The arbitral tribunal's authority to determine the applicable law in international commercial arbitration: patterns and trends

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Abstract

Party autonomy prevails in determining the law applicable to the procedure and to the merits in international commercial arbitration. Nevertheless, when parties fail to make a choice or fail to reach an agreement, the arbitral tribunal has the authority to determine the applicable law. The paper's aim is to present the legal grounds for this authority, its extent and limits, and how it works in practice. In order to reach this, aim the paper starts with a general analysis of the said legal grounds (the parties' agreement, international instruments, arbitration rules, national laws on arbitration), then continues with an analysis of the limits imposed on the arbitral tribunal's authority, which is large but not unlimited, and in the end looks at how this authority is exercised in practice, by scrutinizing recent jurisprudence and boiling down patterns and trends. The study will contribute to a better understanding of the current practice and trends in international commercial arbitration as regards arbitral tribunal's authority to determine the law applicable to the procedure and the merits of a dispute.

Keywords: *applicable law, international commercial arbitration, authority of the arbitral tribunal, party autonomy.*

JEL Classification: K33, K41

1. Introduction

In international commercial arbitration party autonomy prevails in determining the law applicable to the procedure and to the merits of the dispute. Most often, parties include in their contracts choice of law agreements, which are rigorously observed by arbitral tribunals without no further discussion about determining the applicable law. Nevertheless, there are several hypotheses when the authority of the arbitral tribunal to determine the applicable law becomes the centerpiece of the discussion in the arbitral dispute, with important implications for the solution rendered in the dispute, and the finality of the award.

First of all, it is straightforward that when parties fail to choose the applicable law, the arbitral tribunal will have the task of determining the applicable law.

Secondly, although parties may not expressly choose the applicable law, they could however provide in their agreement that they empower the arbitral

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tribunal to choose the applicable law however it considers fit, or they may indicate more clearly how they would like the arbitral tribunal to proceed in determining the applicable law, by pointing to specific conflict-of-laws rules or by providing some other criteria.

Thirdly, although the parties may have provided for a choice of law agreement in their contract as regards all contractual matters, there may be aspects outside the contractual sphere, which are not covered by the choice of law agreement, but however fall under the jurisdiction of the arbitral tribunal. For such aspects, the arbitral tribunal will have to determine the applicable law distinctly, despite the choice of law agreement.

In this respect, professor Giuditta Cordero-Moss explains that party autonomy as a conflict rule finds its application in the sphere of contract law, but not in other areas, like legal capacity, company law, property law, competition law and tort law, to which different conflict rules will apply.[2] Such areas do appear in practice in contractual disputes and are not covered by the parties' choice of law agreements.

Fourthly, the intervention of the arbitral tribunal in determining the applicable law is necessary also when a matter in the dispute is not regulated by the law chosen by the parties or the provision in the chosen law is deemed as breaching public policy or mandatory rules. In this last hypothesis, the public policy or the mandatory rules become limits to party autonomy, which prevent the application of the aspects from the chosen law breaching public policy or mandatory rules and leave a gap, that becomes the responsibility of the arbitral tribunal to fill in by determining the applicable law.

The sources of the arbitral tribunal's authority to determine the applicable law are found in the parties' agreement, in some international instruments dealing with international commercial arbitration, in national laws regulating international arbitration, and in the rules of arbitration of various arbitral institutions. The next section of the paper with deal with each source, followed by a highlight of the limits imposed on the arbitral tribunal's authority usually by the same sources that are granting it. The conclusions will deal with the patterns and trends that can be boiled down from all the relevant legal provisions, and from the practice of arbitral tribunals.

[2] For further explanations and useful examples see Giuditta Cordero-Moss, *The Arbitral Tribunal's Power in respect of the Parties' Pleadings as a Limit to Party Autonomy on Jura Novit Curia and Related Issues*, in Franco Ferrari (Editor), *Limits to Party Autonomy in International Commercial Arbitration*, JURIS, 2016, p. 305.

2. The sources of the arbitral tribunal's authority to determine the applicable law

2.1 The parties' agreement

Most often parties include in their contracts a choice of law agreement and the parties' choice is binding for the arbitral tribunal, with only limited restrictions like public policy, due process or mandatory rules. Nevertheless, when parties do not choose the applicable law, they may however provide in their agreement that they empower the arbitral tribunal to choose the applicable law however it considers fit, or they may indicate more clearly how they would like the arbitral tribunal to proceed in determining the applicable law, by pointing to specific conflict of laws rules or by providing some other criteria or mechanisms. The parties' instructions could include also negative choices, by specifying which laws they want to exclude, for instance each other's laws.[3]

These instructions from the parties are binding for the arbitral tribunal and any departure from the parties' will may be regarded as an excess of power. In this respect, professor Giuditta Cordero Moss delineates the situation when the arbitral tribunal exceeds its powers from the error in interpretation or application of the contractual provisions or the law. The distinction has practical consequences because the excess of power may lead to annulment or denial of recognition and enforcement of the award, while the error in interpretation and application of the contract or the law will generally not be reviewed during annulment and recognition proceedings and therefore should not affect the finality of the award.[4]

The parties' instructions constitute at the same time a legal ground for the arbitral tribunal's authority to determine the applicable law, but also a limit to such authority when the instructions provide for strict mechanisms and criteria to be applied. More precisely, when the parties empower the arbitral tribunal to choose the applicable law however it considers fit, the parties' instructions will be a legal ground for an extensive authority awarded to the arbitral tribunal, while when the parties provide that the arbitral tribunal shall determine the applicable law by following specific conflict-of-laws rules, criteria or mechanisms, these instructions are also limitations to the authority of the arbitral tribunal. These instructions are as binding as a clear choice of law agreement, and any departure from the parties' will may be regarded as an excess of power, with limited exceptions.

Furthermore, when parties designate some rules of arbitration in their agreement, those rules are binding on the arbitral tribunal, including the provisions concerning the determination of the applicable law. Therefore, the provisions in the rules of arbitration selected by the parties will prevail over the provisions in the *lex*

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[3] Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, p. 992.

[4] Giuditta Cordero Moss, *Tribunal's Powers versus Party Autonomy*, in Peter Muchlinski, Federico Ortino, Christoph Schreuer (editors), *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, p. 1221.

arbitri for determining the applicable law, since the conflict rules in the *lex arbitri* are not deemed to have a mandatory character.[5]

Legal scholars distinguish between a direct conferment of powers by parties to the arbitrators, when the parties stipulate expressly the powers they agree to assign to the arbitrators, and an indirect conferment, when the parties agree to pre-established rules of arbitration, accepting the powers conferred to the arbitrators by those rules.[6]

2.2 Relevant international instruments

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[7], the most successful international convention in the field of international arbitration, does not mention directly the authority of the arbitral tribunal to determine the law applicable to the procedure and the merits of the dispute. Nevertheless, this authority transpires from the regulation of all the other aspects, and it seems to be considered a given. For example, as regards the procedure, the New York Convention indirectly acknowledges the authority of the arbitral tribunal in determining the procedural law in Articles V(1)(b) and V(1)(d).[8] On the other hand, the European Convention on International Commercial Arbitration (1961)[9] sets forth the authority of the arbitral tribunal to determine the applicable law both in matters of procedure and on the merits, with a focus on the prevalence of party autonomy.

In this respect, Article IV provides that: "1. The parties to the arbitration agreement shall be free to submit their disputes: (a) to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution; (b) to an ad hoc arbitral procedure; in this case, they shall be free inter alia: [...](iii) to lay down the procedure to be followed by the arbitrators. […] 3. Where the parties have agreed to submit any disputes to an ad hoc arbitration by one or more arbitrators and the arbitration agreement, as mentioned in paragraph 1 of this article, the necessary steps shall be taken by the arbitrator(s) already appointed, unless the parties are able to agree thereon and without prejudice to the case referred to in paragraph 2 above."

As regards the law applicable to the merits of the dispute, Art. VII provides that: "1. The parties shall be free to determine, by agreement, the law to be applied

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[5] Jeffrey Waincymer, *op. cit*., pp. 992-993.

[6] Nigel Blackaby, Constantine Partasides, Alan Redfern, J. Martin Hunter, *Redfern and Hunter on International Arbitration* (Sixth Edition), Oxford University Press, 2015, p. 307.

[7] The text of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY Convention.html (last accessed on 10.11.2018).

[8] Gary B. Born, *International Commercial Arbitration* (Second Edition), Kluwer Law International, 2014, pp. 2145-2146.

[9] The text of the European Convention on International Commercial Arbitration is available online at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en (last accessed on 10.11.2018).

by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages."

The Convention on the settlement of investment disputes between states and nationals of other states (ICSID or Washington Convention)[10] sets forth in Article 44 that "any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." Therefore, Article 44 assures the proper legal basis for an extensive procedural authority for the arbitral tribunal.

On the other hand, as regards the determination of the law applicable on the merits, Article 42 (1) provides that "the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable". In this case, party autonomy maintains its priority, but, in the absence of parties' agreement, the legal provision does not empower the tribunal to choose the conflict rules or the law that it deems appropriate, but it directly provides the solution, limiting in this way the authority of the arbitral tribunal as regards the determination of the applicable substantive law.

The UNCITRAL Arbitration Rules[11] provide for extensive authority for the arbitral tribunal under both limbs, procedural and substantial. Article 15 of the 1976 UNCITRAL Arbitration Rules provides: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." In the 2010 UNCITRAL Arbitration Rules, the relevant article became article 17 (1) with a further amendment: "[...]The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

As regards the law applicable to the merits, UNCITRAL Arbitration Rules (1976) provide in article 33 that: "1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. [...] 3. In all cases, the

[10] The text of the Convention on the settlement of investment disputes between states and nationals of other states is available online at https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx (last accessed on 10.11.2018).

[11] All versions of the UNCITRAL Rules of arbitration are available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (last accessed on 10.11.2018).

arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

The only amendment in the 2010 version of the Rules is that, failing a designation by the parties of the applicable law, the arbitral tribunal shall apply directly the law that it deems appropriate, without any need to first determine the conflict rules.

In the same vein, Article 19 in the UNCITRAL Model Law[12] 1985 (the provision is identical to the one in the 2006 version) sets forth: "(1) Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

As regards the law applicable to the merits, article 28 in the UNCITRAL Model Law, both 1985 and 2006 versions, provides: "(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. [...] (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

2.3 National laws on international arbitration

All relevant national laws on arbitration empower the arbitrators to determine the applicable procedural and substantive law[13]. The text of the provisions is more or less similar, but even when the text is different, as in the case of the UK Arbitration Act, the effect as regards the authority of the arbitral tribunal is the same. Therefore, below there is a display of only several national laws, reflecting both the similarities and the differences between the approaches.

The French Code of Civil Procedure[14] provides in Article 1509 that "an arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules. Unless the arbitration agreement provides otherwise, the arbitral tribunal shall

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[12] All versions of the UNCITRAL Model Law are available online at http://www.uncitral.org /uncitral/en/uncitral_texts/ arbitration/1985Model_arbitration.html (last accessed on 10.11.2018).

[13] Gary B. Born, *International Commercial Arbitration* (second edition), Kluwer Law International, 2014, p. 2621.

[14] The French Code of Civil Procedure is available online at https://www.legifrance.gouv.fr/ (last accessed on 10.11.2018). The English translation of the provisions on arbitration is available at https://sccinstitute.com/media/37105/french_law_on_ arbitration.pdf (last accessed on 10.11.2018).

define the procedure as required, either directly or by reference to arbitration rules or to procedural rules." It further adds in Article 1510 that "irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall up hold the principle of due process." As regards the law applicable to the merits, Article 1511 provides that "the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate. In either case, the arbitral tribunal shall take trade usages into account."

The Swiss Law on Private International Law[15] provides in Article 182 that "1. The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice. 2. If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration. 3. Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings."

As regards the law applicable to the merits, Article 187 sets forth: "1. The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection."

The UK Arbitration Act[16] provides in Article 34(1) that "it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter", and in Article 46 that "(1)the arbitral tribunal shall decide the dispute—(a)in accordance with the law chosen by the parties as applicable to the substance of the dispute, or (b)if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal. (2) For this purpose, the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules. (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".

The German Code of Civil Procedure[17] provides in Article 1042 that "(1) The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. [...] (3) Otherwise, subject to the mandatory provisions of this Book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules. (4) Failing an agreement by the parties,

[15] The Swiss Law on Private International Law is available online at https://www.swissarbitration.org/files/34/Swiss%20 International%20Arbitration%20Law/IPRG_english.pdf (last accessed on 10.11.2018).

[16] UK Arbitration Act is available online at https://www.legislation.gov.uk/ukpga/1996/23/section/46 (last accessed on 10.11.2018).

[17] The German Code of Civil Procedure is available online at https://www.trans-lex.org/600550 (last accessed on 10.11.2018).

and in the absence of provisions in this Book, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate. The arbitral tribunal is empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence".

As regards the rules applicable to the substance of the dispute, Article 1051 sets forth: "(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) Failing any designation by the parties, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected. […] (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Going through the legal provisions displayed above, it becomes clear that the procedural authority of the arbitral tribunals is wide in all regulations as long as the equal treatment of the parties and the right of the parties to be heard in adversarial proceedings is observed. On the other hand, as regards the determination of the law applicable to the merits, there are three categories of regulations. The provisions in the first category empower the arbitral tribunal to decide the dispute in accordance with the law or the rules of law that it considers appropriate, without any need for the intermediation of the conflict rules. The provisions in the second category instruct the arbitral tribunal to determine the applicable law by means of the conflict of laws rules which it considers applicable. The provisions in the third category instruct the arbitral tribunal even more specifically to apply the law of the State with which the subject-matter of the proceedings is most closely connected.

2.4 Institutional rules of arbitration

In exercising their procedural autonomy parties can agree to submit their arbitration to an arbitral institution and therefore to observe the Rules of arbitration proposed by that institution. By agreeing to the Rules of arbitration, the parties also agree to the provisions that empower the arbitral tribunal to determine the applicable law in the absence of the parties' agreement. These provisions will take precedence over any provisions in the national law on arbitration from the seat of arbitration regulating the same matter. For example, if the national law on arbitration from the seat of arbitration requires the arbitral tribunal to apply some conflict rules in order to determine the applicable law, while the Rules of arbitration selected by the parties empower the arbitrators to directly determine the most suitable law, the arbitral tribunal has the authority to directly determine the

law, without being required to pass through the intermediation of the conflict rules.[18]

ICC Rules of Arbitration (2017)[19] set forth in Article 19 that "the proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

As regards the law applicable to the merits, Article 21 provides that "(1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. (2) The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages."

In order to highlight the evolution of the regulation, it is worth showing that the ICC Rules of 1975 provided in Article 13(3) that "the parties shall be free to determine the law to be applied by the arbitrators to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrators shall apply the law designated as the proper law by the rule of conflict which he deems appropriate." It was only in the ICC Rules of 1998 that the regulation moved from the need to apply some conflict rules in order to determine the applicable law to the direct application of the law deemed appropriate. Article 17(1) of the 1998 ICC Rules reads: "The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate."

London Court of International Arbitration Rules (LCIA Rules)[20] (2014**)** provide in Article 14 that: "14.2 The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties under the Arbitration Agreement. [...]14.4 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute. 14.5 The Arbitral Tribunal shall have the widest discretion to

[18] On the prevalence of the Rules of arbitration over the national law on arbitration as regards the determination of the applicable law see also Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, 1999, p. 866.

[19] The ICC Rules of arbitration are available online at https://iccwbo.org/dispute-resolution-services /arbitration/rules-of-arbitration/ (last accessed on 10.11.2018).

[20] The LCIA Rules of arbitration are available online at http://www.lcia.org/dispute_resolution _services/lcia-arbitration-rules-2014 .aspx (last accessed on 10.11.2018).

discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties."

As regards the law applicable to the merits, Article 22.3 reads: "The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate."

Vienna Rules of arbitration (2018)[21] provide in Article 28 (1) that "the arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties in an efficient and cost-effective manner, but otherwise according to its own discretion. The arbitral tribunal shall treat the parties fairly. The parties shall be granted the right to be heard at every stage of the proceedings." As to the substantive law, Article 27 (1) reads: "The arbitral tribunal shall decide the dispute in accordance with the statutory provisions or rules of law agreed upon by the parties. Unless the parties have expressly agreed otherwise, any agreement as to a given national law or national legal system shall be construed as a direct reference to that national substantive law and not to the national conflict-of-laws rules. (2) If the parties have not determined the applicable statutory provisions or rules of law, the arbitral tribunal shall apply the applicable statutory provisions or rules of law which it considers appropriate."

The 2001 version of the Vienna Rules (2001) provided in Article 16: "As to the substance of the case, the sole arbitrator (arbitral tribunal) shall apply the law that the parties have designated as applicable. Failing such designation by the parties, he (it) shall apply the law that is designated by the choice of law rules that he (it) considers to be applicable."

SCC Arbitration Rules (2017)[22] provide in Article 23: "(1) The Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, subject to these Rules and any agreement between the parties. (2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case."

Article 27 tackles the determination of the law applicable to the merits and it reads: "(1) The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate. (2) Any designation by the parties of the law of a given

[21] The VIAC Rules of arbitration are available online at http://www.viac.eu/en/arbitration/arbitration-rules-vienna/93-schiedsverfa hren/wiener#ConductoftheArbitration (last accessed on 10.11.2018).

[22] The SCC Rules of arbitration are available online at https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf (last accessed on 10.11.2018).

state shall be deemed to refer to the substantive law of that state, not to its conflict of laws rules."

SIAC Arbitration Rules (2016)[23] provide in Rule 19: "19.1 The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute. 19.2 The Tribunal shall determine the relevance, materiality and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination."

As regards the law applicable to the merits, Rules 31 reads: "31.1 The Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law or rules of law which it determines to be appropriate. […] 31.3 In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any applicable usage of trade."

The Swiss Rules on International Arbitration[24] (2012) provide in Article 15 (1): "subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard", and in Article 33 (1): "the arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection"

By reading the rules displayed above, the same conclusion can be reached as in the case of the national laws on arbitration. On the one hand, the procedural authority of the arbitral tribunals is wide as long as fundamental principles of procedure are observed. On the other hand, as regards the determination of the law applicable to the merits, the three categories of regulations are again easily identified: (i) applying the law or the rules of law deemed appropriate; (ii) applying the conflict of laws rules which deemed applicable; (iii) applying the law of the State with which the subject-matter of the proceedings is most closely connected. The older versions of the rules reflect the second and third categories of regulation, while the newest versions of the rules opt for the first category of regulation.

3. The limits to the arbitral tribunal's authority

The limits imposed on the arbitral tribunal's authority are to a large extent identical to the limits imposed on party autonomy. As parties do not benefit from absolute autonomy to determine the applicable law, neither does the arbitral tribunal benefit from an absolute authority in this respect. Moreover, party autonomy itself is a limit to the arbitral tribunal's authority to determine the

[23] The SIAC Rules of arbitration are available online at http://www.siac.org.sg/our-rules/rules/siac-rules-2016 (last accessed on 10.11.2018).

[24] The Swiss Rules of arbitration are available online at https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf (last accessed on 10.11.2018).

applicable law, since this power of the arbitral tribunal is in all regulations subsidiary to the parties' agreement.

Public policy, due process and mandatory rules are generally the limitations imposed on the arbitral tribunal's authority. Public policy and due process are usually relevant in a potential setting aside proceeding or during the recognition and enforcement proceedings. Therefore, their content will be delineated by the courts at the seat of arbitration, which have jurisdiction over the setting aside proceedings, and by the courts of enforcement, wherever a party tries to enforce the award. Nevertheless, an arbitral tribunal may decide to abide by such norms or not, depending on their commitment to rendering a viable and enforceable award.

Moreover, it was put forward in scholarly writings that sometimes, when the conception on public policy at the seat of arbitration or at the place of enforcement is irreconcilable with the conception of the arbitrators on the truly international public policy, the arbitral a tribunal should not succumb to any conceptions of public policy no matter what, only for maintaining a viable award. For example, if religious or racial discrimination is a requirement of public policy in the enforcement state, the arbitral tribunal should not abandon their own „conception of the requirements of genuinely international public policy" and their own „conception on the requirements of justice".[25]

While due process seems more clearly delineated in most jurisdictions, public policy on the other hand is quite a variable concept, surrounded by a cloud of uncertainty. It is always surprising what a national court may deem as falling under the public policy of the respective state, despite the fact that international scholars and practitioners are unanimous in arguing for a restrictive interpretation and application of the public policy exemption under the New York Convention, in order to accomplish the purpose of the Convention.

Relevant mandatory rules may derive from various national laws connected to the dispute: mandatory rules under the law of the seat of arbitration, or the place of performance of the contract, or the parties' countries of origin, or any other law of a third country which has sufficient connection with the dispute, as well as the mandatory rules of the state where the award is expected to be recognized and enforced.[26]

While there is widespread acceptance that the mandatory rules of procedure form the seat or arbitration should be observed, as the regards the mandatory substantive laws, their relevance and applicability is highly debated.[27] On the one hand, mandatory rules reflect the will of sovereign States to impose some norms on private parties irrespective of their agreement or on their choice of forum or foreign law. Such norms are simply considered so important by the State

[25] Emmanuel Gaillard, John Savage, *op. cit*., p. 882.

[26] For more details and explanations see George A. Bermann, *Mandatory rules of law in international arbitration* in Franco Ferrari, Stefan Kröll (eds.), *Conflict of Laws in International Arbitration*, Publishing House: Sellier, Munich, 2011, p. 331.

[27] Jeffrey Waincymer, *op. cit.*, p. 183.

for its functioning that it does not permit any derogation.[28] From this perspective, it seems only natural that parties should not be allowed to circumvent mandatory rules which would render a certain transaction illegal by opting for the application of a foreign law under which the said transaction is perfectly legal.[29] On the other hand, an arbitral award is final and binding, and the grounds for setting aside and for refusing enforcement are restrictive, hindering a new review on the merits of the dispute. From this perspective, mandatory substantive rules may be considered irrelevant for the arbitral tribunal which has no duty to protect the mandatory rules of any State. The arbitral tribunal should accomplish its mission entrusted to it by the parties: to solve the dispute to the best of its capacities by applying the law chosen by the parties.

Between the two extremes, a well-balanced approach[30] is that the extent to which arbitral tribunals should observe and apply mandatory substantive norms is a matter of discretion for the tribunal, depending on the various aspects, and the specifics of each dispute.

4. Patterns and trends regarding the arbitral tribunal's authority to determine the applicable law

While traditionally, in the absence of the parties' agreement as regards the procedural law, the law from the seat of arbitration was deemed applicable, the current trend in international arbitration practice is to empower arbitrators with a high degree of authority in determining the applicable procedure. [31]

In the majority of cases, contractual parties exercise their procedural autonomy by selecting a set of institutional rules of arbitration, which are quite general guidelines for the procedure. Therefore, various procedural issues may arise during the proceedings, which need a determination from the part of the arbitral tribunal.[32]

In practice, some arbitrators prefer to determine the applicable procedural law globally at the beginning, when parties, without knowing what procedural issues will be in dispute later on, may reach an agreement more easily. Moreover, this approach ensures a higher degree of predictability. Other arbitrators prefer to determine the applicable procedural law on "an issue-by-issue basis" and not to globally determine an applicable procedural law. This approach is deemed more appropriate considering the particularities of international arbitration because it allows the weighing of the connections between the specific procedural issue that needs determination and the various laws relevant for that procedural issue. Different procedural laws may be relevant for different procedural aspects. For example, counsel's conduct, arbitrators' conduct, confidentiality are issues which

[28] *Idem*, p. 1013.
[29] *Idem*, p. 987.
[30] Jeffrey Waincymer, *op. cit*., p. 1017.
[31] Emmanuel Gaillard, John Savage, *op. cit*., pp. 642-643.
[32] Gary B. Born, *op. cit*., pp. 2144-2145.

may fall under different procedural laws. By choosing a procedural law *in abstracto* at the beginning of the proceedings, before knowing what procedural issues will arise, arbitrators could be faced with difficulties in solving specific issues.[33] Gary Born points out in this respect that "it is misleading to proceed on the basis that there is a single, monolithic procedural law in every international arbitration. Instead, "the" procedural law is subject to *dépeçage*, with different issues being subject to different, overlapping national legal regimes."[34]

Turning to the determination of the substantive law, as noticeable from the provisions displayed in this paper, in the international instruments regarding international commercial arbitration, a chronological analysis makes it clear that there is shift from enshrining the obligation of the arbitral tribunal to apply the conflict-of-laws rules that it deems appropriate in order to determine the applicable law towards providing for a larger authority to directly apply the law or the rules of law deemed appropriate. This trend is also noticeable in the national laws on arbitration, and in the rules of arbitration of the arbitral institutions.

Nevertheless, neither the authority to select the appropriate conflict rules, not the one to directly select the appropriate law should not be regarded as absolute discretion in the hands of the arbitral tribunal. Gary Born explains that the arbitrators cannot select any conflict rules or any law that they feel comfortable with, for example the law in their home jurisdiction, but must select the appropriate one in light of the particularities of the case. Or, this determination involves an analysis and some reasons for any choice the arbitral tribunal makes in respect of the applicable law.[35]

Moreover, there are views that even when the norms permit the arbitral tribunal to directly determine the appropriate law, there should be an objective conflict-of-laws analysis for the sake of certainty, predictability and fairness. It was argued in this respect that the direct application of a substantive law without a conflict of laws analysis "leaves the parties' substantive rights to turn on subjective, unarticulated instincts of individual arbitrators".[36]

From a procedural standpoint, when arbitrators have to determine the appropriate conflict-of-laws rules or directly the applicable law, they should beforehand grant the parties the opportunity to be heard on that matter.[37]

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[33] *Idem*, p. 1615. Emmanuel Gaillard, John Savage, *op. cit*., p. 647.
[34] Gary B. Born, *op. cit*., p. 1633.
[35] *Idem*, p. 2645.
[36] Gary B. Born, *op. cit*., pp. 2646-2647. The quote is from the Partial Award in ICC Case No. 8113, XXV Yearbook Commercial Arbitration 324, 325 (2000) available online at http://www.kluwerarbitration.com/document/IPN22014 (last accessed on 10.11. 2018).
[37] Gary B. Born, *op. cit*., p. 2778.

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