



International Commercial Arbitration Law: The Conflict Of Laws Issues In Determining The Applicable Law When The Express Choice Of Governing Law Is Absent In An Arbitral Agreement.

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Abstract

This dissertation compares the increasing issues in international commercial arbitration's conflict of laws issues while determining the applicable law in the arbitration agreement, specifically when the governing law is absent. The framework is based on the chronology of arbitration, which goes from the arbitration agreement through the actual procedures, and then into court processes involving arbitration with different systems of governing laws, and their approaches.

There are now opposing viewpoints on whether the law relevant to the arbitration agreement should be the law of the arbitral seat or the law of the primary contract. The main goal here is to not only determine the conflict of laws issues in arbitration agreements but also to critically analyse them and provide better alternative approaches.

This dissertation seeks to examine the extent to which the two main approaches are executed in practise compared to the uncertainty that can result in their application, while determining which approach is accurate when the applicable governing law is absent. This dissertation concludes with the view of current developments to answer the conflict of laws issues when the governing law is missing, addressed with relevant case law, and legal approaches finally linked to practical practise.

Chapter 1: Introduction

When a dispute arises, litigating in a foreign court has a number of drawbacks, including new processes, the need to hire local counsel, and well-founded fear of discrimination. As a result, it is no surprise that arbitration has become the favoured method of resolving disputes in international trade.¹ The purpose of different laws and how they apply to international commercial arbitration is still a source of debate today.²

Parties to an international contract commonly choose arbitration because it provides clarity and predictability in the dispute resolution process, as well as neutrality and efficacy.³ The advantages of speed and economy are frequently cited by proponents of arbitration.⁴ On one hand, the parties want their disputes to be addressed under a uniform substantive law. On the other hand, international arbitration, frequently incorporates many legal systems or sets of standards, resulting in even more variance.⁵

Among the multiple issues that international arbitration involves, one of the most important is the application of determining the governing law.⁶ An arbitration agreement's formal and substantive legality, formation, termination, interpretation, assignment, and waiver shall all be decided by the law governing the arbitration agreement.⁷ If it is not mentioned, a choice of law rule will be used to determine its jurisdiction. In most circumstances, an arbitral process is regulated by more than one national system of law, and tribunals typically waste too much time determining which one applies to a particular case.⁸

¹ Peter S. Smedresman, 'Conflict of Laws in International Commercial Arbitration: A Survey on Recent Developments' (CWSL Scholarly Commons, 1977) 1

² Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017) 64

³ Gary Born, *International Commercial Arbitration: Law and Practice* (2nd edn, Kluwer Law International 2017) 239

⁴ Martin Domke, 'Proceeding of the Institute on Private Investment Abroad' [1960] IACD, 131.

⁵ Carlo Croff, 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' [1982] 16 (4) <<https://www.jstor.org/stable/40705399>> accessed January 2022

⁶ Gray Born, *International Arbitration: Cases and Materials* (2nd edn, Kluwer Law International 2015) 90

⁷ Amanda Nunes Sampaio, 'The law governing the arbitration agreement: Why we need it and how to deal with it' (International Bar Association Arbitration Committee Publication) <<https://www.ibanet.org/article/699fd751-0bd4-4a15-bf84-e2542a8219c9>> accessed January 2022

⁸ Justin Williams, Hamish Lal and Richard Hornshaw, 'Arbitration procedures and practice in the UK (England and Wales): overview' (Akin Gump LLP 2020) <[https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a708914](https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a708914)> accessed January 2022

Choice of law rules are frequently used in international arbitration to determine which law should apply to which element of the dispute.⁹ It is important to distinguish between the four types of choice of law issues that can arise in international arbitration:

- a) Substantive law governing the merits of the parties' underlying contract: The underlying issue between the parties will usually be addressed according to the substantive law principles of a specific legal system. When the parties cannot agree on the substantive law that will govern the dispute, the arbitral tribunal will have to choose one.¹⁰
- b) The law applicable to the arbitral proceedings (known as "lex arbitri" or "curial law"): The arbitral proceedings are governed by legal principles that control both internal procedural concerns and relationships between the arbitration and national courts.¹¹ In most cases, the arbitral procedure is governed by the arbitration laws of the arbitral seat. Different country laws treat these concerns in different ways.¹²
- c) Substantive law governing the parties' arbitration agreement: Arbitration agreements are widely viewed as presumptively distinct from the underlying contract in which they occur. As a result, the parties' arbitration agreement might be regulated by a different country's legal system than the offer's underlying contract.¹³
- d) The conflict of laws rules that apply to choose each of the foregoing laws: Selecting each of the bodies of law identified in the preceding three sections in order to select the substantive governing the parties' dispute, for example, a tribunal must ordinarily apply a conflict of law system; as a result, a tribunal must decide at the outset what set of conflicts rules to apply to select each of these systems of law.¹⁴ The use of tribunals to choose the law that applies to each of the aforementioned concerns is on the rise.¹⁵

Although unlikely, each of these four issues may be addressed by a separate national law.¹⁶ For the purposes of this dissertation we will be focusing on (c) law applicable to the arbitration agreement, which will be discussed further in the next chapter.

⁹ Aceris Law LLC, 'Laws Applicable to an International Arbitration' (2021) <<https://www.acerislaw.com/laws-applicable-to-an-international-arbitration/>> accessed 6th February 2021

¹⁰ N.2 p39

¹¹ Latham & Watkins, 'Guide to International Arbitration' (2017) <<https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>> accessed January 2022

¹² N.6

¹³ Abdullah Akpınar, 'Which law governs an International Arbitration Agreement?' (*Barton Legal*, 2020) <<https://www.bartonlegal.com/site/news/newsblnewspeople/feature-which-law-governs-an-international-arbitration-agreement>> accessed October 2020

¹⁴ Max Rheinstein, Hay, Peter and Drobnig, Ulrich M, 'Conflict of laws' (*Encyclopaedia Britannica*, 2018) <<https://www.britannica.com/topic/conflict-of-laws>> accessed 12th April 2018

¹⁵ N.6

¹⁶ Gary Born, *International Arbitration and Forum Selection Agreement: Drafting and Enforcing* (3rd edn, Kluwer Law International, 2010) 82

Chapter 2: Conflict of law rules applied to international arbitration agreements

When parties enter into a contract, they frequently specify how they want any disputes to be settled, whether by way of court litigation or by arbitration.¹⁷ When arbitration runs well, as it does in the great majority of instances, neither party seeks judicial intervention. Even when court supervision is not included, conflict of laws issues exists in arbitration, and they are frequently overlooked by both the parties and the arbitrator.¹⁸

Parties must clearly and in writing refer their disputes to arbitration if they choose to do so.¹⁹ An arbitration agreement is commonly recognised to be a separate agreement wholly independent from the substantive contract that can withstand termination of the substantive contract.²⁰

Additionally, it can be set out separately as an agreement or inserted as a provision in the substantive contract. This effectively indicates that the arbitration agreement is subject to its own set of rules. The ‘proper law of the substantive agreement’ may or may not be separate from this proper law. It is crucial to know what rights and duties the parties have under these two types of ‘proper law’.²¹

2.1 Understanding the proper law of the arbitral agreement

The governing law of the substantive contract is also known as the ‘applicable law’, ‘substantive law,’ and ‘appropriate law of the contract’. It is the law that regulates the parties’ substantive rights, which are the subject of the dispute, whereas the relevant law of the arbitration agreement governs the parties’ responsibility to submit disputes to arbitration.²² It oversees the validity of the arbitration agreement,²³ as well as determining whether a dispute falls within the scope of the arbitration agreement and if the arbitrators have the power to make an award.²⁴

If the parties have specifically selected a proper law for the arbitration that differs from the substantive agreement’s proper law, this choice is deemed independent of the underlying contract and will take precedence.²⁵ In the lack of an express choice, it should be evaluated if the parties have made an inferred choice in this respect. In the absence of an express choice of law clause, the arbitration

¹⁷ Mark Davidson, ‘What law governs my arbitration agreement? Court of Appeal provides welcome clarification in *Enka v Chubb* [2020] EWCA Civ 574’ (*Mills & Reeve*, 2020) <<https://www.mills-reeve.com/insights/publications/what-law-governs-my-arbitration-agreement>> accessed 13th May 2020

¹⁸ N.1

¹⁹ Arbitration Act 1996, Section 5

²⁰ Nigel Blackaby & Constantine Partasides QC, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press, 2015) Chapter 2

²¹ N.15

²² Simon Bromwich, David Capps, Tom Connor, & Tom Cummins, ‘Governing Law Clauses’ (*Ashurst*, 2021) <<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---governing-law-clauses>> accessed 15th January 2021

²³ *Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd.* (1927 28 Lloyd’s Rep 104)

²⁴ *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan* (1978 2 Lloyd’s Rep 223)

²⁵ N.6

agreement will be governed by the law that has the most closest connection to it.²⁶ In most cases, the proper law of the arbitration agreement is considered to be the same as the proper law of the substantial agreement in the absence of an express or implied choice.²⁷ The third chapter will go into this in greater depth.

2.2 Doctrine of Separability and its presumption

The doctrine of separability is one of the conceptual and practical cornerstones of international arbitration.²⁸ It portrays that the arbitration clause in a contract is deemed independent from the main contract of which it is a part, and as a result, it survives the contract's termination, breach, and invalidity.²⁹

The doctrine was first established in the case of *Harbour Assurance*,³⁰ and was thereafter codified in Section 7 of the Arbitration Act 1996.³¹ The rule has the practical impact of ensuring that the underlying agreement's unenforceability does not immediately render the arbitration agreement included within it unenforceable. Without such rule, any issue that raised a doubt about the validity or existence of the contract containing the arbitration agreement would be barred from being heard by an arbitral tribunal.³²

As a result, in order to consider an arbitration agreement invalid, the arbitration agreement must be explicitly challenged. In other words, there must be separate elements that render the arbitration clause void or invalid.³³ The arbitral proceedings will also be terminated if the tribunal or the courts conclude that the arbitration provision is null, invalid, or inoperable.³⁴ Likewise, the entire agreement, including the arbitration clause, will be considered invalid where the contract was never entered into, or where the ground for invalidity also involves the arbitration clause as it does the rest of the agreement.³⁵

²⁶ Dicey and Morris, *Conflict of Laws* (8th edn, Sweet and Maxwell Ltd, 1967) p1047

²⁷ *NTPC v. Singer Co.* (1992 3 SCC 551); *Sulamérica Cia Nacional de Seguros SA and Ors. V. Enesa Engenharia SA and ors* (2012 EWCA Civ 638) p11

²⁸ Ronán Feehily, 'Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine' [2018] 34 (3) p355–383

²⁹ Aastha Chawla, 'Doctrine of Separability and determination of the proper law of an Arbitration agreement' *Bar and Bench* (2020) <<https://www.barandbench.com/columns/doctrine-of-separability-and-determination-of-the-proper-law-of-the-arbitration-agreement>> accessed 25 May, 2020

³⁰ *Harbour Assurance v Kansa General International Insurance* [1993] 1 Lloyd's Rep 455

³¹ Arbitration Act 1996, Section 7

³² James Carter and Hannah Kennedy, 'English High Court addresses separability of arbitration clauses' (*DLA Piper*, 2013) <<https://www.dlapiper.com/en/us/insights/publications/2013/06/english-high-court-addresses-separability-of-arb> /> accessed 26 June 2013

³³ *Fiona Shipping v Privalov* [2007] EWCA Civ 20

³⁴ *Vee Networks v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192

³⁵ Ilias Bentekas, *An Introduction to International Arbitration* (1st edn, Cambridge University Press, 2015) p28

Courts can decline to send parties to arbitration if the arbitration agreement is "null and invalid, inoperative, or incapable of being enforced," according to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³⁶ The provision, however, makes no mention of which law decides this, nor does it establish a choice of law rule to be followed.³⁷

The concept of separability was constructed by arbitration practice and theory to insulate,³⁸ and preserve³⁹ the arbitration agreement from its underlying contract. It is one of the foundations of international arbitration, especially when combined with party autonomy and consent.⁴⁰ Although still not absolute,⁴¹ because of this assumption, the arbitration agreement has autonomy,⁴² and even if the parties agree on a choice of law clause that naturally applies to both, the law that governs the underlying contract does not automatically apply to the arbitration agreement.⁴³

The New York Convention as well as the Model Law recognise the presumed separability of the arbitration agreement, as a result, the arbitration agreement between the parties might be regulated by a different law than the underlying contract.⁴⁴ All pro-arbitration jurisdictions, whether common or civil law, recognise the separability assumption to some extent.⁴⁵

2.3 Concluding Remarks

The applicable law that controls the contract's terms and duties will be explicitly stated in most contracts. On one hand, parties frequently take efforts to ensure that the arbitration's seat is selected.⁴⁶ According to *Shagang v Daewoo*,⁴⁷ the seat chosen by the parties will normally determine the procedural law used to govern the arbitration proceedings.⁴⁸

³⁶ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") Article II

³⁷ N.5

³⁸ Fouchard Gaillard Goldman, 'International Commercial Arbitration' in *E Gaillard & Savage* (eds), (Kluwer Law International, 1999) 199

³⁹ The arbitral tribunal's jurisdiction to adjudicate a challenge to the primary contract is normally retained under preservation.

⁴⁰ N.3 Section 3.02

⁴¹ Preliminary Award in ICC Case No 6401 (1992)

⁴² N.15 p103-107

⁴³ N.27

⁴⁴ Final award in ICC Case No. 3572 (1989) XIV YB Com Arb 111; N.3 p464

⁴⁵ N.25

⁴⁶ N.1

⁴⁷ *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm)

⁴⁸ Prof Jonathan Hill, 'The interpretation of arbitration clauses: where is the seat of arbitration?' (*University of Bristol Law School Blog*, 14th March 2016) <<https://legalresearch.blogs.bris.ac.uk/2016/03/the-interpretation-of-arbitration-clauses-where-is-the-seat-of-arbitration/>> accessed January 2022

Most, if not all, standard form arbitration provisions, on the other hand, do not identify which law rules the arbitration agreement. They will indicate which institutional arbitration rules will apply, the arbitration's seat, and more.⁴⁹ Nevertheless, they do not specify whose law will govern the arbitration agreement. Some drafters might amend the arbitration agreement to state which law rules it to reduce the potential of future ambiguity.⁵⁰

It's usually quite simple to figure out what the parties meant by the arbitration agreement's governing law.⁵¹ For instance, the parties may have chosen London as the arbitration seat, English law as the contract's governing law, and the contract's implementation in England. In that instance, it is reasonable to presume that the arbitration agreement is governed by English law.

Yet, in cases like *Enka v Chubb*,⁵² where the arbitration is held in London, the underlying contract is controlled by Russian law, and the contract is carried out in Russia, what happens?⁵³ The doctrine of separability states that an arbitration agreement can be regulated by a separate law than the substantive contract's governing law. In that instance, we must now determine what law governs the arbitration agreement?⁵⁴

Chapter 3: Which legal system should govern an arbitration agreement?

As previously stated, the governing law of an arbitration agreement is the law that will be used to resolve any disputes about the validity, scope, or interpretation of the arbitration agreement.⁵⁵ The arbitration agreement's governing law is important because if a dispute arises over whether a claim falls within the scope of an arbitration clause, the issue will be addressed by applying the arbitration agreement's governing law.⁵⁶

The ambiguity created by Articles II and V(1)(a) of the New York Convention,⁵⁷ as well as parallel Model Law procedures, has led in a variety of approaches to the law regulating international arbitration agreements. Commentators have broadly identified many for

⁴⁹ N.11 p22

⁵⁰ N.11

⁵¹ Sherina Petit, 'The governing law of the arbitration agreement Q and A' (*Norton Rose Fulbright*, 2014) <<https://www.nortonrosefulbright.com/en/knowledge/publications/5033d6e5/the-governing-law-of-the-arbitration-agreement-q-and-a>> accessed May 2014

⁵² *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38.

⁵³ N.1

⁵⁴ N.50

⁵⁵ James Freeman and Katrina Limond, 'Governing law of arbitration agreement' (*Allen & Overy*, 2021) <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/governing-law-of-arbitration-agreement>> accessed 2nd December 2021

⁵⁶ N.13

⁵⁷ Articles II and V(1)(a) of the New York Convention

selecting the governing international arbitration agreements. The following are some of the most common modern choice of law approaches that have lately been applied.⁵⁸

On the one hand, several have claimed that the law that governs a contract should also govern the arbitration agreement, which, though distinct from the contract, is a component of it. Others, on the other hand, have claimed that the arbitration agreement should be governed by the law of the arbitration seat, not the law of the primary contract.⁵⁹ The debate is significant because it determines which laws apply to matters of arbitration agreement legality and scope. For a better understanding, the recent judgment on the *Enka v Chubb*⁶⁰ will be mentioned throughout as in this case, with the majority of three Lords favoured the location of the seat as determinative in this case. However, as will be seen, the minority Lords regarded there to have been a choice of applicable law for the contract to be proceeded from this to determine the applicable law of the arbitration agreement. This creates a level of uncertainty and great arguments to be considered.

3.1 One approach to governing law - the “seat” approach

The most common approach would be to use the arbitral seat’s law. However, one may argue that implied choice does not work well in this case.⁶¹ The “seat” approach is that states that the governing law follows the geographical location of the seat of the arbitration provided for.

It is difficult to claim that when parties choose a seat, they are implying that the seat’s substantive law would apply to subjects pertaining to their arbitration agreement, such as validity, formation, and so on, because the seat is frequently chosen, among other reasons, because of its arbitration laws.⁶²

Similarly, the law of the seat is not always determined by the parties - taking into account, agreements in which the parties fail to choose a seat and the arbitral institution or even the arbitrators are required to do so.⁶³ Following the adoption of the Arbitration Act of

⁵⁸Andrew Tobin and Mark Davison, ‘What law governs my arbitration agreement? Court of Appeal provides welcome clarification in *Enka v Chubb* [2020] EWCA Civ 574’ (*Mills and Reeve*, 2020) <<https://www.mills-reeve.com/insights/publications/what-law-governs-my-arbitration-agreement>> accessed 13th May 2020

⁵⁹James Stacey and Samantha Holland, ‘*Enka v Chubb*: What is the Governing Law of an Arbitration Agreement?’ (*Slaughter and May*, 2020) <<https://my.slaughterandmay.com/insights/client-publications/enka-v-chubb-what-is-the-governing-law-of-an-arbitration-agreement>> accessed 23 October 2020

⁶⁰ N.51

⁶¹ N.77

⁶² N.7

⁶³Kinga Timar, ‘The Legal Relationship between the Parties and the Arbitral Institution’ (2013) ELJ <<https://eltelawjournal.hu/the-legal-relationship-between-the-parties-and-the-arbitral-institution/>> accessed January 2022

1996, there appeared to be a shift towards placing more importance on seat law.⁶⁴ The case of *XL Insurance v Owen Corning*⁶⁵ is a good example of this.

In the *FirstLink*⁶⁶ case, the application of the law of the seat has been mirrored. In this instance, the underlying agreement's choice of law section said that it would be "governed by and interpreted under the statutes of the Arbitration Institute of the Stockholm Chamber of Commerce".⁶⁷ This approach was then adopted in England after the decision in *Sulamérica*,⁶⁸ which plainly does not extend the rebuttable presumption of the application of the main contract's laws application to the arbitration clause beyond cases when the main contract's law is expressly chosen.⁶⁹

The Singapore High Court expressly disagreed with *Sulamérica*,⁷⁰ stating the rebuttable presumption that it cannot always be presumed that commercial parties desire the same system of law to regulate their relationship of completing substantive duties under the contract, and the totally independent relationship of resolving disputes when issues emerge.⁷¹ The Court concluded that in the absence of an express choice of law, the parties' arbitration agreement shall be governed by the law of the seat of arbitration.⁷²

In *Habas Sinai Ve v VSC Steel Company Ltd*, the contract provided for ICC arbitration in London although did not mention a governing law.⁷³ The relevance of the choice of arbitration seat is likely to be "overwhelming" when the primary contract does not contain an express governing law clause. This will be because the system of law of the seat will generally be the one with which the arbitration agreement has the most closest connection.⁷⁴

While the bold seat approach has its benefits, there are numerous situations in which the law of the seat should not be applied. Notably, either if seat has not yet been determined or if the seat can be altered during or after the arbitration procedures, the court might have to

⁶⁴ Prior to the Arbitration Act 1996, it was considered rare for the proper law of arbitration agreement to differ from the express choice of substantive law. *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] HL 17; *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep. 45

⁶⁵ *XL Insurance v Owen Corning* [2000] 2 Lloyd's Rep. 500

⁶⁶ *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12

⁶⁷ N.7

⁶⁸ N.27

⁶⁹ Renato Nazzini, 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) CUP 65(3), 690

⁷⁰ N.27

⁷¹ Alastair Henderson and Daniel Waldek, 'Going South Singapore High Court diverges from English Court's position on governing law of the arbitration agreement' (*Herbert Smith Freehills*, 2014) <<https://hsfnotes.com/arbitration/2014/07/03/going-south-singapore-high-court-diverges-from-english-courts-position-on-governing-law-of-the-arbitration-agreement/>> accessed 3rd July 2014

⁷² N.55

⁷³ *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm)

⁷⁴ N.81 p691

consider the legitimacy of an arbitration agreement.⁷⁵ Some argue that a delegated seat approach is not completely disconnected from the parties' intent since the parties meant to delegate this decision so that it may be imputed to them.⁷⁶

3.1.1 The law expressly or implicitly chosen by the parties to govern the arbitration agreement

The arbitration agreement and the contract including it will be construed as a whole, using English law principles of contractual interpretation, to decide whether the parties have expressly or impliedly agreed on a choice of law to govern the arbitration agreement. This will be determined by specific circumstances.⁷⁷

For the purposes of this dissertation, we will be looking into what occurs when no express choice by the parties for the governing law has been made, which will be discussed hereof.

3.1.2 In the event no choice has been made, the law which is “most closely connected” to the arbitration agreement.

This case was remarkable in that the parties had not chosen a law to govern the main contract or the arbitration agreement. In the case of *Sulamérica v Enesa*,⁷⁸ the Court of Appeal established guidelines on the area.⁷⁹ If no explicit or implicit decision has been made, the court must determine objectively which system of law the arbitration agreement is most closely associated with. This entails the use of the rule of law.⁸⁰

In the absence of a choice, the majority decided that the law of the place chosen as the seat of arbitration would be the law most directly related to the arbitration agreement, even if it contrasts from the law applicable to the main contract. There are some exceptions to the ordinary default rule, such as where the arbitration agreement would be invalid under the law of the seat but not under the law governing the rest of the contract, or where no seat has been designated, but these were “exceptional” circumstances that did not apply in this case.

Despite this, the UK Supreme Court just issued its long-awaited decision in *Enka v Chubb*.⁸¹ The majority found that the default rule applied since the primary contract did not contain any stated or implicit choice of Russian law, in their opinion. The majority agreed with the Court of Appeal's finding – albeit for different reasons – that the arbitration agreement was governed by English law.⁸² In the

⁷⁵ Ibid p692

⁷⁶ E Gaillard and J Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 226-7

⁷⁷ N.7

⁷⁸ N.27

⁷⁹ N.50

⁸⁰ Ian McDonald and George Spalton QC, ‘Enka v. Chubb in the Supreme Court: Which Law is it Anyway?’ (*New Square*, 2014) <<https://www.4newsquare.com/publications/enka-v-chubb-in-the-supreme-court-which-law-is-it-anyway/>> accessed 14 Oct 2020

⁸¹ N.52

⁸² N.50

absence of an arbitral agreement, the Court confirmed that the law with which the arbitration agreement is most closely associated, which is usually the law controlling the underlying contract itself, shall dominate.

However, there may arise some situations when the arbitration agreement's relevant law is the law of the arbitration's seat, such as when the underlying contract's applicable law is not specified.⁸³ The judgement specifies how arbitration agreements are governed by which legislation. This is definitely appropriate given the potential for ambiguity when a contract or arbitration agreement fails to specifically identify which law governs it.⁸⁴

The 1958 New York Convention's⁸⁵ uniform conflict of law rules, as well as an extensive academic commentary on the subject, support the conclusion that, absent a contrary choice of law provision in the arbitration agreement or the main contract, the arbitration agreement should then generally be governed by the law of the seat of arbitration. Any alternative conclusion would lead to inconsistencies and irrational outcomes.⁸⁶

To recapitulate, the implied predictability of conflict outcomes is only applicable if the parties have agreed on the seat of the arbitration. Otherwise, the theory's flaws appear to be dominant.

3.2 Another approach to governing law – the “main contract” approach

The Rome I Regulation establishes a code by which the governing law of a contract can be decided if the contracting parties have not chosen the law to regulate their operations, however this does not apply to arbitration agreements.⁸⁷ As a result, another option that comes to mind is to extend the law that applies to the underlying contract where the arbitration clause is placed to the arbitration clause itself.⁸⁸

⁸³ Florian Quintard, 'A global view of the law applicable to an arbitration agreement' (*Pinsent Masons*, 2021) <<https://www.pinsentmasons.com/out-law/analysis/a-global-view-law-applicable-arbitration-agreement>> accessed 11 February 2021

⁸⁴ Andrew Fox, Alastair Hopwood, Matthew Shankland and Jonathan Lafferty, 'UK Supreme Court Clarifies Proper Approach to Determining the Applicable Law' (*Sidley Austin LLP*, 2020) <<https://www.sidley.com/en/insights/newsupdates/2020/10/uk-supreme-court-clarifies-proper-approach-to-determining-the-applicable-law>> accessed 20 October 2020

⁸⁵ Article VI(a) of the New York Convention; the same in Article 34 2(a)(i) of the UNCITRAL Model Law

⁸⁶ Lord Goldsmith QC, Tony Dymond, Patrick Taylor, and Samantha J. Rowe 'Supreme Court decision on governing law of arbitration agreement' (*Debevoise & Plimpton*, 2020) <<https://www.debevoise.com/insights/publications/2020/10/uk-supreme-court-sets-out-correct>> accessed 9 October 2020

⁸⁷ N.19

⁸⁸ Yves Derains, 'The ICC Arbitral Process, Choice of Law Applicable to the Contract and International Arbitration' [1995] 16-17 ICC Court of Arbitration Bulletin No 1, 6

It is an interpretation of the parties' choice of law to govern their arbitration agreement, providing they have selected a law to govern their arbitration agreement. The *Sulamérica*⁸⁹ example exemplifies this method. The law governing the arbitration agreement was to establish whether the arbitration provision may be applied in this case.⁹⁰

In the lack of an express choice of law for the arbitration agreement, the English High Court first recognised that parties are considered to have intended for their whole relationship to be governed by the same system of law, i.e. the underlying agreement's choice of law.⁹¹ The Court found that the arbitration agreement would be voided since the main agreement was governed by Brazilian law in this case.⁹² In decision, the parties could not have chosen Brazilian law because they had agreed to arbitrate.⁹³ In much simpler words, it was ruled that, in the absence of an express choice of law for the arbitration agreement, there is a rebuttable presumption that the arbitration agreement would be governed by English law, therefore the underlying agreement's choice of law will apply.⁹⁴

The majority's commercial view, that a contract is a contract for the commercial parties, and that they would reasonably expect a choice of law to extend to the whole contract, is reasonable.⁹⁵ It also follows the principle established by the House of Lords in *Fiona Trust v Privalov*.⁹⁶ The majority did not agree with the Court of Appeal's reasoning that the concept of separability should be included in the review.

The majority also disagreed with the Court of Appeal, which cited *XL Insurance Limited v Owens Corning*,⁹⁷ decided that by agreeing to arbitrate in London under the terms of the Arbitration Act 1996, the parties were consenting to arbitrate in London., the parties had implicitly chosen English law to govern the validity of the arbitration agreement, despite the fact that the main contract was governed

⁸⁹ N.27

⁹⁰ Daniel Wilmot, 'A law unto itself? English Court of Appeal clarifies test for determining which law governs an arbitration agreement' (*Stewart Law LLP*, 2020) <<https://www.stewartslaw.com/news/english-court-of-appeal-clarifies-test-for-determining-which-law-governs-an-arbitration-agreement/>> accessed 1 May 2020

⁹¹ Guy Pendell, David Bridge, Richard Bamforth, and Jessica Foley, 'International Arbitration Law and Rules in England and Wales' (CMS Law-Now, 2020) <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/england-and-wales>> accessed 2 June 2020

⁹² N.7

⁹³ Ibid

⁹⁴ Hamish Lal, Josephine Kaiding and Léa Defranchi, 'Enka v Chubb: The Nuanced Presumptions "Test" on the Law of Arbitration Agreements' (*Akin Gump LLP*, 2020) <<https://www.akingump.com/en/news-insights/enka-v-chubb-the-nuanced-presumptions-test-on-the-law-of-arbitration-agreements.html>> accessed 30 November 2020

⁹⁵ Mihaela Maravela, 'Enka v Chubb Revisited: The Choice of Governing Law of the Contract and the Law of the Arbitration Agreement' (*Kluwer Arbitration Law*, 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/10/11/enka-v-chubb-revisited-the-choice-of-governing-law-of-the-contract-and-the-law-of-the-arbitration-agreement/>> accessed 11 October 2020.

⁹⁶ *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

⁹⁷ *XL Insurance Ltd v Owens Corning* [2001] 1 All E.R. (Comm) 530

by another law.⁹⁸ The court found that the provisions of the Arbitration Act 1996 do not support the conclusion that parties who choose an English seat of arbitration expect their arbitration agreement to be governed by English law.⁹⁹

In another case of *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*,¹⁰⁰ this approach was confirmed. The relevant shareholders' agreement in this case was governed by Indian law and includes a provision for LCIA arbitration in London. Andrew Smith J applied *Sulamérica* to determine that the arbitration agreement was governed by Indian law, which was also the law that applied to the main contract.¹⁰¹ He further concluded that the main contract's choice of law may be an express, rather than an implied, choice of law for the agreement to arbitrate.¹⁰²

Now, considering the recent *Enka v Chubb*¹⁰³ case, although Lords Burrows and Sales agreed with the majority that where parties have expressly or implicitly chosen the law of a contract containing an arbitration agreement, that choice applies to the arbitration agreement, they disagreed on what the position should be if no such express exists.¹⁰⁴

In this case, Lords Burrows and Sales agreed that the arbitration agreement should be governed by the law that governs the principal contract, because of several references to Russian law in the main contract and the transaction's larger circumstances pointing to Russia, it was assumed that Russian law would govern the main contract.¹⁰⁵

Even if the parties had not chosen Russian law for the main contract, Lord Burrows and Lord Sales would have ruled that the arbitration agreement's law was identical to the main contract's law and so subject to Russian law. Parties would expect the whole contract including the arbitration agreement to be governed by the same law, according to them.¹⁰⁶ This approach would also avoid practical issues like the possibility of different laws applying to the arbitration agreement and the larger dispute resolution clause in which the arbitration agreement sat.¹⁰⁷

⁹⁸ N.101

⁹⁹ N.103 paras. 73-94

¹⁰⁰ *Arsanovia Ltd & others v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 2 AU ER (Comms)

¹⁰¹ N.81 p689

¹⁰² Jean-Francois Poudret; Sebastien Besson; Stephen Berti; Annette Ponti, *Comparative Law of International Arbitration* (2nd Edn, Sweet & Maxwell, 2007) 258

¹⁰³ N.52

¹⁰⁴ N.52 [266]

¹⁰⁵ Sherina Petit and Joshua Coates, 'Enka v Chubb: UK Supreme Court clarifies how to determine which law governs an arbitration agreement in absence of an express or implied term' (*Norton Rose Fulbright*, 2020)

<<https://www.nortonrosefulbright.com/en/knowledge/publications/667a9f4c/enka-v-chubbaccessed>> accessed November 2020

¹⁰⁶ N.59

¹⁰⁷ Simon Bromwich, David Capps, Tom Connor, and Tom Cumming, 'Dispute Resolution Clauses: an Overview' (*Ashurst*, 2021) <<https://www.ashurst.com/en/news-and-insights/legal-updates/dispute-resolution-clauses-an-overview/>> accessed 15 January 2021.

In a number of different common law jurisdictions, this technique has been adopted, including India,¹⁰⁸ Australia,¹⁰⁹ and the United States of America.¹¹⁰

3.3 English and French parallel proceedings and applicable law

The UK Supreme Court has addressed the question of how to decide the law that governs the parties' arbitration agreement, where this is not expressly stated and the law of the primary contract differs from the law of the seat, a year after its landmark decision in *Enka v Chubb*.¹¹¹ The case of *Kabab-Ji v Kout Food Group*¹¹² followed by *Enka v Chubb*¹¹³, confirmed the English law approach to the determination of the applicable law governing the arbitration agreement, holding that English law governed the arbitration agreement despite the parties' choice of Paris as the arbitral seat.¹¹⁴

Contrasting to *Enka*, the choice of law issue in *Kabab-Ji* arose at the enforcement stage of the proceedings, rather than pre-arbitration. Therefore, the UKSC was required to apply s.103(2)(b) of the Arbitration Act 1996,¹¹⁵ which incorporates Article V(1)(a) of the New York Convention 1958,¹¹⁶ into English law. Despite the fact that the UKSC's conclusions in *Enka* are not directly applicable to *Kabab-Ji*, the UKSC took a consistent and consistent approach in both cases, stating that it would be illogical if the law governing the validity of arbitration agreements differed depending on whether the question was raised before or after an award was made.¹¹⁷

¹⁰⁸ *Aastha Broadcasting Network v Thaicom Public Co Ltd* [2011] INDLHC 3674 at [31]

¹⁰⁹ *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 175 ALR 725

¹¹⁰ Restatement (Third) US Law of International Commercial Arbitration, S4-14("if the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly), a general choice-of-law clause in the contract that includes the arbitration agreement determines the applicable law").

¹¹¹ Greg Lascelles, Allan Moore, Jeremy Wilson, Ramon Luque, Tom Cusworth, Patricia Snell, and Catherine Karia, 'UK Supreme Court Refuses to Enforce Arbitral Award Upheld by French Court' *Covington News* (2021) <<https://www.cov.com/en/news-and-insights/insights/2021/11/uk-supreme-court-refuses-to-enforce-arbitral-award-upheld-by-french-court>> accessed 12 November 2021

¹¹² *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48

¹¹³ N.52

¹¹⁴ Laurie Aichtouk-Spivak, Robert Garden, Christopher P. Moore, J. Cameron Murphy, and Naomi Tarawali, 'Confirmation of English Law Approach to Law Governing the Validity of the Arbitration Agreement' (*Clearly Gottlieb*, 2021) <<https://www.clearlygottlieb.com/news-and-insights/publication-listing/confirmation-of-english-law-approach-to-law-governing-the-validity-of-the-arbitration-agreement>> accessed 22 December 2021

¹¹⁵ The Arbitration Act 1996 (the "1996 Act"), s.103(2)(b)

¹¹⁶ Article V(1)(a) of the New York Convention 1958 (the "Convention")

¹¹⁷ N.111

In this case, Kabab-Ji entered into an agreement with Al Homaizi Foodstuff Company, which was governed by English law and included an arbitration clause that stipulated that arbitration be conducted in accordance with the International Chamber of Commerce's (ICC) guidelines in Paris. The arbitration agreement's governing law was not specifically stated.¹¹⁸

When a dispute arose between the parties here, the arbitration tribunal decided to implement French law (as the seat law) to establish whether KFG was bound by the arbitration agreement, then English law to evaluate whether KFG had obtained substantive rights under the Agreement. KFG was found accountable for damages and unpaid licence fees by the tribunal.¹¹⁹ The Commercial Court in London heard Kabab-request Ji's for enforcement of the award. KFG, on the other hand, filed an appeal with the Paris Court of Appeal, as well as, requested that the English Commercial Court refuse to recognise and enforce the judgement.¹²⁰

The English Commercial Court found that English law governed the legitimacy of the arbitration agreement, and that KFG was neither a party to the Agreement or the arbitration agreement as a matter of English law. The court refused to make a final decision on enforcement until the Paris Court of Appeal issued its verdict.¹²¹ The English Court of Appeal ruled that the Commercial Court was appropriate, but that it should have reached a final ruling after both parties appealed. The Court of Appeal ruled in favour of KFG in a summary decision, refusing to recognise and enforce the award. Kabab-Ji took his case to the Supreme Court.¹²²

In a concluding judgement, the Supreme Court recognised that the principles laid down in its *Enka* judgement last year applied as well in the context of enforcement procedures after an award had been rendered.¹²³ The Court had addressed the identical grounds in *Enka*, albeit there had been no arbitration at the time. It would be unreasonable, as the Court pointed out, for the law governing the validity of an Arbitration Agreement to change solely based on whether the dispute was presented before or after the judgement was reached.¹²⁴ As in *Enka*, if no express choice of law is made in the contract, the governing law of the arbitration agreement will be the system of law with which it is "most closely connected," which will, in most cases, be the law of the arbitration seat.¹²⁵

¹¹⁸ N.55

¹¹⁹ N.114

¹²⁰ LexisPSL, 'Court of Appeal refuses enforcement of ICC award against non-party (Kabab-Ji v Kout Food Group)' *LexisNexis UK* (21 January 2020)

¹²¹ Victoria Leclerc, Baptiste Rigau, 'A Third-Party, One Arbitration Agreement, Two Approaches: The French Courts' Views on the Law Applicable to the Arbitration Agreement in Kabab-Ji v. Kout Food Group' (*Kluwer Arbitration Blog*, 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/09/08/a-third-party-one-arbitration-agreement-two-approaches-the-french-courts-views-on-the-law-applicable-to-the-arbitration-agreement-in-kabab-ji-v-kout-food-group/>> accessed 8 September 2020

¹²² N.114

¹²³ Steven Lim, 'Enka v Chubb [2020] UKSC 38: Bringing the Validation Principle Into the Light' (*Kluwer Arbitration Blog*, 2020) <<http://arbitrationblog.kluwerarbitration.com/2020/12/16/enka-v-chubb-2020-uksc-38-bringing-the-validation-principle-into-the-light/>> accessed 16 December 2020

¹²⁴ N.115

¹²⁵ Robert Sliwinski, 'The effect of recent English Supreme Court judgments on GCC-based arbitration' (*Legal Business Blog*, 2021) <<https://www.legalbusiness.co.uk/disputes-yearbook-2021/sponsored-briefing-the-effect-of-recent-english-supreme-court-judgments-on-gcc-based-arbitration/>> accessed 30 April 2021.

The Supreme Court ruled in favour of KFG on other grounds as well. There was no reasonable chance that an English court would rule that KFG became a party to the Arbitration Agreement as a matter of English law.¹²⁶ As a result, KJS' argument that KFG had become a party to the Arbitration Agreement was unpersuasive. Given that KJS had no realistic chance of succeeding at trial on these grounds, the Court of Appeal was justified in granting summary judgement in favour of KFG.¹²⁷

The potential of contradicting results depending on the jurisdiction where enforcement is sought is demonstrated by the variance of interpretations of arbitration agreements by different national courts.¹²⁸

3.4 Parties to the arbitration agreement and impact on annulment and enforceability of award in England and Wales

Further analysing the case of *Kabab-Ji v KFG*,¹²⁹ Kabab Ji's allegation that KFG became a party to the arbitration agreement by novation was dismissed by the UK Supreme Court due to the parties' behaviour and KFG's performance of different contractual responsibilities over time.¹³⁰ The Agreement featured a number of terms that stated that it could only be altered in writing signed by both parties which were recognised by the Supreme Court in *Rock Advertising v MWB Business Exchange Centres*¹³¹ as being valid under English law.

As a result, KFG filed an application to annul the ICC award before the French courts on the basis that the arbitrators lacked jurisdiction for KFG since it was not a party to the Franchise Agreements and the arbitration provisions therein. In parallel, Kabab-Ji began enforcement proceedings in England in order to pursue the award.¹³²

The latest Supreme Court ruling arose from the English enforcement proceedings. The ICC award was rejected enforcement and recognition as a decision in England by the Court of Appeal in January 2020.¹³³ The FDA included an express governing law clause that said that the arbitration agreement will be governed by English law. Hence, the Court of Appeal ruled that this freedom of choice included the choice of law that would govern the arbitration agreement.¹³⁴ According to the Court of Appeal, the express choice of

¹²⁶ N.114

¹²⁷ N.115

¹²⁸ N.114

¹²⁹ N.112

¹³⁰ Alex Bevan, 'Kabab-Ji SAL v Kout Food Group: Latest UK Supreme Court Judgement on the Governing Law of Arbitration Agreements' (*Shearman & Sterling*, 2021) <<https://www.shearman.com/Perspectives/2021/11/Kabab-Ji-SAL-v-Kout-Food-Group--Latest-UK-Supreme-Court-Judgment>> accessed 1 November 2021.

¹³¹ *Rock Advertising v MWB Business Exchange Centres* [2018] UKSC 24

¹³² N.112 at para 8

¹³³ N.114

¹³⁴ Hamish Lal, 'The 'Third Act' in the Kabab-Ji Saga—What Law Governs the Arbitration Agreement (Law of the Seat or Law of the Underlying Contract)?' (*Akin Gump LLP*, 2021) <<https://www.akingump.com/a/web/kP7kXNRpAU2sS8tmLc52An/3gdgsp/the-third-act-in-the-kalab-hi-saga.pdf>> accessed 12 November 2021

English law as governing the entire FDA, including the arbitration agreement, is unaffected by the fact that Article 14.5 (the arbitration agreement) provides for the arbitration to take place in Paris, based on the contract's explicit wording.¹³⁵

Despite the English courts' decision, the Paris Court of Appeal dismissed the annulment proceedings, stating that the arbitration agreement's autonomy was well-established as a matter of international arbitral law,¹³⁶ and that the question of the arbitration agreement's existence and validity was to be assessed in light of the parties' common intention, without reference to national law and subject only to the mandatory rules of the seat and to international public policy.¹³⁷

The Paris Court of Appeal held that the parties' choice of English law to govern their agreement was inadequate to establish a common intent of the parties that the arbitration agreement itself would be governed by English law, and that the arbitration agreement did not deviate from principles of international arbitral law that were applicable by virtue of the parties' express choice of Paris as the seat of arbitration.¹³⁸

3.5 Concluding Remarks

The Supreme Court's recent decision in *Kabab-Ji*¹³⁹ follows the decision in *Enka*,¹⁴⁰ which itself clarified the issue of the governing law of arbitration agreements under English law, an issue that had long been in dispute.¹⁴¹ The UK Supreme Court has reaffirmed the basic concept that, unless there are strong indications to the contrary, that while the choice of a seat shall, in certain cases, support an inference that the parties intended for the law of the seat to govern their arbitration agreement.¹⁴²

While the Supreme Court's majority ruling in *Enka* illustrates compelling arguments from either side of the "seat" vs "main contract" approach, it also welcomes clarity to an area that has been uncertain for some time. In effect, the Supreme Court's judgement serves as a valuable reminder that an agreement's important elements should be written out in plain, express terms.¹⁴³

¹³⁵ Aceris Law LLC , 'Approach to Determining Law of the Arbitration Agreement Further Confirmed by UK Supreme Court' (Aceris Law LLC, 2022) <<https://www.acerislaw.com/approach-to-determining-law-of-the-arbitration-agreement-further-confirmed-by-uk-supreme-court/>> accessed 8 January 2022

¹³⁶ Paris Court of Appeal, 23 June 2020, n°17/22943, p8

¹³⁷ N.114

¹³⁸ N.136 p5

¹³⁹ N.112

¹⁴⁰ N.52

¹⁴¹ N.130

¹⁴² N.114

¹⁴³ N.59

These instances highlight the need of stating not only (1) the contract's controlling law and (2) the arbitration agreement's seat of arbitration, but also (3) the law relevant to the arbitration agreement, where (1) and (2) are different.¹⁴⁴ This case demonstrates that the law that governs the arbitration agreement can have a huge impact on the resolution of a dispute, thus requires attention.¹⁴⁵ The Court further highlighted the necessity of using a consistent approach to such conflict of law issues whether they arise under common law, statute, or international treaty, and whether they occur before or after an award is rendered.¹⁴⁶

Chapter 4: Debate on conflict of law approaches

The complexity of private international law in international commercial arbitration originates from the fact that arbitrators in international commercial disputes are challenged with not only determining a conflict of laws rules applicable for an arbitration agreement, but also a conflict of laws rules applicable for an arbitration agreement when the governing law is absent.¹⁴⁷ For domestic courts that adopt their own conflict of laws system, this would not be an issue.

On one hand, must first determine whether they can apply English, French, New York, or Singaporean conflict of laws rules automatically or whether they must use conflict of laws rules different from those used by domestic courts at their seat.¹⁴⁸ On the other hand, while there is legal clarity recently in England and Wales, it must be understood that it constitutes merely the English courts' response to a worldwide legal issue.

It is worth noting that the courts in Europe's other main arbitral jurisdictions take quite different methods to deciding the law that applies to an arbitration agreement.¹⁴⁹ Because the Supreme Court of the United Kingdom recognised that there is little consistency or agreement among jurisdictions in the interpretation and application of the law rules for determining the validity of an arbitration agreement in Article V(1)(a) of the New York Convention,¹⁵⁰ it is perhaps unsurprising that it relied on English conflicts of law principles, as clarified in *Enka*.¹⁵¹

¹⁴⁴ N.55

¹⁴⁵ N.114

¹⁴⁶ N.55

¹⁴⁷ Franco Ferrari and Stefan Kröll, *Conflict of Laws in International Commercial Arbitration* (Otto Schmidt/De Gruyter European Law Publishers, 2019)

¹⁴⁸ N.89

¹⁴⁹ N.8

¹⁵⁰ Article V(1)(a) of the New York Convention

¹⁵¹ N.130

Concerns on the international stage are only expected to grow in the near future, when the French Cour de cassation rules in the most recent case of *Kabab-Ji*¹⁵² is on the tribunal's award being annulled.¹⁵³ The French Court of Cassation is expected to reach the opposite judgement as the UK Supreme Court on whose law applies to the arbitration agreement and whether KFG is a party to it, while also looking generally at the parties' similar objectives at the time.¹⁵⁴ The implementation of Article V(1)(a) by courts of various countries results in varied rulings on matters related to the same award between the same parties, which is clearly unsatisfactory.¹⁵⁵

This has led to an international debate on conflict of law rules applicable to an arbitration agreement to increase.

4.1 Criticisms of conflict of law rules in international arbitration agreements

The application of the more recent choice of law approaches outlined above have serious flaws. These approaches, in particular, are based on faulty conceptual foundations and yield ambiguous and unsatisfying outcomes.¹⁵⁶

The arbitral seat law is predicated on a limited focus on the procedural components of arbitration, overlooking the contractual basis of the arbitration agreement.¹⁵⁷ The application of the seat law automatically conflates the law governing the arbitration agreement with the law regulating arbitral proceedings, which are not all the same.¹⁵⁸ A primary emphasis on the law of the arbitral seat further overlooks the close relationship that exists between the arbitration agreement and the underlying contract.¹⁵⁹

This was demonstrated in the case of *Kabab-Ji vs. KFG*.¹⁶⁰ The main contract, on the other hand, was expressly regulated by English law and had an arbitration clause that required ICC arbitration in Paris. Determining that the main contract's stated choice of law was likewise an express choice of law governing the arbitration agreement as a matter of construction, the Court of Appeal sustained the first instance judgment that the arbitration agreement was governed by English law.¹⁶¹

¹⁵² N.112

¹⁵³ N.130

¹⁵⁴ Tom Cummins and Thomas Karalis, 'UK Supreme Court refuses to enforce a Paris-seated award upheld by the French courts' (Ashurst, 2021) <<https://www.ashurst.com/en/news-and-insights/legal-updates/uk-supreme-court-refuses-to-enforce-a-paris-seated-award-upheld-by-the-french-courts>> accessed 10 November 2021.

¹⁵⁵ Sherina Petit, 'Issues relating to Challenging and Enforcing Arbitration Awards: Grounds to refuse enforcement' (Norton Rose Fulbright, 2019) <<https://www.nortonrosefulbright.com/en/knowledge/publications/ee45f3c2/issues-relating-to-challenging-and-enforcing-arbitration-awards-grounds-to-refuse-enforcement>> accessed August 2019

¹⁵⁶ Gary Born, 'The Law Governing International Arbitration Agreements' [2014] 26 SAclJ p361

¹⁵⁷ I Bantekas, 'The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy' (2010) 27 JIA 1, 8

¹⁵⁸ N.38 p424.

¹⁵⁹ N.40 p518

¹⁶⁰ N.112

¹⁶¹ N.58

Article V(1)(a) of the Convention, according to the UKSC, establishes two consistent international conflict of laws rules.¹⁶² First, the legislation “to which the parties subjected it” governs the validity of an arbitration agreement. This will either be the law that the parties have expressly chosen to govern the arbitration agreement or, in accordance with *Enka*,¹⁶³ the law that the parties chose to govern the main contract and are intended this law to govern the arbitration agreement as well), subject to certain exceptions.¹⁶⁴ Second, if it appears that the parties deliberately did not choose a law to govern the arbitration agreement – the applicable law will either be that of the country in which will be the award was made or the seat of arbitration if the parties have chosen one.¹⁶⁵

In effect, this jeopardises the enforceability of awards since parties now have additional reasons to use to seek non-enforcement of awards and stay of proceedings in motion. It is also possible that the ruling may lead to forum and arbitrator shopping. Applying these principles to the facts of each case would create uncertainty and confusion.¹⁶⁶

The technique based on the most closely connected has yielded unforeseen and inconsistent outcomes because, in the end, the closest connection analysis requires deciding between the law of the arbitral seat and the law of the underlying contract.¹⁶⁷ Using a closest connection approach, courts and tribunals typically list multiple connecting criteria in order to designate one or the other aspect with the arbitration agreement. The conclusion is frequently arbitrary and uncertain: there is seldom any rational reason for deciding that the arbitral seat chosen is, or is not, a stronger relation, or a more accurate reflection of the parties’ intentions than the law selected to regulate the underlying contract.¹⁶⁸

As a result, judgements based on the closest connection principle have a basic flaw: the courts’ incapacity to explain why they prioritise one linking element over another and to give reliable direction for future decisions.¹⁶⁹ Indeed, because it combines uncertainty with an unprincipled and arbitrary decision between the law of the seat and the law governing the underlying contract, which is the closest connection approach.

The flaws of the closest connection approach can be seen in English case law, which has shifted from a choice of law rule that the law chosen to govern the underlying contract to a choice of law rule that specifies an equally strong presumption that the law of the arbitral

¹⁶² N.150

¹⁶³ N.52

¹⁶⁴ N.111

¹⁶⁵ Ibid

¹⁶⁶ Nick Peacock, Victoria Hobbs, Louise Lanzkron, Charlie Bowkett, ‘UK Supreme Court provides further guidance on determining the governing law of an arbitration agreement in upholding a summary judgment not to enforce an arbitral award against a non-party’ (*Bird & Bird*, 2021) <<https://www.twobirds.com/en/news/articles/2021/uk/uk-supreme-court-provides-further-guidance-on-determining-the-governing-law>> accessed December 2021

¹⁶⁷ N.90

¹⁶⁸ N.11

¹⁶⁹ N.40 p543

seat governs the arbitration agreement in a particular timeframe.¹⁷⁰ As a result, English courts have been allowed to adopt two essentially wholly opposing opinions on which of the two key linking criteria should apply during the last 20 years, as mentioned below.¹⁷¹

Comparing *Abuja International Hotels Ltd v Meriden SAS*¹⁷² where the arbitration agreement mentions for arbitration to be held in London and is governed by English law; and *C v D*¹⁷³ where the international arbitration agreements are more likely to be governed by “the law of the seat of arbitration than the law of the underlying contract” along with *Svenska Petroleum Exploration AB v Lithuania*¹⁷⁴ where the arbitration agreement’s relevant law is the same as the law that governs the contract in which it is included; and *Arsanovia Ltd v Cruz City*¹⁷⁵ where the governing law clause was a strong indicator to their intention of the parties’ law governing the arbitration agreement.¹⁷⁶

More recently, by the majority of three Lords in *Enka v Chubb*¹⁷⁷ favoured the location of the seat as determinative. As will be seen, the minority of two Lords regarded there to have been a choice of applicable law for the contract to be arbitrated and proceeded from this to determine the applicable law of the arbitration agreement.¹⁷⁸

This difficulty in implementing a closest connected principle in international arbitration agreements is not unique to the United Kingdom and Singapore; other jurisdictions have come to similar conclusions.¹⁷⁹ The same ambivalence may be seen in the differing outcomes of lower court rulings in the United States when it comes to the legislation that applies to international arbitration agreements.¹⁸⁰

¹⁷⁰ N.144

¹⁷¹ N.40 p545

¹⁷² *Abuja International Hotels Ltd v Meriden SAS* [(2011) EWHC 87 (Comm)]

¹⁷³ *C v D* (2007) EWCA Civ 1282

¹⁷⁴ *Svenska Petroleum Exploration AB v Lithuania* (2005) EWHC 2435 (Comm)

¹⁷⁵ N.100

¹⁷⁶ N.144 p833

¹⁷⁷ N.52

¹⁷⁸ Jonathan Fitch, ‘Determining the applicable law of an arbitration agreement when there is no express choice of a governing law – *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38’ (*Conflict of laws.net*, 2020) <<https://conflictoflaws.net/2020/determining-the-applicable-law-of-an-arbitration-agreement-when-there-is-no-express-choice-of-a-governing-law-enka-insaat-ve-sanayi-a-s-v-ooo-insurance-company-chubb-2020-uksc-38/>> accessed 16 November 2020

¹⁷⁹ *National Thermal Power Corp v Singer Co* [1992] INSC 146 at [8] (“where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract”) with *Citation Infowares Ltd v Equinox Corp* (2009) 7 SCC 220 at (15) (“there is, in the absence of any contrary intention, a presumption that the parties have intended that the proper law of the contract as well as the law governing”).

¹⁸⁰ *Steel Corp of Philippines v International Steel Services Inc* 354 F Appx 689 at 692-693 (3d Cir, 2009); *Sphere Drake Insurance Ltd v Clarendon National Insurance Co* 263 F 3d 26 at 32, n 3 (2d Cir, 2001)

Consequently, depending just on the law that governs the underlying contract is insufficient. In some cases, the arbitration agreement is inextricably linked to the underlying contract between the parties.¹⁸¹ In such situations, it may look difficult to resist applying the governing law of the contract to the arbitration clause.¹⁸² However, in many circumstances, there are aspects that make the automatic application of the underlying contract's law unsuitable.

However, in *Arsanovia v Cruz City*¹⁸³, the judge found that the parties understood that Indian law should apply to their arbitration agreement in a contract where Indian law governed the main contract and references were added in the arbitration agreement that provisions of Indian law should apply to interim relief, although the arbitration was to be seated in London, as previously stated.¹⁸⁴

This approach, in particular, contradicts the separability presumption and the parties' intentions to resolve their issues in a neutral forum.¹⁸⁵ Additionally, this approach conflicts with the conventional choice of law clause in Art V(1)(a) of the New York Convention and Articles 34 and 36 of the Model Law,¹⁸⁶ which states that "the law of the arbitral seat shall apply unless the parties agree otherwise".

The above criticisms prove that none of the recently used approaches are completely reliable or prove certainty.

4.2 Better approaches: Application of validation principle, estoppel principle and an international non-discrimination rule

The criticisms that arose from the application of the different choice-of-law rules outlined above are incompatible with the arbitral process' objectives, as well as the New York Convention and Model Law's purposes. Therefore, creating a need for a more consistent, principled solution that is more in accordance with the objectives of the parties when they enter into international arbitration agreements.¹⁸⁷

¹⁸¹ N.40 p517

¹⁸² N.40 p72

¹⁸³ N.162

¹⁸⁴ Sarah Garvey, 'Determining the governing law of an arbitration clause' (*Allen & Overy*, 2013) <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/determining-the-governing-law-of-an-arbitration-clause>> accessed 5 March 2013

¹⁸⁵ N.144 p832

¹⁸⁶ Art V(1)(a) of the New York Convention; Arts 34 and 36 of the Model Law

¹⁸⁷ N.144 p834

The first approach of validation principle reflects a well-established contract law doctrine that means that when one potentially applicable law has this effect, they will look for another applicable law under which the agreement is valid.¹⁸⁸ In simpler words, this means that the presumption can be rebutted if interpreting the law of the main contract would render the arbitration agreement void or drastically weaken it. Article 178(2) of the Swiss Federal Private International Law Act is a legislative example of this approach.¹⁸⁹

A judgement by the English House of Lords in the case of *Hamlyn & Co v Talisker Distillery*,¹⁹⁰ which predates the New York Convention, is an early example of this choice of law approach. National courts and arbitral tribunals are increasingly adopting this approach.¹⁹¹ Like in *Rhone Mediterranee v Lauro*,¹⁹² and the *Award in ICC Case No 11869*.¹⁹³ In the cases of *Sulamérica*¹⁹⁴ and *Enka*,¹⁹⁵ the English Court of Appeal took a similar approach.¹⁹⁶ While the Court of Appeal used a traditional common law conflict analysis, one of the most important elements it examined in choosing English law was that it gave effect to the arbitration agreement and substituted the law that had declared it invalid.¹⁹⁷

In the most recent case of *Kabab-ji v KFG*,¹⁹⁸ *Kabab-ji* argues that the English law should apply to the arbitration agreement on the basis of the validation principle which would make the agreement invalid. The validation principle, nonetheless, does not apply to issues of “validity in the wider meaning in which that concept is applied in article V(1)(a) of the Convention,” according to the Court.¹⁹⁹ The validation principle’s primary objective is to measure the legality of an existing arbitration agreement, not to address issues about its creation or to “create an agreement that would not otherwise exist.”

¹⁸⁸ Piero Bernardini, ‘Arbitration Clause: Achieving Effectiveness in the Law Applicable to the Arbitration Clause’ in A van den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series No 9* (Paris 1998) (Kluwer Law International, 1999) 197.

¹⁸⁹ Article 178(2) of the Swiss Federal Private International Law Act

¹⁹⁰ *Hamlyn & Co v Talisker Distillery* [1894] AC 202

¹⁹¹ J Lew, L Mistelis and S Kröll, *Comparative International Arbitration* (The Hague, Kluwer Law International 2003) 106.

¹⁹² *Rhone Mediterranee v Achille Lauro*, 555 F. Supp. 481 (D.V.I. 1982)

¹⁹³ *Award in ICC Case No 11869* (2011) 36 YBCA 47,57

¹⁹⁴ N.27

¹⁹⁵ N.52 at [71]

¹⁹⁶ S Pearson, ‘Sulamérica v Enesa: The Hidden Pro-Validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement’ (2013) 29 *Arbitration International* 115.

¹⁹⁷ N.69 p701

¹⁹⁸ N.100

¹⁹⁹ Leila Kazimi, ‘Can’t Budge: The Curious Case of Kabab-Ji and the New York Convention’ (*Kluwer Arbitration Blog*, 2021) <<http://arbitrationblog.kluwerarbitration.com/2021/11/15/cant-budge-the-curious-case-of-kabab-ji-and-the-new-york-convention/>> accessed 15 November 2020

The court here determined that this agreement went beyond the scope of the validation principle, which is not a contract formation concept but rather applies when parties agree to settle disputes through arbitration and seek to enforce their presumed intention that the agreement be legally effective.²⁰⁰

The estoppel approach could be regarded as a second alternative. A party to an arbitration agreement may be barred from contending that the law relevant to the arbitration agreement renders the agreement non-existent, invalid, or ineffective under this approach.²⁰¹ This can be considered as part of the court's inherent powers to prevent an unfair trial or as part of an overriding obligation of good faith.²⁰²

This approach can be first seen in *Scherk v Alberto-Culver Co.*²⁰³ The court emphasised in this case that invalidating an arbitration agreement entered into with full awareness of the circumstances would "enable the respondent to renounce its solemn vow."²⁰⁴ As we have observed, the French courts take a global perspective to the arbitration agreement, therefore the estoppel approach was not necessarily essential.²⁰⁵

It may be claimed that having acknowledged the tribunal's jurisdiction by signing the arbitration agreement, the party was essentially estopped from alleging the arbitration agreement was illegal under domestic law. The consequence of these rulings was similar to the principles of the non-discriminatory principle described below: the enforcing court disapplied unusual domestic legislation invoked to invalidate the arbitration agreement.²⁰⁶

The third alternative can be described as a principle of non-discrimination. A national law still applies to the arbitration agreement under this approach, but regulations expressing national policy objectives are excluded, an arbitration agreement that would otherwise be valid under the law is declared void. Only considerations 'that can be used neutrally on an internal scale' may be used to invalidate an arbitration agreement under this approach.²⁰⁷

²⁰⁰ Samuel Jenkins and Simon Heatley, 'Arbitration agreements: governing law clarified and NOM clauses show their bite' (*Charles Russell Speechlys LLP*, 2021) <[https://uk.practicallaw.thomsonreuters.com/w-033-4739?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-033-4739?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 25 January 2021

²⁰¹ *ibid*

²⁰² Bernardo Cremades, 'Good Faith in International Arbitration' [2012] AUILR 27(4) 761

²⁰³ *Scherk v Alberto-Culver Co*, 417 US 506, 519, 94 S Ct 2449, 2457, 41 L Ed 2d 270 (1974)

²⁰⁴ *ibid*

²⁰⁵ *Ministry of Public Works v Société Bec Frères* (Cour d'Appel de Paris) (1997) 22 YBCA 682, 686.

²⁰⁶ N.184 p700

²⁰⁷ *Ibid* p697

In *Ledee v Ceramiche Ragno*,²⁰⁸ the US courts denied applying a Puerto Rican law provision that expressly prohibited arbitration agreements in automobile dealer contracts. *Sulamérica*²⁰⁹ can be considered as an illustration of this approach. After establishing a presumption that the arbitration agreement is regulated by the main contract's choice of law, the Court of Appeal immediately rejected it, claiming that the main contract's law would render the arbitration agreement unenforceable.²¹⁰

Although it yields comparable results to the French approach in instances like *Dalico*,²¹¹ it does not attempt to impose a system of international law that is immediately applicable to the arbitration agreement. It nevertheless applies national law, as long as such laws do not obstruct the validity of the arbitration agreement. As a result, it is unaffected by the existing lack of clear and defined international laws in commercial arbitration.²¹²

This more conservative, but still globalised approach could be universally applied: The legitimacy of the arbitration agreement must still be determined under domestic law, although this is subject to minimum international norms that prevent individual national regulations from rejecting a fair arbitration agreement.²¹³

4.3 Future of choice of law rules in international arbitration agreements

The UK Supreme Court noted in *Enka*²¹⁴ that “the risk of opposing forthcoming judgments cannot be avoided.”²¹⁵ Though the minority's views have no direct legal significance in this case, it is suggested that the minority's interpretation of Art. 3 of the Rome I Regulation was more accurate than the majority's interpretation.²¹⁶ Additionally, it seems that Lord Burrows' approach provides a more logical and pragmatic means of resolving any such controversies between the law of the seat and the law of the main contract.²¹⁷

Additionally, it is proposed that minority viewpoints may become significant in future situations in which parties seek an apparent advantage based on the applicable law's identity. Though the Rome I Regulation will cease to be immediately applicable in the UK on

²⁰⁸ *Ledee v Ceramiche Ragno* 684 F2d 184 (1st Cir 1982), 187

²⁰⁹ N.27

²¹⁰ N.184 p699

²¹¹ *Municipalité de Khoms El Mergeb v. Société Dalico*, Court of Cassation, Civil Chamber 1, of December 20, 1993, 91-16.828

²¹² N.3 p552

²¹³ *Ibid*

²¹⁴ N.52

²¹⁵ *Ibid* in [90]

²¹⁶ N.165

²¹⁷ N.52 in paras 257-8

December 31, 2020, the United Kingdom intends to implement a local equivalent of the Regulation thereafter.²¹⁸ It is highly probable that a future applicant with different facts would seek to re-adjust the majority decision that, in the event of an unexpressed applicable law for the contract and arbitration agreement, the law of the arbitral seat decides the arbitration agreement's applicable law.²¹⁹

Though, as the recent clash between the English and French courts in the *Enka v Chubb*²²⁰ demonstrates, as mentioned above, even when the English courts applied French law, it was still not possible to avoid opposing judgments.²²¹

The differences in analysis between the majority and the minority on the law governing the main contract will undoubtedly be instructive in future arguments over the governing law of the arbitration agreement as well as the governing law of other contracts.²²²

The most important takeaway for attorneys and party's preparing arbitration clauses is to include an express choice of governing law in the arbitration agreement.

4.4 Concluding Remarks

The choice of law principles to determine the law applicable to the arbitration agreement are unnecessarily complicated and unpredictable (as seen in 4.2). The criticisms levelled at the current conflict of law rules can be addressed by amending the Arbitration Act 1996 to include a comprehensive regime and to judgment. This regime could include that the court in determining the closest connection, the court will presume that the law of the contract will apply to the arbitration agreement. This presumption will be rebutted in where the agreement to arbitrate would be invalidated.²²³

In addition to or instead of the non-discriminatory or estoppel approaches, courts should develop or apply the validation principle more firmly. As a result, the arbitration agreement should be governed by a law that is valid and most effective, rather than a law that is invalidated or rendered less effective, among numerous potential applicable laws.²²⁴

The courts should create, or apply more firmly, the estoppel principle, which prohibits a party whose conduct is inconsistent with the arbitration agreement's invalidity from later relying on that invalidity.²²⁵

²¹⁸ Adam Sanitt, 'Impact of Brexit on Choice of Law, Jurisdiction and Enforcement' (*Norton Rose Fulbright*, 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/a6ec9370/impact-of-brexit-on-choice-of-law-jurisdiction-and-enforcement>> accessed February 2021

²¹⁹ N.165

²²⁰ N.52

²²¹ N.142

²²² Richard Bamforth, Kushal Gandhi, and Jessica Foley, 'UK Supreme Court confirms the English law approach to identifying the governing law of arbitration agreements' (*CMS Law-Now*, 2020) <https://www.cms-lawnow.com/ealerts/2020/10/uk-supreme-court-confirms-the-english-law-approach-to-identifying-the-governing?cc_lang=en> accessed 12 October 2020

²²³ N.95

²²⁴ N.69 p702

²²⁵ ibid

National laws should develop a non-discrimination principle, under which courts should refuse to apply those rules of law applicable to arbitration agreements that specifically invalidate arbitration agreements. This is an alternative to estoppel principle.²²⁶

Chapter 5: Conclusion

Ultimately, the choice between the law of the main contract and the law of the arbitration's seat is unlikely to be resolved worldwide anytime soon. The proper applicable law for determining conflict of laws issues in the arbitration agreement when the express choice of governing law is absent, in summary would be as the principles established by the majority in the Supreme Court in the recent cases:

- i. In the absence of such an express choice, the governing law will be law with which the arbitration agreement is most closely connected as determined by the majority of 3-2 in *Enka v Chubb*.²²⁷
- ii. If the arbitration agreement has no specific choice of law, but the main contract has a chosen governing law, the main contract's governing law will usually apply to the arbitration agreement. The Supreme Court ruled that concluding that a choice of law to regulate the main contract had "little to say," about the choice of law for the arbitration agreement would "put the principle of separability of the arbitration agreement too high." The Supreme Court appears to agree with commercial common sense, noting that commercial parties are highly improbable to be familiar with the separability principle and that, in their words, "a contract is a contract [...] they would reasonably expect a choice of law to apply to the entire contract."²²⁸
- iii. The fact that the arbitration's seat differs from the main contract's choice of governing law does not rule out the possibility that the main contract's governing law also applies to the arbitration agreement. The Supreme Court rejected the Court of Appeal's reasoning recently, saying that there is no "strong presumption" that the parties have selected the law of the arbitration seat to govern their arbitration agreement by implication.²²⁹
- iv. However, there is a significant risk that the arbitration agreement would be rendered useless if it were regulated by the same law as the main contract. (this is consistent with English law's "validation principle" that "the contract should be constructed such that it is valid rather than ineffective").²³⁰ The Supreme Court majority echoed Moore-Bick LJ's analysis in the *Sulamérica* case, holding that parties are unlikely to have intended a contract's choice of governing law to apply to an arbitration agreement if there is "at least a serious risk" that doing so would "significantly undermine" the agreement.²³¹

²²⁶ *ibid*

²²⁷ N.52

²²⁸ N.208

²²⁹ N.55

²³⁰ *ibid*

²³¹ N.24 at paragraph 31

- v. If there is no express choice of law to govern the main contract, then it does not automatically follow that the main contract or the arbitration agreement is intended to be governed by the law of the seat.²³²
- vi. If, after considering the above, no express choice of law can be identified, the law with which the arbitration agreement is most closely connected must be chosen. Only then can the arbitration agreement be regarded to be most closely connected to the law of the seat chosen by the parties.²³³ If any conclusion is to be drawn, it should favour the “seat” approach over the “main contract” approach in light of the Model Law, New York Convention, and traditional private international law.²³⁴ Despite the rational presumption that the parties intended for the aspects of their contract to be governed by the very same system of law, the majority found that there is authority supporting a “general rule” that the arbitration should be conducted in English like seen in *Sulamérica* and *Enka*.²³⁵
- vii. In the recent decision of *Enka*, Lord Burrows held a different view that if no express choice of law applies, the nation with which the contract is most closely connected, as opposed to the country of the seat, should be the same as the laws governing the main contract.²³⁶

As a result, in most circumstances, the law will be determined by the closest and most real connection, which will inevitably result in the prevailing law being that of the place where the seat is located, or at least should. Such a decision is supported by strong policy justifications, is consistent with the majority Judges perspective in other nations and institutions and has the approval of several countries’ courts.²³⁷

²³² N.204

²³³ *ibid*

²³⁴ Peter Ashford, ‘The Proper Law of the Arbitration Agreement – Express Choice makes a come-back?’ (*Fox Williams*, 2020) <<https://www.foxwilliams.com/2020/04/29/the-proper-law-of-the-arbitration-agreement-express-choice-makes-a-come-back/>> accessed 29 April 2020

²³⁵ N.77

²³⁶ N.52 para

²³⁷ Peter Ashford, ‘The Proper Law of the Arbitration Agreement’ [2019] *CIA* 85 (3), 299

Recommendation

I reflect with the minority view in *Enka*²³⁸ was more realistic since it was based on a different understanding of the facts and the Giuliano and Lagarde Report on the Convention on the Law Applicable to Contractual Obligations.²³⁹

It is suggested that the minority's approach to Art. 3 of the Rome I Regulation²⁴⁰ and Lord Burrows' approach²⁴¹ offers a more logical and practical means of resolving any such controversies between the law of the seat and the law of the main contract. It is also proposed that minority viewpoints may become significant in future situations in which parties seek an obvious advantage based on the arbitration's applicable law's identity.²⁴²

Despite the intricacies of this field of law, the core message from the landmark *Enka*²⁴³ and *Kabab-Ji*²⁴⁴ judgments is that "choice" always prevails.²⁴⁵ To ensure certainty in the event of a dispute, the parties should consider and agree in their contracts on all three systems of law that will be relevant to a dispute: (i) the substantive law applicable to the main contract; (ii) the law governing the arbitration agreement; and (iii) the arbitration seat. This will be especially essential if the contract's governing law is not the same as the seats.²⁴⁶

The Hong Kong International Arbitration Centre, which has revised its model provisions to include an express choice of governing law for arbitration agreements, has taken the approach of directly specifying the governing law of the arbitration agreement. Perhaps now may be the time for European institutions to support and follow the change.²⁴⁷

²³⁸ N.52

²³⁹ Mario Giuliano and Paul Lagarde, (1980) 'Report on the Convention on the law applicable to contractual obligations' [1980] OJ EU No C 282-1

²⁴⁰ Rome I Regulation, Article 3

²⁴¹ N.52 at paras 257-8

²⁴² N.165

²⁴³ N.52

²⁴⁴ N.100

²⁴⁵ N.208

²⁴⁶ *ibid*

²⁴⁷ N.118

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