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# Law Applicable to the Extension of Arbitration Agreements

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# Introduction

- Fundamental principles regarding the subjective scope of an arbitration agreement: (i) privity of contract and (ii) separate corporate personality
- Exceptions, where rigid application leads to unjust results
- **Question: what is the legal basis for these exceptions?**
- Two main conflict of law approaches in legal doctrine

## Structure

I. The “mercatorian” approach

II. The traditional approach

III. What really happens in practice…

IV. A “pillow fight”?

V. Key conclusions

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## The “mercatorian” approach

- Autonomy of the arbitration agreement: arbitral tribunals need not apply any specific national law(s)
- Instead: application of **transnational principles** of law to determine the subjective scope of an arbitration agreement
  - Principles of *lex mercatoria* – usages of international trade
  - Common intention of the parties
  - Requirement to act in good faith

## The “mercatorian” approach

- Origins: the “group of companies” doctrine
- *Dow Chemical v. Isover Saint Gobain* (ICC Case No. 4131, Interim Award of 23.09.1982)
- Legal basis for decision:
  - “Mutual intentions of the parties” to be bound by the arbitration agreement
  - Group of companies constitutes “one and the same economic reality”

# The “mercatorian” approach

- Facts and *actes concluants* to be considered by the Tribunal:
  - Contract negotiations: conduct of non-signatory?
  - Formation of contract: confusion between signatory and non-signatory (group objectively considered as contracting partner)?
  - Performance of contract: non-signatory involved in contractual operation?
  - Corporate relationship known to the other side of the bargain (actual or presumed intention of the parties as regards rights of non-signatories)

# The “mercatorian” approach

- Main arguments:
  - Transnational principles of law are particularly appropriate in cross-border disputes with participants from diverse legal cultures
  - Principles of *lex mercatoria* respond to the parties’ needs and expectations in a global buiness community
  - *Bona fides* principle underlies all national laws
  - Emerging uniform body of law: the recourse to conflict of law rules is a “greater source of unforseeability and legal insecurity” (*Yves Derains*)

## The traditional approach

- An arbitration agreement is a contract
- To rule on the extension, the Tribunal must determine and apply the **substantive law governing the arbitration agreement** (validity/scope/reach), i.e. a specific national law
- Is extension a substantive or procedural matter? (if procedural, rules of contract law apply by analogy)

## The traditional approach

- Party autonomy (*see* Art. V(1)(a) New York Convention)
- Choice of law (explicit or tacit)?
  - Hardly ever made by parties
  - Not necessarily the law applicable to the merits of the dispute
- If no choice: law of the seat of arbitration (***lex loci arbitri***)
  - Prevailing in practice because considered the most plausible option

## The traditional approach

- Alternative connecting factors largely rejected as unjust or impracticable:
  - *Lex societatis* (personal law of the place of incorporation of the non-signatory): capacity or authority of third party are irrelevant as no connection to the other parties to the dispute
  - *Lex loci executionis (*law of the place of enforcement): may not be discerned during the proceedings; multitude of possible places with potentially irreconcilable rules

## The traditional approach

- Example of a conflict of laws rule on the validity of arbitration agreement: Art. 178(2) Swiss PILA

> "*Furthermore, an arbitration agreement is valid if it conforms **either** to the law chosen by the parties, **or** to the law governing the subject matter of the dispute, in particular the main contract, **or** to Swiss law*."

- "Ubiquity formula" with alternative, non-hierarchical connecting factors (*in favorem validitatis*)

# The traditional approach

- Main arguments:
  - Extension must be grounded in a specific national law as an arbitration must be connected to a legal system upon which the validity of the arbitration agreement and the validity of the arbitral award depend
  - No need to rely on transnational principles of law as national laws are at hand, which contain all necessary tools and largely recognized remedies capable of resolving the problem and meeting the demands of business
  - Legal certainty and predictability: there is no uniform or standardized international trade usage

# The traditional approach

- Examples of legal doctrines and concepts in national laws, which may lead to extension:
  - Agency and apparent or ostensible authority
  - Rules of estoppel and *alter ego* doctrine (common law)
  - Abuse of law and prohibition of contradictory behaviour (*venire contra factum proprium)*
  - Rules of acquiescence; rules of *mandat apparent* (France); *Duldungs/Anscheinsvollmacht* (Austria, Switzerland, Germany)
  - Piercing the corporate veil; *Durchgriff*

# The traditional approach

- Common denominator of extension-related legal doctrines: all are well grounded in the *bona fides* principle
  - Common intention of the parties (contract interpretation of the parties' conduct)
  - Notion that positions or defenses which stand in contradiction to the requirement to act in good faith will not deserve arbitral protection
  - Fair and reasonable expectations of the parties

## What really happens in practice...

- Even tribunals denying the “mercatorian” approach often do not base their decision on a prior determination of the applicable law
- Instead, they scrutinize the factual matrix to determine the **common intention of the parties** (in particular implied consent) in light of **good faith** and the parties’ **fair and legitimate expectations**
- Fact-driven exercise: most varied results as to what law (if any) and/or what factors should be considered and applied to the question of extension

# What really happens in practice...

| ICC Case | Seat | Applicable Law | Law applied by Tribunal to determine extension |
|---|---|---|---|
| ICC No. 3493 (1983) | Paris | Egyptian | Not specified: consent to be bound by arbitration agreement |
| ICC No. 4131 (1982) | Paris | French | Intention of the contracting parties |
| ICC No. 4402 (1983) | Geneva | Swiss | Law of the seat: some kind of written consent of third party requested |
| ICC No. 4504 (1986) | Geneva | Swiss | Law of the seat: no written agreement |
| ICC No. 5721 (1990) | Geneva | Egyptian | Good faith and international usages |
| ICC No. 6610 (1991) | Hong Kong | English | Intention of the contracting parties / refusal to lift the corporate veil |
| ICC No. 7155 (1993) | Paris | French | French: group of companies doctrine |
| ICC No. 7610 (1995) | Paris | Not specified | Law of the seat / intention of the parties |
| ICC No. 7626 (1995) | London | India (unclear) | Both English and Indian law (unclear) |
| ICC No. 8163 (1996) | Paris | German | German: denying piercing of the corporate veil |
| ICC No. 8385 (1995) | New York | New York | Lex mercatoria |
| ICC No. 8910 (1998) | Paris | Not specified | Law of the seat |
| ICC No. 9517 (2000) | Dubai | Not specified | Intention of the parties (at least implicit) |
| ICC No. 9873 (1999) | Paris | German | German law as law of main contract / intention of the parties |
| ICC No. 10758 (2000) | Geneva | Not specified | Law of the seat |

# What really happens in practice...

- UNCITRAL Arbitration, Final Award of 24 August 2011, ASA Bull. 4/2011, p. 894 (place of arbitration: Geneva): extension of arbitration agreement to an individual (chairman, shareholder) controlling the party to the contract containing the arbitration agreement

> *"Therefore, taking into account the active and critical role of the Second Respondent both at the time of the negotiation and performance of the Cooperation Agreement, the Arbitral Tribunal concludes that such behaviour can be construed as expressing the Second Respondent's acceptance to be bound by the Cooperation Agreement including its arbitration clause.*
>
> *Such conclusion is further supported by applying the principles enshrined in Article 2 of the Swiss Civil Code ("CC") since, in light of the circumstances, it is contrary to the rules of good faith for the Second Respondent to hide behind the First Respondent and dispute being a party to the Cooperation Agreement including the arbitration clause."*

## A “pillow fight”?

- Irrespective of approach: undogmatic “hands-on” investigation without much recourse to (conflict of) law rules
- Differences are rather academic: tribunals will in many cases reach the same result as same *bona fides* principles
- **But**: in *Dallah*, Paris Court of Appeal and UK Supreme Court reached contrary decisions applying the same law to the same facts

## Key conclusions

- Law applicable to extension: no straightforward solution – facts decisive, not legal theories

- Traditional approach still more appropriate to obtain predictability

- Prudent tribunals should consider all of the following:
  (1) the factual matrix of the case, (2) the prevailing norms under the substantive law governing the arbitration agreement, and
  (3) overriding transnational principles and trade usages utilized in the context of international arbitration

**Thank you!**

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