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ARBITRATION AGREEMENTS AND ANATIONAL LAW: A QUESTION OF INTENT?

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# TABLE OF CONTENTS

I  INTRODUCTION ............................................................................................................. 1
II  THE ARBITRATION AGREEMENT AND ANATIONAL LAW ........................................... 2
   A  The Distinctive Nature of the Arbitration Agreement ............................................. 2
   B  What is Anational Law? ......................................................................................... 5
   C  The Arbitration Agreement and Judicial Intervention ...................................... 9
III  THEORETICAL FOUNDATIONS AS GUIDING PRINCIPLES ........................................... 11
   A  Common Theories of Arbitration ................................................................... 12
      1  Jurisdictional theory ................................................................................... 12
      2  Contractual theory .................................................................................... 13
      3  Hybrid (or mixed) theory ............................................................................ 14
      4  Autonomous theory .................................................................................. 15
   B  Anational Law and Party Autonomy: A View Distilled from Theory ............ 16
      1  Party autonomy ........................................................................................ 16
      2  Jurisdictional limits to party autonomy ..................................................... 18
      3  Institutional concerns ............................................................................... 19
      4  Conclusion ................................................................................................. 21
   C  Party Autonomy as a Prerequisite for Anational Law ................................... 21
   D  What is Party Autonomy? .............................................................................. 23
      1  Express choice of law .............................................................................. 24
      2  Implied choice of law ............................................................................. 26
IV  PRINCIPLE VS PRACTICALITY: ANATIONAL LAW AND REAL CONSENT ............... 28
   A  Voidable Agreements ..................................................................................... 29
   B  Void Agreements .......................................................................................... 30
   C  Separability of the Arbitration Agreement .................................................... 33
   D  Summary ...................................................................................................... 34
V  THE STATUS OF ANATIONAL LAW AS THE LAW GOVERNING THE ARBITRATION AGREEMENT IN CURRENT PRACTICE .................................................... 35
   A  International Instruments ............................................................................. 35
<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>B Arbitral Practice</td>
<td>38</td>
</tr>
<tr>
<td>C England</td>
<td>41</td>
</tr>
<tr>
<td>1 Peterson Farms v C&amp;M</td>
<td>42</td>
</tr>
<tr>
<td>2 Halpern v Halpern</td>
<td>45</td>
</tr>
<tr>
<td>D France</td>
<td>48</td>
</tr>
<tr>
<td>1 Municipalité de Khoms El Mergeb v Société Dalico</td>
<td>48</td>
</tr>
<tr>
<td>2 Uni-kod v Ouralkali</td>
<td>53</td>
</tr>
<tr>
<td>3 Implications</td>
<td>54</td>
</tr>
<tr>
<td>E Switzerland</td>
<td>55</td>
</tr>
<tr>
<td>1 Article 178(2) of the Loi Fédérale sur le Droit International Privé</td>
<td>55</td>
</tr>
<tr>
<td>2 XSAL, YSAL, A v Z Sàrl</td>
<td>58</td>
</tr>
<tr>
<td>3 Conclusion</td>
<td>60</td>
</tr>
<tr>
<td>VI WHERE TO FROM HERE? A TENTATIVE PROPOSAL</td>
<td>61</td>
</tr>
<tr>
<td>VII CONCLUSION</td>
<td>62</td>
</tr>
<tr>
<td>VIII BIBLIOGRAPHY</td>
<td>64</td>
</tr>
<tr>
<td>A International Conventions and Arbitration Rules</td>
<td>64</td>
</tr>
<tr>
<td>B Legislation</td>
<td>64</td>
</tr>
<tr>
<td>C Cases</td>
<td>65</td>
</tr>
<tr>
<td>D Arbitral Awards</td>
<td>68</td>
</tr>
<tr>
<td>E Periodicals</td>
<td>69</td>
</tr>
<tr>
<td>F Conference Papers</td>
<td>76</td>
</tr>
<tr>
<td>G Books and Chapters</td>
<td>77</td>
</tr>
<tr>
<td>H Websites</td>
<td>80</td>
</tr>
</tbody>
</table>
ABSTRACT

In light of the ongoing trend towards delocalisation of international commercial arbitration, this paper seeks to examine the role of anational law as the proper law of the arbitration agreement. An overview of commonly accepted theories of international arbitration shows that, in order to determine the desirability of applying anational law to the arbitration agreement, it is important to take into account contractual, jurisdictional and institutional elements of international arbitration. On balance, however, it is argued that the principle of party autonomy must prevail, and that anational law should therefore govern the arbitration agreement if this accords with the intention of the parties. This approach not only corresponds with the inherently consensual and increasingly delocalised nature of international arbitration, it also ensures consistency of arbitral and judicial decision-making throughout the life of the arbitration agreement. Although anational law should not generally be applicable in the absence of intent, an exception must be made for agreements which allegedly have not come into existence, and where consensus ad idem is thus in question, in which case the parties’ agreement on an apparent choice of anational law should simply be presumed. Despite overwhelming support for the principle of party autonomy, neither international instruments nor arbitral or judicial practice give adequate weight to the parties’ intentions. It is therefore argued that a change in perspective is needed, and that arbitrators and judges alike should be guided by the parties’ choice of law, regardless of whether this choice results in the application of anational or national law to the arbitration agreement.
The first and foremost principle of law in commercial arbitration is that it is founded on the autonomy of the parties’ will.”

I INTRODUCTION

The law of international commercial arbitration is undergoing a trend towards delocalisation. Indeed, there seems to be increasing judicial support for the idea that “[a]rbitration is part of no state’s judicial system” and that an international arbitral award “is not anchored to any national legal order”. In particular, it is now well accepted that the merits of a dispute can be governed by anational rules of law instead of a municipal legal system. It is not clear, however, to what extent this is true of the arbitration agreement. While an abundance of legal research has focused on the denationalisation of awards in general, few authors so far have ventured to determine the applicability of anational law to the arbitration agreement. There may be many examples of cases and awards in which the arbitration agreement was held to be governed by anational law, but little principled analysis has been conducted on whether this practice is even desirable. The following paper seeks to find an answer to this question. It should be noted, however, that it is confined to the proper law of the arbitration agreement and will not address matters such as capacity or formal validity.

The argument here put forward is that, due to the crucial importance of party autonomy, anational law should (only) govern the arbitration agreement if this accords with the parties’ intention. However, an exception must be made for agreements which allegedly have not come into existence, and where consensus ad idem is thus in question, in which case the parties’ agreement on an apparent choice

3 Sté PT Putrabali Adyamulia v Est Epices, 29 June 2007, French Cour de Cassation.
of an national law should simply be presumed. Despite overwhelming support for the principle of party autonomy, neither international instruments nor arbitral or judicial practice give adequate weight to the parties’ intentions. It is therefore argued that a change in perspective is needed, and that arbitrators and judges alike should be guided by the parties’ choice of law, regardless of whether this choice results in the application of an national or national law.

II THE ARBITRATION AGREEMENT AND ANATIONAL LAW

A The Distinctive Nature of the Arbitration Agreement

As the cornerstone of arbitration, the arbitration agreement records the consent of parties to resolve their disputes through arbitration. It commonly takes the form of an arbitration clause in a contract, stipulating that all disputes arising from or under the contract must proceed to arbitration. It is not, however, a mere contractual clause whose existence is entirely dependent on the validity of the main contract. If this were the case, a party would be able to divest the arbitral tribunal of its jurisdiction, and thereby rob the arbitration clause of all practical value, simply by claiming that the contract was invalid. In order to prevent such tactics, the arbitration clause is generally treated as separable, or juridically autonomous, from the contract in which it is contained. The effect of this autonomy is that the invalidity of the main contract does not invalidate the arbitration clause unless it can be shown to be specifically affected. The separability of the arbitration clause has

5 McLachlan, above n 4, 16-008; Redfern, above n 4, 1-06.
6 McLachlan, above n 4, 16-011-16-012; Redfern, above n 4, 3-31.
also had the effect of generating greater judicial support for the principle of Kompetenz-Kompetenz. This doctrine enables arbitrators to decide on their own jurisdiction, delaying judicial interference with the arbitral process to a later stage in the proceedings.

In light of this jurisdictional function, it becomes immediately apparent that the arbitration agreement and its underlying contract are conceptually different. While the arbitration clause operates as a gateway to arbitration, thus conferring a mélangé of procedural and substantive rights and obligations, the main contract provides the subject-matter of the arbitration. It is therefore removed from the sphere of national courts and placed within the exclusive jurisdiction of the arbitrator as soon as an agreement to arbitrate is validly concluded. The arbitration agreement itself, on the other hand, is subject to rulings by courts and tribunals alike. Its juridical purpose is to bridge the divide between judges and arbitrators, creating a privately concluded but publicly enforceable award.

Because an arbitrator’s jurisdiction is contingent on the validity, scope and interpretation of the arbitration agreement, the law that is used to decide these

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9 See generally Park, above n 8.
matters – the “proper law of the arbitration agreement” – can be of decisive importance.\textsuperscript{13} The validity or scope of an arbitration agreement may be challenged in numerous ways. A party may dispute that an arbitration clause encompasses a particular type of claim, such as a tort as opposed to a contractual claim,\textsuperscript{15} that it is valid despite allegations of illegality, fraud or mistake,\textsuperscript{16} or that it was even formed or incorporated into the contract in the first place.\textsuperscript{17} The formal validity of arbitration agreements and the parties’ contractual capacity are separate, albeit similarly important issues which are governed by their own applicable laws and thus beyond the scope of this paper.\textsuperscript{18}

Due to the concept of separability, the main contract and the arbitration clause are not necessarily governed by the same law.\textsuperscript{19} It is also evident that both judges and arbitrators routinely determine the law applicable to the arbitration agreement, but that only arbitrators decide which law to apply to the substance of the dispute. This decision is generally not reviewed by courts.\textsuperscript{20} Whether anational law should be applicable to the arbitration agreement is therefore a question which must be analysed on its own, independently from any considerations concerning the merits of the dispute.


\textsuperscript{15} Joseph, above n 10, paras 6.10, 4.49 - 4.59; see for example Asghar v The Legal Services Commission [2004] EWHC 1803, para 21 (Ch) Lightman J; Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The “Playa Larga” and “Marble Islands”) [1983] 2 Lloyd’s Rep 171, 183 (CA); ICC Case 6519, Final Award, 1999.

\textsuperscript{16} Joseph, above n 10, para 6.51; see Harbour Assurance Co (IK) Ltd v Kansa General International Insurance Co Ltd [1993] 1 Lloyd’s Rep 455 (CA).

\textsuperscript{17} Joseph, above n 10, para 6.47.

\textsuperscript{18} McLachlan, above n 4, 16-023 – 16-027.

\textsuperscript{19} Ibid, 16-012.

\textsuperscript{20} Ibid, 16-061.
**B What is Anational Law?**

This paper employs the term “anational law” in a comprehensive manner to refer to three categories of law that are not of national origin: lex mercatoria, public international law and religious law. However, most of the discussion will be dedicated to the role of lex mercatoria, which has been defined as “a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.”  

Lex mercatoria therefore does not derive its binding force from state authorities, but from its recognition as an “autonomous norm system” by states and the business community.

Because of its diffuse and fragmented nature, lex mercatoria is often conceptualised as a method of decision-making rather than a limited list of predetermined principles. If existing principles of lex mercatoria do not provide an answer, the arbitrator turns to a comparative analysis of national legal systems, seeking to find a principle that is shared by a substantial number of states. If no common approach has crystallized across jurisdictions, the arbitrator must decide which rules of law are the most appropriate or else “invent” a new solution. Hence, this process of applying – or indeed creating - lex mercatoria can consist of various elements, namely customs and usages, uniform laws and codifications, and general principles of law.

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23 Lando, above n 22, 752.
25 Gaillard, above n 24, 63; Lando, above n 23, 753.
26 Lando, above n 22, 752-3.
Due to the procedural character of arbitration agreements, most rules of law applicable in this context are likely to be broad contractual principles like good faith, estoppel and pacta sunt servanda. However, it would be wrong to say that there are no specific rules of lex mercatoria that could be relevant to arbitration agreements. The UNIDROIT Principles for International Commercial Contracts 2004 (UNIDROIT Principles) contain detailed rules on the formation and validity of contracts. For example, article 2.1.14 on “terms deliberately left open” could be used to uphold an arbitration agreement that is pathologically uncertain, and article 3 on the validity of contracts could help to determine whether an arbitration agreement should be avoided because of vitiating factors such as mistake.

A transnational rule of law that is particularly relevant in the context of arbitration agreements, and which will therefore be used as an illustration throughout this paper, is the group of companies doctrine. This doctrine is often relied upon in arbitral practice to extend an arbitration agreement to a party that is not named in the agreement, but that is related to the signatory company. It has its origin in the International Chamber of Commerce (ICC) award Dow Chemical France v Isover-Saint-Gobain (Dow), in which the Tribunal held that a parent and a sister company

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28 Lando, above n 22, 749-752.
29 See Goldman, above n 21, 116; see also Andrew Sykes “The Contra Preferentem Rule and the Interpretation of International Commercial Arbitration Agreements – the Possible Uses and Misuses of a Tool for Solutions to Ambiguities” (2004) 8 VJ 65, 73.
31 Wühler, above n 30, 554.
32 Cf Goldman, above n 21, 116.
should be joined to the proceedings because they played an important part in the conclusion, performance and termination of the contracts. The Tribunal based its decision on the “common intent of the parties”, taking into account relevant trade usages and “economic reality”.

While most municipal legal systems allow the extension of contracts to non-signatories in some circumstances, the terms on which this is to occur have not yet converged into a comprehensive set of uniform laws. In this multitude of differing national laws, a general principle of law must form the lowest common denominator. The doctrine is thus largely synonymous with the principle of good faith, necessitating a factual inquiry into the parties’ “common intent”. While decision-makers are free to base their decision on factors that, in their opinion, reflect sufficient intent to arbitrate, they are clearly required to apply the doctrine as an exception to the principle of privity of contract. Mere membership of a group of companies is not sufficient, and the non-signatory’s involvement in the contractual dealings has to be sufficient to rebut the presumption that only signatories are parties to a contract. It is therefore not surprising that, as a generalized version of national laws, the group of companies doctrine has been rejected in many jurisdictions as

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37 Dow, above n 36, 134, 137
38 See Daniel Busse “Privity to an Arbitration Agreement” (2005) 8(3) Int’l ALR 95, 101.
40 See for example ICC Case 9517, Interim Award, May 2000 in (2005) 16(2) ICAB 80, para 47, referring to Adams v Cape Industries plc [1990] 1 Ch 433.
forming part of their respective legal systems.\textsuperscript{43} Indeed, it would be nonsensical to replace detailed laws on the role of non-signatories with the fundamental principle underlying these laws. This should not be confused, however, with the doctrine’s status as lex mercatoria, which can hardly be contested in light of its general character.\textsuperscript{44}

Other sources of anational law are public international law, which may apply to arbitration agreements between states and private parties,\textsuperscript{45} and religious law, that is principles of law pertaining to a well-established system of belief.\textsuperscript{46} Sharia law, for example, allows the unilateral revocability of arbitration agreements.\textsuperscript{47} However, these two forms of anational law do not require further discussion in the context of this paper, which is almost exclusively focused on lex mercatoria.


\textsuperscript{44} Accepted for example by Blessing, above n 14, 22; Marc Blessing “International Arbitration Procedures” (1989) 17 Int’l Bus Lawyer 408, 413; Jarrosson, above n 39, 218; Yves Derains “L’Extension de la Clause d’ Arbitrage aux Non-Signataires – La Doctrine des Groupes de Société” in Marc Blessing (ed) \textit{The Arbitration Agreement – Its Multifold Critical Aspects} (ASA Special Series No 8 Swiss Arbitration Association, December 1994) 241, 242.


\textsuperscript{47} Kosheri, above n 46, 495.
C The Arbitration Agreement and Judicial Intervention

In order to analyse the feasibility of applying a national law to the arbitration agreement, it is first necessary to examine the role of courts in determining its applicable law. More specifically, it is important to outline the different stages of the arbitral process at which courts are potentially required to decide this issue.

The first opportunity for a national court to rule on the validity of an arbitration agreement arises where a party seeks to go to court in spite of the agreement, contesting its validity, and the opposing party requests a stay of these proceedings. A finding that the arbitration agreement is valid ordinarily results in a court referral to arbitration. Courts may also be asked to make a declaratory preliminary determination of the tribunal’s jurisdiction once arbitral proceedings have been instituted. However, due to the principle of Kompetenz-Kompetenz, a judge should generally defer a ruling on this issue until the tribunal itself has had a chance to consider it.

Once an arbitral tribunal has rendered an award, a party may apply to the court of the seat to have it set aside on jurisdictional grounds. Such an application

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48 Convention on the Recognition and Enforcement of Arbitral Awards 1958 (New York Convention), art II(3); Arbitration Act 1996 (UK), s9; Nouveau Code de Procédure Civile 1981 (NCPC) (France), art 1458; LDIP (Switzerland), art 7; McLachlan, above n 4, 16-066; Catherine Kessedjian “Court Decisions on Enforcement of Arbitration Agreements and Awards” (2001) 18(1) Journal of International Arbitration 1, 2.


51 See Kessedjian, above n 48, 8.
would usually be granted if the tribunal’s award exceeded the scope of the arbitration agreement or if the arbitration agreement was invalid.  

Lastly, parties can challenge an award on jurisdictional grounds in the courts of the enforcing country. 53 In accordance with article V(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), recognition of an award may be refused if the arbitration agreement was invalid or the award exceeded the scope of the arbitration agreement. 54 Although courts commonly reject enforcement of awards that were set aside by the seat, some countries such as France do not adhere to this practice. 55

As there are three different stages in the arbitral process at which courts can intervene on jurisdictional grounds, and two stages at which there is potential for more than one country’s courts to become involved, the risk of inconsistent rulings is very real. Judges may not only disagree with arbitrators, but also with each other, resulting in parallel proceedings and unenforceable, or only partially enforceable, awards. The main cause of such conflicting decisions is certainly the lack of any harmonized standards of review, and the judges’ and arbitrators’ propensity to apply different systems of law. 56 Choice of law rules vary across countries, and arbitrators are not usually subject to these rules at all. 57 As material differences in applicable laws are thus bound to lead to divergent outcomes, any inquiry into the applicability of anational law to the arbitration agreement must be made against this background of conflict of laws.

52 See for example Arbitration Act, s67; LDIP, art 190(2); NCPC, art 1504.
53 McLachlan, above n 4, 16-095.
54 New York Convention, art V(1)(a).
56 Graffi, above n 50.
For example, a situation could arise in which company A may wish to benefit from an arbitration agreement entered into between its parent company B and the opposing party C. A commences arbitral proceedings against C, but C has itself instituted judicial proceedings in another country against A in the meantime. A claims that the arbitration agreement is governed by lex mercatoria, and that, because of its extensive involvement in the contractual dealings with C, the requirements of the group of companies doctrine are fulfilled. C, on the other hand, relies on English law, arguing that the tribunal does not have jurisdiction over the dispute because A is not expressly identified in the contract.\(^\text{58}\) Clearly, a string of conflicting decisions can arise from this situation, such as the tribunal confirming its jurisdiction based on the group of companies doctrine, the court seized of the dispute refusing a stay of proceedings based on English law, the court of the seat confirming the tribunal’s decision and the enforcing country’s court applying English law and thus refusing recognition of the award. The issue of whether a national law should be applicable to arbitration agreements is therefore of more than mere academic interest.

III THEORETICAL FOUNDATIONS AS GUIDING PRINCIPLES

In order to better understand the nature of the arbitration agreement, and thus determine whether a national law can and should be applicable to it, it is first necessary to examine the theoretical foundations of arbitration law.\(^\text{59}\) As views on arbitration vary greatly depending on the jurisprudential perspective that is adopted,\(^\text{60}\) the present issues will be analysed based on the principles that seem to best reflect the current state of arbitration law. This paper will thus proceed on a

\(^{58}\) See Contracts (Rights of Third Parties) Act 1999 (UK), ss1 and 8.


number of core assumptions concerning the juridical nature of arbitration. Despite this jurisprudential framework, however, one should be aware that the prescriptive value of such theories is of limited assistance unless complemented by a consideration of wider policy issues.\footnote{Cf Horacio A Grigera Naón \textit{Choice of Law Problems in International Commercial Arbitration} (JCB Mohr Siebeck, Tübingen, 1992) 18.}

\section{Common Theories of Arbitration}

\subsection{Jurisdictional theory}

According to the jurisdictional theory, international commercial arbitration is a product of national sovereignty.\footnote{F A Mann "Lex Facit Arbitrum" (1986) 2 Arbitration International 241; Ch N Fragistas "Arbitrage Etranger et Arbitrage International en Droit Privé" (1960) 49(1) Rev. Crit. de Droit Int'l Privé 1, 2-4, but see 15-16; cf Campbell McLachlan "The New Hague Sales Convention and the Limits of the Choice of Law Process" (1986) 102 LQR 591, 594, 616 ["The New Hague Sales Convention"].} It derives its legitimacy from the national legal system within which it takes place, which both regulates the arbitral process and gives effect to the agreement to arbitrate.\footnote{Mann, above n 62, 244.} Arbitrators therefore gain their powers from a national system of law, and not the will of the parties.\footnote{Hong-Lin Yu and Laurence Shore "Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives (2003) 52 Int'l & Comp L Q 935, 965.} As the role of party autonomy is confined to the initial choice of arbitration, which would be meaningless unless given effect to by a national legal system, an agreement to arbitrate is only binding because a state recognises the parties’ mutual consent to do so.\footnote{Mann, above n 62, 245-6.} While local judges and arbitrators are able to apply foreign law to both the merits and the procedure, they must do so in accordance with the conflict of law rules that are in place at the seat.\footnote{Ibid, 248; see McLachlan "The New Hague Sales Convention", above n 62, 618; cf Fragistas, above n 62, 9.}

\footnote{\textit{Choice of Law Problems in International Commercial Arbitration} (JCB Mohr Siebeck, Tübingen, 1992) 18.}
arbitri itself. In any case, decision-makers are certainly bound to apply municipal legal systems because national law is not perceived as a legitimate source of law.

A frequent criticism of the jurisdictional theory is that too little emphasis is placed on the arbitration agreement. While it is undoubtedly true that international arbitration could not function without the support of national legal systems, the theory overemphasises the judicial elements of arbitration and downplays its contractual origin.

2 Contractual theory

This criticism certainly does not apply to the contractual theory, which perceives the arbitration agreement to be the origin of the arbitral process. The parties are thus free to control the proceedings, and the arbitrator’s jurisdiction is entirely dependent on their will. The influence of states is negligible. Contractual theorists embrace the concept of party autonomy, which is inextricably linked with the consensual nature of arbitration. Just as parties are free to submit their disputes to arbitration, they have the right to choose the law applicable to their contract.

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67 Mann, above n 62, 248.
69 Klein, above n 60, 257-8.
72 See Klein, above n 60, 259-1.
3  **Hybrid (or mixed) theory**

The hybrid theory adopts a more balanced approach to arbitration, combining elements of both the jurisdictional and the contractual theory.\(^\text{76}\) While arbitration originates in the parties’ agreement to arbitrate, it also depends on national legal systems for recognition and support.\(^\text{77}\) Arbitration is therefore only possible within a municipal legal framework, which is why proponents of this theory advocate that party autonomy be acknowledged subject to the laws of the seat.\(^\text{78}\)

Although the hybrid theory has been accepted by many as achieving a vital compromise, it does not offer an answer to issues that could be equally viewed as contractual or jurisdictional in nature.\(^\text{79}\) The exact limits of party autonomy, and particularly the law applicable to the arbitration agreement,\(^\text{80}\) are therefore open for discussion: “The more that contractualist arguments are favoured, the greater the inclination will be to uphold party autonomy, and vice versa.”\(^\text{81}\)

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\(^{77}\) Carabiber, above n 76, 152; Sauser-Hall, above n 76, 523.

\(^{78}\) See Carabiber, above n 76, 155.


\(^{80}\) See Carabiber, above n 76, 194-6; Sauser-Hall, above n 76, 561-2.

\(^{81}\) Barraclough, above n 79.
According to autonomous theorists, the nature of arbitration can only be understood by looking at its use and purpose.\textsuperscript{82} It is therefore neither jurisdictional nor contractual, nor a mix of the two. National laws are only relevant in so far as they contribute to the effectiveness of arbitration, whereas party autonomy is a practical necessity - but not a “defining factor” - to advance the institutionalisation of arbitration.\textsuperscript{83} As the autonomous theorists seek to detach arbitration from national legal systems, believing in an autonomous, “supra-national” legal order, they fully embrace the concept of anational law.\textsuperscript{84}

However, although the arbitration agreement is seen as central to this denationalised arbitral system, the autonomous theory cannot adequately explain the role of states in determining the agreement’s validity.\textsuperscript{85} It may well be argued that this should be done by reference to anational law,\textsuperscript{86} but realistically the enforcement of arbitration agreements (and awards) requires some basic national regulation.\textsuperscript{87} It is thus national legal systems, and not an autonomous order, that have the final say on whether an arbitration agreement should be governed by anational law.\textsuperscript{88}

B National Law and Party Autonomy: A View Distilled from Theory

The main themes of arbitration theory must now be pieced together to determine whether national law ought to be applicable to the arbitration agreement. Seeking to find a solution that closely reflects the most common perceptions of international arbitration, the following discussion aims to reconcile the jurisdictional, contractual and autonomous (or institutional) elements of arbitration law. It is argued that the issue is to be resolved in line with party autonomy where possible, deferring to legitimate state interests and bearing in mind the aims and functions of arbitration. This argument is based on the widespread acceptance of party autonomy as a “connecting factor” and the practical advantages that are associated with this rule. It is recognised, however, that the international arbitral system depends upon state support, that the parties’ choice of law derives legitimacy from the state, and that states might have a valid interest in limiting party autonomy. On balance, this paper advocates an approach that reduces state interference with party autonomy to a mostly supportive role because this seems to reflect the “single prevailing philosophy in international arbitration.”

1 Party autonomy

The doctrine of party autonomy is central to the contractual theory. The freedom of parties to choose the law by which their commercial relations are to be governed is a widely recognised, almost universal principle, and has in fact been

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89 cf Baraclough, above n 79, text at note 25.
90 Lando “Contracts”, above n 73, para 81.
referred to as “a general principle of law recognized by civilized nations.” The law on international arbitration has clearly followed this trend towards maximising party autonomy. To determine the law applicable to the arbitration agreement, courts generally treat the intention of the parties as a “connecting factor,” introducing some uniformity into otherwise differing choice of law rules across states. Similarly, arbitrators will follow the parties’ intentions either by virtue of the choice of law rules applicable at the arbitral seat or by giving direct effect to the parties’ agreement.

There are two main reasons why parties to an international contract should enjoy party autonomy. The first is freedom of contract, which is the foundation of a functioning market economy and allows parties to regulate their contractual arrangements according to their economic needs and interests. For example, parties may wish to subject their arbitration agreement to anational law to achieve the highest possible degree of neutrality in their contractual arrangements. The second reason is that party autonomy increases legal certainty because, by choosing an applicable law, parties are in a better position to predict the outcome of possible disputes. For instance, they could choose to apply transnational law as evidenced in the UNIDROIT Principles, thereby enhancing the enforceability of the arbitration agreement by virtue of the favor contractus approach inherent in these principles, and avoiding the application of unwanted parochial laws. Party autonomy also simplifies the judge’s and the arbitrator’s task of determining the applicable law, saving time and resources.

94 See generally Lew, above n 57, 81; Lew “Achieving the Dream”, above n 12, 181; Bockstiegel, above n 74.
95 Lando “Contracts”, above n 73, para 81; Thrope, above n 92, 19; see McLachlan, above n 4, 16R-001; New York Convention, art V(1)(a); David, above n 76, 220.
96 See Lando “Contracts”, above n 73, para 61.
98 Carbonneau, above n 4, 1192-3; Nygh, above n 92, 2; Lando “Contracts”, above n 73, para 62.
99 Nygh, above n 92, 2; Lando “Contracts”, above n 73, para 61; Lew, above n 57, 80.
100 Berger, above n 27, 947.
101 Thrope, above n 92, 19.
Jurisdictional limits to party autonomy

Because “there are tentacles that float down from the international arbitration domain to the national jurisdiction, to assure recognition of the agreement to arbitrate,” the principle of party autonomy cannot exist in a vacuum, but must be sanctioned by a national legal system. Now that the need for efficient and effective arbitration has become apparent, courts and law-makers are increasingly willing to limit state interference in the arbitral process, substituting regulation, supervision and control with an emphasis on facilitation, cooperation and support. Accordingly, as it seems to be in the interest of states to give effect to party autonomy, courts should only ignore the parties’ choice of law if conflicting greater interests are at stake. It is therefore necessary to determine how arbitration agreements that are governed by national law could affect states’ interests. These interests can probably be broadly classified as public policy considerations, which constitute a universally accepted limit on party autonomy.

The main justification for circumscribing party autonomy in this way is that states should restrict the application of national law to arbitration agreements if this

102 Lew “Achieving the Dream”, above n 12, 182.
106 Cf Park “The Lex Loci Arbitri”, above n 12, 29.
clashed with notions of fairness and justice between the parties.\textsuperscript{108} In particular, a state might not wish to recognise “the right of the parties to select a non-existent or inappropriate or irrelevant or incompetent law to govern their relations.”\textsuperscript{109} As an enforceable arbitration agreement eliminates the parties’ right to seek judicial relief,\textsuperscript{110} one might contest the ability of “irrelevant or incompetent laws” to control parties’ access to courts. However, it is important to emphasise that the arbitral process, and indeed the very core of this analysis, is predicated on the principle of party autonomy. It would therefore be overly protectionist, if not paternalistic, to restrict the free and independent choice of commercial actors to what is deemed “relevant and competent” law.\textsuperscript{111} Indeed, it is difficult to see how applying anational law could be perceived as unfair if the court or the arbitrator was simply acting on the parties’ mandate.\textsuperscript{112} States should therefore “let parties who have chosen anational law ‘sleep in the bed’ they have made for themselves.”\textsuperscript{113} The argument carries much greater weight, however, in the absence of consent, an issue that will be addressed below.\textsuperscript{114}

3 Institutional concerns

According to autonomous theorists, the law of international arbitration should be shaped by its use and purpose.\textsuperscript{115} As has been demonstrated above, consistency in the enforcement of arbitration agreements is one of the greatest challenges in international commercial arbitration.\textsuperscript{116} It is therefore crucial that, as

\begin{itemize}
  \item See Carbonneau, above n 4, 1205.
  \item Lew, above n 57, 79.
  \item See David, above n 76, 209-210; Carbonneau, above n 4, 1200; Reuben, above n 104, 847; see Busse, above n 38, 95.
  \item Carbonneau, above n 4, 1194; see Lew “Achieving the Dream”, above n 12, 190; cf Kenneth R Davis “When Ignorance of the Law is no Excuse: Judicial Review of Arbitration Awards” (1997) 45 Buff L Rev 49, 128.
  \item See Garnett, above n 91, text at note 61.
  \item Nygh, above n 92, 196.
  \item See Part IV Principle vs Practicality: Anational Law and Real Consent.
  \item See Part III A 4 Autonomous theory.
  \item See Part II C The Arbitration Agreement and Judicial Intervention; Lando “Contracts”, above n 73, 5.
\end{itemize}
far as is practicable, courts and tribunals apply the same law to avoid divergent outcomes. Because party autonomy is the most commonly accepted choice of law rule, and thus offers the best means of achieving harmonised decision-making, courts should not override the parties’ choice of anational law. This argument is particularly valid if one considers that the arbitrator’s responsibility is to the parties and not the state. A tribunal would therefore only disregard the parties’ choice if it was more concerned about the enforceability of the award than giving effect to the parties’ will.

However, giving effect to a choice of anational law may not always lead to consistency due to the often uncertain and vague nature of anational law. Consequently, it is vital that, in order to arrive at consistent interpretations of anational law in respect of individual arbitration agreements, the enforcing judges be reluctant to depart from the tribunal’s understanding of the law. In choosing anational law to govern their agreement, the parties are prepared for – or might indeed intend - a discretionary assessment of their agreement to arbitrate. Deferring to the arbitrator’s interpretation can thus be part and parcel of party autonomy, and would be analogous to a wide understanding of Kompetenz-Kompetenz, based on which the parties can empower the tribunal to have the final say on a jurisdictional issue. However, a more restrictive approach would be advisable if the parties’ agreement on anational law was in dispute.

117 Lew, above n 57, 78-9.
119 See Jarvin “The Sources and Limits”, above n 118, 53; Petrochilos, above n 55, 44; cf Bernardini, above n 104, 118.
120 See Smit, above n 87, 633.
121 See Smit, above n 87, 633.
122 Cf Park, above n 8, 63-4, 72-80; see Part IV Principle vs Practicality: Anational Law and Real Consent.
4 Conclusion

On balance, there are neither jurisdictional nor institutional reasons that could justify interfering with party autonomy on this particular issue. On the contrary, parties should be free to choose any law or rules of law to govern their agreement to arbitrate, be they of national, international or transnational origin. This approach is not only consistent with the recognition of arbitration as an inherently consensual and voluntary act;\textsuperscript{123} it also acknowledges trends of denationalisation, based on an autonomous understanding of international arbitration, by recognising the existence and legitimacy of anational law.\textsuperscript{124}

C Party Autonomy as a Prerequisite for Anational Law

The flipside of this emphasis on party autonomy is the question of whether anational law should only apply on the basis of express or implied intent. In other words, why should parties not be taken to have waived their right to rely upon a municipal legal system when they have failed to choose an applicable law?\textsuperscript{125} It is the particular nature of anational law which requires intention to be present, and which militates against the assumption that anational law would best serve the expectations of parties who failed to agree on an applicable legal system. In essence, the dynamic nature of anational law would leave judges and arbitrators with a degree of discretion that would be rather disconcerting in the absence of intent.\textsuperscript{126}

\textsuperscript{123} See Carbonneau, above n 4, 1192.
Proponents of lex mercatoria argue that it leads to greater predictability and neutrality than national law, which is rigid, parochial and not adapted to the needs of the international business context.\textsuperscript{127} However, as has been discussed above, this flexibility and adaptability is often synonymous with a wide scope for interpretation.\textsuperscript{128} The group of companies doctrine, for example, relies on a factual inquiry into the “common intent” of the parties, which clearly demands a considerable degree of discretion. Therefore the choice is often between a well-defined national legal standard,\textsuperscript{129} which might have been moulded to suit the needs and values of a particular country, and a widely accepted rule of law whose generality necessitates largely discretionary decision making.\textsuperscript{130} In fact, some authors have likened the use of lex mercatoria to deciding disputes \textit{ex aequo et bono} or as \textit{amiable compositeur},\textsuperscript{131} both concepts that are reliant on intent.\textsuperscript{132}

Although this discretionary approach has been branded as “law-making” and “social engineering”,\textsuperscript{133} many parties have faith in the ability of the arbitrator to come to a commercially sensible and fair decision. However, this confidence cannot be presumed in any way.\textsuperscript{134} Many parties would prefer the agreement to be governed by laws that are much clearer and that have been created in accordance with


\textsuperscript{129} Sandrock “Extending the Scope”, above n 128, 169.


\textsuperscript{133} Sandrock “Extending the Scope”, above n 128, 180; see also Lando “The Applicable Law”, above n 93, 110.

legislative processes, even if they were influenced by local perceptions. It should also be remembered that the determined national law will rarely be wholly unconnected to the parties.\textsuperscript{135}

Another important consideration is that, by applying anational law "in default", the main contract and the arbitration agreement would be governed by different laws more frequently than is currently the case. The implications of this can be illustrated by the groups of companies doctrine, which could lead to conflicting decisions with respect to the arbitration agreement and the main contract if applied in the absence of intent. The doctrine could confer jurisdiction on the tribunal to hear all the parties' claims, but the law applicable to the merits might not necessarily lead to a joinder of the parties to the substantive dispute.\textsuperscript{136} While this risk will always be present due to the principle of separability, it is greatly reduced if traditional choice of law rules are followed which often result in the same law being applied to the contract and its arbitration clause.\textsuperscript{137}

The conclusion to draw from this analysis is that anational law should not govern the arbitration agreement because of its inherent virtues, but solely to give effect to party autonomy. The next important question is therefore: What constitutes party autonomy?

\textbf{D \hspace{1cm} What is Party Autonomy?}

In order to give practical meaning to a choice of anational law, it is necessary to determine what is meant by party autonomy. The following discussion provides a brief summary of the varying shades of intent.

\textsuperscript{135} See McLachlan, above n 4, 16-020-16-021.

\textsuperscript{136} See Gravel, above n 41, 523.

\textsuperscript{137} See Part III C D What is Party Autonomy.
It is clear that, subject to any factors negating mutual consent, an express choice by the parties, in the form of a choice of law clause in an arbitration agreement stipulating the law applicable to the arbitration agreement itself, is the ideal example of party autonomy. However, some authors believe that recognition of the parties' express choice of law is only legitimate insofar as the chosen law is capable of validating the contract. Giving effect to an invalidating choice of law is seen as irreconcilable with the common intent of the parties to enter into a legally binding agreement. Based on the truism that parties wish to enter into a valid contract, this rule of validation seeks to explain away the parties' choice as a mistake and thus expose it as being contrary to the parties' real intentions. In essence, it is argued that the parties' expressed intent cannot reflect the parties' "real" intent if the stipulated law was to invalidate a contract that was intended to be valid.

It is not disputed that the rule of validation may override the parties' express intention in exceptional circumstances. Such circumstances would usually arise if

140 See Weinberger, above n 103, 625.
141 Ehrenzweig “Contracts”, above n 139, 992.
143 See Kramer, above n 142, 331 (see note 571); Dicey, above n 139, 668 (cited in “Conflict of Laws: ‘Party Autonomy’ in Contracts” (1957) 57 Colum L Rev 553, 571.
the agreement did not satisfy idiosyncratic formal requirements of the chosen law, but was formally valid under another law connected to the agreement. The arbitration agreement would then be subjected to the validating law for the purposes of this particular issue of formality. The remainder of the agreement, however, would still be governed by the chosen law. As issues of formal validity are beyond the scope of this paper, there is no need to consider the role of the validation rule in much detail. However, it is not inconceivable that circumstances might arise in which the parties’ choice of law is contrary to the parties’ “real” intention to conclude a substantively valid arbitration agreement. In particular, this could happen “when the ground for holding the agreement unenforceable was apparent when the contract was made”.

In spite of these concessions to the rule of validation, it must still be true that, generally, the parties’ express choice of law coincides with party autonomy, even if the stipulated law invalidates the contract. First, the assumption that the parties were mistaken as to their choice of law is inherently problematic. Could their agreement on the potentially invalidating provision not have been equally misguided? There would therefore be no reason to honour this provision over the choice of law clause. More importantly, however, parties choose an applicable law to manage all the unforeseen events and unknown facts that form part of their contractual relationship. When a ground of invalidity becomes apparent after the contract has been formed, a party can then invoke an invalidating rule of the expressly chosen law to plead the contract’s unenforceability. In other words, the party can argue that it would not have wished to enter into the contract had it been aware of the now apparent circumstances. In this situation, the parties’ chosen law would directly correspond to the parties’ intentions. However, the importance of the parties’ express choice can also be justified on a more general level. In submitting

144 Kramer, above n 142, 332.
145 Ibid; Nygh, above n 92, 176; Jaffey, above n 139, 6-7, citing Royal Exchange Assurance Corporation v Vega [1902] 2 KB 384.
146 Kramer, above n 142, 333.
147 See Vaugher, above n 139, 233; Ehrenzweig “Contracts”, above n 139, 991-3.
148 Kramer, above n 142, 332.
their agreement to a particular legal system, the parties intend to make all the laws of that system applicable to their contractual relationship and to form a contract in accordance with those terms.\(^{149}\) The contract is thus intended to stand and fall with the prescribed provisions, and there is little room to infer the contrary.

Although courts and arbitrators might be tempted to investigate the “real” intention of the parties when the invalidating law seems to have been chosen inadvertently, the practical implications of such an exception would by far outweigh the certainty and predictability that a consistent application of the parties’ stipulated law could provide.\(^{150}\) It is therefore preferable to give effect to the parties’ express choice of law and disregard the limited merit that the rule of validation holds in principle.\(^{151}\)

2 \textit{Implied choice of law}

In the absence of a choice of law clause, it is common practice for arbitrators and judges to assess whether the parties made an implied choice of law. The prevailing position is that an express choice by the parties as to the law governing the merits of the dispute amounts to an implied choice of law applicable to the


\(^{150}\) Kramer, above n 142, 332; see Vaughter, above n 139, 233.

\(^{151}\) Kramer, above n 142, 332.
arbitration agreement. Indeed, the proper law of the main contract will usually also be the proper law of the arbitration agreement.

An exception to this presumption arises where the arbitration agreement would be unenforceable under the law applicable to the merits. The rationale for this exception is that the parties to the arbitration could not have intended to apply an invalidating law to their arbitration agreement. If there are two possible legal solutions, the parties are thus assumed to have chosen the one in favour of the validity of the agreement. Evidently, the rule of validation is much more accepted in the context of implied than express intent. This is not surprising as there is nothing in the contract to expressly contradict the notion that parties customarily intend to enter into valid agreements. In theory, this presumption of validity based on implied intent can only be triggered if the parties knew that the agreement was invalid under the law that would have been implied but for the invalidity. Usually, this knowledge is simply presumed. To avoid unnecessary interference with the

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154 Jaffey, above n 139, 4; Sayed, above n 103, 627; Smit, above n 87, 637; Thomas, above n 13; Hamlyn & Company v Talisker Distillery [1894] AC 202.


156 Kramer, above n 142, 332; Nygh, above n 92, 119.

157 Jaffey, above n 139, 4; British South Africa Company v De Beers Consolidated Mines Ltd [1910] 2 Ch 502, 513 (CA) Cozens-Hardy MR (reversed on different grounds); see Nygh, above n 92, 119.

parties' real intention, the validating principle should at most operate as a rebuttable presumption.

In summary, courts and arbitrators commonly give effect to the express and implied intention of the parties, which are both expressions of party autonomy. If no such intention can be identified, courts tend to apply objective tests based on reasonableness or the legal system with the "closest and most real connection". Anational law should therefore be applicable if expressly or impliedly chosen by the parties. In the words of Marc Blessing, to:

...honour and respect the choice(s) of law (or: of rules of law) made by the parties ... was, and still is, the demand of the time! The almost global recognition of this very fundamental principle must be seen, valued and appreciated as one of the most significant milestones achieved after decades of evolution; it is one of the milestones by which national laws are being measured...

IV PRINCIPLE VS PRACTICALITY: ANATIONAL LAW AND REAL CONSENT

Having established that the application of anational law is premised on the parties’ express or implied intent, it is now important to consider how an alleged lack of "real consent" can impinge on this conclusion. This problem is not new and has already received considerable attention by scholars in the context of private international law.

To fully understand the significance of this issue, it is worth

159 See Nygh, above n 92, 119.
160 Zhang, above n 149, 524.
161 Thomas, above n 13.
162 Blessing, above n 14, 14-15.
reiterating that arbitration is based on consent: an award is not considered binding unless it is the result of a valid agreement between the parties to submit their dispute to arbitration. As a corollary to this requirement, the validity of the agreement is determined in accordance with the parties’ choice of law as expressed or implied in the agreement. What law should be applied, however, if one party denies to have ever validly consented to the agreement?

A Voidable Agreements

It is important to distinguish two categories of material invalidity: an agreement that never came into existence and an agreement that is merely voidable. The former category of cases is concerned with formation of the contract, whereas the latter category deals with factors that vitiate consent, such as fraud, duress and mistake. Despite the many conflicting opinions in this area of law, there seems to be an overarching consensus that, if a contract is claimed to be voidable, the terms of the contract will operate for as long as the contract has not been avoided. This necessarily includes a choice of law clause. It will thus be the proper law of the agreement which determines whether the agreement is indeed voidable.

Applying anational law to a voidable arbitration agreement is therefore not in conflict with the requirement of party autonomy. While it is true that the claim can result in the invalidity of the whole agreement, retrospectively destroying the mutual consent of the parties, it is merely the quality of the parties’ consent which is in issue. There is thus a fundamental difference between a claim that the agreement did not

164 See Jaffey “Offer and Acceptance”, above n 163, 604; but as to common law mistake and duress in England, see Libling, above n 163, 178.
166 See Mackender v Feldia AG [1967] 2 QB 590 (CA), 603-4 per Diplock LJ, 605 per Russell LJ; Harris, above n 165, 252, 255; Thomson, above n 163, 654; Briggs, above n 163, 198; Libling, above n 163, 173, 178-9.
come into existence and a claim that the agreement should not have come into existence, or that it should not be enforced. At least in legal terms, the parties initially consented to the agreement, making it only logical that the proper law be used to assess the effect of any vitiating factors. This approach was also commonly applied to determine the separability of the arbitration agreement from the main contract, but seems to have been replaced by a more functional approach in most jurisdictions.

B Void Agreements

A different reasoning process must apply when the very existence of the agreement is in doubt. Here, the essence of the problem is that, by applying the purportedly proper law of the agreement, a judge or arbitrator would presuppose the very issue to be determined. It is evidently a “circular exercise” to give effect to the parties’ alleged intent, or even to the law most closely connected to the agreement, when consent to the agreement itself is contested. It is also generally perceived as being unfavourable to the claimant who might not have had any say in choosing the applicable law, or even any of the contractual terms that would be used to determine the legal system with the closest connection. Hence, applying the proper law to a claim of *non est factum* cannot usually be justified on

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170 Thomson, above n 163, 651, Niboyet, above n 165, 29; see also McClelland v Trustees Executors & Agency Co (1936) 55 CLR 483, 492-3 (HCA) Dixon J.
the basis of party autonomy, or even on the basis of the parties’ reasonable expectations. 171

It would therefore only be consistent with the argument of this paper to conclude that a national law should not be used to determine the existence of an arbitration agreement. Unfortunately, however, there does not seem to be a viable alternative to applying the “presumed proper law”, that is the law that would be the applicable law if there was a valid contract between the parties. 172 Applying the law of the seat, for example, would be equally unprincipled because the selection of the seat would again be based on the presumed intent of the parties. Despite its shortcomings, the presumed proper law approach constitutes the most practical solution. 173 It achieves a relatively high degree of consistency by allowing judges and arbitrators to refer to well established choice of law rules (in this case based on presumed party autonomy), and it also circumvents the need to distinguish between issues of voidability and voidness, the classification of which can vary across jurisdictions.

In some instances, it is conceivable that a choice of law clause might have been properly agreed to although the arbitration agreement itself never came into existence. 174 This idea is premised on the separability of the choice of law clause

171 Non est factum is a “plea that an agreement … mentioned in the statement of case was not the act of the defendant”: Oxford Dictionary of Law (Oxford University Press, 2003) 331; see Briggs, above n 163, 198.


174 Cf Societe Pia Investments v Societe L & B Cassia, above n 167.
from the contract in which it is included.175 Of course, separability should not be an unfamiliar concept in the context of international arbitration. Just as the validity of the arbitration agreement is not dependent on the existence of the main contract within which it is contained, the validity of the choice of law clause would not be affected by the voidness of the arbitration agreement. Insofar as parties do not generally agree on individual contractual clauses, but on the contract as a whole, it has been widely acknowledged that the separability doctrine is not based on logic but necessity.176 However, this does not mean that such separate consent could never occur in practice.177 For example, a party might claim that an arbitration agreement never came into existence because its terms were too uncertain. However, the parties could still have reached a clear agreement on the choice of applicable law, which would then be used to determine whether the arbitration agreement was sufficiently certain. In this scenario, the application of an national law would be justified because it would be based on party autonomy.

Although it is thus possible, in some cases, to determine the existence of the arbitration agreement in accordance with its true proper law, giving effect to the separability of the choice of law clause would only continue the vicious cycle of applicable law.178 After all, the validity of the choice of law clause would need to be determined in accordance with law – the law applicable to the choice of law clause itself.179 While there might be some merit in simply applying the choice of law whose validity is to be established,180 differentiating between the existence of an arbitration agreement and an agreement on the applicable law is a futile exercise as

175 Nygh, above n 92, 84; Lew, above n 57, 72; see Briggs, above n 163, 198; Jaffey “Offer and Acceptance”, above n 163, 605, 607, 614; see Otto Kahn-Freund “Jurisdiction Agreements: Some Reflections” (1977) 26 Int’l & Comp LQ 825, 840; Mackender v Feldia, above n 166, 602 Diplock LJ; Lando “Contracts”, above n 73, para 81; see Rabel, above n 139, 369; but see Harris, above n 165, 252-4.


177 See Harris, above n 165, 253-4; Nygh, above n 92, 92.

178 Briggs, above n 163, 196; see Klein, above n 60, 262-263.

179 See Jaffey “Offer and Acceptance”, above n 163, 606; Lando “Contracts”, above n 73, para 81.

long as there is no reasonable alternative to the presumed proper law approach in the absence of an independently valid choice of law.

A variant of the presumed proper law approach would be to ignore the presumed intent of the parties as to choice of law and simply apply the objective proper law, the law with which the arbitration agreement has its closest and most real connection. \(^\text{181}\) As has been indicated above, this approach is equally unsound in theory. \(^\text{182}\) Since the closest connection test is based on the terms of the agreement, the law so determined would still be derived from an agreement whose existence is merely presumed. \(^\text{183}\) Although this approach has the benefit of avoiding the application of a national law, it would lead to greater uncertainty than the (subjective) proper law approach: First, judges and arbitrators might differ in their assessment on whether there was a consensual choice of law, based on either the mere voidability of the agreement or a separate valid agreement on the governing law. Some would thus resort to the law chosen by the parties, whereas others would find it necessary to apply the objective proper law. Second, the identification of the objective proper law is often not clear-cut. In contrast, as long as the parties’ presumed intent is reasonably clear, it will point to one applicable system of law. \(^\text{184}\)

\[C\] Separability of the Arbitration Agreement

For the sake of completeness it should be added that the juridical autonomy of the arbitration agreement could also lead to the application of a national law despite a lack of real consent. Because the arbitration agreement is considered to be


\(^{182}\) Contrast Thomson, above n 163, 653; see The Heidberg, above n 172, 307 Diamond QC; Mackender v Feldia, above n 166, 602 Diplock LJ.

\(^{183}\) Park “Rules and Standards”, above n 169, 444; Libling, above n 163, 170; Jaffey “Offer and Acceptance”, above n 163, 608; see generally Mann “The Proper Law”, above n 173, 67-8; Mann “A Rejoinder”, above n 173, 599; cf Klein, above n 60, 263.

\(^{184}\) See Mann “The Proper Law”, above n 173, 69.
independent from the main contract, a claim that the main contract never came into existence will generally not have an impact on the existence of the arbitration agreement.\(^\text{185}\) In most cases involving an argument of *non est factum*, however, the separate validity of the arbitration agreement amounts to a legal fiction,\(^\text{186}\) which in turn validates the parties’ choice of law.

### D Summary

In conclusion, the presumed proper law approach should apply for want of a better alternative.\(^\text{187}\) It is difficult to accept that, although anational law should only be applied to give effect to party autonomy, the existence of an arbitration agreement could be determined by reference to a presumed choice of anational law. Yet this seems to be exactly what is required to produce a workable solution. The practical benefits associated with this approach, such as ease of use, certainty and consistency, are sufficient to outweigh the lack of principle. After all, concepts like separability and Kompetenz-Kompetenz\(^\text{188}\) have already demonstrated that it is not unusual for the law of international arbitration to trade principle for practicality.\(^\text{189}\)

This conclusion has serious implications for the theoretical legitimacy of the group of companies doctrine, which of course deals with the question of whether the parties intended to be bound by the agreement, and thus whether the agreement ever came into existence between the party and the non-signatory.\(^\text{190}\) Considering the factual context in which the doctrine is typically applied, it is unlikely that the party and the non-signatory would have specifically agreed on lex mercatoria as the

\(^{185}\) s 7 Arbitration Act; Société Omenex SA v M Michel X, above n 168; Poudret and Besson, above n 43, 136; Derains and Schwartz, above n 168, 86; cf Fiona Trust & Holding Corp v Privalov, above n 7; Derains and Schwartz, above n 168, 112.

\(^{186}\) See Redfern, above n 4, 5-31; Schwebel, above n 176, 11; Reuben, above n 104, 845-6, 879.

\(^{187}\) Cf Yackee, above n 172, 95.

\(^{188}\) Cf ICC Arbitration Rules, art 6(2) and commentary in Derains and Schwartz, above n 168, 78-80, 84-5, especially the following case there cited: Ceskolovenska Obchodni Banka AS (Cekobanka) v Chambre de Commerce Internationale, 8 October 1986, Tribunal de Grande Instance de Paris.


\(^{190}\) Derains, above n 44, 247.
governing law and thereby made a valid choice of law in an otherwise allegedly nonexistent arbitration agreement. Consequently, the doctrine is inextricably linked with an alleged lack of consent and could not, in principle, be used to determine the non-signatory issue. However, because the “bugbear of the plea of non est factum” has been shown to constitute a necessary exception to principle, the doctrine would still apply as part of a presumed choice of lex mercatoria.

V THE STATUS OF ANATIONAL LAW AS THE LAW GOVERNING THE ARBITRATION AGREEMENT IN CURRENT PRACTICE

Having concluded that anational law should govern the arbitration agreement as long as this corresponds with either the real, or, in cases on formation, with the presumed intent of the parties, these findings are now to be compared with current practice in international commercial arbitration. As well as considering the role of international instruments and the relevant trends in arbitral practice, the remainder of this paper will focus on three of the most important arbitration countries: England, France and Switzerland.

A International Instruments

Not surprisingly, most international or institutional arbitration rules clarify the role of anational law in determining the substantive applicable law, but remain silent on whether anational law can also be applied to arbitration agreements. The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, for example, do not give any guidance on what law should govern the arbitration agreement. Similarly, article II(3) of the New York Convention requires contracting states to refer parties to arbitration unless the agreement is “null and void, inoperative or incapable of being performed”, but does not specify an

191 Mann “A Rejoinder”, above n 173, 599.
192 See UNCITRAL Rules 1976, art 21(1).
applicable choice of law rule. The role of anational law in either of these two cases remains unclear.\textsuperscript{193}

While article V(1)(a) of the New York Convention goes a little further than that and provides that, for the purposes of recognition and enforcement, the validity of an arbitration agreement is to be determined in accordance with the parties’ chosen law or the law of the country where the award was made, it is not clear whether anational law constitutes “law” within the meaning of this provision. In the context of substantive choice of law, it has been suggested that a reference to the applicable “law” would still allow arbitrators to select mere “rules of law”, thus inviting them to apply transnational principles of law to the substance of the dispute where appropriate.\textsuperscript{194} By analogy, a tribunal or court intent on applying anational law to the arbitration agreement probably would not feel too constrained by narrowly worded choice of law rules.

Nevertheless, there have been rare instances in which “silent” arbitration rules have been construed as giving rise to the option of applying lex mercatoria. A daring interpretation has been offered in relation to articles 6 and 17 of the ICC Rules.\textsuperscript{195} While article 6 enables the tribunal to rule on its own jurisdiction, article 17 provides that it “shall apply the rules of law which it determines to be appropriate”, and that, in doing so, it “shall take account of . . . the relevant trade usages”. Although article 17 is expressly limited to determining the law governing the merits of the dispute, courts and tribunals have used the reference to trade usages in paragraph 17(2) in combination with article 6 to apply the group of companies doctrine to the arbitration agreement.\textsuperscript{196} A mere reference to the ICC Rules in an

\textsuperscript{193} But see Rhone Mediterranee Compagnia Francese Di Assicurazioni e Riassicurazioni v Achille Lauro (1983) 712 F 2d 50, 53.

\textsuperscript{194} Gaillard, above n 24, 71; but see McLachlan, above n 4, 16-055; McLachlan “The New Hague Sales Convention”, above n 62, 617; for an interpretation of ‘rules of law’, see Derains and Schwartz, above n 168, 235-7.


The arbitration agreement seems to have been sufficient to free a tribunal from the "obligation" to apply a national set of laws.\textsuperscript{197}

This approach has been widely criticised.\textsuperscript{198} Not only is article 17(2) concerned with the law applicable to the merits,\textsuperscript{199} it also requires arbitrators to consider trade usages \textit{in addition to} the applicable law derived from art 17(1).\textsuperscript{200} It is therefore difficult to accept the reasoning that, by choosing arbitration under the ICC Rules, the parties "[increase] the scope of the applicable law" and invite the tribunal to exclusively apply trade usages to the arbitration agreement.\textsuperscript{201} In any case it is unclear whether the group of companies doctrine can qualify as a "trade usage" or whether it should more properly be classified as a general principle of law.\textsuperscript{202} While it is submitted that both "trade usages" and "general principles of law" are elements of lex mercatoria,\textsuperscript{203} the concept of "trade usages" is clearly not congruent with "general principles of law" (or lex mercatoria, for that matter).\textsuperscript{204} It has been argued, for example, that the term "trade usages" denotes internal or implied contractual obligations that are incorporated into the parties' agreement by virtue of established

\textsuperscript{197} See XSAL, YSAL, A v Z Sari, above n 196; ICC Case No 5485, above n 196; Dow Chemical France v Isover-Saint-Gobain, above n 36; Fouchard, above n 7, 237; Habegger, above n 39, 400.\textsuperscript{198} Habegger, above n 39, 400-1; Busse, above n 38, 101; Jean-François Poudret "Un Statut Privilégié pour l’Extension de l’Arbitrage aux Tiers?" (2003) 22(2) ASA Bulletin 390, 393-394 ["Un Statut"]; Otto Sandrock "Die Aufweichung einer Formvorschrift und Anderes Mehr – das Schweizer Bundesgericht Erlässt ein Befremdliches Urteil" (2005) 1 SchiedsVZ 1, 5 ["Die Aufweichung"]; but see Gaffney, above n 35, 8; Fouchard, above n 7, 236.\textsuperscript{199} Wilske, above n 43, 79; Jean-François Poudret "L’Extension de la Clause d’Arbitrage: Approches Française et Suisse" (1995) J du Droit Int’l 893, 899 ["L’Extension"]; Poudret and Besson, above n 43, para 255; see Derains and Schwartz, above n 168, 113.\textsuperscript{200} Derains and Schwartz, above n 168, 243.\textsuperscript{201} XSAL, YSAL, A v Z Sär, above n 196, para 5.3.\textsuperscript{202} See Derains and Schwartz, above n 168, 242-244; cf Habegger, above n 93, 401; Sandrock "Die Aufweichung", above n 198, 7-9.\textsuperscript{203} Lando, above n 22; Berthold Goldman "La Lex Mercatoria dans les Contrats et l’Arbitrage Internationaux: Réalité et Perspectives" (1979) J du Droit Int’l 475, 485-7; but see Derains and Schwartz, above n 168, 243.\textsuperscript{204} See Fouchard, above n 7, 805; Emmanuel Gaillard "La Distinction des Principes Généraux du Droit et des Usages du Commerce International" in \textit{Etudes Offertes à Pierre Bellet} (Litec, Paris, 1991) 203 ["La Distinction"].
commercial practices.\textsuperscript{205} The group of companies doctrine, however, may more closely resemble a general principle of law,\textsuperscript{206} which is more likely to take the form of an external legal standard.\textsuperscript{207}

The London Court of International Arbitration (LCIA) is one of two institutions whose arbitration rules seem to expressly permit arbitrators to apply anational law to arbitration agreements.\textsuperscript{208} Article 22.1(c) gives arbitrators the jurisdiction to ascertain “the law(s) or rules of law applicable to ... the Arbitration Agreement” (emphasis added). Similarly, article 59(c) of the World Intellectual Property Organization (WIPO) Rules directs the tribunal to apply the “law or rules of law” that the parties have chosen or that it determines to be appropriate.\textsuperscript{209} However, neither the LCIA Rules nor the WIPO Rules seem to restrict the applicability of anational law to instances of party choice.

\section*{B Arbitral Practice}

In order to appropriately assess the role of anational law in tribunal decisions on arbitration agreements, this discussion should be prefaced by a brief description of the arbitrator’s jurisdictional position. In accordance with the most commonly accepted principles of arbitration as outlined above, the arbitral tribunal’s authority derives from the common will of the parties, and the exercise of its jurisdiction is tolerated and supported by the seat of the arbitration.\textsuperscript{210} Its main obligations are thus to the parties, making the parties’ intentions and the enforceability of awards its main concern.\textsuperscript{211} As its jurisdiction does not depend on any discernible forum, it is

\begin{thebibliography}{99}
\bibitem{205} Derains and Schwartz, above n 168, 243; cf UNIDROIT Principles, art 1.9; see Filip de Ly \textit{International Business Law and Lex Mercatoria} (Elsevier, The Netherlands, 1992) 134-164, 209.
\bibitem{206} Cf Gaillard “La Distinction”, above n 204, 208.
\bibitem{207} See Derains and Schwartz, above n 168, 243.
\bibitem{208} London Court of International Arbitration (LCIA) Arbitration Rules 1998.
\bibitem{210} See Redfern, above n 4, 1-11; Petrochilos, above n 55, 28, 44.
\bibitem{211} See Jarvin “The Sources and Limits”, above n 118, 53; Lew, above n 57, 81; Petrochilos, above n 55, 44; cf Bernardini, above n 104, 118.
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not bound by the choice of law rules of any country. In theory, it is thus free to apply any domestic or international choice of law rules – or any substantive law – that it considers appropriate, as long as this accords with its two chief aims of honouring party autonomy and enforceability. Traditionally, however, arbitral tribunals most often refer to the choice of law rules of the seat.

A particularly noteworthy award is Dow, the first award to formulate the principles that later became known as the group of companies doctrine. The claimants, four entities within the Dow Chemical Group, had brought arbitral proceedings against Isover-Saint-Gobain, but only two of them had formally entered into contractual arrangements with the company. Both contracts included arbitration clauses which provided for the settlement of disputes in accordance with French law. Isover maintained that French law should also be used to determine the effects of the arbitration clauses. In its interim award on jurisdiction, the distinguished Tribunal rejected this argument and concluded that, due to the parties’ reference to the ICC Rules, the arbitration clauses should be treated as autonomous from any national law. In particular, the arbitrators believed that article 6 gave tribunals the authority to determine their own jurisdiction without necessarily applying any national law. The question of jurisdiction should thus be decided “by reference to the common intent of the parties..., such as it appears from the circumstances that surround the conclusion and characterize the performance and later the termination of the contracts in which they appear, [taking] into account...

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212 Lew, above n 57, 223-225; see Blessing “Choice of Law”, above n 57, 438; see McLachlan, above n 4, 16-058.
215 Dow Chemical France v Isover-Saint-Gobain, above n 36.
216 Ibid, 132.
217 Ibid, 133.
218 The arbitrators were Prof Pieter Sanders, Prof Berthold Goldman, Prof Michel Vasseur.
219 Above n 36,133.
220 Ibid, 134.
usages conforming to the needs of international commerce." 221 Because the two non-signatory companies had been involved in various stages of the contractual relationship, the Tribunal held there was implied consent to arbitrate by all the parties. 222

Critics of the award have rightly pointed out that article 6 of the ICC Rules does not seek to make the arbitration agreement autonomous from all national laws. 223 In fact, article 6 merely invokes the principle of Kompetenz-Kompetenz and fails to indicate any applicable law. This cannot be construed as an authorisation by the parties to apply an national law. As the tribunal’s jurisdiction derives from the will of the parties, the tribunal is required to apply the law chosen by the parties. 224 Neither the arbitration clause nor the main contract in Dow reflected a (presumed) intention by the parties to subject their agreement to an national law. Instead, French law should have been applied to the question, which may have led to a different result at that time. 225

Although there was therefore some risk that the award would be unenforceable if a court applied the (presumed) proper law, 226 no such inconsistencies eventuated due to the French Court of Appeal’s approval of the Tribunal’s approach. In addition to article 6, the Court of Appeal relied on the reference to “relevant trade usages” in article 17(2), an approach which has already been criticised above. 227 The group of companies doctrine has since then formed part of French arbitration law. 228

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221 Ibid, 134.
223 Poudret and Besson, above n 43, para 255; Poudret "L'Extension", above n 199, 898; Sandrock, above n 35, 949; see also Peterson Farms Inc v C&M Farming Ltd, above n 152, paras 44-45

Langley J; but see Gaffney, above n 35, 8; Fouchard, above n 7, 236.
224 Peterson Farms Inc v C&M Farming Ltd, above n 152, para 45 Langley J.
225 See Gravel, above n 41, 519.
226 Ibid, 519.
227 See Part V B Arbitral Practice
It must be emphasised that Dow is only one of many awards involving non-signatory issues. Because tribunals have generally adopted very different approaches to determine the scope, validity and existence of arbitration agreements, there is no consistent practice on the group of companies doctrine. Some arbitrators seem to reject the applicability of the group of companies doctrine to the arbitration agreement generally, and others refer to the doctrine in the absence of a presumed intent, following in the footsteps of Dow. Fortunately, however, there are also arbitral decisions in which the issue was decided in accordance with the presumed proper law of the agreement.

C England

As the Arbitration Act 1996 does not contain a choice of law rule for arbitration agreements, the governing law has to be determined based on common law principles. Unless the parties have made an express choice of law, an English judge will usually apply the law governing the merits of the dispute. Where the parties have not chosen a law to govern the substance, however, the lex arbitri is also commonly applied. It is generally accepted that, in the absence of an express or implied choice by the parties, the applicable law is the law with which the arbitration agreement has the closest connection. As will be seen in the following discussion,

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229 Poudret and Besson, above n 34, para 254.
230 See for example ICC Case 10818, Partial Award in (2005) 16(2) ICAB 94.
231 See for example ICC Case 6519, above n 15.
232 See for example ICC Case 9719, Interim Award in (2005) 16(2) ICAB 83; ICC Case 10758, Final Award, in (2005) 16(2) ICAB 87.
235 See McLachlan, above n 4, 16-017-16-018; Fouchard, above n 7, 223.
it is not completely certain what status is accorded to a national law under English common law rules.

1 **Peterson Farms v C&M**

In *Peterson Farms v C&M*, Langley J was confronted with an award that was based on the group of companies doctrine.  C&M, an Indian company, and Peterson, a company incorporated in Arkansas in the USA, entered into a sales agreement under which C&M agreed to buy live poultry from Peterson. C&M then mated the birds in order to sell on the hatching eggs and chicks to other C&M group entities. The poultry, however, was infected with an avian virus. Based on an arbitration clause in the sales agreement, C&M initiated arbitration proceedings in London. The Tribunal awarded damages of US $5,524,769, consisting of losses sustained by C&M and other C&M group entities, despite Peterson’s claims that the it lacked jurisdiction over the entities’ allegations. The Tribunal ruled that, because of the parties’ failure to choose a law governing the arbitration agreement, it was entitled to base its decision on the group of companies doctrine. It subsequently concluded that it had jurisdiction to entertain all the claims even though the entities were not named as parties to the sales agreement, arguing that Peterson knew of the “integrated nature of the poultry business” and that it therefore intended to enter into an agreement with all C&M entities, and not just the signatory party. Peterson challenged the award on jurisdictional grounds under section 67 of the Arbitration Act 1996.

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236 *Peterson Farms Inc v C&M Farming Ltd*, above n 152; see commentary: Woolhouse, above n 35; Wilske, above n 43.
237 *Peterson Farms Inc v C&M Farming Ltd*, above n 152, paras 2-4 Langley J.
238 Ibid, paras 5-7 Langley J.
239 Ibid, above n 152, para 10, Langley J.
240 Ibid, para 41 (para 99 of the award).
241 Ibid, para 1 Langley J.
Langley J criticised the Tribunal’s approach as being “seriously flawed in law” because it had failed to apply the law of a particular jurisdiction.242 Instead of deriving an answer from “the common intent of the parties”, it was necessary to identify the law applicable to the arbitration agreement and to determine whether, under that law, the third party entities were bound by the agreement.243 He then concluded that Arkansas law was the applicable law because it had been expressly chosen to govern the interpretation of the sales agreement.244 Arkansas law, however, did not include the group of companies doctrine,245 and there was no evidence that supported a finding of agency between the signatory party and the other C&M entities.246 The award was therefore set aside to the extent that it awarded damages to the non-signatory entities.247

Two aspects of this case are particularly noteworthy. First, the Court’s approach is consistent with the presumed proper law approach advocated in this paper.248 Although Langley J merely referred to the Tribunal’s failure to apply the “proper law”, he clearly applied the law that would have been applicable had there been an agreement between the entities and Peterson, that is Arkansas law. Second, the case contains an interesting reference to section 46 of the Arbitration Act, which sets out the rules applicable to the substance of the dispute. Section 46(1)(a) provides that a dispute be decided “in accordance with the law chosen by the parties”, whereas section 46(1)(b) permits the application of “other considerations” as long as “the parties so agree”. C&M submitted that the Tribunal’s approach was consistent with this provision, but Langley J rejected the argument on the basis that “there was no relevant agreement within [section 46(1)(b)]”, and that “it was (a) not

242 Ibid, para 42 Langley J.
243 Ibid, para 45 Langley J.
244 Ibid, para 44 Langley J.
245 Ibid, para 59 Langley J; Wilske, above n 43, 81.
246 Peterson Farms Inc v C&M Farming Ltd, above n 152, para 63 Langley J.
247 Ibid, para 68 Langley J.
(b) which should have been applied".249 It followed that Arkansas law was the law chosen by the parties to govern the merits of the dispute, and that this law would also govern the arbitration clause. What is notable is that Langley J did not generally reject the possibility that, if the parties had agreed on “other considerations” to govern their sales agreement, this agreement could have translated into an implied choice of law for the arbitration clause.

It is also interesting that, by implication, Langley J acknowledged that an English court would apply the group of companies doctrine if it formed part of the national applicable law.250 A few years later, the High Court in *Dallah v The Government of Pakistan* (*Dallah*) was confronted with this very situation.251 The parties to an arbitration agreement fell to be determined in accordance with French law as the law of the place where the award had been made.252 French law does not only incorporate the group of companies doctrine, but, as will be explained in more detail below, tends to free the arbitration agreement from all national law, subjecting it to “transnational law” instead.253 Although the Court applied the doctrine in substance, treating it as a French rule of law and not even alluding to its anational origin,254 it did not expressly exclude the possibility of also applying transnational principles.255 In light of the Judge’s conclusion that section 103(2)(b) of the Arbitration Act excluded the principle of *renvoi*256 and his later comment that the reference to transnational principles constituted a French conflict of laws rule,257 it is surprising that “transnational law” was not ruled out as generally inapplicable.258 It seems that the better view would have been to regard such principles as forming part

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249 *Peterson Farms Inc v C&M Farming Ltd*, above n 152, para 46 Langley J.
250 Ibid, para 59 Langley J.
252 Ibid, para 58 Aikens J; New York Convention, art V(1)(a).
253 See Part V D France; *Dallah v The Government of Pakistan*, above n 251, paras 92-93 Aikens J.
254 *Dallah v The Government of Pakistan*, above n 251, paras 85-88 Aikens J, referring inter alia to the French Court of Appeal decision in *Dow Chemical France v Isover-Saint-Gobain*.
255 Ibid, paras 126 and 105 Aikens J.
256 Ibid, para 78 Aikens J.
257 Ibid, para 93, but see para 78 Aikens J.
258 Ibid, para 126 and 105 Aikens J.
of French law, just as Aikens J had effectively done in relation to the group of companies doctrine.

2 Halpern v Halpern

Any hope that English courts might take up Langley J’s tentative acknowledgment of anational law was subsequently destroyed in Halpern v Halpern (Halpern). This case dealt with a dispute that arose between four brothers under the will of their father. The parties were Orthodox Jews and thus agreed to have their dispute resolved by an ad hoc Beth Din consisting of three rabbis, “according to principles of halachah.” After hearings in Switzerland and England, a compromise agreement was reached. When his brothers refused to pay the settlement money, the plaintiff commenced an action for summary judgment, claiming damages for repudiation of the compromise agreement. As part of their defence, the brothers seemed to contend that the arbitration agreement was invalid under Jewish law because two siblings had not been party to it. Although Clarke J did not accept that the validity of the arbitration agreement could be of any relevance to this case, he proceeded to determine whether Jewish law could govern the arbitration agreement.

Following Amin Rasheed Shipping Corporation v Kuwait Insurance Co (Amin Rasheed), Clarke J concluded that, under common law, the proper law of the arbitration agreement had to be the law of a country. Hence, Jewish law, although

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259 See Part V D France; cf Wilske, above n 43, 81.
260 See Dallah v The Government of Pakistan, above n 251, para 128 Aikens J.
261 Halpern v Halpern [2006] 2 Lloyd’s Rep 83 (QB) Clarke J.
262 Ibid, para 8 Clarke J.
263 Ibid, para 58 Clarke J.
264 Amin Rasheed Shipping Corporation v Kuwait Insurance Co [1984] AC 50, 65 (CA) Diplock LJ; Halpern v Halpern, above n 261, para 52 Clarke J; but see Deutsche Schachtbaur- und Tiefbohrgeellschaft mbH v Ras Al-Khaimah National Oil Co [1990] 1 AC 295, 312, 312-316 (HL) Sir Donaldson MR; Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd [1990] 1 WLR 153, 166-167 (CA) Lloyd LJ, both cases were later distinguished on the basis that they were
the law governing the merits of the dispute,\textsuperscript{265} could not be the proper law. A similar observation was made in \textit{Dalla v Bank Mellet}, where Hobhouse J commented that it was necessary to identify a municipal legal system as the proper law of an arbitration agreement between private parties.\textsuperscript{266} This was later criticized in an arbitration case between a state and a private party, where it was decided that “under English private international law principles, the agreement to arbitrate may itself be subject to international law.”\textsuperscript{267} The Court argued that it had long been recognized that substantive issues could be decided according to international law, and that section 46(1)(b) of the Arbitration Act 1996 went even further by permitting the dispute to be resolved in accordance with non-legal considerations.\textsuperscript{268} It could not find a valid reason not to apply the same rules to arbitration agreements, at least in respect of international law.

\textit{Al Midani v Al Midani (Al Midani)} is another case that casts doubt on the status of the traditional view in relation to arbitration agreements.\textsuperscript{269} Dealing with the scope of an arbitration agreement between the heirs to an Islamic will, Rix J decided that the agreement was governed by “Shari'a law or such law as modified by Saudi law.”\textsuperscript{270} This case was addressed by both the High Court and the Court of Appeal in \textit{Halpern}. However, as the defendants merely relied on \textit{Al Midani} to establish the applicability of Jewish law to the compromise agreement, Clarke J did not note the decision’s implications regarding arbitration agreements. Instead, he held that insofar as \textit{Al Midani} treated Sharia law as the proper law of the arbitration agreement it was incompatible with the later decision in \textit{Shami Bank of Bahrain v Beximco Pharmaceuticals Ltd (Shamil)} and thus could not stand.\textsuperscript{271} Shamil however

\textsuperscript{265} Halpern v Halpern, above n 261, paras 8, 46 Clarke J.
\textsuperscript{266} Dalla v Bank Mellet [1986] QB 441, 456 (QB) Hobhouse J.
\textsuperscript{267} Occidental Exploration & Production Co v Republic of Ecuador [2006] QB 432, para 33 (CA) Mance L.J.
\textsuperscript{268} Ibid, para 33 Mance L.J.
\textsuperscript{269} Al Midani v Al Midani [1999] 1 Lloyd’s Rep 923 (QB) Rix J.
\textsuperscript{270} Ibid, 930 Rix J.
\textsuperscript{271} Halpern v Halpern, above n 261, paras 72-74 Clarke J; Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd [2004] 2 Lloyd’s Rep 1 (CA).
was solely concerned with the effect of the Convention on the Law Applicable to Contractual Obligations 1990 (Rome Convention), which expressly excludes arbitration agreements.\(^{272}\)

As the Court of Appeal in *Halpern* did not have to deal with the law applicable to the arbitration agreement, it expressly distinguished *Al Midani* on that basis.\(^{273}\) Waller LJ went on, however, to consider Rix J’s judgment in light of common law principles, possibly intending to bring it into line with *Amin Rasheed*. Referring to the use of the phrase “a branch of foreign law” to describe Sharia law, he inferred that Rix J was aware of the conventional view which required the applicable law to be the law of a country.\(^{274}\) He also pointed out that non-national laws could be used legitimately to interpret parties’ obligations under an arbitration agreement and that in this case Sharia law was merely used in this way.\(^{275}\) However, only the governing law determines substantive matters such as the validity of the agreement.\(^{276}\) It should be noted that Rix J did not attempt to justify his decision by reference to this incorporation doctrine.

As a result of *Halpern*, English courts might refuse to apply non-national law to arbitration agreements even if expressly or impliedly chosen by the parties. The case could therefore affect choice of law rules generally, as an implied choice of law will potentially have to be ignored if the substance of the dispute is governed by non-national law. This could lead to both unfair and inconsistent decision-making. The impact of this decision remains to be seen. As Clarke J observed himself that the validity of the arbitration agreement did not affect the outcome of the case,\(^{277}\) one might even argue that his comments on this issue were strictly obiter. However, his

\(^{273}\) *Halpern v Halpern* [2007] EWCA Civ 291, para 24 (CA) Waller LJ.
\(^{274}\) Ibid, para 24, Waller LJ.
\(^{276}\) *Halpern v Halpern*, above n 273, para 34 Waller LJ.
\(^{277}\) *Halpern v Halpern*, above n 261, para 84 Clarke J.
view impliedly received support in the Court of Appeal’s discussion of Al Midani and has since then been applied in another case.\textsuperscript{278} It therefore seems that, although English courts seem to firmly espouse the principle of party autonomy when determining the law governing the arbitration agreement,\textsuperscript{279} they are unlikely, at least at this point in time, to acknowledge anational law as a valid choice of law.

\textbf{D France}

In many ways, French jurisprudence stands out as an innovative approach to international arbitration.\textsuperscript{280} One of its most remarkable features is that, instead of relying on a choice of law approach to determine the validity or existence of arbitration agreements, French courts apply to the so-called substantive validity method, combining elements of the contractual and autonomous theory.\textsuperscript{281}

\textbf{1 Municipalité de Khoms El Mergeb v Société Dalico}

In 1993, the French Cour de Cassation delivered its seminal decision in Municipalité de Khoms El Mergeb v Société Dalico (Dalico), embracing a novel view on the juridical nature of arbitration agreements.\textsuperscript{282} It concerned a dispute between a Libyan town council and a Danish company, who were party to a works contract that provided for ICC arbitration in Paris. The contract was governed by Libyan law. The council argued that, under Libyan law, the arbitration agreement was invalid because it had not been signed. It seems that the contract included a Libyan jurisdiction clause, but that it also made reference to a document of tender, 

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\textsuperscript{278} Halpern v Halpern, above n 273, para 24 Waller LJ; Sayyed Mohammed Musawi v RE International (UK) Ltd, above n 264, paras 19 and 81-82 Richards J.  
\textsuperscript{279} see Lando “Contracts”, above n 73, 14.  
\textsuperscript{281} Mehren, above n 124, 28.  
\textsuperscript{282} Municipalité de Khoms El Mergeb v Société Dalico, 20 December 1993, Cour de Cassation; see also earlier decision Menicucci v Mahieux, 13 December 1975, Cour d’Appel de Paris. 
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which in turn referred to an unsigned document providing for arbitration. When the Libyan party contested the existence and validity of the arbitration agreement in an action to set aside the award, the French Cour de Cassation decided that, instead of applying French or Libyan law to the question, it would not base its decision on any national law. More specifically, the Court declared that the existence and the effectiveness of the arbitration agreement were to be determined according to the common intention of the parties, subject only to mandatory rules of French law and international public policy. It then concluded that the arbitration clause had substituted the jurisdiction clause and that it had been the parties’ common intention to choose arbitration in Paris over litigation in Libya.

Based on the approach adopted in Dalico, the arbitration agreement is autonomous in two ways. 283 First, it is autonomous from the main contract within which it is included,284 which is of course the French equivalent to the widely accepted separability doctrine. Second, however, the arbitration agreement is also free from any municipal legal system. 285 The effect of the substantive validity rule is thus to separate the arbitration agreement from any applicable law other than French mandatory laws and international public policy. 286 Consequently, because the arbitration agreement exists independently from national laws, questions as to its formation or validity do not have to be resolved in accordance with such laws.

Nonetheless, the arbitration agreement cannot be described as a “contrat sans loi”, 287 but is governed by French principles of international public policy – principles that, according to French law, are fundamental in an international

284 See Gosset v Carapelli, above n 7.
285 Fouchard, above n 7, 217.
287 Fouchard, above n 7, 218.
These substantive rules derive from comparative law and international commerce, but apply by virtue of a French rule of law. In Sponsor v Lestrade, for example, the Court of Appeal acknowledged that the group of companies doctrine formed part of the lex mercatoria, but applied it as part of French substantive law. Although Dalico could therefore at first sight be mistaken as an illustration of the autonomous theory, French commentators have construed it in more restrictive terms. According to Gaillard, the substantive rules method does not support the complete delocalization of arbitral awards. He agrees that it is the legal order of states, and not only the will of the parties, that brings awards into existence. Yet the arbitration agreement does not derive its binding nature from one legal system alone, but from “the sum of all of the legal orders which … are willing to recognize the arbitral award”. In other words, “lex mercaturia facit arbitrum”.

Ironically, the Cour de Cassation seemed to justify its rejection of the choice of law approach on the basis of party autonomy. After all, the only decisive consideration in this case was the parties’ “commune volonté” to choose arbitration over litigation. This emphasis on the parties’ common intent has been widely criticised. Not only is it unclear how, as a rule, the common intent can be practically determined. It is also difficult to accept that the will of the parties should be put on a par with legal standards, when the very purpose of most contractual analysis is to determine the intentions of the parties. Indeed, the substantive rules method is
underpinned by a presumption of validity which is theoretically unsound.\textsuperscript{298} Gaudemet-Tallon, for example, criticises that:

\ldots un acte ne peut-être ‘en principe valable’: il n’est valable que s’il remplit des conditions de fond et de forme posées par une norme logiquement première par rapport à cet acte; ces conditions peuvent être peu sévères, elles ne sauraient être inexistantes.\textsuperscript{299}

Although the authors of \textit{Fouchard, Gaillard and Goldman on International Commercial Arbitration} emphasise that the substantive rules method does not render an arbitration agreement unassailable,\textsuperscript{300} it is clearly based on an inherent presumption of consent and, for the most part, amounts to a self-judging standard.\textsuperscript{301} It is an oversimplified version of the choice of law approach which, instead of embracing an ideal of “pure consensualism”,\textsuperscript{302} seeks to find the law the parties intended to apply in order to determine whether the parties consented to a valid arbitration agreement.\textsuperscript{303} In this instance, Libyan law might have led to the inference that the parties’ signed jurisdiction clause reflected a lack of intention to settle the dispute by arbitration, and could thus have guided the court in its assessment of the parties’ common intent. In any case, it is not self-evident why it was the parties’ “commune intention” to arbitrate when the arbitration clause was incorporated into the contract via two references and remained unsigned, yet the jurisdiction clause formed part of the signed contract.\textsuperscript{304}

In an attempt to expand on the Court’s reasoning, Gaillard argues that the traditional choice of law position would “lead to results that might be completely at

\textsuperscript{298} Romero, above n 286, 92-3; Gaudemet-Tallon, above n 291, 123.
\textsuperscript{299} Hélène Gaudemet-Tallon “Note following Municipalité de Khoms El Mergeb v Société Dalico, 26 March 1991, Cour d’Appel de Paris” (1991) Rev Arb 456: “[A] contract cannot be ‘valid in principle.’ It is only valid if it satisfies the relevant conditions as to its form and substance under a law which governs that contract; such conditions may be liberal, but they cannot be non-existent” (as translated by Fouchard, above n 7, 231).
\textsuperscript{300} Fouchard, above n 7, 231-2.
\textsuperscript{301} Poudret and Besson, above n 43, para 180; see Busse, above n 38, 101.
\textsuperscript{302} Poudret and Besson, above n 43, para 181; see Mayer, above n 283, 666.
\textsuperscript{303} Cf Société Goldschmidt v Vis et Zoom, 9 December 1955, Cour d’Appel de Paris.
\textsuperscript{304} Gaudemet-Tallon, above n 291, 122-3.
odds with the parties’ legitimate expectations.” In other words, because national laws are incapable of meeting the needs of international commercial actors, choice of law rules “may well not correspond to what the parties would have intended,” and might lead to the application of substantive rules that are better suited to a domestic context. In particular, this would be the case where national laws prescribe invalidating rules which the parties could not have been aware of or which would not have affected the parties’ consent to arbitrate. On the other hand, it is argued that the substantive rules method corresponds with the parties’ intention to detach their dispute from national legal systems. In opting for arbitration as a dispute resolution mechanism, parties have chosen to remove their arbitration agreement from any national applicable laws. In essence, the French approach therefore aims to free arbitration agreements from the constraints of national laws.

This emphasis on party autonomy is surprising because it presumes that parties are willing to forego an assessment of their arbitration agreement based on national legal standards. As has been explained above, such an assumption is inappropriate. There is simply no reason why parties should intend to have their relationship governed by an inherently vague and liberal concept like the “ordre public international”. This is particularly true when there is a dispute concerning the existence of the arbitration agreement. Moreover, the substantive validity rule as developed in Dalico seems to go so far as to override the parties’ express intention as evidenced by a choice of law clause. Even if an arbitration agreement was invalid under its chosen law, a French court would recognise and enforce the resulting award unless the agreement breached French principles of international law.

306 Fouchard, above n 7, 234.
307 Gaillard “Lex Mercatoria”, above n 305, 218; see also Baxter, above n 92, 552; but cf Mayer, above n 283, 670.
308 Molfa, above n 34, 7.
309 Poudret and Besson, above n 43, para 182.
310 See Part III C Party Autonomy as a Prerequisite for Anational Law.
311 Sandrock “To Continue Nationalizing”, above n 45, 314; see Besson and Poudret, above n 43, para 182.
312 See Part IV B Void Agreements.
313 Sandrock “To Continue Nationalizing”, above n 45, 312.
public policy. In fact, French courts are far more liberal than others in their enforcement of arbitration agreements and tend to “shield” them from “any possible claim of invalidity”. This might well compel parties to arbitrate against their will.

The Dalico decision has also been dismissed as an example of judicial imperialism because it is based on French conceptions of what constitutes the ordre public international. For example, it is difficult to see why an agreement to arbitrate between a Libyan and a Danish party should be assessed on the basis of a French rule of law. Because the French view will reflect Western notions of right and wrong, there is a real risk that the courts’ or tribunals’ understanding of the parties’ “common intent” will be culturally limited.

2 Uni-kod v Ouralkali

Following Dalico’s complete rejection of choice of law, the Cour de Cassation somewhat softened the effects of this decision in Uni-Kod v Ouralkali (Uni-Kod). Uni-Kod was a French company which had entered into an agreement with Ouralkali and three other Russian companies to jointly form a corporation. The agreement included an arbitration clause. Subsequently another contract was entered into between Uni-Kod and Ouralkali concerning financing for the purchase of resources. A dispute arose out of this latter contract, leading to an award of US$1.5 million to Ouralkali by an arbitral tribunal of the Russian Chamber of Commerce. After the Court of Appeal had granted enforcement of the award in France, Uni-Kod appealed to the Cour de Cassation on the basis that Russian law should have been applied to the arbitration agreement. Uni-Kod argued that, under Russian law, the arbitration agreement could not be incorporated into the second contract (the

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314 Graffi, above n 50, 755.
315 Ibid, 312.
317 Besson and Poudret, above n 43, para 182.
318 Uni-Kod v Ouralkali, 30 March 2004 Cour de Cassation.
contract that had led to the dispute) and that the award was therefore invalid. The Cour de Cassation dismissed this argument. Applying the substantive rules method, it decided that the arbitration clause would only be economically viable if it extended to all business relationships between Uni-Kod and Ouralkali. More importantly, however, it concluded that Russian law was not applicable because the parties had not included a choice of law clause in their arbitration agreement.

The Cour de Cassation therefore both affirmed and limited its own judgment in Dalico. Instead of subjecting all arbitration agreements to the substantive rules method, the Court now seemed to suggest that choice of law clauses should be given effect to.\textsuperscript{319} This change in direction may well have sprung from the realisation that it is difficult to promote a consensualist approach of arbitration and at the same time disregard parties’ choice of law clauses.\textsuperscript{320} However, the decision in Uni-Kod will do little to ameliorate the already mentioned shortcomings of the substantive rules method because parties do not usually include a choice of law provision in their arbitration clause.

3 Implications

An important difference between the substantive validity approach and the choice of law approach is an almost opposing understanding of party autonomy. As has been demonstrated by French case law, the substantive rules notion of party autonomy is detached from reality and does not accord with the actual intent or legitimate expectations of commercial actors. Moreover, the liberal nature of the French approach bears the risk of inconsistent decision-making across jurisdictions. For example, a French judge might stay an action brought by a non-signatory to an arbitration agreement on the basis of the group of companies doctrine. The court of the seat, however, might come to a different conclusion based on an implied choice

\textsuperscript{320} See Besson and Poudret, above n 43, para 182.
of national law and refuse to join the third party. Similarly, foreign courts may refuse to enforce awards based on invalid arbitration agreements which were however upheld by French courts. The substantive rules method can thus be summed up as the direct opposite of the solution advocated in this paper.

E Switzerland

1 Article 178(2) of the Loi Fédérale sur le Droit International Privé

The Swiss Loi Fédérale sur le Droit International Privé (LDIP) is one of only a few national pieces of legislation that expressly deal with the law applicable to arbitration agreements. In a feat of pragmatism, the choice of law rule as set out in article 178(2) follows the in favorem validitatis principle,\(^\text{321}\) setting an end to most disagreements on the applicable law:\(^\text{322}\) “... an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.”\(^\text{323}\) Because article 178(2) provides three potentially different laws to govern arbitration agreements, combining substantive rules and choice of law rules, it increases the chances that an arbitration agreement will be held to be valid.\(^\text{324}\) In fact, it is probably not uncommon that Swiss law, which prescribes very liberal conditions of validity, is used to “validate” the agreement.\(^\text{325}\)


\(^{325}\) Fouchard, above n 7, 237; cf Berger “The Relationship”, above n 27, 164.
The LDIP does not make it clear whether the arbitration agreement can only be governed by a municipal legal system.\textsuperscript{326} Interestingly, article 178(2) uses the term “droit” in referring to the applicable law, whereas article 187, which provides for the substantive applicable law, makes reference to “règles de droit”.\textsuperscript{327} This difference in terminology might indicate that only the merits of the dispute can be governed by anational law.\textsuperscript{328} However, such an approach would seem to be inherently inconsistent with the \textit{in favorem validitatis} rule, based on which the law governing the merits can also apply to the arbitration agreement. Furthermore, the choice of the term “droit” instead of “loi” could also be interpreted as including anational law.\textsuperscript{329} Most commentators thus seem to agree that parties may choose anational law to govern their arbitration agreement, be that lex mercatoria, “rules of a particular bilateral or multinational convention, or rules which are not of a legal character \textit{stricto sensu}, such as trade usages and the 1994 UNIDROIT Principles.”\textsuperscript{330}

It is not difficult to detect a strong pro-arbitration bias in this provision.\textsuperscript{331} Although it is no doubt desirable to create an arbitration-friendly environment, an unconditional espousal of the \textit{in favorem validitatis} principle is irreconcilable with the principle of party autonomy. This has already been shown above in the discussion of the rule of validation.\textsuperscript{332} Even if an arbitration agreement was invalid under the law expressly chosen by the parties, a Swiss court would still enforce the agreement as long as it conformed with either Swiss law or the law governing the merits. Similarly, Swiss law could trump the substantive applicable law as the parties’ implied choice of law. It should be noted, however, that this latter situation only arises when the invalidating law is actually the parties’ implied choice of law. As was explained above, the determination of the parties’ implied intent is

\textsuperscript{326} Habegger, above n 39, 400; but see Blessing, above n 14, 14; Poudret “L’Extension”, above n 199, 906.
\textsuperscript{327} Laurent Levy and Blaise Stucki “Switzerland: The Extension of the Scope of an Arbitration Clause to Non-Signatories” (2005) 8(1) Int ALR 5, 7; Habegger, above n 39, 400.
\textsuperscript{328} Besson and Poudret, above n 43, 260.
\textsuperscript{329} Lalive and Gaillard, above n 324, 928.
\textsuperscript{330} Blessing, above n 14, 14.
\textsuperscript{331} Fouchard, above n 7, 238.
\textsuperscript{332} See Part III D I Express choice of law.
commonly based on the presumption that the parties intended to apply the law under which their agreement is valid if there is more than one potential choice of law.

Article 178(2) is therefore limited to a partial recognition of party autonomy. Although it has been emphatically embraced as fully respecting the choice of law made by the parties,\textsuperscript{333} it is clear that the LDIP subordinates party autonomy to the validation principle. The parties’ choice of law is only given effect to if it validates the agreement, but not if it leads to its invalidity. One of the aims of this provision is clearly to avoid unnecessary challenges to the arbitration agreement.\textsuperscript{334} While such concerns should be taken seriously, it seems drastic to establish a rule that overrides party autonomy simply to curb the possibility of dilatory tactics. It is therefore likely that some Swiss awards, which derive from arbitration agreements that are invalid under their chosen law, will not be enforced in countries which place greater emphasis on party autonomy.\textsuperscript{335}

The overriding effect of the \textit{in favorem validitatis} rule on party autonomy is somewhat diminished in the context of anational law. Generally, anational law is more likely to establish the validity of the arbitration agreement than national law because it often invokes general principles of law that are interpreted generously. Hence, an express or implied choice of anational law would usually be the “validating” law and would thus be given effect to. However, there remain two situations in which article 178(2) has the potential of disregarding party autonomy in relation to anational law. First, the agreement may include an express choice of national law which would render it invalid, yet the merits of the dispute are governed by anational law which is used instead to ensure the agreement’s validity. Second, an express or implied choice of anational law may lead to the invalidity of the agreement while another law applicable under art 178(2) does not, with the result that the latter law prevails over the parties’ intention.

\textsuperscript{333} Blessing, above n 14, 14-15.
\textsuperscript{334} Lalive and Gaillard, above n 324, 929.
\textsuperscript{335} Lalive and Gaillard, above n 324, 929; Poudret “Un Statut”, above n 198, 31.
In the case Société Anonyme Libanaise, Y Société Anonyme Libanaise, A v Z Société à Responsabilité Limitée Libanaise (XSAL, YSAL, A v Z Sàrl), the Swiss Federal Tribunal was asked to decide whether a non-signatory could be made party to an arbitration agreement. The dispute arose from a construction works contract between two Lebanese companies (X and Y) and a contractor (Z). The contract included an arbitration agreement which provided for ICC arbitration in Geneva. Both the main contract and the arbitration agreement were expressly governed by Lebanese law. When Z sought to bring arbitration proceedings not only against the companies, but also against their controlling shareholder (A), A argued that it had never been a party to the contract and hence the arbitration agreement. Nevertheless, the arbitrators concluded that they had jurisdiction over all three defendants on the basis of Lebanese law and article 17(2) of the ICC Rules. As Lebanese law was treated as equivalent to French law, and article 17(2) required the tribunal to “take account of ... the relevant trade usages”, the Tribunal felt justified in applying the group of companies doctrine to determine the extent of the arbitration agreement. Based on this doctrine, the Tribunal held that A was bound by the agreement because the shareholder had participated in the negotiation, performance and termination of the contract. After the arbitrators had rendered an award in Z’s favour, A started proceedings in the Swiss Federal Tribunal to have it set aside on jurisdictional grounds.

Although the Swiss Federal Tribunal had previously rejected the application of the group of companies doctrine as part of Swiss law, it still endorsed the

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336 XSAL, YSAL, A v Z Sàrl, above n 196.
337 Ibid, 365.
339 Ibid, para 5.1.1.
340 Ibid, para 5.1.1.
341 Ibid, para 5.1.2.
arbitrators’ decision to apply it as part of Lebanese law and article 17(2). A argued that the Tribunal had failed to apply the correct provisions of Lebanese law because, instead of using “internal” Lebanese law, it had referred to the body of Lebanese law that was dedicated to international arbitration. While A accepted that this latter part of Lebanese law was the same as French law and that, under French law, the group of companies doctrine had been correctly applied to make it a party to the agreement, it insisted that both the contract and the arbitration clause were governed by “internal” Lebanese law, that neither “internal” Lebanese law nor Swiss law allowed an extension of the arbitration agreement in these circumstances, and that there was therefore no valid arbitration agreement between Z and A for the purposes of article 178(2). The Court rejected this argument and upheld the Tribunal’s decision to apply an national law as part of a (national) proper law, that is the group of companies doctrine as part of Lebanese law on international arbitration, or as part of French law. Leaving aside questions of formality, the extension of the arbitration agreement was therefore uncontroversial insofar as it was based on a national proper law incorporating anational principles. As could be seen in Dallah, even an English court would probably be willing to apply the group of companies doctrine if the arbitration agreement was governed by French law.

While applying the doctrine as part of Lebanese/French law was seemingly consistent with the parties’ choice of law, the interpretation of article 17(2) has been rightfully criticised. Some dicta in this case suggest that the Court used the terms “trade usage” and “lex mercatoria” interchangeably. Unfortunately, the Court did not clarify the relationship in this case between article 17(2) and the application of

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343 XSAL, YSAL, A v Z Sârl, above n 196, para 5.1.2.
344 Ibid, para 5.3.2.
345 Ibid, para 5.1.3 and 5.3.2.
346 Ibid, para 5.3.2.
347 See LDIP, art 178(1), Poudret “Un Statut”, above n 198; Sandrock “Die Aufweichung”, above n 198, 2-5.
348 Levy, above n 327, 7; but see Habegger, above n 39, 402.
349 Wilske, above n 43, 81; Dallah v The Government of Pakistan, above n 251.
351 See Sandrock “Die Aufweichung”, above n 198, 6-7; XSAL, YSAL, A v Z Sârl, above n 196, para 5.3.
Lebanese law as inspired by lex mercatoria. If article 17(2) was used to justify a derogation from ordinary domestic Lebanese law in favour of Lebanese (or French) law on international arbitration, the application of the group of companies doctrine would not have been consistent with the parties' choice of law. On the other hand, if it was the parties' intention to submit their agreement to Lebanese law on international arbitration regardless of the meaning of article 17(2), the decision by the Swiss Federal Tribunal conforms with the principle of party autonomy. This case would then be an example of how article 178(2) gives effect to the parties' chosen law as long as this law ensures the agreement's validity.

3 Conclusion

The Swiss approach has advantages over both the English and the French approach. While it allows for sufficient party autonomy to give effect to a validating choice of anational law, it does not usually go so far as to apply anational law to arbitration agreements without a corresponding choice of law. The case XSAL, YSAL, A v Z Sàrl may have cast some doubt onto this latter point as it is not clear whether the Swiss Federal Tribunal used a mere reference to the ICC Rules in order to apply lex mercatoria as part of Lebanese law. Additionally, a validating choice of anational law governing the merits of the dispute would override an invalidating choice of law governing the arbitration agreement. The main reason, however, why article 178(2) cannot be treated as striking an appropriate balance for the purposes of this paper is its general disregard for an invalidating choice of any law – anational or national.
None of the approaches surveyed in Part V seem to give adequate weight to party autonomy in their (non)application of anational law to arbitration agreements. Some restrict party choice to national legal systems, while others resort to anational law in the absence of intent. Maybe one reason for this unsatisfactory account is that only the notorious positions on anational law are of interest and well-publicised, yet ample examples of uncontroversial cases come and disappear again without much ado. After all, what could be less controversial than applying the law that the parties have chosen? There is therefore some hope that the situation is not as dire as it seems. Nevertheless, it would be wrong to discount the outlined approaches as merely anecdotal evidence and refrain from recommending a more principled perspective. What, then, is the approach that should be followed?

It will not come as a surprise that, as a general rule, arbitrators and judges should refer to the law expressly or impliedly chosen by the parties, be it of national or anational origin. There is no merit in falling back on shortcuts that substitute laws with a factual evaluation of the parties’ intention. A direct reference to general principles of law is equally misguided. The first step must always be to look for the law the parties intended to apply. In practice, this means that anational law would apply (a) if expressly chosen by the parties to govern the arbitration agreement, even if anational law renders the agreement invalid, or (b) if expressly chosen to govern the merits of the dispute and this amounts to an implied choice of law for the arbitration agreement.

It is submitted that an express choice concerning the substance of the dispute would generally reflect the parties’ implied intention with respect to the arbitration agreement more adequately than the law of the seat, but that it is essential to determine this question on a case-by-case basis. In particular, it may be necessary to subject the agreement to the law of the seat if the law applicable to the merits

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352 See Part III 3 What is Party Autonomy.
invalidated the agreement. If the parties’ implied intention cannot be determined, but the main contract is governed by anational law, the law with which the arbitration agreement is found to have the closest connection should be a municipal legal system.\textsuperscript{353} Such a situation could arise if a tribunal applied anational law to the substance of the dispute in the absence of intent, a rare but possible occurrence.\textsuperscript{354}

If these choice of law rules point to anational law as the applicable law, and the chosen law leaves much room for discretion due to its generality, courts should be reluctant to interfere with any decision by the tribunal on the validity of the arbitration agreement, as long as the tribunal actually applied anational law.\textsuperscript{355} In fact, judges should also be wary of disagreeing with an earlier court ruling on this issue if the tribunal did not itself address the question. If courts were willing to limit their interference in this way, they would not only uphold the principle of party autonomy by respecting the parties’ choice of such general rules of law, and hence their wish to subject the arbitration agreement to a discretionary interpretation, they would also avoid any inconsistencies that could result from differing discretionary interpretations at the various stages of the arbitral process. Of course, this approach can only be justified on the basis of party autonomy, requiring judges to be less reluctant to depart from previous interpretations if the parties are unlikely to have agreed on anational law as the applicable law.

\textbf{VII CONCLUSION}

This paper endeavoured to examine the role of anational law with respect to the arbitration agreement. It has been shown that there are neither jurisdictional nor institutional reasons why anational law should not be applicable to arbitration agreements, but that its application is based on intent. A closer look at arbitral and

\textsuperscript{353} This seems to have been the approach adopted in \textit{Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co}, above n 264, 310 Donaldson MR.
\textsuperscript{354} ICC Arbitration Rules, art 17(1); Derains and Schwartz, above n 168, 241-2.
\textsuperscript{355} See Part III B 3 Institutional concerns.
judicial practice revealed that anational law is either applied in the absence of intent or ignored when chosen by the parties. Despite the overwhelming acceptance of party autonomy in choice of law rules generally, it is astonishing how often the principle is categorically brushed aside in the context of arbitration agreements. Of all imaginable contracts, however, the arbitration agreement might well be the most suited to being governed by the parties’ chosen law: manifesting the consensual decision to settle disputes through arbitration, and to voluntarily renounce one’s right to go to court, it is the embodiment of party autonomy. It is perplexing, then, that neither France nor Switzerland subjects the arbitration agreement to its chosen law as a matter of principle. England, on the other hand, generally endorses the party autonomy approach, yet does not go far enough in respecting the parties’ choice of law. The approach suggested in this paper could remedy these various shortcomings and lead to a principled application of anational law to arbitration agreements.
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\[G\] Books and Chapters


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