

APPLICATION OF OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION: AN EMPIRICAL ANALYSIS

*Ibrahim Mohamed Nour Shehata**

Overriding mandatory rules are rules of a public policy nature that supersede the otherwise applicable law and apply automatically to any dispute falling within their scope. They pose a limit to the principle of party autonomy in private international law; while national courts usually have wide discretion to apply foreign overriding mandatory rules, the courts are required to apply forum overriding mandatory rules when the dispute falls within the scope of the application of the overriding mandatory rules. For example, if a contract provides for the importation of cotton from Egypt to the United States (U.S.), an overriding mandatory rule could be a trade ban issued by Egypt against the U.S. The trade ban overriding mandatory rules' application would be required if the forum is an Egyptian court; however, the situation could be different if the forum is a court in the U.S., and it would definitely be different if the forum is international arbitration. International commercial arbitration's landscape is quite different given that arbitration does not have a forum, which makes the application of any overriding mandatory rules in international commercial arbitration entirely discretionary for arbitrators. In this regard, scholars have uniformly agreed that arbitrators have the power to apply overriding mandatory rules in arbitral disputes; however, this does not mean that they will actually apply them in practice. This article analyzes the circumstances that prompt arbitrators to apply overriding mandatory rules in international commercial arbitration. There are many contentious forces that arbitrators have to grapple with; namely, the duty to render an enforceable award, to preserve the integrity of international arbitration by avoiding the utilization of arbitration as a mechanism for evading the application of mandatory rules, and to protect the parties' legitimate expectations.

* Partner at Shehata & Partners; Junior Faculty Member at Cairo University Faculty of Law; LL.M at New York University (NYU). Email: is@shehatalaw.com.

I. INTRODUCTION

In most national jurisdictions, parties to international commercial contracts have the autonomy to choose both the applicable law and the forum for their potential future disputes. As for the choice of law, there are several limitations. Here, the article will focus on one of these limitations: the overriding mandatory rules, which has in fact attracted a great deal of discussion among arbitration scholars.¹ As a starting point, an overriding mandatory rule is “an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship.”² To put it another way, the rules are rules of a public policy nature that override the otherwise applicable law and apply automatically to any dispute falling within the scope of such rules. To this effect, the Rome Convention,³ the Rome I Regulation,⁴ and the Swiss

¹ See, e.g., Pierre Mayer, *Mandatory rules of law in international arbitration*, 2(4) ARB. INTL 274 (1986); Luca G. Radicati di Brozolo, *Arbitrage commercial international et lois de police, Considérations sur les conflits de juridictions dans le commerce international*, in 315 RECUEIL DES COURS 269 (2005); CHRISTOPHE SERAGLINI, *LOIS DE POLICE ET JUSTICE ARBITRALE INTERNATIONALE* (2001); GEORGE A. BERMANN & LOUKAS MISTELIS ET AL., *MANDATORY RULES IN INTERNATIONAL ARBITRATION* (2011); Donald Francis Donovan & Alexander K.A. Greenawalt, *Mitsubishi after Twenty Years: Mandatory Rules before Courts and International Arbitrators*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION (Loukas A. Mistelis & Julian Lew eds., 2006); Moss Guidatta Cordero, *International Commercial Arbitration: Party Autonomy and Mandatory Rules*, 16(3) ARB. INT'L 371 (1999); H. Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, in 289 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 8 (2001); Ibrahim Fadlallah, *L'ordre public dans les sentences arbitrales*, in 249 RECUEIL DES COURS, 249, 369 (1994); DOLORES BENTOLILA, *ARBITRATORS AS LAWMAKERS* 119-22 (2017).

² Mayer, *supra* note 1, at 275.

³ See Art. 7 of the Rome Convention: (1) When applying under this Convention the law of a country, effect may be given to the 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. (2) Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Private International Law (“SPIL”)⁵ provide for the application of overriding mandatory rules. Professor Symeonides indicates that there are around “24 codifications outside the EU [. . .] [that] expressly authorize the application of the overriding mandatory rules of the forum state.”⁶

Typically, overriding mandatory rules include rules concerning, among others, antitrust, anti-corruption, anti-bribery, consumer protection, import and export bans, and exchange control regulations.⁷ In terms of their sources and applicability under private international law, there are two main categories of overriding mandatory rules: (1) forum rules and (2) foreign rules (e.g., under the Rome I Regulation, foreign overriding mandatory rules include those of the foreign *lex contractus*⁸ and the place of performance of the contract when such law deems the contract to be invalid⁹). Under the codifications of most private international

⁴ See Art. 9 of Rome I Regulation: (1) Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic 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. (2) Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. (3) Effect 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.

⁵ See Art. 19 of SPIL: (1) If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require, a mandatory provision of a law other than that designated by this Code may be taken into account if the circumstances of the case are closely connected with that law. (2) In deciding whether such a provision must be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law.

⁶ SYMEON C. SYMEONIDES, *CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS* 158 (2014).

⁷ Michael Wilderspin, *Chapter 0.3: Overriding mandatory provisions*, in *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW* 1331-36 (Jürgen Basedow, Gisela Rühl, Franco Ferrari & Pedro Miguel Asensio eds., 2017).

⁸ *ROME I REGULATION – COMMENTARY* 632 (Ulrich Magnus & Peter Mankowski et al. eds., 2017).

⁹ *Id.* at 635.

law rules, the application of the forum overriding mandatory rules is usually automatic and *ex officio*; by contrast, the application of the foreign overriding mandatory rules is usually rather discretionary for the forum court.¹⁰ This distinction further highlights the importance of the choice of forum by the parties.

During the twentieth century, international arbitration has become the default mechanism for dispute resolution of international commercial contracts and cross-border disputes. Concerning the application of overriding mandatory rules in international commercial arbitration, there are two main issues at play. First, most scholars agree that arbitration does not have a forum or a *lex fori*, which means that arbitral tribunals do not have forum overriding mandatory rules.¹¹ It could also mean that arbitral tribunals' application of overriding mandatory rules would be discretionary in all cases, whether their origin is the seat of arbitration or a foreign jurisdiction.¹² Second, most arbitral institution rules provide that arbitrators have the duty to render enforceable awards.¹³ Under the duty to render enforceable awards, the arbitral tribunals might apply the overriding mandatory rules of the seat of arbitration to prevent the potential annulment of the arbitral award. For example, arbitral tribunals—if possible—could locate the potential jurisdictions of enforcement of the arbitral award and apply, or at least take into consideration, these jurisdictions' overriding mandatory rules to avoid any potential rejection of the recognition or enforcement of such arbitral awards.

¹⁰ *Id.*

¹¹ BENTOLILA, *supra* note 1, at 119.

¹² *Id.* at 121.

¹³ 2017 ICC Arbitration Rules, Art. 42 reads in full: "In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal . . . shall make every effort to make sure that the award is enforceable at law". LCIA Arbitration Rules, Art. 32.2 provides that: "For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat." *See also* Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, in *TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW?* 191 (Anne Veronique Schlaepfer et al. eds. 2005).

In summary, the interaction between overriding mandatory rules and international commercial arbitration raises several questions, especially concerning how international arbitrators deal with the application of overriding mandatory rules. **First**, do international arbitrators still consider that overriding mandatory rules are non-arbitrable, even after the *Mitsubishi* decision?¹⁴ **Second**, when do international arbitrators apply overriding mandatory rules that belong to the law applicable to the merits? **Third**, when do international arbitrators refuse to apply overriding mandatory rules that constitute a part of the law applicable to the merits? **Fourth**, when do international arbitrators apply overriding mandatory rules that do not belong to the law applicable to the merits? **Fifth**, when do international arbitrators refuse to apply overriding mandatory rules that do not constitute a part of the law applicable to the merits?

The best way to approach these questions is by analyzing arbitral awards. In this regard, the article surveys approximately 120 arbitral awards in international commercial arbitration to search for answers. However, one should not expect too much because “arbitrators are not particularly motivated by any desire to contribute to jurisprudence, and they accordingly tend to proceed by affirmation rather than persuasion.”¹⁵ It should be noted that most of the surveyed awards are either seated in Europe or the U.S. This is, however, not by the author’s choice but because most of the published extracts of arbitral awards belonged to these jurisdictions.

II. MAIN QUESTIONS

A. *First Question: Do International Arbitrators Still Consider That Overriding Mandatory Rules Are Non-Arbitrable, Even after the Mitsubishi Decision?*

Since the 1970s, national courts and scholars have almost universally accepted that overriding mandatory rules are in fact arbitrable.¹⁶ The reason for this consensus is the dual premise

¹⁴ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

¹⁵ Mayer, *supra* note 1, at 276.

¹⁶ Luca G. Radicati di Brozolo, *Mandatory Rules and International Arbitration*, 23(1) AM. REV. INT’L ARB. 49, 52 (2012).

that: (1) arbitrators are under a duty to apply the relevant overriding mandatory rules, and (2) national courts retain the ability to take a “second look” at the decision of the arbitrators at two stages.¹⁷ The two stages are when there is an application for setting aside the award or for enforcing the award before national courts.¹⁸ This article analyzes international commercial arbitral awards to determine whether the norm is that overriding mandatory rules are arbitrable, especially after the *Mitsubishi* decision. The author found a total of 13 awards addressing this matter. These awards are categorized based on the critical date of *Mitsubishi* (1985), which shaped the landscape of arbitrability regarding overriding mandatory rules.

1. First Category: Before 1985

In this category, each decision has adopted a completely different approach. In the first award (ICC Case No. 1110), Mr. Lagergren, the arbitrator, determined *ex officio* that anti-bribery disputes are non-arbitrable after applying international rules of arbitrability rather than the rules of any national law in particular.¹⁹ Mr. Lagergren reasoned that the underlying contract would not be litigated before any court in France (the place of arbitration) or Argentina (the law applicable to the merits and the place of performance of the contract) or any civilized jurisdiction.²⁰ Therefore, Mr. Lagergren opined, as well, that no arbitral tribunal should assume jurisdiction for adjudicating such dispute.²¹ This is because—in his opinion—the underlying contract involved grave violations of good morals and international public policy.²²

In ICC Case No. 1397,²³ the arbitral tribunal stated that it had to first determine whether the underlying agreement violated the

¹⁷ See Patrick M. Baron & Stefan Liniger, *A Second Look at Arbitrability*, 19(1) ARB. INT'L 27-54 (2003) (providing further explanation).

¹⁸ *Id.*

¹⁹ Case No. 1110 of 1963, 21 Y.B. Comm. Arb. 47, ¶ 20, 23 (ICC Int'l Ct. Arb.).

²⁰ *Id.* ¶ 23.

²¹ *See id.*

²² *Id.* ¶ 16.

²³ Case No. 1397 of 1966, 2 J. DROIT INT'L 878, 882-84 (1974). The place of arbitration, in this case, was unidentified, while the law applicable to the merits was French law.

EU antitrust rules or not. The tribunal decided that if it found that the underlying agreement violated the relevant EU antitrust rules, then the dispute would not be arbitrable. To the contrary, if the tribunal found that the agreement did not violate the relevant EU antitrust rules, then the dispute would be arbitrable.²⁴ In ICC Case No. 4604,²⁵ the arbitral tribunal ruled that the antitrust dispute was arbitrable as—according to the tribunal—antitrust disputes were arbitrable under Swiss law. The tribunal based its decision on the *lex arbitri* (Switzerland) rather than the law applicable to the merits (Italy).²⁶

This category of pre-1985 cases is divided between different approaches towards the arbitrability of overriding mandatory rules; each arbitral tribunal adopted an *ad hoc* approach. The distinguishing factor behind this division is the law applicable to arbitrability. In other words, arbitrability was determined based on which law the tribunal applied to rule on arbitrability (i.e., *lex arbitri* or another law) and to which jurisdiction such law belonged (e.g., Swiss law provided that overriding mandatory rules are arbitrable).

2. Second Category: After 1985

This category shows the effect of the *Mitsubishi* decision upon the arbitrability of overriding mandatory rules in general, and antitrust disputes in particular, as eight out of ten awards determined,²⁷ following *Mitsubishi*, that overriding mandatory rules disputes are fully arbitrable.²⁸ ICC Case No. 6320 dealt with the arbitrability of RICO²⁹ claims; this case was peculiar as the

²⁴ *Id.* at 879-80.

²⁵ Case No. 4604, 3(3) ASA BULL. 114, 121. The place of arbitration was Switzerland, and the law applicable to the merits was Italian law.

²⁶ *Id.* at 115.

²⁷ The 8 cases are ICC Cases Nos. 6320, 7673, 8420, 8423, 9163, 12502, 14046 and ICC case of Sept. 23, 1997.

²⁸ Seven cases were concerning antitrust disputes while the 8th case concerned a RICO claim.

²⁹ The Racketeer Influenced Corrupt Organizations Act (RICO) is a U.S. federal law that regulates the prosecution of organized crime, and provides for penalties for acts deemed part of an ongoing criminal enterprise, 18 U.S.C. §§1961-1968.

non-U.S. party (Brazilian) was the one invoking RICO claims against a U.S. party.³⁰ The tribunal decided that the RICO claims were arbitrable based on U.S. law, despite the fact that Paris was the place of arbitration and Brazilian law was the law applicable to the merits.³¹ In ICC Case No. 7673, where the seat of arbitration and the law applicable to the merits was Switzerland, the tribunal held that EU antitrust claims are arbitrable based on Article 177 of the SPIL, which provides that any dispute involving “pecuniary matters” is arbitrable.³² In another case, the tribunal in ICC Case No. 8423 concluded that antitrust disputes are fully arbitrable based on the consensus by the national courts, in addition, to the agreement of the parties on this point.³³

ICC Case No. 7893³⁴ seems to be the outlier in this category. The tribunal in this case determined that the antitrust disputes were non-arbitrable under New York Law despite the *Mitsubishi* ruling.³⁵ The tribunal based its reasoning on the opinion of Judge Hogan in *Armco Steel*,³⁶ which was decided 6 years after the *Mitsubishi* case. Judge Hogan stated that the U.S. Federal Arbitration Act (“FAA”) does not compel parties to arbitrate a particular claim when the parties have chosen to be governed by the law of a particular state and said law prohibits the parties from arbitrating claims under antitrust laws.³⁷

The second category shows that international arbitrators have resorted to a conflict of laws analysis to determine the arbitrability of overriding mandatory rules. The reason for this is that arbitrators concluded that there is no consensus amongst the various jurisdictions with respect to the arbitrability of overriding mandatory rules. As for ICC Case No. 7893, it seems that it was

³⁰ Case No. 6320 of 1992, 20 Y.B. Comm. Arb. 62, 98 (ICC Int’l Ct. Arb.).

³¹ *Id.* at 94-95, ¶¶ 139-42.

³² Case No. 7673 of 1993, ICC BULL. SPECIAL SUPPLEMENT 35-38 (1994).

³³ Case No. 8423 of 1994, 26 Y.B. Comm. Arb. 153 (ICC Int’l Ct. Arb., 2001).

³⁴ Case No. 7893 of 1994, 27 Y.B. Comm. Arb. 139 (ICC Int’l Ct. Arb., 2002).

³⁵ *Id.* at 150-51. *But see* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

³⁶ *Armco Steel Co., L.P. v. CSX Corp.*, 790 F. Supp. 311 (D.D.C. 1991).

³⁷ *Id.* at 319.

wrongly decided and was based on a poor interpretation of U.S. case law in this regard. Turning to the empirical results, the fact that eight out of ten awards provide that overriding mandatory rules are fully arbitrable should not be overestimated. This result might easily change if the pool of surveyed awards included awards where the law applicable to arbitrability does not consider that overriding mandatory rules are arbitrable (i.e., jurisdictions outside the EU, Switzerland, or the U.S.).

B. Second Question: When Do International Arbitrators Apply Overriding Mandatory Rules That Belong to the Law Applicable to the Merits?

National courts usually apply overriding mandatory rules when these rules are part of the *lex fori*. In international commercial arbitration, there is no *lex fori*.³⁸ The question is whether international arbitrators deal with the law applicable to the merits in international arbitration as having the same effect as the *lex fori* in international litigation. In other words, do arbitrators apply overriding mandatory rules that belong to the law applicable to the merits automatically and in a manner similar to the way forum overriding mandatory rules are applied by national courts in international litigation? In this respect, Professor Bermann posits that it would be “entirely counter-intuitive” if international arbitrators did not apply overriding mandatory rules that are part of the law applicable to the merits,³⁹ except for rare occasions.⁴⁰

In addition, arbitration scholars uniformly agree that international arbitrators must apply any overriding mandatory rule that reflects transnational public policy.⁴¹ The question is whether international arbitrators’ duty to apply overriding mandatory rules should be restricted to rules that can only be characterized as transnational public policy. Professor Radicati di

³⁸ BENTOLILA, *supra* note 1, at 119.

³⁹ George Bermann, *Mandatory rules of law in international arbitration*, in *CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION* 325, 331 (Franco Ferrari & Stefan Kröll eds., 2010).

⁴⁰ Case No. 6998 of 1994, 21 Y.B. Comm. Arb. 54 (ICC Int’l Ct. Arb.).

⁴¹ *Id.*

Brozolo disagrees with this position because states would usually require that, in certain situations, their overriding mandatory rules must be applied by international arbitrators in transnational situations even if such rules do not *per se* reflect a transnational public policy.⁴² In light of the foregoing, this section analyzes the circumstances that prompt international arbitrators in practice to consider the application of overriding mandatory rules that belong to the law applicable to the merits. The article discerns several approaches followed by international arbitrators:

1. First Approach: Anti-Corruption and Transnational Public Policy

There are several cases that involved anti-corruption claims in which the arbitral tribunal supported the application of the overriding mandatory rules that belong to the law applicable to the merits by ascertaining that such overriding mandatory rules are recognized by most States or are in conformity with the notion of international public policy. This was the case in ICC Cases No. 3913,⁴³ 6248,⁴⁴ 6497,⁴⁵ 8891,⁴⁶ 12990,⁴⁷ 13515,⁴⁸ 13384,⁴⁹ 13914,⁵⁰ and CAM Award of 20 July 1992.⁵¹ For instance, the sole arbitrator in ICC Case No. 13384 stated the following:

[T]here is no doubt that corruption is worldwide considered a wrongful and, indeed, unacceptable

⁴² See Radicati di Brozolo, *supra* note 16, at 67-68.

⁴³ Bruno Oppetit, *Le paradoxe de la corruption à l'épreuve du droit du commerce international* 9, 11 (1987).

⁴⁴ Case No. 6248 of 1990, 19 Y.B. Comm. Arb. 124 (ICC Int'l Ct. Arb.).

⁴⁵ Case No. 6497 of 1994, 24 Y.B. Comm. Arb. 71 (ICC Int'l Ct. Arb.).

⁴⁶ Case No. 8891, J. DROIT INT'L 1076 (2000) (The tribunal indicated that the primary source in this context is national laws, and that international general principles are secondary sources. However, in this case, the tribunal preferred to give precedence to international sources).

⁴⁷ Case No. 12990, 24 ICC BULL. SPECIAL SUPPLEMENT 52 (2005).

⁴⁸ Case No. 13515, 24 ICC BULL. SPECIAL SUPPLEMENT 66 (2005).

⁴⁹ Case No. 13384, 24 ICC BULL. SPECIAL SUPPLEMENT 62 (2005).

⁵⁰ Case No. 13914, 24 ICC BULL. SPECIAL SUPPLEMENT 77 (2005).

⁵¹ Case No. 1491 of 1992, 18 Y.B. Comm. Arb. 80 (Chamber Arb. Milan).

practice which is condemned by various international conventions, instruments of international organizations, such as the UN, UNCITRAL, OECD, European Union, and, not to mention, national legislations. There is no need to make specific references to these sources. Condemnation of such practice may in effect be seen as a material rule of international public policy, indeed a rule of “transnational or truly international public policy” (to use an expression today common in the international legal community), which must apply irrespective of whichever national law parties to a contract may have chosen to govern it.⁵²

Further, ICC Case No. 13914 relied upon prior arbitral case law (ICC Case No. 3913, ICC Case No. 3916, ICC Case No. 6497, ICC Case No. 7047, and ICC Case No. 8891), as well as Texas case law.⁵³ In Case No. 13914, the arbitral tribunal held that combatting bribery was part of international public policy, and that policy was supported by the fact that bribery was prohibited by the (1) United Nations Convention against Corruption; (2) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD”); (3) Council of Europe: Criminal Law Convention on Corruption; (4) Organization of American States’ Inter-American Convention against Corruption; and (5) U.S. Foreign Corrupt Practices Act (“FCPA”).

Various arbitration commentators have already identified a transnational public policy against corruption: “[T]he suppression of [anti-corruption] is an established part of international public policy and must be respected by international arbitrators.”⁵⁴ This approach is reinforced by the arbitral awards under this category. It seems that this, too, would likely be the case for antitrust rules to some extent. For

⁵² Case No. 13384, 24 ICC BULL. SPECIAL SUPPLEMENT 62, ¶ 65 (2005). In this case, the place of arbitration was Paris, and the law applicable to the merits was French law.

⁵³ Case No. 13914, 24 ICC BULL. SPECIAL SUPPLEMENT 52 (2005). In this case, the place of arbitration was London, and the law applicable to the merits was Texas (U.S.) law.

⁵⁴ Bernardo M. Cremades & David J.A. Cairns, *Corruption, International Public Policy and the Duties of Arbitrators*, 58(4) DISP. RESOL. J. 76-85 (2004).

instance, there are some tribunals that have found transnational principles on antitrust rules, but only in cases involving the registration of domain names and the calculation of damages.⁵⁵ Thus, one can infer that antitrust rules might be considered as part of transnational public policy. As for other types of overriding mandatory rules, the case for being considered part of transnational public policy is extremely feeble.

2. Second Approach: Most Closely Connected Law

In the cases of *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)*⁵⁶ and *Celtic Plc v. Union of European Football Associations (UEFA)*,⁵⁷ the arbitral tribunals considered that since the arbitral seat was Switzerland, they were required to consider the application of the Swiss overriding mandatory rules (antitrust rules) even if the Swiss law was not the law applicable to the merits of these cases.⁵⁸

In another ICC case, ICC Case No. 2930, the tribunal referred to the conflict of laws rules of Switzerland, France, Yugoslavia, the CISG, and the Rome Convention.⁵⁹ The tribunal ruled that based on these conflict of laws rules cumulatively, the contract was very closely connected to Yugoslavia and, hence, any contract concerning import into Yugoslavia or export from Yugoslavia was

⁵⁵ Stephen Jagusch, *Issues of Substantive Transnational Public Policy*, in *INTERNATIONAL ARBITRATION AND PUBLIC POLICY* 23, 38 (Devin Bray & Heather L. Bray eds., 2014); see Gui J. Conde e Silva, *Transnational Public Policy in International Arbitration* 230-35 (Oct. 05, 2007) (unpublished Ph.D. thesis, Queen Mary University of London) (on file with Queen Mary College University of London).

⁵⁶ *AEK Athens and SK Slavia, Prague v. Union of Eur. Football Ass'ns (UEFA)*, Case No. 1998/O/200, (Ct. Arb. for Sport, Aug. 20, 1999), *Digest of CAS Awards II 1998-2000* 46-48 (2002).

⁵⁷ *Celtic Plc v. Union of Eur. Football Ass'ns (UEFA)*, Case No. 1998/O/201, ¶ 8, 10 (Ct. Arb. for Sport, Jan. 7, 2000), *Digest of CAS Awards II 1998-2000* 111-12 (2002).

⁵⁸ *Id.* (Swiss law was the law applicable to the merits in this case.).

⁵⁹ Case No. 2930, 9 Y.B. Comm. Arb. 105-08 (ICC Int'l Ct. Arb., 1984) (The place of arbitration, in this case, was Paris.).

subject to the overriding mandatory provisions of the Yugoslav Law of 1972 Controlling Imports and Exports.⁶⁰

Last, ICC Case No. 3916 applied more than one closely connected law.⁶¹ First, the sole arbitrator considered applying the following laws: Iranian, Greek, French, Austrian, and English. The arbitrator concluded that the laws that were most applicable were, Iranian law since the contract was signed in Iran and the activities occurred in Iran; and French law, which was the law referred to in the English version of the contract.⁶² Then, the tribunal applied both French and Iranian laws and also referred to the legal principle generally recognized by civilized nations according to which agreements that are in serious violation of moral standards or international public policy should be considered null and void.

3. Third Approach: Party Autonomy

In ICC Case No. 15709, the arbitral tribunal pointed out that the parties agreed to have French law as the law applicable to their contract, and, therefore, this alone justified the application of this *loi de police* (the French term for overriding mandatory rules) through the parties' choice.⁶³ Further, the tribunal added that

there is no rule or principle of international commercial law which would enable not to apply a provision of the law chosen by the parties, except maybe if this provision would lead to the nullity *ab initio* of the contract according to the adage that the parties could not have the intention that their contract be null.⁶⁴

⁶⁰ *Id.* at 107.

⁶¹ SIGVARD JARVIN & YVES DERAIS, COLLECTION OF ICC AWARDS 1974-1985 507 (1994).

⁶² *Id.*

⁶³ S. Bonnard & S. Touchard, *Les Lois de Police dans l'Arbitrage International: Exemples de Sentences Recentes*, 5 INT'L BUS. L.J. 453, 460 (2015).

⁶⁴ *Id.* (quoting ICC Case No. 15709 (2009)).

Alongside these three approaches, there were numerous arbitral awards where the overriding mandatory rules that belong to the law applicable to the merits were applied by the arbitral tribunals without delving into the reasoning behind applying such rules (e.g., X v. Y (2004/2006)⁶⁵ and ICC Cases Nos. 1397;⁶⁶ 2114;⁶⁷ 2811;⁶⁸ 2930;⁶⁹ 4145;⁷⁰ 4604;⁷¹ 5943;⁷² 6106;⁷³ 6286;⁷⁴ 6475;⁷⁵ 7146;⁷⁶ 7181;⁷⁷ 7315;⁷⁸ 7357;⁷⁹ 8177;⁸⁰ 10518;⁸¹ 10660;⁸² 10704;⁸³ 11018;⁸⁴ 14046;⁸⁵ 14637;⁸⁶ 15709;⁸⁷ 15759;⁸⁸

⁶⁵ KATHRIN BETZ, PROVING BRIBERY, FRAUD AND MONEY LAUNDERING IN INTERNATIONAL ARBITRATION: ON APPLICABLE CRIMINAL LAW AND EVIDENCE 236 (2017).

⁶⁶ See Case No. 1397 of 1966, 2 J. DROIT INT'L 878 (1974).

⁶⁷ Case No. 2114 in 1972, 5 Y.B. Comm. Arb. 189 (ICC Int'l Ct. Arb.).

⁶⁸ Case No. 2811 of 1978, J. DROIT INT'L (1979).

⁶⁹ See Case No. 2930 of 1982, 9 Y.B. Comm. Arb. 105-08 (ICC Int'l Ct. Arb., 1984).

⁷⁰ Case No. 4145, 12 Y.B. Comm. Arb. 97 (ICC Int'l Ct. Arb.).

⁷¹ Case No. 4604 of 1984, 3 ASA BULL. 114 (1985).

⁷² Case No. 5943, 4 J. DROIT INT'L 1014 (1996).

⁷³ Case No. 6106, ICC BULL. SPECIAL SUPPLEMENT 33.

⁷⁴ Case No. 6286, 19 Y.B. Comm. Arb. 141 (ICC Int'l Ct. Arb.).

⁷⁵ Case No. 6475 of 1994, ICC BULL. SPECIAL SUPPLEMENT 46.

⁷⁶ Case No. 7146, 26 Y.B. Comm. Arb. 119 (ICC Int'l Ct. Arb.).

⁷⁷ Case No. 7181, 21 Y.B. Comm. Arb. 99 (ICC Int'l Ct. Arb.).

⁷⁸ Case No. 7315 of 1992, ICC BULL. SPECIAL SUPPLEMENT 42 (1994).

⁷⁹ Case No. 7357 of 1995, 14(2) ICC BULL. 53 (2003).

⁸⁰ Case No. 8177, 12(1) ICC BULL. 85.

⁸¹ Case No. 10518, 24 ICC BULL. SPECIAL SUPPLEMENT 39 (2014).

⁸² Case No. 10660 of 2000, 14(2) ICC BULL. 62 (2003).

⁸³ *Id.* at 66.

⁸⁴ Case No. 11018; see Gordon Blanke, *Antitrust Arbitration under the ICC Rules*, in EU AND US ANTITRUST ARBITRATION: A HANDBOOK FOR PRACTITIONERS 1849 (Gordon Blanke & Phillip Landolt eds., 2011).

⁸⁵ Case No. 14046, 35 Y.B. Com. Arb. 241 (ICC Int'l Ct. Arb.).

⁸⁶ See Bonnard & Touchard, *supra* note 63, at 455, 458-59.

⁸⁷ *Id.* at 455, 457, 460.

⁸⁸ *Id.* at 455, 457, 459.

15913;⁸⁹ 17326⁹⁰). The application of the law pertinent to the merits without delving into the reasoning behind applying such rules could be interpreted as either the published excerpts did not cover such a portion, or the arbitral tribunals did not see any necessity to justify the application of such rules.

The abovementioned attitude might be an indication that several arbitral tribunals recognize the law applicable to the merits in international arbitration as having the same power as the *lex fori* in international litigation with respect to the application of overriding mandatory rules, and that such awards simply follow the third approach: that the application of overriding mandatory rules that belong to the law applicable to the merits is justified through party autonomy. Delving into the reasoning of arbitral tribunals for refusing the application of overriding mandatory rules that belong to the law applicable to the merits might shed some light on this hypothesis.

C. Third Question: When Do International Arbitrators Refuse to Apply Overriding Mandatory Rules That Belong to the Law Applicable to the Merits?

Professor Bermann suggests that tribunals may refuse the application of overriding mandatory rules that belong to the law applicable to the merits in only two situations: (1) the overriding mandatory rules' scope of application does not call for their application to the particular situation; or (2) the application of the overriding mandatory rules would offend other competing overriding mandatory rules.⁹¹ There are few cases in which the arbitral tribunals have followed Professor Bermann's analysis when they refused to apply the overriding mandatory rules despite the rules being part of the law applicable to the merits because their scope of application did

⁸⁹ Sébastien Bonnard & Sabrina Touchard, *Les Lois de Police dans l'Arbitrage International: Exemples de Sentences Recentes*, 5 INT'L BUS. L.J. 453, 458 (2015).

⁹⁰ Case No. 17326 of 2012, 41 Y.B. Com. Arb. 127 (ICC Int'l Ct. Arb.).

⁹¹ See Bermann, *supra* note 39.

not reach the facts of the case (e.g., ICC Cases Nos. 6998,⁹² 8420,⁹³ 12127,⁹⁴ 16705,⁹⁵ and 14637⁹⁶).

On the other hand, the arbitral tribunal in ICC Case No. 8385 ignored the law applicable to the merits (New York law) and denied the claimant the treble damages stipulated in the RICO Act.⁹⁷ The tribunal ruled that it would be inappropriate to apply rules that are parochial and merely related to a specific state interest. The arbitral tribunal also reasoned that treble damages are unknown to parties coming from civil law jurisdictions.⁹⁸ Therefore, the tribunal held that for a Belgian company to have the implicit intention to subject its conduct in Belgium to the U.S. RICO Act would be contrary to such party's legitimate expectations.⁹⁹

In this author's opinion, the analysis in ICC Case No. 8385 could open the gates to giving arbitral tribunals extremely wide discretion when analyzing the law chosen by the parties. The tribunal will subjectively determine whether that chosen law is parochial or not and whether its application would defy the parties' expectations or not. "Arbitrators are not public or supernational bodies charged with the obligation of applying [overriding mandatory] provisions; rather, they are in the same position as any judge and/or private person who must comply with such [overriding mandatory] provisions when carrying out their tasks and/or activities."¹⁰⁰ Therefore, the reason for the refusal of application of overriding mandatory rules that belong to the law applicable to the merits should be restricted solely to the case where the scope of such rules does not reach the facts of the case. The following two sections further illuminate this

⁹² Case No. 6998 of 1994, 21 Y.B. Comm. Arb. 54 (ICC Int'l Ct. Arb.).

⁹³ Case No. 8420 of 1996, 25 Y.B. Comm. Arb. 328 (ICC Int'l Ct. Arb.).

⁹⁴ Case No. 12127 of 2003, 33 Y.B. Comm. Arb. 82 (ICC Int'l Ct. Arb.).

⁹⁵ JARVIN & DERAIS, *supra* note 61, at 455, 458, 460.

⁹⁶ *Id.* at 455, 458-59.

⁹⁷ Case No. 8385 of 1995, 124 J. DROIT INT'L (CLUNET) 1061 (ICC Int'l Ct. Arb., 1997).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Case No. 7146, 26 Y.B. Comm. Arb. 119, 120 (ICC Int'l Ct. Arb., 2001).

distinction by analyzing when international arbitrators apply and refuse to apply overriding mandatory rules that do not belong to the law applicable to the merits.

D. Fourth Question: When Do International Arbitrators Apply Overriding Mandatory Rules That Do Not Belong to the Law Applicable to the Merits?

Limiting the arbitrator's power and authority to applying only the law chosen by the parties would "weaken the support, secured through decades of patient efforts, from the judicial authorities, and rekindle their old suspicion that arbitrators actually undermine the respect for public-policy norms."¹⁰¹ We need to remind ourselves that the existence of the international arbitration mechanism is dependent first and foremost upon the assistance it receives from the legislative and judicial state authorities.¹⁰² Several arbitration scholars have suggested that the expansion in recent years of the matters that can be arbitrated calls for giving effect to overriding mandatory rules, whether they belong to the law applicable to the merits or not.¹⁰³ For instance, Professor Mayer advocates that the application of an overriding mandatory rule outside the law applicable to the merits might, in fact, be appropriate.¹⁰⁴ Professor Mayer's premise is that arbitrators are substitutes for judges.¹⁰⁵ In this regard, states would be hostile towards international arbitration if it meant that replacing a judge with an arbitrator would lead to the sacrifice of public interests that would have been protected if the dispute was adjudicated before a national judge.¹⁰⁶ Likewise, Professor Bermann adds that the case for applying overriding mandatory rules of a law other than the law applicable to the merits is stronger in international arbitration than in national courts

¹⁰¹ Jacques Werner, *Application of Competition Laws by Arbitrators: The Step Too Far*, 12 J. INTL. ARB. 21, 25 (1995).

¹⁰² *Id.*

¹⁰³ SERAGLINI, *supra* note 1. Seraglini suggests that arbitrators are bound to apply all mandatory rules, whether they belong to the *lex contractus* or not.

¹⁰⁴ Mayer, *supra* note 1, at 285.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

because international arbitrators do not owe allegiance to any jurisdiction's rules of law or even its choice of law rules.¹⁰⁷

Moreover, Professor Radicati di Brozolo suggests a practical answer by taking into consideration “only those [overriding mandatory rules] having a genuine and reasonable title to be applied in light of the circumstances of the case.”¹⁰⁸ Such rules would usually belong to “the most likely alternative fora for the settlement of the dispute, in light of the parties' places of business and other relevant jurisdictional connecting factors, and determining which mandatory rules would have been applied in such fora.”¹⁰⁹ This approach, however, might put the arbitrator in a spiteful situation, whereby the non-application of the overriding mandatory rules could lead to the annulment of the award if, for example, the overriding mandatory rules belong to the law applicable to the merits. The application of the same overriding mandatory rules could lead to the non-enforcement of the arbitral award if, for instance, such rules contradict the overriding mandatory rules of a potential place of enforcement.¹¹⁰ Now, we turn to the reasoning of the surveyed arbitral awards to vindicate these theoretical opinions. Generally, this survey has guided the author to discern that the main approach for the application of overriding mandatory rules that do not belong to the law applicable to the merits is a conflict of laws analysis. There is also a secondary approach, namely, the arbitral tribunal's duty to render an enforceable award.

1. Main Approach: Conflict of Laws Analysis

In ICC Case No. 1990,¹¹¹ the tribunal based its decision on both the Italian and the Spanish Private International Law rules, and

¹⁰⁷ Bermann, *supra* note 39, at 333.

¹⁰⁸ Luca G. Radicati di Brozolo, *When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal*, in *THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 351, 377 (Franco Ferrari ed., 2017).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 379.

¹¹¹ Case No. 1990 of 1972, 3 Y.B. Comm. Arb. 217 (ICC Int'l Ct. Arb.).

the tribunal concluded that it should apply the law of the place where the facts concerning unfair competition are alleged.

In ICC Case No. 5622 (Hilmarton First Award),¹¹² the tribunal ruled that the contract in question was in violation of the overriding mandatory rules of the place of performance of the contract (Algerian law), as well as international public policy and the moral standards under the applicable Swiss law. The arbitrator concluded that the Algerian law did not simply aim at serving Algerian interests, but rather that it aims at guaranteeing healthy and fair commercial practices and fighting against corruption in general.¹¹³

In ICC Case No. 8528,¹¹⁴ the tribunal applied Article 19 of the SPIL and referred to Article 7 of the Rome Convention. The tribunal decided that the contract in question was in violation of the overriding mandatory rules under Turkish law (place of performance of the contract) as these rules were *lois de police*¹¹⁵ that were closely connected to the dispute and, from a Swiss legal perspective and practice, these rules aimed at protecting legitimate interests and crucial values.¹¹⁶ The tribunal applied Turkish law and held that the tax benefits were non-transferable privileges between the Turkish government and the defendant.¹¹⁷

In ICC Case No. 9240,¹¹⁸ the defendant argued that the agreement in question violated the antitrust laws of either the European Community ("EC") or those of the State of Ohio (the law applicable to the merits). The sole arbitrator determined that the

¹¹² Case No. 5622 of 1988, 19 Y.B. Comm. Arb. 105 (ICC Int'l Ct. Arb.). Both the place of arbitration and law applicable to the merits belonged to Switzerland in this case.

¹¹³ *Id.*

¹¹⁴ Case No. 8528 of 1996, 25 Y.B. Comm. Arb. 432 (ICC Int'l Ct. Arb.). Both the place of arbitration and law applicable to the merits belonged to Switzerland in this case.

¹¹⁵ "*Loi(s) de police*" is the French expression of overriding mandatory rules.

¹¹⁶ Case No. 8528 of 1996, 25 Y.B. Comm. Arb. 432 (ICC Int'l Ct. Arb.).

¹¹⁷ *Id.*

¹¹⁸ Case No. 9240 of 1998, 14(2) ICC BULL. 59. Brussels, Belgium, was the seat of arbitration.

EC Competition law should be the only antitrust law applicable to this dispute since EC is the place of the performance of the agreement.¹¹⁹

In Final Award SCC Case No. 158/2011,¹²⁰ the sole arbitrator first acknowledged that the rule in question was an overriding mandatory rule of French Law. Then, the arbitrator—by relying on the EC (Article 7) and Rome I Regulation (Article 9)—ruled that arbitrators have a duty to apply the overriding mandatory rules of the laws having a significant connection to the dispute, regardless of the governing law of the relevant relationship.¹²¹

In ICC Case No. 16655,¹²² the tribunal looked at UAE law. According to UAE law (the law of the place of performance of the contract), an agent must be registered with the concerned regulatory agency to benefit from the protective rules of UAE laws.¹²³ In this instance, the claimant was not registered and, therefore, the tribunal dismissed his claim for a violation of the overriding mandatory rules of UAE law.¹²⁴

In *AEK Athens & SK Slavia Prague v. (UEFA)*¹²⁵ and *Celtic Plc v. (UEFA)*,¹²⁶ both tribunals also applied EU overriding mandatory

¹¹⁹ *Id.*

¹²⁰ Case No. 158 of 2011, 38 Y.B. Comm. Arb. 253 (Arb. Inst. Stockholm Chamber of Com.). Both, the place of arbitration and law applicable to the merits belonged to Sweden in this case.

¹²¹ Upon applying the laws to the facts, the arbitrator did not find that the contract in question violated the overriding mandatory rules of the place of performance of the contract, France. Also, the arbitrator found that the six-month termination notice was not “brutal” in the sense of that provision.

¹²² Case No. 16655 of 2011, 4(2) INTL. J. ARAB ARB. 125 (ICC Int’l Ct. Arb.). Both, the place of arbitration and law applicable to the merits belonged to France in this case.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *AEK Athens and SK Slavia, Prague v. Union of Eur. Football Ass’ns (UEFA)*, Case No. 1998/O/200 (Ct. Arb. for Sport, Aug. 20, 1999), *Digest of CAS Awards II 1998-2000* 38 (2002).

¹²⁶ *Celtic Plc v. Union of Eur. Football Ass’ns (UEFA)*, Case No. 1998/O/201 (Ct. Arb. for Sport, Jan. 7, 2000), *Digest of CAS Awards II 1998-2000* 106 (2002).

rules (EU antitrust laws) based on their characterization as *lois de police* that were closely connected to the dispute and that, from a Swiss legal theory and practice perspective, aimed at protecting legitimate interests and crucial values.¹²⁷ Further, both tribunals applied Article 19 of the SPIL and also referred to Article 7 of the European Convention.¹²⁸

2. Secondary Approach: Duty to Render an Enforceable Award

In ICC Case No. 8626,¹²⁹ the defendant asserted that the agreement violated the EC Treaty. Accordingly, the tribunal ruled that the applicable New York law would require the arbitrators to take into consideration the foreign antitrust regulations based on the ruling of *Mitsubishi*.¹³⁰ The tribunal further reasoned that one of its duties is rendering an enforceable award. Furthermore, Germany was a potential place of enforcement; hence, ignoring the EU antitrust regulations would lead to the rejection of the enforcement of such an award in Germany.¹³¹

In ICC Case No. 15977,¹³² the sole arbitrator acknowledged his duty to render an enforceable award as required under the ICC rules. However, the arbitrator indicated that such an obligation did not, in fact, mean importing each and every arbitration public policy (the overriding mandatory rules) of the different countries in which the arbitral award might be potentially submitted for recognition and enforcement; this would create an international

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Case No. 8626 of 1996, 14(2) ICC BULL. 55. The place of arbitration was Switzerland in this case.

¹³⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

¹³¹ In this case, the tribunal applied EU antitrust laws to the facts of this case and reached the result that the obligations of the defendant infringe upon the EC Treaty.

¹³² Case No. 15977 of 2010, 1 ICC BULL. 92 (2016). The place of arbitration, in this case, was Stuttgart, Germany, while the applicable law was German law to the exclusion of the CISG. This case involved the application of commercial agency law.

“public policy standard” on the least permissive level for each and every arbitration award. Nevertheless, the sole arbitrator inquired whether there was any violation of the overriding mandatory rules of the UAE law, and he found none.¹³³

In light of the above arbitral awards, one can deduce that both the Rome Convention and the SPIL had a remarkable impact upon the attitude of arbitral tribunals towards applying “foreign” overriding mandatory rules that do not belong to the law applicable to the merits. This might be influenced by the fact that most arbitral awards surveyed in this research article were seated in Europe. Therefore, one can infer that whenever the arbitration is seated in Europe, the parties can successfully plead the application of overriding mandatory rules outside the law applicable to the merits “foreign rules.”¹³⁴ To ensure the success of this argument, the concerned party should try to persuade the tribunal that the pleaded overriding mandatory rules are (1) closely connected to the dispute (i.e., place of performance of the contract or the potential place of enforcement); and (2) in line with the international public policy of the seat or the law applicable to the merits. In some cases, the party may need to adhere specifically to Article 19 of the SPIL and prove that the interests under the pleaded “foreign” overriding mandatory rules are so preponderant in relation to the public policy of Switzerland itself.

E. Fifth Question: When Do International Arbitrators Refuse to Apply Overriding Mandatory Rules That Do Not Belong to the Law Applicable to the Merits?

The conclusion in the above section suggests that arbitral tribunals would apply overriding mandatory rules that do not belong to the law applicable to the merits provided these rules (i) are closely connected to the dispute, or (ii) in line with the international public policy of the seat or the law applicable to the merits. Under this section, we analyze various arbitral awards to try to validate this conclusion.

¹³³ *Id.*

¹³⁴ *Id.*

1. First Category: Arbitrators Are Not Bound by Conflict of Laws Rules

In ICC Case No. 6858,¹³⁵ the two parties were EC nationals, and the arbitrator was also an EC national. The defendant requested the application of the European Community law on the basis of Article 19 of the SPIL. The sole arbitrator concluded that arbitrators sitting in Switzerland are not bound to apply Article 19 of the SPIL, and, therefore, he was not bound to apply European Community Law.

This award poses an intriguing conundrum. Arbitrators are usually not bound—as per the applicable institutional rules—to apply conflict of laws rules of the seat of arbitration or any other jurisdiction. This conundrum is exactly what this award—rightfully—points out; however, does this mean that no “foreign” overriding mandatory rules would be applicable in any case even if they are closely connected to the case? That’s the conundrum. If we follow the approach in ICC Case No. 6858, that would mean that arbitration can be manipulated by the parties to evade the application of overriding mandatory rules. Nevertheless, arbitrators should be aware that their duty to render an enforceable award mandates the application of overriding mandatory rules that are closely connected to the dispute as long as such rules are in line with the international public policy of the seat of arbitration or the law applicable to the merits. Therefore, international arbitrators should disregard this award when deciding future disputes.

2. Second Category: Overriding Mandatory Rules Are Not Closely Connected to the Dispute (Conflict of Laws Analysis)

In 1981, the tribunal in the Royal Dutch Grain and Feed Association Award¹³⁶ first held that Austrian law was inapplicable because the parties had agreed to have their contract governed

¹³⁵ Case No. 6858, ICC BULL. SPECIAL SUPPLEMENT 40-41 (1994). Both the place of arbitration and the law applicable to the merits belonged to Switzerland.

¹³⁶ Dutch Co. v. Austrian Co., 7 Y.B. Comm. Arb. 141 (ICC Int’l Ct. Arb. 1981). Both the place of arbitration and the law applicable to the merits belonged to the Netherlands.

exclusively by Dutch law. Then, the tribunal reasoned that it should not take Austrian law into account because in this case the goods were to be sold in the Netherlands to a Dutch buyer. The tribunal stated that it cannot be presumed that the meaning of Austrian law and the intent of its legislature was to frustrate international commerce, which would have been the result of applying Austrian law in this case.

In another case, on January 11, 1982, in the Amsterdam Grain Trade Association Award,¹³⁷ the tribunal held that under Dutch Private International Law, arbitrators could give effect to overriding mandatory provisions of the law of another country if a close link exists between the case and that country. In deciding this issue, the tribunal took into consideration the nature and extent of such provisions as well as the consequences of their application or non-application. The tribunal found that the link between the sales contract and Austrian law was insufficient especially if the application of Austrian law would lead to the nullity of the contract as such contracts should have been concluded in Austrian currency. In this case, only the seller was situated in Austria, while the origin of the products sold and the location of the seller were in Amsterdam.¹³⁸ Also, adding to the insufficiency of the link, the sale was conducted through a German broker, and the payment was to be made to a German bank.¹³⁹

In ICC Case No. 13696,¹⁴⁰ the respondent argued that paying royalties violated the EC competition law. The tribunal noted that the royalties there pertained to expired patents that related only to the U.S. and Japan, which are two non-EU countries. The product was not protected by a patent in the territory of the

¹³⁷ Dutch Co. v. Austrian Co., 8 Y.B. Comm. Arb. 160 (ICC Int'l Ct. Arb. 1982). Both the place of arbitration and the law applicable to the merits belonged to the Netherlands.

¹³⁸ *Id.*

¹³⁹ The arbitral tribunal also held that the treaty of Bretton Woods does not apply to this case since the contracts involved in this case are not exchange contracts which involve the currency of Austria but, rather, the currency of Germany.

¹⁴⁰ Case No. 13696 of 2007, 39 Y.B. Comm. Arb. 77 (ICC Int'l Ct. Arb.). Both the place of arbitration and the law applicable to the merits belonged to Switzerland.

European Commission. However, without even discussing the issue of whether the requirements of Article 81(1) of the EC Treaty to apply were fulfilled,¹⁴¹ the arbitral tribunal ruled that the obligation to pay royalties, in this case, was not prohibited by EC competition law.¹⁴²

In ICC Case No. 9333,¹⁴³ the sole arbitrator acknowledged that it was possible that foreign law could have the status of *loi de police* or overriding mandatory rule. The sole arbitrator was of the opinion that applying the U.S. FCPA as a mandatory rule was simply not justified because it was not connected enough to the dispute in the first place. The defendant was a French subsidiary of a U.S. company, and the plaintiff was a national of an African country. Hence, the sole arbitrator held that the FCPA did not apply to foreign subsidiaries of American companies, and even if the FCPA were applicable to the defendant, this would not mean that an international arbitral tribunal could be forced to apply it and no other law. The arbitrator did not consider it appropriate to impose the FCPA on businesses outside of the U.S. even though it was an honorable goal to combat corruption.

In ICC Case No. 6320,¹⁴⁴ the tribunal analyzed the U.S. RICO Act, and it reached the conclusion that the purpose of the act is to protect the U.S. economy and society against the negative effects of organized racketeering activities. The stated purpose reflects a fundamental public policy of the U.S., which is protected by the statute's mandatory application. However, the tribunal asserted that the specific question, in this case, was to decide whether the application of the RICO Act was mandated in a case before an international arbitral tribunal where a non-U.S. (Brazilian) party sought treble damages from a U.S. party. The tribunal acknowledged that there might be situations in which it should

¹⁴¹ Trade between Member States be affected and that the alleged negative effect on competition is appreciable.

¹⁴² Case No. 13696 of 2007, 39 Y.B. Comm. Arb. 77 (ICC Int'l Ct. Arb.).

¹⁴³ Case No. 9333, 19(4) ASA BULL. 757. Both the place of arbitration and the law applicable to the merits belonged to Switzerland.

¹⁴⁴ Case No. 6320 of 1992, 20 Y.B. Comm. Arb. 62-109 (ICC Int'l Ct. Arb., 1995). The place of arbitration, in this case, was Paris, while the law applicable to the merits was Brazilian law.

apply mandatory rules outside the *lex contractus*. However, such application would be subject to two stringent conditions: (1) the mandatory rules must clearly be a “*loi de police*”; and (2) the concerned jurisdiction must have a sufficiently strong and legitimate interest as to mandate the application of such *loi de police*. In this regard, the tribunal refused to apply the provisions of the RICO Act since the second condition was not satisfied. The tribunal also noted that it would have applied the RICO Act or any *lois de police* if it were reflective of an international public policy principle.

The arbitrators in this category have relied upon a conflict of laws analysis to determine how closely connected the pleaded law is to the facts of a case. In these cases, the link to the pleaded law was weak in the eyes of the arbitral tribunals and not closely connected to call for its application. The arbitrators’ approach in these cases is in line with the above conclusion and does not pose any dilemmas.¹⁴⁵

3. Third Category: Overriding Mandatory Rules’ Scope of Application Does Not Reach the Facts

In the Ad Hoc Award of 1989,¹⁴⁶ the sole arbitrator ruled that the brokerage agreement in question was valid under the law applicable to the merits (Swiss law). The sole arbitrator considered whether the foreign public law of State X invalidated such an agreement. The arbitral tribunal deduced that such foreign public law did not pertain to international public order. Also, the tribunal stated that the legislature of State X seemed to have no intention to extend the applicability of its own law to contracts governed by foreign law. Thus, the sole arbitrator decided that the prohibition of intermediaries under the foreign public law was not mandatory for arbitrators sitting in Switzerland and for applying Swiss law because such foreign

¹⁴⁵ It should be noted that the arbitrators relied also on supporting reasons to refuse the application of the overriding mandatory rules that do not belong to the law applicable to the merits, namely, whether the overriding mandatory rules are considered as transnational public policy, also the consequences of application or non-application of such rules.

¹⁴⁶ Ad hoc Award of 1989, 9(3) ASA BULL. 239, 244 (1991). Both the place of arbitration and the law applicable to the merits belonged to Switzerland.

public law did not concern individual or social interests of fundamental importance.¹⁴⁷

This case refused the application of the overriding mandatory rules because their scope of application did not reach the facts of the case. The tribunal supported its reasoning on the fact that the pleaded overriding mandatory rules did not constitute a part of transnational public policy. This analysis is in line with our conclusion, and it does not pose any issues.

4. Fourth Category: Overriding Mandatory Rules Are Not So Preponderant to the Interests of the Law of the Seat of Arbitration (Conflict of Laws Analysis)

In the ICC Case of 1989,¹⁴⁸ the tribunal decided that, based on Article 19 of the SPIL, the interests of State X were not so preponderant in relation to the Swiss law to the extent that they should be taken into consideration and invalidate the contract. This analysis is in line with our conclusion, and does not posit any concerns.

5. Fifth Category: The Effects of the Application of Overriding Mandatory Rules Are Implausible (Conflict of Laws Analysis)

ICC Case No. 6503,¹⁴⁹ involved two EC parties who chose for their agreement to be arbitrated in Switzerland by Swiss Arbitrators applying Swiss law. In other words, they wanted to have a non-EC context for the disputes arising from their agreement. The parties also agreed that the tribunal would have the power to adjudicate the dispute as *amiable compositeurs*. In this regard, the claimant argued that the contract in question was

¹⁴⁷ The sole arbitrator also acknowledged that even though Article 19 of the SPIL has entered into force after this agreement was reached, the result would nevertheless be the same. The sole arbitrator also asserted that international arbitrators are not in any case bound by the SPIL.

¹⁴⁸ *K Ltd. v. M S.A.*, ICC Case of 1989, 11(2) ASA BULL. 216 (1993). Both the place of arbitration and the law applicable to the merits belonged to Switzerland.

¹⁴⁹ Case No. 6503 of 1990, ICC BULL. SPECIAL SUPPLEMENT 39-41 (1994). Both the place of arbitration and the law applicable to the merits belonged to Switzerland.

void for violating the EC competition rules. The tribunal held that acting as *amiable compositeurs*, rendering the contract null would be a shocking and inequitable result because the claimant performed the contract without any reservation and recognized its validity at a date later than Spain's entry into the EC (the pleading party was a national of Spain). In addition, under Swiss law, the fact that the arbitrators were acting as *amiable compositeurs* enabled the arbitrators to disregard even the mandatory rules of law. Further, the claimant here, rightly, did not plead that such rules were transnational public policy as it was not the case.¹⁵⁰ The tribunal rejected the claimant's arguments to nullify the contract.¹⁵¹

In ICC Case No. 12472,¹⁵² the arbitral tribunal acknowledged that foreign *loi de police* which does not belong to the *lex contractus*, has always suffered from a lack of legitimacy. The dominant opinion in international arbitration is unfavorable to *loi de police's* systematic application. However, the tribunal noted that this does not mean that *loi de police* should never be applied. The tribunal held that while the arbitrators do not have the obligation to apply *loi de police*, in this case nothing should have prevented the arbitrators from applying this law because the parties made abundant references to it. Accordingly, the tribunal referred to Article 7 of the Rome Convention and indicated that it had to determine the consequences that would result from the application, or non-application, of the Middle-Eastern *loi de police* in relation to the subject of this dispute. After assessing the facts of the dispute, the tribunal concluded that such a dispute could be decided independently of the law of the Middle-Eastern country, which means that the consequences of the non-application of that law did not appear disproportionate. On the contrary, the arbitrator's application of the law of the Middle-Eastern country, under which the contract could have been found null and void, would have had the effect of allowing the respondent to free itself from the obligations it

¹⁵⁰ *Id. Contra Cremades & Cairns, supra* note 54.

¹⁵¹ Case No. 6503 of 1990, at 39-41.

¹⁵² Case No. 12472 of 2004, 24 ICC BULL. SPECIAL SUPPLEMENT 46 (2013). Both the place of arbitration and the law applicable to the merits belonged to France.

freely contracted even when the respondent had agreed with the claimant not to submit the contract to the law of the Middle-Eastern country.

In ICC Case No. 15913,¹⁵³ the arbitral tribunal held that the Algerian exchange controls justification could generally be considered as a *loi de police* since its application is based on the “protection of major economic interests of the Algerian State.” However, the arbitral tribunal ruled that the complexity of the Algerian exchange controls legislation made it difficult to recognize the qualification of the entire Algerian exchange controls as *lois de police*. Further, the tribunal considered that the application of such foreign *lois de police* would lead to extreme results by enabling the respondent to evade its due payments obligations under the agreement.

The attitude of both of the EC parties in the first case, No. 6503, could be interpreted as if they were trying to evade the application of any EC overriding mandatory rules. The combination of having the seat (Switzerland), the law applicable to the merits (Swiss), the choice of arbitrators (Swiss), and granting the arbitrators the power to act as *amiable compositeurs* eventually allowed the parties to evade the application of the overriding mandatory rules of the EU. In the author’s opinion, the arbitrators should have taken such attitude into their consideration and applied the EU overriding mandatory rules, but only if the latter were closely connected enough to the case and their scope of application reached the facts of the case.¹⁵⁴ In the second case, No. 12472, the tribunal balanced the effects of the application of the overriding mandatory rules and found that such application would be inequitable in light of the facts of the case. In the third case, No. 15913, the tribunal reached the conclusion that the pleaded rules were not overriding mandatory rules, and the tribunal supported its conclusion by the implausible results that could result from applying such rules.

¹⁵³ JARVIN & DERAÏNS, *supra* note 61, at 458, 461, 465. The place of arbitration was Paris, while the law applicable to the merits was Algerian law.

¹⁵⁴ The author’s premise for this answer is the arbitrators’ duty to preserve the integrity of the international arbitration regime.

6. Sixth Category: Overriding Mandatory Rules' Refusal of Application Is Based upon Their Type

In ICC Case No. 1399,¹⁵⁵ the arbitrators determined whether the non-application of the Mexican customs laws would have an effect upon the validity of the contract in question. The arbitrators agreed that the Mexican law was a *loi de police*. However, the tribunal held that its scope of application should not reach the place of performance of the contract (France). In this regard, the arbitrators were not concerned with upholding the fiscal regulations of Mexico. The arbitrators ruled that such Mexican law was a foreign *loi de police* that is not a part of international public policy. The arbitral tribunal also mentioned that a contract tending to corrupt foreign government officials would probably have been held as null and void, but a contract that is in violation of tax laws or importing regulations of a foreign country would not necessarily be invalidated.

In an unpublished award (1981),¹⁵⁶ the buyer invoked the Romanian exchange control regulations as a defense in this dispute. The tribunal analyzed the Romanian regulations and ruled that such regulations were akin to a confiscation of the foreign investor's assets, and, thus, was discriminatory towards the foreign investor, and hence refused to apply such regulations. The discrimination outweighed the typical considerations for such regulations, such as the state's concern to stabilize its balance of payments preventing an undesired outflow of foreign currencies.

In ICC Case No. 14266,¹⁵⁷ the sole arbitrator referred to Article 19 of the SPIL with respect to the application of foreign *loi de police*. He indicated that international arbitrators sitting in Switzerland are not obliged to apply foreign law to contract

¹⁵⁵ Case No. 1399 of 1967 (ICC Int'l Ct. Arb.); JULIAN D. M LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS* 550-552 (1978).

¹⁵⁶ Marc Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts*, 9 Swiss Com. L. Series 1, 6 (1999). The law applicable to the merits was Swiss law.

¹⁵⁷ Case No. 14266, 24 ICC BULL. SPECIAL SUPPLEMENT 83 (2013). Both the place of arbitration and the law applicable to the merits belonged to Switzerland.

obligations. The sole arbitrator acknowledged that he must take into consideration the foreign *loi de police* if they are closely related to the dispute and their scope of application requires. Furthermore, the sole arbitrator made a clear distinction between two types of *lois de police*: (1) antitrust and anti-corruption rules that should be applied by the tribunal (for the antitrust rules, they will be applied if they affect the territory of the enacting state); and (2) *lois de police* that pertain to national economic or political interests such as embargoes or unilateral trade sanctions, restrictions on imports or exports, and monetary restrictions. Therefore, the sole arbitrator refused to apply the alleged mandatory provisions of Belgian law as the sole arbitrator considered that he was not bound by Belgian law which intended solely to protect national Belgian economic interests (Belgian's tax laws).

In ICC Case No. 15972,¹⁵⁸ the tribunal ruled that the Nigerian foreign overriding mandatory rules regarding trade and import restrictions merely serve to enforce national economic or political interests. Therefore, the tribunal held that the rules should not apply no matter how close the connection of the case was to that country (the place of the performance of the contract).¹⁵⁹

These four cases are extremely peculiar since they deal with rules that are neither antitrust nor anti-corruption rules. Based on the facts of the first case, it is clear that the reason for not applying the Mexican customs law is that its scope of application did not reach the facts of the case. However, the type of law in question seems to have weighed heavily in that case, as the tribunal made it clear in its dicta that their decision would probably have been different if the Mexican law was an anti-corruption law. In the second case, the tribunal also refused to act as a guardian of the foreign governmental agency by applying Romanian exchange control rules.

The most intriguing case in this category is the third case.¹⁶⁰ The analysis under this case invites us to consider whether such a

¹⁵⁸ Case No. 15972 of 2011, 1 ICC BULL. 92 ¶ 130 (2016). Both the place of arbitration and the law applicable to the merits belonged to Switzerland.

¹⁵⁹ *Id.* ¶ 132

¹⁶⁰ *See* Case No. 14266.

distinction only applies when the overriding mandatory rules do not belong to the law applicable to the merits. Further, preserving the integrity of the international arbitration world and committing to the arbitrators' duty to render enforceable awards might largely affect this distinction even if the pleaded overriding mandatory rules do not belong to the law applicable to the merits. The sole arbitrator, in the third case, analyzed his/her duty to render an enforceable award and recognized that his/her position might risk the enforcement of the arbitral award in a potential place of enforcement; however, the sole arbitrator advocated that his duty to render an enforceable award did not mean that he had to review the overriding mandatory rules of all possible and potential places of enforcement of the award.

III. CONCLUDING REMARKS

Based on our survey, the arbitrability of overriding mandatory rules in international arbitration largely depends on the law applicable to the arbitration, which is usually the *lex arbitri*. Our survey is limited to arbitrations conducted inside the EU, Switzerland, and the U.S.¹⁶¹ In this regard, arbitrations conducted inside the EU, Switzerland, or the U.S. will most likely rule that overriding mandatory rules are fully arbitrable. On the other hand, arbitrations conducted outside of the EU, Switzerland, and the U.S. might still run the risk of an intervention by national state courts on the basis of the non-arbitrability of the overriding mandatory rules.

In light of the above, we turn to defining the role of arbitrators with respect to the application of overriding mandatory rules, and argue that the right answer is that "[a]rbitrators are not public or supernational bodies charged with the obligation of applying [overriding mandatory] provisions; rather, they are in the same position as any judge and/or private person who must comply with such [overriding mandatory] provisions when carrying out their tasks and/or activities."¹⁶² This position complies with an arbitrators' duty to (1) render an enforceable award, (2) preserve

¹⁶¹ The reason for such a limitation is the fact that we did not find any published arbitral awards concerning arbitrability seated outside these jurisdictions.

¹⁶² Case No. 7146, 26 Y.B. Comm. Arb. 119, 120 (ICC Int'l Ct. Arb.).

the integrity of international arbitration, and (3) prevent utilizing arbitration as a mechanism to evade the application of overriding mandatory rules.

In this respect, the **main question** becomes: **What should be the criteria for the application of overriding mandatory rules in international commercial arbitration?** To answer this question, arbitration scholars must first settle a few questions: **first**, we need to determine whether such criteria should be based on the conflict of laws rules of the seat of arbitration or other jurisdictions, namely Article 9 of Rome I Regulation or Article 19 of the SPIL, especially if the applicable arbitral institutional rules¹⁶³ direct the arbitrators to consider the most appropriate law without conducting a conflict of laws analysis (the *voie directe* approach). Based on our survey, several arbitral awards have already applied overriding mandatory rules based on a conflict of laws analysis, especially when the overriding mandatory rules did not belong to the law applicable to the merits. The problem with this approach is that Article 9 of Rome I Regulation limits the application of foreign overriding mandatory rules to cases where the overriding mandatory rules (i) belong to the place of performance of the contract and (ii) lead to the invalidation of the contract. Further, Article 19 of the SPIL requires that foreign overriding mandatory rules protect interests that are so preponderant under Swiss law. This induces us to make our **second** inquiry: Should international arbitrators be restricted by these conditions when determining the application of overriding mandatory rules? It should be noted that both the Rome Convention¹⁶⁴ and Rome I Regulation explicitly exclude arbitration from their scope of application¹⁶⁵; that is why arbitration scholars argue that arbitrators should enjoy more freedom when determining the application of overriding mandatory rules.¹⁶⁶

¹⁶³ As provided for under the 2017 ICC International Arbitration Rules.

¹⁶⁴ See Art. 1(2)(e) of Rome Convention.

¹⁶⁵ See Art. 1(2)(e) of Rome I Regulation: "The following shall be excluded from the scope of this Regulation: [. . .] (e) arbitration agreements and agreements on the choice of court."

¹⁶⁶ See Mayer, *supra* note 1.

Further, this prompts us to ask a **third** question: What qualifies as *foreign* overriding mandatory rules in international commercial arbitration? There is no *lex fori* in international commercial arbitration¹⁶⁷; does this mean that any law other than the law applicable to the merits is a *foreign* law? The surveyed arbitral awards did not answer this question; however, as mentioned-above, in many cases, the arbitrators applied overriding mandatory rules that belonged to the law applicable to the merits without seeing a necessity to reason such an application. A **fourth** intriguing issue is whether international arbitrators should distinguish between overriding mandatory rules that pertain to transnational public policy (anti-corruption rules and, arguably, antitrust rules) and other overriding mandatory rules that pertain to purely national political and economic interests. Arbitration scholars seem to disagree with this position.¹⁶⁸ Arbitral awards also appear to be divided on this issue; four awards made this distinction between what the overriding mandatory rules pertain to, yet, in those cases, the overriding mandatory rules did not belong to the law applicable to the merits.¹⁶⁹ On the other hand, three awards applied overriding mandatory rules that did not belong to the law applicable to the merits and these rules were neither anti-corruption nor antitrust rules.¹⁷⁰

Generally speaking, international arbitrators must navigate the process of applying overriding mandatory rules with great caution. Professor Radicati di Brozolo advocates that arbitrators should always take into consideration the expectations of the parties because arbitrators “are not organs of the State and [...] their primary responsibility remains to the parties.”¹⁷¹ This

¹⁶⁷ See BENTOLILA, *supra* note 1.

¹⁶⁸ See *infra* Question (II).

¹⁶⁹ See ICC Case No. 1399, Unpublished Award of 1981; ICC Case No. 14266 and ICC Case No. 15972.

¹⁷⁰ See ICC Case No. 8528 (which applied tax law); ICC Cases No. 15977 and 16655 (where commercial agency law was applied).

¹⁷¹ Luca G. Radicati di Brozolo, *When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal*, in *THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 351, 381 (Franco Ferrari ed., 2017).

means that international arbitrators must walk a fine line to navigate the tension between protecting the parties' expectations and avoiding frustrating the States' interests when such interests deserve protection per the facts of any given case. In the author's opinion, the parties' expectations should play a role in determining the application of overriding mandatory rules only when such rules do not belong to the law applicable to the merits. Otherwise, the overriding mandatory rules that belong to the law applicable to the merits should always be applicable unless the scope of application of these rules does not reach the facts of the case.

Accordingly, this article tries to provide a view on the status quo of the arbitral case law with respect to the application of overriding mandatory rules in international commercial arbitration. In this respect, the reasoning for the application of overriding mandatory rules that belonged to the law applicable to the merits was either that they were: (a) anti-corruption rules that pertained to transnational public policy; (b) rules that were most closely connected to the dispute; or (c) part of the law applicable to the merits (party autonomy). On the other hand, the reasoning for refusing the application of overriding mandatory rules that belonged to the law applicable to the merits was usually because the scope of application of the overriding mandatory rules did not reach the facts of the case (except for one case: ICC Case No. 8385).

Concerning the application of overriding mandatory rules that did not belong to the law applicable to the merits ("foreign rules"), the reasoning was either that they were: (a) mandated to be applied based upon a conflict of laws analysis; or (b) required for the arbitrator to render an enforceable award. In contrast, the reasoning for refusing the application of overriding mandatory rules that did not belong to the law applicable to the merits was either that: (a) the arbitrators were not bound in the first place by conflict of laws rules; (b) the pleaded overriding mandatory rules were not closely connected enough to the dispute; (c) the scope of application of the overriding mandatory rules did not reach the facts of the case; or (d) failed to fulfill the conditions under Article 19 of the SPIL, namely, the interests behind the overriding mandatory rules were not so preponderant under Swiss law perspective; (e) the effects of application of the overriding

mandatory rules were implausible; or (f) the type of overriding mandatory rule pertained to purely national economic and political interests (any rules other than antitrust and anti-corruption rules).

These findings show the remarkable influence of conflict of laws' rules upon international commercial arbitration in this field. In conclusion, overriding mandatory rules that did *not* belong to the law applicable to the merits were generally—and rightly so—under higher scrutiny than those that did belong.