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Article

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The application of substantive mandatory rules in International Commercial Arbitration from the perspective of an EU UNCITRAL Model Law jurisdiction

Constantin Calavros*

ABSTRACT

The article deals with the obligation of arbitral tribunals to apply the substantive mandatory rules of the *forum* or of the law of third states not designated by the parties or by the tribunal (especially that of the state where enforcement of the award is anticipated) in international disputes. This obligation, with regard to the mandatory rules of the *forum*, has been challenged on the basis of the assumption that, in international commercial arbitration, the arbitrators have no *forum*. The author contests this assumption as such and also in light of the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the Rome I and Rome II Regulations applicable in Greece. Same obligation, with regard to the law of third states, has been challenged on the basis of the assumption that the will of the contracting parties, as to the law applicable to the merits of the case, shall prevail. The author challenges this assumption as well by arguing that the limits of the parties' autonomy in light of said Regulations undoubtedly exist also in the context of international commercial arbitration. Other matters pertinent to said issues are also dealt with in the article.

In any domestic arbitration the application of the mandatory rules of the law of the place of arbitration to the merits of the case seems self-evident. In international arbitration, however, it is argued that the matter should be dealt with under a different perspective. This is mainly because the international arbitration tribunal knows no forum and is therefore bound only by the *lex contractus*, either chosen by the parties or designated by the arbitral tribunal. Nevertheless, even in such a case, *lex contractus* is applicable not as state law, the binding effect of which is founded upon the Constitution and the judicial function of State Courts, but by virtue of the parties' autonomy, since the parties have chosen said law to constitute the *lex contractus* in the case at hand. In this context the mandatory rules which would be binding on any State Court, are not binding on an international arbitral tribunal. The parties may by choosing a particular

* Professor Dr Constantin Calavros holds the Chair of Procedural Law and International Arbitration at the Law School of Democritus University of Thrace, Greece. He is also the Managing Partner of Calavros & Partners Law Firm, Athens. He has been an active arbitrator and practitioner in international disputes for more than 30 years. Email: professor@calavros.gr

law to apply to the case at hand as *lex contractus*, exclude the application of mandatory, according to the relevant state law, rules.[1] Nevertheless, this prevailing approach does not withstand closer scrutiny, as it will be argued further below.

The mandatory rules which may be applicable to the merits of the arbitrated dispute may be part of the law of the place of arbitration, of the *lex contractus* or of the law of a third State. In legal literature reference is made to other two alternatives: (i) to mandatory rules that belong to a 'supranational' legal regime or; (ii) to the mandatory rules of the law of the State where enforcement and recognition of the foreign arbitral award is to be anticipated.[2] These alternatives however fall under the third said category. In any event, the mandatory rules of the so called 'supranational' legal regime are very often hardly traceable, whereas the mandatory rules of the place of enforcement may also be hardly predictable. Hence, present analysis will not include these two subcategories.

1. THE APPLICATION OF THE MANDATORY RULES OF LAW OF THE PLACE OF ARBITRATION

As noted above, it is argued that the concept of the *forum,* as this is known and understood in the theory of private international law,[3] is not applicable to arbitral tribunals in international commercial arbitration,[4] which derive the adjudicative authority solely from the agreement of the parties.

Nevertheless, this approach, which in any event has not prevailed in many other jurisdictions,[5] is certainly not applicable to those States which have adopted the

1 See the comparative analysis at Schäfer, *Application of Mandatory Rules in the Private International Law of Contracts* (2010) 135ff, 177ff, 221ff, 267ff.

2 See Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) Journal of International Arbitration 26.

3 See Krispis, *Private International Law, General Part* (1970) 12ff; Vrellis, *Private International Law 3rd edition* (2008) 67ff (both in Greek).

4 See among many others, Derains, 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series (1987) 231; Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), ibid, 270 and fn 33; Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) Arbitration International 283 and Mistelis, 'Mandatory Rules in International Arbitration – Too much Too early or Too little Too late?' in Bermann and Mistelis (eds), *Mandatory Rules in International Arbitration* (2011) 298;· see also, Lipstein, 'Conflict of Laws before International Tribunals' (1941) 27 Transactions of the Grotius Society 142ff, 149ff, as well as Papeil, 'Conflict of Overriding Mandatory Rules in Arbitration' in Ferrari and Kröll (eds), *Conflict of Laws in International Arbitration* (2011) 341ff, 343ff, and Schütze, Die Besetzung eines internationalen Schiedsgerichts und das anwendbare Recht, FS Kaisis, 2012, 887–888;· Lew, *Applicable Law in International Commercial Arbitration* (1978) 100, 125; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (2003) 17–27, 17–51ff; also Handorn, Das Sonderkollisionsrecht der deutschen internationalen Schiedsgerichtsbarkeit (2005) 19.

5 See for example on the English legal system, Nygh, *Choice of Forum and Law in International Commercial Arbitration, Forum Internationale* (1997) 3ff and Nygh, *Autonomy in Internatonal Contracts* (1999) 226· also, *Russel on Arbitration* (24th edn, 2015) 2–118 and 5-077, as well as Poudret and Besson (Berti and Ponti), *Comparative Law of International Arbitration* (2nd edn, 2007) 134ff, and Fouchard, Gaillard and Goldmann, *On International Commercial Arbitration* (1999) 1239ff· indicative is also the language used by Mann, 'Lex facit Arbitrum' reprinted in Arbitration International (1986) 248: '*The law of the arbitration tribunal's seat initially governs the whole of the tribunal's life and work. In particular, it governs the validity of the submission, the creation and composition of the tribunal, the rules of the conflict of laws to be followed by it, its procedure, the making and publication of its award*'· see also, Nygh, ibid 226 and Lando, 'The Law Applicable to the Merits of the Dispute' in Lew, *Contemporary Problems in International Arbitration* (1987) 108.

UNCITRAL Model Law on International Commercial Arbitration. Indeed, already under the mandatory rule of Article 1 section 2 it is stated that the provisions of the Model Law shall apply to all international arbitrations the place of which is to be found in the territory of the state that has incorporated it.[6] Thus, in Greece, the provisions of Law 2735/1999 (which is the law that incorporated the Model Law in Greece) shall apply to all international arbitrations conducted in the Greek territory, according to Article 1 section 1.[7] Said provisions shall apply, depending on the matter, either as mandatory rules, or as rules applicable in lieu of a parties' agreement controlling a specific procedural issue, assuming that such an agreement is permissible. Said provision embodies also a general prohibition, according to which the parties may not, by agreement, exclude the application of the mandatory (procedural) rules of the place of arbitration.[8]

As a result, in light of said provision of Law 2735/1999, by virtue of the choice of the place of arbitration by the parties,[9] the arbitral tribunal which conducts an international arbitration procedure in Greece, acquires a definite and given nexus to Greece as the place of arbitration. Hence, Greek law will govern various issues (mainly procedural), ie the arbitrability of the dispute at hand[10] or the authority of State Courts to aid—facilitate the arbitration procedure under certain circumstances.[11] Most importantly Greek law will control the exercise of judicial review of the arbitral award in the context of annulment proceedings. This given and definite nexus between the arbitration proceedings and the place of arbitration suffices[12] in order to perceive the latter as the *forum* of the arbitration.[13] This, however, does not mean that the arbitral tribunal is obliged to apply also the private international law rules of the place of arbitration.[14] As to the last point, it is worth noting that, when

6 See also the English Arbitration Act of 1999, s 2.

7 Which embodies the rule of art 1 s 2 of the Model Law.

8 See among others, Petrochilos, *Procedural Law in International Arbitration* (2004) 2.57ff, 3.79ff, as well as Lazareff, 'Mandatory Extraterritorial Application of National Law' (1995) Arbitration International 137ff, 140ff;· it is another matter of course whether the parties have the power to agree on procedural rules additionally to the procedural rules of the place of arbitration—on this matter, see especially the decision of the Institut de Droit International of 1990 on the arbitration between States, Public Corporations and Public Entities, art 6.

9 See Handorn (n 4) 23ff.

10 See for example art 34 s 2(b)(aa) of Law 2735/1999· also, Calavros, *Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit* (1988) 24ff and Lew, Mistelis and Kröll (n 4) 74.

11 See among others, Filiotis, 'Relationship between State Courts and Arbitration' (2015) Review of Civil Procedure 506ff, 513ff (in Greek).

12 See Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) Arbitration International 179ff.

13 Accepted by Stein, Jonas and Schlosser, ZPO Kommentar 23rd edition (2014), ¶ 1051, no 1; Schütze, Schiedsgericht und Schiedsverfahren 6th edition (2016) no 512ff; Schütze, Deutsches internationales Zivilprozessrecht unter Einschluss des Europäischen Zivilprozessrechts 2nd edition (2005) no 525; Schütze, FS Böckstiegel (2005) 722 (cf also Schütze, Zur Wirksmakeit von internationalen Schiedsvereinbarungen und zur Wirkungserstreckung ausländischer Schiedssprüche über Ansprüche aus Börsentermingeschäften, Jahrbuch für die Praxis der Schiedsgerichtsbarkeit, Bd. 1, (1987) 97ff), Beulker, Die Eingriffsnormenproblematik in internationalen Schiedsverfahren (2005) 162ff;· also MünchKommZPO and Münch ZPO 4th edition (2013) ¶ 1051, no 11, as well as Commandeur and Gößling, 'The Determination of Mandatory Rules of Law in International Arbitration – An Attempt to Set out Criteria' (2014) SchiedsVZ 16 and Handorn (n 4) 20.

14 See in particular Jarvin, 'The Sources and Limits of the Arbitrator's Powers' in Lew, *Contemporary Problems in International Arbitration*' (1987) 62: '*An arbitrator acting within the framework of the ICC Rules*

the dispute is not a domestic case but rather an international one, the mere fact that the arbitrator did not apply private international law rules of the place of arbitration, does not give rise to a recourse against the award for annulment pursuant to Article 34 of the UNCITRAL Model Law, nor does it prevent, according to Article V of the New York Convention of 1958, the recognition and enforcement of this arbitral award in another State.[15] Therefore, the *forum* of the place of arbitration, even under the UNCITRAL Model Law, does not correlate fully and completely with the concept of the *forum* in relation to State Courts. Nevertheless, the mandatory application of the UNCITRAL Model Law, as it is founded upon the principle of territoriality, allows for the conclusion that, under the Model Law regime, *lex arbitri* constitutes the *lex fori,*[16] with whatever such a conclusion may entail, especially with regard to the application of Article 28 which controls the law applicable to substance of dispute by introducing a private international law rule.[17]

Following the conclusion of the arbitration proceedings and the issuance of the arbitral award, an additional nexus often surfaces (other than that with the place of arbitration) ie the nexus of the arbitration with the State in which the recognition and enforcement of the (foreign) arbitral award will be sought.[18]

The abovementioned nexuses of the arbitration either to the State of the place of arbitration (primarily) or to the State in which enforcement and recognition of the arbitral award will be sought, (may be considered to) yield the *forum* of the arbitration. This is because, said nexuses make the arbitration subject to the legal regime of the State of the place of arbitration or to the legal regime of the State of recognition/enforcement, the rules of which will authoritatively govern and control all matters pertaining either to the arbitration *per se* or to the recognition and enforcement of the arbitral award. In other words, said associations, and the first one in particular, constitute, at least, a partial yet decisive submission of the arbitration to the respective legal system, the procedural rules of which will apply to the former so that the place of arbitration is the *forum* for the arbitration in question.

In light of the judicial review of the arbitral award, either by the state courts of the place of the arbitration (in the context of an action for annulment) or by the courts

of Arbitration is therefore under no obligation to apply the system of conflict of laws in force at the place of arbitration. If he does so it can only be by virtue of his own choice. Nor is he under any obligation to take the rule of conflict he chooses from a national system of conflict of laws. One may venture that the freedom of the arbitrators in this respect merely amounts to expressing the will of the parties, whose role in choosing the law applicable in contractual matters is widely recognised. Increasingly ICC arbitrators choose the applicable law directly, that is without passing through a conflict of laws rule'.

15 See Nygh (n 5) 6.

16 See Handorn (n 4) 20, 21ff.

17 See ibid 25, Stein, Jonas and Schlosser ZPO Kommentar 23rd edition, ¶ 1051, no 1; MünchKommZPO and *Münch* ZPO 4th edition, 2013, ¶ 1051, no 1, Junker, Deutsche Schiedsgerichte und Internationales Privatrecht (¶ 1051 ZPO), FS Sandrock (2000) 449· also Mann (n 5) 248: '*The law of the arbitration tribunal's seat initially governs the whole of the tribunal's life and work. In particular, it governs the validity of the submission, the creation and composition of the tribunal, the rules of the conflict of laws to be followed by it, its procedure, the making and publication of its award*' ; see also Nygh, 'Autonomy in Internatonal Contracts' (n 5) 226· see also Solomon, Das vom Schiedsgericht in der Sache anzuwendende Recht nach dem Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts, RIW 1997, 987ff.

18 cf von Hoffmann, 'Internationally Mandatory Rules of Law Before Arbitral Tribunals' in Böckstiegel, *Acts of State and Arbitration* (1997) 11ff· also, BGHZ 29, 120, as well as *Mitsubishi Motors v Soler Chrysler-Plymouth*, 105 S.Ct. 3346, 3359 (1985).

of the receiving State (in the context of the petition for recognition or enforcement of a foreign arbitral award), an arbitrator must take into account the mandatory rules of the states concerned so as not to risk a possible annulment or non-recognition of the arbitral award.[19]

The mandatory application of the provisions of Law 2735/1999 to international arbitrations conducted in the Greek territory stays not without penalty in case it is violated, since any failure of the arbitral tribunal to apply the respective rules will, pursuant to Article 34 section 2, give rise to an action for annulment of the said arbitral award. Therefore, the choice of the Greek Territory as the place of an international arbitration results in the obligatory application of all mandatory rules of Law 2735/1999, but also in the application of other non-mandatory rules of Law 2735/1999 which come into play in cases where a parties' allowable agreement controlling certain issues is missing.

Despite the mandatory application of the procedural rules of Law 2735/1999 to international arbitration procedures conducted in the Greek Territory, it should be noted that the same does not apply, in principle, to the substantive mandatory rules of law of the place of arbitration, which control the merits of the dispute. In other words, despite the association of an international arbitration to the place of arbitration and consequently the application of the procedural provisions of Law 2735/1999 thereof, the application of Greek substantive law may not be imposed, as it seems, by any provision of Law 2735/1999.[20] As regards the substantive law applicable to any dispute, party autonomy prevails, in the sense that the parties are free to agree on the applicable law as they wish, unless the application of the Greek substantive law rules is imposed by other provisions of law, such as, for example, the provisions of Regulation (EC) No 593/2008 (Rome I) on the law applicable to contractual obligations, and in particular the provisions of Article 3 sections 3 and 4 and more specifically those of Article 9 thereof.[21]

The question of the application of the mandatory rules of the place of arbitration to the merits of the dispute is a different matter altogether especially after Rome I Regulation entered into force, introducing two categories of restrictions on the parties' freedom of choice as regards the applicable law to the merits of the case (Article 3 section 1): On the one hand, 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 (Article 3 section 3). Also, when all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of

19 See Derains (n 4) 242, 250, Derains, JDI (Clunet) 1979, 988, 992–93; Lazareff (n 8) 137; von Hoffmann, ibid 3ff; Blessing (n 2) 26, Petrochilos (n 8) no 2.57, 3.79.

20 See Czernich, Die Rom I-VO als Grundlage für die Anwendung von Eingriffsnormen durch Schiedsgerichte, RIW 2016, 702.

21 See on relevant provisions, Emilianidis, *The New European Private International Law on Contracts* (2009) 121ff; Pampoukis, 'The Choice of the Applicable Law and the Mandatory Rules in the Convention of Rome on the Applicable Law on Contracts' (1992) Nomiko Vima 1327ff, 1337ff (both in Greek)· also Reithmann and Martiny, Internationales Vertragsrecht 8th edition, (2015) no 2.122ff; 5.1ff and Schäfer (n 1) 51ff, 94ff.

applicable law other than that of a Member State shall not prejudice the application of provisions of European Union law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement (Article 3 section 4). On the other hand, Article 9 introduced the following three provisions: *first*, it is defined that overriding mandatory provisions are provisions that respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation. *Second*, it is specified that the provisions of the Regulation cannot restrict the application of the overriding mandatory provisions of the law of the forum. *Third,* it is stated that 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 first category of limitations to the parties' autonomy reflected in Article 3 sections 3 and 4 of the Rome I Regulation refers to the mandatory rules of domestic nature (contractual ius cogens rules ie rules which cannot be derogated from by agreement) whereas the second category of restrictions of Article 9 of the Rome I Regulation refers to the internationally mandatory rules.[23] Said distinction is roughly equivalent to the distinction of rules of public order within the meaning of Articles 3 (*ordre public interne*) and Article 33 (*ordre public international*)[24] of the Greek Civil Code, hence it is crucial for their interpretation as well.

Hence, where the parties choose that the law applicable to the merits of the case is the law of the place of arbitration (Article 3 section 1),[25] the case is rather simple:[26] the mandatory rules of the place of arbitration, both above-mentioned categories, apply directly to the dispute in question. However, in this case, the substantive

22 On the meaning of the terms used in art 9 of the Rome I Regulaiton see the decision of the ECJ, 18.10.2016, C-135/15 *Republik Griechenland against Grigorios Nikiforidis*, Journal of Administrative Justice 2016, 898 (fn by Pervos), paras 40ff (in Greek).

23 See on this distinction the Preamble of the Rome I Regulation, no 37 according to which: '*Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed more restrictively*'· see also Max Planck Institute for Foreign Private and Private International Law, Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization, Question 13, 56ff <http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/max_planck_institute_foreign_private_international_law_en.pdf> last accessing date 20.2.2018; on this distinction further below.

24 This is a matter of further discussion not to be included in the present analysis; see Bermann, 'The Origin and Operation of Mandatory Rules' in Bermann and Mistelis (eds) (n 4) 4ff; Audit, 'How do Mandatory Rules of Law Function in International Civil Litigation?' in Bermann and Mistelis, (n 4) 55ff and Sheppard, 'Mandatory Rules in International Commercial Arbitration: An English Law Perspective' in Bermann and Mistelis (n 4) 173ff, 178ff· also, Derains (n 4) 233ff.

25 Or by choice of the arbitral tribunal, secondarily, per art 4 of the Rome I Regulation.

26 See, Derains (n 4) 243;· cf Handorn (n 4) 185, and Beulker (n 13) 218ff. (no clear view), Schäfer (n 1) 105ff; Nygh, 'Autonomy in Internatonal Contracts' (n 5) 226.

rules of the place of arbitration shall be applied as such, provided that the Rome I Regulation is effective in the State of the place of arbitration, whereas, in any other case, they shall be applied as *lex contractus.*[27]

2. THE APPLICATION OF THE MANDATORY RULES OF THE *LEX CONTRACTUS*

In case the law applicable to the merits of the dispute is different from that of the place of arbitration, the application of the mandatory rules of the place of arbitration is rejected,[28] at least, in those jurisdictions in which the function of the arbitral tribunal is not considered as resembling that of State Courts.[29] It is thus argued[30] that, ultimately, the application of the mandatory rules of the place of arbitration depends on the extent of the review which will take place in the context of annulment or recognition and enforcement proceedings. Nevertheless, this approach is not accurate to the extent that it seeks to justify its validity by invoking the result to which it leads and also lacks a doctrinal foundation.

Things become even more complicated when the law applicable to the merits of the case (chosen by the parties or by the arbitrators), is that of a third State, i.e., of a state other than the place of arbitration.

According to one opinion, the mandatory rules of the *lex contractus* are applicable to disputes in international arbitration under two conditions[31]: first, that their application has not been excluded by the parties' agreement and second, that one of the parties has invoked their application during the arbitration proceedings.[32]

The first condition is related to the parties' discretional power to exclude the application of mandatory rules in a particular case. According to the strict subjective theory that has been articulated in relation to this issue,[33] the parties have said discretion, given that it is the principle of party autonomy alone that provides the foundation for the application of the law of a specific State to a given agreement which

27 cf Nygh, ibid 226.

28 See, Bermann (n 24) 7ff; Beulker (n 13) 222ff.

29 As is the case in English law; see especially, Nygh, 'Choice of Forum and Law in International Commercial Arbitration' (n 5) 3ff, 25ff.

30 Nygh ibid 26.

31 According to Blessing (n 2) 33ff, the mandatory rules of the *lex causae* apply in all cases; the same in Lazareff (n 8) 138 and fn 4, who explicitly disagrees with the opinion expressed by Mayer.

32 See, Mayer (n 4) 280ff· the various theories on the nature of arbitration (contractual theory, jurisdictional theory etc.) are obviously of importance in this context· see further on this Lew, Mistelis and Kröll (n 4) 71ff;· cf Shore, 'Applying Mandatory Rules of Law in International Commercial Arbitration' in Bermann and Mistelis (n 4) 135ff.

33 See on all opinions held Mayer and Heuzé, Droit international privé 11th edition, (2014) no 734ff, p 520ff the subjective theory concludes that the applicable law is 'incorporated' in the contract· see, Batiffol and Lagarde, Droit international privé, II 7th edition, (1983) 262ff· Batiffol himself supported the view that it is on the parties' free will to determine in a case of a sale of goods from France to England whether this was a French or an English matter; at the end, he formed the theory of 'localization' of the contract which provided that the subjective elements in one contract are to be taken into account to the extent that they create a reality: the localization of the contract in relation to a specific legal order· see, Batiffol, Subjectivisme et objectivisme dans le droit international privé des contrats, Mélanges Maury, t. I, 1960, 39ff, 53 and Batiffol and Lagarde, as above 265ff.

involves foreign elements.[34] This approach deems it obvious that under the principle of party autonomy the parties have unlimited power, to choose a certain law as applicable; to exclude, in any specific case, the application of amendments to the law chosen which are subsequent to its choice; to exclude the contract from any and all legal regimes; and, finally, to exclude the application of some or all mandatory rules of a specific legal regime.[35]

Nevertheless, said strictly subjective theory has not prevailed. Strong arguments have been made against it, as well as against other individual approaches which constitute its evolution throughout the years:[36] most notably that the cause of a legal consequence may only be the rule of law which provides for it, whereas the parties' autonomy as to the choice of applicable law is given effect only to the extent recognized and afforded by the law itself.[37]

Besides, as already noted above,[38] the European Union private international law on contractual obligations, has introduced, under the Rome I Regulation, two fundamental restrictions on the autonomy of the parties to choose the law applicable to their agreement so that (i) 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 (Article 3 section 3), and (ii) to restrict the application of the overriding mandatory provisions of the law of the forum (Article 9 section 2) or 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 (Article 9 section 3).[39]

Moreover, the inherent in the Rome I Regulation distinction between the simply mandatory rules of law (Article 3 section 3) and the overriding mandatory rules of law (Article 9 section 2),[40] also defines the exact limits of the restrictions imposed upon parties' autonomy by the EU legislator: the simply mandatory rules of law apply, self-evidently, in all cases in which the parties have chosen to submit their agreement to the legal order that entails them, and, additionally in all cases in which the provisions of Article 3 sections 3 and 4 of the Regulation apply; these provisions

34 The term 'international contract', widely used in legal literature (see, for example, Derains (n 4) 234ff), is not exact· the use of the more precise term 'contract involving foreign elements' should be preferred.

35 Batiffol and Lagarde (n 33) 262; Mayer and Heuzé (n 33) no 734, p 520; Derains (n 4) 234–35, 238, 243ff;· cf Audit, 'Choice of the Applicable Law by the Parties' in ICC: Bortolli and Mayer, *The Application of Substantive Law by International Arbitrators* (2014) 13ff.

36 See Mayer and Heuzé (n 33) no 736ff, p 521ff.

37 See, ibid no 735ff, p 520ff; Derains (n 4) 234ff.

38 See further above under 1 in fine.

39 See Emilianidis (n 21) 121ff, 255ff; Pampoukis (n 21) 1327ff, 1337ff; Papasiopi-Pasia, *New Developments in Private International Law on Contractual Obligations* (1985) 406ff; Papasiopi-Pasia, *Mandatory Rules and Substantive Private International Law Rules* (1989) 44ff 60ff (all in Greek) and Reithmann and Martiny (n 21) no 2.122ff, Reithmann and Martiny/[Freitag], ibid no 5.1ff and Güllemann, Internationales Vertragsrecht2, (2010) 40ff, 111ff See specifically on the application of art 9 s 3 of the Regulation in arbitration law Czernich (n 20) 704.

40 On said distinction see the fundamental work of Neumayer, Autonomie de la volonté et dispositions impératives en droit international privé des obligations, Revue critique DIP 1957, 579ff, 603ff, as well as Mayer and Heuzé (n 33) no 737, p 521.

bring about an 'export' of the simply mandatory beyond their domestic legal system.[41] The scope of the overriding mandatory rules of law is even more wide ranging, since these, regardless of whether they belong to the legal regime of the *forum* or of the State where the obligations arising out of the agreement have to be or have been performed, are applicable to all cases falling under their scope irrespective of the law which is otherwise applicable to the contract according to the Regulation.[42]

As regards the second condition mentioned above that is deemed crucial by the strictly subjective theory (ie that the application of the mandatory rules is pleaded before the arbitral tribunal) and relates to the more general question of the application of the *iura novit curia* principle to arbitration proceedings,[43] the following should be noted: although this condition responds to the practical need that the parties be afforded the discretion to point out to the arbitral tribunal the applicable law, this discretion shall be exercised in accordance with the adversarial principle (the principle under which the parties have the burden to present the material facts and evidence).[44]

It follows from the foregoing considerations that the mandatory rules of law of the *lex contractus* are in any event applicable for the resolution of the underlying dispute submitted to international arbitration.[45] Of course, said application is not without limitations, since the mandatory rules of law of the *lex contractus* will apply only if they do not contradict international public policy considerations.[46] Thus, for example, mandatory rules of law of the *lex contractus,* which discriminate against people according to their sex or religion will not be applied by the arbitrator to resolve the dispute at hand[47] because said provisions are obviously in conflict with fundamental freedoms.[48] Beyond these limitations imposed by the international public order however, it appears that there are no other restrictions on the application of the mandatory rules of the *lex contractus*.

3. THE APPLICATION OF MANDATORY RULES OF LAW INDEPENDENT FROM THE *LEX CONTRACTUS*

3.1. The prevailing views—questioning their accuracy

Beyond the law of the place of arbitration which controls the procedural issues which arise, the arbitral tribunal shall also consider the *lex contractus* applicable to the merits

41 This is overlooked by Mayer and Heuzé, ibid no 737, p 521–22, who focus exclusively on the national–local, ie within one state, binding effect of the simply mandatory rules of law.

42 See, Reithmann, Martiny and [Freitag] (n 21) no 5.56ff and 5.113ff.

43 See, Dimolitsa, 'The Raising ex officio New Issues of Law' in ICC: Bortolli and Mayer (n 35) 22ff.

44 See especially Chainais, L'arbitre, le droit et la contradiction : l'office du juge arbitral à la recherche de son point d'équilibre, RevArb 2010, 3ff.

45 See also Nygh, 'Choice of Forum and Law in International Commercial Arbitration' (n 5) 25; Blessing (n 2) 33ff· reference is made here only to mandatory rules of private law· see Czernich (n 20) 703; von Hoffmann (n 18) 3· also, Derains (n 4) 237ff, 243ff· cf Handorn (n 4) 182ff, as well as Beulker (n 13) 229ff.

46 See for example art 2 of decision dated 12 September 1989 of the Institut of International Law in Santiago de Compostella, which provides that '*it is recommended that the applicable foreign law shall only be set aside if its effects are manifestly contrary to public policy*'.

47 Lazareff (n 8) 139.

48 See for example arts 3 and 18 of the International Convention on human rights (Law 2462/1997 in Greece).

of the dispute submitted to arbitration.[49] Although, as a rule, the parties designate as *lex contractus* the law of a certain State, it is possible, in theory at least, for the parties to opt for a combined set of rules they derive from various legal regimes or to opt for a certain set of rules derived from a specific legal regime[50] or even to opt for rules that are independent from any particular legal order, as it is clearly suggested by Article 28 section 1[51] of the UNCITRAL Model Law.

It has been argued that the fact that an arbitral tribunal knows no *forum*, contrary to State Courts, leads to a key consequence:[52] from the perspective of an arbitral tribunal there is no 'foreign' law, in the sense of a rule of law which is not part of a legal order the rules of which are applicable to the merits of the case.[53] All national state laws are at the same level and have the same binding effect as long as they are chosen as applicable to the merits of the dispute by the parties (or the arbitral tribunal). Besides, it is argued, that since the arbitral tribunal itself, as adjudicative authority, has no nationality, all applicable laws are to be treated the same, regardless of their origin (according to the parties' will expressed in their choice of the applicable law or according to the designation of the applicable law by the arbitral tribunal).

However, we must point out once again that the arbitral tribunal does not operate within a so called legal vacuum[54] and that the proposition that international arbitral tribunals know no forum, is a myth which runs afoul of Article 1 section 1 of UNCITRAL Model Law, that makes the application of its rules mandatory based on the territoriality principle.[55] As has been suggested, this mandatory application based on the agreed upon place of arbitration establishes a given nexus with any State which has incorporated the Model Law which suffices to make this State the forum of the arbitration proceedings.[56] In Greece, this is the case with Law 2735/1999.

49 See Mayer (n 4) 283.

50 See on this interesting matter, Derains (n 4) 234ff, 238, 239; Batiffol and Lagarde (n 33) 262ff, and mainly, Mayer and Heuzé (n 33) no 734ff, p 520ff, where all respective theories are analysed · it is worth noting that this theory was first elaborated by Savigny, System des heutigen römischen Rechts, VIII, 1849, s 374· whereas it is questionable if there is indeed such freedom on the parties; see, Mayer and Heuzé, ibid, no 748, p 529ff and Neumayer (n 40) 602.

51 See, Calavros (n 10) 122ff.

52 It is argued that there is another legal consequence, that is, there is no 'competent' applicable law· see, Derains (n 4) 231· however, said consequence does not result from the fact that an arbitral tribunal has no forum but is pegged to the question whether a certain dispute involves foreign elements: in case this question is to be answered in the affirmative, the parties (and secondarily the arbitral tribunal) have the right to choose the applicable law whereas in case it is answered in the negative the law of the state to which—only—the dispute bears direct connection shall be the applicable law.

53 See especially Goldman, Les conflits de lois dans l' arbitrage international de droit privé, Recueil de Cours, 1063 II, Academie de Droit International, 1964, tome 109, 443· also, Derains (n 4) 231.

54 Lalive (n 4) 270; see also, Hayward, *Conflict of Laws and Arbitral Discretion* (2017) 2.07 (52), as well as Sheppard, 'Applicable Substantive Law' in Lew and others (eds), *Arbitration in England* (2013) 233ff, 234.

55 See on this as a criterion for the acceptance of the existence of a forum for an arbitral tribunal, Lipstein (n 4) 150, Mankowski, Rom I-VO und Schiedsverfahren, RIW 2011, 37.

56 See also art 11 s 1 of the decision of the Institut de Droit International, Session of Amsterdam 1957, Arbitration in Private International Law, art 11(1) <http://www.idi-iil.org/idiE/resolutionsE/1957_amst_03_en.pdf> last accessed date 20.2.2018: '*Les règles de rattachement en vigueur dans 1'Etat du siège du tribunal arbitral doivent être suivies pour déterminer la loi applicable au fond du litige* '.

According to one opinion, the general tendency is for the arbitral tribunal not to apply mandatory rules which do not belong to the *lex contractus,* and, according to this opinion, this tendency is to be applauded.[57] Nevertheless, against this approach it has been rightly observed that, if the mandatory rule of law originates, for example, from the place of arbitration or from the State receiving the foreign arbitral award, then the risk that the arbitral award is annulled in the first case or not recognized or declared unenforceable in the second case is so great that every reasonable arbitrator will take it into account and eventually apply also said mandatory rules.[58]

In such cases, there are two ways to apply the mandatory rules of law in question: either the arbitral tribunal will apply the mandatory rule to the merits of the case or it will take account of the existence of the mandatory rule of law as a fact but without applying it *in casu*.[59] Out of these two possible scenarios, the first appears to be relevant in the present case, since in the second case the mandatory rule of law is not applicable, but it is merely considered upon as a fact.

3.2. Critical analysis—an accurate assessment

It is indeed argued, rather emphatically, that the application of a rule of law extraneous to the *lex contractus*[60] should in principle be ruled out. This proposition however is not supported by any doctrinal argument apart from the reliance on the principle of party autonomy as to the choice of applicable law.[61] Further on, it does not take into account the fact that the parties' autonomy does not exist per se,[62] but takes meaning within a certain legal order;[63] in other words, it is a specific rule of law[64] which belongs to a specific legal regime that confers to the parties the right and authority to determine the law applicable to the merits of the case. It is therefore necessary to consider the legal underpinning of the parties' autonomy within a specific legal regime in order to determine whether it imposes or not restrictions to the parties' authority to stipulate the law applicable to the merits of the dispute.

This gives rise to the more general question as to whether the parties' autonomy, even when recognized by a rule of law, may confer to the parties authority which they would not otherwise possess of: in other words, the question is posed whether the principle of party autonomy may afford the parties the discretion to render a null and void contract valid, simply by excluding the application of the mandatory rules

57 Derains (n 4) 241; Mayer (n 4) 280ff, 283; see, Blessing (n 2) 34 and mainly, Lazareff (n 8) 142ff., who comes to the opposite conclusion as to the prevailing tendency (!); see also, Handorn (n 4) 183ff.

58 Mayer (n 4) 284.

59 Derains (n 4) 247; Mayer (n 4) 281.

60 It could be argued that the distinction between mandatory rules extraneous or not to the *lex contractus* is not correct since the application of mandatory rules extraneous to the *lex contractus* is premised on a specific conflict rule of the state of the *lex contractus*; see, Horn, Zwingendes Recht in der internationalen Schiedsgerichtsbarkeit, SchiedsVZ 2008, 213.

61 Derains (n 4) 249ff.

62 Neumayer (n 40) 601.

63 Of the place of conclusion of the contract or enforcement of the contract or the place of the arbitration and so on, or a set of rules that do not belong to any specific legal order, ie the *lex mercatoria*; on the last one, von Hoffmann (n 18) 11.

64 See, von Hoffmann, ibid 11 and von Hoffmann, Internationale Handelsschiedsgerichtsbarkeit-Die Bestimmung des maßgeblichen Rechts, 1970, 69ff; as well as Nygh, 'Choice of Forum and Law in International Commercial Arbitration' (n 5) 19.

of law which render it null and void, by means of submission of the contract in question to the rules of a different legal order. The question arises here at the level of the source of the applicable law and may not be answered simply by invoking the concept of 'a truly international public policy'.[65] Even more, party autonomy confers to the parties the authority to determine the applicable law, self-evidently, only regarding rights and obligations that they may dispose of.[66] Thus, for example, the principle of party autonomy does not afford them the right to stipulate the law applicable for the determination of their capacity to enter into the contract, or for the legal consequences against third parties, or for the legal consequences of the application of public law rules to their contractual relationship.[67]

In any case, however, it should be borne in mind that Law 2735/1999 may be applied, pursuant to Article 1 sections 1 and 2, to international arbitrations conducted in Greece, the subject matter of which involves no foreign elements.[68] The question thus arises as to whether Article 28 section 1 confers upon the parties the right to choose the law applicable to the dispute at hand even in such cases. In other words, the underlying question is whether in such a case the parties will still have the right to choose the law applicable to the merits of the case according to Article 28 section 1. Said question should obviously be answered in the negative[69] since neither *lex loci* nor any conflict rule allow the parties to choose the law applicable to the merits of the dispute or, more generally, to any legal relationship, which involves no foreign elements. Therefore, a teleological contraction of the scope of Article 28 section 1[70] is required in these cases.

But also, in cases where the application of Article 28 section 1 is unquestionable, because the subject matter of the dispute referred to arbitration involves foreign elements, the parties may not be vested with unlimited authority to designate the applicable law.[71] Suffice to say that specific rules are in place for certain contractual disputes that are referred to arbitration, which restrictively regulate also choice of law issues, as it is the case, for example, regarding consumer contract disputes.[72] In addition, specific rules apply as to the choice of law regarding non-contractual disputes which are also referred to arbitration.[73] Lastly, specific rules exist which confer to the parties the authority to choose the applicable law from a certain point onwards,[74] but not the authority to exclude the mandatory provisions that would otherwise be

65 See on this concept, Lalive (n 4) 258ff, also, von Hoffmann (n 18) 22ff.

66 von Hoffmann, ibid 11.

67 See on this last issue, Schiffer, Normen ausländischen „öffentlichen"Rechts in internationalen Handelsschiedsverfahren, 1990, 69ff, 83ff, 103ff.

68 The international character of such an arbitration procedure may result from elements non-connected with the subject matter of the dispute at hand.

69 See, Wagner, Rechtswahlfreiheit im Schiedsverfahren: Ein Probierstein für die juristische Methodenlehre, FS Schumann, 2001, 552 and more analytically, Handorn (n 4) 159ff;· also McGuire, Grenzen der Rechtswahlfreiheit im Schiedsverfahrensrecht? – Über das Verhältnis zwischen der Rom-I-VO und ¶ 1051 ZPO, SchiedsVZ 2011, 260.

70 See also MünchKommZPO and Münch ZPO[4] (n 13) no 19-20.

71 Handorn (n 4) 176ff.

72 See, ie art 6 of Rome I Regulation and Güllemann (n 39) 68ff.

73 See, ie arts 4 and 10 of Rome II Regulation · see also, Georgantis, 'Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations' (2010) Civil Procedure Law Review 125ff (in Greek).

74 See, ie art 14 s 1 of Rome II Regulation· also, Georgantis ibid 183ff (in Greek).

applicable at their case.[75] In all these cases, it may not be seriously argued that the rule of private international law of Article 28 section 1 overrides said specific applicable provisions.[76]

Following relevant discussions on the scope of Article 7 section 1 of the Rome Convention of 1980[77] and later of Article 9 of the Rome I Regulation[78] as well as Article 19 of the Swiss Law on Private International Law,[79] the proposal was made to vest an international arbitral tribunal with the the discretion to apply an internationally mandatory rule of law[80] of a third State (other than that of the *lex contractus* or of the place of arbitration) provided that this third State has a substantial interest in the application of this mandatory rule of law and the law obligates its application.[81]

This view however bears a serious contradiction: the arbitrator in an international arbitration either is obliged to apply the mandatory rules of the law of a third State, or he is not; the purported by said proposal middle-ground discretionary option

75 See, ie art 14 ss 3 and 4 of Rome II Regulation· on this, also, Georgantis, ibid 184ff (in Greek).

76 See, Handorn (n 4) 176ff, MünchKommZPO and Münch ZPO 4th edition (n 13) no 21 also, von Hoffmann (n 18) 9.

77 Rome Convention (16.9.1980) on the law applicable to contractual obligations as replaced by Regulaiton 593/2008, (Rome I) art 7: '*Mandatory Rules: 1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application. 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract*'.

78 Regulation 593/2008 on the law applicable to contractual obligations (Rome I), art 9: '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. 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*'.

79 Art 19 of the Swiss Law of Private International Law: '1. *Anstelle des Rechts, das durch dieses Gesetz bezeichnet wird, kann die Bestimmung eines anderen Rechts, die zwingend angewandt sein will, berücksichtigt werden, wenn nach schweizerischer Rechtsauffassung schützenswerte und offensichtlich überwiegende Interessen einer Partei es gebieten und der Sachverhalt mit jenem Recht einen engen Zusammenhang aufweist. 2.Ob eine solche Bestimmung zu berücksichtigen ist, beurteilt sich nach ihrem Zweck und den daraus sich ergebenden Folgen für eine nach schweizerischer Rechtsauffassung sachgerechte Entscheidung*'· see, Hochstrasser, 'Choice of Law and "Foreign" Mandatory Rules in International Arbitration' (1994) Journal of International Arbitration 57ff.

80 These are the overriding mandatory rules of law according to art 9 of the Rome I Regulation.

81 Nygh, 'Choice of Forum and Law in International Commercial Arbitration' (n 5) 26· on the same conclusion results also the proposition of Derains (n 4) 228ff, 247ff 250, and Mayer (n 4) 280ff, 283ff· and Wichard, Die Anwendung der UNIDROIT-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte, RabelsZ 1996, 276ff, McGuire(n 69) 259· also, for an accurate account of all different approaches to the matter see Hochstrasser (n 79) 57ff, 66ff; said opinion as it is righteously pointed out by Grimm, 'Applicability of the Rome I and II Regulations to International Arbitration' (2012) SchiedsVZ 190, is combined with the thesis that the (international) arbitral tribunal has no forum.

ultimately annuls the nature of these rules as rules of law and more importantly as mandatory rules of law. Since an arbitrator in an international arbitration is subject to the procedural rules of the law of the place of arbitration and to the substantive rules of the *lex contractus* as to the merits of the dispute, it is not in principle apparent how he may be bound to enforce any rules, mandatory or not, of any other third State. This would constitute a grave breach either of the law of the place of arbitration regarding a procedural matter or of the *lex contractus* regarding the merits of the case. Especially, in relation to the latter, the overriding of the parties' autonomy, which is caused by the application of rules (even mandatory rules) extraneous to *lex contractus*, shall be justified on the premise of a mandatory rule of the place of arbitration or on the premise of a mandatory rule of *lex contractus,* or, finally, on the premise of the truly international public policy. Otherwise the validity of the arbitral award will not be safeguarded.

The first option has already been ruled out.[82] The application of mandatory rules of a third State by means of a rule (also mandatory) of the place of arbitration is not feasible at least as far as the territorial scope of Law 2735/1999 is concerned. Law 2735/1999 does not entail any such provision, and indeed one of mandatory law. Even more, as already noted, Article 28 does not introduce such a rule (the same holds true regarding any other State that has incorporated the UNCITRAL Model Law).[83]

On the other hand, the second option above cannot be ruled out under the Rome I Regulation, namely it is possible that the application of the mandatory rules of a third State be obligated by a law (also mandatory) of the *lex contractus.*[84] Despite arguments to the opposite,[85] this was indeed the understanding of the drafters of the law which incorporated into the German legal order the UNCITRAL Model Law.[86] It seems also to be the gradually prevailing view in German legal literature.[87]

I believe that this view will also prevail internationally. The basic argument made against it, namely that the rules of private international law, and, in particular, the rules of European private international law under the Rome I Regulation, are obligatory only to State Courts and not to arbitrators in international arbitrations,[88] can easily be overruled.

82 See above under 1.

83 See on this especially McGuire, (n 69) 259ff; see however Czernich (n 20) 702, who reaches the opposite conclusion.

84 See Ancel, Deumier and Laazouzi, Droit de contrats internationaux (2017) no 504, 359–60; cf Lardeux, Droit international privé des obligations contractuelles (2016) no 195ff, p 165ff.

85 See Stein, Jonas and Schlosser ZPO Kommentar 23rd edition, ¶ 1051, no 6, especially fn 13.

86 See BT Drucksache 13/5274 p 52; cf *Bericht* of Giuliano/Lagarde, Drucksache 10/503, S 44 li. Sp. vor Abschnitt 6; See Handorn (n 4) 59ff; also, Wagner (n 69) 538.

87 See, MünchKommZPO and Münch ZPO[4] (n 13) no 1, fn 1; also, Baumbach, Lauterbach and Hartmann, ZPO[71], 2013, ¶ 1051, no 1; Zöller and Geimer, ZPO[25], 2005, ¶ 1051, no 1; Thomas, Putzo and Reichold, ZPO[30], 2009, ¶ 1051, no 2, Wieczorek and Schütze, ZPO 4th edition, 2014, ¶ 1051, no 2; Reithmann, Martiny and Hausmann, Internationales Vertragsrecht[8], 2015, no 8.412ff; McGuire (n 69) 257, 259ff.

88 See among many others, Derains (n 4) 242ff; Mayer (n 4) 283ff; Hochstrasser (n 79) 67ff; Blessing (n 2) 26ff; Stein, Jonas and Schlosser ZPO Kommentar 23th edition, ¶ 1051, no 1, all with references to further legal literature.

Primarily, as it has been correctly pointed out,[89] any rule of law, hence any rule of private international law as well, is meant to be binding upon individuals in a law-abiding society, and, obviously, its binding effect may not depend on the adjudicative authority, namely it may not vary depending on whether any given dispute is resolved by State Courts or arbitral tribunals. The opposite approach mistakenly relates the fact that the arbitrator is indeed an individual empowered with adjudicative function by virtue of the arbitration agreement of the parties with the question whether the arbitrator, in his said capacity, is subject or not to a specific legal regime. This way though it overlooks the fact that the arbitration agreement confers adjudicative power to the arbitrator not by virtue of the party autonomy but because the legal order provides for this procedural legal consequence, 'tolerating' in a sense (argument from Article 8 of the Greek Constitution), an exception to the adjudicative monopoly of the State (argument from Articles 26 section 3 and 93ff of the Hellenic Constitution).[90] Therefore, the power already rested upon the parties to refer their dispute to arbitration arises from a substantive rule of law (from Article 7 section 1 of Law 2735/1999 in particular) and, hence, although it is true that the arbitrator derives his power from the arbitration agreement, it is also true that this power is ultimately based on the law itself.[91]

This understanding provides also the explanation why, although the arbitrator is not an organ of a State, like the State Courts, he is nevertheless subject to a legal regime,[92] initially to the legal regime which conferred to the parties the power to conclude the arbitration agreement, from which he derives his adjudicative authority, and, subsequently, to the legal regime of the place of arbitration, as it is provided in Article 1 section 1 of Law 2735/1999. In case now the Rome I Regulation is directly applicable in the place of arbitration, its provisions override any conflicting national rules,[93] including that of Article 28 section 1 of Law 2735/1999. This presupposes that such a conflict exists. Namely, that Article 28 section 1 of Law 2735/1999 introduces a rule of private international law which implicitly excludes the application of the Rome I Regulation by stating that the law applicable to the merits of the case is authoritatively determined by the parties' agreement with prejudice to the provisions of the Rome Convention of 1980 or the Rome I Regulation.[94] Nevertheless, even if it were assumed that this is the meaning of Article 28 section 1 of Law 2735/1999 in the sense that it provided the parties with the power to exclude the application of mandatory rules by means of the choice of the law applicable to the merits of the case, then this essentially abusive choice of the parties (*in fraudem legis*)[95] could again

89 McGuire (n 69) 262· also, Wagner(n 69) 552, 554.

90 See on this matter, Handorn (n 4) 79ff, 165ff, and McGuire (n 69) 259.

91 See Calavros, *Fundamental Issues of Arbitration Law* (2011) 75ff, 134ff and Calavros, *Annulment and non-existence of Arbitral Awards* (2017) 384ff (both in Greek).

92 Mankowski (n 55) 36.

93 McGuire (n 69) 263.

94 In light of ¶ 1051 of the German Code of Civil Procedure, Schütze (n 13) no 504, Stein, Jonas and Schlosser ZPO Kommentar 23th edition, ¶ 1051, no 6; Ostendorf, Wirksame Wahl ausländischen Rechts auch bei fehlendem Auslandsbezug im Fall einer Schiedsvereinbarung und ausländischem Schiedsort?, SchiedsVZ 2010, 234ff, 236.

95 See Poudret and Besson (Berti/Ponti) (n 5) p 705, and fn 179· also, Blessing (n 2) 39 and Hochstrasser (n 79) 84–86.

be successfully dealt with by reference to the provisions of Article 3 sections 3 and 4 of the Rome I Regulation.

The UNCITRAL Model Law system provides for a right on the parties to designate, by choosing the place of arbitration (Article 20 section 1) the *lex arbitri* (Article 1 section 2), and also for a right to designate, by choosing the law applicable to the merits of the case (Article 28 section 1), the *lex contractus,* the violation of which may result in the annulment of the award.[96] Even if we were to assume those rights as unrestricted we should not overlook the fact that the submission to the system of the Model Law leads, indirectly yet necessarily, in a conflict of laws system, which is that of the place of arbitration, or that of the *lex contractus* or, finally, that of the State to which the dispute referred to arbitration is related. This is because, parties may have the right to choose the procedural law applicable to the arbitration or the substantive law applicable to the merits of the dispute, or, indirectly, as noted above, even the applicable system (set of rules) of private international law, nevertheless, they do not have the right to exclude altogether the application of any and all private international law systems, since, in case the dispute involves foreign elements, it is mandatory to choose the applicable law through the application of a rule which is part of a system of private international law, which may indeed recognize the parties' autonomy to choose the applicable law. In other words, the parties have the right to choose the applicable rules of private international law, but they are not free to dispense with the application of all rules of private international law.[97] In this respect, the limitations to the parties' autonomy enshrined in Article 3 sections 3 and 4 and Article 9 of the Rome I Regulation as well as Article 14 sections 3 and 4 of Rome II Regulation embody more general principles of private international law, applicable to all cases.

It follows from the foregoing analysis that the provisions of Article 3 sections 3 and 4 and of Article 9 of the Rome I Regulation[98] constitute overriding mandatory law rules,[99] and, as a result, if the place of arbitration is within the territorial scope of the Regulation, these provisions provide the legal basis for the application of mandatory law rules of a State other than that of the *lex contractus*. Likewise, in case the *lex contractus* is the law of a State to which the Rome I Regulation applies, self-evidently the Regulation will become part of the *lex contractus*, and, consequently, by means of the above provisions, it will be possible again to apply to the merits of the arbitrated dispute the mandatory rules of a State other than that of the *lex contractus*.

96 Per art 34 s 2(a)(dd) of the Greek Law 2735/1999 provided the mistake made by the arbitral tribunal affected the substance of the arbitral award itself· see more on this Gottwald, Die sachliche Kontrolle internationaler Schiedssprüche durch Staatliche Gerichte, FS Nagel, 1987, 62ff; Kronke, Internationale Schiedsverfahren nach der Reform, RIW 1998, 262; Schwab and Walter, Schiedsgerichtsbarkeit 7th edition, 2005, 213; Beulker (n 13) 172ff; MünchKommZPO/*Adolphsen* ZPO 4th edition, 2013, ¶ 1061 Anh 1 UNÜ, art V, no 41; Thomas, Putzo and Reichold, ZPO 30th edition, 2009, ¶ 1059, no 13 and Junker (n 17) 443ff, 447ff, 449· also, Wolff, Borris and Hennecke, New York Convention, 2012, art V, no 313-314, as well as Stein, Jonas and Schlosser, ZPO Kommentar 23th edition, Anhang zu ¶ 1061, no 277, and more specifically no 279.

97 Wagner (n 69) 553.

98 The same holds true for Switzerland in light of art 19 of the Law on Private International Law· see more above under n 79.

99 See art 28 ss 1 and 2 of the Hellenic Constitution and more on this in *Spyropoulos/Kontiadis/Anthopoulos/Gerapetritis (-Sarigiannidis),* ErmSynt, (2017), art 17, no 47ff, 72 (in Greek).

Finally, without merit is also the last argument invoked by the opposite view, namely that the Rome I Regulation is not applicable to arbitration proceedings, given that arbitration in general is excluded from its scope.[100] As it is obvious from the language of Article 1(2)(e) of the Rome I Regulation, it is arbitration agreements that are excluded from the scope of the Regulation and not arbitration proceedings. This was clearly the understanding and the intention of the drafters of the Regulation as it becomes evident from the relevant preparatory works.[101] This is also the prevailing now opinion in legal literature.[102] As a result, the Regulation is not applicable to the arbitration agreement *per se,* yet it is indeed applicable to the merits of the disputes which are referred to arbitration. Besides, following the decision of the Court of the European Union in the *Eco Swiss* case,[103] it would be very difficult to challenge the obligation of arbitral tribunals to apply EU law, such as the Regulation in question.[104]

The said meaning of the provisions of Article 28 sections 1 and 2 is reaffirmed in light of the fact that are referred not only contractual disputes in general, in the context of which party autonomy constitutes the rule, but also disputes arising out of specific categories of contacts, such as, for example, consumer contracts, for which there are specific rules as to the applicable law[105] or non-contractual disputes in relation to which, the determination of the applicable law also follows specific rules[106] or the parties have the discretionary power to choose the applicable law from a certain point onwards[107] but not to exclude the mandatory provisions that would otherwise be applicable.[108] In all these disputes, it may not be seriously argued that the rule of private international law contained in Article 28 section 1 overrides the specific provisions of the Rome I Regulation or those of the Rome II Regulation. Therefore, the

100 See among others *Stein/Jonas/Schlosser*, ZPO Kommentar 23th edition, ¶ 1051, no 6, and n 13 and 15; also, Sandrock, Welches Kollisionsrecht hat ein internationales Schiedsgericht anzuwenden? RIW 1992, 785, 792; Junker (n 17) 443, 454 Stein, Jonas and Schlosser, ZPO Kommentar 23th edition, ¶ 1051, no 6, and especially n 13 and 15.

101 See, Bericht of Giuliano and Lagarde, 1980 Drucksache 10/503, S. 44 li. Sp. vor Abschnitt 6· n 1· see on the preparatory works Mankowski (n 55) 32ff;· it is noteworthy that Regulation 864/2007 (Rome II) on the law applicable to non-contractual obligations, in the preamble point 8, states the following: '*This Regulation should apply irrespective of the nature of the court or tribunal seised*'· see on this last matter, Grimm(n 81) 190.

102 See McGuire (n 69) 262ff; Mankowski (n 55) 30ff; Czernich (n 20) 701ff; Commandeur and Gößling (n 13) 16, Grimm (n 81) 190; Lazareff (n 8) 142.

103 C-126/97· the decision is also published in the Private Law Chronicles, 2001, 453ff, with a comprehensive commentary by Professor Marinos, pp 457–61, providing a full analysis (in Greek)· see also, Komninos, Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, Judgment of 1 June 1999, Full Court, Common Market Law Review 2000, 459ff; Idot, Note, RevArb 1999, 639ff and Kaisis, 'Public Order Considerations in the Recognition and Enforcmenet of Foreign Court Decisions and Arbitral Awards' (2003) 196ff (in Greek)· on this point, Wagner (n 69) 555.

104 Mankowski (n 55) 36· see also Russel on Arbitration 24th edition, 2015, no 1-038.

105 See for example art 6 Rome I Regulation and Güllemann (n 39) 68ff.

106 See for example arts 4 and 10 of the Rome II Regulation· also on this matter, Georgantis (n 73) 173ff, 181ff. (in Greek) and Güllemann (n 39) 125ff.

107 See for example art 14 s 1 of the Rome II Regulation·of the Rome II Regulation Georgantis (n 73) 173ff, 183ff (in Greek).

108 See for example art 14 ss 3 of the Rome II Regulation · also on this matter, Georgantis (n 73) 173ff, 184ff (in Greek).

language of Article 28 section 1 which makes no discrimination must be read narrowly from a teleological point of view[109] in favor of mandatory law rules.

The application of mandatory rules of law to arbitration proceedings through the Rome I Regulation, and in particular Article 9 section 3 thereof, requires that the following three cumulative conditions be met: firstly, the mandatory rule of law should be applicable in the place of performance of the obligation. Secondly, it should introduce a prohibition. Thirdly, the tribunal should be able to review its content considering the nature and its purpose as well as the consequences of its application or non-application.[110]

But also beyond the scope of application of the Rome I Regulation, the application of the mandatory rules of law to the merits of the disputes referred to arbitration must now be regarded as generally indisputable.[111] For the arbitral tribunal to enforce any given mandatory rule of law, the following conditions must also be met cumulatively: the mandatory rule of law must be closely linked to the dispute at hand and its application must be worthy in light of the particular case.[112] Both of these conditions are, of course, rather vague, particularly in the absence of a specific rule of law which would delineate their exact content. Also to this regard, the interpretational significance of the Rome I Regulation, and, in particular of Article 9, surfaces as the provisions of the latter provide for the necessary legislative clarity and precision for the implementation of these criteria as well.

3.3. The indirect obligation to apply mandatory rules in the context of public policy considerations

Notwithstanding the above, the obligation to apply mandatory rules may be imposed, albeit indirectly, by public policy considerations. This is because, in all jurisdictions, the violation of public policy falls within the ambit of the judicial review of the arbitral awards either in the place of arbitration in the context of annulment proceedings or in the state receiving the award in the context of recognition or enforcement proceedings. Public policy is referred to hereto in its international perspective which entails mandatory law provisions that override the parties' choice of applicable law and fundamental principles of justice and morality;[113] in other words, reference

109 Likewise Junker (n 17) 443, 459, Kronke (n 96) 262, Wagner (n 69) 553ff; Beulker, (n 13) 186–88; Handorn (n 4) 46ff; MünchKommZPO/*Münch ZPO 4th edition*, 2013, ¶ 1051, no 21, especially n 45· also, Calavros (n 10) 125 and Stein, Jonas and Schlosser, ZPO Kommentar 23th edition, ¶ 1051, no 11.

110 For an analysis, see, Czernich (n 20) 704ff and more generally, Emilianidis (n 21) 255ff, 258ff (in Greek).

111 Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit[2], 1989, no 740; Commandeur and Gößling (n 13) 12ff; Czernich (n 20) 703; Schütze, Tscherning and Wais, Handbuch des Schiedsverfahrens[2], 1990, no 585; Redfern and Hunter on International Arbitration 6th edition, 2015, no 3.128ff· also, Fouchard, Gaillard and Goldman, *On International Commercial Arbitration* (1999) no 1515ff, Poudret and Besson (Berti/Ponti) (n 5) no 705, Blessing (n 2) 34, Ungeheuer, Die Beachtung von Eigriffsnormen in der internationalen Handelsschiedsgerichtsbarkeit, 1995, 90ff, 167ff, Handorn (n 4) 183ff, Beulker (n 13) 244ff also, Lew, Mistelis and Kröll (n 4) 419ff· and Wagner (n 69) 556.

112 See, Czernich (n 20) 705ff with further references· also, Horn (n 60) 214, also with further references.

113 Sheppard (n 54) 233ff; Sheppard, Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, Arbitration International 2003, 218ff; Sheppard, 'Mandatory Rules in International Commercial Arbitration: An English Law Perspective' in Bermann and Mistelis (n 4) 173ff.

is hereto made to the so-called truly international public policy,[114] which encompasses those mandatory rules the observance of which is considered of primary importance by a State in order to safeguard its public interests, ie its political, social or economic structure, and, for that purpose, are deemed applicable to all cases which fall within their scope, regardless of the law otherwise applicable to the agreement at hand.[115]

4. CONCLUDING REMARKS

In international arbitration proceedings, the question of the application of substantive mandatory rules, even beyond the choice of law made by the parties, raises many issues, especially since there is no apparent obligation of arbitral tribunals to apply substantive rules of law which do not belong to the legal regime that the parties have chosen to control the merits of their dispute. Therefore, legal literature internationally has opted for solutions which address practical needs, such as, for example, the proposition that the arbitral tribunals has the *discretionary power* to apply mandatory rules to the merits of the case, provided that certain conditions, delineated in the theory of international arbitration, are met.[116]

These solutions, however, disregard the fundamental perception of the binding nature of the law which is a structural element of any legal order, while, at the same time assert, if not explicitly, most certainly, implicitly, that the parties' autonomy constitutes a self-governing principle which yields the law applicable to the merits of the dispute.

It is obvious that said approaches overlook the fact that the powers and rights exercised by the parties in the context of party autonomy has been conferred to them by virtue of a rule of law belonging to a certain legal regime in the first place. The concept of an arbitration proceeding detached from any and all legal orders, however interesting it may be, is, though, flawed and in any case not affirmed by national legislations, especially in Model Law jurisdictions.

The more general and theoretical question which is posed in the context discussed is whether the parties may 'delocalize' the arbitration proceedings ie detach them from the law of the place of arbitration and make it subject to a different legal order[117] or to a set of rules which do not belong to any specific legal order.

114 Lalive (n 4) 258ff; also, von Hoffmann (n 18) 22ff.

115 See for example art 9 s 1 of Rome I Regulation (or art 16 of the Rome II Regulation).

116 See, Derains (n 4) 228ff; Mayer (n 4) 283ff. and especially, Blessing (n 2) 30–31.

117 See Schlosser (n 111) no 62; Fouchard, L'autonomie de l'arbitrage commercial international, RevArb 1965, 99; Fragistas, Arbitrage étranger et arbitrage international en droit privé, Revue Critique de Droit International Privé 1960, 14ff (*'. . . les parties peuvent-elles détacher l'arbitrage internationale de tout ordre juridique étatique. . .?'*), Gentinetta, Die lex fori internationaler Handelsschiedsgerichte, 1973, 145; E Gaillard, Aspects philosophiques du droit de l'arbitrage international 2008, 135 (*'. . . au cours de la seconde moitié du XXe siècle . . .. c' est en effet l' émancipation de la procedure arbitrale par rapport aux dispositions de l'ordre juridique du siège . . .'*); Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) Arbitration International 19, 20 ('*in international commercial arbitration the arbitral procedure and any resulting award were autonomous, being unconnected to any national legal system and deriving their force solely from the agreement of the parties*'); Goldman, Arbitrage international et droit commun des nations, RevArb 1956, 115 (*international arbitration is detached from any national legal system*); Lew (n 12) 179ff; Paulsson, 'Arbitration Unbound: Award Detached From the Law of Its Country of Origin' (1981) Int'l & Comp LQ 358; Paulsson, 'Delocalization of International

The advantage of an answer to the affirmative, particularly in the latter case, in which arbitration is detached from any legal order, and is thus made immune to judicial review in the place of arbitration, is that, in effect, it confines the judicial review of arbitral awards only in the state receiving the foreign award and in the context of recognition or enforcement proceedings.[118] This theoretical approach, which is inherently informed by the concept of a supranational arbitration,[119] namely an arbitration in which the parties determine not only the law applicable to the procedure and the merits of the case but are empowered also with the authority to detach it from any legal order, is, however, not affirmed by national legislations. Thus, for example, Article 1(2) of the UNCITRAL Model Law explicitly states that its provisions shall apply to all international arbitrations conducted in a country which has incorporated them into law.[120] Similar is the provision of section 1025 of the German Code of Civil Procedure.[121] Also, the English Arbitration Act of 1996 provides in section 4(1) that its mandatory rules law shall apply, even if the parties agree the opposite.[122]

Commercial Arbitration: When and Why It Matters' (1983) Int'l & Comp LQ 53; Petrochilos (n 8) no 2.38ff, 2.52 ('*it is not axiomatic that an arbitration should be exclusively attached to the legal order of the place of the proceedings, or the seat of the arbitration*')· see also Pampoukis, Lex mercatoria as applicable law in international contractual obligations, 1996, 166ff. (in Greek).

118 See Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, 2015) no 3.76· also, *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices,* RevArb 2007, 507, 514 : '*Mais attendu que la sentence internationale, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées*'.

119 See also Calavros, *The Concept of a Foreign Arbitral Award* (1982) 87ff (in Greek) · cf Calavros, *Arbitration Law, I: National Arbitration Procedures* (2nd edn, 2011) 32ff (in Greek)· Decision on the Case '*Aramco*' [8.11.1958] published in Rev crit 1963, 272ff, parties to the arbitration were Saudi Arabia and the Arabian American Oil Company. The Arbitral Tribunal presiding by G Sausser-Hall (the other two arbitrators were M Hassan and S Habachi) regarded the arbitration as an international arbitration, because one of the parties was indeed a State and thus, the subject to public international law: '*. . . L'immunite de juridiction assuree par le droit de gens aux Etats etrangers souverains fait obstacle a ce que l'arbitrage auquel participe un Etat souverain releve de la loi d'un autre Etat. . . Un pareil arbitrage est soumis aux regies du droit des gens pour la raison qu'une des parties est un Etat*'· see, also, Klein, 'L'arbitrage international de droit privé' (1963) Schw Jb Int R 54; published in International and Comparative Law Quarterly 13 (1964), 1011ff. Parties to the arbitration were Sapphire Int Petr Ltd and the State of Iran; Case 'Abu Dhabi' [28.8.1951] published in International and Comparative Law Quarterly 1952, 247ff, parties to the arbitration were the Sheikh of Abu Dhabi and Petroleum Development· see also, Klein, ibid 54 · see on this issue, Theodorou, Investitionsschutzverträge vor Schiedsgerichten (2001) 200ff.

120 See, Calavros (n 10) 24ff.

121 See, Stein, Jonas and Schlosser, ZPO Kommentar 23th edition, ¶ 1025, no 2ff., MünchKommZPO and *Münch* ZPO 4th edition, 2013, ¶ 1025, no 10ff, 15; Wieczorek and Schütze, ZPO[4], 2014, ¶ 1025, no 102ff; Schwab and Walter, (n 95) 128ff· also, BGHZ 96, 40· see also s 1042 III of the German Civil Procedure Code: '*Im übrigen können die Parteien volbehaltlich der zwingenden Vorschriften dieses Buches das Verahren selbst oder durch Bezugnahme auf eine schiedsrichterliche Verfahrensordnung regeln*'· Berger, „Sitz des Schiedsgerichts"oder „Sitz des Schiedsverfaherns", RIW 1993, 8ff· the same goes for the Swiss Law which has incorporated the UNCITRAL Model Law· see, Pfisterer, in Berner Kommentar zur Schweizerischen Zivilprozessordnung, III, 2014, Art 355, no 1ff; Weber-Stecher, in Spühler, Tenchio and Infanger, Basler Kommentar zur schweizerischen Zivilprozessordnung, 2010, art 355, no 1ff Wenger, in Sutter-Somm, Hasenböler and Lauenberger, Kommentar zur schweizerischen Zivilprozessordnung, 2010, art 355, no 5ff.

122 s 4(1) of the Arbitration Act of 1996: '*The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary*' · also, Harris, Planterose and Tecks, *The Arbitration Act 1996 – A Commentary* (5th edn, 2014) s 4Cff.

Besides, the concept of a supranational arbitration in its absolute form, that is, the total separation of an arbitration from all legal orders, is flawed *ab initio*, since the arbitration agreement, as a contractual agreement, produces legal effect only to the extent recognized by the rules of a certain legal order, to which is thus necessarily linked.[123] Similarly, the partial separation of individual stages of the arbitration from a specific or even from all legal orders, and, in particular, the separation of the appointment of the arbitrators and of the *stricto sensu* arbitration proceedings, appears equally problematic. Firstly, it is effectuated by virtue of the arbitration agreement, which, in turn, derives its effect from a rule of law affording the parties this option which belongs to a specific legal order. Secondly, such separation may not result in the non-application of the mandatory rules of the place of arbitration.

The issue of application of mandatory rules in international arbitrations conducted in a EU Member State which has also incorporated the UNCITRAL Model Law seems straight forward.

The incorporation of the UNCITRAL Model Law, entails the application of the principle of territoriality (Article 1 section 2). This principle establishes a definite nexus between international arbitration proceedings and the place of arbitration: the rules of the place of arbitration shall apply to various (mainly procedural) issues, ie in order to determine the arbitrability of the dispute at hand,[124] in order to control the facilitation of the arbitration proceedings by State Courts, or, most importantly, in order to govern the judicial review of the arbitral award in the context of annulment proceedings. This nexus between the arbitration proceedings and the place of arbitration suffices[125] to regard the latter as *forum* of the arbitration.[126] Hence, the main objection as to the non-application of the mandatory rules of the place of arbitration[127] is abolished.

Furthermore, in case the international arbitration is conducted in a Member State of the European Union, the binding effect of the Rome I Regulation and the Rome II Regulation, may not be disregarded by any arbitral tribunal. Otherwise the risk exists that the arbitral award will be annulled or denied recognition and enforcement because the arbitral tribunal did not apply the overriding mandatory rules of law[128] either of the *forum*, or of the *lex contractus* or of a third State which would otherwise be applicable. The relevant provisions of the Rome I Regulation are obviously not

123 See, Calavros (n 119) 91ff· also, Raape, Internationales Privatrecht 5th edition, 1961, 557: '*Das Schiedsgericht schwebt nicht über die Erde, es schwebt nicht in der Luft, es muß irgendwo landen, irgendwo erden*' and Batiffol, Aspects philosophiques du droit international privé (1956 (ed 2002)), 75· as well as Theodorou, Investitionsschutzverträge vor Schiedsgerichten (2001) 222ff and Petrochilos (n 8) no 2.43ff.

124 See for example art 34 s 2(b)(aa) of the Greek Law 2735/1999· also, Calavros (n 10) 24ff and Lew, Mistelis and Kröll (n 4) 74.

125 See, Lew (n 12) 179ff.

126 On this line, Stein, Jonas and Schlosser, ZPO Kommentar 23th edition, ¶ 1051, no 1· Schütze (n 13) no 512ff; Schütze, Deutsches internationales Zivilprozessrecht unter Einschluss des Europäischen Zivilprozessrechts(n 13) no 525, Schütze, FS Böckstiegel (n 13) 722 (cf *Schütze*, Zur Wirksmakeit von internationalen Shiedsvereinbarungen (n 13) 97ff), Beulker (n 13) 162ff· also, MünchKommZPO and Münch ZPO 4th edition, 2013, ¶ 1051, no 11, as well as Commandeur and Gößling (n 13) 16 and Handorn (n 4) 20.

127 See, Derains (n 4) 230ff; Mayer (n 4) 282ff.

128 See for example art 9 s 1 of the Rome I Regulation (or art 16 of the Rome II Regulation).

overruled by Article 28 section 1 of the UNCITRAL Model Law, as these provisions are deemed superior to the provision of Article 28 section 1.

Moreover, the Court of the European Union has repeatedly held that the provisions of the European Union law, which belong to the European Union public order, are also to be applied by the arbitral tribunals in arbitrations conducted in a EU Member State.[129] Obviously, European Union Regulations form part of the European Union public order as they consolidate the law of the Member States and are intended to the uniform application of the law by both state courts and arbitral tribunals.

129 See, Cases *Eco Swiss* and *Claro*; For more, see Calavros (n 91) 407ff, 413ff (in Greek).