The Regulatory Framework Applicable in International Arbitration and the Interplay Between its Components

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Abstract

This paper is a broad analysis of the norms applicable in international arbitration. Its purpose is to outline the way these norms interact, by reference to the characteristics of arbitration as an alternative dispute resolution method, mainly pertaining to party autonomy, but also considering elements outside of the parties' control. The research method employed is the comparative one. Nevertheless — since a detailed analysis of such aspects would exceed the limits of this exercise — no direct comparison will be made neither between commercial arbitration and investment arbitration, nor between institutional arbitration and ad-hoc arbitration, while the differences between the aspects pertaining to procedure and those applicable on the merits of the disputes will not be insisted upon. Rather, the focus will be on the overlapping issues. The results will highlight the advantages of corelating the applicable law with the arbitral rules as well as with other relevant norms, such as mandatory norms (e.g., public policy - whether national, supranational, or transnational/international) on the one hand, and soft law instruments on the other hand.

Keywords: *international arbitration, arbitral rules, regulatory framework, supranational norms, public policy, soft law instruments.*

JEL Classification: K33, K39, K49

1. Preliminary considerations

The regulatory framework applicable in international arbitration[2] is not only vast but also heavily contextualized, seeing that it mostly relies on the parties' choice by virtue of the doctrine of party autonomy[3] as a key characteristic of this alternative dispute resolution method.

Nevertheless, this framework also has several fixed or quasi-fixed components either completely outside of the parties' control, such as potentially applicable international treaties,[4] or for which the parties only have an indirect control (arising out of their direct control on the choice of law), such as supranational norms that are not directly applicable in the relevant national laws yet are potentially mandatory[5]. Or, vice

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[2] For details about the structure of the regulatory framework applicable in international arbitration, see *infra,* section 4.

[3] More on the role of party autonomy in section 2, *infra.*

[4] E.g., The New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards (1958). Full text available online at: https://www.newyorkconvention.org/english.

[5] E.g., EU Directives, which become mandatory once transposed in the national law, and have a goal imposed at the supranational level to be reached through flexible means, subject to the option of the member country transposing it in its national legislation. For a short presentation of the differences between EU

versa, supranational norms that are technically mandatory (and potentially relied upon at the conclusion of the arbitral agreement) but not necessarily applicable.[6]

Additionally, diverse legal orders are potentially simultaneously applicable when it comes to international arbitration. Thus, the applicable framework is usually found at the intersection between factors intrinsic to the arbitration agreement (the legal orders corresponding to the parties' choice of law and the applicable rules) and extrinsic factors (the international legal order, supranational laws, mandatory norms, and soft law instruments).

Accordingly, the analysis will address in some detail the aspects evoked above, starting with the role of party autonomy in structuring the applicable regulatory framework, going to the importance of the legal nature of arbitration in determining the applicable norms, then presenting the structure *per se* of this framework. Concluding remarks can be drawn upon the interplay between the array of norms applicable in international arbitration and other factors touched upon.

2. The salient role of party autonomy in shaping the applicable regulatory framework

There are many benefits to choosing international arbitration as an alternative dispute resolution method. Among those, we recall, *exempli gratia*, the dependability of enforcement and recognition of awards under the NY Convention,[7] the privacy and the confidentiality of the procedure,[8] or party autonomy.

This last-mentioned benefit (i.e., party autonomy) is also an essential feature of arbitration, considered to be the "*guiding principle in determining the procedure to be*

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legislative acts, see the EU's official website description available at: https://europa.eu/european-union/law/legal-acts_en, Accessed June 15, 2021.

[6] For example, State aid under EU Competition Law. Although not allowed based on article 107 on the Treaty on the Functioning of the EU (TFEU), an exemption or a derogation can be granted. For details on EU State Aid, see: Ferri, D. and J. J. Piernas López, "The Social Dimension of EU State Aid Law and Policy." Cambridge Yearbook of European Legal Studies, 2019, 21: 75-100. doi:10.1017/cel.2019.2. Accessed June 20, 2021, www.scopus.com. For an applied analysis of the potential effects of supranational norms (i.e., the EU State Aid Public Policy) in international (investment) arbitration see: Struckmann, K. and W. De Catelle. "State Aid and International Investment Arbitration: The Micula Case – Taking Stock in an Ongoing Saga." *ERA Forum,* 2021, 22 (1): 101-117. Accessed June 20, 2021. doi:10.1007/s12027-021-00655-9. www.scopus.com.

[7] *Supra,* note 4. For a historical presentation about the recognition and enforcement of arbitral awards under a national law, see: Carbonneau, Thomas E. "The Recognition and Enforcement of International Arbitral Awards in French Law." The International Lawyer 11, no. 4 (1977): 603-17. Accessed June 20, 2021. http://www.jstor.org/stable/40705132. Some consider this to be the most important advantage of arbitration. See e.g., Mia Louise Livingstone, 'Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?', Journal of International Arbitration, Volume 25, Issue no. 5, 2008, pp. 529-535, available online at https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/25.5/JOIA2008041, Accessed June 2021.

[8] Although sometimes (mistakenly) considered one and the same, privacy and confidentiality are distinguished from each other, with the first usually referring to the participation in the arbitral proceedings while the latter referring to the non-disclosure of the information relating to the arbitration, outside of a pre-approved so called "confidentiality club" i.e., agreed upon individuals. See Born, Gary, "International Commercial Arbitration", Kluwer Law International 2014, p. 238.

followed".[9] As such, it bears a very important role in establishing the regulatory framework applicable to international arbitration.[10]

Historically, the doctrine of party autonomy in arbitration only gained widespread recognition in the previous century[11] but has its origins in the common law doctrine of contractual freedom of the parties.[12] This doctrine has several facets, allowing the parties not just the choice law (both on substantive law and on procedural aspects), but also the choice of forum.

As it relates to the shaping of the applicable regulatory framework, the focus of this analysis will be on the choice of law, without delineating between the procedural and substantive law aspects. Thus, based on party autonomy, the parties can theoretically choose between any applicable laws and arbitral rules (or even make up their own procedural rules). In effect, this freedom of the choice implies that the parties also have the option not to choose a specific (or any) law, which is technically an implied choice in and of itself although most of the times just an oversight. Regardless, this is not a desirable situation as it elicits all sorts of conflict of laws rules to be applicable with unpredictable and sometimes less than satisfactory results as the parties expose themselves to the (inherently) subjective interpretation of the arbitrators[13] or of other interpretative authorities.

However, the autonomy of the parties is not unlimited[14] and the underlying limits to party autonomy are mapped out by many aspects, mostly contextual to the specifics of a certain dispute, such as the mandatory rules potentially applicable[15] *(e.g.,* the public policy at the seat or at the place of enforcement) or the chronology of the dispute (as usually the parties have more freedom of choice before the initiation of an arbitration than after an arbitral tribunal has been created[16]).

Consequently, the limits of party autonomy are also important when it comes to the configuration of the body of norms to be applied in a specific international arbitration

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[9] Redfern, Alan and Hunter, Martin, with Blackaby, Nigel and Partasides Constantine, "Law and Practice of International Commercial Arbitration", 4th edition, 2004, p. 315.

[10] See section 4, *infra.*

[11] Rühl, Gisela, Eckhart. Gottschalk, Ralf. Michaels, & Jan von Hein "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency". Conflict of Laws in a Globalized World (pp. 153-183), 2007, Cambridge University Press, doi:10.1017/CBO9780511511196.011

[12] Cheshire, Geoffrey. Chevalier, James J. Fawcett, and Peter Manchin North, "Cheshire and North's Private International Law". 13th ed., Butterworths, 2005. Some authors consider the origins of the doctrine of party autonomy as it is accepted today (multifaceted, as it relates not only to the choice of (substantive) law but also to the choice of forum and freedom for procedural aspects) to be non-uniform, that is to have evolved separately, based on different rationales. See e.g., Mills, Alex, "Historical and Theoretical Foundations of Party Autonomy." Chapter. In Party Autonomy in Private International Law, 29–90, 2018, Cambridge University Press. doi:10.1017/9781139941419.002, Accessed June 2021.

[13] See Gaillard, Emmanuel, "The Role of the Arbitrator in determining the applicable law", Leading Arbitrators' Guide to International Arbitration, 3rd Edition, Chapter 18, 2014, available online at https://arbitrationlaw.com/library/chapter-18-role-arbitrator-determining-applicable-law-leading-arbitrators-guide

[14] Except when the autonomous nature of arbitration is applied, in which case it's considered basically unlimited. See *infra,* section 3.

[15] For details on mandatory norms see *infra*, section 3.

[16] See Pryles, Michael, "Limits to Party Autonomy in Arbitral Procedure", Journal of International Arbitration, Volume 24, Issue 3, 2007, pp. 327-339, Wolters Kluwer, Available online at Kluwer: https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/24.3/JOIA2007023

procedure.[17]

3. Determining the applicable norms

In determining the norms applicable in a certain international arbitration (that is establishing the entire regulatory framework) all sorts of factors are to be considered. Those are both intrinsic to the arbitration agreement — whether a compromissory clause or a compromis — and extrinsic and usually outside of the parties' control[18] such as public order/public policy norms,[19] due process considerations, arbitrability concerns, *etc.*

Of great importance in establishing the interplay between all relevant factors, the pertinent conflict of laws issues, and the hierarchy of the underlying norms is qualifying the procedure appropriately. This can be achieved by assessing the pertinent legal orders and depends on one's understanding of the judicial nature of arbitration.

In terms of the legal orders potentially applicable, those are usually considered to be two or three – the international legal order on one end of the normative spectrum and the national legal order on the other, with potentially a third legal order, a supranational one[20] in between. The interaction between the legal orders is not always very clear as at times not only that they overlap, but they can be interpreted differently based on whether the monist, dualist, or pluralist legal theories are employed.[21] Nevertheless, each legal order is considered autonomous in rapport with the other(s).

When it comes to the nature of arbitration, several theories are accepted, from the jurisdictional theory (arbitration is considered justice delegated by the state), to the contractual theory (consensual character), to the hybrid theory (both jurisdictional and contractual elements) and finally to the autonomous theory (rather recent and similar to the mixed theory but with a twist - as its underlines party autonomy and views arbitration

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[17] See also Blessings, Marc, "Mandatory Rules of Law versus Party Autonomy in International Arbitration" Journal of International Arbitration, Volume 14, Issue 23, 1997, available online at https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/jia0014&div=38&id=&page= Accessed June, 2021.

[18] For the relation between the limits on party autonomy and extrinsic factors, such as mandatory rules or conflict of laws issues, see Böckstiegel, Karl-Heinz, "The Role of Party Autonomy in International Arbitration, ICDR Handbook on International Arbitration, Chapter 9, 3rd Edition, 2017, available online at https://arbitrationlaw.com/library/role-party-autonomy-international-arbitration-chapter-9-icdr-handbook-international Accessed June 2021. See also Hochstrasser, Daniel, "Choice of Law and Foreign Mandatory Rules in International Arbitration" Journal of International Arbitration, Volume 11, Issue 57, 1994.

[19] *Public Order (Ordre Public)* and *Public Policy* are related but not identical legal institutions, with the first one usually encountered in countries adopting the civil law system while the second in common law countries. For details on the correspondence between the notions of p*ublic order* and *public policy* see C. Leaua, F.A. Baias, "Arbitration *in Romania. A practitioner's Guide",* Kluwer Law International, 2016. Chapter 1.01 (Ștefan Deaconu), p. 16, footnote 16, and Chapter 3.04 (Ioan Schiau), p. 148, footnote 404.

[20] E*.g.,* EU legal order.

[21] That is either deference, non-deference, or mutualism in relation to other legal orders as dual natured legal doctrines, relating both to international law and constitutional law. Some authors are striving to find a common denominator between the monist, dualist, and pluralist theories. See *e.g.,* Moreno-Lax, Violeta, Gragl, Paul, "Introduction: Beyond Monism, Dualism, Pluralism: The Quest for a (Fully-Fledged) Theoretical Framework: Co-Implication, Embeddedness, and Interdependency between Public International Law and EU Law", Yearbook of European Law, Volume 35, Issue 1, Oxford Academic, 2016, pp 455–470, Available online at https://doi.org/10.1093/yel/yew016.

as an institution independent of outside concerns).[22]

Thus, with such a vast array of norms and theories potentially applicable, it becomes obvious that the actual results are always very fine tuned contextually to the dispute. That is why some consider the development of a body of conflict of laws rules particularly tailored to international arbitration, a must.[23] Others, think that international arbitration is already heading towards clearly outlining a specific hierarchy of norms.[24]

4. The structure of the regulatory framework

The norms applicable in international arbitration are drawn upon a complex structure, with multiple levels intertwined in some points. Generally speaking, the regulatory framework is built based on three regulatory planes, i.e., international treaties, national laws, and arbitral rules.

However, a more in-depth analysis reveals additional norms potentially applicable, such as supranational norms. One example would be European Union Law which is comprised of different types of legal acts[25] either primary legislation (international treaties, technically part not only of the European legal order, but of the international and national legal orders as well), or secondary legislation (both directly and indirectly applicable), some of which are also part of the national laws of the member countries.[26] Or soft laws, as quasi-legal instruments, which, despite their name can nevertheless be just as binding as some "hard laws" in certain situations[27] in terms of their effect of the overall arbitral procedure. As in the case of procedural soft law norms codified by important arbitral bodies — *e.g.,* the International Bar Association ("IBA")'s Guidelines on Conflict of Interest in International Arbitration. Still, such quasi-legal instruments are very popular because they usually codify (pseudo)customary rules, as a mix between the procedures employed in the common law and the civil law system, thus being more internationally "friendly".

The international treaties and national laws categories are easier to address, despite potential difficulties[28] mainly relating to the interplay between autonomy and mandatory rules.[29] This is resolved either by balancing the interests of the country

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[22] See Yu, Hong-Lin, "A Theoretical Overview of the Foundations of International Commercial Arbitration", Contemporary Asia Arbitration Journal, Volume 1, Issue 2, p. 255, 2008, available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.555.2751&rep=rep1&type=pdf

[23] See *e.g.,* Cordero-Moss, Giuditta "Why Arbitration Needs Conflict of Laws Rules", Kluwer Arbitration Blog, 2018, available online at http://arbitrationblog.kluwerarbitration.com/2018/10/17/why-arbitration-needs-conflict-of-laws-rules/

[24] Renner, Moritz, "Towards a Hierarchy of Norms in Transnational Law?", Journal of International Arbitration, Volume 26, Issue 4, 2009, pp. 533 – 555, available at Kluwer Law Online https://kluwerlaw online.com/journalarticle/Journal+of+International+Arbitration/26.4/JOIA2009029, Accessed June 2021.

[25] *Supra*, note 5.

[26] Issued by the EU Institutions, based on the powers enshrined at the EU level by the primary legislation (EU treaties). For details on the different types of EU legislation, see the EU's official description available at: see https://europa.eu/european-union/law_en, accessed June 2021.

[27] For a detailed explanation of this paradox, see Fabien Terpan. "Soft Law in the European Union - The Changing Nature of EU Law", European Law Journal, Volume 21, no. 1, 2015 pp.68-96. Available online at SSRN: https://ssrn.com/abstract=2545641. Accessed June 2021.

[28] *Supra,* section 3.

[29] See *supra*, notes 18 and 19.

imposing them with those of the parties (the common law approach)[30] or by giving deference to the interest of the country in question (the usual civil law approach).

When it comes to the interaction with arbitral rules, which normally relate to procedural aspects, most national laws (at the seat) — the ones usually establishing the procedural framework — give deference to the parties' choice of arbitral rules, absent contrary mandatory norms. As such, the role of the arbitral rules within the regulatory framework applicable in international arbitration can be better inferred from the beginning and is a little less (co)dependent of other factors than the rest of the potentially applicable norms.

Additionally, despite the fact that arbitration offers *"by definition, an alternative to state courts"*[31] one should also be mindful of the potential role of the (domestic) courts of laws in the international arbitration procedure,[32] as this can also influence the regulatory framework applicable.[33]

5. Concluding remarks

International arbitration is sought after, *inter alia,* for being extremely adaptable to the parties' needs and flexible enough to allow for an array of choices. However, such freedom is best used sparingly[34] as each additional choice brings another element in the midst, putting more weight on this carefully created "house of normative cards", *i.e.,* the desired regulatory framework ultimately applicable, which can potentially collapse at the slightest imbalance.

In conclusion, the regulatory framework applicable in international arbitration is a complex and flexible structure — but also a rather fragile one for that matter — and the interplay between its components is difficult to determine without the proper analysis of very specific contextual factors.

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[30] See *e.g.,* Barraclough Andrew and Waincymer, Jeff, "Mandatory Rules of Law in International Commercial Arbitration", Melbourne Journal of International Law, Volume 6, 2005, available online at https://law.unimelb.edu.au/__data/assets/pdf_file/0003/1681167/Barraclough-and-Waincymer.pdf

[31] Leaua Crenguta, Müller Ingrid A., Cozac, Sofia., "Comparative view on the role of domestic courts in arbitration: Romanian Law vs. the UNCITRAL Model Law", Perspectives of Law and Public Administration, vol. 9, issue 2, 2020, p. 224-234, ISSN 2601-7830, http://www.adjuris.ro/revista/an9nr2.htm.

[32] *Ibid.*

[33] Determined also by limits of party autonomy. See section 2, *supra.*

[34] Engle, Rachel, "Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability", Global Business and Development Law Journal, Volume 15, Issue, 2, 2002, p. 323. Available at: https://scholarlycommons.pacific.edu/globe/vol15/iss2/12.

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