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Arbitral autonomy and applicable and overriding law*

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ABSTRACT

This article examines themes associated with the role of arbitration and its interrelationship with the law generally. These include the extent to which parties to an arbitration agreement are free to choose the principles governing the procedural and substantive aspects of the arbitration. The article considers the circumstances in which such a choice may be affected or overridden by mandatory principles of law or court intervention, by the courts of the seat of arbitration or in enforcement proceedings in another jurisdiction. It identifies the potential tension between the interests of party and arbitral autonomy on the one hand, and the public policy which justifies court interventions in the arbitral process and governs enforcement of awards on the other. The tension has in a European context manifested itself recently in a marked dichotomy between the attitudes of European Union law to commercial arbitration and to bilateral investment treaty arbitration, presenting arbitrators and courts involved in the latter with potential dilemmas. It suggests that there is still scope for holistic development, recognizing the value attached to arbitration by the commercial community.

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It is an honour to give a talk in memory of the late Lord Goff of Chieveley, Robert Goff — a towering intellectual and judicial figure, as well as a man of great personal charm, courtesy and consideration. I first met him some 55 years ago, when arranging to do pupillage in his chambers shortly before departing to do an internship with a Hamburg law firm. He asked me to ensure that the Hamburg arbitration clause did not affect the popularity of London maritime arbitration. I do not think it has done, or that this had anything to do with me. But I joined his chambers, and was often fortunate enough to be led in some memorable cases by Robert Goff QC. It was a formative experience, especially for anyone accustomed to eat at normal hours. After court finished at 4:15 pm, we would return to chambers to discuss the twists and turns of the current scuttling case, or to complete demurrage calculations — undertaken in those distant days on a hand-cranked calculating machine (wind one way for multiplication, the reverse for division, etc). Robert Goff and his juniors would work through to near midnight, when

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his juniors would return home to recover, only to find, next morning, their leader arriving in chambers with fresh ideas and submissions, developed it appeared during the small hours. A more balanced experience were the Sunday mornings spent in the study of his Holland Park house, ending at midday when Robert would play a Mozart piano piece, followed by a very handsome lunch prepared by his loyal wife, Sarah, who obviously appreciated that we were likely to be hungry. Robert Goff's early life as an Oxford academic saw him set out to become the father of a whole new subject: *Restitution*, or — as for arcane reasons his modern editors have now renamed it — *Unjust Enrichment*. On the bench, the measured perfection of his judgments combined with his academic pre-eminence made it a huge pleasure to appear in front of him and saw him rise rapidly through the system to become the Senior Law Lord. The title of his famous Maccabaean lecture '*The Search for Principle*' encapsulates the professional and personal life of a remarkable man, who influenced and continues to influence so many in ways extending well beyond the field of law.

I turn to my subject: '*Arbitral autonomy and applicable and overriding law*'. The hallmark of arbitration is autonomy. Parties choose that their disputes shall be determined by an arbitrator or arbitrators, rather than in a court to which, whether in accordance with or against their will, it could otherwise be taken. There are a variety of reasons for such choice. Choice of forum is usually possible in both arbitration and litigation. But, when it comes to enforcement, arbitration awards enjoy the benefits of the remarkably successful New York Convention 1958 (now 60 years old, with some 150 parties). Judgments, in contrast, are enforceable on a much more limited basis, depending on local law, bilateral treaties or within Europe under the Brussels regimes. The only instrument with potentially worldwide scope comparable to the New York Convention 1958 is the Hague Choice of Court Convention 2005. It is admirable in itself, but has as yet only the European Union (EU), Denmark, Singapore and Mexico as ratifying states. Hopefully, it will achieve more adherents — indeed, with Brexit, one of them will be the United Kingdom (UK) in its own right, which will be able to apply the Convention against its former fellow EU members.

So enforcement is clearly one important factor. But there are others. They can include a belief that it is easier to rest assured about the expertise and quality of arbitrators chosen by the parties or by some reliable institutions than that of some judges in some jurisdictions; or a belief that parties agreeing to arbitration can exercise greater control over the applicable law and procedure than they can in litigation. But in many cases a decisive consideration may well be that, while arbitration proceedings may be no cheaper than a trial, arbitration is usually a one-stop shop, without possibility of appeal. That seems attractive to many parties, at least until after an award reveals that they have lost.

I want to examine how far parties can choose the principles governing the dispute which they agree to arbitrate. There are at least two and sometimes even three aspects to this question. The first concerns the substantive subject-matter, or as I shall call it business, in respect of which the parties agree to arbitrate, commonly some relationship or transaction between them. The second concerns their agreement to arbitrate. This is now generally accepted as separate from, even if it is embodied in, the same document as records the business which is the agreed subject-matter of arbitration.[1] The third concerns the procedure to be followed in the arbitration. This may in some respects be

[1] See for example, *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

mandated by an arbitration law at the place of the seat. In other respects, it may be agreed by the parties. Normally, however, the law governing the arbitration agreement will coincide with the law of the seat and will also be the law which the parties have, at least implicitly, chosen to govern procedure. It is something of a recipe for confusion to choose a different law to govern procedure from that governing the agreement to arbitrate.

How far can parties choose the principles which will govern the determination of disputes relating to the business, the subject of arbitration? Normally, parties intend that their disputes shall be determined in accordance with law. In the case of commercial arbitrations, on which I am focusing, this will commonly be domestic law.[2] In theory, however, parties can choose any principles they like to determine disputes between them, ranging from tossing a coin to the conferral on arbitrators of the power to act as *aimables compositeurs* or *ex aequo et bono* — that is equitably without reference to any legal principles at all. No doubt, they would in all such cases be bound by the outcome. It is not sensible to describe tossing a coin as arbitration at all. But the English Arbitration Act 1996 does expressly permit parties to agree on arbitration by reference to principles which are not strictly legal. In particular, Section 46(1) reads:

> Rules applicable to substance of dispute.
>
> (1) The arbitral tribunal shall decide the dispute —
>
> (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
>
> (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.[3]

The one case in which I have been involved where the contract seemed to confer a power which might now fall within Section 46(1) was *Home and Overseas Ins Co v Mentor Ins Co (UK)*.[4] The contract there provided that arbitrators should 'interpret this reinsurance as an honourable engagement', and that their award should effect 'the general purpose of this reinsurance in a reasonable manner, rather than in accordance with a literal interpretation of the language'. The Court of Appeal held that these provisions did no more than confirm that arbitrators should give the contractual provisions what we would now call a purposive construction, and did not permit arbitrators to depart from the law itself.

Assuming that the parties wish their dispute to be decided by law, the question arises: what law and how is it ascertained? The position is relatively simple if the parties have expressly chosen a particular law. The English Arbitration Act 1996 makes clear that such a choice 'shall be understood to refer to the substantive laws of that country and not its conflict of laws rules'.[5] Otherwise, one could embark on an endless circle or

[2] In the case of an International Centre for Settlement of Investment Disputes (ICSID) arbitration, it will commonly be international law, and ICSID arbitrations are administered from Washington on a denationalized basis. Such arbitrations raise separate considerations, with which I am not here concerned.

[3] English Arbitration Act 1996, s 46(1).

[4] *Home and Overseas Ins Co v Mentor Ins Co (UK)* [1989] 1 Lloyd's Rep 473.

[5] English Arbitration Act 1996, s 46(2).

voyage, with the arbitration agreement referring to law A, that law referring to law B and law B referring back to law A or on to law C. Where the parties have chosen a law, the arbitrators will be expected to apply it. If they do not, but elect to apply some other law, they will commit an error of law, which may, in a system like the English, constitute the basis for an appeal to the court, if the court thinks the error both sufficiently obvious and significant for the outcome.[6]

What however if the arbitrators have not expressly chosen a law? The arbitration agreement may provide its own guidance, a private set of choice of law rules, to cater for this situation. It may for example tell the arbitrators to apply the law of the jurisdiction with the closest connection to the subject-matter of the business or to the actual dispute which has arisen. Alternatively, it may tell the arbitrators to look at the choice of law rules of all potentially relevant jurisdictions, in the hope that these may all agree or at least point in a clear direction, or it may direct the arbitrators to internationally accepted principles. The approaches adopted by a number of sets of institutional rules are that:

> In the absence of any such agreement, the Arbitration Tribunal shall apply the rules of law which it determines to be appropriate.[7]

The English Arbitration Act adopts a slightly different formula, providing that:

> If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.[8]

It is open to doubt far either approach leaves arbitrators with a completely free hand. The former (applying the rules of law which the tribunal determines to be 'appropriate') appears to enable arbitrators to invent their own choice of law scheme, whether this involves applying the law with the closest connection to the subject-matter of the business or to the actual dispute which has arisen, or applying the choice of law rules of all potentially relevant jurisdictions, or proceeding directly to apply a particular law as a matter almost of instinct. The law with the closest connection to the business gives a stable solution, but the other possibilities all present. To take the law with the closest connection to the dispute is tenuous and suspect, since the applicable law will then vary according to the precise nature of the dispute which arises. To look at the choice of law rules of all potentially relevant jurisdictions is ultimately fruitless. If they all reach the same result, the exercise is unnecessary, and, if they differ, some means of choosing between them has to be found. In either event, the exercise may have involved quite substantial effort, to no purpose. An appeal to internationally accepted principles suffers from the same problem as appeals to the *lex mercatoria* generally: Whatever idealists may maintain, it never proves easy to identify any uniform principles at that level. A fourth suggested possibility, which is to forego any choice of law rules and to proceed

[6] Ibid, s 69(3).
[7] International Chamber of Commerce (ICC) Rules, art 17(1); see also to similar effect Hong Kong International Arbitration Centre (HKIAC) Rules (2018), art 36(1).
[8] English Arbitration Act 1996, s 46(3).

directly to apply whatever law the arbitrators think appropriate, appears to involve a process of divination, rather than law.[9]

In the last analysis, the conventional approach, where no particular domestic law has been either directly or indirectly chosen, still appears to be to revert to the choice of law rules of the law governing the arbitration, the law of its legal seat, wherever it may in fact sit. That may well also be the correct interpretation of Section 46(3) of the English Arbitration Act 1996, which, as you will recall, requires the arbitrators, where there is no choice or agreement on the relevant law, 'to apply the law determined by the conflict of laws rules which it considers applicable'.[10] In other words, the choice of an English seat may ultimately involve — indeed require — the choice of English conflict of laws rules, which is certainly the traditional common law approach.[11] The current English choice of law rules in respect of contractual obligations are found in Article 9(3) of the Rome Regulation (EC) No 593/2008 (Rome Regulation). The Rome Regulation does not apply to arbitration agreements or choice of court clauses,[12] but it can apply to determine the law applicable to the business, the subject-matter of an arbitration agreement. Thus, if the choice of law rules applicable in an arbitration refer to those of the *lex arbitri* and if the *lex arbitri* is the law of a EU member state, the Rome Regulation will apply to determine the law applicable to determine the substantive dispute submitted to arbitration.

That being so, it would be open to an English court, in the restricted circumstances in which any appeal to the court is possible, to review the correctness of arbitrators' understanding and application as a matter of law of such conflict of laws rules. If such rules pointed to English law as the law applicable to the substantive dispute, an appeal could also lie, under the same restricted conditions, in respect of any point of law involved in the substantive award.[13] But, if such rules pointed to, for example, French or Hong Kong law, no appeal would be possible to the English court against the arbitrators' findings, because, at least in common law eyes, these would strictly be findings of facts, about the content of French law or about its application on the facts.

The parties can therefore choose the law applicable to their substantive dispute, failing which the arbitrators will, on one approach or another, determine it for them. But, paradoxical though it may at first sight appear, the process of selecting a law may actually limit the parties' agreement. The law selected may itself contain provisions which cannot be derogated from by agreement, and which will therefore override some aspect of the parties' agreement — mandatory provisions or public policy rules.[14] The view at one time was that it was not for arbitrators to consider such provisions or rules — they were to concern themselves only with contractual issues.[15]

[9] Sir Sydney Kentridge QC once wrote in the context of interpretation: 'If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination' (*State v Zuma* 1995 (4) BCLR 401, para 18, cited in *Matadeen v Pointu* [1999] 1 AC 98, 108).

[10] English Arbitration Act 1996, s 46(3).

[11] It has been argued that less significance should attach to a choice of seat made not by the parties directly, but by an arbitral institution such as the ICC. But in that situation the parties have chosen the institution, and can be taken to have been content that its choice should carry the usual incidents of an arbitral seat.

[12] Rome Regulation, art 1(2)(e).

[13] See *Occidental Exploration and Production Co v The Republic of Ecuador* [2005] EWCA Civ 1116; [2006] QB 432 and [2007] EWCA Civ 656 and *Gold Reserve Inc v The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm) for the justiciability and possibility of appeal to court in the context of investment treaty arbitration.

[14] See Gary Born, *International Commercial Arbitration* (2nd edn Wolters Kluwer Law & Business, New York 2014) 2707–2708.

[15] See for example, *Alexander v Garden-Denver Co* 415 US 36, 56–57 (1974).

That view has long disappeared.[16] A suggestion[17] that selection of a particular domestic governing law, will not necessarily import mandatory provisions of that law, such as competition law rules, trade controls, etc, is also unconvincing.

At common law, the legality of the agreement may also fall to be determined by reference to the legal position in another country, where the agreement falls to be or is performed. If the agreement necessarily involves the performance abroad of an act unlawful by the law of the place where the act is to be performed, the contract will to that extent be unlawful and unenforceable.[18] In *Ralli Bros v Co Nav Sota y Aznar*, where the agreement required payment in Spain of additional freight which it was unlawful under Spanish law to demand. The agreement was *pro tanto* unlawful.[19] If the agreement could be performed legally, but the parties in fact intend it to be performed in a manner which is unlawful under the law of the place where they in fact intend it to be performed, it will again be unlawful and unenforceable *pro tanto*.[20] The facts in *Foster v Driscoll* are irresistible to recount. They involved five over-ambitious joint venturers entertaining the project of smuggling a boat-load of whisky into the prohibition-bound United States of America. The financier was a Knight of the Realm and Member of Parliament, two other participants were shipbrokers, the whisky supplier was, as one might expect, an Edinburgh distiller, but the fifth, entrusted with the disposal of the whisky in the United States of America for unstated reasons not obviously associated with his career, was a retired schoolmaster living in Worthing. Unsurprisingly the five fell out, and the joint venture had no success, save to clarify English law.[21]

The common law principles contained in all these cases are now preserved and permitted in the UK, though not required, by the current European regime on the law applicable to contractual obligations. Article 9(3) of the Rome Regulation provides:

> 3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.[22]

The law of the place of performance of a contract thus remains important in common law contracts. But there is no European law requirement to that effect. Other legal systems may see the matter differently, and enforce contracts irrespective of their legality at the place of performance.

So much for the law of the place of performance. I turn to a second law sometimes suggested to be relevant. That is the law of the forum or seat of arbitration. In the context of court proceedings, the Rome Regulation qualifies the application of the parties' agreement and of the law they select in certain limited respects, by reference to the law of the forum. That, as will appear, may have indirect relevance for arbitration. Recital (37) of the Rome Regulation points out that considerations of public interest can

[16] See for example, *Mitsubishi v Soler Chrysler-Plymouth* 473 US 614, 636-637 (1985).
[17] Born (n 14) 2707–2708.
[18] *Ralli Bros v Co Nav Sota y Aznar* [1920] 2 KB 287.
[19] Ibid.
[20] *Foster v Driscoll* [1929] 1 KB 470; *Regazzoni v K C Sethia* [1944] 2 *AB* 490.
[21] *Foster*, ibid.
[22] Rome Regulation, art 9(3).

in exceptional circumstances justify the application by courts of 'exceptions based on public policy and overriding mandatory provisions'. By this are meant exceptions to the law which would otherwise be applied to the relevant contractual obligations. Thus, with regard to overriding mandatory provisions, Articles 9(1) and (2) of the Rome Regulation state:

> Overriding mandatory provisions
>
> (1) Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
> (2) Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.[23]

With regard to public policy, Article 21 of the Rome Regulation is in similar, or at least parallel, terms, providing that:

> The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.[24]

Bearing in mind that the Rome Regulation is concerned with court proceedings, how far should an arbitration tribunal take account of the mandatory overriding rules and public policy of the law of its seat? If the substantive dispute is subject to the law of the seat, then, as I have said, the mandatory provisions are part of the law which the arbitration tribunal must anyway apply. The caselaw of the European Court of Justice also establishes that, if a tribunal fails to take account of mandatory provisions of EU law (e.g. protective employment law or consumer law rules, competition law principles or anti-trust laws), then it is for the courts of the law of the seat to correct the position on review, irrespective of the position under purely domestic substantive law.[25]

What then if the seat of the arbitration and the law governing the dispute differ? Of course, if a challenge to an award comes before a court of the seat, that court will apply any mandatory laws or public policy applicable under the law of the seat, regardless of the governing law of the dispute. Emphasis needs here to be put on the word 'applicable'. There is always a potential question whether a particular mandatory law or policy was intended to apply generally to all issues coming before the seat. But, assuming that it was, then it cannot be evaded in the court of the seat by the simple device of making the parties' relationship or transaction subject to the law of another state where the relevant mandatory provisions or public policy does not apply. Thus, continuing with the example of EU law, parties agreeing to arbitrate within Europe could hardly avoid the protective rules of European employment or consumer law, or European competition

[23] Ibid, arts 9(1) and (2).
[24] Ibid, arts 21.
[25] *Eco Swiss China Time Ltd v Benetton International NV* (Case C-126/97). The European Court of Justice did however concede that a party's failure to apply in time to challenge an award under domestic procedural rules could mean that the award became unchallengeable, even though the result was to overlook an infringement of mandatory European law rules.

law principles, by selecting Hong Kong law (or, post-Brexit, English law) to govern their relationship.[26]

The conceptual basis for such a conclusion at common law is, however, important. If all that is being said is that no EU court would recognize the choice of a non-European law as ousting the mandatory provisions or public policy of EU law, that is not saying much. The European Court of Justice decided accordingly in *Ingmar GB Ltd v Eaton Leonard Inc*. where an agreement between a Californian principal and a European commercial agent was expressly subject to Californian law. The question was whether the agent could take advantage of the protection of the EU's Commercial Agency Regulations. The Court of Justice held that the mandatory provisions of those Regulations, could not be evaded 'by the simple expedient of a choice-of-law clause' in favour of a non-EU jurisdiction.[27]

The key question is what attitude a court of state A should take to an award issued by a tribunal sitting within state B which disregards the mandatory provisions or public policy of state B in circumstances where the law governing the substantive dispute is that of either state A or indeed state C? In short, what weight should a chosen state or a third state give to the law of the seat? This is not an easy question. One possible argument, which side-steps the question, is to suggest that the parties, even though they chose the law of state A or C, must also be taken to have intended the arbitrators to have regard to mandatory provisions or public policy of the law of the seat. More particularly: parties must be taken to contemplate and intend that, whatever the law governing their relationship, that any award rendered would not be liable to be set aside, and would be enforceable, in the courts of the seat. Article V(1)(e) of the New York Convention 1958 can be invoked to support this argument, having regard to its explicit withdrawal of any right to enforce an award set aside in or under the law of the arbitral seat. The argument can however be criticized for being based on a priori reasoning which tends to assume has to be proved, namely the overriding importance of the law of the seat in the face of parties' express choice of another law.

The argument can be further tested by asking what would be the position if the parties were unwise enough to include in their arbitration agreement a provision, not only selecting a governing law other than that of the seat, but also expressly excluding consideration of any mandatory provisions or public policy of the law of the seat. There certainly appears to be a body of thought that maintains that — in the interests of the survival of arbitration as an institution as well as in the general interest — arbitrators should, if necessary, be prepared to override the parties' agreement even in that situation, and apply such provisions or public policy notwithstanding the contrary agreement.[28] The thought might claim support from the French idea of an arbitral legal order floating free of any particular national law. But it is a considerable stretch to suggest that an arbitration can float free not only from domestic law, but from the very agreement giving rise to the arbitration. Not even arbitrators enjoy powers of levitation. In domestic terms, if England were the seat of arbitration, any award would seem to be vulnerable to challenge for want of jurisdiction or irregularity (excess of

[26] In this context, even the rules in *Ralli Bros, Foster* and *Reggazoni* may arguably be overriding mandatory rules, which the common law would apply, even if the substantive dispute was not subject to the common law.
[27] *Ingmar GB Ltd v Eaton Leonard Inc* (Case C-381/98).
[28] See generally, Born (n 14) 2706–2707.

power), and in international terms it would fall outside or contain a decision on matters beyond the scope of the submission to arbitration.[29] So I doubt whether an award could survive with a scope extending beyond the parties' agreement. The more likely position is that the arbitration agreement would be vulnerable to challenge before the courts of the seat, if it purported to exclude consideration of the public policy or overriding mandatory principles of the law of the seat.[30] Even in the French legal tradition, where international arbitration is regarded as floating free of any particular legal system, French courts have, it appears, annulled arbitration awards made under French law in circumstances where the award violated fundamental public policies of the French legal system.

So much for mandatory provisions and public policy of: (a) the law governing the business, the subject of arbitration; and (b) the law of the arbitral seat. But arbitration tribunals are from time to time asked to take account of the mandatory provisions or public policy of a law which is neither that of the business being arbitrated nor that of its seat. Such a law may nevertheless have a real connection with the issues being arbitrated, or may be the law of a place where one or other party might wish to enforce any award. What are arbitrators then to do? What are courts to do?

An example of such a case came before the English courts in *Accentuate Ltd v Asigra Inc*.[31] It concerned an arbitration in Canada of a dispute subject to Canadian law but involving the activities of a commercial agent acting within the EU for a Canadian principal. The claimant, an English company, agreed to act as a commercial agent in England distributing software belonging to the defendant licensor, a Canadian company. The contract contained a choice of law clause in favour of Ontario law and an arbitration clause in favour of Toronto. The claimant gave notice in September 2006 of a claim under the Commercial Agents (Council Directive) Regulations 1993, which it quantified at £1.75 million on 5 June 2017. In riposte, on 21 June 2007 the licensor started a Toronto arbitration, in which the distributor participated, submitting that its claim under the Regulations was outside the scope of the arbitration clause (a submission which the arbitration tribunal rejected), but in the alternative seeking to rely on it by way of counterclaim. The arbitrators decided that a claim under the Regulations was within the scope of the arbitration clause, but that the claim failed because the parties' rights and obligations must be decided as agreed by Ontario law. So they issued awards against the distributor in late 2007 and March 2008. They contented themselves by noting in passing that:

> 18. There may be interesting academic and intriguing domestic and international policy reasons why an arbitral tribunal should or should not apply *lex non contractus* [i.e. a law other than that chosen by the parties]. But this is not a debate for this tribunal. …
>
> 19. … while a principal purpose the English Regulation according to the European Court of Justice may be to 'protect, for all commercial agents, freedom of establishment and operation of undistorted competition in the internal market', … this does not justify restricting the parties' freedom to choose a desired governing law in Ontario.[32]

[29] See New York Convention 1958, art V(1)(c).
[30] This would follow in an EU context from *Eco Swiss China Time Ltd*, cited in footnote 25 above. Any award would likewise probably be incapable of enforcement in any other EU State.
[31] *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB).
[32] Ibid, paras 18–19.

The Canadian arbitration tribunal therefore took a firmly restricted view of its jurisdiction, noting that there were 'interesting academic and intriguing domestic and international policy reasons' for a different approach, but refusing to go there.

Diverting slightly from my main theme, it is interesting to trace the sequel to this award. The distributor in *Accentuate* commenced the English proceeding, claiming that the Commercial Agency Regulations applied in England as a matter of overriding mandatory law, and so that it was entitled to be paid compensation in England. The judge, Tugendhat J, accepted the distributor's case. In the eyes of English law, the arbitration clause in favour of Toronto fell to be regarded as null and void or inoperative, in so far as it purported to submit to arbitration in Ontario under Ontario law a claim which involving the Regulations which were under EU and so UK law mandatorily applicable within the EU whatever the governing law of the agency relationship. Nevertheless, the judge recognized the different position which applied looking at the matter from the arbitrators' viewpoint, since he concluded that nothing in his judgment 'should be taken as a criticism by me of the conduct or reasoning of the arbitral tribunal'.[33] Tugenhat J's reasoning on the application of mandatory legal provisions was later followed by Mann J in *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Ltd*.[34]

Both these cases have a famous precursor in the United States Supreme Court.[35] In *Mitsubishi v Soler Chrysler-Plymouth*, Misubishi, as a car manufacturer, entered into a sales agreement with Soler, a Puerto Rican distributor, expressed to be subject to Swiss law and providing for arbitration in Japan. Soler asserted claims against Mitsubishi under the US anti-trust Sherman Act in the United States Federal Court. Mitsubishi claimed that any such claims could and should be remitted to arbitration in Japan. The Supreme Court had no more difficulty than Tugendhat J in finding that statutory claims of this nature fell within the scope of a generally worded arbitration provision. But the United States and the International Chamber of Commerce as *amici curiae* raised the possibility that the application of Swiss law in a Japanese forum would exclude the application of the US Sherman Act. The United States Supreme Court was able to duck this difficulty, on the basis that Mitsubishi had conceded the application of the US Sherman Act in the Japanese arbitration. But it gave a strong pointer to its attitude, were it to be asked to enforce a clause in favour of an arbitration which would not respect United States mandatory principles:

> in the event that the choice-of-forum and choice-of-law clauses [had] operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for anti-trust violations, we would have little hesitation in condemning the agreement as against public policy.[36]

That last comment fits neatly with Tugendhat J's reasoning. In summary, a court cannot ignore the mandatory overriding principles or public policy of its own legal system, when considering a foreign arbitration award.

[33] Ibid, para 96.
[34] *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Ltd* [2014] EWHC 2908 (Ch).
[35] *Mitsubishi v Soler Chrysler-Plymouth* 473 US 614 (1985).
[36] Ibid, 636-637 and footnote 19.

Further, not all arbitral practice is, it appears, so constrained as was the Canadian tribunal in *Accentuate*. The Hague Principles on the Choice of Law in International Commercial Contracts (approved 19 March 2015) provide:

> These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.[37]

The word 'required' suggests a specific mandate from the parties. The word 'entitled' leaves open what is envisaged. But there can be situations in which the governing law does 'entitle' an arbitration tribunal to look to a law other than that of the governing law or the law of the seat. Thus, in *ICC Case No. 8528*,[38] the seat and governing law were both Swiss, but the defendant was Turkish and in receipt of Export Incentive Certificates (EICs) in respect of a joint venture to be performed largely in Turkey. It submitted that Turkish law entitled it to the benefit of these EICs without sharing them with its joint venture partner. Article 19 of the Swiss Private International Law Act enabled the Swiss court to accede to this submission, since it stated that a mandatory provision of a foreign country might be given effect 'provided that legitimate and manifestly preponderant interests … so requires, and provided that the case has a close connection with that system of law'.

Gary Born in his work appears ultimately to limit the application of the 'foreign' mandatory law (i.e. other than that governing the transaction or applicable in the seat) to circumstances where both the foreign mandatory law itself and the conflicts of laws principles applicable in the arbitration provide for its application.[39] But he qualifies this in one respect, by suggesting that there may also be circumstances in which arbitrators are obliged to take account of 'international' public policy. He takes the example of an agreement to commit a crime, to engage in slave trading or piracy, to assist terrorism, or to obtain a contract by bribery of public officials.

A graphic illustration of this sort of situation is provided by *World Duty Free Co v Kenya*.[40] There, a duty free concession had, on the evidence, been obtained by payment of a large sum to the then President of Kenya. The tribunal was asked to determine whether, as a matter of international public policy as well as under Kenyan and English law (the two potentially governing laws), the contract was in these circumstances unenforceable. In an instructive examination of various sources and caselaw,[41] it concluded that bribery was 'contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy' and that 'Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal'.[42] It went on to examine the two potentially applicable substantive laws — Kenyan and English laws — which it held to be essentially identical on the point and to lead to the same conclusion.

[37] Hague Conference Principles on Choice of Law in International Commercial Contracts, art 11(5).
[38] *ICC Case No. 8528*, Y.B. Comm Arb XXV (2000) 341.
[39] Born (n 14) 2712–2714.
[40] *World Duty Free Co v Kenya*, ICSID Case No ARB/00/7 of 4 October 2006.
[41] Ibid, paras 138–156.
[42] Ibid, para 157.

A key feature of this case, perhaps unfortunate for those interested in understanding arbitration law, is that there was a coincidence of result under international and domestic law. This made it unnecessary to analyse explicitly whether transnational public policy could or would oust arbitral jurisdiction, even in the unlikely event of parties having expressly agreed to arbitrate a corrupt bargain. In *Inceysa Vallisoletana S.L v El Salvador*,[43] the Tribunal had no difficulty in holding that the parties' consent to International Centre for Settlement of Investment Disputes (ICSID) arbitration under a bilateral investment treaty (BIT) (which itself provided for any arbitration to be based on generally recognized rules and principles of international law) did not extend to circumstances in which the relevant investment had been obtained by fraud. One reason was that it would violate international public policy for BIT protection to exist in such a situation. But that again appears as a decision based on a conventional analysis of contractual intention, rather than on any absolutely overriding concept of international propriety.

By way of conclusion, there is, from a private international law or conflict of laws viewpoint, a clear case for more developed rules about the circumstances in which commercial arbitrators, and indeed courts, should take account of the public policy or overriding mandatory provisions of any legal system other than: (i) that whose law governs the substantive dispute which they are determining; or (ii) that of the forum in which the arbitration is taking place. I would in this connection make three final points.

First, it is interesting to recall the common law rules, preserved by the Rome Regulation as I mentioned earlier, invalidating any aspect of the parties' relationship or transaction, which is contrary to the law of the place of contractually agreed performance or which the parties intend it to perform in a manner contrary to the law of the place where they intend it to perform it. Invalidation is however a crude tool. Might it not be possible to develop an alternative rule whereby arbitrators and courts were at least entitled to take account of and apply the public policy and overriding mandatory provisions of the contractual or intended place of performance? In the modern world, where choice of forum is relatively easy, this could assist better integration of different legal systems.

Second, within the EU, Article 3(3) and Article 3(4) of the Rome Regulation go some way towards indicating a more coherent approach towards the application of mandatory provisions or public policy of the law of the seat. Article 3(4) I have already mentioned. Article 3(3) provides:

> 3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.[44]

Again, this is like Article 3(4) limited to situations where *all the elements* involved are connected with a country other than that chosen.

Third, the International Law Institute sought to give some guidance in this area in 1991, in these terms:

[43] *Inceysa Vallisoletana S.L v El Salvador*, ICSID Case No ARB/03/26.
[44] Rome Regulation, art 3(3).

> If regard is to be had to mandatory provisions … Of a law other than that of the forum or that chosen by the parties, then such provisions can only prevent the chosen law from being applied if there is a close link between the contract and the country of that law and if they further such aims as are generally accepted by the international community.[45]

Unfortunately, this illustrates, rather than solves, the difficulty of deciding when it may be appropriate to take account of a law other than that of the forum or that chosen. Arbitrators can never guarantee that their awards will be valid in every jurisdiction of the world. But a test of a close link and of 'aims generally accepted' internationally gives only limited guidance. We must hope that the International Law Institute or some other body may try to be more specific.

[45] 1991 Resolution of the Institute of International Law on 'The Autonomy of the Parties in International Contracts between Private Persons and Entities', art 9(2).