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PUBLIC POLICY NORMS AND CHOICE-OF-LAW METHODOLOGY ADJUSTMENTS IN INTERNATIONAL ARBITRATION

*Hossein Fazilatfar**

ABSTRACT

Arbitration agreements draw the legal relationship not only between the parties but also are the contractual source of authority for arbitrators to resolve parties' dispute. To respect the principle of party autonomy, arbitrators must serve parties' will and consider their interests in issuing the arbitral award. However, there is one caveat: respect public policy norms of the states that have an important stake in the outcome of the arbitration. Indeed, application of public policy norms in international arbitration is a challenge due to their mandatory character. The law chosen by the parties, or the otherwise applicable law chosen by the tribunal is where the first and foremost public policy norms must be applied and respected. The limitations would be overriding public policy norms of the place of arbitration on the issue of arbitrability and such procedural norms of the place of arbitration over the procedural aspect of the arbitration. Another overriding public policy norms possibly involved (that may override parties' choice of law) are those of the foreign states to the chosen law and to the *Lex arbitri*, which have a close connection to the case, such as places of enforcement of the award and performance of the transaction. This Article suggests that in addition to the traditional conflicts methods of determining the applicable law, arbitrators could make adjustments in approaching public policy norms in arbitration. Arbitrators do not have to necessarily reject application of public policy norms, in particular ones with an overriding character or directly applicable in disputes. Possibly, they have the option to apply the applicable norm to particular issues in the dispute (*dépeçage*) or award and respect party autonomy in all other aspects of the case. This may be done *ex officio* or through mediation within the arbitration process conducted by the same arbitrator most familiar with the dispute, with active participation of the parties.

INTRODUCTION

Public policy norms present scenarios that complicate choice of law determinations for arbitrators in international arbitration.¹ This complexity generally derives from the imperative nature of such norms and the unique position of arbitrators as private adjudicators, compared to judges.² Arbitration, whether domestic or international, provides a venue for contracting parties to govern, quite freely, the resolution of their disputes by appointing experts in the field to act as arbitrators, choosing the applicable law to their interest (or leaving it for the arbitrators to decide), and by selecting or designing the procedure according to which the resolution of the dispute should take place whether ad hoc or institutional.³

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¹ See Pierre Mayer, *Mandatory Rules of Int'l Arb.*, 2 *Arb. Int'l* 274, 276 (1986).

² See George A. Bermann, *The Origin and Operation of Mandatory Rules*, 18 *Am. Rev. Int'l Arb.* 1, 2 (2007); Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in Int'l Arb.*, 14 *J. Int'l Arb.* 23, 27 (1997).

³ See Yeshnah D. Rampall and Ronán Feehily, *The Sanctity of Party Autonomy and the Powers of Arbs. to Determine the Applicable L.: The Quest for an Arbitral Equilibrium*, 26 *Harv. Negot. L. Rev.* 345, 348 (2018).

Indeed, limitations apply when parties' private interests become so entangled with states' public interests. The arbitrator being appointed by the parties has the duty to resolve the conflict of interest before her. On the one hand, she gains her authority from the parties, and on the other hand there are public policy norms external to her source of authority (the arbitration agreement) that claim application; this is because the public policy behind them is potentially at risk.⁴ Also, the arbitrator should aim to resolve the conflict between the states that their public policy norms are at stake and may claim application at different stages of arbitration.⁵

Thus, due to the principle of party autonomy, she must first respect the parties' choice in any decision they make.⁶ Second, she has to assure that at the end of the proceedings, her award is in line with public policy of the place of arbitration to avoid annulment and in accord with public policy of the potential place(s) of enforcement to avoid refusal of enforcement by those courts.⁷ Third, in addition to the question of whether arbitrators should apply public policy at all, the question of what criteria should arbitrators take into account in applying such norms must be considered. Finally, if there is a conflict between the applicable public policy norms, then dispute resolution becomes even further complicated for the arbitrator. This challenging issue in arbitration is not addressed in the main arbitration conventions such as the New York Convention (1958) or the Geneva Convention (1961).⁸ In practice, however, public policy norms are a challenge for arbitrators. There is an abundance of academic literature that have proposed solutions in dealing

⁴ Although there are distinctions regarding public policy and mandatory rules in theory, in this Article they are used interchangeably. See Hossein Fazilatfar, *Overriding Mandatory Rules in Int'l Com. Arb.* 26-29 (Edward Elgar Pub. 2019) (discussing distinctions and interplay between mandatory rules and public policy).

⁵ See *infra* Part II.

⁶ See *infra* Part I.

⁷ See Art. V. 2(b) and V. 1(e) of the NY Convention, respectively.

⁸ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958); European Convention on International Commercial Arbitration (Geneva Convention of 1961).

with such norms both in litigation and arbitration.⁹ These solutions tend to address public policy norms from both the contractual and jurisdictional nature of arbitration or a hybrid of both.¹⁰

However, this article approaches public policy norms from a conflict of laws perspective by applying *dépeçage* to the transaction on their own initiative or through a multitier alternative dispute resolution (ADR) mechanism. Part I discusses the contractual source of authority of the arbitrator in applying the law applicable to the dispute, which is chosen by the parties and followed by a discussion on party autonomy. It further addresses the jurisdictional aspect of arbitration, the link between general mandates and concerns of an arbitral tribunal with regard to the enforcement of their awards, and laws that are overridingly mandatory and foreign to their source of authority. Part II shifts the discussion to the approaches taken by arbitral tribunals in practice when dealing with public policy norms applicable to the merits of a dispute and the methods of determining the applicable law in arbitration. Parts III and IV, respectively, analyze the roles that public policy norms of the *lex arbitri* (place of arbitration) and those foreign to the law chosen by the parties

⁹ See e.g., Zeller, B., Mohanty, G., Garimella, S.R. (2021). The Law on the Public Policy Exception in International Arbitration—State Practice in South Asia. In: Enforcement of Foreign Arbitral Awards and the Public Policy Exception. Springer, Singapore. https://doi.org/10.1007/978-981-16-2634-0_5; Jan Kleinheisterkamp, The Myth of Transnational Public Policy in International Arbitration, *Am. J. Comparative L.* (In press 2021); Symposium articles on Overriding Mandatory Provisions in Private International Law and Arbitration, 1 *ELTE Law Journal* (2020) available at https://eltelawjournal.hu/wp-content/uploads/2020/12/ELJ-2020-1_WEB.pdf; Jean-Michel Marcoux, Transnational Public Policy as an International Practice in Investment Arbitration, 10 (3) *Journal of International Dispute Settlement* 496 (2019); Hossein Fazilatfar, OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION (Edward Elgar Publishing 2019); Ibrahim Mohamed Nour Shehata, Application of Overriding Mandatory Rules in International Commercial Arbitration: An Empirical Analysis, 11 *World Arbitration and Mediation Review* 383 (2017); Meng Chen, Empirical Research on Mandatory Rules Theory in International Commercial Arbitration, 19 *Int'l Trade & Bus. L. Rev.* 245 (2016); Josh B. Martin, Contractualists Versus Jurisdictionalists: Who Is Winning the Mandatory Law Debate in International Commercial Arbitration? 27 *Am. Rev. Int'l Arb.* 475 (2016); Fifi Junita, Public Policy Exception in International Commercial Arbitration – Promoting Uniform Model Norms, 5(1) *Contemp. Asia Arb. J.* 45 (2012); Allen B. Green and Josh Weiss, Public Policy and International Arbitration in The European Union, 22 *Am. Rev. Int'l Arb.* 661 (2011); Christopher S. Gibson, Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law, 113 (4) *Penn State L. Rev.* 1227 (2009); Jan Kleinheisterkamp, The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements, 3(2) *World Arbitration & Mediation Review* 91 (2009); Jeff Waincymer, International Commercial Arbitration and the Application of Mandatory Rules of Law, 5 *Asian Int'l Arb. J.* 1, 38 (2009); See also edited versions of number of papers delivered at a colloquium on Mandatory Rules of Law in International Arbitration held at Columbia Law School in June 2007 in *MANDATORY RULES IN INTERNATIONAL ARBITRATION* (George A. Bermann and Loukas A. Mistelis eds.) (Juris 2011), originally published in Vol. 18, issues 1-2 of *The American Review of International Arbitration* (2007); Andrew Barraclough, and Jeff Waincymer, Mandatory Rules of Law in International Commercial Arbitration, 6 *Melb. J. Int'l. L.* 205 (2005); Homayoon Arfazadeh, In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception, 13 *Am. Rev. Int'l Arb.* 43 (2002); Andrew T. Guzman, Arbitrator Liability: Reconciling Arbitration and Mandatory Rules, 49 *Duke L. J.* 1279 (2000); Marc Blessing, Mandatory Rules of Law versus Party Autonomy in International Arbitration, 14 *J. Int'l Arb.* 23 (1997); Nathalie Voser, Mandatory Rules of Law as a Limitation to the Law Applicable in International Commercial Arbitration, 7 *Am. Rev. Int'l Arb.* 319 (1996); Serge Lazareff, Mandatory Extraterritorial Application of National Law, 11 *Arb. Int'l* 137 (1995); Mohammad Reza Baniassadi, Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration, 10 (1) *Berkeley J. Int'l L.* 59 (1992); Pierre Mayer, Mandatory Rules of Law in International Arbitration, 2 *Arb Int'l* 274 (1986).

¹⁰ See generally Josh B. Martin, Contractualists Versus Jurisdictionalists: Who Is Winning the Mandatory Law Debate in International Commercial Arbitration? 27 *Am. Rev. Int'l Arb.* 475 (2016). See also Hossein Fazilatfar, International Arbitration and the Mandatory Law Problem: A Mixed Mode ADR Approach, 33 (3) *Am. Rev. Int'l Arb.* (Forthcoming Winter 2022), at Part II.

(often norms of the place of enforcement and performance) play in determining the applicable law. Part V suggests that arbitrators should be flexible in coping with public policy norms. No rigid formula can provide an appropriate solution in dealing with norms of such multidimensional nature in international trade, especially in a venue such as arbitration. Finally, this article states that in addition to other legally based solutions from the literature and practice of arbitration, another solution that can be applied by arbitrators is a conflicts adjustment to determine the applicable law. *Dépeçage* is a concept rooted in conflict of laws where different bodies of law may be applied to different parts or issues in an international transaction.¹¹ Arbitrators, when appropriate, could on their own initiative apply the concept to the transaction before them rather than excluding an overriding public policy norm from application. *Dépeçage* could also be applied through a more collaborative method: a mixed mode alternative dispute resolution (ADR) mechanism where parties and the arbitrator will actively negotiate and mediate application of *dépeçage*. An arbitral award based on party consent would be the result of the mixed mode processes.

I. AUTHORITY AND MANDATE IN DETERMINING THE APPLICABLE LAW

Party autonomy, the mandate to issue an enforceable award, and the mandate to protect the integrity of arbitration are the sources of an arbitrator's authority and points of concern when it comes to the law applicable in international arbitration.

A. PARTY AUTONOMY: THE CHOICE-OF-LAW CLAUSE IN ARBITRATION

Arbitration is contractual in nature and as a private dispute resolution mechanism begins with the will of the parties like any other contract.¹² The arbitration agreement confers power to a tribunal to arbitrate a particular dispute. Therefore, any decision made by the tribunal on its composition, jurisdiction, and issues with regard to scope, remedies, and of course the applicable law ought to be in accord with the arbitration agreement. This all derives from the principle of party autonomy, well recognized in arbitration, however not limitless.¹³

¹¹ See *infra* Part V.

¹² See *AT&T Techs., Inc. v. Commo'n's Workers of Am.*, 475 U.S. 643, 648-49 (1986) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.” (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”); *Volt Info. Scis., Inc. v. Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“[A]rbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”). See also Hossein Fazilatfar, *In Defense of Separability: Pima Paint, Buckeye, & Rent-A-Center*, 54 (2) TEX. TECH L. REV. (Forthcoming Spring 2022).

¹³ It has been emphasized that there are only a few principles well recognized in private international law, including the principle “according to which the law of the contract is the law chosen by the parties,” see ICC Case No. 1512 (*Preliminary Award*) in 1 Y.B. of Com. Arb. (1971) at 128-9. However, there are limitations to the principle. For example, Maniruzzaman states: “Although the parties’ freedom of choice is a general principle, it should operate within the limits imposed by such equally important general principles of law or subject to any restraint of public policy.” A. F. M. Maniruzzaman, *International Arbitration and Mandatory Public Law Rules in the Context of State Contracts: An Overview*, 7(3) J. INT’L. ARB. 52, 54 (1990). See also the decision of an Arbitral Tribunal sitting in Geneva and hearing a dispute arising out of an agreement governed by Swiss law pursuant to the parties’ choice-of-law stipulation decided to exclude the application of mandatory law regarding commercial agency contracts not

With respect to international arbitration, party autonomy is provided in Article V(1)(c) of the New York Convention and Articles 34(2)(a)(iii) and 36(1)(a)(iii) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law.¹⁴ Article V(1)(c) basically establishes that an award's recognition and enforcement may get refused if "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration" The UNCITRAL Model Law contains a similar language, thus an award may be set aside or refused recognition and enforcement if the arbitrators have exercised power beyond what they were authorized by the parties.

After the adoption of the New York Convention and the commitment of the States to recognize arbitration awards, one could say, "arbitration is usually held out to be the paradise of party autonomy and not particularly prone to the furthering of state interests."¹⁵ Party autonomy assures parties that the arbitration will be conducted according to their plans and legitimate expectations, but the autonomy is not unlimited and is in fact subject to public policy norms of possibly multiple jurisdictions.¹⁶ Of course, the difficulty is in deciding exactly where, how, and to what extent party autonomy may be limited.¹⁷

belonging to the chosen law. After finding that Article 19 of the Swiss PILA was not relevant and that Article 187 of such statute providing for party autonomy in choice-of-law should prevail, the Tribunal reasoned that the freedom of the parties to choose the applicable law was a generally recognized principle enabling the parties to:

Exclude the national law which would otherwise apply. Therefore, provisions of the law which is excluded can only be recognized within the chosen law to the extent they are a part of the *ordre public international*. Examples of this are provisions to fight corruption and bribery. In the permanent practice of international arbitration, national provisions governing the law of agency are not considered to belong to the *ordre public international*.

See ICC Case No. 7047 (1994); XXI Yearbook Comm. Arb. (1996). See also Yeshnah D. Rampall and Ronán Feehily, *The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium*, 26 HARV. NEGOT. L. REV. 345, 399 (2018); Giuditta Cordero-Moss, *Limits on Party Autonomy in International Commercial Arbitration*, 4 PENN ST. J. L. & INT'L AFF. 186 (2015).

¹⁴ UNCITRAL Model Law states:

The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

¹⁵ See H. Watt and L. Brozolo, *Party Autonomy and Mandatory Rules in a Global World*, 6 INT'L L.F. D. INT'L 90, 91 (2004).

¹⁶ See, e.g., section 1(b) of the English Arbitration Act (1996): "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest." In other words, public interest will have an overriding effect over the party autonomy rule. Section 4(1) of the Act provides that: "The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary." See also C. Chatterjee, *The Reality of The Party Autonomy Rule in International Arbitration*, 20(6) J. INT'L ARB. 539, 544 (2003); BARRACLOUGH & WAICYMER, *supra* note 9, at 206 ("However, such party autonomy is not without limits, as a private commercial behavior will invariably be subject to various national rules and policies. Many of the contentious areas in the theory and practice of arbitration relate to the inevitable tensions between party autonomy and state legal controls.")

¹⁷ See, e.g., HORACIO GRIGERA NAON, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 194 (Recueil des Cours, vol. 289 2001). Grigera Naon observes that some international arbitrators ignore domestic mandatory law chosen by the parties or even by "transnational legal rules or principles without interference of mandatory or supplemental provisions of the proper law inappropriate to govern, for example, an international dispute."

Under the sources mentioned above, there are also provisions that recognize the limitations to party autonomy, where if the arbitrator ignores public policy of the place of arbitration, the place of enforcement, or both, national courts may rule for annulment of the award or refuse enforcement on the grounds of public policy violation.¹⁸ An award might be against forum's public policy if parties' choice of law is some law other than that of the forum's. Usually, that is where the conflict appears to exist between party autonomy and public policy norms and where the arbitrator plays a significant role balancing the legal paradox: party autonomy versus public policy norms.

From the text of the New York Convention and the Model Law, it appears that mere application of a law other than parties' choice would not disqualify the arbitral award. Also from a practical stance, reported cases concerning the UNCITRAL Model Law and the New York Convention show that the defense of excess of power is seldom given effect for the purpose of sanctioning the arbitral tribunal's application of the law.¹⁹ However, if the outcome of applying parties' chosen law and a foreign law are different, and by applying a foreign law the decision turn out to be over issues other than those submitted by the parties, then it is conceivable to raise the issue of excess of power, where arbitrators went beyond their authority in applying a foreign law.²⁰

Although arbitrators take all instructions from the parties, in cases where parties might be against public policy norms of a particular state, they may still disregard parties' choice of law.²¹ One may label such a decision an excess of power,²² and consider it an act beyond an arbitrator's authority and, thus, an award rendered without a valid basis. However, as it shall be illustrated further, under certain circumstances an arbitral tribunal's application of a law different from the law chosen by the parties may not be seen as ignoring parties' choice of law and against party autonomy.²³

Relying merely on the practice of arbitration has led some to conclude that there are "virtually no cases where the arbitrators have relied on the application of a mandatory rule to justify a decision other than that would have resulted from the application of the law chosen by the parties."²⁴ However, others have argued that "the fact that the parties have chosen a certain governing law does not exclude the relevance of all rules of any other laws."²⁵ Arbitrators are reluctant in applying public policy norms that are not part of the governing law of the contract, but there are sufficient examples of cases where they have displaced the governing law (chosen by the parties) with an overriding public policy norm.²⁶

¹⁸ See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 9 U.S.C.A. 305, 330 U.N.T.S. 3.

¹⁹ Giuditta Cordero-Moss, *Can an Arbitral Tribunal Disregard the Choice of the Law Made by the Parties?* 1 STOCKHOLM INT'L ARB. REV. 1, 6 (2005).

²⁰ Giuditta Cordero-Moss, *Can an Arbitral Tribunal Disregard the Choice of the Law Made by the Parties?*, 1 Stockholm Int'l Arb. Rev. 1, 4 (2005).

²¹ See Mayer, *Mandatory Rules*, at 275.

²² See Cordero-Moss, at 4.

²³ *Id.* at 2.

²⁴ See Fouchard, at 856-57; See also D. Donovan and A. Greenawalt, *Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* (Loukas Mistelis & Julian Lew eds., 2006), at 54.

²⁵ See Cordero-Moss, at 8.

²⁶ See generally Grigera Naon, at 200 *et seq.* and 296 *et seq.*

B. ARBITRATION SOURCES REFLECTING THE MANDATE TO RENDER AN ENFORCEABLE AWARD

Generally, rendering an award worthy of recognition and enforcement is a duty of an arbitrator. This important duty has been expressed in a variety of sources such as national laws,²⁷ ethical codes,²⁸ and institutional rules. Arbitrators have also recognized their duty to issue an enforceable award.²⁹ On the one hand, parties' reasonable expectation is to have a valid award that is enforcement worthy. If an award on its face satisfies parties' expectations but later gets annulled or rejected for enforcement by national courts it shows that the tribunal failed to afford its contractual duty towards the parties.³⁰ On the other hand, the institutional rules and national laws, where applicable, may also further strengthen the tribunal's mandate to issue a valid award. Arbitration institutions reflect this duty in their rules perhaps for the sake of upholding their business and reputation. States, however, do so not only to welcome arbitration and spread the word of being known as arbitration friendly venues, but also to have taken pre-enforcement measures to protect their public policies. Therefore, if arbitrators fail to comply with their mandate, both aforementioned purposes are frustrated.

Arbitrators are obliged to comply with institutional rules of the institution which parties have referred to in the arbitration clause to govern the procedural aspects of the dispute resolution process. For example, Article 42 of the ICC Rules (2021), as a general rule state that "[i]n all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law." The same provisions can be found in Article 32.2 of the LCIA Rules (2020), which states that "[f]or all matters not expressly provided in the Arbitration Agreement, the LCIA, the LCIA Court, the Registrar, the Arbitral Tribunal, any tribunal secretary 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 recognized and enforceable at the arbitral seat."

Application of public policy norms is confirmed in Article 1.4 of the UNIDROIT Principles of International Contracts, which are addressed to both arbitrators and judges. Article 1.4, which is reinforced by Article 3.3.1 on the illegality deriving from violation of public policy norms, states that "[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, supranational or international origin, which are applicable in accordance with the relevant rules of private international law." To the same effect, Article 11.5 of the proposed Hague Principles on Choice of Law in International Commercial Contracts declares: "[T]hese principles shall not prevent an arbitral tribunal from applying public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so."³¹

²⁷ If the national laws are somehow applicable in the dispute, for examples are part of the *lex contractus*, then they are considered as a source for determining the extent of tribunal's power; but see e.g., the Austrian Code of Civil Procedure (Zivilprozeßordnung or "ZPO") s. 584.

²⁸ See Gunther Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18 (2) J. Int'l. Arb. 135, 136 (2001).

²⁹ *Id.* at 136.

³⁰ *Id.* at 138.

³¹ See http://www.hcch.net/upload/wop/contracts_rpt_june2011e.pdf. [last visited 09/21/2021]; see also Brozolo, at 66-67.

What these provisions confer, perhaps, is that the international practice has as much respect for party autonomy as it does for forum's public policy norms, and arbitration may not be used as a venue to contract around such norms while such norms should be applied exceptionally in arbitration.³² Although arbitrators and judges function differently due to their private and public allegiance, respectively, there is a shared respect for public policy norms of the forum for judges and arbitrators at the very least. Radicati di Brozolo well states their position and shared concern over public policy norms:

Judges are organs of the state with an unquestionable duty to apply the mandatory rules of the forum and in most cases are entitled to disregard those of other countries, given that neither the enforceability of their judgments abroad nor the enforcement of foreign mandatory law is their concern. Conversely, arbitrators are not organs of any state and have no forum; moreover, they owe their primary allegiance to the parties who, in most cases, will not have specifically agreed to the application of mandatory rules. Yet, there is an expectation, perhaps even a requirement, that arbitrators apply mandatory rules.³³

1. The limits of the tribunal's mandate

Limitations apply to arbitrators' duties of issuing enforceable awards. In cases where the arbitration is ad hoc, normally the applicable national laws or procedural rules will govern the termination of an arbitrator's mandate, and if institutional, then the rules of the institution, determined by the parties, apply.³⁴ These rules are default rules—meaning if parties have not specified otherwise, they apply. Such rules also contain a replacement mechanism in certain cases where an arbitrator dies, ceases to act, withdraws, refuses to accept his office, refuses to fulfill his obligations or delays unreasonably in their fulfillment. However, for reasonable causes an arbitrator may decline to comply with his duties and even to accept the appointment in the first place. In such instances where arbitrators resign, a court usually accepts the resignation. Under some circumstances an arbitrator may in fact be unable to perform his functions or fail to act based on the authority he has been provided by the parties. For instance, “if the parties would have expressly or implicitly agreed that antitrust provisions of European Law shall not apply, the arbitrators should declare themselves incompetent since otherwise they would be enforcing an illicit obligation.”³⁵

2. The mandate to protect the integrity of arbitration

Survival of arbitration as an institution depends on states' recognition and support for private dispute resolution. National legislators may pass laws that provide a minimal or maximal approach towards recognition and enforcement of international arbitral awards. The less court intervention an award receives, the more efficient arbitration becomes as a system to resolve disputes. Thus, it must be recognized that states' interests have some relevance in the practice of

³² See generally Zeller, B., Mohanty, G., Garimella, S.R. (2021). The Law on the Public Policy Exception in International Arbitration—State Practice in South Asia. In: Enforcement of Foreign Arbitral Awards and the Public Policy Exception. Springer, Singapore. https://doi.org/10.1007/978-981-16-2634-0_5; See also Meng Chen, Empirical Research on Mandatory Rules Theory in International Commercial Arbitration, 19 Int'l Trade & Bus. L. Rev. 245 (2016); Ibrahim Mohamed Nour Shehata, Application of Overriding Mandatory Rules in International Commercial Arbitration: An Empirical Analysis, 11 World Arbitration and Mediation Review 383 (2017).

³³ See *id.* at 66.

³⁴ See Horvath, at 154.

³⁵ See Grigera Naon, *supra* note 17 at 326; Horvath, *supra* note 28 at 154-55.

arbitration.³⁶ If arbitration is going to be used as a back door to avoid intervention of national public policy, courts will not respect arbitration in the long run.

Therefore, when public policy norms are at stake, arbitrators have a general duty to safeguard the survival of international arbitration.³⁷ Some parties may use arbitration to escape mandatory laws. This may be attempted by stipulating a governing law that is not related to the transaction, and one which ultimately ignores other mandatory laws that have a close connection to the transaction. Of course, in such a case the arbitrator is faced with a two-fold problem: whether to give effect to the parties' choice of an unrelated law in order to respect party autonomy, or to protect the reputation of the arbitral process by refusing to allow its abuse by the attempt to evade the mandatory laws of countries with a vital interest in the case.³⁸ Where parties choose a law to circumvent or escape a foreign mandatory rule which would have applied to the agreement in the absence of the choice, arbitrators may disregard the parties' choice and take into account the mandatory norm;³⁹ thus, only contractual stipulations that do not violate fair dealing and good faith deserve protection.⁴⁰

II. PUBLIC POLICY NORMS APPLICABLE TO THE MERITS

There are only a few situations where application of public policy in arbitration is uncontroversial; public policy norms of the law chosen by the parties governing the contract qualify as one. Various arbitration cases support application of such norms.⁴¹ One caveat is

³⁶ See Barraclough and Waincymer, *supra* note 9 at 214.

³⁷ See Mayer, *supra* note 1 at 285-86; see also D. Hochstrasser, Choice of Law and Foreign Mandatory Rules of Law in International Arbitration, 11 J. INT'L ARB. 57, 70 (1994).

³⁸ See D. Vagts, National Legal Systems and Private Dispute Resolution, 82 AM. J. INT'L. L. 616, 620 (1988).

³⁹ See also Rome I Regulation, Articles 3(3-4) and 9(2-3). It should be noted that exclusion of a mandatory law by the parties does not necessarily give arbitrators the right to disregard parties' exclusion. The norm and its relevance or connection to the case ought to be evaluated by the tribunal. For example, in ICC Case No. 7528 (1993), the tribunal respected exclusion of a specific mandatory rule of the proper law chosen by the parties. The parties were French, while the employer was the government of Pakistan, as it was also the place of performance. The French law applied to the dispute while arbitration taking place in France. To the tribunal, it was clear that the parties intended to avoid the provisions of French law 75-1334 of 31 December 1975 as a result of which the sub-contract giving rise to the dispute and submitted by the parties to French law would be null and void or at least lead to the dismissal of Respondent's counterclaim. The tribunal in its evaluation of the French mandatory norm stated:

...No reported French decision has been put before the Tribunal where an international contract was avoided for noncompliance with Art. 14. This does not necessarily mean that it could not happen. But if Art. 15 were to be applied to this international contract, as claimant requests, such application would have to be warranted by a specific contact with France. In the present situation, the common nationality of the parties is important; but the place of performance of the contract is of equal significance... In order to tip the scales, it is useful to take into consideration the purpose of Art. 14 and the consequences of its application or non-application in the present situation. The purpose of the Article is to protect the sub-contractor against the consequences of the contractor's bankruptcy. This purpose simply does not have any scope of application here...

See Award of 1993 in ICC case 7528, XXII Yearbook Comm. Arb., 125 (1997).

⁴⁰ See Hochstrasser, *supra* note 37 at 63-64; see also R. von Mehren, From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law, 12 BROOK. J. INT'L. L. 583, 672 (1986).

⁴¹ See Bernd von Hoffmann, Internationally Mandatory Rules of Law before Arbitral Tribunals, in Karl-Heinz Böckstiegel (ed.), Acts of State and Arbitration (1997), at 3. See also Mayer, Mandatory Rules, at 280.

contradiction of the chosen norm with transnational public policy.⁴² Some have submitted that “it is uniformly accepted that arbitrators must apply any public policy norm that reflects transnational public policy to maintain minimum standards of conduct and behavior in international commercial relations.”⁴³

Another caveat is contradiction with public policy norms of the place of performance where the conditions to apply *force majeure* are met.⁴⁴ Mandatory norms of the place of performance may provide performance of a contract impossible as *force majeure* events. Thus, for instance, if such norms were not foreseeable (e.g., the legislature suddenly passes a law banning import of particular goods from a country), then arbitrators must apply them. However, applying *force majeure* has to be provided under the law chosen by the parties, or *lex contractus* (in case of lack of choice), as arbitrators must first see if their source of authority allows them to apply the laws of place of performance as a valid ground for *force majeure*.⁴⁵

A. PUBLIC POLICY OF THE LAW CHOSEN BY THE PARTIES

In international arbitration “arbitrators are very slow to derogate from the principle of party autonomy”,⁴⁶ and “the reported cases show that the arbitrators invariably apply the law selected by the parties.”⁴⁷ Thus, arbitrators apply the law specified in the choice of law clause, including its public policy norms, even if the norm is not truly related to the dispute.⁴⁸ However, it is argued that if the parties have excluded a specific public policy norm of the chosen law, then the tribunal ought to ignore that norm,⁴⁹ unless the norm is categorized as a transnational one.⁵⁰ In case the public policy norm that parties have excluded address “negative externalities” (where third party

⁴² Transnational public policy is a narrow concept in scope. It generally refers to the very common notions of public policy among civilized nations (e.g., illegalizing corruption and bribery).

⁴³ See Barraclough and Waincymer, *supra* note 9 at 219; see also Grigera Naon, *supra* note 17 at 322, fn. 355.

⁴⁴ See Barraclough and Waincymer, *supra* note 9 at 218; see also Mayer, Mandatory Rules, *supra* note 1 at 281-82.

⁴⁵ *Id.*

⁴⁶ See Julian D M Lew, *Determination of Applicable Substantive Law*, 25 INT’L BUS. LAW. 157, 158 (1997).

⁴⁷ See Ole Lando, *The Law Applicable to the Merits of the Dispute*, in: Sarcevic (ed.), *Essays on International Commercial Arbitration* 129, 135 (1991).

⁴⁸ See e.g., the language of the tribunal in the ICC Case No. 11307, in 29 YB. Com. Arb. (2008), at 59, (“The law that governs the substantive matters in dispute in this arbitration in the law of South Africa, as the law chosen by the parties themselves...”); see also ICC Case No. 6474, in 27 YB. Com. Arb. (2000), at 283, (“in international commercial arbitration, the first and foremost duty of the arbitrator is undoubtedly to base his decisions, whether relating to jurisdiction or to the merits of the dispute, on the common will of the Parties, regarding for instance the applicable law...”); and ICC Case No. 4145, in 12 YB. Com. Arb. (1987), at 101, (“the principle of autonomy widely recognized- allows the parties to choose any law to rule their contract, even if not obviously related with [the dispute].”)

⁴⁹ See Linda Silberman and Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (eds. Franco Ferrari and Stefan Kröll), 257, 275 (2011) (“Embracing the general philosophy of extending broad autonomy to parties in international commercial arbitration, parties should be permitted to exclude not just one, but various laws, from being applied to the substance of the dispute. However, parties should not be allowed to exclude all national legal systems from application.”), citing ICC Arbitral Case No. 15089; and the decision of the *Tribunale di Padova* (Italy), 11 Jan 2005.

⁵⁰ See Barraclough and Waincymer, at 219, citing Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in Pieter Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) at 227-28.

rights are involved), then due to conflict of interest, arbitrators should weigh the interests, i.e. public policy norms at stake, and apply one over the other.⁵¹

B. THE LAW CHOSEN BY THE TRIBUNAL

Parties may occasionally fail to determine the law applicable to their transaction. In that case, either arbitration Acts of the seat of arbitration or the arbitration rules, in case of institutional arbitration, may dictate an approach in determining the applicable law.⁵² When parties fail to make a choice, the tribunal will choose the law applicable to the transaction and the dispute, either directly or indirectly.

Parties implicitly provide the authority to determine the applicable law to arbitrators by their lack of choice of law. As a result, since arbitrators make the choice for the parties, they practice more flexibility in replacing public policy norms of the chosen law in favor of a stronger norm of a foreign jurisdiction (those of the place of enforcement of the award), which contradict with the arbitrators' direct or indirect choice of law.⁵³ The following illustrates how arbitrators select the otherwise applicable law and its public policy norms accordingly.

1. *Direct selection*

When parties fail to choose laws applicable to their contractual relationship, arbitrators may directly select national laws or general principles of law, trade usages, and *lex mercatoria* to govern parties' disputes. If parties have failed to provide for the substantive law of the contract, and the arbitrator has not made a choice yet, then all laws that affect the contract seem to have equal weight.⁵⁴ Most national and international legislation allow arbitrators to directly choose the law applicable they find most appropriate,⁵⁵ without going through the mediation of a choice of law rule.⁵⁶

One possibility is the laws of the place of arbitration. Although it has been argued that parties may choose a seat for various reasons, (they may not have even had its laws in mind to apply substantively to their contract) it may still remain a possible direct choice for the

⁵¹ See Barraclough and Waincymer, at 220; some legislations have explicitly pointed out areas which parties cannot waive mandatory laws. See e.g., Art 6(2) of the Rome I Regulation regarding non-waivability of mandatory consumer protection laws. It should be noted that, however, some authors believe that it is not for the parties to exclude the application of mandatory laws of the *lex contractus*. It would be for the Arbitral Tribunal to evaluate whether its application is appropriate on the basis of the mandatory law criteria of application, including exogenous factors such as transnational public policy (a functional choice-of-law approach). See Yves Derains, Application of European Law by Arbitrators – Analysis of Case Law, in *Arbitration and European Law*, 67-78 (1997).

⁵² See Silberman and Ferrari, at 264.

⁵³ See Barraclough and Waincymer, at 222, citing ICC case No. 4123 (1985) 10 Yearbook of Commercial Arbitration 49, at 50-51, where “Mandatory rules of the *lex contractus* were placed on the same footing as all foreign mandatory rules claiming to be applied.” Of course, the authors mention that “once the substantive law has been determined, the orthodox approach is for arbitrators to then automatically apply all of this law’s mandatory rules.”

⁵⁴ See Baniassadi, at 78.

⁵⁵ See e.g., Article 35(1) of the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), stating: “The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.” See also Art. 21(1) of the ICC Rules (2021) and Art. 22.3 of the LCIA Rules (2014).

⁵⁶ See Silberman & Ferrari, *supra* note 49 at 265. However, the authors are “skeptical as to whether conflict of laws methodologies can ever be avoided completely.”

arbitrators.⁵⁷ An arbitrator should, however, limit the application of the substantive law (whatever it may be, such as national, international, general principle, etc.) by excluding from its operation those questions which she considers to be subject to public policy norms of another relevant law.

The other relevant law she should consider is generally public policy norms of the country where the contract is going to be performed. A reasonable view would be, however, considering the application of public policy norms with reference to legitimate expectations of the parties, as it explains an arbitrator's decision in applying norms of the place of performance.⁵⁸

With respect to public policy interventions, arbitrators should also take into account the appropriate trade usage or *lex mercatoria* when there are valid reasons to do so since *lex mercatoria* or transnational law originated and was developed within the permissive sphere traced by public policy norms as a choice-of-law methodology.⁵⁹ Thus, they may not override or supplant the applicable public policy norms.⁶⁰

2. *Indirect Selection via Conflicts Rules*

With respect to the applicable law, the New York Convention is silent in case of lack of choice of law by the parties; however, the UNCITRAL Model Law and the UNIDROIT Principles provide a direct application.⁶¹ The European Convention though has adopted the “indirect approach”. In Article VII(1) after giving priority to the law chosen by the parties, it states: “Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable.”⁶² Under the indirect approach, arbitrators should first determine which PILA (private international law act) they find suitable

⁵⁷ See, e.g., Restatement (Second) of Conflict of Laws, §218 cmt. at b (Am. Law Inst. 1971) (which observes that where the parties provide that arbitration take place in a certain place, it constitutes “some evidence of an intention on their part that the local law of this state should govern the contract as a whole.”).

⁵⁸ See Baniassadi, *supra* note 9, at 78-79.

⁵⁹ See Grigera Naon, *supra* note 17, at 333.

⁶⁰ See e.g., Case No. 13954 of 2010, in XXXV YB. Comm. Arb. (Int'l Comm. Arb.).

⁶¹ See U.N. Comm. On Int'l Trade, *Model Law*, Article 28(2): “Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.” The first step of this approach requires deciding what set of conflict-of-laws rules are applicable. The second step would apply those conflict-of-laws rules to determine the applicable law. See also, to the same effect, U.N. Comm. On Int'l Trade, *Arbitration Rules*, Art. 33 (1976) (the latest version adopts the “direct approach”; see U.N. Comm. On Int'l Trade, *Arbitration Rules*, Art. 35(1) (revised in 2010)). Applying a conflict-of-laws analysis is also recommended in Article 1.4 of the UNIDROIT Principles of International Commercial Contracts (2004), stating: “Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.” However, neither Article 1.4, nor Comment 4 attached to it resolves the mandatory substantive rule problem. The UNIDROIT “black-letter rules” and comments are available at <http://www.unidroit.org>. Comment 4 to Article 1.4 states:

4. Recourse to the rules of private international law relevant in each individual case, both courts and arbitral tribunals differ considerably in the way in which they determine the mandatory rules applicable to international commercial contracts. For this reason, the present article deliberately refrains from entering into the merit of the various questions involved, in particular whether in addition to the mandatory rules of the forum and of the *Lex contractus* those of third States are also to be taken into account and if so, to what extent and on the basis of which criteria. These questions are to be settled in accordance with the rules of private international law which are relevant in each particular case (see, for instance, [Art. 9 of the Rome I Regulation;] Art. 7 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations; Art. 11 of the 1994 Inter-American Convention on the Law Applicable to International Contracts).

⁶² See Silberman & Ferrari, *supra* note 49, at 266.

based on a conflicts analysis, and through applying its rules, they shall determine the applicable law to the merits.⁶³

In practice, arbitrators enjoy a wide range of discretion determining the applicable law absent a choice by the parties.⁶⁴ Their choices may be an application of the conflict rules or the seat of arbitration.⁶⁵ They may also apply the conflict rules of the country most closely connected with the dispute, though without recourse to any conflict of laws rules.⁶⁶

Another possibility is applying the cumulative approach: “a comparative analysis of several bodies of private international law and thereby simultaneously on the conflict of laws rules of the countries connected with the dispute.”⁶⁷ Arbitrators have also resorted to conflict of laws rules contained in international legislation, or even recourse to general principles of conflict of laws, “finding common or widely- accepted principles in the main systems of private international law.”⁶⁸

Due to the diversity and complication of disputes in arbitration, providing this level of flexibility regarding determination of the applicable law absent a choice by the parties to international arbitrators in the Swiss PILA seems to be more suitable for arbitration as a transnational venue for resolving international commercial disputes. For instance, with regard to the application of public policy norms, it is submitted that this flexibility allows arbitrators to look into multiple conflicts of law rules in order to determine if any specific public policy norm must

⁶³ See English Arbitration Act § 46(3), (1996).

⁶⁴ See Silberman & Ferrari at 281, fn. 142.

⁶⁵ If the parties have chosen a seat, then the arbitrators are supposed to and welcome to apply the conflict rules of the seat, but if the parties choose no seat, then the tendency is not to apply the rules of the seat, *see, e.g.*, ICC Arb. Award Case No. 9771 (2001), in IXXX YB. Com. Arb. 52-53 (2004) at pp. (where the conflict rules of the seat were applied); *see also* ICC Arb. Award Case No. 2930 (1982), in IX YB. Com. Arb. 105 (1984) (“the most authoritative present-day doctrine and international commercial arbitration jurisprudence admit that in determining the substantive law, the arbitrator may leave aside the application of the conflict rules of the forum.”); the leading exponent of this view was F.A. Mann, who believed in the application of the conflict rules of the seat by arbitrators, *see generally* F.A. Mann, The UNCITRAL Model Law – *Lex Facit Arbitrum*, 2(3) Arb. Int’l. 241, 251 (1986) (“Just as the judge has to apply the private international law of the forum, so the arbitrator has to apply the private international law of the arbitration tribunal’s seat, the *lex arbitri*. Any other solution would involve the conclusion that it is open to the arbitrator to disregard the law.”).

⁶⁶ *See, e.g.*, ICC Arbitral Award Case No. 8113 (1995), in XXV YB. Com. Arb. 325 (2000), the arbitral tribunal applied Syrian conflict of laws rules recognizing “several connecting factors”:

The claimant is a Syrian citizen whose place of business is Syria, and the services corresponding to his ‘monetary dues’ are supposed to have been performed in Syria, with a view to obtain a Syrian contract with a Syrian authority. Therefore, the tribunal finds that the Syrian rules of conflict of laws are the most appropriate to apply to this dispute.

⁶⁷ *See* Beda Wortmann, Choice of Law by Arbitrators: The Applicable Conflict of Laws System, 14(2) Arb. Int’l. 97, 110 (1998).

⁶⁸ *See, e.g.*, the final award in ICC Case No. 6527 (1991); Austrian Buyer v. Turkish Seller, Collection of ICC Arbitral Awards 1991-1995 at 185, 197 (Kluwer 1997), where the arbitrator refused to apply the conflict rules of the place of arbitration because the international arbitrator has no *Lex fori*, and instead applied general principles of international private law as stated in international conventions, specifically the Hague Convention on the Law Applicable to the International Sale of Goods. For further commentaries and citations regarding the possibilities of the choice of conflict of law rule by arbitrators absent a choice by the parties, *see*, Silberman & Ferrari, *supra* note 49, at 282-293. Authors also mention the conflict rules of the country that would have jurisdiction absent an arbitration clause or even the conflict of laws rules of the arbitrator’s home state, but as authors point this out in their research such possibilities have no support in practice, *see also id.* at 104-111.

be applied.⁶⁹ Even when parties have stipulated a choice, the tribunal may still consider the PILA rules of a state to resolve a conflict regarding application or nonapplication of a foreign public policy norm.⁷⁰

Tribunals, however, are not obliged to apply states' PILA rules.⁷¹ Arbitrators, unlike judges, have no forum and are not obligated in the same way to protect local public policy.⁷² Therefore, there is no uniform answer to the question of which PILA rule is applicable to an arbitral dispute. However, some assert that "arbitrators nevertheless have to choose certain conflict of laws rules, at least to determine the mandatory rules [public policy norms] which are decisive for the dispute in question because in this case the same principle is relevant as if the arbitrators had applied the substantive law without any recourse to private international law."⁷³

III. APPLICABLE PUBLIC POLICY NORMS IN CONNECTION WITH THE SEAT

Parties are free to agree on the seat of arbitration. Failing such an agreement, the arbitral tribunal shall make this determination.⁷⁴ Domestic arbitration acts apply only if the parties choose the enacting state as the seat of arbitration— "*lex loci arbitri*." *Lex loci arbitri* may refer to the arbitration rules, conflict-of-laws rules applicable in the place of arbitration, or even to the arbitration institution's procedural rules. However, the most important relevancy of the seat to

⁶⁹ See Silberman & Ferrari, *supra* note 49, at 279:

The direction to use a specific choice-of-law rule, such as "the closest connection" does have a limitation; like the situation in which arbitrators are to apply the law or the rules of law chosen by the parties, a specific choice-of-law rules is not exhaustive in that it does not deal with all the conflict of laws issue that may arise. Thus, it might be necessary to look to other conflict of laws rules, for example to determine what specific mandatory rules might need to be applied.

⁷⁰ See Grigera Naon, *supra* note 17, at 302-305.

⁷¹ Statutes and arbitration rules also indicate that resort to a conflict of laws analysis is not mandated, even if it is not prohibited and some sort of guidance is provided, see Marc Blessing, *Choice of Substantive Law in International Arbitration*, 14 J. INT'L ARB. 39, 55 (1997).

⁷² See Catherine Kessedjian, *Determination and Application of Relevant National and International Law and Rules*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, 71, 81 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

⁷³ See Wortmann, at 103-04, 111.

⁷⁴ See New York Convention, *supra* note 7, at art. V(1)(d), which gives priority to the parties agreement "and failing such agreement" it shall be "in accordance with the law of the country where the arbitration took place."; see also UNCITRAL Model Law, *supra* note 14, at art. 1(2): "The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State." and UNCITRAL Arbitration Rules, *supra* note 61, at art. 18; for an example in national arbitration law, see the English Arbitration Act of 1996, *supra* note 16 at sec. 2(3):

"In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated- (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorized by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

arbitration is mainly its procedural laws, which govern the procedure in arbitration, unlike the *lex causae* or the *lex contractus*, which apply to the merits of the dispute.⁷⁵

As mentioned earlier, the seat may also function as a connecting factor in conflict of laws. In arbitral practice, however, the connection of the dispute to arbitration laws of the seat is considered as gap-filler, as most provisions of modern arbitration laws are default norms and may be replaced by agreement of the parties, for example by reference to a set of institutional arbitration rules.

Indeed, under the New York Convention, application of procedural public policy norms of the place of arbitration are recognized.⁷⁶ Courts of the place of arbitration are the only authorities that have jurisdiction to set aside an arbitral award on the grounds of forum's procedural public policy violations by the arbitral tribunal (e.g., due process violations). In other words, courts of the place of arbitration "have a residual power to permit, enjoin, or supervise the conduct of any local arbitration."⁷⁷ In case of annulment, the arbitral award may not get enforced elsewhere, and thus, may leave the parties with nothing.⁷⁸ That is a valid reason for the arbitral tribunal to be sensitive with regard to the application of procedural public policy norms of the *Lex arbitri*, and give these norms priority over other applicable public policy norms.⁷⁹ That being said, however, a judgment of a court at the place of arbitration, setting aside an award, may have no effect in other states, if the municipal laws of enforcement state still authorize to enforce annulled awards (e.g., a trend recognized in France, with reservations).⁸⁰

⁷⁵ See, e.g., ICC Case No. 11307, *supra* note 48: "the law that governs the substantive matters in dispute in this arbitration is the law of South Africa, as the law chosen by the parties themselves. But the arbitration proceedings are governed both by the ICC Rules and by the law of England, as the seat of the arbitration; and English law itself, in the Arbitration Act 1996, confers powers and duties on arbitral tribunals."

⁷⁶ See New York Convention, *supra* note 74, which states that an arbitral award may not get recognized or enforced if: "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

⁷⁷ See Alan Rau, *The Arbitrator and "Mandatory Rules of Law"*, 18 AM. REV. INT'L ARB. 51, 75 (2008), at fn. 84.

⁷⁸ See New York Convention, art. V(1)(e), 1958; See also Geneva Convention, 1961 (referencing the *lex loci arbitri*, Art. IX(1)(a)).

⁷⁹ See generally Karsten Thorn & Walter Grenz, *The Effect of Overriding Mandatory Rules on the Arbitration Agreement*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (Franco Ferrari & Stefan Kröll eds., 2011).

⁸⁰ See Cour de Cassation, 23 March 1994, *Société Hilmarton Ltd v. Société Omnium de Traitement et de Valorisation (OTV)*; See also Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17(1) ARB. INT'L. 19, 28 (2001).

The laws of the seat also apply to the validity of the arbitration agreement under Article V(1)(a) of the New York Convention when parties have not stipulated any other law, as is usually the case in practice.⁸¹ Further, the laws of the place of arbitration also apply to the issue of arbitrability.⁸²

The more controversial side of *lex loci arbitri* is whether public policy norms of the seat are applicable to the merits of a dispute. For instance, if an arbitrator is applying a law that permits punitive damages, may he award this type of relief, even if he is sitting in a jurisdiction that punitive damages are forbidden? In ICC Case No. 5946, a distribution agreement between a French seller and an American buyer contained a New York choice-of-law clause and called for ICC arbitration in Geneva. The arbitrator found that the seller had improperly terminated the agreement and issued an award of lost profits in favor of the buyer. But he denied the buyer's claim for punitive damages. It stated that “[d]amages that go beyond compensatory damages to constitute a punishment of the wrongdoer are considered contrary to Swiss public policy, which must be respected by an arbitral tribunal sitting in Switzerland even if the arbitral tribunal must decide a dispute according to a law that may allow punitive or exemplary damages as such.”⁸³ Apparently, New York law did allow punitive damages, but the fact that the tribunal was sitting in Geneva, rejected application of the choice of law clause being in contradiction with Swiss public policy. That decision saved the award from getting annulled in Switzerland, as it may still be enforceable in the United States. Another way to analyze the scenario is that the nature of the law permitting punitive damages was not overridingly mandatory in the United States. Hence, one cannot say that any public policy norm was violated, but in fact the public policy of the place of arbitration were given priority over a non-mandatory norm governing the distributorship agreement chosen by the parties.⁸⁴ As to the function public policy norms play, here the Swiss norm which prohibited punitive damages in an early termination of a distributorship agreement, forced its negative function and blocked the parties’ choice of law from application under the circumstances of this case.⁸⁵

⁸¹ Based on the principle of ‘Separability/Severability’ of the arbitration clause, the arbitration clause, as an independent agreement between the parties, survives any attack directed to the validity of the main contract. *See generally* Hossein Fazilatfar, *In Defense of Separability: Pima Paint, Buckeye, & Rent-A-Center*, 54 (2) TEX. TECH L. REV. (Forthcoming Spring 2022). However, if the subject-matter of the dispute is inarbitrable, then the arbitration clause is “inoperative or incapable of being performed” (Art. II (1) and (3) of the New York Convention) with respect to that subject-matter. Indeed, the arbitration clause is still operative and capable of being performed to the disputes that are within the scope of the arbitration clause under the law of the seat. According to the principle of ‘Kompetenz-Kompetenz’ the arbitrator may rule on his own jurisdiction, i.e., whether she is allowed, under the *lex loci arbitri*, to rule on that particular dispute/subject-matter. *See generally*, Hossein Fazilatfar, *Adjudicating “Arbitrability” in the Fourth Circuit*, 71 (4) S.C. L. REV. 741 (2020).

⁸² *See* British Glass Company (U.K. v. It.), Case No. 14046 of 2005, XXXV Y.B. Comm. Arb. 241 (ICC Int’l Ct. Arb.), at p. 243, where the Italian parties had chosen ICC arbitration to take place in Geneva and had stipulated Italian law governing their concentration agreement, although lacking a choice on the law applicable to the arbitration clause. Under Swiss law (being the place of arbitration the arbitrators had found the arbitration clause valid regarding both form and substance (referring to Art V(1)(a) of the NY Convention). They also found that they could decide on their own initiative to consider their jurisdiction over the case, as under Swiss law they had jurisdiction to decide competition law (breach of non-competition clause in the case before them).

⁸³ *See* ICC Case No. 5946, XVI Y.B. COM. ARB. ¶ 97 (1990); *See also* *Soleimany v. Soleimany*, [1999] Q.B. 785 (C.A. 1998); *Westacre Investments Inc. v. Jugoinport-SPDR Holding Co. Ltd.*, [2000] Q.B. 288 (C.A. 1999); and *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 Lloyd’s Rep. 222 (Q.B.)

⁸⁴ *See* ICC Case No. 5946, XVI Y.B. COM. ARB. ¶ 97 (1990).

⁸⁵ *See* Hossein Fazilatfar, *OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION*, 26-29 (Edward Elgar Publishing) (2019).

In discussing the relevance of arbitrability to *Lex loci Arbitri*, one observer has noted that: “the arbitrators should take the *lex loci arbitri* into account only when the pending dispute has a territorial connection with the seat of the arbitration.”⁸⁶ Should there be a territorial connection between the seat, its public policy norms, and the dispute? A glance at the wording of the New York Convention would support this contention. The courts – and perhaps arbitral tribunals – should only be concerned with procedural public policy violations of the seat. Article V(1)(d) of the Convention expressly states that any decision by the tribunal regarding “the composition of the arbitral authority or the arbitral procedure” must be in line with the law chosen by the parties, and in case of lack of choice of law, the law of the state where arbitration took place. It seems that under the Convention, procedural laws of the seat are relevant and applicable in arbitration as default laws. Therefore, in order to limit the application of any and all public policy norms in arbitration, there should be a higher threshold upheld to qualify substantive public policy norms of the place of arbitration for application (e.g., a territorial connection).⁸⁷

IV. APPLICABILITY OF FOREIGN PUBLIC POLICY NORMS

A foreign public policy norm is a law other than parties’ choice of law and the *Lex arbitri*.⁸⁸ It generally claims application when it is overriding and has been given an extraterritorial effect by the legislator.⁸⁹ Indeed, to arbitrators and judges, there must be a legitimate and strong connection between the state that promulgated the norm and the case at hand.⁹⁰ After an initial determination of such connection, the issue in the process of applying or at least considering the norm is whether arbitrators should address the issue *ex officio* or based on one of the parties’ initiative. The answer can be a mix of both.

The issue mainly revolves around two factors: norm connection and party initiative.⁹¹ It is submitted that, if one party requests application of a public policy norm and there is an apparent connection between the case and the country that promulgates the norm, the arbitrator should take that foreign public policy norm into account.⁹² In the absence of the close connection factor, an arbitrator must ignore the norm, regardless of a request by one of the parties.⁹³ However, it is within arbitrators’ discretion to inquire on their own initiative, in case of apparent close connection

⁸⁶ Stavros Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited lex fori*, Queen Mary U. of London, Sch. of L., 99, 111 (2009).

⁸⁷ *See Id.* at 111.

⁸⁸ *See generally* Christopher S. Gibson, Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law, 113 (4) PENN STATE L. REV. 1227 (2009).

⁸⁹ *Id.*

⁹⁰ Laurence Shore, *Applying Mandatory Rules of Law in International Commercial Arbitration*, 18 AM. REV. INT’L ARB. 91 (2007).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; *see also* Luca Brazolo, *Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration -- A Fresh Look at the "Second Look,"* 7(1) Int’l Arb. L. Rev. 23 (2004) (giving the same proposition regarding judges, stating that if “a given defense is not raised by the party having an interest . . . , and if for whatever reason the issue is not addressed *ex officio* by the court, irrespective of the mandatory or public policy nature of the purportedly violated rule the matter can no longer be raised once the case is finally decided or the statute of limitations has elapsed. There is no apparent reason why things should be different when arbitration is involved”).

between the third country's public policy norm and the dispute.⁹⁴ Commentators have further suggested that then "it is the arbitrator's duty to apply the mandatory procedural rule of due process and give the parties a reasonable opportunity to set out their positions on the applicability of the mandatory substantive rule."⁹⁵

In terms of tribunals dealing with foreign public policy norms in practice, there are three general observations: reject application, direct or indirect application of the norm, and taking the norm into account as datum.⁹⁶

In an ICC case No. 6320,⁹⁷ a contract on the construction of a power plant in Brazil contained a choice of law clause. It provided for Brazilian law as the governing law and an arbitration clause that had France as the seat of arbitration. The Brazilian company (the claimant) brought a claim against the contractor, a U.S. company, for defective product quality (fraudulent act). The case escalated into a claim for treble damages under the RICO Statute.⁹⁸ Although the parties agreed that the tribunal had jurisdiction over RICO claims and to award damages accordingly,⁹⁹ (the U.S. courts had already permitted arbitrability of similar statutes),¹⁰⁰ the tribunal held that RICO claims were inadmissible.

The tribunal reasoned that application of RICO would be contrary to the law to which the parties agreed¹⁰¹ because the substantive Brazilian law provided an exclusion of RICO claims.¹⁰² Also, there is a lack of United States' "strong and legitimate interest" in the case, as the performances related to the contract neither took place in the United States nor had any impact on the American market.¹⁰³ Finally, the tribunal found that RICO applied to domestic cases, without any extraterritorial reach when the transaction lacks significant contact with the United States.¹⁰⁴

Admittedly, arbitrators often consider an award's compatibility with the law of the likely place(s) of enforcement. Belgian distributor was named exclusive agent for the Benelux countries, in a distribution agreement that Italian law governs, providing arbitration in Italy.¹⁰⁵ A Belgian statute provides damages for early termination of a distribution agreement that has an impact on the Belgian market. Also, the statute provides all rights to the distributor to bring the dispute before Belgian courts to be decided under Belgian law. After early termination by the manufacturer, the distributor-initiated court proceedings in Belgium, while the manufacturer filed a demand for arbitration. The arbitrator held that "according to the principle of the parties' contractual

⁹⁴ See Marc Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts*, 35-38 (1999) (citing ICC Case No. 7181 (1992), ICC Case No. 7181 (1992), and ICC Case No. 7539 (1996)).

⁹⁵ See Laurence Shore, *Applying Mandatory Rules of Law In International Commercial Arbitration*, 18 INT'L ARB. L. REV. 91 (2007).

⁹⁶ See generally Rau, *The Arbitrator* *supra* note 77.

⁹⁷ Case No. 6320, XX Y.B. COM. ARB. 62 (ICC Int'l Ct. Arb. 1992); see also commentaries by Rau, *The Arbitrator* *supra* note 77, at 55-58.

⁹⁸ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970).

⁹⁹ See Rau, *The Arbitrator* *supra* note 77, at 55-58.

¹⁰⁰ See e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (recognizing arbitrability of Anti-trust disputes (the Sherman Act)).

¹⁰¹ See Case No. 6320, 20 Y.B. Comm. Arb., *supra* note 97, at 153-154.

¹⁰² *Id.* at 170; (The tribunal, on the basis of the governing law states: "the [c]ontract and the intentions of the parties must be interpreted as intended to exclude claims such as a RICO claim").

¹⁰³ *Id.*; See also NAON, *supra* note 17, at 297-302.

¹⁰⁴ See Rau, *supra* note 77, at 55-58.

¹⁰⁵ See Case No. 6379 of 1990, 17 Y.B. Comm. Arb. 212 (ICC Int'l Ct. Arb.).

autonomy,” Italian law shall govern the dispute and it “cannot be disregarded in the present case.” Therefore, the validity of both the overall contract and of the arbitral clause itself was to be ascertained according to Italian law. The three-month notice given by the manufacturer was in line with Italian law, despite the longer mandatory notice period under the Belgian statute, protecting agents. The distributorship agreement had thus been validly terminated, and the distributor’s claim for compensation was denied. Also, according to Italian law, “the arbitration clause in the Contract is not null and void, inoperative or incapable of being performed,” based on the New York Convention.¹⁰⁶ In this case, arbitrators insisted on party autonomy and applied parties’ law to the issue of arbitrability and rendered award applying Italian law to the arbitration clause and the dispute in general. Since Belgium was not a potential place for enforcement, it seems that there were no enforcement concerns. Perhaps the outcome would have been different if parties had to enforce the award in Belgium, or if Belgium was the place of arbitration.

Arbitrators, almost rarely, replace the applicable law with a foreign public policy norm and apply it directly to the merits. This application is usually authorized either under the law the parties chose (or *Lex contractus*) or based on the connection between the dispute and the foreign norm. In the famous Hilmarton case, OTV (a French company) entrusted Hilmarton (an English company) with the task of providing advice and coordination for a bid to obtain and perform a contract for works in Algeria (the place of performance).¹⁰⁷ Hilmarton relied on the ICC arbitration agreement in order to obtain payments of the remaining balance of its fees. The parties chose Swiss law. The award rendered in Geneva dismissed this claim due to an Algerian prohibition (the foreign mandatory law) on the use of intermediaries and declared the contract void. This case may be a clear indirect application of the mandatory rules approach, under which the arbitrator was entitled to give effect to the mandatory rules of a law of the place of performance. However, the main point is that arbitrators applied the Algerian prohibition on the use of intermediaries to invalidate a contract, not because they had independent authority to directly apply that norm but because the parties’ choice of Swiss law required them to honor public policies of the place of performance.¹⁰⁸ Among very few cases is the decision in ICC Case No. 8626 – where the tribunal sitting in Geneva, Switzerland decided to apply European antitrust law although New York law was the chosen law.¹⁰⁹ The tribunal found under New York law that a foreign tribunal must “take into account on the grounds of international public policy, the anti-trust law of the United States.¹¹⁰” Thus, it held that “it appears to us that the law of New York requires that an arbitral tribunal wherever situated should take into account the anti-competition provision of the Treaty of Rome and the relevant regulation made thereunder.”¹¹¹ The tribunal also relied on decisions of the Swiss Federal Tribunal, whereby Arbitral Tribunals sitting in Switzerland “are competent” to decide whether the contract is valid or not under European antitrust law. Since the contractual

¹⁰⁶ See Rau, *supra* note 77, at 83; See also The New York Convention Guide, UNCITRAL, Article II (July 2016); See also Italian Grantor of Distributorship v. Belgium Exclusive Distributor, Case No. 6752 of 1991, 28 Y.B. Com. Arb. 54-57 (ICC Int’l Ct. Arb.) (detailing Belgian public policy provides that distributors may always file a lawsuit in Belgium. Upon termination of the distributorship must yield on the basis of the New York Convention to Italian law, which was selected by the parties and which validates the arbitration agreement (for more, see COLLECTION OF ICC ARBITRAL AWARDS 1991-1995 at 195-6-97 (Kluwer 1997).

¹⁰⁷ OTV v. Hilmarton, Case No. 5622 of 1994, 19 Y.B. Comm. Arb. 112 (ICC Int’l Ct. Arb.).

¹⁰⁸ See LEW, MISTELIS & KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 422 (Kluwer L. Int’l 2003), (agreeing that the issue was one of correctly applying the parties’ own choice of Swiss law).

¹⁰⁹ Case No. 8626 of 1996 (ICC Int’l Ct. Arb.).

¹¹⁰ *Id.*

¹¹¹ *Id.*

clauses at stake restrained competition, with a direct impact on the European Union's market, it concluded that European antitrust law applied and that choice of law clauses in favor of New York law was invalid.

In reaching this conclusion, the tribunal pointed out that “an Arbitral Tribunal should always be concerned with the effectiveness of its decision” and referred in that connection to Article 26 of the ICC arbitration rules of 1988 (the same text is found in Article 41 of the 2012 ICC rules) according to which the arbitrator “shall make every effort to make sure that the award is enforceable at law.”¹¹² Should claimant succeed in its claims, the award would “in all probability” be sought to be enforced in the country of respondent – a member of the European Union.¹¹³ The tribunal believed courts of such country would deny enforcement of the award, if the latter gave effect to the contractual clauses – the validity of which were challenged.¹¹⁴

Arbitration proponents have noticed that public policy norms do not necessarily have to be applied or even rejected. A third approach is to take such norms into account as datum or fact when they are a legal impediment to the performance of the transaction at stake.¹¹⁵ Therefore, if they are qualified under the law the parties chose or the *lex loci contractus* as acts of force majeure, then the foreign norm should be taken into account indirectly to prevent performance and not necessarily applied to the case as the applicable law.¹¹⁶ The arbitral tribunal made a decision based on this approach in *Northrop Corp. v. Triad Int'l Marketing S.A.*¹¹⁷ Northrop, a U.S. firefighter jet manufacturer, entered into a marketing agreement with Triad, a Liechtenstein company wholly owned by a Saudi citizen and Northrop's exclusive agent, to sell fighter aircrafts to Saudi Arabia.¹¹⁸ Triad, in exchange for commissions on sales, solicited contracts for aircraft to the Saudi Air Force.¹¹⁹ The agreement, containing an arbitration clause, was to be governed by California law.¹²⁰ After a few years, the Saudi government issued a decree prohibiting the payment of commissions in connection with armaments contracts, which required that existing obligations for the payment of commissions be suspended.¹²¹ Northrop ceased paying commissions, and thus Triad submitted the dispute to arbitration.¹²² What the tribunal considered here was the Saudi decree as a point of fact and the Californian Civil Code as the applicable law which the parties chose.¹²³ Under California law, performance is excused when prevented by law. Here, however, payment of the commission to Triad is far from being impossible or impracticable, making the

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Rau, *supra* note 77, at 55-58.

¹¹⁶ See *Northrop Corp. v. Triad Int'l Marketing S.A.*, 811 F.2d 1265 (9th Cir.1987).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *id.* at 1267.

¹²² *Id.* at 1267-68.

¹²³ See Rau, *supra* note 77, at 71 (“The arbitrators were not expected to apply the Saudi Decree as regulatory law *ex proprio vigore*, but merely to ‘take it into account’ in order to judge the nature of the defendant's promised performance determining whether the *lex contractus*, as properly understood, imposed liability for the defendant's conduct.”).

force majeure defense inapplicable.¹²⁴ Therefore, the tribunal awarded in favor of Triad.¹²⁵ The tribunal took the foreign public policy norm, the Saudi decree, into account as an event of force majeure based under the law that governed the contract, California law, “without actually applying it because it was unnecessary to do so.”¹²⁶

V. MAKING ADJUSTMENTS IN APPROACHING PUBLIC POLICY NORMS

The discussion so far reveals that arbitrators can treat public policy norms from either a contractual, jurisdictional, or a hybrid perspective. Indeed, no rigid formula can guarantee proper application of public policy norms in all cases.¹²⁷ In addition to the traditional conflicts or independent approaches arbitrators could take towards this issue, there are other adjustments they could also take into account to determine the appropriate public policy norm(s) applicable in the dispute before them. Here it is suggested that arbitrators: (a) consider application of *dépeçage* and apply multiple bodies of law to each part of the transaction; and (b) the arbitrator may act as a mediator within the arbitration proceeding and mediate the conflict between the parties.

Application of *dépeçage* where multiple laws are applied to different parts of the contract to accommodate the immediate application some public policy norms deserve.¹²⁸ *Dépeçage* results everywhere because of issues such as procedural characterization, rejection of parts of foreign law on public policy grounds or, for that matter, when a public policy norm displaces a part of foreign law.¹²⁹ American Restatement (Second), Conflict of Laws adopts that as a general approach where “it directs the court to divide the case into its component parts – ‘issues’ - and to make a separate choice of law determination with respect to each of them.”¹³⁰ In Europe, *dépeçage* is accepted in a more limited scope where only in exceptional cases the issue-by-issue approach is adopted and labeled “principled *dépeçage*” that requires express party stipulation.¹³¹ The assumption there is

¹²⁴ *Id.* (citing Restatement (Second) Contracts, § 261) (“Discharge by Supervening Impracticability.”) *But cf. id.* at § 264, comment a. (“The fact that it is still possible for a party to perform if he is willing to break the law and risk the consequences does not bar him from claiming discharge.”).

¹²⁵ *Northrop*, 811 F.2d at 1267.

¹²⁶ *See* Mayer, *supra* note 1, at 281.

¹²⁷ *See* Jeff Waincymer, *International Commercial Arbitration and the Application of Mandatory Rules of Law*, 5 ASIAN INT’L ARB. J. 1, 38 (2009) (“Any attempt to present a rigid formula as to the applicability of mandatory laws is fraught with danger.”).

¹²⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188 cmt. d (1971) (“Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states”); It seems the European approach is more limited than that of the American *dépeçage*; *See* Peter Hay, *European Conflicts Law after the American “Revolution” – Comparative Notes*, 2015 U. ILL. L. REV. 2053, 2066 (2015) (“European law does not follow the Second Restatement’s general issue-by-issue approach. Its rules provide for the law applicable to ‘THE contract’ or to ‘THE tort.’”). *See also* Peter Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law*, 226 RECUEIL DES COURS 281, 377 (1991).

¹²⁹ *See* Hay, *supra* note 128 at 375.

¹³⁰ *Id.* *See also* Hay, *European Conflicts of Law After the American “Revolution” – Comparative Notes*, *supra* note 128, at 2065-66 (“The Second Restatement directs courts to determine the applicable law to the ‘particular issue’ in a tort or contract case on the basis of its ‘most significant relationship’ test.”)

¹³¹ Hay, *European Conflicts of Law After the American “Revolution” – Comparative Notes*, *supra* note 128, at 2066; *See also* Rome I Regulation, *supra* note 39, at Art. 3(1): (“By their choice the parties can select the law applicable to the whole or to part only of the contract”); *see also* Article 4(1) of the Rome Convention (“a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.”).

that parties are not willing to have multiple bodies of law split and govern their transaction.¹³² However, some have urged that a broader application of *dépeçage* (issue-by-issue, the American style) better serves the international character and aspects of multistate cases.¹³³ The principled *dépeçage* brings certainty to choice of law and dispute resolution (that requires party stipulation), while the American style provides flexibility. However, possibly, applying *dépeçage* in the European style seems to be a better approach when the norms involved are default norms. The question is when overriding public policy norms of particular states claim immediate application in a given scenario, why is there a need for party stipulation (‘principled *dépeçage*’) for them to be applied? In certain situations where a transaction has been performed in multiple states and their public policy norms are at stake, arbitrators may apply *dépeçage* as a final method to justify application of such norms. However, the limit can be a late application and specific to public policy norms of the place of performance, unlike a general approach under the American Restatement.

Finally, in addition to the various legal-based solutions for the application of public policy norms in arbitration, mediation by the same arbitrator(s) within the arbitration process, as a non-legal-based approach, can also be an efficient way to resolve a public policy issue in arbitration.¹³⁴ As this research has revealed thus far, public policy norms can bring a complex situation to an international dispute. In case the contractual stipulations the parties drafted or the laws the arbitrator applies are unable to address the dispute, then an option outside the legal paradigm can be settlement of that dispute through mediation. An arbitrator, due to his understanding and knowledge over the dispute, can well act as a mediator when faced with a challenging issue such as public policy norms. But the mediation can only be successful with willing and cooperative parties. This so-called ‘arb-med-arb’¹³⁵ solution is a trend in line with the general arbitration process.¹³⁶ Indeed, like arbitration, mediation is also contractual and based in party-consent.¹³⁷ Thus, for the arbitrator to proceed with mediation he must have the parties’ agreement. The arbitrator may, at any stage, mention the possibility of mediation to mediate all or parts of a dispute. The arb-mediator would recognize parties’ choice of law, and discuss potential impact or application of public policy norms of that state and other foreign states involved with the

¹³² Hay, *European Conflicts of Law After the American “Revolution” – Comparative Notes*, *supra* note 128, at 2066, fn. 63.

¹³³ Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law*, *supra* note 128, at 376; See also Arthur T. von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

¹³⁴ For a thorough application of this approach, see generally Hossein Fazilatfar, *International Arbitration and the Mandatory Law Problem: A Mixed Mode ADR Approach*, AM. REV. INT’L ARB. (forthcoming Winter 2022).

¹³⁵ See Thomas J. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators*, 26 HARV. NEGOT. L. REV. 265, 277 (2021) (Hybrid processes are also referred to as Multitier or Mixed Mode.) See also Singapore International Mediation Center (SIMC), *SIAC-SIMC Arb-Med-Arb Protocol* (2014), <http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf>.

¹³⁶ See Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT’L. 187 (2009).

¹³⁷ See UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, Art. 5(1), 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation (2002)).

transaction, including places of arbitration, performance, and enforcement.¹³⁸ She would also have an opportunity to share with the parties the impact of public policy violations on foreign judgments and enforcement of awards in the jurisdictions involved in the case.¹³⁹ The arb-mediator could then, on a case-by-case basis and where proper, suggest that parties make post-dispute changes to the existing choice of law, or adopt a particular body of law to apply to part of their transaction (*dépeçage* discussed above).¹⁴⁰ Indeed, there will be laws more favorable to one party. In that case, the arb-mediator, depending on the issues at stake and parties' interests rather than position, should urge parties in making compromises.¹⁴¹

CONCLUSION

Arbitration agreements draw the legal relationship not only between the parties but also are the contractual source giving authority to the arbitrators to resolve parties' commercial disputes. To respect the principle of party autonomy, arbitrators must serve parties' will and consider their interests in issuing the arbitral award. However, there is one caveat: respect public policy norms of the states that have an important stake in the outcome of the arbitration. This reservation in respecting such norms is not far from arbitrators' mandate to issue an enforceable at law.

Indeed, application of public policy norms in international arbitration is a challenge. The law chosen by the parties, or the otherwise applicable law chosen by the tribunal is where the first and foremost public policy norms must be applied and respected. The limitations would be overriding public policy norms of the place of arbitration on the issue of arbitrability (if the *Lex arbitri* has a territorial connection with the dispute) and such procedural norms of the place of arbitration over the procedural aspect of the arbitration. Another overriding public policy norms possibly involved (that may override parties' choice of law) are those of the foreign states to the chosen law and to the *Lex arbitri*, which have a close connection to the case. In practice arbitrators have reacted to foreign public policy norms in three ways: either they have only taken such norms into account as matters of fact, or have applied them as a matter of law, or have ignored them with no consideration.

When it is said that public policy norms are taken into account as a matter of fact, the public policy behind the norm is considered as a force majeure event preventing the transaction from getting legally performed, and if already performed, in violation of that state's public policy. Where foreign public policy norms are applied directly, however, the law chosen by the parties is governing all parts of the transaction, but not where that law contradicts with the overriding foreign public policy norm. Thus, only in that issue, the foreign norm replaces the law chosen by the parties and applies assertively.

¹³⁸ See Veronique Fraser & Kun Fan, *Working Group 3: Mediators using non-binding evaluations and proposals*, INTERNATIONAL MEDIATION INSTITUTE, 33, <https://imimmediation.org/about/who-are-imi/mixed-mode-task-force/> (“[...] the neutral is mandated to help the parties find solutions and reach agreement, which may take into account the parties' subjective interests, but he or she is also expected to act evaluatively. This can take the form of advising on objective parameters and norms, such as the applicable law or other norms such as financial, industrial, technical, tax-related, social, etc., or predicting the result of an adjudicative outcome (court, arbitration, or others).”).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 35,41.

In cases where foreign public policy norms are ignored by the tribunal is either because the norm lacked an overriding character, or there was a lack of close connection between the case and the country promulgating the norm. However, in cases where all the right circumstances are met and the tribunal still ignores the overriding public policy norm, the award may face possible annulment or refusal of enforcement by courts of the enforcement state and eventually replacement of the chosen law by overriding norms of the forum.

As this Article illustrates, arbitrators do not have to necessarily reject application of public policy norms, in particular ones with an overriding character or directly applicable in disputes and endanger the fate of their award. On a case-by-case basis, they have the opportunity to apply the applicable norm to particular issues in the dispute or award (*dépeçage*) and respect party autonomy in all other aspects of the case. This may be done *ex officio* or through mediation within the arbitration process conducted by the same arbitrator most familiar with the dispute, with active participation of the parties.