

CISG and Arbitration Agreements: A Janus-Faced Practice and How to Cope with It

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Arbitration clauses or institutional arbitration rules rarely, if ever, specify the law applicable to the arbitration agreement. A wide range of laws may thus govern this question, such as the law at the place of arbitration, the law where the agreement or the award is enforced or the law of the main contract between the parties. It is also conceivable that international uniform law or soft law may play a role. Tribunals and courts seized with this question must consequently decide which of these various laws shall apply to verify the existence and validity of the arbitration agreement. This paper picks up on this controversially debated conflict of laws issue. At times, this debate is characterized by a strong divide between arbitration and international trade law practitioners. But are the different approaches really leading to diverging results in arbitral practice?

Key Words : Arbitration Agreement, Applicable Law, CISG, Lex Arbitri, Seperability Principle, Articles II and V New York Convention, ICC International Court of Arbitration, Article 21 ICC Arbitration Rules

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I . Introduction

Arbitration is a private beast. It relies on the parties' consent to oust the national courts of their jurisdiction and to bestow a private tribunal with the task and the power to settle a dispute that may arise or already arose between the parties. Consequently, the linchpin of arbitration is the arbitration agreement. It is the starting- and end-point of this private dispute settlement mechanism. Against this backdrop, it is no surprise that the arbitration agreement plays an important role not only in the theoretical justification of arbitration in general, but also in practice. However, as the authors will show in deference to two recent ICC awards dealing with the question whether the CISG may apply to the validity of the arbitration agreement, "*in theory, there is no difference between theory and practice. In practice, there is*".¹⁾

A party that seeks an arbitral tribunal must rely on an arbitration agreement while a party who tries to evade arbitration must show that the parties are not bound by such an arbitration agreement or at least that the one agreed to is not valid. The legal requirements for a valid arbitration agreement are thus crucial. They decide upon the fate of the arbitration at hand. In an international environment, those requirements for a valid arbitration agreement may hail from different legal sources. The dispute between the parties is often connected to more than just one national law. Thus, several laws may govern the arbitration agreement, such as the law at the place of arbitration, the law where the agreement is enforced, the law where the award is enforced, or the law of the main contract between the parties. It may also be an international uniform law that applies or soft law that plays its role. Eventually, even more than one source may apply, specifically to validate an otherwise invalid agreement. In any event, the tribunal and the courts must decide which of these laws apply to verify the existence and validity of the arbitration agreement.

This conflict of laws issue has already been discussed widely. Many scholars and practitioners have spilled much ink on this issue, in academic articles as well as briefs, awards and judgments. It is an old adage that many cooks spoil the broth. The plenitude of offered solutions is an issue on its own. It creates uncertainty for the

1) This quote is frequently attributed to New York Yankee catcher and baseball Hall of Famer Yogi Berra.

parties, lengthier arbitrations and higher legal costs. Despite the crucial impact of the law governing the arbitration agreement, in practice parties expressly regulate this question in their arbitration agreement only on rare occasions. Chapter II of this article will provide an overview of the discussion on the applicable law to international arbitration agreements.

A uniform law may be the solution. There is no uniform law specific to arbitration agreements that covers on its own all legal aspects of the formation and validity of such an agreement. However, parties may avail themselves of a frequently²⁾ used uniform law on international sales contracts. If the arbitration agreement nests as a contract clause in a sales and purchase agreement that falls under the CISG, this convention may also apply to the arbitration agreement. But also here, scholars and practitioners do not speak with one voice. Different views exist not only on the question whether the CISG can apply to arbitration agreements at all, but also on what aspects are covered by the CISG. This, again, causes practical headaches. Chapter III of this article digs into that discussion.

Practitioners, especially arbitrators, may use several evasion strategies to cope with the multitude of possible solutions to the applicable law on international arbitration agreements. Two of those strategies will be discussed in Chapter IV of this article.

II. Law Applicable to Arbitration Agreements

This paper only concerns the law applicable to arbitration agreements regarding their formation as well as substantive and formal validity, i.e. those questions that uncontroversially fall under the umbrella term “contractual”³⁾ and that might be governed by the CISG. Other questions, especially the capacity of the parties to enter into an arbitration agreement and arbitrability, are not covered. It is clear that the CISG does not deal with those questions.

2) Despite the fact that 83 countries have ratified the CISG, its success in practice is actually open for debate and there are no clear statistics as to the number of cases in which the parties opt out of the CISG, see as an overview Ingeborg Schwenzer/Pascal Hachem, “The CISG - A Story of Worldwide Success”, in: Kleinemann (ed.), *CISG Part II Conference*, 2009, pp. 119, 125.

3) See, for instance, the characterization under Art. 10-12 Rome I Regulation (Regulation 593/2008 of the European Communities). The characterization as substantive or procedural is not relevant in that respect.

To determine the law applicable to international arbitration agreements can be a difficult and complex task.⁴⁾ Many solutions have been offered and so far no clear majority view has been reached neither in the academic discussion nor in practice.⁵⁾ There are several reasons why it can be hard to rule on the law applicable to the formation as well as formal and substantive validity of the arbitration agreement.

1. Different Sources of Law: Horizontal, Vertical, Hard and Soft Law

As regularly in the international sphere, there are many different sources of law that may be applied. On a horizontal level, different national laws may impose themselves. At least in theory, every law may have a say that has a significant relationship with the issue and the case at hand. This might in principle be every national law worldwide, since the arbitration agreement and the award may potentially be enforced in all jurisdictions. Such a limitless approach would inevitably run counter to legal certainty and efficiency in the settlement of a specific international legal dispute. This would hurt international arbitration as a legal institution that was invented, *inter alia*, to settle international cases more effectively and efficiently than by virtue of national courts.⁶⁾

Moreover, different sources may also be applied on different vertical levels. Apart from national laws, international uniform law regularly couched in international conventions may contain rules on arbitration agreements. However, so far, there is no such international convention that extensively rules on all issues pertaining to arbitration agreements. Article II of the New York Convention (NYC) postulates to

4) That is also the impression that was received at the ICCA Congress in 1999, see V. V. Veeder, "Summary of Discussion in The First Working Group", in: Albert van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series, Vol. 9, Kluwer Law International, 1999, pp. 43, 44.

5) See, as an overview, Gary Born, *International Commercial Arbitration*, 2014, pp. 472 *et seq.*; Julian Lew/Loukas Mistelis/Stefan Kröll, *Comparative International Commercial Arbitration*, 2003, paras. 6-26, 6-67 *et seq.*; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration*, pp. 135-138; Leonardo Graffi, "Law applicable to the validity of the arbitration agreements", in: Franco Ferrari/Stefan Kröll (eds.), *Conflict of Laws in International Arbitration*, sellier, european law publishers, 2011, pp. 19-62.

6) Alan Redfern/Martin Hunter, *et al.*, *Redfern and Hunter on International Arbitration*, Kluwer, 2009, paras. 1,50 *et seq.*

recognize and enforce international arbitration agreements. The NYC is permeable for more arbitration friendly solutions in other conventions or in the local law.⁷⁾ Still, it does not state under which circumstances the parties substantively concluded a valid arbitration agreement.⁸⁾ Hence, the NYC does generally not uniform the substantive law applicable to arbitration agreements. However, one approach interprets the formal requirements of Article II(2)(3) NYC to have substantive repercussions. This broad autonomous construction minimizes the need to rely on the different national law conceptions of what constitutes a valid arbitration agreement.⁹⁾ Additionally, also Article VI(2) European Convention on International Commercial Arbitration merely prescribes a choice of law rule in lieu of setting its own international substantive standard.

Apart from those hard law rules, practitioners must also look to soft law. One such soft law is the UNCITRAL Model Law on International Commercial Arbitration. However, it only sets up the enforcement of an arbitration agreement as well as its formal requirements in Option I of Article 7. It does not put forward requirements as to the formation or substantive validity of the arbitration agreement. Institutional arbitration rules, such as the ICC Rules, UNCITRAL Rules, DIS Rules, LCIA Rules or ICDR Rules, normally do not speak to the formation or validity of an arbitration agreement either.

2. Different Fora where the Existence and Validity of the Arbitration Agreement Come into Play

Another reason why it is so complex to ascertain the applicable law on international arbitration agreements is the fact that the formation and validity of those agreements may come up in different *fora* and in different situations.

7) For a discussion on the interpretation of Art. II NYC as to its standard vis-à-vis other arbitration laws, read Dorothee Schramm/Elliott Geisinger/Philippe Pinsolle, "Article II", in: Herbert Kronke/Patricia Nacimiento, et. al. (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, Kluwer Law International, 2010, p. 45-48.

8) Ulrich Haas, "New York Convention", in: Frank-Bernd Weigand (ed.), *Practitioner's Handbook on International Arbitration*, Part 3, Art. II, para. 60.

9) Lew/Mistelis/Kröll (*supra* fn. 5), para. 14-41; Graffi (*supra* fn. 5), pp. 19, 41 *et seq.* regarding Art. II(2) NYC.

National courts may be involved under various circumstances. A court may support the arbitration, e.g. in case an arbitrator is challenged. In that case, normally, the court at the arbitral seat has jurisdiction.¹⁰⁾ This is also the only competent forum with regard to a challenge of the arbitral award where the validity of the arbitration agreement may matter.¹¹⁾ However, a party may attack the arbitration by seeking an anti-arbitration injunction¹²⁾ or by just lodging a claim before a national court in breach of an arbitration agreement. The other party must defend its right to arbitrate before the national court. The formation and validity of the arbitration agreement is crucial in such circumstances.¹³⁾ Here, already, multiple fora may have jurisdiction. The party who files a lawsuit against the other party may do so before every court that has international jurisdiction to hear the case. A myriad of conceivable fora exists also when the arbitral award must be declared enforceable by a national court. In theory, an award can be enforced in every jurisdiction in the world.¹⁴⁾ A valid arbitration agreement is regularly a requirement for a national court to enforce a (foreign) arbitral award.¹⁵⁾

At the outset, all those *fora* apply their own choice of law rules on the arbitration agreement. Those rules, as will be demonstrated below, are not completely harmonized across the globe. Therefore, judges who ponder the question whether the arbitration agreement at hand is valid, may apply different rules of law although it is the exact same arbitration agreement between the same parties in the same case. Applying different laws may eventually lead to different results. A valid arbitration agreement in one jurisdiction that has been invalidated in another jurisdiction gives rise to potential conflicts which in turn may inhibit an effective dispute settlement.

Further, not only courts but also the arbitral tribunal must rule on the formation and

10) See, for instance, Art. 13(3), 6, 1(2) UNCITRAL Model Law on International Commercial Arbitration.

11) Art. 34(2) lit. a (i), 6, 1(2) UNCITRAL Model Law on International Commercial Arbitration.

12) Jennifer Gorskie, "US Courts and the Anti-Arbitration Injunction", 28 *Arbitration International* 295 (2012). However, in general, courts act with caution before issuing an anti-arbitration injunction; see, for instance, England and Wales High Court (Commercial Court), *AmTrust Europe Ltd. v. Trust Risk Group SpA*, [2015] EWHC 1927 (Comm), paras. 23-30.

13) See, Art. II(3) NYC; Art. 8 UNCITRAL Model Law on International Commercial Arbitration.

14) 156 countries have signed the New York Convention. But also outside this convention is an enforcement of a foreign arbitral award possible even if the award creditor needs to rely on the (idiosyncratic) local rules in the jurisdiction where he wants to enforce the award. See also the Inter-American Convention on International Commercial Arbitration (Panama Convention) which is ratified by 19 states, *i.e.* South American jurisdictions and the United States.

15) Art. V(1) lit. a NYC; Art. 5(1) lit. a Panama Convention.

validity of the arbitration agreement. According to the *Kompetenz-Kompetenz* principle, although not uniformly applied,¹⁶⁾ it is a core task and power of the tribunal to decide upon its own jurisdiction. Arbitrators have generally more wiggle room than judges to decide which law they apply to the arbitration agreement. They do not have to follow the *lex fori* approach described above.¹⁷⁾ However, they regularly perform a choice of law analysis. Since those rules are not uniform, the uncertainty about the applicable law may even be greater. Nonetheless, there is a tendency among arbitral tribunals to validate arbitration agreements rather than declining their own jurisdiction to hear the case.¹⁸⁾ As will be shown below, such a “validation principle” may even have its roots in actual choice of law rules.

3. Many different Conflict of Laws Solutions

The complexity of the answer to the question which law applies to an international arbitration agreement derives also from the many different conflict of laws solutions that are available. Globally, conflict of law rules are harmonized only to a small extent. As a general rule, every jurisdiction sets its own conflict of law rules. A judge will hence normally apply his own conflict rules. Although conflict of law rules have more extensively been harmonized within the European Union, the arbitration agreement has been spared from that harmonization.¹⁹⁾

The European Convention on International Commercial Arbitration (Geneva Convention 1961) does not cover all issues related to the law applicable to the arbitration agreement.

16) For a discussion on the positive and negative effect of the *Kompetenz-Kompetenz* principle, Jan Paulsson, *The Idea of Arbitration*, OUP, 2013, pp. 53-60.

17) See, for instance, Alexander Grimm, “Applicability of the Rome I and II Regulations to International Arbitration”, *SchiedsVZ* 2012, pp. 189-200 (with more references; dismissing the opinion of some scholars that tribunals seated in an EU Member State must apply the Rome I and II Regulations; further emphasizing that the application of the wrong law regularly does not make the award unenforceable).

18) Gary Born, *International Commercial Arbitration in the United States*, Commentary & Materials, Kluwer Law, 1994, p. 161; Julian Lew, “The Law Applicable to the Form and Substance of the Arbitration Clause”, in: Albert Jan van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series, Vol. 9, Kluwer Law International, 1999, pp. 113 *et seq.*, 128.

19) Art. 1(2) lit. e Rome I Regulation: “*The following shall be excluded from the scope of this Regulation: [...] arbitration agreements and agreements on the choice of court.*”. On the discussion whether the Rome I Regulation might be applied by analogy: Michael Stürmer/Christoph Wendelstein, “Das Schiedsvereinbarungsstatut bei vertraglichen Streitigkeiten”, *Praxis des International Privat- und Verfahrensrechts*, 2014, pp. 473, 474-475.

Article VI(2) of that Convention²⁰⁾ according to its position within Article VI only deals with the question of which law applies in case either party seizes a court in spite of the arbitration agreement.²¹⁾ Further, Article VI(2) lit. c does not provide for a harmonized choice of law rule for the situation in which a court is seized at a time when the parties have neither chosen the applicable law nor set up the arbitral seat.

Further, in a rather global setting, the NYC sets, at least prima facie, also only a very limited conflict of laws standard. Article V(1) lit. a NYC is, according to its wording, only concerned with the situation in which a foreign award ought to be recognized and enforced. Accordingly, it seems that this rule does not apply to all other situations in which a judge or arbitrator must decide upon the applicable law to an international arbitration agreement. Whether such a strict construction is to be applied is questionable. It has been argued that Article V(1) lit. a extends to Article II NYC because in the view of the NYC it does not make much sense that the law applicable to the arbitration agreement changes depending on whether the award is to be enforced in another jurisdiction, or the award is challenged at the arbitral seat, or a court must decide whether it has jurisdiction to hear the case brought by a claimant despite the arbitration agreement.²²⁾ This would end the discussion on the law applicable to international arbitration agreements for almost all jurisdictions in the world which are a party to the NYC, under the condition that a seat of arbitration has already been set and unless one conceives Article V(1) lit. a NYC as referring to the choice of law rules at the arbitral seat.²³⁾ Nonetheless, this view is far from being universally accepted.²⁴⁾ Some argue that the relevant interests at the time of enforcing

20) Art. VI(2) reads in pertinent part: “*In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement [...] (a) under the law to which the parties have subjected their arbitration agreement; (b) failing any indication thereon, under the law of the country in which the award is to be made; (c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.*”

21) Dominique Hascher, “European Convention on International Commercial Arbitration 1961, Commentary”, *Yearbook Commercial Arbitration* XXXVI (2011), pp. 504, 528 (para. 55).

22) Born (*supra* fn. 5), p. 493; Stephan Wilske/Todd Fox, Article II, in: Wolff (ed.), *New York Convention - Commentary*, 2012, paras. 228, 230; Haas (*supra* fn. 8), Part 3, Art. II, para. 61.

23) Those who strive to make Art. 178(2) Swiss Private International Law Statute compatible with Art. V(1) lit. a NYC: Christoph Müller, in: Manuel Arroyo (ed.), *Arbitration in Switzerland*, Article 178 PILS, para. 38; Bernhard Berger/Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, Sweet & Maxwell, 2006, para. 385.

a foreign arbitral award are different to the interests of the parties before an award has been rendered.²⁵⁾ Moreover, Article 5(1) lit. a Inter-American Convention on International Commercial Arbitration (Panama Convention) sets up a rule that is identical to Article V(1) lit. a NYC.

Not only on an international level, but also national laws oftentimes do not contain clear and specific conflict rules to answer the question which law applies to an international arbitration agreement.²⁶⁾ This adds to the complexity of a choice of law analysis since the task to come up with a choice of law rule is assigned to the courts and the literature. It is thus no surprise that even in one country different solutions are discussed. There is no guarantee that the courts will find a uniform approach.²⁷⁾

Despite this lack of uniform or specific conflict of law rules, there are in general five pillars on which a conflict of laws analysis for international arbitration agreements is based. These baselines, however, are not always uniformly accepted or may be applied with a different twist. Hence, they explain the complexity of a choice of law assessment.

The first pillar is the separability principle. According to that principle, the arbitration agreement is independent from the substantive contract between the parties. Therefore, the arbitration agreement may be governed by a different law than, for instance, the sales contract the arbitration agreement refers to.²⁸⁾ This principle is evident when the parties opted to enter into an arbitration agreement which is also physically detached from the underlying substantive contract. But it also applies to arbitration clauses which form part of such a substantive contract. However, it is not self-evident that the separability principle also suits the situation in which the substantive contract is not only void, but the parties did not even consent to the substantive contract that contains the arbitration clause in the first place. The majority view today is that the

24) So, for instance, US Courts deny the extensive effect of Art. V(1) lit. a to Art. II NYC: James Carter/John Fellas, *International Commercial Arbitration in New York*, Oxford University Press, 2012, p. 17. Critical also Graffi (*supra* fn. 5), pp. 19, 53-56.

25) Stürner/Wendelstein (*supra* fn. 19), p. 473, 475.

26) Art. 36(1)(a)(i) UNCITRAL Model Law on International Commercial Arbitration, just as the NYC, delineates the applicable law to the arbitration agreement only regarding the recognition and enforcement of an award. The U.S. Federal Arbitration Act (FAA) also does not deal with that issue. Art. 178(2) Swiss Private International Law Statute and Art. 3121 Civil Code of Québec are rather an exception.

27) So, for instance, the courts in the 2nd circuit in the US (which includes New York) do not follow one clear line as to the applicable law to the arbitration agreement, see Carter/ Fellas (*supra* fn. 24), pp. 18-24.

28) Born (*supra* fn. 5), p. 472.

separability principle is vast and also covers the situation in which the substantive contract never came into existence.²⁹⁾ Yet, the arbitration agreement may suffer from the same defect as the substantive contract. Still, the separability principle is not necessarily applied uniformly around the globe, which probably stems from the divergent perceptions of that principle.³⁰⁾

The party autonomy principle as a cornerstone of arbitration forms the second pillar of a conflict of laws analysis for international arbitration agreements. The parties may choose the applicable law on the arbitration agreement. This fits well with the general conception that the party autonomy principle has taken over international contract law.³¹⁾ Since the parties may also impliedly choose the applicable law, it may be challenging to decide whether the parties actually have chosen the applicable law to the arbitration agreement. A choice of law clause in a contract may only target the substantive contract or may well be interpreted as also covering the arbitration clause.³²⁾ Further, some argue that the parties' choice of an arbitral seat should be interpreted as also being an implied choice of law on the arbitration agreement.³³⁾

29) See the discussion in Jean-François Poudret/Sébastien Besson, *Droit comparé de l'arbitrage international*, Schulthess, 2002, para. 167. This may also be suggested by the broad wording of sec. 7 English Arbitration Act 1996: "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement." Different opinion: Pilar Perales Viscasillas/David Ramos Muñoz, "CISG & Arbitration", Spain Arbitration Review 2011, pp. 63, 74.

30) Redfern/Hunter (*supra* fn. 6), paras. 2,89-2,91, 2,98.

31) See, for instance, Art. 2 The Hague Principles on Choice of Law in International Commercial Contracts, more information at www.hcch.net.

32) For a broad construction of the choice of law clause which also covers the arbitration clause within the contract: German Federal Court of Justice, *Neue Juristische Wochenschrift* 1976, p. 1591; Rolf Trittman/Inka Hanefeld, in: Karl-Heinz Böckstiegel/Stefan Kröll/Patricia Nacimiento (eds), *Arbitration in Germany, The Model Law in Practice*, 2015, § 1029 ZPO, para. 11; Thomas Webster/Michael Bühler, *Handbook of ICC Arbitration*, 2014, para. 6-6; David St. John Sutton/Judith Gill/Matthew Gearing, *Russell on Arbitration*, Sweet & Maxwell, 2007, para. 2-095. Different opinion: *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc.*, Swedish Supreme Court, T 1881-99, 27 October 2000, in: Albert van den Berg (ed.), *Yearbook Commercial Arbitration 2001* - Vol. XXVI, p. 291, para. 2; Jean-François Poudret/Sébastien Besson, *Comparative Law of International Arbitration*, Sweet & Maxwell, 2007, para. 297.

33) See already Institut de Droit International, Resolution Neuchâtel 1959, Questions générales, Article premier: "Les parties sont libres dans la convention arbitrale (compromis ou clause compromissoire) de faire usage de leur autonomie et d'indiquer le lieu où le tribunal arbitral doit siéger ; ce choix implique qu'elles entendent soumettre l'arbitrage privé à la loi du pays de ce siège." Also, *XI Insurance Ltd. v. Owens Corning*, High Court of Justice, Queen's Bench Division (Commercial Court), 28 July 1999, in: Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2001*, Vol. XXVI, p. 869, para. 42.

The third pillar of a choice of law analysis is the validation principle. Such a principle allows the judge or arbitrator to apply several laws alternatively. If only one of those laws validates the agreement at hand, the arbitration agreement was formed and is valid. This *in favorem validitatis* approach is expressly provided for e.g. in Article 178(2) of the Swiss Private International Law Statute³⁴⁾ as well as Article 3121 Civil Code of Québec.³⁵⁾ Moreover, the NYC with its pro-arbitration bias could eventually also be construed in a way to require a pro-validation approach.³⁶⁾ However, many judges, arbitrators, or scholars seem to opt for the application of one specific law on the arbitration agreement and therefore *en passant* reject the validation principle. This may hail from a broader choice of law view because there is no general principle in the conflict of laws for a validation principle in favor of a specific contract. Rather this principle only applies to very specific questions, especially concerning the formal validity of a contract.³⁷⁾ Furthermore, it is not entirely clear whether the validation principle may also be used for questions other than validity covered by the applicable law to the arbitration agreement, such as interpretation and scope of that agreement.³⁸⁾

As the fourth pillar the “nature” of the arbitration agreement may also have an impact on the conflict of laws analysis. The qualification ranges from a “normal” substantive contract, over a procedural contract to a contract *sui generis* which merges both approaches by acknowledging that the contract has a substantive element as to its formation and general validity but its effects mostly concern the procedural law realm.³⁹⁾

34) Art. 178(2) reads: “Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.”

35) Art. 3121 reads: “In the absence of a designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the State where arbitration takes place.”

36) Born (*supra* fn. 5), pp. 474, 493 *et seq.*, 561 *et seq.*; Graffi (*supra* fn. 5), pp. 19, 57-61: especially backing a “validity presumption” under Art. II(2) NYC.

37) For instance, Art. 11 Rome I Regulation; Art. 124 Swiss Private International Law Statute; Art. 3538 Civil Code of Louisiana; Art. 3109(2) Civil Code of Québec.

38) In the negative, Pierre Karrer, “The Law Applicable to the Arbitration Agreement”, 26 Singapore Academy of Law Journal 849, 859 *et seq.* (2014). In the affirmative, Christoph Müller (*supra* fn. 23), Article 178 PILS, para. 35.

39) German Federal Court of Justice, Neue Juristische Wochenschrift 1957, pp. 589, 590; Karl-Heinz Böckstiegel/Stefan Kröll/Patricia Nacimiento (eds), *Arbitration in Germany, The Model Law in Practice*, 2015, General Overview, para. 47; Trittmann/Hanefeld, *ibid.*, § 1029, para. 7; Waincymer (*supra* fn. 5), p. 135; Christoph Müller (*supra* fn. 23), Article 178 PILS, para. 5-7; Lew (*supra* fn. 18), p. 113, 113 *et seq.*, 117 (“the arbitration agreement has both a contractual and jurisdictional character”).

Thus, the procedural aspects may be considered to have more weight.⁴⁰⁾ However, the importance of pigeonholing the arbitration agreement into one of the above mentioned categories is not carved in stone. For some the nature of the arbitration agreement is crucial or has at least some impact on the applicable law⁴¹⁾ while others prefer to rely on other choice of law principles.⁴²⁾

The principle of the closest connection forms the fifth pillar of a choice of law analysis of the law applicable to the arbitration agreement. The issue is how to ascertain the closest connection, especially in case the parties did not have (impliedly) chosen the applicable law. The closest connection-test is not a straight forward path that inevitably leads to the only one solution. An international arbitration agreement has by definition connections to more than just one jurisdiction or law and it is tough to say which one is “the closest”. Principally two different views dominate the discussion.⁴³⁾ Some argue that the arbitration agreement is closest connected with the law at the arbitral seat (*Jex loci arbitri*).⁴⁴⁾ Two arguments that speak in favor of this view are the necessity of the enforcement of the arbitration agreement at the seat of arbitration⁴⁵⁾ and the rule in Article V(1) lit. a NYC⁴⁶⁾ as well as Article 5(1) lit. a Panama Convention and Article VI(2) lit. b Geneva Convention 1961. However, the issue is how to fill the gap in case the parties, the tribunal or the arbitration institution

40) German Federal Court of Justice, *Neue Juristische Wochenschrift* 1987, pp. 651, 652; Christoph Reithmann/Dieter Martiny, in: Reithmann/Martiny (eds.), *Internationales Vertragsrecht*, Otto Schmidt, 2010, para. 6552. See also already Institut de Droit International, Resolution Neuchâtel 1959, Questions générales, Article premier, above at footnote 33.

41) Waincymer (*supra* fn. 5), p. 136 *et seq.*; Reinhold Geimer, in: Zöller, ZPO, 2014, § 1029, para. 17a; Stürmer/Wendelstein (*supra* fn. 19), pp. 473, 474.

42) Trittman/Hanefeld (*supra* fn. 32), para. 7; Born (*supra* fn. 5), p. 513; Lew (*supra* fn. 18), pp. 113, 117.

43) See also the overview of some cases across jurisdictions, Vivekananda N/Ankit Goyal, “Which law governs the agreement to arbitrate?”, *Global Arbitration Review* of 21 April 2015 (Vol. 10 – Issue 3).

44) Higher Regional Court Hamburg, BeckRS 2014, 06734; Trittman/Hanefeld, (*supra* fn. 32), para. 11; Karl Heinz Schwab/Gerhard Walter, *Schiedsgerichtsbarkeit*, C.H. Beck, 2005, chapter. 43, para. 7; Rolf Schütze, „Kollisionsrechtliche Probleme der Schiedsvereinbarung, insbesondere der Erstreckung ihrer Bindungswirkung auf Dritte“, *SchiedsVZ* 2014, pp. 274, 275; Geimer (*supra* fn. 41), § 1029, para. 17b; Peter Schlosser, in: Stein/Jonas, *ZPO Kommentar*, Volume 10, 2014, § 1029, para. 108; Redfern/ Hunter (*supra* fn. 6), para. 3.20 (for England); Keechang Kim, “Arbitration Agreement under Korean Law”, 3 *Korea University Law Review* 83, pp. 83-87 (2008); Lew/Mistelis/Kröll (*supra* fn. 5), para. 6-69 (most tribunals apply the law at the arbitral seat).

45) Webster/ Bühler (*supra* fn. 32), para. 6-19.

46) Schwab/Walter (*supra* fn. 44), Chapter 43, paras. 1 *et seq.*; Geimer (*supra* fn. 41), § 1029, para. 17a f.

have yet to fix the arbitral seat.⁴⁷⁾ Others evade that problem and prefer the application of the law of the main substantive contract.⁴⁸⁾ One argument in its favor is to rule out the situation in which the arbitration clause is invalid while the underlying substantive contract is enforceable.⁴⁹⁾ The idea is to assure that an arbitral tribunal can rule on the substantive contract rather than a national court.

Finally, one may reject a choice of law approach altogether and apply “international substantive law” rules. This is the peculiar path that in particular French judges choose when dealing with the formation and validity of an international arbitration agreement.⁵⁰⁾ This means that French judges apply a specific international substantive law and refrain from choosing a national law applicable to the international arbitration agreement.⁵¹⁾

4. Reference to Procedural or Substantive Law?

The complicated and complex answer to the question which law applies to an international arbitration agreement does not stop at the finding of an applicable law belonging to a specific jurisdiction. The next step is to wrestle with the question which exact rules of law of that jurisdiction shall be applied. Especially if one adheres to the procedural qualification of the arbitration agreement, it is consistent to apply the procedural rules of law of that jurisdiction. Yet, those rules, if any, normally only contain provisions as to the form of the arbitration agreement.⁵²⁾ They do not set forth rules on the formation or substantive validity of the agreement. Thus, at the end, the focus is on the application of the substantive rules.⁵³⁾

47) See the still open issue in Art. VI(2) lit. c Geneva Convention 1961.

48) Stürner/Wendelstein (*supra* fn. 19), pp. 473, 478-479.

49) Karrer (*supra* fn. 38), 849, 858 *et seq.*

50) Since the decision by the French Cour de Cassation, Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors, 121 Clunet 432 (1994); François-Xavier Train, “L'affaire Dallah ou de la difficulté pour le juge anglais d'appliquer le droit français, note sous Paris, Pôle 1 – Ch. 1, 17 février 2011 et Cour suprême du Royaume-Uni, 3 novembre 2010”, *Revue de l'Arbitrage* 2012, pp. 377, 385.

51) Philippe Fouchard/Emmanuel Gaillard/Berthold Goldman, *International Commercial Arbitration*, Kluwer Law International, 1999, paras. 435-445; Christophe Seraglini/Jerome Ortscheidt, *Droit de l'arbitrage interne et international*, Montchrestien, 2013, p. 483.

52) See, for instance, Art. II(2) NYC; Art. 7 Option I UNCITRAL Model Law on International Commercial Arbitration; Art. 8 Korean Arbitration Act; § 1031 German Law on Civil Procedure; Art. 178(1) Swiss Private International Law Statute; § 583 Austrian Law on Civil Procedure; Sec. 5 English Arbitration Act 1996; § 2 US Federal Arbitration Act.

III. Does the CISG Apply to Arbitration Agreements?

The CISG applies to an international sales contract in the meaning of Article 1 CISG, unless the parties have opted out (Article 6 CISG). The CISG contains rules as to the formation of the sales contract and its obligations but is not concerned with its substantive validity (Article 4 CISG). Our focus now concerns the question whether the CISG may also apply to the arbitration agreement. As generally with the question as to the applicable law to international arbitration agreements there is no clear picture on the applicability of the CISG to such an agreement.

1. Is the Arbitral Tribunal Bound or Free to Apply the CISG?

Before turning to the question of the application of the CISG to arbitration agreements, a preliminary issue shall be discussed briefly. It has been discussed whether and to what extent arbitral tribunals are bound or free to apply the CISG.⁵⁴⁾ Other than a court which is bound to apply the CISG as part of its national law (Article 1(1) lit. a CISG) or the law of another jurisdiction applicable through a conflict of laws analysis (Article 1(1) lit. b CISG), an arbitral tribunal is not directly bound to apply the CISG since the tribunal does

53) Poudret/Besson (*supra* fn. 32), para. 298; Born (*supra* fn. 5), pp. 508-513, 739; Kim (*supra* fn. 41), pp. 83, 86.

54) Urs Peter Gruber, "The Convention on the International Sale of Goods (CISG) in Arbitration", *International Business Law Journal* 2009, pp. 15, 23-28; Ugo Draetta, "La Convention des Nations Unies de 1980 sur les Contrats de Vente Internationale de Marchandises et l'Arbitrage", *International Business Law Journal* 2012, pp. 193, 197-199; Hans van Houtte, "La convention de Vienne dans la pratique arbitrale de la Chambre de commerce internationale", *ICC International Court of Arbitration Bulletin*, Vol. 11, No. 2, 2000, pp. 22, 23-26; Alexis Moure, "Application of the Vienna International Sales Convention in Arbitration", *ICC International Court of Arbitration Bulletin* Vol. 17, No. 1, 2006, p. 43; Georgios Petrochilos, "Arbitration Conflict of Law Rules and the 1980 International Sales Convention", 52 *Revue Hellenique de Droit International* (1999), 191, available at <http://cisgw3.law.pace.edu/cisg/biblio/petrochilos.html> (last visit August 20, 2015); Jeffrey Waincymer, "The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure", in: Camilla Andersen/Ulrich Schroeter (eds.), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmonds & Hill Publishing, 2008, pp. 582, 594-596, available at <http://www.cisg.law.pace.edu/cisg/biblio/waincymer2.html> (last visit on August 20, 2015); Nils Schmidt-Ahrendts, "CISG and Arbitration", 59 *Belgrade Law Review* pp. 211, 213-215 (2011), available at <http://www.cisg.law.pace.edu/cisg/biblio/schmidt-ahrendts.html> (last visit August 21, 2015).

not form part of a contracting party. Although they have more leeway in the application of the CISG, tribunals have a strong preference for its application.⁵⁵⁾ The path on which arbitrators arrive at the application of the CISG varies.⁵⁶⁾ The tribunal may apply the CISG directly if the parties hail from different contracting parties (Article 1(1) lit. a CISG). Such a finding may either be predicated on a (hidden) choice of law analysis since that rule of the CISG may be seen as a choice of law rule, or the CISG applies *per se* as uniform substantive law. Others focus on the choice of law rule contained in the *lex loci arbitri* and the applicable arbitration rules to ascertain the applicable law on the merits. These rules underline the primacy of party autonomy, but also in case the parties have not chosen the applicable law, regularly allow the arbitrators to use a wide discretion in determining the applicable law.⁵⁷⁾ Thus the tribunal assesses whether the parties have chosen the CISG,⁵⁸⁾ or which national law applies and whether the CISG is part of that substantive law (either by virtue of Article 1(1) lit. b CISG, or only based on the choice of law analysis itself). Tribunals may also directly apply the CISG through the *voie directe* approach because it is a widely used instrument.⁵⁹⁾ Finally, a tribunal may even decide to apply the CISG as a part of the *lex mercatoria*.

Another issue arises that is specific to the question whether the CISG extends to arbitration clauses. It is questionable whether the CISG can – even at the outset – apply to the arbitration clause if – after exhibiting a choice of law analysis as set out above – the tribunal reaches the conclusion that the law of a country applies to the arbitration agreement (in particular the *lex loci arbitri*) which has not ratified the CISG. Imagine the following case: The Korean seller and the New York buyer have a dispute on the quality

55) Loukas Mistelis, “CISG and Arbitration”, in: André Janssen/Olaf Meyer (eds.), *CISG Methodology*, sellier, european law publishers, 2009, p. 375, 387 (“*arbitration [is] the main forum for the resolution of disputes arising out of international sales contracts under the CISG*”).

56) See references in footnote 54.

57) The wording of the choice of law rules differs. Most laws or rules allow the tribunal to apply the “*choice of law rules which it considers appropriate*”: Art. 28(2) UNCITRAL Model Law. Others, at least on its wording, require the application of the law which is most closely connected with the case: § 1051(2) German Code of Civil Procedure; Art. 187(1) Swiss Private International Law Statute. In any event, the choice of law rules are framed broadly enough to assume a huge leeway for the arbitrators.

58) On the discussion whether the Art. 1 CISG must be fulfilled nonetheless, Mourre (*supra* fn. 54), pp. 43, 45 *et seq.*

59) See, Art. 1511(1) French Code of Civil Procedure: “*Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu’il estime appropriées.*” In the same vein, Art. 21(1) ICC Arbitration Rules.

of the shipped goods. They end up being before an arbitral tribunal seated in London. The parties grapple with the problem whether they actually have concluded an arbitration agreement. The tribunal applies the law at the seat of the arbitration to that question. The UK is not a contracting party to the CISG. Even if the sales contract between the parties is governed by the CISG which may even not be in dispute between the parties, the CISG seems *per se* to not be applicable to the formation of the arbitration agreement. Whether a tribunal would reach that conclusion hinges on two considerations, *i.e.* which kind of conflict of law analysis the tribunals prefers and its take on the separability principle. Regarding the latter, if the tribunal is a strong proponent of that principle, it probably assumes the result to be appropriate. On the other hand, if the tribunal generally does not want to differentiate between the substantive (sales) contract and the arbitration clause concerning the parties' consent and assumes that both, sales contract and arbitration clause, can suffer from the same legal default, it may feel constraint to change the choice of law analysis and apply the law of the substantive contract also to the arbitration clause. This again shows how complex the choice of law analysis can be.

2. Application of the CISG as to the Formation of the Arbitration Clause

Many scholars share the view that the CISG applies to the formation of the arbitration agreement if it is enshrined as a clause in the sales contract.⁶⁰⁾ Further, the CISG is said to cover the arbitration agreement also in the case it is not contained in the sales contract but in separate general terms to which the sales contract refers,⁶¹⁾ or when the

60) Ulrich Schroeter, in: Schlechtriem/Schwenzer (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht - CISG*, 2013, Vor Artt. 14-24, para. 10; Franco Ferrari, *ibid.*, Art. 4, para. 40; Pilar Perales Viscasillas, in: Kröll/Mistelis/Perales Viscasillas (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG) - Commentary*, Art. 11, para. 13; Ingo Saenger, in: Ferrari/Kieninger/Mankowski et. al. (eds.), *Internationales Vertragsrecht*, 2011, Art. 4 CISG, para. 18a; Ingo Saenger, in: *Beck'scher Online-Kommentar BGB*, Stand: 01.05.2015, Art. 4 CISG, para. 17a; Robert Koch, "The CISG as the Law Applicable to Arbitration Agreements?", in: Camilla Andersen/Ulrich Schroeter (eds.), *Sharing International Commercial Law across National Boundaries*, FS Albert Kritzer (2008), S. 267, 282, available at: www.cisg.law.pace.edu/cisg/biblio/koch5.pdf, last seen on 23 July 2015 last visit on 25 August 2015); Perales Viscasillas/Ramos Muñoz (*supra* fn. 29), pp. 63, 70-74. Schmidt-Ahrendts (*supra* fn. 54), pp. 211, 217 *et seq.* who points to the consequence that a party may seek damages through the CISG due to a violation of the arbitration clause.

61) Schroeter (*supra* fn. 60), Vor Artt. 14-24, para. 10.

conflict of laws analysis concludes to apply the law governing the main substantive contract between the parties also to the arbitration agreement.⁶²⁾ They argue that the CISG itself refers to an arbitration clause. Article 19(3) CISG states that “*additional or different terms relating [...] to [...] the settlement of disputes are considered to alter the terms of the offer materially*”. Moreover, Article 81(1) CISG reads: “*Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.*” It thus states the principle of separability.

However, those two provisions do not require that the arbitration agreement is actually covered by the CISG. They merely evince the effect of an arbitration clause on the offer to enter into the sales contract as well as declare that the avoidance of the sales contract does not spill over to the arbitration agreement. Hence, those rules can perfectly apply even if a local national law sets the legal ground for the formation of the arbitration agreement.⁶³⁾

Still, one may argue that the CISG ought to apply to an arbitration clause within the international sales contract since the CISG sets uniform rules on the formation of a contract. Hence, if the CISG finds that the parties consented to the sales contract it is not easy to conceive why the parties did not also agree on the arbitration clause within that contract. In terms of the parties’ consent, the arbitration clause is just another clause among many within the sales contract and the parties normally do not divide their consent as to the rules within one legal document.⁶⁴⁾

Nonetheless, other scholars reject the idea of the application of the CISG to the arbitration clause.⁶⁵⁾ This understanding primarily argues with the separability of the arbitration agreement and thus stresses that the arbitration clause is disconnected from

62) Perales Viscasillas/Ramos Muñoz (*supra* fn. 29), p. 75.

63) Other opinion for Art. 19(3) CISG by Ingeborg Schwenzer/David Tebel, “The Word is not Enough – Arbitration, Choice of Forum and Choice of Law Clauses Under the CISG”, 23 *Journal of Arbitration Studies* 1, pp. 9 et seq. (2013); *ibid.*, 31 *ASA Bulletin* pp. 740, 744 et seq. (2013).

64) Draetta (*supra* fn. 54), pp. 193, 197; Janet Walker, “Agreeing to Disagree: Can We just Have Words? CISG Article 11 and the Model Law Writing Requirements”, 25 *Journal of Law and Commerce* 2005-06, pp. 153, 154, available at <http://www.cisg.law.pace.edu/cisg/biblio/walker1.html> (last visit on August 20, 2015).

65) Harm Peter Westermann, in: *Münchener Kommentar zum BGB*, Bd. 3, C.H. Beck, 2012, Art. 4 CISG, para. 7; Stefan Kröll, “Selected Problems Concerning the CISG’s Scope of Application”, 25 *Journal of Law and Commerce* pp. 39, 42 et seq. (2005-2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/kroll.html> (last visit on 24 August 2015).

the sales contract. Apparently, the proponents of the application of the CISG have a different understanding of the separability principle than those who deny the application of the CISG to arbitration agreements. More specifically, the latter implicitly refer to the above mentioned broad concept of the separability principle which draws the arbitration clause as being a completely separate agreement even as to its formation. Further, they refer to Article 1-3 CISG that purport the application to sales contracts only and therefore do not open the door for the application to (procedural) arbitration clauses.⁶⁶⁾

3. Application of the CISG as to the Form of the Arbitration Clause?

Another question is whether the CISG can also apply as to the form of the arbitration clause. Under the CISG, the parties can agree on a sales contract in any form (Article 11-13 CISG). Accordingly, if those provisions applied to the arbitration clause, the form requirements for an arbitration agreement in the national laws, which often are not strict but frequently foresee a writing requirement of some sort,⁶⁷⁾ would become obsolete. Also the NYC in Article II(1)(2) requires a written arbitration agreement, although more lenient international or local laws may prevail.⁶⁸⁾

Nonetheless, some argue the CISG also applies to the form of the arbitration agreement.⁶⁹⁾ They consider a trend in international arbitration to water down the

66) See also Schweizerisches Bundesgericht, judgment of 11 July 2000, *Gutta-Werke AG v. Dörken-Gutta Pol. and Ewald Dörken AG*, available at: cisgw3.law.pace.edu/cases/000711s1.html (for a forum selection clause). Against the argument which is predicated on a substantive versus procedural qualification, Schwenzer/Tebel (*supra* fn. 63), p. 11, *ibid.*, 31 ASA Bulletin, pp. 740, 746 *et seq.*

67) An overview about the different form requirements is provided by Poudret/Besson (*supra* fn. 29), para. 183-226.

68) The formal requirement has sparked some issues and courts differ in their approaches as to a relaxation of that requirement; for the related legal discussion, see UNCITRAL Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2006); Schramm/Geisinger/Pinsolle (*supra* fn. 7), pp. 72-78; Wolfgang Kühn, "Current Issues on the Application of the New York Convention - A German Perspective", 25 Journal of International Arbitration 743, 744-747 (2008).

69) *Filanto, S.p.A. v. Chilewich Intern*, 789 F.Supp. 1229, 1237 (S.D.N.Y. 1992); *Chateau des Charmes Wines Ltd. v. Sabaté USA*, 328 F.3d 528, 530 (9th Cir. 2003) (for a forum selection clause); Perales Viscasillas (*supra* fn. 60), Art. 11, para. 13; Perales Viscasillas/Ramos Muñoz (*supra* fn. 29), pp. 63, 73.

writing requirement for a valid arbitration clause.⁷⁰⁾ Additionally, there is supposed to be no inconsistency with the NYC since the CISG is perceived to be more liberal.⁷¹⁾ After all, the approach to apply Article 11 CISG to arbitration clauses aims to lessen the burden of the writing requirement still found in many arbitration laws. This thinking borrows from the validation method.⁷²⁾

Others deny the application of Article 11 CISG to an arbitration clause.⁷³⁾ This clause is separate from the rest of the sales contract and thus should obey to other rules as to its form.⁷⁴⁾ It may be argued that apparently the Contracting Parties to the CISG did not use Article 12, 96 to shield the application of Article 11 CISG to arbitration agreements, although such declarations would have been expectable in case the framers had conceived the application to arbitration clauses.⁷⁵⁾ A similar argument points to the drafting history of the CISG and connects it with the fact that dispute resolution clauses under many national laws have always required some sort of formal validation: Still, the drafters of the CISG did not discuss that topic when framing Article 11 CISG, and some sources even mention that they have been wary of cutting into national rules on jurisdiction.⁷⁶⁾

IV. Evasion Strategies adopted by Arbitrators

1. First Case – False Conflict Approach

In the first practical case example based on a recent unpublished ICC award the sole arbitrator was a proponent of the view that the CISG also applies to the question whether the arbitration agreement, which was contained in the seller's general terms and conditions, was validly incorporated into the main contract. Mindful of the fact

70) Walker (*supra* fn. 64), p. 153, 156-161.

71) Perales Viscasillas/Ramos Muñoz (*supra* fn. 29), p. 76 *et seq.*; Walker (*supra* fn. 64), p. 162 *et seq.*

72) See *supra* II. 3.

73) Martin Schmidt-Kessel, in: Schlechtriem/Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht - CISG*, C.H. Beck, 2013, Art. 11, para. 7; Schwenger/Tebel (*supra* fn. 63), p. 14; *ibid.* 31 ASA Bulletin, pp. 740, 749 (with many references to case law); Schmidt-Ahrendts (*supra* fn. 54), pp. 211, 215; Koch (*supra* fn. 60), pp. 282-286.

74) Draetta (*supra* fn. 54), pp. 193, 196.

75) Draetta, *ibid.*, p. 197. Although it may be noted that Art. 96 CISG only speaks of „contracts of sale“.

76) Schwenger/Tebel (*supra* fn. 63), pp. 12 *et seq.*; *ibid.*, 31 ASA Bulletin, pp. 740, 748 *et seq.*

that this question is highly debated among academics, the sole arbitrator however opted to address all potentially relevant applicable laws in the award by way of a comparative analysis. The sole arbitrator ultimately decided to consciously leave the choice of law question open as it was not relevant to the outcome of the analysis. All national laws under consideration, in the case at hand the CISG, German law and Swiss law, led to the result that the arbitration agreement contained in the general terms and conditions was validly incorporated into the parties' main contract and fulfilled the necessary formal requirements. When adopting this solution, an arbitral tribunal must analyze all relevant national laws, which may theoretically differ but will in practice more often than not yield identical results. This so called false conflict approach offers arbitral tribunals an elegant solution to circumvent the problem and remain on the brink of the academic debate presented above.

2. Second Case – In Favorem Validitatis Approach

In the second practical case example based on a recent unpublished ICC award, neither the parties nor the sole arbitrator considered the CISG as being among the potential laws governing the arbitration agreement. The sole arbitrator rather held that Danish law is applicable to the arbitration agreement, which again was contained in the seller's general terms and conditions. The sole arbitrator reached this conclusion on the basis of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 1955 Hague Convention on the Law Applicable to International Sale of Goods. The sole arbitrator found that it follows directly from Article 3 of the 1955 Hague Convention on the Law Applicable to International Sale of Goods that in the absence of an express choice of law, a sales contract is governed by the law of the seller, *i.e.* by Danish law. This tallied with Article 4.2 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, according to which the law of the party performing the characteristic obligation, in this case the seller, is applicable to the parties' contract. Furthermore, Danish law was the applicable law foreseen by the main contract and the sole arbitrator found nothing to support the conclusion that a different law was chosen for the arbitration agreement.

In principle, under Danish law, the CISG would govern the international sale and purchase of goods, but Denmark has made a reservation to the applicability of the convention, Part II. Consequently, the rules for the formation of a contract contained in the CISG are inapplicable and this question will instead be governed by the general rules of Danish contract law.

What is more, the sole arbitrator held that there are no formal requirements for an arbitration agreement under Danish law. The sole arbitrator however emphasized that the NYC may be relevant when determining the law applicable to the formation of agreements between international parties provided that they contain an arbitration clause. As shown above, the NYC contains provisions dealing with the form of arbitration agreements. Pursuant to Article II NYC, the contracting parties have agreed to recognize “*agreements in writing*” under which the parties have undertaken to submit their disputes to arbitration. According to this provision, the term “*agreement in writing*” shall include an arbitration clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letter or telegrams. The clear reference to the seller’s general terms and condition in the parties’ main contract was ultimately considered sufficient by the sole arbitrator to satisfy the relevant provisions of Danish law as well as the NYC.

By conducting this line of analysis the sole arbitrator considered several laws which could all have been held to be “appropriate”, in the sense of Article 21(1) ICC Arbitration Rules,⁷⁷⁾ to apply to the question whether the arbitration agreement contained in the general terms and conditions was validly incorporated into the main contract. The sole arbitrator thereby chose to validate the arbitration agreement on the most favorable basis rather than declining his own jurisdiction to hear the case by relying on actual choice of law rules. By doing so, the sole arbitrator also complied with his obligation to make every effort to make sure that the award is enforceable at law pursuant to Article 41 ICC Arbitration Rules.

77) Art. 21 ICC Arbitration Rules only refers to the rules of law to be applied by the arbitral tribunal to the merits of the dispute. It thus is not directly applicable to the arbitration agreement. Art. 19 ICC Arbitration Rules (*i.e.* the procedural rules) does even less so apply, since the existence, validity and scope of the arbitration agreement is not directly relevant for the rules governing the conduct of the proceedings. Hence, for the lack of a specific rule and given the duty of the tribunal to decide upon its own jurisdiction, Art. 21 ICC Arbitration Rules should apply by analogy.

V. Conclusion

In theory, the decision on the law applicable to an international arbitration agreement is complex and difficult. The solution finding is entangled in theoretical pitfalls of a choice of law analysis that is not uniform in the different jurisdictions. Even applying the CISG to the arbitration clause may seem appealing. The analysis becomes even more arduous since international arbitration has interconnections with national courts in multiple situations and in different jurisdictions. On the other hand, international arbitration is not welded on a specific national law and that law's approach on the issue. This frees the tribunal in its practical dealing with the issue but does not obviate the need for a holistic analysis of the different laws under consideration in the case at hand. The tribunal cannot only forego a choice of law analysis in case of a false conflict, which will in practice appear more often than not. The tribunal may also conceive the idea of a validation principle regardless whether such a view is shared by the courts. Still, one last word of caution is in order: local courts charged with deciding a challenge against an arbitral award will most likely not follow academic theories about the law governing the arbitration clause but strive to apply their own domestic procedural rules.

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