

INTRODUCTION:
MANDATORY RULES OF LAW IN
INTERNATIONAL ARBITRATION

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The notion of mandatory rules of law has long been of interest in private international law. It is no wonder that the subject has also emerged as something of a preoccupation of those who are involved in the world of international commercial arbitration. As both legal academics and international arbitrators, the editors of this special issue of the *American Review of International Arbitration* took a keen interest in how mandatory rules might “fit” into the international arbitration picture.

To better understand the phenomenon of mandatory rules (and to gauge whether its importance might possibly even be exaggerated in the international arbitral context), the editors convened at Columbia Law School in June 2007 a workshop under the joint auspices of Columbia and the School of International Arbitration at Queen Mary University of London. The workshop gathered a small number of leading academics and practitioners to consider whether the notion of mandatory rules of law has a place in international arbitration and, if so, how it might best be accommodated. In fact, as shown by the articles that follow in this issue, the participants display a range of views on how the notion of mandatory rules of law should be approached and treated.

In this Introduction, I mean to raise only the most essential questions pertaining to the place of mandatory rules of law in international commercial arbitration. Because the notion of mandatory rules of law has arisen primarily in the context of private international law, any discussion of them in arbitration appropriately starts with its usage in international civil litigation.

I. WHAT IS A MANDATORY RULE OF LAW?

I begin with a matter of definition. In the private international law literature, a norm or rule of law is most often described as “mandatory” when a court must apply it, even if the court, under the operation of its conflict of laws rules, would ordinarily apply some other body of law (often referred to casually as “the otherwise applicable law”).¹ As indicated in several of the articles in this issue, other terms – often in other languages (*lois de police* in French, for example) – capture much the same idea.

On other occasions, authors define as “mandatory” those rules of law that cannot be derogated from by private parties in the exercise of their party

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¹ See Bjorklund, *infra* at 175, Buxbaum, *infra* at 21 (both quoting Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT’L 274 (1986)).

autonomy. They are, in other words, rules of law that the parties cannot, as the saying goes, “contract around.”² As Donald Donovan has put it, mandatory rules are those that “arise outside the contract, apply regardless of what the parties agree to, and are typically designed to protect public interests that the state will not allow the parties to waive.”³

It is easy to discern the close kinship between these two formulations of the idea of mandatory law. Very often in private international law – and in international arbitration as well – the parties will by contract have designated a choice of law to govern their contractual relationship and the disputes arising out of or related to it; the inclusion of a choice-of-law clause in a contract is very much an exercise of party autonomy. Since under virtually all jurisdictions’ conflict of laws rules, courts should presumptively respect an expression of party autonomy in the choice of law, the law chosen by the parties is indeed “the otherwise applicable law.” In this way, a rule that starts out reading “notwithstanding the ordinary rules of conflict of laws” may end up reading “notwithstanding a contrary agreement between the parties.”

The advantage of this transformation of the notion of mandatory rules of law from overriding “the otherwise applicable law” to overriding “the intent of the parties” is that it more clearly suggests the tension between mandatory rules, on the one hand, and party autonomy, on the other. That is an aspect of mandatory rules that, as many of the articles in this volume illustrate,⁴ needs to be borne in mind.

But there is one disadvantage to the transformation. To designate mandatory rules of law as ones from which the parties cannot derogate by agreement suggests that there is nothing at all that the parties can do to escape the application of these rules (or, to put the matter differently, that the parties have no possibility whatsoever of “opting out” of them, no matter how clearly and unequivocally they manifest their intention to do so, as well as no possibility of waiving them or acquiescing in their displacement). Yet, there is a suggestion in more than one of the articles in this volume that, while a rule might well be mandatory in the sense of displacing the “otherwise applicable law” (as identified through the ordinary play of conflict of laws rules), it may nevertheless be one around which the parties may still be permitted to contract or one whose advantages the party meant to benefit from the mandatory rule may waive. It seems to me useful to leave very much open the possibility that a rule of law may be mandatory in the sense of being applicable, notwithstanding “the otherwise applicable law,” but nevertheless subject to being derogated from by parties who clearly enough express that intention.⁵

² See Kessedjian, *infra* at 147.

³ Donovan, *infra* at 205, quoting Donald F. Donovan & Alexander K.A. Greenawalt, *Mitsubishi After Twenty Years: Mandatory Rules before Courts and International Arbitrators*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 1, 13 (Loukas Mistelis & Julian D.M. Lew eds., 2006).

⁴ See in particular Bjorklund, *infra* at 175.

⁵ See the discussion at notes 68-70, *infra* and accompanying text.

The fact is that, despite the rich literature on mandatory rules, the exact difference between (a) rules that are “imperative” because they command their application, notwithstanding the otherwise applicable law, and (b) rules that are “imperative” because they cannot be derogated from by agreement between the parties (and very likely cannot be waived) remains to be more fully explored and better understood. A recital in the new 2008 Regulation of the European Union on the Law Applicable to Contractual Obligations suggests that there may indeed be a difference between these two notions.⁶

II. MANDATORY RULES AND “PUBLIC POLICY”

American lawyers, not particularly conversant with the term mandatory rules of law, may well find themselves translating the term in their minds as “public policy” – a term that manages to capture both of the conceptions of mandatory rules of law set out above.⁷ That is to say, “public policy” can both prevent application of “the otherwise applicable law” and also bar the possibility of party agreement to the contrary. French private international law draws an important further distinction within the realm of public policy between those norms (*ordre public interne*) that are mandatory only when the legal relationship or transaction facing the judge is governed by French law, on the one hand, and those norms (*ordre public international*) that are mandatory even when the legal relationship or transaction is or has been subjected to a law other than the law of France. Norms of the latter kind should consist only of the most essential and fundamental – even universal – of norms, worthy of binding parties not only when the parties have subjected themselves to French law, but in all cases that come before a French court.⁸

The *ordre public* of a jurisdiction, it should be noted in passing, is subject to considerable expansion to the extent that the State is a member of a regional legal system whose own legal norms are deemed to be directly applicable in, and part

⁶ Regulation on the Law Applicable to Contractual Obligations, *infra* note 18. Recital 37 reads:

Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of ‘overriding mandatory provisions’ *should be distinguished* from the expression ‘provisions which cannot be derogated from by agreement’ *and should be construed more restrictively* (emphasis added).

⁷ See Donovan, *infra* at 205, Kessedjian, *infra* at 147. Kessedjian regards the distinction between mandatory rules and rules of public policy as, from a practical point of view, “unnecessary.”

⁸ Audley Sheppard draws a parallel distinction in U.K. private international law between “domestic mandatory rules” and “international mandatory rules.” In principle, only the latter have application to “international relationships.” Sheppard, *infra* at 121.

Donovan offers as illustrations of norms of *ordre public international* the prohibition of apartheid or trafficking in drugs. Donovan, *infra* at 205.

of, the national legal order. The United States may not be a member of any such regional organization (NAFTA certainly does not meet that standard), but plenty of other countries are, notably the Member States of the European Union.⁹ For an EU Member State, not only are certain bodies or principles of European Union law capable of constituting *ordre public* (whether *interne* or *international*),¹⁰ but a regional court such as the European Court in Luxembourg may feel entitled to tell the courts of that Member State authoritatively which EU legal norms they should regard as *ordre public* and which not.

In civil litigation, a French court faced with a dispute governed by French law will presumably feel bound to give effect to any and all relevant principles of French *ordre public*, be they *interne* or *international*. (So too, presumably, will the courts of other countries, once they determine French law to be the applicable law in a case before them.) But if a French court will feel bound by the principles of *ordre public* of French law (including EU law), it may not feel so bound if it considers that the dispute is governed by a law other than the law of France (or of another EU Member State). On the other hand, a French court will feel duty bound to give effect to the rules that enter into the category of *ordre public international*, irrespective of what the proper law governing the dispute may be. That is the difference between a public policy norm being *international* as opposed to “merely” *interne*.

The distinction between *ordre public interne* and *ordre public international*, which was devised primarily with international civil litigation in mind, applies less readily in the context of international arbitration. An international arbitral tribunal may have a harder time deploying the distinction. This is because an international arbitral tribunal is not an organ of a State that is deemed to be possessed of something we call “public policy.” To be sure, the tribunal will (or at least should) apply norms of both French *ordre public interne* and *ordre public international*, whenever it deems French law to be applicable to the case before it. But otherwise, what is the source from which the tribunal is to draw its *ordre public*? Surely it does not have its own *ordre public*. So should it draw only upon the *ordre public* of the particular jurisdiction whose law the tribunal has identified as the governing law, or of the jurisdiction where it sits? Or is there some other way of identifying the rules of *ordre public* to which the tribunal should feel bound to give effect, irrespective of “the otherwise applicable law”?¹¹ I shall

⁹ Kessedjian, *infra* at 149, referring to “regional mandatory rules.”

¹⁰ See Audit, *infra* at 37. The EU’s new 2008 Regulation on the Law Applicable to Contractual Obligations (see note 18 *infra*) makes explicit the obligation of Member State courts to apply mandatory rules of law established at the EU level: “Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.” This is largely consistent with established European Court of Justice case law. See *Ingmar GB v. Eaton Leonard Technologies*, Case C-381/98, [2000] ECR I-9305.

¹¹ On this issue, see in particular Kessedjian, *infra* at 147.

come back to these questions at least twice below: first, on the occasion of discussing the possibility that an arbitral tribunal might give effect to the mandatory rules of law of a jurisdiction other than the one whose law the tribunal has designated as the applicable law; and second, on the occasion of determining whether international law itself may be a source of mandatory rules of law for arbitrators.

III. WHAT MAKES A RULE OF LAW MANDATORY?

We may well understand the definition of a mandatory rule of law and the effect it is supposed to have, without having a very good idea of the criteria by which to decide whether in fact a given rule of law falls within this category. While one could indulge in purely circular reasoning (i.e. “a rule of law is mandatory if it is one that a court must apply, irrespective of the otherwise applicable law including a law chosen by the parties”), it would be nice to have a way of identifying mandatory rules of law in advance and upon encountering them. The reality is that only some statutes unambiguously announce their mandatory character, and some rules are undoubtedly mandatory without taking written form at all.¹² When a court or tribunal seeks to characterize a rule of law as mandatory (or not), it has little choice but to try to gauge the strength and depth of the attachment of the legal system in question to the values that the rule of law is thought to embody.¹³ The difficulty entailed in making this determination should not be underestimated.¹⁴

IV. MANDATORY RULES OF THE ARBITRAL SITUS

There is widespread agreement that, irrespective of what the generally applicable law might be, an international arbitral tribunal is bound to apply or otherwise respect the mandatory rules of arbitral procedure of the place of arbitration.¹⁵ This requirement is deemed to be the price (and occasionally the advantage) of having chosen one arbitral situs rather than another. Mandatory rules of procedure of the situs essentially tell the parties which procedural norms they must respect if they expect to validly arbitrate on the territory, and they tell the arbitral tribunal which procedural norms it must respect if it expects to render an award that is safe from local annulment. To underscore the importance of mandatory rules in the *lex arbitri*, Audley Sheppard reports that the English Arbitration Act 1996 contains no fewer than 26 of them.¹⁶

¹² Audit, *infra* at 37.

¹³ Kessedjian, *infra* at 147.

¹⁴ Buxbaum, *infra* at 21.

¹⁵ See Rau, *infra*, at 51, Sheppard, *infra* at 121, Shore, *infra* at 91.

¹⁶ Sheppard, *infra* at 121. The English Act specifically enumerates in an annexed schedule the provisions of the Act that are mandatory.

Matters become more interesting when we move from the realm of mandatory procedural rules of the situs to that of mandatory substantive rules of the situs. Of course, the situation is simple where the dispute is substantively governed, as a matter of conflict of laws, by the situs' own law. The substantive mandatory rules of law of the situs are for that reason alone immediately applicable where relevant. But where the applicable law is another country's law, what claim does the situs have to demand that its substantive legal norms be respected? None of the contributors to this volume rules out that possibility – and some specifically contemplate it¹⁷ – though what remains unclear is (a) what kind of nexus to the forum will be required to justify such a demand, above and beyond the fact that the arbitration is taking place there, and (b) how compelling must be the values underlying these substantive mandatory rules of the arbitral situs to warrant their application.

Several of the authors urge us to dwell a little bit longer than we otherwise might on the question whether the jurisdiction whose mandatory rules of law are in question (here, the arbitral situs) really *mean* to have those rules applied to the situation at hand or whether, on the contrary, the mandatory rule in question simply does not apply. This might be the case, for example, when the particular setting is so “transnational” that application of the rule would be unacceptably “extraterritorial.”¹⁸ All of this is, at bottom, a matter of legal construction of the mandatory law itself and in particular its “reach.”¹⁹ Bernard Audit plausibly suggests that the situs can expect only norms that enter into its *ordre public*

¹⁷ See Audit, *infra* at 37, Bjorklund, *infra* at 175, Buxbaum, *infra* at 21, Shore, *infra* at 91.

¹⁸ See Audit, *infra* at 37, Bjorklund, *infra* at 175, Kessedjian, *infra* at 147, Shore, *infra* at 91. Sheppard suggests that Article 7(2) of the Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266), which pertains to mandatory rules of law of the forum, is broadly interpreted in the U.K. so as to include, among other things, competition law, consumer protection law, carriage of goods by sea law, employment law, and the Financial Services and Markets Act of 2000. Sheppard, *infra* at 121.

Article 7(2) of the Convention reads: “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.”

The Rome Convention was recently converted into directly applicable European Union legislation in the form of a regulation. Regulation 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177/6) (July 4, 2008). The parallel provision (Art. 9.3) reads: “Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.”

¹⁹ See Rau, *infra* at 51, citing the example of a tribunal's refusal to apply the RICO legislation of the U.S., not merely because the parties had not adopted U.S. law as governing, but because the tribunal rejected the notion that the drafters of RICO intended to impose liability under that statute for conduct that neither took place in the U.S. nor had an effect on U.S. markets. ICC Case No. 6320, XX Y.B. COM. ARB. 62 (1992).

international (rather than merely its *ordre public interne*) to qualify for application by the tribunal as mandatory substantive rules of law.²⁰

V. MANDATORY RULES OF THE CHOSEN LAW

Where the parties to an international arbitration have selected a particular body of law to govern disputes arising out of or related to that transaction, we can mostly rest assured that the tribunal will consider the mandatory rules of the chosen law as figuring among the applicable legal norms.²¹ The only possible reasons not to do so would be (a) if, as suggested above, the mandatory rule of law is for some reason, even in the eyes of its enactor, not meant to be applied to a situation like the one at hand,²² or (b) if there is in play some other contrary and overriding mandatory norm that would be offended.²³ *A fortiori*, attention should be paid to the mandatory rules of law of the country whose law (the *lex arbitri*) the parties have explicitly chosen to govern the arbitration agreement, in those cases where they have established both a law of the contract and a law of the arbitration.²⁴

VI. MANDATORY RULES OF A “THIRD COUNTRY”

Still more interesting of course is the prospect of an arbitral tribunal reaching beyond both “the otherwise applicable law” (typically the law chosen by the parties as applicable) and the law of the situs to discover and apply the mandatory rules of law of some other, or “third,” jurisdiction.²⁵ This situation is highly analogous to the one in which a national court judge in country A, applying as a matter of its own conflict of laws the substantive law of country B (which, let us assume, the parties have selected in their contract), is tempted on a particular issue to apply, as somehow mandatory, the law of country C (being neither the forum nor the country whose law would ordinarily be applicable). Both the Rome Convention on Choice of Law in Contracts²⁶ and the Restatement (Second) of

²⁰ Audit, *infra* at 37.

²¹ See Bjorklund, *infra* at 175, Kessedjian, *infra* at 147, Sheppard, *infra* at 121, Shore, *infra* at 91.

²² Audit, *infra* at 37.

²³ Professor Bjorklund specifically identifies as two situations in which a court or tribunal may refuse to enforce a rule of law that purports to be mandatory (a) the situation where application of the mandatory rule of law seems to the court or tribunal to be impermissibly extraterritorial and (b) the situation where application of a mandatory rule of law of another country would offend a mandatory rule of law of the forum. Bjorklund, *infra* at 175.

²⁴ Sheppard, *infra* at 121.

²⁵ See, e.g., Bjorklund, *infra* at 175, Buxbaum, *infra* at 21, Shore, *infra* at 91.

²⁶ Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266), Art. 7.1. As noted, *supra* note 18, the European Union adopted the Convention as a directly applicable regulation in June 2008. Article 7.1 of the Convention, with slight

Conflict of Laws²⁷ invite precisely a move of this kind on the part of the forum, albeit only in exceptional circumstances.

Here, at last, the national judge and international arbitrator find themselves in analogous situations. Both the judge and the arbitrator sitting in country A should feel bound in principle to apply the substantive law of country B (the chosen law), but they both may nevertheless wonder whether country C might possibly have a strong enough claim on the facts to have its mandatory rules of law on a given issue applied as well. (To put the proposition in *ordre public* terms, we must in this scenario imagine that the mandatory law of country C reaches the level of *ordre public international* and thus warrants mandatory application.)

The question of course is what will it take to persuade an arbitrator to go outside the chosen law and apply the mandatory rules of a third State? To this it is difficult to give a reliably informative answer.

One might expect, to begin with, a certain hesitation to apply third countries' mandatory rules, particularly among those who subscribe to an "a-national" notion of international arbitration. Such an individual may well consider it anomalous for an arbitral tribunal to apply *any* mandatory rules of law other than those that may be found in the body of law that the parties previously adopted as their governing law (or possibly in the body of arbitral law of their chosen situs). To apply in any measure the law of a jurisdiction whose law the parties did *not* select would thwart the value of party autonomy which underlies the very notion of "a-national" arbitration.²⁸ However, I sense that most commentators reject so categorical a view, preferring to leave the door open, at least theoretically, to the application of a third country's mandatory rules of law.²⁹ The premise of that position must be that, even in the context of purely private commercial disputes, an arbitral tribunal has a public role and function to perform, and cannot remain categorically deaf to the values underlying truly mandatory rules of law, whatever their source or origin may be. (The political function of international arbitral tribunals is of course at its most palpable in investor/state arbitration.)

The contributors to this volume come at this question in a variety of ways. Lawrence Shore proposes basically a "rule of reason" which would take into account, among other things, the strength of country C's nexus to the case, the tribunal's sense of the mandatory rule's "application-worthiness," and the appropriateness of the result if country C's mandatory rule of law were to be

modification of language, has become Article 9.3 of the new Regulation. For the text of Article 7.1 of the Convention and Article 9.3 of the 2008 Regulation, see *infra* note 36.

²⁷ RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS, § 187(2)(b).

²⁸ This position is well stated, though not necessarily subscribed to, by Professor Bjorklund. Bjorklund, *infra* at 175. While Alan Rau professes little interest in the supposed tension between arbitrators as "servants of the parties" (i.e., the contract model) and as persons concerned with "the public interest" (i.e., the jurisdictional model), he concedes that if forced to choose, he would choose the former. *See also* Rau, *infra* at 51.

²⁹ *See, e.g.,* Sheppard, *infra* at 121.

applied.³⁰ Alan Rau counsels arbitrators to pay special heed not only to the mandatory rules of law of the situs (see above), but also to those of the jurisdictions where the eventual arbitral award is likely to be brought for enforcement,³¹ an admonition energetically joined in by others.³² Alexander Greenawalt goes furthest, floating what he calls the “maximal option,” according to which all mandatory rules of law should be applied (though only of course within their proper scope of application), whatever their source, provided the agreement between the parties has not excluded their application.³³ This is a rather extreme position; even the adventurous Rome Convention³⁴ made the forum’s application of a third state’s mandatory rules of law essentially discretionary.³⁵

If we were to judge by the frequency with which *national courts* in civil litigation enforce the mandatory rules of law of third countries, the prospects for *arbitral tribunals* actually taking the step of applying a mandatory rule of country C would not seem to be very great. Bernard Audit finds it to be the rare case indeed that a national court takes that step; indeed he can find no national court decision actually employing Article 7.1 of the Rome Convention – the provision that invites national courts to do just that.³⁶ Hannah Buxbaum expresses much the

³⁰ Shore, *infra* at 96 (making special reference to the “legitimate expectations” of the parties). In this, Shore invokes the support of Marc Blessing and the latter’s influential article, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14(4) J. INT’L ARB. 23, 28-33 (1997) (setting out six criteria). See also Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELBOURNE J. INT’L L. 205, 227-35 (2005). Barraclough and Waincymer advocate taking no fewer than eight separate factors into account, including concern for the enforceability of the award, the closeness of the connection between the dispute and the State whose mandatory law is under consideration, the universality of the norm, the degree of importance of the norm to the enacting State, and the norm’s appropriateness to the situation.

Andrea Bjorklund regards it as “well-accepted that arbitral tribunals do have the authority to apply mandatory laws,” but concedes that the tribunal’s decision whether to exercise that authority “depends on the circumstances.” Bjorklund, *infra* at 175.

³¹ Rau, *infra* at 51.

³² See *id.* Shore, *infra* at 91.

³³ Greenawalt, *infra* at 103. Note that this very proposition implies that there are at least some mandatory rules of law whose application the parties have the right to exclude.

³⁴ See note 18 *supra* and note 35 *infra*. As noted, *supra* note 18, the European Union in June 2008 adopted a Regulation based heavily on the Rome Convention.

³⁵ According to Article 7.1 of the Convention, “... effect *may* be given to the mandatory rules of law of another country ...” (emphasis added). Note that when the European Union in June 2008 adopted a Regulation on the basis of the Rome Convention (see note 18 *supra*), it retained the discretionary “may” (Art. 9.3).

³⁶ See *generally* Audit, *infra* at 37. In fact, the Rome Convention allows ratifying States to opt out of Article 7.1 upon ratification, and several (including Germany and the U.K.) did so.

Article 7.1 of the Rome Convention (*supra* note 18) reads in full as follows:

same view, tracing the rarity of such cases to a range of factors including, among others, both the difficulty of confidently identifying a third country's "truly" mandatory rules of law and the prevalence of the so-called "public law taboo," according to which courts need not and indeed should not entertain legal actions by which a foreign government seeks to assert its sovereign interests in another country's courts.³⁷

There is certainly nothing in the new 2008 European Regulation on the Law Applicable to Contractual Obligations,³⁸ replacing for the EU the 1980 Rome Convention, to suggest that this pattern will change. Worth noting is the fact that the Regulation gives some "mixed signals" as to the scope of the mandatory rule

When applying under this Convention the law of a country, effect may be given to the mandatory rules of law of another country with which the situation has a close connection, if and insofar 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.

(Emphasis added). However, Article 3.3 defines mandatory rules as "rules ... *which cannot be derogated from by contract*" (emphasis added). The two italicized formulations reflect the two different renditions of mandatory rules of law set out above. (See notes 1-6 *supra* and accompanying text.)

The analogue to Article 7.1 of the Rome Convention is Article 9.3 of the 2008 EU Regulation on the subject (*supra* note 18). Article 9.3 reads:

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.

The analogue to Article 3.3 in the new Regulation is Article 9.1, which defines "overriding mandatory provisions" as: "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" (emphasis added). Note that the Regulation now consistently defines mandatory rules as ones that are applicable, notwithstanding the law otherwise applicable to the contract. No further reference is made to "rules which cannot be derogated from by contract."

³⁷ Buxbaum, *infra* at 21. Part of the problem, according to Buxbaum, is the absence of meaningful, workable and predictable criteria for differentiating between those mandatory laws of a foreign state worthy of enforcement by the forum and those unworthy of forum enforcement.

³⁸ See note 18 *supra*. Note that the U.K. and Denmark, acting pursuant to existing Protocols to the Treaty Establishing the European Community and the Treaty on European Union, have exercised their option not to participate in the adoption of the Regulation and are neither bound by nor subject to it. See Recitals 45 and 46 in the Preamble to the Regulation.

of law exception in choice of law. On the one hand, Article 9.3 of the Regulation – the closest counterpart to Article 7.1 of the Convention – could be construed as limiting the freedom of Member State courts to apply the mandatory rules of States other than the forum or the State whose law is the “otherwise applicable” law. This is because in place of Article 7.1’s reference to “the mandatory rules of law of *another country with which the situation has a close connection*” (emphasis added), Article 9.3 of the Regulation invites the forum to apply only “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” (emphasis added). Not only does the provision cite only the country of the place of performance (rather than simply “another country”) as the source of mandatory rules, but the mandatory rule must be one that renders performance of the contract unlawful. On the other hand, other provisions of the Regulation – such as Article 3³⁹ – speak in much broader terms. Moreover, several recitals in the Preamble to the Regulation suggest that States may indeed apply mandatory rules of law of countries other than the country of the place of performance.⁴⁰ The European Court of Justice will certainly have occasion to bring some clarifications to the matter.⁴¹

³⁹ Article 3 (captioned “Freedom of choice”) reads in part as follows:

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

⁴⁰ Recital 15 in the Preamble speaks in much broader terms:

Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement.

Even broader is scope is Recital 20:

Where the contract is manifestly more closely connected with a country other than that indicated [as the presumptive “otherwise applicable” law] in Article 4(1) or (2) [of the Regulation], an escape clause should provide that the law of that other country is to apply.

Recital 37 speaks in general terms of applying “public policy” norms and “overriding mandatory provisions,” without restricting the jurisdictions whose norms or provisions may thereby be applied:

Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.

An addendum to Recital 37 states cryptically that “[t]he concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively.”

⁴¹ Complicating matters still further is Article 21 of the new Regulation, according to which “[t]he application of a provision of the law of any country specified by this

But perhaps international commercial arbitrators will prove not to be as cautious as national judges when it comes to enforcing the mandatory rules of law of countries other than the arbitral situs or the country of the applicable law. One need not adopt a full-bodied “a-national” theory of international arbitration in order to recognize the simple fact that international arbitrators have a lesser degree of obligation as decisionmakers to any given State and, consequently, may prove more receptive to the mandatory law claims of third countries.⁴²

One reason why international arbitrators may find themselves headed in this direction is that, as keenly observed by Alexander Greenawalt, arbitration clauses often sweep considerably more broadly than the choice-of-law clauses that are found in the very same contracts.⁴³ The fact that an arbitration clause vests arbitrators with decisional authority over a significantly broader set of claims than those encompassed in a more narrowly drawn choice-of-law clause may entitle the arbitrators to entertain claims arising out of the mandatory rules of law of a State other than the one whose law was chosen for the determination of contract-based claims. As Greenawalt points out, this is precisely the pathway to which the United States Supreme Court was pointing in its seminal *Mitsubishi* decision,⁴⁴ where the Court felt comfortable assuming that the arbitrators sitting in Tokyo would read the arbitration clause broadly enough to encompass claims arising out of the U.S. antitrust laws, while reading the choice-of-law clause designating Swiss law narrowly enough to apply to contract and contract-based claims only. As Alan Rau rightly asks, “Why should we conclusively presume that the law that may govern the performance of the substantive terms of [the parties’] bargain tells us everything we need to know about the merits of ... extra-contractual causes of action?”⁴⁵

VII. MANDATORY RULES OF A THIRD COUNTRY AS “DATUM”

In searching for the place of mandatory rules in international arbitration, one should not overlook the fact that courts in many jurisdictions manage to “give effect” to the mandatory rules of law of third countries, not by applying them directly, but by treating those rules basically as data – facts, really – for purposes of applying legal principles drawn from the law that the parties in fact chose. A

Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.”

⁴² Audit rightly observes that, by comparison with international arbitrators, national judges are simply “not neutral” as regards mandatory rules of law. Audit, *infra* at 37.

⁴³ Greenawalt, *infra* at 115 (“[A]rbitrators facing [a] standard pairing of a broad arbitration provision with a narrow choice-of-law clause need not limit their consideration of mandatory rules to those arising under the parties’ chosen contractual law”).

⁴⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). For further discussion of *Mitsubishi*, see Smit, *infra* at 155.

⁴⁵ Rau, *infra* at 65, citing FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 859-60 (Emmanuel Gaillard & John Savage eds., 1999).

classic example of merely “tak[ing] into consideration” foreign mandatory law⁴⁶ arises when a court of country A, consonant with its choice-of-law rules (or with a choice of law made by the parties), applies the law of contracts of country B (including its prohibition on the enforcement of contracts that are illegal in the place of performance), but then looks to the law of country C to determine whether performance would in fact be illegal in country C, inasmuch as country C would be the place of performance.⁴⁷ Country A without doubt thereby “gives effect” to the mandatory rules of country C, without however “applying” or “enforcing” the law of any jurisdiction other than B, the proper law of the contract. The distinction between “applying” a third country’s mandatory rules of law, on the one hand, and “merely taking that country’s mandatory rules of law into account,” on the other, is a subtle one. The fact remains that in this fashion much can be accomplished by way of effectuating the fundamental public policies of third countries.⁴⁸ There is no reason to suppose that this technique will be any less appealing to international arbitrators than it appears to be to national judges.⁴⁹

VIII. MIGHT MANDATORY RULES OF LAW, BY THEIR NATURE, BE NON-ARBITRABLE?

At one point or another, we stumble upon the following paradox. The very values that may be considered so fundamental as to impose themselves (irrespective of the otherwise applicable law) on a decisionmaker as a mandatory rule of law may also be considered so fundamental that their enforcement should be reserved for national courts of the country that established that mandatory rule and withheld from international arbitral tribunals.⁵⁰ This brings us to the question of “arbitrability” in the narrow sense of the term, viz. the question whether a claim is one that, by virtue either of express statutory language or the nature of the cause of action itself, should be deemed actionable only in a court of law of the enacting State and not in arbitration. Some commentators, like Hans Smit, believe that arbitrators should not entertain claims arising under mandatory rules of law, on

⁴⁶ Audit, *infra* at 44.

⁴⁷ See Greenawalt, *infra* at 103; see also Shore, *infra* at 91, citing Pierre Mayer, *supra* note 1.

⁴⁸ Rau offers as an example the case of *Northrop Corp. v. Triad Int’l Marketing S.A.*, 811 F.2d 1265 (9th Cir. 1987).

⁴⁹ As Professor Kessedjian observes, arbitrators may find it more palatable to “give effect” to third countries’ mandatory laws than to “apply” them. Kessedjian, *infra* at 147.

⁵⁰ See Smit, *infra* at 155, exploring this traditional view. Of course, claims based on mandatory rules of law were not only considered “off-limits” to arbitral tribunals; they were also considered off-limits to national courts of countries other than the country that enacted the mandatory rule. Audit, *infra* at 45, invokes “the ancient principle that a court shall not enforce the public laws of another State,” citing DICEY, MORRIS & COLLINS, *THE CONFLICT OF LAWS* (14th ed. 2006) (Rule 3: “The exclusion of foreign law”). On the so-called “public law taboo,” see Buxbaum, *infra* at 21; William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L. J. 161 (2002).

the view that claims of that kind require decisionmakers such as national judges who are unquestionably committed to, and capable of, a proper interpretation and application of such laws (particularly of course when the mandatory law in question is a law of the jurisdiction to which the judge belongs).⁵¹ Yet we know from the unswerving *Mitsubishi* line of cases⁵² that this is decidedly not the position that the United States Supreme Court has adopted on this question. Under the Court's steady jurisprudence, virtually all non-penal statutes appear to be eligible for arbitral enforcement.⁵³ The law in many other countries is equally, if not more, pro-arbitration in this regard.

But even if a court in the United States or elsewhere were to hold that a particular cause of action is non-arbitrable in this sense, that is unlikely to keep arbitrators from "taking account" of the legislation as a datum in their consideration of cases otherwise coming before them. It is entirely possible for an arbitral tribunal (if it comes to that) to decline to adjudicate directly a statutory claim on behalf of the claimant, without necessarily having to ignore the existence of the underlying statute when adjudicating a cause of action that is properly before it and to which the statute might bear some relevance. The best example, once again, is a tribunal's willingness to entertain a defense of illegality to a contract claim based upon a piece of foreign mandatory legislation that the tribunal would not, however, itself directly enforce through an action based on that legislation. That is how I would reconcile the non-arbitrability of a particular statutory claim with the notion that the statute nevertheless constitutes mandatory law for the arbitrators. It is just that the statute would not have mandatory application under all circumstances.

⁵¹ Smit, *infra* at 155. Professor Smit sets forth a variety of reasons (among them the arbitrators' flexibility in choice of law, the lack of requirement of arbitral reasoning and the absence of judicial review) that render arbitral tribunals significantly inferior to national courts as interpreters and appliers of mandatory rules of law and raise the risk of "arbitral misapplication or non-application of properly applicable mandatory law." He concludes that "mandatory law issues should not be arbitrated and the [arbitration should be] limited to claims and defenses based on non-mandatory law." *Id.* at 168. Moreover, when mandatory law is pleaded as a defense in arbitration to a claim based on non-mandatory law, "the arbitrators should reject the defense and refer the party asserting the defense to the normally competent court." *Id.* at 169. Thus arbitrators would be precluded from ruling on issues of mandatory law either as the basis of a cause of action or as the basis of a defense.

⁵² See, in particular, Smit, *infra* at 155.

⁵³ This is not to say that the U.S. Congress could not intervene to provide statutorily that claims arising out of one or more important pieces of federal legislation, or categories of pieces, shall not be subject to arbitration, but rather reserved to a judicial forum.

IX. MUST ARBITRATORS INITIATE THE APPLICATION OF A THIRD COUNTRY'S MANDATORY LAWS?

If ever international arbitrators should feel obliged to apply a mandatory rule of law of a third country, must they do so on their own initiative, that is, even if neither party has called upon them to do so? It is, in my view, far from established that national courts are bound *ex officio* to identify and apply the mandatory rules of law of a jurisdiction other than the forum and other than the jurisdiction whose law is the proper law of the contract. If national courts may leave to the parties the burden of adducing the mandatory rules of law of third countries, it is difficult to see why international arbitrators should not feel free to do so as well.

Those contributors who addressed the issue in this symposium seem to concur. They would appear to go no further than to *permit* arbitrators to raise third countries' mandatory rules *sua sponte*, and would stop short of requiring that they do so,⁵⁴ though that may not be a universally held view.⁵⁵

X. MANDATORY RULES OF "INTERNATIONAL LAW" ORIGIN

Up to now, I have been envisioning the possibility of arbitrators applying mandatory rules deriving solely from domestic law – be it the law of the situs, the proper law of the contract, or the law of a third country. In international arbitration, however, the question is bound to arise whether arbitrators may and possibly must give effect to mandatory rules deriving from international law. (By international law, I mean norms created not by a State acting alone, but rather via conventions, resolutions, enactments of international bodies of various sorts,⁵⁶ or the consistent enough practices of a sufficient number of States acting out of some sense of obligation so as to give rise to norms of customary international law.⁵⁷)

International law's eligibility as a source of mandatory law should be a non-question in those legal systems that directly incorporate international law into their domestic law, for then mandatory rules of international origin will

⁵⁴ See Sheppard, *infra* at 121, Shore, *infra* at 91.

⁵⁵ Marc Blessing has acknowledged that Article 7.1 of the Rome Convention (*supra* notes 18, 36) states that a court merely "may" give effect to mandatory rules *ex officio*, but opines that it will feel it has a duty to do so in some fields, such as competition law, citing several ICC awards (Case No. 7181 (1992), Case No. 7315 (1992), Case No. 7539 (1996)). Blessing, *supra* note 30, at 35-38.

⁵⁶ Kessedjian, *infra* at 147.

⁵⁷ Customary international law would by definition include any norms that qualify as *ius cogens*. *Id.* Laurence Shore raises the prospect of the UNIDROIT Principles giving rise to international mandatory law. Shore, *infra* at 91. However, the UNIDROIT Principles contain few provisions that could possibly rise to the level of mandatory law. I would say the same of *lex mercatoria*, though the principle of good faith is an example of one that certainly might. See Kessedjian, *infra* at 147.

automatically constitute mandatory rules of law within the domestic legal order.⁵⁸ It should also be a non-issue to the extent that the parties have adopted international law as the governing law of the contract – something they may do either directly (as by an appropriately phrased choice of law clause) or indirectly (by opting for ICSID arbitration without a designated choice-of-law).⁵⁹

An interesting question, not fully explored in the articles that follow, is the extent to which mandatory rules of law of international origin impose themselves above and beyond the law chosen by the parties, even when the chosen law does not expressly embrace international law and international law has not otherwise – directly or indirectly – been adopted by the parties as governing.⁶⁰ As Kessedjian and Donovan both show, support is emerging both in international arbitral practice and in the literature for recognition of at least some mandatory principles denominated international or (to more clearly signify their binding effect in relations between private parties) “transnational.”

XI. THE SPECIAL CASE OF INVESTOR/STATE ARBITRATION

What of the increasingly important realm of investor/state arbitration, particularly the sort that arises not out of an arbitration clause found in a concession or other State contract, but rather out of a bilateral investment treaty or a regional organization treaty containing investor protection provisions? Intuitively, mandatory rules have no place in that realm since such disputes are presumptively governed exclusively by the international law principles that the treaty embodies (e.g. national treatment, fair and equitable treatment, protection from expropriation without prompt and adequate compensation) – principles that we tend to think of as having their own independent treaty-based existence.⁶¹ These are the principles that govern investor/state arbitrations of this type, whether we term them mandatory or not. Moreover, in treaty-based arbitrations – in which obligations by definition flow from an international undertaking – a State should not be allowed to invoke either its own national law (or indeed the law of another country, however mandatory) so as to escape those obligations.⁶²

Andrea Bjorklund nevertheless demonstrates that, for a variety of quite different reasons, mandatory rules of law may enter importantly into consideration in investor/state arbitration. For example, even investment treaties require interpretation, and mandatory rules of law may emerge as aids to the

⁵⁸ Kessedjian, *infra* at 147.

⁵⁹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID), Art. 42.

⁶⁰ Professor Kessedjian would distinguish from “international” mandatory norms a separate category of “transnational” mandatory norms – norms that may be drawn from such private law sources as the *lex mercatoria*, an example being the principle of “good faith” (codified in Article 1.7 of the UNIDROIT Principles of International Commercial Contracts).

⁶¹ Bjorklund, *infra* at 175.

⁶² Donovan, *infra* at 205.

understanding of treaty rights and obligations. We may also expect to find that some of the incidental issues that are bound to arise in investment arbitration – for example, norms governing access to information, environmental laws, or foreign exchange control regulations – potentially implicate a country’s mandatory rules of law.⁶³

Even Donald Donovan, who is more skeptical about the utility in investor/state arbitration of the notion of mandatory rules, envisions situations in which the outcome of an investment dispute may be altered on account of a powerful rule of law that is fully external to the investment treaty. Such an outcome-determinative rule, external to the treaty regime, may flow from other treaty obligations,⁶⁴ from a notion of “transnational public policy,”⁶⁵ or even from a mandate of national law.⁶⁶ Donovan is right to question whether a tribunal’s application of such external norms is truly an “override” of the otherwise applicable law. Might it still not represent nothing more than application of the norms that the “otherwise applicable law” (international law) itself chooses to treat as legally relevant?⁶⁷

XII. WAIVER OF MANDATORY RULES

I raised earlier the possibility that a rule of law might be deemed mandatory by a court or arbitral tribunal, in the sense of being applicable irrespective of the forum’s ordinary choice-of-law rules, and still possibly be the subject either of an agreement between the parties to the contrary or of waiver or acquiescence. (It is,

⁶³ Bjorklund, *infra* at 175. Bjorklund of course further observes that some investment arbitrations are contract-based rather than treaty-based, and that the transaction will therefore be subject not only to the *lex causae* but potentially to the mandatory laws of third countries. Moreover, respondent States may interpose counterclaims or setoffs in an investment arbitration that, in the view of those States at least, implicate their own mandatory rules of law.

⁶⁴ Donovan imagines, by way of example, a State defending its violation of an investment treaty obligation by invoking a United Nations Security Council resolution combating piracy on the high seas. Donovan, *infra* at 205.

⁶⁵ In the *World Duty Free* case, ICSID Case No. ARB/00/7 (Oct. 4, 2006), discussed by Donovan, *infra* at 205, the tribunal found that both the relevant national laws (English and Kenyan) and transnational public policy forbade the assertion of claims based on contracts procured by bribery or corruption, and so the outcome would be the same under both sets of norms. Donovan is correct in suggesting that even if it were necessary to rely on transnational public policy to justify the outcome, that “move” could be considered as an application of international law, and thus not an override of the otherwise applicable law. Much the same is true of the case of *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (Aug. 2, 2006), also discussed by Donovan, *infra* at 205.

⁶⁶ Donovan, like Bjorklund, envisions that mandatory rules of national law on issues such as property rights could enter into consideration in investor/state arbitration and even prove outcome-determinative. *Id.*

⁶⁷ *Id.*

as I have noted,⁶⁸ much more difficult to imagine contracting around a mandatory rule, or deeming it waived, when mandatory rules are defined as ones from which the parties actually lack the power to derogate.) Uncomfortable though the notion of waiving, or agreeing to displace, a mandatory rule may be, the possibility should not be categorically excluded. Audley Sheppard gives the example of Article 6 of the European Human Rights Convention, guaranteeing the right to a fair hearing.⁶⁹ Article 6 may well be mandatory in the sense of binding on courts and arbitral tribunals, but that does not in itself mean that under no circumstances may the parties contract otherwise or waive the protections of the rule. To be sure, the European Court of Human Rights may need to be fully convinced that the agreement or waiver was both knowing and unequivocal before honoring it, but that goes more to the standard of proof of party agreement or waiver than to its permissibility.⁷⁰

XIII. CONCLUSION

Where arbitrators have been left free of any choice of law by the parties, most institutional rules invite the arbitrators to apply the law they deem most appropriate (if only by way of consulting the choice-of-law principles they deem most appropriate). This, it seems to me, places arbitrators in an enviable position so far as their freedom to bring mandatory rules of law to bear is concerned. Unlike national judges, they do not – in the absence of a choice of law by the parties – have an “otherwise applicable law” the override of which they obviously must be able to justify. They therefore may (and indeed should) apply any relevant mandatory laws of the arbitral situs, inasmuch as the parties may properly be deemed to have subjected themselves to those laws by directing that an arbitration be conducted on the territory of one State rather than another. But the latitude of the arbitrators in identifying the applicable law (or laws) also enables them, in their discretion, to bring to bear mandatory rules of law having other sources, such as foreign (i.e. third country) or international law. To consider them as precluded from doing so would be contrary not only to the generalized flexibility inherent in arbitration, but to the fact that the parties evidently saw fit, in an exercise (or non-exercise) of party autonomy, to refrain from designating an applicable law.

⁶⁸ See notes 1-6 *supra* and accompanying text.

⁶⁹ Sheppard, *infra* at 121.

⁷⁰ So too, as Bjorklund points out, States may waive (presumably mandatory) principles of customary international law vis-à-vis one another, provided they clearly enough express their agreement to do so. Bjorklund, *infra* at 175.

For further examples of the possible waiver of mandatory laws – even mandatory laws of the law that the parties had chosen – see Audit, *infra* at 49 (“A court may find that in [deviating from mandatory rule of the chosen law on a given point] the parties intended to derogate from their own choice-of-law on the specific point, basing its decision on ‘substantive party autonomy’ in international transactions”).

The presence of a choice-of-law provision unquestionably changes the calculation. International arbitrators do well to remember that, at least as a matter of principle, their authority to conduct the arbitration in the first place derives from party agreement, and that they should accordingly apply to the dispute before them the law, if any, that that same agreement instructs them to apply. But when, on the margins of applying that law (including of course that law's own mandatory rules), may arbitrators also apply mandatory rules of law emanating from other authorities? As seemed likely to us from the outset, that question does not lend itself to easy answers. Rather, reflection suggests that arbitrators should instead ask themselves a series of questions foreshadowed in the preceding pages and meaningfully explored in the articles that follow.

For example, may the choice-of-law clause be understood as governing a relatively bounded range of issues (issues of contract construction or breach, for example), thus leaving over issues, claims and even causes of action as to which it may be only appropriate to apply the mandatory rules of law emanating from a different source? Might it not only be possible, but in fact appropriate, to invoke the mandatory rules of one jurisdiction as a relevant datum in applying the law of the jurisdiction whose law was chosen or is otherwise applicable? May mandatory rules of international law origin make their way into the body of applicable law because the applicable law can be said, in one way or another, to have embraced or at least invited them? Would disregard of the mandatory laws of a jurisdiction where an eventual award is bound to be brought for enforcement so imperil the validity and efficacy of the award as to make it unthinkable that the parties, who after all invited the arbitration, meant for those mandatory laws to be disregarded? Does a jurisdiction other than the one whose law the parties chose possibly have such a weighty and obvious interest in having its mandatory rules of law applied to the case at hand that the parties may be treated as if they authorized – or at least would not object to – their application? And, are there some precepts that embody values – such as human dignity or good faith – so profoundly important to society (i.e. so international or transnational) that arbitrators simply cannot be expected to leave them out of consideration?

Asking all these questions (and possibly others) is useful not only because it assists in deciding what to do with rules of law that are ostensibly mandatory, but because doing so also demonstrates how far a court or arbitral tribunal can go in giving effect to such laws without necessarily overriding the parties' choice of law. The proposition is put emphatically by Donald Donovan:

[M]any of the situations that are discussed as applications of mandatory rules are in fact situations in which the rules are applied without in any way overriding the parties' choice, either because the arbitration clause encompasses disputes that the governing law clause does not encompass; because the chosen law itself

requires consideration of the rules, mandatory or not, of another legal system; because an unchosen national law constitutes, in effect, an underlying fact ...; or because the conflict of laws rules of the chosen law, if not excluded, require application of the mandatory rules of another legal system.⁷¹

Of course, if arbitrators go too far in manipulating the chosen law in these and other ways so as to justify enforcing mandatory laws derived from other sources, they could well run afoul of their basic mandate, which is to effectuate the intent of the parties as to the law to be applied to their transaction. Of this, international arbitrators should be mindful whenever called upon by a party to apply one or another legal norm that happens to be deemed mandatory in the legal system to which it is attached.

⁷¹ Donovan, *infra* at 205.