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# Arbitration and Antitrust: Navigating the Contours of Mandatory Law

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## Arbitration and Antitrust: Navigating the Contours of Mandatory Law

CHARLES H. BROWER II†

### INTRODUCTION

In international law, the most nettlesome issues lurk at the points where theory seems to contradict practice. For example, while public international law presumes a system of absolutely independent states,<sup>1</sup> those states now operate in an environment characterized by interdependence and overlapping spheres of competence.<sup>2</sup> Mirroring the same

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1. See Case of the S.S. “*Lotus*” (*The Lotus Case*) (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will . . . . Restrictions upon the independence of States cannot therefore be presumed.”); ANTONIO CASSESE, *INTERNATIONAL LAW* 24-25 (2d ed. 2005) (explaining that, in 1648, the Peace of Westphalia marked “the birth of an international system based on a plurality of independent States, recognizing no superior authority over them”).

2. See CASSESE, *supra* note 1, at 5 (“[M]ost components . . . of the international community . . . are so closely intertwined across national borders that they make up the phenomenon usually called ‘globalization.’”); VAUGHAN LOWE, *INTERNATIONAL LAW* 290 (2007) (asserting that the power and influence of individual nation-states have undeniably declined as a result of “[g]lobal interdependence”).

Cassese describes the juxtaposition of theoretical independence and factual interdependence as “striking and unsatisfactory” because the chaotic state of “global governance” remains largely incapable of solving shared problems. CASSESE, *supra* note 1, at 5. Others see the juxtaposition as reconcilable through the establishment of informal coordinating mechanisms, such as the principle of comity. See *Laker Airways Ltd. v. Sabena, Belg. World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (“[C]omity serves our international

tension in private international law, international commercial arbitration holds itself out as a system founded on party autonomy,<sup>3</sup> but increasingly unfolds in a setting where tribunals apply public regulatory laws without regard to the law selected by the disputing parties.<sup>4</sup> Here

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system like the mortar which cements together a brick house. . . . [It] is a necessary outgrowth of our international system of politically independent, [but] socio-economically interdependent nation states. . . . [It] compels national courts to act at all times to increase the international legal ties that advance the rule of law . . . among nations.”).

3. See *Bay Hotel & Resort Ltd. v. Cavalier Constr. Co.*, [2001] UKPC 34, 2001 WL 825663, ¶ 38 (July 16, 2001) (describing party autonomy as a “key principle of current arbitration law”); *American Diagnostica, Inc. v. Gradipore Ltd.*, 24a Y.B. Comm. Arb. 574, 583 (NSW Sup. Ct. (Austl.) 1998) (referring to party autonomy as the “cornerstone of modern arbitration”); Case No. 1512 of 1971, 1 Y.B. Comm. Arb. 128, 130 (ICC Int’l Ct. Arb.) (“There are few principles more universally admitted in private international law than that referred to by the standard terms of the ‘proper law of the contract’, according to which the law governing the contract is the law chosen by the parties . . . .”); PHILLIP LANDOLT, *MODERNISED EC COMPETITION LAW IN INTERNATIONAL ARBITRATION* ¶ 6-02 (2006) (“Since international arbitration is private, the role of party autonomy, in relation in particular to . . . substantive law . . . is particularly pronounced . . . so as to become almost a cure-all, a mantra to be recited in response to any question thrown up.”); JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 1-11 (2003) (“Party autonomy is the ultimate power determining the form, structure, system and other details of the arbitration.”); Loukas A. Mistelis, *Mandatory Rules in International Arbitration: Too Much Too Early or Too Little Too Late?*, in *MANDATORY RULES IN INTERNATIONAL ARBITRATION* 291, 294 (George A. Bermann & Loukas A. Mistelis eds., 2011) (explaining that the promotion of party autonomy represented “a major objective of the arbitration community in the twentieth century,” and has become “the primary element that regulates all aspects of international arbitration”).

4. One observer describes the increasing application of so-called “mandatory law” by arbitral tribunals:

Although traditionally, an arbitrator might not have been expected to take into account the law of the enforcing jurisdiction when rendering an award, increasingly, this is changing with regard to regulatory areas that fall under the heading of public policy or *ordre public*. . . .

. . . Although traditionally, tribunals have seen their responsibility as primarily to the parties appearing before them, and have not generally assumed a duty to enforce the public interest, the duty to render an enforceable award in a case involving statutory and regulatory claims appears to impose new responsibilities.

MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 81-82 (2008); see also NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* ¶¶ 3.128 to 3.135 (5th ed.

too, globalization represents the source of friction. To promote international judicial cooperation among inter-reliant states, legal thinkers developed the concept of mandatory laws,<sup>5</sup> which enable adjudicators to apply

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2009) [hereinafter REDFERN & HUNTER] (describing the increasing tendency to treat competition norms as mandatory rules in international commercial arbitration); LANDOLT, *supra* note 3, ¶¶ 6-08, 6-52 (noting that “over the last decade . . . arbitrators have increasingly been applying mandatory norms” such as competition laws); Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELB. J. INT’L L. 205, 207-08 (2005) (“To complicate matters, mandatory rules issues are on the rise. With the ever-increasing popularity of arbitration, expanded notions of arbitrability and increased legislative activities in this area, mandatory rules issues have been said anecdotally to arise in over 50 per cent of cases.”); Horacio A. Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, in 289 RECUEIL DES COURS 9, 380 (2001) (describing the increased application of *lois de police* by international commercial arbitral tribunals over the past ten years); Nathalie Voser, Current Developments, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT’L ARB. 319, 336 (1996) (“[I]t is safe to assume that in the last decade the trend favorable to the application of mandatory rules has, at least to some extent, benefitted from increased support from scholarly opinion as well as from court and arbitral decisions.”). Perhaps it is no exaggeration to say that “the subject has . . . emerged as something of a preoccupation of those who are involved in the world of international commercial arbitration.” George A. Bermann, *The Origin and Operation of Mandatory Rules*, in MANDATORY RULES IN INTERNATIONAL ARBITRATION, *supra* note 3, at 1, 1.

By contrast, the practice of municipal courts shows “no pattern of assistance [to] foreign interests” and “no body of cases applying foreign mandatory law in this way.” Hannah L. Buxbaum, *Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization*, in MANDATORY RULES IN INTERNATIONAL ARBITRATION, *supra* note 3, at 31, 36. If anything, courts are retreating from the application of mandatory laws, including the mandatory laws of their own jurisdiction. *Id.* at 44-45, 47.

In other words, just as the balance swings from party autonomy to mandatory laws in international commercial arbitration, the balance swings the opposite way in international civil litigation. One wonders if the counter-trends are moving towards convergence or towards opposite poles. At first glance, at least, the latter possibility seems more likely. Whereas the application of mandatory norms contemplates a leading role for adjudicators in coordinating the interests of interdependent states, deference to party autonomy signals greater confidence in private ordering as the key to managing “the complexities of global transactions.” *Id.* at 47; *see also id.* at 34, 44, 48-49.

5. See Thomas G. Guedj, *The Theory of the Lois de Police, A Functional Trend in Continental Private International Law—A Comparative Analysis with Modern American Theories*, 39 AM. J. COMP. L. 661, 671 (1991) (“[T]he close social, economical and political interdependence among modern [s]tates

important regulatory norms enacted by the place of adjudication or by jurisdictions closely connected to the parties,<sup>6</sup> without regard to (and often in contravention to) private agreements about the governing law.<sup>7</sup> Common examples of mandatory laws include norms involving the regulation of competitive markets (antitrust or competition laws), securities regulation, currency controls, environmental laws, and embargos.<sup>8</sup> Opinions differ on whether mandatory laws also include norms designed to protect groups with inferior bargaining power.<sup>9</sup> However,

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commands a minimum of co-operation which in turn gives some credit to a claim that the judge, at least in some instances, should apply the mandatory rules of third states, too.”); *see also* Buxbaum, *supra* note 4, at 44 (“[T]he growing interdependence of states, and the resulting need for greater international cooperation were in the past identified as a basis for extending the doctrine of mandatory rules to permit the application . . . of the law of other states.”).

6. *See* ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES* ¶¶ 7.49 to 7.59 (2005) (explaining that one may divide mandatory laws into two categories: (1) those applied by the seat of arbitration, and (2) those applied by third states having a close connection to the parties or the underlying transaction).

7. *See* Barraclough & Waincymer, *supra* note 4, at 206 (“Mandatory rules are laws that purport to apply irrespective of a contract’s proper law or the procedural regime selected by the parties.”); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 *ARB. INT’L* 274, 275 (1986) (“In matters of contract, the effect of a mandatory rule of the law of a given country is to create an obligation to apply such a rule . . . despite the fact that the parties have expressly or implicitly subjected their contract to the law of another country.”); Audley Sheppard, *Mandatory Rules in International Commercial Arbitration: An English Law Perspective*, in *MANDATORY RULES IN INTERNATIONAL ARBITRATION*, *supra* note 3, at 171, 171 (“By ‘mandatory rule,’ I mean an imperative rule of law that cannot be excluded by agreement of the parties.”).

8. *See* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2178 (2009); LANDOLT, *supra* note 3, ¶ 6-19; Daniel Hochstrasser, *Choice of Law and “Foreign” Mandatory Rules in International Arbitration*, 11 *J. INT’L ARB.*, no. 1, Mar. 1994 at 57, 68; Mayer, *supra* note 7, at 275; Voser, *supra* note 4, at 325.

9. *Compare* Mayer, *supra* note 7, at 275 (indicating that such norms properly qualify as mandatory laws), *with* Voser, *supra* note 4, at 325 (arguing that rules intended to protect a weaker party should not be considered international mandatory rules). For European Union member states, the Rome I Regulation seems to have resolved this debate by excluding consumer and employment laws from the definition of “overriding mandatory norms.” *See* ALEXANDER J. BELOHLAVEK, 2 *ROME CONVENTION/ROME I REGULATION: COMMENTARY* ¶ 09.81, at 1492 (2010) (“Provisions regarding protection of the weaker party to a contract, such as consumers, are not a part of the expression

whatever the proper scope of mandatory laws, the point is that they aim to harmonize the interests of states in a globalized world and, in so doing, encroach on the independence and autonomy long regarded as the theoretical underpinnings of international law.

In both public and private international law, the apparent divide between theory and practice results in surprise and conflict. On the public side, one may refer to fierce transatlantic disputes about the extraterritorial application of competition laws. Although the energetic overreaching of U.S. antitrust laws supplied the focus for debate during the 1970s and 1980s,<sup>10</sup> more recently the European Union (“EU”) has developed a taste for regulating business arrangements grounded in the United States.<sup>11</sup> For example, in 2001, EU competition regulators scuttled General Electric’s proposed takeover of Honeywell International, provoking expressions of “dismay” by President Bush.<sup>12</sup> Similarly, in 1997, the resistance of EU regulators to the merger between Boeing and McDonnell-

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*overriding mandatory provisions.”); see also infra notes 74-83 and accompanying text.*

10. GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 648-50 (4th ed. 2007); *see also* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 309 (7th ed. 2008) (“In the field of economic regulation, and especially anti-trust legislation, controversy has arisen [as a result of] American policies [that] have provoked a strong reaction from a large number of foreign governments.”); LOWE, *supra* note 2, at 173 (“[The so-called] ‘effects doctrine’ has been controversial, for instance when used by US authorities to break up cartels formed lawfully by non-US companies outside the United States. Some such cartels have been organized with the explicit approval and encouragement of the national States of the companies concerned . . . .”); MALCOLM N. SHAW, *INTERNATIONAL LAW* 688 (6th ed. 2008) (indicating that the United States’ “energetic” application of its antitrust laws to aliens outside of U.S. territory on the “basis of the so-called ‘effects’ doctrine [has] provoked considerable controversy”).

11. *See, e.g.*, BORN & RUTLEDGE, *supra* note 10, at 650 (“More recently, the extraterritoriality debate has broadened, to include objections against extraterritorial applications of national competition laws by the EU and other states. In particular . . . the EU competition laws have repeatedly been applied to conduct occurring either predominantly or entirely outside the European Union. U.S. companies and officials have been among the most vigorous critics of such actions.” (footnotes omitted)).

12. Edmund L. Andrews & Paul Meller, *Europe Ends Bid by G.E. for Honeywell*, *N.Y. TIMES*, July 4, 2001, at C1.

Douglas Corporation triggered a political stand-off during which U.S. cabinet secretaries publicly discussed avenues for retaliation, President Clinton personally threatened trade sanctions against European states, and both houses of Congress passed resolutions criticizing the EU's "unwarranted and unprecedented interference in a United States business transaction."<sup>13</sup>

The apparent divide between theory and practice can also generate rude awakenings and conflict on the private side of international law. For example, prominent members of the arbitration bar have emphasized that the application of mandatory laws can come as a "bad surprise" to disputing parties who have carefully selected the laws of another jurisdiction.<sup>14</sup> Furthermore, intense doctrinal conflicts about the relationship between party autonomy and mandatory laws cast a shadow of uncertainty over international commercial arbitration.<sup>15</sup> While some arbitrators reject the very existence of mandatory laws,<sup>16</sup> others recognize their existence, but emphasize the reluctance of tribunals to apply them in practice.<sup>17</sup> Still others regard the application

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13. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 331-32 (3d ed. 2010).

14. See, e.g., Jacques Werner, Note, *A Swiss Comment on Mitsubishi*, 3 J. INT'L ARB., no. 4, 1986 at 81, 83 (explaining that the International Chamber of Commerce's views on the application of mandatory laws, submitted in an amicus brief in the *Mitsubishi* case, "came as a bad surprise to many long-time users of ICC arbitration").

15. See Mistelis, *supra* note 3, at 291 ("Few legal issues ignite such major debates amongst lawyers as the issue of mandatory rules of law."); see also TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 7.50 ("There is no consensus . . . as to when or if an arbitral tribunal should take into account the mandatory laws of another country."); Alexander K.A. Greenawalt, *Does International Arbitration Need a Mandatory Rules Method?*, in *MANDATORY RULES IN INTERNATIONAL ARBITRATION*, *supra* note 3, at 147, 147 ("[T]he role of mandatory rules in international arbitration remains a persistent source of debate.").

16. See LEW ET AL., *supra* note 3, ¶ 17-27 ("Other than that of the chosen applicable law, there is no mandatory law for international arbitration."); Mistelis, *supra* note 3, at 299 ("There is no basis for a tribunal to ignore the express choice of the parties because it determines that there is a contrary mandatory rule in one of [the] national laws [in effect at the place of arbitration, the place of performance, or the place for enforcement of awards].").

17. See BORN, *supra* note 8, at 2184 ("In general, arbitral tribunals have been reluctant to override contractual choice-of-law agreements."); FOUCHARD, GAILLARD, *GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* § 1526

of mandatory laws to be well settled, at least in particular contexts.<sup>18</sup> Even within this last group, doctrine remains inconsistent and poorly articulated.<sup>19</sup> While perhaps less dramatic than inter-governmental political spats, such debates reinforce the potential for misjudgments in a field that demands clarity,<sup>20</sup> particularly with respect to the governing law.<sup>21</sup>

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(Emmanuel Gaillard & John Savage eds., 1999) [hereinafter FOUCHARD, GAILLARD, GOLDMAN] (“[A]rbitrators have so far remained particularly reluctant to apply mandatory rules other than those of the *lex contractus*.”); HORACIO A. GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 74 (1992) (“Arbitrators have shown a certain hesitation in applying international mandatory rules not belonging to the proper law of the contract.”); LANDOLT, *supra* note 3, ¶¶ 6-10, 6-13 (recalling “certain factors of resistance” to the application of mandatory laws, including the “almost hagiographic incantation of ‘party autonomy’”); TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 6.22, at 188 (“Quite often mandatory laws, other than those applicable at the seat of the arbitration or relevant under the applicable law, will be ignored.”); Barraclough & Waincymer, *supra* note 4, at 226 (“There is significant academic support . . . for an approach that would apply no mandatory rules . . . .”); Bernard Hanotiau, *What Law Governs the Issue of Arbitrability?*, 12 *ARB. INT’L* 391, 397 (1996) (“[I]t is a fact that numerous arbitrators remain strongly opposed to the application [of foreign mandatory laws] in the field of arbitrability . . . .”); Mayer, *supra* note 7, at 279 (“[I]n at least some quarters of the arbitration milieu, there is a manifest hostility to the application of mandatory rules of law that do not belong to the law governing the contract.”).

18. See Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 *J. INT’L ARB.*, no. 4, Dec. 1997 at 23, 36-37 (asserting that, during the 1990s, arbitral practice in Switzerland experienced a sea change favoring the application of foreign competition norms as mandatory laws); Laurence Shore, *Applying Mandatory Rules of Law in International Commercial Arbitration*, in *MANDATORY RULES IN INTERNATIONAL ARBITRATION*, *supra* note 3, at 131, 131 (“Arbitrators must apply mandatory rules of the seat of arbitration. This is, in most circles, accepted.”).

19. See Barraclough & Waincymer, *supra* note 4, at 243 (“Arbitrators confronted with mandatory rules questions find few easy answers. There is now a significant body of literature to guide them, but generally speaking opinions tend to be cursory and contradictory.”).

20. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (“[O]rderliness and predictability [are] essential to any international business transaction.”); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 *COLUM. L. REV.* 53, 77 (1992) (“[I]nternational business transactions require stability and predictability to be successful.”).

21. See *Scherk*, 417 U.S. at 516 (“A contractual provision specifying in advance . . . the law to be applied is . . . an almost indispensable precondition to



While reconciliation between the theory of party autonomy and the practice of applying mandatory laws seems desirable for the maintenance of stability in international commercial arbitration, it remains complicated by the fact that the contours of emerging practice remain poorly understood.<sup>22</sup> For example, while one can document the increasing application of competition norms as mandatory law in international commercial arbitration,<sup>23</sup> we know far less about (1) the justifications for applying competition norms as mandatory law, (2) the factors that affect the disposition of tribunals to apply competition norms as mandatory law, and (3) the legal consequences of doing so. At best, these elements of practice remain “ghosts that are seen in the law but that are elusive to the grasp.”<sup>24</sup> As a result, it becomes difficult even to verify the perceived distance between theory and practice, much less to design appropriate mechanisms for bridging possible gaps.<sup>25</sup>

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achievement of the orderliness and predictability essential to any international business transaction.”).

22. See Barraclough & Waincymer, *supra* note 4, at 208 (“[T]here is a notable lack of attempts to examine the issue from first principles and establish a sound theoretical framework for arbitrators to use when confronted with mandatory rules.”); Buxbaum, *supra* note 4, at 32 (“Yet for all [the] attention [lavished on mandatory laws], it is not clear that a fully realized doctrine of mandatory rules has emerged.”); Mayer, *supra* note 7, at 274 (“The impact of mandatory rules of law is of great practical importance in international arbitration. Yet it has scarcely been analysed in a serious manner. . . . This paucity of scholarly work is surprising.”); Mistelis, *supra* note 3, at 291 (“Most relevant questions, including [the] notion, relevance and applicability [of mandatory laws] are not settled and there is certainly a lack of fruitful communication between scholars and practitioners.”); Voser, *supra* note 4, at 319 (“There is uncertainty in the international world of arbitration about the role of mandatory rules in international commercial disputes.”).

23. See *supra* note 4 and accompanying text.

24. Alan Scott Rau, *The Arbitrator and “Mandatory Rules of Law,”* in MANDATORY RULES IN INTERNATIONAL ARBITRATION, *supra* note 3, at 77, 78 (quoting *The Western Maid*, 257 U.S. 419, 433 (1922) (Holmes, J.)) (expressing dissatisfaction with “an endless literature” on mandatory laws that focuses on abstract principles to the exclusion of pragmatic concerns).

25. In a well regarded article, two observers described the landscape for disputing parties, arbitrators, and scholars seeking to understand the phenomenon of mandatory laws:

Assuming that careful examination of practice represents a critical but neglected task, this Article focuses on the causes, catalysts, and consequences of applying European competition law<sup>26</sup> to a dispute between U.S. and European energy companies under a contract governed by New York law. In this example, a U.S. energy producer agrees in 2005 to supply liquefied natural gas (“LNG”) to a European energy distributor for resale to its regular, local customers over a twenty-five year period, subject to the understanding that the distributor may redirect deliveries to superior business opportunities (“SBOs”) upon notice and agreement to share the increased revenue with the U.S. producer. After learning that the distributor has diverted substantial LNG shipments without notice or an offer to share the increased revenue, the producer commences arbitration proceedings under the Arbitration Rules of the International Chamber of Commerce (“ICC Rules”) for breach of the SBO provisions. Despite the contractual choice of New York law, the distributor pleads that the SBO provisions are invalid because they violate European

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Arbitrators confronted with mandatory rules questions find few easy answers. There is now a significant body of literature to guide them, but generally speaking opinions tend to be cursory and contradictory. Arbitral case law is even more unhelpful. Despite the increasing number of arbitral tribunals confronted with mandatory rules issues, explicit analyses of principle are few and far between. . . . [T]he situation needs to improve if a consistent and principled approach is to be achieved.

Barracough & Waincymer, *supra* note 4, at 243; *see also* Sheppard, *supra* note 7, at 171 (“The application of mandatory rules has been described as one of the most difficult issues in international commercial arbitration.”).

26. For the purposes of this Article, “European competition law” means the treaty provisions formerly codified in (and extensively analyzed in the literature as) the Consolidated Version of the Treaty Establishing the European Community arts. 81, 82, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty]. Subsequently, the treaty provisions were codified in the Treaty on the Functioning of the European Union arts. 101, 102, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. The first provision prohibits “all agreements . . . and concerted practices which may affect trade between [EU] Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . .” EC Treaty art. 81 (as in effect 2005) (now TFEU art. 101). The second provision forbids the “abuse . . . of a dominant position within the common market . . . in so far as it may affect trade between Member States.” EC Treaty art. 82 (as in effect 2005) (now TFEU art. 102).

competition law. At the time that the dispute arises, the distributor has also received, but not paid for, \$25 million worth of regular LNG deliveries and seems disposed to walk away from the long-term supply agreement due to changing market trends.<sup>27</sup>

## I. CAUSES

Before engaging the substance of the respondent's arguments about European competition law, the tribunal must find some justification for disregarding the parties' contractual choice of New York law.<sup>28</sup> Invoking Article 35 of the ICC Rules (which mandates the use of best efforts to render enforceable awards),<sup>29</sup> and mindful of the *Eco Swiss* case (in which the European Court of Justice declared European competition law to be a matter of public policy

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27. The broad outlines of this scenario are drawn from publicly available information about a business venture, and subsequent dispute, between BPA America Production Co. ("BPA") and the Spanish energy company Repsol YPF S.A. ("Repsol"). See COMPASS LEXECON, COMPASS LEXECON'S 2009 CLIENT NEWSLETTER 7 (2010), [http://www.compasslexecon.com/highlights/Documents/Newsletter Final Dated 01-11-10 V2.pdf](http://www.compasslexecon.com/highlights/Documents/Newsletter%20Final%20Dated%2001-11-10%20V2.pdf); KING & SPALDING, ANNUAL REVIEW 2010, at 15 (2010), <http://www.kslaw.com/imageserver/KSpublic/Library/publication/KingSpaldingAnnualReview2010.pdf>. However, the scenario remains hypothetical in the sense that it assumes some facts contrary to publicly available information. For example, while the scenario refers to arbitration under the ICC Rules, BPA and Repsol apparently submitted their dispute to arbitration under the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules. KING & SPALDING, *supra*, at 15. In addition, the scenario simply assumes a number of facts for pedagogical reasons. These include the date and anticipated duration of the business arrangements between the U.S. energy producer and the European distributor, the existence of outstanding payments for regular LNG shipments, and the commercial motivations of the disputing parties.

28. See Barraclough & Waincymer, *supra* note 4, at 217 ("The difficulty . . . is in deciding just when party autonomy should be trumped.").

29. See INT'L CHAMBER OF COMMERCE, ARBITRATION RULES, art. 35 (1998) [hereinafter ICC RULES], available at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf) ("In all matters not expressly provided for in these Rules, the [ICC] Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."); see also Voser, *supra* note 4, at 333 ("An arbitral tribunal has the duty to ensure that its award will be enforceable.").

when reviewing arbitral awards in EU member states),<sup>30</sup> many arbitrators would apply European competition law to increase the prospects for enforcement in the respondent's home jurisdiction.<sup>31</sup> More broadly, some arbitrators regard

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30. Case C-126/97, *Eco Swiss China Time Ltd. v. Benneton Int'l NV*, 1999 E.C.R. I-3055, ¶¶ 31-39. For discussion of the *Eco Swiss* decision see LANDOLT, *supra* note 3, ¶¶ 6-87 to 6-89; LEW ET AL., *supra* note 3, ¶¶ 19.24 to 19.28; REDFERN & HUNTER, *supra* note 4, ¶¶ 3.131 to 3.135; Maurits Dolmans & Jacob Grierson, *Arbitration and the Modernization of EC Antitrust Law: New Opportunities and New Responsibilities*, 14 ICC INT'L CT. ARB. BULL., no. 2, Fall 2003 at 37, 43; Hans van Houtte, *The Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission*, 19 EUR. BUS. L. REV. 63, 63-66 (2008); Robert B. von Mehren, *The Eco Swiss Case and International Arbitration*, 19 ARB. INT'L 465, 467-69 (2003). Among other things, the European Court of Justice held that the courts of member states must review arbitral awards for compliance with European competition law, even if the parties had not raised the issue in the arbitral proceedings. *Eco Swiss*, 1999 E.C.R. I-3055, ¶¶ 7, 30; see also LANDOLT, *supra* note 3, ¶ 6-88, at 147 ("It should be noted that the court in *Eco Swiss* requires review not just for a failure to apply EC competition law, but apparently, for a failure to apply it properly.").

31. See Case No. 8626 of 1996, Final Award, 14 ICC Int'l Ct. Arb. Bull., no. 2, Fall 2003 at 55, ¶¶ 18-19 (ICC Int'l Ct. Arb.) ("Furthermore, we are of the opinion that an arbitral tribunal should always be concerned with the effectiveness of its decisions. . . . In the present arbitration the enforcement of any award . . . would . . . be sought . . . in Germany . . . . Accordingly we consider that we are bound to consider the applicability of [European competition law]."); Dolmans & Grierson, *supra* note 30, at 44 ("[A]rbitrators . . . have to raise European competition law issues, taking into account their obligation to make every effort to ensure that their award is enforceable at law."); Mayer, *supra* note 7, at 284 ("[A]rbitrators should pay heed to the future of their award. They should consider that if they do not apply a mandatory rule of law, the award will in all likelihood be refused enforcement in the [jurisdiction] which promulgated that rule."); Luca G. Radicati Di Brozolo, *Arbitration and Competition Law: The Position of the Courts and of Arbitrators*, 27 ARB. INT'L 1, 19 (2011) (recalling the arbitrators' "duty to render an enforceable award," which implies that "they will be expected to take into account the competition rules in force at the place of enforcement"); Voser, *supra* note 4, at 335 ("Concern for the effectiveness of the award may be a reason for arbitrators to respect the mandatory rules of the state where the award may be enforced . . ."); see also LEW ET AL., *supra* note 3, ¶ 19-43 (supporting the application of European competition law "when the award is likely to be enforced within a[n] [EU] Member State"); MOSES, *supra* note 4, at 82 ("[T]he duty to render an enforceable award in a case involving statutory and regulatory claims appears to impose new responsibilities. A tribunal that does not consider the public interest . . . risks offending the public policy in the jurisdiction of enforcement and thereby rendering an unenforceable award."); REDFERN & HUNTER, *supra* note 4, ¶ 3.135 (regarding the *Eco Swiss* decision as an effort to encourage arbitral tribunals to apply European competition law if they hope to ensure the enforceability of their awards in

the application of mandatory norms as the price of securing the political support of states for arbitration.<sup>32</sup> Standing by themselves, these views lack principle, invite blowback, and encourage speculation.

The pursuit of enforcement for its own sake lacks principle because it suggests that tribunals can (and should) do whatever it takes to enhance the prospects for universal acceptance of their awards without regard to the law or

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Europe). *But see* BORN, *supra* note 8, at 2182 (asserting that the “general duty” to render an enforceable award “does not, as a matter of contract, override a specific choice-of-law clause”); Hanotiau, *supra* note 17, at 398 (indicating that tribunals should ensure that their awards are enforceable at the place of arbitration, but concluding that “a majority of arbitrators” recognize no duty to apply foreign mandatory laws to ensure enforcement in other jurisdictions); van Houtte, *supra* note 30, at 68 (“[L]egal rules should be applied because they are part of the proper law of the contract, because they are relevant mandatory rules or because of the public policy of the seat of arbitration; not merely because their application would increase the chances of enforcement abroad.”).

32. *See* LANDOLT, *supra* note 3, ¶ 6-07, at 108 (“[The failure to apply mandatory laws] brings arbitration into disrepute and thus jeopardises it as an institution . . . . If States are not satisfied that their competition law is being treated with sufficient seriousness in arbitration they can remove it from the categories of matters which are arbitrable.”); Grigera Naón, *supra* note 4, at 209 (“Arbitral proceedings and awards and arbitration agreements would risk losing the generous degree of acceptance and support they presently enjoy at the level of national legal systems and jurisdictions should Arbitral Tribunals not have the authority to establish the existence and advance the application of international mandatory rules . . . .”); Hochstrasser, *supra* note 8, at 85 (“[I]nternational arbitration finally depends on the goodwill of . . . [s]tates and their courts for the enforcement of arbitral awards.”); Mayer, *supra* note 7, at 285-86 (admonishing arbitrators to apply mandatory laws “out of a sense of duty to the survival of international arbitration as an institution”); Voser, *supra* note 4, at 337 (“[A]rbitration will only be able to maintain its relevance and, more importantly, gain greater influence in areas where states have strong legislative policies—such as antitrust, exchange, or environmental control—by considering mandatory rules.”); *see also* Hanotiau, *supra* note 17, at 397 (indicating that arbitrators will consider, but will not be motivated exclusively by, concern for “the future of the arbitral institution”); Radicati Di Brozolo, *supra* note 31, at 19 & n.50 (“[T]he application of competition law by arbitrators is . . . the implementation of a bargain between states . . . and the arbitral community . . . . [A]rbitrators may also have in mind a broader consideration of the ‘interests of arbitration’ . . . .”). *But see* BORN, *supra* note 8, at 2182 (“[T]he parties’ legal rights should not (and cannot) turn upon an arbitrator’s ‘sense of duty to the survival of international arbitration as an institution.’” (quoting Mayer, *supra* note 7, at 286)).

solemn agreements about the applicable law.<sup>33</sup> The quest for political approval for its own sake seems no better because it also implies that expediency should prevail over legal analysis in deliberations. To the extent that such views represent anything more than a license for arbitrary decision-making, the operative principle seems to be that arbitrators owe their primary duties not to the parties or to the applicable law, but to the process of arbitration as measured by judicial and legislative acceptance of their work. Given the identity between the arbitral process and arbitrators as repeat players,<sup>34</sup> one wonders if an overriding duty to the arbitral process represents a polite way of saying that arbitrators owe their primary duties to themselves.<sup>35</sup>

While the pursuit of widely enforceable awards and political approval represent important secondary goals,

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33. See BORN, *supra* note 8, at 2182-83 (“[T]he arbitrator’s primary duty must be to render an award in accordance with the parties’ arbitration agreement, even if it proves unenforceable in some places, rather than a universally enforceable award that disregards the parties’ agreement.”); Blessing, *supra* note 18, at 30-31 (“[I]t would seem entirely wrong for an arbitrator to give that concern [for enforceability of the award] a weight which it does not deserve, or to give it a weight which would outweigh a legally correct decision . . . .”); Greenawalt, *supra* note 15, at 160 (doubting that arbitrators should invoke the duty to render enforceable awards “as a means of exceeding or violating the parties’ agreement, particularly where application of a mandatory rule excluded by the parties will operate to change the result of the dispute”).

34. See W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1923 (2010) (indicating that international commercial arbitration has until recently been dominated by an “elite” and “relatively homogenous group of . . . arbitrators” who operated as “repeat players” within the profession); see also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 8-10 (1996) (“Only a very select and elite group of individuals is able to serve as international arbitrators. . . . Members of the inner circle . . . often referred to this group as a ‘mafia’ or a ‘club.’”); Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Lawmaking*, 12 GERMAN L.J. 1083, 1096 (2011) (“[A] relatively small pool of arbitrators is appointed in the most prominent and influential [investment treaty] cases.”).

35. See Rau, *supra* note 24, at 81-82 (finding no difference between an “arbitrator’s ‘sense of duty to the survival of international arbitration as an institution” and “enlightened self-interest,” “at least with respect to [arbitrators] with a career stake as . . . repeat player[s]” (quoting Mayer, *supra* note 7, at 285-86)).

exaggeration of those themes also invites blowback. For example, by emphasizing expediency and by neglecting justifications that conform to widespread views about party autonomy, tribunals may leave the impression of contempt for the parties' agreement,<sup>36</sup> thereby creating grounds for courts to refuse enforcement of their awards under Article V(1)(d) of the New York Convention.<sup>37</sup> Conversely, assuming that courts do not discipline tribunals by refusing to enforce awards, the impression of contempt for private agreements seems likely to undermine support for arbitration among its commercial users. Either way, the pursuit of expediency outside the normal bounds of party autonomy seems likely to harm the integrity of the arbitral process.

Even if it did not lack principle or invite blowback, the emphasis on securing enforcement invites speculation in the application of mandatory laws. For example, while arbitrators can safely assume that the disputing parties have assets in their home jurisdictions, they can only guess about the possibilities for enforcement against assets in third states,<sup>38</sup> even though the New York Convention and the rise of a global economy have increased the relevance of multi-jurisdictional enforcement strategies.<sup>39</sup> Under these

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36. Cf. BORN, *supra* note 8, at 2192 ("Some authorities reject the proposition that arbitral tribunals may (or must) apply the mandatory laws . . . of states other than that of the parties' chosen law. Commentators reason that such a result would contradict the parties' autonomy to select the applicable law." (footnote omitted)).

37. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(d), June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention] (authorizing courts to refuse enforcement of awards when "the arbitral procedure was not in accordance with the agreement of the parties"); FOUCHARD, GAILLARD, GOLDMAN, *supra* note 17, § 1528 ("[B]y applying mandatory rules other than that of the *lex contractus* . . . , arbitrators run the risk of exceeding the terms of their brief . . .").

38. See Mayer, *supra* note 7, at 276 ("[T]here may be several potential execution jurisdictions, and one cannot always predict the attitude of judges who may be called upon to examine the award."); van Houtte, *supra* note 30, at 68 ("[T]he places of prospective enforcement may be manifold and unpredictable."); Voser, *supra* note 4, at 335 ("[A]ssets are often distributed among different countries, and the arbitrator cannot foresee where enforcement will be sought.").

39. See, e.g., Rau, *supra* note 24, at 118 (recognizing "the transitory nature of 'assets' in an electronic world," which logically increases the likelihood of seeking enforcement of awards in multiple jurisdictions).

circumstances, the emphasis on securing enforcement seems likely to support a pair of unpalatable alternatives. First, because the emphasis on enforcement requires arbitrators to speculate about the location of assets, the application of mandatory law may descend into unpredictable guesswork.<sup>40</sup> Conversely, arbitrators wishing to avoid speculation might skew towards the application of mandatory laws of the disputing parties' home jurisdictions, a result that secures predictability by forsaking any real inquiry into the likely scenarios for enforcement. Either way, one faces the prospect of relying on an unknown, or an incomplete, factual matrix in the application of mandatory laws.

By contrast, justifications for mandatory laws that reflect common understandings about party autonomy rest on principle and settled expectations. In this regard, one may observe that even those legal systems most clearly oriented towards autonomy still recognize the existence of peremptory norms. For example, while embracing a community of absolutely independent states that submit to

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40. See Case No. 6106 of 1988, Interim Award, 5 ICC Int'l Ct. Arb. Bull., no. 2, Nov. 1994 at 44, 44-45 (ICC Int'l Ct. Arb.) ("[I]t would be an impossible and sterile task for the arbitrators to determine . . . where an award may be enforced, since enforcement may take place at any place where assets of the condemned party are located. Such location of assets need not be permanent and therefore is . . . unpredictable."); LANDOLT, *supra* note 3, ¶ 6-83 ("[I]t is . . . a matter of inordinate difficulty during [an] arbitration proceeding to predict where the award will be enforced."); Barraclough & Waincymer, *supra* note 4, at 215 ("[W]hen parties have assets in different countries it is difficult to predict the place of enforcement."); Blessing, *supra* note 18, at 30-31 (indicating that concerns about the enforceability of awards seem rather speculative given uncertainly as to which jurisdiction will be called upon for enforcement); Mistelis, *supra* note 3, at 308 ("[I]t is mere speculation where enforcement of the award may be sought."); Rau, *supra* note 24, at 118 ("[I]t may . . . be impossible for the arbitrators to predict with any accuracy just which jurisdictions may later be called on to recognize an award."); van Houtte, *supra* note 30, at 68 ("The arbitration process would lose its foreseeability if the law to be applied by the arbitrators depended on their assessment of the possibilities to enforce the award in different places."). Also, because "the likely 'place of enforcement' will vary depending on just who the successful party was," Rau, *supra* note 24, at 118, prognostication about the likely place of enforcement invites speculation about the merits at a stage when the parties will not have fully developed their cases.



regulation only by consent,<sup>41</sup> the Westphalian model of international law<sup>42</sup> has always reserved space for mandatory norms, known first as “natural law”<sup>43</sup> and, later, placed under the rubric of “*jus cogens*.”<sup>44</sup> If peremptory norms seem reconcilable with the vast autonomy of states on the international plane, the existence of comparable limits on private parties hardly comes as a surprise.

In fact, national legal systems almost universally accept the principle that strong public policies can override private agreements deemed to produce socially undesirable results.<sup>45</sup> Mandatory rules, thus, reflect the premise that all

41. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 135 (June 27) (“[I]n international law there are no rules, other than such rules as may be accepted by the State concerned . . . .”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 1, intro. note, at 18 (1987) (“Modern international law is rooted in acceptance by states which constitute the system.”).

42. The Westphalian model of international law has been characterized as “a plurality of independent States, recognizing no superior authority over them.” CASSESE, *supra* note 1, at 24.

43. See M. DE VATTTEL, 1 THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS §§ 4, 5 (1759) (asserting that states remain “absolutely free and independent with respect to all men, or to foreign nations,” but accepting that they simultaneously remain “subject to the laws of nature, and [ ] obliged to respect them in all its proceedings”).

44. Virtually all writers recognize that international law includes a category of peremptory or nonderogable norms known as “*jus cogens*.” BROWNLIE, *supra* note 10, at 510-12; CASSESE, *supra* note 1, at 201-02; MARK WESTON JANIS, INTERNATIONAL LAW 65, 67 (5th ed. 2008); LOWE, *supra* note 2, at 59; SHAW, *supra* note 10, at 124-25. At a minimum, these include the prohibition on the aggressive use of force, genocide, and slave trading. BROWNLIE, *supra* note 10, at 510-11; CASSESE, *supra* note 1, at 202; LOWE, *supra* note 2, at 59; SHAW, *supra* note 10, at 126.

Many writers regard *jus cogens* as the resurrection of, or successor to, natural law. See JANIS, *supra*, at 66 (“It makes better sense to view *jus cogens* as a modern form of natural law . . . .”); see also CASSESE, *supra* note 1, at 200 n.3 (indicating that *jus cogens* translated the natural law concepts of seventeenth- and eighteenth-century theorists such as Emmerich de Vattel into terms of positive law); SHAW, *supra* note 10, at 125-26 (explaining that *jus cogens* “reflects the influence of Natural Law thinking”).

45. CASSESE, *supra* note 1, at 10 (“Every domestic system contains a core of values that members of the community cannot disregard, not even when they engage in private transactions *inter se*.”); see also BORN, *supra* note 8, at 2170-71 (“Many national conflict of law systems recognize that mandatory rules of public

legal systems require mechanisms to restrain the potential excesses of free will.<sup>46</sup> While the concept seems unassailable in the abstract or within the context of a single legal system,<sup>47</sup> it becomes controversial in international arbitration because there still may be disagreements about the justification for applying a *particular country's* mandatory laws to the parties and their dispute.<sup>48</sup> Ultimately, the issue boils down to a choice-of-law question. While the details may be complex, the basic concept is not: (1) tribunals have an obligation to decide cases according to law,<sup>49</sup> (2) states may enact laws designed to restrain free will,<sup>50</sup> and (3) those laws must prevail over contrary agreements whenever those laws apply by their own terms *and* their application also has been validated by the relevant choice-of-law rules.<sup>51</sup> In other words, mandatory

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policy or statutory law will in some circumstances override an otherwise valid choice-of-law agreement.”); LANDOLT, *supra* note 3, ¶ 6-16, at 112 (“A principle found almost universally in systems of private international law the world-over is that the ordinary rules to determine applicable law can be ousted insofar as a matter is characterised as involving the rules of ‘mandatory application’ of the State whose courts are called upon to determine these matters.”).

46. See Hochstrasser, *supra* note 8, at 85 (“Just as the freedom of contract, in even the most liberal legal system, finds its limits at certain mandatory rules, the freedom of choice of law, which is nothing more than a different expression of the freedom of contract on the international level, finds its limits at the mandatory and applicable rules of law affected by an international agreement.”).

47. See Mayer, *supra* note 7, at 284-85 (“[No] one would hold an arbitrator in a purely domestic dispute to be exempt from the duty of applying rules whose sole purpose is to defend the public interest. Naturally, it may be said that in the context of domestic arbitration the applicability of one single system of law is *ex hypothesi* evident . . .”).

48. See *id.* at 286 (“If one allows that arbitrators may not systematically disregard mandatory rules of law even when originating outside the *lex contractus*, it remains to be determined which ones they should in fact apply.”).

49. BORN, *supra* note 8, at 2183, 2192, 2196.

50. See *supra* notes 45-46 and accompanying text.

51. As a leading observer explains:

[T]he better view is that the “foreign” mandatory law will apply only if *both* the requirements of the foreign mandatory law and relevant conflicts rules provide for the application of the foreign law. That is because it is the conflicts rules applicable to the parties’ dispute—and not the unilateral definitions of foreign legal systems—which must

laws do not prevail over contrary agreements because they claim preemptory status for themselves,<sup>52</sup> but because the relevant conflicts-of-law rules validate their application in the particular case.

Returning to the Article's opening scenario,<sup>53</sup> the tribunal may apply European competition law without regard to the contractual selection of New York law if the SBO arrangements cause substantial anticompetitive effects in EU member states (thus triggering European competition law by its own terms),<sup>54</sup> and if the relevant conflicts-of-law rules also validate the claims of European competition law.<sup>55</sup>

## II. CATALYSTS

Having adopted a legal justification that better reconciles mandatory laws with widely held views about the limits of party autonomy, one may begin to explore three catalysts likely to affect the disposition of arbitrators towards the application of a *particular* mandatory law. These include (1) the place of arbitration, (2) the relevant

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define the circumstances in which a choice-of-law clause will be overridden.

BORN, *supra* note 8, at 2192.

52. See Case No. 6320 of 1992, Final Award, 6 ICC Int'l Ct. Arb. Bull., no. 1, May 1995 at 59, 62 (ICC Int'l Ct. Arb.) (“[E]ven if a particular state does claim the mandatory extraterritorial application of its laws, that—by itself—is not sufficient to lead to the mandatory application of such laws in international arbitration.”); Mayer, *supra* note 7, at 286 (“It is not sufficient that . . . the State having promulgated [the rule of mandatory law] declares it to be applicable.”). *But see* Mistelis, *supra* note 3, at 292 (describing mandatory laws in terms of “a category of express (positive) rules which provides for its own scope of application” (emphasis added)).

53. See *supra* notes 26-27 and accompanying text.

54. See Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753, ¶¶ 82, 90 (holding that European competition law did not exclude application to overseas conduct that had the effect of creating or strengthening a dominant position that impedes competition in the European Common Market); Dolmans & Grierson, *supra* note 30, at 45-46 (noting that European competition law is applicable to any agreement that has substantial anticompetitive effects in the EU).

55. As explained below, different conflicts-of-law rules may vary substantially in their tendency to validate the claims of mandatory law. See *infra* notes 71-77 and accompanying text.

choice-of-law rules, and (3) the selection of institutional rules.

### A. *Place of Arbitration*

Starting with the place of arbitration, one may identify four likely effects on a tribunal's inclination to apply mandatory rules. First, courts at the place of arbitration have the power to set awards aside for violations of public policy,<sup>56</sup> which then becomes a ground to refuse enforcement in third states under Article V(1)(e) of the New York Convention.<sup>57</sup> In this regard, one should recall that most courts seem keen to defend their own states' mandatory laws, but show much less enthusiasm in defending the mandatory laws of other states.<sup>58</sup> Cognizant of this fact, tribunals may feel particularly inclined to apply the mandatory laws of the arbitral seat.<sup>59</sup>

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56. See Voser, *supra* note 4, at 333 (“[I]f an arbitral tribunal renders an award which violates public policy, it risks that the award may be challenged at the place of arbitration.”).

57. New York Convention, *supra* note 37, art. V(1)(e) (authorizing courts to refuse enforcement of an award that “has been set aside . . . by a competent authority of the country in which . . . that award was made”); see also Voser, *supra* note 4, at 333 (indicating that, while not absolutely required by Article V(1)(e) of the New York Convention, the setting aside of an award at the place of arbitration usually prevents enforcement of awards in third states).

58. See Hanotiau, *supra* note 17, at 397 (“If state courts are inclined to apply the forum policy laws, even if the *lex contractus* does not coincide with the *lex fori*, they are very reluctant to apply policy laws of a foreign legal system.”); Mayer, *supra* note 7, at 282-83 (“Judges are quite ready . . . to apply their own country’s mandatory rules of law . . . . On the other hand, the possibility of making such an exception in favour of mandatory rules of a foreign law is met with far greater reluctance.”); see also LANDOLT, *supra* note 3, ¶¶ 6-25 to 6-26 (noting that courts invariably apply the mandatory laws of their own jurisdictions, but that judicial “application of foreign mandatory law is a very different matter”); Bernard Audit, *How Do Mandatory Rules of Law Function in International Civil Litigation?*, in MANDATORY RULES IN INTERNATIONAL ARBITRATION, *supra* note 3, at 53, 65 (“A national court will normally be reluctant to displace its own law in order to comply with a foreign mandatory rule.”); van Houtte, *supra* note 30, at 67 (“[A] judge is less preoccupied with the advancement of policies of a foreign state than with the application of the proper law.”).

59. See Voser, *supra* note 4, at 334 (“If a state . . . allow[s] the challenge to an arbitral award that was rendered in its territory on the basis of its own . . .

Second, perhaps for the reason just stated, observers often refer to a generic presumption favoring application of the seat's mandatory laws, at least if the parties or their transaction bears a close relationship to that jurisdiction.<sup>60</sup>

Third, even when policing the application of their own mandatory laws, courts apply different standards of review. Thus, U.S. courts pause only to ensure that arbitrators have *applied* local mandatory laws without regard to the *quality* of analysis.<sup>61</sup> Increasing the level of scrutiny, French courts review awards for obvious misapplications of local mandatory laws.<sup>62</sup> Taking things a step further, the Dutch

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public policy, the arbitrator may be inclined to respect the mandatory rules of the law of th[at] state . . .").

60. See GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* ¶ 5.04, at 168 (James J. Fawcett ed., 2004) ("One clear-cut conclusion that emerges from arbitral practice is that international arbitrators strive to give effect to mandatory provisions of the law of the seat of the arbitration, if their violation might leave the award open to be set aside in that state."); Shore, *supra* note 18, at 131 ("Arbitrators must apply mandatory rules of the seat of arbitration. This is, in most circles, accepted."); Voser, *supra* note 4, at 338 ("[I]n practice there is a tendency to favor mandatory rules of . . . the seat of arbitration."). However, another leading observer cautions against the automatic application of the seat's mandatory laws because that jurisdiction may have little to do with the parties or the underlying dispute. BORN, *supra* note 8, at 2187; see also Audit, *supra* note 58, at 60 ("[T]he purpose of [a] particular domestic mandatory rule might *not* call for its application in transnational situations, [for example] where the substance of the transaction has no relation to the forum."); Barraclough & Waincymer, *supra* note 4, at 224 (arguing against the application of the seat's mandatory laws when the disputing parties have only tenuous connections to the jurisdiction and have chosen the location "purely for convenience"); Radicati Di Brozolo, *supra* note 31, at 18 ("[T]he arbitrators' power . . . to apply competition law will as a rule not derive from the law of the seat of the arbitration, since that law will not mandate the application of the local competition law if the relationship submitted to arbitration has no effects on the markets of that country.").

61. See, e.g., *Baxter Int'l, Inc. v. Abbott Labs.*, 315 F.3d 829, 832 (7th Cir. 2003). In *Baxter*, the Seventh Circuit held that judicial review of arbitral awards only goes as far as ascertaining whether the tribunal "took cognizance" of U.S. antitrust claims and "actually decided them." *Id.* Furthermore, the court indicated that plenary review of the arbitrators' decisions on antitrust claims "would throw the result [of the arbitration] in the waste basket," which "would be just another way of saying that antitrust matters are not arbitrable." *Id.*

62. See BORN, *supra* note 8, at 2628-30 nn.396, 402 (citing a French Court of Cassation decision for the proposition that violations of public policy must be "flagrant and have material effect" to justify the annulment of arbitral awards, as well as a Paris Court of Appeal decision for the proposition that a "manifest"

Hague Court of Appeal has applied a *de novo* standard of review to questions of local mandatory law.<sup>63</sup> Given the vast differences in approach by national courts, tribunals may devote more or less attention to local mandatory laws depending on the anticipated level of judicial review at the seat of arbitration.

Fourth, while no longer a universal rule,<sup>64</sup> many arbitrators still presumptively apply the seat's conflicts-of-

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violation of European competition law would justify annulment of arbitral awards). Another well-known commentator has explained that the violation of mandatory law "must be so blatant as to 'knock your eyes out'" in order to "attract judicial notice" in France. Rau, *supra* note 24, at 115 & n.94. French courts follow a similar approach in proceedings to enforce foreign arbitral awards. See *SNF SAS v. Cytec Indus. BV*, Judgment of Mar. 23, 2006, 23 Y.B. Comm. Arb. 282, 288 (Paris Ct. App.) (requiring parties to prove a "flagrant, effective and concrete violation of international public policy" to justify refusal to enforce foreign awards). Because "alleged violations of competition law are, by their very nature, rarely blatant," this standard of review implies that French courts will almost never set aside awards based on incompatibility with European competition law. Denis Bensaude, *Thalès Air Defence BV v. GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law*, 22 J. INT'L ARB. 239, 243 (2005).

63. *Mktg. Displays Int'l v. VR Van Raalte Reclame BV*, Judgment of Mar. 24, 2005, 31 Y.B. Comm. Arb. 808, 816 (Hague Gerechtshof) ("[A] national court must grant a request for annulment of an arbitral award — when, *in its opinion*, that award is indeed in conflict with [European competition law]." (emphasis added)); see also BORN, *supra* note 8, at 2630 ("[T]here are commentators who urge, and national courts which apply, significantly more extensive judicial review of arbitrators' mandatory law and public policy decisions, on the grounds that this is necessary to safeguard underlying public values." (footnotes omitted)). But see Alexis Mourre & Luca G. Radicati di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 23 J. INT'L ARB. 171, 185 (2006) (describing the Dutch judgment in *Marketing Displays* as "a deplorable step back" which "clearly demonstrates the serious drawbacks of the intrusive review of awards by national courts"). Some observers have interpreted the European Court of Justice's decision in the *Eco Swiss* case to require the courts of EU member states not only to ensure that arbitrators apply European competition law, but that they do so "properly," an assessment that suggests *de novo* review. See, e.g., LANDOLT, *supra* note 3, ¶ 6-88, at 147.

64. See BORN, *supra* note 8, at 2123; John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L L. 278, 283 (1989) (explaining that applying the seat's conflicts-of-law rules "holds far less sway . . . today than once it did"); Voser, *supra* note 4, at 340 ("Even though some scholars still view [applying the seat's conflicts-of-law rules] as the 'usual rule,' . . . the *obligation* to apply the private international law of

law rules.<sup>65</sup> As already noted, the relevant conflicts-of-law rules play an important role in validating the application of mandatory laws.<sup>66</sup> Furthermore, as explained below, European conflicts rules may skew more towards validating the application of mandatory law than their U.S. counterparts, at least in particular cases.<sup>67</sup> For this reason, the seat of arbitration can affect the tribunal's disposition to apply mandatory laws.

Aggregating the foregoing observations, arbitration in a particular forum generally supports the application of that jurisdiction's mandatory laws. More specifically, arbitration in an EU member state seems likely to trigger the application of European competition law,<sup>68</sup> at least in cases where a party or the transaction has a close connection to that jurisdiction.<sup>69</sup> Thus, returning to this Article's opening scenario,<sup>70</sup> the respondent's invocation of European

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the arbitral tribunal's seat can safely be assigned to the history of international commercial arbitration.”).

65. See BORN, *supra* note 8, at 2127 (“Arbitrators continue in many cases to apply the choice-of-law rules of the arbitral seat . . .”); Crook, *supra* note 64, at 283 (opining that this view “retains energetic supporters”); Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 22-23 (1986) (describing this approach as the “usual rule”); Voser, *supra* note 4, at 340 (“[A]rbitrators still seem to apply [this rule] in practice.”). *But see* Mayer, *supra* note 7, at 284 (“No rule of conflict of laws is imperative as to arbitrators.”). It goes without saying that arbitrators will be more likely to favor the seat's conflicts-of-law rules if they adhere to the “jurisdictional” theory of arbitration, or the view that proceedings remain anchored in the legal system prevailing at the place of arbitration. Barraclough & Waincymer, *supra* note 4, at 210. Arbitrators who prefer a “delocalized” approach will be less likely to apply the seat's conflicts-of-law rules. See REDFERN & HUNTER, *supra* note 4, ¶ 3.74 (describing the theory of delocalization, which seeks “to detach an international commercial arbitration from control by the law of the place in which it is held”).

66. See *supra* notes 51-52 and accompanying text.

67. See *infra* notes 71-77 and accompanying text.

68. See van Houtte, *supra* note 30, at 65 (“[A]rbitrators have to apply [European] competition law when the seat of the arbitration is located within the European Union. It is part of the public policy of the country where they perform their duties . . .”).

69. See *id.* (“Arbitrators sitting within the E.U. may have additional grounds to apply European competition law, for instance, because . . . the case is closely linked with an E.U. country.”).

70. See *supra* notes 26-27 and accompanying text.

competition law may prevail in arbitrations seated on one side of the Atlantic, but seems less likely to succeed in arbitrations seated on the other side of the Atlantic.

### B. *Conflicts-of-Law Rules*

Turning from the place of arbitration to the relevant choice-of-law rules, certain approaches seem more likely to validate the application of foreign mandatory law. With respect to contracts concluded through December 17, 2009, the Rome Convention on the Law Applicable to Contractual Obligations (in effect for EU member states)<sup>71</sup> permits the application of foreign mandatory laws having a “close connection” to the “situation.”<sup>72</sup> According to this approach,

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71. Rome Convention on the Law Applicable to Contractual Obligations, Oct. 9, 1980, 1980 O.J. (L 266) 1. As explained by Landolt, the Rome Convention was only open to ratification by EU member states and was, in fact, ultimately ratified by all EU member states. LANDOLT, *supra* note 3, ¶ 6-29. Article 7(1), the relevant provision on mandatory laws, states that “effect may be given to the mandatory rules of the law of another country with which the situation has a close connection . . . .” Rome Convention, *supra*, art. 7(1). However, the Rome Convention also permits state parties to opt out of Article 7(1). *Id.* art. 22(1)(a). This step has been taken by Germany, Ireland, Luxembourg, and the United Kingdom. BELOHLAVEK, *supra* note 9, ¶ 09.138; BORN, *supra* note 8, at 2176; FOUCHARD, GAILLARD, GOLDMAN, *supra* note 17, § 1516, at 848; Grigera Naón, *supra* note 4, at 208 n.196; *see also* Audit, *supra* note 58, at 70 (noting that Germany, Luxembourg and the U.K. availed themselves of that possibility).

72. Rome Convention, *supra* note 71, art. 7(1). One should emphasize that this provision permits (but does not require) the application of foreign mandatory laws. *See* BORN, *supra* note 8, at 2176. As such, it leaves tribunals with a substantial degree of discretion. *See* LANDOLT, *supra* note 3, ¶ 6-32 (emphasizing that the Rome Convention grants courts considerable discretion to decide whether they will apply foreign mandatory laws, as well as the “effect” to give them once applied); Bermann, *supra* note 4, at 12 (“[The] Rome Convention made the forum’s application of a third state’s mandatory rules of law essentially discretionary.”); Shore, *supra* note 18, at 142 (“The very breadth of Article 7.1 . . . is expressly intended . . . to give a power of discretion to judges . . .”). This discretion may depend on subjective impressions about the “nature and purpose” of foreign mandatory laws, as well as predictions about the “consequences of their application or non-application.” Rome Convention, *supra* note 71, art. 7(1). The breadth of discretion may not be “particularly reassuring for parties involved in international commerce, for whom predictability is an important consideration.” FOUCHARD, GAILLARD, GOLDMAN, *supra* note 17, § 1522, at 853; *see also* BELOHLAVEK, *supra* note 9, ¶ 09.142, at 1511 (explaining that the United Kingdom opposed the wording of Article 7(1) on the grounds that it “leads to great legal uncertainty for no reason”); Sheppard, *supra* note 7, at 180 (explaining that the U.K. delegation opposed



the satisfaction of a single, modest criterion (a “close connection”) triggers the tribunal’s discretion to apply mandatory law.<sup>73</sup> Thus, European conflicts-of-law rules traditionally have invited the application of foreign mandatory laws.

By contrast, the Restatement (Second) of Conflict of Laws represents the traditional point of departure across the Atlantic. According to section 187(2), contractual choices of law have no effect to the extent that they contradict a “fundamental policy” of a state which (1) has a “*materially greater interest*” in determination of the issue,<sup>74</sup> and (2) has the “*most significant relationship*”<sup>75</sup> to the parties and their transaction,<sup>76</sup> a cumulation of demanding criteria that seems to discourage the application of mandatory laws.<sup>77</sup>

To be sure, intervening developments have rendered it more difficult to generalize about the differences between European and U.S. conflicts rules. For contracts concluded after December 17, 2009, the Rome I Regulation supersedes the Rome Convention.<sup>78</sup> While preserving a wide scope for the application of non-derogable laws in the employment<sup>79</sup>

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Article 7(1) of the Rome Convention because its text created “a recipe for confusion [and] uncertainty . . .” (quoting DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶ 32-143, at 1593 (Sir Lawrence Collins et al. eds., 14th ed. 2006))).

73. Landolt has indicated that the vagueness of the “close connection” standard reinforces the discretion of courts in deciding whether to apply foreign mandatory laws. LANDOLT, *supra* note 3, ¶ 6-33. Arbitrators not inclined to apply foreign mandatory laws over the will of the parties may, for example, use their discretion to demand a particularly close connection to justify the application of foreign mandatory laws. *Id.* ¶ 6-70, at 138.

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971) (emphasis added).

75. *Id.* § 188(1) (emphasis added).

76. *Id.* § 187(2) (incorporating § 188).

77. See BORN, *supra* note 8, at 2177 (emphasizing the Restatement’s more restrictive approach towards mandatory law).

78. Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), arts. 24, 28, 2008 O.J. (L 177) 6, 15, 16 (EC) [hereinafter Rome I Regulation]; see also Shore, *supra* note 18, at 143-44.

79. Rome I Regulation, *supra* note 78, art. 8(1) (“An individual employment contract shall be governed by the law chosen by the parties . . . . Such a choice of law may not, however, have the result of depriving the employee of the

and consumer fields,<sup>80</sup> the new regulation restricts their application in other fields. For example, the regulation draws a distinction between “provisions which cannot be derogated from by agreement” and a narrower category of “overriding mandatory provisions.”<sup>81</sup> According to the Regulation, these “overriding mandatory provisions” represent a more restrictive concept involving “provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract . . . .”<sup>82</sup>

With respect to “provisions . . . which cannot be derogated from by agreement,” a contractual choice of law will not prevent the application of EU law or the national law of another jurisdiction if “all other elements relevant to the situation at the time of the choice” were located in an EU member state or in the other jurisdiction, respectively.<sup>83</sup> According to commentary, this provision serves to prevent the evasion of non-derogable norms in “purely domestic cases.”<sup>84</sup>

With respect to “overriding mandatory provisions,” a contractual choice of law will not prevent application of (1) the forum’s own laws; or (2) those of another “country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract

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protection afforded to him by provisions that cannot be derogated . . . under the law that . . . would have been applicable . . .”).

80. *Id.* art. 6(2) (“Such a choice may not . . . have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated . . .”).

81. *Id.* recital 37.

82. *Id.* art. 9; see also Shore, *supra* note 18, at 144 (describing the Rome I Regulation’s more restrictive approach to overriding mandatory provisions).

83. Rome I Regulation, *supra* note 78, art. 3(3) (other jurisdiction); *id.* art. 3(4) (EU Member State).

84. Dennis Solomon, *The Private International Law of Contracts in Europe: Advances and Retreats*, 82 TUL. L. REV. 1709, 1727 (2008).

unlawful.”<sup>85</sup> Thus, by adopting a restrictive definition of “overriding mandatory provisions” and by limiting their geographic scope to the forum and to the place of performance, the EU’s newest conflicts rules appear to signal a retreat from the application of mandatory laws,<sup>86</sup> and towards the more restrictive approach codified in the Restatement.<sup>87</sup>

Although it may have become more difficult to *generalize* about the differences between European and U.S. conflicts rules, the point is that differences remain clear and substantial for *particular* situations. For example, given the timing involved in this Article’s opening scenario (long antedating the effective date for the Rome I Regulation), the tribunal would have to choose between the Rome Convention and the Restatement as the source of the relevant conflicts rules. Selection of the Rome Convention seems likely to encourage the application of European competition law, whereas selection of the Restatement seems likely to discourage it.

Before leaving the topic of conflicts-of-law rules, one should pause to observe that recourse to arbitration may itself enhance the prospects for applying mandatory law.<sup>88</sup>

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85. Rome I Regulation, *supra* note 78, art. 9; *see also* Shore, *supra* note 18, at 144 (noting that the “overriding mandatory provisions” of the Rome I Regulation refer only to the law of the forum and the law of the country of performance).

86. *See* BELOHLAVEK, *supra* note 9, ¶¶ 09.141 to 09.142 (describing the Rome I Regulation as a compromise designed to appeal to member states that wanted to restrict the scope of mandatory laws in order to enhance party autonomy and legal certainty); Audit, *supra* note 58, at 70 (“[T]he Rome I Regulation has retreated from the position of the Convention.”). More specifically, the Rome I Regulation seems to embrace the narrow British view that gives judges discretion only to invalidate contracts that would be unlawful at the place of performance. *See* LANDOLT, *supra* note 3, ¶ 6-40 (describing the English approach to foreign mandatory laws). *But see* Sheppard, *supra* note 7, at 179 n.24 (indicating that Article 9 of the Rome I Regulation has an effect similar to Article 7(1) of the Rome Convention, “albeit with some changes in wording”).

87. *See* Audit, *supra* note 58, at 70 (discussing the Rome I Regulation and concluding that “there is nothing here very different from what could already be found in the Restatement . . .”).

88. *See supra* note 4 (describing opposing trends, in which arbitrators increasingly apply mandatory laws without regard to contractual choices of law, but national courts are retreating from the application of mandatory laws).

Building on French legal traditions<sup>89</sup> and ICC practice,<sup>90</sup> all major international arbitration rules now authorize tribunals to “apply the rules of law [that they determine] to be appropriate” in the absence of a contractual choice.<sup>91</sup> As a result, tribunals have the discretion to choose an “appropriate” substantive law directly, without having to perform a conflicts analysis or even “explain or justify [their] findings regarding the law or legal rules governing the merits.”<sup>92</sup> Assuming their willingness to exercise that discretion, tribunals might free themselves from the restraining criteria found in certain national conflicts rules and, thus, increase their leeway to secure the application of mandatory laws.<sup>93</sup>

One should, however, bear in mind three qualifications regarding the direct selection of substantive law. First, that possibility only appears in the UNCITRAL Arbitration Rules as of the July 2010 amendments,<sup>94</sup> which

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89. BORN, *supra* note 8, at 2117, 2136; REDFERN & HUNTER, *supra* note 4, ¶ 3.222; TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 6.66.

90. BORN, *supra* note 8, at 2118, 2136.

91. ICC RULES, *supra* note 29, art. 17(1) (“In the absence of any . . . agreement [by the parties], the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.”); *see also* INT’L CTR. FOR DISPUTE RESOLUTION & AM. ARBITRATION ASS’N, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 28(1) (2010), *available at* <http://www.adr.org/si.asp?id=6449> (“Failing . . . a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.”); U.N. Comm’n on Int’l Trade Law, UNCITRAL Arbitration Rules (as revised in 2010), G.A. Res. 65/22, art. 35(1), U.N. Doc. A/65/17 (Dec. 6, 2010) [hereinafter UNCITRAL Rules] (“Failing . . . designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.”). LCIA *Arbitration Rules*, LONDON COURT OF INTERNATIONAL ARBITRATION, art. 22.3 (Jan. 1, 1998), [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx) (“If . . . The Arbitral Tribunal decides the parties have made no . . . choice [of law], the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate”).

92. Grigera Naón, *supra* note 4, at 213.

93. *See id.* at 216 (“[T]he wide notion of ‘appropriateness’ found in Article 17(1) of the 1998 ICC Rules do[es] not exclude [the] possibility [of applying mandatory laws] when the parties have not stipulated the applicable law governing the merits.”).

94. *Compare* UNCITRAL Rules, *supra* note 91, art. 35(1), *with* U.N. Comm’n on Int’l Trade Law, UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 33(1) (Dec. 15, 1976), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (“Failing such designation by the parties, the

presumptively apply only to contracts concluded after August 15, 2010.<sup>95</sup> Thus, for many contracts in force as of this writing, direct selection of the substantive law will not be available to tribunals operating under the UNCITRAL Arbitration Rules.

Second, while perhaps well established in French legal circles,<sup>96</sup> some arbitrators regard the direct selection of substantive laws as subjective and unpredictable,<sup>97</sup> and therefore inappropriate.<sup>98</sup> As a result, they continue to apply national conflicts-of-law rules on the theory that the resulting selection of substantive law rules represents the most "appropriate" choice.<sup>99</sup>

Third, and perhaps most importantly, arbitration rules authorize the direct selection of substantive laws only in the absence of contractual choices of law.<sup>100</sup> Therefore, if the parties have selected the applicable law by contract, arbitration rules do not expressly permit the arbitrators to engage in the direct selection of competing mandatory laws. However, to the extent that one of the disputing parties challenges a contractual selection of law as invalid in the particular case, the arbitration rules would then authorize the tribunal to engage in direct selection of the legal rules to judge the validity of the contractual choice, which might bring into play the mandatory laws of another state.<sup>101</sup>

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tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.”).

95. See UNCITRAL Rules, *supra* note 91, art. 1(2).

96. See *supra* note 89 and accompanying text.

97. See BORN, *supra* note 8, at 2137 (criticizing direct selection of the applicable law because it “leaves the parties’ substantive rights to turn on subjective, unarticulated instincts” of arbitrators); TWEEDDALE & TWEEDDALE, *supra* note 6, ¶ 6.65 (“The approach has been criticized because of the uncertainty that can occur.”); Grigera Naón, *supra* note 4, at 213 (“It is difficult to conceive of choice-of-law rules more flexible and open-ended or imposing lesser limitations on the authority of . . . arbitrators.”).

98. BORN, *supra* note 8, at 2137.

99. See *id.* at 2142.

100. See, e.g., sources cited *supra* note 91.

101. See BORN, *supra* note 8, at 2183 & n.365 (noting that the arbitrators’ mandate may require adjudication of claims that “contractual arrangements are invalid, unlawful, or otherwise contrary to public policy,” which may open the door to consideration of mandatory laws).

### C. Institutional Rules

Turning from conflicts-of-law rules to the procedural rules for conducting arbitrations, one may identify a number of factors that arguably encourage the application of mandatory law in proceedings conducted under the ICC Rules. For example, among the leading arbitration institutions, the ICC has distinguished itself by expressing positive views about the application of mandatory laws. Thus, as early as 1980, an ICC working group issued draft recommendations confirming the authority of arbitrators to apply mandatory laws in circumstances broadly similar to those contemplated by the Rome Convention.<sup>102</sup> Four years later, the ICC's Executive Board approved a "Report of the Joint Working Party on Arbitration and Competition," which disclaimed any wish "to serve as a substitute for the arbitrators themselves," but which nevertheless stated that "the International Chamber of Commerce takes up the same position as that expressed by the Commission" of the European Communities regarding the circumstances calling for the mandatory application of European competition law.<sup>103</sup> Later that same year, when appearing as amicus curiae before the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>104</sup>

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102. See *id.* at 2183 n.365 (discussing the draft recommendations of a working group of the ICC Commission on Law and Commercial Practices).

103. Brief of the International Chamber of Commerce as Amicus Curiae at 36 n.34, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (Nos. 83-1569, 83-1733), 1985 U.S. S. Ct. Briefs LEXIS 1613 [hereinafter ICC Brief] (quoting a document referred to as ICC Doc. No. 420/259, Report of the Joint Working Party on Arbitration and Competition at 4-5 (Apr. 6, 1984)).

104. 473 U.S. 614 (1985). In its brief, the ICC expressed its view that the arbitrators would likely apply U.S. antitrust law despite a choice-of-law clause providing that the relevant contract would be "governed by" the laws of Switzerland "in all respects . . . as if entirely performed therein." *Mitsubishi*, 473 U.S. at 637 n.19; ICC Brief, *supra* note 103, at \*39. For additional discussion of the brief from the ICC's perspective, see generally Sigvard Jarvin, Correspondence, *Mitsubishi Again—an ICC Comment*, 4 J. INT'L ARB., no. 1, 1987 at 87. Mr. Jarvin was General Counsel to the ICC Court of Arbitration. *Id.* at 89.

When one compares the ICC's amicus brief to that of the American Arbitration Association ("AAA"), one may better appreciate the ICC's unusually strong perspective on mandatory law. Both of the arbitration institutions reassured the Supreme Court that arbitration of antitrust claims for international transactions would not undermine the enforcement of U.S.

the ICC horrified some members of the arbitration bar by appearing to endorse the view that a Japanese tribunal should apply U.S. antitrust law to a dispute involving U.S., Japanese, and Swiss parties, notwithstanding an express contractual choice of Swiss law.<sup>105</sup>

In addition to having institutional views on the application of mandatory laws, the ICC possesses the tools required to ensure that arbitrators consider those views in appropriate cases. Almost uniquely in the field, the ICC reserves the right under its arbitration rules to scrutinize and comment on draft awards,<sup>106</sup> a power that it exercises in

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antitrust laws. In staking out its position, the AAA emphasized its commitment to the principle of party autonomy by criticizing the lower courts for “disregard[ing] the parties’ autonomous choice of arbitration under a foreign governing law (Swiss) and in a foreign location (Japan) . . . .” Brief for the American Arbitration Association as Amicus Curiae Supporting Petitioners at \*11, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (No. 83-1569), 1985 U.S. S. Ct. Briefs LEXIS 1614 [hereinafter AAA Brief]. However, the AAA argued that enforcement of the parties’ agreement would not undermine U.S. competition policy because “both the United States Government and affected third parties retain[ed] at all times a right of action to redress any injury to competition in United States domestic or foreign commerce . . . .” *Id.* at \*13; *see also id.* at \*47 (“The antitrust enforcement authorities of the United States Government are free at all times to initiate proceedings to enforce the antitrust laws.”). By contrast, the ICC emphasized its commitment to the application of mandatory laws by predicting that the arbitrators would apply U.S. antitrust law regardless of the parties’ contractual selection of Swiss law. *See ICC Brief, supra* note 103, at \*38 (“U.S. antitrust policy will, of course, be vindicated when an arbitrator applies the law of the United States to resolve the claim.”).

105. *See, e.g., Werner, supra* note 14, at 83 (opining that the ICC’s position “came as a bad surprise to many long-time users of ICC arbitration,” and suggesting that the decision would impose costs on party autonomy that the users of international arbitration could not afford to pay). *But see Jarvin, supra* note 104, at 88 (explaining that the ICC only forecast what the arbitral tribunal was likely to do, and “did not express an opinion of what it wished the arbitrators to do”).

106. *See ICC Rules, supra* note 29, art. 27. To the author’s knowledge, the China International Economic and Trade Arbitration Commission (“CIETAC”) represents the only other major administering institution that follows a similar practice. *See Arbitration Rules, CIETAC*, art. 45 (May 1, 2005), <http://www.cietac.org/index.cms> (follow “Rules” hyperlink). Supporters view institutional scrutiny as a form of quality control that can be useful when seeking enforcement of awards. *See REDFERN & HUNTER, supra* note 4, ¶ 9.209 (“[T]he scrutiny process acts as a measure of quality control . . . .”); *MOSES, supra* note 4, at 186 (“The purpose of the scrutiny is to ensure that the form of

nearly all cases.<sup>107</sup> In so doing, the ICC explicitly states in Article 6 of its Internal Rules, that it will consider “the requirements of mandatory law at the place of arbitration.”<sup>108</sup> Furthermore, in accordance with unpublished guidelines adopted in September 1998, the ICC also considers mandatory laws at “possible places of enforcement” when scrutinizing draft awards.<sup>109</sup> Given these internal rules and guidelines, observers have concluded that selection of ICC arbitration provides “some evidence of consent” to the application of mandatory laws.<sup>110</sup> Perhaps

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the award is appropriate, and to be able to encourage arbitrators to revise the substantive core, if necessary.”); *see also* *Carte Blanche (Sing.) Pte. Ltd. v. Carte Blanche Int’l, Ltd.*, 683 F. Supp. 945, 957 (S.D.N.Y. 1988) (assigning great significance to the fact that the ICC had scrutinized and confirmed the final award).

Detractors regard institutional scrutiny as a time consuming and costly process that may expose arbitrators to influences that disputing parties can neither observe nor control. *See REDFERN & HUNTER, supra* note 4, ¶ 9.208.

107. In 2009, the ICC approved 415 awards. Int’l Chamber of Commerce, *2009 Statistical Report*, 21 ICC INT’L CT. ARB. BULL., no. 1, 2010 at 5, 14 [hereinafter *2009 Statistical Report*]. In scrutinizing those awards, the ICC Court of Arbitration “laid down modifications as to the form of the award and/or drew the arbitral tribunal’s attention to points of substance when approving 382 awards, leaving 33 awards approved without commentary by the Court.” *Id.* Thus, while the extent of scrutiny and commentary may be greater or lesser in particular cases, the fact is that they play a role on over 92% of awards rendered by tribunals under the ICC Rules.

108. ICC Rules, *supra* note 29, app. II, art. 6.

109. Grigera Naón, *supra* note 4, at 214 (discussing unpublished guidelines regarding the preparation of draft arbitration awards before the ICC Court). It is interesting to note that the ICC expresses its interest in mandatory laws chiefly through obscure vehicles, such as internal rules, internal guidelines, and confidential exchanges with tribunal members. *See id.* at 214-16. There have been proposals to modify the ICC Rules so as to provide tribunals with the express authority to disregard choice-of-law clauses in favor of mandatory laws, *id.* at 216, which would have made the ICC’s institutional position much more transparent. However, in the words of Grigera Naón, a former Secretary-General of the ICC, those efforts “were not crowned with success.” *Id.*

110. Barraclough & Waincymer, *supra* note 4, at 223; *see also* LANDOLT, *supra* note 3, ¶ 6-53 (“[N]on-ICC awards . . . may not reflect the same degree of concern to apply EC competition law.”). *But see* Grigera Naón, *supra* note 4, at 216 (“Article 17(1) of the 1998 ICC Rules indicates that the parties are free to determine the rules of law that the Arbitral Tribunal ‘must’ apply to the substance of the dispute. Thus, any theoretical basis for the application of . . . international mandatory rules by ICC tribunals must be found outside the ICC arbitration rules themselves . . .”).



more importantly, while delicately cast in the form of suggestions to tribunal members,<sup>111</sup> the ICC's interventions (or even the prospect of ICC interventions) seems likely to color the tribunal's deliberations on mandatory laws.<sup>112</sup>

When one adds the fact that EU member states represent the seat of arbitration for a clear majority of cases administered under the ICC Rules,<sup>113</sup> it seems obvious that a clear majority of ICC tribunals will be forced to consider the EU's potentially relevant mandatory laws. Thus, reverting to this Article's opening scenario,<sup>114</sup> selection of the ICC Rules by itself increases the chances that the tribunal will apply European competition law without regard to the contractual choice of New York law. Selection of Paris as the seat would further increase the chances, whereas selection of a Swiss venue might have a countervailing effect.<sup>115</sup>

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111. See ICC Rules, *supra* note 29, art. 27 (indicating that the ICC's interventions do not affect the tribunal's "liberty of decision" on matters of substance); Grigera Naón, *supra* note 4, at 214 ("Although . . . the ICC Court has no powers to impose the decision on the merits to be followed by the arbitrators . . . , it may alert them as to the existence of public policy principles or mandatory legal rules in the relevant national law which if not taken into account may jeopardize the enforceability or validity of the award.").

112. See MOSES, *supra* note 4, at 186 (emphasizing that the expectation of scrutiny creates incentives for arbitrators to anticipate and correct problems at the drafting stage). Because the ICC not only scrutinizes awards, but also has the authority to "confirm" (or not to confirm) arbitrators nominated by the disputing parties in future cases, one would expect repeat players to give serious consideration to the ICC's comments on matters of substance likely to affect the enforceability of awards. See ICC Rules, *supra* note 29, art. 9(1)-(2) (referring to the ICC's confirmation of persons nominated to serve as arbitrator).

113. The ICC has identified the seat of arbitration by country for 630 cases initiated in 2009. Of those, 332 arbitrations (or 52.7%) had their seats in EU member states. See *2009 Statistical Report*, *supra* note 107, at 13.

114. See *supra* notes 26-27 and accompanying text.

115. See LANDOLT, *supra* note 3, ¶ 6-91 ("[I]t is far less certain that a court outside the EU will treat a failure to apply EC competition law as an infringement of public policy . . . . Switzerland may serve as an example."); Radicati Di Brozolo, *supra* note 31, at 19 ("Swiss law will not require that arbitrators sitting in Switzerland will apply a foreign competition law."); van Houtte, *supra* note 30, at 66 ("For arbitrators sitting outside the EU, European competition law is not part of the law of the seat of the arbitration (*lex arbitri*). Consequently, their award does not have to be set aside as contrary to public policy if it would fail to apply [European competition law]. A striking example thereof is given by a recent decision from the *Tribunal Fédéral Suisse*.").

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In the past, parties wishing to avoid European competition law reportedly provided for Swiss arbitration. LANDOLT, *supra* note 3, ¶ 6-91. In more recent years, the Swiss Federal Tribunal has rendered a number of decisions promoting consideration of European competition law. For example, in 1992 the court held that arbitrators have the jurisdiction and the obligation to apply European competition law, at least when the disputing parties are from EU member states and one invokes the provisions of European competition law. V SpA v. G SA, Judgment of Apr. 28, 1992, 18 Y.B. Comm. Arb. 143, 148-49 (Federal Supreme Court (Switz.)).

Six years later, the Swiss Federal Tribunal held that Swiss-seated tribunals must examine the validity of contracts in light of European competition law when invited to do so by one of the disputing parties. X SA v. Y SA, Judgment of Nov. 13, 1998, 25 Y.B. Comm. Arb. 511, 513 (Federal Supreme Court (Switz.)). In other words, Swiss-seated tribunals must *consider* arguments regarding the application of European competition law. See LANDOLT, *supra* note 3, ¶ 6-98 (“In Switzerland therefore, the position is that if a party raises EC competition law in an arbitration, the arbitral tribunal is bound to *consider this plea.*” (emphasis added)).

Consistent with the jurisprudence outlined above, one Swiss-seated tribunal applied European competition law to a dispute between U.S. and German companies, even though the underlying contract called for the application of New York law. LANDOLT, *supra* note 3, ¶ 6-55 (discussing ICC Case No. 8626); see also Grigera Naón, *supra* note 4, at 325 (referring to “several cases” in which Swiss-seated arbitrators have applied European competition law despite the parties’ contractual selection of Swiss law).

Whether the extra-contractual application of European competition law represents the prevailing trend for Swiss-seated arbitrators seems less clear. See Blessing, *supra* note 18, at 36 (“While the arbitral practice in Switzerland, up to the end of the 1980s, had shown a certain reluctance to accept the interference of antitrust law which are extractions to the *lex causae*, the situation in Switzerland has clearly changed during the 1990s.”). But see Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, 11 ARB. INT’L 137, 142 (1995) (“It is interesting to note that a minority of legal authors has advanced the idea that arbitrators sitting in Switzerland should apply Article 19 of [the Swiss Private International Law Act], entitled ‘taking into account of mandatory provisions of foreign law.’ However, this opinion is not shared by all writers.” (footnote omitted)).

To the extent that Swiss-seated arbitrators seem disposed to apply foreign mandatory laws, the relevant Swiss statute contemplates a distinctly narrower scope for the application of foreign mandatory laws than does the Rome Convention. Thus, Article 19 of Swiss Private International Law Act requires not only a “close connection” with the foreign jurisdiction, but also that the interests of the party seeking the application of the foreign mandatory law are “manifestly preponderant” according to “Swiss legal concepts,” and that “its application would result in an adequate decision under Swiss concepts of law.” Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht [Swiss Private International Law Act], Dec. 18, 1987, SR 291, art. 19 (Switz.),

#### D. *Conclusions*

Wrapping up the discussion of catalysts, one may conclude that the choice of the arbitral seat, the relevant conflicts rules, and the institutional rules each have a role in promoting (or inhibiting) the application of mandatory laws. Taken cumulatively, they may have mutually reinforcing effects. For example, an undertaking to arbitrate

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available at <http://www.admin.ch/ch/d/sr/2/291.de.pdf> (German language). For an English translation, see Rau, *supra* note 24, at 100 n.63. See also Grigera Naón, *supra* note 4, at 328 (“The wording of Article 19 is such as to permit a narrow and subjective construction of what is . . . ‘clearly overriding’ [i.e., ‘manifestly preponderant’] . . . according to Swiss ‘views.’”).

Also, given the difficulties of defining when European competition law applies, the difficulties in applying it correctly, and the grave consequences of misapplying it (which may include the curtailment of competition), arbitrators may seek pretexts to avoid the application of European competition law. LANDOLT, *supra* note 3, ¶ 6-10. Arbitrators wishing to follow this path may rely on Article 19 of the Swiss Private International Law Act, which “grants . . . a wide field of discretion” in determining whether to apply foreign mandatory laws. Hochstrasser, *supra* note 8, at 64; see also van Houtte, *supra* note 30, at 67 (emphasizing that judges and arbitrators have “the largest discretion” to apply, or not to apply, foreign mandatory laws based on a close connection between the case and the relevant jurisdiction); cf. Buxbaum, *supra* note 4, at 42 (“Even in its most concretized form, as in the Rome Convention and . . . other legislative instruments . . . , the ‘rule’ regarding the application of foreign mandatory law is still merely discretionary. . . . Thus, even when the path to application of a foreign norm is established, courts do not feel pressed to take it.”).

Swiss-seated arbitrators inclined to exercise their discretion against the application of EU competition law might draw additional comfort from a decision in which the Swiss Federal Tribunal expressed doubt “that the provisions of—national or EU—competition law are among those fundamental legal or moral principles that are recognized in all civilized countries, to the point that their violation should be seen as a violation of public policy.” X SA v. Y SA, Judgment of Nov. 13, 1998, 25 Y.B. Comm. Arb. 511, 513 (Federal Supreme Court (Switz.)); see also X S.p.A. v. Y S.r.l., Judgment of Mar. 8, 2006, 24 ASA Bull. 550, 560 (Federal Supreme Court (Switz.)) (holding that “European or Italian competition laws do not belong to the realm of public policy” for purposes of set aside proceedings in Switzerland).

Whatever the inclination of Swiss-seated tribunals, parties bent on excluding any consideration of European competition law issues may achieve that result by neglecting to raise them during the arbitral proceedings. In that case, Swiss courts will not address competition issues in the context of judicial review. X SA, 25 Y.B. Comm. Arb. at 513; LANDOLT, *supra* note 3, ¶ 6-98. As a result of the *Eco Swiss* decision, the contrary result would apply in the courts of EU member states. See LANDOLT, *supra* note 3, ¶ 6-98; *supra* note 30.

disputes with a European company in Amsterdam according to the ICC Rules under a distribution agreement concluded before December 17, 2009 seems likely to attract the application of European competition law because (1) the tribunal faces a high level of judicial review in the Netherlands that could result in annulment of the award and the worldwide refusal to enforce under the New York Convention, thus spurring it towards rigorous application of the forum's mandatory law;<sup>116</sup> (2) the Rome Convention's likely application as the relevant conflicts rule will tend to validate the application of mandatory law;<sup>117</sup> and (3) the ICC's internal rules and its mechanism for scrutiny of draft awards will further encourage rigorous application of the forum's mandatory laws.<sup>118</sup>

### III. CONSEQUENCES

While frequently agonizing about the *possible application* of mandatory laws, members of the arbitration bar often neglect to consider the *consequences* of applying mandatory laws.<sup>119</sup> Reverting to this Article's opening scenario, let us assume that the tribunal applies European competition law. Let us also make the heroic assumption that it regards the SBO provisions as incompatible with European competition law.<sup>120</sup> That cannot be the end of the story because a number of questions remain<sup>121</sup>: Does the

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116. See *supra* notes 56-59, 63 and accompanying text.

117. See *supra* notes 71-77 and accompanying text; see also LANDOLT, *supra* note 3, ¶ 6-50 ("Article 7(1) of the Rome Convention is particularly influential in arbitrations having their seat within the EU.").

118. See *supra* notes 102-07 and accompanying text.

119. See BORN, *supra* note 8, at 2185 ("[T]he arbitral tribunal must first determine which state's mandatory law . . . it should apply and thereafter *what the effect of that mandatory law . . . is.*" (emphasis added)). While Mr. Born's treatise does not in fact examine that critical second step, it at least identifies the need to do so. Other leading treatises do not. Cf. REDFERN & HUNTER, *supra* note 4, ¶¶ 3.128 to 3.135; TWEEDDALE & TWEEDDALE, *supra* note 6, ¶¶ 6.21 to 6.22.

120. In the real-life dispute between BPA and Repsol, the tribunal apparently found no violation of EU competition law. See COMPASS LEXECON, *supra* note 27, at 7; KING & SPALDING, *supra* note 27, at 15.

121. See van Houtte, *supra* note 30, at 71 ("Awards seldom are limited to a declaration that a clause or a contract is null and void [under European competition law]. They also have to draw the consequences of this nullity.").

violation of European competition law invalidate only the SBO arrangements or the entire contract, so that the distributor can walk away from its obligations with respect to all future performance? If the violation invalidates the entire contract and the distributor can walk away from future performance, can it likewise refuse to pay for previous deliveries of LNG? Whatever the fate of other provisions, must the distributor still share the SBO premiums already generated by diverted LNG sales, or may it retain the benefits of its unfaithful conduct?

While it may come as a surprise to a U.S. audience, European competition law answers none of the foregoing questions. To the contrary, decisions by the European Court of Justice firmly establish that a violation of European competition law only nullifies the offending contractual provision.<sup>122</sup> All other consequences are determined by the *lex causae*;<sup>123</sup> in this case, the parties' contractual selection of New York law.<sup>124</sup>

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122. See, e.g., Case 56/65, *Société Technique Minière v. Maschinenbau Ulm GmbH*, 1966 E.C.R. 235, 252; see also LANDOLT, *supra* note 3, ¶ 10-23.

123. Case 319/82, *Société de Vente de Ciments et Bétons de l'Est SA v. Kerpen & Kerpen GmbH & Co. KG*, 1983 E.C.R. 4173, 4184 ¶ 12 ("The consequences of such nullity for other parts of the agreement . . . are not a matter for Community law. Those consequences are to be determined by the national court according to its own law."); Case No. 7673 of 1993, Partial Award, 6 ICC Int'l Ct. Arb. Bull. 57, 59 (ICC Int'l Ct. Arb.) (holding that arbitrators must resolve the legal consequences of violations of European competition law by applying "the substantive [national] law applicable to the issue at hand"); LANDOLT, *supra* note 3, ¶ 10-41, at 342 ("EU law is by and large silent on the private law consequences of violations of [European] competition law. These consequences are therefore governed by the *lex causae*."). For example, while the "Community legal order" mandates the *existence* of a remedy for violations of European competition law, the *measure* of damages remains a question governed by the relevant national law. LANDOLT, *supra* note 3, ¶ 10-32.

124. See LANDOLT, *supra* note 3, ¶ 10-23, at 336 ("It is more accurate to say that those consequences are to be determined by the *lex causae*, more specifically, the *lex contractus*, since severance is a matter of contract."); Dolmans & Grierson, *supra* note 30, at 40 ("Whether the nullity of a particular clause leads to nullity of the entire agreement is a matter to be determined under the applicable contract law . . ."); van Houtte, *supra* note 30, at 70 ("The law applicable to the contract will determine whether the voidness of a specific contract provision that breaches EC competition law . . . only affects that clause or whether it extends to the whole contract[.]").

Although some jurisdictions might possibly void the entire contract and leave the parties where they find them, New York law takes a more forgiving stance. Thus, one “may sever the illegal aspects” and enforce the remainder of the contract, provided that the illegal aspects do not represent “the main objective of the agreement.”<sup>125</sup> Applying this standard to the Article’s opening scenario, it seems likely that the lawful (non-SBO) aspects of the supply agreement could stand on their own.<sup>126</sup> As a result, the distributor probably cannot walk away from all future performance of its obligations to purchase LNG.

Assuming that the legal and illegal aspects of an agreement are not divisible, New York law still permits restitution for the value of past performance as long as it does not represent the “precise conduct” made unlawful by the antitrust laws.<sup>127</sup> Applying this standard, it seems

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125. *Mark Hotel LLC v. Madison Seventy-Seventh LLC*, 872 N.Y.S.2d 111, 114 (App. Div. 2009) (“Where an agreement consists in part of an unlawful objective and in part of lawful objectives, a court may sever the illegal aspects of the agreement and enforce the legal ones, so long as the illegal aspects are incidental to the legal aspects and are not the main objective of the agreement.” (quoting *Glassman v. Pro Health Ambulatory Surgery Ctr., Inc.*, 865 N.Y.S.2d 295, 297 (App. Div. 2008))); *Murray Walter, Inc. v. Sarkisian Bros.*, 486 N.Y.S.2d 396, 399 (App. Div. 1985) (“Where a promisee has thus given lawful consideration for two promises, one legal, the other illegal, enforcement of the lawful promise may be permitted.”); *N.Y. Stock Exch., Inc. v. Goodbody & Co.*, 345 N.Y.S.2d 58, 59 (App. Div. 1973) (“A violation of federal antitrust laws may be asserted as a defense in a state action . . . . However, where the antitrust violation is collateral to the main issue in the complaint, it cannot remain as a viable defense.” (citations omitted)).

126. *See Kelly v. Kosuga*, 358 U.S. 516, 521 (1959) (“[W]hile the [unlawful portion of the] agreement between the parties could not be enforced by a court . . . we do not think it inappropriate or violative of the intent of the parties to give [the lawful sale of onions] effect even though it furnished the occasion for a restrictive agreement . . .”).

127. *See Sarkisian Bros.*, 486 N.Y.S.2d at 399 (indicating that where the non-enforcement of an unlawful agreement would lead to a substantial forfeiture by one party and would allow the other party to retain the benefits of the transaction, courts should apply principles of equity to prevent unjust enrichment unless doing so would enforce the prohibited conduct); *see also X.L.O. Concrete Corp. v. Rivergate Corp.*, 634 N.E.2d 158, 161-62 (N.Y. 1994) (recognizing that antitrust defenses in contract actions should only be upheld to avoid enforcement of the “precise conduct made unlawful” by antitrust statutes, but otherwise courts should follow a policy of avoiding unjust enrichment (quoting *Kelly*, 358 U.S. at 520)).

unlikely that the respondent can refuse to pay outstanding balances on regular deliveries of LNG. However, the outcome might be different if the parties had chosen the law of another jurisdiction.<sup>128</sup>

The most difficult determination for the tribunal will involve the allocation of SBO premiums generated by previously diverted LNG sales—a topic on which the arbitrators face a pair of unappealing choices. Either they must enforce the substance of the unlawful agreement in equity to prevent the respondent's unjust enrichment, or they must permit the respondent to retain the benefit of its unfaithful conduct.<sup>129</sup> The outcome of this dilemma remains

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128. See Mark H. Miller, *Franchising in Texas*, 14 ST. MARY'S L.J. 301, 325 (1983) ("Texas antitrust violations can be used to void debts or other unwanted agreements and retain all prior delivered benefits without set-off, restitution, or compensatory payment whatsoever.").

129. For examples of the role that equitable considerations may play in the application of mandatory laws, see Grigera Naón, *supra* note 4, at 309 n.337 ("[I]nternational commercial arbitrators have taken into account whether one of the parties would obtain an undue benefit or advantage through the application of the *loi de police*."), and Hochstrasser, *supra* note 8, at 70 (indicating that, in exercising their discretion to apply foreign mandatory laws, arbitrators may consider the breach of good faith by a defendant who first waives the protection of foreign mandatory laws in a choice-of-law clause, but later invokes the very same rules to avoid contractual obligations). *But see* Radicati Di Brozolo, *supra* note 31, at 21 ("The fact that the party may be renegeing on an earlier . . . agreement not to invoke competition law [is] immaterial."). Consideration of undue advantage and bad faith seems appropriate given the fact that the "rules" governing the application of foreign mandatory laws actually call for the exercise of broad discretion. *See supra* notes 72-73, 115.

Assuming the relevance of undue advantage and good faith, one should bear in mind that issues of foreign mandatory laws are usually raised by defendants eager to avoid their contractual obligations. *See* Barraclough & Waincymer, *supra* note 4, at 237 ("Most probably the party relying on the [mandatory] rule is trying to avoid part or all of the obligations to which it freely agreed."); Mayer, *supra* note 7, at 277 (noting that the issue of mandatory law typically arises as a defense to the performance of contractual obligations). *But see* BORN, *supra* note 8, at 2178 (asserting that "mandatory laws or public policy can also be important in international arbitration because it can provide the basis for . . . affirmative claim[s]," including antitrust claims).

Perhaps one should also bear in mind that "antitrust claims arising in contractual disputes are often frivolous." AAA Brief, *supra* note 104, at \*43; *see also* *Reisner v. General Motors Corp.*, 511 F. Supp. 1167, 1178 n.25 (S.D.N.Y.) ("Numerous cases are filed in the federal district courts attempting to make antitrust claims out of what are, at most, contract claims . . . . Such claims are

unclear: On the one hand, the United States Supreme Court and the New York Court of Appeals generally refuse to issue judgments that would enforce the “precise conduct” made unlawful by antitrust statutes.<sup>130</sup> On the other hand, both courts have expressed distaste for the interposition of antitrust defenses by defendants eager to avoid their contractual obligations.<sup>131</sup> Furthermore, the New York Court of Appeals has emphasized the need to consider “the equities of the parties” and to “avoid upholding antitrust defenses in contract cases where doing so would work a substantial forfeiture on one party while unjustly enriching the other.”<sup>132</sup> In so doing, the Court of Appeals has suggested an openness to the strategy of discouraging *both* unjust enrichment *and* anticompetitive practices by (1) holding defendants to their contractual obligations, but (2) permitting the development of antitrust issues through statutory remedies or public enforcement actions.<sup>133</sup>

New York courts have also observed that substantial performance by one party “critically affects” the decision to refuse enforcement on the grounds of illegality.<sup>134</sup> Thus, where one party has performed its obligations, where refusal to enforce a contract would result in a “substantial forfeiture” by the performing party and would confer substantial benefits on an equally culpable counter-party, New York courts have sometimes estopped the assertion of illegality defenses.<sup>135</sup> For example, in the distant past, one New York court reasoned:

It is urged . . . upon the part of the defendant, that the contract which was entered into . . . with the plaintiff was void, because it was part of a corrupt and wicked conspiracy against the law and

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regularly dismissed, however, after taking up considerable amounts of judicial time.”), *aff'd*, 671 F.2d 91 (2d Cir. 1981), *cert. denied*, 459 U.S. 858 (1982).

130. *Kelly*, 358 U.S. at 520; *X.L.O. Concrete Corp.*, 634 N.E.2d at 161.

131. *Kelly*, 358 U.S. at 518-19; *X.L.O. Concrete Corp.*, 634 N.E.2d at 161.

132. *X.L.O. Concrete Corp.*, 634 N.E.2d at 162 (citations omitted).

133. *See id.* (“[P]ublic policy in favor of frustrating or discouraging [anticompetitive] schemes . . . must not be deprecated. However, such a danger is reduced where statutory remedies exist and the State Attorney-General can directly attack the alleged antitrust violations.”).

134. *Murray Walter, Inc. v. Sarkisian Bros.*, 486 N.Y.S.2d 396, 399 (App. Div. 1985).

135. *See id.*



public policy of this state, in that it was a combination of manufacturers, for the purpose of putting up the price of goods and down the price of wages. In view of the fact that the defendant retained the price which was paid for his corrupt and wicked agreement, it is difficult to see how he can claim that he should be absolved from its obligations, or how he can claim, being a party to the instrument, and having received that which he considered an adequate consideration for the restraints which were put upon his volition, that such restraint should be removed, and he be permitted to enjoy the fruits of what he claims to be his unlawful agreement. We do not think that the defendant is in a position to attack this contract, certainly not with its fruits in his pocket.<sup>136</sup>

Although these precedents do not establish an airtight case for requiring the respondent to share the SBO premiums already generated by diverted LNG sales, they give the claimant a fighting chance to persuade an arbitral tribunal that may be concerned about issues of undue benefit and good faith.<sup>137</sup> Under these circumstances, it remains unclear how a tribunal might allocate the previously earned SBO premiums. However, the point is that the tribunal must do so in accordance with the law chosen by the parties, namely New York law. In other words, the fighting ground in this case remains under party control.

### CONCLUSION

In the end, the contrast between the theory of party autonomy and the practice of applying mandatory law seems less stark than anticipated. Even within legal systems strongly oriented towards principles of autonomy, one finds preemptory norms designed to restrain the excesses of free will. While there may be fundamental

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136. *Nat'l Wall Paper Co. v. Hobbs*, 35 N.Y.S. 932, 933 (App. Div. 1895); see also *Bonta v. Gridley*, 78 N.Y.S. 961, 963-64 (App. Div. 1902) ("[T]he contract having been fully performed by the plaintiff, and the defendants having had the benefit of such performance for a period of four years, they ought not now to be allowed to urge its invalidity. . . . One who accepts and retains the benefits of a contract cannot allege, as a defense to an action upon it, that it is void as against public policy.").

137. See *supra* note 129 (indicating that arbitrators often consider the conferral of undue benefits, or breaches of good faith, in applying mandatory laws).

disagreements about the relevance of any *particular country's* mandatory laws in the context of a *given* arbitration, those situations only involve disagreements about the proper conflicts analysis. They do not represent a challenge to the existence of mandatory laws *per se*.

Furthermore, in navigating the contours of mandatory law, party autonomy continues to play a key role. By selecting the administering institution, the seat of arbitration, and by, thus, influencing the selection of conflicts rules, disputing parties may significantly alter the disposition of tribunals to apply the mandatory laws of particular jurisdictions. Also, following the *application* of mandatory laws, the *consequences* fall to be determined under contractual choices of law. As a result, party autonomy continues to regulate a wide and hotly contested battleground.<sup>138</sup> Under these circumstances, the distance between theory and practice seems narrow, with effective bridging mechanisms already in place.

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138. See Bermann, *supra* note 4, at 26 (“Asking all these questions . . . demonstrates how far a court or arbitral tribunal can go in giving effect to [mandatory] laws without necessarily overriding the parties’ choice of law.”).