# The Possibility of Addressing Mandatory Rules and Its Adjustments in the Framework of International Commercial Arbitration

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ABSTRACT *Mandatory rules are rules that apply to disregard the law chosen by the parties in their agreement. In this article, we will examine and address the role of international commercial arbitration and arbitrators when facing issues related to mandatory rules. It should be stated that mandatory rules pose conflicts for arbitrators because they place the state's and the parties' interests in competition. This highlights the main issue of whether the arbitrator should apply the related law when the parties' agreement does not include this law. In other words, what should the arbitrator do in this case? The answer to this issue varies due to the variety of ways in which the "nature of arbitration" might be legally interpreted. However, a practical solution is needed. In order to reach a practical solution, the author will assess, from a normative approach, the relative benefits of various methodological techniques and their adjustments that are now in use. Then finally, conclusions will be reached regarding the approach and methodological techniques that best balance the parties' interests.*

KEYWORDS *mandatory rules, international commercial arbitration, arbitrator, legal framework*

## 1. Introduction

As it is known, the primary technique for resolving disputes between parties involved in cross-border business transactions is arbitration. International commercial disputes and conflicts are now most often resolved through arbitration. There are several institutions, laws, acts, and conventions that provide parties the opportunity to have their disputes arbitrated in a more effective setting. For example, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] and the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, which has also played a significant role due to its functioning across

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[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) n.d. https://www.newyorkconvention.org/english.

sectors.[2] Also, since arbitration is based on the parties' approval and consent, this provides more flexibility over a wide variety of issues, including choice of substantive and procedural law.

In numerous domestic legal systems, participants involved in international commercial agreements possess the authority to select both the governing law and the venue for addressing potential contractual disputes. Essentially, arbitration agreements underscore the legal relationship between parties and establish the legal foundation for arbitrators' competence in settling disputes arising from these agreements. Legal scholar Professor Dr Ádám Boóc stated that "The judgment underlines the characteristic of the arbitration relationship, which has been a feature of arbitration since Roman law, namely that the arbitration relationship is essentially a contractual relationship with the characteristics of a mandate".[3] To honor the principle of party autonomy and this mandate, arbitrators are required to uphold and align with the parties' intentions and concerns during the resolution of conflicts. However, this selection of governing law is not without limitations, particularly in the presence of mandatory rules. Mandatory rules are rules that apply automatically, irrespective of the chosen governing law decided upon by the parties. Mandatory rules impose limitations on the principle of party autonomy. This complicated scenario presents arbitrators with a complex dilemma when determining the applicable law. Thus, the central issue can be framed as follows: "When a law stipulates that arbitrators must apply it, even though the parties' contract does not incorporate this law, how should arbitrators proceed? Which perspective should they endorse?"

While various instances of legal models and efforts by international arbitration bodies like the International Chamber of Commerce (ICC), the United Nations Commission on International Trade (UNCITRAL), and even Hungarian arbitration law have addressed this central concern, it remains unresolved. For example, the Hungarian Arbitration Act does not specify any mandatory rule that must be followed by law; instead, party autonomy governs the formulation of the norms guiding the arbitral procedure under Hungarian arbitration law.[4] Consequently, it becomes imperative to address the arbitrator's obligation not only to adhere to the parties' chosen legal framework but also to abide by any obligatory regulations in place. This assumes particular significance due to the fact that numerous complex challenges in both the theory and practice of

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[2] László Kecskés, "Some ethical problems of arbitration," *Acta Universitatis Szegediensis: Forum: Acta juridica et politica* 11, no. 3 (2021): 211–218. http://acta.bibl.u-szeged.hu/73793/1/juridpol_forum_011_003.pdf#page=211

[3] Ádám Boóc, "Liability of Arbitrators in Hungarian Law with a View to the Latest Amendment of the Rules of Procedure of the Arbitration Court Attached to the Hungarian Chamber of Commerce and Industry," *Romanian Arbitration Journal / Revista Romana de Arbitraj* 17, no. 1 (January-March 2023): 60–84.

[4] "International Arbitration 2023 - Hungary | Global Practice Guides | Chambers and Partners." Practiceguides.chambers.com. https://practiceguides.chambers.com/practice-guides/international-arbitration-2023/hungary.

arbitration arise from the inherent clashes between the independence of the involved parties and the legal limitations imposed by states. These expected conflicts between party autonomy and constitutional restrictions underlie a substantial portion of disputes within the scope of arbitration philosophy and practice. Additionally, it is noteworthy that mandatory rules commonly serve to protect economic, social, or political interests and may reflect a state's domestic or foreign public policy.

According to the article “Mandatory Rules of Law in International Arbitration” written by Professor Pierre Mayer[5], “mandatory rules are laws that assert to be applicable regardless of the applicable law to the agreement or the parties' selected procedural system. Mandatory rules in International Arbitration remain to be a source of debate”.

However, mandatory rule issues are getting worse, which makes things more difficult. Mandatory rules difficulties are believed to develop in more than fifty percent (50%) of cases due to the rising popularity of arbitration, widened ideas of arbitrability, superior legislative activity[6], and many more.

The purpose of this article is to tackle the debate concerning mandatory rules from a normative perspective using a legal descriptive approach by defining the concept of the mandatory rule vs. the principle of party autonomy by referring to the related/ relevant conventions, discussing the various methodological techniques and approaches that are now in use, and the role of International Commercial Arbitration to reach the approach that best balances the parties' interests.

## 2. Mandatory Rules of Law vs. Party Autonomy

Similarly to any agreement, arbitration operates based on a contract and serves as a mechanism for settling conflicts. These arbitration agreements grant the tribunal the authority to address a specific dispute. As a result, it is essential for the tribunal to adhere to the arbitration agreement, particularly when making determinations concerning the composition of the dispute, jurisdiction, and elements pertaining to scope, remedies, and the relevant legal framework. It is worth highlighting that all of this originates from the widely recognized concept and principle in arbitration referred to as “Party Autonomy.”

The concept of party autonomy has been addressed in several conventions such as Article 28(1) of the UNCITRAL Model Law[7] and Article 35(1) of the

[5] Pierre Mayer, *Mandatory Rules of Law in International Arbitration* (Arbitration International, 1986), 274–275.

[6] Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International 2nd edition, 2001), 560.

[7] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006*, 17 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

UNCITRAL Arbitration Rules[8]. These articles provide parties the freedom to choose any law or international convention they deem appropriate to be applied to their dispute.
Also, Article V(1)(c)[9] of the New York Convention along with Articles 34 (2)(a)(iii)[10] and 36 (1)(a)(iii)[11] of the Model Law adopted by the United Nations Commission on International Trade Law (UNCITRAL) highlight the concept of party autonomy.
We can infer from Article V(1)(C) of the New York Convention that the recognition and enforcement of an award may be rejected if it attempts to deal with a dispute that was not contemplated by or does not fall within the terms of the submission to arbitration, or consists of decisions on matters outside the scope of the submission to arbitration. In other words, an arbitral award can be set aside if the arbitrators have exceeded their scope of powers and authority. The same explanation can also be deduced from Articles 34 (2)(a)(iii) and 36 (1)(a)(iii) of the United Nations Commission on International Trade Law Model Law (UNCITRAL). [12]
Still, the concept or principle of party autonomy is not absolute, especially in situations involving mandatory rules. The existence of mandatory rules gives rise to a significant conflict between party autonomy and public policy standards. In such cases, the arbitrator's role becomes fundamental in finding a suitable compromise between these conflicting interests.
There exist various interpretations of the term “Mandatory Rules of Law.” For instance, Donald Donovan has described mandatory rules as regulations that “originate beyond the contract, are applicable regardless of the parties' mutual agreement, and typically aim to safeguard public interests that the state prohibits parties from waiving.”[13] Additionally, Professor Pierre Mayer has

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[8] “UNCITRAL Arbitration Rules | United Nations Commission on International Trade Law.”
Uncitral.un.org. https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.
[9] “U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.” 1968. International Legal Materials 7 (5): 1042–1061.
[10] United Nations Commission On International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006*, 19. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.
[11] United Nations Commission On International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006*, 21. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.
[12] Hossein Fazilatfar, “Public Policy Norms and Choice-of-Law Methodology Adjustments in International Arbitration,” *South Carolina Journal of International Law and Business 18, no.* 2, Article 7 (2022): 92.
https://scholarcommons.sc.edu/scjilb/vol18/iss2/7.
[13] Loukas A Mistelis, Julian D M Lew, and Queen Mary, *Pervasive Problems in International Arbitration* (Alphen Aan Den Rijn: Kluwer Law International, 2006), 36–38.

outlined Mandatory Rules of Law as "binding legal provisions that must be enforced in an international relationship, regardless of the governing law of that relationship. Alternatively, mandatory rules can be seen as expressions of public policy, commanding such authority that they must be enforced even if the overall body of law they belong to lacks jurisdiction due to the relevant conflict of laws principle. The practical nature of these rules is what renders them enforceable."[14]

Based on the definition provided earlier, it can be inferred that while party autonomy stands as a fundamental concept within Private International Law and a significant factor in international interactions granting parties the liberty to select the governing law for their dispute, mandatory rules of law are identified as regulations rooted in public policy. These rules are enforced in international contexts irrespective of the law selected by the parties, as explained by legal experts like Donald Donovan.

Furthermore, by examining the provisions of the New York Convention and the Model Law of the United Nations Commission on International Trade Law (UNCITRAL), we can conclude that the inclusion of rules and regulations not explicitly stated in the arbitration agreement will not invalidate the arbitration award. Nonetheless, arbitrators must refrain from exceeding their designated jurisdiction and authority when resolving disputes and rendering the arbitration award, otherwise the concern of exceeding their authority arises.

As mentioned earlier, although the arbitrator should apply and respect the will and interest of the parties, under certain circumstances if the arbitrator and the arbitral tribunal have applied a law/ mandatory rule related to public policy different than the law chosen by the arbitral parties, this is not considered as violating the principle of party autonomy according to Professor Pierre Mayer.[15] However, the debate over applying mandatory rules by arbitrators and taking no notice of the law chosen by parties highlights how the "nature of arbitration" is interpreted, since conflicting interpretations affect how parties' and arbitrators' rights are understood and analyzed. Several of these interpretations and theories will be discussed in Section 3.

## 3. The Nature of Arbitration

The ongoing debate about the fundamental essence of arbitration is a matter that the majority of arbitrators are confronted with. Different interpretations of what arbitration truly encompasses influence the way the rights and obligations of both parties and arbitrators are perceived. Such divergent viewpoints result in practical challenges. There are three main theories or viewpoints that provide different interpretations of the nature of arbitration. These theories include the contractual theory, the jurisdictional theory, and the hybrid theory, all of which require thorough examination.

[14] Mayer, *Mandatory Rules of Law in International Arbitration*, 274–275.
[15] Ibid.

## 3. 1 The Contractual Theory

According to this theory, arbitration is viewed as having a contractual basis. The entire arbitral procedure is viewed as the result of the parties' agreement, including the creation of the tribunal, the authority of the arbitrators, and the binding nature of the judgment.[16] As a result, according to this theory, arbitration is a tool of "free enterprise" and is distinct from the government system because governments do not impose restrictions on people's rights and freedoms. The state will easily step in to enforce the parties' agreement as a formed agreement if one party attempts to avoid its contractual obligations by avoiding arbitration or by failing to comply with the arbitrator's judgment. It follows that state legal systems have no business influencing how contracts governing the arbitration procedure are interpreted. The idea holds that necessary regulations should only be applicable if they are a part of the contract or demonstrate the invalidity or illegality of the parties' agreement.

## 3. 2 The Jurisdictional Theory

According to this theory, national sovereignty is the key characteristic. Contrary to the contractual theory, which views arbitration as a form of free enterprise, the jurisdictional theory recognizes that all activity taking place on state territory is inevitably subject to that state's jurisdiction.[17] The proponents of this view contend that all parts of the arbitration, including the validity of the arbitration contract, the power of the arbitrators, and the capacity to enforce the award, are governed by domestic legislation. The laws of the seat and the country where implementation is sought will be of main concern regarding the conduct of arbitration. Thus, according to this theory, arbitrators must ultimately turn to domestic laws, particularly, the laws of the seat, just like a local judge does, when establishing the law that applies to the merits of the dispute. They are still free to implement foreign laws, but they must do so in compliance with conflict of laws guidelines. As a result, decisions about whether to apply an obligatory rule should also be made using conflict rules, starting with the seat's conflict rules.

## 3. 3 The Hybrid Theory

According to this theory, most people now consider that contractual or jurisdictional theories do not fully explain arbitration. They argue that components of each of these ideas are necessary for arbitration. It is contractual in that the parties decide on some details, such as whether to arbitrate a dispute

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[16] Horacio A. Grigera, *Choice-of-Law Problems in International Commercial Arbitration* (Tübingen: J.C.B. Mohr, 1992).
[17] Pieter Sanders, *International Arbitration* (The Hague: Martinus Nijhoff, 1968), 157–162.

and the chosen arbitrators, yet it is jurisdictional in that it ultimately depends on the will of the states, which may choose to reject arbitrability. Thus, most people today agree that arbitration is a combination of the two views. Among many legal experts, Okezie Chukwumerije also believes that "[t]he reality is that an understanding of the concept of arbitration must acknowledge the interaction of both its consensual basis and the legitimacy and support conferred on the process by national legal systems"[18].

However, accepting this expanding pattern only partially resolves the issue. There is plenty of opportunity in the middle for diverse conceptions of the hybrid view if the many perspectives on arbitration's character may be seen as points along a continuous spectrum, with the contractual and jurisdictional theories at each end. It should be noted that the closer arbitrators are to the contractual theory, the less likely they will be to restrict party autonomy. Therefore, recognizing arbitration as a hybrid does not establish the proportional importance of the many interests and concerns involved. We can deduce that the question of the nature of arbitration is more challenging to answer, but what are the possible approaches and techniques for addressing mandatory rules?

## 4. Possibilities for Addressing Mandatory Rules

Applying mandatory rules is a debatable topic, since it is harder to balance the conflicting interests between the state and parties. There are three different approaches and techniques applied for addressing mandatory rules by arbitral tribunals, (a) applying all mandatory rules, (b) applying no mandatory rules, and (c) applying mandatory rules at the arbitrator's discretion. However, these approaches have advantages and disadvantages, which will be treated in this section.

### 4. 1 Applying All Mandatory Rules

According to this approach, all mandatory rules will be applied by arbitrators despite the related rules. This approach highlights several advantages, the first advantage being that applying this approach would guarantee the protection of state interests and maintain official support for arbitration, because all necessary regulations would be applied irrespective of their nature, origin, or relevance to the dispute. Another benefit could be that it would result in predictability and consistency if the parties were informed of all possibly applicable required rules. However, the number of necessary mandatory rules is already increasing.[19] If they were to be implemented regardless of how strong the connecting variables were, it might be challenging and therefore ineffective for

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[18] Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration*, (Westport, Conn: Quorum Books, 1994).

[19] Andrew T. Guzman, "Arbitrator Liability: Reconciling Arbitration and Mandatory Rules," *Duke Law Journal* 49, no. 5 (2000): 1279.

parties to be aware of every legislation that might be relevant. This could lead to inequity between the parties since less experienced parties who cannot afford legal counsel might not be aware of pertinent requirements. On the other hand, mandatory rules that protect parties as well as those that protect weaker parties would always be in effect. As a result, it is difficult to predict the overall degree of damage that the parties might experience.

Therefore, and concerning what is stated above, one disadvantage is that arbitration would lose favor with the business community since national legal systems would probably have a better possibility of evading the necessary regulations of third countries. Another is the encouragement of state-level legal expansion. If this concern is to be taken into account, it can be argued that this approach makes such expansion more obvious than any other, because governments would be guaranteed that their mandatory principles are observed until there is a conflict of mandatory rules.

However, the main concern with this approach is that it denies party autonomy. According to this approach, even if we lean toward the contractual theory, arbitrators should not mindlessly follow the parties' instructions, who will still have every right to criticize a strategy that essentially gives states total control. Party autonomy is nevertheless a key component of arbitration, although it is less potent than it is frequently rumored to be.[20] There are valid concerns about the tribunal's authority and jurisdiction to adopt a position without attempting to weigh this against the other opposing factors.[21]

However, according to several legal scholars and jurisdictional reasoning, this strategy does not make sense. A tribunal would be bound by the seat's required rules but would only take into account foreign mandatory requirements if the conflict of laws rules of the seat permitted it. Conflicts might prevent the enforcement of all foreign mandatory laws, especially if they reflect unjustified state interests or also if they are laws that are against transnational public policy. Therefore, it is not difficult to understand why this strategy has so little academic support.

## 4. 2 No Mandatory Rules Applied

Contrary to the “Applying All Mandatory Rules” approach, this approach has several advantages. The key benefit is that arbitrators have less discretion, which improves uniformity and predictability and eliminates complaints of arbitrariness. Additionally, the argument for state legal expansionism is eliminated.

[20] Marc Blessing, “Mandatory Rules of Law Versus Party Autonomy in International Arbitration,” *Journal of International Arbitration* 14, no. 4 (1997): 23–40.

According to Emmanuel Gaillard and John Savage [22], this is the optimal method since under any other technique arbitrators face the possibility of going beyond the scope of their work, making their award susceptible to a motion to set aside in some jurisdictions.
However, despite the advantages of this approach, it also has disadvantages. One disadvantage is that state interests are given less protection, which increases the possibility that arbitrability would be denied, resulting in an ineffective arbitral system. In this case, it is important to distinguish between two meanings of the term "arbitrability": a) the first refers to whether the dispute has ever been capable of being resolved through arbitration, and b) the second is whether the parties' arbitration agreement, when properly interpreted in the given case, covers the disputed issue.
According to the first definition, litigation would be permitted in the event of an inarbitrable conflict. The second concerns the agreement's scope and interpretation, and it asks if the arbitration clause should be interpreted as superseding the courts on all matters, including mandatory rules that are not covered by the arbitration clause. Additionally, it means that arbitration gives parties the chance to escape state attempts to regulate what takes place inside their borders. This might potentially harm the larger community in addition to undermining state sovereignty. Furthermore, it does not support the adoption of a required regulation based on worries about its enforceability, which could result in costly failures of enforcement actions.

### 4. 3 Applying Mandatory Rules at the Arbitrator's Discretion

The majority of legal experts appear to support a strategy that provides arbitrators the freedom to enforce strict regulations. When opposing factors are present, discretion seems logically preferable, since it enables the delicate balancing of the pertinent factors. A strategy like this could, however, be used inconsistently if it is unknown how much weight each factor merits. Conferring discretion raises questions regarding consistency, because it allows arbitrators' moral convictions or conscience goals to preserve party autonomy in decisions.[23] All of these approaches make us question the recent adjustments followed by arbitrators in approaching mandatory rules, which will be tackled in the below section.

## 5. Adjustments in Approaching Mandatory Rules

Moreover, it has been established that arbitrators possess the option to approach mandatory rules with a hybrid, jurisdictional, or contractual perspective. The

[22] Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague; Boston: Kluwer Law International, 1999), 856–857.
[23] Fazilatfar, "Public Policy Norms and Choice-of-Law Methodology Adjustments in International Arbitration," 92.

existence of a strict method guaranteeing the accurate application of public policy rules, also known as mandatory rules, in every circumstance, is lacking.[24] Nevertheless, arbitrators can consider various adjustments to effectively determine the suitable mandatory rule relevant to the dispute. Many legal experts propose that, in this instance, the arbitrator should either (a) evaluate the utilization of dépeçage, a principle permitting the utilization of different legal frameworks for distinct elements or issues within an international transaction, thus applying distinct legal structures to each contractual element, or (b) undertake the role of a mediator during the arbitration process to facilitate the resolution of the conflict.

Applying the dépeçage concept will allow the use of several law concepts regarding the different components of the dispute to adjust the instant application that some mandatory rules deserve.[25] Dépeçage occurs everywhere as a result of problems like procedural classification, the rejection of specific provisions of foreign law due to public policy considerations, or even when a specific provision of foreign law is replaced by a public policy norm. This overall strategy is also adopted by the American Restatement (Second)[26], Conflict of Laws, which "directs the court to divide the matter into parts, or issues, and to make a distinct choice of law determination with respect to each of them." While in European countries, dépeçage is permitted in a more restricted context and only in rare circumstances, the issue-by-issue approach is used, which is known as "principled dépeçage" and necessitates express party stipulation.[27]

According to the article "European Conflicts Law after the American "Revolution", the underlying presumption is that parties are unwilling to have their transaction divided across several different bodies of law.[28]

However, on the other hand, broader use of dépeçage has been argued to better serve the international nature and aspects of multistate situations. The principled dépeçage adds assurance to the parties' agreement, the choice of applicable law, and conflict settlement, while the American style offers flexibility. Despite that, when the involved norms are default norms, implementing dépeçage in the European way is considered by many experts as a superior strategy and approach. The main question is what is the reason behind the need for party stipulation ('principled dépeçage') when overriding mandatory rules of certain states call for instant application in a given scenario? The answer to these questions is that, if a transaction has been carried out in

[24] Jeffrey Maurice Waincymer, "International Commercial Arbitration and the Application of Mandatory Rules of Law," *Asian International Arbitration Journal* 5, no. 1 (2009): 1–45. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912318.

[25] Peter Hay, "European Conflicts Law After the American 'Revolution' – Comparative Notes," *University of Illinois Law Review*, (2015): 2056–2070. https://www.illinoislawreview.org/wp-content/ilr-content/articles/2015/5/Hay.pdf.

[26] Ibid.

[27] Ibid.

[28] Ibid.

many jurisdictions and those rules are in question, then arbitrators may use dépeçage as a last resort to support the adoption of specific public policy norms. However, unlike a generic approach under the American Restatement, the limit might be applied late and specifically to mandatory rules of the location of implementation.

Lastly, an alternative method within the arbitration process is the one that involves the arbitrator also taking on the role of a mediator, a practice sometimes referred to as "arb-med-arb", noting that in some cases the method "arb-med-arb" can be implemented through appointing a separate mediator to handle the process. In other words, regardless of whether the method "arb-med-arb" is carried out by the same arbitrator or given to a separate mediator, it is a method where mediation is included into an ongoing arbitration procedure, according to Dr. Manuela Renáta Grosu. [29] This can prove to be an effective avenue for resolving a public policy concern during arbitration. Additionally, a variety of legally grounded avenues exist for the application of public policy criteria in arbitration.[30] Nonetheless, if the matter cannot be reconciled based on the provisions outlined in the parties' formulated contract or the statutes the arbitrator employs, mediation emerges as an extra-legal recourse. It should be noted that the "arb-med-arb" method is called "arb-med-arb", since it starts with arbitration, then the arbitrator suspends arbitration at some stage to allow the inclusion of mediation into the diuspute. However, if mediation does not succeed in settling the dispute, then the arbitration procees will resume and an arbitral award will be issued.[31]

Confronted with the intricacies of intricate subjects, such as public policy standards and obligatory regulations, an arbitrator might assume the role of a mediator owing to their comprehension of and proficiency in the matter under dispute. Nevertheless, the mediation's success hinges on the willingness and collaboration of all involved parties, but it is to be noted that this method might not solve the entire dispute but only a part of it.[32]

This "arb-med-arb" solution is a development consistent with the standard arbitration procedure.[33] Indeed, mediation is based on party consent and is governed by contracts, just like arbitration.[34] Therefore, the parties' consent is required before the arbitrator can begin with mediation. Any time during the

[29] Manuela Renáta Grosu, "Hybrid procedures: The Combination of Mediation and Arbitration in Resolving Commercial Disputes from Arbitrator, Mediator, Legal Representative, and Client Perspective" (PhD diss., Eötvös Loránd University, Budapest, 2021), 83–84.

[30] Fazilatfar, "Public Policy Norms and Choice-of-Law Methodology Adjustments in International Arbitration," 92.

[31] Grosu, "Hybrid procedures: The Combination of Mediation and Arbitration in Resolving Commercial Disputes from Arbitrator, Mediator, Legal Representative, and Client Perspective," 83–84.

[32] Ibid.

[33] Fazilatfar, "Public Policy Norms and Choice-of-Law Methodology Adjustments in International Arbitration," 92.

[34] Ibid.

arbitration process, the arbitrator may bring up the prospect of mediating the entire or a portion of the dispute.
The arbitrator-mediator should recognize the parties' choice of law throughout the "arb-med-arb" and look into any possible impact or implementation of the public policy norms of that state and any participating foreign governments which pertain to the areas of the arbitral proceedings, performance, and implementation. As a result, the arbitrator-mediator, with the parties, would also go over all implications of violating public policy for the implementation and enforcement of awards in the applicable jurisdictions. [35]
The arb-mediator may then, on an individual level and as appropriate, suggest that the parties adopt a particular body of legislation to apply to a section of their transaction (in accordance with the dépeçage already indicated) or modify the current choice of law after a dispute. Yet, there will be laws that benefit one party more than the other. In that situation, the arb-mediator should encourage parties to reach a settlement based on the problems at hand and the parties' interests rather than their position.[36]

## 6. Conclusion

Arbitration agreements define the legal relationship between parties and serve as the contractual foundation for arbitrators' empowerment to resolve commercial disputes between them. As previously noted, arbitrators are obliged to honor the parties' intentions and consider their concerns when rendering an arbitration award, thus preserving the principle of party autonomy. Nonetheless, a limitation exists in the requirement to uphold the essential regulations of governments that have a substantial interest in the outcome of the arbitration. This reservation to adhere to such regulations is not dissimilar to the arbitrators' responsibility to deliver a decision that can be legally enforced in a court of law. It can be difficult to use public policy principles in international arbitration. The law chosen by the parties, or any other appropriate legislation established by the tribunal is the initial and most important condition for implementing and maintaining public policy norms. The limits would take precedence over local procedural laws of the arbitration venue if the law of arbitration adopted by the parties had a territorial connection to the dispute. The foreign government's adherence to the selected law which has a direct connection to the case may also be implicated as overriding public policy norms and thus may prevail over the parties' choice of law. In actual reality, arbitrators can respond to foreign public policy standards in one of the three below suggested ways in order to best balance the parties' and the state's interests: applying norms as matters of fact or as a matter of law, or ignoring them with no consideration.

[35] Ibid.
[36] Ibid.

In considering public policy norms, the actual underlying principles of public policy are regarded as an unforeseen and uncontrollable event that renders the transaction unenforceable. On the other hand, in situations where foreign public policy norms are expressly invoked, the law chosen by the parties dictates all elements of the transaction, except when it contradicts a prevailing foreign public policy principle. In such instances, the foreign standard supersedes the previously chosen legislation.

Furthermore, tribunals dismiss foreign public policy norms when they lack either a pronounced significance or a robust link to the nation that introduced the norm. Nevertheless, the tribunal's decision could potentially face termination or denial of enforcement within the courts of the enforcing jurisdiction. This may eventually lead to the substitution of the chosen law by the prevailing standards of the host jurisdiction. This transformation occurs if specific prerequisites are met and the tribunal persists in disregarding the dominant public policy norm.

Moreover, we can also deduce that arbitrators are not required to reject the application of public policy principles, particularly, those that have a dominant or immediately applicable nature, and jeopardize the outcome of their ruling. They have the option to maintain party autonomy in all other areas of the case while applying the applicable rule to specific matters in the dispute or award on a case-by-case basis. With the parties' active participation, this might be done throughout the arbitration process, during mediation led by the same arbitrator who is the most familiar with the case.