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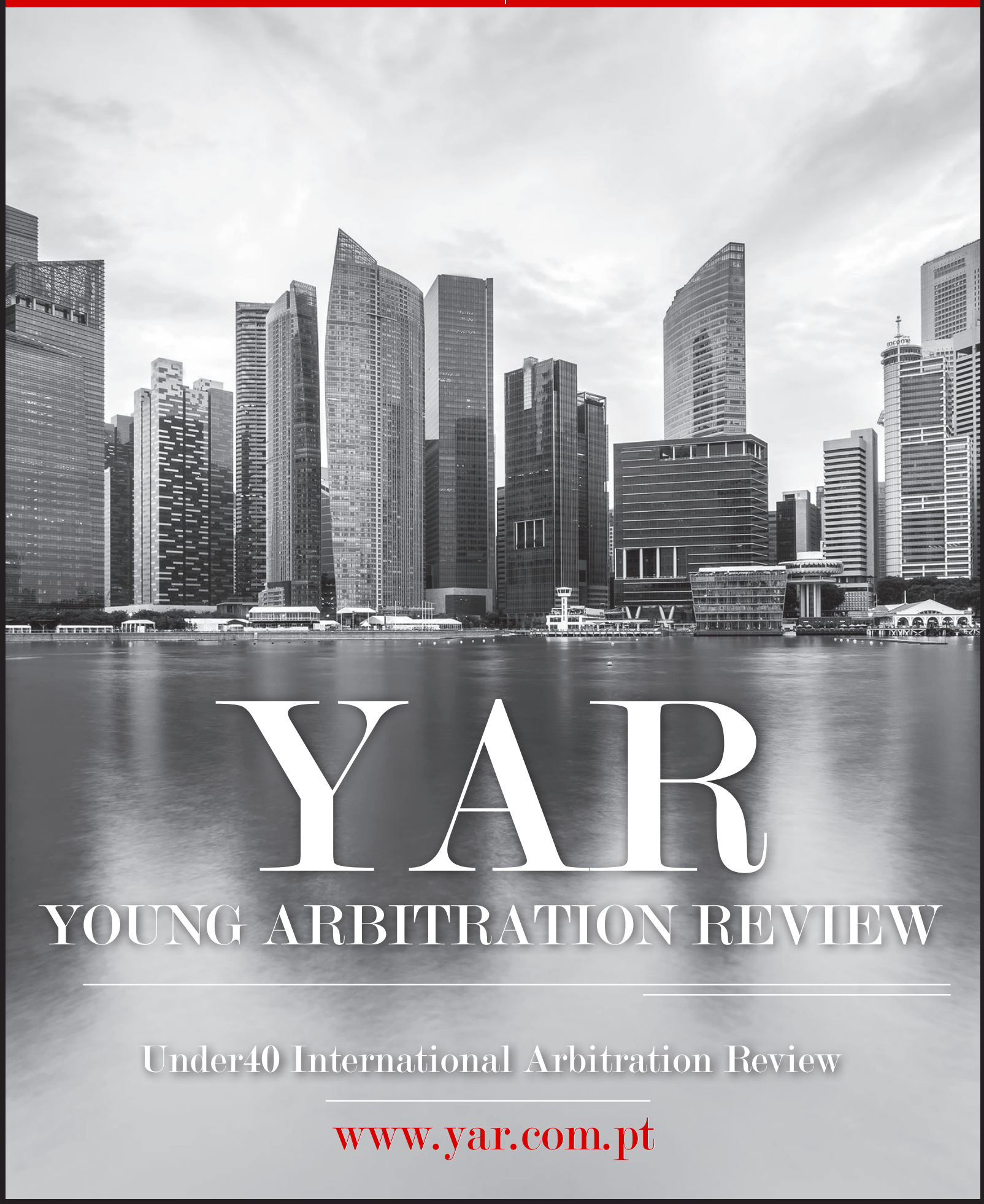

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ARBITRATORS AND COURTS COMPARED: The long path towards an arbitrators' duty to apply internationally mandatory rules[1]

By Carolina Pitta e Cunha

1. Introduction

The impact of internationally mandatory laws in international commercial arbitration has been the subject of great debate. Whilst it is now almost universally recognised that disputes involving the application of internationally mandatory rules can be arbitrated, there is still some confusion as to whether arbitrators may or must apply the internationally mandatory rules of a law other than that chosen by the parties to govern their contract. The purpose of this paper is to challenge the assumption that arbitrators are legally bound to apply internationally mandatory laws by drawing upon a comparison between the possibilities open to arbitrators and to State courts when faced with the potential application of internationally mandatory laws.

The concept of internationally mandatory rules is controversial, especially as to whether mandatory laws are always an expression of public policy.[2] Furthermore, the term 'mandatory rules' can also refer to those rules that cannot be excluded by contract in the domestic context, but which are subject to the normal conflict of law rules ('domestically mandatory laws'). For

the purpose of this paper, the term 'mandatory rules' should be construed to include only those rules of national or supranational law that 'reflect a public policy so commanding that they must be applied [in an international situation] even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws'.[3] Typical examples of mandatory laws are antitrust or competition laws, exchange control laws, measures of embargo, blockade or boycott.

At one time, it was considered that arbitral tribunals were not the appropriate forums to give effect to internationally mandatory laws. Since the Supreme Court of the United States' (US) *Mitsubishi* decision[4] and the European Court of Justice's (ECJ) *Eco Swiss* decision[5], it is generally accepted that the potential application of mandatory rules to a dispute is not necessarily a bar to the latter's arbitrability. This is not to say that arbitrators are not expected to apply internationally mandatory laws. On the contrary, arbitrability is largely based on a presumption that arbitrators will apply internationally mandatory laws.[6] Albeit recognising the arbitrability of antitrust claims, the US Supreme Court, in *Mitsubishi*, noted that the Japanese tribunal would be bound to apply American antitrust law.[7] Similarly, in the *Eco Swiss* case, the ECJ held that a national court, to which an application is made for annulment of an arbitral award, must grant such an application where it finds that the arbitral tribunal failed to observe a prohibition laid down by domestic competition law.[8] 'These decisions indicate that courts, at least in Europe and in the United States, expect an arbitrator to have obligations to do more than just resolve a private dispute between the parties.'[9]

The question of whether arbitrators apply internationally mandatory laws is of crucial importance. If arbitrators do not routinely apply internationally mandatory rules, parties to international contracts will start using arbitration as a means of contracting around those rules, thus externalising costs that they would otherwise be forced to internalize.[10] 'Such a scheme undermines mandatory laws designed to bring private costs in line with social costs, and it may reduce social welfare.'[11]

Some authors have argued that, to prevent mandatory rules from becoming 'default rules', policy makers must either (1) make claims based on mandatory rules inarbitrable or (2) require *de novo* review of arbitrators' decisions.[12]

This paper does not seek to discuss the impact of internationally mandatory rules on the enforcement of arbitration agreements and arbitral awards. Rather, it will discuss whether arbitrators can reasonably be expected to apply internationally mandatory laws, by comparing the legal situation of arbitrators and that of national judges as regards the application of internationally mandatory laws. This paper will focus on the situation of judges within the European Union (EU) context, although it must be noted that courts in other jurisdictions may treat internationally mandatory rules in a different way.[13] It will be argued that, although it is desirable that arbitrators apply internationally mandatory rules, there is (yet) no legal basis upon which to justify an obligation on the part of arbitrators to apply internationally mandatory rules of a law other than that chosen by the parties to govern their relations.

2. Internationally mandatory rules in European courts

2.1. Mandatory rules of the forum

The Rome I Regulation provides the legal framework upon which European courts *shall* determine the law applicable to contractual obligations in situations involving a conflict of laws.[14] One of the cornerstones of the system of conflict of law rules laid down in the Regulation is party autonomy.[15] However, while recognising the freedom of the parties to choose the applicable law[16], the Rome I Regulation makes it possible for certain mandatory provisions to override the parties' choice of law.[17]

Article 9(2) provides that nothing in the Regulation 'shall restrict the application of the overriding mandatory provisions of the forum'. For the purpose of this provision,

> Overriding mandatory provisions are provisions the respect of which is regarded as crucial by a country for safeguarding its public interests … to such an extent that they [must be applied] to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under [the] Regulation.[18]

Mandatory laws may be promulgated by States autonomously or derived from supranational law, eg, EU law. It should be noted, in this respect, that mandatory rules of national law are no less 'mandatory' than those mandatory provisions derived from EU law and enacted by all Member States[19]. Article 9(1) of the Rome I Regulation is clear in that it is the law of each country – and not the court in which the action is brought – that defines which of its rules are mandatory.

The courts' obligation to disregard the parties' choice of law so as to give effect to the mandatory rules of the forum is justified by the 'intimate link between the state judge and his own law'.[20] While arbitrators are appointed by private parties and have no *lex fori*, national judges are appointed by States to uphold the law.[21] Importantly, the judges' compliance with their obligation to apply the law is ensured by mechanisms of legal and psychological nature. If a lower court ignores the law, its decision may be subject to scrutiny by the higher courts. Moreover, the fact that national judges are appointed by States gives them a strong incentive to give effect to the mandatory laws of the forum, as 'they wish to avoid being blamed for misconduct, they are mindful of their career, etc.'[22]

2.2. Mandatory rules of foreign law

Apart from giving full effect to the mandatory rules of the forum, Article 9 deals only with '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'.[23] According to Article 9(3), courts *may* apply the mandatory rules of the country of performance 'in so far as those overriding mandatory provisions render the performance of the contract unlawful'. Article 9(3) further adds that, in exercising their

discretion, courts shall consider the nature and purpose, as well as the consequences, of the application or non-application of those provisions.

Article 9(3) is much more restrictive than its predecessor, Article 7(1) of the Rome Convention[24], which allowed the application of the mandatory laws of *any* country with which the situation had a 'close connection', regardless of whether those provisions rendered the performance of the contract unlawful. Article 7(1) of the Rome Convention was inspired in the famous *Alnati* decision of the Dutch Supreme Court (Hoge Raad), in which the Court said that 'it may be that, for a foreign State, the observance of certain of its rules, even outside its territory, is of such importance that the courts must take account of them, and hence apply them in preference the law of another State which may have been chosen by the parties to govern their contract'.[25] Article 7(1) was however considered to be 'too much' by some Contracting States – particularly, the United Kingdom (UK), Ireland, Germany, Luxembourg and Portugal – who were permitted not to apply it by entering a reservation under Article 22(1)(a).[26]

Article 9(3) is largely based on the English common law position under the Court of Appeals' decision in the *Ralli Bros* case.[27] It is the result of a compromise that ultimately contributed to the decision of the UK to accept the Regulation.[28] Article 9 is not however immune from criticism. Rather, this is perhaps the most controversial provision of the Rome I Regulation.

2.3. Objections to Article 9

First, Article 9 fails to clarify whether and in what circumstances the mandatory rules of the *lex causae* apply. Should they be applied directly as a part of the law designated by the normal conflict of law rules or should they be submitted to any test? It is suggested that those rules should only be applied 'if they so demand'.[29] This is the view that better takes into account the notion of internationally mandatory rules as rules that 'are applicable in the situation described by their unilateral choice-of-law rule, irrespective of the normal rules of private international law'.[30] To apply the mandatory rules of the *lex causae* without considering whether such rules demand to be applied to the case at hand would have 'the effect of granting the interests of the state which provides the *lex causae* an unjustified primary position over other states' interests'.[31]

Article 9(3) is very unclear as to its terms[32], in particular as to what is meant by the requirement that the law of performance renders the performance of the contract 'unlawful': is it sufficient that the obligations to be performed in the foreign country are unenforceable under the law of that country, or is it necessary that the performance of the contract is illegal in the foreign country? Given the English antecedents to this provision, one expects that it is not sufficient that the contract be merely unenforceable in the country where the obligations arising out of the contract have to be or have been fulfilled.[33]

Dependent or not upon the requirement that the performance would lead one of the parties to commit a criminal or illegal act in the foreign country, the rule in Article 9(3) can be criticised for being against comity. The term 'comity' has caused some irritation among legal writers. 'Arguably the criticisms have more to do with the imprecise and inconsistent use of the word rather than the doctrine of comity itself.'[34] Although it is not disputed that 'the basis of private international law lies in the domestic law of the forum' and that comity is not an overriding principle of conflict of laws[35], one must recognise that strong reasons, based on or derived from the notion of comity, militate in favour of giving effect to third countries' mandatory rules.

Chong has referred to the term comity as being grounded upon the following considerations: the desire to strengthen relations with foreign States, the need to prevent the problem of forum shopping and achieve uniformity of decisions, and the need to do justice between the parties.[36] According to this author, '[a]lthough harmonisation of choice of law and jurisdictional rules work in tandem to achieve the twin objects of deterring forum shopping and achieving uniformity of decisions, loopholes remain'.[37] That is, although the Rome I Regulation was intended to ensure that a given legal situation is decided under the same substantive law, irrespective of the court before which the matter is brought, the regime established in Article 9 can seriously undermine that objective and result in a lack of legal certainty and predictability.

Let us consider the hypothetical example of an exclusive distribution agreement between a distributor doing business in Belgium and a manufacturer established in the UK. The contract contains a choice of law clause specifying English law and a jurisdictional clause designating the English courts. The manufacturer terminates the agreement and the distributor initiates proceedings before a Belgian court, claiming compensation under the Belgian Law of 27 July 1961.[38] Article 3 of this statute provides that the *concessionaire* is entitled to an indemnification if its 'exclusive sales concession of unlimited duration' is terminated unilaterally by the *concédant*.[39] Article 4 then provides the scope of application of this provision, stating that:

> [T]he *concessionaire*, who has suffered damaged upon the termination of an exclusive sales concession having its effects entirely, or in part, on Belgian territory, can always sue the provider in Belgium … [and] if the dispute is brought before a Belgian court, this court will apply exclusively Belgian law.[40]

The provisions of the Law of 27 July 1926 are undoubtedly 'overriding mandatory rules' within the meaning of Article 9(1) of the Rome I Regulation.

Right after the distributor initiated proceedings in Belgium, the manufacturer brings proceedings in England, pursuant to the jurisdictional clause contained in the distribution agreement. How should the courts of the two Member States proceed?

The Brussels I Regulation provides that, where a court of a Member State designated in an exclusive choice of court agreement is seised, any court of another Member State shall

stay proceedings until the designated court declares that it has no jurisdiction.[41] Moreover, in accordance with Article 25(1) and recital 20 of the Brussels I Regulation, the substantive validity of choice of court agreements is to be governed by the applicable rules under the (national) conflict of law rules of the Member State of the court designated in the agreement. This means that the Belgian court will have to stay proceedings until the English court decides on the validity of the choice of court agreement.

If the English court decides that it has jurisdiction, because there is a valid choice of court agreement, the question arises as to what is the applicable substantive law. This is of crucial importance, since the Belgian distributor will only be entitled to compensation if the Belgian Law of 27 July 1926 applies. However, since the application of the Belgian provisions would not render the performance of the contract 'unlawful'[42], the English court is not entitled to apply Belgian law and will in principle apply English law, pursuant to the parties' choice of law clause.

Now, supposing that the parties' distribution agreement did not contain a jurisdictional clause, then, the Belgian court would not have had to stay proceedings and would have been competent under Article 7(1)(b) of the Brussels I Regulation.[43] Moreover, in accordance with Article 9(2) of the Rome I Regulation, the Belgian court would be required to disregard the parties' choice of English law in order to give effect to the Belgian mandatory provisions.

This goes to show that, under the current version of Article 9, parties to international contracts may avoid the application of provisions the respect of which is crucial for safeguarding a country's public interests[44] by coupling a choice of law clause with a choice of court agreement. If, however, Article 9 obliged courts to *always* apply the mandatory rules of the place of performance, the mandatory provisions of Belgian law would be applicable irrespective of the court deciding the matter and the distributor's rights would not be dependent upon the existence or non-existence of a jurisdictional clause in the distribution agreement.

One could argue that the above reasoning is contrary to the ECJ's decision in the *Ingmar* case[45]. *Ingmar* concerned a contract between an agent doing business in the UK (Ingmar) and a Californian company (Eaton Leonard). The contract contained a choice of law clause specifying the laws of California. In 1996, Eaton Leonard terminated the contract and Ingmar initiated proceedings in England, claiming compensation under the Commercial Agents (Council Directive) Regulations 1993, which is the enactment of the European Commercial Agents Directive in the UK. The Directive gives commercial agents the right to be indemnified or compensated on the termination of agency agreements.[46] It further provides that the parties cannot derogate from those rights to the detriment of the commercial agent before the contract expires.[47]

The question referred by the English court to the ECJ was whether the national provision transposing Article 17 of the European Directive was applicable even though the principal was established in a non-Member State and a clause of the contract stipulated that the contract was to be governed by the law of that country.[48] The ECJ answered affirmatively, stating that 'a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause'.[49]

The English court was therefore required to disregard the parties' choice of law in order to give effect to the English mandatory provisions.

In *Ingmar*, the parties' agency contract did not contain a jurisdictional clause, but only a choice of law clause. Therefore, despite recognising the need to prevent parties from contracting around mandatory rules, the ECJ did not address what would happen if a choice of law clause was coupled with a choice of court agreement.

Arguably, *Ingmar* should apply to choice of law clauses as much as to jurisdictional clauses. However, the 'recast' version of the Brussels I Regulation (which entered into force in 2015) expressly provides that, where there is a choice of court agreement in favour of a Member State and 'any' court of another Member State is seised, it is for the courts of the Member State designated in the agreement to decide whether there is a valid choice of court agreement, under the law indicated by their conflict of law rules.[50] Hence, it is hard to escape the conclusion that parties to international contracts can currently exclude the application of certain mandatory provisions, at least those not belonging to European harmonised law and thus requiring any judge of a Member State to uphold them (as was the case in *Ingmar*), by entering into a choice of court agreement in favour of the courts of a Member State other than the Member State who has enacted those provisions.

To summarise, under the current European framework of private international law, national courts are required to apply the mandatory rules of the forum and of the *lex causae*, and permitted – but not required – to apply the mandatory rules of the law of performance, yet under the restrictive conditions set out in Article 9(3) of the Rome I Regulation.[51] Only then can a European court disregard the law chosen by the parties to give effect to internationally mandatory laws. Furthermore, even when the mandatory rules of a given State normally apply – by virtue of the normal jurisdictional rules and Article 9(2) of the Rome I Regulation –, it is still possible for the parties to avoid their application by the expedient of a jurisdictional clause.

3. Internationally mandatory rules in international arbitration

What about arbitrators? Unlike judges, 'arbitrators do not have a forum; for arbitrators all mandatory rules present themselves as foreign mandatory rules'.[52] Does this mean that arbitrators may not take into account mandatory rules of a law other than that chosen by the parties?

3.1. *Determination of the applicable law*

Before considering the legal situation of arbitrators as regards mandatory rules, one must consider how an arbitrator will determine the applicable substantive law. While the determination of the applicable law may not be problematic in the context of transnational litigation, it is one of the most critical issues in international arbitration, since arbitrators have no *lex fori* and are in principle not obliged to apply the conflict of law rules of any particular State.

When considering how an arbitrator must determine the applicable law, most commentators start by stating that arbitrators must apply the law chosen by the parties.[53] It is to some not clear, however, whether an arbitrator sitting in England must apply the law chosen by the parties by reason of a 'general principle of party autonomy', or because section 46(1) of the English Arbitration Act[54] tells them to do so.

Gaillard has argued that the way in which an arbitral tribunal determines the applicable law may be influenced by the arbitrators' conception of international arbitration.[55] Accordingly, an arbitrator who sees international arbitration as part of the legal order of the seat will feel obliged to take into account the conflict of law rules applied by the national courts of the seat. By contrast, an arbitrator who considers that international arbitration derives its legitimacy from a plurality of national legal orders 'would not shy away from selecting, amongst the various conflict of law rules at play, the choice of law rule which he considers appropriate to the arbitration hand'.[56] Alternatively, Gaillard has suggested that 'the juridicity of arbitration is rooted in a distinct, transnational legal order, … the arbitral legal order, and not in a national legal system'.[57] An arbitrator adopting this transnational view of arbitration would 'look to the international trend for the determination of the relevant choice of law rule or, in appropriate cases, the rule which reflects the consensus of nations to resolve a particular substantive issue'.[58]

While this paper does not purport to embark on a discussion about the different philosophical understandings of international arbitration, it is suggested that the view that best fits in with the modern rules of international commercial arbitration is that which anchors the arbitral process in a plurality of national legal systems, including that of the country of the seat and that of the place(s) of enforcement of the arbitral award.

In line with this pluralistic view of arbitration, most modern arbitration laws recognise that 'in international arbitration, the arbitrators' primary duty is to respect the intention of the parties as regards the determination of the applicable rules of law and that, where the parties have remained silent, they enjoy great freedom in such determination'.[59] The UNCITRAL Model Law provides that '[f]ailing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable'[60], and some arbitration laws even allow the arbitrators to apply the 'rules of law' which they consider most appropriate, without the need for a conflict of law analysis[61]. As arbitration is based on the consent of the parties, the freedom of the parties' to choose the applicable law is also more extensive in international arbitration than in the context of transnational litigation. Whilst the Rome I Regulation only allows the parties to choose national systems of law, most national laws on arbitration allow the parties to choose principles other than national law, such as the 'UNIDROIT Principles' and the *lex mercatoria*.[62]

How, then, should an arbitrator justify his determination of the applicable law: should the arbitrator sitting in England determine the applicable law on the basis of Article 46 of the English Arbitration Act, or should he justify such a determination on his own conception of international arbitration? Although

the choice of the seat is often motivated by considerations of neutrality and convenience, rather than by a desire of the parties to submit to the control a given legal order[63], one must also acknowledge that States will often exercise a supervisory role over the arbitral process, in particular when a party moves to set aside an award. For this reason, arbitrators should be advised to determine the applicable law on the basis of the national arbitration law of the seat, rather than on the basis of their own pre-conceptions about international arbitration. Only in this way can arbitrators prevent the risk of having their award set aside in the 'country of origin' and refused enforcement in a foreign country on the basis of Article V(1)(e) of the New York Convention[64].

In conclusion, arbitrators can be generally expected to determine the applicable substantive law on the basis of the arbitration law in force at the seat of arbitration, and not on the basis of the conflict of law rules applied by national courts or the French idea of a transnational system of conflict of law or substantive rules. Hence, although arbitrators sitting in Europe may choose to determine the applicable law on the basis of the conflict of law rules provided by the Rome I Regulation, they are not obliged to do so, just as they are not obliged to apply Article 9 so as to give effect to internationally mandatory laws.

3.2. The arbitrators' competence to apply internationally mandatory rules

The problem of whether arbitrators may or must apply internationally mandatory laws specifically arises where the parties agreed to a choice of law clause in favour of a particular legal system and the mandatory rules of a law other than that chosen by the parties want to be applied to the dispute, and are invoked by one of the parties or known to the arbitral tribunal.

Where the applicable mandatory rules belong to the law chosen by the parties, and the parties have not expressly excluded their application, there can hardly be any objection to the arbitrators' competence to apply those rules. By choosing a law, 'the parties are deemed to have chosen a legal system in its entirety'.[65] In so far as the mandatory rules of the law chosen by the parties want to apply to the dispute, by virtue of their own unilateral choice of law rules, the arbitrators may – and must indeed – apply those rules. Where the parties did not choose the applicable law, the arbitrators' freedom to select the conflict of law rules or the substantive law also gives them sufficient discretion to apply mandatory rules.

The big question then is: 'are arbitrators, because their authority is derived from a contract, precluded from considering the effect of mandatory laws that are at variance with contractual terms?'[66] First, it must be noted that the potential application of mandatory rules to a dispute does not generally prevent arbitrators from deciding that dispute. Of course, virtually every legal system treats certain disputes as 'inarbitrable'. Where those national provisions apply, they may preclude an arbitral tribunal from deciding a particular dispute; they do not, however, generally prevent arbitrators from deciding claims based on mandatory rules.[67] Thus, where the parties have freely agreed to submit 'all disputes' relating to their contract to arbitration, that reference usually encompasses claims based on mandatory laws, provided that they have a sufficient connection with the parties' contract.[68] 'Only if one implies an exclusion – "all disputes except disputes based on statutory, public policy, tort or non-contractual claims" – would most arbitration agreements fail as a matter of interpretation to grant the arbitrators the power to resolve such claims.'[69]

A different question is whether, having jurisdiction to decide the dispute, arbitrators may disregard the parties' choice of law in order to apply internationally mandatory laws. Some commentators have suggested that the application of mandatory rules in arbitration is an affront to the parties' autonomy to select the applicable law.[70] This, however, fails to take into proper account the essence of the arbitrators' mandate. As put by Paulsson, '[t]he mandate of arbitration agreements – unless they are couched in unusually narrow terms – is the fair resolution of disputes, not the vindication of contracts'.[71] Some commentators have gone further to suggest that '[i]nherent in the legally-binding resolution of a dispute and the making of a legally-binding award is the duty to consider and resolve public policy (and other mandatory legal) objections'.[72] Although it is doubtful whether the binding nature of the arbitral process can be said to impose on arbitrators a duty to apply mandatory laws, the fact that arbitrators can decide the parties' substantive rights, in a binding manner, certainly helps to understand why arbitrators must be allowed to apply mandatory rules of law. If an arbitrator was not allowed to consider anything but the law chosen by the parties, an arbitrator asked to enforce a contract, which the arbitrator himself recognised to be invalid, illegal or otherwise contrary to an 'applicable' mandatory law, would be *obliged* to enforce that contract, in so far as the law chosen by the parties did not invalidate the agreement.

The fact that most arbitration laws simply state that arbitrators *shall* apply the law chosen by the parties, without making any reference to internationally mandatory laws, is also not an argument, since most of those laws also provide that national courts at the seat of arbitration may set aside arbitral awards which violate that State's public policy.[73] It could be argued that the risk of having their awards set aside in the 'country of origin' only permits arbitrators to take into account the mandatory rules of the seat. However, the New York Convention also provides that a court in a foreign country may refuse to recognise or enforce an award where such recognition or enforcement would be contrary to that country's public policy, which in turn favours the conclusion that arbitrators may consider the mandatory rules of all countries where the parties may seek enforcement of the award.

Other arguments could be used in favour of the arbitrators' power to apply internationally mandatory laws. The consideration that the arbitrators' mandate is to resolve the dispute between the parties – and not to act as a slave of the parties' agreement[74] – seems, however, sufficient to justify the position that, absent an express exclusion of mandatory laws from the arbitrators' mandate, arbitrators may apply the mandatory rules of a law other than that chosen by the parties to govern their agreement.

3.3. The myth of the arbitrators' duty to apply internationally mandatory laws

Having seen that arbitrators *may* generally apply internationally mandatory laws, the question remains as to whether they will in fact do so. Some authors have sought to overcome the tension between the consensual nature of arbitration and the need to enforce public interests by claiming that arbitrators are under a legal obligation to apply mandatory rules. However, since 'arbitrators are neither guardians of the public order nor invested by the State with a mission of applying mandatory rules'[75], it is very difficult to see where such a duty derives from. This part will argue that arbitrators are under no legal obligation to apply the mandatory rules of a law other than that chosen by the parties to govern their agreement, nor can they reasonably be expected to do so.

3.3.1. General considerations

Taking into account the nature of mandatory laws, in particular competition laws, one commentator has suggested that, even where the parties do not invoke competition law, 'the arbitrators have a '"duty"' to apply competition law on account of its mandatory nature'.[76] However, this argument fails to consider that courts themselves are not entitled to apply mandatory laws without further ado.

There are good reasons for national courts to give effect to foreign mandatory rules, namely the motivation to strengthen relations with foreign States, the need to promote judicial co-operation, and the interest in encouraging reciprocal action by foreign courts.[77] Yet, under the current version of the Rome I Regulation, courts are only permitted to apply the mandatory laws of a foreign country under very restrictive conditions.

For arbitrators all mandatory rules are foreign mandatory rules; moreover, none of the reasons why courts might have an interest in applying the mandatory rules of third States applies to arbitrators. As Radicati himself recognises, arbitrators are not organs of a State and 'owe their primary allegiance to the parties who, in most cases, will not have specifically agreed to the application of [mandatory] law'.[78] Moreover, arbitrators are not bound by a system of automatic recognition and enforcement of foreign judgements, justified on notions of 'mutual trust' between the Member States.[79] This means that, if arbitrators have any incentives to apply mandatory rules, these will be based on the interests of the parties and not on the interests of the enacting States in having their public interests respected.[80] In other words, arbitrators are less likely to be persuaded by the imperative nature of mandatory laws than national courts. Hence, it is hard to see how an arbitrator sitting in a EU Member State can be said to be bound by the mandatory nature of 'foreign mandatory provisions' when courts, at least in Europe, may not even take account of those provisions except within the narrow limits specified in Article 9(3) of the Rome I Regulation.

Another argument that is often advanced to justify a general duty of arbitrators to apply mandatory rules is the arbitration community's interest in legitimizing arbitration as an effective dispute resolution mechanism. The idea is simple: if arbitrators categorically refuse to apply mandatory rules, States may adopt a hostile stance towards arbitration, with national courts refusing to enforce arbitral awards and national legislators restricting the matters that can be arbitrated.[81] This is a legitimate concern – and indeed one that explains the amount of scholarly work on the application of internationally mandatory laws in arbitration. However, justifying an arbitrators' duty to apply mandatory rules out of

a 'sense of duty of the survival of international arbitration as an institution'[82] can hardly be convincing in terms of legitimacy.[83]

3.3.2. Mandatory rules of the seat and of the place(s) of enforcement

It could be argued that, if arbitrators are not bound by a duty to consider all mandatory laws applicable to the dispute, they ought nevertheless to apply the mandatory rules of the seat and of the likely place(s) of enforcement. The duty to apply the mandatory rules of the seat and of the place(s) where the parties may seek enforcement of the award would be justified on the interest of the parties in having a final and enforceable award and/or on the arbitrators' 'duty to render an enforceable award'.[84]

Whether or not an arbitrator's duty to render an enforceable award exists to the extent claimed[85], there is no doubt that '[t]he point of the arbitration process is to end the dispute, which is expected to be accomplished by the issuance of a final and enforceable award'.[86] Hence, some institutional rules provide that arbitrators shall make 'every effort' to ensure that their award is enforceable.[87] The question is whether the parties' interest in an unchallengeable and enforceable award or the arbitrators' duty to ensure that their award will be enforceable at law can give rise to a legal obligation on the part of arbitrators to apply the mandatory rules of the seat or of the countries where the parties may seek enforcement of the award, even if the parties have not expressly agreed on the application of such laws.

As regards the application of the mandatory rules of the seat, it must first be noted that,

> [T]he arbitral seat will in many cases have nothing to do with the parties' underlying transaction or dispute (*and will have been selected in part for precisely this reason*). In such cases, the substantive public policies of the seat will very likely be irrelevant to the parties' underlying dispute ... Moreover, by their own terms, the public policies and mandatory laws of the seat may not be applicable to the parties' dispute.[88]

Moreover, even in the rare cases where the mandatory rules of the seat are applicable to the dispute, the arbitrators' failure to apply those rules may not necessarily result in the setting aside of the award. This is because some States have shown themselves reluctant to set aside arbitral awards on public policy grounds[89], and parties will often choose a seat where arbitral awards cannot be easily set aside. For example, under the English Arbitration Act, an award can only be set aside on public policy grounds when the arbitral proceedings were conducted in a manner which is contrary to public policy[90]; and the Swiss rule which provides for the possibility of setting aside arbitral awards 'incompatible with public policy'[91] has been interpreted as applying only to situations in which the award is inconsistent with 'transnational public policy', ie, when 'it disregards those essential and broadly recognised values which, according to the prevailing values in Switzerland, should be the founding stones of any legal order'.[92]

Furthermore, an award set aside in its country of origin may potentially not be refused recognition and enforcement in a foreign country. Article V(1)(e) of the New York Convention does not require the refusal of enforcement of awards set aside abroad. French courts, for example, are well known for their willingness to give effect to arbitral awards set aside in their 'country of origin'.[93]

Just as the country of the seat, the place of enforcement may have no connection with the contract or its mandatory rules may not be applicable to the parties' dispute. Most of the times, the parties will seek enforcement in a country where the debtor has assets, and '[n]either the state where the assets of the debtor are located, nor the state where enforcement for other reasons may have anything to do with the contract'.[94] Even assuming that arbitrators *should* consider the mandatory rules of the place of enforcement, the debtor may have assets in different countries, which the arbitrators may not be able to anticipate or which may have different, and even conflicting, mandatory laws.[95]

In addition, when reviewing compliance with Article V(2)(b) of the New York Convention, courts will not consider the arbitral tribunal's reasoning, but rather the consequences of giving effect to the award, which means that courts will not necessarily refuse the recognition and enforcement of awards that did not apply the *lex fori*'s internationally mandatory laws. Finally, an 'unenforceable' award may not be without value. As noted by Voser, it may not be necessary to seek enforcement 'because the underlying party fulfils the award, even if it's only to avoid the publicity related to enforcement proceedings'.[96]

Thus, although the risk of having the award set aside or refused enforcement in a foreign country might work as an *incentive* for arbitrators to consider the application of the mandatory rules of the seat and of the countries where enforcement is likely to be sought, 'the different circumstances within States, the uncertainty of the place of enforcement, and the value of an "unenforceable" award show that it is hardly sufficient to construe an obligation for the arbitrator to do so'.[97]

3.3.3. Mandatory rules of the place of performance

Just like legal writers, European courts have been struggling to find a way of preventing parties to commercial contracts from using arbitration as a means of circumventing the application of mandatory rules.

In *Sebastian International Inc v Common Market Cosmetics*, the Belgian Cour de Cassation refused to enforce an arbitration agreement because of the risk of the arbitral tribunal not applying the Belgian Law of 27 July 1961.[98] Similarly, in *Accentuate Limited v Assigra Inc*, the English High Court refused to recognise an arbitration agreement and an arbitral award where the arbitrators had not applied the national provisions transposing the European Commercial Agents Directive in the UK.[99]

The facts of the Belgian decision are similar to the facts of the hypothetical case described above (in section 2.3.), with the difference that in *Sebastian International* the distributor was Californian and the contract contained an arbitration clause providing for arbitration in California (and not a jurisdictional

clause). The manufacturer terminated the agreement and the distributor brought proceedings in Belgium, claiming compensation under the Belgian Law of 27 July 1961.

The question for the Belgium court was whether it should refer the parties to arbitration, under Article II of the New York Convention. The case ultimately went to the Cour de Cassation and the Court held that 'when an arbitration agreement is subject to a foreign law, the court requested to decline its jurisdiction must '*exclure l'arbitrage*' when, according to the relevant rules of the *lex fori*, the dispute cannot be subtracted from the jurisdiction of the national courts'.[100] The relevant rule in this case was Article 4 of the Law of 27 July 1961, which provides that 'the *concessionaire* … can always sue the provider in Belgium'.

Similarly, in *Accentuate*, the English High Court held that an arbitration clause was '"null and void" and "inoperative" within the meaning of s. 9(4) of the Arbitration Act, in so far as it purported to require the submission to arbitration of "questions pertaining to" mandatory provisions of EU law, and Regulation 17 in particular'.[101] This case concerned a dispute relating to the termination of an agreement for the distribution by the claimant ('the *distributor*') of software products of the defendant ('the licensor'). The agreement contained a choice of law clause specifying the laws of Ontario and an arbitration clause providing for arbitration in Toronto. The licensor terminated the agreement and initiated arbitration in Canada for a declaration that the distributor had no claims against him. One month later, the distributor started proceedings in England, claiming compensation under the Regulations.

The English court at first instance decided that it did not have jurisdiction to hear the distributor's claim and gave permission to the distributor to appeal. The distributor relied strongly on three ECJ decisions, including the above-mentioned *Ingmar* decision. According to the distributor, the consideration that 'a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause'[102] 'should apply to choice of foreign law as much as, e.g., to choice of foreign arbitration (and especially a combined choice of foreign law and arbitration, as in the present case)'.[103] The distributor further added that 'any arbitration award that offended against a mandatory rule of EU law would itself have to be refused recognition by national courts in Member States', pursuant to the ECJ decisions in *Eco Swiss* and *Claro v Centro Móvil Milenium*[104]. The English High Court accepted the distributors' submissions and allowed the appeal.

Although neither the Belgian Cour de Cassation nor the English High Court went as far as to say that arbitrators are under a legal obligation to apply mandatory rules, both the decisions show that courts, at least in Europe, expect more from arbitrators than they expect from the courts of their fellow Member States.[105]

As explained in section 2.3. above, when a court designated in a choice-of-court agreement is seised, '*any* court of another Member State *shall* stay the proceedings'[106]. This rule applies even if there is a risk of the designated court not applying mandatory rules. If a distributor brings proceedings in Belgium and the principal responds by starting proceedings in the courts of a Member State designated in a choice of court agreement, the Belgian court must stay proceedings, regardless of whether the designated court will apply the relevant Belgian mandatory provisions.

It could be argued that national courts have an obligation to ensure the effectiveness of their own mandatory rules, and therefore should only refer the parties to arbitration when they are satisfied that the arbitral tribunal will apply the mandatory rules of the *lex fori*, or that the protection offered by the law chosen by the parties is equivalent to that of the *lex fori*.[107] However, these considerations should apply to arbitration clauses as much as to jurisdictional clauses.

Presently, a *concédant* that wants to avoid the application of the Belgian Law of 27 July 1961 would be best advised to negotiate a jurisdictional clause, rather than an arbitration clause. Whilst Belgian courts cannot refuse to give effect to jurisdictional clauses in favour of the courts of other Member State, they will most likely refuse to recognise an arbitration clause contained in a distribution agreement to be performed entirely, or in part, on Belgian territory.

This lack of alignment between the enforcement of mandatory laws in European courts and the courts' approach to the enforcement of arbitration agreements shows that there is still a long way to go before arbitrators can reasonably be expected to apply mandatory laws. This does not mean that it is not desirable that arbitrators apply mandatory laws. However, if not even European courts are obliged to apply the mandatory laws of their fellow Member States, *why* should an arbitrator sitting in California or in Ontario apply the mandatory rules of Belgian, English or even EU law?

4. Conclusion

The tension between mandatory laws and arbitration could be solved by making all claims arising under mandatory rules not arbitrable. This however is not desirable, because in many cases arbitration offers significant advantages over transnational litigation.[108] Moreover, if disputes involving mandatory laws 'were not arbitrable, there would be an enormous scope for tactical manoeuvres aimed at interfering with the proper effects of the arbitration agreement'.[109]

Motivated by the perceived need to ensure the protection of public interests without compromising the 'arbitrability' of disputes involving mandatory laws, some commentators have argued that arbitrators are bound by a duty to apply mandatory rules. According to those authors, such a duty is not based on the interests of countries in protecting public interests, but rather on the interest of the parties in an unchallengeable and enforceable award, or the interest of the arbitration community (arbitrators and arbitral institutions) in enhancing the reputation of arbitration as a legitimate and effective dispute resolution mechanism.

Although such broad considerations might help to understand why arbitrators should in theory apply internationally mandatory laws, they do not however amount to a legal obligation. As put by one commentator,

> [One] can work up an interest in the positive law implications of arbitral failure …; [one] can also work up an interest in the pragmatic constraints that push individual behaviour in one direction or another. But untethered from either of these, the abstract notion of "obligations" without consequences – obligations "that exist but cannot be enforced" – are "ghosts that are seen in the law but that are elusive to the grasp".[110]

The uncertainties as to whether arbitrators will apply mandatory laws are even more evident if we look at the impact of mandatory laws in the European context of transnational litigation. Under Article 9 of the Rome I Regulation, a European court is only allowed to take into account foreign mandatory provisions if those provisions belong to the country of performance and their application renders the performance of the contract 'unlawful'. Furthermore, the 'recast' version of the Brussels I Regulation requires courts to give effect to choice-of-court agreements in favour of the courts of other Member States in all circumstances. This means that an agent or a distributor carrying out his activity in a Member State can easily be deprived of the protection offered by certain mandatory provisions by means of a jurisdictional clause in favour of the courts of another Member State. In this light, it is very difficult to see, at least at the moment, how a European court can justify not giving effect to arbitration agreements because of a *risk* of the arbitral tribunal not applying certain mandatory provisions. Arguably, the risk of non-application of internationally mandatory laws is bigger in cross-border litigation than in international arbitration, where arbitrators might feel incentivised – yet not obliged – to apply mandatory laws out of a 'sense of duty of the survival of international arbitration as an institution'.[111] There is clearly still quite some thinking needed on the nature and role of internationally mandatory rules both in arbitration and litigation.

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85 See Chrystopher Boog and Schellenber Wittmer, 'The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award' (Kluwer Arbitration Blog, 28 January 2013) <http://kluwerarbitrationblog.com/blog/2013/01/28/the-lazy-myth-of-the-arbitral-tribunals-duty-to-render-an-enforceable-award/#fnref-6772-4> accessed 18 August 2015.
86 Moses (n 10) 83.
87 See, eg, Rules of Arbitration of the International Chamber of Commerce (in force as from 1 January 2012), art 41; Arbitration Rules of the London Court of International Arbitration (in force as from 1 January 2012), art 32.2.
88 Born (n 73) 2709 (emphasis added).
89 Voser (n 32) 333.
90 English Arbitration Act, s 68(2)(g).
91 Swiss Private International Act, art 190(2)(e).
92 English translation of the decision of the Swiss Supreme Court ('Federal Tribunal') of March 8, 2006 in the case of *Tensaccia SPA v Freyssinet Terra Armata RL* (by Charles Poncet) <http://www.swissarbitrationdecisions.com/sites/default/files/8%20mars%202006%204P%20278%202005.pdf> accessed 18 August 2015.
93 See *OTV v Hilmarton*, Cass civ 1, 23 March 1994 <http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=140&seule=1> accessed 18 August 2015; *PT Putrabali Adyamulia v Rena Holding*, Cass civ 1, 29 June 2007 <http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=176> accessed 18 August 2015 ('an international award that is not attached to any State's legal order is a decision of international justice whose validity must be ascertained in accordance with the rules applicable in the country where its recognition and enforcement is sought' (translated by the author)).
94 Voser (n 32) 347.
95 ibid. See also Luca G Radicati di Brozolo, 'Mandatory Rules and International Arbitration' (2012) 23 Am Rev Intl Arb 49, 69 ('in the presence of a plurality of mandatory laws that at leas in principle could be held to be applicable … arbitrators are confronted with the absence of any recognized conflict principles on the coordination of … mandatory law, since such principles do not exist even for States and their courts, let alone for arbitrators').
96 Voser (n 32) 347.
97 ibid 335.
98 Cass, 14 January 2010, Case No. C.02.0445F <http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20100114-6> accessed 18 August 2015. See also Cass, 16 November 2006, Van Hopplynus Instruments SA v Coherent Inc, Case No. C.02.0445.F <http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20061116-7> accessed 18 August 2015.
99 [2009] EWHC 2655 (QB).
100 *Sebastian International* (n 105), p 6.
101 *Accentuate* (n 106) [88].
102 *Ingmar* (n 46), para 25.
103 *Accentuate* (n 106) [76].
104 Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-7879.
105 Patrick Wautelet, 'Arbitration of Distribution Disputes Revisited: A Comment on *Sebastian International Inc v Common Market Cosmetics NV*' in Patrick Wautelet, Thalia Kruger and Govert Copens (eds), *The Practise of Arbitration: Essays in Honour of Hans Van Houtee* (Hart Publishing 2012) 217, 228.
106 Brussels I Regulation, art 31(2).
107 See Kleinheisterkamp (n 3).
108 See Guzman (n 11) 1285-1288.
109 Radicati, 'Arbitration and Competition Law' (n 7) 3.
110 Alan Scott Rau, 'The Arbitrator and "Mandatory Rules of Law"' (2007) 18 Am Rev Intl Arb 51, 52.
111 Mayer, 'Reflections on the International Arbitrator's Duty to Apply the Law' (n 21) 286.

[BIOGRAPHIES]

PEDRO SOUSA UVA

Pedro Sousa Uva (born 1979) is an Associate Lawyer at Miranda & Associados. His practice focuses on litigation and arbitration.

Pedro is a Graduate of the Lisbon Law School of the Portuguese Catholic University (2003). Pedro was admitted at the Portuguese Bar in 2006.
Before joining the Firm in May, 2013, Pedro worked for practically ten years as an Associate at Abreu Advogados, where he focused his practice in the areas of litigation and arbitration.

Between 2009 and 2010, Pedro participated in the International Arbitration Group's Intern Program, in London, at Wilmer Cutler Pickering Hale and Dorr LLP.

Pedro is a former scholarship student of the Katolieke Universiteit Leuven, Belgium, where he pursued studies in International Arbitration (2001/2002).
He completed with merits an LL.M in Comparative and International Dispute Resolution at Queen Mary University of London (2008/2009), where he focused on International Commercial Arbitration, International Trade and Investment Dispute Settlement and Alternative Dispute Resolution.

He is a member of the Portuguese Bar Association, a member of the Alumni & Friends of the School of International Arbitration (AFSIA), University of London. He is co-founder of AFSIA Portugal (created in June, 30 2010).

Pedro co-authored the Portuguese Chapter of "Getting the Deal Through – Arbitration 2016; "World Arbitration Reporter - 2nd Edition", Jurisnet 2014; "Interim Measures in International Arbitration - Chapter 30 (Portugal), Jurisnet 2014; Pedro is also author of "A comparative reflection on challenge of Arbitral awards through the lens of the arbitrator's duty of impartiality and independence", published in the American Review of International Arbitration, Volume 20, No. 4, in January 2011 (an updated version of his LLM Dissertation).

Pedro co-Chairs the Sub40 Committee of the Portuguese Association of Arbitration (APA) and a member of the latter's Ethics Council (Conselho de Deontologia). He participated in the 3rd Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry (April 2015).

GONÇALO MALHEIRO

Gonçalo Malheiro is Junior Partner at PBBR Law Firm and co-head of its Litigation and Arbitration Department, currently acting as counsel in both ad hoc and institutional arbitration proceedings (domestic and international arbitration).

He is a graduate from the Catholic University Law School of Lisbon. He has an LL.M from Queen Mary - University of London, School of Law, where he focused on the following subjects: International Commercial Arbitration, International Commercial Litigation, Alternative Dispute Resolution and International Trade and Investment Dispute Settlement (subject grouping: Commercial and Corporate Law).

Gonçalo is a member of the Portuguese Bar Association, the Catholic University Alumni Association, the Chartered Institute of Arbitrators and the Alumni & Friends of the School of International Arbitration (AFSIA), University of London. He is also a co-founder of AFSIA Portugal.

Gonçalo was Chairman of the Young Member Group of the Chartered Institute of Arbitrators.

Besides publishing in English and Portuguese on different arbitration subjects, Gonçalo is also Co-Founder of YAR - Young Arbitration Review.

Gonçalo published his LLM dissertation "Interim Measures in Arbitration Proceedings" (2008).

Gonçalo participated in the 1st Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry in 2003.

CLAIRE MOREL DE WESTGAVER

Claire Morel de Westgaver practices in the field of international arbitration and commercial litigation. A lawyer with a mixed civil law common law background, she is admitted to practice law in England and Wales and in the U.S. (New York).

Ms. Morel de Westgaver has been assisting clients in relation to disputes concerning investments, joint-ventures, fraud, trade secrets, patents, IT and construction projects, natural disasters, competition law infringements as well as license and distribution agreements. These disputes involved the law of many jurisdictions including England & Wales, New York, France, Sweden, Switzerland, Belgium, China, Qatar, Pakistan, Romania and Saint Lucia, and arose in a variety of sectors, including financial services, media, telecommunications, hospitality, energy, aviation & defence.

Ms. Morel de Westgaver has acted for clients in arbitral proceedings conducted under leading arbitration rules such as the these of the LCIA, ICC, AAA/ICDR and SCC as well as ad hoc proceedings. Also, Ms. Morel de Westgaver regularly advises on dispute resolution and arbitration clauses. In addition, she advises pro bono clients in relation to international human rights and corporate matters.

Ms. Morel de Westgaver's career includes time spent at another international law firm, the Chartered Institute of Arbitrators in London and the Arbitration Chamber of Paris.

EMILIE GONIN

Emilie's practice focuses on investment treaty and commercial arbitration, public international law and human rights. She has acted as counsel in investment treaty arbitrations on behalf of investors as well as States. She is also a lecturer on investment treaty arbitration at Sciences Po Paris and has provided training on investment treaty negotiation to government lawyers in Cameroun, Rwanda as well as in the UK. Prior to joining Doughty Street Chambers as an international pupil in September 2015, she was an associate in the international arbitration department of Allen & Overy in London for four years. She is also a qualified French avocate à la cour.

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Alexander Zollner is a member of the Dispute Resolution team at Baker & McKenzie • Diwok Hermann Petsche Rechtsanwälte LLP & Co KG in Vienna, which he joined as a Junior Associate in July 2013. Mr. Zollner primarily focuses his practice on litigation and international arbitration and assists clients in disputes before state courts and arbitral tribunals. In addition, he frequently publishes on arbitration related topics. Alexander Zollner can be reached at Alexander.Zollner@bakermckenzie.com

GEORGE LAMBROU

George is a Solicitor Advocate and partner at Thomas Cooper, an English firm of solicitors founded in 1825, and one of the oldest specialist maritime arbitration firms in the City of London. George specialises in international arbitration with a focus on insurance, energy, maritime, and construction arbitrations. Primarily an advocate, he is also currently sitting as an arbitrator on various ICC, LMAA and ICSID tribunals.

Prior to joining Thomas Cooper, George was instrumental in setting up the Institute of European Law within the legal faculty at MGIMO in Moscow. He has been an advisor to the Government of Kyrgyzstan on international trade legislation, has worked for the US Department of Commerce on investment and trade issues in Russia, and the US Department of Energy under the US – Russia Highly Enriched Uranium Agreement.

He has degrees from the University of Chicago, Boston College and an LLM in maritime and international arbitration law from Queen Mary, University of London. He is a Supporting Member of the LMAA, Fellow of the Chartered Institute of Arbitrators (FCIArb), Member of the Law Society of England and Wales, Member of the Athens Bar, the British Russian Law Association, and of the Russian Arbitration Association.

George is fluent in both Russian and Greek.

CAROLINA PITTA E CUNHA

Carolina is a Junior Lawyer in the Litigation and Arbitration Team of Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS) in Lisbon, where she previously joined the Banking and Finance Team.

She has an LL.M. in Commercial and Corporate Law from the London School of Economics and Political Science (2014/2015), where she studied International Commercial Arbitration and International Commercial Litigation, and attended the LSE/Freshfields Seminar on the Practice of International Arbitration.

Carolina obtained her Law Degree from the Portuguese Catholic University, Faculty of Law – School of Lisbon (2014).

She is fluent in English and Portuguese.

DEEPA SUBRAMANIAM

Deepa Subramaniam is an associate who focuses her practice on international arbitration matters. Prior to joining the firm, she was an Assistant Legal Counsel at the Permanent Court of Arbitration, The Hague, as a part of the PCA Fellowship Program. Her experience includes commercial contract claims, investor-state claims under bilateral investment treaties and inter-state disputes pursuant to Annex VII of the United Nations Convention on the Law of the Sea. Ms. Subramaniam was also involved with appointing authority matters under the UNCITRAL Arbitration Rules.

Previously, Ms. Subramaniam completed a pupillage at a leading chambers in London.

MATTHEW WESCOTT

Matthew is a Partner in DAC Beachcroft's London office from where he advises and represents clients worldwide. Matthew is an experienced dispute resolution practitioner and has advised on and conducted arbitrations under the arbitral rules of several institutions including UNCITRAL, OHADA, LCIA, ICC, LMAA and LME. Matthew deals with a wide variety of areas including banking, financial markets (including ISDA transactions), fraud, contractual disputes, international sale of goods and commodities disputes; he has also undertaken regulatory and investigatory work for a range of clients. Matthew acts for underwriters, brokers and insureds on the Lloyd's, London and international markets. He has acted as coverage and defence counsel in respect of, inter alia, D&O and fidelity policies. He also has experience of bringing and defending accountants', tax advisers' and insurance brokers' negligence claims.

He speaks fluent Spanish and Portuguese. Matthew has worked for a number of clients in Latin American jurisdictions, including a major hydrocarbons transmission company and a sovereign entity.

ANTÓNIO PINTO MONTEIRO

António Pedro Pinto Monteiro is a Senior Associate at PLMJ Law Firm and he is part of the PLMJ Arbitration Team.

Admitted to the Portuguese Bar Association in 2007, Pinto Monteiro is also a member of the IPPC (Portuguese Civil Procedure Institute), the APA (Portuguese Arbitration Association), the CEA (Spanish Arbitration Club) and the AIA (Association for International Arbitration).

Having earned a law degree from Faculdade de Direito da Universidade de Coimbra, he went on to obtain a postgraduate degree in arbitration from Universidade Nova de Lisboa and is currently finishing his PhD in arbitration.

António has published many articles regarding arbitration and civil procedure, and is a regular speaker in several conferences and seminars.

ARTUR FLAMÍNIO DA SILVA

Artur Flamínio da Silva is a PhD. Student in Sports Arbitration (waiting for disputation). He has earned his law degree from Faculdade de Direito da Universidade de Lisboa, and a Master of Laws degree in Public Law from Faculdade de Direito da Universidade Nova.

Artur has published several papers in Sports Law, Sports Arbitration, Constitutional Law and Administrative Law. He has also published a commentary of the Law of the Portuguese Court of Arbitration for Sport.

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Daniel Becker is a junior associate in the Rio de Janeiro office of Tauil & Chequer Advogados in Association with Mayer Brown LPP's Litigation and Arbitration practices. The author is graduated in Law from the Federal University of Rio de Janeiro. He participated in the XIX and XX Willem C. Vis International Commercial Arbitration Moot as a team member representing his university. Daniel Becker is also Vice-President of the Brazilian Association of Arbitration Students (ABEArb) and the Brazilian Association of Law and Economics (ABDE).

NIKOLAI SOSA REBELO

Nikolai is a Brazilian lawyer and a LL.M candidate at University of California Berkeley (2015/2016). He wrote a LL.M thesis about the DIAGNOSIS OF INVESTORS' PROTECTION IN BRAZILIAN STOCK MARKET. He is a member of the Technical Committee of Síntese's Journal of Business Law (Revista Síntese Direito Empresarial) and of the Executive Group of Business Arbitration of Chamber of Mediation and Arbitration of FEDERASUL – Federation of Commercial Associations of Rio Grande do Sul. He participated in the Arbitration Commission of Brazilian BAR Association of Rio Grande do Sul State and in the Young Lawyers Commission of the Brazilian BAR Association of Rio Grande do Sul State. He is author and co-author of many articles and of two books in Brazil.

RICARDO CARRION ALVES

Ricardo Carrion Alves is graduating in Law from FGV School of Law. Ricardo Carrion is also President of the Young Arbitrators Committee of the Brazilian Center of Mediation and Arbitration (CJA/CBMA). He has experience as a legal intern in the litigation and arbitration practices at Sergio Bermudes Advogados and Ferro, Castro Neves, Daltro e Gomide Advogados.

EDUARDO SILVA

Eduardo Silva da Silva has experience in arbitration with industry sector, energy and construction. He is Doctor and Master of Laws at Universidade Federal do Rio Grande do Sul (UFRGS/Brasil), professor and a arbitrator. Visiting Scholar in University of Victoria (UVic, B.C., Canadá). Secretary General of the Rio Grande do Sul Bar Association Arbitration Chamber (OAB RS) and Director in the Federasul Arbitration Chamber (CAF).

Member of many panel of arbitrators and decision members in Brazilian Arbitrations Centers (CAM/CCBC ,FIERGS/CIERGS, SRB, CAF, FIEP and others). In International Chamber of Commerce (ICC) have place on Commission on Arbitration and ADR of Court of Arbitration (Paris). He is author and co-author of many articles and of the books "Arbitragem e Direito da Empresa" (RT, São Paulo, 2003), "Teoria Geral do Processo" (SAFE, 2006) e "Regras da Arbitragem Brasileira" (Marcial Pons, São Paulo, 2015).

JOHN LOWE

After having worked for over twenty years in a variety of in-house positions John Lowe has recently opened an arbitration and mediation practice. While practicing in-house he was active with the Association of Corporate Counsel Europe, an association of in-house counsel with approximately 2,000 members serving as President and Treasurer. Recently, Mr. Lowe was the General Counsel and Director of Communications at Qioptiq a privately-owned Luxembourg company involved in the development and manufacture of precision photonic products for the defence, medical and life science, industrial manufacturing and research and development markets.

Before joining Qioptiq, Mr Lowe was Of Counsel at the Paris office of Orrick, Herrington and Sutcliffe in the corporate department. Prior to that he was the Assistant General Counsel at Alcatel (now Nokia) an international supplier of telecommunications equipment after having served in several other positions in the legal department in Italy, Belgium and France.

Mr. Lowe began his career as a diplomat with the US Department of State serving in Mexico, Washington, D.C. and Italy. He has also worked in private practice in Italy and in the US. Mr. Lowe received his law degree from George Washington University in Washington D.C. He is experienced in a wide variety of legal specialties including dispute resolution, mergers and acquisitions, compliance programs, security regulation and complex commercial transactions.

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