EU Overriding Mandatory Provisions and the Law Applicable to the Merits

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INTRODUCTION

Overriding mandatory rules, also known as *lois de police* or directly applicable rules, are mandatory rules that require application even though they do not belong to the law applicable to the merits of the dispute. As the name suggests, these rules override the choice of law that was made by the parties or that followed the application of the conflict rules that had identified the law governing the legal relationship.

Mostly, overriding mandatory rules aim to protect public interests, such as the proper functioning of securities markets. However, it is not only regulatory norms of a public law nature that may qualify as overriding mandatory rules. Private law rules may also do so. For example, in the EU the rules protecting commercial agents, contained in the law of the country where the agency is carried out, are deemed to apply even though the agency contract is subject to a different law.¹ In EU law, the applicability of overriding mandatory rules is regulated in article 9 of the Rome I Regulation on the law applicable to contractual obligations,² and in article 16 of the Rome II Regulation on the law applicable to non-contractual obligations.³

While the notion of overriding mandatory rules is well known in the context of private international law and application of the law by the courts, there may still be unclear aspects regarding its relevance in the context of international arbitration. This is mainly due to the widespread

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(though not uncontroversial, and not supported here) opinion that international arbitration, unlike national courts, is not subject to rules of private international law. As the applicability of overriding mandatory rules is usually explained in terms of private international law, negating the relevance of private international law necessitates development of alternative bases for justifying the applicability of these rules in arbitration, including the conditions for applicability and its limitations. Recognising the relevance of private international law to arbitration, to the contrary, permits reliance on known concepts to explain the relationship between the choice of law made by the parties and the powers of an arbitrator with regard to the applicable law. While this latter approach may seem old fashioned, it permits a more predictable or, at least, a less unpredictable, regime.

I. BRIEFLY ON OVERRIDE MANDATORY RULES

Much has been written on overriding mandatory rules. In addition to the uncertainty relating to which rules qualify as overriding,⁴ a much discussed topic has been which law’s rules are relevant. While the applicability of overriding mandatory rules belonging to the law of the court, the lex fori, seems to be uncontroversial, there has been an evolution with regard to overriding mandatory rules belonging to third laws. The predecessor of the Rome I Regulation, the Rome Convention,⁵ in the first paragraph of article 7 used to leave open the possibility to give effect to overriding mandatory rules belonging to third laws, though a number of states made use of the possibility to reserve against this provision. Under the Rome I Regulation, the possibility to give effect to third countries’ rules has been significantly restricted and applies only to the overriding mandatory rules belonging to the law of the state where the performance is to be made, and only where the effect of these rules is to render the performance illegal. This, however, does not mean that overriding mandatory rules of other systems are completely irrelevant. The possibility to take into consideration overriding mandatory rules from third countries is a principle of private international law that pre-

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⁴ Not all mandatory rules are so important that they override other conflict rules; which rules are so important is mainly ascertained on the basis of a functional analysis. See Giuditta Cordero-Moss, *International Commercial Contracts* 191 (Cambridge University Press) (2014).
⁵ See Council Convention 80/934/ECC, 1980 O.J. (L 266/1) 1.
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existed the Rome Convention, and seems to be acknowledged as a principle of private international law beyond the Rome Convention and the Rome Regulation. Furthermore, there may be other bases to give third countries’ overriding mandatory rules some effect. For example, the applicable substantive law may have a rule on agreements against good morals; this rule may apply when the parties aim at circumventing a foreign rule protecting public interests and those interests are deemed worthy of protection also under the applicable law. Section 138 of The German Bürgerliches Gesetzbuch has a rule like this, called Sittenwidrigkeit. Also, the applicable substantive law may consider the effects of the foreign overriding mandatory rule as an impediment that excuses non-compliance with a contract violating that rule.

II. BRIEFLY ON INTERNATIONAL COMMERCIAL ARBITRATION

The matter of interest here is to what extent overriding mandatory rules have relevance in the field of international arbitration. The effects of mandatory rules may be different in arbitration than in courts. To begin with, the legal framework is different: Civil procedure law regulates court proceedings, whereas arbitration law regulates arbitration proceedings. Furthermore, there are strong theories on the relationship between international arbitration and national law that emphasize the role of the will of the parties in international arbitration and restrict the relevance of national law. Arbitration has been said to be “the archetypical realm of party autonomy.”

The ability of overriding mandatory rules to override the will of the parties, therefore, may need particular justification.

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8 Cordero-Moss, supra note 4, at 200.
9 Id. at 199.
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This article will discuss mandatory rules regulating the substance of the disputed relationship – leaving aside procedural rules, and only incidentally touching on the general questions of whether international arbitration may be deemed to have a forum,\(^\text{11}\) to what extent it is possible to apply non-national rules in arbitration,\(^\text{12}\) and how accurately the arbitral tribunal is expected to apply the governing law.\(^\text{13}\)

The legal framework of arbitration is the starting point of the analysis. Arbitration enjoys a relative autonomy from national laws thanks to the New York Convention:\(^\text{14}\) Arbitration agreements shall be recognised and arbitral awards shall be enforced in the over 150 countries that have ratified it. The New York Convention contains in article V an exhaustive and restrictive list of exceptions to the enforceability of arbitral awards.

In addition to enforceability, it is important to ensure that an award is valid and, thus, not set aside by the courts in its country of origin. Although the validity of arbitral awards is not unified by a convention and is thus subject to national law, national law on the validity of arbitral awards is largely harmonised, among others on the basis of the UNCITRAL Model law on international commercial arbitration.\(^\text{15}\) National law’s grounds for invalidity, to a large extent, correspond to the grounds that article V of the New York Convention contemplates as the only grounds to refuse enforcement.\(^\text{16}\)

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\(^{11}\) See Cordero-Moss, supra note 4, at 219 (pointing out the importance of the law of the arbitration venue and answering positively); Luca Radicati di Brozolo, *Party autonomy and the rules governing the merits*, in *Limits to Party Autonomy in International Arbitration* §§ I(b) – II (Franco Ferrari ed., 2016) (answering negatively).

\(^{12}\) See Cordero-Moss, supra note 4, at 152; *Id.* at 29; Radicati, *supra* note 11, at §§III (b)–(c).

\(^{13}\) See Cordero-Moss, supra note 4, at 123 (pointing out that international arbitration shows a plurality of approaches); Radicati, *supra* note 11, at §§4 –5 (supporting a flexible application of the law).


\(^{16}\) See *id.* art. 34. On English law, which has additional grounds for annulment, see Gary Born, *International Commercial Arbitration* 3186 (Kluwer Law International, 2nd ed.) (2014); *Id.* at 3340; Cordero-Moss, *supra* note 4, at 224.
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According to these sources, an arbitral award runs the risk of being unenforceable or invalid if: it is based on an arbitration agreement that was invalid or did not bind one of the parties; the principle of due process was violated during the proceedings; the arbitral tribunal exceeded its power; the composition of the arbitral tribunal or the procedure followed was irregular; the subject of the dispute was not arbitrable; or if the award violates fundamental principles (ordre public) in the legal system of the court. As this short overview shows, court control is not meant to be an appeal on the merits or on the application of law: court control is meant to ensure that fundamental principles, both procedural and substantial, are respected, as well as to avoid that arbitration takes place without consent by all parties. In other words, within the area where the grounds for setting aside or refusing enforcement of an award are not applicable, arbitration enjoys full autonomy and the wrongful application of rules or the application of the wrong rules will not affect the effectiveness of the award.

III. BRIEFLY ON OVERRIDING MANDATORY RULES AND INTERNATIONAL ARBITRATION

Within this legal framework, the question of overriding mandatory rules’ relevance in arbitration may be answered by inquiring under what circumstances would the disregard or application of overriding mandatory rules not belonging to the applicable law affect the validity or enforceability of the award. As will be seen in section III.B below, disregarding or breaching overriding mandatory rules has, in itself, no automatic impact on the validity or enforceability of an award, but can have impact if the breach amounts to a violation of the ordre public – or the arbitrability rule.

This leads to the further question of whether arbitrators have an independent power to apply overriding mandatory rules, or whether they are bound by the will of the parties as expressed in the disputed contract, in the arbitration agreement, or in the pleadings. In other words: if the parties have chosen a given law to govern their relationship, and have not pleaded overriding mandatory rules belonging to a different law, does the arbitral tribunal have the power, or even the duty to apply the overriding mandatory rules in spite of the parties’ different choice of law? Section III of this paper considers two bases for the arbitral tribunal’s power to go beyond the parties’ will. The approach preferred here is to see this power as a complement to party autonomy. This may be done if
principles of private international law are applied to determine the scope of the parties’ choice of law. An alternative approach is to assume that the arbitral tribunal is under an ethical duty to consider applicable overriding mandatory rules, also having regard to the necessity to preserve the credibility of arbitration as a method to resolve dispute. As this paper will show, these approaches do not necessarily diverge in their result, although the path to the result may be different.

A. Relevance of a Classification?

As mentioned in the introduction, overriding mandatory rules are rules applied irrespective of which law governs the dispute.

The classification as overriding implies that there is another class of mandatory rules, which is not overriding. These non-overriding mandatory rules may not be derogated from by the parties’ agreement, as long as they belong to the applicable law; however, their application may be excluded when a legal relationship is subject to another law (whether because the parties chose another law, or because conflict rules identified another law as governing).

The classification as mandatory rules (overriding and non-overriding) implies yet another category, that of non-mandatory rules or default rules. These rules may be derogated from by the parties’ agreement, even when the legal relationship is subject to the law to which these rules belong.

The picture derived from the above is threefold: some rules (default rules) may be derogated from by simple agreement even in domestic contracts; some rules (mandatory rules) may not be derogated from by agreement, but may be excluded by choice of another law if the contract is international; and some rules (overriding mandatory rules) remain applicable even though the contract is international and is subject to another law. This is a classical distinction in private international law. The question is whether this division into three different classes of rules has relevance in international arbitration.

If the relevance of this classification must be measured against the impact that it possibly may have on the validity or enforceability of the award, it is necessary to enquire whether the distinction between default-, mandatory- and overriding mandatory rules is reflected in any of the

17 See Cordero-Moss, supra note 4, at 281.
18 See Radicati, supra note 10, at 65.
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grounds for refusing enforcement of the award or for setting it aside as invalid. This line of thought will be followed in the next section.

B. Relevant Grounds for Setting Aside an Award or Refusing Enforcement

As will be seen below, three grounds for setting aside or refusing enforcement of an award may be relevant in this context. Under circumstances, an award that disregarded applicable rules may be deemed invalid or refused enforcement as a consequence of the violation of two rules: the *ordre public* and the arbitrability rule. Furthermore, an award that considers rules different from the rules that were chosen by the parties may be deemed invalid or refused enforcement as a consequence of excess power. A further ground may become relevant from a procedural point of view: due process. This ground applies if, *i.e.*, one party was not given the possibility to comment on the applicability of rules that were applied by the arbitral tribunal even though they were not pleaded by the parties. As this latter ground is not directly and exclusively relevant to the classification of the rules in default-, mandatory- and overriding mandatory rules, it will not be dealt with here.19

It must be pointed out here that some national arbitration laws have a longer list of grounds for setting aside an award. For example, the English Arbitration Act permits, in section 69, an appeal on point of law, where the applicable law was English law. This provision may potentially be an additional ground for invalidity, not present in the UNCITRAL Model Law, and relevant to the question of the classification of rules. However, this provision does not seem to significantly increase the relevance of the classification, as it is applied very restrictively: the leave to appeal an award on point of law will be granted only if the matter is of general public importance and if the application of law made in the award was obviously wrong.20 Also, the provision is rarely applied, as its application may be

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19 See Giuditta Cordero-Moss, *The arbitral tribunal's power in respect of the parties' pleadings as a limit to party autonomy (on jura novit curia and related issues)*, in *Limits to party autonomy in international arbitration*, § 3.2 (Franco Ferrari ed., 2016).

20 See *Arbitration Act*, 1996, c. 69 (Eng.). In 2016 the Lord Chief Justice of England and Wales, Lord Thomas, held a lecture in which he pointed out that, since many commercial parties choose arbitration to solve their disputes and appeal from arbitral awards is very restricted, courts are not participating to the desirable extent to the development of the law. Among the measures that could
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excluded by the parties’ agreement and arbitration rules of institutions that often administrate arbitration in England, such as the LCIA and the ICC, exclude applicability of § 69.

None of the relevant grounds for refusing enforcement or for setting aside an award make specific reference to the distinction between default-, mandatory- and overriding mandatory rules. From this it may be inferred that the classification, in itself, is not sufficient to have an impact on the effects of the award: assuming that an award violates applicable rules, it is not the qualification of these rules as default-, mandatory- or overriding mandatory rules that will determine the consequence for the validity or enforceability of the award.

The sections below will discuss under what circumstances disregard of applicable rules may affect the award, and will show that the qualification is not only irrelevant, but also not consistently followed: While disregarding default rules generally cannot be seen as basis for a ground for invalidity of an award or for refusing enforcement (unless the disregard is accompanied by a violation of the principle of due process or a serious procedural irregularity – which is outside of the scope of this paper)\(^{21}\) situations may be envisaged where an award may be refused enforcement or set aside for not having considered “simple” mandatory rules. Additionally, situations may be envisaged where having disregarded overriding mandatory rules does not lead to invalidity or refusal of enforcement.

We will now turn to examining the applicability of the three mentioned grounds for invalidity and unenforceability in case an arbitral award has disregarded overriding mandatory rules.

1. Ordre Public

According to the so-called ordre public (public policy) principle, an award may be set aside as invalid or refused enforcement if it violates fundamental principles in the socio-economic system of the annulling or, respectively, of the enforcing court. It seems generally recognised that this defence is to be applied only in exceptional situations.\(^{22}\)

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\(^{21}\) See Cordero-Moss, supra note 19, at § 3.

\(^{22}\) See Born, supra note 16, at 3312; Id. at 3647.
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a) Narrow scope

The scope of *ordre public* (or public policy) is very narrow, narrower than the body of overriding mandatory rules of a state. This narrow understanding is also called “negative *ordre public.*” The function of this narrow category is to prevent introducing into the court’s legal system elements that can seriously violate the system’s fundamental principles. The purpose is thus not to ensure an accurate application of the system’s rules, but to protect its fundamental principles.

When dealing with domestic legal relationships, however, some jurisdictions use the terminology “*ordre public*” for their overriding mandatory rules. This expanded understanding is also known as “positive *ordre public,*” or “domestic public policy.” The function of this expanded category is to permit application of rules having particular importance for society. The purpose is thus to ensure an accurate application of these rules.

In order to distinguish the positive *ordre public* (relevant only domestically) from the negative (relevant for international arbitration), in these jurisdictions the terminology used in the context of international enforceability of awards is “international *ordre public.*” What is international here is not the principles being protected, but the context in which the category is used. The scope of the international public policy is, in the jurisdictions that operate with the concept of positive *ordre public,* comparable to the narrow notion of public policy that is generally accepted under the New York Convention or the UNCITRAL Model Law, and that, as was seen above, may also be defined as negative *ordre public.*

In order to avoid confusion with yet another term, that of “truly international public policy,” this article will apply the terminology of *ordre public,* or public policy, in the narrow sense generally assumed in international arbitration and without the adjective “international.” Public policy is, thus, a narrower category than the body of overriding mandatory rules in a given state.

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24 This is an even narrower category that comprises only those fundamental principles that are common to a large number of states. This category has mainly academic relevance, as national courts can hardly be expected to disregard fundamental principles in their own systems, in case these are not shared by other states. See Cordero-Moss, *supra* note 4, at 245; Radicati, *supra* note 10, at 67.
Public policy is relevant not only in the context of annulment or enforcement of arbitral awards: it is also a limitation to the application of a foreign governing law, and to the enforcement of foreign court decisions. In EU law, the former is regulated, *i.a.*, in the Rome I and Rome II regulations, respectively in articles 21 and 26, and the latter in the Brussels I Regulation, 25 article 45. Under all these instruments, as well as under the New York Convention, the Model Law on arbitration and most national arbitration laws, public policy may be seen as an expression of the basic socio-economic principles of the society, and does not necessarily correspond to the positive content of specific provisions; it is the underlying principles that may constitute public policy, not the technicalities of the provisions.

Therefore, even though a certain provision may be deemed to protect fundamental principles of a given system, public policy will not necessarily be deemed violated if the specific, technical content of that provision has not been accurately followed – as long as the underlying principles have been safeguarded. 26 Public policy, in other words, is not meant to ensure an accurate application of the details of a provision (quite irrespective of whether the provision is based on fundamental principles), but to make sure that the interests protected by that rule are safeguarded. As a corollary, a violation of public policy may not be determined in the abstract, simply observing that a certain rule was not applied accurately. It will be necessary to evaluate case by case whether the violation of a certain provision entailed violation of public policy or not. 27

The specific content of public policy is dynamic: principles that in the past were considered to constitute public policy, may have lost their paramount importance after a few years, 28 and vice versa. 29 In addition, 25 Council Regulation 1215/2012, 2012 O.J. (L 351/1) 1 (EC). The EU has a convention with Iceland, Norway and Switzerland, the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is meant to be parallel to the Brussels I Regulation. The Lugano Convention corresponds to the text of the Brussels I Regulation 44/2001, as it was prior to the 2012 recast. In the Lugano Convention, the provision on public policy is in article 34, see Council Decision 2007/712/EC, 2007 O.J. (L. 339/1) 1.

26 See Cordero-Moss, *supra* note 4, at 246; Radicati, *supra* note 10 at 56 - 60.
27 See Cordero-Moss, *supra* note 4, at 247; Radicati, *supra* note 10, at 60.
28 An illustration is the prohibition of gambling under Austrian and German law (so-called *Differenzieinwand*), that was successfully invoked during the 1980s to refuse enforcement of arbitral awards or recognition of arbitration
the content of this category varies geographically: Although it is desirable to avoid municipal differences, ultimately the national courts are called upon to give effect to the fundamental principles in their own legal system. Therefore, there may be differences in what each state evaluates to constitute a fundamental principle. Admittedly, where the defence of public policy is regulated in an international instrument, such as the New York Convention, the international character of the source will have to be considered in the interpretation of the defence’s function, the conditions for its exercise and its effects; these, therefore, will have to be interpreted autonomously. However, the specific content, i.e. which principles are fundamental in a given legal system, will be determined by that national system. Thus, with respect to enforceability of awards the New York Convention sets the borders for how the defence may be used, along the lines of what was briefly described above. The same is done, with respect to invalidity of awards, by an internationally oriented application of national arbitration law – to which the countries who adopted the UNCITRAL Model Law are committed, and which is generally followed also by other countries. The determination of which principles are fundamental, on the contrary, is left to the national courts.

Member states of the European Union have to take into consideration, in addition to their own fundamental principles, principles that are deemed fundamental at the Union level. In a controversial decision, the Court of Justice of the European Union affirmed that European competition law has to be considered as European public policy. The CJEU justified this qualification affirming that competition rules “are necessary for the achievement of the internal market.”

agreements concerning the first agreements on financial derivatives that appeared in the financial market – whereas it a few years later was not deemed to be an obstacle any more to the enforcement of an award concerning the same type of agreements, see Cordero-Moss, supra note 4, at 380.

An illustration is the payment of bribes to obtain contracts in foreign countries: until recently these were considered as tax-deductible costs in many jurisdictions, whereas now anti-corruption legislation is increasingly passed and being considered as a matter of public policy, see Martine Millet-Einbinder, Writing of Tax Deductibility, OECD OBSERVER (Apr. 2000), http://www.oecdobserver.org/news/archivestory.php/aid/245/Writing_off_tax_deductibility_.html.

Case C-126/97, Eco Swiss China Time Ltd. v Benneton Int’l NV, 1999 E.C.R. I-3079.
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Given the narrow understanding of the defence of public policy (a narrow understanding that is shared by the EU instruments of private international law such as the Rome I and Rome II Regulations and the Brussels I Regulation), it is to be expected that the Court of Justice has a restrictive understanding of this formulation. As most EU rules have the purpose of achieving the internal market, emphasis should be placed on the adjective “necessary” – otherwise, a situation may arise where the majority of EU regulation is deemed to be public policy. This would run counter the assumption that the public policy defence shall be used only in exceptional cases.

Moreover, the narrow use of the public policy defence, as described above, does not imply that any non-compliance with an EU rule automatically leads to violation of public policy, even when the rule is necessary for the achievement of the internal market. It is first when the underlying principles are violated, that public policy may become relevant.

Some national courts, as well as the Advocate General of the CJEU, seem to have, in respect of arbitrability, an expansive understanding of what is necessary to achieve the internal market (see subsection III.B below). Such an extensive understanding threatens to blur the line between overriding mandatory rules and public policy. It is not desirable development in the context of private international law in general, and is even less desirable in the context of international arbitration.

In recent case law, however, the CJEU confirmed the narrow understanding of public policy and stated that a violation of an EU rule, even violation of a rule that has an impact on the internal market, shall not automatically be deemed to qualify as a violation of public policy.31

b) Intensity of court control

A debated aspect of the exercise of the public policy defence is the intensity of the control that may be exercised by the court in case an award is challenged or enforcement is resisted on the basis that the award disregarded applicable rules and this may lead to violation of public policy.

There are two opposed views, defined as maximalist and minimalist.32

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The maximalist view is that the court may independently assess whether the award properly applied the rules and, thus, whether public policy was safeguarded or violated.

The minimalist view is that the court may not revise the application of law and the assessments made by the arbitral tribunal, but has to limit itself to verifying whether the arbitral tribunal has considered, with the due attention and competence, the rules that are deemed to be relevant to public policy.

Thus, the maximalist view assumes an independent review by the court of the application of law; the minimalist view assumes that the court owes deference to the application of law made by the arbitral tribunal. However, there seems to be a convergence between these two approaches on the principle that the defence of public policy shall not be used to re-judge the dispute: court control of arbitral awards is not meant as a tool to permit a review of the merits, neither in respect of the application of the law or of the assessment of the facts. Therefore, an error of law or a divergent opinion by the court is not sufficient to deem public policy violated.\(^{33}\) It has been suggested that it should be possible to exercise court control by examining, in some detail, the reasoning of the award. Only in exceptional cases, such as when the award has no reasons, or the award did not consider applicability of public policy rules, the court may be allowed to go further than that and examine the parties’ pleadings or the evidence produced in the arbitral proceeding – or, in extreme cases, to launch a full-fledged investigation.\(^ {34}\)

In my opinion, while it is desirable that courts exercise self-restraint and do not consider the public policy exception as an appeal on point of law, this restrictive approach should not go so far as to expect that a court delegates to the arbitral tribunal the evaluation of whether fundamental principles in the court’s own system have been violated.

In the recent Genentech-case,\(^ {35}\) the Advocate General Wathelet pleaded for an extensive court control and criticised the minimalist approach, according to which court control may be exercised only in the case of manifest infringement of public policy, and only if the issue had not been examined in the arbitration proceeding. The requirement that only manifest infringements may trigger court control was criticised for making court control illusionary – because many restrictions of

\(^{33}\) See Cordero-Moss, supra note 4, at 246; Radicati, supra note 10, at 62.

\(^{34}\) Radicati, supra note 10, at 63.

\(^{35}\) Case C-567/14, Genentech Inc. v Hochoest GmbH, 2016 E.C.R.
competition that are forbidden in EU law by article 101 TFEU would escape review.³⁶ The requirement that the court owes deference to the decision made by the arbitral tribunal was criticised as being at odds with the system of review of compatibility with EU law: as arbitral tribunals have no competence to refer to the CJEU questions for preliminary rulings, in the view of the AG, the responsibility for reviewing compliance with EU law must be placed with the courts and not with arbitral tribunals.³⁷ On this basis, according to the AG opinion, the principle that a court may not review the substance of an award does not prevent the court from considering the issue of compliance with competition law independently, even though the issue has already been considered by the arbitral tribunal – given that article 101 TFEU is a provision of fundamental importance in the EU legal order.³⁸

The AG seemed to assume that any and all violations of article 101 TFEU would amount to a violation of EU public policy; ³⁹ as was mentioned above, this expansive understanding is at odds with the narrow category of public policy that is recognised in private international law generally, and in EU instruments of private international law as the Rome I, Rome II and Brussels I Regulations.

In its final judgement in the Genentech case, the CJEU ignored the matter and did not take a position on the scale from the AG’s maximalist approach with automatic effects to the minimalist approach with deference to arbitral tribunal’s evaluation. Therefore, there has not been a clarification on this point.

It should also be pointed out that the minimalist approach and the narrow understanding of public policy are not necessarily interlinked – it can be well envisaged that a court has independent competence to review the compatibility of the award with public policy (as the maximalist approach suggests), but that it will apply the public policy rule in a narrow way (as the above described consensus requires). This is the approach preferred here.

³⁶ Id. Opinion of Advocate General Wathelet, ¶ 64-67 (March 17, 2016).
³⁷ Id., ¶ 59-62.
³⁸ Id., ¶ 70-72.
³⁹ In the specific case, the Advocate General concluded that article 101 TFEU was not violated. The CJEU confirmed that there is no automatic equivalence between violation of competition law and violation of public policy, see Diageo, supra note 31.
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c) Fundamental principles

The foregoing shows that, as a starting point, there is no automatic correspondence between overriding mandatory rules and public policy. Even though overriding mandatory rules pursue public interests and may therefore have affinities with situations where fundamental rights are at stake, not all aspects of an overriding mandatory rule are necessarily of such importance that they may be relevant to public policy. The underlying principles may be safeguarded even if the technical content of the rule was not implemented accurately. Moreover, not all violations of such rules have necessarily so serious consequences that they shall be deemed to violate public policy. This should be true even for EU overriding mandatory rules – considering that any violation of EU overriding mandatory rules amounts to a violation of public policy, would be difficult to reconcile with the narrow scope of public policy supported in EU private international law.

On the other hand, fundamental principles may become relevant even in the absence of overriding mandatory rules. The disputed contract may affect interests in areas that a state regulates with the aim of protecting third party interests, and where therefore party autonomy is excluded. For example, company law and property law are areas with mandatory rules and where the applicable law is mandatorily chosen by conflict rules that do not contemplate the possibility for the parties to make a choice. Rules of company law and of property law, however, may not be considered overriding mandatory rules, because they do not override the applicable law: they are the applicable law as a consequence of the mentioned conflict rules.

An illustration may be useful: assume that a shareholder agreement regulates how the parties will instruct the directors to vote in the company bodies, or which decisions should be taken in which company body and according to which procedure. The regulation does not comply with the applicable company law, but the shareholders’ agreement contains a choice of law in favour of a more liberal law. Assuming that one of the parties to the shareholders agreement refuses to perform these obligations because they violate the applicable law, and that the other party insists on their application and invokes the contract’s choice of law; and assuming that the arbitral tribunal gives full effect to the contract’s choice of law, the result may be an award that considers the non-performing party in default and orders it to pay reimbursement of damages for having complied with the applicable company law. The
contractual obligations between the parties are actually governed by the
chosen law, while the company law aspects are subject to the applicable
company law, among other reasons for the purpose of protecting the
interests of minority shareholders. Depending on the circumstances, an
award giving effect to a contract that violates these rules may be
considered to violate fundamental principles.40

Similarly, a contract may create security interests that do not comply
with the applicable law on pledge, and an award giving effect to the
contract may, under circumstances, create a situation that deprives other
creditors of the protection that the law on pledge grants them. Seen in the
context of the principle of equality among the creditors in insolvency
law, and assuming that the latter is deemed fundamental, there may be
implications of public policy.41

The foregoing shows that the classification as overriding mandatory
rules is neither sufficient nor necessary for a potential relevance of the
defence of public policy. However, as the defence is to be applied very
restrictively, it will be only under exceptional circumstances that an
award will be set aside or refused enforcement for having infringed
fundamental principles on the basis of disregard of applicable rules.

2. Arbitrability

The New York Convention and the Model Law contain another
defence that may become relevant in respect of overriding mandatory
rules: the defence that the subject-matter of the dispute was not capable of
being subject to arbitration. The purpose of this defence is to ensure that
the courts are the only venue for resolving disputes in areas where the legal
system considers it essential to ensure an accurate application of the law.

Arbitrability is a defence that has undergone an interesting evolution:
as legal systems became more arbitration-friendly during the second half
of the XX century, the scope of the defence has been restricted
accordingly.42 However, as will be seen below, there are signs that it may
be starting to expand again.

40 See Cordero-Moss, supra note 4, at 248. But see Radicati supra note 10, at 61 (affirming that an award that is merely deciding on damages does not breach public policy, even though damages are a consequence of the breach of a contract provision that did violate public policy).
41 See Cordero-Moss, supra note 4, at 249.
42 See Cordero-Moss, supra note 4, at 122.
Representative of the evolution towards a narrower application of the defence is the US Supreme Court decision in the Mitsubishi case, which did not exclude the arbitrability of a dispute where anti-trust regulation was involved (traditionally considered inarbitrable). The court permitted arbitration and relied on the possibility to review the accurate application of competition law at the stage of enforcement (the so-called second look doctrine).

More recent case law, particularly of EU state courts, seems to reverse this trend and denies the arbitrability (or the recognition of a contractual choice of forum in favour of a court not located within the EU) in disputes regarding contracts of commercial agency. Commercial agency is an area where EU law has overriding mandatory rules with the purpose in part to protect the agent, who is considered to be the weaker party in the relationship, in part to ensure free movement within the internal market and in part to ensure that all commercial activity carried out on the European territory is carried out under comparable circumstances. Permitting a principal to employ commercial agents at conditions more favourable to the principal than the conditions imposed by EU rules is deemed to have an impact on competition and on the internal market. For this reason, some courts have affirmed that disputes concerning commercial agency be decided by courts that belong to the EU: the choice of a court outside the EU, or the choice of arbitration, may endanger the effective enforcement of EU law. This approach seems to go further than necessary or advisable.

It is possible to see parallels with the abovementioned reasoning in Advocate General Wathelet’s G’s opinion in Case C-567/14 (Genentech). It should be reminded here, however, that the AG opinion in Genentech was completely disregarded by the CJEU in this regard: the Court did not discuss the matter. The opinion in Genentech regarded restrictions to the review of arbitral awards, in particular, the question whether an annulment court should be limited to examining flagrant

infringements of public policy, or whether it has the power to independently evaluate the compatibility of the award with EU competition law. The AG argued that restrictions to the court’s review are contrary to the principle of effectiveness of EU law because they deprive the court of the possibility to ensure, by referring a question for preliminary ruling to the CJEU, compliance with EU law. Moreover, the AG observed that, since arbitral tribunals (and, we can add, courts outside the EU) fall outside of the scope of application of the Brussels I Regulation, they also are excluded from the principle of mutual trust among the courts of Member States, established precisely by the Brussels I Regulation.

A similar reasoning was at the basis of Advocate General Jääskinen’s opinion in another case involving EU competition law. Here, the AG argued that, as long as the chosen court is within the EU, the principle of mutual trust prevents invoking, as a ground to disregard the choice of forum agreement, the risk that the chosen court may not give effective enforcement of EU competition law. The principle of mutual trust, however, does not apply to arbitration. Therefore, regarding arbitration agreements, the AG invoked the principle of effective enforcement of EU competition law. The AG recalled the above-mentioned CJEU decision on Eco Swiss, affirming that EU competition law may be regarded as a matter of public policy and that questions regarding the compatibility of an arbitral award with EU competition law should be open to examination by national courts. The Eco Swiss reasoning was made in the context of the court’s review of an arbitral award. The AG extended this reasoning by analogy to the issue of arbitrability. On one hand, the AG recognised that an arbitration agreement does not necessarily deprive victims of an alleged violation of EU competition law of the possibility to obtain full compensation in

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46 Id. ¶ 59.
47 Id. ¶ 69.
48 Case C-352/13, CDC Hydrogen Peroxide, 2015 E.C.R.
49 Id. ¶ 116.
arbitration. On the other hand, the AG described this as a theoretical possibility, and its implementation into practice as a “matter of some delicacy.” In respect to horizontal restriction of competition, as in the case at hand, the AG argued that an arbitration agreement would be compatible with the principle of effective enforcement only if the victims had expressly accepted arbitration and the arbitral tribunal was required to apply EU competition law as rules of public policy.

The CJEU decided only in respect to agreements choosing a court within an EU member state. The CJEU declined to answer in regards to arbitration agreements and forum agreements choosing a court outside the EU, affirming that it did not have sufficient information. It is, therefore, left open whether the AG’s arguments would be capable of restricting the arbitrability of a dispute concerning EU public policy. On the one hand, in respect to forum agreements choosing an EU court, the CJEU affirmed that the quality of the substantive rules applicable to the merits may not affect the validity of a jurisdiction clause. Therefore, the requirement for effective enforcement of public policy may not prevent choosing a court within the EU. On the other hand, the CJEU emphasized that this is based on the principle of mutual trust established by the Brussels I Regulation. As arbitration agreements fall outside the scope of the Brussels I Regulation, they are not part of the system of mutual trust. As the irrelevance of the requirement for effective enforcement is linked with the system of mutual trust, the CJEU reasoning may not be used to confirm arbitrability of disputes concerning EU-public policy.

The second look doctrine seems to be more compatible with the arbitration-friendly regime based on the New York Convention. Rather than excluding arbitration automatically and a priori, simply on the basis that the dispute is on an area regulated by laws that need being applied accurately, it is better to permit arbitration and verify at the stage of

52 Id. ¶ 126.
54 Id. (referring to Case C-159/97 Castelletti v Trumpy, at ¶ 51. The AG supported the same view).
55 Id. ¶ 63.
56 See Radicati, supra note 10, at 58 (Casting doubt on the assumption that arbitration is not capable of an accurate application of the law).
challenge or enforcement whether the award is compatible with fundamental principles.  

C. Applying Overriding Mandatory Rules or Observing the Contract Terms?

That disregarding applicable (overriding) mandatory rules does not necessarily lead to an award being set aside or refused enforcement, does not automatically imply that an arbitral tribunal shall not take these rules into consideration.

Other than when disregard or breach of the applicable law results in a violation of fundamental principles, as was seen above, there seem to be no clear guidelines regarding the accuracy with which an arbitral tribunal is expected to apply the governing law. The issue becomes relevant particularly where the applicable law negatively affects the validity or enforceability of some of the terms contained in the contract – for example (without suggesting that these rules are overriding), where the contract contains a detailed mechanism for payment of penalties in case of delay in the performance and the governing law is US law, under which penalties are not enforceable. In the dilemma between applying the governing law accurately (with the consequence that the penalty clause becomes unenforceable) and following the will of the parties as recorded in the contract (with the consequence that the prohibition of penalty clauses in the applicable law is disregarded), various approaches have been suggested. It seems difficult to give a general guidance, as the circumstances of the case and the quality of the relevant rules may have an influence on the approach taken by the arbitral tribunal.

Although situations may be envisaged, where the courts do not have the possibility to give a second look: where the arbitral tribunal had the seat outside the EU/EEA area, courts of EU/EEA states will not have jurisdiction on the validity of the award. Likewise, these courts will not have jurisdiction on the enforcement either, if the award is carried out voluntarily by the losing party, is sought enforced in a country outside the EU/EEA area, or is not sought enforced.

A recent Supreme Court decision departed from the restrictions to contractual penalties traditional found in English law, see Cavendish Square Holding BV v Talal El Makdessi [2015] UKSC 67; see also ParkingEye Ltd. v Beavis [2015] UKSC 67. US case law, to the contrary, still operates with the traditional restrictions, see Caudill v. Keller Williams Realty, Inc., Caudill v. Keller Williams Realty, Inc., 2016 WL 3680033 (7th Cir. July 6, 2016).
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As a matter of principle, there are two opposite approaches. One
approach gives prevalence to the will of the parties and emphasizes that
the arbitral tribunal receives its mandate from the parties. This approach
leads to the conclusion that the arbitral tribunal shall disregard the
applicable law if it invalidates a term of the contract. The other
approach gives prevalence to the judicial function of arbitration, and
points out that arbitral tribunals shall apply the law accurately. As long
as the award does not violate public policy, the arbitral tribunal is free to
choose between these approaches.

Between these opposed extremes there are proposals of criteria that may
add objectivity to the choice of approach. It has been suggested that, in a
contract containing a choice of law clause in favour of a law that
invalidates another term of the contract, the principle of lex specialis
should be applied. As the choice of law clause has a general character,
the other term of the contract may be deemed to have derogated from it.
This approach, however, does not seem to be a sufficient basis for
disregarding overriding mandatory rules: as these rules, per definition,
override any choice of law made by the parties, even more so will they
override a diverging contract term.

It has also been suggested that the relationship between the chosen
law and contract terms that may be affected by it should be informed by
the expectations of the parties.

It is certainly true that, in commercial transactions, objectivity and
predictability in the construction of a contract are of paramount
importance, as contracts often are scrutinized by third parties for the
purpose of, for example, financing the project or determining the
insurance premium. It seems, therefore, fair to assume that the parties’
expectations are that a contract be read on the basis of its own terms,
without interference from external sources (including also the applicable

59 See Radicati, supra note 11, §§IV – V (supporting this approach).
60 See Giuditta Cordero-Moss, “Detailed contract regulations and the
UPICC: parallels with national law and potential for improvements – the
example of Norwegian law”, UNIDROIT (ed), Eppur si muove: The Age of
Uniform Law. Essays in Honour of Michael Joachim Bonell to Celebrate His
70th Birthday, UNIDROIT 1302, § 3.4 (2016); Joshua Karton, The arbitral role
in contractual interpretation, 6 J. INT’L DISPUTE SETTLEMENT 2015, 4-41.
61 See W. Park, The Predictability Paradox, in The Application of
Substantive Law by International Arbitration 62 (F. Bortolotti & P. Mayer eds.,
2014).
62 Radicati, supra note 11, at §§ III a; IV.
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law). This seems to be confirmed by the style in which commercial contracts usually are written: contracts are very detailed and have the ambition of regulating the legal relationship exhaustively. They even contain terms (so called boilerplate clauses) that regulate the interpretation and general operation of the contract, with the aim of substituting the applicable general contract law. All this seems to indicate that the parties’ expectation is that the contract terms shall prevail, in case of conflict with the applicable law. Moreover, often a choice of law clause is inserted at the last minute, without the parties having taken particular care in ascertaining the content of the chosen law and its effects on the contract.63

However, not all terms are inserted into the contract with the specific intention that they shall prevail. Parts of the contract certainly are, for example the parts setting forth the specifications of the obligations. Other parts, on the contrary, are inserted out of a need to standardise internal documentation and on the basis of a cost-benefit analysis – particularly when the contract is entered into by a company with extensive international activity.64 Tailoring each contract to the applicable law would assume an assessment of each of the applicable national laws, an adjustment of the contract model to the need of each law, as well as negotiating with the counterparty who may be used to the more standardised language. Also, it would not be possible to standardise contract management, as this would have to be tailored to each applicable law. All this has a cost that may exceed the costs connected with the potential risk of seeing a standardised contract term declared invalid because it conflicts with the applicable law. In short, the parties may assess and assume the legal risk connected with using terms that are not adapted to the applicable law. In a situation as this, an analysis of the parties’ intentions may not lead to the conclusion that the parties

63 See Giuditta Cordero-Moss, Interpretation of contracts in international commercial arbitration: diversity on more than one level, in 22 EUR. REV. PRIV. L., 13 (2014).

expected the contract terms to prevail in case of conflict with the applicable law.  

In the following section, I suggest that the borders for the arbitral tribunal’s powers are ultimately determined by the applicable arbitration law and by private international law. These may give guidance as to the arbitral tribunal’s powers regarding the application of law.  

**D. Excess of Power if the Tribunal Overrides the Contract Terms?**  

The sections above showed that disregarding or breaching overriding mandatory rules has no direct impact on the validity or enforceability of an award, as these are affected only when the award violates the court’s public policy or its arbitrability rule — and a breach of overriding mandatory rules does not automatically mean that public policy was violated. It remains to verify whether the arbitral tribunal has the power to take into consideration overriding mandatory rules, given that these do not belong to the law chosen by the parties or applicable according to conflict rules.  

Following the logic set forth in this article, to answer this question it is necessary to inquire whether any of the grounds for setting aside an award or refusing its enforcement may be triggered as a consequence of the application by the arbitral tribunal of overriding mandatory rules that do not belong to the applicable law. There are many bases upon which the governing law may have been determined: the disputed contract or the arbitration agreement may have contained a choice of law clause; the parties may have agreed on which law to apply after the dispute arose; the arbitral tribunal may have selected the applicable law after having applied conflict of laws rules; or, where arbitration law or arbitration rules allow the arbitral tribunal to do so, the applicable law may have been selected simply because it seemed appropriate to apply that law (so-called *voie directe*). Where the arbitral tribunal finds that overriding mandatory rules not belonging to the applicable law should be given effect, various scenarios may be imagined: none of the parties invokes these rules, and the arbitral tribunal desires applying them *ex officio*; or, one party invokes them and the other party objects to their application because they do not belong to the chosen law. In a third scenario, where both parties agree on the applicability of these rules, the issues analysed here do not arise. In a

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65 See Cordero-Moss, supra note 4, at 14; Cordero-Moss, supra note 63, at 22.
fourth scenario, where both parties explicitly instruct the arbitral tribunal to disregard the overriding mandatory rules, it has been suggested that the arbitral tribunal should decline its mandate.  

Among the grounds for invalidity or unenforceability, which were quickly mentioned in subsection III.B above, one ground may be relevant here: excess of power, also known as *ultra petita*. The main purpose of this ground is to ensure that the award is rendered within the borders set by the arbitration agreement and by the parties’ pleadings. An award that goes beyond those borders is an award not based on the parties’ consent to arbitrate, and is therefore invalid and unenforceable. Generally, this ground is considered to apply when the arbitral tribunal decides on matters that were not raised by the parties, or when it otherwise goes beyond the scope of power that was conferred on the arbitral tribunal. As an illustration may be mentioned an award ordering one party to set off its claims against claims that the other party has under a contract that was not subject to the arbitration agreement under which the arbitral tribunal was appointed. Often, the defence of excess of power is considered to be irrelevant to the question of the applicable law.  

However, the applicable law is certainly relevant to the scope of the dispute: the scope of the dispute is in part determined by the disputed contract, and the contract does not have legal effects simply in force of itself – it receives its legal effects from the governing law. The same contract wording may have dramatically different effects depending on which law governs it. It may be argued, therefore, that the scope of the dispute is (in part) determined by the contract as construed under its applicable law. An arbitral tribunal that applies a different law may be equalled to a tribunal that applies a contract wording different from the wording contained in the disputed contract. Hence, the tribunal may be deemed to have gone beyond the powers that were conferred to it under the contract.  

Although it is not often recognised that application of a law different from the applicable law may constitute an excess of power, therefore, there is no conceptual obstacle to invoking this defence in such a situation.

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66 Radicati, *supra* note 10, at 70.  
67 See Cordero-Moss, *supra* note 19, § 1 C 1.  
68 See Cordero-Moss, *supra* note 4, at 90.  
69 *Id.* at 282.
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It is, therefore, necessary to verify whether the tribunal has the power to apply overriding mandatory rules when these do not belong to the applicable law, or whether this goes beyond the powers that the parties conferred on the tribunal. The sections below present two alternative approaches to answering this question, which have a different starting point, but seem to come to comparable results.

1. The Private International Law Route

The route preferred here is based on the revitalisation of an approach that many consider old fashioned. In short, this approach applies the traditional legal method and looks for legal sources that may justify legal effects. The legal effect of interest here is the arbitral tribunal’s power to apply overriding mandatory rules not belonging to the applicable law. If the parties chose the applicable law, the corresponding limitation to party autonomy must be justified. If the arbitral tribunal selected the applicable law, the exception to the rule under which the governing law was selected must be justified.

In both situations, it seems appropriate to assess first what is the legal source that permits the parties or the arbitral tribunal to choose the applicable law; on this basis, it will be possible to explain the restrictions or exceptions to this choice.

According to the traditional approach, the parties’ or the arbitral tribunal’s choice of law is regulated by that branch of the law that goes under the name of private international law (also known as conflict of laws, or choice of law rules). As known, the private international law contains rules that give instructions as to how to select the applicable

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70 The role of private international law in arbitration has undergone an evolution, from being the classical framework for choice of law to being criticised by some for being a rigid and undesirable mechanism, see Giuditta Cordero-Moss, Arbitration and Private International Law, 11 INT’L ARB. L. REV. 153, 153 (2008); Radicati, supra note 10, § 1b. The criticism against private international law in arbitration, however, is not unanimously shared, see Giuditta Cordero-Moss, Arbitration and Private International Law, 11 INT’L ARB. L. REV. 153, 153 (2008); G. Cordero-Moss, International commercial contracts, supra note 4, at 203.

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law. Today, European Union Regulations or international conventions,\textsuperscript{72} harmonise part of the private international law, but national law still regulates some areas of the private international law.\textsuperscript{73}

In the field of international arbitration, some specific private international law rules are codified in international conventions,\textsuperscript{74} whereas others are regulated in national arbitration law. Of particular interest in the trans-national context may be the 2015 Principles of Choice of Law in International Contracts,\textsuperscript{75} published by the Hague Conference and meant as a restatement of generally recognised principles of private international law.

Regarding the law applicable to the merits of the dispute, which is the relevant issue, national arbitration law is harmonised by the UNCITRAL Model Law and contains a choice of law rule giving the parties’ the possibility to choose the applicable law.\textsuperscript{76} In case the parties have not made use of their party autonomy, the UNCITRAL Model law directs the arbitral tribunal to apply the conflict rules that the tribunal “considers applicable”.\textsuperscript{77} The Model Law, thus, follows the traditional approach and applies the private international law mechanism. However, in the revision of 2006, the Model Law received a more flexible version and was emancipated from the automatic application of the private international law of the state where the tribunal has its venue. This was meant to cater to the situations where the venue of arbitration has no connection with the dispute, and where it may be appropriate to apply the conflict rules of states with closer connection. In practice, in many situations, arbitral tribunals may still consider the venue of the arbitration as a significant connecting factor and thus apply its conflict rules to determine the law applicable to the merits of the dispute.

\textsuperscript{72} Some conventions drafted by the Hague Conference have the purpose of harmonising choice of law rules, see https://www.hcch.net/en/instruments/conventions.

\textsuperscript{73} For example, company law and property law.

\textsuperscript{74} For example, the New York Convention contains choice of law rules regarding the law governing the capacity of the parties, the validity of the arbitration agreement, the arbitral procedure, arbitrability and public policy.

\textsuperscript{75} See Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, March 19, 2015, art. 11(5).

\textsuperscript{76} See United Nations Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, UNCITRAL, art. 28(1).

\textsuperscript{77} See id., at art. 28(2).
According to the Model Law, the venue is the proper connecting factor for a series of important aspects, such as the validity of the arbitration agreement, the arbitral procedure, the tribunal’s power to issue interim measures, the validity of the award and the applicable public policy – it does not seem unreasonable to consider it as a proper connecting factor also for the conflict rules. Some jurisdictions have formalised these considerations and instruct the tribunal to apply the private international law of the venue.\textsuperscript{78}

However, not all jurisdictions have adopted the Model Law’s reference to private international law (of the venue or otherwise): some jurisdictions provide a specific conflict rule for arbitration,\textsuperscript{79} some contain no guidelines at all,\textsuperscript{80} and some regulate the so-called \textit{voie direct},\textsuperscript{81} that does not rely on private international law and gives no criteria for the selection of the applicable law. It cannot be excluded that arbitral tribunals will make use of private international law even when the arbitration is subject to an arbitration law that does not regulate the selection of law or provides for the \textit{voie direct}: although not required to apply conflict rules, arbitral tribunals may find that the well-known mechanism of private international law permits to select the law more objectively and predictably than the mere discretion without guidelines. Even though conflict rules may be complicated and sometimes they may leave room for discretion, the abundant literature and case law on the area contribute to rendering its application quite predictable.

With the exception of the latter mentioned approach, the \textit{voie directe}, (that is the starting point for the observations made in the section below), this short overview shows that the private international law has still a quite important role in arbitration.\textsuperscript{82} Even those who deem it undesirable to apply a national system of private international law, can find the mechanism underlying private international law in generally

\textsuperscript{78} See Arbitration Act, 2004, § 31(2) (Nor.).
\textsuperscript{79} See SCHWEIZERISCHES ZIVILGESETZBUCH, [CC] CIVIL CODE, Dec. 18, 1987, art. 187 (Switz).
\textsuperscript{80} For example, Swedish and Italian law.
\textsuperscript{81} See \textit{e.g.} CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE], art. 1511 (Fr.).
\textsuperscript{82} See Cordero-Moss, \textit{supra} note 70 (On the role of private international law in arbitration); \textit{See also} Conflict of laws in international arbitration (Franco Ferrari & Stephan Kröll eds., 2010).
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acknowledged principles such as the Hague Principles on Choice of Law.\textsuperscript{83}

It is, therefore, justified to look at the private international law as the framework for determining the scope of the choice of law made by the parties and selected by the arbitral tribunal. As the choice of law is the exercise of a power based on private international law, any restrictions or exceptions that rely on principles or rules of private international law do not violate the choice of law; they simply implement the choice of law pursuant to its scope as determined in the legal sources upon which it is based.

Party autonomy in private international law generally applies only within the scope of contract law (and to a certain extent also tort law); if a dispute has implications of company law or property law, or if it is on areas where states exercise their regulatory powers, the court will apply the law chosen by the parties to the contractual aspects of the dispute, and to the other aspects it will apply the law selected according to the appropriate conflict rules (so-called dépeçage). In private international law, therefore, the parties’ choice of law does not cover areas where there may be overriding mandatory rules – and even if there were overriding mandatory rules in the area of contract law, the system of private international law would justify that they override the choice made by the parties.

It has been suggested that party autonomy in arbitration has a wider scope than party autonomy in private international law.\textsuperscript{84} Many choice of law rules contained in arbitration law permit the parties to choose the law applicable not only to the contract, but more generally to the merits of the dispute – for example, the UNCITRAL Model Law speaks of the law applicable to the substance of the dispute. This is interpreted as giving party autonomy a wider scope than the one party autonomy has in private international law as described above: if the dispute has implications that go beyond the mere contract law, according to this opinion party autonomy would cover also these aspects. According to this logic, therefore, the private international law would not be a sufficient basis to justify the arbitral tribunal’s power to override the parties’ choice of law: the parties’ choice of law would not be restricted to the mere contract matters, but would extend to any issues within the scope of the dispute.


\textsuperscript{84} Radicati, supra note 11, § IIIa.
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However, although the wording of the arbitration choice of law rule may seem wider than, for example, the wording of the Rome I Regulation – which applies not to the merits of the dispute, but only to contractual obligations – it may be questioned whether this can be taken as a basis for assuming that the parties in arbitration have the power to choose the law applicable to matters of company law, property law or regulatory matters. This is because the choice of law possible in arbitration relates to the merits of the dispute. Therefore, it must be interpreted within the scope of the dispute that may be decided by the arbitral tribunal. Generally, arbitration may decide disputes between the parties on rights and obligations that the parties may dispose of, and decides the dispute with effects for the parties. An arbitral tribunal may not render an award with effects for third parties: therefore, an arbitral award will not be empowered to decide that the resolution of a company body is invalid, or that a certain asset of the insolvent debtor is not available to the generality of the creditors. These aspects are outside of the dispute; hence, they are not covered by the broad language of the conflict rule for arbitration. The wording of the choice of law rule contained in the Model Law, therefore, does not seem to extend the scope of party autonomy in a significant manner.

In summary, a systematic interpretation of the sources applicable to arbitration, including also the private international law, seems to give justification for the arbitral tribunal’s power to apply overriding mandatory rules not belonging to the governing law. If the governing law was chosen by the parties, the arbitral tribunal does not violate its mandate because the choice made by the parties does not extend beyond contract (and possibly tort) law. If the governing law was selected by the arbitral tribunal, and it was selected applying private international law mechanisms, it is the private international law itself that gives the power to override the governing law.

2. Assuming an Ethical Duty

Similar results may be obtained following an alternative route that assumes an understanding of arbitration quite opposed to the position taken in the previous section: the understanding of arbitration as detached from national laws. Starting from the observation that party autonomy is fundamental in arbitration, and relying on the modern mechanism of the voie direct in case the parties have not made a choice, this approach concludes that it is not correct to assume that a certain
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national law constitutes the legal framework for arbitration – generally summarised with the statement that arbitration does not have a forum.\(^{85}\) In this frame of mind, it is not useful to look at principles of private international law to find a basis for limitations to party autonomy. Party autonomy in the context of arbitration is not considered as a regular conflict rule based on private international law; applying overriding mandatory rules belonging to a law different from the chosen law, therefore, constitutes a limitation of party autonomy that has to be explained on another basis.

Following this logic to its extremes leads to considering national laws completely irrelevant and arbitral tribunals obliged to obey exclusively by the will of the parties. This was indeed a largely supported view in the past, although voices were raised against it, pointing out that this approach would be detrimental to arbitration’s credibility.\(^ {86}\)

There has been an evolution in this approach, and nowadays there seems to be a consensus that arbitrators may not be deemed to be exclusively servants of the parties.\(^ {87}\) Although the arbitral tribunal is said to owe its primary allegiance to the parties, there is an “expectation, perhaps even a requirement that arbitrators apply mandatory rules.”\(^ {88}\) This is based on the acknowledgement that arbitration needs to preserve its credibility, if it is to enjoy the states’ continued recognition as an institution.

The arguments made to justify this position are largely similar to the arguments that supported the mentioned criticism against the delocalisation theory: States permit to arbitrate disputes, even in areas where there are mandatory rules, and lend their judiciary to ensure enforceability of the award; this extensive support of arbitration is premised on the assumption that mandatory rules will be applied competently in arbitration.\(^ {89}\) Also, arbitral tribunals are said to be under a

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\(^{85}\) Radicati, supra note 10, at 65.  
\(^{87}\) Radicati, supra note 10, at 72.  
\(^{88}\) Id. at 66.  
\(^{89}\) Id. at 66; Id. at 51. For the criticism against the delocalization theory, see Cordero Moss, supra note 86.
professional duty not to become accomplices of a violation or circumvention of the law.\textsuperscript{90}

The inference taken from these arguments, however, differs from the above mentioned criticism against the theory of delocalisation: the basis for the application of overriding mandatory rules is said to be an ethical duty\textsuperscript{91} which creates a power, possibly even a legal obligation\textsuperscript{92} to apply those rules.

Since this approach is based on the assumption that arbitration has no \textit{forum}, and that private international law is not applicable to arbitration, the question arises as to which overriding mandatory rules shall be applied. In international disputes, it is possible that rules from a variety of legal systems are potentially applicable. If the arbitral tribunal had applied a private international law (of the \textit{forum} or otherwise identified as the most appropriate private international law), it would have had some criteria to guide the selection of the applicable mandatory rules. However, under this approach the arbitral tribunal does not follow the private international law method. Therefore, there is the theoretical possibility that it ends up applying all mandatory rules that are potentially applicable, thus having an even more expansive application of mandatory rules than what is to be expected when the dispute is decided by a court.

To avoid this result, this approach recommends that overriding mandatory rules be applied “with reason and pragmatism”.\textsuperscript{93} The arbitral tribunal should consider applying only those rules “having a genuine and reasonable title to be applied in light of the circumstance of the case”, and also consider which courts would have had jurisdiction in the absence of an arbitration agreement, and which mandatory rules these courts would have applied.\textsuperscript{94}

This latter observation seems to show a convergence with the private international law-based approach described in the previous section: as courts apply private international law to give effect to mandatory rules, some private international law considerations may become relevant after all – for the purpose of guiding a reasonable application of the arbitral tribunal’s ethical duty to apply mandatory rules.

\textsuperscript{90} Id. at 68.
\textsuperscript{91} Radicati, \textit{supra} note 11, §V(c).
\textsuperscript{92} Radicati, \textit{supra} note 10 at 66.
\textsuperscript{93} Id. at 69.
\textsuperscript{94} Id.
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CONCLUSION

As seen in subsection III.D, there are different explanations for when and how overriding mandatory rules may be applied in arbitration. The two approaches described above have different starting points:

The approach preferred here is to rely on the traditional legal method and give the private international law a central role in determining the scope of the choice of law made by the parties or the arbitral tribunal—having determined this scope, the private international law ensures that application of rules not belonging to the chosen law does not constitute a violation of the arbitral tribunal’s mandate. Also, the private international provides the criteria for selecting which overriding mandatory rules to apply.

An alternative approach has the opposed starting point: it negates that private international has a role and assumes an ethical duty to apply overriding mandatory rules. This ethical duty is to be exercised reasonably, and considerations of private international may contribute to guiding this reasonable exercise. It seems, therefore, that, notwithstanding the diametrically opposed starting points, the two approaches may meet in the result.

The framework for the application of overriding mandatory rules not belonging to the chosen law is, in both approaches, based on the assumption that arbitral awards shall be considered final and binding unless there is a ground for setting them aside or refusing enforcement. The grounds that may be relevant are violation of public policy and lack of arbitrability.

That an award disregarded applicable overriding mandatory rules is in itself not sufficient to assume that the award violates public policy. It is necessary to assess whether the award actually and seriously violates the principles underlying these rules, and that these principles are fundamental.

Regarding the arbitrability rule, the general trend over the past decades has been to enlarge the scope of disputes that are arbitrable more and more, and the simple circumstance that some overriding mandatory rules are applicable is generally no longer considered a reason to exclude arbitration—certainly not if the dispute regards the private law aspects of these rules. However, there seem to be signs that some European states courts and the Advocate General of the CJEU may be reversing this arbitration-friendly trend for the purpose of ensuring that European rules necessary for the achievement of the internal market are accurately applied by courts in European states.
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In summary, arbitral tribunals should be wary of an interventionist approach that gives effect to any mandatory rules without taking into any consideration the parties’ expectations. At the same time, they should not lend themselves to circumvention of mandatory laws. Between these two extremes, arbitral tribunals may find guidance in the grounds for validity and enforceability of arbitral awards, as well as in private international law criteria (either because they deem private international law to be applicable, or because they find that it can contribute to a reasonable exercise of their ethical duty to apply mandatory law).

The principle of due process is a further caveat for arbitral tribunals that, *i.e.*, provides that each party has been given the possibility to present its case. This also includes the possibility to comment on the applicability of overriding mandatory rules that the arbitral tribunal may deem applicable. While the foregoing showed that arbitral tribunals may have the power to apply overriding mandatory rules that do not belong to the chosen law and that were not pleaded by the parties, it must be kept in mind that this power may not be exercised in a way that deprives the parties from their right to be heard. Therefore, it is important that the tribunal informs the parties of its intention to consider overriding mandatory rules that were not pleaded by the parties, and invites them to comment.\(^{95}\)

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\(^{95}\) See Cordero-Moss, *supra* note 19, § 3.2.