

# Mandatory Rules of Law in International Arbitration:

## Ukrainian perspectives

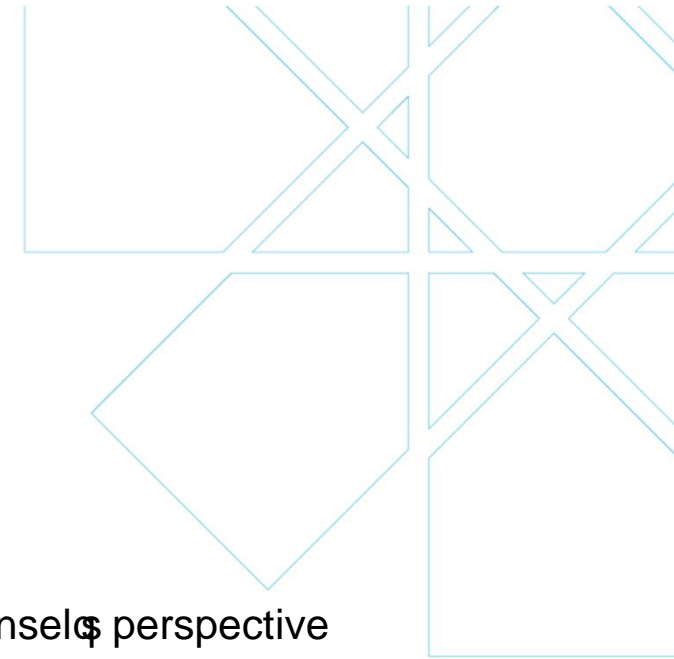


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# Introduction

- “ What are mandatory rules?
- “ To provide a better understanding of mandatory rules from a client / counsel's perspective and the perspective of arbitrator
- “ Mandatory Rules of *Governing Law & Lex Arbitri*: limits of party autonomy
- “ Other mandatory rules of law applicable to contractual obligations (*lex loci contractus, locus regit actum*, law at the place of performance / potential enforcement, public policy, antitrust and competition regulations, etc)
- “ Examples of how the Ukraine's mandatory rules may affect a contract / arbitration
- “ A Vital Question or What is To Be Done?



# What are mandatory rules?

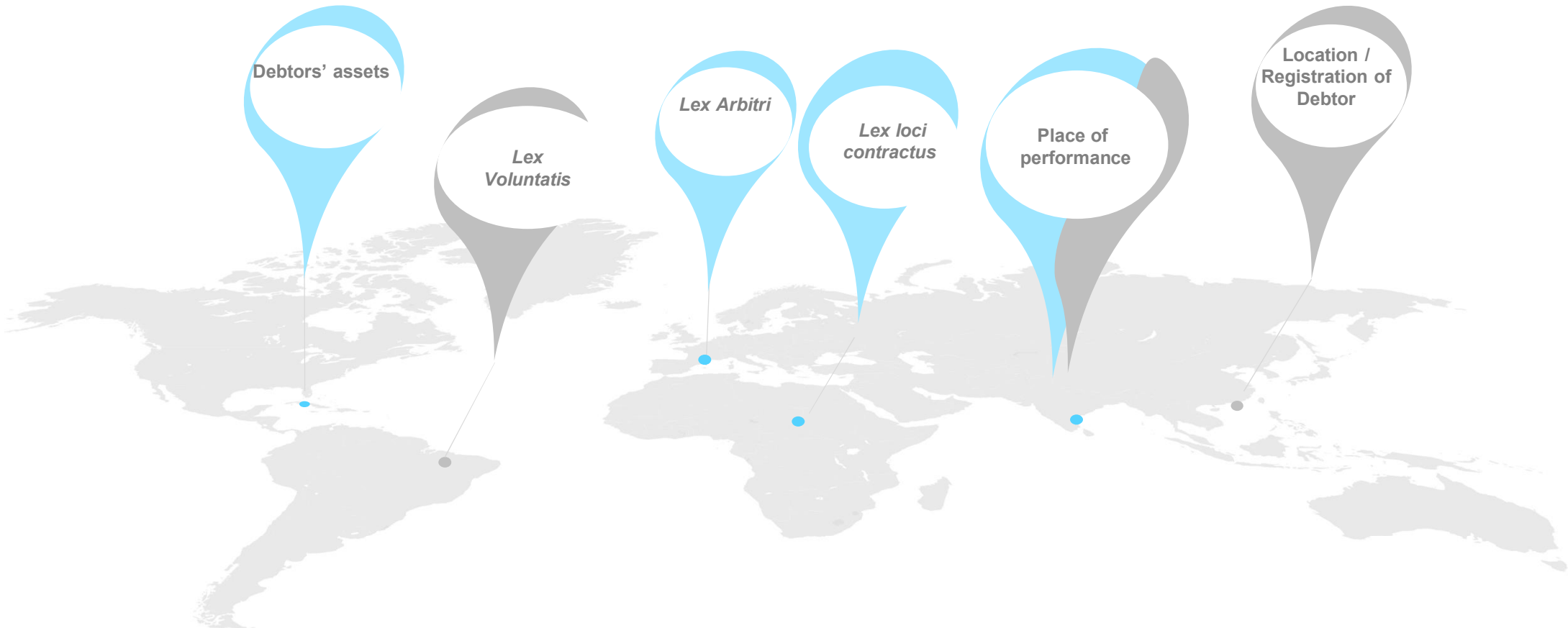
- “ Mandatory rules are laws [or provisions enacted in a (perceived) public interest] which purport to apply [and to prevail over] irrespective of a contract's proper law or the procedural regime selected by the parties+

*Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2 Arbitration International 274, 275. Marc Blessing, 'The Impact of Mandatory Rules of Law in International Arbitration (seen from an arbitrator's perspective)' BIICL (2010)*

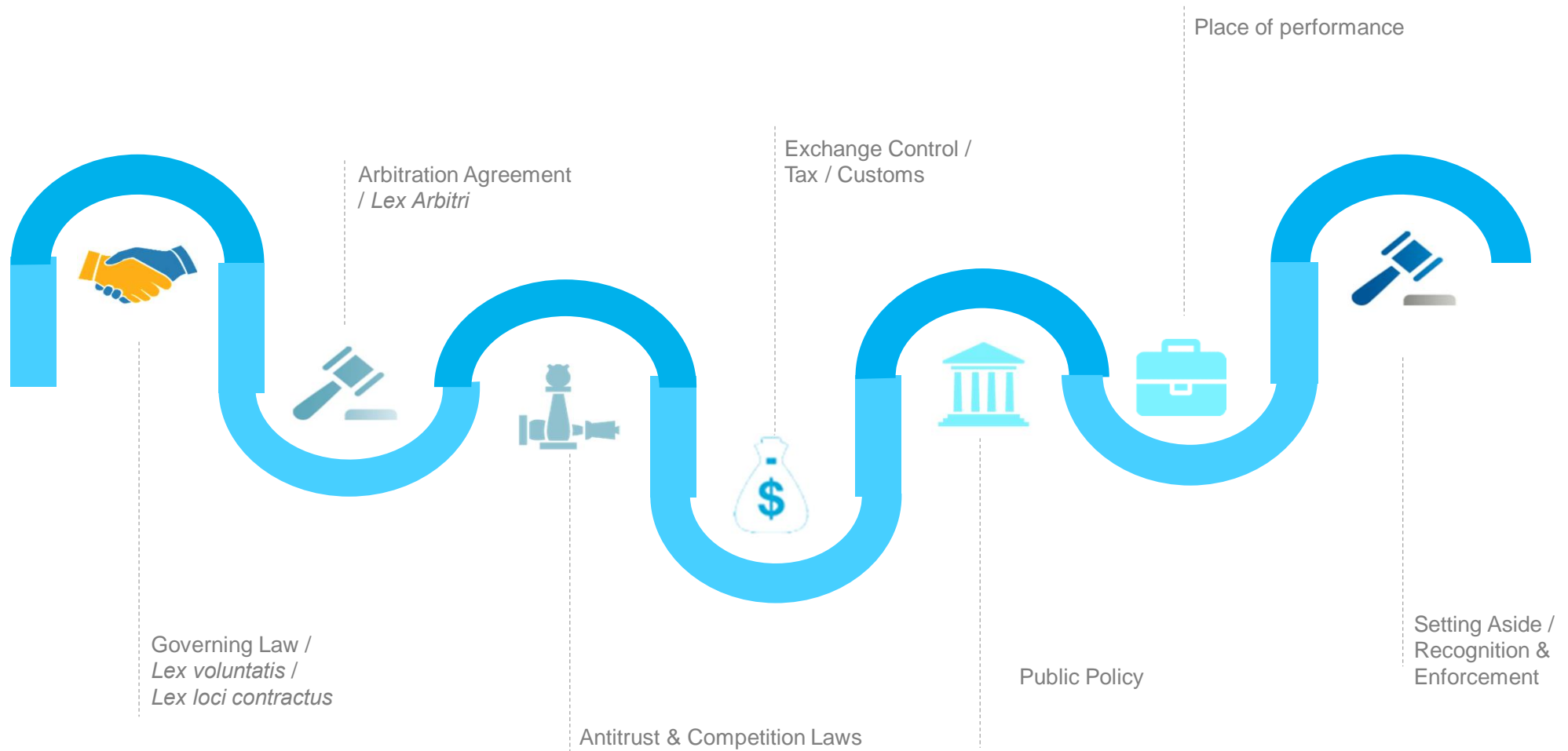
- “ [E]ffect may be given to the mandatory rules of the law of another country with which the situation has a close connection, ò [and] those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

*Art. 7 of the 1980 Rome Convention 80/934/ECC on the law applicable to contractual obligations*

## Where are mandatory rules?



## Different views on mandatory rules



## Mandatory Rules of Governing Law & Lex Arbitri

- “ *Few principles are more universally recognized in private international law than the principle according to which the law of the contract is the law chosen by the parties.*” [ICC Case No 1512]
- “ Art. 19 (1) the ICA Act of Ukraine: *the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*”
- “ Art. 28 (1) and (4) the ICA Act: *“... The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute... In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction”.*
- “ However, the parties' choice of law may not cover all aspects related to the dispute and might be limited by mandatory rules (e.g. *lex arbitri*, *lex loci contractus*, legal capacities, legal representation, public policy, law at place of performance and/or enforcement, etc.)

## Mandatory rules on arbitration procedure in Ukraine

- “ arbitration agreement shall be in writing (Art. 7 (2) the ICA Act);
- “ arbitral tribunal must treat the parties equally and provide them with a full opportunity to present their cases (Art. 18 the ICA Act);
- “ arbitral award shall be made in writing and shall be signed by the sole arbitrator or the majority of the arbitral tribunal (Art. 31 (1) the ICA Act);
- “ award shall be reasoned (Art. 31 (2) the ICA Act); and
- “ parties may not derogate from the procedure set forth by Art. 34 of the ICA Act (Ukraine) for settling the arbitral awards.

## Other mandatory rules of law

- “ Review of the conformity of an arbitral award with the public policy of the country in which recognition and/or enforcement are sought (Art. V.2 (b) the 1958 New York Convention);
- “ Arbitrator's duty to render an award that (a) is unlikely to be set aside at the seat of arbitration and that (b) will be recognised and/or enforced in jurisdictions of potential enforcement / recognition;
- “ +Classic+ Public Policy matters: apartheid, antitrust/competition violations, corruption, fraud?, customs and tax offences, drug trafficking, embargo and other sanctions;
- “ *Lex loci contractus / Locus regit actum* (Art. 31 the PIL Act)
- “ Any choice of law (foreign governing law) does not limit or affect application and effect of mandatory rules of Ukrainian law applicable to respective relations (Art. 14 (1) and (2) the PIL Act)



## Consequences of violating Ukraine's mandatory rules

- “ an international sales contract may be recognized invalid by a competent court, if such contract contradicts mandatory law of Ukraine or international treaty of Ukraine (Art. 6 the Foreign Commercial Contract Act)
- “ any transaction in Ukraine shall comply with mandatory requirements of Ukrainian law (Art. 14 the PIL Act), e.g. if a contract is interpreted as being contrary to Ukrainian competition law (e.g., achieving the unlawful competition advantages and/or constituting other uncompetitive practices), such non-compliance may result in specific sanctions of the AMCU being entitled to impose fines (penalties) and/or to oblige parties to amend their contractual relations to align with the Ukrainian competition law (Art. 48 (1) the Ukrainian Competition Law, as well as to enforce the AMCU sanctions through court proceeding (Art. 25 the AMCU Act)

## Public Policy

- “ Pursuant to Decree No. 12 the Plenum of the Supreme Court of Ukraine (24 December 1999) public order (almost identical to ~~public policy~~) should be understood as the legal order of the state, the determining principles and basis, as being fundamentals of the existing state order, and connected with its independence, integrity, inviolability, main constitutional rights, freedoms, guarantees etc.
- “ The Supreme Court of Ukraine (24 November 2010) held that arguments on contradiction of the SCC arbitral award to the public policy of Ukraine are groundless, since ~~the awards are binding only upon [parties] and do not influence on the independence, integrity, sovereignty and inviolability, basic constitutional rights, liberties, guarantees as basis of Ukraine’s existent regime.~~

## Setting Aside

- “ arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the ICA Act from which the parties cannot deviate
- “ the dispute is not capable of settlement by arbitration under the law of Ukraine; or
- “ the award is in conflict with the public policy of Ukraine.

## Non-Enforcement or Non-Recognition

Article 36 of the ICA Act / Article V of the New York Convention

- “ the award contradicts public policy;
- “ the dispute is not arbitrable under the laws of Ukraine.

*Telenor Mobile Communications AS and Storm LLC [2007]*

*Dallah RE and Tourism Holding Co -v- The MRA, Government of Pakistan [2010] UKSC 46*

## Invalidity / Ineffectiveness

National law rules (e.g. antitrust / competition / public policy) may render the performance of the contract as stipulated unlawful at the place of performance and hence render the contractual provisions (the application of which would be unlawful) ineffective

*Ministry of Energy of Ukraine vs state oil & gas companies [Kyiv Commercial Court, 2009]*

## A Vital Question or What Is To Be Done?

- “ **Severability Clause**, e.g.: *“If at any time during the existence of the contract one of its provisions is determined to be or to have become invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions of the contract shall not in any way be affected or impaired...  
  
The parties shall negotiate in good faith to **replace such invalid, illegal or unenforceable provision with a valid, legal and enforceable provision the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provision.**”*
- “ **Article 28 (3) of the Ukraine’s ICA Act** provides that the arbitral tribunal may decide ex *aequo et bono* or as *amiable compositeur* if the parties have expressly authorized it.
- “ **UNIDROIT Principles 2010 on contracts infringing mandatory rules**

## Practical considerations

“ Article 3.3.1 (1) of UNIDROIT Principles 2010

Where there is no prescribed effects of an infringement upon a contract under mandatory rules, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable:

- (a) the purpose of the rule which has been infringed;
- (b) the category of persons for whose protection the rule exists;
- (c) any sanction that may be imposed under the rule infringed;
- (d) the seriousness of the infringement;
- (e) whether one or both parties knew or ought to have known of the infringement;
- (f) whether the performance of the contract necessitates the infringement; and
- (g) the parties' reasonable expectations.

# Contacts

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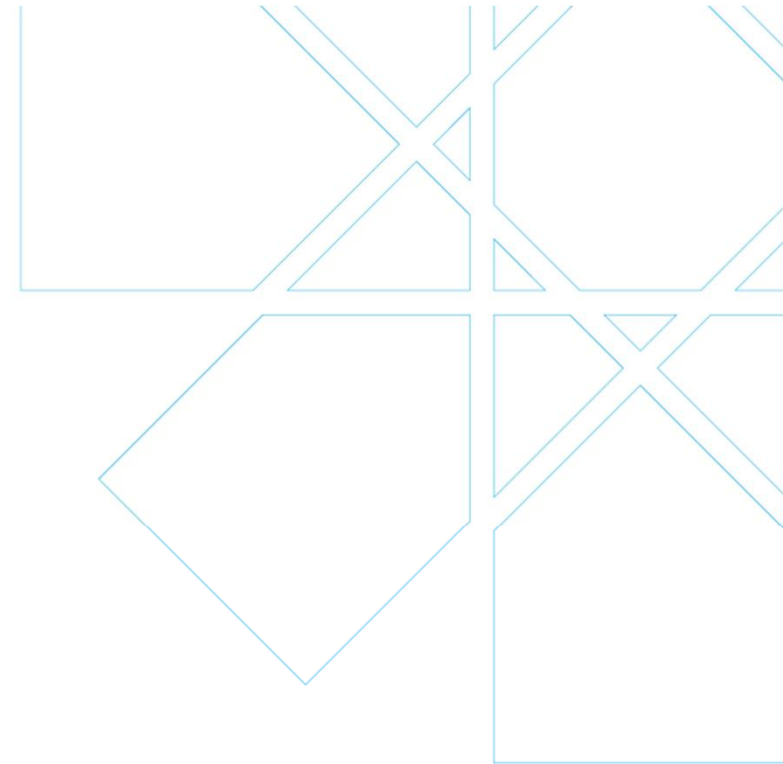
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