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Arbitration and the Mandatory Law Problem: A Mixed Mode ADR Approach

Hossein Fazilatfar[*]

ABSTRACT

Rigorous scholarly debate has shaped the discussion on the application of mandatory laws and public policy in arbitration, which has led to an array of legal solutions to the mandatory law problem. The determination of the applicable law in arbitration is a dilemma due to arbitrators' contractual source of authority and commitments to the parties, their mandate to issue an enforceable award, and the imperative nature of mandatory laws at stake. Proposed solutions thus far have primarily been suggestions that are based on either contractual concerns of the parties, jurisdictional (mandatory law) concerns of states involved, or a mix of the two extreme ends. Depending on the circumstances of a particular case, these suggestions could warrant a workable legal solution. However, when the complexity of the question of what law(s) the arbitrator should apply is multidimensional, a more flexible approach should be available to arbitrators. This Article suggests a new and unique procedural mechanism for this substantive law problem: a multitiered alternative dispute resolution approach. An Arb-Med-Arb (Arbitration-Mediation-Arbitration) mechanism allows the arbitrator to switch hats between arbitration and mediation, and with active cooperation of the parties, make appropriate arrangements on a case-by-case basis that respond to both contractual and jurisdictional concerns of the case at hand. This Article first explains mandatory laws and the problem they present in international commercial arbitration. It then discusses the theoretical approaches to the nature of arbitration and the suggested legal solutions for the problem. Finally, it proposes the use of Arb-Med-Arb in the context of mandatory laws and the specific approach the arbitrator-mediator should take within the mediation stage.

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[*] Associate Professor of Law, Creighton University School of Law. This Article is drawn, in parts, from author's book OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION (Edward Elgar Publishing 2019). I would like to specially thank Professor Peter Hay for his valuable and insightful comments on earlier drafts of this Article. I also thank comments from the participants at the 13th Annual Works-in-Progress Conference held by the AALS Alternative Dispute Resolution Section. Indeed, all errors are my own. I also thank JDR's Volume 2024 editorial team on their diligent work in preparing this Article for publication.

INTRODUCTION

Despite the contractual freedom parties enjoy, mandatory laws are defined as imperative norms which parties may not derogate from.[1] Aside from international litigation, due to arbitrators' unique role in the adjudication process, such norms present particular difficulties and uncertainties in international arbitration.[2] Simply stated, the mandatory law problem arises where arbitrators must cope with balancing the tension between demands to apply, or not, a particular body of law chosen by the parties, and at the same time having to at least consider applying a jurisdiction's mandatory laws that contradict parties' choice of law.[3] Proposals suggesting solutions to reduce the tension between party autonomy and mandatory laws tend to be placed on a scale where on one end, contractual concerns of the parties are focal and on the other end, imperative norms of jurisdictions involved with the transaction or its adjudication are focal.[4] The more effective suggestions, however, are ones that consider arbitration of a hybrid nature and thus account for both contractual and jurisdictional concerns which are at odds with one another.[5] Indeed, there are also calls to the effect that mandatory laws are not of significant

1. Trevor C. Hartley, *Mandatory Rules in International Contracts: The Common Law Approach*, 266 RECUEIL DES COURS 337, 345 (1997); Josh B. Martin, *Jurisdictionalists v. Contractualists: Who Is Winning the Mandatory Law Debate in International Commercial Arbitration?* 27 AM. REV. INT'L ARB. 475 (2017); Yeshnah D. Rampall & Ronán Feehily, *The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium*, 23 HARV. NEGOT. L. REV. 345, 378 (2018).
2. *See infra*, Part I.
3. *See generally* sources cited *infra* note 12.
4. *See id.*
5. *See infra*, Part II.

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importance in practice and adjudicators should merely yield to conflict of laws analysis under public policy, as judges in any forum would.[6]

This article presents a different approach to the mandatory law problem. A non-legal approach apart from any conflict of laws analysis: a mixed-mode alternative dispute resolution ("ADR") approach. Under this mixed-mode ADR approach, arbitrators would initiate arbitration, then, with the agreement and cooperation of the parties, mediate resolution of the mandatory law problem (what law for the arbitrator to apply), and finally would return to their role as arbitrator and issue the arbitration award based on the terms of the settlement agreement.[7] This multitier ADR procedure is called Arbitration-Mediation-Arbitration ("Arb-Med-Arb").[8] Arbitration, mediation, or a combination of these procedures, as ADR processes, are consensual alternatives to court adjudications in domestic and international transactions.[9] In some cases, depending on various factors surrounding the case and the level of cooperation between the parties, opting for a combination of such processes to resolve substantive disputes is not uncommon.[10] For years, debates have continued among ADR practitioners and academics regarding challenges and opportunities in combining these processes to resolve domestic and international disputes – so called hybrid, multitier, and more recently "mixed-mode" processes.[11]

This Article proposes the use of Arb-Med-Arb in the context of mandatory laws and consists of three main parts: Part I explains mandatory laws and the problem they present in international commercial arbitration. Part II discusses the theoretical

6. *See, e.g.*, Catherine Kessedjian, *Mandatory Rules in International Arbitration: What Are Mandatory Rules?* 18 AM. REV. INT'L ARB. 147, 151–53 (2007); Meng Chen, *Empirical Research on Mandatory Rules Theory in International Commercial Arbitration*, 19 INT'L TRADE & BUS. L. REV. 245, 267–68 (2016).

7. *See generally* Thomas J. Stipanowich & Veronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 FORDHAM INT'L L.J. 839 (2017); *Mixed Mode Task Force,* INT'L MEDIATION INST. https://imimediation.org/about/who-are-imi/mixed-mode-task-force/ (last visited Mar. 14, 2024); s*ee also infra*, Part III.

8. *See, e.g.,* Aziah Hussin, Claudia Kuck & Nadja Alexander, *SIAC-SIMC's Arb-Med-Arb Protocol,* 11 N.Y. DISP. RESOL. LAW. 85 (2018).

9. *See* Thomas J. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators*, 26 HARV. NEGOT. L. REV. 265, 277 (2021).

10. *Id.* at 267.

11. *See, e.g.*, *id.* at 265; Thomas J. Stipanowich, *Multi-Tier Commercial Dispute Resolution Processes in the United States, in* MULTI-TIER APPROACHES TO THE RESOLUTION OF INTERNATIONAL DISPUTES: A GLOBAL AND COMPARATIVE STUDY 271–93 (Anselmo Reyes & Gu Weixia, eds. 2020); Dorothee Ruckteschler &Anika Wendelstein, *Efficient Arb-Med-Arb Proceedings: Should the Arbitrator also be the Mediator?*, 38(6) J. INT'L ARB. 761 (2021); Stipanowich & Fraser, *supra* note 7; Weixia Gu, *Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications*, 29 WASH. INT'L L.J. 117 (2019); Klaus Peter Berger & J. Ole Jensen, *The Arbitrator's Mandate to Facilitate Settlement*, 40 FORDHAM INT'L L.J. 887 (2017); Brian A. Pappas, *Med-arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157 (2015); Edna Sussman, *Med-Arb: An Argument for Favoring Ex Parte Communications in the Mediation Phase*, 7 WORLD ARB. & MEDIATION REV. 421 (2013); Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ARB. & MEDIATION 219 (2013); Weixia Gu & Xianchu Zhang, *The Keeneye Case: Rethinking the Content of Public Policy in Cross Border Arbitration Between Hong Kong and Mainland China*, 42 (3) H.K. L.J. 1001 (2012); Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT'L. 187 (2009); Harold I. Abramson, *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 AM. REV. INT'L ARB. 1 (1999); James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83 (1997); Leonard Riskin, *Understanding Mediators Orientations Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

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approaches to the nature of arbitration (contractual, jurisdictional, or hybrid) and the suggested legal solutions to the problem. Part III presents the use of Arb-Med-Arb in the context of mandatory laws and the specific approach the arb-mediator (Arbitrator-Mediator) should take within the mediation stage.

I. MANDATORY LAWS AND THE PROBLEM

The inherent tension between public policy rules and party autonomy has sparked scholarly debate for years.[12] The Rome I Regulation provides a clearer definition and method of application for mandatory rules among other international instruments. It refers to mandatory rules as *overriding mandatory provisions* which due to their imperative and public policy character directly apply within their scope of application (without regards to domestic Private International Laws).[13]

One way to understand the unique problem such public policy norms bring to arbitration is to compare the position of judges and that of the arbitrators coping with such norms. For judges appointed by the state – depending on the importance of the mandatory norm belonging to their forum or to a foreign jurisdiction, and its connection to the dispute – application of mandatory rules may be less of a controversial issue. Simply, this is because judges enjoy having a forum and they should follow conflict of law rules of the forum which dictate the applicable law.[14] However, in *tribunals* for arbitrators which lack such a forum, along with other inherent characteristics/limitations of arbitration, (e.g., arbitrator's contractual responsibility

12. *See, e.g.,* Peter Gardoes, *Transfer for Contracts under Hungarian Law,* 2 ELTE L.J. 9 (2020), https://ojs.elte.hu/eltelj/article/view/7698/6081; Jan Lieder, *Transfer of Contracts under German Law* 2 ELTE L.J. 25 (2020), https://ojs.elte.hu/eltelj/article/view/7699/6082; Roberta Peleggi, *Assignment of Contracts: Italian Law and the UNIDROIT Principles of International Commercial Contracts in Parallel,* 2 ELTE L.J. 41 (2020), https://ojs.elte.hu/eltelj/article/view/7700/6083; HOSSEIN FAZILATFAR, OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION (Edward Elgar Publishing eds., 2019); Ibrahim Shehata, *Application of Overriding Mandatory Rules in International Commercial Arbitration: An Empirical Analysis*, 11 WORLD ARB. & MEDIATION REV. 383 (2017); Chen, *supra* note 6; Martin, *supra* note 1; Jan Kleinheisterkamp, *The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements*, 3 WORLD ARB. & MEDIATION REV. 91 (2009); Jeff Waincymer, *International Commercial Arbitration and the Application of Mandatory Rules of Law*, 5 ASIAN INT'L ARB. J. 1, 38 (2009); GEORGE A. BERMANN & LOUKAS A. MISTELIS, MANDATORY RULES OF LAW IN INTERNATIONAL ARBITRATION (Juris eds., 2011); Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELB. J. INT'L L. 205 (2005); Homayoon Arfazadeh, *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*, 13 AM. REV. INT'L ARB. 43 (2002); Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279 (2000); Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration*, 14 J. INT'L ARB. 23 (1997); Nathalie Voser, *Mandatory Rules of Law as a Limitation to the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319 (1996); Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, 11 J. ARB. INT'L. 137 (1995); Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration*, 10 BERKELY J. INT'L L. 59 (1992); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L 274 (1986).

13. *See* Regulation (EC) 593/2008, of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L 177) 6 [hereinafter "Rome I Regulation"]; s*ee also* Rome I Regulation, art. 9(1), 6, 13; s*ee also* Rome I Regulation, para. 37, 6, 9 (recommending that: "The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.").

14. *See* George A. Bermann, *The Origin and Operation of Mandatory Rules*, 18 AM. REV. INT'L ARB. 1, 2 (2007); Blessing, *supra* note 12, at 27–28.

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to apply the law chosen by the parties) dealing with mandatory rules would be a more complex matter.[15]

The problem of mandatory rules in arbitration is for the arbitrator to issue an award enforceable at law by balancing the tension between party autonomy (parties' freedom of choice) and mandatory rules as limitations to the freedom of choice.[16]

On the one hand, the notion of party autonomy is to secure the interests of the contracting parties where more sophisticated parties would choose a self-serving body of law.[17] In arbitration, since arbitrators gain all of their authority from the parties, stipulated in an arbitration clause, applying the parties' chosen law to the merits becomes an inherent duty they owe to the parties, which usually extends to the mandatory laws of the *lex contractus* (as default rules), when there is a lack of choice of law by the parties.[18] On the other hand, mandatory laws promulgated by the state are meant to protect the interests of the public,[19] and are considered as limitations to party autonomy.[20]

Rendering a comprehensive and unobjectionable award in a scenario where mandatory rules of the various stakeholder jurisdictions conflict is not an easy task for the arbitrator. Balancing these conflicting interests comes at a cost. To ignore the parties' choice of law, the award may get set aside, and if not that, refused recognition and enforcement. Although the arbitrator is not the guardian of public policy of a foreign state, if he ignores foreign mandatory norms which the foreign state considers to be directly applicable, his award will face denial of enforcement by the courts of that state,[21] or the award is prone to get set aside by courts of the place of arbitration.[22] To ensure a healthy award, the arbitrator must take foreign mandatory norms into account, and somehow balance the conflict, if any, between such norms

15. In this Article, the phase "tribunal" (or "arbitral/arbitration tribunal") refers to a panel of arbitrators - appointed by contracting parties or an arbitration institution - and not to national or international courts.

16. Rampall & Feehily, *supra* note 1, at 399.

17. *See* Karl-Heinz Böckstiegel, *The Role of Party Autonomy in International Arbitration*, 62 DISP. RESOL. J. 24, 25 (1997).

18. *See* Lazareff, *supra* note 12, at 138. However, the issue which remains open to discussion, is whether there is a limit to the principle of party autonomy (freedom to choose the applicable law here). *See generally* Rampall & Feehily, *supra* note 1; Blessing, *supra* note 12.

19. Ole Lando, Ulrich Magnus & Monika Novak-Stief, *Mandatory Rules and Ordre Public,* HARMONIZATION OF SUBSTANTIVE & INT'L PRIV. L. 99, 100 (2003).

20. *See* Rampall & Feehily, *supra* note 1, at 399 (concluding that "[u]nless the choice of law by the parties contravenes these two restrictions ["overriding" mandatory law and public policy (*ordre public*)], the law chosen by the parties prevails under the principle of party autonomy."); s*ee also* Kessedjian, *supra* note 6, at 148.

21. "… 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … b. The recognition or enforcement of the award would be contrary to the public policy of that country." Thus, the local judge of any forum country that has adopted the Convention is also given authority to apply its public policy in order to refuse an award from enforcement. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]. *See also,* Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, 40 U.N. GAOR Supp. (No. 17) U.N. Docs. A/40/17 (1985) (addressing public policy as a ground to set aside an award or its refusal of recognition). Article 34(2)(b)(ii) states: "… (2) An arbitral award may be set aside by the court specified in article 6 only if: (b) the court finds that: … (ii) the award is in conflict with the public policy of this State." Article 36(1)(b)(ii) states: "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: … (b) if the court finds that: … (ii) the recognition or enforcement of the award would be contrary to the public policy of this State." It should be noted that the Model Law has been adopted in various national arbitrations laws.

22. *See* New York Convention, *supra* note 21, at art. V(1)(e).

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and the norms of the law chosen by the parties. Note also that mandatory rules of the place(s) of performance of the transaction may also claim application.[23] Unless the place of performance is the place of arbitration or enforcement of the award, ignoring its mandatory laws usually does not impact party autonomy or enforceability of the award. However, it may risk the integrity of arbitration as an institution if parties are allowed to use arbitration as a private venue to contract around mandatory laws of the place of performance.[24] Scholars and practitioners have suggested an array of solutions to deal with this inherent dilemma in arbitration.

II. APPROACHES TO MANDATORY LAWS IN ARBITRATION

International arbitrators are as qualified as judges to resolve disputes that involve application of mandatory laws.[25] Balancing the mandatory law problem is the arbitrator's duty. As described in Section I, how the arbitrator balances the tension between parties' chosen law (party autonomy) and the conflicting mandatory rule of the foreign state (mandatory rule), with their duty to issue an enforceable award (arbitrator's duty) is the challenge.[26]

The real challenge, indeed, is where there is a true conflict between the law chosen by the parties and the foreign law, when both are overridingly mandatory. Some scholars suggest that arbitrators should take the judicial model and possibly duplicate the way judges deal with mandatory laws. In other words, have arbitrators apply Private International Laws of a forum.[27] However, understanding positional differences of judges and arbitrators would show that a distinct approach in arbitration, one suitable for such unique venue should be adopted.[28] Judges appointed by the state will apply mandatory laws of the forum (the *lex fori*). The same weight is

23. The New York Convention has not dealt with the applicability of foreign mandatory rules (and those of the place of performance), however, national, European and American laws have addressed the issue in litigation. *See, e.g.*, Rome I Regulation, *supra* note 13, at art. 9; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

24. *See, e.g.*, Rome I Regulation, *supra* note 13, at art. 9(3) ("Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."); b*ut see* Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, O.J. (C 27) art. 7(1), 34, 38, which had a further inclusive language ("[…] effect may be given to the mandatory rules of the law of another country with which the situation has a close connection […].") [hereinafter "Rome Convention"]. The former recognizes the particular importance of mandatory laws of the place of performance, while the latter applies the close connection test. For more information about the close connection test, see *infra*, Part II.

25. *See* Mayer, *supra* note 12, at 277.

26. *See* Gunther J. Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18(2) J. INT'L. ARB. 135 (2001) ("When one speaks of an arbitrator's duties, perhaps none is more important than the duty to render an enforceable award… Should the award be enforced, the arbitrator's efforts are thereby honored, and arbitration as an institution strengthened. Should the award be vacated or enforcement denied, the result casts a dark shadow over the proceeding.").

27. *See* Mayer, *supra* note 12, at 282.

28. *See* Resolution No. 6/2008, International Law Association Recommendations on Ascertaining the contents of the Applicable Law in International Commercial Arbitration, Aug. 17–21, 2008 (issued at the 73d Conference of the International Law Association, Rio de Janeiro, Brazil) ("4. Arbitrators attempting to ascertain the contents of applicable law should bear in mind that the rules governing the ascertainment of the contents of law by national courts are not necessarily suitable for arbitration, given the fundamental differences between international arbitration and litigation before national courts.").

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given to mandatory rules of the *lex contractus*, unless they conflict with those of the *lex fori*. In cases of conflict between mandatory laws of the *lex contractus* and foreign law(s), judges consider their own Private International Laws to determine the applicable mandatory law.[29] Arbitrators – as private adjudicators, appointed by the parties – lack such a forum, which puts them in a position to be able to "view all laws as being of equal dignity."[30] Indeed, the contractual nature of arbitration only adds to the complications. If arbitrators should give any preference to an applicable law, that law should be the one stipulated by the parties.[31] Hence, it is fair to submit that, as far as private international law formulas provided by the legislature binding judges in resolving such conflicts, "no rule of conflict of laws is imperative as to arbitrators; nor are they bound by any method of resolution of the conflict."[32] By taking that proposition into account, and enjoying that flexibility in determining the proper mandatory law, what is an arbitrator to do?

When determining the law applicable to the merits, any decision made by the arbitrator depends on his understanding and adoption of either of the three approaches regarding arbitration's nature: the contractual, jurisdictional, or hybrid approach. Suggestions to resolve the mandatory law problem are based on these three approaches: contractual theory, jurisdictional theory, and hybrid theory.

A. Contractual Theory

To the contractualist, arbitration is purely a matter of contract and thus a private arrangement. Arbitration is considered "an instrument of 'free enterprise' and isolated from the state system,"[33] where it owes nothing to its seat or any other domestic forum. Under this theory, the mandatory rules that deserve application are the ones of the *lex contractus*. Thus, a strict application of the *lex contractus* is strongly applied, ignoring any other relevant foreign mandatory laws. One may question any strong support for such a theory, at least when parties have made no choice as to the substantive law applicable to their dispute.[34]

The basic reasoning adopted by those who oppose the application of foreign mandatory rules is that the arbitrator should primarily be at the service of the parties or is "generally safer sticking to their contractual mandate unless exceptional facts before them suggest mandatory rules are highly pertinent."[35] Although this approach is logical based on its foundations of arbitration being contractual in nature, practically it is unrealistic and isolated as it does not address later threats to the validity, recognition, and enforcement of the arbitration award.[36]

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29. *See* Mayer, *supra* note 12, at 282–83.
30. *See id.* at 283.
31. Martin, *supra* note 1, at 493 (stating that arbitrators are much safer respecting party autonomy than mandatory laws of other states).
32. *See* Mayer, *supra* note 12, at 284; *see also* Beda Wortmann, *Choice of Law by Arbitrators: The Applicable Conflict of Laws System*, 14(2) ARB. INT'L. 97, 108 (1998) ("[T]he private tribunal drives its power from the arbitration agreement, whereas a national court derives its power from the state and thereby from the public. In contrast to this, arbitrators do not exercise public or institutional powers in the name of a state. As a consequence, the basis of the 'seat theory', namely the comparison with national judges, neglects the private character of arbitration.").
33. Barraclough & Waincymer, *supra* note 12, at 209.
34. *Id.*
35. Martin, *supra* note 1, at 493.
36. Lazareff, *supra* note 12, at 140.

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Some have argued that to determine the applicable law in arbitration, arbitrators should start with the parties' reasonable and legitimate expectations, rather than their contractual will (what parties truly want/intend).[37] Thus, the legitimate expectation criterion should be used to determine the appropriate applicable mandatory law. This approach leans more towards the contractual theory for its emphasis on the parties. Under this approach, the arbitrator should first identify the parties' expectations in particular circumstances.[38] Next, the arbitrator should determine if those expectations are actually 'legitimate.'[39] Assuming that a case satisfies both steps, the critical question is then how should the arbitrator treat an overriding mandatory law that is outside parties' legitimate expectations and claims direct application? Then, should the arbitrator simply reject it based on this criterion and claim it was not expected by the parties? It seems that the legitimate criterion is an objective test with no guidelines: if a reasonable person finds a mandatory law within parties' legitimate expectations, then that mandatory law applies, otherwise it should not. Some scholars submit that the only law that can limit parties' choice is transnational public policy.[40] The issue becomes somewhat easier if the parties exclude a mandatory law.[41] If the parties do so, the arbitrators must yield to the parties' stipulation and not apply the excluded law or refuse adjudication of the [42]

Another contractualist view claiming to resolve the mandatory law problem in the "most pragmatic and efficient" way is a contractual stipulation by the parties before the forum court.[43] This will be a stipulation where the party insisting on arbitration explicitly accepts the application of the mandatory rules of the forum state, before the forum court, when the case is presented to the arbitrators. The consent of the other party, benefiting from application of mandatory law, is presumed.[44] This view also asserts that such a contractual stipulation before the forum court will oblige arbitrators to apply the particular mandatory law of the forum.[45] Such a contractual stipulation will avoid waste of resources as the tribunal will recognize the mandatory law and the award will be enforced later at the forum.[46] This general idea is taken from the landmark *Mitsubishi* case where it is reasoned that the Supreme Court did not condemn the parties' agreement providing for arbitration in Japan according to Swiss law, due to the oral argument which counsel for Mitsubishi made: counsel "conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis."[47] Such assurance has convinced some scholars to propose the view of

37. *See* Alan Rau, *The Arbitrator and "Mandatory Rules of Law"*, 18 AM. REV. INT'L ARB. 51 (2007); *see also* Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (1987).

38. *See* Barraclough & Waincymer, *supra* note 12, at 234.

39. *Id.* at 234–35.

40. Derains, *supra* note 37, at 251.

41. *Id.* at 234.

42. *See* Barraclough & Waincymer, *supra* note 12, at 235.

43. *See* Kleinheisterkamp, *supra* note 12, at 114–17.

44. *Id.*

45. *Id.*

46. *Id.* at 112.

47. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985). The Court also noted that:

> The record confirms that before the decision of the Court of Appeals the arbitral panel had taken these claims under submission. We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to

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'seeking a commitment,' or in other words a pre-arbitration contractual stipulation before the forum court, assuring the court that its mandatory law shall be respected by the arbitral tribunal. This *dépeçage* will allow the court to decline its jurisdiction in favor of the arbitral tribunal.[48]

Although the proposal deserves admiration as "a somewhat elegant solution that takes a middle road between completely rejecting the arbitration agreement or abandoning the national law and policy that is implicated in the dispute,"[49] it is not flawless. To ask the parties to change their intentions at the forum's request, after the choice of law and arbitration clause have been concluded seems an inadequate response in respecting party autonomy.[50] In other words, the fact that "the courts will respect the parties' choice of arbitration only if they abandon their choice of law"[51] is not in line with freedom of contract.

However, there is doubt as to whether 'seeking a commitment' from the parties was the case in *Mitsubishi*. To some scholars, footnote 19 of the *Mitsubishi* decision which seems to be the spotlight of this approach, did not mean that the parties ought to waive the choice of law clause (in which they had chosen a law other than the law of the forum).[52] Nor was it meant to commit the parties to have the arbitrators apply the law of the forum. In construing footnote 19, one scholar suggested that the Supreme Court ruled for arbitration not because counsel assured application of the Sherman Act, but because the arbitration clause was drafted more broadly than the choice of law clause in a way that the tribunal sitting in Japan, applying Swiss law, would also take account of potential Sherman Act violations.[53]

B. Jurisdictional Theory

Under the jurisdictional theory, where the main emphasis is on the protection of national sovereignty, every private dispute resolution system operating within

> arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

48. *See* Kleinheisterkamp, *supra* note 12, at 117.

49. Tai-Heng Cheng, *New Tools for an Old Quest: A Commentary on Jan Kleinheisterkamp, The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements*, 3(2) WORLD ARB. & MEDIATION REV. 121, 127 (2009).

50. Alan Rau, on *Mitsubishi* footnote 19, states: "an appreciation of the indispensable nature of choice-of-law and choice-of-forum clauses, and universal recourse to them, has given rise to a growing consensus that footnote 19 has become an embarrassing anomaly - indeed virtually 'inapplicable.'" See Alan Rau, *Comment: Mandatory Law and the Enforceability of Arbitration Agreements*, 3(2) WORLD ARB. & MEDIATION REV. 133, 142–43 (2009) [hereinafter "Rau, *Comment*"].

51. *See* Cheng, *supra* note 49, at 128.

52. Rau, *Comment*, *supra* note 50, at 143.

53. *Id.* The Court noted in footnote 19 that: "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985). Kleinheisterkamp believes that the court did not condemn the agreement because counsel for Mitsubishi gave assurance that the tribunal will give effect to American anti-trust law. *See* Kleinheisterkamp, *supra* note 12, at 115–17. Rau, however, argues "both the proponent and the ICC are asserting that the parties' choice of law was not intended to mandate a result that would necessarily be in violation of the Sherman Act." Rau, *Comment*, *supra* note 50, at 143.

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the territory of a sovereign state should be subject to that state's jurisdiction and thus regulated by its laws.[54] In practice that sovereign state may be the seat of arbitration, the place of performance, or potential places of enforcement of the award. Therefore, *e.g.*, an arbitrator sitting in Germany must act like a German judge, consider German conflict-of-law rules to see if he is authorized to apply foreign mandatory laws to the dispute, and if so, how.[55] There is no consensus on this approach as arbitrators and judges are not in the same position, nor do they share the same concerns when dealing with mandatory laws.[56] Judges usually consider and apply the forum's standards when dealing with mandatory laws in foreign judgments or arbitral awards. Unless the forum's laws or an international instrument allow judges to apply a mandatory foreign law, they refuse to do so. Unlike judges, arbitrators lack any forum. They are appointed by the parties and the utmost standards they must respect, notwithstanding the parties' choice of law, are the fundamental transnational principles rather than local mandatory law. Unless the foreign state has a close connection to the dispute and its mandatory laws have a negative impact on the tribunal's decision, arbitrators are reluctant to apply any law foreign to the transaction.[57]

The possibility of judicial review of the award by the courts of the place of arbitration gives an important role to mandatory laws of the *lex arbitri* at set-aside proceedings. This factor alone makes mandatory rules of the seat stand out, and the basis for the seat theory. When a tribunal ignores mandatory rules of the seat (where local courts would have applied such rules in that scenario) the award will most likely get annulled on public policy grounds.[58] Arbitrators generally give effect to mandatory rules of the seat where the traditional method of determining the applicable law is through the forum's conflict of law rules.[59] Some scholars believe that the arbitrator's forum is the seat of arbitration and thus they should give those laws priority over other norms.[60] Another argument in favor of this approach is the interrelation between procedural law of the *lex arbitri* with the arbitration.[61] Thus, the traditional view is that arbitrators must respect mandatory laws of the *lex arbitri*

54. *See* Barraclough & Waincymer, *supra* note 12, at 210.

55. *Id.*; *see also* Rome I Regulation, supra note 13, at art. 9(3), which states:

Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

56. Lazareff, *supra* note 12, at 142.

57. *See supra* discussion of 'the Seat Theory'.

58. See Laurence Shore, *Applying Mandatory Rules of Law in International Commercial Arbitration*, 18 AM. REV. INT'L ARB. 91 (2007) ("Only a very bold "a-nationalist" arbitrator would uphold the parties' agreement in these circumstances [where overriding mandatory law of the place of arbitration is against parties' choice], thereby exposing the award to a challenge (and endangering his or her own future as an arbitrator) for the sake of purity of theory.").

59. *The UNCITRAL Model Law – Lex Facit Arbitrum*, 2(3) ARB. INT'L 241, 248 (1986) [hereinafter "*UNCITRAL Model Law*"]; Wortmann, *supra* note 32, at 106; Marc Blessing, *Choice of Substantive Law in International Arbitration*, 14 J. INT'L ARB. 39, 51–53 (1997) [hereinafter "Blessing, *Choice of Substantive Law*"].

60. Some believe that the choice of the forum in arbitration is rather a matter of convenience than a matter of connection, thus due to its importance in annulment proceedings it must be applied without any connection to the case. The *lex arbitri* is the arbitrator's "natural forum". *See UNCITRAL Model Law*, *supra* note 59; *see also* Wortmann, *supra* note 32, at 106.

61. Wortmann, *supra* note 32, at 106–08.

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and in cases where a foreign mandatory law is at stake, then they should apply the conflict of laws analysis of the place of arbitration to make such determinations.[62] National mandatory laws add unpredictability to the outcome of international disputes and frustrate parties' intentions. Therefore, any solution to reduce unpredictability of disputes deserves attention (e.g. applying conflict rules of the place of arbitration as a standard).[63] However, adopting the place of arbitration as arbitrators' forum is going beyond arbitration's private nature (arbitration is not a public forum nor arbitrators are unconditional guardians of any particular national legal order).[64] Giving effect to the seat's mandatory laws when it has no connection to the dispute other than it being the *lex arbitri* also goes beyond arbitration's private nature. Additionally, applying the conflict of laws analysis of the seat might result in the application of a law unexpected by the parties.[65]

The more modern approach is that the applicability of a mandatory rule belonging to the place of arbitration is determined by the extent of the connection between the dispute and the mandatory law and not merely by the fact that a mandatory law forms part of the *lex arbitri*.[66] This is particularly true with respect to substantive rules of the seat of arbitration that are expressed as international mandatory laws by the state.[67] However, procedural mandatory rules tend to have a stronger position for claiming application and are still considered to apply regardless of any connection to the dispute.[68] Therefore, this stance leaves substantive mandatory rules of the *lex arbitri* at the same level as mandatory rules of other states.[69]

When considering application of substantive mandatory rules of the seat, one practical consideration that should be taken into account (mostly case by case, thus subjective) is whether courts of the place of arbitration actually set aside awards if a particular mandatory law of the seat is violated.[70] Also, whether the potential place(s) of enforcement give effect to Article V.1.e. of the New York Convention, and actually refuse recognition and enforcement of awards that are set aside by courts of the seat is another relevant factor (*e.g.,* France enforces some annulled awards).[71]

Another more jurisdictional-leaning idea is that there should be a mechanism where the tribunal could refer the mandatory law issue to a specific court prior to issuing the final award.[72] This approach originates from a mindset that is against

62. *UNCITRAL Model Law*, *supra* note 59, at 167; Wortmann, *supra* note 32, at 106; Blessing, *Choice of Substantive Law*, *supra* note 59.

63. *See* Wortmann, *supra* note 32, at 105.

64. *Id.* at 108.

65. *Id.* at 107.

66. See Stavros Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited lex fori*, *in* ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES (2009); *see also* Baniassadi, *supra* note 12, at 61.

67. *See* Bernard Audit, *How Do Mandatory Rules of Law Function in International Civil Litigation?*, 18 AM. REV. INT'L ARB. 37 (2007) (suggesting that in case there is a connection only the international public policy rules of the situs should be applicable rather than its *ordre public interne*).

68. *See* Barraclough & Waincymer, *supra* note 12, at 224.

69. Voser, *supra* note 12, at 346.

70. Rau, *supra* note 37, at 75–86.

71. *See, e.g.*, Société Hilmarton Ltd. v. Société Omnium de traitement et de valorisation (OTV), XX YB Com. Arb. 663 (Cour de Cassation, 1995)**;** *or* PT Putrabali Adyamulia v. Rena Holding et Société Mnogutia Est Epices, 2007 Rev. arb. 507 (Cour d'appel de Paris 2007).

72. *See* Hans Smit, *Mandatory Law in Arbitration*, 18 AM. REV. INT'L ARB. 155, 170–73 (2008).

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arbitrability of mandatory rules to begin with.[73] The approach basically excludes the question of mandatory law for arbitrators and provides judges exclusive authority to decide that part of the case. Therefore, when the tribunal finds the case awaiting a decision and pending due to a potential mandatory law issue of a state at stake, then it is time to refer the issue to a court, perhaps particularly designated to rule on arbitration matters in that jurisdiction.[74]

Under this approach, the court, after reviewing the case, renders its decision on the potential application of its mandatory law and mandates the tribunal to apply its decision in the final award. Some scholars argue that when a single court of the state whose mandatory law is to be applied rules on that law, it will avoid multiple litigation in review of the award in that jurisdiction and eventually bring consistency to the application of mandatory laws and predictability of outcomes in each forum.[75] The model is generally taken from the European Union Court of Justice where issues of community law ('courts against whose decisions there is no judicial remedy under national law') must be referred, as "preliminary references," by member states' highest courts in the final instance, for a "preliminary ruling" by the Court of Justice.[76] The Court of Justice's ruling is mandatory for state courts to follow.[77] The American model for this approach is where mandatory law issues of federal law are referred to the U.S. Court of Appeals for the Federal Circuit, with the possibility of certiorari review by the Supreme Court, or when mandatory law issues of state law are referred to the state's highest court.

"If this approach is adopted," it may, to a certain point, "avoid multiple litigation in review of awards," and "greatly promote efficiency and consistent adjudication."[78] However, adoption of any sort of preliminary reference to the courts should be mandated by legislation either at the national or international level, and thus is not readily available. Nevertheless, a binding decision on a matter issued by courts for arbitrators to follow while the case is pending in arbitration seems incompatible with the independent nature of arbitration as an institution, unless the feedback by the court is merely an opinion (dicta) and not binding.[79]

73. For procedural and substantive arbitrability in American law, see Hossein Fazilatfar, *Adjudicating "Arbitrability" in the Fourth Circuit,* 71 (4) S.C. L. REV. 741, 743–46 (2020).

74. Smit, *supra* note 72.

75. *Id.*

76. Treaty Establishing the European Community, art. 234, Dec. 24, 2002, O.J. (C 321 E/147-48); *see also* Smit, *supra* note 72.

77. Benedetti v. Munari, EUR. CT. REP., 163 (1977) ("The purpose of a preliminary ruling by the court is to decide a question of law, and that ruling is binding on the national court as to the interpretation of the community provisions and acts in question.").

78. Smit, *supra* note 72, at 170–72. In evaluating this proposal, one should note that it would be a point of concern when there are multiple jurisdictions involved in arbitration and submitting a 'preliminary reference' for each jurisdiction may be time-consuming, thus effecting 'efficiency'. It would be reasonable to ask what if each court has a different opinion on the matter? That further complicates the scenario for arbitrators to issue a final award. *Id.*

79. In *Mitsubishi,* the US Supreme Court rejects American court's jurisdiction on the matter (Sherman Antitrust Act) due to a valid arbitration clause and refers parties to arbitration. The Court expressed its opinion and expected the arbitral tribunal sitting in Japan to apply the Sherman Act. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 636-38 (1985).

> […] the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.

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C. Hybrid Theory

The hybrid theory addresses a mix of contractual and jurisdictional concerns, somewhere in the middle of the continuum, whereas the contractual and jurisdictional theories are at the two opposite ends. Indeed, "the closer in proximity arbitrators are to the contractual end, the less inclined they will be to deny party autonomy, and vice versa."[80] Recognizing a hybrid approach would better equip the arbitrator to more effectively respond to the main concern of issuing a healthy award, immune from later annulment and enforcement challenges.[81] As a result, the tribunals' reaction when faced with foreign mandatory law is simply to consider and possibly apply those foreign norms that may influence the survival of their awards. However, even a hybrid theory does not determine how one mandatory law should be applied and in case of contradictory mandatory norms, which one(s) prevail(s).[82] Perhaps a more in-depth analysis of the application of a hybrid approach may offer some insight. Some scholars suggest a checklist of criteria which arbitrators should consider before making any decision on the application of mandatory laws.[83] Importantly, the rule at stake must be of mandatory character; directly applicable while its scope of application should be construed narrowly; there ought to be a close connection between the case and the state which promulgated the mandatory law; the mandatory law should be application worthy (regards should be given to its imperative nature, impact and legal effects on the transaction); and finally, the results of its application must be appropriate (promote enforceability of the award).[84] Providing criteria for application of mandatory laws would contradict any approach that totally rejects their application, but it justifies approaches that have respect for relevant mandatory laws and the integrity of arbitration as an institution for dispute resolution acting in parallel with state-designated public forums.

Practical considerations advocate an approach that makes application of mandatory rules of the place(s) of enforcement and performance a necessity to ensure the efficacy of arbitration (a pragmatic approach).

When arbitrators ignore the public policy of the place of enforcement of the award, courts may refuse recognition and enforcement based on a violation of the forum's public policy under the New York Convention.[85] Thus, the pragmatic approach supports issuing an enforceable award, which is the duty of the arbitrator.[86] Like other theories, there are difficulties in applying this approach in practice. For

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Id. (*quoting* Wilko v. Swan, 346 U.S. 427, 433-34 (1953)).

80. Barraclough & Waincymer, *supra* note 12, at 210.

81. *See* JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, 80 (2003) ("The mixed or hybrid theory has become the dominant world-wide theory as elements of both the jurisdictional and the contractual theory are found in modern law and practice of international commercial arbitration.").

82. *Id.*

83. Blessing, *supra* note 12, at 31–32.

84. *Id.*

85. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), 1958; s*ee also, e.g.*, regarding offshore futures transactions, where the Chinese courts have refused recognition of an award reasoning that it conflicted with the Chinese mandatory rules forbidding futures contracts, ED & F Man (Hong Kong) Co., Ltd. v. China Nat'l Sugar & Wines Grp. Corp., Supreme People's Court, China, 1 July 2003, [2003] Min Si Ta Zi No. 3; **s***ee also* comments by Lanfang Fei, *Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach*, 26(2) ARB. INT'L. 301, 305–06 (2010).

86. Rau, *supra* note 37, at 74–75.

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instance, the effectiveness of the award cannot be the sole basis for determining the applicable law. In addition, arbitrators may not know where the award is eventually going to get enforced. To predict place of enforcement, the arbitrator should determine who the losing party is and whether that party has assets in the potential place of enforcement. That, *per se,* is dependent on the application or non-application of a particular mandatory rule. Thus, under the pragmatic approach, arbitrators should predict the place of enforcement, but that may not be possible in every case. It may further complicate the scenario if multiple jurisdictions are involved.

Mandatory laws of the place of performance should be given close attention among other mandatory laws, as it is both impractical and immoral to force a party to perform a contract that is illegal to the law of the country where it exercises control over performance of the contract.[87] It should be noted that the place of performance has such an importance that the European Rome I Regulation (Article 9.3), considers overriding mandatory provisions of the place of performance as the only mandatory provisions that may be applied by courts of the forum (other than forum's own mandatory laws).[88] However, its predecessor, the Rome Convention (1980), Article 7(1) had further inclusive language by stating: "… effect may be given to the mandatory rules of the law of another country with which the situation has a close connection…"[89] This means that any state that had a close connection to the situation may have had its mandatory laws given effect if other conditions were met. The fact that the Rome I Regulation has exclusive language in giving effect only to the mandatory laws of the place of performance shows the importance of such laws. The Rome I Regulation is indeed for judges having their forums in EU member states. Perhaps, if the instrument addressed arbitrators in an international convention, not only mandatory laws of the place of performance would have been recommended, but also mandatory rules of the place of enforcement, which would rest on the duty of arbitrators to render an award enforceable at law.

A similar approach to the pragmatic approach above is to determine mandatory laws' application based on their connection to the case and the function of their purpose: a method applied in court litigations, which was proposed under the Rome Convention (Art. 7.1) and the American Restatement Second of Conflict of Laws.[90] According to this approach, application of a mandatory rule is foreseeable when there is an adequate and relevant connection between that country and the

87. For arguments by proponents of the pragmatic approach *see* Julian Lew, *Determination of Arbitrators' Jurisdiction and the Public Policy Limitations on that Jurisdiction*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 80 (Julian Lew ed., 1986)**;** Ole Lando, *The Law Applicable to the Merits of the Dispute*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 158 (Julian Lew ed., 1986); *see also* Martin, *supra* note 1, at 492-93 (2016) ("What is perhaps needed now is a well-drafted set of guidelines for use by arbitrators, legal counsel, courts and legislatures for use when approaching mandatory rules. Instead of being largely theoretical and based on jumbled hypotheses, as has been the case with academic literature on the subject to date, such guidelines should be carefully drafted through collaborative research based on case law, judicial opinion and primary sources, rather than theory, and ultimately provide pragmatic guidelines ordered by subject matter.").

88. Rome I Regulation, *supra* note 13, at art. 9.3 states:
Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

89. Rome Convention, *supra* note 24, at art. 7(1).

90. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188(2).

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transaction.[91] In other words, there is a connection when there are acts committed or required acts omitted in the territory of the country enacting the mandatory law.[92]

Under the Convention, after a rule is described as mandatory (one that must be applied regardless of any conflict of laws rule) the close connection test will be met by considering "the consequences of their [the mandatory rule's] application or non-application."[93] The wording is "very vague,"[94] but from the literature and existing Reports, it seems that a genuine connection must be present and not merely a vague connection.[95] Also, a level of discretion is implicitly given to judges as they go through the process of evaluating the consequences of a mandatory law's application.[96] This may be concluded both from the nature of such evaluations *per se*,[97] and by the discretionary language of the article quoted above.

It should be noted that under the Convention's successor, the Rome I Regulation, the connection test is thwarted and replaced by the certain and definite "overriding mandatory provisions" of the place of performance, if and only those provisions "render the performance of the contract unlawful."[98] Again, regard shall be given to "the consequences of their application or non-application."[99]

Based on this criterion, that laws of the potential place(s) of enforcement are not closely connected to the parties' contract.[100] However, this is relevant in court adjudications and not arbitration. In arbitration, the closeness of the connection should be measured to the entirety of the dispute (including effects of mandatory laws on the award) and not merely the main agreement between the parties.[101] If an

91. *See* Barraclough & Waincymer, *supra* note 12, at 228.

92. *Id.*; *see also* the European Court of Justice's preliminary ruling in the famous *Ingmar* case on the question of whether the national provision transposing Article 17 of the Directive relating to self-employed commercial agents (Council Directive 86/653/EEC) would prevail over the law of a non-EC country chosen by the parties. The Court makes a sensible link between the 'close-connection factor' and the 'place of performance':

The purpose of the regime established by Articles 17 and 18 of the Directive is… to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market… It must therefore be held that it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries out activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.

Ingmar GB Ltd. v. Eaton Leonard Techs. Inc., C-381/98 (2000), ¶¶ 24–25.

93. *See* Rome Convention, *supra* note 24, at art. 7(1).

94. *See* Mayer, *supra* note 12, at 288 ("This wording is of course very vague, and it has caused much protest; the United Kingdom in particular has made the reservation permitted under Article 22 of the Convention (which means that the UK reserved the right not to apply Article 7(1)).").

95. M. Giuliano & P. Lagarde, Report on The Convention on the Law Applicable to Contractual Obligations, Official Journal C 282, 31 October 1980, at 27 ("For example, there would be a genuine connection when the contract is to be performed in that other country or when one party is resident or has his main place of business in that other country.").

96. *Id.*

97. For example, the convention does not clarify as to what 'consequences' qualify, or are convincing enough, as a ground to give effect to the mandatory rule at stake or not.

98. Rome I Regulation, *supra* note 13, at art. 9.

99. The latter phrase does not seem necessary as the consequence of non-application is stated in the former phrase, namely an unlawful performance. One may plausibly imagine what other consequence of applying or not applying the overriding mandatory law of the place of performance can possibly be.

100. Barraclough & Waincymer, *supra* note 12, at 229.

101. Even in court litigation it is suggested that there should be a close connection between the mandatory rule and the situation (the contract as a whole). *Id.* (*citing* Giuliano & Lagarde, *supra* note 95, at 27).

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award is refused enforcement in its only place of enforcement due to mandatory law violations of the forum, arbitration's efficacy is compromised; although, in case multiple jurisdictions are available for enforcement, denial of recognition and enforcement in one forum will not prevent enforcement yet in another forum. In addition, one should be mindful of the fact that the Convention and the Regulation address judges and not arbitrators.

The close connection test is objective,[102] thus a general formula provides for all cases and is applied at the arbitrators' discretion.[103] The main objection to the 'close connection' criterion presented under the Rome Convention, which is true in court litigation, and asserted to be applicable to arbitration too, is that it not only makes determination of the applicable law process more complicated and difficult (partly due to the convention's vague language), but also brings substantial uncertainty to the proceedings.[104] Indeed, inconsistent outcomes are not absolutely inevitable on the issue.[105] Also, under the close connection test, party autonomy and the contractual end of the problem would receive less consideration.[106] In other words, the solution is more jurisdictional rather than hybrid. But as Mayer states, "the difficulty in assessing the applicability of mandatory rules using this method has been exaggerated."[107]

Some scholars are skeptical of whether there should be a formula or method applied in determining which mandatory laws apply.[108] Alternatively, they ask, "[w]hy shouldn't arbitrators simply apply any applicable mandatory rules that are not expressly excluded by the contract?"[109] Thus, for example, where multiple mandatory laws are extended to the parties' conduct, the arbitrators should entertain and decide all applicable claims, a maximal approach.

The proposal may seem somewhat extreme as application of all mandatory laws involved is not possible.[110] However, it is in accord with parties' legitimate expectations as the approach ignores rules excluded by the parties and respects all states' public policies that are involved by taking them all into account. To further

102. HORACIO GRIGERA NAÓN, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION, 289 Collected Courses, HAGUE ACAD. INT'L L. 9 (2001); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

103. Marc Blessing considers "close connection" as one of the "six leading criteria" to be applied in determining the applicable law. The final three of six, which he proposed are more relevant and summarized as follows: (a.) "There must be a close connection between the subject matter of the parties' contract" and the State promulgating the mandatory rule, (b.) The rule must appear to be "application-worthy" under a functional analysis test (*e.g.*, does the Rule "protect a fundamental principle or a universally recognized legal right?"), and (c.) The result must qualify as an "appropriate result." *See* Blessing, *supra* note 12, at 32; *see also* Shore, *supra* note 58, at 95; *see* others using and advocating quite similar literature and methodology: Lazareff, *supra* note 12 ("close connection factor"); Voser, *supra* note 12 ("special connection"); Barraclough & Waincymer, *supra* note 12 (checklist of eight principles).

104. *See, e.g.,* G.R. Delaume, *The European Convention on the Law Applicable to Contractual Obligations: Why a Convention?,* 22 VA. J. INT'L L. 113 (1981).

105. Shore, *supra* note 58, at 97 ("I would suggest that although the distillation of principles from the literature [referring to the eight principles proposed by Barraclough and Waincymer] is useful to arbitrators and counsel, "inconsistent outcomes" in this area (which are inevitable) are of less concern than the achievement of a fundamental agreement that the rules of private international law provide the appropriate model for arbitrators to follow.").

106. *See* Barraclough & Waincymer, *supra* note 12, at 235.

107. See Mayer, *supra* note 12, at 288.

108. *See generally* Alexander Greenawalt, *Does International Arbitration Need a Mandatory Rules Method?*, 18 AM. REV. INT'L ARB. 103 (2007).

109. *Id.*

110. Bermann, *supra* note 14, at 9.

polish the approach, and in cases where rules conflict, the arbitrator should issue the award, acknowledge the conflict, and leave it to local courts to decide which parts of the award they wish to enforce. For instance, an arbitrator may, based on the particular circumstances of the case or any relevant factor, award punitive damages under one mandatory law while noting simultaneously the prohibition of issuing punitive damages under another law, and eventually leaving it to the latter jurisdiction to refuse enforcement if it so wishes.[111]

Proponents of the maximal approach avoid applying a conflicts or private international law rule to determine a specific law to apply but suggest that "the nonwaivable character of mandatory rules can be recharacterized to focus on protecting the core interests behind the mandatory rule rather than on honoring every aspect of the rule as codified in a particular national law."[112] Allegedly, this will help the arbitrator to exclude some mandatory laws and instead select and apply laws whose protections are sufficient to advance the various policies of those states claiming an interest in the dispute.[113] This general idea of protecting the policy underlying the mandatory rule in some way, rather than applying it word by word is taken from the *Roby* decision.[114] In that decision, the U.S. Court of Appeals for the Second Circuit enforced arbitration and judicial forum selection agreements on the assumption that English courts and arbitrators would not enforce applicable U.S. securities and racketeering laws invoked by the plaintiffs.[115] Taking into account comity considerations, rather than being strict about expecting every word of the law applied by British adjudicators, the fundamental question in the Court's view was whether the available remedies under English law were sufficient to uphold the statutory policies underlying the US mandatory law.[116] Although English law allowed neither the "controlling person" liability of U.S. securities law, nor the treble damages offered by the RICO statute, the Court reasoned that English law was nevertheless sufficient "to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure."[117] One far reaching result of this approach is the "harmonization of national laws into a common international or transnational mandatory law that arbitrators rely upon irrespective of the particulars of any given case."[118] Under a maximal approach the outcome is unpredictable, as the application and reasoning for adoption of mandatory law should be tailored for each case. In addition, limited application of mandatory laws is advised instead of expanding their application.[119]

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111. Greenawalt, *supra* note 108, at 117, n.43.
112. *Id.* at 118.
113. *Id.*
114. *See* Roby v. Corp. of Lloyd's, 996 F.2d 1353 (2d Cir. 1993).
115. *Id.* at 1363.
116. *Id.*
117. *Id.* at 1365; *see also* Greenawalt, *supra* note 108, at 109.
118. Greenawalt, *supra* note 108, at 118.
119. *See, e.g.,* INT'L BAR ASS'N SUBCOMM. ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS, REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION (2015) [hereinafter "Report on the Public Policy Exception 2015"], https://www.ibanet.org/document?id=Subcommittee-on-Recognition-and-Enforcement-of-Arbitral-Awards-Public-Policy-Oct-2015; *see also* Int'l Law Ass'n Comm. on Int'l Commercial Arbitration, *Interim Report on Public Policy as A Bar To Enforcement of International Arbitral Awards* (2002) [hereinafter "Interim Report on Public Policy 2002"], https://www.ila-hq.org/en_GB/documents/conference-resolution-english-new-delhi-2002-1.

III. AN ALTERNATIVE DISPUTE RESOLUTION APPROACH

Before exploring an alternative approach to the mandatory law problem in international arbitration, there are three jurisdictions that the arbitrator and the parties must at least consider in almost all cases that involve mandatory laws: the places of enforcement, performance, and the seat of arbitration.

A. Practical Considerations

After discussing the three theories regarding the nature of arbitration and their affiliated approaches, no approach seems flawless, which shows the multidimensional nature of mandatory laws in arbitration. However, among the proposed solutions, the 'pragmatic approach' seems to be more in accord with the position of arbitrators as private adjudicators compared to other approaches, as it accounts for both contractual and jurisdictional concerns. Indeed, some suggestions and reservations should be made in application of the pragmatic approach.

Recall that under the pragmatic approach, the only mandatory rules that deserve application other than the law chosen by the parties, were mandatory rules of the places of performance and enforcement. The former is the place where the transaction has the most effect on, thus making its laws applicable to the case even if not chosen by the parties.[120] The latter is the forum where courts will have ultimate authority to recognize and enforce the arbitration award under the New York Convention.[121]

Prior to applying the rules of the places of performance and enforcement, the laws of the seat or place of arbitration (*lex arbitri*) hold a particular importance in a case.[122] The fact that the courts of the seat may annul or set aside an award is granted under Article V(1)(e) and limited under V(1)(a) and (d).[123] If the parties have not made a choice as to what law applies to the issue of arbitrability (a procedural matter, V.1.a.) or other procedural aspects of arbitration (V.1.d), then the laws of the seat apply.[124] As far as substantive laws of the seat are concerned, however, they should only apply to the merits when the place of arbitration is chosen by the parties to govern the contract as the *lex contractus* (party autonomy), and if not, only when the seat is 'closely connected' to the dispute.[125] The seat would be closely connected when the seat is also the place of performance of the contract and/or the place of enforcement of the award. Therefore, application of the seat's substantive public policy or mandatory rules should be out of the question if the seat is merely the

120. *See* Rome I Regulation, *supra* note 13, at art. 9(3) (clearly limiting discretionary application of foreign mandatory rules to those of the place of performance, and only if they make performance of the contract unlawful); see also Rome Convention, *supra* note 24, at art. 7(1) (which allows discretionary application of any foreign mandatory rules, if conditions are met.); see also comments made above for the pragmatic approach.

121. *See* New York Convention*, supra* note 21, at art. V.

122. *See id*. at art. V(1)(e); C.p.c. art. 840(5) (It.); Art. 1076(1)(A)(e) Rv (Neth.).

123. *See* New York Convention, *supra* note 21, at art. V(1)(e), (a), and (d).

124. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2625 (Kluwer Law International ed., 2009) ("… national courts in most developed jurisdictions have annulled international arbitral awards on the basis of public policy only in limited, exceptional cases. Public policy has generally been invoked only in cases of clear violations of fundamental, mandatory legal rules, not in cases of judicial disagreement with a tribunal's substantive decisions or procedural rulings.").

125. *See* Blessing, *supra* note 12, at 31–33.

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place of arbitration without any further connection to the case. Now, what mandatory law(s) should the arbitrator apply?

Mandatory laws of the place of performance: to be practical, the only mandatory rules that have been raised in practice and recognized in recent European conflicts rules are the rules of the place of performance.[126] Other (foreign) mandatory rules at stake may overlap, for example, when the place of performance is also the place of arbitration and/or enforcement of the award. If so, that mix would indeed encourage arbitrators to consider and apply the mandatory law. In addition to the law chosen by the parties, laws of the place of performance have the closest nexus to the transaction. Not all laws of the place of performance, however, claim application immediately; only the overriding mandatory rules of that state(s) that are violated by the performance of the transaction should apply.

To arbitrators, mandatory rules of the place of enforcement of the award should be relevant if that State is also the place of performance. This should be the norm when there is consensus on limited and exceptional application of Article V(2)(b) of the New York Convention when it comes to denying recognition and enforcement of arbitral awards on public policy grounds.[127] There should be a substantive and close connection between the dispute and the place of arbitration to have the forum's substantive mandatory laws apply, otherwise only norms of due process and procedural laws deserve application.[128] The same limitations should be claimed regarding mandatory rules of the place of enforcement. Not all mandatory laws of the place of enforcement deserve application, unless the consequences of enforcing a foreign award would be in violation of the public policy of the forum state. The consequences of enforcing a foreign award by the enforcement court possibly arise when the place of enforcement is also the place of performance. For example, how would enforcing an award (issued in Japan) by a court in New York (e.g., enforcement would be compensating one of the parties) be against American public policy, when the transaction involved was performed in Germany and violated European competition laws?

That award would be against U.S. public policy only if the transaction was performed in the U.S., affecting the U.S. market. However, since it was performed in Germany and the U.S. is the place of enforcement, U.S. competition laws have nothing at stake here, other than the U.S. merely being the forum where assets are located, making it a place of enforcement with no further substantive connection to the dispute. Therefore, substantive public policies of the place of enforcement are mostly relevant when that forum is also the place of performance.

Finally, arbitration is a private dispute resolution system that operates within the public judicial system. It is reasonable to expect that overriding mandatory rules of the place of performance play a significant role, even when they contradict with parties' choice of law.[129] Otherwise, party autonomy will be abused with arbitration

126. *See* Rome I Regulation, *supra* note 13.

127. *See* Interim Report on Public Policy 2002, *supra* note 119; *see also* Report on the Public Policy Exception 2015, *supra* note 119.

128. *See* decision of English court in Minmetals Germany GmbH v. Ferco Steel Ltd., [1999] C.L.C 647, 661 (Q.B.D. (Comm.)) (stating that in international cases, an agreement to arbitrate in a foreign jurisdiction as the seat of arbitration, a party "has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction.").

129. See, for example, Final Award in ICC Case No. 7047, 13 ASA Bull. 301 (1995), where the parties entered into a contract governed by Swiss law for sales assistance in support of various products. To avoid performance of its obligations, the defendant relied on the regulations of the country where the

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as its venue to circumvent mandatory rules of states where the transaction was performed. In some instances, the courts of the place of performance may not get a chance to review the award, unless the place of performance is also the place of arbitration and/or enforcement. Thus, if the U.S. Sherman Act is violated in a transaction being performed on U.S. soil, impacting the U.S. market, an arbitrator sitting in Japan, should consider and perhaps apply the Act. This consideration should be in place notwithstanding whether the award would get enforced in the US.

Overriding mandatory laws of the place of performance should be considered as limitations to party autonomy, as it is the case under Article 9 of Rome I Regulation.[130] Parties should not be allowed to perform their transaction in State A disregarding its mandatory laws by having the laws of state B apply to the transaction. There is no doubt that any law of state B must be applied to respect party autonomy, however, if there is a conflict between overriding mandatory rules of state A and state B, the former should prevail. Thus, overriding mandatory rules of the place of performance should override party autonomy "in so far as they are matters of public policy."[131]

B. A Path Forward Through ADR

The discussion so far reveals that no rigid formula can guarantee proper application of mandatory laws in all cases.[132] Any proposal aimed at helping arbitrators balance the mandatory law problem should be of a hybrid nature that accounts for both the contractual concerns of the parties and mandatory laws of jurisdictions involved in the dispute. One possible non-legal or non-conflicts approach could be a multitier ADR approach where the arbitrator would act as a mediator within the in-progress arbitration, and mediate application of proper mandatory law(s) between the parties.

According to one empirical study, 29% of settlements in arbitration have occurred before the first meeting of the tribunal with the parties.[133] According to the same study, 37% of settlements occurred during either evidentiary hearings or post-hearings.[134] As mentioned earlier, mediation as an ADR method, like arbitration, is

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main contract was to be performed, which prohibited the use of intermediaries in that field of activity. The arbitral tribunal rejected the defendant's argument on the grounds that:

[T]he parties are entitled to submit their legal relations to whatever law they choose, and to exclude national laws which would apply in the absence of a choice. Consequently, the provision of the law thus excluded can only prevail over the chosen law in so far as they are matters of public policy.

See also Final Award in ICC Case No. 6320 (1992), where the tribunal accepted the principle of extra-territorial application of a US mandatory rule against corruption where the contract was governed by the Brazilian law, on the condition (which was not met in this case) that the rule reflected "an important and legitimate interest of that State."

130. *See* Rome I Regulation, *supra* note 13, at art. 9(3) ("Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.").

131. ICC Case No. 7047.

132. *See* Waincymer, *supra* note 12, at 38 ("Any attempt to present a rigid formula as to the applicability of mandatory laws is fraught with danger.").

133. *See* Fan Kun, *An Empirical Study of Arbitrators Acting as Mediators in China*, 15 CARDOZO J. CONFLICT RESOL. 777, 782 (2014).

134. *Id.*; *see also* Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV.

contractual in nature. The ADR mechanism, however, can deal with substantive law problems that are manageable by the parties with the help of a neutral third party, one acting as the arbitrator and then mediator in the case. Could a procedural mechanism remedy a substantive law problem in arbitration? A hybrid understanding of arbitration and adoption of a multitier mechanism could warrant a workable solution, with active party involvement.

1. Arb-Med-Arb[135]: A Mixed Mode ADR Approach

The problem of mandatory laws in international arbitration is multidimensional. The problem demands a flexible approach, one that the most familiar and involved actors in a case could work out: the arbitrator and the parties. In addition to the substantive law solutions for the application of mandatory rules in arbitration (discussed in Part II), arbitrators acting as a mediator within the arbitration process could lead to an efficient way to resolve the mandatory law dilemma.[136] An arbitrator, due to his deep understanding and knowledge of the dispute, can well act as a mediator when faced with a challenging issue such as mandatory laws. However, mediation can only be successful by having willing and cooperative parties, as mediation initiates by agreement and the settlement requires agreement on both sides. Thus, for the arbitrator to proceed with mediation he must have the parties' agreement.

a. Arb-Med-Arbitrator[137]: Same Arbitrator Acting as Mediator

The mediation stage of arb-med-arb should be conducted by the individual(s) most familiar with the case and the ramifications of applicable mandatory laws regarding both the parties' transaction and the states (mandatory laws) involved with the transaction. Thus, both contractual and jurisdictional concerns should be addressed in the mediation. It is predictable that the mediator will have to make suggestions in terms of modifications parties should make in their transaction, and the law(s) that the arbitrator will later apply or exclude from application, and perhaps agreed upon place of enforcement. Therefore, professionals supporting mixed mode ADR suggest that the same arbitrator should also act as the mediator within the arbitration process to bring further efficiency to the mixed mode proceedings.[138] The now arb-mediator deeply understands the substance of the dispute, particular conflicts that application of various mandatory laws may bring to the dispute and can possibly make constructive suggestions she may have for the parties to avoid violating party autonomy and later annulment and enforcement concerns due to violation of the forum or foreign jurisdiction's mandatory laws. Efficacy and

NEGOT. L. REV. 1, 36–40 (2014) (finding that in a 1997 survey of Fortune 1,000 corporate counsel, 87% companies had recently used mediation and that by 2011, the number increased to 98%, with 83.5% having used mediation in commercial or contractual disputes).

135. Arb-Med-Arb refers to Arbitration-Mediation-Arbitration. *See, e.g.,* Singapore International Arbitration Centre (SIAC) & Singapore International Mediation Center (SIMC), *SIAC-SIMC Arb-Med-Arb Protocol,* Sing. Int'l Mediation Ctr. (2014), https://simc-website.glueup.com/sites/default/files/content-files/SIAC-SIMC-AMA-Protocol.pdf.

136. *See* Ruckteschler & Wendelstein, *supra* note 11, at 762.

137. I will refer to the same arbitrator acting as mediator and again returning to her role as arbitrator, the arb-med-arbitrator or arb-mediator.

138. *See* Ruckteschler & Wendelstein, *supra* note 11, at 762.

familiarity with the dispute and applicable mandatory laws in such arbitrations is crucial to resolve the mandatory law problem through multitier ADR processes.[139] Despite challenges and concerns raised regarding the same arbitrator acting as mediator,[140] such challenges may be overcome by proper procedure and safeguards in place.[141] These challenges and concerns revolve around three issues: bias, due process, and waiver.[142] Some believe that having knowledge of confidential information about parties would make it difficult to remain unbiased,[143] and may make the later award prone to enforceability challenges under public policy for due process violations.[144] Other concerns have been raised, with respect to arb-med-arb proceedings, like whether parties' consent given for the mediation would survive a failed mediation and would allow the arbitrator to proceed with arbitration or not.[145]

Despite these legitimate concerns, as mentioned above, application of proper, tested procedure and safeguards would mitigate these concerns.[146] In providing such safeguards prior to conducting the mediation, a procedural conference is necessary, where the parties and the arb-mediator agree on sensitive matters regarding the process, such as conducting caucuses and disclosing information exchanged during caucus with one party to the other, and perhaps limit caucuses to stages in the mediation only where necessary.[147] The arb-mediator must also make sure, while making suggestions towards resolving the problem, not to be assertive.[148] Further, in case the mediation fails, prior to the arbitration being resumed, the arb-mediator should ask parties to give written consent to proceed with arbitration.[149] To avoid due process violations, the arb-mediator should also disclose to all parties any confidential information (which parties should be informed about in advance), any information he unilaterally obtains, and finally, only consider information the parties provided.[150] The arbitrator may at any stage, where and however appropriate, mention availability of mediation ability.[151] The parties' informed, express, and written consent ought to be present to provide the arbitrator with proper authority to act as mediator.[152] That may have happened earlier when they signed the arbitration clause, or later after the initiation of the arbitration proceedings. Under most

139. Ruckteschler & Wendelstein, *supra* note 11, at 771; Stipanowich, *supra* note 9, at 286.

140. *See, e.g.,* Peter, *supra* note 11, at 91–94; Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 3(27) Willamette L. Rev. 664, 685 (1991).

141. *See, e.g.,* Ruckteschler & Wendelstein, *supra* note 11, at 771–73; *see also* Gu & Zhang, *supra* note 11, at 1028.

142. *See* Gu & Zhang, *supra* note 11, at 1018.

143. Peter, *supra* note 11, at 91; Bartel, *supra* note 140, at 686.

144. *See* Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 Baylor L. Rev. 317, 332–37 (2011); Pappas, *supra* note 11, at 177–78; *see also* Gu & Zhang, *supra* note 11.

145. *See* Ruckteschler & Wendelstein, *supra* note 11, at 762–63.

146. *See* Stipanowich, *supra* note 9, at 362; Berger & Jensen, *supra* note 11, at 906–16.

147. *See* Gu & Zhang, supra note 11, at 1028; *see also* Sussman, *supra* note 11.

148. *See* Gu & Zhang, *supra* note 11, at 1028.

149. *See* Ruckteschler & Wendelstein, *supra* note 11, at 771.

150. *See* Gu & Zhang, supra note 11, at 1028. For an opposing opinion, see Ruckteschler & Wendelstein, *supra* note 11, at 772, arguing that "in order to fully unlock the potential of a mediation," confidential information gained by the arb-mediator should remain confidential. *See also* Abramson, *supra* note 11; Stipanowich, *supra* note 9, at 291.

151. *See* Berger & Jensen, *supra* note 11, at 907.

152. *See generally* Deason, *supra* note 11.

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circumstances, with the consent of all parties, soft law on international arbitration,[153] institutional arbitration rules in Europe,[154] North America,[155] and other areas,[156] contain conciliation rules which allow the same third party neutral to act as mediator and arbitrator in mixed mode processes.[157] If the same arbitrator genuinely believes that she cannot act as a neutral third party either as a mediator and later again as a returning arbitrator, or the applicable laws of the jurisdiction or institutional rules do not allow her to conduct this dual function, it is submitted that then she should excuse herself from the proceedings.

2. Navigating the Mandatory Law Problem Through Arb-Med-Arb

In a mixed mode ADR mechanism, parties would initiate dispute resolution through arbitration, then, when application or conflict of mandatory laws becomes an issue, the arbitrator would – via the parties' consent – act as a mediator to resolve that issue (arb-mediator). When the parties have reached an agreement on the application of mandatory laws, the arb-mediator would then issue the award in line with the parties' agreement, "a consent arbitration award."[158] Under the New York Convention, settlement agreements reached within the arbitration process and recorded in the arbitral award are enforceable.[159] This multitier ADR procedure is called Arb-Med-Arb.[160] Although less widely adopted, it is a trend in line with the general arbitration process.[161]

The arbitrator, when mandatory law(s) are a problem in the case, may encourage the parties to allow the arbitrator to mediate that specific issue between the parties, and with the help of the parties apply law(s) that would fulfill both contractual and jurisdictional concerns of the parties and states involved. Indeed, the parties, with the help of the arb-mediator should first recognize the conflict that

153. *See, e.g.,* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL MEDIATION AND INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION (2018) ('Mediation Model Law'), art. 13; INTERNATIONAL BAR ASSOCIATION (IBA) GUIDELINES ON CONFLICTS OF INTERESTS IN INTERNATIONAL ARBITRATION (2014) ('IBA Guidelines on Conflicts'), art. 4(d).

154. *See, e.g.,* Stockholm Chamber of Commerce (SCC) Mediation Rules (2014), art. 7(2); Netherlands Arbitration Institute (NAI) Mediation Rules (2017), art. 6(6); International Chamber of Commerce (ICC) Mediation Rules (2014), art. 10(3), *but also,* International Chamber of Commerce (ICC) Mediation Guidance Note, para. 34.

155. *See, e.g.,* American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures (2013), rule 9; and American Arbitration Association (AAA) Procedures for Large, Complex Commercial Disputes (2017), rule L-2(c). *See also* Canadian Dispute Resolution Procedures (2015) Canadian Arbitration Rules, art. 5.

156. *See, e.g.*, China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (2014), art. 47(1); Japan Commercial Arbitration Association (JCAA) Commercial Arbitration Rules (2019), arts. 58(1) and 59(1); Singapore International Arbitration Act 2002, s. 17; and Hong Kong Arbitration Ordinance 2011, para. 33(3)(a).

157. *See* Ruckteschler & Wendelstein, *supra* note 11, at 763–71; Berger & Jensen, *supra* note 11, at 905.

158. Stipanowich, *supra* note 9, at 278.

159. *See* Peter, *supra* note 11, at 89, n.34.

160. Stipanowich, *supra* note 9, at 277–78. Hybrid processes are also referred to as Multitier or Mixed Mode. *See also* Singapore International Arbitration Centre (SIAC) & Singapore International Mediation Center (SIMC), SIAC-SIMC Arb-Med-Arb Protocol (2014). However, SIMC rules apply to different neutrals for arbitration and mediation, unless parties agree otherwise. *See also* Gu, *supra* note 11, at 155–56.

161. Kaufmann-Kohler, *supra* note 11.

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mandatory law(s) introduce in their case and – with a cooperative attitude towards the problem – actively participate in resolving the mandatory law problem.[162]

a. Arb-Mediator's Evaluative-Narrow Approach

When substantive issues are at stake (such as the application of mandatory laws), a successful mediation would be more likely if the mediator uses an evaluative mediation approach. In the practice of mediation, mediators take various approaches towards resolving the dispute. According to Leonard Riskin, mediators can take an evaluative approach as opposed to a facilitative one, and each approach can also take a narrow or broad problem-solving orientation.[163] In evaluative mediations, the mediator is more substantively involved in the mediation process as she not only conducts the process of mediation as a third party neutral but also provides parties with guidance and suggestions in resolving the dispute.[164] In facilitative mediations, however, mediators help parties to have effective and efficient communication while the parties generate solutions themselves.[165]

While there is controversy over evaluative approaches to mediation,[166] resolving the dispute between the parties is as technical as determining the proper law applicable to the dispute taking an evaluative approach to mediation by the arb-mediator is critical. Evaluation is an element of mediating complex commercial cases, with the purpose of sharing information, giving advice, making predictions over outcome, and possibly providing solutions.[167] It is necessary for the mediator to discuss with and educate the parties regarding the implications of applicable laws and what parties could agree on to avoid a mandatory law dilemma later at the enforcement stage.

In the context of mandatory laws, since the mediator will be evaluating the substance of the dispute, an evaluative-narrow approach is preferred.[168] Under this approach, in addition to joint meetings with the parties, a mediator could conduct caucuses (private meetings with each party) and delve further into the dispute.[169] According to Riskin the mediator could assess parties' weaknesses and strengths,

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162. Stipanowich, *supra* note 9, at 347–48.

163. Riskin, *supra* note 11, at 25; *see also* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques,* 12 ALTS. TO HIGH COSTS LITIG. 111 (1994); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

164. Riskin, *supra* note 11, at 24 ("The mediator who evaluates assumes that the participants want and need to provide some guidance as to the appropriate grounds for the settlement – based on law, industry practice or technology – and that she is qualified to give such guidance by virtue of her training, experience and objectivity.").

165. *Id.* (stating that the facilitative mediator assumes the parties are capable of understanding the situation and can generate solutions, and the focus of the mediator would be "to clarify and to enhance communication between the parties in order to help them decide what to do.").

166. *See, e.g.,* Peter, *supra* note 11 ("Whenever the med-arbitrator indicates a perception, it is not just another opinion, it is part of the decision. If the med-arbitrator makes a settlement suggestion based on a legal evaluation, this is basically a pre-decision."); *see also* Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 146–54 (2001); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

167. *See* Kenneth Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187, 210 (2007).

168. For further details on the approach, see Riskin, *supra* note 11, at 26–28.

169. Stipanowich, *supra* note 9, at 354; Berger & Jensen, *supra* note 11, at 907 (suggesting that arbitrator should make an early evaluation).

predict litigation outcomes, propose solutions, and compromises, and urge parties to settle.[170] Through an evaluative-narrow orientation, the arb-mediator would recognize parties' choice of law, discuss the potential impact or application of mandatory laws of that state and other foreign states involved with the transaction, including places of arbitration, performance, and enforcement.[171] The arb-mediator would also have an opportunity to share with the parties the impact of mandatory law violations on foreign judgments and enforcement of awards in the jurisdictions involved in the case.[172] The arb-mediator could then, on a case-by-case basis and where proper, suggest parties to make post-dispute changes to the existing choice of law, or adopt a particular body of law to apply to part of their transaction.[173] The arb-mediator may suggest that parties agree to enforce the award in a particular state or agree to apply the rules of the seat instead of the law chosen by the parties to avoid annulment of the award. In some cases, there will be laws more favorable to one party, and in that case the arb-mediator – depending on the issues at stake and parties' interests rather than position – should urge parties to make compromises using caucuses closer to the end of the mediation.[174] Finally, in case this collaborative multitier ADR attempt fails, as discussed in Part II, a range of legal solutions are available for the arbitrator to choose from. However, the arbitrator should at least suggest the arb-med-arb approach to the parties and mitigate issuing an unhealthy award prone to set aside and enforcement challenges.

CONCLUSION

Mandatory laws present a complex and unique set of problems in international arbitration compared to court adjudications. An arbitrator's contractual authority, their mandate to issue an enforceable award, and the imperative nature of mandatory laws all feed into this complexity: the dilemma of what law(s) should the arbitrator apply. As shown in this Article, the debate on suggesting a workable solution to this problem are based on either contractual concerns of the parties, jurisdictional (mandatory law) concerns of states involved, or a mix of the two extreme ends. Depending on the circumstances of each case these suggestions or guidelines could indeed warrant a workable legal solution. However, when the complexity of the quest over what law(s) should the arbitrator apply is multidimensional – due to multiple mandatory laws being at stake which at times may contradict one another, or other elements that arbitrators must consider in issuing an enforceable award – a more flexible approach should be available to arbitrators. As this Article suggests, one such tool could be using a procedural mechanism where multitier alternative dispute resolution processes are employed. An Arb-Med-Arb mechanism allows the arbitrator

170. Riskin, *supra* note 11, at 26–28; Stipanowich, *supra* note 9, at 352–54.

171. *See* Draft Report of Working Group 3 of the IMI/CCA/Strauss Institute Mixed Mode Taskforce, *Practice Guidelines for Mediators Use of Non-Binding Evaluations and Settlement Proposals*, Co-chaired by Veronique Fraser and Kun Fan (2021), at 33, available at https://imimediation.org/about/who-are-imi/mixed-mode-task-force/ ("[…] the neutral is mandated to help the parties find solutions and reach agreement, which may take into account the parties' subjective interests, but he or she is also expected to act evaluatively. This can take the form of advising on objective parameters and norms, such as the applicable law or other norms such as financial, industrial, technical, tax-related, social, etc., or predicting the result of an adjudicative outcome (court, arbitration or others).").

172. *See generally id.*

173. *See generally id.*

174. *Id.* at 35, 41.

to switch hats between arbitration and mediation and, with active cooperation of the parties, make appropriate arrangements on a case-by-case basis.