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I. Introduction

Throughout human history, states have invoked a variety of sanctions to achieve certain political goals, to protect their essential interests, or to punish other provocative states.[1] In particular, following the cease-fire

[1] *See* KERN ALEXANDER, ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY 1 (2009).

of World War II, many powers in the world started to realize that another global-scale war must not occur again and shifted their attention to economic sanctions instead of military actions.[2] Coupled with the collective self-reflection on the ravages of two world wars, a more interdependent and free trade structure has emerged in the modern global economy and contributed to the greater spotlight on economic sanctions as an effective means to achieve a political, diplomatic objective.[3] Economic sanctions, by nature, intend to "restric[t] foreign trade and finance . . . ."[4] More specifically, trade sanctions are carried out to "prevent the flow of services and commodities between one or several sanctioning sates . . . and a target state."[5] As another type of economic sanctions, financial sanctions aim to "impede the flow of finance towards a target state or targeted individuals and entities."[6] Due to such inherent nature and functions, economic sanctions tend to give rise to international commercial disputes over the validity or non-performance of commercial contracts.[7] While embarrassments emanating from economic sanctions would not differ depending on whether the disputes are brought to courts or arbitral tribunals, complexities surrounding economic sanctions are more likely to arise in the context of international arbitration.[8] This is because arbitral tribunals are less familiar with the application of rules that are alien to the applicable law chosen by the parties due to the dominant concept of 'party autonomy' in international arbitration.[9] With this in mind, this research will focus on the challenge that arbitration tribunals are confronted with in determining whether to give effect to economic sanctions that run contrary to the applicable law chosen by the parties.

In tackling this challenging task, the research will start with preliminary inquiries, such as how to characterize economic sanctions when determining whether to give effect to economic sanctions in international arbitration. This section will reveal that economic sanctions can qualify as internationally mandatory rules. After this preliminary analysis, the article will proceed to its methodology. In short, the methodological section will stress that arbitrators should be

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[2] *Id.* at 20.

[3] *Id.* at 20-29.

[4] *Id.* at 10.

[5] MERCÉDEH AZEREDO DA SILVEIRA, TRADE SANCTIONS AND INTERNATIONAL SALES: AN INQUIRY INTO INTERNATIONAL ARBITRATION AND COMMERCIAL LITIGATION Para. 26 (Kluwer Law International 2014).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

illuminated by a hybrid theory incorporating private international law, international commercial arbitration, and public international law to resolve the theoretical and practical problems of economic sanctions in international arbitration. Following this, the research will shed light on the controversy over arbitrators' authority to apply economic sanctions as internationally mandatory rules. In this phase, it should be noted that some authors adhering to the perception of international arbitration as a transnational system of justice take the restrictive approach, whereas others, guided by private international law mechanisms in respect of the overriding mandatory rules, advocate the discretionary-but-structured view.[10] While scrutinizing the conflicting views on the applicability of economic sanctions as internationally mandatory rules, the research will introduce some notable formula or criteria for when arbitrators should apply economic sanctions as internationally mandatory rules, which has been suggested by a couple of critics. In the last part, drawing on hybrid insights from public international law principles, private international law rules, and international arbitration theories, the article will present its solution customized for arbitrators confronted with the applicability of economic sanctions.

II. Some Preliminary Inquiries- Characterization of Economic Sanctions

Before going further, it would be necessary to address the preliminary question of how economic sanctions are characterized from a private international law perspective. According to the approach that regard economic sanctions as factual circumstances, a ban on trade should be taken into account as "an event of *force majeure*" under the applicable law in determining whether non-performance of a party relying on the ban can be justified.[11] Also, a foreign economic sanction, as a factual element of public policy or international comity under the applicable law, might render a sales contract in conflict with the sanction illegal or immoral.[12] In contrast, proponents of the legal approach characterize an economic sanction as a legal norm that is directly applied to assess the validity of a contract irrespective of the applicable law.[13] Under the legal approach, the applicability of economic sanctions should be determined by invoking private international law mechanisms such as Article 9(3) of the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual

[10] *See infra* Section IV.

[11] Hans van Houtte, *Trade Sanctions and Arbitration*, 25 INT'L BUS. LAW. 166, 167 (1997).

[12] AZEREDO DA SILVEIRA, *supra* note 5; Houtte, *supra* note 11.

[13] Houtte, *supra* note 11.

Obligations (the Rome I Regulation).[14] In between these two approaches, there is a compromising school of thought, which seems to be prevailing among critics. According to the approach, the economic sanction affecting the performance of a contract should be taken into account as fact whereas the trade prohibition concerning the validity of a contract should apply as law.[15] By way of example, Dr. Brunner characterized export or import restrictions, embargos, and other trade sanctions as "legal impediments," and then divided them into the following two types: (i) "directly applicable rules" that "may cause the invalidity of the contract in whole or in part," and (ii) "a factual element" which justifies "an exemption for non-performance."[16]

Upon a closer examination of these approaches, only the legal and compromising approaches deserve to be noted in current private international law. Furthermore, comparing the two approaches with each other, it can be noted that the difference lies merely in how to treat the sanction affecting the performance of a contract.[17] Under the compromising approach, the determination of whether to give effect to a sanction in relation to justification for non-performance depends on the governing law chosen by the parties.[18] That is, what matters in the determination is not the nature or purpose of the sanction concerned, but the criteria laid down in the *lex contractus*.[19] Due to this, even an indispensable and urgent economic sanction might be disregarded if the applicable law does not allow room for its application.[20] In addition, even when a sanctions measure comes into play, to determine whether performance of contractual obligations is made impossible, the adjudicator must not take any economic sanction currently in effect across all jurisdictions; but instead, enquire into which sanction, alien to the applicable law, has a "close" connection with the dispute or the contractual relationship.[21] That being said, this enquiry requires the private international law analysis, which is different from the legal assessment of normal factual events pursuant to the applicable law.[22]

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[14] AZEREDO DA SILVEIRA, *supra* note 5, para. 81.

[15] *See, e.g.*, CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 272-73 (2008); Andrew Barraclough & Jeff Waincymer, *Mandatory Rule of Law in International Commercial Arbitration*, 6 MELB. J. INT'L. L. 205, 217-18 (2005).

[16] *Id.* at 272-73.

[17] *Id.* at 273-74.

[18] *Id.* at 274-75.

[19] *Id.*

[20] AZEREDO DA SILVEIRA, *supra* note 5, para. 72.

[21] Barraclough & Waincymer, *supra* note 15.

[22] AZEREDO DA SILVEIRA, *supra* note 5, at para. 81.

Furthermore, even when an economic sanction is invoked in order to justify non-performance of a contract, unless adjudicators give effect to the sanction as a separate rule or norm (not as a factual element), it is not straightforward to explain why the sanction has a binding effect on the contractual relationship of the parties that might otherwise remain intact. In other words, it can be said that the effect of a sanction on a contract should be explained by its legal nature, which makes the sanction binding on the parties to the contract. Also, from a practical perspective, it is not always possible to make an unequivocal distinction between the circumstances where an economic sanction is relevant in relation to the non-performance of a contract and those where an economic sanction arises with regard to the validity or legality of a contract. Taking these into account, it would be undeniable that even when an economic sanction allegedly acts as fact in the case of making the performance of a contract impossible, it should be treated as law, like other instances such as making a contract illegal or invalid where contemporary critics agree that economic sanctions should be taken into account as law.

Yet, even though economic sanctions are characterized as law, the question remains to be addressed how they should be categorized within the "law" framework. For this purpose, as long as economic sanctions should be taken into account as law, most literature on the subject of mandatory rules or economic sanctions explicitly categorizes economic sanctions as overriding mandatory rules, or at least seems to present their views under the premise that economic sanctions have the nature of mandatory rules.[23] This characterization is predicated on the notion that the concept and purpose of economic sanctions are squarely compatible with those of overriding mandatory rules, most notably as defined by Article 9(1) of the Rome I Regulation. [24] Drawing on such characterizations of economic sanctions, the other sections in this research might be guided by the private international law theory on overriding or foreign mandatory rules governing domestic court proceedings, despite its incongruity with the international arbitration regime.[25] What is more, in terms of the terminology, even though a lot of literature uses overriding mandatory rules or foreign mandatory rules even in the context of

[23] *See, e.g.*, *Id.* at 83-89; Barraclough & Waincymer, *supra* note 15, at 218; JOHN SAVAGE & EMMANUEL GAILLARD, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL ARBITRATION *passim* (Kluwer Law International 1999); Karl-Heinz Böckstiegel, *Applicable Law in Disputes Concerning Economic Sanctions: A Procedural Framework for Arbitral Tribunals*, 30 ARB. INT'L 605, 609-10 (2014); Bernardo Cortese, *International Economic Sanctions as a Component of Public Policy for Conflict-of-Laws Purposes*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW / LES SANCTIONS ÉCONOMIQUES EN DROIT INTERNATIONAL 728-29 (Laura Picchio Forlati & Linos-Alexander Sicilianos eds., 2004).

[24] AZEREDO DA SILVEIRA, *supra* note 5, at 95-98.

[25] BRUNNER, *supra* note 15.

international arbitration, this article will label those rules as internationally mandatory rules. This is because, while the term "overriding mandatory rules" or "foreign mandatory rules" presupposes a forum or forum law in domestic court proceedings, international arbitration has neither a forum nor forum law. In this regard, "internationally mandatory rules" would better suit international arbitration than overriding or foreign mandatory rules.[26]

III. The Need for a Hybrid Theory of Private International Law Rules, International Arbitration Theories and Public International Law Principles

As briefly noted in the previous section, since economic sanctions can be characterized as internationally mandatory rules, the private international law theory on overriding mandatory rules might provide guidance for arbitral tribunals requested to determine whether to apply economic sanctions. In this connection, the private international law rules adopted by some jurisdictions regarding the application of overriding mandatory rules (most notably, Article 9(3) of the Rome I Regulation) and the underlying principles could be a useful tool for arbitral tribunals.

However, those rules were designed for domestic courts, and thus do not consider the distinct characteristics of international arbitration or the general principles governing the international arbitration regime. First of all, what matters under the private international law rules is the distinction between forum law and foreign law. In contrast, international arbitration has neither a forum nor a forum law.[27] Instead, in the context of international arbitration, the law of the seat of arbitration, or the state where enforcement is foreseeably sought, attracts arbitrators' attention due to their concerns over refusal of enforcement or annulment of an award that they rendered under the New York Convention.[28] Moreover, considering how party autonomy is the cornerstone of international arbitration, it would be logically acceptable that arbitrators should be bound by the parties' choice of the applicable law to a greater extent than domestic court judges. In this respect, before discussing the authority of arbitral tribunals to take economic sanctions into account, there is a need to examine the question of whether international arbitration theories

[26] Professor Jan Kleinheisterkamp already used the term of "internationally mandatory laws" in Jan Kleinheisterkamp, *The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements*, 3 WORLD ARBITRATION & MEDIATION REV. 91, 93 (2009).

[27] BRUNNER, *supra* note 15, at 265.

[28] *See* Cortese, *supra* note 23, at 739-41; AZEREDO DA SILVEIRA, *supra* note 5, at 188, 194; SAVAGE & GAILLARD, *supra* note 23, at 898.

emanating from the perception of international arbitration as a consensual means of dispute resolution conflict with the application of mandatory rules by arbitral tribunals.

In addition to such insights from private international law and international commercial arbitration theories, public international law should be another source of methodological insights for the purpose of this research. This is due to the public international law character of economic sanctions that is not found in other mandatory rules.[29] In this regard, Dr. Cortese observed that "the appreciation of a situation in which international (economic) sanctions are adopted involves a complex assessment of the state of international law."[30] In a similar vein, Dr. Azeredo da Silveira also noted that "[b]efore addressing the effects of the sanction on the contract, . . . the deciding court must settle a matter of a private international law nature involving considerations of public international law." [31] Specifically, it is recognized that economic sanctions are subject to the limits that international law imposes with regard to the legality and legitimacy of a sanction and the principles governing jurisdiction in international law.[32] Furthermore, given the fact that there are a variety of economic sanctions in terms of scope and purpose, the effect of a sanction on an arbitrators' determination of whether the sanction should be taken into account can vary depending on its categorization.[33] In this context, arbitral tribunals must deal with "preliminary questions of [public] international law" in relation to economic sanctions before determining whether to apply the economic sanctions.[34]

For these reasons, while private international law theory would be the main instrument for this analysis, it would not suffice to provide solutions customized for arbitrators confronted with the issue of economic sanctions. In the following section, the research will be illuminated by public international law principles and international commercial arbitration theories as well as private international law rules.

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[29] Cortese, *supra* note 23, at 742.

[30] *Id.*

[31] AZEREDO DA SILVEIRA, *supra* note 5, para. 98.

[32] ALEXANDER, *supra* note 1; Cortese, *supra* note 23, at 743 ([T]he lawfulness of the sanction is still to be checked, depending as it does on the limits international law imposes").

[33] Cortese, *supra* note 23, at 746.

[34] *Id.*

IV. Controversy over Arbitrators' Authority to Apply Economic Sanctions as Internationally Mandatory Rules

1. Introductory Remark

International arbitration has neither a forum nor forum law.[35] Thus, in international arbitration, any mandatory rule external to the contractually applicable law could be characterized as overriding or foreign mandatory rule in the 'private international law' parlance.[36] However, there is no private international law mechanism meant to determine whether arbitral tribunals must or are allowed to give effect to an internationally mandatory rule.[37] At this juncture, two main approaches emerge as feasible methods of determining whether to give effect to economic sanctions as internationally mandatory rules.[38] Some argue that arbitrators are entitled to apply only a very limited category of economic sanctions falling within the concept of transnational public policy.[39] In contrast, others are in favor of providing arbitrators with more discretion to apply mandatory rules, provided that those rules meet a certain set of conditions.[40] This section will highlight the differing approaches towards arbitrators' authority to apply economic sanctions as internationally mandatory rules, and introduce various formula for when mandatory rules are applied by arbitrators.

2. Restrictive Approach based on the Concept of "Transnational Public Policy"[41]

There is no doubt that international arbitration enshrines "the parties' autonomy to select the substantive law governing their commercial relations."[42] Out of respect for the principle of party autonomy, arbitrators have traditionally been reluctant to give effect to mandatory

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[35] BRUNNER, *supra* note 15, at 265-66.

[36] SAVAGE & GAILLARD, *supra* note 23, at 849; Brunner, *supra* note 15, at 265-66; AZEREDO DA SILVEIRA, *supra* note 5, at paras. 152, 174.

[37] SAVAGE & GAILLARD, *supra* note 23, at 848-49, para. 1517-18; AZEREDO DA SILVEIRA, *supra* note 5, para. 174.

[38] Barraclough & Waincymer, *supra* note 15, at 224-27.

[39] *Id.*

[40] *Id.*

[41] For the concept of "transnational public policy", *see e.g.,* Pierre Lalive, *Transnational (or International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION (Pieter Sanders ed., 1987).

[42] Gary Born, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 7 (2d ed. 2017); Savage & Gaillard, *supra* note 23, at para. 1421.

rules other than those chosen by the parties.[43] Also, the perception of international arbitration as a "transnational system of justice"[44] tends to make arbitrators recoil at the concept of internationally mandatory rules which are, by nature, intended to serve "specific public interests."[45] This is because, considering such perception, arbitrators were deemed not to owe allegiance to any particular state or its public interests.[46] For those who adhere to the transnational and consensual aspects of international arbitration, the application of internationally mandatory rules belonging to a legal system other than that chosen by the parties would come across as undermining the neutral and transnational character of international arbitration.[47]

From these perspectives, when it comes to internationally mandatory rules, it has been argued that arbitral tribunals are authorized to apply overriding mandatory rules enacted by a state other than that of the applicable law only if the rules reflect transnational public policy.[48] Under this cautious approach towards internationally mandatory rules, the application of those rules is governed by the theory of transnational public policy.[49] Savage and Gaillard, two advocates of this approach, opined that "by applying mandatory rules other than that of the *lex contractus* without justifying their application on the basis of international public policy, arbitrators run the risk of exceeding the terms of their brief . . . ."[50] In a similar vein, Dr. Brunner observed that "a foreign mandatory rule should only be applied if it is to be characterized as *transnational public policy rule*."[51] This approach can find its support also in Article 9(2) of the International Law Institute's 1991 Resolution on the Autonomy of Parties in International Contracts between Private Persons or Entities, setting out that "[i]f regard is to be had to mandatory provisions . . . such provisions can only prevent the chosen law from being applied . . . if they

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[43] SAVAGE & GAILLARD, *supra* note 23, at para. 1526.

[44] Emmanuel Gaillard, *International Arbitration as a Transnational System of Justice*, *in* ARBITRATION- THE NEXT FIFTY YEARS 66 (Albert Jan Van Den Berg ed., 2012).

[45] Jan Kleinheisterkamp, *The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements*, 3 WORLD ARBITRATION & MEDIATION REV. 91, 93 (2009).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] SAVAGE & GAILLARD, *supra* note 23, at para. 1520. "[T]he grounds for the application of such rules do not lie in the mandatory rules doctrine but in that of international public policy." *Id.*

[50] SAVAGE & GAILLARD, *supra* note 23, at para. 1528.

[51] BRUNNER, *supra* note 15, at 273-74.

further such aims as are generally accepted by the international community."[52]

In practice, according to Savage and Gaillard, this approach appears to be most favored by arbitrators.[53] For example, the arbitral tribunal in an ICC case recognized the principle of transnational public policy as the criterion for giving effect to internationally mandatory rules, holding that "the conclusion might be different if the national mandatory law had to be considered as reflecting a principle of international public policy."[54]

While this approach is faithful to the consensual and transnational notion of international arbitration, it nevertheless has drawbacks. In particular, Barraclough and Waincymer indicated that "the difficulties with transnational public policy are . . . the evidentiary difficulty . . . [of] establishing a given principle's universality." [55] Furthermore, the approach based on transnational public policy enables the parties to avoid mandatory rules meant to protect a state's essential public interests, which might pose a threat to the legitimacy and perpetuity of international arbitration.[56]

3. Discretionary-but-Structured Approach adapted from Private International Law Rules

As opposed to the approach which keeps internationally mandatory rules away from international arbitration, there is another school of thought which draws analogy from domestic courts' methodology used in determining whether to give effect to overriding mandatory rules, most notably, the criteria set forth in Article 19 of Swiss Private International Law ("SPIL"), Article 7(1) of the Rome Convention and Article 9(3) of the Rome I Regulation (collectively, the "private international law rules on overriding mandatory rules").[57] This approach derives from the idea that arbitral tribunals are not different from domestic courts in their role and function of resolving a dispute by applying the law appropriate for the dispute. [58] Based on this functional commonality between arbitral

[52] The Institute of International Law, *The Resolution on the Autonomy of the Parties in International Contracts between Private Persons or Entities* Art. 9 (1991); SAVAGE & GAILLARD, *supra* note 23, at para. 1522; Barraclough & Waincymer, *supra* note 15, at 219.

[53] SAVAGE & GAILLARD, *supra* note 23, at 855-56, paras. 1525 and 1526.

[54] Case No. 6320 of 1992, Final Award, 6 Int'l Comm. Arb. 1 (1992).

[55] Barraclough & Waincymer, *supra* note 15, at 219.

[56] Kleinheisterkamp, *supra* note 45, at 22. "The legitimacy, and thus the success of arbitration itself, might be at stake if courts allow arbitration to become a mean for circumventing such protective public policies." *Id*.

[57] AZEREDO DA SILVEIRA, *supra* note 5, at para. 207; Blessing, *supra* note 61, at 31-32.

[58] AZEREDO DA SILVEIRA, *supra* note 5, at para. 162; Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

tribunals and domestic courts, Prof. Bermann noted that "[E]ven in the context of purely private commercial disputes, an arbitral tribunal has a public role and function to perform, and cannot remain categorically deaf to the values underlying truly mandatory rules of law . . . ."[59] In the same thread, Dr. Azeredo da Silveira took the view that "arbitrators are not deprived, as a matter of principle, of the authority to take into account overriding mandatory rules."[60]

However, assuming that the authority to take overriding mandatory rules is granted to arbitrators, the discretion must not be exercised in an unfettered manner. To avoid making the application of overriding mandatory rules by arbitrators look arbitrary and partial, it would be necessary to circumscribe their discretion. Among possible means for achieving this objective, the test incorporated in the private international law rules on overriding mandatory rules seems to be the most compelling despite the fact that its scope is limited to court proceedings.[61] Prof. Lando recognized the utility of the private international law rules on overriding mandatory rules adopted by some jurisdictions as the ground for applying overriding mandatory rules, stating that "Article 7(1) of the Rome Convention is expressive of international solidarity.[…] The arbitrator should contribute to this solidarity by giving effect to mandatory provisions claiming application, provided that those rules are enacted by a State having a close relationship with the contract and that it is fair and reasonable to give effect to them."[62] Prof. Böckstiegel also observed that Article 7 of the Rome Convention would be a useful guideline for arbitral tribunals which are confronted with "economic sanctions of third states."[63]

Based on the utility of the private international law rules for guiding arbitral tribunals facing the issue of the applicability of economic sanctions as internationally mandatory rules, most conspicuously, Dr. Azeredo da Silveira put forward a formula for when trade sanctions are applied by arbitrators, which was adapted from the conditions laid down

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[59] George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 19 AM. REV. INT'L ARB. 1, 8 (2007).

[60] AZEREDO DA SILVEIRA, *supra* note 5, at para 134.

[61] *Id.* at para 175; Marc Blessing, *Mandatory rules of Law versus Party Autonomy in International Arbitration*14 J. INT'L. ARB. 23, 31-33 (1997); Barraclough & Waincymer, *supra* note 15, at 227 ("When considering how a discretion to apply mandatory rules should be exercised, it is logical to look at the approach taken by national courts. Therefore, it is not surprising that one of the popular methods for determining mandatory rules' applicability is based on Art. 7(1) of the Rome Convention . . . .").

[62] Ole Lando, *The Law Applicable to the Merits of the Dispute*, *in* ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 159 (Sarcevic ed., 1991).

[63] Böckstiegel, *supra* note 23, at 610.

in the private international law rules on overriding mandatory rules.[64] To be specific, the requirements for a trade sanction to be applied by arbitrators are (i) "overriding mandatory rules as an appropriate means of achieving a legitimate purpose", (ii) "existence of a close connection between the contractual dispute and the enacting state", and (iii) "prevalence of the benefits of a decision to give effect to an overriding mandatory rule over those of a decision to disregard it."[65] In a similar tone, Dr. Blessing also suggested the following notable criteria labeled as an "application-worthiness test" or "rule-of-reason test":

(i) "The rule in question must be a norm of mandatory rules."
(ii) "The rule must be such as to impose itself irrespective of the applicable law."
(iii) "The scope of mandatory rules must be construed narrowly"
(iv) "There must be a close connection between the subject matter of the parties' contract and the jurisdiction area or State that had promulgated the mandatory rule or norm."
(v) "The rule or norm as such must appear to be "application-worthy", having regard to its […] goals and underlying policies."
(vi) "The result must, in view of all the circumstances, qualify as an 'appropriate result'." [66]

In evaluating the approach inspired by the private international rules designed for domestic courts, Barraclough and Waincymer indicated that the approach does not take party autonomy into account adequately.[67] In addition, it fails to give mandatory rules of the arbitration's seat and the probable place of enforcement the sufficient weight that they deserve. Given this, it can be said that the approach based on the criteria adapted from existing private international law mechanisms for overriding mandatory rules is insufficient to address the difference between international arbitration and domestic court proceedings. What is more, the approach based on the private international law rules on overriding mandatory rules lacks public international law considerations despite the predominant "public international law nature" of economic sanctions.

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[64] AZEREDO DA SILVEIRA, *supra* note 5, at para 207. "Whether such a sanction will be given effect will thus depend on the same conditions as those that govern the taking into account of a sanction imposed by a State other than the forum State and other than the State of the applicable law. These conditions are laid down in Article 19 SPILA, Article 7(1) Rome Convention, and Article 9(3) Rome I Regulation." *Id.*

[65] AZEREDO DA SILVEIRA, *supra* note 5, at paras. 207-38.

[66] Blessing, *supra* note 61, at 31-32.

[67] Barraclough & Waincymer, *supra* note 15, at 235-36.

Therefore, while it is evident that the discretionary-but-formulated approach has quite a few merits in guiding arbitral tribunals entrusted with determining whether to give effect to economic sanctions, there must be additional considerations to supplement the criteria adapted from existing private international law mechanisms.

V. Suggestion of a Hybrid Theory Customized for Addressing the Applicability of Economic Sanctions in International Arbitration

1. Introductory Remark

As discussed in the Section IV, the transnational public policy approach tries to distance arbitrators from economic sanctions as internationally mandatory rules by limiting their applicability in international arbitration whereas the discretionary approach acknowledges arbitrators' authority to take economic sanctions into account by assimilating arbitral tribunals to domestic courts. Analyzing those approaches, the choice of arbitration instead of court proceedings must not be conducive to "narrowing down of the categories of laws which, in substance, may govern the disputed issues."[68] That is, the authority to give effect to an internationally mandatory rule should not differ depending on whether the means of dispute resolution is arbitration or litigation.[69] In addition, as held by some case law, the principle of party autonomy does not necessarily exclude the application of internationally mandatory rules.[70] Thus, the authority to give effect to internationally mandatory rules should be granted to arbitral tribunals just like domestic court judges. Yet, without a set criteria for circumscribing the discretion, the application by arbitrators of internationally mandatory rules external to the applicable law chosen by the parties is likely to come across as arbitrary or trigger backlash from those who value the notion of party autonomy in international arbitration. To avoid this backlash, there is a need to formulate the arbitrators' discretion. For this purpose, there would be no match for the test laid down in the private international rules on internationally mandatory rules as discussed in the previous section. However, despite their utility as guidance for exercising arbitrators' discretion to take internationally mandatory rules into account, the private international law rules alone do not suffice to incorporate both the public international law aspects of economic sanctions distinct from general internationally mandatory rules and the differing features of international

[68] AZEREDO DA SILVEIRA, *supra* note 5, at para 156.

[69] *Id.* at para 157.

[70] *See e.g.,* Case No. 6320 of 1992 (ICC Int'l Ct. Arb.): "This priority of the will of the parties must, however, be construed to be subordinate to the mandatory application of a 'loi de police'."

arbitration proceedings from domestic court proceedings. Given this, this section will suggest a hybrid theory combining insights from public international law principles and international commercial arbitration theories with the principles underlying the private international law rules on mandatory rules in order to tailor a solution for arbitrators who are requested to determine whether to give effect to economic sanctions.

2. Analogy from the Conditions Set forth in Article 9(3) of the Rome I Regulation as the Rudimentary Guideline for Arbitrators

Although some authors, most notably Barraclough and Waincymer, seem to be skeptical about "a criteria-based formula for when mandatory rules must be applied" since its effectiveness is limited to providing guidance to adjudicators, it would still be necessary to offer a bright-line test so long as there is need to circumscribe their discretion.[71] However, considering that there is no rule of private international law governing international arbitration regarding the applicability of internationally mandatory rules,[72] the question of which rule or rules should be applicable by analogy as guidance for arbitral tribunals remains. At this juncture, Article 19 of SPIL, Article 7 of the Rome Convention and Article 9(3) of the Rome I Regulation would be worth noting as a possible source of such guidance.[73] Of the instruments, the rules of the Rome Convention and the Rome I Regulation look more convincing because they can be said to receive more support from stakeholders than that of SPIL. Breaking down to the rules of the Rome Convention and the Rome I Regulation, then, it should be noted that the rule of the Rome Convention was superseded by that of the Rome I Regulation due to criticism over its broader scope and open-textured aspect.[74] Given this, the test incorporated in Article 9(3) of the Rome I Regulation and its underlying principles would provide arbitrators with the most useful and insightful tool for determining whether to apply economic sanctions.

According to the conditions laid down in Article 9(3) of the Rome I Regulation, arbitrators would have to consider the 'nature and purpose' of an economic sanction and the 'consequence' of its application or non-application when they are entrusted to determine the applicability of the economic sanction.[75] In invoking the criteria, there is a fundamental

[71] Barraclough & Waincymer, *supra* note 15, at 237.

[72] SAVAGE & GAILLARD, *supra* note 23, at para 1519; AZEREDO DA SILVEIRA, *supra* note 5, at para 174.

[73] Blessing, *supra* note 61, at 28; AZEREDO DA SILVEIRA, *supra* note 5, at para. 175.

[74] JONATHAN HILL & MÁIRE NÍ SHÚILLEABHÁIN, CLARKSON & HILL'S CONFLICT OF LAWS 242 para. 4.99 (OUP 2016).

[75] HILL, *supra* note 74, at 242 para. 4.98.

notion underlying the criteria that arbitrators should bear in mind. That is, as the first guideline for applying the criteria, arbitrators should be aware that internationally mandatory rules, by nature, are applicable to very limited cases.[76] According to Paragraph 37 of the Preamble to the Rome I Regulation, applying overriding mandatory rules can be justified only in exceptional circumstances.[77] If the application of overriding mandatory rules should remain exceptional even in domestic courts for which the Rome I Regulation explicitly grants the authority to give effect to those rules, the possibility that internationally mandatory rules are taken into account in arbitral proceedings should be much slimmer considering the supremacy of party autonomy in arbitral proceedings and absence of any rules to explicitly grant arbitral tribunals the authority to apply mandatory rules. Given this, as prescribed by the Rome I Regulation and observed by Dr. Blessing, the elements of the criteria "should be construed more restrictively."[78]

That being said, looking into individual limbs of the criteria, the limb of the 'consequence' seems to have relatively little room for theoretical analysis. In addition, in practice, the purpose of a sanction would be more dispositive of the applicability of the sanction. As such, the following analysis would focus on the element of the 'purpose.'

Tackling the 'purpose' test requires the motives or purpose of an economic sanction to be application-worthy or legitimate.[79] In giving flesh to the 'legitimate purpose' prong, it is worth noting that one of the basic rationales of domestic courts for applying foreign mandatory rules is international comity or deference that a state owe to another state, in particular, her ally.[80] Indeed, the concept of international comity, to some extent, compelled a domestic court judge to apply foreign mandatory rules on the ground of the relationship between his or her state and the enacting state of the mandatory rules rather than the purpose and content of the mandatory rules. However, the comity ground on which a domestic court exercises its discretion to apply overriding mandatory

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[76] AZEREDO DA SILVEIRA, *supra* note 5, at para 210.

[77] "Considerations 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." Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), para. 37, 2009 O.J. (L177/9).

[78] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), para. 37, 2009 O.J. (L177/9); Blessing, *supra* note 66, at 32.

[79] AZEREDO DA SILVEIRA, *supra* note 5, at para 215-18; Blessing, *supra* note 61, at 32.

[80] TREVOR HARTLEY, INTERNATIONAL COMMERCIAL LITIGATION: TEXT, CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW 622, 678 (CUP 2015); *Foster v. Driscoll* [1929] 1 KB 470.

rules as a state organ is not pertinent to an arbitral tribunal which does not owe the comity obligation to any particular state.[81] Therefore, in determining whether the purpose of an economic sanction is legitimate, arbitrators have to rule out the 'international comity' consideration which guides domestic court judges under Article 9(3) of the Rome I Regulation.[82]

In addition, it should be noted that arbitral tribunals are not subject to any particular state's parochial public policy or public interest compared to domestic courts.[83] In this connection, arbitral tribunals must not be allowed to evaluate the legitimacy of the purpose of a sanction at issue on the ground of a particular state's law or public policy. Instead, in light of the perception of international arbitration as a "transnational system of justice" and some critics' concerns over the partiality or arbitrariness of arbitrators, the determination of whether the purpose of a sanction is legitimate should be based on the assessment of whether "[t]he international community may recognize the legitimacy" of the sanction.[84] Although this account of legitimacy of the purpose provides some insights as to the "purpose" requirement, the question still remains to be addressed how to distinguish economic sanctions serving the interests recognized by international community from others. At this juncture, the following categories that Dr. Voser identified as meeting the test incorporated in the Rome Convention might provide more guidance for arbitrators: (1) transnational public policy, (2) universally recognized legally protected interests, and (3) strong public interests of concerned states or supranational entities.[85] Categorically and conceptually, the interests served by economic sanctions recognized as application-worthy would be narrower than the local public interests pursued by other mandatory rules, but broader than those of transnational public policy.

Along with the elements of purpose and consequence, a close connection between the dispute and the sanction or the sanctioning state is another integral factor that arbitral tribunals must consider in order to determine the applicability of a sanction.[86] This close connection element is not explicitly laid down in Article 9(3) of the Rome I Regulation. However, given that the provision limits its scope to the overriding mandatory rules of the place of the performance of the

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[81] *Id.*

[82] *Id.*

[83] AZEREDO DA SILVEIRA, *supra* note 5, at para 222.

[84] *Id.* at paras. 224-27, 226.

[85] Nathalie Voser, *Mandatory rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319, 348-55 (1996).

[86] Blessing, *supra* note 61, at 32; AZEREDO DA SILVEIRA, *supra* note 5, at paras. 259-64; Barraclough & Waincymer, *supra* note 15, at 228-29, 238.

obligations arising out of a contract, it can be said that the close connection element is reflected in the provision through the intermediary of "the country where the obligations arising out of the contract have to be or have been performed."[87] Also, in light of the principle of the closest connection as one of the main theories underlying the choice-of-law rules across jurisdictions, the close connection element can be said to be inherent in the provision. Dr. Azeredo da Silveira gave the following examples which she viewed to satisfy the close connection requirement: (1) "the disputed contract . . . is to be performed in the sanctioning State", (2) "the disputed contract involves prohibited imports into, and/or exports from, the territory of the sanctioning State", and (3) "one of the parties must take certain steps, within the sanctioning State, in view of the performance of its obligations."[88] As its merit, the requirement of the close connection would be effective in sorting out indiscriminate extraterritorial sanctions.[89]

Despite the fact that the above analysis inspired by the criteria incorporated in the private international law rules on overriding mandatory rules can provide arbitrators with some insight, however, such analysis alone cannot encompass additional issues stemming from the public international law nature of economic sanctions and the arbitrators' critical duty to render a valid and enforceable award. That is why the above analysis needs to be supplemented by further inquiries into the theories which aim to address the public international law aspects of economic sanctions and arbitrators' concerns over enforceability of their awards under the New York Convention. Those further inquiries can be said to have their significance in providing separate insight from those that the approach based on the criteria incorporated in the Rome I Regulation provides by dealing with some unique aspects of economic sanctions and their implications for international arbitration proceedings that the approach inspired by the private international law rules cannot capture. At the same time, however, the further analyses predicated on the theories of public international law and international arbitration will also contribute to providing the conditions incorporated in Article 9(3) of the Rome I Regulation with more clarity and precision by giving meaningful flesh to the conditions.

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[87] Article 9(3) of the Rome I Regulation.

[88] AZEREDO DA SILVEIRA, *supra* note 5, at para. 259.

[89] Barraclough & Waincymer, *supra* note 15, at 228 ("requiring a close connection has the benefit that states are discouraged from venturing beyond the limits of their legitimate legislative jurisdiction").

3. Insights from the Public International Law Principles

Compared to other internationally mandatory rules which are enacted to serve local public policy and interests, economic sanctions involve the interplay between states or the conduct of a state vis-à-vis other states or foreign entities to pursue security or foreign policies.[90] This feature of economic sanctions in terms of public international law requires arbitrators to assess the legitimacy and legality of economic sanctions pursuant to the principles and rules under customary international law and treaty provisions which govern economic sanctions.[91] In this context, determining whether to apply an economic sanction, arbitrators need to take into account the public international law theories on economic sanctions along with the conditions adapted from Article 9(3) of the Rome I Regulation.

First of all, the taxonomy between multilateral sanction and unilateral sanction deserves attention. As far as multilateral sanctions, in particular, sanctions to implement the resolutions of the UN Security Council, are concerned, most authors seem to agree with the direct applicability of such sanctions on the ground that they amount to transnational public policy.[92] The tribunal in an arbitration case involving UN sanctions also opined that the sanctions "are provisions which must be necessarily applied in the EC, whichever law applies to the contract, as it appears from their purpose and pubic-law character."[93] However, this observation does not mean that unilateral sanctions are not applicable to international arbitration or that multilateral sanctions are not subject to legal scrutiny.[94] Of course, there is a school of thought that advocates that UN Security Council sanctions are not bound by any legal standards and must be immune from judicial review.[95] This idea was derived from the need to strengthen the power of the Security Council and maintain its effectiveness as an organ promoting international peace and security.[96] However, because

[90] ALEXANDER, *supra* note 1, at 10; AM. LAW INST., RESTATEMENT OF THE LAW THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1986).

[91] Cortese, *supra* note 23, at 743-47; ALEXANDER, *supra* note 1, at 58, 63-64.

[92] AZEREDO DA SILVEIRA, *supra* note 5, at para. 240; Cortese, *supra* note 23, at 742; Böckstiegel, *supra* note 23, at 609; Eric De Brabandere & David Holloway, *Sanctions and International Arbitration*, *in* RESEARCH HANDBOOK ON SANCTIONS AND INTERNATIONAL LAW (Larissa van den Herik ed., 2016), https://ssrn.com/abstract=2847000.

[93] Case No. 1491, ICCA YEARBOOK COMM. ARB. VOL. XVIII (1992).

[94] Cortese, *supra* note 23, at 748.

[95] Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16(1) EUR. J. INT'L L. 59, 86–87 (2005); Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13(1) EUR. J. INT'L L. 63, 70 (2002).

[96] Orakhelashvili, *supra* note 95, at 86–87.

peremptory norms are non-derogable and an inherent constraint on any state or organization's acts, the Security Council's acts, including its economic sanctions measures, must be subject to peremptory norms; these peremptory norms include "the prohibition of the use of force," "the principle of self-determination," "fundamental human rights," and "humanitarian law" and its basic principles.[97] Thus, even in the case of UN sanctions, out of respect for *jus cogens* norms in the international community, arbitral tribunals must be entitled to scrutinize the compatibility of the sanctions with *jus cogens* norms such human rights obligations.[98] The European Court of Justice also ruled that even measures giving effect to resolutions of the UN Security Council are not immune from full judicial review.[99] However, despite the possibility of judicial scrutiny, the UN sanctions are presumed to be consistent with peremptory norms.[100] This presumption of legality is reasonable in that the decision by the UN Security Council, as the most authoritative and legitimate institutional body in the international arena, is most likely to reflect the common will of the global community as a whole.

Second, no rule or principle seems to prohibit each state from taking unilateral sanctions against other states or entities.[101] However, the recognition of the sovereign authority to impose unilateral sanctions is not conducive to the unconditional application of those sanctions. Considering that many states adopt unilateral sanctions in order to achieve unjustifiable policy objectives vis-à-vis a particular state rather than pursue the universally recognized interests of the international community, the need to scrutinize the legality and legitimacy of unilateral sanctions should be greater than that of multilateral sanctions. In this respect, arbitral tribunals have to ascertain whether a unilateral sanction is consistent with customary international principles such as reciprocity, proportionality, discrimination, and necessity, which govern the scope or type of a sanction measure, before determining whether to apply the

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[97] Orakhelashvili, *supra* note 95 at 60, 62–67; O'Connell, *supra* note 95, at 71–79.

[98] Böckstiegel, *supra* note 23, at 607; Cortese, *supra* note 23, at 748–50.

[99] Case C-402/05, Yassin Abdullah Kadi and Al Barakaat Int'l Foundation v. Council of the European Union and Commission of the European Communities, para. 2008 ECR I-6351 (2008). "[T]he Community judicature must . . . ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations." *Id.*

[100] Orakhelashvili, *supra* note 95, at 84.

[101] ALEXANDER, *supra* note 1, at 57.

unilateral sanction.[102] In addition, according to Dr. Azeredo da Silveira, "today's broad conventional and treaty obligations protecting freedom of trade" such as the GATT and WTO rules also delimit the state's authority to impose unilateral sanctions.[103]

Third, some unilateral sanctions draw attention due to their extraterritorial scope.[104] In particular, a number of U.S. sanctions purported to apply extraterritorially and produced strong reactions from other states (notably, the EU and the UK) in the form of blocking statutes.[105] The extraterritorial sanctions, by definition, are intended to target "nationals abroad or subsidiaries of domestic entities incorporated in states other than the sanctioning state."[106] Due to this broad scope of jurisdiction, there is a need to assess whether the application of those sanctions is consistent with the international law principles governing a state's jurisdiction to prescribe and enforce laws such as (i) the territoriality principle, (ii) the nationality principle, (iii) the protective principle and (iv) the universal principle.[107] Thus, arbitral tribunals should disregard an extraterritorial sanction if its scope exceeds the permissible range under the customary international law principles of jurisdiction.

However, when blocking statutes, which aim to resist the extraterritorial sanctions, are adopted, the situation becomes more complicated. As Dr. Cortese noted, the blocking statutes represent "an assessment of international law leading to the legal inadmissibility and the political unsoundness of the [extraterritorial sanctions]."[108] In this context, most authors agree that the existence of blocking statutes acts as a signal that the extraterritorial sanctions are not application worthy.[109] Prof. Böckstiegel took the view that when blocking statutes are applicable, "the tribunal cannot apply such extra-territorial laws."[110] In a similar vein, Dr. Azeredo da Silveira opined that "the mere existence of blocking statutes . . . should weigh most heavily against a finding of legitimacy [of

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[102] ALEXANDER, *supra* note 1, at 56, 63–64; AZEREDO DA SILVEIRA, *supra* note 5, at para. 251; Michael Reisman & Douglas Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes* 9 EUR. J. INT'L L. 86, 129–34 (1998).

[103] AZEREDO DA SILVEIRA, *supra* note 5, at paras. 252–53.

[104] ALEXANDER, *supra* note 1; AZEREDO DA SILVEIRA, *supra* note 5; Cortese, *supra* note 23; Böckstiegel, *supra* note 23.

[105] ALEXANDER, *supra* note 1, at 80–81.

[106] AZEREDO DA SILVEIRA, *supra* note 5, at para. 255.

[107] ALEXANDER, *supra* note 1, at 65–66.

[108] Cortese, *supra* note 23, at 745.

[109] *Id.*

[110] Böckstiegel, *supra* note 23, at 610.

an extraterritorial sanction]".[111] Dr. Blessing went as far as to state that the EU blocking regulation "must be seen as a significant yard-stick . . . for courts and arbitral tribunals when being confronted with issues triggered by [extraterritorial] sanctions."[112] Given the foregoing, arbitral tribunals should exercise more caution affecting the extraterritorial sanctions that triggered the adoption of blocking statutes.

4. Insights from the Duty of Arbitrators to Render a Valid and Enforceable Award

Even within the New York Convention framework, which aims to make the enforcement of an international arbitral award easier and simpler, it is still possible for a domestic court to engage in a substantive review of the application or non-application of internationally mandatory rules on public policy grounds in accordance with the law applicable to setting aside proceedings (*lex arbitri*) and Article V(2)(b) of the New York Convention.[113] This possibility of substantive review on the ground of public policy leads to arbitrators' concerns that any award which does not comply with an economic sanction in effect at the seat of the arbitration or the place where enforcement is sought might be annulled and its enforcement might be refused.[114] Considering such enforcement concerns stem from arbitrators' crucial duty to render a valid and enforceable award, in practice, arbitrators can be advised to take into account economic sanctions adopted by the state of the seat of arbitration or the state where enforcement is sure to be sought.[115] However, the perception of public policy as transnational public policy can mitigate those enforcement concerns. That is, it is widely accepted that the "public policy" ground for refusal to enforce an award under the New York Convention is designed to represent "truly transnational public policy" transcending a particular state's public policy.[116] In addition, a significant number of courts have affirmed the narrow concept of public policy in enforcement proceedings involving economic sanctions of the place of the enforcement, on the basis of the notion of genuinely

[111] AZEREDO DA SILVEIRA, *supra* note 5, at para. 284.

[112] MARC BLESSING, IMPACT OF THE EXTRATERRITORIAL APPLICATION OF MANDATORY RULES OF LAW ON INTERNATIONAL CONTRACTS 25 (1999).

[113] Brunner, *supra* note 15, at 268.

[114] Cortese, *supra* note 23, at 741; Barraclough & Waincymer, *supra* note 15, at 223-24.

[115] Cortese, *supra* note 23, at 741; Barraclough & Waincymer, *supra* note 15, at 244.

[116] Cortese, *supra* note 23, at 741; AZEREDO DA SILVEIRA, *supra* note 5, at para. 189; De Brabandere & Holloway, *supra* note 92, at 11; SAVAGE & GAILLARD *supra* note 23, at para. 1557.

international public policy.[117] For instance, the US District Court for the District of Delaware and the US Court of Appeals for the Second Circuit were of the same view that "[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the [New York] Convention's utility."[118] They added that "[t]his provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'"[119] Given this narrow concept of public policy, arbitrators need not automatically give effect to economic sanctions merely because the sanctions were enacted by the state of the seat of the arbitration or the probable place of the enforcement.[120] This is because even if an arbitrator disregards a sanction enacted by the state of the seat of the arbitration or the state of the place of enforcement which is neither actually linked to the contract nor legitimate, it would not necessarily lead to the setting-aside of the award or the refusal to enforce the award unless disregarding the sanction amounts to violation of transnational public policy.[121]

In this scenario, arbitrators might be allowed to give more weight to the criteria incorporated in Article 9(3) of the Rome I Regulation and the principles of public international law than the enforcement concerns. However, the perception of public policy varies across jurisdictions.[122] Some jurisdictions still advocate the parochial concept of public policy.[123] Due to this varying concept of public policy, therefore, arbitrators cannot turn a blind eye to the enforcement concerns. Given these circumstances, arbitrators would be required to take dual approaches depending on whether the public policy is perceived as transnational or parochial. In detail, if the state where enforcement is probably sought is known to adopt the concept of transnational public policy, arbitral tribunals should take a stringent approach towards the economic sanctions enacted by the state by putting more value on the assessment of the compatibility of the sanctions with the criteria adapted from Article 9(3) of the Rome I Regulation and the public international law principles than the enforcement concerns. In contrast, if the probable state of enforcement

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[117] *See e.g.*, MGM Prods. Group, Inc. v. Aeroflot Russian Airlines, 91 Fed. Appx. 716 (2d Cir. 2004); Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974); Ministry of Def. and Support for the Armed Forces of the Islamic v. Cubic Def. Sys., 665 F.3d 1091 (9th Cir. 2011); Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800 (D. Del. 1990); X._Ltd. v. Société Z., Case 4A_250/2013 (Tribunal Fédéral Suisse 2014).

[118] Parson & Whittemore, *supra* note 117, at 974; Nat'l Oil Corp., *supra* note 117, at 819.

[119] Parson & Whittemore, *supra* note 117, at 974; Nat'l Oil Corp., *supra* note 117, at 819.

[120] AZEREDO DA SILVEIRA, *supra* note 5, para. 194.

[121] *Id.* at para. 189-94.

[122] Barraclough & Waincymer, *supra* note 15, at 215.

[123] *Id.*

adheres to the municipal concept of public policy, arbitral tribunals should take a lenient approach toward the sanction enacted by the state by being more mindful of the risk that disregarding the sanction enacted by the state might lead to a refusal to enforce the award. In the latter scenario, in practice, the sole fact that the sanction is enacted by the state of enforcement would be determinative of the applicability of the sanction despite the aforementioned criteria adapted from the Rome I Regulation and the public international law principles.[124]

VI. Conclusion

Economic sanctions are enacted mostly due to political and diplomatic motives. By definition, however, they are designed to affect various business transactions, and cause a number of private or commercial disputes. In this connection, arbitral tribunals, which have their strengths in dealing with international commercial disputes compared to domestic courts, are likely to be confronted with the applicability of economic sanctions to a dispute. Yet, despite the increasing importance of economic sanctions in international arbitration, this topic has attracted far less attention than it deserves. Against this backdrop, this article focused on the dynamics between public international law principles, private international law rules and international arbitration theories to address the issue of the applicability of economic sanctions to the merits in international arbitration. On first thought, the rule or theory of private international law may appear to be the best tool for handling this issue because it was primarily within the field of private international law that the categorization of economic sanctions as a type of overriding mandatory rule and the applicability of such rule were discussed.[125] Although the private international rule on general overriding mandatory rules has its merits, it is not sufficient to incorporate the public international law considerations stemming from the public international law aspects of economic sanctions. Furthermore, the mechanism designed for domestic courts cannot reflect the distinct features of international arbitration proceedings from domestic court proceedings.

In this context, on the part of arbitrators, when they are requested to determine whether to give effect to an economic sanction, they have to assess the applicability of the sanction by virtue of the public international law principles governing the legality and scope of the sanction and the international arbitration rules and theories concerning the enforceability of an award under the New York Convention. Not only that, they cannot

[124] *Id.*

[125] See e.g., Barraclough & Waincymer, *supra* note 15; Brunner, *supra* note 15.

overlook the private international rule on general overriding mandatory rules either. In the same thread, on the part of parties or arbitral institutions, they would need to find arbitrators who are well-versed in both private international law and public international law when nominating or appointing an arbitrator for a dispute involving an economic sanction. The arbitral decision-making process based on such hybrid theories and perspectives will contribute to enhancing both the legitimacy and the efficacy of the arbitral decision in a case involving economic sanctions.

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