MANDATORY RULES AND THE DWINDLING RESTRAINT OF ARBITRABILITY

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The doctrine of arbitrability is perceived to be dead. But this does not mean that the relevance of public interest in international commercial arbitration is reduced to a minimalistic public policy exception. Rather, in light of the gradual decline of the arbitrability doctrine, many former issues of arbitrability must now be reframed as questions of application of mandatory rules, which must apply notwithstanding any agreement to the contrary between the contracting parties. This would involve shifting the responsibility for safeguarding public interests from courts to arbitrators; thereby, precluding the courts from re-tightening the screws of arbitrability due to a sense of distrust in the arbitration machinery. It is in this context that the notion of mandatory rules attains importance. Their relevance is premised on an assertion that although an arbitral tribunal derives its competence from the parties’ arbitration agreement, it is not merely a creation of contract. It owes equal allegiance to the rule of law, which includes the mandatory rules of the foundational legal framework that granted the parties their autonomy to arbitrate their disputes in the first place. Simultaneously, an arbitral tribunal’s duty to identify and apply relevant mandatory rules is also a component of its duty to render an enforceable award, by reference to the mandatory rules of the arbitral seat and the likely place(s) of enforcement of the eventual award.

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The authors thank Dr. Jan Kleinheisterkamp, Associate Professor of Law, London School of Economics, for his lectures on ‘International Arbitration and Public Policy’ at the MIDS, which were helpful in conceptualising this article.
I. INTRODUCTION

In the realm of international commercial arbitration, the concept of mandatory rules serves as an important tool to preserve the public policy considerations of a State in an otherwise private method of dispute settlement. It guides an arbitral tribunal as to what content of the applicable law is imperative to the decision-making process, notwithstanding any agreement between the parties to the contrary.

From this perspective, mandatory rules are the proverbial lighthouses in the sea of international commercial arbitration, where a fleet of arbitral tribunals often get swayed by the stormy winds of conflict of laws. Yet, their relevance, although much discussed, remains disputed. Questions are often raised about the source of an arbitral tribunal’s supposed duty to apply mandatory rules, and whether it would undermine the principle of party autonomy in international arbitration. This paper is yet another attempt to answer some of these questions, albeit from a different perspective. Though relying on the wealth of literature on this issue, the paper adopts a broad conceptual approach to endorse the relevance of mandatory rules when juxtaposed against the gradual decline of the arbitrability restraint.

To attempt an understanding of mandatory rules in isolation is futile. It is not the only tool that strives to balance the private commercial interests of the disputing parties with any public interest that may be impinged by the arbitral process. Quite to the contrary, the notion of mandatory rules is intrinsically related to the doctrine of arbitrability in as much as both are manifestations of the same eclectic concept of public policy. Thus, the evolving understanding of the latter necessarily affects the perception of the former. To put it differently, while the theoretical sources underlying the duty to apply mandatory rules remain independent, the importance attached to them is contingent on the threshold of arbitrability recognised across jurisdictions. The more the categories of disputes that are considered arbitrable, the greater is the need to recognise and impose on an arbitral tribunal the duty to apply mandatory rules. A relaxation of the arbitrability restraint allows more disputes that ordinarily belong to the domain of national courts to be resolved by arbitration; more disputes that would have been adjudicated by a qualified judge of a State to be decided by an arbitral tribunal. In such a circumstance, the responsibility for safeguarding the public interest element involved in an adjudicatory process must also be shifted from national courts to arbitrators. This is precisely what mandatory rules strive to achieve.

Part II commences by introducing the doctrine of arbitrability and how it is considered to be in decline across jurisdictions. Part III elaborates on the notion of mandatory rules in international commercial arbitration and why they hold significance. Against this backdrop, Part IV proceeds to identify the legal sources for an arbitral tribunal’s duty to apply mandatory rules if so required and Part V concludes. Throughout this discussion, the authors’ analysis remains conceptual and any references to judicial decisions emanating from different jurisdictions are only illustrative.
II. THE DECLINE OF ARBITRABILITY

The doctrine of arbitrability entails a general enquiry into which types of disputes are capable of settlement by arbitration, and which are not. It imposes a duty upon national courts to inquire whether the subject matter of the difference between the disputing parties can be arbitrated under the applicable law. Pursuant to the principle of competence-competence, this duty extends to arbitral tribunals as well; particularly since national legal systems often prefer to list the precise classes of disputes that may not be referred to arbitration. Accordingly, when a subject matter is considered inarbitrable under the applicable law, it deprives an arbitral tribunal of its jurisdiction. In other words, if commercial arbitration is construed as a garden of disputes, then the arbitrability doctrine is its proverbial gatekeeper; the first line of defence for keeping disputes unsuited for private adjudication outside its realm.

However, the barrier of arbitrability is increasingly perceived to be dead. The gradual decline of judicial hostility towards arbitration, coupled with an advent of public policy favouring arbitral awards and agreements, has caused significant expansion of the domain of arbitration. In the United States of America, for instance, matters of antitrust law and consumer rights, though traditionally suspected as being inarbitrable, have now made the cut of arbitrability. Chapter 29 of Title 35 of the Code of Laws of the United States of America, which enlists the remedies for the infringement of a patent, also explicitly provides for arbitrability of any dispute relating to patent validity or infringement arising under the contract. It is thus not surprising that the United States has progressively been regarded as one of the jurisdictions most amenable to settlement of disputes through arbitration.

A similar assertion, if not a stronger one, can be made about France, which permits

3 See UNCITRAL Model Law, art 16.
5 Youssef (n 1) 47.
7 Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc 473 US 614.
8 Sher v Alberto-Culver 417 US 506.
entities to enter into arbitration agreements ‘relating to rights of which they have the free disposal’; except ‘matters of status and capacity of the persons, in those relating to divorce and judicial separation or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned.’ Likewise, Article 177 of the Swiss Federal Act on Private International Law states that any ‘dispute involving an economic interest may be the subject-matter of an arbitration.’

In fact, if the United States of America has shown a discernable trend of steadily disarming the gatekeepers of its garden of commercial arbitration, a large part of continental Europe has always had puny gatekeepers to begin with. Couple that with what has colloquially been called a favourable climate for arbitration, and one finds the garden of arbitrable disputes continually blossoming! It is uncanny how commercial arbitration can find blossom and growth in these colder regions of the northern hemisphere, which are otherwise more suited to aridity.

At first glance, this may appear surprising to the tropically bred Indian arbitration lawyers. In India, the general principle remains that all disputes relating to rights in personam are amenable to arbitration, while those relating to rights in rem are not. However, certain disputes involving in personam rights may also be regarded inarbitrable for reasons of public policy. This situation is exacerbated by Indian courts who frequently rely on this exception to proclaim a category of subject matter to be inarbitrable. For instance, disputes relating to eviction or tenancy rights under a special law, claims arising out of a trust deed, consumer complaints, and claims of copyright infringement are considered inarbitrable in India, but perfectly arbitrable in most other jurisdictions. In this regard, the reasoning put forth by Indian courts often places excessive reliance on Section 2(3) of the Indian Arbitration & Conciliation Act 1996, which states that Part I of the Act ‘shall not affect any other law for the time being in force by virtue of which certain disputes

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11 French Civil Code, art 2059 (Translated by Georges Rouhette and Dr Anne Rouhette-Berton).
12 French Civil Code, art 2060(1) (Translated by Georges Rouhette and Dr Anne Rouhette-Berton).
13 Switzerland Federal Act on Private International Law, art 177(1). But see Case 4A_7/2018, Judgment of 18 April 2018 (Federal Court) on arbitrability of employment disputes in domestic arbitrations in Switzerland.
14 Booz Allen and Hamilton Inc v SBI Home Finance Ltd and Ors (2011) 5 SCC 532 [23].
15 ibid [22].
17 Booz (n 14) [22(vi)].
18 Vimal Kishore Shah (n 16).
20 The Indian Performing Right Society Ltd v Entertainment Network (India) Ltd (2016) SCC Online Bom 5893. But see Eros International Media Ltd v Telemax Links India Pvt Ltd, Notice of Motion No 886 of 2013 of Suit No 331 of 2013.
may not be submitted to arbitration.’

Therefore, as far as the gateway of arbitrability is concerned, the Indian approach remains anomalous.

In the above circumstance, the decline of the arbitrability doctrine in international commercial arbitration has sparked many fears, particularly since arbitrators are not traditionally considered to be the guardians of public order. They are understood to derive their jurisdiction only from the parties’ arbitration agreement, and for this reason, are expected to display special fidelity to their shared expectations. Consequently, one fears that the relevance of public interest in commercial arbitration may be reduced to minimalistic public policy exceptions; with little scope for judicial intervention at the stage of annulment or enforcement of an arbitral award. It is in this context that the notion of mandatory rules acquires immense significance. And the decline of the doctrine of arbitrability must compel a re-characterisation of some of the former issues of inarbitrability as questions involving the application of mandatory rules, be they of international or domestic origin. But this poses the question – what is the precise meaning of a mandatory rule? And is there a legal basis to corroborate their relevance?

III. THE NOTION OF MANDATORY RULES

Unlike its unruly sibling public policy, mandatory rules are indeed capable of being precisely defined. Pierre Mayer describes a mandatory rule as ‘an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship.’ This is consistent with Article 9 of the Rome I Regulations, which defines mandatory rules as the provisions, ‘the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under [the said] Regulation.’

Nonetheless, the question remains – what is the legal basis for an arbitral tribunal to apply a mandatory rule, especially if it is deemed to inhibit the principle of party autonomy?

21 Arbitration & Conciliation Act 1996, s 2(3).
22 Pierre Mayer, ‘Mandatory Rules of Law in International Arbitration’, (1986) 2 Arbitration International 274, 286; See Mitsubishi (n 7) 9 (‘… An international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties.’)
24 See for instance, Cytec Industries BV v SNF SAS, Cass civ 1er (4 June 2008), (2008) XXXIII Yearbook of Commercial Arbitration, [5] (‘[In the context of international public policy], the examination is limited to the flagrant, effective and concrete nature of the alleged violation.’)
25 Richardson v Mellish 130 ER 294 (1824).
26 Mayer (n 22) 275.
In other words, what is the legal basis for the tribunal to have a mandatory rule trump the law stipulated to govern the contract? The answers are multiple.

Mandatory rules, whether they are international or domestic, preserve a particular policy or public interest of a State. Some common examples include competition or anti-trust laws, laws for the protection of the environment, currency controls, as well as laws designed to protect those parties presumed to be in an inferior bargaining position, such as wage-earners or consumers. As such, by their very definition, mandatory rules possess an inherently imperative character. They apply to any commercial transaction made by the nationals of any particular State, notwithstanding the parties’ choice of applicable law. Ultimately, it is this imperative character that validates their relevance in international commercial arbitration. This is conceptually similar to the mandate of Section 23 of the Indian Contract Act 1872, which prescribes that the ‘object of an agreement is lawful, unless […] if permitted it would defeat the provisions of any law […]’

This assertion has received significant judicial approval. For instance, in Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc. (‘Mitsubishi’), the petitioner, a noted Japanese automobile manufacturer, was a joint venture between Chrysler International, S.A., a Swiss corporation, and another Japanese corporation. It sought to distribute its automobiles outside of the United States of America through Chrysler’s dealers. Toward this end, the Petitioner and Chrysler entered into a sales and distribution agreement with the Respondent, a Puerto Rico corporation, which provided that all disputes arising out of certain articles of the agreement or for the breach thereof shall be resolved through arbitration by the Japan Commercial Arbitration Association. Upon the occurrence of a dispute relating to the slackening of sales, the Petitioner approached the Federal District Court in the United States of America to seek an order to compel arbitration of the disputes in accordance with the arbitration clause. The Respondent, however, objected to such a relief, and instead filed counterclaims asserting certain provisions of the Sherman Antitrust Act. The dispute eventually reached the Supreme Court of the United States of America, which was then required to determine the arbitrability of antitrust disputes arising in the context of an international commercial transaction.

The US Supreme Court found in favour of arbitrability. However, it warned that ‘where the parties have agreed that the arbitral body is to decide […] claims, which includes […] those arising from the application of American anti-trust law, the tribunal […] should be bound to decide that dispute in accord with the national law giving rise to the claim.’ As such, while antitrust disputes could be referred to arbitration, the Court emphasised that the same may only be adjudicated by the arbitral tribunal by applying the national law

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28 Mayer (n 22) 275.
29 Indian Contract Act 1872, s 23.
30 Mitsubishi (n 7) 12. See also Mayer (n 22) 280 (‘[In Mitsubishi,] in holding that arbitrators have a right to apply such rules, the Supreme Court appears to presume that they are in some manner obliged to do so, which in turn makes it possible to trust them in this matter.’)
in question, i.e. the Sherman Antitrust Act. Its rationale was that merely by ‘agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute. Instead, it only submits to their resolution in an arbitral, rather than a judicial, forum.’ To paraphrase, an arbitration agreement is akin to a forum selection clause by which the parties agree to lawfully oust the jurisdiction of the competent national court in exercise of their procedural autonomy. It does not, however, dilute the substantive protection offered by the lex fori if the same possesses a mandatory character.

A similar affirmation of mandatory rules was arrived at in Accentuate Ltd v Asigra Inc. There, an arbitral tribunal seated in Canada, and mandated to decide under Canadian law, had rejected a claim advanced by an English commercial agent seeking compensation owed under European law for the termination of its contract. Notwithstanding the tribunal’s finding, the English Court seized of the same dispute in parallel held to the contrary. It reasoned that notwithstanding the parties’ contractual choice of law, it was obligated to give effect to the Claimant’s mandatory rights under the applicable European Union (‘EU’) Regulations.

To support its conclusions, the English Court relied on the decision rendered by the European Court of Justice in Ingmar GB Ltd v Eaton Leonard Technologies Inc. There, the Petitioner was the commercial agent of the Respondent, a company incorporated in California, USA. The agency contract between the two explicitly stipulated that it was governed by Californian law. However, when the Respondent terminated the contract in 1996 without paying commission to the Petitioner, the latter brought legal proceedings before the High Court of England for seeking compensation for damage suffered as a result of this termination. Initially, the High Court held that since the contract was governed by Californian law, the provisions of EU law relating to the payment of compensation to commercial agents did not apply. However, on appeal, the Court of Appeal (Civil Division) asked the European Court of Justice for a preliminary ruling on the compatibility of the English legislation, which generally allowed contracting parties to agree to be governed by the law of another country, with EU law.

While deciding the referred question, the European Court of Justice noted that although the freedom of contracting parties to choose the system of law by which they wish their contractual relations to be governed is a basic tenet of private international law, it can be removed by ‘rules that are mandatory.’ It then determined that the specific EU regulations in question were of a mandatory nature. Accordingly, they could not have been evaded by a principal established in a non-member country, whose commercial agent carries on his activity within the EU Community, through a choice-of-law clause. On such basis, the

31 Mitsubishi (n 7).
33 ibid [79].
35 ibid [25].
Court affirmed that such mandatory rules will govern the parties’ contract, irrespective of the content of their choice of law clause.\(^\text{36}\)

Notwithstanding the aforementioned affirmations, the relevance of mandatory rules in international commercial arbitration continues to be questioned for it tends to undermine the principle of party autonomy.\(^\text{37}\) Undoubtedly, the overriding mandatory rules of a jurisdiction can and will, at times, collide with the exercise of party autonomy; especially because an arbitral tribunal is considered to be bound to effectuate the intentions of the parties, and not vindicate a State’s statutory dictates.\(^\text{38}\) However, there are few caveats that merit some attention here.

At the outset, it is apposite to acknowledge that practitioners and scholars take the existence of party autonomy for granted, even though there is little discussion as to the principle’s origins.\(^\text{39}\) And the principle surprisingly rallies unquestioned support as an expression of tradition common to developed nations.\(^\text{40}\) Nonetheless, the concept of party autonomy is not absolute.\(^\text{41}\) It always remains subject to the countervailing public interest of a State, which may have proximity to the parties or the dispute.\(^\text{42}\) As succinctly noted in the Dissenting Opinion attached to Mitsubishi, ‘it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes.’\(^\text{43}\)

Many of the similarly placed public interests of a State are codified in its statutory laws, which an arbitral tribunal must not overlook under the garb of some unbridled loyalty to party autonomy. Just like the parties’ procedural autonomy is subject to certain core principles, such as equality between the parties,\(^\text{44}\) the parties’ autonomy to subject their dispute to any legal regime of their choice is also circumscribed by the relevant mandatory rules. There are many instances to exemplify this proposition.

\(^{36}\) ibid.


\(^{38}\) Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc (n 7) 9.

\(^{39}\) H M Watt, ‘Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance’ (2010) 3 ERCL 1, 4 (‘… Indeed, its centrality in the European tradition is so taken for granted, or at least, appears to be so solidly rooted in the history of western private international law that astonishingly little attention has been paid to the function with which it is henceforth invested.’)

\(^{40}\) See for instance, H Heiss, ‘Party autonomy’, in F Ferrari and S Leible (eds), Rome I Regulation: The Law Applicable to Contractual Obligations in Europe (Sellier de Gruyter 2009). (‘Party Autonomy: The Fundamental Principle in European PIL of Contracts. Party autonomy has been and will remain the fundamental principle in European private international law in matters of contractual obligations.’)


\(^{43}\) Mitsubishi (n 7), Dissenting Opinion of Justices Stevens, Brennan and Marshall, 33.

\(^{44}\) UNCITRAL Model Law, art 18.
For instance, in *Hyderabad Precision Mfg Co Pvt Ltd v Government of India*, an arbitration clause between two Indian parties stipulated that the Indian Arbitration & Conciliation Act 1996 shall not apply to any arbitration commenced pursuant thereto. However, the then Chief Justice of the High Court of Andhra Pradesh found this stipulation ‘providing for non-applicability of the Arbitration and Conciliation Act 1996 [as] void under the provisions of Section 23 of the Indian Contract Act’. This is because such a constraint was considered to have an unlawful object, which if permitted, would defeat the provisions of law. Notably, a derogation from the procedural law applicable to arbitration has also been looked at favourably by some courts. However, a proposition that most courts do subscribe to, at least insofar as substantive law is concerned, is found in *TDM Infrastructure Pvt Ltd v UE Development India Pvt Ltd*, where Justice S B Sinha had held that ‘Indian nationals should not be permitted to derogate from Indian law [because this] is part of the public policy of the country’.

What emerges from the above is that any assertion to the contrary, in favour of unbridled party autonomy, will make both domestic and international commercial arbitration a fertile ground for evading mandatory rules that would otherwise apply to a dispute. Such concerns are certainly not new. In 2003, Judge Cudahy in his Dissent in *Baxter International Inc v Abbott Laboratories* had already cautioned that ‘[t]oo deferential an attitude by courts when the rights of the consuming public are at stake […] will open a royal detour around the anti-trust laws.’ Therefore, any over-emphasis on party autonomy bears the potential to, and in fact has previously ‘allowed economic actors to escape from the internationally mandatory provisions which would otherwise have been applicable before their natural forum.’ It then does not take tremendous foresight to see how this tendency affects the institutional credibility of commercial arbitration as whole; something which arbitral tribunals must take responsibility for.

In light of the above, one may draw two alternative conclusions, both of which support

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45 *Hyderabad Precision Mfg Co Pvt Ltd v Government of India* 2013 (6) ALD 492.
46 ibid [6].
48 *TDM Infrastructure Pvt Ltd v UE Development India Pvt Ltd* (2008) 14 SCC 271.
50 *Baxter Int’l Inc v Abbot Laboratories* 315 F 3d 829 US Court of Appeals (7th Cir 2003), Dissenting Opinion of Judge Cudahy.
51 ibid [28].
52 H M Watt, ‘Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance’ (2010) 3 ERCL 1, 20.
the application of mandatory rules notwithstanding the parties’ choice of law.

Firstly, as posited by Jan Kleinheisterkamp, the issue is not about denial of party autonomy, but rather ‘about ensuring that the party autonomy can be exercised without infringing upon third party rights and public interests, and that contractual freedom is protected for all in the long run.’54 If the legislature had the competence to legislate, then it follows that the enacted provisions must be given full effect.55 Secondly, in the alternative, even if arbitration is viewed exclusively as a derivative of the parties’ autonomy, any limitation placed by a State’s mandatory rules upon this autonomy also constitutes a limitation imposed upon the arbitrator’s consequent authority. The parties may only empower an arbitrator to decide disputes by applying or ignoring certain rules, which they are permitted to do in the first place by the national laws governing their capacity to contract. In either scenario, mandatory rules, being imperative in nature, bind the parties and therefore, an arbitral tribunal constituted to effectuate their contractual intentions. In this sense, what may have once been issues relating to the doctrine of arbitrability can and certainly must, now be reframed as questions of the application of mandatory rules in international commercial arbitration.

IV. SOURCING A LEGAL DUTY

The previous sections dealt with why must arbitral tribunals apply mandatory rules in deciding a dispute and share some responsibility for safeguarding any public interests involved. But this still leaves the question as to how they may do so, open. To put it differently, even if an arbitral tribunal is desirous of applying a certain mandatory rule not falling within the parties’ chosen legal framework, how can it source the authority to deviate from the parties’ agreed choice of law? The fundamental concern in this regard emanates from the conflict between an arbitrator’s mandate to apply the parties’ chosen substantive law to decide a dispute versus the arbitrator’s duty to render an enforceable award.56 Accordingly, one rightly questions whether an arbitral tribunal has the authority to apply a mandatory rule that does not constitute part of the rules of law as chosen by the parties. Answering this question is a rather delicate exercise, encompassing a multitude of theoretical and pragmatic considerations; the first of which concerns ascertaining the conceptual nature of an arbitral tribunal.

A. Arbitral Tribunal as a Creation of Contract?

It is accepted that an international arbitration tribunal is a different animal as compared to a national judge.57 While the latter finds the source of its powers in the lex fori, these

55 ibid.
56 UNCITRAL Model Law, art 28(1).
rules do not bind an arbitral tribunal, since it is not an organ of a State.\textsuperscript{58} Thus, it does not come as a surprise that an arbitral tribunal sitting as far back as in 1958 had acknowledged that it ‘does not have a lex fori.’\textsuperscript{59}

The \textit{lex fori} has always been a fundamental presence in private international law.\textsuperscript{60} It provides a national judge with conflict of law rules that contain connecting factors that are relevant in determining the applicability of a foreign law and also play a part in regulating potential fraudulent evasions of the law.\textsuperscript{61} But having no \textit{lex fori}, an international arbitral tribunal is the subject of a two-pronged legal regime made of the \textit{lex arbitri} and the \textit{lex contractus}. Of course, if the parties do not designate a \textit{lex contractus}, the arbitral tribunal has no conflict of law rules at its disposal to determine the applicable law. In such a situation, it may proceed to apply whatever conflict of law rules it deems appropriate\textsuperscript{62} or whatever rules the arbitral seat prescribes.\textsuperscript{63} However, where the parties have designated a \textit{lex contractus}, it remains to be answered whether and how an arbitral tribunal can apply a mandatory rule or law of another State if the circumstances so require?

To answer this question, one must delve deeper to decipher the theoretical underpinnings of an arbitral tribunal and comprehend the sources of its juridical existence. In this regard, the Contractual Theory and the Jurisdictional Theory constitute the two opposite pillars of the vast spectrum of explanations surrounding an arbitrator’s legal creation.

On the one hand, the \textit{Contractual Theory} views the arbitral process as rooted solely in the contract between the disputing parties, specifically their arbitration agreement. On such basis, the theory posits that an arbitral tribunal owes its authority \textit{only} to this contract.\textsuperscript{64} This is exemplified by the fact that it is primarily for the parties to an arbitration proceeding to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings,\textsuperscript{65} and it is only failing such agreement that the tribunal may conduct the arbitration proceedings in such manner as it considers appropriate.\textsuperscript{66} Similarly, the tribunal is also mandated to decide the dispute before it in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.\textsuperscript{67}

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\item \textsuperscript{58} Piero Bernardini, ‘The Role of the International Arbitrator’ (2004) 20(2) AI 113.
\item \textsuperscript{59} \textit{Saudi Arabia v Aramco}, Award of 23 August 1958 (1963) 27 ILR 117, 161-62.
\item \textsuperscript{60} Albert Ehrenzweig, ‘The \textit{Lex Fori} – Basic Rules in the Conflict of Laws’ (1960) 58(5) Michigan LR 637, 645.
\item \textsuperscript{62} UNCITRAL Model Law, art 28(2).
\item \textsuperscript{63} German Arbitration Law 1998, s 1051(2); Switzerland Federal Act on Private International Law, art 187(1).
\item \textsuperscript{65} UNCITRAL Model Law, art 19(1).
\item \textsuperscript{66} UNCITRAL Model Law, art 19(2).
\item \textsuperscript{67} UNCITRAL Model Law, art 28(1).
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However, the Contractual Theory is marred by some evident shortcomings. On the face of it, the theory restricts an arbitral tribunal to the contents of the parties’ contract, notwithstanding the legal feasibility of such content. This implies that unless the notion of public policy forms part of the \textit{lex contractus}, the arbitrator would be free to ignore it.\textsuperscript{68} The authors find it difficult to endorse such an absolute proposition.

On the other hand, the Jurisdictional Theory posits that an arbitral tribunal always sources its adjudicatory powers in the first place from the permission granted by any sovereign State to the arbitral mechanism.\textsuperscript{69} As a corollary, this theory attributes the relationship between the arbitral tribunal and the parties to the tribunal’s status as an appointee that acts in the interest of a State.\textsuperscript{70}

Interestingly, many challenge the Jurisdictional Theory on the premise that it undermines the principle of party autonomy, which, as discussed above, has been recognised as being central to international commercial arbitration. But it is important to note that while the principle of party autonomy is indeed fundamental to arbitral jurisprudence, it exists not because of its centrality to international commercial arbitration, but because nation States allow it to sustain. After all, pursuant to the social contract theory,\textsuperscript{71} it is the primary responsibility of a State to provide its nationals a functional judicial mechanism for the settlement of disputes. Thus, any possibility of departing from this State-provided-mechanism through the exercise of party autonomy remains subject to the State’s will. In other words, the parties’ freedom to experiment with the envisaged dispute resolution processes\textsuperscript{72} and exercise control over all aspects of their arbitration,\textsuperscript{73} must necessarily be sourced to a permissive legal system; failing which, it has no independent existence or sanctity.

For instance, Section 28(a) of the Indian Contract Act, 1872 renders void agreements, which restrict a party ‘absolutely from enforcing his [or her] rights under or in respect of any contract by usual legal proceedings in the ordinary tribunals.’\textsuperscript{74} Ordinarily, this would be sufficient to negate any arbitration agreement. However, the Indian arbitration machinery, premised on the principle of party autonomy, nonetheless exists because of the statutory exceptions to the said provision. These exceptions provide that the provision shall neither render illegal ‘a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall

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\item \textsuperscript{68} Andrew Barraclough and Jeff Waincymer, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 Melbourne JIL 205, 211.
\item \textsuperscript{69} FA Mann, ‘Lex Facit Arbitrum’ in \textit{International Arbitration: Liber Amicorum for Martin Domke} (Martinus Nijhoff 1967) 157.
\item \textsuperscript{70} Lord Mustill and Stewart Boyd, \textit{Commercial Arbitration} (2nd edn, LexisNexis 1989) 223.
\item \textsuperscript{71} See generally Jean Jacques Rousseau, \textit{The Social Contract} (Penguin 2006); Peter Nygh, \textit{Autonomy in International Contracts} (OUP 1999).
\item \textsuperscript{73} Born (n 42) 1609.
\item \textsuperscript{74} Indian Contract Act 1872, s 28(a).
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be referred to arbitration”\(^{75}\) nor ‘affect any provision of any law in force for the time being as to references to arbitration.’\(^{76}\)

Viewed from this perspective, to assert that arbitrators are immune from a States’ statutory dictates or policy considerations is convenient, but mistaken. This allows one to look beyond the status of an arbitral tribunal as a mere creation of the parties’ contractual agreement and entertain the possibility of applying mandatory rules. To put it differently, according to the Jurisdictional Theory, there is nothing in the nature of arbitral tribunals \(\text{per se}\) that prohibits them from applying a mandatory rule that lies outside the legal framework specifically agreed to by the parties. After all, the primary allegiance of arbitral tribunals remains not with the parties, but with the rule of law.

Yet, the Jurisdictional Theory also poses certain avenues for concern. It seems to postulate that an arbitral tribunal is restricted to applying the \(\text{lex contractus}\) only to the extent that the law of the seat, which is the sole source of the tribunal’s legitimacy, permits its application.\(^{77}\) This creates a situation where the arbitrator, in addition to ignoring the mandatory rules that may constitute part of the public policy of other potentially relevant States, may also be incentivised to ignore the \(\text{lex contractus}\).

This is precisely why many advocate for a middle ground, i.e. a hybrid of both the Contractual and the Jurisdictional Theory, which acknowledges that while an arbitral tribunal is a creation of contract, it must also act in conformity with certain statutory requirements of public law.\(^{78}\) This hybridised characterisation is considered to be a more apposite representation of the modern arbitrator, since it tranquillises the overreaching consequences of both the theories.

What emerges from the above is that a pure, unbending allegiance to either of the theoretical conceptualisations of an arbitral tribunal’s juridical existence is insufficient to appropriately address the question of application of mandatory rules. While these theories do provide a reliable starting point, they certainly do not proffer a conclusive answer to this question. Instead, they leave us in search of a hybridised amalgamation of the two theories. Such a hybrid would represent the common denominator that both the Contractual and the Jurisdictional Theories subscribe to; a higher value that theorists from neither faction would decline the existence of. This common denominator comes in the shape of the arbitrator’s duty to render an eventually enforceable award.

\textbf{B. The Duty to Render an Enforceable Award}

It is interesting that while both the Contractual and the Jurisdictional theory fall at opposite ends of the spectrum, neither denies the existence of an arbitral tribunal’s duty to

\(^{75}\) Indian Contract Act 1872, s 28(a), Exception 1.

\(^{76}\) Indian Contract Act 1872, s 28(a), Exception 2.

\(^{77}\) Barraclough and Waincymer (n 68) 212.

render an enforceable award, even if they do differ on the extent of its importance.\textsuperscript{79} The Jurisdictional theorists treat a breach of this duty as a breach of the law of the seat, whereas the Contractualists treat it as a breach of the arbitral contract.\textsuperscript{80}

Irrespective of which lens one uses to view this issue, it is incongruous to deny that an arbitrator has a general duty to endeavour to render an enforceable award. Indeed, the parties’ agreement to arbitrate is premised on an implicit legitimate expectation that this method will prove effective, and that the arbitral process will culminate in an enforceable award.\textsuperscript{81} This would require that an arbitral tribunal, in addition to meeting the formal and procedural mandates of the arbitration agreement and the \textit{lex arbitri}, must also endeavour to observe a concerned State’s public policy, which includes its mandatory rules.\textsuperscript{82} This is because the New York Convention of 1958, which forms the basis of enforcing foreign arbitral awards, permits refusal of enforcement of an award if such enforcement is contrary to the public policy of the enforcing country.\textsuperscript{83} The same is also a ground for annulment in most arbitral legislations.\textsuperscript{84} Consequently, an arbitral tribunal’s duty to render an enforceable award can be taken a step further, so as to impose on it a duty to apply a mandatory rule of law. Such mandatory rules can emanate from \textit{firstly}, the arbitral seat where the award may be challenged,\textsuperscript{85} and \textit{secondly}, the likely place(s) of enforcement of the award.\textsuperscript{86} The authors address these two avenues individually.

\textit{Firstly}, as far as the seat of arbitration is concerned, there is no hurdle in the application of its mandatory rules, since an arbitral tribunal is appropriately situated to be aware of the law of the seat, and thus take into consideration any of its relevant mandatory rules. And while it is debatable that the legitimate expectations of the parties would encompass an application of the mandatory rules of their chosen seat of arbitration, the mandatory rules of the arbitral seat nonetheless assume importance pursuant to the ‘close connection’ test.\textsuperscript{87}

The close connection test, which is a fundamental principle of private international law enjoying significant acceptance, finds place in many legal instruments having domestic and international origins. For instance, Article 7 of EU’s Rome Convention on the Law Applicable to Contractual Obligations provides that States may give effect ‘to the mandatory rules of the law of another country with which the situation has a close

\begin{itemize}
\item \textsuperscript{79} Günther Horvath, ‘The Duty of the Tribunal to Render and Enforceable Award’ (2001) 18(2) Journal of International Arbitration 135, 137-8.
\item \textsuperscript{80} Onyema (n 78) 45 - 48.
\item \textsuperscript{81} Greenawalt (n 37) 112.
\item \textsuperscript{83} New York Convention, art V(2)(b).
\item \textsuperscript{84} UNCITRAL Model Law, art 34(2)(b)(ii).
\item \textsuperscript{85} See Jan Kleinheisterkamp (n 54); Cunha (n 37).
\item \textsuperscript{86} Mayer (n 22) 284.
\item \textsuperscript{87} Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC), art 7(2).
\end{itemize}
connection.

The Rome Convention, which contains many other stipulations of the close connection test to ensure that weaker parties such as consumers and employees do not lose protection of certain mandatory rules, has been implemented across Europe. For instance, there are secondary legal instruments enacted by the European Parliament and/or Council to deal with situations where the close connection test would apply within the European context and where it would apply to contracts governed by the law of a non-EU Member State. Moreover, there are domestic legislative instruments, for instance in Belgium and in the Nordic States, which stipulate the application of the close connection test, albeit in many different contexts. Similarly, Article 19 of the Swiss PILA, though not concerned with international arbitration, also prescribes that when ‘interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to by this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law.’ In fact, scholarly opinion suggests that at least until 1997, the prevailing view in Switzerland was that a tribunal ‘having its seat in Switzerland has to have regard, and moreover, should directly apply the relevant competition laws even if they pertain to a foreign legal order (i.e. to a legal order which is outside the law governing the contractual relationship).’

On applying this principle in the present context, it follows that the seat of arbitration bears a close connection with an arbitral proceeding, for it is the jurisdiction where the resultant award’s validity may be assessed at the stage of annulment. Consequently, since an annulled award is not ripe for enforcement, an arbitral tribunal’s duty to render an enforceable award constrains it to take into account any relevant mandatory rule of the jurisdiction where the arbitral seat is situated.

Secondly, an arbitral tribunal’s supposed duty to take into account the mandatory rules of the likely place(s) of enforcement is not without criticism. In many cases, an arbitral
tribunal is either not aware of the potential place(s) of enforcement of its eventual award, or faces a situation where its award may in fact be enforceable in multiple jurisdictions.\textsuperscript{95} For this reason, many even deny an arbitral tribunal’s duty to render an enforceable award as a definitive source of its authority to apply any mandatory rules in the first place.\textsuperscript{96}

However, the above reasoning merely points out the difficulty in identifying the place(s) of enforcement in a plurality of cases, without necessarily refuting an arbitrator’s general duty to render an enforceable award \textit{per se} based on the legitimate expectations of the parties. One must also question what percentage of commercial arbitration disputes actually poses this difficulty. The absence of any empirical data on this aspect undermines the credibility of this objection, which in any event is based on a presumption of multi-jurisdictional enforcement that does not necessarily apply to a significant number of commercial disputes. Thus, barring exceptional circumstances, an arbitrator’s duty to render an enforceable award is ordinarily sufficient for it to apply mandatory rules of the likely place(s) of enforcement, where circumstances so require.

In this regard, the arbitral tribunal, in view of its understanding of the case, appears to be well placed to envisage the probable places where the resultant award might be enforced, and apply their mandatory rules.\textsuperscript{97} Theoretically, such an expedition is justified in the legitimate expectations of the parties to have an enforceable award.\textsuperscript{98} If the assets of the award-debtor are only in one State, then the tribunal must apply the mandatory rules of that State.\textsuperscript{99} In the event the assets are located in multiple jurisdictions, more than one of which prescribe conflicting mandatory rules, the tribunal should endeavor to apply all the rules cumulatively to the extent that it can, so as to ensure that its ultimate award is the most enforceable one possible.\textsuperscript{100} Needless to say, in any of these scenarios, it is incumbent upon the tribunal to consult the parties about the application of these mandatory rules to the facts of the case, as opposed to applying them \textit{suo motu}. After all, the legitimate expectations of the parties also envisage the expectation to not be surprised by an award that applies laws or rules, on which they were not afforded the opportunity to make submissions. Of course, the ideal scenario is for the arbitral tribunal to ask the parties to concede on the application of a particular mandatory rule, as was done by the Court in \textit{Mitsubishi}.

At this juncture, it is important to remind ourselves of the barter that took place in \textit{Mitsubishi}. There, the Court agreed to relax the threshold of arbitrability on the basis of its expectation, and the agreement of the parties that the arbitral tribunal will necessary apply

\begin{footnotesize}
\begin{enumerate}
\item[95] Greenawalt (n 37) 112.
\item[96] ibid.
\item[98] ibid.
\item[99] Barraclough and Waincymer (n 68) 218.
\end{enumerate}
\end{footnotesize}
the mandatory rule in question, i.e. the Sherman Antitrust Act, where the circumstances so warrant. It even warned that ‘in the event the choice-of-forum and choice-of-law clauses operated […] as a prospective waiver of a party’s right to pursue statutory remedies for anti-trust violations, [the Court] would have little hesitation in condemning the agreement as against public policy.’\(^{101}\) The ultimate implication being that where the parties submit their contract to a foreign law, the party requesting arbitration must have ‘the opportunity to show to a court that the protection afforded by the *lex contractus* is equivalent to that of the *lex fori*.\(^{102}\) If such equivalence is demonstrated, or if the parties consent to the application of mandatory rules like in *Mitsubishi*, then the national courts are likely to refer the matter to arbitration notwithstanding any concerns of inarbitrability. However, any deliberate blindness to this caveat is likely to invite judicial hostility, possible annulment or non-enforcement of the award, and in the longer run, an eventual re-tightening of the arbitrability doctrine.

V. CONCLUSION

The above discussion allows one to draw several conclusions. In the first place, it cannot be denied that the realm of what were traditionally considered to be inarbitrable disputes is progressively shrinking across jurisdictions. It is thus not surprising that Professor Albert Jan van den Berg’s reworked New York Convention presented during the ICCA Conference of 2008, celebrating 50 years of the Convention, did not specifically mention arbitrability as a ground for refusal of enforcement either of the arbitration agreement or the arbitral award.\(^{103}\) His explanation was that the ground for arbitrability should be ‘subsumed in the public policy ground’ itself.\(^{104}\) However, the gradual decline of the relevance of the arbitrability barrier does not indicate a corresponding deterioration of the relevance of public interest in international commercial arbitration. Rather, in light of the decline of the arbitrability doctrine, many former issues of arbitrability must now necessarily be reframed as questions of application of mandatory rules, which apply notwithstanding any agreement between the parties stating to the contrary. This would involve a shift in the responsibility for safeguarding public interests from courts to arbitrators, who are being trusted more and more to resolve a variety of commercial disputes. In other words, as and how the gatekeepers of the garden of commercial arbitration become more permissive in nature, the gardeners themselves, i.e., the arbitrators, need to assume a greater responsibility in maintaining the flora with utmost care. The authors insist that this responsibility can be

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101 *Mitsubishi* (n 7) 12, Footnote 19.
102 Kleinheisterkamp (n 54) 27.
exercised by giving more credence to the notion of mandatory rules.

In the second place, the relevance of mandatory rules in international commercial arbitration is preserved by looking at an arbitral tribunal as a creation, not merely of the parties’ contract, but also of a permissive legal system’s rule of law. It is this underlying legal system around which an arbitral tribunal operates, and which creates a framework that permits the parties to exercise their autonomy to arbitrate their disputes in the first place. This outlook of an arbitral tribunal helps defend, in adequate terms, the tribunal’s duty to render an enforceable award, which forms part of the legitimate expectations of the parties arbitrating their dispute and the legal framework(s) relevant to the arbitration proceeding. In turn, an arbitral tribunal’s duty to identify and apply relevant mandatory rules forms a component of this duty to render the most enforceable award possible. In this regard, it is intriguing that the New York Convention does not provide a basis to refuse recognition and enforcement if an arbitral tribunal were to apply a mandatory rule not forming a part of the parties’ choice of law.\footnote{105} However, an arbitral tribunal’s failure to apply a mandatory rule may leave the award vulnerable for violating the public policy of a State whose mandatory rule has been overlooked.\footnote{106}

This discussion evokes memories of Joanne K. Rowling’s fabled prophecy for Harry Potter and Voldemort that ‘neither can live while the other survives’. But unlike Harry and his adversary, the survival of the notion of mandatory rules and the doctrine of arbitrability shares no mutuality. Quite to the contrary, their inimitable bond warrants that the decline of arbitrability must fuel an acceptance of an arbitral tribunal’s duty to apply mandatory rules. In that sense, the latter must live if the former does not survive. Consequently, this tendency, coupled with an arbitral tribunal’s duty to render an enforceable award, empowers and obligates a tribunal to apply mandatory rules of jurisdictions that share a ‘close connection’ with the dispute or the disputing parties. These typically include mandatory rules of the arbitral seat, the nationality of the parties, as well as the likely place(s) of enforcement of the eventual award.

\footnote{105}{See New York Convention, art V.} \footnote{106}{See New York Convention, art V(2)(b).}