International commercial arbitration: Law governing the arbitration agreement

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INTERNATIONAL COMMERCIAL ARBITRATION: LAW GOVERNING THE ARBITRATION AGREEMENT

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1. INTRODUCTION

International commercial arbitration is a way of resolving disputes between two or more commercial parties. Its usage and popularity increase each year, as it is proven to be a fast, efficient and amicable way of resolving disputes. Commercial contracts concluded between the parties generally contain a dispute resolution clause. This clause contained within the contract is usually refered to an arbitration and takes form of the arbitration agreement. When determining the law governing the arbitration agreement, the principal conventions and other relevant sources on arbitration relay on the the choice-of-law method. These choice-of-law rules are the oldest, and most commonly used method in determining the governing law. The choice-of-law rules applicable to international arbitration agreements under the New York Convention and the UNCITRAL Model Law apply equally to both the existence and the substantive validity of such agreements.[1] These two contain virtually the same choice-of-law rule. However, analysis of the choice of the law governing an international arbitration agreement begins with the separability presumption. The separability presumption is one of the conceptual and practical cornerstones of international arbitration, as it states that the international arbitration agreement is presumptively separable from the underlying contract with which it is associated. Consequently, it is possible for different laws to govern the arbitration agreement, and the underlying contract. The legal practice established that four different laws could possibly govern the arbitration agreement. These are the law expressly chosen by the parties, the law impliedly chosen, the law of the seat of arbitration, and the law of the underlying contract. This paper will explain each one in detail, with an extensive commentary on the legal practice– both court and arbitral. The topic of the law governing the arbitration agreement is very complex, and still to this day gives uncertainty when has to be dealt with.

[1] Born Gary, International Commercial Arbitration, Third Edition, Kluwer Law International 2021, p. 604.

2. KEY ELEMENTS OF INTERNATIONAL COMMERCIAL ARBITRATION

2.1. Overview of international commercial arbitration

International commercial arbitration is a means of resolving disputes arising under international commercial contracts.[2] "Almost all international commercial arbitrations arise from the parties' contractual relationship."[3] In most parts of the world, it is a generally accepted method of resolving international business disputes.[4] It is controlled primarily by the terms previously agreed upon by the contracting parties, rather than by any national legislation or procedural rules.[5] That's why arbitration is widely used as an alternative to litigation. "Most commercial contracts usually contain a dispute resolution clause specifying that any disputes arising under the contract will be handled through arbitration rather than in front of the courts."[6] Arbitration is indeed a quicker and more amicable way to resolve potential disputes between the two parties. Not to mention the lower costs and greater efficiency of the process.

When drafting the commercial contract and specifying arbitration as a dispute resolution mechanism, parties can select the forum (which will usually be neutral), procedural rules, arbitral tribunal, and the governing law for both the contract and arbitration agreement.[7] So unlike litigation, parties can choose practically anything. Another purpose of international arbitration is to provide for a confidential, or at least private dispute resolution mechanism. International commercial arbitration is not a public proceeding. „It is essentially a private process and this is seen as a considerable advantage by those who do not want discussion in open court, with the possibility of further publication elsewhere."[8] Most international businesses prefer, and affirmatively seek out, the privacy and confidentiality of the arbitral process.[9]

[2] Redfern Alan, Hunter Martin, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, Second Edition 1991, p. 1

[3] *Ibid.*, p. 139.

[4] Eric Robine, The evolution of International Commercial Arbitration over the past years, Arbitration International, Volume 5, Issue 4, 1 December 1989, p. 146.

[5] Redfern/Hunter, *op.cit.* (n. 2), p. 140.

[6] Born, *op. cit.* (n. 1), p. 67.

[7] Redfern/Hunter, *op. cit.* (n. 2), p. 23.

[8] *Ibid.*, p. 27.

[9] Born, *op. cit.* (n. 1), p. 87.

Nonetheless, the practice of resolving disputes by international commercial arbitration is a practice that increases in popularity each year. „What contributes to its popularity is that it is held in place by a complex system of national laws and international treaties, so it is well-controlled, and the parties feel safe when choosing such a way of resolving disputes.“[10]

It’s important to mention that the big advantage of international commercial arbitration is the development of party autonomy and procedural flexibility.[11] „Leading international and national arbitration conventions respect parties' broad autonomy to agree upon the substantive laws and procedures applicable to their arbitration.“[12] Regarding flexibility, as already mentioned, procedures can be adapted to fit the dispute, rather than the dispute being made to fit the available procedures.[13]

Finally, the end result of the arbitral process is a decision on the dispute in the form of an arbitral award.[14] This reward is final and binding upon the parties. „Once made, it will be directly enforceable by national and international court action.“[15] Regarding the enforceability of arbitral awards, it is especially important to mention one of the most internationally important treaties. That is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention" (NYC)[16]

[10] Redfern/Hunter, *op. cit.* (n. 2), p. 2.
[11] Born, *op. cit.* (n. 1), p. 87.
[12] *Ibid.*
[13] Redfern/Hunter, *op. cit.* (n. 2), p. 23.
[14] *Ibid.*, p. 25.
[15] *Ibid.*
[16] United Nation Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), available at: https://www.newyorkconvention.org/english

2.2. Significant features of arbitration

Four significant features of the process of international commercial arbitration are singled out, although specifically, the arbitration agreement will be the subject of more detailed analysis later.

These features are:

- the agreement to arbitrate
- the choice of arbitrators
- the decision of the arbitral tribunal
- the enforcement of the award

"One of the features that distinguish arbitration from litigation is the fact that the parties to the arbitration are free to choose their own tribunal."[17] The selection of the people who compose the arbitral tribunal is vital and often the most crucial step in arbitration.[18]

Next, the arbitral tribunal resolves the dispute by making a decision, in the form of a written award. This award is binding for the parties, and they must act by it. "Once an arbitral tribunal has made its award, if that award is not carried out voluntarily, the award may be enforced by legal proceedings both locally and internationally."[19] One of the most widely used treaties is the New York Convention. Its sets out the procedure to be followed for the recognition and enforcement of foreign arbitral awards. The provisions of the New York Convention will be considered in more detail later.

[17] Refern/Hunter, *op. cit.* (n. 2), p. 8.

[18] UNCITRAL Arbitration Rules 2021., Art. 8-10., available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf

[19] Redfern/Hunter, *op. cit.* (n. 2), p. 10.

3. ARBITRATION AGREEMENT

3.1. Arbitration agreement as a foundation stone of the arbitral proceeding

An arbitration agreement is the foundation stone of every arbitral proceeding. As defined by many legal scholars "It is an agreement by the parties to submit to arbitration any disputes which have arisen, or which may arise between them."[20]

Thus, it deals with any present or future dispute between the parties. The contractual nature of an arbitration agreement requires the consent of each party for arbitration to happen.[21] This consent is essential, so it is obvious that there is no arbitration without the consent of both parties. [22] In particular, it must be made clear as a day, that the parties intended that any disputes between them shall be finally resolved by the arbitration.

The arbitration agreement establishes the tribunal's jurisdiction and sets the framework for the conduct of the proceedings.[23] Hence, the nature of the arbitration agreement is predominantly procedural. [24]

Arbitration agreements can take different forms.[25] "They may be pages long, trying to address every conceivable issue at the time of drafting, or can be very short simply providing for 'Arbitration'."[26] They can be specifically drafted for a particular contract or simply be in a form of standard clauses. They may be contained in a separate document or at least a separate clause in the contract or can be tied into the choice of applicable law and a wider dispute resolution provision. "The differences in form often depend on whether the agreements deal with future disputes or existing disputes."[27] The most common type of arbitration agreement is one that

[20] Redfern/Hunter, *op. cit.* (n. 2), p. 4.; Born, *op. cit.* (n. 1), p. 251.; Gaillard Emmanuel, Savage John, Fouchard Gaillard Goldman on International Commercial Arbitration, in Emmanuel Gaillard and John Savage (eds.), Kluwer Law International 1999, p. 122.; Waincymer Jeffrey Maurice, Procedure and Evidence in International Arbitration, Kluwer Law International 2012, p. 177.

[21] Lew D.M. Julian, Mistelis A. Loukas, Kröll Stefan Michael, Comparative International Commercial Arbitration, Kluwer Law International 2003, p. 99.

[22] *Ibid.*

[23] Berger Klaus Peter, Private Dispute Resolution in International Business: Negotiation, Meditation, Arbitration (Third Edition), Part III, 16th Scenario: The Commencement of the Arbitration, Kluwer Law International 2015, p. 316.; Hook Maria, Arbitration Agreements and National Law: A Question of Intent? Journal of International Arbitration, Kluwer Law International 2011., p. 176.

[24] Poudret Jean-Francoise, Besson Sebastien, Comparative law of international arbitration, Sweet & Maxwell 2007, p. 258.

[25] Lew/Mistelis/Kröll, *op. cit.* (n. 23), p. 100.

[26] *Ibid.*

[27] *Ibid.*

submits future disputes to arbitration.[28] "These are called arbitration clauses, and they are usually standard clauses that regulate the method of resolving any possible future disputes which may arise between the parties. "[29]

The second type is a submission agreement. "The submission agreement is an agreement to submit already existing disputes between the parties to the arbitration."[30] Submission agreements are prepared after the dispute has arisen and they tend to be much longer than an arbitration clause. „Submission agreements can be included during litigation to remove the dispute from the jurisdiction of the court."[31] However, the condition is that the court of the first instance has not issued its judgment yet and that the pleading stage is still taking place.

As already mentioned, without a valid arbitration agreement there is no valid arbitration. Moreover, for all practical purposes, and in particular for international enforcement, there must be written evidence of the arbitration agreement.[32]

3.2. International standards for the arbitration agreement

"An arbitration agreement that provides for international arbitration must take into account international requirements."[33] But, if it fails to do so, the arbitration agreement, and any award made under it, may not qualify for international recognition and enforcement.

In seeking to establish international requirements, the starting point has to be the New York Convention.[34] Under the New York Convention, each contracting state undertakes to recognize and give effect to an arbitration agreement when the following requirements are fulfilled:

I. the agreement is in writing
II. it deals with existing or future disputes
III. these disputes arise in respect of a defined legal relationship, whether contractual or not; and
IV. they concern a subject matter capable of settlement by arbitration.

[28] Redfern/Hunter, *op. cit.* (n. 2), p. 139.
[29] *Ibid.*
[30] Born, *op. cit.* (n. 1), p. 152.
[31] *Ibid.*
[32] Redfern/Hunter, *op. cit.* (n. 2), p. 2.
[33] *Ibid.*, p. 74.
[34] *Ibid.*

These are the four positive requirements of a valid arbitration agreement, laid down in Article II (1) of the New York Convention.

A further two requirements are, added by the provisions of Article V(1)(a) of NYC, which stipulates "that recognition or enforcement of an award may be refused if the party requesting refusal can prove that the arbitration agreement was made by a person under incapacity or that the agreement was invalid under the applicable law." These represent additional requirements to the effect that:

I. the parties to the arbitration agreement must have legal capacity under the law applicable to them

II. the arbitration agreement must be 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.

3.3. Validity of the international arbitration agreements

a) Formal validity

"Like other types of contracts, international arbitration agreements are often subject to form requirements."[35] The formal validity of an arbitration agreement is closely related to the issue of whether the party actually consented to arbitration. The formal requirements are intended to ensure that the parties agreed on arbitration as it serves as written proof.[36] "The most significant and universally accepted form requirement is the "writing" or "written form" requirement, together with requirements for a "signature" and/or an "exchange" of written communications."[37] Both the New York Convention and most national arbitration laws prescribe as a formal requirement that the arbitration agreement is in writing.[38] According to Article II(2) of the NYC, the term "agreement in writing" "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

[35] Born, *op. cit.* (n. 1), p. 697.
[36] Lew/Mistelis/Kroll, *op. cit.* (n. 23), p. 130.
[37] Born, *loc. cit.*
[38] Redfern/Hunter, *op. cit.* (n. 2), p. 75.

"On the other hand, most domestic arbitration laws take a broad view of what constitutes a written document, including telexes, emails, and all other means of communication that generate a record."[39] The UNCITRAL Model Law on International Commercial Arbitration (UML)[40] follows a similar approach as NYC in its Article 7(2) "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication to provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. 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 reason for imposing this requirement is self-evident. A valid agreement to arbitrate excludes the jurisdiction of the national courts and means that any dispute between the parties must be resolved by arbitration. "The writing requirement is intended to ensure that the parties agreed on arbitration." [41]

"The requirement for signature by the parties has given rise to problems in some states, but the general view is that a signature is not necessary, provided that the arbitration agreement is in writing."[42]

b) Substantive validity

An arbitration agreement has to fulfill the ordinary requirements for the conclusion of a contract. „The parties have to agree on arbitration and their agreement must not be vitiated by related external factors."[43] Consent to arbitration is easy to establish if the arbitration clause is contained in a contract negotiated and signed by the parties. In practice, however, many contracts are concluded by reference.[44]

[39] Born, *op. cit.* (n. 1), p. 698.
[40] UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf
[41] Lew/Mistelis/Kroll, *op. cit.* (n. 23), p. 131.
[42] Redfern/Hunter, *op. cit.* (n. 2), p. 76.
[43] Lew/Mistelis/Kroll, *op. cit.* (n. 23), p. 141.
[44] *Ibid.*

The categories of substantive invalidity of international arbitration agreements contained in the NYC and most national arbitration legislation „are limited to cases where such agreements are invalid on grounds of the contract law (*e.g.*, mistake, fraud, unconscionability, frustration, impossibility).“[45]

„In addition, an arbitration agreement might be invalid for other reasons, such as misrepresentation concerning the arbitration agreement, or the dissolution of the chosen institution.“[46] „Other factors which might affect the validity of the arbitration agreement are uncertainty, mistakes as to the relationship between an arbitrator and the parties, the insolvency of the parties, the exclusion of statutory rights or remedies, and the lack of arbitrability.“[47] „Where a contract is invalid due to illegality, as a result of the doctrine of separability the arbitration agreement will remain valid.“[48]

4. THE LAW GOVERNING THE ARBITRATION AGREEMENT

4.1. Analysis of the choice-of-law applicable to an arbitration agreement

The choice of the law applicable to an international commercial arbitration agreement is a complex subject. The topic has given rise to extensive commentary and can be found among all well-known and respected legal scholars.

“Analysis of the choice of the law governing an international arbitration agreement begins with the separability presumption.”[49] The separability presumption is very meaningful when determining the law which governs the arbitration agreement and as such, it deserves to be explained in detail. The definition of separability is relatively simple, and it states that “an international arbitration agreement is presumptively separable from the underlying contract with which it is associated.”[50]

[45] Born, *op. cit.* (n. 1), p. 894.
[46] *Ibid.*
[47] *Ibid.*
[48] Lew/Mistelis/Kroll, *op. cit.* (n. 23), p. 149.
[49] Born, *op. cit.* (n. 1), p. 508.
[50] *Ibid.*

As a consequence, it is theoretically possible for the parties' arbitration agreement to be governed by a different law than the one governing their underlying contract.

4.2. Separability presumption

As already mentioned, the separability presumption is one of the conceptual and practical cornerstones of international arbitration.[51] It's so well known among legal practitioners and arbitrators that it is usually presupposed when dealing with arbitration proceedings. "An international arbitration agreement is almost always treated as presumptively separable or autonomous from the commercial or another contract within which it is found."[52] This result is generally referred to as a consequence of the separability doctrine, or, more accurately, the separability presumption.

The concept of the separability of the arbitration agreement is interesting in theory but also very useful in practice. It is useful in practice because it means "that the arbitration clause in a contract is considered to be separate from the main contract of which it forms part and, as such, survives the termination of that contract."[53] This ensures that "the arbitration agreement can be valid even when the underlying contract is not and that the tribunal has the jurisdiction to decide on the validity of the underlying contract."[54] Hence, "the primary consequence of the separability doctrine is that the non-existence, invalidity, or termination of the main contract does not necessarily invalidate the agreement to arbitrate contained within it."[55] Consequently, an arbitration clause may survive regardless of the termination of the main contract.

The separability presumption has substantial practical, as well as analytical importance. "It produces several consequences relating to issues of choice of law, contractual validity, and competence-competence."[56] Specifically, the consequences include "(a) the possible application of a different national law to the arbitration agreement than to the underlying contract; (b) the possible validity of an arbitration agreement, despite the non-existence, invalidity, illegality, or termination of the parties' underlying contract;

[51] *Ibid*, p. 376.
[52] *Ibid.*
[53] Redfern/Hunter, *op. cit.* (n. 2), p. 104.
[54] Redfern/Hunter, *op. cit.* (n. 2), p. 174; Lew/Mistelis/Kröll, *op. cit*. (n. 23), p. 102; Poudret/Besson, *op. cit.* (n. 26), p. 133.
[55] Redfern/Hunter, *op. cit.* (n. 2), p. 174.
[56] Born, *op. cit.* (n. 1), p. 377.

(c) the possible validity of the underlying contract, despite the non-existence, invalidity, illegality, or termination of an associated arbitration clause; and (d) in the view of some authorities, the foundation for the competence-competence doctrine[57], whereby the jurisdiction of the arbitral tribunal to decide on its own jurisdiction is recognized." [58] "The first two effects of the separability doctrine– the possible applicability of different laws, and the possible validity of the arbitration agreement, despite defects in the underlying contract – play vital roles in ensuring the efficacy of the international arbitral process."[59]

Moreover, as a consequence of the separability presumption, the parties are free to choose a different governing law for their arbitration agreement from the one that governs the underlying contract. [60]

However, the separability doctrine does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract. It instead means that different laws may apply to the main contract and the arbitration agreement. Despite this possibility, however, in many cases, the same law governs both the arbitration agreement and the underlying contract. [61]

Also, separability ensures that if, "for example, one party claims that there has been a total breach of contract by the other, the contract is not destroyed for all purposes. Instead, it survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement."[62]

The doctrine of separability is endorsed by institutional and international rules of arbitration, such as those of UML and NYC, which generally states that 'an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.'

[57] „The arbitral tribunal's power to determine its own jurisdiction is commonly referred to as the positive competence-competence. Consequently, even a challenge to the existence or the validity of the arbitration agreement does not prevent the arbitrators from proceeding with the arbitration. In other words, the principle of competence-competence permits arbitral tribunals to consider and decide challenges to their own jurisdiction, including disputes over the existence, validity, legality, and scope of the parties' arbitration agreement." See: Erk-Kubat Nadja, Parallel Proceedings in International Arbitration: A Comparative European Perspective, (2007), p. 26.

[58] Born, *op. cit.* (n. 1), p. 377.

[59] *Ibid.*

[60] Lew/Mistelis/Kröll, *op. cit.* (n. 23), p. 102; Mustill Sir Michael J., Boyd Stewart C., Commercial Arbitration, The Law and Practice of Commercial Arbitration in England, Second Edition, Butterworths London and Edinburgh, 1989, p. 7; Poudret/Besson, *op. cit.* (n. 26), p. 133

[61] Born, *op. cit.* (n. 1), p. 511.

[62] Redfern/Hunter, *op. cit.* (n. 2), p. 104.

The UNCITRAL Model Law recognizes, at least for some purposes, the presumptive separability of the parties' arbitration agreement. Article 16(1) of the Model Law states: "The arbitral tribunal may rule on its own jurisdiction, including any objections concerning the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract."

As with Article II of the New York Convention, this provision acknowledges that "arbitration agreement will often take the form of a clause in an underlying contract", which implies and presupposes the existence of a separate agreement when dealing with the subject of arbitration.

One of the first cases which introduced the separability doctrine in the common law system is the *Prima paint v. Flood & Conklin case.*[63] The importance of this case is still recognized nowadays, even though it's decades old. In that case, the US Supreme Court recognized the separability of the arbitration clause from the underlying contract. The Supreme Court held in Prima Paint that "claims of fraudulent inducement, directed at the underlying contract and capable of rendering it voidable, did not impeach the arbitration clause contained in that contract."[64] So, the Court found the true purpose of the separability which is that the separability presumption applies where the parties' underlying contract was allegedly void, as well as where it was voidable.

This presumption "saves" the arbitration agreement from being declared invalid, and it can still serve its purpose, which is to ensure that an arbitration agreement survives the underlying contract. The Court reasoned that "except where the parties otherwise intend, arbitration clauses are 'separable' from the contracts in which they are embedded.[65]" Taking everything into the account, The Court implied that the separability presumption is a rule of substantive federal law that helps to the validity of arbitration agreements.

[63] Prima Paint Co. v. Flood & Conklin Manufacturing Corp., U.S. Supreme Court 12 June 1967, available at: https://casetext.com/case/prima-paint-corp-v-flood-conklin-mfg-c
[64] *Ibid.*, p. 402.
[65] *Ibid.*, pp. 406-407.

4.3. Introduction to the law governing the arbitration agreement

Before jumping into explaining the law governing the arbitration agreement, it is necessary to explain that international arbitration usually involves more than one system of law rules or legal rules. It is easy to identify at least five different systems of law which exist, and which are taken into account in international arbitration.[66] However, only the law governing the arbitration agreement will be discussed in this paper.

"These systems of law are:

(1) the law governing the arbitration agreement
(2) the law governing the existence and proceedings of the arbitral tribunal (i.e., *lex arbitri*)
(3) the law, or the relevant legal rules, governing the substantive issues in dispute
(4) other applicable rules and non-binding guidelines and recommendations[67]; and
(5) the law governing recognition and enforcement of the award" [68]

One of the vitally important issues in the arbitral process is the choice of the law governing an arbitration agreement.[69] As mentioned in the detailed analysis of the separability presumption, the law applicable to the underlying contract does not automatically apply to the substantive validity of the arbitration agreement.[70]

„An unfortunate consequence of the separability presumption has been the development of a multiplicity of different approaches when choosing the law governing international arbitration agreements."[71] The law applicable to the substantive validity of the arbitration agreement is determined following the choice-of-law rules tailored specifically for such agreements.[72] These choice-of-law rules can refer to the application of the law of the arbitral seat, or else to the law governing the underlying contract or any other law which is expressly or implidely choosen by the parties.

[66] Redfern/Hunter, *op. cit.* (n. 2), p. 157.
[67] What some have referred to as the procedural 'soft law' of international arbitration: see Park, 'The procedural soft law of international arbitration: Non-governmental instruments', in Mistelis and Lew (eds) Pervasive Problems in International Arbitration (Kluwer Law International, 2006), pp. 141–154.
[68] Redfern/Hunter, *loc. cit.*
[69] Born, *op. cit.* (n. 1), p. 507.; Mustill/Boyd, *op. cit.* (n. 62), p.63.
[70] Mustill/Boyd, *op. cit.* (n. 62), p. 63.
[71] Born, *op. cit.* (n. 1), p. 522.
[72] Lew/Mistelis/Kröll, *op. cit.* (n. 23), p. 108; Redfern/Hunter, *op. cit.* (n. 2), p. 73; Van Den Berg Albert Jan, International Arbitration 2006: Back to Basics?, ICCA International Arbitration Congress, 2006, Kluwer Law International, p. 315

The law applicable to the arbitration clause is a significant issue to consider when drafting international contracts that provide for arbitration. „In particular, where the parties choose the law of one jurisdiction to govern the main contract and provide for the seat of arbitration in a different country, important issues such as whether a dispute falls within the scope of the arbitration clause or whether the clause is invalid may be decided differently under these different legal systems.“[73] This scenario gives rise to the difficult question of whether the parties intended the arbitration clause to be governed by the law of the main contract or by the law of the seat.[74]

4.4. Determinating the law governing the arbitration agreement

“An arbitration agreement should preferably contain a choice of law clause to govern both the matters in dispute and the arbitration agreement itself.”[75] By doing so, the parties and the arbitral tribunal will know precisely which law they should take into account if any questions arise during the arbitral proceeding.

There is an almost universal consensus that parties may select the law applicable to their international arbitration agreement.[76] Although this basic principle of party autonomy is essentially undisputed, it has rarely provided clear solutions in selecting the law governing the arbitration agreement. That is basically because parties generally do not expressly specify the law applicable to the arbitration agreement.[77] By doing so, they may hope that there would be no need for arbitration or perhaps they are unaware of this possibility.

However, this has caused many problems in practice for the arbitral tribunal. It has to be mentioned that international commercial contracts frequently contain choice-of-law clauses which apply to the underlying contract without specific reference to the arbitration clause contained within that contract.[78] Stating this, it might be assumed that the same law governs both the substantive issues in the underlying contract and the arbitration agreement. But this is not necessarily a safe assumption. “An applicable law clause will usually refer only to the

[73] https://www.osler.com/en/resources/regulations/2021/choice-of-law-for-arbitration-agreements-a-case-comment-on-enka-insaat-ve-sanayi-as-v-ooo-insurance, accessed on august 29 2022 at 20:04
[74] *Ibid.*
[75] Redfern/Hunter,*op. cit*. (n. 2), p. 156.
[76] Born, *op. cit.* (n. 1), p. 525.
[77] *Ibid.*
[78] *Ibid.*, p. 526.

substantive issues in dispute."[79] Generally, it will not refer to terms of disputes that might arise concerning the arbitration agreement itself. Therefore, it should be made clear which law applies specifically to the arbitration agreement.

If no such designation has been made by the parties, it becomes necessary for the arbitrators to determine the law applicable to the arbitration agreement.[80] In the event of any dispute as to the validity, meaning, or effect of the arbitration clause, either the arbitral tribunal itself or the competent court must decide which law governs the arbitration agreement.[81]

Thus, if no choice of law is made, the arbitral tribunal must select the applicable law on some established principles.

The application of choice-of-law rules is both the oldest method of determining the law governing an arbitration agreement and the most commonly used in comparative law.[82]

4.5. Appropriate conflict-of-laws rule

When determining the law governing the arbitration agreement, the principal conventions on arbitration refer to the choice-of-law method.[83] The choice-of-law rules applicable to international arbitration agreements under the New York Convention and the UNCITRAL Model Law apply equally to both the existence and the substantive validity of such agreements.[84] These arbitration conventions contain virtually the same choice-of-law rule. For example, Article V(1)(a) of the New York Convention provides "that recognition or enforcement of an 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." This article provides a default choice-of-law rule, applicable in cases where the parties have not expressly or impliedly chosen the law governing their arbitration agreement.

[79] Redfern/Hunter, *op. cit.* (n. 2), p. 158.
[80] Born, *op. cit.* (n. 1), p. 605.
[81] Redfern/Hunter, *loc. cit.*
[82] Fouchard,/Galliard, *op. cit.* (n. 22), p. 218.
[83] Lew/Mistelis/Kröll, *op. cit.* (n. 23), p. 108; Schramm Dorothee, Geisinger Elliott, Pinsolle Philippe, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kronke, Nacimiento, Otto, et al. (eds), 2010, Article II, Kluwer Law International 2010, p. 54.
[84] Born, *op. cit.* (n. 1), p. 604.

In addition, Article 34(2)(a)(i) of the UML states "that the law governing the substantive validity of an arbitration agreement is 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 i.e., the law of the seat". These UML provisions adopt the same standard as that of Article V(1)(a) of the NYC, giving effect to any express or implied choice of law by the parties and, failing such agreement, prescribing a default rule, by selecting the law of the arbitral seat.

Consequently, following such a choice-of-law rule it is easy to distinguish that the four possible laws may govern the arbitration agreement: **a)** law expressly chosen by the parties, **b)** law impliedly chosen by the parties, **c)** the law of the seat of arbitration, and finally, **d)** the law of the underlying contract.

A) Law expressly chosen by the parties

An express choice-of-law clause in the arbitration agreement itself will provide the clearest indication of which law to apply. Some contracts that include an arbitration agreement will also specify the applicable law to govern that arbitration agreement.[85] Yet such express choice-of-law clauses are rare when drafting the arbitration agreement. As discussed before, due to the party autonomy, the parties are free to include specific provisions in their arbitration agreement that expressly select the law applicable to that agreement. "Party autonomy provides contracting parties with a mechanism that allows them to avoid the application of an unfavorable or inappropriate law."[86] This express choice of law when made is and should be binding on the arbitration tribunal.[87] Such chosen law may be different from the law that governs the parties' underlying contract or the law of the seat of arbitration. When stipulating the governing law for their arbitration agreement parties have complete freedom in choosing which law suits them. In such matters, Art V(1)(a) of the NYC does not contain any limitations. There is no need for an actual link between the parties, the forum, or the arbitrators. [88]Parties are free to select a law that is completely neutral and has no connection with any other aspects of the proceeding whatsoever.

[85] Born, *op. cit.* (n. 1), p. 76.
[86] Lew/Mistellis/Kroll, *op. cit*. (n. 23), p. 415.
[87] *Ibid.*
[88] Dietmar Czernich, The Law applicable to the Arbitration Agreement, Austrian Yearbook on International Arbitration 2015 (Klausegger, Klein, Kremslehner, et al. (eds); Jan 2015), p. 78., available at: https://www.schiedsrichter.at/wpcontent/uploads/2016/11/Austrian_Yearbook_on_International_Arbitration_2015.pdf

This can be done, for example, by prescribing: "This Arbitration agreement shall be governed by the laws of State X"

In such cases, there would be relatively little doubt as to which law applies to that arbitration agreement.

Although, as seen in practice, it is very rare that parties truly expressly chose the governing law for their arbitration agreement. In a well-known *Sulamérica case*[89], the Court of Appeal of England and Wales stated: "It is common for parties to make an express choice of law to govern their contract, *but unusual for them to make an express choice of law to govern any arbitration agreement contained within it*; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate." [90]

Thus, when no express choice of law clause is included, we have to turn to the next inquiry and that is the implied or tacit choice of law.

B) Implied choice of law

According to article V(1)(a), NYC, and 34(2)(a)(i) UML, the parties' choice of law can be either expressed or implied.[91] As the Court of Appeal of England and Wales in the *Kabab-Ji SAL v. Kout Food Group case*[92] explained, the wording "*any indication thereon*"[93] allows for an implied choice of law. "An implied choice can be induced by the parties' actions, the circumstances of the case, and other objective factors."[94] Given the relative lack of express choice-of-law provisions in arbitration agreements, the question under which circumstances a tacit choice-of-law may be assumed is of high importance.[95] As a general rule, "a tacit choice of law may only be assumed if there is clear evidence that the parties mutually intended to agree on a certain law but did not expressly stipulate their common intention."[96]

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[89] Sulamérica v. Enesa, Court of Appeal of England and Wales, 16 May 2012, available at: https://030704nt-y-https-www-kluwerarbitration-com.baze.pravo.hr/document/kli-ka-1252105-n?q=enesa

[90] *Ibid.*, p. 467§11

[91] Born, *op. cit*. (n. 1), p. 514; Lew/Mistelis/Kröll, *op.cit.* (n. 23), p. 415; Nacimiento, *op. cit*. (n. 86), p. 225.

[92] Kabab-Ji SAL v. Kout Food Group case, Court of Appeal of England, 20 January 2020, available at: https://www.bailii.org/uk/cases/UKSC/2021/48.html

[93] „any indication thereon", see article V(a) of the NYC

[94] Lew/Mistelis/Kröll, *op. cit*. (n. 23), p. 415

[95] Czernich, *op. cit*, (n. 91), p. 79.

[96] *Ibid.*

The common intention of the parties may be derived from
(a)the choice-of-law clause in the main contract,
(b)the reference to certain legal provisions of national law in the arbitration clause; or
(c)the reference to institutional arbitration. [97]
Consequently, we can state that when the parties decide to select certain specific regulations, they also indirectly accept the set of rules that apply based on the chosen regulations. Thus, if the parties expressly select the law of the underlying contract and the seat of arbitration, these choices may provide relevant information concerning the conflict-of-law rules to be used for selecting the law of the arbitration clause. So as seen, the implied choice can be derived based on other factors regarding the arbitration proceeding. The implied choice mostly falls within the scope of either the seat or the law of the underlying contract.

C) Law of the seat of arbitration

"Where the parties have not chosen a law governing the arbitration, the seat of the arbitration is undoubtedly considered to be the most significant factor in the determination of the applicable law."[98] After all, that is where the arbitration agreement is to be performed. The concept that arbitration is governed by the law of the place in which it is held, which is the seat (or forum) of the arbitration, is well established in both the theory and practice of international arbitration.[99] There is a strong line of authority in the case law that supports the application of the law of the seat of arbitration which will be explained in detail.

The provision of the New York Convention discussed earlier refers to the validity of the arbitration agreement being determined "under the law of the country where the award was made, i. e. law of the seat."[100] That default rule provides for the application of the law of the arbitral seat to the existence and substantive validity of the arbitration agreement if no express or implied choice of law was made.

[97] *Ibid.*
[98] Fouchard/Gaillard/Goldman, *op. cit*. (n. 22), p. 429.
[99] Redfern/Hunter,*op. cit*. (n. 2), p. 171.
[100] New York Convention, Art. V (a)

When dealing with arbitration the parties are free to choose the seat of arbitration.[101] By selecting the seat, the parties choose the law of the seat, i.e. *lex arbitri*, to govern the arbitration.[102] This "*lex arbitri* governs virtually all aspects of the arbitral process – the commencement of arbitration, the constitution of the tribunal, the authority, and discretion of the tribunal, the presentation of evidence, the conduct of the hearings, etc." [103]*Lex arbitri* is crucial for arbitration proceedings and thus, its mandatory provisions cannot be derogated from either by the arbitration agreement or the arbitration rules.[104] In other words, by choosing the seat of arbitration, parties express which law suits them the most.

As explained before, at the heart of the arbitral proceedings is the arbitration agreement. "The arbitration agreement establishes the tribunal's jurisdiction and sets the framework for the conduct of the proceedings."[105] Thus the nature of the arbitration agreement is predominantly procedural.[106] Therefore, if parties choose the law governing the arbitration, that law should apply to the arbitration agreement as well. It makes no sense to subject the arbitration agreement, whose basic and principal purpose is to prescribe the procedures of the arbitral process, to a different law from that of the arbitral seat, whose law governs the same arbitral process.[107] "Subjecting the arbitration agreement and the arbitral process to two different laws gives rise to uncertainties and possibilities of conflict that directly contradict the objectives of the arbitral process and the intentions of most commercial parties."[108]

Such interpretation is confirmed by the case law of the countries, which adopted UML, such as Japan and Singapore. Tokyo High Court in a *Japan Educational Corporation v. K. J case*[109] relied on the specific character of the arbitration agreement, reasoning: "*If the parties' will is unclear we must presume, as it is the nature of arbitration agreements to provide for given*

[101] Lew/Mistelis/Kröll, *op. cit.* (n. 23), p. 172; Poudret/Besson, *op. cit.* (n. 26), p. 111; van den Berg, *op. cit.* (n. 75), p. 335.

[102] Lew/Mistelis/Kröll, op. cit. (n. 23), p. 172; Poudret/Besson, *op. cit.* (n. 26), p. 114; van den Berg, *op. cit.* (n. 75), p. 335.

[103] Born, *op.cit*. (n.1), p. 536; Redfern/Hunter, *op.cit.* (n. 2), p. 79; Poudret/Besson, *op.cit.* (n. 26), p. 83; van den Berg, *op.cit*. (n. 75), p. 302.

[104] Poudret/Besson, *op. cit.* (n. 26), p. 458; Lew/Mistelis/Kröll, *op. cit.* (n. 23), p. 523.

[105] Berger, *op.cit*. (n. 25), p. 316.

[106] Poudret/Besson, *op. cit.* (n. 26), p. 258.

[107] Born, *op. cit.* (n. 1), p. 537.

[108] *Ibid.*

[109] Japan Educational Corporation v. K. J. Feld, High Court Tokyo, 30 May 1994, available at: Yearbook, Commercial Arbitration, Volume XX-1995

procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply."[110]

Also, in a recent *BNA v BNB case*[111], the High Court of the Republic of Singapore decided that "the choice of the seat of arbitration constituted an implied choice of the law governing the arbitration agreement."[112]

Moreover, the arbitration agreement is more closely related to the arbitration proceedings than to the underlying contract. As stated before, because the law of the arbitral seat governs most aspects of the arbitral procedures, it makes little sense to think that parties would intend for a different jurisdiction's law to govern their arbitration agreement's provisions addressing precisely the same issues. Particularly often times the objective of the underlying contract is entirely different from the objective of the arbitration agreement. „Therefore, if the parties choose the law applicable to the underlying contract which differs from the law of the seat, it should rather be presumed that the parties wanted the law of the seat to govern their arbitration agreement." [113]

Such a position was taken by the English Court of Appeal in the *C v. D case*[114] where the law chosen for the underlying agreement was the law of New York and the seat of the arbitration was in London. The Court reasoned that "the law of the seat, rather than the law of the underlying contract, governs the arbitration agreement."[115]

A similar interpretation can also be found in English case law. In *Sulamérica v Enesa*[116], the English Court of Appeal held that "English law was the governing law of an arbitration agreement, even though it appeared in a contract that was governed by Brazilian law, and which also reserved exclusive jurisdiction about any disputes under the contract to the Brazilian

[110] *Ibid.*, p. 288.

[111] BNA v. BNB, Supreme Court of Singapore, High Court, 1 July 2019., available at: https://030704ns-y-https-www-kluwerarbitration-com.baze.pravo.hr/document/kli-ka-ons-19-41-002?q=BNA

[112] *Ibid.*, at §65–§69 and §91–§93

[113] Born, *op. cit.* (n. 1), p. 547; van den Berg, *op. cit.* (n. 75), p. 335.

[114] C v. D, High Court of Justice, 5 December 2007., available at: https://030704nt-y-https-www-kluwerarbitration-com.baze.pravo.hr/document/ipn31272?q=UK%20no.%2080

[115] *Ibid.*, p. 754.

[116] Sulamérica v. Enesa, Court of Appeal of England and Wales, 16 May 2012, available at: https://030704nt-y-https-www-kluwerarbitration-com.baze.pravo.hr/document/kli-ka-1252105-n?q=enesa

courts."[117] The contract separately provided for a seat of arbitration in London, under the ARIAS Arbitration Rules.

The case concerned two insurance policies covering various risks in connection with the construction of a hydroelectric generating plant in Brazil. A dispute had arisen between the parties over Sulamérica's liability for certain claims made by Enesa. Sulamérica gave notice of arbitration to Enesa and in response, Enesa commenced proceedings in the Brazilian courts. Enesa appealed to the English Court of Appeal, arguing (among other things) that it was not bound to arbitrate because the arbitration agreement was governed by the law of Brazil, under which the arbitration agreement could be invoked only with Enesa's consent. The English Court of Appeal upheld Sulamérica's anti-suit injunction, finding that the proper law of the arbitration agreement was English law. The central question concerned in the case was the appropriate law of the arbitration agreement.

"The English Court of Appeal held that the law of the arbitration agreement was to be determined by application of the three-stage inquiry."[118] This is how the three-stage-step test was born.

Three-stage-step test

Its purpose is to determine the proper law of the arbitration agreement and its usage is very distributed and established among common law practitioners. It is similar to the provisions of the NYC and UML which are used when determining the governing law in civil law jurisdiction.

The first step in determining the governing law is:

(1) If the parties made an express choice of law to govern the arbitration agreement, that choice would be effective, regardless of the law applicable to the contract as a whole.

Second step:

(2) Where the parties failed expressly to specify the law of the arbitration agreement, it was necessary to consider whether the parties had made an implied choice of law.

And third:

(3) Where it was not possible to establish the law of the arbitration agreement by implication, it was necessary to consider what would be the law with the 'closest and most real connection' with the arbitration agreement.

[117] *Ibid.*, p. 467, §8
[118] *Ibid.*, §25

"Where the parties had not made an express choice of law, the English Court of Appeal accepted that it was fair to start from the assumption that, in the absence of any contrary indication, the parties intended the whole of their relationship to be governed by the same system of law."[119] Starting from that assumption, the 'natural inference' was that the parties intended that law chosen to govern the substantive contract and also to govern the agreement to arbitrate.

However, the English Court of Appeal held that, "in the present case, two specific factors indicated that the parties did not intend that Brazilian law should govern the arbitration agreement."[120]

First, it was argued that, under Brazilian law, the arbitration agreement was enforceable only with Enesa's consent. The English Court of Appeal recognized "that there was no indication that the parties intended the arbitration agreement to be enforceable by only one party and, accordingly, there was a serious risk that a choice of Brazilian law would entirely undermine the arbitration agreement"[121]. Such a risk militated against an implied choice of Brazilian law as the proper law of the arbitration agreement. Secondly, the choice of London as the seat of arbitration entailed acceptance by the parties that English law would apply to the conduct and supervision of the arbitration, which suggested that the parties intended English law to govern all aspects of the arbitration agreement. Accordingly, turning to the third stage of the inquiry, the English Court of Appeal held "that, in the circumstances of the case, the arbitration agreement had its closest and most real connection with the law of the place where the arbitration was to be held."[122] Thus, Court concluded that the closest connection is the law of the seat regardless of any other factors. The effect of this decision was to validate the arbitration agreement by selecting the law which keeps the arbitration agreement valid, rather than invalid.

On the other hand, the foregoing standard, requiring the application of the law of the arbitral seat, is a presumptive rule, which can be rebutted.[123] As discussed above, parties can include a choice-of-law provision in their arbitration agreement or can expressly agree that the law applicable to the arbitration agreement is the law governing their underlying contract or another law (rather than the law of the arbitral seat). A general choice-of-law provision does not constitute such an agreement, but other types of contractual provisions might do so.[124] Thus, a

[119] *Ibid*, p. 467, §11
[120] *Ibid.*, p. 466, see: Summary
[121] *Ibid.*, p. 467, §11
[122] *Ibid.*, §8
[123] Born, *op. cit.* (n. 1), p. 584.
[124] *Ibid.*

choice-of-law clause providing "this contract including its arbitration provision," or "this contract including the arbitration agreement" would ordinarily overcome the presumption that the arbitration clause is governed by the law of the arbitral seat. In that case, the law of the underlying contract would apply to the arbitration agreement as well.

D) Law of the underlying contract

"When the traditional choice-of-law method is used, the separability presumption requires that the main contract and the arbitration agreement are treated separately when determining the applicable law."[125] "There has often been confusion between the law applicable to the arbitration agreement and the law applicable to the main contract." [126] In practice, this confusion commonly occurs when the arbitration agreement takes the form of an arbitration clause.[127] It is easy to understand how this confusion arises because parties, since they have no legal knowledge, usually perceive the contract as a whole.

Where the main contract does contain a choice of law clause, it is legitimate to wonder whether that choice, which is usually expressed applies only to the main contract, or whether it also applies to the arbitration agreement. Since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause.[128] "If the parties expressly choose a particular law to govern their agreement, why should some other law, which the parties have not chosen, be applied to only one of the clauses in the agreement, simply because it happens to be the arbitration clause?"[129] Thus, there is a very strong presumption in favor of the law governing the underlying contract.[130] This underlying contract usually contains the arbitration agreement within, so it makes sense for the same law to govern both.

[125] *Ibid*, p. 222.
[126] *Ibid.*
[127] *Ibid.*
[128] Redfern/Hunter, *op. cit.* (n. 1), p. 158.
[129] *Ibid.*
[130] Lew/Mistelis/Kroll, *op. cit*. (n. 23), p. 143.

Some may argue that the separability presumption has to be kept in mind, however, as stated by the High Court of Singapore in the *BCY vs. BCZ case*[131], "the separability doctrine does not render the arbitration agreement entirely separate from the underlying contract."[132] According to Article 16 UML, "the arbitration agreement is separable only for the purpose that the arbitral tribunal may rule on its jurisdiction, including any objections concerning the existence or validity of the arbitration agreement."[133] In every other aspect, an arbitration agreement is an integral part of the underlying contract. For example, "the acceptance of the underlying contract entails acceptance of the arbitration agreement, without any additional requirement."[134]

Therefore, "when the parties choose a law to govern their contract, in all likelihood, they have in mind their entire contractual relationship, with all of its clauses."[135] It is hardly conceivable that the law which the parties deemed to be fit for their underlying contract would not be fit for the arbitration agreement.

Such reasoning was adopted by many of the highest courts from leading arbitration jurisdictions.

In the already mentioned *Sulamérica case*, the Court of Appeal of England and Wales stated: "It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate."[136] In another famous case, *Enka v. Chubb*[137], the Supreme Court of the UK applied the same reasoning.

[131] BCY v. BCZ case, the High Court of the Republic of Singapore, 16-17 August 2016., available at: https://nysba.org/NYSBA/Sections/International/Events/2018/Seoul%20Regional%20Meeting/Course%20Materials/BCY%20v%20BCZ.PDF

[132] *Ibid.*, p. 370, §46

[133] Holtzman Howard M., Neuhaus Joseph E., A Guide to The UNCITRAL Model Law on International Commercial Arbitration, Legislative History and Commentary, 1989, Kluwer Law International, p. 480.

[134] Blackaby Nigel, Partasides Constantine, 'Chapter 3. Applicable Laws', Redfern and Hunter on International Arbitration, 6th edition, Kluwer Law International; Oxford University Press 2015., p. 159.

[135] Schramm/Geisinger/Pinsolle, *op. cit*. (n. 86), p. 55; Redfern/Hunter, *op.cit*. (n. 2), p. 75.

[136] Sulamérica case, *op. cit*. (n. 119.), p. 467, §11

[137] Enka v. Chubb case, Supreme Court of the United Kingdom, 9 October 2020, available at: https://030704nt-y-https-www-kluwerarbitration-com.baze.pravo.hr/document/kli-ka-icca-yb-xlvi-310-n?q=enka

Likewise, the Court of Appeal of Thüringen, Germany, held "that the choice of law for the underlying contract was an implicit choice of law for the arbitration agreement."[138]The Court explained that, "since the arbitration agreement does not contain an express choice-of-law provision, and the underlying contract does, there is a strong indication that the parties wanted to apply the same choice-of-law to the arbitration agreement."[139] Similar decisions were reached by the Singapore High Court (*BCY vs. BCZ case*), the High Court of Calcutta (*Coal India Limited v. Canadian Commercial Corporation case*)[140], and an ICC tribunal (*case No. 2626)*[141].

The main reasons for favoring the law of the underlying contract instead of the law of the seat are reasonable expectations of the parties. "When parties select a particular law to govern the contract, they expect the same law to govern every provision of the contract, including the arbitration agreement."[142] On the other hand, the parties rarely concern themselves with the conduct of the arbitration proceedings. Instead, they leave the conduct of the proceedings to the chosen arbitration rules and the tribunal.[143] Therefore, only if parties fail to choose the law governing the underlying contract, the choice of the seat can be one of the indications as to the law chosen to govern the arbitration agreement. As explained by the case law, the selection of a seat in a different country from the one whose law governs the underlying contract is not sufficient by itself to override the presumption in favor of the law of the underlying contract. The English court in the *Arsanovia case*[144] stated "that even though the parties chose London as a seat, the Indian law applies as a law selected for the underlying contract."[145]

Even in the absence of a general choice-of-law clause in the underlying contract, some authorities have held that an arbitration clause is governed, either presumptively or definitively, by the law applicable to the underlying contract.[146] This conclusion applies „both where the law

[138] see: XXXVII YBCA 2012, p. 220-222

[139] *Ibid.*

[140] Coal India Limited v. Canadian Commercial Corporation case, High Court of Calcutta, 20 March 2012, available at: XXXVII YBCA 2012, p. 242-243

[141] No. 2626, ICC International Court of Arbitration, available at: Collection of ICC Arbitral Awards, Vol I (1974–1985) (Kluwer Law International 1994)

[142] Redfern/Hunter, *op. cit.* (n. 2), p. 158.

[143] Lew/Mistellis/Kröll, *op. cit*. (n. 23), p. 524.

[144]Arsanovia case, England and Wales High Court, 20 December 2012, available at: https://www.oeclaw.co.uk/images/uploads/judgments/Arsanovia_Ltd_Ors_v_Cruz_City_1_Mauritius_Holdings_2013_2_All_E_R_(Comm)_1.pdf

[145] *Ibid.*, p. 2.

[146] Born, *op. cit.* (n. 1), p. 559.

governing the underlying contract is selected as the parties' implied choice and where it is selected by default choice-of-law rules."[147] And also as discussed above, other national courts in both civil and common law jurisdictions have reached similar conclusions.

Hence, as seen, there is still not a universal consensus in theory and practice about which law applies to the arbitration agreement. In conclusion that depends on the circumstances of each case, as seen by the cited case law.

5. VALIDATION PRINCIPLE

A recent development in international commercial arbitration suggests that the proper law of the arbitration agreement should depend on what has been described as 'the validation principle'. According to this principle, „the proper law of the arbitration agreement is the one that upholds the tribunal's jurisdiction, and by this means validates the arbitration agreement."[148] The validation principle is an established principle of contractual interpretation. Where there is uncertainty in a contract, the law presumes that the interpretation that upholds the validity of the contract will prevail.[149] Therefore, if the parties have chosen two laws (for example the law of the seat and the law of the underlying contract) to apply to an arbitration agreement, the law will presume that the one which upholds the arbitration agreement will apply.[150] Thus, this principle rests on the premise that parties generally intend the application of the law which will give effect to their agreement to arbitrate.

The validation principle has been applied numerous times by both courts and tribunals. The Austrian Supreme Court, thus, stated that "If the wording of the declaration of intent allows for two equally plausible interpretations, the interpretation which favors the validity of the arbitration agreement is to be preferred."[151]

[147] *Ibid.*

[148] Hook, *op. cit.* (n. 25), p. 183; Born, *op. cit.* (n. 1), p. 527.

[149] Andrew Tweeddale, The Validation Principle and Arbitration Agreements: Difficult Cases Make Bad Law, The International Journal of Arbitration, Mediation and Dispute Management (Brekoulakis (ed.); May 2022), p.240.

[150] *Ibid.*

[151] 4Ob80/08f, Oberster Gerichtshof, 26 August 2008, available at: Yearbook, Commercial Arbitration, Volume XXXIV, 2009, p. 405, §1

The Award in an ICC case held that "arbitration agreements should be interpreted in a way that leads to their validity in order to give effect to the intention of the parties to submit their disputes to arbitration.".[152]

In a well-known *Enka v. Chubb case*[153], the Supreme Court of the United Kingdom reasoned „that the validation principle was a form of purposeful interpretation to give effect to the parties intentions."[154] In particular, "Interpretation which would, without doubt, mean that an arbitration clause is void and of no legal effect at all gives rise to a very powerful inference that such a meaning could not rationally have been intended."[155]

Also, both the New York Convention and the Model Law mandate the validation principle.[156] This validation principle is mandated by the Article V(1)(a), which gives effect to the parties choice of law, either express or implied, including the parties' overriding intention that their international arbitration agreement will be valid and effective, regardless of the jurisdictional and choice-of-law complexities that attend other international contracts.

Without a doubt, the validation principle is an important principle when the parties' intent is clear. Therefore, when there is doubt about which law applies to the arbitration agreement, it should be the one that gives effect to the party's intent to resolve their disputes by arbitration. However, this presupposes that the parties actually wanted to arbitrate. "When it is not certain if the parties ever reached an agreement, there is no common ground that could be validated."[157] Validating the parties' inexistent arbitration agreement would go against the principle of party autonomy. Therefore, "if there is a dispute about whether the parties wanted to arbitrate, a tribunal should first apply the rules for determining the parties' consent."[158] This was confirmed by the Court of Appeal of England and Wales in *Kabab-Ji SAL v. Kout Food Group case*.[159] The Court explained "that the validation principle does not cover the conclusion of contracts.

[152] No 11869, ICC International Court of Arbitration, 2011, available at: Yearbook Commercial Arbitration, Volume XXXVI, 2011, p. 58, §34
[153] Enka v. Chubb case, *op. cit*. (n. 140)
[154] *Ibid*., §251
[155] *Ibid*, §106
[156] Born,*op. cit*. (n. 1), p. 527
[157] Lew/Mistelis/Kröll, *op. cit*. (n. 23), p. 151.
[158] Gaillard/Savage, *op. cit*. (n. 22), p. 25.
[159] Kabab Ji, *op. cit*. (n. 95)

Only after it is certain that the parties wanted arbitration, the validation principle seeks to give effect to their agreement."[160]

6. CONCLUSION

International commercial arbitration is an efficient, fast, and amicable way of resolving any disputes which arise between two commercial parties. At the heart of the arbitral proceeding is the arbitration agreement. Without it, there wouldn't be valid arbitration as it is a cornerstone of every arbitration. This arbitration agreement takes the form of the arbitration clause contained within the commercial contract or the submission agreement which is usually drafted after the dispute arises. Like everything in the law domain, an arbitration agreement has to be governed by some system of law or rules. This requirement is especially important in case any question of validity or existence arises. That is why parties' autonomy exists, so the parties can choose any system of law that fits their arbitration agreement. If the parties don't make an express choice of law, the arbitral tribunal has to decide on the governing law based on some established principles. These established principles are choice-of-law rules that are widely used in juridical practice and talked about among legal scholars. Choice-of-law rules can be found in the New York Convention, or some similar international arbitration treaties. These treaties contain virtually the same rule which states, "that recognition or enforcement of an 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 i.e., the law of the seat" This is where the complexity begins. Consequently, the arbitration agreement can be governed by at least four possible governing laws. These are the law expressly chosen by the parties, the law impliedly chosen, the law of the seat, and the law of the underlying contract. When determining the appropriate law, the separability presumption has to be kept in mind. The separability presumption ensures that an international arbitration agreement is presumptively separable from the underlying contract with which it is associated. Thus, we cannot automatically apply the same law to the arbitration agreement. When determining the appropriate law, the parties wil has to be kept in mind. According to the validation principle, when parties chose two laws (*ex*. the law of the seat and the law of the underlying contract) the law which gives effect to the arbitration agreement will apply. Hence, its mission is to save the arbitration agreement from possible invalidity.

[160] *Ibid.*, §51

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