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PARTY AUTONOMY AND NORMATIVE LIMITS: A STUDY OF LEGAL RESTRICTIONS ON THE SELECTION OF APPLICABLE LAW TO THE MERITS IN INTERNATIONAL ARBITRATION

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Abstract: Party autonomy is often seen as the foundation of international commercial arbitration. However, the parties' choice of law (or rules of law) regarding the merits of the dispute in international arbitration is not limitless. Specific rules of the national laws most relevantly connected to the arbitration proceedings limit this choice from the outset. This paper investigates which national laws impose limitations on the parties' choice of law on the merits, to what extent and with what consequences. A first conclusion reached is that these normative limits are both directly imposed, by way of express provisions limiting the scope of the parties' choice of law across several select jurisdictions (Portugal, France, Switzerland, England and Wales, United States of America, Hong Kong and Singapore), and indirectly imposed, considering the limits regarding the scope and object of this choice, including through the *ex ante* interference of overriding mandatory rules and *ex post* control of international public policy. A second conclusion reached is that these limits are only effectively enforced in limited circumstances, confirming their exceptional nature.

I. Introduction

In the private international law “playground” that international arbitration is,¹ the freedom of the parties to choose the law applicable to the merits is considered an established principle of international arbitration law and has been recognized in international legal instruments, international and transnational sources and national laws.² However, as important as this principle may be, party autonomy is not limitless.³ What are the grounds and manifestations of party autonomy? How is party autonomy regulated in international arbitration? Are there any normative limits to this principle in regard to the choice of law applicable to the merits of the dispute? Are they effective?

To provide answers to these questions, I will employ doctrinal and comparative approaches, looking into the New York Convention, the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”), the national arbitration laws of Portugal, France, Switzerland, England and Wales, United States of America, Hong Kong and Singapore. I will also consider the rules of arbitration institutions, specifically the Portuguese Centre for Commercial Arbitration of the Portuguese Chamber of Commerce and Industry (“CAC”), International Court of Arbitration of the ICC (“ICC”), Swiss Arbitration Centre (“SAC”), London Court of International Arbitration (“LCIA”), Hong Kong International Arbitration Centre (“HKIAC”), Singapore International Arbitration Centre (“SIAC”), and the UNCITRAL *ad hoc* rules, as well as the 2015 Hague Principles on Choice of Law in International Commercial Contracts (“Hague Principles”).

I will first analyse the sources of party autonomy and its limits in international arbitration, (Chapter II). Then, I will present the manifestations of party autonomy in arbitration (Chapter

1. G. A. Bermann, “Private international law in international arbitration”, in F. Ferrari and D. P. Fernández Arroyo (eds.), *Private international law: contemporary challenges and continuing relevance*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2019, p. 482.

2. L. Lima Pinheiro, *Arbitragem Transnacional. A Determinação do Estatuto da Arbitragem*, Coimbra, Almedina, 2005, pp. 467-469.

3. G. Cordero-Moss, “Limitations on Party Autonomy in International Commercial Arbitration”, *Recueil des cours*, Vol. 372 (2015), p. 143

III) and a detailed account of the normative limits imposed on party autonomy related to the law applicable on the merits of an arbitral dispute and describe their direct and indirect nature (Chapter IV). Finally, I will touch upon the consequences of breaching those normative limits (Chapter V) and present my conclusions (Chapter VI).

II. The source(s)

The source of party autonomy is enshrined in the private international law rules applicable to the arbitral tribunal.⁴ Accordingly, arbitrators have to assess whether the parties can make such a choice, and if that choice is in conformity with the limitations imposed by said conflict rules. The issue that arises in this context is to know which private international law conflict rules (or “meta law”)⁵ regulate the parties’ choice of law on the merits in international arbitration. Several theories regarding arbitration will propose different national and a-national sources of party autonomy.

First, a territorialist approach to arbitration argues that every arbitration is subject to a specific system of national law, and that will be the law of the seat, acting as a forum.⁶ Manifestations of this approach can be found in England and Wales⁷ and in Germany,⁸ where the respective arbitration law will apply if the seat of arbitration is situated in the territory of these countries.⁹

4. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 202.

5. G. Cordero-Moss and D. P. Fernández Arroyo, “Private International Law and International Commercial Arbitration: a Dialogue about the Usefulness and Awareness of the Former for the Latter”, in V. Ruiz Abou-Nigm and M.B. Noodt Taquela (eds.), *Diversity and Integration in Private International Law*, Edinburgh, Edinburgh University Press, 2019, p. 313.

6. This is the so-called “Lex Facit Arbitrum” thesis, supported by F. A. Mann – see F. A. Mann, “*Lex Facit Arbitrum*”, P. Sanders (ed.), *International Arbitration: Liber Amicorum for Martin Domke*, The Hague, Martinus Nijhoff, 1967, p. 157; and “England Rejects ‘Delocalized’ Contracts and Arbitration”, *International Comparative Law Quarterly*, 193, 1984, pp. 197-198. See also D. Moura Vicente, “Requirements for the Enforceability of Arbitral Awards: A Comparative Overview”, in L. A. DiMatteo, M. Infantino, and N. M-P Potin (eds.), *The Cambridge Handbook of Judicial Control of Arbitral Awards*, Cambridge, Cambridge University Press, 2020, pp. 86-88.

7. EAA, sec. 2(1). See *Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru* [1988] 1 Lloyd's Rep. 116, whereby the court decided that the parties could not contract out the law of the seat. See D. Mavunduse and C.B. Andersen, “Party autonomy in international commercial arbitration: a look at freedom, delimitation and judicialisation”, *International Trade Law & Regulation*, 25, 2019, No. 2, pp. 97-98.

8. German Civil Procedure Code, sec. 1025(1).

9. EAA, sec. 2(1) provides that the provisions of its Part I “apply where the seat of the arbitration is in England and Wales or Northern Ireland”; sec. 1025(1) of the German Civil Procedure Code provides that the

Second, a pluralistic approach upholds that, despite any existing uniformity, a pluralism of legal systems will be relevant.¹⁰ Under the auspices of this theory, it is understood that a multitude of legal systems may, without any inevitability, be the foundation of arbitration, and thus be competent to decide on the arbitral process, providing the arbitrators with their authority.¹¹ Besides the law of the seat, the laws of the place(s) of enforcement of the arbitral award should also be considered. The Portuguese Arbitration Law (“PAL”)¹² adopts this approach. Arbitrations taking place in the Portuguese territory will be governed by the PAL but the awards issued in international arbitration proceedings rendered in Portugal remain immune to annulment, even if contrary to Portuguese public policy, if they are not intended to be enforced in the country.¹³

Third, an autonomous or transnational approach proposes that arbitration is an autonomous system of arbitral dispute resolution, independent of any national legal order.¹⁴ Under this understanding, the juridicity of arbitration arises from a transnational legal order, even if arbitrators apply national law or laws in the arbitration.¹⁵ The autonomous approach prevails in France, where parties can agree to waive to set aside the award, the only recourse available to challenge arbitral awards.¹⁶ Switzerland allows this but only in relation to awards involving foreign interests.¹⁷

Based on these approaches, I argue that the principle of party autonomy can be understood to have distinct justifications in international arbitration, and therefore, different consequences

provisions of this Book apply if the place of arbitration, as referred to in sec. 1043 subsection 1, is situated in Germany.

10. See J. Paulsson, *The Idea of Arbitration*, Oxford, Oxford University Press, 2013, p. 48; also D. Moura Vicente, “Requirements for the Enforceability”, p. 95.

11. J. Paulsson, *The Idea of Arbitration*, pp. 29-30.

12. Law no. 63/2011, of 14 December 2011.

13. PAL, Arts. 61 and 54; D. Moura Vicente, “Requirements for the Enforceability”, p. 90.

14. Supporters of this view are B. Goldman, P. Fouchard, and more recently E. Gaillard, *Legal Theory of International Arbitration*, Leiden-Boston, Nijhoff, 2010, p. 35. In more detail, D. Moura Vicente, “Requirements for the Enforceability”, pp. 86-88.

15. E. Gaillard, *Legal Theory*, p. 35.

16. French Code of Civil Procedure (“CCP”), Arts. 1518 and 1522.

17. Federal Private International Law Act (“Federal PIL Act”), Art. 192(1).

regarding the source of party autonomy in arbitration.

The first (territorialist) and second (pluralistic) approach ultimately anchor party autonomy in national law – the law of the seat and/or the law of the place(s) of enforcement of the arbitration award. These national laws, through a positive rule of choice of law, will determine the assumptions, prerequisites, form, time of conclusion and possible object of a choice of law clause considered in arbitration.¹⁸ Differently, from the viewpoint of the third approach (transnational), autonomy is a *prior* to national law.¹⁹

This means that, from a territorialist point of view, assuming that national law is the source of party autonomy, the law of the seat, including its procedural rules and conflict laws rules, will be binding on arbitrators.²⁰ This approach has been praised for its predictability and uniformity of results, along with meeting the parties' expectations, if parties choose the seat.²¹ However, it is criticized for ignoring that the seat is often chosen for its neutrality, for assuming incorrectly that arbitrators exercise the same function as courts and that the national conflict of laws rules apply equally in litigation and international arbitration.²² A current trend of this approach has evolved to allow national legal systems to provide specialized conflict rules for arbitration, different than those applied by the courts.²³

The pluralistic approach questions the exclusivity of the relevance of the law of the seat.²⁴ This is the case even if it is not possible to predict with certainty, from the outset of the arbitral

18. F. A Mann, “*Lex Facit Arbitrum*”, p. 159; D. Moura Vicente, *Da arbitragem*, p. 87 and p. 110.

19. A. Mills, *Party Autonomy in Private International Law*, Cambridge, Cambridge University Press, 2018, p. 272.

20. F. A Mann, “*Lex Facit Arbitrum*”, p. 159; D. Moura Vicente, *Da arbitragem*, pp. 72-73; B. Wortmann, “*Choice of Law by Arbitrators: The Applicable Conflict of Laws System*”, in W. Park (ed.), *Arbitration International*, Vol. 14, 2, Oxford, Oxford University Press, 1998, p. 106.

21. B. Wortmann, “*Choice of Law*”, p. 106.

22. D. Jones, “*Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties – A discussion of voie directe and voie indirecte*”, *Singapore Academy of Law Journal*, 26, 2014, p. 919.

23. G. B. Born, *International Commercial Arbitration*, Kluwer International, 2020, sec. §19.03[B][3], p. 2838; L. Radicati di Brozolo, “*Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration*”, *European International Arbitration Review*, Vol. 8, No. 1, 2019, pp. 69-73; M. Elcin, “*Lex Mercatoria in International Arbitration. Theory and Practice*”, Vol. I, EUI Thesis, Florence, 2012, p. 106, available at: https://cadmus.eui.eu/bitstream/handle/1814/25204/2012_ELCIN_Vol1.pdf?sequence=1.

24. J. Paulsson, *The Idea of Arbitration*, pp. 32-35; see also A. Mills, *Party Autonomy*, p. 270.

proceedings, what are the potential places of enforcement of the arbitration awards.²⁵ This position entails the cumulative application of the different conflict rules contained in the laws relevant to the dispute or the option to resort to a conflict rule that is contained in an international convention or that is widely accepted in international commerce.²⁶ The cumulative method, cumbersome, although ensuring that the parties are satisfied because their law would be considered, may only be helpful if all rules point to the same substantive law; applying a widely accepted conflict rule could work in this scenario.²⁷ Tellingly, however, there is no set of specific supranational conflict rules regulating the law applicable to the merits in international arbitration²⁸ in conventional law or otherwise, nor does a widely accepted principle in this respect exist, although some proposals have been presented.²⁹

Contrarily, the autonomous approach – not anchored in national law – argues that the arbitrators should resort “to the direct application of substantive rules, which are more likely to take into account the international nature of the situation and the plurality of legal orders that have expressed their views on what they consider to constitute an arbitration worthy of legal protection”.³⁰ Arbitrators could ignore private international law rules and choose to submit a dispute to certain laws or rules of law based on the nature and characteristics of the contract, the circumstances of the case and the parties’ submissions, employing a *voie directe* method.³¹

25. A. Mills, *Party Autonomy*, p. 270.

26. B. Wortmann, “Choice of Law”, pp. 109-110; D. Jones, “Choosing the Law”, pp. 918, 922; M. Elcin, “Lex Mercatoria”, p. 108.

27. B. Wortmann, “Choice of Law”, pp. 109-110.

28. D. Moura Vicente, *Da arbitragem*, p. 72; G. B. Born, *International Commercial Arbitration*, §19.03[D][3][e], p. 2861.

29. B. Wortmann, “Choice of Law”, p. 111. Arguing that some tribunals have applied the CISG, the 1955 Convention of the Law Applicable to International Sales of Goods and the Rome Convention to find conflict rules; and stating that some tribunals have considered that the closest connection test as a “transnational principle of private international law” as a conflict rule - D. Jones, “Choosing the Law”, pp. 921, 923. Mentioning the 1994 Inter-American Convention on the Law Applicable to International Contracts and several widely accepted general principles, such as the closest connection, characteristic performance, proper law of the contract, the law of the seller in sales, the rejection of *renvoi* in contract, and the principle of party autonomy, “Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong”, *Revista Brasileira de Arbitragem*, Vol. VII, 26, Comitê Brasileiro de Arbitragem & IOB, 2020, p. 97.

30. E. Gaillard, *Legal Theory*, p. 35.

31. B. Wortmann, “Choice of Law”, p. 101; D. Jones, “Choosing the Law”, p. 913; M. Elcin, “Lex Mercatoria”, pp. 107-108, citing ICC Case no. 1512, 1971, *Yearbook Commercial Arbitration*. 1976, p. 129, and Case no. 2930, 1982, *Yearbook Commercial Arbitration*, 1984, pp. 105-106.

Differently, a *voie indirecte* method would limit the tribunal's discretion to determining the applicable conflict of laws rule, be it of national or of transnational origin.³² In practice, the *voie directe* method is accepted in several jurisdictions in situations where there is no choice of law clause.³³

My position is that the arbitration law of the seat is the departure point of arbitral proceedings – even if chosen for its neutrality—,³⁴ but other laws, such as the laws of the place of enforcement, the potential *terminus* of the arbitral conflict, may also provide for conflict rules that touch upon party autonomy, by ultimately affecting the enforceability of the award. These laws are the most relevantly connected with any given arbitration proceeding, and I argue that taking them into account is in line with the parties' expectations. Therefore, the territorialist approach must be complemented with the pluralistic approach in the search for the applicable private international rules in arbitration.³⁵ The transnational approach has the disadvantage, in my view, of lacking certainty (parties should know in advance which law potentially applies to their dispute) and opening the door to the choice of the most convenient or familiar law to the arbitrators,³⁶ ignoring that in arbitration awards may be subject to some form of state control, even if limited.³⁷

Therefore, I will consider the combination of relevant national arbitration laws. First, the law of the seat, which, as the law governing the arbitral process, may include certain directions regarding the object and scope of the parties' ability to select the law applicable to the merits.

32 D. Jones, "Choosing the Law", p. 913, citing the example contained in the 1961 European Convention on International Commercial Arbitration, Art. VII(1); see also Model Law, Art. 29(2); EEA, and Singapore IAA, sec. 46(3), and Swiss Federal PIL Act, Art. 33, pointing to the most relevant connection.

33. L. Lima Pinheiro, *Arbitragem Transnacional*, pp. 251-253; D. Jones, "Choosing the Law", p. 911; M. Elcin, "Lex Mercatoria", p. 109. See French CCP, Art. 1511.

34. D. Jones, "Choosing the Law", pp. 911, 918.

35. See also B. Wortmann, "Choice of Law", p. 113, arguing "a three-stage procedure: (1) application of the cumulative approach if all rules of conflict of laws connected with the dispute lead to the same substantive law; if not (2) application of the rules of conflict of laws being in effect at the seat of arbitration if the parties have chosen it; if not (3) application of the general principles of private international law which can be found by a comparative review of the conflict of laws rules connected with the dispute."

36. B. Wortmann, "Choice of Law", p. 101; D. Jones, "Choosing the Law", pp. 911, 915; G. B. Born, *International Commercial Arbitration*, §19.03[D][3], p. 2855.

37. D. Jones, "Choosing the Law", p. 915.

Second, the laws of the places of enforcement should also be considered, seeing that the arbitrability and public policy of the forum of recognition are considered relevant limits to party autonomy. Third, the law of the contract may also impose limits. Fourth, other laws may also be important, be it through a conflict rules perspective, when certain issues in the dispute will be regulated by other choice of law rules, or through a substantive law perspective, when overriding mandatory rules will want to apply to an arbitral dispute. I will also consider international and transnational sources, and, when relevant, any arbitral institutions that provide any limits on choice of law, as these can fill gaps or supersede the national rules on this issue.

III. Party autonomy and the parties' choice of law applicable to the merits in arbitration

I will focus now on establishing if and how the parties can choose the applicable law to the merits of their arbitration, from an international and transnational point of view (section 1), from a national law perspective (section 2), and from the perspective of arbitration rules (section 3). The point is to assess whether party autonomy is a unanimous conflict rule.

1. International and transnational perspective

The New York Convention,³⁸ as the most significant contemporary legislative instrument relating to international commercial arbitration, sets out the principles for the respect of arbitration agreements and recognition of arbitral awards.³⁹ As such, this convention also deals with the effects of party autonomy.⁴⁰ More specifically, the New York Convention acknowledges the relevance of the parties' choice of law, for example, in relation to the ground for refusal of recognition or enforcement related to the validity of the arbitration agreement, in Article V.1.(a) and the composition of the arbitral tribunal and arbitral process, in Article

38. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards.

39. *The ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, ICCA, 2011, refers to the New York Convention as the "cornerstone of international commercial arbitration", p. 7; see also G. B. Born, *International Commercial Arbitration*, §1.04[a][1]; M. Paulsson, *The 1958 New York Convention in Action*, The Hague, Kluwer Law International, 2016, p. 1.

40. G. Cordero-Moss, "Limitations on Party Autonomy", pp. 146-147.

V.1.(d). Moreover, parties can request to benefit from a more favourable regime on recognition and enforcement of arbitral awards through Article VII.⁴¹ No express references are found to party autonomy in relation to choice of law on the merits, however, it flows from its underlying policy that the parties choice must be respected.⁴²

The Model Law has modern features to meet the specific needs of international arbitration and was designed to assist States in reforming their arbitration laws.⁴³ The Model Law provides in Article 28 that the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties. This provision has a four-fold implication. It grants the parties freedom to choose the law applicable to the merits of the dispute;⁴⁴ the arbitrators are bound by this choice of the parties and must apply the rules of law chosen; the phenomenon of *dépeçage* is allowed, and parties may choose different rules to apply to different aspects of their relationship;⁴⁵ the expression “rules of law” was introduced to ensure that parties can opt for non-state law, such as the United Nations Convention on Contracts for the International Sale of Goods (“CISG”).⁴⁶ Both Article 34, dealing with setting aside applications, and Article 36, dealing with grounds for refusing recognition and enforcement of arbitral awards, mirror Article V of the New York Convention. However, both “Article V of the New York Convention and Article 34 of the UNCITRAL Model Law do not foresee, as a ground to refuse enforcement or

41. Regarding the operation of this article, D. De Meulemeester and P. Lefebvre, “The New York Convention: An Autopsy of Its Structure and Modus Operandi”, in M. Scherer (ed.), *Journal of International Arbitration*, Vol. 35, 4, The Hague, Kluwer Law International, 2018, pp. 413-438.

42. F. Ferrari and L. Silberman, “Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong”, *Revista Brasileira de Arbitragem*, Vol. VII, 26, Comitê Brasileiro de Arbitragem & IOB, 2020, pp. 73-121, p. 80.

43 . “Commercial Arbitration”, Model Law, Arbitration, UNCITRAL, undated. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

44. Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 33; I. Bantekas, P. Ortolani, S. Ali, M. A. Gomez, and M. Polkinghorne, “Rules Applicable to Substance of Dispute”, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary*, Cambridge, Cambridge University Press, 2020, p. 737.

45. R. Pereira Dias, “Direito aplicável à convenção de arbitragem e ao mérito”, in C. Monteiro Pires and R. Pereira Dias (coords.), *Manual de Arbitragem Lusófona*, Coimbra, Almedina, 2020, p. 184; D. Moura Vicente, “A determinação do Direito aplicável ao mérito da causa na arbitragem internacional à luz da nova portuguesa Lei de Arbitragem Voluntária”, *Revista Internacional de Arbitragem e Conciliação*, V, Associação Portuguesa de Arbitragem, Almedina, 2012, p. 45.

46. Explanatory Note, p. 33

to set aside an award, that the award is not based on the applicable law”.⁴⁷

2. National perspective

The PAL is said to be modelled after the Model Law,⁴⁸ and, as an example of its implementation, it comes as no surprise that it provides that the parties may choose the rules of law to be applied by the arbitrators in international arbitrations seated in Portugal.⁴⁹ The same goes for Hong Kong and Singapore, also Model Law jurisdictions.⁵⁰ Also in non-Model Law acts such as the English Arbitration Act (“EAA”)⁵¹ and in French⁵² and Swiss law,⁵³ parties may select any rules of law to be applied in their arbitral disputes. Similarly, the Hague Principles expressly provide that “a contract is governed by the law chosen by the parties”, and for the possibility of *dépeçage*.⁵⁴ The US Federal Arbitration Act (“FAA”) has no provisions on choice of law,⁵⁵ but case law has consecrated that arbitration clauses are enforceable, also when they contain choice of law provisions.⁵⁶

47. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 157.

48. On the influence of the Model Law regarding the PAL, see A. Sampaio Caramelo, “A reforma da lei da arbitragem voluntária”, in *Revista Internacional de Arbitragem e Conciliação*, II, Associação Portuguesa de Arbitragem, Almedina, 2009, p. 7.

49. Art. 52; R. Pereira Dias, “Direito aplicável”, p. 184. Art. 49 defines the concept of and the rules applicable to international arbitration that take place in the Portuguese territory, under Art. 61.

50. Hong Kong Arbitration Ordinance (Cap. 609) (“HKAO”), Art. 65 and International Arbitration Act of Singapore (“IAA”), Art. 3. See also M. Hwang, L. Boo, et al., “National Report for Singapore (2018 through 2021)”, in L. Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International, 2020, Supplement No. 116, June 2021, p. 38.

51. EAA, sec. 46. Sec. 1(b) is excluded in case of statutory arbitrations under Sec. 96 of the EAA. See also K. Nairn, “National Report for England and Wales (2019 through 2020)”, in L. Bosman (ed.), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International 2020, Supplement No. 110, April 2020, p. 73; and A. W. Sheppard, “Chapter 12: Applicable Substantive Law”, in J. Lew, H. Bor, et al. (eds.), *Arbitration in England, with chapters on Scotland and Ireland*, Kluwer Law International, 2013, p. 225.

52. French CCP, Art. 1511. Also L. Kiffer, “National Report for France (2020 through 2021)”, in L. Bosman (ed.), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International 2020, Supplement No. 114, December 2020, Ch. 5, sec. 5; “Part II, Chapter 6: Arbitrators and the Law”, in J. Rouche, G. H. Pointon, et al., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd ed., Kluwer Law International, 2009, p. 131.

53. Swiss Federal PIL Act, Art. 187; P. M. Patocchi, “National Report for Switzerland (2018 through 2021)”, in L. Bosman (ed.), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International 2020, Supplement No. 114, July 2020, pp. 63-64; P. Burckhardt and P. Groz, “Chapter 8: The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono”, in E. Geisinger and N. Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd ed., Kluwer Law International, 2013, p. 156.

54. Hague Principles, Art. 2.

55. See also C. M. Amirfar, N. L. Reid, et al., “National Report for the United States of America (2018 through 2021)”, in L. Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International, 2020, Supplement No. 114, April 2020, pp. 61-62.

56. *Volt Inf. Sciences v. Stanford Univ.*, 489 U.S. 468 (1989).

3. Arbitral rules perspective

Arbitral rules are an extension of the parties' will.⁵⁷ They are relevant since they may set out a relevant consecration of party autonomy in international arbitration, different from national rules. It is undisputed that parties may exercise their choice of law as per the content of these rules and arbitrators are bound to respect this choice.⁵⁸ A debate exists however on whether this choice always prevails over the private international law of the *lex arbitri*,⁵⁹ when it contains a conflict rule that is different from the one provided in the arbitral rules, or if this is not the case when those conflict rules are mandatory.⁶⁰

In any case, all rules considered – CAC 2021 Arbitration Rules,⁶¹ the 2021 ICC Arbitration Rules,⁶² the 2020 LCIA Arbitration Rules,⁶³ the 2021 SAC Arbitration Rules,⁶⁴ the 2018 HKIAC Administered Arbitration Rules,⁶⁵ the 2016 SIAC Rules⁶⁶ and the UNCITRAL Arbitration Rules, as adopted in 2013⁶⁷ - recognized the parties' freedom to choose the law applicable to the merits of the dispute. As show the available institutional statistics, parties do often exercise this prerogative. For example, the 2020 ICC statistics demonstrate that in 95% of cases filed in 2020 with the ICC the parties had chosen rules of law.⁶⁸ This number was also

57. G. Cordero-Moss, "Limitations on Party Autonomy", p. 195.

58. P. Burckhardt and P. Groz, "The Law Governing the Merits", p. 155; C. M. Amirfar, N. L. Reid, et al., "National Report", pp. 61-62; G. Cordero-Moss, "Limitations on Party Autonomy", p. 195.

59. Arguing that the choice of law rules included in arbitral rules should supersede the statutory rule, based on the "overriding importance of party autonomy in this context" – G. B. Born, *International Commercial Arbitration*, § 19.03[C], p. 2844.

60. P. Burckhardt and P. Groz, "The Law Governing the Merits", p. 155; G. Cordero-Moss, "Limitations on Party Autonomy", pp. 195-196. Pointing out that this will depend on the actual rule itself being mandatory or not, which may differ in each *lex arbitri*, and pointing to Sec. 46 and Schedule 1 of the EAA as an example – H. A. Grigera Naón, "Choice-of-Law Problems in International Commercial Arbitration", *Recueil des cours*, Vol. 289 (2001), p. 327.

61. Art. 36.1.

62. Art. 21. See also "Chapter 3: Arbitral Proceedings Under The ICC Rules of Arbitration of 2012", in H. Verbist, E. Schäfer, et al., *ICC Arbitration in Practice*, 2nd ed., Kluwer Law International, 2015, p. 114; and W. Craig, W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed., 2000, ¶17.

63. Art. 22.3. See L. Richman, "Chapter 17: Special Powers of the Tribunal", in M. Scherer, L. Richman, et al., *Arbitrating under the 2020 LCIA Rules: A User's Guide*, Kluwer Law International, 2021, p. 290.

64. Art. 35.

65. Art. 36.

66. Rule 31.

67. Art. 35. See C. Croft, C. Kee, and J. Waincymer, *A Guide to the UNCITRAL Arbitration Rules*, Cambridge, Cambridge University Press, 2013, p. 395.

68. "ICC Dispute Resolution 2020 Statistics", ICC, 2021, p. 17.

at 96% in the 2019 SAC cases.⁶⁹

4. Party autonomy as the rule

Transnational and national sources provide the parties to an arbitration agreement with a relevant degree party autonomy. So much so that it can be said that party autonomy is today a principle with generalized acceptance when it comes to the determination of the substantive rights applicable in arbitrations related to disputes emerging from international commercial relationships.⁷⁰

From a theoretical standpoint, it follows from the above analysis that parties to an arbitration agreement are generally able to choose the law applicable to their international commercial contracts. However, the same modern arbitration framework that establishes this principle also entails normative limits to party autonomy, the exceptions to this rule, as provided in the next chapter.

IV. Normative limits

I will identify what the normative limits are to the parties' choice of law on the merits, be them direct, expressly imposed by the *lex arbitri* (section 1), or indirect, imposed by the *lex arbitri* and other laws in a non-express manner (section 2).

1. Direct normative limits imposed by the *lex arbitri*

Direct limits can be imposed by the law of the arbitration seat and can touch the object of the parties' choice of law.

A. Object

a) Choice of "rules of law"

The object of the choice of law can go beyond national laws. The relevance of transnational sources has been increasingly recognised in international arbitration, as demonstrates the

⁶⁹ . "Arbitration Statistics 2019", SCAI, 2020, p. 4, available at: <https://www.swissarbitration.org/resources/arbitration-statistics-2019/>.

⁷⁰ D. Moura Vicente, *Da arbitragem*, p. 104.

adoption in the Model Law of the expression “rules of law”, understood to include transnational sources in addition to “laws” of States.⁷¹ This approach, following the French position at the time, ensures the validity of choice of law agreements by broadening the potential objects of the choice of law agreement.⁷² This has been received in many arbitration laws including Portugal,⁷³ Hong Kong⁷⁴ and Singapore.⁷⁵ The same is the case in England and Wales⁷⁶ and in Switzerland.⁷⁷ The US FAA is silent on this issue, thus the arbitration agreement and eventually selected arbitral rules will govern this issue.⁷⁸ In addition all the arbitration rules consulted indicated that arbitrators should apply the rules of law selected by the parties.⁷⁹ The Hague Principles recognize that parties may elect “rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.”⁸⁰

Some jurisdictions, however, adopt a more conservative expression, narrowing the choice of the parties to state laws. This is the case, for example, of Angola, seat to an increasing number of international arbitrations and signatory to the New York Convention since 2017, where the law only provides for the parties’ ability to choose “laws” in international arbitration.⁸¹

71. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 211; L. Radicati di Brozolo, “Party Autonomy”, pp. 77-82; G. Bermann, *International Arbitration*, p. 355.

72. G. B. Born, *International Commercial Arbitration*, §19.06[C][1], p. 2967-2968. See current Art. 1511 of the French CCP, and L. Kiffer, “National Report”, Ch. 5, sec. 5.

73. PAL, Art. 52.

74. HKAO, Art. 64.

75. M. Hwang, L. Boo, et al., “National Report”, p. 38.

76. EAA, Sec. 46; K. Nairn, “National Report”, p. 73.

77. Swiss Federal PIL Act, Art. 187; P. Burckhardt and P. Groz, “The Law Governing the Merits”, pp. 158-163.

78. C. M. Amirfar, N. L. Reid, et al., “National Report”, p. 62. M. Elcin, “Lex Mercatoria”, p. 109, note 346.

79. CAC 2021 Arbitration Rules, Art. 36(1); 2021 ICC Arbitration Rules, Art. 21(1); 2020 LCIA Arbitration Rules, Art. 22(3); 2021 SAC Arbitration Rules, Art. 35(1); 2018 HKIAC Administered Arbitration Rules, Art. 36(1); 2016 SIAC Rules, Art. 31(1); and UNCITRAL Arbitration Rules, Art. 35(1).

80. Hague Principles, Art. 3. See R. Michaels, “Non-State Law in the Hague Principles on Choice of Law in International Contracts”, in K. Purnhagen and P. Rott (eds.), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz*, 2014, arguing that this is “emblematic of a dangerous tendency of law made to educate parties as to what would be good for them” (sec. I). Reminding that arbitrators have no forum, and reinforcing Art. 3’s consecration of party autonomy – K. Boele-Woelki, “Party Autonomy in Litigation and Arbitration in View of the Hague Principles on Choice of Law in International Commercial Contracts”, *Recueil des cours*, Vol. 379 (2016), p. 66.

81. Law no. 16/03, of 25 July, Art. 43(1) of the Angolan Arbitration Law. See R. Pereira Dias, “Direito aplicável”, pp. 182-183; *Lei de Arbitragem Voluntária Comentada*, M. Gonçalves, S. Vale, L. Diamvutu (eds), Coimbra, Almedina, 2013, pp. 143-144.

This almost unanimous broad understanding opens the doors for the parties, exercising their party autonomy, to choose transnational rules of law, such as the United Nations Convention on Contracts for the International Sale of Goods (“CISG”).⁸² More recent systematizations and standardizations of transnational sources are the 2010 Unidroit Principles on International Commercial Contracts (“UPICC”) and the Principles of European Contract Law (“PECL”).⁸³ In practice, French courts have ruled that the application of the UPICC in an ICC arbitration, in the absence of a choice by the parties, was within the arbitrators’ mission⁸⁴. Another example is that of *lex mercatoria*,⁸⁵ a set of non-written “rules developed spontaneously by business practice”,⁸⁶ of substantive character, that includes usages, practices and customs of international commerce,⁸⁷ as well as general principles of law.⁸⁸

From a practical perspective, arbitration institutions statistics tell us that these rules of law are selected only in very few cases, in 2020 in ICC arbitrations only 2%.⁸⁹ HKIAC statistics show the UPICC as the least chosen law in cases started in 2020⁹⁰.

In any case, it should be highlighted that in general “transnational law does not have the ability to govern a relationship to the full exclusion of national laws.”⁹¹ This appears to be the case in relation to the CISG, that has external gaps that will need to be filled with provisions of

82. Explanatory Note, p. 33, expressly providing this example.

83. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 261, pp. 283-284. Regarding the UPICC see L. Gama Jr., “Les principes d’UNIDROIT et la loi régissant les contrats de commerce”, *Recueil des cours*, Vol. 406 (2020).

84. L. Kiffer, “National Report for France (2020 through 2021)”, Ch. 5, sec. 5, citing in note 292 “Société Prakash Steellage Ltd v. Société Uzuc SA, Court of Appeal of Paris, 25 February 2020”, *Revue de l’Arbitrage*, Issue 1, Comité Français de l’Arbitrage, 2020, pp. 321-322.

85. L. Lima Pinheiro, *Arbitragem Transnacional*, p. 443.

86. G. Cordero-Moss, “Limitations to Party Autonomy”, p. 258; G. Bermann, *International Arbitration*, pp. 362-363.

87. A. Marques dos Santos, *Direito Internacional Privado*, Introdução, Vol. I, Lisboa, AAFDL, 2001, p. 34; P. Burckhardt and P. Groz, “The Law Governing the Merits”, pp. 161-163.

88. G. Cordero-Moss, “Limitations on Party Autonomy”, pp. 262-263, speaking of sources of transnational law, broadly. For a modern thesis on *lex mercatoria*, proposing it as a *lex fori* in international arbitration to give effect to the parties’ reasonable expectations, see M. Elcin, “Lex Mercatoria”, p. 241.

89. “ICC Dispute Resolution 2020 Statistics”, p. 17. In the SCAI, 0% of cases - “Arbitration Statistics 2019”, SCAI, p. 4.

90 “2020 Statistics”, HKIAC, available at: <https://www.hkiac.org/about-us/statistics>.

91. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 301.

national law,⁹² but also in relation to the UPICC and the PECL.⁹³ The same conclusion is reached regarding manifestations of *lex mercatoria*, which some scholars argue lack sufficiency and predictability.⁹⁴

2. Indirect normative limits imposed by *lex arbitri* and other laws

There are limits to the choice of law on the merits that arise from non-express rules on the law applicable to the parties' choice (section A), the scope of the choice (section B), or its object (section C).

A. The law applicable to the parties' choice

Faced with a choice of law on the merits by the parties, the arbitrator is not excused from verifying the validity of that choice against the applicable conflict rules – whichever they are.⁹⁵ This confrontation will verify if the choice is possible and if it was made within the objective and substantive limitations of that law.⁹⁶ In this sense, it is said that the validity of the choice of law made by the parties is in itself a limitation to party autonomy.⁹⁷

Although one author suggests that an international conflict rule exists regarding the validity of the parties' choice of law agreement in arbitration,⁹⁸ most authors look to conflicts rules codified in national law. This option is based on the predictability arising thereof, and the availability of special conflict rules in many national legal orders that propose more flexible solutions applicable to international commerce.⁹⁹ Flowing from this proposition, different laws can be considered.¹⁰⁰

A reference to the law chosen by the parties to determine the applicable law may lead to two results: applying its own substantive rules or that jurisdiction's conflict rules (*renvoi*).

92. Art. 7(2) of the CISG; G. Cordero-Moss, "Limitations on Party Autonomy", p. 287.

93. Art. 1:106 (2) of the PECL.

94. G. Cordero-Moss, "Limitations on Party Autonomy", p. 261

95. D. Moura Vicente, *Da arbitragem*, p. 91.

96. *Id.*, p. 71.

97. G. Bermann, *International Arbitration*, pp. 381-388.

98. G. B. Born, *International Commercial Arbitration*, §19.04[A][6], pp. 2893-2894.

99. D. Moura Vicente, *Da arbitragem*, pp. 87, 91-92.

100. G. Bermann, *International Arbitration*, pp. 381-382.

Support exists for both solutions.¹⁰¹⁻¹⁰² The Hague Principles refer precisely to this first option.¹⁰³ The simplicity of this first approach and the presumption that the parties' intention is likely compatible with the actual policies reflected in the substantive rules of that jurisdiction seem more persuasive.¹⁰⁴ In any case, both these approaches turn to the law whose choice is under scrutiny, which has been criticized as constituting "bootstrapping".¹⁰⁵

In favour of the conflict rules of the law applicable to the arbitral process, that is the *lex arbitri*, is the argument that the seat performs a function similar to that of the forum in courts.¹⁰⁶ Some authors argue that this law should apply as the "otherwise applicable law", that is, the hypothetical applicable law if the parties had not displaced it, defending from a logic and policy standpoint the interest that law has in being applied.¹⁰⁷ However, this entails a full conflict rules analysis, which has been pointed out as uneconomical¹⁰⁸ and outdated.¹⁰⁹

The option of applying the substantive rules of the seat would lead to the application of the general law of the seat. This approach has merited some criticism, based on the arguments that the parties did not contemplate that that law would govern the validity of their choice of law on the merits,¹¹⁰ and that the application of the approach prevailing in courts of the seat runs

101. In support of the substantive rules of the law chosen by the parties, F. Ferrari and L. Silberman, "Getting to the Law", p. 87; and M. De Boer, Th., "Choice of Law in Arbitration Proceedings", *Recueil des cours*, Vol. 375 (2015), p. 80.

102. In support of the conflict rules of the law chosen by the parties, G. B. Born, *International Commercial Arbitration*, § 19.04[A][6], p. 2892.

103. Hague Principles, Art. 6.

104. G. Bermann, *International Arbitration*, pp. 383-384, explaining that the Rome Regulation I, in respect to the validity of forum selection agreements is also assessed as per the law chosen, and excluding renvoi.

105. *Id.*, p. 384.

106. D. Moura Vicente, *Da arbitragem*, p. 92. Also P. Lalive, "Problemes relatifs à l'arbitrage international commercial", *Recueil des cours*, Vol. 120 (1967), p. 659, arguing in that in many cases the arbitrators will have the duty to apply the conflict rules of the seat; B. Wortmann, "Choice of Law", p. 113, arguing for the application of the rules of conflict of laws in effect at the seat, if the parties chose the seat and if a cumulative approach is not possible (when all rules of conflict of laws connected with the dispute will apply the same law to the merits); "Partial Award in CRCICA Case No. 120/1998", in M. Alam-Eldin (ed.), *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration II 1997- 2000*, Alphen aan den Rijn, Kluwer Law International, 2003, p. 28.

107. G. Bermann, *International Arbitration*, pp. 384-385.

108. *Id.*, p. 385.

109. A. F. M. Maniruzzaman, "Conflict of Laws Issues in International Arbitration: Practice and Trends", *Arbitration International*, Vol. 9, 1993, p. 401; G. B. Born, *International Commercial Arbitration*, §19.04[A][6], p. 2893, but arguing that this is the correct approach if there is no party choice of law agreement.

110. G. Bermann, *International Arbitration*, p. 387; B. Nigdel, C. Partasides, et al., *Redfern and Hunter on International Arbitration*, 6th ed., Kluwer Law International, Oxford University Press, 2015, p. 223.

counter the purpose of arbitration of not adhering to court practices.¹¹¹

B. Scope

The scope of party autonomy is not unanimous. Some suggest that party autonomy in international arbitration is unlimited, that is, the parties choice of law on the “merits” or “substance” governs all aspects of the dispute;¹¹² whereas another position is that party autonomy is not all-encompassing, and certain issues within the parties’ legal relationships will be regulated by the law determined by other conflict rules, which the parties cannot select.¹¹³

I take the former position. Tellingly, there is typically no indication on this matter under arbitral statutory conflict rules. As a point of reference, the Hague Principles establish that “The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to - a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages; d) the various ways of extinguishing obligations, and prescription and limitation periods; e) validity and the consequences of invalidity of the contract; f) burden of proof and legal presumptions; g) pre-contractual obligations”.¹¹⁴

b) Other choice-of-law rules

Following from the above position, the choice of law that applies to a contractual dispute will not apply to all the aspects of the legal relationship between the parties, therefore other private international law rules will be relevant. One example of is the capacity of a contract signatory to bind the respective party to the contract in dispute.¹¹⁵ Other examples involve third-

111. G. Bermann, *International Arbitration*, p. 387

112. L. Radicati di Brozolo, “Party Autonomy”, pp. 75-77.

113. G. B. Born, *International Commercial Arbitration*, §19.04[C], p. 2931; G. Cordero-Moss, “EU Overriding Mandatory Provisions and the Law Applicable to the Merit”, in F. Ferrari (ed.), *Impact of EU Law On International Commercial Arbitration*, Jurisnet, 2017, p. 344; G. Cordero-Moss, “Conflict of laws as a basis to determine the arbitral tribunal's power”, in F. Ferrari and S. Kröll (eds.), *Conflict of Laws in International Commercial Arbitration*, Juris, 2019, 177-180.

114. Hague Principles, Art. 9; A. Sheppard, “Applicable Substantive Law”, pp. 225-226.

115. G. B. Born, *International Commercial Arbitration*, §19.04[C], p. 2931; G. Cordero-Moss, “Limitations on Party Autonomy”, p. 167; P. Burckhardt and P. Groz, “The Law Governing the Merits”, p. 164.

party interests, like corporate law, insolvency law, property law, encumbrances or security interests law.¹¹⁶ Some authors also include tort law and competition law in these matters.¹¹⁷ These issues will be subjected to laws identified on the basis of other connecting factors more relevant to them.¹¹⁸

Because the parties' choice of law on the merits does not extend to these other matters, arbitral tribunals are not bound by this choice in relation to them.¹¹⁹

c) *Arbitrability*

Commercial disputes are usually arbitrable, that is, may be brought before arbitrators. In contrast, some countries allocate exclusive jurisdiction to courts regarding certain types of legal issues,¹²⁰ such as taxation, insolvency, labor or intellectual property, imposed by and containing mandatory rules.¹²¹ This means that there are certain mandatory rules or public policy considerations - regarding areas of law where the public in general or certain parties must be protected¹²² - that cannot legally be heard by arbitrators, despite the position that the elected law for the merits takes on those issues.¹²³

Arbitrability – subjective and objective - can be considered an indirect limit to party autonomy because “it determines the point at which the exercise of contractual freedom ends and the public mission of adjudication begins”.¹²⁴ Despite the historical evolution towards

116. G. B. Born, *International Commercial Arbitration*, §19.04[C], p. 2932; G. Cordero-Moss, “Limitations on Party Autonomy”, pp. 179-182; G. Cordero Moss, “International Arbitration and the Quest for the Applicable Law”, *Global Jurist*, Vol. 8, Issue 3, (Advances), Article 2, 2008, pp. 1-18.

117. G. B. Born, *International Commercial Arbitration*, §19.05[B][4], pp. 2949-2957, analysing different approaches regarding torts in case law; G. Cordero-Moss, “Limitations on Party Autonomy”, p. 202.

118. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 179.

119. D. Moura Vicente, “Applicable Law”, p. 365; G. Cordero-Moss, “Limitations on Party Autonomy”, p. 204.

120. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 190, arguing that this presupposes that arbitrators cannot or will not apply the law as accurately as courts.

121. G. Cordero-Moss, “Quest for the Applicable Law”, pp. 31-32; G. B. Born, *International Commercial Arbitration*, §19.04[B][3], p. 2910.

122. F. Ferrari and F. J. Rosenfeld, “Límites a la autonomía de las partes en arbitraje internacional”, *Revista de Arbitraje Comercial y de Inversiones*, Vol. 10, Issue 2, Kluwer Law International, IproLex, 2017, pp. 357-358.

123. G. B. Born, *International Commercial Arbitration*, §26.05[C][10], p. 4058; A. Papeil, “Conflict of overriding mandatory rules in arbitration”, in F. Ferrari and S. Kröll (eds.), *Conflict of Laws in International Arbitration*, Sellier, 2011, pp. 349-350, 353.

124. T. E. Carbonneau and F. Janson, “Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability”, *Tulane Journal of International and Comparative Law*, 1994, 2, p. 194.

greater objective and subjective arbitrability,¹²⁵ there has been a recent trend to reject arbitral disputes related to EU rules on commercial agency.¹²⁶

Many national arbitration laws regulate arbitrability (including in Portugal, Switzerland and Hong Kong, but not in England, France or Singapore),¹²⁷ which begs the question: what if the parties chose a law according to which the dispute is arbitrable, but the dispute is not arbitrable under the law of the seat or the law of the place of enforcement? Per the New York Convention and the Model Law, at the stage of setting aside, the law of the seat will be relevant, and at the stage of enforcement, courts may consider local standards,¹²⁸ especially if the dispute has a connection to the forum.¹²⁹

C. Object

d) *Overriding mandatory rules*

Similarly, an express choice of a specific law applicable to the merits also does not render other laws totally irrelevant.¹³⁰ There is an *ex ante* element¹³¹ that contributes to the arbitrator's assessment of the applicable law, and that is the existence of mandatory rules of the law of the

125. See the case US Supreme Court, *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 US 614 (1985), where the court decided that antitrust issues were arbitrable, and the courts of enforcement could at the stage of recognition and enforcement under the New York Convention take a "second look" at the award. Similarly, in the EU, EUCJ Case C-102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, decision of 23 March 1982. Also G. Cordero-Moss, "EU Overriding Mandatory Provisions", pp. 333-335; A. Belohlavek, "The law applicable to the arbitration agreement and the arbitrability of a dispute", in M. Roth and M. Giestlinger (eds.), *Yearbook of International Arbitration*, Intersentia / DIKE / NWV, Antwerpen-Zurich-Vienna-Graz, 2013, pp. 35-36.

126. G. Cordero-Moss, "Chapter 12: Court Control on Arbitral Awards: Public Policy, Uniform Application of EU Law and Arbitrability", in A. Calissendorff and P. Schöldström (eds.), *Stockholm Arbitration Yearbook 2020*, Stockholm Arbitration Yearbook Series, Vol. 2, Kluwer Law International, 2020, pp. 199-216, citing *inter alia* in Belgium, Cour de Cassation, 16.11.2006, PAS. 2006, I, No. 11; Cour de Cassation, 14.1.2010, PAS. 2010, I, No. 12; Cour de Cassation, 3.11.2011 PAS. 2011, I, No. 1; in England, *Accentuate Limited v. Asigra Inc.* [2009] EWHC (QB) 2655.

127. Art. 1(1) of the PAL; Art. 177(1) of the Swiss Federal PIL Act; and Part 11A of the HKAO.

128. See Art. V.2.(a) of the New York Convention, and Arts. 34(2)(b)(i) and 36(2)(b)(i) of the Model Law; G. Cordero-Moss, "Limitations on Party Autonomy", p. 193; A. Papeil, "Conflict of overriding mandatory rules", pp. 352-353. Regarding the law applicable to arbitrability - A. Belohlavek, "The law applicable", pp. 42-49; See also E. Sinander, "What law applies to the issue of arbitrability in international arbitration?", in this book.

129. G. B. Born, *International Commercial Arbitration*, §26.05[C][10], pp. 4063.

130. D. Moura Vicente, *Da arbitragem*, p. 193.

131. R. Pereira Dias, "Direito aplicável", p. 195. Speaking of a "preventive role", versus the "therapeutical role" of public policy – see A. Papeil, "Conflict of overriding mandatory rules", p. 353.

contract or overriding mandatory rules of other laws that should be applied as per the conflict rules of the private international law applicable by the tribunal.¹³² The latter raise some questions.¹³³

The often titled overriding mandatory rules project interests and values that are especially relevant to a certain legal community and have a sufficient connection to the matter at hand, irrespective of the choice of law of the parties or of which law is otherwise applicable, that justifies their extraterritoriality.¹³⁴ In other languages these are called *lois de police*, *Eingriffsnormen*, or *normas de aplicação necessária e imediata*.¹³⁵ The source of these rules can be the *lex contractus*, the *lex arbitri* or a third jurisdiction.¹³⁶

The arbitral tribunal is empowered to apply overriding mandatory rules if these provisions regulate the private law consequences of the dispute.¹³⁷ This is the position also contained in the Hague Principles, which “shall not prevent an arbitral tribunal (...) from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so”.¹³⁸

132. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 202; L. Lima Pinheiro, *Arbitragem Transnacional*, p. 266.

133. G. Bermann, *International Arbitration*, pp. 395-403. The former are part of the governing law and will not be addressed – more in G. Cordero-Moss, “Limitations on Party Autonomy”, pp. 191, 236; G. Bermann, *International Arbitration*, pp. 393-394.

134. H. A. Grigera Naón, “Choice-of-Law Problems”, p. 185; G. Cordero-Moss, “Limitations on Party Autonomy”, p. 203; R. Pereira Dias, “Direito aplicável”, p. 192. Calling them “legal irritants”, see J. Kleinheisterkamp, “Overriding Mandatory Laws in International Arbitration”, *International and Comparative Law Quarterly*, 67, no. 4, October 2018, pp. 903-930. See also “Les lois de police non choisies par les parties”, W. Sylvie Zongo, in this book.

135. R. Pereira Dias, “Direito aplicável”, p. 195; “Arbitrators and the Law”, in J. Rouche, G. H. Pointon, et al., p. 154; P. Burckhardt and P. Groz, “The Law Governing the Merits”, p. 164.

136. G. Bermann, *International Arbitration*, pp. 396-403; A. Sheppard, “Applicable Substantive Law”, pp. 234-236; G. B. Born, *International Commercial Arbitration*, §19.04[B][5], pp. 2916-2926, arguing that the arbitrator is bound to apply the mandatory rules of the seat, if no international treaty or rule of law dictates otherwise.

137. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 191; L. Radicati di Brozolo, “Party Autonomy”, pp. 73-74. G. Bermann, *International Arbitration*, pp. 393-394 speaks of rules that operate affirmatively, that arbitrators are obliged to apply, although later admitting that they have the discretion to do so (p. 415). Arguing that pursuant to Swiss law, the arbitrators have a duty to consider overriding mandatory rules under penalty of the arbitral award being set aside based on international public policy - P. M. Patocchi, “National Report”, pp. 63-64; arguing that arbitrators have discretion in deciding whether to apply these rules– P. Burckhardt and P. Groz, “The Law Governing the Merits”, p. 165. Explaining that this authority arises from the jurisdictional function of arbitrators - H. A. Grigera Naón, “Choice-of-Law Problems”, p. 208.

138. Hague Principles, Art. 11(5).

This requirement of entitlement, i.e., the relevance of the concrete overriding mandatory rules, will depend on the legal values involved and the connection of those rules to the case¹³⁹ (via other connecting factors).¹⁴⁰ Once the arbitrators interpret these rules and their content and scope, they can consider whether these are applicable under the relevant conflict rules,¹⁴¹ and arguably, consider also the parties' expectations and other relevant systemic considerations.¹⁴²

The determination of the content of these rules can be challenging.¹⁴³ In any case, some examples include provisions on unfair contract terms, competition law rules, antitrust and securities law, labour law rules protecting the employee and consumer laws, and international obligations.¹⁴⁴

e) Public policy

Public policy is a much-debated concept.¹⁴⁵ It can be described as the unbreachable core of a legal order.¹⁴⁶ As proposed by the Committee on International Commercial Arbitration of the International Law Association (ILA) Recommendations on the application of public policy as a ground for refusing recognition and enforcement of international arbitration awards (2002),¹⁴⁷ public policy includes “(i) *fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned* (ii) *rules designed to serve the essential political, social or economic interests of the State, these being known as*

139. R. Pereira Dias, “Direito aplicável”, p. 195; G. B. Born, *International Commercial Arbitration*, §19.04[B][5], p. 2920; D. Mavunduse and C.B. Andersen, “Party autonomy”, p. 95.

140. G. Cordero-Moss, “Quest for the Applicable Law”, pp. 21-22.

141. G. B. Born, *International Commercial Arbitration*, §19.04[B][5], p. 2920.

142. H. A. Grigera Naón, “Choice-of-Law Problems”, pp. 188-189, 204, speaking of a functional choice-of-law methodology for applying *lois de police*, and suggesting that arbitrators consider the several relevant elements to conclude if these shall apply; likewise, D. Jones, “Choosing the Law”, p. 928.

143. G. Bermann, *International Arbitration*, pp. 412-414.

144. G. Cordero-Moss, “Limitations on Party Autonomy”, pp. 191-192, 203; C. M. Amirfar, N. L. Reid, et al., “National Report”, pp. 61-62; A. Sheppard, “Applicable Substantive Law”, p. 236; H. A. Grigera Naón, “Choice-of-Law Problems”, p. 185.

145. R. Pereira Dias, “Direito aplicável”, pp. 195-199; G. Bermann, *International Arbitration*, pp. 414-426; G. Cordero-Moss, “Limitations on Party Autonomy”, pp. 202-205; L. Lima Pinheiro, *Arbitragem Transnacional*, pp. 262-268.

146. R. Pereira Dias, “Direito aplicável”, p. 196, “reduto inviolável da ordem jurídica”.

147. *ILA Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards*, as adopted in ILA Resolution 2/2002, Art. 1(c).

“*lois de police*” or “*public policy rules*” and (iii) the duty of the State to respect its obligations towards other States or international organisations.”¹⁴⁸⁻¹⁴⁹

Whether international public policy is narrower in scope compared to overriding mandatory rules is not consensual,¹⁵⁰ however, differently from these rules, public policy operates defensively.¹⁵¹ It is assessed both at the seat, in annulment proceedings, and at the place of enforcement of the arbitral award.¹⁵² Courts in this instance analyse if the effects of the application by the arbitrators of the law on the merits chosen by the parties is manifestly incompatible with the public policy of the forum of recognition.¹⁵³ This is seen as a concession of a certain control by courts over the arbitration process to ensure that certain fundamental principles of law are upheld in arbitration.¹⁵⁴ Differently, at the stage of recognition and enforcement, the argument of public policy is a shield against the effects of said award when it offends the core values of the forum,¹⁵⁵ operating as an eventual *ex post* limit to party autonomy.¹⁵⁶

Scholars distinguish between internal public policy, relevant as a limit to the individual freedom of parties, and international public policy, relevant as a bar to the applicability of a certain *lex causae* originally considered appropriate.¹⁵⁷ International public policy aggregates fundamental principles common of developed legal systems.¹⁵⁸ Only this category is considered

148. *ILA Recommendations*, Art. 1(d).

149. Examples are principle of *pacta sunt servanda*, the prohibition of abuse of rights or the prohibition of expropriation without compensation; EU competition law, environmental protection law, embargoes or boycotts and consumer protection law; the requirement for tribunals to be impartial, to not make an award based on fraud or corruption, or the enforcement of an award that is incompatible with a previous judicial decision with *res judicata* effect – *ILA Recommendations*, Art. 1(e); G. Cordero-Moss, “Limitations on Party Autonomy”, p. 203.

150. G. B. Born, *International Commercial Arbitration*, §19.04[B][6], p. 2928 and G. Cordero-Moss, “Limitations on Party Autonomy”, p. 189, for a narrower scope of public policy; L. Lima Pinheiro, *Arbitragem Transnacional*, pp. 265-266, citing positions that exclude and include overriding mandatory rules in public policy.

151. G. Bermann, *International Arbitration*, p. 415; G. B. Born, *International Commercial Arbitration*, §26.05[C][9], pp. 4014, calling it an “escape device”.

152. Model Law, Arts. 34 and 36.

153. R. Pereira Dias, “Direito aplicável”, p. 192.

154. D. Moura Vicente, “Applicable Law”, p. 361.

155. G. Bermann, *International arbitration*, p. 415.

156. R. Pereira Dias, “Direito aplicável”, p. 195.

157. *Id.*, p. 196; *ILA Recommendations*, Art. 1(b); G. A. Bermann, “Mandatory rules of law in international arbitration”, in F. Ferrari and S. Kröll, *Conflict of Laws in International Arbitration*, Sellier, 2011, pp. 329-330.

158. G. B. Born, *International Commercial Arbitration*, §19.04[B][6], p. 2926; G. Cordero-Moss, “EU

in this section. Notwithstanding this, some scholars advocate for a narrower understanding of public policy, through the adoption of a transnational perspective, to help unify the international framework of recognition and enforcement of foreign arbitral awards.¹⁵⁹

It is argued that arbitrators have the duty not to apply the law chosen by the parties if it offends the public policy of the states with a significant connection to the arbitration.¹⁶⁰ This is also the position of the Hague Principles.¹⁶¹ However, this concept cannot be applied arbitrarily by arbitrators,¹⁶² and, at the same time, should exceptionally not be applied when the national concept of public policy is idiosyncratic or hostile to international arbitration.¹⁶³ In contrast, courts will inevitably consider the public policy of the forum.¹⁶⁴

Hong Kong and Singapore,¹⁶⁵ as well as Portugal have provisions similar to the Model Law, the latter with the already mentioned peculiarity that international arbitration awards rendered in Portugal remain immune to annulment, even if contrary to Portuguese public policy, if not intended to be enforced in the country.¹⁶⁶

English law speaks of public policy regarding foreign awards, understood by scholars as a narrow concept, and regarding domestic awards a challenge may be made on ground of serious

Overriding Mandatory Provisions”, p. 325.

159. For it, M. Moses, “Chapter 11: Public Policy under the New York Convention: National, International, and Transnational”, in K. Fach Gomez and A. M. Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges*, Kluwer Law International, 2019, pp. 169-184; L. Lima Pinheiro, *Arbitragem Transnacional*, pp. 469-474; against a “transnational public policy”, P. Mayer, “Chapter 2: Effect of International Public Policy in International Arbitration”, in L. A. Mistelis and J. D. Mathew Lew (eds.), *Pervasive Problems in International Arbitration*, International Arbitration Law Library, Vol. 15, Kluwer Law International, 2006, pp. 61-69, explaining how this concept was introduced in 1986 by P. Lalive; M. Pryles, “Reflections on Transnational Public Policy”, *Journal of International Arbitration*, Kluwer Law International, 2007, Vol. 24, Issue 1, pp. 1-7.

160. G. Bermann, *International Arbitration*, pp. 417-418; L. Lima Pinheiro, *Arbitragem Transnacional*, p. 264; R. Pereira Dias, “Direito aplicável”, p. 196.

161. Hague Principles, Art. 11(5).

162. G. B. Born, *International Commercial Arbitration*, §19.04[B][6], p. 2927, R. Pereira Dias, “Direito aplicável”, p. 196.

163. G. Bermann, *International Arbitration*, p. 418.

164. *Id.*, pp. 417-418; L. Lima Pinheiro, *Arbitragem Transnacional*, p. 264; R. Pereira Dias, “Direito aplicável”, p. 196.

165. IAA, Art. 31 and M. Hwang, L. Boo, et al., “National Report”, pp. 47-48; and HKAO, secs. 81 and 82 and E. T. M. Yang and S. Cheng, “Setting Aside an Arbitral Award in Hong Kong Pursuant to Article 34 of the UNCITRAL Model Law: A Practical Guide”, *Asian Dispute Review*, Vol. 15, Issue 2, HKIAC, 2013, p. 58.

166. PAL, Art. 54.

irregularity.¹⁶⁷ For the annulment of awards rendered in France and opposition to the recognition and enforcement of awards rendered abroad or in international arbitration, the award cannot be manifestly contrary to international public policy.¹⁶⁸ In Switzerland incompatibility with public policy is also a ground to set aside an arbitral award, and despite diverging case law on whether this would be international or national public policy, it is settled that this is a narrow concept assessed on a case-by-case basis.¹⁶⁹ US case law also considers public policy under the New York Convention, which the FAA incorporates by reference,¹⁷⁰ a narrow ground to justify non-recognition and enforcement.¹⁷¹ Despite the fact that its FAA does not provide for vacatur in case of incompatibility of the award with public policy, it can be argued that the existing grounds likely allow a party to arrive at the same result as under a Model Law jurisdiction.¹⁷²

3. Normative limits as the exception

In conclusion, this section has revealed that there are several relevant limits to the application of the law chosen by the parties regarding the merits of their dispute, be them with an *ex ante* or *ex post* nature. However, if on the one hand those limits seem reasonable, considering the interests they aim to protect and the justifications for the enforceability of party autonomy, they confirm the broad spectrum of laws that may be at play in international

167. EEA, secs. 68(2)(g), 81(1)(c) and 103(3); K. Nairn, “National Report”, pp. 28, 83; A. Sheppard, “Applicable Substantive Law”, p. 237.

168 French CCP, Arts. 1514 and 1520; L. Kiffer, “National Report”, Ch. 5, sec. 10, Ch. 6, sec. 3, and Ch. 7, sec 2.

169. Swiss Federal PIL Act, Art. 190; P. M. Patocchi, “National Report”, pp. 83-84; arguing for the international public policy under the same statute, see P. Burekhardt and P. Groz, “The Law Governing the Merits”, p. 165.

170. Y. Lahlou, A. Poplinger, et al., “Chapter 8: Basic Principles Governing Recognition and Enforcement of Foreign Arbitral Awards in the United States and New York”, in A. A. Frischknecht, Y. Lahlou, et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York*, Kluwer Law International, 2018, p. 110.

171. C. M. Amirfar, N. L. Reid, et al., “National Report”, citing in notes 424 and 425, among others, *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). See also Y. Lahlou, A. Poplinger, et al., “Substantive Barriers to Recognition and Enforcement”, in A. A. Frischknecht, Y. Lahlou, et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York*, Kluwer Law International, 2018, pp. 163-169.

172. Sec. 10 of the FAA, and V. S. Sahani, “Chapter 1: Comparing the Federal Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration”, in L. Shore, T. Cheng, et al. (eds), *International Arbitration in the United States*, Kluwer Law International, 2017, pp. 24-25.

arbitration. It must be state however that these restrictions are the exception, rather than the norm, and that in most cases, the parties' choice of law is unfettered.¹⁷³

V. Consequences of the breach of the normative limits

Finally, I address the question of the consequences of the non-compliance with said limits, i.e. their true effectiveness.

The real test on whether the presented limitations are effective is conducted in courts.¹⁷⁴ I argue that, save if parties can appeal from an arbitral award for a review on the merits, courts will very seldomly enforce the normative limits in setting aside and recognition and enforcement proceedings. Only in limited circumstances will the arbitrators' interpretation of the parties' choice of law or of the applicable conflict rules be controlled by courts, which are prohibited from reviewing the merits (section 1). We will analyse the potential grounds for annulment or non-recognition that courts typically consider: excess of authority, irregular composition of the arbitral procedure, arbitrability, public policy and other conflict rules (section 2).

1. Review of the merits

The majority of scholars argue that, either in setting aside or enforcement proceedings, a court may not review the arbitrators' interpretation of the parties' choice of law or of the applicable conflict rules.¹⁷⁵ The underlying explanation is that these are issues related to the merits, and no review on the merits is possible because arbitral awards are final and binding.¹⁷⁶ The policy goal behind this statement is to prevent challenges to arbitral awards and promote efficiency in arbitral outcomes.¹⁷⁷ Tellingly, the respect for the parties' choice of law clause or

173. G. Cordero-Moss, "Limitations on Party Autonomy", p. 205.

174. H. A. Grigera Naón, "Choice-of-Law Problems", p. 228.

175. G. Cordero-Moss, "Limitations on Party Autonomy", p. 196; G. B. Born, *International Commercial Arbitration*, §26.05[C][4], p. 3882. Regarding Switzerland, see P. Burckhardt and P. Groz, "The Law Governing the Merits", p. 171. See also A. Kouami, "Le Contrôle Par Les Tribunaux Nationaux Du Droit Appliqué Au Fond À Un Litige Tranché Par Un Tribunal Arbitral", in this book.

176. G. Cordero-Moss, "Limitations on Party Autonomy", pp. 199-200.

177. F. Ferrari and L. Silberman, "Getting to the Law", p. 111.

the private international law rules that regulate the law applicable to the merits are typically not grounds that justify setting aside or refusal of recognition of arbitral awards,¹⁷⁸ which limits courts influence on this topic.¹⁷⁹

Based on this assumption, I argue that the misapplication or non-application of the proper law applicable to the parties' choice may be a non-effective normative limit, because it is non-reviewable by courts.

Likewise, the normative limit that prohibits the choice of rules of law may also not be effective, save if it is mandatory. A scenario where arbitrators apply the UPICC to an international arbitration seated in Angola, either because the parties choose it or the relevant private international laws lead to its application, would not be challengeable, following this line of thought.¹⁸⁰

2. Potential grounds for annulment or refusal of recognition and enforcement

A. Excess of authority

One ground that can be raised in this regard in courts, under Article V.1.(c) of the New York Convention and Articles 34(2)(a)(iii) Article 36(1)(a)(iii) of the Model Law is that of the arbitral tribunal's scope of authority.

One author argues that "An erroneous choice-of-law decision, including a decision disregarding a choice-of-law agreement, is a mistake of substance, not an excess of authority".¹⁸¹ Other scholars take the more nuanced position that the application of a law different from the one the parties elected, based on the application of private international law rules (correctly or incorrectly), is not included in this ground.¹⁸² This would be the case, for

178. L. Lima Pinheiro, *Arbitragem Transnacional*, pp. 268-269.

179. H. A. Grigera Naón, "Choice-of-Law Problems", p. 185.

180. L. Radicati di Brozolo, "Party Autonomy", pp. 78-79.

181. G. B. Born, *International Commercial Arbitration*, §26.05[C][4], pp. 3897; C. Borris and R. Hennecke, Article V(1)(c), in R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary*, 2nd ed., 2019, p. 321.

182. G. Cordero-Moss, "Limitations on Party Autonomy", pp. 196, 206-207, see note 163; L. Lima Pinheiro, *Arbitragem Transnacional*, p. 269; F. Ferrari and L. Silberman, "Getting to the Law", p. 110.

example, if such a choice was unwarranted based on overriding mandatory rules or public policy,¹⁸³ insofar as it relates to the dispute at issue, within the scope of the arbitration clause, and if the parties had the opportunity to comment on such application.¹⁸⁴

Case law confirms that the determination of the applicable law is within the authority of the tribunal. An example is the case *Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, where a US court considered that the determination of the law – in this case that the UPICC applied, despite no mention of it in the Terms of Reference – was contained within the authority of arbitrators.¹⁸⁵ Another example is that of *SNF SAS v. Cytec Industries BV*, where the Paris Court d’Appel confirmed the enforcement of an award against SNF’s contention that the tribunal had failed to apply the law contractually agreed – *lex mercatoria*, primarily, and French law, subsidiarily –, deciding that “the determination and application by the arbitrators of the rules of law applicable to the merits of the dispute are not subject to review”.¹⁸⁶ In other cases, the courts are tempted to opine on the justification for a tribunal’s decision. In Switzerland, in case *DFT 4A_240/2009*, the Swiss Federal Tribunal rejected the argument that an arbitral tribunal had exceeded its jurisdiction by disregarding a clear choice of law (choice of Swiss and exclusion of the CISG), concluding that, besides the fact that this challenge did not qualify as an excess of jurisdiction nor as a violation of public policy under the Swiss Federal PIL Act, the arbitrators had merely interpreted the contract according to Swiss law.¹⁸⁷

183. F. Ferrari and L. Silberman, “Getting to the Law Applicable to the Merits”, p. 112.

184. H. A. Grigera Naón, “Choice-of-Law Problems”, p. 367; G. Cordero-Moss, “EU Overriding Mandatory Provisions”, p. 349.

185. 29 F. Supp. 2d 1168 (S.D. Cal. 1998). See also US Supreme Court, *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, relating to the enforcement of an arbitration agreement. Likewise, under Art. V.1.(c) of the convention - *Revson v. Hack*, 239 A.D.2d 169, 657 N.Y.S.2d 51 (1997); and *Silverman*, 61 N.Y.2d 299, 308 (N.Y. 1984) “His award will not be vacated even though the court concludes that his interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power.”

186. “France No. 38, *SNF SAS (France) v. Cytec Industries BV (Netherlands)*, Cour d’Appel [Court of Appeal], Paris, First Chamber, Not Indicated, 23 March 2006”, in A. J. van den Berg (ed), *Yearbook Commercial Arbitration*, Vol. XXXII, ICCA & Kluwer Law International, 2007, pp. 282-289.

187. Judgment of 16 December 2009, *DFT 4A_240/2009*, Swiss Federal Tribunal; see from the same court, Judgment of 8 March 2017, *DFT 4A 40/2017*.

In the same vein, if the arbitrators go against the parties' choice of law, without providing any reasons for this deviation or without applying private international law rules, then courts may consider that they exceeded their scope of authority.¹⁸⁸ Scholars mention the UK and the US as examples of cases where under the national and federal arbitration statutes, respectively, authorities point to this conclusion.¹⁸⁹

Some authors, however, posit that if the arbitrators apply a rule that is not contained in the law chosen by the parties¹⁹⁰ or misapply or ignore the parties' choice of law willingly,¹⁹¹ they are exceeding the scope of its authority.

Therefore, in the same abstract scenario above, the arbitrators could, based on private international law rules, apply the UPICC, rather than a national law, in derogation of the parties' choice or of the requirements imposed by a national arbitration law, without their respective award being at risk of non-enforcement.¹⁹²

B. Irregular composition of the arbitral procedure

Another possible ground to argue against recognition and enforcement is that provided in Article V.1.(d) of the New York Convention and Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the Model Law, relating to the composition of the arbitral procedure in accordance with the parties agreement, or failing it, the law of the seat – or in case of the Model Law, the mandatory rules of the seat.

While two authors reject this,¹⁹³ another author is open to the possibility that a decision in

188. G. Cordero-Moss, "Limitations on Party Autonomy", p. 207; F. Ferrari and L. Silberman, "Getting to the Law", p. 113; H. A. Grigera Naón, "Choice-of-Law Problems", p. 368.

189. F. Ferrari and L. Silberman, "Getting to the Law", pp. 113-115, citing secs. 67 and 68 of the EAA, and the US case *Edstrom Industries v. Companion Life*, 516 F.3d 546 (7th Cir. 2008), where a domestic award was vacated because the arbitrators ignored an rule of Wisconsin law pleaded by the parties.

190. G. Bermann, *International Arbitration*, p. 403.

191. C. Borris and R. Hennecke, Article V(1)(c), *cit.*, p. 321. In turn, these authors argue that an erroneous application of the incorrect law is not an excess of competence.

192. D. Moura Vicente, *Da arbitragem*, pp. 215-220.

193. G. B. Born, *International Commercial Arbitration*, §26.05[C][4], pp. 3920; S. Jarvin, "Irregularity in the Composition of the Arbitral Tribunal or the Arbitral Procedure", *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London, Cameron, 2008, p. 752.

breach of the parties' choice of law provided in the arbitration agreement¹⁹⁴ or the private international law rules that regulate the law applicable to the merits be considered procedural non-conformities under the mentioned instruments.¹⁹⁵ Similarly, there may be a risk of setting aside if the arbitrators do not respect the mandatory laws of the seat, even though this may not prevent recognition and enforcement in other jurisdictions.¹⁹⁶

Our Angolan scenario, therefore, could be subject to attack on these bases.

A. Other conflict rules, such as legal capacity

A choice of law that offends the conflict rules on legal capacity of a party to enter into the arbitration agreement, pursuant Article V.1.(a) of the New York Convention and Article 34(2)(a)(i) and Article 26(2)(a)(i) of the Model Law, which points to its personal law, is also reviewable.¹⁹⁷ A previously cited example in this regard is the case of *State of Ukraine v Norsk Hydro ASA*, where the Stockholm Court of Appeal set aside an award that applied the Swedish law, chosen to govern the merits by the parties, to the legal capacity of the Ukrainian party, finding that Ukrainian law should regulate that parties capacity.¹⁹⁸ Therefore, this normative limit is effective.

B. Arbitrability

This is an effective normative limit, as it is expressly reviewable under Article V(2)(a) of the New York Convention and Arts. 34(2)(b)(i) and 36(1)(b)(i) of the Model Law, especially if the dispute has a strong connection with the forum.¹⁹⁹ The rules contained therein point to the

194. L. Lima Pinheiro, *Arbitragem Transnacional*, p. 270; G. Cordero-Moss, "Limitations on Party Autonomy", pp. 209-210; M. Aden, "Wrong answers to wrong questions? A new approach to judicial review of international arbitral awards", *Revista Brasileira de Arbitragem*, Vol. XII, Issue 47, Comitê Brasileiro de Arbitragem CBAr & IOB, 2015, pp. 55-69.

195. L. Lima Pinheiro, *Arbitragem Transnacional*, p. 270.

196. G. Bermann, *International Arbitration*, pp. 398-399.

197. D. Di Pietro, "Applicable laws under the New York Convention", in F. Ferrari, S. Kröll (eds), *Conflict of Laws in International Arbitration*, Sellier, 2011, p. 77.

p. 75. See G. B. Born, *International Commercial Arbitration*, §26.05[C][2], pp. 3816-3821.

198. *State of Ukraine v Norsk Hydro ASA*, Svea Hovrätt, 17 December 2007, cited in G. Cordero Moss, "Quest for the Applicable Law", p. 31, note 52.

199. G. B. Born, *International Commercial Arbitration*, §26.05[C][10], p. 4064, saying that if the dispute is not connected with the forum, the courts need not impose their local standards.

law of the seat, in annulment proceedings, and the law of the forum in recognition proceedings.²⁰⁰ One example of this exercise is the *Aloe Vera* case in Singapore, where the agreement in dispute pointed to the laws of Arizona, and the court applied the law of Singapore to assess the arbitrability of an alter ego claim in recognition and enforcement proceedings.²⁰¹

C. Public policy

The ability for a court to review an award's compatibility with the forum's public policy entails a deviation to the usual judicial self-restraint. While it is rejected that courts may re-judge an arbitral dispute, they retain the ability to control if that award breached the fundamental principles of the forum.²⁰² In doing this, it has been suggested that the application of *lex mercatoria* by arbitrators is not, in itself, a breach of public policy, because this incompatibility is assessed, not by considering the source of the criteria for the decision, but rather taking into account the effects of the decision on the forum.²⁰³ The same reasoning applies to the non-consideration of overriding mandatory rules, applicable pursuant to the conflict rules of the forum.²⁰⁴

An example of a case where the exception of public policy prevailed is a recent Portuguese Supreme Court case where a foreign award applying Spanish law was refused recognition under the New York Convention because it ordered the losing party – a Portuguese lawyer that had left a law firm - to pay a penalty clause in an amount of over 4.5 million euros for breaching a

200. G. Cordero-Moss, "Limitations on Party Autonomy", p. 193; D. Di Pietro, "Applicable laws under the New York Convention", p. 77.

201. *Aloe Vera of America, Inc. v. Asianic Food Pte Ltd* [2006] SGHC 78; and *Larsen Oil and Gas Pty Ltd v. Petroprod* (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] SGCA 21.

202. G. Cordero-Moss, "EU Overriding Mandatory Provisions", p. 329. For a discussion regarding the minimalist and maximalist approaches; and A. Papeil, "Conflict of overriding mandatory rules", pp. 358-359; M. Penades Fons, "The Effectiveness of EU Law and Private Arbitration", *Common Market Law Review*, 2020, 57, pp. 1081-1098, raising the issue of whether this prohibition of *revision au fond* in the minimalist approach is compatible with the principle of effectiveness of EU law; and G. Cordero-Moss, "Court Control", arguing that the EUCJ has tacitly adopted the maximalist approach in *Slovak Republic v. Achmea BV*, Case C-284/16, decision of 6 March 2018, and that a maximalist review is not the same as a review on the merits.

203. L. Lima Pinheiro, *Arbitragem Transnacional*, p. 279; G. B. Born, *International Commercial Arbitration*, §26.05[C][9], pp. 4026.

204. G. Cordero Moss, "Quest for the Applicable Law", pp. 26-27; L. Lima Pinheiro, *Arbitragem Transnacional*, p. 267.

non-compete clause.²⁰⁵ The court found that a choice of a law that did not provide for the possibility of a reduction of an excessive penalty clause based on equitable principles, like Portuguese law did, was not compatible with the Portuguese civil law rules that affirmed the principle of correction of excessive or abusive conduct in the exercise of freedom of contract – regardless of whether Spanish law was properly applied.²⁰⁶ The offense of the principles of good faith, proportionality, free choice of employment and of free economic initiative, and the public interest attached to the legal profession were also mentioned by the court, that highlighted that the seat had no connection with the dispute.²⁰⁷

Differently, in case *DFT 132 III 389*, an arbitral award was upheld because the Swiss Federal Tribunal considered that EU competition law was not part of Swiss public policy, and therefore the failure to consider these rules by the arbitrators in a case where Italian law applied was not a breach of said public policy.²⁰⁸

Interestingly, the application of overriding mandatory rules of third countries by arbitrators has been contested by courts. Take the *Hilmarton case*, where the Swiss courts found that the application of an overriding mandatory rule of Algeria forbidding payment to intermediaries – deeming unlawful the underlying services agreement (that included an obligation to obtain a contract from the Algerian government) otherwise considered lawful under Swiss law, the *lex contractus* - was incompatible with Swiss public policy, and thus set aside the relevant arbitral award²⁰⁹. The court considered that it was the Algerian restrictive rules that offended Swiss

205. AA, S.L.P and AA & Associados, R.L. v. BB, Supreme Court of Justice of Portugal, 103/13.1YRLSB.S1, 14 March 2017. English summary available in J. M. Júdice, “AA, S.L.P and AA & Associados, R.L. v. BB, Supreme Court of Justice of Portugal, 103/13.1YRLSB.S1, 14 March 2017”, *A contribution by the ITA Board of Reporters*, Kluwer Law International.

206. AA, S.L.P and AA & Associados, R.L. v. BB, Supreme Court of Justice of Portugal.

207. Id. See R. Alves and I. Carrera, “(Des)Ordem Pública Internacional, Acórdão do Tribunal da Relação de Lisboa de 02 de Junho de 2016”, in *PLMJ Arbitration Review*, 1, 2017, pp. 52-65; G. Santos Silva, “Chapter 15: Recognition and Enforcement of Foreign Arbitral Awards”, in A. Pereira da Fonseca, D. M. Lentz de Moura Vicente, et al. (eds), *International Arbitration in Portugal*, Kluwer Law International, 2020, pp. 292-293.

208. P. Burckhardt and P. Groz, “The Law Governing the Merits”, p. 165, citing in note 65, Judgment of 8 March 2006, DFT 132 III 389, 398 et seq, Swiss Federal Tribunal.

209. Decision of 17 November 1989, Court of Justice of the Canton of Geneva, *Revue de l'Arbitrage*, Issue 2, Comité Français de l'Arbitrage, 1993, pp. 315-321; Decision of 17 April 1990, Swiss Federal Tribunal, *Revue de l'Arbitrage*, Issue 2, Comité Français de l'Arbitrage, 1993, pp. 322. See H. A. Grigera Naón, “Choice-of-Law

public policy by pushing protectionist policies aimed at continuing State monopolies of foreign trade²¹⁰. A similar situation took place in the *Northrop Corp* case in the US.²¹¹

Based on the above analysis, the non-application of overriding mandatory rules, or an application that is against public policy, deems this normative limit effective.

One last word to add that a choice of law that offends the scope of party autonomy, based on third-party interests, may also be considered incompatible with the international public policy of the seat or the place of enforcement.²¹²

VI. Conclusion: The rule and the limited effectiveness of the exceptions

It has been revealingly stated that “*The great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself.*”²¹³ This statement underlines the findings of this study. On the one hand, party autonomy plays a relevant role in international arbitration, including in regard to the possibility of parties electing their governing law, which has evolved over time towards greater autonomy. On the other hand, normative limits arise from national sources linked to international arbitration. These limits may be *ex ante* or *ex post* limits, in reference to the moment when arbitrators render their decisions, and may derive from the *lex arbitri*, the *lex causae*, the *lex loci executionis* or other laws connected to the dispute. However, breaching these limits will only in very seldom occasions lead to the setting aside or non-recognition of arbitral awards, which undercuts the effectiveness of court control of both the respect for party autonomy or the limits imposed thereto.

Despite the apparent contradiction, this finding allows me to conclude that in modern arbitration party autonomy is the rule, and normative limits are the exception. Further research should be undertaken to investigate other normative limits related to the form and moment of

Problems”, pp. 305-310.

210. Decision of 17 April 1990, Swiss Federal Tribunal. See H. A. Grigera Naón, “Choice-of-Law Problems”, pp. 309-310. This raises the issue of whether an overriding mandatory rule should apply based on transnational public policy principles, and the effectiveness of this application – see id., p. 368.

211. *Northrop Corp v Triad Int'l Marketing SA*, 811 F.2d 1265, 1270 (9th Cir. 1987).

212. G. Cordero-Moss, “Limitations on Party Autonomy”, p. 177.

213. J. Paulsson, *The Idea of Arbitration*, p. 30.

the choice of law. Clarity on these issues will allow a full picture of the selection of the applicable law by the parties in international arbitration.

VII. Bibliography

Legislation/Rules

- Angolan Arbitration Law, Law no. 16/03, of 25 July
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
- English Arbitration Act
- Portuguese Arbitration Law, Law no. 63/2011, of 14 December 2011
- European Convention on International Commercial Arbitration (1961)
- French Code of Civil Procedure
- German Civil Procedure Code
- Hong Kong Arbitration Ordinance (Cap. 609)
- Principles of European Contract Law
- Singapore International Arbitration Act
- Swiss Federal Private International Law Act
- UNCITRAL Model Law on International commercial Arbitration (1985, revised in 2006)
- UNIDROIT Principles on International Commercial Contracts (2010)
- United Nations Convention on Contracts for the International Sale of Goods (1980, Vienna)

Scholarly Writings

- Aden, M., “Wrong answers to wrong questions? A new approach to judicial review of international arbitral awards”, *Revista Brasileira de Arbitragem*, Vol. XII, Issue 47, Comitê Brasileiro de Arbitragem CBAr & IOB, 2015, pp. 55-69
- Alves, R. and Carrera, I., “(Des)Ordem Pública Internacional, Acórdão do Tribunal da Relação de Lisboa de 02 de Junho de 2016”, in *PLMJ Arbitration Review*, 1, 2017, pp. 52-65
- Amirfar, C. M., Reid, N. L., et al., “National Report for the United States of America (2018 through 2021)”, in Bosman L. (ed), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International, 2020, Supplement No. 114, April 2020, pp. 1-122
- Bantekas, I., Ortolani, P., et al., and Polkinghorne, M., “Rules Applicable to Substance of Dispute”, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary*, Cambridge, Cambridge University Press, 2020, pp. 732-757
- Belohlavek, A., “The law applicable to the arbitration agreement and the arbitrability of a dispute”, in Roth M. and Giestlinger M. (eds.), *Yearbook of International Arbitration*, Intersentia / DIKE / NWV, Antwerpen-Zurich-Vienna-Graz, 2013, pp. 27-57
- Bermann, G.A., “Private international law in international arbitration”, in Ferrari F and Fernández Arroyo D. P. (eds.), *Private international law: contemporary challenges and continuing relevance*, Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing, 2019, pp. 464-483
- Bermann, G., *International Arbitration and Private International Law*, The Pocket Books of The Hague Academy of International Law, Vol. 30, Brill Nijhoff, 2017
- Bermann, G. A., “Mandatory rules of law in international arbitration”, in F. Ferrari and S. Kröll, *Conflict of Laws in International Arbitration*, Sellier, 2011, pp. 325-339
- Boele-Woelki, K., “Party Autonomy in Litigation and Arbitration in View of the Hague

Principles on Choice of Law in International Commercial Contracts”, *Recueil des cours*, Vol. 379 (2016), pp. 51-72

- Born, G. B., *International Commercial Arbitration*, 3rd ed., The Hague, Kluwer Law International, 2020.
- Borris, C. and Hennecke, R., Article V(1)(c), in Wolff R. (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary*, 2nd ed., 2019, p. 321-###,
- Burckhardt, P. and Groz, P., “Chapter 8: The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono”, in Geisinger E. and Voser N. (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd ed., Kluwer Law International, 2013, pp. 153–172
- Carbonneau, T. E., and Janson, F., “Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability”, *Tulane Journal of International and Comparative Law*, 1994, 2, pp. 193-222
- Cordero-Moss, G., “Chapter 12: Court Control on Arbitral Awards: Public Policy, Uniform Application of EU Law and Arbitrability”, in A. Calissendorff and P. Schöldström (eds.), *Stockholm Arbitration Yearbook 2020*, Stockholm Arbitration Yearbook Series, Vol. 2, Kluwer Law International, 2020, pp. 199-216
- Cordero-Moss, G. and Fernández Arroyo, D. P., “Private International Law and International Commercial Arbitration: a Dialogue about the Usefulness and Awareness of the Former for the Latter”, in Ruiz Abou-Nigm V. and Noodt Taquela M. B. (eds.), *Diversity and Integration in Private International Law*, Edinburgh, Edinburgh University Press, 2019, pp. 310-324
- Cordero-Moss, G., “Conflict of laws as a basis to determine the arbitral tribunal's power”, in Ferrari F. and Kröll, S. (eds.), *Conflict of Laws in International Commercial Arbitration*, Juris, 2019, pp. 163-185
- Cordero-Moss, G., “EU Overriding Mandatory Provisions and the Law Applicable to the Merit”, in Ferrari f. (ed.), *Impact of EU Law On International Commercial Arbitration*, Jurisnet, 2017, pp. 317-349
- Cordero-Moss, G., “Limitations on Party Autonomy in International Commercial Arbitration”, *Recueil des cours*, Vol. 372 (2015), pp. 133-326.
- G. Cordero Moss, “International Arbitration and the Quest for the Applicable Law”, *Global Jurist*, Vol. 8, Issue 3, (Advances), Article 2, 2008, pp. 1-18
- Craig, W., Park, W., and Paulsson, J., *International Chamber of Commerce Arbitration*, 3rd ed., 2000
- Croft, C., Kee, C., and Waincymer, J., *A Guide to the UNCITRAL Arbitration Rules*, Cambridge, Cambridge University Press, 2013
- De Meulemeester, D., and Lefebvre, P., “The New York Convention: An Autopsy of Its Structure and Modus Operandi”, in Scherer M. (ed.), *Journal of International Arbitration*, Vol. 35, 4, The Hague, Kluwer Law International, 2018, pp. 413-438.
- Elcin, M., “Lex Mercatoria in International Arbitration. Theory and Practice”, Vol. I, EUI Thesis, Florence, 2012, p. 106. Available at: https://cadmus.eui.eu/bitstream/handle/1814/25204/2012_ELCIN_VolI.pdf?sequence=1 (last visited on 13 September 2021)
- Ferrari, F., and Silberman, L., “Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong”, *Revista Brasileira de Arbitragem*, Vol. VII, 26, Comitê Brasileiro de Arbitragem & IOB, 2020, pp. 73-121
- Ferrari, F. and Rosenfeld, F. J., “Límites a la autonomía de las partes en arbitraje internacional”, *Revista de Arbitraje Comercial y de Inversiones*, Vol. 10, Issue 2, Kluwer Law International, IproLex, 2017, pp. 335-386
- Gaillard, E., *Legal Theory of International Arbitration*, Leiden-Boston, Nijhoff, 2010

- Gama Jr., L., “Les principes d’UNIDROIT et la loi régissant les contrats de commerce”, *Recueil des cours*, Vol. 406 (2020), pp. 34-287
- *Lei de Arbitragem Voluntária Comentada*, Gonçalves, M., Vale, S., Diamvutu, L. (eds), Coimbra, Almedina, 2013
- Grigera Naón, H. A., “Choice-of-Law Problems in International Commercial Arbitration”, *Recueil des cours*, Vol. 289 (2001), pp. 13-395
- Hwang, M., Boo, L., et al., “National Report for Singapore (2018 through 2021)”, in Bosman L. (ed), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International, 2020, Supplement No. 116, June 2021, pp. 1-55
- Jarvin, S., “Irregularity in the Composition of the Arbitral Tribunal or the Arbitral Procedure”, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London, Cameron, 2008
- Jones, D., “Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties – A discussion of voie directe and voie indirecte”, *Singapore Academy of Law Journal*, 26, 2014, pp. 911-941
- Júdice, J. M., “AA, S.L.P and AA & Associados, R.L. v. BB, Supreme Court of Justice of Portugal, 103/13.1YRLSB.S1, 14 March 2017”, A contribution by the ITA Board of Reporters, Kluwer Law International.
- Kleinheisterkamp, J., “Overriding Mandatory Laws in International Arbitration”, *International and Comparative Law Quarterly*, 67, no. 4, October 2018, pp. 903-930
- Lahlou, Y., Poplinger, A., et al., “Chapter 8: Basic Principles Governing Recognition and Enforcement of Foreign Arbitral Awards in the United States and New York”, in Frischknecht A. A., Lahlou Y., et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York*, Kluwer Law International, 2018, pp. 93-114
- Lahlou, Y., Poplinger, A., et al., “Substantive Barriers to Recognition and Enforcement”, in A Frischknecht A. A., Lahlou Y., et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York*, Kluwer Law International, 2018, pp. 153–172
- Lalive, P., “Problèmes relatifs à l'arbitrage international commercial”, *Recueil des cours*, Vol. 120 (1967), pp. 571-711.
- Lima Pinheiro, L., *Arbitragem Transnacional. A Determinação do Estatuto da Arbitragem*, Coimbra, Almedina, 2005
- Kiffer, L., “National Report for France (2020 through 2021)”, in Bosman L. (ed.), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International 2020, Supplement No. 114, December 2020, pp. 1-122
- Maniruzzaman, F. M., “Conflict of Laws Issues in International Arbitration: Practice and Trends”, *Arbitration International*, Vol. 9, 1993
- Mann, F.A., “*Lex Facit Arbitrum*”, P. Sanders (ed.), *International Arbitration: Liber Amicorum for Martin Domke*, The Hague, Martinus Nijhoff, 1967
- Mann, F.A., “England Rejects ‘Delocalized’ Contracts and Arbitration”, *International Comparative Law Quarterly*, 193, 1984, pp. 197-198.
- Marques dos Santos, A., *Direito International Privado*, Introdução, Vol. I, Lisboa, AAFDL, 2001
- Mavunduse, D., and Andersen, C. B., “Party autonomy in international commercial arbitration: a look at freedom, delimitation and judicialisation”, *International Trade Law & Regulation*, 25, 2019, No. 2, pp. 92-116
- Mayer, P., “Chapter 2: Effect of International Public Policy in International Arbitration”, in Mistelis L. A. and Mathew Lew J. D. (eds.), *Pervasive Problems in International Arbitration*, International Arbitration Law Library, Vol. 15, Kluwer Law International, 2006, pp. 61-69
- Michaels, R., “Non-State Law in the Hague Principles on Choice of Law in International Contracts”, in Purnhagen K. and Rott P. (eds.), *Varieties of European Economic Law*

and Regulation: Liber Amicorum for Hans Micklitz, 2014

- Mills, A., *Party Autonomy in Private International Law*, Cambridge, Cambridge University Press, 2018
- Moses, M., “Chapter 11: Public Policy under the New York Convention: National, International, and Transnational”, in Fach Gomez K. and Lopez-Rodriguez A. M. (eds), *60 Years of the New York Convention: Key Issues and Future Challenges*, Kluwer Law International, 2019, pp. 169-184
- Moura Vicente, D., *Da arbitragem comercial internacional. Direito aplicável ao mérito da causa*, Coimbra, Coimbra Editora, 1990.
- Moura Vicente, D., “A determinação do Direito aplicável ao mérito da causa na arbitragem internacional à luz da nova portuguesa Lei de Arbitragem Voluntária”, *Revista Internacional de Arbitragem e Conciliação*, V, Associação Portuguesa de Arbitragem, Almedina, 2012, pp. 37-50
- Moura Vicente, D., “Requirements for the Enforceability of Arbitral Awards: A Comparative Overview”, DiMatteo L. A., Infantino M., and Potin N. M-P (eds.), *The Cambridge Handbook of Judicial Control of Arbitral Awards*, Cambridge, Cambridge University Press, 2020, pp. 84-95
- Nairn, K., “National Report for England and Wales (2019 through 2020)”, in Bosman L. (ed.), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International 2020, Supplement No. 110, April 2020, pp. 1-97
- Nigel, C. Partasides, et al., *Redfern and Hunter on International Arbitration*, 6th ed., Kluwer Law International, Oxford University Press, 2015
- A. Papeil, A., “Conflict of overriding mandatory rules in arbitration”, in Ferrari F. and Kröll S. (eds.), *Conflict of Laws in International Arbitration*, Sellier, 2011, pp. 341-377
- Paulsson, J., *The Idea of Arbitration*, Oxford, Oxford University Press, 2013
- Paulsson, M., *The 1958 New York Convention in Action*, The Hague, Kluwer Law International, 2016
- Pereira Dias, R., “Direito aplicável à convenção de arbitragem e ao mérito”, in Monteiro Pires C. and Pereira Dias R. (coords.), *Manual de Arbitragem Lusófona*, Coimbra, Almedina, 2020
- Penades Fons, M., “The Effectiveness of EU Law and Private Arbitration”, *Common Market Law Review*, 2020, 57, pp. 1069-1106
- Di Pietro, D., “Applicable laws under the New York Convention”, in F. Ferrari, S. Kröll (eds), *Conflict of Laws in International Arbitration*, Sellier, 2011, pp. 64-79.
- Pryles, M., “Reflections on Transnational Public Policy”, *Journal of International Arbitration*, Kluwer Law International, 2007, Vol. 24, Issue 1, pp. 1-7.
- Radicati di Brozolo, L., “Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration”, *European International Arbitration Review*, Vol. 8, No. 1, 2019, pp. 67-93
- Richman, L., “Chapter 17: Special Powers of the Tribunal”, in Scherer M., Richman L. et al., *Arbitrating under the 2020 LCIA Rules: A User's Guide*, Kluwer Law International, 2021, pp. 277-292
- “Part II, Chapter 6: Arbitrators and the Law”, in Rouche J., Pointon G. H., et al., *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd ed., Kluwer Law International, 2009, pp. 131-157
- Patocchi, P. M., “National Report for Switzerland (2018 through 2021)”, in Bosman L. (ed.), *ICCA International Handbook on Commercial Arbitration*, ICCA & Kluwer Law International 2020, Supplement No. 114, July 2020, pp. 1-98
- Sahani, V. S., “Chapter 1: Comparing the Federal Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration”, in Shore, L., Cheng, T., et al. (eds), *International Arbitration in the United States*, Kluwer Law International, 2017,

pp. 15-30

- Sampaio Caramelo, A., “A reforma da lei da arbitragem voluntária”, in *Revista Internacional de Arbitragem e Conciliação*, II, Associação Portuguesa de Arbitragem, Almedina, 2009, pp. 7-56
- Santos Silva, G., “Chapter 15: Recognition and Enforcement of Foreign Arbitral Awards”, in Pereira da Fonseca, A., Lentz de Moura Vicente, D. M., et al. (eds), *International Arbitration in Portugal*, Kluwer Law International, 2020, pp. 275-296
- Sheppard, A., “Chapter 12: Applicable Substantive Law”, in Lew J., Bor H., et al. (eds.), *Arbitration in England, with chapters on Scotland and Ireland*, Kluwer Law International, 2013, pp. 225-23
- “Chapter 3: Arbitral Proceedings Under The ICC Rules of Arbitration of 2012”, in Verbist H., Schäfer E., et al., *ICC Arbitration in Practice*, 2nd ed., Kluwer Law International, 2015, pp. 23-230,
- Wortmann, B., “Choice of Law by Arbitrators: The Applicable Conflict of Laws System”, W. Park (ed.), *Arbitration International*, Vol. 14, 2, Oxford, Oxford University Press, 1998, pp. 97-114
- Yang, E. T. M., and Cheng, S., “Setting Aside an Arbitral Award in Hong Kong Pursuant to Article 34 of the UNCITRAL Model Law: A Practical Guide”, *Asian Dispute Review*, Vol. 15, Issue 2, HKIAC, 2013, pp. 55-58

Case Law

Arbitral Awards

- “Partial Award in CRCICA Case No. 120/1998”, *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration II 1997- 2000*, M. Alam-Eldin (ed.) Alphen aan den Rijn, Kluwer Law International, 2003, p. 28.
- ICC Case no. 1512, 1971, *Yearbook Commercial Arbitration*, 1976, p. 129
- ICC Case no. 2930, 1982, *Yearbook Commercial Arbitration*, 1984, p. 105

Belgium

- Cour de Cassation, 16.11.2006, PAS. 2006, I, No. 11;
- Cour de Cassation, 14.1.2010, PAS. 2010, I, No. 12
- Cour de Cassation, 3.11.2011 PAS. 2011, I, No. 1

England and Wales

- Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru [1988] 1 Lloyd's Rep. 116
- England, Accentuate Limited v. Asigra Inc. [2009] EWHC (QB) 2655

EU

- EUCJ Case C–102/81, Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG, decision of 23 March 1982
- Slovak Republic v. Achmea BV, Case C-284/16, decision of 6 March 2018

France

- “Société Prakash Steillage Ltd v. Société Uzuc SA, Court of Appeal of Paris, 25 February 2020”, *Revue de l'Arbitrage*, Issue 1, Comité Français de l'Arbitrage, 2020, p.

321.

- “France No. 38, SNF SAS (France) v. Cytec Industries BV (Netherlands), Cour d'Appel [Court of Appeal], Paris, First Chamber, Not Indicated, 23 March 2006”, in A. J. van den Berg (ed), *Yearbook Commercial Arbitration*, Vol. XXXII, ICCA & Kluwer Law International, 2007, pp. 282-289

Portugal

- AA, S.L.P and AA & Associados, R.L. v. BB, Supreme Court of Justice of Portugal, 103/13.1YRLSB.S1, 14 March 2017

Singapore

- Aloe Vera of America, Inc. v. Asianic Food Pte Ltd [2006] SGHC 78
- Larsen Oil and Gas Pty Ltd v. Petroprod (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] SGCA 21.

Sweden

- State of Ukraine v Norsk Hydro ASA, Svea Hovrätt, 17 December 2007

Switzerland

- Decision of 17 November 1989, Court of Justice of the Canton of Geneva, *Revue de l'Arbitrage*, Issue 2, Comité Français de l'Arbitrage, 1993, pp. 315-321
- Decision of 17 April 1990, Swiss Federal Tribunal, *Revue de l'Arbitrage*, Issue 2, Comité Français de l'Arbitrage, 1993, pp. 322
- Judgment of 8 March 2006, DFT 132 III 389, 398 et seq, Swiss Federal Tribunal
- Judgment of 16 December 2009, DFT 4A_240/2009, Swiss Federal Tribunal
- Judgment of 8 March 2017, DFT 4A 40/2017, Swiss Federal Tribunal

United States

- Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974)
- Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc., 473 US 614 (1985)
- Northrop Corp v Triad Int'l Marketing SA, 811 F.2d 1265, 1270 (9th Cir. 1987)
- Volt Inf. Sciences v. Stanford Univ., 489 U.S. 468 (1989)
- Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc., 29 F. Supp. 2d 1168 (S.D. Cal. 1998)
- Edstrom Industries v. Companion Life, 516 F.3d 546 (7th Cir. 2008)

Others

- “A Guide to UNCITRAL. Basic facts about the United Nations Commission on International Trade Law”, United Nations Commission on International Commercial Law, Vienna, January 2013. Available at: <https://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf> (last visited on 13 September 2021)
- “Arbitration Statistics 2019”, SCAI, 2020, p. 4, available at: <https://www.swissarbitration.org/resources/arbitration-statistics-2019/> (last visited on 13 September 2021)
- Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.
- “2020 Statistics”, HKIAC, available at: <https://www.hkiac.org/about-us/statistics> (last visited 13 September 2021)

- “ICC Dispute Resolution 2020 Statistics”, ICC, 2021
- *The ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, ICCA, 2011
- *ILA Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards*, as adopted in ILA Resolution 2/2002
- “Status”, UNCITRAL, available at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status (last visited on 13 September 2021)

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