

The Application of Mandatory Rules of Law in International Arbitration (summary)

Tatsuya NAKAMURA

Professor, Kokushikan University

Mandatory rules of law may intervene in the settlement of disputes between private parties in international arbitration. In such cases, the question arises as to how the arbitral tribunal will apply such mandatory rules of law. It is generally accepted that an arbitral tribunal must apply mandatory rules as part of the law governing the disputes chosen by the parties. However, mandatory rules have a will to be applied regardless of the parties' choice of governing law, and conflict of laws rules are created to serve the parties' interests. Therefore, automatic application of mandatory rules by the arbitral tribunal as part of the law chosen by the parties cannot be justified, and the applicability of all mandatory rules should be determined using the same test.

Scholars have developed so called "mandatory rules method" for the applicability of mandatory rules other than those as part of the governing law, referring to, for instance, Article 7.1 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations and there are indeed arbitration cases where the arbitral tribunal utilized this method. However, this method involves evaluating whether it is appropriate to apply mandatory rules of law in the case at hand, considering the closeness of connections between the case and the legal system and the consequences of their application or non-application. In addition, it provides no guidance other than functional criteria for an arbitral tribunal to decide whether to apply such rules in a particular case. As a result, this method leaves a great deal of room for subjective appreciation by an arbitral tribunal and may not necessarily be appropriate for determining the applicability of mandatory rules of law.

Instead of the mandatory rules method, the applicability of mandatory rules of law by an arbitral tribunal can be considered as follows: Arbitration is a means of settlement of disputes based on the agreement of the parties to submit their disputes to an arbitral tribunal instead of national court litigation. Therefore, if the parties agree to submit their disputes to the arbitral tribunal, which would otherwise be settled by the competent national court applying its mandatory rules of law, the arbitral tribunal should apply the same mandatory rules to fulfill its

obligation undertaken by the agreement with the parties.

Regarding the applicability of mandatory rules of the place of arbitration, it is considered that unlike a national judge, an arbitral tribunal has no responsibility to maintain and ensure the legal order of the place of arbitration. However, considering its duty to finally settle the disputes between the parties, the arbitral tribunal, even though it has no obligation to render an arbitral award that cannot be set aside by the national court, has an obligation to make its best efforts to ensure the enforceability of the award. Otherwise, the whole arbitration proceeding would become a futile exercise. Similarly, the arbitral tribunal has an obligation to make its best efforts to ensure that the arbitral award is enforceable in the place where enforcement will be sought.

As for transnational public policy, generally viewed as fundamental values in the international community, it is scholarly argued that an arbitral tribunal must apply mandatory rules of the governing law chosen by the parties, provided, they are not contrary to transnational public policy, and that mandatory rules other than those as part of the governing law can be applied by an arbitral tribunal, provided, they reflect and constitute transnational public policy. However, transnational public policy is a vague principle and the exact scope of the principle is uncertain, making it difficult for the arbitral tribunal to determine the applicability of mandatory rules on the basis of such a principle. If the arbitral tribunal does not apply mandatory rules because they are not part of transnational public policy, it will possibly lead to the result that the arbitral award will conflict with the court decision applying its mandatory rules. It also will contravene the legitimate expectations of the parties that the arbitral tribunal will finally settle the disputes, which the national judge would otherwise settle by applying mandatory rules of law. Therefore, the arbitral tribunal should apply mandatory rules even if their application does not necessarily protect the interests of the international community as long as it does not violate public international law.