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Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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Implied Choice of the Law Applicable to the Arbitration Agreement: The Effect on Non-Signatories in International Arbitration

LUIS BRAVO ABOLAFIA

1. Introduction

The determination of the law applicable to the arbitration agreement constitutes a contentious issue in international arbitration, particularly when the lex contractus and the law of the seat selected by the contracting parties differ. Under this situation, there is not a clear path as to which criteria should be used, given the wide range of diverse opinions held by scholars and case law. Furthermore, the applicable law may establish different formal requirements to the arbitration agreement. Hence, the validity and extension of the arbitration agreement to non-signatories depend on determining the applicable law.

The article is organized in three parts: Firstly, we will address (i) the issue of determination of the law applicable to the arbitration agreement, (ii) its effects on the extension to non-signatories, and (iii) the proposal adopted in this article. Secondly, we will try to implement this proposal through the analysis of the conflict-of-law rules applied in both the Common Law and the Civil Law traditions. Thirdly, we will describe the outcome reached, in order to present the two-stage model submitted in the final part of this article.

We anticipate that it is an evolving and complex issue that requires a deeper analysis, as the author will address in detail in the future.

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2. The issue of determining the applicable law for the arbitration clause

When negotiating an international contract, it is common for the parties to expressly select the *lex contractus* and the *lex arbitri*. However, it is also common that they do not establish the law applicable to the arbitration agreement. This situation causes a high level of uncertainty to all the parties involved and is an issue that scholars and case law have tried to solve for long. This absence of choice is extremely crucial as «*the law governing the arbitration agreement applies to […] the interpretation, effect, and scope of an arbitration agreement*».

2.1 Non-disputed situations

Before addressing the subject matter of this article, we must review two situations where the law applicable to the arbitration clause is not disputed:

2.1.1 The parties expressly chose the applicable law for the arbitration agreement

The parties to a contract have selected the law applicable to the arbitration clause, as established by Art. V.1.a) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “NYC”) and Arts. 34 and 36 of the 1985 UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006) (the “2006 ML”). This possibility has been considered undisputed by scholars.

2.1.2 The *lex arbitri* and the *lex contractus* do not differ

It is also uncontroversial when the parties have not selected the law governing the arbitration agreement, that the choice «appears to be between the law of the seat of the arbitration and the law which governs the contract as a whole».

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possibilities, then in cases where the *lex arbitri* and the *lex contractus* selected by the parties do not differ, this law shall also be applicable to the arbitration agreement.

On the other hand, some jurisdictions have provided different solutions. Examples of this would be the analysis of the *implied* choice made by the French system\(^5\) and the recent English case law\(^6\), or the combination of several approaches, such as the Swiss model\(^7\). Nevertheless, these possibilities do not conform to alternative solutions that are different from the *lex contractus* and the law of the seat. In other words, they do not refer to a specific outcome, but to the criteria used, with the aim of determining the law of the arbitration agreement.

### 2.1.3 Preliminary summary

At this stage, it may be convenient to sum up some of the fundamental pillars of this article:

Firstly, when the parties have not selected the law governing the arbitration clause, the main choices to be considered are the *lex contractus* and the *lex arbitri*.

Secondly, these two options do not entail that the only possibility is to assess which one is the more appropriate solution. On the contrary, we may consider, at least, one additional element: the implied choice of the parties.

It is true that, traditionally, most of the scholars have addressed this issue from an *objective* approach trying to determine the law more closely connected to the arbitration agreement. However, it could be inappropriate to rely solely on this *objective* criterion. By contrast, it could be more suitable to analyse these possibilities together with the interpretation of the implied choice of the parties, as discussed below.

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\(^6\) *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER 1 (Comm); and *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm).

2.2 Effects on the interpretation, scope and extension of the arbitration clause

In this Section, we will briefly refer to (2.2.1) the extension of the arbitration agreement to third parties and (2.2.2) the development of international arbitration in the last decades. This introduction must be approached in order to assess (2.2.3) how both these issues are closely connected with the subject matter of this article.

2.2.1 Doctrines allowing the extension to non-signatories

It is not the purpose of this article to address the issue of extension of the arbitration agreement to third parties, but to focus on the law applicable to this issue. In this regard, we will solely refer to those doctrines that have been analysed in the case law and by scholars with the aim of drawing the common features shared by all these doctrines: the implied consent of the parties.

The consent of the parties constitutes the soul of arbitration, as it is a voluntary and private institution. In MOSES’ words:

«In light of the important rights that are extinguished when the parties agree to arbitrate, the validity of the arbitration agreement is critical. Arbitration is a creature of consent, and that consent should be freely, knowingly, and competently given»

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10 Some scholars understand that there are also a few doctrines which are not driven by the implied consent of the parties, but they are applicable ope legis -legal succession or alter ego, for instance-. Nevertheless, even in these cases the parties show some kind of implied consent, as (i) by acquiring a company, the purchaser implicitly consents to be part of the contracts entered into by the target, or (ii) in alter ego cases, the parent company actually express its will to be part of the contract, although it tries to avoid its contractual obligations.
Therefore, this consent constitutes an essential point to be taken into account when deciding whether the arbitration agreement should be extended to non-signatory parties.\textsuperscript{12}

The doctrines related to the extension of the arbitration agreement to third parties provide several requirements that should be analysed in order to assess whether those parties have consented to be part of the arbitration agreement – e.g. the Dow Chemical case. However, the fulfilment of those requirements does not imply, necessarily, that the relevant parties intended to be a part of the arbitration agreement. We should not forget that those requirements are merely an instrument to be used for the purpose of finding out the true will of the parties.

On that basis, we may ascertain that the common element shared by all these doctrines is that they rest on the fact that the parties involved have issued an implied or tacit consent for the dispute to be arbitrated.

If this is so, the following becomes clear: (i) it is essential to use a global approach with the aim of analysing the intention of the parties in order to extend the arbitration agreement to third parties, and (ii) the choice of the law applicable to the arbitration agreement should be considered coherently with the possibility of its extension to third parties.

\subsection*{2.2.2 Development of international arbitration}

Separately, but in relation to the previous Section, we should also consider the development of the international arbitration in the last decades.

The origins of arbitration were based on the express will of the parties to choose this alternative dispute resolution method. It was mandatory to conclude the arbitration agreement in writing, so the parties could show their unequivocal consent by signing the contract. These requirements can be found in Art. II of the NYC and the Art. 7 of the 1985 Model Law on International Commercial Arbitration (the “\textit{1985 ML}“)\textsuperscript{13}.

\begin{itemize}
\end{itemize}
This formalistic approach has experienced a substantial change in the last thirty years due to the flexible criteria adopted by the case law in many jurisdictions. This change crystallised into Art. 7 of the 2006 ML, as may be inferred from the Explanatory Note made by the UNCITRAL Secretariat on the 2006 ML (the “2006 ML Explanatory Note”). The 2006 ML Explanatory Note – paragraphs 19 and 20 – expressly states that the amendment of Art. 7 fundamentally aims (i) to modernize and expand the traditional meaning of the concept “in writing”, by accepting to record the contents of the agreement “in any form”, and (ii) to remove the signature requirement from both the options of Art. 7.

In short, we may conclude that, in the last sixty years, the development of international arbitration has shifted from a formalistic approach to a flexible one.

2.2.3 Connection between the law applicable to the arbitration agreement and its extension to third parties

Prima facie, it could appear that the issues described in Sections 2.2.1 and 2.2.2 are not connected with the topic of this article. However, both those issues are closely related to the subject matter of this article.

The parties to a contract may decide to apply the 1985 ML or the 2006 ML to an arbitration agreement. This choice may have a decisive impact on the possibility of extending the arbitration clause to third parties. In this

There are relevant positions stating that the formal validity of the arbitration agreement is governed by the Model Law and the NYC. However, the fact that there are uniform private international rules to be applied to the formal validity does not supersede parties’ will to interpret those international standards by adopting the traditional approach or the recommendation made by UNCITRAL in 2006. Consequently, the formal and substantive validity may be governed by the same law. See: XL Insurance Ltd v Owens Corning [2001] 1 All E.R. (Comm) 530 via Sulamérica Cia Nacional de Seguros S.A. and others v Enesa Engenharia S.A [2012] EWCA Civ 638 (Court of Appeals): «By providing for arbitration in
respect, all doctrines allowing the extension are based on the implied consent of the parties to do so. However, such consent could not exist in case the parties have decided to apply the formalistic approach – the 1985 ML – to the arbitration agreement.

On the contrary, in case the parties have selected the 2006 ML, it is coherent to analyse whether there are facts allowing the arbitration clause to be extended to third parties.

Based on the above, we could assert that it is not possible to reach a decision concerning the extension of the arbitration clause before the law governing this matter has been determined.

2.3 The Approach for Selecting the Applicable Law

2.3.1 Framework

As pointed out in Sections 2.1.2 and 2.1.3 above, there are different criteria for determining the proper law of the arbitration agreement.

On one hand, there are some scholars, several positions interpreting the international rules – Art. 34(2) 2006 ML, and Art. V(1)(a) NYC – and part of the case law, which have understood that the law that is more closely connected with the arbitration agreement is the law of the seat of the arbitration17. Thus, this is the law governing the arbitration agreement.


On the other hand, it has also been interpreted that the law governing the arbitration agreement is a substantive issue and thus, the *lex contractus* shall govern this question.\(^{18}\)

Although this issue has been discussed for a long time, it is still disputed among scholars. Besides, both positions are adopted by different jurisdictions – causing a high level of uncertainty. Consequently, it does not seem reasonable to state why one of these criteria should supersede the other.

In view of this situation, it is our understanding that we should follow a different approach. Therefore, the way to proceed seems to be to attend to the implied choice of the parties.

### 2.3.2 Implied choice of the parties

The recent English case law and the French legal system have adopted an approach which is based on determining the implied choice of the parties. France gives importance to both (i) the determination of the intention of the parties, and (ii) the designation of the applicable set of conflict-of-law rules. In addition, the English case law has provided a three-stage test where the implied choice of the parties is taken into account when determining the law of the arbitration clause.\(^{19}\)

The interpretation of the implied consent of the parties is an element that should be considered, since it is based on the first principle of arbitration.\(^{20}\) In parallel, we can also state that when the parties decide to select certain specific regulations, they also accept indirectly the set of rules to be applied based on the chosen regulations.\(^{21}\) Thus, if the parties expressly select the *lex contractus* and the seat of arbitration, these choices may provide relevant information concerning the conflict-of-law rules to be used for selecting the law of the arbitration clause.\(^{22}\)

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\(^{20}\) See footnote no 11 and 12.


\(^{22}\) This statement does not breach the exclusion of renvoi, as (i) at the time when we are applying this rule, it has not been possible to determine the proper law of the arbitration agreement for the first time; and (ii) this approach is a tool aimed to find out the intention of the parties, but it is not to be applied *ope legis*. 

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In accordance with the foregoing, an interesting way to proceed could be (i) to analyse whether the conflict-of-law rules of the *lex contractus* and the *lex arbitri* arrive at the same outcome, and (ii) to draw some general principles that both the laws might share. This goal may be pursued by assessing the features of the legal system of both laws – Common Law or Civil Law.

Indeed, if the parties decide to select the law of two different Common Law countries to both (i) the main contract, and (ii) the proceedings, it could be stated that the conflicts-of-law rules to be applied should be inspired by the solution adopted in the Common Law legal system. Similar conclusion could be reached if the *lex contractus* and the *lex arbitri* belong to two Civil Law countries. This understanding is based on the *indirect* choice made by the parties.

The question is whether it is possible to establish a homogeneous outcome when analysing the Common Law and the Civil Law as a whole. If we were to conclude that each legal system applies a solution which is consistent among a representative group of countries within each category, it could then be reasonably stated that the parties have selected such outcome *indirectly*. This approach would be compatible with the case by case analysis adopted in France and England.

3. **Methodology for providing a solution: case by case basis**

In order to study the proposal made in the previous Section in detail, we need to analyse (i) the conflict-of-law rules indirectly chosen by the parties – distinguishing between Common Law and Civil law, together with (ii) the implied choice of the parties.

3.1 **Case 1: both laws are based on the common law tradition**

The first task that we intend to pursue is to analyse the applicable conflict-of-law rules for a representative sample of Common Law countries. This will allow us to find out whether we may draw certain rules that could be applicable to the entire legal system.

3.1.1 **England**

We have already discussed the English case law with regard to the importance of the implied choice of the parties. However, in the absence of such implied choice, we may examine whether this jurisdiction opts to select the *lex arbitri* or the *lex contractus* as the law of the arbitration agreement.
Historically, English case law has stated that the law of the seat of arbitration has the *closest and most real connection* with the arbitration agreement. Thus, if the parties do not choose the applicable law, the *lex arbitri* is to be applied to the arbitration agreement23.

However, this position has been partially amended in 2012. The English courts have introduced a three-stage test for the purpose of determining the governing law, as stated in the *Sulamérica*, *Arsanovia*, and *Habas* rulings. These cases have reviewed the English case law and the Common Law scholars’ positions in order to provide an updated solution.

In *Sulamérica*, the parties chose the law of Brazil as the *lex contractus* and London as the seat of arbitration, without referring to the Arbitration Act 1996. It should be noted that in the other rulings, the selection of the Act was an essential element for determining the law applicable to the arbitration agreement. This was due to the fact that its substantive provisions – Arts. 5, 7, 8 etc.– were considered to be applicable as well24.

In this case, the court stated that the fact the parties had expressly selected the *lex contractus*, was a «powerful factor in favour of an implied choice of Brazilian law as the law of the arbitration agreement». However, there were two important factors pointing the other way: (i) the law of Brazil was not compatible with the arbitration agreement -suggesting that the parties did not intend to select the referred law; and (ii) the fact that the parties chose another country as the seat of arbitration indicated that they intended the law of the seat to govern all aspects of the arbitration agreement.

Secondly, in *Arsanovia*, the parties chose London as the seat of arbitration and the law of India as the *lex contractus*. In contrast to previous cases, Smith LJ ruled that the law applicable to the arbitration agreement was the *lex contractus*.

Smith LJ gave greater importance to the election of the *lex contractus* in relation to interpretation of the implied choice of parties than Moore-Bick LJ did25. However, according to Smith LJ, the decisions adopted in *C v D* and *Sulamérica* were not based on the implied choice made by the parties, but on a solution to be implemented in the absence of such choice. In addition, Smith LJ clarified that his decision was based on the fact he understood the parties to

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25 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER 1 (Comm).
have made an implied choice, without which he would have come to the same conclusion as in C v D and in Sulamérica.

Finally, in Habas, the solution reached by Hamblen LJ was simpler than in the previous cases, as the parties selected the seat of arbitration as London but had not expressly chosen the lex contractus. Thus, “the significance of the choice of seat of the arbitration is likely to be ‘overwhelming’.”

In short, the English courts have not changed their criterion. Indeed, they do not consider from now on that the lex contractus – instead of the lex arbitri – has the closest and most real connection with the arbitration agreement. On the contrary, they still state that the law of the arbitration agreement is the law of the seat, in the absence of an express or implied choice. However, they have now given greater importance to the implied choice of the parties. This distinction needs to be made, as it is not the aim of this Section to analyse the interpretation given by the English Courts to one specific set of facts, but the objective solution to be adopted in the absence of an express or implied choice.

3.1.2 United States

When a dispute falls under the umbrella of the Federal Arbitration Act of 1925 (the “FAA”), this law applies to all matters of interpretation, construction, validity and enforceability of the arbitration clause. There are also several precedents in the American case law where the court stated that the FAA supersedes any other element.

In a nutshell, United States treats the law of the seat of arbitration as the law applicable to the arbitration agreement.

3.1.3 Other Common Law countries

Once we have analysed some of the most relevant cases, we now need to compare this outcome with the other Common Law countries:

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26 Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd [2013] EWHC 4071 (Comm).


Singapore also chooses the law of the seat as the law governing the arbitration agreement\(^3\), just like China and Hong Kong\(^3\).

Australia has incorporated the 2006 ML as its arbitration Act, and its Art. 34(2)(a)(i) states that an arbitral award can be set aside if the arbitration agreement is not valid under the law of the seat – in the absence of an express choice\(^3\). We may find similar provisions if we look at the regulations incorporated in Sri Lanka\(^3\), Cyprus\(^3\), Malaysia\(^3\) and Myanmar\(^3\). Scotland and Nigeria also consider the law of the place of arbitration with regard to the recognition and enforcement of the award\(^3\).

Finally, as a matter of principle, India takes side with the *lex contractus* as the applicable law, as it can be interpreted from the *National Thermal Power v Singer* judgement (“NTP”). NTP includes certain similarities with the English case law, although it points out the *lex contractus* as the law of the arbitration clause. However, there are important circumstances of the particular case that should be noted. In particular, the parties chose the law of India as the *lex contractus*, but they did not select the place of arbitration – ICC chose London as the seat. Consequently, the parties did not intend to link the contract to London, and there was no connection with the law of England\(^3\).

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\(^3\) F. WEIGAND, *Op. cit.*, p. 699; *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12. By contrast, in *BCY v BCZ* [2016] SGHC 249, the High Court decided -following *Sulamérica*- that the *lex contractus* was the applicable law, but this conclusion was reached based on the interpretation of the implied choice of the parties. Thus, as it has been analysed concerning *Arsanovia*, it does not mean that the *lex contractus* is the solution adopted in Singapore in the absence of choice.


\(^3\) Section 1.1.6 of the *CMS Guide to Arbitration – Volume I* (Australia).

\(^3\) Art. 32(1)(a)(i) of the Arbitration Act No 11 of 1995.


\(^3\) Arts. 37(1)(a)(ii), 39(1)(a)(ii) and 51(2) of the Arbitration Act 2005 (as at 1 March 2018).


\(^3\) Section 10.2.3 of the *CMS Guide to Arbitration – Volume I* (Scotland); and in relation to Nigeria, the art. V(1)(a) of the NYC was incorporated in the Second Schedule of the Arbitration and Conciliation Act (Chapter 19), Laws of the Federation of Nigeria 1990.

3.1.4 Outcome

Based on the analysed sample, on one hand, four relevant Common Law countries - England, China and Hong Kong, United States and Singapore – take side with the law of the seat of arbitration as the law applicable to the arbitration agreement. Seven other jurisdictions – Australia, Sri Lanka, Cyprus, Malaysia, Myanmar, Scotland and Nigeria - take into account the law of the seat when an award is challenged or with regard to its recognition and enforcement. On the other hand, there is one country where the solution is to apply the *lex contractus* - India-, although this case cannot be considered crystal clear, for the reasons described above.

Consequently, it can be asserted, with a sufficient degree of certainty, that the most stable and accepted rule within Common Law tradition is to select the law of the seat as the law of the arbitration agreement.

3.2 Case 2: both laws are based on the civil law tradition

3.2.1 Countries in favour of the *lex contractus*

Germany has selected the *lex contractus* as the law applicable to the arbitration agreement, as has been clarified by its case law\(^{39}\). Besides, Belgium\(^{40}\) and Italy\(^{41}\) have reached the same outcome.

3.2.2 Countries in favour of the law of the seat of arbitration

By contrast, Austria has followed a different approach by selecting the law of the seat of arbitration, as stated by its Supreme Court\(^{42}\). Poland has adopted the same criterion\(^{43}\).

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43 See art. 39(2) of the Act of 4 February 2011; and Section 4.4.1 of the *CMS Guide to Arbitration - Volume I* (Poland).
In addition, the law of the seat of arbitration is taken into consideration in order to set aside the award and/or in relation to its recognition and enforcement in Brazil\textsuperscript{44}, Argentina\textsuperscript{45}, Hungary\textsuperscript{46}, Serbia\textsuperscript{47} and Greece\textsuperscript{48}.

3.2.3 Neutral countries

Finally, there are several countries that could be considered neutral, taking into account that they do not offer an \textit{ex ante} solution to the problem.

As we have seen, France is favourable to determine the law of the arbitration clause through the implied choice of the parties. Thus, it has no \textit{ex ante} position regarding the application of the \textit{lex contractus} or the law of the seat.

Spain, Portugal and Switzerland use an \textit{in favorem validatis} approach, where both relevant laws are considered\textsuperscript{49}. Croatia\textsuperscript{50} and Czech Republic also use the rule of the most favourable law, although the latter takes into account the law of the seat and the law where the arbitration agreement was made\textsuperscript{51}.

Slovakia\textsuperscript{52} establishes that the parties are free to choose the law of the arbitration agreement, although the \textit{objective arbitrability} is to be governed by the Slovak law.

3.2.4 Outcome

In accordance with the referred sample, we may find that (i) there are three countries in favour of the \textit{lex contractus}, (ii) two countries pointing to the law of the seat, (iii) five countries consider the law of the seat with regard to challenge the validity and enforcement of the award, and (iv) seven countries could be considered neutral on this matter.

It could be asserted that the trend is in favour of selecting the law of the seat as the law governing the arbitration clause. Nevertheless, we cannot state

\textsuperscript{44} See art. 38.II of the Law no 9307 of 23 September 1996; and section 11.2.2 of the \textit{CMS Guide to Arbitration - Volume I} (Brazil).
\textsuperscript{45} Section 9.2.1 of the \textit{CMS Guide to Arbitration - Volume I} (Argentina).
\textsuperscript{46} Section 9.1.2 of the \textit{CMS Guide to Arbitration - Volume I} (Hungary).
\textsuperscript{47} Section 9.2.2 of the \textit{CMS Guide to Arbitration - Volume I} (Serbia).
\textsuperscript{48} P. DIMITRIADIS & K. ROKAS, Greece, Global Arbitration Review.
\textsuperscript{49} See art. 178(2) of the Switzerland’s Federal Statute on Private International Law; art. 9.6 of the Spanish Arbitration Act no 60/2003; art. 51 of the Law 63/2011 of 14 December; and J.M. JÚDICE & P. METELLO, Portugal, Global Arbitration Review.
\textsuperscript{50} Section 3.5.1 of the \textit{CMS Guide to Arbitration - Volume I} (Croatia).
\textsuperscript{51} Section 3.2.5 of the \textit{CMS Guide to Arbitration - Volume I} (Czech Republic).
\textsuperscript{52} Art. 5(1) of the Act No 244/2002 of 3 April 2002 on Arbitration; and Section 3.3.1 of the \textit{CMS Guide to Arbitration - Volume I} (Slovakia).
with sufficient degree of certainty that the Civil Law countries take side with any of the two possibilities discussed homogeneously.

4. Determining the law governing the arbitration clause: the two-stage test

Once we have reviewed the outcome derived from the foregoing analysis, it is time to put all of this information together in order to find out whether there are some general rules to be applied with the aim of determining the law applicable to the arbitration agreement. In this regard, our approach was to analyse (i) the implied choice of the parties, and (ii) the conflict-of-law rules as established in the previous Section, as it also provides relevant information concerning the parties’ intention.

That being so, when the parties have not selected the law of the arbitration agreement and the facts of the case clearly suggest the implied choice made by the parties, it would not be necessary to check the conflict-of-law rules.

Otherwise, if there is no such implied choice, the assessment of the conflict-of-law rules can shed light on the parties’ intention, without forgetting the previous approach. Under this situation, it is needed to distinguish among three different scenarios:

In the first place, the conflict-of-law rules of the lex contractus and the law of the seat arrive at the same outcome – e.g. China and Poland: the law of the seat53 –. In this case, and in the absence of any factor pointing in the other direction, the law applicable to the arbitration clause may be determined by adopting the solution reached by the conflict-of-law rules (“First Scenario”).

In the second place, when the chosen lex arbitri and lex contractus belong to the Common Law tradition, we must differentiate between several sub-categories.

First, both laws point to the law of the seat -this case falls under the First Scenario.

Second, the conflict-of-law rules of one of the two relevant laws point to the law of the seat, whereas those of the other do not provide a specific solution to this matter. In these cases, both laws belong to the Common Law, and neither of the laws expressly select the lex contractus as the law of the arbitration agreement. Thus, we may conclude that this issue will be governed by the lex arbitri – again, in the absence of factors pointing the other way.

53 See footnotes no 31 and 43.
Third, in case one of the two chosen laws points to the *lex contractus* as the law governing the arbitration clause – *e.g.* the law of India\(^54\) –, the determination of the law applicable may be controversial. Thus, it is essential to assess the implied choice of the parties in parallel -first-stage test. In case there is no possibility to tip the balance in favour of any of the two options, the indirect choice of the law of the seat should be considered acceptable.

This logic is based on the fact that it is reasonable to interpret that two Anglo-Saxon parties may assume that the law of the arbitration agreement is the law of the place of arbitration. This is the general rule within this legal system, as discussed in Section 3.1.

It is necessary to stress once again that this criterion is to be applied in the absence of factors pointing the other way. An example of this may be found in case where both the parties belong to two different countries where their national conflict-of-law rules suggest applying the *lex contractus*. In this case, it could be interpreted that they simply selected a neutral seat without having any relation to its regulations – among many other factors that could tip the balance in different directions.

The basis of this proposal is that, in those cases where there are no facts available in order to determine the implied choice of the parties, the conflict-of-law rules may help to find an appropriate solution *in the absence of indicators*.

In the third place, we fall under the last scenario when (i) the laws of both the countries belong to Civil Law tradition, or (ii) the *lex contractus* and the *lex arbitri* belong to different legal systems – assuming that they do not arrive at the same outcome anyway. In these cases, it is not possible to determine a conflict-of-law rule that could be stated as generally applicable. Consequently, it will only be possible to assess the implied choice of the parties, as established by the English case law or the French legal system.

\(^{54}\) See footnote no 38.
5. Conclusion

The extension of the arbitration agreement to third parties depends on the determination of the law governing the arbitration clause, as described in Section 2.2.3. However, there is no uniform approach in case law and among scholars on how to determine this law. This article analyses how the parties’ intention could be established by the conflict-of-law rules indirectly chosen by them.

This article is aimed to propose a debate in relation to whether we can accept the existence of transnational conflict-of-law rules derived from parties’ intention. To this regard, the author presents the solutions adopted for this matter in different jurisdictions – both Common Law and Civil Law – with the purpose of finding out whether there are uniform outcomes within the same legal system.

While any statement related to the existence of transnational conflict-of-law rules must be approached with great caution, this article may constitute a starting point for discussing whether this possibility may be accepted based on a customary perspective – i.e. by analysing the parties’ intention rather than following an opus legis approach.

To this end, it is necessary to continue the present research in order to go further in this analysis, as it is an evolving issue -e.g. the English case law- that requires to examine a larger number of arbitral decisions and court judgements. The study of the conflict-of-law rules of such wide number of countries -within the Common Law and the Civil Law systems- needs a period of transition before reaching undisputed outcomes. In addition, several topics could not be analysed in depth, as a single paper is not enough for describing all matters regarding to this issue. This author will address this topic in the future as part of his doctoral thesis providing the final results.
Luis BRAVO ABOLAFIA, *Implied Choice of the Law Applicable to the Arbitration Agreement: The Effect on Non-Signatories in International Arbitration*

**Summary**

The law applicable to the arbitration agreement has a decisive impact on the validity, scope and extension of the arbitration clause to non-signatory third parties. The determination of the law governing the arbitration clause therefore has to precede the analysis of the factual and legal requirements allowing such extension. In fact, it is not possible to state that the parties have given their implied consent to the extension of the arbitration agreement when they have agreed to apply the formalistic requirements contained in the 1985 ML.

Taking into account the difficulties with regard to the determination of the law of the arbitration agreement, the author analyses the possibility of inferring the implied choice of the parties from the conflict-of-law rules indirectly selected by them. For this purpose, the article studies the conflict-of-law rules of a sample of both Common Law and Civil Law countries.
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Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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