The Law Applicable to the Arbitration Agreement

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I. Introduction

The arbitration agreement is the cornerstone of each arbitration procedure. The arbitrators have no authority to hear a case or render an award if there is no valid arbitration agreement. If there is none, the court may seize an arbitral award; and if the award needs to be enforcement in another jurisdiction, Art V of the New York Convention provides for a reason of non-recognition if the arbitration agreement is found to be invalid. Given the paramount importance of the arbitration agreement and given the fact that the parties frequently have their respective seats in different jurisdictions, it comes as a little surprise that there is no provision in Austrian law which law to apply to the arbitration agreement,[1]) nor is there sufficient academic writing nor much specific case law. The following article endeavors to shed some light into the darkness of international private law rules which determine which law to apply to an arbitration agreement.

II. The Theory of Separability

In most cases, arbitration agreements are embedded in commercial contracts. This leads to the temptation to consider them as part of such contract. However, if the arbitration agreement forms part of the main contract and such contract is void or invalid, the arbitration agreement would equally be unenforceable. A a consequence, the issue of the validity of the main contract would be excluded from the material scope of the arbitration clause. As this will hardly match party expectations, it is widely held that the arbitration agreement is to be considered as legally independent from the main contract. This notion is commonly referred to as the theory (or doctrine) of seperability.[2])

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[1]) *See* Gerold Zeiler, Schiedsverfahren, §§ 577–618 ZPO idF des SchiedsRÄG 2013, § 581 ZPO mn 124 (2nd ed. 2014).

[2]) *E.g.* Jean-Franois Poudret & Sbastien Besson, Comparative Law of International Arbitration 142 (2nd ed. 2007).

Unlike Switzerland with its famous Art 178 PIL[3]), in Austria, there is no statutorial basis for the theory of seperability but still it is widely accepted both in academic writing and in jurisprudence.[4]) The Austrian Supreme Court has repeatedly[5]) held that the arbitration agreement is to considered as a seperate agreement. Ever since, there has never been any challenge to the doctrine of seperability in Austria and, consequently, it forms a solid part of Austrian arbitration law even if there is no statutorial basis for it.

The best approach for the analysis of an arbitration agreement embedded in another contract under the theory of seperability is to consider the arbitration agreement as a completely seperate contract which – more or less by chance – is located in another contract. Under this approach, the arbitration agreement has a legal fate of its own without any repercussions to the main contract. The only elements the arbitration agreements shares with the main contract are, as a rule, the identity of the parties and date and place of execution of the contract.

Regarding the arbitration agreement as a contract by its own has, among other, two consequences: First, the applicable law to the arbitration agreement has to be determined independently from the law applicable to the main contract,[6]) and, second, the rules of international private law for *contracts* have to be applied, as opposed to any procedural rules on the applicable law. An arbitration agreement is contractual in its nature and that has also to been reflected on the level of conflict of laws rules.[7]) In the outcome, the main contract and the arbitration agreement may well be subject to different laws.[8])

[3]) The statute reads: The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2 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.

3 The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen.

[4]) *See* Zeiler, *supra* note 1, at § 581 ZPO mn 96; Dietmar Czernich, New Yorker Schiedsübereinkommen Art II mn 40 (2008).

[5]) OGH, Aug 7, 2007, docket no. 4 Ob 142/07x (Austria); OGH, Apr 29, 2003, docket no. 1 Ob 22/03x, wbl 305 (2003) (Austria).

[6]) Gary B. Born, International Commercial Arbitration Vol I 412 (2014); Fasching, Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht 32 (1973).

[7]) Zeiler, *supra* note 1, at § 581 ZPO mn 14; Nils Schmidt-Ahrends & Philipp Höttler, *Anwendbares Recht bei Schiedsverfahren in Deutschland*, SchiedsVZ 267, 272 (2011).

[8]) Zeiler, *supra* note 1, at § 581 ZPO mn 95; Born, *supra* note 6, at 412.

III. Determining the Applicable Law

A. Legal Framework

As has been said above, Austrian law on arbitration does not provide for a specific rule which determines the law applicable to an international arbitration agreement, *i.e.* an arbitration agreement where at least one party has its seat or domicile in a different jurisdiction. This lack is to some extent surprising because the law on arbitration is quite new and the need for a rule should have been obvious to the fathers of the reform of 2007. Still we know from the legislative history that the need of a specific rule was discussed but then abandoned because the issue was considered as being too complex.[9])

The lack of a specific rule leads to the more general set of rules applying to international contracts. Among them the Rome I Regulation is most prominent as it addresses almost universally all aspects of international contracts. However, under Art 1(2)(e) of the Rome I Regulation, arbitration agreements do not come under its scope and are explitedly excluded from the applicability of the Rome I Regulation. It is commonly held that at the moment of enacting the Rome Convention in 1980, which is the predecessor of the Rome I Regulation, the New York Convention already provided for a set of rules on the law applicable to international arbitration agreements. Therefore, these agreements should be excluded from the Rome Convention to avoid conflicting results.[10])

Based on the lex fori approach, under which the arbitral tribunal has to apply the private international law rules of the state where it sits,[11]) an arbitral tribunal with its seat in Austria has to apply Austrian rules of conflict of laws. If an international issue is excluded from the scope of the Rome Regulation, the Austrian Law of International Private Law of 1979 (*Bundesgesetz über das Internationale Privatrecht* – IPRG), as amended, steps in. Under § 35 IPRG a contract (that is outside the scope of the Rome I regulation) is subject to the law which the parties choose. Such choice-of-law may be done explicetedly by a corresponding contractual clause or in a tacit manner. However, § 35 IPRG does not provide for an answer, what law to apply if there is no choice-of-law by the parties to the arbitration agreement. In such case, a different solution has to be sought. If there is no choice-of-law, the applicable law has to be determined according to the overriding principle of the closet connection. This will be in most cases the place where the arbitral tribunal sits.[12])

[9]) Christian Hausmaninger *in* Kommentar zu den Zivilprozessgesetzen (ZPO) § 581 ZPO mn 274 (Fasching & Konecny eds., 2nd ed. 2007).

[10]) Thomas Rauscher, Europäisches Zivilprozessrecht und Kollisionsrecht – EuZPR/EuIPR Art 1 Rom I-VO mn 40 f (2010).

[11]) *See* Dietmar Czernich, *Die Bestimmung des anwendbaren Rechts im Schiedsverfahren: Rom I-VO vs nationales Sonderkollisionsrecht*, wbl 554 (2013).

[12]) Zeiler, *supra* note 1, at § 581 mn 126; OGH, Apr 23, 2006, docket no. 7 Ob 236/05i, JBl 726 (2006).

Still, there is also a rule of international law, which is also part of Austrian law, that specifically addresses the issue of the law applicable to the arbitration agreement. That is Art V(1)(a) of the New York Convention. Art V(1)(a) says that recognition of a foreign arbitral award may be refused if the arbitration agreement between the parties was invalid under the law which the parties have chosen or according to the law where the award was made. Art V(1)(a) of the New York Convention clearly is a conflicts of law rule and determines the law applicable to the arbitration agreement.[13]) However, Art V(1)(a) of the New York Convention is to be applied only by the state courts which are invoked in the enforcement situation. There is no direct basis to apply this clause also in a situation where the arbitral tribunal has to decide about the validity of the arbitration agreement to determine its own jurisdiction nor where a state court has to judge about the validity of the arbitration agreement if one party challenges its validity.

It has been argued that Art V(1)(a) of the New York Convention is to be applied by analology also in these situations.[14]) Indeed, as G. Born has pointed out,[15]) it makes little sense to apply different standards and different rules to one and the same question, *i.e.* which laws governs the arbitration agreement. There is no need to argue that it desirable to have one single standard, however, the fact remains that Art V(1)(a) of the New York Convention demands applicability only in the enforcement situation. An analogy is problematic: [16])Under general principles of legal construction, a legal provision may only be extended beyond its own scope if there is a lack of a legal provisions. If there is a choice-of-law in the arbitration agreement, even if it is merely tacit, there is no lack of legal provisions applying to the situation because in such case the general rule of § 35 IPRG steps in. Only if there is no choice-of-law and, consequently, § 35 IPRG is not applicable, there is a real lack of legal provisions which can be filled by an analogy to Art V(1)(a).

There has been some writing by prominent authors suggesting an international set of material rules to determine the substantive validity of the arbitration agreement.[17]) This approach does not touch the conflict of law issues but applies "generally accepted international principles" to the arbitration agreement.[18]) This doctrine has recently been applied by the French courts.[19]) Albeit this approach might be appealing because it leads to more uniformity, there is no legal basis in Austria to apply some more or less vague standards of "generally accepted principles" without prior reference to the conflict of law rules. Any arbitration tribunal which goes this way risks a vacation of its award by the state courts if they find that the law applicable under the conflict of law rules invalidates the arbitration agreement.

[13]) Albert Jan Van den Berg, The New York Arbitration Convention 257 (1981).

[14]) *See* Hausmaninger *in* ZPO, *supra* note 9, at § 581 ZPO mn 271; Karl H. Schwab & Gerhald Walter, Schiedsgerichtsbarkeit: Kommentar Kap 43 mn 2 (7th ed. 2005); Nathalie Voser & Schramm *in* Praxishandbuch Schiedsgerichtsbarkeit Kap L Rz 24 (Hellwig Torggler ed., 2007).

[15]) Born, *supra* note 6, at 422 f.

[16]) *Also* Leonardo Graffi, *The law applicable to the validity of the arbitration agreement: A practioner's view, in* Conflict of Laws in International Arbitration 55 ["... rather daunting task ..."] (Ferrari & Kröll eds., 2010).

[17]) *See* Born, *supra* note 6, at 410.

[18]) *See also* Graffi, *supra* note 16, at 35 f.

[19]) Cour de Cassation, Dez 20, 1993, *in* Rev. Arb. 116 (1994) (Dalico).

So the Austrian legal framework to determine the law applicable to an arbitration agreement looks like this:

(a) Jurisdiction by the Arbitral Tribunal
If the arbitral tribunal looks at the arbitration agreement to find out which law to apply, eg. to its validity, it has to apply § 35 IPRG. Under this provision, the law chosen by the parties will govern the arbitration agreement.[20]) Choice-of-law may also by in a tacit manner.[21]) If there is no choice-of-law, the arbitral tribunal may apply Art V(1)(a) of the New York Conventions which directs, to the law where the arbitral tribunal sits.[22])

(b) Arbitration Agreement before the State Courts
If an Austrian court has to determine which law to apply to an arbitration agreement, the situation is materially the same. This is the logical consequence of the lex fori approach.The state court has equally to look at a choice-of-law in the arbitration agreement first, and if there is none, it may apply the rule of Art V(1)(a) of the New York Convention by analogoly which directs to the law where the arbitral tribunal has its seat.

(c) Enforcing Foreign Award
If enforcement of a foreign award is sought, the law applicable to the underlying arbitration agreement is directly provided by Art V(1)(a) of the New York Convention.[23]) Under this provision, the court has to look if there is a choice-of-law among the parties of the arbitration agreement and if there is none, the law of the place where the arbitration was held has to be applied.

As we see, even if different legal provisions apply to the issue of the applicable law, the results are the same. There might be some room to argue if the standards for a valid choice-of-law under § 35 IPRG on the one hand and Art V(1)(a) of the New York Convention are different. This would be anything but surprising as § 35 IPRG is national law, whereas Art V of the New York Convention is international law. However, as we will see, there are only slight differences.

[20]) OGH JBl 629 (1974); Hausmaninger *in* ZPO, *supra* note 9, at § 581 ZPO mn 275.

[21]) OGH, Mar 8, 1961, docket no. 1 Ob 98/61, SZ 34/35 = EvBl 1961/204 (1961).

[22]) OGH, Apr 23, 2006, docket no. 7 Ob 236/05i, JBl 726 (2006); OGH, Aug 24, 2005, docket no. 3 Ob 65/05p, ecolex 53 (2006).

[23]) *See* Hausmaninger *in* ZPO, *supra* note 9, at § 581 ZPO mn 284.

B. Choice of law

A choice-of-law has predominant importance when determining the applicable law. Both § 35 IPRG as well as Art V(1)(a) admit an express choice-of-law clause or a tacit choice-of-law by the parties. Both have the same legal effect. An express choice-of-law clause is not seen very often,[24]) whereas there is considerable dispute as to which circumstances give rise to the assumption of a tacit choice-of-law.

As for the law chosen by the parties, neither § 35 IPRG nor Art V(1)(a) New York Convention contain any limitations.[25]) There is clearly no need of an actual link between the parties, the forum or the parties.[26]) Parties are free to select a law which is completely neutral and has no connection with the seat of the arbitral tribunal or the parties.[27]) However, if the arbitral tribunal has its seat in Austria, certain mandatory rules of the arbitration procedure apply irrespective of the law chosen by the parties.[28]) Among these rules is § 586 of the Austrian Code of Civil Procedure (*Zivilprozessordnung* – ACCP) which provides that the arbitration agreement may only stipulate for an impair number of arbitrators in the panel. In addition, the power of the courts to vacate an arbitral award as provided for in § 611 ACCP is considered mandatory. Any stipulation in the arbitration agreement to the contrary *(pactum de non petendo)* will be ignored by the Austrian courts.

Other than under Art Art 3(5) Rome I Regulation, under Austrian conflicts of law principles,[29]) the formation and material validity of the choice-of-law clause is not subject to the law chosen but to the lex fori.[30]) There is no basis to apply the bootstraps rule of Art 10 Rome I Regulation. Under the New York Convention, a modified bootstraps rule applies in the sense that the validity of the choice-of-law clause is determined by the law selected in that clause and not by the lex fori of the state where the court or the arbitral tribunal sits.[31]) This is the essential difference between applying § 35 IPRG and Art V New York Convention.

1. Express Choice-of-Law

An express choice-of-law clause in the arbitration agreement itself will provide the clearest indication which law to apply. Yet such express clauses are very

[24]) Rainer Hausmann *in* INTERNATIONALES VERTRAGSRECHT mn 6613 (Reithmann & Martiny eds., 7th ed. 2010).

[25]) *See* Hausmann *supra* note 24, at mn 6613.

[26]) Schmidt-Ahrends & Höttler, *supra* note 7, at 273.

[27]) Czernich, *supra* note 4, at Art II mn 44.

[28]) Hausmaninger *in* ZPO, *supra* note 9, at § 581 ZPO mn 278.

[29]) Bea Verschraegen *in* KOMMENTAR ZUM ALLGEMEINEN BÜRGERLICHEN GESETZBUCH § 11 IPRG mn 6 (Rummel ed., 3rd ed. 2004); Dietmar Czernich, *Die Rechtswahl im internationalen österreichischen Vertragsrecht*, ZfRV 157, 162 (2013).

[30]) OGH JBl 120 (1991); OGH JBl 383 (1984).

[31]) *E.g.* Czernich, *supra* note 4, at Art II mn 44.

rare.[32]) Only in exceptional cases the lawyers drafting the arbitration clause also give special attention to the applicable law and add a clause to that end. Even the standard clauses of the various institutional arbitration bodies do not provide for any language what law to apply to the arbitration clause. This is rather astonishing because the need to determine the law applicable to the arbitration agreement is quite obvious in international cases. A potential explanation to this might be that the drafters of the standard clauses in most cases assume that the clause is subject to the law of the institutional body and do not see the need to add an express choice-of-law clause.

2. Tacit Choice-of-law

Given the relative scarcity of express choice-of-law provisions in arbitration agreements, the question under which circumstances a tacit choice-of-law may be assumed is of high importance. As a general rule, a tacit choice-of-law may only be assumed if there is clear evidence that the parties mutually intended to agree on a certain law but did not expressly stipulate their common intention. The common intention of the parties may be derived from

(a) the choice-of-law clause in the main contract,
(b) the reference to certain legal provisions of national law in the arbitration clause; or
(c) the reference to institutional arbitration.

a) Choice-of-law Clause in the Main Contract

In the standard cases, the arbitration clause is embedded in the main commercial contract. If parties have their seats in different countries and the main contract is well drafted, it will usually contain a choice-of-law clause which law to apply to the material provisions of the contract. As a consequence of the doctrine of seperability, the choice-of-law in the main contract does clearly not by itself extend to the arbitration clause, which is legally independent from the main contract.[33]) In many cases, however, it might be arguable that parties – albeit erroneously – thought that the choice-of-law clause in the main contract would also govern the arbitration clause because they did not know about the legal independence of the arbitration clause.[34])

In such a situation, the circumstances clearly indicate that both parties had the common intention to subject also the arbitration clause to the law selected in the main contract.[35]) Then it will be completely legitimate to assume a valid choice-of-law also for the arbitration agreement in favor of the choice-of-law of

[32]) *E.g.* Hausmaninger *in* ZPO, *supra* note 9, at § 581 ZPO mn 268.

[33]) BORN, *supra* note 6, at 412.

[34]) Graffi, *supra* note 16, at 28 f.

[35]) Poudret & Besson, *supra* note 2, at 170.

the main contract.[36]) Only in cases where parties (or their lawyers) positively knew that the choice-of-law clause in the main contract does *not* extend to the arbitration clause, a different solution might be argued. In such situation a tacit choice-of-law in favor of the law of the main contract may only be assumed if there are other circumstances which give rise to the assumption that the parties had the will to choose a certain law for the arbitration agreement.

If the main contract does not provide for a choice-of-law clause and its law is established by the provisions of the international private law of the forum, there is no basis to extend the law of the contract also to the arbitration clause. The absence of a choice-of-law clause in the main contract by itself shows that there was no common intention of the parties to subject the main contract to a certain law and, consequently, such will cannot be substituted for the purposes of the arbitration agreement by extending the law of the contract also to the arbitration clause.

b) Reference to Certain Legal Provisions of National Law

Sometimes parties choose to refer in the arbitration clause to certain legal provisions. An arbitration clause used rather frequently in Austria reads like "Parties agree to arbitration in the sense of § 577 of the Code of Civil Procedure (ZPO) ...". By referring to the Austrian Code of Civil Procedure (ACCP), it becomes sufficiently obvioius that it was the parties intention to subject the arbitration clause to Austrian law. Otherwise, the reference to the Austrian Code would not make much sense. So as a general rule it may be said that any express reference to provisions of any national law generally gives rise to the assumption that parties wished to subject the arbitration clause to the law to which the provision referred to belongs. In such case, this law will control the arbitration clause.

c) Reference to Institutional Arbitration

If parties refer to institutional arbitration, there is a certain inference that they also had the will to subject the arbitration agreement to the law of the country where the institutional body has its seat. Still, in such circumstances the intention of the parties needs to be carefully scrutinized. For instance, choosing ICC Arbitration in Paris may or may not reflect the will of the parties to subject the arbitration agreement to French law. This holds all the more true if parties chose the ICC Rules only but determine the place of arbitration in another jurisdiction, eg Switzerland. In such circumstances one needs to be very cautious assuming a tacit choice-of-law in favor of the seat of the arbitration institution.

As a general rule, choosing the arbitral rules of a certain institution will only rise to a tacit choice-of-law in favor to the law of the jurisdiction where the institution sits if there is corresponding evidence that this corresponds with the intention of the parties. Choosing institutional arbitration will normally by itself not be sufficient to assume a common intention of the parties to apply the law of that country also to the arbitration agreement.

[36]) OGH, Jan 26, 2000, docket no. 7 Ob 368/98p, JBl 738 (2000); *cit* Hubertus Schumacher, *Unbestimmte Schiedsvereinbarungen und Dissens: Anknüpfungsfragen bei internationalen Sachverhalten in der Judikatur des OGH*, SchiedsVZ 54 (2005); Czernich, *supra* note 4, at Art II mn 44.

d) Contradicting Indications

It may well be that the indications for a tacit choice-of-law may point to different laws. As the case might be, the choice-of-law in the main contract might point to English law and the arbitration clause might refer to an arbitral tribunal "in the sense of the Austrian Civil Code (ZPO)". Alternatively, choice-of-law in the main contract might be in favor of Swiss law but parties agreed to arbitration under the Vienna Rules at the VIAC. Obviously, all sorts of contradicting indications for the tacit choice-of-law are conceivable.

When solving this contracting indications, one has to bear in mind that only a mutual agreement by the parties to apply a certain law to the arbitration agreement may constitute a valid choice-of-law. With this in mind, it appears that a reference to legal provisions of a certain jurisdiction in the arbitration clause itself shows the common intention of both parties to subject the arbitration clause to the law of that jurisdiction in the strongest way. If there is such reference in the arbitration clause itself, it clearly overrides any other indications that might direct to another law.

In absence of such reference, it seems that an express choice-of-law in the main contract establishes a strong indication of the intent of the parties to subject their entire legal relations, including the arbitration agreement, to the law selected. Only in cases where there is a strong indication that the parties wanted to exclude the arbitration agreement from their choice-of-law in the main contract other indicators might play a role. Finally, the choice of a certain institutional arbitration body by itself will in most cases only provide a minimal indication that parties wished to subject the arbitration clause also the law where the institution is located.

C. Applicable Law in Absence of a Choice-of-law

If there is no express or tacit choice-of-law to the arbitration agreement, Art V(1)(a) of the New York Convention steps in. Under this rule, in absence of a choice-of-law by the parties the arbitration agreement is subject to the law where the arbitral tribunal has its seat.[37]) This has been held by the Austrian Supreme Court[38]) and is unanimous opinion in legal writing.[39])

[37]) Hausmaninger *in* ZPO, *supra* note 24, at mn 6627.

[38]) OGH, Feb 19, 2004, docket no. 6 Ob 151/03, SchiedsVZ 52 (annotation Schumacher) (2005).

[39]) *E.g.* Fasching, *supra* note 6, at 32; Zeiler, *supra* note 1, at § 581 ZPO mn 126.

IV. Scope of the Applicable Law

A. General

Determining which law applies to the arbitration agreement is only half way. The answer to that question will only identify the law of a certain jurisdiction to apply but will leave it open what legal aspects will be covered by that law and what legal aspects might be covered by another law. This additional distinction might come as a little surprise to those unfamiliar will dealing with conflict of laws issues because they might be inclined to believe to have succeeded when they have found the applicable law. Still, their hope is not unfounded because there is a clear tendency to cover as many aspects as possible under the applicable law to avoid a situation where the arbitration clause is subject to two (or more) different laws *(depecage)*.

As a general rule, it may be said that subject to the contrary all legal aspects of the arbitration clause are covered by the law which applies to it.[40]) This is in particular true to formation and material validity of the arbitration clause. But still many issues remain. Problematic areas to be dealt with are for instance arbitrability, personal capacity, restrictions for consumers, power of attorney to conclude the arbitration agreement or subrogation of the arbitration agreement to a third party. In these cases, it is evident that extending the chosen law to such legal aspects needs further discussion, in particular with a view to the fact that there is a free choice-of-law for the arbitration agreement. Many of these legal aspects are mandatory in their nature and parties might seek to avoid them by choosing a law that meets their special needs. Not always will the lex fori tolerate such attempts.

B. Specific Legal Aspects

As has been said above, the general rule is that all aspects of the arbitration agreement are covered by the applicable law. So the question about the scope of the applicable law is rather a question about its limits. In practice, it may be held that all legal aspects of the arbitration agreement are covered unless there is a specific basis that a certain aspect of the arbitration agreement might be subject to another law. In particular, issues as lack of consent, fraud, duress, mistake, illegality, waiver of the arbitration agreement and termination of the arbitration agreement are covered by the law applicable to the arbitration agreement.[41]) Only specific aspects to be discussed below fall outside the scope of the applicable law:

[40]) Hausmaninger *in* ZPO, *supra* note 24, at mn 6614.
[41]) Graffi, *supra* note 16, at 47.

1. Capacity

Issues relating to the personal capacity are under general principles of Austrian international private law governed by the law of the nationality of the contracting party.[42]) Consequently, the personal capacity of one party to enter into the arbitration agreement is not covered by the applicable law. This is specifically provided for in § 10 IPRG. If such party is a corporation, the law at its corporate seat governs.

Art V(1)(a) of the New York Convention comes to the same result: The personal capacity of a party entering an arbitration agreement is subject to its own law which is the law of its nationality in case of a natural person and its seat in case of a corporation.[43])

2. Legal Form

For purposes of party protection and generating sufficient evidence, arbitration agreements are subject to certain formal requirements. Again, as a general rule, issues relating to the legal form of contracts are not part of the law applicable to such contract. To these issues separate rules of international private law apply. As Art II of the New York Convention particularly addresses issues of the legal form of the arbitration agreement, a distinction needs to be made between domestic Austrian Law and the New York Convention.

Domestic Austrian law applies if the arbitration agreement is challenged before a national court and the arbitration agreements provides for Austria as place of arbitration. To ascertain the formal validity of the arbitration agreement, the national Austrian court will apply the rules of national international private law. § 8 IPRG provides to that end that the legal form of a contract is subject either to the law which governs the contract itself or to the law of the place where the parties entered into the contract *(lex loci contractus)*. If the contract (arbitration agreement) is legally valid under either of these laws, the formal requirements for the contract shall be deemed fulfilled. In addition to that, an arbitration agreement in an international situation is also formally valid if it meets the formals requirements of Art II of the New York Convention.

Only the New York Convention applies in the enforcement situation where one party seeks to enforce a foreign arbitral award in Austria.[44]) In such case the court seized will only check if the arbitration agreement underlying the arbitral award meets the formal requirements of Art II of the New York Convention.

[42]) *See* Verschraegen *in* ABGB, *supra* note 29, at vor § 35 IPRG mn 3.
[43]) *E.g.* Domenico Di Pietro, *Applicable laws under the New York Convention, in* Conflict of Laws in International Arbitration 75 (Ferrari & Kröll eds., 2010).
[44]) *See* Graffi, *supra* note 16, at 41 *et seq.* who argues that Art II oft he New York Convention also applies in domestic situations.

3. Agreement with Arbitrators

On the basis that the entire arbitration process is built on the arbitration agreement, it might be arguable that the law applying to the arbitration agreement might also control the agreement with the arbitrators. It is widely held, however, that the agreement of the parties concluded with the arbitrators is a legal contract which is separate from the agreement among the parties. In fact, the arbitrators are never a party to the arbitration agreement, and, consequently, any choice-of-law in the arbitration agreement cannot be extended to them because they never consented to it. The same holds true if there is no choice-of-law; also in that situation an extension of the applicable law to third parties is not possible without their consent. In fact, the agreement with the arbitrators has its own legal fate and will usually be subject to the law at the place of arbitration

4. Procedural Issues

Whereas parties are in general free to choose the national procedural law of a certain jurisdiction, a choice-of-law in the arbitration agreement will not be deemed as also determining the procedural law. The applicable law only governs the merely *contractual issues* of the arbitration agreement and does not extend to procedural aspects.[45]) For this reason, a choice-of-law in the arbitration agreement will not lead to the application of the procedural rules of the law chosen, unless there is a party agreement to that end. If parties agree that the choice-of-law shall also extend to the procedural rules, such choice is to be honoured by the arbitral tribunal.

5. Subrogation and Transfer

Resulting from the doctrine of seperability, any transfer of the rights and duties of the main contract to a third party does not automatically extent to the arbitration clause embedded in such main contract. Instead, it has to be checked separately if and under what circumstances the third party shall also be bound also by the arbitration agreement.

As the German Supreme Court has recently held,[46]) the law which controls the arbitration agreement also controls the manner and effect of the subrogation, in particular what legally needs to be accomplished that the third party shall be bound by the arbitration agreement.[47]) In particular, it is not the law which governs the contract between the assignor and the assignee but the law of the arbitration agreement.

[45]) Hausmaninger *in* ZPO, *supra* note 24, at mn 6614.
[46]) BGH May 5, 2014, docket no. III ZR 371/12, SchiedsVZ 151 (2014).
[47]) *E.g.* Schwab & Walter, *supra* note 14, at Kap. 44 mn 24.

6. Power of Attorney

Any choice-of-law in the arbitration agreement does not automatically extend to the power of attorney.[48]) Any power of attorney to sign an arbitration agreement or a contract with an arbitration clause has its own legal fate.[49]) Still, under § 49 IPRG parties to the power of attorney have the possibility to enter into a choice-of-law agreement effective for the power of attorney. Such choice-of-law may also entered in a tacit manner. It is arguable that in cases where the main contract has been completely negotiated and where the empowered person is in positive knowledge of the choice-of-law clause contained in the contract to be concluded, it comports with the intention of the parties that also the power of attorney shall be subject to the same law as the main contract. In this case, a tacit choice-of-law in favor of the law of the arbitration agreement may be assumed. However, the law applicable to a general power of attorney for any future arbitration agreement has to be established separately. In such case, under § 49 IPRG the law of the jurisdiction where the power of attorney shall be used is in control.

7. Consumer Protection

Austrian law is very rigid when it comes to consumers entering into an arbitration agreement. The legal requirements for the validity of an arbitration agreement with a consumer are so strict that in ordinary circumstances consumer arbitration is dead in Austria.[50]) In particular, under § 617 ACCP an arbitration agreement with a consumer is only valid if such arbitration agreement has been concluded after the dispute among the parties has arisen. At that point of time, a party agreement to enter into arbitration is usually unlikely. Still, the law leaves it open what law controls the personal qualification of a party to the arbitration agreement if such party has its seat (residence) outside of Austria.

In a recent decision,[51]) the Austrian Supreme Court has held that the law applicable to the arbitration agreement also controls the qualification of a party a a consumer. Under the view of the Supreme Court, the qualification as a consumer is within the scope of the applicable law. The correctness of this view is most disputable because under general principles of international private law the personal characteristics of a person will always b qualified by the law of its domicile or its nationality.[52]) Under correct application of the law, the qualification as a con-

[48]) Czernich, *supra* note 4, at Art II Rz 48.
[49]) This has been incorrectly seen by the Austrian Supreme Court, JBl 726 (2006) (Hügel), *in* RZ 255 (2006), *in* ecolex 424 (2013) (Wörle) when it held that the power of attorney came under the same applicable law as the arbitration agreement.
[50]) *See* Andreas Reiner, *Schiedsverfahren und Gesellschaftsrecht*, GesRZ 151, 168 (2007).
[51]) OGH, Dez 16 2013, docket no. 6 Ob 43/13m (2013) (Austria).
[52]) *See* Dietmar Czernich, *Anwendbares Recht zur Bestimmung der Verbrauchereigenschaft im Schiedsverfahren*, RdW 251, 252 (2014).

sumer is under the scope of the law applicable to the arbitration agreement but has to be determined independently.[53])

8. Arbitrability

Both subjective and objective arbitrability do not come under the scope of the law applicable to the arbitration agreement.[54]) The New York Convention does not address this issue.[55]) These issues are both determined by the law where the arbitral tribunal sits *(lex fori)*.[56]) If this is in Austria, Austrian law will govern if the matter before the arbitral tribunal is arbitrable or not. This is a simple result of the fact that an award rendered by an arbitral tribunal sitting in Austria may be vacated by the Austrian Supreme Court and that under § 611(2)(7) ACCP the lack of arbitrability is a reason for vacating the award. Under a recent judgment of the Austrian Supreme Court,[57]) there is no difference to be made between national or international arbitration proceedings. The arbitrability of the matter will also judged by Austrian law if there is no connection of the parties or the matter to Austria as long as the award is rendered in Austria.

V. Summary

Under the Theory of Seperability, the arbitration agreement is to be considered as an agreement of its own, even if it is part of the main (commercial) contract. Consequently, the law applicable to the arbitration agreement has to be ascertained seperatedly from the law of the main contract. Both under the choice-of-law principles of the New York Convention and Austrian international private law, parties may chose the law applicable to the arbitration agreement freely. In absence of such choice-of-law, the law of the state where the arbitration tribunal has its seat will control.

[53]) *See* Dietmar Czernich, *Die Bestimmung des auf die Schiedsvereinbarung anwendbaren Rechts in Liechtenstein*, ZVglRWiss 111, 428, 440 (2012).

[54]) Zeiler, *supra* note 1, at § 581 ZPO mn 127 f.

[55]) *E.g.* Di Pietro, *supra* note 43, at 72.

[56]) Born, *supra* note 6, at 521.

[57]) OGH, Dez 16, 2013, docket no. 6 Ob 43/13m.