CONFLICT OF LAWS AND ARBITRAL JURISDICTION—A STRUCTURAL AND COMPARATIVE ANALYSIS

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Abstract

The conflict of laws analyses required in the context of determining arbitral jurisdiction, and the laws applicable to it, are often complicated enough. But they are rendered even more difficult by the lack of a clear and universally accepted legal framework and terminology. This article seeks to give guidance in that respect, without, however, prejudging the outcome of such analysis. The general structure and overall legal effects of arbitration agreements are similar to those of choice of court agreements. When determining the laws related to arbitral jurisdiction, i.e., the competence of a tribunal to decide on the merits, the structure of the analysis is therefore similar to the analysis undertaken in view of choice of court agreements. This analysis encompasses three distinct categories, each requiring a different mindset, with sub-issues. An applicable law must be determined for each category separately. The starting point is a determination of whether an arbitration agreement is admissible in principle, i.e., whether the difference allegedly covered is, in theory, capable of settlement by arbitration. Second, the validity of the individual arbitration agreement invoked must be determined. Third, it must be assessed whether the specific claim raised falls within this agreement's scope.

I. Arbitration Agreements as Choice of Forum Agreements

A complex conflict of laws analysis is often required when determining arbitral jurisdiction, i.e., the competence of an arbitral tribunal to hear a dispute and decide on the merits. Such analysis must be made from the perspective of an arbitral tribunal or from the perspective of state courts. In order to facilitate this task, while avoiding to impose any particular solution, this article proposes a general structure for such conflict of laws analysis.

Such jurisdictional analysis encompasses three distinct categories of issues: (1) the general admissibility of arbitration agreements, i.e., whether certain differences are deemed capable of settlement by arbitration in the sense of Article V(2)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"],[1] which is referred to by many as "*arbitrability,*" although the term is not used consistently worldwide;[2] (2) the validity of a particular arbitration agreement; as well as (3) its scope, and whether a specific claim falls within

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"].

[2] The term "arbitrability" is used in the United States to label what most others call the "scope of the arbitration agreement." Bernard Hanotiau, *The Law Applicable to Arbitrability*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA CONGRESS SERIES, 146 (Albert Jan Van den Berg ed., 1999) [*hereinafter* "Hanotiau"]. The use of the term also encompasses, even more broadly, "all kinds of threshold issues." *Contra* JAN PAULSSON, THE IDEA OF ARBITRATION 72 (2013) [*hereinafter* "PAULSSON"].

it. For each of these categories, applicable laws or rules must be determined separately, although, of course, the applicable law need not be actually different.

Arbitration scholarship has discussed these issues extensively. However, the various issues and sub-issues are often grouped in a seemingly arbitrary way.[3] As will be explained in the subsequent parts, the perspective for each of the three aforementioned categories of issues is fundamentally different, requiring a somewhat different "*mindset*" to be applied when conducting the respective conflict of laws analysis—although the "*mindset*" is the same within each category.

The present structural analysis is not limited to a specific legal framework, domestic or otherwise—else we would have to start with a more detailed factual scenario and legal analysis. Also, while examples from domestic legal orders will be provided, the purpose is not to make a full comparative analysis of the individual issues on which excellent scholarship already exists.

Further, this structural analysis is not restricted by any specific concept of party autonomy—else the analysis would require an initial determination of the type of legal agreement under scrutiny. We would have to determine, to put it ontologically, what arbitration agreements "*are*" (jurisdictional, contractual, etc.). It is safe to say that there is no universal consensus on this issue—not on a worldwide scale, not across domestic legal orders, and often not even within a particular legal order.

Instead of an ontological approach, the focus in the following is on the function of arbitration agreements in the context of determining arbitral jurisdiction—which is to designate an independent (from the parties) decision-making body to hear and decide a dispute, and to shape its decision-making capacity.[4] This enables us to identify other agreements that perform a similar function. We can then hope to learn from the conflict of laws analysis undertaken with regard to such other agreements—in particular, with regard to the three distinct categories of conflict of laws issues mentioned above.

Such other agreements are, of course, choice of court agreements,[5] also referred to as prorogation agreements. Indeed, whatever they "*are*" under a particular law, arbitration agreements *operate* in a way that is not dissimilar to choice of court agreements, which will be further demonstrated in this article. Not surprisingly, arbitration and litigation are often discussed as competitors.[6] Which is

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3 *Cf., e.g.,* Marc Blessing, *The Law Applicable to the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA CONGRESS SERIES, 168–188 (Albert Jan Van den Berg ed., 1999) [*hereinafter* "Blessing"] (discussing the law applicable to formal validity, substantive validity, representation, subjective arbitrability and objective arbitrability, but omitting to treat separately the arbitration agreement's *scope*, mixing it with the issue of substantive validity). *But see* Rolf A. Schütze, *Kollisionsrechtliche Probleme der Schiedsvereinbarung, insbesondere der Erstreckung ihrer Bindungswirkung auf Dritte*, 12(6) GER. ARB. J. (SCHIEDSVZ) 274 (2014).

4 *Cf.* Anthony Evans, *Forget ADR—Think A Or D*, 22 CIVIL JUSTICE QUARTERLY 230, 230–231 (2003). When discussing ways to resolve disputes, Evans distinguishes between "agreement" (by the parties) and "decision" (by a third person). The latter is rendered by a judge or an arbitrator.

5 *See* Ulrich Magnus, *Sonderkollisionsnorm für das Statut von Gerichtsstands- und Schiedsgerichtsvereinbarungen?*, 36(6) IPRAX 521 (2016).

6 *See, e.g.,* Ronald A. Brand, *Arbitration or Litigation? Choice of Forum After the 2005 Hague Convention on Choice of Court Agreements*, 3 BELGRADE L. REV. 23 (2009).

why Pryles pointed out a long time ago that it is beneficial to compare the functioning of choice of court (prorogation) and arbitration agreements.[7]

However, and in order to avoid any disappointment, it must be kept in mind that function and structure only provide the starting point and rough guidance for the conflict of laws analysis concerning arbitral jurisdiction. They do not finally determine the outcome, i.e., the laws actually applicable to the different aspects of a specific case. The purpose of the present analysis is thus primarily descriptive, in order to facilitate a comparative debate across legal orders, i.e., to highlight the aspects that need to be considered. It is submitted that many aspects of the debate about the laws applicable to arbitral jurisdiction would become clearer and less controversial, if this structure was kept in mind.

Still the question remains as to whether a detailed conflict of laws analysis is relevant for handling arbitration agreements. Some have argued that the whole phenomenon of arbitration, i.e., arbitration agreement, arbitration proceedings, and arbitral award, is necessarily governed by the same law. We disagree.[8] Arbitration is contractual in nature, which has an impact, in one way or another, on more or less all elements of its law and practice. However, the phenomenon of arbitration is not an indivisible unit. It is linked to a number of areas of law, i.e., numerous provisions may need to be coordinated, thereby requiring a more or less detailed[9] conflict of laws analysis on a case-to-case basis.[10] Therefore, the term "*conflict of laws analysis*" is used in a broad and functional sense, which relates to the determination of the applicable rules to a case at hand. This need not involve a domestic private international law rule.[11]

First, in Part II, we dwell into the matter pertaining to the overall effects of a choice of forum agreement. Then, in Part III, we present a structural analysis of the steps taken while determining the laws applicable to jurisdiction, that is, the required conflict of laws analysis. Finally, in Part IV, we assess how decision-makers approach this analysis, distinguishing, in regards to arbitration agreements, between the perspectives of state courts and arbitral tribunals.

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7 Michael Pryles, *Comparative Aspects of Prorogation and Arbitration Agreements*, 25(3) INT. COMP. LAW Q. 543 (1976) [*hereinafter* "Pryles"].

8 *See* Stelios Koussoulis, *Zur Dogmatik des auf die Schiedsvereinbarung anwendbaren Rechts*, *in* GRENZÜBERSCHREITUNGEN: BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT. FESTSCHRIFT FÜR PETER SCHLOSSER ZUM 70. GEBURTSTAG 417 *et seq.* (Birgit Bachmann, Stephan Breidenbach, Dagmar Coester-Waltjen, Burkhard Heß, Andreas Nelle, and Christian Wolf eds., 2005) (with historic overview and further references).

9 In line with our functional and structural approach, we do not opine on how detailed arbitral conflict of laws rules should be drafted and by whom. In favour of more detailed regulation, *see* Giuditta Cordero Moss, *International Arbitration and the Quest for the Applicable Law*, 8(3) GLOBAL JURIST 1 (2008).

10 *See, e.g.,* Daniel Girsberger, *The Effects Of Assignment On Arbitration Agreements. Why Conflict-Of-Laws Theory Is Still Needed*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW—LIBER AMICORUM KURT SIEHR (Katharina Boele-Woelki, Talia Einhorn, Daniel Girsberger & Symeon C. Symeonides eds., 2010); Pierre Lalive, *On the Conflict Rules Applicable by the International Arbitrator*, 7(1) ASA BULL. 27, 35 (1989) ("there must be a "choice" of some sort."); PETER SCHLOSSER, DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT ¶ 214 (2d ed. 1989) [*hereinafter* "SCHLOSSER"].

11 This, however, is what some arbitration scholars, usually with a critical undertone, understand by a conflict of laws analysis, *cf., e.g.,* Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16(4) THE INTERNATIONAL LAWYER 613 (1982); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 112 (2010).

II. Legal Effects of Choice of Forum Agreements

At the outset, we discuss certain basic terminologies in order to facilitate the debate across legal cultures and orders **[Part II.A]**. Semantics often unnecessarily cloud the debate around arbitral jurisdiction—the same thing being given different names, or different things being given the same name, depending on the legal order and the commentator involved. We will provide examples of both throughout this article.

There is also a debate as to whether choice of forum agreements are jurisdictional (procedural) or substantive in nature,[12] and what their "*legal nature*"[13] is. While we need not concern ourselves with the details of this debate—the advantage of a functional and structural analysis being that ontological questions can be avoided—we highlight that choice of forum agreements may have jurisdictional **[Part II.B]** and/or substantive effects **[Part II.C]**. To put it differently, certain effects can be ascribed to choice of forum agreements, and those effects can be analysed as jurisdictional or substantive.[14]

A. Terminology

In choice of forum agreements, we label agreements selecting any third party decision-maker to decide on the merits of a dispute, whether that be a state court ("*choice of court agreement*") or a private decision-making body, i.e., arbitral tribunal ("*arbitration agreement*"). While this terminology may appear obvious to many, it is not universally used—although terminological variations are often not reflective of substantive differences.

For instance, as alternatives to choice of forum agreements, one author alone uses "*conflicts clauses,*"[15] "*conflicts agreements,*"[16] or "*dispute resolution agreements*"[17]—without any apparent difference as to their content. In any event, all these terms may induce to error. The first two might be confused with choice of law clauses. The problem here is of a linguistic kind, namely that conflict

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12 *E.g.,* in a leading textbook on English conflict of laws, ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS ¶¶ 4.184 (2014) [*hereinafter* "BRIGGS"], Briggs distinguishes the jurisdictional (or procedural) purpose of choice of forum agreements from their operation as "though [they] were a contract." He states that, under the Brussels Ia Regulation (the "Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)"), choice of court agreements are not "contractual in character," and that a contractual analysis of such agreements "may be positively misleading." *Id.* ¶¶ 4.204–4.205. There would be no need for "recourse to a "governing law" […] to determine validity" of a choice of court agreement. *Id.* ¶ 4.205. Yet it is respectfully submitted that this account is at least incomplete. According to Article 25(1)(1), a chosen court has jurisdiction "unless the agreement is null and void *as to its substantive validity under the law* of that Member State" (emphasis added)—i.e., the Regulation designates a governing law for determining the (substantive) validity of a choice of court agreement. What Briggs may mean is that choice of court agreements do not give rise to substantive effects *under the Regulation*, although possibly under domestic law.

13 For a Swiss perspective on the "nature" of *arbitration* agreements, in particular their duty-imposing (*verpflichtend*) and rights-modifying (*gestaltend*) elements, MARCO STACHER, DIE RECHTSNATUR DER SCHIEDSVEREINBARUNG (2007). For an overview of the historic debate, *see* BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND ¶¶ 309 *et seq.* (3d ed. 2015) [*hereinafter* "BERGER & KELLERHALS"].

14 Whether a particular choice of forum agreement actually *has* such effects then depends on the factual and legal framework—which is beyond the scope of this article.

15 ZHENG SOPHIA TANG, JURISDICTION AND ARBITRATION AGREEMENTS IN INTERNATIONAL COMMERCIAL LAW 18 (2014) [*hereinafter* "TANG"].

16 *Id.* at 33.

17 *Id.* at 74.

can refer to the parties' dispute[18]—hence "*conflicts clause*" as the clause concerning the parties' conflict or conflicts. But conflict can also refer, in the abstract, to the collision of norms[19]—the conflict of laws. The third term, "*dispute resolution clause,*" is even more infelicitous in that it risks confusion with contractual clauses serving the purpose of dispute resolution in a wider sense, albeit not by way of a third party decision—for instance, negotiation or mediation clauses.

Etymologically similar to "*choice of forum agreement*" is the term "*forum selection agreement,*" although it is usually meant to refer exclusively to the designation of state courts as the competent forum.[20] In addition to the resulting risk of a preconception by lawyers from some legal backgrounds, "*selection*" might also not be limited to choices made by the parties themselves. A court, when seized with a certain dispute not covered by a choice of court agreement, might also be required to "*select,*" for instance, an appropriate jurisdiction rule on which to base its jurisdiction. By contrast, the term "*choice of forum agreement*" is used herein to refer to an act by which parties exercise party autonomy ("*choice,*" "*agreement*") to designate a third-party decision-maker to decide their dispute ("*forum*").

The term choice of court agreement, more specifically, appears to be used primarily in European Union ["**EU**"] law[21] and international treaties.[22] We use the term as a label but do not limit the analysis to the types of agreements sanctioned by EU law or by some international treaty. The analysis covers all agreements performing a similar function in any jurisdiction. English common law, for instance, appears to prefer "*jurisdiction clause*" or "*jurisdiction agreement.*"[23] An Australian commentator uses the term "*prorogation agreement.*"[24] Although not uniform, the terms prevalent in the United States seem to be "*choice of forum clause,*"[25] "*forum selection clause,*" or "*forum selection agreement,*"[26] etymologically similar to the French "*clause d'élection de for.*"[27] We seek to avoid these terms as they are slightly imprecise if used only for agreements designating state courts. Arbitration agreements also relate to "*jurisdiction*" (of the arbitral tribunal).[28] By agreeing to arbitrate their disputes, parties designate a "*forum.*"

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18 In French *litige*, in German *Streit*.

19 In German *Kollisionsnorm*.

20 *Cf.* Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 546 (2005) [*hereinafter* "Teitz"].

21 *See, e.g.,* Regulation (EU) No. 1215/2012, [2012] O.J. L351/1, Recital 22 [*hereinafter* "Brussels Ia Regulation"].

22 *See, e.g.,* Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (2005) [*hereinafter* "Hague Convention"]. It entered into force for the EU (without Denmark) and Mexico on October 1, 2015; for Singapore on October 1, 2016; for Montenegro on August 1, 2018; for Denmark on September 1, 2018; and for the United Kingdom on January 1, 2021; *see* also the (unsuccessful) Hague "Convention of 25 November 1965 on the Choice of Court", signed only by Israel.

23 BRIGGS, *supra* note 12, ¶ 4.421; RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION ¶ 2.27 (2d ed. 2015).

24 *Cf.* Pryles, *supra* note 7.

25 Ronald A. Brand, *Forum Selection and Forum Rejection in US Courts: One Rationale for a Global Choice of Court Convention*, *in* REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF SIR PETER NORTH, 59 (James Fawcett ed., 2002).

26 *See, e.g.,* Teitz, *supra* note 20, at 546.

27 *See, e.g.,* NATHALIE COIPEL-CORDONNIER, LES CONVENTIONS D'ARBITRAGE ET D'ÉLECTION DE FOR EN DROIT INTERNATIONAL PRIVÉ (1999) [*hereinafter* "COIPEL-CORDONNIER"].

28 *See, e.g.,* BERGER & KELLERHALS, *supra* note 13, ¶¶ 686 *et seq.*

The term "*arbitration agreement*" is used herein without qualification as to its "*international,*" as opposed to domestic character. The denominator "*international*" in a comparative context often adds little to the debate.[29] As there is no transnational consensus on what international is,[30] the term has meaning only in the context of a specific legal framework.[31]

B. Jurisdictional Effects: Prorogation and Derogation

Choice of forum agreements have jurisdictional and substantive effects **[Part II.C]**. Within both types, there is a need to distinguish positive and negative effects.

i. General Observations

The positive jurisdictional effect is called "*prorogation,*" hence the term "*prorogation agreement.*"[32] A choice of forum agreement usually seeks to prorogate at least one forum, i.e., it designates a forum to have jurisdiction that would otherwise not have it.[33] This prorogative effect is also referred to as the "*jurisdiction-granting*" aspect of choice of forum agreements.[34]

The negative jurisdictional effect is called derogation. A choice of forum agreement may—although not compulsorily—derogate one forum or several fora, i.e., it may oust certain fora of the jurisdiction that they would otherwise have.[35] This derogative effect is also referred to as the "*jurisdiction-depriving*" aspect of choice of forum agreements.[36]

Choice of forum agreements often combine prorogation and derogation.[37]

These positive and negative jurisdictional effects play a role in different contexts, depending on which forum is faced with the choice of forum agreement. The allegedly prorogated forum must determine whether to accept jurisdiction, i.e., whether to accept the dispute for decision on the merits. Any potentially derogated forum must determine whether to respect the choice of forum agreement, i.e., whether to refrain from exercising its own jurisdiction that it would otherwise have, i.e., to refrain itself from making a decision on the merits.

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29 Unless a "sociological" (rather than legal) phenomenon is described that may transcend legal frameworks. *See, e.g.,* Karl-Heinz Böckstiegel, *Die Internationalisierung der Schiedsgerichtsbarkeit*, *in* GRENZÜBERSCHREITUNGEN: BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT. FESTSCHRIFT FÜR PETER SCHLOSSER ZUM 70. GEBURTSTAG (Birgit Bachmann, Stephan Breidenbach, Dagmar Coester-Waltjen, Burkhard Heß, Andreas Nelle, and Christian Wolf eds., 2005).

30 *See, e.g.,* GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE § 1.01[D] (2d ed. 2016) [*hereinafter* "BORN"] (providing a variety of possible definitions).

31 Swiss law, for example, distinguishes between international arbitration, *see* LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW], Dec. 18, 1987 effective Feb. 1, 2021, art. 176(1) (Switz.) [*hereinafter* "Swiss PILA"], and domestic arbitration, *see* CODE DE PROCÉDURE CIVILE [CODE OF CIVIL PROCEDURE] Dec. 19, 2008 effective Jan. 1, 2021, art. 353 (Switz.). Only in this context would it be meaningful to distinguish domestic and international arbitration agreements, or, more precisely, arbitration agreements relating to domestic or international (Swiss) arbitration proceedings.

32 *Cf.* Pryles, *supra* note 7.

33 *Cf.* HEIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT § 9.II.1 (8th ed. 2021) [*hereinafter* "SCHACK"].

34 TREVOR C. HARTLEY, CHOICE-OF-COURT AGREEMENTS UNDER THE EUROPEAN AND INTERNATIONAL INSTRUMENTS: THE REVISED BRUSSELS I REGULATION, THE LUGANO CONVENTION, AND THE HAGUE CONVENTION ¶ 1.08 (2013) [*hereinafter* "HARTLEY"].

35 *Cf.* SCHACK, *supra* note 33, § 9.II.2.

36 HARTLEY, *supra* note 34, ¶ 1.08.

37 *See, e.g.,* SCHACK, *supra* note 33, ¶ 544.

ii. Choice of Court Agreements—a Comparative Overview

With regard to choice of court agreements, we must look at three issues more closely: (1.) their exclusivity, (2.) the principle of *Kompetenz-Kompetenz*, and (3.) whether the choice of court agreement itself automatically prorogates the chosen court.

1. Whether the parties, by selecting a specific forum (prorogation), meant to exclude all other fora (derogation), thus providing the chosen forum with "*exclusive*" jurisdiction, is a matter of interpretation. In the context of choice of court agreements, many legal orders provide for legal presumptions failing specification by the parties.[38]

2. The issue of the exclusivity of a choice of forum agreement is distinct from the concept of *Kompetenz-Kompetenz*. In its most basic formulation, *Kompetenz-Kompetenz* means that a decision-making body may decide upon its own competence, i.e., determine whether to accept a case for decision on the merits. It need not delegate this determination to any other channel.[39]

   Two aspects need to be distinguished from this basic formulation, relating to (a.) the extent of the binding nature of a forum's decision on its competence, and (b.) the priority of the decision-making in that respect. They are often confused.[40]

   a. The fact that a decision-making body may determine its own competence does not mean that its decision on its competence will be recognised by other decision-making bodies.

   b. A decision-making body may have what could be called a "*right of first refusal*" to determine its jurisdiction, i.e., other decision-making bodies might have to wait for its decision before they can act themselves. For state courts within one legal order, the *lis alibi pendens* doctrine sometimes provides the court first seized with such a right of first refusal—other courts being blocked from taking the case pending the determination in the court first seized[41]—whereby, if the court first seized accepts jurisdiction, the doctrine of *res judicata* comes into play, implying that the other courts would have to follow its decision.[42] Sometimes the

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38 Pursuant to the Hague Convention, art. 3(b), a choice of court agreement is "deemed to be exclusive unless the parties have expressly provided otherwise." A similar approach applies under EU law, *see* Brussels Ia Regulation, art. 25(1)(2), and, apparently, in Australia, *see* Richard Garnett, *The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?*, 5(1) J. PVT. INT'L. L. 161, 164 (2009). In the U.S., the presumption seems to be the opposite, namely that choice of court agreements are non-exclusive, *cf.* RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 190 (2008) [hereinafter "BRAND & HERRUP"]; Louise Ellen Teitz, *Choice of Court Clauses and Third Countries From a US Perspective: Challenges to Predictability*, *in* INTERNATIONAL CIVIL LITIGATION IN EUROPE AND RELATIONS WITH THIRD STATES 288 (Arnaud Nuyts & Nadine Watté eds., 2005); Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: the Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31(4) U. PA. J. INT'L L. 1013, 1015–16 (2010) [*hereinafter* "Heiser"]. Under Singapore and English common law, there is no presumption either way, *cf.* Singapore Academy of Law, Law Reform Committee, *Report of The Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005* (March 2013), ¶ 4, *available at* https://www.sal.org.sg/sites/default/files/PDF Files/Law Reform/2013-03 - Hague Convention on Choice of Court Agreements.pdf; BRIGGS, *supra* note 12, ¶ 4.423.

39 *See, e.g.,* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 253 (4th ed. 2019); MARCO STACHER, EINFÜHRUNG IN DIE INTERNATIONALE SCHIEDSGERICHTSBARKEIT DER SCHWEIZ ¶¶ 192 *et seq.* (2015) [*hereinafter* "STACHER"]; TANG, *supra* note 15, at 67.

40 For further details, *cf. also* PAULSSON, *supra* note 2, at 54 *et seq.*

41 *Cf., e.g.,* Brussels Ia Regulation, art. 29(1).

42 *Cf., e.g., Id.* art. 45(3).

right of first refusal is conferred upon the "*chosen*" court,[43] irrespective of whether it was seized first. In such a case, a court seized, albeit not chosen, would initially not have *Kompetenz-Kompetenz*.

3. Whether the choice of court agreement automatically prorogates the respective forum depends on the applicable rules. In most civil law systems, courts are directly granted jurisdiction, i.e., they have jurisdiction simply due to a choice of court agreement. If validly seized, the court must hear the case.[44] In traditional common law systems, on the other hand, *prima facie* jurisdiction is only based on service. Choice of court agreements do not confer jurisdiction, although they are an important factor when deciding on whether to permit service. Furthermore, common law judges exercise discretion as to whether to take up a matter by conducting a *forum non conveniens* analysis.[45] The existence of a choice of court agreement is one of the elements taken into account when exercising discretion.[46]

iii. Arbitration Agreements

Arbitration agreements, on their positive side, confer jurisdiction upon the arbitral tribunal, which is referred as "*l'effet attributif de compétence à l'égard de l'arbitre*" in French.[47] The prorogative effect of arbitration agreements thus concerns only the arbitral tribunal, since, as a forum, it would otherwise not be competent. On the other hand, the derogative effect plays a role in front of all state courts, if they are seized notwithstanding the alleged existence of an arbitration agreement.

Yet, the question of whether arbitration agreements automatically oust all other fora (state courts) of jurisdiction, i.e., whether they can be said to be exclusive choice of forum agreements, requires a more careful analysis. If and insofar as arbitration agreements need to be invoked to take effect, either by the party initiating arbitration proceedings (simply by initiating them), or by the defendant objecting to a state court's jurisdiction,[48] i.e., raising the arbitration defence or *exceptio arbitri*,[49] it would seem that arbitration agreements per se do not restrict the state courts' jurisdiction. Accordingly, prior to being invoked, arbitration agreements would not operate as exclusive choice of forum agreements. Notwithstanding that, arbitration agreements are fully binding, i.e., not

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43 *Id.* art. 31(2); limited to *exclusive* choice of court agreements.

44 *Cf., e.g., Id.* art 25(1)(1); Hague Convention, art. 5.

45 TANG, *supra* note 15, at 122. Many common law courts, for example, those in London, New York, or Singapore, operate as service providers to the global business community. When prorogated, they are unlikely to decline a case. However, not all courts share this view. Some refuse to spend the taxpayers' money on cases that they think should be litigated elsewhere. *Cf., e.g.,* Christopher Tate, *American Forum Non Conveniens in Light of the Hague Convention on Choice-of-court Agreements*, 69 U. PITT. L. REV. 165, 177 (2007).

46 BRIGGS, *supra* note 12, ¶¶ 4.426-7. For a comparative assessment, *see* Anna Gardella & Luca G. Radicati di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51(3) AM. J. COMP. L. 611 (2003); Julian Wyatt, *Chronique de droit international privé australien*, (2) CLUNET 673, 684–705 (2017).

47 JEAN-BAPTISTE RACINE, DROIT DE L'ARBITRAGE 226 (2016).

48 *Cf., e.g.,* United Nations Comm'n on Int'l. Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 8(1), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "UNCITRAL Model Law"] ("if a party so requests"); Arbitration Act 1996, c. 23, § 9 (Eng.) (a party "may […] apply to the court"); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1032(1) (Ger.).

49 *Cf., e.g.,* BERGER & KELLERHALS, *supra* note 13, ¶ 323.

binding to a limited extent or degree.[50] As demonstrated, choosing one forum does not necessarily exclude the competence of all other fora.

Furthermore, as regards the prorogation of arbitral tribunals, it would appear that tribunals do not have discretion as to whether to take up a matter,[51] although the *forum non conveniens* doctrine has been held in the U.S. to have an impact at the stage of recognition of arbitral awards by state courts.[52] Arbitral tribunals would seem to be granted, civil law style,[53] jurisdiction directly through the arbitration agreement, in conjunction with it being invoked.[54]

C. Substantive Effects: Damages for Breach of a Choice of Forum Agreement and Anti-suit Injunctions

The existence of the above-mentioned jurisdictional effects of choice of forum agreements should be uncontroversial, even though their precise shape and form will differ from one legal order to the other. Yet, whether choice of forum agreements also have substantive effects is a matter of controversy.

In some legal orders, substantive effects of choice of forum agreements provide a basis for a claim for damages, in case the agreement is breached. Such breach will often be the initiation of judicial proceedings in an allegedly incompetent (derogated) forum.[55] In the case of arbitration agreements in particular, some allege an obligation not to litigate in state courts as part of the arbitration agreement's "*negative effects.*"[56] Some also assume an obligation to arbitrate in good faith as part of the arbitration agreement's "*positive effects.*"[57] For the avoidance of doubt, those negative and positive effects are substantive and must not be confused with the arbitration agreement's negative and positive jurisdictional effects.[58]

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50 *Contra* Reinmar Wolff, *Die Schiedsvereinbarung als unvollkommener Vertrag? Zum Rügeerfordernis des § 1032 Abs. 1 ZPO*, 13(6) GER. ARB. J. (SCHIEDSVZ) 280, 281 (2015).

51 Individuals nominated as arbitrators may, of course, decline to sit as arbitrators. Yet this is a separate issue. The solution would be for them to decline the nomination or to resign. However, they must not deny jurisdiction (potentially with *res judicata* effect) on the basis that the case should be litigated in a state court.

52 *Cf.* (critical) Christian Borris & Rudolf Hennecke, *Article V*, *in* NEW YORK CONVENTION. COMMENTARY ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 ¶ 25 (Reinmar Wolff ed., 2019).

53 *See* sources cited *supra* note 44 *et seq*.

54 There is a further discussion on whether an arbitral seat may become inconvenient, *see* BORN, *supra* note 30, § 3.01[F][9]. But this relates to a potential invalidation of the arbitration agreement itself (or, potentially, some legal argument as to why the seat must be moved), not an arbitral tribunal's power or duty to exercise discretion as to whether to take a case.

55 For a detailed Swiss law analysis regarding arbitration agreements, *see* Simon Gabriel, *Chapter 18, Part XVIII: Damages for Breach of Arbitration Agreements*, *in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE (Manuel Arroyo ed., 2d ed. 2018).

56 BORN, *supra* note 30, § 2.07[B]; JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 315 (2d ed. 2007) [*hereinafter* "POUDRET & BESSON"].

57 BORN, *supra* note 30, § 2.07[A].

58 On those positive and negative "jurisdictional" effects, *see* discussion *supra* Part II.B.

Other legal orders do not recognise substantive effects,[59] although there may be alternative legal bases for a damages claim such as ancillary obligations under the main contract, or a general duty of good faith and fair dealings.

Furthermore, if a legal order recognises substantive effects of choice of forum agreements, and if such substantive effects include the right not to be confronted with proceedings in a derogated forum, a threat of a violation of such right might, in addition to damages, provide the basis for interim or final injunctive relief. On this basis, courts enforce choice of forum agreements via anti-suit injunctions,[60] although such enforcement is effected indirectly, i.e., through blocking competing proceedings—by prohibiting a party to the choice of forum agreement to initiate or continue them. If the competing proceedings are arbitration proceedings, the term "*anti-arbitration injunction*" is also used.

III. The Structure of Choice of Forum Agreements

When seized with a specific claim and confronted with a particular choice of forum agreement, a judicial decision-making body must cumulatively deal with three categories of issues before accepting (if prorogated) or declining (if derogated) jurisdiction. As mentioned earlier, the mindset to be applied per category is different, as we shall now further explain.

First, the decision-making body ascertains, without looking at the particular agreement, whether choice of forum agreements are at all "*admissible*" in the area of law (such as family or competition law) that the specific claim touches upon. For if choice of forum agreements cannot be recognised at all, analysing the particular agreement would be unnecessary. In this context, the decision-maker exclusively looks to its own legal order, without taking into account the parties' choices **[Part III.A]**. Second, the decision-making body determines whether the particular choice of forum agreement is "*valid*." This is where the decision-maker focuses on the parties' intentions. Given that it has already been determined that, in principle, the respective legal order recognises the particular choice of forum, leniency can be given with regard to the validity issues, such as a presumption of validity, etc. **[Part III.B]**. Third, the decision-maker verifies whether the specific claim falls "*within the agreement's scope*." In this context, while giving due regard to the parties' intentions, the decision-maker must balance their interests with potential interests of third parties, i.e., a presumption of validity does not necessarily translate into a presumption of the claim falling within the agreement's scope **[Part III.C]**. This is how the mindset of the decision-maker changes when dealing with these three categories of issues relating to its jurisdiction in view of a choice of forum agreement. Before deciding on the substance of these issues, the decision-making body determines a law applicable to each of them. We will focus on this aspect in the following.

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[59] For the view of Swiss law, *see, e.g.,* Pascal Grolimund & Eva Bachofner, *Art. 5*, *in* INTERNATIONALES PRIVATRECHT: IPRG (BASLER KOMMENTAR) ¶ 62 (Pascal Grolimund, Leander D. Loacker & Anton K. Schnyder eds., 4th ed. 2021). Among these legal orders was, until very recently, also Germany. Yet its highest court has now decided that initiating proceedings abroad (in this case in the U.S.), in violation of an agreement on a domestic (German) forum, may entail liability in damages for costs incurred in US litigation, *cf.* Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19, 75(15-16) JURISTENZEITUNG 797 (2020) (Ger.).

[60] *Cf., e.g.,* BRIGGS, *supra* note 12, ¶¶ 5.105–13; Johannes Landbrecht, *Anti-Suit Injunctions and the Hague Choice of Court Convention—Turner v Grovit Turning Global?*, 24 ZZP INT'L 159 (2019).

A. Admissibility of a Choice of the Forum

The admissibility of choice of forum agreements concerns the issue of whether such agreements are considered permissible or acceptable in principle by a legal order with regard to certain disputes, i.e., whether the respective legal order generally recognises choice of forum agreements—relating to a particular area of law or entered into by a particular type of person—as "*potentially*" valid with regard to their prorogative or derogative effect.[61] To be even more precise, what is admissible in civil law jurisdictions is the prorogation or derogation of a particular forum by agreement of the parties, as the court then automatically has or loses jurisdiction.[62] In common law jurisdictions, admissible is the creation, by agreement of the parties, of a factor to be taken into account in the court's *forum non conveniens* analysis.[63]

To put it differently, such jurisdictional admissibility of choice of forum agreements concerns the conditions of the jurisdictional effects of those agreements in the abstract, i.e., without looking at an individual agreement.[64] Whether a decision-making body then applies the particular choice of forum agreement, depends on its validity **[Part III.B]**.

This notion of "*admissibility*" of choice of forum agreements generally must not be confused with the procedural admissibility of specific claims in particular proceedings (*Zulässigkeit*)—as opposed to the claim having merit (*Begründetheit*).[65] In the arbitration context, the admissibility of a specific claim is also sometimes referred to as "*procedural arbitrability*"—as opposed to "*substantive arbitrability*"[66]—again an example of possible terminological confusion. Yet, objections to the procedural admissibility of specific claims have no impact on the jurisdictional admissibility of choice of forum agreements generally and, thus, the decision-maker's jurisdiction. Prorogation of a forum may be admissible, i.e., accepted generally in a specific legal order, yet, the specific claim brought on the basis of a choice of forum agreement may be inadmissible procedurally.

But, the potential for terminological confusion does not end here. The concept of jurisdictional admissibility of choice of forum agreements is also sometimes referred to as "*enforceability,*"[67] enforceability in a narrow sense,[68] or "*validity*."[69] In order to avoid confusion with the enforceability of judgements and awards as well as with the legal effectiveness (validity) of choice of forum agreements, we prefer the term (jurisdictional) "*admissibility.*"

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61 *Cf., e.g.,* SCHACK, *supra* note 33, ¶¶ 549 (prorogation), 561 (derogation).

62 *See* sources cited *supra* note 44.

63 *See* sources cited *supra* note 46.

64 COIPEL-CORDONNIER, *supra* note 27, ¶ 55.

65 *Cf., e.g.,* Marco Stacher, *Jurisdiction and Admissibility under Swiss Arbitration Law—the Relevance of the Distinction and a New Hope*, 38(1) ASA BULL. 55, 60 (2020).

66 Carolyn G. Nussbaum & Christopher M. Mason, *Who Decides: The Court or the Arbitrator?*, BUSINESS LAW TODAY (Mar. 2014), at 1.

67 *See* TANG, *supra* note 15, at 110 (enforceability "means what effect should be given to the legally sound [valid] agreement," considering "a country's policy to give party autonomy its binding effect.").

68 *Cf.* the usage in Heiser, *supra* note 38, at 1013–1014. In a "wider" sense, on the other hand, "enforceability" determines whether a choice of forum agreement is considered effective in a specific case. *Id.* at 1014; Nino Sievi, *Enforceability of International Choice of Court Agreements: Impact of the Hague Convention on the US and EU Legal System*, *in* 24 HAGUE YEARBOOK OF INTERNATIONAL LAW (Nikolaos Lavranos & Ruth A. Kok eds., 2011).

69 *Cf.* RONALD A. BRAND & PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 20 (2008) [*hereinafter* "BRAND & HERRUP"] ("Validity […] deals with state interests and limitations on the ability of private parties to enter into agreements that will be recognized by the state.").

The jurisdictional admissibility of arbitration agreements in particular, i.e., whether in the words of Article V(2)(a) New York Convention,[70] an issue is "*capable of settlement by arbitration,*" is often more specifically called "*arbitrability.*"[71] In line with Pamboukis' analysis,[72] we consider arbitrability to relate to a conflict of jurisdiction problem, not to a conflict of (substantive) law problem. To some, it may appear superfluous to speak of the admissibility of arbitration agreements, considering that we have the term "*arbitrability.*" However, as mentioned, the usage of the latter term is far from uniform globally.[73]

How can the admissibility of choice of forum agreements be analysed further?

The admissibility of choice of forum agreements may be limited *ratione materiae*, i.e., related to the relevant subject matter—for instance, competition law, constitutional law, family law etc.—or *ratione personae*. The latter "*personal aspect*" of the admissibility of choice of forum agreements concerns the issue of whether a legal order accepts, in principle, that certain persons prorogate or derogate its decision-making bodies. Such restrictions are rare these days.[74] Even consumers and employees enter into choice of forum agreements—although there may exist restrictions as to the timing (before or after the dispute has arisen), specific formal requirements, or the prohibition of derogation, but not of prorogation to the benefit of the "*weak*" party, i.e., the parties may be allowed to add an additional forum for the consumer to choose from, whereas the consumer must not be deprived of any default fora.[75] In an arbitration context, these types of admissibility are also referred to as subject-matter arbitrability (*objektive Schiedsfähigkeit*, *l'arbitrabilité objective*) and person-related arbitrability (*subjektive Schiedsfähigkeit*, *l'arbitrabilité subjective*).[76]

It is important to note that any decision-maker confronted with a choice of forum agreement needs to make itself, and independently of the others, a determination as to the admissibility of choice of forum agreements in the area invoked—the decision-making body allegedly prorogated as well as any decision-making body potentially derogated. It is important to distinguish those perspectives, because, a legal order might accept the prorogative effect of choice of forum agreements more readily than their derogative effect, or vice versa. For instance, a legal order might seek to ensure that its own courts decide employment disputes, but it does not seek to determine which one precisely. It may then accept prorogation, as long as it is prorogation of one of its own courts. Yet it may not accept derogation at all. The applicable law to all these sub-issues in the admissibility category must also be determined separately.

Finally, the question may arise whether a lack of admissibility affects the validity of the respective choice of forum agreement overall. Many commentators argue for instance that a lack of

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70 New York Convention, art. V(2)(a).

71 *See* Loukas A. Mistelis, *Arbitrability—International and Comparative Perspectives*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 5, ¶ 1-9 (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009) ("restrictions imposed on the parties' freedom to submit certain types of disputes to arbitration.").

72 Charalambos Pamboukis, *On Arbitrability: The Arbitrator as a Problem Solver*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 128, ¶¶ 7-20 *et seq.* (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

73 *Cf. supra* note 2 and accompanying text.

74 *Cf., e.g.,* SCHACK, *supra* note 33, ¶ 1418.

75 *Cf., e.g.,* Brussels Ia Regulation, art. 19.

76 *Cf., e.g.,* Bernard Hanotiau, *L'arbitrabilité et le favor arbitrandum: un réexamen*, 4 J. DU DROIT INT'L 899, 902 (1994) [*hereinafter* "Hanotiau"].

arbitrability renders arbitration agreements null and void.[77] We cannot go into the details of this discussion but caution against such approach. The admissibility of choice of forum agreements must be treated conceptually separate from a particular agreement's validity.[78] In particular, arbitrability is a jurisdictional requirement rather than a condition for the arbitration agreement's (substantive) validity.[79]

B. Validity of the Particular Choice of Forum Agreement

Once the decision-making body has determined that it would recognise choice of forum agreements generally with regard to a particular type of dispute (for instance, company law or involving employees), it would still need to determine whether the particular agreement presented to it is legally valid, i.e., whether the decision-making body should give effect precisely to this agreement between the relevant parties concerned.

What we thereby call "*validity,*" is sometimes also referred to as "*enforceability*" in a wider sense.[80] We avoid this term again in order not to create confusion between a wide and narrow sense of enforceability of choice of forum agreements, and in order not to create confusion with the enforceability of judgments or arbitral awards.

Some distinguish validity from the existence of choice of forum agreements.[81] Existence refers "*to the conclusion of a conflicts clause and incorporation of this clause into a contract,*" whereas validity refers "*to the quality and authenticity of the parties' consent and other issues that may render a conflicts clause void or voidable.*"[82] This distinction is unclear and adds little to the analysis. As for the "*existence,*" this is often merely a characterisation issue. For the purposes of applying a certain conflict of laws rule or treaty such as the Hague Convention on Choice of Court Agreements ["**Hague Convention**"] or the New York Convention, a particular agreement must be characterised prima facie as a choice of forum agreement—in order to point to the potential application of such treaties in the first place. Such characterisation, however, does not prejudge whether the respective choice of forum agreement is to be given legal effect, i.e., whether it is indeed valid. Beyond this distinction, existence and validity are the same issue—an invalid agreement does not exist and an existing agreement is valid. An agreement may, of course, be invalid *ab initio* (lack of consent) or become invalid subsequently (termination, repudiation, voidance etc.).

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77 *See, e.g.,* BERGER & KELLERHALS, *supra* note 13, ¶ 184; Hanotiau, *supra* note 76, at 901; POUDRET & BESSON, *supra* note 56, at 281; STACHER, *supra* note 39, ¶ 222; Pierre-Yves Tschanz, art. 177 *in* COMMENTAIRE ROMMAND LDIP ¶ 8 (Andreas Bucher ed., 2011) [*hereinafter* "Tschanz"]; Reinmar Wolff, *Article II*, *in* NEW YORK CONVENTION. COMMENTARY ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 ¶ 161 (Reinmar Wolff ed., 2d ed. 2019) [*hereinafter* "Wolff"].

78 *Cf.* Stavros L. Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, 37, ¶¶ 2-58 *et seq.* (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

79 *See* David Quinke, *Article V*, *in* NEW YORK CONVENTION. COMMENTARY ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 ¶ 426 (Reinmar Wolff ed., 2d ed. 2019) [*hereinafter* "Quinke"].

80 *See* sources cited *supra* note 6868. *See* Raymond J. Heilman, *Arbitration Agreements and the Conflict of Laws*, 38(5) YALE L.J. 617 (1929).

81 *Cf.* for references Johannes Landbrecht, *Uniform Jurisdiction Rules under the Hague Choice of Court Convention*, *in* 19 Y.B. PRVT. INT'L. L. 123 (Andrea Bonomi & Gian Paolo Romano eds., 2017/2018) [*hereinafter* "Landbrecht"].

82 TANG, *supra* note 15, at 18.

As to the alleged "*incorporation of this clause into a contract,*"[83] there may be a conceptual misunderstanding. Choice of forum agreements are, in regards to their legal validity, separate from the main contract to which they refer **[Part III.B.i]**. If a uniform validity standard is missing at the treaty level—which would reduce the conflict of laws analysis to the one step of determining whether the treaty applies **[Part III.B.ii]**—the laws applicable to a choice of forum agreement's formal **[Part III.B.iii]** and substantive validity **[Part III.B.iv]** must be determined according to a more or less complex conflict of laws analysis. Relating to substantive validity, but to be discussed separately,[84] is the capacity of individual parties to enter into the respective agreement, as well as a possible power to bind third parties **[Part III.B.v]**.

All the sub-issues falling within this validity category can be approached with a similar mindset. Having determined that the choice of forum agreement would be recognised in principle—i.e., is considered admissible—the decision-maker can potentially be more lenient with respect to the parties' intentions and choices.

i. The Doctrine of Separability or Severability

The main contract and the corresponding choice of forum agreement are treated as legally distinct, even if they are contained in a single document.[85] This concept is referred to as the "*doctrine of separability*" or "*severability,*" in its most general formulation. In many legal orders, the legal (in)effectiveness of the one does not affect the legal (in)effectiveness of the other[86]—although certain defects may affect both agreements, such as forgery of the document.[87]

The law applicable to the validity of either agreement thus needs to be determined separately. Different laws may apply. The most important consequence is that the parties' choice of law for the main contract (if any) does not necessarily imply a choice of law for the validity aspects of the choice of forum agreement.

The details of how the separability concept is applied will differ from one legal order to the other, and may differ with regard to choice of court and arbitration agreements. For instance, under English law, it has been argued that the arbitration-related doctrine of separability "*treats the arbitration agreement as a distinct agreement* only in the context of *a challenge to its validity and not for other purposes, including that of choice of law*."[88] For present purposes, we can leave open whether this view is accurate. Its practical impact seems to be limited, considering that its proponents nonetheless accept that different laws might apply to the main contract and the arbitration agreement.[89]

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83 *Id.*

84 *See, e.g.,* Tschanz, *supra* note 77, art. 178, ¶¶ 57 *et seq.* for the Swiss provisions governing the substantive validity (*la validité matérielle*) of arbitration agreements.

85 *E.g.,* Brussels Ia Regulation, art. 25(5)(1); Hague Convention, art. 3(d); UNCITRAL Model Law, art. 16(1)(2).

86 *Cf., e.g.,* Brussels Ia Regulation, art. 25(5)(2); Hague Convention, art. 3(d); UNCITRAL Model Law, art. 16(1)(3); Swiss PILA, art. 178(3).

87 *Cf.* Fiona Trust & Holding Corporation v. Privalov [2007] UKHL 40, ¶ 17 (Lord Hoffmann).

88 Ian Glick & Niranjan Venkatesan, *Choosing the Law Governing the Arbitration Agreement*, *in* JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 137 (Neil Kaplan & Michael J. Moser eds., 2018) (emphasis in the original).

89 *Id.* at 139 *et seq.*

ii. Uniform Standard of Validity of Choice of Forum Agreements under International Treaties?

With regard to arbitration agreements falling under the New York Convention, there is a debate as to whether it establishes, through substantive rules (*Sachnormen*) at treaty level, a uniform standard of validity.[90] If such a standard existed, it would make the conflict of laws analysis with regard to the law applicable to an arbitration agreement's validity much easier. One would not have to look farther than the New York Convention itself. The concern is, however, that it is unlikely that a uniform standard will ever emerge—for the simple reason that the New York Convention does not establish a judicial body that could define this standard with authority. Yet "*[a]ny promulgated text of law [like the provisions of the New York Convention] is just words until it is applied as law. And any drafted text purporting to be a uniform law is nothing until it is applied uniformly as law.*"[91]

A comparable problem exists with regard to choice of court agreements falling under the Hague Convention.[92]

The issue is very different under the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ["**Brussels Ia Regulation**"], as the Court of Justice of the European Union ["**CJEU**"] has the final say on its interpretation,[93] and ensures uniformity not only of the textual basis, but also of its application.

iii. Formal Validity

The formal validity of a choice of forum agreement relates to aspects of how the agreement was made and/or recorded (in writing, etc.)—not what it contains—or whether the parties consented. The law applicable to a choice of forum agreement's formal validity is often determined separately from the law applicable to its substantive validity. Leniency may be applied to formal validity issues, as in the validity category generally, in view of the agreement's overall admissibility, and given that only the parties' interests must be protected in this context.

For instance, Article 25(1)(3) of the Brussels Ia Regulation determines, through substantive provisions at EU level, most aspects of formal validity. No further conflict of laws analysis is required. On the other hand, concerning substantive validity, Article 25(1)(1) contains an intra-EU conflict rule, referring to the law of the Member State of the court seized.

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90 On the debate, *see* Gary Born & Johannes Koepp, *Towards a Uniform Standard of Validity of International Arbitration Agreements Under the New York Convention*, *in* GRENZÜBERSCHREITUNGEN: BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT. FESTSCHRIFT FÜR PETER SCHLOSSER ZUM 70. GEBURTSTAG (Birgit Bachmann, Stephan Breidenbach, Dagmar Coester-Waltjen, Burkhard Heß, Andreas Nelle & Christian Wolf eds., 2005); SCHLOSSER, *supra* note 10, ¶¶ 247 *et seq.* (critical).

91 Camilla Baasch Andersen, *Defining Uniformity in Law*, 12(1) UNIF. L. REV. 5, 41 (2007).

92 On this discussion in detail, Landbrecht, *supra* note 81.

93 *Cf.* HARTLEY, *supra* note 34, ¶¶ 1.29–1.36. Such difference as regards the existence of a body ensuring uniformity of application should be reflected in the methodological approach to applying, for example, the three instruments that Hartley discusses, i.e., the Brussels Ia Regulation, the Lugano Convention (an international treaty with the CJEU having persuasive authority only), and the Hague Convention (no judicial authority to ensure uniformity).

Article 178(1) of the Swiss Private International Law Act ["**Swiss PILA**"] is a substantive rule determining formal requirements of arbitration agreements,[94] as is Section 1031 of the German Code of Civil Procedure or Article 7(2) of the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Arbitration (Option I). If the New York Convention applies, the formal requirements in Article II(1) and Article II(2) of the same must also be taken into account.

iv. Substantive Validity

The substantive validity of a choice of forum agreement relates for instance to issues of consent, certainty, variation, waiver, estoppel, or termination.[95] A law applicable to those aspects of the validity of the choice of forum agreement must be determined separately from the other issues in the validity category.

For instance, Article 178(2) of the Swiss PILA designates the laws applicable to the substantive validity of arbitration agreements.[96] Contrary to Article 178(1),[97] the provision is a conflict rule that refers, in the alternative, to three different laws, namely to "*the law chosen by the parties, or to the law applicable to the dispute, in particular the law governing the main contract, or to Swiss law*." If the agreement conforms to any one of those laws, it is considered valid as to its substance. The provision is often cited as a prime example of the "*validation principle.*"[98] Swiss law favours the validity of arbitration agreements by accepting their substantive validity alternatively under several laws.[99]

Whether an aspect is qualified as relating to formal or substantive validity differs from one legal order to the next. No distinction is possible in the abstract. However, such distinction is also not necessary. What is important is to be aware of the issue and to carefully determine the law applicable to the relevant aspect, as per the conflict of laws rules applicable. To provide an example, issues of fairness in the context of the conclusion of a choice of forum agreement, in particular if such agreement is supposed to be based on pre-formulated, non-negotiated standard contract terms (*Allgemeine Geschäftsbedingungen*), are considered formalities in some legal orders but issues of substantive validity (consent) in others.[100] Whatever the reason for such distinction, the decision-making body's own conflict of laws rules determine whether the issue is to be qualified as one of formal or substantive validity.

v. Capacity and Power of Attorney

The issue of the parties' capacity to contract is closely linked to a choice of forum agreement's validity, but potentially, a separate applicable law needs to be determined. While it may be rare that whole classes of persons are prohibited from entering into the choice of forum agreements—i.e.,

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94 *See, e.g.,* Andreas Furrer, Daniel Girsberger & Dorothee Schramm, *IPRG 176–178*, *in* HANDKOMMENTAR ZUM SCHWEIZER PRIVATRECHT. INTERNATIONALES PRIVATRECHT ¶ 18 (Andreas Furrer, Daniel Girsberger & Markus Müller-Chen eds., 3d ed. 2016) [*hereinafter* "Furrer et al."].

95 For these elements see in detail, Landbrecht, *supra* note 81, at 123 *et seq.*

96 *See, e.g.,* Furrer et al., *supra* note 94, ¶ 20.

97 *See* discussion *supra* Part III.B.iii.

98 *See, e.g.,* BORN, *supra* note 30, §2.06[D]; BERGER & KELLERHALS, *supra* note 13, ¶ 393 ("conflict of laws rule in favorem validitatis"); Tschanz, *supra* note 77, art. 178, ¶ 72.

99 Sabrina Pearson, *Sulamérica v Enesa: The Hidden Pro-validation Approach Ad- opted by the English Courts with Respect to the Proper Law of the Arbitration Agreement*, 29(1) ARB. INT'L 115, 125 (2013) argues that English courts in essence apply a similar principle.

100 *Cf.* Landbrecht, *supra* note 81, at 126.

there are limits to the admissibility *ratione personae*[101]—the individual parties still need to have capacity to enter into a legally binding agreement.

Yet another issue in regards to which an applicable law must be determined, and again separately, is whether the person attempting to enter into the choice of forum agreement had the power to bind the person or entity supposed to become a party to the agreement. The applicable law to this issue may differ depending on whether the person signing was an official representative, a simple employee, a third person with express authority, or a third person without express authority.

C. The Specific Claim Falling Within the Scope of a Particular Choice of Forum Agreement

Finally, if choice of forum agreements are admissible in principle in the relevant area of law, and if the particular agreement is legally valid, what is still left to do for the decision-making body is to determine whether the specific claims raised fall within the agreement's scope, i.e., whether these claims are covered by the particular choice of forum agreement. This is often an issue of interpretation of the particular choice of forum agreement.

The scope of a choice of forum agreement thereby has a substantive, a personal, and a temporal dimension.[102] An applicable law may have to be determined for each aspect separately. As will become clear in the following, the mindset for the jurisdictional analysis again changes slightly for the issues covered by this scope category, as compared to the previous admissibility and validity categories, as the interests of third parties may have to be taken into account.

The substantive scope refers to the types of claims covered by the choice of forum agreement—for instance, claims concerning pre-contractual liability (*culpa in contrahendo*) or competing tort claims. The link with the substantive validity of the respective choice of forum agreement may often be so close as to warrant applying the same law to both issues. However, it may sometimes be preferable to apply the law applicable to the main contract, given that the availability of remedies (potentially an aspect of the forum agreement's scope) and the existence of substantive rights (under the main contract) may overlap. Since events giving rise to extra-contractual liability may involve parties other than those having entered into the choice of forum agreement, these third-party interests will also be taken into account.

The personal scope of choice of forum agreements determines who is bound[103] through explicit, implied, presumed, or fictitious (imputed) consent.[104] In this context, it is even more obvious that third-party interests play a role in determining a choice of forum agreement's scope.

Conceptually, there is some overlap between the concepts of the personal scope of choice of forum agreements and consent—an aspect treated as part of substantive validity above. The question of who is bound is often identical to the question of who has consented. In straightforward scenarios, there may then be no need to determine separately a law applicable to the personal scope of the choice of forum agreement and its validity. However, it is sometimes

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101 *See* discussion *supra* Part III.A.

102 *See* STACHER, *supra* note 39, ¶ 215.

103 *See* Stefan Kröll, *Zur kollisionsrechtlichen Behandlung von Schiedsvereinbarungen—Rechtsfragen der subjektiven Reichweite (zu BGH, 8.5.2014—III ZR 371/12)*, 36(1) IPRAX 43 (2016).

104 On these distinctions, with regard to arbitration agreements, Johannes Landbrecht & Andreas Wehowsky, *Determining the Law Applicable to the Personal Scope of Arbitration Agreements and its "Extension"*, 35(4) ASA BULL. 837, 839–841 (2017).

undisputed that a valid choice of forum agreement exists—i.e., there is no dispute about validity in general—but it is disputed whether a particular individual is bound thereby. In these scenarios, the applicable law must be determined separately. The choice of forum agreement cannot necessarily be the starting point as it is yet unclear whether the individual has anything to do with it. The applicable law to the personal scope may also differ depending on whether one is dealing with presumptions of consent, assignment, responsibility due to good faith, etc.[105]

Finally, a choice of forum agreement's temporal scope may need to be determined, along with a law governing this issue. The agreement may be limited to claims arising within a defined period of time, or at a specific point in time. A choice of forum agreement might require pre-judicial steps, such as an attempt at mediation, before judicial proceedings can be initiated. If brought prematurely, a claim may not be within the agreement's (temporal) scope yet.

IV. Determining the Applicable Law to Jurisdiction

We have now discussed the potential effects of choice of forum agreements and their structure. Now the question arises as to how a decision-making body goes about determining a law applicable to its jurisdiction. At the outset, the relevant perspective must be clarified. This cannot be overemphasised as it is often neglected in scholarly discussions. Each decision-maker determines, by itself, the laws that are applicable to the issues, which it is required to decide, and according to its own perspective. For instance, asking about the law applicable to arbitration agreements, in general, is meaningless—as it always depends on the specific perspective of the relevant decision-maker involved.

In the forthcoming part of the article, we focus on arbitration agreements. We distinguish between the perspectives of state courts **[Part IV.A]**, and that of arbitral tribunals **[Part IV.B]**.

A. State Courts and Arbitral Jurisdiction

When assessing which laws are to be applied to the various aspects of choice of forum agreements, state courts start with their own conflict of laws rules, as part of their *lex fori*. As a scholar put it, judges take orders only from their own legal order.[106] Such conflict of laws analysis may guide the judge to the substantive rules of his or her domestic law or to foreign laws, which may be either substantive rules, or further conflict of laws rules.

State courts determine the law applicable to arbitral jurisdiction primarily[107] in two scenarios: either when faced with an arbitration agreement when the same was invoked as an exception to the court's jurisdiction (*exceptio arbitri*)—this often concerns the hypothetical jurisdiction of a potential arbitral tribunal insofar as arbitral proceedings have not yet been commenced; or if a court is asked to recognise and enforce an arbitral award rendered on the basis of an arbitration agreement—in which case the court verifies the jurisdiction of a particular arbitral tribunal having rendered a

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105 For detailed analyses concerning the law applicable to the personal scope of arbitration agreements, *cf., e.g., Id.*; Martin Gebauer, *Zur subjektiven Reichweite von Schieds- und Gerichtsstandsvereinbarungen—Maßstab und anwendbares Recht*, *in* ARS AEQUI ET BONI IN MUNDO, FESTSCHRIFT FÜR ROLF A. SCHÜTZE ZUM 80. GEBURTSTAG (Reinhold Geimer, Athanassios Kaissis & Roderich C, Thümmel eds., 2014); Michael Mráz, *Extension of an Arbitration Agreement to Non-Signatories: Some Reflections on Swiss Judicial Practice*, 3 BELGRADE L. REV. 54 (2009).

106 SCHACK, *supra* note 33, ¶ 549.

107 We leave aside the issue of state courts supporting arbitral proceedings (*juge d'appui*), for instance with regard to the taking of evidence.

decision. The overall structure of the conflict of laws analysis is similar—courts will go ahead and determine the laws applicable to the admissibility **[Part IV.A.i]**, validity **[Part IV.A.ii]**, and scope **[Part IV.A.iii]** of the arbitration agreement.

i. Arbitrability[108] in the Sense of General Admissibility

Many emphasise that the admissibility of choice of forum agreements, in the allegedly prorogated as well as in the potentially derogated forum, is governed by the *lex fori*,[109] i.e., the law of the court confronted with a particular choice of forum agreement. The same would apply in the arbitration context with regard to arbitrability in both (1.) the recognition or enforcement context as well as (2.) when a court is faced with an arbitration agreement as an exception to its jurisdiction.[110] This general statement is accurate insofar as the *lex fori* is the starting point for the conflict of laws analysis. Yet, whether the *lex fori* regulates the issue via substantive rules,[111] or contains conflict rules—including, potentially, the recognition of a choice of the applicable law by the parties[112]—remains to be determined.

1. In the context of recognition or enforcement, the conflict rule in Article V(2)(a) of the New York Convention refers, for determining the law applicable to arbitrability, to the law of the country where recognition or enforcement are sought, which may include its conflict of laws rules. This appears to be undisputed for arbitrability *ratione materiae*. With regard to arbitrability *ratione personae*, however, some use the conflict rule in Article V(1)(a) instead.[113]

2. If confronted with a particular arbitration agreement as an exception to its jurisdiction, a state court has the perspective of a potentially derogated forum. In the interest of efficiency, the court would probably start by determining its hypothetical jurisdiction according to general rules. If the court itself does not have jurisdiction, it need not concern itself with the arbitration agreement and will simply decline to hear the case. Only if the court otherwise could have jurisdiction, it assesses whether it is required to suspend or terminate the proceedings in view of the arbitration agreement.

What law will the state court apply to arbitrability in the latter context?

Within the framework of the New York Convention, the Contracting States are obliged to recognise arbitration agreements pursuant to Article II(1). The provision contains an exception to

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108 For a comparative account, *cf., e.g.,* Hanotiau, *supra* note 2.

109 *Cf.* TANG, *supra* note 15, at 110.

110 For a critical re-assessment of this *lex fori* approach, Stavros L. Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

111 *See, e.g.,* Oberlandesgericht München [OLG München] [Higher Regional Court of Munich] July 7, 2014, 34 SchH 18/13, SCHIEDSVZ 2014, 262, 264 (Ger.) (if the place of arbitration is in Germany, arbitrability is governed exclusively by German law—this being the conflict of laws analysis of the Munich court. The corresponding provision of German arbitration law (s 1030 German CCP) then operates as a substantive rule (*Sachnorm*) on arbitrability).

112 In favour of (limited) party autonomy with respect to determining the law applicable to arbitrability, *e.g.,* Dietmar Czernich, *Österreich: Das auf die Schiedsvereinbarung anwendbare Recht*, 13(4) GER. ARB. J. (SCHIEDSVZ) 181, 185 (2015) (under Austrian law). Against party autonomy as regards the law applicable to arbitrability, *e.g.,* BERGER & KELLERHALS, *supra* note 13, ¶ 190 (for Swiss law).

113 SCHACK, *supra* note 33, ¶ 1417.

this obligation if the subject matter is not "*capable of settlement by arbitration*." However, Article II(1) does not stipulate the applicable law.

As one observer put it, "*nearly every conceivable position as to which law governs arbitrability has been taken*."[114] Indeed, many courts apply Article V(2)(a) of the New York Convention by analogy. Then it would be the law of the country in which the arbitrability issue arises—including, potentially, its conflict of laws rules—that governs arbitrability *ratione materiae*. This is where recognition or enforcement of an award or, by analogy, recognition of the arbitration agreement is sought. Others submit that the forum's arbitrability concept only applies if its legal order has a material connection to the dispute.[115] If anything, this confirms that issues of arbitrability must be analysed separately from validity issues.[116] This penchant for applying the law of the forum with regard to arbitrability, which is not present with respect to validity, also confirms that the mindset of the courts when dealing with issues of admissibility is different from that applied in the validity category. As for arbitrability *ratione personae*, a starting point could again be Article V(1)(a) of the New York Convention.[117]

ii. Validity

As mentioned, domestic law often has separate substantive or conflict rules for the (1.) formal and (2.) substantive validity of arbitration agreements,[118] as well as for (3.) the parties' capacity.

1. Concerning the formal validity of arbitration agreements, requirements at treaty level (Article II of the New York Convention), and those of domestic law, must be coordinated. A state's treaty obligations prevail over its domestic rules.[119] The provisions at treaty level must therefore be considered first.

   Article II(1) and Article II(2) of the New York Convention contain substantive rules for the formal validity of arbitration agreements—much like the Brussels Ia Regulation for choice of court agreements.[120] If the particular arbitration agreement complies with these requirements, it must be recognised within the New York Convention's scope. No further reference to domestic law or conflict of laws analysis is required. Insofar as the New York Convention applies, it would seem that its formal requirements thus provide a maximum standard. No Contracting State may stipulate stricter form requirements.[121]

   Insofar as the New York Convention does not apply, or if its formal requirements are not met, the court may or may not, according to its own law, recognise the particular arbitration agreement, or an arbitral award made on the basis of it. Article VII of the New York Convention expressly reserves the application of other treaties and domestic rules in case they are more lenient. Therefore, the court must turn to its conflict of laws and, ultimately, its own or foreign substantive rules, in order to determine the formal validity of the particular

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114 Wolff, *supra* note 77, ¶ 159.
115 For references, *see* BORN, *supra* note 30, § 3.02[C].
116 *Cf.*, *e.g.*, Quinke, *supra* note 79.
117 *Cf.*, *e.g.*, SCHACK, *supra* note 33, ¶ 1417.
118 *Cf.* discussion *supra* Parts III.B.iii, III.B.iv.
119 *Cf., e.g.,* HARTLEY, *supra* note 34, ¶ 1.02.
120 *Cf.* discussion *supra* Part III.B.iii.
121 *See* BORN, *supra* note 30, §3.01[E][4].

arbitration agreement. For instance, French law concerning international—as defined by French law[122]—arbitration, recognises oral arbitration agreements.[123] Although arguably not under the New York Convention, which governs only agreements in writing,[124] a court obliged to apply French law must recognise such oral arbitration agreements as per domestic law.

2. As for the laws applicable to the substantive validity of a particular arbitration agreement, the starting point under the New York Convention is Article II(3), if the issue is about recognising a particular arbitration agreement as an exception to the court's jurisdiction. According to Article II(3), an arbitration agreement need not be recognised if it "*is null and void, inoperative or incapable of being performed*." But the provision does not specify what law applies to these issues or whether Article II(3) is a substantive provision at treaty level.

   As regards the recognition of an arbitral award, Article V(1)(a) of the New York Convention expressly refers, with regard to determining the law applicable to the arbitration agreement underlying such award, to "*the law to which the parties have subjected it [the arbitration agreement] or failing any indication thereon, under the law of the country where the award was made*" (the law at the seat). As per its wording, Article V(1)(a) is a conflict rule.

   It could be argued that in the interest of internal consistency, the New York Convention subjects the same arbitration agreement—whether a state court is confronted with it directly as an exception to its jurisdiction or indirectly in a recognition and enforcement context—to the same laws, i.e., the New York Convention provides the same conflict or substantive rule for both scenarios. Article V(1)(a) would then seem to indicate that, even the parallel provision in Article II(3) should be read as a conflict rule, and not as a substantive rule.[125]

   However, this is not the end of the conflict of laws analysis. It leaves the question open whether, failing an express agreement of the parties on the law applicable to the substantive validity of the arbitration agreement, it is the substantive rules of the law of the seat that determine the substantive validity of the arbitration agreement, or whether the reference to the law of the seat in Article V(1)(a) and Article II(3) of the New York Convention includes this law's conflict of laws rules—that might refer to the law applicable to the main contract or some other law. Failing a stipulation at treaty level, this must be left to the respective domestic law.

   Domestic law sometimes prescribes that an arbitration agreement is valid if it is valid under at least one of several laws.[126] Such provisions are conflict of laws rules pointing to several substantive rules to determine validity. They must be taken into account by any decision-making body that is bound to apply the respective conflict rules.

3. As regards the parties' *capacity* to enter into the particular arbitration agreement, Article V(1)(a) of the New York Convention refers to "*the law applicable to them*" (the parties). A similar conflict

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122 CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1504 (Fr.) [*hereinafter* "French C.P.C."] ("An arbitration is international when international trade interests are at stake.").

123 *Id.* art. 1507.

124 New York Convention, art. II(1).

125 *See* Wolff, *supra* note 77, ¶ 42.

126 On the corresponding example of Swiss law, *see* sources cited *supra* note 98.

rule would seem to apply in the context of the recognition of the arbitration agreement,[127] although Article II is silent on the matter. Thus, insofar as the New York Convention applies, state courts determine the law governing the parties' capacity to contract separately from the other issues of the arbitration agreement's validity.

iii. Scope

Finally, a state court determines the laws applicable to the arbitration agreement's scope. The New York Convention provides little guidance on this matter.[128]

B. The Perspective of Arbitral Tribunals

When confronted with a particular arbitration agreement, and when determining whether it is admissible, valid and covering the specific claim raised, arbitral tribunals also need to start with determining the applicable laws. Although seemingly similar to the conflict of laws analyses conducted by state courts, an arbitral tribunal's task, in this context, is rendered much more difficult, in the sense of legal theory, as well as from a practical point of view, by the fact that arbitral tribunals do not have their own conflict of laws rules as a starting point. This is one important consequence of the fact that arbitral tribunals have no *lex fori* of their own **[Part IV.B.i]**—the other consequence being that they do not have their own procedural rules. Notwithstanding this, and given that arbitral tribunals cannot avoid a conflict of laws analysis, practice has found ways to deal with this dilemma **[Part IV.B.ii]**.

i. Theoretical Obstacles to Arbitral Tribunals Determining Conflict of Laws Rules

When conducting a conflict of laws analysis, state court judges have a solid starting point: their own conflict of laws rules, i.e., the conflict of laws rules applicable in the jurisdiction in which the judge is hearing the case—those of the *lex fori*. The judge may need to look at international treaties, such as, the New York Convention or the Hague Convention; at EU law, such as, the Rome or Brussels Ia Regulations; and at domestic law to locate all relevant (conflict) rules. But the judge has a way to clarify which of these rules apply and which regulatory level takes precedence (hierarchy of norms). The highest court in each jurisdiction will authoritatively settle potential disputes as to the right approach. Arbitrators, on the other hand, do not have their own conflict of laws rules.[129] They have no *lex fori*.[130]

Some commentators point to the conflict of laws rules of the *lex arbitri* as a starting point.[131] This is indeed one among several possible solutions. But it is not the only one, as the *lex arbitri* is not the arbitrators' own law either.[132] What do we mean by that?

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127 Wolff, *supra* note 77, ¶ 46.

128 For details, *cf. Id.* ¶¶ 43 *et seq.*

129 Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16(4) THE INTERNATIONAL LAWYER 613, 613 (1982); V.S. Deshpande, *The Applicable Law in International Commercial Arbitration*, 31(2) J. INDIAN L. INST. 127, 128 (1989); Tschanz, *supra* note 77, art. 187, ¶ 10; SCHLOSSER, *supra* note 10, ¶ 209.

130 SCHLOSSER, *supra* note 10, ¶ 726; BERGER & KELLERHALS, *supra* note 13, ¶ 1375.

131 *See, e.g.,* DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES ¶ 1402 (3d ed. 2016) [*hereinafter* "GIRSBERGER & VOSER"].

132 Johannes Landbrecht, *Strong by Association: Arbitration's Policy Debates, Mandatory Rules, and PIL Scholarship*, 37(2) ASA BULL. 305, 307 (2019) [*hereinafter* "Landbrecht"]; *cf.* specifically with regard to arbitrability, Bernard Hanotiau, *L'arbitrabilité et le favor arbitrandum: un réexamen*, 4 J. DU DROIT INT'L 899, 911 *et seq.* (1994).

A simple comparison illustrates the point. A state court judge is bound to apply his or her law, and knows which law that is, before ever being seized, i.e., before ever hearing about the parties' dispute. An arbitrator on the other hand, does not know which law he or she might be called upon to apply, and whether he or she might be asked to make determinations as an arbitrator in the first place—until appointed in a specific dispute. For arbitrators, therefore, the appointment comes first, and then they conduct the conflict of laws analysis in light of it. For state court judges, on the other hand, not only the structure but also the content of their conflict of laws analysis is certain before they ever hear about the case. For them, the legal order that makes them judges always takes precedence over the dispute.

Subject to express provisions to the contrary,[133] and although some have argued otherwise,[134] arbitrators as private decision-makers are not agents of a particular state, not even of the state in which is located the seat of the arbitration.[135] Therefore, they do not owe any independent duty to any state as decision-makers.[136] The status of state court judges is different, given that they swear an oath of office, promising to serve and uphold a specific legal order.[137]

In turn, arbitrators do not derive powers from the *lex arbitri*,[138] or any other arbitration law. A state may offer to accept a tribunal's decisions in case they comply with the requirements of the state's arbitration law. Yet the state usually reserves the right to review any such decision. To provide but one example, again from Swiss law: tribunals "*may*" order protective measures under Article 183(1) of the Swiss PILA. Yet, those measures will not be enforced directly—which they would if arbitral tribunals were granted powers under this provision. Rather, tribunals need to seek assistance from a state court in accordance with Article 183(2) of the Swiss PILA. It would then seem only logical that, if arbitrators are not empowered by this provision, they are also not obliged by it—at least not directly by the fact of it being a provision of the relevant arbitration law; although, they may be obliged to apply this provision, or refrain from doing so, because the parties so direct them.

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133 A certain domestic legal order may establish arbitral tribunals as state organs. Yet insofar as their jurisdiction is not based on a voluntary submission agreement, resulting awards would fall outside the scope of the New York Convention, *see* Bernd Ehle, *Article I*, *in* NEW YORK CONVENTION. COMMENTARY ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 ¶ 87 (Reinmar Wolff ed., 2019).

134 *See, e.g.,* HANS-JÜRGEN HELLWIG, ZUR SYSTEMATIK DES ZIVILPROZESSUALEN VERTRAGES 54 *et seq.* (1968), referred to by GERHARD WAGNER, PROZEßVERTRÄGE 582 (1998), who, however, rejects this view.

135 *Cf.* Marco Stacher, *Der unzuständige Schiedsrichter*, SCHWEIZERISCHE ZEITSCHRIFT FÜR ZIVILPROZESS- UND ZWANGSVOLLSTRECKUNGSRECHT (ZZZ) 58 (2013) (the arbitrators are not exercising official authority of the state ("*keine hoheitliche Gewalt*")).

136 *See* Charalambos Pamboukis, *On Arbitrability: The Arbitrator as a Problem Solver, Thoughts About the Applicable Law on Arbitrability* in ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 124, ¶¶ 7–10 (Loukas Mistelis & Stavros Brekoulakis eds., 2009); Johannes Landbrecht, *supra* note 132, at 307 *et seq.* Rules of deontology, criminal law, administrative law (including work permits), taxes etc, that are applicable to the arbitrators in their personal capacity, regardless of their function as decision-makers, are a different matter.

137 *See, e.g.*, GRUNDGESETZ [GG] [BASIC LAW] art. 20(3) (Ger.) (according to which the judiciary is bound by law and justice—"*an Gesetz und Recht gebunden*"); in connection with DEUTSCHES RICHTERGESETZ [DRiG] [GERMAN JUDICIARY ACT] § 38(1) (concerning the judicial oath: "A judge shall take the following oath at a public sitting of the court: "I swear to exercise the judicial office in conformity with the Basic Law of the Federal Republic of Germany and with the law, to adjudicate to the best of my knowledge and belief, without distinction of person, and to serve the cause of truth and justice alone—so help me God".").

138 Tschanz, *supra* note 77, art. 187 ¶ 5.

Arbitral tribunals are thus required to create their own conflict of laws approach *ad hoc*. They might determine the applicable laws via the conflict of laws rules of the law of the seat[139] or some other law—which has been called indirect reference (*voie indirect*). Alternatively, tribunals might create their own conflict of laws rules or apply certain substantive rules without thinking too much about a conflict of laws analysis—although thereby, logically, not avoiding it—which has been called direct reference (*voie directe*).[140]

The only thing that would be wrong to argue is that arbitral tribunals do not apply any conflict of laws rules at all. For any rule that a tribunal uses—and if need be creates *ad hoc*—in order to determine applicable laws, is, from a structural and functional perspective, a conflict rule; maybe not a domestic one, but a conflict rule nevertheless; maybe the arbitral tribunal does not make a complicated conflict of laws analysis, but it needs to determine the applicable law—which is a conflict of laws analysis.[141]

How should arbitral tribunals proceed when creating their own conflict of laws approach *ad hoc*? The fact that they are, from a legal theory point of view, fairly unrestricted in developing their conflict of laws approach, does not provide an answer to how these conflict of laws rules should look like.

While an arbitral tribunal could apply conflict of laws rules specifically chosen by the parties, this option will rarely be available in practice—for lack of such choice. Also, a "*closest connection test,*" which is sometimes proposed in this context, provides little guidance—as long as it is unclear what a *"connection*" is, and what "*close*" should be, and to what.

The arbitral tribunal's analysis will, to a large extent, depend on the parties' agreements and choices, even if they have not chosen the applicable conflict of laws rules specifically. For the sake of clarity, the aforementioned does not say—and as submitted, this would be a wrong approach—that tribunals always have full discretion as to which conflict of laws approach they follow. Domestic law might provide for such discretion.[142] However, this would be no starting point for the tribunal—as it cannot rely directly on any domestic law. The parties' appointment comes—logically—before any law the tribunal would be obliged and could determine to apply. Only if the parties authorise the tribunal to exercise discretion, for instance by referring to institutional arbitration rules,[143] or indeed a particular domestic arbitration law,[144] would the tribunal be empowered to exercise discretion. All else, i.e., a determination of the relevant conflict of laws approach without regard to the parties' instructions would be an arbitrary determination of this conflict of laws approach that must be avoided.[145]

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139 *See* GIRSBERGER & VOSER, *supra* note 131, ¶ 1402.
140 BERGER & KELLERHALS, *supra* note 13, ¶ 1377.
141 *See* SCHLOSSER, *supra* note 10, ¶ 729.
142 *See, e.g.,* UNCITRAL Model Law, art. 28(2); French C.P.C., art. 1511(1).
143 *E.g.,* International Chamber of Commerce (ICC), Arbitration Rules 2021, art. 21(1)(2) [*hereinafter* "ICC Rules 2021"].
144 BERGER & KELLERHALS, *supra* note 13, ¶ 1377.
145 *See* SCHLOSSER, *supra* note 10, ¶ 726, with references also to the opposite view.

We cannot address all the details of how arbitral tribunals should determine the applicable law to arbitration agreements[146] and must limit ourselves to a few general thoughts.

ii. General Approach in a Nutshell

In practice, the laws most frequently used by arbitral tribunals to handle arbitration agreements are probably (1.) the laws chosen—expressly or impliedly through designating a law applicable to the main contract—by the parties, and (2.) the arbitration law of the seat (*lex arbitri*).[147] This may include the conflict of laws rules of those laws. Such general statement of a factual rather than legal nature is difficult to verify empirically. It is therefore made with all possible reservations.

But why is it at least likely that this statement is indeed correct? And what should an arbitral tribunal do if the analysis according to those laws does not yield a satisfactory result?

An arbitral tribunal could start with considering its mission, which is to decide, upon the parties' instruction, a dispute by rendering an arbitral award. Considering that the arbitral tribunal ultimately derives its authority from the parties' agreement, it is primarily the parties' interests—subject to the arbitral tribunal not violating general laws of a criminal, administrative, deontological nature etc.—that should be on the tribunal's mind.

This explains the common respect for and acceptance, to a very large extent, of the parties' choices (party autonomy). The principle of party autonomy is widely, and increasingly, respected as the starting point of any conflict of laws analysis—also in a domestic state court context.[148] In this respect, arbitration is not an outlier, but perfectly in sync with general developments of conflict of laws related legal theory.[149]

Explaining the penchant for applying the *lex arbitri* requires some intermediate steps.

The parties will be interested in receiving an award that is of practical usefulness to them. This usually means, on the one hand, that the award should not be set aside. Since it is difficult, although not impossible,[150] to enforce internationally an award set aside at the seat, its practical usefulness would otherwise be reduced. On the other hand, the parties require an award that can be enforced wherever they need it to be enforced—which they sometimes make clear in their arbitration agreement, for instance, by referring to arbitration rules that contain a duty, or incumbency, on the part of the arbitral tribunal to ensure enforceability.[151]

When resolving conflict of laws issues, the arbitral tribunal should thus, first and foremost, consider risks of setting aside and possible obstacles to enforcement. As discussed above, the provisions of international treaties, such as the New York Convention, and domestic laws, contain

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146 For the relevant aspects, *see supra* Part III.

147 *Cf.* SCHLOSSER, *supra* note 10, ¶¶ 228 *et seq*.

148 *See* the recent and comprehensive study in SAGI PEARI, THE FOUNDATION OF CHOICE OF LAW: CHOICE AND EQUALITY (2018).

149 *See* Landbrecht, *supra* note 132, at 308.

150 *See, e.g.,* BORN, *supra* note 30, § 16.05; Amanda Lee & Harald Sippel, *To Enforce or Not to Enforce: That is the Question: Arbitral Awards Set Aside at Their Seat*, *in* ARBITRAL AWARDS AND REMEDIES, 8 CZECH (& CENTRAL EUROPEAN) YEARBOOK OF ARBITRATION (Alexander J. Belohlávek & Nadezda Rozehnalová eds., 2018).

151 *See, e.g.,* ICC Rules 2021, art. 42.

many pointers as to the criteria for setting aside (*lex arbitri*) and enforcement (*lex loci executionis*). These provide at least some guidance for the resolution of conflict of laws issues.

For instance, arbitral tribunals are often prohibited, by virtue of the parties' agreement—through a reference to arbitration rules or a domestic arbitration law—from deciding *ex aequo et bono* or as *amiable compositeur*.[152] This is a negative conflict rule: the tribunal must, when deciding the claims brought before it, make a legal analysis, and such legal analysis, by definition, must contain—however rudimentary—a conflict of laws analysis. Even when implementing the parties' express authorisation to decide *ex aequo et bono*, the tribunal would apply a conflict rule—the parties' authorisation to not having to make a full legal assessment.

As long as the requirements under the *lex arbitri* and the *lex loci executionis* are compatible, following this approach—which is probably what most practitioners intuitively do—is a safe way forward. If those requirements are not too specific, the arbitral tribunal may indeed have considerable leeway—although still impliedly through the parties' agreement.

Yet what should the arbitral tribunal do if the requirements under the *lex arbitri* and a potential *lex loci executionis* are incompatible? The arbitral tribunal would then need to ask itself, and the parties, what is more important: an award that does not risk setting aside but may not be enforceable in a particular jurisdiction (although potentially somewhere else?)—the *lex arbitri*'s approach to conflict of laws issues should then take precedence; or an award that risks setting aside, but could be enforced in a relevant jurisdiction[153]—the *lex loci executionis*'s approach should then prevail.

V. Conclusion

Arbitral tribunals must, like any decision-making body, start their analysis of a given case by determining the applicable laws. While not necessarily elaborate, depending on the legal framework and facts, arbitral tribunals always conduct a conflict of laws analysis.

For arbitral tribunals to conduct such conflict of laws analysis properly, they must *ad hoc* create and apply conflict of law rules of their own, related to the admissibility, validity and scope category of arbitration agreements—given that they are not obliged, in their function as decision-makers, to uphold any specific domestic legal order. Even if tribunals refer to the conflict rules of the *lex arbitri* or look for a closest connection, they make a choice of their own—as neither the *lex arbitri* is gospel for the tribunal, nor a closest connection standard cast in stone. A state court judge can point to his or her own conflict rules, hide behind them, and otherwise decline responsibility. But arbitral tribunals are not in such a comfortable position.

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[152] *See, e.g.,* French C.P.C., art. 1512; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 1051(3) (Ger.); Swiss PILA, art. 187(2); ICC Rules2021, art. 21(3).

[153] It is far from certain that an award set aside would *not* be enforced elsewhere. *See* sources cited *supra* note 150.