Re-Examining the Arbitration Agreement Applicable Law: Consensus or Confusion?

I. Introduction

Arbitration is essentially an agreement to establish "private justice", e.g. private dispute resolution by a private tribunal. This is why it is generally recognized today that arbitration agreements have a hybrid nature, comprising both procedural and contractual elements. Leaving aside special scenarios such as arbitration under investment protection treaties or free trade agreements, every arbitration requires an agreement by the parties. The English Commercial Court has explained the contractual character of arbitration as follows:

"An arbitration clause in a commercial contract like the present one is an agreement inside an agreement. The parties make their commercial bargain, i.e. exchange promises in relation to the subject matter of the transaction, but in addition agree on a private tribunal to resolve any issues that may arise between them."
Given that the arbitration agreement is "the gateway to arbitration," one is struck by surprise to hear that the determination of the law applicable to that agreement is "certainly a more complex task than determining the law governing the [main] contract" and that in spite of these alleged difficulties, parties who negotiate and draft an arbitration agreement do not agree on the law applicable to the arbitration agreement but rather "rely on the future arbitrators’ wisdom." Surprise changes into sheer horror when one hears that, in his comment to Julian Lew's Report on "The Law Applicable to the Form and Substance of the Arbitration Clause", presented to the ICCA Congress in May 1998 in Paris, which celebrated 40 years of application of the New York Convention, Marc Blessing identified, as a starting point for his analysis, no less than nine different potential conflict rules for determining the law applicable to the arbitration agreement.

Eight years later, this Report undertakes a fresh attempt to find out whether confusion still prevails or whether international doctrine and arbitration practice have finally reached a consensus on how to deal with applicable law issues related to an international agreement to arbitrate.

II. Basic Distinctions

A major reason for the confusion which has prevailed over the past years in the area of the law applicable to the arbitration agreement stems from the fact that very often, basic distinctions between essential issues and elements relating to the validity of arbitration agreements are neglected, misunderstood or not distinctly perceived by arbitral tribunals. In particular, there are various, often closely related factors which might affect the existence and validity of the arbitration agreement, all of which may be submitted to different laws. Neglecting these vital distinctions has caused misleading and unproductive discussions creating more uncertainty instead of less confusion.

1. Form vs. Substance

A first and essential distinction relates to the difference between substance and form. The former relates to the question whether there was a valid meeting of the minds of the parties with respect to dispute settlement through arbitration. The latter concerns special formal validity rules established to ensure that the parties are aware that by concluding the arbitration agreement, they oust the jurisdiction of the otherwise competent state courts. There is a hierarchy between both issues. The formal validity comes into play only if and to the extent that the parties have reached an agreement to arbitrate. Like in general conflict of laws theory, formal and substantive validity are subject to different conflict of laws approaches. This can, but must not necessarily mean that both issues are governed by different laws. Even though the distinction seems to be obvious and clear, state courts have sometimes not differentiated between the formal validity requirements governed by the New York Convention and the substantive validity requirements governed by domestic law, and have applied the latter to both requirements.

There may also be other issues in dispute between the parties which relate to the validity of the arbitration agreement. Thus, the parties’ capacity to arbitrate, sometimes called "subject arbitrability", may be in question. Also, a party’s authority to represent another party in the conclusion of the arbitration agreement may be disputed. Finally, one party may challenge the objective "arbitrability" of all or certain claims that are in dispute. All these issues can be governed by different laws.

2. Arbitrability vs./and Validity of the Arbitration Agreement

In any event, it would be wrong to say that we are dealing with "the law" applicable to the arbitration agreement. The above considerations as well as the following observations show that we are searching for "the laws" applicable to that agreement.
The arbitration agreement forms the basis of the tribunal’s jurisdiction. American courts and legal doctrine are using the sweeping term “arbitrability” to cover all issues of jurisdiction. This term, however, can mean different things. In Europe, its meaning is limited to “subject-matter arbitrability”. Subject matter arbitrability determines those types of issues which can or cannot be submitted to dispute settlement by arbitration. If the subject matter of the dispute is non-arbitrable, the arbitration agreement is invalid and the tribunal has no jurisdiction to decide the dispute even if both parties want this. The arbitrability issue, therefore, resolves the conflict between public policy and party autonomy. However, American courts and legal doctrine extend this concept beyond the ambit of public policy to cover the validity (i.e. existence) and scope of the arbitration agreement (“contractual arbitrability”). From a conflict of laws perspective, this extended view is problematic because subject matter arbitrability and contractual arbitrability are subject to completely different conflict of laws approaches.

Today, all modern arbitration laws contain substantive rules of private international law which govern the subject matter arbitrability of claims that are in dispute in arbitrations which have their seat in that jurisdiction. Art. 177 Swiss Statute on Private International Law, Sec. 1030 (1) German Arbitration Act, Sec. 1020 (3) Dutch Arbitration Act, or Sec. 1 (1) Swedish Arbitration Act contain such “règles materielles”. These mandatory rules substitute classical conflict of laws analysis. Due to the territoriality principle, these substantive rules apply as soon as the seat of the arbitration is fixed in that country. The seat serves as the connecting factor for these rules when the question is to be determined by the tribunal itself. However, when this issue is to be determined by a court in a country other than that where the arbitration had its seat, e.g. in recognition and enforcement proceedings, that court will determine that issue according to its own law. This approach is confirmed by Art. V (2) (a) New York Convention and Art. 36 (1) (b) (i) UNCITRAL Model Law on International Commercial Arbitration which provide that recognition and enforcement of the award may be refused if the subject matter of the dispute is not arbitrable under the law of the state where enforcement is sought. Thus, the legal determination of the objective arbitrability of the subject matter of the arbitration is only relative, i.e. limited to the viewpoint of the forum whose rules are applied. The significance of this problem is substantially reduced due to the worldwide trend in favor of arbitrability which has begun with the Mitsubishi decision of the US Supreme Court.

The substantive validity of the arbitration agreement, i.e. the contractual arbitrability, however, is governed by the choice of law principles to be elaborated below. Again, in spite of these different approaches both subject matter and contractual arbitrability may be governed by the same law. One must be aware of the fact that such a result does not follow from a uniform conflict of laws principle and that both kinds have to be distinguished from each other in terms of conflicts of laws methodology.

### 3. Arbitral Tribunals vs. Courts

An often overlooked but vital distinction is that the issue of the existence and validity of the arbitration agreement may arise in different fora and at different stages of the proceedings. A basic distinction must be made in this respect between arbitral tribunals and state courts.

Arbitral tribunals must determine the law applicable to

the arbitration agreement whenever they have to ascertain the basis of their own jurisdiction. They are allowed to do this under the generally accepted principle of “Kompetenz-Kompetenz”. Such an examination of the existence, validity or scope of the arbitration agreement under the law applicable to it is required if one party challenges the jurisdiction of the tribunal for all or certain claims submitted to it or if one party requests arbitral interim relief which, as an annex to the tribunal’s decision-making power, requires the validity of the arbitration agreement as the basis of the tribunal’s jurisdiction. However, the arbitral tribunal has no lex fori. This means that the tribunal is under no legal obligation to have resort to the conflict of laws rules at the seat of the arbitration to determine the law applicable to the arbitration agreement. Due to the territoriality principle, arbitral tribunals are under an obligation to apply the arbitration law at the seat of the arbitration. However, only very few of these arbitration laws contain specific conflict rules for the determination of the law applicable to the arbitration agreement by the arbitral tribunal, the Swedish Act being a notable exception to this rule. Those conflict rules that deal with this issue are concerned with the determination of the applicable law by the courts in setting aside and enforcement proceedings.
Therefore, the tribunal must develop its own conflict rule(s) in order to determine the law applicable to the arbitration agreement. This, of course, entails the tribunal’s right to draw inspiration from the conflict laws of domestic laws, including those in force at the seat of the arbitration, and from international uniform law instruments such as the New York Convention and the UNCITRAL Model Law.

The situation is different when the law applicable to the arbitration agreement is to be determined by state courts. This may be the case if a party is sued before a state court and invokes the existence of an arbitration agreement, if a party seeks interim relief or other measures of assistance from a state court under the applicable arbitration law in force at the seat of the arbitration or in another jurisdiction or in the postaward stage, if the losing party seeks to have the award set aside by the courts at the seat of the arbitration for lack of a valid arbitration agreement or if the winning party seeks to have the award enforced at the seat of the arbitration or in another jurisdiction. Under German arbitration law, a German court may also have to determine the law applicable to the arbitration agreement if one party seeks a declaration as to the admissibility or non-admissibility of the arbitration proceedings prior to the constitution of the arbitral tribunal under Sec. 1032 (2) German Arbitration Act.

There are two major differences in these state court scenarios when compared with the determination of the law applicable to the arbitration agreement by arbitral tribunals. First, unlike arbitral tribunals, state courts have a *lex fori* and they must apply the conflict of laws rules of that *lex fori*. This may lead to a forum shopping effect, meaning that different laws are applied to the same arbitration agreement in different jurisdictions. Secondly, to avoid these forum shopping effects, state courts are under an obligation to apply conflict of laws rules contained in international uniform law instruments. The two most important instruments are the New York Convention and the European Arbitration Convention. Both contain conflict of laws rules related to the law that determines the substantive validity of the arbitration agreement and formal validity rules in the form of directly applicable *règles matérielles*.

### 4. Domestic Laws vs. International Uniform Laws

What has been said above about the determination of the law applicable to the arbitration agreement leads us directly to another distinction which has contributed a lot to the confusion in this area: the complex interplay between domestic laws and international uniform instruments. Given the freedom of international arbitrators in choice of law issues, it seems to be an open question which law a tribunal should apply to the formal or substantive validity of the arbitration agreement. Or should it apply the conflict rules or formal validity rules of the New York Convention even though the scope of this Convention is restricted to proceedings before state courts on the enforcement of arbitration agreements and foreign awards? A state court, on the other hand, can apply international uniform law in lieu of its own domestic law only provided that the state in which it sits has ratified the instrument and the problem with which the court is concerned in a given case falls within the scope of the instrument. Unfortunately, the latter question is not always clear. The European Convention defines its scope in a clear and unambiguous way. Art. I (1) (a) provides that the Convention applies to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different contracting states. Due to the drafting history, there is no such clear rule with respect to the formal validity rule of Art. II New York Convention. However, it is generally recognized today that this rule applies whenever the arbitration agreement will probably lead to an award covered by the Convention pursuant to its Art. I, i.e. where the award will be made in a different contracting state irrespective of the country where the parties are resident. Another source of confusion is the fact that the conflict rule related to the substantive validity of the arbitration agreement which is contained in Art. V (1) (a) New York Convention is concerned only with the enforcement of foreign arbitral awards, i.e. with the post award stage. The same is true for conflict rules contained in domestic laws such as Art. 34 and 36 UNCITRAL Model Law which deal only with the setting aside and the enforcement of awards. If a court has to determine the law applicable to the arbitration agreement in the pre-award phase, e.g. when determining the admissibility of the arbitration pursuant to Sec. 1031 (2) German Arbitration Act, can it apply these conflict rules?

### 5. Submission Agreements vs. Arbitration Clauses


Pursuant to Art. 7 (1) UNCITRAL Model Law, Sec. 1029 (2) German Arbitration Act and the provisions in most arbitration laws around the world, an arbitration agreement may be in the form of a separate agreement ("separate arbitration agreement") or in the form of a clause in a contract ("arbitration clause"). A separate arbitration agreement may deal with future disputes arising out of a contract to which it is attached. However, it may also deal with an existing dispute which it submits to arbitration instead of dispute resolution before domestic courts. For these "submission agreements", the qualification attached to them by the English Commercial Court quoted in the Introduction - "an agreement inside an agreement" - does not apply. The submission agreement is a free standing contract. This has important repercussions on conflict of laws analysis. It is a much debated question whether the law applicable to the main contract also applies to the arbitration clause contained therein. For submission agreements, this question cannot arise. Typically, this contract contains nothing more than the arbitration agreement itself and a choice of law clause contained therein necessarily governs that agreement:

"Where the agreement to arbitrate is set out in a specially drawn submission agreement, the parties should choose a law to govern that agreement and should set out their choice in an appropriate clause. This is what the parties would normally do in any other kind of international agreement; and in this respect a submission agreement is no different. If no express choice of law is made, and a question arises as to the law governing the submission agreement, the general principles as to the choice of law will apply[...]."

6. Territoriality vs. Transnationalism

The eternal conflict between territoriality and transnationalism is not limited to the determination of the law applicable to the substance of the dispute where the doctrine of the "new lex mercatoria" has provoked strong reactions from those who favor a more traditional, positivistic approach to conflict of laws in international arbitration. The same conflict between territoriality and transnationalism exists with respect to the determination of the law applicable to the substantive validity of the arbitration agreement. The transnational approach to the substantive validity of international arbitration agreements is a particularity of French legal doctrine. Rather than relying on a classical, and by its very nature territorial, conflict of laws approach, French courts have developed a substantive rule of international arbitration law pursuant to which the arbitration agreement is not only independent from the main contract but which also provides that, subject only to mandatory provisions of French law and the French international ordre public, the existence and validity of the arbitration agreement "depends only on the common intention of the parties, without it being necessary to make reference to a national law". This transnational approach had already been adopted by a three-member arbitral tribunal in the famous Isover Saint Gobain interim award in which the tribunal, apparently influenced by French arbitration doctrine and decisions of the French Cour de Cassation going back to 1975, held that the tribunal had:

"determine[d] the scope and effect of the arbitration clause in question, and thereby reach[ed] its decision regarding jurisdiction, by reference to the common intent of the parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterize the performance and later the termination of the contracts in which they appear[...]. To ensure the enforceability of the award in France, the tribunal] will assure itself that the solution it adopts is compatible with international public policy, in particular, in France."

In his 1998 ICCA Report, Julian Lew maintained the view that "[i]n reality, courts, arbitrators and parties today recognize that the arbitration clause is governed by the common intention of the parties, general principles and usages of international business". In his comment to Julian Lew's Report, Marc Blessing argued that since the "strictly academic approach" which favors a traditional conflict of laws analysis, has produced unsatisfactory answers and results, international arbitrators should indeed "go back to the parties and take the most determinative guidance from the intentions which the parties have expressed (either explicitly or implicitly and by their behavior), taking into account their fair and reasonable expectations and the kind of usage which may exist between them".

Such a transnational approach certainly has the beauty of avoiding the uncertainties and idiosyncrasies connected with...
the application of a multiplicity of connecting factors and resulting domestic laws to international arbitration agreements.\textsuperscript{50} Such an approach is particularly relevant in international arbitration, where practice and doctrine have always strived to escape the pitfalls of domestic laws. However, there are two reasons why such a transnational approach should not be adopted in this context. First, a "reasonable contract interpretation" as the essential source of guidance for the determination of the validity of the arbitration agreement does not necessarily require the abandonment of traditional conflict of laws analysis. As we will see below,\textsuperscript{51} the notion of "in favorem validitatis" as the guiding principle for the interpretation of international arbitration agreements is part of almost any developed legal system. The French approach may thus be characterized as an unnecessary exaggeration of transnationalism. Piero Bernardini's comment to Julian Lew's Report at the 1998 ICCA conference is still valid today:

"The French rule, with its extreme liberalism, may bring about results going beyond parties' expectations in view of the wide discretion left to the arbitrator in determining the parties' common intent, considering also the absence of any requirement of form of the arbitration clause in case of international arbitration."\textsuperscript{52}

Secondly and more importantly, the need to ensure the validity and enforceability of the award will usually prevent international arbitrators to "transnationalize" the arbitration agreement from which they derive their jurisdiction. If the award is attacked in setting aside proceedings before the courts at the seat of the arbitration or in recognition and enforcement proceedings for lack of a valid arbitration agreement, the secourts will determine the validity of the agreement pursuant to the conflict of laws rules of their lex fori, whether they are derived from autonomous domestic law or unified law. These conflict of laws rules are based on the traditional conflict of laws approach. A purely transnational character is read into these rules in only very few jurisdictions. France is the exception, not the rule. It was (only) due to this extremely liberal and transnational approach of French law to the validity of international arbitration agreements that the arbitral tribunal in the Isover Saint Gobain award\textsuperscript{53} could apply

transnational principles to the substantive validity of the arbitration agreement without risking the refusal of enforcement of the award in France.\textsuperscript{54} Not surprisingly, a survey of arbitral case law reveals "how important still are more traditional or conservative approaches to the determination of choice-of-law issues concerning international commercial arbitration".\textsuperscript{55}

Here lies the basic difference between the transnationalization of substantive law and of the law applicable to the arbitration agreement. First, a conflict with a traditional, territorial attitude of the courts is unlikely given that the well-known prohibition of a "révision au fond" of the arbitral tribunal's substantive decision prevents a full fletched scrutiny of the tribunal's conflict of laws decisions. With respect to the latter, there are no such limitations of the courts' powers to examine en detail the tribunal's conflict of laws decision relating to the arbitration agreement. It is for this reason that arbitral tribunals that determine their jurisdiction based on the will of the parties and general arbitration practice make sure that the law of the seat of the arbitration does not conflict with such solutions.\textsuperscript{56}

This view has recently been confirmed by the English High Court in its Peterson Farms judgment of February 4, 2004. In the award that was before the court, the tribunal had argued that the law applicable to the arbitration agreement may differ from the law applicable to both the substance of the contract\textsuperscript{57} and to the arbitral proceedings themselves, i.e. the law of the seat.\textsuperscript{58} It then decided the question whether other group-entities of the claimant\textsuperscript{59} were bound by the arbitration agreement and whether claimant could claim (the vast majority) of the alleged damages on their behalf by interpreting the arbitral agreement according to the common intent of the parties, without referring to any domestic law. The court set aside that part of the award for want of jurisdiction and argued:

of the agreement nor even the law of the chosen place of arbitration but, in effect, the group of companies doctrine itself.\textsuperscript{60}

It may well be that the tribunal's approach of effectively de-localizing the law applicable to the arbitration agreement may have given rise to difficulties in enforcing the award had it not been challenged under Sec. 67 English 1996 Arbitration Act.\textsuperscript{61} It was for these reasons that Julian Lew, even though in favor of a transnational approach towards the determination of the substantive validity of the arbitration agreement,\textsuperscript{62} had to conclude his 1998 ICCA Report by stating that "the application of national laws prevails in this field".\textsuperscript{63} This view is even more valid today. It goes without saying that this does not prevent an arbitral tribunal from attaching more persuasive force to its decision on jurisdiction by arguing that the solution reached on the basis of domestic law is compatible with a-national legal rules or "international arbitral
7. Conflict Analysis and the "In Favorem" Rule

In most modern jurisdictions it is generally acknowledged that the principle of "in favorem validitatis" must be applied to international arbitration agreements. This pro-arbitration approach serves to enforce the common intention of the parties to have their dispute decided before an international arbitral tribunal:

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause[...]
The invalidation of such an agreement[...]would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts."\(^{65}\)

The *in favorem* approach to arbitration agreements is also a consequence of today's arbitration-friendly climate which is based on the understanding that dispute settlement by international arbitral tribunals has the same value and standing as adjudication before domestic courts.\(^{66}\) International arbitrators, therefore, show a natural tendency to respect the common intention of the parties as expressed in their agreement to arbitrate and tend to adopt a very liberal "pro-arbitration" approach in order to make sure that the will of the parties to arbitrate their disputes is not frustrated.

"The arbitrators have from the [arbitration] clause and the pleadings of the parties decided that both parties desire a settlement of disputes outside state jurisdiction. That wish, expressed by both parties, has essentially determined the attitude of the arbitrators vis-à-vis the clause inserted into the contract. They felt an obligation to help the parties realize such a wish."\(^{67}\)

This *in favorem* rule has two important effects.

First, an arbitration agreement should be construed in good faith\(^ {68}\) and in a way that upholds its validity.\(^ {69}\) Julian Lew argued in his Report to the 1998 ICCA Congress that "the validity of the arbitration clause is presumed".\(^ {70}\) Other argue that "doubts about the intended scope of an agreement to arbitrate are [to be] resolved in favor of arbitration".\(^ {71}\) This means that a liberal way of construing arbitration agreements has to be pursued even in those cases where in general contract law the ambiguity could not be resolved through the application of traditional means of interpretation. However, one must stress that the *in favorem* rule relates to the interpretation of the arbitration agreement which is the way to determine its substantive validity. It goes too far to argue that under this rule "the formal and substantive validity of the arbitration clause is presumed".\(^ {72}\)

Secondly, in determining the law applicable to the arbitration agreement, the tribunal should seek a solution that upholds the validity of the arbitration agreement. This approach is known as "favor negotii" in general conflict of laws theory.\(^ {73}\) This *in favorem* approach with respect to the determination of the law applicable to the arbitration agreement\(^ {74}\) has been adopted by the Swiss legislature in Art. 178 (2) Swiss Federal Statute of Private International Law. An identical rule is contained in Sec. 458 bis 1 (3) Algerian Code of Civil Procedure.\(^ {75}\) Art 178 (2) provides that:

"As regards its substance, an arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or the law governing the subject matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law."

The idea of alternative application of different laws to the substantive validity of the arbitration agreement has also been employed in a similar vein and with express reference to the legal concept of *in favorem validitatis* in Art. 4 of the Santiago de Compostela Resolution of the Institut de Droit International:
"Where the validity of the agreement to arbitrate is challenged, the tribunal shall resolve the issue by applying one or more of the following: the law chosen by the parties, the law indicated by the system of private international law stipulated by the parties, general principles of public or private international law, general principles of international arbitration, or the law that would be applied by the courts of the territory in which the tribunal has its seat. In making this selection, the tribunal shall be guided by the principle in favorem validitatis."\(^{76}\)

While the drafters of the Swiss provision acknowledge that this alternative conflict rule implements the *in favorem validitatis* principle, they also emphasize that in all cases and whatever the law applicable to the arbitration agreement is, it must always also meet the formal validity requirements established in Art. 178 (1) Swiss Federal Statute of Private International Law, which in their view means that in many cases, the absence of a written text as required by Art. 178 (1) will prevent the enforcement of the arbitration agreement even under the extremely liberal conflict of laws rules of Swiss arbitration law.\(^{77}\)

### III. The Law Applicable to Substantive Validity

#### 1. The General Consensus

It seems that with respect to the determination of the law governing the substantive validity of the arbitration agreement, there is a gross discrepancy between the amount of doctrinal writings and the need for clarification. Far from the nine theories listed by Marc Blessing in his comment to Julian Lew's 1998 ICCA Report the conflict rule contained in Art. V (1) (a) New York Convention reflects the modern view of a single conflict of laws rule for the determination of the law applicable to the arbitration agreement. It provides that enforcement of the arbitral 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."

Pursuant to Art. 31 (3) UNCITRAL Model Law, "[t]he award shall be deemed to have been made at the place [of arbitration]." Contrary to the alternative Swiss conflict rule,\(^{78}\) this conflict rule establishes a hierarchy between party autonomy, to which it attaches primary importance, and the law of the place (seat) of arbitration, which applies in those cases where the parties have not chosen the law applicable to the arbitration agreement.

The rationale behind the application of the law of the seat of the arbitration is the closest connection or center of gravity test which, in itself, is a generally accepted principle of conflict of laws.\(^{79}\) It is widely acknowledged today that an agreement to arbitrate is more closely connected with the law of the seat of the arbitration as the place of performance of the arbitration agreement than with any other country.\(^{80}\) The close functional connection between the arbitration agreement and the arbitral procedure, which is reinforced if the parties include detailed procedural stipulations in the agreement to arbitrate, should then also lead to the application of this law to the arbitration clause.\(^{81}\)

Thus, the choice of the seat by the parties, or on their behalf by the arbitral institution or the arbitral tribunal, functions as an indirect choice of law not only for the law applicable to the arbitration procedure\(^{82}\) but also for the law applicable to the substantive validity of the arbitration agreement, and, as we have seen above,\(^{83}\) for the law that determines the arbitrability of the claims raised and the formal validity of that agreement. In fact, this approach has been taken by some older French court decisions.\(^{84}\) While from a practical perspective, the significance of the seat of the arbitration is reduced to a mere "formal legal domicile" (*formales Legaldomizil*) of the arbitration,\(^{85}\) its significance for choice of law issues related to the arbitral procedure and the arbitration agreement cannot be emphasized enough. Also, since we are dealing here with one single connecting factor for a variety of legal issues, the seat of the arbitration has an important harmonizing effect on applicable law issues in international commercial arbitration.\(^{86}\)

#### 2. The Transnational Conflict Rule
It is fair to say that today, the conflict rule contained in Art. V (1) (a) New York Convention, Art. VI (a) and (b) European Convention, in Art. 34 (2) (a) (i) and 36 (1) (a) (i) UNCITRAL Model Law, Sec. 1059 (2) 1. a) and 1060 (2) German Arbitration Act, Art. 1073 Dutch Arbitration Act, and Sec. 48 Swedish Arbitration Act has developed into a truly transnational conflict rule for the determination of the law governing the substantive validity of the arbitration agreement. 87 This rule has been applied in numerous international arbitral awards, 88 is favored by international arbitral doctrine 89 and has been accepted by domestic courts. 90 The significance and persuasive force of the New York Convention must lead international arbitrators to apply that conflict rule:

"Given the fact that the law applicable to the arbitration clause is rarely the subject of a specific stipulation, it is hardly surprising to find that most national court decisions under the New York Convention have applied the law of the country where the award was rendered. What this means is that prudent ICC arbitrators, although free to decide on the validity of the arbitration clause without reference to a national law should also deem themselves bound, under Article 35’s exhortation that they ‘shall make every effort to make sure that the Award is enforceable at law’, to take account of the law of the place of arbitration." 91

In view of its transnational character, the rule applies irrespective of whether a tribunal or court deals with the question of the validity of the arbitration agreement in the pre-award stage or a court deals with this issue in the post-award stage in setting aside or enforcement proceedings. 92 This means that in practice the territorial connection of the arbitration law to the law of the seat of the arbitration prevails over any attempts to transnationalize the arbitration clause.

3. The Relationship between the Traditional Choice of Law Clause and the Arbitration Agreement

The only question that is still disputed is whether the choice of law clause of the main contract also extends to the arbitration clause contained therein. 93 The prevailing view answers this question in the affirmative and reformulates the general conflict rule explained above by stating that:

"[...]the real choice [today] - in the absence of any express or implied choice by the parties - appears to be [only] between the law of the seat and the law which governs the contract as a whole." 94

Likewise, Julian Lew, in his 1998 ICCA Report, argued that "[i]n practice, one may wonder whether the proper law of the arbitration clause would be deemed to be other than either the law of the main agreement in which it is contained, or the law of the seat of arbitration." 95 This view has also been applied in a variety of arbitral awards. 96 It extends the parties’ choice of law to the arbitration agreement included in the contract because it would be artificial to assume that the choice of law clause whose purpose is to fix the law for the whole contract does not cover the arbitration clause which is an integral part of that contract. 97 Also it is argued that due to the substantive nature of arbitration agreements, the law governing this agreement is to be determined by virtue of the principles of the "proper law" of the contract. 98 One exception from this rule is made for submission agreements concluded after the dispute has arisen. It is argued that since such agreements are physically separated from the main contract, there may be less reason to imply the same proper law as that applicable to the main contract. 99

However, this view ignores the legal effects of the doctrine of separability. That doctrine separates the arbitration agreement legally from the main contract even if it is physically included in that contract, 100 and the particular character of an arbitration agreement involving both substantive and procedural aspects ascribes it a special character different in nature from the main contract. 101 Both aspects speak against an automatic extension of the standard choice of law clause to the arbitration agreement. 102 Craig/Park/Paulsson have rightly stated:
“Even when a contract is expressly subject to a particular law, as by a stipulation for example that ‘any difference arising hereunder shall be settled[...] according to Belgian law’, it is not certain that the validity, scope, and effects of the arbitration clause would be determined by reference to Belgian law.

This is so because of the autonomy of the arbitration clause[...] By referring to ICC arbitration, the parties have accepted that the arbitrators are to decide upon challenges to their jurisdiction and to the validity of the main contract. In so doing, ICC arbitrators need not apply the law applicable to the merits of the dispute.”

Also, even though both clauses are typically located at the very end of the contract, the parties rarely, if ever, consider the arbitration clause when negotiating the choice of law clause in the contract. Finally, extending the general choice of law clause to the arbitration agreement would be inconsistent with a stipulation in the arbitration clause that any dispute should be determined by an arbitral tribunal having its seat in a country different from the one whose law is to govern the substance of the dispute.

Therefore, since the parties usually fail to include a special choice of law clause for the arbitration agreement into their contract and absent any special indications hinting at a tacit choice of law for the arbitration agreement, the second tier of the two-tier transnational conflict rule applies: the law of the seat of the arbitration should be applied to determine the substantive validity of the arbitration agreement. This principle was also acknowledged by the UN Working Group that drafted the UNCITRAL Model Law:

“[…]to use the place of arbitration as a secondary criterion was beneficial in that it provided the parties with a degree of certainty which was lacking under [other suggested approaches, like the application of the law of the main contract]. There were also doubts as to whether in fact a trend could be discerned in favour of determining the question of the validity of the arbitration agreement according to the law of the main contract.”

This means that in most cases, the seat of the arbitration is transformed from a subsidiary to the primary connecting factor for the determination of the law applicable to the arbitration agreement.

Thus, rejecting the automatic extension of the choice of law clause to the arbitration agreement achieves decisional harmony between the law applicable to the arbitral procedure and the law applicable to the arbitration agreement. This approach takes account of the fact that the arbitration clause is a contract intended to achieve procedural effects, i.e. the establishment of a system of private justice for the parties. The smooth running of this procedural system requires decisional harmony between the arbitration agreement as the basis of this system and the procedure itself. This is confirmed by the fact that there are no overwhelming party interests requiring a harmonization of the law applicable to the arbitration agreement and the law applicable to the main contract.

4. Determining the Applicable Law when the Seat has not yet been Fixed

It has been argued that the value of the seat of the arbitration as the connecting factor for the law applicable to the substantive validity of the arbitration agreement is relatively low. While this view has been refuted above, it is still justified in cases where the seat has not (yet) been fixed by the parties or on their behalf by the arbitral institution or the arbitral tribunal. Indeed, English courts have sometimes taken the approach that in such a case, the law of the contract, which was English law, governs the arbitration agreement and have then applied certain sections of the previous English arbitration laws by regarding them as statutory implied terms in the arbitration agreement governed by English law, thereby qualifying these provisions of the Arbitration Act as a matter of substance. This rather confusing approach has raised the question whether in cases where the arbitration has its seat in England, but the arbitration agreement is governed by a foreign law, the English courts might not be able to apply these provisions of the English Arbitration Act due to their substantive qualification.

However, Art. VI (c) European Arbitration Convention provides that in such cases, the courts shall determine the substantive validity of the arbitration agreement “by virtue of the rules of conflict of the court seized of the dispute”. This rule merely repeats the obvious: the court will apply the conflict rule of its own lex fori, which will almost certainly be the closest connection or center of gravity test. Application of this objective conflict rule will in most cases lead to the
application of the law of the main contract.\textsuperscript{117}

It must be stressed that this approach is characterized by two issues. First, the application of the \textit{lex contractus} to the arbitration agreement does not result from an extension of the parties’ choice of law clause but from the application of the objective closest connection test. Secondly, if the seat of the arbitration is later fixed by the parties or by the arbitral institution or the arbitral tribunal, then the law of that seat applies to

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the arbitration agreement. If this law is different from the law applicable to the main contract, then the subsequent choice of the seat leads to a change of the law applicable to the arbitration agreement ("Statutenwechsel"). Such a change is nothing unusual in conflicts doctrine and is provided for in Art. 3 (2) Rome Convention on the Law Applicable to Contractual Obligations.\textsuperscript{118} Also, this change of the applicable law is inherent in the general conflict rule which links the arbitration agreement to the law of the seat, given that there is no indication in the Conventions or the UNCITRAL Model Law or the domestic arbitration laws from which this rule is derived\textsuperscript{119} that it shall apply only in cases where the seat of the arbitration has been fixed in advance by the parties.\textsuperscript{120} Finally, the subsequent choice of the seat is always connected to the will of the parties, either directly or because the parties have delegated that power to the arbitral institution or the arbitral tribunal.\textsuperscript{121}

5. The Scope of the Law Applicable to the Substantive Validity

The law determined according to the conflict of laws rule explained above governs all issues that relate to the substantive validity of the arbitration agreement. This includes the conclusion of the arbitration agreement, i.e. the validity of offer and acceptance and the determination of the moment of conclusion of contract, as well as errors of consent like fraud, mistake, threat, undue force etc., and the execution and termination of the arbitration agreement, e.g. duration, impossibility, the prerequisites and consequences of cancellation and the application of the rule "exceptio non adimpleti contractus".\textsuperscript{122} Finally, this law governs all questions that relate to the scope of the arbitration agreement, including the extension of the arbitration agreement to third parties.\textsuperscript{123} Typically, this latter issue must be determined by applying the rules of contract interpretation of that law, including the principle of "in favorem validitatis" dealt with above.\textsuperscript{124}

In certain circumstances, it can be difficult to ascertain whether a certain legal issue is to be determined under the law applicable to the substantive or the formal validity of the arbitration agreement. Thus, Art. 7 (2) UNCITRAL Model Law provides that an arbitration clause contained in standard terms is formally valid only if "the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract". The first part of this provision is certainly a formal validity requirement. The situation is not so clear with respect to the second, highlighted passage of this provision. In this context one is frequently confronted with the observation that inclusion by reference of an arbitration clause contained in standard forms does not only concern the formal validity of the arbitration agreement but at the same time decides over the existence of the parties’ consent to submit the dispute to arbitration.\textsuperscript{125} It would not be correct to deduce from this observation a strong interaction of formal and substantive requirements, in a way that the formal requirements, construed restrictively, decide over the substantive consensus of both parties\textsuperscript{126} or that the question of formal validity is decided solely on the basis of the substantive national law which governs the question of consent of the parties.\textsuperscript{127} Confusing substantive and formal validity requirements does not do justice to the different functions of both kinds of rules and runs the risk of restricting the ways of including an arbitration clause by reference to an extent which is incompatible with the needs of modern commercial transactions.\textsuperscript{128} Instead, the problem of inclusion by reference has to be tackled by taking into account the specificity of international commercial arbitration. The customs and usages of international trade and commerce and not the law of the seat decide over the question of whether "the reference was such as to make that clause part of the contract".\textsuperscript{129} Based on these considerations, two rules have been developed by international doctrine. First, a specific reference to the arbitration clause contained in a set of standard terms is always sufficient to make that clause part of the contract. Secondly, in case of a global reference to a set of standard terms which contains an arbitration clause that is not specifically mentioned in the reference, the generally accepted view is that the formal validity rule is met if the other party is already in possession of the standard forms or if the other party is put into a position to check the reference, for example where the conditions are

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set out on the reverse side of the contract or attached to it or, alternatively, if dispute settlement through arbitration is customary in that particular business.¹³⁰

IV. The Law Applicable to Formal Validity

1. General Considerations

Almost every arbitration law contains formal validity requirements applicable to the arbitration agreement. The reason for these requirements is that the parties should be made aware that by concluding the arbitration agreement they oust the jurisdiction of the domestic courts ("warning function"). Also, such "in writing" requirements serve to preserve the text of the arbitration agreement if the jurisdiction of the arbitral tribunal is disputed ("proof function").¹³¹ Sometimes, one of these functions prevails. Thus, it is undisputed that the formal validity rule contained in Sec. 1021 Dutch Arbitration Act is a provision of proof which is reflected in the wording of that provision ("[...]\ shall be proven [...]").¹³² From a practical perspective, these differences are immaterial for two reasons. First, courts seized of a matter relating to the arbitration may refuse to proceed if the party invoking the arbitration agreement cannot prove its existence just as the court would have to refuse to act if the arbitration agreement violates any substantive formal validity rules. Secondly, the competence of the tribunal may be established under all laws if the existence of an arbitration agreement is alleged by one party and not denied by the other.¹³³

If a tribunal has to deal with the formal validity of the arbitration agreement, it must apply the formal validity rule contained in the lex loci arbitri. This very clear rule follows from the fact that, first, these formal validity rules must be qualified as substantive rules of private international law,¹³⁴ and that, secondly, the territorial connection of the arbitration to the arbitration law of the seat, which is so widely accepted today, necessarily leads to the conclusion that an arbitral tribunal sitting in that country must apply the mandatory formal validity rules contained in that law.¹³⁵ It is in view of this clear cut rule that most international arbitration rules "ignore the formal validity issue".¹³⁶ It is also for that reason that the drafters of the UNCITRAL Model Law stated that "the model law is intended to govern all international commercial arbitration agreements".¹³⁷

What makes this very clear rule more complicated is the fact that one is confronted here with the interplay of domestic law and international uniform law described above¹³⁸ and more specifically, Art. II (2) New York Convention. Here, one has to draw a distinction between the arbitration agreement being examined by the arbitral tribunal or by a state court.

2. Formal Validity Rule to be Applied by the Tribunal

In this context, it must first be noted that the uniform rules contained in the Convention are addressed to courts and not to arbitral tribunals. International arbitrators are therefore under no treaty obligation to apply the formal validity requirements of the Convention. However, they may feel a practical necessity to ensure compliance with the Convention if parties indicate possible enforcement fora and the arbitrators realize that the enforcement judge will apply the New York Convention.¹³⁹ For these purely practical reasons, the tribunal in ICC Award No. 5730, after having rejected the theory of the direct application of the New York Convention by international arbitrators, reasoned that it is nonetheless desirable that international arbitral tribunals do not "without serious reasons" depart from the formal validity rule laid down in Art. II (2) New York Convention.¹⁴⁰ This practical approach follows from the arbitrators’ "soft" obligation to render an enforceable award. However, the clear rule stated above and the international arbitrators’ tendency to accept jurisdiction means that if the arbitration agreement is not in line with Art. II (2) of the Convention but meets the more lenient requirements of the formal validity rule of the law of the seat, then the tribunal must apply this rule¹⁴¹ because it is under a legal duty, and not just a practical "nobile officium" obligation to do so,¹⁴² due to the two principles outlined above.¹⁴³

3. Formal Validity Rule to be Applied by State Courts

If a court is faced with the question of which formal validity rule applies to an arbitration agreement, the approach to be taken depends on where the seat of the arbitration is located.
a. State courts in the country of the seat

aa. Art. II (2) New York Convention as a maximum form requirement

If the seat is located in the country where the court sits, the court will apply the formal validity requirements of Art. II (2) of the New York Convention if it is concerned with the enforcement of the arbitration agreement under Art. II, irrespective of whether the law at the seat contains stricter form requirements. The Convention sets a maximum standard and supersedes any stricter form requirements within its scope.144

bb. Art. II (2) New York Convention as a minimum form requirement?

If a party decides to profit from the "more favorable rights" provision in Art. VII (1) of the Convention, it may rely on a more lenient formal validity rule contained in the lex arbitri. In that case, however, enforcement of the arbitration agreement or the award is based on non-unified local law and not on the unified and widely tested and respected enforcement system of the New York Convention. It must be assumed that Art. II of the New York Convention provides not only a maximum, but also a minimum form requirement for the enforcement of arbitration agreements and awards under the Convention. The Convention is a self-contained regime and it would be contrary to the intention of its drafters if awards made on the basis of an agreement that did not comply with the Convention's formal validity requirement would nevertheless benefit from its regime. This means that a party is not allowed to combine the enforcement provisions of the Convention with the lenient form requirements of domestic law. Rather, a choice must be made to rely either on the New York Convention or on domestic law.145 This can make a considerable difference in practice.146

cc. UNCITRAL's efforts to modernize Art. II (2) New York Convention and to promote the revised Art. 7 (2) Model Law

The UNCITRAL Working Group on Arbitration, however, seems to assume that the New York Convention contains nothing to prevent the use of some of its provisions in conjunction with other more liberal form requirements of domestic laws,187 a position which is shared by some domestic courts.148 Based on this approach, the Working Group has suggested a draft interpretative declaration regarding the interpretation of Art. VII (1) and Art. II (2) of the New York Convention. Such a non-binding instrument is regarded as a viable alternative to the promulgation of a binding amending protocol relating to Art. II (2) on which the Working Group has not been able to reach a consensus.149

With respect to the more favorable rights provision of the Convention the draft interpretative declaration recommends that:

"[...]article VII, paragraph (1), of the Convention should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where the arbitration agreement is sought to be relied upon, to seek recognition of the validity of such arbitration agreement."150

Opening the Convention to the application of more lenient form requirements of domestic law, such as those based on the revised Art. 7 (2) UNCITRAL Model Law151, is regarded as a means to promote the modernized form requirements of the Model Law.

At the same time, the Working Group seeks to create a "friendly bridge" between the new form requirement in Art. 7 (2) Model Law and Art. II (2) New York Convention by promoting a liberal, flexible and broad approach to the interpretation of the form requirement of Art. II (2) of the Convention. Promoting a liberal interpretation of the form requirement instead of adapting the text of Art. II (2) itself to the requirements of modern trade avoids the potential damage that a change of the text of that provision could do to the complex and vulnerable enforcement mechanism established in the Convention as an instrument of international uniform law. Towards that end, the drafters of the interpretative declaration recommend:

"[...]that article II, paragraph (2), of the Convention be applied recognizing that the circumstances described therein are not exhaustive."152
Together with the reference in the draft declaration to the modernized form requirement of Art. 7 (2) Model Law and to the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the UN Convention on the Use of Electronic Communications in International Contracts, this recommendation is intended to ensure that state courts understand that the express reference to "letter or telegram" in Art. II (2) of the Convention does not prevent an interpretation which allows for the formally valid conclusion of an arbitration agreement through modern means of telecommunication. The idea of using Art. 7 (2) Model Law as an "interpretation tool" to clarify the application of Art. II (2) of the Convention is in line with the Swiss Federal Tribunal's approach to modernize ("actualize") the outdated form requirement of Art. II (2) New York Convention by construing Art. II (2) New York Convention in light of Art. 7 UNCITRAL Model Law. To speed up this process of modernizing the form requirement of the Convention, the Working Group also considers the promulgation of a non-binding commentary to be used by domestic courts as guidance in their application and interpretation of the form requirement of the New York Convention.

Thus, UNCITRAL is taking a dual approach to the creation of harmonized and modernized formal validity rules for international arbitration agreements. The "friendly bridge" which it intends to build between the Model Law and the New York Convention is not a one-way street. The more favorable rights provision in Art. VII (1) of the Convention is seen as a catalyst for the adoption of the modernized form requirement of Art. 7 (2) Model Law by domestic legislatures worldwide. At the same time, the modernized Art. 7 (2) Model Law - provided that it is adopted by as many legislatures as possible - shall serve as a means for a more liberal interpretation of Art. II (2) of the Convention by domestic courts which is in line with modern trade practice.

b. State courts in countries other than the country of the seat

If the seat of the arbitration is outside the country where the court sits, the court will apply the formal validity rule of Art. II (2) New York Convention in all cases covered by the Convention. In all other cases, the territoriality rule should direct the court to apply the formal validity requirement, to be qualified as "règles matérielles", of the arbitration law in force at the seat of the arbitration. This would follow from a logical application of the two principles outlined above. However, the policy judgments behind the formal validity rules of domestic law, especially their function to "protect" the parties from an unwilling derogation of the competence of the state courts, makes most domestic courts apply the formal validity rules of their own law because they do not (yet!) accept that this question should be decided by a law other than their own. The courts adopt a similar approach to that of objective arbitrability where the enforcement courts are called upon to apply their own law instead of that of the seat of the arbitration. One may state that this is the last bulwark of judicial skepticism and parochialism in the area of international commercial arbitration.

V. The Law Applicable to the Parties’ Capacity to Arbitrate

1. The General Conflict Rule

The parties’ capacity to conclude the arbitration agreement ("subjective arbitrability") follows special conflict of laws considerations. Sec. 48 (2) Swedish Arbitration Act provides that the general conflict rule for the determination of the law governing the substantive validity of the arbitration agreement "shall not apply to the issue of whether a party was authorized to enter into an arbitration agreement[...]". This negative rule of the Swedish Act does not state which conflict rule applies to the issue of the parties’ capacity to arbitrate. Likewise, Art. 1 (2) (a) Rome Convention on the law Applicable to Contractual Obligations provides that its conflict rules do not apply to "questions involving the status or legal capacity of natural persons[...]". Sec. 1059 (2) No. 1 a) German Arbitration Act is more specific. It provides that the award may be set aside if "a party to the arbitration agreement [...] was under some incapacity pursuant to the law applicable to him". The travaux préparatoires for the German law state that Art. 34 (2) (a) (i) UNCITRAL Model Law, which Sec. 1059 (2) No. 1 a) transforms into German law, does not contain such a rule and that the German legislature intended to close this gap by adopting the rule contained in Art. V (1) (a) New York Convention and Art. VI (2) European Convention.

Indeed, this approach reflects a general conflict rule which is accepted both in international commercial arbitration and in general conflicts doctrine. The problem remains that different connecting factors are considered relevant in the various jurisdictions to determine a party’s capacity to enter into contractual relations. They include the party’s nationality, place of business, domicile or residence, or place of incorporation. In international commercial arbitration, which involves commercial entities as parties to the arbitration agreement, these differences are rarely relevant.

2. A State Party’s Capacity to Arbitrate
It must be noted that in certain cases, the rules applicable to a party’s capacity to enter into arbitration agreements may be superseded by substantive rules of private international law. This applies in particular to a state party’s capacity to arbitrate. Sec. 177 (2) Swiss Private International Law Statute provides that:

“If a party to the arbitration agreement is a state or an enterprise or organisation controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.”

This provision confirms a general principle of international arbitral practice. It has been confirmed in Art. 5 of the Santiago De Compostela Resolution of the Institut de Droit International. The notion of sovereignty as developed in public international law and the confidence of the private party in the validity of the arbitration agreement concluded with the state or state controlled party binds the state to the arbitration agreement which it cannot rescind unilaterally by invoking its internal law. This rule is a specification of the more general principle of “non concedit venire contra factum proprium” which in itself is a general principle of customary international law.

Therefore, Art. 177 (2) Swiss Private International Law Statute reflects a substantive rule of private international law (règle materielle) which incorporates a general principle of customary international law and transnational ordre public that supersedes any conflicting domestic law the application of which has been determined according to the special conflict of laws provision for the parties’ subjective arbitrability. It was for this reason that the German legislature, when enacting the 1998 German Arbitration Act, repealed the "Law on Arbitral Disposition of Private Disputes of the Empire and the States" which required the consent of the German Ministry of Finance as a prerequisite under German law for the validity of every arbitration agreement concluded by the German federal state or the federal government. The travaux préparatoires of the Act state that this Law, which "served to protect the state as party to an arbitration against itself" appeared no longer timely, given the undisputed acceptance of arbitration as a means of dispute resolution equivalent to that before domestic courts.

The same considerations apply to the cases in which a state or state controlled entity does not invoke its internal laws but simply claims immunity from suit before the tribunal. It is generally accepted today and was confirmed in the Santiago de Compostela Resolution of the Institut de Droit International that a state party, once having accepted arbitration in a contract as the sole conflict remedy, may not paralyze the proceedings by pleading sovereign immunity from suit. It is considered to have waived a plea of immunity from jurisdiction.

VI. The Law Applicable to a Party’s Representation

A tribunal of the German Maritime Arbitration Association (GMAA) has held that the question whether a party was duly represented when it concluded the arbitration agreement should be governed by the generally accepted conflict rule contained in Art. V (1) (a) New York Convention. However, it is also generally accepted today in conflicts doctrine that the question whether a party was duly represented is subject to independent connecting factors. Again, Sec. 48 (2) Swedish Arbitration Act provides that the general conflict rule for the determination of the law governing the substantive validity of the arbitration agreement "shall not apply to the issue of whether a party [...] was duly represented". As in the case of the subjective arbitrability, the Swedish Act does not state which law shall apply to this question. The generally accepted rule today is that in the interest of protecting potential contract partners who are not able to know the details of the relationship between representative and principal, this issue should be governed by the law of the place where the contract was to be concluded by there presenterative for the party that has authorized him to act on its behalf vis-à-vis the other side. This means that the locus regit actum rule applies here.

VII. Conclusion

This study has revealed that, leaving aside the complex relationship between domestic law and the New York Convention in the area of formal validity, there is today more consensus than confusion with respect to the law applicable to the
The study has also revealed that the juridical seat of the arbitration plays a dominant role as a connecting factor for the determination of the law applicable to the formal and substantive validity of the arbitration agreement.\(^1\) This role does not follow from a procedural characterization of the arbitration agreement.\(^2\) Rather, it is based on the intrinsic value of the seat as a clearly determinable connecting factor. The way in which the law of the seat becomes involved can be different. Its application may be due to the fact that the law of the seat contains a substantive rule of private international law which applies to all arbitrations having their seat in that country, as in the case of the formal validity requirements or objective arbitrability rules. It may also be due to the fact that the seat serves as a classical connecting factor of conflict of law provisions in effect at the seat or in other countries, as in the case of the determination of the law applicable to the substantive validity of the arbitration agreement.

Leaving aside these dogmatic differences, it must be noted that the law of the seat governs the following issues, three of which relate to the validity of the arbitration agreement:

1. The substantive validity of the arbitration agreement absent a choice of law;

2. The formal validity of the arbitration agreement if it is to be determined by the tribunal;

3. The objective arbitrability of the subject matter of the dispute;

4. The arbitral procedure.

This significance of the law of the seat has an important harmonizing effect on the determination of the law applicable to the validity of the arbitration agreement. It serves to avoid frictions and contradictions that might arise if different laws apply to these issues. Decisional harmony created by the seat is important because the arbitration agreement constitutes the very basis of the tribunal’s jurisdiction. This requires hard, fast, workable and generally accepted conflict rules in order to avoid further complications if the jurisdiction of the tribunal is contested by one side. This is also in line with the notion of party autonomy as one of the principal maxims of international commercial arbitration. The seat is typically chosen by the parties or by the tribunal or by the arbitral institution on their behalf. The choice of the seat thus becomes a direct or indirect choice of law by the parties with respect to the issues listed above.\(^3\)

If the issue at stake relates to the personal status of a party or to the protection of the other party, the significance of the seat is overridden by other connecting factors which are better able to do justice to these policy considerations. This applies to:

5. The parties’ capacity to arbitrate ("subjective arbitrability"), which is governed by the law of the country where the party has its residence, domicile or seat and

6. The issue of whether a party was duly represented when concluding the arbitration agreement, which is governed by the law of the state where the agent has concluded the arbitration agreement.

Thus, there are only three different connecting factors, the seat reigning most prominently among them, with respect to the determination of the law governing all aspects of the validity of international arbitration agreements for six different legal issues.

\(^1\) E. I. Du Pont De Nemours and Co. v. Rhodia Fiber and Resin Intermediates SAS, Int’l Arb. Rep. (June 2001) p. 13 at pp. 15 et seq. (US Court of Appeals for the 3rd Circuit): “Arbitration is fundamentally a creature of contract, characterized by consent. As a matter of contract law, no party should be forced to arbitrate its claims unless that party has agreed to do so”; see also Reinhold GEIMER, in Richard ZÖLLER (ed.), Zivilprozessordnung, 25th ed. (Otto Schmidt Verlag 2005) Vor
§ 1025, No.4: “...nobody may be deprived of the state court system against his will”.

See Julian D. M. LEW/Loukas A. MISTELIS/Stefan M. KRÖLL, Comparative International Commercial Arbitration, (Kluwer Law International 2003) No. 5-23: “In spite of their apparent diametrically opposed views, the jurisdictional and contractual theories can be reconciled. Arbitration requires and depends upon elements from both the jurisdictional and the contractual viewpoints; it contains elements of both private and public law; it has procedural and contractual features. It is not surprising that a compromise theory, claiming arbitration to have a mixed or hybrid character should have been developed.” (Emphasis added).


See infra IV.


Marc BLESSING, “The Law Applicable to the Arbitration Clause and Arbitrability” in ICCA Congress Series no. 9, p. 168 at pp. 169 et seq.


See Julian D. M. LEW, “The Law applicable to the Form and Substance of the Arbitration Clause” in ICCA Congress Series no. 9, p. 119.

See Art. 3 et seq. and Art. 8 (substantive validity) and Art. 9 (formal validity) Rome Convention on the Law Applicable to Contractual Obligations.


Julian D. M.LEW/Loukas A. MISTELIS/Stefan M. KRÖLL, Comparative International Commercial Arbitration, op. cit., fn. 2, No. 9-1 quoting Carbonneau and Janson who have stated that arbitrability “determines the point where the exercise of contractual freedom ends and the public mission of adjudication begins”.

Art. 177 (1) provides: “Any dispute involving an economic interest may be the subject matter of an arbitration.”

Sec. 1030 (1) German Arbitration Act provides that “any claim involving an economic interest (’vermögensrechtlicher Anspruch’) can be the subject of an arbitration agreement. An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute”.

Sec. 1020 (3) Dutch Arbitration Act provides that the “arbitration agreement shall not serve to determine legal consequences of which the parties cannot freely dispose”.

Sec. 1 (1) provides that all disputes are arbitrable that “concern matters in respect of which the parties may reach a settlement”.

See, e.g. Art. 1 (2) Model Law which provides that “[t]he provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State”.

Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 473 US 614 (1985): see generally L. Yves FORTIER, “Arbitrability of Disputes” in Global Reflections on International Law, Commerce and Dispute Resolution; Liber Amicorum in honour of
Robert Briner (ICC Publishing 2005) p. 269 at p. 284. "Indeed, in the vast majority of cases, it could be said that arbitrability has become a 'non-issue'."

26See infra II.


29Klaus Peter BERGER, Private Dispute Resolution in International Business op. cit., fn. 28 Vol. II (Handbook), No. 20-22 et seq.

30Alan REDFERN and Martin HUNTER, Law and Practice of International Commercial Arbitration, op. cit., fn. 9, No. 2-80.

31See Art. 34 Model Law; Sec. 1059 German Arbitration Act.

32Art. 34 Model Law; Sec. 1060 German Arbitration Act.

33Klaus Peter BERGER, International Economic Arbitration, op. cit., fn. 8 p. 663.

34Art. 35 Model Law; Sec. 1060 f. German Arbitration Act.

35Art. 5 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

36Sec. 1032 (2) of the German Arbitration Act provides: "Prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible."

37See supra text at fn. 30.


39See generally Julian D. M. LEW, "The Law applicable to the Form and Substance of the Arbitration Clause", in ICCA Congress Series no. 9 pp. 117 et seq.

40See supra text at fn. 4.

41See infra II. 3.

42Alan REDFERN and Martin HUNTER, Law and Practice of International Commercial Arbitration, op. cit., fn. 9, No. 2-93.


45One of the arbitrators was Professor Berthold Goldman from France, the conceptual father of the modern lex mercatoria doctrine (the other arbitrators were Professor Pieter Sanders from the Netherlands and Professor Vasseur from France).


48Julian D. M. LEW, "The Law applicable to the Form and Substance of the Arbitration Clause", in ICCA Congress Series no. 9, p. 123.


51See infra I. 7.


56Ibid., p. 57.

57This assumption was justified, see infra II. 3.

58This assumption was not justified, see infra II. 2.


See text at fn. 48.

Julian D. M. LEW, "The Law applicable to the Form and Substance of the Arbitration Clause", ICFA Congress Series no. 9, p. 145.


Yugoslav Co. v. PDR Korea Co., Arbitration Court attached to the Chamber for Foreign Trade of the GDR, Yearbook VIII (1983) p. 129 at p. 131 (emphasis added).

See Decision on Jurisdiction, Amco Asia Corp. v. Republic of Indonesia, ILM (1984), 351, 359 et seq.: "[...]any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged".


Julian D. M. LEW, "The Law applicable to the Form and Substance of the Arbitration Clause", ICFA Congress Series no. 9, p. 123.


Julian D. M. LEW, "The Law applicable to the Form and Substance of the Arbitration Clause" in ICFA Congress Series no. 9, p. 123.

See Principle No. XV.2 of the Transnational Law Database at www.tldb.de; see also ICC award No. 4145, Yearbook XII (1987) p. 97 at p. 100; ICC Award No. 4996, Clunet 1986, p. 1132 at p. 1134.

Julian D. M. LEW "The Law applicable to the Form and Substance of the Arbitration Clause", ICFA Congress Series no. 9, p. 139: "The mere fact that the choice lies between two systems of law, under one of which the arbitration agreement would be invalid, has been considered as a factor in favor of choosing the other".


Resolution «L'arbitrage entre Etats et entreprises étrangères», adopted at the 18th Session in Santiago de Compostela, September 4-14, 1989, (5) ICSID Rev-FILJ (1990) p. 139 at p. 141; in Art. 5 of its previous Amsterdam Resolution, the Institute had advocated the mandatory application of the law of the seat, see Institute of International Law Yearbook 47-II, pp. 479 et seq.


See supra II. 7.

See Principle No. XV.1 of the Transnational Law Database at www.tldb.de


See supra I.2.


Klaus LIONNET and Annette LIONNET, Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit, 3rd ed.
See the decision of the Dutch District Court of The Hague, Yearbook XIX (1994) p. 703, where the court stated that this rule "can be considered as a general rule of private international law as a result of the broad international influence of the [New York] Convention".

86Klaus Peter BERGER, ibid., No. 20-46.

87See, e.g., ICC Award No. 2626, Clunet 1978, p. 981; No. 6379, (Beck 1999) p. 52; cf. also Horacio A. GRIGERA-NAÓN, Rec. Cours 289, [2000] 2 Lloyd's L. Rep. p. 500 at p. 508: "[...]by stipulating for arbitration See the decision of the Dutch District Court of The Hague, Yearbook XIX (1994) p. 703, where the court stated that this rule "can be considered as a general rule of private international law as a result of the broad international influence of the [New York] Convention".

86Klaus Peter BERGER, ibid., No. 20-46.

87See the decision of the Dutch District Court of The Hague, Yearbook XIX (1994) p. 703, where the court stated that this rule "can be considered as a general rule of private international law as a result of the broad international influence of the [New York] Convention".

86Klaus Peter BERGER, ibid., No. 20-46.

87See the decision of the Dutch District Court of The Hague, Yearbook XIX (1994) p. 703, where the court stated that this rule "can be considered as a general rule of private international law as a result of the broad international influence of the [New York] Convention".

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86Klaus Peter BERGER, ibid., No. 20-46.

*See* Julian D. M. LEW, "The Law applicable to the Form and Substance of the Arbitration Clause", in *ICCA Congress Series* no. 9, p. 118.


*Julian* D. M. LEW/Loukas A. MISTELIS/Stefan M. KRÖLL, fn. 93, p. 57.


*See* Piero BERNARDINI, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause", in *ICCA Congress Series* no. 9, p. 201: "Even where the parties have chosen the law governing their contract it does not necessarily follow that this law applies to the arbitration clause, since the autonomy of the arbitration clause is an obstacle to reaching such a conclusion automatically"; see also the holding of the tribunal in the *Peterson Farms* arbitration, quoted in *Peterson Farms* Inc v. *C&M*, *supra* note 60, at 609: "A corollary to the separability doctrine is that the law applicable to the arbitration agreement may differ from the law applicable both to the substance of the contract[...].and to the arbitral proceedings themselves."


*William* L. CRAIG/William PARK/Jan PAULSSON, *International Chamber of Commerce Arbitration*, op. cit., fn. 54, para. 5.05.

*XL Insurance v. Owens Corning, supra* note 90, at 508.

*See supra* fn. 4.

A tacit choice of the law applicable to the arbitration agreement may be assumed if the parties have agreed on institutional arbitration rules (eg. commodity arbitration) which are clearly rooted in a domestic legal system, see the decision of the German Federal Supreme Court BGHZ 55, p. 162 at p. 164; Manja EPPING, *Die Schiedsvereinbarung im internationalen privaten Rechtsverkehr nach der Reform des deutschen Schiedsverfahrensrechts*, op. cit., fn. 93, p. 57.


*Klaus* LIONNET and Annette LIONNET, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*, op. cit., fn. 85, at pp. 131 et seq.

*See supra* text at fn. 1.


*See supra* text at fn. 79.


*Art. 3 (2)* Rome Convention provides: "The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention."

*See supra* notes 87-90.


*Pierre* LALIVE/Jean-Francois POUDELTRA/Claude REYMOND, op. cit., fn. 6, Art. 178, No. 14; Manja EPPING, *Die
See supra I.7.


129See supra I.4.


133See supra I.7.


137See supra text at notes 134, 135.

138See supra text at notes 134, 135.


140See Julian D. M. LEW, "The Law applicable to the Form and Substance of the Arbitration Clause", *op. cit.*, fn. 13, p. 130.


143See supra text at notes 134, 135.

151 The Working Group has drafted a revised text for Art. 7 Model Law, see UN Doc. A/CN.9/WG.II/136 of July 19, 2005, p. 2; the draft contains the following subsections which take account of modern IT communication: "(2) The arbitration agreement shall be in writing. ‘Writing’ means any form, including, without limitation, a data message, that provides a record of the arbitration agreement or is otherwise accessible so as to be useable for subsequent reference. (3) ‘Data message’ means information generated, sent, received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."
155 See Swiss Federal Supreme Court in Compagnie de Navigation et Transports SA v. MSC (Mediterranean Shipping Company), Yearbook XI (1986), p. 690; Albert J. VAN DEN BERG, "The Application of the New York Convention by the Courts" in ICCA Congress Series no. 9 (1999) p. 25 at p. 32: "It may indeed be questioned whether the uniform rule of Art. II (2) of the Convention should be maintained in all its respects. As almost 40 years have elapsed since its drafting, it seems justified to bring its interpretation in accordance with views generally held in our times with respect to the conclusion of contracts that contain an arbitration clause."
157 See supra text at fn. 134, 135.
158 Julian D. M. LEW/Loukas A. MISTELIS/Stefan M. KRÖLL, Comparative International Commercial Arbitration, op. cit., fn. 2, No. 6-47 in fine; "Each state wants to determine for itself under which circumstances the jurisdiction of its courts can be excluded, i.e. whether or not a written agreement is required".
159 See supra l.2.
160 See Klaus Peter BERGER, International Economic Arbitration, op. cit., fn. 8, p. 393.
163 Albert V. DICKEY and John H. C. MORRIS, Dicey and Morris on the Conflict of Laws, op. cit., fn. 80, p. 1275, quoting from the Restatement of Conflicts of Laws: "If the state of a person's domicile has chosen to give him capacity to contract, [...] there can usually be little reason why the local law of some other state should be applied [...] and to declare the contract invalid to the disappointment of the parties' expectations"; Art. 7 (1) German Introductory Law to the Civil Code which provides that a person's capacity to enter into contracts is governed by the law of the state to which that person belongs.
165 Text reprinted in (5) ICSID Rev-FILJ 1990, p. 141: "A state, a state enterprise, or a state entity cannot invoke incapacity to arbitrate in order to resist consent to which it has agreed."
167 See Principle I.7 CENTRAL Transnational Law database at www.tldb.de with further references from international
doctrine and arbitral case law.


171 Art. 9, text reprinted in (5) ICSID Rev.-FILJ 1990, p. 141: "Denial of the tribunal's jurisdiction based on a State's sovereign status is not admissible in arbitration between a State, a state enterprise, or a state entity, on the one hand, and a foreign enterprise, on the other."

172 Pieter SANDERS, Quo Vadis Arbitration?, op. cit., fn. 89, p. 207.


175 See supra text at fn 160.

176 See, e.g. the German Federal Supreme Court BGH NJW 1990, p. 3088; BGHZ 128, p. 41 at p. 47; see also Albert V. DICEY and John H. C. MORRIS, Dicey and Morris on the Conflict of Laws, 13th ed. (Sweet & Maxwell 2000) op. cit., fn. 80, p. 1255 (with respect to form); Klaus Peter BERGER, International Economic Arbitration, op. cit., fn. 8, p. 393.

177 William L. CRAIG/William PARK/Jan PAULSSON, International Chamber of Commerce Arbitration, op. cit., fn. 54, Para. 5.03.

178 See also Horacio A. GRIGERA-NAÓN, Rec. Cours 289, op. cit., fn. 11, p. 45 at p. 70: "(Arbitral practice) illustrates[...]the prevailing influence of the law of the place of arbitration or lex arbitri on the determination of the applicable law to issues regarding the validity of the arbitration agreement[...]".

179 But see Emmanuel GAILLARD and John SAVAGE, Fouchard Gaillard Goldman On International Commercial Arbitration, op. cit., fn. 44, para. 424, who argue that application of the law of the seat follows from a procedural characterization of the arbitration agreement.

180 See Alan REDFERN and Martin HUNTER, Law and Practice of International Commercial Arbitration, op. cit., fn. 9, No. 2-90: "In choosing the law of the place of arbitration as the law governing the arbitration agreement, the court or tribunal may be seen as having decided to give effect to the parties' agreement"; see also Art. 3 1996 English Arbitration Act:

In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated-

(a) by the parties to the arbitration agreement, or
(b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
(c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances

(emphasis added).

Referring Principles:

XIV.1 - Law applicable to international arbitration agreements