Going Local for perfection: How do the English courts give defective arbitration agreements the maximum effect?

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In the absence of parties' choice of law governing an arbitration agreement as an integral part of the main contract, the determination of the proper law of an arbitration agreement can vary from the law governing the main contract, the law of the proceedings, the law of the seat or another system of national law. In England, the choice of law related to an arbitration agreement is excluded from the scope of application according to Article 1(2)(e) of the Rome I Regulation. Consequently, the law governing an arbitration agreement is to be determined by the common law rules. They are: (1) the express choice of the parties; (2) the implied choice in the absence of an express choice; or (3) the law with which the arbitration agreement has its closest and most real connection. With "no international consensus on the choice of law rule applicable to an arbitration agreement"[1] and the noticeably inconsistent rulings delivered by the English Court of Appeal,[2] *Enka v Chubb* (*Enka*)[3] is the most significant decision delivered by the UK Supreme Court on this matter. In contrast to the international commentary on the "main contract" approach and the "seat approach", however, the author intends to prove that localising arbitration to the law of the seat of arbitration should not be read alone, but as a result of localising arbitration to the English common law rules. To be precise, its interpretative method can lead to both approaches.

In England, the debate on which law should be the proper law of the arbitration agreement in the absence of parties' express choice is settled by a split 3-2 majority decision in *Enka*.[4] The UK Supreme Court confirmed that parties' choice of law to govern their contract is a question of interpretation under common law. Contractual interpretation sees the application of *dépeçage* and business efficacy under common law and the choice of the law of the seat chosen for its the closest and most real connection to the arbitration agreement. In its analysis, the UK Supreme Court spoke of "putative applicable law"[5] and confirmed that (1) where there is no express or implied choice for the main contract, the third stage of the choice of law rules under common law determines the applicable law of the arbitration agreement, (2) the seat approach applied at the third stage to determine the proper law of an arbitration agreement and (3) the existence of the validation principle under English law

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[1] L. Collins et al., *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2018) 16-014.

[2] *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102 and *C v D* [2007] EWCA Civ 1282; [2008] Bus LR 843.

[3] *Enka Insaat Ve Sanayi AS (Respondent) v OOO Insurance Company Chubb (Appellant)* [2020] UKSC 38.

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

[5] *Enka* (fn 3) [31]: putative applicable law" is the law which would be applicable if it were validly concluded. See *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583, where English law was chosen as the putative law; *Albeko Schumaschinen v The Kamborian Shoe Machine Co* (1961) 111 LJ 519; Adeline Chong, Choice of law for void contracts and their restitutionary aftermath: The putative governing law of the contract. (2007) in Paula Giliker (ed), Re-Examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives (2007) Brill/Nijhoff Leiden/Boston)155, 161; <https://ink.library.smu.edu.sg/sol_research/364> accessed 28 December 2021.

to realign English jurisprudence with other jurisdictions.[6] Despite the split in the judgment, some noted that the majority and the dissenting Lords agreed on more than they disagreed.[7] The common view is that the Supreme Court confirmed that all five judges were in agreement that "an express choice of the main contract law would, save for the validation principle, be an express or implied choice of law for the arbitration agreement as well."[8]

Their division lies in the question whether the validation principle should be applied to an arbitration agreement or its scope where its validity is significantly undermined by its applicable law, express or implied. Some described the majority decision as "not wholly satisfying" and noted the powerful arguments presented by the two dissenting judges[9] who argued for a simpler, more unequivocally pro-arbitration 'validation' or 'favour' principle to dispense with these fruitless conceptual debates.[10] The dissenting opinions expressed by Lord Burrows and Lord Sales stressed that the presumption of the seat approach is not helpful in providing certainty. With certainty in mind, it would be more desirable to have the same law to govern the main contract and the arbitration agreement by establishing the closest and most real connection between them.

The underlying issue behind the discussions on the governing law of an arbitration agreement has been largely focused on the importance of the seat of arbitration. Questions have long been raised as to whether an arbitration should be attached to the seat of arbitration.[11] The approach taken by the Supreme Court would have an impact on arbitration practice and potential conflicts between *Enka* and the law of countries which do not favour a strong link between the place of arbitration and the arbitration agreement. This article aims to highlight that *Enka* follows the English jurisprudence anchoring arbitration to the common law rules, not the direct choice of the law of the place of arbitration as most literature suggested. To do so, the author will firstly confirm the localisation approach applied in the English jurisprudence, where the literature and case law highlighting the significance of the seat approach will be presented. The discussion will be followed by an examination of the evidence of the English courts' support for the contractual interpretations under English law to determine the proper law of the arbitration, in the absence of parties' choice. This will include

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[6] Mihaela Maravela, Keilin Anderson, Nick Papadimos, 2020 in Review: Proper Law of Arbitration Agreement, Kluwer Arbitration Blog (January 2021), <http://arbitrationblog.kluwerarbitration.com/author/mihaela-maravela/> accessed 28 December 2021 where the Swedish court ruled in favour of the application of Swedish law in the absence of parties' express choice of proper law in *Coraline Limited v Walter Höft*, Svea Court of Appeal (Division 02 Section 020101 Judgment 19 December 2019 Stockholm Case no. T 7929-17.

[7] Steven Lim, *Enka v Chubb* [2020] UKSC 38: Bringing the Validation Principle Into the Light, <http://arbitrationblog.kluwerarbitration.com/2020/12/16/enka-v-chubb-2020-uksc-38-bringing-the-validation-principle-into-the-light/> accessed 28 December 2021; Mark Campbell, 'How to determine the law governing an arbitration agreement: direction from the UK Supreme Court' [2021] Int. A.L.R. 24(1) 28, 36.

[8] Ibid.

[9] Johannes Koepp and David Turner, 'A Massive Fire and a Mass of Confusion: *Enka v. Chubb* and the Need for a Fresh Approach to the Choice of Law Governing the Arbitration Agreement', (2021) 38(3) Journal of International Arbitration 377, 385.

[10] Ibid. 378.

[11] Jan Paulsson, Arbitration Unbound: Award Detached from the Law of Its Country of Origin (1981) 30(2) ICLQ 358, 358-364; 384; Jan Paulsson, Delocalisation of International Commercial Arbitration: When and Why It Matters (1983) 32(1) 53; Francis Mann, The UNCITRAL Model Law - *Lex Facit Arbitrum* (1986) 2(3) Arbitration International 241; William W. Park, The *Lex Loci Robert* and International Commercial Arbitration (1983) 32(1) ICLQ 21, 21-30.

the rulings on common law choice of law rules, separability, *dépeçage,* business efficacy and the determination of the proper law of the arbitration in the absence of parties' choice. The article will conclude that it is the English common law choice of law rules, not only the seat approach, dictating the link between the English law and the law governing the arbitration agreement.

LOCALISATION AT THE PLACE OF ARBITRATION AND ENFORCEMENT - DELOCALISATION THEORY IS NEVER AN OPTION

Delocalisation theory was defined as "a self-contained juridical system, by its very nature separate from national systems of law."[12] Paulsson[13] and Henderson similarly pointed that neutrality demands that national laws and courts at the seat of arbitration enjoy a supporting role only. Henderson wrote: "[p]arochial judicial oversight and review would become relevant only when a party resorts to a national court to enforce an arbitration agreement or an arbitration award."[14] Although doubts were expressed over the practicality of delocalisation theory, its influence is said to be "powerful and valuable"[15] and not to be under-estimated. This was seen as the evidence of "the modern relaxation of legislative control and the "hands off" philosophy exemplified by the Model Law" [16] as well as possible "derogation to a significant degree, even to the extent of allowing adoption of other national laws in preference to the law of the seat, at least to the extent that the law of the seat is not of mandatory application."[17]

In England, the "hands off" philosophy of the delocalisation theory is never an option. The argument on neutrality was doubted on its unsound presumption of a link between neutrality and arbitration.[18] After all, there may be a plethora of reasons, such as convenience, proximity or reputation when parties choose the seat of arbitration. A more conservative approach was expressed by Beaston who argued that the delocalisation theory is less acceptable.[19] Lord Collins[20] held the same view and pointed out that a qualified delocalised arbitration is accepted only by fewer than a handful of jurisdictions, namely France, Switzerland and Belgium.[21] He further stated that the reason why no arbitration can be wholly divorced from the control of the court of the *lex arbitri* is "because the arbitration process is an exercise of party autonomy, which nevertheless can only proceed (and subsequently be

[12] *SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38, 52.
[13] Paulsson, Arbitration Unbound (fn 11) 358-364; 384; Paulsson, Delocalisation of International Commercial Arbitration (fn 11) 53.
[14] Alastair Henderson, *Lex Arbitri*, Procedural Law and the Seat of Arbitration – Unravelling the Laws of the Arbitration Process (2014) 26 SAcLJ 886, 894.
[15] Ibid. 896.
[16] Ibid. 896.
[17] Ibid. 895.
[18] Satyajit Bose, 'Evaluating the Express Choice Approach to Governing Law: The End of the Sulamérica Presumption?' (2020) 39 Spain Arbitration Review 53, 57.
[19] Jack Beatson, 'International arbitration, public policy considerations, and conflicts of law: the perspectives of reviewing and enforcing courts' (2017) 33(2) Arbitration International 175, 182-183.
[20] Lord Collins of Mapesbury, Introductory Essay (2014) 26 SAcLJ 789, 790
[21] Hong-Lin Yu, Commercial Arbitration: The Scottish and International Perspectives (2011 Edinburgh EUP) 265-266.

enforced) to the extent permitted by national law."[22] It was further pointed out that a reference to a provision in the *lex arbitri* would lead to a form of attachment to the seat of arbitration.[23] It was commented that the premise for a workable delocalisation system relies on the extent that the relevant national law of the supervising jurisdiction or the enforcing jurisdiction permits it.[24]

The English jurisprudence stands firm on localisation theory, localising as the place of arbitration and an enforcing court. This approach can be seen in its rejection of the delocalisation theory and strong emphasis on English courts' power to determine the appropriate procedures to follow. In the context of the role played by the law and courts of the seat of an arbitration, Lord Mance once said that:

> "Decisions of the court of the seat should in the ordinary case be treated as final and binding. This reflects the choice of the parties. Empirical evidence suggests that the choice of seat is usually the result of a careful consideration of the legal consequences and not merely a matter of convenience. … To view arbitral awards as autonomous of national courts is a step back in terms of the comity of nations and also contradicts the wording of the New York Convention. Siren calls for complete or yet further autonomy for arbitration should be viewed with scepticism. An increasingly inter-connected world needs mutually supportive and inter-related systems for the administration of law, not more legal systems."[25]

The English courts' emphasis on localising arbitration to a national element is evident in *Bank Mellat,*[26] *Coppée-Lavalin,*[27] *Dallah*[28] *and Kabab-Ji.*[29] Kerr LJ in *Bank Mellat* and Lord Mustill in *Coppée-Lavalin* stated that "in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration ... Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law"[30] and "I doubt whether in its purest sense the doctrine [transnationalism] now commands widespread support ... At all events it cannot be the law of England".[31]

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[22] Lord Collins of Mapesbury (fn 20) 807.

[23] Simon Greenberg, Christopher Kee & J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011) para 2.89

[24] Alastair Henderson, *Lex Arbitri*, Procedural Law and the Seat of Arbitration – Unravelling the Laws of the Arbitration Process (2014) 26 SAcLJ 886, 894-896: The comments were expressed in the context of the traditional approach taken by the common law countries.

[25] Lord Mance, Arbitration – a Law unto itself? 30th Annual Lecture organised by The School of International Arbitration and Freshfields Bruckhaus Deringer (4 November 2015) 1, 2 https://www.supremecourt.uk/docs/speech-151104.pdf accessed 28 December 2021.

[26] *Bank Mellat v Helliniki Techniki SA* [1995] 1 AC 38, 52.

[27] *Coppée* (fn 12).

[28] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* (2010) UKSC 46.

[29] *Kabab-Ji* (fn4).

[30] *Bank Mellat* (fn26) at 52.

[31] *Coppée* (fn 12) 52.

Localising as an enforcing court: the UK Supreme Court confirmed in both *Dallah*[32] and *Kabab-Ji*[33] that it is the English courts which have the ultimate say in the matter of a tribunal's jurisdiction and the enforcement procedures to be followed. Ruling for a full hearing for ordinary judicial determination on the tribunal's jurisdiction, Lord Mance stated: "The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all."[34] In upholding its powers, the court also highlighted that "the word 'may' could not have a purely discretionary force and must in this context have been designed to enable the court to consider other circumstances" [35] to determine the tribunal's jurisdiction. The court also pointed out that the appellant's reference to the view expressed by Fouchard, Gaillard and Goldman [36] ignored the further interpretation of competence-competence made by the authors; "Even today, the competence-competence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award."[37]

Lord Collins also pointed out that despite the application of competence-competence allowing a tribunal to rule on its own jurisdiction it "does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it. He used the phrase "is entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction"[38] as Article V of the New York Convention never offers primacy to the courts of the arbitral seat regarding the exclusivity of a rehearing of the issue. This view was also shared by Lord Saville who spoke of an independent investigation by the court during the enforcement proceedings.[39] To sum up, in a challenge to the tribunal's ruling on the question of jurisdiction, the issue can be re-examined by the supervisory court of the seat and the enforcing court.[40] Furthermore, "[t]he consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate."[41]

In a similar vein, the Supreme Court could not see any reason why the English courts could not adopt summary proceedings at the enforcement stage in *Kabab-Ji.*[42] Lord Hamblen and

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[32] *Dallah* (fn 28).
[33] *Kabab-Ji* (fn 4).
[34] *Dallah* (fn 28) [30].
[35] *Ibid.* [67].
[36] Fouchard, Gaillard and Goldman on International Commercial Arbitration (edited by Emmanuel Gaillard and John Savage) (Kluwer International 1999) para 658.
[37] Ibid. para 659; *Dallah* (fn28) [22].
[38] *Dallah* [103-104].
[39] *Ibid.* [160].
[40] *Ibid.* [84].
[41] *Ibid.* [96].
[42] *Kabab-Ji* (fn 4).

Lord Leggatt not only confirmed that the same rule applied to both ordinary and summary proceedings but also stated: "For the interest of justice and proportionality, the saving of time and costs, … there is no good reason why it should do so in cases which are appropriate for summary determination."[43] They dismissed the appellant's claim of a possibility of "the reversal of the normal burden of proof"[44] as a false point because "there is no real prospect of a party's case succeeding at trial",[45] and the court also confirmed that it is for the English courts to determine whether a summary procedure was suitable in this case after considering all the facts and circumstances.[46] Referring to section 103 of the 1996 Act, the court ruled that "there is every reason to do so, not least because in many cases the nature and extent of the relevant evidence will already be clear from the hearing before the arbitral tribunal and it will be the party seeking to enforce the award who will be concerned to achieve a speedy decision and who will benefit from the availability of summary procedure. The availability of such procedure is therefore fully consistent with the pro-enforcement policy of the Convention and its equivalent provisions in the 1996 Act. "[47]

LOCALISING THE GOVERNING LAW OF ARBITRATION AGREEMENT: THE SIGNIFICANCE OF THE SEAT APPROACH

Localising arbitration: in England, the seat of arbitration plays a significant role in the contractual interpretation of the choice of proper law. The seat approach relies heavily on the phrasing of "failing any indication thereon, under the law of the country where the award was made" stipulated in Article V(1)(a) of the New York Convention and the procedural support and supervision the curial law can provide for an arbitration taking place within its jurisdiction.[48] Such an approach has found its support in Sweden,[49] Belgium,[50] England and Japan.[51] The importance of the seat is emphasised in Glick and Venkatesan's dismissive comments on the connection between the doctrine of separability and the identification of the proper law of the arbitration agreement. They repeatedly mentioned that "objectively" the arbitration is more likely to be governed by the law of the seat[52] and wrote: "To put it differently, in circumstances where the consequence of choosing a seat is that the law of the seat will in any event govern many aspects of the arbitration agreement, the parties would

[43] *Ibid.* [80].
[44] *Ibid.* [81].
[45] *Ibid.* [81].
[46] *Ibid.* [81].
[47] *Ibid.* [80].
[48] David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet and Maxwell 2015) 6.41; Dicey, Morris & Collins on The Conflict of Laws (16th edn, Sweet & Maxwell 2018), [16-014]; A.J. van den Berg, The New York Arbitration Convention of 1958 (1981) 126-7; Maxi Scherer, Ole Jensen, 'Towards a Harmonized Theory of the Law Governing the Arbitration Agreement' (2021) 10(1) IJAL 1, 7.
[49] Article 48, Swedish Arbitration Act. It reads: "Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place."
[50] van den Berg (fn 48) 673. However, Article 1718, the Belgian Judicial Code 2013 allows non-Belgian nationals to expressly exclude the jurisdiction of the Belgian courts in a written form.
[51] Ibid. 745; Trevor Cook and Alejandro I. Garcia, *International Intellectual Property Arbitration* (Arbitration in Context Series) Volume 2 (Kluwer Law International 2010) 77, 105-106.
[52] Ian Glick and Niranjan Venkatesan, 'Choosing the Law Governing the Arbitration Agreement', in Neil Kaplan and Michael J. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018) 131, 150.

objectively be understood by choosing that seat to have demonstrated their intention that the entirety of that agreement (i.e., the arbitration agreement) should be governed by the law of the seat."[53] Furthermore, most choices of seat carry a neutral characteristic in order to "insulate the dispute resolution mechanism from the national law of either party."[54] Despite the argument on neutrality, it was said that parties' choice of a seat should be viewed as a legal choice which indicates that parties intend to have the law of the seat recognize, enforce and interpret the arbitration agreement.

Both Separability And *Dépeçage* Opens The Door For The Seat Approach

In England, both the internationally accepted principle of separability and *dépeçage* under common law can be used to address the importance of the seat. For the former view, the reference to the importance of the seat in determining the law governing the arbitration agreement is frequently made in connection with the principle of separability enshrined in section 7 of the English Arbitration Act 1996. Daimsis commented on such a principle as "positing that an arbitration clause included within a larger contract is a separate contract"[55] The phrase "a separate contract" adds more weight to the support for the seat approach. The English Court of Appeal used "rare" to describe the multiple applicable laws to the arbitration agreement in *C v D*.[56] It states: "it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration."[57] Similarly, in the absence of choice of law, the law of the seat was determined to be a stronger candidate for the system of law which has the closest and most real connection in *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Co Ltd.*[58]

Some commentators have raised doubts concerning Born's presumptive and pro-arbitration policy and questioned the unequivocal tone of Articles II and Article V(1)(a) of the New York Convention.[59] Instead, they have highlighted the link between the parties' real intent, party autonomy and the need to avoid an arrogation of the presumptive approach. To this end, Chan and Yang wrote:

> "It is suggested here that a better route which truly respects the primacy of party autonomy would be to eschew the use of presumptions, and refrain from arrogating to ourselves whatever 'commercial' sensibilities businessmen may have to justify those presumptions. Fundamentally, parties are allowed to make an express choice of law governing the arbitration agreement, whether expressed through the clauses of

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[53] *Ibid*. 146.
[54] *Ibid*. 145.
[55] Anthony Daimsis, 'How Heuristics Misshape Reasoning and Lead to Increased Costs in Arbitration', in Sherlin Tung, Fabricio Fortese, et al. (eds), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy*, (Kluwer Law International 2019) 91, 92; Aaron Yoong, 'Of principle, practicality, and precedents: the presumption of the arbitration agreement's governing law' (2021) 37 Arbitration International 653, 658: the separability presumption should be interpreted in the narrow instance to support the parties' intention to choose arbitration.
[56] *C v. D* (fn 2) [26].
[57] *Ibid.* [26].
[58] *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Co Ltd* [2014] 1 Lloyd's Rep 479.
[59] Darius Chan and Teo Jim Yang, 'Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There is None' (2020) 37(5) Journal of International Arbitration, 635, 643-644.

the main contract (such as *Kabab-Ji*), in the arbitration clause, or indeed in a separate free-standing agreement. In the absence of an express choice, one turns to look for an implied choice."[60]

Other commentators support the seat approach when parties' intention is unclear[61] on the grounds of party autonomy and *dépeçage.* They argued that the seat theory is not based on the principle of separability, but the rule of *dépeçage* where a choice of seat is ordinarily also a choice of law. Arguing that *dépeçage* should be the real reason for multiple governing laws for different parts of a single agreement, Glick and Venkatesan pointed out that separability is simply irrelevant to the *entire* choice of law analysis.[62] This view was shared by Bose in his discussion against the seat approach solely based on the principle of separability[63] where he wrote: "the framework for determining implied choice is simply a *dépeçage* inquiry i.e., whether the parties intended to apply the same law to two different clauses, irrespective of whether the clause is substantive, remedial or separable." Glick and Venkatesan further opined: "The fact, however, that the arbitration agreement is not a distinct agreement from the matrix contract for the purposes of choice of law does not mean that it is necessarily governed by the same law. This is because English law recognises, as do other jurisdictions, the concept of *dépeçage*, i.e., that different systems of law may govern different parts of a single contract."[64]

The basis of their argument is that (1) the consequence of choosing a seat is that many aspects of the arbitration agreement – and not merely the arbitration procedure – will be governed by the law of the seat in any event, regardless of the law which applies to the matrix contract,[65] and (2) the choice of seat is only relevant at the third stage of the analysis – "closest connection" is inconsistent with the *Hamlyn* case[66] which, as noted above, treated the choice of a London seat as evidence of what the parties intended.[67] Most importantly, they disagreed with their Lordships' statement that the matrix contract is ordinarily governed by the law of the seat because this is the law with which it has its closest connection. Instead, the analysis carried out by Glick and Venkatesan is that "an arbitration agreement is ordinarily governed by the law of the seat because a choice of seat is ordinarily also a *choice of law*.[68] Consequently, an inference that a choice of seat carries significant weight on a choice of law for the arbitration agreement because the *lex fori* would govern many aspects of the arbitration agreement."[69] In contrast to the seat approach reached by the combination of the principles of separability and validation, *dépeçage* directly offers an explanation of the significance of the seat on the choice of law governing the arbitration agreement.

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[60] Ibid. 635, 645.
[61] Iris Ng, Melissa Ng, et al., 'Five Recurring Problems in International Arbitration: The Relationship Between Courts and Arbitral Tribunals', VIII (2) Indian Journal of Arbitration Law 19, 23-24.
[62] Glick and Venkatesan (fn 52) 140, 141–147.
[63] Bose (fn 18) 57.
[64] Glick and Venkatesan (fn 52) 139, 140 and 141-147.
[65] Glick and Venkatesan (fn 52) 141, 142.
[66] *Hamlyn & Co v Talisker Distillery* [1894] AC 202.
[67] Glick and Venkatesan (fn 52) 143.
[68] Glick and Venkatesan (fn 52) 143.
[69] Glick and Venkatesan (fn 52) 142–143.

The importance of the seat is evident in English law. Not only *dépeçage* but also multiple applicable laws in contract and procedures were confirmed in English law. Acknowledging that the *lex fori* can be different from the proper law of the contract or arbitration agreement, Lord Mustill pointed out such a rarity in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* AG.[70] He stated that "It is by no means uncommon for the proper law of the substantive contract to be different from the *lex fori*; and it does happen, although much more rarely, that the law governing the arbitration agreement is also different from the *lex fori*". Furthermore, Toulson J emphasised that such a rarity only existed because the substance and process of arbitration are "closely intertwined."[71] By localising, a London arbitration clause is by implication a choice of English law as the proper law of the arbitration clause.[72] This paved the way for the principle of separability and the significance of the *lex fori* in determining the proper law of the arbitration agreement and ultimately the validation principle.

Earlier decisions confirming a choice of seat being treated as a choice of the curial law as the arbitration agreement law include *Hamlyn Co v Talisker Distillery*[73] *and Naviera Amazonica v Cie Peruana SA v Compania Internacional de Seguros del Peru.*[74] In *Hamlyn*, the House of Lords ruled that, in an English seat arbitration, the parties' intention is to have the arbitration agreement governed by English law, not Scots law which would make the arbitration agreement null and void. Kerr LJ observed that the law of the place of the seat is usually referred to as the curial or procedural law or the *lex fori* and the choice of seat was not impacted by the choice of arbitration institutions in *Naviera Amazonica v Cie Peruana SA v Compania Internacional de Seguros del Peru.*[75] Such a view was also followed by the Court of Appeal in *Enka* where the reference to London was viewed as a strong indication that the choice of English seat implied that English law was the curial law.[76]

Later in 2007, Cooke J and Colman J again confirmed the importance of seat of arbitration in relation to arbitration agreement. One sees the support provided by the courts of the seat as the natural consequence of such an arbitration agreement and the basis favouring the seat approach. For instance, Cooke J ruled that: "The significance of the "seat of arbitration" has been considered in a number of recent authorities. The effect of them is that the agreement as to the seat of an arbitration is akin to agreement to an exclusive jurisdiction clause. Not only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over that arbitration. By agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration."[77]

Similarly, Colman J determined that, Geneva being the seat of the arbitration, the "natural consequence" of such an arbitration agreement was that any issue as to the validity of the

[70] [1981] 2 Lloyd's Rep 446, 453.
[71] *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530, 541e.
[72] *Ibid.* 543b.
[73] Hamlyn (fn 66).
[74] [1988] 1 Lloyd's Rep 116, 119.
[75] *Ibid.* 119.
[76] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb & Ors* [2020] EWCA Civ 574 [46].
[77] *C v D* (fn 2) [29].

arbitration provisions should be resolved according to Swiss law.[78] This is because "an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration."[79] Furthermore, as Sir Geoffrey Vos' reference to Longmore LJ's decision states, "their agreement on the seat and the 'curial law' necessarily meant that any challenges to any award had to be only those permitted by that Act", [80] therefore, a choice of seat for the arbitration was also a choice of forum for remedies seeking to attack the award.[81]

Following *C v D,*[82] Cooke J in *Shashoua v Sharma*[83] spoke of how curial law could coincide with the proper law governing the validity of an arbitration agreement.[84] He stated: "questions of challenge to the award and enforcement of the award are matters for the curial law, they plainly impact also upon the law of the agreement to arbitrate and the law of the Agreement to Refer, because those are matters which are inextricably caught up with the whole business of arbitrating and the effect of it. When the parties agreed to arbitrate in a particular place under particular laws, they plainly had in mind the effect of so doing and chose the law and seat of the arbitration with a view to achieving particular results in that respect. I cannot see that the law of the agreement to arbitrate and the law of the agreement to refer can here differ from the curial law." Such a view found support from Longmore LJ who favours "a closer and more real connection with the place where the parties have chosen to arbitrate"[85] in the context of setting aside or enforcement of an award. Similarly, in *Enka*, Popplewell LJ stated that "[T]he significance of the choice of a seat is … a legal one as to the curial law and the curial court"[86] and a presumption can only be rebutted by any features of the case which demonstrate powerful reasons to the contrary.

MAKE ARBITRATION AGREEMENT PERFECT – TRANSNATIONAL AND COMMON LAW VALIDATION

The Transnational Validation Principle

Yet, not all law of the seat guarantees the validity of the arbitration agreement. Furthermore, parties' intention of choosing "would not have serious risk of invalidity" exaggerates parties' full understanding of the laws of the seat and that those laws would invalidate the arbitration agreement. [87] Consequently, the seat approach was criticised by Born as one which

[78] *A v B* [2007] 1 All ER (Comm) 591 [111].
[79] *Ibid.* [111].
[80] *Minister of Finance v IPIC* [2019] EWCA Civ 2080 [37].
[81] *A v B* (fn 78) [111]; C v D (fn 2) [17].
[82] *C v D* [2007] 2 All ER (Comm) 557 (Cooke J) [2008] 1 All ER (Comm) 1001 (Court of Appeal), Longmore LJ.
[83] *Shashoua v Sharma* [2009] 2 All ER 477.
[84] *Ibid.* [29].
[85] *C v D* (fn 2) [26]. Also see Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.
[86] *Enka* (fn 76) [46].
[87] Wendy Miles and Nelson Goh, 'A Principled Approach Towards the Law Governing Arbitration Agreements', in Neil Kaplan and Michael J. Moser (eds) *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018) 385, 394.

"mistakenly conflates the law governing the arbitration agreement with the law governing the arbitral proceedings, which do not necessarily coincide."[88] Miles and Goh have also commented that the seat approach may be a "slightly tenuous" means to presume that the parties have selected the law of the seat at the time of contract formation[89] as well as having argued for the validation principle as a transnational approach to ensure the validity of the arbitration agreement. Leaving complex choice of law rules and *dépeçage* behind, they invoked the validation principle as an intervening approach to ensure the validity of an arbitration agreement. It was said that "parties would not have intended a specific place to be the arbitral seat if there is a serious risk that the law of the seat would invalidate the agreement."[90] They called such an approach "the only principled way to reconcile the divergent views while also acknowledging the compelling arguments behind them."[91] It can also remedy the invalidity of an arbitration agreement due to the application of the implied choice of law. They also expressed the view that validation can be a way to reconcile the opposing views on the issue of applicable law of the arbitration agreement. Such a view was also proposed by Cook and Garcia[92] who cited as reasons the pro-enforcement policy embodied in Article V(1)(a) and Article II of the New York Convention and the arbitral tribunal's power to determine the applicable law.[93]

Such a transnational approach combining parties' intention behind their choice of arbitration and the validation principle has been discussed in a variety of international literature.[94] Born called for the validation principle to address the uncertainty caused by a defective arbitration agreement invalidated by the applicable law. Arguing for the validation principle, Born concerns focused on the complexity arising from the application of choice of law rules.[95] He stated: "Given these conflicting considerations concerning what legal system the parties might have "intended" to select to govern their arbitration agreement, it is essential in interpreting the scope of a choice of law clause to have regard to the fundamental objectives of the arbitral process and the parties' agreement to utilize that process."[96] He maintained that "[t]his approach, aimed at validating imperfect arbitration agreements, has now been

[88] G. Born, 'The Law Governing International Arbitration Agreements: An International Perspective' (2014) 26 *Singapore Academy of Law Journal* 814, 831.
[89] Miles and Goh (fn 87) 393.
[90] *First Link Investments Corp Ltd v. GT Payment Pte Ltd and Ors*, [2014] SGHCR 12 [14].
[91] Miles and Goh (fn 87) 394.
[92] Cook and Garcia (fn 51) 108 and 123.
[93] The validation principle also appears in Article 59 (C) of the WIPO Arbitration Rules, which reads: An arbitration agreement shall be regarded as effective if it conforms to the requirements concerning form, existence, validity and scope of *either the law or rules of law applicable* [*according to the parties' choice or the law that the tribunal determines to be applicable], or the law [of the seat].*
[94] Gary B. Born, Matteo Angelini, et al., 'Rethinking "Pathological" Arbitration Clauses: Validating Imperfect Arbitration Agreements', in Sherlin Tung, Fabricio Fortese, et al. (eds), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy*, (Kluwer Law International 2019) 35, 37; 'The proper law of the arbitration agreement: Mainland Chinese and English law compared', (2017) 33(1) Arbitration International 121, 134; Fan Yang, '"How Long Have You Got?" Towards a More Streamlined System for Enforcing Foreign Arbitral Awards in China, (2017) 34(3) Journal of International Arbitration, 489, 501; C. Ferdinando Emanuele and Milo Molfa, *Selected Issues in International Arbitration: The Italian Perspective*, (Thomson Reuters 2014) 55-56.
[95] Gary Born, International Commercial Arbitration (3rd edn Wolters Kluwer 2021) 454.
[96] *Ibid*. 456.

widely adopted,"[97] as such an approach is "mandated by the New York Convention and, ultimately, accords with the expectations of businesses engaged in international commerce and the pro-arbitration policies behind domestic arbitration law."[98] Vorburger expressed an similar view and stated: "An *in favorem validitatis* approach is justified since parties intended to agree upon a reliable dispute resolution method in an international setting. This intent should be given maximum effect, and provisions of local law should not easily be able to repudiate it." [99] The reference to the provisions of local law in Vorburger's statement suggested a lesser reliance on the seat approach.

Internationally, the practice of the principle of validation has been noted in China, Spain, Switzerland and Argentina. It was suggested that the Chinese court's previous preference for applying the law of the PRC to determine the validity of an arbitration agreement[100] had been abandoned. It was replaced with the introduction of the Provisions of the SPC on Several Issues Concerning the Trial of Cases of Arbitration-Related Judicial Review 2017[101] which "effectively codified the validation principle into Chinese law"[102] supporting the validity of the arbitration agreement.[103] Similarly, in their discussion of the Spanish, the Swiss and the Dutch practices of the validation principle,[104] Koepp and Turner confirmed the approach to "avoid idiosyncratic or parochial restrictions on arbitration under national law, and serve as a powerful affirmation of modern pro-arbitration principles by giving parties' agreements to arbitrate their maximum possible scope and effect."[105] They noted that Article 178(2) of the Swiss Federal Statute of Private International Law [106] and Article 9(6) of the Spanish Arbitration Act are frequently used as examples supporting the validation principle.[107] The

[97] Born and Angelini (fn 94) 37. They preferred the term "imperfect clauses" or "convalescent clauses," which "are in need of judicial (or arbitral) care or perfection but capable with such care of serving as healthy, valuable members of the dispute resolution family."

[98] Born and Angelini (fn 94) 55.

[99] Simon Vorburger, International Arbitration and Cross-Border Insolvency: Comparative Perspectives, International Arbitration Law Library, Volume 31 (Kluwer Law International 2014) 216.

[100] Fan Yang, 'The proper law of the arbitration agreement: Mainland Chinese and English law compared', in (2017) 33(1) Arbitration International 121, 129; Chan and Yang (fn 59) 635.

[101] Provisions of the SPC on Several Issues Concerning the Trial of Cases of Arbitration-Related Judicial Review, (Dec. 26, 2017), the SPC. Helen H. Shi, 'Have Chinese Courts Adopted an Arbitration-Friendly Approach Towards International Arbitration?', in Neil Kaplan, Michael Pryles, et al. (eds), *International Arbitration: When East Meets West – Liber Amicorum Michael Moser*, (Kluwer Law International 2020) 235 – 237.

[102] Shi (fn 101) 238.

[103] *China Light Tri-union Int'l Co., Ltd. v. Tata International Metals (Asia) Limited,* Beijing Forth Intermediate People's Court, Jing 04 Min Te No. 23, Civil Order (2017) ("*China Light*"), where the court ruled that the validation principle is an international and contemporary concept corresponding with the Chinese judicial interpretation and Article V of the New York Convention. Its application can also promote and support the development of international commercial arbitration.

[104] Koepp and Turner (fn9) 378 and 387; Cook and Garcia (fn 51) 108.

[105] Koepp and Turner (fn9) 379.

[106] Art 178(2) of the Swiss Federal Statute of Private International Law: 'the arbitration agreement shall be valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law'. Further comments can be seen in Maria Hook, 'Arbitration Agreements and Anational Law: A Question of Intent?' (2011) 28(3) Journal of International Arbitration, 175, 182-184.

[107] Koepp and Turner (fn9) 378. Art 9(6) of the Spanish Arbitration Act: 'the arbitration agreement shall be valid and the dispute shall be capable of arbitration if it complies with the requirements established by the juridical rules chosen by the parties to govern the arbitration agreement, or the juridical rules applicable to the merits of the dispute or Spanish law'.

validation principle was manifested in Article 178(2) of the Swiss Act as providing that the validity of the arbitration agreement shall be evaluated by the "less demanding" of (1) the law chosen by the parties to govern the arbitration agreement (*lex arbitri*), (2) the law governing the subject matter of the dispute (*lex causae*) or (3) Swiss law.[108] Similarly, the acceptance of the presumption in favour of the enforceability of arbitration agreements is expressed in Article 1656 of the Argentinean National Civil and Commercial Code (NCCC); "[i]n case of doubt, the arbitration contract must be as effective as possible." [109] This "effective interpretation" approach, coupled with the presumption in favour of the enforceability of arbitration agreements, is consistent with the understanding that courts and tribunals should aim to respect and give the fullest effect to the parties' intention to arbitrate disputes.

Let Imperfection Stay

Nevertheless, not all commentators or jurisdictions support such a presumptive validation of an arbitration agreement.[110] Some commentators have described it as "doubtful" in their emphasis on the different treatments received in among different jurisdictions and stated that the validation principle "begs the question of whose yardstick should be applied to ascertain the validity of the arbitration agreement in the first place, since different laws will yield different answers to the same set of facts."[111] Highlighting U.S. courts' application of mixed conflict of law rules, Henin and Digón pointed out that three options can be considered in the US; namely (1) general choice of law clause governing the main contract, (2) federal common law rules and (3) the seat approach and the validation principle; doubts were expressed in relation to non-US law as the law of the seat.[112]

Further concerns over the pro-validation approach were expressed regarding an award being set aside or refused recognition or enforcement at a later stage.[113] Instead of a blanket application, others such as Cook and Garcia argued that a restrictive interpretation of the validation principle in the context of intellectual property disputes should be applied to the disputes.[114] Acknowledging Born's desire to attain the finality of the underlying dispute,

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[108] Saverio Lembo and Aurélie Conrad Hari, 'International Arbitration in Switzerland and Foreign Bankruptcy: Where Do We Stand?' (2014) 32(4) ASA Bulletin 735, 739; Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd Edition Kluwer Law International 2016) 61, 79.

[109] Fabricio Fortese, Issues of Jurisdiction in Argentina', in Fabricio Fortese (ed), *Arbitration in Argentina* (Kluwer Law International 2020) 93, 106-107.

[110] Francesca Ragno, 'The Incapacity Defense under Article V(1)(a) of the New York Convention' in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Autonomous Versus Domestic Concepts under the New York Convention* International Arbitration Law Library, Volume 61 (Kluwer Law International 2021) 159, 166. The author disagreed that the validation principle should be applied in the context of parties' capacity.

[111] Chan and Yang (fn 59) 644.

[112] Paula F. Henin and Rocío Ines Digón, 'Enforcing New York Convention Awards in the United States: Chapter 2 of the FAA' in Laurence Shore, Tai-Heng Cheng, et al. (eds), International Arbitration in the United States, (Kluwer Law International 2017) 553, 578-580. For the third option, despite their acknowledgement of the existence of literature supporting the validation principle and the logic behind article V(1)(a) of the New York Convention.

[113] Sapna Jhangiani, 'Conflicts of Law and International Commercial Arbitration – Can Conflict Be Avoided?' (2015) 2(1) BCDR International Arbitration Review 99, 108.

[114] Cook and Garcia (fn 51) 315; Raphael F. Meier, 'Commentary on the WIPO Arbitration and WIPO Expedited Arbitration Rules, WIPO Arbitration Rules, Article 61 / WIPO Expedited Arbitration Rules, Article 55 [Laws Applicable to the Substance of the Dispute, the Arbitration and the Arbitration Agreement]' in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide (2nd edn Kluwer Law International 2018) 2019, 2026 and 2030.

nevertheless, Gupta emphasised that such a principle has not found many takers in arbitration circles and its application is limited within "the cases where the same law is application to the merits as well as the forum."[115] Consequently, one may have to return to "parochial restrictions on arbitration under national law giving parties' agreements to arbitrate their maximum possible scope and effect"[116] as decided in *Enka* but criticised by Koepp and Turner.

Localisation – The English "Effective Interpretation" Approach Or Interpreting To Support The Parties' Intention

Confirming the importance of the arbitral seat and its law, with a pro-arbitration approach with a yardstick*,* [117] English law returned to its common law root and applied the contractual interpretative rules to achieve an effective interpretation. The application of ordinary principles of construction to determines the implied choice of law was used to construe a particular clause as rational businessmen would.[118] Similarly, this common law choice of law rules approach was frequently applied. This could be seen in Lords Hamblen and Leggatt's application of the closest and most connected test in *Enka* and their return to the expressed choice rule in *Kabab-Ji*[119] to address a defective or unclear arbitration agreement and its validity. Both cases view the common law-based choice of law rules as a sufficient indication on this matter. Whether the governing law is the same as or different from the law of the main contract depends on the interpretation of the choice of law rules under common law.

Express or Implied choice of law leads to main contract approach

The advantage of having an arbitration agreement or different parts of a contract governed by the law of the main contract have been advanced by various commentators. The most quoted comment has come from Dicey, Morris & Collins who stated: "Even if different parts of a contract are said to be governed by different laws, it would be highly convenient and contrary to principle for such issues as whether the contract is discharged by frustration, or whether the innocent party may terminate or withhold performance on account of the other party's breach, not to be governed by a single law."[120] Such a view was also shared by Redfern and Hunter who pointed out that the arbitration clause is only one of many clauses contained in a contract, hence it is only reasonable for this clause to be governed by the same law expressly chosen by the parties.[121] Bantekas[122] and Grover[123] have both acknowledged that a selection of multiple jurisdictions in respect of various parts of the contract is based on freedom of contract, with the latter invoking a unification of proper law of the arbitration

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[115] Ritunjay Gupta, 'Res Judicata in International Arbitration: Choice of Law, Competence & Jurisdictional Court Decisions' (2020) 16(2) Asian International Arbitration Journal, 193, 201-202.
[116] Koepp and Turner (fn9) 379; Cook and Garcia (fn 51) 108.
[117] Chan and Yang (fn 59) 644.
[118] *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 [5].
[119] *Kabab-Ji* (fn 4).
[120] L. Collins (fn 1) 32-026.
[121] Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (6th edn, OUP 2015) 3.12.
[122] Ilias Bantekas, 'The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy' (2010) 27 Journal of International Arbitration 1, 2.
[123] Neerag Grover, 'Dilemma of the Proper Law of the Arbitration Agreement: An Approach Towards Unification of Applicable Laws' (2014) 32 Sing L Rev 227.

agreement and the underlying contract as the most balanced approach to maintain certainty, simplification and reduce complication.[124]

These commentators who are in favour of the main contract approach[125] have spoken of the difference between severable and separate. Their argument is that an arbitration agreement is severable but not separatable. Because it is only severable, the logical assumption is that the entire clause should be governed by the same law; in particular the multi-tier clause.[126] Such an implied choice of law of the main contract test is preferred by Bose as it is less mechanical and provides flexibility in taking various factors into consideration to reflect the principle and policy of pro-arbitration.[127] Briggs similarly observed that 'The autonomy of the arbitration agreement is one thing; its hermetic isolation would be quite another. To put the point yet another way: the agreement to arbitrate is severable, but that does not mean it is separate';[128] hence, the phrase "for that purpose" provided a restricted definition of the doctrine of separability in section 7 of the Arbitration Act 1996. Further evidence was found in the Departmental Advisory Committee on Arbitration Report expressly stating that the doctrine of separability "is confined to the effect of invalidity etc of the main contract on the arbitration agreement, rather than being, as it was in the July 1995 draft, a freestanding principle." [129] Derains has also highlighted that the severable nature of an arbitration agreement does not mean a total independence from the main contract. He succinctly stated that: "[t]he autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause."[130] Furthermore, silence on the applicable law may be attributed to the parties' assumption that an integral arbitration agreement is to be governed by the same law.[131]

Such an application of an implied choice leading to the law of the main contract can also be observed in *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [132] where Moore-Bick LJ emphasised the natural inference and parties' "would be intention" and ruled that:

> "A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself."[133]

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[124] Ibid. 255.
[125] M. Mustill & S. Boyd, *Commercial Arbitration* (2nd edn, Butterworths, 1989) 63, which was cited in *Sulamérica* [17].
[126] Miles and Goh (fn 87) 389.
[127] Bose (fn 18) 54, 62.
[128] A. Briggs, *Private International Law in English Courts* (2014, Oxford University Press) 14.37.
[129] The Departmental Advisory Committee Report on Arbitration Bill (1996) 43.
[130] Yves Derains, 'ICC Arbitral Process: Part VIII. Choice of Law Applicable to the Contract and International Arbitration' (1995) 6(1) ICC International Court of Arbitration Bulletin 10, 16–17.
[131] *Attorney-General of Belize v. Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988 at [21].
[132] *Sulamérica* (fn 2).
[133] *Ibid.* [26].

He further used the words "the natural inference" to ascertain the parties' intention of the proper law. His conclusion was that "they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate."[134] This approach was also seen in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*[135] and *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*[136] where the choice of law for the underlying contract extends to the arbitration agreements by an "express" choice. Through the main contract in *Kabab-Ji,* both the English Court of Appeal[137] and Supreme Court[138] rejected the *lex fori* (French law) but found English law, the governing law of the contract, to be a strong indicator after interpreting the wording of the contract. According to *Kabab-Ji*, it is possible to find an express choice of law for the arbitration agreement from the wording of the main contract, as long as this results from a proper construction of the particular terms of the main contract and arbitration clause.[139] Although Bose questioned *Kabab-Ji*'s ruling of express choice and whether such application is "pro-arbitration",[140] it is worth noting that the analysis of the choice of law rules in *Kabab-Ji*[141] actually concerns an '*express choice*' of law for the arbitration clause based on the governing law for the matrix contract,[142] rather than the debates between the main contract approach and the seat approach through the second and the third stages. Despite the clarification, *Kabab-Ji*'s abandonment of the traditional multiple stages of choice of law inquiry was criticised for its inaccurate construction of party intent and its potential harm to the enforcement of international arbitration agreement with its non "pro-arbitration" approach.[143]

Implied choice of law rules leads to seat approach

Although reaching the same conclusion through the different limbs of the choice of law rules, both the Court of Appeal and the Supreme Court confirmed the importance of the seat in the addressing a would-be defective arbitration agreement in the absence of parties' choice. Popplewell LJ, for the Court of Appeal, highlighted the overwhelming factor played by the London arbitration agreement in his judgment and confirmed that, in the absence of parties' choice of law or any particular feature of the case demonstrating powerful reasons to the contrary, the arbitration agreement is governed by the law of the seat, as a matter of implied/inferred choice. His legal reasoning highlighted the role English courts should play in relation to the scope of the powers conferred on the English Court with parties' choice of English curial law. This includes, but is not limited to, the jurisdiction which the English Court undoubtedly has to grant declaratory and anti-suit relief in relation to foreign proceedings brought in breach of the arbitration agreement. Citing Lord Hoffmann[144] who linked the importance of the seat with the parties' right to choose the governing law and the seat of

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[134] *Ibid.* [11].
[135] *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); [2013] 2 All ER (Comm).
[136] *Kabab-Ji* (fn 4).
[137] [2020] EWCA Civ 6.
[138] Applying English law, the enforcement of the arbitral award in question was rejected on the basis that the non-signatory respondent was not a proper party to the arbitration agreement.
[139] *Kabab-Ji* (fn 4) [53] [69].
[140] Bose (fn 18) 61.
[141] *Kabab-Ji (fn 4)*.
[142] *Ibid*.
[143] Bose (fn 18) 63.
[144] *West Tankers Inc. v RAS Reiunione Adriatica di Sicurta SpA (The "Front Comor")* [2007] 1 Lloyd's Rep 391.

arbitration as the choice made to "best serve their interests,"[145] Popplewell LJ agreed that the parties' choice of seat is to provide certainty as well as "to give effect to party autonomy which is fundamental to arbitration agreements and which it is the primary function of the courts to respect and uphold."[146] Furthermore, the choice of seat is not a practical one but a legal one which is linked with the curial law, curial court and the nationality of an award in the context of international practice and the New York Convention.[147]

He stated that the general rule should be that the law governing the arbitration agreement is the curial law, as a matter of implied choice, "subject only to any particular features of the case demonstrating powerful reasons to the contrary."[148] Linking with the discussion on the doctrine of separability, Lord Popplewell's inferred choice was based on separability and the significance of parties' express chosen seat. He stated that, due to section 7 of the Arbitration Act 1997 and the doctrine of separability, there is no reason why the law governing the substantive contract carries itself as a significant source of guidance for the AA law in cases where there is an arbitration clause with a different curial law. The doctrine of separability was supported for choice of curial law to govern the arbitration agreement where the main contract law has nothing to say.[149]

Once the arbitration agreement is properly severed or separated from the main contract, there is "a powerful indication that it is to be isolated for the purpose of determining the law governing the arbitration agreement generally"[150] before linking it to the curial law. Choosing the curial law to govern the arbitration agreement is in line with the legal reasoning given in *XL Insurance v Owens Corning*[151] and *C v D*[152] discussed above. According to Popplewell LJ, this allowed the court to determine aspects of the substantive rights of the parties to the arbitration,[153] including the validity of an arbitration agreement "by reference to the curial law."[154] Seeking support from the *West Tanker case*, it was decided that parties' express choice of seat is a submission to the curial jurisdiction, hence a choice of curial law. "Given the connection and overlap between the scope of the curial jurisdiction and the scope of the arbitration agreement law, it seems natural to regard a choice of the former as a choice of the latter, rather than merely the latter being the system of law with which the arbitration agreement has its closest and most real connection."[155]

Despite *Popplewell LJ's* inferred choice being later dismissed for its lack of a clear reasoning on the merger of the second and third limb[156] by the Supreme Court as well as the "oddly inconsistent"[157] logic on separability, his decision did highlight the overwhelming role played

[145] *Ibid.* [18].
[146] *Enka* (fn 76) [46].
[147] *Ibid.* [46], [54].
[148] *Ibid.* [91].
[149] *Ibid.* [94].
[150] *Ibid.* [94].
[151] *XL Insurance* (fn 71) 543b and 541e.
[152] *C v D* (fn 2).
[153] *Enka* (fn 76); *Sulamérica* (fn 2) [29].
[154] *Enka* (fn 76) [96].
[155] *Ibid.* [101].
[156] *Ibid.* [70].
[157] Chan and Yang (fn 59) 640.

by the London arbitration agreement in his judgment and the role English courts should play in relation to the scope of the powers conferred on the English Court with parties' choice of English curial law.[158]

The closest and most real connection test leads to the seat approach

The common law contractual interpretative approach held by the English courts also saw that the application of the closest and most real connection test combined with the validation principle led one to the seat of arbitration. Despite Gaillard's "arbitral legal order" [159] emphasising the autonomy of arbitration and its transnational nature, the importance of the seat was stressed by the English judges[160] and commentators[161] who confirmed that the governing law of a defective or unclear arbitration agreement can be the law of the seat of the arbitration via the third limb of the choice of law rules. However, the application of the closest and most real connection test requires an extra requirement; the validation principle.

Linked with the *lex fori*, the third limb of the choice of law rules requires the validation principle as an extra requirement, rather than a standalone principle, in the event when the arbitration agreement would be invalidated by the application of the second limb. It was suggested that Longmore LJ treated the curial law as a guide to the arbitration law by application of the closest and most real connection test without first considering implied choice of law. [162] This led us to Moore-Bick LJ's decision in *Sulamérica*,[163] where he cited Lord Mustill's "exceptional otherwise"[164] and ruled that in the absence of parties' choice of law, though the "natural inference"[165] is that the parties intended the proper law of the main contract to govern the arbitration agreement,[166] the law of the arbitration agreement should be the *lex fori.* He made a distinction between a free-standing arbitration agreement and an integral arbitration agreement and stated that (1) for a free-standing London arbitration agreement without express choice of proper law, "it would simply be necessary to seek to identify the system of law with which the agreement had the closest and most real connection"[167] and the choice of London is significant in determining the proper law of the arbitration agreement. (2) In the case where an arbitration agreement forms an integrated part of the main contract, parties' express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. Consequently, "A search for an implied choice of proper law to govern the arbitration

[158] *Enka* (fn 76) [46], [54].
[159] Emmanuel Gaillard, Legal Theory of International Arbitration (2010, Martinus NiJhoff Leiden) 163.
[160] *Dallah* (fn 28) [96].
[161] Mustill & Boyd (fn 125) 6-7; David Sutton, Russell on Arbitration (24th edn, Sweet & Maxwell 2015), [2-121]; Margaret L. Moses, A New Framework: Choosing the Proper Law of the Arbitration Agreement Based on the Issue to be Decided (November 12, 2021). Arbitration, Contracts and International Trade Law: Essays in Honour of Giorgio Bernini, 553,555, <https://ssrn.com/abstract=3962329> accessed on 28 December 2021.
[162] *C v D* (fn 2) [26] (Court of Appeal), Longmore LJ. Also see Lord Mustill in *Channel Tunnel* (fn 85).
[163] *Sulamérica* (fn 2).
[164] *Channel Tunnel* (fn 85) 357 Lord Mustill stated that where more than one national system of law is bearing upon an international arbitration, exceptionally, the proper law of the main contract may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration.
[165] *Sulamérica* (fn 2) [11]
[166] *Ibid.* [26]
[167] *Ibid.* [26]

agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion."[168]

The strong factors "pointing to a different conclusion" referred to in Moore-Bick LJ's judgment are a London arbitration agreement[169] and the invalidation of the arbitration agreement. Both factors changed the course of choice of law rules because of (1) the importance of the seat of arbitration and (2) a pro-arbitration approach deviated from the course of invalidation of an arbitration agreement through the application of parties' choice of law. For the former, he stated that parties' choice of the seat of the arbitration carries parties' foreseeability in the application of the law of the seat; a legal choice. This "inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings."[170] In terms of the latter factor, parties' intention to use arbitration as a dispute resolution must include a valid arbitration agreement. If the parties' choice of the proper law of the substantive contract presents a serious risk invalidating the arbitration agreement, the parties' express choice of law of the main contract would not carry with it an implied choice of the same law to govern the validity of arbitration agreement. This was shown in *Sulamérica* where English law was chosen to support the validity of the arbitration agreement despite all factors pointing at Brazilian law which casted doubts on the parties' intention to utilise arbitration as the dispute resolution mechanism. English law was also chosen as the law which has the closest and most real connection to the arbitration in order to support the operation of arbitration which the parties agreed to take place in London. He stated:

> *"*In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, … has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective. Its closest and most real connection is with English law. I therefore agree with the judge that the arbitration agreement is governed by English law."[171]

The exceptional factors re-energising a would-be valid arbitration agreement can be seen in the Supreme Court's lowering the bar for the principle of separability due to the logic that it "does not follow from the separability principle that an arbitration agreement is generally to be regarded as "a different and separate agreement" from the rest of the contract or that a choice of governing law for the contract should not generally be interpreted as applying to an

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[168] *Ibid.* [26]

[169] *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER (Comm) 1; Kabab-Ji (fn 4).

[170] *Sulamérica* (fn 2) [29].

[171] *Ibid.* [32]. Lord Neuberger's further comments on the potential approach to determine the applicable law do not help as his mentioning of three approaches created more confusion. They are: one being to treat the approach in *C v D* as correct, another to treat it as wrong, and a third being to say that there were sound reasons to adopt either approach, but not to choose between them since they led to the same result on the facts of the instant case [59].

arbitration clause."[172] In other words, an arbitration agreement is a distinct agreement being separated from the underlying contract for the purpose of determining its validity, existence and effectiveness only. It does not mean that this agreement should be viewed as a totally different or separate agreement from the underlying contract or should not be governed by the same law chosen to govern the underlying contract. This is because of the collateral or ancillary nature of an arbitration agreement highlighted in the previous authority.[173] As Moore-Bick LJ pointed out, that separability is to give effect to parties' intention to use arbitration as a means of resolving their disputes, not to insulate it from the underlying contract for all purposes.[174]

Localisation

The importance of parties' choice of seat carries a significant weight in the Supreme Court's interpretation of the choice of proper law of the arbitration agreement. This is to deliver the fundamental objectives of the arbitral process and the parties' agreement to utilize that process for resolution. The majority of the Lords[175] agreed that: "the nature and scope of the jurisdiction exercised by the courts of a country over an arbitration which has its seat there is a highly material consideration in choosing a seat for the arbitration."[176] Because of the intertwined relationship mentioned above, "[a] choice of seat can in these circumstances aptly be regarded as a choice of the curial law."[177] The Lords also pointed out that the question is whether such a choice of the curial law impacts on parties' intention of the proper law of the arbitration agreement. A clear endorsement of the place of arbitration was also highlighted by the Lords in that a consistent approach between their decision and the Scottish practice where the impact is carried by the curial law is provided in section 6 of the Arbitration (Scotland) Act 2010.[178]

However, the Supreme Court pointed out that localising is not the only indication they would consider as it should not be a sweeping inference as decided by Popplewell LJ.[179] More evidence is required to infer the choice of the seat as the choice of the law governing the arbitration agreement. The Supreme Court criticised his omission of the non-mandatory substantive provisions of the English Arbitration Act 1996 excluded by section 4(5), if the arbitration agreement was governed by Brazilian law.[180] Having reviewed the legislative

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[172] *Enka* (fn 3) [61].
[173] *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854, 917, per Lord Diplock; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909, 998, per Lord Scarman, *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* [1997] 2 Lloyd's Rep 279, 285; *Shayler v Woolf* [1946] Ch 320; and *Cockett Marine Oil DMCC v ING Bank NV (The M/V Ziemia Cieszнska)* [2019] EWHC 1533 (Comm); [2019] 2 Lloyd's Rep 541; *JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm); [2004] 2 Lloyd's Rep 335 [31].
[174] *Sulamérica* (fn 2) [63].
[175] Lord Hamblen, Lord Leggatt and Lord Kerr.
[176] *Enka* (fn 3) [68].
[177] *Ibid.* [68].
[178] Section 6 reads: "Where (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but (b) the arbitration agreement does not specify the law which is to govern it, then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law."
[179] *Enka* (fn 3) [73-82]; *XL Insurance* (fn 71) 543b and 541e, as per Toulson J.
[180] *Enka* (fn 3) [103].

history of the English Arbitration Act 1996, the court "confirms that sections 2 and 4(5) of the 1996 Act as enacted were intended to have the effect that, where England is chosen as the seat of an arbitration but the arbitration agreement is governed by a foreign law, the non-mandatory provisions of the Act do not apply to any matter concerning the parties' substantive rights and obligations under the arbitration agreement. The fact that the Act contains some provisions which are substantive, or partly substantive, cannot therefore - where those provisions are non-mandatory - support an inference that, by choosing an English seat of arbitration, parties must be taken to have contemplated and intended that the validity and scope of their arbitration agreement should be governed by English law."[181]

Furthermore, with the major evolution and exponential growth of international arbitrators and institutions in London, the Supreme Court is of the opinion that parties' choice of London as the seat is due to its attractiveness specifically as a forum in which to arbitrate international disputes. Consequently, the parties' choice of the seat of arbitration should no longer be inferred as parties' intention to subject their arbitration agreement to the English Law.[182] The link between the inference and English law needs more evidence. In this context, the Lords said:

> "Where there is insufficient reason to infer that the parties chose London as the seat of arbitration because they wanted the arbitrators to be versed in English law, that applies as much to any issues concerning the validity or scope of the arbitration agreement which the arbitrators might be asked to decide as it does to the substance of any dispute. Nor can any necessary implication be drawn from the possibility that issues concerning the validity or scope of the arbitration agreement might have to be decided by the English courts in the exercise of their supervisory jurisdiction. Questions of foreign law are dealt with in the English Commercial Court on a daily basis … even an express choice of jurisdiction does not by itself give rise to an implied choice of law. We therefore do not consider that a choice of the seat of arbitration can by itself be construed as an implied choice of the law applicable to the arbitration agreement."[183]

Therefore, in the circumstances where the parties did not specify the choice of law rules governing their arbitration agreement, "the court must … determine, objectively and irrespective of the parties' intention, with which system of law the arbitration agreement has its closest connection."[184] Lord Hamblen's further reference to sections 66 to 68 of the English Arbitration Act governing any challenge to an award made in England suggested localisation. The provisions were used as the reason why parties' choice of foreign law or institutional rules would not impact on the application of mandatory rules provided by section 1(b) of the Act or the link between the place of arbitration and the arbitration agreement. It reads: "Such provisions of themselves establish a close nexus between the law determining the validity and scope of the arbitration agreement and the law of the seat of arbitration."[185]

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[181] *Ibid.* [80].
[182] *Ibid.* [113].
[183] *Ibid.* [117].
[184] *Ibid.* [118].
[185] *Ibid.* [124].

Referring to "the country where the award was made" as provided in section 103(1)(b) of the Act, the court made a link between the closest and most real connection with "the country where the award was made where parties made no express choice." [186] They also viewed such an interpretation as a coherence between this approach and Article V(1)(a) of the New York Convention. Such an approach can also address van den Berg's concerns over "the undesirable situation of the same arbitration agreement being held to be governed by two different laws: one law determined according to the conflict rules of the forum at the time of the enforcement of the agreement, and the other determined according to article V(1)(a) at the time of enforcement of the award."[187]

On the point of giving effect to commercial purpose, Lord Hamblen's emphasis was placed on the neutrality and the meaning of the place of arbitration represented to the parties who are "inherently unlikely"[188] to agree on either of their national systems of law. It was suggested that the desire for neutrality can be achieved by parties' intention to have their disputes decided by a court which is supportive of arbitration and where the place of arbitration can serve this purpose.[189] The law of the place of arbitration represents "a neutral choice of law but it is already the law of that place which - in countries which have implemented the Model Law or are parties to the New York Convention - will determine the validity of an award if an application is made to set it aside or if its enforcement in the other party's home state is resisted."[190] Finally, Lord Hamblen ruled that, in the absence of parties' choice, the link with the law of the place of arbitration will offer the parties certainty to have an easy prediction and little room for argument which law the court will apply by default.[191]

CONCLUSION

This article has highlighted that, giving the necessary significance to the seat of arbitration, English law can also achieve validation of an arbitration agreement and the recognition of the parties' intention through the common law rules. Unlike Born's unconditional validation, English law applied the common law rules to validate a defective arbitration agreement. Accordingly, *dépeçage*, aided by section 7 of the English Arbitration Act, addresses the concerns over the lack of yardstick in determining the multiple applicable laws within a single contract. With the recognition of multiple applicable laws, the English courts can apply the three steps of the choice of law rules under common law to establish the importance of the place of arbitration on the governing law of the arbitration agreement. All these can be done by means of contractual effective interpretation with an aim to validate a defective arbitration agreement to achieve the goal similar to that of the transnational validation principle, but with the English yardstick to allow the parties to follow. While the Supreme Court's decision was criticised for instating an antithetical 'default rule' that the law of the arbitral seat should apply, where no choice of law has been made, as the law presumptively most 'closely connected' to the arbitration agreement,[192] one should be reminded that

[186] *Ibid.* [125-130] The court highlighted that the implied test should fall into the first limb of the same provision providing "the law to which the parties [have] subjected it".
[187] *Ibid.* [130]; van den Berg (fn 48) 126-7.
[188] *Ibid.* [142]
[189] *Ibid.* [143]
[190] *Ibid.* [142]
[191] *Ibid.* [144]
[192] Koepp and Turner (fn 9) 386.

adjudicating on the importance of the seat is not a direct application but a complex process under the English common law. Still, being reminded of Merkin's cautious tone on the presumption,[193] one must avoid the presumptive conclusion[194] but be aware of the necessity to examine the arbitration agreement itself and conflict of law rules in every case before determining whether the presumption should be upheld. [195] Now, international parties who choose London as the seat of arbitration must be reminded of the English contractual interpretative approach as Lord Hoffmann once highlighted in Fiona Trust. That is, though some rational commercial purpose and an understanding of this purpose will influence the interpretation of the agreement between the parties, [196] a proper interpretative approach requires the court to give effect to the parties intending meaning.[197]

[193] *Sonatrach Petroleum Corpn (BVI) v Ferrell International Ltd* [2002] 1 All ER (Comm) 627 [32]: "Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract."
[194] Robert Merkin, Arbitration Law (2020 Informa) para 7.12.
[195] Ibid.
[196] *Fiona Trust* (fn 118) [5].
[197] *Ibid.* [8].