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# Navigating the Paradox: Mandatory Laws and Legal Certainty in International Arbitration

Shakhzoda Tuychieva<sup>1</sup>

<sup>1</sup>Lecturer, Tashkent State University of Law

\*Correspondence: [shakhzoda.tuychieva1998@gmail.com](mailto:shakhzoda.tuychieva1998@gmail.com)

**Abstract:** This paper explores the intricate relationship between mandatory laws and legal certainty in international arbitration. While legal certainty is critical for ensuring predictability in international transactions, mandatory laws, which often reflect public policy, can create tensions by imposing restrictions that override party autonomy. Through the examination of key cases such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, *Eco Swiss China Time Ltd. v. Benetton International NV*, and *Soleimany v. Soleimany*, this article analyzes the balance arbitrators must strike between upholding public policy and maintaining legal certainty. Strategies for navigating these challenges include harmonization, empowering arbitrators, and leveraging conflict-of-laws rules. This analysis offers insights into how international arbitration can evolve to reconcile these competing principles and enhance the predictability of dispute resolution processes.

**Keywords:** Mandatory laws, legal certainty, international arbitration, public policy, party autonomy, conflict of laws, enforcement.

At first glance, the existence of mandatory laws appears to contradict the principles of legal certainty. If contracting parties are unable to circumvent specific legal rules, how can they be assured of the safety and predictability of their transactions? This perceived conflict arises from the inherent tension between the need for predictability in commercial transactions and the necessity of upholding public policy through mandatory regulations. It is widely recognized that predictable legal frameworks foster confidence in international trade and investment; businesses can make informed decisions and allocate resources efficiently when they are cognizant of the governing rules. Moreover, parties should have the autonomy to structure their agreements freely, reflecting their individual needs and risk tolerances.

The pursuit of legal certainty in international arbitration involves a delicate balancing act, wherein the imperative of upholding public policy through mandatory laws often conflicts with the need for predictability and stability in cross-border transactions. While mandatory laws are essential for protecting fundamental rights, public interests, and societal values, their application in international disputes can create a paradoxical tension. Specifically, the challenge lies in ensuring the certainty required for businesses to thrive while simultaneously upholding the vital public policy concerns these laws embody. This is the fundamental question that this chapter aims to explore.

Consider, for example, two companies—one from Europe and one from Asia—entering into a contract for the sale of goods. Their agreement may contain detailed provisions regarding payment terms, delivery schedules, and quality standards. However, if a mandatory law in either jurisdiction—for instance, one concerning consumer protection or environmental standards—

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imposes different requirements, complexity arises. The parties' carefully negotiated agreement may be overridden by external laws, potentially leading to uncertainty, disputes, and instability.

This conflict between predictability and public policy is not merely theoretical; it has tangible real-world consequences. Businesses operating in the international arena require a clear understanding of the legal landscape to make informed decisions, allocate resources effectively, and plan for the future with confidence. However, the dynamic nature of mandatory laws, coupled with their potential to contradict contractual agreements, can engender a sense of unease and unpredictability.

One significant concern is the impact on choice of law and forum selection. A company may opt to have its dispute resolved in a particular jurisdiction based on perceived neutrality or familiarity with its legal system. However, if a mandatory law in another jurisdiction—such as where the transaction occurred or where the goods were manufactured—conflicts with the chosen forum's rules, this can lead to complex legal battles over which jurisdiction's law applies and whether the chosen forum can enforce a decision that might contradict its own public policy.

Further complicating the matter is the potential for forum shopping. Companies may strategically select the forum most favorable to their interests, thereby influencing the application of mandatory laws. This practice can create a perception of bias and erode trust in the arbitral process. The application of mandatory laws from different jurisdictions can lead to conflicting legal regimes, making it difficult to determine which law governs a particular dispute. This uncertainty can undermine the integrity of the arbitral process and create additional challenges in ensuring legal certainty. The interpretation and application of mandatory laws also pose challenges. Harmonization efforts, while commendable, often fall short, leaving businesses navigating a patchwork of potentially conflicting rules across jurisdictions. Even within a single jurisdiction, variations in interpretation can lead to different outcomes for seemingly similar cases, creating a sense of inconsistency and unpredictability. Arbitrators, though experts in their field, face a difficult task in balancing conflicting legal principles and applying mandatory laws fairly while maintaining a sense of consistency and predictability.

The discourse surrounding the application of mandatory laws in international arbitration revolves around two contrasting perspectives. Jurisdictional purists assert that arbitrators derive their authority from the law of the arbitration's seat and, consequently, should inherently apply its mandatory rules. On the other hand, contractualist purists emphasize the primacy of party autonomy, arguing that the law of the seat is irrelevant and that arbitrators should refrain from applying its mandatory rules in substantive matters. They do, however, recognize the relevance of the seat's law in procedural aspects, contending that by selecting a particular seat, parties implicitly accept its procedural regulations.

The International Chamber of Commerce (ICC) Rules present a more nuanced stance. While the ICC Court of Arbitration does not mandate the automatic application of mandatory rules, it acknowledges their significance and considers them "to the extent practicable." This approach indicates a degree of consent to the application of mandatory rules within ICC arbitrations.

A critical factor in this debate is the potential for arbitral awards to be set aside or refused enforcement based on national arbitration statutes and the New York Convention. These legal instruments permit non-enforcement if an award contravenes public policy or has been annulled by the competent authority in the country where it was rendered. This possibility strengthens the argument for applying the mandatory rules of the seat, particularly when they reflect pertinent public policy concerns.

Nonetheless, some contend that party autonomy should supersede mandatory rules, especially given the discretionary nature of the New York Convention. This viewpoint holds less persuasive power concerning procedural mandatory rules, as the widespread adoption of the UNCITRAL Model Law across jurisdictions fosters a more consistent and predictable application

of procedural regulations. If an award violates such provisions at the seat, jurisdictions that have enacted the Model Law are less inclined to enforce it.

The complexity intensifies when addressing substantive mandatory rules. Although certain jurisdictions are known to enforce awards even if they have been set aside at the seat, there are scenarios where concerns about enforceability may be minimal. For example, if the parties' home countries or the probable enforcement country lack relevant substantive mandatory rules, but the seat has a mandatory rule conflicting with the contract's governing law, and the likely enforcement jurisdiction is recognized for its pro-enforcement stance, the concerns regarding enforceability might be less significant.

This analysis underscores the ongoing debate about the application of mandatory laws in international arbitration. While both sides present valid arguments, the most appropriate approach ultimately depends on the specific circumstances of each case, including the nature of the mandatory rules, the relevant jurisdictions, and the parties' intentions.

The enforceability of arbitral awards involving mandatory laws is crucial for ensuring legal certainty. If an award conflicts with the public policy of the enforcing state, its execution can be challenged, leading to further uncertainty and potentially undermining the entire arbitration process. Navigating this complex terrain and achieving a balance between legal certainty and the necessary protection of public policy requires several strategic approaches.

The interplay between mandatory laws and legal certainty in international arbitration presents a multifaceted and evolving challenge. While mandatory laws are essential for safeguarding public policy and upholding fundamental societal values, their application can compromise predictability and stability, causing unease for businesses operating internationally. By adopting strategies that promote harmonization, empower arbitrators, utilize conflict-of-laws rules, and encourage transparency and communication, a legal landscape can be fostered that balances the need for legal certainty with the imperative of protecting public policy concerns, thereby creating a more robust and sustainable environment for international arbitration. This analysis examines three seminal cases—*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *Eco Swiss China Time Ltd. v. Benetton International NV*, and *Soleimany v. Soleimany*—to explore the interplay between mandatory laws and arbitration, with a focus on their implications for legal certainty, proportionality, and practical considerations.

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985)

In this landmark decision, the United States Supreme Court addressed the relationship between arbitration agreements and mandatory antitrust legislation. The case involved a distribution agreement between Mitsubishi Motors and Soler Chrysler-Plymouth, which included an arbitration clause specifying that disputes would be resolved in Japan. A conflict arose concerning alleged antitrust violations. The Court held that antitrust claims are arbitrable, underscoring the federal policy favoring arbitration. Importantly, the Court emphasized that the arbitral award would be subject to judicial review to ensure compliance with U.S. antitrust laws, highlighting the significance of mandatory legislation in protecting public interests.

This case illustrates the delicate balance between honoring arbitration agreements and upholding the protective function of mandatory laws. By allowing arbitration to proceed while maintaining the possibility of judicial oversight, the Court recognized the necessity of both legal certainty and adaptability. The decision demonstrates how mandatory laws can coexist with arbitration agreements when mechanisms are in place to ensure compliance, thereby preserving the integrity of public policy.

*Eco Swiss China Time Ltd. v. Benetton International NV* (1999)

This case from the European Court of Justice (ECJ) further delves into the application of mandatory laws within the European Union's legal framework in the context of international arbitration. The dispute between Eco Swiss China Time Ltd. and Benetton International NV arose from a licensing agreement containing an arbitration clause. An arbitrator ruled in favor of

Benetton, but Eco Swiss challenged the decision in Dutch courts, alleging a violation of EU competition law—a mandatory provision.

The ECJ ruled that EU competition law constitutes a matter of public policy, requiring national courts to ensure its enforcement even in arbitration settings. This decision affirmed the supremacy of EU competition rules as mandatory laws essential for protecting the internal market and consumers.

The Eco Swiss case underscores the paramount authority of mandatory laws within the EU legal system and their impact on arbitration proceedings. It reinforces the principle that arbitral awards must adhere to public policy considerations, including mandatory competition laws. This case highlights the necessity for arbitrators to consider mandatory provisions and for national courts to have the authority to set aside awards that violate these provisions. It exemplifies how mandatory laws can influence and guide the arbitration process to align with public interest objectives.

*Soleimany v. Soleimany* (1998)

In this decision by the English Court of Appeal, the court addressed the enforceability of arbitral awards that conflict with mandatory laws, particularly those related to public policy. The case involved a dispute between a father and son over the proceeds from smuggling carpets out of Iran—an activity illegal under Iranian law. The dispute was arbitrated under Jewish law, resulting in an award in favor of the son.

When the son sought to enforce the award in England, the father contended that the underlying contract was illegal under Iranian law and that enforcement of the award would be inappropriate. The English Court of Appeal agreed, stating that enforcing an award based on an illegal contract would contravene English public policy. The court emphasized its reluctance to enforce arbitral awards founded on actions prohibited by mandatory laws, regardless of the parties' agreement to arbitrate.

*Soleimany v. Soleimany* highlights the critical role of national courts in scrutinizing arbitral awards for compliance with mandatory laws and public policy. It illustrates the principle that the enforceability of arbitral awards is subject to overarching legal norms designed to uphold public interest, even when parties have consented to arbitration. This case demonstrates the limitations of party autonomy in arbitration and the necessity of judicial oversight to prevent the enforcement of awards that violate mandatory legal provisions.

The cases of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *Eco Swiss China Time Ltd. v. Benetton International NV*, and *Soleimany v. Soleimany* provide valuable insights into the implementation and impact of mandatory laws in international arbitration. They reveal a complex relationship between respecting arbitration agreements and ensuring that mandatory laws are upheld to protect public interests.

These cases collectively illustrate that while arbitration offers flexibility and efficiency as a method of dispute resolution, it does not operate in isolation from mandatory legal provisions. Arbitrators and national courts must navigate the tension between party autonomy and the imperative to enforce essential legal norms. The jurisprudence demonstrates that arbitration must be conducted within the framework of mandatory laws to maintain fairness, legal certainty, and the integrity of public policy objectives in the international legal arena.

While mandatory laws are essential for upholding public policy and safeguarding fundamental rights, their application in cross-border disputes introduces a complex layer of challenges and opportunities, fundamentally reshaping the landscape of arbitration.

The procedural framework of international arbitration is already a delicate tapestry woven from diverse legal systems, institutional rules, and party agreements. The introduction of mandatory laws further complicates this intricate web, often leading to conflicting jurisdictions, shifting burdens of proof, and a re-evaluation of discovery procedures.

Imagine two companies, one based in the United States and one in China, entering into a contract for the sale of technology. Their agreement carefully outlines the terms of the deal, but

a mandatory law in China, perhaps concerning data privacy or export controls, imposes additional requirements. Suddenly, the parties are confronted with a complex legal puzzle: which jurisdiction's procedural rules govern the dispute? Can the American company seek discovery under U.S. law, or are they bound by the more restrictive Chinese data protection regulations?

Beyond the complexities of choice of law and forum selection, mandatory laws often impact the scope and availability of discovery. For example, a mandatory law protecting confidential business information might limit the scope of document requests or depositions, potentially hindering a party's ability to gather essential evidence.

Further complicating the matter are mandatory laws that establish presumptions or shift the burden of proof. This can significantly influence the evidence required to support a claim and the evidentiary standards applied by the arbitral tribunal. The importance of carefully considering the impact of mandatory laws on presumptions and burdens of proof, as these elements can have a substantial influence on the outcome of the dispute should not be underestimated.

The substantive impact of mandatory laws on arbitration is perhaps the most significant area of contention. These laws, by their very nature, cannot be overridden by contractual agreements, potentially impacting the core of the parties' dispute and ultimately influencing the outcome of the arbitration.

Take, for example, a contract between a multinational corporation and a local supplier in a developing country. The contract might specify certain performance standards and dispute resolution mechanisms. However, a mandatory law in the developing country, perhaps addressing environmental protection or labor rights, might impose stricter requirements. This creates a tension between the parties' contractual agreement and the mandatory requirements of the law.

The non-waivable nature of mandatory laws further complicates the situation. Parties cannot simply contract around these rules, potentially leading to disputes over the enforceability of agreements that attempt to circumvent them. The non-waivable nature of mandatory laws can create challenges in arbitration, as parties may attempt to circumvent these rules through contractual provisions, potentially leading to disputes over the enforceability of such agreements.

The application of mandatory laws can also significantly alter the scope and content of contractual agreements. Arbitral tribunals must interpret and apply contracts in light of these overriding rules, potentially leading to adjustments or even the voiding of certain contractual terms. Arbitrators have a duty to ensure that contractual provisions comply with mandatory laws, potentially leading to adjustments or even the voiding of certain contractual terms.

The complexities posed by mandatory laws in international arbitration are indisputable. However, various strategies can mitigate their adverse effects and foster a more predictable and equitable legal environment.

**Harmonization and Clarification:** International cooperation is essential in aligning mandatory laws across different jurisdictions, which can reduce inconsistencies and promote a more coherent legal framework. Precise and clear drafting of these laws is crucial to minimize ambiguity and the potential for misinterpretation.

**Empowering Arbitrators:** Specialized training programs that address the intricacies of mandatory laws can equip arbitrators with the knowledge and skills necessary to navigate these challenges with greater confidence and consistency. Enhancing transparency in decision-making processes and establishing accountability mechanisms can further strengthen trust in the arbitral process.

**Leveraging Conflict-of-Laws Rules:** Developing comprehensive and well-defined choice-of-law rules can assist in determining which legal system governs a dispute, thereby reducing uncertainty and enhancing predictability in the application of mandatory laws. Courts and arbitral tribunals should carefully consider public policy exceptions to enforceability, ensuring that awards do not undermine fundamental legal principles of the enforcing state.



Fostering Open Communication: Transparent and open dialogue among parties, arbitrators, and counsel can facilitate a shared understanding of legal complexities and build trust in the arbitral process. Early disclosure of relevant mandatory laws and their potential impact on the dispute can help all parties navigate challenges more effectively.

In conclusion, while mandatory laws in international arbitration present complex challenges, they also offer opportunities to develop a more robust and adaptable legal framework. By adopting strategies that promote harmonization, empower arbitrators, leverage conflict-of-laws rules, and encourage transparency and communication, we can work toward a more predictable and just legal landscape for international arbitration. This approach ensures that the pursuit of public policy does not come at the expense of fairness and certainty in the resolution of international disputes

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