First off and furthest to the

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<sup>76</sup> Hans Smit, *Mandatory Law in Arbitration*, 18 AM. REV. INT'L ARB. 155, 160 (2007).

<sup>77</sup> Bermann, *supra* note 4, at 8; Kessedjian, *supra* note 22, at 152-53; Brekoulakis, *supra* note 41, at 25.

<sup>78</sup> Rau, *supra* note 13, at 54; Voser, *supra* note 10, at 333; cf. Barraclough & Waincymer, *supra* note 10, at 213.

<sup>79</sup> This of course depends on whether the arbitrator is appointed pre or post-dispute, and whether the arbitrator is party-appointed or appointed by the institution. See Greenawalt, *supra* note 5, at 107; Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VANDERBILT J. INT'L L. 647, 650 (1998); Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L. J. 1279, 1302-07 (2000).

jurisdictional side is the objective methodological approach to mandatory rules, often based along conflict-of-laws methodologies – perhaps the most common in practice.<sup>80</sup> This invites arbitrators to use either the conflicts methodologies of the place of arbitration or of the governing law – opinions differ as to which<sup>81</sup> – in order to determine whether the mandatory law in question should take precedence over the governing law. Common methodologies therefore include the Rome I Regulation,<sup>82</sup> the U.S. Restatement on Conflict of Laws,<sup>83</sup> or the Swiss Private International Law Act.<sup>84</sup>

Next along the continuum is the contractual approach, where the only relevant factors are the parties' consent, legitimate expectations and what is implied or contained within the contract.<sup>85</sup> Then furthest along, in line with the anationalist view of international arbitration, is the approach where only truly international public policy needs to be considered.<sup>86</sup> Similarly, there is a suggested practice that arbitrators should only be concerned with detecting whether the arbitration has clearly been used as a vehicle to avoid certain mandatory rules,<sup>87</sup> and some academics have also promoted the “maximalist” approach, which is that of seeing the parties' choice-of-law as broad enough to permit the application of *every* possible mandatory law, unless expressly reserved under the contract to the jurisdiction of national courts.<sup>88</sup> There are cogent arguments in favor and against each of these approaches and there is nothing to prevent arbitrators, under their wide discretionary powers, from using a combination of each of them; again, the most important determinant in their decision is probably the legitimate expectations of the parties as well as a brief consideration of the attitudes of any clearly relevant state(s) toward that particular public policy rule. It should perhaps be asked, however, whether this great

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<sup>80</sup> Waincymer, *supra* note 6, at 29; Voser, *supra* note 10, at 344; Barraclough & Waincymer, *supra* note 10, at 227-233.

<sup>81</sup> Brower, *supra* note 37, at 1158; Bjorklund, *supra* note 29, at 185.

<sup>82</sup> Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I) 2008 O.J. (L 177) 13 (EC), Art. 9(1) (“Overriding mandatory provisions are 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...”) and Art. 9(3) (“In considering whether to give effect to those provisions regard shall be had to their nature and purpose and to the consequences of their application or non-application.”).

<sup>83</sup> U.S. RESTATEMENT (SECOND), CONFLICT OF LAWS, § 187(2)(b) only permits the application of foreign mandatory laws where that state has a “materially greater interest” in seeing their laws applied; *see also* Brower, *supra* note 37, at 1150, who refers to this as a “demanding criteria that seems to discourage the application of mandatory laws.”

<sup>84</sup> Swiss Private International Law Act 1987, Art. 19(1) (“When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to by this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law”) and Art. 19(2) (“In deciding whether such a provision is to be taken into consideration, one shall consider its aim and the consequences of its application...”).

<sup>85</sup> Barraclough & Waincymer, *supra* note 10, at 233-235; Rau, *supra* note 13, at 64-65; Brekoulakis, *supra* note 41, at 20; Waincymer, *supra* note 6 at 19, 23.

<sup>86</sup> Derains, *supra* note 65, at 251-52; OKEZIE CHUKWUMERIEJE, CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 184 (1994); These methodologies do of course generally include the mandatory rules of the *lex causae* in addition to transnational public policy. Gaillard et al., *supra* note 12, at 853.

<sup>87</sup> Radicati Di Brozolo, *supra* note 8, at 55; Barraclough & Waincymer, *supra* note 10, at 235; Smit, *supra* note 76, at 173; Buxbaum, *supra* note 28, at 29.

<sup>88</sup> Rau, *supra* note 13, at 64-8; Greenawalt, *supra* note 5; Voser, *supra* note 10, at 339-47.

divergence of methodological approaches provides us with sufficient predictability and consistency.

### B. *The Practice of Courts*

Just as the arbitrators have a delicate balancing act to undertake, the same can be said of the courts that review arbitral awards. The first thing to be said is that in this post-*Mitsubishi* age, there is nothing to suggest that arbitrators are averse to or incapable of correctly interpreting or applying mandatory rules;<sup>89</sup> instead they just need guidance as to *when* to do so. On this point, one might question the English High Court's decision in *Accentuate Ltd v. Asigra Inc*<sup>90</sup> at the pre-award stage, finding that arbitrators will not consider foreign mandatory rules outside the *lex causae* simply because they are under no obligation to do so.

As with general arbitrability, courts need to balance the parties' intentions to arbitrate and the finality of the arbitration process with those important public policy matters for which arbitration could facilitate circumvention.<sup>91</sup> Just as in *Mitsubishi*, courts are often mindful of the time and expense already invested in the arbitration process at the post-award stage,<sup>92</sup> and tread very carefully in terms of challenging the finality of arbitration awards. They, too, need to determine the nature of their own mandatory rules and whether their extraterritorial reach is justifiable.<sup>93</sup> Ultimately, it is important to remember that the pro-enforcement bias of the New York Convention nowadays encourages refusal under Article (V)(2)(b) only for breach of *international* public policy, i.e. that "violate[s] the forum state's most basic notions of morality and justice."<sup>94</sup> This confirms again that arbitrators are probably safest bedding down in the *contractualist* rather than *jurisdictionalist* camps,<sup>95</sup> except in those very rare cases where the

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<sup>89</sup> Voser, *supra* note 10, at 353; Brekoulakis, *supra* note 40, at 28-32.

<sup>90</sup> *Accentuate Limited v. Asigra Inc.*, [2010] 2 All ER (Comm) 738 (QBD); Stephen Burke, *Case Comment - Accentuate Limited v. Asigra Inc: Arbitration Does Not Displace Mandatory Provisions of EU Law*, 13 INT'L ARB. L. REV. 18 (2010); Stuart Dutton & Thierry Berger, *Case Comment - The Application of Mandatory Laws in England and Wales: Accentuate Limited v. Asigra Inc.*, 14 INT'L ARB. L. REV. 73 (2011).

<sup>91</sup> Audit, *supra* note 31, at 40; Bermann, *supra* note 4, at 6-7; Sheppard, *supra* note 29, at 143-44; Kessedjian, *supra* note 22, at 152 ("what is important to find out are the values underlying the rules and whether those values are so profoundly important for the society from which they emanate, that private parties cannot deviate from them").

<sup>92</sup> Smit, *supra* note 76, at 165.

<sup>93</sup> ILA Final Report, *supra* note 35, at 10 ("inconsistency with a mandatory rule should not per se be a ground for refusing enforcement of an arbitral award. Only the violation of those mandatory rules, which are at the same time *lois de police* [i.e. international] may be grounds for refusing enforcement"); Barraclough & Waincymer, *supra* note 10, at 224.

<sup>94</sup> *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974). Therefore, international public policy is a very narrow concept, as compared with domestic public policy. See generally ILA Final Report, *supra* note 35, specifically Recommendation 1(b); Barraclough & Waincymer, *supra* note 10, at 224; Voser, *supra* note 10, at 333-34; Luigi Fumagalli, *Mandatory Rules and International Arbitration: An Italian Perspective*, 16 ASA BULL. 43, 57 (1998); Radicati Di Brozolo, *supra* note 8, at 56.

<sup>95</sup> Rau, *supra* note 13, at 60:

[W]e are increasingly obliged to recognize, as a practical matter, the ability of arbitrators to make a "reasonable choice" among all the bodies of law that purport to apply to a given dispute--and to choose that law they deem

public policy allegation is *transnational*, judging from international consensus, or, a state which is *likely* to become involved is *known* to expect extraterritorial application of their own policy on the matter.<sup>96</sup>

It is also important to take a moment to praise the decisions of the U.S. courts in the *Lloyd's* cases.<sup>97</sup> They had to address head-on the question as to why one state's legislative approach to a certain public concern should carry extraterritorial effect into the transnational sphere, where arguably every state with some connection to the dispute has a right to see its laws applied. Ultimately they determined that the English mandatory laws (the governing law), while not providing for U.S.-style punitive treble damages, still carried sufficient "deterrent effect" compelling the parties to observe the alternative yet well-regulated English securities laws.<sup>98</sup> This perhaps provides a glimpse into the future when national laws have become increasingly harmonized.<sup>99</sup> The more similar that domestic public policy laws are, the less concern there will be for preferring the contractually elected state's laws. Therefore, the primary concern for courts should be ensuring that parties are not avoiding related public policies in their entirety and focusing whether there is a sufficient level of "deterrence" provided in the governing law.

### C. Reasoned Awards

One of the primary objections to arbitrability generally is the confidential nature of arbitration and its lack of appellate procedure; hence the development of the "second-look" doctrine.<sup>100</sup> This provides another difficult balancing act for the courts in determining how rigorous the judicial review of arbitral awards addressing mandatory laws should be. They are not expected to decide on the merits or second-guess arbitrators, nor are they, in the interests of finality of the process, expected to re-open the arbitral hearing.<sup>101</sup> However, they may need to

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most "worthy" of application: This is an inevitable corollary of indulgent standards of judicial review, and indeed is only limited by the occasional willingness of courts to intervene.

<sup>96</sup> An example is where a case involves an EU member state and the subject matter relates to a licensing arrangement which is in possible breach of Article 101, as in *supra* note 36, *Eco Swiss China Time Ltd. v. Benetton International NV*

<sup>97</sup> *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1361-66 (2d Cir. 1993); *Haynsworth v. The Corporation*, 121 F.3d 956, 969-70 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923, 928-30 (4th Cir. 1996); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 161-62 (7th Cir. 1993).

<sup>98</sup> *Greenawalt*, *supra* note 5, at 109; *Buxbaum*, *supra* note 28, at 32 ("these decisions may be read simply as an expedient recognition of the fact that few cross-border transactions today are connected so closely with a single jurisdiction that only one state can fairly lay claim to exclusive application of its rule").

<sup>99</sup> *Greenawalt*, *supra* note 5, at 118.

<sup>100</sup> HERBERT KRONKE, *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY*, 356-58 (2010).

<sup>101</sup> See generally Gordon Blanke, *Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law*, 23(3) J. INT'L ARB. 249 (2006); *Mitsubishi*, 473 U.S. at 637; *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956), (holding that whether arbitrators misconstrued a contract is not open to judicial review); *United Steelworkers v. Enterprise Wheel & Car Corporation*, 363 U.S. 593, 599 (1960); *United Paperworkers International Union v. Misco, Incorporated*, 484 U.S. 29, 38 (1987) ("Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts"); *ARW Exploration Corporation v. Aguirre*, 45 F.3d 1455, 1462

undertake further investigations in those very rare cases where it is apparent *prima facie* that there has been a clear breach or an ignorance of deep-seated international mandatory rules.<sup>102</sup>

Therefore, the decision of the U.S. Second Circuit Court of Appeals addressing domestic arbitration in *Halligan v. Piper Jaffray*<sup>103</sup> – where enforcement was refused for lack of detail in the arbitral award’s reasoning when addressing an imperative public policy matter – should perhaps be observed in the transnational sphere.<sup>104</sup> Requiring arbitrators to provide clear and detailed reasoning in their awards when addressing mandatory laws and public policy generally – even if just to provide succinct reasoning why a claim was quickly dismissed – could be sufficient to satisfy the courts that such issues were satisfactorily addressed.<sup>105</sup> It thus overcomes any reservations about the private nature of arbitration in dealing with public matters<sup>106</sup> and provides sufficient threat to the parties that mandatory laws will be considered by arbitrators. Such a practice would also diminish a party’s desire to challenge enforcement on the basis that mandatory laws were not properly considered in the arbitral process. Furthermore, as is well-known, arbitrators do not have the particular expertise, resources or sanctioning abilities of certain competent authorities, such as the Court of Justice of the European Union,<sup>107</sup> nor are they in a position to make referrals to such authorities.<sup>108</sup> However, encouraging detailed reasoning in the award enables the courts at the review stage to make such referrals where necessary, ensuring that potentially serious public policy breaches do not slip through the net.<sup>109</sup>

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(10th Cir. 1995) (“the standard of review of arbitral awards is among the narrowest known to the law”); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association*, 790 F.2d 611, 614 (7th Cir. 1986) (award must be confirmed even if arbitrator “clearly misinterpreted” the contract); *National Wrecking Company v. International Brotherhood of Teamsters*, 990 F.2d 957, 960 (7th Cir. 1993); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972); *Lew, Mistelis & Kröll*, *supra* note 36, at 731.

<sup>102</sup> *Smit*, *supra* note 76, at 163.

<sup>103</sup> *Halligan v. Piper Jaffray Incorporated*, 148 F. 3d 197 (2d Cir. 1998), *cert. denied*, 52 U.S. 1034 (1999).

<sup>104</sup> *See also Smart Systems Technologies Inc. v. Domotique Secant Inc.*, 2008 QCCA 444 (Can.); Jurisdictions around the world actually vary as to their requirements for award reasonings, with many jurisdictions not specifically requiring detailed award reasoning within their international arbitration legislation (e.g. Greece and India) or with legislation based on the basic requirements under UNCITRAL Model Law Article 31(2). *See Kronke*, *supra* note 100, at 376-77. This provision of the UNCITRAL Model Law could potentially be developed to require stricter levels of reasoning in the award when addressing mandatory law and public policy questions.

<sup>105</sup> *See Smit*, *supra* note 76, at 159-60:

If the award is not reasoned, arbitrators may be inclined simply to disregard the applicable mandatory law. But if the award is to be reasoned, they will have to take recourse to seeking reasons for not applying it. Awards that are improperly reasoned are generally not subject to attack in court. This rule may be subject to qualifications if mandatory law is involved, but the extent to which this is so is not clear;

*See also* ILA Final Report, *supra* note 35, at recommendation 3(c) (“When the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the courts should be allowed to undertake such reassessment of the facts”); *Kronke*, *supra* note 100, at 376 (also suggests the same where the award reasoning appears contradictory or confused).

<sup>106</sup> *Barraclough & Waincymer*, *supra* note 10, at 213-14.

<sup>107</sup> *Lew*, *supra* note 36, at 215, 485-87; *Voser*, *supra* note 10, at 331.

<sup>108</sup> *BREKOULAKIS*, *supra* note 41, at 23-24, 26; *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

<sup>109</sup> *Smit*, *supra* note 76, at 164-65 (“As long as arbitral tribunals are regarded as authorized to apply mandatory law, review of their awards for misapplication of that law will remain necessary in order to avoid that arbitration will become the means of avoiding the application of mandatory law that, by definition, may not be avoided”).



#### IV. CONCLUSION

The reality is that despite some discussion, we are no closer to consensus on the controversial aspects of mandatory law than we were 30 years ago.<sup>110</sup> As this article demonstrates, there is a distinct lack of academic literature facing up to the tattered pieces of the subject. Despite a growing preference toward contractualist pragmatism, we cannot forget that with its unrestrained autonomy, shrouded secrecy and ever-increasing global influence, arbitration has the potential to dampen or entirely circumvent many laws of vast public importance. The wide adoption of conflict-of-laws methodologies indeed ensures some level of predictability. Nevertheless, it remains optional. Furthermore, considering arbitration's transnational and contractual-jurisdictional hybrid nature, issues could arise from adopting jurisdictionalist conflict-of-laws methodologies based on meagre notions of judicial comity. What is perhaps needed now is a well-drafted set of guidelines for use by arbitrators, legal counsel, courts and legislatures for use when approaching mandatory rules. Instead of being largely theoretical and based on jumbled hypotheses, as has been the case with academic literature on the subject to date,<sup>111</sup> such guidelines should be carefully drafted through collaborative research based on case law, judicial opinion and primary sources, rather than theory, and ultimately provide pragmatic guidelines ordered by subject matter.

Such guidelines would not only finally provide some substance to a vast grey area at the heart of arbitration, but would drive forward harmony and cohesion in the international arbitration framework promoting consistency, predictability and the upholding of public values: Arbitrators and legal counsel would have a better idea of how courts would review their awards, as well as how to interpret the mandatory aspirations of multiple national laws, and courts would know what they were looking for at the review stage and would more clearly understand their role within the framework.

Some other conclusions on the subject of mandatory laws can be drawn from this article. Firstly, on the whole, arbitrators are generally safer sticking to their contractual mandate unless exceptional facts before them suggest mandatory rules are highly pertinent. Mandatory rules

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<sup>110</sup> Waincymer, *supra* note 10, at 2-3.

<sup>111</sup> See Blessing's 6 Leading Criteria, *supra* note 11, at 28-33; Waincymer's 22 Questions, *supra* note 6, at 43-44; Barraclough & Waincymer's private international law styled suggested approaches, *supra* note 10, at 227-235; REPORT ON ASCERTAINING THE CONTENTS OF THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION, 20-21 (73d Conf. 2008); Blessing, *supra* note 1, 266-67; Rau, *supra* note 13, at 78.

intended to protect parties of weaker bargaining power, e.g. consumer laws, should be considered of an international nature to ensure they cannot be contracted around. At the review stage, courts should promote the practice amongst arbitrators

of providing detailed reasoning in addressing questions of mandatory law and public policy generally. Finally, courts should also be mindful to compare, where possible, the “deterrent effect” of their own mandatory laws with the contract’s governing law; only where there are clear avoidances of that form of public protection, in its entirety, need they be especially concerned.