THE CONSIDERATION OF MANDATORY STANDARDS BY AN INTERNATIONAL BODY ARBITRARY TRIBUNAL ACCORDING TO THE CODE ON INTERNATIONAL PRIVATE LAW OF SWITZERLAND

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Summary: *An international arbitral tribunal based in Switzerland has not only the competence but also the duty to take into account mandatory rules in connection with the dispute to be arbitrated. Because even an arbitral tribunal cannot, in its function as a substitute for the state judge, escape the influence of the legal systems affected. It is true that the principle of party autonomy applies in international arbitration. Nevertheless, arbitration is only possible due to the acceptance of the national legal systems. Since an interfering norm wants to be applied compulsorily, independent of possible conflicting private interests, it is not possible to make a decision on the application of the norm. such application is not precluded by any choice of law made by the parties. On the contrary, the mandatory rules represent a barrier to party autonomy. For this reason, the arbitral tribunal is also free to take into account mandatory rules ex officio. In determining which mandatory rules an arbitral tribunal must apply in the event of a dispute over the arbitral award, no legal system should be given preferential treatment will be. Neither the mandatory rules of the lex fori of the host state nor these of the lex causae chosen by the parties. A arbitral tribunal should rather focus on this question in relation to all the issues at stake The following criteria should be taken as a guide for the mandatory standards: Willingness to apply the mandatory rule, close connection with the dispute, Eligibility for application of the mandatory provision and the consequences of such application.*

Keyword: *International Arbitration, Arbitration Court, International Private Law, Intervention Standard, Mandatory standards.*

Introduction

A state judge has the possibility or even the obligation, in certain cases, to take into account and apply Mandatory rules. It is therefore possible that such an overriding rule may break through a choice of law made by the parties for a particular point of law. Now the question also arises for an international arbitrary tribunal under Art. 187 (1) CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND as to whether it may even have to take into account such overriding rules which affect the dispute. Despite the fact that this question arises for the arbitrary tribunal in a large number of cases and has also been the subject of a large number of essays and decisions by state courts and arbitrary tribunals, there is still uncertainty about the treatment of the Mandatory rules in the world of international arbitration. Even from the various arbitrary decisions issued on this issue, no uniform practice of the arbitrary tribunals can be discerned. Mandatory standard·Rather, different arbitrary tribunals have held different views on this issue and have used different methods to solve the problems that have arisen. In the following, therefore, this problem of Mandatory rules in connection with international arbitration proceedings will be examined in more detail. Three main areas of question emerge: Does an international arbitrary tribunal have the competence, contrary to the parties' choice of law, to take such Mandatory rules into account? Does an arbitrary tribunal, like a state court, possibly even have the obligation to take such Mandatory rules into account? And if so, according to which criteria does an arbitrary tribunal have to decide which Interventional standards it finally applies?

Relationship between CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND-General part and Chapter 12 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND

Art. 18 and Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND regulate the state judge's observance of the Mandatory rules of the lex fori (the law of the host state) as well as of third countries. It has been established that such observance of Mandatory rules can lead to a breach of the choice of law agreed by the parties. Since the lex arbitri (Arbitratio law) of Switzerland in the legal regulations of the 12th chapter of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, it is first necessary to ask in

which Relationship of this Chapter 12 to the other provisions of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND is standing. Extend the provisions of, in particular, the General Section of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, i.e. also Art. 18 and Art. 19, their effect on Chapter 12 of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, would provide for arbitrary tribunals to take the necessary steps to the same rules that apply to state courts[1].

It is generally assumed, however, that the provisions concerning international arbitration in Switzerland, although considered the 12th chapter in which are embedded in CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, but nevertheless represent an independent order. This also corresponds to the international requirement and the expectation of a modern lex arbitri (Arbitration law), which should have a certain independence. For this reason, an arbitrary tribunal is not bound by the provisions of the General Section of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, just as the corresponding provisions on contract law in Chapter 9 of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND have no binding effect on an international arbitrary tribunal domiciled in Switzerland.

With regard to the treatment of Mandatory rules, it can thus be stated that Art. 18 and Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND are not directly applicable in international arbitration proceedings, which is why the admissibility of the observance of such Mandatory rules by an arbitrary tribunal has to be examined separately, and sometimes it is not possible to fall back indiscriminately on the findings concerning the handling of Mandatory rules in front of state courts[2].

The relationship between state courts and arbitrary tribunals

As stated above, the remaining provisions outside Chapter 12 of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND do not apply directly to an international arbitration proceeding domiciled in Switzerland. Nevertheless, one may ask oneself whether the rules applicable to the national judge should not be adopted by an arbitrary tribunal even if the individual legal norms are

[1] Berger/Kellerhals 2010: 57
[2] Blessing 1989: 13

not directly applicable. This would then make sense if the starting position for a state court and an arbitrary tribunal were identical. Because in such a situation there would be no reason to handle the treatment of Mandatory rules differently before an arbitrary tribunal than before a state court. Consequently, in order for an international arbitrary tribunal to be able to make an assessment of the consideration of Mandatory rules, the relationship between the state courts and the arbitrary tribunals must first be clarified.

Arbitrary tribunals have the sovereignty to decide on certain disputes in a binding manner instead of using state courts. In contrast to state jurisdiction, however, arbitration is based on private agreements, which usually take the form of a contract. In contrast to state courts, an arbitrary tribunal receives its Jurisdiction thus not directly from the state, but it always requires legitimacy by the parties involved consequently, an arbitrary tribunal is never an organ of a particular state, even if each state has the possibility to regulate arbitration within its territory. An important consequence of this is that an arbitrary tribunal has no forum and therefore no lex fori in the sense of private international law. As described above, Art. 18 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND obliges the state courts always to apply the internationally binding norms of the lex fori (the law of the host state). For the arbitrator, on the other hand, there is no such privileged right; for him, all national legal systems have the same value. He acts as a private person and is therefore not particularly bound to any state, as is the case in the case of a state judge, who first of all represents the interests of his forum must take into account.

Due to these fundamentally different points of departure of a state judge and an arbitrator, the envisaged barrier concept is not easily transferred to an international arbitrary tribunal.

Competence of an international arbitrary tribunal in consideration of Mandatory rules

As already seen, the applicable law in international arbitration is in principle determined by the principle of party autonomy. That is why the question must first of all be clarified, whether an international arbitrary tribunal has the competence to consider Mandatory rules in its decision making, and to thereby limit party autonomy. Since an arbitrary tribunal is not bound to a state, but only to the interests of the parties, it must therefore follow their choice of law and is in principle bound

by it. For this reason, in the earlier doctrine and practice of arbitration, the application of Mandatory rules of a third state was rejected, with the result that Argument that the arbitrators are instructed by the parties to decide the dispute and are therefore bound by their choice of law. In the modern doctrine of arbitration, however, it is undisputed that an arbitrary tribunal also has the competence to consider and, if necessary, apply Mandatory rules. Of course, even today the parties' choice of law is still the first principle for the determination of the applicable law to decide the dispute. However, as with the freedom of contract provided for in most national legal systems, there are also certain the autonomy of the parties can also find their limits in legal norms, which want to be applied obligatorily to a fact. This is not affected by the fact that the arbitrators have been instructed by the parties themselves to settle the dispute. This is because they are not instructed to make a particular decision, but precisely to judge the dispute from their point of view and thus to establish justice in the individual case[3]. This makes the arbitrator a substitute for the state judge. Although the parties may choose which If the arbitrator's legal system is to be used as the basis for this assessment, this authorisation to settle disputes also includes, in my opinion, the fact that an arbitrator finds such intervention rules which wish to apply to a situation irrespective of the otherwise applicable law, i.e. also irrespective of the parties' choice of law. It is precisely the fact that an arbitrator, unlike a state judge, does not owe special loyalty to any legal system that enables him to identify all the legal rules that require application to the dispute and thus to take into account regulations worthy of protection. An arbitrator who takes into account the consequences of such an intervention rule shall not do so on the basis of a protective function vis-à-vis a particular national legal order, but because he locates the law applicable to the case in question, and that is precisely his task when he has been instructed by the parties to assess the dispute. Therefore, it can be doubted whether the parties can expect an arbitrary tribunal to ignore this mandatory rule, which in its opinion must be applied, only because of a different choice of law by the parties. Ultimately, arbitration is not a legal vacuum, but only possible within existing legal systems. the role of the state courts is limited by the decision to arbitrate, but the parties do not escape the scope of the legislative power of the states concerned. if, therefore, legal rules exist in these states which

[3] Gaillard/Fouchard/Goldman 1999: 75

are applied by a state court under conflict of laws rules, the same shall apply to arbitration proceedings in which the parties have chosen a different law as the applicable law. The choice of a neutral third-party right by the parties does not alter the fact that different legal systems are affected by the dispute. This becomes particularly clear when the parties have chosen a particular right for the sole reason of circumventing certain Mandatory rules which they would otherwise have been subject to. Such an obvious abuse of rights always represents a limit to party autonomy. An arbitrator is therefore not obliged to respect a choice of law that deliberately seeks to circumvent an encroachment provision. An arbitrator is therefore not obliged to respect a choice of law which deliberately seeks to circumvent an overriding rule of law which is applicable in the opinion of the arbitrator. A competence of the arbitrary tribunal for Consideration of Mandatory rules must therefore be affirmed[4]. This view has meanwhile been confirmed by various decisions of state courts, including the Federal Supreme Court in Switzerland.

Does an arbitrary tribunal have a duty to take account of Mandatory rules?

Based on the above statement that an arbitrator in international arbitration proceedings also has the competence to apply mandatory rules of third state law, the next step is to examine whether the arbitrator is further obliged to take into account the scope of such Mandatory rules when making his decision.Mandatory rules represent a possible barrier to party autonomy in proceedings in front of state courts. A state court is therefore obliged vis-à-vis the state in its decision-making process to take into account the possible application of mandatory rules. It is now questionable whether such an obligation also applies to an arbitrary tribunal. Arguments have been made in favour of such a duty, that the parties cannot confer on an arbitrary tribunal more freedom than they are entitled to under the legal systems involved. This is true to the extent that it leads to a restriction of party autonomy. However, it cannot be concluded from this that, an arbitrary tribunal is like a governmental Court which, directly obligated by the issuing State, to comply with the mandatory rules involved. As already stated above, an arbitrary tribunal is not an organ of a state. It can therefore not equal a state Judges who must comply with the mandatory rules of their forum and must be obliged to comply with certain

[4] Grigera 1992: 84

mandatory rules. On the contrary, an arbitrator has no relationship with the State but is in an agency relationship with the parties and is therefore obliged only to them. The primary duty of an arbitrator shall be to obtain a valid and enforceable decision. But if a decision violates the order public, it may be arraigned the seat of the arbitrary tribunal. Even if this compromised from Art. V (1) (e) of the New York Convention, which regularizes the international recognition of arbitrary verdicts. A decision which has been successfully arraigned in the State in which the seat is situated, is normally not enforceable in other states. In Switzerland an arbitrary verdict may, however, only be appealed if it has been made against the international public policy, a violation of the purely Swiss law, or a violation of the Ordre public is not enough. But there are also states that have a dispute in the event of a violation of one's own public policy. But even if an arbitrary verdict is not contested in the State in which the seat is situated, an infringement of the international public policy lead to the recognition and enforcement of a decision in a particular state by nature. V par. 2 letter B NY Conv. is denied. The obligation of the arbitrary tribunal vis-à-vis the parties to a decision which is valid and enforceable at least in the State in which the party's registered office is situated, to the obligation of the arbitrary tribunal to take such measures is now partially derived to take into account the mandatory norms which, in the event of non-consideration of the could stand in the way of enforceability i.e. at least that of the State in which the person's registered office is situated and of the potential executing State as belonging to the public policy order of the people we looked at. However, this approach does not take into account the fact that the alleged Place of enforcement during the proceedings not necessarily for the parties themselves is fixed. Further, a defendant party may have assets in various states which may result in enforcement in several states with different, possibly even different, legal forms and mutually exclusive prerequisites. Even in such a case, it would not be foreseeable for an arbitrary tribunal which state it now has to take into account. Further it can be that the plaintiff from the outset not at all intended to challenge the arbitrary verdict against the other party, but possibly against a guarantor or a I want to go to the insurance company. There is also the possibility that the parties may be to follow the decision of the arbitrary tribunal. An arbitration verdict may therefore be of importance to the parties even if he does not enforce his rights, or can become. The enforceability of the arbitrary verdict can therefore be determined with regard to the consideration of an

intervention standard may be an incentive to introduce such standards. However, to consider an obligation of the arbitrary tribunal, it is not possible to take certain intervention norms into account from this. However, by striving to achieve a valid and enforceable decision is only an incentive to take into consideration the mandatory rules of the State in which the decision is taken and of the State in which the decision is taken is likely to be enforced. In addition, in many countries only a violation of the international order public a ground for rescission is. With regard to these states, the incentive would therefore still exist more limited only in connection with those intervention norms, which are international public policy can be counted. All in all, it can be done alone. on the basis of the arbitrator's duty to make a valid and enforceable decision no general obligation to take into account they can be derived from intervention norms. In addition, the opinion is expressed that an arbitrary tribunal is only competent to of such overriding norms, which are necessary for the international Ordre public, because this is not an organ of the state, and therefore the preservation of public interests cannot be part of his duties. What should not be forgotten, however, is the fact that a arbitrator is basically a substitute for the state judge. Because the aim of arbitration proceedings is the same as in proceedings before the resolution of a conflict. Even though the parties voluntarily subject them to an arbitration agreement and the arbitrary tribunal shall legitimation is primarily obtained from the parties, so one also has to be that the new situation will once again remind us that the Arbitration does not move in a lawless area. Arbitration is only possible on the basis of the acceptance of the community of states. Consequently, within these legal systems as well as arbitration. Can arbitrary jurisdiction only be based on of a state legitimation exist, it must accept that this state can issue standards, which in any case must be based on the facts of the case. Arbitration may also be a matter of not simply withdraw this influence with reference to party autonomy.

This link between international arbitration and various national legal systems means that the international legal system is also the international mandatory norms, the arbitrary tribunal has not yet legal policy of the countries concerned. That's why the effects of a state norm of intervention on the rights and obligations of the dispute that has been adjudicated. Because Mandatory rules are like this that, where there is a link with the facts of the case, they are not apply independently of any other applicable law want. If, therefore, such an encroachment

provision is to be applied before state courts in its scope of application can displace the legal system which is actually applicable, then this must logically also apply to the parties' chosen law in arbitration proceedings. Because basically the purpose of such of the very rules of intervention which, on the basis of overriding interests, are to break through party autonomy in areas in which it would otherwise be valid. For this reason, arbitrary jurisdiction can influence the possibility of the autonomy granted to the parties by the state legal systems, which is, however, precisely the same as the autonomy granted to the parties by the state legal systems. Commercial relations are an arbitrary tribunal in the exercise of its activities not only to the parties involved as such, but also to the parties concerned to the international trading community as a whole. Because finally, international arbitration is based on the willingness of states to allow and accept them. Will the international arbitration thus retain the importance that they have in the last few decades, referees in certain jurisdictions must be situations similar to judges, because otherwise the community of states may no longer be prepared in certain areas to take advantage of this possibility to submit them to arbitration? For these reasons, an Arbitration court not only entitled, but also obliged, encroachment norms, which are related to the dispute, in which decision making. For Switzerland, this has also had the Federal Supreme Court at least for EC competition law. In a Decision of 28 April 1992, the Federal Supreme Court obliged the Arbitrary Tribunal, the contract concluded between the parties to the dispute on the basis of which the parties to verify compliance with EC competition law, even though the Commission considers that the Treaty Statute was governed by Belgian law. The federal court is holding, that an arbitrary tribunal must decide whether to apply mandatory rules, or if one of the parties refers to the fact that, on the other hand, there has been a violation of Art. 190 para. 2 letter b CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND. The Federal Supreme Court, however, on whether an arbitrary tribunal can also decide without reference to the parties must take an overriding norm into account. It is also unclear according to which guidelines an arbitrary tribunal with an encroachment norm and whether the Federal Supreme Court will have such a duty in a complaint procedure.

Method for determining the application of intervention standards by an international arbitrary tribunal

Now that it has been established that an arbitrary tribunal is competent and competent to even has the obligation to take into account the fact that the of the dispute, the next step is to deal with the intervention norms affected by the Question now, according to which criteria an arbitrary tribunal should determine which Mandatory rules ultimately applies it. This question is addressed in the literature is not a unanimous opinion, but rather a large number of possible procedures are discussed.For state courts, there are various criteria with regard to the Consideration of intervention norms, depending on the origin of these are. For this reason, it should be examined in advance whether the following factors are also taken into account by an international arbitrary tribunal is to establish various criteria depending on the origin of the intervention norms in question.

a) Interventional norms of the lex causae (The choosen law by the parties)

First, it must be clarified whether the intervention norms of the lex causae, i.e. of the parties, should be given preferential consideration. Various authors argue that an arbitrary tribunal has the power to the interventional norms of the lex causae must be observed in every case and with priority. This is justified by the fact that the applicable law contains all its norms, including its mandatory norms, belong, as does Art. 13 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, to the state in the jurisdiction of the courts[5]. In the opinion of these authors, the intervention norms of the lex causae are thus considered to have been co-opted by the parties. However, there are more and more voices to be read which question the self-evident application of the intervention norms of the lex causae. On the one hand, it is pointed that Art. 13 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND177 is not binding on arbitrary tribunals, since they are bound only by Chapter 12 of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND and not by the connecting rules of the other provisions of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND. On the other hand, it is also mentioned that Art. 187 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND does not contain an obligation on the arbitrary tribunal to take into account the the private interests

[5] Hochstrasser 1994: 57

involved, and hardly depend on the public interests affected by the dispute. But exactly this public interest serves intervention norms, and for this reason I believe that from a realistic point of view it is difficult to assume that the parties, when choosing the lex causae, will also take into consideration the to vote for the overriding norms. It will be different, though presumably in these overriding rules, which concern legal issues which are the subject of the specific legal relationship, for which the parties have chosen the law of the to meet. Here the parties will in all likelihood agree on the be aware of individual regulations and want to vote for them as well. However, find these intervention norms already with the rule linkage after art. 187 Para. 1 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND applies to the corresponding legal relationship, which is why from this point of view, too, no fundamental preference is given to the intervention norms that justifies lex causae. It is often precisely for this reason that the parties will choose a particular legal system because it is not related to the dispute has. In such a case, however, it is not convincing that the arbitrary tribunal for the application of the mandatory rules of this legal order to oblige them, if they have no connection to the dispute and for this reason may not even want to be applied. And even if the parties are aware of the overriding mandatory rules for a particular right, it cannot be justified to make it solely dependent on the parties' choice of law which state can assert its public interests. Just like that little can be justified, as a consequence of which all other states, which may be exactly the same in relation to the dispute. have interests in taking this possibility in advance. This would give the parties the possibility, by the choice of a tolerant right, which under certain circumstances has no connection whatsoever with the dispute, which would normally have been applicable mandatory rules, which have a close connection to the litigation and which to circumvent the rules. But it's just a characteristic of the that they restrict party autonomy, which is why it is opposed to the any logic would be to exclude the consideration of an overriding rule from the choice of law by the to make parties dependent. Preferential consideration would also be given to the impact of the lex causae, which also affects third countries. The parties may have to disregard the rules of intervention on the parties and the dispute. For these reasons, a preferential observance of the lex causae are not included in the intervention norms.

b) Mandatory standards of the host state

A state court distinguishes between mandatory rules of the lex fori (The law of the host State) and those of a third state legal system. The mandatory rules of the lex fori always take precedence because the court is an organ of the state in which its seat is located. They are therefore always applied by the court without differentiation of application or consideration of the lex causae. This different treatment of the mandatory rules of the lex fori and those of third state legal systems also results from the law, where Art. 18 and Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND contain two different regulations for the consideration of mandatory rules depending on whether the court belongs to the lex fori or another legal system. It is now questionable whether for a international arbitral tribunal, the mandatory rules of its State of domicile must also be taken into account as a matter of priority. Partly in the literature it is argued in the same way with regard to international arbitral tribunals that these would have to give priority to the mandatory rules of the domicile state, especially if these belong to the public order of the domicile state, due to the risk that the decision could otherwise be challenged[6]. However, on the basis of Art. 190 para. 2 letter e CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, an arbitral tribunal must comply with the international order public irrespective of any mandatory rules, and most domestic mandatory rules will not be included in the international public policy order within the meaning of Art. 190 para. 2 letter e CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND anyway. Often, the interest in the application of a mandatory rule will be lacking anyway, if the seat of the arbitral tribunal or, at most, the nationality of the arbitrator is the only relation to the state concerned. Therefore, such preferential treatment of the mandatory rules of the lex fori also rejected by the majority. This is also justified by the fact that an arbitral tribunal has no forum and thus no lex fori to which it could be bound before other legal systems. Admittedly, an arbitral tribunal is bound by the lex arbitri of the respective state in which it has its seat, which determines the procedural and connecting factors. However, this does not mean that an arbitral tribunal is bound by the domestic law of intervention of the state in which it is based. Rather, the decisive factor is that an arbitral tribunal is not an organ of a

[6] Lazareff 1994: 537

state, in particular not of the state of domicile, and therefore cannot be obliged to take into account the right of intervention of a specific state. Such preferential consideration of the right of intervention of the lex fori would therefore not be justified. The domiciliary state must also accept that only "foreign" legal systems exist for an international arbitral tribunal, and all of these have the same value from the point of view of the arbitral tribunal. Otherwise, the state in question would have to limit arbitration and reserve certain areas solely to the state jurisdiction[7].

c) Mandatory rules of the place of performance and the place of enforcement

In addition, there are other doctrinal voices in favour of giving preference to the mandatory rules of the place of performance or the (presumed) place of enforcement. The fact that an overriding mandatory rule belongs to the legal system of the place of performance or the place of enforcement may be an important criterion for establishing a close relationship between the mandatory rule and the dispute. However, it should be noted that the place of performance can no longer be the decisive factor where arbitration proceedings no longer concern the performance of the contract but only monetary claims, and that a judgment that may not be enforceable need not necessarily be of no use to one party, notwithstanding the fundamental difficulty that the future place of enforcement cannot always be determined during the arbitral proceedings. It is therefore also not possible to justify the priority in principle of the mandatory rules of the place of performance or enforcement.

d) Own special relationship rule

Since it is consequently not justifiable in the field of international arbitration to give preference to mandatory rules of certain jurisdictions, the same criteria must therefore apply to all mandatory rules that are potentially relevant to a dispute as far as their applicability is concerned. The question of the relevant criteria is not answered uniformly in the literature, which is why a wide variety of proposals can be found. It is therefore necessary to first present an overview of the various proposed solutions and then to work out a suitable solution for international arbitral tribunals based in Switzerland. Some argue that only such mandatory rules of intervention can constitute limits to party autonomy which are to be attributed to

[7] Mayer 1986: 274

the international public policy 205. It should be noted that the advocates of this view usually have a rather broad concept of the international public policy, which is why some of the same examples of the international public policy are given which others use as examples of mandatory rules. Therefore, the reference to the international public policy order does not help here, since this is already protected in another framework. This would not leave any separate scope for mandatory rules. However, it has already been stated above that an international arbitral tribunal generally has a competence to take account of mandatory rules. Another method followed the "debt statute theory", according to which mandatory rules are not to be applied directly at all, but may only be taken into account as facts under the applicable lex causae, e.g. in the context of impossibility or immorality. There are certainly cases

It is conceivable that a mandatory rule of a third state may be taken into account as a fact in the context of the lex causae. However, to allow mandatory rules to be taken into account only as facts would limit the scope of action of the arbitral tribunal from the outset to the possibilities provided for in the lex causae. However, as already discussed, it cannot be made dependent on the lex causae as to what extent a mandatory rule is taken into account. There is also the proposal that arbitral tribunals should apply mandatory rules if they belong to one of several groups of cases. For example, if the parties have chosen a particular law only in order to avoid a mandatory rule of the law applicable without choice of law; if the performance of the contract is affected by a mandatory rule which has a close connection with the dispute; or if the non-observance of an overriding mandatory rule would jeopardise the enforcement of the award. Such groups of cases can certainly constitute a useful guideline by showing situations in which the consideration of a mandatory rule often seems appropriate. However, it is not appropriate to require the arbitral tribunals to adhere strictly to such case groups. On the one hand, an intervention standard that does not fall into any of the case groups may also prove to be applicable. On the other hand, it is only because it belongs to one of the case groups that it is not possible to conclude that an interoperability standard is applicable. Thus, for example, a non-enforceable arbitral award may also prove useful to the parties. It is therefore postulated that an arbitral tribunal should "special relationship" to general criteria in order to determine whether a relevant mandatory provision should be applied. Some arbitral

tribunals have based their decisions on conflict-of-law rules of the lex causae. But here again the objection applies that an arbitral tribunal cannot be bound by the parties' choice of law when considering mandatory rules[8]. But this would be exactly the case with such a solution, since an arbitral tribunal could not consider mandatory rules at all if the lex causae did not contain a corresponding rule which provides for this. It is also being discussed whether an arbitral tribunal should adhere to the IPR conflict rule of the domiciliary state. Such a discussion exists in Switzerland with regard to Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, which regulates the consideration of third state mandatory rules by state courts, since for an arbitral tribunal all mandatory rules are in principle foreign and thus third state. This would provide the arbitrator with a fixed rule with corresponding literature and case law to which he could orient himself. That Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND but not one-to-one for international arbitration can be adopted, is already shown by the consideration of the "Swiss legal opinion", as provided in Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND. Such an interpretation is not relevant for an international arbitral tribunal, even with its seat in Switzerland, since, as already mentioned, an arbitral tribunal does not owe any forum special consideration. But apart from this requirement, some authors consider Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND to be analogously applicable to an arbitral tribunal if the regulatory and connecting ideas provided for in Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND are based on an international perspective be transmitted. The other criteria contained in this article are intended to serve the arbitral tribunal as guiding principles, even if Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND is not directly binding on the arbitral tribunal. However, it is even more questionable with a forum-independent arbitral tribunal than with a state court whether mandatory rules can only be taken into account if they are in the interest of one of the parties. For the application of a mandatory rule may be necessary precisely for the purpose of avoiding the circumvention of a certain standard by both parties. Although some of the guiding principles laid down in Art. 19 CODE ON PRIVATE

[8] Derains 1986: 227

INTERNATIONAL LAW OF SWITZERLAND can also be applied to international arbitration, Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, just like other already existing rules, should not be more than a guideline with regard to the problems of intervention for an international arbitral tribunal. An obligation for an analogous application of Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND cannot be justified. Rather, a conflict-of-law rule specifically tailored to the circumstances of international arbitration should be established. There are various proposals in the literature for the individual criteria of such a conflict rule. Therefore, in the following an attempt will be made to draw up a catalogue of the most important criteria on the basis of which an international arbitral tribunal based in Switzerland should assess the consideration of mandatory rules.

1. Willingness to apply

As already explained, it is already difficult to decide at all whether a specific standard is to be qualified as mandatory or not. However, once the internationally mandatory character of a standard has been established, this does not mean that it will also be applied to every international situation. For this reason, an arbitral tribunal must first of all examine, with regard to a questionable mandatory rule, whether it is at all applicable to the specific situation to be dealt with. Thus, for example, a competition law norm basically only wants to protect its own competition, i.e. that of the issuing state. Consequently, the intention to apply this norm does not extend to every international situation which has competition law character. Only if it is established that an overriding mandatory rule requires application in a specific case does it need to be further examined whether it should be applied by the arbitral tribunal. Whether a such a willingness to apply is to be determined from the perspective of the issuing state, as in a state process.

2. Close correlation

Even if, from the point of view of the issuing State, a mandatory rule is to be applied to a particular international situation, an arbitral tribunal should only consider those rules that are closely related to the factual circumstances. This condition should be largely uncontroversial. It is rather the determination of when such a close connection should exist that poses difficulties. Here, too, the fact that a mandatory rule is governed by the law of the State of the seat of the arbitral tribunal or the law of the place of presumed enforcement does not per se establish

a close connection. The same applies to the lex causae chosen by the parties. The mere fact that the parties have chosen a particular legal system cannot in itself establish a close connection, since, as already mentioned, it cannot be for the parties to determine which mandatory rules are to be taken into account[9]. In assessing the close connection, an arbitral tribunal should make similar considerations as those required under Art. 187 para. 1 part 2, or as a state court has to make under Art. 19 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND. For example, there may be a close connection to antitrust law provisions of the directly affected market, to norms regarding purchase restrictions at the place where the matter is located or to import prohibitions at the place of performance.

3. Application authorization

The next question that arises is whether an arbitral tribunal should also should be free to carry out a substantive review of the mandatory standard in question and to have this review taken into account in the decision for or against the application of the standard. This possibility is partly denied, a substantive review should only be possible within the scope of the public policy reservation. However, a state court also subjects a mandatory rule to a substantive review and does not apply it merely on the basis of a will to apply it and an existing close connection. Since an arbitral tribunal is in principle a substitute for the state court, an international arbitral tribunal should also take into account the purpose of the mandatory rule when considering its application. In this context, it is clear that those norms that are part of the international public order, but also those that contain a general legal principle or a legitimate state interest, are worthy of application. A rather cautious assessment of the applicability of norms with a purely political purpose, which, for example, are deliberately hostile to another state, is likely to be more reserved.

4. Consequences of application / non-application

Furthermore, when considering whether to take account of mandatory rules, an arbitral tribunal should also include the consequences of application or non-application in its considerations in order to examine whether, taking into account all the circumstances of the specific case, a result that is "correct" and "just" from its point of view can be achieved because ultimately the Arbitrators determine

[9] Berger/Kellerhals 2010: 90

within the scope of their dutiful discretion whether the application of the mandatory rule would lead to a decision that is appropriate from their point of view. In my opinion, however, it is important in this context that it is not a matter of a "correct" result from the point of view of the parties or one of the parties, but that the arbitral tribunal takes into account all interests affected in a concrete case, i.e. also those of the legal systems concerned or of possibly affected third parties. For if international arbitration wants to retain its legitimacy as a valid substitute for state proceedings, it cannot be the intention and purpose of the arbitral tribunal to provide the parties with a result that they would never have achieved before a state court[10].This last criterion in particular naturally grants the arbitral tribunal a large degree of discretion. However, the parties concerned have deliberately opted for the assessment of their dispute by an arbitral tribunal and have chosen the appropriate arbitrators. By this choice, the parties have consequently expressed their confidence in the ability of the arbitrators to arrive at a fair and correct decision. For this is ultimately the main task assigned to an arbitral tribunal, namely to establish individual justice in a particular dispute.

e) Norm competition

It still needs to be clarified how an arbitral tribunal should behave if several mandatory rules on the same legal issue meet the above criteria. In most cases, it will be possible to avoid such a result if the assessment of the relevant mandatory rules is not carried out individually but in parallel. Thus, one must not only ask oneself whether all the mandatory rules are in themselves closely related to the dispute, but also which of them has the closest connection to the dispute or which one is to be protected, or which one, from the arbitrators' point of view, is to be considered to be related to the best result. In my opinion, however, it is not important which standard has the stronger will to apply. Firstly, a standard will in very few cases say anything about the "strength" of its will to be applied; it either wants to be applied on a mandatory international basis or not. Secondly, even the recognition of a "stronger" intention to apply a standard would not change the fact that it is precisely the task of the arbitral tribunal and not of the It is for the issuing State to decide which mandatory rule is to be applied. If it is not possible to discuss a more protective or a mandatory standard with the closest connection, it’s proposes

[10] Mayer 1986: 279

a cumulative consideration of all mandatory standards in question, each of which alone fulfils the criteria set out. If necessary, the strictest foreign provision should prevail. In my opinion, however, such a constellation can hardly come about in practice, as the application of a mandatory rule will lead to a "fairer" result from the point of view of the arbitral tribunal at the latest when the consequences of application are examined. If, on the other hand, different mandatory rules provide for the same "correct" legal consequence, it is conversely also irrelevant whether one of them is preferred or a cumulative consideration.

f) Ex officio application (to take legal steps even against the will of the parties)

Finally, it is still to be discussed whether an arbitral tribunal can only take into account mandatory rules if they have been submitted by at least one party to the proceedings, or whether such a consideration should also be possible ex officio. In most cases, one of the parties will claim the applicability of a mandatory rule. In such a case of disagreement between the parties as to the applicability of a mandatory rule, the arbitral tribunal is free to decide which party's submission it intends to follow. However, it is questionable whether an arbitral tribunal also has the competence to take into account a mandatory rule on its own initiative and possibly also against the will of the parties. A state court must always apply the lex fori under Art. 18 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND if the relevant conditions are met. With regard to the consideration of third country mandatory rules by a state court, it is disputed whether such consideration can only be given at the request of a partyor also ex officio. For an arbitral tribunal it is argued that this should primarily take into account the private interests involved and that it is the task of the political organs of a state to help the public interests to prevail. On the other hand, it can be argued that an international arbitral tribunal, due to its independence from the various lex fori, is in a position to weigh up the relevant mandatory rules against each other. Since is only applied if it is closely related to the facts of the case, such consideration will also have been foreseeable by the parties concerned. Since these mandatory rules limit party autonomy, an international arbitral tribunal should take such to the same extent without the submission of any party. This is even clearer in those cases where the mandatory rule is part of the public international order, or has been deliberately circumvented by the parties through a choice of law. In my

opinion, this also follows from the principle of iura novit curia, which also applies to arbitral tribunals and obliges them to independently submit to the party the legal norms affected by the facts of the case. A court of arbitration should be more reserved in the case of norms which primarily represent national interests. However, the application in these cases will often already fail due to the criteria of close connection or eligibility for application[11].

Further Barriers to the Choice of Law

1. Preliminary remarks

In addition to the application of mandatory rules by an arbitral tribunal, there are other possibilities, which can set limits to party autonomy. For this reason, these are also briefly examined below.

2. Negative Ordre public

Art. 190 (2) letter e CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND states that one of the few cases in which an arbitral award of an international arbitral tribunal with seat in Switzerland may be challenged before a federal court is incompatible with the public policy order. In contrast to the mandatory rules, which, due to their internationally binding character, want to be applied regardless of their effect in a concrete individual case, the focus of the examination of the public policy rules is on the concrete result of the application of law. Thus, the focus is not on whether a particular provision is to be applied, but rather on whether the concrete result achieved by the intended application of law is compatible with the public policy, irrespective of the origin of the applied legal provision. Even if the public policy rule is not mentioned in Art. 187 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, it is considered a reservation of the law designated by the parties as applicable. The public order is generally understood to be the indispensable values of an authoritative set of values, the observance of which is also required by Art. 17 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND of the public courts. In contrast to Art. 17 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, however, Art. 190 para. 2 letter e CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND does not contain the words "Swiss". Thus, according to the

[11] Hochstrasser 1994: 65

prevailing view and the case law of the Federal Supreme Court, the public order under Art. 190 para. 2 letter e CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND is not identical with the one which is laid down as binding for state courts in Art. 17 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND. In the field of arbitration, it is much more a question of an international public order, of fundamental legal and moral principles that are recognised in all "civilised" states[12]. If an arbitral tribunal now finds that a result determined on the basis of the rules of law chosen by the parties would be contrary to the public order within the meaning of Art. 190 para. 2 letter e CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, it is obliged not to apply such rules of law. This obligation arises from the mere fact that the arbitral tribunal is required to issue a decision that is valid at least in Switzerland. This creates a barrier to party autonomy in that the parties may not choose a law which is contrary to the public policy as defined in Art. 190 (2) letter e CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND, or which would result in the arbitrators disregarding such a choice. However, to note that, as mentioned above, the public order within the meaning of Article 190(2) letter e CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND covers only the fundamental principles of law, and accordingly the restriction of party autonomy cannot be overestimated.

3. Arbitrability

As explained above, there is therefore a possibility that the party's autonomy as regards the choice of law is limited by the application of mandatory rules.However, it should also be borne in mind that only a small part of the mandatory provisions of a legal system can be qualified as mandatory rules and that it is often disputed which rules can be regarded as mandatory standards. For this reason, especially in disputes with a socially weaker party, the observance of mandatory rules may not be offer sufficient protection, particularly because it is disputed whether standards for the protection of a weaker party can be qualified as mandatory standards at all. Mainly for such cases, the choice of law could be a limitation of arbitrability by means of special conflict-of-law rules that take into account the interests of the weaker party. The CODE ON PRIVATE

[12] Lazareff 1994: 540

INTERNATIONAL LAW OF SWITZERLAND contains various mandatory jurisdictions which cannot be waived in advance. For example, in Art. 114, para. 2 for consumer contracts or in Art. 151, para. 3 for actions arising out of liability resulting from the public issue of shares. It is questionable whether this also the conclusion of an arbitration agreement is made impossible. Chapter 12 of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND does not contain a corresponding provision which would reserve the mandatory jurisdictions of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND. Since Chapter 12 of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND is a separate part in itself, the provisions of the other chapters of the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND therefore have no direct effect on the field of international arbitration because an international arbitral tribunal with its seat in Switzerland has no lex fori. For this reason, it has been argued, when considering mandatory rules, that an international arbitral tribunal should not give preferential consideration to any legal system, i.e. neither to the Swiss legal system, when considering mandatory rule. For the same reason, the opinion is now also expressed with regard to the question of arbitrability that the mandatory places of jurisdiction provided for in the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND have no influence on arbitrability. For the question of the arbitrability in international arbitration proceedings based in Switzerland, however, the legislator has created a substantive provision in Art. 177 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND for the assessment of this particular legal issue, which is why the assessment of arbitrability is generally decided according to Swiss law. For this reason, the assessment of arbitrability must also take into account the convictions inherent in the Swiss legal system. Does the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND therefore, due to a need for protection of social weaker parties a mandatory place of jurisdiction, as for example in Art. 114 (2) for consumer contracts, the question of the Arbitrability of a dispute in consideration of this need for protection must be assessed. The arbitrability of such disputes should therefore be limited by the protective purpose of these mandatory jurisdictions will not be given, thus always there, where just this protective purpose is violated. However, the exclusion of arbitrability must be limited to the protective purpose, which is why arbitration agreements must always be admissible after a dispute has arisen.

Conversely, for the same reason, an arbitration clause made in advance would be valid if the consumer-initiated arbitration proceedings against the supplier on his own initiative. Also, an arbitration agreement should be admissible where the mandatory place of jurisdiction is not based on a protective concept, such as in the case of Art. 97 CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND for actions concerning rights in rem in real property in Switzerland[13]. Of course, arbitrability is always excluded if the Ordre public requires it.It is questionable whether arbitrability is also limited by the mandatory jurisdiction of the Lugano Convention. That Convention also provides for compulsory jurisdictions to protect socially weaker parties. However, Article 1(2). (d) of the Lugano Convention does not apply to arbitration. Although to Swiss law it cannot therefore have any influence on the arbitrability of international arbitration proceedings in Switzerland. If the Swiss legislator shares an idea of protection expressed in the Lugano Convention, it must therefore have included it by means of a separate provision in the CODE ON PRIVATE INTERNATIONAL LAW OF SWITZERLAND so that it is also applicable to international arbitration in Switzerland.Since the question of arbitrability is governed by Swiss law, as mentioned above, arbitrability cannot be restricted by foreign law, not even by the lex causae. Of course, the Ordre public, which an arbitral tribunal always has the right to enforce, is also reserved here.If an arbitral tribunal has to take into account the arbitrability of a dispute due to abuse of rights, it would have to deny the arbitrability of a dispute on the basis of abuse of rights, if without reference to the Switzerland only because Switzerland has been chosen as the place of arbitration in order to avoid compulsory jurisdictions of foreign legal systems which are affected by the dispute.

Closing words

The criteria proposed in this paper for dealing with mandatory rules are an attempt to provide arbitral tribunals with assistance in dealing with this problem. It is clear that even if the criteria mentioned above are applied, the individual arbitral tribunals still have a large degree of discretion. However, this discretion of the arbitrators should also be maintained. The arbitrators are chosen by the parties precisely because they are considered capable of acting in a specific In the event of

[13] Derains 1986: 2230

a dispute, it is necessary to find the appropriate decision. This also includes the responsible exercise of their discretion.However, the aim of dealing with this issue should be to achieve a uniform approach of the arbitral tribunals to the issue of mandatory rules, even if this does not completely prevent contradictory judgments. But this problem also exists in state courts.It is regrettable that the legislator has failed to take into account the protection of vulnerable parties is not based on the has transferred national arbitration. Due to the limited scope of this work, the problem could not be discussed in depth. It would be desirable for the future that a discourse on this problem is created in order to correct this legislative error, if possible. The effects of the opting-out possibility could not be deepened either be discussed. Although in principle it is to be welcomed to hope that before the national arbitration tribunals shall, in particular, consider the effects of such an opt-out be interpreted restrictively to the extent that it would prevent circumvention of Swiss mandatory rules is not offered by the parties.

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