SUBSTANCE OR PROCEDURE?

THE ENFORCEABILITY AND THE CHOICE OF LAW OF ARBITRATION AGREEMENTS

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SUMMARY OF DOCTOR'S THESIS

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The parties' agreement to arbitrate is often regarded as the 'foundation stone' of arbitration.[1] It is indeed almost impossible to talk about arbitration without mentioning *'its very basis, the arbitration agreement.'*[2] Accordingly, it is not surprising that tons of authorities are available about the scope, the form and the enforcement of arbitration agreements by state courts. However, systematic analyses on the legal nature of the arbitration agreement are more sporadic.

Speaking about international arbitration, there is one more topic that is not very often discussed, especially not in Hungary, even though its practical significance is obvious: the choice of law of arbitration agreements. The existence, validity, effects and even the definition of the arbitration agreement depend on the applicable law.[3] Therefore, in each case of international arbitration where the existence, validity and/or effects of an arbitration agreement are challenged by either party or questioned by the arbitral tribunal or a state court on its own motion, the question of which law shall be applied to the enforceability of the arbitration agreement must be answered as a preliminary issue. The choice of law of arbitration agreements is thus a highly relevant topic, which, for some reason, has not received much attention yet in the Hungarian case law and literature.

The arbitration agreement is a complex legal concept. As one Hungarian author pointed out correctly, *'in connection with the evaluation of arbitration agreements, contract law, procedural law, private international law and occasionally—especially in relation to the negative side (exclusion) of the right of access to court—also constitutional law aspects may come up with an emphasis different from time to time'*.[4] In my Thesis, I addressed all these aspects with different intensity. The ultimate goal was to provide a comprehensive analysis of the choice-of-law issues, i.e. the private international law aspects of the arbitration agreement. However, in order to arrive at the choice-of-law analysis, several preliminary issues had to be first clarified and understood. The starting point of every choice-of-law assessment is qualification. Qualification often requires an in-depth look into the dogmatic fundamentals of a particular legal concept. Therefore, the primary focus of my analysis was on the legal nature of arbitration, the legal nature of the arbitration agreement and the meaning of certain selected issues relating to the enforceability of the arbitration agreement.

In light of the above, after a short introductory part, I devoted the second Chapter of my Thesis to such fundamental issues as the definition, typology and legal nature of arbitration, the meaning of international arbitration, party autonomy as the guiding principle of arbitration, and the territorial scope of application of national arbitration legislations. In relation to the legal nature of arbitration, I also provided an overview on the human rights and constitutional aspects of arbitration. In the next two Chapters of my Thesis, I provided a detailed analysis of the legal nature of the arbitration agreement, and an insight into those specific aspects of the enforceability of arbitration agreements that are discussed from a choice-of-law point of view in the last Chapter of my Thesis. After discussing the dogmatic fundamentals, I turned to the choice-of-law analysis of the arbitration agreement, focusing on the following aspects of enforceability: substantive and formal validity, subjective and objective arbitrability. I started the choice-of-law examination with some theoretical considerations relating to the laws

1 Blackaby / Partasides / Redfern / Hunter (2009), p. 85, para. 2.01.
2 See van den Berg (1981), p. 144. See also Cook / Garcia (2010), p. 109 and from the Hungarian literature Bán in Bodzási (2018), p. 9, and Bán / Kecskés in Európai Jog 2001/1, p. 3.
3 See Rüßmann / Timár in Geimer / Schütze (2012), p. 837.
4 Bán in Bodzási (2018), p. 9.

applicable to the arbitration agreement. The theoretical part is followed by an in-depth analysis of the choice-of-law regulations applicable in Hungary. Besides the international conventions to which Hungary is a Contracting State, I also scrutinized the domestic choice-of-law regulations, both under the legal regime effective until 31 December 2017 and under the legal regime that is currently effective. I concluded my Thesis with a summary of the findings of the previous Chapters, including a bunch of *de lege ferenda* proposals.

1. Scope, Objectives and Methodology

1.1. Scope

Since choice-of-law issues usually arise in international cases, i.e. in cases connected to more than one legal system, my Thesis is focused on **international arbitration**.

Even though the question of which laws apply to the arbitration agreement and the related legal issues may come up in every sub-category of international arbitration—inter-state, investor-state and private law arbitration—, I limited the scope of my analysis to **private law arbitration**. The other two sub-categories of arbitration are fully, or at least mainly, governed by public international law and fall outside the scope of private international law.

With regard to the fact that arbitration is reserved for commercial disputes in Hungary, and this was the case under the previous legal regime as well, and that the main field of application of arbitration is worldwide the resolution of commercial disputes, I focused my analysis on **commercial arbitration**.

Since the two central topics of my research were the legal nature of the arbitration agreement and the determination of the laws applicable to the arbitration agreement, the scope of my Thesis only covers **voluntary arbitration**, that is, arbitration based on the mutual consent of the parties.

As one Hungarian author stated,[5] the basic conditions for the enforceability[6] of the arbitration agreement are the following:

- the clearly expressed intention of the parties to submit their dispute(s) to arbitration,
- (written) form,
- (legal) capacity of the parties to the arbitration agreement, and that
- the dispute can be referred to arbitration.

From this it follows that there are, at least, **four important aspects relating to the enforceability of the arbitration agreement**:

- substantive validity,
- formal validity,
- subjective arbitrability, and
- objective arbitrability.

These are the four aspects which I discussed in my Thesis. All these issues are subject to their own choice-of-law regime, which may lead to the simultaneous application of several different

5 Benke in Gazdaság és Jog 2001/3, Section B, subsection 1.

6 *Benke* uses the term 'validity' (in Hungarian: *'érvényesség'*) instead of enforceability. This terminology is not correct, because validity is only one aspect of enforceability (see below).

laws to the arbitration agreement.[7] That is why I used the term 'applicable law' throughout the Thesis in plural form ('**applicable *laws***'), unless I only meant the law that governs the arbitration agreement as a contract.

1.2. Objectives

In the case law of Hungarian courts, the occurrence of the issue of the laws applicable to the arbitration agreement has so far been negligible. There are practically no such published court decisions that would contain a choice-of-law analysis regarding the arbitration agreement. This can be led back to various reasons: the relatively low number of arbitral proceedings in Hungary; the failure of courts and parties to recognize that the arbitration agreement, or a legal issue related thereto, is not governed by Hungarian law; and the lack of explicit choice-of-law rules for the arbitration agreement before the current legal regime. The low occurrence of choice-of-law issues relating to the arbitration agreement is not only a feature of the case law of Hungarian courts but also a characteristic of the arbitration literature in Hungary. The list of published awards of arbitral tribunals seated in Hungary that would contain a choice-of-law analysis regarding the arbitration agreement is also rather short.

Based on the above, the purpose of my research was to provide a systematic review of the laws applicable to the enforceability of the arbitration agreement, starting with the dogmatic and constitutional foundations of arbitration and arbitration agreement, in order to raise awareness on certain issues that may have a bearing on the outcome of the choice-of-law analysis and to offer thereby a methodology for the practice. As a final output of the research, I also made some *de lege ferenda* proposals for choice-of-law issues related to the arbitration agreement under Hungarian law.

1.3. Methodology

The basic methodology of my Thesis followed from the primary aim of providing a systematic review of the choice-of-law regulation for arbitration agreements with a focus on Hungarian law. Accordingly, I examined most issues discussed in my Thesis from the point of view of Hungarian law, based on an analysis of the respective Hungarian legislations, the available Hungarian case law (i.e. published decisions of the Hungarian Constitutional Court, Hungarian state courts and arbitral tribunals seated in Hungary), and the contributions of Hungarian authors to the body of literature on arbitration, with special regard to international arbitration.

In addition to the relevant domestic laws, I also considered the regulations of and the available case law to the most important international treaties incorporated into Hungarian law: the New York Convention,[8] the Geneva Convention[9] and, in the subchapter on the human rights aspects of arbitration, the Rome Convention 1950.[10] There is one more international instrument I strongly relied on: the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 (hereinafter: UNCITRAL Model Law). The reason for this is that both the previous and the current Hungarian arbitration legislation— Act LXXI of 1994 (hereinafter: HAA

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7 Born (2014), p. 473.

8 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed at New York, on 10 June 1958 (hereinafter: New York Convention).

9 European Convention on International Commercial Arbitration, done at Geneva, 21 April 1961 (hereinafter: Geneva Convention).

10 European Convention on Human Rights, signed at Rome, on 4 November 1950 (hereinafter: Rome Convention 1950).

1994) and Act LX of 2017 (hereinafter: HAA 2017) and—are implementations of the UNCITRAL Model Law.[11]

Dealing with international arbitration, it is not correct and not possible to restrict the analysis to one single legal system. As it is already suggested by the terminology, international arbitration has been and is permanently evolving on the international scene, in a constant interaction between different legal systems and different legal cultures. There are practically no books and articles on international arbitration that would only refer to one legal system. The authors of such books and articles either follow a comparative approach—comparing the relevant rules of two or more national laws or more frequently the relevant rules of a national law to the international standards or trends—, or discuss the most various topics relating to international arbitration without referring to any specific legal system. In the Chapter on the legal nature of the arbitration agreement and in the subchapter on the theoretical choice-of-law considerations regarding the arbitration agreement, just as in the subchapters dealing with the provisions of international conventions, I followed this approach. The foreign laws most often cited in my Thesis include German, Swiss, Austrian, French, English, US, Belgian, Czech and Polish law.

In addition to the relevant rules of the above-mentioned national laws, I also quoted, where appropriate, the rules of proceedings of arbitral institutions, the case law of arbitral tribunals and the jurisprudence of state courts, mainly from the above-mentioned jurisdictions.

2. The Foundations of Arbitration

2.1. The Definition, the Types and the Legal Nature of Arbitration

Arbitration is a **process**: it starts with the submission of a request for arbitration or statement of claim, ends with a decision, and consists of a series of procedural acts. During the process, the parties present their respective cases to the arbitrator, *'who listens, considers the facts and the arguments, and then makes a decision'*.[12]

There is no arbitration without the **parties**: arbitration is an adversarial procedure, involving at least two opposing parties, the claimant and the respondent. The claimant is the one who initiates the arbitral proceedings in order to protect his or her right(s), and the respondent is the one against whom the claimant seeks the protection of his or her right(s).

The subject-matter of arbitration, just as the subject-matter of any other dispute settlement *'to be achieved by judicial means'*,[13] is the parties' dispute, which must be a **legal dispute**. From the 'legal' nature of the dispute it follows that arbitrators have to resolve the parties' disputes by applying legal rules, and that disputes which do not affect the legal rights or obligations of the parties (e.g. disputes on mere facts) cannot be submitted to arbitration.[14]

The foundation of arbitration is the parties' **consensus** (i.e. mutual consent) to submit a dispute that has already arisen, or future disputes that may arise, to arbitration. This is the arbitration agreement. The **submission** of a dispute to arbitration has another layer as well, which is just

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[11] See Section 3(3) of the HAA 2017. See also the General Part of the official Explanatory Note to the HAA 2017, the official Explanatory Note to Sections 1-3 and Csehi in Polgári Jog 2019/9-10, para. 11.

[12] Blackaby / Partasides / Redfern / Hunter (2009), pp. 1-2, para. 1.02.

[13] See Schreuer in Festschrift Hafner (2008), p. 965.

[14] Such disputes can be subject to other alternative dispute resolution procedures, e.g. expert determination. See, e.g., Article 189 of the Swiss Code of Civil Procedure (hereinafter: SCCP), BGH 25.06.1952, BGHZ 6, 335-341, para. 11 and OGH, 14.12.1994, 7 Ob 604/94.

as inevitable as the parties' consensus to arbitrate, since arbitration can never be conducted *ex officio*: the actual referral of the dispute to arbitration. This may take several forms: the submission of a request for arbitration, a statement of (counter-)claim or a claim for set-off.

Arbitration is aimed at resolving the parties' dispute by a **binding decision**, the arbitral award. In the context of arbitration, the resolution of the dispute means that, from the adverse positions of the parties, the arbitrators will accept the position of one party and reject the position of the other party. To the extent one party wins, the other party loses. Therefore, arbitration is an **adjudication** procedure as opposed to such other alternative dispute resolution methods as conciliation, mediation or expert determination. Moreover, the arbitral award is not simply a decision binding upon the parties but a decision having the same effects as a final and binding court judgment: *res judicata* effect and enforceability.[15]

Besides the parties' mutual consent to arbitrate and the effects of the arbitral award, the third distinctive feature of arbitration is the decision-maker. The arbitrator or the arbitral tribunal, depending on how many decision-makers are involved in the procedure, is a **non-governmental decision-maker**.

In addition to the above, there is one more defining aspect of arbitration: **the role of the State**. Even though, by entering into an arbitration agreement, the parties are contracting out of the state court system, arbitration is not completely detached from the judiciary. The relationship between the State and arbitration is an ambivalent one. On the one hand, the State recognizes arbitration as an equivalent to litigation and provides support to ensure the efficiency of arbitration. On the other hand, arbitration is subject to a considerable degree of state control, which has two basic forms (tools):[16] legislation (i.e. the adoption of mandatory rules providing for certain minimum requirements to be fulfilled by the arbitrators[17]), and legal remedies (i.e. the monitoring of the fulfillment of those minimum requirements).[18]

Arbitration can be categorized in several different ways. Based on the subject-matter of the legal dispute referred to arbitration—the legal basis and nature of the claims brought before, and the remedies sought from, the arbitral tribunal—, a clear distinction must be made between the following three categories:

(i) **private law arbitration**, i.e. the arbitration of civil (private) law disputes;
(ii) **inter-state arbitration**, i.e. the arbitration of public international law disputes between states; and
(iii) **investor-state arbitration**, i.e. the arbitration of investment protection disputes between investors and states.

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15 For a comparison between arbitration and mediation from the point of view of the outcome, see Bauer in Jogtudományi Közlöny 2005/12, p. 489 and Boronkay / Wellmann in MTA Law Working Papers 2015/12, p. 5. For a confirmation that arbitral awards have the same *res judicata* effect as the judgments of state courts, see EBH2009. 1969 = BH2010. 191 (Hungarian S.C.).

16 See Varga in Bányai / Nagypál (2015), pp. 1-2.

17 See Csehi in Polgári Jog 2019/9-10, para. 11, who emphasizes that *'arbitration as an entirely private activity cannot be excluded from the scope of state legislation, it cannot be placed in a legal vacuum, in a legal "nobody's land", since there are rules even on the open see'*.

18 See EBH2008. 1794 (Hungarian S.C.), where the Supreme Court of Hungary established that *'[t]he State recognizes and enforces the decisions of the arbitral tribunal if, in the arbitral proceedings, the procedural guarantees of a fair decision of the dispute were ensured and kept'*.

My Thesis focuses on **commercial arbitration**, i.e. on the arbitration of disputes that shall be regarded as commercial based on the law governing the issue of objective arbitrability, which is a subcategory of private law arbitration.

Depending on whether or not the arbitration procedure has a relevant foreign element, a distinction has to be made between **international arbitration** and **domestic arbitration**.[19] This distinction is only relevant for private law arbitration, since inter-state arbitration and investor-state arbitration are, by definition, 'international': they are always connected to at least two states.

Based on the definition of arbitration, it would seem that arbitration is, by definition, **voluntary**: the foundation of arbitration is the mutual consent of the parties, and whether or not they give their consent to arbitration is in the sole discretion of each party. This is, however, not always the case: there are special cases where the actual consent of one party is missing and such party must nevertheless accept the jurisdiction of the arbitral tribunal,[20] and there are also cases where arbitration is forced upon the parties by law. The latter kind of arbitration is usually called **compulsory** arbitration.

Arbitration has two basic forms: ***ad hoc*** and **institutional arbitration**. The archetype of arbitration is *ad hoc* arbitration. Under the principle of party autonomy, the parties are free to refer disputes to arbitration instead of litigation (i.e. state courts), and, once they have opted for arbitration, they can freely decide between *ad hoc* and institutional arbitration.

With regard to the foundation (the parties' agreement to arbitrate) and the contents of arbitration (a process leading to an award, which is as enforceable as a state court judgment), there are two extreme theories for the legal nature of arbitration: the '**contractual**' (substantive law) theory and the '**jurisdictional**' or '**judgment**' (procedural law) theory.[21] In fact, arbitration is a mixed legal concept, consisting of both contractual and procedural elements. *'[A]rbitration is a matter of contract'*,[22] but *'an essential feature of "arbitration" is its "judicial" character'*,[23] which makes arbitration in several aspects very similar to the procedure of state courts. Arbitration is thus a **hybrid** of substance and procedure: whereas certain aspects of arbitration are contractual and thus governed by substantive law, others are jurisdictional (procedural) and are thus governed by procedural law.[24]

The question of whether arbitration is a concept of procedural law or a concept of substantive law raises another fundamental question: is arbitration a concept of private law or a concept

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19 See Nagy (2012), p. 271, para. 677 and Nagy (2017), p. 324, para. 684.

20 One example is the arbitration clause included in the articles of association of a legal person (see e.g. Section 3:87 of the HCC 2013), or arbitration chosen by a unilateral legal act, e.g. in a last will and testament (see e.g. Section 1066 of the GCCP). Another group of examples consists of cases where a non-signatory is deemed to be bound by the arbitration agreement based on one of the doctrines established by the case law on international commercial arbitration, e.g. succession, assignment, agency, third-party beneficiary, piercing the corporate veil or alter ego, group of companies, estoppel. See O'Neill (2012), pp. 48 et seqq. and Born (2009), pp. 1142-1205.

21 See Battle in VLR (Jan. 1930), pp. 255-260, Schlosser (1989), pp. 28 et seqq. and Born (2009), pp. 185-187.

22 *Steelworkers v Warrior & Gulf* (U.S. S.C. 1960), at 582.

23 Born (2009), p. 247.

24 Sometimes, it is suggested that arbitration is neither contractual, nor jurisdictional, nor hybrid, but 'autonomous', without clarifying what consequences such qualification should have. See Born (2009), p. 187.

of public law? Commercial arbitration is clearly a concept of **private law**,[25] because the law of commercial arbitration provides for *'the rights and duties of equal ranking individuals'*:[26] arbitrators do not exercise public authority, their authority to administer justice over the parties is based on the parties' submission to arbitration by mutual consent. The interference of the State with arbitration is confined to support and supervision and therefore it does not change the private law nature of commercial arbitration.

Talking about the legal nature of arbitration, there is one more question that is often raised: can arbitral proceedings fully be detached from any national law, both in terms of procedure and in terms of substance? At the moment, the 'delocalization' of international commercial arbitration is nothing more than an ambitious dream. Even though the idea that *'an international arbitral award […] does not belong to any state legal system'* and that *'its validity must [only] be examined according to the applicable rules of the country where its recognition and enforcement are sought'* has appeared in certain jurisdictions and international conventions,[27] it is very far from becoming a worldwide approach. Moreover, true 'delocalization' would become a reality only if all the standards applied at the enforcement stage, including public policy, were uniform all over the world. This is certainly not the case at the moment, and it is highly questionable whether the international arbitration world will ever reach this ideal stage of development.

2.2. The Human Rights Aspects and the Constitutional Foundations of Arbitration

According to the **European Court of Human Rights** (hereinafter: ECtHR), the voluntary submission of the parties to arbitration constitutes an acceptable partial waiver of the procedural guarantees granted in Article 6(1) of the Rome Convention 1950, provided that the submission is unequivocal, based on an informed consent, and it does not involve any issues of public interest.[28] The arbitration agreement is a waiver of the right of access to court, the right to a tribunal established by law and the right to a public hearing, but Article 6(1) has a certain core protection area, which cannot be waived, not even by submitting the dispute to arbitration. The non-waivable core guarantees are the right to be heard, the equal treatment of the parties and the independence and impartiality of the tribunal.[29]

As far as the control of the State over arbitration is concerned, the ECtHR found that Article 6(1) did not require Contracting States to make available setting aside procedures.[30] However, at the stage of recognition and enforcement of the arbitral award, state courts have to exercise

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[25] See also Magyary (1913), pp. 7-8, 942. *Magyary* distinguishes between 'public law adjudication' (in Hungarian: *közjogi bíráskodás*), which is based on a public law authorization, and 'private law adjudication' (in Hungarian: *magánjogi bíráskodás*), which is solely based on a legal act governed by private law. The former is litigation, and the latter is arbitration.

[26] For the definition of private law, see Wörlen (2007), p. 4. For the lack of superiority and superordination in relation between the parties and the arbitrators, see Bauer in Jogtudományi Közlöny 2005/12, p. 497.

[27] See the decision of the French Cour de Cassation in *Putrabali v Rena Holding et al.* (Cour de Cass. 2007). For an attempt to (partially) detach the arbitral award from the law of the seat of arbitration, see Article IX of the Geneva Convention.

[28] See *Axelsson v Sweden* (ECHR 1990) and *Suovaniemi v Finland* (ECtHR 1999). See also Kodek in Liebscher / Oberhammer / Rechberger (2012), p. 16, para. 1/35.

[29] See *Nordström-Janzon v The Netherlands* (ECHR 1996), *Suovaniemi v Finland* (ECtHR 1999). See also Kodek in Liebscher / Oberhammer / Rechberger (2012), pp. 16-17, para. 1/38 and Krausz in J Int'l Arb (2011), pp. 156-157.

[30] See Krausz in J Int'l Arb (2011), p. 158.

a certain degree of control as to the fairness and correctness of the arbitral proceedings.[31] At the enforcement stage, another guarantee granted by the Rome Convention 1950 comes also into consideration: the guarantee of property under Article 1 of Protocol No. 1. A claim which has been granted in an (enforceable) arbitral award is regarded by the ECtHR as 'property'.[32]

The case law of the **Constitutional Court of Hungary** (hereinafter: CC) has much in common with that of the ECtHR. Based on the case law of the CC, arbitration has three constitutional pillars:[33]

- Article XXVIII(1) of the Fundamental Law of Hungary (hereinafter: Fundamental Law) on the right of access to courts [Section 57(1) of Act XX of 1949 on the Constitution of the Republic of Hungary (hereinafter: Constitution];
- Article 25(1) and 25(7)[34] of the Fundamental Law on the administration of justice by state courts and the authorization of the legislator to adopt laws permitting other bodies to hear certain disputes [Section 45(1) of the Constitution];[35] and
- Article M) of the Fundamental Law on the three vital elements of market economy—the freedom of labor, the freedom of enterprise and the freedom of competition—, which is the constitutional root for the freedom of contract [Section 9(1) of the Constitution].[36]

Relying on the above constitutional provisions, the CC has confirmed in several cases that the parties' agreement to arbitrate is a waiver of the right of access to courts and that such waiver is usually acceptable from a constitutional point of view. The CC has clearly considered the arbitration agreement as a contract, containing both substantive and procedural elements, the conclusion and the contents of which are subject to the parties' right to self-determination and freedom of contract.[37] From the fact that, according to the CC, arbitration is founded on the right to self-determination and the freedom of contract, it follows that, just like the ECtHR, the CC considers the voluntary nature of the parties' submission as an essential element of arbitration.[38]

In line with the case law of the ECtHR, the CC has held that the waiver of the right of access to courts by entering into an arbitration agreement entails, at the same time, also a waiver of the procedural guarantees of state court litigation. Out of these procedural guarantees, the CC

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31 See *Schiebler v Germany* (ECHR 1991) and *Boss Söhne v Germany* (ECHR 1991).

32 See *Stran Greek v Greece* (ECtHR 1994), *Regent v Ukraine* (ECtHR 2008) and *Sedelmayer v Germany* (ECtHR 2009).

33 See also Boronkay / Wellmann in MTA Law Working Papers 2015/12, p. 10 and Tóth in DJM/OTDK 2005, Part III, subsection 1. For a comprehensive but uncritical overview of the case law of the CC, see Kovács / Tilk in Kecskés / Tilk (2018), pp. 143-153.

34 Between 1 January 2012 and 1 April 2013, Article 25(6).

35 The Constitution did not contain an explicit provision similar to Article 25(7) of the Fundamental Law, but it explicitly provided for the state monopoly of administering justice.

36 See 3192/2012 (VII. 26.) AB (Hungarian C.C.). In this decision, the CC confirmed that its case law on the freedom of contract under the Constitution [13/1990 (VI. 18.) AB (Hungarian C.C.)] is still valid under the Fundamental Law. From the case law on the freedom of contract under the Constitution, see also 32/1991 (VI. 6.) AB (Hungarian C.C.).

37 See 604/B/1990 AB (Hungarian C.C.), 1282/B/1993 AB (Hungarian C.C.), 388/D/1999 AB (Hungarian C.C.), 657/B/2002 AB (Hungarian C.C.), 569/D/2005 AB (Hungarian C.C.), 1036/D/2005 AB (Hungarian C.C.), 3118/2013 (VI. 4.) AB (Hungarian C.C.), 3116/2015 (VII. 2.) AB (Hungarian C.C.), 3263/2015 (XII. 22.) AB (Hungarian C.C.), 3108/2016 (VI. 3.) AB (Hungarian C.C.), 3174/2017 (VII. 14.) AB (Hungarian C.C.), 3265/2017 (X. 19.) AB (Hungarian C.C.) and 3385/2019. (XII. 19.) AB (Hungarian C.C.).

38 For an explicit confirmation of this finding, see 3174/2017 (VII. 14.) AB (Hungarian C.C.).

has put the most emphasis on the right to a legal remedy,[39] which does not exist under the Rome Convention 1950 and therefore does not appear in the respective case law of the ECtHR at all. Even though in a more subtle way but it is also apparent from the case law of the CC that the parties' submission to arbitration does not constitute a full waiver of all procedural guarantees granted by the Constitution and the Fundamental Law, and that arbitration is subject to a certain degree of state control. The case law of the CC is, however, not so sophisticated regarding the non-waivable minimum guarantees as the case law of the ECtHR. As it is demonstrated by a series of decisions from the past decade, the CC has so far been rather reluctant to examine whether the procedural minimum guarantees, such as the right to a fair trial, has been preserved by the arbitrators.[40]

The distinction between arbitral tribunals and institutions, on the one hand, and state courts, on the other hand, is more prevalent in the case law of the CC than in the case law of the ECtHR. In this respect, an interesting feature of the case law of the CC is the differentiation between arbitration and state judiciary both from an organizational and from a functional point of view, and the corresponding classification of arbitration as a 'quasi-judicial but non-judicial' activity.[41]

Based on an overall assessment of the case law of the CC, it can be established that, in Hungary, arbitration enjoys a certain degree of constitutional protection—or as some authors put it, *'the right to submit disputes to arbitration can also be derived from constitutional rights'*[42]—but there is no fundamental right to arbitration.

2.3. International Arbitration

Generally speaking, international arbitration means arbitration *'which in some way transcend[s] national boundaries'*.[43] There is no globally applying definition for international arbitration. Whether or not an arbitration shall be regarded as international depends on the applicable legal regime.

The question of whether or not the arbitration is an international one is fundamental under the **UNCITRAL Model Law**, since the Model Law is only applicable to international commercial arbitration.[44] Article 1(3) of the UNCITRAL Model Law provides for a complex definition of international arbitration, which blends several different approaches: the nationality (places of business) of the parties, the nature of the dispute, the place of arbitration and party autonomy.[45]

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[39] See 604/B/1990 AB (Hungarian C.C.), 1282/B/1993 AB (Hungarian C.C.), 388/D/1999 AB (Hungarian C.C.), 657/B/2002 AB (Hungarian C.C.), 569/D/2005 AB (Hungarian C.C.), 1036/D/2005 AB (Hungarian C.C.), 3004/2012 (VI. 21.) AB (Hungarian C.C.), 3118/2013 (VI. 4.) AB (Hungarian C.C.) and 3240/2013 (XII. 21.) AB (Hungarian C.C.).

[40] See 3348/2012 (XI. 19.) AB (Hungarian C.C.), 3240/2013 (XII. 21.) AB (Hungarian C.C.) and 3108/2016 (VI. 3.) AB (Hungarian C.C.). In these cases, the CC consistently held that it had no jurisdiction to examine whether the arbitral tribunal conducted a fair trial. It was the setting aside court that could have established the violation of procedural rules which could then have served as a basis for the CC to establish the violation of the right to a fair trial.

[41] See 95/B/2001 AB (Hungarian C.C.), 339/B/2003 AB (Hungarian C.C.), 1245/B/2011 AB (Hungarian C.C.), 3244/2014 (X. 3.) AB (Hungarian C.C.), 3116/2015 (VII. 2.) AB (Hungarian C.C.) and 3263/2015 (XII. 22.) AB (Hungarian C.C.).

[42] Boronkay / Wellmann in MTA Law Working Papers 2015/12, p. 13. See also Kecskés in Kecskés / Tilk (2018), p. 105.

[43] Blackaby / Partasides / Redfern / Hunter (2009), p. 8, para. 1.22.

[44] See Article 1(1) of the UNCITRAL Model Law.

[45] See Blackaby / Partasides / Redfern / Hunter (2009), p. 9, para. 1.22 and p. 12, para. 1.30.

As a result, the scope of application of the UNCITRAL Model Law is extended to a very broad range of cases.

The **HAA 1994**, which was an implementation of the original 1985 version of the UNCITRAL Model Law,[46] followed an approach similar to that of the UNCITRAL Model Law, with two exceptions:

- The HAA 1994 [Section 47(1)] did not implement Article 1(3)(c) of the UNCITRAL Model Law. As a result, under the HAA 1994, the parties did not enjoy the freedom to agree on the international character of the arbitration.[47]
- Article 1(3)(b)(i) of the UNCITRAL Model Law refers to the place of arbitration determined by the parties *in* the arbitration agreement, or by the arbitral tribunal or a state court, as the case may be, *pursuant to* the arbitration agreement. In contrast, Section 47(1)(b)(ba) of the HAA 1994 took a more restrictive approach: it was applicable only if the parties explicitly determined the place of arbitration in the arbitration agreement.[48]

Under the HAA 1994, the basic type of arbitration was domestic *ad hoc* arbitration. If the arbitration was international under the HAA 1994, this meant that the arbitration was subject to the special rules laid down in Chapter VI of the Act.[49]

In the period between its entry into force (i.e. 1 January 2018) and 7 August 2018, the **HAA 2017**, in Section 3(1) paras 2 to 4, contained a word-by-word translation of Article 1(3) and (4) of the UNCITRAL Model Law,[50] with a very broad definition of the term 'place of business' (in Hungarian: *üzletvitel helye*). Yet, as from 8 August 2018, Section 3(1) paras 2 to 4 have been repealed (the provisions amending the HAA 2017 as from 8 August 2018[51] hereinafter collectively: HAA Amendment 2018). This means that the definition of international arbitration has been deleted from the HAA 2017.

Since the HAA 2017 does not differentiate between international and domestic arbitration, it does not contain a separate Chapter providing for rules that are only applicable to international arbitration. This was the case also before the HAA Amendment 2018. Yet, most of the rules of the HAA 1994 on international arbitration has been adopted with some—more or less significant—adjustments. The lack of a definition for international arbitration and the lack of any differentiation regarding the application of the provisions of the HAA 2017 to domestic and international arbitration will certainly produce interesting cases and challenges for arbitral tribunals and state courts.

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46 See Section 2 of the General Part of the official Explanatory Note to the HAA 1994. See also Boronkay / Wellmann in MTA Law Working Papers 2015/12, pp. 11-12, Csőke in Magyar Jog 2014/12, p. 721, and, from a critical point of view, Varga in FS Mezey (2013), p. 374 and Varga in FS Németh II (2013), p. 510.

47 See Varga in Oberhammer (2005), pp. 650-651 and Timár in Németh / Varga (2014), p. 653.

48 See the official Explanatory Note to Sections 46-48 of the HAA 1994.

49 See Section 2 of the General Part of the official Explanatory Note to the HAA 1994. See also Csehi in Polgári Jog 2019/9-10, para. 12, Éless in Magyar Jog 2015/4, p. 240, Benke in Gazdaság és Jog 2001/3, Section A, subsection 3, Murányi in Petrik (2016), § 46.

50 See Csehi in Polgári Jog 2019/9-10, para. 12.

51 See Section 47 of Act LIV of 2018 on the Protection of Trade Secret (hereinafter: Hungarian Trade Secret Act).

German and Austrian law adopted the UNCITRAL Model Law. However, in these jurisdictions, the set of rules implemented from the UNCITRAL Model Law are not only applicable to international arbitration but also to domestic arbitration. Moreover, similar to the HAA 2017, neither German nor Austrian law provides for a definition of international arbitration or for rules that would be explicitly and specifically designed for international arbitration.[52]

French law follows the dualist approach, distinguishing between domestic and international arbitration. Under French law, the domestic or international nature of arbitration depends on the subject-matter (nature) of the dispute. Article 1442 of the French Code of Civil Procedure (hereinafter: FCCP) defines international arbitration in a very broad manner as *'the one that concerns interests of international trade'*.[53]

Swiss law has also opted for the dualist approach. The distinction between domestic and international arbitration is also reflected by the fact that the two types of arbitration are governed by separate legislations.[54] The approach adopted by Swiss law in relation to the definition of international arbitration focuses on the nationality (domicile, habitual residence or seat) of the parties, but party autonomy also plays a role, since, under both legal regimes applying to arbitration in Switzerland, the parties have the freedom to agree on the application of the other legal regime to their arbitration.[55]

2.4. Party Autonomy as the Guiding Principle of Arbitration

Party autonomy is commonly referred to as a 'guiding principle' of arbitration.[56] The term 'party autonomy' is generally used to describe the parties' freedom to determine the procedures to be followed by the arbitral tribunal. In my Thesis, I showed that party autonomy in arbitration is a more complex, multi-layer concept, which *'involves several aspects of what is called in our modern democratic society "private autonomy" in the widest sense (i.e. the constitutional right of self-determination)'*.[57]

Private autonomy and **party autonomy** are often used as synonyms. This is not right because the two terms cover different concepts. Private autonomy *in the widest sense* means the constitutional right of self-determination.[58] Private autonomy *in a wider sense* means the individual's power to make his or her own choices or decisions with regard to his or her private relations, i.e. relations governed by private law. Private autonomy in this wider sense includes both private autonomy *in a stricter sense* (hereinafter referred to as private autonomy) and party autonomy.[59] In private law (especially in contract law), the parties are vested with private autonomy, while in private international law they can make use of the benefits of party autonomy. Party autonomy is subject to less restrictions than private autonomy:[60] the

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52 See Konrad in Liebscher / Oberhammer / Rechberger (2012), pp. 36-37, para. 2/6 and especially footnote 17.
53 Prior to the 2011 reform, the same definition was included in Article 1492 of the FCCP.
54 Cf. Articles 1(d), 61 and 353-399 of the SCCP and Articles 1(e), 7, 176-194 of the Swiss PILA.
55 See Article 176(2) of the Swiss PILA and Article 353(2) of the SCCP.
56 See Blackaby / Partasides / Redfern / Hunter (2009), p. 365, para. 6.08.
57 Timár in FS Rüßmann (2013), p. 930.
58 In Hungarian: *önrendelkezési jog*, in German: *Selbstbestimmungsrecht*.
59 See Timár in FS Rüßmann (2013), p. 931.
60 See Hartenstein (2000), p. 32.

restrictions on party autonomy are basically confined to overriding mandatory provisions and the requirements of public policy.[61]

The reflection of private autonomy in civil procedural law is the principle of **party disposition**.[62] According to this principle, the parties may dispose of the proceedings and the substantive claims made subject to the proceedings.[63] In procedural matters, the parties' autonomy is more limited than in substantive matters.

Party autonomy in international arbitration can be defined as the parties' freedom to submit disputes to arbitration and *'to adapt the particular arbitration to the needs of their contractual relationship'*,[64] which unites elements of all the three components of private autonomy *in the wider sense*: private autonomy, party autonomy and party disposition. This means that, in general, the autonomy of the parties in international arbitration is more extensive than in state court proceedings. The broader scope of autonomy logically follows from the fact that the whole concept of arbitration is founded upon the autonomy of the parties:[65] arbitration is based on the parties' choice to arbitrate instead of litigating,[66] which is already an expression of autonomy.

Party autonomy in international arbitration includes the freedom of the parties to

- contract out of the jurisdiction of state courts (i.e. enter into an arbitration agreement);
- choose between *ad hoc* and institutional arbitration, and in the latter case, to confer certain rights or powers (e.g. the appointment of arbitrators) upon the selected institution;
- determine the seat of arbitration;
- determine the language of the arbitration;
- choose the applicable laws, including the law governing the substance of the dispute, the law applicable to the arbitration agreement and the law applicable to the procedure;
- determine the rules for the composition and the composition of the arbitral tribunal;
- determine the procedural rules to be followed by the tribunal;
- shape the proceedings within the framework of the applicable procedural rules (e.g. to finish the proceedings by settlement).[67]

The parties' freedom to choose the law applicable to the arbitration procedure has a significant bearing on the laws applicable to the arbitration agreement. The exercise of this freedom leads to the duplication of the arbitral seat by *'severing the link between the seat and the* lex arbitri*'*.[68] Arbitral proceedings are basically governed by the law of the seat of arbitration

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61 See, e.g., Articles 7 and 16 of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (hereinafter: Rome Convention 1980) and Articles 9 and 21 of Regulation No. 593/2008/EC on the law applicable to contractual obligations (hereinafter: Rome I Regulation).

62 In Hungarian: *rendelkezési elv*, in German: *Dispositionsfreiheit* or *Dispositionsmaxime*. See Hartenstein (2000), p. 18; Paulus (2010), p. 107, para. 311.

63 For an incomplete and imprecise statutory definition of the principle of party disposition, see Section 2(1) of the HCCP 2016.

64 Garnett / Gabriel / Waincymer / Epstein (2000), p. 3.

65 See Timár in FS Rüßmann (2013), p. 933 and Erdős in Somssich (2021), p. 183.

66 See Garnett / Gabriel / Waincymer / Epstein (2000), p. 3.

67 See, for example, Ujlaki in Kiss / Varga (2003), p. 871.

68 See Hill in ICLQ (2014), p. 527.

(*lex loci arbitri*).[69] Hence, it is the law of the arbitral seat that determines whether or not the parties are allowed to contract out of the statutory framework provided by that law. The majority of national arbitration legislations, including Hungarian law, do not explicitly authorize the parties to choose the applicable procedural law, nor does the UNCITRAL Model Law.[70] In these jurisdictions, the parties' freedom to choose a foreign procedural law and the effects of their choice will be limited to the replacement of the non-mandatory rules of the *lex loci arbitri* by the rules of the foreign law.[71] Even in those jurisdictions, where the parties are explicitly authorized to select a foreign procedural law [see e.g. Article 182(1) of the Swiss PILA], parties will certainly not be able to contract out of the overriding mandatory requirements of equal treatment and the right to be heard, as guaranteed by the law of the arbitral seat,[72] and *'the basic "external" support and supervisory roles of local courts'* at the place of arbitration.[73]

2.5. The Territorial Scope of Application of National Arbitration Legislations

The territorial scope of application of national arbitration legislations is a fundamental question which has a great impact on the legal framework of international arbitration. In my Thesis, I demonstrated that there is a significant difference between the Hungarian solution and the mainstream solution applied by other jurisdictions.

The territorial scope of application of **most national arbitration legislations** is connected to the place of arbitration. The place, seat, situs or forum of arbitration, arbitral seat[74] or, as it is referred to in certain jurisdiction, the seat of the arbitral tribunal[75] is where the arbitration procedure is conducted in a legal meaning. It shall be distinguished from the venue or location of the proceedings, which means the physical place where procedural acts (e.g. meetings and hearings) are actually performed.[76] The place of arbitration is the legal domicile—the 'juridical home' or 'juridical seat'[77]—of arbitration, i.e. the law under which the arbitration takes place.

The place of arbitration is subject to party autonomy.[78] This means that, under most laws, the parties are free to select the place of arbitration.[79] In case the parties have not determined the place of arbitration, the decision will have to be made for them usually by the arbitral tribunal.[80] In case the parties opted for institutional arbitration, depending on the parties' individual

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69 See Kaufmann-Kohler in ICCA Congress Series (1998), p. 336; Blackaby / Partasides / Redfern / Hunter (2009), p. 180, para. 3.51.

70 See Article 19(1) of the UNCITRAL Model Law, Section 1042(3) of the GCCP, Section 28 HAA 1994, Section 30 HAA 2017, Sections 1(b) and 34(1) EAA 1996. For further details see Segesser / Schramm in Mistelis (2010), pp. 930-934.

71 See Timár in FS Rüßmann (2013), p. 935.

72 See Section 1042(1) of the GCCP, Article 182(3) of the Swiss PILA, Sections 27-28 of the HAA 1994 and Sections 29-30 of the HAA 2017.

73 Born (2009) pp. 1299, 1322-1324.

74 All these terms are synonyms and cover the same concept. See Hill in ICLQ (2014), p. 519 and Csehi in Polgári Jog 2019/9-10, para. 3.

75 See, for example, Section 577 of the ACCP, Article 176 of the Swiss PILA and Articles 353(1) and 355 of the SCCP (in German: *'Sitz des Schiedsgerichts'*).

76 See Szabó in Polgári Jog 2018/7-8, paras 10-12 and 16-18.

77 See Born (2009), pp. 1530, 1538-1540 and 1676, Zeiler (2006), pp. 27 and 203. See also Csehi in Polgári Jog 2019/9-10, para. 5 and Szabó in Polgári Jog 2018/7-8, para. 11.

78 See also Hill in ICLQ (2014), pp. 518, 521 and Csehi in Polgári Jog 2019/9-10, paras 1 and 15.

79 See Article 20(1) of the UNCITRAL Model Law, Section 1043(1) of the GCCP and Section 595(1) of the ACCP. See also Article IV(1)(b)(ii) of the Geneva Convention.

80 See Article 20(1) of the UNCITRAL Model Law, Section 1043(1) of the GCCP and Section 595(1) of the ACCP, Section 176(3) of the Swiss PILA and Section 355(1) of the SCCP. See also Article IV(3) of the Geneva Convention.

agreement (if any) and the rules of proceedings of the arbitral institution, the arbitral institution might also be authorized to choose the place of arbitration for the parties.[81] Whether or not state courts have the power to determine (i.e. to select) the place of arbitration if it has not been determined by the parties and has not yet been established either by the arbitral institution or by the arbitrators, is in most jurisdictions not explicitly addressed in the national arbitration legislations.[82] From the lack of an explicit empowerment of state courts it would follow that they do not have such power, since, as a principle, state courts may intervene in matters submitted to arbitration only to the extent they are explicitly authorized to do so under the applicable arbitration legislation.[83] Yet, there are situations in which the determination of the place of arbitration by the court is unavoidable.[84]

Based on the international legislative practices, national arbitration laws usually contain 'extraterritorial' provisions as well. This means that certain provisions of the arbitration legislation are applicable irrespective of whether the place of arbitration is within or outside the country. The scope of such provisions is different from jurisdiction to jurisdiction.

The territorial scope of application of the **HAA 1994** raised considerable discussions among Hungarian scholars and practitioners. Pursuant to Section 1 of the HAA 1994, *'[u]nless otherwise provided by this Act, this Act shall be applied if the place (seat) of the* ad hoc *or permanent arbitral tribunal is in Hungary'*. Other Sections of the HAA 1994 used partially different terms: *'place of arbitration'*, *'place of arbitration determined in the arbitration agreement'* and *'seat of the arbitral tribunal'*.[85] Due to the ambiguous wording used by Section 1, its deviation from the wording of Article 1(2) the UNCITRAL Model Law, and the inconsistency of the terms used by the HAA 1994 it was not clear under which conditions the HAA 1994 was applicable to institutional arbitration. Three different views appeared in the literature:

(i) the term *'place (seat) of the ad hoc or permanent arbitral tribunal'* in Section 1 of the HAA 1994 had to be correctly interpreted as the place of arbitration, irrespective of whether the arbitration was an *ad hoc* or an institutional one;[86]

(ii) the correct interpretation of the scope of application of the HAA 1994 was that the term 'place' only referred to *ad hoc* arbitration and, in the case of institutional arbitration, the relevant territorial link was the 'seat' of the arbitral institution;[87]

(iii) the term *'place (seat) of the ad hoc or permanent arbitral tribunal'* was simply unclear but it could be construed in a way that the provisions of the HAA 1994

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81 Some national laws explicitly refer to the right of the arbitral institution to determine the place of arbitration based on the parties' authorization. See, for example, Section 595(1) of the ACCP, Section 176(3) of the Swiss PILA, Section 355(1) of the SCCP and Section 3(b) of the EAA 1996. Other laws do not contain such an explicit rule but only a general rule allowing the parties to confer their rights to determine (procedural) issues upon a third party such as an arbitral institution. See, e.g., Article 2(d) of the UNCITRAL Model Law.

82 See Born (2009), p. 1703.

83 See Article 5 of the UNCITRAL Model Law, Section 1026 of the GCCP, Section 578 of the ACCP, Section 7 of the HAA 1994 and Section 6 of the HAA 2017.

84 This is especially the case when a state court is seized of a request for judicial assistance in the constitution of the arbitral tribunal without the parties having agreed on the place of arbitration and, in case of institutional arbitration, without the arbitral institution having the power to fix the place of arbitration for the parties.

85 Cf. Sections 4, 31(1), 41(3), 46(2) and 47(1)(b)(ba) of the HAA 1994.

86 See Csőke in Magyar Jog 2014/12, pp. 722-723.

87 See Éless in Magyar Jog 2015/4, pp. 240-241.

> governing the arbitration itself were applicable to cases where the place of the arbitral tribunal, i.e. the place of arbitration, was in Hungary—irrespective of whether the arbitration was *ad hoc* or institutional—, whereas the provisions governing the operation of arbitral institutions were applicable to cases where the seat of the arbitral institution was located in Hungary.[88]

According to the original wording of Section 1(1) of the **HAA 2017**, as effective between 1 January 2018 and 7 August 2018, *'[t]his Act shall be applied during the arbitration if the seat of the permanent arbitral tribunal or the place of* ad hoc *arbitration is in Hungary'*. From this wording it is apparent that the legislator learned from the discussions regarding the territorial scope of application of the HAA 1994 and wanted to make it clear that the term 'place' refers to *ad hoc* arbitration, whereas the term 'seat' to institutional arbitration. However, between 1 January 2018 and 7 August 2018, there was a number of further provisions in the HAA 2017 which did not follow the dualist approach, i.e. the distinction between the seat of the arbitral institution and the place of *ad hoc* arbitration but simply referred to the 'place of arbitration'.[89] The legislator's choice for a dualist approach regarding the definition of the territorial scope of application of the Hungarian arbitration legislation and the discrepancy between the points of reference for the territorial scope of application of the HAA 2017 (seat of the arbitral institution and place of the *ad hoc* arbitration) and the point of reference for other provisions of the HAA 2017 (place of arbitration) could have serious practical implications in cases where the parties submitted their disputes to arbitration under the auspices of a foreign arbitral institution. Therefore, the regulation became subject to strong criticism,[90] which led the legislator to modify the HAA 2017.

Pursuant to the currently effective wording of Section 1(1) of the HAA 2017*, '[t]he provisions of this Act shall apply if the place of arbitration is in Hungary'*. Whether the arbitration is an *ad hoc* or an institutional one is no longer relevant for the territorial scope of application defined in Section 1(1), but it is still relevant for the application of the extraterritorial provisions of the HAA 2017. According to Section 1(2) of the HAA 2017, as effective since 8 August 2018, *'[u]nless otherwise provided by an international treaty, Sections 9, 10, 26-28, 40, 53 and 54 shall apply to the procedure of an arbitral institution seated in Hungary even if the place of arbitration is outside Hungary'*.

Based on the new regulation, arbitral proceedings administered by foreign arbitral institutions and conducted in a foreign jurisdiction, meaning that the place of arbitration is abroad, are not covered by Section 1(2). Considering the contents and the significance of the extraterritorial provisions listed in Section 1(2) (the recognition and enforcement of arbitration agreements, interim measures rendered by arbitral tribunals and arbitral awards, the provision of judicial assistance), this is very problematic. Another issue with the new regulation is that Section 59(1)-(2) of the HAA 2017 grants exclusive jurisdictions to the currently existing four Hungarian arbitral institutions.[91] In view of Section 1(1) of the HAA 2017, the provisions on the exclusive

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88 See Timár in Németh / Varga (2014), pp. 655-656.

89 See Sections 3(1) para. 2, 28, 31 and 44(4) of the HAA 2017, as effective between 1 January 2018 and 7 August 2018.

90 See, for example, Szabó in Polgári Jog 2018/7-8, paras 29-75, Varga in Eljárásjogi Szemle 2018/1, p. 3, Bodzási / Tanács in Fontes Iuris 2017/4, p. 46 and Bodzási in Bodzási (2018), p. 18.

91 The Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, the Sports Permanent Court of Arbitration, the Court of Arbitration attached to the Hungarian Chamber of Agriculture and the Concession Arbitration Court.

jurisdiction of the four Hungarian arbitral institutions are applicable to each case where the place of arbitration is in Hungary. This can be construed in a way that foreign arbitral institutions are not allowed to administer arbitral proceedings in Hungary and that the parties' agreement on the contrary is invalid. Because of these two concerns, the Hungarian regulation is still not in line with the international trends.

3. The Legal Nature of the Arbitration Agreement

In general terms, the arbitration agreement is the parties' agreement to submit one or more legal disputes to arbitration. The dispute does not need to be an existing one that has already arisen between the parties. However, the disputes to be resolved by arbitration according to the arbitration agreement must concern a defined legal relationship, which is usually but not necessarily a contract governed by substantive law. An agreement by the parties to submit all disputes that may arise between them in the future without referring to a defined legal relationship is under most legal regimes not an arbitration agreement: it is an agreement falling outside the scope of application of the legal regime governing arbitration.[92]

In international commercial arbitration, there are two basic forms of the arbitration agreement: arbitration clause included in a substantive law contract, commonly called the 'main', 'underlying' or 'container contract',[93] and separate arbitration agreement.[94] Arbitration agreements relating to an existing dispute, which usually take the form of a separate agreement, are called *compromise* (in French) or *compromissum* (in Latin),[95] whereas arbitration agreements dealing with future disputes, which are usually included in the main contract, are called *clause compromissoire* (in French) or *clausula compromissoria* (in Latin).[96] In the above-mentioned two basic types of the arbitration agreement it is common that the parties' mutual consent to submit one or more disputes to arbitration appears explicitly. An arbitration agreement can also be implied by the parties' conduct: it can be formed by *'the exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other'*.[97]

Despite the different concepts of contract in civil law and common law jurisdictions, the arbitration agreement is everywhere treated as a **contract** by courts and arbitral tribunals. By entering into a typical arbitration agreement, both parties submit to arbitration and give up the possibility to resort to state courts. This constitutes a benefit and a detriment on both sides and thus the consideration requirement of the common law is met: the arbitration agreement is a contract under the common law as well, also without being incorporated into a deed.

Whether or not **non-exclusive arbitration agreements**, which do not exclude the jurisdiction of state courts, can be considered as arbitration agreements is a controversial issue. The case

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92 See Article II(1) of the New York Convention, Article 7(1) (Option I) or Article 7 (Option II) of the UNCITRAL Model Law, Section 5(1) of the HAA 1994, Section 8(1) of the HAA 2017, Section 1029(1) of the GCCP, Section 581(1) of the ACCP. In contrast, Section 6(1) of the EAA 1996 does not require a defined legal relationship in case the parties agree to submit future disputes to arbitration. See also Born (2009), pp. 256-258.

93 See O'Neill (2012), p. 195.

94 See, e.g., Article I(2)(a) of the Geneva Convention.

95 For the origin of the term *'compromissum'* (*com-promissum*, 'double promises', promise to arbitrate with a penalty mechanism), see Born (2009), p. 25.

96 See Benke in Gazdaság és Jog 2001/3, Section A, subsection 1, and Bae / Lee (2012), p. 56. See also Okányi (2009), p. 13 and Okányi in Varga (2018), p. 2874, para. 7357.

97 See Article 7(5) (Option I) of the UNCITRAL Model Law.

law of Hungarian courts is contradictory.[98] However, based on the provisions of the HAA 1994 and the HAA 2017, considering the principle of party autonomy and with regard to the fact that non-exclusive arbitration agreements can be handled within the legislative framework without any difficulties, non-exclusive arbitration agreements can and should be regarded as arbitration agreements provided that the parties' intention to enter into a non-exclusive arbitration agreement is clearly stipulated.

Despite the fact that arbitration is a way of providing justice and, as such, an equivalent to state court litigation, the arbitration agreement is a **private law contract**: none of the actors of the arbitration procedure exercises public authority over the others. The parties to the arbitration are equal ranking, neither party is subordinate to the other. The same applies to the relationship between the parties and the arbitral tribunal or the arbitral institution: arbitral tribunals and arbitral institutions are not state organs and do not exercise public authority. Their power stems from the parties' mutual consent.

The qualification of the arbitration agreement as a substantive, procedural or mixed contract is more difficult. According to the so-called **procedural theory**, which is especially prevalent in civil law jurisdictions, the arbitration agreement is a bilateral procedural act, a subcategory of procedural contracts (*Prozessvertrag*), primarily governed by procedural law.[99] The **substantive theory** holds that the arbitration agreement is a substantive law contract with procedural effects.[100] This means that it is basically subject to the provisions of substantive (contract) law. Under the **mixed theory**, the arbitration agreement is an inseparable combination of substantive and procedural elements, similar to a settlement in court.[101] This means that the arbitration agreement is a concept of both procedural and substantive law, and these two aspects cannot be separated. This leads to the cumulative application of procedural and substantive law.

In my opinion, it is better to accept a **dualist theory**, according to which *'[a]rbitration agreements […] have both a contractual and a jurisdictional character. It is contractual by virtue of the required agreement of the parties. It is jurisdictional by virtue of conferring jurisdiction upon the arbitration tribunal'.*[102] The arbitration agreement produces both procedural and substantive effects. It is a contract and as such is basically governed by the general rules of contract law. If arbitration law contains a special provision concerning a contractual (substantive) element of the arbitration agreement, then this provision must be applied. However, when applying the general rules of contract law, we have to pay due regard to the limits of the applicability of those rules, taking account of the specific purpose of the arbitration

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98 Cf. BH1992. 48 (Hungarian S.C.), BDT2005. 1207 (Metropolitan H.C. of Appeals), BDT2013. 3028 (Metropolitan H.C. of Appeals), Civil Law Uniformity Decision No. 3/2013 (Hungarian S.C.), Gfv.IX.30.328/2011/4 (Hungarian S.C.), 9.G.40.400/2017/12 (Metropolitan C.), affirmed by Gfv.VII.30.008/2018/11 (Hungarian S.C.).

99 See Reithmann / Martiny (2004), p. 2214, para. 3218; BG, *Tobler v Schwyz*, BGE 59 I 177 (1933), at 179; BGH, 10.12.1970, BB 1971, 369, para. 32, BGH, 03.12.1986, BGHZ 99, 143-150, para. 22, and BGH, 06.04.2009, BGHZ 180, 221-235, para. 17; OGH, 30.03.2009, 7 Ob 266/08f, p. 13; *'Sojuznefteexport' v Joc Oil* (FTAC 1984), pp. 97 et seqq.

100 Oertmann in ZfdZP (1915), pp. 403-404; see also the earlier decisions of the Federal Supreme Court of Germany: BGH, 23.11.1972, NJW 1973, 191-191, para. 11 and BGH 22.05.1967, BGHZ 48, 35-46, para. 44. From the Hungarian literature, see Fejes in Gazdaság és Jog 2005/4, p. 21, para. 5 and Ujlaki in Jogtudományi Közlöny 1991/9-10, pp. 224 et seqq.

101 See Wagner (1998), pp. 579 and 43 et seqq. As opposed to the majority view, Wagner denies the existence of mixed contracts and thus the mixed nature of the arbitration agreement.

102 Lew / Mistelis / Kröll (2003), p. 100, para. 6-2.

agreement to provide for a dispute resolution mechanism and of all the procedural aspects which result from this specific purpose. Legal issues arising out of the arbitration agreement which are directly related to the proceedings of the arbitral tribunal, or the proceedings of a state court, are governed by the procedural rules of arbitration law. All in all, the classification of a particular element of the arbitration agreement as either procedural or substantive is more important than the qualification of the whole contract.

The arbitration agreement is presumed to be **separable** from the underlying contract. This means that, as a rule, the existence and the validity of the arbitration agreement must be examined independently, and that the non-existence, invalidity or termination of the main contract does not automatically affect the arbitration agreement. Since separability is a presumption, it can be proven that, for the same reason as the main contract, the arbitration agreement is also non-existing, invalid or terminated. Despite its separability, the arbitration agreement cannot exist without an underlying legal relationship, and thus it is also **ancillary** in nature.

4. Validity and Arbitrability

Substantive validity, formal validity, subjective arbitrability and objective arbitrability are the four main conditions for the enforceability of an arbitration agreement. The meaning of these notions, their qualification of either substantive or procedural and their distinction from each other and from other similar notions raise a lot of question marks. In my Thesis, I tried to provide a clarification of the contents of the above legal concepts and to draw a clear distinction among them for the purposes of qualification, which is the very first step of every choice-of-law analysis.

4.1. Substantive Validity

The substantive validity of the arbitration agreement is governed by the general rules of contract law,[103] unless there is a special regulation laid down in an international convention or the applicable national arbitration law.[104] This means that the substantive validity of the arbitration agreement is usually subject to the same rules as the substantive validity of any other substantive contract.[105]

Generally speaking, validity means that a contract is capable of producing the legal effects intended by the parties and thus the contract is enforceable. The substantive invalidity of the arbitration agreement covers cases where the parties' intent to agree on arbitration or the intended legal effect of the arbitration agreement is defective *ab initio*, i.e. already at the time of conclusion of the arbitration agreement, and therefore the applicable law deprives the arbitration agreement of its capability to produce the intended legal effects.

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[103] From the German case law, see BGH, 06.04.2009, BGHZ 180, 221-235, para. 17. From the Hungarian literature, see Juhász in Varga (2018), p. 2882, para. 7372 and Fejes in Gazdaság és Jog 2005/4, p. 24, para. 9.

[104] *'Sojuznefteexport' v Joc Oil* (FTAC 1984), p. 98.

[105] This is especially apparent from U.S. Code Title 9, Chapter 1, § 2, which provides that an arbitration agreement *'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract'*.

Looking at the defects of the intent first, an arbitration agreement can be invalid, for instance, on the grounds of fraud,[106] mistake, duress, menace, or undue influence, depending on the applicable law.

As far as the defects of the intended legal effects are concerned and taking the rules of Hungarian contract law as an example, the following grounds for substantive invalidity may come into consideration in the case of an arbitration agreement: illegality, unconscionability (immorality), illegal and unfair terms in a business-to-consumer contract, impossibility *ab initio*.

The substantive validity of the arbitration agreement is subject to certain specialties. First of all, separability is a special substantive validity rule of arbitration law, providing, amongst others, that the arbitration agreement is presumed not to be compromised by the invalidity of the main contract. Second, as the arbitration agreement provides for a dispute resolution process and is the basis of the arbitral tribunal's jurisdiction, the invalidity of the arbitration agreement has procedural consequences. The most important consequence of invalidity is the lack of jurisdiction of the arbitral tribunal. In order to ensure the proper functioning of arbitration, invalidity claims regarding the arbitration agreement are subject to procedural (time) limits, which do not exist in the case of substantive law contracts. Third, because of its main jurisdictional effects, the invalidity of the arbitration agreement is usually raised as a preliminary question in a procedure on a different subject-matter. Yet, it is also conceivable that the invalidity of the arbitration agreement is the main subject of the procedure.[107]

Based on the above specialties and especially for the procedural implications of the arbitration agreement, the legal consequences of substantive invalidity under general contract law cannot be invariably applied to the arbitration agreement: *restitutio in integrum* cannot come into consideration.

Substantive invalidity has to be distinguished from the following legal concepts: **non-existence, ineffectiveness, incapability of being performed, nullity** and **inoperability**. The exact meaning of these terms and their relationship to the concept of substantive invalidity are subject to a certain degree of uncertainty. The reason for this is that the terms applied by the New York Convention are not defined in the Convention itself and that different national laws apply different terms to describe the same situations. A further reason is that some of the terms used by the Convention and the national laws are difficult to identify with the traditional concepts of contract law. Despite the ambiguities, the following can be established with certainty:

- there is a clear distinction between non-existence and substantive invalidity;
- the outcome of substantive invalidity is clear: the court seized of a matter covered by the invalid arbitration agreement will not refer the dispute to arbitration but assume jurisdiction to decide on the merits of the case;
- cases in which a court refuses to enforce an arbitration agreement at the referral stage (i.e. when one of the parties brings an action before a state court despite the arbitration agreement) are not limited to the cases of non-existence and—substantive or formal—invalidity.

[106] From the Hungarian case law see Gfv.X.30.296/2009/5 (Hungarian S.C.).
[107] See, for example, Gfv.VII.30.151/2014/4 (Hungarian S.C.) and BH2018. 87 (Hungarian S.C.).

4.2. Formal Validity

Certain legal acts have legal effects only if they have been carried out in accordance with certain form requirements. Form requirements do not only exist in contract law and, more generally, in substantive law, but also in procedural law. The form requirements of substantive law and procedural law ordinarily serve two purposes:

(i) providing proof of the existence and the content of the legal act, and
(ii) protecting the author of the legal act from hasty actions and ensuring that he or she becomes aware of the content and the consequences of the legal act.

Arbitration agreements are usually subject to form requirements, and the most universal form requirement regarding the arbitration agreement is the written form.[108] What criteria need to be fulfilled in order to meet the writing requirement, depends on the applicable law. There is, however, a general trend towards the liberalization of form requirements relating to the arbitration agreement.[109] The above-mentioned general purposes of form requirements are also relevant for the arbitration agreement.

Under the general rules of contract law, form defects of a contract can usually be cured. The same principle applies to the arbitration agreement, however, not based on the general rules of contract law but the special rules of arbitration law. Most national arbitration legislations contain a rule providing that the exchange of statements of claim and defense during the arbitration, in which the existence of an arbitration agreement is alleged by one party and not denied by the other, constitutes an arbitration agreement in writing.[110]

The legal consequence of the non-compliance of an arbitration agreement with form requirements is usually invalidity. However, non-compliance with form requirements may have a different primary effect as well. Certain legal regimes—international conventions and national arbitration legislations—are only applicable to written arbitration agreements.[111] In such cases, the primary effect of non-conformity with the writing requirement is not invalidity but the inapplicability of the legal regime. Finally, the wording of certain national arbitration legislations suggest that the existence of a written arbitration agreement is a mere evidentiary issue and not a matter of validity.[112]

Formal invalidity has to be distinguished from the following legal concepts: **substantive validity** and **non-existence**.

4.3. Subjective Arbitrability

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[108] See, e.g., Article 7(2) (Option I) of the UNCITRAL Model Law, Section 1031(1) of the GCCP, Section 583(1) of the ACCP, Article 178(1) of the Swiss PILA (for international arbitration) and Article 358 of the SCCP (for domestic arbitration), Section 5(3) of the HAA 1994 and Section 8(2) of the HAA 2017 and Section 5(1) of the EAA 1996.

[109] See Article 7 (Option II) of the UNCITRAL Model Law, which renounces any form requirement regarding the arbitration agreement. See also Born (2009), pp. 586-587 and Born (2014), p. 663.

[110] See, e.g., Article 7(5) (Option I) of the UNCITRAL Model Law, Section 1031(6) of the GCCP, Section 583(3) of the ACCP, Section 5(4) of the HAA 1994 and Section 8(4) of the HAA 2017. From the Hungarian case law see EBH2007. 1705 (Hungarian S.C.) and EBH2006. 1525 (Hungarian S.C.).

[111] Born (2009), pp. 581-582 and Born (2014), pp. 657-658.

[112] See, for example, Article 1021 of the Dutch Code of Civil Procedure.

Subjective arbitrability or 'arbitrability *rationae personae*' is one side of arbitrability. It refers to the parties' ability to submit disputes to arbitration, i.e. to enter into an arbitration agreement.[113] As long as someone has the capacity to enter into an arbitration agreement, he or she is also capable of becoming a party to, and participating in, the arbitration procedure. Most national arbitration legislations do not provide for rules on subjective arbitrability.[114] In the absence of such special regulations, the general rules on capacity of persons apply.

Under some national legislations, the subjective arbitrability of certain persons may be subject to special limitations or exclusions. A typical example is the limitation or exclusion of the capacity of a state, state entity or state-owned company to enter into an arbitration agreement.[115] In international arbitration, such limitations and exclusions are mostly regarded as idiosyncratic and anachronistic rules, and the right of a state, state entity or state-owned company to rely on its own law in order to evade a previous commitment to arbitrate is usually not recognized.[116]

From the principle of separability, it follows that the capacity of the parties to conclude an arbitration agreement needs to be examined separately from the parties' capacity to enter into the main contract. However, in cases where the parties' capacity to arbitrate is subject to the same requirements as their general capacity to enter into contracts, the separability doctrine has no practical implications.

The lack of subjective arbitrability may have two different primary consequences. If the party does not even have the capacity to have rights, i.e. it is an entity without any kind of legal personality, the arbitration agreement entered into by such party will be non-existing. If the party is a legal subject, i.e. he or she is capable of holding rights, but lacks the capacity to exercise those rights because he or she is a minor or a person under guardianship, the arbitration agreement entered into by such party on his or her own will generally be regarded as invalid from a substantive law perspective.[117] In case a special rule of subjective arbitrability has been disregarded, e.g. a state entity has entered into an arbitration agreement in violation of an applicable provision of law prohibiting such entities to conclude arbitration agreements, the arbitration agreement will usually[118] be regarded as invalid, provided, of course, that the prohibition is not disregarded but actually applied by the forum seized of the matter. Irrespective of the fact that subjective non-arbitrability may have different primary consequences, it is common in all the above-mentioned cases that the arbitration agreement will not be recognized and enforced. This means that the arbitral tribunal will have no jurisdiction and state courts will refuse to refer the parties to arbitration.

Subjective arbitrability has to be distinguished from the following legal concepts: **substantive validity, formal validity, objective arbitrability, standing** and **representation**. Hungarian

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113 See Zeiler / Siwy (2018), p. 4, para. 6.

114 See Born (2009), p. 627 and Born (2014), p. 725.

115 E.g. state entities may not conclude arbitration agreements or they may but only upon the approval of higher state officials (e.g. ministers). See Hanotiau in ICCA Congress Series (1998), pp. 147-148. For specific examples, see Article 139 of the Constitution of the Islamic Republic of Iran and the previous (repealed) version of Article 1676(2) of the Belgian Judicial Code.

116 See, for example, Article 177(2) of the Swiss PILA and Article II(1) of the Geneva Convention.

117 See Sections 2:17 and 2:24 of the HCC 2013.

118 Under the rules of Hungarian contract law, the lack of approval by a higher state official of the arbitration agreement, which is a common limitation on the subjective arbitrability of state entities, would not render the arbitration agreement invalid but ineffective (in Hungarian: *hatálytalan*).

law provides very good examples for the difficulties in distinguishing the two sides of arbitrability (see the general arbitrability rule of the HAA 1994, the limitations on the arbitrability of disputes concerning national assets under the HAA 1994 and the National Assets Act, and the provision of the HAA 2017 on the non-arbitrability of disputes arising out of consumer contracts).

In relation to subjective arbitrability, I devoted a separate subchapter to the impact of insolvency on the arbitration agreement and came to the conclusion that the impact of insolvency on arbitration, including both the impact on the arbitration agreement and on the arbitration procedure, cannot be squeezed into any of the categories examined in my Thesis. It must be subject to a separate choice-of-law consideration based on the assessment of circumstances there are not inherent to arbitration but follow from the underlying policies of the law of insolvency.

4.4. Objective Arbitrability

Objective arbitrability means that a dispute or a subject-matter is *'capable of settlement by arbitration'*.[119] This is the other side of arbitrability,[120] in some jurisdictions also called arbitrability *rationae materiae*.[121] Objective arbitrability is a special legal issue, which only exists in arbitration law and has nothing to do with the contractual nature of the arbitration agreement.[122] The rules of national laws on objective arbitrability and non-arbitrability are jurisdictional rules: they allocate competences between state courts and arbitral tribunals.

At first sight, objective arbitrability appears to have nothing to do with the allocation of jurisdiction between state organs either, since arbitration is conducted by arbitral tribunals outside the system of state organs. However, between the different layers of jurisdiction of state organs and objective arbitrability there is still a correlation. The considerations and distinctions underlying the determination of the scope of objective arbitrability, on the one hand, and the allocation of jurisdiction between state organs, on the other hand, are by and large similar and strongly affect public policy:

(i) arbitration is an alternative to the administration of civil justice by state courts:[123] matters belonging to the jurisdiction of non-judicial state organs (e.g. administrative authorities) and matters falling under the criminal or administrative branches of justice cannot be referred to arbitration;

(ii) matters not involving a legal dispute are not capable of settlement by arbitration; that is why arbitration cannot replace those non-litigious proceedings that do not have a legal dispute as their subject-matter;[124]

(iii) non-arbitrable matters are typically governed by special jurisdictional regulations, which often provide for exclusive jurisdictions,[125] and leave virtually no room for party disposition (choice-of-court agreements).

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119 See Articles II(1) and V(2)(a) of the New York Convention, Article VI(2)(c) last sentence of the Geneva Convention, and Articles 34(2)(b)(i) and 36(2)(b)(i) of the UNCITRAL Model Law.

120 Zeiler / Siwy (2018), p. 4, para. 6.

121 See Born (2014), p. 943.

122 See Rüßmann / Timár in Geimer / Schütze (2012), p. 854.

123 See Tóth in DJM/OTDK 2005, Part III, subsection 2.1, Hajdú in Jogelméleti Szemle 2014/3, p. 240.

124 See Tóth in DJM/OTDK 2005, Part III, subsection 2.1, Hajdú in Jogelméleti Szemle 2014/3, p. 240.

125 From a historical point of view, see also Varga in FS Mezey (2013), p. 369.

Despite the above-discussed correlations between objective arbitrability and the allocation of jurisdiction among state organs, there is also a big difference. The ultimate source of the jurisdiction of state organs is state sovereignty: in case a statute confers jurisdiction upon a state court or other state organ, there is no need for any further act to enable the court or other organ to exercise jurisdiction, if the matter is referred to them. In contrast, objective arbitrability is only one pillar of the arbitrators' jurisdiction: without the other pillar—the parties' agreement to arbitrate—the tribunal will have no jurisdiction, and without an exclusive arbitration agreement, which is the rule rather than the exception, objective arbitrability will not deprive state court of their jurisdiction.

Based on the above, objective arbitrability seems to be a concept of procedural law. However, considering the above-described difference between objective arbitrability and the allocation of jurisdiction among state organs, and especially the close relationship of objective arbitrability in several jurisdictions with the parties' ability to freely dispose of, or reach a settlement on, the subject-matter of the dispute, which is predominantly a matter of substantive law, it can hardly be denied that objective arbitrability is not a purely procedural concept but in fact a mixture of procedural and substantive elements.

Taking a look at the national legislations, objective arbitrability rules show a high degree of variety. Yet, there are certain trends that appear worldwide:

(i) in the past decades, the scope of objective arbitrability has overall become wider and, in parallel, the scope of non-arbitrable matters has been narrowed;[126]
(ii) arbitration is primarily viewed as a dispute resolution method for commercial matters; accordingly, the scope of objective arbitrability is in many jurisdictions limited to commercial disputes;
(iii) besides those jurisdictions where the availability of arbitration is restricted to commercial matters, there are many jurisdictions where the boundaries of objective arbitrability are more broadly defined so as to include all private law matters where the parties are free to dispose of the subject-matter of the dispute, i.e. matters within the boundaries of the parties' private autonomy;[127]
(iv) there is a trend to distinguish between purely domestic and cross-border matters in terms of objective (non-)arbitrability;
(v) since the consequences of objective non-arbitrability are partially governed by international conventions, most importantly by the New York Convention, the pro-arbitration approach of such conventions has a significant influence on the application of the national rules on objective (non-)arbitrability;
(vi) there are two types of objective arbitrability rules: positive definitions for arbitrable matters, and negative definitions for non-arbitrable matters; most jurisdictions combine the two types of rules.

The non-arbitrability of matters referred to non-litigious procedures does not only appear in Hungarian law but, for example, also in German and Austrian law. However, under German and Austrian law, the allocation of matters between litigious and non-litigious proceedings is usually not regarded as a decisive factor. What really matters is whether a particular case concerns a legal dispute and/or a claim involving an economic interest and/or a subject-matter

[126] See Born (2009), p. 775 and Born (2014), pp. 957-972.
[127] See Varga in FS Mezey (2013), p. 363 and Varga in Bányai / Nagypál (2015), p. 1.

the parties are able to freely dispose of.[128] In contrast, under Hungarian law, arbitration as a dispute resolution mechanism can be chosen by the parties only instead of litigation. In relation to the payment order procedures, this has resulted in an awkward situation: despite the arbitration agreement, the parties may initiate a payment order procedure; however, in case the order for payment procedure turns into a litigious procedure due to the fact that the defendant has timely submitted a statement of opposition against the order for payment, the litigious procedure must be terminated, if so requested by the defendant based on the arbitration agreement not later than in his or her written statement of defense.

The legal consequences of objective non-arbitrability depend on who and in which phase of the arbitration establishes that the dispute is not arbitrable. The non-arbitrability of the subject-matter of the difference is usually a ground for the setting aside and the refusal of recognition and enforcement of the arbitral award, which shall be considered by the court *ex officio*.[129] As an exception, the non-arbitrability of the matter and, for that reason, the setting aside of the award in the Contracting State in which, or under the law of which, the award was made has under Section IX of the Geneva Convention no bearing on the recognition and enforcement of the award in another Contracting State. In the referral phase, objective non-arbitrability is a ground for the refusal of recognition of the arbitration agreement, but this is not explicitly stated in every legal regime (see, for example, the New York Convention, the HAA 1994 and the HAA 2017). The consequences of objective non-arbitrability during the arbitration procedure is even more underregulated than the consequences of the same in the referral phase. Because of the public policy nature of objective (non-)arbitrability, also arbitral tribunals should consider the non-arbitrability of the dispute *ex officio*.

Objective arbitrability has to be distinguished from the following legal concepts: **subjective arbitrability**, **public policy**, **substantive validity** and **allocation of jurisdictions between arbitral institutions**.

5. The Laws Applicable to the Arbitration Agreement

The ***law* applicable to the arbitration agreement** is the law which governs the arbitration agreement as a contract, i.e. all contractual—substantive law—aspects of the arbitration agreement except for those that are subject to a separate choice-of-law approach (e.g. formal validity). The ***laws* applicable to the arbitration agreement** include all the laws that are applicable to the different issues related to the arbitration agreement, such as substantive validity, which is governed by the law applicable to the arbitration agreement, and formal validity, subjective arbitrability and objective arbitrability, which are subject to separate choice-of-law considerations.[130]

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[128] See Voit, Dissertation (2009), pp. 80-97. For the German approach see also Voit in Musielak/Voit (2020), para. 8.

[129] See, e.g., Article V(2)(a) of the New York Convention, Articles 34(2)(b)(i) and 36(2)(b)(i) of the UNCITRAL Model Law, Sections 1059(2) No. 2(a), 1060(2) and 1061(1) of the GCCP, Section 611(2) No. 7 of the ACCP, Sections 55(2)(a) and 59(a) of the HAA 1994, and Sections 47(2)(b)(ba) and 54(a) of the HAA 2017.

[130] For a different meaning of the term 'laws applicable to the arbitration agreement' (at the different stages of the arbitral dispute resolution process different laws might be applied to the arbitration agreement, depending on who and when determines the applicable law), see Schmidt in Magyar Jog 2020/1, p. 55.

Choice-of-law issues, i.e. conflicts of different national laws, arise only if the legal relationship contains a relevant foreign element.[131] This is also true for the arbitration agreement. As a rule, arbitration legislations, whether national or international, do not explicitly define what renders the arbitration agreement international. Rather, they define the international character of the arbitration itself (see subchapter 2.3 above) or are completely silent on this issue.

One exception is the Geneva Convention, which, in the context of its material scope of application, contains an explicit definition for the internationality of the arbitration agreement. Pursuant to Article I(1)(a) of the Convention, the fact that renders the arbitration agreement international is the parties having their habitual residence or seat[132] in different Contracting States[133] at the time of the conclusion of the arbitration agreement. The parties' nationality (i.e. citizenship) and the place of arbitration is not relevant.[134] The subject-matter of the arbitration agreement—disputes arising from 'international trade'—is in fact not an additional requirement.

Based on the above, if the arbitration agreement is international within the meaning of the Geneva Convention or is related to international arbitration as defined in the applicable national law, the choice-of-law analysis of the arbitration agreement and the related legal issues can hardly be spared. The reason for this is that the nationality (places of business) of the parties, the seat of arbitration and the territorial connections of the main contract are the most important factors both for the arbitration and for the arbitration agreement.[135] However, other circumstances, such as the conclusion of the arbitration agreement or the recognition and enforcement of the arbitral award abroad, may also render an otherwise domestic arbitration agreement international.

The difficulties and ambiguities around the laws applicable to the arbitration agreement and the related legal issues can be traced back to a number of different circumstances:

(i) Choice-of-law questions relating to the arbitration agreement may come up at different stages of the dispute resolution mechanism (arbitral proceedings, state court litigation, court review of arbitral jurisdiction, setting aside procedure, recognition and enforcement or separate action concerning the arbitration agreement).

(ii) As different bodies—the arbitral tribunal, state courts, enforcement authorities—are in charge of the different stages and those different bodies may be situated in different countries, the chance that the arbitration agreement and the related legal issues will be subject to diverging choice-of-law rules during the same dispute resolution process is extremely high.

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131 This is a general principle of private international law. See e.g. Article 3 of the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*, hereinafter: IAGCC), Section 1 of the Hungarian PILA 2017 and Article 1(1) of the Rome I Regulation.

132 If a party has several places of business, the relevant place—the 'seat' within the meaning of the Convention—will always be the one by which the arbitration agreement was concluded. See de la Brena in Zeiler / Siwy (2018), pp. 35-36, paras 12-15.

133 See van den Berg (1981), p. 94.

134 See de la Brena in Zeiler / Siwy (2018), p. 36, para. 16 and pp. 48-49, paras 67-71. For a different—incorrect—view, see Konrad, Kluwer Arbitration Blog (02.11.2010).

135 See Rüßmann / Timár in Geimer / Schütze (2012), p. 839 and Timár in Harsági / Horváth / Raffai (2013), p. 216.

(iii) While state courts always have a *lex fori*, which provides them with the necessary choice-of-law rules, arbitral tribunals have no *lex fori*.[136]

(iv) The provisions of national laws and international conventions which specifically provide for the laws applicable to the arbitration agreement and the related legal issues are generally addressed only to state courts.

(v) Usually, the choice-of-law rules which are specifically addressed to arbitral tribunals and grant them the discretion to apply the most appropriate choice-of-law rule or substantive law, do not specifically provide for the laws applicable to the arbitration agreement and the related legal issues, but only determine the law applicable to the substance of the dispute.

(vi) While most national arbitration legislations contain conflict-of-laws rules for the purposes of the post-award phase (setting aside actions, recognition and enforcement),[137] there are no explicit rules on the laws applicable to the arbitration agreement and the related legal issues at the referral stage (i.e. when one of the parties initiates litigation in breach of the arbitration agreement).[138]

(vii) The scope of application and the provisions of the international conventions which provide for uniform choice-of-law and substantive rules related to arbitration agreements are not always clear and well-defined.

(viii) The special legislations relating to the laws applicable to the arbitration agreement are often silent on the question of *renvoi*.

(ix) The arbitration agreement is separable from but at the same time also ancillary to the underlying legal relationship. The dilemma whether to keep the arbitration agreement fully isolated from the main contract or to pay more regard to the functional connection of the arbitration agreement to the main contract is also relevant to the choice-of-law analysis.[139]

(x) The enforceability of the arbitration agreement consists of several components that require separate choice-of-law analyses and may accordingly be governed by different laws.

(xi) It is not always easy to decide whether a certain legal issue should be subject to a substantive or a procedural choice-of-law approach. For the purposes of the determination of the applicable law, procedural issues are sometimes treated as matters of substance, governed by the law applicable to the arbitration agreement, and, *vice versa*, substantive issues are regarded as procedural questions, governed by the *lex fori* or the law of the place of arbitration.[140]

5.1. Theoretical Considerations

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136 See Schlosser (1989), pp. 162, 163; Reithmann / Martiny (2004), p. 172, para. 177, p. 469, para. 500, p. 2330, para. 3399. See also Schmidt in Magyar Jog 2020/1, pp. 54, 55.

137 See Article V(1)(a) of the New York Convention, Articles 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law, Section 1059(2)(1)(a) of the GCCP, Section 55(1)(b) of the HAA 1994 and Section 47(2)(a)(aa) of the HAA 2017.

138 Article VI(2) of the Geneva Convention is an exception.

139 See Rüßmann / Timár in Geimer / Schütze (2012), p. 844 and Timár in Harsági / Horváth / Raffai (2013), pp. 219-220.

140 See Rüßmann / Timár in Geimer / Schütze (2012), p. 844.

If the arbitration agreement was a pure procedural act, governed by procedural law, it should always be subject to the *lex fori*—or in the pre-award phase to the law of the seat of arbitration—and the parties would not enjoy the freedom to choose the applicable law.[141]

Should the arbitration agreement be regarded as a pure substantive contract, the applicable law—the *lex causae*—should be determined by means of contractual choice-of-law rules. The most important consequence of the application of the contractual choice-of-law rules would be the parties' freedom to determine the law applicable to the arbitration agreement.

In fact, the complex—substantive and procedural—legal nature of the arbitration agreement does not allow the submission of the whole arbitration agreement, including all legal issues related thereto, to a single legal system, based on a uniform—procedural or contractual—connecting factor. The legal issues arising out of the contractual nature of the arbitration agreement should be governed by the contractual choice-of-law principles, whereas the procedural aspects should generally be subject to the *lex fori* principle, including its version 'adapted' to arbitration (applicability of the law of the arbitral seat).[142] Taking a look at the application of choice-of-law rules to the arbitration agreement in practice, it can be established that this approach is widely used.[143] In order to prove this, in my Thesis, I gave an overview of the laws applicable to the arbitration agreement and the related legal issues based on the international practice.

5.2. The Laws Applicable to the Arbitration Agreement under Hungarian Law

Under the Hungarian jurisdiction, choice-of-law issues relating to the arbitration agreement are governed by a multi-level legal regime. In addition to the national legislations on arbitration—the HAA 1994, replaced by the HAA 2017 on 1 January 2018—and on private international law—Law-Decree No. 13 of 1979 (hereinafter: Hungarian PILA 1979), replaced by Act XXVIII of 2017 (hereinafter: Hungarian PILA 2017) on 1 January 2018—, choice-of-law regulations can be found in international treaties as well. The two most important international instruments are the New York Convention and the Geneva Convention. The EU-level is missing: arbitration agreements are explicitly excluded from the scope of application of the Rome Convention 1980 and the Rome I Regulation,[144] and there is no other EU legislation that would contain choice-of-law rules regarding the arbitration agreement.

5.2.1. The Laws Applicable under the New York Convention

The New York Convention contains both substantive and choice-of-law rules related to arbitration agreements. Both the substantive and the choice-of-law rules of the Convention are addressed to the courts of the Contracting States, i.e. state courts only.[145] This means that arbitral tribunals are not bound to apply the Convention. Nevertheless, in order to ensure the enforceability of the award under the world widely applied enforcement regime of the Convention, which is an expectation towards arbitrators,[146] it is advisable for arbitral tribunals

141 See Wagner (1998), p. 368. See also Osztovits in Vékás / Nemessányi / Osztovits (2020), p. 353.
142 See Rüßmann / Timár in Geimer / Schütze (2012), p. 849.
143 With regard to the practice of German courts see Wagner (1998), pp. 350-351.
144 See Article 1(2)(d) of the Rome Convention 1980 and Article 1(2)(e) of the Rome I Regulation.
145 See Berger in ICCA Congress Series (2006), p. 325.
146 Even though the rendering of an enforceable award is often regarded as a 'duty' of the arbitrators, there is no support for such a formal duty in any arbitration legislation, because the fulfillment of such a duty would in practice almost be impossible. See Boog, Kluwer Arbitration Blog (28.01.2013). Therefore,

to take account of the provisions of the Convention, whenever they have a chance to do so (i.e. if the choice-of-law regulation which is binding upon them allows them to do so).

The most important **uniform substantive rules** of the New York Convention relating to the arbitration agreement are the following:

(i) Article II(1) setting forth the uniform requirements for the recognition and enforcement of arbitration agreements;
(ii) Article II(2) defining the form (writing) requirement as a condition for the applicability of the New York Convention;[147] and
(iii) Article II(3) providing for the negative jurisdictional effect of the arbitration agreement and the procedural remedy, available to the aggrieved party, if the other party starts litigation in a state court.

The exceptions from the courts' obligation to refer the parties to arbitration—the terms *'null and void, inoperative, or incapable of being performed'* and *'(in)capable of settlement by arbitration'*—are too vague to construe them as autonomous substantive rules of the New York Convention, without resorting to any national law.[148]

The **uniform choice-of-law rules** of the New York Convention concerning the arbitration agreement can be found in Article V, which determines the grounds for the refusal of recognition and enforcement of foreign arbitral awards.[149] These rules include the following:

(i) Article V(1)(a) defining the law applicable to the arbitration agreement and its substantive validity (the law chosen by the parties, or, in the absence of a choice of law by the parties, the law of the seat of arbitration);
(ii) Article V(1)(a) providing for the law applicable to the capacity (subjective arbitrability) of the parties (personal law);
(iii) Article V(2)(a) referring to the law applicable to the objective arbitrability of the dispute (*lex fori* of the enforcement authority).

For the referral phase, the New York Convention does not contain any explicit uniform choice-of-law rules.

5.2.2. The Laws Applicable under the Geneva Convention

Similar to the New York Convention, the Geneva Convention contains both substantive and choice-of-law rules related to arbitration agreements. However, the coverage of its provisions is significantly broader than that of the New York Convention: the Geneva Convention does not only contain rules for the referral phase and the enforcement phase but also for the

it is more appropriate to talk about an 'expectation' or 'soft duty'. See also Berger in ICCA Congress Series (2006), p. 325.

147 How exactly Article II(3) must be interpreted, whether it provides for maximum *and* minimum requirements, for maximum but no minimum requirements, or for a non-exhaustive definition of the written form, is disputed. See Rüßmann / Timár in Geimer / Schütze (2012), p. 850 and Born (2009), pp. 539 et seqq.

148 See Erdős in Somssich (2021), p. 185. For an overview of the interpretation of the terms *'null and void, inoperative, or incapable of being performed'*, see Guide on the New York Convention (UNCITRAL 2016), pp. 69-74, paras 100-117.

149 See Rüßmann / Timár in Geimer / Schütze (2012), p. 851.

arbitration procedure, and it covers a lot of issues that fall outside the scope of application of the New York Convention.[150]

The **uniform substantive rules** of the Geneva Convention relating to the arbitration agreement include the following:

(i) an autonomous definition of the arbitration agreement in Article I(2)(a);
(ii) a form requirement in Article I(2)(a);
(iii) the subjective arbitrability of 'legal persons of public law' as defined in Article II, which is one of the most often cited and most significant provisions of the Geneva Convention;
(iv) the possible challenges to the jurisdiction of the arbitral tribunal *'based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed'* or *'that an arbitrator has exceeded his terms of reference'*, as set forth in Article V;
(v) a time limit determined in Article VI(1) for challenging the jurisdiction of state courts with reference to the arbitration agreement (*'before or at the same time as the presentation of [the] substantial defence'*), and in relation thereto the waiver of the arbitration agreement.

Interestingly, most of the substantive rules of the Geneva Convention contain a choice-of-law element:

- the form requirement refers to the more-favorable-form requirement of the relevant national laws;
- the subjective arbitrability rule applies to legal persons considered by the law applicable to them as 'legal persons of public law';
- the provision on challenges to the jurisdiction of the arbitrators does not provide for an autonomous definition of non-existence, nullity and lapse of the arbitration agreement, and, in relation to the issue of whether pleas as to the arbitral jurisdiction are left to the parties' sole discretion, refers to the *'law applicable by the arbitrator[s]'* and the law applicable *'under the rule of conflict'* of the *lex fori* in the referral phase or in the enforcement phase;
- the waiver provision refers to the *lex fori* in relation to the question of whether the plea as to the jurisdiction of the court is one of procedure or of substance.

The **uniform choice-of-law rules** of the Geneva Convention can be found in Articles VI(2), VII and IX(1)(a):

(i) Article VI(2) provides for a bunch of choice-of-law rules addressed to state courts concerning the existence and validity of the arbitration agreement, the capacity of the parties and the objective arbitrability of the dispute;
(ii) Article VII determines the law applicable to the substance of the dispute by the arbitrators;
(iii) Article IX(1)(a) contains choice-of-law rules regarding the arbitration agreement, including its substantive validity, and the subjective arbitrability of the parties.

[150] See de la Brena in Zeiler / Siwy (2018), p. 32, para. 1, Konrad, Kluwer Arbitration Blog (02.11.2010) and van den Berg (1981), p. 94.

5.2.3. The Laws Applicable to the Arbitration Agreement under Hungarian Domestic Law

In the development of the rules of Hungarian domestic law providing for the laws applicable to the arbitration agreement, 1 January 2018 was a watershed. This is the date when the new legal regimes on arbitration and on private international law entered into force and replaced the previous regulations.

5.2.3.1. The Choice-of-Law Rules in Force Before 1 January 2018

Before 1 January 2018, Hungarian domestic law provided for explicit choice-of-law rules regarding the arbitration agreement and some of the related legal issues only in the context of the setting aside and the refusal of enforcement of the arbitral award. These choice-of-law rules concerned the substantive validity of the arbitration agreement and the objective arbitrability of the dispute and were included in Sections 55(1)(b), 55(2)(a) and 59(a) of the HAA 1994. In addition to the above choice-of-law rules, which applied specifically to the arbitration agreement and the related legal issues, Sections 49 and 50 of the HAA 1994 determined the law applicable to the substance of the dispute in the arbitral proceedings, similar to Article 28 of the UNCITRAL Model Law.[151]

The choice-of-law rules of the HAA 1994 constituted a *lex specialis* to the general rules of the Hungarian PILA 1979. This means that, in the absence of a choice-of-law rule for a specific issue regarding the arbitration agreement, state courts had to resort to the general choice-of-law rules included in the Hungarian PILA 1979.[152]

In respect of the arbitration agreement, the following provisions of the Hungarian PILA 1979 could play a role, depending on the circumstances of the case:

(i) the choice-of-law rules governing the capacity of natural and legal persons with reference to their personal law;[153]

(ii) the choice-of-law rules applicable to contracts in general,[154] i.e. the provisions on
- the parties' freedom to choose the law governing the contract,[155]
- the application of the law to which the contract, as regards its substantial elements, is most closely connected (in case the parties have not selected the applicable law),[156]
- the list of issues covered by the law applicable to the contract (all elements of the contract, including formation (existence), substantive and formal validity, substantive effects, assignability of rights and obligations, etc.),[157]
- the application of the *favor validitatis* doctrine in case the contract was formally invalid under the law applicable to the contract but met the form requirements of the law of the court conducting the procedure in which the

[151] For a presentation of the difference between the two regulations, see Varga in Oberhammer (2005), pp. 678, 683, 685-686.
[152] See Timár in Harsági / Horváth / Raffai (2013), p. 217.
[153] Sections 10(1) and 18(1) of the Hungarian PILA 1979.
[154] According to Section 24, the provisions of the Hungarian PILA 1979 on the laws applicable to contracts (Sections 25-29) applied only to contracts not falling within the scope of the Rome Convention 1980 or the Rome I Regulation. This was exactly the case with the arbitration agreement.
[155] Section 25 of the Hungarian PILA 1979.
[156] Section 28 of the Hungarian PILA 1979.
[157] Section 29(1) of the Hungarian PILA 1979.

formal validity of the contract was challenged (*lex fori*), the law of the place of conclusion of the contract or the law of the country where the contract was to produce the legal effects intended by the parties;[158]

(iii) the choice-of-law rules governing the procedure of state courts, i.e. the *lex fori* principle.

The choice-of-law regulation of the arbitration agreement and the related legal issues under the pre-2018 regime suffered from several deficiencies and uncertainties:

(i) The special choice-of-law rules of the HAA 1994 were located among the rules on the setting aside action and the refusal of enforcement of the arbitral award. For the purposes of the arbitral proceedings, the referral phase, and the separate actions brought for the declaration of the non-existence, invalidity or termination of an arbitration agreement, the HAA 1994 did not contain any explicit choice-of-law rule concerning the arbitration agreement.[159]

(ii) The impact of the parties' choice of law for the substance of the dispute and the parties' choice of the place of arbitration on the law applicable to the arbitration agreement was not clear. When the parties had not selected a law specifically for the arbitration agreement, but the main contract included a choice-of-law clause, it could not be foreseen whether the arbitral tribunal or a state court would or would not apply the parties' choice of law to the arbitration agreement. Furthermore, neither the HAA 1994 nor the Hungarian PILA 1979 gave any guidance as to whether the parties' choice of the arbitral seat could be an implicit choice of the law of the arbitral seat for the arbitration agreement.

(iii) The scope of the choice-of-law rule governing the validity of the arbitration agreement and included in Section 55(1)(b) of the HAA 1994 was unclear. It was not clear whether the choice-of-law rule also applied to formal validity, and whether the regulation included in the HAA 1994 regarding the form requirements of arbitration agreements left room for the application of the *favor validitatis* rule of the Hungarian PILA 1979.[160]

5.2.3.2. The Choice-of-Law Rules in Force Since 1 January 2018

Since 1 January 2018, the choice-of-law rules concerning the arbitration agreement can be found in the HAA 2017 and the Hungarian PILA 2017. The choice-of-law rules of the HAA 1994 have been transferred to the HAA 2017 almost invariably. There is only one significant change: the provision on the determination of the law applicable to the substance of the dispute in the absence of the parties' choice of law has been brought in line with Article 28(2) of the UNCITRAL Model Law.[161] Otherwise, the HAA 2017 contains exactly the same choice-of-law rules as the HAA 1994.

Other than the HAA 2017, the Hungarian PILA 2017 brought about significant changes regarding the laws applicable to the arbitration agreement: under the heading 'Contractual Relationships', it contains a separate Section on the laws applicable to the arbitration

158 Section 29(2) of the Hungarian PILA 1979.

159 For the incompleteness of the legal environment under the old (pre-2018) regime, see also Bán / Nemessányi in Berke / Nemessányi (2016), pp. 226, 227 and Schmidt in Magyar Jog 2020/1, p. 62.

160 See Section 29(2) of the Hungarian PILA 1979.

161 Király in Varga (2018), p. 2948, para. 7474 and p. 2952, para. 7479.

agreement: Section 52(1)-(3) provides for the law governing the arbitration agreement and Section 52(4) determines the laws alternatively applicable to the formal validity of the arbitration agreement.

Section 52 of the Hungarian PILA 2017 provides for a multi-level combination of the mainstream connecting factors for the law applicable to the arbitration agreement.

On the first level [Section 52(1) of the Hungarian PILA 2017], the new regulation puts the emphasis on party autonomy: the parties may choose the law applicable to the arbitration agreement.[162] This is a clear reflection of the contractual nature of the arbitration agreement and at the same time a confirmation of the separability doctrine. The first level of the regulation is in line with the international trends.

On the second level [Section 52(2) of the Hungarian PILA 2017], if there is no specific choice of law for the arbitration agreement, the focus is still on the contractual nature of the arbitration agreement, but instead of the separability doctrine the ancillary nature of the arbitration agreement is put forward:[163] in the absence of a choice of law by the parties, the arbitration agreement is subject to the law governing the underlying legal relationship; in case the parties have chosen a law for the underlying legal relationship, that law will apply to the arbitration agreement as well.

On the third level [Section 52(3) of the Hungarian PILA 2017], if the parties have designated the place of arbitration and the law of that place is more closely connected to the arbitration agreement than the law governing the underlying legal relationship,[164] the emphasis is on the separability doctrine again and on the procedural aspects of the arbitration agreement: the arbitration agreement is governed by the law of the place of arbitration.

Comparing the second and the third level, it becomes obvious that the legislator wanted to give priority to the law applicable to the underlying legal relationship over the law of the place of arbitration. This is a clear difference from the New York Convention, which, in the absence of the parties' choice of law for the arbitration agreement, provides for the application of the law of the country in which the award was made, i.e. the law of the place of arbitration. The priority of the law governing the underlying legal relationship without regard to the fact whether it is a law chosen by the parties or the law otherwise applicable is also not in line with the international trends.

For the formal validity of the arbitration agreement, the legislator introduced an explicit *favor validitatis* rule. According to Section 52(4) of the Hungarian PILA 2017, the arbitration agreement cannot be regarded as formally invalid if it complies with the form requirements of any of the laws to be applied under Section 52 of the Hungarian PILA 2017 or the law of the state of the court seized of the matter, i.e. the law of the state of the court conducting the procedure in which the formal validity of the arbitration agreement is challenged (*lex fori*). The

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162 See also Szabados in Vékás / Nemessányi / Osztovits (2020), p. 317 and Erdős in Somssich (2021), p. 187.

163 See Bán / Nemessányi in Berke / Nemessányi (2016), p. 233 and Szabados in Vékás / Nemessányi / Osztovits (2020), p. 318 and Erdős in Somssich (2021), pp. 188-189.

164 For an interpretation of the term 'more closely connected' in this context, see Erdős in Somssich (2021), pp. 190-191.

favor validitatis concept chosen by the legislator is a progressive approach, which ensures the formal validity of the arbitration agreement to the widest extent possible.[165]

In addition to the special rules on the laws applicable to the arbitration agreement, the general choice-of-law rules for contracts and the general provisions of the Hungarian PILA 2017 are also applicable.

As it is obvious from the Explanatory Note to the Hungarian PILA 2017, with the introduction of the new choice-of-law rules for arbitration agreements, the goal of the legislator was to eliminate the deficiencies of the existing regulation. Based on a scrutiny of all elements of the post-2018 regime, in my Thesis, I came to the conclusion that the deficiencies and the uncertainties of the previous legal regime have not been completely eliminated and, in addition to the already existing problems, the new regulation raises further issues as well:

(i) The Hungarian PILA 2017 has filled in the gap of the choice-of-law regulation of arbitration agreements only to the extent that it provides special choice-of-law rules for the purposes of determining the law applicable to the arbitration agreement for all stages of the arbitral dispute resolution process conducted by state courts.[166] However, for the arbitral tribunal, there are still no choice-of-law rules that would explicitly govern the arbitration agreement.[167]

(ii) In addition to the above, there is a further issue which did not exist under the previous regulation but has been generated by the new legislation. Taking a comparative look at Section 52 of the Hungarian PILA 2017 and Section 47(2)(a)(aa) of the HAA 2017, it becomes apparent that there is a contradiction between the two provisions. Based on the general principles of legal interpretation, Section 47(2)(a)(aa) of the HAA 2017 should have a priority over Section 52 of the Hungarian PILA 2017, because it is a *lex specialis*. However, the result of this interpretation is not satisfactory and is contrary to the purpose of the new regulation of establishing choice-of-law rules that are globally applicable in each case when a state court needs to determine the law applicable to the arbitration agreement.

(iii) Section 52 of the Hungarian PILA 2017 is also not in line with Article V(1)(a) of the New York Convention and Articles VI(2) and IX(1)(a) of the Geneva Convention. This divergence is not a mere 'beauty spot' in the choice-of-law regulation of arbitration agreements—a small inconsistency without any practical implications—, but a real issue which may have detrimental consequences. The application of different choice-of-law rules for the validity of the very same arbitration agreement at the different stages of arbitration where the validity of the arbitration agreement is challenged in a state court may lead to the application of different laws and to different decisions on the validity of the arbitration agreement.[168]

(iv) The question of whether, in the absence of a specific choice of law for the arbitration agreement, the parties' choice of the law governing the underlying legal relationship or the parties' choice of the place of arbitration can be regarded as an implicit choice of the respective law for the arbitration agreement has become obsolete. The reason for this is that both scenarios have been converted into explicit choice-of-

165 See Schmidt in Magyar Jog 2020/1, p. 63.
166 See also Király in Varga (2018), pp. 2954-2955, para. 7484.
167 See Erdős in Somssich (2021), pp. 191-193.
168 See Schmidt in Magyar Jog 2020/1, p. 62.

law rules.[169] This new solution raises the following question: does the parties' choice of law under Section 52(1) of the Hungarian PILA 2017 have to be explicit or is an implicit choice of law specifically for the arbitration agreement, other than the choice of a law for the underlying legal relationship or the designation of the place of arbitration, also conceivable and admissible? Based on a joint interpretation of the provisions of the Hungarian PILA 2017, I concluded that the implied choice of a law different from the law governing the underlying legal relationship and the law of the place of arbitration is possible.

(v) The Hungarian PILA 2017 does not contain a provision that would define the scope of the law applicable to the contract.[170] Therefore, the question arises which issues are covered by the law applicable to the arbitration agreement. The wording of Sections 50-54 of the Hungarian PILA 2017 and Section 47(2)(a)(aa) of the HAA 2017 suggests that the law applicable to the arbitration agreement covers at least the following issues: formation (existence), substantive validity, formal validity (not exclusively but alternatively with other laws), and the formation (existence) and the (substantive and formal) validity of the choice-of-law agreement relating to the arbitration agreement. There are a number of other issues that are of substantive nature and thus should be governed by the law applicable to the arbitration agreement: the interpretation, the assignability and the substantive effects of the arbitration agreement. Whether or not these issues are also covered by the law governing the arbitration agreement is not clear. In this regard, the new regulation is a step back rather than a step forward after the previous regulation.

(vi) The uncertainties as to whether the term 'invalid' used by the special choice-of-law rule foreseen for the setting aside phase includes formal invalidity and whether the special rules of the arbitration legislation regarding the form requirements and the law applicable to the validity of the arbitration agreement in the setting aside phase leave room for the application of the *favor validitatis* rule included in the private international law legislation have not been resolved by the enactment of the special choice-of-law rules for arbitration agreements in Section 52 of the Hungarian PILA 2017. The reason for this is that the wording of the setting aside ground based on the invalidity of the arbitration agreement has not been brought in line with the new regulation included in the Hungarian PILA 2017.

(vii) The special *favor validitatis* rule included in Section 52(4) of the Hungarian PILA 2017 can be interpreted in two different ways: in addition to the law of the state of the court seized of the matter, it includes (1) *all* laws that might be applicable under Section 52(1)-(3), or (2) only the law that is *actually applicable* under Section 52(1)-(3). Based on an in-depth analysis of the foreign laws that were used as inspirations for the Hungarian PILA 2017 and on the overall language of the provision I came to the conclusion that the first interpretation is correct.

In the last part of my Thesis dealing with the current domestic choice-of-law regime of the arbitration agreement, I examined to what extent the general rules of the Hungarian PILA 2017 are applicable to the arbitration agreement and the related issues and which specific issues

[169] See also Szabados in Vékás / Nemessányi / Osztovits (2020), p. 318 and Erdős in Somssich (2021), pp. 187-188.

[170] See Szabados in Vékás / Nemessányi / Osztovits (2020), p. 315.

follow from the application of those general rules. Based on this examination, I arrived at the following findings:

(i) With regard to Section 50(4) of the Hungarian PILA 2017, if an arbitration agreement does not contain any foreign element, the parties may still subject it to another law, but the provisions of the law chosen by the parties will only replace the non-mandatory provisions of the otherwise applicable law.

(ii) In view of Section 1(a) of the Hungarian PILA 2017, the parties' autonomy to choose the law governing the arbitration agreement under Section 52(1) of the Hungarian PILA 2017 is restricted to the selection of a state law.

(iii) The most important treaties that may come into consideration under Section 2 of the Hungarian PILA 2017 are the New York Convention and the Geneva Convention. From the priority of these treaties, it follows that, insofar as they contain an exhaustive substantive or choice-of-law regulation for a particular issue, the choice-of-law rules of the Hungarian PILA 2017 do not come into play.

(iv) Based on Section 4 of the Hungarian PILA 2017, the court must qualify the legal issues that may come up regarding the arbitration agreement according to Hungarian law, i.e. the *lex fori*. The consideration of a foreign law may become necessary in those cases where a certain legal concept does not completely correspond to one specific concept of Hungarian law (e.g. if the qualification of a particular legal issue under Hungarian law as an issue of substantive validity, formal validity, subjective arbitrability or objective arbitrability is not straightforward).

(v) In relation to the arbitration agreement, the issue of *renvoi* can be relevant to the capacity of the parties to enter into an arbitration agreement, but otherwise the choice-of-law rules of the Hungarian PILA 2017 governing the arbitration agreement always refer to the substantive rules of the applicable law. The reason for this is that, in case of other elements of the arbitration agreement, citizenship does not play any role in the determination of the applicable law [cf. Section 5(2) of the Hungarian PILA 2017].

(vi) The general escape clause (Section 10) of the Hungarian PILA 2017, which allows the court to apply a law other than the one to be applied under another provision of the Hungarian PILA 2017, if the case is manifestly and significantly more closely connected to such other law, may be applied to an arbitration agreement only if the parties have failed to choose a law to apply both explicitly and impliedly. Since the primary choice-of-law rule under Section 52 of the Hungarian PILA 2017 is party autonomy and the closer connection as a method of finding the most appropriate law is already applied by Section 52, there is a relatively small room left for the application of the general escape clause in respect of the law applicable to the arbitration agreement.[171]

(vii) The general backup clause (Section 11) of the Hungarian PILA 2017 may in extreme cases also come into consideration in the determination of the law applicable to the arbitration agreement. This is the case when the parties have failed to choose the law applicable to the arbitration agreement, the law governing the underlying legal relationship cannot be determined because it is subject to more than one laws or affected by *dépeçage*, and the parties have also not agreed upon

[171] For a discussion on the relationship between the general and special escape rules of the Hungarian PILA 2017, see Nemessányi in Vékás / Nemessányi / Osztovits (2020), pp. 102-103.

the place of arbitration.[172] The general backup clause may also come into consideration as a gap filling rule for the determination of the law applicable to objective arbitrability at those stages where the HAA 2017 does not contain an explicit choice-of-law rule to be applied by state courts to the issue of objective arbitrability.

(viii) It is not easy to find a proper example for the application of the public policy exception stipulated in Section 12 of the Hungarian PILA 2017 in relation to the arbitration agreement, since public policy considerations are usually not relevant for the enforcement of the arbitration agreement itself but only for the enforcement of the arbitral award. It may nevertheless happen that the arbitration agreement is itself contrary to the public policy of the *lex fori* of the court, e.g. if it serves the enforcement of seriously illegal claims or the avoidance of a prohibition of a choice of law by the parties for a certain subject-matter according to the choice-of-law rules of the *lex fori*.[173] Public policy considerations may certainly come up with regard to objective arbitrability, since in many jurisdictions, including Hungarian law, the rules on objective non-arbitrability often have public policy character.

(ix) Overriding mandatory provisions (Section 13 of the Hungarian PILA 2017) can play a role in respect of the substantive validity of the arbitration agreement and the issues of objective and subjective arbitrability. In my Thesis, I analyzed in detail the relationship between Section 6:104(1)(i) of the HCC 2013, which is an overriding mandatory provision concerning the substantive (in)validity (unfairness) of arbitration agreements included in consumer contracts, and Section 1(3) of the HAA 2017, which is a rule of objective non-arbitrability providing that legal disputes arising from consumer contracts cannot be submitted to arbitration. As a result of the analysis, I established that the non-arbitrability rule leaves no room for the application of the substantive invalidity rule as an overriding mandatory provision.

(x) In respect of the law applicable to the arbitration agreement, Section 14 of the Hungarian PILA 2017 has to be applied in conjunction with Section 50(3). This means that a change, following the conclusion of the arbitration agreement, of the fact that serves as a connecting factor for the law governing the arbitration agreement will not have any influence on the applicable law. The applicable law may change due to a choice of law by the parties after the conclusion of the arbitration agreement, but, as a result, the arbitration agreement cannot become formally invalid. Section 14 of the Hungarian PILA 2017 is highly relevant for the issue of subjective arbitrability: a change in the personal law of the party will not impair the capacity of the party to enter into an arbitration agreement which was given under the previous personal law.

6. Conclusion

When I started to do the research for my Thesis, I set up the following hypothesis: the laws applicable to the arbitration agreement and the different aspects of its enforceability depend on the legal—substantive or procedural—nature of the arbitration agreement. The findings of my research confirmed this hypothesis, but also revealed that the qualification of the arbitration

[172] See Nemessányi in Vékás / Nemessányi / Osztovits (2020), p. 116.
[173] See Palásti in Magyar Jog 2006/2, p. 66.

agreement, or a particular legal issue related thereto, as either substantive or procedural is not sufficient for finding the most appropriate law.

The arbitration agreement—just as arbitration itself—is a hybrid creature, which consists of both substantive and procedural elements and is surrounded by legal issues that cannot be definitely assigned either to the field of substantive law or to the field of procedural law. The arbitration agreement is separable from, but at the same time also ancillary to, the underlying legal relationship, and, despite the increasing acceptance of the delocalization theory, international arbitration is (still) existing in the system of national laws, each of them having their own concept of public policy. These are all circumstances that have a significant bearing on the laws applicable to the enforceability of the arbitration agreement.

In the choice-of-law regimes applicable to the arbitration agreement and the related legal issues in Hungary, there are many loopholes, inconsistencies and question marks both on the international and on the national level. The 2018 reform of our domestic private international law has brought about significant changes by the introduction of an explicit choice-of-law regulation for the arbitration agreement. However, these changes were not supplemented by a corresponding review of the choice-of-law regulation of our arbitration legislation, left a number of deficiencies and uncertainties of the pre-2018 regime unresolved and also raised new concerns in addition to the existing ones.

My *de lege ferenda* proposals regarding the laws applicable to the arbitration agreement, which I summarized in the final Chapter of my Thesis, are aimed at the implementation of a choice-of-law regime consisting of elements that are harmonized to the greatest extent possible (i.e. they form a consolidated, uniform and consequent system of choice-of-law rules) and ensure the recognition and enforcement of arbitration agreements and arbitral awards as much as possible due to the broad application of the *favor validitatis* principle.

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