



ΕΛΛΗΝΙΚΗ ΔΗΜΟΚΡΑΤΙΑ
Εθνικόν και Καποδιστριακόν
Πανεπιστήμιον Αθηνών
— ΙΔΡΥΘΕΝ ΤΟ 1837 —

ΝΟΜΙΚΗ ΣΧΟΛΗ

ΕΝΙΑΙΟ ΠΡΟΓΡΑΜΜΑ ΜΕΤΑΠΤΥΧΙΑΚΩΝ ΣΠΟΥΔΩΝ
ΚΑΤΕΥΘΥΝΣΗ: ΙΔΙΩΤΙΚΟ ΔΙΕΘΝΕΣ ΔΙΚΑΙΟ ΚΑΙ ΔΙΚΑΙΟ ΔΙΕΘΝΩΝ
ΣΥΝΑΛΛΑΓΩΝ
ΠΑΝΕΠΙΣΤΗΜΙΑΚΟ ΕΤΟΣ: 2016-2017

ΔΙΠΛΩΜΑΤΙΚΗ ΕΡΓΑΣΙΑ
της Ευγενίας Χρήστου Σταυροπούλου
Α.Μ.: 7340012116021

ISSUES OF THEORY IN INTERNATIONAL COMMERCIAL ARBITRATION: THE APPLICATION OF OVERRIDING MANDATORY PROVISIONS IN INTERNATIONAL COMMERCIAL ARBITRATION

Επιβλέποντες:

Χαράλαμπος Παμπούκης
Ελίνα Μουσταΐρα
Χρυσαφώ Τσούκα

Αθήνα, 19 Φεβρουαρίου 2019

Copyright © *Ευγενία Σταυροπούλου* 2019

Με επιφύλαξη παντός δικαιώματος. All rights reserved.

Απαγορεύεται η αντιγραφή, αποθήκευση και διανομή της παρούσας εργασίας, εξ ολοκλήρου ή τμήματος αυτής, για εμπορικό σκοπό. Επιτρέπεται η ανατύπωση, αποθήκευση και διανομή για σκοπό μη κερδοσκοπικό, εκπαιδευτικής ή ερευνητικής φύσης, υπό την προϋπόθεση να αναφέρεται η πηγή προέλευσης και να διατηρείται το παρόν μήνυμα.

Οι απόψεις και θέσεις που περιέχονται σε αυτήν την εργασία εκφράζουν τον συγγραφέα και δεν πρέπει να ερμηνευθεί ότι αντιπροσωπεύουν τις επίσημες θέσεις του Εθνικού και Καποδιστριακού Πανεπιστημίου Αθηνών.

TABLE OF CONTENTS

TABLE OF CONTENTS	1
1. Introduction.....	3
2. Applicable Law and Overriding Mandatory Rules in International Commercial Arbitration	5
2.1. <i>Private International Law in Arbitration Proceedings and the Determination of the Applicable Law by Arbitrators</i>	5
2.2. <i>The Arbitrators' Discretion in Determining the Applicable Law</i>	6
2.3. <i>The Various Methodological Approaches Followed by Arbitrators</i>	8
3. The Notion of Overriding Mandatory Rules in Private International Law	10
4. The Application of Overriding Mandatory Rules by Arbitrators	13
4.1. <i>The Application Of Mandatory Rules By Arbitrators As A Matter Of Principle</i>	13
4.2. <i>Determining the applicable mandatory rules in arbitration</i>	15
4.2.1. <i>The Overriding Mandatory Provisions of The Seat Of The Arbitration</i>	15
4.2.2. <i>Application of Mandatory Rules Deriving from the Governing Law of the Contract and of Third Countries</i>	16
5. EU Conflict of Law Rules and EU Overriding Mandatory Rules in International Commercial Arbitration	19
5.1. <i>The Application of EU Private International Law Rules by Arbitrators and the Interplay with EU Overriding Mandatory Rules</i>	19
5.1.1. <i>The Application of Rome I and Rome II Regulation as a Gateway for EU Overriding Mandatory Provisions</i>	19
5.1.2. <i>The Application of Rome I and Rome II Regulation in the Context of International Arbitration as EU Private International Law</i>	20
5.1.3. <i>The Resulting Application of Overriding Mandatory Norms under Rome I and Rome II Regulation by Arbitrators</i>	24
6. EU Overriding Mandatory Rules as Illuminated Through Case-Law	27

6.1.	<i>Joined cases C-369/96 and C-376/96: Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)</i>	27
6.2.	<i>Case C-381/98: Ingmar GB Ltd v. Eaton Leonard Technologies Inc.</i>	28
6.3.	<i>Case C-116/11: Bank Handlowy W Warszawie Sa, Pphu «Adax»/Ryszard Adamiak v. Christianapol Sp. Z O.O.</i>	28
6.4.	<i>Case C-426/11: Mark Alemo-Herron Et Al. v. Parkwood Leisure Ltd</i>	29
6.5.	<i>Case C-184/12: United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare</i>	30
6.6.	<i>Case C-338/14: Quenon K. Sprl v. Beobank Sa, Metlife Insurance SA</i>	30
6.7.	<i>Case C-464/14: Secil – Companhia Geral De Cal E Cimento SA v. Fazenda Pública</i>	31
6.8.	<i>Case C-15/15: New Valmar BVBA v. Global Pharmacies Partner Health Srl</i>	32
6.9.	<i>Case C-135/15: Republik Griechenland v. Grigorios Nikiforidis</i>	32
6.10.	<i>Case C-191/15: Verein für Konsumenteninformation v. Amazon EU Sàrl</i>	33
7.	The Hague Principles on Choice of Law and Overriding Mandatory Principles	35
7.1.	<i>The Nature of the Hague Principles on Choice of Law</i>	35
7.2.	<i>The Relevance of the Hague Principles on Choice of Law for the Application of Overriding Mandatory Rules in Arbitration</i>	35
8.	The Possible Consequences of the Non-Applicability of Overriding Mandatory Rules in the Context of International Arbitration	38
8.1.	<i>Arbitrators: May They or Should They Apply Overriding Mandatory Rules in the Context of International Arbitration?</i>	38
8.2.	<i>The Consequences of the Violation of Overriding Mandatory Rules in the Context of International Arbitration</i>	40
8.2.1.	<i>The Eco Swiss Decision</i>	40
8.2.2.	<i>Germany</i>	42
8.2.3.	<i>England</i>	43
8.2.4.	<i>Austria</i>	43
9.	Summary of Findings	45
10.	Bibliography	47

1. Introduction

The present thesis revolves around certain theoretical issues in international arbitration, which exist at the intersection between private international law and the more restricted field of international arbitration. The main subject contemplated herein concerns the application by arbitral tribunals of overriding mandatory provisions of law and the effects of this application on the fundamental notion of party autonomy.

Beginning with the definition of overriding mandatory provisions, as contemplated by Savigny¹ in the middle of the 19th century and later by Professor Phocion Francescakis in the context of '*lois d'application immédiate*'². Bearing in mind the function of overriding mandatory provisions in the context of private international law, the thesis will then focus on the discourse between the methods utilized by arbitrators to determine the applicable law and overriding mandatory provisions.

The nature and position of these rules in the context of the methodology of private international law renders their application by international arbitral tribunals rather more nuanced in comparison to their application by state courts. Indeed, when contemplating the application of overriding mandatory provisions, the arbitrators are called upon to determine not only if they must or may apply these rules, but, also, the legal order whence they derive as well as their exact content. The answer to the above questions is further complicated by the various issues attendant to international arbitration; the lack of forum, the particular position of party autonomy and the question of the duties and powers of the arbitrators come to the forefront, as foil to the ever evolving question of the application of overriding mandatory rules by arbitrators.

In the context of EU law, the prospect of applying overriding mandatory rules appears to be rather more organized and predictable. The Rome I and II Regulations provide the arbitrators with a legal framework of private international law rules which may also be applied in the context of arbitration, in order to determine the law applicable to the substance of each dispute. At the same

¹ Savigny, F.C., 1849. *Herrschaft der Rechtsregeln über die Rechtsverhältnisse: (System des heutigen römischen Rechts VIII)* 1st ed., Berlin: Veit.

² Francescakis, P., 1967. *Lois d'application immédiate et règles de conflit. Riv.dir.int.priv.proc.*, pp.691–698.

time, the thesis affords due attention to the main case law within the EU referring to the existence of certain overriding mandatory provisions stemming from EU law.

Of equal normative value are the Hague Principles of Choice of Law in International Commercial Contracts, which serve as a harmonisation tool regarding the determination of the legal rules governing international transactions. With forethought of unprecedented value, the drafters of the Principles included provisions on the application of overriding mandatory rules by arbitral tribunals, thus paving the way toward a more systematic approach regarding the regulation of the application of the said rules.

Last but not least, the thesis is contemplating the possible consequences of the non-applicability of overriding mandatory rules in the context of international arbitration. More specifically, both the ECJ case-law and case-law from various EU member states draw the picture of a system, which strives to balance state and party interests in the context of arbitration -the archetypical creature of party autonomy. Notably, the object and purpose of overriding mandatory provisions, which is often fulfilled through the function of the so-called public policy, finds a guiding hand militating for the application of the former principles in the application of the latter.

2. Applicable Law and Overriding Mandatory Rules in International Commercial Arbitration

2.1. Private International Law in Arbitration Proceedings and the Determination of the Applicable Law by Arbitrators

It is a legal commonplace in private international law that the courts of a country apply the conflict of law rules of the *lex fori*, in order to determine the law applicable to the various issues of substance pertaining to the merits of a case³. In contradistinction, the nature of international arbitration leads -by necessary implication- to the conclusion that in arbitration no such rule as the above can or, indeed, does exist. Indeed, arbitral tribunals, unlike domestic courts, do not have a *forum* and they are not judicial organs of any state⁴. Thus, the question of determining the applicable law, as well as the rules that will apply to the above question, is paramount⁵.

It is a generally accepted principle of law in general and international commercial arbitration in particular -which can ascribe its genesis and growth to the generalization of party autonomy as a foundational principle of choice of law⁶- that parties to an international business contract are free to choose the law governing their transaction⁷. The principle of party autonomy, which constitutes the so-called cornerstone of international commercial arbitration⁸, is recognized by most systems of national law as well as most international conventions and institutional arbitration rules⁹.

³ Yntema, H.E., 1953. The Historic Bases of Private International Law. *The American Journal of Comparative Law*, 2(3), p.297; Ehrenzweig, A.A., 1960. The Lex Fori: Basic Rule in the Conflict of Laws. *Michigan Law Review*, 58(5), pp.637–688; Wasserstein Fassberg, C., 1985. The Forum: Its Role and Significance in Choice of Law. *ZVglRWiss* 1, p.84; Lando, O., 1995. Lex Fori in Foro Proprio. *Maastricht Journal of European and Comparative Law*, 2(4), pp.359–375.

⁴ Blackaby, N. et al., 2015. *Redfern and Hunter on international arbitration*, Oxford: Oxford University Press, § 3.212.

⁵ Ferrari, F. and Kröll, S. (2011). *Conflict of laws in international arbitration*. Munich: Sellier, pp.257 et. seq.; Grigera Naón, H. (2001). *Choice-of-law problems in international commercial arbitration*. Hague Academy of International Law.

⁶ Watt, H.M., 2017. Chapter P.1: Party autonomy. *Encyclopedia of Private International Law*, pp.1336–1341.

⁷ Francescakis, P., 1966. Quelques précisions sur les lois d'application immédiate et leurs rapports avec les règles de conflit de lois. *Rev.crit.DIP* 1.; Briggs, A., 2008. *Agreements on jurisdiction and choice of law*, Oxford: Oxford University Press.

⁸ Born, G. (2014). *International commercial arbitration*. Alphen aan den Rijn, The Netherlands: Kluwer Law International, pp. 2615–2669.

⁹ Ibid.

However, in cases where the parties have not made an explicit choice of applicable substantive law, the arbitrators are called upon to determine the applicable law or, indeed, laws. In such cases, it is important to consider the arbitrators' admittedly wide discretion to determine the applicable law or laws, in conjunction with the various approaches they adopt, when faced with the question of applicable law.

2.2. The Arbitrators' Discretion in Determining the Applicable Law

As a matter of theoretical as well as practical importance, most -if not all- institutional arbitration rules and national arbitration acts explicitly recognize party autonomy and, thus, ascribe supremacy to the agreement of the parties regarding the applicable law or laws. Some examples include Art. 28(1) of the UNCITRAL Model Law; Art. 31(1) of the UNCITRAL Arbitration Rules; sections 47 of the English Arbitration Act 1996; Part I of the Indian Arbitration and Conciliation Act 1996; Art. 21 of the ICC Rules.

The parties have the freedom to choose any national law or even anational rules for their contract, in accordance with their common wished and needs. Increasingly, it is being accepted by national arbitration or private international law acts and international arbitration rules¹⁰ that such soft law rules as the UNIDROIT Principles of International Commercial Contracts (UPICC), the Principles of European Contract Law (PECL), or even the *lex mercatoria*, have a place in international arbitration.

At the same time, when the parties have not included a choice of law and the arbitrators are called upon to determine the substantive applicable law, the question of how to achieve the result is in the forefront of the arbitrations consideration. In general, there are three ways, espoused by either institutional rules or national laws, to determine the law applicable to the merits of a specific case. First, the arbitrators may determine the applicable law or laws applying a closest-connection test; having recourse to the conflict-of-laws norms that they consider appropriate using an indirect approach (*voie indirecte*)¹¹; or by directly applying the law or laws that they consider appropriate

¹⁰ More specifically, see Art. 187(1) of the Swiss PILA; Hague Principles on Choice of Law in International Commercial Contracts; Singapore International Arbitration Center, Rule 27(1) (2016); Netherlands Arbitration Center, Arbitration Rules, Art. 46 (2010); Vienna International Arbitration Center, Arbitration Rules, Art. 27(2) (2013).

¹¹ This method limits the arbitrator's power to the determination of the applicable conflict rules. See Jones, D. (2014). Choosing the law or rules of law to govern the substantive rights of the parties: A discussion of *voie directe* and *voie indirecte*. *Singapore Academy of Law Journal*, 26, Special Edition, pp.911-941.

without the need to refer to any particular choice-of-law rule (*voie directe*).

One characteristic example of the first approach is notably included in the Swiss and German arbitration laws. Under the art. 187(1) PILA, failing a choice of law by the parties, arbitral tribunals ‘*shall decide the case according to the rules of law... with which the case has the closest connection*’, while under German Arbitration Act Sect. 1051(2), absent a determination by the parties, arbitral tribunals ‘*shall apply the law of the State with which the subject-matter of the proceedings is most closely connected*’.

The second approach has notably been followed in the UNCITRAL Model Law Art. 28(2), which provides that, in absence of parties’ choice, the law applicable to the substance of the dispute will be determined by the conflict of law rules which the arbitral tribunal considers applicable. A similar choice is reflected in Section 46(3) of the English Arbitration Act of 1996; Section 28(2) of the Danish Arbitration Act of 2005; and the European Convention on International Commercial Arbitration Art. VII(1), which refers to ‘*the proper law under the rule of conflict that the arbitrators deem applicable*’.

As an alternative to the above, many modern arbitral laws and institutional rules afford the arbitrators the opportunity to make a direct choice regarding the applicable law (*voie directe*)¹² by referring to the appropriate substantive law, thus eliminating the need to refer to rules of private international law. This third approach can be found in Art. 1511 of the French Code of Civil Procedure, where, failing a relevant determination by the parties, arbitral tribunals ‘*shall decide the dispute in accordance with the rules of law [they] consider[...] appropriate*’, while similarly worded provisions can be found in the Rules of ICC, LCIA, AAA, SIAC, SCC, VIAC, and NAI¹³; as well as national arbitration laws¹⁴.

In addition to the above, some national arbitration acts contain an autonomous conflict of law rule,

¹² Jones, D. (2014). Choosing the law or rules of law to govern the substantive rights of the parties: A discussion of *voie directe* and *voie indirecte*. *Singapore Academy of Law Journal*, 26, Special Edition, pp.911-941.

¹³ Kramer, X.E. 2017. EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration. In: Ferrari, F ed. *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, pp. 285-316.

¹⁴ See indicatively the Austrian Code of Civil Procedure Section 603(2); Dutch Code of Civil Procedure Art. 1054(2) etc.

which most often takes the form of a closest connection test¹⁵. In practice¹⁶, however, the result of the application of either of the above solutions shows a tendency to be indistinguishable, owing largely to the wide discretion of arbitrators to choose either the conflict rules or the applicable law. This is viewed, at least from the parties' perspective, as leading to considerable legal uncertainty. In this context, the application of overriding mandatory rules may constitute a point of uncontested stability; a certainty in the many uncertainties surrounding the current status of international arbitration.

2.3. *The Various Methodological Approaches Followed by Arbitrators*

As a direct result of the above analysis, it becomes apparent that there is a finite number of solution that arbitral tribunals may follow when determining the applicable substantive law in the absence of an agreement between the parties. These include the application of the conflict norms of the arbitral seat¹⁷; the cumulative application of domestic conflict norms; or the application of general principles of choice of law.

As regards the first method, the application of the conflict of law rules of the seat of arbitration by arbitrators, has been followed by various arbitral tribunals in commercial cases and showcases a tendency of the said tribunals to consider themselves bound by the conflict of law rules of the seat. In the joint ICC cases No. 2977, 2978, and 3033 –the so-called *Götaverken* case¹⁸, the arbitral tribunal having its seat in Paris heard a dispute between a Swedish shipyard and a Libyan State entity. The arbitral tribunal held that the substantive applicable law had to be determined '*either by an international convention or by the conflicts of laws rules of France, as the country of the place of arbitration*'. The decision to apply Swedish law was based primarily on French conflict rules.

¹⁵ See indicatively Art. 187(1) of the Swiss PILA; German § 1051(2) ZPO.

¹⁶ Arbitrators will often be guided in their choice by uniform transnational rules or the UNIDROIT Principles. See Ferrari, F. and Kröll, S. (2011). *Conflict of laws in international arbitration*. Munich: Sellier, pp. 257 et. seq.

¹⁷ Garimella, S. & Jolly, S., 2017. *Private international law South Asian states practice*, Singapore: Springer, p. 22 et seq.

¹⁸ *AB Götaverken v. General National Maritime Transport Company (GMTC), as legal successor of Libyan General Maritime Transport Organization (GMTO)*, Award, ICC Case Nos. 2977, 2978 and 3033, 1978 Yearbook 1981, Vol. VI (ICC).

On the other hand, the method whereby arbitral tribunals make use of their discretion in the determination of the applicable substantive law consists of the cumulative application of the conflict norms involved¹⁹. The arbitrators may freely decide, which rules will be applied, including rules belonging to their own legal system –as most familiar to them, to the legal systems of the parties and, frequently, those of the seat. This approach can therefore only be applied where the relevant provisions of the various legal systems converge toward one unified solution.

This particular approach has been followed by various tribunals, including those in ICC case No. 6281²⁰, where the arbitrator examined Egyptian, Yugoslav, and French conflict norms, all of which point toward the application of Yugoslav law. In another case before the Stockholm Chamber of Commerce²¹, an arbitral tribunal seated in Stockholm heard a dispute between a Chinese seller and a US buyer. The arbitral tribunal took into account all the possible conflict of law approaches and ultimately observed that it was *‘immaterial which doctrinal method is employed because the center of gravity rule is common to all conflict -of -laws systems which may be resorted to (including the Chinese, United States and Swedish conflict -of -laws systems)’* and found that Chinese law was applicable.

Last but not least, the application of general principles of choice of law is another method, which may appear problematic, in that it raises questions of threshold characterization²² in regards to which principles may be considered general principles of law; in practice, however, they have been applied with alacrity and success. Characteristically, in ICC case No. 614937²³, the arbitral tribunal, seated in Switzerland, based its decision to apply Korean law to the merits of the dispute on the cumulative application of the conflict norms concerned, a solution, which was *‘further supported by some other general principles prevalent in modern conflict of laws’*, specifically those contained in the 1955 Hague Convention on the Law Applicable to International Sale of Goods and those contained in the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

¹⁹ Op cit. 17.

²⁰ *Egyptian Company (buyer) v Yugoslav Company (seller)* [1989]. ICC Case No. 6281 Yearbook 1990, Vol. XV (ICC), p.96.

²¹ *Licenser and buyer v Manufacturer, Interim Award and Final Award* [1992] Yearbook 1997, Vol. XXII (Stockholm Chamber of Commerce), p.197.

²² Op cit. 17.

²³ *Seller v Buyer, Interim Award* [1990]. ICC Case No. 6149 Yearbook 1995, Vol. XX (ICC), p.41.

3. The Notion of Overriding Mandatory Rules in Private International Law

Overriding mandatory provisions, known also as internationally mandatory provisions, *lois de police*, *lois d'application immédiate*, *international zwingende Normen* or *Eingriffsnormen*, are those rules that are applicable to a situation irrespective of the *lex causae*²⁴. These rules, labelled by Professor Phocion Francescakis as laws claiming immediate application or *lois d'application immédiate*²⁵, apply irrespective of the ordinary conflict rules, thus opposing, due to their special nature and substantive content to the interchangeability of laws²⁶.

The overriding mandatory rule is, as its name denotes, of mandatory character; it ousts the application of the normally applicable law, or at least certain parts of it, and, upsets the normal operation of conflict-of-law rules²⁷. The questions that naturally arise pertain not only to the methodological problem of the application of the rule, but also to its identification.

In general, the application of the *lex fori* is required for those legal rules and enactments which express a strong policy of the State²⁸, or, as P. Francescakis aptly noted, when it regards ‘*rules compliance with which is necessary for the protection of the political, social and economic organisation of the country*’²⁹. As a result, the application of overriding mandatory rules may be said to be justified in such cases, where the *forum* state has a dominant interest of application in view of all circumstances of the case, which include the importance of the substantive concern, the closeness of the transaction to the *forum* and the justified expectation of the party in need of protection³⁰.

²⁴ Wilderspin, M. (2017). Overriding mandatory provisions. In *Overriding mandatory provisions*, [eBook] Cheltenham, UK: Edward Elgar Publishing Limited, Edward Elgar Publishing, Inc.. Available From: Elgar Online: The online content platform for Edward Elgar Publishing.

²⁵ Francescakis, P. (1974). *Lois d'application immédiate et droit du travail*. *Rev. crit. DIP*, 273(695), 63.

²⁶ Friedrich Karl von Savigny (1849). *System des heutigen Römischen Rechts, Vol VIII*. Berlin, where Savigny noted that ‘. . . mit Rücksicht auf manche Arten von Gesetzen, deren besondere Natur einer so freien Behandlung der Rechtsgemeinschaft unter verschiedenen Staaten widerstrebt’.

²⁷ Wilderspin, op. cit., p. 3.; Hartley T.C. (1998). *Mandatory Rules in International Contracts: The Common Law Approach*. 266 *Rec. des Cours*, p. 337.

²⁸ Vischer, Frank, “Foreign public law and conflict of laws (232)”, in: *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law.

²⁹ Francescakis, op. cit., p. 3.

³⁰ *Ibid*.

Indeed, overriding mandatory rules allow the state to exercise its regulatory authority through private law,³¹ by insisting on the observance of such rules crucial for its functioning in any given horizontal dispute. This notion may seem particularly restrictive, especially when viewed under the lense of party autonomy, and the free expression it is given in the context of international transactions, where the parties may freely choose both the substantive law to govern their contract as well as the forum where any dispute that may arise, may be resolved; such legal norms with immediate application override the principle of parties' autonomy, especially when such choice veers away from the law of the *forum*.

The freedom to choose the law applicable to a contract is nowadays a well-established principle of private international law in general, and of European law -which is of particular interest for the purposes of the present thesis- in particular.³² When confronted with a multitude of jurisdictions and the laws deriving therefrom, parties are in principle able to choose the law or laws they consider to be most appropriate to their transaction; this is especially significant when an issue of collision of the laws of different jurisdictions effectively hinders the sovereign from pushing through his convictions as he could do if a situation were exclusive to his territory³³. It becomes apparent that a certain restraint must be shown when the transaction assumes an international character, and that private parties should be afforded a larger degree of autonomy on the international plane than in a national context.³⁴

In this context, while the normative expansion of the principle of party autonomy increasingly allows the parties to choose the applicable law or laws of their own preference, the development of overriding mandatory provisions constitutes a force toward the opposite direction;³⁵ a set of rules that must be applied irrespective of the parties choice of applicable law, and even contrary to their efforts to escape their scope of influence by manipulating the application of any law dictated under conflict rules. As a result, the overriding mandatory rules override the otherwise applicable law and thus also the law chosen by the parties.³⁶

³¹ Collins, H (2010). *Regulating Contracts*.: Oxford Scholarship Online, pp. 57-87.

³² Bermann, G.A., 2005. *Party autonomy: constitutional and international law limits in comparative perspective*, New York: Juris Publishing.

³³ Kuipers, J.-J., 2012. *EU law and private international law: the interrelationship in contractual obligations*, Leiden: Martinus Nijhoff Publishers, p.p. 35-123.

³⁴ Kassis, A (1993), *Le nouveau droit européen des contrats internationaux*, LGDJ, Paris, 1993, p. 194.

³⁵ Kuipers, op. cit., p. 4.

³⁶ Ibid.

The implications of the above are various and not quite obvious in the context of cross-border adjudication of claims, especially when the latter takes the form of arbitration rather than court litigation. The various aspects of arbitration revolving around the applicable substantive law, from the seat of the arbitration, to the ability of the arbitral tribunal to determine the applicable law, to the stages after the arbitration, ie the annulment and recognition or enforcement, the question of the possible application of overriding mandatory provisions is ever-present and significant, however removed arbitration may be to state courts and state *fora*.

4. The Application of Overriding Mandatory Rules by Arbitrators

Professor P. Mayer's paper of 1986 on mandatory rules of law in international arbitration³⁷ sought to delineate the issue around which the present thesis revolves by asking three specific questions, two of which will be addressed in the present chapter. First, whether an arbitral tribunal may apply mandatory rules as a matter of general principle; and second, which specific mandatory rules should the arbitral tribunal apply. The same questions may be said to be pertinent when contemplating the applicability of overriding mandatory provisions in the context of international arbitration.

The above questions would have been rather more easily answered in the context of court proceedings; however, in arbitration, neither the legal framework for the application of overriding rules, nor the nature of the overriding mandatory, which should be applied can be determined with consistency. In the context of court proceedings, the judge may or even must consider the overriding provisions belonging to the *lex fori* and, in some instances, the overriding mandatory rules of third countries, including, for example, those belonging to the law of the country where the contract must be performed³⁸.

4.1. The Application Of Mandatory Rules By Arbitrators As A Matter Of Principle

As it is, the first question, *ie* 'which legal or normative framework enables or may even oblige arbitral tribunals to apply overriding mandatory rules'³⁹, may be answered by reference to the systematic approach provided by private international law in accordance with the *voie indirecte* approach referred to above. In such cases, the direct reference of such private international law rules may make direct reference to the application of overriding mandatory rules, either by courts or arbitral tribunals themselves. Such references may include the discretionary or otherwise power of the adjudicative body to apply said provisions as well as the legal order whence said provisions will be derived. Nevertheless, it is evident that the answer to the question of their applicability cannot be delimited to a simple monosyllable, and necessarily follows rather than preceding the determination of the applicable legal or normative framework.

³⁷ Mayer, P. (1986). Mandatory rules of law in international arbitration. *Arbitration International*, 2(4), pp.274-293.

³⁸ See Rome I Regulation.

³⁹ Kramer, X.E. 2017. EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration. In: Ferrari, F ed. *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, pp. 285-316.

Traditionally, however, insofar as the merits of a dispute are concerned, the agreement of the parties, which in most of the cases will be rather extensive, will be supplemented by their choice of law, and in the absence of the latter, by the appropriate law as determined by the arbitrators, without reference to a framework of private international law and conflict rules. In this regard, the application of overriding mandatory laws will likely contradict the will of the parties, which may have even aimed at circumventing such provisions, thereby creating a collision, whether real or fictitious, between state and private interests⁴⁰.

We are, thereby, confronted with the issue of balancing between the will of the parties on the one hand, and the impingement upon party autonomy of such rules. As noted above, arbitral tribunals are not organs of the state; rather, as arbitration is the creature of consent, so are arbitrators private adjudicators, whose guiding hand lies primarily in the will of the parties⁴¹. In reality, the possibility of application of mandatory rules in the context of arbitration has been recognized by rules of international arbitration institutions, UNCITRAL, as well as regional treaties.

In 1980, a working group of the Commission on Law and Commercial Practices of the International Chamber of Commerce prepared the ICC Draft Recommendations, a treatise on the law applicable to international contracts. Between the two alternatives provided by the draft, arbitrators were given the discretion to apply a country's relevant mandatory rules foreign to the substantive law of the contract, insofar as the parties or the contract have a close contact to that country or the arbitral award is likely to be enforced there⁴². It is noted that in exercising this discretion, the arbitrators should take into consideration the purpose, nature, and the effects of these mandatory rules⁴³.

Another such example may be found in the work titled '*Mandatory Legal Rules of Public Nature*' by the UNCITRAL, in its compendium titled '*Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*'⁴⁴. Therein, the UNCITRAL puts the parties on notice of

⁴⁰ Waincymer, J. (2009). International Commercial Arbitration and the Application of Mandatory Rules of Law. SSRN Electronic Journal.

⁴¹ Lalive, P., 1986. Transnational(or Truly International) Public Policy and International Arbitration. In *Comparative Arbitration Practice and Public Policy in Arbitration*. Congress Series no. 3. International Council for Commercial Arbitration, pp. 257–271.

⁴² Lando, O., 1981. Conflict of Law Rules for Arbitrator. In *Festschrift für Konrad Zweigert: Zum 70. Geburtstag*. Mohr Siebeck, p. 176.

⁴³ Ibid.

⁴⁴ UNCITRAL, 1993. *UNCITRAL legal guide on drawing up international contracts for the construction of industrial works*, New York: United Nations.

the existence of such rules, without, however, going so far as the ICC Draft Recommendations: *‘In addition to legal rules applicable by virtue of a choice of law by the parties, or by virtue of the rules of private international law, certain rules of an administrative or other public nature in force in the countries of the parties and in other countries (e.g. the country of a sub-contractor) may affect certain aspects of the construction. These rules, which are often mandatory, are usually addressed to all persons resident in or who are citizens of the State which issued the rules, and sometimes to foreigners transacting certain business activities in the territory of the State. They may be enforced primarily by administrative officials. Their purpose is to ensure compliance with the economic, social, financial or foreign policy of the State. The parties should therefore take them into account in drafting the contract.’*

The 1980 European Convention on the Law Applicable to Contractual Obligations also recognizes the application of mandatory rules of law. Article 7(1) provides that: *‘When applying under this Convention the law of a country, effect may be given to mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.’*

4.2. Determining the applicable mandatory rules in arbitration

The second question to which an answer is sought to be provided in the present, pertains to which mandatory rules would come into consideration. The conflict of laws theory and the consideration of party autonomy would militate for the application of the overriding mandatory rules of the seat of the arbitration or the *lex causae*⁴⁵.

4.2.1. The Overriding Mandatory Provisions of The Seat Of The Arbitration

In the context of the above, the issue of the seat of the arbitration may also not be overlooked or depreciated in the context of the answer provided. It is doubtful whether the overriding mandatory rules of the *lex arbitri*, which can be said to reflect the notion of the *lex fori*, should be factored in by arbitrators when determining or applying the law applicable to the substance of the dispute. The

⁴⁵ Ferrari, F. and Kröll, S. (2011). *Conflict of laws in international arbitration*. Munich: Sellier, pp. 325-331.

role of the law of arbitration seat, bears closely upon the conduct of the arbitral proceeding, acting in a supplementary and restrictive capacity⁴⁶.

As noted above, arbitrators are not connected to any country in particular and thus neither a *lex fori*; indeed, the choice of seat may not always be due to the legislation connected to the country, but rather because of its geographical location or neutrality⁴⁷.

One such view is eloquently expressed in the famous *Mitsubishi*⁴⁸ decision, where *Soler*, a corporation under US antitrust law had submitted the case to the US courts and claimed that the dispute was non arbitrable due to the character of the antitrust law of the US, despite the fact that the governing law chosen by the parties was Swiss Law. The judge in *Mitsubishi* stated that *'[t]here is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictate.'*

The same, however, cannot be said for the merits of each case. The function of the law of the seat of the arbitration may manifest itself through the application of its public policy criteria during a possible setting aside procedure, where the application of the chosen law may be blocked because its application in a particular case is *'repugnant to the fundamental policies of the forum or another legal system whose law would apply to the contract absent the parties' choice'*⁴⁹. In any event, such criteria will inevitably be considered by the arbitrators in the context of their duty to render an enforceable award⁵⁰, as will be demonstrated in more detail below.

4.2.2. Application of Mandatory Rules Deriving from the Governing Law of the Contract and of Third Countries

⁴⁶Hcch.net. (2017). *HCCCH: Principles: Text and Commentary*. [online] Available at: <https://www.hcch.net/de/instruments/conventions/full-text/?cid=135#text> [Accessed 6 Dec. 2017].

⁴⁷ Moss, G.C., 2015. *Limitations on party autonomy in international commercial arbitration*, Leiden: M. Nijhoff, p. 327 et seq.

⁴⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* [1985] 473 U.S. 614 (U.S. Supreme Court).

⁴⁹ Ibid.

⁵⁰ Cordero Álvarez, C. (2017). Incidencia de las normas imperativas en los contratos internacionales: especial referencia a las normas de terceros estados desde una aproximación europea. *Cuadernos De Derecho Transnacional*, 9(2), p.174.

The application of overriding mandatory rules can also derive from the law governing the merits of a case, ie the choice on substantive law made by the parties. Due to the principle on party autonomy, the parties are free to choose a particular law or laws to govern a dispute. While it by no means is readily apparent that the parties are familiar with its content, and thus its mandatory provisions, it does, however, beg the question whether the parties free to exclude the application of such mandatory rules in their agreement.

The application of mandatory rules deriving from the *lex contractus* will follow an express choice made by the parties. Art. 3(3) of Rome I Regulation stipulates that ‘*[w]here all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement*’.

Last but not least, some authorities postulate that other, third country, overriding mandatory rules may also be considered by arbitral tribunals⁵¹. Such pronouncements are made mainly in the context of Art. 9(3) of the Rome I Regulation⁵², which refers to the law of the country where the contract has to be performed; and, less directly connected, the law of the country where enforcement is expected to take place in view of the public policy exception of Article V(2)(e) of the New York Convention⁵³.

In the above-mentioned Mitsubishi⁵⁴ case, the judge held that ‘*[...] the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention (The New York Convention) reserves to each signatory country the right to refuse enforcement of an award where the “recognition or enforcement of the award would be contrary to the public policy of that country.” Article V (2)(b)*’.

A cursory analysis of arbitral practice demonstrates that consideration of state mandatory rules contains an element of comparative analysis conducted by the arbitrators while discharging their duties as such. Notwithstanding the above, determining the conditions under which the arbitrators

⁵¹ Mayer, op. cit., p. 6; Ferrari, op. cit., p. 8.

⁵² Ibid.

⁵³ Ferrari, op. cit., p. 8.

⁵⁴ Op cit. 48.

considered any overriding mandatory rules while deliberating for the forming of a decision, poses a far greater difficulty.

5. EU Conflict of Law Rules and EU Overriding Mandatory Rules in International Commercial Arbitration

The present chapter is dedicated to a brief analysis of the notion of overriding mandatory norms and seeks to address the question of how these rules may delimit party autonomy to select the applicable substantive law, a concept which is key in arbitral proceedings. To this effect, special mention will be made to

5.1. The Application of EU Private International Law Rules by Arbitrators and the Interplay with EU Overriding Mandatory Rules

5.1.1. The Application of Rome I and Rome II Regulation as a Gateway for EU Overriding Mandatory Provisions

The quest to define and apply overriding mandatory rules can be said to be more systematic and holistic in the context of the European Union, where both the legislator and the ECJ have adopted a harmonious private international law approach in regards to overriding mandatory norms, through the adoption of the Rome I Regulation for contractual obligations and Rome II Regulation on non-contractual obligations.

The two Regulations, along with the Brussels I Regulation (recast)⁵⁵, provide a comprehensive regime for the determination of the applicable law in both contractual and non-contractual obligations in civil and commercial matters, where a conflict of laws issue is detected. The question that arises in the context of the present thesis pertains to whether the application of these two Regulations may also be applied in the context of international arbitration, and to what extent is that application mandatory.

It is noteworthy that many arbitral tribunals seated in the EU have chosen to apply the Rome Convention international commercial arbitration in ascertaining the law applicable to the substance

⁵⁵ Recital 21 of the Brussels I Regulation (Recast) excludes arbitration from its scope to avoid conflicts with the New York Convention. More specifically, the instrument provides that nothing in the Regulation would prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

of the dispute. Such arbitral tribunals have done so either on the basis of the Convention being part of the private international rules of the *lex fori*⁵⁶, or as a reference suggested by the international arbitration rules or conventions regarding the determination of the law applicable to the merits of a dispute⁵⁷.

The following analysis contemplates the possible bases for the application of the said rules in the context of international arbitration, and in turn, the application of overriding mandatory provisions, through the application of the above instruments. More specifically, the thesis adopted by this author militates for the application of the overriding mandatory provisions contained in the above Regulations, which are understood in the context of the EU conflict of laws system⁵⁸, thus finding direct application in the determination by the arbitrator of the applicable substantive law.

5.1.2. The Application of Rome I and Rome II Regulation in the Context of International Arbitration as EU Private International Law

Beginning with Rome II Regulation, the first striking point in favor of its application in the context of international arbitration stems from Recital 8, which states that the Regulation should apply irrespective of the nature of the court or tribunal seised. This is a clear indication that the drafters of the Regulation bore specifically in mind the possibility of application of the instrument in the context of proceedings others than those raised before state courts, and that the instrument itself does not delimit its application to state fora.

On the other hand, the absence in the Rome I Regulation of a similar provision to that of Recital

⁵⁶ Yüksel, B. (2011). The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of Private International Law*, 7(1), pp.157-159; *Final Award of 1998 in Case 8908* [1999]. 10 ICC International Court of Arbitration Bulletin 83 (ICC), where the arbitral tribunal sitting in Paris contemplated a case regarding a contract for the sale of equipment that did not include any choice-of-law clause and any indication of how the governing law would be determined. The parties had agreed that the tribunal had wide discretion in determining the governing law and accordingly the tribunal asserted that it might apply any method in this respect and considered the relevant international conventions, ie Rome Convention, as it served as “evidence of trade usages and internationally recognised principles applicable to choice of law issues”; *Final Award of 1998 in Case 8908* [1999]. 10 ICC International Court of Arbitration Bulletin 83 (ICC), where a tribunal seated in Milan considered the conflict-of-laws rules in the Rome Convention, as a part of Italian law, in determining the applicable law.

⁵⁷ Ibid.

⁵⁸ Ibid.

8 is notable, especially in light of the fact that contractual disputes are much more often resolved in arbitration, in comparison to non-contractual disputes. Indeed, the absence of an analogous provision may appear to lead to the exact opposite conclusion, ie that the Rome I Regulation cannot be applied in disputes submitted to arbitration.

However, it has been supported by scholars, that the lack of the above provision cannot be construed as a ban to the application of the Regulation by arbitrators, but rather as a natural manifestation of the fact that the formulations in the Rome I Regulation (not the concept of the Rome I Regulation itself) are a political and doctrinal compromise to the proponents of the strictly contractual approach to arbitration, especially those groups which support the potential application of transnational law in arbitration⁵⁹, which the Rome I Regulation appears to not contemplate at all⁶⁰.

On the other hand, the exclusion from the scope of the Rome I Regulation of the validity of arbitration agreements as prescribed under Art. 1(2)(e), especially when read in tandem with the Brussels I Regulation (Recast) exclusion of arbitration, appears to militate against its application in the context of arbitration. Again, the majority of scholars as well as case-law⁶¹ have dispersed the ambiguity by taking a stance in favour of its application in the matter of determining the pertinent substantive law, thus limiting the scope of the exclusion to the application of the instrument in the law governing the arbitration agreement and not the merits.

Significantly, the Giuliano-Lagarde Report⁶² notes that *‘[t]he exclusion of arbitration agreements does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements. Where the arbitration clause forms an integral part of a contract, the exclusion relates only to the clause itself and not to the contract as a whole. This exclusion does not prevent*

⁵⁹ It is notable that Art. 3 Para. 1 of the Rome I Regulation regulating freedom of choice provides that *‘[a] contract shall be governed by the law chosen by the parties.’* It is clear that the reference cannot be said to encompass rules other than those contained in the national laws of states, thus excluding the possibility of the parties’ agreeing to apply any rules of law such as the UNIDROIT Principles or the *lex mercatoria*.

⁶⁰ See Belohlavek, A.J. 2014. Substantive Law Applicable to the Merits in Arbitration. *Revista Romana de Arbitraj*.8(2(30)), pp. 15-16.

⁶¹ See characteristically *Chalbury McCouat International Ltd v P.G. Foils Ltd* [2010] (Queen's Bench Division, Technology and Construction Court).

⁶² Giuliano M., Lagarde, P., 1980. *Report on the Convention on the law applicable to contractual obligations*. Official Journal C-282.

such clauses being taken into consideration for the purposes of Article 3(1).’

The Report makes it sufficiently clear that the exclusion covers the law applicable to the arbitration agreement and the law applicable to arbitration procedure⁶³. On the other hand, the Report does not explicitly specify the law applicable to the merits of the dispute within the scope of the exclusion. On this basis, the Rome I Regulation can be considered applicable to the substantive parts of the contract, including the determination of the law applicable to the merits of the dispute⁶⁴.

It follows from the above, that the instruments of the two Regulations themselves do not appear to impose a ban on their application in the context of international arbitration. The question of whether their application is mandatory, however, for arbitrations seated within the EU is distinct and rather more difficult to answer. Indeed, while some authorities take the stringent position that, when the EU is the seat of the arbitration, the Regulations should be applied⁶⁵ in all cases, the vast majority of authorities in the field of international arbitration have concluded that the application of the two Regulations by arbitral tribunals is not mandatory.

First, the vast majority of national arbitration laws and institutional arbitration rules allow the parties wide discretion when choosing the applicable substantive law or laws. In the absence of such a choice, arbitrators are deemed to have a wide discretion in determining both the conflict of law rules –in case of *voie indirecte*- as well as determining directly the applicable law –in case of *voie directe*.

The above is a direct result of the fact that arbitrators, unlike state judges, have no forum⁶⁶, and

⁶³ Yüksel, B. (2011). The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union. *Journal of Private International Law*, 7(1), pp.149-178.

⁶⁴ Ibid, pp.154-155.

⁶⁵ See Belohlavek, A.J, 2014. Substantive Law Applicable to the Merits in Arbitration. *Revista Romana de Arbitraj*.8(2(30)), pp. 15-16; Yüksel, 2011. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union, *Journal of Private International Law*, 7:1, pp. 149-178.

⁶⁶ The statement is quoted in Blackaby, N., Hunter, M. Redfern, 2015. *Redfern and hunter on international arbitration*, Oxford: Oxford University Press, para 3.218. For similar statements, see eg *Arabia v Arabian American Oil Company (Aramco)* [1963] 27 ILR 117; Stern, B. (1980), *Trois arbitrages, un même problème, trois solutions: les nationalisations pétrolières libyennes devant l’arbitrage international*. *Revue de l’arbitrage* 1, 3 as cited by Rubino-Sammartano, M. (2001), *International Arbitration Law and Practice* (The Hague, Kluwer Law International., p. 426; Final Award of 1991 in Case 6527.

thus are not bound by the conflict of law rules of the place of arbitration⁶⁷. Thus, from the point of view of the arbitrators, there exists no duty for them to apply these Regulations, even though they can be of considerable assistance in case of arbitrations seated within the EU⁶⁸. When considering the appropriate conflict rules under *voie indirecte*, the Regulations may provide important guidelines in any case that has a connection with the EU⁶⁹. Unlike a judge, it is doubtful whether the arbitrator would apply the said law *ex officio*.

Thus, from the arbitration point of view, it appears that the is not bound to apply private international law rules of Union law, and, consequently, it does not *prima facie* appear necessary that the overriding mandatory provisions of any connecting legal order should be applied by the arbitrators.

However, from the point of view of the EU, there appears to be no differentiating factor between the application of the law by arbitrators and the courts of member states, a position affirmed in the Nordsee⁷⁰ decision by the ECJ, where the Court found that since the arbitration is provided for within the framework of law, the decision of any arbitrator must be reached in accordance with the law.

Therefore, EU private international law rules, like substantive rules of EU law, have to be applied by arbitrators under the principle of supremacy of EU law⁷¹ and its uniform application unless otherwise stated by the provision itself or by the instrument in which it is found⁷². This aspect, coupled with the fact that arbitration has a quasi-judicial nature, leads us to the conclusion that the arbitrator, much like the judge, is bound to apply the rules of the Rome I and Rome II Regulation to the question of the law applicable to any contractual obligations within its scope⁷³, thus giving

⁶⁷ Blackaby, N., Hunter, M. Redfern, 2015. *Redfern and hunter on international arbitration*, Oxford: Oxford University Press.

⁶⁸ Kramer, X.E. 2017. EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration. In: Ferrari, F ed. *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, pp. 285-316.

⁶⁹ Ibid.

⁷⁰ Case 102/81, Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG [1982]

⁷¹ Hellner M. (2009). Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles? *J Priv Int L*, p. 447.

⁷² Case 106/77, Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978].

⁷³ Yüksel, op. cit., p. 7.

clear precedence to EU law over the national law in an arbitration seated in one of the member states, instead of the relevant provisions of the national arbitration legislation of the said member state.

What is more, even the postulation that the arbitrator is not bound by the conflict-of-laws rules of the seat, does not affect the duty of arbitrators to apply the Rome I Regulation, as *‘this duty derives from the supremacy of EU law and the direct effect of EU Regulations but not directly from the conflict-of-laws rules of the seat’*⁷⁴. Thus, acting mandatorily within the framework of the said Regulations, the arbitrator may give effect to the parties’ agreement as to the applicable substantive law, while at the same time, it must respect the limits set by the Regulations themselves; this, by necessary implication, leads us to the application of the overriding mandatory rules as prescribed under the two Regulations.

5.1.3. The Resulting Application of Overriding Mandatory Norms under Rome I and Rome II Regulation by Arbitrators

In case one accepts the application of Rome I and Rome II Regulations in the context of international arbitration, the arbitral tribunal will soon come face to face with such provisions referring to the application of overriding mandatory provisions. More specifically, Art. 9 of the Rome I Regulation and Art.16 of the Rome II Regulation provide the legal framework for the application of overriding mandatory rules in the EU context⁷⁵.

Art. 9 Para. 1 of the Rome I Regulation reads provides that *‘[o]verriding 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 organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.’*

The content of the above provision, in conjunction with Recital 37⁷⁶ leads to the conclusion that,

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Recital 37 reads as follows: ‘Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of ‘over-riding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively.’

unlike ordinary mandatory or non-derogable rules, which subject to certain limited and well-defined exceptions in the Rome I Regulation⁷⁷, such rules will not be applicable in an international context when they do not form part of the applicable law⁷⁸, overriding mandatory rules go a step further than conflict rules and demand that they be applied irrespective of the parties' choice and agreement.

To this effect, the Regulation explicitly provides that '*[n]othing in [the] Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum*' and that '*[e]ffect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. 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*'.⁷⁹

Similarly, Art. 16 of the Rome II Regulation provides that '*[n]othing in [the] Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation*'.

In general, the overriding mandatory provisions of two different jurisdictions under the two Regulations may be said to affect the outcome of an arbitration; those provisions of the law of the forum and the law of the country where the obligations arising out of the contract have to be or have been performed, when those rules render the performance of the contract unlawful. The result of the application of the said overriding mandatory provisions is the delimitation of party autonomy or '*the application of the otherwise applicable law to the merits only when strictly necessary to safeguard public interests*'⁷⁹.

So far, the ECJ has reaffirmed the exceptional nature and strict interpretation⁸⁰ of overriding mandatory rules in a bid to safeguard party autonomy to the greatest extent possible⁸¹, as well as to enhance the predictability of the applicable substantive law. At the same time, it appears that

⁷⁷ Artt. 3(3), 3(4), Art. 6(2) and Art. 8(1).

⁷⁸ Wilderspin, op. cit., p. 3.

⁷⁹ Kramer, op. cit., p. 8.

⁸⁰ C-135/15, Republik Griechenland v Grigorios Nikiforidis [2015]; C-184/12, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare [2012]

⁸¹ Kramer, op. cit., p. 8.

there is a certain element of discretion in the application of Art. 9, which stipulates that effect '*may be given*' to overriding mandatory rules of the place where the contract has to be performed. Authorities state that the overwhelming practice of member state courts so far shows that '*the application of overriding mandatory rules of third countries by courts is extremely rare*'⁸².

At the same time, the contemplation of EU overriding mandatory provisions, that is overriding mandatory provisions stemming from EU law and overriding the application of the law designated by the Rome Regulations under Art. 9 of Rome I and Art. 16 of Rome II Regulation, also constitute part of the body of overriding mandatory provisions that are of interest to the present thesis.

The most characteristic example of the above may be found in the Eco Swiss case, which relates to the violation of anti-trust rules, as well as the Ingmar case, where the Court contemplated the applicability of provisions of the Agency Directive, both of which decisions, as well as the various other aspects of EU overriding mandatory provisions that necessarily may bear relation to the application of the said provisions in international arbitration, are contemplated below.

⁸² Ibid.

6. EU Overriding Mandatory Rules as Illuminated Through Case-Law

Over the years, the ECJ has produced a plethora of decisions relating to the nature of overriding mandatory provisions stemming from EU law, as well as their effect on party autonomy. In this context, the best possible illuminator of both the status and the legal effects of the said rules may be found in the decision of the Courts, as provided for in the present section.

6.1. *Joined cases C-369/96 and C-376/96: Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96)*

In the context of two criminal proceedings against Jean-Claude Arblade, in his capacity as manager of the French company Arblade & Fils SARL, and Arblade & Fils SARL as civil liability and Serge and Bernard Leloup, in their capacity as administrators of Sofrage SARL and Sofrage SARL itself, as civil liability, accused of failing to comply with various obligations under Belgian labor law, the breach of which is punishable by Belgian public law order and safety, prev a series of preliminary questions arose. Arblade and Leloup have been brought before the Tribunal Correctionnel de Huy for criminal proceedings for failure to comply with the abovementioned obligations under Belgian law.

In this context the ECJ noted that the characterization in Belgian law of the disputed provisions as public-law and security laws relates to national provisions the observance of which is of prime importance for safeguarding the political, social or economic organization of the Member State concerned so as to ensure that they are complied with by all persons in the territory of that Member State or in any legal relationship found in that State.

The ECJ held that Articles 59 and 60 of the Treaty prohibit a Member State from imposing, even under public law and security laws, on undertakings established in another Member State and temporarily carrying out operations in the first State the obligation to pay, any posted workers, employers' contributions to insurance schemes such as the Belgian '*bad weather stamps*' and '*loyalty stamps*' schemes, and to issue to each of them a personal card when these companies are already subject to in essence, similar obligations in terms of purpose, consisting in safeguarding the interests of employees, for the same employees and for the same periods of activity, in the State where the undertakings are established.

In the same terms, the Court has held that Articles 59 and 60 of the Treaty preclude a Member State from imposing, even under public law and safety laws, on undertakings established in another Member State and carrying out work temporarily in the first State to draw up employment-related

documents, such as the rules of employment, the special register of staff and, for each posted worker, an individual wage bill in the form required by the legislation of the first social protection of workers which may justify such claims is already ensured by the production of documents relating to the employment relationship which the undertakings in question are subject to in accordance with the law of the Member State in which they are established.

6.2. Case C-381/98: *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*

The Court of Appeal (England & Wales) (Civil Division) referred a question on the interpretation of Council Directive 86/653 / EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self- professionals). That question was raised in proceedings between Ingmar GB Ltd, a company established in the United Kingdom, and Eaton Leonard Technologies Inc., a company established in California, concerning the payment of sums due due, inter alia, to the termination of a contract delegation. The contract expired in 1996.

Following the expiration of the contract, Ingmar brought an action before the High Court of Justice (England & Wales), Queen's Bench Division (United Kingdom) for payment of a commission and, pursuant to Art. 17 of the Regulations, damage caused by the cessation of its relations with Eaton. The Court has held that Artt. 17 and 18 of the Directive, which guarantee certain rights of the commercial agent after the expiry of the dealership agreement, must apply when the commercial agent has exercised his activity in a Member State, and even though, on the one hand, the principal is established in a third country and, on the other, under a clause of the contract, the latter is governed by the law of that country.

6.3. Case C-116/11: *Bank Handlowy W Warszawie Sa, Pphu «Adax»/Ryszard Adamiak v. Christianapol Sp. Z O.O.*

In the present case, a question arises as to the interpretation of Articles 4 (1) and (2) (j) and 27 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended (EC) No 788/2008 of 24 July 2008. This request was made in the context of a procedure to initiate proceedings in Poland, at the request of Bank Handlowy w Warszawie SA and PPHU ADAX / Ryszard Adamiak, insolvency proceedings against Christianapol sp. z o.o. ('*Christianapol*'), a company incorporated under Polish law in respect of which an earlier rescue procedure had been initiated in France. By its first question, the national court has essentially asked the Court whether Art. 4(2)(j) of the Regulation must be interpreted as meaning that the term 'termination of insolvency proceedings' has its own semantic content as regards the regulation or if it is for the

national law of the Member State in which the insolvency proceedings to be instituted to determine the time-limit for completing that procedure.

The Court noted, *inter alia*, that its analysis is not inconsistent with what the Court held in paragraph 54 of *Eurofood IFSC*, cited by *Christianapoli* and the French Government, that the phrase 'decision to initiate insolvency proceedings', according to Art. 16(1) of the Regulation, must be determined on the basis of two criteria specific to the regulation. Contrary to Article 4 of the Regulation, Art.16(1) does not expressly refer to national law but lays down a rule of direct application in the form of a principle of recognition of the initiating decision to initiate the procedure, thus giving the answer must be that Art. 4(2)(j) of the Regulation must be interpreted as meaning that it is for the national law of the Member State in which insolvency proceedings to be initiated to determine the time-limit for completing that procedure.

6.4. Case C-426/11: *Mark Alemo-Herron Et Al. v. Parkwood Leisure Ltd*

This reference for a preliminary ruling concerns the interpretation of Art. 3 of Council Directive 2001/23 / EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses business. The reference was made in the course of proceedings between Mr Alemo-Herron and Others and Parkwood Leisure Ltd concerning the application of a collective agreement.

The Court has pointed out that, according to settled case-law, the provisions of Directive 2001/23 must be interpreted in the light of the fundamental rights and principles recognized by the Charter of Fundamental Rights of the European Union. It has also been pointed out that Article 3 of Directive 2001/23, read in conjunction with Article 8 thereof, can not be interpreted as allowing the Member States to take measures which, although more favorable to employees, may affect the very substance of the transferee's right to business freedom.

Finally, the Court has held that the answer to the three questions referred must be that Art. 3 of Directive 2001/23 must be interpreted as precluding legislation of a Member State which provides that, in the event of a transfer of an undertaking, the clauses relating to the dynamic use of collective agreements the negotiation and conclusion of which are after the date of the transfer, shall apply to the transferee where he is not able to participate in the negotiation of such collective agreements with eration concluded after the transfer.

6.5. Case C-184/12: *United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare*

The reference for a preliminary ruling concerns the interpretation of Artt. 3 and 7(2) of the Convention on the law applicable to contractual obligations, read in conjunction with Council Directive 86/653 / EEC of 18 December 1986 on the coordination of the laws of the Member States relating to turnover taxes Member States as regards commercial agents. The reference was made in the course of proceedings between United Antwerp Maritime Agencies (Unamar) NV, a company incorporated under Belgian law, and Navigation Maritime Bulgare, a company incorporated under Bulgarian law, concerning the payment of various damages allegedly due by NMB following of the termination of the agency contract entered into between those two companies.

In this context the Court noted that in order to fully ensure the effectiveness of the principle of the autonomy of the will of the Contracting Parties, an effort must be made to respect the choice freely made by the Contracting Parties as to the law applicable in their contractual relationship, in accordance with Art. 3(1) of the Rome Convention, in which case the exception based on the existence of a '*rule of direct effect*' under the legislation of the Member State concerned, Art. 7(2) of the Convention must be interpreted restrictively.

It further held that Artt. 3 and 7(2) of the Rome Convention must be interpreted as meaning that a court in a Member State which is the subject of a dispute may refrain from applying the law of another Member State of the Union which provides the minimum protection which is required by Directive 86/653 and which has been chosen by the parties as applicable to a dealership agreement but the *lex fori*, because the rules governing the legal status of independent commercial agents have, in the legal order of the Member States a Member of the forum which is a matter for direct applicability only if the court hearing the dispute finds in detail that, in the course of its transposition, the legislature of the State in which the court is seised considers it essential in the relevant legal system to provide the commercial agent with protection in excess of that provided for in that directive, taking account of the nature and purpose of those provisions immediately applicable.

6.6. Case C-338/14: *Quenon K. Sprl v. Beobank Sa, Metlife Insurance SA*

A dispute between Quenon on the one hand and Citibank and Citilife on the other, concerning the payment of a flat-rate compensation and the recovery of the damage suffered by Quenon as a result

of the termination of the agency contract by those companies. The Court held that, since the Agency Directive does not specify the conditions under which a commercial agent is entitled to claim damages, it is for the Member States, in the exercise of their margin of discretion, to determine those conditions and procedural details. The Belgian law, defining further protection as provided for in the Directive, does not preclude it. Condition to avoid double compensation.

6.7. Case C-464/14: *Secil – Companhia Geral De Cal E Cimento SA v. Fazenda Pública*

The reference was made in the course of proceedings between SECIL - Companhia Geral de Calimento Cimento SA and Fazenda Pública concerning the tax treatment, for the tax year 2009, of dividends distributed to SECIL by two companies based in Tunisia and Tunisia respectively Lebanon. On 29 May 2012, SECIL submitted a request for treatment to the Director de Finanças de Setúbal (Director of the Public Financial Services of Setúbal, Portugal) concerning IRC automatic charging for 2009, arguing that the tax on dividends distributed by Ciments de Gabès and Ciments de Sibline was unlawful since the Portuguese rules precluded the application of the rules for the elimination of that tax from the economic point of view of double taxation and was therefore contrary to the EC-Tunisia Agreement and the EC-L Agreement Vanou and to the TFEU. This reference for a preliminary ruling concerns the interpretation of Artt. 31 and 34 of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Tunisia, of the other part, signed in Brussels on 17 July 1995, whether they are rules of direct application.

As regards the question of the direct effect of the provisions of an agreement in the legal order of the parties, the Court considers that if that question has not been settled by that agreement, it is for the Court to resolve it, like any other question of interpretation implementation of agreements in the Union.

The Court has held that Art. 34(1) of the EC-Tunisia Agreement must be interpreted as having direct effect and that it may be invoked in a case such as that in the main proceedings in which a company established in Portugal receives dividends from a company established in Tunisia because of the direct investment it has made in the distributing company for the purpose of raising objections to the tax treatment of those dividends in Portugal. It has also been established that, by laying down that, under the provisions of the EC-Lebanon Agreement, and without prejudice to Artt. 33 and 34 of that Agreement, there are no restrictions between the Community, on the one hand, and the Republic of Lebanon, on the other hand capital and non-discrimination based on the nationality or the place of residence of the nationals of the parties or the place where the capital is

invested, Article 31 of that agreement clearly and unambiguously introduces a specific obligation to obtain results which individuals may invoke before the courts in order to seek the application of the provisions introducing the restriction or discrimination or to apply to them rules whose non-application implies the restriction or unfavorable discrimination, without the need for further implementing measures.

6.8. Case C-15/15: *New Valmar BVBA v. Global Pharmacies Partner Health Srl*

New Valmar, a Belgian company established in Belgium, and GPPH, a company incorporated under Italian law in Milan (Italy), entered into a contract governed by Italian law and with jurisdiction by the Belgian courts. The ITC was asked by the Belgian court whether a Flemish language regime requiring any undertaking having its head office in the territory of that entity to draw up cross-border invoices exclusively in the official language of that federation on a nullity is contrary to Art. 35 TFEU (prohibition of quantitative restrictions). The ITU ruled that if the national court considers that the Flemish language rules it intends to apply is a '*overriding provision of the forum*' within the meaning of Art. 9 of the Rome I Regulation, which is for that court to determine *in concreto*, may apply it in spite of the choice of Italian law by the contracting parties. However, it must take into account a series of objective criteria and state the reasons why the application of the relevant provisions of the legislation under consideration is required in the specific case to the detriment of the law of another country.

6.9. Case C-135/15: *Republik Griechenland v. Grigorios Nikiforidis*

The request for a preliminary ruling concerns Artt. 9(3) and 28 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 (Rome I). The reference was made in the course of proceedings between the Republic of Griechenland and Gregory Nikiforidis, a Greek national working as a teacher at the Greek Primary School in Nuremberg, concerning, *inter alia*, the reduction in the gross remuneration of the latter following the issue by the Hellenic Republic of two laws to reduce the government deficit.

During the period from October 2010 to December 2012, the Hellenic Republic reduced, due to the adoption by the Greek legislator of Laws 3833/2010 and 3845/2010, by 20,262.32 euros the gross earnings of G. Nikiforidis, which until then were calculated on the basis of the German collective labor regulations. These laws were intended to implement the agreements concluded by the Hellenic Republic with the European Commission, the European Central Bank and the

International Monetary Fund (IMF) and Decision 2010/320. Mr G. Nikiforidis filed a lawsuit in Germany requesting him additional remuneration for the period from October 2010 to December 2012, as well as paying salary statements.

The question arises whether Art. 9(3) of the Rome I Regulation must be interpreted restrictively as allowing only the provisions of direct application of the law of the forum or the State in which the contract is to be applied, or whether they may be taken into account indirectly the provisions of another Member State's direct application.

The Court noted that the inclusion in Art. 9 of the Rome I Regulation of the direct applicability provisions to which the forum judge may give effect is exhaustive. Art. 9 of the Rome I Regulation must be interpreted as precluding a judge from applying as legal rules provisions of direct application other than those of the forum or the State in which the obligations arising from the contract. On the other hand, Art. 9 of that regulation does not preclude the taking into account, as a matter of fact, of the immediate application of provisions of a State other than that of the forum or the State in which the obligations arising from the contract are to be fulfilled or fulfilled, by a substantive rule of law applicable to the Convention under the provisions of that regulation.

6.10. Case C-191/15: Verein für Konsumenteninformation v. Amazon EU Sàrl

The reference was made in the course of proceedings between the Verein für Konsumenteninformation and Amazon EU Sàrl, established in Luxembourg, concerning an action for failure to act brought by VKI. The reference for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and 95/45/EC of the European Parliament and of the Council of 24 October 1993 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Art. 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a clause contained in the general terms and conditions of sale of a professional subject to individual negotiation and where the contract concluded with a consumer in the context of e-commerce is governed by the law of the Member State in which the registered office is situated, that professional is abusive if it creates the consumer that the Convention applies only the law of that Member State without informing it that, under Art. 6(2) of Regulation No 593/2008, the consumer is also entitled to rely on the guaranteed by the

mandatory provisions of the law which would have been applicable in the absence of that clause, which is for the national court to determine, on the basis of all the relevant circumstances.

7. The Hague Principles on Choice of Law and Overriding Mandatory Principles

7.1. The Nature of the Hague Principles on Choice of Law

The Hague Principles on Choice of Law is the result of a concentrated effort to create a non-binding instrument on choice of law⁸³ under the auspices of the Hague Conference on Private International Law initiated in 2006 with a view to promoting and safeguarding party autonomy⁸⁴. The Principles were adopted in 2015 and have the status of soft law; an attempt, really, to ‘*reform domestic law on choice of law and operate alongside existing instruments*’⁸⁵. Their creator intended for them to be used by lawmakers, courts, arbitral tribunals, business parties and legal advisors⁸⁶.

According to Article 1, the Principles apply only to international contracts, and only to contracts where each party is acting in the exercise of its trade or profession. Moreover, under the Hague Principles, party autonomy is not limited by any requirement of a connection, between the chosen law and the parties, thus promoting the concept of delocalization of international transactions⁸⁷. While aiming at reinforcing party autonomy, as do the Rome I and II Regulations, the Hague Principles also recognize overriding mandatory provisions as a limit to the principle of party autonomy, by being positively applied regardless of the chosen system of law⁸⁸.

7.2. The Relevance of the Hague Principles on Choice of Law for the Application of Overriding Mandatory Rules in Arbitration

One of the primary functions of the Hague Principles, whose very nature lends itself to the particular framework of arbitration proceedings, is to provide a sound international framework for

⁸³ Reimann, M. (2015). Symeon C. Symeonides, Codifying Choice of Law Around the World: An International Comparative Analysis. *American Journal of Comparative Law*, 63(3), pp.801-809.

⁸⁴ Kwon, J. (2016). Choice of Rules of Law as the Governing Law under the Hague Principles on Choice of Law in International Commercial Contracts. *Northeast Asian law journal*, 10(1), pp.473-500.

⁸⁵ Principles on choice of law in international commercial contracts. (2015). The Hague: The Hague Conference on Private International Law.

⁸⁶ Ibid.

⁸⁷ Girsberger, D. & Cohen, N.B. (2017). Key Features of the Hague Principles on Choice of Law in International Commercial Contracts. *Uniform Law Review*. 22(2,1), pp. 316–335.

⁸⁸ Born, G. (2014). *International commercial arbitration*. Alphen aan den Rijn, The Netherlands: Kluwer Law International, pp. 2171–2172.

choice of law, which can be utilized by arbitrators in their quest to supplement the gaps of arbitration laws and rules, as well as the the gaps of domestic law in general. Moreover, they seek to harmonize the choice of law approaches taken by judges and arbitral tribunals alike⁸⁹, especially in regard to the choice of law for non-State rules of law and overriding mandatory rules⁹⁰. While, much like the Rome I Regulation, the Hague Principles do not address the law governing arbitration agreements or choice-of-court agreements, they can be used as a powerful tool by arbitrators to determine the governing substantive law, as well as its limitations in the form of overriding mandatory provisions.

Art. 11 Para. 5 of the Principles specifically provides '*[t]hese Principles shall not prevent an arbitral tribunal from applying or taking into account [...] overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so*'. It thus draws a clear distinction between the application of overriding mandatory provisions by the courts on the one hand -as provided for in Art. 11 Para. 1- and arbitral tribunals on the other.

The Commentary⁹¹ for the Hague Principles characteristically states in relation to the distinction that '*[a]rbitral tribunals, unlike courts, do not operate as part of the judicial infrastructure of a single legal system, and are subject to a range of legal influences. Moreover, the Principles, by their very nature as a non-binding instrument, do not (and cannot) grant an arbitral tribunal any authority beyond that which it already has pursuant to its mandate and cannot predict the exact circumstances in which an arbitral tribunal will be constituted and called upon to reach a decision*'.

Moreover, it is already significant to point out that in arbitration the reference to the *lex fori* as articulated in Art. 11(1) of the Hague Principles is irrelevant, because there is no *forum*; only '*seat*' of the arbitral tribunal, which does not necessarily have a close connection to the dispute⁹². Indeed, as the Commentary⁹³ again notes, Art. 11(5) '*does not confer any additional powers on arbitral tribunals and does not purport to give those tribunals an unlimited and unfettered discretion to depart from the law chosen by the parties. Quite to the contrary, the Principles*

⁸⁹ Girsberger, op. cit, p. 19.

⁹⁰ Ibid.

⁹¹ Hcch.net. (2017). *HCCH: Principles: Text and Commentary*. [online] Available at: <https://www.hcch.net/de/instruments/conventions/full-text/?cid=135#text> [Accessed 6 Dec. 2017].

⁹² Girsberger, op. cit, p. 19.

⁹³ Hcch.net. (2017). *HCCH: Principles: Text and Commentary*. [online] Available at: <https://www.hcch.net/de/instruments/conventions/full-text/?cid=135#text> [Accessed 6 Dec. 2017].

recognise that an arbitral tribunal might be required to take into account public policy or overriding mandatory provisions of another law, and must otherwise be satisfied that it is entitled to do so. The wording of the Article requires the tribunal to consider the legal framework within which its decision-making processes are conducted, having regard (in particular) to the agreement of the parties, the designated or deemed seat of the arbitration, any institutional rules applicable to the arbitration, and the potentially controlling influence of State courts applying local arbitration legislation’.

In general, the wording of Art. 11(5) merely requires the tribunal to consider the legal framework within which its decision-making process is conducted, while not specifying any further how the arbitrators should apply overriding mandatory norms, or even dictating positively that such norms must be applied⁹⁴.

The Principles do, however, urge the arbitral tribunals to consider their duty to render an enforceable award⁹⁵, which can potentially encompass the question of whether the arbitral tribunal is thus burdened with a duty pay due consideration to the overriding mandatory provisions and policies of the seat, however identified, or of the places where enforcement of any award would be likely to take place⁹⁶.

In short, under the application of the Principles, the answer to the question of whether the arbitrators should apply overriding mandatory provisions fall upon their shoulders, after due consideration of their duties as arbitrators as well as the discretionary powers they possess under the very same capacity.

⁹⁴ Girsberger, op. cit, p. 19.

⁹⁵ See, e.g., Art. 41 ICC Rules and Art. 32.2 LCIA Rules; see also Art. 34(2) UNCITRAL Arbitration Rules requiring that the award be final and binding.

⁹⁶ HCCH: Principles: Text and Commentary. [online] Available at: <https://www.hcch.net/de/instruments/conventions/full-text/?cid=135#text> [Accessed 6 Dec. 2017].

8. The Possible Consequences of the Non-Applicability of Overriding Mandatory Rules in the Context of International Arbitration

8.1. Arbitrators: May They or Should They Apply Overriding Mandatory Rules in the Context of International Arbitration?

The starting point in any attempt to answer the present question is at the heart of the issue of whether an arbitrator has the discretion or the obligation to apply the overriding mandatory provisions, irrespective of the legal order whence they stem.

Seeing from the standpoint of modern arbitration practice, which considers arbitration as a creature of the private will of the parties only tenuously connected with the legal order of the seat of the arbitration, the answers to the question whether the arbitrator *should* apply these is in the negative, ameliorated by such considerations as may affect the enforceability of the resulting award.

Indeed, in cases where the overriding mandatory provisions at stake correspond to certain rules of public policy incorporated at the seat of the arbitration, as well as in the states, where recognition and enforcement may be sought, by virtue of the application of Art. V(2)(b) of the New York Convention. Scholars have also supported the view –tittering on the edge between obligation and discretion- that when transnational public policy is at stake, arbitrators should apply the said overriding mandatory provisions⁹⁷.

While the answer to the question cannot be immediately supported by the weight of a legal or dogmatic framework that would either prescribe the mandatory application of overriding mandatory norms or just afford the arbitrators the discretion to do so, the many practical considerations faced by arbitrators, including their duty to render an enforceable award.

The above consideration puts forth another major question, which the present thesis will not attempt to definitively answer, but which bears upon the applicability of the overriding mandatory norms as a matter of course. Are the arbitrators obliged to apply such rules of overriding character without the recommendation of the parties? Would the notion –admittedly frowned upon by many-

⁹⁷ Kramer, X.E. 2017. EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration. In: Ferrari, F ed. *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, pp. 285-316.

of *arbiter novit curia*⁹⁸ be sufficient motivation for arbitrators to apply such rules?

Born notes that '[w]here the parties' contract raises issues of illegality, violations of public policy or mandatory law, or performance of administrative functions, then the tribunal's mandate must necessarily include consideration of those issues insofar as they would affect its decision or the enforceability of the award'.

This pronouncement militates for the examination *ex officio* by arbitrators⁹⁹ of such issues, without, however, giving a definitive answer regarding the mandatory or not nature of the inquiry. Again, the risk of an action to set aside due to an *ultra petita* award must be taken into serious consideration¹⁰⁰.

A paper published in 2016¹⁰¹ discusses mandatory rules theory from an empirical perspective. The survey contemplated 520 published extracts from ICC arbitral awards since 1990. The total number of awards making even passing reference to mandatory rules -mostly regarding competition, agency, and insolvency law- was 34; only 13 awards¹⁰² went into the specifics of the application of the said rules. directly discussed these rules.

The survey notes that in 9 awards, the mandatory rules in question were upheld. In addition, the survey put under the microscope over 7000 court decisions on enforcement under the New York Convention; it found that no more than 26 cases bore any relevance with the violation of mandatory rules. Only in 3 cases did a court find that a mandatory provision had been violated. In most of these arbitration and court cases, public policy was the dominant factor rather than mandatory rules.

At the same time, the many problems that may arise in the context of consideration of application of overriding mandatory provision, may well be solved by taking into account the various provisions of overriding mandatory rules, as prescribed under the Rome I and II Regulations and

⁹⁸ Knuts, G. (2012). *Jura Novit Curia and the Right to Be Heard - An Analysis of Recent Case Law*. *Arbitration International*, 28(4), pp.669-688.

⁹⁹ Sixto, S. (2010). *Choice Of Law And Overriding Mandatory Rules In International Contracts After Rome I*. *Yearbook of Private International Law*, 12, pp.67-91.

¹⁰⁰ Ibid.

¹⁰¹ Chen, M. (2016). *Empirical Research on Mandatory Rules Theory in International Commercial Arbitration*. *International Trade & Business Law Review*, 19, pp.154-268.

¹⁰² Ibid. In 46% of these cases, the respondent brought up the mandatory rules in 38%; in 8% (which should be only one out of the 13 cases) it was the claimant.

the Hague Principles. The resulting effect would strike a balance between state interested and the private interests of the parties to arbitration, while allowing the arbitrators to discharge their duties in a manner that would neither contradict the will of the parties nor the law they consider applicable in each case.

8.2. The Consequences of the Violation of Overriding Mandatory Rules in the Context of International Arbitration

8.2.1. The Eco Swiss Decision

As discussed above, a compelling reason to take account of overriding mandatory rules, is that to disregard them may have adverse effects on the fate of any award produced in the context of a specific dispute. The effects of the said violation will most likely be demonstrated when the overriding mandatory provision that has been violated corresponds to a specific public policy rule that is, by necessary implication, also violated.

As has been already discussed, public policy violations are pertinent both in the context of the law of the seat of the arbitration, where annulment of the resulting award may be sought, as well as of the countries where the award creditor may conceivably pursue the recognition or enforcement of the arbitral award¹⁰³.

One striking example attesting to the pertinence of the above considerations is the decision on the Eco Swiss case¹⁰⁴, which renders evident that a violation of the antitrust rule of Article 101 -which has been found to constitute a rule of overriding mandatory nature¹⁰⁵- of the TFEU constitutes a violation of public policy and would thus lead to annulment of the arbitral award¹⁰⁶. More specifically, the ECJ's decision in Eco Swiss makes it clear that a national court in the

¹⁰³ See Art. V(2)(e) of the New York Convention and the duty of an arbitrator to render an enforceable award.

¹⁰⁴ C-126/97, Eco Swiss China Time Ltd v Benetton International NV [1997]

¹⁰⁵ On the other hand, Sweden's Supreme Court in the decision for the case T 5767-13 of 17 June 2015 found that, where a party has requested a court to annul an arbitration award for failure to observe rules of a public policy nature, Swedish arbitration law provides that annulment shall only take place if the infringement of such rules is manifest.

¹⁰⁶ Kramer, X.E. 2017. EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration. In: Ferrari, F ed. *The Impact of EU Law on International Commercial Arbitration*. New York: Juris, pp. 285-316.

European Union must annul¹⁰⁷ an arbitral award ‘*where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy*’.

In 1986 Benetton International NV entered into a licensing agreement with Eco Swiss China Time Ltd and Bulova Watch Company Inc, granting Eco Swiss the right to manufacture watches and clocks and providing that these products could be sold by Eco Swiss and Bulova. The agreement contained a choice of law provision choosing Dutch law to govern the contract and an arbitration clause providing that all disputes would be settled by arbitration in conformity with the rules of the *Nederlands Arbitrage Instituut*. In 1991, an arbitration was commenced, which led to the issuance of two awards: a Partial Final Award holding that Benetton was liable to Eco Swiss and Bulova for the damages they had suffered as the result of the early termination; and a Final Award, ordering Benetton to pay US\$23,750,000 to Eco Swiss and US\$2,800,000 to Bulova by way of compensation for the damages suffered by them¹⁰⁸.

In July 1995, Benetton applied to the Dutch courts for annulment of the two Awards on the ground that they ‘*were contrary to public policy by virtue of the nullity of the licensing agreement under Article 85 of the Treaty, although during the arbitration proceedings neither the parties nor the arbitrators had raised the point that the licensing agreement might be contrary to that provision*’. The case, thus appears to dictate to arbitrators the raising of issues of competition *sua sponte*.

Failing to address such issues, the arbitrators would be faced with the practical consequences of a theretofore theoretical dilemma; on the one hand, their duty to render an enforceable award by taking into account such provisions as are at stake here; and on the other, the explicit agreement of the parties to the effect that these provisions are excluded.

Further to the Eco Swiss case, and into the realms of EU consumer law, which may also under circumstances constitute overriding mandatory provisions, the ECJ in the *Mostaza Claro v. Centro Movil* case¹⁰⁹ found that a national court enforcing an arbitral award must assess on its own motion

¹⁰⁷ See also *Genentech* case, where the Advocate General Wathelet requested a more extensive review of arbitral awards by the Court where Article 101 of the TFEU is at stake, due to the rule’s fundamental nature in the EU.

¹⁰⁸ Von Mehren, R.B. (2014). The Eco-Swiss Case and International Arbitration, *Arbitration International*. 19(4), pp. 465–470.

¹⁰⁹ C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*.

whether the award has not been rendered in violation of EU consumer law, irrespective of the fact that none of the parties have sought to rely on it in their pleadings¹¹⁰.

More specifically, the Court found that '*Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court seised of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment*'.

8.2.2. Germany

The stance of Germany on the issue of overriding mandatory provisions and their relation to arbitration is best illuminated through the landmark decision of the Munich *Oberlandesgericht*, which is considered as generally reflecting the policy of the German Courts on the issue of overriding mandatory principles and arbitration so far¹¹¹.

The provisions of the Agency Directive, which concern the substantive law of the contract, has a less obvious public policy character; it has been repeatedly, however, found that certain provision of the said Directive have an overriding mandatory character¹¹². Based on the Ingmar decision, the Munich *Oberlandesgericht* held that in a sales agency contract, the arbitration agreement including a choice of Californian law invalid, in order to secure application of provisions on compensation of the agent after termination of the contract¹¹³. The Court made reference to the Ingmar decision, on the basis of which it found that a sales agent under German law is entitled to compensation under Section 89b of the German Commercial Code, despite the fact that Californian law did not provide for such compensation.

On the basis of the status of Art. 17 of the Agency Directive as an overriding mandatory provision, the Court found that these provisions are applied irrespective of the substantive law of the contract chosen by the parties, and results in effect to the prohibition of an arbitration agreement that directs

¹¹⁰ See Landolt, P. (2007). Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements. *Arbitration International*, 23(1), pp.63-92.

¹¹¹ Ferrari, F. and Kröll, S. (2011). *Conflict of laws in international arbitration*. Munich: Sellier, pp. 193-195.

¹¹² Case C-381/98, Ingmar GB Ltd v. Eaton Leonard Technologies Inc.

¹¹³ This judgment is referred to and analyzed in Ferrari, F. and Kröll, S. (2011). *Conflict of laws in international arbitration*. Munich: Sellier, pp. 193-195.

the proceedings regarding the dispute outside the member states of the EU. This, coupled with the existence of a choice of law provision stipulating Californian law, effectively deprived the EU law-maker of the ability to enforce its protective policies regarding agents and was thus invalidated by the German Court.

8.2.3. *England*

The English High Court in the *Accentuate Ltd v. Asigra Inc* case¹¹⁴, declared an arbitration agreement relating to an agency contract that included a choice of Ontario law null and void, since their agreement did not recognise or incorporate mandatory EU law. The claimant brought claims for compensation under the Commercial Agents Directive 1993, while the respondent submitted that the existence of the arbitration clause entitled him to initiate arbitration, which he did. The arbitral tribunal denied the claimant's request for a declaration that the Regulations fell outside the scope of the arbitration agreement; found that the Regulations did not apply when determining the parties' rights and liabilities, and that Ontario law applied; and that the respondent was liable to the claimant for certain losses.

The claimant appealed the decision in England, by arguing that the combined effect of an arbitration agreement and a choice of law clause amounted to an evasion of the Regulations and was therefore unenforceable, and contrary to public policy.

The English High Court found in favour of the claimant, stating that the '*interests which the provisions in question seek to protect, namely competition within the Community and the protection of commercial agents who carry on their activities there, are the reason for the Community legislature's firmly expressed intention to make those provisions prevail over any expression to the contrary on the part of the contracting parties*'. Indeed, the Court seems to suggest that the arbitral tribunal is under a duty to apply certain mandatory norms irrespective of the parties' choice of law.

8.2.4. *Austria*

The *Oberster Gerichtshof* in a 2017 decision ruled on whether potential claims under the Austrian Commercial Agents Act can be brought before an Austrian court, despite the existence of an arbitration clause governed by the laws of New York into the agency agreement. The judgment

¹¹⁴ *Accentuate Ltd v ASIGRA Inc* [2009] EWHC 2655, 30 October 2009.

addressed international overriding mandatory provisions on the compensation of commercial agents.

The Austrian Supreme Court found that Art. II Para. 3 of the New York Convention in conjunction with Section 584 Para. 1 of the Austrian Code of Civil Procedure dictate that an Austrian court make adjudicate a dispute, despite the prima facie existence of an arbitration agreement, if the said arbitration agreement is non-existent or unenforceable.

It further noted that an arbitration agreement shall be unenforceable if it aims to circumvent the applicability of mandatory procedural or material law provisions to the governed contract. Notably, the Austrian Supreme Court declared that *‘the refusal of recognition of the arbitration clause remains the only possibility to secure the international mandatory scope of application of Articles 17 and 18 of the Directive in favour of the Agent, who shall be protected by the provisions of the Directive and its transposition in Section 24 Austrian Commercial Agents Act.’* the agency agreement must be deemed invalid and must not oppose the lawsuit filed by the Agent.

9. Summary of Findings

The application of overriding mandatory rules does in many instances come to direct contradiction with the choice of law of the parties. Arbitrators in international commercial arbitration, which is traditionally considered to be a creature of consent, may sometimes find themselves lost in space when it comes to the application of overriding mandatory provisions.

The consistent case-law within the EU in favor of the due consideration of such provisions, even in circumstances when both the arbitration agreement and the choice of law agreement steer the arbitrator away from the EU legal order. As a result, arbitrators are called upon to strike a balance between respecting the agreement of the parties on the one hand and granting due consideration to the such rules of any given legal order, which the said order considers of paramount importance and thus of mandatory and immediate application.

Indeed, there is no black letter rule imposing upon arbitrators the obligation to apply overriding mandatory provisions. Yet, such considerations as the duty of rendering an enforceable award and the guidelines offered to the arbitrators by private international law instrument, renders their application something which the arbitrators appear entitled to do; indeed, sometimes, it may even be considered prudent for them to apply them. While there is no general indication in arbitral practice as regards the legal framework the arbitrators utilize when applying overriding mandatory rules, or which rules they do apply, there is a strong indication that both the the overriding mandatory norms of the seat of arbitration, as well as sometimes of third countries, such as those of recognition and enforcement, may be prudently considered for application.

Disregarding the choice of law of the parties could, under certain circumstances, be considered excess of power and may lead to the setting aside or non-enforcement of the arbitral award. At the same time, ignoring overriding mandatory rules may also effect on the validity of the arbitration agreement and the enforceability of the arbitral award under the public policy exception. It is important to note that it has been argued –and some tribunals have held– that an arbitrator may apply such rules of overriding mandatory nature *ex officio*. This is especially important when viewed under the lense of the arbitrator's duty to render as enforceable award. Even though the non-application of an overriding mandatory rule may not result in the violation of a public policy rule, it must yet be noted that overriding mandatory rules and public policy rules are largely the same type of rules and may have similar to identical content.

An important feature of the EU overriding mandatory rules lies with the consistent application of the said provisions by the ECJ and EU member state courts, as rendering the performance of the contract unlawful. In theory, the support for the application of mandatory law appears to be strengthening. In practice, however, there is little indication so far that the arbitrators are willing to drastically overlook the parties' express wishes with a view to applying overriding mandatory rules or other rules of mandatory nature.

As the arbitration constellation moves toward a more liberalized approach, getting all the more detached from the various state legal systems and even getting considerably delocalized in some circumstances, international arbitration seems to be moving away from such notions as overriding mandatory rules and the policies these rules represent for the states. This author does not underrate their importance in the context of national legal systems. Their object is even today to safeguard such principles as the state legislator considers fundamental, especially in connection with the weaker parties in transactions.

However, it appears that their application by arbitral tribunals is both complex and unduly disruptive of the goals of international arbitration, ie the resolution of disputes according to the parties' wishes and agreements.

10. Bibliography

Born, G. (2014). *International commercial arbitration*. Alphen aan den Rijn, The Netherlands: Kluwer Law International.

Belohlavek, A.J, 2014. Substantive Law Applicable to the Merits in Arbitration. *Revista Romana de Arbitraj*. 8(2(30)). Available at SSRN: <https://ssrn.com/abstract=2409863>.

Bermann, G.A., 2005. *Party autonomy: constitutional and international law limits in comparative perspective*, New York: Juris Publishing.

Blackaby, N., Hunter, M. Redfern, 2015. *Redfern and hunter on international arbitration*, Oxford: Oxford University Press.

Chen, M. (2016). Empirical Research on Mandatory Rules Theory in International Commercial Arbitration. *International Trade & Business Law Review*.

Collins, H (2010). *Regulating Contracts*: Oxford Scholarship Online.

Cordero Álvarez, C. (2017). Incidencia de las normas imperativas en los contratos internacionales: especial referencia a las normas de terceros estados desde una aproximación europea. *Cuadernos De Derecho Transnacional*.

Francescakis, P. (1974). Lois d'application immédiate et droit du travail. *Rev. crit. DIP*, 273(695).

Friedrich Karl von Savigny (1849). *System des heutigen Römischen Rechts*, Vol VIII. Berlin.

Girsberger, D. & Cohen, N.B. (2017). Key Features of the Hague Principles on Choice of Law in International Commercial Contracts. *Uniform Law Review*. 22(2,1).

Giuliano M., Lagarde, P., 1980. *Report on the Convention on the law applicable to contractual obligations*. Official Journal C-282.

Grigera Naón, H. (2001). *Choice-of-law problems in international commercial arbitration*. Hague Academy of International Law.

Hcch.net. (2017). *HCCH: Principles: Text and Commentary*. [online] Available at: <https://www.hcch.net/de/instruments/conventions/full-text/?cid=135#text>.

Hartley T.C. (1998). Mandatory Rules in International Contracts: The Common Law Approach. 266 Rec. des Cours.

Hellner M. (2009). Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?. *J Priv Int* .

Jones, D. (2014). Choosing the law or rules of law to govern the substantive rights of the parties: A discussion of *voie directe* and *voie indirecte*. *Singapore Academy of Law Journal*, 26, Special Edition

Kassis, A (1993), *Le nouveau droit européen des contrats internationaux*, LGDJ, Paris, 1993.

Kramer, X.E. 2017. EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration. In: Ferrari, F ed. *The Impact of EU Law on International Commercial Arbitration*. New York: Juris

Knuts, G. (2012). *Jura Novit Curia and the Right to Be Heard - An Analysis of Recent Case Law*. Arbitration International.

Kuipers, J.-J., 2012. *EU law and private international law: the interrelationship in contractual obligations*, Leiden: Martinus Nijhoff Publishers.

Kwon, J. (2016). Choice of Rules of Law as the Governing Law under the Hague Principles on Choice of Law in International Commercial Contracts. *Northeast Asian law journal*.

Landolt, P. (2007). Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements. *Arbitration International*.

Mayer, P. (1986). Mandatory rules of law in international arbitration. *Arbitration International*, 2(4).

Rubino-Sammartano, M. (2001), *International Arbitration Law and Practice* (The Hague, Kluwer Law International).

Sixto, S. (2010). Choice Of Law And Overriding Mandatory Rules In International Contracts After Rome I. *Yearbook of Private International Law*, 12, pp.67-91.

Stern, B. (1980), Trois arbitrages, un même problème, trois solutions: les nationalisations pétrolières libyennes devant l'arbitrage international. *Revue de l'arbitrage*

Vischer, Frank, "Foreign public law and conflict of laws (232)", in: *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law.

Yüksel, 2011. The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union, *Journal of Private International Law*, 7:1.

Waincymer, J. (2009). International Commercial Arbitration and the Application of Mandatory Rules of Law. *SSRN Electronic Journal*.

Wilderspin, M. (2017). Overriding mandatory provisions. In *Overriding mandatory provisions*, [eBook] Cheltenham, UK: Edward Elgar Publishing Limited, Edward Elgar Publishing, Inc.. Available From: Elgar Online: The online content platform for Edward Elgar Publishing.