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ASPECTS OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION

Doctoral Thesis

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I. SUMMARY OF THE RESEARCH

There are several aspects of the meaning of autonomy. On the one hand, autonomy means the right of an institution, community or organisation to manage its internal relations independently. This autonomy is referred to in administrative law as the right of self-government.[1] The right to autonomy is also reflected in minority rights, where we can speak of territorial, personal and cultural autonomy.[2] It also means the freedom of individuals, also known as the right of self-determination. This is where the Constitutional Court derived the right to self-determination of the parties to a judicial process from the right to self-determination derived from human dignity, which includes the right to abstain from the enforcement of rights.[3] When the parties agree to have their dispute decided by arbitration, taking into account the many advantages of arbitration, they also waive certain rights under the Constitution, including the fact that the dispute is not decided by a public court in open court and that there is no ordinary right of appeal against the arbitral award. It is therefore part of the parties' freedom to waive a statutory right in this way.

The doctoral thesis is structured around an exploration of the aspects of the parties' autonomy, each chapter of which covers an aspect of the exercise or limitation of autonomy.

In the first pages of the thesis, I present the basic questions and hypothesis of the doctoral research, and in the *third and fourth chapters* I deal with the legal history of arbitration.

Under the heading *Historical Review I*, I cover the period from Roman arbitration to the new Hungarian Arbitration Act, with a special focus on the legal history of arbitrability. Arbitrability is the most important issue in arbitration, which determines the types of cases that are within the scope of arbitration. *The right to party autonomy creates the possibility of "opting out" of the jurisdiction of the state courts in these cases.*[4]

The aim of the legal history review was to identify the subjective and objective limits of *arbitrability* by historical context. From the point of view of our modern law, the 1911 Code of Civil Procedure was an epoch-making act: it defined the scope of cases that could be referred to arbitration as a general rule, stating the principle that: the extension of procedural law can only be interpreted as long as the parties are *free to determine* the subject matter of the proceedings in a substantive sense.[5] At the time of the 1952 Code of Civil Procedure, arbitration could only be used in an extremely narrow range of cases, only in disputes between a domestic state enterprise or a state body and a foreign natural or legal person.[6] The 1994 Arbitration Act chose a half-way solution: arbitration is available under the Act if at least one of the parties is a person professionally engaged in an economic activity and the dispute relates to that activity, and the parties are free to determine the subject matter of the proceedings and the arbitration is provided for in an arbitration agreement. Under the new regulatory technique of the new Arbitration Act, the right to arbitration is no longer subject to the condition that at least one of the parties must be engaged in a professional economic activity (*subjective arbitrability limit*) and, of course, the new Act does not exclude from the scope of the matters

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1 The Hungarian language dictionary: autonomy.https://www.arcanum.com/hu/online-kiadvanyok/Lexikonok-a-magyar-nyelv-ertelmezo-szotara-1BE8B/a-a-1BFAF/autonomia-1EE1D/

2 NAGY Andrea: Az autonómia értelmezésének fogalmi alapjai és az önrendelkezési törekvések gazdasági háttere. Jelenkori társadalmi és gazdasági folyamatok (2017) XII. évfolyam 4. szám 258-260.

3 46/2007. (VI. 27.) AB határozat

4 LEW, Julian D. M.- MISTELIS, Loukas A. - KRÖLL, Stefan: Comparative International Commercial Arbitration. Kluwer Law International, Hague/London/New York. 2003. 187.

5 VARGA István: Az objektív arbitrabilitás magyar szabályozásának története és töréspontjai. Jogtörténeti parerga. Ünnepi Tanulmányok Mezey Barna 60. születésnapja tiszteletére. Szerk.: MÁTHÉ Gábor – RÉVÉSZ T. Mihály – GOSZTONYI Gergely, Budapest, ELTE Eötvös Kiadó, 2013. 370.

6 VARGA István op. cit. 371.

that may be submitted to arbitration the matters of litigation fixed by the National Property Law (*objective arbitrability limit*).[7]

Under the heading *Historical Review II* , I have reviewed the international instruments that have been relevant to the history of arbitration.

The 1923 Geneva Protocol and the 1927 Geneva Convention were the first harbingers of the unification of arbitration law, followed by the 1958 New York Convention. The latter is one of the most successful international conventions in history, with the greatest achievement being the abolition of double exequatur. Based on the proposal known as the Dutch submission, the recognition and enforcement of an arbitral award is subject to two conditions: the submission of a certified original (or a duly certified copy) of the arbitral award and the submission of an arbitration agreement (or a duly certified copy).

After the historical overview, *the fifth chapter of* the thesis provides a general introduction to alternative dispute resolution, followed by an examination of the link between arbitration and mediation, with a particular focus on the enforceability of multi-tiered dispute resolution clauses and, in this context, the dilemmas concerning the autonomy of the parties.

It is true for all ADR procedures that they require the mutual consent of the parties in order to be initiated, i.e. they are based on *the private autonomy of* the parties. However, while the *parties need a written arbitration agreement* to initiate arbitration, mediation requires only the *mutual consent of the parties*. However, in business, it is not uncommon for the parties to draft a so-called "tiered dispute resolution clause", whereby the parties agree on how they will resolve a dispute between them and in what order they will resolve it, for example, first through negotiation, then through mediation and finally arbitration. However, given that the mediation agreement, unlike the arbitration agreement, does not have a derogating effect, it becomes questionable to what extent the mediation level of the tiered dispute resolution clause can be enforced. In the light of the case-law described in this chapter, the assessment of mediation agreements has always depended on the extent to which their essential elements were precisely drafted.

The aim of the *fifth chapter* was to demonstrate that the autonomy of the parties in arbitration also extends to the possibility of making the initiation of arbitration proceedings subject to a specific condition (preliminary proceedings).

In the sixth chapter, I present the general characteristics of arbitration, identifying the procedural basis for the parties' autonomy.

Arbitration is a form of alternative dispute resolution derived from the private autonomy of the parties, in that the arbitral tribunal's award has the same effect as a final court judgment. It is characterized by the fact that the proceedings (hearing) are not public, the time taken to reach a judgment is generally shorter than in proceedings before state courts, the parties can appoint the arbitrators and, in view of the New York Convention, the enforcement of judgments in international cases is relatively quick. *In the second half of Chapter 6,* I explored the relationship with state courts. *One of the main research questions of this thesis is to define the limits of party autonomy.* One such boundary is observed at the entry of state courts. Research question No. 3, which is related to hypothesis 1, also addressed this issue: i.e., to what extent does the entry of state courts into the proceedings limit the autonomy of the parties.

The arbitration tribunal itself decides on its competence, which also means that it prevents the state court from deciding on the question. It is therefore the competence of the arbitral tribunal to determine whether or not a case is subject to arbitration. Under the UNCITRAL Model Law, and thus also under the Hungarian

[7] VARGA István: A választottbírósági eljárásjog megújulása – új törvény, új szabályzat. Eljárásjogi Szemle 2018/1.2.

Arbitration Act, state courts have a mainly supporting role in arbitration proceedings: they appear when requested by the parties or when the aim is to continue the proceedings.

In the context of the intervention of state courts, I have identified one case where the autonomy of a party may be significantly impaired: in proceedings before a non-institutional arbitral tribunal, in the appointment of an arbitrator by the state court, where the parties have agreed to have a sole arbitrator act in the arbitration proceedings. In this case, if one of the parties does not cooperate in the appointment of the arbitrator, either to delay the proceedings or for other reasons, the arbitrator will be appointed by the state court. Given that there is no legal obligation for the State court to take into account the position of the party willing to actively participate in the appointment of the arbitrator, autonomy is clearly violated.

Unlike the action of state courts to advance the procedure, exceptions can be identified here for the refusal to enforce an arbitral award on the grounds that the subject-matter of the dispute is not subject to arbitration in the state of enforcement or that the arbitral award is contrary to the public policy of that state, and for an application for setting aside the arbitral award, which can also be brought before a state court.

In chapter seven, I present theoretical models of international arbitration, based on Emmanuel Gaillard's well-known approach, in which I analyse the monolocal, the Westphalian and the transnational arbitration law and their practical implications.

Based on the *monolocal* approach, the role of arbitrators is identical to that of state arbitrators sitting in the seat of arbitration. The seat is the forum and the arbitral tribunal is part of it. The arbitral tribunal is part of the state legal system. Under the *multilocal* approach, each state can decide on the arbitral award on the basis of its own law, independently of the decision of the other states. According to the *transnational* view, the jurisdiction of arbitration is not anchored in a national legal system, but in a separate transnational legal order.

The hypothesis of the thesis is that international commercial arbitration is becoming progressively independent of state law. At the time of writing, it can be said that the monolocal approach has been superseded, while the transnational approach still seems a long way off. Nowadays, therefore, the multilocal (Westphalian) approach is considered to be the most acceptable. [8]

A common criticism of the transnational approach, is that it is impossible to take into account all the national jurisdictions in which recognition or enforcement may be sought. Instead, arbitrators must decide on the basis of transnational public policy rules. [9]

From my point of view, we do not observe today a high degree of independence from the legal systems of the States, meaning a shift from a multilocal approach towards a transnational arbitration order, given that the seat of arbitration, the substantive law of the arbitral tribunal and the law of the place of enforcement of the arbitral award are currently of utmost importance for the recognition and enforcement of awards, and there are no indications that a transnational arbitration order will be achieved in the near future.

In chapter eight, after a general description of arbitration agreements, I examined in detail arbitration agreements based on non-explicit consensual agreements: I focused on arbitration agreements concluded in a non-classical form, which were concluded by unilateral declaration of law or which are considered to exist

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8 The acceptance of this latter model is greatly assisted by the fact that the New York Convention is also consistent with it (Article V(a)).

9 Cf.: PAULSSON, Jan: Arbitration in Three Dimensions. LSE Law, Society and Economy Working Papers 2/2010. 2. De Boeck, Michael: Consumer Arbitration and Collective Dispute Resoulution in the European Union. Is Class Arbiration an Alternative? Dissertation tot he degree of Master of Laws.

between parties who were not parties to the arbitration agreement at the time of its conclusion, but who subsequently became parties to it.

A prerequisite for arbitration is that the parties, by virtue of their autonomy, authorize the arbitral tribunal by agreement to decide their dispute. It also derives from the private autonomy of the parties that, in addition to the identity of the arbitrators, they may also determine certain rules of procedure.

The basic question of this chapter is *whether the parties' autonomy is violated if they become parties to the arbitration proceedings without having previously - and directly - concluded an arbitration agreement.*

The *US Second Circuit* in *Thomson CSF S.A. v. American Arbitration Association*[10] identified five situations in which a non-signatory party to a contract may be bound by an arbitration agreement. These *were 1) Incorporation by reference 2) Assumption 3) Agency 4) Veil piercing* and *5) Estoppel.* In addition, I have examined the possibilities of the *assignment* of a contract containing an arbitration agreement and the issue of *succession* under company law.

In all the cases presented in this chapter, the courts' concern was the same: *to prevent the parties to the agreements from being released from their obligations, while respecting the autonomy of the parties, and to exclude the parties who were not really parties to the arbitration proceedings.*

In chapter nine, I examined the questions of the parties' discretion in relation to the rules of arbitration and the determination of the applicable law.

The Model Law and the Hungarian Arbitration Act provide for the possibility for the parties to determine the rules of the procedure at two levels: on the one hand, it gives the parties the right to determine the rules of the procedure and, on the other hand, it provides, as a supplementary rule, that if the parties do not exercise their right to determine the procedure according to their own rules, the arbitral tribunal shall determine the missing rules to the extent necessary.

In the chapter I reviewed the Hungarian Arbitration Act, which is based on the Model Law, and set out how the parties may determine:

i. the law governing the procedure and the arbitration agreement,
ii. the place of the proceedings,
iii. the language of the proceedings,
iv. the number of arbitrators and the constitution of the arbitral tribunal,
v. supplement/amend their claim and defense or agree to limit this right,
vi. decide whether or not to hold a hearing,
vii. decide whether the proceedings shall be closed or open to the public,
viii. may apply to the State court for the taking of evidence,
ix. enter into a settlement and request its entry into the award.

The parties' choice of law may take place in two different ways: they may determine the law applicable to the arbitration agreement, the substantive law applicable to the arbitral tribunal proceedings, and they may agree on the applicable procedural rules, which may be, for example, the rules of procedure of an institutional arbitral tribunal.

[10] Thomson CSF S. A. v. American Arbitration Association 17 J. Int. Arb. 19. Cited by: Mauro RUBINO-SAMMARTANO: International Arbitration. Law and Practice. Third Edition. Juris. Huntington, New York. 2014. 238.

Once the parties have determined the applicable law, the arbitral tribunal shall not be entitled to derogate from it. If the parties have not decided on the applicable law, the arbitral tribunal will determine it on the basis of the rules of private international law it considers applicable. This means that the arbitral tribunal will determine the applicable law according to the conflict of laws rules of the country whose law it considers applicable in the circumstances of the case. I briefly described in this chapter also the possibility of ruling under the lex mercatoria and ex aequo et bono rules.

Chapter ten focuses on the determination of the law governing the arbitration agreement and the related international case law.

In accordance with the principle of separability, the parties may choose a law other than the law governing the main contract to govern their arbitration agreement. The determination of the applicable law is the most important point in the initiation of international commercial arbitration proceedings, where the parties choose the applicable law, or, failing that, the court determines the applicable law according to the conflict of laws rules. According to international practice, two connecting principles 'compete' for the judicial determination of the law governing the arbitration agreement: the *lex contractus*, the law applicable to the main contract, and the *lex loci arbitri*, the law of the place of arbitration.

In this chapter, I briefly presented the relevant Hungarian legislation, comparing it with the relevant parts of the Swiss Private International Law Act, described some of the well-known international case law on the determination of the law governing arbitration agreements, and examined how the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards deals with the issue.

In chapter eleven, I turned to the challenges for autonomy in determining the applicable language. The definition of the language of the arbitral proceedings determines the language used in the proceedings, including the language of negotiations, hearings, submissions and the arbitral tribunal's decision and communications. In disputes involving parties of different nationalities and cultural backgrounds, it is crucial to determine the proper language in which to present their claims and defenses. If the parties cannot agree on this or simply leave the issue open, the language applicable to the proceedings will be determined by the arbitral tribunal. While the choice of language by the parties is usually the result of a compromise, the arbitral tribunal will decide on the basis of the circumstances of the case. In this chapter, I have analysed the scope of the arbitral tribunal's discretion by presenting case law and reviewing the possibilities for invoking the grounds for refusal of recognition and enforcement in Article V of the New York Convention.

In chapter twelve, I set out to examine whether the joint adjudication of cases, in particular in the joinder of parties, does not infringe the parties' autonomy and freedom of choice of arbitrator, and the confidentiality of the proceedings. It can be concluded that, contrary to the practice of the state courts, consolidation and joinder of cases in arbitration proceedings is only possible if the parties have given their unanimous consent. This is necessary because, as explained above, the original arbitration agreement typically provides for a dispute between two parties.[11] International treaties generally do not explicitly address the issue of joinder, because if the parties do not unanimously agree to joinder, the arbitral tribunal has no power to order joinder. This procedural mode is a consequence of the procedural autonomy of the parties. [12]

In this chapter, I have analysed in detail the exercise of the right of the parties to appoint the arbitrators. The right to appoint an arbitrator is one of the cornerstones of arbitration and cannot be withdrawn as a general rule. At the same time, another principle has emerged in this complex issue: *the equality of the parties*. The right to equality and private autonomy in the appointment of arbitrators were therefore weighed against

[11] MISTELIS Loukas: A. Concise International Arbitration. Wolters Kluwer Law & Business 2010. ISBN: 9789041159687. 443.

[12] BORN Gary B.: International Commercial Arbitration. Volume I. Wolters Kluwer Law & Business. 2009. 2537.

each other. However, the law of the various states and the practice of institutional arbitration courts are not entirely consistent on this issue.

In the last chapter of the thesis, I outlined the *internal limits of autonomy*, the subjective limits of arbitrability, which include the inability of the parties to conclude a contract or to have legal capacity and capacity to act in a dispute, and the *external limits of autonomy*, the objective limitations of arbitrability, which refer to whether the case can be decided by arbitration, whether it is not subject to the exclusion of arbitration. The third group consists of other external limitations: compliance with imperative rules and public policy requirements, as well as cases of intervention by state courts and the arbitral tribunal's own discretion, which are not direct limits to the parties' autonomy but may nevertheless have an impact on it.

II. DESCRIPTION OF THE RESEARCH METHOD, DEFINITION OF THE RESEARCH QUESTION, HYPOTHESISES

In order to achieve my research objectives, I used the following instruments as research methods:

1. secondary data collection (textbooks, journals, legislation, analyses, publications, etc.);
2. the use of primary and secondary sources of data (data and information collection from libraries and the Internet);

In the secondary data collection, I used both national and international sources of literature in the relevant discipline. As a result, the main body of my thesis consists of analyses based on legal texts.

The research method focuses on the analysis of primary and secondary sources of data and documents, the evaluation of available research results, further research on the respective conceptual levels and the search for answers to the hypotheses developed. The method of comparison of laws was also used several times in the thesis, whereby I compared the rules of certain states/institutional arbitration tribunals with Hungarian law and analysed the reasoning of awards in the field of international commercial arbitration.

HYPOTHESES OF THE DOCTORAL THESIS

Hypothesis 1

The extension of the scope of party autonomy is a general trend, but there are certain limits to this extension. (H1)

Hypothesis 2

International commercial arbitration is becoming progressively independent of state law. (H2)

1.1. Research questions for PhD research

Research questions related to Hypothesis 1

1. Arbitration is based on the contractual autonomy of the parties. Is there an observable dissolution of pacta sunt servanda?
2. Which procedural rules of arbitration may be determined by the parties and, if any, by the arbitral tribunal?
3. Is the arbitral tribunal entitled to deviate from the parties' agreement in certain circumstances?
4. What are the identifiable limits to the parties' autonomy?

Research question related to Hypothesis 2

1. Is arbitration moving away from a multilocal approach towards a transnational order?

III. BRIEF SUMMARY OF THE RESEARCH RESULTS AND THE POTENTIAL APPLICATIONS

H1 HYPOTHESIS	**The extension of the scope of party autonomy is a general trend, but there are certain limits to this extension. (H1)**

Research question 1.

Arbitration is based on the contractual autonomy of the parties. Is there an observable dissolution of pacta sunt servanda?

The findings are:

A *pro-arbitration* trend is observed in both international and domestic arbitration:

1. The **principle of validation principle** (also known as *in favorem validitatis*) refers to the pursuit of the validity of the arbitration agreement. In the following cases, the pursuit of this principle was common in the proceedings of the (arbitral) courts.
    a. In *ICC Case No. 4667*, the court decided that an Italian company was bound by a contract executed by its commercial director, even though the commercial director did not have the authority to sign it. On the basis of the reasoning, the other contracting party was entitled to presume that the commercial director had the necessary authority to sign the contract, given that the agreement had been reviewed jointly in the presence of the company's CEO and commercial director.
    b. *Sulamérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A*: the parties had chosen Brazilian law as the law applicable to the main contract between them, but the arbitration clause specified London as the place of arbitration. When the dispute arose, the English court had to rule on the validity of the arbitration agreement. The arbitration agreement would have been invalid under the lex contractus principle, but was valid under favor validitatis - the English court accepted it as valid.
2. The **principle of favor validitatis** appears in the Hungarian Private International Law Act: Private International Law Act § 52 (4) An arbitration agreement shall not be considered invalid on formal grounds if any of the rights specified under this § or the formal requirements under the law of the forum state are met.
3. **The assessment of arbitration clauses based on non-explicit consensual agreements** also supports the pro-arbitration trend.
4. There is a **tendency towards a dissolution of the written form**. This is also supported by Article 8(3) of the Hungarian Arbitration Act: an arbitration agreement concluded in writing shall be deemed to include an agreement concluded by electronic communication without an electronic signature, if the information contained in the electronic communication is accessible to the other party and can be referred to later.

In my view, the principle of pacta sunt servanda (*agreements must be honoured*) has not been resolved, but the way arbitration agreements are assessed is adapted to the challenges of the times. Arbitration courts seek to ensure the validity of arbitration agreements in order to guarantee the autonomy of the parties.

Research question 2.

Which procedural rules of arbitration may be determined by the parties (and, if any) which by the arbitral tribunal?

Findings:

1. **First,** it can be stated that the parties have the right to determine the rules of procedure:
   i. they may decide to make the initiation of arbitration subject to the fulfilment of a prior condition (pre-arbitration mediation)
   ii. decide to conduct the proceedings before an institutional arbitral tribunal (autonomy only applies here in the dispositive provisions of the procedural rules)
   iii. may decide to proceed before an ad hoc arbitral tribunal
   iv. decide on the appointment of arbitrators, determine how arbitrators are to be appointed in the event of a dispute and decide on the termination of the arbitrators' mandate;
   v. decide on the place of arbitration (meaning not only the location but also the underlying applicable law),
   vi. decide on the rules of procedure to be applied by the arbitrators;
      - decide on the rules of notification;
      - decide on the acceptability of amendments and additions to the claim;
      - decide whether to request a hearing;
      - decide whether the proceedings are to be public or closed;
      - either party may decide to apply to the state court for the taking of evidence;
      - decide whether to enter into a settlement;
      - decide how to assess the party's omission;
      - decide whether to conduct expert evidence;
      - decide how the arbitral tribunal will make its decision (by majority vote or otherwise)
   vii. decide on the applicable law;
   viii. decide on the language of the proceedings;
   ix. decide on the termination of the proceedings.

2. In the **second** instance, where the parties have not agreed on the rules of arbitration, no institutional arbitration rules have been agreed and the applicable law does not regulate the matter, the arbitral tribunal shall determine them, taking into account the preferences of the parties in its decision.

This can be derived from the provisions of the Hungarian Arbitration Act as follows:

- Article 3(3) of the Hungarian Arbitration Act states that the provisions of the Act shall be interpreted in the light of the UNCITRAL Model Law and the UNCITRAL Explanatory Notes thereto;
- the commentary to the Model Law cited in paragraph 9.2 explains that arbitrators shall adopt rules of procedure that are "*familiar or at least acceptable to the parties*".

Research question 3.

Is the arbitral tribunal entitled to depart from the parties' agreement in certain circumstances?

Findings:

The arbitral tribunal is not entitled to deviate from the parties' agreement.

1. Under Article V(1)(d) of the New York Convention, 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 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

   Two of the cases examined in the thesis are highlighted in this context:

i. CEEG v. Lumos: the arbitral tribunal may not decide to use a language other than the language of proceedings determined by the parties and is not entitled to give notice in a language other than the language determined by the parties. The 10th US Circuit Court pointed out that the defendant's notice in Chinese was not reasonable in light of the fact that the parties had previously communicated only in English, and further explained that the language choice provisions of the first Agreement governed the sales contract, given that the Agreement, as the main contract, served as a umbrella to set forth the terms of the parties' business relationship. The district court denied the request for recognition and enforcement of the arbitration award.

ii. Government of UK v. Boeing Co.: the court may not order consolidation of cases in order to promote its own economic considerations and expeditiousness of proceedings against the arbitration agreement.

   On the latter point, it should be noted that, under the Hungarian Arbitration Act, at the request of either party, the arbitral tribunal shall inform any person who has a legal interest in intervening in the proceedings to promote the success of the party with the same interest. There is no right of appeal against a decision of the arbitral council to grant intervention (Article 37 of the Arbitration Act).

   It should be noted that the Hungarian Arbitration Act does not require the agreement of the parties in this regard and, even if the other party objects, there is no obstacle to allowing intervention, which as I understand it is a limitation on the autonomy of the parties.

Research question 4.

What are the identifiable limits to party autonomy?

Findings:

1. The limits to autonomy may be identified as set out in (i) to (v) below.

i. Subjective and Objective Arbitrability Limits
ii. Imperative rules and public policy

There is no explicit rule as to what is considered an imperative rule. The court has a wide discretion in setting aside an arbitral award or in recognising and enforcing a foreign arbitral award, which creates uncertainty for the parties and also limits their autonomy.

Public policy protects the fundamental values and moral standards of the law of the forum. In my view, this is a narrower and more predictable scope than the scope of the imperative rules.

In my view, the maintenance of both imperative and public policy rules is justified in view of the fact that it prevents socially/morally inappropriate awards from being enforced, while maintaining the integrity of arbitration.

iii. State courts' intervention (under the Hungarian Arbitration Law)

a. The function of the state court: *assisting* and *controlling* function. State courts may intervene in the following cases (i) to (v).

(i.) appointment of arbitrators in the absence of an agreement (unless otherwise provided by the rules of an institutional arbitration tribunal)
In a proceeding before a non-institutional arbitral tribunal, with respect to the appointment of an arbitrator, if the parties have agreed to a single arbitrator procedure, but one of the parties does not cooperate in the appointment of the arbitrator and the state court therefore appoints the acting arbitrator, the autonomy of the party actively cooperating in the appointment of the arbitrator is violated, given that the state court is not required by any law to take into account the views of that party in the appointment of the arbitrator. [6.3. - 6.7.]

(ii.) decision on a request for the removal of an arbitrator if the arbitral tribunal has previously refused it;

(iii.) determine the termination of the arbitrator's appointment upon the request of a party;

(iv.) granting legal assistance and taking interim and protective measures;

(v.) setting aside of an arbitral award.

iv. Discretionary powers of the arbitral tribunal (under the Hungarian Arbitration Act)

a. The arbitral tribunal may, in its discretion, decide on the following matters.

(i.) decide on its competence (Hungarian Arbitration Act §17)

(ii.) decide on the admissibility, relevance and weight of evidence (Article 30 of the Hungarian Arbitration Act)

(iii.) decide on the authorisation of intervention (Hungarian Arbitration Act, Article 37)

(iv.) decision on the admissibility of a rehearing (Hungarian Arbitration Act, Article 50)

(v.) modify, suspend and revoke any interim measure or preliminary measure taken by it (Hungarian Arbitration Act, *Article 22)*

(vi.) the arbitral tribunal may, by way of substitution, determine any procedural rule not previously agreed by the parties.

v. Ensuring equality of the parties

a. In arbitration proceedings, the equality of the parties shall be ensured along the following two principles.

(i.) all parties shall be treated equally - this means that no party shall be treated in a material or procedural manner that is more favourable to any party

(ii.) all parties must be given the opportunity to present their case.

EVALUATION OF HYPOTHESIS H1

1. **The increase in the scope of party autonomy** can be observed, as evidenced by the use of the pro arbitration approach / validation principle, which is widespread in international arbitration and is also reflected in Hungarian Act on Private International Law.

2. Party autonomy is measured by
   - who can determine the rules of the procedure and according to which rules;
   - whether the arbitral tribunal is entitled to deviate from the parties' agreement;
   - what subjective and objective arbitrability limits are set by the applicable law / the law of the country of arbitration;
   - what imperative and public policy rules must be complied with;
   - under what conditions state courts may intervene in the proceedings;
   - the degree of discretion granted to the arbitral tribunal by the Rules of Procedure/applicable law/law of the place of arbitration.

3. There are necessary and unnecessary limits to the autonomy of the parties:

i. Considered as a **necessary limits** based on research:
ii. subjective arbitrability
iii. objective arbitrability in certain categories of cases
iv. the protection of public policy and imperative rules
v. the assisting and supervisory function of the state courts
vi. the arbitral tribunal's discretion as to its competence and the assessment of evidence
vii. ensuring equality of the parties.

Based on the research, I have identified the following ***as unnecessary limits***, that adversely affect the autonomy of the parties:

i. the exclusion of consumers from the arbitration process - as an objective arbitrability;
ii. the arbitral tribunal's decision to allow intervention without or even despite the parties' agreement;
iii. the withdrawal of interim measures/preliminary injunctions without the consent and prior notice of the parties, on its own initiative.

On the basis of the doctoral research, I have found that there is a trend towards an expansion of the scope of autonomy, but that this expansion is constrained by the necessary/unnecessary limits discussed above.

H2 HYPOTHESIS	**International commercial arbitration is becoming progressively independent of state law. (H2)**

Research question:

Is arbitration moving away from a multilocal approach towards a transnational order?

The findings are:

The arbitration is successful if the award is enforceable.

1. Under the New York Convention, the country in which enforcement is requested may examine whether the law of that country provides that the case is arbitrable (objective arbitrability limit) or whether recognition or enforcement of the decision would be contrary to the public policy of that country (Article 5.2(a) and (b))

2. Accordingly, the State of the seat of arbitration and the State in which enforcement is sought have a wide margin of interpretation of the law: the court of the State of enforcement may consider whether the legal subject-matter of the award to be enforced is subject to an objective arbitrability limit.

The law of the seat of arbitration and of the place of enforcement of the arbitral award, with regard to the provisions of the New York Convention, fundamentally determines the enforceability of the arbitral award.

Examples against the movement towards a transnational legal order

1. In the European Union there are very strict conditions for consumer arbitration, so that an arbitration award made in a non-EU country that does not comply with the strict consumer protection rules required in the EU may become unenforceable in the EU. According to Article 1(3) of the Arbitration Act, no arbitration proceedings may be initiated in disputes arising out of consumer contracts.

2. According to the provisions of the Hungarian Arbitration Act, the person appointed by the parties may not be an arbitrator in the cases provided for in Article 12(7). Such cases include, inter alia: if he/she is under the age of twenty-four, if he/she has been prohibited by a final court judgment from public office, if he/she has been sentenced by a final court judgment to imprisonment and is not exempt from the disadvantages of a criminal record, if he/she is subject to custodial care or supported decision-making affecting his/her capacity to act.
   In accordance with the New York Convention Recognition and enforcement of the award may be refused, if 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.

EVALUATION OF THE H2 HYPOTHESIS

In conclusion, the transnational legal order goes beyond the limits of current understanding. Today, there is no great degree of independence from the legal systems of states - by which I mean a shift from a multilateral approach towards a transnational arbitration legal order - given that the place of arbitration and the law of the place of enforcement of the arbitral award are currently of extreme importance for the recognition and enforcement of awards, and there are indications that a transnational arbitration legal order will not be achieved in the near future.

POTENTIAL APPLICATIONS FOR THE SCIENTIFIC RESULTS

The potential of the scientific applications of the thesis summarised above in promoting the internal development of the discipline is to be hoped for. In addition to the theoretical premises and questions, the thesis also focuses on practical aspects: in the pages of the thesis nearly forty cases have been reviewed, from which the conclusions and implications may also be useful for practitioners.

IV. LIST OF PUBLICATIONS ON THE RESEARCH TOPIC

1. **Bencsik Imola: KERESETHALMAZAT VS. SZABAD BÍRÓVÁLASZTÁS JOGA: Pertársaság a választottbírósági eljárásban az új polgári perrendtartás és az új választottbíráskodásról szóló törvény rendszerében.**
IUSTUM AEQUUM SALUTARE 15 pp. 145-178., 34 p. (2019)

   Joinder of Parties vs. Arbitrator Selection

   How Party Equality may be Ensured in the Process of Designating Arbitrators in International Commercial Multiparty Arbitrations in the System of the new Hungarian Civil Procedure Code and the new Law on Arbitration

   Arbitration could be described as an alternative dispute resolution procedure based on an agreement between the parties. According to the definition of Rendfern and Hunter's, the party autonomy determining the procedure and providing entitlement to assess the dispute. The parties may determine certain rules of the procedure by the virtue of their contractual freedom, but their freedom is not unlimited: besides the mandatory procedural rules and the international conventions, ensuring the party equality also impact on the procedure.

   Nowadays a business project rarely involves only a claimant and a defendant: the international transactions and commercial disputes increasingly involve multiple parties. Since arbitration is basically bilateral agreement, it is worth examining that what kind of procedural issues may arise relating the appointment of the arbitrators if three or more parties involved in the procedure.

   This study seeks to ascertain how can be ensured the party equality relating the appointment of the arbitrators in multi-party disputes without prejudice the principles of the procedure, the parties' rights and the rules of arbitration.

2. **Bencsik Imola: A VÁLASZTOTTBÍRÓSÁGI MEGÁLLAPODÁS A FELEK RENDELKEZÉSI JOGÁNAK TÜKRÉBEN: Különös tekintettel a megállapodásban nem részes felekre.**
IUSTUM AEQUUM SALUTARE 16 pp. 101-115., 16 p. (2020)

   The Extension of the Arbitration Agreement to Non-Signatories in International Arbitration Disputes

   Arbitration is an alternative dispute resolution procedure based on an agreement between the parties. The aim of the study is to analyze the principle of party autonomy, paying particular attention to the consent to arbitration with a reduced consensual character. Due to the complexity of the contractual relations of the parties, arbitration disputes often involve third parties. An agreement between the parties is a prerequisite for arbitration, but in some cases the arbitration agreement may extended to third parties who were not formal signatories of the arbitration agreement.

   Based on the judgement of the Thomson CS.F. S.A. v. American Arbitration Association case, the study examines the legal theories to the issue including incorporated by reference, assumption, agency, veil piercing/alter ego and estoppel and provides an overview of the issue of the assignment of an arbitration agreement and the question of legal succession in this matter.

3. **Bencsik Imola: A felek autonómiájának történelmi előzményei és korlátai a hazai és a nemzetközi kereskedelmi választottbírósági eljárásban**
JOGTUDOMÁNYI KÖZLÖNY LXXV. pp. 443-459., 17 p. (2020)

Arbitration could be described as an alternative dispute resolution procedure based on an agreement between the parties. The arbitral award has final and binding effect on the rights and obligations of the parties. This study examines the historical background, content and limits of the parties' autonomy. In addition, the main purpose of the study is to examine in detail the issue of arbitrability and to provide a comprehensive overview of the forms of the parties' autonomy, including the internal and external limits, especially the contractual limits, the imperative rules, the public order and the intervention of state courts.

4. **Bencsik Imola: MEDIÁCIÓ ÉS VÁLASZTOTTBÍRÁSKODÁS. A többszintű vitarendezési klauzulák érvényesíthetősége a nemzetközi kereskedelmi eljárásokban.**
Glossa Iuridica X. évfolyam (2023), 5-6. szám. 164-194.

Mediation and Arbitration. The enforceability of multi-tiered dispute resolution clauses in international commercial arbitration proceedings

Alternative dispute resolution procedures are popular topics in international law, and due to the adoption of the 2019 Singapore Mediation Convention and the unifying work of the European Union and UNCITRAL, mediation has received even more attention. In this study we undertook to examine: what advantages and possible disadvantages can bring the application of multi-step mediation and arbitration clauses, and how possible to enforce the pre-litigation provisions contained in them. Examining the international judicial practice, we present four cases in which the courts had to decide whether the multi-tiered dispute resolution clauses are binding on the parties, or more specifically: can these ADR-first clauses constitute obstacles to the initiation of arbitration proceedings?

5. **Bencsik Imola: A választottbírósági megállapodásra irányadó jog meghatározása a magyar jogszabályok és a nemzetközi trendek tükrében.**
ARS BONI XI. évfolyam 2023/3. szám 3-21.

Determination of the law applicable to the arbitration agreement in the light of Hungarian legislation and international trends

Separability of the arbitration agreement from the contract into which it is incorporated is a fundamental aspect of international commercial arbitration. In accordance with the principle of separability, the parties may choose a different law for their arbitration agreement than the law governing the main contract. Determining the applicable law is the most important point in the initiation of international commercial arbitration proceedings: in the case of a choice of law, the parties, otherwise the court determines the applicable law according to the conflict of law rules. Based on international practice, two connecting principles 'compete' with each other in the judicial determination of the law governing the arbitration agreement: the lex contractus, i.e., the law applicable to the main contract, and the lex loci arbitri, i.e., the law of the place of arbitration.

In the study, we briefly present the relevant Hungarian legislation, comparing it with the Swiss Private International Law Act, describe some of the more well-known international legal cases close connection with the law governing the arbitration agreements, and examine how the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards deals with the issue.

6. **Bencsik Imola: Historical background and limitations of the autonomy of the parties in domestic and international commercial arbitration.**
In: Bándi, Gyula; Pogácsás, Anett (szerk.) Variációk jogi témákra: Válogatott doktorandusz tanulmányok. Budapest, Magyarország. Pázmány Press (2023) 198 p. pp. 163-182.

   Arbitration is the oldest form of dispute resolution that has evolved with societies and has become the solution to today's complex legal and business conflicts. Progress has not stopped: with the flexibility and fluency of the arbitration procedure and the high level of theoretical and practical knowledge of arbitrators, arbitration has become a competitive alternative to public justice. The purpose of the study is to provide an insight into the historical antecedents of the parties' right of disposal and its interpretation according to each age.

7. **Bencsik Imola: A többlépcsős alternatív vitarendezési klauzulák érvényesíthetőségének gyakorlati megközelítése**
Doktori Műhelytanulmányok – Doctoral Working Papers. Szerk: Dr. habil Bartkó Róbert PhD. UNIVERSITAS – GYŐR Nonprofit Kft., Győr, 2024. 92-108.

   A practical approach to the enforceability of multi-tiered alternative dispute resolution clauses

   Alternative dispute resolution (ADR) is a popular subject in the international legal landscape, of which mediation has recently gained prominence as a result of the 2019 Singapore Mediation Convention and the unifying work of the European Union and UNCITRAL. In this paper, we describe - with a specific focus on practice - the advantages and possible disadvantages of using multi-step mediation and arbitration clauses and the extent to which it is possible to enforce them. In the cases presented, ranging from the landmark decision of Walford v Miles in 1992 to the more recent decision of Kajima Construction Europe (UK) Ltd v Children's Ark Partnerships Ltd in 2023, courts have had to decide whether the parts of tiered dispute resolution clauses relating to conciliation and/or mediation are binding on the parties, in other words, whether they constitute an impediment to the commencement of arbitration proceedings.

8. **Bencsik Imola: A nyelvi aspektusok relevanciája a nemzetközi kereskedelmi választottbírósági eljárásokban**
Magyar Jog 2024/6., 358-366.

   The relevance of language aspects in international commercial arbitration

   The language of the arbitration proceedings is defined as the language used in the proceedings, including the language of the negotiations, hearings, submissions and the arbitral tribunal's decision and communications. In disputes involving parties of different nationalities and cultural backgrounds, it is crucial to determine the appropriate language in which to present their claims and defences. If the parties cannot agree on this or simply leave the issue open, the language applicable to the proceedings will be determined by the arbitral tribunal. While the choice of language by the parties is usually the result of a compromise, the arbitral tribunal will decide on the basis of the circumstances of the case. This study analyses the scope of the arbitral tribunal's discretion by presenting case law and reviewing the possibilities for invoking the grounds for refusal of recognition and enforcement in Article V of the New York Convention.