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Legal Certainty, Proportionality and Pragmatism: Overriding Mandatory Laws in International Arbitration

Jan Kleinheisterkamp*

Abstract:

Overriding mandatory laws present one of the most pervasive and delicate problems of international arbitration because these laws affect party autonomy in both its substantive and procedural dimension. The tension between these concepts both in theory and in practice is a classic emanation of the public-private divide, which is particularly problematic in international and transnational settings. This tension is all the stronger in the context of economic integration and regulation, such as in the EU Internal Market. This article revisits and conceptualizes the operation of overriding mandatory laws in the context of arbitration from the perspectives of conflict of laws, public law, and EU law. Drawing on the principles of effectiveness and proportionality, it proposes a practical rather than a theoretical solution to the dialectic relationship between private and public interests in legal certainty.

I. Introduction

In recent years, courts in the EU have repeatedly refused to enforce arbitration clauses when judges deemed that arbitrating the disputes between the parties would allow evading fundamental market regulations of the forum. Crucially in these cases, parties had not only agreed on arbitration outside the EU but also agreed on non-EU law to govern their transactions. Similar scenarios have arisen with choice-of-forum clauses.¹ This court practice has drawn significant criticism from both practice and academia, the primary argument being that the lack of respect for the parties' autonomy would undermine legal certainty. Indeed, the efficiency of international business transactions is considered to be fundamentally dependent on legal certainty; however, legal certainty is also crucial for any regulated markets, especially in the context of economic integration.² Businesses seek legal certainty

* Associate Professor of Law at the London School of Economics. I would like to thank Agnieszka Ason, Emilio Bettoni, Jacco Bomhoff, Michael Bridge, Trevor Hartley, Nicola Lacey, Aleksandra Orzeł, Philipp Paech and Stéphanie Francq, and especially the peer reviewers for their helpful comments. I would also like to thank the students of my courses 'Advanced Issues of International Commercial Arbitration' at LSE in the past years as well as the students of my course 'Arbitration and Public Policy' at the MIDS for the inspiration and consolidation of my thinking based on the discussion in class on this topic. For a fine product of these discussions at LSE see C. Pitta e Cunha, 'Arbitrators and Courts Compared: The Long Path Towards an Arbitrator's Duty to Apply Internationally Mandatory Rules' [2016-2] *Young Arbitration Review* 26-38. All errors are exclusively mine.

¹ See, e.g., J Basedow, 'Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms' in *Essays in Honour of Michael Bogdan* (U. Maunsbach *et al* eds, Juristförlaget 2013) 15-31. These clauses are not further discussed in the present article, yet the problems and the arguments involved are largely the same.

² For a classic expression of the former, see *Scherk v Alberto-Culver Co*, 417 U.S. 506, 516 (1974): 'Choice-of-law and choice-of-forum provisions in international commercial contracts are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," and should be enforced absent strong reasons to set them aside.' For a classic expression of the latter, see W Hallstein, *Die Europäische Gemeinschaft* (5th edn, Econ 1979) 53: 'The majesty of the Law shall

for their respective private economic interests; regulators seek legal certainty to enhance public welfare within their respective jurisdictions. Whereas arbitration practitioners may worry that overriding mandatory provisions could act as an impediment to arbitration, regulators may wonder to what degree arbitration constitutes an impediment to the effectiveness of market regulation, especially in the EU Internal Market. This dialectical relationship between the private and the public interests in legal certainty have not yet sufficiently informed the debate on what is one of the most pervasive issues in the field.³

I suggest to revisit the topic by putting these controversial court practices into the perspective of the public law dimension of overriding mandatory laws, which obliges the judiciary to uphold the public policies they enshrine (Section II). The situation becomes more comprehensible when considering the transnational challenge for both courts and arbitrators when confronting the combined effect of arbitration and choice-of-law agreements (Section III). The question of how to cope with the resulting potential for regulatory arbitrage is, in the EU, intimately linked with the principle of procedural autonomy of the Member States, which in turn is subject to the general requirement of effectiveness under EU law (Section IV). This analysis shows why courts, in principle, are right to be reluctant to enforce arbitration or choice-of-forum agreements where the application of EU overriding mandatory laws is at stake. However, it is necessary to push the public law dimension of the problem even further. I argue that the courts' *prima facie* legitimate refusal to enforce the parties' agreement to arbitrate is itself subject to the principle of proportionality, by which EU law (and constitutional laws in all Member States) fetters public power when it interferes with private rights (Section V). In particular, I argue that the courts' central problem does not really arise as a consequence of the parties' choice for arbitration. Instead, the clash with the applicability of overriding mandatory laws results from the parties' choice-of-law agreement: this is what purportedly binds the arbitrators to the application foreign laws irrespective of the laws of the affected market. Accordingly, striking down arbitration clauses is unnecessary – and thus disproportionate – when courts could instead remedy the problematic choice-of-law agreement. This is possible by seeking the parties' consent to the application of the overriding mandatory laws of the forum in the arbitration. If denied, the non-enforcement of the arbitration agreement is inevitable. If accepted, this consent would modify the choice-of-law agreement so as to be binding on the arbitrators and would allow – and, indeed, oblige – the courts to refer the parties to arbitration. This pragmatic rather than theoretical solution finally allows to conclude with some reflections on the dialectical relationship of the private and the public interests in legal certainty (Section VI).

create what blood and iron could not achieve in centuries. Since only the self-determined Unity can hope to persist, legal equality and legal unity are insolvably linked.⁷

³ On the subject see, e.g., P Mayer, 'Mandatory Rules in International Arbitration' (1986) 2(4) *Arbitration International* 274-293; LG Radicati di Brozolo, 'Mondialisation, jurisdiction, arbitrage: vers des règles d'application semi-nécessaire?' (2003) *Revue critique de droit international privé* 1-36; *id.*, 'Arbitration and Competition Law: The Position of the Courts and of Arbitrators' (2011) 27(1) *Arbitration International* 1-25; J Kleinheisterkamp, 'The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements' (2009) 3(2) *World Arbitration & Mediation Review* 91-120.

II. The setting of the problem

A. Overriding mandatory laws as legal irritants

As much as the foundations of party autonomy remain ‘elusive’ and ‘theoretically unresolved’,⁴ and public policy is perceived as ‘an unruly horse’,⁵ the situation is not much better when it comes to overriding mandatory laws. The name itself is an attempt to neutrally catch differing conceptualizations of a phenomenon that is the *bête noire* of the dominant bilateral conflict-of-laws doctrine. *Lois d’ordre public, lois de police, lois d’applications immédiate ou nécessaire*;⁶ *Eingriffsnormen, Sonderanknüpfungsnormen, Wirtschaftskollisionsnormen*:⁷ these French and German denominations each represent somewhat varying understandings as to their content, mode of operation and contextualization – and, most of all, efforts to contain their effect and significance.

Overriding mandatory provisions are, indeed, both elusive and unruly. They are quintessentially non-cosmopolitan, non-libertarian, and unilateral; some would say they are parochial, authoritarian and exorbitant, if not chauvinist.⁸ They are the flexed muscle of the long-arm of interest-driven legislatures reaching beyond their jurisdictions’ domestic realm. They are *d’application immédiate* in their local forum because their application is not mediated by neutral and gently civilizing ‘traffic rules’ and follows only from their self-determined scope of application. Moreover, they blur the neat private-public divide by injecting the messy political element into the structured clean private law sphere. It thus comes as no surprise that conflict-of-laws scholars rarely have much sympathy for these unilateralist creatures and prefer to circumscribe their role to limited exceptions. The arbitration community is likewise irritated by this phenomenon and typically reacts rather allergically to the resulting interference with the parties’ contract and party autonomy.⁹ In light of conceptualizations of arbitration as part of international justice that creates its own

⁴ J Basedow, ‘Law of Open Societies – Private Ordering and Public Regulation of International Relations’ (2012) 360 *Recueil des Cours de l’Académie de Droit International* 9, 164.

⁵ *cf* Burrough J in *Richardson v Mellish* [1824] 2 Bing 229, 252: ‘Public policy ... is a very unruly horse, and once you get astride it, you never know where it will carry you’; *contrast* Lord Denning MR in *Enderby Town Football Club Ltd v Football Assn Ltd* [1971] Ch. 591, 606-607: ‘I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice... It can hold a rule to be invalid even though it is contained in a contract.’

⁶ See Ph Francescakis, ‘Quelques précisions sur les lois d’application immédiate et leurs rapports avec les règles de conflit de lois’ [1966] *Revue critique de droit international privé* 1; P Mayer, ‘Les lois de police étrangère’ [1981] *Journal de Droit International (Clunet)* 277.

⁷ See W Wengler, *Die Anknüpfung zwingenden Schuldrechts im internationalen Privatrecht. Eine rechtsvergleichende Studie* (1941) 54 *Zeitschrift für vergleichende Rechtswissenschaft* 168; J Basedow, ‘Wirtschaftskollisionsrecht: Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates’ (1988) 52 *Rabels Zeitschrift* 8, in English: ‘Conflicts of Economic Regulation’ (1994) *American Journal of Comparative Law* 423.

⁸ See, e.g., E Jayme, *Internationales Privatrecht und Völkerrecht* (Beck 2003), 28: referring to what is today Art 9(2) of the EU Rome I Regulation as ‘a carte blanche for the caprice of national lawmakers.’

⁹ See, e.g., M Weininger, R Byrne, ‘Mandatory Rules, Arbitrability and the English Court Gets it Wrong’ (2010) *Cahiers de l’Arbitrage / Paris Journal of International Arbitration* 201; H Dundas, ‘EU law versus New York Convention - who wins? *Accentuate Ltd v Asigra Inc*’ (2010) 76(1) *Arbitration* 159, 164-165: ‘The fact that EU law (which the judge was bound to apply) condones this [element of dishonesty of pleading on a wholly different basis than what was agreed] is no advertisement for the European Union’s credentials as a supporter of a free world trade system; ... this is about protectionism.’

legal order,¹⁰ it should not be surprising to see the rise of rhetorical claims that these overriding mandatory laws would constitute an impediment to some ‘arbitral justice’.¹¹

B. Overriding mandatory rules as impediments to arbitration

The fear that especially EU law could be an impediment to the effectiveness of arbitration stems in part from a series of court cases in EU Member States.¹² In brief, German and Belgian courts refused to give effect to arbitration agreements out of fear over the effective application of their respective overriding mandatory provisions, where the parties had also agreed to have foreign law apply. This line of case law has now been confirmed and consolidated,¹³ and the situation can be summarized as follows.

The analysis of Belgian courts starts with the rule that is more the product of path dependency than conscious conceptualization: in principle, claims involving overriding mandatory provisions of the forum cannot be taken out of the forum by virtue of arbitration or choice-of-court clauses. Belgians courts, however, exceptionally accept to enforce such clauses if it can be demonstrated that Belgian overriding mandatory laws will be applied abroad or if the laws to be applied abroad provide for equivalent protection.¹⁴

German courts reach essentially the same result in practice, though by means of a reverse – and arguably conceptually sounder – rule-exception relationship. Claims involving German overriding mandatory rules are, in principle, capable of settlement by arbitration or in foreign courts; however, arbitration and other jurisdictional agreements are unenforceable if it is unlikely that the arbitral tribunal or court abroad will apply the overriding mandatory laws of the (German) forum and the applicable foreign laws provide no equivalent solution.¹⁵

¹⁰ For the French case law in this direction, see below n 33 and 36.

¹¹ In this sense see the panel on ‘EU Overriding Mandatory Provisions as Impediment to Access to Arbitral Justice?’ at the Conference of the NYU Center for Transnational Litigation, Arbitration and Commercial Law on ‘The Impact of EU Law on International Commercial Arbitration’ on 31 October and 1 November 2016..

¹² See Kleinheisterkamp, ‘Impact...’ (n 3), focusing primarily in Belgium on Cour de Cassation, 16 November 2006, *Van Hopplynus Instruments SA v Coherent Inc*, [2007] *Revue Belge de Droit Commercial* 889, analysed in the context of *id*, 18 June 1979, *Audi NSU v Adelin Petit SA*, [1979] *Pasicrisie* I 1260, [1979] *Journal des Tribunaux* 626; *id*, 2 February 1979, *Bibby Line v Insurance Company of North America*, [1979] *Pasicrisie* I 634; *id*, 22 December 1988, *Gutbrod Werke GmbH v Usinorp de Saint-Hubert et Saint Hubert Gardening*, [1988] *Journal des Tribunaux* 458; and in Germany on Oberlandesgericht München, 17 May 2006, [2006] *Wertpapier Mitteilungen* 1556, [2007] *IPRax* 322, analysed in the context of Bundesgerichtshof, 30 January 1961, [1961] *Neue Juristische Wochenschrift* 1061.

¹³ See below nn 14 and 15.

¹⁴ In addition to the cases discussed in Kleinheisterkamp, ‘Impact...’ (n 3) 94-99, see Cour de Cassation (Belgium), 14 January 2010, *Sebastian International Inc v Common Market Cosmetics NV*, [2010–2011] *Rechtskundig Weekblad* 2010-2011, 1087 (rejecting the argument that refusing enforcement of the arbitration agreement would only legitimate if there was *fraude à la loi*, ie, the parties’ tampering with the connecting factors in bad faith so as to obtaining the application of a different law), discussed by P Wautelet, ‘Arbitration of Distribution Disputes Revisited. A Comment on *Sebastian International Inc. v Common Market Cosmetics NV*’ in *The Practice of Arbitration. Essays in Honor of Hans van Houtte* (P Wautelet et al eds, Hart 2012) 217; Cour de Cassation (Belgium), 3 November 2011, *Transat International AT Inc v Air Agencies Belgium*, *Pourvoi* n° C.10.0613.N, available at www.juridat.be, discussed by P. Hollander, ‘Applicable Law, Jurisdiction and Arbitration Issues Affecting International Distribution Agreements’, in *Commercial Distribution, La Distribution Commerciale, Commerciële Distributie* (P Demolin et al eds, Larcier 2014) 335, 339.

¹⁵ In addition to the cases discussed in Kleinheisterkamp, ‘Impact...’ (n 3) 99-103, see Bundesgerichtshof (BGH) 5 September 2012, VII ZR 25/12, [2012] *Betriebsberater* 3103, [2012] *Gesellschafts- und Wirtschaftsrecht* 486, discussed by Basedow, ‘Exclusive...’ (n 1) 15-31.

Most of these cases concerned mandatory provisions in the European Commercial Agency Directive of 1986¹⁶ and are thus spin-offs from the seminal *Ingmar* decision of the EU Court of Justice (CJEU, back then still the ECJ), which was not yet concerned with jurisdictional issues.¹⁷ In the cases at hand, the parties had chosen laws and jurisdictional seats outside of the EU,¹⁸ which neither provided for any equivalent substantive protection nor any assurance that the arbitrators or the foreign courts would take the EU overriding mandatory provision into consideration, let alone apply them. In all cases, the courts therefore refused to give effect to the arbitration or choice of court agreements. Similar cases can be found in other European countries, such as Italy, England and, most recently and in the same vein, Austria.¹⁹

C. Overriding mandatory laws as public law

The unpopular effects of overriding mandatory laws on party autonomy, however, must be placed in the context of their public law nature of market regulation. As illustrated by the *Ingmar* case, they are exceptional key vehicles for implementing (only) the market's most important policies, that is, those deemed so fundamental that a materially diverging outcome cannot be tolerated, irrespective of the international implications. If one wishes to conceptualize party autonomy as the outflow of fundamental or even human rights of the individual against the State,²⁰ then it is equally necessary to recognize that overriding mandatory provisions are the constitutionally allowed – and, indeed, warranted – legal limitations to those underlying fundamental rights, enacted in the public interest. The State has a duty to regulate to ensure that all stakeholders in the market, and affected by it, can equally enjoy and develop (at least the core of) their fundamental rights. The law regulating private relations in particular hinges on the State ensuring a level playing field that is ‘so regulated that it reflects the objective order incorporated in the fundamental rights.’²¹ The arbitrages that become necessary in the policymaking process, the balancing of interests, and the drawing of lines between them, through the (re-)definition of rights, is primarily entrusted to the political legislative process.²²

In the EU, this legislative process is subject to the checks of constitutional safeguards. These safeguards bind the legislature to respect the judiciary and mandate it to preserve the

¹⁶ Council Directive 86/653/EEC on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, [1986] OJ L382/17.

¹⁷ CJEU Case C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-9305.

¹⁸ For a case regarding the contractual choice of forum in another member state, *i.e.*, still within an area with harmonized law in the matter, see Corte di Cassazione 20 February 2007, case no 3841, (2008) XLIV *Rivista di diritto internazionale privato e processuale* 160; discussed by Basedow, ‘Exclusive...’ (n 1) 18.

¹⁹ In Italy, see Corte di Cassazione 30 June 1999, case no 369, (2000) XXXVI *Rivista di diritto internazionale privato e processuale* 741, discussed by F Ragno, ‘Inarbitrability: A Ghost Hovering over Europe?’ in *Limits to Party Autonomy in International Commercial Arbitration* (F. Ferrari ed, Juris 2016) 125-161; in England see *Accentuate v Asigra* [2009] EWHC 2655 (QB), see below text accompanying n 56; in Austria see Oberster Gerichtshof (OGH) 1 March 2017, case 5Ob72/16y, [2007] IHR 123 (with comments by T Eckard at 126).

²⁰ Such as Basedow, ‘Law of Open Societies...’ (above n 4) 202 para 253; also M Renner, *Zwingendes transnationales Recht - Zur Struktur der Verfassungsverfassung jenseits des Staates* (Nomos 2011) 83.

²¹ In German constitutional law see Bundesverfassungsgericht (BVerfG) 15 July 1998, 1 BvR 1554/89, 963, 964/94 BVerfGE 98, 365, 395 para 90.

²² *cf* BVerfG, 27 January 2015, 1 BvR 471/10 and 1 BvR 1180/10, BVerfGE 138, 296 para 98: ‘Solving the normative tension between the constitutional values ... is the responsibility of the democratic legislator, who in the [political] process of forming a public opinion has to seek a compromise acceptable for all.’

essence of the individual's rights and to optimize their effectiveness.²³ This protection of the minority (which unsuccessfully resisted in the political process) is the legitimization of the majority rule that is inherent to democracy. The ultimate safeguard limiting government interference in individual rights is the protection against arbitrariness and excessive individual burdens, operationalized through the principle of proportionality, a cornerstone of most national constitutional laws and of EU law itself.²⁴ This system of freedoms and limitation with checks and balances is designed to produce legality and legitimacy of the public interference with, and limitation of, individual rights. If the legislature had the competence to legislate, and if it respected the required procedures and the principles of subsidiarity and proportionality, the enacted provisions must have full effect. This is the implementation of the underlying policy adopted in the democratic process and cast into law. That is the reason, at least when the provision's legality has been affirmed and its scope interpreted accordingly by the CJEU, why its internationally and overriding mandatory application must be the last word – at least for every judge in an EU Member State.

III. The transnational challenge

A. Substantive party autonomy and regulatory arbitrage

Drilling into the public law dimension of overriding mandatory laws illustrates the dialectic between party autonomy and the public policies these laws seek to enforce. The issue is not to deny party autonomy as such; on the contrary, it is about ensuring that party autonomy can be exercised without infringing upon third parties' rights and public interests and that contractual freedom is protected for all in the long run. This is the very old quest for balance between private and public interests, whose complexity increases exponentially in an international dimension. Cross-border transactions pose a particular challenge for the conceptual relationship between freedom of contract and regulatory powers. The latter find their limitations in the (physical) boundaries of sovereignty and territoriality, and thus struggle to keep control over the former when facing the discourse and the reality of party autonomy both in its substantive and procedural dimension.

Freedom of contract, or *private* autonomy, allows parties to determine the content of their agreement: parties write down and define, and make enforceable at law and thus regulate among themselves, the rights and obligations they respectively wish to acquire from, and assume towards, each other. *Party* autonomy in its substantive dimension, in turn, enables parties to control the definition of the meaning, and thus determine the substance, of these rights and obligations through the choice of the applicable law. The acceptance of party autonomy as allowing parties to enhance legal certainty in an uncertain, because non-uniform, transnational legal setting, also implies accepting strategic regulatory arbitrage. Regulatory arbitrage has been defined in the context of financial transactions as 'those ...

²³ See Charter of Fundamental Rights of the European Union (CFR) Art 52(1), first sentence: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.'

²⁴ See Treaty on European Union (TEU) Art 5(1), first sentence, and (3), as well as CFR Art 52(1), second sentence.

transactions designed specifically to reduce costs or capture profit opportunities created by different regulations or laws.’²⁵

Regulatory arbitrage, such as forum shopping, is not illegal *per se*; arguably, it is very much part of party autonomy.²⁶ The legitimate purpose is legal certainty: the free choice of the applicable law allows parties to choose the regulatory framework for their transaction. Indeed, the entire idea of normative competition is based on regulatory arbitrage.²⁷ In the absence of international institutions with regulatory powers, the result is the well-known cat-and-mouse game between regulators and international economic operators.²⁸ And this is where overriding mandatory laws kick in. As much as the parties seek legal certainty when operating at the international scale,²⁹ their individual needs cannot persuade regulators to let go of the control over the effects of such transactions on their territory. If party autonomy is contractual freedom with transnational ‘super powers’, then internationally or overriding mandatory laws are those (actually rather few) mandatory regulatory provisions that are equally equipped with some ‘super powers’ to reach beyond the market’s geographical borders. They neutralize – because they override – party autonomy (only) where the most important, fundamental policies are at stake. One may well have reservations and doubts regarding the content and scope of certain regulatory interventions, as illustrated by the controversial *Ingmar* case. However, that is, or rather should be, a very different debate about specific content and normative choices. In the absence of institutionalized global regulation of the globalized economy, which unfolds through party autonomy, the need for national regulation having international reach, and thus for overriding mandatory laws of the forum, can hardly be questioned.

B. The tandem of substantive and procedural party autonomy

The balance of private and public interests in terms of choice of law, however, becomes fragile, if not delusive, when the *procedural* dimension of party autonomy is added to the equation. As already mentioned, certain national and EU provisions are ‘overriding mandatory’ so long as they are part of the *lex fori*: they are binding for judges in the EU or in the Member State whose fundamental policy is at stake. That overriding mandatory effect, however, vanishes largely in other jurisdictions, as seen in Article 9(3) of the Rome I Regulation. This is arguably even more so in arbitration, which leads to the heart of the problem of this topic: can parties avoid *l’application necessaire*, and disarm the overriding mandatory effect of such provisions, simply by reserving the resolution of their disputes to courts or arbitral tribunals outside the realm of the regulator? The *prima facie* finding is that they can, at least to a rather extensive degree.

²⁵ F Partnoy, ‘Financial Derivatives and the Costs of Regulatory Arbitrage’ (1997) 2 Journal of Corporate Law 211, 227.

²⁶ See H Muir Watt, L.G. Radicati di Brozolo, ‘Party Autonomy and Mandatory Rules in a Global World’ (2004) 4(1) Global Jurist Advances, Art 2 para 2, although arguably confusing cause and effect.

²⁷ For a critical discussion see S Francq, ‘Regulation and Party Autonomy – Public Interests in Private International Law’ (2016) 59 Japanese Yearbook of International Law 251, 278-283.

²⁸ A Riles, ‘Managing Regulatory Arbitrage: A Conflict of Laws Approach’ (2014) Cornell International Law Journal 63, 65: ‘The ability of financial institutions to act beyond the reach of regulators threatens the sovereignty of nation-states and the well-being of national economies. Yet as regulators are well aware, the threat is possible only because of the differences in legal regimes. For off-shore investors, a patchy regulatory landscape is key to the business model; the very purpose of booking the transactions offshore, or through an entity that is not subject to a particular kind of regulation, is to circumvent regulatory authority.’

²⁹ As captured by the US Supreme Court in *Scherk v Alberto-Culver Co*, 417 U.S. 506, 516 (1974), cited above n 2.

The operation of the tandem of choice of law agreements, opting for the laws of a different legal order, and of jurisdictional agreements, providing for a forum or an arbitral seat in a foreign jurisdiction, has led Luca Radicati di Brozolo to conclude famously that parties can actually reduce overriding mandatory laws to mere '*lois d'application semi-nécessaire*', not without pointing at the potential benefits of the enhanced normative competition.³⁰ The background against which Radicati makes his observation of the degradation to semi-mandatory laws is the overall pro-enforcement bias originating from the New York Convention, its prohibition of substantive review of arbitral awards and the presumption of validity of arbitral awards. Both privileges of arbitration have been developed further in the name of a 'strong policy in favour of arbitration',³¹ culminating in the French doctrines of the autonomous validity of arbitration agreements independent of any national contract law consideration (*Uni-Kod*),³² the immunity of arbitral awards against the effects of annulment in their foreign country of origin (*Putrabali*),³³ and the reduction of court review under the public policy exception both in annulment and recognition and enforcement proceedings to only 'flagrant, effective and specific' violations of (French) international public policy (*Thalès*).³⁴ Except in outrageous cases, arbitration agreements and awards can be expected to fly, at least in France, thus seeming to fulfil the prediction (supposedly dating back to Domat in 1702) that '*l'arbitre est ... le juge naturel du commerce international*'.³⁵

C. Arbitrators as the guardians of public policies?

Would an emerging '*ordre arbitral international*'³⁶ and a virtually unfettered reign of party autonomy ruin the effectiveness of EU – or any – public policies? The most vanguard – and in the literal sense utopian – answer is given by Emmanuel Gaillard:³⁷ public policies would not be imperilled in practical terms, because the essence of those public policies, transported in the vehicle of (national and thus potentially parochial) overriding mandatory laws, would be captured by the transnational or 'truly international' public policy emerging as the flip-side of the *lex mercatoria* coin. This transnational public policy would be distilled through the comparative law method from the vast range of domestic limitations to party autonomy and the underlying public policies. International arbitrators could then define the boundaries of party autonomy and contractual freedom at the transnational level and refuse claims or vindications where enforcing them would violate the elaborated transnational policies. As a

³⁰ Radicati, 'Mondialisation...' (n 3) paras 37 and 38; see also H. Muir Watt, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy' (2003) 9 Columbia Journal of European Law 383; L.G. Radicati di Brozolo, 'Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration: A Fresh Look at the "Second Look"' [2004] International Arbitration Law Revue 23.

³¹ See, for example, in the US *Moses H. Cone Memorial Hospital v Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); see also in England *Westacre Investments Inc v Jugoimport-SPDR Ltd* [1999] QB 740, 773.

³² Cour de Cassation (civ 1er), 30 March 2004, *Uni-Kod v Ouralkali* [2004] Revue de l'Arbitrage 723-24.

³³ Cour de Cassation (civ 1er), 29 June 2007, *PT Putrabali Adyamulia v Rena Holding and Mnogutia Est Epices* [2007] Revue de l'Arbitrage 507.

³⁴ Cour d'appel de Paris, 18 November 2004, *Thalès v Euromissile* [2004] Revue de l'Arbitrage 751, commented by L.G. Radicati di Brozolo, 'L'illicéité qui 'crève les yeux': critère du contrôle des sentences au regard de l'ordre public international' [2005] Revue de l'Arbitrage 529; confirmed by Cour de Cassation (civ 1er), 4 June 2008, *SNF v Cytec* [2008] Revue de l'Arbitrage 473; but see below n 83.

³⁵ See T Clay, *L'arbitre* (2001) 227 para 271, similarly already P Fouchard, 'L'arbitrage international en France après le décret du 12 mai 1981' [1982] Journal de Droit International (Clunet) 374 para 11; P Mayer, 'Le contrat illicite' [1984] Revue de l'arbitrage 205, 208.

³⁶ For this conceptual exaltation see the French Cour de Cassation (civ 1er), 8 July 2015, Pourvoi n° 13-25846, *Sté Ryanair Ltd v Syndicat mixte des aéroports de Charente (SMAC)*, available at <http://www.legifrance.gouv.fr>.

³⁷ E Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (2007) 176-183 paras 115-118.

consequence, arbitrators would no longer be required to apply national overriding mandatory laws. This grand construction of the transnational arbitral legal order deserves more attention than there is space here. Suffice it to say that this vision is simply irreconcilable with any notion of legitimacy, ranging from democracy to separation of powers: it can hardly be accepted that ‘arbitrators are becoming – if with some hand-wriggling and reluctance – default law makers for international traders’.³⁸ Arbitrators cannot possibly (want or be wanted to) fill the void of the absence a global regulator, which states are not willing or able to create. Conflict of laws remains the uncomfortable and unavoidable reality.

A slightly less utopian answer seems to be premised, like the previous one, on Holmes’ realist view that law is the nothing more pretentious than ‘the prophecies of what courts will do in fact do’.³⁹ Luca Radicati, as also Pierre Mayer and Natalie Voser,⁴⁰ has suggested that

[t]he application of [overriding mandatory laws] by arbitrators is in a sense the implementation of a bargain between states, on the one hand, and the arbitral community, on the other hand. ... [A]rbitrators may also have in mind a broader consideration of the ‘interests of arbitration’ which requires that they confirm the perception that arbitrators apply [such laws], since a generalized refusal of arbitrators to do so could have negative repercussions on the future amenability of courts to recognise arbitrability in this field.⁴¹

As compelling as the argument may be in terms of arbitral deontology and self-representation, it is obviously not a legal argument that could assure courts of the respect for their overriding mandatory provisions, as Radicati himself readily acknowledges.⁴²

However, more realist constructions prove equally elusive. The much-invoked obligation of arbitrators to render an enforceable award has traction only if the seat of arbitration is in the forum state whose public policies are at stake; in any other state, a request annulment of the arbitral award on public policy basis will usually be futile.⁴³ If the seat is elsewhere, the award may not be enforceable in the concerned forum state owing to the public policy exception of Article V(2)(b) NYC. However, it is unlikely to be set aside at the (foreign) seat of arbitration and, as a result, enforceable in any other jurisdiction whose market is not affected by the transaction and which may host assets of the award debtor.

Somewhat more attractive, and still unsatisfying, is the most pragmatic argument by Jan Paulsson,⁴⁴ made similarly by Gary Born,⁴⁵ that arbitrators are given (expressly or inherently) the mandate by the parties also to resolve their dispute over the applicable law, so long as the

³⁸ A Stone Sweet, ‘The New Lex Mercatoria and Transnational Governance’ (2006) 13 *Journal of European Public Policy* 627, 641.

³⁹ O W Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 461; invoked by Gaillard (above n 37) 24-25.

⁴⁰ N Voser, ‘Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration’ (1996) 7 *American Review of International Arbitration* 319, 337; P Mayer, ‘Mandatory Rules...’ (n 3) 292; *id.*, ‘Reflections on the International Arbitrator’s Duty to Apply the Law’ (2001) 17(3) *Arbitration International* 235, 246.

⁴¹ Radicati, ‘Arbitration and Competition Law...’ (n 3) 18 and n 50.

⁴² *Ibid.*

⁴³ See, e.g., J Lew, ‘Competition Law – Limits to Arbitrators’ Authority’ in *Arbitrability: International and Comparative Perspectives* (L. Mistelis, S. Brekoulakis eds, 2009) 241, 245; but see above n 34.

⁴⁴ J Paulsson, *The Idea of Arbitration* (2013) 133.

⁴⁵ G Born, *International Commercial Arbitration* (2nd edn, 2014) 2705.

arbitration agreement is coached in the usual broad terms ('any dispute arising out of or relating to this contract...'). It seems difficult to conceive that the safeguard of public interests should depend on the exact wording of the arbitration agreement. The approach raises more questions in cases in which the application of an overriding mandatory provision is not pleaded by one of the parties.⁴⁶ In any case, this approach advocates primarily a broad scope of jurisdiction, and thus maximum discretion, of the arbitrators in the matter, albeit without providing for any binding rules for the arbitrator to actually resolve such a true conflict of law.

In sum, none of these constructions gives a reassuring answer to the forum's question as to whether its fundamental policies underlying its overriding mandatory provisions will actually be given proper or at least equivalent effect in arbitration.⁴⁷ Arbitrators themselves affirm 'that international arbitrators almost invariably apply these rules, or at least consider the question of their applicability, and do so with considerable proficiency'.⁴⁸ This is certainly expression of a desideratum – yet the reality looks less promising.

What arguably carries more motivational weight for arbitrators are cases such as *Hilmarton* in Switzerland,⁴⁹ the indignation over which is at the heart of the French vanguard doctrine to ignore the effect of the law at the seat of arbitration.⁵⁰ Swiss courts annulled an arbitral award because the arbitrator had applied Algerian mandatory laws concerning corruption when the parties had agreed on the exclusive application of Swiss law. The same pattern underlies *Northrop Corp v Triad Int'l Marketing*, where the 9th Circuit brushed aside the argument that arbitrators should have applied clearly mandatory Saudi Arabian law prohibiting similar 'intermediary contracts' for the peddling of influence and insisted on the exclusive application of the chosen Californian law.⁵¹ Indeed, the arbitrators themselves had excluded California's conflict-of-laws rules, and thus any *renvoi* to Saudi law, since this would 'interject the laws of various other countries into the resolution of these disputes, thereby causing the uncertainty and lack of uniformity which the parties sought to avoid'.⁵² The same argument has, in my own experience, much traction in arbitrations under English law: s. 46(1)(a) of the Arbitration Act, instructing arbitrators to apply the law chosen by the parties, should be read in conjunction with the no-*renvoi* provision of s. 46(2) to prohibit the arbitrators moving away from the chosen English law.⁵³ Another recent example is that of an

⁴⁶ cf CJEU Case C-168/05 *Claro v Centro Móvil Milenium* [2006] ECR I-10421 para 39.

⁴⁷ Interesting, yet unrealistic, and silent on the conflict-of-laws question, are two Law & Economics approaches to incentivizing arbitrators to respect mandatory laws: AT Guzman, 'Arbitrator Liability: Reconciling Arbitration and Mandatory Rules' (2000) 49(5) *Duke Law Journal* 1279-1334 (proposing to make arbitrators financially liable for failing to mandatory rules); E Posner, 'Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi' (1999) 39 *Virginia Journal of International Law* 647-669 (suggesting random judicial review in substance of awards to as to create the fear of losing reputation by arbitrators if outed by courts).

⁴⁸ See, eg, Radicati, 'Antitrust...' (n 30) 28, relying on H Grigera Naón, *Choice of Law Problems in International Commercial Arbitration* (2001) 13.

⁴⁹ Cour de Justice du Canton de Geneve, 17 November 1989, *Omnium de Traitement et de Valorisation (OTV) v Hilmarton*, confirmed by the Federal Tribunal, 17 April 1990, both in (1994) XIX *Yearbook of Commercial Arbitration* 214-222, especially the former at 217-218.

⁵⁰ See V Heuzé, 'La morale, l'arbitre et le juge' [1993-3] *Revue de l'Arbitrage* 179-198.

⁵¹ *Northrop Corp v Triad Int'l Marketing SA*, 811 F.2d 1265, 1270 (9th Cir. 1987), referring to the passage of *Scherk v Alberto-Culver Co*, 417 U.S. 506, 516 (1974) cited above n 29; *Northrop* pre-empts at least for California the application of §187(2) Restatement (Second) Conflicts.

⁵² See *Northrop* (n 51) 1267.

⁵³ But see the argument made by Mitsubishi's lawyer before the US Supreme Court, arguing that Swiss law would allow a *renvoi* to US law, Transcript of Oral Argument *Mitsubishi v Soler* at 18, 473 U.S. 614 (1985) (No. 83-1569). On such *renvoi* under Art 19 of Swiss Law of Private International Law, see H van Houtte, 'The

arbitral tribunal sitting in New York and mandated to apply New York law to a maritime agency agreement that did not consider an Austrian agent's counter-claim for compensation under EU law, despite the fact that in parallel proceedings brought by the agent in Vienna, the US principal acknowledged the agent's entitlement when arguing (ultimately unsuccessfully) that this claim should be subject to the arbitration clause.⁵⁴ Other similar cases confirm the preference for party autonomy over overriding mandatory laws.⁵⁵

A particularly telling example is the indifference of the Canadian arbitrators in *Accentuate v Asigra*, which later played out in the English High Court. They affirmed that '[t]here may be interesting academic and intriguing domestic and international policy reasons why an arbitral tribunal should or should not apply *non lex contractus* mandatory rules of law to certain situations' and acknowledged the *Ingmar* case law of the CJEU, just to conclude that 'this does not justify restricting the parties' freedom to choose a desired governing law in Ontario' and to apply exclusively the latter.⁵⁶ Remarkable are also the English judge's comments in *Accentuate*. Tugendhat J first determined that the claim brought by the English distributor could not be obstructed by the arbitration agreement – and, indeed, the award – because of the need to give effect to the English provisions transposing the Commercial Agency Directive, which were overriding mandatory provisions according to *Ingmar*. He then observed:

I wish to add that nothing in this judgment should be taken as a criticism by me of the conduct or reasoning of the Arbitral Tribunal. ... [I]t was the duty of the Tribunal to apply the law which, according to the [contract], was designated by the parties as the law applicable to the substance of the dispute: see UNCITRAL Art 33. The passages cited from the Award ... above demonstrate that the Tribunal was fully conscious of the relevant considerations. They were clearly aware that the English court might approach the matter differently for reasons which do not reflect adversely upon the Tribunal.⁵⁷

This much solicitude for the arbitrators' considerations is somewhat surprising in view of the costs that their decision not to apply the EU overriding mandatory provisions – contrary to the postulates of the aforementioned arbitration literature⁵⁸ – inflicted on the Canadian principal.⁵⁹ However, the point is that judges, even when enforcing overriding mandatory provisions against the parties' tandem of arbitration and choice-of-law clauses, do not actually expect arbitrators to apply them. It is consequently not surprising that European judges, in case of doubt, refuse to give effect to the parties' transactional constructions that appear to aim at reducing the overriding mandatory provisions of the forum to *lois*

Application by Arbitrators of Articles 81 & 82 and Their Relationship with the European Commission' [2008] European Business Law Review 63, 67-68.

⁵⁴ Oberster Gerichtshof 1 March 2017 (n 19) para III(4).

⁵⁵ ICC Award no. 6379 (1990) XVII Yearbook of Commercial Arbitration 212; ICC Award no. 12193 (2004) (2007) 134 Journal du Droit International 1276; both cited by Wautelet (above n 14) 227 nn 65 and 67. See also Cour d'appel de Paris, 24 November, 2005, [2006] Revue de l'Arbitrage 717.

⁵⁶ Excerpt of the award of 3 March 2008, paras 18-20, cited in *Accentuate v Asigra* [2009] EWHC 2655 (QB) para 73.

⁵⁷ *Ibid* para 96.

⁵⁸ Above n 48; see also LG Radicati 'Mandatory Rules and International Arbitration' (2012) 23 American Review of International Arbitration 49, 72.

⁵⁹ Tugendhat J subsequently rejected a part of the legal costs claimed by the victorious English distributor; see *Accentuate Ltd v Asigra Inc* [2013] EWHC 889 (QB).

d'application semi-nécessaire. However, turning back to the original question: *why* do these provisions need to remain *d'application nécessaire*?

IV. Procedural autonomy and the principle of effectiveness

A. The principle of procedural autonomy of the Member States

The fundamental question is: to what degree does EU law actually compel judges to deny the enforcement of arbitration agreements where they cannot expect that the overriding mandatory laws of the forum will be applied in the arbitration or courts abroad and that the then applied foreign laws provide no equivalent solution?⁶⁰ Some argue that it does not. When discussing a decision of the German *Bundesgerichtshof* that rejected the need for requesting a preliminary ruling from the CJEU as to whether *Ingmar* could justify not enforcing a choice-of-forum agreement, Jürgen Basedow points at the ‘principle of procedural autonomy of the EU Member States’, from which he concludes:

Thus, the effectiveness of enforcement mechanisms for the post-contractual compensation of commercial agents is not ensured by the law of the Union, instead being entrusted to the Member States, and the obligation of the Member States is expressed with some reserve: they ‘must not render practically impossible or excessively difficult’ the exercise of individual rights. This negative obligation is clearly less than a duty to ensure the greatest possible effect to exercise the rights in question. Thus, the effectiveness of the right to such payments is a matter for national law, with some broad limits drawn by the law of the Union.⁶¹

The ‘principle of procedural autonomy’ is also the main argument when it comes to how much pro-arbitration bias national arbitration laws of Member States may promote despite the requirements of EU law. The CJEU confirmed in *EcoSwiss v Benetton* the prohibition of anti-competitive agreements in (what is now) Article 101 TFEU as constituting an overriding mandatory provision of EU law.⁶² Questions of EU law raised in arbitration would need to remain under the control of ordinary courts at the different stages of review of the award, ‘which may be more or less extensive depending on the circumstances’.⁶³ Moreover:

[i]t follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such

⁶⁰ D Quinke, ‘Arbitration of Disputes from Commercial Representation in Germany’ in *Arbitration in Germany* (KH Böckstiegel *et al* eds, 2nd edn, Kluwer 2015) 817, 825 para 30, suggests ‘reasonable certainty’ as the threshold rather than a ‘likely danger’ of non-application of the forum’s overriding mandatory provisions as required by the OLG München (n 12).

⁶¹ Basedow, ‘Exclusive...’ (n 1) 29.

⁶² CJEU Case C-126/97 *EcoSwiss China Time Ltd v Benetton International NV* [1999] ECR I-3055 para 36, referring to what is now Art 3(1)(b) TFEU, which defines the regulation of competition in the Internal Market as an exclusive competence of the EU.

⁶³ *Ibid* para 32, relying on Case 102/82 *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co KG* [1982] ECR 1095 para 14, which also established in paras 10-13 that an arbitral tribunal is not ‘a court or tribunal of a member state’ within the meaning of (now) Art 267 TFEU.

an application where it is founded on failure to comply with the prohibition laid down in [now] Article [101] of the Treaty.⁶⁴

This decision has been hailed as implicitly recognizing that competition law matters are, in principle, capable of settlement by arbitration in Europe.⁶⁵ Much attention has also been given to the other part of *EcoSwiss*, in which the Court clarified:

that [EU] law does not require a national court to refrain from applying domestic rules of procedure according to which an ... award ... in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine ... whether an agreement which the interim award held to be valid in law is nevertheless void under Article [101] of the Treaty.⁶⁶

This is, indeed, an expression of the ‘principle of procedural autonomy of the Member States’. That has motivated some to extrapolate this principle as a *carte blanche* for the abovementioned French doctrine of minimalist court review of awards for public policy violation resulting from the *Thalès case* law in terms of compatibility with EU law.⁶⁷ The same spirit is found in Basedow’s argument that procedural autonomy would grant courts of Member States the freedom not to refuse enforcement of jurisdictional agreements despite the expectation that an overriding mandatory provision of the forum will be neither applied nor compensated for by an equivalent foreign provision. In both instances, it is questionable that the CJEU would appreciate the ‘principle of procedural autonomy’ in such a manner as suggested by the opinion of AG Wathelet in *Genentech v Hoechst and Sanofi-Aventis*.⁶⁸ Quite to the contrary: national procedural autonomy does not, itself, limit the principle of effectiveness of EU law but is a subordinate principle of practical application to the latter, which thus deserves some more attention.

B. The context of the principle of effectiveness

The CJEU in *Nordsee* and, building thereon, in *EcoSwiss* insisted on the importance of references for preliminary rulings to the CJEU in order to ensure the uniform application of EU law⁶⁹ – a path not open to arbitral tribunals as mere creatures of contract and thus not ‘courts or tribunals of a Member State’ in the sense of [now] Article 267 TFEU. The orthodoxy of the European legal construction would be at stake if the implementation of EU

⁶⁴ Ibid para 37.

⁶⁵ See, eg, S. Brekoulakis, ‘Arbitrability – Persisting Misconceptions and New Areas of Concern’ in *Arbitrability: International and Comparative Perspectives* (L. Mistelis, S. Brekoulakis eds, Kluwer 2009) 19, 21; Lew (n 43) 255.

⁶⁶ Case C-126/97 *EcoSwiss* (n 62) para 48.

⁶⁷ See, eg, E Cheng, B Ward, ‘Application of *EcoSwiss* to French Annulment Proceedings’ (27 January 2005), <http://www.internationallawoffice.com>; R Nazzini, ‘International arbitration and public enforcement of competition law’ [2004] *European Competition Law Review* 153, 155. For *Thalès* see above n 34.

⁶⁸ Opinion of Advocate General M. Wathelet in CJEU Case C-567/14 *Genentech v Hoechst and Sanofi-Aventis* (17 March 2016) paras 55-72, especially 58.

⁶⁹ Case 102/82 *Nordsee* (n 63) para 14 (‘Community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it’); Case C-126/97 *EcoSwiss* (n 62) para 40 (‘it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied (Case C-88/91 *Federconsorzi* [1992] ECR I-4035, paragraph 7)’).

law were to diverge materially from one Member State to another.⁷⁰ Accordingly, (now) Article 5(3) of the Treaty on European Union (TEU) spells out the requirement of effectiveness as a benchmark for uniformity, which in the EU necessitates the principle of sincere cooperation and translates into a specific obligation of all Member States.

This requirement of effectiveness has been elaborated by the CJEU in a long line of cases:

In such circumstances [of lack of EU rules], it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [EU] law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness).⁷¹

The first part of this sentence later evolved into the CJEU affirming in 2006 the already mentioned ‘principle of procedural autonomy of the Member States’.⁷² However, as its genesis shows, this principle only applies for the purpose of filling a void left by EU law.⁷³ In filling this gap by domestic procedural law, Member States are then acting as trustees of the interest of the EU, which necessarily requires allowing for some variance in procedural terms – but not in terms of substance. National procedural provisions cannot, of their own right, take any precedence over substantive EU law. They merely remain applicable to the degree that they actually accord with general principles on which EU law itself is based,⁷⁴ such as the protection of legitimate expectations or, like the time-limitation issue in *EcoSwiss*, legal certainty and *res iudicata*.⁷⁵ Put differently, if national procedural law circumscribes the application of substantive EU law, this is not because of a higher principle of ‘national procedural autonomy’ but because EU law relies on national procedural law for its own (EU law) purposes.⁷⁶

National procedural provisions, even if ‘autonomous’, must still comply with the requirement of effectiveness, which means that, at the very minimum, they should ‘not make the exercise of the rights conferred ... [in practice] virtually impossible or excessively

⁷⁰ cf CJEU Case 6/64 *Costa v ENEL* [1964] ECR 585 para 17: ‘The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question.’

⁷¹ CJEU Case C-231/96 *Edis v Ministero della Finanze* [1998] ECR I-4951 para 34, relying on Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025 para 27; reaffirmed in Case C-260/96 *Ministero delle Finanze v SPAC* [1998] ECR I-4997 para 18; Case C-228/96 *Aprile v Amministrazione delle Finanze dello Stato* [1998] ECR I-7141 para 18; Case C-343/96 *Dilexport Srl v Amministrazione delle Finanze dello Stato* [1999] ECR I-575 para 25; Case C-453/99 *Courage v Crehan* [2001] ECR I-6297 para 29.

⁷² Joined Cases C-392/04 and C-422/04 *i-21 and others v Germany* [2006] ECR I-8559 para 57.

⁷³ cf TFEU Art 291, which reiterates the Member States’ duty of effective implementation of EU law and specifies in Paragraph 2 that implementing powers may be conferred upon the Commission ‘[w]here uniform conditions for implementing legally binding Union acts are needed’.

⁷⁴ For the status of general principles of law as primary EU law see CJEU Case 29/69, *Stauder* [1969] ECR 419 para 7.

⁷⁵ See Joined Cases C-392/04 and C-422/04 *i-21 and others v Germany* [2006] ECR I-8559 para 57; see W Schroeder, in *EUV/AEUV* (R Streinz ed, 2nd edn, Beck 2012) AEUV Art. 288 para 43.

⁷⁶ Schroeder (n 75) para 43 and n 141; CM Kakouris, ‘Do the Member States Possess Judicial Procedural “Autonomy”?’ (1997) 34 *Common Market Law Review* 1389, 1404.

difficult'.⁷⁷ If taken in isolation, one could conclude – as Basedow does – that ‘this negative obligation [would be] clearly less than a duty to ensure the greatest possible effect to exercise the rights in question.’⁷⁸ This misses the point, however, as clarified by the current President of the Court, Koen Lenaerts:

There is a fundamental difference between the national procedural autonomy to provide adequate remedies, which may indeed result in differences in *enforcement* of EU law and the prior question whether a certain EU norm can be *invoked* before the national judge. The former is as a matter of subsidiarity usually left to the Member States and rightly so. The latter should be a matter of EU law, applying equally across all the Member States, thus giving everyone as much or as little chance to rely on EU law using whatever procedural format the Member State provides for this.⁷⁹

Compelling a party to bring a claim on the basis of an overriding mandatory provision in a non-EU forum and against the odds of a choice-of-law clause mandating the application of non-EU law, given the predictability of failure as well as the time and costs involved, *is* making the exercise of that right ‘virtually impossible or excessively difficult’.

Moreover, effectiveness is required not only in negative terms but also in positive terms,⁸⁰ as clarified by the CJEU:

For that purpose [of guaranteeing the application and effectiveness of EU law], whilst the choice of penalties remains within [the Member States’] discretion, they must ensure in particular that infringements of [EU] law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.⁸¹

The much-criticized refusal of courts to enforce choice-of-forum or arbitration agreements in tandem with choice-of-law clauses where EU public policies are at stake is precisely such a sanction mandated by EU law. The importance of the principle of effectiveness becomes even more tangible when considering the consequences of courts’ failure to ensure such effectiveness: under the *Francovich I* case law, this would arguably give rise to liability of the Member State to the individuals protected by the EU substantive provisions in question.⁸²

⁷⁷ Joined Cases C-392/04 and C-422/04 *i-21* (n 72) para 58; Joined Cases 205-215/82 *Deutscher Milchkontor and Others v Germany* [1983] ECR 2633 para 22.

⁷⁸ See Basedow, ‘Exclusive...’ (n 1) 29, cited above at n 61.

⁷⁹ See K Lenaerts, T Corthaut, ‘Of birds and hedges: the role of primacy in invoking norms of EU law’ [2006] *European Law Review* 287, 309 (emphases in the original, internal citations omitted).

⁸⁰ But see Nazzini (above n 67) 155, arguably misreading the judgment’s para 37 (n 64).

⁸¹ ECJ Case 68/99 *Commission v Greece* [1989] ECR 2965 paras 23-24; for the Member States’ discretion see ECJ Case 50/76 *Amsterdam Bulb BV v Produktschap voor Siergewassen* [1977] ECR 137 para 32.

⁸² Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357 para 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* and *ex parte Factortame* [1996] ECR I-1029 para 31; Case C-392/93 *ex parte British Telecommunications* [1996] ECR I-1631 para 38; Case C-5/94 *ex parte Hedley Lomas* [1996] ECR I-2553 para 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others v Germany* [1996] ECR I-4845 para 20.

C. The requirement of effectiveness and its impact on arbitration

The limits of national procedural autonomy have been clearly captured by AG Wathelet in *Genentech*: ‘No system can accept infringement of its most fundamental rules making up its public policy, irrespective of whether or not those infringements are flagrant or obvious... Put another way, one or more parties to agreements which might be regarded as anticompetitive cannot put these agreements beyond the reach of review under Articles 101 TFEU and 102 TFEU by resorting to arbitration.’⁸³ Put yet another way, it is simply unacceptable, because it is unconstitutional, for judges to let deference to arbitration water down ‘the most fundamental rules making up [a country’s] public policy’ to merely ‘semi-mandatory rules’.⁸⁴

This reasoning *mutatis mutandis* shows also the insufficiency of the proposals that courts should only refuse to enforce arbitration or choice-of-forum agreements in the case of ‘*fraude à la loi*’⁸⁵ or ‘in clearly abusive circumstances’.⁸⁶ Courts have rightly refused to restrain themselves to this very restrictive criterion.⁸⁷ Such a minimalist approach would, in fact, be the equivalent to the problematic French *Thalès* logic at the stage of court scrutiny of the arbitration agreement for compatibility with the public policy of the forum. It is equally not compatible with the requirement of substantive effectiveness of EU law. Indeed, it would make little sense, also in terms of costs, to first pursue pointless arbitration or court proceedings, in which the EU overriding mandatory provisions are not expected to be applied, and then litigate anew the same dispute.

The concept of *lois d’application semi-nécessaire* may be an accurate factual description of an enforcement deficit in the transnational dimension of the globalized economy, but it is not a legal concept that could justify accepting such a regulatory deficit. Specifically, in the EU, the courts’ refusal to give effect to arbitration agreements that would undermine the effectiveness of EU overriding mandatory provisions is nothing but an application of the principle of effectiveness in its negative dimension. The resulting frustration of the parties’ (not the Member States’) procedural autonomy is, indeed, regrettable – and yet just the kind of sanction that, at least as a starting point, may even be required from Member States to ensure the full effectiveness of EU law.⁸⁸ Concerns that this approach would be merely speculative and should rather be left to the *ex post* control at the stages of enforcement, as suggested by the US Supreme Court in *Mitsubishi*,⁸⁹ cannot prevail over the effectiveness of

⁸³ AG Wathelet in *Genentech* (n 68) paras 67 and 72. See now also Cour d’appel de Paris 21 February 2017, *Belokon v Kirghizistan*, no 15/01650, available at <https://www.italaw.com/sites/default/files/case-documents/italaw8476.PDF>, at 8 finding that ‘the prohibition of money laundering is part of the number of principles, the violation of which the French legal order cannot accept even in an international context...’ and setting aside an award after very detailed scrutiny, albeit insisting that the violation would be ‘manifeste, effective et concrète’ at 15.

⁸⁴ In that sense Kleinheisterkamp, ‘Impact...’ (n 3) 116.

⁸⁵ Ragno (n 19) 158. The choice of this legal concept of conflict of laws is, strictly speaking, not convincing, as it refers to the manipulation of the connecting factors by the parties so as to circumvent the application of otherwise applicable law, which is not the case when the relevant connecting factor is the parties’ exercise of party autonomy; see F Rigaux, M Fallon, *Droit international privé* (3rd edn, Larquier 2005) 215-217 para 5.73.

⁸⁶ Basedow, ‘Exclusive...’ (n 1) 30-31.

⁸⁷ In Belgium, Cour de Cassation, *Sebastian International* (n 14).

⁸⁸ See above text accompanying n 81.

⁸⁹ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth* 473 U.S. 614 (1985) at 638: ‘Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the anti-trust laws has been addressed.’

core public regulation. Advocating a solution *à la Mitsubishi* is not only unrealistic where courts actually adopt the problematic minimalist *ex post* control of public policy.⁹⁰ As already noted, sending parties first off to a pointless arbitration is incompatible with the court's obligations to respect procedural efficiency as well as the EU requirement of substantive effectiveness. The reactions of European courts to potential circumventions of their overriding mandatory laws, especially those originating in EU law, can thus hardly be condemned as a matter of principle.⁹¹ What then remains as a question is whether breaking the arbitration agreements is actually the only and necessary consequence.

V. Proportionality and Pragmatism

There is, after all, a solution to the seeming antagonism between the need for effectiveness of EU overriding mandatory provisions and the efficiency of international arbitration. This solution emerges from the public law dimension of the problem. As elaborated above,⁹² overriding mandatory provisions limit the fundamental rights of the parties upon which party autonomy is constructed. The refusal to enforce the parties' choice-of-law agreement *and* their arbitration or choice-of-forum agreement is, as such, a legitimate yet harsh sanction. This sanction is an interference of the State (here the EU through the judges of a Member State) with the freedom of the parties that can be justified only to the degree that it is necessary. This follows directly from the principle of proportionality, which is the essential constitutional limitation of all exercise of sovereign power affecting the fundamental rights of individuals. This principle binds all public powers both at the EU level and at the level of the Member States,⁹³ whose constitutions mostly recognize the same principle.⁹⁴ As much as it is partially recognized that the legislature has a particular broad margin of appreciation in the field of economic ordering,⁹⁵ freedom of contract is recognized to be covered by the fundamental rights of the EU – and thus subject to the principles of proportionality.⁹⁶ This means, in the CJEU's own words:

In accordance with the principle of proportionality, which is one of the general principles of [EU] law, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate [or suitable] and necessary in order to achieve the objectives legitimately pursued by the legislation in

⁹⁰ See in the US *Baxter International v Abbott Laboratories* 325 F.3d 954 (7th Cir. 2003).

⁹¹ Not discussed here, for lack of space, is whether the courts' attitude would mean a re-installation of abolished rules of inarbitrability of matters covered by internationally mandatory laws and that the non-application of these laws would not constitute violations of public policy. As much they would deserve further clarification, both arguments are arguably conceptually misguided and, in any case, not decisive for the present purposes.

⁹² See above II.C.

⁹³ See Treaty on European Union (TEU) Art 5(1), first sentence, and (3), as well as CFR Art 52(1), second sentence;

⁹⁴ In Germany, BVerfG 12 November 1958 – 2 BvL 4, 26, 40/56, 1, 7/57 *Preisgesetz* (1958) 8 BVerfGE 274 at 328; in Belgium, e.g., Cour d'arbitrage Arrêt 167/2004 of 28 October 2004 – *SA Les AP Assurances v G Van Leekwijck et H Wouters*, (2005) 10 *Revue de Droit commercial belge* 1052, 1054. In France: Cour constitutionnelle, n° 2008-562 DC of 21 February 2008, *Loi relative à la rétention de sûreté*, ECLI:FR:CC:2008:2008.562.DC, paras 14, 17, 19, 23 (elaborating for the first time the criteria of the test of proportionality as recognized in German and EU law).

⁹⁵ CJEU Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405 para 56; Case C-84/94 *UK v Council* [1996] ECR I-5755 para 57; see already Case C-331/88 *FEDESA* [1990] ECR I-4057 para 14. Similarly in Germany BVerfG 18 July 2005 - 2 BvF 2/01 *Risikostrukturausgleich* (2005) 113 BVerfGE 167 para 224.

⁹⁶ CJEU Case 151/78 *Sukkerfabriken Nykøbing v. Ministry of Agriculture* [1979] ECR 1 para 22 (*obiter*); Case C-292/97 *Kjell Karlsson and Others* [2000] ECR I-2737 para 45.

question, it being understood that when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.⁹⁷

This is the benchmark of legality that the legislator has to respect when devising overriding mandatory laws, as well as courts when interpreting provisions as constituting overriding mandatory rules.

A. Suitability

Maybe proportionality is also the underlying point that Basedow has in mind when he argues that refusing to enforce a jurisdiction agreement and entertaining the claim by the protected European party is ‘far from being effective; in terms of its broader impact, it is almost completely ineffective by its very nature.’⁹⁸ That is because an EU judgement that ignores an arbitration agreement for the purposes of giving effect to the overriding mandatory provisions is only enforceable within the EU. Anywhere else, especially in the foreign party’s home jurisdiction, the enforcement is likely to fail. Indeed, courts outside the EU, not bound by EU public policy considerations, will usually not refuse recognizing the validity of the choice-of-forum or arbitration agreement, which is then an obstacle to recognizing a European court’s jurisdiction as well as its judgements. With this in mind, Basedow suggests:

Well-advised principals from third states will react to this case law by cautiously avoiding the placement of any assets in the EU which might serve as the basis for the subsequent enforcement of an agent’s claims. For the everyday payment operations undertaken in Europe, a bank account in the Principality of Liechtenstein (or other similar places) will usually be sufficient; in Liechtenstein, a Contracting State of the European Economic Area, judgments from EU Member States will not be enforced under Brussels I or the Lugano Convention. Moreover, well-informed principals, when negotiating an agreement with an EU agent, will use the uncertainty of a duty to pay post-contractual compensation as an argument to squeeze the agent’s remuneration that is due during the term of the contract. Thus, instead of protecting the agent, the courts might pave the way for the principal’s higher profits.⁹⁹

First, this point sits uncomfortably with Basedow’s subsequent conclusion that arbitration agreements *should* be disregarded for the purpose of protection against abusive circumvention in the particular circumstances of the case.¹⁰⁰ If things were as related by Basedow,¹⁰¹ courts in the EU would have indeed an even more legitimate case to start from the presumption that such critical ‘off-shore’ arbitration or choice-of-forum clauses flanked by choice-of-law clauses should not be given any effect. Moreover, the suggestion to focus on abuse in the particular case is not quite in line with the nature of overriding mandatory laws as elaborated by Basedow himself: they are supposedly precisely not mere domestic *statuta interventionalia* that protect special group interests but *statuta institutionalialia* that implement policies fundamental for the states’ economic, social and political functioning.¹⁰² The protection they provide to individuals is secondary and just a means, not the goal.

⁹⁷ Case C-331/88 *FEDESA* [1990] ECR I-4057 para 13.

⁹⁸ Basedow, ‘Exclusive...’ (n 1) 29-30.

⁹⁹ *Ibid* 30.

¹⁰⁰ *Ibid* 22 and 31.

¹⁰¹ See below the two paragraphs preceding n 120.

¹⁰² Basedow, ‘Wirtschaftskollisionsrecht...’ (n 16) 20, 27-28.

Second, the deeper legal point seems to be that the principle of effectiveness is not served by the courts' disregard for the parties' procedural autonomy when the application of overriding mandatory laws is at stake because of the parties' possibility of escaping nevertheless. Re-contextualized in light of the public law dimension of overriding mandatory laws, Basedow's argument could be that the courts' repressive approach would fail the first hurdle of the test of proportionality, which is that the measure needs to be suitable for attaining the pursued policy goal. However, this would ignore the already mentioned deference owed to the regulator's margin of appreciation and prerogative of choice of means, especially in economic matters.¹⁰³ More importantly, the argument relies on the same fallacy that animates the construct of *lois d'application semi-nécessaire*:¹⁰⁴ a sanction enforcing a regulatory measure designed to remedy a market failure cannot possibly be unsuitable because the regulated actors simply recur to ever more inventive transactional engineering and regulatory arbitrage to undermine the regulatory effort. Otherwise, most financial regulations (if not all regulation in the face of globalization) would likely fail the test of proportionality and have to be declared illegal.

The argument is more than questionable as a matter of fact. Accessing the EU market without having any assets whatsoever, merchandise or payments, within the reach of execution measures of European courts may be possible – yet at potentially significantly increased transaction costs. Hardly any foreign company will want to operate at a larger scale in such circumstances on one of the world's largest markets. The recent standoff between the EU and globally operating tobacco corporations over the operation of a vast tobacco smuggling scheme involving tax fraud and money laundering illustrates this well: in view of keeping access to the EU market, all corporations seated outside the EU but one accepted the tough conditions imposed by the Commission as settlement for their involvement in the scheme.¹⁰⁵ The sanction of seriously complicating, if not outright excluding, access to the EU market should provide enough leverage in most cases to obtain compliance with EU judgements giving effect to the overriding mandatory provision in question. Consequently, refusing to give effect to the arbitration or jurisdictional agreement is not, as such, an unsuitable sanction.

B. Necessity

If the regulatory measure pursues a legitimate policy objective and is not clearly unsuitable, it is still disproportionate if its impact on the individual's rights exceeds what is necessary to achieve the intended objective. This is a general principle of EU law and explicitly enshrined in Article 5(3) TEU, as well as in the case law relating especially to fundamental rights.¹⁰⁶ The question for the present purposes is whether there is a less restrictive alternative measure that is equally as effective in obtaining the policy objective.

¹⁰³ See above n 95.

¹⁰⁴ See above text accompanying n 30.

¹⁰⁵ Admittedly, the one to refuse any such settlement, Nabisco, was left off the hook by the US Supreme Court, who refused to interpret the RICO Act as granting the EU a right of action in US courts thus frustrating the EU's hope to use the US private enforcement mechanisms against racketeer influenced and corrupt practices: *RJR Nabisco v European Community*, No. 15-138 (S.Ct. 20 June 2016); see S Francq, 'Agora: Reflections on RJR Nabisco v European Community: A European Story', ASIL Unbound 9 August 2016, <https://www.asil.org/blogs/agora-reflections-rjr-nabisco-v-european-community-european-story>.

¹⁰⁶ For the recognition of contractual freedom as protected by fundamental rights and thus subject to the principle of proportionality under EU law, see above n 96; for examples of member states' constitutional law see above n 94.

1. Focusing on the problem: the choice-of-law agreement

The path to such an alternative solution can be found in *Mitsubishi*,¹⁰⁷ the very decision that pioneered the departure from general exclusions of certain matters from arbitration towards ensuring application of mandatory laws in matters of public policy. The intriguing question remains: what made the US Supreme Court reverse an order by which the Court of Appeals for the First Circuit found that antitrust claims brought by a car dealer in the context of the termination of a distribution agreement would not be capable of settlement by arbitration? The US Sherman Act clearly intended to govern these claims, but the Supreme Court accepted these to be referred to an arbitral tribunal composed of three Japanese arbitrators, sitting in Japan, and called upon to apply Swiss law.

Arguably, this bold step was not only motivated by the manifold policy considerations that the Supreme Court elaborated upon in its judgement but also by an imminently practical one. The Court noted in footnote 19 ‘that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.’¹⁰⁸ This suggests that, at the outset, the Court took more or less the same position as the Belgian and German courts.¹⁰⁹ However, a factual detail given in the same footnote shows why the Supreme Court did not feel the need to condemn the parties’ agreement providing for arbitration in Japan according to Swiss law: ‘At oral argument, however, counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis.’¹¹⁰

Irrespective of the controversy over what the US Supreme Court actually meant in footnote 19, the approach of seeking an undertaking that those – and only those – issues intended to be governed by the forum’s overriding mandatory rules shall be governed by them, irrespective of the *lex contractus*, is pragmatic and efficient.¹¹¹ Indeed, this approach is the most convincing key to solving the courts’ dilemma between respecting the parties’ original intention to arbitrate and their legislatures’ intention to protect fundamental public interests. It is for the parties to give the judges the elements they need to determine the relevancy of their overriding mandatory provisions in the dispute. As shown above,¹¹² the courts simply cannot tolerate their overriding mandatory provision to be de-activated by party autonomy since the former are necessarily, and legitimately, limits to the latter. That being said, before striking down the parties’ contractual construction the courts must first verify whether the circumstances of the case may nevertheless allow respecting the arbitration agreement without compromising their duty to ensure the effectiveness of the fundamental policies in question. It is then for the party requesting the enforcement of the arbitration agreement to present the necessary clarification.

¹⁰⁷ Above n 89. See already Kleinheisterkamp, ‘Impact...’ (n 3) 115-117.

¹⁰⁸ *Mitsubishi* (n 89) 637 n 19.

¹⁰⁹ See above text accompanying nn 14 and 15.

¹¹⁰ *Mitsubishi* (n 89) 637 n 19.

¹¹¹ Similarly, the Australian Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 paras 241 and 254; compare in the US *Mohamed v Uber Technologies, Inc.*, ___ F.3d ___, 2016 WL 4651409 (9th Cir., Sept. 7, 2016), with reference to *American Express Co v Italian Colors Restaurants*, 133 S.Ct. 2304, 2310 (2013) (quoting footnote 19 of *Mitsubishi*).

¹¹² See above text after nn 79 and 90.

This should be rather unproblematic in the absence of a choice-of-law clause, so long as the applicable conflict-of-laws rules can be expected to select the law of the country whose fundamental policy is at stake.¹¹³ On the other hand, where the parties have submitted their contract to foreign law, the party requesting arbitration has the opportunity to show to the court that the protection afforded by the *lex contractus* is equivalent to that of the *lex fori*, thereby ensuring an outcome that will not clash with the forum's public policy. If such equivalence cannot be established or remains doubtful, the requesting party's last resort would be – as in *Mitsubishi* – to give an undertaking that it expects and accepts the application of the overriding mandatory laws of the forum by the arbitrators. Once recorded by the court, this would then constitute a variation of the original choice of law agreement by confirming the applicability of the forum's overriding mandatory laws to the regulatory issues at stake. The issue created by the original choice-of-law agreement is thereby eliminated, and the court could refer the parties to arbitration without having to fear for the application of its overriding mandatory laws. That is, because the so varied choice-of-law agreement – and thus the applicability of the overriding mandatory laws in question – is binding on the arbitral tribunal in the future arbitration. The effectiveness of the forum's fundamental policies and market regulations is then no longer at stake.

2. *Objections and consequences*

One objection against this contractual solution could be that a unilateral undertaking cannot cause the variation of the original agreement. This objection could arise if the party who initiated the court proceedings still continues to resist arbitration. However, at this stage, an expression of consent to the variation by that party resisting arbitration is irrelevant: its consent can be presumed, since the non-application of the forum's overriding mandatory rules is its only legitimate reason for resisting the arbitration agreement. Accordingly, the resisting party would be stopped from rejecting the undertaking given by the party moving to stay the court proceedings. Moreover, inverse concerns that the latter party had given the undertaking under duress because of the court's threat to ignore the arbitration agreement would also miss the point. It would ignore the fundamental nature of both overriding mandatory laws and party autonomy: the foreign party was never free to contract out of the application of the overriding mandatory laws in the first place. The undertaking given is nothing but the reconciliation of the parties' autonomy with the legal framework in which that autonomy is exercised. The undertaking is no different from, for example, a behavioural undertaking given by a merged entity in order to obtain clearance of the merger from the competition authority. Finally, a theoretical objection that the application of *lois d'application immediate*, which – by definition – define their own scope application themselves, cannot be dependent on the parties' intention would also be of no concern. The parties do nothing more than acknowledge, and undertake to respect, the (in any case overriding mandatory) scope of application of those rules upon which they had previously cast doubt by their original choice of law. From that perspective, their agreement merely serves the purpose of avoiding the legal sanction (non-enforceability of the arbitration agreement) that the court would have to impose in case they insisted on their original choice.

¹¹³ See, eg, Hague Convention on the law applicable to agency (14 March 1978) Art 6; Rome I Regulation 593/2008 of 17 June [2008] OJ L177/6, Art 4 paras 1(b) and (f) (for service and distribution agreements). In this sense also the Portuguese Supremo Tribunal de Justiça 11 October 2005, Case 478/05, available at <http://www.dgsi.pt>; but see for transport law in Germany see Oberlandesgericht Köln 2 August 2005, BeckRS 2005, 10360 = TranspR 2005, 472: 'The literature conditions the effectiveness of an arbitration agreement to the provision expressly provides that the arbitral tribunal has to apply the CMR.'

Once the court has referred the parties to arbitration on this basis, the so obtained variation of the choice-of-law agreement is then binding on the most party-autonomy-minded arbitrators. The arbitral tribunal is no longer torn by the dilemma between loyalty to the parties and regulatory threat. The object of the variation agreement is technically a *dépeçage*: as much as the originally chosen law remains generally the *lex contractus*, the parties accept its derogation by the overriding mandatory laws of the affected market (only) insofar that the scope of the latter claims mandatory application as *lex specialis*. This then defines the arbitral tribunal's mandate to decide the dispute without risking later incompatibilities with the public policy of the affected market.

When seen in the context of the 'public law' requirement of necessity, courts are arguably *obliged* to request such a clarification on the law to be applied by the arbitral tribunal when confronted with arbitration agreements whose enforcement could lead to the violation of certain fundamental policies of the forum. So long as a defendant is willing to give an undertaking that ensures the applicability of the forum's overriding mandatory provisions, a categorical refusal to enforce the arbitration agreement would constitute an excessive, because unnecessary, interference by the State with the parties' party autonomy – at least in its procedural dimension. This solution therefore catalyses the synthesis of the antithetical relationship between party autonomy and overriding mandatory provisions allowing both for the efficiency of the former and the effectiveness of the latter: the defendant has to sacrifice the right to plead the exclusive application of the law originally chosen for the sake of keeping the arbitration agreement alive, whereas the claimant can invoke the protection of the overriding mandatory laws, yet only by accepting arbitral jurisdiction.

VI. Conclusion

Overriding mandatory laws, at least those of and in the EU, are not any kind of ghost haunting the efficiency of international arbitration. When framed and applied correctly, they are, indeed, the *lois de police* that enforce a minimum of respect for national and EU public policies. As much as they may appear as antithetical to international arbitration, it is their public law nature that allows drawing a synthesis between the interests at stake: 'private' and 'public' legal certainty.

It is worth noting that the *Scherk* rhetoric of legal certainty in international trade requiring the enforcement of jurisdictional and choice-of-law agreements cuts both ways.¹¹⁴ Leaving all public interest issues to the *ex post* control at the stages of enforcement would indeed enhance the 'orderliness and predictability' in international contracts. However, it would be at the expense of the 'orderliness and predictability' that the legislature intended to guarantee to market participants, contractual stipulations notwithstanding, by defining a stable basis of their operations in an *overriding* mandatory rule of law.¹¹⁵ Put differently,

¹¹⁴ See above n 29.

¹¹⁵ *cf Solman Distribs v Brown-Forman Corp*, 888 F.2d 170, 172 (1st Cir. 1989) (in a US inter-state case on a choice-of-law clause in favour of California law in a Maine distribution contract: 'Defendant merely contends the state recognizes that its business has the necessity of "certainty." This is to ignore that there would be a corresponding uncertainty on plaintiff's part. A distributor's uncertainty, its economic livelihood, may readily be thought at far greater risk, having in mind that the [producer] can always cancel freely if it is not receiving proper performance.').

enforcing arbitration and choice-of-law agreements in order not to ‘imperil businessmen’s willingness to enter into international commercial agreements’¹¹⁶ could result in ignoring that the design of the EU overriding mandatory laws is precisely to ensure the establishment and good functioning of the Internal Market – and thereby also foreign businessmen’s opportunity to access, and benefit from, the level playing field of the so regulated markets.¹¹⁷

The problem then boils down to the question of why ‘private’ legal certainty should be given primacy over ‘public’ legal certainty. This becomes more tangible when considering the reproach that animates the criticism of the European court decisions, notably that they would approve a breach of good faith of one of the parties.¹¹⁸ The fallacy is the following: *statuta institutionalia* do not, and cannot, care about the individual arrangements but only about ensuring the functioning of the market through their rule over the multitude of individual contracts they regulate.¹¹⁹ That is precisely the reason why they constitute *overriding* mandatory laws. This becomes even more palpable when considering Article 101(2) TFEU, the archetype overriding mandatory rule of EU law: any agreements prohibited by EU competition law, because distorting the level playing field of the Internal Market, ‘shall be automatically void’. There is simply no good faith to start with – and thus no legitimate expectations – when parties enter into such agreements that undermine competition on the Internal Market. Smart use of party autonomy cannot possibly change that outcome.

Counsel drafting international agreements need to do their homework. In virtually all cases discussed here, starting with *Ingmar*, there is nothing indicating an intent to evade EU laws. It seems that counsel for the North American companies have simply ignored the problem of overriding mandatory laws in other jurisdictions and (understandably) wanted uniformity in their contracts with agents or distributors around the globe – rather than being lucid about, and accepting, the different regulation of the foreign markets on which they wish to operate. Here, as well, the rhetoric of the US Supreme Court cuts both ways, if flipped around. The parties that simplistically insist on compliance with the jurisdictional and choice-of-law clauses have to accept that:

We cannot have trade and commerce in world markets and international waters exclusively on our [preferred] terms, governed by our [preferred] laws, and resolved in our [preferred] courts.¹²⁰

The heart of the problem is one of perspective. Arbitration practitioners are rightly worried about abusive invocation of some public interest reflected in overriding mandatory laws outside the chosen *lex contractus*¹²¹ – after all, it is arbitration practitioners who raise

¹¹⁶ *Scherk v Alberto-Culver Co*, 417 U.S. 506, 517 (1974).

¹¹⁷ Kleinheisterkamp, ‘Impact...’ (n 3) 114.

¹¹⁸ See, eg, Dundas ‘EU law ...’ (n 9) 164: ‘As a former Head of Legal at an international oil company, I have major conceptual difficulty with the concept that a Canadian contract with Canadian arbitration, *as agreed by the parties*, should in fact, by operation of EU law, turn out to be a Brussels sprout... [T]here is an element of dishonesty in Accentuate contracting on one basis, then pleading a wholly different basis...’ (emphasis in the original).

¹¹⁹ See also above n 102.

¹²⁰ *cf The Bremen v Zapata Off-Shore Co*, 407 U.S. 1, 9 (1972), cited by *Scherk v Alberto-Culver Co*, 417 U.S. 506, 519 (1974).

¹²¹ For such an example in the Federal Court of Australia see *Casaceli v Natuzzi SpA* [2012] FCA 691 para 50: ‘the applicants sought to surround their claims with an aura of important public policy issues when, in substance, the dispute is a commercial cause between two companies involved in the international furniture trade by which one company seeks damages from another.’

such issues if that is in the interest of their clients. From this (private law) perspective of *pacta sunt servanda*, the understandable preference is for letting the arbitration move forward and limiting control to *ex post* review by courts at the challenge or enforcement stage, to dissuade obstructive practices. The focus is thus: what if there is nothing to the party's argument of public interests?

From a (public law) perspective of economic regulation, however, the focus is from the other side: what if there is? Because if there is, regulatory efficiency may well be compromised by the private transaction, which then calls for privileging, in case of (justified) doubt, the public interest of the affected market. The public law perspective is compelling for courts – and ultimately unproblematic for arbitration if properly tempered by the limitations that public law itself provides for the protection of private interests, notably proportionality. Arbitration is unhindered so long as the application of overriding mandatory laws is ensured. What potentially remains is the unease with trusting national courts to address and dispose of these issues properly. However, the trust in the courts' capacity may just be the price to be paid for gaining their trust in the arbitrators' capacity to uphold public interests in international arbitration.