

# *Lex arbitri* / the chosen law of the contract v. mandatory rules of the law of a third country

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## *Lex arbitri* and choice of law by parties

- Party autonomy: the cornerstone of international commercial arbitration
- Parties are free to choose the procedural rules guiding their dispute (*lex arbitri*) and rules governing the substance of their dispute (*lex causae*)
- The choice of *lege arbitri* may have impact on the rules guiding the substance of the dispute (*voie directe* or *voie indirecte*)

## *Lex arbitri* – its meaning

- *Lex arbitri* – procedural rules of the place of the arbitration
- May refer to the arbitration rules and/or conflict-of-laws rules applicable in the place of arbitration
- May refer to the arbitration institution procedural rules

## *Lex Causae* – its meaning

- *Lex causae* governs the mutual rights and obligations of the parties to the contract only – and only with respect to the material terms of the contract excluding its arbitration clause
- Art. 12 of Regulation EC No. 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations:
  - Scope of the law is applicable to:
    - Interpretation
    - Performance
    - Consequences of breach and assessment of damages
    - Ways of extinguishing obligations, prescription and limitation
    - Consequences of nullity of contract

## Relevance of the mandatory rules

- Constraints of the “real world”
  - a contract is to be performed in a particular jurisdiction under its laws
- Public policy concerns – fundamentals may not be ignored
- Enforcement concerns – arbitrability and violations of public policy



## Mandatory rules defined

- Art. 6, clause 3, para 2 of the Ukrainian Civil Code (“**UCC**”)
- Art. 14 of the Law of Ukraine On Private International Law (“**UPIL**”)
- Art. 9 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 (“**Rome I**”)



## Definition in Art. 6, section 3, para 2 of the UCC

- Parties to a contract may not deviate from the provisions of civil legislation acts if such acts directly provide for such a requirement, as well as in the event the mandatory nature of the provisions of civil legislation for the parties to a contract transpires from the contents of such acts or from the nature of the relations between such parties.

## Definition in Art. 14 of the UPIIL

1. The provisions of this Act shall not limit the application of mandatory rules of Ukrainian law regardless of the applicable law.
2. A court, independently from the law otherwise applicable under this Act, may give effect to foreign mandatory rules that have a close connection with the relevant legal relationship save in cases falling under par. 1 of this Article. In so doing a court shall take account of the designation and the character of such rules as well as the consequences of their application.





## Definition in Art. 9 of Rome I Regulation

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

## Where mandatory rules may be found

- Law of the country of performance (certification of goods)
- Law chosen by the parties (*lex causae*)
- Law applicable to arbitral proceedings (*lex arbitri*)
- Law of a third country (US sanctions)
- Law of a country of the likely enforcement of an award
- International law (UNSC sanctions)
- International public policy (corruption, slavery)

## Effect of mandatory rules on arbitration

- On jurisdiction:
  - Arbitrability – corruption, UNSC sanctions, drug trafficking;
  - Capacity of parties – insolvency, anti-arbitration injunctions or decrees
- On substance of the dispute:
  - Overriding parties' contractual arrangements
- **BUT:** arbitration being contractual by nature, the line between jurisdiction and substance may be blurred.

## Application of mandatory rules

- Arbitral tribunals in arbitration friendly jurisdictions generally tend to
  - give effect to mandatory rules pertaining to:
    - competition law
    - international public policy (corruption, money-laundering)
    - UNSC sanctions
    - IMF Member States currency controls
    - anti-arbitration prohibitions of general character
  - give no effect to mandatory rules pertaining to:
    - individual (e.g., local) anti-arbitration rulings/decrees
    - third party (e.g., local) sanctions
    - domestic regulations irrelevant to the international context

## Reflections on mandatory rules

- Arbitral tribunals are not guardians of public interests
- Arbitral tribunals are expected to resolve international disputes quickly and fairly
- There are no universal tests for application of mandatory rules
- Arbitral tribunals tend to rely more on common sense and pragmatism when applying mandatory rules
- The “application-worthiness” tests in various forms are being developed by arbitral tribunals, emerging approaches which are yet to be codified

## Ukrainian mandatory rules v international practice: is the gap unbridgeable?

- Vague wording of Art. 14 of UPIL
- Equating mandatory rules with public policy by the Supreme Court of Ukraine in 2008 (non-arbitrability of corporate disputes)
- Equating Ukrainian domestic mandatory rules (Art. 6(3) of the UCC) with international ones
- Strong adherence to the “jurisdictional” rather than contractual theory of arbitration in the past (relevance of *lex arbitri!*)
- Narrowing down the public policy defence in recent case law

## Questions? THANK YOU!

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