International mandatory provisions in distribution agreements impacting on arbitration.

The European experience and a look into Argentine future.

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I. LIST OF ABBREVIATIONS


Belgian Law of 1995: Belgian Law of 13 April 1995 on commercial agency contracts


Rome I Convention: Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980

II. A TWO-FOLD PROBLEM

The problem raised by international mandatory rules in distribution agreements (as a generic notion encompassing, inter alia, agency, franchising and concession) and their impact on arbitration is located at the intersection between international private law and commercial law, on the one hand, and international litigation and arbitration, on the other. Both faces of the problem (the substantial and procedural one) should be taken into account and integrated to reach good and practical solutions. Even more, they should be in permanent dialog.

The topic to be herein discussed, thus, raises a two-stepped analysis. First stage of the analysis is whether a certain provision dealing with distribution agreements ranks as international mandatory provision. This is the substantial aspect of the problem that has been said to be one of the most difficult questions in the field of international private law and certainly contributes to the complexity of the subject matter. International mandatory provisions apply irrespective of the law that may otherwise govern a legal relationship by virtue of party autonomy or other international private law rules. They reflect a tension between a state’s willingness to protect certain type of interests and private autonomy that becomes restricted thereby. Whether provisions protecting distributors (also in the broad sense) shall be raised to the category of international mandatory provisions has been subject to long discussions that came to an end within the EU with the ECJ judgments in Ingmar and, more recently, Unamar, albeit both judgements have been subject to hard criticism.

The second stage is the procedural face of the problem: provided that there are international mandatory provisions in the field of distribution agreements, it is to be determined which impact (if any) these provisions should have on arbitration. This approach has, on its turn, two perspectives: that of the arbitrators and that of the national courts. From an arbitrator’s viewpoint the issue essentially encompasses the questions of whether arbitrators are empowered to apply international mandatory provisions outside the

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1 Reference to this twofold approach to the problem has been made, among others, by Becker, Michael, “Zwingendes Eingriffsrecht in der Urteilsanerkennung”, RabelsZ 60 (1996), p. 693.

*lex contractus* and, should the answer be affirmative, whether they should apply them or at least take them into account and under which circumstances. In addition, if we were to conclude that they should, it is to be determined which international mandatory rules are the relevant ones (the rules of the arbitral *situs*, the enforcement state, third states in general)? From the state courts’ standpoint, the question is which impact (again, if any) these international mandatory provisions should have at the pre- and post-award stages. Mainly three approaches have been taken: (i) the (at least, limited) exclusion of arbitrability; (ii) the invalidity of arbitration agreements provided that there an “obvious risk” that the arbitral tribunal may not apply the referred provisions; (iii) and the “second look” doctrine born in the US leading case *Mitsubishi*, that defers the assessment to the recognition and enforcement stage through the public policy defence. In other words, the question is how supportive of international arbitration national courts are, when international mandatory rules dealing with distribution agreements come into play. Of course, answers previously given to the arbitrators’ perspective of the problem will influence significantly the approaches that can be taken by courts, especially before the award is rendered. Actually, hesitations are precisely born by the alleged risk or fear perceived by the state courts that arbitrators may not apply the international mandatory rules as they would.

A first part of this Thesis will be dedicated to the general description and status of the problem within the EU with emphasis on the procedural challenges that state courts are faced with when dealing with the topic on the basis of a selection of recent cases taken as a sample. Notwithstanding, it is my conviction that these procedural issues cannot be separated from the substantial ones, namely the reasons why the involved rules have been risen to the category of international mandatory provisions and further substantial issues of international private law that will influence the approaches that can be taken at the procedural level. And the interaction goes both ways: the approach that state courts take will shape the effects that international mandatory provisions have in practice. If, as the tendency shows, the impact of international mandatory provisions on arbitration has moved from arbitrability to the public policy defence, we end up admitting that parties actually can evade international mandatory provisions by choosing another law as applicable to

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4 The extent to which arbitral tribunals have to take into account international mandatory rules has been said to be “one of the most difficult issues in international arbitration” (Blessing, *ob. cit*, pp. 39-40).
their agreement (in tandem with an arbitration agreement). Should we thus rethink the notion of international mandatory rules at all?

A second part will be devoted to provide an answer to the problem *de lege ferenda* from an Argentine law perspective: the enactment of the Civil and Commercial Code Draft in the near future may introduce the discussion in the country by regulating the distribution agreements for the first time and including provisions that may be regarded as of international mandatory character. Even if the conclusion is negative, the question of whether any of the rules included in the Draft ranks as international mandatory provision should be posed and carefully answered. At first sight, the Draft includes a provision that replicates Article 17 of the Commercial Agents Directive that the ECJ declared as international mandatory rule in Ingmar. Should the same character be attached to the Argentine rule?

Subsequently and for purposes of exhausting the analysis, I will assume that some of the Draft’s provisions are vested with international mandatory character and analyse which approach an Argentine court should take when requested to intervene in a dispute arising out of a distribution agreement and faced with the question of the impact that those rules should have on arbitration.
III. THE EUROPEAN EXPERIENCE

A. SUBSTANTIVE ISSUES

(i) Party autonomy as general rule in determining the applicable law and jurisdiction in civil and commercial contractual matters

Party autonomy is deemed as one of the essential pillars of modern private law and has been recognized within the EU as the general principle in contractual matters in its twofold aspects: substantial (the freedom to self-determine the rules applicable to contractual relationships and the law that will govern it) and procedural (the freedom in determining the jurisdiction for the resolution of disputes).

As will be explained below, international mandatory provisions by nature set a limitation to party autonomy: they apply irrespective any agreement to the contrary and any foreign law that might have been called by the parties to govern their relationship. Party autonomy will thus be the starting point of our analysis. Normally, parties have a good reason to choose a certain law to govern their agreement.

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6 The “kollisionsrechtliche Privatautonomie” that implies the “sachrechtliche Privatautonomie” (Renner, *ob. cit.*, p. 48). Article 3 (1) of the Regulation on the law applicable to contractual obligations (Rome I Regulation) establishes under “Freedom of choice” that “a contract shall be governed by the law chosen by the parties. (...) By their choice the parties can select the law applicable to the whole or to part only of the contract”. The preamble of the Regulation confirms the relevance attached to party autonomy by declaring that “the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations” (recital 11).

7 Article 23 (1) of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters sets forth under “Prorogation of jurisdiction” that “if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise...” The principle is also confirmed in recital 14 of the preamble: ‘The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation’.
(ii) International mandatory provisions as limitation to party autonomy

(a) Theoretical foundation

As described by Basedow, from the perspective of the traditional international private law, international mandatory rules were “marginal beings” which, according to the circumstances, were given different names, such as “positive ordre public”, “Eingriffsnormen”, “lois d’application immediate” or “leggi di applicazione necessaria”. I will refer to them in this study as “international mandatory rules”.

To define these rules has been said to be practically impossible: all attempts are nothing more than the description of the problem they introduce in the legal world and, mainly, of their effect. They are to be distinguished from the simple mandatory provisions, which the parties may not contract out in the national arena: international mandatory provisions cannot be excluded by the parties, even by agreeing on other law as applicable to their contract. International mandatory provisions are rules which serve public interests (of state or economic nature) and interfere with private relationships.

10 This expression is attributed to Karl Neumeyer (Beulker, Jette, Die Eingriffsnormenprobemalik in internationalen Schiedsverfahren, Mohr Siebeck, Tübingen, 2005, p. 9).
11 The French expression “lois d’application immédiate”, which could translated as “immediate applicable laws”, was used for the first time by Francescakis in 1958 to indicate that these provisions are directly applicable, without recourse to the bilateral conflict of law rules (see Schiffer, Karl Jan, Normen ausländischen „öffentlichen“ Rechts in internationales Handelsschiedsverfahren, Heymann, Köln (i.a.), 1990, pp. 114-115 and also Goldschmidt, Werner, Derecho internacional privado, Abeledo-Perrot, Buenos Aires, 2009, 10th ed. updated by Perugini Zaneti, Alicia, p. 240). This expression has been subject to hard criticism. Goldschmidt, for example, argues that the so-called immediate applicable laws are provisions of the own law that become applicable by virtue of indirect unilateral provisions. In his view, the term “exclusive provisions” attributable to Kegel describes more accurately the phenomenon (Goldschmidt, ob. cit., p. 241).
12 Basedow, Wirtschaftskollisionsrecht..., ob. cit., p. 22. For a review of the terminology that has been used in connection with these rules, see also Beulker, ob. cit., pp. 8-10.
13 See, for instance, Beulker, ob. cit., p. 19 and the bibliography therein quoted.
14 Renner, ob. cit., p. 49 and Handorn, ob. cit., pp. 92-93. As for the structure of the international mandatory provision itself, it encompasses two norms: a primary substantial rule and a secondary rule of international private law indicating that the provision shall apply irrespective of the law otherwise applicable to the relationship (Renner, ob. cit., p. 33). See also Beulker, ob. cit., pp. 22-25, where she distinguishes between “einfach zwingende” and “international zwingende Normen”.
15 Beulker, ob. cit., p. 9 (“Es geht um Normen, die aus öffentlichen Interesse auf private Rechtsverhältnisse einwirken, in diese "eingreifen").
Hence, consequence of the application of an international mandatory rule will normally be a depecage: a unique legal relationship will be governed by different national laws.\textsuperscript{16}

There is a relevant distinction to be made between international mandatory rules aimed to protect institutional structures (“\textit{statute institutionalia}”) and those aimed to protect groups (the so-called “Eingriffsnormen”, “\textit{statute interventionalia}”)\textsuperscript{17}, normally the weaker party in a legal relationship. The selection of the weak parties as well as further interests worth protecting is always a political decision.\textsuperscript{18} Since normally only domestic groups (as opposed to foreign ones) are taken into account in the political process, existence of these rules should be construed narrowly and their application should in principle be reserved for domestic relationships and markets only.\textsuperscript{19} In this regard, “the origin of such rules in the political process demonstrates that, usually, one domestic group is supposed to be protected against another”.\textsuperscript{20}

Some authors have indeed expressed their opinion against the recognition of the international mandatory rules for the protection of private groups.\textsuperscript{21} Nevertheless, this discussion has been settled within the EU with the Ingmar judgment of the ECJ, as will be explained infra: norms protecting private interests (namely, that of commercial agents) may be considered international mandatory provisions. In favor of this view, it has been

\textsuperscript{16} Becker, \textit{ob. cit.}, p. 694.

\textsuperscript{17} Basedow, \textit{Wirtschaftskollisionsrecht…}, \textit{ob. cit.}, p. 20. See also Renner, \textit{ob. cit.}, pp. 30-31 and Schwarz, \textit{ob. cit.}, pp. 48-49.

\textsuperscript{18} Renner, \textit{ob. cit.}, pp. 34-35.

\textsuperscript{19} Basedow, \textit{Wirtschaftskollisionsrecht…}, \textit{ob. cit.}, pp. 27 and 38, with a reference to the BGH judgment of 30.1.1961 where §§84 and ss. HGB dealing with distribution agreements were denied the status of international mandatory rules. As will be described \textit{infra}, the ECJ adopted the opposite view in Ingmar. This “\textit{Inlandsbeschränkung}” (limitation to domestic contexts) is a feature of the international mandatory rules protecting groups, that do not apply those protecting institutional structures (\textit{idem}, p. 29). About the restrictive interpretation of the existence of these rules, see also Beulker, \textit{ob. cit.}, pp. 44-45.

\textsuperscript{20} Basedow, \textit{Wirtschaftskollisionsrecht…}, \textit{ob. cit.}, p. 39.

\textsuperscript{21} See Schiffer, \textit{ob. cit.}, p. 125-6 and his position against the so called “\textit{Parteischutzvorschriften}” or “\textit{Normen zum Schutz des Schwächeren}”. He argues that it is very doubtful that social policies pursued by the states in the national arena are to be considered in equal footing with economic and public policies. In addition, the provisions aimed to protect weak parties immediately serve the parties’ private interest and only indirectly social interests. This is why, in his view, they deserve a different treatment. It would be enough, according to Schiffer, to protect these interests with the public policy reservation and to restrict party autonomy in certain fields such as consumer law, but not through the recognition of international mandatory provisions. From another perspective, he argues that international mandatory rules can functionally be seen as “public” law, not in the sense of the traditional dichotomy between private and public law that very much varies from one state to another, but as reflecting the interest of the state in the safeguard of the referred provisions. Provisions aimed to protect certain contractual parties and to balance private interests only indirectly influence social or economic goals and, therefore, are not functionally “public” in the above sense, unlike provisions in the fields of competition law, export and market regulations. Hence, they should not be included in the category of international mandatory rules (\textit{ob. cit.}, p. 31).
stated that the distinction between private and public law changes from state to state and that public interests may also be pursued by means of provisions of private law.²²

A national rule will normally not expressly indicate its international mandatory character: such nature is to be deduced from its purposes and meaning.²³ A relevant condition for the international mandatory rules to be applicable is the connection between the case and the state that has enacted the referred rules (“Inlandsbezug”), which –in the examples that will be covered by this study- could be derived from place of performance of the contract by the distributor and its place of establishment.²⁴

Especially relevant for our analysis is the fact that by virtue of these provisions legal consequences are attached not to a specific behavior but to the result arising thereof.²⁵ This is why, as will be explain below, the result pursued by the provision may have been achieved in a particular case despite the non-application of the rules by an arbitral tribunal.

(b) Positive legal expression within the EU: “mandatory rules” of Article 7 of the Rome Convention I and “overriding mandatory provisions” of Article 9 of the Rom I Regulation.

International mandatory rules have been expressly recognized within the EU in legal instruments applicable to contractual obligations: the Rome I Convention and its successor, the Rom I Regulation. Article 7 of the Rome Convention on the law applicable to contractual obligations (Rome I Convention), under the title of “Mandatory rules”, establishes that “effect may be given to the mandatory rules of the law of another country with which the situation has a close connection”, and that “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”.²⁶ In addition, it establishes that “nothing in this Convention shall restrict the application of the rules of the law of the

²⁴ Schwarz, ob. cit., p. 49.
²⁶ Paragraph.1.
Article 9 of the Regulation on the law applicable to contractual obligations of 2008 (Rome I Regulation), under the title “Overriding mandatory provisions”, defines them as “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”. The Regulation, like the Convention, establishes that application of international mandatory rules of the forum shall not be restricted and, more generally, that in assessing whether to apply these provisions “regard shall be had to their nature and purpose and to the consequences of their application or non-application”. As a new rule, the Regulation adds that those overriding mandatory provisions of the place of performance of the obligations may also be given effect “in so far as those overriding mandatory provisions render the performance of the contract unlawful”.

Basically, the conclusions to be derived from these rules for purposes of this study are the following: (a) application of international mandatory rules (even if it could appear contradictory) is not mandatory but discretionary and, thus, has to be assessed under the particular circumstances of the case with particular emphasis on the objectives pursued by them; (b) for these rules to be applicable a close connection between the case and the enacting state has to be shown; and (c) to be considered as such, these rules must be attached to a fundamental interest pursued by the enacting state, whether political, social or economic. The latter has been interpreted by the ECJ as including group interests.

A relevant question in this regard is who bears the authority of determining whether a certain provision falls within the notion of overriding mandatory provision, in terms of Article 9 of the referred Regulation: is it a competence of the Member States or of the European Union? As for public policy, from Krombach onwards the ECJ has defined the external boundaries within which it is up to the Member States to select the principles that

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27 Paragraph 2. The principle of party autonomy is established in Article 3.
28 Article 9, paragraph 1.
29 Paragraphs 2 and 3.
30 Paragraph 2.
31 See Ingmar judgment described below (section III. A, (iii) b).
will be considered included in the notion. Since, compared to public policy, international mandatory provisions constitute a harder intrusion into party autonomy, it has been interpreted that the ECJ should exercise a controlling function on the matter, but that the primary authority to declare a provision as international mandatory should -just as it is the case with public policy- remain with each Member State. This conclusion is to be derived as well from the recent ECJ judgment in Unamar, to be analyzed below.

(iii) International mandatory provisions in the field of distribution agreements

(a) Overview. The Commercial Agents Directive

Different approaches had been taken by national courts within the EU as to whether provisions protecting distributors could be held as international mandatory provisions. The discussion came to an end with the landmark ECJ judgment in Ingmar regarding the Council Directive of 18 December 1986 on the coordination of the laws of the Member State relating to self-employed commercial agents (86/653/EEC; the “Commercial Agents Directive”). Aims of the Directive were, according to its recitals, to grant protection to commercial agents vis-à-vis their principals and to create better conditions of competition by eliminating restrictions to the free trade of goods within the EU.

Critical for the discussion were Articles 17 to 19 thereof related to the agent’s compensation in case of termination of the contract. Article 17 of the Commercial Agents Directive granted the Member States an option to implement an agent’s right to compensation in case of termination of the agreement in form of an indemnity according to paragraph 2 (German model) or damages according to paragraph 3 (French model). Main difference between both is that the indemnity to be awarded according to paragraph 2 is cupped (in Germany, for instance, the limitation equals the commission perceived during one year). Article 18 enumerates the exceptional cases in which the agent is not entitled...
to the referred compensation or indemnity, while Article 19 provides that “the parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires”.

(b) ECJ judgment in “Ingmar” (2000)

The Ingmar case concerned an agency agreement concluded between Eaton, a principal based in California, USA, and a distributor based in the UK, Ingmar.\(^{35}\) The agreement included a choice of law clause in favor of Californian law, but apparently no choice of forum provision. Upon termination of the agreement by the principal, Ingmar initiated proceedings before English courts seeking *inter alia* a compensation under the Commercial Agents Regulations 1993, which implemented the Commercial Agents Directive in the UK.\(^{36}\) The ECJ ruled that Articles 17 and 18 of the Directive are to be regarded as international mandatory rules\(^{37}\) and, thus, “must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country”.\(^{38}\) Basically, the ECJ based its decision on the purpose of the compensation or indemnification set forth in Articles 17 to 19 of the Directive being twofold: (i) on the one hand, the protection of the commercial agent upon termination of the contract, having as a consequence that the legal regime so established is deemed to be “mandatory in nature” (a conclusion that the ECJ also derived specifically from Article 19);\(^{39}\) and (ii) on the other hand, the “freedom of establishment

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\(^{35}\) European Court of Justice, 9.11.2000, Ingmar GB Ltd v. Eaton Leonhard Technologies Inc, Case C-381/98.

\(^{36}\) Those Regulations apply only in relation to activities performed by agents in Great Britain.

\(^{37}\) The ECJ used the expression “mandatory rules”, as in Art. 7 of the Rome I Convention.

\(^{38}\) See the operative part of the judgment. For a reference to the German and French case law that held the opposite view before the Ingmar judgment, see Schwarz, *ob. cit.*, 49-51.

\(^{39}\) Paragraph 21. This international mandatory nature would be confirmed by Article 19 that establishes that the parties may not dispose of its provisions to the detriment of the agent before termination of the contract,
and the operation of undistorted competition in the integral market” to be ensured “for all agents”.40

The decision has been strongly criticized, albeit it is binding on the state courts of all Member States.41 First, it has been noted that the ECJ is confusing two different categories of provisions: those which are mandatory only internally and that parties may not contract out in a domestic context, and those being internationally mandatory, which always apply irrespective of the law applicable to the contract and reflect the willingness of a legislator to expand their scope of application also vis-à-vis third states. Article 19 of the Commercial Agents Directive is an indicator of the internal mandatory nature of the rules only (actually, of the national rules implementing the Directive). 42 Second, the assumption that an agent is the weak party that needs to be protected is not always accurate in practice and should be assessed in the context of each individual case.43 Putting consumers and self-employed distributors on equal footing is difficult to be justified from a legal policy perspective.44 An agent that accepts a choice of law in favor of the laws of a third state, which do not contemplate the compensation or indemnification provided in Articles 17 to 19 of the Commercial Agents Directive, will normally negotiate and obtain payment of a higher commission.45 Third, the nature of Article 17 itself confirms the conclusion that it does not enshrine an international mandatory provision: it does not entail a social protective rule in form of an entitlement to maintenance, but rather a consideration owed in equity for the contribution made by the agent to the increase or conservation of the customers’ value.46 Forth and finally, the protection of free competition within the EU cannot serve as justification for having the rules at stake prevail over the law of a third non-Member State.47 Furthermore, as far as intra-EU relationships are concerned,

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40 Paragraph 24.
41 For a summary of the objections that the judgment has risen, see inter alia Beulker, ob. cit., pp. 36-41. For a critical view, see also Schurig, Klaus, “‘Ingmar’ und die ‘international zwingende’ Handelsvertreter-Richtlinie oder: Die Überzeugung einer Kollisionsnorm“, in Mansel, Heinz-Peter, Kronke, Herbert and Pfeiffer, Thomas (edit.), Festschrift für Erik Jayme, Sellier European Law Publ., München, 2004, Vol. I, pp. 837-847.
42 Schwarz, ob. cit., p. 55.
43 Or, at least, protection should be reserved for certain categories of small enterprises or tied agents (Schwarz, ob. cit., pp. 56-57).
44 Schwarz, ob. cit., p. 59.
46 Schwarz, ob. cit., p. 57.
47 Schwarz, ob. cit., p. 62. This would lead to a so-called “Festung Europas” (European “fort”) as a consequence (Freitag/Leible, RIW 2001, p. 287 quoted by Beulker, ob. cit., p. 42).
ununiformed competition conditions is simply the direct consequence arising from the minimum harmonization instrumented by Directives.  

(c) ECJ judgment in “Unamar” (2013)

The ECJ had recently the opportunity to rule again on the matter in the Unamar case and went much further both on the recognition of international mandatory rules and the correlative restriction of party autonomy. The underlying contract was an agency agreement for the operation of a shipping service concluded between NMB, a principal based in Bulgaria, and Unamar, an agent based in Belgium. Unlike in the Ingmar case, the parties had chosen the law of an EU Member State that had implemented the Commercial Agents Directive (Bulgaria) to govern their contract and agreed on arbitration by the Chamber of Commerce and Industry in Sofia (Bulgaria) as dispute resolution method. Upon termination of the agreement by the principal, Unamar initiated court proceedings in Belgium claiming various types of compensation under the Belgian Law on commercial agency contracts of 1995 implementing the Directive (the “Belgian Law of 1995”): compensation in lieu of notice, goodwill indemnity and an additional compensation for dismissal of staff, notwithstanding the fact that the agreement was governed by Bulgarian law. Belgian Law of 1995 had a wider subjective scope of application and a more generous compensation than the minimum required by the Directive. The question referred to the ECJ was, essentially, whether the law of a

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48 Schwarz, ob. cit, pp. 67-69, explaining that the key issue is the difference between “Rechtsangleichung” and “Rechtsvereinheitlichung”. This distinction has been explained by Basedow highlighting that the approximation of laws (“Rechtsangleichung”) does not make international private law rules superfluous: the Member States approximate their substantive laws so much, that they are able to accept and apply the laws of another Member States as if they would be their own laws (Basedow, Jürgen, “Materielle Rechtsangleichung und Kollisionsrecht” in Schnyder, Anton, Heiss, Helmut and Rudisch, B. (edit.), Internationales Verbraucherschutzrecht, Mohr, Tübingen, 1995, p.33).


50 Paragraph 20.

51 In Ingmar, the parties had chosen Californian law -as already mentioned- and apparently had not included an arbitration clause in their agreement.

52 Paragraph 20.

53 Paragraph 21. Such compensation was claimed specifically under Articles 18 (3), 20 and 21. Particularly relevant for the dispute is also Article 27 of the Belgian Law that provides that “without prejudice to the application of international conventions to which Belgium is a party, any activity of a commercial agent whose principal place of business is in Belgium shall be governed by Belgian law and shall be subject to the jurisdiction of the Belgian courts”.

54 See plea of the Belgian Government, paragraph 34 of the judgment. The definition of “commercial agent” was broader than the one given in the Directive. In addition, both Belgian and Bulgarian law provide a wider objective scope of application because they apply not only to agency agreements concerning the sale of
Member State implementing an EU Directive and chosen by the parties to govern their relationship could be disregarded by a state court in favor of the law of the forum being considered mandatory in that legal order in terms of Article 7(2) of the Rome I Convention. The ECJ replied affirmatively, albeit “only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition [of the Commercial Agents Directive], the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by the directive, taking into account in that regard of the nature and of the objective of such mandatory provisions”. 56

Main arguments given by the ECJ were the following: (i) the regime established by Articles 17 to 19 of the Commercial Agents Directive was mandatory in nature as established in Ingmar; 57 (ii) national provisions can be categorized as “public order legislation” only when compliance therewith is deemed by a forum state as crucial “for the protection of the political, social or economic order”; 58 and (iii) a strict criteria is to be applied when determining whether a national provisions is a “mandatory rule” in order not to excessively restrict party autonomy, a cornerstone of the Rome I Convention. 59 The impact of international mandatory rules on the arbitration agreement remained unsolved by the ECJ.

This judgment has also been confronted with serious objections and raised justified concerns as to its future implications. It has been stated that the objectives of EU law do not require that national law implementing the Directive prevails over the law of another Member State chosen by the parties which has also transposed the Directive. Quite the contrary is the case: should national provisions implementing the Directive be always deemed as international mandatory rules, the whole purpose of minimal harmonization would be undermined. 60 Furthermore, it has been stressed that the arguments on which the Ingmar judgment is based do not apply to the factual scenario of Unamar: on the one hand, Bulgarian law chosen by the parties sufficiently protected the agent by transposing the goods, but also the provision of services (Lüttringhaus, Jan D, “Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar”, IPRax 2014, p. 147).

Thus, “international mandatory” in the terminology used in this study.

Paragraph 52 and operative part of the judgment.

Paragraph 40.

Paragraph 47.

Paragraph 49.

See Schwarz, ob. cit., p. 69 (even his opinion was given before the ECJ ruled in Unamar, it is notwithstanding applicable to the factual scenario underlying it).
Commercial Agents Directive into national law; and, on the other, the argument related to the competition conditions within the EU could not be invoked in connection with two Member States.  

The Unamar judgment entails a serious risk that Member States significantly increase the number of rules to be regarded as of international mandatory provisions to the detriment of party autonomy and harmonization within the EU. Time will tell whether this danger turns to have been justified or not. In the meantime, some proposals have been raised as to how to restrict national legislators’ leeway granted by Unamar and impede arbitrariness: (i) having the ECJ defining the external boundaries of the “positive public policy” by providing a definition of the legal terms of Article 9 of the Rome I Regulation; (ii) and interpreting the national legislative powers in light of the basic freedoms and party autonomy as cornerstone of the referred Regulation.

In addition, it should be taken into account that both Belgian and Bulgarian law involved in the Unamar case expanded the scope of application of the Commercial Agents Directive. It remains therefore unsettled by the ECJ whether national law granting further protection in cases falling within the scope of the Directive could also be held as encompassing international mandatory rules in terms of Article 9 of the Rome I Regulation. Another issue that remains unsettled is whether the holding of Unamar is also to be applied to other fields of the law.

(d) Consequences to be derived for the present study

As we have seen, in Ingmar and Unamar the ECJ only had to deal with the validity of choice of law clauses, but did not rule on the validity of choice of forum clauses or arbitration agreements. Notwithstanding, both judgments are relevant steps that may not be skipped in the analysis of our topic since they introduce international mandatory rules in

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62 Idem.
63 As the ECJ did with the negative concept of public policy from Krombach onwards. Lüttringhaus, ob. cit., p. 148. It should be noted, however, that the external boundaries are already given in the wording of Article 9: international mandatory provisions shall serve “public interests, such as its political, social or economic organization”. What constitutes a public interest should in principle be reserved to the Member States.
64 Idem.
65 Lüttringhaus, ob. cit., p. 150, concluding that the response should be negative.
the field of distribution agreements (albeit both cases referred to a specific type of distribution agreement, the agency agreement). It can no longer be discussed whether these rules are mandatory in terms of Article 9 of the Rome I Regulation, the question now is how they impact on arbitration and this question is for the courts of the Member States and the arbitrators themselves to be answered. We will start reviewing the latter perspective and subsequently discuss the approaches taken by the state courts on the basis of a selection of cases.

B. PROCEDURAL ISSUES

(i) The perspective of the arbitral tribunal

From the arbitrators’ viewpoint, first question to be posed is whether they may (or, even more, shall) take international mandatory rules into account, even if they do not belong to the law chosen by the parties to govern their agreement. Main arguments for the negative is that, unlike state courts, arbitrators derive their authority from the parties’ will (arbitration being a creature of contract) and are not “entrusted with a public mission of defending the public interest”. Arguments for the affirmative, however, weigh more: (i) the whole international arbitration as an alternative to litigation would be endangered if the states could no longer trust that their international mandatory rules would be applied by arbitral tribunals; and (i) arbitrators have a duty to render an enforceable award (which is also in the interest of the parties).

The complexity of the issue has been clearly summarized by Mayer: “the arbitrator is pulled in different directions. He should seek to respect the contract and the intent of the parties, but at the same time be concerned with the efficacy of his award and the avoidance of annulment. He cannot disregard the more general interest of the international arbitral

69 Hyder Razvi, ob. cit., pp. 36 and, in particular, p. 44, where the authors explains that: “states allow the arbitration of sensitive matters, such as antitrust disputes, do so on the assumption that arbitrators arbitrating antitrust disputes which are substantially connected to their jurisdictions would apply the relevant antitrust laws of these jurisdictions. If arbitrators reject the application of these mandatory laws, there is little doubt that these States would move to make such sensitive matters non-arbitrable” (emphasis added). See also, among many others, Drobnig, Ulrich, “Internationale Schiedsgerichtsbarkeit und wirtschaftliche Eingriffsnormen” in Musielak, Hans-Joachim and Kegel, Gerhard (edit.), Festschrift für Gerhard Kegel zum 75. Geburtstag, Kohlhammer, Stuttgart (i.a.), 1987, p. 113; Papeil, ob. cit. p. 363; Beulker, ob. cit., p. 245; and Hochstrasser, Daniel, “Choice of Law and “foreign” mandatory rules in international arbitration”, (1994) 11 (1) Journal of International Arbitration, pp. 84-85.
process as an institution, although he certainly has the right to express his personal convictions, either with a view to upholding general interests or to resisting the application of laws that shock his conscience. Finally, he should remain politically neutral.” 

If we are to assume that arbitrators should take international mandatory rules outside the *lex contractus* into account, next questions are under which circumstances they should be applied, as well as which rules are the relevant ones. As to the first question, it is worth mentioning the criteria followed in an ICC arbitral award rendered in 1992, wherein application of the referred rules was made dependent on the following two elements: (i) a strong and legitimate interest of the state in the extraterritorial application of its national law, and (ii) a connecting factor of the case to the state that enacted the alleged rules. As to the second question, it has been said that arbitrators should take into account international mandatory rules belonging to the law of (i) the arbitral *situs* inasmuch they show a strong connection with the case (since the contrary may lead to the annulment of the award in this jurisdiction); (ii) the *lex contractus*; and (iii) under certain

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72 ICC case N° 6320, see extracts published in Böckstiegel (edit), *Acts of State and Arbitration*, Heymanns, Köln (i.a.), 1997, pp. 149-160 (also published in YBCA XX (1995) 62 and ss). These conditions clearly correlate with two of the main features of international mandatory rules described *supra*. In this case, the tribunal found that none of requirements was met: the Racketeer Influenced and Corrupt Organizations (RICO) Act could not be interpreted as imposing liability for conduct that neither took place in the USA nor had effects in US markets, in a case where the parties had agreed on another law as applicable. For further reference of awards in which arbitrators applied or took into account international mandatory rules, see Mayer, *ob. cit.*, p. 286 and Hochstrasser, *ob. cit.*, pp. 79-84. It is worth noting that the prevailing view is that arbitrators may apply or take into account international mandatory rules outside the *lex contractus*, but that they are not bound to do so. For a criteria on how an arbitral tribunal could assess whether to apply these rules or not, see Blessing, *ob. cit.*, pp. 31-32. Most critical criteria according to Blessing is whether the rule is “application-worthy” and whether its application would lead to an “appropriate result”. See also Barraclough, Andrew and Waincymer, Jeff, “Mandatory rules of law in international commercial arbitration”, in Melbourne Journal of International Law, Vol. 6 (2), 2005 (chapter VI), with a detailed description about the “special connection” and the “legitimate expectations” tests as guidance for arbitrators by exercising their discretion in the matter.

73 Bermann, George A., “The origin and operation mandatory rules” in Bermann, George A. and Mistelis, Loukas (edit.), *Mandatory Rules in International Arbitration*, Juris, Huntington, N.Y, 2011, p. 7 and also in “Mandatory rules…”, *ob. cit.*, p. 330. The opposite opinion has been held by Drobnig (*ob. cit.*, p. 106). A slightly different view has been held by Beulker: she argues that the place of arbitration cannot play a relevant role on the matter since it is normally chosen because of its neutrality and that international mandatory rules of the arbitral *situs* enshrining substantial safeguards should be treated by arbitrators just as international mandatory rules of third states (Beulker, *ob. cit.*, pp. 226-227).

74 See *inter alia* Drobnig, *ob. cit.*, p. 106; and Bermann, “Mandatory rules…”, *ob. cit.*, p. 331. Exceptions to these rules are those cases in which (i) the international mandatory rule at stake was not meant to govern under the perspective of its legislator; and (ii) another international mandatory rule is already governing the case and might be infringed by the application of a second one (Bermann, “The origin…”, *ob. cit.*, p. 9). See also Hyder Razvi, *ob. cit.*, p. 45. Account should be also taken of international mandatory rules of the *lex arbitri* (the law governing the arbitration agreement, provided that the parties made an express choice of law in its regard: *idem*). Some authors, on the contrary, held the contrary view: international mandatory rules of the *lex contractus* should not be applied because parties often choose an applicable law that is not
circumstances, a third state (such as, *inter alia*, the potential enforcement state or the state where the underlying contract is performed). 75

Regarding application of international mandatory rules of a third country, arbitrators are placed in a different position than judges since they are not bound by the laws of a forum: 76 an arbitrator “views all laws as being of equal dignity”. 77 This is why, in essence, all rules outside the *lex contractus* are to an arbitral tribunal rules of a third state (including those of the arbitral *situs*). 78 Among other arguments that support the application of these rules by arbitral tribunals, it should be mentioned that institutional arbitration rules often call for the applicability of the rules arbitrators deem more appropriate 79 and that normally arbitration clauses are drafted with a broader scope than choice of law clauses, thus, enabling consideration of claims arising out of international mandatory rules on a different basis than the law chosen by the parties to govern their contract. 80 The Rome I Regulation supports the conclusion that these rules may be taken into account. 81 However, international mandatory rules of a third state should have a sufficiently strong connection with the case or be part of the law of a potential enforcement state for them to be applied or taken into account by arbitrators. 82

In principle, the parties may also contractually exclude the application of international mandatory provisions, but it has been pointed out that arbitrators may apply

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75 For reference of awards that took international mandatory provisions of a third country into account, see Drobnig, *ob. cit.*, p. 108-109. It has been noted that common law state jurisdictions tend not to enforce international mandatory provisions of a third country (Hyder Razvi, *ob. cit.*, p. 46).


78 Unlike state courts, arbitrators do not distinguish between *lex fori* and foreign law, because they just ”*do not have a forum. They are not faced with domestic mandatory rules as opposed to foreign mandatory rules, but simply with mandatory rules external to the lex contractus*” (Mayer, *ob. cit.*, pp. 282-3).


81 The situation was pretty much the same under the Rome I Convention. See Bermann, “The origin…”, *ob. cit.*, p. 10 and *supra* (section III. A, (ii) b).

82 Idem, pp. 10-17. What is more, it has been proposed that international mandatory rules of every state closely related to the facts and the underlying transaction should be taken into account (Bermann, “Mandatory rules…”, *ob. cit.*, p. 338; and Hyder Razvi, *ob. cit.*, p. 45).
them nonetheless if they are closely related to the transaction giving rise to the dispute and, as a consequence, to the *lex contractus* chosen by the parties.\textsuperscript{83}

Another relevant issue to be pointed out is that a subtle distinction should be drawn between directly applying international mandatory rules outside the *lex contractus* and taking them into account as a factual data, normally as legal basis for a defense.\textsuperscript{84} Finally, opinions are divided as to whether application of international mandatory rules outside the *lex contractus* by the arbitral tribunal is conditioned by a party having invoked them\textsuperscript{85} or whether they can be applied *ex officio*.\textsuperscript{86}

In a whole, it is to be concluded that the prevailing understanding on the matter is that arbitrators should apply international mandatory rules of third states, provided that they are closely connected to the facts underlying the cases to be adjudicated. However, application of these rules is still interpreted as discretionary.

(ii) The perspective of the state courts

(a) Brief overview

The question of how state courts confronted with distribution contracts including an arbitration agreement *in tandem* with a choice of law clause should assess the impact of international mandatory provisions thereon depends, for obvious reasons, on the answer given to the question in the precedent section (provided that a provision is indeed to be regarded as international mandatory). If courts were to assume that arbitrators would apply the relevant international mandatory provisions, there would be no justifiable reason why not to refer the parties to arbitration. However, as previously seen, the issue has not been completely settled, especially as to the identification of the rules that are relevant and the existence of a duty by the arbitral tribunal to apply them.

The perspective of the state courts on the matter includes, among other issues, the arbitrability of the disputes governed by international mandatory rules and the


\textsuperscript{85} This is the opinion of Mayer, for instance (*ob. cit.*, p. 280). He argues that, on the one hand, an arbitrator could have applied *ex officio* an international mandatory rule of a state different than the enforcement state that is irrelevant to the latter and, on the other hand, that arbitrators may very well be ignorant of the existence of rules outside the *lex contractus* that could be claimed as having international mandatory nature.

\textsuperscript{86} According to Bermann, the prevailing view is that arbitrators may (but shall not) apply international mandatory rules *propio motu* (Bermann, “Mandatory rules…”, *ob. cit.*, p. 336). See also Blessing, *ob. cit.*, p. 35.
determination of the law under which it should be assessed, as well as the validity of 
arbitration agreements.

Whether state courts may deny recognition or enforcement of arbitral awards based 
on public policy in cases where the arbitral tribunal failed to apply international mandatory 
rules is a different question, but derives from the previous ones. If we come to the 
conclusion that parties should be free to arbitrate their disputes even if international mandatory provisions were at stake, the public policy defense would be the sole and last 
controlling resort reserved to state courts on the matter. Furthermore, once the award has 
been rendered, the mystery has vanished: we already know whether or not arbitrators 
applied or took into account the international mandatory provisions. Therefore, the key 
issue in this regard is whether their non-application automatically amounts to a public 
policy infringement of the courts seized or, at least, to what extent (if any) a link between 
both concepts (international mandatory rules and public policy) is to be established. In the 
following sections, the questions posed above will be critically discussed in the light of a 
selection of recent cases.

(b) First interpretation: international mandatory provisions impact on 
arbitrability

The example traditionally given to illustrate this approach is the one taken by the 
Belgian courts on the basis of the Law of 27 July 1961 on Unilateral Termination of 
Exclusive Distribution Agreements of Indefinite Duration (the “Belgian Law of 1961”), 
deemed as one of the most protective laws within the EU in favor of distributors.87 
Basically, upon termination of the agreement and under certain circumstances, this Law 
entitles the distributor to a compensation that should be quantified taking into account inter 
alia the value of the customer base that the distributor contributed to create and the 
principal will benefit from upon termination, the labor expenses that the distributor must 
incurs in as a consequence of termination, as well as other expenses originated in the 
performance of the agreement.88 The right to compensation is only to be excluded if 
termination is attributable to severe infringements incurred by the distributor.89

87 For the summary provided in this section, I am closely following the German unofficial translation of the 
89 Idem.
Two other provisions have, however, played a decisive role in the subject matter: Articles 4 and 6. Article 4 establishes that in case of termination of a contract with effects in the whole territory of Belgium or a part thereof, the distributor having suffered damages may always sue the principal in Belgium. Article 4 further indicates that should the case be brought before Belgian courts, they will apply Belgian law exclusively. Article 6 establishes that the provisions of the Belgian Law of 1961 shall apply irrespective of any agreement to the contrary that the parties may have executed before termination of the contract.

Belgian courts have generally interpreted these provisions as international mandatory rules and been particularly generous as to the compensation to be awarded to distributors.\footnote{90} Even if the wording of Article 4 could have been interpreted as excluding arbitrability whenever a distribution agreement is to be executed within the boundaries of Belgium, the \textit{Cour de Cassation} from the Audi NSU case of 1979\footnote{91} onwards took a liberal approach, excluding arbitrability only where a law other than the Belgian was to govern the contract (German law in that case).\footnote{92} This doctrine was confirmed in the Gutrob judgment of 1988.\footnote{93}

Another view has been expressed in the sense that it was not until 2004 with the Colvi judgment that the \textit{Cour de Cassation} decided that arbitrability of disputes concerning compensation falling within the scope of the Belgian Law of 1961 depended on the applicability of Belgian law to the substance of the dispute. Due to procedural and factual features of the previous cases, the Court did not need to rule before on the referred issue.\footnote{94}


\footnote{92} See Kleinheisterkamp, Jan, “Eingriffsnormen und Schiedsgerichtsbarkeit. Ein praktischer Versuch”, RabelsZ Bd. 73 (2009), pp. 822-823. This author indicates that the referred interpretation was confirmed by the previous Bibby judgment, where the \textit{Cour de Cassation} declared the enforceability of a forum selection clause in favour of Sweden courts, due to the fact that the parties had expressly agreed that Belgian provisions were to apply (idem, p. 823).

\footnote{93} \textit{Cour de Cassation}, 2.12.1988, Gutrob Werke GmbH v. Usinor Alain Hubert and Saint Hubert Gardening.

\footnote{94} As for the Audi case, the award was already rendered rejecting the distributor claim under German law and was invoked by the principal in the subsequent proceedings initiated by the distributor before Belgian courts. Hence, it was a fact that the arbitral tribunal failed to apply Belgian law to the dispute. In Gutrob the Court
The dispute in Colvi\textsuperscript{95} concerned a distribution agreement entered into a Swiss principal (Interdica) and a Belgian distributor (Colvi N.V), subject to arbitration in Switzerland and Swiss law. Following termination of the contract by the principal, Colvi initiated court proceedings claiming the compensation contemplated in the Belgian Law of 1961 arguing the inarbitrability of the dispute according to Belgian law. The Supreme Court declared that the obligation of the Contracting States to the New York Convention\textsuperscript{96} to recognize arbitration agreements and refer the parties to arbitration under Article II (1) and (3) is subject to the condition of the dispute being arbitrable and that the New York Convention did not prescribe the law under which arbitrability is to be assessed. In view of that, unlike the Court of Appeals that preferred the \textit{lex contractus}, the Supreme Court decided to subject the issue to the \textit{lex fori}: "where the parties have determined that the arbitration clause is governed by a foreign law, the state court whose jurisdiction is objected to may hold that [the dispute is not] arbitrable, if this affects the public policy of its own legal system". Certainly, the reference to “public policy” is misleading and has given rise to conflicting interpretations. Some have interpreted the judgment not as subjecting arbitrability to the \textit{lex fori}, but solely as not excluding the \textit{lex fori} in the analysis of arbitrability.\textsuperscript{97} Others have stated that the issue in Belgium no longer involves arbitrability, but the public policy defence.\textsuperscript{98}

Notwithstanding, later judgments such as Van Hopplynus Instruments and Sebastian International\textsuperscript{99} (rendered in 2006 and 2010, respectively) confirm the interpretation that the Supreme Court understanding is that arbitrability is governed by the \textit{lex fori} (or, at least, that nothing in the New York Convention prevents the court seized from assessing the arbitrability according to its own \textit{lex fori}) and that international mandatory provisions of the Belgian Law of 1961 still impact on the objective arbitrability under Belgian case law. In other words, it has been noted that, in the interpretation of the

\textsuperscript{95}Cour de Cassation, 15.10.2004, Colvi N.V. v. Interdica, 2006 (31) Yearbook Commercial Arbitration, pp. 587-594. For reference of further case law, please see Wautelet, \textit{loc. cit.} Moreover, it has been pointed out that inarbitrability of the referred disputes is not expressly provided by Belgian law, but rather derived from the general principles. (Kröll, \textit{ob. cit.}, p. 330).

\textsuperscript{96}Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

\textsuperscript{97}Wautelet, \textit{loc. cit.}

\textsuperscript{98}Kröll explains that this position taken by Hollander is incompatible with the decision adopted by the Supreme Court, namely to revoke the decision of the lower court referring the dispute to arbitration (See Kröll, \textit{ob. cit.}, p. 334).

Belgian courts, objective arbitrability of disputes is not completely excluded by the international mandatory provisions, but conditioned to the application of Belgian law to the merits. International mandatory rules are thus interpreted as giving rise to a “limited” inarbitrability.¹⁰⁰

This first interpretation of international mandatory rules impacting on arbitrability is currently being displaced by the prevailing view that their impact should be limited to the public policy defense¹⁰¹ and the tendency by the states to reduce the matters falling under objective arbitrability. It has been said in this regard that “the importance of arbitrability as a mechanism of state to control private adjudication of disputes has declined. (...) Questions that were formerly addressed under the heading of ‘arbitrability’ now appear in the guise of ‘public policy’”.¹⁰²

(c) Second interpretation: international mandatory provisions impact on the validity of arbitration agreements

A second view that can be taken on the issue is that of international mandatory rules not inferring with the arbitrability of the dispute as such, but with the validity and enforceability of arbitration agreements. The underlying reasoning of this approach is normally the prognosis by the state court that the arbitral tribunal may or will not apply the relevant international mandatory provisions.¹⁰³

¹⁰⁰ See Kröll, ob. cit, p. 330-336. Whether the foreign law chosen by the parties grants a similar protection than the one afforded to distributors according to the Belgian Act does not play a role in the case law referred to in this section (See Kröll, ob. cit., pp. 335-336).

¹⁰¹ In the doctrinal field, the view that international mandatory rules exclude arbitrability has been defended by Smit. He concluded that “the most drastic and, in my view, most appropriate solution would be to preclude arbitrators from ruling on issues of mandatory law. The obvious solution is to refer questions of mandatory law arising in arbitration to a single judicial institution of the country or state whose mandatory law is to be applied” (Smit, Hans, “Mandatory Law in Arbitration”, in Berman, George A. and Mistelis, Loukas (Edit.), Mandatory Rules in International Arbitration, Juris, Huntington, N.Y, 2011, pp. 226-227).


¹⁰³ It has been noted that in the structure of the New York Convention the issue of arbitrability (Article II. 1 and V.2. (a) has been clearly distinguished from that of the validity and enforceability of the arbitration agreements (Article II (3) and V.1 (a) New York Convention). See Kröll, ob. cit, p. 328.
1. German case law

1.1. The “obvious risk” of non-application of international mandatory rules

The case to be referred to in this section concerns the right to compensation that, under certain circumstances, the German Commercial Code (§89 b) grants to agents in case of termination of the agreement. This provision implements Arts. 17 and 18 of the Commercial Agent Directive discussed above in the context of the Ingmar and Unamar ECJ judgments. The dispute that ended up before the Higher Regional Court of Munich in 2006 concerned an agency agreement entered into between a principal seating in California, USA, and an agent seating in Munich, Germany, for the distribution of chips in Germany and other European countries, that called for Californian law and arbitration under the AAA Rules as dispute resolution method. Upon termination of the agreement by the principal, the agent initiated proceedings in Germany seeking damages under §89 b of the German Commercial Code invoking its international mandatory nature.

The Court decided to declare the arbitration clause void essentially based on two grounds. First, §89 b was regarded as an international mandatory provision according to the ECJ decision in Ingmar. Second, invoking three judgments of the German Supreme Court, due to the referred international mandatory nature of §89 b, the Court held that the parties were not allowed to agree on a choice of law and choice of forum in favor of a third state whose law does not contemplate an agent’s compensation claim for the event of termination. The lack of evidence of the non-application of the international mandatory provisions could not be seen as an obstacle: the obvious risk (“nahe liegende Gefahr”) that the courts of a third state may not apply them would suffice. The Court concluded that it

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104 Basically, the agent is entitled to a compensation that covers the value of the customer base created through his activities that will result in a benefit for the principal upon termination of the contract, as well as the recovery of other expenses that the agent may have incurred in (paragraph 1). The compensation is excluded inter alia in case of termination of the agreement by the principal on grounds attributable to the agent, or (with some exceptions) in cases where it is terminated by the agent (paragraph 3). The provisions of §89.b may not be contracted out by the parties in advance (paragraph 4).

105 OLG München, Urteil vom 17.05.2006 – 7 U 1781/06, BeckRS 2006, 07559. Alternatively, the parties agreed on the jurisdiction of the state courts of California (clause 14.3 of the agreement).

106 Perhaps “inoperative” would be a more accurate translation, since “unwirksam” was the term used by the Court (see para. 3 of the judgment).

107 Provided that the case be strongly connected with the EU (in the referred case the connection was given by the seat of the distributor and the locations where he had to carry on his activities). See Section b. of the judgment.

108 “Die (...) zwingende Vorschriften der Handelsvertreterrichtlinie über Ausgleich und Entschädigung nach Vertragsbeendigung können nicht dadurch verleitet werden, dass über die Rechtswahl hinaus der Gerichtsstand eines Drittstaates gewählt wird, dessen Recht dem Handelsvertreterausgleich entsprechende Aussprüche des Handelsvertreters nicht kennt” (Section c. of the judgment).
appeared “seriously doubtful” that the Californian court would apply the German provisions due to the choice of law clause, the defendant having its seat in California and both parties being merchants.109 Same reasoning should apply, in the Court’s view, to the arbitration agreement calling for arbitration under the AAA Rules included in the contract that gave rise to the dispute.110

The judgment has been strongly criticized.111 In a nutshell, the doctrine raised the following issues: first and above all, that the mere non-application of an international mandatory provision by the arbitral tribunal will not necessarily constitute a relevant infringement of the public policy of the forum state impeding the enforcement of the award.112 The latter can only be assessed in light of the particular circumstances of the case and, thus, only once the award has been rendered: whether the agent actually needs to be protected has to be determined in the concrete case.113 Second, the possibility that the arbitral tribunal were to apply the German provisions as relevant international mandatory rules of a third state to ensure the enforceability of the award could not be excluded a priori, as the Court arbitrarily did.114 In this regard, the statement that the arbitral tribunal will not apply the German international provisions has been described as being “more the

109 “Angesicht des Schutzzwecks der Eingriffsnorm reicht es vielmehr für die Annahme eines Derogationsverbot aus, wenn die nahe liegende Gefahr besteht, dass das Gericht des Drittstaats zwingendes deutsches Recht nicht zur Anwendung bringt. Dies ist hier der Fall. Es erscheint nämlich ernstlich zweifelhaft, dass kalifornische Gerichte angesichts der getroffenen Rechtswahl zur Anwendung der deutschen Vorschriften über den Handelsvertreterausgleich gelangen. Vielmehr könnten kalifornische Gerichte mit Blick auf den Sitz der Bekl. In Kalifornien und die Kaufmannseigenschaft beider Parteien (...) zum – jedenfalls aus kalifornischer Sicht vertretbaren- Ergebnis gelangen, dass das Vertragsverhältnis der Parteien ausnahmslos kalifornischem Sachrecht unterliegt, da eine Bindung an EU-Richtlinien bzw. die Rechtsprechung des EuGH nicht bestehe” (Section c. of the judgment).

110 Section d. of the judgment.

111 Quincke, for instance, has pointed out that the judgment is not convincing both in the reasoning and the solution (Quincke, ob. cit., III).

112 Quincke, ob. cit., III. l.c. In other words, the non-application of §89b of the German Commercial Code may infringe the public policy, but not necessarily will. An assessment in light of the particular circumstances of the case is required (“...die Nichtanwendung von §89bHGB kann den ordre public verletzen, muss es aber nicht. Es bedarf also der Abwägung im Einzelfall”). The same idea has been expressed by Beulker, ob. cit. p. 57.

113 See Quincke, ob. cit., III, 1.d and Rühl, ob. cit., p. 298. To perform such prognosis at the referral stage (to anticipate the decision and results that would derive from the future award) would make no sense also from the perspective of the procedural economy (See Kleinheisterkamp, ob. cit., p. 830).

114 It could not be excluded as well that the arbitral tribunal may, after consideration of all circumstances, decide to grant a compensation to the agent (perhaps in a lower amount that the one that would strictly arise out of the application of relevant German provisions) or that the compensation claim be rejected, should the tribunal come to the conclusion that the agent has already been compensated for the customer base increase and maintenance during the life of the contract. In both examples, such awards would not constitute an infringement to German public policy: they would be enforceable in Germany. See Quincke, ob. cit., III. 1.d.
result of presumptions and speculations than the result of an actual legal review”.¹¹⁵ Third, the criteria used in the context of consumers’ and employees’ protection cannot be validly applied to assess procedural covenants included in contracts concluded between business persons.¹¹⁶ Forth, the Court omitted to analyze the issue under the effect utile principle: it should have discussed to which extent the effectiveness of Articles 17 and 18 of the Commercial Agents Directive would be endangered or turned excessively difficult by virtue of a choice of forum clause. The mere danger of the non-application of the mandatory internationally rules would not be enough.¹¹⁷ And fifth and last, the Court should not have analyzed the validity of choice of forum clauses and that of arbitration agreements under the same patterns.¹¹⁸ All these objections seem convincing to me and good arguments to support the interpretation that the solution to the problem herein discussed should be reserved to the public policy defense, as will be explained in more detail infra.

Some authors commenting the judgment, however, have expressed that they agree with the decision reached by the Higher Regional Court of Munich as to its result, albeit not as to its reasoning. Thorn, for instance, argues that the Court should protect the agent as the structural weaker party “by preventing the parties from escaping to a forum where the overriding mandatory provisions of European law most probably will not be applied”, considering that place of arbitration was outside Germany and the scenario of an

¹¹⁵ Rühl, ob. cit, p. 298 (“Bermerkungen (...) [die] mehr das Ergebnis von Vermutungen und Spekulationen zu sein scheinen als das Ergebnis einer tatsächlichen rechtlichen Prüfung”; free translation of mine). As Rühl suggests, quite the contrary could be the case: generally speaking, Californian law could have led to the application of the German international mandatory provisions (idem). However, Rühl is of the opinion that in a case involving independent agents (unlike consumers or franchisees) Californian law would strictly stand for the law chosen by the parties (loc. cit., p. 302). The same opinion has been expressed by Thorn: “it seems highly speculative to foresee whether the tribunal will apply overriding mandatory rules of a third country or not, not to mention the assessment of whether such a risk is obvious or not” (Thor n, Karsten and Grenz, Walter, “The effect of overriding mandatory rules on the arbitration agreement”, in Ferrari, Franco and Kröll, Stefan (edit.), Conflict of laws in international arbitration, Sellier Pub., 2010, p. 196; emphasis added). Kleinheisterkamp referred to the reasoning of the Court as “superficial” (Kleinheisterkamp, ob. cit., p. 827).
¹¹⁶ See Quincke, ob. cit, IV and Rühl, ob. cit, p. 302.
¹¹⁷ See Rühl, ob. cit., p. 298.
¹¹⁸ Since recognition and enforcement of the latter are governed by two specific instruments: the New York Convention and a bilateral treaty entered into the US and Germany. Notwithstanding, both rank as a German national law that is to be subjected to the primacy of the EU law and its effect utile principle (Rühl, ob. cit, p. 301).
enforcement in Germany was “too remote” to impose a duty on the arbitrators to take German international mandatory rules into account.\textsuperscript{119}

1.2. The substantive invalidity of arbitration agreements in the context of franchise contracts

Further and subsequent German case law cited as example of the interpretation that international mandatory rules do impact on the validity of arbitration agreements are the decisions that have been rendered in the last years by the Higher Regional Courts of Dresden, Bremen and Celle in the context of franchise agreement.\textsuperscript{120} As will be noted below, no international mandatory rule was actually involved in these cases, which are referred more for their potential implications as for what they have actually decided.

The case brought before the Higher Regional Court of Dresden in 2007, for instance, concerned a franchise agreement entered into a Dutch subsidiary of a mother company based in the USA, as franchisor, and a German franchisee with the purpose of running a business of sale of sandwiches and salads in Germany.\textsuperscript{121} The contract was subjected to the laws of Lichtenstein (where the Austrian Civil Code applies) and called for arbitration in New York according to the UNCITRAL Arbitration Rules with a mandatory hearing to take place therein. Upon failure by the franchisee to pay the agreed fees, the franchisor initiated arbitration in New York and obtained an award in his favor, whose enforcement he sought in Germany.

The Higher Regional Court of Dresden decided to refuse enforcement of the arbitral award on the grounds of the invalidity of the arbitration agreement (Article V.1.a of the New York Convention), that it assessed according to Austrian law (the law chosen by the parties to govern the merits).\textsuperscript{122} The Court found that the arbitration agreement included in the general terms and conditions of the contract, under consideration of all relevant circumstances of the case, imposed a “gross disadvantage” on the German franchisee that turned the covenant void according to the relevant provision of Austrian

\textsuperscript{119} Thorn, ob. cit., pp. 208-209. According to Thorn, the key issue at stake is rather the law governing the substantive validity of the arbitration agreement, than the arbitrability of the dispute as such (p. 196).
\textsuperscript{120} For a detailed analysis of the judgments, see Thorn, ob. cit., pp. 187-210.
\textsuperscript{122} Thorn points out that this is an example of the tendency of German courts to subject the arbitration clause to the law chosen by the parties to govern the merits, more on the basis of an accession principle than of the implicit will of the parties (ob. cit., p.191).
In addition, the Court stressed that the German franchisee may encounter “orientation difficulties” in attending a hearing in New York. The other two decisions rendered by the Higher Courts of Bremen and Celle dealt with basically the same factual scenario and reached the similar decisions.  

As previously said, the cases referred to in this section should clearly be distinguished from the decision rendered by the Higher Court of München and cannot really be interpreted as dealing with the issue of international mandatory provisions impacting on arbitration. It should be noted that the Higher Court of Dresden simply assessed the validity of the arbitration agreement under the law chosen by the parties to apply to the merits (ultimately, the laws of Austria) and did not considered the substance of the award and its compatibility with the German public policy (another ground on which enforcement of the award could have been denied). In the reasoning followed by the Court it was not necessary to invoke the international mandatory nature of any rule: Austrian law—interpreted in a peculiar and perhaps controversial manner—applied by virtue of party autonomy and led to the invalidity of the arbitration clause, as it could have led to the nullity of any other covenant to be interpreted as imposing a “gross disadvantage” on the franchisee. However, commenting these cases, Thorn noted that “the franchisor might change the choice-of-law clause used in his standard terms by referring now to a legal system under which arbitration clauses as the ones invalidated by the German courts are effective. The question arises, if German courts would then uphold such an arbitration clause or find a way to protect the franchisee…”

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123 §879, paragraph 3, Österreichische Bürgerliche Gesetzbuch (that the Court recognized was applicable to contracts concluded with consumers but decided to apply to the contract at stake as well).
125 See also Kröll, ob. cit., footnote 69, noting that “the issue was not the non-application of international mandatory rules…”.
126 Thorn, ob. cit., pp. 192-193. He is of the opinion that “overriding mandatory rules of the forum invalidating the arbitration clause for substantive reasons had to be applied” in order to protect weaker parties from “less restrictive jurisdiction[s]”, with the clarification that the invalidation of arbitration agreements due to the structural imbalance between the parties in the context of franchise agreements, could not extended to other type of contracts where such imbalance does not exist.
2. An English view: international mandatory provisions as requiring the invalidity of arbitration agreements and choice of law clauses

Another decision worth mentioning in the context of the “second” interpretation is the one rendered by the English Court of Justice in 2009 in Accentuate v. Asigra.127 The case concerned an agreement for the distribution of software products entered into a principal based in Canada and a distributor based in the UK. The parties agreed on Canadian law128 as applicable law and arbitration in Toronto, Canada.129 Upon termination of the agreement, the distributor sought payment of a compensation under the Commercial Agents Regulations 1993 (implementing the Commercial Agents Directive in the UK). The principal started parallel arbitral proceedings in Canada and inter alia obtained an award declaring that the rights and obligations of the parties were governed by Canadian law and not by the UK Regulations. The arbitral tribunal also found the principal liable for certain direct losses suffered by the distributor that were unrelated to the referred Regulations.130 Relevant for purposes of the present analysis are the following findings of the English Court, supporting the decision that the arbitration agreement should be deemed void and, thus, that the award should not be recognized in the UK:

“The decision in Ingmar requires this court to give effect to the mandatory provisions of EU law, notwithstanding any expression to the contrary on the part of the contracting parties. In my judgment this must apply as much to an arbitration clause providing for both a place and a law other than a law that would give effect to the Directive, as it does to the simple choice of law clause that was under consideration in Ingmar.

Accordingly, the arbitration clause would be "null and void" and "inoperative" within the meaning of s.9(4) of the Arbitration Act, in so far as it purported to require the submission to arbitration of "questions pertaining to" mandatory provisions of EU law, and Regulation 17 in particular, provided that the Regulations apply at all."131

128 Actually, Ontario law and the federal rules of Canada.
129 Paragraph 2.
130 Paragraphs 5 and 6.
131 Paragraphs 88 and 89 (emphasis added).
This interpretation substantially differs from the prognosis method applied by the Higher Regional Court of Munich, even though it reaches the very same conclusion: the invalidity of the arbitration agreement. In practice, the decision of the English Court is very close to the interpretation that international mandatory rules exclude arbitrability, provided that arbitration is agreed in tandem with a choice of law clause. It follows from the holding of the decision quoted above that the invalidity of the arbitration clause was concluded irrespective of any consideration of whether arbitrators would apply the international mandatory rules. On the other hand, it should be borne in mind that the English court already knew as a matter of fact that the arbitrators failed to apply the referred provisions, what might have influenced the result it arrived to.

3. An alternative proposal to overcome to speculations attached to the prognosis at the referral stage: the “subsequent partial choice of law” and the “arbitrators’ liability”.

To overcome the uncertainties surrounding the prognosis test about whether an arbitral tribunal will apply or not the relevant international provisions, Kleinheisterkamp proposed that the parties conclude an agreement before the state court dealing with the validity and enforceability of the arbitration clause acknowledging that the relevant international mandatory provisions of the forum shall apply, notwithstanding the choice of law clause included in the contract. Such an agreement should be binding on the arbitral tribunal and would imply that the “obvious risk” of non-application of the referred rules would have vanished.\(^\text{132}\) This proposal cannot withstand, in my view, the objections that it has encountered: not only the willingness of the defendant to enter into such an agreement is very unlikely, but also the idea that the binding force of international mandatory rules would be provided by party autonomy raises serious doubts as to its dogmatic justification.\(^\text{133}\)

Another proposal that has been expressed to solve the problem described above is to held arbitrators liable towards the losing party, should they have failed to apply the relevant international mandatory provisions.\(^\text{134}\)

\(^\text{133}\) See Thorn, ob. cit., pp. 197-198.
\(^\text{134}\) By imposing such liability, arbitrators would have an incentive to apply the international mandatory rules, opposite to the incentive to ignore them that they already have based on the alleged parties’ wish prior to the birth of the dispute. See Guzmán, Andrew T, “Arbitrator liability: reconciling arbitration and mandatory
(d) Third interpretation: international mandatory provisions impact on the recognition and enforcement of arbitral awards through public policy

I. Overview. The legendary Mitsubishi case

Those opponents of the approaches summarized in the previous sections stand for reserving the impact of international mandatory provisions for the public policy defense at the enforcement and recognition stage (Article V. 2. B of the New York Convention).

This so called “second look” doctrine was born with the famous judgment of the US Supreme Court of Justice in Mitsubishi. As for the facts, the dispute arose out of a distribution agreement between a Japanese car manufacturer (Mitsubishi) and a distributor based in Puerto Rico that included an arbitration clause in favor of the Japanese Commercial Arbitration Association and called for Swiss law as governing law. The Court ruled in favor of the arbitrability of the dispute and decided to refer the parties to arbitration even if the proceedings were to include statutory rights (namely, antitrust claims). At the recognition and enforcement stage of the award, a second review could be performed in light of the public policy defense. The Court reminded that “we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts” and referred to the “strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions” already established in previous cases. More remarkably, the Court recalled that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum”.

Many discussions have been raised by footnote 19 of the judgment, wherein the Court stated that: “we therefore have no occasion to speculate on this matter [whether the

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136 Actually, the arbitration clause was included in a sales agreement that was executed separately by the parties. The dispute arose once the distributor could not reach the minimum sales volume contractually agreed.
137 473 U.S. 628.
138 473 U.S. 629.
139 473 U.S. 629, with reference to Bremen and Scherk.
140 473 U.S. 628.
arbitral tribunal will apply the U.S. Sherman Act despite Swiss law having been chosen by the parties to govern the agreement] at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal’s failure to take cognizance of the statutory cause of action on the claimant’s capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy”. It has been pointed out, however, that underlying the decision was the high probability that despite the choice of Swiss law made by the parties- the arbitrators would apply the U.S. Sherman Act, which played a decisive role in the operative part of the judgment.141

It has been noted that the concerns raised by the critics of Mitsubishi in the sense that parties and arbitrators would have an incentive to evade the application of international mandatory rules have shown to be unjustified in practice.142 The “second look” doctrine was confirmed in subsequent cases by the US Supreme Court, such as Shearson/American Express (1987)143 and Vimar Seguros y Reaseguros (1995).144

141 The Supreme Court made an express reference to the fact that the claims filed before the Japanese arbitrators were based on American antitrust law (see footnote 19). Mayer expressed the idea as follows: “in holding that arbitrators have a right to apply such rules, the Supreme Court appears to presume that they are in some manner obliged to do so, which in turn makes it possible to trust them in thus matter. And abversely, even if this trust is not always deserved, it may contribute to an evolution of mentalities; knowing that national courts allow them to arbitrate because they count on an actual application of mandatory rules of law, arbitrators will perhaps be inspired not to disappoint this expectation. The Mitsubishi decision will therefore have an impact on the search for an answer to the second question, that of the duty to apply mandatory rules of law” (Mayer, ob. cit., p. 280). See also Kröll, ob. cit., p. 344 and Hyder Razvi, ob. cit., p. 35.

142 In 20 years only one case in the USA dealt with an arbitral award that failed to apply international mandatory provisions. See Donovan and Greenawalt, ob. cit., pp. 11-60 and Drobnig, ob. cit., p. 97. Nonetheless, it should be noted that the lack of precedents not necessarily means that arbitrators always applied the relevant international mandatory rules. Perhaps the cases did not reach the enforcement stage in the USA for other reasons.

143 US Supreme Court, Shearson/American Express v. MacMahon, 482 U.S. 220 (1987). The Court ruled that “the Arbitration Act establishes a ‘federal policy favoring arbitration’ (...) This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights (...) Like any statutory directive, the Arbitration Act’s mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue”. The Court also confirmed the distinction between the prohibition of waiver of substantial rights and the parties´ right to agree on arbitration.

144 The detailed analysis of the subsequent developments of US case law would exceed the scope of this study. For further reference see, among many others, Weller, Matthias, Ordre public Kontrolle internationaler Gerichtsstandsvereinbarungen im autonomen Zuständigkeitsrecht, Mohr Siebeck, Tübingen, 2005, Chapter V.B (pp. 246-300); and Baron and Liniger, ob. cit., pp. 27-54.
2. A recent example from Portugal (2014)

An interesting case rendered very recently in Portugal illustrate well this second-look approach and deserves to be considered in this section, because it deals with international mandatory rules and public policy in the field of distribution agreements.\textsuperscript{145} It concerned a serious of distribution agreements entered into a principal (a car manufacturer) based in Spain and a distributor based in Portugal for the distribution of vehicles in Portugal, governed by Spanish law and providing for arbitration in Paris under the ICC Rules as dispute resolution method. Upon termination of the contract, the Portuguese distributor started arbitration claiming loss of profits and further damages, as well as a \textit{clientele} compensation ("indemnização de clientele") as provided under Portuguese Decree Law N\textdegree{} 178/96 on commercial agency contracts,\textsuperscript{146} despite of the choice in favor of Spanish law. The principal filed a counterclaim seeking enforcement of other obligations (such as payment of the price agreed for some vehicles). The arbitral tribunal partially admitted both the claims and the counterclaims (resulting in a balance in favor of the Portuguese distributor), but rejected the claim filed by the latter for \textit{clientele} compensation. Lately, even though the parties concluded an agreement by which they acknowledged that the mutual obligations had been extinguished with the payment of the balance by the principal, the distributor filed a claim before Portuguese state courts seeking the \textit{clientele} compensation rejected by the arbitral tribunal and arguing that the award could not be recognized in Portugal because if would infringe Portuguese public policy (due to the non-application of the Portuguese law).\textsuperscript{147} The Court of Appeal of Lisbon decided on January 2014 that, despite the non-application of the Portuguese mandatory rules, the ICC award should be recognized in Portugal: the referred rules should be considered as part of the domestic public policy, but not as of the international public

\textsuperscript{145}Unfortunately, due to its very recent date the decision remains unpublished and is currently available online only on in its original language. Court of Appeals of Lisbon, Portugal, 16.01.2014. Full text of the judgment in Portuguese is available at http://www.dgsi.pt/jtrl.nsf/33182fe732316039802565fa00497ee/c2769dfe89c5e8a80257c82003b78cb?OpenDocument&ExpandSection=1,2,3,4,5,6,7http://.

\textsuperscript{146}Even though this is not mentioned in the judgment, this Decree Law was originally enacted in 1986 and lately amended to comply with the Commercial Agents Directive already discussed in the context of the Ingmar and Unamar cases. Relevant for the analysis are Article 33 and 38: Article 33 contemplates a \textit{clientele} compensation in favor of the agent in case of termination (it is to be assumed that this Article implements Art. 17 of the Directive, even though the judgment does not expressly refer thereto) and Article 38 establishes that agency agreements to be exclusively or mainly performed in Portugal can be subjected to a law different that the Portuguese only if it is more beneficial to the agent.

\textsuperscript{147}The Portuguese distributor argued that the \textit{clientele} compensation foreseen in the Decree Law on agency contracts was applicable to the distribution agreements at stake by analogy.
policy, the latter being the only relevant for recognition and enforcement purposes. According to the Court, the award could not be considered as having infringed the fundamental principles and rules underlying the Portuguese legal system and, hence, the international public policy of the Portuguese State.

In my opinion, the judgment is very interesting both because of what it has considered and what it has left without (express) consideration.\textsuperscript{148} At the outset, it is to be assumed that the arbitral tribunal rejected the compensation claim because it considered that Articles 33 and 38 of the Portuguese Decree were not applicable to the contract governed by Spanish law.\textsuperscript{149} It is worth noting that the Court admitted that the referred Portuguese provisions were international mandatory and would have been applied by Portuguese state court, despite the choice of law clause. Nonetheless, since the parties agreed on arbitration the only scope of review available to the Portuguese Court was the public policy defense, which could only be deemed as infringed in very exceptional cases, provided that the award is incompatible with the fundamental principles of Portuguese law. In the end, the Court is favoring the view that non-application of international mandatory rules not necessarily amounts to an infringement of public policy obstructing the enforcement of the award.

\textbf{3. Critical assessment of the approach}

By performing the public policy control at the enforcement stage, it is irrelevant whether a certain provision is considered as part of the public order of the \textit{lex fori}: the key issue is rather whether the solution derived from the non-application of the provisions is compatible with the public policy of the enforcement state.\textsuperscript{150} This question can only be answered \textit{in concreto} taking into consideration the circumstances of the case and especially the objectives pursued by the international mandatory provision at stake, such as the compensation enshrined in §89.b. German Commercial Code (and other national laws implementing the Commercial Agents Directive). On the one hand, the grant of a consideration in exchange of the services performed by the agent to the extent he

\textsuperscript{148} The Court failed to make reference, for instance, to the Commercial Agents Directive and the judgments of the ECJ when assessing the mandatory nature of the Portuguese provisions.

\textsuperscript{149} Either because they were not considered as international mandatory provisions by the arbitral tribunal or on other grounds. If the arbitral tribunal would have considered the claim based on the Portuguese provisions and decided to reject it on substantial grounds the argumentation of the judgment should have gone in another direction.

\textsuperscript{150} Quincke, \textit{ob. cit.}, III. 1.c. See also Kleinheisterkamp, \textit{ob. cit}, p. 828; Beulker, \textit{ob. cit}, pp. 249-251; and Kröll, \textit{ob. cit.}, pp. 336-337.
contributed to the creation or extension of the customer base (provided they have not been already compensated by the commission foreseen in the contract) and, on the other, the provision of a social protection for the agent after termination of the contract.151 It may very well be that both objectives have been achieved by other means in the context a specific distributorship relationship and that, therefore, no violation of the public policy could be invoked based on the sole non-application of the international mandatory provisions granting the referred compensation: there may be no need to protect the agent in a particular factual scenario.152

This approach that focuses rather on the solution reached in the award and its compatibility with the objectives pursued by the international mandatory provisions rather than on the formal naked check of whether such norms have been applied or not had already been taken by the German Supreme Court in 1983.153 This interpretation that focuses on the public policy defense is more in line with the nature of international mandatory provisions which follow the principle of the effectiveness principle: they are tools to implement a legislator’s willingness to achieve certain results and objectives (not specific conducts) by prevailing over party autonomy.154 From another perspective and specifically in connection with the Commercial Agents Directive, it has been highlighted that international mandatory rules should only preclude party autonomy whenever a law has been chosen that does not provide any protection at all to agents, or that sets forth a lower level of protection.155 This cannot be assessed but on a case by case basis under consideration of all relevant circumstances and, thus, only at the recognition or enforcement stage by means of the public policy defense.

In addition, a distinction should be made between internal public policy and international public policy (as the Portuguese Court did in the case cited above). International public policy is composed of the basic principles of a certain legal system,

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151 See Quincke, ob. cit., III.1.c.
152 As for the first objective, the principal may have agreed to pay a higher remuneration during the life of the contract that partially serves as consideration for the value of the customer base attributable to the agent’s activity. As for the second, the agent may have started new activities immediately after termination of the agreement without having incurred in losses. See Quincke, ob. cit., III.1.c. The same idea has been expressed by Rühl (ob. cit., pp. 297-298), Kleinheisterkamp, ob. cit., pp. 831-832 and Kröll, ob. cit, pp. 346-348.
153 BGH, 30.05.1983, NJW 1983, 2772. See Rühl, ob. cit., pp. 269-7. The case law of the German Supreme Court does not, however, clarify on which dogmatic basis the compatibility test is to be performed. (idem, p. 297).
155 Schwarz, ob. cit., p. 67.
which shall be taken into account also *vis-à-vis* foreign provisions, judgments and arbitral awards, while internal public policy has a much wider scope, encompassing all mandatory rules that may not be contracted out by private parties and normally are enacted taking into account a domestic factual background.\(^{156}\) On the contrary, some authors have pointed out that the distinction is irrelevant for arbitrators since they strictly have no own “public policy” to protect.\(^{157}\)

In the assessment of whether an arbitral award\(^{158}\) in a concrete case is compatible with the public policy of the state before which recognition or enforcement is sought, the test developed by Sandrock could be particularly useful. Basically, he proposes to follow a three-stepped approach. First, a domestic connection (“*Inlandsbeziehung*”) between the case and the state whose public policy is at stake has to be shown.\(^{159}\) Second, it is to be determined whether the party invoking the protection of the public policy has freely undertaken the “foreign” risk or whether such risk is to be objectively attributed to him.\(^{160}\) Should the answer be affirmative, then no infringement of public policy is to be assumed. On the contrary, a third step is to be assessed, namely: whether the party that may be favored by the public policy defense is not entitled to waive or, more generally, dispose of his legal situation.\(^{161}\) This would constitute a public policy infringement.

Applying the test to the topic under analysis herein the following is to be concluded. Normally, the domestic connection will be given by the activities of the distributor being performed in the state where enforcement is sought. First requirement

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\(^{156}\) Basedow, Jürgen, „Die Verselbständigung des europäischen ordre public“, in Privatrecht in Europa. Vielfalt, Kollision, Kooperation. *Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag*, C. H.Beck, München, 2004, p. 295. According to some authors, the distinction between internal and international *ordre public* is not justified within German and EU law. (Renner, *ob. cit.*, p. 56). Also Sandrock is of the opinion that the distinction introduced in Germany by the BGH (German Supreme Court) is based in a misunderstanding basically because most of the provisions deemed as belonging to the *public ordre* are enacted to be applied in the international field (Sandrock, Otto, "'Scharfer' ordre public interne und 'laxer' ordre public international?: die Unterscheidung zwischen 'ordre public interne' und 'ordre public international' ist nicht gerechtfertigt", in Coester, Michael, Martiny, Dieter and Prinz von Sachsen Gessaphe, Karl August (edit.), Privatrecht in Europa. *Festschrift für Hans Jürgen Sonnenberger zum 70. Geburtstag*, Beck, München, 2004, pp. 615-649; especially p. 620-621).

\(^{157}\) *The distinction between ordre public interne and ordre public international, which has been devised primarily with international civil litigation in mind, applies less readily in the context of international arbitration. An international arbitral tribunal will have a harder time deploying the distinction, since it is not an organ of a State that is deemed to be possessed of something we call ‘public policy’"* (Bermann, “Mandatory rules...”, *ob. cit.*, p. 329).

\(^{158}\) The reasoning is also applicable to foreign judgments.


\(^{160}\) *Idem*. Those who make business in foreign countries or somehow enter into contact with foreign elements should be aware that they may be exposed to other laws and to the jurisdictions of foreign courts.

\(^{161}\) Sandrock, *ob. cit.*, p. 634.
would be thereby met. The approach to be taken in respect of the second and third issues is more complex and, in my view, the decisive ones. Are distributors to be treated like consumers and considered not to be able to freely undertake a foreign risk and forego their statutory rights? In my opinion, the question should be answered negatively as a matter of principles. First, as the US Supreme Court held in Mitsubishi, by agreeing to arbitrate parties do not forego their statutory rights. And second, the distributor is a business person who has to be aware of the risks attached to the transactions he enters into, especially if he is acting in the international field. Thus, in general terms no infringement of public policy would be involved. Only in the individual case, under consideration of all relevant circumstances, an infringement of the public policy could be derived from the fact that the distributor could not have disposed of the protection granted by some international mandatory rules because the principal abused of its superior bargaining power. In my view, this should be reserved for few very exceptional and clear cases.

Finally, negative aspects of this “second look” approach deserve a consideration. Drawbacks of deferring the analysis to the post award stage are the costs and expenses associated with the arbitral proceedings that the distributor will first have to undergo to be able, only then, to start new courts proceedings based on the international mandatory provisions previously ignored by the arbitrators. This may, in practice, deter them from litigating. Nonetheless, to have these costs borne by the distributor has been said to be fair and not to constitute by itself an infringement of the public policy. In this regard, the distributor will normally have to opportunity to select one arbitrator and it is to be assumed that the arbitrator so appointed will be familiarized with the relevant international mandatory rules. Cost and time attached to this approach has been said to be simply the consequence of the distributor having agreed to arbitrate.

In a whole, I believe that the “second look” doctrine is the approach that proves better understanding of the nature of the international mandatory rules, especially in cases involving the protection of group interests, such as the interests of distributors, who that cannot be attributed a priori and necessarily the condition of weak parties deserving protection after termination of the agreement. In principle, the will of the parties deserve to be respected by the state courts. This approach fosters not only arbitration, but more

163 See Quincke, ob. cit., III. 4. The opposing view has been held by Weller, loc. cit.
164 See Quincke, ob. cit., III. 2. V. Same opinion has been held by Kröll, ob. cit., p. 350.
generally foreseeability and legal certainty in international transactions and, thus, international trade in general.  

IV. AN ARGENTINE PERSPECTIVE: LOOKING INTO ITS FUTURE

A. Overview. The potential birth of the problem in Argentina

The problem previously discussed assumes the existence of international mandatory provisions applying to distribution agreements. As we have seen, whether a provision falls under the category of international mandatory is perhaps one of the most difficult questions of international private law. Normally, these rules are not expressly denominated as such by the legislator. Within the EU the matter has been settled (not exempted from criticism) with the Ingmar judgment, wherein the ECJ declared that certain provisions of the Commercial Agents Directive are “mandatory” in terms of Article 7 of the Rome I Convention (currently, Article 9 of the respective Regulation).

The situation is quite the opposite in Argentina. Precondition for a provision to be recognized as international mandatory is naturally the existence of a legal provision at all. And this is the reason why the topic has not reached the status of a legal problem under Argentine law so far: distribution agreements are not specifically regulated in the Argentine Commercial Code, but instead governed by general contract provisions set forth both in the Civil Code and the Code of Commerce, as well as by the relevant commercial case law.  

The topic may, however, gain practical relevance in the near future in Argentina provided that the National Civil and Commercial Code Draft (the “Draft”) is enacted,  

165 In addition, one of the key advantages of the “second look” doctrine is that it prevents parties from obstructing arbitration by simply invoking an international mandatory rule that would turn the dispute inarbitrable or an arbitral agreement void, according to the first two approaches referred supra. (Donovan and Greenawalt, ob. cit., pp. 13-14). It has been noted as well that the risk perceived by state courts that arbitral tribunal would failed to apply the relevant international mandatory rules has proven to be exaggerated (idem, p. 16). This is another fact that supports the view that the impact on international mandatory rules should be reserved for the enforcement stage.

166 With the only exception of some partial regulation applicable to very specific types of distribution agreements (distribution of newspapers and magazines and of cinematographic films). See Marzorati, Osvaldo J., Sistemas de distribución comercial. Astrea, Buenos Aires, 1990, p. 7. Even if case law of is not mandatory for lower courts (since Argentina is a civil law country), it is a relevant source of law (rather material, than formal) together with the opinion of scholars.

since distribution agreements will be regulated for the first time in the country and some of its provision may be regarded as international mandatory provisions.\textsuperscript{168} Even if the Draft is not enacted soon, the regulation of distribution agreements it proposed essentially follows the one included in a previous Draft of 1998.\textsuperscript{169} Thus, a future regulation of this type of agreements in Argentina - whenever it takes place - probably will include provisions similar to the ones that will be discussed below.

The logical structure of the analysis will be the same as in the first part hereto: a substantial perspective followed by a procedural one. As a consequence, first question to be posed is whether some of the provisions enshrined in the Draft should indeed be considered as international mandatory. Would the reasoning of the ECJ in Ingmar \textit{mutandis mutandi} also justify such a declaration in respect of Argentine provisions? The issue bears practical relevance since Argentina is not a highly industrialized country and, hence, numerous distribution agreements are concluded between principals located abroad (normally, the manufacturers) and local distributors. Secondly, and assuming for purposes of the analysis that an Argentinean court may regard some provisions as being international mandatory, the procedural problem arises. Namely, which is the impact, if any, that these provisions should have on arbitration? How is the problem to be solved in light of the Draft and previous case law? Can and should Argentina benefit from the European experience and take a “second look” approach to the issue? The following sections will be devoted to critically discuss these queries.

\textsuperscript{168} It has been noted in this regard that “\textit{the only cases of interest for the topic treated here are those in which the various substantive or procedural provisions regulating a certain type of commercial representation are of a mandatory nature}” (Kröll, \textit{ob. cit.}, p. 324).

B. The Draft: regulation of distribution agreements and international private law rules

(i) Description of the rules concerning distribution agreements that may be problematic

The Draft regulates in different chapters agency, concession and franchise agreements. Distribution agreements are not separately regulated but only with reference to concession agreements, what has been criticized by the doctrine since distribution is the generic type of agreement encompassing the other species and the distribution itself.

It would exceed the scope of this study to provide a full description of the referred regulation. Focus will be therefore put in a selective briefly description of the provisions that could raise the issue of whether they are truly international mandatory or simply mandatory in a domestic context.

These provisions are the following:

170 Third Book, Title IV, Chapter 17 of the Draft. Agency agreements have been defined by Argentine scholars as those by which one person engages another in the promotion of his business in a stable manner, either with or without representation. Unlike the concessionaire, the agent is not compelled to acquire goods from the principal, but only to promote his business. As a consequence, there is no transfer of property among the parties. See Lorenzetti, Ricardo Luis, Tratado de los contratos, Rubinzal Culzoni Editores, Santa Fe, 2004, 2nd. Ed., pp. 528-9). See also Marzorati, Sistemas..., ob. cit., p. 9 and ss.

171 Third Book, Title IV, Chapter 18 of the Draft. The concession agreement has been characterized as the agreement by which a conceding party grants the concessionaire an exclusive right to distribution within a certain territory, authorizes the use of the brand and distinctive signs and transfers the property of the goods to be sold to third parties. The concessionaire acts in his own name towards third parties, bearing the associated risks and is subject to the control of the conceding party (See Lorenzetti, ob. cit., pp. 528-9).

172 Third Book, Title IV, Chapter 19 of the Draft. The franchise agreement creates a stronger integration among the parties since it creates the illusion of a unique enterprise, unlike the concession agreement, which allows the creation of a specific clientele attached to the concessionaire due to the differentiation. The franchisor authorizes the use of the brand, distinctive signs and the successful procedure involved in the business, against a consideration to be paid by the franchisee in order to replicate the business. The agreement includes an assignment of brands, image and a provision of goods, as well a strong control imposed on the franchisee (See Lorenzetti, ob. cit., pp. 528-9).

173 The Draft regulates concession agreements only, indicating that these provisions also apply to distribution agreements accordingly (Article 1511, b). For a critical view thereon, see Marzorati, Osvaldo, “Contrato de distribución en el Proyecto de Código”, Diario La Ley of 25.03.2014 and Molina Sandoval, Carlos A, “El contrato de franquicia en el Proyecto de Código”, La Ley 2012-F, pp. 1078 and ss (section II). Distribution agreements have been pointed out as the generic type of commercial agreements encompassing, among others, the species of agency, concession and franchise agreement. Distributorship as the generic notion has been defined as a legal relationship based on the provision of goods destined to final consumers (Lorenzetti, loc. cit.)
(1) Minimum termination notice periods for contracts agreed (or deemed as agreed) for an indefinite period of time and compensation in lieu of notice. Termination notice period for agency agreements shall be at least one month per contractual year and failure therewith entitles the agent to a compensation in lieu of notice for the loss of profits incurred in.\textsuperscript{174} This provision also applies to concession and distribution agreements\textsuperscript{175} as well as to franchise agreements.\textsuperscript{176}

(2) Compensation in case of termination (for agency agreements only). This provision follows very closely the wording of the indemnity contemplated in Article 17, paragraph 2, of the Commercial Agents Directive.\textsuperscript{177} The agent shall be entitled to a compensation in case of termination provided that he contributed with his activity to significantly increase the volume of the business of the principal and his previous activity may continue to produce substantial benefits to the latter. Should the parties not come to an agreement on the amount, the compensation shall be fixed by the courts and may not exceed the equivalent to the net remunerations perceived during one year.\textsuperscript{178} It is worth noting that, even in absence of a specific regulation, Argentine scholars had pointed out that agents were entitled to such a compensation based on a restitution obligation: the principal would be benefitting from a pecuniary increase caused by the agent’s activity that

\textsuperscript{174} Articles 1492 and 1493 of the Draft.
\textsuperscript{175} Article 1508 (a) of the Draft.
\textsuperscript{176} Article 1522 (b) of the Draft. Termination notice periods are substantially the same as those provided for agency agreements.
\textsuperscript{177} Reference to the Directive can be found in the “Grounds” of the Draft, pp. 161-162, see http://www.nuevocodigocivil.com/pdf/Fundamentos-del-Proyecto.pdf.
\textsuperscript{178} Article 1497 of the Draft. This right is enforceable irrespective of the indefinite or definite period of time agreed for the contract and may be added to further damages that the agent may claim in case the termination of the agreement is attributable to the principal. The original text in Spanish is the following: “Compensación por clientela. Extinguido el contrato, sea por tiempo determinado o indeterminado, el agente que mediante su labor ha incrementado significativamente el giro de las operaciones del empresario, tiene derecho a una compensación si su actividad anterior puede continuar produciendo ventajas sustanciales a éste. En caso de muerte del agente ese derecho corresponde a sus herederos. A falta de acuerdo, la compensación debe ser fijada judicialmente y no puede exceder del importe equivalente a UN (1) año de remuneraciones, neto de gastos, promediándose el valor de las percibidas por el agente durante los últimos CINCO (5) años, o durante todo el período de duración del contrato, si éste es inferior. Esta compensación no impide al agente, en su caso, reclamar por los daños derivados de la ruptura por culpa del empresario”. The right to the compensation is excluded in the following cases: (i) termination of the contract caused by the agent’s failure to comply with his obligations; and (ii) termination of the contract by the agent, unless it is been justified by the principal’s failure to comply with its obligation, or the age, health or invalidity of the agent (Article 1498 of the Draft).
is left without cause upon termination of the agreement, and, hence, should be compensated.179

(3) **Validity requirements of non-competition clauses to be effective after termination of the contract.** The validity of such a covenant in an agency agreement is dependent upon the following two conditions: (i) a maximum term of one year; and (ii) a limited scope of application attached to a reasonable territory or group of persons according to the circumstances.180 Practically the same applies to franchise agreements as well.181

(4) **Minimum contractual terms.** As for concession and distribution agreements, the only provisions that in my view could be problematic are those establishing minimum contractual terms, namely four years.182 Only in the exceptional case, that the principal provided the use of the necessary facilities to perform contract, the minimum period shall be of two years.183 In the field of franchise agreement, the Draft contains contradictory provisions: one providing that it has to be agreed for a minimum of two (2) years,184 another making a cross reference to minimum periods applicable to concession agreements (and thus, to the four years period).185

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179 Lorenzetti, *ob. cit.*, p. 652. The customer base is a measurable asset that produces benefits. Upon termination of the contract its “ownership” is transferred from the distributor to the principal, but said transfer is not caused by the contract, that regulates the collaboration between the parties resulting in a common good, the *cliente*. Therefore, a compensation is owed by the principal on the basis of unjust enrichment (“enriquecimiento sin causa”) (See Lorenzetti, *ob. cit.*, p. 600).

180 Article 1499 of the Draft.

181 According to Article 1522 of the Draft.

182 Article 1506 of the Draft. It is not clear to what extent this provision would also apply to distribution agreements (as explained, governed by the rules applicable to concession agreements, to the extent they are pertinent). The legislative policy of establishing a minimum contractual term responds to the concerns raised by the subordination and control imposed on the concessionaire or franchisee in exchange for the contractual exclusivity and the practice of concluding agreements for short periods of time subject to repeated renewals. On the one hand, it has been argued that the uncertainty about the non-renewal of contracts agreed for short terms affects the equilibrium between the parties and is harmful to the concessionaire’s autonomy. On the other hand, it has been explained on the basis of French case law, that the non-renewal cannot be deemed as an abuse but a as a regular exercise of a contractual right. In addition, it has been argued that no one can be forced to enter into an agreement with a contractual party, whom he is not satisfied with. Short terms have the advantage of representing an incentive to the concessionaire to maximize his performance. See Marzorati, Sistemas…., *ob. cit.* pp. 143-144. The Argentine Draft goes in the opposite direction by forcing the principal to be bound by minimum terms.

183 Article 1506 of the Draft.

184 *Idem.*

185 Article 1516 of the Draft. Nonetheless, a shorter period may be applied if it corresponds to particular situations, like a congress or a mess (*idem*). This provision has been criticized, since those contingent situations do not correspond with the concept of franchise business (Mizraji, Guillermo, “La franquicia comercial en el Proyecto de Código”, Diario La Ley 2013-A, p. 624).
(5) **Nullity of certain covenants included in franchise agreements.** Finally, some clauses are specifically deemed void if incorporated to a franchise agreement, such as those prohibiting the franchisee to defend the rights subject to the franchise vis-à-vis third parties, to meet with other franchisees or acquire products from other franchisees within the country, provided that the products meet the contractual standards.  

(ii) **Framework for the analysis: party autonomy, international mandatory provisions, public policy and arbitrability as contemplated in the Draft**

The Draft recognizes both substantial and procedural aspects of party autonomy as general principle. In this regard, the Draft does not innovate in respect of the legal situation under Argentina law *de lege lata*, even though the doctrine is not unanimous as to the degree of recognition of substantial party autonomy. Thus, the Draft would contribute to provide more clarity on the matter.

In determining the law applicable to contractual relationships (substantial party autonomy), parties are granted in the Draft wide freedom, with the clarification that public policy principles and international mandatory provisions of Argentine law apply to the legal relationship irrespective of the law governing the contract and that, as a matter of principle, also those international mandatory provisions of the third states showing relevant economic connections shall apply as well.

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186 Article 1519 of the Draft. Basis for the illegality of said covenants is that they limit the franchisee’s freedom of contracting (See Lorenzetti, *ob. cit.*, p. 715). In addition, the franchisor may not hold a controlling shareholding in the franchisee’s share capital (Article 1512), but this provision has been criticized because of its improper and imprecise wording (by referring *inter alia* to a shareholding in the “business” of the franchisee).

187 Party autonomy in the determination of the law applicable to contractual relationships has been deduced from Articles 1209, 1210 and 1212 of the Argentine Civil Code (by which the parties may select the place of performance of their contract, which will be the connecting factor determining the applicable law). It has also been deduced from Article 1 of the National Civil and Commercial Procedural Code (as amended by Law 22.434) that entitles the parties to agree on the courts or arbitration tribunals that will have jurisdiction to hear their disputes in international patrimonial matters. Since parties are, thus, entitled to choose the applicable international private law rules (by selecting the state courts having jurisdiction that will apply their own international private law rules) it is to be interpreted (*a maiore ad minus*) that they are also entitled to choose the law applicable to the merits of their disputes (Boggiano, Antonio, *ob. cit.*, Vol. II, pp. 172-175).

188 See Grigera Naón, Horacio A., *Choice-of-law problems in international commercial arbitration*, Mohr, Tübingen, 1992, p. 207 and ss., stating that party autonomy is only recognised to a limited extent in Argentina, subject to the law chosen by the parties being reasonably connected with the case and further limitations, like the prohibition of *fraude à la loi*, etc.

189 Article 2651 of the Draft, with the only exception of consumer contracts.

190 Article 2651 (e) of the Draft. The original text provides as follows: "(e) los principios de orden público y las normas internacionalmente imperativas del derecho argentino se aplican a la relación jurídica, cualquiera sea la ley que rija el contrato; también se imponen al contrato, en principio, las normas..."
As for the procedural aspect of party autonomy, leading principle in international and patrimonial matters is that parties are free to agree on the jurisdiction of foreign courts or arbitration, unless Argentine courts have exclusive jurisdiction on the matter or prorogation is prohibited by law.\(^{191}\) The jurisdiction conferred by the parties shall be deemed exclusive, unless the contrary is expressly agreed by them.\(^{192}\) In this regard, the Draft would also confirm the current view on the matter under Argentine Law.\(^{193}\)

Arbitration is regulated in the Draft as a type of contract, even though—as have been noted— it should have been regulated in a federal procedural law.\(^{194}\) The only matters excluded from arbitrability are those related to the civil status, capacity and extra patrimonial issues arising out of family law.\(^{195}\) Arbitrability has been traditionally construed in a very broad way in Argentina: issues that can be subject matter of settlement are arbitrable as well,\(^{196}\) but some courts have departed from this understanding and adopted a restrictive view that will be considered infra.

In addition, the Draft contains a specific section\(^{197}\) with provisions of international private law, which are currently dispersed throughout the Civil Code. Relevant for our topic are the provisions contained therein concerning international mandatory provisions and public policy. As for international mandatory provisions, the Draft sets forth that they shall prevail over party autonomy and that they exclude the application of the foreign law chosen by the parties or otherwise applicable by virtue of international private law rules.\(^{198}\)

\(^{191}\) Article 2605 of the Draft.

\(^{192}\) Article 2606 of the Draft.

\(^{193}\) Deduced from Article 1 of the National Civil and Commercial Code of Procedure and similar provisions included in the Code of Procedures enacted by the different provinces.

\(^{194}\) Currently, the few provisions related to arbitration can be found in the National and State Codes of Civil and Commercial Procedures.

\(^{195}\) Article 1651 of the Draft. Also labour and consumer relationships are excluded from the provision and subject to special rules.


\(^{197}\) Sixth Book, Title IV.

\(^{198}\) Article 2599 of the Draft. The original text is the following: “Normas internacionalmente imperativas. Las normas internacionalmente imperativas o de aplicación inmediata del derecho argentino se imponen por sobre el ejercicio de la autonomía de la voluntad y excluyen la aplicación del derecho extranjero elegido por las normas de conflicto o por las partes. Cuando resulta aplicable un derecho extranjero también son aplicables sus disposiciones internacionalmente imperativas, y cuando intereses legítimos lo exigen pueden reconocerse los efectos de disposiciones internacionalmente imperativas de terceros Estados que presentan vínculos estrechos y manifiestamente preponderantes con el caso”. These provisions have been referred by
Interestingly, it further states that whenever foreign law is applicable to a case, international mandatory provisions of said law are to be applied and that also those of a third country may be applicable if closely and manifestly connected to the case. 199 Public policy is defined in its traditional negative fashion, as an element excluding the application of the foreign law provisions called by the international private law rules, provided that they lead to results that are incompatible with the fundamental principles underlying the Argentine legal system. 200 In a whole, the provisions contained in the Draft reflect the international understanding of both notions as explained in the first part of this study.

As far as agency agreements are concerned and even though is does not concern the Draft but the current law, it is relevant to mention in this section that Argentina is a party to the Hague Convention on the law applicable to agency (1978), 201 which reinforces some of the conclusions that will be drawn infra. Party autonomy is the main rule for determining the law governing the agency contract. 202 A very interesting provision is

Goldschmidt as “explicit rigid provisions” or “explicit provisions of international public policy” which cause the active extraterritorial application of national law (Goldschmidt, ob. cit., pp. 245-246). He warned about the danger of confusing internal public policy with international public policy and thus of granting active extraterritoriality to provisions of private law which cannot be derogated by the parties (Article 21 Argentine Civil Code) but can be excluded by the application of foreign law. In his view, such provisions shall never be construed as tacit “rigid” provisions of private law (loc. cit., p. 246-7). The problem is that, as we have seen, it is almost never the case that a provision will expressly declare its “rigid” or “international mandatory nature”. Goldschmidt has expressed his position against the proliferation of this type of norms, in view of the uncertainty that they introduce into party autonomy that could be affected any moment by the enactment of provisions to be interpreted as having the referred extraterritorial effect. He recommends rather to exclude party autonomy in particular situations, for example by providing that the legality of the performance of a contract shall be governed by the law of the place of performance, in particular taking into account the application of international mandatory provisions is not “mandatory” but discretionary according to Article 7 of the Rom I Convention and Article 16 of the Hague Convention applicable to agency, two international instruments that expressly refer to these rules (Goldschmidt, ob. cit, p. 244).

199 Argentinean scholars have recognized that international mandatory rules (“normas de policia”) may protect not only public economic interests, but also familiar, care or social public interests (Boggiano, Antonio, ob. cit, Vol. I, p. 221).

200 Article 2600 of the Draft. The original text in Spanish reads as follows: “Orden público. Las disposiciones de derecho extranjero aplicables deben ser excluidas cuando conducen a soluciones incompatibles con los principios fundamentales de orden público que inspiran el ordenamiento jurídico argentino”. Absent a legal definition, public policy has traditionally been understood by Argentine scholars and case law as a group of principles underlying certain provisions (“los principios inalienables del derecho propio”), which have a negative consequence in the field of international private law, namely that of excluding the application of the foreign law called by the international private law rules. Because of its negative function, it has been referred to as “reservation clause”. Public policy always functions a posteriori, once foreign law has been applied to the case or a foreign judgment or arbitral award has been rendered. See Goldschmidt, ob. cit., pp. 234-239.

201 Ratified by Law N° 23.964. The Convention has in addition been ratified by France, Portugal and Netherlands, only (see http://www.hcch.net/index_en.php?act=conventions.status&cid=89 ). It has a very broad scope of application not restricted to agency agreements executed between parties established in Contracting States and the law specified therein applies irrespective of the fact of whether it is the law of a Contracting State or not (Articles 1 and 4).

202 Absent an agreement by the parties, the basic rule is that the law of the State where the agent is established (or where he has his habitual residence) by the time the contract shall apply. The law designated
enshrined in Article 16 regarding the application of international mandatory rules of third states: “In the application of this Convention, effect may be given to the mandatory rules of any State with which the situation has a significant connection, if and in so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules”. It has been pointed out that application of mandatory rules is not mandatory, as stems from the wording “effect may be given”, and that it should be interpreted strictly because “capricious choices [of law] are rarely –if ever- made” and “there is usually a good reason for the parties to choose a particular law”.

As for the recognition and enforcement of arbitral awards, Argentina is party to the New York Convention and other multilateral treaties.

C. Substantive issues. Are some provisions of the Draft to be construed as international mandatory rules?

The question now is whether the provisions of the Draft listed in section B (i) hereto are to be considered as international mandatory provisions. In my view and taking into account the discussion presented in the first part of this study, with the only exception of the provisions related to the validity of non-competition clauses (to be analyzed separately) the question should be answered in the negative: the rules should be interpreted as applicable to domestic contexts only and mandatory only internally. Local distributors may enter into agreements with principals located abroad and have their contract governed by foreign law, even if that would imply for them to waive some of the rights listed supra (it should be noted that the waiver would be effected by the choice of law clause and not by the Convention applies also to the obligations of the parties, the consequence of non-performance and, specifically, to non-competition clauses and clientele allowances (Article 8).


204 Verhagen, ob. cit., p. 243. Public policy should be considered as sufficient remedy to impede application of foreign law, in particular with regard to non-competition clauses to “moderate or nullify the[i]r effects” (idem, p. 248).

205 Ratified by Law 23.619.

206 Such as the Inter-American Convention on the extraterritorial efficacy of foreign judgments and arbitral awards of Montevideo, the Inter-American Convention on International Commercial Arbitration and the MERCOSUR Arbitration Agreement (ratified by Law 23.619, 22.921, 24.322 and 25.223, respectively). There is also an Arbitration Agreement in force between the MERCOSUR and the Republics of Bolivia and Chile, also ratified by Argentina, with essentially the same content. The MERCOSUR Protocol of Buenos Aires is also worth mentioning inasmuch it acknowledges party autonomy in selecting the applicable jurisdiction (judicial or arbitral). See also Goldschmidt, ob. cit., pp. 897-898.
by the arbitration agreement, which *per se* does not constitute a waiver of substantial rights). Reasons supporting my conclusion will be provided below.

Distribution agreements are bilateral contracts, in the sense that they constitute the legal source of rights and obligations that are imposed not on one, but both parties. A right held by one party normally correlates with a duty or obligation imposed on the counterparty and it is to be assumed that has been granted in consideration or in view of other obligations or terms included in the agreement, usually as a result of negotiations or a regime designed by a particular law. International mandatory rules destroy the mechanism of weights and counterweights created (or, at least, wanted) by the parties in a field were inequality of bargaining power cannot be assumed *a priori* and in general, as it may be the case in the fields of consumer or employment contracts. It has been highlighted in this regard, that the indemnity or compensation granted to agents in terms of Article 17 of the Commercial Agents Directive is justified by the non-competition clauses that normally bound the agents after termination of the agreement and put them in a position in which they need to be protected. A more liberal approach, to the contrary, is followed normally in the USA leaving the referred right without proper justification. This is why one should be extremely carefully in transposing a statutory right into a legal situation governed by another law or the rules that parties gave to themselves: exactly the effect that international mandatory rules have by nature. In my opinion, the same holds true for the provisions of the Draft referred to above and the pretension of actively expanding its territorial scope of application. Argentinean distributors should be aware of the “foreign” risk they are undergoing when entering into an agreement with a foreign party with a choice of law clause.

In addition, the provisions of the Draft referred to above differ from those that have been held in the past as international mandatory rules by the doctrine in Argentina in that the latter regulate international matters (such as foreign patents and trademarks or companies incorporated in foreign countries) expressly establishing that some particular aspects will be governed by Argentine law. The regulation of distribution agreements in

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207 See the comment on the Mitsubishi case, *supra*, III. B. (d).
209 Boggiano, *ob. cit.*, Vol. I, p. 126, giving as example, among other provisions, Articles 120, 121 and 124 of Companies Law 19.550 and Law 111 and 22.362 inasmuch they subject the protection of foreign patents and trademarks to Argentine law. Another example traditionally given of an Argentine international mandatory
the Draft, on the contrary, is primarily deemed to apply to domestic transactions. At least, the provisions on their face do not relate to an international context. This finding confirms that the Draft provisions should not considered as international mandatory rules.

There is no provision in the Draft (such as Article 19 of the Commercial Agents Directive) expressly providing that the parties may no derogate from the regulation, even if the wording of the provisions listed in section IV.B (i) above is clear about their mandatory nature. Nonetheless, such wording would confirm their internal non-dispositive character, but would not say anything about its international mandatory character.210

Another aspect to bear in mind is that the effect of international mandatory rules is so strong considering that, unlike the public policy defense, they operate a priori, that it has been pointed out that there must be no room for doubt as to the nature of these rules: “the outcome of the loi de police reasoning as it has been advanced by Argentine doctrine is that from the outset only a reduced range of rules from national for a will apply to international cases: those which clearly embody such fundamental public policy that there is a priori practically no doubt that they will apply irrespective of any foreign law (for instance, foreign exchange or foreign banking and investment regulations)”.211 Quite to the contrary, it would be far from settled that the rules protecting distributors in the Draft are to be considered as applying to international contracts and, even more, as constituting international mandatory provisions. Another confirmation of the simple mandatory nature of the rules, only applicable in a domestic context.

Finally, the reasons provided by the doctrine before the Ingmar judgment about why the Commercial Agents Directive and its implementation should not be regarded as international mandatory rules are, in my view, very good arguments why the same conclusion should apply to the regulation of distribution agreements in the Draft: on the one hand, “something more is necessary than that a rule aims to protect the agent as the economically weaker party”, “socio-economic relations” of the country (in our case, Argentina) should be “seriously involved as well” to justify that they application displace the otherwise applicable law; and, on the other, “the agent is by no means necessarily the

210 As has been noted in connection with Article 19 of the Commercial Agents Directive. See above, section III.A (iii) b.
211 Grigera Naón, ob. cit. pp. 188-189; emphasis added.
economically weaker party”. Of course, the serious objections that were risen in connection with the ECJ judgments in Ingmar and Unamar, to which I refer for brevity purposes, also support the conclusion that the Draft should not be interpreted as encompassing international mandatory rules (at least, as far as distribution agreements are concerned).

A different conclusion is to be drawn regarding the provisions of the Draft that subject the validity of non-competition clauses to a maximum period of one-year and a limited territorial and/or objective scope of application. Behind them is indeed “something more” than the simple protection of the distributor: the elimination of restrictions to competition in the Argentine market is at stake and there is a sufficiently strong connection between a contract to be performed in the country by local distributors and the local market to justify the consideration of these rules as international mandatory. However, the public policy defense at the enforcement stage would suffice to preserve the referred interest in cases where arbitration is agreed in tandem with choice of law clauses, as will be explained infra.

D. Procedural issues

Even that, in my view it is to be concluded that -with the only exception of those related to non-competition clauses- none of the provisions included in the Draft should be considered as international mandatory, it cannot be excluded that a state court reaches the opposite conclusion and is faced with the problem of the impact that such a provision should have on arbitration. The relevant questions are the ones posed in the first part of this study, namely: (i) would the dispute still be arbitrable?; (ii) should Argentinean courts assume jurisdiction on the basis of the arbitration agreement being void or unenforceable?; and (iii) should recognition and enforcement of arbitral awards be denied in Argentina if the arbitral tribunal failed to apply the international mandatory provisions?

Just to illustrate with some examples, the local agent may disregard the arbitration clause and claim before Argentinean courts the compensation arising out of termination (especially if the law chosen by the parties does not contemplate such a right). As for the minimum contractual terms foreseen for concession and franchise agreements, since

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212 Verhagen, ob. cit., pp. 244-245.
213 See supra, sections III, A (iii), b and c.
214 See supra, sections IV.B (i).
parties may not be compelled to comply with obligations that involve conducts rather than the payment of a monetary sum, the Argentine party may claim damages (also before Argentinean courts) derived from the failure by the principal to comply with its obligations during the minimum period foreseen by law. A different situation may arise if a non-competition clause has been agreed in the contract to be effective for a longer period than one year (thus, void under the Draft) and the principal initiates arbitration proceedings claiming damages arising out of the breach of said obligation.\textsuperscript{215} Supposing that an award is rendered in favor of the claimant, would it be enforceable in Argentina? The same discussion could arise in respect of other clauses deemed void in the field of franchise agreements.

That disputes arising out of distribution agreements are arbitrable should be beyond any doubt. As previously described, issues that can be subject matter of settlement are considered arbitrable \textit{de lege lata} in Argentina and the Draft follows this broad approach as well. Nonetheless, there some judgments rendered by the National Court of Appeals in commercial matters that following a different understanding on the issue that should be mentioned, even though they do not specifically relate to the still unregulated field of distribution agreements. In these cases the Court ruled that matters of “public and general interest” or pertaining to the “public order” such as mining activities\textsuperscript{216} or environmental issues\textsuperscript{217} should be regarded as excluded from arbitrability. Even though these judgments

\textsuperscript{215} The same situation would arise if the non-competition clause included in the contract has a too wide scope of application that would also turn the contractual provision void according to the Draft.

\textsuperscript{216} National Court of Appeals in Commercial Matters, Room C, 5.10.2010, “CRI Holding Inc. Sucursal Argentina v. Compañía Argentina de Comodoro Rivadavia Explotación de Petróleo S.A.”, commented by Rivera, Julio César in “Arbitrabilidad: cuestiones regidas por leyes de orden público”, Diario La Ley 2011-A, p. 555. The Court ruled that a public and general interest is involved in mining activities and that their specific legal regime cannot be contracted out by the parties. As a consequence, disputes affecting the public order were to be considered inarbitrable. The Court added that its conclusion was supposedly based on well-established case law of the Supreme Court (section IV, (iv) of the judgment). Rivera points out that there is no prohibition to submit patrimonial issues to arbitration, even those arising from matters governed by public policy. No legal provision or case law of the Supreme Court of Justice supports the contrary conclusion. In addition, Rivera has highlighted that from the mere fact that an activity is of general interest it does not follow the conclusion that the whole regulation of the subject-matter should be deemed as pertaining to the public policy and non-disposable by the parties (\textit{idem}, footnote 7).

\textsuperscript{217} National Court of Appeals in Commercial Matters, Room C, 4.7.2013, “Algabi S.A. v. Esso S.R.L.”, available in Spanish under KluwerArbitration.com (KLI-KA-143004). The Court annulled a domestic arbitral award and ruled that the General Law on Environmental issues 25.675 (“Ley General de Ambiente”) pertains to the public policy and that, as a consequence, parties may not dispose of the rights and obligations arising therefrom. From the public policy supposedly involved, the Court deduced the inarbitrability of disputes concerning environmental matters. This conclusion was, in the Court’s view, confirmed by Article 32 of the Law by establishing the exclusive jurisdiction of Argentine courts, which –also according to Article 32– could not be restricted in any way. The arbitral award was annulled on the grounds that failure to apply public policy provisions would amount to an “essential violation of the procedure” (one of the grounds for
were far from welcomed by the specialized doctrine, some state courts might follow this approach in the potential scenarios described above. Some scholars have even favored the interpretation that arbitrability should be excluded whenever the public order is involved.218

From another perspective, there is consensus in Argentina on the conclusion that arbitral tribunals are empowered, just like state courts, to decide on the unconstitutionality of legal provisions.219 This constitutes a strong argument confirming the arbitrability of the disputes affected by international mandatory rules, as well as the validity of arbitration agreements connected to them: how could one argue that arbitrators may rule on the alleged unconstitutionality of a provision, but not on a matter affected by an international mandatory provision?

As for the impact of international mandatory rules on the validity of arbitration agreements, Argentinean courts should assume jurisdiction based on a similar reasoning than the one followed by the German case law referred to in the first part of this study, where it has been demonstrated to be inconsistent and unconvincing.

The test developed by Sanrock referred to in section III.B (e) above is, in my opinion, a very useful instrument that will normally end up demonstrating that awards render in the context of disputes arising out of distribution agreements do not infringe Argentinean public policy, even if the arbitrators would have failed to apply Argentinean provisions (and again, assuming for purposes of the analysis that they are of international mandatory nature). As we have seen, this is the approach that a Portuguese court took recently.220 Perhaps the only exception that one could imagine are arbitral awards

setting aside an award according to Article 760 of the National Code of Civil and Commercial Procedure). See section III. 1 of the judgment.

218 Caivano, Roque J., “La cláusula arbitral en contratos por adhesión”, Diario La Ley 1996-E, p. 1103. Caivano bases his conclusion on Article 21 of the Argentine Civil Code that provides that "private covenants may not derogate the laws in whose compliance the public order and the good morals are interested" (free translation of mine) and a judgment of the Supreme Court of Justice of the Province of Buenos Aires of 1965. The original text of cited Article 21 of the Civil Code is the following: "Las convenciones particulares no pueden dejar sin efecto las leyes en cuya observancia estén interesados el orden público y las buenas costumbres". In my view, nothing in Article 21 allows to conclude the exclusion of arbitrability. It is remarkable that according to this view not only international mandatory rules, but simply internal mandatory ones would turn a dispute inarbitrable. This approach should be rejected.

219 The constitutionality control in Argentina is judicial and diffuse, as in the USA. For a detailed analysis of the issue see Rivera, Julio César, “El principio de autonomía del arbitraje. Claroscuros del derecho argentina”, Academia Nacional de Derecho 2005 (noviembre), p. 1 (section III, b), also in La Ley Online, AR/DOC/3773/2005.

220 See supra, section III. B, (ii) d.2.
condemning local distributors to the payment of damages on the basis of infringement of non-competition exceeding the one-year term or the limited scope of application required by the Draft as validity requirements, since such an award could be deemed incompatible with the principles of free competition in Argentinean markets. But, again, the last resort of public policy would suffice: in principle state courts should trust that arbitrators will take the international mandatory rules into account and not interfere with the arbitrability of the dispute as such or the validity of the arbitration agreements.
V. FINAL REMARKS

There is an idea going through this study and it is that every single aspect thereof is closely interconnected to the other. The more arbitrators take relevant international mandatory rules into account, for instance, the more state courts will trust and refer parties to arbitration. The contrary also holds true. In the end, it is mistrust on arbitration what underlies approaches like the one taken by German courts.

In the same line of thoughts, if we focus the attention on the practical consequences that follow from the second look doctrine, which –for the reasons above described- seems to be the most appropriate, it is to be concluded that non-application of international mandatory rules by arbitrators will not necessarily constitute an infringement of the public policy of the state where enforcement or recognition of the award is sought. As we already questioned in the introduction to this study, are we not admitting that, in the end, international mandatory rules do not always apply irrespective of the law governing the contract? Does this practical effect not contradict the nature of these rules? Or is it, perhaps, that in reaching this practical solution we are influenced by the fact that we are not convinced that distributors deserve the protection of the international mandatory rules a priori and as a general rule irrespective of the circumstances of the case? It is not my pretension to find clear cut answers to these queries, but to promote the rethinking of the problem with particular emphasis on the mutual relationships of its different aspects.

The ultimate decision is of political nature: the decision of which interests should be protected by the state (and whether group interests are to be included among these interests) and which principles are more essential to a particular political community: whether a state should foster party autonomy and arbitration -as one of its multiple expressions- or whether it should adopt a more active role that would end up in a stronger interference with contractual relationships.

Finally, it is to be noted that, even if the topic herein discussed only concerns international mandatory provisions in distribution agreements, the conclusions could affect the impact of such rules on arbitration in general, also concerning different subject matters.221 This constitutes one of the reasons why the ECJ judgments in Ingmar and Unamar have drawn so much attention in the legal community. Precisely because of that

221 Rühl, ob. cit., p. 302.
and provided that the problem arrives to Argentina, the doctrine arising from the ECJ judgments and further case law mentioned above should not be followed blindly without a profound assessment of all their implications. We should learn from the European experience, but always with a critical view and taking the lessons that better suit our own culture and particularities.
VI. BIBLIOGRAPHY

(i) Literature


Schiffer, Karl Jan, Normen ausländischen „öffentlichen“ Rechts in internationales Handelsschiedsverfahren, Heymann, Köln (i.a.), 1990.


(ii) Cases

a. *European Court of Justice*

European Court of Justice, 28.03.2000, Dieter Krombach v André Bamberski, Case C-7/98.


**b. ICC arbitral awards**


c. National cases

**Argentina**


**Belgium**


England

English Court of Justice, Queen´s Bench Division, 30.10.2009, Accentuate Ltd. v. Asigra Inc. ([2009] EWHC 2655 QB), judgment of Sir Michael Tugendhat.

Germany

BGH, 30.05.1983, NJW 1983, 2772.

OLG München, Urteil vom 17.05.2006 – 7 U 1781/06, BeckRS 2006, 07559.


Portugal

Court of Appeals of Lisbon, Portugal, judgment of 16.01.2014 (unpublished, available only in Portuguese under the following link: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/c2769dfe89cf5e8a80257c82003b78cb?OpenDocument&ExpandSection=1,2,3,4,5,6,7http://

United States


(iii) Electronic sources related to the Draft

http://www.nuevocodigocivil.com/pdf/Texto-del-Proyecto-de-Codigo-Civil-y-
Comercial-de-la-Nacion.pdf


http://www.senado.gov.ar/prensa/11870/noticias