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LAW GOVERNING ARBITRATION AGREEMENT: EXCERPTS FROM THE AZERBAIJANI LEGISLATION

Abstract

Although international commercial arbitration has been quite famous recently as a dispute resolution mechanism, the question of what law governs the arbitration agreement remains unsolved both internationally, and in local jurisdictions. With enough conundrums attributed to this question, the main purpose of this article is to study the law governing arbitration agreements from the perspective of Azerbaijani arbitration law and pinpoint the necessity of its determination. The article continues by arguing how the problem can be solved if faced before Azerbaijani courts and elaborates on possible solution mechanisms based on local laws and court decisions at hand.

Annotasiya

Beynəlxalq kommersiya arbitrajı mübahisələrin həlli mexanizmi kimi son vaxtlar kifayət qədər məşhur olsa da, arbitraj sazişinin hansı qanunla tənzimlənməsi məsələsi həm beynəlxalq, həm də yerli yurisdiksiyalarda həlsiz qalmışdır. Kifayət qədər çaşqınlığa səbəb olan bu sualla birlikdə, məqalənin əsas məqsədi arbitraj sazişinə tətbiq olunan hüququ Azərbaycanın arbitraj qanunvericiliyi prizmasından öyrənmək və onun müəyyənləşdirilməsinin zəruriliyini dəqiqliklə ifadə etməkdir. Məqalə Azərbaycan məhkəmələri qarşısında problemin necə həll oluna biləcəyini müzakirə etməklə davam edir və yerli qanunlara və mövcud məhkəmə qərarlarına əsaslanaraq mümkün həll mexanizmlərini ətraflı şəkildə araşdırır.

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Introduction

It is widely known that arbitration, which has been a preferred dispute settlement mechanism for disputes arising out of cross-border transactions throughout the last decades, cannot simply exist without a valid and effective agreement to arbitrate since the choice of the parties to resolve their disputes in arbitration is reflected in arbitration agreements. Such arbitration agreements are distinct contracts from the contract they are included or incorporated into (hereinafter "main contract" or "underlying contract"), thereby they have their own object, existence, and their governing law can be different from the law governing the main contract.

The law governing arbitration agreement (hereinafter referred to as "arbitration agreement" or "arbitration clause") having an undeniable role in determining the arbitration agreement's validity, effect, and scope, is indispensable in today's world of international commercial arbitration. It requires a separate inquiry and is difficult to discern since the parties generally do not choose a separate governing law for the arbitration agreement while they choose the substantive law of the main contract and a seat for the arbitration.

Although the question had been raised before, the discussion on the determination of law governing arbitration agreements had never actually been finalized and lose its popularity in the academic world. On that note, with its recent judgment in the case of Kabab-Ji SAL (Lebanon) v. Kout Food Group [2021], UKSC 48 (hereinafter referred to as "*Kabab-Ji v. KFG*"),[1] the Supreme Court of the United Kingdom has made considerable changes in its approach to the question of the law governing the arbitration agreement thereby making it the focal point of discussion again.

From the very early times, the international commercial arbitration commenced, and the literature on the basis of arbitration agreements was introduced, there has been a discussion[2] on why there must be a separate law

[1] Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait) (2021).
[2] *See* Gary B. Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 Singapore Academy of Law Journal 814, 817 (2014); *See generally* Renato Nazzini,

governing the arbitration agreement and how it should be identified.[3] During this time, there have been different solution mechanisms proposed – which will later be discussed in this article – yet there has been no agreement in the international sphere. Meanwhile, courts of different jurisdictions and tribunals have presented diverging methods for providing a uniform answer yet failed in doing so. Therefore, the issue remains a "Gordian knot"[4] and with no agreed way of determination, thereby making it not only an issue of academic but also of practical importance.

While each country seems to provide a separate solution mechanism in this regard,[5] in Azerbaijan, the issue has been left unaddressed by legislation and the courts, despite a recent rise in the recourse to arbitration by national companies mostly in their cross-border commercial disputes. The precise way of determination of the law governing arbitration agreement is vital for the legal certainty, predictability, and economic growth of one's country since the development of arbitration and arbitration law is often understood as directly proportional to the growth of businesses in the country.[6]

The present Article intends to examine the need for a separate inquiry into the law applicable to the arbitration agreement and how it causes a dilemma in the practice of the courts and tribunals both in the international sphere and in Azerbaijan. The first chapter will address possible case situations where the examination of the law governing the arbitration agreement is necessary, whereas the following chapter will elaborate on the four main options of identifying the law governing the arbitration agreement (law of the main contract, law of the seat, transnational approach, pro-arbitration approach) based on the available conflict of laws rules. The later chapter, on the other

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The Law Applicable to the Arbitration Agreement: Towards Transnational Principles, 65 International and Comparative Law Quarterly 681, 687; *See also* Ibrahim F. I. Shihata, The Power of The International Court to Determine Its Jurisdiction, 187 (1965).

[3] *See generally* Gary B. Born, International Commercial Arbitration, 508 (2020).

[4] *See* Jim Yang Teo, Darius Chan, *Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There is None*, 37 Journal of International Arbitration (2020).

[5] Katharina Plavec, *The Law Applicable to the Interpretation of Arbitration Agreements Revisited*, 4 University of Vienna Law Review 82, 85-89 (2020); *See also* Maxi Scherer, Ole Jensen, *Towards a Harmonized Theory of the Law Governing the Arbitration Agreement,* 10 Indian Journal of Arbitration Law, 3 (2021); *See also* Naomi Tarawali, Patrick Gerardy, *The Law Governing the Arbitration Agreement – A Fresh Look at an Old Debate after the UK Supreme Court's Enka Judgment and Recent Clarification by the German Federal Court of Justice*, 19 German Arbitration Journal 208, 208-215; *See generally* Rolf Trittmann, Inka Hanefeld, Arbitration in Germany: The Model Law in Practice, 84 (2nd ed. 2015); *See also* Hamlyn & Co. v. Talisker Distillery A. C. 202, para. 208 (1894); *See generally* Kabab-Ji SAL v Kout Food Group, UKSC, 48 (2021); *See also* Ibrahim Amir, The Proper Law of the Arbitration Agreement: A Comparative Law Perspective: A Report from the CIArb London's Branch Keynote Speech (2021), http://arbitrationblog.kluwerarbitration.com/2021/05/21/the-proper-law-of-the-arbitration-agreement-a-comparative-law-perspective-a-report-from-the-ciarb-londons-branch-keynote-speech-2021/ (last visited Mar. 17, 2022).

[6] Jordi Paniagua, The Economic Impact of International Commercial Arbitration (2021), https://events.development.asia/materials/20210317/economic-impact-international-commercial-arbitration (last visited Mar. 17, 2022).

hand, is more specific and will determine the possibilities that the question of the applicable law of arbitration agreement may arise before Azerbaijani courts and provide an analysis of Azerbaijani legislation to propose practicable solution mechanisms.

I. Need for a separate law governing the arbitration agreement

A. When does the issue arise?

The arbitration agreements have their own object and existence, or in other words, are separable from the main contract. This comes from the separability doctrine (also referred to as "separability presumption")[7] which is a legal fiction that has been incorporated to arbitration practice. It is reflected in New York Convention on the on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "NYC"),[8] UNCITRAL Model Law on International Commercial Arbitration (hereinafter "Model Law"),[9] European Convention on International Commercial Arbitration (hereinafter "European Convention" or "Geneva Convention")[10] and other international instruments[11] taking a complementary approach.

As per its influence, when there is an international arbitration agreement which sets the jurisdiction of the arbitral tribunal for cross-border disputes, the issue of determining the applicable law will always arise. Possible cases where the tribunal or the court will have to determine the law governing the arbitration agreement are:[12]

1. When respondent party before a state court requests from the court to refer a case to arbitration;

2. When an arbitral tribunal is deciding on its jurisdiction: Acting with the principle of Kompetenz-Kompetenz,[13] arbitral tribunals have the power to determine their own jurisdiction. When the tribunal is exercising this power and

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[7] *Supra* note 3, 355-357; *See* C v. D EWCA Civ 1282 (2007); *See also* XL Insurance Ltd. v. Owens Corning, 1 All ER (Comm) 530 (2001).

[8] United Nations Convention on the Recognition and Enforcement of Arbitral Awards, art. 2 (1958).

[9] UNCITRAL, Model Law on International Commercial Arbitration, art. 16 (1985).

[10] European Convention on International Commercial Arbitration, art. 6 (2) (1961).

[11] *Supra* note 8, art. 81 (1).

[12] Julian David Mathew Lew, Loukas A. Mistelis, Stefan Kröll, Comparative International Commercial Arbitration, para. 6-30 (2003).

[13] *See* Born, *supra* note 3, 1048-1051; *See also* Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, International Commercial Arbitration, para. 416 (1999); *See* Stephen M. Schwebel, Luke Sobota, Ryan Manton, International Arbitration: Three Salient Problems, 11 (1987); *See also* Shihata, *supra* note 2, 25-26; Manuel Arroyo, Arbitration in Switzerland: The Practitioner's Guide, 647 (2nd ed. 2018); *See generally* American Bureau of Shipping (ABS) v. Copropriété Maritime Jules Verne et al. (2002); *See generally* Continental Commercial Systems v. Davies Telecheck International, B. C. J. No. 2440 (1995); *See also* BNA v. BNB, SGCA 84 (2019).

when a party decides to challenge the jurisdiction of the tribunal, the law governing the arbitration agreement "governs the inquiry";[14]

3. When respondent party before an arbitral tribunal applies to a state court, acting as claimant, requesting that the court finds it has the jurisdiction;

4. When a state court is deciding on the recognition and enforcement of a foreign arbitral award.

More precisely, we are required to have an applicable law of arbitration agreement in the following cases: (1) whether the parties have consented to submit their dispute to arbitration; (2) whether they had the capacity to do so; (3) whether they have complied with the form requirements set out for arbitration agreements; (4) whether they are legally bound by it; (5) whether the agreement bind non-signatory third parties; (6) what does the included terms mean; (7) whether the dispute can even be arbitrated; (8) in which case the arbitration agreement can be terminated, (8) whether they have complied with form requirements, etc.[15]

Notably, there is not one law governing the arbitration agreement because there should be, in fact, laws governing various aspects of the arbitration agreement.[16] Indeed, most of the aforementioned cases where we need an arbitration agreement are governed by several laws.[17] Accordingly, the substantive validity, i.e. whether the parties have intended to enter into an arbitration agreement; formal validity, i.e. the form requirements of the arbitration agreement; the scope, i.e. whether the disputed issue is covered within the scope of the arbitration agreement; the effect, i.e. whether the arbitration agreement binds the third parties, and other issues regarding the arbitration agreement are, though not necessarily, governed by different laws.[18]

B. Why is the issue problematic?

As mentioned above, the issue of law governing arbitration agreement remains unsolved for the decades and causes difficulties before courts and/or

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[14] *See* Koh, S. Unpacking the Singapore Court of Appeal's Determination of Proper Law of Arbitration Agreement in BNA v. BNB (2020), http://arbitrationblog.kluwerarbitration.com/2020/01/19/unpacking-the-singapore-court-of-appeals-determination-of-proper-law-of-arbitration-agreement-in-bna-v-bnb/ (last visited Mar. 17, 2022); *See also* Koh, S. A Critical Review of the Singapore High Court's Determination of the Proper Law of the Arbitration Agreement in BNA v BNB (2019), http://arbitrationblog.kluwerarbitration.com/2019/09/20/a-critical-review-of-the-singapore-high-courts-determination-of-the-proper-law-of-the-arbitration-agreement-in-bna-v-bnb/ (last visited Mar. 17, 2022).

[15] James Hope, Lisa Johansson, Stockholm Arbitration Yearbook, Chapter 9: What Is the Governing Law of the Arbitration Agreement? A Comparison Between the English and Swedish Approaches, 146 (2021); *See supra* note 3, 490.

[16] ICDR Young and International, Where to Go & What to Do When You Get There: Identifying the Law Governing the Arbitration Agreement (2021), https://www.youtube.com/watch?v=7tB5FrBC4ZY ((last visited Mar. 17, 2022).

[17] *Ibid. See also, supra* note *3,* 477-478.

[18] *Id.*, 76.

arbitral tribunals. The reasons for this difficulty can be structured in following way:[19]

To begin with, the parties usually fail to insert in their arbitration clauses or agreements which law is applicable to it.[20] In fact, they merely select the governing law of the main contract and frequently neglect to specify which law will govern the agreement to arbitrate.[21]

Additionally, for identifying the law governing arbitration agreement, one needs to know which conflict of law rules (also referred to as "choice-of-law rules") will govern the process of identification of applicable law. In that regard, there is legal uncertainty on the issue as there has been differing and complex approaches by the arbitral tribunals and the national courts on the matter, particularly due to the lack of choice-of-law rules to be applied in the identification process,[22] Several choice-of-law rules suggested to be used in the determination of the law governing the arbitration agreement are: (i) NYC, (ii) Model Law, (iii) three-tiered test from *Sulamérica*, (iv) conflict of law rules of *lex arbitri*. In a few words, according to NYC Article V (1) (a), the law governing the arbitration agreement shall be the law the parties have chosen (explicitly or impliedly), and if not any, the law of the seat (default rule). Three-tiered test also refers to explicit or implied choice of the parties, however, if not any, the law having the closest connection to the arbitration agreement.

Furthermore, there is widespread misunderstanding about the possibility of distinct laws controlling various components of arbitration agreements.[23] Academics and case law[24] have occasionally advocated opinions on applying the same approaches regarding the law governing the substantive validity of the arbitration agreement to the cases where a law governing any other aspect of arbitration agreement was required.

Lastly, as adjudicated by Prof. Ms. Scherer in her research[25] on 80 jurisdictions reflecting their approaches on the question of law governing the arbitration agreement, most of the jurisdictions prefer the law of the seat as the law governing the main contract as they encompass 51%, thus being the majority.[26] In contrast, the jurisdictions selecting the law of the main contract as the law governing arbitration agreement contain 34% of the map.[27] The other options are the Swiss and French models, respectively holding 9% and

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[19] *See supra* note 16.
[20] Sulamérica Cia Nacional De Seguros v. Enesa Engenharia SA, EWCA Civ 638, para. 11 (2012); *See* Teo, *supra* note 4, 636.
[21] *Ibid.*
[22] *Supra* note 3, 488.
[23] *Id.*, 477-478.
[24] *Ibid.*
[25] Amir, *supra* note 5.
[26] *Ibid.*
[27] *Ibid.*

6% roles.[28] Moreover, this map shows, all major jurisdictions, be it England or US, do not take a clear path in answering the question.[29]

Thus, as a result of lack of consistent approach and confusion regarding the nature of the law governing the arbitration agreement, there is no definitive solution and all we have are presumptions.

II. What law governs the arbitration agreement?

To find out which law governs the arbitration agreement, one has to find out which choice of law rules to rely on. Along with determining the appropriate conflict of law rules, one must determine which law is preferred under that rule.

The academic literature and the case law[30] on the law governing arbitration agreement are full of controversy when it comes to determination of the governing law of the arbitration agreement, since all choice of law rules give effect to the parties' choice, be it express or implied. Further, while some choice of law rules point out to the law having the closest connection when the choice of the parties is impossible to identify, some determine fallback rules. In that regard, the controversy on the law governing arbitration agreement focuses on four assumptions: 1) law of the main contract; 2) law of the seat; 3) a national approach of French courts; 4) validation principle.

This Chapter will address the discussions on each issue by specifying the opinions of both supporting and adverse groups briefly.

A. The law of the main contract

One of the commonly supported opinions is that the law of the main contract should be construed as the implied choice of the parties or the law having the closest connection to the laws governing the arbitration agreement. Notably, the courts do not consider the law of the underlying contract as an express choice of law governing the main agreement but rather jump to the second and the third stages of their determination, because they consider the arbitration agreement a distinct contract from the main contract for all purposes.[31]

1. Discussion favoring the law of the main contract

The supporting position on the law of the main contract always being the law governing the arbitration agreement comes from the text of the NYC, since it indicates that the arbitration agreement is governed by "the law to which the parties have subjected [the arbitration agreement] or, failing any indication thereon [by the parties], […] the law of the country where the

[28] *Ibid.*
[29] *Ibid.*
[30] *See* Born, *supra* note 2, 817; *See also supra* note 3, 508; *See* Nazzini, *supra* note 2, 687; *See also* Shihata *supra* note 2, 187.
[31] *See* BCY v. BCZ SGHC 249 (2016).

award was made".[32] The wording as "failing any indication thereon" seems to support the position that the choice of law of the main contract should be deemed as "any indication" by the parties.[33] Also, it has been accepted that the parties intend to govern all their disputes arising from a contract with the same body of law unless they point to the contrary.[34] This is because the parties are generally unaware of the application of a separate law to the arbitration agreement. This position affirmed by the UK Supreme Court in *Enka v Chubb*, is consistent with *the Fiona Trust & Holding Corpn v Privalov* case[35], where the House of Lords held that "construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship into which they have entered or purported to enter to be decided by the same tribunal".[36]

2. Discussions against this approach

Some suggest, the separability doctrine should prescribe that the law governing the main agreement cannot be applied to the agreement to arbitrate as far as the parties choose so expressly or impliedly. [37] To put it differently, the rationale of the courts and the literature on the application of the separability doctrine is comprised of that the separability doctrine will not prevent the application of the same law to the main contract and the arbitration agreement, because the separability doctrine acts as a as a protection mechanism for the arbitration agreement to prevent it from becoming invalid, non-existent or ineffective in the case that the main agreement it is included in is invalid, non-existent or ineffective[38] and comes at stake when the effectiveness, existence and/or the validity of the contract is in danger. Thus, the law of the main contract can govern the arbitration agreement either as an express or implied choice, and even as the law having the closest connection to it.[39]

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[32] United Nations Convention on the Recognition and Enforcement of Arbitral Awards, art. V (1) (a) (1958).
[33] Kabab-Ji SAL v. Kout Food Group, UKSC 48, para. 33-35 (2021).
[34] *See* Born, *supra* note 2, 825; *See also supra* note 3, 506.
[35] Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb, UKSC 38, para. 107 (2020).
[36] Fiona Trust & Holding Corp v. Privalov, UKHL 40, para. 7 (2007).
[37] *See* Kabab-Ji SAL v. Kout Food Group, UKSC 48, para. 33-35 (2021); *See also* Blake Primrose, *Separability and stage one of the Sulamérica inquiry*, 33 Arbitration International 139, 144 (2017); *See generally* Karan Rukhana, Saisha Bacha, *The Doctrine of Separability: Through Lens of Darwinism*, 10 Indian Journal of Arbitration Law (2021); BCY v BCZ SGHC 249, para. 60 (2016).
[38] *See* Lew, *supra* note 12, para. 6-1 (2003); *See also* Sulamérica Cia Nacional De Seguros v. Enesa Engenharia SA, EWCA Civ 638 para. 26 (2012).
[39] Enka Insaat Ve Sanayi A. S. v. OOO Insurance Company Chubb, UKSC 38, para. 283 (2020).

B. The law of the seat

Several jurisdictions, both common and civil law, have applied the substantive law of the arbitral seat as the law governing the arbitration agreements, and particularly, their validity.[40]

Particularly, the approach of the tribunals and the courts somehow differ in relation to the application of the law of the seat: On the one hand, they apply it as an implied choice of parties by indicating that the parties choose the law of the arbitration agreement when they choose the seat of arbitration. On the other hand, some courts and tribunals apply the law of the seat as the law having the closest connection to the arbitration agreement.[41] Furthermore, the second part of the Article V (1) (a) of NYC and the identical instruments provide for a default rule by indicating that, when there is no agreement between the parties on the choice of law of the agreement to arbitrate, it will be governed under the law of the country where the award was made, namely the law of the arbitral seat.[42]

Although the rationale behind the application of the law of the seat to the arbitration agreements has not been very "well-articulated"[43], the main reasons favoring this approach are the separability doctrine, the procedural nature of the law of the seat, and sometimes, its neutrality.

1. Separability doctrine

As having already been conveyed in the previous paragraph, the separability doctrine does not affect the choice of law of the arbitration agreement in the sense of preventing the law of the main contract being applicable to the agreement to arbitrate. Thus, the separability doctrine is not really a strong argument in favor of choosing the law of the seat as the proper law.

2. Procedural nature of the law of the seat

It has been articulated that the purpose of the arbitration agreement is completely different from that of the main contract since the main contract deals with the substantive relations between parties[44] whereas the arbitration agreement, by providing for the jurisdiction of the arbitral tribunal, has procedural nature.[45] By this, law of the seat is considered as more connected with the arbitration agreement, since the seat and seat's law deal with the procedural side of the arbitration.[46] It regulates the interference of the national

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[40] *Supra* note 3, 17.

[41] *See generally* FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd. (2014); *See also* XL Insurance Ltd. v. Owens Corning, 1 All ER (Comm) 530 (2001).

[42] UNCITRAL, *supra* note 9, art. 36 (1) (a) (i); *See supra* note 33, art. 100, V (1) (a); *See also supra* note 10, art. VI (2).

[43] *Supra* note 3, 17.

[44] Nazzini, *supra* note 2.

[45] Neil Kaplan, Michael Moser, Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles, 145 (2018).

[46] *Supra* note 3, 18.

courts to arbitral process.[47] Much importantly, seat country is mostly where the arbitration agreement is performed. The courts of the seat also have crucial supporting and supervisory roles in arbitral process, such as aiding in the formation of the arbitral tribunal and the collection of evidence, as well as for deciding on the tribunal's jurisdiction, and the award's validity.[48]

3. Neutrality

One of the tendencies in international commercial arbitration is that, the parties, as they most of the time have different nationalities, intend to resolve their disputes in a neutral place.[49] For such reason, it has been suggested that the law of the neutral seat should be applicable to the arbitration agreement as the implied choice of parties, since the parties choosing a neutral seat would not intend to govern the arbitration agreement with the law of the one of their country of nationality, but rather with a neutral law.[50]

On the contrary, some suggest that, the neutral consideration, which aims at ensuring a fair adjudication, normally focuses on the integrity of the decision-makers and rarely the governing law of the arbitration agreement.[51]

C. Validation principle

A more recent approach regarding the choice of law for the arbitration agreements is taking a pro-arbitration approach in deciding the law governing the substantive validity of the arbitration agreement.[52]

The validation principle proposes that whenever the choice of law of arbitration agreement results in posing a serious risk to the substantive validity of the arbitration agreement, the law validating it, be it the law of the seat or the underlying contract, should be upheld.[53] The supporters of this principle underline the importance of giving effect to the parties' common intention when they are concluding the agreement to arbitrate, and the wording of Article V (1) (a) of NYC.[54] As believed by Born, the text of the article, when using the wording as "shall recognize", puts the obligation on the Contracting States to recognize and give full effect to the agreement to arbitrate made by parties.[55]

Furthermore, Born considers acting on validation principle as a safe path, since the the validation principle, giving effect to parties' true intentions, is

[47] Kaplan, supra note 47; *See also* Nazzini, *supra* note 2, 702.
[48] *Supra* note 9, arts. 6, 11 (3); 11 (4); 13 (3); 14 (1); 16 (3); 27; 31 (3); 34 (2).
[49] Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb, UKSC 38, para. 142 (2020).
[50] *Id*., para. 143.
[51] *Id*., para. 244.
[52] Born, *supra* note 2, 823-824.
[53] *Ibid.*
[54] *Supra* note 4, 644; *See also* Mihaela Maravela, Hold on to Your Seats, Again! Another Step to Validation in Enka v Chubb Russia? (2020), http://arbitrationblog.kluwerarbitration.com/2020/05/05/hold-on-to-your-seats-again-another-step-to-validation-in-enka-v-chubb-russia/ (last visited March 17, 2022).
[55] Born, *supra* note 2, 824.

able to provide for a consistent and uniform international practice on the issue of law governing arbitration agreement without harming the mixed (substantive or procedural) nature of the arbitration agreement, whereas choosing other options would do so.[56] As per his opinion, choosing the law of the seat by default harms the substantive nature of the arbitration agreement, whereas choosing the law of the main contract by default harms its procedural nature and avoids separability doctrine entirely.[57]

Notwithstanding the number of its supporters, the validation principle is not favoured by everyone. In fact, there is enough contrary view to the validation principle among scholars and in case law.[58] It has been argued that nothing in the language of these provisions or the negotiations of the contracting parties indicates such obligation.[59]

As a side note, although one might consider the opinion of the English Court in *Kabab-Ji v. KFG* as preventing the application of the validation principle wholly, by indicating that the validation principle cannot 'create an agreement which would not otherwise exist'[60], the court meant to limit the application of validation principle to the cases of determining the law applicable to the substantive validity of the arbitration agreement only, rather than in finding the law governing the existence of an arbitration clause.

D. Parties' intention – french model

A transnational approach can be seen in French courts, where they refer to the arbitration agreement as an "autonomous" contract from all national legal systems.[61] As per their approach, the arbitration agreements are governed by *régles matèrielles*, the general principles of international law.[62] As far as one can see, the French court refused to apply conflict of law rules for the determination of the applicable law to the agreement to arbitrate and instead chose to rely on the common intention of the parties; thus, an international principle as the proper law.[63]

Nevertheless, this position is a cause for concern. As elucidated in Dallah and Astro cases, it is risky to take a likewise approach because it may prevent the enforcement of the award if the country where the award is sought to be enforced refuses to tolerate a de-localised arbitral system.[64]

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[56] Born, *supra* note 2, 814.
[57] *Ibid.*
[58] *Supra* note 4, 643.
[59] *Ibid.*
[60] Kabab-Ji SAL v. Kout Food Group, UKSC 48, para. 51 (2021).
[61] Nazzini, *supra* note 2, 688.
[62] *Ibid.*
[63] Alexander J. Belohlavek, *The Law Applicable to the Arbitration Agreement and the Arbitrability of a Dispute*, 3 Yearbook on International Arbitration 27, 32-33 (2013).
[64] James Spigelman, The Centrality of Contractual Interpretation: A Comparative Perspective, 19 (2013).

E. Swiss model

The Swiss model provides a rare example of the choice of law analysis by offering a mix of the abovementioned approaches.[65] Article 178 (2) of the Swiss Law on Private International Law prescribes a regime for determining the applicable law of the agreements to arbitrate. Article 178 (2), like most approaches, provide for the parties' choice. Alternatively, however, it articulates that, in the absence of the parties' choice, the law of the arbitration agreement should be either the law of the underlying contract or the Swiss law, under which the agreement is valid.

To put it simply, if the agreement deems to be invalid under the law of the main contract, it paves the way for the application of Swiss law "if [the agreement] conforms to" it.[66] Herewith, the Swiss law takes a pro-arbitration approach or affirms the validation principle since it allows an arbitration agreement to be deemed as a valid one if it complies with any of the mentioned three laws mentioned in the Article. Moreover, it is pertinent to note that validation principle, as its wording suggests, only provides a choice of law analysis for identifying the law governing the validity of the arbitration agreement, not for its existence or interpretation.

III. Azerbaijani perspective on the law governing the arbitration agreement

Azerbaijani arbitration law consists of Civil Procedural Code of the Republic of Azerbaijan (hereinafter "CPC"), Law "On International Arbitration", and the international conventions it is a party of: NYC, Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and European Convention.[67] Notably, CPC Articles on the recognition and the enforcement of the arbitral awards, and the Law "On International Arbitration" are the verbatim adoption of NYC to a great extent.[68]

As previously reviewed, determining the law governing arbitration agreements is a "hot topic" in national courts of foreign countries. Law governing the arbitration agreements, an issue of value for determining the validity, effect, and scope of the arbitration agreements, undisputedly, may come into question before Azerbaijani courts as well.

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[65] Lew, *supra* note 12, para. 6-63.
[66] *Ibid.*
[67] *See* Gunduz Karimov, Law and Practice of International Arbitration in the CIS Region, Chapter 3: Azerbaijan, 89 (2017); *See also* Farkhad Mirzayev, Aikhan Asadov, Recognition and Enforcement of Foreign Arbitral Awards in Russia and Former USSR States, Azerbaijan: Recognition and Enforcement of Arbitral Awards, 307 (2021); *See also* Ruslan Mirzayev, Legislation and Practice of Commercial Arbitration in Azerbaijan (2019), http://arbitrationblog.kluwerarbitration.com/2019/04/03/legislation-and-practice-of-commercial-arbitration-in-azerbaijan/ (last visited Mar. 17, 2022).
[68] *Ibid.*

A. Growing popularity of arbitration and economic growth

Arbitration is a reliable and predictable dispute resolution mechanism having more than one general welfare effects:[69] greater GDP, reduced consumer prices, and higher producer pricing, etc. According to data, arbitration has raised worldwide GDP by around 13%, and specifically, 15% for NYC members.[70] On that perspective, even the mere joining the NYC sends the message that a country is open for business.[71]

Azerbaijan is a developing country who is in very much a need of the economic growth, and thereby the increase of both foreign and domestic businesses in the country. Therefore, as per the need for constant tendency towards economic growth and growth of businesses in Azerbaijan, examining Azerbaijani approach on the question of law governing the arbitration agreement may have practical significance, given that arbitration is one of the best means for a prosperous business chance in any country.

B. Separability doctrine

The separability doctrine serves as the primary basis for the possibility that the arbitration agreement can be governed by a different source of law than the main contract. Therefore, to answer the question of law governing arbitration agreement, it must firstly be determined whether the separability doctrine it is embodied in Azerbaijani arbitration law.

According to Law "On International Arbitration", an agreement to arbitrate can be formed as an arbitration clause and a separate arbitration agreement.[72] More directly, Article 16.1 of the Law stipulates that, "The arbitral tribunal may decide on its jurisdiction, including any objection to the existence or validity of the arbitration agreement".

For this purpose, the arbitration clause, which is an integral part of the contract, should be construed as an agreement independent of other contract terms. The arbitral tribunal's decision on the invalidity of the contract shall not invalidate the arbitration clause "ipso jure".[73]

Like Azerbaijani arbitration law, Azerbaijani scholars treated arbitration agreement independently as well, thus highlighting the possible consequences separability doctrine might have in the relations between commercial parties.[74]

Thus, to encapsulate, Azerbaijani law also requires a separate determination of the proper law of arbitration agreement.

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[69] Paniagua, *supra* note 6.
[70] *Ibid.*
[71] *Ibid.*
[72] Law on International Arbitration of The Republic of Azerbaijan, art. 7.1 (1999).
[73] *Id.,* art. 16.1.
[74] *See* Sabir Allahverdiyev, International Private (Civil) Law Course of The Republic of Azerbaijan, 775 (2007); *See also* Zavar Gafarov, Atakhan Abilov, International Private Law (2nd ed. 2007).

C. Silence on the law governing the arbitration agreement

Azerbaijani arbitration law, albeit incorporating the separability presumption, does not provide for its consequences. It does not enumerate how the arbitration agreement's validity, existence, effect, and interpretation, which is deemed to be independent from the underlying contract, will be determined. Most importantly, there is no express conflict of laws rules for identifying the law governing arbitration agreement or do not straightforwardly specify under which laws these issues should be defined.

This conclusion would be supported by the analysis of Law "On International Arbitration" and CPC as well. Article 7 of the Law provides the definition of the "arbitration agreements" and sets out requirements for its formal validity.[75] Further, Article 28 delineates the rules for determining the law that will govern the substance of the dispute.[76] Apart from that, the law mentions nothing about applicable laws, leaving the question unanswered. By the same token, CPC does not have express mention of any law that may apply to the arbitration agreement.

Therefore, neither CPC nor Law "On International Arbitration" expressly states which law will govern the arbitration agreement if the Azerbaijani courts decide on the matter and which choice of law rules should apply in determining the law governing the arbitration agreement.

On that note, this silence is not only limited by the Azerbaijani arbitration law but also by the Azerbaijani court practice. As will be elaborated in the following paragraphs, the issue rarely went before Azerbaijani courts, and when they faced it, they avoided delving into the specifics and made irrelevant decisions.

Set aside, despite the silence in legislation and in court practice, as further will be elaborated, Sabir Allahverdiyev had addressed the issue in his book. He asserted that, the status of an arbitration agreement will be determined by the law governing the arbitration agreement (proper law) and it will be determined according to the closest connection rule.[77]

D. When may the issue arise?

1. The recognition and the enforcement of arbitral awards

When the losing party does not perform the arbitral award voluntarily, the winning party may seek the recognition and enforcement of an arbitral award in the national courts of the country where the losing party has its assets.[78] In Azerbaijan, the issue is dealt with by the Supreme Court of the Republic of

[75] *Supra* note 77.
[76] *Id*., art. 28.
[77] Allahverdiyev, *supra* note 79, 779.
[78] *See* Muhammad Atiab Mahdi, The Effectiveness of International Commercial Arbitration System and a Critical Analysis (2012).

Azerbaijan (hereinafter "Supreme Court").[79] While carrying out this function, the Supreme Court has to consider several circumstances set out in the legislation on recognizing and enforcing arbitral awards, i.e. the CPC and the Azerbaijani Law "On International Arbitration".[80] Before embracing the role of the law governing the arbitration agreement during the recognition and enforcement of the arbitral awards, we have to address the relevant Articles and what they provide for.

The legislation in this respect is vague and contains many loopholes since there are two Articles in CPC – Article 465 and 476 – setting out grounds for the refusal of the "decision of arbitral tribunals". Even though they seem identical at first glance because of their names, they are different in nature and content. Their differences had been set out by many scholars and practical lawyers, however, they were applied identically in the court practice.[81]

The differences were firstly identified in judicial level in the famous Constitutional Court decision made on the complaint of the "POSCO DAEWOO" Corporation.[82] In this case, Supreme Court refused the recognition and enforcement of the arbitral award rendered by the Korean Commercial Arbitration Council based on Article 465 of the CPC.[83] The Constitutional Court had decided that the decision of the Supreme Court shall be considered invalid due to non-compliance with Article 476 of the CPC, and the Supreme Court shall reconsider the case.[84] Even though Constitutional Court did not indicate how the two articles differ, it reasoned its decision only based on Article 476.[85]

According to abovementioned Azerbaijani scholars and practitioners, Article 465 deals with the recognition and enforcement of decisions of "arbitrazh" of foreign countries - the instance courts dealing with economic cases.[86]

This reasoning comes from the differences in the language and the nature of Article 465 and Article 476. At the same time, it is Article 476 that is identical

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[79] The Civil Procedural Code of The Republic of Azerbaijan, art. 464 (1999).

[80] *Supra* note 77, art. 36; *See Id*., art. 464-464, 472-476.

[81] *See* The Supreme Court of the Republic of Azerbaijan, № 10-2(102)-28/2021 (2021); *See also* The Supreme Court of the Republic of Azerbaijan, № 10-2(102)-33/2021 (2021); *See* The Supreme Court of the Republic of Azerbaijan, № 2-2(102)-31/2020 (2020).

[82] The Constitutional Court of the Republic of Azerbaijan, The decision of the Constitutional Court of the Republic of Azerbaijan "On checking the compliance of the decision of the Supreme Court of the Republic of Azerbaijan dated May 16, 2018 on the complaint of 'POSCO DAEWOO' Corporation with the Constitution and laws of the Republic of Azerbaijan" (2019). Available at: https://constcourt.gov.az/az/decision/407 (last visited Mar. 17, 2022).

[83] *Ibid.*

[84] *Ibid.*

[85] *Ibid.*

[86] Arshad Huseynov, Commentary on The Civil Procedural Code of The Republic of Azerbaijan, 1378 (2015); *See* Sara Hasanli, Enforcement of International Arbitration Awards in The Republic of Azerbaijan (2020), https://lawels.com/2020/06/06/xarici-arbitraj-q%C9%99rarlarinin-az%C9%99rbaycan-respublikasinda-t%C9%99tbiqi/ (last visited Mar. 17, 2022); *See also* Mirzayev, *supra* note 70.

to Article 36 of Law "On International Arbitration" and NYC.[87] In contrast, Article 465 sets dissimilar grounds for the refusal of the recognition and enforcement. More importantly, it does not mention arbitration agreements and their possible invalidity as grounds for refusal, while Article 476 does.[88] Therefore, to stave off any judicial imputation, it must be noted that Article 465 does not have any relevance for the determination of the law governing the arbitration agreement.

The discussion of the law governing the arbitration agreement during the recognition and enforcement of arbitral awards is significant because laws require the arbitral award to be based on and within the scope of a valid arbitration agreement.[89] According to Article 476 of CPC and Article 36 of the Law "On International Arbitration,"

"recognition and enforcement of the arbitral award may be refused if there is any evidence that the arbitration agreement has been declared invalid under the law to which **the parties are subject**, and if there is no such law determined in the agreement, by the law of the country where the award was made".[90]

More clearly, according to Article 476 of CPC and Article 36 of the Law "On International Arbitration," the Supreme Court shall refuse to recognize and enforce arbitral awards made based on or within the scope of the invalid arbitration agreements. Therefore, the Supreme Court has to determine the arbitration agreement – more specifically, its validity and scope – to decide whether the arbitral awards were made according to a valid arbitration agreement and within its scope. It means, to act under these articles, Supreme Court needs identify to under which law it shall determine the arbitration agreement's validity, and according to which conflict of law rules it shall determine the law governing the arbitration agreement.

The arbitration practice of the Supreme Court, however, is limited, and does not reflect the aforementioned issues. An analysis of a handful amount of recent Supreme Court decisions shows that, there is no uniform approach regarding which Articles of CPC shall govern the arbitration related procedures. In fact, even after the decision of the Constitutional Court on differentiating Article 465 and 476 of the Code, the Supreme Court continues to give reference to Article 465,[91] and at the same time, in some decisions, avoids it.[92]

Accordingly, because of the lack of uniformity in the practice of Supreme Court regarding the rules applicable in the procedure of the recognition and

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[87] *Supra* note 77, art. 36.
[88] *Supra* note 86.
[89] *Id*., 476. *See supra* note 77, art. 36.
[90] *Ibid.*
[91] *See generally* The Supreme Court of the Republic of Azerbaijan, № 10-2(102)-28/2021 (2021); *See also* The Supreme Court of the Republic of Azerbaijan, № 2-2(102)-31/2020 (2020).
[92] *See generally* The Supreme Court of the Republic of Azerbaijan, № 10-2(102)-33/2021 (2021).

enforcement of arbitral awards, Supreme Court, if it relies on Article 465 of CPC, can even recognize and enforce arbitral awards without looking up to the validity and scope of the agreement to arbitrate. Therefore, the issue still remains baffled, and needs clear determination.

2. Azerbaijani law as lex arbitri?

As per the scholarly opinion, for determining the law applicable to the arbitration clause, the Tribunal is requested to apply the conflict of laws rules contained in the *lex arbitri*.[93] The *lex arbitri* is determined by the seat of arbitration.[94] In this case, the court or the Arbitral Tribunal will have to look through the national laws of the seat country in order to find an answer. Thus, when the arbitral tribunal exercises its right to *Komptenz-Kompetenz*,[95] it will need a law governing arbitration agreement to see if there is an existing and valid arbitration agreement referring the case to arbitration and whether the dispute in question falls within the scope of the arbitration agreement.

In that regard, if the seat of the arbitration in the case in Azerbaijan, then the arbitral tribunal will have to find out what answer the conflict of laws rules of Azerbaijan provide for the question.

3. Duty of Azerbaijani courts to refer the case to arbitration

Article 8 of the Law "On International Arbitration", provides that "The court leaves a statement of claim without consideration if a party timely invokes an arbitration agreement unless such agreement is invalid, has lost effect or cannot be executed".[96] This Article hereby subjects the court's rejection of a claim to enforce the arbitral award when an agreement to arbitrate exists to two conditions:[97]

1) unless one of the parties objects to the jurisdiction of the court and invokes the arbitration agreement;

2) unless the arbitration agreement is valid, effective and can be executed.

Therefore, if one of the parties claims that the issue should not be heard before the Court on the grounds that there is an arbitration agreement, the Court shall determine if the arbitration agreement is existent, valid, operative, and capable of being performed. If such an issue arises, Azerbaijani courts will have to find which law governs the arbitration agreement to identify

[93] *See* Franz Schwarz, Schiedsverfahrensrecht Handbuch: Band II, Die Durchführung des Schiedsverfahrens, para. 8/125 (2016); *See also supra* note 12, para. 6-55.

[94] Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration, para. 3.37 (6th ed. 2015); *See* Pietro Ferrario, The Adaptation of Long-Term Gas Sale Agreements by Arbitrators, 85 (2017); *See also* Danish firm v. Egyptian firm, (final Award), ICC Case No. 5294 (22 February 1988).

[95] *Supra* note 3, 1048-1051; *See* Fouchard, supra note 13, para. 416; *See also* Schwebel, *supra* note 13, 11; *See* Shihata, *supra* note 2, 25-26; Arroyo, *supra* note 13; *See generally* American Bureau of Shipping (ABS) v. Copropriété Maritime Jules Verne et al. (2002); *See generally* Continental Commercial Systems v. Davies Telecheck International, B.C.J. No. 2440 (1995); *See also* BNA v. BNB, SGCA 84 (2019).

[96] *Supra* note 77, art. 8.1.

[97] *Ibid.*

those characteristics. Nevertheless, the court practice asserts that this issue is not deeply delved into in Azerbaijan.

There are two cases where the Court failed to take advantage of an excellent opportunity to provide a new approach in Azerbaijan and address the issue of law governing the arbitration agreement. Instead, they delivered inconsistent decisions hindering the development of the arbitration practice by the Azerbaijani legal entities.

The first one is the decision of the Supreme Court № 2-2(102)-31/2020 dated March 11 2020.[98] There, in the Court of First Instance (Baku Commercial Court), the claimant sued the respondent to pay debt and damages. This right is transferred to the claimant from the contract between the respondent and a third party, A. Afterwards, the respondent filed a complaint requesting the termination of the contract because claimant was bound by the arbitration agreement included in the contract.

In this regard, the claimant alleged that it was not bound by the arbitration agreement because:

1) The claimant was not a party to the contract between the respondent and A. Therefore, the arbitration agreement could not bind claimant.

2) The contract, which includes the arbitration agreement, was terminated.

The Respondent's complaint was not satisfied in the Court of the first instance, and it was sent to the Baku Court of Appeal.

By the decision of the Administrative-Economic Board of the Baku Court of Appeal dated October 29, 2019, No. 2-2 (103) -812/2019, the appeal was satisfied, and the proceedings were terminated. Later, a cassation complaint was filed, and the case went before the Supreme Court.

The Supreme Court held that acting under article 8 of the Law "On International Arbitration", it could not refer the parties to arbitration because the arbitration agreement was terminated when the contract was terminated. Accordingly, it overturned the decision of the Court of Appeal and remanded the case for consideration on the merits.

Seemingly, the Supreme Court considered the arbitration agreement as terminated just because the underlying contract was terminated, therefore avoiding the whole concept of the separability doctrine and a separate law governing the arbitration agreement.

The second example is a recent decision of Supreme Court № 2-2(102)-3/2022 dated February 23 2022.[99] In this case, claimant sought to invalidate a contract between himself/herself and the respondent party because the contract was in English, and they did not understand a single word since they do not know the language.[100] By this, the claimant was left unaware of the

[98] *See generally* The Supreme Court of the Republic of Azerbaijan, № 2-2(102)-31/2020 (2020).
[99] *See generally* The Supreme Court of the Republic of Azerbaijan, № 2-2(102)-3/2022 (23 February 2022).
[100] *Id*., para. 3.

contract provisions and thus sought to invalidate it. The contract that the claimant aimed to invalidate contained an arbitration clause.[101] The claimant argued that the contract was entirely invalid because they did not understand English and were not aware of the contract's content.

The case went before the first instance court, and the court refused to decide on the case because there was an arbitration clause in the contract, referring the case to arbitration in Istanbul.[102]

Later, the claimant, who was seemingly uninformed of the inclusion of the arbitration clause as a dispute resolution mechanism, appeared before the Court of Appeal. Taking the same path as the First Instance Court, the Court of Appeal refused to decide on the case by pointing to the arbitration clause.[103]

After the case went before the Supreme Court, in the cassation instance, the Supreme Court, referring to the CPC, alluded that the case might be decided before the national courts even though there is an agreement to arbitrate subject the parties' agreement. The Supreme Court rightfully held that:[104]

"The possibility of accepting the claim by the court should be examined [...] in accordance with the requirements of Articles 152 and 153 of the CPC, although there is a relevant contractual condition for the consideration of a specific dispute in the arbitration. If the respondent objects to the resolution of the dispute in court, the claim may be reevaluated as per the requirements of Article 259.0.5 of the Civil Procedure Code."

By this, the Supreme Court returned the case to the Court of Appeal because it failed to apply the procedural rules on the acceptance of a claim.[105] The Supreme Court's position, in this case, is not quite, yet somehow in compliance with the rule established in Article 8.1 of the Law "On International Arbitration". Here, the respondent party, with whom the Claimant had an arbitration clause, had failed to appear before the national courts. It appears, the First Instance Court and the Court of Appeal had accepted this absence by the respondent side as an objection despite their failure to show up. Nevertheless, they did not determine if the clause is valid, effective and can be executed.

In conclusion, despite rightfully sending the Court of Appeal decision back for reconsideration, the Supreme Court failed to rely on Article 8.1 of the Law "On International Arbitration" and address the court's duty to identify the validity and effectiveness of the arbitration clause. If they had complied with their duties, they had to determine the law governing the arbitration agreement.

[101] *Id.*, para. 7.
[102] *Ibid.*
[103] *Id.*, para. 12.
[104] *Id.*, para. 35.
[105] *Id.*, para. 38.

The aforementioned two decisions show that, although the courts had the chance to address the issue of law governing arbitration, they never chose to follow the legally incorporated doctrine of separability and make a separate inquiry for the law governing the arbitration agreement for the determination of their existence, and effectiveness. Such an approach hardly cooperates with today's world of international commercial arbitration and leaves the issue unaddressed in our case law.

4. Legal obligation arising from European Convention

The regulatory environment contains many loopholes regarding this issue, which provides sufficient room for manoeuvring to the legislator. Nevertheless, - in the author's opinion - it also generates implicit legislative obligation. For example, Article VI (2) (c) of the European Convention[106] to which Azerbaijan is a party,[107] can be interpreted as an obligation. According to this:

"In deciding the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement (...) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law under the rules of conflict of the court seized of the dispute".[108]

Therefore, the European Convention practically obliges the contracting states to have a conflict of laws rules regarding determining the law applicable to arbitration agreements.[109] Since Azerbaijan fails to do so, it can be considered as a violation of the convention by Azerbaijan.

E. Possible conflict of laws rules in Azerbaijan. What conclusion can be derived?

1. Laws on the recognition and enforcement of arbitral awards and their use as the conflict of law rules

There is a well-known debate on whether the choice of law rules potentially established in Article V (1) (a) of NYC should be used for determining the law governing the arbitration agreement. Despite the Article providing only the validity of the arbitration agreement, most of the time the international practice has used it in determining the laws governing every aspect of arbitration agreement.[110]

[106] *Supra* note 10, art. VI (2) (c).
[107] *See generally* Law on Accession to the European Convention on International Commercial Arbitration of The Republic of Azerbaijan (1996).
[108] *Supra* note 10, art. VI (2) (c).
[109] Daniel Ban, *The Law Applicable to Arbitration Agreements Remarks on the Codification of the New Hungarian Code of Private International Law,* 12 Romanian Arbitration Journal 41, 42 (2018).
[110] *Supra* note 3, 532; *See also supra* note 12, para. 6-55.

Naturally, taking this path, there is a need to look into the rules on recognising and enforcing arbitral awards in Azerbaijan by applying the same logic used in NYC, as there is no explicit conflict of laws rules in Azerbaijani arbitration law for providing the answer to the question at hand.

Pursuant to article 476.0.1.1 of CPC, which sets one of the grounds for the refusal of the recognition and the enforcement of the arbitral awards, "recognition and enforcement of the arbitral award may be refused if there is any evidence that the arbitration agreement has been declared invalid under the law to which **the parties are subject**, and if there is no such law determined in the agreement, by the law of the country where the award was made".[111]

It indicates that the arbitration agreement's validity will be governed under the **law to which the parties are subject.** It gives the impression that the article, when using the language like "the law to which the parties are subject", refers to the law of the country in which each person is incorporated.[112] Nevertheless, it does not do so. As underpinned by scholarly opinion,[113] the language of Art. 476.0.1.1 of CPC is defective.

Principally, the second part of the Article proceeds by enunciating that the law of the seat will apply "if there is no such law determined in the agreement".[114] It propounds that the article subjects the arbitration agreement to the law to which the parties have subjected it, as it is apparent that the country of incorporation cannot be "determined" in any agreement - it is a legal fact. Likewise, Law "On International Arbitration", in its identical article, subjects the arbitration agreement to "*the law to which the parties have subjected it*".[115]

Furthermore, the relevant Article in NYC, as construed above, stipulates that the validity of the arbitration agreement will be ascertained under the law to which the parties have subjected it.[116] It is overt that the rules on the recognition and enforcement of arbitral awards are verbatim adoption of the NYC and UNCITRAL Model Law.[117] Furthermore, CPC itself, in its article 477, demonstrates that NYC will apply in the cases of recognition and enforcement of arbitral awards.[118]

What can be inferred from the analysis above is that article 476.0.1.1 shall be read in compliance with the Law "On International Arbitration" and NYC. Convincingly, the part stating "*the law where each party is subject to*" shall be understood as "*the law to which the parties have subjected it*".

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[111] *Supra* note 86, art. 476.0.1.1.
[112] *Ibid.*
[113] Huseynov, *supra* note 93, 1381.
[114] *Supra* note 86, art. 476.0.1.1.
[115] *Supra* note 77, art. 36.
[116] *Supra* note 33.
[117] *See generally* Mirzayev, *supra* note 70.
[118] *Supra* note 86, art. 477.

Azerbaijani arbitration law, paving the way for parties' choice regarding the applicable law, is not materially different from the laws of the other countries on the same topic. Critically, Azerbaijani arbitration law does not detail what could be required to form such a choice-of-law agreement between the parties, explicitly regarding arbitration agreements. The other countries having the same conflict of laws rules in their arbitration legislation provide details in their case-law and practice;[119] however, Azerbaijan fails.

2. Using the law "on private international law" on the interpretation of article 476 of CPC. Law of the seat or the main contract?

To find out what the "agreement of the parties" on the applicable law of the arbitration agreement means under Azerbaijani legislation, we may look at the Law "On Private International Law" in analogy and, in particular, Article 1.3.[120] It delineates that "consent of the parties to determine the applicable law should be clearly stated or directly proceed from the terms of the contract and the circumstances of the case as a whole".[121]

Considering that Law "On Private International Law" governs the civil legal relations (hereinafter "agreement(s)" or "contract(s)") with foreign elements,[122] we shall firstly find out if the international arbitration agreements for resolving commercial law issues are the agreements with foreign elements. A contract is a contract with a 'foreign element' when the relation has an international nature and the parties belong to different jurisdictions.[123]

Accordingly, arbitration is international when "(i) the parties to the contract belong to different jurisdictions; (ii) the place of performance under the contract is outside Azerbaijan; or (iii) the contract's subject matter is located outside Azerbaijan".[124] The parties to arbitration agreement setting the jurisdiction for international commercial arbitration tribunals naturally belong to different jurisdictions. This alludes that the arbitration agreements we are dealing with can well be considered as the agreements with "foreign element" under the Azerbaijani Law "On Private International Law". This belief is upheld by Azerbaijani scholars as well,[125] insinuating that the international arbitration agreements are contracts having foreign element, thus falling under the Law "On Private International Law".

Therefore, by applying Article 1.3 of Law "On Private International Law" for the interpretation of Article 476 of CPC, altogether, "*the law to which the*

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[119] *See* Plavec, *supra* note 5; *See also supra* note 3, 486, 515, 545, 576, 582; *See* Tarawali, *supra* note 5; *See* Trittmann, *supra* note 5; Scherer, *supra* note 5, 3, 6; Hamlyn & Co. v. Talisker Distillery A.C. 202 (1894) para. 208*; See generally* Kabab-Ji SAL v. Kout Food Group, UKSC 48 (2021); Amir, *supra* note *5*.

[120] Law on Private International Law of The Republic of Azerbaijan, art. 1.3 (2000).

[121] *Ibid.*

[122] *Id.*, art. 1.1.

[123] Allahverdiyev, *supra* note 79, 25.

[124] *Supra* note 77, art. 1.3.

[125] Allahverdiyev, *supra* note 79, 80; *See also* Karimov, *supra* note 70, 110.

parties have subjected it" within the language of the Code means the laws that are "clearly stated" by the parties, or "directly proceeding from the terms of the contract" or "directly proceeding from the circumstances of the case as a whole".[126]

This corroborates, the law to which the parties have subjected the arbitration agreement includes both express and implied choices of law in the Azerbaijani arbitration law. In fact, the "clearly stated" requirement represents the express choice of law, whereas the other two signify the parties' implied choice of the arbitration agreement's governing law.[127] By this, Azerbaijani arbitration law is in the same place as other jurisdictions, either those favouring the three-tiered test or the two-step test of NYC.

3. The law having the closest connection? Is it a problem?

The second part of Article 476 provides that in the absence of the law to which the parties have subjected the arbitration agreement, the latter shall be governed by the law of the country where the award was rendered, which is equivalent to the law of the seat.[128] This is entirely in compliance with NYC and sets the law of the seat as default choice-of-law rule in the absence of any choice by the parties. This would suggest that Azerbaijan lawfully follows the NYC approach on selecting the choice of law of arbitration agreement.

However, the problem arises when we try to use the Law "On Private International Law" in the interpretation of Article 476 of CPC. Despite in the previous paragraph, we have used and identified that the Article 476 gives effect to express or implied choice of the parties and then, by default, the law of the seat in the absence of any choice, Articles 24-25 of the Law "On Private International Law" indicates something different.

Article 24, affirming the principle of party autonomy in international commercial arbitration, sets the duty for the relevant institution to determine the applicable law considering the parties' intentions.[129] This Article is followed by Article 25, according to which, in the absence of an agreement between the parties on the applicable law, the law of the country to which such agreement is most closely connected shall apply.[130]

Herewith, Azerbaijani law fails to provide a uniform set of rules in the determination of the law applicable to the arbitration agreement. While Article 476 sets the ground for the application of one form of choice of law rules for the arbitration agreements, Article 25 of the Law "On Private International Law" sets for another, a more Sulamérica-like approach.

It may be suggested that Article 25 and the closest connection test set there shall be applied when there is no choice of law done by the parties regarding

[126] *Supra* note 127.
[127] Kabab-Ji SAL v. Kout Food Group, UKSC 48, para. 39 (2021).
[128] *Supra* note 86, art. 476.
[129] *Supra* note 127, art. 24.
[130] *Id*., art. 25.

the arbitration agreement, and there is no choice of seat. This is because the law shows no guidance for the rule set out in Article 476 about the law governing the arbitration agreement in the absence of both choice of law and the seat. Additionally, some Azerbaijani scholars assert that, the law governing the arbitration agreement should be determined according to the closest connection test.[131]

Moreover, it is uncertain if the Azerbaijani arbitration law regards the law of the seat as the law having the closest connection or if the closest connection test should be applied if there is no seat. These all show the possible legal collision between two norms having the same legal force in the hierarchy of norms.

4. Validation principle in Azerbaijani law?

In the absence of a clear choice of law rule, we might need to showcase how the Azerbaijani arbitration law and Azerbaijani courts contemplate the arbitration agreements to see whether they are keener to give effect to the parties' agreement or take a pro-arbitration approach, therefore favouring the validation principle.

Azerbaijan has joined NYC without any reservation. Since NYC takes the pro-arbitration approach and incorporates the validation principle in Article 2, one might argue that Azerbaijan shall take a pro-arbitration approach to act in compliance with NYC.

Azerbaijani arbitration practice is confined to a few previously mentioned cases in relation to the recognition and enforcement of the arbitral awards Moving back to those cases and analyzing their approaches regarding the arbitration, it is not straightforward to argue that they endorse the validation principle. For instance, in Supreme Court case № 2-2(102)-3/2022,[132] the First Instance Court and the Supreme Court defended the court's jurisdiction without looking up to the validity and effect of the arbitration agreement. In the other one, Supreme Court case № 2-2(102)-31/2020,[133] First Instance Court and the Supreme Court considered the arbitration agreement just in light of the termination of the underlying contract, without giving effect to the separability doctrine. Further, in the cases of recognition and enforcement of arbitral awards, the Supreme Court failed even to apply the right Article. To sum up, there is obviously a cold attitude and indifference to arbitration in Azerbaijan.

Conclusion

This Article had provided an overview of both the international perspective and specifically, the perspective derived from Azerbaijani arbitration law and court decisions regarding the issue of law governing the

[131] Allahverdiyev, *supra* note 79, 779; *See also* Gafarov, *supra* note 79, 313.
[132] *See generally* The Supreme Court of the Republic of Azerbaijan, № 2-2(102)-3/2022 (2022).
[133] *See generally* The Supreme Court of the Republic of Azerbaijan, № 2-2(102)-31/2020 (2020).

arbitration agreement. As shown in our discussion, determination of the law governing the arbitration agreement is challenging almost in all aspects, and Azerbaijani arbitration law and court practice lack specific regulations for dealing with such a challenging issue. Bearing in mind that arbitration has substantial importance in business context, implications of this research suggest that, having local regulations identifying ways for the determination of the law governing the arbitration agreement would be a step towards acknowledging the significance of arbitration in Azerbaijan. Therefore, the findings in the Article at hand suggests:

1. Azerbaijani arbitration law should address the issue of the law governing the arbitration more straightforwardly. One uncertainty is, which conflict of law rules will govern the matter, if faced before Azerbaijani courts. To begin with, there is a need for pinpointing a conflict of law rule to determine the law governing the arbitration agreement, be it Article 476 of CPC or the Law "On Private International Law".
2. Further, the first part of Article 476 should be amended as "law to which the parties have subjected it" in order to avoid contradictions regarding terminology. Further, there should be a more precise guide as to what the law chosen by the parties means and whether we should be relying on the Law "On Private International Law" for it. If yes, it should be made unambiguous if the closest connection test will apply to the arbitration agreements.
3. By taking the safest way, Azerbaijani arbitration law may take a similar approach to Swiss law by adding to the Law "On Private International Law", or CPC Articles on recognition and enforcement of the award a similar provision on the law governing the validity of the arbitration agreement:

   "The arbitration agreement shall be deemed valid if it conforms to either the law of the main contract or the laws of Azerbaijan".

   Accordingly, under this provision, the Supreme Court would be freed from

   - having to find out the appropriate conflict of law rules,
   - having to find out which law the parties have chosen by looking up the facts of the case.
4. The possible contradiction between the Article 476 of CPC and the Law "On Private International Law" shall be avoided.