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The application of public interest norms in international commercial arbitration

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ABSTRACT

This article seeks to situate the application of public interest norms by arbitrators within private international law principles appropriate to the arbitral context.

INTRODUCTION

With what seems gathering frequency, commentary has been appearing over the last 30 years or so on how legal norms expressing a public interest should be treated in international commercial arbitration. The multiplication of embargos and other sanctions is doubtless one of the factors propelling this heightening attention. Another important factor is the progressive transfer to arbitration from court proceedings of the occasion privately to enforce the public interest behind these norms, as international commercial arbitration increasingly eclipses litigation in international commercial matters.

A generalized acceptance appears to have taken hold that arbitrators may apply public interest norms in appropriate circumstances and there is even a degree of consensus as to when those circumstances obtain. It may even be said that there is agreement that there are situations where arbitrators *must* apply public interest norms, and a fairly tight range of opinions on when those situations arise.[1]

Behind all of this commentary, there is much leaning on how judges deal with public interest norms. This is entirely understandable inasmuch as there is rarely any express basis in arbitration

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[1] Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne J. Int'l L. 205, purport at 207–208 to identify four situations where 'potentially' the application of public interest norms is 'uncontroversial' (i) 'force majeure', ie what will be called here the 'effects' approach, (ii) transnational public policy, (iii) mandatory rules of the *lex contractus*, and (iv) rules of the seat of arbitration. For a less sanguine view see Lawrence Boo and Adriana Uson Ong, 'Chapter 13: Mandatory Laws: Getting the Right Law in the Right Place' in Neil Kaplan and Michael J Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018) 203: 'Many able minds have sought a solution on the correct balance to be struck between mandatory rules and party autonomy but it remains a maze of majority and minority opinions'. See also Josh B Martin, 'Contractualists versus Jurisdictionalists: Who Is Winning the Mandatory Law Debate in International Commercial Arbitration?' (2017) 27(4) The American Review of International Arbitration 475 at 492: 'The reality is that despite some discussion, we are no closer to consensus on the controversial aspects of mandatory law than we were 30 years ago'.

law systems for the application of public interest norms. Resort is therefore had to a purported analogy to how courts proceed.[2]

But there is seldom any critical assessment of what judges are actually doing and how far this reality may be adopted for use by arbitrators. For arbitrators to act in this relation, it is important to identify a solid legal justification, one that fits within private international law principles applicable to arbitrators and is appropriate to arbitration.

It was therefore thought useful in this article first to examine the applicable law requirements on arbitrators as they exist in positive law, in particular in accordance with the most prominent applicable law schemes for arbitration around the world. It will be concluded that with few exceptions positive law places no direct requirement on arbitrators to apply public interest norms, but will not usually interfere with arbitrators' doing so.

Secondly, the treatment of public interest norms by courts will be considered as a possible analogy for how arbitrators may treat them. Judges and arbitrators are after all functionally analogous to the degree that they are both resolving private-law disputes resulting in potential *res judicata* effect in at least one state, for judges their forum, for arbitrators their place of arbitration. It will be found that there is much hortatory commentary concluding that on this basis arbitrators should apply public interest norms, with some temerity. But this proves a slender reed, since the reasons why judges apply public interest norms either do not apply to arbitrators (norms outside the *lex causae*) or should not necessarily apply (norms within the *lex causae*).

Once this underbrush has been cleared, elements relevant to arbitrators' application of public interest norms will be presented with an eye to providing an analytical framework for dealing with these norms in arbitration.

The general impression is that whilst arbitrators certainly will usually have the power to apply public interest norms for whatever objective reasons they find appropriate, it will only be with circumspection that they will do so, especially in the absence of an interest of at least one of the parties.

PUBLIC INTEREST NORMS AND THEIR AIMS

The term 'public interest norm' as used in this article means any norm of sufficient public interest for its state sponsor to be concerned about its application and even to seek such application irrespective of the *lex causae*. Public interest norms seek various ends. They seek to advance political, social, and economic goals. They seek also to protect weaker parties to the private law relationship.

Where the state's interest is sufficiently low, it will have no preference as to whether or not its own norms apply, over those agreed between the parties themselves, perhaps even by their reference to another state's legal norms. Where, however, the public interest element behind a norm becomes sufficiently great, the state promotor of the norm will generally wish to remove the parties' ability to circumvent the application of the norm.

Public interest norms that seek to apply in private relationships such as contracts are of increasing frequency, for example, in relation to environmental protection. There are also increasing sanctions for political ends. New areas of activity, such as artificial intelligence, call, moreover, for new regulatory schemes. For one thing, there has been a general trend over the

[2] Gary B Born, 'Chapter 19: Choice of Substantive Law in International Arbitration' in Gary B Born, *International Commercial Arbitration* (3rd edn Kluwer Law International, Alphen aan den Rijn 2021). Gary Born, with his encyclopaedic knowledge of arbitration law, is at para. 2914 illustrative of this approach: '[…] arbitrators are obliged, by the adjudicative character of their mandate, to consider and apply mandatory laws and public policies, even when this is contrary to the terms of the parties' choice-of-law or other agreement. The essence of the arbitrators' mandate is to render a decision through an adjudicative process that rests on the application of legal rules'.

decades towards increasing public regulation. There is moreover an enduring state interest in ensuring the protection of the weaker party in private relationships.

It is equally true that the effectiveness of public interest norms presupposes ever-increasing territorial scope as private relations become increasingly international.

Lastly, it bears pointing out that in many areas public regulation seeks mountingly to enlist private activity in the achievement of its goals. The notion of private individuals being 'private attorneys general', as the phenomenon is styled in the United States, has witnessed substantial reinforcement in recent decades. A prime example is antitrust law. Here private enforcement has the attraction of sparing public money and overcoming information blockage on offending behaviour.[3] In the United States, there have for many years been particular incentives for private parties to seek antitrust remedies, which have the effect of policing antitrust violations, such as treble damages[4] and legal costs advantages.[5] In the EU, there has more recently been a sustained campaign to remove barriers to private antitrust enforcement.[6]

The enforcement of public interests in private relationships does proceed in some measure by individual private conduct. For example, a party to a contract may decide voluntarily not to perform if this is contrary to sanctions. But a more forceful cat's paw is adjudication of private rights. States frequently advance their policies by interfering with economic relationships between private persons, classically by prohibiting them and deeming any relationship in violation to be void.

Why focus on relationships rather than directly on the individuals sought to be censured? The individuals actually targeted will often be beyond the control of a state, but that person's activity may be regulated by interference with their relationship with others within the control of a state. It is also easier for a state to interfere with activity than with the *status quo*. It is, for example, easier for a state to prohibit imports into another state than to procure the removal of products already within that other state. Additionally, much economic activity requires cooperation between two or more persons. It is furthermore generally a more severe incursion into a person's rights to expropriate their property than to interfere with their power to deal with their property and acquire more property. A modern liberal state will therefore prefer to clamp down on the latter rather than on the former.

Where the enforcement proceeds before the state's courts the state has a comparatively high level of assurance it will be actual and accurate, as courts are organs of their state. As will be seen, this assurance is attenuated a great deal, however, where the enforcement is in the hands of foreign courts and even more in the hands of arbitral tribunals, even those whose place of arbitration is within the state.

As will also be seen, however, the essential structure of modern conflicts law for the most part is ill-adapted and indeed even antagonistic to accounting for public interests beyond those that concern the parties themselves, with the result that it does so poorly. It overapplies public interest norms of the *lex causae* and underapplies those outside which are not of the forum.

[3] Hannah L Buxbaum, 'Public Regulation and Private Enforcement in a Global Economy: Strategies for Managing Conflict' (2019) 2861 Articles by Maurer Faculty 277, 294.

[4] *Clayton Antitrust Act* of 1914 s 4, 15 USC 15; see Michael D Blechman and Karin E Garvey, 'Chapter 36 Remedies in Arbitration for US Antitrust Violations' in G Blanke and Ph Landolt (eds), *EU and US Antitrust Arbitration*, vol. 2 (Kluwer Law International, Alphen aan den Rijn 2011) para 36-005.

[5] *Clayton Antitrust Act* of 1914 ss 4 and 16, 15 USC 15; see Michael D Blechman and Karin E Garvey, 'Chapter 36 Remedies in Arbitration for US Antitrust Violations' in G Blanke and Ph Landolt (eds), *EU and US Antitrust Arbitration*, vol. 2 (Kluwer Law International, Alphen aan den Rijn 2011) paras 36-005 and 36-009.

[6] See, for example, DIRECTIVE 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1 of 12 May 2014. See in particular art 3(1): 'Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm'.

This is already the case for classic conflicts systems employed by courts. It is even more so in arbitration, chiefly because of the latter's private nature. As public interest norms in private relations expand, this problem of ill-adaptedness of conflicts rules is exacerbated.

SURVEY OF INTERESTS ANIMATING LEGAL NORMS IN CIVIL DISPUTE RESOLUTION

The intended beneficiaries of legal norms applying in civil dispute resolution, both before arbitrators and state court judges, may be the private disputants themselves, or they may be the public,[7] for example, the political, economic, or social interests of the state,[8] or they may be a mixture of private and public interests.[9]

This distinction between the interests of the disputants themselves and interests beyond the disputants, ie public interests, operates as a sort of *summa divisio* under private international law. A sufficiently important public interest aim behind a legal norm may influence how it applies in litigation before courts.[10]

What is operative in this analysis is the intention of the state in promulgating the norm of what interests it seeks thereby to serve.

Whilst the public interest sought in any particular norm will generally be constant, given the invariability of the state, the interest of the disputants themselves, or of one of the parties, will generally vary with the parties' individual circumstances. It may, for instance, serve the interests of none of the parties for an arbitrator to apply a norm of antitrust law,[11] for example, one which denies the validity of a market-sharing agreement between parties in a dispute.

Some norms are aimed predominantly at the parties themselves, such as most dispositive rules of the law of contract. But even here the state always has a public interest in the settlement of disputes, most basically, to avoid private justice in the form of revenge. And the state has an interest in supplying a sensible private law system in that this promotes economic well-being and social order.

Some norms only seek a public purpose and not at all any interest of the parties to a dispute, although they may line up with the interests of one of the parties. An obvious case is state A's

[7] Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (online edn, Oxford Academic, Oxford 2014) 127: 'Many tribunals, however, argue that the question of the applicable law in international arbitration must not only accommodate the autonomy of the parties, but also state regulatory interests'; ICC Case no 12045 (2003), *Clunet* (2006) p 1434.

[8] Mohammad Reza Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?' (1992) 10(59) International Tax & Business Lawyer/Berkeley Journal of International Law, 62: 'These rules, which are often mandatory, are usually addressed to all persons resident in or who are citizens of the state which issued the rules, and sometimes to foreigners transacting certain business activities in the territory of the state. They may be enforced primarily by administrative officials. Their purpose is to ensure compliance with the economic, social, financial or foreign policy of the state. The parties should therefore take them into account in drafting the contract'; UNCITRAL, Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works at 304, U.N. Doc. A/CN.9/SER.B/2, U.N. Sales No. E.87.V.10 (1988): 'Mandatory rules are those which advance core economic, political and social interests of a state, protect the welfare of its people and regulate the state's policing powers […] and are closely intertwined with public interest […]. The application of mandatory rules of public law gain particular relevance in the context of disputes relating to public-private contracts'; Gustavo Gaspar Nogueira, 'The Protection of Public Interest in Contract-Based Arbitration with Public Entities: A Comparative Analysis of the English and Brazilian Legal Systems' (2020) 86(2) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 111.

[9] See Mahmood Bagheri, 'Conflict of Laws, Economic Regulations and Corrective/Distributive Justice' (2007) 28(1) Penn Law: Legal Scholarship Repository 124: 'The advent of economic regulations, the blurring the public/private law distinction, the phenomenon of globalization, and the proliferation of multinational enterprises requires alternative means of allocation of jurisdiction and conflicts issues'.

[10] Frank Vischer, 'General Course on Private International Law (Volume 232)' in *Collected Courses of the Hague Academy of International Law* (1992) 167. This is true even if there is doubt as to whether a 'public conflicts' system exists.

[11] Case C- 381/98- *Ingmar GB Ltd. v Eaton Leonard Technologies Inc* [2000] ECR-1: The European Directive 86/653 seeks to protect public interests related to competition rules rather than interests in protecting commercial agents, the directive displays extraterritorial features.

legal norm imposing an embargo[12] in respect of the sale into state B of certain military products.[13] The purpose of the embargo will be nothing private, but rather it seeks to serve the political or economic ends of state A. In accordance with the private international law of state A, reflective of principles found widely around the world, the courts of state A *must* apply that norm in accordance with its substantive scope even where the law of the contract is not that of state A.[14]

There are also norms falling more towards the centre of this spectrum, such as anti-corruption, anti-money laundering, and antitrust law.

Then there are norms which seek to protect a weaker party to a contract. These too disclose a public interest in expressing a sense of justice and favouring socially useful outcomes of the contract. But this public interest is secondary to the interest of the disputant benefiting from them.

A state's interest may indeed be very modest, for example, with norms seeking merely to ensure the coherence of the state's contractual system by seeking to remove party ability to contract out of them once that contractual system applies.

PUBLIC INTEREST NORMS IN INTERNATIONAL COMMERCIAL ARBITRATION

There may be public interest in private international law (eg jurisdictional), procedural, and substantive norms. A handful of instances of the latter have been mentioned above.

It is principally in relation to jurisdiction that one finds *private international law* public interest norms of interest to arbitration. Conflicts of law before arbitrators, for instance, is subject to such broad discretion one strains to find any public interest behind it. A high proportion of jurisdictional norms express an important public interest, for instance, regulating and ensuring access to courts. Norms relating to arbitrability are an example in this category as are limits on arbitration in the event of insolvency.

States have an interest not just in any dispute resolution but in credible dispute resolution. Therefore, they have an interest in ensuring bedrock procedural protections. Examples of *procedural* norms expressing state interests include procedural guarantees, like equal treatment and the right to be heard, and also norms imposing qualities of arbitrators, for example, neutrality.

There are, as has been mentioned, *substantive* public interest norms. These are the most varied since unlike jurisdictional and procedural public interest norms their concern extends far more widely than with how dispute resolution operates.

There is very little difficulty with the application of jurisdictional and procedural public interest norms, whether by courts or by arbitrators. They are addressed directly to the adjudicator in compliance with the territoriality principle, and where the adjudicator is a court it faithfully applies these norms according to the intention behind them. Where the adjudicator is an arbitral tribunal again the territoriality principle is respected. Jurisdictional and procedural public

[12] EU embargo regulation, Council Regulation (EEC) 3541/92; Jean-Yves Garaud and Camille Martini, 'Ordre public international: le juge de l'annulation face à l'invocation des sanctions économiques onusiennes, européennes et américaines, note sous Paris, Pôle 5 – Ch. 16, 3 juin 2020' 2020-4 (2020) in Revue de l'Arbitrage 4: 'Dans l'affaire *Air France* c/ *LAA*, une juridiction québécoise a ainsi estimé que des résolutions du Conseil de sécurité de l'ONU instituant un embargo contre la Libye relevaient d'un ordre public international'. Translation: 'In *Air France* v. *LAA*, a Quebec court held that UN Security Council resolutions instituting an embargo against Libya were a matter of international public policy'.

[13] *Fincantieri-Cantieri Navali and Oto Melara SpA v M.*, 23 June 1992 [Swiss Federal Tribunal (1ère Cour civile)] in Revue de l'Arbitrage 691 (1993).

[14] Naimeh Masumy and Niyati Ahuja, 'Divergence from Conflict-of-Law Analysis: The Need for a Coherent Standard of Review for Economic Sanctions in International Arbitration', in Stavros Brekoulakis (ed), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Kluwer Law International; Sweet & Maxwell 2021) 87-1, 4: 'European countries often criticize the United States for the broad reach of some of its federal law which may apply to persons and conduct situated abroad, especially when there is no direct, substantial and foreseeable effect on US trade and commerce'.

interest norms are only addressed to arbitral tribunals with their seat in the territory of the state sponsor of the norm. Since the arbitrator sitting in a place of arbitration within that legislative jurisdiction is the addressee of the public interest norm that arbitrator will faithfully apply the norm, and there will be a high degree of objective legal consequence for a failure to do so. Arbitral jurisdiction is generally assessed in the final instance by courts of the seat without deference to what the arbitral tribunal thinks. An arbitral tribunal's failure to comply with procedural public interest norms such as the requirements to treat the parties equally and to afford them a proper opportunity to make their case is usually within the available bases for setting aside the award.

The only complication that arises in relation to jurisdictional and procedural public interest norms in arbitration is the interest in their disapplication if their content is obnoxious to arbitration. Only one of the three usual mechanisms for accounting for public interest,[15] the public policy reservation, is engaged here. There is, for example, generally no question of the application of procedural public interest norms through the mandatory norms mechanism. Examples of such jurisdictional norms are racial requirements for arbitrators, and requirements subjecting arbitration by state entities to special permission from that state. Examples of such procedural norms are requirements that the award be signed at the place of arbitration, or that the treatment of witness testimony depends on its being delivered under oath presupposing allegiance to a particular religious faith.

There is a vast array of public interest substantive norms, that is those that regulate rights and legal relationships, that may seek to apply in arbitration. They seek important political, social and economic goals. They may also seek protection for the weaker party in a private law relationship. Some question whether the latter category of norms should be treated like other public interest norms since they have a prominent individual interest behind them. However, the reference point is not the comparative importance of the aims, but the degree of importance of the public aim viewed in isolation. Since this may be sufficiently important this category of norms should be treated like all other public interest norms.

With substantive norms, one finds issues not just of disapplication but also application. Therefore all three of the usual methods for accounting for public interest norms are engaged. Unlike jurisdictional and procedural public interest norms, however, there will generally be a lack of a clear and express normative direction to the arbitrator on how to treat substantive public interest norms. As a result, much of the complexity concerning the application of public interest norms in arbitration surrounds this vast and varied category of substantive norms. Substantive public interest norms are therefore the focus of concern in this study.

CONFLICTS RULES APPLICABLE TO ARBITRATORS

Arbitrators not subject to ordinary conflicts rules of courts

It is today almost universally accepted that the analogy of courts being bound to apply the conflicts principles of their forum does not apply to arbitrators.[16] Unlike judges, arbitrators are not, at least directly, part of any state or public organization in respect of their adjudicatory

[15] The mechanisms are: belonging to an applicable legal system, the public policy reservation, and the application of mandatory norms. See infra section "The Application of Public Interest Norms in International Commercial Arbitration".

[16] Berthold Goldman, 'Les Conflits de lois dans l'arbitrage international de droit privé (Volume 109)' *Collected Courses of the Hague Academy of International Law* (1963), https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789028614628_04#d35618039e6326, accessed 28 November 2022.

functions.[17] State court judges always apply the conflict of laws rules of their own state since conflicts systems are conceived to express the political choices of a state.[18]

It is not even possible for parties to contract out of the application of such laws. When the parties choose an applicable law a judge of a state court looks to his or her state's conflict of laws rules in deciding what effect to give that choice. Of course, most modern private international law systems will duly honour a choice of law,[19] often assiduously, which makes it look as if parties are permitted to contract out of the domestic system as a whole, conflicts rules included.

In fact, most modern arbitration law systems actively ordain this freedom of arbitrators from forum conflicts law by specific provision applying to international arbitration, usually first requiring recognition of party choice, then supplying a test for objective application of legal norms, usually one that is remarkably open-textured. This has the effect of disapplying the usually highly ramified forum conflicts rules.

Importance of the principle of party autonomy

Acceptance of parties' freedom to choose the law applicable to their contract has long been established in European conflicts law, although through different routes (case law, legal commentary, and statute) and at different times for different countries.[20] Its affirmation in conflicts law for contracts is increasing over time.[21]

Whilst the principle is not disputed, it is useful to acknowledge its rationale in commercial matters, which is the injection of legal certainty for the parties.[22]

The Rome Convention on the Law Applicable to Contractual Obligations (the 'Rome Convention') exemplified the position.[23] Its cornerstone principle, in article 3, was the parties' freedom to choose their contract law, with a few exceptions.

[17] Arthur Taylor von Mehren, 'To what Extent Is International Commercial Arbitration Autonomous?', Philippe Fouchard, Philippe Kahn et Antoine Lyon-Caen (eds), *Le Droit des Relations Internationales, Etudes Offertes à Berthold Goldman* (Litec 1982) 220: 'From the perspective of exercising effective state control, arbitral proceedings obviously cannot be fully assimilated to judicial proceedings. The latter are held on public premises, are open to the public, and are subject to hierarchical review and control. Arbitration typically has none of these characteristics'.

[18] Pierre Lalive 'Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse' (1976) 3 Revue de l'Arbitrage 155, 159: '[….] une certaine vision ou conception politico-juridique de la délimitation des compétences législatives des Etats'. Translation: '(...) a certain politico-juridical vision or conception of the delimitation of the legislative competences of states.'

[19] Alex Mills, 'Connecting Public And Private International Law' in Veronica Ruiz Abou-Nigm and others (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018) 10: 'Private International Law rules almost universally recognize the direct power for private parties to determine the law which governs their legal relationship or the courts which have the power over them, through an exercise of party autonomy in the form of a choice of law or choice of court clause'.

[20] Mario Giuliano and Paul Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' 1980 OJ. (C 282) 1, 15–16; Institut de droit international 'The Autonomy of the Parties in International Contracts Between Private Persons or Entities', Session of Basel—1991, Mr Eric Jayme rapporteur: Already in a resolution of 1991 the Institut de droit international recognized party autonomy as 'one of the fundamental principles of private international law'; Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 313.

[21] Jürgen Basedow, 'The Law of Open Societies—Private Ordering and Public Regulation of International Relations General Course on Private International Law (Volume 360)' in *Collected Courses of the Hague Academy of International Law* (2013) 164, para 183: 'Party autonomy is generally considered as a universally accepted bedrock principle of the international law of contractual obligations despite the fact that its theoretical foundations continue to remain elusive. This shortcoming has, nonetheless, done little to hinder its triumphant march forward'. Mathias Reimann, *Conflict of Laws in Western Europe: A Guide through the Jungle* (1995) 571 at 576: '[…] the fundamental rule in the United States as well as in Europe today is that the parties to a contract can choose their own law'.

[22] Classically, the commentary to the *Restatement (Second) of Conflicts of Law* (187 cmt. e (1971)) expresses this rationale as follows:

> Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

[23] EU publication L266/1, Rome on 19 June 1980.

The Rome I Regulation[24] replaced the Rome Convention for contracts entered into after 17 December 2009. Article 3(1) of Rome I in identical terms to those of article 3(1) of the Rome Convention enshrines the position that parties are in principle free to choose the law applicable to their contractual relations.

Since private autonomy is the rule in conflicts systems before courts, for the greater reason it operates in arbitration.[25] It is a commonplace to acknowledge that arbitrators owe their office to the will of the parties, and not, as judges, to the will of a state. The principle of party autonomy is high in the hierarchy of arbitration values.[26] As a consequence, all of the typical conflicts rules of application to arbitration enshrine as their paramount rule the application of the law or legal rules chosen by the parties.[27] Arbitrators tend to treat party choice of law with a great deal of seriousness and strive to comply with it.[28]

The applicable law agreement may be entered into impliedly or tacitly[29] if a conscious choice can be derived from the contract or the circumstances, ie if there is a reference to a certain national law. In arbitration, the choice of law is not limited to one system of national law as transnational rules such as trade usages or the *lex mercatoria* can also apply.

[24] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6 of 4 July 2008 ('Rome I').

[25] George A Bermann, 'International Arbitration and Private International Law—General Course on Private International Law (Volume 381)' in *Collected Courses of the Hague Academy of International Law* (2016) 63: 'Party autonomy in private international law finds its most characteristic expression in two forms: a contractual forum selection clause (by which the parties designate an exclusive or non-exclusive forum for the resolution of their disputes) and a contractual choice of- law clause (by which parties designate the law governing the interpretation of their contract and disputes arising out of or related to that contract). But, in international arbitration, party autonomy is utterly pervasive'. Hege Elisabeth Kjos, 'Choice of Law Rules', in *Applicable Law in Investor–State Arbitration* (Oxford University Press 2013) 69: 'It is suggested, however, that the reference in Article V to "choice of law rules" and "contract provisions" supports the inference that the tribunal should heed choice-of-law agreements entered into by the disputing parties, especially when considering that the principle of party autonomy has been stated to constitute a general principle of international law'.

[26] Many tribunals at least implicitly follow the *lex causae* approach. See Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (online edn, Oxford Academic, Oxford 2014), 126: 'Mandatory norms are not applied because they are mandatory, but because (and not only to the extent that) they form part of the law chosen as applicable by the parties to the contract themselves'; ICC case no 10671 (2006), *Clunet* (2005), p 1268; ICC Case no 7528 (1993), *Y.B. Comm.* Ab. XXII (1997), p 125'. Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (online edn, Oxford Academic, Oxford 2014) p 127; ICC Case no 6149 (1990), *Y.B. Arb.* XX (1995), 41: 'Some tribunals hold that the contractual choice of law trumps all other provisions of the contract (See e.g. ICC case no 6998 (1994), Y.B. Comm. Arb. XXI (1996), p. 54) the paradox of party autonomy is thus resolved through establishing a hierarchy of norms within the contract itself. Other tribunals, in contrast, refer to the French doctrine of *contrat international* and argue that the parties should be assumed to have excluded from their choice of law those norms of the *lex causae* which would invalidate- as a whole or in part their contract'.

[27] Art 187(1) of the Swiss Public International Law Act codifies this principle. See also art 35(1) of the *UNCITRAL Arbitration Rules*.

[28] George A Bermann, 'International Arbitration and Private International Law—General Course on Private International Law (Volume 381)' in *Collected Courses of the Hague Academy of International Law* (2016) 259: '[…] parties to international contracts commonly include provisions designating the law governing the contractual relationship. From a purely theoretical point of view, these choice of law provisions are not directly binding in an arbitration; they are binding to the extent that arbitrators privilege them in the express or implied choice of law analysis in which they engage. As a practical matter, however, arbitral tribunals will apply the substantive law designated in a choice of law clause unless there is a compelling reason not to do so'. Hege Elisabeth Kjos, *Applicable Law in Investor–state Arbitration* (Oxford University Press 2013) 69: 'It is suggested, however, that the reference in article V to "choice of law rules" and "contract provisions" supports the inference that the tribunal should heed choice-of-law agreements entered into by the disputing parties, especially when considering that the principle of party autonomy has been stated to constitute a general principle of international law'. Linda Silberman and Franco Ferrari, 'Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong', in *Law & Economics Research Paper Series Working Paper 10-40* (2010): '[…] not surprisingly, given that party autonomy is the pillar and the hallmark of international commercial arbitration, arbitrators generally respect the parties' choice as to the law that is to govern their contract'. They also contend at p 5 that the New York Convention by analogy to its treatment of party choice of procedural law urges respect for party choice of substantive law: 'Arts. V(1)(a) and V(1)(d) look to the agreement of the parties on [the law governing the arbitration agreement and the law governing arbitral procedure] at the recognition stage. By analogy, the New York Convention would seem to reflect a policy that a choice of law clause selecting the applicable law to govern the merits of the parties' dispute should be respected'.

[29] Art 4 of the *Hague Principles on Choice of Law in International Contracts* 2015. Para 4 of their preamble directs that they may be applied by arbitral tribunals. The Hague Principles in fact have arbitration centrally in their focus, as unlike courts there is no highly ramified system of conflicts imposed upon them. Also, the Hague Principles by their art 1(1) apply 'where each party is acting in the exercise of its trade or profession' and in international and commercial matters arbitration is the norm.

Based on the party autonomy principle, the parties can determine the law applicable to their relationship at the initial contracting stage and after the dispute arises or even during the arbitral proceedings.[30] Parties can alter their choice of law whenever they deem it fit to do so.

It might be conceived that party agreement on applicable law binds arbitrators *a priori* to any conflicts rules.[31] The thinking here is that the arbitration itself is engendered by party agreement, and party choice of substantive law is consubstantial with the arbitration.[32]

It is not possible to test the proposition since the conflicts provisions of virtually every arbitration law system lay down that arbitrators are to apply the parties' choice of law. Arbitration law positive conflicts of law is therefore a sufficient source for the application of the parties' choice of law. Only in its absence could one discern the operation of some other source for the application of the rule of party choice.

Arbitrators are generally free to determine the scope and effect of parties' choice of law, and will often find limits and attenuations. Moreover, the availability of effective review of arbitrators' treatment of party choice of law is fairly limited.[33] Few arbitration laws and few enforcement systems contain enforceable requirements that arbitrators comply with party instructions whether procedural or substantive. This leaves a public policy review. Apart from the fact that review on this basis is begrudging almost everywhere, a failure to comply with a choice of law is not generally of a nature to engage the necessarily wider concerns inherent in public policy.

Typical conflicts rules in the absence of party choice

In arbitration, in default of party choice, it is perhaps not overly reductive to posit that there are operating in the world three prominent general standards for the applicable law (or more frequently today, applicable 'legal rules').

The first is that the arbitral tribunal is to apply 'the law determined by the conflict of laws rules which it considers applicable' (UNCITRAL Model Law, article 28(2)). Section 46(3) of the English *Arbitration Act*, 1996 provides the same for English arbitration law, a non-Model Law jurisdiction.

[30] Art 2(3) of the Hague Principles: 'The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties'. Peter Burckhardt and Philipp Groz, 'Chapter 8: The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono', in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd edn, Kluwer Law International 2013) 163.

[31] The following provisions confirm the parties' autonomy to choose the applicable law: art 33(1) of the original 1976 *UNCITRAL Rules*; art 35(1) of the revised 2013 and 2010 *UNCITRAL Rules*; art 21(1) of the 2012 *ICC Rules*. See 'Chapter 19: Choice of Substantive Law in International Arbitration (Updated September 2022)', in Gary B. Born (ed), *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).

[32] George A Bermann, 'International Arbitration and Private International Law General Course on Private International Law (Volume 381)' in *Collected Courses of the Hague Academy of International Law* (2016) 261: 'By most appearances, when arbitrators honour a choice of law by the parties – and, again, they do so with great consistency – it is not because a pre-existing conflicts of law framework of analysis independently requires them to do so, but because the parties, as architects of their own arbitration, are deemed to have directed them to do so. This impression is only fostered by the fact that, all else being equal, arbitral tribunals are less likely than courts to justify their choice of applicable law by express reference to a particular choice of law methodology'.

[33] See Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) ch. 19, p 2, para 19.02: 'Absent contrary agreement, arbitrators generally possess broad power – comparable to that which exists for arbitrators' decisions regarding the interpretation and application of substantive law rules – to select, interpret and apply choice-of-law rules choosing the applicable substantive law in an arbitration. The arbitrators' authority is almost uniformly recognized in international arbitration conventions, national arbitration statutes and institutional arbitration rules. In almost all instances, the arbitrators' selection of the applicable substantive law, and the conflict of laws rules applicable in making this selection, is subject to minimal judicial review in either annulment, recognition, or other proceedings'. Marc Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14(2) J. Int'l Arb. 39; Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3d edn, Schulthess 2016) para 1402; Gabriel M Wilner, 'Determining the Law Governing Performance in International Commercial Arbitration: A Comparative Study' (1965) 19 Rutgers L. Rev. 646, 684–86: If there is no agreement between the parties, *'the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'*; art 33(1) of the original 1976 UNCITRAL Rules; 'The arbitral tribunal shall apply the law which it determines to be appropriate'. See art 35(1) of the 2010 and 2013 UNCITRAL Rules.

The second is that the arbitrator is to apply the legal rules that the arbitrator finds to be 'the most appropriate'. Article 1511 of the French *Civil Procedure Code* refers to the rules of law that the arbitrator finds appropriate.[34]

The third is the legal rules which are 'closest to the case'. Swiss arbitration law directs international arbitrators to decide 'according to the rules of law with which the case has the closest connection'.[35] This rule is in fact of such widespread use[36] that it may be considered hegemonic in international commercial operations. Its prominence is such that it may even lay claim to its being a general principle of conflicts law[37] in international arbitration. But for more immediate purposes, its prominence justifies it as a focus of analysis in this study.

Where the parties have chosen a set of arbitration rules these will also almost invariably lay down conflicts provisions in accordance with one of these three approaches.

The UNCITRAL Arbitration Rules provide in article 35(2) that 'the arbitral tribunal shall apply the law which it determines to be appropriate'. The London Court of International Arbitration (LCIA) Arbitration Rules provide in article 22.3 that 'the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate'. The Singapore International Arbitration Centre (SIAC) Arbitration Rules also provide in article 31.1 for the application of 'the law or rules of law which it determines to be appropriate'. The same test is in article 61(1) of the World Intellectual Property Organization (WIPO) Rules. Article 21(1) of the International Chamber of Commerce (ICC) Rules directs the tribunal to apply 'the rules of law which it determines to be appropriate'. The 'law' that is appropriate suggests that the arbitrators are confined to choosing whole legal systems whereas 'the rules of law' would better accommodate the applicability of rules of different provenance.[38]

Article 33(1) of the Swiss Rules, modelled upon article 187(1) of the Swiss Private International Law Statute lays down a 'closest connection' test.

At least on their face, these rules grant arbitrators considerable latitude in settling the applicable law in default of party choice. The typical standards laid down by arbitration law systems are so loose as to permit almost any result. It a situation where, as the French say, *qui trop embrasse mal étreint*.

The requirement that the arbitrators apply the choice of law rules they consider the most appropriate is structurally the tightest. This approach is known as a '*voie indirecte*' since it proceeds to the applicable law indirectly through rules to determine the applicable law.[39] It actually requires that the arbitrators proceed by means of first identifying conflicts rules to apply, and then by operation of them arrive at the substantive legal rules applicable.

The other two tests contemplate the rules applied themselves and are silent as to the means by which the arbitrator selects them. The arbitrator is empowered thereby, for example, to skirt conflicts rules altogether, and directly apply substantive legal rules (so-called *voie directe*). It

[34] Art 1511 of the French *Civil Procedure Code*: '[…] conformément [aux règles de droit] qu'il estime appropriées'.

[35] Art 187(1) of the Swiss *Private International Law Act*.

[36] Symeon C Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism - General Course on Private International Law (Volume 384)' in *Collected Courses of the Hague Academy of International Law* (2017) 264: 'The "closer" or "closest connection" is the most popular of the flexible connecting factors in recent codifications'.

[37] Benjamin Hayward, *Conflict of Laws and Arbitral Discretion* (OUP 2017) 188–189; art XIV.2(b) of the Trans-Lex Principles: '(b) Absent a choice of law by the parties, a contract is governed by the law with which the contract is most closely connected ("centre of gravity test"; "engster Zusammenhang"; "liens les plus étroits")'; Doug Jones, 'Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties – A Discussion of Voie Directe and Voie Indirecte' (2014) 26 Singapore Academy of Law Journal 911, 921 para 34.

[38] AR Parra, 'Applicable Law in Investor–state Arbitration' (2007) TDM, at 4: 'The term "rules of law" is understood to be wider than the term "law," allowing the parties to designate as applicable to their case rules of more than one legal system, including rules of law which have been elaborated on the international level'.

[39] Benjamin Hayward, *Conflict of Laws and Arbitral Discretion* (OUP 2017) 58–74: proposing a four-level classification scheme moving from the most indefinite test and providing four tables assigning arbitration statutes and arbitration rules in according with this scheme. Doug Jones, 'Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties—A Discussion of Voie Directe and Voie Indirecte' (2014) 26 Singapore Academy of Law Journal 911.

remains, however, that no criteria are referred to for determining which conflict of law rules the arbitrator applies. In the result there is still gaping discretion with the arbitrator.

The operation of conflicts rules in arbitration

It is certainly not contrary to any of the three conflicts approaches prominently found in arbitration laws and rules for an arbitrator to advert to the private international law of the legal system of the place of arbitration, just as a judge would. Nonetheless, it is difficult to identify any satisfactory justification for doing so.[40] An arbitrator's particular familiarity with it would seem decidedly not to qualify, although at a stretch it may be contended that the parties' choice of an arbitrator who is an authority in this particular conflicts system (and little else) may begin to form a basis. The fact is that nothing particular argues for preferring the local conflicts law over any other system.

There is in fact no particular reason for international arbitrators to apply the conflicts law of any particular system. A choice of substantive law is generally understood to exclude the conflicts law of a legal system. Systems of private international law do not supply an analysis of what factor or factors might connect to a conflicts system simply because the necessary application of a court's own conflicts system obviates any such enquiry.

Nor has any discernable approach emerged from arbitral practice where the question does in fact arise. When arbitrators do apply a conflicts system this usually operates upon the basis of convenience or upon the acceptance that it expresses general principles of private international law (the evidence of and reasoning for this is in practice often pretty thin). It is difficult to conceive what the factor could be that connects an arbitration to conflicts rules or a system of the same.

The only firm constraint on arbitral discretion in the choice of law is the prohibition on judging on a purely subjective basis, as *aimiables compositeurs* or *ex aequo et bono* failing express permission to do so. In other words, arbitrators may appeal with impunity to any legal reasoning providing it exists objectively and is no resort to their inner sense of justice. But even this prohibition is a sort of paper tiger. Where, for example, the arbitrator is directed to apply the rules of law that are 'most appropriate' the arbitrator is authorized to apply a subjective process landing upon objective rules. The available objective rules will generally include rules of the same substantive content as any subjective notions the arbitrator may have. In the result, this prohibition only really operates where the arbitrator has imprudently declared a resort to subjective considerations rather than has just gone ahead and applied them.[41]

General assessment of the three standard tests

The conflict of laws rules which the arbitrator 'considers applicable' can be any rules. The arbitrator's discretion in selecting the conflicts rules is unbound. The injunction against deciding *ex aequo et bono* without permission from the parties relates to the substantive decision and not the decision on applicable law. It may be that the arbitrator is at least obligated to express the reasoning process leading to the applicable law decision but there is little risk of adverse consequence for a failure to do so. One might build a challenge on the basis that without reason the arbitrator effectively violated the requirement not to decide *ex aequo et bono*. But this is a small constraint on what is otherwise gaping discretion under this first test.

[40] See, however, Hege Elisabeth Kjos, 'Choice of Law Rules', in *Applicable Law in Investor–state Arbitration* (Oxford University Press 2013) 67: 'the national law of their juridical seat constitutes the starting point for the choice-of-law methodology of territorialized tribunals. Since the freedom to determine the law applicable to the merits is granted to the disputing parties and arbitrators by virtue of the national arbitration law, it is this law that one must first examine for any guidance in this respect'.

[41] Pierre Lalive, 'Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse', Revue de l'arbitrage 1976 (3) 155 at 157. Professor Lalive recognized the similarity between deciding subjectively and not being compelled to provide reasons for one's decision: 'situation voisine mais certes non identique - des cas où [l'arbitre] serait expressément dispensé d'indiquer des motifs'. Translation: 'the similar but certainly not identical situation - cases where [the arbitrator] would be expressly exempted from giving reasons'.

On its face, the 'most appropriate legal rules', the second test, would appear a rule of infinite capacity. Obviously, this standard can be putty in the hands of the arbitrator, to be shaped in any form the arbitrator deems 'appropriate'.

But this standard does have a strong pedigree in private international law thinking developed in relation to courts:

> The classical, traditional view of PIL, going as far back as Savigny and Story, is grounded on the basic premise that the goal of PIL is to ensure that each multistate legal dispute is resolved according to the law of the state that has the "most appropriate" relationship with that dispute.[42]

If it is understood as a reference to settled private international law principles, and therefore nested within them, the rule is much more definite.

The 'closest connection' rule is not as indeterminate on its face as 'the most appropriate' rule. Closeness is less abstract than appropriateness. According to Symonides, moreover, it is 'a modern iteration of Savigny's seat of the relationship'.[43] It would therefore follow that the closest connection rule is a particular instance of the 'most appropriate' test.

It also follows that, just as with the most appropriate rules test, the application of the closest connection test can be structured and constrained by reference to the tradition of thinking behind it in relation to courts.

It is in fact extremely well developed and ramified in private international law for the use of courts.[44]

RELEVANT FEATURES OF CONFLICTS LAW BEFORE COURTS—DISCRETION AND THE MARGINALIZATION OF PUBLIC INTEREST NORMS IN THE CONFLICTS ANALYSIS

Introduction

Originally courts would only apply their own laws. Around 1200,[45] it began to be accepted that courts might apply foreign legal systems where this would be more appropriate or correct in view in particular of the private interest engaged.

The starting point in modern, so-called 'classical'[46] conflicts law was the acceptance that for the most part there was no compelling state interest in the application or even preference of its own laws in matters involving individual relationships (*Rechtsverhältnisse*). The starting point

[42] Symeon C Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism - General Course on Private International Law (Volume 384)' in *Collected Courses of the Hague Academy of International Law* (2017) 195.

[43] Symeon C Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism - General Course on Private International Law (Volume 384)' in *Collected Courses of the Hague Academy of International Law* (2017) 187. See the following section "Relevant Features of Conflicts Law before Courts - Discretion and the Marginalisation of Public Interest Norms in the Conflicts Analysis".

[44] Benjamin Hayward, *Conflict of Laws and Arbitral Discretion* (OUP 2017) 228–229 contending that it was the test in the English common law prior to the Rome Convention (and the Rome I Regulation). It may be noted that the English test, as enunciated by Lord Simon in *Bonython v The Commonwealth* [1951] 1 AC 201 (PC) at 219–220 was 'the closest and most real connection'; *Dicey, Morris and Collins on the Conflict of Laws*, Lord Collins of Mapesbury and Jonathan Harris (gen. eds) (16th edn, Sweet & Maxwell 2022) at pp 1784–1785. According to this work at p 1846, the closest connection test operated in all of the original contracting states to the Rome Convention except Italy; Symeon C Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism—General Course on Private International Law (Volume 384)' in *Collected Courses of the Hague Academy of International Law* (2017) 288: suggests that 'closest' indicates a geographical criterion: 'The reliance on geography is symbolized by the drafters' choice of the adjective "closer" to qualify the word "connection", rather than, for example, "more significant", which is the critical adjective in the English statute 1211 and the *Restatement (Second)*'.

[45] Hessel E Yntema, 'The Historic Bases of Private International Law' (1953) 2 Am. J. Comp. L. 297 at 301–302: 'It was towards 1200 that Aldricus […] had the genius to propose that, in such cases, the judge, in his discretion, should apply the more effective and more useful law'.

[46] Nikitas E Hatzimihail, *Preclassical conflict of laws* (Cambridge University Press, Cambridge 2021) 15–17: 'It is commonly accepted that the defining moment in the history of private international law concerns the full and definitive displacement of pre-nineteenth century doctrine by a new legal paradigm, sometime in the early to mid-nineteenth century. Often described as a "Copernican revolution," this paradigm shift entailed the abandonment of the "statutist" doctrines of ascertaining the spatial reach of statutes in favor of the "Savignian" method of localizing in space the legal relationship'.

of the 19th-century Prussian statesman and jurist Friedrich Carl von Savigny was that states' claims to the application of their laws were secondary to the concern to obtain a substantively 'satisfactory' outcome in the application of laws:

> Most writers on this subject start with the concept of collisions, and treat the resolution of them as their true and only task; this is certainly at the cost of a satisfactory outcome. The natural thought process should rather be the following: For the legal rules the enquiry is about what legal relationships should they govern? For the legal relationships: To which legal rules are they subjected, or do they belong? The question about the extent of sovereignty or belonging and about the border disputes or collisions that arise at their limits are by their nature derivative and subordinate.[47]

Classic conflicts of law as propounded by Savigny laid great importance on courts in principle not preferring the application of their own state law over the application of foreign law. For Savigny, it was possible to achieve such equality of treatment between legal systems in that he concluded that states are in principle indifferent to what private law applied. What Savigny thought should determine the applicable law in private law matters was rather its appropriateness to the private relationship it was to govern.

He discerned a concept of the condition for a person to be the subject of legal relationships (*Rechtsverhältnisse*), namely, personal status (*'Zustand der Person an sich'*), as well as four types of legal relationships for this purpose, and a connecting factor for each of the five. The four legal relationship categories for the purposes of selecting applicable law are property (*Sachenrecht*), obligations (*Obligationenrecht*), successions (*Erbrecht*), and family law (*Familienrecht*).

The connecting factor for obligations is first the choice of the parties, and secondly, in the absence of choice, principally the place of performance. Since the parties can freely agree on the place of performance, classical conflicts theory accepted equally that the parties can more directly validly agree on the law applicable to their contract.

Savigny foresaw, however, that in exceptional 'public policy' cases the state of the court may be interested in the application of its own law. Savigny described these cases as involving 'statutes of a strong positive, imperative nature, which precisely on account of this nature are not amenable of party determination without regard to the borders of various states'.[48] In such an exceptional circumstance he accepted that the court of the state so concerned could validly prefer the application of the norm of its own state in ouster of that part of the law otherwise applicable. Savigny astutely discerned that it was not every state policy that would justify such ouster. It was only where the policy sought to achieve a goal outside the concerns of the particular area of law.[49] So, for example, any state policy seeking to protect a weaker party in a contract would not qualify, but rather the rules of the *lex causae* would apply undisturbed.[50]

[47] FC von Savigny, *System des heutigen Römischen Rechts*, vol. 8 (Voet und Comp. 1849) 33: 'Die meisten Schriftsteller über diesen Gegenstand gehen aus von dem Begriff der Kollisionen, und behandeln die Entscheidung derselben als ihre wahre und einzige Ausgabe; gewiss zum Nachtheil eines befriedigenden Erfolgs. Die natürliche Folge der Gedanken ist vielmehr folgende. Für die Rechtsregeln wird gefragt: Über welche Rechtsverhältnisse sollen sie herrschen? Für die Rechtsverhältnisse: Welchen Rechtsregeln sind sie unterworfen, oder angehörig? Die Frage nach den Grenzen der Herrschaft oder der Angehörigkeit, und nach den an diesen Grenzen eintretenden Grenzstreitigkeiten oder Kollisionen, sind ihrer Natur nach abgeleitete und untergeordnete Fragen'.

[48] FC von Savigny, *System des heutigen Römischen Rechts*, vol. 8 (Voet und Comp. 1849) 33: 'Gesetze von streng positiver, zwingender Natur, die eben wegen dieser Natur zu jener freien Behandlung, unabhängig von den Grenzen verschiedener Staaten, nicht geeignet sind'.

[49] FC von Savigny, *System des heutigen Römischen Rechts*, vol. 8 (Voet und Comp. 1849) 35: f. 'ihren Grund und Zwecke ausser dem reinen, in seinem abstraktem Dasein aufgefassten Rechtsgebiet, so dass sie erlassen werden nicht lediglich um der Personen Willen, welche die Träger der Rechte sind'. 'that have] their ground and purpose outside the pure legal area conceived of in its abstract being, so that they are promulgated not exclusively for individuals who are bearers of rights'.

[50] For the development of the public policy exception after Savigny, see Olaf Meyer, 'A Flexible System in Flux: On the Realignment of Public Policy', in O. Meyer (ed), *Public Policy and Private International Law* (Edward Elgar Publishing Limited, Cheltenham 2022) 4, para 1-014: 'More precise contours were carved out by the generation after him, in Germany above all by Kahn and von Bar, in France Bartin and in Italy Mancini, from whose pen the first statutory rule also emanated'.

Discretion

Despite these roots, many legal commentators have considered the closest connection test one of extreme discretion.[51] There is at all events an irreducible tension in the notion of closest connection as it has developed in conflicts systems used by courts. This tension is the question of whether the attachment or connection in question is one specific connecting factor or several.

A single connecting factor favours foreseeability of outcomes and ease of application whereas reference to a multiplicity of factors is more apt to achieve the purpose of determining genuine proximity between the case and the applicable law. This incompressible trade-off explains the existence of the tension.

Common law systems have tended to favour reference to a multiplicity of connecting factors in determining the applicable legal system.

A useful synopsis of the approach to English common law in determining the 'closest and most real connection' is found in the Giuliano–Lagarde report:

> In this inquiry, the court has to consider all the circumstances of the case. No one factor is decisive; instead a wide range of factors must be taken into account, such as for instance, the place of residence or business of the parties, the place of performance, the place of contracting and the nature and subject matter of the contract.[52]

The US *Restatement (Second) on Conflicts* adopted a test called the 'most significant relationship' which directs reference to a list of connecting factors.[53]

In European Union law there has been a movement from a single connecting factor to a multitude of factors in relation to contractual relations. In default of party choice, article 4 of the Rome Convention[54] provides that the law 'most closely connected' applies. Article 4 gives some guidance by way of presumptions as to which law that is, notably the law of the 'habitual residence' of the characteristic performer, with an 'escape clause' where the relevant facts about the presumptions are not able to be determined.

The regime for the applicable law in the absence of party choice under Rome I[55] differs substantially from that under the Rome Convention. Article 4 of Rome I lays down connecting factors for a list of typical contracts. It then provides that for contracts other than those types

[51] Lord Collins of Mapesbury and Jonathan Harris (gen. eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell, London 2022) fn 466 (p 1846) note that 'many commentators especially in Germany consider that the test is an empty formula'; Sagi Peari, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test*, 45 at 243 U.W. Austl. L. REV. 240 (2019) 243: 'Much ink has been spilled in the literature to mock this principle as inherently problematic and as granting adjudicators with almost unlimited discretion'.

[52] Mario Giuliano and Paul Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' (1980) OJ. (C 282) 1, 19.

[53] For contract, s 187 of the *Restatement (Second) on Conflict of Laws* provides that reference is to be made to:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

[54] 80/934/EEC: *Convention on the law applicable to contractual obligations* opened for signature in Rome on 19 June 1980.

[55] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

the law of the place of habitual residence of the characteristic performer applies. But then article 4(3) of Rome I provides that where 'it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than' that indicated by the application of the rule for the typical contracts and the closest connection rule then the law of that other country shall apply. Lastly, article 5(4) of Rome I lays down that where one cannot determine the applicable law by reference to the connecting factors for the typical contracts and characteristic performance rules then one applies the closest connection test.

The clear result of this approach is to make applicable law much less predictable than under the Rome Convention, and of course conversely, much closer to the individual case. There remains, however, a mix of abstract reasoning and reference to individual aspects of a particular set of facts.

Marginalization of the public interest in conflicts law

Conflicts of law presents an inherent tension between on the one hand the exercise of a state's legislative powers and on the other hand the interest of the parties in the application of legal rules most appropriate to their relation.[56] It may be observed that this tension is even reflected in the two names for this area of law, private international law and conflicts of law. The name private international law emphasizes the parties' 'private' interests and conflicts of law focuses on the competing sovereign claims.[57] But the exercise is never exclusively private, and often there is no conflict.

Most modern conflicts systems are structured to make the application of public policy norms outside the *lex causae* an exceptional accessory.[58] Of note here, the 'closest connection' approach does so. By contrast, as will presently be seen, the United States 'most significant relationship' for contracts in section 188 of the *Restatement (Second) on Conflicts of Law* expressly includes public interest considerations within its list of factors to be adverted to (section 145 does the same for torts).

As has been seen, Savigny's revolution was to redirect the conflicts focus to the interests of the private parties,[59] with the residual possibility of the court applying norms that are of particular importance to the state of the forum.

The result has been an effort to give voice to public interest norms from sources outside the forum. This, it will be argued, has resulted in the first place in an over-application of public interest norms of the *lex causae*. Secondly, it has also resulted in the strained development of

[56] Hege Elisabeth Kjos, *Applicable Law in Investor–State Arbitration* (OUP 2013) at 67: 'It will be seen that for both territorialized and internationalized tribunals choice-of-law rules often involve striking a balance between, on the one hand, the private interests of the parties, and, on the other, the public interests of a particular national or the international legal order'.

[57] Symeon C Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism—General Course on Private International Law (Volume 384)' in *Collected Courses of the Hague Academy of International Law* (2017) 85–86: 'For instance, the term private international law focuses on the private parties involved in disputes with extra-national elements. By contrast, the name conflict of laws emphasizes the role of states, assuming that:

> (1) in such disputes, each involved state has an active or passive desire, claim, or "interest" to apply its own law; and
> (2) these claims always pull in opposite directions and thus "conflict".'

[58] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201, 209: 'The application of public policy is not just an exceptional choice of law rule because it chooses local law in circumstances which are an exception to the usual choice of law process. It is exceptional also because it is a choice of law rule which is attentive to the substantive content of the applicable law'. Michael Traynor, 'Conflict of Laws: Professor Currie's Restrained and Enlightened Forum' (1961) 49(5) California Law Review 845–876, 846: 'Choice of law rules reflecting views concerning the "nature of law and its abstract operation in space" but "remote from mundane policies and conflicts of interest" won't work. They generate false problems and irrational solutions and operate to nullify state interests. They become encrusted with exceptions such as "local policy", which produce uncertainty and only serve to help the ancient system to totter on'. For a different view, see Mathias Reimann, *Conflict of Laws in Western Europe: A Guide through the Jungle*, vol. 30 (1995) 571, at 589: 'the modern approach is a mid-course between the practical need for, and the advantages of, party autonomy on the one hand, and the regulatory interests of the various states on the other'.

[59] Lord Collins of Mapesbury and Jonathan Harris (gen. eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell, London 2022) 5, para 1-006: 'The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence'.

mechanisms to apply public interest norms of third states. By strained it is meant that this development challenges the bases of Savigny's system, and there is exertion to maintain fidelity to it.

One eruption of dissatisfaction with how the Savignian system treats public policy norms was the American 'conflicts revolution' led by Professor Brainerd Currie beginning in the 1950s. This was a reaction to the first *Restatement on Conflicts* of 1934 which had a classical Savignian (or, more proximately, Joseph-Storyian) territorial and multi-lateral character largely oblivious to states' interests and which did accurately represent American law at the time.[60]

Brainerd Currie developed a state-interest theory that challenged the choice of law theory that was based on the territorial rules principally serving party interests.[61] Currie believed that the main concern in the conflict of laws theory related to states' diverging laws and interests.[62]

To determine the applicable law, Brainerd Currie proposed the following methodology:

> 1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
> 2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
> 3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
> 4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
> 5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.[63]

[60] Patrick J Borchers, 'Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note' (1997) 56 Md. L. Rev. 1232, at 1235.

[61] Robert A Sedler, 'The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation' 25 (1977) UCLA Law Review 181: 'The governmental interest approach formulated by the late Brainerd Currie has been the catalyst of the modern "revolution" in choice of law in this country. […] It was developed against the background of the rules approach of the original *Restatement* as a basic alternative to that methodology'. https://digitalcommons.wayne.edu/lawfrp/435; Gene R Shreve, 'Currie's Governmental Interest Analysis—Has It Become a Paper Tiger?' (1985) 980 Articles by Maurer Faculty, https://www.repository.law.indiana.edu/facpub/980; James R Ratner, 'Using Currie's Interest Analysis to Resolve Conflicts Between state Regulation and the Sherman Act' (1989) 30 William and Mary Law Review 705–728, https://scholarship.law.wm.edu/wmlr/vol30/iss4/2: 'His contributions can be seen as part of a larger movement away from formalism and toward instrumentalism in procedural jurisprudence'; Alfred Hill, 'Governmental Interest and the Conflict of Laws: A Reply to Professor Currie' (1960) 27(3) The University of Chicago Law Review: 'Professor Brainerd Currie has proposed the scrapping of traditional methods of choice of law in favor of a system involving the effectuation of relevant governmental policies on what appears to be an *ad hoc* basis'.

[62] Brainerd Currie, 'Notes on Methods and Objectives in the Conflict of Laws' (1959) 2 Duke Law Journal 173–177, https://www.jstor.org/stable/pdf/1371195.pdf?refreqid=fastly-default%3A06e5504cd7da3d51c92d13b7d00b9b29&ab_segments=0%2Fbasic_phrase_search%2Fcontrol&origin=&initiator=search-results: 'We would be better off without choice-of-law rules'.

[63] Brainerd Currie, 'Notes on Methods and Objectives in the Conflict of Laws' (1959) 2 Duke Law Journal 178, https://www.jstor.org/stable/pdf/1371195.pdf?refreqid=fastly-default%3A06e5504cd7da3d51c92d13b7d00b9b29&ab_segments=0%2Fbasic_phrase_search%2Fcontrol&origin=&initiator=search-results; James R Ratner, 'Using Currie's Interest Analysis to Resolve Conflicts Between state Regulation and the Sherman Act' (1989) 30 William and Mary Law Review 729, https://scholarship.law.wm.edu/wmlr/vol30/iss4/2; Robert A Sedler, 'The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation' (1977) 25 UCLA Law Review 183, https://digitalcommons.wayne.edu/lawfrp/435; ibid.: Brainerd Currie, 'Survival of Actions: Adjudication Versus Automation in the Conflict of Laws' (1958) 10 Stanford Law Review 205, 221: 'California has an interest in the application of its law and policy whenever the injured person is one toward whom California has a governmental responsibility[…] It is not involved to a greater degree by virtue of the victim's residence in Arizona, since that state has no policy calling for compensation to injured plaintiffs where the tort-feasor has died'.

The *Restatement (Second) on Conflict of Laws* of 1971 took some account of Currie's views. It is much more open than its predecessor to adverting to state interests in conflicts law than European conflicts systems of the time were. The *Restatement (Second) on Conflict of Laws* accepted the principle of party autonomy in the choice of law, and in default adopted a closest connection test called the 'most significant relationship'. Section 187 identified criteria for making this determination in contractual matters, a number of which refer to the public interest (or 'policies') behind a norm:

Section 187 of the *Restatement (Second) of Conflict of Laws* provides as follows:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

THE APPLICATION OF PUBLIC INTEREST NORMS IN INTERNATIONAL COMMERCIAL ARBITRATION

Introduction

There are three main bases upon which public interest norms are applied in international commercial arbitration,[64] as part of a system of applicable law (ie *lex causae* or *lex arbitrii*), the public policy reservation, and the mandatory norms mechanism. It will be seen that there is in fact virtually never an express, direct legal foundation in arbitration laws for the latter two of these bases but rather they have usually been elucidated by legal commentary on the analogy of conflicts law before courts, and in some extremely few cases have been argued to have arisen upon judicial recognition.

It should be mentioned that conflicts systems before courts may also account for public interest norms by imposing conditions on the recognition of the parties' choice of law.[65] But a requirement of this type has never figured in arbitration. It is true that the general conflicts rules applying in arbitration would tend to exclude it, but more importantly it is considered an unacceptable incursion into party autonomy which receives greater expression in arbitration than before courts.[66]

[64] See Louise Merrett, 'Chapter 6: England' in Olaf Meyer (ed), *Public Policy and Private International Law: A Comparative Guide* (Elgar, 2022): "Mandatory rules, of either the forum or a third state, allow for an alternative way of expressing what are, essentially, public policy considerations." Professor Merrett's statement in relation to conflicts before courts is also true in relation to conflicts before arbitrators.

[65] Examples here include art 3(3) and (4) of Rome I, and *Restatement (Second) of the Conflict of Laws*, s 187(2)(b).

[66] For further reasons, see George A Bermann, 'International Arbitration and Private International Law General Course on Private International Law (Volume 381)' in *Collected Courses of the Hague Academy of International Law* (2016) 309–310, para 446; Cindy G Buys, 'The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration' (2005) 79–1 St. John's Law Review 59–96; art 2(4) of the Hague Principles: 'No connection is required between the law chosen and the parties or their transaction'.

Application as part of a system of applicable law

Parties choose the applicable law as an expression of their self-interest. Where a legal norm seeks a public interest exclusively or very prominently it is therefore very unlikely that the parties will expressly select it. One does not, for example, find in contracts the stipulation that the US federal law of antitrust or the Bolivian law on embargos shall apply.

Therefore, party choice of public interest norms generally arises as a prospect where the public policy norm may be considered to fall within a system of legal rules claiming application because of party choice. For this reason, party choice as a basis for the application of public interest norms is included in the basis which is their application as part of a system of applicable law.

In classical conflicts law, the applicable law is conceived of as all of a system of state law on a particular issue. In contractual matters, therefore, the applicable legal norms are those that govern any contractual issues.

For Savigny, for instance, there is no question that the appropriate law is the law applying to the entirety of the legal relationship. He speaks of the 'seat' (*der Sitz*) of the legal relationship.[67] The crucial stage is the insertion of the particular facts into one of the categories of legal relationships, what has come to be known as 'qualification'. Qualification comprises the entirety of the legal relationship.

As a rule one and only one legal system is supposed to apply.[68] This presumption is based upon the notion that modern legal systems comprise a complete system.[69] In order to avoid gaps in the application of legal norms and indeed their duplication, both party choice and objective attachment are treated as affording the widest substantive availability.

As with the continental tradition, in English law, the proper law is at least presumptively an entire legal system,[70] on the basis that party choice is deemed to extend to the entire area of law of the chosen system.

Classical conflicts law developed such that even public interest norms are treated as part and parcel of the applicable legal system yet the theory propounded by Savigny provides no satisfactory analysis of the question whether they should apply, even if they express values outside those of the particular area law, say contract law.

At common law in England, it has long been accepted that in principle public interest norms forming part of the *lex causae* apply as part of the *lex causae*.[71]

The hegemonic and perhaps unchallenged view amongst legal commentators is that parties' choice of law includes norms with a mixture of public and private interests.[72] Curiously, it is even

[67] FC von Savigny, *System des heutigen Römischen Rechts*, vol. 8 (Voet und Comp. 1849) 27 *et seq*.

[68] See, for example, Rome I, art 12 and Hague on the scope of the applicable law and the Hague Principles on Choice of Law in International Commercial Contracts, art 9. That one system is contemplated is already seen in the terms *lex causae* and *lex contractus*. *Lex* is singular.

[69] Paul Heinrich Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts* (2nd edn, J. C. B. Mohr 1976) 34–35: 'In der Regel soll aber für einen privatrechtlichen Sachverhalt immer eine und nur eine Rechtsordnung anwendbar sein. Dies entspricht dem modernen Prinzip der Vollständigkeit der Rechtsordnung (im Gegensatz etwa zu dem römischen Denken in Legisaktionen, das nur eine begrenzte Anzahl einklagbarer Ansprüche kannte)'. Translation: 'As a rule, however, one and only one legal system should always be applicable to a private-law situation. This corresponds to the modern principle of the completeness of the legal system (in contrast, for example, to the Roman thinking in *legis actiones*, which only knew a limited number of actionable claims)'.

[70] Lord Collins of Mapesbury and Jonathan Harris (gen. eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2022) 1785: 'At common law, it is well established that (a) the "proper law" of the contract determines its material or essential validity, its interpretation and effect, and its discharge, and (b) a contract is formally valid if made either in accordance with its "proper law" or with the law of the place where it was made. The role of the "proper law" in the formation of a contract (reality of consent) is less clearly settled, and the issue is further complicated by the significance of questions of consent in determining whether the parties have chosen the governing law of the contract'.

[71] Lord Collins of Mapesbury and Jonathan Harris (gen. eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2022) at p 1902 citing *Kleinwort, Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 K.B. 678 (CA).

[72] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arbitration International 274 at 280: 'Must the arbitrator apply mandatory rules of law? An affirmative answer to this question can hardly be doubted whenever the following three statements are true: the mandatory rule belongs to *lex contractus*, the parties have not expressly excluded its application (which is doubtless exceedingly rare in practice), and finally one of the parties has invoked it before the arbitrators'.

widely accepted that the parties' choice of law includes norms from that system of purely public interest even where that public interest was not engaged, most notably for lack of territorial connection with the state that adopted them. So, for example, the embargos of state A would apply if the law of state A was chosen, even if the private relation had nothing to do with state A.

Perhaps the awareness of the inequality of applying public interest norms of the forum but not foreign ones has conditioned what may be observed as a remarkable readiness to apply public interest norms as part of the *lex causae* (which will often be foreign to the formum).

Public policy reservation

State courts generally have power, and indeed are generally under a duty, to disapply the result of the applicable law if this result is sufficiently repugnant to values which the court's state considers especially repugnant.

It is in one way problematic to speak of the application of norms in the public policy reservation. The result of the public policy assessment is conceived of as occurring subsequent to the application of all relevant legal norms. It is an assessment of the result of this application, in particular an assessment of whether this result is so obnoxious to the legal order of reference to the adjudicator that it must be disapplied.

Nonetheless, functionally, the public policy reserve operates as the application of legal norms since it alters the result of the application of other legal norms. The substance of the public policy reserve is therefore normative, although its formal source is not, especially in civil law systems, where the formal source of legal norms is almost invariably statute. In common law systems, legal norms may unapologetically be values recognized through case law, and therefore their displacement by the public policy reserve looks more akin to the substitute of like by like.

It is a distinct rarity to find an express basis in arbitration law statute for the public policy reservation available to arbitrators. It is not in the UNCITRAL Model Law, for example, and in no transposition of it around the world. Kaufmann-Kohler and Rigozzi are of the view that in Swiss arbitration law, there is a judicially recognized and judicially enforced duty on arbitrators to apply the public policy reservation.[73] If there is, it would appear to be limited to the public policy of the *lex causae*, and there is no consequence for failing to apply it.[74]

The notion that arbitrators can appeal to public policy in determining their awards was discerned by legal theorists who reasoned by analogy to the public policy reservation which is a frequent if not invariable feature of conflicts law before courts.

Under Savigny's conflicts system,[75] and under his influence hereafter, there is a need for regard to public interest norms since the central focus is on applying the law that best suits the private interests of the parties.[76] Public interests are relegated to a mere secondary level.

[73] G Kaufmann-Kohler and A Rigozzi, *International Arbitration—Law and Practice in Switzerland* (OUP 2015) 384, paras 7.97 and 285, paras 7.101.

[74] It would appear, however, from the case cited by these authors (ATF 132 III 389), that the public policy the Supreme Court is dealing with and treating as entailing legal consequences there is that of the court itself (under a challenge in accordance with art 190(2)(e) of the Swiss Private International Law Act). The Supreme Court does mention an 'arbitrator's public policy' but in reference to a case many years previous, ATF 122 II 155. In that earlier case (at consid. 6a) (p 167 *in fine*) the Supreme Court had determined that Swiss international arbitrators must apply the public policy of the *lex causae* in the narrow context of an explanation why disregard of a mandatory norm by the arbitrator does not necessarily entail the invalidity of the award.

[75] The structure of mandatory norms discloses an obvious parentage in Savigny's work. For the public policy reservation, see Olaf Meyer, 'A Flexible System in Flux: On the Realignment of Public Policy' in O Meyer (ed), *Public Policy and Private International Law* (Edward Elgar Publishing Limited 2022) at 5.

[76] See, for example, Lord Collins of Mapesbury and Jonathan Harris (gen. eds), *Dicey, Morris and Collins on the Conflict of Laws*, vol. I (16th edn, Sweet & Maxwell 2022) 5: 'The main justification for the conflict of law is that it implements the reasonable and legitimate expectations of the parties to a transaction or to an occurrence'.

As mentioned above, the public policy reservation is available to judges in virtually all legal systems.[77] It allows and perhaps more properly requires[78] judges to disapply the result emerging from the application of the law where that result is sufficiently repugnant to values held to be of sufficient importance. Those values are always those of the forum.[79] They may, however, include the forum's concern to preserve relations with foreign states. Where this occurs, public policy indirectly takes foreign values into account. Public policy is conceived of as not entailing the application of legal norms, but rather as avoiding the result of such application.

The reason usually cited for taking into account the interests of a foreign state in the application of the public policy reservation is 'comity'.[80] In *Regazzoni v KC Sethia* [1958] A.C. 301, a case involving the sale of jute from India into South Africa contrary to Indian anti-racist laws, the court commented, '[j]ust as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State, and it will do so because public policy demands that deference to international comity'.[81] In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*, Phillips J. (as he then was) refused to enforce a contract subject to English law for the payment of a commission in Qatar which was illegal there, stating:

> the English courts should not enforce an English law contract which falls to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country. *In such a situation international comity combines with English domestic public policy to militate against enforcement.*[82] (emphasis supplied)

Comity is the concern of courts as agents of a state to avoid giving offence to another state by flouting its important policy,[83] and also the hope of reciprocity.[84]

[77] Olaf Meyer, 'A Flexible System in Flux: On the Realignment of Public Policy', in O Meyer (ed), *Public Policy and Private International Law* (Edward Elgar Publishing Limited 2022) at 2: '[…] the public policy exception is to this day firmly anchored in all private international law statutes worldwide'.

[78] It is generally the position that judges are obliged to apply the public policy reserve of their forum, but public policy is generally such an indistinct notion that the appearance is of a discretion.

[79] A clear and useful statement of the features of the public policy reserve before courts is found in Julian DM Lew, *Applicable Law in International Arbitration* (Oceana Publications, Inc. 1978) 535 para 408: 'Judges apply public policy as the minimum standard acceptable to their *lex fori*, the national legal system to which they owe allegiance. The refusal to apply a normally applicable foreign law or to recognize a foreign judgment because it infringes the forum's public policy is a direct application of the *lex fori*; it is not a question of discretion for the judge: he is obliged to uphold the forum's doctrine of public policy'. It might be noted that forum public policy may advert to international considerations, ie 'truly international public policy' or foreign interests, but it is always the forum's concern with them that is operative, and therefore it is the forum that is the source of the public policy. For example, in *Foster v Driscoll* [1929] 1 KB 470 the (English) Court of Appeal held that it was part of English public policy to invalidate a contract for the principal purpose of violating the criminal laws of a friendly foreign state.

[80] Lord Collins of Mapesbury and Jonathan Harris (gen. eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2022) 1905, para 32-255: 'When the illegality arises under foreign law, the principal concern is comity that is to say deference to the legislative authority of the foreign State to treat as lawful or unlawful conduct taking place in its own territory and judicial restraint as regards assisting or sanctioning the breach of the laws of a friendly foreign country'.

[81] At 319 per Lord Simonds.

[82] *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 at 461.

[83] *Regazzoni v KC Sethia* [1958] A.C. 301 per Lord Keith at 327: 'to recognise the contract […] would give a just cause for complaint by the Government of India and should be regarded as contrary to conceptions of international policy. On grounds of public policy, therefore, this is a contract which our courts ought not to recognise'.

[84] Staughton J. in *AG of New Zealand v Ortiz* [1982] Q.B. 349 at 372. But see a more skeptical view expressed on appeal by Lord Denning M.R. at [1984] 1 A.C. 1 at 24. See also Naimeh Masumy and Niyati Ahuja, 'Divergence from Conflict-of-Law Analysis: The Need for a Coherent Standard of Review for Economic Sanctions in International Arbitration' (2021) 87(1) The Int'l J. of Arb., Med. & Dispute Mgmt 25, 33: 'Reciprocity and the expectation of courtesy is regarded as the primary cornerstone of comity'. Joel R Paul, 'The Transformation of International Comity' (2008) 19 L. & Contemp. Probs. 71, for the multiple (and shifting) meanings and uses of comity in the United States, including that the core is respect between sovereigns, although there are conceptual reservations in relation to its exercise by the judicial branch of government.

Other legal systems tend to account for the public interests of foreign states by transnationalizing their own public policy and, more controversially, relativizing the required territorial connection. Thus, there is openness to reference to values found universally or at least prominently around the world, and a readiness to intervene where the required territorial connection with a state espousing those values is disclosed (it generally will be if the values are sufficiently universal), albeit such connection may be lacking with the territory of the forum state.

The public policy reservation is nonetheless declining in use before courts. This may be because its functional equivalent, mandatory norms, is positive and more definite and can relate not just to the protection of forum and *lex causae* interests but also to the interests of third states.

Foremost among those who contended for an arbitrator's public policy reservation are French and Swiss theorists,[85] the *leges arbitrii* of which disclose advanced transnationalized concepts of public policy of application in challenges to arbitration awards and enforcement actions. As will be seen, one of the obstacles to recognizing a public policy reservation available to arbitrators is the achievement of content adapted to arbitration. For these theorists, this obstacle is therefore diminished if not altogether removed.

Professor Pierre Lalive's 1986 report for the 8th International Council for Commercial Arbitration (ICCA) Congress in New York[86] constitutes a decisive moment in the elucidation of the concept. In that report, Professor Lalive's argument is that there is an emerging body of super-national legal principles, which is well suited to arbitration, and which contains values which may be appealed to as constituting a 'transnational' public policy reservation. The term 'transnational' public policy is employed here since international public policy already bears two other acceptations, namely, public policy as between states (a part of public international law) and the part of public policy of civil municipal legal systems that cannot be derogated from by choice of law (for the purposes of both applicable law and refusal of enforcement). According to Lalive, the classic example of a transnational public policy value is the invalidity of contracts tainted by corruption.[87]

Lalive discerns this general development of a transnational legal order in judicial pronouncements appealing to principles specially adapted to international situations. For the existence of transnational public policy, he also appeals to the functional utility for arbitrators to avoid reprehensible results and the appropriateness of a public policy composed of transnational principles for this purpose. Lastly, he buttresses his argument upon legal comment and scattered instances of arbitrators relying on the public policy of international content. He deftly explains away the acknowledged paucity of arbitration cases featuring resort to the public policy reservation as the result of the confidentiality of arbitration and arbitrators' prudence in not invoking innovative and admittedly indeterminate bases for what they are really doing.[88]

In a 2006 article, the distinguished French arbitrator and former private international law professor Pierre Mayer also addressed the topic of arbitrators' public policy.[89] He summarized the content of transnational public policy as cited by the legal literature as the following[90]:

[85] A striking exception is Julian DM Lew, *Applicable Law in International Arbitration* (Oceana Publications, Inc. 1978) 539, para 413: 'Every international and non-national court and tribunal must respect and uphold the principles of 'ordre public réellement international'. In this prodigiously documented study, for this particular proposition Lew cites Batiffol-Lagarde, Francescakis, Goldman, Rigaux, and also Christian Wolff. See also Martin Hunter and Conde E Silva Gui, 'Transnational Public Policy and its Application in Investment Arbitration' (2003) 4 J. World Inv. 367, 377.

[86] Pierre Lalive, 'Ordre public transnational (ou réellement international) et arbitrage international' (1986) 3 Revue de l'Arbitrage 329–374.

[87] Pierre Lalive, 'Ordre public transnational (ou réellement international) et arbitrage international' (1986) 3 Revue de l'Arbitrage 329.

[88] Pierre Lalive, 'Ordre public transnational (ou réellement international) et arbitrage international' (1986) 3 Revue de l'Arbitrage 329–330.

[89] Pierre Mayer, 'Chapter 2: Effect of International Public Policy in International Arbitration' in Julian DM Lew and Loukas A Mistelis (eds), *Pervasive Problems in International Arbitration*, International Arbitration Law Library, vol. 15 (Kluwer Law International 2006).

[90] Pierre Mayer, 'Chapter 2: Effect of International Public Policy in International Arbitration' in Julian DM Lew and Loukas A Mistelis (eds), *Pervasive Problems in International Arbitration*, International Arbitration Law Library, vol. 15 (Kluwer Law International 2006) 61, 62.

- Corruption
- Racial or religious discrimination
- Drug trafficking
- Terrorism
- Trade in stolen art objects
- Traffic in human organs

Professor Mayer asserted that since there is no system of transnational law of which transnational public policy can be a component, and certainly not one that is enforceable, the force of transnational public policy can only be arbitrators' own sense of morality:

> [...] it is his position as an arbitrator that gives him the freedom to invoke the principles which he considers to be worthy of being respected. Transnational public policy is not imposed on the arbitrator, it is imposed by the arbitrator, by virtue of the powers conferred on him by the parties.
>
> Let me immediately qualify this statement. I am not saying that the arbitrator is at liberty to do anything he pleases. He should act reasonably, he should defend, and defend only, those principles which are considered as inviolable by the community of men, or by a majority of states having enacted legislation or entered into treaties in order to protect them. That is his duty, it being observed that it is not a legal duty since it is not sanctioned as such; it is a professional, and to some extent a moral, duty.[91]

A more recent acknowledgement of arbitrators' public policy is found in article 11(5) of the Hague Principles on Choice of Law in International Contracts.[92]

> 5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.

The expression '[t]hese Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public)' assumes that public policy available to arbitrators does or at least may exist.[93] The Hague Principles do not address or in any way define the sources and contents of public policy. However, the wide definition of 'law' in article 3[94] indicates that they can well be transnational in content.

[91] Pierre Mayer, 'Chapter 2: Effect of International Public Policy in International Arbitration' in Julian DM Lew and Loukas A Mistelis (eds), *Pervasive Problems in International Arbitration*, International Arbitration Law Library, vol. 15 (Kluwer Law International 2006) 61, 64–65: G Kaufmann-Kohler and A Rigozzi, *International Arbitration—Law and Practice in Switzerland* (OUP 2015) 382, paras 7.89 and 7.90: largely following Professor Lalive's conclusions but adding a separate justification, that arbitrators are bound by the public policy reserve because of their 'judge-like function': 'It is a general rule of private international law that courts do not apply foreign laws designated by their conflict of law rules if the result is (manifestly) incompatible with the international public policy of the forum. The same rule applies to arbitral tribunals, whether they decide in law or *ex aequo et bono*. It derives from their judge-like function'. The authors also mention without apparently endorsing Professor Mayer's view (see below): 'Some argue that arbitrators also have a moral duty to ensure that the fundamental principles that are part of international public policy prevail over infringing laws'.

[92] Hague Conference on Private International Law 2015.

[93] Daniel Girsberger, 'Chapter 12: Foreign Mandatory Norms in Swiss Arbitration Proceedings: An Approach Worth Copying?' in Patricia Louise Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Kluwer Law International 2017) 113 at 114 reports that the drafters of the Hague Principles were forced to leave this issue open (he says so about mandatory norms but the public policy reservation receives exactly the same treatment) since 'there was so much controversy'. Professor Girsberger was the Chair of the Working Group that drafted the Principles.

[94] 'The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise'. If the law chosen by the parties can be so capacious, including supranational rules, so too can public policy as a component of *lex mercatoria*.

The preface to the Hague Principles states that they are intended to be 'an international code of current best practice in relation to party autonomy in international commercial contracts'. One might discern[95] two elements in 'best practices', that is, that they are claimed to represent what is actually occurring, but they also incorporate a statement that this is desirable (and therefore that future development should confirm this occurrence). The participants and observers involved in their creation are distinguished experts on private international and include a number of persons experts in international arbitration. They are therefore of substantial weight as a statement of arbitral practice and the desirability of it.

Additionally, it is frequently contended in the legal literature that the public policy review of arbitration awards by the courts of the seat and the public policy ground for a court to refuse the enforcement of arbitral awards act as a sort of indirect application of public policy on arbitrators. Public policy review of arbitration awards in setting aside and enforcement actions may be viewed as a practical requirement upon arbitrators to apply the same public policy reserve. This is especially so if there is, as is often asserted, an obligation on the arbitrators to render an enforceable award. This may arise as an incident of the arbitrator's relation with the parties, or under a set of arbitration rules the parties have chosen.[96] If this is the case, it is an additional argument for an arbitrator's public policy.

Mandatory norms

Mandatory norms are norms that are intended by their state sponsor to be applicable without regard to party will but rather in accordance with the achievement of important state economic, political, or social values.[97] Some consider that norms ordained to protect private interests of special importance to the state, such as the protection of consumers or employees, are also within the concept.

There is very little incidence of express direct requirement on arbitrators to apply public interest norms as mandatory norms. When a legal system does contain such requirements, they almost invariably are not found in statute but are developments of the law through judicial decision. The requirements are never absolute but are almost always attenuated to preserve the value of the finality of arbitration as expressed in particular in the New York Convention enforcement scheme.

Notable examples include the following. US federal law is expressly content to leave arbitrators to decide to apply mandatory norms or not and to police any failure to do so by the 'second look' of public policy requirements in enforcement.[98] EU law too leaves it to the courts, that is Member State courts, to ensure compatibility with EU public interest norms, but attenuates the review for such compatibility to preserve the finality advantages of arbitration. Member

[95] Alexis Mourre, 'Arbitral Institutions and Professional Organizations as Lawmakers' in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series, vol 20 (ICCA & Kluwer Law International 2019) 86 at 103: 'Best practices are desirable techniques that are believed to be widely followed and to be beneficial to users'.

[96] See, for example: art 42 of the ICC Arbitration Rules: 'In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'; art 32.2 of the LCIA Rules: 'For all matters not expressly provided in the Arbitration Agreement, the LCIA, the LCIA Court, the Registrar, the Arbitral Tribunal, any tribunal secretary and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat'.

[97] 'Legal norms expressing a public interest' refers to 'mandatory rules of law' defined by George Bermann as a norm that a judge must consider and apply in a court of law, even if the said court would ordinarily apply another body of law (in a conflict of law situation): 'Authors define as "mandatory" those rules of law that cannot be derogated from by private parties in the exercise of their party autonomy'. Donald Donovan categorizes 'mandatory rules' as those that arise outside the contract and are to be applied regardless of the party's approval and are intended to protect the state's public interests. See George A Bermann, 'Introduction: Mandatory Rules of Law in International Arbitration' (2007) The American Review of International Arbitration 1.

[98] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985).

States are therefore at liberty to strike a balance. French law is, for example, more deferential to the finality of arbitration,[99] whilst German law sides with the rigorous application of qualifying public interest norms.[100]

Uniquely, it would seem, Swiss law requires arbitrators to apply qualifying mandatory norms as such, that is, without attenuation, but on condition that a party invokes them. Moreover, it draws the circle of qualifying mandatory norms narrowly and limits the substantive review of how arbitrators apply mandatory norms by requiring only public policy compatibility.[101] This position was arrived at in two Swiss Supreme Court decisions.[102]

One of the principal aims of the 2021 update of Swiss international arbitration law was to integrate the law developed by the courts into Switzerland's international arbitration code.[103] This development concerning mandatory norms was not incorporated into the code. In fact, it seems to have been overseen in the updating debates.[104] It nonetheless remains a component of Swiss international arbitration law.

What has given life to the application of mandatory norms in arbitration has been legal comment which, as with the public policy reserve, contended that judges' treatment of mandatory norms could and should extend to arbitrators by analogy.

The public policy reservation contained the natural disadvantage that it can only reverse and not positively supply a result. Many public interests are of course adequately served, for example, by treating a contract otherwise perfectly good under its *lex contractus* as invalid or by lopping off interest in excess of what is permitted by a legal system. However, other public policy interests require a specific further result. For example, competition laws often seek the availability of compensation. That cannot be achieved by the public policy reserve in its classically negative avatar.

It was this barrier to the positive application of public interest norms that doubtless spurred the development of the second basis for this application, as mandatory norms apply upon a

[99] *Thalès Air Defence BV v GIE Euromissile* (18 November 2004, Paris Court of Appeals, Case No. 2002/60932).

[100] Germany: Bundesgerichtshof, *Beschluss KZB 75/21*, verkündet am 27. September 2022 [Award partially quashed for violating public policy due to the misapplication of core antitrust rules], in Matthias Scherer (ed), ASA Bulletin (Kluwer Law International 2023, Volume 41 Issue 1) 53–66.

[101] G Kaufmann-Kohler and A Rigozzi, *International Arbitration—Law and Practice in Switzerland* (OUP 2015) 384, para 7.97—that such a duty was recognized to exist in Swiss arbitration law by the Swiss Supreme Court: '[…] after much hesitation, the Swiss Supreme Court as well as a majority of scholars now accept – and rightly so – that tribunals should take third state mandatory rules into account, provided they meet the requirements of art 19 of the [Swiss Private International Law Act, which is addressed to Swiss courts not arbitrators] applied by analogy'. However, these authors rightly acknowledge at para 7.101 (p 385) that such a duty is a soft one, not attracting objective legal consequence: 'While arbitrators are expected to apply mandatory rules, the failure to take account of a rule that meets the requirements of Article 19 of the [*Swiss Private International Law Act*] is not a ground for annulment of the award'.

[102] See the decision 4P.119/1998 of 13 November 1998 [Swiss Supreme Court] consid. 1a (confirmed in ATF 118 II 193 consid. 5), in combination with the decision 4P.278/2005 of 8 March 2006 [Swiss Supreme Court].

[103] 18.076 *Message concernant la modification de la loi fédérale sur le droit international* privé (Chapitre 12: Arbitrage international) du 24 octobre 2018: From the summary at p 7154 of the Swiss Federal Gazette (*Feuille fédérale*) for 2018: 'Le projet intègre dans la loi des éléments essentiels de la jurisprudence du Tribunal fédéral et clarifie certaines questions ouvertes en matière d'application. Il vise également à rendre la loi plus facile à appliquer et à consolider l'autonomie des parties de manière à suivre les développements observés dans la règlementation d'autres places'. And at para 1.2.1 (p 7161) 'Depuis l'entrée en vigueur de la LDIP il y a 30 ans, le Tribunal fédéral a clarifié et complété la loi sur plusieurs points importants. Pour renforcer la transparence et simplifier l'application de la loi, il apparaît opportun d'inscrire les apports de la jurisprudence dans la loi là où cela paraît nécessaire. Cette révision doit aussi être l'occasion de clarifier certains points restés ambigus. L'objectif premier est d'améliorer la sécurité et la clarté du droit'. Translation: 'The draft incorporates essential elements of the Supreme Court's case law into the statute, and clarifies certain open issues of application. It also aims to make the statute easier to apply, and to consolidate party autonomy so as to keep pace with developments in other legal systems'. And at para 1.2.1 (p 7161) 'Since the entry into force of the *Swiss Private International Law Act* 30 years ago, the Supreme Court has clarified and supplemented the statute on several important points. In order to enhance transparency and simplify the application of the law, it seems appropriate to enshrine the contributions of case law in the statute where necessary. This revision should also provide an opportunity to clarify certain points that have remained ambiguous. The primary objective is to improve the security and clarity of the statute'.

[104] See, for example, the ASA position paper of 12 May 2017 on the reform of Swiss international arbitration law '*Stellungnahme der Association Suisse de l'Arbitrage (ASA) in der Vernehmlassung zur Revision (Änderung) des Bundesgesetzes über das Internationale Privatrecht (Internationale Schiedsgerichtsbarkeit)*', https://www.swissarbitration.org/wp-content/uploads/2021/05/ASA-Vernehmlassung-Kap-12-IPRG.pdf

special attachment.[105] There can be no question of the positive effect of the application of mandatory norms, since one is applying the norm itself such as the application of any norm, except that the mandatory norm is treated as hierarchically superior to norms applied upon the ordinary attachment, in that it classically derogates from them.

States often extended the so-called 'negative public policy' effect, by admitting a so-called 'positive public policy'. In this latter case, the state court would actively apply a norm of its own state where the legal system applying to the private relation was of another state.

Positive public policy entailed a break with the generally accepted principle that only one legal system (in Savigny's term, the 'statute' law) applies to the entirety of a private relation. Legal theorizing was directed at overcoming this objection. It developed the notion that these norms of the forum applied 'immediately', that is before the conflicts analysis. After the application of *lois de police*, the usual conflicts analysis could proceed.

Despite the efforts of this theorizing, because it is in violation of the principle that all of a legal relation is governed by one legal system, positive public policy, although widely accepted as a concept, does represent a high-water mark even today in the application of public policy norms.

The Rome Convention, for example, envisaged that in principle one legal system applies. This was already clear by the reference to 'applicable law' in the singular in articles 3 and 4. But article 10 puts the matter out of doubt in its definition of the scope of applicable law. The Convention did, however, permit parties to choose a law applicable to 'part of the contract' (article 3(1)) and article 4 envisaged that the law that had a closer connection to a 'severable part of the contract' would apply to it. Additionally, whatever the applicable legal system, article 10 foresaw that 'regard was to be had' to the place of performance in relation to the 'the manner of performance and the steps to be taken in the event of defective performance'.

As with the Rome Convention, under its successor the Rome I Regulation it is the 'law' that the parties may choose, that is, a whole contractual system, but the parties are free to choose a law for only part of their contract, and the objectively applicable law is in principle that of one legal system. This is clear both from the numerous and invariable references to the 'law of the country …' in article 4 and to the scope of applicable law in article 12 of Rome I.

The public policy reservation contained a second important limitation, namely, that it can only be drawn from the values of the legal system of the court itself, however, internationalized. Thus, public interests of other legal systems, however legitimate, escape its cognizance.

The fact that the application of mandatory norms itself first developed as a mechanism to deliver not just negative but also positive effects demonstrates that the institution developed independently of this latter concern, that is, to give voice to foreign public interests. But once established, it also proved more amenable to the inclusion of foreign public interests than the public policy reserve ever could.

Dutch, German, and Swiss private international law theorists identified a contradiction in this classical model of conflicts in that it recognized the interests of the forum state in applying its laws, but not those of foreign states.[106] This was an unprincipled equality of treatment with

[105] Olaf Meyer, 'A Flexible System in Flux: On the Realignment of Public Policy' in O Meyer (ed), *Public Policy and Private International Law* (Edward Elgar Publishing Limited 2022) 4, para 1-011: 'In particular the overriding mandatory provisions ("*Eingriffsnormen*" or "*loi de police*" or "*loi d'application immédiate*") have emancipated from the original "ordre public positif" to an independent legal institution with their own conditions of application'.

[106] Hannah L Buxbaum, 'Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization' (2008) 18-1 Am. Rev. Int'l Arb. 21 at 22: 'This starting point [viz. forum mandatory norms], however, has been used as the foundation for the articulation of a more robust doctrine that would permit courts, in certain circumstances, to apply not only the mandatory law of the forum, but also the mandatory law of other countries connected with the transaction in question'.

all the moral dignity of double predestination.[107] In addition, there was concern to vindicate the courts' role in policing inequality of bargaining power and regulatory governance.[108]

The application of forum mandatory norms or public policy could accommodate the principle that the conflicts analysis should lead to the application of a unitary system of substantive applicable law. The 'application immédiate' theory had the virtue of treating forum mandatory norms as being upstream of and separate from the conflicts analysis and thereby insulated it.

However, the application of foreign mandatory norms was a challenge to the principle of the unity of applicable law since they were clearly from a new source or rather from new sources, since the mandatory norms of more than one foreign state could apply, and their application was necessarily posterior to the application of the ordinarily applicable law.

Another challenge in applying foreign mandatory norms is that it is rare for the states actually to express their scope of application. It is usually necessary to construe them by implication, in reference principally to two factors, what is necessary for them to achieve their purpose, and the limits of public international law, chiefly the territoriality principle. Courts are experts and acknowledged so in interpreting the scope of the law of the forum, as it will generally be amongst their constitutionally appointed tasks to do so. But interpreting foreign legislation will be less familiar and therefore less certain for courts.

The principal challenge facing the application of foreign public policy norms, however, was that this would tend to involve the court in assessing the substance of the norm as a criterion for its application. The classical conflicts systems avoided this by fastening upon multilateral and abstract criteria separate from the substantive facts to determine the applicable law, and thus insulated the court from all suspicion and criticism of not just preference usually local in the application of legal norms but also of using conflicts to pre-ordain specific outcomes.

Wilhelm Wengler's theory[109] of the application of foreign mandatory norms preserved the Savignian system by admitting a 'special connection' of the mandatory norm alongside the ordinary factor connecting to the applicable legal system. This special connection was abstract from the facts of the case and was itself non-discriminatory between the legal systems enacting such mandatory norms. Whilst maintaining the principle of non-discrimination, this conception of mandatory norms did overthrow the principle of the unitary application of the applicable law.

The application of foreign mandatory rules is viewed as the exercise of comity:

> When properly used, the doctrine of mandatory rules … serves as a means to exercise comity and to strengthen the cooperation among nations through mutual assistance in the enforcement of especially vital policies.[110]

[107] Erik Jayme 'Wilhelm Wengler als Internationalprivatrechtler—Eine persönliche Erinnerung und Würdigung' (2016) 76 ZaöRV 579–595 at 582: 'Die Aushöhlung des Schuldvertragsstatuts durch die einseitige zusätzliche Anwendung der Eingriffsnormen der *lex fori* ergab also ein Missverhältnis zu Lasten ausländischer Rechte, verstieß gegen den Gleichheitsgedanken, wie er in dem Bekenntnis zur bilateralen Kollisionsnorm zum Ausdruck kommt. Auch ausländisches zwingendes Recht sei zu berücksichtigen'. Translation: 'The hollowing out of the concept of the statute of the contractual obligation through the unilateral additional application of the overriding norms of the *lex fori* has resulted in disproportion to the detriment of foreign law which is repugnant to equality concerns, which achieved expression in the affirmation of bilateral conflicts rules'.

[108] Hannah L Buxbaum, 'Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization' (2008) 18-1 Am. Rev. Int'l Arb. 21 at 22–23.

[109] Wilhelm Wengler, 'Die Anknupfung des zwingenden Schuldrechts im internationalen Privatrecht' (1941) 54 Zeitschrift für die vergleichende Rechtswissenschaft 168; Hannah L Buxbaum, 'Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization' (2008) 18-1 Am. Rev. Int'l Arb. 21 at 21, fn 3: '[Wengler's theory] at least formally, maintained the theory of using the factual characteristics of a transaction to point to the law of a particular jurisdiction'.

[110] Mathias Reimann, *Conflict of Laws in Western Europe: A Guide through the Jungle*, vol 30 (1995). Hannah L Buxbaum, 'Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization' (2008) 18-1 Am. Rev. Int'l Arb. 21, 23 in relation to the application of foreign mandatory norms: 'Here, the doctrine may be viewed as one instantiation of the more general doctrine of judicial comity'.

Nonetheless, the position in relation to foreign public interest norms and forum ones was not identical in that the forum retained its interest in ensuring that nothing repugnant to its legal order would be issued from the application of the foreign public interest norm.[111] Indeed, public interest in any particular question could indeed vary and quite starkly, not just in terms of assessment of importance but also as regards the underlying values. To take an obvious example, one legal order may consider it of the highest public interest that there be triple damages 'to punish' certain behaviour whilst another may consider that a remedy beyond compensation cannot be justified in civil matters.

There is an additional dimension to assessing the values behind non-forum mandatory laws. Not only must such values not be repugnant to the legal order of the court, but that legal order must consider them to be of sufficient importance to justify application, and usually the ouster of the norms otherwise applicable, for example, as chosen by the parties.

Moreover, forum public interest norms apply because the state of the court orders their application. It is therefore enough to say that any connection justifying jurisdiction is equally sufficient to attract the application of forum mandatory norms. By contrast, it is necessary to ascertain that foreign public interest norms qualify for application by virtue of a particularly close relationship of the case to the foreign sponsor of the norm and the norm itself.

As a consequence, continental European thinking on the application of forum mandatory norms has centred around these two criteria for application—value-worthiness and sufficient connection.

Value-worthiness has been a relatively straightforward analysis. Ultimately, the perspective is the eye of the beholder, the court where the application is sought, and this court will have an exclusive reference in the values of its own state, that is, the values behind its own mandatory norms, or at least the subject matter of them. So a foreign mandatory norm on a subject matter that it does not treat as so important will struggle to qualify. An example here is antitrust. The Swiss legal order does not think it is so important as to consider foreign mandatory norms on the subject to be applicable *ex officio*.[112]

Sufficient connection has proven more disputed

Article 7 of the Rome Convention related to 'mandatory rules'. It provided:

> 1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
>
> 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 7(2) of the Rome Convention therefore authorized courts of signatory states to apply their forum's mandatory rules of law in accordance with the requirements of the forum's private

[111] Paul Heinrich Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts* (2nd edn, J. C. B. Mohr 1976) 33: 'Inländische Gesetze sind nur dann, aber auch immer dann anzuwenden, wenn sie – *expressis verbis* oder nach ihrem Sinn und Zweck – gelten wollen. Ausländische Gesetze sind jedenfalls nur, aber nicht immer dann anzuwenden, wenn sie – wiederum nach ihrer ausdrücklichen Bestimmung oder nach Sinn und Zweck – gelten wollen'. Translation: 'Domestic laws are to be applied only, but also then always, if they - *expressis verbis* or according to their meaning and purpose - intend to apply. Foreign laws are to be applied in any case only, but not always, if they - again according to their express provision or according to their meaning and purpose - seek to apply'.

[112] 4P.278/2005 of 8 March 2006 [Swiss Supreme Court].

international law. So, the Convention left the forum entirely free in relation to public policy norms. Even the term 'mandatory rules of law' receives no qualification here.

Article 7(1) of the Rome Convention dealt with foreign mandatory rules of law, in a manner presenting a range of limitations. First, rules qualifying as 'mandatory rules of law' are defined as rules that under the law of the legal system they come from 'must be applied whatever the law applicable to the contract'. Secondly, although they can come from any legal system and not just another EU Member State, the 'situation' has to have a 'close connection' with the country of that legal system. Thirdly, less than full application is permitted. Fourthly, there is no obligation to give any effect, but rather only an obligation to consider giving the rules effect with reference to 'their nature and purpose and to the consequences of their application or non-application'.

Article 12 of the Rome Convention permitted a signatory state to exclude the application of the provisions regarding foreign mandatory norms in article 7(1). Germany, Austria, Luxembourg, the United Kingdom, Portugal, Latvia, Slovenia, and Ireland made use of the exception. The United Kingdom was especially concerned that the restrictions in it were not sufficiently tight. In particular, the United Kingdom was concerned that any mandatory norms of 'close connection' were too loose a requirement. The 2000 edition of Dicey Morris and Collins was of the view that the wording 'close connection' and 'the situation' was 'a recipe for confusion, uncertainty, expense and delay'.[113] In light of what the United Kingdom finally agreed to in the Rome I Regulation, it appears that it was also uncomfortable with the very concept of mandatory norms, and preferred the public policy reserve.

Article 9 of Rome I is the regime applying to mandatory laws. It provides:

> 1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
>
> 2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
>
> 3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Rome I contains a definition of 'overriding mandatory provisions' whereas the Rome Convention left that determination largely to the law of the state sponsor of the mandatory rules, and only required that according to that law, they must be applied 'whatever the law applicable to the contract'. Article 9(1) of Rome I lays down that overriding mandatory provisions must: first, be 'regarded as crucial for safeguarding [their state sponsor's] public interests, such as its political, social or economic organization' and that, secondly, by that law they apply within their scope, irrespective of the law otherwise applicable to the contract.

As with the Rome Convention, Rome I does not interfere with Member State law on the application of forum mandatory provisions. As a result, for such applicability, such provisions simply need to meet the definition of the same under Rome I.

[113] Lord Collins of Mapesbury and Jonathan Harris (gen. eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell, London 2022) at 1234.

Rome I, by contrast, significantly tightens the treatment of mandatory provisions that are not of the forum. They must of course first meet the Rome I definition. Furthermore, it is only the mandatory norms of the place of performance which qualify, and they must be such as to have the effect of making performance under the contract unlawful.

After much deliberation, the United Kingdom accepted article 9 of Rome I. Indeed, Lando and Nielsen note that, 'The clarification of Article 9(3) of Rome I has to some extent been inspired by the English judgment in the *Ralli Bros* case'.[114]

As slender as the academic support for the public policy reservation is in the hands of arbitration, legal commentators would appear broadly to accept that arbitrators may and indeed should, in principle, apply mandatory norms.

As with mandatory norms before courts, the reasoning given depends on whether the mandatory norms are part of the *lex causae*, the law of place of arbitration, or a third state. But the reasoning for the latter often also extends to public interest norms of all origins, ie including those of the *lex causae* and the law of the place of arbitration. It is the application of foreign mandatory norms by judges (and not those of the *lex f*ori) which is the analogy to what arbitrators do, since arbitrators have no forum. Legal commentators generally accept that arbitrators' function is sufficiently similar to that of judges vis-à-vis the application of such mandatory norms, with the consequence that the theorizing relating to foreign mandatory norms is largely transferable to the arbitral context.

Where the mandatory norm is part of the *lex causae* the reasoning tends to be that it is contemplated within the applicable system of law. Where the public interest norm is part of the law of the place of arbitration the argument is generally that a failure to apply it would jeopardize the validity and enforcement of the award. This is to be avoided because of the unreasonability of producing an ineffectual award and moreover, it may violate the supposed duty of arbitrators to ensure the enforceability of their awards.

The reasoning in favour of applying the public interest norms of third states (ie which are not the state of the place of arbitration) draws from the commentary developing the notion of courts' application of foreign mandatory norms, ie it is coherent as a matter of conflicts law to apply laws on the basis of their state sponsor's intention and the need for a special attachment system to ensure the efficacy of the public interest behind the norm.[115] Additionally, there is an appeal to a supposed interest in appeasing states by applying their public interest norms in this way so that they will continue to look benignly upon arbitration and not interfere with it.[116]

[114] Ole Lando and Peter Arnt Nielsen, 'The Rome I Regulation' (2008) 45–6 Common Market Law Review 1687 at 1722.

[115] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arbitration International 274, 285: 'Nonetheless, it is in the precise nature of mandatory rules of law that their imperative force is intended to resist what one might call the internationalisation of the dispute. Mandatory rules are designed to apply even if the contract is an international one, provided that there exists a definite connecting factor between the dispute and the State which promulgated the rule in question'. François Knoepfler, 'L'article 19 LDIP est-il adapté à l'arbitrage international?' in Christian Dominicé, Robert Patry and Claude Reymond (eds) *Études de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn 1993) 531: 'Sur le principe il paraît judicieux, et non contraire à l'idée de l'arbitrage, de participer au respect de certains principes juridiques fondamentaux. Le système de l'art. 19 LDIP, comme également d'autres dispositions analogues, permet d'éviter que, par l'utilisation habile des règles de conflit de lois, les parties échappent à des dispositions matérielles méritant le respect'. Translation: 'In principle, it seems judicious, and not contrary to the idea of arbitration, to participate in the compliance with certain fundamental legal principles. The scheme under Art. 19 of the *Swiss Private International Law Act*, as also other similar provisions, makes it possible to avoid that, by the skillful use of rules of conflict of laws, the parties escape material provisions deserving the respect'. Luca G Radicati Di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23-1 Am. Rev. Int'l Arb. 49, 70: 'Therefore, in deciding whether to apply mandatory rules, and which ones to apply, the arbitrators should consider only those having a genuine and reasonable title to be applied in light of the circumstances of the case'. And 68: 'While it is true that arbitrators are primarily at the service of the parties, it is now recognized that they are not their mere servants and that in some way they are also under a broader duty to see that justice is done'.

[116] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arbitration International 274 at 285: 'It may be that the award to be rendered will escape annulment, and indeed that it will be executed, but in declining to apply the mandatory rule an arbitrator emperils the very arbitrability of disputes implicating mandatory rules'. Jeffrey M Waincymer, 'International Commercial Arbitration and the Application of Mandatory Rules of Law' (2009) 5-1 Asian International Arbitration Journal 1–45: 'If arbitrators are unwilling to show sufficient respect for mandatory rules, this would undermine state support for such

Assessment of application of public interest norms in conflicts before courts

Writing in 2021, Symeonides summarized the incidence of provisions of mandatory norms around the world as follows:

> Altogether, 35 PIL codifications enacted in the last 50 years, three EU Regulations, and nine international conventions contain general provisions giving priority to mandatory rules. This count does not include codifications that provide for mandatory rules only as limitations to party autonomy, or states that recognize mandatory rules only through special statutes, judicial decisions, or academic doctrine. Twenty-two codifications, two EU Regulations, and six conventions expressly authorize the application of the mandatory rules of both the forum state and a third foreign state, in addition to the state of the *lex causae*. In contrast, 13 codifications, Rome II, and two conventions do so for only the mandatory rules of the forum state. In virtually all codifications, the third state is one with a "close" (but not necessarily a closer or the closest) connection with the case. The standard for applying foreign mandatory rules is usually different from the standard for applying the forum's corresponding rules. While the forum's mandatory rules apply automatically, the application of foreign mandatory rules is always discretionary. The court "may" apply the mandatory rules of a third state after considering the "nature" and "purpose" of those rules, as well as the "consequences of their application or non-application".[117]

Thus, the application of mandatory norms of foreign states is less frequently provided for than those for the forum. Unlike forum-mandatory norms, the application of foreign ones is never obligatory but merely discretionary.

Account for mandatory norms appears not to be frequently resorted to by courts even where there is a specific provision for them to do so. Professors Ole Lando and Peter Arnt Nielsen reported in 2008 that, '[i]t should be noted that since the Rome Convention came into force, we have neither seen nor heard of a single reported case in which a European court has invoked Article 7(1) of the Rome Convention to give effect to a mandatory rule of a foreign country'.[118]

Writing in 2007, Prof. Hannah L. Buxbaum's similarly pessimistic assessment was that, 'no pattern of assistance of foreign interests has emerged. There is certainly no body of cases applying foreign mandatory law in this way -- commentary depends largely on the same small handful of decisions, most of which recognize the possibility of such application but do not actually apply foreign law'.[119]

Buxbaum identifies the following as obstacles to the development of a practice of applying foreign public policy norms: difficulties in knowing when a foreign norm is intended to be mandatory, disinclination to apply the public policy of another state (the so-called 'public policy taboo'), and lack of clear legal authority or a requirement to apply foreign public policy norms.

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processes.[…] There may also be situations where different states have very different views as to whether a particular mandatory law should apply […] An important obligation commonly referred to as having some bearing on the debate is the arbitrator's duty to render an enforceable award[…] It is not enforceability per se that matters, but instead the presence of legitimate grounds for preventing enforcement that should matter to an arbitrator'; 'An arbitrator considers mandatory public laws in an effort to guarantee that his award is ultimately enforceable and also to safeguard the credibility of arbitration as an effective mechanism for the settlement of disputes arising from commercial contracts'; Mohammad Reza Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?' (1992) 10(59) International Tax & Business Lawyer, Berkeley Journal of International Law 59–84, 65–66.

[117] Symeon C Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism—General Course on Private International Law (Volume 384)' in *Collected Courses of the Hague Academy of International Law* (2017) 167–168.

[118] Ole Lando and Peter Arnt Nielsen, 'The Rome I Regulation' (2008) 45–6 Common Market Law Review 1687, 1722.

[119] Hannah L Buxbaum, 'Mandatory Rules in Civil Litigation: Status of the Doctrine Post-Globalization' (2008) 18-1 Am. Rev. Int'l Arb. 21 at 24–25.

The public policy reservation is even less used in practice[120] and has largely been eclipsed by the mandatory norms mechanism in use by courts around the world. Mandatory norms are a much more powerful instrument for achieving account for public interest norms. As seen, they accommodate not just a negative but also a positive functioning, and they accommodate not just mandatory norms of the forum but also foreign mandatory norms both within the *lex causae* and outside it. But also they permit a much more granular treatment of the norm since the public policy reserve only intervenes in the general result and then only sparingly.

It may be that the application of mandatory norms has not entirely supplanted the public policy reservation because there is a perceived need to account for public interests against the backdrop of a classical conflicts system that marginalizes them. Keeping both institutions maximizes the opportunity to vindicate public interests.

The 'effects' approach to public interest norms

It bears observing that a widely employed mechanism (also in arbitration) for integrating foreign public interest content into a choice of law is to include in that choice of law its conception of invalidity of the contract for illegality or immorality but to supply that content by reference to the factual situation at the place of performance on the basis that it is a fact preventing contractual performance. As a result, it is a norm of the *lex causae* that is being applied but no legal norm of foreign provenance.

Vischer calls this the 'substantive law approach' and describes its functioning as follows:

> This "substantive law approach" is in principle the position of the German courts and, in the view of many scholars, the English solution. It proposes that almost all national laws of contract will under various concepts offer reliefs and sanctions which can take care of the effects of "third laws", may it be impossibility of performance, frustration of the contract, or, for the question of validity, immorality of the parties' intention.

But it may also be called the 'effects' approach since the focus is the factual effects in the territory foreign to that of the *lex causae*.[121]

At common law in England, the effect of norms of the state of contractual performance may apply, inasmuch as these norms require the invalidity of the contract. This is known as the principle in *Ralli Brothers*.[122] There is a question of whether this principle operates on the basis that English law takes into account the fact of invalidity under the foreign law of the place of performance, or whether it operates on the basis that foreign law is actually being applied. In the first case, the principle will only apply where the *lex causae* is English law. In the latter, it will apply whatever the *lex causae* (as in article 9(3) of Rome I). According to the latest version of Dicey, Morris, and Collins, 'the latter view seems to have prevailed'.[123]

If, however, it is the first, it obtains the substantial effect of article 9(3) of Rome I, without resorting to the notion of mandatory norms. It is therefore understandable that the United Kingdom was amenable to this device, but not to the purer and broader expression of the application of foreign mandatory norms in article 7 of the Rome Convention.

[120] Olaf Meyer, 'A Flexible System in Flux: On the Realignment of Public Policy' in O Meyer (ed.), *Public Policy and Private International Law* (Edward Elgar Publishing Limited 2022) 4, para 1-011: 'The retreat of public policy is underpinned by an increasing availability of alternative regulatory mechanisms which have over time assumed more and more of its original functions'.

[121] On how these factual effects may be treated under various *leges contractus* see Mercédeh Azeredo Da Silveira, 'Chapter 7: Economic Sanctions, Force Majeure and Hardship, Hardship and Force Majeure' (2018) International Commercial Contracts—Institute Dossier XVII, ICC, p 161.

[122] *Ralli Bros v Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (CA).

[123] Lord Collins of Mapesbury and Jonathan Harris (gen. eds), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell, London 2022), 1907.

ASSESSMENT OF TREATMENT OF PUBLIC INTEREST NORMS IN INTERNATIONAL COMMERCIAL ARBITRATION

General considerations

Absence of express objective legal basis for arbitrators' application of public interest norms

The conclusion seems unavoidable that the rules governing the application of substantive law in international commercial arbitration take no express account of public interest norms. There is in fact no clear purpose-made legal basis for the application of public interest norms in international commercial arbitration. For mandatory norms, the closest connection test would even seem to exclude at least norms outside the *lex causae*. This is confirmed by the travaux préparatoires for the UNCITRAL Model Law and UNCITRAL Rules where there was no discussion of the application of public interest norms by arbitrators. A test such as the 'most significant relationship' would evoke public interest sensitivities such as those in section 188 of the *Restatement (Second) on Conflicts of Law*. But the conflicts law pedigree of the 'closest connection' tends to shut them out. At its highest, therefore, the conflicts law scheme applicable to arbitrators would appear to contemplate their only applying public interest norms as part of the *lex causae*.

This fact that the usual conflict rules applicable to arbitrators do not contemplate special consideration for public interest norms by arbitrators is itself an argument for arbitrators to refrain from any such special consideration.

A second fact corroborating this point is that under typical arbitration laws, special consideration for public interest norms is actually foreseen in the review of arbitration awards, ie that a violation of public policy is a basis to refuse the validity and enforcement of an award. This suggests that arbitration laws make no direct demands on arbitrators but rather the focus of public interest demands is the review and enforcement of arbitration awards.[124]

Indirect obligation on arbitrators to comply with public interests of the forum but not of any place of enforcement

Perhaps more practically important, it might be thought that arbitrators are effectively subject to the public policy of the country of the *lex arbitrii* inasmuch as the courts of that country will generally entertain actions to annul arbitration awards on the basis of incompatibility with forum public policy. There is equally a basis for refusing to enforce an arbitral award if it is against public policy and by parity of reasoning this for some becomes an argument for observing the public policy of the place of probable enforcement.

These arguments are often buttressed by an appeal to a supposed duty of arbitrators to render an enforceable award. The argument runs that a violation of the public policy of the forum of the seat leading to an annulment of the award or a violation of public policy at the place of enforcement by consequence violates this duty. As will be seen below, however, a duty on arbitrators to render an enforceable award is a very limited one.

One might validly take into consideration the public policy of the seat[125] if one accepts that an arbitration award is attached to the legal order of the place where it was rendered.[126] In this view, the arbitral process is the first (and by far the most important) stage in the award's journey to finality in the legal order of the seat. This view is by no means retrograde or lacking in

[124] Jan Kleinheisterkamp, 'Overriding Mandatory Laws in International Arbitration' (2018) 67 ICLQ 903, 916: '[…] judges, even when enforcing overriding mandatory laws against the parties' combined arbitration and choice-of-law clauses, do not actually expect arbitrators to apply these laws'.

[125] Since EU law requires its public policy to be protected as Member State public policy where the seat of the arbitration is an EU Member State EU public policy will equally fall to be taken into consideration on this basis. See Case C-126/97 *Eco Swiss China Time Ltd. v Benetton International NV* [1999] ECR I-03055.

[126] Constantin Calavros, 'The Application of Substantive Mandatory Rules in International Commercial Arbitration from the Perspective of an EU UNCITRAL Model Law Jurisdiction' (2018) 34(2) Arbitration International 219, 222–223.

ambition. The New York Convention proceeds upon this vision inasmuch as it permits a refusal of enforcement where the award is shown not to be final at the place it was rendered. Under the New York Convention, a court is of course free to enforce even if the award is not final where rendered, but this is rarely encountered.

There is also the argument of practicality. What is the point of issuing an award that has little or no prospect of enforcement? It is said that a good percentage of awards are honoured without the need for recourse to enforcement. But if this is the case it is surely because of the credible threat of enforcement. To flaunt public policy in an award risks upending the whole enterprise of the arbitration.

Limited duty on arbitrators to adhere to values expressing public interests

The contract between the arbitrator and the parties may indeed contain a duty to render an enforceable award.[127] Moreover, some prominent arbitration rules also provide for such a duty. For example, article 42 of the ICC Rules provides that, '[i]n all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law'. Article 32.2 of the LCIA Arbitration Rules provides that, '[f]or all matters not expressly provided in the Arbitration Agreement, the LCIA, the LCIA Court, the Registrar, the Arbitral Tribunal, any tribunal secretary and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat'. Article 41.2 of the SIAC Rules lays down that, '[i]n all matters not expressly provided for in these Rules, the President, the Court, the Registrar and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any Award'.

Any obligation in the contract between an arbitrator and the parties to render an enforceable award is, however, never an absolute obligation. This is because there are too many factors outside the control of the arbitrator that could inhibit the achievement of this goal. So it is never more than a limited obligation, ie one which admits to numerous excuses and exceptions. Exhortations in arbitral rules to favour an enforceable award are equally limited, as seen in their references to 'efforts', in particular 'every reasonable effort', and do not require absolute results.

It seems an excessive effort to subject the applicable legal norms and indeed the result of an arbitration to the overriding goal of ensuring an enforceable award. The legally indicated determination of the applicable legal norms should not be influenced by such an exogenic consideration as to how the award will fare in enforcement. To take an extreme case, if enforcement is such an important goal, why not dismiss all other concerns (including the terms of the contract) and ensure the delivery of an award in favour of the party whose state is less likely to protect it from enforcement? Or one may test the proposition as follows: would it be appropriate for a court to apply the law with a view to how its judgment thereby resulting will fare in enforcement abroad? This never happens. Why therefore should such considerations be foisted upon arbitrators?

It may be observed that it is a curious phenomenon that the hard-won freedom of parties and arbitrators in modern international arbitration from interests beyond themselves, in particular, state interests as it osmotically draws criticism of and challenges to it. It is as strange as how the

[127] Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) at para 13.04[A][4]. But see Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3d edn. 2016) 234: where, referring to Born, the obligation is diluted to that of rendering a 'valid award'.

frogs in Aesop's fable felt impelled to trade in their freedom for a king to govern them. They sorely regretted having done so.

As a result, the public policy exception in arbitration extends no further than the reservation of those results in violation of the arbitrator's contract with the parties and the protection of reputation justifies the arbitrator in avoiding.

Courts' application of public interest norms is weak so for the greater reason arbitrators' may be too

A general point to be made is that the incidence of courts applying foreign public interest norms is in practice rather limited. As has been seen, there is difficulty determining when their sponsor wished them to apply and a lack of a specific imperative basis upon which to apply them. Both concerns exist equally before arbitral tribunals. It would therefore follow that there is no reason to expect arbitrators to be more robust in applying public interest norms than courts have been.

The analogy from courts to arbitrators as regards the application of public interest norms is problematic

Inconclusiveness of arbitrators sharing adjudicative function with judges

It is of course true that arbitrators share with judges the exercise of an adjudicatory role which ordinarily leads to *res judicata* decisions in a state, for arbitrators their place of arbitration, for judges their forum state.[128] It is true too that the arbitration and the arbitral award both rely on state support for their effectiveness, in particular, as regards awards, for their *res judicata* quality.

Nonetheless, the analogy proceeds upon the assumption that conflicts rules are the same for judges and arbitrators. But they differ in significant ways. From the fact alone that states support arbitration, one cannot deduce an obligation on arbitrators to give voice to public interest norms.

No express legal basis

It should be acknowledged that with respect to public interest norms, the analogy to arbitrators from judges is not very good. As seen above, in applying public interest norms an express legal basis is often available to judges. This is not the case for arbitrators who generally base themselves upon the analogy to judges.

In the absence of a party choice of substantive law, the wide discretion that prevails under the most usual standards objectively to determine the applicable law in arbitration, even constrained by conflicts traditions of close analogy, may furnish an opportunity to apply not just public interest norms of the *lex causae* but also those outside it.

Those within may apply as part and parcel of a deemed application of a system of law. The fact that this system applies objectively rather than by party subjective choice does not alter the analysis. But they may also apply on the basis that those out-with the *lex causae* may apply, that is, by virtue of their individual appropriateness or closeness for application.

It remains, however, that the formulation 'closest connection' is not particularly well adapted to the determination of whether public interest norms apply. 'Closeness' is indeed a relevant determinant[129] since, as will be seen, policies behind public policy norms will only matter to the

[128] Gary B Born, 'Chapter 19: Choice of Substantive Law in International Arbitration' in Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2914: '[…] arbitrators are obliged, by the adjudicative character of their mandate, to consider and apply mandatory laws and public policies, even when this is contrary to the terms of the parties' choice-of-law or other agreement. The essence of the arbitrators' mandate is to render a decision through an adjudicative process that rests on the application of legal rules'.

[129] François Knoepfler, 'L'article 19 LDIP est-il adapté à l'arbitrage international?' in Christian Dominicé and others (eds), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn 1993) 531, 537 (concerning the closest connection test under Swiss arbitration law and the analogy to the application of public interest norms by Swiss judges): 'La règle impérative étrangère dont l'appréciation, voire l'application, est demandée au juge ordinaire, voire au juge-arbitre, n'est pas celle de n'importe quel Etat du globe. Il s'agit d'un Etat qui présente aussi avec la cause des liens d'une certaine intensité. L'art. 19

state in most cases if it itself is affected. However, why should the public policy norms of a state also affected but not the closest not apply? Unlike norms treating private interests, public policy norms are not necessarily functionally substitutable and can indeed co-exist in application.

Furthermore, and more importantly, this test makes no reference to the content of public policy norms, and whether that is worthy of application. As will be seen, the usual approaches to public interest norms include an assessment of their value-worthiness as part of the applicability assessment. This is understandable. Norms seeking private interests are much more value-neutral than public policy norms, which express values that the country that adopted them considers important, but others may not feel are so important, and indeed may find them repulsive. So the content of public policy norms is a prominent concern.

It may be, however, that closeness may be treated by arbitrators as a necessary but not sufficient condition. If so, arbitrators can go on to assess other relevant matters in their determination as to whether or not to apply public policy norms.

The closest connection test applied by judges is usually in relation to a particular 'law', whereas with arbitrators it is increasingly in relation to 'legal rules'. Where there is a closest connection test applying to courts, public policy norms outside the *lex causae* are treated as beyond it. However, the application of 'legal rules' may be more apt to accommodate the application even of public interest norms outside the *lex causae*.[130]

Comity

It has been seen that the basis upon which courts apply foreign public interest norms, whether via the public policy reservation or the mandatory norms mechanism, is comity. It has been seen that the interests behind comity are a sense of mutual respect among legal systems, and the hope of reciprocity. The fact is that not just the hope of reciprocity but also respect for other legal systems are self-serving. Courts feel that respect for legal systems in general will promote respect for them in particular. Arbitrators may properly feel respect for legal systems, although they need not since the crucial element of self-interest is missing. Respect for legal systems does not discernibly rub off as respect for arbitration. Moreover, arbitrators have no legal system commensurable to that of courts that they have any interest in protecting. Arbitrators not only have no forum, but their jurisdiction is limited to the case before them.

In the absence of comity as a concern of arbitrators, it may be suggested that resort by them to the public policy reservation and the mandatory norms mechanism is less indicated than it is before judges.

Private autonomy and private interests

Private autonomy is a value of the highest order in international arbitration.[131] Arbitrators are contractually bound to the parties to perform the service of settling their dispute by producing an arbitration award. This relationship is foremost a private one between the parties and the arbitrator. Unlike a judge, an arbitrator is not instituted to administer justice for the public

précise que la situation visée doit présenter un lien étroit avec le droit qui demande à être impérativement appliqué'. Translation: 'The foreign mandatory rule whose assessment, or even application, is required of the ordinary judge, or even the arbitrator, is not that of just any country in the world. It must be a state with which the case has a certain degree of connection. Art 19 specifies that the situation in question must be closely linked to the law which is to be applied on a mandatory basis'.

[130] This argument is espoused by Professor François Knoepfler, 'L'article 19 LDIP est-il adapté à l'arbitrage international?' in Christian Dominicé and others (eds), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn 1993) 531 at p 539.

[131] Luca G Radicati Di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23(1) Am. Rev. Int'l Arb. 49: 'Arbitration is the archetypical realm of party autonomy. Not only is it the creature of party autonomy, in the sense that arbitration can only exist if it is willed by the parties, it is also increasingly governed by rules which the parties are free to fashion as they choose'.

good.[132] The standards of justice that states require of arbitrators are attenuated. The state aim in retracting the usual standards, those applying to its courts, is precisely to facilitate the autonomy of the parties.

Private autonomy finds fuller expression in arbitration than in court litigation.[133] This is particularly the case in regard to conflicts law. In arbitration it is, for example, generally permissible for the parties to choose legal rules,[134] for those rules to be from non-state sources, such as the *lex mercatoria*, and for the parties even to validly permit the arbitrator to decide in accordance with a subjective sense of justice.

We have seen that private autonomy is an important value in the conflicts of law rules developed for use by courts, so much so that interests other than those of the parties, state interests, are marginalized. It is therefore entirely justifiable that, in arbitration, interests beyond those of the parties be commensurably restrained, as their expression comes at the expense of party autonomy. This is obviously the case for norms outside the *lex causae* where the parties have chosen the *lex causae*. It is also the case where they have not, since modern conflicts law is geared to pursuing the parties' interests. It is moreover the case if the public interest norms are within the *lex causae* and have not really been chosen by the parties as part of it, as illustrated in particular where the public interest norm invalidates the parties' contract.

Additionally, accounting for public interest norms adds to the time and costs of adjudication, and they inject uncertainty as to result.

Thus, the heightened concern for private autonomy in arbitration vis-à-vis in-court litigation is a factor recommending a decreased inclination to give voice to public interests in arbitration.

Arbitration is ill-adapted to the application of public interest norms

A further factor militating against the application of public interest norms by arbitrators is that they are generally ill-equipped for this purpose. Courts applying the public interest norms of their forum are highly familiar with the requirements of forum law, and in fact, will usually be constitutionally required to interpret it. Arbitrators by contrast will usually have no relationship with the state whose public interests seek application, and no privileged understanding of them. As courts decline to apply foreign mandatory norms because there is uncertainty as to whether they are under an obligation to do so, there is an even greater reason arbitrators should decline.

It is not just a problem of identifying where the norm seeks application. There will often be questions as to how to apply it. The improper application of public interest norms may actually

[132] See Berthold Goldman, 'Les Conflits de lois dans l'arbitrage international de droit privé' in *Collected Courses of the Hague Academy of International Law* (1963) 109, Brill Reference Online 363–364: 'Le juge qui exerce ses fonctions au nom d'un Etat ne peut par conséquent faire autrement que de respecter la répartition des compétences législatives telle que voulue par cet Etat. Toute autre est la situation de l'arbitre saisi d'un litige relatif à un rapport de droit international. Il ne juge ni au nom, ni par l'investiture de l'Etat, mais en vertu de pouvoirs qui trouvent leur source dans la volonté des parties, et dont il a été investi soit personnellement et originellement, soit par un organisme d'arbitrage ayant bénéficié de l'investiture primaire des parties'. Translation: 'The judge who exercises his functions on behalf of a state cannot therefore do otherwise than respect the distribution of legislative powers as intended by that state. The situation of an arbitrator seized of a dispute relating to a relationship of international law is quite different. He judges neither in the name of nor by the authority of the state, but by virtue of powers which have their source in the will of the parties, and of which he has been invested either personally and originally, or by an arbitration body having benefited from the primary authority of the parties'.

[133] George A Bermann, 'International Arbitration and Private International Law—General Course on Private International Law (Volume 381)' *Collected Courses of the Hague Academy of International Law* (2016) 64: 'Whereas discussions of private international law are apt to emphasize limitations on party autonomy, discussions of international arbitration portray party autonomy as utterly foundational. It should come as no surprise, then, that there has been a trend in national law as well as in the rules of arbitral institutions to allow for ever greater choice: parties can now frequently choose not only virtually any national law to govern their dispute, but also a non-national law, whether written or unwritten, or even amiable composition (which is essentially the absence of law)'.

[134] From the discussions of the working group in preparation of the *UNCITRAL Model Law*, it is clear that the expression 'legal rules' in relation to substantive conflicts rules is intended to increase party autonomy in this manner. See the travaux préparatoires of the 326th Meet, 17 June 1985, of Working Group II.

run counter to the state interest behind them, for example, with competition law.[135] Unlike judges, arbitrators have no power directly to compel the parties or third-party witnesses to cooperate in the application of public interest norms. Unlike judges, arbitrators will not usually benefit from the ready and often free state support of actors knowledgeable about the public interest. The EU will not provide a preliminary ruling to arbitrators on the application of EU law in the case.[136] The parties may even decline to assist the arbitrator with the application of public interest norms. They may indeed have no interest in their doing so. In such a case, they may even fail to raise the public interest norms. In addition, arbitrators will generally be under a duty of confidentiality. The confidentiality of arbitration can exacerbate this impotence of the tribunal. The arbitral tribunal can thereby be impeded in seeking assistance, for example, from public officials who have special expertise in the particular norms and their application. Moreover, under the cloak of confidentiality in arbitration parties may be emboldened to fail to invoke them in the arbitration and to cooperate in establishing their content and applying them.

In the context of applying public interest norms, these limitations on arbitrators' objective ability may be particularly debilitating. Since public policy norms classically call for political, social, or economic assessments, the evidence for which will often be expert and voluminous, arbitrators are heavily dependent on assistance.

It therefore occurs that the willingness of at least one party to cooperate may often be a prerequisite for the application of public interest norms. Their application of the arbitrator's own motion may well prove impractical if not impossible.

The risk of states interfering with arbitration if discontent with arbitrators' treatment of public interest norms

The risk of states interfering with arbitration and the private autonomy it delivers if arbitrators fail to account for public interest norms is actually fairly minor.[137]

The first point is that any such concern falsely inflates states' expectations concerning how arbitrators apply public interest norms. As has been seen, the general conflicts schemes directed to arbitration are silent about public interest norms, whilst conflicts law will often make express provisions for how courts deal with them.

Not only are states free to interfere with the result of arbitration through existing institutions whose purpose is to control arbitration, but states actively enforce their public interests through mechanisms parallel to arbitration. Private enforcement is always subsidiary to public enforcement. Indeed, public enforcement can override the result of an arbitration.[138] So states currently have a well-stocked toolbox for the advancement of their public interests both in relation to any arbitration and outside it.

[135] See *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth, Inc*, 473 U.S. 614 (USSC, 1985) fn 32: 'The greatest risk, of course, is that the arbitrator will condemn business practices under the antitrust laws that are efficient in a free competitive market. cf. *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 85 L.Ed.2d ---- (1985), rev'g 715 F.2d 1393 (CA9 1983). In the absence of a reviewable record, a reviewing district court would not be able to undo the damage wrought. Even a Government suit or an action by a private party might not be available to set aside the award'.

[136] CJEU 23.03.1982 - 102/81 - *Nordsee Deutsche Hochseefischerei v Reederei Mond*.

[137] See, however, Jan Kleinheisterkamp, 'Overriding Mandatory Laws in International Arbitration' (2018) 67 ICLQ 903 on how 'EU countries have repeatedly refused to enforce arbitration clauses when judges deemed that arbitrating the disputes between the parties would allow them to evade fundamental market regulations of the forum. Crucially in these cases, parties had not only agreed on arbitration outside the EU but had also agreed on non-EU law to govern their transactions'.

[138] See Sotiris I Dempegiotis, 'EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003 - Conceptual Conflicts, Common Ground, and Corresponding Legal Issues' (2008) 25(3) Journal of International Arbitration 365–395: 'EC competition rules should always be borne in mind when they are called upon to apply within a private justice forum, such as arbitration. […] In the *Transocean Marine Paint Association* decision the Commission's reluctance towards arbitration has been seen in relation to certain provisions of Block Exemption Regulations (BER) providing for a withdrawal of the BER benefits in case of an arbitral award's implications having been incompatible with either Article 81(3) (then 85(3)) of the EC Treaty or the BER itself'.

States are moreover aware that any more robust demand for the application of public interest norms comes at the cost of party autonomy, which states have shown themselves to value, for example, by increasing it over the years notably in widening arbitrability. There is in fact no chorus of demand from states for arbitrators to heighten their regard for the public interest in the application of the law.

Secondly, if states wish to intervene in relation to how arbitral tribunals treat public interest norms, they will certainly do so in a way that will show sensitivity to their interest in preserving the attractive features of arbitration, such as private autonomy, efficiency, and finality. Reforms can be envisioned that maintain these fundamental attractions of arbitration, such as the imposition on arbitrators of anticorruption requirements, or an express discretion but not an obligation to apply mandatory norms in accordance with stipulated principles.

Public interest norms as part of the lex causae

Arbitrators are free to apply public interest norms as part of the *lex causae*. Where there is a party choice of law, they may feel that doing so is in vindication of the principle of private autonomy, so talismanic in arbitration. The essential enquiry facing arbitrators in doing so is what is the material scope of the applicable law.[139] If there is a party choice of law, within that choice are the parties choosing public interest norms, whether as a class or individually?

Where public interest norms are within an applicable legal system, whether or not chosen by the parties, it may be thought they apply as part and parcel of this system. This is a view that is often found in the literature and can frequently be observed in arbitral practice.[140]

It is, however, not without controversy. Vischer says the 'strict adherence' to applying public interest norms of the *lex causae* 'may lead to puzzling results'.[141] How can the parties' choice of a legal system activate the parts of it that are ordained to serve state interests? If such state interests are sufficiently important, they claim to apply irrespective of party choice. If the state interest is not attracted by virtue of the contract, the application of such norms is at best otiose, and at worse a distortion of arbitral dispute resolution as a determination of the parties' interests *inter se*.

There is indeed rarely enquiry as to whether the state interest is actually engaged in the norms on the particular facts. The result can be an absurdity of applying state norms that have nothing to do with the case and its facts. An example would be the application of Swiss public interest limits to interest rates in the construction of a jetty in Chile paid for in US dollars.

[139] There has been surprisingly little consideration of matters relating to the scope of party choice of law. George A Bermann, 'International Arbitration and Private International Law—General Course on Private International Law (Volume 381)' *Collected Courses of the Hague Academy of International Law* (2016) 264: 'Regrettably, there is very little literature on the question of ascertaining the scope of a choice of law provision. In both the litigation and arbitration settings, it is common simply to observe that the scope of a choice of law provision depends on the parties' intentions'.

[140] A high-water mark of this view was expressed by Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arbitration International 274 at 280: 'Must the arbitrator apply mandatory rules of law? An affirmative answer to this question can hardly be doubted whenever the following three statements are true: the mandatory rule belongs to *lex contractus*, the parties have not expressly excluded its application (which is doubtless exceedingly rare in practice), and finally one of the parties has invoked it before the arbitrators'. Mayer's view here emphasizes that the application of mandatory norms is so fully within the parties' powers that they can even exclude their application. But even in 2016 G Bermann was content to state that, 'Obviously, no problem arises in connection with mandatory laws of the law chosen by the parties. When the parties choose a governing law, they necessarily also choose that law's mandatory norms, as they are a fully integral part of the chosen law'. George A Bermann, 'International Arbitration and Private International Law—General Course on Private International Law (Volume 381)' *Collected Courses of the Hague Academy of International Law* (2016) 312; Lawrence Boo and Adriana Uson Ong, 'Chapter 13: Mandatory Laws: Getting the Right Law in the Right Place' in Neil Kaplan and Michael J Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018) 203, 205; Gary B Born, 'Chapter 19: Choice of Substantive Law in International Arbitration' in Gary B Born (ed), *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2917–18: 'Preliminarily, one point is reasonably clear. Where the parties have selected the laws of State A to govern their disputes, the arbitral tribunal in principle may apply the mandatory laws and public policies of State A, even if they invalidate portions of the parties' underlying contract. This conclusion follows from the parties' selection of the laws of a particular jurisdiction, a choice that naturally includes the mandatory laws and public policies of that jurisdiction'.

[141] Frank Vischer, 'General Course on Private International Law (Volume 232)' in *Collected Courses of the Hague Academy of International Law* (1992) 166.

Support for this view is often sought in how state courts and commentators in that context deal with public interest norms within the *lex causae*. There too it is often unquestioningly accepted that the *lex causae* applies monolithically, without distinction as to the purposes sought by its individual norms, whether private or public, or both, and in what relative proportion.

In view in particular of the usual applicable law regimes facing arbitrators, it might be thought that the *lex causae* exhausts the field as a source of applicability of norms. If that is the case, one consequence is that no substantive public policy norms outside the *lex causae* will apply. This is however a fairly radical outcome, as one can easily see how thereby the parties or a dominant party could avoid all manner of inconvenient norms seeking to further important political, social, and economic values, or aimed at the protection of a weaker party, by the mere contrivance of selecting a law free of them. To avoid the application of sanctions, for example, it would suffice to choose the law of the sanctioned state.

Furthermore, unlike the private interest in norms, those public policy norms of the *lex causae* may well express obnoxious values, like racial discrimination. Have arbitrators no answer to the application of such obnoxious values?[142]

Moreover, it is open to the parties to contract out of all public interest norms by selecting a non-state law, like the *lex mercatoria*. This may be thought repellant in the extreme case.

There is indeed a tendency to accept an overly broad substantive scope of application of the *lex causae* in its usual form, a (unitary) legal system, for the very reason that it is a useful hook to hang public interest norms onto, especially in arbitration, where all other bases are even more hazardous.

In international arbitration, the touchstone in determining the material scope of the *lex causae* is the parties' interests.[143] States have a legislative interest in the application of conflicts systems before courts, but not in arbitration.[144] The strongest evidence of this is of course the acceptance in arbitration law systems the world over, discussed in the section 'Arbitrators not subject to ordinary conflict rules of courts', that the arbitrator is not subject to the conflict rules of the forum of the place of arbitration.

Even if one were to consider public interest norms as part of the *lex causae* before an arbitrator, any coincidence with the achievement of such interests would be purely accidental in the ordinary case where there is a choice of law, and imperfect where there is not. States have no legitimate interest where a sufficient connection to their territory, consistent with the requirements of public international law, is absent. Many choices of law have nothing to do with territories affected and indeed are often made to avoid such territories. The objective application of a *lex causae* is only an approximation of geographical closeness. Furthermore, why should such

[142] It is frequently suggested that the public policy reservation may be available here. But this assumes that it is available to arbitrators. This occurs, however, only within strict bounds. See the section 'Public policy reservation in arbitration' above. A related problem has been considered in the literature, that of norms of the *lex causae* chosen by the parties, which invalidate the contract. See Sylvain Bollée, 'L'impérativité du droit choisi par les parties devant l'arbitre international' (2016) 3 Revue de l'arbitrage 675; Sixto A Sánchez Lorenzo, 'Derecho Aplicable al Fondo de la Controversia' in *Arbitraje comercial internacional (un estudio de Derecho comparado)* (Thomson-Reuters 2020), 667–708.

[143] In court litigation, as an expression of comity, it is possible that this delimitation be determined with reference to states' intentions since a court representing one state would defer to the state of the *lex causae* on this matter out of respect and with a view to reciprocal treatment. The element of respect is especially the acceptance that that other state is expert on what scope delimits the cohesiveness of the relevant area of its law. For such a rule see, for example, see art 13 of the *Swiss Private International Law Act*, which provides (in unofficial English translation): 'Reference to a foreign law in this Act includes all the provisions which under that law are applicable to the case. The application of a foreign law is not precluded by the mere fact that a provision is considered to have public law character'. Under this approach the result is that mandatory norms part of the *lex causae* apply, inasmuch as their 'spatial' scope of application is satisfied, ie they are self-limiting to the achievement of their policy; *CR LDIP*-Bucher, art 13 LDIP paras 29–31.

[144] Sylvain Bollée, 'L'impérativité du droit choisi par les parties devant l'arbitre international' (2016) 3 Revue de l'arbitrage 675, 696: 'Or l'arbitre n'a guère de raison de s'attacher ici à la volonté du législateur, dans la mesure où elle n'aurait de toute façon aucune part dans le titre d'application de la règle envisagée'. Translation: 'However, there is little reason for the arbitrator to focus on the legislator's will here, since the legislator would in any case have no part in the application of the rule in question'.

interests be given full expression whilst the interests of states outside the *lex causae* (and the *lex arbitrii*) are entirely ignored?

Where there is a choice of law, it is only what the parties actually choose that comprises the *lex causae*, and they can only be understood to choose those elements of a legal system that serve party interests. Similarly, law, and in particular areas of legal systems, applying objectively, ie in default of party choice, *prima facie* serves the parties' interest, inasmuch as the means of determining its applicability focuses on the interests of the parties, as is typical in conflicts law today, in particular as applied in arbitration.[145] So the material scope of law applied objectively operates upon the same basis (ie party interest). It is only what states ordain in the parties' interests that is included in the *lex causae*.

What is in the parties' interests must be viewed abstractly in the sense of its assisting in the regulation of a type of legal relationship, such as contract. This is something desirable to all private parties whatever their role in an actual legal relationship or dispute. Clearly one cannot envisage a situation where any legal norm which is burdensome for a seller (or even more concretely, a seller in breach of a guarantee of quality) must thereby be deemed excluded from any relationship where one party is a seller. One must take interests as being those of the parties under a sort of Rawlsian veil of ignorance as to what their particular role is and will be in the legal relationship.

It is credible to suppose that the parties chose a whole system of regulation for a particular type of their relation, such as their contractual relation. This is because it is in the parties' interest, viewed abstractly, to have a norm available to regulate all aspects of this relationship and because areas of law operate as a cohesive system such that the exclusion of some element of it may entail imbalance.

Therefore, crucially, in the absence of express and specific party choice otherwise, an applicable contract law system (ie a *lex contractus*) in arbitration extends to those contractual aspects serving to interpret and supplement contracts. It also extends to those aspects serving the coherence of the contractual system, especially but not exclusively domestically mandatory norms. An example from Swiss law is article 404(1) of the Code of Obligations permitting a contract of mandate to be terminated at any time.

Private law, such as contract and tort, is generally intended to serve the interests of private parties. One can envisage parties choosing these areas, perhaps all of them together. But the usual language will refer to a choice of law in relation to a contract ('this contract is governed by the law of Argentina …') in which case the question is the more specific one whether a choice of contract law has any effect on the law applicable to legal relationships between the parties outside contract law.[146]

It is moreover particularly credible that a contractual system applies, and in its entirety, as the parties have stipulated specific rules in their contract and these rules best apply within a system of contract law and will almost never foresee everything that can arise.

But other legal areas are not ordained, at least primarily, to serve the interests of individuals in a private relationship, such as embargo and competition law even if they impact upon chosen areas, such as contract. *Prima facie*, the rules within them do not form part of the *lex causae*.

[145] Mathias Reimann, *Conflict of Laws in Western Europe: A Guide through the Jungle*, vol 30 (1995) 571 at 595: 'Savigny argued that in finding this connection, the primary factor should be the parties' intentions. In the absence of a clear manifestation, these intentions should be inferred. Even objective choice-of-law criteria should reflect what the parties would have wanted had they thought about the problem'.

[146] Swiss law, for example, admits of this possibility, in regard to the law applicable to a tort. Art 133(3) of the Swiss *Private International Law Act* provides that a tort that is equally a contractual violation is governed by the law of the contract ('Notwithstanding the preceding paragraphs, if a tort violates a legal relationship existing between the tortfeasor and the injured party, claims based on that tort are governed by the law applicable to such legal relationship'.)

This may also be a reason to exclude from applicability any legal rules within an applicable legal system that are not ordained to benefit the parties but rather interests beyond them. Where a legal norm is treated by its state sponsor as a mandatory norm the state sponsor is expressing that there is a powerful public interest behind that norm. This does not logically exclude a private interest, but it follows that every mandatory norm must be viewed with scepticism as to the interest it holds for parties. States limit the application of their mandatory norms (in particular those seeking political, economic, and social ends, but possibly also those seeking to protect weaker parties) strictly to the territory of their state. Where the scope of application of a norm is limited to the territory of their state sponsor this is evidence that the norm is not aimed at the parties' interests. By contrast the incoherence of the legal system is still an operative value in cases where the territory of the state sponsor is not affected. This reality corroborates the conclusion that *prima facie* all mandatory norms seeking political, social, or economic goals are not within the parties' choice.[147]

There can be no credible objection to this approach that it makes the content of what the *lex causae* actual is uncertain or unpredictable. As observed in the section 'Survey of interests animating legal norms in civil dispute resolution', legal norms are adopted either for the parties' interest or for the state's interests. It is only where a norm expresses the interests of no potential actual user too little or not at all that it is not part of the *lex causae* in private matters. Perhaps the category of such norms is delimited by what a state considers mandatory in its forum laws. One can rely on the view of the state itself,[148] which means no more unpredictability and uncertainty than this element of the mandatory norms mechanism (and the latter presents additional unpredictability and uncertainty in its other elements, such as the closeness of the connection and the value-worthiness assessments).

The frequent reference to applicable 'legal rules' in arbitration as contrasted to the more usual applicable 'law' in courts' conflicts systems may additionally provide an opportunity to separate

[147] Gary Born is one of the rare arbitration commentators who engages with the question of whether and if so to what extent the *lex causae* includes mandatory norms. His analysis rightly focuses on party choice, but does not address the (much rarer) situation of the *lex causae* applying objectively. He floats arguments for the exclusion of mandatory norms of the *lex causae* but ultimately rejects this position. On such exclusion see Gary B Born, 'Chapter 19: Choice of Substantive Law in International Arbitration' in Gary B Born (ed), *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2917: '[…] the question whether a particular mandatory rule is within the scope of the choice-of-law agreement will require interpretation of the choice-of-law agreement. For example, an agreement providing that "This contract shall be interpreted in accordance with the laws of State X" would arguably not encompass applicable mandatory rules that could be characterized as "noncontractual"; the rationale for such a conclusion would be that the choice-of-law clause only applies to rules of contractual construction, not mandatory laws. A similar analysis would apply to a choice-of-law agreement providing "This contract shall be governed by the laws of State X." Again, such a provision would arguably encompass only rules of contractual interpretation, performance and validity, not more general mandatory law provisions (such as competition law, trade controls, intellectual property rules and the like)'. For Born's conclusion that mandatory norms are after all included in the *lex causae*, see ibid 2917–2918: 'Notwithstanding these analyses, the better view is that such provisions ordinarily permit (and require) application of the mandatory laws and public policies of the state whose law is selected to govern the parties' contract. It is unlikely that parties intend to cordon off vitally important legal rules from application by an arbitral tribunal, particularly through the use of relatively standard or formulaic text in their arbitration agreement. That is particularly true given the fact that canons of contractual interpretation, and other contract law rules, frequently take into account applicable public policies. Moreover, it would also appear that rules of mandatory law are applicable by reason of conflict of laws rules even in the absence of an applicable choice-of-law agreement (for example, because the rule of law is a mandatory law of the arbitral seat or because it regulated conduct at the contractual place of performance). The foregoing principle is subject to qualification in instances where the mandatory law/public policy of the parties' chosen law is not intended to apply or conflicts with binding international public policies. For example, if the public policy of a particular state demanded or authorized uncompensated expropriation or required racial or religious discrimination, international public policy would generally apply to preclude the application of such national public policies. There will also be instances in which the validation principle or principles of good faith and estoppel apply to preclude statutory law rules of the parties' chosen law'. The parties do not intend the application of legal norms which do not serve their interests but rather those of the state.

[148] Symeon C Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism—General Course on Private International Law (Volume 384)' in *Collected Courses of the Hague Academy of International Law* (2017) 109–113: In another context (Currie's interest analysis), Symeonides points out that although states rarely declare the scope of application of their legal norms, this scope is not difficult to determine.

out *lex causae* public interest norms from application.[149] The focus is on the individual applicable legal rule and not the unitary system.

Public policy reservation in arbitration

The public policy reservation before courts relates always to the public policy of the court's forum. Thus, if the analogy is to be extended to arbitration, it will depend heavily upon the existence of a legal order applicable to arbitration having values of a sufficiently high degree of clarity and importance for a public policy incompatibility to arise. If the model of courts is to be applied, it must indeed be observed that even where the values are defined with an international perspective, it is always the forum's view of these values that is the point of reference.

Arbitrators are of course conceived of as not having a forum. There is moreover nothing in any of the major *leges arbitrii*, even interpreted expansively, which might lend itself to this task. The material scope of arbitration laws simply does not contain an identification of essential values and moreover, a requirement that incompatibility with any of them should have any consequences.

This tends to deprive arbitrators of the baseline against which to measure the compatibility of the result of the arbitration, the award. Professor Lalive's attempt to discern a sort of legal order of special appropriateness to arbitrators, whilst an incisive recognition of the problem, and a forceful suggested response, ultimately fails to convince. Even if one identifies a legal order of specific adaptedness to international arbitration, it does not follow that it applies, or that arbitrators are under any duty to apply it, or that it specifically contains a public policy reservation functioning.

In the absence of a legal order to which arbitration is subject, some commentators attempt to identify a duty on arbitrators to ensure compliance of their awards with certain interests which they consider that arbitrators may and even should promote. The two interests most prominently invoked for this purpose are the thriving of (i) international arbitration and (ii) international commerce.[150]

There is, however, certainly no formal source of such other duties. Moreover, arbitrators are participants in these activities just as all others are, and it is never supposed that anyone else is under such a duty.[151] Arbitrators are not different, for example, in that they determine

[149] Sylvain Bollée, 'L'impérativité du droit choisi par les parties devant l'arbitre international' (2016) 3 Revue de l'arbitrage 675, 684: 'Mais le moins que l'on puisse dire est qu'une conception aussi étroite de la faculté de choisir les "règles de droit" applicables ne s'impose pas fatalement. Si on les prend au mot, les textes considérés n'imposent pas le choix d'une loi nationale prise dans sa globalité, ni même simplement celui d'un système juridique cohérent. Il semblerait raisonnable d'en tirer la conséquence que les parties peuvent choisir par principe la loi d'un certain pays, tout en retranchant de celle-ci telle ou telle de ses dispositions—même impérative—qui ne leur conviendrait pas […]'. Translation: 'But the least we can say is that such a narrow conception of the ability to choose the applicable "rules of law" is not inevitable. If we take them at their word, the texts in question do not impose the choice of a national law taken as a whole, or even simply that of a coherent legal system. It would seem reasonable to draw the conclusion that the parties may choose the law of a certain country as a matter of principle, while deleting from it any of its provisions - even mandatory ones - which do not suit them […]'; by contrast, see the *Hague Principles on the Choice of Law in International Commercial Contracts* which in art 3 refers to a 'set of rules' in relation to the applicable 'rules of law'.

[150] Julian DM Lew, *Applicable Law in International Arbitration* (Oceana Publications, Inc., 1978) 536, para 408: 'An arbitrator has a responsibility to the arbitrants in particular *and to international commerce in general*'. (emphasis supplied); Marcus Commandeur and Sebastian Gößling, 'The Determination of Mandatory Rules of Law in International Arbitration—An attempt to set out criteria' (2014) 12(1) SchiedsVZ 12, 15. There is also, although infrequently, suggestion that arbitrators owe a duty to the 'international community'. See, for example, Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne J. Int'l L. 205, 207–208: There is much confusion as to what 'international community' is being referred to. See Moritz Renner, 'Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance Contending Theories and Evidence* (OUP 2014) 117, 131: 'However, it often remains rather unclear to which form of "international community" the concept of transnational public policy might actually refer. Sometimes it seems to denote the international community of states in the public international law sense of the term, sometimes it describes legal concepts shared by different legal systems, and sometimes it refers to the values of international commerce'. Insofar as it is something more than Professor Lalive's argument one may ask whether there is such a thing as an 'international community' and whether if there is it may be a proper subject of concern. Margaret Thatcher's dismissal of 'society' seems relevant here, perhaps acutely. Margaret Thatcher, Interview for Woman's Own, 23 September 1987: '[…] who is society? There is no such thing! There are individual men and women and there are families and no government can do anything except through people and people look to themselves first'.

[151] The exception is judges, but they are under a legally prescribed duty. See section 'Public policy reservation'.

rights which are then recognized by states since many others do too in international commerce, for example, regulatory bodies, and private associations in particular arbitration institutions. Nobody suggests they should be deflected from their ordinary tasks to ride to the aid of international commerce.

Arbitrators' jurisdiction is limited in time, to the life of the arbitration. Arbitration is the mayfly of jurisdiction. It is entirely inapposite for arbitrators to be looking beyond their arbitration to what tomorrow will bring to the institution of arbitration and to international commerce.[152]

Perhaps more importantly, arbitrators owe explicit and obvious duties to the parties, and any additional duties to any other interest must be securely founded and clearly expressed if they are to displace or alter the duty to the parties. Any duties to international commerce, and international arbitration, no matter how genuinely felt, decidedly do not rise to this standard.

There may, however, be a limited role for a public policy reservation in international arbitration. As Professor Mayer points out, although the arbitrator is in the service of the parties, the arbitrator's services are not without limitation. It may validly be said that where to do so would bring the arbitrator into a violation of public interest laws, or even seriously damage the arbitrator's reputation (notwithstanding confidentiality), the arbitrator may apply the reservation on the basis that this is beyond his or her contractual duties to the parties.

It is noted, however, that commentators do not identify such limits on the arbitrator's duties, or place a duty on the parties not to require such action from arbitrators. The way to clarify such matters would be for arbitrators simply to cite their contract in refusing to comply and thereby incite a reaction from parties and judicial determinations (and hope that immunity provisions protect them where they are wrong).

Mandatory norms

The conflicts rules one generally finds in arbitration limit the arbitrator to applying the parties' choice of law if there is one, or the legal rules connected to the contract if there is not. Both bases disclose limitations as regards the application of public interest norms as mandatory norms. The parties' choice of law properly can only contain a subset of the public interest norms claiming application. The connection tests as developed before courts do not contemplate mandatory norms. They do not fit such applications well.

A final factor worth mentioning as relevant to the assessment of whether the standard tests of applicable law in international arbitration admit public interest norms is that judges applying these tests, the closest connection test in particular, do not base their consideration of public interest norms outside the *lex causae*, even forum norms, on this test, but on a separate legal basis. Examples of these separate legal bases are articles 17–19 of the Swiss Private International Law Act, or article 9 of the Rome I Regulation. The argument therefore arises that where the only basis for the application of public interest norms is a standard applicable law test for arbitration such as the closest connection this does not suffice.

Moreover, if public policy norms apply for the sole or principal reason that this is the will of their state sponsor, it seems incoherent to impute their application to party choice. In the extreme case, a state's interest in the public policy norm may not even be engaged in the case, for example, where there is no sufficient territorial connection between the case and that state. There is also difficulty in applying public policy norms of the *lex causae* which are not related to the area of law that may be considered to have been chosen, for example, contract law. Why apply public interest norms which have nothing to do with what may be essentially a choice

[152] Gary B Born, 'Chapter 19: Choice of Substantive Law in International Arbitration' in Gary B Born (ed), *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2817, 2914: 'The parties' legal rights should not (and cannot) turn on an arbitrator's "sense of duty to the survival of international arbitration as an institution."'

of contract law? Indeed, it is characteristic of public interest norms that they will often seek to invalidate contracts. It is also conceptually difficult to understand the parties as choosing norms which have the effect of invalidating their legal relationship, although this concern is probably limited to invalidation pre-dating the contract. Lastly, if it is thought for a moment that interests beyond those of the parties are relevant, what is to justify the absolute exaltation of those from the *lex causae* and the entire banishment of any beyond? Indeed, in the usual schemes of applicable law in arbitration, the most obvious conclusion is that a party choice of law or legal rules excludes all other substantive-law[153] bases for the application of legal rules.

One of the strongest arguments in favour of the use of the mandatory norms mechanism in international arbitration is that, without it, it is difficult to obtain certain remedies. An example is damages (or triple damages) for antitrust violations. The public policy reservation is negative, so it cannot deliver such a positive remedy. The effects mechanism will also not usually avail since damages can hardly be conceived of as a factual effect in the situation (including its legal situation) of the place of performance.

Such other relief may, however, be available, where it is conceived of as arising not from a contract but from a legal relationship between the parties of another legal source, such as statutory duty, and the arbitration clause extends to this relationship, *ratione materiae.* This appears to have been the view of the US Supreme Court in *Mitsubishi v Soler*:

> 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. *Cf. Wilko v. Swan,* 346 U.S. at 346 U. S. 433-434. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum […].[154]

It remains, however, that without the mandatory norms mechanism, certain effects may be excluded, for example, where the arbitration clause does not extend to claims beyond the contract,[155] where the *lex causae* is deemed to extend to the material legal area which is the subject of the foreign legal norm and therefore ousts it, and even where a party does not invoke it in the arbitration. Moreover, requiring merely that the arbitrator accept jurisdiction over claims which deliver such other relief entails no requirement whatsoever as to how the arbitrator actually treats them whereas there is at least some prospect of a breach of mandatory norms resulting in a public policy setting aside of or refusal to enforce the award.[156]

The effects approach

The mechanism of invoking an illegality or immorality of a contract at the place of performance as a fact grounding the invalidity of the contract has found application in international

[153] In the narrow sense of contrast to the *lex arbitrii*, the application of which, as will be seen, can have effects on the applicability of substantive legal norms.

[154] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985) 636–637. The Swiss Supreme Court appears to share this conception in treating an arbitrator's declining to decide a party's claim on the basis of lack of jurisdiction as vitiating the award (under art 190(2)(b) of the Swiss *Private International Law Act*), but denying that the result is necessarily a violation of public policy (ie within the meaning of art 190(2)(e) of the Swiss *Private International Law Act*) justifying the setting aside of the award. See the decision 4P.119/1998 of 13 November 1998 [Swiss Supreme Court] consid. 1a and ATF 118 II 193 consid. 5 [Swiss Supreme Court], in combination with the decision 4P.278/2005 of 8 March 2006 [Swiss Supreme Court].

[155] This might occur, for example, where the *lex contractus* applicable law, whether chosen by the parties or applied objectively, contains no norm functionally equivalent to that of the mandatory norm.

[156] George A Bermann, 'International Arbitration and Private International Law—General Course on Private International Law (Volume 381)' (2016) *Collected Courses of the Hague Academy of International Law* 320: Professor Bermann is of the view that a non-contractual claim is moreover 'more likely to succeed in doing so if the claim is regarded as mandatory under that other law'.

commercial arbitration and indeed can be seen as particularly appropriate to the conflicts regime attending arbitrators. Under it, one can draw upon the *lex contractus* notion of illegality on the basis that it is legitimately within the realm of contract law and therefore within the parties' choice or an integral part of the objectively applying contract law of interest to parties. But then one gets the effect of the foreign mandatory norm in that the place of performance supplies the content of the illegality or immorality as a fact taken into account in the assessment of the contractual rights. A contract impossible from the start may therefore be found invalid or if the illegality or immorality is supervening there may be an excuse for non-performance (such as frustration or impossibility).

The attraction of this solution in arbitration is that it allows a credible use of the *lex contractus*, in particular, what has credibly been chosen by the parties, whilst also avoiding the application of mandatory norms foreign to the *lex contractus* which lack any secure basis for application in arbitration.

Additionally, this basis of giving voice to public interests does not involve the arbitrator in making difficult value decisions but is rather objective. The enquiry is the straightforward one of how factual performance is affected.

CONCLUSIONS

The only express basis for the expressions of public interest norms in international arbitration is usually as part of the *lex causae*. The *lex causae* will invariably be tailored to the interests of the parties either as their choice or as the legal rules which are applied as being appropriate to their private interests. But the arbitrator should be anxious only to apply legal rules which are actually chosen by the parties or which serve their interests, although incidentally, they may serve public ones too. To go beyond and to apply public interest norms of no relation or interest to the parties just because their provenance is the same as others which legitimately qualify for application is not indicated in arbitration.

An extension of the *lex causae* basis of the application of public interests is where a legal norm of the *lex causae* adverts to a fact at the place of performance affecting performance, what Vischer called the 'substantive law method'. This has the advantage of fidelity to applicable law norms available to arbitrators whilst expanding the range of public interests accounted for.

It is certainly usually available to arbitrators to apply public interest norms upon the analogy of courts' treatment of them, whether as a public policy reservation or in accordance with the mandatory norms mechanism. But a lack of express basis for this, judges' own reluctance to avail themselves of these bases, the weakness of the analogy to the arbitral context, the structure of arbitration laws, the focus of arbitration on the parties' interests to the exclusion of all others, and practical hurdles, cumulatively urge a high degree of circumspection in doing so. The one exception is public interest norms of the place of arbitration which if unobserved by the arbitrator will vitiate the award.

Resort by an arbitrator to the public policy reservation can only be justified on the basis that it is consistent with the arbitrator's contractual obligations to the parties which should include the preservation of the arbitrator's reputation and the avoidance of criminal activity.

The mandatory norms mechanism is the most powerful means of vindicating the public interest. It may well be the only basis upon which to recognize legal consequences other than illegality, which in some areas, such as antitrust law, is of considerable importance.

If states wish to provide more adequately for the expression of public interests in the application of the law in arbitration it would seem necessary for them to introduce legal reforms. Whatever reform is undertaken, it should be careful to protect the desired features of international arbitration such as private autonomy, efficiency, and finality.

If states wish for arbitrators to resort securely to a public interest reservation they might inject contractual requirements into the relationship between the arbitrator and the parties.

If states wish to encourage arbitrators to avail themselves of the mandatory norms mechanism, they might modify the applicable law provisions to add an express basis for resorting to the mandatory norms mechanism.