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

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Determining the Law Applicable to the Personal Scope of Arbitration Agreements and its “Extension”

JOHANNES LANDBRECHT*, ANDREAS WEHOSKY**

A. To consent or not to consent

Commercial arbitration is built on consent.1 The parties’ agreement provides an arbitral tribunal with the authority to decide their dispute on the merits.2 Whoever consents is bound to arbitrate. This is also called the personal (or subjective)3 scope of the arbitration agreement and a tribunal’s authority (persönliche or subjektive Reichweite or the scope ratione personae). Yet, what is consent?

There may be actual consent, either explicit or implied, initially or subsequently given, or presumed (vermutet); or consent may be a mere fiction.4

It is sometimes said that, in principle, only the persons “signing” or “concluding” the arbitration agreement are bound by it.5 The tribunal would have authority over “non-signatories” or “third parties” only if the personal scope of the arbitration agreement could be “extended”. Yet, as will be discussed below,6 a reference to “non-signatories”,7 “third parties”, or

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** MLaw, LLM, Bär & Karrer Ltd, Zurich.
2 BLACKABY/PARTASIDES/REDFERN/HUNTER, Redfern and Hunter on International Arbitration, 20156, para 2.01.
5 GIRSBERGER/VOUSER, International Arbitration, Comparative and Swiss Perspectives, 20165, para 298.
6 See below Section B.I.
“extension” is potentially misleading. If commercial arbitration is built on consent, what matters is a careful analysis of this concept.

The first step when assessing the personal scope of a tribunal’s authority must be determining the law applicable to the issue, although this step is often neglected. The present contribution focuses on this analysis. A brief comparative overview of the corresponding substantive level discussion (below B) merely serves to demonstrate that significant differences across domestic systems render a conflict of laws analysis important. We then provide general considerations for such analysis (below C).

Under Swiss law, the conflict rule for determining the law applicable to the personal scope of a tribunal’s authority in situations that are characterised as actual consent is Art 178(2) of the Swiss Private International Law Act (= PILA). For situations characterised as fictitious consent, Swiss law has no statutory conflict rule but sometimes applies Art 178(2) by analogy. In light of recent case law from Germany, we re-evaluate the Swiss approach and submit that it remains up to date and might serve as a model for other jurisdictions (below D).

B. The personal scope of arbitration agreements and its “extension” (substantive level)

A discussion of the personal scope of a tribunal’s authority and of arbitration agreements needs to start with a clarification of the concept of consent (below I). Typical examples of more controversial theories for determining the personal scope are “piercing the corporate veil” (below II) and the so-called “Group of Companies (GoC) doctrine” (below III).

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7 BERGER/KELLERHALS (fn 3), para 563, appropriately refer to “non-signatories” in inverted commas, signalling that the term is not to be taken at face value.
9 YOUSSEF, The Limits of Consent (fn 4), pp 98 f.
10 For further details of the Swiss conflict rules see below Section D.
11 BGH, III ZR 371/12 of 8.5.2014.
12 See, eg, PARK, Non-Signatories and International Contract: An Arbitrator’s Dilemma, in: Permanent Court of Arbitration (ed), Multiple Party Actions in International Arbitration, 2009, para 1.08.
I. Types of consent – four Scenarios

The personal scope of an arbitration agreement and the corresponding scope of an arbitral tribunal’s authority to decide on the merits is determined by asking “who consented” to arbitration.\(^\text{13}\) The distinction of “signatories” and “non-signatories”, often used in this context, adds little to the analysis, and combined with an imprecise use of the term “extension” likely leads to confusion. The “signature” under an agreement is merely an issue of evidence (of “consent”) and, possibly, formalities. A proper analysis of the notion of consent is therefore necessary.

Various types of “consent” should be distinguished – three involving actual, one involving fictitious consent: the persons actually consenting are the parties to the arbitration agreement; in case of fictitious consent, the tribunal’s authority covers a non-party to the agreement.

**Scenario (1)** – Consent can be explicitly given (ausdrückliche Annahme), either at the time of the conclusion of the agreement (initial explicit consent) or subsequently. For instance, a person initially not bound may later be included in the arbitration agreement by consent of all parties concerned, either replacing an original party or joining the others.\(^\text{14}\) The signature under an arbitration agreement is usually conclusive evidence of explicit consent and also serves compliance with formalities that might, however, also be fulfilled otherwise.\(^\text{15}\)

**Scenario (2)** – Consent can also be implied (konkludente Annahme). There is then no (express) declaration and the arbitration agreement will not be “signed” by hand,\(^\text{16}\) but it may be possible to evidence consent, initially or subsequently given, otherwise. This may suffice if relevant formalities are fulfilled.\(^\text{17}\) Implied consent can be deduced from a party’s behaviour (without

\(^{13}\) As opposed to the question of what disputes were subjected to arbitration (the “objective” scope); on the latter, see, eg, RAU, Arbitral Jurisdiction and the Dimensions of ‘Consent’, Arbitration International 2008, 199, 213 ff.


\(^{15}\) Eg, under Swiss law, a textual record suffices, see Handkommentar-FURER/GIRSBERGER/AMBAUEN, 2016 3, Art 178 PILA, para 18. French law accepts also oral arbitration agreements, see Art 1507 French Code de procédure civile.

\(^{16}\) Under, eg, Swiss law, an agreement “in writing” must be signed by all persons on whom the agreement imposes obligations (Art 13(1) Swiss Code of Obligations). These persons are “signatories”.

\(^{17}\) Implied consent is not sufficient, eg, under German law, which requires an exchange of declarations, see, eg, TRITTMANN/HANE Feld, in: Böckstiegel/Kröll/Nacimiento (eds), Arbitration in Germany, 2015\(^2\), § 1031, para 11. No exchange of declarations is required
making a declaration of intent),\textsuperscript{18} \textit{eg}, commencing arbitration proceedings on the basis of an arbitration agreement for the benefit of a third party \textit{(Schiedsvereinbarung zugunsten Dritter)}.\textsuperscript{19} Depending on its precise reading, the GoC doctrine may also be interpreted as a variant of implied consent.\textsuperscript{20}

### Scenario (3)

Consent is sometimes presumed \textit{(vermutet)}, in particular due to the operation of statutory provisions, \textit{ie} a person consents to some transaction (substantive level) and it is then presumed that such consent encompasses an arbitration agreement that is somehow closely linked to the transaction. For instance, in cases of universal or singular succession\textsuperscript{21} (in particular assignment\textsuperscript{22}), or liability in solidarity,\textsuperscript{23} the arbitration agreement may “follow” the underlying substantive legal relationship. The status of “signatory” of the original agreement becomes wholly immaterial.

### Scenario (4)

Finally, a tribunal’s authority may be based, irrespective of a party’s actual consent to an arbitration agreement or any underlying legal relationship, on other concepts, such as equity and good

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\textsuperscript{18} This is the way the Swiss Federal Court analyses “consent” of a party in cases labelled “Rechtsscheinhaftung”, see, as one of the latest examples, DFC 4A.459/2016 of 19.1.2017, ASA Bull 2/2017, 418, 423 ff, c 2.1–2.4 (with further references; an “extension” was ultimately denied); see also ICC cases no 7604 and 7610, in: Arnaldez/Derains/Hascher (eds), Collection of ICC Arbitral Awards, 1996–2000, 2003, pp 510 ff.

\textsuperscript{19} See, \textit{eg}, DFC 103 II 75. The beneficiary of an arbitration agreement for the benefit of a third party may rely on the arbitration agreement. If it initiates proceedings, the beneficiary at least impliedly (through its behaviour) accepts the arbitration agreement. Similarly MEIER/SETZ, Arbitration Clauses in Third Party Beneficiary Contracts – Who May and Who Must Arbitrate?, ASA Bull 1/2016, 62, 70; BERGER/KELLERHALS (fn 3), para 559. The Swiss Federal Court follows a different reasoning, namely that the arbitration agreement is an annex or accessory right to the beneficiary’s rights under the main contract (see DFC 4A 627/2011 of 8.3.2012, ASA Bull 3/2012, 647, 651 ff, c 3.2 and DFC 4A 44/2011 of 19.4.2011, ASA Bull 3/2012, 659, 666 ff, c 2.4.1 \textit{in fine}), but one could argue that the Federal Court’s approach also presumes consent, only that the presumption operates on the basis of case law and appears irrebuttable.


\textsuperscript{22} MOHIS, Drittewirkung von Schieds- und Gerichtsstandsvereinbarungen, 2005, pp 38 ff, 63 ff, 94 ff.

\textsuperscript{23} BERGER/KELLERHALS (fn 3), para 577.
faith. Consent then becomes a mere fiction. Sometimes it is only these (more controversial) cases that are referred to as “extension” of arbitration agreements to “non-signatories”25 – whether labelled Rechtsscheinhaftung,26 piercing the corporate veil,27 estoppel, or, at least according to some authorities,28 the GoC doctrine.29

Hence, the labels “non-signatory” and “extension” are too imprecise for determining the personal scope of a tribunal’s authority.30 Rather, it is submitted, one should distinguish (i) cases where the tribunal’s authority extends to a person because it has become a party31 to the arbitration agreement by way of actual consent – may it have consented explicitly or impliedly, initially or subsequently, or may such consent be presumed (Scenarios (1) to (3)) – from (ii) cases where the tribunal has authority based on fictitious consent (Scenario (4)) over a person that is not a party to the arbitration agreement (such person being referred to as a non-party in this contribution).

The most common concepts used in fictitious consent cases are “piercing the corporate veil” (below II) and the “GoC doctrine” (below III).32

II. The doctrine of “piercing the corporate veil”

It is a widely-accepted principle of company law that separate legal entities are to be treated separately with regard to their liability even where an

24 TOWNSEND, Extending an Arbitration Clause to a Non-Signatory Claimant or Non-Signatory Defendant: Does it Make a Difference?, in: Hanotiau/Schwartz (eds), Multiparty Arbitration, 2010, p 117.
25 BERGER/KELLERHALS (fn 3), para 563.
26 BERGER/KELLERHALS (fn 3), para 567; PFISTERER, Ausdehnung von Schiedsvereinbarungen im Konzernverhältnis, 2011, paras 169 ff; the Swiss Federal Court seems to treat representations made (Rechtsschein) as a type of implied consent; see fn 18.
27 For a comprehensive study of potential scenarios see NIKLAS, Die subjektive Reichweite von Schiedsvereinbarungen, 2008, pp 228 ff.
29 For details see below Section B.III.
30 Also critical of the term “non-signatory” (with a different alternative) BREKOULAKIS, Parties in International Arbitration: Consent v Commercial Reality, in: Brekoulakis/Lew/Mistelis (eds), The Evolution and Future of International Arbitration, 2016, paras 8.1.4.1 ff.
31 Also debating the use of “party” in the context of the personal scope of arbitration agreements KAUFMANN-KOHLER/RIGOZZI (fn 21), para 3.152.
32 Although the latter may, depending on its precise definition, belong to Scenario (4) (fictitious consent) or Scenario (2) (implied consent).
entity is under the full control of another entity (e.g., a wholly-owned subsidiary). Only under specific and very limited circumstances will the reference (of the controlling entity) to its separate legal status be rejected as an abuse of right. In these very limited cases, the separate personalities of the legal entities are disregarded by “piercing the corporate veil”, and the controlling entity might be held accountable for liabilities of the controlled entity.

If the controlled entity’s liability is subject to an arbitration agreement, the “extension” of its liability to the controlling entity on the substantive level will usually, but not automatically, entail also the “extension” of the (personal) scope of an arbitral tribunal’s corresponding authority. Since “piercing the corporate veil” is based on considerations of equity and fairness, such “extension” of the tribunal’s authority is not based on actual consent. Rather, the controlling entity’s consent is a mere fiction.

The precise requirements of veil piercing in the context of arbitration agreements differ across jurisdictions. Both Switzerland and Germany apply this doctrine restrictively, whereas it seems to be more readily

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33 See ZUBERBÜHLER, Non-Signatories and the Consensus to Arbitrate, ASA Bull 1/2008, 18, 19; DFC 128 II 329 c 2.4; English High Court, Acatos & Hutchinson plc v Watson [1995] BCLC 218, 223; see also the instructive DFC 120 II 155, ASA Bull 3/1994, 404, 419 ff, c 6c. Veil piercing requires an element of fraud or at least abuse and corrects outcomes of a purely formalistic analysis that are perceived as unjust, see, e.g., FERRARIO, The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?, Journal of International Arbitration 2009, 647, 655 ff.


37 BORN (fn 4), pp 1432 ff.


accepted in the US – at least with regard to state-owned entities.\textsuperscript{40} As an aside, some US decisions suggest that the courts derive the concept of veil piercing from “international principles” or law,\textsuperscript{41} despite the argument of US courts in the context of the GoC doctrine that no such international principles exist.\textsuperscript{42} Other US decisions, however, rely on the law of incorporation (\textit{lex incorporationis}) of the company whose “veil should be pierced”.\textsuperscript{43}

III. The Group of Companies (GoC) doctrine

The GoC doctrine as a concept for “extending” the personal scope of a tribunal’s authority seems to have been used before,\textsuperscript{44} but it was most prominently “applied” in the \textit{Dow Chemical case} (“\textit{DOW}” = ICC case no 4131),\textsuperscript{45} which is often viewed as its origin\textsuperscript{46} (below 1). To a varying degree, similar concepts are applied across jurisdictions (below 2). In Swiss law, however, the doctrine is largely rejected (below 3).

1. \textit{Origin of the doctrine: DOW}

The GoC doctrine was used in \textit{DOW} to solve certain “non-signatory issues”.\textsuperscript{47} Several wholly-owned subsidiaries of the \textit{Dow Chemical Company} had concluded contracts with arbitration agreements with \textit{Isover Saint Gobain}. The \textit{Dow Chemical Company} had never signed these contracts but, according to the tribunal’s findings (seated in France), was heavily involved in their conclusion, performance and termination. The tribunal also concluded that the group structure was so tight that the legally distinct companies formed one economic unit (“\textit{une réalité économique unique}”).

\textsuperscript{40} See Bridas cases (fn 35); US Supreme Court, \textit{First National City Bank v Banco Para el Comercio Exterior de Cuba}, no 81-984, 17.6.1983; for a good overview, see TYLER/KOVARSKY/STEWART, Beyond Consent: Applying Alter Ego and Arbitration Doctrines to Bind Sovereign Parents, in: Permanent Court of Arbitration (ed), Multiple Party Actions in International Arbitration, 2009, paras 4.01 ff.

\textsuperscript{41} \textit{First National City Bank v Banco Para el Comercio Exterior de Cuba} (fn 40), para 9.

\textsuperscript{42} Below Section B.III.2.


\textsuperscript{45} ICC case no 4131, IX Yearbook Commercial Arbitration, 1984, pp 132 ff.

\textsuperscript{46} JÜRSCHEK (fn 39), p 36.

\textsuperscript{47} BREKOULAKIS, Third Parties in International Commercial Arbitration, 2010, paras 5.01 ff.
The Dow Chemical Company later initiated arbitration proceedings against Isover Saint Gobain. The latter challenged the tribunal’s jurisdiction ratiocinatio personae. Yet, because of the above-mentioned circumstances of the transaction, ie the tight group structure and the heavy involvement of the Dow Chemical Company in the conclusion, performance and termination of the contracts, the tribunal held that all entities involved had consented to an “extension” of the personal scope of the arbitration agreement to the Dow Chemical Company. The GoC doctrine was thus used as an instrument for determining implied consent. The Dow Chemical Company was considered a party to the arbitration agreement despite not having signed it.48 This is at least the narrowest possible reading of DOW.49 Others argue that the tribunal also relied on representations made (in holding that certain group companies would be bound because they “appear” to have been veritable parties to these contracts),50 which reads more like fictitious consent. With regard to the applicable law, the tribunal considered the GoC doctrine to be grounded in international law (lex mercatoria),51 not in a national legal order.52

In a number of cases prior to DOW, tribunals,53 and arguably courts,54 had “extended” the arbitration agreement to other group companies merely due to the close group structure with one of the “signatories”, irrespective of the “non-signatory”’s involvement in the transaction, ie based on some sort of “strict liability”. Yet, although such “strict liability” approach is what

51 For a comprehensive discussion of the lex mercatoria see LEW/MISTELIS/KRÖLL, Comparative International Commercial Arbitration, 2003, paras 18.46 ff.
often appears to be associated with the GoC doctrine,\textsuperscript{55} \textit{DOW}, arguably, rejected it.\textsuperscript{56} 

Subsequently, some variant of the GoC doctrine was applied, beyond the \textit{DOW} factual matrix (ie a “non-signatory” claimant relying on implied consent), \textbf{to at least three other scenarios:} 

First, the doctrine was applied in the reverse, \textit{ie} to join a “non-signatory” respondent (group company) into arbitration proceedings. Yet, the relevant cases still analysed implied consent, as reflected in the parties’ actions.\textsuperscript{57} Second, the “group” requirement was amended by, notably in France, “extending” arbitration agreements only due to an entity’s involvement in the conclusion, performance or termination of the contract, irrespective of a tight group structure or economic reality.\textsuperscript{58} Third, the requirement of consent was gradually loosened. Instead, the “extension” was justified on the basis of legal certainty and reasonable expectations.\textsuperscript{59} It is submitted that this (broader) version of the GoC doctrine moves towards good faith, equity and fairness, \textit{ie} belongs to a fictitious consent situation. 

2. \textit{Comparative remarks} 

There may hence not exist “the” GoC doctrine. Also unclear appears to be whether the doctrine, or some GoC type concept, is internationally recognised, and sometimes even whether specific jurisdictions apply it.\textsuperscript{60} 

In \textit{Peterson Farms}, the \textit{English} Commercial Court stated that the doctrine does not form part of English law.\textsuperscript{61} Determining the parties to an arbitration agreement was a matter of substantive law, not procedural law.\textsuperscript{62} 

\textsuperscript{55} Highlighting a potential misunderstanding of the doctrine also YOUSSEF, Consent in Context (fn 50), para 6.7. 

\textsuperscript{56} We could not find any decision after \textit{DOW} that followed this earlier, extensive approach. Quite to the contrary, the mere reliance on a close group structure received strong criticism, and it has been argued that such approach should not be considered a correct application of the GoC doctrine. Such “extension” could only be the result of piercing the corporate veil, see BORN (fn 4), pp 1446 f. Explicitly rejecting the approach under French law ICC case no 11405 (unpublished), in: \textit{HANOTIAU}, Complex Arbitrations – Multiparty, Multi-Issue and Class Actions, 2006, paras 158 ff. 

\textsuperscript{57} Eg, Cour d’Appel de Pau of 26.11.1986, Revue de L’Arbitrage 1988, 153 ff (\textit{Sponsor v Lestrade}). 

\textsuperscript{58} See for an overview PÔUDRET/BESSON, Comparative Law of International Arbitration, 2007\textsuperscript{2}, para 255. 

\textsuperscript{59} See, eg, ICC case no 5103, Journal Du Droit International 1988, 1206, 1212. 

\textsuperscript{60} See, for an overview, \textit{HANOTIAU}, Non-Signatories (fn 14), pp 571 ff; WEGEN/WILSKE (eds), Arbitration in 55 jurisdictions worldwide, Getting the Deal Through, 2013. 

\textsuperscript{61} \textit{Peterson Farms Inc v C&J Farming Ltd} [2004] EWHC 121, para 62.
According to our analysis, Germany has not accepted a GoC type concept either. But German scholars seem to be receptive to the notion of an “extension” on the basis of representations made (Rechtsschein).

It seems to be accepted that a GoC type concept does not exist in US law – at least not under such label. Yet, US law recognises the doctrine of “intertwined estoppel”, a remedy based on equity instead of actual consent (i.e. it is a fictitious consent case), which prevents the non-party from opposing an “extension” of a tribunal’s authority under two conditions: The dispute between a “signatory” and a “non-signatory” must be intertwined with the contract containing the arbitration clause; and the “non-signatory” must have close contractual or corporate ties with one of the “signatories”. As for a potential conflict of laws analysis, the relevant US court, when confronted with the GoC doctrine, held that a US entity could only be joined to the arbitration based on US law.

3. The position under Swiss law

Commentators disagree as to whether a GoC type concept is recognised in Switzerland. Although some scholars support the concept, a notable number criticises and rejects it entirely, or accepts it only in

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62 Peterson Farms (fn 61), para 45. English law not only rejects the GoC doctrine as such but also its foundation in international principles (contrary to French law, see above Section B.III.1 and below Section C.I.1).

63 For a comprehensive overview, see Jürschik (fn 39), pp 197 ff, with further references.

64 Jürschik (fn 39), p 213.

65 Sandrock, Wirkungen von Schiedsvereinbarungen im Konzern, in: Böckstiegel/ Berger/Bredow (eds), Die Beteiligung Dritter an Schiedsverfahren, 2005, pp 102 f. US courts held that the “extension” of an arbitration agreement inter alia based on a group affiliation may not be justified with international principles (contrary to the French position, see above Section B.III.1) but instead may be justified on the basis of the lex incorporationis, see US Court of Appeals, Second Circuit, Sarhank Group v Oracle Corporation, case no 02–9383, 14.4.2005, c 7.

66 For a comprehensive overview, see Brekolakis, Third Parties in International Commercial Arbitration (fn 47), paras 4.14 ff.

67 Sarhank Group v Oracle Corporation (fn 65), c 7.


69 Blessing, Introduction to Arbitration (fn 49), paras 491 ff.

70 Berger/Kellerhals (fn 3), paras 573 ff; Pfisterer (fn 26), paras 471 ff; Poidret/Besson (fn 58), para 265.
specific circumstances. The Swiss Federal Court has so far neither expressly rejected the concept nor endorsed it.

In a 1996 decision, the Federal Court discussed the GoC doctrine and concluded, obiter, that it should – if at all – only be applied restrictively. In two, arguably three subsequent decisions, the Federal Court held that a “non-signatory” might be bound in situations where it must be assumed (reasonably) that the “non-signatory” impliedly consented, by its (heavy) involvement in the performance of the underlying contract, to the arbitration agreement. Yet, the Federal Court made no reference to the GoC doctrine in these decisions and thus merely ruled that arbitration agreements could be accepted impliedly – which pertains to an actual consent rather than a fictitious consent type analysis.

C. The law applicable to the personal scope of arbitration agreements and the tribunal’s authority (conflict of laws level)

The above analysis revealed significant differences across systems when determining, on the substantive level, the personal scope of arbitration agreements or tribunals’ authority. Carefully determining the law applicable to this scope is therefore important.

The considerations in this Section C are independent of any legal system and its conflict of laws rules. Quite a number of conflict rules could potentially be relevant to the determination of the law applicable to the personal scope, also depending on whether an actual or fictitious consent type situation is analysed (below I). In fictitious consent type cases, we propose different solutions depending on whether a non-party claimant wishes to

71 MÜLLER (fn 17), para 69.
73 The Federal Court reasoned that the doctrine could be applied if a “non-signatory” made representations that a “signatory” relied upon. The Federal Court did not, however, make reference to an economic reality or a group structure. Hence, it is submitted that this decision belongs to the doctrine of representations made (Rechtsscheinhaftung) rather than the GoC doctrine.
intervene (below II), or whether parties to the arbitration agreement wish to join non-party respondents (below III).

I. Conflict rules potentially relevant – general considerations

When assessing which conflict rules could be relevant for determining the law applicable to the personal scope of the arbitration agreement and the tribunal’s authority, a fundamental distinction must be made between cases that are to be characterised as an analysis of actual consent (like in Scenarios (1) to (3),\(^77\) below 1) and cases where merely fictitious consent is sought to be relied upon (like in Scenario (4), below 2). Depending on this characterisation (\(Qualifikation\)) at the conflict of laws level, the applicable conflict rules are to be determined.

1. Determination of the law applicable to the personal scope in case of actual consent

If the analysis refers to actual consent, determining the personal scope of an arbitration agreement is equal to analysing whether a valid arbitration agreement exists between the respective entities. Whether an entity has become a party to the arbitration agreement depends on whether the entity has actually consented. The personal scope of the tribunal’s authority then follows from the answer to such analysis. According to which substantive law should this be determined and, in a first step, according to which conflict rules must this law be determined?

It is submitted that the conflict of law rules used to determine the law applicable to the personal scope of the arbitration agreement in case of alleged actual consent\(^78\) should be the same as those used to determine the law applicable to the substantive validity of the arbitration agreement.\(^79\) This appears justified because the analysis of the personal scope, in these cases, seeks to determine whether the agreement is valid for a specific party. The conflict rules determining the law applicable to such validity should (as seems usual in private international law\(^80\)) be determined based on the

\(^77\) See above Section B.I.
\(^78\) Relevant cases would belong to Scenarios (1) to (3).
\(^80\) See, eg, Art 116(2) PILA; Art 10(1) Regulation no 593/2008 of 17.6.2008 (Rome I). The validity of choice of court agreements is also primarily determined by the court chosen according to its own law (\(lex fori\)), ie assuming that the choice of court agreement is valid, see, eg, Art 5(1) Hague Convention on Choice of Court Agreements of 30.6.2005; similar Art 25(1)(1) Regulation no 1215/2012 of 12.12.2012 (Brussels Ia).
assumption that such agreement was valid – *ie* assuming that the respective party actually consented.\(^{81}\) The starting point of the conflict of laws analysis can thus be the arbitration agreement and the conflict rules applicable to its validity.

As an “option” for a “governing law” for the personal scope of arbitration agreements (substantive level), some propose the application of national rules, *ie* international law or principles.\(^{82}\) This would not make a conflict of laws analysis superfluous. As correctly pointed out by the UK Supreme Court in *Dallah*,\(^{83}\) international law or principles only apply based on a conflict rule contained in some system,\(^{84}\) *eg* French law.\(^{85}\) Applying national rules (substantive level) for determining the personal scope is justified, and required, to the extent that such (French) conflict rule refers to national rules. However, this conflict rule is relevant only within a certain (here French) legal order, and other systems may operate with different conflict rules. Switzerland, *eg*, has no conflict rule referring to international law or principles.\(^{86}\)

### 2. Determination of the law applicable to the personal scope in fictitious consent cases

In situations that are to be characterised as potential “extensions” of the personal scope of a tribunal’s authority irrespective of actual consent,\(^{87}\) additional difficulties arise already at the conflict of laws level (below 2.1). They have recently been discussed by the highest German court (below 2.2).

\(^{81}\) Similar Stein/Jonas/Schlosser, *Zivilprozessordnung*, 2014\(^{23}\), Anhang zu § 1061, para 72. In many systems (*eg* Swiss law, Art 178(2) PILA), this will ultimately result, on the substantive level, in the application of the law chosen to govern the arbitration agreement, the respective *lex arbitri*, or the law applicable to the underlying substantive contract, see Greenberg/Kee/Weeramantry, *International Commercial Arbitration, An Asia-Pacific Perspective*, 2011, paras 4.51 ff.

\(^{82}\) For France see *Dalico: Cour de Cassation*, case no 91-16828, of 20.12.1993; and Art 1478 French *Code de procédure civile*, which is considered as a direct authorisation to apply the *lex mercatoria*, see Cuniberti (fn 1), pp 60 f; Ritlewski, *Die Lex Mercatoria in der schiedsgerichtlichen Praxis*, SchiedsVZ 2009, 130, 132.


\(^{85}\) See Art 1478 French *Code de procédure civile*.

\(^{86}\) See below Section D.II.

\(^{87}\) See above B.I, Scenario (4).
2.1 Potential difficulties with applying the conflict rules applicable to the arbitration agreement

In cases where an “extension” is sought irrespective of actual consent, applying indiscriminately the conflict rules applicable to the arbitration agreement in order to determine the personal scope of the tribunal’s authority may not be justified, considering that the non-party may have no link to the arbitration agreement and the conflict rules determining the law applicable to the agreement’s validity and scope.

One cannot assume that a “choice” was valid if there was no “choice”. The fact that others concluded an arbitration agreement, to which certain conflict rules apply, cannot “bind” a person that is unrelated to it. Notwithstanding this, tribunals, courts and commentators frequently determine the law applicable to the personal scope of a tribunal’s authority (substantive level) purely on the basis of the conflict rules applicable to the arbitration agreement (conflict of laws level). This may be unsatisfactory.

2.2 Recent considerations in German case law

The German Federal Supreme Court (Bundesgerichtshof = BGH), in 2014, considered precisely the concern raised in the previous Section. In a Scenario (4) type case, the BGH discussed alternatives to the conflict rules potentially applicable to determine the law applicable to the personal scope in actual consent Scenarios (1) to (3).

An entity had signed a contract with an arbitration agreement but later alleged that it had done so only as a proxy, and that it was a non-party to the agreement. The BGH contemplated, inter alia, whether it was appropriate to use the arbitration agreement as the starting point for determining the conflict rules, and ultimately the substantive law, governing the personal scope of the tribunal’s authority over that non-party.

It had been argued in these proceedings, similar to the consideration in the previous Section, that it would be incorrect to base, without further ado, the analysis on the arbitration agreement (and the conflict rules applicable to it). Otherwise a third parties’ agreement could “bind” a non-party with regard to the conflict of laws analysis, or could otherwise provide a tribunal with authority over such non-party. As an agreement to the detriment of a third

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89 BGH, III ZR 371/12 of 8.5.2014.
90 BGH, III ZR 371/12 of 8.5.2014, c 21.
party this would be invalid according to general principles ("no third party burden" principle). \(^91\)

The BGH seems to have accepted this argument in general although, in this particular case, it concluded that the arbitration agreement, and the conflict rules applicable to it, could indeed be used as a starting point because by signing the contract, the non-party had become aware of the arbitration agreement. \(^92\) The non-party had brought itself into the “danger zone” of the arbitration agreement and had to live with the consequences, also that the tribunal’s authority might be “extended” to it on the basis of a law determined according to the conflict rules applicable to the arbitration agreement.

Turning to solutions to this dilemma, a distinction needs to be made depending on whether a non-party claimant wishes to intervene (below II) or whether parties to the arbitration agreement wish to join a non-party respondent (below III).

### II. Solution (1) – conflict rules applicable to the “extension” to a non-party claimant

If a non-party relies on an arbitration agreement to intervene in proceedings, the non-party is trying to consent subsequently. However, this is still a fictitious consent type situation insofar as one or more of the actual parties to the arbitration agreement reject such intervention. \(^93\)

It is submitted that, in such non-party intervention cases, it is appropriate to use the arbitration agreement and the conflict rules applicable to it as a starting point.

The parties to the arbitration agreement set the arbitral “framework”, and it should be their choices that determine the scope of their agreement (leading, first of all, to applicable conflict rules that in turn determine the applicable substantive law). An intervening non-party is not unduly burdened by having to respect the parties’ choices but must take the arbitration agreement as it finds it. The party or parties to the arbitration agreement rejecting the non-party’s intervention also merit protection only insofar as

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\(^91\) For Swiss law, see, eg, HUGUENIN, Obligationenrecht, Allgemeiner und Besonderer Teil, 2014; para 1168.

\(^92\) BGH, III ZR 371/12 of 8.5.2014, c 22-44.

\(^93\) A likely example would be a group company relying on the GoC doctrine for justifying its intervention, see above Section B.III.1.
they could legitimately expect such protection on the basis of their choices (as to the substance and conflict rules).

For the sake of completeness, in GoC type cases, the starting point for the conflict of laws analysis would be identical to the one described in this Section if one understands the GoC doctrine as a tool for determining implied consent (ie as a Scenario (2) situation), but with a different reasoning. The intervening entity would then argue that all parties had impliedly consented to the intervening entity being bound, and that in order to determine whether they had done so, the conflict rules applicable to the arbitration agreement should apply. This is then an (alleged) actual consent case to which the above considerations apply.94

III. Solution (2) – conflict rules applicable to “extensions” to a non-party respondent

In cases where a non-party respondent is sought to be joined, it might appear warranted, in order to protect its legitimate expectations,95 to create a separate conflict rule to the issue of “extension” (Drittwirkungsstatut96),97 pointing to a law closer to the non-party than to the arbitration agreement.98 Such law (substantive level) may be the law applicable to the personal scope of arbitration agreements at the place of incorporation (lex incorporationis), at the place of business, at the place of residence, or at the habitual residence of the non-party.99 It may also be another law that governs the relationship between the non-party and one of the parties to the arbitration agreement. Indeed, this line of reasoning seems to have been adopted, obiter, by the BGH.100

Yet, such separate conflict rule is justified only if the non-party has “no connection” to the arbitration agreement (below 1), an issue that must be

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94 See above Section C.I.1.
95 Expressing sympathy for the approach also RUBINS (fn 76), p 471.
96 This term is used, eg, by GEBAUER, Zur subjektiven Reichweite von Schieds- und Gerichtsstandsvereinbarungen, Maßstab und anwendbares Recht, in: Geimer/Kaissis/Thümmel (eds), Festschrift Schütze, 2014, pp 95, 97.
97 For a separate treatment of the scenarios where an entity attempts to join and where it is supposed to be joined to an arbitration also TOWNSEND (fn 24), pp 111 f.
98 Prominently held in Sarhank Group v Oracle Corporation (fn 65), c 7.
100 BGH, III ZR 371/12 of 8.5.2014, c 20-21.
carefully analysed\textsuperscript{101} (below 2 and 3). In any event, such separate conflict rule is unwarranted if it leads to the application of a more flexible law on “extension” than the laws determined on the basis of the conflict rules applicable to the arbitration agreement (below 4).

1. \textit{Separate conflict rule is justified if there is “no connection” to the arbitration agreement}

A non-party has no “connection” to the arbitration agreement in cases where, \textit{e.g.}, the tribunal seeks to base its authority solely on the non-party’s group affiliation.\textsuperscript{102} Since there is no “action” of the non-party alleged by which it would have created a “connection” to the arbitration agreement, a separate conflict rule for determining the law applicable to the personal scope of the tribunal’s authority is then required in order to protect the non-party.

Whether a particular conflict of laws system would consider a mere group affiliation to be a sufficient “connection” is a policy issue, and the outcome might differ depending on the policy choices made.

2. \textit{Sufficient “connection” in case of “piercing the corporate veil”?}

As outlined above,\textsuperscript{103} veil piercing is independent of actual consent. However, considerations regarding veil piercing still relate to actions resulting from an abuse of right of the non-party directly linked or with regard to the agreement (containing an arbitration clause).

It is submitted that, by virtue of these actions, the non-party has created a “connection” to the arbitration agreement that justifies using the arbitration agreement as the starting point for the conflict of laws analysis when determining the law applicable to its validity and personal scope (whether or not the veil piercing will be successful, on the merits and with regard to the “extension” of the tribunal’s authority, remains of course a separate issue).

3. \textit{Is there a “connection” in the context of the GoC doctrine?}

Similarly, there appears to be sufficient “connection” if the tribunal’s authority is sought to be based on a GoC type doctrine under its narrow reading, \textit{i.e.} if mere membership in a group does not suffice.\textsuperscript{104}

Either the non-party will have committed a number of actions – \textit{e.g.} heavy involvement in the conclusion, performance, or termination of the

\textsuperscript{101} This also appears to be the approach chosen by the \textit{BGH}, see above C.I.2.2.

\textsuperscript{102} See above Section B.III.1.

\textsuperscript{103} See above Section B.II.

\textsuperscript{104} See above Section B.III.1; also for a case-by-case analysis and exceptional departure from the law ordinarily applicable SACHS/NIEDERMAIER (fn 54), pp 14 ff.
contract – that could be said to relate also to the arbitration agreement\textsuperscript{105} and justify basing the conflict of laws analysis on the arbitration agreement as a starting point. Or the analysis will be based on a finding of implied consent, in which case no separate conflict rule is warranted either.

4. \textit{Applying a separate conflict rule to further “extend” the tribunal’s authority?}

So far, a separate conflict rule for determining the law applicable to a tribunal’s authority over a non-party has been discussed under the assumption that such conflict rule would ultimately lead to a law providing additional protection to the non-party. However, the opposite is also possible, \textit{i.e.} that such separate conflict rule leads to a law (\textit{e.g.} the non-party’s \textit{lex incorporationis}) that is more lenient with regard to “extensions”. If that is the outcome, however, no separate conflict rule should be created:

It is submitted that the starting point of the conflict of laws analysis should be the legitimate expectations of the parties to the arbitration agreement. It is further submitted that these parties have no legitimate expectation to join a non-party where this is not possible on the basis of the law(s) applicable to the personal scope of their arbitration agreement.

Thus, a separate conflict rule for determining the personal scope in Scenario (4) type cases is unwarranted if it leads to a more permissive law than the laws (substantive level) determined on the basis of the conflict rules applicable to the arbitration agreement (conflict of laws level). An additional conflict rule for the joinder of non-parties in Scenario (4) type cases may be created for the benefit of the non-party as a shield (against joinder), but it may not be created as a sword for the parties to the agreement (to determine a law that is more permissive with regard to joining a non-party).

5. \textit{Summary}

When establishing the conflict rules for determining the law(s) applicable to the personal scope of a tribunal’s authority, our proposal is thus to distinguish along the lines of types of consent:\textsuperscript{106} if the tribunal’s authority is sought to be based on fictitious consent (Scenario (4)), a separate conflict rule needs to be created. If the tribunal’s authority is sought to be based on an actual consent analysis (Scenarios (1) to (3)), the arbitration agreement is the starting point for the conflict of laws analysis. However, and this is important, this distinction is one at the conflict of laws level (of a given legal

\textsuperscript{105} See above Section B.III.1.

\textsuperscript{106} See above Section B.I.
system) that is separate from potential distinctions in the substantive laws governing the personal scope of arbitration agreements.

The conflict of laws analysis would have the following steps: (i) It must be determined whether the analysis relates to actual consent or whether fictitious consent is alleged. In the first case, the conflict rules applicable to the validity of the arbitration agreement are used to determine the applicable law(s) to the personal scope of the tribunal’s authority. If fictitious consent is alleged, (ii) a further distinction needs to be made depending on whether the non-party has created a “connection” to the arbitration agreement. If it has, the conflict rules applicable to the arbitration agreement are again the starting point. If the non-party has not created such “connection”, the analysis continues. (iii) As a preliminary issue, it must then be determined whether the substantive law(s) applicable to the personal scope of the arbitration agreement would permit a joinder of the non-party. If they do not, this is the end of the analysis and no joinder is warranted. (iv) If at least one of them does allow joinder, a separate conflict rule needs to be created based on the proximity of the non-party to some other law (concerning the personal scope of an arbitration agreement on the substantive level). (v) Only if this law closer to the non-party permits joinder, should joinder then take place.

D. The position of Swiss law

In light of these general considerations, the Swiss position on the conflict rules determining the law applicable to the personal scope of arbitration agreements can now be restated (below I). Swiss law does not sanction the direct application of “international principles” but always requires a conflict of laws analysis (below II).

I. Conflict of laws analysis missing?

Pursuant to Art 178(1) PILA, an arbitration agreement has to be in writing or in a form that allows proof of the agreement in text form. According to the Swiss Federal Court, it suffices if at least two parties to an arbitration agreement initially comply with this formality. In the context of an analysis as to whether a person not mentioned in the arbitration agreement is bound or covered by the tribunal’s authority, formalities play no role, as the agreement may be “extended” to “non-signatories” regardless of additional considerations of formalities.107

Art 178(2) PILA is the Swiss conflict rule for determining the law applicable to the validity of an arbitration agreement and provides that an arbitration agreement is valid if it either conforms to the law chosen by the parties, the law governing the merits of the dispute, or Swiss law. This conflict rule favours the validity of the arbitration agreement (favor validitatis).\footnote{See MÜLLER (fn 17), para 33.} It applies, according to its wording,\footnote{Art 178 PILA refers, in Switzerland’s official languages, to “Schiedsvereinbarung”, “convention d’arbitrage”, or “patto di arbitrato”, in English translation “arbitration agreement”.
} to situations that involve an “agreement”, and thus also to the issue of determining the law applicable to the personal scope of an arbitration agreement in actual consent cases (Scenarios (1) to (3)).


Yet, in veil piercing and Rechtsschein type cases, the non-party will at least have established a “connection” to the arbitration agreement. It thus appears justified to start the conflict of laws analysis with the arbitration agreement. The situations of actual consent and a “connection” to the arbitration agreement in veil piercing and Rechtsschein type cases appear sufficiently similar\footnote{See the general considerations above, Section C.III.} to warrant an application of Art 178 PILA by analogy. There is no “agreement”, so the conflict of laws analysis cannot be based on its assumed validity, but there is a potential “connection”, and the conflict of laws analysis may start with the assumption that such “connection” to the arbitration agreement was actually established.

**Example A:** Seller S and Buyer B conclude a purchase contract with an arbitration clause (seat in Switzerland). B is part of a group of companies with mother company M, but M was not
openly involved in the transaction. After delivery, B does not pay the purchase price. Since B has no assets, S tries to hold M liable and to join it to the arbitration. In order to extend M’s liability on a substantive level, concepts such as veil piercing come to mind. In addition, for arbitration purposes, S will have to establish that also the arbitration agreement should be “extended” to M. Which law should apply to this question? – **Swiss law solution:** The first step is to determine, from a Swiss law perspective, the applicable conflict rule. As the personal scope of the tribunal’s authority is sought to be based on a fictitious consent type analysis (the facts do not point to any actual consent – express, implied, or presumed – by M), Art 178(2) PILA does not apply directly. Thus, a separate conflict rule must be created. If there are facts that might warrant the application of the concept of veil piercing, the conflict rule in Art 178(2) PILA is applied by analogy (due to a “connection” created by M), which points to the law chosen by the parties to govern the arbitration agreement, the law applicable to the substance of the dispute, or Swiss law.

On the other hand, Swiss law does not recognise “extensions” in situations that do not involve actual consent or “connection”. Also, the law chosen by the parties or the law otherwise applicable to the dispute then cannot provide a basis for joining the non-party:

**Example B:** S and B in Example A have agreed on domestic law X to govern the substance of their dispute. We assume that, under the arbitration law of X, parties may be joined merely on the basis of being part of a group structure. Which conflict rule determines the law applicable to the issue of whether A may join M in proceedings against B? – **Swiss law solution:** As there is neither actual consent nor a “connection”, the regular Swiss conflict rule of Art 178(2) PILA does not apply (also not by analogy). A separate conflict rule would have to be created – but there is no such conflict rule in Swiss law. This is the end of the analysis (on the conflict of laws level), no determination of an applicable substantive law takes place, and M may not be joined. In particular, given that the conflict rule in Art 178(2) PILA does not apply (by analogy), a *renvoi* to law X (under Art 178(2), second alternative) is not possible. At least this is how one would have to argue to avoid “extensions” beyond the narrow rules of Swiss substantive law in Swiss arbitration proceedings, considering that Art 178(2) PILA might refer to substantive laws that are more
lenient than Swiss law – a renvoi that the Federal Court apparently does not contemplate.

II. No application of “international principles”

Under Swiss law, a conflict of laws analysis may not be avoided by directly applying “international principles”.

An arbitral tribunal once “extended” the arbitration agreement to a “non-signatory” based on its involvement in the performance of the contract, applying the law chosen by the parties for the arbitration agreement (Lebanese law), interpreted together with the lex mercatoria and international trade usages. The Swiss Federal Court accepted this \(^{112}\) and held that there was no need to evaluate whether Swiss law would have permitted such “extension”\(^ {113}\).

Some commentators argued that the Federal Court thereby partially recognised the GoC doctrine which, according to DOW, relies on international principles.\(^ {114}\) However, the application of international principles was foreseen in Lebanese law.\(^ {115}\) As a consequence, the Federal Court merely held that the tribunal correctly applied Lebanese law but did not accept that, under Swiss law, “international principles” would directly govern the validity or personal scope of arbitration agreements. A conflict of (national) laws analysis determining the substantive law governing scope and validity, as outlined above, is always necessary.

In conclusion, it is submitted that the Swiss conflict of laws approach to determining the substantive law applicable to the personal scope of arbitration agreements is appropriate and predictable and could also serve as a model for other jurisdictions.


\(^{113}\) As for the conflict of laws analysis: The non-party, through the involvement in the performance of the main contract, had established a “connection” to the arbitration agreement, and the Swiss conflict rule for this case was Art 178(2) PILA (by analogy). One of the laws referred to in Art 178(2) PILA was the law chosen by the parties (here Lebanese law).

\(^{114}\) See above B.III.1.

Summary

Commercial arbitration is based on consent. But what is consent and what happens if it is uncertain whether there was consent? In particular, what law should govern the analysis of this issue if it is even unclear whether a particular entity had anything to do with the arbitration agreement?

Following general considerations, in light of significant differences of domestic provisions regarding the personal scope of arbitration agreements (Section B), the authors develop guidance concerning the issue of how to determine the law applicable to such personal scope in general (Section C) and assess the position under Swiss law in particular (Section D).

In summary, in situations (i) that are to be characterised as an analysis of alleged actual consent, the Swiss conflict rule for determining the law applicable to the personal scope of an arbitration agreement and the tribunal’s authority is Art 178(2) PILA (which refers to the law chosen by the parties, the law applicable to the dispute, or Swiss law). (ii) In cases of fictitious consent, where the non-party nevertheless establishes a “connection” to the arbitration agreement, Swiss law, it is submitted, has developed a separate conflict rule which results in an application of Art 178(2) PILA by analogy. (iii) In cases where there is neither alleged actual consent nor “connection”, Swiss law has no conflict rule and does not recognise any “extensions” of the personal scope of arbitration agreements and the tribunal’s authority, neither based on a national law nor on international principles.
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Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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