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Applicable Law Issues in International Arbitration: Selective Bibliography

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Peace Palace Library, The Hague

Introductory Note
This bibliography has been compiled exclusively from materials available in the Peace Palace Library for the use of the researchers of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law. Originally published in 2021, its bibliographic content will be completed in 2022.

Directors of Research:
Prof. Giuditta Cordero-Moss (University of Oslo)
Prof. Diego Fernández Arroyo (Sciences Po, Paris)

International arbitration has long been the most successful method for settling all kinds of international commercial disputes, and still is – notwithstanding the surrounding criticism – the leading method for settling disputes between foreign investors and the host state. One of the characteristics of international arbitration is that it to a large extent relies on an international or transnational legal framework. The effects of arbitration agreements and of arbitral awards, as well as the role of the courts regarding arbitration agreements and awards, are regulated in international conventions such as the New York or the ICSID Conventions. Furthermore, although there is room for specificities of national law, commercial arbitration acts are largely harmonised especially through the impact of the UNCITRAL Model Law. Similarly, even if arbitral institutions try to distinguish one from each other by providing for some specific tools, the essential content of arbitration rules does not vary. It can be said, consequently, that the transnational framework of arbitration is intended to create to the extent possible an autonomous system of dispute resolution, which can be applied in a uniform way irrespective of the country in which the proceedings take place or the award is sought enforced. The procedural autonomy of arbitration may also have an impact on how arbitral tribunals relate to the substance of the dispute.

As arbitral awards are final and binding, and domestic courts and ICSID annulment committees do not have the power to review them in the merits, arbitral tribunals enjoy a considerable flexibility in selecting and applying the rules of law applicable to the dispute, even though they are constrained to respect the will of the parties. Legal literature has

strongly emphasized that this flexibility creates an expectation of delocalization: both from the procedural and from the substantive point of view, arbitration is described as a method for settling disputes that strives for uniformity on a transnational level and should not be subject to national laws. The autonomy and flexibility of arbitration, however, are not absolute. The international instruments that regulate arbitration either make, in some contexts, reference to national law or call for the application of (general or concrete) international law. Also, they do not cover all aspects of arbitration, thus leaving room for national regulation. Additionally, the restricted role that courts and ICSID ad hoc committees have in arbitration does not completely exclude that national law may have an impact. While court and committee control is not a review in the merits, application of the parameters for validity or enforceability of an award, even where these parameters are harmonised, may depend on national regulation.

Importantly, the definition of what disputes are arbitrable is left to national law. While the scope of arbitrability has been significantly expanded starting from the last two decades of the last century, there are signs now that it may be restricting. The scope of arbitrability may be looked upon as a measure of the trust that the legal system has in arbitration. From another perspective, it may represent the way in which States approach the settlement of international commercial disputes: intending to keep an exclusive power by means of the exclusion of private deciders,or adopting the role of controllers of the regularity of arbitration. As far as investment arbitration is specifically concerned, it is well known that States' attitudes are diverse and may change from time to time. In both cases, States' policy choices may have an impact on applicable law issues.

All the foregoing considerations, succinctly exposed, are the frame for the present topic. On such a basis, it is possible to develop two lists of issues to be individually addressed. The first list deals with the fundamental aspects of the topic. Among the issues included therein, some refer to all types of arbitration, while others are rather specific to either commercial or investment arbitration. The second list responds to the fact that the applicable law is not necessarily unitary. Indeed, according to the principle of severability, a different law may apply to the procedural aspects and to the substantive aspects of the dispute, and within these two categories there are further possibilities for severing the applicable law. Thus, one can wonder to which issues is it appropriate to apply international sources of law, to which issues is it appropriate to apply soft sources of law, to which is it appropriate to apply national sources of law, and to which issues is it appropriate to apply (or to create) transnational standards. Or a combination of these sources? On which basis may this selection be made, and what are its effects on the autonomy of arbitration, on the expectations of the parties and on the credibility and legitimacy of arbitration as an out-of-court judicial system that enjoys enforceability?

Académie de droit international de La Haye
Centre d'étude et de recherche de droit international et de relations internationales
16 août – 3 septembre 2021

Questions de droit applicable dans l'arbitrage international: bibliographie sélective

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Note introductive
Cette bibliographie a été préparée sur la seule base des matériaux de la Bibliothèque du Palais de la Paix à l'usage des chercheurs du Centre d'étude et de recherche de droit international et de relations internationales de l'Académie de droit international de La Haye. L'information bibliographique d'origine, publiée en 2021, a été complétée jusqu'en 2022.

Directeurs de recherche:
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L'arbitrage international est depuis longtemps la méthode la plus efficace pour régler toutes sortes de différends commerciaux internationaux et, malgré les critiques qui l'entourent, il demeure la principale méthode de règlement des différends entre les investisseurs étrangers et l'État hôte. L'une des caractéristiques de l'arbitrage international est qu'il repose dans une large mesure sur un cadre juridique international ou transnational. Les effets des conventions d'arbitrage et des sentences arbitrales, ainsi que le rôle des tribunaux en matière de conventions et de sentences arbitrales, sont régis par des conventions internationales telles que la Convention de New York ou la Convention de Washington. En outre, bien qu'il y ait place pour des spécificités du droit national, les actes d'arbitrage commercial sont largement harmonisés, en particulier grâce à l'impact de la Loi type de la CNUDCI. De même, même si les institutions arbitrales tentent de se distinguer les unes des autres en prévoyant des outils spécifiques, le contenu essentiel des règles d'arbitrage ne varie pas. On peut donc dire que le cadre transnational de l'arbitrage vise à créer, dans la mesure du possible, un système autonome de règlement des différends, qui peut être appliqué de manière uniforme quel que soit le pays dans lequel la procédure se déroule ou la sentence est demandée. L'autonomie procédurale de l'arbitrage peut également avoir une incidence sur la façon dont les tribunaux arbitraux se rapportent au fond du litige.

Les sentences arbitrales étant définitives et contraignantes, et les tribunaux nationaux et les comités d'annulation du CIRDI n'ayant pas le pouvoir de les examiner sur le fond, les tribunaux arbitraux jouissent d'une grande souplesse dans le choix et l'application des règles de droit applicables au litige, même s'ils sont tenus de respecter la volonté des parties. La

littérature juridique a fortement insisté sur le fait que cette souplesse crée une attente de délocalisation : tant du point de vue de la procédure que du point de vue du fond, l'arbitrage est décrit comme une méthode de règlement des différends qui vise l'uniformité au niveau transnational et ne devrait pas être soumise aux lois nationales. L'autonomie et la souplesse de l'arbitrage ne sont cependant pas absolues. Les instruments internationaux qui réglementent l'arbitrage font, dans certains contextes, référence au droit national ou appellent à l'application du droit international (général ou concret). De plus, elles ne couvrent pas tous les aspects de l'arbitrage, ce qui laisse une place à la réglementation nationale. En outre, le rôle restreint que les tribunaux et les comités ad hoc du CIRDI ont dans l'arbitrage n'exclut pas complètement que le droit national puisse avoir un impact. Bien que le contrôle des tribunaux et des comités ne soit pas un examen au fond, l'application des paramètres de validité ou d'exécution d'une sentence, même lorsque ces paramètres sont harmonisés, peut dépendre de la réglementation nationale.

Il est important de noter que la définition de ce qui constitue un litige arbitrable est laissée au droit national. Bien que le champ d'application de l'arbitrabilité ait été considérablement élargi depuis les deux dernières décennies du siècle dernier, certains signes indiquent maintenant qu'il pourrait être restrictif. La portée de l'arbitrabilité peut être considérée comme une mesure de la confiance que le système juridique accorde à l'arbitrage. D'un autre point de vue, elle peut représenter la manière dont les Etats abordent le règlement des différends commerciaux internationaux : vouloir conserver un pouvoir exclusif par l'exclusion des décideurs privés, ou adopter le rôle de contrôleurs de la régularité de l'arbitrage. En ce qui concerne spécifiquement l'arbitrage en matière d'investissement, il est bien connu que les attitudes des États sont diverses et peuvent changer de temps à autre. Dans les deux cas, les choix politiques des États peuvent avoir une incidence sur les questions de droit applicable.

Toutes les considérations qui précèdent, succinctement exposées, constituent le cadre du présent sujet. Sur cette base, il est possible d'établir deux listes de questions à traiter individuellement. La première liste traite des aspects fondamentaux du sujet. Parmi les questions qui y sont abordées, certaines portent sur tous les types d'arbitrage, tandis que d'autres sont plutôt spécifiques à l'arbitrage commercial ou d'investissement. La deuxième liste répond au fait que la loi applicable n'est pas nécessairement unitaire. En effet, selon le principe de la divisibilité, une loi différente peut s'appliquer aux aspects procéduraux et aux aspects de fond du litige, et au sein de ces deux catégories il existe d'autres possibilités de diviser la loi applicable. On peut donc se demander à quelles questions il convient d'appliquer les sources de droit international, à quelles questions il convient d'appliquer les sources de droit non contraignantes, à quelles questions il convient d'appliquer les sources de droit national et à quelles questions il convient d'appliquer (ou de créer) des normes transnationales. Ou une combinaison de ces sources ? Sur quelle base cette sélection peut-elle être faite et quels sont ses effets sur l'autonomie de l'arbitrage, sur les attentes des parties et sur la crédibilité et la légitimité de l'arbitrage en tant que système judiciaire extrajudiciaire et exécutoire ?





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