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Doctoral Thesis

A RESOLUTION OF THE CONFLICT BETWEEN PUBLIC AND PRIVATE INTERESTS IN INTERNATIONAL COMMERCIAL ARBITRATION: FOCUSING ON THE ISSUES OF ARBITRABILITY AND THE APPLICATION OF INTERNATIONALLY MANDATORY RULES

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Abstract

International commercial arbitration has been considered as a common means for a resolution of private disputes. The increase of cases submitted to international arbitration includes also the cases that affect public interests of a certain country. The involvement of public interests can appear as a limit to the exercise of the parties' private interests. Although the parties aim to submit their disputes to arbitration, for public interests reasons, parties have to refer the dispute to a domestic court. Even in the case where the subject matter of the dispute is arbitrable, the arbitrators may have to consider the applicability of mandatory provisions that intend to protect the public interests despite the parties' choice of applicable law. Consequently, public interests are in conflict with the parties' private interests, and the arbitrators have to resolve this conflict. This research seeks to clarify the role and authority of the arbitrators to consider the relevance of public interests while arbitrating a dispute between two private parties. It also addresses the methods that the arbitrators may adopt in order to settle the conflict between public and private interests in the issue of arbitrability and applicability of internationally mandatory rules.

From a theoretical discussion, the thesis argues that the arbitrators have the role and authority to evaluate the relevance of public interests. Regarding the issue of arbitrability, different countries adopt different approaches based on their policies. The role of the arbitrators is to determine which countries' rule on arbitrability is applicable. The thesis argues that the arbitration law of the seat of arbitration governs arbitrability issue. Furthermore, the arbitrators should consider the applicability of a foreign rule that demands the dispute inarbitrable. Regarding the issue concerning the applicability of internationally mandatory rules, the thesis recommends the arbitrators to evaluate the internationally mandatory rules of the seat of arbitration, governing law, and a third country based on four criteria, which are: 1) nature: the rules must be of international mandatory character; 2) scope: the rules must claim for application in that case; 3) connection: the rules must have a close connection with the case; and 4) application consequences: the application or non-application of the rules must not be in contrary to international public policy of the seat of arbitration.

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List of Abbreviations

Cf.	Confer: compare
EU	European Union
Ibid.	Ibidem: in the same source
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
IMR	Internationally Mandatory Rules
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Rome Convention	Convention 80/934/EEC on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980
Rome I Regulation	Regulation (EC) No 593 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration
U.S.	United States (of America)
Vs.	Versus

Chapter I: Introduction

1.1 Background of the Research

International commercial arbitration has been considered as a common means for private dispute resolution. The parties to the arbitration are private parties, and seek for arbitration in order to settle their private disputes. The parties also elect for arbitration because arbitration allows the parties to maximize their autonomy in their dispute settlement.[1]

The function of arbitration tends to be evolving during this era of globalization. Presently, as international commerce expands, many international commercial disputes have increasingly been submitted to international commercial arbitration.[2] Hence, this dispute resolution mechanism seems to be playing an important role in governing the transnational activities of private parties.[3] In relation to this evolution, the arbitral tribunal has gradually been provided a task to resolve a dispute that concerns public interests because cases concerning public interests have been included in those which can be submitted to international commercial arbitration for resolution.[4] These cases include, for instance, antitrust disputes, intellectual property disputes, and disputes relating to environmental issues or tax matters. Although issues submitted to international commercial arbitration are supposedly private matters, because some activities of the private parties affect public interests, disputes submitted to the arbitral tribunal involves a resolution of the conflict between public and private interests.

To illustrate the conflict between the two interests, the thesis will explain one case. In 1986, the United States Supreme Court has declared in the case of *Mitsubishi v. Soler Chrysler-Plymouth*[5]

[1] Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (OUP Oxford, 2002), 336.
[2] Ibid. at 337.
[3] See, Walter Mattli and Thomas Dietz, "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction," in *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), 1–21.
[4] Julian D. M. Lew, Loukas A. Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), 199.
[5] Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc, 473 US 614, 105 S Ct 3346 (1985).

that a case concerning antitrust law is arbitrable in international commercial arbitration.[6] The questions concerning public interests in this arbitration involve both the issue of arbitrability and applicable law. In this particular case, Soler (the buyer) and Mitsubishi (the manufacturer) had an agreement on the sale of vehicles from Japan to a region in America. Under the agreement, parties chose Swiss law as the law governing the contract. The parties were also bound by an arbitration clause designating Japan as the seat of arbitration. After Soler made its order, the sale of the vehicles dropped. Consequently, Soler requested to transship the product to a different region in America, but Mitsubishi refused. Soler renounced the order, and the dispute between the parties arose.

Mitsubishi filed a claim to compel arbitration and to claim for other substantive matters. Soler made a counter claim that Mitsubishi breached the U.S. Sherman Act, which concerns antitrust matter. Antitrust law had been considered as a body of law that aims to protect public interest, so the debate in this case was whether the issue should fall under the compulsory jurisdiction of the U.S. court or an arbitral tribunal could also arbitrate the dispute. In addition, under the consideration of applicable law, the arbitral tribunal had to resolve applicability of rules of public interest, referred to as "the internationally mandatory rules" or "overriding mandatory provisions",[7] which are not the governing law of the contract.[8] In this case, while the parties have expressed their intention and expectation of having the law of Swiss Confederation applied to their case, internationally mandatory rules of America claims for its application under the justification of the protecting public

[6] Thomas E. Carbonneau, "Mitsubishi: The Folly of Quixotic Internationalism," *Arbitration International* 2, no. 2 (April 1, 1986): 116–39; Andreas F. Lowenfeld, "The MitsubishI Case: Another View," *Arbitration International* 2, no. 3 (July 1, 1986): 178–90.

[7] Under Article 9(1) of the Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 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 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 this Regulation".

[8] Andrew Barraclough and Jeff Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," *Melbourne Journal of International Law* 6 (2005): 205–44; Catherine Kessedjian, "Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?," *American Review of International Arbitration* 18 (2007): 147; George A. Bermann, "Mandatory Rules of Law in International Arbitration," in *Conflicts of Laws in International Arbitration* (Walter de Gruyter, 2010), 325–39; Marc Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration," *Journal of International Arbitration* 14, no. 4 (December 1, 1997): 23–40; Serge Lazareff, "Mandatory Extraterritorial Application of National Law," *Arbitration International* 11, no. 2 (1995): 137–50; Pierre Mayer, "Mandatory Rules of Law in International Arbitration," *Arbitration International* 2, no. 4 (1986): 274–93.

interests of America. Hence, there are two compelling interests conflicting with each other, which are parties' private interest in having their designated law applied, and the public interests as represented by the claim for application of the internationally mandatory rules.

Based on the illustration above, the involvement of public interests in international arbitration leads to the issue of a conflict between public interests and private interests as represented by party autonomy. The increase of the involvement of public interests in international arbitration grants the arbitral tribunal a task to address the question, especially when the parties raise it during the arbitral proceeding. The arbitrators are entrusted to try to find a balance between the two conflicting interests, which nevertheless, is not an easy task. A careful examination on the general principles underlying the two interests is necessary to find a proper balance. Thus, it would be helpful to develop a recommendation, which could assist the arbitral tribunals on this task.

This chapter will be divided into five sections. Section 1.2 will first provide a definition of several terms that will be used throughout the discussions. Then, section 1.3 will clarify the objective of this research, and sections 1.4 and 1.5 will provide a description of the research methodology and the structure of the thesis.

1.2 Definition of Key Terms

In order to ease a discussion of the legal issue, it is necessary to define several important key terms, such as 'public interests' and 'private interests'. Furthermore, other related terms, such as party autonomy, public policy and mandatory rules that will appear in the discussions will also be defined in this section.

The term 'private interests' used in this thesis refers to the interests of the parties to have the arbitration conducted in a manner that the parties desire. An expressed illustration of the parties' interests is through the stipulation of their arbitration agreement, such as the choice of arbitration as a means for dispute resolution or the choice of law to govern the contract. In international arbitration, the parties' private interests are ensured through the principle of party autonomy.

The principle of party autonomy functions as a basis for the parties to agree upon many features of their dispute resolution mechanism, such as the choice of governing law, the choice of a country as the seat of arbitration, and the conduct of the proceedings. Professor Symeon Symeonides defines party autonomy as the freedom of the parties to contract out of waivable rules (*jus dispositivum*) as opposed to the nonwaivable or mandatory rules (*jus cogens*) of that law.[9] During the early twentieth century when this principle was newly founded, the principle did not receive much support.[10] In particular, legal scholars and courts of different countries divided their standpoints.[11] However, later on, as international trade increased due to the rise of globalization, the principle of party autonomy was able to obtain more support.[12] This principle has been considered to be a practical tool to tackle the issue of conflict of laws in international contracts.[13] Despite the increase recognition of the principle of party autonomy, this principle is still limited by relevant States' mandatory rules and public policy.[14] Mandatory rules and public policy are tools that State use to protect public interests of its country.

Dora Marta Gruner defines public interests as "a set of values and norms that serve as ends toward which a community strives."[15] The content of public interests varies in different countries depending on the values that each society holds. A general example of matters involving public interests includes corruption, bribery, money laundering, and fraud.[16]

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[9] Symeon Symeonides, "Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple," *Brooklyn Journal of International Law* 39, no. 3 (2014): 1130.
[10] Marta Pertégas and Brooke Adele Marshall, "Party Autonomy and Its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts," *Brooklyn Journal of International Law* 39, no. 3 (2014): 976.
[11] Giesela Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency," in *Conflict of Laws in a Globalized World* (Cambridge University Press, 2007), 156.
[12] Pertégas and Marshall, "Party Autonomy and Its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts," 976.
[13] Ibid.
[14] Hong-lin Yu, "Choice of the Proper Law vs. Public Policy," *Contemporary Asia Arbitration Journal* 1, no. 1 (2008): 113.
[15] Dora Marta Gruner, "Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform," *Colum. J. Transnat'l L.* 41 (2002–2003): 929.
[16] Kessedjian, "Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?," 149.

Public interests are not positive rules that can bind actors in the society. States adopt various statutory regulations to protect its public interests.[17] Antitrust law, for instance, is adopted to protect competition in the market and Security Act is adopted for the purpose of protecting integrity of the markets.[18] This thesis uses the term 'public interests' to refer to the reasons behind the adoption of the various laws that intend to protect the values in each society, such as anti-corruption act, and a group of the general public such as the consumers.

Mandatory rules are rules that aim to protect public interests, such as the social and economic interests, of the country.[19] The term 'mandatory rules' has a broad meaning, and can refer to all kinds of norm that have a mandatory nature.[20] For instance, Article 3(3) of the *Convention on the Applicable Law to Contractual Obligations* (the "Rome Convention")[21] use the term 'mandatory rules' to refer to rules that cannot be derogated from by contract.[22] Article 7 of the same Convention use the term 'mandatory rules' to refer to rules that demand application irrespective of the governing law. The *Regulation (EC) No 593 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations* (the "Rome I Regulation") refers to the mandatory rules under Article 7 of the *Rome Convention* as "overriding mandatory provision".

Article 9(1) of the *Rome I Regulation* defines this provision as:

> Provisions the respect for which is regarded as crucial by a country for safeguarding 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 this Regulation.

In order to avoid complications, the thesis will use the term 'internationally mandatory rules' to refer to rules that claim for application irrespective of the governing law. Examples of

[17] Gruner, "Accounting for the Public Interest in International Arbitration," 931.
[18] Ibid.
[19] Mohammad Baniassadi, "Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration," *Berkeley Journal of International Law* 10, no. 1 (July 1, 1992): 62.
[20] Kessedjian, "Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?," 147.
[21] *Convention 80/934/EEC on the Law Applicable to Contractual Obligations* opened for signature in Rome on 19 June 1980 (the "Rome Convention").
[22] Article 3(3) of the *Rome Convention* stipulates that: "The fact that the parties have chosen a foreign law, whether or not accompanied 29 by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

internationally mandatory rules are antitrust laws, import or export embargos, and environmental protection laws.[23]

In the field of private international law, public policy or *ordre public* is a national concept which represents a country's value or view on fairness and justice.[24] It is a fundamental rule in a national legal system, and can be procedural or substantive. Public policy functions as a safety valve that allows the forum court to avoid the application of the law that provides injustice and unfair result from the perspective of the forum.[25] Thus, if the application of a foreign law is manifestly incompatible with the public policy of the forum, the court may decide not to apply that foreign law.[26] Moreover, a court may also invoke public policy during the process of recognition and enforcement of a foreign judgment,[27] in order to refuse to recognize or enforce a foreign judgment, which is in contrary to the public policy of the forum.[28]

Additional to public policy that originates from a national concept, in the field of international arbitration, the source of public policy is further discussed in a transnational context. Professor Pierre Lalive is the main contributor to the discussion on the so-called "transnational public policy."[29] To comprehend the content of transnational public policy, professor Lalive suggested three factors for examination:

> First, traditional public policy in private international law may contribute to the formation of specific rules (of substantive private international law) adapted to international situations, thus taking into account the needs of international trade. Second, its intervention in a given case does not always result in imposing the application of a particular and mandatory rule of the *lex fori*. Third, the public policy of the forum may also intervene in order to protect the (foreign) public policy of one or several States and lastly, that of international community.[30]

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[23] Mayer, "Mandatory Rules of Law in International Arbitration," 275.
[24] Wolfgang Wurmnest, "Chapter 14: Ordre Public (Public Policy)," in *General Principles of European Private International Law* (Alphen aan den Rijn: Wolters Kluwer, 2016), 305–6.
[25] Ibid.
[26] Michael Bogdan, *Private International Law as Component of the Law of the Forum* (Martinus Nijhoff Publishers, 2012), 215; Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," *Comparative Arbitration Practice and Public Policy in Arbitration* 3 (1987): 261.
[27] Bogdan, *Private International Law as Component of the Law of the Forum*, 215.
[28] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration* (the "UNCITRAL Model Law"), Article 36(2)(b)(ii); *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention"), Article V(2)(b).
[29] See: Lalive, "Transnational (or Truly International) Public Policy and International Arbitration."
[30] Ibid. at 273.

Professor Blessing further clarified transnational public policy as norms which aim to protect "fundamental principles or universally recognized legal rights."[31] Transnational public policy includes both substantive and procedural public policy. Richard Kreindler claims that a reliance on the consensus of a majority of States upon the content of the policy helps to identify transnational substantive public policies.[32] Some examples of these policies include prohibitions against agreements to perform criminal acts, principle of good morals (*bona fides*), bribery, slavery and similar abuses, and supplying arms to terrorist groups and comparable acts.[33] These rules are perceived to be of transnational nature because the content of most countries' policies include these rules.

This section has defined important key terms that are important for the discussions. The following section will proceed to describe the significance and objective of this research.

1.3 The Significance and Objective of the Research

The issues concerning arbitrability and applicability of internationally mandatory rules illustrate that the arbitrators, in resolving private parties' dispute, also confront with the tasks to determine the relevance of public interests. The arbitrators also have a task resolve the conflict between the parties' interests and public interests that the arbitrators perceive to be relevant in the arbitration. In order to assist the arbitrators with this task, the thesis sets out to discover the relevance of public interests in international commercial arbitration, and the methods that the arbitrators can adopt to strike a balance between the conflict between public and private interests in the question of arbitrability and internationally mandatory rules.

The two legal issues are not new legal problems. After a dispute arises and a party initiates an arbitration proceeding, the other party may raise inarbitrability as a defense against the authority of the arbitrators to settle the dispute between the parties. In addition, during an arbitration proceeding,

[31] Marc Blessing, "Choice of Substantive Law in International Arbitration," *Journal of International Arbitration* 14, no. 2 (June 1, 1997): 61.
[32] Richard Kreindler, "Chapter 2: Standards of Procedural International Public Policy," in *International Arbitration and Public Policy* (JurisNet, LLC, 2015), 10.
[33] Gary B. Born, *International Commercial Arbitration*, vol. II (Kluwer Law International, 2009), 2194; Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 290–91.

a party may also refer to internationally mandatory rules foreign to the applicable law to justify the non-performance of their contractual obligation. Much work has been done address each legal issues. Nevertheless, legal scholars generally unravel each legal question without clearly clarifying the relevance of public interests in international arbitration.

Since these legal issues involve the tasks of the arbitrators to address States' public interests, it is necessary to first conduct a background research to ascertain an understanding about the legal nature of arbitration. Even though arbitration is a means for the settlement of private disputes, the arbitrators still face the challenge to address public interests as a result of the effect of the parties' transaction on public interests. Therefore, the study about legal theories that define the relationship between international arbitration and State is necessary to identify the necessity for the arbitrators to address public interests as well as to identify which countries' public interests the arbitrators need to address. A clarification about the relationship between international arbitration and State assists a resolution of practical legal issues in a more efficient way. Moreover, in addressing the question from the perspective of legal theories, the findings of the research helps shed some lights on the general understanding about international arbitration and the relevance of public interests in international arbitration.

The findings of this research contribute to clarify the debate on the juridical nature of arbitration as well as elaborate on the practical implications of the theoretical debate. In addition, this research also contributes to solving practical issues in international arbitration. Specifically, the thesis will provide recommendations on how to solve the question of the arbitrability of a subject matter of a dispute as well as applicability of internationally mandatory rules.

1.4 Research Methodology

To achieve its objective, this thesis will investigate into both theoretical discussions surrounding arbitration and practical matters that arise out of the conflict between public and private interests. As the dispute directly concerns the effect of international arbitration on public interest of a certain State, it is necessary to conduct a theoretical study to investigate the relationship between

arbitration and State. This study allows the thesis to identify the relevance of public interests in international arbitration and the necessity for the arbitrators to address public interests when solving the parties' disputes. After a theoretical discussion, the research will review previous discussions to determine the suggestions on how to solve the conflict of public and private interests in the issue of arbitrability and internationally mandatory rules.

As the discussion in this study is not limited to a particular country, but international arbitration in general, the thesis will make reference to the *United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration* (the "UNCITRAL Model Law")[34] and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention")[35] when the discussion requires a reference to arbitration law and legislation concerning the recognition and enforcement of an arbitral award. The research refers to these two international instruments as main references because of their widespread adoption and ratification. The UNCITRAL drafted the Model Law as a legal framework for States that intend to modernize their arbitration law. As of June 2018, 80 States have adopted their legislations based on the *UNCITRAL Model Law*.[36] A discussion in relation to the enforcement of arbitral award cannot be conducted in ignoring the *New York Convention* as this legal instrument has been adopted by a majority of States to ease the enforcement of a foreign arbitral award. To date, 159 States are parties to this convention.[37] Hence, a reference to the *New York Convention* is helpful to consider a common approach concerning the recognition and enforcement of foreign arbitral awards.

1.5 Thesis Structure

The thesis is divided into five chapters. Chapter I is the introduction.

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[34] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration* (the "UNCITRAL Model Law"), 24 ILM 1302 (1985).
[35] *Law on the Adoption and Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, NS/RKM/0701/10 (23 July 2001).
[36] United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006," *UNCITRAL*.
[37] United Nations Commission on International Trade Law, "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)," *UNCITRAL*.

Chapter II defines the relationship between international arbitration and State. After reviewing the legal theories, the thesis provides its recommendation in arguing that international arbitration cannot exist without the parties' agreement to arbitrate, nor can international arbitration be independent from a State. Therefore, in solving legal issues, the arbitrators need to respect arbitration law of the seat of arbitration and the intention of the parties, which serve as the main source to grant the arbitrators the authority to evaluate issues involving public interests. With regards to the method to solve public interests, this thesis proposes that the arbitrators have the liberty to adopt an autonomous conflict of laws method that the arbitrators deem appropriate to solve each legal problem.

After addressing a theoretical discussion as a background for discussions, the research proceeds to discuss the question of arbitrability in Chapter III. Arbitrability concerns the question of the capability of a subject matter to be settled by means of arbitration. Arbitrators do not have the authority to determine which subject matters are arbitrable and which are not because this question depends on the policy of each State. Different countries adopt different approach regarding which subject matter can be referred to arbitration. Thus, the issue of arbitrability in front of the arbitrators is a choice-of-law question, which requires the arbitrators to elect which countries' law governing arbitrability the arbitrators should respect.

In perceiving that arbitrability is a jurisdictional problem, which falls under procedural law, this research claims that the law of the seat of arbitration governs the question of arbitrability. However, the issue of arbitrability deserves a more critical discussion than to simply accept the application of the law of the seat on arbitrability. Additional to the law of the seat of arbitration, this study proposes that the arbitrators should also evaluate whether there is any rule of other countries that demands for a jurisdiction of the court in that country. If the arbitrators found that such rule exists, Chapter III proposes that the arbitrators should evaluate the possibility of applying this rule under the law of the seat of arbitration.

Chapter IV focuses on the issue concerning the applicability of internationally mandatory rules in international commercial arbitration. After evaluating previous scholarly discussions and

arbitral awards, Chapter IV argues that the arbitrators should evaluate objectively the applicability of the IMR of the seat of arbitration and of a third country. For the IMR of the law chosen by the parties, the arbitrators should also evaluate the applicability of the rule if the parties have conclude an agreement disregarding the applicability of the IMR. Chapter IV recommends that the arbitrators should evaluate the applicability of the IMR by confirming that the IMR meets four criteria: 1) nature: the rules must be of international mandatory character; 2) scope: the rules must claim for application in that case; 3) connection: the rules must have a close connection with the case; and 4) application consequences: the application of the rules must not be in contrary to international public policy of the seat of arbitration.

Finally, Chapter V concludes the entire discussion in the thesis. The findings of this research will be helpful for the arbitral tribunal to use as a tool to resolve the question of the two conflicting interests. Moreover, it also provides clarity to the parties when resolving their dispute in international arbitration, as it is possible for the parties to expect the extent to which their private interests will be considered and enhanced when facing a challenge from the public interests.

Chapter II: A Theoretical Discussion Defining the Relationship between International Arbitration and State

2.1 Introduction

This chapter intends to look into theoretical discussion surrounding the conflict between public and private interests in international commercial arbitration. Hence, it is necessary to investigate the relationship between State and international arbitration in order to clarify the influence that a State can have over international arbitration. Particularly, this research has to identify which State is relevant for the discussion as well as how attached or detached is arbitration to the relevant State. The more attached arbitration is with a State, the more arbitration is bound by public interests of the State.

Many legal scholars have contributed their works on defining the legal nature of international arbitration. The legal theories describing international arbitration are abundant. Nevertheless, from the viewpoint of the relationship between international commercial arbitration and State, the legal theories can be categorized into three groups. The first group describes international arbitration to be bound by a national legal order. The second ground claims that international arbitration is independent from national legal order. Lastly, the third theory advocates that arbitration is bound by national legal order and the parties' agreement. This thesis is of the view that international arbitration is mainly bound by the legal order of the seat of arbitration as well as the agreement between the parties.

This chapter will elaborate on each legal theory in sections 2.2, 2.3, and 2.4. Then, this chapter will proceed to analyze the legal theories in section 2.5. After the analysis, the thesis will advocate on its position with regards to the juridical nature of arbitration and its relationship with the seat of arbitration in section 2.6 as well as define the role of international arbitration in relation to the question of public interests in section 2.7. Finally, section 2.8 will provide a conclusion of Chapter 2.

2.2 Arbitration Being Bound By a National Legal Order

The legal theory that claims for arbitration to be attached to a national legal order is the Jurisdictional Theory, which argues for national sovereignty.[38] The State in which arbitration takes place regulates and controls the arbitration.[39] Professor Jan Paulsson refers to this concept as the "Territorial Thesis" because this theory pleads for a localization of every happening of international arbitration into a specific territory.[40]

Professor F. A. Mann is the main advocate of the Jurisdictional Theory. In 1967, Professor Mann published a paper, called the *Lex Facit Arbitrum*, to object Professor Goldman's claim that international arbitration is not attached to the place where it is seated.[41] Professor Mann claims that international arbitration is subject to municipal law of the place where it has its seat,[42] and the authority of the arbitrators to arbitrate the case is delegated from a State.[43] Hence, based on the Jurisdictional Theory, the existence of international arbitration relies entirely on the law of the seat of arbitration,[44] which determines the possibility of arbitrating a dispute by means of arbitration.[45] Therefore, without the law of the seat recognizing arbitration, arbitration cannot happen.[46]

Under the Jurisdictional Theory, as argued by Professor F. A. Mann, arbitration is bound to jurisdiction of a State, and even the principle of party autonomy finds its root from municipal law.[47] Any conduct of arbitration that is contrary to the mandatory rules and public policy of the seat of

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[38] cf. Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 210.
[39] cf. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 74.
[40] Jan Paulsson, *Arbitration in Three Dimensions*, Rochester, NY, SSRN Scholarly Paper ID 1536093 (Rochester, NY: London School of Economics and Political Science Law Department, January 13, 2010), 4.
[41] F. A. Mann, "Lex Facit Arbitrum," in *International Arbitration Liber Amicorum For Martin Domke* (The Netherlands: Martinus Nijhoff Publishers, 1967).
[42] F. A. Mann, "State Contracts and International Arbitration," *The British Yearbook of International Law* 42, no. 1 (1967): 4.
[43] cf. Hong-lin Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," *Contemporary Asia Arbitration Journal* 1, no. 2 (2008): 261.
[44] cf. Emmanuel Gaillard, "International Arbitration as a Transnational System of Justice," in *Arbitration - The Next Fifty Years*, ICCA Congress Series 16 (Kluwer Law International, 2012), 67.
[45] Mann, "Lex Facit Arbitrum," 161.
[46] cf. Emmanuel Gaillard, "Transcending National Legal Orders for International Arbitration," in *International Arbitration: The Coming of a New Age?*, ICCA Congress Series (Wolters Kluwer Law and Business, 2013), 372.
[47] Mann, "Lex Facit Arbitrum," 10.

arbitration is considered to be judicially unjustified.[48] Thus, when considering about any legal question in international arbitration, the arbitrators have to consult with the legislation of a State, possibly the seat of arbitration.[49] Specifically, the arbitral tribunal has to determine the governing procedural and substantive laws of the case by referring solely to the laws of the seat of arbitration. The law of the seat of arbitration is also a reference to determine the validity of an arbitral award.[50] As a result, awards that are set aside by the court of the seat cannot be enforced elsewhere.[51]

The Jurisdictional Theory also claims that arbitration is considered as an organ of a State. The role of the arbitrators is similar to that of a judge because the Jurisdictional Theory contends that the power and authority of the arbitrators derive from the local law.[52] This contention leads to a view that the arbitral award should be treated and enforced the same way as the enforcement of a court judgment.[53]

One of the advantages of the Jurisdictional Theory is that it elevates predictability in international arbitration.[54] As arbitration is bound by the *lex arbitri*, the arbitrators can solve legal questions by referring to provisions in the law of the seat of arbitration, such as arbitration law to determine legal questions. However, predictability can also be preserved via the Contractual Theory based on which the parties have made a reference to a particular legal order in their agreement.[55] Therefore, the adoption of either the Jurisdictional Theory or the Contractual Theory could grant predictability to the parties.

2.3 Arbitration Being Independent from National Legal Order

Under the second group of theories, legal scholars argue that international arbitration is not related to any national legal order, but only the parties' agreement. There are two legal theories that

[48] cf. Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," 259.
[49] Mann, "Lex Facit Arbitrum," 167.
[50] cf. Adam Samuel and Marie-Françoise Currat, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S., and West German Law* (Schulthess, 1989), 55.
[51] cf. Gaillard, "International Arbitration as a Transnational System of Justice," 70.
[52] cf. Julian D. M. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications, 1978), 53.
[53] Ibid.
[54] Paulsson, "Arbitration in Three Dimensions," 6.
[55] Ibid.

support this argument, which are the Contractual Theory and the Autonomous Theory. Sections 2.3.1 and 2.3.2 will elaborate on each of these theories.

2.3.1 The Contractual Theory

The Contractual Theory views the nature of arbitration as being contractual on the ground that the entire arbitration process results from the agreement between the parties.[56] Without the parties' agreement, arbitration does not exist.[57] Therefore, the Contractual Theory rejects the claim that State has any influence or control over international arbitration.[58] The parties' agreement is the source of legitimacy of the arbitration, and the parties' agreement also delimits the scope of the arbitrators' authority.[59] Based on this viewpoint, the Contractual Theory perceives that international does not have a forum, and arbitrators do not owe any responsibility to any State, but the parties.[60]

The basis of the Contractual Theory is that arbitration and the entire arbitration process originates from the parties' private contract.[61] The parties voluntarily agree to submit to arbitration without being subject to any influence from the State.[62] Based on this standpoint, the arbitral power derives from the parties' agreement.[63] Arbitration is not territorially attached to any particular country.[64] Despite the unlimited autonomy, the contractualists acknowledge that national law can have influence or effect over the arbitration proceeding and award.[65] Such influence is identifiable when a party requests for an assistance from the State court to enforce the arbitration agreement or the arbitral award. In this situation, the court has the power to refuse enforcing the arbitration

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[56] cf. Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 209.
[57] Karl-Heinz Böckstiegel, "Major Criteria for International Arbitrators in Shaping an Efficient Procedure," *ICC Bulletin, Special Supplement: Arbitration in the Next Decade*, 1999, 49.
[58] cf. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 77.
[59] Alec Stone Sweet and Florian Grisel, "The Evolution of International Arbitration: Delegation, Judicialization, Governance," in *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), 29.
[60] Arthur Taylor von Mehren, "International Commercial Arbitration: The Contribution of the French Jurisprudence," *La. L. Rev.* 46 (1985–1986): 1057.
[61] cf. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 77–78.
[62] Ibid. at 78.
[63] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 55.
[64] cf. Samuel and Currat, *Jurisdictional Problems in International Commercial Arbitration*, 34.
[65] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 56.

agreement whose subject matter is not arbitrable under the *lex fori* or the arbitral award that violates international public policy of the forum.[66]

The classical Contractual Theory considers the arbitrators as the parties' agents and the parties as the principals.[67] The arbitrators are not judges and do not exercise State's authority when resolving the dispute.[68] The role of the arbitrators is to settle the parties' dispute and render an arbitral award, which is considered as a contractual document.[69] As the award is considered as a contract between the parties, the enforcement of the award at a court is not the same as the enforcement of a judgment, but rather as an unexecuted contract.[70]

This classical view receives a critique that the arbitrators cannot be considered as the parties' agent for two reasons. First, whereas the agent's duty is to act in conformity with the parties' wish, the arbitrators' duty to render an award have to be impartial and unbiased.[71] Second, the arbitrators perform the tasks that the parties are not able to do, which is to decide the merit of the dispute impartially.[72] As the agent cannot perform acts that the principals are incapable of doing, the arbitrators cannot be considered as the parties' agent.[73] The view that the award is a form of the parties' contract was also rebutted on the ground that the award, unlike a contract, could be set aside or reconsidered on the merit or amended.[74]

The modern view the Contractual Theory renounces the ideas that arbitration is an agent of the parties and the arbitral award is merely a contractual document. The development of the argument rather focuses more on the contractual nature of arbitration. The modern view emphasizes on the fact that arbitral process results from the parties' agreement, and therefore, the parties should

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[66] Ibid.
[67] cf. Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Westport, CT: Quorum Books, 1994), 10.
[68] cf. Samuel and Currat, *Jurisdictional Problems in International Commercial Arbitration*, 34.
[69] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 10; cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 55.
[70] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 56.
[71] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 10.
[72] cf. ibid.
[73] cf. ibid.
[74] cf. Samuel and Currat, *Jurisdictional Problems in International Commercial Arbitration*, 35.

have the freedom to regulate their own arbitration proceeding without receiving any interference from State courts.[75]

In summary, under the Contractual Theory, arbitration is an illustration of the parties' contract, and the unlimited party autonomy is the main source that regulates arbitration.[76] In addition, arbitration is not dependent on States, and State legal system play very limited role in the international arbitration aside from enforcing the parties' contract.[77] Therefore, when considering any legal question that arises in arbitration, the arbitrators have to make reference to the parties' agreement.

2.3.2 The Autonomous or Delocalized Theory

The Autonomous Theory defines the character of arbitration from the perspective of the use and purpose of arbitration as well as the way arbitration responds to the need of the business community.[78] According to this theory, international arbitration has been developed as a convenient and appropriate method for businessmen to resolve their dispute. The founder of the Autonomous Theory, Madame Rubellin-Devichi, further claims that the popularity of international arbitration does not derive from the enforceability of the arbitral award, but rather from the fast and flexible proceedings. [79]

Based on the Autonomous Theory, the development of international arbitration itself is attributable to the businessmen, and not any State.[80] The businessmen sought for arbitration outside and irrespective of the law, and party autonomy is not based on arbitration being contractual or jurisdictional, but rather on the "necessities of the institution".[81] Additionally, the arbitration

[75] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 11.
[76] cf. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 78.
[77] cf. Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 209.
[78] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 13.
[79] Jacqueline Rubellin-Devichi, *L'arbitrage ; Nature juridique ; Droit interne et droit international privé* (Paris: Librairie générale de droit et de jurisprudence, 1965), 59 as cited in Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards.
[80] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 60.
[81] Ibid.

agreement and the arbitral award are enforced for the purpose of a smooth functioning of the international commercial relations.[82]

Madame Rubellin-Devichi argues that international arbitration should be an original system that is free from both contractual and jurisdictional notions in order to provide the necessary speed and guarantees for the parties.[83] A further argument is that international arbitration can develop outside the controls of national legal system and the main contributors of the development of international arbitration are the businessmen themselves.[84] These businessmen develop international arbitration in a way that they consider appropriate and convenient for the resolution of their disputes.[85]

In order to allow international arbitration to expand and develop efficiently, the Autonomous Theory demands a complete party autonomy.[86] Based on this advocacy, this legal theory is arguing for a delocalization of international arbitration, which refers to a detachment of international arbitration from all national legal orders, including its seat.[87] The Autonomous Theory claims that national law is of a minor significance for international arbitration. Only transnational rules or international rules that are widely accepted are relevant to regulate international arbitration.[88] As defined by Olakunle Olatawura, a delocalized arbitration is a type of arbitration that is not based on a municipal legal order.[89] Party autonomy is unlimited and is the only controlling force of arbitration. In determining the procedural and substantive law applicable to the dispute, the

[82] Ibid.
[83] Rubellin-Devichi, *L'arbitrage ; Nature juridique ; Droit interne et droit international privé* as cited in Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards.
[84] cf. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 81.
[85] Ibid.
[86] cf. Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," 279.
[87] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 14; cf. Loukas A. Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," in *The UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration*, Queen Mary School of Law Legal Studies Research Paper 144, 2013, 169.
[88] Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," 166.
[89] Olakunle O. Olatawura, "Delocalized Arbitration under the English Arbitration Act 1996: An Evolution or a Revolution," *Syracuse Journal of International Law and Commerce* 30 (2003): 51.

arbitrators should look at the parties' intention instead of the stipulation under the law of the seat of arbitration.[90]

Aside from national law, the Autonomous Theory suggests that the parties can elect for the law of international commerce, the *lex mercatoria* or the general law of equity as the applicable law.[91] In case where the parties failed to express their intention, the arbitrators may either apply the choice of law rule the arbitrators consider appropriate or resort to international law or standard that is relevant for the dispute.[92]

Legal scholars who support the Delocalized Theory argue that international arbitration has its own legal order.[93] The community of merchants is capable of developing their own law, and the international arbitration institution has a role to further develop the law and framework of international arbitration.[94] Specifically, the Autonomous Theory claims that the so-called "truly international instruments" such as the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention")[95] and the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration* (the "UNCITRAL Model Law")[96] regulate the arbitration practice.[97]

Two legal scholars try to develop arguments in support the emergence of arbitral legal order. Even though their focuses are different from this thesis, and may deviate from the Autonomous Theory, as described above, it may be useful to briefly explain their theories.

The first scholar is Professor Alec Stone Sweet. This scholar can be considered as one of the advocates arguing for arbitral legal order under the Autonomous Theory.[98] In his works, Professor

[90] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 14.
[91] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 61.
[92] Ibid.
[93] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010), 35.
[94] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 61.
[95] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (the "New York Convention"), 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
[96] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"), 24 ILM 1302 (1985).
[97] cf. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 82.
[98] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017).

Sweet adopts a Judicialization Theory in order to prove that international arbitration is developing its own legal order.[99] However, the focus of Professor Sweet is not to clarify the relationship between international arbitration and State. Rather, Professor Sweet's argument surrounding the emergence of arbitral legal order is to prove that international arbitration is exercising its own governance. As the main focus of this thesis is not about arbitral governance, the argument developed by Professor Sweet will not be further discussed.

Professor Gaillard is another author who discusses about the emergence of arbitral legal order by using the 'Transnational Theory'.[100] However, this legal order is not independent from States. Under the Transnational Theory, arbitration roots from a community of States collectively, rather than individually, through various international instruments such as the *UNCITRAL Model Law* or the *New York Convention*. This representation is sometimes labeled as the 'arbitral legal order'.[101] Contrasting to the Autonomous Theory, the Transnational Theory claims that arbitration process is not regulated by the State of the seat or any particular State, but rather by the international community as a whole.[102] As a result, the role of international arbitration is not to find justice for any particular State, but to administer justice for the international community.[103] The uniqueness about this theory is that international arbitration is not perceived to be detached from national legal orders, but rather attached to a plurality of national legal orders.[104] The discussion related to the autonomous theory will not include the theory from Professor Gaillard because of the uniqueness of this theory.

From the viewpoint of the relationship between ICA and State, the Contractual Theory and the Autonomous Theory lead to the same result, which is unlimited party autonomy. Moreover, the two legal theories imply a detachment of international arbitration from national law. The Contractual

[99] Sweet and Grisel, "The Evolution of International Arbitration: Delegation, Judicialization, Governance"; Sweet and Grisel, *The Evolution of International Arbitration*.
[100] Gaillard, "International Arbitration as a Transnational System of Justice."
[101] Gaillard, "Transcending National Legal Orders for International Arbitration," 373; Paulsson, "Arbitration in Three Dimensions," 11.
[102] Emmanuel Gaillard, "Three Philosophies of International Arbitration," in *Contemporary Issues in International Arbitration and Mediation* (Martinus Nijhoff Publishers, 2010), 307.
[103] Gaillard, "International Arbitration as a Transnational System of Justice," 68.
[104] Gaillard, *Legal Theory of International Arbitration*, 37.

Theory rejects a strong connection between arbitration and the seat of arbitration.[105] In addition, an implication of the Contractual Theory is that international arbitration does not need to rely on a State in order to exercise its role to settle the parties' dispute. This theory advocates that the source of power and legitimacy of international arbitration derive only from the parties' agreement. Similarly, the Delocalized Theory also advocates that the parties' agreement is the source of arbitrators' power and legitimacy.[106]

The difference between the Autonomous Theory and the Contractual Theory is that the Contractual Theory acknowledges that the State can have some influence over arbitration in certain instances such as the enforcement of the arbitration agreement or arbitral award. However, the Autonomous Theory considers that the arbitration can function on its own without relying on any State's authority and the development of law, in fact, follows the practice that was already in existence.[107]

2.4 Arbitration Being Bound By a National Legal Order and Party Autonomy

After an on-going debate regarding the nature of arbitration, some legal scholars reached a conclusion that arbitration is neither only contractual nor only jurisdictional, but is a mixture of both.[108] This conclusion leads to another legal theory, which is the Mixed or Hybrid Theory.[109] Professor G. Sauser-Hall developed this theory in 1952, and defined arbitration as: "… a mixed juridicial institution, *sui generis*, which has its own origin in the [parties'] agreement and draws its jurisdictional effects from the civil law."[110] Under this theory, arbitration a special institution that is

[105] cf. Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," 265.
[106] Dejan Janićijević, "Delocalization in International Commercial Arbitration," *Facta Universitatis: Law and Politics* 3, no. 1 (2005): 64.
[107] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 60.
[108] cf. Gaillard, *Legal Theory of International Arbitration*, 13.
[109] cf. ibid.
[110] G. Sauser-Hall, "L'Arbitrage en Droit International Privé", 44-I, Ann. Inst. Dr. Int'l 469 (1952), as cited in Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 57.

not complete if described as either contractual or judicial; indeed, arbitration is a mixture of both theories.[111]

On the one hand, arbitration is judicial in the sense that States take control of the existence of arbitration and regulates its procedure.[112] Whether or not a subject matter is arbitrable, for instance, depends on the policy of a State. In addition, arbitration also has to apply the law of the seat of arbitration and sometimes need to request for an assistance from the court of the seat of arbitration.[113] The enforceability of an arbitral award is also dependent on a national law.[114]

On the other hand, arbitration is contractual because it is the parties who construct the entire process of arbitration, including the choice of arbitrators and applicable law.[115] Supporters of the Hybrid Theory recognize that arbitration also needs to respect rather than frustrate the wishes of the parties.[116] As pointed out by Okezie Chukwumerije, "whereas arbitration is a product of the consent of the parties and the parties decide on the manner in which to conduct the proceedings, the legality and efficacy of that choice is guaranteed by national laws."[117] An implication from this statement is that the wishes of the parties, including the choice of governing law, have to be in compliance with the stipulation under the law of the seat of arbitration.[118]

In brief, the Hybrid Theory considers that arbitration is created by the parties' agreement, but has a judicial function.[119] Furthermore, arbitration has a strong connection with the place where it is seated.[120] By subjecting international arbitration to the parties' agreement and the law of the seat of arbitration, this theory seeks to find a harmonization of the two conflicting theories. However, it does not provide an answer on how much weight should be given to the parties' agreement or the

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[111] cf. Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 210.
[112] cf. Gary B. Born, *International Commercial Arbitration: International Arbitration Agreements*, 2nd ed., vol. I (Wolters Kluwer Law and Business, 2014), 215.
[113] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 13.
[114] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 57.
[115] Ibid.
[116] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 13.
[117] Ibid.
[118] G. Sauser-Hall, "L'Arbitrage en Droit International Privé", 44-I, Ann. Inst. Dr. Int'l 469 (1952), as cited in ibid.
[119] cf. Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 80.
[120] Ibid.

seat of arbitration. The space between two extreme views, namely the contractual and jurisdictional, is wide, and by putting international arbitration in between, this theory does not suggest any method to weigh the interests involved.[121]

This section has elaborated on the four main legal theories that define the nature of international arbitration, which also implies the relationship between international arbitration and State. The next section will analyze the advantages and disadvantages of adopting each of the theories explained above.

2.5 Analysis of the Legal Theories

The legal theories described above expressly or implicitly define the relationship between international arbitration and State. Each legal theory stresses on one extreme and almost disregards the relevance of the other considerations. This section will analyze the pros and cons of each theory in order to provide a recommendation on how to perceive the relationship between international arbitration and State. Specifically, this part will analyze a theory, which claim that arbitration is bound by a national legal order (2.5.1), and proceed to evaluate the theory that argues for a detachment of arbitration from State (2.5.2). Finally, the thesis will examine the theory that considers arbitration to be in between State and the parties, which is the Hybrid Theory (2.5.3).

2.5.1 Arbitration Being Bound by a National Legal Order

The Jurisdictional Theory provides much importance to the law of the seat of arbitration. The advantage about this legal theory is that it grants much clarity on issues in international arbitration. A practical implication of the application of the Jurisdictional Theory is that the arbitrators can refer the law of the seat of arbitration when the arbitrators have to address any legal question that concerns the procedure of arbitration or choice of law applicable in international arbitration.[122] The law of the seat of arbitration also serves as a standard to measure the legitimacy of the arbitration

[121] Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 211.
[122] Mann, "State Contracts and International Arbitration," 4.

and arbitral award. If the law of the seat of arbitration recognizes the parties' freedom to regulate the procedure, the arbitrators are bound to respect the parties' agreement.[123]

Despite these advantages, the Jurisdictional Theory has three main drawbacks. First, in requiring international arbitration to strictly refer to the law of the seat of arbitration to address legal issues concerning arbitration procedure and choice-of-law rules,[124] the Jurisdictional Theory tends to assume that the law of the seat of arbitration is complete and can address all legal issues in international arbitration. In fact, not all arbitration law is complete. National arbitration laws, such as the *UNCITRAL Model Law*, addresses general provisions concerning international arbitration, such as the arbitration agreement, powers and duties of arbitrators, the conduct of arbitral proceeding, and the awards.[125] Loopholes on specific legal questions in relation to international arbitration, such as how the arbitrators should determine applicability of internationally mandatory rules, still exist.[126] Concerning the issue of applicable law, if one was to assume that the arbitrators should refer to the conflict of laws rules of the seat of arbitration, it is necessary to note that not all countries' private international law rules are developed. Some countries, such as Cambodia, do not have a complete codification of private international law rules. As a consequence, reference to the law of the seat of arbitration does not always help solving a legal problem.

Second, this theory does not reflect the present status of international arbitration.[127] In arguing against the jurisdictional theory, Professor Jan Paulsson asserts that this theory is outdated, as it no longer reflects the contemporary society of international arbitration.[128] A foreign court may, for example, refuse to enforce an award even though the award is in compliance with the law of the seat of arbitration. Therefore, Professor Paulsson argues that arbitration is not bound by only one national

[123] Mann, "Lex Facit Arbitrum," 165.
[124] Mann, "State Contracts and International Arbitration," 4.
[125] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"), 24 ILM 1302 (1985).
[126] Moritz Renner, "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration," in *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), 122–23.
[127] Paulsson, "Arbitration in Three Dimensions," 7.
[128] Ibid.

legal system, which is the law of the seat; rather, arbitration is subject to more than a single legal order.[129]

The third drawback is that a complete reference to the law of the seat of arbitration causes inflexibility in the development of international arbitration. Professor Arthur Taylor von Mehren considered that a complete linking of international arbitration to a national legal system could seriously weaken or even demolish arbitration's efficacy as a mechanism for dispute resolution.[130] It can also lead to a disregard of the application of the otherwise more appropriate applicable law to determine a legal issue.

The Jurisdictional Theory, for instance, only requires the arbitrators to protect rules of public interests of the seat of arbitration.[131] In case where the parties violate rules protecting public interests of another country, the arbitrators have to consult with private international law of the seat of arbitration to determine the possibility for the arbitrators to consider those rules.[132] However, not all national legislations on private international law have clear stipulations on the consideration of internationally mandatory rules of a third country. To illustrate, private international law rules of China, Japan, Macau, Republic of Korea, Taiwan, and Vietnam do not have a clear provision under their private international law rule that addresses the applicability of mandatory rules of a third country.[133]

Therefore, although it is undeniable that the law of the seat of arbitration serves as a foundation for the development of international arbitration, a complete reliance on the law of the seat of arbitration can cause drawbacks on the development of arbitration as a dispute resolution mechanism. The arbitrators should be granted some room for flexibility.

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[129] Ibid.
[130] Arthur Taylor von Mehren, "To What Extent Is International Commercial Arbitration Autonomous?," in *Le Droit Des Relations Économiques Internationales : Études Offertes à Berthold Goldman*, vol. 80 (Paris: Litec, 1982), 224–25.
[131] Mann, "Lex Facit Arbitrum," 168.
[132] Ibid.
[133] See, Alejandro Carballo Leyda, ed., *Asian Conflict of Laws: East and South East Asia* (The Netherlands: Kluwer Law International, 2015).

2.5.2 Arbitration Being Independent from National Legal Order

As described above, two legal theories claim that arbitration is independent from a national legal order. To ease the analysis of each theory, this section will be divided into two subsections addressing the Contractual Theory and the Autonomous Theory.

2.5.2.1 The Contractual Theory

The Contractual Theory advocates for the independence of arbitration from a country's law on the basis that arbitration is created by the parties' agreement.[134] The parties' agreement determines the legitimacy of arbitration and the arbitral award. Despite a provision for unlimited party autonomy, this theory acknowledges the influence of a State on arbitration when the court is requested to enforce the arbitration agreement or the arbitral award. The obstacle in adopting the Contractual Theory is the general difficulty in interpreting the parties' subjective intent.[135] In solving any legal issue, the arbitrators have to refer to the parties' agreement. The interpretation of the terms in the contract is already a difficult task.[136] What is more problematic is when the parties are silent about a certain legal issue, and the arbitrators have to interpret the parties' subjective intent or expectation. The interpretation of the parties' intention is a delicate task that the arbitrators cannot easily perform, especially when the parties are disputing about the legal issue.

Another weakness of the Contractual Theory is that it aims to disregard the influence of a country's law on international arbitration. This argument is somehow impractical. In focusing on the fact that the parties' agreement determines the legitimacy of arbitration, the Contractual Theory excludes the fact that the legitimacy of the parties' agreement is based on a State's law.[137] In addition, the conduct of the arbitration cannot be fully independent from a State court because

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[134] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 55.
[135] Aaron D. Goldstein, "The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation," *Santa Clara Law Review* 53, no. 1 (2013): 76.
[136] Giuditta Cordero-Moss, "Limits on Party Autonomy in International Commercial Arbitration," *Penn. St. J. L. & Int'l Aff.* 4, no. 1 (2015): 187.
[137] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 11; Mann, "Lex Facit Arbitrum," 160.

arbitration can take place in a territory only because the law of the country permits the arbitration.[138] Furthermore, the arbitral tribunal does not have the power to enforce its order. The enforcement of any preliminary order or the arbitration agreement still relies on the power of a State court.[139] Therefore, the adoption of the Contractual Theory leads to providing much burden on the arbitrators to interpret the parties' intention while disregarding the law of any country except when the issue concerns enforceability of an arbitration agreement or an arbitral award.

2.5.2.2 The Autonomous Theory

Quite differently from the Contractual Theory, the Autonomous Theory completely refuses the influence of a State in international arbitration. Legal scholars who advocate for this theory claim that international arbitration can development on its own without the need of a State.[140] Such claim has two weaknesses. First, as elaborated above, arbitration still needs assistance from the State. The enforcement of any preliminary orders or interim measures requires assistance from State courts in case where the party in the proceeding does refuses to follow the order.[141] This is because international arbitration does not have any power to execute the orders.[142] Second, the recommendation for a development of international arbitration outside the auspices of any State authority seems impractical because international arbitration cannot act in a legal vacuum.[143] The conduct of international arbitration needs the assistance from State courts.[144] Moreover, international

[138] cf. Julian D. M. Lew, "Chapter 20: Achieving the Dream: Autonomous Arbitration?," in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (The Netherlands: Kluwer Law International, 2007), 464.
[139] Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," 172.
[140] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 60–61.
[141] American Arbitration Association, *AAA Handbook on International Arbitration and ADR*, 2nd ed. (Juris Publishing, Inc., 2010), 93.
[142] David Brynmor Thomas, "Interim Relief Pursuant to Institutional Rules Under the English Arbitration Act 1996," *Arbitration International* 13, no. 4 (1997): 405–10.
[143] J. Ole Jensen, "Setting Aside Arbitral Awards in Model Law Jurisdictions: The Singapore Approach from a German Perspective," *European International Arbitration Review* 4, no. 1 (2015): 55–56; Loukas A. Mistelis, "Chapter 19: Arbitral Seats - Choices and Competition," in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (The Netherlands: Kluwer Law International, 2011), 370.
[144] See, Section 2.6.1 below.

arbitration cannot be efficient as it intends to be if its conduct does not respect any country's law, especially the law that the parties generally cannot derogate from.[145]

The ultimate goal of arbitration is an enforceable award.[146] If arbitration is conducted in a way that does not respect public interests of States, such as the place of arbitration or the place of award enforcement, the award may be set aside or refuse enforcement by those States on the ground that the arbitral award violates public policy of the forum.[147] In addition, if arbitration conducts in a way that fully ignores even the public interests of the country that has a connection to the case, States would lose its trust in derogating the authority to solve commercial disputes to arbitration.[148] Although this argument tends to be a moral argument, this argument is essential for a future development of arbitration, which is the core intent of the Autonomous Theory.

The advantages of the Autonomous Theory are the flexibility that it provides to international arbitration to evolve based on the need of the arbitration community as well as the freedom it provides to the arbitrators to organize the arbitration procedure.[149] Although this research does not support a complete delocalization of arbitration from the State, the thesis supports the view of the Autonomous Theory, which advocates for the focus on the objective and function of arbitration in order to allow arbitration to grow in a way that is efficient for its role to settle the parties' dispute.

2.5.3 The Hybrid Theory

The Hybrid Theory considers that the conduct of the arbitration has to be in compliance with party autonomy and the law of the seat of arbitration. The main intention about this theory is that it reconciles the conflict between the Contractual Theory and the Jurisdictional Theory. This theory also correctly describes arbitration nature to possess both contractual and jurisdictional nature.

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[145] Mayer, "Mandatory Rules of Law in International Arbitration," 285.
[146] Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," 172.
[147] *UNCITRAL Model Law,* Article. 34(2)(b)(ii); *New York Convention*, Article V(2)(b).
[148] Nathalie Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," *The American Review of International Arbitration*, 1996, 356.
[149] cf. Lew, "Chapter 20: Achieving the Dream: Autonomous Arbitration?," 465.

The problem about the Hybrid Theory is that it merely states the fact, but does not clearly solve a legal problem.[150] Whereas the conduct of arbitration has to be in compliance with the parties' consent and the law of the arbitration, this theory is vague and does not specify how much weight should be given to either the parties' consent or the seat of arbitration.[151] In addition, the Hybrid Theory does not clearly specify whether the parties' consent is considered legitimate as long as it does not violate the law of the seat of arbitration. Neither does this theory delimit the scope of the parties' freedom to agree on their arbitration proceeding only to the extent that the law of the seat of arbitration allows. In conclusion, if one was to adopt the Hybrid Theory in order to solve a legal problem, further work needs to be done in order to delineate the weight granted to the parties' agreement and the law of the seat of arbitration.

2.6 Recommendation on the Relationship between International Arbitration and State

In considering that each of the above-presented theories are incomplete and bring some drawbacks to international arbitration, this thesis proposes its viewpoint on the relationship between international commercial arbitration and State. The first part of this section will elaborate on the nature of arbitration (2.6.1), and followed by the second part describing the relevance of international arbitration and the law of the seat of arbitration (2.6.2). Lastly, the third part discusses on the relevance of international public policy of the seat of arbitration on the international arbitration (2.6.3).

2.6.1 The Juridical Nature of International Commercial Arbitration

To begin with, this thesis does not support the Jurisdictional and Contractual Theory based on the same ground as the scholars who support the Hybrid Theory, which is that arbitration is not

[150] Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 211.
[151] cf. Samuel and Currat, *Jurisdictional Problems in International Commercial Arbitration*, 63.

complete if merely perceived as either jurisdictional or contractual.[152] The elements of jurisdictional and contractual both exist in the nature of arbitration.

International arbitration cannot exist without the parties' agreement to arbitrate. The parties' agreement is the source of the arbitrators' authority to arbitrate the case.[153] In addition, most arbitration laws have acknowledged and stipulated the principle of party autonomy in their legislation.[154] This is evidenced by the increase adoption of the *UNCITRAL Model Law* as a national legislation regulating arbitration.[155] A consideration of the parties' expectation, such as to determine the applicable law, is also essential in international arbitration.[156] Consequently, the arbitrators have to respect the parties' agreement when organizing the arbitration procedure or determining the applicable law.

Although parties' agreement is essential for the organization of the arbitration, the claim for unlimited party autonomy may be unrealistic.[157] The parties are bound to respect a certain country's law, especially its mandatory law.[158] It is also undeniable that international arbitration needs the support from States. As stated above, arbitration laws play a crucial role in supporting the principle of party autonomy.[159] Additionally, the conduct of international arbitration cannot be totally independent of a State organ. For instance, the arbitral tribunal has no power to enforce a provisional or conservatory measures, but requires assistance from State courts for compel a party to comply with the measures.[160] Similarly, the arbitral tribunal also needs to rely on the power of a State court

[152] cf. Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," 274; cf. Lew, "Chapter 20: Achieving the Dream: Autonomous Arbitration?," 464.
[153] von Mehren, "To What Extent Is International Commercial Arbitration Autonomous?," 222.
[154] Sunday A. Fagbemi, "The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?," *Journal of Sustainable Development Law and Policy* 6, no. 1 (2015): 228, https://www.ajol.info/index.php/jsdlp/article/view/128033.
[155] Lew, "Chapter 20: Achieving the Dream: Autonomous Arbitration?," 470–71.
[156] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 415.
[157] Marc Blessing, "Regulations in Arbitration Rules on Choice of Law," in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, International Council for Commercial Arbitration Congress 7 (Kluwer Law International, 1996), 395.
[158] Matthias Weller, "Mandatory Elements of the Choice-of-Law Process in International Arbitration: Some Reflections on Teubnerian and Kelsenian Legal Theory," in *Conflict of Laws in a Globalized World* (Cambridge University Press, 2011), 258.
[159] Roy Goode, "The Role of the Lex Loci Arbitri in International Commercial Arbitration," *Arbitration International* 17, no. 1 (2001): 29.
[160] Mauro Rubino-Sammartano, *International Arbitration Law* (Kluwer Law and Taxation Publishers, 1990), 596.

when a party refuses to abide by order of the arbitrators, for instance to produce documents, or when the witness refuses to appear in the arbitration proceeding.[161] Thus, from this perspective, international arbitration is linked to a national legal system in the situations where a party or arbitrator seeks for assistance from a court.[162]

Concerning the attachment between international arbitration and a State, it is difficult to state that arbitration is independent from a State. Without arbitration law, it is hard to imagine how international arbitration can legally be seated in a particular country. The role of the seat of arbitration is also important during the post-award stage. For instance, under the *UNCITRAL Model Law*, only the court of the place where the award is made, which is the seat of arbitration, has the jurisdiction to accept a party's request to review and set aside an arbitral award.[163] On this point, professor Albert Jan van den Berg has conduct an analysis on the question of the necessity of the procedure for setting aside the award, and reached a conclusion that this procedure should not be abolished.[164] Professor van den Berg relied mainly on the interpretation of the *New York Convention* when evaluating the issue concerning the enforcement procedure.

In order to reach the above conclusion, Professor van den Berg addressed the four reasons behind the attempt to abolish the setting aside procedure, which are: "1) the potential of double control; 2) the potential of conflicting decisions; 3) the international effect of setting aside on perceived parochial grounds; and 4) the question whether the court in the country of origin should have the last say with the universal effect on the validity of an international arbitral award."[165] With regards to the first question, Professor van den Berg considered that the double control issue cannot arise if: first, the award has been set aside by the country of origin; second the setting aside procedure occurred before the enforcement procedure; and last, the country of enforcement refuse enforcement based on Article V(1)(e) of the *New York Convention* without any exception.[166]

[161] Ibid. at 584.
[162] von Mehren, "To What Extent Is International Commercial Arbitration Autonomous?," 223.
[163] Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," 177.
[164] Albert Jan van den Berg, "Should the Setting Aside of Arbitral Awards Be Abolished?," *ICSID Review: Foreign Investment Law Journal* 29, no. 2 (2014): 1–26.
[165] Ibid. at 10.
[166] Ibid. at 23.

Concerning the issue of possible conflicting decisions, it could only arise if the enforcement procedure took place before the setting aside procedure; to solve this problem, the enforcement court could adjourn the enforcement decision while waiting for the pending setting aside proceeding.[167] The third issue concerns the universal effect of the annulled award. In reviewing various reasons such as States have valid reasons to set aside an award and the text and legislative history of the *New York Convention* does not permit the enforcement of award that has been set aside by the country of origin, Professor van den Berg concluded that the annulled award has a universal effect.[168] Finally, concerning the fourth question, professor van den Berg claims that the court of the country of origin should have the last say about the validity of an arbitral award because this standpoint is a prevailing view in practice.[169] Bases on these reasons, professor van den Berg advocates that the setting aside procedure should not be abolished.[170]

In addition to the importance of the seat of arbitration, without any legal regulation stating clearly the possibility of enforcing a foreign award, a judge may have the reluctance to enforce the foreign award. In reviewing the finding in the survey conducted by the School of International Arbitration in 2010,[171] Professor Loukas A. Mistelis found that one of the main reasons the respondents elected a country to be their seat of arbitration is the fact that the country is a signatory to the *New York Convention*.[172] Another survey, which focuses on the post-award experience, also shows that there are still parties who do not comply with the arbitral award, and parties who only partially comply with the result of the award.[173] The survey also revealed that in some cases, the winning party had to request the court to order enforcement of the award in order to make the losing party comply with the award.[174] Hence, States, including the seat of arbitration, play an important

[167] Ibid.
[168] Ibid. at 23–24.
[169] Ibid. at 24.
[170] Ibid. at 25.
[171] School of International Arbitration, "2010 International Arbitration Survey: Choices in International Arbitration," *Queen Mary University of London*.
[172] Mistelis, "Chapter 19: Arbitral Seats - Choices and Competition," 368.
[173] Richard W. Naimark and Stephaine E. Keer, "Post-Award Experience in International Commercial Arbitration," in *Towards a Science of International Arbitration: Collected Empirical Research* (The Netherlands: Kluwer Law International, 2005), 270, 272.
[174] Ibid. at 271.

role in assisting the efficiency of international arbitration. This leads to a conclusion that international arbitration cannot be considered as an autonomous legal system that operates outside the realm of national legal orders.

Despite the attachment of international arbitration to the national legal order, having noticed that the law of the seat of arbitration may not be sufficient for a resolution of international commercial disputes, as described in Section 2.5.1, the research recommends that Madame Rubellin-Devichi's proposal on the development of arbitration should be considered.[175] To be specific, the thesis proposes that international arbitration should be allowed to develop based on the purpose and objectives that it serves, which is mainly to settle the parties' disputes effectively and efficiently. This research supports the claim of the Autonomous Theory that international arbitration should be able to evolve and develop in accordance with the need of the arbitration community. In stating about the autonomous character of arbitration, this thesis does not imply that it agrees with the Autonomous Theory, which claims that international arbitration can conduct outside the guard of national legal orders. Rather, in the event that national laws are insufficient for a resolution of the parties' dispute, the arbitrators should have the liberty to develop further mechanisms that is necessary to settle the dispute.

In summary, it is appropriate to conclude that international arbitration has to respect both the relevant national law and the parties' agreement. Even though arbitration was founded by the parties' agreement and supported by the arbitration law of the seat as well as of the place of award enforcement, the arbitrators are not agent of any State or the parties. As the thesis considers that both the relevant national law, mainly the law of the seat of arbitration, and the parties' agreement binds the arbitration, it is necessary to consider the extent to which the law of the seat of arbitration binds the international arbitration. The next section will address this question.

[175] Rubellin-Devichi, *L'arbitrage ; Nature juridique ; Droit interne et droit international privé* as cited in Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards.

2.6.2 Relevance of the Law of the Seat of Arbitration

This research argues that the arbitration law of the seat of arbitration (*lex arbitri*) binds international arbitration. The conduct of international arbitration has to be in compliance with the law on international commercial arbitration of the seat of arbitration. The seat of arbitration is important for providing support from local court during the arbitration proceeding, for challenging the arbitral award, and for gap-filling on procedural rules.[176] Thus, the seat of arbitration plays an important role in aiding the efficiency of the conduct of arbitration that takes place in its territory. Based on this viewpoint, it is appropriate that the law of the seat of arbitration binds the conduct of the arbitration proceeding.

As for substantive matter, the principle of party autonomy applies to grant the parties the freedom to designate the governing law.[177] Arbitration law in most jurisdictions grants the autonomy to the parties to choose the law governing the disputes.[178] International instruments such as the *UNCITRAL Model Law* also recognize this autonomy. Therefore, the substantive law of the seat of arbitration generally does not bind international arbitration.

2.6.3 Relevance of International Public Policy of the Seat of Arbitration

Despite the parties' freedom to regulate their arbitration procedure and elect the law governing their contract, party autonomy comes with a limit.[179] Public policy serves as a safety valve to protect a State from enforcing a foreign law, judgment or award that may destruct public order of the country.[180] In international private adjudication, the court invokes public policy to reject the application of a foreign law that is in contrary to the forum's public policy.[181] Thus, if the

[176] Mistelis, "Chapter 19: Arbitral Seats - Choices and Competition," 371.
[177] Yu, "Choice of the Proper Law vs. Public Policy," 110.
[178] Ibid. at 112.
[179] Dean Symeon C. Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford, New York: Oxford University Press, 2014), 155–56; Yu, "Choice of the Proper Law vs. Public Policy," 113.
[180] Wurmnest, "Chapter 14: Ordre Public (Public Policy)," 305–6.
[181] Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 263; Wurmnest, "Chapter 14: Ordre Public (Public Policy)," 316.

application of a foreign law is manifestly incompatible with the public policy of the forum, the court may decide not to apply that foreign law.[182]

The notion of public policy should be differentiated from the notion of mandatory rules. According to Professor Catherine Kessedjian, mandatory rules work as a positive obligation, which imposes on the arbitrators a task to apply the mandatory rules due to the goals and objectives the mandatory rules pursue.[183] On the other hand, public policy has a negative imposition, which demands the arbitrators to refuse the application of the proper law on the ground that the content of the proper law is objectionable in the particular case.[184] In addition, mandatory rules have a broad content, which include issues that are classified as public policy and issues that are not classified as public policy.[185]

In international arbitration, international public policy of the seat of arbitration aims to prohibit the conduct and application of foreign values that are incompatible with the fundamental values of the seat of arbitration.[186] Although States allow the conduct of international arbitration in its territory, the permission would not extend to the conduct that insults its fundamental value. A certain mandatory law and public policy are designed as a protection against the conduct of any fundamentally unfair procedure.[187]

International public policy is divided into procedural public policy and substantive public policy. As stated above, the law of the seat of arbitration is the basis for the conduct of international arbitration. Thus, the arbitration is bound to respect procedural international public policy rules of

[182] Bogdan, *Private International Law as Component of the Law of the Forum*, 215; Lalive, "Transnational (or Truly International) Public Policy and International Arbitration," 261.
[183] Kessedjian, "Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?," 152.
[184] Ibid. at 153.
[185] Luke Villiers, "Breaking in the Unruly Horse: The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards," *Australian International Law Journal* 18 (2011): 164–65; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 322.
[186] Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007), 115; Monika Pauknerová, "Mandatory Rules and Public Policy in International Contract Law," *ERA Forum* 11, no. 1 (March 1, 2010): 31.
[187] Philipp Habegger, "Chapter 13: The Arbitrator's Duty of Efficiency: A Call for Increased Utilization of Arbitral Powers," in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (The Netherlands: Kluwer Law International BV, 2017), 129.

the seat of arbitration.[188] The procedural public policy of the seat of arbitration also functions as a standard for the arbitrators to refer to in considering any legal issues in the arbitration proceeding.

Regarding substantive matter, a general limitation to the party autonomy is when the choice of law made by the parties contradicts relevant mandatory law and public policy.[189] When this situation arises, the choice of governing law would be inapplicable.[190] The relevance of the law of the seat of arbitration derives from the fact that the international arbitration takes place in the territory of the country. International public policy of the seat of arbitration binds the international arbitration from the viewpoint of validity of the award.

The court of the seat of arbitration can annul an arbitral award on public policy ground. Article 34(2)(b)(ii) of the *UNCITRAL Model Law* provides that the court may set aside an arbitral award on the ground that the award is in conflict with public policy of the forum. In relation to this provision, Article V(1)(e) of the *New York Convention* stipulates that a court may refuse recognition and enforcement of a foreign award on the ground the award has been set aside by the court of the seat of arbitration. Concerning the interpretation of this article, Professor Pieter Sanders, a founding father of the *New York Convention*, claimed that an award that has been set aside by a competent court under the applicable arbitration law is perceived to no longer exist; thus, it is impossible for a foreign court to enforce a non-existing award.[191] In addition, Professor Albert Jan van den Berg points out that the enforcement court is not permitted to review the grounds based on which the court of the country of origin set aside the award.[192] Consequently, except for a few exceptions, an award that has been set aside by the court of the seat of arbitration is not enforceable in the court of other countries under the *New York Convention*.[193]

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[188] Ibid.; Laurence Shore, "Applying Mandatory Rules of Law in International Commercial Arbitration," *American Review of International Arbitration*, 2007, 91.
[189] Yu, "Choice of the Proper Law vs. Public Policy," 113.
[190] Symeonides, "Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple," 1130.
[191] Pieter Sanders, "New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *Netherlands International Law Review* 6, no. 1 (1959): 55; Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford: Oxford University Press, 2014), 91.
[192] Berg, "Should the Setting Aside of Arbitral Awards Be Abolished?," 5.
[193] Alan Scott Rau, "The Arbitrator and 'Mandatory Rules of Law,'" *American Review of International Arbitration* 18 (2007): 74–75; Schultz, *Transnational Legality*, 91.

Despite the fact that some countries adopt the delocalized view, and accept that an award annulled in the country of origin is still enforceable in other countries, only few courts have implemented this view.[194] Moreover, France is a special case in considering that an award being set aside by the country of origin is not a sufficient ground for refusal of enforcement.[195] The French court justifies its position on the enforceability of an annulled award by virtue of the application of Article VII(1) of the *New York Convention*, which provides the possibility of application of more favorable rules on award enforcement.[196] As this is not a common practice under the *New York Convention*, the thesis recommends that the arbitrators should still consider international public policy of the seat of arbitration.

Based on this viewpoint, the arbitrators have to take into account international public policy of the seat of arbitration when international public policy of the seat of arbitration functions to limit party autonomy. The arbitrators should determine whether the international public policy of the seat of arbitration truly aims to limit party autonomy in the particular dispute.

As this section has elaborated on the position of the thesis, the next part will further discuss implications of the recommendation of the thesis.

2.7 The Role of International Arbitration in Relation to the Question of Public Interests

The section above has identified the relationship between international arbitration and the seat of arbitration. What remains unanswered is the relationship between international arbitration and public interests. As the purpose of this research is to resolve the conflict between public and private interests, it is necessary to further discuss the role and authority of the arbitrators to consider public interests.

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[194] Berg, "Should the Setting Aside of Arbitral Awards Be Abolished?," 17.

[195] George A. Bermann, "Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts," in *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer, 2017), 53.

[196] Article VII(1) of the *New York Convention* stipulates that: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

Section 2.7.1 and 2.7.2 will address this question in arguing that the arbitrators also have the role and authority to consider State's public interests. Section 2.7.3 will further elaborate on the argument that the arbitrators should adopt an autonomous conflict-of-laws rules to determine which public interests the arbitrators should protect. Finally, the thesis will discuss whether the adoption of the recommendation of the thesis would lead to a possibility of award enforcement (2.7.4).

2.7.1 The Role of Arbitrators to Address Public Interests

In addition to considering international public policy of the seat of arbitration, this chapter argues that international arbitration also has a role to address public interests of other relevant States. Because of the increase of international commerce, international commercial disputes submitted to international arbitration have also been increasing.[197] Disputes that affect public interests are also submitted to international arbitration for settlement, and some countries have already granted arbitrability of subject matters that involves public interests.[198] Accordingly, the arbitrators have a 'special responsibility towards international commerce'.[199] In particular, international arbitration is perceived as the guardians of international commercial order.[200] International arbitration is no longer a mere tool to resolve parties' private dispute, but also a forum to serve justice to the public as well.[201] Therefore, rather than rejecting this trend, arbitrators should accept the role to address disputes that affects public interests. In fact, according to Professor Moritz Renner, many international arbitral tribunals also admit that they have an additional role to take into account State's interests that are at stake.[202]

Being derogated with the role to resolve commercial disputes that affects public interests, the arbitrators should perform this role in an efficient manner. Namely, because transnational commerce

[197] Shapiro and Sweet, *On Law, Politics, and Judicialization*, 337.
[198] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 199.
[199] Sigvard Jarvin, "The Sources and Limits of the Arbitrator's Powers," *Arbitration International* 2, no. 2 (April 1, 1986): 155.
[200] Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 540.
[201] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 336–37; Mayer, "Mandatory Rules of Law in International Arbitration," 285.
[202] Renner, "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration," 127.

affects State's public interests, the conduct of arbitration should develop in a way that does not violate relevant countries' public interests. In solving the disputes, the arbitrators should take into consideration the interests of States that are affected by the parties' commercial activities. The possibility of electing arbitration as a means for dispute resolution should not create an opportunity for the parties to avoid the application of rules that protect the public interests.[203] In summary, in bearing the task to settle disputes across borders, the arbitrators should be independent and impartial to evaluate the relevance of public interests that are affected by the parties' transaction.

2.7.2 The Authority of the Arbitrators to Address Public Interests

This thesis argues that the arbitrators have the authority to address public interests. The sources of the arbitrators' authority derive from the parties' agreement and States.

To begin with, one of the sources of authority derives from the parties themselves. In submitting their disputes to the arbitral tribunal for a resolution, the parties may have implicitly or expressly submit the questions that concern public interest matters to be settled by the tribunal as well. For instance, in case where the arbitral tribunal has to consider whether or not to apply internationally mandatory rules of the law foreign to the governing law in the case, the tribunal's authority stems from the parties.[204] To illustrate, the internationally mandatory rules may nullify the parties' contract, and the subject matter of the dispute in front of the tribunal concerns the validity of the parties' contract.[205] Therefore, the authority of the tribunal to consider public interest in such a case derives from the parties' agreement to submit the dispute to the arbitral tribunal.

Furthermore, States also grant the authority to the arbitrators to consider public interests. To be specific, in the question of arbitrability of a dispute, an arbitral tribunal cannot resolve subject matters that the national law of relevant countries prohibits from being arbitrated. As will be discussed in detail in Chapter III, the subject matter of the dispute is arbitrable because the law of the seat of arbitration permits arbitrability of the dispute and the dispute does not fall under a

[203] Daniel Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," *Journal of International Arbitration* 11, no. 1 (January 1, 1994): 63.
[204] Mayer, "Mandatory Rules of Law in International Arbitration," 284.
[205] *Final Award in ICC Case No. 7181 of 1992*, Yearbook Commercial Arbitration XXI (1996).

compulsory jurisdiction of the court of a foreign country. The court that may have compulsory jurisdiction over the dispute is generally the court of the countries whose public interests are affected by the parties. In permitting the arbitrators to adjudicate cases that affect public interests, the seat of arbitration and the State whose public interests is affected by the parties' transaction also grant the arbitrators the authority to consider public interests.[206]

2.7.3 A Determination of Public Interests and the Adoption of Autonomous Choice-of-Law Rules

The thesis has argued that the arbitrators have the role and authority to address States' public interests; the next question that needs to be addressed is which country's public interests should the arbitrators consider. Public interests are not positive rules that can claim for international application and binds the parties in the arbitration. The rules that protect public interests are mandatory rules and public policy of the country whose public interest is at stake.[207] As indicated in the previous section, public interests of the seat of arbitration are already protected by virtue of the binding nature of international public policy of the seat of arbitration. The public interests that remain for discussion are public interests of countries other than the seat of arbitration. The sections above have already identified the role and authority of the arbitrators to consider public interests. Thus, the next question that this section needs to address is how the arbitrators should consider which public interests require protection.

This is a question of choice of law. One possible answer is a reference to the conflict of laws rules of the seat of arbitration. Professor Mistelis stated that the law of the seat of arbitration also includes the conflict rules that determine the applicable law.[208] One drawback on the reference to the law of the seat of arbitration is that arbitration laws may not have conflict rules that assist the

[206] For instance, in the *Mitsubishi case*, the U.S. Supreme Court decided that disputes that concern antitrust law is arbitrable, and implies also that the arbitrators have the authority to take into consideration public interests of America. *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc,* 473 US 614, 105 S Ct 3346 (1985).
[207] Kessedjian, "Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?," 148–49.
[208] Loukas A. Mistelis, "Reality Test: Current State of Affairs in Theory and Practice Relating to 'Lex Arbitri,'" *The American Review of International Arbitration* 17 (2006): 165.

arbitrators to consider questions concerning public interests. To illustrate, Article 28(1) of the *UNCITRAL Model Law* provides that the arbitrators shall apply the law chosen by the parties to decide the dispute. However, the *UNCITRAL Model Law* does not have any provision similar that guides the arbitrators on how to consider rules that protect public interests of a third country.

Another possibility is to make reference to private international law rules of the seat of arbitration. However, as private international law rules are generally designed for judges, they do not bind the arbitrators who arbitrate the dispute in the territory of the country.[209] For example, even though the Swiss arbitration law is included in the *Swiss Federal Act on Private International Law*, the arbitrators are not bound by Article 19 of the *Swiss Federal Act on Private International Law*, which concerns the application of internationally mandatory rules of a third country.[210]

Due to the lack of rules for the arbitrators to determine the application of rules protecting public interests, this research supports the view that arbitrators have the discretion to flexibly evaluate the situation and adopt a method to solve legal questions.[211] As the arbitrators are entrusted with the role to evaluate and consider public interests of States, the arbitrators should be granted the liberty to evaluate a method that is appropriate to determine choice-of-laws issues.[212] Furthermore, the role of the arbitrators is to administer justice.[213] Therefore, as long as the resolution of the dispute is in compliance with arbitration law and grants justice to the parties, the arbitrators have the liberty to resolve the dispute in a manner the arbitrators deem appropriate.

In brief, the chapter recommends that the arbitrators should adopt an appropriate choice-of-law rule in order to determine which State's public interests the arbitrators should give effect. This recommendation merely serves as a starting point to delineate the authority of the arbitrators when

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[209] Davor Babić, "Rome I Regulation: Binding Authority for Arbitral Tribunals in the European Union?," *Journal of Private International Law* 13, no. 1 (January 2, 2017): 71.
[210] Daniel Girsberger, "Chapter 12: Foreign Mandatory Norms in Swiss Arbitration Proceedings: An Approach Worth Copying?," in *The Powers and Duties of an Arbitrator*, Liber Amicorum Pierre A. Karrer (The Netherlands: Kluwer Law International B.V., 2017), 115–16.
[211] Pierre Mayer, "Chapter 15: Reflections on the International Arbitrator's Duty to Apply the Law," in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (The Netherlands: Kluwer Law International, 2007), 294; Renner, "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration," 120, 124.
[212] von Mehren, "To What Extent Is International Commercial Arbitration Autonomous?," 227.
[213] Gaillard, *Legal Theory of International Arbitration*, 44; Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 540.

settling the disputes of the parties. To be able to address a specific legal question efficiently, the arbitrators need to adopt further mechanisms. Chapters III and IV will further elaborate on the two legal issues in international arbitration, which requires a consideration of State's public interests, and the recommendation on specific mechanisms to evaluate each legal problem.

2.7.4 Possibility of Award Annulment

The recommendation of this chapter should not create the possibility of award annulment. A violation of public policy of the forum is a ground for a court to set aside an arbitral award under Article 34(2)(b)(ii) of the *UNCITRAL Model Law*. The thesis has recommended that the arbitrators refer to the international public policy of the seat of arbitration as a standard of measurement for the validity of the award. Hence, even though this research further recommends that the arbitrators have the authority to consider public interests of other countries, such consideration is conducted within the limited allowed by the arbitration law and public policy of the seat of arbitration. Therefore, the adoption of this recommendation would not lead to an annulment of an arbitral award.

2.8 Conclusion

This chapter has presented the legal theories that define the relationship between international arbitration and State. The Jurisdictional Theory argues that the international commercial arbitration is a State organ. Therefore, international arbitration is attached to its seat. On the contrary, the Contractual Theory and Autonomous Theory claims for a detachment of international arbitration from any country, including the seat of arbitration. Although acknowledging that States sometimes influence international arbitration, the Contractual Theory claims that the source of legitimacy of international arbitration and award is the parties' agreement.

Similarly, the Autonomous Theory advocates that international arbitration can development on its own by the businessmen, and does not need the assistance of any State for its development. An implication of the Autonomous Theory is that international arbitration is detached from any country and is functioning on its own. Another theory that contributes to a third viewpoint about the relationship between international arbitration and State is the Hybrid Theory. In trying to reconcile

the jurisdictional and contractual nature of international arbitration, the Hybrid Theory claims that arbitration is not complete if perceived to be either contractual or jurisdictional. Accordingly, both the parties' agreement and the law of the seat of arbitration bind international arbitration.

Having reviewed the legal theories above, the thesis provides its recommendation. This thesis acknowledges that arbitration law of the seat of arbitration binds the arbitration, but rejects the claim that arbitration is an organ of a State. This thesis does not support the argument that arbitrators are agents of the parties. In considering that arbitration cannot act outside State's legal order, this thesis suggests that international arbitration should have the freedom to develop itself in a way that is in compliance with the arbitration law of the seat of arbitration as well as the agreement between the parties. In determining the legal issues, the arbitrators should also be aware of the international public policy of the seat of arbitration. Further, because the parties' transaction may affect not only public interests of the place where the arbitration is seated but also public interests of other countries, this thesis also recommends that the arbitrators should consider rules protecting public interests of the countries that are affected by the parties' transaction.

Whereas this chapter has presented its view on the legal theory that describes the relationship between international arbitration and State, the legal theory should be treated as a starting point to understand the legal nature of international arbitration as well as the relevance of national legal order in international arbitration. Although it bears some practical implication, the legal theory should not be depended on solely in order to solve practical legal issues. In order to solve the conflict that arises from the clash of public interests and private interests, the arbitrators should adopt more specific evaluation criteria to evaluate the legal problem. Chapters III and IV will address two legal issues that are affected by the involvement of public interests in international arbitration and provide a recommendation on how to solve the legal problems.

Chapter III: An Evaluation of the Conflicting Interests in the Issue of Arbitrability

3.1 Introduction

In international commercial context, the parties' procedural autonomy provides the parties the freedom to choose a forum for the resolution of their disputes. Likewise, the parties enjoy the liberty to choose arbitration as a method for a resolution of their dispute. Despite such freedom, a country may still restrict the parties' procedural autonomy, and disallow the parties from submitting certain disputes to international arbitration for settlement.[214]

In the situation where the State considers that the dispute between the parties has an effect not only on the disputing parties, but also to the public, the State may consider reserving the case for court adjudication in order to ensure a proper protection of public interests.[215] From this perspective, a certain subject matter is restricted from being arbitrable. Therefore, the question of whether or not a certain dispute can be submitted to arbitration involves public policy consideration.[216] Consequently, public policy also limits party autonomy from the perspective of objective arbitrability.

In a narrow sense, arbitrability concerns the question of "whether the legislature, in establishing or recognizing a particular cause of action, authorize its adjudication by an arbitral tribunal or […] reserve its adjudication to courts of law."[217] Traditionally, arbitrability of a dispute is categorized into 'subjective arbitrability' and 'objective arbitrability'.[218] Subjective arbitrability refers to the possibility of a person, whether legal or natural, to be a party in an arbitration

[214] Francesca Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," in *Limits to Party Autonomy in International Commercial Arbitration* (New York: JurisNet, LLC, 2016), 127; Laurence Shore, "Defining 'Arbitrability' - The United States vs. the Rest of the World," *New York Law Journal* Special Section (June 15, 2009), http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf; Stavros L. Brekoulakis, "Chapter 2: On Arbitrability: Persisting Misconceptions and New Areas of Concern," in *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009), 20.

[215] William W. Park, "Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration," *Brooklyn Journal of International Law* 12, no. 3 (1986): 636.

[216] Matthias Lehmann, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice," *Columbia Journal of Transnational Law* 42, no. 3 (2004): 755.

[217] George Bermann, "The 'Gateway' Problem in International Commercial Arbitration," *Yale Journal of International Law* 37, no. 1 (January 1, 2012): 11, http://digitalcommons.law.yale.edu/yjil/vol37/iss1/2.

[218] Yves Fortier, "Arbitrability of Disputes," in *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005), 269.

agreement, and therefore, an arbitration proceeding.[219] Subjective arbitrability concerns, for example, the possibility for a dispute involving an insolvent party to be resolved in arbitration under the applicable law.[220] The purpose of limiting a party from arbitration is for the purpose of protecting the party itself whereas the restriction of a State from arbitration is based on the concern about sovereign dignity.[221] Objective arbitrability, on the other hand, refers to the question of whether or not a subject matter of a dispute can be resolved by means of arbitration.[222] The main focus of this chapter is the question of objective arbitrability, as objective arbitrability concerns more about the impact of public policy on party autonomy, and the purpose of this chapter is to assess how arbitral tribunal strike the balance between the conflict of public policy and party autonomy in the context of arbitrability.

The question of arbitrability of a dispute can arise at a pre-award stage or post-award stage. A party to a dispute may bring up the question of arbitrability, both subjective and objective, to a court or an arbitral tribunal depending on the stage of the proceedings. To be precise, there are three instances where a party relies on inarbitrability as their defense. The first instance is when a party requests a court to recognize an arbitration agreement based on Article II of the *New York Convention*, which requires a court to recognize a valid arbitration agreement and refer the dispute between the parties to arbitration.[223] To illustrate, a party may file an action to a court before or during an arbitration proceeding, and another party objects the court's jurisdiction due to the

[219] Ibid. at 270; Karl-Heinz Böckstiegel, "Public Policy as a Limit to Arbitration and Its Enforcement," *IBA Journal of Dispute Resolution*, no. Special Issue: The New York Convention-50 Years (2008): 5.
[220] See: Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, Chapter 9.
[221] Loukas A. Mistelis, "Chapter 1: Arbitrability - International and Comparative Perspectives: Is Arbitrability a National or an International Law Issue?," in *Arbitrability: International and Comparative Perspectives* (The Netherlands: Kluwer Law International, 2009), 6.
[222] Fortier, "Arbitrability of Disputes," 270; Loukas A. Mistelis, "Mandatory Rules in International Arbitration: Too Much Too Early Or Too Little Too Late? Concluding Remarks," *American Review of International Arbitration*, 2007, 220.
[223] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (the "New York Convention"), 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

existence of an arbitration agreement.[224] In such a case, the court has to evaluate whether to enforce the parties' arbitration agreement, and consequently, refer the case to arbitration.[225]

The second instance is during an arbitration proceeding when a party raises the issue of arbitrability in front of an arbitral tribunal in order to object the authority of the tribunal to handle the case.[226] In this circumstance, the arbitrators have the competence to rule on their own jurisdiction.[227] The arbitrators have to assess whether the dispute can be submitted to arbitration under the applicable law.

Lastly, after the arbitrators have rendered an award, a party may rely on the arbitration law of the seat of arbitration to request a court to set aside or refuse enforcement of the award on the ground of inarbitrability. In particular, Article 34(2)(b)(i) of the *UNCITRAL Model Law* stipulates that a court of the seat of arbitration may set aside an arbitral award on the ground that the subject matter of the dispute is inarbitrable under the law of the forum.[228] Moreover, Article V(2)(a) of the *New York Convention* allows a court to refuse recognition or enforcement of an award if the subject matter of the dispute is incapable for settlement by arbitration based on the law of that country. Therefore, both State courts and arbitral tribunals encounter this issue of arbitrability.

As the scope of this thesis is to assess how the arbitrators should evaluate the conflict of public and private interest, the scope of this chapter is limited to the resolution of arbitrability by the arbitral tribunal. This chapter will not focus on recommending how domestic courts should evaluate which the legal issues are arbitrable and which are not. Even so, section 3.2 will provide a general discussion regarding the rationales behind court decisions on arbitrability as well as the different

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[224] Stavros L. Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," in *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009), 5.
[225] Article II(3) of *the New York Convention* provides that: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."
[226] Karl-Heinz Böckstiegel, "Public Policy and Arbitrability," in *Comparative Arbitration Practice and Public Policy in Arbitration*, International Council for Commercial Arbitration Congress 3 (Kluwer Law International, BV, 1986), 184.
[227] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 333.
[228] *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration* (the "UNCITRAL Model Law"), 24 ILM 1302 (1985) (the "New York Convention").

decisions courts of different countries have adopted with regards to arbitrability of various subject matters.

Next, this chapter will apply the legal theories that have been identified in Chapter II to solve the issue of arbitrability (3.3). Having discovered the solutions arising from the application of legal theories, the chapter will proceed to analyze other available methods to solve the legal problem (3.4). Then, the research will provide its recommendation on how the arbitrators should address the question of arbitrability of disputes (3.5). Finally, this chapter will draw a conclusion (3.6).

3.2 States' Approaches Towards Issues Concerning Public Interests

The question of whether a certain subject matter can be arbitrated depends on domestic law of each country as the countries decide this question based on the consideration of their own political, social and economic policy.[229] A limit to party autonomy on arbitrability issue may also be delimited by national or international public policy of each country.[230] Arbitrability depends on the balancing between the policy in favor of arbitration and policy to protect certain (public) interests. The end result is that if a country decides one matter to be inarbitrable, an arbitration clause that designates the same matter for arbitration may not be enforceable in that country.[231] Consequently, the arbitral tribunal does not have the authority to settle the subject matter of the dispute and the award of that tribunal is not valid in that country.

In this section, the thesis will address the rationales behind the general decisions to limit arbitrability of certain disputes as well as how domestic courts have been dealing with different subject matters that involve public interests. Section 3.2.1 and section 3.2.2 will address the two discussions.

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[229] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration: Student Version*, 5th ed. (Oxford University Press, 2009), 124.
[230] Fortier, "Arbitrability of Disputes," 271; Lehmann, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice," 766; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 220.
[231] Mistelis, "Mandatory Rules in International Arbitration: Too Much Too Early Or Too Little Too Late? Concluding Remarks," 221.

3.2.1 States' Rationales to Exclude Arbitration from Resolving the Dispute

Domestic courts of certain countries have refused to enforce parties' arbitration agreement and declared certain subject matters to be inarbitrable due to public policy reasons. Specifically, Professor Francesca Ragno identifies four rationales behind courts' decisions to refuse arbitrability of a subject matter.[232] In all the identified reasons, there is an involvement of public policy or internationally mandatory rules of the forum.

First of all, the court may consider that the subject matters of the dispute have a strong connection with mandatory rules that reflects public policy of the country.[233] Consequently, the subject matter is under the compulsory jurisdiction of the court. To illustrate, in the case of *Air Malta v. Scopellita Travel Sas* of 1999,[234] the Italian Supreme Court decided that the disputes between the parties that involve an indemnity rule is inarbitrable on the ground that indemnity rule is characterized as an overriding mandatory rule that parties cannot derogate from.[235] Consequently, disputes related to this rule also cannot be arbitrated even though the parties had a prior arbitration clause to refer their disputes to arbitration.[236]

Furthermore, in *Accentuate Ltd. v. Asigra Inc.* of 2009, the English High Court invalidated the parties' choice of law and arbitration clauses due to the non-application of EU mandatory regulation.[237] The issue concerned an alleged wrongful termination of a distribution agreement between claimant (Distributor) and defendant (Licensor).[238] The laws of Ontario and the federal laws of Canada was the applicable law, and the parties had an arbitration clause to resolve their disputes by arbitration seated in Ontario.[239] Shortly after the Licensor began an arbitration in Canada, the Distributor filed a court proceeding in England seeking for a compensation pursuant to mandatory

[232] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 144–56.
[233] Ibid. at 144.
[234] Italian Supreme Court (Corte di Cassazione), 30 June 1999, no. 369, Air Malta v. Scopelliti Travel Sas, Rivista di Diritto Internationale Privato e Processuale (2000), 741 in Ragno, *"Chapter 4: Inarbitrability: A Ghost Hovering over Europe?"* 135–36.
[235] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 135.
[236] Ibid.
[237] [2009] EWHC 2655 (QB).
[238] "Arbitration Agreements and Foreign Laws That Do Not Give Effect to Mandatory Principles of EU Law - Publications - Allen & Overy," Publications, *Allen & Overy*.
[239] Ibid.

provisions of the *Commercial Agents (Council Directive) Regulations 1993*.[240] The English High Court declared that an arbitration clause was null, void and inoperative under the *1996 Arbitration Act.* The reason behind the decision was that the parties' agreement designated arbitration in a non-EU member State and a non-EU law as the applicable law, which did not give effect to EU mandatory provisions.[241] The court even further stated that an arbitral award that did not give effect to the EU mandatory provisions would not be enforceable in England on the ground of violation of public policy.[242]

Another possible rebut against arbitrability of a dispute is that the arbitral tribunal may resolve the dispute in overlooking the internationally mandatory rules.[243] Although the court did not explicitly indicate this reason, in the case of *Air Transat AT Inc v. Air Agencies* of 2011, the Belgian Supreme Court rejected arbitrability of a dispute concerning compensation of a claim brought by a commercial agent despite the fact that the parties have had an arbitration clause designating an arbitral tribunal seated in Canada.[244] The court reasoned that the parties' chosen Quebec law might not provide equivalent protection as compared to the protection afforded by the mandatory provisions of the Belgian law.[245] Implicitly, the court refused arbitrability of this case on the ground that the arbitral tribunal might not apply Belgian mandatory law, as the governing law is that of Quebec. On this matter, Professor Ragno remarked that the court might have made a different decision and would allow arbitrability of the dispute if the applicable law were that of a member State of the EU.[246]

The third reason why a court may refuse to enforce the parties' arbitration agreement is a concern that the arbitral award may not be enforceable due to its violation of the forum's public

[240] United Kingdom, *Commercial Agents (Council Directive) Regulations 1993*, SI 1993/3053, http://www.legislation.gov.uk/uksi/1993/3053/made.
[241] Baker & McKenzie, *Baker & McKenzie International Arbitration Yearbook: 2010-2011* (Juris Publishing, Inc., 2011), 465; Weiniger Matthew and Byrne Ruth, "Mandatory Rules, Arbitrability and The English Court Gets it Wrong," *The Paris Journal of International Arbitration*, no. 1 (2010): 203.
[242] McKenzie, *Baker & McKenzie International Arbitration Yearbook*, 465.
[243] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 145.
[244] Ibid. at 139.
[245] Ibid.; Francesca Ragno, "Chapter 6: Are EU Mandatory Provisions an Impediment to Arbitral Justice?," in *The Impact of EU Law on International Commercial Arbitration* (JurisNet, LLC, 2017), 168.
[246] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 143.

policy.[247] Such reasoning can be identified in the decision of the above-mentioned *Accentuate case* where the British court refused to enforce the parties' agreement in providing that it would also deny enforcement of the arbitral award on public policy grounds as the award failed to apply EU mandatory principles.[248]

Finally, the last reason a court may rely on to refuse arbitrability of a dispute is that the arbitral tribunal may disregard the derogated forum's overriding mandatory rules.[249] To illustrate, in May 2006, the Munich Higher Regional Court[250] declared inarbitrability of a case where there is an agency contract governed by Californian law having an arbitration clause designating an arbitration seated outside the EU.[251] Briefly, in that case, the plaintiff filed a lawsuit to the German court alleging that the defendant wrongly terminated the agency agreement, and demanded compensation based on Section 89b of the *German Commercial Code*. This provision was an implementation of the (overriding mandatory) Article 17 of the *EC Directive (86/653/EEC) of 18 December 1986*[252] concerning commercial agents.[253] The reason behind the Higher Court's decision is that there is likelihood that the arbitral tribunal would not apply German internationally mandatory rule.[254] Therefore, to secure the application of the rule, the court declared invalidity of the arbitration agreement; thus, reserve jurisdiction over the case from an arbitral tribunal.[255]

To sum up, it seems that when a dispute is related to internationally mandatory rules reflecting public policy of the forum, but the applicable law of the dispute is not the law of the forum, and the seat of arbitration is in a foreign jurisdiction, the court may decide not to enforce the

[247] Ibid. at 147.
[248] McKenzie, *Baker & McKenzie International Arbitration Yearbook*, 465; Ragno, "Chapter 6: Are EU Mandatory Provisions an Impediment to Arbitral Justice?," 168.
[249] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 152.
[250] *Oberlandesgericht München* (Germany), 17 May 2006, Praxis des Internationalen Privat-und Verfahrensrechts 2007, 322.
[251] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 140.
[252] Council Directive 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents.
[253] Karsten Thorn and Walter Grenz, "The Effect of Overriding Mandatory Rules on the Arbitration Agreement," in *Conflicts of Laws in International Arbitration* (Walter de Gruyter, 2010), 17–18.
[254] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 140; Thorn and Grenz, "The Effect of Overriding Mandatory Rules on the Arbitration Agreement," 18.
[255] Xander Kramer, "Chapter 9: EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration," in *The Impact of EU Law on International Commercial Arbitration* (JurisNet, LLC, 2017), 308.

parties' arbitration agreement in order to ensure that the forum's overriding mandatory provision is given effect. For disputes that involve public law, Sever pointed out that States refuse to allow arbitrability of such disputes under the concern that the effect of the arbitration will injure the society as a whole rather than affecting only the two parties.[256] Section 3.5.2 will further provide a concrete analysis on States' rationales behind the decision to refuse or allow arbitrability of specific subject matters.

3.2.2 Different Court Decisions towards Objective Arbitrability

The purpose of this section is to provide general information regarding different court evaluations on different subject matters that affect a State's public interests. Matters that involve public policy and may become inarbitrable in arbitration include matters involving competition rules, intellectual property law, insolvency law as well as issues that involve natural resources, and bribery and corruption.[257] These laws are designed not simply to bring justice to the contracting parties, but mainly to benefit the general society.[258] Other subject matters that the court may retain power to adjudicate can be issues that involve a party with lower bargaining power, such as agency contracts.[259] The subsections in this section will address each subject matter in further details.

3.2.2.1 Competition law

Competition law or antitrust law is designed to regulate the conduct of companies from committing anti-competitive acts.[260] This law is important as it ensures both the fair management of business and fair prices for consumers.[261] In a dispute that concerns a violation of competition law, the conflict is between the policy to protect the market, which reflects interest of the public, and the

[256] Jay R. Sever, "Comment: The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?," *Tulane Law Review* 65 (1991): 1669.
[257] Blackaby et al., *Redfern and Hunter on International Arbitration: Student Version*, 125–35; Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 132.
[258] Park, "Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration," 637.
[259] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 135.
[260] Stephen Jagusch, "Chapter 3: Issues of Substantive Transnational Public Policy," in *International Arbitration and Public Policy* (JurisNet, LLC, 2015), 37.
[261] Ibid.

State policy in favor of arbitration. Matters involving competition law or antitrust law are considered to concern public interests because the outcome of the issue affects the entire market of the product. As stated in the *American Safety case*, "Antitrust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage."[262] As a result, disputes involving competition law were traditionally considered to fall under the jurisdiction of domestic courts, which are a part of state authority and are the guarantors of public interests. However, the situation has eventually altered in some jurisdictions.

The American Supreme Court took the first lead in ruling that antitrust claims are arbitrable. The *Mitsubishi case*[263] concerns a sales agreement among three companies, namely Soler Chrysler, Mitsubishi, and Chrysler International. The parties have included an arbitration clause in their agreement designating arbitration seated in Japan under the rules of Japan Commercial Arbitration Association. The parties chose Swiss law as the governing law. When a dispute arose, Mitsubishi filed case at the U.S. District Court against Soler for an allege violation of the sales agreement. Soler filed a counter claim contending that Mitsubishi violated the US Sherman Act. The issue reached the U.S. Supreme Court, and the court had to decide whether the dispute was arbitrable. The Supreme Court decided to allow antitrust claims to be arbitrated in stating that:

> We conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forth coming in a domestic context.[264]

Whereas the Supreme Court in this case has granted authority to an arbitral tribunal to handle an issue involving antitrust matter, it further specified that: "national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[265] At this point, the Supreme Court considered that at the award enforcement stage, the court would still have the power to refuse the recognition and enforcement of the arbitral award if the arbitral tribunal failed to address legitimate

[262] *American Safety Equipment Corp v JP Maguire Co*, 391 F 2d 821 (2nd Cir 1968).
[263] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985).
[264] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985).
[265] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985).

interests concerning antitrust issue. Such refusal is granted by the *New York Convention* under Article V(2)(b) concerning a violation of public policy.[266] In brief, two main reasons why the Supreme Court recognize antitrust disputes to be arbitrable are: its belief that the tribunal would not ignore its antitrust law, and its possibility to have a second look during award enforcement stage to verify whether the arbitral tribunal had addressed the antitrust law.[267]

Courts of several other countries have taken the same position as the United States although their legal justifications vary.[268] The European Court of Justice did not address directly the possibility of a dispute involving antitrust law to be submitted to arbitration, but rather stated in the *Eco Swiss China Time Ltd v Benneton International NV case* that national courts of the member States may annul or refuse the enforcement of an arbitral award that violates Article 81 of the *EU Treaty* as this Article is considered to be a matter of public policy.[269] In The Netherlands, matters involving competition law of the EU is arbitrable in so far as there is an assurance that the arbitral tribunal will apply the EU competition law.[270] In short, the approach of courts in balancing the interests in issues concerning competition law is that generally courts allow the parties to arbitrate the issue under the condition that the arbitral tribunal applies competition law of the courts.

3.2.2.2 Insolvency law

In a dispute that involves an insolvent party, the conflict is between the purposes of two procedures. The Bankruptcy Law aims at having all relevant parties present in court for the purpose of property division and guaranteeing an equal treatment for all creditors;[271] whereas the main purpose of arbitration is a settlement of a private dispute between an insolvent party and possibly

[266] Article V(2)(b) of the *New York Convention* stipulates that: a court may refuse recognition and enforcement of a foreign award if "the recognition or enforcement of the award would be contrary to the public policy of that country."
[267] Ragno, "Chapter 4: Inarbitrability: A Ghost Hovering over Europe?," 167.
[268] Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge University Press, 2015), 31.
[269] Case C-126/97, Yearbook Commercial Arbitration XXIV (1999), 629.
[270] Bantekas, *An Introduction to International Arbitration*, 31.
[271] Stefan Kröll, "Arbitration and Insolvency: Selected Conflict of Laws Problems," in *Conflict of Laws in International Arbitration* (Walter de Gruyter, 2010), 214.

one of the creditors.[272] A court may be requested to determine its jurisdiction when a party raised the existence of an arbitration clause as a defense against the court's jurisdiction.[273] The arbitrators may also encounter a challenge of its authority by one of the parties, which is a trustee.[274]

The general trend concerning arbitrability of an insolvency-related dispute is that if the nature of the issues is considered to be 'core' or 'pure' insolvency matters, such as appointment of a trustee or the creditors' claims verification, the issues are not arbitrable; otherwise, the issues can be submitted to arbitration.[275] Specifically, in the United States, the court would need to determine arbitrability of the dispute by confirming whether the dispute is considered to be a core insolvency issue.[276] Quite differently, under Section 349A of *the English Insolvency Act of 1986*,[277] a trustee in bankruptcy has the freedom to either adopt or reject an arbitration agreement.[278] If the trustee rejects the arbitration agreement, a party can bring the case to arbitration only with the consent of the company's creditors as well as the court.[279]

3.2.2.3 Agency Law

Agency laws, specifically in the EU context, are considered to be overriding mandatory rules. The aims of this law are: "to protect the agent, who is considered to be a weaker party in the relationship, in part to ensure free movement within the internal market, and in part to ensure that all commercial activity carried out on the European territory is carried out under comparable

[272] Blackaby et al., *Redfern and Hunter on International Arbitration: Student Version*, 129; Stefan Kröll, "Chapter 18: Arbitration and Insolvency Proceedings: Selected Problems," in *Pervasive Problems in International Arbitration* (The Netherlands: Kluwer Law International, 2006), 359.
[273] Kröll, "Chapter 18: Arbitration and Insolvency Proceedings: Selected Problems," 361–62.
[274] Ibid. at 362.
[275] Blackaby et al., *Redfern and Hunter on International Arbitration: Student Version*, 129; Klaus Sachs, "Insolvency Proceedings and International Arbitration," *Collected Courses of the International Academy for Arbitration Law* 1, no. 1 (2013): 27, http://www.arbitrationacademy.org/wp-content/uploads/2014/01/Arbitration-Academy-Klaus-Sachs.pdf.
[276] Blackaby et al., *Redfern and Hunter on International Arbitration: Student Version*, 130.
[277] United Kingdom, *Insolvency Act 1986, Chapter 45*, https://www.legislation.gov.uk/ukpga/1986/45.
[278] Blackaby et al., *Redfern and Hunter on International Arbitration: Student Version*, 130.
[279] Ibid. at 131.

circumstances."[280] The trend in the countries in the EU recently is to limit arbitrability of disputes concerning agency law because of the critical purpose behind this law.[281]

3.2.2.4 Intellectual Property Law

Intellectual property rights have an undefined nature. Whereas patent, trademark, and copyrights are rights of private individuals, these rights have crucial impacts on a country's economy and social policy. As such, arbitrability of disputes violating intellectual property rights is a complex question.

States take different approaches regarding this matter. The US and Switzerland, for instance, allows arbitrability of intellectual property disputes without any limitation. Contrastingly others States, such as South Africa, declare that all intellectual property disputes are inarbitrable.[282] However, a general tendency is that intellectual property disputes are broadly arbitrable although some exceptions exist.[283]

Intellectual property law includes patent, trademark and copyright. Copyrights are non-registered rights and parties can freely dispose such rights. For this reason, disputes concerning a violation of copyrights are generally arbitrable.[284] Different from copyrights, patent and trademark requires prior registration, and the registration is under the authority of a State. Consequently, it seems reasonable that a State organ has the authority to verify the validity of the rights.[285] However, in cases that do not concern directly the validity of an intellectual property right, the situation is more complicated.

To illustrate, intellectual property disputes that are submitted to international arbitration are mostly related to international contracts concerning a license or transfer of patents or trademark. In such contracts, arbitration clauses are generally inserted. When disputes arise, a party may invoke

[280] Giuditta Cordero-Moss, "Chapter 10: EU Overriding Mandatory Provisions and the Law Applicable to the Merits," in *The Impact of EU Law on International Commercial Arbitration* (JurisNet, LLC, 2017), 333.
[281] Ibid.
[282] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 209–10.
[283] Irene Calboli and Jacques de Werra, *The Law and Practice of Trademark Transactions: A Global and Local Outlook* (Edward Elgar Publishing, 2016), 305.
[284] Blackaby et al., *Redfern and Hunter on International Arbitration: Student Version*, 125.
[285] Ibid.; Lehmann, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice," 773.

invalidity of a patent as a defense against the jurisdiction of the arbitral tribunal. This action creates a situation where two interests conflict each other. On the one hand, the parties have already had an arbitration agreement. Arbitration is a common choice for this type of intellectual-property-related dispute because the parties have the opportunity to choose experts as their resolution panel.[286] In addition, arbitration proceeding is not public as the court proceeding, thus, arbitration grants the parties a sense of protection on their trade secrets.[287] On the other hand, the dispute relates to the validity of a registered intellectual property right. In such a circumstance, it is necessary to evaluate which interest is stronger, public interest or private interest. As explained above, the way each country weights the two interests vary based on their own justifications.

In summary, domestic courts generally reserve jurisdiction over issues that affects their public interests from arbitration. However, for certain types of disputes, the reservation of compulsory jurisdiction has become less restrictive.[288] Another reflection from the above discussion is that different countries have adopted different approach towards arbitrability of disputes based on their necessity to protect public interests. When requested to enforce the arbitration agreement at a pre-award stage, the courts often apply their *lex fori* to determine arbitrability of the dispute. This approach has also been suggested by a commentary on the *New York Convention*.[289]

In the circumstance where the arbitrators have to consider the authority to arbitrate the case, the question that the arbitrators have to answer is which countries' arbitrability rule the arbitrators should respect. Section 3.3 will apply the legal theories on arbitration to find the answer to this question.

3.3 The Application of Legal Theories to Answer the Question of Arbitrability

The application of legal theories to solve the question of arbitrability does not lead to the application of conflict of laws rules of the place to which the arbitration is attached. Rather, it

[286] Blackaby et al., *Redfern and Hunter on International Arbitration: Student Version*, 125.
[287] Ibid.
[288] Mistelis, "Chapter 1: Arbitrability - International and Comparative Perspectives: Is Arbitrability a National or an International Law Issue?," 9.
[289] Herbert Kronke et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010), 72.

directly leads to the respect for public interests of the country where the arbitration is attached to as well as the rule concerning arbitrability of that place. Chapter II has identified three groups of legal theories that describe the relationship between international arbitration and State. Therefore, this part will apply each theory to solve the problem of arbitrability of disputes. Then, the research will draw a reflection from the application of the legal theories.

3.3.1 Arbitration Being Bound by National Legal Order

Under the Jurisdictional Theory, international arbitration is perceived as a state organ and it is attached to the State in which it is seated.[290] Therefore, in considering the issue of arbitrability, the arbitrators are bound to protect the public interests of the place where it is seated. The law of the seat of arbitration also governs the validity of the arbitration agreement as well as the question of arbitrability itself.[291] Consequently, the arbitrators also have to refer to the legislations of the seat of arbitration in order to consider their authority to arbitrate the case.

3.3.2 Arbitration Being Independent from National Legal Order

As identified in Chapter II**,** two legal theories lead to a conclusion that arbitration is not bound by national legal orders. The first is the Contractual Theory, which argues that arbitration derives its authority and legitimacy from the parties' agreement. The second is the Autonomous Theory, which maintains that international arbitration can function on its own without having to subject itself to any national legal order. Subsections 3.3.2.1 and 3.3.2.2 will apply the two theories in the issue of arbitrability.

3.3.2.1 The Contractual Theory

Under the Contractual Theory and the Autonomous Theory, the source of the arbitrators' legitimacy comes from the parties' agreement.[292] The arbitrators, in considering its authority to

[290] Mann, "State Contracts and International Arbitration," 4.
[291] cf. Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," 259, 260.
[292] Sweet and Grisel, "The Evolution of International Arbitration: Delegation, Judicialization, Governance," 29.

arbitrate the dispute, have to rely on the agreement between the parties. Despite this fact, supporters of the Contractual Theory also recognize a certain control of a State on arbitration.[293] In particular, a State can decide not to enforce an arbitration agreement when the subject matter of the dispute is perceived to be under compulsory jurisdiction of its court.[294] In case if the parties do not need to request a court to enforce the arbitration agreement, no national law binds the question of arbitrability. As a result, if the arbitrators are requested to determine arbitrability of the dispute, the application of the Contractual Theory leads to a viewpoint that the arbitrators do not need to apply any national law.

3.3.2.2 The Autonomous Theory

The Autonomous Theory claims for a delocalization of international arbitration. The arbitrators are not bound to respect any countries' public interests, and national law does not have any relevance in the conduct of arbitration.[295] International arbitration is rather regulated by the arbitration practice itself.[296]

Concerning the issue of arbitrability, it is unclear how the advocate for the Autonomous Theory would argue. As efficiency and flexibility of arbitration is the main basis of this legal theory,[297] a possible the answer is that the arbitrators have jurisdiction to any types of dispute so long as the businessmen finds the necessity to have their disputes resolved by arbitration. An evaluation of arbitrability of dispute is based solely on the parties' consent.[298] Thus, State's law is irrelevant for the examination of arbitrability of a dispute.

Such analyses under the Contractual Theory and Autonomous Theory are not very helpful to solve the issue of arbitrability of disputes. Although practices have shown that courts has increasingly been allowing cases concerning public interests to be resolved by arbitration, this fact

[293] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 56.
[294] Ibid.
[295] Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," 166.
[296] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 60.
[297] cf. Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," 279.
[298] cf. Kronke et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 45.

does not prove that arbitration can ignore national law of any country that restricts arbitrability of disputes. In addition, to allow arbitration evolve unboundedly, these theories can easily bring danger to the development of international arbitration itself. For instance, a court of the seat of arbitration may set aside an arbitral award, which concerns a subject matter that is incapable of settlement by arbitration under the law of the forum.[299] Advocates for the Autonomous Theory may claim that an annulled award is still enforceable in other countries.[300] However, Article V(2)(a) of the *New York Convention* provides that a court can refuse to recognize a foreign arbitral award if the court finds that the subject matter of the dispute is inarbitrable under the law of the forum. Thus, a determination of arbitrability of a dispute without relying on any national law may not be practical.

3.3.3 Arbitration Being Bound by National Legal Order and Party Autonomy

Under the Hybrid Theory, international arbitration's nature derives from the Contractual Theory and Jurisdictional Theory.[301] Based on this general rule, the agreement between the parties alone is not sufficient to grant the arbitrators the authority to adjudicate the case; whether or not the dispute is arbitrable is also dependent upon the law of the seat of arbitration. Therefore, under the question of arbitrability of disputes, the application of the Hybrid Theory leads to a similar conclusion as the application of the Jurisdictional Theory, which requires that the subject matter of the dispute is perceived to be arbitrable under the law of the seat of arbitration.

3.3.4 Reflection on the Application of Legal Theories

The adoption of a certain legal theory leads to two different conclusion. The first conclusion, under the Contractual Theory and Autonomous Theory, is that the arbitrators may not need to rely on any country's law to determine arbitrability of a dispute.[302] As pointed out above, this approach may not lead to an efficient functioning of international arbitration as it results in a disregard of

[299] *UNCITRAL Model Law*, Article 34(2)(b)(i).
[300] cf. Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," 170–71.
[301] cf. Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," 274.
[302] Kronke et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 45.

public interests of all States and recommends the arbitrators to determine arbitrability only from the interpretation of the parties' intention.

The second conclusion is that the arbitrators have to consult with the law of the seat of arbitration in order to evaluate whether the subject matter of the dispute is arbitrable. This conclusion is reached from the application of the Jurisdictional Theory and Hybrid Theory. Whereas the adoption of this approach clarifies the situation, there is a possibility that a foreign rule demanding compulsory jurisdiction of a court in another becomes irrelevant. Therefore, a direct and absolute application of the law of the seat of arbitration may create a possibility for the parties to avoid the jurisdiction of a court that may have a compulsory jurisdiction over the particular dispute.

In order to confirm the above possibility, the next section will clarify the efficiency of the application of the law of the seat of arbitration to determine arbitrability. In addition, the thesis will also assess other possible methods that have been recommended for the arbitrators to adopt in order to determine the arbitrability of the disputes that have been submitted to the arbitration.

3.4 Assessing Choice-of-Laws Methods to Resolve the Issue of Arbitrability

In the circumstance where the question of arbitrability is faced by the arbitral tribunal, arbitrability has two meanings. The first concerns the substance of parties' agreement. It focuses on the question of whether or not the parties have agreed to submit their dispute to arbitration. This question is not covered under the scope of this thesis. The second meaning of arbitrability, which is the focus of the thesis, is whether or not the law allows a subject matter to be arbitrated by an arbitral tribunal.[303] In order to determine arbitrability in this sense, the arbitral tribunal would have to determine the applicable law that applies on this matter. Therefore, the question of arbitrability is a choice-of-laws question.

One of the requirements that a court should consider when requested to enforce an arbitration agreement under Article II of the *New York Convention* is to confirm that the subject matter of the

[303] Shore, "Defining 'Arbitrability' - The United States vs. the Rest of the World."

dispute is capable of settlement by arbitration.[304] Despite this general stipulation, the *New York Convention* does not provide any guidance regarding the law governing arbitrability.[305] There has not been a consensus regarding which law is applicable in the matter of arbitrability. In fact, arbitral tribunals have applied different governing law to address this legal issue. Legal scholars have also submitted differently as to which law should govern the issue of arbitrability. The possibilities include the law of the seat of arbitration, the law chosen by the parties, the law of the country where the award would most likely be enforced, and the applicable substantive law.[306] Therefore, in evaluating its authority, the question that the arbitrators have to address is a choice-of-law question. The subsections below will address the different arguments that legal scholars have presented with regards to the adoption of different country's law to determine the issue of arbitrability of disputes.

3.4.1 The Application of the Law of Governing the Validity of the Arbitration Agreement

Professor Bernard Hanotiau advocates that the law governing arbitration agreement should govern the issue of arbitrability, with the exception as will be explained below.[307] To justify his position, Professor Hanotiau refers to Article II(1)[308] and V(1)(a)[309] of the *New York Convention* as well as Article VI(2)[310] of the *European Convention on International Arbitration*,[311] which provide

[304] Artice II(1) of *the New York Convention* stipulates: Each Contracting State shall recognize an in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, *concerning a subject matter capable of settlement by arbitration*. [Emphasis added]
[305] Kronke et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 70.
[306] Anne-Sophie Papeil, "Conflict of Overriding Mandatory Rules in Arbitration," in *Conflicts of Laws in International Arbitration* (Walter de Gruyter, 2010), 352; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 196.
[307] Bernard Hanotiau, "The Law Applicable to Arbitrability," in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, International Council for Commercial Arbitration Congress 9 (Kluwer Law International, 1999), 154–55.
[308] Article II(1) of the *New York Convention* stipulates that: "Each Contracting State shall recognize an in writing; under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."
[309] Article V(1)(a) of the *New York Convention* stipulates that the enforcing court may refuse recognition and enforcement of a foreign award if the court finds that the arbitration agreement is invalid under "the law to which the parties have subjected it or, failing any indication thereon, under the country where the award was made".
[310] Under Article VI(2) of the *European Convention on International Arbitration*: "In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall

that the court should evaluate the validity of an arbitration agreement based on the law governing the arbitration agreement. Professor Piero Bernadini also refers to the three legal provisions and suggests that the arbitrators should apply law governing the arbitration agreement to determine arbitrability of the subject matter of the dispute.[312]Despite this recommendation, the two scholars also acknowledge that there is a problem about the law governing the arbitration agreement, which is that parties do not usually have a choice of law clause designating the applicable law.[313]

Contrasting to the above view, Professor Stavros Brekoulakis argues that the law governing the validity of the arbitration agreement is irrelevant because arbitrability is not a question concerning validity of the arbitration agreement.[314] Whereas the question of arbitrability is a matter of jurisdiction, the question of validity of the arbitration agreement concerns substantive matter.[315] From this viewpoint, the law governing arbitration clause is irrelevant to determine arbitrability of a dispute.

3.4.2 The Application of the Law Governing the Main Contract

Following the discussion above, due to the reason that the parties do not usually elect the law governing the validity of the agreement,[316] there is a discussion about the possibility of the parties' choice of law governing the contract as law governing the arbitration agreement as well. The law

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examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions:

(a) under the law to which the parties have subjected their arbitration agreement;
(b) failing any indication thereon, under the law of the country in which the award is to be made;
(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.

The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration."

[311] *European Convention on International Commercial Arbitration of 1961* done at Geneva, April 21, 1961 United Nations, Treaty Series , vol. 484, p. 364 No. 7041 (1963-1964).

[312] Piero Bernardini, "Chapter 17: The Problem of Arbitrability in General," in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (United Kingdom: CMP Publishing, 2009), 510–11.

[313] Ibid. at 511.

[314] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 15.

[315] Homayoon Arfazadeh, "Arbitrability under the New York Convention: The Lex Fori Revisited," *Arbitration International* 17, no. 1 (2001): 80.

[316] Hanotiau, "The Law Applicable to Arbitrability," 155; Jan Paulsson, "Arbitrability, Still Through a Glass Darkly," *ICC International Court of Arbitration Bulletin - Special Supplement: Arbitration in the Next Decade*, 1999, 97.

governing the contract is, nevertheless, an unlikely candidate for the assessment of arbitrability because the arbitration agreement is considered as a separate agreement from the law governing the contract.[317] Consequently, the law governing the arbitration agreement is theoretically different from the law governing the main contract, and the substantive law governing the main contract cannot be the law governing the arbitration agreement.[318] Another separate argument against the application of the law applicable to the merits of the dispute is that the issue of arbitrability concerns the question of jurisdiction, which signifies that the law governing the substance of the dispute is irrelevant for the discussion.[319]

3.4.3 The Application of the Law of the Seat of Arbitration

The *lex arbitri* cannot be construed as entirely irrelevant in the examination of arbitrability.[320] Traditionally, when a party contends the invalidity of the arbitration clause on the purported non-arbitrability ground, the arbitrators generally rely on the law of the seat of arbitration to determine arbitrability of a dispute.[321] Professor Bernardini contemplates that the *lex arbitri* is applicable when the parties have not chosen the law governing the validity of the arbitration agreement.[322] The rationale behind this opinion is that the seat of arbitration, being the place of performance of the arbitration agreement, has the closest connection to the arbitration agreement.[323]

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[317] Piero Bernardini, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to Arbitration Clause," in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, International Council for Commercial Arbitration Congress 9 (The Hague: Kluwer Law International, 1999), 201.

[318] A. J. van den Berg, "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note," in *50 Years of the New York Convention: ICCA International Arbitration Conference*, International Council for Commercial Arbitration Congress 14 (Kluwer Law International, BV, 2009), 655; Kronke et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 54; Markus A. Petsche, "International Commercial Arbitration and the Transformation of the Conflict of Laws Theory," *Michigan State Journal of International Law* 18, no. 3 (2010): 466.

[319] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 15.

[320] Kronke et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 349.

[321] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 13; Lehmann, "A Plea for a Transnational Approach to Arbitrability in Arbitral Practice," 758; Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 197.

[322] Bernardini, "Chapter 17: The Problem of Arbitrability in General," 513.

[323] Bernardini, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to Arbitration Clause," 201; Bernardini, "Chapter 17: The Problem of Arbitrability in General," 513.

The relevance of the law of the seat of arbitration can also be identified from the perspective of the recognition and enforcement of an arbitral award.[324] Article V(1)(a) of the *New York Convention* provides that the enforcing court may refuse recognition and enforcement of a foreign award if the court finds that the arbitration agreement is invalid under "the law to which the parties have subjected it or, failing any indication thereon, under the country where the award was made."[325] Therefore, in the event that the parties do not indicate the law governing the arbitration agreement, the *lex arbitri* is applicable to determine the validity of the arbitration agreement, and consequently, the arbitrability of the dispute.[326]

In addition, the relevance of the law of the seat of arbitration extends to the consideration of the validity of an award. The *New York Convention* does not stipulate reasons for award annulment. Nevertheless, Article 34(2)(b)(i) of the *UNCITRAL Model Law* stipulates clearly that the court may set aside an award on the ground that the subject matter of the dispute is incapable of settlement by arbitration under the *lex fori*. Depending on the approach of the enforcing country in relation to Article V(1)(e) of the *New York Convention*,[327] an annulled award may or may not be enforceable. In recognizing the relevance of the seat of arbitration, Professor Bernardini also advocates that the arbitrators should always be cautious about the principle of international public policy of the seat of arbitration in order to secure that the arbitral award would not be set aside by the court of the seat of arbitration.[328]

In contrast to the position above, there are scholars who claim that arbitrators should apply the law of the seat of arbitration *only if* the dispute has a territorial connection to the seat of arbitration.[329] From the viewpoint of conflict of jurisdiction, Professor Brekoulakis points out that States stipulate the rules concerning inarbitrability of disputes in order to protect the exclusive

[324] Bernardini, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to Arbitration Clause," 203.
[325] Bernardini, "Chapter 17: The Problem of Arbitrability in General," 513.
[326] Ibid.
[327] Article V(1)(e) of the *New York Convention* stipulates that the enforcing court may refuse recognition and enforcement of a foreign award that has been set aside or suspended by a competent authority, of the country in which, or under the law of which, that award was made.
[328] Bernardini, "Chapter 17: The Problem of Arbitrability in General," 513.
[329] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 13–14.

jurisdiction of its court; the purpose is not to ban international arbitration in general.[330] In the occasion where the dispute has no territorial link to the seat of arbitration, the argument is that the authority of the arbitral tribunal to solve the dispute should not conflict with the exclusive jurisdiction of the court of the seat of arbitration, and therefore, the arbitrators should consider that the dispute is arbitrable.[331] While this argument sounds reasonable, the drawback of this approach lies in a disregard of the law of the seat of arbitration to determine arbitrability of a subject matter of a dispute can lead to award annulment.[332] In addition, as argued in Chapter II, only a minority of countries confirms the enforcement of an award that has been set aside by the competent court.[333]

Professor Bernard Hanotiau is another scholar who claims that the law of the seat of arbitration is applicable only when a certain situation arises. The situation that allows the application of the law of the seat of arbitration is:

> (a) When, this is the first hypothesis, the law applicable to the arbitration agreement declares the dispute non-arbitrable contrary to the law of the seat and (i) either the latter contains a substantive rule leading to declare the particular case arbitrable or (ii) the foreign law which is applicable to the agreement goes against a transnational principle of international commercial arbitration;
> (b) When, and this is the second hypothesis, the law applicable to the arbitration agreement declares the dispute arbitrable contrary to a principle of international public policy of the seat of the arbitration, any award rendered in violation of such a principle could be set aside. But this is a most unlikely situation.[334]

Professor Hanotiau further explains the second hypothesis that he raised in pointing out that the arbitrators should evaluate the closeness between the dispute and the seat of arbitration.[335] One of the examples that the scholar provides is the case between landlords and tenants. If the building is not located in the place where the arbitration is seated, even though the law of the seat objects

[330] Stavros L. Brekoulakis, "Arbitrability and Conflict of Jurisdictions: The (Diminishing) Relevance of Lex Fori and Lex Loci Arbitri," in *Conflict of Laws in International Arbitration* (Sellier European Law Publishers, 2011), 122.
[331] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 14.
[332] Article 34(2)(b)(i) of the *UNCITRAL Model Law* stipulates that a court may set aside an arbitral award if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State".
[333] Article V(1)(e) of the *New York Convention* provides that a court may refuse recognition or enforcement of a foreign award if the award has been set aside by the court of the place where the award was made.
[334] Hanotiau, "The Law Applicable to Arbitrability," 157–58.
[335] Ibid. at 158.

arbitrability of this case, the arbitrators should consider the dispute arbitrable if the law chosen by the parties permit arbitrability of the dispute.

3.4.4 The Application of the Law of the Place of Award Enforcement

Another possible country's law that can be considered for the question of arbitrability is the law of the place of award enforcement based on an observation that a court of the enforcing State may refuse enforcement of the award on the ground that the subject matter of the dispute is not arbitrable under the law of the enforcing State.[336] Professor Brekoulakis advocates that the arbitrators should consider the applicable law from the perspective of award enforcement.[337] Regardless of the law of the place where the arbitration is seated, if the award "is able to successfully dispose of the dispute", the arbitrators should decide that dispute is arbitrable.[338] To clarify his suggestion, the scholar specifies an example about a dispute concerning ownership of a patent. Professor Brekoulakis suggests that the arbitrators should consider whether the place where the patent is registered permits arbitrability of this type of dispute.[339] If the answer is affirmative, the arbitrators should consider the dispute arbitrable even if the seat of arbitration does not permit arbitrability of this type of dispute.[340]

The example that Professor Brekoulakis stated is a case in which the place of award enforcement can be clearly identified because the place of registration of a patent is specific. However, the consideration of the law of the place of award enforcement to govern issue of arbitrability may not be helpful when the place of award enforcement cannot be identified in advance as there can be more than one place for the award enforcement purpose. Professor Loukas Mistelis points out that tribunals have been reluctant to consider the dispute inarbitrable based on the

[336] Emmanuel Gaillard, Berthold Goldman, and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), para. 559.
[337] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 15.
[338] Ibid.
[339] Ibid. at 16.
[340] Ibid.

law of the possible place of award enforcement on the ground that assets may also be available in another country.[341]

3.4.5 The Application of the Mandatory Jurisdictional Rule of the Place where the Case is Closely Connected

In the situation where the seat of arbitration has no connection with the dispute, the dispute may have a nexus with another country, which has a mandatory jurisdictional rule that demands the dispute to be submitted to its court.[342] The situation is likely the country of place of contractual performance or the place of award enforcement.[343] In case the parties' transaction affects public interests of the country, the law of that country may require that the dispute be subject to an exclusive jurisdiction of the court in that country.

An *Interim Award in ICC Case No. 6149* can illustrate this situation. According to this award, Claimant (Korean) had a dispute with Defendant (Jordan) concerning a performance of bond through a bank in Jordan.[344] The parties had an arbitration clause designating arbitration seated in Paris, France.[345] After Claimant initiated an arbitration proceeding, Defendant objected jurisdiction of the arbitral tribunal on the ground that the dispute is inarbitrable under Jordan law, which is the law of the place for the performance of bond.[346] In this case, the seat of arbitration does not have any nexus with the dispute, but the law of the place of performance has a mandatory provision that demands for a jurisdiction of its court. The question, then, is whether or not this mandatory provision binds the arbitration.

This evaluation is relevant to the discussion in Section 3.2.1, which explains that a court may refuse to enforce an arbitration clause in considering that dispute affects mandatory rules of that country and the case is, therefore, subject to jurisdiction of the court. Professor Brekoulakis also considers that the rule that demand exclusive jurisdiction of its court is a rule of mandatory

[341] Mistelis, "Chapter 1: Arbitrability - International and Comparative Perspectives: Is Arbitrability a National or an International Law Issue?," 14.
[342] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 15.
[343] Hanotiau, "The Law Applicable to Arbitrability," 158.
[344] *Interim Award in ICC Case No. 6149 of 1990*, Yearbook Commercial Arbitration XX (1995), 41.
[345] *Interim Award in ICC Case No. 6149 of 1990*, Yearbook Commercial Arbitration XX (1995), 42.
[346] *Interim Award in ICC Case No. 6149 of 1990*, Yearbook Commercial Arbitration XX (1995), 43.

character.[347] Accordingly, Professor Hanotiau and Professor Brekoulakis question whether or not the arbitrators are bound to apply the mandatory jurisdictional rule of that other country even though the seat of arbitration is elsewhere.[348]

Professor Brekoulakis considers that the arbitrators should ignore the mandatory jurisdictional rule of the foreign country because the rule has no extraterritorial power to bind the international arbitration seated in a different country.[349] In addressing this question, Professor Hanotiau adopts the viewpoint that international arbitration does not have a forum, and arbitrators are not guardians of any country's public policy.[350] All policies are perceived to be foreign to the law governing the contract.[351] Accordingly, Professor Hanotiau asserted that arbitrators are not bound to apply these rules that limit arbitrability.[352]

3.5 Analysis on the Previous Methods to Address the Issue of Arbitrability

The discussions above entail two main approaches to address the question of arbitrability. The first approach addresses arbitrability from the viewpoint of the law governing the validity of an arbitration agreement. Hence, the group of scholars behind this position recommends from the viewpoint of identifying the law governing the validity of the arbitration agreement. The second group of scholars approaches the issue of arbitrability from the viewpoint of conflict of jurisdiction, and tries to solve the problem by considering the law applicable to the question of jurisdiction.

Regarding the first approach, scholars such as Professor Hanotiau and Professor Bernardini, considers that the *New York Convention* implies that the law governing the validity of the arbitration agreement is to be considered as the law governing the issue of arbitrability.[353] Consequently, to determine arbitrability, the arbitrators have to determine the law governing the arbitration agreement. Nevertheless, the parties generally do not conclude an agreement concerning law

[347] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 15.
[348] Ibid.; Hanotiau, "The Law Applicable to Arbitrability," 158.
[349] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 15.
[350] Hanotiau, "The Law Applicable to Arbitrability," 158–59.
[351] Ibid. at 159.
[352] Ibid.
[353] Bernardini, "Chapter 17: The Problem of Arbitrability in General"; Hanotiau, "The Law Applicable to Arbitrability."

governing the arbitration agreement.[354] Professor Hanotiau makes a general remark that the parties' silence about the law governing the arbitration agreement grants the arbitrators the authority to determine the applicable law as appropriate.[355] The law governing the main contract does not necessarily have to be the law governing the arbitration agreement: this is based on the principle of separability, which considers that the arbitration agreement is a separate agreement from the main contract.[356] To determine the applicable law on arbitrability, Professor Bernardini applies a close connection test and claims for the application of the law of the seat as the scholar considers that the seat of arbitration has the closest connection to the dispute because the seat is the place where the arbitration agreement is enforced.[357]

For the second approach, a determination of arbitrability is proposed from the viewpoint of conflict of jurisdiction.[358] Based on this consideration, Homayoon Arfazadeh recommends that the law governing arbitrability is the law of the seat of arbitration.[359] Contrastingly, Professor Brekoulakis suggests that the law of the seat of arbitration is applicable only if the dispute has a territorial link to the seat of arbitration.[360] Without suggesting any specific rule governing arbitrability, Professor Brekoulakis recommends that the arbitrators should consider whether accepting arbitrability of the dispute would be in conflict with rules on exclusive jurisdiction of any country in order to determine whether or not the arbitrators have the authority over the case.[361]

This thesis does not support the first approach, which applies the rule governing general validity of arbitration agreement as the law governing arbitrability. Under the *New York Convention*, one of the general requirements for a valid arbitration clause is that the subject matter of the dispute

[354] Hanotiau, "The Law Applicable to Arbitrability," 155.
[355] Ibid.
[356] Hilmar Raeschke-Kessler, "Some Developments on Arbitrability and Related Issues," in *International Arbitration and National Courts: The Never Ending Story*, International Council for Commercial Arbitration Congress 10 (The Netherlands: Kluwer Law International, 2001), 50.
[357] Bernardini, "Chapter 17: The Problem of Arbitrability in General," 513.
[358] Arfazadeh, "Arbitrability under the New York Convention: The Lex Fori Revisited," 74; Brekoulakis, "Arbitrability and Conflict of Jurisdictions: The (Diminishing) Relevance of Lex Fori and Lex Loci Arbitri," 122.
[359] Arfazadeh, "Arbitrability under the New York Convention: The Lex Fori Revisited," 75.
[360] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 13.
[361] Arfazadeh, "Arbitrability under the New York Convention: The Lex Fori Revisited," 76.

is arbitrable.[362] An agreement to submit to international arbitration a subject matter that cannot be arbitrated is an invalid agreement.[363] Because inarbitrability is one of the reasons to invalidate an arbitration clause, some scholars claim that the law governing validity of the arbitration clause should govern the issue of arbitrability as well. Following this viewpoint, the law governing arbitration clause should determine arbitrability of a subject matter. In fact, the choice of law governing the issue of arbitrability and validity of arbitration clause are two separate questions.[364] The law governing the validity of an arbitration agreement generally covers only issues of substance validity of the arbitration agreement, such as question of consent, parties' capacity to enter into the agreement or scope of the agreement.[365]

Arbitrability is a separate question. This thesis supports the second approach in characterizing the question of arbitrability as the issue of jurisdiction, and solving the issue from the viewpoint of choice of law governing jurisdiction.[366] Arbitrability concerns the allocation of jurisdiction between a domestic court and international arbitration,[367] and therefore, directly concerns rule on compulsory jurisdiction of the country's court.[368] Consequently, arbitrability is a procedural question,[369] and the law governing arbitrability should not be substantive law governing substance validity of the arbitration agreement. Thus, a determination of the law governing arbitrability should be made from the perspective of jurisdiction.

Sections 3.4 and 3.5 have assessed and analyzed previous scholarly discussions concerning the law governing the issue of objective arbitrability. Next, the thesis will proceed to provide its

[362] Kronke et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 69.
[363] George A. Bermann, "Chapter 5: The Role of National Courts at the Threshold of Arbitration," in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (The Netherlands: Kluwer Law International BV, 2017), 47.
[364] Mauro Rubino-Sammartano, *International Arbitration Law and Practice*, 3d ed. (JurisNet, LLC, 2014), 157.
[365] Berg, "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note," 655.
[366] Charalambos Pamboukis, "Chapter 7: On Arbitrability: The Arbitrator as a Problem Solver," in *Arbitrability: International and Comparative Perspective* (The Netherlands: Kluwer Law International, 2009), 127.
[367] Arfazadeh, "Arbitrability under the New York Convention: The Lex Fori Revisited," 77–78.
[368] Patrick M. Baron and Stefan Liniger, "A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany," *Arbitration International* 19, no. 1 (2003): 27.
[369] Brekoulakis, "Arbitrability and Conflict of Jurisdictions: The (Diminishing) Relevance of Lex Fori and Lex Loci Arbitri," 126.

recommendation on the method arbitrators can adopt in order to determine whether or not the subject matter of the dispute is arbitrable.

3.6 Recommendation on a Method to Determine Arbitrability

In perceiving that international arbitration is not fully detached from the seat of arbitration, this thesis considers that the law of the seat of arbitration regulates procedural issue of arbitration in general. However, the issue of arbitrability deserves a more critical discussion than to simply accept the application of the law of the seat. The reason is that the issue of arbitrability can involve matter of public interests of more than just the country in which the arbitration is seated. The issue of arbitrability of a dispute may contravene mandatory rule that grants compulsory jurisdiction to a court in a country other than the seat of arbitration. Hence, the arbitrators should evaluate the issue carefully when having to determine their authority to arbitrate the subject matter of the dispute.

As elaborated above, arbitrability is a question of jurisdiction, and is a procedural question by nature. Therefore, the thesis proposes that the law of the seat of arbitration governs the issue of arbitrability. In addition to verifying arbitrability from a reference to the law of the seat of arbitration, the thesis proposes that the arbitrators should also consider the applicability of a foreign mandatory jurisdictional rule that demands a compulsory jurisdiction of its court. Sections 3.6.1 and 3.6.2 will explain the thesis's recommendations on general rule governing arbitrability and the additional consideration respectively.

3.6.1 The Relevance of the Law of the Seat of Arbitration to Determine Arbitrability

To begin with, the proposed recommendation on the attachment of arbitration and State in Chapter II leads to a conclusion that the law of the seat of arbitration governs the conduct of arbitration. Arbitrability reflects a conflict of jurisdictions,[370] and is therefore an issue of procedure by nature.[371] Accordingly, the law of the seat of arbitration is applicable to determine the issue of

[370] Rubino-Sammartano, *International Arbitration Law and Practice*, 158.
[371] Brekoulakis, "Arbitrability and Conflict of Jurisdictions: The (Diminishing) Relevance of Lex Fori and Lex Loci Arbitri," 126.

arbitrability.[372] As arbitration takes place in the country, the law of the country is the primary basis to determine whether or not the dispute could be submitted to international arbitration.[373] Therefore, the arbitrators should refer to the law of the seat of arbitration to determine arbitrability of the dispute.

There are three main reasons to further support the use of the law of the seat of arbitration to determine arbitrability. First, the use of law of the seat of arbitration as the law governing arbitrability also reflects the parties' intention. The parties' election for a certain country as the seat of arbitration marks their indirect choice of law governing the arbitration.[374] Marike Paulsson specifically considers that the parties' choice of the seat infers the parties' intention of having the law of the seat of arbitration governing the issue of arbitrability.[375] Hence, the parties' choice of a certain country as the seat of arbitration determines also the choice of law governing arbitrability.

Second, the drafters of the *UNCITRAL Model Law* also recognized the application of the law of the seat of arbitration for the determination of arbitrability of a dispute. When drafting Article 34(b)(2)(i) of the *UNCITRAL Model Law*, the drafters of the *UNCITRAL Model Law* also intended the arbitration law to be the law governing arbitrability. This provision concerns a setting aside procedure by the court of the seat of arbitration on the ground that the subject matter of the dispute is incapable of settlement by arbitration *under the law of the forum (seat of arbitration)*. According to a guide to the *UNCITRAL Model Law*, when drafting Article 34(b)(2)(i), the delegates had a debate about whether or not to delete this provision.[376] The Chairman suggested a compromise solution, which is to delete the choice-of-law rules in that article and leave discretion to the court to determine the law governing arbitrability of the dispute.[377] Most delegates objected to this compromise solution

[372] Mistelis, "Reality Test: Current State of Affairs in Theory and Practice Relating to 'Lex Arbitri,'" 166.
[373] Poudret and Besson, *Comparative Law of International Arbitration*, 117.
[374] Ibid. at 115.
[375] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International B.V., 2016), 90.
[376] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1989), 973–77.
[377] Ibid. at 975.

because it could create uncertainty to the parties.[378] Mr. Holtzmann, a delegate from America, pointed out that:

> "When parties sat down to draft a contract, they needed to know whether local laws of the place of arbitration permitted arbitration of the kinds of dispute that might arise. The model law should enable the parties to know in advance under what conditions arbitration might take place, but the Chairman's suggestion would have the effect of leaving them entirely in the dark on that point."[379]

The final conclusion of the debate was that this provision should be retained, and should include the choice-of-law rule in order to allow predictability for the parties.[380]

Third, the application of the law of the seat of arbitration to determine arbitrability is also incompliance with a consideration of validity of the award from the viewpoint of the duty of the arbitrators to render a valid award. The duty of the arbitrators to render an enforceable award may be debatable; however, the arbitrators cannot refuse their duty to render a valid award under the applicable arbitration law and rule.[381] From the viewpoint of the *UNCITRAL Model Law* the award would not be valid if it the subject matter of the dispute is incapable of settlement by arbitration.

Article 34(2)(b)(i) of the *UNCITRAL Model Law* grants the court of the seat of arbitration the authority to set aside an arbitral award on the ground that the subject matter of the dispute is incapable of settlement by international arbitration under the law of the forum. In applying the law of the seat of arbitration to determine arbitrability of the dispute, the arbitrators can ensure that the court of the seat of arbitration would not set aside the award on the ground of inarbitrability. In disregarding the law of the seat of arbitration, the arbitrators would risk the validity of the award.[382]

Even though an arbitral award that has been set aside by the seat of arbitration has the possibility of enforcement in other countries under the name of a 'floating award',[383] Chapter II already argued that this possibility is made under an exceptional condition as provided under Article

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[378] Ibid. at 973–77.
[379] Ibid. at 977.
[380] Ibid. at 1001.
[381] Franz T. Schwarz and Christian W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, 2009), paras. 17-054; Poudret and Besson, *Comparative Law of International Arbitration*, 610.
[382] Arfazadeh, "Arbitrability under the New York Convention: The Lex Fori Revisited," 79.
[383] See, Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," 167.

VII(1) of the *New York Convention*. In addition, only a minority of countries adopts this trend.[384] Therefore, the law of the seat of arbitration is relevant for the determination of arbitrability of a dispute.

Regarding how to determine arbitrability based on the rule of the seat of arbitration, the arbitrators may have to consult with arbitration law of the seat of arbitration or the decision of the courts of the seat of arbitration. Most arbitration laws do not stipulate the law governing arbitrability.[385] National legislations generally do not have a rule that provides a list of disputes whose subject matters are capable for settlement by means of international commercial arbitration. The legislation may, however, contain a general provision that describes the type of disputes that are arbitrable, which requires further interpretation. For instance, Article 177(1) of the *Swiss Federal Act on Private International Law of 18 December 1987* states that disputes 'involving an economic interest' can be submitted to arbitration. Based on this provision, one scholar interpreted that a claim for monetary payment as a compensation of a violation of moral rights is arbitrable.[386] In addition, as described in section 3.2.2, the court of the country may have decided that a certain subject matter is or is not arbitrable. In the *American Safety* case, for example, the U.S. court decided that a dispute involving a violation competition law is not arbitrable.[387]

Thus, to determine arbitrability of the subject matter of the dispute, the arbitrators need to investigate whether such rule exists under the law of the seat of arbitration. If the arbitrators are convinced that subject matter of the dispute is inarbitrable under the rule of the seat of arbitration, the arbitrators should refuse the authority to arbitrate the dispute.

In summary, because arbitrability is a procedural matter, the law of the seat of arbitration governs arbitrability. When having to determine arbitrability of the dispute, the arbitrators have to consider whether the law of the seat of arbitration permits arbitrating the subject matter of the

[384] Berg, "Should the Setting Aside of Arbitral Awards Be Abolished?," 17.
[385] Mistelis, "Chapter 1: Arbitrability - International and Comparative Perspectives: Is Arbitrability a National or an International Law Issue?," 10.
[386] Francois Dessemontet, "Chapte 19: Arbitration of Intellectual Property Rights and Licensing Contract," in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (United Kingdom: CMP Publishing, 2009), 557.
[387] American Safety Equipment Corp v JP Maguire Co, 391 F 2d 821 (2nd Cir 1968).

dispute. If the law of the seat of arbitration considers that the dispute is inarbitrable, the arbitrators should reject their authority to arbitrate the dispute. In disregarding the relevance of the law of the seat of arbitration, the arbitrators would run the risk of issuing an invalid award, which is less likely to be enforceable in another country.

The application of the law of the seat of arbitration does not always lead to a complete disregard of a foreign law. The law of the seat of arbitration may require the arbitrators to consider the applicability of a foreign law that demands compulsory jurisdiction of its court. In that case, the arbitrators should also consider the applicability of the foreign rule. Section 3.6.2 will further clarify this point.

3.6.2 A Consideration of the Mandatory Jurisdictional Rule of Other Country under the Law of the Seat of Arbitration

In addition to the application of the law of the seat of arbitration, the thesis recommends an additional consideration to determine arbitrability of the dispute. The purpose of this additional consideration is to avoid the problem of forum shopping, for instance, when parties elect for arbitration in order to avoid compulsory jurisdiction of a competent court. The issue of arbitrability can involve matter of public interests of a country other than the country in which the arbitration is seated. Thus, even if the law of the seat of arbitration permits arbitrability of the dispute, the dispute may be subject to a rule that demands compulsory jurisdiction of a court in a country other than the seat of arbitration.[388]

Due to the mandatory nature of this jurisdictional rule, Professor Lew *et al.* argue that the rule governing arbitrability is applicable irrespective of the parties' intention of avoiding its application.[389] Hence, the thesis proposes that the arbitrators should, determine whether the law of a country other than the law of the seat of arbitration requires the particular dispute to be submitted to a domestic court of the foreign country.

[388] Brekoulakis, "Chapter 6: Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori," 15.
[389] Lew, Mistelis, and Kröll, *Comparative International Commercial Arbitration*, 221.

Depending on the arbitration law of different countries, the law may or may not require the arbitrators to consider the rule demanding compulsory jurisdiction of a court in a foreign country. Even in the case where the arbitration law does not stipulate expressly about the consideration of the rule safeguarding compulsory jurisdiction of a foreign court, the thesis proposes that the arbitrator should consider a possibility of the application of the rule. If the arbitrators encounter an issue that may be subject to a compulsory jurisdiction of a court, the arbitrators should determine the applicability of the rule that demands compulsory jurisdiction of its country's court. However, because arbitrability is a jurisdictional question, the arbitrators are bound by the arbitration law of the seat of arbitration, and cannot completely disregard the application of the law of the seat of arbitration. Therefore, in order to determine the applicability of the foreign law, the arbitrators have to consult with the legislation of the law of the seat of arbitration.

One possibility of considering the applicability of a foreign rule on jurisdiction is when the law of the seat of arbitration expressly demands the arbitrators to do so. This situation can be clarified by referring to the final award of *ICC Case No. 6162 of 1990*.[390] The parties in the arbitration concluded a contract under which the Claimant (a French consultant) had to conduct a technical and financial study as well as to prepare a book for a project to construct a plant for the Defendant (Egyptian local authority). The contract also contained an arbitration clause designating arbitration seated in Geneva under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Under the parties' agreement, "Egyptian laws will be applicable."[391]

As the parties had a dispute concerning payment, Claimant submitted a request for the arbitration. Defendant objected the jurisdiction of the arbitrator on the ground that the dispute is inarbitrable under Egyptian law, which demands exclusive jurisdiction of Egyptian court over the parties' dispute. The Defendant implicitly considered that the Egyptian law, which is the law governing the contract, governs the issue of arbitrability of the case. Thus, the arbitrator had to

[390] *Final Award in ICC Case No. 6162 of 1990*, Yearbook Commercial Arbitration XVII (1992), 153.
[391] *Final Award in ICC Case No. 6162 of 1990*, Yearbook Commercial Arbitration XVII (1992), 153.

evaluate whether and to what extent Swiss law, rather than Egyptian law, governs the question concerning arbitrability of the case.[392]

The arbitrators considered that the *Swiss Intercantonal Arbitration Convention* governs any arbitration proceedings that are seated in Switzerland, and applied Swiss law to determine arbitrability of the dispute.[393] In this particular case, the Swiss provision concerning arbitrability also requires the arbitrators to consider mandatory provision that demands for an exclusive jurisdiction of the court. Therefore, the arbitrators determine the applicability of the rule on exclusive jurisdiction of the Egyptian court by interpreting the Swiss law on arbitrability.[394]

Assuming that Swiss law were silent about the consideration on the rule on exclusive jurisdiction, the next question is whether or not the arbitrators have the authority to determine the applicability of the Egyptian law. In this case, the application of a foreign rule may be possible through an interpretation of the rule of international public policy of the seat of arbitration.

In another case, decided under a partial award in *ICC Case no. 8420 of 1996*, the arbitrator had to determine arbitrability of the dispute as the defendant objected the jurisdiction of the arbitrator by relying on provisions of Italian law, which demanded exclusive jurisdiction of the Italian court.[395] Claimant (Syrian agent) undertook to promote the sale of products of Defendant (Italian supplier) under an agency agreement and two secondary contracts, which included an arbitration clause designating international arbitration having its seat in Geneva and being governed by *the ICC Rules of Arbitration*.[396] The excerpt of the case did not specify the law governing the contract, but implied that Italian law was the *lex causae*.[397] As the parties had a dispute over the agreement and contracts, Claimant submitted the dispute to a sole arbitrator.[398] Defendant challenged the jurisdiction of the arbitrator on the ground that the dispute is subject to exclusive jurisdiction of the Italian court under Articles 409 and 413 of *the Italian Code of Civil Procedure*.

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[392] *Final Award in ICC Case No. 6162 of 1990*, Yearbook Commercial Arbitration XVII (1992), 157.
[393] *Final Award in ICC Case No. 6162 of 1990*, Yearbook Commercial Arbitration XVII (1992), 157.
[394] *Final Award in ICC Case No. 6162 of 1990*, Yearbook Commercial Arbitration XVII (1992), 159.
[395] *Partial Award in ICC Case No. 8420 of 1996*, Yearbook Commercial Arbitration XXV (2000), 328.
[396] *Partial Award in ICC Case No. 8420 of 1996*, Yearbook Commercial Arbitration XXV (2000), 328.
[397] See, *Partial Award in ICC Case No. 8420 of 1996*, Yearbook Commercial Arbitration XXV (2000), 331.
[398] *Partial Award in ICC Case No. 8420 of 1996*, Yearbook Commercial Arbitration XXV (2000), 328.

In determining arbitrability of the dispute, the arbitrator had to determine the law governing arbitrability. As Chapter 12 of the *Swiss Federal Act of Private International Law*, which concerns international arbitration, governs the present arbitration, the arbitrator had to further determine whether Article 177(1) of the Act is applicable to determine arbitrability of the case.[399] Having found that Article 177(1) is a rule of substantive nature, and not a choice-of-law rule, the arbitrator determined that Article 177 of the *Swiss Federal Act of Private International Law* is applicable to determine arbitrability of the case.[400] The arbitrator proceeded to investigate whether Article 177(1) was subject to any restriction, and found that the only restriction on Article 177(1) is international public policy, which is a reason to set aside an award based on Article 190(2)(e) of the *Swiss Federal Act of Private International*.

As the Defendant referred to Italian law to oppose the jurisdiction of the arbitrator on inarbitrability ground, the arbitrator had to determine whether the Italian law fell under the definition of international public policy provided under Article 190(2)(e) of the *Swiss Federal Act of Private International*. In citing a decision of the Swiss Supreme Court, the arbitrator found that the public policy restriction under Article 190(2)(e) of the *Swiss Federal Act of Private International* included "fundamental principles of law which are to be applied regardless of the connection of the dispute to a specific country."[401] As the nature of the Italian law was not 'fundamental principles of law which are to be applied regardless of the connection of the dispute to a specific country' and the intention of Italian law does not cover the particular case, the arbitrator decided that the Italian law was not applicable for the assessment of arbitrability of the present dispute.[402]

In summary, in the above two situations, the law of the seat of arbitration provides a possibility for the arbitrators to determine the applicability of a foreign jurisdictional rule that demands compulsory jurisdiction of a court in the foreign country. Therefore, in order to determine arbitrability of the dispute, the thesis recommends that the arbitrator should first refer to the law of

[399] Article 177(1) of the *Swiss Private International Law Act* provided that: "Any dispute of financial interest may be the subject-matter of arbitration."
[400] *Partial Award in ICC Case No. 8420 of 1996*, Yearbook Commercial Arbitration XXV (2000), 331.
[401] *Partial Award in ICC Case No. 8420 of 1996*, Yearbook Commercial Arbitration XXV (2000), 334.
[402] *Partial Award in ICC Case No. 8420 of 1996*, Yearbook Commercial Arbitration XXV (2000), 335-36.

the seat of arbitration. If the law of the seat of arbitration permits the subject matter of the dispute to be submitted to international arbitration, the arbitrators should consider whether arbitrating the dispute would contravene the rule on compulsory jurisdiction of a court of another country and the applicability of that rule. To determine the applicability of the rule, the arbitrators should consider whether the law of the seat of arbitration provides a possibility for the arbitrators to consider the application of the foreign rule.

3.7 Conclusion

In conclusion, this chapter has discovered that the application of the Contractual Theory and Autonomous Theory is inefficient to address the issue of arbitrability as this theory only respects the parties' intention and does not pay regard to any country's public interests. The application of the Jurisdictional and Hybrid Theories leads to the determination of arbitrability based on the law of the seat of arbitration. In order to test the efficiency of the legal theories and also to assess other possible solutions to determine the law governing arbitrability, the thesis also investigated further into relevant legislations and scholarly discussions on this issue.

Article II of the *New York Convention* also does not provide any guidance on the determination of the law governing arbitrability.[403] By virtue of electing for the law of the place that governs the arbitration clause, scholarly discussions led to a suggestion of the application of different country's law, including the law of the seat of arbitration, the law governing the arbitration clause, the law of the place of award enforcement. This thesis denies the use of law governing arbitration agreement as the law governing arbitrability on the ground that arbitrability is a procedural question concerning jurisdiction between State court and arbitration; however, the law governing arbitration agreement is a substantive law that does not involve the question of jurisdiction.

In considering that arbitrability may involve compulsory jurisdiction of State courts, the thesis proposes that the arbitrators should adopt a two-stage process to address the question of arbitrability. First, the law of the seat of arbitration, which governs the conduct of arbitration, should govern the

[403] Paulsson, "Arbitrability, Still Through a Glass Darkly," 98.

question of arbitrability. In case the law of the seat of arbitration considers that the dispute is arbitrable, but the law of another country requires compulsory jurisdiction of its State court, the arbitrators should evaluate the applicability of the latter law. In order to determine the applicability of the foreign law, the arbitrators should consult with the exceptions provided under the law of the seat of arbitration.

This chapter has also pointed out that the courts of a certain country have decided to allow cases that involve an alleged violation of rules protecting public interests to be submitted to arbitration. A follow up question that the arbitrators would encounter is whether the substantive rules that aim to protect public interests are applicable in the case, for instance, if the rule is not part of the law chosen by the parties. The next chapter will address this question.

Chapter IV: A Resolution of Conflicting Interests in the Issue of the Applicability of Internationally Mandatory Rules

4.1 Introduction

Internationally mandatory rules ("IMR") are perceived as rules that aim to protect a country's social, economic or political interests. They are regarded by the enacting State to be so important that they have to be applied regardless of the governing law of the contract.[404] This means that even in the case where the parties have already selected law of a country to be the applicable law, the arbitrators may still have to consider the application of internationally mandatory rules of another country. Therefore, this situation creates a conflict between private and public interests. Mandatory rules may represent public policy of a country,[405] so a non-consideration or non-application of the IMR may lead to an unenforceable award on public policy ground,[406] as stipulated under Article V(2)(b) of the *New York Convention*.[407] The arbitral tribunal would have to consider whether or not to give effect to the IMR.

Internationally mandatory rules are sometimes referred to as "overriding mandatory rules", "overriding mandatory provisions" or "*lois de police*". To understand the concept of this rule, this thesis will use the definition provided under Article 9(1) of the *Regulation (EC) No 593 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations* (the "Rome I Regulation"),[408] which results from a careful discussions among the drafters of the Regulation.[409]

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[404] Peter Edward Nygh, *Autonomy in International Contracts* (Oxford University Press, 1999), 203.
[405] Ibid. at 206.
[406] George A. Bermann, *International Arbitration and Private International Law*, Pocketbooks of The Hague Academy of International Law (Brill Nijhoff, 2017), 409.
[407] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968) (the "New York Convention"). Article V(2)(b) of the *New York Convention* provides that a court may refuse recognition and enforcement of a foreign award if "the recognition or enforcemcnt of the award would be contrary 10 the public policy of that country."
[408] *Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations* (the "Rome I Regulation").
[409] See, Commission for the European Communities, *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* (Green Paper) COM (2002) 654 final, Brussels, 14 January 2003, 33-34; Max Planck Institute for Foreign Private and Private International Law, *Comments on the European Commission's*

Under this provision, internationally mandatory rules or overriding mandatory provision is defined as:

> "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 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 this Regulation."

This definition can break down into two parts. The first part is the legislative purpose behind the rule. Internationally mandatory rules are enacted for the purpose of protecting a country's public interests.[410] Those public interests may include, but are not limited to, political, social or economic organization. Insolvency laws, for instance, can be characterized as IMR because it seeks to safeguard crucial interests, and to be applied regardless of the applicable law or location of the assets.[411]

The second part is the mode of application of the rule. The IMR delineates its own scope of application, and demands to apply only to the situation that falls under its scope of protection.[412] The rules require application regardless of the applicable law. Therefore, regardless of the parties' choice of applicable substantive law, these rules must be applied. In other words, these rules claim to prevail over party autonomy.

Even though it was not expressly provided in the wording of Article 9(1), an implication of the Article signifies the reason behind the prevailing characteristic of IMR. The rules' crucial task to protect a country's public interests creates a situation for the rules to become prevailing over any other principles, such as the principle of party autonomy. However, it is appropriate to remember that Article 9(1) of the *Rome I Regulation* is part of a body of legislation primarily conceived for the court system of EU countries, and it is not specifically addressed to arbitral tribunal. As already described in Chapter II, the peculiarity of arbitration, and in particular its reliance on *lex arbitri*

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, 56-63.

[410] Nygh, *Autonomy in International Contracts*, 199.

[411] Sachs, "Insolvency Proceedings and International Arbitration," 33.

[412] Luca G. Radicati di Brozolo, "Chapter 11: When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal," in *The Impact of EU Law on International Commercial Arbitration* (JurisNet, LLC, 2017), 353–54; Mistelis, "Mandatory Rules in International Arbitration: Too Much Too Early Or Too Little Too Late? Concluding Remarks," 217.

rather than *lex fori*, needs to be factored in the reflection. Therefore, while Article 9(1) of the *Rome I Regulation* may not generally be considered having any binding effect over an arbitral tribunal,[413] its operational mechanism may be either directly (as the applicable law) or indirectly (as a principle) be used by arbitral tribunals in deciding over the issue of choice of law.

Although the parties have chosen the law of a certain country as the governing law, the IMR of different countries can affect the parties' transaction. The most obvious example is the IMR of the place of contractual performance, which can invalidate the parties' agreement or frustrate the performance of the contract.[414] In addition, the IMR of the seat of arbitration may also claim for application because the arbitration is seated in that country.[415] From the perspective of award enforcement, the IMR of the place of award enforcement may be pleaded by a party to be applicable to the case because a non-application of this IMR may lead to an unenforceable award under the consideration of public policy.[416] In addition, even IMR of the law governing the merits of the dispute may be conflicting the parties' agreement. This kind of situation can happen when the parties have concluded an agreement that the IMR of the governing law should not be applied in the case. Finally, due to the observation about the existence of transnational public policy, some legal scholars[417] claim that IMR representing transnational public policy should override party autonomy and should be applied in ICA independently from any States' law because they are widely accepted principle that is shared by most nations. A violation of this rule can lead to an unenforceable award as well because most nations have these principles embedded in their legal system.

The main question this chapter tries to answer is how to strike a balance between the conflict between public interests, represented by IMR, and private interests, signified by the exercise of party autonomy to choose a governing law. This question still does not have a definite answer in the field

[413] Babić, "Rome I Regulation," 72.
[414] Audley Sheppard, "Mandatory Rules in International Commercial Arbitration: An English Law Perspective," *American Review of International Arbitration* 18 (2007): 143.
[415] Bermann, "Mandatory Rules of Law in International Arbitration," 2010, 330–31.
[416] Ibid. at 334.
[417] Blessing, "Choice of Substantive Law in International Arbitration," 61; Yves Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration," *Comparative Arbitration Practice and Public Policy in Arbitration*, 1987, 251.

of international arbitration.[418] To answer this main question, there are several sub-questions that this chapter needs to address. These include the obligation and authority of the arbitral tribunal to look into the question of the applicability of the IMR as well as the criteria to determine for the applicability of the IMR.

Section 4.2 will apply the legal theories that Chapter II has identified in order to solve the legal problem in this chapter. From the application of the legal theories, section 4.2 will prove that a complete reliance on the legal theories is insufficient to solve the problem. Theories are merely the starting points, which are useful to clarify how to perceive international arbitration. As an evaluator of public and private interests, the arbitrators need to find further solutions to solve the problem.

Having proven that legal theories server as a starting point on how to view international arbitration, the research will proceed to identify the arbitrators' authority to consider the applicability of IMR. Section 4.3 will prove that the source of the arbitrators' authority derives from the national law and the parties' agreement.

Next, in Section 4.4, the research will prove that scholars who research in relation to how to deal with the issue of IMR have been suggesting objective criteria for the arbitrators to adopt in order to evaluate the legal issue. Based on the study of the scholarly works, the thesis will proceed to recommend the criteria that the arbitrators should adopt to evaluate the conflict of public and private interests in the issue of applicability of IMR (4.5). Section 4.6 is the conclusion.

4.2 The Application of Legal Theories and Their Insufficiencies to Solve Practical Problem

This section intends to prove that the understanding of the legal theory that defines the nature of international arbitration is merely a starting point. To resolve specific legal issue, it is necessary to further analyze the situation and find a specific legal solution. To prove this, the thesis will first apply each legal theory described in Chapter II and reflect on the implication of each legal theory on the issue of applicability of IMR. Particularly, in each subsections, the thesis will analyze the authority of the arbitral tribunal as well as how the arbitral tribunal should consider the applicability

[418] Renner, "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration," 122.

of the IMR. This section will be divided into three subsections, evaluating the applicability of IMR based on the three groups of legal theories that were identified in Chapter II.

4.2.1 Arbitration Being Bound By a National Legal Order

According to the Jurisdictional Theory, the role of arbitrators resembles that of a judge.[419] Additionally, the law of the seat of arbitration is the only source of authority for the international arbitration.[420] To determine any legal issue, the arbitrators have to consult with the provisions under the law of the seat of arbitration.[421]

Because the role of the arbitrators resembles that of the judges, the authority of the arbitrators to consider the application of any IMR should be the same as the authority of the judges. The way to consider the authority of the arbitrators to apply the IMR depends on the type of the IMR. The IMR that claims for application can be the rules of: the seat, the law governing the merits of the dispute, a third jurisdiction (the place of contractual performance or the place of award enforcement).

Regarding the IMR of the forum, a judge has the role to protect its country's public interests.[422] Accordingly, the judge would have to apply IMR of the forum.[423] Based on this way of consideration, the arbitrators also have the authority and obligation to apply the IMR of the seat of arbitration. The fact that the law of the seat of arbitration binds arbitration does not necessarily mean that the applicable law of the case is the law of the seat. The applicable substantive law can also be the law of other legal systems.[424] Hence, if the applicable law is not the law of the seat, the arbitrators will first have to confirm whether the conflict of laws rule of the seat grants the arbitrators the authority to consider rules of public interests nature of another country. The same strategy applies to the applicability of IMR of other countries. The arbitrators, same as the judges, will have to consult with the private international law rules of the seat of arbitration.

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[419] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 53.
[420] Mann, "Lex Facit Arbitrum," 164.
[421] Ibid.
[422] Lazareff, "Mandatory Extraterritorial Application of National Law," 138.
[423] Nygh, *Autonomy in International Contracts*, 212.
[424] Mann, "Lex Facit Arbitrum," 164.

The methods for application of IMR are to directly apply the rule or to simply give effect to the rule. Regarding the IMR of the seat of arbitration, the arbitrators would have to apply it directly as the judges would apply IMR of the forum. However, for IMR of the applicable law or other countries, if there were a room for application, the arbitrators would have to consult with the private international law rule of the seat of arbitration in order to determine the method of application.[425]

To conclude, the Jurisdictional Theory does not give a definite answer towards the applicability of IMR. Aside from the IMR of the seat of arbitration, the arbitrators would have to further consult with the conflict of laws rule of the seat of arbitration in order to determine their authority and the method of application of the IMR. The Jurisdictional Theory assumes that the private international law system of the seat is fully developed. However, if the seat of arbitration does not have a fully developed conflict of laws rule or when the conflict of laws rule does not specify how a judge would treat the IMR, the Jurisdictional Theory meets its limitation.

4.2.2 Arbitration Being Independent From National Legal Order

As stated in Chapter II, two theories that lead to a detachment of international arbitration from a national legal order are the Contractual Theory and the Autonomous Theory. This section will address the implication of these legal theories respectively in sections 4.2.2.1 and 4.2.2.2.

4.2.2.1 The Contractual Theory

Under the Contractual Theory, the parties have almost unlimited autonomy to agree upon the applicable substantive law.[426] Therefore, the arbitrators have to refer to the parties' agreement or interpret the intention of the parties to determine the applicable law as well as their authorities to apply the law.[427] The intention of the parties can be explicit or interpreted implicitly. If the parties intend for the IMR to be applied, the arbitrators have the authority and can directly apply the IMR.

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[425] Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 210.
[426] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 56.
[427] Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 209.

In case that the parties state clearly their intention regarding the applicability of any IMR, the situation is resolved. However, generally such agreement does not exist, and the arbitrators' have to interpret the parties' implied intent to determine their authority and applicability of the IMR.

The authority of the arbitrator to consider the applicability of the IMR comes from the parties' arbitration agreement. Unless the parties expressly or implicitly grant the arbitrators the authority, the arbitrators do not have the authority to determine the applicability of the IMR. One way of interpreting the arbitrator's authority is to determine whether or not the parties are in dispute about the applicability of the IMR. For instance, Professor Mayer advocates for that in cases where one of the parties pleads for the application of internationally mandatory rules, the parties are in dispute on the matter.[428] In such a case, the arbitral tribunals are merely performing their task and are not acting out of their authority in resolving the parties' dispute when the tribunal considers the issue regarding the applicability of internationally mandatory rules.[429] From this viewpoint, the IMR that the arbitrators have the authority to apply is the IMR that the parties are in dispute about.

Another way to consider the authority of the arbitrators and the applicability of the rule from the viewpoint of the parties' intention is to evaluate based on the types of the IMR. If the IMR is a part of the applicable law, the arbitrators can interpret that the parties also intend for the application of the IMR.[430]

Concerning the IMR of the seat of arbitration, the arbitrators have to ascertain whether, by choosing a certain country as the seat of arbitration, the parties intend for the law of that country to be applied. On this matter, an empirical study has revealed that a majority of the parties choose a venue for arbitration for reasons of convenience and neutrality, and not for the purpose of being bound by the substantive law of the seat of arbitration.[431] In determining the applicable law, an

[428] Mayer, "Mandatory Rules of Law in International Arbitration," 284.
[429] Ibid.
[430] Bermann, *International Arbitration and Private International Law*, 394–95.
[431] Eric E. Bergsten and Stefan Kröll, eds., *International Arbitration and International Commercial Law: Synergy, Convergence, and Evolution : Liber Amicorum Eric Bergsten* (Kluwer Law International, 2011), 376.

arbitral tribunal in the case of *SCC Arbitration, Code 618 (2012): Z (Kazakhstan) vs. C (US)*,[432] also concluded that the parties' choice of a country as the seat of arbitration does not lead to a consideration that the parties intended for the application of substantive law of the seat of arbitration.[433] Therefore, the arbitrators cannot interpret that the parties, in electing a place as a seat of arbitration, intend for the application of IMR of that country.[434]

Another source of IMR is the place of contractual performance. By conducting commercial activity in a territory, the parties should be aware that they are subject to the law of that country. Even if the parties have elected a different law as the applicable law, can the arbitrators then conclude that the parties implicitly intend for the application of the IMR of the place of performance? If the parties are not aware of the existence of the IMR while concluding the contract, can ignorance be an excuse for the non-application of the IMR? These are the questions that the arbitrators need to answer. The legal authority that the arbitrators can use to interpret the parties' intention can be the law that the parties have chosen to govern their agreement.

IMR of the place of award enforcement is another possible candidate for the arbitral tribunal to examine. As explained in Chapter II, although the Contractual Theory tries to detach arbitration from national legal system, it acknowledges that a court can have an influence on arbitration in the case of award enforcement.[435] If the arbitral award is not in compliance with the public policy of the forum, the court can deny enforcement of the award.[436] In relation to this view, under the Contractual Theory, the arbitrators' duty is to settle the dispute and render an award for the parties.[437] If the award were unenforceable, the arbitrators would be considered as not performing their job properly. Therefore, under the Contractual Theory, the arbitrators may need to apply IMR of the place of enforcement in order to ensure the enforceability of the award.

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[432] Linn Bergman, *A Casebook on Choice of Law in Arbitration: A Comprehensive Collection of 101 Previously Unpublished SCC Decisions* (Landa, 2017), 271–73.
[433] Ibid. at 272.
[434] Bermann, *International Arbitration and Private International Law*, 397–98.
[435] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 56.
[436] Ibid.
[437] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 10.

In summary, when the parties have not explicitly concluded an agreement regarding the applicability of the IMR, the arbitrators can directly apply only the IMR of the applicable law. For IMR of the seat, place of performance, and place of enforcement, the arbitrators have to interpret the parties' intention. The Contractual Theory also implies that the arbitrators must not apply the IMR if the parties agree for the non-application of the IMR. In granting party autonomy without any limit, the Contractual Theory can lead to an extreme case whereby the parties can conclude illicit contract without being governed by any law.

4.2.2.2 The Autonomous or Denationalized Theory

The Denationalized Theory argues for the independence of international arbitration from a national legal system. This proposition leads to a conclusion that international arbitration is not bound by public interests of any State.[438] Consequently, IMR of a national legal system should not have any direct effect on the international arbitration as well.

Whereas party autonomy plays an important role under the Autonomous Theory, the source of legitimacy and authority of international arbitration arises from the international arbitration practice.[439] Following this viewpoint, the IMR that can have an effect on ICA under the Autonomous Theory has to be the IMR of a truly international character. These are the IMR that are created by the businessmen and arbitration practices throughout their conduct of international business and arbitration. Professor Kessedjian refers to these rules as transnational public policy.[440] Some legal scholars claim that arbitrators should apply only IMR of this nature.[441]

As the Autonomous Theory considers that the New York Convention is a framework for ICA, IMR of the place of award enforcement may be relevant for the arbitrators to consider. By analogy, IMR are rules that protect public, social and political interests of a country, and it can sometimes

[438] Ralf Michaels, "Roles and Role Perceptions of International Arbitrators," in *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), 71.
[439] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 60.
[440] Catherine Kessedjian, "Transnational Public Policy," in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series 13 (The Netherlands: Kluwer Law International, 2007), 861.
[441] Blessing, "Choice of Substantive Law in International Arbitration," 61; Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration," 251.

considered as public policy under Article V(2)(b) of the New York Convention. However, despite the effect that IMR of the place of award enforcement can have over the arbitration, the source of the arbitrators' authority to consider IMR of this type is unclear. To determine the authority, the arbitrators would have to rely on the agreement between the parties or an international legal instrument that clearly states the authority of the arbitrators. In brief, based on the Autonomous Theory, the arbitrators have the authority to apply only IMR that are of truly international character and IMR of the seat of arbitration.

4.2.3 Arbitration Being Bound By Legal Order of the Seat and Party Autonomy

According to the Hybrid Theory, the parties' agreement and the law of the seat of arbitration bind international arbitration. Regarding the choice of applicable law, this theory points out that the arbitrators have to apply the law chosen by the parties to the extent allowed by conflict of laws rule of the seat of arbitration.[442] In absence of the parties' choice, the arbitrators have to determine the applicable law based on the conflict of laws rule of the seat of arbitration.[443] Therefore, under the Hybrid Theory, the parties' intention plays an important role in determining the governing law. However, the limit of the parties' autonomy is stipulated by private international law rule of the seat of arbitration.

To determine the arbitrators' authority to consider the applicability of the IMR under the Hybrid Theory, the arbitrators would have to go through a checklist. The parties' intention is a crucial point. Additionally, the arbitrators would have to confirm that the conflict of laws rule of the seat of arbitration does not prohibit the parties from agreeing for the application or non-application of the IMR. In a situation where there is a collision between the parties' intention and the law of the seat, the law of the seat tends to prevail because, according to Professor Lew, the parties could exercise their autonomy only to the extent that the law of the seat allows.[444] Therefore, regardless of

[442] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 58.
[443] Ibid. at 59.
[444] Ibid. at 58.

the source of the IMR, the parties can only agree for the application of IMR that the conflict of laws rule of the seat permit.

The Hybrid Theory is criticized for being imprecise, as it does not specify the relative weights the arbitrators should grant to the State's public interests and the parties' private interests.[445] To state that arbitration is a hybrid of both Jurisdictional Theory and Contractual Theory means that the arbitrators have a role of being both a judge and a service provider for the parties. If the parties' intention and the regulation under the law of the seat parallel each other, there is no problem. Nevertheless, a problem may arise if the two disagree. Specifically, regarding the IMR of the seat, under the Jurisdictional Theory, the arbitrators are obliged to apply it. However, under the Hybrid Theory, it is unclear whether there needs to be the parties' agreement in order for the arbitrators to apply the rule. In addition, in case if the parties conclude an agreement repudiating the application of the IMR of the seat, it is unclear how the Hybrid Theory would resolve the matter.

In conclusion, the Hybrid Theory reconciles the conflict between the previous two theories. Nonetheless, this theory is imprecise with regards to how to solve the conflict between the parties' intention and the law of the seat. The application of this theory alone does not solve the legal problem.

4.2.4 Reflection on the Application of the Legal Theories

Based on the discussion above, the conclusion is that legal theories are not sufficient, *per se*, to solve the legal issue, as each of them partly explains the problem but ultimately is incapable of encompassing all possible situations. Mainly, a reliance on the legal theories alone to solve this specific legal problem still creates uncertainty. The adoption of any of the theories above would lead to putting an importance on a certain IMR and avoiding the possible application of IMR of other legal system. A problem may occur when IMR that may be closely related to the case is not applicable because they are not IMR of the place deemed to be relevant under that specific theory. Therefore, the thesis proposes to use the theories as a starting point, to understand the relevance of

[445] Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 211.

the State to ICA. The solution to the practical problem should derive from more specific criteria for evaluation.

While each of the theories referred to above offers an insightful perspective on the problem, it seems that the issue cannot be fully resolved by either theory. Section 4.3 will confirm the sources of authority for the arbitrators to determine the applicability of the IMR using arbitration cases and scholarly debates, and Section 4.4 will assess the methods that legal scholars recommend for the examination of the applicability of the IMR.

4.3 The Source of the Arbitrator's Authority to Determine the Applicability of the IMR

Even though the previous section has partly addressed the question of authority of the arbitrators to determine the applicability of the IMR, it touched upon the authority of the arbitrators from the perspective of each "theory". The purpose of this section is, however, to contrast the theories with arbitration cases and to put them in the perspective of a broader scholarly debate. In other words: while each theory has the pretension to be self-standing, both practice and subsequent criticisms have illuminated weak points and shortcomings in each of them. Hence, it is necessary again to investigate the authority of the arbitrators to determine the applicability of IMR from this partially different, more structured, perspective. Of course, the scholarly debate sparked exactly from the theories described in Section 4.2, and therefore – while keeping an original perspective – it will be occasionally necessary to refer to them again during the exposition.

Party autonomy is one of the main principles in international commercial arbitration.[446] Whenever parties express their intention for a certain conduct in arbitration, the arbitral tribunal has to respect the parties' agreement. Similarly, the arbitral tribunal would need a proper justification to allow the application of internationally mandatory rules that the parties had not agreed for application.[447] Otherwise, the arbitral tribunal can be considered to have exercised its power

[446] Baniassadi, "Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration," 61.
[447] Cordero-Moss, "Chapter 10: EU Overriding Mandatory Provisions and the Law Applicable to the Merits," 319.

excessively, which can lead to a set aside of the arbitral award delivered by that tribunal.[448] As such, this section will identify the possible sources that substantiate the tribunal's authority to consider the application of mandatory rules that are not part of the applicable law by looking into scholarly opinions on this matter (4.3.1). Then, the thesis will present its viewpoint as to what can contribute to the authority of the arbitrators to consider the applicability of the IMR (4.3.2).

4.3.1 Possible Sources for Arbitrators' Authority

Generally, no arbitration law has a stipulation that provides an international arbitral tribunal with the authority to consider internationally mandatory rules that are foreign to the applicable substantive law.[449] Despite the general silence of the law, legal scholars still claim that the arbitrators may still consider the application of the IMR under two main grounds.[450]

First, the source of arbitrators' authority derives from the parties whose dispute concerns the applicability of the IMR.[451] In such a case, in order to arbitrate the parties' dispute, the arbitral tribunals have to consider the applicability of the IMR.[452] In addition, in certain cases, internationally mandatory rules can nullify the parties' contract. A determination of the validity of the parties' contract is part of the tribunal's adjudicative process in making a binding award.[453] Thus,

[448] Kramer, "Chapter 9: EU Overriding Mandatory Law and the Applicable Law on the Substance in International Commercial Arbitration," 294.
[449] An exception is with regards to Article 11(5) of *the Hague Principles on Choice of Law in International Commercial Contracts*, which specifically stipulated that *the Hague Principles* does not prevent arbitral tribunal from applying pubic policy or take into account overriding mandatory provisions of a law other than the law chosen by the parties, if the tribunal is required or entitled to do so. However, a commentary on this article does not explain what circumstance would constitute a requirement or justification for the tribunal to apply or take into account IMR. See, Hague Conference on Private International Law (HCCH), *Hague Principles on Choice of Law in International Commercial Contracts*, 19 March 2015 <https://www.hcch.net/pt/instruments/conventions/full-text/?cid=135> accessed 1 May 2017.
[450] See for example, George A. Bermann, "Mandatory Rules of Law in International Arbitration," *American Review of International Arbitration* 18 (2007): 332; Blessing, "Choice of Substantive Law in International Arbitration," 58; Born, *International Commercial Arbitration*, II:2190–91; Mayer, "Mandatory Rules of Law in International Arbitration," 277–80.
[451] Mayer, "Mandatory Rules of Law in International Arbitration," 284.
[452] Bermann, *International Arbitration and Private International Law*, 409; Mayer, "Mandatory Rules of Law in International Arbitration," 284.
[453] Born, *International Commercial Arbitration*, II:2183.

the arbitral tribunals have the authority to consider internationally mandatory rules that affect the parties' contract.[454]

In *ICC Case No. 7181*, for example, there was an agreement between Claimant and Respondent regarding the sale of software in a certain part of Europe.[455] There was a clause in the parties' agreement that restricted an activity of Claimant.[456] The arbitral tribunal considered that this clause might be invalid if it violated Article 85 of the European Community, which is a mandatory competition law.[457] The arbitral tribunal stated that it had to examine whether there was an infringement of Article 85 (Article 81 of the consolidated version) of the *Treaty Establishing the European Community*.[458] In this case, the arbitral tribunal had the authority to consider the internationally mandatory rule because this rule affects the validity of the parties' agreement. Following this reasoning, Professor Mayer argued that the arbitrators, in applying internationally mandatory rules to consider any illicitness of the parties' contract, do not act as a guardian of any countries' public policy.[459] Rather, they conduct their normal duty, which is to "state the law."[460]

Second, arbitral tribunals have gradually been granted the authority to assess the issue that affects public interests.[461] For instance, in the *Mitsubishi case*, the U.S. Supreme Court decided that the arbitral tribunal may have jurisdiction over antitrust disputes.[462] In stating that it had a chance to have a "second look" during the award enforcement stage to confirm whether the tribunal addressed public interests, the court implied that the tribunal had the authority to give effect to the IMR of America. Based on this reasoning, Professor Voser argued that the arbitral tribunal also has the authority to consider the application of the rules that protect these interests.[463] Furthermore, a sole

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[454] Ibid.
[455] *Final Award in ICC Case No. 7181 of 1992*, Yearbook Commercial Arbitration XXI (1996).
[456] Ibid., 104.
[457] Ibid.
[458] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.
[459] Mayer, "Mandatory Rules of Law in International Arbitration," 278.
[460] Ibid.
[461] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 330–31.
[462] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985).
[463] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 330–31.

arbitrator in the case of *SCC Arbitration, Code 680 (2012): (France) vs. (Sweden)*,[464] also determined that its duty to apply IMR that had a significant connection to the dispute is a consequence of the arbitrability of the IMR.[465] Specifically, in that case, both the country of the IMR and the arbitration law of the seat of arbitration permitted arbitrability of the subject matter of the dispute, which concerns competition law.[466]

A related reasoning is that the arbitral tribunal has an inherent power to address relevant State's interest, as the tribunal's role is not only to resolve the parties' disputes, but also to perform a judicial function.[467] This reasoning seems to be inspired by the new study about arbitration, which argues that arbitral tribunal plays an important role in global governance, specifically in governing transnational commercial activities.[468] According to Professor Moritz Renner, many international arbitral tribunals also admit that they have an additional role to take into account State's interests that are at stake.[469]

4.3.2 Arbitrators' Authority Deriving from the Parties and the States

This thesis agrees with the interpretation of the parties' agreement to interpret the authority of the arbitrators due to a wide recognition of the principle of party autonomy.[470] Whichever legal theory one may adopt, the conclusion is still that the arbitrators have to respect the principle of party autonomy because of its international recognition.[471] The parties' submission of the dispute to the arbitrators would grant the arbitrators the authority to determine the applicability of the IMR. As stated above, in cases where a party relied on the IMR to justify their position, it is a part of the

[464] Bergman, *A Casebook on Choice of Law in Arbitration*, 283–85.
[465] Ibid. at 284.
[466] Ibid. at 284–85.
[467] Radicati di Brozolo, "Chapter 11: When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal," 371.
[468] See, Mattli and Dietz, "Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction."
[469] Renner, "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration," 127.
[470] María Mercedes Albornoz and Nuria González Martín, "Towards the Uniform Application of Party Autonomy for Choice of Law in International Commercial Contracts," *Journal of Private International Law* 12, no. 3 (2016): 438; Symeonides, *Codifying Choice of Law Around the World*, 114; Yu, "Choice of the Proper Law vs. Public Policy," 109.
[471] Symeonides, "Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple," 1123–24.

arbitrators' duty to consider all the relevant law to determine the parties' dispute.[472] In addition, the parties are considered to be disputing about the applicability of the IMR.[473] Consequently, the arbitrators have the authority to determine the parties' dispute.[474]

In a circumstance where neither of the parties pleads the issue of the applicability of IMR to the arbitrators, the source of the arbitrators' authority cannot be interpreted to derive from the parties' submission. However, this research argues that the arbitrators still have the authority to address the public interests that are at stake. As the States has lent the authority to the arbitrators to resolve disputes that affect public interests, this thesis supports the view that the arbitrators possess an additional role to address the State's interests that are at stake.

The authority of the arbitrators to evaluate the applicability of IMR also derives from the fact that issues involving public interests have gradually become arbitrable.[475] Based on the analysis of Chapter II, objective arbitrability can be considered as a tool that States adopt to prevent a certain subject matter that concerns its public interests from being submitted to arbitration. However, Chapter II has also discovered that the restriction has been loosened, and certain countries have granted the authority to the arbitrators to settle disputes involving public interests. Therefore, the arbitral tribunal also has the authority to consider the application of the rules that protect these interests.[476]

To sum up, the arbitral tribunals have the authority to assess the applicability of internationally mandatory rules even if these rules are not part of the governing law of the contract.[477] Despite having the authority, the arbitrators may not apply just *any* internationally

[472] Bermann, *International Arbitration and Private International Law*, 409.
[473] Mayer, "Mandatory Rules of Law in International Arbitration," 278.
[474] Ibid.
[475] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 330–31.
[476] Ibid.
[477] Bermann, "Mandatory Rules of Law in International Arbitration," 2007, 332; Blessing, "Choice of Substantive Law in International Arbitration," 58; Born, *International Commercial Arbitration*, II:2190–91; Mayer, "Mandatory Rules of Law in International Arbitration," 284; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 330–31.

mandatory rules. Scholars have advocated different conditions that internationally mandatory rules have to meet in order to be applicable. The next part identifies and categorizes these conditions.

4.4 Assessing the Available Methods to Consider the Applicability of the Rules

Legal scholars have been working on trying to solve this issue. The methods recommended by the scholars to solve the problem are not based on any specific legal theories. While acknowledging generally that party autonomy and certain State's authority bind ICA although the ICA has no forum, scholars suggest objective criteria for the arbitrators to determine the issue of the applicability of the IMR. In this section, the IMR of the law chosen by the parties, of the seat of arbitration and of a third country will be analyzed separately under subsections 4.4.1, 4.4.2, and 4.4.3 respectively.

4.4.1 The Applicability of IMR of the Law Chosen by the Parties

Regarding the IMR of the law chosen by the parties, Professor Mayer and Dr. Serge Lazareff state that the arbitrators apply them because they are part of the governing law.[478] The parties' choice of governing law should also include the mandatory rules of that law.[479] Professor George A. Bermann also makes a comment that it would be counter-intuitive to exclude the application of the IMR of the governing law.[480] However, professor Nathalie Voser has a different viewpoint.

In Professor Voser's opinion, the IMR of the governing law should be evaluated the same way as IMR of other countries.[481] Professor Voser's opinion was based on the view that in Continental Europe, the grant of party autonomy to elect a governing law was based on the need to balance the competing private interests.[482] Therefore, the parties' choice should not include the public interests that are part of the governing law. According to Professor Voser, the examination of

[478] Mayer, "Mandatory Rules of Law in International Arbitration," 281; Lazareff, "Mandatory Extraterritorial Application of National Law," 138.
[479] Bermann, *International Arbitration and Private International Law*, 395.
[480] Bermann, "Mandatory Rules of Law in International Arbitration," 2010, 331.
[481] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 339.
[482] Ibid.

the applicability of the IMR of the governing law should be evaluated the same way as the IMR of other countries.[483]

Professor Pierre Mayer does not address the evaluation of IMR of the governing law in general. Professor Mayer seems to consider that it is natural for the arbitrators to apply the IMR of the law chosen by the parties. However, in the situation where the parties have expressly exclude the application of the IMR of the governing law, Professor Pierre Mayer suggests that the arbitrators should respect the parties' agreement, with a reservation. Specifically, if the IMR of the governing law meets the conditions that he suggests for an evaluation of the applicability of IMR in general, the arbitrators should disregard the parties' agreement and apply the IMR.[484]

4.4.2 The Applicability of IMR of the Seat of Arbitration

The discussion under this subsection does not govern the case where the law of the seat of arbitration is the governing law of the contract. This subsection focuses mainly on the applicability of the substantive IMR of the seat of arbitration when the governing law is the law of another country.

A determination of the applicability of IMR of the seat of arbitration involves the relationship between international arbitration and the seat of arbitration. Legal scholars who discuss this issue claim that international arbitration does not have a *lex fori*.[485] Consequently, the arbitrators would not be required to apply directly the IMR of the seat of arbitration unless the IMR of the seat of arbitration meets the conditions set out by the scholars.[486] These conditions will be presented in Section 4.4.3 below. Another related consideration to reject a direct application of the IMR of the seat of arbitration is based on the interpretation of the parties' intention. In electing a country as the seat of arbitration, the parties intend to be bound by arbitration law of the seat of arbitration;

[483] Ibid. at 340.
[484] Mayer, "Mandatory Rules of Law in International Arbitration," 281.
[485] Ibid. at 283; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 330.
[486] Mayer, "Mandatory Rules of Law in International Arbitration," 283; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 330.

however, the parties do not necessarily the mandatory rules of substantive public policy of the seat of arbitration, especially when the parties have already chosen the applicable law.[487]

In contrast, Professor Alan Scott Rau, without distinguishing between substantive and procedural mandatory rules, argues that the parties, in electing a particular place as the seat of arbitration, submit themselves to the entire legal regime that govern the arbitration process.[488] In supporting the relevance of IMR of the seat of arbitration, Professors Jean-François Poudret and Sébestian Besson, recommend that the arbitrators should consider the application of IMR that represents international public policy of the seat of arbitration in order to avoid the risk of having the award set aside.[489] Professor Bermann rejects this basis in considering that an award that has been annulled still have the possibility of enforcement elsewhere.[490]

4.4.3 The Applicability of IMR of a Third Country

IMR of a third country refers to the rules that are not part of the governing law or the law of the seat of arbitration. The IMR of this type can be the law of the place of contractual performance or of the place of award enforcement. Even in the case where the parties' have already elected the governing law, the arbitrators are still entitled to consider the applicability of this IMR under the view that the choice of substantive law made by the parties does not have the effect to disregard the application of a relevant mandatory norm.[491]

Generally, legal scholars suggest and arbitrators adopted a list of criteria. Although the content may differ and not all the four requirements are not considered at once, the list usually contains four main considerations, namely: the nature of the rule, the scope of application of the rule, the connection between the rule of the case, and the consequence of the application or non-application of the rules. This part will proceed to analyze these conditions based on the four themes.

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[487] Bermann, *International Arbitration and Private International Law*, 397–98; Bergsten and Kröll, *International Arbitration and International Commercial Law*, 376.
[488] Rau, "The Arbitrator and 'Mandatory Rules of Law,'" 75.
[489] Poudret and Besson, *Comparative Law of International Arbitration*, 609.
[490] Bermann, *International Arbitration and Private International Law*, 399.
[491] Petsche, "International Commercial Arbitration and the Transformation of the Conflict of Laws Theory," 466.

4.4.3.1 The Nature of the IMR

In examining the nature of internationally mandatory rules, according to Professor Marc Blessing, the arbitrators need to firstly verify whether the rules are of truly mandatory character.[492] Regarding this verification, Professor Bermann expresses a concern about the difficulty in studying the nature of the rules.[493] Besides acknowledging the difficulty, Professor Bermann also offers a solution. He recommends that the tribunal should examine the attachment between the values that the internationally mandatory rules try to protect with the legal system of the country that enacted the rules.[494]

Another requirement is that the rules impose themselves for application regardless of the governing law.[495] This requirement is similar to one of the conditions in Article 7(1) of *the Rome Convention*, [496] which requires the mandatory rules to impose extraterritorial application and override the governing law of the contract.[497] Regarding this examination, Professor Blessing noted that the applicability of the internationally mandatory rules is also based on the purpose that the rules serve – not all rules of any purpose can be applicable.[498] For instance, the arbitral tribunal may disregard the internationally mandatory rules that aim *only* to protect a country's financial, fiscal, or

[492] Marc Blessing, "Impact of the Extraterritorial Application Mandatory Rules of Law on International Contracts," *Swiss Commercial Law Series* 9 (1999): 63, http://www.baerkarrer.ch/publications/4_3_9.pdf.
[493] Bermann, "Mandatory Rules of Law in International Arbitration," 2010, 329.
[494] Bermann, "Mandatory Rules of Law in International Arbitration," 2007, 329.
[495] Blessing, "Impact of the Extraterritorial Application Mandatory Rules of Law on International Contracts," 63; Mayer, "Mandatory Rules of Law in International Arbitration," 275.
[496] Article 7(1) of the *Convention 80/934/EEC on the Law Applicable to Contractual Obligations* opened for signature in Rome on 19 June 1980 ("the Rome Convention") stipulates that: "When applying under this Convention the law of a country, effect may be given to 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." *Convention 80/934/EEC on the Law Applicable to Contractual Obligations* opened for signature in Rome on 19 June 1980.
[497] Ulrich Drobnig, "Comments on Art. 7 of the Draft Convention," in *European Private International Law of Obligations: Acts and Documents of an International Colloquium on the European Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, Held in Copenhagen on April 29 and 30, 1974* (Mohr Siebeck, 1975), 84; Mario Giuliano and Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligation*, C282/1, (October 31, 1980), 27.
[498] Blessing, "Choice of Substantive Law in International Arbitration," 62.

political interests.[499] On the other hand, Professor Mayer argues that the arbitral tribunal should apply internationally mandatory rules irrespective of the purpose the rules serve if the rules are manifestly applicable.[500]

Adding to the above evaluations, Professor Voser remarks that when the internationally mandatory rules are of a transnational public policy nature, these rules prevail over the intention of the parties.[501] Several other scholars and arbitral awards also recognize the concept of transnational public policy to be essential for the application of internationally mandatory rules, this thesis finds that a thorough discussion about this concept is necessary.[502] Professor Blessing further recommends that *only* the rules that reflect a "truly international public policy" can be applicable.[503] The scholars imposed such a limitation based on a general consideration that, unlike a court, an arbitral tribunal is not a state organ, but a private institution created to resolve private dispute.[504] Accordingly, these authors considered that an international arbitral tribunal should not have any task to protect any state's public policy when deciding a case.[505] The arbitral tribunal does not apply IMR, which concerns only interests of the states but does not reflect transnational public policy.[506] This thesis has already defined transnational public policy in Chapter I.

Since the content of public policy is not clearly determined, Professor Gary Born warns that arguments for the application of internationally mandatory rules based on public policy grounds

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[499] Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland* (Sweet & Maxwell, 2010), 372; Blessing, "Choice of Substantive Law in International Arbitration," 62.
[500] Mayer, "Mandatory Rules of Law in International Arbitration," 291.
[501] Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration," 251; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 350.
[502] See for example, Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration"; Blessing, "Impact of the Extraterritorial Application Mandatory Rules of Law on International Contracts"; Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration"; Lalive, "Transnational (or Truly International) Public Policy and International Arbitration"; Michael Pryles, "Reflections on Transnational Public Policy," *Journal of International Arbitration* 24, no. 1 (February 1, 2007): 1–8. See also, *Partial Award in ICC Case No. 6286 of 1991*, Yearbook Commercial Arbitration XIX (1994); *Partial Award in ICC Case No. 6474 of 1992,* Yearbook Commercial Arbitration XXV (2000); *Partial Award in ICC Case No. 8420 of 1996*, Yearbook Commercial Arbitration XXV (2000).
[503] Blessing, "Choice of Substantive Law in International Arbitration," 61.
[504] Papeil, "Conflict of Overriding Mandatory Rules in Arbitration," 344.
[505] Bermann, "Mandatory Rules of Law in International Arbitration," 2010, 333.
[506] Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration," 32.

might lead to unpredictability and arbitrariness.[507] The arbitrators should be cautious in deciding the application of internationally mandatory rules reflecting transnational public policy.[508] Professor Born does not support the claim that the arbitral tribunal should apply *only* internationally mandatory rules that reflect transnational public policy because internationally mandatory rules that reflect transnational public policy exist in a very limited context.[509] Such rules do not cover a wide range of circumstances in which internationally mandatory rules may claim for application.[510] For example, even though some rules under antitrust law, securities law, and corporation laws are crucial to safeguard public interests for a State that legislated the rule, they are excluded from the concept of transnational public policy. Hence, the approach to apply *only* internationally mandatory rules that reflect transnational public policy may be too restrictive.[511] As recommended by Professor Born, arbitral tribunals do not need to pay separate emphasis on transnational public policy, but rather regard all internationally mandatory rules to have originated from national law and should base their examination on general public policy.[512]

4.4.3.2 Scope of Application of the IMR

The scope of the rules refers to the question of the legislative intention for the internationally mandatory rules to be extraterritorially applicable in a particular circumstance.[513] In litigation, a court would have to look at the legislator's intention, such as identifying explicit statement in the statute or conducting a statutory interpretation, in order to determine whether or not the IMR

[507] Born, *International Commercial Arbitration*, II:2195; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 350.
[508] Born, *International Commercial Arbitration*, II:2195; Michael Pryles, *Choice of Law Issues in International Arbitration*, 1996, 1.
[509] Born, *International Commercial Arbitration*, II:2196.
[510] Ibid.
[511] Radicati di Brozolo, "Chapter 11: When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal," 375.
[512] Born, *International Commercial Arbitration*, II:2196.
[513] Bermann, *International Arbitration and Private International Law*, 413; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 347–48.

demands application in the case.[514] To determine the scope of application of the rules, the arbitrators may also have to investigate the legislative intention.

To illustrate, in the earlier-mentioned *Mitsubishi case*, the threshold question was whether U.S. antitrust law was applicable to the case even though the governing law was Swiss law.[515] To answer this question, the U.S. Supreme Court had to first discover the purpose of the U.S. antitrust law. The Court concluded that the purpose of the law was to protect the American market from any anti-competition act that affects the market.[516] Having found this purpose, the Court's next task was to determine whether the parties' conduct in that case negatively affects U.S. market.

The approach to investigate into the scope of the rule itself is also suggested in the area of insolvency law. Sachs claimed that this approach is actually a common approach in practice.[517] Specifically, Sachs recommended that the tribunal could inspect the territorial or universal scope of the law, and if the law does not have an extra-territorial scope of application, the tribunal might decide to refuse the application of the law.[518]

4.4.3.3 The Connection between the IMR and the Case

In order to determine the connection between the IMR and a given case, scholars suggest that the arbitral tribunal should consider the application of internationally mandatory rules only if the rules have a close connection to the case.[519] The arbitral tribunal has the discretion to examine a close connection in each case.

According to professor Voser, there is a close connection when:

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[514] Ole Lando, "The EC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations: Introduction and Contractual Obligations," *Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* 38, no. 1 (January 1, 1974): 35; Ole Lando, "The EEC Convention on the Law Applicable to Contractual Obligations," *Common Market Law Review* 24, no. 2 (1987): 210.
[515] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985).
[516] Mayer, "Mandatory Rules of Law in International Arbitration," 287.
[517] Sachs, "Insolvency Proceedings and International Arbitration," 34.
[518] Ibid.
[519] Papeil, "Conflict of Overriding Mandatory Rules in Arbitration," 376–77; Bermann, "Mandatory Rules of Law in International Arbitration," 2007, 333; Blessing, "Impact of the Extraterritorial Application Mandatory Rules of Law on International Contracts," 61; Shore, "Applying Mandatory Rules of Law in International Commercial Arbitration," 100; Poudret and Besson, *Comparative Law of International Arbitration*, 610; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 346.

1. The contractual performance takes place in the country which enacts the internationally mandatory rules;
2. In antitrust cases, the parties' contract affects the economic market of the country that enacts the rules;
3. Regarding exchange regulations, the transaction affects the currency of the country that enacts the rules.[520]

Professor Radicati di Brozolo also suggests that States which market is interfered by the parties' transaction can be considered as a relevant State, and the arbitral tribunal can give effect to the IMR of such State.[521] In *ICC Case No. 8528*, decided by an arbitral tribunal seated in Switzerland in 1996, there was a question of whether Turkish mandatory law was applicable even though the governing law was Swiss law.[522] The tribunal applied Article 19 of the *Swiss Federal Law on Private International Law*, which required that the mandatory rule must have a close connection to the case, on the ground that the conflict rules required by this Article were also shared by other legislation.[523] In examining whether there was a close connection, the tribunal found that the law governing the defendant (as a legal person), the place of incorporation, and the law that affected the contractual performance was Turkish law, and the place of contractual performance was also in Turkey.[524] Consequently, the tribunal decided that there was a significant connection between Turkish law and the case.[525]

There is also a recommendation on a clearer connecting factor, which is IMR of the 'place of performance'. Specifically, Daniel Hochstrasser argues that an arbitral tribunal should take into account internationally mandatory rules at the place of performance when the rules render the performance of the contract illegal.[526] Hochstrasser is concerned about the practicability of the arbitral award as an award that demands a party to perform a contractual obligation being illegal in

[520] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 346.
[521] Radicati di Brozolo, "Chapter 11: When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal," 376.
[522] *Final Award in ICC Case No. 8528 of 1996*, Yearbook Commercial Arbitration XXV (2000).
[523] Ibid., 347.
[524] Ibid., 348.
[525] Ibid.
[526] Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 86.

the place of performance might be impractical.[527] Considering that the award orders a performance of an illicit act, the scholar noted that the award might also be unenforceable.[528] Accordingly, Hochstrasser suggests that the arbitral tribunal should apply internationally mandatory rules of the place of performance when the rules invalidate the parties' contract.[529]

4.4.3.4 The Consequence of the Application or Non-Application of the IMR

In litigation, when a court has to determine the applicability of IMR of a third country, the court has to consider the consequence of the application of the IMR in a sense that the application of the foreign IMR would provide a reasonable outcome and would not be contrary to the policy of the forum.[530] Contrastingly, international commercial arbitration does not have a forum.[531] As legal scholars generally consider international arbitration to have no forum, there is no forum's public policy that can act as a standard for the arbitral tribunal to evaluate the consequence of the application or non-application of the IMR as in litigation.[532] Therefore, 'application consequences' in the context of international arbitration refers to the consideration of possibility of enforcement of arbitral award resulting from the application or non-application of internationally mandatory rules.[533]

The arbitral tribunal may consider whether its award is enforceable if it applies or does not apply the IMR that demands application because a competent court may refuse to recognize or enforce a foreign arbitral award that contradicts public policy of its country.[534] For instance, an arbitral tribunal seated in Switzerland may not award punitive damage because such award is considered to be contrary to Swiss public policy.[535] Such decision was, in fact, reached by an

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[527] Ibid.
[528] Ibid.
[529] Ibid.
[530] Lando, "The EEC Convention on the Law Applicable to Contractual Obligations," 211; Lazareff, "Mandatory Extraterritorial Application of National Law," 138; 横溝大 [Yokomizo Dai], "国際私法の範囲" [The Scope of Private International Law], in 注釈国際私法, Edited by: 櫻田嘉章, 道垣内正人 (有斐閣, 2011), 44.
[531] Lazareff, "Mandatory Extraterritorial Application of National Law," 138; Mayer, "Mandatory Rules of Law in International Arbitration," 283.
[532] Mayer, "Mandatory Rules of Law in International Arbitration," 283.
[533] Ibid. at 284.
[534] *New York Convention*, Art. V (2)(b).
[535] Rau, "The Arbitrator and 'Mandatory Rules of Law,'" 76; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 338.

arbitrator in a *Final Award in ICC Case No. 5946 of 1990*[536] on the ground that granting punitive damage would be contradicting public policy of the seat of arbitration.[537]

In addition, Professor Mistelis suggests that another standard to evaluate the application consequence of the IMR is to refer to the standard international public policy.[538] If the application of the IMR is in violation of international public policy, the tribunal may consider not applying those rules. Whereas Professor Mistelis did not specifically state what he meant by international public policy, he pointed towards elements of illegality or immorality as examples of these policies.[539]

Therefore, in examining the applicability of internationally mandatory rules, some legal scholars suggest that the arbitral tribunal may also take into account public policy of the seat of arbitration as well as of the country of award enforcement (if known) for the effectiveness of its decision.[540] In addition, scholars such as Professor Derains noted that the internationally mandatory rules might not be applicable if the rules are in contrary to transnational public policy.[541] Dr. Serge Lazareff remarks that this approach should be encouraged since it helps strengthening the arbitral award.[542]

4.4.4 Modes of Application

Scholarly opinions and arbitral awards have shown that there are also two modes of application for internationally mandatory rules, namely: a direct application of rules, and taking the rules into account.[543] As its name suggests, a direct application of internationally mandatory rules

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[536] *Final Award in ICC Case No. 5946 of 1990*, Yearbook Commercial Arbitration XVI (1991), 97.
[537] See, Markus A. Petsche, "Punitive Damages in International Commercial Arbitration: Much Ado about Nothing?," *Arbitration International* 29, no. 1 (n.d.): 92; Rau, "The Arbitrator and 'Mandatory Rules of Law,'" 76.
[538] Mistelis, "Mandatory Rules in International Arbitration: Too Much Too Early Or Too Little Too Late? Concluding Remarks," 222.
[539] Ibid.
[540] Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 86; Lazareff, "Mandatory Extraterritorial Application of National Law," 140.
[541] Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 15; Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration," 254. Unlike discussed earlier, the function of transnational public policy, referred to here, is rather a negative function of the policy, which disallow an application of certain legal provisions.
[542] Lazareff, "Mandatory Extraterritorial Application of National Law," 140, 146.
[543] See, Bermann, "Mandatory Rules of Law in International Arbitration," 2010, 335; Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration," 31; Born, *International*

allows the arbitral tribunal to apply the rules to the situation of the case irrespective of the governing law. The method of taking rules into account allows for an indirect application of internationally mandatory rules. Under this method, the arbitral tribunal does not apply internationally mandatory rules directly, but rather takes the effect of the rules on the parties' contractual relationship as a fact while applying the governing law.[544] For instance, a party may fail to perform its obligation to deliver goods due to an export embargo, which is considered as an internationally mandatory rule. Rather than directly applying the rule, the tribunal may take this matter as a fact and consider whether this fact falls under the requirement of force majeure of the applicable law.[545]

In *ICC Case No. 5622* decided by an arbitral tribunal seated in Switzerland, the tribunal had to rule on the validity of a contract that violates Algerian mandatory law (law of the place of performance) although the governing law of the contract was Swiss law.[546] The sole arbitrator did not directly apply Algerian law, but examined whether the illegality under Algerian law would also be in violation of Swiss law. Having found that the parties' activities, which were considered to be a violation under Algerian law, and also a violation of Swiss law and Swiss public policy, the arbitrator rendered the contract null and void.[547] In this regard, the arbitral tribunal took into account the violation of Algerian law as a fact, and considered whether this fact violates Swiss law, which was the governing law of the contract.

Legal scholars have some disagreements as to which of these modes the arbitral tribunal should adopt. Professors Born and Mayer suggest that the tribunal should directly apply the rules that fulfill the requirements.[548] On the other hand, Professor Bermann suggests that the tribunal should take into account the internationally mandatory rules.[549] Professor Blessing and Hochstrasser

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Commercial Arbitration, II:2185; Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 74.

[544] Bermann, "Mandatory Rules of Law in International Arbitration," 2007, 335.

[545] Mayer, "Mandatory Rules of Law in International Arbitration," 281.

[546] *Final Award in ICC Case No. 5622 of 1998*, Yearbook Commercial Arbitration XIX (1994), 105-123.

[547] Ibid., 122.

[548] Born, *International Commercial Arbitration*, II:2185; Mayer, "Mandatory Rules of Law in International Arbitration," 282.

[549] Bermann, "Mandatory Rules of Law in International Arbitration," 2007, 335.

prefer to leave the discretion to the tribunal to decide whether they would directly apply or take into account the rules.[550]

Contrasting to these scholars, Professor Kurt Siehr considered that it did not matter whether the arbitral tribunal applied the rules directly or indirectly because the end result is similar.[551] Professor Siehr reasoned that the arbitral tribunal still has to consider, for instance, the validity or enforceability, of the contract based on the (effect of the) internationally mandatory rules.[552] However, other scholars argued that there is a need to distinguish the two approaches because the adoption of either of the modes may lead to a different outcome in the case. Professor Voser criticized the indirect approach for its sole reliance on the governing law.[553] Professor Mayer further argues that an arbitral tribunal should acknowledge the authority of the internationally mandatory rules and should apply the rules if the tribunal aims to render a contract illegal under the effect of the mandatory rules.[554] By taking into account the internationally mandatory rules without directly applying them, the tribunal might end up reaching a different conclusion from a direct application of the rules. Assume, for example, a hypothetical situation in the above-mentioned *ICC Case No. 5622* where Swiss law or Swiss public policy did not consider the parties' activities, deemed a violation under Algerian law, to be illegal:[555] the arbitral tribunal would reach a different conclusion, and would decide that the contract was valid even though it violated the internationally mandatory Algerian law.

4.5 Analysis on the Previous Methods to Address the Applicability of IMR

This section intends to analyze the above scholarly opinions on the determination of applicability of IMR. The format of the analysis in this section is the same as the section above. This section is divided into 3 subsections, and addresses the applicability of IMR of the law chosen by the

[550] Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration," 31; Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 74.
[551] Kurt Siehr, *Parteiautonomie im Privatrecht,* 1989 in Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 74.
[552] Ibid.
[553] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 323.
[554] Mayer, "Mandatory Rules of Law in International Arbitration," 282.
[555] *Final Award in ICC Case No. 5622 of 1998*, Yearbook Commercial Arbitration XIX (1994).

parties (4.5.1), rules of the law of the place where arbitration is seated (4.5.2) or rules of a third country (4.5.3).

4.5.1 IMR of the Law Chosen by the Parties

This thesis supports the view that IMR of the governing law should be applied unless otherwise specified by the parties. It only complicates the matter to require the arbitrators to evaluate the application of IMR of the governing law when the choice of governing law is valid and the IMR is not in conflict with any other countries' public interests. As the principle of party autonomy grants the parties the choice of electing the governing law, the arbitrators should apply the chosen law entirely because an election of a governing law should include also the law of mandatory nature.[556]

However, in case where the parties have expressly exclude the application of the IMR of the governing law, this thesis supports professor Mayer's claim that the arbitrators should respect the parties' intention unless the IMR meets the conditions that require them to be applied regardless of the parties agreement.[557] Concerning the relationship between ICA and the parties, the arbitrators should not be perceived as the parties' agent. Although the authority of the arbitrators derives from the parties' agreement, the arbitrators have to act independently when evaluating the parties' dispute.

There are two justifications on this standpoint. First, the parties are submitting the dispute that concerns the applicability of the rules to the arbitrators. Therefore, the arbitrators are merely performing their task in resolving the disputes when considering the applicability of the rule.[558] To illustrate the situation, in *SCC Arbitration, Code 699 (2013): Company P (Russia) vs. Company C (Switzerland)*, the dispute between the parties concerns a transfer of ownership of goods.[559] Even though the parties had agreed that Swiss law governed the questions concerning right of ownership of the goods,[560] Respondent claimed for the arbitral tribunal to decide the issue as *amicable compositeurs*.[561] On the other hand, Claimant pleaded that the arbitral tribunal should determine the

[556] Bermann, *International Arbitration and Private International Law*, 394–95.
[557] Mayer, "Mandatory Rules of Law in International Arbitration," 281.
[558] Ibid. at 278.
[559] Bergman, *A Casebook on Choice of Law in Arbitration*, 277–80.
[560] Ibid. at 277.
[561] Ibid. at 278.

question of ownership only by contractual interpretation.[562] Claimant based its position on the existence of a clause (Clause 7.1) in the parties' contract, which dealt with the transfer of 'the right of property'. As Swiss Property Law was considered to be mandatory law, the arbitral tribunal had to determine whether it should apply only Clause 7.1 to decide the parties' dispute or it should also apply the Swiss mandatory law.[563] As the parties' dispute concerned the transfer of property, and both parties were disputing about which rules of law governs this question, the arbitral tribunal had a task and authority to determine the applicable law.

Second, based on the consideration that international arbitration also has the role to address public interests, even if neither of the parties raises the issue of the applicability of the rule for the arbitrators to evaluate, the arbitrators can still raise the matter for evaluation. These two justifications also apply to the evaluation of the applicability of the IMR of a third country, such as the place of contractual performance and place of award enforcement. Concerning the conditions for evaluation, the thesis will explain them in section 4.5.

4.5.2 IMR of the Seat of Arbitration

Chapter II has already argued that international public policy of the seat of arbitration binds the arbitration proceeding. Thus, international public policy of the seat of arbitration that claims to govern the arbitration and to prevent the conduct of arbitration that offends the fundamental value of the seat of arbitration, also binds arbitration. In addition, Chapter II has already clarified the distinction between mandatory rules and public policy. Because not all mandatory rules constitute to international public policy of the seat of arbitration, [564] the arbitrators should not immediately apply the mandatory rules, but rather evaluate whether the rules are perceived as a part of international public policy of the seat of arbitration. Therefore, this thesis supports the view that the applicability of the IMR of the seat of arbitration should also be evaluated.

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[562] Ibid. at 277.
[563] Ibid. at 279.
[564] Villiers, "Breaking in the Unruly Horse," 164–65; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 322.

4.5.3 IMR of a Third Country

In order to analyze scholarly opinions in the section above, this section is divided in the same way as the section above, and will evaluate the four main criteria that legal scholars have recommended to evaluate the applicability of IMR. The first requirement concerns a verification of the nature of the IMR. The purpose of this requirement is to ensure that the rule that claims for application truly possesses mandatory nature.[565] Although the study of the nature of the rule is not an easy task, this verification is necessary as a starting point for the consideration of the applicability of the rule.[566] Regarding international mandatory rules that reflect transnational public policy, the arbitrators should not limit the applicability of only IMR of this type because their content is limited to only policy that are shared by many nations. Some IMR may not reflect transnational public policy, but the IMR may reflect international public policy of a country and the country perceives the IMR to be very important. Thus, this thesis does not support the argument that *only* IMR of transnational public policy nature should be applicable.

It is also appropriate to evaluate whether the rule truly imposes itself for application in the particular dispute because some rules may be mandatory rule, but is designed to protect only domestic situation.[567] The arbitrators need to investigate the legislative intention behind the rule in order to confirm whether the scope of application of the rule is intended to be extra-territorial.[568]

The third requirement concerns the connection between the IMR and the dispute. The 'closest connection' doctrine is a general principle in the field of private international law that has been adopted for a determination of a proper law to govern a contractual relation.[569] As the arbitrators have to evaluate the applicability of the IMR, it is appropriate that the arbitrators adopt this doctrine to evaluate the applicability of the rule.

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[565] Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration," 30.
[566] Sheppard, "Mandatory Rules in International Commercial Arbitration: An English Law Perspective," 141–42.
[567] Blessing, "Mandatory Rules of Law versus Party Autonomy in International Arbitration," 32.
[568] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 347–48.
[569] Mathias Reimann, "Savigny's Triumph--Choice of Law in Contracts Cases at the Close of the Twentieth Century The Fifteenth Sokol Colloquium on Private International Law: Unity and Harmonization in International Commercial Law," *Va. J. Int'l L.* 39 (1998–1999): 580.

Finally, the thesis supports the recommendation to evaluate the consequence of the application or non-application of the IMR. This consideration also exists in private international law, which requires a court to consider whether or not the application of a foreign law violates public policy of the forum. However, international arbitration does not have a form as the court. To evaluate the consequence of the application or non-application of the rules, the arbitrators would need to use a different standard. Section 4.6.4 will elaborate on the recommendation of the thesis on which standard the arbitrators should adopt to evaluate the consequence of the application or non-application of the IMR.

Based on the above discussion, aside from IMR of the governing law, IMR of other countries should be considered as IMR foreign to the governing law. Therefore, the arbitrators should examine the applicability of these IMR by using the same evaluative criteria. Section 4.6 will further elaborate on the recommendation of the thesis on how to evaluate the applicability of the IMR.

4.6 Recommendation on the Adoption of an Objective Criteria to Determine the Applicability of the IMR

The thesis recommends that the arbitrators should apply these criteria to evaluate the applicability of the rules (*special connection test*[570]):

i. Nature: the rules must be of international mandatory character;
ii. Scope: the rules must claim for application in that case;
iii. Connection: the rules must have a close connection with the case;
iv. Consequences of Application or Non-Application: the application or non-application of the rules must not be in contrary to international public policy of the seat of arbitration and transnational public policy.

This section is divided into four subsections based on the above four categories.

[570] 横溝大, "国際私法の範囲," 41.

4.6.1 The Nature of the Rules

The concern regarding the nature of the IMR is that the IMR that claim for application must be of mandatory character.[571] Given that the definition provided by the *Rome I Regulation* has received supports from its member states, this chapter also suggests the adoption of the definition provided by Article 9(1) of the *Rome I Regulation* in order to evaluate the mandatory nature of the IMR. Under Article 9(1), internationally mandatory rules are rules that are 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".[572] Hence, when evaluating the nature of the IMR, the arbitrators should clarify whether the IMR that is in dispute are rules that intend to safeguard its country's public interests, such as its political, social or economic organization, and the mandatory nature of this rule is that they must be applied regardless of the applicable law.

Moreover, is necessary to confirm that the mandatory law that a party claims to be applicable to the case is of international character and imposes extraterritorial application.[573] In *SCC Arbitration, Code 589 (2012): N (British Virgin Islands) vs. T (Austria),* the arbitration was seated in Stockholm and the law governing the merits of the dispute was English law.[574] Despite the governing law, Respondent in the case claimed that a provision under the *Swedish Contracts Act* was applicable because the law was of mandatory character.[575] However, because Respondent failed to prove that the provision was *international* mandatory law, the arbitral tribunal refused the application of the provision.[576]

Another essential discussion concerning the nature of internationally mandatory rules is about the IMR that protects the transnational or truly international public policy. According to Professor

[571] Blessing, "Impact of the Extraterritorial Application Mandatory Rules of Law on International Contracts," 231; Sheppard, "Mandatory Rules in International Commercial Arbitration: An English Law Perspective," 141–42.
[572] Regulation (EC) No 593 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations.
[573] Blessing, "Impact of the Extraterritorial Application Mandatory Rules of Law on International Contracts," 275.
[574] Bergman, *A Casebook on Choice of Law in Arbitration*, 258–59.
[575] Ibid. at 258.
[576] Ibid. at 258–59.

Catherine Kessedjian, transnational public policy is "composed of mandatory norms which may be imposed on actors in the market either because they have been created by those actors themselves or by civil society at large, or because they have been widely accepted by different societies around the world."[577] A direct application of this rule can be justified by the role of the arbitrators as a guardian of transnational commerce.[578] According to Professor Julian Lew, the arbitrators have the task to uphold the view that is commonly accepted in the international commercial community and to enforce the fundamental and moral values that trigger commercial activities.[579] As transnational public policy is composed of values shared by the international community, the arbitrators should apply this policy.

Two leading scholars argue that *only* internationally mandatory rules that reflect transnational public policy may be applicable to the disputed case.[580] This research acknowledges the relevance of transnational public policy in determining the application of internationally mandatory rules. Nevertheless, considering that the content of transnational public policy is unclear and the scope of this public policy is narrow,[581] this thesis suggests that the arbitral tribunal should not limit the application of internationally mandatory rules to only those rules that reflect transnational public policy.

4.6.2 The Scope of the Rules

Under this requirement, the scope of application of the IMR must include the disputed case. By examining the scope of the internationally mandatory rules, the arbitral tribunal can eliminate the rules that do not need to be applied to the case. To illustrate, assume that in the *Mitsubishi case*, the parties' contractual performance affected the Japanese market rather than American market.[582] In such a case, the American antitrust law would not be applicable because this law was aimed to

[577] Kessedjian, "Transnational Public Policy," 861.
[578] Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 540.
[579] Ibid.
[580] Blessing, "Choice of Substantive Law in International Arbitration," 61; Derains, "Public Policy and the Law Applicable to the Dispute in International Arbitration," 251.
[581] Born, *International Commercial Arbitration*, II:2195; Pryles, "Reflections on Transnational Public Policy," 6.
[582] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614, 105 S Ct 3346 (1985).

protect the American market, and not the Japanese market. Therefore, this thesis proposes that the tribunal should examine the scope of the internationally mandatory rules as one of the conditions for the rules to be applied to the case. As indicated by Professor Mayer,[583] if the arbitral tribunal finds that the rules claim for application in the disputed case, and if, after examining all other considerations, the tribunal finds that the internationally mandatory rules are manifestly applicable, then the tribunal should apply the rules.

4.6.3 The Connection between the Rules and the Case

The principle of most closely connected law is one of the main principles in the field of private international law.[584] As indicated in the previous part, the requirement for a connection between the internationally mandatory rules and the parties' dispute split into two different opinions: close connection, and connection based on the place of contractual performance. To be more precise, the second opinion requires that the internationally mandatory rules must be rules of the place where the contract is to be performed, and must render the performance illegal.[585]

While the first opinion provides broad discretion to the tribunal to consider the connection issue, the second opinion provides more clarity for the analysis. Nevertheless, the second opinion might also limit possible application of internationally mandatory rules that are crucial to protect interests at stake, but are not part of the law of the place of performance. Therefore, this thesis suggests that the arbitral tribunal should adopt the first opinion, which recommends the tribunal to examine whether there is a close connection between internationally mandatory rules and the parties' dispute.

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[583] Mayer, "Mandatory Rules of Law in International Arbitration," 291.
[584] Blessing, "Regulations in Arbitration Rules on Choice of Law," 412; Reimann, "Savigny's Triumph--Choice of Law in Contracts Cases at the Close of the Twentieth Century The Fifteenth Sokol Colloquium on Private International Law," 580.
[585] Daniel Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," *J. Int'l Arb.* 11, no. 1 (1 January 1994): 86; *Rome I Regulation*, Article 9(3).

4.6.4 The Application Consequences

The requirement to consider the application consequences concerns mainly the enforceability of the arbitral award. Some legal scholars point out that an arbitral tribunal has a legal obligation to ensure that the award they render is enforceable.[586] In fact, even without this legal obligation, the tribunal still has a moral obligation to put their best efforts to render valid award in order to fulfill the parties' expectations.[587] In submitting their disputes to an international arbitration, the parties expect that the award rendered will be a valid award. Therefore, this thesis suggests that the arbitral tribunal should take into account the validity of the arbitral award when evaluating the applicability of the IMR in question. The next question, then, is how to ensure the enforceability of an arbitral award.

As stated above, international public policy of the seat of arbitration binds the arbitration. Hence, with regards to IMR of the seat of arbitration, the arbitrators would have to consider if a non-application of the rule would lead to an annulled award on the ground that the award violates international public policy of the seat of arbitration.

With regards to IMR of the law governing the contract or of a third country, the arbitrators should evaluate the result of the application of the IMR by making a reference to the international public policy of the seat of arbitration. If the seat of arbitration has any international public policy that is in conflict with the foreign IMR that claims for application, the arbitrators should not apply the IMR. The reason for an examination of the international public policy of the seat of arbitration is related to a consideration of the possibility of award annulment.[588]

In addition, *the New York Convention* can be a further reference for this evaluation. Since the IMR is mainly connected with the issue of public policy, the consideration of the consequence of the application or non-application of the IMR should be evaluated from the viewpoint of public policy

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[586] Günther J. Horvath, "The Duty of the Tribunal to Render an Enforceable Award," *Journal of International Arbitration* 18, no. 2 (2001): 135; Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 333.
[587] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), 79.
[588] Article 34(2)(b)(ii) of *the UNCITRAL Model Law* provides that the court may set aside an arbitral award on the ground that the award is in conflict with international public policy of the forum.

under *the New York Convention*. Article V(2)(b) of *the New York Convention* provides that a court may refuse to enforce a foreign award that violates the forum's public policy. The term public policy under *the New York Convention* has been interpreted narrowly to include only international public policy of the forum.[589] Thus, some legal scholars suggest that the arbitrators should consider whether the application of the IMR would violate the enforceability of the award at the place of award enforcement.[590]

The problem with the above suggestion is that the place or places of award enforcement is unpredictable and can be more than one country.[591] It is unclear in which country the party would request for the enforcement of the arbitral award.[592] Based on this view, this thesis does not recommend the use of place of award enforcement to evaluate the applicability of the IMR.

Finally, with regards to transnational public policy, this thesis suggests that it is not necessary for the arbitrators to pay a separate attention on it. First, international public policy that directly binds international arbitration is international public policy of the seat of arbitration. Second, because transnational public policy are likely to be shared in many jurisdictions, they might already exist under international public policy of the seat of arbitration.[593] Therefore, as suggested by Professor Born, the arbitrators do not need to pay a separate emphasis on transnational public policy.[594] In conclusion, in order to verify the consequence of the application or non-application of the IMR, the arbitrators should consult with international public policy of the seat of arbitration.

4.6.5 A Direct Application of the Internationally Mandatory Rules

As discussed in the previous parts, there are two modes for applying the IMR, which are a direct and an indirect application. The disadvantage of applying internationally mandatory rules

[589] Kreindler, "Chapter 2: Standards of Procedural International Public Policy," 9.
[590] Bermann, "Mandatory Rules of Law in International Arbitration," 2007, 334; Hochstrasser, "Choice of Law and 'Foreign' Mandatory Rules in International Arbitration," 140.
[591] Mayer, "Mandatory Rules of Law in International Arbitration," 284.
[592] Rau, "The Arbitrator and 'Mandatory Rules of Law,'" 82.
[593] Jagusch, "Chapter 3: Issues of Substantive Transnational Public Policy," 25.
[594] Born, *International Commercial Arbitration*, II:2196.

indirectly is that the application of the rules relies mainly on the governing law.[595] This means that the rules cannot act independently in addressing the legal question in dispute between the parties. In addition, an indirect application of the IMR may also lead to a different result from a direct application of the rule. In order to avoid a different outcome caused by an indirect application of internationally mandatory rules, this thesis suggests that the arbitral tribunal should apply internationally mandatory rules directly.

4.7 Conclusion

In conclusion, the issue of the applicability of IMR is a question of how to balance conflict of public and private interests. Even though the parties have elected the governing law, the law that aims to protect public interests demands for application in that case, based on a presumption that the parties' commercial activities affect the public interests. Therefore, the arbitrators have the role to resolve this conflict.

This chapter has proven that a complete reliance on legal theories is insufficient to solve the practical problem. However, the understanding of the legal nature of arbitration is helpful as a starting point to address the legal problem. Specifically, the roles that the legal theory plays in this chapter is to define the relationship between the international arbitration and the State as well as the parties. The legal theory also assists in clarifying the arbitrators' authority to determine the applicability of rules of public interests nature.

This chapter has also assessed and analyzed possible methods to consider the applicability of IMR of the law chosen by the parties, the IMR of the seat of arbitration, and IMR of a third country. Whereas the arbitrators have to respect the application of the law chosen by the parties, the arbitrators still have the authority to evaluate the applicability of the IMR of the governing law in the case where the parties expressly agreed to exclude the application of that IMR. Furthermore, the thesis also argues that the arbitrators are not obliged to directly apply IMR of the seat of arbitration

[595] Voser, "Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration," 323.

unless the rules meet the criteria for application. Similarly, the arbitrators also have the authority to assess the applicability of the IMR of a third country.

This chapter recommends that the arbitrators should adopt further evaluative criteria in order to consider how to balance the conflict of public and private interests in the issue of the applicability of IMR. Specifically, the arbitrators have to examine: 1) nature: the rules must be of international mandatory character; 2) scope: the rules must claim for application in that case; 3) connection: the rules must have a close connection with the case; and 4) application consequences: the application or non-application of the rules must not be in contrary to international public policy of the seat of arbitration.

An implication of the above recommendation of the thesis is that the thesis recommends that the arbitrators to take into consideration the relevance international public policy of the seat of arbitration that has a negative function to disregard the application of the IMR. In addition, for mandatory rules of the seat of arbitration, which may or may not be international public policy of the seat of arbitration, the arbitrators should evaluate the applicability of the mandatory rules the same way as the arbitrators evaluate the applicability of mandatory rules of a third country. The result of this suggestion is that a party may request the court of the seat of arbitration to set aside the arbitral award on the ground that the award violates public policy of the seat of arbitration.[596]

The thesis considers that the court should not annul the arbitral award. One of the reasons why the arbitrators do not apply the mandatory rules of the seat of arbitration is that the mandatory rules may not constitute the international public policy of the seat of arbitration. Therefore, the effect of the award should not be considered to violate the international public policy of the seat of arbitration. As there is no violation, there is no reason for the court to set aside the award as well.

[596] Article 34(2)(b)(ii) of *the UNCITRAL Model Law* provides that the court may set aside an arbitral award on the ground that the award is in conflict with public policy of the forum.

Chapter V: Conclusion

International arbitration is a popular forum for the settlement of international commercial disputes. The parties' freedom to elect arbitration as a means for dispute settlement derives from the widely recognized principle of party autonomy. This principle also grants the parties the freedom to regulate their arbitration proceeding and choose the law that governs the merits of the dispute. Despite its wide recognition, the principle of party autonomy tends to be limited by relevant mandatory rules and public policy, which function as the guardian of public interests. Specifically, States forbid certain subject matters from settlement by means of arbitration. Moreover, notwithstanding the parties' choice of law governing the merits of the dispute, mandatory rules of law of a different jurisdiction still claim for application.

Being a dispute resolver, the arbitrator has the task to determine the applicability of the law that limit arbitrability of the dispute as well as the law that claim for application despite the parties' choice of applicable law on the merits of the dispute. To assist the arbitrators in this task, the thesis had adopted a theoretical discussion in order to identify the role and authority of the arbitrators to address rules and policies protecting public interests. The thesis also investigated into and provided recommendations on the methods to strike a balance between the need to enhance party autonomy, on the one hand, and the need to consider public interests, on the other hand, in the question of arbitrability and applicability of internationally mandatory rules.

In presenting the findings of the research, section 5.1 will clarify the role and authority of the arbitrators to address public interests. Having determined the theoretical background in support of the role and authority of the arbitrators to address public interests, the thesis will proceed to a more practical discussion. Sections 5.2 and 5.3 will present specific methods the arbitrators can adopt in order to resolve the conflict between public and private interests in the issue of arbitrability and applicability of internationally mandatory rules. Finally, section 5.4 will present the scope of application of the research findings and a recommendation on further studies.

5.1 The Role and Authority of the Arbitrators to Consider Public Interests

In order to determine the role and authority of the arbitrators to evaluate the conflict between public and private interests, the study adopted a theoretical research to investigate the relationship between international arbitration and State in order to discover the relevance of public interests in international commercial arbitration. In Chapter II, the research has presented four legal theories that have defined the relationship between arbitration and State in three different ways. International arbitration is perceived to be attached to the seat of arbitration under the Jurisdictional Theory, but to be detached from any State under the Contractual and Autonomous Theories. In trying to reconcile the two contrasting views, the Hybrid Theory puts arbitration in between the seat of arbitration and the parties.

The Jurisdictional Theory considers that municipal law regulates international arbitration.[597] This theory requires the arbitrators to refer to the law of the seat of arbitration when the arbitrators have to solve any legal issues.[598] Any conduct of arbitration that is not in compliance with the mandatory rules and public policy of the seat of arbitration would be perceived to be unjustified.[599] While acknowledging the importance of the seat of arbitration, the research also noticed the flaws in the Jurisdictional Theory. A drawback of the Jurisdictional Theory is the claim that only the law of the seat of arbitration regulates international arbitration.[600] As argued by Professor Paulsson, arbitration is subject to more than one legal order.[601] In addition, the requirement that arbitration refers to only the law of the seat of arbitration can weaken the efficiency of arbitration as a dispute resolution mechanism.[602]

The second group of theory claims for a detachment of international arbitration from all legal orders. The Contractual Theory considers that the nature of arbitration is contractual, and the parties are the ones to regulate the conduct of arbitration. Another legal theory that claims for a detachment

[597] Mann, "Lex Facit Arbitrum."
[598] Ibid. at 167.
[599] cf. Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration," 259.
[600] Gaillard, "Three Philosophies of International Arbitration," 7.
[601] Ibid.
[602] von Mehren, "To What Extent Is International Commercial Arbitration Autonomous?," 14.

of arbitration from the national legal order is the Autonomous Theory.[603] This theory considers claim that the unlimited autonomy of the parties is the controlling force in arbitration.[604] It appears impractical to detach arbitration from national legal order under both theories because the legitimacy of the parties' agreement is also based on national law.[605] Moreover, as elaborated in detail in Chapter II**,** arbitration cannot function on its own without the assistance from State courts.[606] Therefore, the thesis does not support the argument that national law is irrelevant to international arbitration.

The last theory, which is the Hybrid Theory, claims that the nature of arbitration is a mixture of the Contractual Theory and Jurisdictional Theory. Thus, the conduct of arbitration has to be in accordance with the parties' agreement and the law of the seat of arbitration.[607] The thesis acknowledges the importance of party autonomy and the law of the seat of arbitration in regulating the conduct of the arbitration. However, the flaw of the Hybrid Theory is that it does not specify how much importance the arbitrators should give to the law of the seat of arbitration or to the parties.[608]

Having noticed the flaws in the theories indicated above, the thesis recommended its own viewpoint about how to perceive the relationship between international arbitration and State. The thesis argues that international arbitration is bound to respect the parties' agreement as well as procedural rules and arbitration law of the seat of arbitration. However, international arbitration is not an organ of the parties or any State. In solving a dispute, the arbitrators have the authority to objectively evaluate the legal problem and adopt an appropriate mechanism that can efficiently solve the legal problem. In addition, due to the influence of the parties' transaction on public interests of countries other than the seat of arbitration, the research claims that the arbitrators have the role to

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[603] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 14; cf. Mistelis, "Chapter 8: Delocalization and Its Relevance in Post-Award Review," 169.
[604] cf. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, 60.
[605] Mann, "Lex Facit Arbitrum," 160.
[606] See, Chapter 2, Section 2.6.1.
[607] cf. Chukwumerije, *Choice of Law in International Commercial Arbitration*, 13.
[608] Barraclough and Waincymer, "Mandatory Rules of Law in International Commercial Arbitration," 211.

consider public interests of other countries as well. The research further argues that the arbitrator has the authority to consider these pubic interests, which stem from States that have delegated the authority of the arbitrators to solve disputes that affect public interests and the parties who submit their dispute to the arbitrators for a settlement.

An implication from the above recommendation is that international public policy of the seat of arbitration binds the international arbitration. As the law of the seat of arbitration binds the arbitration, its international procedural public policy also binds the arbitration. Moreover, the importance of international public policy of the seat of arbitration is relevant because the court of the seat of arbitration can set aside an arbitral award that violates international public policy of the forum.[609]

Regarding rules protecting public interests of other countries, the thesis proposes that the arbitrators should evaluate the applicability of the rules. If the arbitration law of the seat of arbitration has any stipulation on this matter, the arbitrators should respect the law of the seat of arbitration. However, if the law of the seat of arbitration is silent, the thesis proposes that the arbitrators should adopt an autonomous choice-of-law rule that can address the legal issue.

The limit about the theoretical discussion in Chapter II is that it cannot extend to making a specific recommendation on the choice-of-law rules that the arbitrators can adopt because different legal issues require different treatment. The theories are helpful to delineate the role of arbitrators to address public interests. However, to solve a legal problem, the arbitrators have to seek for more specific solutions in each legal problem. Hence, the thesis proceeds to addressing specific legal issues that concern the conflict of public and private interests in Chapter III and Chapter IV.

5.2 Method to Determine Arbitrability

Public policy and internationally mandatory rules can be viewed as a tool that a State creates in order to protect public interests that are influenced by the conduct of the parties in international arbitration. In Chapter III on the issue of arbitrability, the thesis has revealed that States intervene into the conduct of arbitration in the form of limiting certain subject matters from being submitted to

[609] The *UNCITRAL Model Law*, Article 34(2)(b)(ii).

arbitration. Such limitation on the possibility to arbitrate in various manners is to retain the authority to resolve public interests matter to the domestic court. In addition, the limitation is based on the lack of trust on capability or willingness of the arbitral tribunal to consider important public interests. In case where the court allows arbitration to have authority over disputes that involve public interests, the court somehow reminds the arbitral tribunal to consider relevant public interests because the court still has the power to scrutinize this matter at the award enforcement stage.

In Chapter III, the research sought to find a solution for the arbitrators to determine arbitrability of a dispute. Arbitrators do not have the role to determine which subject matters are arbitrable and which are inarbitrable. Whether or not a subject matter is capable of settlement by arbitration depends on the policy of each State. Thus, when dealing with the question of arbitrability, the arbitrators' task is to identify which country's law the arbitrators should apply.

After reviewing scholarly discussions on this question, the research has discovered that scholarly opinions separate into two groups. The first group considers that the law governing arbitrability is the law that governs the arbitration agreement between the parties. The second group characterizes arbitrability as a problem of conflict of jurisdiction, and seeks to find the governing law from the perspective of conflict of jurisdiction. In considering that the question of jurisdiction is a procedural question problem, the thesis rejects the application of the law governing validity of the arbitration agreement to govern arbitrability. The thesis argues that the law of the seat of arbitration, which binds the conduct of arbitration, determines arbitrability of the dispute. However, because there is a possibility that the law of countries other than the seat of arbitration may claim for compulsory jurisdiction over the dispute the parties, the thesis suggests that the arbitrators should also consider whether the law of the seat of arbitration extends to allowing the application of the rule that claims for compulsory jurisdiction of the foreign court.

5.3 Method to Determine the Applicability of Internationally Mandatory Rules

In addition to arbitrability question, the issue regarding applicability of internationally mandatory rules also concerns how the arbitrators should address public interests that are in conflict

the parties' private interests. Chapter IV has looked further into the possibility of the arbitral tribunal to take into account IMR, which reflects a country's important interests. From the viewpoint of the State, IMR is designed to claim for its own application in order to ensure its role to safeguard the State's important interest. Domestic courts are not reluctant to apply rules that protect public interests of the forum if the transaction between the parties affects these public interests. In a certain jurisdiction, such as the European Union, courts are also required to consider the application of international mandatory rules of a third country. However, when the dispute is submitted to arbitration, the question is whether the arbitrators have to consider the IMR that aim to protect public interests as well when the parties did not agree for the application of this IMR.

Chapter IV investigated this legal issue by assessing previous scholarly discussions and arbitral awards that address this question. The thesis argues that the arbitrators should evaluate objectively the applicability of IMR that claims for application, with an exception to the IMR of the law chosen by the parties. However, if the parties expressly agree to derogate from the applicability of the IMR of the law that the parties have elected, the arbitrators should also evaluate the applicability of the IMR rather than simply respecting the parties' agreement.

The thesis has recommended four criteria for the arbitrators to adopt in order to evaluate the applicability of the IMR. Specifically, the arbitrators have to examine: 1) nature of the IMR: the rules must be of international mandatory character; 2) scope of application of the IMR: the rules must claim for extraterritorial application in the particular case; 3) connection: the rules must have a close connection with the case; and 4) consequences of application or non-application of the IMR: the application or non-application of the rules must not be in contrary to international public policy of the seat of arbitration.

5.4 Application of the Research Findings and Recommendation on Further Studies

The findings of this research serve as a contribution to international commercial arbitration academia. The theoretical discussions contribute to broaden the understanding about the debate

surrounding the nature of international arbitration. The discussions and recommendation in Chapters III and IV are useful for the arbitrators when the arbitrators face with any of these legal issues.

As the thesis refers to the *UNCITRAL Model Law* and the *New York Convention* as a reference for the discussion, the findings of the research is applicable for international arbitration that is seated in a country whose arbitration law took the model from the *UNCITRAL Model Law* and the country is a party to the *New York Convention*. Moreover, the analysis of the research was limited to disputes involving two private parties in international commercial arbitration. Thus, the application of the findings of the research cannot extend to a dispute that involves a State.

As parties in the disputes submitted to international commercial arbitration can also be a State entity, the evaluation about the method to resolve the public and private interest differs. For instance, in the case of arbitrability, the condition for the application of the rule limiting compulsory jurisdiction of a court may differ when the rule is the law of the State that is a party to the dispute. Therefore, further studies can be conducted in order to address the conflict between public and private interests in the case where one of the parties is a State entity.

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