

The Law Applicable to the Interpretation of Arbitration Agreements Revisited

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International commercial arbitration is often considered as the preferred method of dispute resolution in an international setting, *i.e.* whenever parties from two or more different jurisdictions enter into a contract. The cornerstone of every arbitration is an agreement by the parties to submit future disputes to arbitration and to exclude the jurisdiction of State courts. In most instances, this is done by inserting an arbitration clause into the parties' main agreement. While many contracts contain "boilerplate clauses",¹ parties sometimes opt for more sophisticated arbitration agreements. If this is the case and the parties are not properly advised, it might trigger disputes, for instance when it is unclear whether a particular claim is encompassed by the arbitration clause or which arbitral institution was chosen. In such a case, the arbitration agreement needs to be interpreted just like any other agreement. However, before starting the process of interpretation, another question arises in the international context, namely, under which law the arbitrators or judges should conduct said interpretation. This question is the subject of the present article.

First, it has to be noted that this paper only deals with the law applicable to substantive validity, which encompasses the question of interpreting the arbitration clause. This law can be distinguished from other laws that might be of relevance during the arbitral proceedings. Most importantly, the law governing the substance of the dispute, also called the *lex causae*, is not always the same as the law applicable to the arbitration clause, as will be explained further below. Similarly, the law at the seat of the arbitration (the *lex arbitri*) is governing the conduct of the proceedings but does not necessarily apply to the arbitration clause. The question of objective arbitrability, *i.e.* whether a particular claim is capable of settlement by arbitration, also needs to be assessed by applying one or several distinct law(s). Different laws might be applicable to further aspects of the arbitration, for instance concerning the formal validity of the arbitration agreement and the subjective capacity of the parties involved to conclude said agreement. Finally, establishing the governing law in cases where the arbitration agreement might be extended to a non-signatory of the contract is another disputed question that is not addressed in the present article.

1. Rules on the Law Applicable to the Arbitration Agreement in Different Jurisdictions

When faced with an ambiguous arbitration clause, the first step of the analysis is to ascertain the applicable law. As will be shown in this part, different jurisdictions have developed different concepts to deal with this conflict-of-laws question. While many

¹ "Boilerplate clauses" are standardised clauses that are used in different contracts without being adapted to the circumstances of each case.

aspects of international arbitration are (fully or partially) harmonised in many jurisdictions, due to the influence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) as well as the UNCITRAL Model Law on International Commercial Arbitration (Model Law), this is not fully the case for the applicable law.

A fairly limited number of jurisdictions, such as Switzerland, contain an explicit and general provision on the law governing the arbitration agreement in their arbitration law (see Section 1.c). Other countries have developed a well-established case law on the matter. In jurisdictions where no explicit provisions exist, recourse is often made to the provisions applicable in enforcement proceedings against arbitral awards, most importantly, to the New York Convention. This Convention is largely considered the most important international treaty in the field of arbitration² and has significantly influenced the *status quo*. According to Article V(1)(a) of the New York Convention, recognition and enforcement of the award may be refused if the arbitration “*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.*” According to Article V(1)(a) NYC, the parties of the arbitration are thus able to choose the law applicable to the arbitration agreement explicitly. If no such explicit choice is made – which is often the case in practice –, the law of the country where the award is made is applied. This is understood as being the law of the seat of the arbitration.³ Similar provisions are contained in Article 34(2)(a)(i) and Article 36(1)(a)(i) of the Model Law and have been adopted in a number of Model Law

² Christoph Liebscher, ‘Prelims’, in Reinmar Wolff (ed.), *New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Commentary*, 2nd edn. (Baden-Baden: Beck, 2019) para. 1; Albert van den Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (Deventer, Boston: Kluwer Law and Taxation, 1981) p. 1; Leonardo D. Graffi, ‘Securing Harmonized Effects of Arbitration Agreements Under the New York Convention’ 28 (2006) *Houston Journal of International Law* 663-769, p. 666; Gary Born, *International Commercial Arbitration*, 2nd edn. (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2014) p. 99.

³ *UNCITRAL Secretariat Guide on the NYC* (2016) p. 144; Albert van den Berg, ‘Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards’, in Albert van den Berg (ed.), *50 Years of the New York Convention. ICCA Congress Series No 14* (2009) 649-66, p. 655; Patricia Nacimiento, ‘Art V(1)(a) NYC’, in Nicola Christine Port, Dirk Otto, Patricia Nacimiento, Herbert Kronke (eds.), *Recognition and Enforcement of Foreign Arbitral Awards. A global commentary on the New York Convention* (Alphen aan den Rijn: Wolters Kluwer, 2010) 205-30, p. 224; Stephan Wilske, Todd J. Fox, ‘Art II Abs 3’, in Reinmar Wolff (ed.), *New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Commentary*, 2nd edn. (Baden-Baden: Beck, 2019) para. 234; cf. also Born, *International Commercial Arbitration* p. 499.

jurisdictions such as Germany⁴ and Belgium.⁵ As its name suggests, the New York Convention deals with the recognition and enforcement of arbitral awards. The objective of Article V(1)(a) is to ensure a certain degree of harmonisation among its contracting States. Therefore, applying the rule of Article V(1)(a) is mandated not only at the enforcement stage, but also if a claim is raised before a State court despite there being an arbitration clause⁶ or when a court is asked for assistance prior or during the arbitral proceedings (for instance for the constitution of the arbitral tribunal). The same is true in situations where the arbitral tribunal itself has to decide on the validity of the arbitration agreement by virtue of its *Kompetenz-Kompetenz*.⁷ However, contracting States are free to deviate from this choice-of-law rule and include different rules to ascertain the applicable law outside the enforcement stage.

a. Austria

The Austrian Arbitration Act is silent on the issue of the law governing the arbitration agreement.⁸ When the revised Arbitration Act was introduced in 2006, the question was discussed, but the legislator ultimately and deliberately decided to leave the question open to further developments by case law and literature.⁹ This lack of a rule

⁴ Cf. § 1059(2)(1)(a) German Code of Civil Procedure.

⁵ Cf. Article 1717(3)(a)(i) Belgian Judicial Code.

⁶ Ulrich Haas, 'Art II - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958', in Frank-Bernd Weigand (ed.), *Practitioner's Handbook on International Commercial Arbitration* (Oxford: Oxford University Press, 2002) paras. 61 and 104; Carolyn B. Lamm, Jeremy K. Sharpe, 'Inoperative Arbitration Agreements Under the New York Convention', in Emmanuel Gaillard, Domenico Di Pietro (eds.), *Enforcement of arbitration agreements and international arbitral awards. The New York Convention in practice* (London: Cameron May, 2008) 297-322, p. 302; Reinmar Wolff, 'Article II Abs 1 u 2', in Reinmar Wolff (ed.), *New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. Commentary*, 2nd edn. (Baden-Baden: Beck, 2019) para. 42; cf. also Born, *International Commercial Arbitration* pp. 494, 499 and 566; Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn. (London: Sweet & Maxwell, 2007) para. 299; cf. Swiss Bundesgericht [Federal Court] 21.03.1995, 5C.215/1994/lit, ASA BULL 1996, 255.

⁷ Jean-François Poudret, 'Le droit applicable à la convention d'arbitrage', in Marc Blessing (ed.), *The Arbitration Agreement - Its Multifold Critical Aspects. ASA Special Series No 8* (1994) 23-31, p. 25; Piero Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause', in Albert van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards. 40 Years of Application of the New York Convention. ICCA Congress Series No 9* (1999) 197-203, pp. 200 and 203.

⁸ Cf. Paul Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts. Mit Erläuterungen von Paul Oberhammer. Veröffentlichungen des Ludwig-Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen XXVII* (Wien: Manz, 2002) p. 39.

⁹ Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts*, p. 75.

has led to different opinions on how to determine the law applicable to the arbitration agreement: First, it is undisputed that parties can explicitly agree on the governing law.¹⁰ It is however highly disputed if the choice of law of the substantive agreement constitutes an implicit choice of law for the arbitration clause or whether the arbitral seat should be seen as an indication of such choice. In a few recent decisions, the Austrian Supreme Court has applied the law of the main agreement to the arbitration clause.¹¹ In 2019, one chamber of the Supreme Court held that the question is “particularly disputed” (“besonders umstritten”) on an international level and should thus be assessed on a case-by-case basis.¹² In the case at hand, the Supreme Court held that a literal interpretation of the choice-of-law clause led to the conclusion that the arbitration clause was encompassed by the main agreement. However, the court did not explain the reasons for such an interpretation.¹³ While part of the Austrian literature agrees with the Austrian Supreme Court’s opinion,¹⁴ others argue that the law of the main agreement does not necessarily extend to the arbitration clause and instead prefer to rely on the law of the seat.¹⁵ In any case, if there is no implicit choice of law, Austrian courts apply the law of the place where the award will be rendered,

¹⁰ Cf. Hans Walter Fasching, *Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht. Ein Handbuch* (Wien: Manz, 1973) p. 32; Christian Hausmaninger, ‘§ 581 ZPO’, in Hans Walter Fasching, Andreas Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen IV/2*, 3rd edn. (Wien: Manz, 2016) para. 275; Christian Koller, ‘Die Schiedsvereinbarung’, in Christoph Liebscher, Paul Oberhammer, Walter H. Rechberger (eds.), *Schiedsverfahrensrecht I*. (Wien: Verlag Österreich, 2012) para. 3/60.

¹¹ Austrian OGH [Supreme Court] 15.05.2019, 18 OCg 6/18h; OGH 19.12.2018, 3 Ob 153/18y; OGH 30.03.2009, 7 Ob 266/08f; OGH 08.03.1961, 1 Ob 98/61. But see OGH 22.09.1994, 2 Ob 566/94, where the Austrian Supreme Court relied on the seat.

¹² Austrian OGH 19.12.2018, 3 Ob 153/18y.

¹³ Cf. Katharina Plavec, ‘Neues zum auf die Schiedsvereinbarung anwendbaren Recht’ (2019) *ecolex* 330-331, p. 331.

¹⁴ For example Dietmar Czernich, ‘The Law Applicable to the Arbitration Agreement’ (2015) *AYIA* 73-86, pp. 79 et seq.; Hausmaninger, ‘§ 581 ZPO’, para. 276; Nathalie Voser, Dorothee Schramm, Florian Haugeneder, ‘Schiedsverfahren und anwendbares Recht’, in Hellwig Torggler (ed.), *Praxishandbuch Schiedsgerichtsbarkeit*, 2nd edn. (Wien: Verlag Österreich, 2017) para. 806, point out that the *lex causae* is often applied to the arbitration agreement if the chosen substantive law is identical to the law at the seat of the arbitration.

¹⁵ Walter H. Rechberger, ‘Evergreen: Gültigkeit der Schiedsklausel’, in *FS Schlosser = Grenzüberschreitungen. Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit* (Tübingen: Mohr Siebeck, 2005) 733-46, pp. 733 et seq.; Hubertus Schumacher, ‘Unbestimmte Schiedsvereinbarungen und Dissens: Anknüpfungsfragen bei internationalen Sachverhalten in der Judikatur des OGH’ (2005) *SchiedsVZ* 54-56, p. 54; Gerold Zeiler, *Schiedsverfahren. §§ 577 - 618 ZPO idF des SchiedsRÄG 2013*, 2nd edn. (Wien: NWV, 2014) § 581 ZPO para. 125. Koller, ‘Die Schiedsvereinbarung’, para. 3/63, wants to rely on the hypothetical will of the parties which will often lead to the arbitration agreement being valid.

i.e. the law at the seat of arbitration. This is in line with the New York Convention as well as supported by literature.¹⁶

b. Germany

In contrast to Austria, German law has incorporated a provision similar to Article V(1)(a) New York Convention for the setting aside procedure in § 1059(2)(1)(a) German Code of Civil Procedure. According to this provision, an award may be set aside if “*the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law.*” A requirement for the applicability of this provision is that the seat of the arbitration is in Germany (see § 1025 German Code of Civil Procedure); it therefore does not apply if the seat has not yet been determined. § 1061 German Code of Civil Procedure makes a direct reference to the New York Convention when an award needs to be enforced in Germany. German law does not contain a provision for the determination of the applicable law before the arbitral award is rendered. According to the prevailing opinion in literature, the rule contained in § 1059(2)(1)(a) German Code of Civil Procedure and Article V(1)(a) New York Convention should however also be applied if a claim is raised before a State court despite there being an arbitration clause¹⁷ and in the arbitral proceedings before the tribunal (provided the seat is in Germany).¹⁸ For the purpose of the tribunal’s *Kompetenz-Kompetenz*, this can be directly deduced from the legislative materials.¹⁹ The materials name the desired consensus

¹⁶ Austrian OGH RS0045375; RS0045112; OGH 17.11.1971, 8 Ob 233/71; OGH 22.09.1994, 2 Ob 566/94; OGH 19.02.2004, 6 Ob 151/03d; OGH 26.01.2005, 7 Ob 314/04h; OGH 24.08.2005, 3 Ob 65/05p; OGH 26.04.2006, 7 Ob 236/05i; OGH 30.03.2009, 7 Ob 266/08f.

¹⁷ Court of Appeal Braunschweig 31.10.2012, 2 U 59/11; Court of Appeal Düsseldorf 15.11.2017, VI-U (Kart) 8/17; Rainer Hausmann, ‘Schiedsvereinbarungen’, in Christoph Reithmann, Dieter Martiny (eds.), *Internationales Vertragsrecht. Das internationale Privatrecht der Schuldverträge*, 8th edn. (Köln: Dr. Otto Schmidt, 2015) para. 8.261; Manja Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* (München: Beck, 1999) p. 116; Inka Hanefeld, Nils Schmidt-Ahrendts, ‘Germany’, in Frank-Bernd Weigand, Antje Baumann (eds.), *Practitioner’s Handbook*, 3rd edn. (Oxford: Oxford University Press, 2019) para. 9.16.

¹⁸ Joachim Münch, ‘§ 1029 dZPO’, in Thomas Rauscher, Wolfgang Krüger (eds.), *Münchener Kommentar zur ZPO. Band 3.*, 5th edn. (München: Beck, 2017) paras. 32 et seq.; Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* p. 46.

¹⁹ BT-Drucks. 13/5274, 43.

of decisions²⁰ as well as the goal of the legislator to have coherent rules for national and international proceedings²¹ as reasons.

Similar to Austria, it is disputed how the law is determined if there is no explicit choice of law by the parties. The opinions mirror those in Austria: While some argue that an implicit choice of law can be based on the substantive law of the main agreement²² others want to apply the law at the seat of arbitration.²³ German case law is not uniform on this issue either: In some instances, German courts have extended the law of the main agreement to the arbitration clause,²⁴ in other cases, they regarded the designation of the seat as an implicit choice of law.²⁵

c. Switzerland

Compared to Austria and Germany, Switzerland has taken a different approach. According to Article 178(2) of the Swiss Federal Act on Private International Law (PIL), “an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the

²⁰ Rainer Hausmann, ‘Internationale Schiedsvereinbarungen’, in J. Staudinger (ed.), *Staudingers Kommentar zum Bürgerlichen Gesetzbuch - Internationales Vertragsrecht 2. Art 11-29 Rom I-VO; Art 46 b, c EGBGB* (Berlin: Sellier - de Gruyter, 2016) para. 449.

²¹ BT-Drucks. 13/5274, 43.

²² Wilske, Fox, ‘Art II Abs 3’, paras. 232 et seq.; Michael Stürner, Christoph Wendelstein, ‘Das Schiedsvereinbarungsstatut bei vertraglichen Streitigkeiten’ (2014) *IPRax* 473-80, p. 477 (due to the objective interests of the parties).

²³ Reinhold Geimer, ‘§ 1032 dZPO’, in Richard Zöllner (ed.), *Zivilprozessordnung*, 33rd edn. (Köln: Dr. Otto Schmidt, 2020) para. 17a; Hausmann, ‘Schiedsvereinbarungen’, para. 8.257; Münch, ‘§ 1029 dZPO’, para. 35; Klaus Peter Berger, ‘Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?’, in Albert van den Berg (ed.), *International Arbitration 2006: Back to Basics? ICCA Congress Series No 13* (2007) 301-34, pp. 318 et seqq.; Nils Schmidt-Ahrendts, Philipp Höttler, ‘Anwendbares Recht bei Schiedsverfahren mit Sitz in Deutschland’ (2011) *SchiedsVZ* 267-75, p. 273; Markus Schulz, Tilman Niedermaier, ‘Unwirksame Schiedsklausel in Franchiseverträgen durch Wahl des Tagungsortes im Ausland?’ (2009) *SchiedsVZ* 196-202, p. 198; Markus S. Rieder, Richard Kreindler, ‘The Arbitration Agreement’, in Richard Kreindler, Reinmar Wolff, Markus S. Rieder (eds.), *Commercial Arbitration in Germany* (Oxford: Oxford University Press, 2016) para. 2.9; Klaus K. Lionnet, Annette A. Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*, 3rd edn. (Stuttgart: Boorberg, 2005) p. 170.

²⁴ German BGH (Supreme Court) 07.01.1971, VII ZR 160/69; BGH 23.04.1998, NJW 1998, 2452; Court of Appeal Schleswig 30.03.2000, 16 SchH 5/99; Court of Appeal Frankfurt 10.05.2012, 26 SchH 11/10; Court of Appeal München 16.08.2017, 34 SchH 14/16; Court of Appeal München 18.06.2018, 34 SchH 7/17.

²⁵ German BGH 28.11.1963, VII ZR 112/62, however, in this case, the Supreme Court stated that this does not necessarily follow in every case; cf. also BGH 12.02.1976, III ZR 42/74; Court of Appeal Hamburg 17.02.1989, 1 U 86/87; Court of Appeal Hamburg 24.01.2003, 11 Sch 06/01; Bavarian Court of Appeal 16.01.2004, 4 Z Sch 22/03.

main contract, or to Swiss law.” This is a clear provision *in favorem validitatis*,²⁶ containing three alternative possibilities to determine the applicable law. Article 178(2) PIL is applied before the arbitral tribunal,²⁷ in setting aside proceedings before Swiss courts²⁸ and when Swiss courts are acting to support the arbitral tribunal.²⁹ Whether the provision also applies when a claim is raised before a State court despite there being an arbitration clause is a matter of dispute.³⁰

Under Swiss law, the parties can first choose the applicable law explicitly.³¹ However, such choice is rarely made in practice.³² Second, an implicit choice of law is possible. The choice of the seat of the tribunal in Switzerland is regarded as such an implicit choice of Swiss law for the arbitration agreement.³³ However, as the seat of the tribunal is in any case one of the alternatives explicitly contained in the provision, this

²⁶ Dieter Gränicher, ‘Art 178 chIPRG’, in Heinrich Honsell, Peter Vogt, Anton K. Schnyder, Stephen V. Berti (eds.), *Basler Kommentar: Internationales Privatrecht*, 3rd edn. (Basel: Helbing Lichtenhahn, 2013) para. 24; Bernhard Berger, Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd edn. (Bern: Stämpfli, 2015) para. 393; Poudret, Besson, *Comparative Law of International Arbitration* para. 300; Pierre-Yves Tschanz, ‘Art 178 chIPRG’, in Andreas Bucher (ed.), *Loi sur le droit international privé (LDIP). Convention de Lugano* (Basel: Helbing & Lichtenhahn, 2011) para. 72; Gabrielle Kaufmann-Kohler, Antonio Rigozzi, *International Arbitration. Law and Practice in Switzerland* (Oxford: Oxford University Press, 2015) para. 3.76; cf. also Swiss BGER (Supreme Court) 19.04.2011, 4A_44/2011; BGER 25.04.2017, 4A_34/2016.

²⁷ Tschanz, ‘Art 178 chIPRG’, para. 14; Gränicher, ‘Art 178 chIPRG’, para. 5; Christoph Müller, Olivier Riske, ‘Article 178 chIPRG’, in Manuel Arroyo (ed.), *Arbitration in Switzerland. The practitioner’s guide*, 2nd edn. (2018) para. 8; Pierre Lalive, Jean-François Poudret, Claude Reymond, ‘Art 178 chIPRG’, in Pierre Lalive, Jean-François Poudret, Claude Reymond (eds.), *Le droit de l’arbitrage interne et international en Suisse* (Lausanne: Payot S.A., 1989) para. 16.

²⁸ Tschanz, ‘Art 178 chIPRG’, para. 15; Gränicher, ‘Art 178 chIPRG’, para. 5; Berger, Kellerhals, *International and Domestic Arbitration in Switzerland* para. 339; Müller, Riske, ‘Article 178 chIPRG’, para. 9.

²⁹ For instance, when a State court orders provisional and conservatory measures (Article 183(3) PIL); when the assistance of State judiciary authorities is necessary for the taking of evidence (Article 184(2) PIL) or if any other judicial assistance by State courts is required (Article 185 PIL): Gränicher, ‘Art 178 chIPRG’, para. 5; Müller, Riske, ‘Article 178 chIPRG’, para. 9.

³⁰ Müller, Riske, ‘Article 178 chIPRG’, para. 9; Gränicher, ‘Art 178 chIPRG’, para. 5; cf. also Berger, Kellerhals, *International and Domestic Arbitration in Switzerland*, paras. 323, 328 and 331.

³¹ Bernardini, ‘Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause’, p. 202; Swiss BGER 08.07.2003, BGE 129 III 675.

³² Müller, Riske, ‘Article 178 chIPRG’, para. 39.

³³ Berger, Kellerhals, *International and Domestic Arbitration in Switzerland* para. 401; Daniel Girsberger, Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives*, 3rd edn. (Zürich: Schulthess, 2016) p. 87.

is just a theoretical point.³⁴ In other words, while Art 178(2) PIL does not answer when an implied choice of law exists,³⁵ this question is less pronounced in Switzerland as a choice of law is only one of the three alternatives to ascertain the governing law: The second choice is to apply the law of the main contract (*lex causae*) even in cases where such law was not explicitly chosen. In the absence of an explicit choice, the *lex causae* is determined objectively,³⁶ *i.e.* according to the rules of law to which the case has the closest connection (Article 178(2) PIL).³⁷ This possibility to ascertain the applicable law based on objective criteria distinguishes Swiss law from other national laws and the New York Convention that allow the applicability of the law of the main agreement only if parties have actively chosen the *lex causae*. The third possibility is the application of Swiss law.³⁸ Swiss law is therefore applicable if the arbitration agreement would be invalid under the other two laws.³⁹ This is the case even if the law leading to the invalidity of the clause was explicitly or implicitly chosen by the parties.⁴⁰ While the wording of Article 178(2) seems to establish no hierarchy,⁴¹ it makes practical sense to follow the above-described order when ascertaining the

³⁴ Girsberger, Voser, *International Arbitration: Comparative and Swiss Perspectives* p. 87.

³⁵ Müller, Riske, 'Article 178 chIPRG', para. 39. Cf. Pierre Karrer, 'The Law Applicable to the Arbitration Agreement' 26 (2014) Singapore Academy of Law Journal 849-73, pp. 855 et seqq.

³⁶ Paul Volken, 'Art 178 chIPRG', in Daniel Girsberger, Anton Heini, et al (eds.), *Zürcher Kommentar zum IPRG. Kommentar zum Bundesgesetz über das internationale Privatrecht (IPRG) vom 18. Dezember 1987*, 2nd edn. (Zürich: Schulthess, 2004) para. 51; Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause', p. 202.

³⁷ Lalive, Poudret, Reymond, 'Art 178 chIPRG', para. 15; Tschanz, 'Art 178 chIPRG', para. 78; Gränicher, 'Art 178 chIPRG', para. 28; Berger, Kellerhals, *International and Domestic Arbitration in Switzerland* para. 403; Girsberger, Voser, *International Arbitration: Comparative and Swiss Perspectives* p. 87; Tarkan Göksu, *Schiedsgerichtsbarkeit* (Zürich/St. Gallen: Dike, 2014) para. 432; Müller, Riske, 'Article 178 chIPRG', para. 42.

³⁸ According to Emmanuel Gaillard, John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) para. 447, Article 178(2) PIL does in fact not contain a "pure" conflict-of-law rule, but simply allows Swiss courts to apply Swiss substantive law.

³⁹ Volken, 'Art 178 chIPRG', para. 52; Berger, Kellerhals, *International and Domestic Arbitration in Switzerland* paras. 395 and 407.

⁴⁰ Gränicher, 'Art 178 chIPRG', para. 29; Müller, Riske, 'Article 178 chIPRG', para. 45.

⁴¹ Tschanz, 'Art 178 chIPRG', para. 72; Gränicher, 'Art 178 chIPRG', para. 24; Kaufmann-Kohler, Rigozzi, *International Arbitration* para. 3.77. According to some, the courts are not bound by any hierarchy when assessing the validity of the arbitration clause: Girsberger, Voser, *International Arbitration: Comparative and Swiss Perspectives* pp. 84 et seq. Cf. also Swiss BGer 07.07.2014, 4A_124/2014; BGer 09.07.2014, 4A_90/2014; BGer 15.09.2015, 4A_136/2015; BGer 25.04.2017, 4A_34/2016.

applicable law.⁴² However, Swiss courts assess the validity according to the law they know best, *i.e.* Swiss law.⁴³

As a result, for an arbitration agreement to be valid under Swiss law, only the liberal requirements of Swiss law have to be met.⁴⁴ Therefore, Article 178(2) PIL can be regarded as very arbitration-friendly⁴⁵ as Swiss law can always be applied if the arbitration agreement would otherwise be invalid.⁴⁶ However, one has to consider that Article 178(2) PIL may be problematic if enforcement proceedings are conducted in another country: If an arbitration agreement is valid under Swiss law (for instance because it is valid according to the law of the main agreement that was determined objectively), enforcement might be refused in another State as the requirements of Article V(1)(a) New York Convention might not be fulfilled (due to a lack of choice of law).⁴⁷ This outcome was deliberately accepted by the Swiss legislator.⁴⁸ A solution to this problem might be to read Article V(1)(a) New York Convention as making reference to the choice-of-law rules of the referenced State which would lead to the applicability of Article 178(2) in its entirety.⁴⁹ However, such an interpretation is

⁴² Berger, Kellerhals, *International and Domestic Arbitration in Switzerland* para. 395; Müller, Riske, 'Article 178 chIPRG', para. 33.

⁴³ Swiss BGer 03.06.2015, 4A_676/2014; see also Kaufmann-Kohler, Rigozzi, *International Arbitration* para. 3.77.

⁴⁴ Preliminary Award on Jurisdiction, ZHK, 25.11.1994, ASA Bull 1996, 303; Swiss BGer 07.08.2001, 4P.124/2001; Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 447.

⁴⁵ Karrer, 'The Law Applicable to the Arbitration Agreement', p. 859; Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 447.

⁴⁶ Girsberger, Voser, *International Arbitration: Comparative and Swiss Perspectives* p. 84. According to Kaufmann-Kohler, Rigozzi, *International Arbitration* para. 3.77, there has been no known case so far where the arbitration agreement was invalid under Swiss law but would have been valid under another law.

⁴⁷ Poudret, 'Le droit applicable à la convention d'arbitrage', p. 30; Müller, Riske, 'Article 178 chIPRG', para. 38; Kaufmann-Kohler, Rigozzi, *International Arbitration* para. 3.78.

⁴⁸ BBl 1983 I 263, 462.

⁴⁹ Gränicher, 'Art 178 chIPRG', para. 25; Müller, Riske, 'Article 178 chIPRG', para. 38; Berger, Kellerhals, *International and Domestic Arbitration in Switzerland* para. 410; Tschanz, 'Art 178 chIPRG', para. 76. According to Christian Koller, *Aufrechnung und Widerklage im Schiedsverfahren. Unter besonderer Berücksichtigung des Schiedsorts Österreich* (Wien: Manz, 2009) p. 78, any potential problems arising in the enforcement stage are at such insufficient to question the Swiss approach as there is no consensus that the arbitrators are indeed under an obligation to render an enforceable award.

against the common understanding of the New York Convention, which is regarded as referring to substantive laws.⁵⁰

In conclusion, Swiss law is certainly more arbitration-friendly than Article V(1)(a) New York Convention and many other national laws – with the notable exception of French law (see Section 1.e below)⁵¹ which does not apply national laws to the arbitration agreement at all. Moreover, under Swiss law, objections based on the material validity of the arbitration agreements are limited,⁵² which might be one reason to explain the popularity of Switzerland as a seat for international arbitrations.

d. England

Another jurisdiction that is of particular interest is England, as the case law of English courts has a big influence also beyond English borders. It has received renewed attention following the *Sulamérica* decision⁵³ and, most recently, the *Enka* case⁵⁴. *Sulamérica* first reinforced a “three-stage enquiry” when determining the law applicable to the arbitration agreement, namely (i) express choice, (ii) implied choice and (iii) closest and most real connection. In the *Sulamérica* case, the main contract was governed by Brazilian law, while the arbitration clause provided for a seat in London. The court implied that applying the law of the main contract is a – rebuttable – presumption. However, it subsequently came to the conclusion that the governing law was English rather than Brazilian law, for two reasons: First, because the parties had chosen England as a seat of the arbitration. This suggested that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the jurisdiction of the arbitrators. Second, the arbitration agreement would have been invalid under Brazilian law. Thus, the court concluded that “*the parties’ express choice of Brazilian law to govern the substantive contract is*” not “*sufficient evidence of an implied choice of Brazilian law to govern the arbitration agreement, because there is at least a serious risk that a choice of Brazilian law would significantly undermine that agreement.*” Following this landmark decision, many

⁵⁰ Cf. Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* pp. 48 et seqq.

⁵¹ Poudret, ‘Le droit applicable à la convention d’arbitrage’, p. 31.

⁵² Berger, Kellerhals, *International and Domestic Arbitration in Switzerland* para. 392.

⁵³ English Court of Appeal, 16.05.2012, *Sulamérica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others*, EWCA Civ 638.

⁵⁴ *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, [2020] UKSC 38.

questions were still open.⁵⁵ While some argued that *Sulamérica* had settled the debate in England, the approach was not fully followed in subsequent decisions.⁵⁶ For instance, a governing law clause stating that “[t]his Agreement shall be governed by [English law]” was interpreted as being an express choice of law for the entire contract, including the arbitration clause.⁵⁷ The issue received renewed attention with the *Enka* case. In this case, the Court of Appeal ruled that in the absence of express consent, there is a strong presumption in favour of the law of the seat of arbitration.⁵⁸ In a very detailed decision, the English Supreme Court followed a different reasoning.⁵⁹ After summarizing the English case law, it concluded that a choice of governing law for the main contract will in general apply to the arbitration clause. In contrast, it held that a choice of the seat of arbitration is generally not sufficient to establish an intent to apply this law to the arbitration agreement. However, additional factors might imply that the arbitration agreement was intended to be governed by the law of the seat, for instance where there is a serious risk that the law of the main contract would render the arbitration agreement ineffective (thereby following *Sulamérica*). In the case at hand, the Supreme Court came to the conclusion that no (implied or express) choice of law for the main contract had been made. Therefore,

⁵⁵ Cf. David Joseph, *Jurisdiction and arbitration agreements and their enforcement*, 3rd edn. (London: Sweet & Maxwell, 2015) paras. 6.31 et seqq.; Sabrina Pearson, ‘Sulamérica v. Enesa: The Hidden Pro-Validation Approach Adopted by the English Courts With Respect to the Proper Law of the Arbitration Agreement’ (2013) *Arb Int* 115-26, pp. 124 et seqq.; Brunda Karanam, ‘Choice of Law of an Arbitration Agreement – A Comparative Analysis & the Path Ahead’ (2017) *YAR* 85, pp. 86 et seqq.; Darius Chan, Teo Jim Yang, ‘Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There is None’ (2020) *Journal of International Arbitration* 635-48, pp. 635 et seqq.; Karrer, ‘The Law Applicable to the Arbitration Agreement’, pp. 861 et seqq.; Peter Ashford, ‘The proper law of the arbitration agreement’ 85(3) (2019) *CI Arb Journal* 276-299, pp. 281 et seq.; Milo Molfa, ‘Pathological Arbitration Clauses and the Conflict of Laws’ (2007) *Hong Kong Law Journal* 161-84, pp. 166 et seq.; Renato Nazzini, ‘The Law Applicable to the Arbitration Agreement: Towards Transnational Principles’ (2016) *International and Comparative Law Quarterly* 681-703, pp. 687 et seq., p. 701, according to whom applying the law of the main contract remains a rebuttable presumption also under English law. Regarding the situation before *Sulamérica* cf. Ardavan Arzandeh, Jonathan Hill, ‘Ascertaining the Proper Law of an Arbitration Clause under English Law’ (2009) *Journal of Private International Law* 425-45, pp. 425 et seqq.

⁵⁶ Cf. *Arsanovia Ltd and others v. Cruz City1 Mauritius Holdings*, [2012] EWHC 3702 (Comm) (return to the law of the main agreement); *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company Ltd*, [2013] EWHC 4071 (Comm) (law of the main agreement was not chosen, therefore, law of the seat of the arbitration applied); *National Iranian Oil Company v. Crescent Petroleum Company International Ltd & Another*, [2016] EWHC 510 (Comm) (regarding separability).

⁵⁷ *Kabab-Ji S.A.L. (Kuwait) v. Kout Food Group (Lebanon)*, [2020] EWCA Civ 6.

⁵⁸ *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, [2020] EWCA Civ 574.

⁵⁹ *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, [2020] UKSC 38.

relying on the third step of its three-stage enquiry, it found that the closest connection existed to the law of the seat. Two judges issued dissenting opinions, arguing that the arbitration agreement should be governed by the law of the main contract, irrespective of whether such law was explicitly chosen or determined according to the Rome I Regulation. After it was published, the *Sulamérica* decision received widespread attention outside England, but not all courts followed its reasoning.⁶⁰ It is expected that *Enka* will have a comparable impact also beyond the United Kingdom.

e. France

No discussion of the law applicable to the arbitration agreement would be complete without reference to the approach of the French courts, as French case law has developed a separate solution that warrants a more detailed analysis. Following the well-known *Dalico* decision of the French Cour de Cassation,⁶¹ French case law considers the arbitration agreement as being legally independent from the main contract: Its validity depends only on the common intention of the parties, without it being necessary to make reference to a national law, provided that no mandatory provision of French law or international public policy (*ordre public*) is affected. Therefore, under the French doctrine, there is no need to ascertain the (national) law applicable to the arbitration agreement. Rather, one should focus solely on the will of the parties. However, this approach has been subject to much criticism outside France,⁶² but also from some French scholars.⁶³ Indeed, it seems difficult to interpret a contractual clause such as an arbitration agreement without recourse to any law, as even French literature agrees that there is “*no contract without a law*”.⁶⁴ As there are currently no internationally recognised laws of contract interpretation and different

⁶⁰ The Singapore High Court recently described the English approach as “Professor Born’s wider validation principle in disguise”: Singapore High Court 01.07.2019, *BNA v. BNB and another*, [2019] SGHC 142. Note that some common law jurisdictions also apply the law of the seat of arbitration to the arbitration agreement, for instance English Court of Appeal, Queen’s Bench Division, 05.12.2007, *C v. D*, [2007] EWCA Civ 1282; Singapore High Court 19.06.2014, *FirstLink Investments Corp Ltd. V. GT Payment Pte Ltd. and others*, [2014] SGHCR 12. See Karanam, ‘Choice of Law of an Arbitration Agreement’, pp. 88 et seqq. with further references.

⁶¹ French Cour de Cassation, 20.12.1993, *Municipalité de Khoms El Mergeb v. Société Dalico*.

⁶² Cf. Roy Goode, ‘The Role of the Lex Loci Arbitri in International Commercial Arbitration’ (2001) *Arb Int* 19-40, pp. 29 et seq.

⁶³ Cf. Antoine Kassis, *L’autonomie de l’arbitrage commercial international. Le droit français en question* (Paris: L’Harmattan, 2005) paras. 34 et seq.; Christophe Seraglini, Jérôme Ortscheidt, *Droit de l’arbitrage interne et international* (Paris: Montchrestien-Lextenso éd, 2013) paras. 592 et seq.

⁶⁴ Berthold Goldman, ‘Les conflits de lois dans l’arbitrage international de droit privé’ (1964) *Recueil de Cours* 351-480, p. 480 FN 29; Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* p. 218.

methods are applied in different jurisdictions, the French approach is conceptually not convincing. Moreover, upholding the validity of an arbitration agreement based on the French rule may jeopardise the enforceability of the arbitral award at a later stage, as it seems questionable how it would be reconcilable with the clear wording of Article V(1)(a) New York Convention.

f. Rome I Regulation

Finally, it should be noted that the Rome I Regulation⁶⁵, which contains provisions on the law governing contractual obligations, is not applicable to arbitration agreements, as its Article 1(2)(e) explicitly excludes arbitration agreements from its scope. This exclusion “*does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements.*”⁶⁶ While it has been argued that the conflict-of-law rules of the Rome I Regulation, especially Articles 3 et seqq., should nevertheless be applied by analogy to arbitration agreements, this argument is not particularly convincing. Arbitration agreements are excluded from the scope of the Rome I Regulation for good reasons. As already pointed out in the *Giuliano/Lagarde-Report*, the arbitration clause is an independent contract where “*procedural and contractual aspects are difficult to separate.*”⁶⁷ Moreover, it is hard to determine what would constitute the “*characteristic performance of the contract*” (Article 4(2) Rome I Regulation) if the contract in question is an arbitration agreement.⁶⁸ The same difficulties arise when it comes to determining the “*country with which it [the agreement] is most closely connected*” according to Article 4(4) Rome I Regulation.⁶⁹ Simply looking at the characteristic performance of the main agreement would lead to arbitrary results, thus risking the application of laws without any meaningful connection to the arbitration agreement.⁷⁰ For exactly these reasons, arbitration agreements were explicitly excluded from the Rome I Regulation’s scope. Moreover, the arbitration agreement is already subject to separate harmonised private

⁶⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁶⁶ *Giuliano/Lagarde*, ABL EWG 1980 C 282/12 Article 1 (5).

⁶⁷ *Giuliano/Lagarde*, ABL EWG 1980 C 282/12 Article 1 (5).

⁶⁸ Reinmar Wolff, ‘Empfiehl sich eine Reform des deutschen Schiedsverfahrensrechts?’ (2016) *SchiedsVZ* 293-305, p. 298.

⁶⁹ Wolff, ‘Empfiehl sich eine Reform des deutschen Schiedsverfahrensrechts?’, p. 298.

⁷⁰ Reinhold Geimer, *Internationales Zivilprozessrecht*, 8th edn. (Köln: Schmidt, 2020) para. 3788.

international laws, for instance the New York Convention.⁷¹ The history of the Rome I Regulation, its purpose and the existing international framework therefore speak against applying its rules per analogy.⁷²

2. Two Different Approaches: Law of the Main Contract or Law of the Seat

The fundamental question regarding the law applicable to the arbitration agreement is whether this law can also be chosen implicitly if the parties have made a choice of law regarding another aspect of the arbitration. As shown, this issue is neither sufficiently answered by Article V(1)(a) New York Convention nor national laws (with the notable exception of some countries such as Switzerland and France mentioned above). Literature as well as case law is divided on this point, with some scholars extending the choice of law of the main agreement to the arbitration clause⁷³ and others applying the law of the seat of the arbitration.⁷⁴ While the Austrian Supreme Court seems to favour the former approach, it explicitly states that the question has to be answered on a case-by-case basis and that an implicit choice of law needs to be established with reasonable certainty.⁷⁵ The ensuing uncertainties contravene one of the goals of arbitration, which is to ensure efficient and predictable dispute resolution.

The simplest solution for this problem would clearly be that the parties explicitly choose the applicable law to the arbitration agreement. However, even if parties are represented by lawyers during contract negotiations, such a choice is rarely ever made. Instead, negotiations often focus on choosing the seat, hoping that the law at the seat can solve any potential problems arising in connection to the arbitration

⁷¹ Hausmann, 'Schiedsvereinbarungen', para. 8.246; Geimer, *Internationales Zivilprozessrecht* para. 3786; Schmidt-Ahrendts, Höttrler, 'Anwendbares Recht bei Schiedsverfahren mit Sitz in Deutschland', p. 273; Born, *International Commercial Arbitration* p. 504.

⁷² Reinhold Geimer, '§ 1025 dZPO', in Richard Zöllner (ed.), *Zivilprozessordnung*, 33rd edn. (Köln: Dr. Otto Schmidt, 2020) para. 11; Stürmer, Wendelstein, 'Das Schiedsvereinbarungsstatut bei vertraglichen Streitigkeiten', p. 475.

⁷³ Cf. only Wilske, Fox, 'Art II Abs 3', para. 233; Leonardo D. Graffi, 'The law applicable to the validity of the arbitration agreement: A practitioner's view', in Franco Ferrari, Stefan Kröll (eds.), *Conflict of Laws in International Arbitration* (München: Sellier, 2011) 19-62, p. 35.

⁷⁴ Cf. only Nacimiento, 'Art V(1)(a) NYC', p. 224; Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts*, pp. 54, 56; Domenico Di Pietro, 'Applicable laws under the New York Convention', in Franco Ferrari, Stefan Kröll (eds.), *Conflict of Laws in International Arbitration* (München: Sellier, 2011) 63-79, pp. 73 et seq.

⁷⁵ Austrian OGH 15.05.2019, 18 OCg 6/18h; OGH 19.12.2018, 3 Ob 153/18y.

agreement.⁷⁶ Most model clauses suggested by arbitral institutions also do not contain such a rule,⁷⁷ with the Hong Kong International Arbitration Centre (HKIAC),⁷⁸ the Vienna International Arbitral Centre (VIAC),⁷⁹ and the London Court of International Arbitration (LCIA)⁸⁰ providing notable exceptions.

While an explicit choice of law is rare, parties do often choose the governing substantive law and/or the seat of the arbitration. In the following, I will demonstrate why it is in generally more convincing to extend the law of the seat of the arbitration to the arbitration agreement.

In general, to determine the applicable law, the general rules of interpretation for arbitration agreements ought to be applied.⁸¹ According to case law, an implicit will needs to be established with reasonable certainty.⁸² Therefore, it is not permissible to base the choice of law solely on the behaviour of the parties during the proceedings.⁸³ Such behaviour may however be taken into account.⁸⁴

⁷⁶ Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause', p. 197.

⁷⁷ Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause', p. 197.

⁷⁸ Model clause: "The law of this arbitration clause shall be ... (Hong Kong law)."

⁷⁹ Annex 1 VIAC Rules: "(...) Optional supplementary agreements on: (...) (3) (...) the substantive law applicable to the arbitration agreement (...)."

⁸⁰ Article 16(4) of the LCIA Rules: "The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat." See also Article 22(1)(iii) LCIA Rules. See also the similar provision in Article 61(c) WIPO Rules.

⁸¹ Austrian OGH 15.05.2019, 18 OCg 6/18h.

⁸² Austrian OGH 15.05.2019, 18 OCg 6/18h. See also Hausmann, 'Internationale Schiedsvereinbarungen', para. 450, who argues that any implicit choice of law needs to be subject to strict requirements to justify the deviation from applying the law at the seat of arbitration.

⁸³ Hausmann, 'Internationale Schiedsvereinbarungen', para. 450; Hans-Viggo von Hülsen, *Die Gültigkeit von internationalen Schiedsvereinbarungen nach Konventionsrecht mit Hinweisen auf deutsches, französisches, englisches und US-amerikanisches Recht* (1973) pp. 102 et seq.; pp. 112 et seqq.

⁸⁴ Austrian OGH 15.05.2019, 18 OCg 6/18h.

a. Lex Causae

At first glance, applying the substantive law of the main agreement to the arbitration clause seems to be a sensible solution.⁸⁵ Parties often choose the law applicable to the main agreement explicitly and such clause is frequently situated close to the arbitration agreement. The legitimate question that follows is whether and why a different law should then apply to the arbitration agreement.⁸⁶

In my opinion, establishing whether extending the law of the main contract to the arbitration clause really is the best solution requires a careful analysis of the parties' intentions.⁸⁷ In general, out of practicability, it is in the parties' best interest that all provisions of a contract are subject to the same law.⁸⁸ Parties prefer the same law to govern all questions of substantive validity, namely a law that they or their lawyers know well and trust.⁸⁹ Those arguing in favour of extending the law of the main agreement to the arbitration clause therefore stress that it is in the objective interest of the parties to apply the same laws to the entire contract, at least when it comes to the formation of the contract.⁹⁰ However, as already pointed out by *Lüthge*, this goal could easily be reached if parties included an explicit choice-of-law clause for their arbitration agreement.⁹¹ If such explicit choice is not made, the arguments for applying the *lex causae* to the arbitration agreement are less convincing.

One argument against the applicability of the *lex causae* is that the arbitration agreement is, in many ways, not a standard contractual provision. Regardless of whether one qualifies the arbitration agreement as a procedural or a substantive contract, its core content goes beyond the purpose of other contractual clauses.

⁸⁵ Born, *International Commercial Arbitration* p. 591; Julian D. M. Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause', in Albert van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards. 40 Years of Application of the New York Convention. ICCA Congress Series No 9* (1999) 114-45, p. 143.

⁸⁶ Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th edn. (Oxford: Oxford University Press, 2015) para. 3.12.

⁸⁷ See also Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* pp. 54 et seq.

⁸⁸ Wilske, Fox, 'Art II Abs 3', para. 233; Dietmar Czernich, 'Das auf die Schiedsvereinbarung anzuwendende Recht' (2019) *ecolex* 771-75, p. 774; *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, [2020] UKSC 38.

⁸⁹ Ilias Bantekas, 'The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy' (2010) *Journal of International Arbitration* 1-8, p. 5.

⁹⁰ Stürmer, Wendelstein, 'Das Schiedsvereinbarungsstatut bei vertraglichen Streitigkeiten', p. 477; Czernich, 'Das auf die Schiedsvereinbarung anzuwendende Recht', p. 772.

⁹¹ Jürgen Lüthge, *Die kollisionsrechtliche Funktion der Schiedsvereinbarung* (Bonn: 1975) p. 142.

Primarily, the arbitration agreement contains the allocation of jurisdiction to an arbitral tribunal. While the arbitration clause's purpose is dispute resolution, the goal of the main contract is to determine the rights and obligations of the parties under said substantive contract.⁹² Hence, the purpose of the arbitration clause and the main agreement differ significantly.⁹³ It therefore seems difficult to accept that the law of the main agreement should automatically be applied to the arbitration agreement. This is even more true if parties have chosen a seat that it is different from the *lex causae*,⁹⁴ therefore providing an alternative possibility to ascertain the applicable law. Moreover, any existing economic connection between the main agreement and the arbitration clause does not suffice to automatically extend the *lex causae* to the arbitration agreement.⁹⁵

Concluding, no unconditional interests of the parties mandate subjecting the main agreement and the arbitration clause to the same law.⁹⁶

i. The Role of the Doctrine of Separability

In this context, the influence of the doctrine of separability should also be critically evaluated. Proponents of the view that the law of the seat should be applied are often relying on this principle, according to which the arbitration clause is separable and hence independent from the main contract.⁹⁷ Therefore, some authors argue that the law governing the arbitration agreement should generally be deduced independently from the law applicable to the main contract.⁹⁸ In other words, the choice made for

⁹² Born, *International Commercial Arbitration* pp. 590 et seq.; van den Berg, *The New York Arbitration Convention of 1958* p. 293; Seraglini, Ortscheidt, *Droit de l'arbitrage interne et international* para. 581.

⁹³ K. Lionnet, A. Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit* p. 170; Hausmann, 'Schiedsvereinbarungen', paras. 8.240 and 8.256; Schmidt-Ahrendts, Hötter, 'Anwendbares Recht bei Schiedsverfahren mit Sitz in Deutschland', p. 274. Cf. also Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb, [2020] UKSC 38 (however, the Court ultimately reached a different conclusion).

⁹⁴ Hausmann, 'Internationale Schiedsvereinbarungen', para. 452.

⁹⁵ Hausmann, 'Schiedsvereinbarungen', para. 8.240.

⁹⁶ Hausmann, 'Schiedsvereinbarungen', para. 8.256; Karrer, 'The Law Applicable to the Arbitration Agreement', p. 856.

⁹⁷ Cf. Poudret, Besson, *Comparative Law of International Arbitration* para. 278; Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 212.

⁹⁸ Hausmaninger, '§ 581 ZPO', para. 104; cf. also Nacimientto, 'Art V(1)(a) NYC', pp. 223 et seq.; Gary Born, 'The Law Governing International Arbitration Agreements: An International Perspective' 26 (2014) Singapore Academy of Law Journal 814-48, p. 832.

the main contract should not automatically be extended to the arbitration clause;⁹⁹ in fact, it has been said that such direct extension ignores the doctrine of separability.¹⁰⁰

It is indeed undisputed that the arbitration agreement can be subject to a different law than the *lex causae*.¹⁰¹ However, it does not necessarily follow from the doctrine of separability that the law applicable to the arbitration agreement has to be deduced independently from the parties' agreement in all cases.¹⁰² Already the ending "ability" implies that this is a mere possibility but by no means binding in all circumstances. In addition, those arbitration laws that contain the separability doctrine treat the arbitration agreement as distinct only in the context of its existence or validity.¹⁰³

⁹⁹ Nacimiento, 'Art V(1)(a) NYC', pp. 223 et seq.; Zeiler, '§ 581 ZPO', para. 12. See also German BGH 28.11.1963, VII ZR 112/62: Due to general principles of experience, it can be assumed that the intention is usually to subject the arbitration agreement to the same law as the substantive legal relationship. However, in special circumstances it is entirely possible that the parties choose a different law for the main contract than for the arbitration agreement. This would apply even if the arbitration clause was contained in the main contract, because even in such a case the parties are free to subject individual provisions of the same contract to different legal systems. Cf. also Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, 'Art II NYC', in Nicola Christine Port, Dirk Otto, Patricia Nacimiento, Herbert Kronke (eds.), *Recognition and Enforcement of Foreign Arbitral Awards. A global commentary on the New York Convention* (Alphen aan den Rijn: Wolters Kluwer, 2010) 37-114, pp. 53 et seq.; Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause', p. 201; Stelios Koussoulis, 'Zur Dogmatik des auf die Schiedsvereinbarung anwendbaren Rechts', in *FS Schlosser = Grenzüberschreitungen. Beiträge zum Internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit* (Tübingen: Mohr Siebeck, 2005) 415-27, p. 421.

¹⁰⁰ Berger, 'Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?', p. 318.

¹⁰¹ Born, *International Commercial Arbitration* p. 473; Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 413; Philippe Leboulanger, 'The Arbitration Agreement: Still Autonomous?', in Albert van den Berg (ed.), *International Arbitration 2006: Back to Basics? ICCA Congress Series No 13* (2007) 3-31, p. 16; Ian Glick, Niranjana Venkatesan, 'Choosing the Law Governing the Arbitration Agreement', in Neil Kaplan, Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration. Liber Amicorum Michael Pryles* (Alphen aan den Rijn: Kluwer, 2018) 131-50, pp. 140 et seq., referring to the principle of *dépeçage*.

¹⁰² Nazzini, 'The Law Applicable to the Arbitration Agreement', p. 684; Jeff Waincymer, 'Pathologies, Presumptions and Proof' (2015) *American Review of International Arbitration* 407-51, p. 420; Molfa, 'Pathological Arbitration Clauses and the Conflict of Laws', p. 170; Born, 'The Law Governing International Arbitration Agreements: An International Perspective', p. 819 FN 9; Glick, Venkatesan, 'Choosing the Law Governing the Arbitration Agreement', p. 137; Wendy Miles, Nelson Goh, 'A Principled Approach Towards the Law Governing Arbitration Agreements', in Neil Kaplan, Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration. Liber Amicorum Michael Pryles* (Alphen aan den Rijn: Kluwer, 2018) 385-94, p. 388. But see Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts* p. 75.

¹⁰³ Glick, Venkatesan, 'Choosing the Law Governing the Arbitration Agreement', p. 137. See the text of Article 16(1) Model Law: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the

Moreover, the doctrine does not, for instance, require that the conclusion of the arbitration agreement needs to be assessed separately from the main agreement.¹⁰⁴

It further has to be taken into account that some jurisdictions, including Austria, consciously decided to not include the doctrine of separability in their arbitration law. For example, the Austrian legislator has criticised the doctrine as “grossly simplistic.”¹⁰⁵ Therefore, when assessing the validity of the arbitration agreement, one should rather look at the parties’ intentions.¹⁰⁶ This is in line with Austrian case law, which regards the arbitration agreement as an auxiliary agreement that generally shares the legal fate of the main agreement.¹⁰⁷ However, in contrast to this case law, some Austrian commentators consider the arbitration agreement as a fully independent agreement.¹⁰⁸

Moreover, it will often be difficult to determine *ex post* whether parties knew about this legal concept when choosing the *lex causae*.¹⁰⁹ In fact, it can be assumed that parties will rarely have been aware of the doctrine of separability when concluding their contract.¹¹⁰ To the contrary, it seems more likely that parties believed that their

other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

¹⁰⁴ Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* p. 54; Yves Derains, ‘The ICC Arbitral Process Part VIII, Choice of Law Applicable to the Contract and International Arbitration’ (1995) ICC Bull 10-18, p. 16.

¹⁰⁵ Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts* p. 75; Alice Fremuth-Wolf, *Die Schiedsvereinbarung im Zessionsfall* (Wien: Verlag Österreich, 2004) p. 124 and Walter H. Rechberger, Michael Hofstätter, ‘§ 581’, in Walter H. Rechberger, Thomas Klicka (eds.), *Kommentar zur ZPO*, 5th edn. (Wien: Verlag Österreich, 2019) para. 11, agree.

¹⁰⁶ Koller, ‘Die Schiedsvereinbarung’, para. 3/184; cf. Martin Schauer, ‘Schiedsvereinbarungen nach der ZPO’, in Dietmar Czernich, Astrid Deixler-Hübner, Martin Schauer (eds.), *Handbuch Schiedsrecht* (Wien: Manz, 2018) para. 5.16.

¹⁰⁷ RS0045295; Austrian OGH 15.05.2019, 18 OCg 6/18h; OGH 13.02.2018, 5 Ob 188/17h; OGH 05.02.2008, 10 Ob 120/07f; OGH 08.05.2013, 6 Ob 47/13z; OGH 23.06.2015, 18 OCg 1/15v.

¹⁰⁸ Hausmaninger, ‘§ 581 ZPO’, paras. 99 et seqq.; Zeiler, ‘§ 581 ZPO’, para. 96. Other authors are skeptical: Cf. Andreas Reiner, ‘SchiedsRÄG 2006: Wissenswertes zum neuen österreichischen Schiedsrecht’ (2006) *ecolex* 468-72, p. 468; Czernich, ‘The Law Applicable to the Arbitration Agreement’, p. 74. Czernich now appears to differentiate: There has to be concrete evidence of the parties’ intention to not apply the doctrine: Czernich, ‘Das auf die Schiedsvereinbarung anzuwendende Recht’, p. 773.

¹⁰⁹ Dietmar Czernich, ‘Österreich: Das auf die Schiedsvereinbarung anwendbare Recht’ (2015) *SchiedsVZ* 181-86, p. 184; Czernich, ‘Das auf die Schiedsvereinbarung anzuwendende Recht’, p. 774.

¹¹⁰ Born, *International Commercial Arbitration* p. 590; Czernich, ‘The Law Applicable to the Arbitration Agreement’, p. 54; Paul A. Gélinas, ‘Arbitration Clauses: Achieving Effectiveness’, in Albert van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards. 40 Years of Application of the New York Convention. ICCA Congress Series No 9* (1999) 47-66, p. 50; Graffi,

choice of law for the main agreement would also apply to the arbitration clause, especially in the absence of specialised legal advice.¹¹¹

While the doctrine of separability constitutes an additional argument for applying the law at the seat of arbitration, its application alone is therefore not convincing to establish which law should apply to the arbitration agreement. Rather, it is crucial to assess the reasons why parties choose a specific law. As I will show in the following part, this will result in the same outcome that is also argued for by those relying on the doctrine of separability: Namely to *not* extend the *lex causae* to the arbitration clause.

ii. Reasons for Choosing the *Lex Causae*

There are multiple reasons why parties choose a particular law for their main agreement, the validity of the arbitration agreement, however, is rarely one of them.¹¹² Rather, parties choose a certain law because they know it well, because it is easily accessible (for instance, because it is available in the parties' language or in English or because of the availability of court decisions) or because they think that the law contains provisions that are advantageous to their position.¹¹³ Already the fact that parties rarely think about the law applicable to the arbitration agreement implies that there should not be an automatic extension of the *lex causae* to the arbitration agreement.¹¹⁴

Data underlines this conclusion: In 2010, Queen Mary University of London¹¹⁵ looked at the factors behind choice-of-law decisions in arbitration: The main reasons for choosing the applicable substantive law were the neutrality and impartiality of the

'The law applicable to the validity of the arbitration agreement: A practitioner's view', p. 35; *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, [2020] UKSC 38.

¹¹¹ Czernich, 'The Law Applicable to the Arbitration Agreement', pp. 79 et seq.; Czernich, 'Österreich: Das auf die Schiedsvereinbarung anwendbare Recht', p. 184; Fremuth-Wolf, *Die Schiedsvereinbarung im Zessionsfall* p. 118; Derains, 'The ICC Arbitral Process Part VIII, Choice of Law Applicable to the Contract and International Arbitration', p. 16.

¹¹² Poudret, Besson, *Comparative Law of International Arbitration* para. 297; cf. Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 425, according to whom the law applicable to the main contract is chosen for different reasons than the law applicable to the arbitration agreement.

¹¹³ Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 5th edn. (Alphen aan den Rijn: Wolters Kluwer, 2016) pp. 139 et seqq.

¹¹⁴ Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 425; Koussoulis, 'Zur Dogmatik des auf die Schiedsvereinbarung anwendbaren Rechts', p. 421.

¹¹⁵ Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*.

legal system (66%), the appropriateness of the law for the type of contract (60%), and familiarity with and experience of the particular law (58%).¹¹⁶ Strategic aspects equally play a role. Apart from the law of their respective jurisdictions, parties prefer English law, which is chosen in 40% of contracts according to the survey.¹¹⁷ English law seems to best fulfill the parties' expectations of "predictability", "foreseeability" and "certainty" and is commonly regarded as highly developed and internationally accepted.¹¹⁸ For instance, English law is often chosen because parties believe it is particularly suitable for certain kinds of dispute, for instance in financial disputes. Therefore, parties seem more concerned about finding a law appropriate for their substantive contractual relationship than a law suitable for a potential dispute resolution process.¹¹⁹ It follows that the *lex causae* and the *lex arbitri* are clearly distinguished by the relevant players; and the arbitration agreement is closer connected to the *lex arbitri*.

In my opinion, the same solution would result from looking at Article 3 Rome I Regulation. As indicated above, applying the Rome I Regulation to arbitration agreement by analogy is not convincing. However, even if it were applicable, the outcome would not be different. According to Article 3(1) Rome I Regulation, the choice of law "*shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.*" An implicit choice of law therefore is only possible if this is "clearly" demonstrated – this also would have to be the case for the arbitration agreement¹²⁰ and is not fulfilled by a mere choice of law for the main contract.

Therefore, the implicit extension of the *lex causae* to the arbitration clause requires clearer indications than a mere choice of law for the substantive contract.¹²¹ Such choice should only be implied if the circumstances of the case and the wording of the arbitration agreement allow for such an interpretation. In particular, there would have to be clear indications that the parties wanted to subject all questions of substantive validity to the same law.¹²² Such a circumstance might be that the parties have in the

¹¹⁶ Queen Mary University of London, *2010 International Arbitration Survey* p. 11.

¹¹⁷ Queen Mary University of London, *2010 International Arbitration Survey* pp. 14 et seqq.

¹¹⁸ Queen Mary University of London, *2010 International Arbitration Survey* p. 13.

¹¹⁹ Queen Mary University of London, *2010 International Arbitration Survey* p. 8.

¹²⁰ Hausmann, 'Schiedsvereinbarungen', para. 8.253.

¹²¹ Münch, '§ 1029 dZPO', para. 35.

¹²² Cf. Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* p. 57.

past always agreed that the *lex causae* should also apply to the arbitration clause.¹²³ As held by the Austrian Supreme Court in its latest decision on the matter, the fact that both parties have so far thought that the choice-of-law clause had been the relevant clause for the arbitration agreement during the entire proceedings also speaks in favour of extending the *lex causae* to the arbitration agreement.¹²⁴ On the other hand, mere assumptions about the parties' hypothetical will should not suffice.¹²⁵ If one considers that Article V(1)(a) New York Convention contains a default rule in the absence of a choice of law, the extension of the law of the main agreement to the arbitration clause would therefore require that the circumstances of the individual case clearly indicate that the parties have willingly chosen to apply this law to the arbitration agreement.¹²⁶ This is not the case if the choice-of-law clause makes no direct reference to the arbitration agreement, the seat of the arbitration is in another country and there are no other indications that the parties wanted to apply the *lex causae* to the arbitration clause.¹²⁷

In conclusion, in the absence of indications to the contrary, the choice of a certain *lex causae* does not extend to the arbitration agreement.

b. The Law of the Seat

The second option for determining the law applicable to the arbitration agreement is to extend the law at the seat of arbitration to the arbitration clause. The choice of a specific seat of arbitration indicates that the parties have consciously decided to conduct their arbitration in a specific jurisdiction. This choice is nothing else than a choice of law, as parties choose a certain legal system.¹²⁸ This law at the seat of the

¹²³ Rainer Gildeggen, *Internationale Schieds- und Schiedsverfahrensvereinbarungen in allgemeinen Geschäftsbedingungen vor deutschen Gerichten* (Frankfurt am Main: Lang, 1991) p. 127.

¹²⁴ Austrian OGH 15.05.2019, 18 OCg 6/18h.

¹²⁵ Schmidt-Ahrendts, Höttler, 'Anwendbares Recht bei Schiedsverfahren mit Sitz in Deutschland', p. 273; Siegfried H. Elsing, 'Zur Auslegung von Schiedsvereinbarungen', in *FS Graf von Westphalen* (Köln: Dr. Otto Schmidt, 2010) 109-26, p. 118: The existence of a "real" intention is always required while a merely hypothetical will should not be taken into account.

¹²⁶ Geimer, *Internationales Zivilprozessrecht* para. 3790d. According to Born, 'The Law Governing International Arbitration Agreements: An International Perspective', p. 832, it is difficult to reconcile the application of the *lex causae* with this provision.

¹²⁷ Hausmann, 'Internationale Schiedsvereinbarungen', para. 452.

¹²⁸ Seraglini, Ortscheidt, *Droit de l'arbitrage interne et international* para. 581; for Swiss law Karrer, 'The Law Applicable to the Arbitration Agreement', p. 857; Glick, Venkatesan, 'Choosing the Law Governing the Arbitration Agreement', p. 146. Critical Blackaby, Partasides, Redfern, Hunter, *Redfern and Hunter on International Arbitration* para. 3.61, but cf. Nathalie Lendermann, *Procedure Shopping Through Hybrid Arbitration Agreements* (Baden-Baden: Nomos, 2018) p. 70.

arbitration is often more closely connected to the arbitration agreement than the law of the main agreement.¹²⁹ While it is true that the seat may also be chosen for geographical reasons or solely to have a neutral forum for both parties,¹³⁰ usually, other considerations prevail. In this context, it has to be noted that the seat of the arbitration is a legal construct, meaning that the actual proceedings, including oral hearings, can take place in another country.¹³¹

Queen Mary University's survey that has already been cited above also assesses the reasons for choosing a seat. The seat is usually determined after the law for the main agreement has been chosen.¹³² The main reason for selecting a certain seat is the formal legal infrastructure, "*which includes the national arbitration law and also the track record in enforcing agreements to arbitrate and arbitral awards in that jurisdiction and its neutrality and impartiality.*"¹³³ Comparable answers were given when a similar study was repeated in 2015 and 2018; however, respondents now cited the reputation of the country of the seat as the main reason.¹³⁴ In 2015 and 2018, parties further said that the national arbitration law was a reason for choosing a specific seat.¹³⁵ These considerations seem to be more important than purely

¹²⁹ Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause', p. 201; Karrer, 'The Law Applicable to the Arbitration Agreement', p. 860. Born, 'The Law Governing International Arbitration Agreements: An International Perspective', p. 831, is critical.

¹³⁰ Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 433; Filip de Ly, 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning' (1991) *Northwestern Journal of International Law & Business* 48-85, p. 52.

¹³¹ Ly, 'The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning', p. 51.

¹³² Queen Mary University of London, *2010 International Arbitration Survey* p. 5.

¹³³ Queen Mary University of London, *2010 International Arbitration Survey* p. 18. While the second most cited reason for choosing a seat was the law governing the contract, the problem of the applicable law becomes irrelevant once the law of the main agreement and the seat are identical.

¹³⁴ Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* p. 13; Queen Mary University of London, *2018 International Arbitration Survey* p. 10.

¹³⁵ Queen Mary University of London, *2015 International Arbitration Survey* p. 14; Queen Mary University of London, *2018 International Arbitration Survey* p. 10.

geographical or practical considerations.¹³⁶ In fact, the 2015 survey explicitly stated that the choice is made based on “intrinsic legal features”.¹³⁷

The selection of the seat is of utmost importance for the entire arbitration.¹³⁸ For instance, the seat of arbitration determines the role of national courts as well as the available grounds for setting aside the award. For this reason, one can assume that it is coherent with the parties’ intentions that all questions relating to the arbitration agreement should be settled in accordance with the law at the seat of arbitration.¹³⁹ It has also been argued that the law at the seat of arbitration should apply due to the procedural character of the arbitration clause;¹⁴⁰ however, this completely disregards the contractual component of the arbitration agreement.¹⁴¹ More importantly, the seat of the arbitral tribunal determines where the arbitration agreement is fulfilled and should therefore be regarded as the most important factor when determining the law applicable to the arbitration agreement.¹⁴² This can be supported by the fact that parties often spend considerable time and effort in choosing a suitable seat, which indicates that parties believe that the law that is ultimately chosen will also solve potential problems concerning the arbitration agreement.¹⁴³ This is even more true if

¹³⁶ Goode, ‘The Role of the Lex Loci Arbitri in International Commercial Arbitration’, p. 32; Bruno Leurent, ‘Reflections on the International Effectiveness of Arbitration Awards’ (1996) *Arb Int* 269-86, p. 272: “The seat is typically fixed in a place where neither party has a place of business, e.g. the shores of Lake Lemman. That location is not selected for its hotel facilities or charming setting, but essentially because of the parties’ confidence in the neutrality of the forum, the quality of the Swiss Statute on Private International Law (FSPIL), and the competence of Swiss jurists, arbitrators and judges.” Cf. also Gélinas, ‘Arbitration Clauses: Achieving Effectiveness’, p. 58.

¹³⁷ Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* p. 15.

¹³⁸ Berger, ‘Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?’, p. 333; Ashford, ‘The proper law of the arbitration agreement’, p. 287; Glick, Venkatesan, ‘Choosing the Law Governing the Arbitration Agreement’, p. 142. But see Julian D. M. Lew, ‘Achieving the Dream: Autonomous Arbitration’ (2006) *Arb Int* 179-203, pp. 196 and 201.

¹³⁹ Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* p. 55; Hausmann, ‘Schiedsvereinbarungen’, para. 8.256; Schmidt-Ahrendts, Höttler, ‘Anwendbares Recht bei Schiedsverfahren mit Sitz in Deutschland’, p. 273; Nazzini, ‘The Law Applicable to the Arbitration Agreement: Towards Transnational Principles’, p. 702; Glick, Venkatesan, ‘Choosing the Law Governing the Arbitration Agreement’, p. 145.

¹⁴⁰ Born, *International Commercial Arbitration* p. 512.

¹⁴¹ Born, *International Commercial Arbitration* p. 517.

¹⁴² Gaillard, Savage, Fouchard, Gaillard, *Goldman on International Commercial Arbitration* para. 429.

¹⁴³ Bernardini, ‘Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause’, p. 197.

they choose a neutral country for the seat.¹⁴⁴ In the absence of parties' intention to the contrary, the law at the seat of the arbitration should therefore apply to the arbitration agreement.¹⁴⁵

This solution is also in line with the default rule contained in Article V(1)(a) New York Convention:¹⁴⁶ In the absence of a choice of law, the validity of an arbitration agreement should be determined according to the law of the country where the award was made, *i.e.* the seat. Therefore, in cases where it is unclear whether an implicit choice of law was made, one should directly apply the law at the seat of the arbitration.¹⁴⁷ A different interpretation would almost directly contradict the clear wording of Article V(1)(a) New York Convention:¹⁴⁸ If one considers the purpose of the fallback provision in relieving the courts from the often complicated search for the main connecting factor for the legal relationship,¹⁴⁹ this goal would be undermined by applying the law of the main agreement too extensively.

Therefore, the choice of law for the substantive agreement should only be extended to the arbitration clause if there are clear indications of parties' intentions.¹⁵⁰ If this is not the case, the law at the seat of arbitration should be applied.¹⁵¹ If such a rule was established on an international level this would further increase parties' awareness of the importance of the law at the seat for the arbitration agreement.¹⁵²

¹⁴⁴ Glick, Venkatesan, 'Choosing the Law Governing the Arbitration Agreement', p. 145. Cf. also *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, [2020] UKSC 38.

¹⁴⁵ Rolf A. Schütze, 'Kollisionsrechtliche Probleme der Schiedsvereinbarung, insbesondere der Erstreckung ihrer Bindungswirkung auf Dritte' (2014) *SchiedsVZ* 274-77, p. 275.

¹⁴⁶ Reinhold Geimer, 'Das Schiedsvereinbarungsstatut in der Anerkennungsperspektive' (2006) *IPRax* 233-36, p. 234; Chan, Yang, 'Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There is None', pp. 645 et seq.

¹⁴⁷ But see Molfa, 'Pathological Arbitration Clauses and the Conflict of Laws', pp. 171.

¹⁴⁸ Berger, Kellerhals, *International and Domestic Arbitration in Switzerland* para. 341.

¹⁴⁹ Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* p. 51.

¹⁵⁰ Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* p. 51; Hausmann, 'Internationale Schiedsvereinbarungen', para. 450; Geimer, *Internationales Zivilprozessrecht* para. 3790d.

¹⁵¹ Yves Derains, 'Observations sur ICC Award No 4392', in Sigvard Jarvin, Yves Derains (eds.), *Collection of ICC Arbitral Awards 1974-1985* (Paris: Wolters Kluwer, 1990) 475, p. 475.

¹⁵² Yasuhei Taniguchi, 'Comment: The Applicable Law to the Arbitration Agreement: A Comment on Professor Berger's Report', in Albert van den Berg (ed.), *International Arbitration 2006: Back to Basics? ICCA Congress Series No 13* (2007) 335-38, p. 336.

Finally, applying the law at the seat of the arbitration promotes uniformity and avoids the risk of diverging decisions.¹⁵³ For instance, it might well be possible that the arbitration agreement is valid under the *lex causae* but invalid under the law at the seat of arbitration, which might be used to determine the validity of the arbitration agreement in enforcement proceedings. Therefore, a formerly valid arbitration agreement could subsequently become unenforceable, which would be illogical.

In conclusion, the extension of the law at the seat of arbitration should be preferred. The recent decisions by the Austrian Supreme Court mentioned above arguing that the question has to be assessed on a case-by-case basis, do, in my opinion, not provide sufficient reasons why the law of the main contract should prevail.

3. Alternative Approaches

Scholars have developed a number of alternative approaches to ascertain the law applicable to the arbitration agreement. In the following part, some of these will be briefly presented and critically evaluated. In my opinion, these alternatives all have one common flaw: It is unclear if and how an award would be enforceable in other jurisdictions that apply stricter conflict-of-law rules, especially such stemming from the New York Convention.

a. Seat of the Arbitral Institution

Some authors argue that the parties' choice of an arbitral institution and its arbitration rules suggest that the parties wanted to subject the arbitration agreement to the laws of the country where the institution is seated.¹⁵⁴ While there are some countries that explicitly provide for such rule, e.g. China,¹⁵⁵ this cannot be extended to truly

¹⁵³ Hausmann, 'Schiedsvereinbarungen', para. 8.256; Ute König, 'Zur Bestimmung des Schiedsvertragsstatuts bei fehlender Gesetzesgrundlage nach Inkrafttreten der Rom I-Verordnung' (2012) SchiedsVZ 129-33, p. 132.

¹⁵⁴ Münch, '§ 1029 dZPO', para. 36; Hausmann, 'Schiedsvereinbarungen', para. 8.257; but see Peter Mankowski, 'Anwendbares Recht', in Dietmar Czernich, Astrid Deixler-Hübner, Martin Schauer (eds.), *Handbuch Schiedsrecht* (Wien: Manz, 2018) para. 6.33; Elsing, 'Zur Auslegung von Schiedsvereinbarungen', p. 119.

¹⁵⁵ Article 18 of the Chinese Law on the Laws Applicable to Foreign-Related Civil Relations reads as follows: "The parties may by agreement choose the law applicable to their arbitration agreement. Absent any choice by the parties, the law of the place where the arbitration institution locates or the law of the seat of arbitration shall be applied" (unofficial translation; provided by <https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn173en.pdf> [retrieved 21.11.2020]). The reasoning behind this provision is that under Chinese law, having a Chinese arbitration institution administering the arbitration is mandatory; ad-hoc proceedings are prohibited (cf. Article 16 Chinese Arbitration Law).

international institutions such as the International Chamber of Commerce (ICC).¹⁵⁶ The ICC is, for instance, seated in Paris, but only has a limited connection to French law. Many arbitrations conducted under its rules are seated elsewhere. Therefore, it does not seem convincing to apply French law to all arbitration agreements making reference to the ICC Rules.

b. Cumulative Approach

In practice, arbitrators often adopt a so-called cumulative approach and argue that the arbitration agreement is valid under all potentially applicable laws,¹⁵⁷ especially under the law of the seat and the law of the country where the arbitral award is likely to be enforced at a later stage.¹⁵⁸ In other words, arbitrators consider different possible applicable laws and conclude that the arbitration agreement would be valid irrespective of the law applied. However, this approach offers no solution in circumstances where the arbitration agreement would only be valid under one of the potentially applicable laws, *i.e.* when determining the applicable law is exactly the crucial question.¹⁵⁹ It also has no dogmatic basis, as (subject to the exceptions mentioned above), ordinary conflict-of-law rules foresee the application of one specific national law.

c. Validation Principle

Another approach is the so-called “validation principle“ which is largely based on Article II New York Convention.¹⁶⁰ Proponents of this approach wish to apply the law that leads to the validity of the arbitration agreement.¹⁶¹ In other words, the

¹⁵⁶ Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 428; Mankowski, ‘Anwendbares Recht’, para. 6.33.

¹⁵⁷ Klaus Peter Berger, ‘International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts’ (1998) *American Journal of Comparative Law* 129-50, pp. 129; ICC Award No 953, III (1978) *YB Comm Arb* 214; ICC Interim Award No 4145; ICC Interim Award No 6149, XX (1995) *YB Comm Arb* 41; ICC Award No 6850, XXIII (1998) *YB Comm Arb* 37; Born, *International Commercial Arbitration* p. 523 FN 25; Court of Appeal Hamburg 11.10.2016, 6 Sch 12/16.

¹⁵⁸ Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* para. 443.

¹⁵⁹ Born, *International Commercial Arbitration* pp. 523 et seq.

¹⁶⁰ Born, *International Commercial Arbitration* p. 495; Born, ‘The Law Governing International Arbitration Agreements: An International Perspective’, pp. 834 et seqq.; Koussoulis, ‘Zur Dogmatik des auf die Schiedsvereinbarung anwendbaren Rechts’, pp. 425 et seq.

¹⁶¹ Born, ‘The Law Governing International Arbitration Agreements: An International Perspective’, p. 817. According to Lendermann, *Procedure Shopping Through Hybrid Arbitration Agreements* p. 83, there is no reason to determine the applicable national law where internationally recognised

arbitration agreement shall be valid if it is valid under any one specific law that could potentially be applicable.¹⁶² The arbitration agreement could therefore even be held valid if it was invalid under the relevant laws of Article V(1)(a) New York Convention.¹⁶³ Instead of relying on abstract choice-of-law rules, the purpose of this approach is to further the parties' economic interest.¹⁶⁴ Any uncertainties arising through the traditional choice-of-law approach should be overcome,¹⁶⁵ as, according to the proponents of this principle, neither the applicability of the *lex causae* nor of the law at the seat of arbitration sufficiently take into account the parties' economic expectations.¹⁶⁶ The purpose of international arbitration, namely the efficient settling of international disputes, would be undermined by applying formalistic national rules, which would, at the end of the day, prove arbitrary and unpredictable. Therefore, one should simply apply the law that supports the parties' original intentions, namely to have a valid and enforceable arbitration agreement.¹⁶⁷ According to this approach, it is unthinkable that parties would choose a law that leads to the invalidity of the arbitration agreement.¹⁶⁸

One problematic aspect of the *validation principle* is that it sometimes confounds the choice of law with the actual validity of the arbitration agreement. For the latter, there is indeed an internationally recognised *favor-validitatis* principle, establishing that arbitration agreements are in doubt deemed valid. However, this pro-arbitration approach has to be strictly distinguished from the question of the applicable law. Moreover, while the validation principle has a certain practical appeal, it cannot be reconciled with the existing rules on conflict of laws.¹⁶⁹ Further problems can again

principles already provide solutions. Only if this is not the case one should first rely on the law of the main contract and subsequently on the law at the seat of arbitration. Cf. also Miles, Goh, 'A Principled Approach Towards the Law Governing Arbitration Agreements', p. 393 et seq.

¹⁶² Born, *International Commercial Arbitration* pp. 495, 501; Born, 'The Law Governing International Arbitration Agreements: An International Perspective', p. 834.

¹⁶³ Born, *International Commercial Arbitration* p. 502.

¹⁶⁴ Born, 'The Law Governing International Arbitration Agreements: An International Perspective', p. 834.

¹⁶⁵ Born, *International Commercial Arbitration* p. 542.

¹⁶⁶ Born, *International Commercial Arbitration* pp. 542 et seq.

¹⁶⁷ Born, *International Commercial Arbitration* p. 545; Born, 'The Law Governing International Arbitration Agreements: An International Perspective', p. 835.

¹⁶⁸ Born, *International Commercial Arbitration* p. 548. But see Karanam, 'Choice of Law of an Arbitration Agreement - A Comparative Analysis & the Path Ahead', p. 92.

¹⁶⁹ Glick, Venkatesan, 'Choosing the Law Governing the Arbitration Agreement', pp. 148 et seq.; Chan, Yang, 'Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring

arise at the enforcement stage if the *validation principle* is not accepted by the courts in the enforcement State.¹⁷⁰

A modified version of the *validation principle* has been suggested by *Koller*. According to him, one first has to establish what the parties would have agreed on if they had concluded an explicit choice-of-law clause.¹⁷¹ This approach therefore focuses on the hypothetical will of the parties. He then reasons that fair and reasonable parties would have chosen a law that would lead to the validity of the arbitration agreement.¹⁷² Accordingly, the law of the main agreement would be extended to the arbitration agreement if the law at the seat led to the invalidity of the arbitration clause, and *vice versa*.¹⁷³ While the *validation principle* cannot be reconciled with existing international conventions, *Koller's* approach would be in line with Article V(1)(a) New York Convention. A similar approach is now adopted by English courts,¹⁷⁴ however, as stated above (Section 1.d) some questions remain open.

d. Anational Approach

Some authors promote a solution similar to the French approach insofar as they want to assess the substantive validity of the arbitration agreement without recourse to any national law. Instead, one should rely only on the (explicit or implicit) will of the parties, including their legitimate expectations and any existing customs.¹⁷⁵ As already mentioned above, such an approach is not viable in practice: For an arbitrator or judge who is faced with a potentially invalid arbitration clause the question is almost

Intention When There is None', p. 643. But see the dissenting opinions in *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, [2020] UKSC 38, playing down the importance of the NYC.

¹⁷⁰ Explicitly Singapore High Court 01.07.2019, *BNA v. BNB and another*, [2019] SGHC 142.

¹⁷¹ *Koller*, 'Die Schiedsvereinbarung', para. 3/63; Julian D. M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) para. 6.24.

¹⁷² *Koller*, 'Die Schiedsvereinbarung', para. 3/63; Elisabeth Lovrek, Gottfried Musger, 'Aufhebungsklage', in Dietmar Czernich, Astrid Deixler-Hübner, Martin Schauer (eds.), *Handbuch Schiedsrecht* (Wien: Manz, 2018) para. 16.28.

¹⁷³ *Koller*, 'Die Schiedsvereinbarung', para. 3/63.

¹⁷⁴ An explicit reference to the validation principle is, for instance, made by the Supreme Court in *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, [2020] UKSC 38.

¹⁷⁵ Marc Blessing, 'The Law Applicable to the Arbitration Clause and Arbitrability', in Albert van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards. 40 Years of Application of the New York Convention. ICCA Congress Series No 9* (1999) 168-88, p. 174.

impossible to answer solely based on general principles of law as it is unclear what principles she should refer to.

A similar but less extreme solution is the so-called “non-discrimination principle.”¹⁷⁶ According to this approach, the arbitration agreement is subject to a national law unless the application of such national law leads to the invalidity of a clause that would be valid when applying international standards and general contractual principles.¹⁷⁷ However, this approach also does not provide guidance on where to find these standards and principles.

e. Other Suggestions

Another approach is to apply the law that has the closest connection to the arbitration agreement.¹⁷⁸ However, this does not offer a solution: Again, it is unclear when such a close connection occurs.¹⁷⁹ This can then lead to arbitrary result, depending on whether one finds a close connection to the arbitral seat or the law of the main contract.¹⁸⁰

Yet another solution is to distinguish certain procedural questions – for instance, whether a certain dispute falls within the jurisdiction of the arbitral tribunal – from general questions regarding the validity and feasibility of the arbitration agreement. While the former group should be subject to the *lex fori*, the latter group should be subject to the international private law in the country of the seat.¹⁸¹ The disadvantage of this approach is that it complicates things further by artificially creating different categories of validity.

¹⁷⁶ Nazzini, ‘The Law Applicable to the Arbitration Agreement: Towards Transnational Principles’, pp. 697 et seq.

¹⁷⁷ Nazzini, ‘The Law Applicable to the Arbitration Agreement: Towards Transnational Principles’, p. 698. Cf. also US Court of Appeals, 3rd Circuit, 06.07.1983, Rhône Méditerranée Compagnia Francese di Assicurazioni e Riassicurazioni v. Achille Lauro, 712 F.2d 50.

¹⁷⁸ Cf. Born, *International Commercial Arbitration* p. 518 and the English approach described above.

¹⁷⁹ Born, *International Commercial Arbitration* p. 521.

¹⁸⁰ Born, ‘The Law Governing International Arbitration Agreements: An International Perspective’, p. 832.

¹⁸¹ Ruggiero Cafari Panico, ‘Jurisdiction and applicable law in the case of so-called pathological arbitration clauses in view of the proposed Reform of the Brussels I-Regulation’, in Franco Ferrari, Stefan Kröll (eds.), *Conflict of Laws in International Arbitration* (München: Sellier, 2011) 81-116, p. 103.

Other solutions often find no basis in law, for instance when authors want to rely on the law of the country where the arbitration agreement was entered into (*lex loci contractus*)¹⁸² or the place where arbitrators meet to decide the dispute.¹⁸³

4. Exceptions

Having established that the law applicable to the arbitration agreement should be the law at the seat of arbitration, exceptions need to be made for special circumstances.

a. No Choice of Seat

The first exception occurs if the parties have not explicitly chosen the seat of the arbitration in their arbitration agreement but have chosen a law for the main contract *and* a State court has to decide on the validity of the clause. For instance, the opposing party may rely on the arbitration agreement if proceedings before the State court are started despite there being an arbitration clause. A State court might also be called upon to help constitute the arbitral tribunal (cf. § 587 (2)(4) and (5) et seqq. Austrian Code of Civil Procedure and § 1034 et seqq, § 1025(3) German Code of Civil Procedure). A similar situation occurs when parties have only designated an arbitral institution that is tasked to determine the seat. In these circumstances, it is difficult to argue that relying on a seat that is not yet chosen is in line with the parties' intentions.¹⁸⁴

In this particular setting, applying the law of the main contract seems to be more convincing,¹⁸⁵ simply because this is the sole existing indication of the parties' intentions. A possibly divergent approach taken later concerning the law applicable to the arbitration clause therefore has to be accepted.¹⁸⁶ The same result is reached if

¹⁸² Gaillard, Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* paras. 427 et seq.; Jobst Buhmann, *Das auf den internationalen Handelsschiedsvertrag anzuwendende nationale Recht* (Regensburg: 1970) pp. 96 et seq.

¹⁸³ Buhmann, *Das auf den internationalen Handelsschiedsvertrag anzuwendende nationale Recht* pp. 97 et seqq.

¹⁸⁴ Nazzini, 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles', p. 693; Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, 3rd edn. (Cambridge: Cambridge University Press, 2017) p. 84; Seraglini, Ortscheidt, *Droit de l'arbitrage interne et international* para. 581; Glick, Venkatesan, 'Choosing the Law Governing the Arbitration Agreement', p. 147. But see Pierre Karrer, 'Le contrat d'arbitrage et l'autonomie de la lex arbitri', in *FS Tercier. Mélanges en l'honneur de Pierre Tercier* (Zürich: Schulthess, 2008) 837-50, p. 839, who considers this as being an indirect choice of the law at the seat.

¹⁸⁵ Cf. also Hausmann, 'Schiedsvereinbarungen', para. 8.263; Nazzini, 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles', p. 693.

¹⁸⁶ Peter Schlosser, 'Anh § 1061 dZPO', in Friedrich Stein, Martin Jonas (eds.), *Kommentar zur Zivilprozessordnung: ZPO X. Band 10*, 23rd edn. (Tübingen: Mohr Siebeck, 2014) para. 71.

one denies the direct applicability of the *lex causae* due to a lack of agreement:¹⁸⁷ In such a case, applying the general rules of private international law will lead to the law of the closest connection and, because of the absence of alternatives, again to the law of the main agreement.¹⁸⁸ For instance, relying on Article 4(4) of the Rome I Regulation (see Section 1.f) would lead to the applicability of the *lex causae*.¹⁸⁹

An alternative would be to apply the conflict-of-law rules of the *lex fori*.¹⁹⁰ This would be in line with Article VI(2)(c) European Convention on International Commercial Arbitration. According to this provision, failing any indication as to the law to which the parties have subjected the arbitration agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, the validity of the arbitration agreement should be determined under the competent law by virtue of the rules of conflict of the court seized of the dispute. However, in my view, this rule would only apply if there is also no choice of law for the main contract.

Another special situation exists in case the parties have chosen institutional arbitration rules that contain an explicit provision to determine the seat. For instance, Article 25(1) of the VIAC Rules provides that absent party agreement, the place of arbitration shall be Vienna. In this case, I consider that Austrian law as the law at the seat of arbitration should again be applied to the arbitration agreement, as the parties have indirectly chosen this law by choosing the VIAC Rules. The situation is, however, different if the seat is to be determined by the arbitral tribunal or the arbitral institution on a case-by-case basis, as it is done under Article 18(1) ICC Rules.

¹⁸⁷ Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* p. 56; Rieder, Kreindler, 'The Arbitration Agreement', para. 2.9 (closest connection).

¹⁸⁸ Wilske, Fox, 'Art II Abs 3', para. 235; Nazzini, 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles', p. 702.

¹⁸⁹ Hausmann, 'Schiedsvereinbarungen', para. 8.263; Court of Appeal Düsseldorf 15.11.2017, VI-U (Kart) 8/17. But see Münch, '§ 1029 dZPO', paras. 37 et seq.; Ulrich Magnus, 'Sonderkollisionsnorm für das Statut von Gerichtsstands- und Schiedsgerichtsvereinbarungen?' (2016) IPRax 521-31, p. 531; Court of Appeal Düsseldorf 15.11.2017, VI-U (Kart) 8/17. Cf. also Schmidt-Ahrendts, Hötter, 'Anwendbares Recht bei Schiedsverfahren mit Sitz in Deutschland', p. 274. However, they argue that while the reference to the closest connection does not result from Article 4 Rome I Regulation, it constitutes a generally recognised principle of private international law.

¹⁹⁰ König, 'Zur Bestimmung des Schiedsvertragsstatuts bei fehlender Gesetzesgrundlage nach Inkrafttreten der Rom I-Verordnung', p. 133, argues that for proceedings before national courts one should apply the "original principle" of international civil procedure law, *i.e.* rely on the *lex fori* of the national court. Cf. also Albert van den Berg, 'Consolidated Commentary: Cases Reported in Volumes XXII (1997) - XXVII (2002)' XXVIII (2003) YB Comm Arb 562-700, p. 622; Wilske, Fox, 'Art II Abs 3', para. 235.

Relying on the *lex causae* as the law governing the arbitration agreement from the beginning of the proceedings is, in my opinion, the most convincing solutions in such situations due to the ensuing legal certainty. The alternative proposition that a later determination of the seat will lead to a change of the governing law¹⁹¹ seems to insert another degree of uncertainty. A “floating” choice of law, *i.e.* to leave the determination of the applicable law until the seat is fixed, is also not convincing.¹⁹² In addition, the latter solution cannot be based on any positive law. Some have argued that State courts should assist the arbitral tribunal to be constituted and that, once established, the arbitral tribunal should then determine the arbitral seat,¹⁹³ which would also be the law applicable to the arbitration agreement. This solution has limited practical value if one considers situations where a State court would first help to establish an arbitral tribunal only to then rule that the underlying arbitration agreement is invalid. In these special cases, it is thus more convincing to apply the *lex causae* to the arbitration agreement.

The next question is what happens if the arbitral tribunal, once constituted, determines the seat. In this case, the arbitral tribunal is bound by the parties’ agreement and has to assess the validity of the arbitration agreement according to the *lex causae*, without being able to rely on the *lex arbitri* as an alternative. Here, party autonomy (as expressed through their agreement on the substantive contractual law) trumps the considerations that speak in favour of applying the law at the seat of arbitration.

Finally, if parties have chosen neither the seat nor a substantive applicable law, the validity of the arbitration agreement should also be assessed according to the *lex causae*, which would first need to be determined under general rules of private international law.¹⁹⁴

¹⁹¹ Koller, ‘Die Schiedsvereinbarung’, para. 3/64; Geimer, *Internationales Zivilprozessrecht* para. 3789; Epping, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts* p. 56.

¹⁹² Glick, Venkatesan, ‘Choosing the Law Governing the Arbitration Agreement’, p. 147. But see Schütze, ‘Kollisionsrechtliche Probleme der Schiedsvereinbarung, insbesondere der Erstreckung ihrer Bindungswirkung auf Dritte’, p. 275.

¹⁹³ Geimer, ‘§ 1025 dZPO’, para. 16.

¹⁹⁴ van den Berg, *The New York Arbitration Convention of 1958* p. 127; Derains, ‘The ICC Arbitral Process Part VIII, Choice of Law Applicable to the Contract and International Arbitration’, p. 16. According to the Court of Appeal Düsseldorf (15.11.2017, VI-U [Kart] 8/17), Article 4(4) Rome I Regulation would apply per analogy, with the law having the closest connection regularly being the law of the main contract. However, as pointed out by Vincent Wächter, ‘Kollisionsrechtliche Aspekte der Schiedsvereinbarung am Beispiel der „Husten-Affäre“ - zugleich eine Anmerkung zu OLG Düsseldorf, Urt. v. 15.11.2017 - VI-U (Kart) 8/17’ (2018) *SchiedsVZ* 294-98, p. 296, such

b. Choice Between Two Different Seats

Another special case exists if the parties have included a choice between two different seats in their arbitration clause or if their contract contains an arbitration agreement and a contradicting choice-of-court agreement. In the second case, the question of the governing law is of particular importance, as it is unclear whether there exists an agreement to arbitrate in the first place.

If the contract contains both an arbitration as well as a choice-of-court clause and refers to two different countries while also containing a substantive choice-of-law clause, the *lex causae* is, yet again, the only indication of the parties' will.¹⁹⁵ In such a setting, it is unclear whether parties wanted to arbitrate in State X or litigate in State Y: Therefore, applying the only law that is clearly chosen seems to be the most sensible solution.

The situation is different if the choice is between arbitral proceedings at two different seats, *i.e.* in State Y or X.¹⁹⁶ Here, it is clear that the parties wanted to grant jurisdiction to an arbitral tribunal. It is also evident that they have thought about the seat of the arbitral tribunal. If such a case is presented to State courts, it is, in my opinion, sufficient if the arbitration agreement is valid under the laws of only one of the chosen seats. In any case, the claimant will often choose to initiate proceedings in the country where the clause will be valid. Once the tribunal is constituted at one of the seats, it then has to apply the law at its seat to the arbitration agreement. The same law also continues to apply in setting-aside or enforcement proceedings.

5. Conclusion

In conclusion, absent a clear indication that the parties have chosen a specific law, applying the rule contained in Article V(1)(a) New York Convention by referring to the law at the seat of the arbitration remains, in my opinion, the most sensible solution for ascertaining the law applicable to the interpretation of arbitration agreements. If the parties have chosen a seat, applying this law to the substantive validity of the clause is also in line with the parties' will and expectations. The situation is only different if

considerations were unnecessary in the case at hand as there was a clear choice of law for the arbitration agreement.

¹⁹⁵ Richard Garnett, 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2015) *Journal of Private International Law* 361-86, p. 384.

¹⁹⁶ German BGH 27.02.1969, KZR 3/68.

no clear seat has been chosen by the parties. In this case, the application of the *lex contractus* is warranted.

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