Nonarbitrability and Mandatory Rules: Brothers, Not Twins

Édouard Bruc*

Notwithstanding the lack of clear legislative intent, Belgian judges have unilaterally prohibited the arbitration of exclusive distribution disputes, unless a specific Belgian pro-distributor statute was applied or unless similar substantive foreign rules were applied. However, in 2023, the Court of Cassation finally reversed its jurisprudence. Yet, the syllogism underlying this long-awaited reversal remains unsatisfactory. It mistakenly equates a conflict-of-laws issue concerning mandatory rules with questions of nonarbitrability under international arbitration law. Such an overly simplistic assimilation is inappropriate in many respects. It dilutes the tailored legal standard applicable to international arbitration into a lesser question of applicable rules. It unduly prevents a subject matter from entering ratione materiae *into the arbitration field. Upon closer examination, it conflates two substantively different gateways to arbitration: the nonarbitrability doctrine (Article V(2)(a) of the New York Convention) and the public policy exception (Article V(2)(b) thereof). In so doing, it needlessly erodes confidence in the arbitral process, which is based on parties' autonomy, and violates the principles of judicial non-interference in international arbitral proceedings and of competence-competence. In essence, regardless of the pro-arbitration outcome in the case at hand, this flawed syllogism violates the New York Convention's straightforward language and pro-arbitration ethos by potentially generating unnecessary, unforeseeable, and improper exceptions to arbitration.*

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[1] Although the New York Convention's ambit is expressly limited to 'subject matter[s]' capable of settlement by arbitration, it does not identify which matters are nonarbitrable.[1] Logically, such jurisdictional incompatibility should reflect 'public' policy choices designed to protect each Signatory's legal order against

* Solicitor in England and Wales and a Paris Bar Avocat and works at Wilmer Cutler Pickering Hale and Dorr LLP. The views expressed in this article are purely personal and cannot, under any circumstances, be attributed to the law firm, other lawyers, or any of the firm's clients. The author has no conflicts to disclose. He sincerely thanks Hannah Kannegieter for her valuable feedback. All mistakes are the author's own. To my friend Stivian, 'as flies to wanton boys are we to the gods; they kill us for their sport'. Email: edouard.bruc@wilmerhale.com.

1 Article II(1) of the New York Convention: 'concerning a subject matter capable of settlement by arbitration'. (Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 Jun. 1958) 330 U.N.T.S. 38 (1959)). The Geneva Convention provided for recognition of arbitral awards where 'the subject matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon' (Art. 1(b) of the Geneva Convention on the Execution of Foreign Arbitral Awards (25 Jul. 1929) 92 L.N.T.S. 302 (1929)).

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international 'private' arbitration.[2] Given the ever-changing nature of the concept of 'public policy', especially when considering a disparate community of nations coming together to sign a harmonizing instrument, the drafters of the Convention understood that determination of the matters suitable for arbitration was better left to national legal systems.[3] For the very same reasons in municipal laws, most nations do not provide an exhaustive list of rigid exceptions but use flexible concepts.[4]

[2] Irrespective of the conceptual path taken, practically all commercial disputes are deemed arbitrable. Until recently, however, a notable rigid exception existed in the Kingdom of Belgium, which since 1971 had sought to prohibit, and then limit, the arbitrability of exclusive distribution agreements of indefinite duration based on public policy considerations.[5] Post-*Mitsubishi* and *Eco Swiss*,[6] this unsympathetic attitude was inconsistent with the prevailing international consensus that considered antitrust law matters arbitrable.[7] Unsurprisingly, this *rara avis* prompted a great deal of comment, often unfavourable, from academics.[8]

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2 *See* Hossein Fazilatfar, *Overriding Mandatory Rules in International Commercial Arbitration* 35–36 (Edward Elgar Publg 2019).

3 In another context, *Payment in Gold of Brazilian Federal Loans Contracted in France*, 1929 P.C.I.J. Ser. A, No. 21, at 125: 'in a case concerning public policy, a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself'.

4 By way of illustration, the US Federal Arbitration Act of 1925 (9 US Code §§1–14) speaks of 'issue referable to arbitration'. Under Art. 2059 of the French Civil Code, as under Art. 806 of the Italian Civil Procedure Code, Art. 2(1) of the Spanish Act 60/2003 of 23 Dec. 2003, on Arbitration, or Art. 1020(3) of the Dutch Civil Procedure Code, a person can refer all freely disposable rights to arbitration. German law, like Swiss or Austrian law, specifies that any 'claim involving an economic interest can be the subject of an arbitration agreement' (Art. 1030(1) of the German Arbitration Law of 1998; Art. 177 of the Swiss Private International Law Act of 1987; and s. 582 of the Austrian Arbitration Act 2013). Swedish law is even clearer: 'arbitrators may rule on the civil law effects of competition law as between the parties' (s. 1(3) of the Swedish Arbitration Act of 1999). *See also* Art. 36(1)(b)(i) of the UNCITRAL Model Law.

5 This rigid exception coexisted with a more flexible concept of dispute that can be the subject of a settlement agreement. In 2013, this criterion was revised by the legislator to cover any pecuniary claim.

6 C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, EU:C:1999:97; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). In his dissent in the latter case, Justice Stevens noted that '[t]he courts of other nations … have … refused to enforce agreements to arbitrate specific subject matters of concern to them. … For example, the Cour de Cassation in Belgium has held that disputes arising under a Belgian statute limiting the unilateral termination of exclusive distributorships are not arbitrable'.

7 Except for public powers that fall within the exclusive competence of antitrust authorities, such as the imposition of fines and approval of mergers (e.g., *Aplix v. Velcro*, Paris Court of Appeal, 14 Oct. 1993, 1994 Rev. Arb. 164; *Labinal v. Mors et Westland Aerospace*, Paris Court of Appeal, 19 May 1993, 1993 Rev. Arb. 645, 650). *See* Organisation for Economic Co-operation and Development, Arbitration and Competition DAF/COMP(2010)40 (2010), https://doi.org/10.1787/828bbff7-en (accessed 14 Aug. 2024).

8 For example, Raymond Ledoux, *L'arbitrage en matière de concession de vente*, 673 Journal des Tribunaux (1978); Patrick Wautelet, *Arbitration of Distribution Disputes Revisited: A Comment on Sebastian*

[3] In 2023, the Court of Cassation, Belgium's Highest Civil Appellate Court, revisited the issue in *Thibelo* and seized the opportunity of the recent reform of Belgian arbitration law to reverse its old jurisprudence.[9] Whilst this alignment with the international standard is undoubtedly a sound outcome, the rationale underpinning this shift begs many legal questions. Not least, its compliance with the EU legal order, which enjoys primacy over Belgian law, and with other international instruments such as the New York Convention merits scrutiny. For example, the application of a conflict-of-laws approach to resolve a purely municipal question of arbitrability seems ill-suited.

[4] Accordingly, this article will first briefly retrace the legal history of the infamous Belgian issue of nonarbitrability (**1**). In turn, the Court of Cassation's landmark ruling will be analysed (**2**) before being criticized (**3**). To conclude, the article will summarize the multiple and fundamental risks involved in blindly conflating the nonarbitrability doctrine with less consequential questions of applicability of mandatory rules (**4**).

1 A JUDGE-MADE IDIOSYNCRASY: 1979-2023

[5] The Law of 27 July 1961, on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration, introduces a comprehensive legal regime designed to protect Belgian distributors.[10] Among other things, this statute provides that, in the absence of a serious breach of the distribution agreement by the distributor, the supplier may only terminate the agreement subject to a reasonable notice period, or an equitable indemnity determined by the parties when the contract is terminated.[11]

[6] To protect distributors even further, Article 4 thereof, now codified under Article X.39 of the Belgian Code of Economic Law, provides that:

International Inc v. Common Market Cosmetics NV, in *The Practise of Arbitration: Essays in Honour of Hans Van Houtee* 217, 228 (Patrick Wautelet, Thalia Kruger & Govert Copens eds, Hart Publishing 2012); Olivier Caprasse, *Les grands arrêts de la Cour de cassation belge an droit de l'arbitrage*, 1 b-Arbitra Belgian Review of Arbitration 140–145 (2013); Hans van Houtte, *L'arbitrabilité de la résiliation des concessions de vente exclusive*, in *Mélanges offerts à Raymond Vander Elst* 821–833 (Nemesis 1987); Orb. Leuven 19 May 2020, A/20/0034, unpublished, discussed in Hannes Abraham & Patrice Vanderbeeken, *Arbitreerbaarheid van concessiegeschillen: revisited* (934) 942, no. 34–36 (RABG 2020); Johan Erauw, *De arbitragewet (Ger.W.) maakt concessiegeschillen vatbaar voor arbitrage*, RW 2018–19, 1069–1074. *Contra*, *see* Raymond Vander Elst, *Arbitrabilité des litiges et fraude à la loi en droit international privé*, 354 Revue critique de jurisprudence belge (1981).

[9] *Thibelo v. Stoelzle Oberglas*, Court of Cassation (1st ch.), 7 Apr. 2023, no. C.21.0325.N.

[10] Moniteur Belge of 5 Oct. 1961, at 7518, as amended by the Law of 13 Apr. 1971, on Unilateral termination of distribution agreements (Moniteur Belge of 21 Apr. 1971, at 4996).

[11] This indemnity comprises two elements, namely compensatory damages for the turnover achieved during the required notice period, plus compensatory damages.

> If a distributor has suffered loss as a result of the termination of a distribution agreement covering all or part of Belgian territory, it may in any event bring legal proceedings against the supplier before the Belgian courts or before the courts for the place where the supplier is domiciled or has its registered office. If the proceedings are brought before the Belgian courts, *they must apply Belgian law exclusively*.

[7] Article 6 thereof, now Article X.35 of the aforesaid Code, adds that this statute will apply notwithstanding any contrary agreements reached before the end of the distribution agreement.[12] As such, these provisions do not expressly prohibit arbitration.

[8] Given the relatively generous indemnities to which distributors are entitled, numerous attempts have been made by foreign suppliers to avoid the statute's restrictions. Notably, foreign suppliers have employed choice of jurisdiction clauses, appeals to the Brussels I Recast Regulation,[13] and arbitration clauses.[14] These options entail grappling with the nature of this obligation and the weight of the statute in question, notably from a public policy standpoint. More specifically for arbitration in a civil law system, the interaction of such domestic prohibition with directly applicable higher international norms, such as relevant provisions in treaties, calls for some reasoning on the part of judges.

[9] In particular, two major binding international conventions are of relevance to arbitration in Belgium: (1) the New York Convention and (2) the European Convention on International Commercial Arbitration ('**European Convention**').[15] Both legal instruments provide useful guidance.

[10] First, Article V(2) of the New York Convention enables the courts of a Contracting State, such as Belgium, to refuse recognition and enforcement of an award (a) if they find that the subject matter of the difference which led to the award is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought or (b) the recognition or enforcement of the award would be against the Contracting State's public policy. In almost identical terms, Article II(1) thereof enables the Contracting State to deny the validity of arbitration agreements when the 'subject matter' of the dispute is incapable of settlement by arbitration.

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12 'The following [forms of exclusive distributorship] shall be subject to the provisions of this Title, notwithstanding any clause to the contrary'.

13 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, at 1.

14 Edward J. Hayward, *Jurisdiction under the Belgian Law on Termination of Exclusive Distributors: An Exercise in Conflicts of Law and Jurisdiction*, 14 Int'l L. 128, 129 (1980).

15 European Convention on International Commercial Arbitration (21 Apr. 1961) 484 U.N.T.S. 364.

[11] Second, Article 6(2)(a) of the European Convention provides that, when deciding on the validity of the arbitration clause, a court should look to the law chosen by the parties. Yet, Article 6(2) also specifies that the court should find an arbitration clause invalid if, according to the law of the forum, the dispute is not arbitrable. In other words, both conventions, while shaping a regime that presupposes a *favour arbitrandum*, leave a safety valve that enables Contracting States to protect their legal order from awards that run counter to their fundamental values or are otherwise deemed unsuitable for arbitration.

[12] Against this background, in *Audi-NSU v. Adelin Petit*, the Belgian Court of Cassation ruled in 1979 that:

> those mandatory (*impératives*) provisions are intended to ensure that in all cases the distributor has the right to invoke the protection of Belgian law, except where it has renounced this right by an agreement concluded after the end of the contract under which the concession is granted.[16]

[13] Accordingly, regardless of any consensual *ex-ante* agreement or the international nature of the arbitration, the relevant provisions of the Belgian Code of Economic Law must be applied 'in all cases'. According to the Court, if an arbitration clause provided for another governing law, this would apparently conflict with this Belgian mandatory rule. In such circumstances, based on the New York Convention, barring an unlikely ex-post renouncement, Belgian courts could refuse to recognize an arbitral award and deny it the force of res judicata on the grounds that the 'dispute was not capable of settlement by arbitration under Belgian law'.[17] In that particular case, this was because the arbitration clause provided for arbitration in Switzerland under German law.

[14] Even if the arbitrators 'could' apply, instead of 'shall' apply, Belgian law, the Court of Cassation held in 1988 that, because of this slight uncertainty as to the governing law, the dispute remained nonarbitrable.[18]

[15] Likewise in 2004, in *Colvi v. Interdica*, the Court of Cassation quashed a ruling of the Antwerp Court of Appeal which challenged its past pronouncements in two fundamental ways. First, the Court of Appeal wrote that, in line with the

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[16] *Audi-NSU Auto Union A. G. v. S. A. Adelin Petit & Cie*, Court of Cassation (1st ch.), 28 Jun. 1979, Belgium no. 2 / E2; confirmed in: *Bibby Line v. Insurance Company of North America*, Court of Cassation, 2 Feb. 1979, 1979 Pasicrisie I 634.

[17] *See Audi-NSU*, *supra* n. 16. The lower court, the Liège Court of Appeal, also ruled that 'the arbitral award can be recognized only if it is not contrary to the public policy of the state where it is sought to be relied upon, especially the laws of police and of safety (*lois de police ou de sûreté*) such as the Law of 27 July 1961′ (12 May 1977, in ICCA Yearbook Commercial Arbitration 1979, Volume IV).

[18] *Gutrob Werke GmbH v. Usinorp de Saint-Hubert and Saint-Hubert Gardening*, Court of Cassation, 22 Dec. 1988, in *Distributierecht-Droit de la distribution 1987–1992,* 145–150 (Geert Bogaert & Paul Maeyaert eds, Kluwer Belgique 1994).

New York Convention, an arbitration clause's validity, along with the dispute's arbitrability, must be assessed pursuant to the *lex contractus*, here Swiss law, rather than under the *lex fori*, i.e., Belgian law.[19] Second, the Court of Appeal accepted that the provisions of the Belgian distributorship law were mandatory, but emphasized that, as such, they did not attain an 'international public policy' status. The statute, therefore, could not prevail over the New York Convention's pro-enforcement ethos.[20] On the first issue, the appellate court reasoned that, in the absence of a clear textual choice in the New York Convention, the *lex fori* can be of relevance, and accordingly remanded the case to the lower court without deeming it necessary to rule on the second issue.[21]

[16] For the same reason, in November 2006 the Court of Cassation overturned a decision of the Brussels Court of Appeal that had considered arbitrable under the *lex contractus* a dispute over the termination of an exclusive distribution agreement between an American supplier and a Belgian distributor providing for arbitration in the United States under California law.[22]

[17] Despite these numerous legal precedents, the judicial dialogue between the higher court and lower courts continued.[23] This is unsurprising, since commentators regarded this nonarbitrability as an international idiosyncrasy.[24] Once again, in 2010, the Court of Cassation ruled that Belgian courts could rely on conditions unrelated to the situation of the parties or to the subject matter of the dispute, such as domestic mandatory rules, in their holistic assessment of arbitrability.[25] Relatedly, the Court added that when an arbitration agreement is governed by foreign law, the court hearing a motion to compel arbitration 'must deny the possibility to arbitrate the dispute, if according to all relevant rules of the *lex fori*, the dispute cannot be removed from the jurisdiction of the national court'.[26]

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19 *Colvi v. Interdica*, Court of Cassation, 15 Oct. 2004, no. C.02.0216.N.

20 Maud Piers & Herman Verbist, *Concessiegeschillen en arbitrage: Welk recht bepaalt vatbaarheid voor arbitrage?*, NJW 619–626 (2005); Michael Traest, *De beoordeling van de arbitreerbaarheid van een geschil bij een exceptie van rechtsmacht: het Hof van Cassatie kiest voor de lex fori*, TBH/RDC May 492 (2005).

21 Herman Verbist, *Arbitrability of Exclusive Distributorship Agreements in Belgium:* Lex Fori *(and* Lex Contractus*)*, 22(5) J. Int'l Arb. 427–434, doi: 10.54648/JOIA2005027.

22 *Van Hopplynus Instruments v. Coherent Inc*, Court of Cassation, 16 Nov. 2006, Yearbook Commercial Arbitration, Vol. XXXI 587–588 (2006).

23 *See* among others, *NV Larssen and NV I.V.G. Lab Hoses v. I.V.G. Colbachini SpA*, Antwerp Court of Appeal, 15 Sep. 1997, TBH/RDC 1998; Commercial Court of Brussels, 6 May 1993, RW 1993–94, 474; Brussels Court of Appeal, 4 Oct. 1985, JT 1986, 93–95, Note A. Kohl, vol. XIV Yearbook Commercial Arbitration 618–620 (1979).

24 'The nonarbitrability limits that exist under national law have evolved materially over time, with historic skepticism about the arbitral process' ability to resolve particular categories of disputes eroding substantially in recent decades' (Gary B. Born, *International Commercial Arbitration*, vol. I, 775 (Kluwer 2009).

25 *Sebastian International Inc. v. Common Market Cosmetics S.A.,* Court of Cassation, 14 Jan. 2010, no. C.08.0503.N.

26 *Ibid.*

[18] Later, in 2011, in the context of commercial agency contracts, yet analogously applicable to distribution agreements, the Court of Cassation ruled that such disputes were not arbitrable unless the arbitrators were required to apply Belgian substantive law or the law of another country offering similar substantive protection to the commercial agent (or, by analogy, the distributor).[27] While remaining true to its previous pronouncements, the Court thus allowed for a degree of flexibility in terms of applicable law.

2 THE LONG-AWAITED REVERSAL: *THIBELO v. STOELZLE OBERGLAS*

[19] On 7 April 2023, the Court of Cassation finally fully reconsidered its stance and decided to bury its long-standing anti-arbitration exception by holding that distribution agreements of indefinite duration were arbitrable, regardless of whether the distributor enjoyed 'the protection of Belgian law'.[28] National commentators have described this landmark reversal as an 'earthquake' or 'atomic bomb'.[29]

[20] As such, the facts of the case do not present any eye-catching features likely to precipitate such departure. An Austrian manufacturer, Stoelzle Oberglas, supplied products to a Belgian distributor, Thibelo. The underlying distribution agreement was governed by Austrian law and contained an arbitration clause selecting Vienna as the arbitral seat. Following the Austrian manufacturer's unilateral termination of the distribution agreement in March 2018, the distributor sought damages pursuant to Belgian law before the Commercial Court of Turnhout. The supplier challenged the jurisdiction of the Commercial Court, raising a motion to compel arbitration. The motion, however, was denied.

[21] The Austrian supplier subsequently appealed this first-instance judgment. This time, the Antwerp Court of Appeal granted the motion to compel and affirmed the arbitration clause's validity while refusing to adjudicate on the merits.

[22] Shortly thereafter, in 2021, the Belgian distributor appealed to the Court of Cassation, arguing that when an arbitration clause deprives a distributor of its

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27 *Air Transat AT Inc. v. Air Agencies Belgium SA*, Court of Cassation, 3 Nov. 2011, no. C.10.0613.N; *see also United Antwerp Maritime Agencies v. Navigation Maritime Bulgar*, Court of Cassation, 5 Apr. 2012, no. C.11.0430.N.

28 *Thibelo*, *supra* n. 9, §7.

29 Cosmo Sanderson, *An 'earthquake' for distribution law in Belgium,* Global Arbitration Review (5 Jun. 2023); Thijs Vancoppernolle, *Nieuwe cassatierechtspraak over alleenverkoopwetgeving: géén loi de police en onvoorwaardelijk arbitreerbaar*, CorporateFinanceLab (26 May 2023); Pascal Hollander & Maarten Draye, *Belgium's Supreme Court Overturns Decades-Old Precedent and Allows Disputes About the Termination of Exclusive Distribution Agreements to Be Settled by Arbitration,* Kluwer Arbitration Blog (15 Sep. 2023).

protections under Belgian law that clause is invalid or, at least, unenforceable. Moreover, the Belgian distributor claimed that the Court of Appeal had not ascertained that Austrian law offered similar protections to Belgian law.

[23] In 2023, the Court of Cassation dismissed the appeal.

[24] The five-judge bench held that, under Article 6(2) of the European Convention, which resembles Article II(1) of the New York Convention, national courts must consider all relevant rules of the *lex fori* when deciding on nonarbitrability. Turning to its national rules, the Court referred to Article 1676(1) of the Belgian Judicial Code enacted in 2013.[30] Under this article, any dispute involving pecuniary claims may be submitted to arbitration. The Court concluded that a dispute regarding the termination of a distribution agreement is pecuniary and, in principle, arbitrable.[31]

[25] Still, the question remained as to whether Article X.39 of the Code of Economic Law provided for an exception to this principle. To answer this, given the primacy of Union law, the Court of Cassation drew upon a 2013 judgment by the Court of Justice of the European Union ('**ECJ**').[32] Citing *Unamar*, the Court observed that overriding mandatory provisions should be interpreted strictly and protect only 'essential' national interests in accordance with the European Union ('**EU**') choice-of-law regulation known as the Rome I Regulation.[33] This requires a 'detailed assessment' of the legislator's clear will, as well as the nature and objective of these alleged mandatory provisions.[34]

[26] With this in mind, the Court held that Article X.39 of the Code of Economic Law mainly protects private interests.[35] Departing from its precedents, the Court acknowledged that seen in this light, it is not an overriding mandatory provision under the Rome I Regulation.[36] It cannot therefore override the foreign law chosen by the parties to apply Belgian law. Nor can it make the arbitrability of a dispute conditional on the application of such law or of a foreign law offering equivalent protection.[37] Hence, a dispute regarding the termination of a distribution agreement is perfectly arbitrable, whatever the chosen applicable law.

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30 *Thibelo*, *supra* n. 9, §2.
31 Article 1676(4) of the Judicial Code adds that this rule is 'without prejudice to the exceptions provided by law'.
32 *Thibelo*, *supra* n. 9, §3.
33 C-184/12, *Unamar v. Navigation Maritime Bulgare*, EU:C:2013:663, §§47–51. *See* Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 Jun. 2008, on the law applicable to contractual obligations ('**Rome I Regulation**') OJ L 177, at 6.
34 *Unamar*, *supra* n. 33, §52.
35 *See* by analogy, in France: *Bugaboo International BV*, Paris Court of Appeal, 28 Feb. 2019, no. 17/16475.
36 *Thibelo*, *supra* n. 9, §6.
37 *Ibid*.

3 A FALLACIOUS AND HAZARDOUS RATIONALE

[27] In terms of outcome, the Court of Cassation's reversal may well please the international arbitration community. For it brings long-awaited order, homogeneity, and legal certainty for users and practitioners. Yet, it works based on some intellectual shortcuts that are, at least legally and formalistically, improper. These jerry-rigged syllogisms, again, partly highlight the misunderstanding surrounding arbitration law that gave birth to the past flawed legal precedent that had reigned in the Kingdom of Belgium for almost half a century.

[28] For this reason alone, more ink on this – now pragmatically dead – topic can be spilt. Three core points will be underscored: **(3.1)** mandatory rules do not provide an adequate, and legally accurate, answer as to the international arbitrability of a dispute; **(3.2)** relatedly, EU conflict-of-laws regulations are, likewise, ill-equipped to properly address arbitrability; **(3.3)** in contrast, an interpretation that conforms with higher ranking norms, such as the New York Convention and other treaties, should have guided the Belgian courts in deciding whether Article X.35 of the Code of Economic Law really precluded international arbitration (something they have hitherto failed to do). Since 1961, the answer to the question of whether such a prohibition exists most certainly remains a resounding 'no'. Article X.35 thereof neither expressly nor implicitly prohibits international arbitration. Nothing justifies this judge-made proscription.

3.1 A FLAWED CONFLICT-OF-LAWS APPROACH

[29] There are obvious reasons to believe that mandatory rules under the *lex fori* give substance to the notion of nonarbitrability under the same forum. Mandatory rules mirror the legislature's will to see a set of rules applicable in all circumstances, notwithstanding the will of the parties.[38] Put another way, they represent a conflict-of-laws approach which gives precedent to rules that are deemed so important that parties lose their freedom to deviate from them. As such, they can represent the legislative municipal embodiment of the public policy notion.

[30] Under a broad-brush approach, if there is a nexus with the *lex fori*, this seems a legitimate rationale for denying the right to arbitrate under a foreign law. But this approach turns a blind eye to the fundamental different legal standards applicable to a mere conflict-of-laws question under domestic law, including EU law, and nonarbitrability under international arbitration law.

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[38] George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 Am. Rev. Int'l Arb. 1, at 1–2 (2007).

[31] The New York Convention and the European Convention deal only with 'international' public policy.[39] As in Venn diagrams, the notion of mandatory rules may well overlap with the notion of international public policy as encapsulated by the nonarbitrability doctrine. Still, interpreting Articles 2(1) and 5(2)(a) of the New York Convention as encompassing any domestic overriding mandatory rule on the applicable law dilutes these narrow exceptions to arbitrability of strict application under an international context to a domestic one.[40] The threshold of 'international' implies that a vital question of public policy is at stake and that arbitration is unfit for this purpose. It protects the 'superiority of basic value choices of the local community' and concerns public matters affecting the community at large.[41] The opposite broad approach opens the door to consider, in an international setting, a commercial arbitration for a distribution agreement between two consenting professionals, surely well-advised when so consenting, as nonarbitrable.[42]

[32] Seen in a broader context, the Belgian anti-arbitration idiosyncrasy is a colourful illustration of the many inherent issues arising when conflating the two concepts. To cite but a few examples, these include: **(1)** its inane scope; **(2)** the failure to provide legally sound grounds for the prohibition; **(3)** the obvious shortcomings of the Court of Cassation's conflict-of-laws reasoning; **(4)** the associated nebulous burden imposed on national judges and parties; and **(5)** more profoundly, the far-reaching substantive and practical consequences of confusing the public policy exception and the nonarbitrability doctrine.

[33] First, the exception's limited scope calls into question its 'public policy' importance under the nonarbitrability doctrine. The Law of 27 July 1961, on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration does not regulate the interpretation or performance of exclusive distribution agreements in Belgium. These are left to parties' autonomy. The statute's remit is much narrower; it only deals with agreements of indefinite duration. Notably, when applicable, this statute solely governs the agreements' termination,

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39 *See* Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) Arb. Int'l 251, 253 (2003), doi: 10.1093/arbitration/19.2.249.

40 International Law Association, resolution 2/2002 on International Commercial Arbitration, 3 Apr. 2002(a): '[a]n award's *violation of a mere "mandatory rule"* (i.e., a rule that is mandatory but does not form part of the state's international public policy so as to compel its application in the case under consideration) *should not bar its recognition or enforcement*, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration'.

41 Stephan W. Schill, *Schreuer's Commentary on the ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* 566 (Loretta Malintoppi et al. eds, 2d ed. 2009).

42 This could be considered as a misinterpretation of the New York Convention's pro-arbitration stance, insofar as it is a step backwards from the Geneva Protocol's treatment of all 'commercial matters' as arbitrable.

or more precisely, the necessity of reasonable prior notice by the supplier. Failure to do so bestows the Belgian distributor with a right to an indemnity. Accordingly, distribution agreements that are not of 'indefinite duration' under this statute are arbitrable. Similarly, the performance and interpretation of all Belgian distribution agreements, be they of indefinite duration or not, are also arbitrable. Furthermore, as discussed above,[43] Article X.35 of the Economic Code does accept arbitration of distribution agreements by means of *ex-post* compromise. So, it is only the very limited in-scope subject matter of this statute that is, arguably for some, nonarbitrable. Strikingly, many arbitral adjudicative processes that govern the same economic actors, very similar facts, context, and legal questions do not raise any international nonarbitrability questions under Belgian law.

[34] Second, one would expect that a distributor in a long-term agreement would have anticipated – either expressly by saying so in the contract, or impliedly through reliance on applicable legal precedent – the termination of the business relationship. In principle, such a clause and the chosen law, or lack thereof, would typically represent an arm's-length bargain between the distributor and supplier. It can also be assumed that there are no issues of due notice or unconscionability. Both parties being sophisticated, the supplier is theoretically not forced under duress to do business with the supplier. Even so, this would raise other issues, including under contract, tort, or antitrust law. The opposite stance in favour of the exclusive distributor solely works on the assumption of a blatant and proven imbalance between the parties, thus placing the Belgian distributor in the consumer's role. While such imbalance can sometimes occur, explaining why other states have seen fit, justifiably or not, to enact similar laws,[44] these situations usually remain highly fact-dependent and do not facially prevent arbitration.[45] Intrinsically, such consumer-like imbalance totally precluding arbitration proceedings would likely, and most reasonably, taint the entire contractual relationship, not just the termination.

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43 *See* §§ 7 and 13 above.

44 For example, Art. L442-1 of the French Commercial Code: '[a]ny person engaged in the production, distribution or provision of services who abruptly terminates an established commercial relationship, even partially, in the absence of prior written notice which takes into account the duration of the commercial relationship, with reference to trade practices or interprofessional agreements, and, for the determination of the price applicable during the duration of the relationship, the economic conditions of the market in which the parties operate, shall be liable for damages'; in Brazil, Arts 22 and 24 of the Law of 28 Nov. 1979, no. 6.729/1979, known as the Ferrari Law.

45 For example, *Lavalin*, French Court of Cassation (commercial ch.), 1 Mar. 2017, no. 15–22.675: 'according to the competence-competence principle, it is up to the arbitrator to rule, by priority, on his own jurisdiction, … arbitration was not excluded by the mere fact that the mandatory provisions of Article [L442-1] of the Commercial Code were applicable … the Paris Commercial Tribunal lack jurisdiction'. *See SMP Technologies v. Axon Enterprise*, Paris Court of Appeal, 21 Mar. 2018, no. 18/01877.

[35] As a consequence, the Belgian nonarbitrability exception seemingly lacks a proper foundation, unless there is cumulatively: (1) consistent evidence of such disastrous imbalance against the Belgian distributor regarding termination; (2) a proven inability of the adjudicative arbitral process under foreign laws to remedy this; and (3) most importantly, on the international plane, a deleterious effect to the Belgian legal order because of this state of affairs justifying interference with, among other rights, *pacta sunt servanda* and foreign investors' legitimate expectations.[46] This relatively high bar is in keeping with the notion that a blanket prohibition of arbitration, rather than ex-post scrutiny, is overly harsh. That also explains why economic disputes between businesses are usually arbitrable. Against this backdrop, for almost half a century, *Audi-NSU v. Adelin Petit* and its progeny have been out of step with numerous treaties and the international consensus. For the last decade, this body of law has also contradicted Article 1676(1) of the Belgian Judicial Code.[47]

[36] Third, even if the Law of 27 July 1961 (now Articles X.35–39), provides a clearcut answer to what could be deemed as unreasonable prior notice of termination, many other internationally accepted legal tools are available to the distributor – notably, equity,[48] customs, or contract and tort law, including some sort of good faith and reasonableness principles applicable in many civil and common law countries for long-term relationships.[49] The Belgian parochial interpretation of the

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[46] The latter criterion seems appropriate, insofar as the 'public policy' arbitral exception enables a national court to protect the core interests of the legal order to which it belongs, and does not address any domestic minor issue. Put another way, as noted by Advocate General Ernest Krings, the provisions of the Belgian Code of Economic Law have an imperative character, 'but are not of a public policy nature, as they do not touch upon the essential interests of the state or of the community or did not fix private law rules on which the economic or moral order of the society is based. The latter, of course, referred to public policy – which was not at risk. He added that, when the risk of pressure that could be exercised on the individual party of the protected group of persons has disappeared, the clause could perfectly be concluded' (Herman Verbist & Johan Erauw, *Note: Arbitrability of Exclusive Distributorship Agreements with Application of Foreign Law confirmed by Belgian Courts after the Reform of the Belgian Arbitration Law of 2013*, in Annet van Hooft & Jean-François Tossens, 1 b-Arbitra Belgian Review of Arbitration 263–286 (2019); Opinion of Advocate General Ernest Krings, Pass. 1979, I, 1260, 1268).

[47] This provision makes plain that any dispute involving an 'economic interest' (i.e., a pecuniary claim) may be submitted to arbitration.

[48] Article X.36 of the Code of Economic Law emphasizes that: '[i]n the absence of an agreement between the parties, the judge will rule in equity and, where appropriate, taking account of customary practice'.

[49] For example, *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111, in which the High Court explained the importance of recognizing good faith and fair dealing in all contractual relationships, but especially those involving a longer-term relationship, such as franchise agreements and long-term distributorship agreements; *Braganza v. BP Shipping Ltd* [2015] 1 WLR 661; *Bates v. Post Office (No 3 common issues)* [2019] EWHC 606 (QB); but *see* among others, *MSC Mediterranean Shipping Company S. A v. Cottonex Ansault* [2016] EWCA Civ 789; *Lamesa Investments Ltd v. Cynergy Bank Ltd* [2021] ER (Comm) 573. *See also Renault*, Italian Corte di Cassazione, 18 Sep. 2009, no. 20106 in which, based on good faith, the court held that Renault's termination of a distribution agreement with approximately 200 car dealers was abusive, even though Renault relied on the terms

Law of 27 July 1961, does not therefore stand in a complete international legal vacuum that would warrant urgent domestic remedy. If necessary and legally justified, arbitrators have many options to penalize manifestly wrongful and unfair behaviours. Surprisingly, these other international potential remedies have been recognized by the Court of Cassation, which has accepted arbitration under foreign municipal rules that arrive at the same result as Belgian statutory law. In so doing, the Court has left up for grabs the best evidence against an amalgamation of nonarbitrability and mandatory rules. Inasmuch as the arbitrators can arbitrate under other rules if the outcome is similar to that of Belgian law, it cannot be a question of mandatory rules. The Belgian court's half-baked solution cannot squarely fit a conflict-of-laws approach, as that approach strictly only results in applying a particular set of rules – here, the relevant provisions of the Belgian Code of Economic Law. Simply put, the conflict-of-laws approach is not outcome-oriented and should neither abstractly, nor substantially, determine the outcome of the chosen law to consider its applicability. One specific set of national rules is applicable or it is not. Apart from displaying a faulty rationale, there is a parochial undertone in such subjective gauging by national courts. It opens the door to covertly reviewing the arbitral award on its merits – something courts should avoid if at all possible. As a result, this rationale is at odds with the internationally accepted stance and commitment against such an exceptional substantive review by domestic courts.[50]

[37] Fourth, and in particular at the pre-award stage, by asking the judge to assess if foreign laws offer similar substantive protection, the past jurisprudence in Belgium required the national judge to venture into the potential arbitral tribunal's mind, guessing what rules it will consider applicable, how it will apply them, and whether they will *mutatis mutandis* confer an alike pro-distributor protection as under the Belgian statute. This Freudian allocentric exercise proves detrimental to all parties involved. The inherent subjectivity in such a speculative and comparative analysis, particularly on the part of a judge with limited expertise, introduces significant legal uncertainty. Indirectly, but with no less significance, it elevates the risk of judicial bias against the foreign party. Moreover, this uncertainty, whether before or after the award is rendered, equally burdens

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of the contract. *See* Art. L442-1 of the French Commercial Code (e.g., *Canal plus*, Court of Cassation (commercial ch.), 20 May 2014, no. 13–16.398; *Comexpo Paris*, Court of Cassation (commercial ch.), 15 Sep. 2009, no. 08–19200) and Art. 1104 of the French Civil Code. *See also* Art. 5(3) of the Swiss Constitution, Art. 1375 of the Civil Code of Quebec 1991, Art. 7 of the Spanish Civil Code. *See also* Lord Neuberger, *Reasonableness and Good Faith in International Arbitration Law*, Gaillard Lecture of 31 Oct. 2023 (2023).

[50] For example , Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 Marq. L. Rev. 625, at 627–631 (1997).

arbitrators, as well as international and national legal counsels, who are faced with complex and potentially ambiguous appraisals.

[38] Apart from the great legal uncertainty it engenders, this defect is unnecessary for a well-defined nonarbitrable 'subject matter'. It is unnecessary to delve into the arbitral tribunal's purported mind for the national judge to deny the arbitrability of disputes dealing with ontologically nonarbitrable public matters. A national judge should only need to rely on clear municipal provisions prohibiting arbitration for certain matters in absolute terms, or sound legal precedent to the same effect, regardless of what has been enacted in other sovereign countries or the foreseeable view(s) of the arbitral tribunal on the applicable rules. That undesirable defect is thus avoidable and only arises from the initial flawed analysis that underlies the Belgian jurisprudence.

[39] Fifth, the impact of public policy on the arbitrability of a dispute does not prohibit arbitrators from applying mandatory rules, but only from hearing cases which, because of their subject matter, can only be heard by national courts. Pursuant to the Court of Cassation's jurisprudence, the suggested gauging exercise performed by the Belgian courts further demonstrates the danger of conflating the 'public policy exception' (Article V(2)(b) of the New York Convention) and the nonarbitrability doctrine (Article V(2)(a) thereof). As demonstrated by the existence of two separate subsections, albeit related, the two exceptions are distinguishable. Unlike the nonarbitrability doctrine, public policy objections to an award focus on the effect of the award's enforcement, not on the subject matter of the dispute. On the one hand, under the latter exception, the substantive results reached by arbitral awards must contradict public policy and cannot be recognized. National judges appraise the arbitral award's effect on their own legal order.[51] On the other hand, under the nonarbitrability doctrine, regardless of the results, the arbitral process itself is wholly prohibited. It is a jurisdictional objection against the arbitrators. Tellingly, by attempting to predict the outcome, or potential outcome, of the award, what the Court of Cassation is erecting is a veiled 'public policy' exception under Article V(2)(b), rather than a nonarbitrability analysis under subsection (a) thereof.

[40] At bottom, the idea that national courts can or, worse, should weigh whether other foreign laws provide for the same level of protection as Belgian law is reminiscent of a 'public policy exception' rather than an arbitrability prohibition. That reasoning presupposes that a particular outcome is favoured, instead of a jurisdictional bar to arbitration. Practically speaking, this mislabeling

[51] With respect to foreign law, public policy is not understood as imposing the application of legal norms, but rather as avoiding the result of such application. It is therefore a results-driven process.

has vitally important effects. For example, it enables the judge, and the arbitration-averse party, not only to bar arbitration at the enforcement stage, but far earlier, at the jurisdictional stage.[52] Equally, by confusing the concepts, a subject matter is prevented from entering *ratione materiae* into the field of international arbitration, although it should be admitted subject to judicial review.[53] Applying such flawed reasoning needlessly erodes confidence in the arbitration process, whose foundation is parties' autonomy, and violates the principle of judicial non-interference in international arbitral proceedings.[54] Conversely, this approach shows little respect for the competence-competence principle and arbitrators' jurisdictional autonomy.[55] Indeed, they are likely to decide to apply indirectly applicable Belgian mandatory laws by virtue of the agreed applicable foreign law.[56] Or, notwithstanding the agreed applicable law, for some commentators, they can do so to render an 'enforceable award'.[57]

[41] Incidentally, too, this materially expands the array of tactical litigations.[58] For instance, this helps to counter any legitimate anti-suit injunction based on the arbitration clause filed by the foreign supplier. Such mislabeling also allows Belgian distributors to delay or halt the arbitration proceedings, to challenge enforcement, or to force a settlement on terms more advantageous than warranted.

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52 Article II(1) of the New York Convention: 'State shall recognize an [arbitration] agreement … concerning a subject matter capable of settlement by arbitration'.

53 This distinction follows from Art. V(2)(b) of the New York Convention.

54 For examples of this principle, *see* Art. IV(1) of the European Convention: '[t]he parties to an arbitration agreement shall be free to submit their disputes'; Art. II(3) of the New York Convention: '[t]he court … shall … refer the parties to arbitration'; Art. V thereof: '[r]ecognition and enforcement of the award may be refused … where the recognition and enforcement is sought'. More generally, the logic of these conventions is built solely on the assumption of deference to the arbitral process, with some necessary and limited exceptions.

55 *See* Steven P. Finizio & Duncan Speller, *A Practical Guide to International Commercial Arbitration: Planning, Assessment and Strategy* 165 (Sweet & Maxwell 2010).

56 Rome I Regulation, Art. 9(3) provides that '[e]ffect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful' (*see also* Art. 7(1) of the Rome Convention); §187(2) of the Restatement (Second) Conflict of Laws.

57 Julian D. M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, 9 ICCA Congress Series 114–145 (Albert Jan van den Berg ed., Kluwer Law International 1999). *See also* '[i]n disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate instructions or ordering appropriate measures insofar as they consider this necessary to abide by those rules or to protect against challenges to the award' (ILA, Final Report: Ascertaining the Contents of the Applicable Law, at 23 (Recommendations 6, 13); ILA Resolution No. 6/2008 from the Biennial Conference in Rio de Janeiro, Aug. 2008). *Contra* Gary B. Born, *International Commercial Arbitration*, Ch. 19 (3d ed., Kluwer Law International 2021).

58 *See* Emmanuel Gaillard, *Seven Dirty Tricks to Disrupt Arbitral Proceedings and the Responses of International Arbitration Law*, 39(3) Arb. Int'l 361–378 (2023), doi: 10.1093/arbint/aiad037.

[42] In sum, applying this reasoning waters down the threshold justifying nonarbitrability, inappropriately trumps the arbitral tribunal's jurisdiction, leads to unnecessary litigation before national courts, and intrinsically contravenes the very purpose of the New York Convention. Indeed, the indiscriminate application of the 'public policy exception' to the nonarbitrability doctrine is not just a *non sequitur*. It effectively transplants a less stringent doctrine into a more rigorous and demanding legal environment, leading to unjustifiable and unpredictable outcomes.[59] In the process, it undermines the New York Convention's clear and straightforward language in Article V(2)(b) and (a)[60] by causing national courts to adopt irreconcilable interpretations, thus defeating the Convention's harmonizing goal.[61]

3.2 Inadequacy of an EU conflict-of-laws analogy

[43] As seen, the logical path trodden by the Court of Cassation in *Thibelo* took a detour via EU law and its recent case law to redefine the contours of what it deemed 'overriding mandatory' provisions. This detour was unnecessary in many ways.

[44] First of all, while conflict-of-laws answers are short-cut and reductive answers to questions of nonarbitrability, even these simplistic answers display some common features with the question of arbitrability, so that, in this case, one could expect an identical outcome when it comes to exclusive distribution agreements.[62] Interestingly, Article 9(3) of the Rome I Regulation provides that

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[59] What would remain of the Convention's substantive scope should every Contracting state prohibit arbitration whenever some domestic mandatory rules might not be applied?

[60] The existence of two paragraphs is no accident. The drafters of the Convention rejected a proposal by the French delegation that Art. V(2)(a) be deleted on the grounds that it unduly attributed international importance to domestic rules, and that it would be sufficient that an award comply with international public policy under Art. V(2)(b) (Travaux préparatoires, United Nations Conference on International Commercial Arbitration, Summary Record of the Eleventh Meeting E/CONF.26/SR.11, at 7).

[61] On the balkanization risk: Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115, at 167–185 (2018), doi: 10.36642/mjil.40.1.new.

[62] Article 9 of the Rome I Regulation: '[o]verriding mandatory provisions are 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'. *See also* Art. 7(2) of Rome Convention. In that regard, *see* in the Report on the Convention on the law applicable to contractual obligations by Prof. Mario Giuliano and Prof. Paul Lagarde (OJ 1980 C 282, at 1), especially at 27–28: '[t]he origin of this paragraph is found in the concern of certain delegations to safeguard the rules of the law of the forum (notably rules on cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage) which are mandatory in the situation whatever the law applicable to the contract may be. Thus the paragraph merely deals with the application of mandatory rules (lois d'application immediate; leggi di applicazione necessaria, etc.) in a different way from para. 1'.

effect may be given to foreign overriding mandatory provisions in light of their nature and purpose and the consequences of their application or non-application.[63] Relatedly, Article 21 thereof adds that the application of a provision of the law of any country may be refused only if such application is 'manifestly incompatible' with the 'public policy (ordre public)' of the forum.[64] Analogously, in *Eco Swiss*, the ECJ noted that annulment of or refusal to recognize an award 'should be possible only in exceptional circumstances'.[65]

[45] And so, the *Unamar* ruling handed down by the ECJ in 2013 merely confirms that overriding mandatory rules are by no means a blank cheque allowing States to introduce unnecessary and unjustified restrictions on the parties' freedom of contract.[66] The latter remains the 'cornerstone' of the Rome I Regulation.[67] Since 1979, Belgian courts have failed to consider the scope, nature, and objective of the purported exception to that core principle. That defect is particularly salient when dealing with 'international' public policy for arbitration in the context of the EU's internal market.[68] For this reason alone, considering that the Law of 27 July 1961, never expressly or implicitly prohibited arbitration, the now-obsolete past jurisprudence set a very poor precedent.

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63 The distinction drawn in Art. 9(2) of the Rome I Regulation ('[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum') does not affect the significance of this paragraph in that it illustrates how mandatory rules are to be examined. *See also* recital 37 thereof: '[c]onsiderations of public interest justify giving the courts of the Member States the possibility, in *exceptional circumstances*, of applying exceptions based on public policy and overriding mandatory provisions. The concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed *more restrictively*'.

64 The Hague Principles also emphasizes the 'exceptional' nature of overriding mandatory provisions. *See* Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, 11.10 (2015).

65 *See Eco Swiss*, *supra* n. 6, §35.

66 By analogy, from a teleological standpoint, the aforementioned strict legal standard is not entirely foreign to the standard applicable to restrictions on foreign direct investment. Even if the assessment takes place within a different legal setting, it restricts the state's freedom to limited, well-defined exceptions. *See* C-106/22, *Xella Magyarország Építőanyagipari Kft v. Innovációs és Technológiai Miniszter*, EU:C:2023:568, §§63–74.

67 *Unamar*, *supra* n. 33, §49.

68 Indeed, the EU market has unique characteristics that shape it and call into question its genuine 'international' nature. It operates under the framework of a quasi-federal constitutional legal order and a great deal of harmonized rules that bring its EU Member States much closer into alignment. What may or may not be considered a matter of 'international' public policy depends to a great extent on EU rules, the degree of legislative approximation, and the rulings of the ECJ. Of course, overlap between the EU and international concepts as interpreted by the state is possible, but confusing them results in a form of internalization or nationalization of the international criterion. Furthermore, Member States indistinctively apply the same legal test to all states, regardless of whether they are members of the Union. They therefore impose the same inappropriate standard to non-Member States that are not bound by EU law. In so doing, each Member State lacks a cogent and uniform legal standard applicable to non-Member States in line with its own individual international commitments.

[46] Second, and most importantly, conflict-of-laws regulations, whether in the EU or elsewhere, are ill-suited to correctly address a nonarbitrability exception. Sometimes they can help the tribunal to identify the applicable law(s), but rarely touch upon the tribunal's jurisdiction under the aforesaid exception. Remarkably, like the Rome Convention,[69] Article 1(2)(e) of the Rome I Regulation excludes from its scope 'arbitration agreements and agreements on the choice of court'. That makes sense, given that the Rome I Regulation was devised to complement the Brussels I Regulation, which also excludes arbitration from its scope.[70] This exclusion 'does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements'.[71] Yet, for some commentators, this exclusion covers only the arbitration clause itself but not the dispute referred to arbitration.[72]

[47] Even so, a conflict-of-laws analysis entails determining the substantive rights of the parties.[73] Apart from exhibiting the existence of some relevant nexus with a forum, and unless the rule addresses the nonarbitrability of a dispute, what substantive law 'should', and in the case of mandatory rules 'must', be applied has little to do with the nonarbitrability doctrine.[74] And most national arbitration laws do not regulate which law governs the question of arbitrability; rather they directly determine which disputes are arbitrable and which are not.[75] Of course, the misapplication, or lack of application, of a mandatory law can legitimately infringe the public policy of a forum under Article V(2)(b) of the New York Convention.

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69 Article 1(2)(d) of the 1980 Rome Convention on the law applicable to contractual obligations, OJ C 27, at 34.

70 Articles 1(2)(d) and 73 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, at 1. *See also* Gina McGuinness, *The Rome Convention: The Contracting Parties' Choice*, 1 San Diego Int'l L.J. 127, 139 (2000); Filip Vlček, *Applicability of Rome I Regulation in International Commercial Arbitration*, 354 Masaryk University Press (2019); Petr Bříza, *Zákon o mezinárodním právu soukromém: komentář* 692 (C. H. Beck 2014).

71 The recitals of the Rome I Regulation refer only to national courts and are silent on arbitration tribunals. *See* Giuliano & Lagarde, *supra* n. 62, at 1.

72 The Convention's and Regulation's exclusion of arbitration agreements also 'reflects, and confirms, the fact that those agreements are properly subject to specialized, *sui generis* choice-of-law rules, derived from Arts II and V(1)(a) of the New York Convention, rather than generally-applicable choice-of-law rules applicable to other contracts' (Born, *supra* n. 57, at 507–674). *See also* Burcu Yüksel, *The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union*, 7(1) J. Priv. Int'l L. 149–178 (2011), doi: 10.5235/174410411795375588; Davor Babić, *Rome I Regulation: Binding Authority for Arbitral Tribunals in the European Union?*, 13(1) J. Priv. Int'l L. 71–90 (2017), doi: 10.1080/17441048.2017.1288471.

73 These rights include applicable mandatory rules that are an integral part of the relevant legal framework.

74 Arbitrators are as well-equipped as national judges to apply mandatory rules. Allegiance to a particular state is likely not a prerequisite for the proper application of an overriding mandatory rule.

75 Loukas A. Mistelis, *Arbitrability, International and Comparative Perspectives*, in *Arbitrability: International and Comparative Perspectives* 1–18, at 11 (Loukas A. Mistelis & Stavros Brekoulakis eds, Kluwer Law International 2009).

Nonetheless, an analysis under this paragraph never totally excludes *ex-ante* arbitration. This is because arbitrators may apply overriding mandatory provisions, and there is no reason for the arbitrators to declare a dispute nonarbitrable because it involves such provisions.[76]

[48] At best, a misapplication of the Rome I Regulation provides no different or greater grounds for annulment or non-recognition of an award than a misapplication of domestic choice-of-law rules. Similarly, the misapplication of overriding mandatory rules would, as a matter of law, require more than simply pointing to the alleged misapplication to deny enforcement of the award on 'international' public policy grounds. It is thus puzzling that the Court of Cassation predicates its reasoning in *Thibelo* on the Rome I Regulation in lieu of pursuing a nonarbitrability analysis proper to international arbitration law.[77]

[49] On that score, when Member States decided to exclude arbitration from the scope of the Rome Convention, it is worth noting that the German and French delegations, in line with the International Chamber of Commerce's stance, emphasized particularly that 'any increase in the number of conventions in this area should be avoided'.[78] Surely, one of the conventions they had in mind was the New York Convention.[79]

3.3 A New York Convention-conforming interpretation

[50] Whilst it is true that international treaties, such as the New York Convention, leave to municipal laws some freedom to substantiate the very notion of arbitrability, they set forth inherent limits,[80] especially in monist countries like Belgium,[81] where international treaties are directly applicable norms that rank higher than domestic legislative acts and thus, in effect, fill in the aforesaid exception with meaning and give more context. Even when these treaties are

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[76] Even if the international arbitral tribunal owes no prior allegiance to the legal norms of a particular state.

[77] *Thibelo*, *supra* n. 9, §4.

[78] Giuliano & Lagarde, *supra* n. 62.

[79] *See also* European Commission, Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), 2005/0261 (COD), at p. 5, which mentions 'the exclusion of arbitration agreements and agreements on the choice of court as the majority of the replies to the Green Paper felt that the former *was already covered by satisfactory international regulation*'. *See also* Brussels I Recast Regulation: '[t]his should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 Jun. 1958 ("the 1958 *New York Convention*"), *which takes precedence over this Regulation*'.

[80] For example, *Eco Swiss*, *supra* n. 6, §35.

[81] Court of Cassation, 25 May 1971, Pass. 1971, 886.

not of direct effect, any other interpretation would contradict the state's international commitments and the Law of Nations.[82]

[51] A somehow simpler, treaty-complying interpretation is the only legally correct one.[83] These treaties include a built-in interpretative mechanism, both contextual and teleological, that sets the contours of the nonarbitrability doctrine. The Convention's strong pro-enforcement ethos, as compared with the Geneva Convention,[84] requires courts to apply an international, rather than a domestic, notion to identify subject matters capable of settlement by arbitration.[85]

[52] Consistent with this, US, French, Swiss, Swedish, and other national courts, as well as a substantial body of commentary and authorities, have distinguished between the treatment of nonarbitrability in the international and domestic contexts.[86] The special considerations and policies underlying international arbitration 'call for a narrower view of nonarbitrability in the international than the domestic context'.[87] By noting that only private interests are protected, *Thibelo* tacitly acknowledged that Article X.39 of the Code of Economic Law does not meet this test.

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[82] No rule of a state's internal law can be used to justify a breach of an international obligation according to Art. 27 of the Vienna Convention on the Law of Treaties ('**Vienna Convention**'), 1155 U.N.T.S 331 (1969). Also, in *Belhaj v. Straw*, Lord Sumption suggested that 'international law may none the less affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law. Although the courts are not bound, even in these contexts, to take account of international law, they are entitled to do so if it is appropriate and relevant' (*Belhaj & Anor v. Straw & Ors (Rev 1)* [2017] UKSC 3, §252). *See also R (SG) v. Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 per Lord Carnwath, §115, Lord Hughes, §137, and Baroness Hale, §§239–240; *Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116, 143E-G; *Garland v. British Rail Engineering Ltd* [1983] 2 AC 751, 771; *Assange v. Swedish Prosecution Authority* [2012] 2 AC 471, §122. *See also* Born, *supra* n. 61.

[83] Although similar, the assimilation of overriding mandatory rules with nonarbitrability fails to address, let alone analyse, the subject matter of the nonarbitrability doctrine in its proper context. It fails to recognize that, due to the New York Convention and other relevant treaties, the issue has never been about overriding 'mandatory' rules, but rather about whether the arbitral adjudicative process is wholly unfit to deal with a subject matter for fundamental reasons of public policy.

[84] Article 1(b) of the 1927 Geneva Convention conditioned recognition and enforcement on a positive showing that the subject matter of the award was capable of settlement by arbitration under the law of the country where the award was relied upon. By contrast, the New York Convention only provides for a possibility. It 'may' be refused.

[85] Fouchard Gaillard Goldman, *International Commercial Arbitration* 995, §1707 (E. Gaillard & J. Savage eds 1999); Laurence Craig, William W. Park, Jan Paulsson, *International Chamber of Commerce Arbitration* 62–63 (2000); Gary B. Born, *International Commercial Arbitration* 3697–3698 (2d ed., Kluwer 2014); Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 152–53 (1981).

[86] *See* Born, *supra* n. 57, Ch. 6.

[87] *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974); *Sojuznefteexport (SNE) v. Joc Oil Ltd*, 7 Jul. 1989, XV Y.B. Comm. Arb. 384, 397 (Bermuda Court of Appeal) (1990); *see also Mgmt. Tech. Consultants v. Parsons-Jurden*, 820 F.2d 1531 (9th Cir. 1987).

[53] On the same note, the nonarbitrability doctrine, as an exceptional safety valve, necessitates some proper domestic legal roots to displace the pro-arbitration international commitment set forth in the New York Convention.[88] Such a requirement echoes the obligation of reciprocity under Article XIV of the Convention and of good faith imposed on states in the performance of treaties under Article 31 of the Vienna Convention. Notably, according to the latter obligation, a party shall abstain from acts, *in casu* unnecessary and improper exceptions, deliberately inconsistent with the object and purpose of a Treaty and thus from impeding its proper execution.[89]

[54] In general, national courts have required a 'clear and express statement of legislative intention before concluding that a subject is nonarbitrable in an international setting'.[90] This is unsurprising as the UNCITRAL Model Law contemplates that nonarbitrability exceptions will take the form of legislative enactments.[91]

[55] Logically, legislative provisions, such as the Law of 27 July 1961, requiring that particular types of claims or disputes be resolved in specified courts or by prescribed procedures, do not render those claims or disputes nonarbitrable. Those provisions do not dispute the competence of arbitrators to rule upon such disputes. Article 4 even clarifies that the distributor 'may' ('kan' or 'peut') bring legal proceedings before the Belgian courts, demonstrating that this is only a purely unilateral private right. This illustrates that, objectively considered, the 'subject matter' of the dispute is not in and of itself incapable of settlement by arbitration.

[56] Properly understood, these provisions mainly deal with the judicial internal organization and good administration of a state.[92] Regardless of these provisions' mandatory nature, the preparatory legislative work and statutory wording of the Law of 27 July 1961, never mentions any issue of nonarbitrability under international arbitration law.[93] Party autonomy has never been weighed against any public interest justifying any prohibition to that effect. The text refers only to the state's

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88 As stated by the Singapore High Court, 'the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist' (*Aloe Vera of Am., Inc. v. Asianic Food (S) Pte Ltd*, 10 May 2006, XXXII Y.B. Comm. Arb. 489, 504 (2007)).

89 Good faith covers the narrower doctrine of the abuse of rights (*see* Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 367 (Nijhoff 2009).

90 *See* Born, *supra* n. 57, Ch. 6.

91 Article 1(5) of the UNCITRAL Model Law.

92 Particularly, it is only 'if' a dispute is brought before Belgian courts that the judge will exclusively apply Belgian law under Art. X.39 of the Code of Economic Law.

93 *See Mitsubishi*, *supra* n. 6, at 628: 'if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history'.

judiciary: 'judges' and 'Belgian tribunals', not to arbitral tribunals.[94] Accordingly, under the hierarchy of norms, there is no national legislative intention to override the treaty-based pro-arbitration framework deriving from the New York Convention or the European Convention.[95]

4 CONCLUSION: A LEGAL RUBIK'S CUBE

[57] The Court of Cassation's haphazard rationale, upon close examination, presents itself as a faulty Rubik's Cube, whichever way it is turned – nonarbitrability or public policy; whatever the angle – European or international. It does not line up perfectly, nor does it present a cogent or fully satisfactory outcome.[96]

[58] Arbitrability forms part of a wider range of tools, such as the mandatory rules of the forum, that override party autonomy and enable a national court to protect the core interests of the legal order to which it belongs. At the same time, in the context of international arbitration law, Belgium's reasoning on overriding mandatory rules more aptly embodies a 'public policy exception' rather than a nonarbitrability one. In line with binding treaties, the former and the latter exceptions differ in fundamental, and non-academic, respects. Different colours for different sides of the cube, so to speak.

[59] Nonarbitrability challenges the enforceability of an arbitration agreement (even when it is raised at the award-enforcement stage) whereas, in this setting, public policy normally challenges only the award.[97] These different considerations call for different legal standards in line with states' international commitments to this effect. These include greater deference to arbitrators and the competence-competence principle when nonarbitrability is not at stake. Just as importantly, the unfettered assimilation of a lesser 'mandatory rule' question to a stricter 'nonarbitrability' answer is likely to generate improper and unforeseeable exceptions to arbitration. The Court of Cassation and, in fairness, most academic literature seem to have ignored this distinction.

[60] Avoiding such a mismatch is of vital importance in a context where there is a widespread desire, supported by case law,[98] to maintain a broad notion of

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94 Article X.39 of the Code of Economic Law.

95 Not to mention that these treaties entered into force in Belgium after the Law of 27 Jul. 1961: *lex posterior derogate priori*.

96 This lack of harmony persists notwithstanding the many potential applicable rules, because Belgian jurisprudence had long operated on the basis of erroneous assumptions about international arbitration law.

97 Fabien Gélinas & Leyla Bahmany, *Arbitrability: Fundamentals and Major Approaches* 5–18 §33 (Kluwer Law International 2023).

98 *Mitsubishi*, *supra* n. 6; *Eco Swiss*, *supra* n. 6; *Labinal*, *supra* n. 7. *See also* Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 Duke L.J. 1279, at 1291 (2000), doi: 10.2307/

arbitrability, and where mandatory rule issues arise in most arbitration cases.[99] Further, by sidestepping many adjacent, tangential, and intricate conflict-of-laws issues, while addressing the truly relevant one, Belgium (and other unnamed culprits) would also avoid being confronted with puzzling legal questions.

[61] If a state wishes to prohibit international arbitration for specific 'subject matter', it can do so. If it so chooses, however, it should do so expressly, thereby providing legal clarity and certainty while properly rebutting the New York Convention Article II's pro-enforcement presumption.[100] Such a stance benefits practitioners, enabling them to provide clear guidance when advising clients on arbitration agreement drafting. Equally, such a bright-line rule suits national judges and arbitrators, who can legitimately avoid applying vague open-ended concepts that require a degree of subjective appreciation and lack reliability.[101]

[62] At common law, this may seem less salient. Yet, alongside a presumption of arbitrability, well-established legal precedents can and effectively do achieve the same result.[102] In a civil system, such as Belgium's, traditionally the judge is only the 'mouthpiece of the law'.[103] In *Thibelo*, there was no clear express or implied statutory intent to prohibit international arbitration, be it under the Law of 27 July 1961, or

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1373012: '[i]n recent years, however, courts have expanded the category of arbitrable disputes to include issues that are normally considered questions of public law and that previously had been inarbitrable'.

99 Jeffrey Waincymer, *International Commercial Arbitration and the Application of Mandatory Rules of Law*, 5(1) Asian Int'l Arb. J. 7 (2009), doi: 10.54648/AIAJ2009001: 'Blessing suggested that mandatory rule issues arise in more than 50% of modern arbitrations'.

100 It is 'necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration' (*Mitsubishi*, *supra* n. 6).

101 Having said that, when positively defining arbitrable matters, even civil law systems heavily rely on jurisprudence. Example, Art. 2059 of the French Civil Code states: '[a]ll persons may enter into arbitration agreements in relation to the rights they can freely waive', and Art. 2060 thereof states: '[o]ne may not enter into arbitration agreements … more generally in all matters concerning public policy' (however, there is a presumption of arbitrability that requires an express or implied restriction in the relevant statute for a dispute to be inarbitrable); Art. 177 of the Swiss Private International Law Act (PILA 1987) states: '[a]ll pecuniary claims may be submitted to arbitration'; and Art. 1030(1) of the German Code of Civil Procedure (ZPO 2005) states: '[a]ny claim under property law may become the subject matter of an arbitration agreement. An arbitration agreement regarding non-pecuniary claims has legal effect insofar as the parties to the dispute are entitled to conclude a settlement regarding the subject matter of the dispute'; Art. 2639 of the Civil Code of Québec 1991: '[d]isputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration'.

102 Gélinas & Bahmany, *supra* n. 97, §90: 'all the common law jurisdictions that have been the focus of this research [USA, Canada, England and Wales, Hong Kong, Singapore] require either an express/implied restriction in the relevant statute or there to be a conflict between arbitration and the statute's underlying purposes. Of the civil law jurisdictions, only France and Québec apply such a presumption'. *See also W.R. Grace & Co. v. Local Union 749*, 461 U.S. 757, 766 (US S. Ct. 1983): 'public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests"'.

103 Charles Montesquieu, *The Spirit of Laws* Book XI, Ch. 6 (1748).

the relevant provisions of the Code of Economic Law. There was, therefore, no legitimate reason to carve out an exception.

[63] Practically speaking, in civil and common law, such a legally rigorous interpretation fosters international trade[104] and national growth, by bolstering party autonomy, trust, and above all, legitimate expectations. Such expectations are not merely legal niceties; they have tangible and practical implications. Until the *Thibelo* case, in countless reported and unreported cases foreign suppliers, large and small, found themselves before the Belgian courts, incurring unnecessary legal costs and human resources, in spite of a legally binding arbitration clause signed in good faith and Belgian distributors' unequivocal and clear promises to the contrary.[105] Moreover, if some claims remained in the arbitral proceedings, both parties ended up facing additional costs and other inefficiencies arising from multiple proceedings.[106] Arbitrators, too, found themselves in an uncomfortable position, torn between their adjudicatory duties and poorly reasoned national judgments denying their competence.

[64] Considering the frailty of the parochial justifications grounding the 'Belgian nonarbitrability' exceptions, including for the commercial agent, previous jurisprudence failed to furnish any intelligible and legitimately foreseeable answer justifying the repudiation of the foreign trader's trust in its Belgian counterpart's written consent, its legal system, and equally, its chosen neutral tribunal.[107] That must have left foreign traders in disbelief.[108] Thus, while the syllogism underpinning *Thibelo* resembles a faulty Rubik's Cube, this judgment nonetheless represents a move in the right direction, albeit an imperfect one.

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[104] *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972): '[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts'.

[105] *Hamilton v. Mendes* (1761) 2 Burr 1198, 1214, Lord Mansfield: '[t]he daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case'.

[106] Finizio & Speller, *supra* n. 55, at 171.

[107] By and large, this deformation of the nonarbitrability doctrine, or to use a more colourful term, weaponization, shows scant respect for all the widely recognized benefits underpinning international arbitration.

[108] *See* William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 Tul. L. Rev. 647, 702 (1989): 'the *role of arbitration in the process of global wealth creation* normally is justified by neither speed nor cost, but rather because its neutrality of forum and delocalized procedure provide a means of avoiding the "hometown justice" of the other party's judicial system … This special *need for neutrality of forum* led the Supreme Court to allow a *wider scope for subject matter arbitrability* in international arbitration than in domestic'.