UNDERSTANDING THE INTERFACE BETWEEN PARTY AUTONOMY AND MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATIONS

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ABSTRACT

Party autonomy has always been recognised by arbitrators as one of the cardinal principles of international commercial arbitration. It is by virtue of this principle that contracting parties can choose the substantive law that will govern the contract. However, a perusal of the prevailing arbitral practice as practiced across varied arbitral institutions in the world indicates the presence of one of the recurring themes in international commercial arbitration i.e. the friction between party autonomy and the application of mandatory rules to arbitration proceedings. In international arbitrations, arbitrators are usually faced with the complex question of whether or not to apply mandatory rules of public law which were not opted for by the contracting parties. The complexity of the above question is further heightened by the mere fact that neither the conventions governing international arbitrations nor national arbitration laws have conclusively answered the question. The abovementioned conflict assumes pivotal importance when viewed from the perspective of an arbitrator who has an implicit duty to balance the interest of the parties with the need to apply mandatory rules which are relevant to the dispute, always keeping in mind the need to issue an enforceable award. Through this article the author attempts to highlight the contrast between the positions of international arbitrator with those of national judges in the context of application of mandatory rules. The author will also examine the impact of international public policy (which is considered a mandatory rule of international legal order in itself) upon the application of mandatory rules to the merits of a dispute.

Keywords: - Party autonomy, recurring, duty to balance, international public policy.

INTRODUCTION

It is a well-established principle of international commercial arbitration that the principle of party autonomy gives contracting parties a sufficient amount of discretion to choose the substantive law of their contract.[1] It is by virtue of this levy that the substantive law of the contract may be the principle law of one of the contracting parties, the *lex mercatoria*[2], a general principle of law of one of the contracting parties, or a combination of the above rules.[3] It is important at this juncture to address the crucial question pertaining to the present discussion that whether an arbitrator should apply or take into consideration mandatory rules of public law that are relevant, but not chosen by the parties? The question raised above even though addressed in recent arbitral case law and international arbitration rules, remains unanswered. Notably neither the varied international arbitration conventions, such as the Geneva Conventions, New York Convention nor the national arbitration laws, such as the French New Code of Civil Procedure have categorically dealt with the role of an arbitrator in the context of application of mandatory rules.[4]

However, recent arbitration trends indicate that some arbitration institutions, such as the International Chamber of Commerce (the "ICC") and to some extent the United Nations Commission on International Trade Law (UNCITRAL) have dealt with the above highlighted issue.[5] Thus, given the lack of clarity in the current arbitration literature about the relationship between an arbitrator's duty to uphold party autonomy and his duty to apply the relevant mandatory rules foreign to the substantive law of the contract the author believes that this issue is worth discussing.

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[1] The official international acceptance of the notion of party autonomy is categorically postulated in almost every major treaty/uniform law affecting international contracts or arbitration. For example, Article V (1) (a) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article 1 of UNCITRAL Arbitration Rules, Article 34(2)(a)(i) Model Law on International Commercial Arbitration, 1985, reprinted in ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 412, 416, 445 (1986); Vienna Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, Articles. 2, 9, 19 I.L.M. 672, 674.

[2] Lex Mercatoria can be understood to connote as enunciated in ROBERT GOLDMAN, THE APPLICABLE LAW: GENERAL PRINCIPLES OF THE LAW-THE LEX MERCATORIA IN CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION, 125(2nd ed., 1986) as "a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade without reference to a particular system of national law".7

[3] Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration*, 10 Int'l Tax & Bus. Law. 59 (1992).

[4] *Id.*

[5] W. MICHAEL REISMAN, W. LAURENCE CRAIG, WILLIAM PARK & JAN PAULSSON, INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (UNIVERSITY CASEBOOK SERIES), (1st ed. Foundation Press 1997).

A cursory glance over the approach adopted by the arbitrators in relation to the above mentioned issue of maintaining equilibrium between party autonomy and application of mandatory rules highlights that an arbitrator primarily faces three issues in relation to the same. *Firstly*, the international business community perceives the application of mandatory rules of public law as a disruptive national interference in the formation and performance of international contracts.[6] *Secondly*, the public policy reasons underlying the enactment of mandatory rules[7] cannot be ignored by the arbitrator as it may often conflict with the will of the parties from which the arbitrator obtains his authority.[8] *Thirdly*, the enforceability of the award is of pivotal importance and something which the arbitrator must duly take into his consideration. The enforceability of an arbitral award is particularly relevant in the context of awards which are to be executed in several jurisdictions.

This article attempts to examine the application of mandatory rules of public law by the arbitrators in the context of recent case laws, varied arbitration institutional rules, and regional arbitral treaties. Moreover, as mandatory rules of a state are legislated with a view of protecting the basic notions of morality and justice pivotal for the state's public policy, this article will also further attempt to take into consideration the impact of international public policy on the jurisdiction of an arbitrator.

UNDERSTANDING THE TRUE NATURE OF MANDATORY RULES AND IDENTIFYING THE PROBLEM

Traditional conflict theory postulates that a statute is inapplicable to a contract unless the statute forms a part of the proper law of the contract or is otherwise applicable as part of the procedural laws of a forum court.[9] Notwithstanding the above, the aforementioned proposition is subject to the qualification that imperative laws of the forum may apply to the agreed contract irrespective of the proper law of the contract.[10] Thus, it follows as a necessary corollary that

[6] *Supra* note 3.
[7] The purpose behind mandatory rules is to protect a nation's basic notions of morality, values, and justice.
[8] The application of mandatory rules by the national courts automatically leads to the preclusion of the operation of the conflicting applicable law of the contract through the forum conflict of laws rules. In contrast, an arbitrator does not possess a forum established by law. Therefore, the principle that the mandatory rules of a forum automatically prevails over the conflicting substantive law and does not apply to an arbitral proceeding. *See*, PIERRE LALIVE, TRANSANTIONAL PUBLIC POLICY AND INTERNATIONAL ARBITRATION IN COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, 3 INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION 257, 270-71 (Pieter Sanders, 1986).
[9] H.HOLTZMANN & J.NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 43 (Kluwer Law & Taxation Publishers, 1984).
[10] A.Maniruzzaman, *International arbitrator and Mandatory Public Law Rules in the Context of State Contracts: An Overview*, 7 J.Int'l Arb 3, (1990).

one of the major limitations on the concept of party autonomy within a national legal system is that the laws of the forum may override the law chosen by the parties.

A perusal over the available literature relating to the apparent conflict between party autonomy indicates and the applicability of mandatory rules indicates that there is a general consensus regarding the fact that *"mandatory rules denote those rules of law that parties cannot derogate from, rules which in appropriate cases supersede the proper law, thereby substituting their provisions for the will of the parties:*

[a] mandatory rules is a rule which overrides the normally applicable law (or…the proper law of the contract) whether that applicable (proper) law is ascertained by reference to an express stipulation or by reference to an express stipulation or by reference to the closest connection. In short it is a law which applies irrespective of or despite the proper law of a contract."[11]

In addition to the above mentioned, mandatory rules embody the fundamental underlying principles of a given State and are therefore automatically applicable by virtue of their imperative nature. The governing ambit of such Rules include all those matters which typically have a direct and proportional relationship with the interest of the State and tend to be applicable in situations where the interests of the State are too important for them to be in competition with foreign laws[12] or the will of the parties.[13] In the context of Mandatory Rules, there can be little argument that arbitrators must apply the mandatory rules of the law chosen by the parties, subject only to compliance with international public policy.[14]

More importantly, a perusal over the current arbitral practice indicates that mandatory rules can displace or restrict party autonomy in certain situations. In particular,

> *"Arbitrators have shown hesitation in applying international mandatory rules not belonging to the proper law of the contract. However, there are sufficient examples of cases where arbitrators have allowed lois de police to displace the proper law of the contract as chosen by the parties, adopting the position that arbitrators are also ready*

[11] M. Prylees, *Reflection on the E.E.C. Contractual Obligations Convention – An Australian Perspective* in P. NORTH (ED.) CONTRACT CONFLICT: THE E.E.C. CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS, A COMPARATIVE STUDY (The Netherlands: North-Holland Publishing, 1982).

[12] Y. Derains, *Possible Conflict of Law Rules and the Rules Applicable to the Substance of the Dispute* in P. SANDERS (ED.) UNCITRAL'S PROJECT FOR A MODEL LAW OF INTERNATIONAL COMMERCIAL ARBITRATION 169 (Deventer, the Netherlands: Kluwer, 1984).

[13] Article 3(3) of the EEC Convention on the Law Applicable to Contractual Obligation defines mandatory rules as "rules of law of a country which cannot be derogated from by contract."

[14] ICC Case no. 8385 (1995), 124 Clunet 1061 (1997). Here in the present case the tribunal decided to apply RICO as mandatory rule of the chosen New York Law.

to set limits on the scope of the proper law even if by so doing they do not strictly abide by the parties' will".[15]

It is also of pertinent importance to address the question of the relevant applicable mandatory law to an international arbitration i.e. what mandatory law should international arbitrators apply? The relevant applicable mandatory rules could be the rules of the place of arbitration or the place where the contract has to be performed, or the law of the place of enforcement.[16]

Notably, the overlap between the concept of public policy and that of mandatory rules is to be taken into due consideration at this juncture. Mandatory rules would include those aspects of public policy that lie within the superstructure of a legal system and which, because they reflect the basic social and economic philosophy of a State, are framed in an imperative manner.[17] Some examples of mandatory rules that can be taken for our better understanding include currency and exchange regulations, boycotts and blockades, and environmental protection laws[18]. Further examples of mandatory rules incorporated in national legislations include the Consumer Transaction Act in Australia which applies to a consumer contract involving the delivery of goods in South Australia irrespective of the proper law of the contract. Alternatively, similar provisions can be found to be encapsulated in the English Employment Protection (Consolidation) Act[19], the English Uniform Contract Terms Act, and the German Regulation of Standard Contract Terms Act.[20]

The issue of conflict between mandatory rules and party autonomy is often highlighted in international arbitrations when one of the contracting parties seeks the defence of applicability of mandatory rules for noncompliance or breach of contract as according to the contesting contracting party the contract is unenforceable or void by virtue of it violating a mandatory provision of law. Notably, some of the pointers which might aid in giving considerable effect to the mandatory rules of law depends on whether (a) the parties have chosen the substantive law of the contract and the mandatory rules are a part of it; (b) the parties

[15] Grigera Naon, *Choice-of-law Problems*, 74. See also, Grigera Naon, *Choice of law Problems in International Commercial Arbitration*, 289 RCADI 8 (2001) 200 et seq, 296.
[16] *Id.*
[17] *Supra* note 3.
[18] *Supra* note 15.
[19] A. ANTON AND P. BEAUMONT, PRIVATE INTERNATIONAL LAW, 343 (2nd ed., Edinburgh: W.Green, 1990).
[20] S.M. Hyder Razvi, *Mandatory Rules of Law in International Business Arbitration*, 3 The Lahore Journal of Economics 2, (1998).

have chosen the substantive law, but the mandatory rules are not part of it; (c) the parties have left the choice of substantive law to the arbitrator.[21]

DIVERGENT APPROACHES OF APPLICATION OF MANDATORY RULES TO INTERNATIONAL COMMERCIAL ARBITRATIONS

In addition to the above mentioned, what is to be taken into due consideration is the very fact that there are divergent approaches regarding the extent to which the arbitration law of a state is mandatorily binding on international arbitrations conducted within that state. These divergent approaches are duly illustrated in both arbitration legislations across varied states and academic literature where various authors have adopted diametrically opposing views regarding the extent to which the law of the arbitral seat is mandatorily applicable to locally seated arbitrations.[22]

THE TERRITORIAL APPROACH

- *Mandatory application of Arbitral Legislation of Arbitral Seat*

From an academic and theoretical perspective it is noteworthy to note the observation of the late Dr. Francis Mann in the context of mandatory rules and its application to international arbitrations. He opines that "*every arbitration is a national arbitration, that is to say, subject to a specific system of national law*,"[23] and "the *loi de l'arbitrage* is the law of the country in which the tribunal has its seat."[24] Alternatively, other authorities have held that the arbitration law of the seat is mandatory applicable courtesy of territorial legislative jurisdiction to the arbitrations seated in national authority.[25]

Moreover, the above view is illustrated on a perusal of series of resolutions adopted by the Institute of International Law in the 1950s.[26] The abovementioned resolutions clearly declared or assumed that the law of the arbitral seat was mandatorily applicable to arbitrations

[21] GARY B.BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1583(2nd ed., Wolters Kluwer, 2014).
[22] *Supra* note 21.
[23] Mann, *Lex Facit Arbitrum*, 2 Arb, Int'l 241,244 (1986).
[24] *Id*. The traditionalist theory presupposes that the contractual foundation of an international arbitral tribunal is a façade which conceals the legally crucial adjudicatory character of the tribunal. See also, G.PETROCHILOS PROCEDURAL LAW IN INTERNATIONAL ARBITRATION, 23 (1st ed., Oxford 2004).
[25] N.BLACKABY, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (5th ed., Oxford University Press, 2009).
[26] Sauser-Hall, *L'Arbitrage en droit international prive, 44-I Annuaire de I'Institut de droit international,* 469,535(1952). See also, A. SAMUEL, JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION, (1st ed., Publication de I'Institut Suisse de Droit Compare, 1989).

seated locally and also conceded to the fact that the law of the arbitral seat might in all possibility forbid the parties from agreeing upon the arbitral procedures:

"The law of the place of the seat of the arbitral tribunal shall determine whether the procedure to be followed by the arbitrators may be freely established by the parties, and whether, failing agreement on this subject between the contracting parties, it may be settled by the arbitrators or should be replaced by the provisions applicable to procedure before the ordinary courts."[27]

Proponents of the traditional territorial view of the law governing the arbitration argue that any arbitration requires a legal procedural framework to give it legitimacy, to permit judicial assistance in constituting a tribunal, procuring evidence and in granting provincial measures and to provide a degree of judicial supervision in hearing challenges to the arbitrators and in reviewing the ultimate arbitral award.[28] Further they also opine that in the absence of a national legal framework governing the arbitration seated locally the legitimacy of judicial review is diminished and that the award ultimately rendered is not a legal act and would not be entitled to recognition in national courts or to the protection of the New York Convention's pro-arbitration provisions.[29]

- *Mandatory Provisions of National Arbitration Legislation*

A perusal over major national arbitration legislations illustrates the fact that leading modern arbitration statutes are by their very nature mandatorily applicable to arbitrations seated on national territory.[30] Notably, the UNCITRAL Model Law adopts the territorial approach whereby the mandatory application of National Legislations is determined by the territorial scope of arbitration legislation.[31] Article 1(2) of the Model Law postulates that the statute's provisions apply, without the possibility of contracting out of this legislative framework, to all arbitrations seated in national territory.[32] Furthermore, the drafting history of the Model Law highlights that the drafters intended that the parties should not be given the freedom and

[27] Institute of International Law, *Resolution on Arbitration in Private International Law*, 1957 (Amsterdam) Art.9 (1992).
[28] *Supra* note 21.
[29] L.COLLINS, DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS (15th ed., Sweet and Maxwell, 2012).
[30] *Supra* note 21.
[31] *Id.*
[32] UNCITRAL, MODEL LAW, Art. 1(2). Art. 1(2) states that *"The provisions of this Law….apply only if the place of arbitration is in the territory of this State".*

leverage to contract out of its legislative framework, to select a foreign arbitration law, or contract into its framework, to govern a foreign arbitration.[33]

In addition to the above mentioned, other arbitration legislations adopt a similar approach too. The English Arbitration Act, 1996[34], provides that various provisions of the Arbitration Act are "mandatory" and have "effect notwithstanding any agreement to the contrary".[35] Consequent to the application of mandatory provisions parties to an arbitration conducted in England are automatically barred from contracting out of the Act's basic provisions regarding the court's "*external*" supervisory powers, including the power to remove arbitrators, to consider jurisdictional objections, to assist in evidence taking and to annul awards.[36] Also, it prevents contracting parties from contracting out of the internal requirements of procedural fairness. Moreover, English courts have regularly opined that *"our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law."*[37]

Another example of national arbitration legislation that can be taken in order to highlight the fact that parties are prohibited from contracting out of the supervisory and assistance functions of the courts is the arbitration legislation prevailing in Switzerland, France.[38] Pertinently, the arbitral award in the case of ICC Case No. 7373[39] while explaining the debate revolving around the mandatory application of national arbitration legislations stated that:

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[33] UNCITRAL, *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration*, Para 13, XIX Y.B. UNCITRAL, 117, 118 (1988).

[34] Section 4(1) envisages the various provisions of the Act which are to be considered as "*mandatory*" and have "*effect notwithstanding any agreement to the contrary*".

[35] English Arbitration Act, 1996. See also *Supra* note 24.

[36] Section 12, 24, 31, 32,43,67,68 of the English Arbitration Act, 1996. In C v. D [2007] EWCA Civ 1282, Para 19, the Court rejected the argument that *"the proper law of the contract to refer disputes to arbitration can constitute an agreement to import a method of challenge to the award not permitted by the seat of arbitration"*. Also, in A v. B [2007] 1Llyod's Rep. 237, 255-56 and in Minmetals Germany GmbH v. Ferco Steel Ltd [1999] 1 ALL ER (Comm) 315, 330-31 the English High Court opined that *"In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration."*

[37] Bank Mellat v. Helliniki Techniki SA [1984] Q.B. 291, 301.

[38] Am. Diagnostica Inc. v. Gradipore Ltd, XXIV Y.B Comm. Arb. 574, 582 (1999). In the given case, the court observed that"*... There must be a limit to the parties freedom, because their choice of the place of their arbitration may carry with it the application to the arbitration of the law of that place according to its terms so as to govern the conduct of the arbitration. The freedom is to choose the place. So far as the local rules compulsorily apply and are inconsistent with the chose lex arbitri they cannot be put aside by agreement that they do not apply."* See also, Cargill Int'l SA v. Peabody Australia Mining Ltd, [2010] NSWSC 887 Para 75. Also, in Gov't of India v. Cairn Energy India Pty Ltd, C.A. No. 02(f)-7-2010 (W) Para 25 the Malaysian Supreme Court has held that *"it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards."*

[39] Award in ICC Case No. 7373.

> *"the fact is that the place of arbitration is located in the Netherlands; and therefore that the arbitration must comply with the mandatory rules of the Netherlands Arbitration Act, 1986… which states that the Act shall apply if the place of arbitration is situated within the Netherlands."*[40]

Therefore, the above mentioned references to national legislations and arbitral awards clearly bring forth the approach of national legislatures and courts which have held that national arbitration legislation is mandatorily applicable to all arbitrations seated locally. Although contemporary arbitration legislations allow the contracting parties ample of levy to concretely agree upon major aspects of the arbitral procedure, however, in the context of internal procedural issues most legislations require that the exercise of such freedom should be done within the framework of the law of the arbitral seat and that the parties should not be allowed to contract out of the basic "external" support[41] and supervisory roles of local courts.[42]

THE DENATIONALIZED APPROACH

The advocates of the denationalized approach propagate that an international arbitration does not need to be governed by a national arbitration law, irrespective of whether the law of the arbitral seat or otherwise.[43] Noteworthy is the observation of one proponent of the theory who opines that:

> *"The ideal and expectation is for international arbitration to be established and conducted according to internationally accepted practices, free from the controls of parochial national laws, and without the interference or review of national courts. Arbitration agreements and awards should be recognized and given effect, with little or no complication or review, by national courts. …It is essential to remember that, in every international arbitration, parties and arbitrators are invariably from different jurisdictions. The place of arbitration is frequently selected as a neutral country. The parties have rejected the normal jurisdiction offered by national courts. They have intentionally placed themselves and their dispute settlement mechanism in a neutral,*

[40] *Id*, as discussed in Grigera Naon, *Choice-of-Law Problems in International Commercial Arbitration*, 289 Recueil des Cours 9,71 (2001).
[41] *Supra* note 3.
[42] *Supra* note 21.
[43] Paulsson, *Delocalisation of International Commercial Arbitration: When and Why it matters*, 32 Int'l & Comp L.Q. 53 (1983). See also, G.Petrochilos, *Procedural Law in International Arbitration*, 41 (2004). The authors are of the view that it is not viable and axiomatic that an arbitration should be exclusively attached to the legal order of the place of proceedings, or the seat of the arbitration.

non-national domain. For the reason, national laws have no interest in controlling the arbitration process."[44]

Subsequently, the above cited approach was adopted by the arbitral tribunal in ICC Case No.2321 where the tribunal went on to opine in elaborate and absolutist terms that:

"I… do not see any need for referring to any particular set of national law rules or court practice of any particular country in this respect. …Nor do I see any necessity for relying… upon Swedish law as the law of the place of arbitration. Furthermore, the court and other authorities of Sweden can in no way interfere with my activities as an arbitrator; neither direct me to do anything which I think I should not do nor to abstain from anything which I think I should do."[45]

An incisive analysis of the ICC's 1953 Draft Convention aptly highlights the denationalized approach whereby the proposition that "*there could be no progress without full recognition of the conception of international awards… i.e., an award completely independent of national laws*"[46] was strong endorsed by the drafters.[47] However, this was ultimately rejected in the New York Conference and thus the present New York Convention has narrowed down the scope of the Convention and affirmed the broad annulment powers of the courts of the seat. Although most arbitration statutes are mandatorily applicable to arbitrations with local seats, arbitral legislations such as the ones prevailing in Belgium[48], Switzerland[49], Peru[50], Argentina[51] and Dominican Republic[52] permit the parties to contract out of most aspects of arbitration law. The legislative approach adopted by the above mentioned arbitral legislations permit the contracting parties to contract out of access to local courts for annulment of international arbitral awards.[53] Notably, most arbitral legislations do not follow the

[44] Julian D M Lew, *Achieving the Dream: Autonomous Arbitration*, 22 Arb. Int'l 179, 179-80 (2006). In the article, Lew observes the lack of clarity regarding the position of various propagators of the denationalized approach as to whether the analysis (as produced verbatim in the present article) rests on the notion that national law is inapplicable to regulate an international arbitration or that national law chooses not to do so.
[45] *Preliminary Award in ICC Case No. 2321*, I.Y.B. Comm Arb. 133,134 (1976). See also Fouchard, *L'autonomie de l'arbitrage commercial international*, Rev. arb. 99, 104-05, (1965). A. van den Berg, *The New York Convention* of 1959, 29 (1981) which states that a national award is in its very essence an award resulting from an arbitration which is detached from the ambit of a national arbitration law by means of an agreement between the parties.
[46] ICC, *Report and Preliminary Draft Convention Adopted by the Committee on International Commercial Arbitration at Its Meeting of 13 March 1953*, reprinted in 9(1) ICC Ct. Bull. 32 (1998).
[47] *Id.*
[48] Art.1718, Belgian Judicial Code, 2013.
[49] Art.192, Swiss Law on Private International Law, 1987.
[50] Art. 63(8), Peruvian Arbitration Law, 2008.
[51] Ricardo C v. Urbaser Argentina SA, CSJN, 18/3/2008.
[52] Art.40, Dominican Republic Arbitration Act, 2008.
[53] *Supra* note 21.

denationalized approach and there is a clear inclination towards territorial approach as explained above.

ROLE OF INTERNATIONAL PUBLIC POLICY IN DETERMINING MANDATORY RULES

Traditionally, transnational public policy embodies the fundamental principles, the basic ethical standards, and the enduring moral consensus of the international business community. The issues of international public policy are complex and relevant at various stages in the international arbitration process. More pertinently, their importance will be determined by both national courts and the arbitral tribunal whereby a national court will indulge in the process of determining the impact of the recognition and enforcement of the rendered award in conjunction with its own international public policy. Such a determination will arguably be primarily influenced by whether specific issues are arbitrable[54] and whether the substance of the award contradicts a fundamental standard of the enforcing court[55].

A perusal over the available literature highlights that an arbitration tribunal may have to consider the effects of international public policy at various stages of the proceedings. Such stages may include when deciding whether to give full or limited effect to the law chosen by the parties or which is otherwise applicable, if jurisdiction, i.e. arbitrability, is contested or where the factual or substantive issues are alleged to be contrary to fundamental standards.[56] Notably, some common examples of international public policy include not seeking to bribe or corrupt government officials[57], assembling a mercenary army to support an insurrection against a legitimate government, human rights[58], fair hearing and due process[59]. Though a rarity in international arbitrations, where arbitration proceedings are brought to enforce rights under these types of contracts, arbitrators would probably be constrained by international public policy not to enforce and give effect to the contract.[60]

[54] New York Convention V(2)(a), II(1).
[55] New York Convention Article V (2)(b).
[56] JULIAN D.M. LEW, LOUKAS A. MISTELIS, STEFAN M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, (Kluwer Law International, 2003).
[57] Westacre Investments Inc v. Jugoimport-SDPR Holding Co Ltd and Others [1992] 2 Llyod's Rep 65; [2000] QB 288 (CA). See also, Cour d'appel Paris, 30 September 1993, European Gas Turbines SA v. Westman International Ltd, Rev Arb 359 (1994).
[58] E. GAILLARD, J. SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *(1st ed.* Kluwer Law International 1999).
[59] National Oil Corporation v. Libyan Sun Oil Company, 733 F Supp 800-822. See also, Swiss Federal Tribunal decision of 20th November, 1985, reported in 271. Zurcher Zeitung 34 (21st November, 1985).
[60] *Supra* note 56.

There is a common consensus among established practitioners and authors that arbitrators must apply any mandatory rule that reflects transnational public policy in order to maintain minimum standards of conduct and behaviour in international commercial relations.[61] As aptly illustrated by the Cour d'appel, the court in one case has duly observed that,

> *"the security of international commercial and financial relations requires the recognition of a public policy that is, if not universal, at least common to the various legal systems and, since transnational public policy represent values that are superior to those of particular national systems arbitrators owe a paramount duty to the international community, they should refuse to apply any mandatory rules that conflict with transnational public policy."*[62]

Also, the International Law Institutes' Resolution on the Autonomy of Parties supports the above mentioned view, by stating that *"in no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community"*.[63] Pertinently, the difficulties associated with transnational public policy in the context of contracting parties include establishing a principle's universality and in the context of arbitrators include uncertainty as to the degree of universal acceptance required to establish that a principle is truly international.[64]

It is noteworthy at this juncture to illustrate the fact that arbitrators are particularly suited to implement the principles of transnational public policy because they have a responsibility of maintaining the coherence between equality and fair play in the international commercial arena and more importantly, they are not guardians of the public policy of any particular nation. In addition to the above, the arbitrators partially do away with the responsibility of balancing the will of the parties with the legitimate interests of the international community in preserving the basic notions of contractual morality and justice.[65] In the case of ICC Case No. 1110[66] where the sole arbitrator concluded that the commission claimed by the claimant amounted to a bribe, the sole arbitrator opined that the contract was in

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[61] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 11.
[62] Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration* in PIETER SANDERS, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (2nd ed., 1987) 257, 285–6.
[63] *Supra* note 61.
[64] E. GAILLARD, J. SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *(1st ed.* Kluwer Law International 1999).
[65] *Supra* note 61.
[66] As cited in MAURO RUBINO SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE, (2nd ed. Kluwer International, 2001).

violation of transnational public policy and the claimant cannot claim any damages under the breach of contract.

THE PROPOSED APPROACH

The diversity of opinions and commentaries regarding adopting the appropriate solution to the issue of application of mandatory rules to international commercial arbitrations does not provide much decisive guidance and thus it follows as a necessary corollary that an inference for the same must be drawn out from the prevailing practice duly illustrated in various national arbitral regimes. As noted above, all major contemporary arbitral legislations always contain statutory provisions which are mandatory in nature and generally cannot be contracted out from when the arbitration is seated locally. Importantly, these statutes among many other things provide for judicial review pertaining to varied jurisdictional issues, such as competence-competence issues[67]. Given the absolute rejection of the denationalized approach in the New York Convention and the provisions envisaged in various arbitral legislations, as mentioned above, it can therefore be conclusively determined that the current prevailing trend seems to be that the territorial approach is the more preferred approach over the denationalized approach.

Notwithstanding the above mentioned the arbitration laws in most jurisdictions allow the contracting parties a certain degree of autonomy whereby the contracting parties can contract out of a very broad range of internal and external procedures.[68] For the better understanding of the above mentioned point an example can be taken in the form of the provisions postulated in the UNCITRAL Model Law which allows contracting parties a substantial amount of party autonomy in relation to a substantial range of issues.

A necessary caveat that must be added to the above stated conclusion is that the New York Convention imposes international limits on the extent to which a Contracting State may disregard procedural party autonomy, both directly in the arbitral seat and in recognition proceedings.[69] Therefore it follows as a necessary corollary from the above mentioned that if this interpretation is accepted then, in an abstract and critical sense, every international arbitration proceeding can be regarded as autonomous from the law of the arbitral seat and be subjected to international governing standards.[70] What is also to be taken into due consideration

[67] *Id.*
[68] *Supra* note 39.
[69] *Supra* note 21.
[70] *Supra* note 24.

at this juncture is the very fact that even though national arbitration laws provide for a legal framework for international arbitrations they in their very essences are subject to international limitations as imposed by the New York Convention and also other international conventions too.

Moreover, the Convention's provisions curtail the limits of interference by the national law and thereby automatically tend to discourage any issues that may arise subsequently regarding recognition of the arbitration agreement between the parties and also arguably, to the parties' agreed arbitral procedures. Thus, it is not that international arbitrations or arbitral awards are denationalized, but that, while rooted in the legal framework and law of the seat, international arbitral awards and arbitrations are also subject to international protections that limit, in important but defined respects, the effects of national law.[71]

The author of this article is of the opinion that the objective of suggesting denationalized arbitrations is quite understandable i.e. to avoid choice-of-law uncertainties and confusion regarding the procedural law of the arbitration. However, the author believes that it is not an appropriate or sustainable method of accomplishing this objective. Numerous procedural issues such as professional obligations[72], privileges[73], the availability/necessity of an oath[74], the form of an award[75], the time for seeking corrections and interpretations of an award[76], the grounds of annulment[77] and similar issues must be governed by national arbitral legislations imposing the territorial approach and not denationalize legislations.

CONCLUSION

Mandatory rules are one of the primary methods by which the doctrine of party autonomy is adapted to be in consonance with the legitimate interests of States thereby ensuring that the arbitral process is on the same pedestal as the basic elements of contractual morality. Even though, arbitrators in international arbitrations are not under any compulsion to apply

[71] *Supra* note 39.
[72] *Supra* note 64.
[73] HOWARD M. HOLTZMANN, JOSEPH E. NEUHAUS, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY, (Kluwer Law and Taxation Publishers, 1989).
[74] MATTHIEU DE BOISSESON, LE DROIT FRANFAIS DE (3rd ed, Arbitrage National et Internationa, 1998).
[75] JAN PAULSSON, THE IDEA OF ARBITRATION, (1st ed, Oxford Publishing, 2013).
[76] Thomas Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 Columbia Journal of Transnational Law, 579 (1985).
[77] PIETER SANDERS, QUO VADIS ARBITRATION?: SIXTY YEARS OF ARBITRATION PRACTICE, (1st ed., Kluwer Law International, 1999).

mandatory rules the objective application of such rules is to be determined and understood in the context of the nature and purpose of relevant mandatory rules and more importantly whether the State's connection with the parties transaction warrants the application of such rules. Furthermore, arbitrators in international arbitrations should ensure that the disputes before them conform to the requirements of transnational public policy. Moreover, the enforcement of appropriate rules by arbitrators would across a strong message that the arbitral process is certainly not a method for circumventing imperative laws of Sates with which the transaction has a close connection and increase confidence of propagators who are of the strong opinion that arbitrators are well suited to adjudicate claims involving matters of State policy.