RIGA GRADUATE SCHOOL OF LAW

Choice of Law and Validity of Arbitration Agreements: A Comparative Analysis

BACHELOR THESIS

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) …….

RIGA, 2024

ABSTRACT

This bachelor thesis explores the interplay between the validity of arbitration agreements and the choice of law issues. The aim of the present thesis is to analyse and compare the legal frameworks governing these two crucial aspects of international commercial arbitration, considering the perspectives of different jurisdictions and international conventions. The study objectives contain the following: First, to analyse the normative documents approving the validity of international arbitration agreements and the procedure for selecting the law applicable to such agreements. Second, to examine these issues through the prism of the national legislations of England and France. Third, to find out to what extent and when these areas (law applicable and validity of the agreement with further enforceability) can be and are interrelated. And, fourth, to find out what influence the law applicable to the agreement has on its validity. The main results of the thesis include the following: The law applicable to the arbitration agreement indeed can have a great influence on the validity of the agreements. However, it is worth noting that national law in turn determines part of crucial issues, such as the issues of legal capacity affecting validity. At the same time, this thesis does not explore investment arbitration and the peculiarities of Eastern legal systems, which may serve as a basis for further research.

KEYWORDS: International commercial arbitration, dispute resolution, choice of law, validity of arbitration agreements, enforceability, capacity, UNICITRAL Model law, New York Convention.

SUMMARY

This thesis addresses the complex legal issue of determining the applicable law and validity of arbitration agreements. Taking into account the fact that arbitration dispute resolution in the modern world occupies a significant position in commercial relationships, it is appropriate to emphasise the essential importance attached to this legal instrument. Despite the established legal framework accumulated through years of practice, navigating different legal systems with different approaches presents a challenge in determining the law governing an arbitration agreement, potentially leading to different results. Therefore, while international principles and criteria from sources such as the New York Convention provide guidance, analysing domestic law and selecting the applicable law become a prerequisite for establishing the validity of an arbitration agreement, as they may affect the validity of a particular arbitration agreement.

The aim of this study is to analyse the extent to which the law applicable to an international arbitration agreement affects its validity. The objectives are: to analyse the normative documents approving the validity of international arbitration agreements and the procedure for selecting the law applicable to such agreements. Then, to examine these issues through the prism of the national legislations of England and France. Subsequently, to find out to what extent and when these areas can be and are interrelated. And, finally, to find out what influence the law applicable to the agreement has on its validity. It should also be noted that this thesis focuses exclusively on commercial arbitration and does not touch upon investment arbitration. Also, it is limited to the laws of England and France in terms of analysis of national legislation. It will be of high importance, to mention, that the thesis is limited by the scope of the topic and the question at hand, so anything beyond the direct impact of choice of law on the validity of an arbitration agreement is automatically beyond the scope of this study.

The methodology of this thesis consists of doctrinal and non-doctrinal methods of legal research. The author uses a historical approach, where the analytical and comparative approaches are also used in order to compare the relevant Articles of English and French law. Analytical approach is also used by the author in order to conduct the analysis of the principles of choice of law in international commercial arbitration, along with the comparative and empirical approaches, including exploration of case law and determining the correlation between the validity of an arbitration agreement and the law applicable to such an agreement.

The main research question of this thesis is: "What is the impact of choice of law applicable to the arbitration agreement on its validity and subsequent enforceability issues?".

The main instruments used are the New York Convention, Articles II, III, IV and the UNCITRAL Model Law. Two legal systems are also used for the analysis: the English Arbitration Act and French arbitration law. The choice of these legal systems is justified by their popularity and the fact that it is these two legal systems that take the lead in choice of the counter parties as the place of hearing and the law governing the arbitration agreements. Doctrinal and comparative legal research methods have been used and various sources have been analysed in order to arrive at several conclusions from which the research question is answered. Central to the analysis are the Articles of the legislative acts mentioned earlier. Books have been studied, and the main definitions of the concept of choice of law and the possibility of its application have been given, and strong arguments supporting the position of the majority of scholars have been formed. The Articles are extensively researched and are used as a basis

for constructing additional argumentation. And case law is used and applied as a practical example to construct an answer to the research question.

The structure of the thesis includes an introduction, three chapters with several subchapters and a conclusion. The first chapter is devoted to validity and enforceability of arbitration agreements, namely, overview of international conventions and national laws governing arbitration agreements and the validity of such agreements and requirements for a valid arbitration agreement. The second chapter deals with choice of law in international commercial arbitration, legal frameworks, principles governing the choice of law in international arbitration and key factors influencing the determination of the applicable law. The third chapter examines intersection of arbitration agreements and choice of law. The study concludes with a discussion of additional issues that may be considered in relation to the relationship between the law applicable to an arbitration agreement and its validity.

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INTRODUCTION

Today we live in a rapidly developing world, where globalisation is going on at a rapid pace, allowing ones to integrate economies, facilitate international trade, transnational interaction of companies and scaling of business. Commercial relations of market players have their origins deep in history, where trade has always occupied a separate place in the relations of both market players in the person of entrepreneurs and at the state level. With the development of such trade relationships, the legal framework surrounding these relationships developed, which is why the phenomenon of commercial arbitration today occupies one of the central places in the prospect of resolving disputes arising between trading counterparts.

The modern legal framework of arbitration has its origins in the Geneva Protocol of 1923[1] and the Geneva Convention of 1927.[2] These treaties, after their ratification and subsequent adoption into the domestic arbitration rules of the contracting states, made a significant contribution to the standardisation and uniformity of approaches to arbitration. These seminal documents set the course for the development of arbitration in the second half of the twentieth century. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the "New York Convention"[3], signed on 10 June 1958, succeeded the 1923 Geneva Protocol and the 1927 Geneva Convention. More than one hundred and sixty States have acceded to this Convention. It is currently the most effective modern instrument in commercial arbitration, having a significant impact on the recognition and enforcement of foreign arbitral awards.[4] The Convention empowers national courts and arbitral tribunals by providing them with reliable and expeditious mechanisms for enforcing international arbitration agreements and awards. It also crucial to refer within the scope of the present study the UNCITRAL Model Law[5], the major guiding document in the field of arbitration. It is the provisions of the Convention that have helped to consolidate the disparate elements of the Geneva Protocol and the Geneva Convention into a single structure, providing the legal basis for a sound and effective legal framework for international arbitration. That framework includes both provisions governing arbitration agreements and protocols on the recognition of arbitral awards, which eventually led to the formation of a single system.[6] Thus, having a reliable and effective legal basis for international arbitration and understanding of the phenomenon of arbitration agreement, which is classified as a type of contract to which generally accepted rules of contract law are applicable, one can face a number of issues, among which is the question of validity of such agreement and factors affecting such validity, as well as how the law applicable to the arbitration agreement affects its validity, taking into account the freedom of the parties to choose such law.

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[1] UN Protocol on Arbitration Clauses, Sept. 24, 1923. Available on: v27.pdf (un.org). Accessed March 21, 2024.
[2] Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927. Available on: v27.pdf (un.org). Accessed March 21, 2024.
[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958. Available on: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) . Accessed March 21, 2024.
[4] Dezalay, Yves, and Bryant G. Garth, *International Commercial Arbitration: The creation of a legal market*, ed. T. Schultz, and F. Ortino. (The Oxford Handbook of International Arbitration, 2020), accessed March 30, 2024, available on: https://doi.org/10.1093/law/9780198796190.003.0032.
[5] UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006. United Nations, 2008. Available on: UNCITRAL Model Law on International Commercial Arbitration 1985. Accessed March 30, 2024.
[6] Dezalay, Yves, and Bryant G. Garth, *supra note* 4.

The legal problem within the present thesis is laid to determination of the applicable law and the validity of an arbitration agreement. This problem is reflected in different studies and addressed by prominent scholar authorities. Proper determination of the law applicable to the arbitration agreement is always referred as a crucial step due to its great impact on the outcome of the arbitration. This question was triggered on the CIArb's London Branch hosted its annual Keynote Speech.[7] And Gary B. Born emphasised that:

> A recurrent and vitally-important issue in the arbitral process is the choice of the law governing an international arbitration agreement. This subject arises in most disputes over the existence, validity and interpretation of international arbitration agreements, and continues to produce unfortunate confusion and uncertainty. [8]

Even though the legal framework was established and accumulated through years of practice, the navigation through different legal systems and approaches common to those systems presents a challenge in determining the law governing an arbitration agreement. By the means of international principles and criteria from sources such as the New York Convention the international guidance is provide. However, analysis of domestic law and the applicable law chosen by the parties within the agreement made becomes a clear prerequisite for establishing the validity of an arbitration agreement. Reason lies within the impact law applicable to the arbitration agreement may have on the validity of a given agreement.

The methodology of the present thesis is composed of doctrinal and non-doctrinal legal research methods. The author utilises historical approach, namely the history of the arbitration legal background formation. Analytical and comparative approach (doctrinal) are also used as a part of historical approach, more precisely, comparison of relevant Articles of English and French law. Moreover, the author utilises analytical approach within the in-depth analysis of choice of law principles in international commercial arbitration. Comparative and empirical approaches are used by the author, including analysis of international legal framework, study of case law decisions and determining correlation in the matters of validity of the arbitration agreement and law applicable to such agreement.

The research question of this study is: "What is the impact of choice of law applicable to the arbitration agreement on its validity and subsequent enforceability issues?"

The aim of this thesis is to analyse the extent to which the law applicable to an international arbitration agreement affects its validity.

The objectives of the thesis are:

1. to analyse the normative documents approving the validity of international arbitration agreements and the procedure for selecting the law applicable to such agreements;

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[7] Amir, Ibrahim. 2021. "The Proper Law of the Arbitration Agreement: A Comparative Law Perspective: A Report from the CIArb London's Branch Keynote Speech 2021." Kluwer Arbitration Blog. May 21, 2021. https://arbitrationblog.kluwerarbitration.com/2021/05/21/the-proper-law-of-the-arbitration-agreement-a-comparative-law-perspective-a-report-from-the-ciarb-londons-branch-keynote-speech-2021/. See also: "CIArb London Branch Keynote Speech 2021." n.d. Www.youtube.com. Accessed May 9, 2024. https://www.youtube.com/watch?v=IrDp3OZAgj4&list=LL&index=2.

[8] Gary Born, *International Commercial Arbitration*. (London, England: Kluwer Law International, 2021), p. 738.

2. to examine these issues through the prism of the national legislations of England and France;

3. to find out to what extent and when these areas (law applicable and validity of the agreement with further enforceability) can be and are interrelated;

4. to find out what influence the law applicable to the agreement has on its validity.

The limitations of the thesis are as follows: First and foremost, this thesis is limited only to the analysis of commercial arbitration. Second, it is limited to the laws of England and France in terms of analysis of national laws, however, the author tried to avoid this limitation to the extent possible by taking civil and common law systems. Third, it is limited by the scope of the topic and the question at hand, so anything beyond the direct impact of choice of law on the validity of an arbitration agreement is automatically beyond the scope of this study and is a topic for further study in separate works.

The structure of the present study is determined by the aims and objectives of the thesis. Thus, the constituent structure is as follows: summary, table of content, list of abbreviations, introduction, 3 (three) chapters combining several sub-chapters, conclusion, and the list of bibliography. Where, the first chapter is devoted to validity and enforceability of arbitration agreements, namely, overview of international conventions and national laws governing arbitration agreements and the validity of such agreements and requirements for a valid arbitration agreement and historical background of arbitration development. The second chapter deals with choice of law in international commercial arbitration, legal frameworks, principles governing the choice of law in international arbitration and key factors influencing the determination of the applicable law. The third chapter examines intersection of arbitration agreements and choice of law. The present thesis concludes with a discussion of additional issues that may be considered in relation to the relationship between the law applicable to an arbitration agreement and its validity.

CHAPTER 1: VALIDITY OF ARBITRATION AGREEMENTS

1.1 Overview of international conventions and national laws governing arbitration agreements and the validity of such agreements

This chapter will primarily cover the historical background of international arbitration law formation and regulatory framework. The first part will analyse the New York Convention and the UNCITRAL Model Law, which will provide the understanding of current trends in international arbitration through the prism of its formation. The key trends applicable to international arbitration dispute resolution will also be highlighted. Further, the legal framework in England and France will be analysed due to the fact that these two jurisdictions occupy a central position in international arbitration. The second part will examine the aspects that form a valid arbitration agreement between the parties, as well as the reasons for the invalidity of such agreements, followed by an analysis of court decisions.

1.1.1 Analysis of international legal framework

The basis of the formation of the current legal arbitration regime was formed by the Geneva Protocol of 1923 and Geneva Convention 1927, followed by the incorporation of these instruments into the national arbitration rules of the signatory parties, leading to harmonised approach. The field of arbitration was founded in the latter half of the 20th century, precisely on the aforementioned pillars. This strategy leads to the emergence of a "pro-arbitration" framework that guarantees the enforceability of arbitral rulings and agreements. A significant achievement is the procedural autonomy of the parties and the procedural discretion of the arbitral tribunal and, as a consequence, a significant reduction of interference by national courts or other public authorities. [9] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on tenth of June 1958 acknowledged and referred *hereinafter* as the "New York Convention" is a successor of the Geneva Protocol of 1923 and Geneva Convention 1927 and has more than hundred and sixty states adhere to it. Nowadays it is the most successful modern instrument adopted in the matters of commercial arbitration, playing a decisive role in the process of recognition and enforcement of foreign arbitral awards.[10] Thereby, the convention provides national courts and arbitral tribunals with reliable and efficient methods for enforcing international arbitration agreements and awards. In addition, it forms the basis of most of today's national legislation, and in particular the UNCITRAL Model Law.[11] It was the provisions of the Convention that made it possible to combine the individual subjects of the Geneva Protocol and the Geneva Convention into a coherent whole, which provided the legal basis for the emergence of a reliable and effective legal regime for international arbitration. This regime includes both the provisions of arbitration agreements and the procedure for recognizing an arbitral award. The result was the emergence of a unified system.

The scope of applicability of the New York Convention is set in its title, namely, "on the Recognition and Enforcement of Foreign Arbitral Awards", meaning that the main focus is not on the procedural aspects, but rather on the enforcement and recognition of foreign awards

[9] *Ibid*., pp. 182-185.
[10] Ronan Feebily, "Neutrality, Independence and Impartiality in International Commercial Arbitration, a Fine Balance in the Quest for Arbitral Justice," Penn State Journal of Law and International Affairs 7, no. 1 (2019): 88-114, pp.89-90.
[11] UNCITRAL Model Law on International Commercial Arbitration, *supra note* 5.

as such with single and uniformed rules applied. Article II of the New York Convention, which is central one, provides with following:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[12]

Provisions of Article II clearly emphasise unified approach and at this point indirect governance over the process itself can be noticed, as it precludes Contracting States to recognize the agreements to arbitrate.[13] Emphasising "agreement in writing" it covers to some extent even part of substantive validity of the agreements. By virtue of Article II (3), the Convention establishes an enforcement mechanism whereby the national courts of States Parties are required to refer the contracting parties to arbitration, whether national or international, with the exception of an exhaustive list of exceptions. This list means that none of the Contracting State is allowed to identify and apply any of additional grounds for rendering the arbitration agreement null and void.

Articles III and IV deal expressly with recognition and enforcement aspects and establish basic rules. So, Article III imposes binding recognition of the award:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.[14]

Thus, through this provision, the New York Convention enhances the enforceability of arbitration agreements and obligates state parties to recognize and enforce foreign arbitral awards in the same manner as domestic ones. As a result, enforcement of an arbitration agreement is not hampered by the fact that it was rendered in another jurisdiction. Whereas Article IV sets out the procedural requirements that must be submitted with a foreign arbitral award when enforcement is sought. Further, through Article V, the New York Convention explicitly limits the grounds for refusal of recognition and enforcement of arbitral awards during the enforcement stages. These grounds, such as incapacity, invalidity of the arbitration agreement, or public policy considerations, are narrowly construed to prevent undue interference with the arbitral process. [15] Secondly, the Convention encourages judicial cooperation between contracting states by promoting the smooth and efficient enforcement of arbitral awards.[16]

Another legal instrument upholding the mood of the New York Convention is The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, adopted in 1985 and acknowledged and referred *hereinafter* as the

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[12] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 2.
[13] Born, *supra* note, 8, p 187.
[14] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note, 3, Article 3.
[15] *Ibid*., Article 5.1.
[16] *Ibid*., Article 5.2.

"UNCITRAL Model Law", with final amended version of 2006. It is vital to note, that the UNCITRAL Model Law is not a binding instrument, it rather assists the legislators on the matters of harmonisation and modernisation of the national laws.[17] It is built up with 36 Articles, divided into 8 parts, which extensively covers the majority of the issues arising in national courts over the arbitration matters. Chapter 2 covers issues concerning arbitration agreements as such, with the 3rd chapter the procedure for appointment and removal of the arbitrators is regulated, while chapter 4 covers the jurisdictional matters of the tribunal. The UNCITRAL Model Law thus makes an indisputable contribution to the validity and enforceability of arbitration agreements by harmonising arbitration approaches as well as conforming to international best practices. In addition to making arbitration agreements binding and enforceable, the Model Law provides for the protection of the law and the autonomy of the parties involved. By providing clear provisions on the form and content of arbitration agreements, the validity and enforceability of such agreements are secured. And a favourable micro climate is created for the recognition and enforcement of arbitral awards, in accordance with the principles of the New York Convention.[18] Thus, this instrument has significant impact on harmonisation of international arbitration law and dispute resolution framework since it is transposed into national laws of the contracting parties.

1.1.2 Examination of key provisions in national laws governing arbitration agreements in France and England

In focusing on the national jurisdictions of France and England, it is important to emphasise that these two jurisdictions can indeed be called the leading centres of international commercial arbitration. It is France that has historically been the site of most ICC arbitrations and where the headquarters of the International Chamber of Commerce is located.[19] And given the position of English as an international language, as well as London's long-standing role as an international financial and business centre, it is difficult to underestimate the role of England and English law in resolving arbitration disputes. French arbitration law has undergone a number of changes; nevertheless, it is worth noting that for the time being it has established an approach that supports international arbitration. Arbitration, both national and international in French jurisdiction, is governed by the French Code of civil procedure (*Code de procédure civile*).[20] Namely, Articles 1442 up to 1503 is applicable to national arbitration, while Articles 1504 up to 1527 are governing international arbitration. However, Article 1506[21] establishes, that several Articles applicable to domestic arbitration, unless otherwise specified, are applicable to international arbitration matters:

> Unless the parties have agreed otherwise and subject to the provisions of this Title, Articles:
>
> 1. 1446, 1447, 1448 (paragraphs 1 and 2) and 1449, relating to the arbitration agreement;
> 2. 1452 to 1458 and 1460, relating to the constitution of the arbitral tribunal and the procedure applicable before the supporting judge;

[17] United Nations. 2012. "UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 | United Nations Commission on International Trade Law." Un.org. 2012. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.
[18] Born, *supra* note 8, pp. 202-204.
[19] International Chamber of Commerce. 2019. "ICC - International Chamber of Commerce." ICC - International Chamber of Commerce. 2019. https://iccwbo.org.
[20] C. civ. (French Code of Civil Procedure).
[21] *Ibid*., Article 1506.

3. 1462, 1463 (paragraph 2), 1464 (paragraph 3), 1465 to 1470 and 1472 relating to the arbitration proceedings;
4. 1479, 1481, 1482, 1484 (paragraphs 1 and 2), 1485 (paragraphs 1 and 2) and 1486 relating to the arbitration award;
5. 1502 (paragraphs 1 and 2) and 1503 relating to remedies other than appeal and annulment proceedings.[22]

Under Article 1465, the arbitral tribunal is empowered to hear jurisdictional disputes and establish jurisdiction to hear the case.[23] However, restrictions are set out in Article 1448, which implies that the arbitral tribunal can establish jurisdiction over the arbitration dispute unless the agreement is "manifestly invalid or manifestly inapplicable".[24]

> Where a dispute arising under an arbitration agreement is brought before a State court, the latter shall declare that it has no jurisdiction unless the arbitral tribunal has not yet been seised and the arbitration agreement is manifestly null and void or manifestly inapplicable.[25]

In regard to the issues of law applicable, and general procedural issues French law provides parties with reasonable autonomy.[26] Drawing attention to other important issues such as the possibility of annulment of international arbitral awards made in France and the recognition and enforcement of international arbitral awards, the French Code of Civil Procedure provides for the possibility of annulment on limited grounds:

> An action for annulment may only be brought if:
>
> 1. The arbitral tribunal has wrongly declared itself competent or incompetent; or
> 2. The arbitral tribunal was improperly constituted; or
> 3. The arbitral tribunal has ruled without complying with the terms of reference given to it; or
> 4. The principle of contradiction was not respected; or
> 5. The recognition or enforcement of the award is contrary to international public policy.[27]

It is worth noting the considerable similarity with the clauses in the New York Convention.28 Under Article 5.1 it is stipulated that the award can be refused in recognition on several grounds, among which are: incapacity of the party to conclude the agreement under the law applicable, the matter of dispute is beyond the scope of the submission to the arbitration, the arbitral tribunal lacked proper composition.[29]

Bearing in mind, exceptional role of England as a centre of international commercial arbitration for a long period, it is worth diving into its legal regulatory field. The main legal act governing in this case both, domestic and international arbitration is the English Arbitration

[22] *Ibid.*
[23] *Ibid.*, Article 1465.
[24] *Ibid.*, Article 1448.
[25] *Ibid.*
[26] *Ibid.*, Articles 1508-1509, 1511-1512, 1464, 1509.
[27] *Ibid.*
[28] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 5.1.
[29] *Ibid.*

Act, 1996.[30] This Act consists of four parts, where the first one covers issues pursuant to arbitration agreements, second contains other provisions, third deals with recognition and enforcement issues and fourth – general provisions.[31] The English Arbitration Act, 1996 is substantially based on UNCITRAL Model Law and was adopted due to criticism towards previous acts. It is worth noting that the Act is somewhat different from the common law approach to legislation. It is through the projection of the Model Law that the regulation of international arbitration has been codified and formalised with greater accuracy as compared to France, discussed above. The substantive requirements are laid down in Part one, Article 5, where the validity and definition of "agreement in writing" is stipulated. Moreover, aligned with the spirit of UNCITRAL Model Law, English Arbitration Act, 1996 within Article seven upholds "separability doctrine":

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.[32]

And under Articles 30 (thirty) and 31 (thirty-one) recognizes "competence-competence" doctrine for the establishment of the jurisdiction to hear the case.[33] And whole Part three deals with "Recognition and enforcement of certain foreign awards"[34], where "Enforcement of Geneva Convention awards" and "Recognition and enforcement of New York Convention awards"[35] are divided into two separate blocs. The latter represent a transposition of the New York Convention's provisions.

1.2 Requirements for a valid arbitration agreement

This subsection will address the issue of the validity of arbitration agreements, namely, what elements of such an agreement are necessary for it to be recognised as valid. And, accordingly, on what grounds an arbitration agreement between the parties becomes null and void. The main provisions of the UNCITRAL Model Law and the New York Convention will be considered.

1.2.1 Exploration of the elements necessary for an arbitration agreement to be considered valid

Given that an arbitration agreement can be classified as a type of contract, it must meet a number of conditions in order to be considered a valid agreement. In the absence of a valid arbitration agreement, there can be no further arbitration, which is similar in its logic to the basic principles of contract law, where with the absence of the consent, there is no contract. This is why the issue of the validity of an arbitration agreement is a cornerstone of arbitration proceedings. Hence, the issue of validity can be questioned in two dimensions, where the first

[30] English Arbitration Act, 1996.
[31] *Ibid*., Article 5.
[32] *Ibid*., Article 7.
[33] *Ibid*., Articles 30, 31.
[34] *Ibid*., Article 99.
[35] *Ibid*., Articles 100-104.

one is formal validity and the second one is substantive validity.[36] Speaking of formal validity, one perceives the crucial condition of such agreement being in writing. Article two of the New York Convention:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.[37]

The wording of the convention clearly emphasises the need for the form of a written agreement between the parties, which can take various forms, ranging from the classic form of contract, *i.e*. the presence of an arbitration clause in the main commercial contract or a separate arbitration agreement, to the fact of an exchange of letters or telegrams.

The same emphasis is present in chapter two of the UNCITRAL Model Law in Article seven, option one, point two saying precisely that: "The arbitration agreement shall be in writing."[38] Notably, the UNCITRAL Model Law can be considered more up-to-date in determining the formal criteria of agreement being conducted in writing for its validity, and defining under Article 7 that:

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
2. The arbitration agreement shall be in writing.
3. An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
4. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
5. Furthermore, an arbitration agreement is in writing if it is contained in an 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.

[36] Rouzana Kasem, "The Future of Choice Court and Arbitration Agreements under the New York Convention, the Hague Choice of Court Convention, and the Draft Hague Judgments Convention," *Aberdeen Student Law Review* 10 (2020): pp. 80-82, accessed March 13, 2024, Law Journal Library - HeinOnline.org.
[37] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 5.1.
[38] UNCITRAL Model Law, *supra* note 5, Article 7.

6. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.[39]

That is, if there is a record of the provisions of the arbitration agreement, the written form requirement may now be satisfied. Thus, one can observe in modern arbitration laws a reasonable predominance of substance over form if the latter allows to confirm the existence of the arbitration agreement.[40]

Turning the attention to the question of substantive validity, it is possible to determine it as general principles of contract law, such as free will, consent, illegality, fraudulent nature, etc. It can be traced in Article 8 of the UNCITRAL Model Law which states that:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[41]

From the prospective of the New York Convention, substantive validity is determined by the means of Article II. 3, stating following:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[42]

A contextual analysis reveals strong similarities between the two provisions, which emphasises the unity of approach in the issue of defining substantive validity.

Thus, it is possible to conclude that substantive validity of the arbitration agreement entails such aspects as subject matters of the agreement, scope of the dispute, parties' consent, legality, while the formal validity primarily concerns the form of the agreement. The crucial importance of the substantive validity of an arbitration agreement is that it determines whether the parties are bound to arbitrate their disputes. An important notice to be done, is that both formal and substantive validity are not mutually excluding, meaning that whenever one of them is met it does not automatically provide validity as such, it must come along with satisfaction of the rest.

1.2.2 Validity of arbitration agreement under French and English law

From the perspective of French law, it is worth bearing in mind the distinction between domestic and international arbitration agreements. By virtue of the limitation of this thesis, only the international arbitration agreements and the principles applicable to them will be considered. Within the issue of substantive validity Section V of Book IV of the French Code of Civil Procedure does not explicitly regulate the form or evidence of the arbitration agreement. It only indirectly addresses the issue of form and provides that when arbitral awards are recognised and enforced, the exhibit, in this case the arbitration agreement between the parties or any other written evidence of such an agreement between the parties must be

[39] *Ibid.*
[40] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter. *Redfern and Hunter on International Arbitration.* Oxford: Oxford University Press, 2018, accessed March 25, 2024, p. 82.
[41] UNCITRAL Model Law, *supra* note 5, Article 8.
[42] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 2.3.

submitted. However, it should be noted that this has little effect on the conclusion of oral arbitration agreements. Therefore, the question as to whether a written form of the arbitration agreement is required or some form of written confirmation remains unclear. It is also worth noting that, in fact, based on the textual interpretation of these provisions, it requires the claimant to allow the court to establish the *prima facie* existence of the arbitration agreement.[43] Thus, the formal requirements of Articles 1443 (for arbitration clauses) and 1449 (for filing agreements) are of secondary importance. The question arises as to the validity of oral arbitration agreements and their exclusion from the requirements of Articles 1443 and 1449 because they are not expressed in writing. Thus, in international arbitration, even if the arbitration is subject to French law, the fact that an arbitration agreement is concluded in a form other than that provided for in Article 1443 is sufficient to confirm the parties' intention to derogate from the requirements of that Article.[44] From the substantive validity point of view, French Code of Civil Procedure abolished all form requirements necessary to recognise the validity of an international arbitration agreement contrary to the New York Convention, which imposes a strict and complete list of requirements and expressly mandates that the agreement be in writing. A reasonable question then arises, whether the state party, here in France, should adhere to these requirements set by the New York Convention? But, since the convention is a tool to facilitate the recognition and enforcement of arbitral awards, rather than a means of ensuring uniform law, such a derogation is in line with the international law principles and party autonomy. Thus, questions relating to the validity of arbitration agreements are subject to substantive rules of legality. In practical terms, this means that, under French law, an international arbitration agreement will be considered valid if the parties have reached a mutual agreement and if it does not violate international standards of public order.[45]

Within the English law formal validity criteria is observed by the means of Article 5.2 of the English Arbitration Act, 1996, which by its clear wording states, that:

> There is an agreement in writing—
>
> (a) if the agreement is made in writing (whether or not it is signed by the parties),
>
> (b) if the agreement is made by exchange of communications in writing, or
>
> (c) if the agreement is evidenced in writing.[46]

Along with the subsequent paragraphs of the Article, namely 5.3 and 5.4, which eventually allows where the parties have reached an agreement using terms that are not explicitly set out but are referred to in writing to be considered as a valid written agreement. And the fact of confirmation of the agreement being in writing can be derived from third party documentation evidence.[47] It is through these provisions that the requirements for an arbitration agreement to establish its validity are outlined. A rather broad interpretation of the need for a written form establishes the requirements for a signature or exchange and the fact that a document may serve as evidence of the agreement. This makes it possible to include, for example, an oral arbitration agreement within the scope of the law if there is documentary evidence of such an agreement. Of course, agreements made only orally without any evidence are not covered by the English Arbitration Act, 1996 under the part I of it.[48] Substantive validity

[43] E. Gaillard, J. Savage. *Fouchard, Gaillard, Goldman on international commercial arbitration*, pp. 370-371
[44] *Ibid*., p. 371.
[45] *Ibid.*, pp. 220-241.
[46] English Arbitration Act, 1996, *supra note* 28, Article 5.2.
[47] Born, *supra* note 8, p. 1102.
[48] *Ibid*., p. 1102., See also o TTMI Sarl v. Statoil ASA case.

in turn is defined by the criteria such as that all parties have genuinely consented to arbitration, meaning that all of the parties willingly and mutually consented to the arbitration within the party autonomy principle. Another ground is that the arbitration agreement is clear, dully specific and in accordance with legal formalities. Also, a key factor is that the parties must have the legal capacity to enter into agreements, and the terms of such agreements must be in accordance with public policy. It means that all the parties to the arbitration agreement possess relevant legal capacity to execute such an arbitration agreement and that such an agreement is within the public policy considerations of English law.[49] All these requirements can be observed from the Article 103 of the English Arbitration Act, 1996, which are close to the ones set out in the Article 34 of UNCITRAL Model Law.

[49] English Arbitration Act, 1996, *supra note* 28.

CHAPTER 2: CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

2.1 The relevance and complexities of choice of law issues in international commercial arbitration

The issue of choice of law in international commercial arbitration is a crucial aspect that parties should consider when entering into an agreement to arbitrate. The choice of law determines which rules and principles will apply to the merits of the dispute and how the arbitrators will interpret and apply them in making an award. It is important to bear in mind that the choice of law may affect the outcome of the case, so, parties usually carefully analyse their interests and needs before determining it. This chapter will explore and examine the complexity and necessity of the choice of law applicable to international arbitration agreements, and identify key factors. The chapter excludes the law of procedure from the analysis.

2.1.1 Examination of the importance of choice of law in the context of international commercial arbitration

The choice of the applicable law for an international commercial arbitration agreement is a complex issue that is widely debated. At the moment, there are mechanisms that allow to systematise and resolve these ambiguities. These in turn lay the foundation for a reliable and efficient resolution of the choice of law applicable to arbitration agreements.[50] The first thing to consider is the presumption of separability as such. Since the main essence of an arbitration agreement is the resolution of disputes arising between the parties, the arbitration agreement is severable from the main contract and remains valid even if the main contract lapses. The separability doctrine provides with the autonomy of the arbitration agreement from the underlying agreement.[51] One of the essential consequences of the separability doctrine is the fact that the arbitration agreement can be governed by a different law than the underlying agreement. Since, it follows that the arbitration agreement itself may be subject to a different law than the main contract, the determination of the applicable law for a separate international arbitration agreement, given that it may not be the same as the law governing the parties underlying contract, is often a complex and confusing process.[52] The principle of separability was best referenced in a milestone case of Fiona Trust, where it was held that the separability presumption provides that an arbitration agreement, even though included in and related closely to an underlying commercial contract, is pre-emptively a separate and autonomous agreement.

> But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.[53]

Thus, it leads to the fact that the separability presumption provides for the validity of an arbitration clause notwithstanding defects in or termination of the parties' underlying contract or any defect present in it. This notion is referenced in legislative acts as well, so, in accordance

[50] Born, *supra* note 8, p. 738.
[51] Winner Sitorus, "Separability Doctrine in Arbitration Agreement (a Comparative Study)," *Journal of Legal, Ethical and Regulatory Issues* 24, no. Special 6 (2021): p 2, accessed April 02, 2024.
[52] Born, *supra* note 8, p. 739.
[53] Fiona Trust and Holding Corporation and Others v. Yuri Privalov and Others under name of Premium Nafta Products Ltd (20th Defendant) & Others v. Fili Shipping Co Ltd (14th Claimant) & Others, 17 October 2007.

with Article 16(1) of the UNCITRAL Model Law, the Arbitration Agreement at hand must be interpreted independently and separately.[54] It should also be noted that different aspects of agreements may be governed by different applicable laws. It follows that different legal rules may apply to issues related to formal admissibility, substantive validity, legal capacity, interpretation, transfer of rights, waiver of the right to conclude an international arbitration agreement and even issues related to arbitrability. However, this thesis does not address *lex arbitri* issues by virtue of its limitation.

2.1.2 Exploration of the complexities and challenges associated with determining the applicable law

In the context of international agreements and arbitration procedures, the determination of the applicable law is a complex and topical issue In the matter of choice of law, which implies the choice of the legal system regulating the dispute, the following approaches can be distinguished: *lex loci contractus*, which implies the law of the place of conclusion of the contract, and *lex loci delicti* - the law of the place where the tort was committed or, in other words, the principle of closest connection. The result is the potential for different outcomes based on the circumstances, which introduces uncertainty and unpredictability into the arbitration process. As it was stated in the third chapter, paragraph 3.04 in the "Redfern and Hunter on International Arbitration":

> Like a contract, an arbitration does not exist in a legal vacuum. It is regulated, first, by the rules of procedure that have been agreed or adopted by the parties and the arbitral tribunal; secondly, it is regulated by the law of the place of arbitration. It is important to recognise at the outset—as even distinguished judges and commentators sometimes fail to do—that this dualism exists.[55]

An examination of the complexities and problems associated with determining the applicable law in international arbitration agreements reveals a number of challenges faced by parties, arbitrators and courts. An obvious factor is the diversity of regulatory frameworks. International arbitration disputes may have many links to different jurisdictions, which entails the need to choose the legal system that best suits the situation. It is the diversity of legal rules between countries, which can lead to difficulties in determining the applicable law. Such diversity leads to problems of inconsistencies between legal systems and uncertainties in determining the applicable law.[56] Arbitration agreements may specify the application of different legal systems to different aspects of the dispute, which in turn may give rise to conflicts and questions as to which law should take precedence. And in such cases, when different aspects of the dispute are subject to different legal systems, difficulties arise in interpreting and applying heterogeneous rules. Moreover, considerations of public policy also hold significant importance, as the choice of applicable law may be subject to the public policy constraints of a particular jurisdiction, which may affect the admissibility and applicability of the chosen law.[57]

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[54] UNCITRAL Model Law, *supra* note 7, Article 16. See also: Emmanuel Gaillard, John Savage. 1999. Fouchard, Gaillard, Goldman on international commercial arbitration, pp. 198-209.

[55] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter. *Redfern and Hunter on International Arbitration*, *supra* note 40, p.162.

[56] Gary Born; Cem Kalelioglu, "Choice-of-Law Agreements in International Contracts," *Georgia Journal of International and Comparative Law* 50, no. 1 (2021): pp. 100-103, avaolable on: Law Journal Library - HeinOnline.org. Acessed February 27, 2024.

[57] Joshua Karton, "International Arbitration as Comparative Law in Action," *Journal of Dispute Resolution 2020*, no. 2 (Spring 2020): 293-326, p. 313, available on: SSRN: https://ssrn.com/abstract=3654734. Accessed January 23, 2024.

Scholars highlight such complexity and draws the attention to the intricateness of the multifaceted nature of the issue of the choice of law applicable to the arbitration agreement and the legal systems involved in such proceedings:

> International arbitration, unlike its domestic counterpart, usually involves more than one system of law or of legal rules. Indeed, it is possible, without undue sophistication, to identify at least five different systems of law that, in practice, may have a bearing on an international arbitration:
>
> the law governing the arbitration agreement and the performance of that agreement;
>
> the law governing the existence and proceedings of the arbitral tribunal (the *lex arbitri*);
>
> the law, or the relevant legal rules, governing the substantive issues in dispute (generally described as the 'applicable law', the 'governing law', 'the proper law of the contract', or 'the substantive law');
>
> other applicable rules and non-binding guidelines and recommendations;
>
> and the law governing recognition and enforcement of the award (which may, in practice, prove to be not one law, but two or more, if recognition and enforcement is sought in more than one country in which the losing party has, or is thought to have, assets).[58]

It follows that by examining the specifics of the procedure of determination of the applicable law in the context of cross-border litigation, along with the complexities of such a choice, the ambiguity of the topic is emphasized. Due to the dynamic development of the society and legal field, judicial systems in the field of arbitration adapt to changes in the environment. The efforts of legislators towards harmonization of the mechanisms for determining the law applicable to arbitration still remains of high importance, since it will enable to achieve a higher level of predictability in international litigation.

2.2 Legal frameworks and principles governing the choice of law in international arbitration

In the context of the question of the legal framework and principles governing choice of law in international arbitration, it is worth noting that they are multifaceted and, in their essence, reflect a combination of international conventions, national laws and established legal doctrines. Thus, some key aspects include discussed above New York Convention, UNICITRAL Model Law, national arbitration laws, and, principles such as party autonomy principle, *Lex Mercatoria* principles[59], separability principle, *etc.* Thus, they all together create a comprehensive structure that allows the parties involved in international arbitration to choose the legal regulation that best meets their needs, which further allows flexibility in the process and respect for the principle of party autonomy.

[58] *Ibid.*

[59] Juramirzaev, Zarif, "Legal issues concerning the application of the lex mercatoria in international commercial arbitration," *The American Journal of Political Science Law and Criminology* (2022): p. 14, accessed January 25, 2024, https://doi.org/10.37547/tajpslc/volume04issue04-03.

2.2.1 Comparative study of the legal frameworks and principles used to determine the applicable law in international commercial arbitration

Taking into account the separability principle in the area of choice of law, it is worth noting that it has contributed to the proliferation of different approaches to determining the law governing the conclusion, validity and termination of international arbitration agreements. This diversity encompasses the various rules applied by national courts, arbitral tribunals and experts. These rules are diverse and include the application of the laws of the judiciary in the context of the enforcement of arbitration agreements, as well as the determination of the laws of the seat of arbitration. They may be related to the law explicitly or implicitly chosen by the parties to govern arbitration agreements, or be related to the law governing the underlying contract. In some cases, non-standard approaches are used, such as the "closest connection" or "most significant connection" criteria, as well as the "cumulative" method, which takes into account the laws of all potentially relevant States.[60]

When we speak of explicit choice of law, it is clear, based on basic principles of contract law, that it is a right chosen by the parties and enshrined in the arbitration agreement. However, in the case of implicit choice, it is possible to speak of the intention of the parties regarding the acceptance of the right of venue to such an arbitration clause. The logic behind this phenomenon is that when the parties have not specified a particular law applicable to the arbitration agreement, but have mutually chosen the place of hearing, the law of the place of hearing is the most appropriate law to govern the arbitration agreement itself. In this choice of law context, it is worth noting Hamlyn & Company v Talisker Distillery, *hereinafter* Hamlyn & Co case, where the issue was the law applicable to the arbitration agreement in the absence of an explicit choice of law. The case involved a claim for damages based on an arbitration agreement which stated that disputes arising out of the contract were to be settled in London, but did not set out the applicable law. However, one of the parties was located in Scotland.[61] As Lord Watson reasoned:

> If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles. And, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act ' in the usual way,' or, in other. words, in the manner which is customary in London, indicates, not less conclusively, that, in agreeing to such an arbitration, they were contracting with reference to the law of England.[62]

In this case, the judges did not disagree as to whether the law of the place of hearing would apply to the arbitration agreement. The decision also raised another important issue, the validation principle,[63] which implies that in the absence of a law expressly chosen by the parties, the law applicable to the arbitration agreement upholding its validity must prevail over any other law that in any way disqualifies it, which was reflected in the words of Lord Ashbourn:

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[60] Born, *supra* note, 8, p 752.
[61] William Schofield, "Hamlyn & Co. v. Talisker Distillery: A Study in the Conflict of Laws," *Harvard Law Review*, Jan. 25, 1896, Vol. 9, No.6, p. 373, accessed January 26, 2024, https://doi.org/10.2307/1321255.
[62] Hamlyn & Co v. Talisker Distillery (1894).
[63] Plavec, Katharina, "The Law Applicable to the Interpretation of Arbitration Agreements Revisited," *SemanticScholar. 2020*: pp. 110-112, accessed January 26, 2024, https://doi.org/10.25365/VLR-2020-4-2-82.

> This interpretation gives due and full effect to every portion of the contract; whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed. It is more reasonable to hold that the parties contracted with the common intention of giving effect to every clause, rather than of mutilating or destroying one of the most important provisions.[64]

Thus, it can be concluded that, in situations where there is no explicit choice of law, taking into account the attendant factors, an implied choice of law implies the application to the arbitration clause of the law of the place of hearing mutually chosen by the parties. However, there is another way of looking at this issue, which implies that the law governing the underlying contract also applies to such a clause. Nevertheless, the validation principle will play an important role in determining the law applicable to the arbitration clause in such a case.

2.2.2 Analysis of relevant international conventions and national laws that provide guidance on choice of law issues

Hereby, as discussed above, where an arbitration agreement contains a specific choice-of-law agreement, the applicable law is determined by that agreement. However, in other cases, in particular where the underlying contract contains only general choice-of-law clauses, the parties may encounter ambiguities and debates as to whether such a clause applies to the arbitration agreement or whether it is necessary to determine privately the law applicable to the arbitration agreement because of its separateness from the main contract. In this case, attention should be paid to the approaches determined by international conventions and the UNCITRAL Model Law as the instrument providing default rules and principles, namely Article V(1)(a) of the New York Convention and Article 34(2)(a)(i) of the UNCITRAL Model Law. Article V(1)(a) of the New York Convention provides as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;[65]

And must be read in conjunction with Article II, which by its virtue prescribes uniform rules of international substantive law, along with the validation principle, but not expressly covering choice of law issues in question.

The UNCITRAL Model Law stipulates, that:

> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the

[64] Hamlyn & Co v. Talisker Distillery, *supra* note 55.
[65] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 5.1(a).

> parties have subjected it or, failing any indication thereon, under the law of this State;[66]

In this way one can see that, for example, the New York Convention supports the seat (or "forum", or *locus arbitri*)[67] theory, which implies that the law of the place of hearing should be applicable to the arbitration agreement as one of the closest. This tendency is evident in the text of the convention, especially Article II:

> The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.[68]

And this reference to the law of the seat of arbitration remains systematically in the text of the convention, which is certainly important in understanding the issue of choice of law. The Model Law, in turn, also incorporates the concept of the seat (forum) theory from its earliest provisions, namely Article I:

> The provisions of this Law, except Articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.[69]

Given the particular importance of the Model Law as an international tool for understanding the concepts of arbitration in general and the principles to be applied, it can be concluded that the default law applicable to arbitration, *i.e. lex arbitri*, will be the law of the place of the seat of the arbitration, provided that it does not undermine the validity of such an arbitration agreement.

In terms of English law, one peculiarity is worth noting, namely that not all the provisions of the Arbitration Act 1996 will apply if the place of hearing is outside England, Wales and Northern Ireland or is undefined *per se*. Thus, in the context of the Arbitration Act 1996, the term "place" of arbitration is defined as the legal place under the third Section.[70] In other words, English law indicates that the seat of arbitration is not just a simple geographical location, but rather a direct link between the arbitral tribunal and the legal framework, turning a kind of legal center.

In the case of Dallah Real Estate and Tourism Holding Company *v.* The Ministry of Religious Affairs, Government of Pakistan, where the central issue was whether to enforce an award or deny such an action against a party, who claimed not being a party to the arbitration agreement, Lord Collins acknowledged that:

> In this case, because there was no "indication" by the parties of the law to which the arbitration agreement was subject, French law as the law of the country where the award was made, is the applicable law…[71]

In another milestone case SulAmerica Cia Nacional de Seguros SA v. Enesa Engenharia SA, the background contained a couple complex agreements governed by the law of Brazil with the London arbitration clause. The main issue before the Commercial Court in London turned

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[66] UNCITRAL Model Law, *supra* note 7, Article 34.
[67] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter. *Redfern and Hunter on International Arbitration*, *supra note* 40, p. 171.
[68] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 2.
[69] UNCITRAL Model Law, *supra* note 7, Article 1.
[70] English Arbitration Act, 1996, *supra note* 28, Article 3.
[71] Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan (2010).

out to be the question of an injunction against process under Brazilian law. The Master of the Rolls stated that:

> Given the desirability of certainty in the field of commercial contracts and the number of authorities on the point, it is, at least at first sight, surprising that it is by no means easy to decide in many such cases whether the proper law of the arbitration agreement is (i) that of the country whose law is to apply to the contract or (ii) that of the country which is specified as the seat of the arbitration. However, once it is accepted that that issue is a matter of contractual interpretation, it may be that it is inevitable that the answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense.[72]

It is thus clear that where the parties have not chosen the law applicable to the arbitration agreement, the court shall determine the system of law with which the arbitration agreement has the closest and most real connection under the circumstances of each specific case and approach common to the legal system at hand.

Speaking of English law, here, it is the "host" theory present, which implies that the law applicable to the arbitration agreement must be the law applicable to the underlying agreement itself. The logic behind this theory is that the parties, by entering into the underlying agreement, mutually intended to subject all of their relationship, including potential disputes, to one particular law. The most striking case in the "host" theory is Fiona Trust v Privalov, where it was reasoned that:

> [t]he construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."[73]

Based on this theory, the closest connection between the law governing the underlying agreement and the law applicable to the arbitration agreement is based on the fact that the parties have clearly expressed their mutual desire for a certain law to be the one governing their relations, and that such law must be consistently applicable to both the underlying agreement and the arbitration agreement in order to preserve such notion of consistency. Also, that despite the separability of the arbitration agreement, it falls under the system of law governing a contract, in other words, it is the arbitration agreement most closely related to the main agreement, and the system of separability in this case guarantees the validity of the arbitration agreement in the event of non-validity of the main agreement.

However, if we refer to the French Code of Civil Procedure, we can see that it does not require that international arbitration be governed by law through the application of choice of law rules. It is worth noting that the main emphasis is that the parties are free to choose. This is most clearly reflected in Articles 1494[74] and 1496[75] , thereby leaving the parties freedom to

[72] SulAmérica Cia Nacional de Seguros SA v. Enesa Engenharia SA (2012) Available on SULAMERICA CASE.
[73] Fiona Trust, *supra note* 47, Para. 13.
[74] C. civ. (French Code of Civil Procedure), *supra note* 17, Article 1494.
[75] *Ibid*., Article 1496.

choose both the law governing the arbitration agreement as such and the substance of the dispute.[76] Thus, the notion is that the approaches of national laws are divided into common law countries upholding the "host" theory and civil law countries supporting "seat" theory.

[76] E. Gaillard, J. Savage. *Fouchard, Gaillard, Goldman on international commercial arbitration*, *supra note* 43, p. 70.

CHAPTER 3: INTERSECTION OF ARBITRATION AGREEMENTS AND CHOICE OF LAW IN TERMS OF VALIDITY

3.1 Invalidity of arbitration

Present chapter is aimed at analysis of the grounds under which the arbitration agreement can be rendered invalid from both, international perspective and on the level of national laws in France and England. Since, taking into account the separability presumption, which detaches arbitration agreement from the underlying agreement saving its validity, it is of high importance to establish and analyse particular reasons establishing the invalidity.

3.1.1 Identification and analysis of common grounds on which the validity of arbitration agreements may be challenged

Since, the criteria for the arbitration agreement to be considered valid are discussed within the scope of first chapter, it is worth analysing the common grounds on which such validity can be denied, and, accordingly lead to further inability of enforcement of the awards. Thus, when one of the terms of an international arbitration agreement is invalid or defective, the result is that arbitral tribunals, and subsequently national courts, give effect to the rest of the arbitration agreement. So, in case of substantive invalidity based, for example, on the fact that the parties have invoked a non-existent arbitration institution will not cause the whole arbitration agreement to lose its validity, but will cause great concern and lead, as in case of male reference to the court-appointed selection.[77] So, the remainder, apart from the invalid part, retains the status of an arbitration agreement and is valid. This best reflects the basic essence of an arbitration agreement - the resolution of disputes between the parties.

However, there can be severe grounds invalidating the entire agreement, mostly they concern crucial provisions and criteria. Among them are: lack of mutual consent, lack of clarity, not meeting the formal criteria of the agreement to be in writing, lack of capacity to conclude such agreements, illegality of the agreement, public policy grounds, fraudulent nature. Thus, grounds on which the agreement can be rendered invalid are provided in Article 34 of UNCITRAL Model Law:

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can

[77] *Ibid*., pp. 18-22.

be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.[78]

It provides grounds for challenging the validity and enforceability of arbitral awards, and these are applicable to both domestic and international arbitral awards and, as a result, are frequently raised in the enforcement or setting aside of arbitral awards. As noted earlier, Article 34 covers the issue of the admissibility of actions to set aside an award. Moreover, the Article clarifies on the question of the applicable rules to arbitral awards. The UNCITRAL Model Law, in turn, does not regulate the content or admissibility of evidence, as this is a matter for national law. Thus, applications that violate national law may be rejected, as it was in the case No. 106, where the rejection was based on the fact that the application did not fulfil the requirements of Bulgarian law.[79] In regard to the issue of parties being capable to enter into such an agreement, central issue is that it must be accessed at the moment when parties actually entered into this agreement, meaning, that if a party started a liquidation process for example during the proceedings do not qualify it as being incapable of concluding arbitration agreement under Article 34 (2)(a)(i) of the UNCITRAL Model Law.[80]

The New York Convention stipulates the grounds for refusal of the recognition and enforcement under Article V, clearly stating seven grounds:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

[78] UNCITRAL Model Law, *supra* note 5, Article 34.
[79] Supreme Court of Cassation, Bulgaria, Commercial Chamber, case No. 106 of 1 December 2009.
[80] SDV. Transami Ltd. v. Agrimag Limited et al., Kampala High Court, Commercial Division, Uganda, 19 June 2008, HCT-00-CC-AB-0002-2006.

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country. [81]

When speaking of illegality of the agreement as a basis for its invalidation, general contract principles will be applicable. An example of corruption underlying an arbitration agreement, which is often found in case law, can be cited as a reason for invalidating the agreement. It is worth noting that legal scholars disagree as to whether corruption is such a serious cause that even its presence in the underlying agreement can lead to the invalidity of the arbitration agreement.[82] However, given the mere fact that corruption is severe in its nature and it is in international interest to fight against corruption, even presence of it in the underlying agreement can affect validity of arbitration clause notwithstanding standing separability presumption. So, in such a case, as it is established in litigation practice, corruption is transposed to the Arbitration Agreement and violates public policy. [83] Another approach towards the issue of substantive validity is that for some cases there is no need for any law at all, the only instrument needed is just public policy of the place of enforcement of the respective award or the place of the seat of the tribunal. In a milestone arbitral award by a well-known Swedish arbitrator - Gunnar Lagergren the jurisdiction was declined on a basis of "general principles denying arbitrators the power to entertain disputes of this nature". [84] Gunnar Lagergren stated:

> It cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate bonos mores or international public policy

[81] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 5.
[82] Low, Lucinda A. 2019. "Dealing with Allegations of Corruption in International Arbitration." *AJIL Unbound* 113: 341–45. https://doi.org/10.1017/aju.2019.61.
[83] ICC Case No. 1110, 1963.
[84] *Ibid.*

> are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.

Thus, the UNCITRAL Model Law provides clear grounds for challenging the validity and enforceability of arbitral awards by the means of Article 34. And the New York Convention lists the grounds under Article V. These grounds play a crucial role for parties seeking to enforce or set aside arbitral awards. Case law examples demonstrate the application of these grounds in practice and their impact on the finality and enforceability of arbitral awards through the perspective of validity of the arbitration clause. Parties to arbitration must pay special attention to these provisions in order to protect their rights and ensure the effectiveness of arbitration agreements.

3.1.2 Nonarbitrability under French and English law

Based on the analysis above, it is worth drawing attention to "objective arbitrability" and nonarbitrability of the disputes under the national laws of France and England. The "objective arbitrability" refers directly to the national law and its provisions that determine whether a particular issue and dispute between the parties can be resolved by arbitration. Where the provisions of national law purport to exclude such a dispute from arbitration, the award may be invalidated under this legal regime.[85] French Civil Code under Articles 2059 and 2060 imposes limitations on the objective arbitrability. Article 2060 states, that:

> It is not possible to compromise on questions of the status and capacity of persons, on those relating to divorce and legal separation, or on disputes concerning public authorities and public institutions and, more generally, in all matters of public order.[86]

The greatest concern accrues with the interpretation of the wording "all matters of public order", since it is broad term without a close specified list of matters, and public order itself includes a vast number of areas which can concern it. Most recent trend in regard to interpretation of public order is more liberal in its nature regarding international arbitration, and declares that Articles 2059 and 2060 are only applicable to the national arbitration agreements, but not to the international ones.[87] This more liberal approach was established in several cases, such, as: Impex V. P.A.Z. Produzione Lavorazione 1972[88] case, Aplix v. Velcro 1993[89] case, within a short period of time. Keeping with the trend, the French Conseil d'État, the highest administrative body, proposed in 2016 changes to the review process of arbitral awards. Thus, as part of this proposal, the French Conseil d'État proposes to emphasise the question of whether a dispute can be resolved by arbitration. Thus, it approved the possibility of cancelling an arbitral award if the dispute in question is not arbitrable.[90] Overall, such decisions only reinforce and confirm the dynamic of French arbitration law moving towards a liberal approach to the issues of the doctrine of non-arbitrability. While respecting and taking into account the historical approach and the rules of French law in the framework of international arbitration, the judiciary retains the power to interpret the doctrine in question.

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[85] Anastasia Ezinwanne, "The existence of a valid arbitration agreement as a prerequisite for arbitration," p. 146, accessed April 07, 2024, availavle on: The existence of a valid arbitration agreement as a prerequisite for arbitration .

[86] C. civ. (French Code of Civil Procedure), *supra note* 17, Article 2060.

[87] Born, *supra* note, 8, pp. 1565-1567.

[88] Impex V. P.A.Z. Produzione Lavorazione.

[89] Aplix v. Velcro.

[90] Conseil d'État (Council of State), Decision No. 38886, available on: https://www.conseil-etat.fr.

From the perspective of English law, it can be said that there is no clear wording within the English Arbitration Act, 1996. Moreover, English law is rather negative on the issue of non arbitrability of certain arbitration disputes. Although a number of cases have addressed this issue, the methodical and consistent approach of the courts has been to reject arguments regarding non arbitrability. So, the English courts hardly accept the doctrine of non-arbitrability and have no sympathy for it, and, in general, take the position that a dispute that may contain various arguments by the parties, including those that define it as a non-arbitrable dispute, should still be treated as arbitrable. Thus, in the recent case Nori Holding Ltd v. PJSC "Bank Otkritie Fin. Corp in 2018, the Court reasoned that:

> But in each case, the essence of the dispute is the same, regardless of the labelling. It is a dispute that can be resolved by arbitrators.[91]

The case covered a dispute between Cypriot companies, subsidiaries of O1G Group, and other organisations. The Bank provided loans under contracts governed by Russian law and secured by a pledge of shares in O1 Properties. This collateral was subject to arbitration in London. As a result of the loan transactions under the new contractual provisions, the pledge agreements were terminated. After the insolvency was established, the bank initiated proceedings in Russia and challenged the validity of the bonds. The Cypriot party, being the plaintiff, initiated proceedings in London and requested to recognise the termination of the contracts as valid and to impose an anti-seizure injunction on the bank.[92] The English court approached the issue with its inherent scepticism about the question of the non-arbitrability of the dispute, finding that the matter was arbitrable. Thus, in view of the fact that the English Arbitration Act, 1996 and English law are rather lenient on the question of arbitrability, it is worthwhile to look at some of the provisions of the AA which indirectly address this issue. Analysing provision 81(1)(a) of the English Arbitration Act, 1996, which reads:

> Nothing in this Part shall be construed as excluding the operation of any rule of law
>
> consistent with the provisions of this Part, in particular, any rule of law as to-
>
> (a) matters which are not capable of settlement by arbitration;
>
> (b) the effect of an oral arbitration agreement; or
>
> (c) the refusal of recognition or enforcement of an arbitral award on grounds of
>
> public policy[93]

Similarities with the provisions and spirit of the New York Convention can be seen. The provision suggests that English law is applicable to the determination of the arbitrability of a dispute and the provision is intended to include a list of such issues.[94] In other words, the narration of this provision implies that matters governed by the common law remain relevant and are not included in the English Arbitration Act, 1996. Namely, that the three underlying causes remain governed by the common law.[95] Also important is provision 103(3)[96], which is

[91] Nori Holdings Ltd & Ors v Public Joint-Stock Company 'Bank Otkritie Financial Corporation, available on: Nori Holdings Ltd & Ors v Public Joint-Stock Company.
[92] *Ibid.*
[93] English Arbitration Act, 1996, *supra note* 28, Article 81.
[94] Oliveira, Leonardo V. P. de. "The English law approach to arbitrability of disputes", available on: The English Law Approach to Arbitrability of disputes.pdf (royalholloway.ac.uk). Accessed April 12, 2024, pp.- 19-21.
[95] Ibid.
[96] English Arbitration Act, 1996, *supra note* 28, Article 103.

a direct incorporation of Articles V, II(a) and (b) of the New York Convention. It addresses issues that may be resolved by arbitration. Among other things, the provision focuses on obstacles that may arise from public policy in the recognition and enforcement of arbitral awards.[97] To summaries, it can be said that firstly, the English Arbitration Act, 1996 does not presuppose by its wording an explicit mention of the issue of arbitrability and leaves this issue to the jurisdiction of national law. However, it is clear from the structure of the English Arbitration Act, 1996 that it is possible to challenge arbitrability even after the award has been made. Such a possibility exists for disputes concerning a matter of public order. The important fact is that, due to the structure of the English Arbitration Act, 1996, such a possibility exists at the stage of challenging the substantive jurisdiction of the court.

3.2 The impact of capacity on the validity of arbitration agreements

The issue of legal capacity to enter into an arbitration agreement is worthy of special attention because it is one of the most important issues in the validity of an arbitration agreement under all international conventions. The impact of capacity of the parties on the validity of arbitration agreements should be considered next.

3.2.1 Analysis of how the capacity of the party can affect the validity of arbitration agreements

On the issue of capacity of the parties to enter into an arbitration agreement, the provisions of Article II of the New York Convention do not expressly and explicitly recognize lack of capacity as a ground for challenging the validity of an arbitration agreement. The text itself suggests the following: "...unless it finds that the said agreement is null and void, inoperative or incapable of being performed." [98] Article V(1)(a), meanwhile, in turn contemplates the non-recognition of arbitral awards based on agreements entered into by a party that lacks the requisite capacity to enter into such agreements, and says the following:

> Recognition and enforcement of the award may be refused, … [t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;[99]

Thus, apparently Article II of the New York Convention does not position capacity as a criterion for recognizing arbitration agreements as valid at all stages of the arbitration process. However, the interpretation of Article II should imply that incapacity should be included in the context of the arbitration agreement as a reason for its invalidity and, as a consequence, in a situation where at least one of the parties is incapacitated, not to treat the arbitration agreement as valid.[100] However, most national arbitration laws are not furnished in full with the provisions regarding the capacity requirements of the parties to the arbitration agreement. The UNCITRAL Model Law does not raise the issue of capacity of the parties in the context of arbitration agreements within Articles 7 and 8. It does, however, provide for the possibility of non-recognition, including annulment of an award under Articles 34 and 36, where an award is made under an arbitration agreement in which at least one of the parties was not capable at the time

[97] Oliveira, Leonardo V. P. de. "*The English law approach to arbitrability of disputes*", supra note 94.
[98] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 2.
[99] *Ibid.*
[100] Born, *supra* note, 8, p. 1111.

the agreement was concluded. It should be noted, however, that the UNCITRAL Model Law does not elaborate on the specific details of the capacity of the parties to enter into arbitration agreements as such. It also remains silent as to the choice of law applicable to this issue of capacity, thus leaving these matters to the sole discretion of the judiciary and national law in particular. At the same time, it can be said that national laws do not always provide a clear definition of the capacity of a party as such, but nevertheless refer to the lack of such capacity as a reason for which the arbitration agreement can be considered invalid.[101] It should also be noted that the aspect of a party's capacity is important not only when the arbitration agreement is directly concluded, but also during the arbitration agreement. The reason for this is the requirement of some national legislations. Thus, the parties should be aware of the requirements of their national laws regarding capacity in order to successfully conclude and implement the arbitration agreement.[102] In situations where there is no clear regulation of a party's capacity to enter into a valid arbitration agreement, common contract law capacity criteria are often applied, which is consistent with the fact that the arbitration agreement is still subject to the basic principles of contract law. Such criteria include, for example, such standard criteria which find application in the context of arbitration agreements, similar to their application in other legal areas: incapacity due to age or mental incapacity, minority, restrictions provided for in the constituent documents of corporations, *etc.*[103] As it was referenced in Chapter 2 of the "Redfern and Hunter on International Arbitration" by N. Blackaby, C. Partasides, A. Redfern, and M. Hunter:

> Parties to a contract must have legal capacity to enter into that contract, otherwise it is invalid. The position is no different if the contract in question happens to be an arbitration agreement. The general rule is that any natural or legal person who has the capacity to enter into a valid contract has the capacity to enter into an arbitration agreement. Accordingly, the parties to such agreements include individuals, as well as partnerships, corporations, states, and state agencies.[104]

So, given that the legal capacity of the parties to enter into an arbitration agreement is determined by the law applicable to those parties in accordance with the general rules of contract law, any natural or legal person who has the capacity to enter into valid contracts also has the capacity to enter into valid arbitration agreements. Nevertheless, exceptions that protect the interests of consumers may limit such capacity of the parties.[105] Nevertheless, national laws rarely impose restrictions on the capacity to conclude arbitration agreements; moreover, imposing such restrictions in a very strict manner would be inconsistent with the principles of the New York Convention. However, for example, in countries where the economy is regulated by the state, the absence of the necessary licence for foreign trade may result in a limitation of capacity. Thus, it can be said that the issue of the capacity of the parties to an arbitration agreement plays an important role in determining the validity of such arbitration agreement and the further course of the proceedings, however, it should be remembered that this issue is not clearly defined by international law mechanisms, and is left to the discretion of national law. This implies that under international law, the issue of capacity is only referenced as one of the reasons for determining the invalidity of an arbitration agreement, but the process of defining

[101] *Ibid.*, pp.1118-1120.
[102] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter. *Redfern and Hunter on International Arbitration*, *supra note* 40 pp. 87-97.
[103] Born, *supra* note, 8, pp. 1118-1120.
[104] N. Blackaby, C. Partasides, A. Redfern, and M. Hunter. *Redfern and Hunter on International Arbitration*, *supra note* 40, p .87.
[105] Steingruber, Andrea M. 2012. *Consent in International Arbitration*. OUP Oxford, Ch3, pp.3-5

the concept of incapacitated party is left entirely to national law applicable to the determination of whether a party to the arbitration satisfies its capacity.

3.2.2 Exploration of legal doctrines and principles related to the interaction between capacity and arbitration agreements

Since the issue of legal capacity, its role, and the fact that it belongs entirely to national law has been discussed above, it is worth considering how to define such national law. Thus, international legal instruments emphasize the need for choice-of-law rules relating to issues of legal capacity, but they do not contain specific choice-of-law rules or substantive rules governing this aspect, unlike the issue of the validity of an arbitration agreement. However, as stated earlier, the task of establishing choice-of-law rules applicable to legal capacity to conclude arbitration agreements, in accordance with the provisions of non-discrimination conventions, is largely left to national law.[106] Taking into consideration Article V(1)(a) of the New York Convention in terms of the law applicable to and governing capacity, according to the wording, the capacity of the parties is determined through "[t]he law applicable to them"[107], which raises the question of which law is determined by this reference. Thus, two conclusions can be drawn, the first inference implies that the law prescribed by the convention is the law of the place of residence or place of registration of the party as a legal entity. And, second implies, that this issue is left to the discretion of national courts, including in the context of the application of their conflict of laws rules to resolve this issue.[108] It can be said that academics take these two views and believe that the more reasoned view is that Article V(1)(a) implies a particular approach to the choice of law for deciding questions of capacity. Also implying that such an approach is different from the approach to issues of substantive validity. The reason behind is the fact that the provision refers to two different choice-of-law rules for different aspects, namely, capacity and substantive validity of the arbitration agreement. As the Gary Born notes:

> It is difficult to see why the Convention's drafters would have prescribed a choice-of-law rule for issues of substantive validity (which they did), but not issues of capacity.[109]

Given that there is no uniform conflict of laws rule as to which law governs the legal capacity of a party to a contract, it is common for Common Law jurisdictions to treat capacity as an aspect of contract law. The consequence is that the issue of capacity may be subject to the law governing the arbitration contract itself.[110] Where more broadly, a party's capacity to contract is usually determined by the law applicable to that party.[111] Thus, in the first case, the conflict of laws rule determining the issue of a party's legal capacity is determined by the law of the state where the legal entity was incorporated or registered, the so-called domicile of the party.[112] In the second case, the conflict of laws rule determining the issue of a party's legal capacity is determined by the law of the state where the legal entity has its centre of management or principal place of business, often referenced by the term "real seat". [113] From a practical

[106] Born, *supra* note, 8, p. 883.
[107] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra note* 3, Article 4.
[108] Born, *supra* note, 8, p. 884.
[109] *Ibid.*
[110] Maxi Scherer; Ole Jensen, "Towards a Harmonized Theory of the Law Governing the Arbitration Agreement," *Indian Journal of Arbitration Law* 10, no. 1 (July 2021): pp. 3-4, accessed April 27, 2024.
[111] G. Moss, "*Legal Capacity, Arbitration and Private International Law*.", available on: choice-of-law_e_cordero_moss. Accessed April 21, 2024

[113] *Ibid.*

point of view, this means that when the governing law depends on the place of incorporation of the company (the first option), the issue of a party's capacity, as well as its operations, may not have to be harmonised with the law of the countries where it operates, but rather it must be governed by the law of the country where it is incorporated. This implies that the jurisdictions where the party to an arbitration agreement operates remain silent and accept the legal standards of the country of incorporation without requiring them to be adapted to local norms.[114] In the second scenario, where the law governing the issue of party's capacity is determined by the law of the country of the real seat of the party, compliance with national standards becomes necessary and the issue of capacity will be determined by such national provisions. Compliance with such provisions becomes necessary and comes to the forefront in determining capacity, as opposed to the law of the party's home country, which seems to take a back seat.[115] In the spirit of this study, one generalisation of the legal systems is worth noting, namely that there is a marked divergence between common law and civil law systems. That is, Common Law systems are characterised by the principle of domicile, where the question of capacity is determined by the law of the place where a party is legally incorporated, irrespective of where its activities are actually carried out.[116] Thus, for the English arbitration process, the issue of determining the capacity of a party will be determined according to the law of the country where the party is registered. And civil law systems are characterised by the principle of real seat, meaning that the law of the place where the party has its principal place of business will determine the issue of capacity. That is, for French arbitration, the issue of capacity will be determined under the law of the country where the party has its principal place of business.

[114] Born, *supra* note, 8, pp. 885-888.
[115] G. Moss, "*Legal Capacity, Arbitration and Private International Law*.", supra note 103, pp. 10-15.
[116] Steingruber, M. Andrea, "*Consent in International Arbitration*.", OUP Oxford, chap. 3., accessed April 20, 2024.

CONCLUSION

The aim and objectives set within the present thesis were achieved. The extent to which the law applicable to an international arbitration agreement affects its validity was analysed and it can be concluded, that the law applicable to the arbitration agreement is crucial in the matters of validity.

As regards the research question of this thesis "What is the impact of choice of law applicable to the arbitration agreement on its validity and subsequent enforceability issues?", it is worth noting that this study examines the question from different angles in order to form the most accurate conclusion. Thus, the tools of international arbitration law are used for the analysis, as well as the legislations of England, as a representative of the Common law system, and France, as a representative of the Civil law system, respectively. Within the framework of the study, taking into account all the limits of the work, a detailed answer was given to the question posed.

The normative documents of international arbitration law were studied to determine the concept of arbitration agreement and its validity. The Milestone provisions of the New York Convention, which applies to Recognition and Enforcement of Foreign Arbitral Awards, and the UNCITRAL Model Law, which is a creation of the United Nations and serves as a model for legislators in matters of arbitration law, were analysed. In order to determine an arbitration agreement as valid, a number of criteria must be met, namely formal validity, which includes criteria such as written form, and substantive validity, which can be determined as general principles of contract law, such as free will, consent, illegality, fraudulent nature, etc., must be met. The provisions of the national legislation of England and France were also analysed to identify critical differences in these legal systems. French law does not provide a clear definition of substantive validity, in particular the criterion of written form. From the substantive validity point of view, the French Code of Civil Procedure plays a rather liberal role and does not establish a clear list of criteria, unlike the New York Convention. The English legislation on the issue of the written form criterion defines an agreement as valid if, in the absence of written form, it is possible to obtain confirmation of the fact of conclusion of such an agreement from a third party. It should be noted that the provisions of the English Arbitration Act, 1996 are close to the provisions of the UNCITRAL Model Law. Thus, for an arbitration agreement to be valid it is necessary to comply with both formal validity and substantive validity according to the studied normative documents.

The issue of determining the law applicable to the arbitration agreement was studied. The legal rules and principles determining such a choice were studied. Special attention was paid to the difficulties in the issue of choosing the law applicable to the arbitration agreement. Taking into account the doctrine of separability of the arbitration agreement from the main contract, which implies the possibility of applying different rights to these agreements, it is worth noting two main approaches. Namely, the "seat" theory and the "host" theory. According to the "host" theory, which is characteristic of the Common law system, the law of the place of hearing should be applicable to the arbitration agreement as one of the closest. "Seat" theory, characteristic of the Civil law system, in turn, implies that the law applicable to the arbitration agreement must be the law applicable to the underlying agreement itself. At this stage, it is clear that the law applicable to the arbitration agreement can have a great influence on the outcome of the process and its influence is becoming irreducible.

The relationship between the law applicable to an arbitration agreement and its subsequent validity were established. This issue has been analysed through the prism of both international arbitration law instruments and English and French law, respectively, in order to understand the correlation between the law applicable and the validity of the agreement. Particular attention has been paid to the issue of a party's capacity in the context of the conclusion of an arbitration agreement and the subsequent arbitration process. International law defines a specific list of criteria under which an arbitration agreement may be invalidated and the enforceability of arbitral awards may be denied. This is set out in Articles 34 of UNCITRAL Model Law and V of the New York Convention. Also, provisions of the national legislations of England and France establish similar criteria. The national law, and in particular the law applicable to the arbitration agreement, plays a special role in the question of the capacity of a party. The sources of international law refer to "[t]he law applicable to them (the parties)". Consequently, there are two approaches, the principle of domicile of the party characteristic for Common law system, here, the English arbitration process, where the issue of determining the capacity of a party will be determined according to the law of the country where the party is registered. And the principle of "real seat", characteristic for Civil law systems, here, French arbitration process, where the law of the place where the party has its principal place of business will determine the issue of capacity.

It is thus clear that the law applicable to the arbitration agreement runs through the various fundamental issues and has a great influence on the process of determining the validity of arbitration agreements and subsequent enforceability issues. It is the national law that determines the issue of capacity, which may be the reason for determining an agreement as invalid. It is the law applicable to the agreement that ultimately has a major impact on the validity of the agreement. It should be noted that due to the limitations of this study, the issues of investment arbitration and the peculiarities of Eastern legal systems have not been studied, which may serve as a topic for further research in this area. It is also possible to study in more depth the issue of enforceability of the tribunal's decisions and the influence of the law applicable to the arbitration agreement in this regard. Since it was concluded within present study, that the law applicable to the arbitration agreement has great influence on the validity of the latter, another important issue not covered in this thesis is the influence of the law applicable on the enforcement of the tribunal's awards. The issue of awards enforceability is a separate and extremely important question within the arbitral process. It deeply depends on the national legislation, however still falls within the umbrella of international legislation.

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