DETERMINING THE LAW TO GOVERN AN ARBITRATION AGREEMENT: A QUEST FOR THE BEST APPROACH

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Abstract

This article deals with the complexities surrounding the determination of the governing law in an international commercial arbitration, particularly the law which is to govern the arbitration agreement itself. The arbitration agreement is separate from the main contract or agreement between the contracting parties. Thus the question arises whether the arbitration agreement is to be governed by the law of the main underlying contract or the law of the seat of the arbitration. This article aims to examine the three stage approach test as founded in *Sulamerica Cia Nasional* v *Enesa Engelharia* and its application in three different jurisdictions, namely, Singapore, United Kingdom and Malaysia. The article then discusses the case of *Enka v Chubb* which appears to have resolved some of the complexities in this area of the law. This article argues that the adoption of a uniform international choice of law rule for arbitration agreements in the form of a validation principle is ultimately the way forward to end the quest for a proper approach to determine the governing law for the arbitration agreement.

Keywords: Arbitration agreements, choice of law, Malaysia.

I INTRODUCTION

The law relating to arbitration agreements forms one quarter of the 'layer cake' theory, frequently used to illustrate for a better and easy understanding of the applicable law in a commercial arbitration. The first layer is the law governing the substance of the dispute, and this relates to the causes of action, types of damages, remedies claimed and also the quantum. The second layer is regarding the law and procedural rules governing the conduct of the arbitration, or simply put, the *'lex arbitri'* or the curial law which will facilitate the conduct of the arbitration proceedings. Then there is the third layer, which is the law governing the arbitration agreement. The last layer is the law governing the recognition and enforcement of the arbitration award. All these four layers make up the 'layer cake'.

It is this 'layer cake' that all parties to the arbitration, including the appointed arbitrator(s), will look into to navigate how the arbitration will take place. Only once these applicable laws are determined, can the arbitration proceedings safely journey through this myriad of maze.

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This article examines the complexity surrounding the law governing the arbitration agreement and the impact that it has on the Malaysian legal landscape. The article discusses the various tests, *inter alia*, the early preference by the domestic courts to rely on the law of the substantive contract itself because this is seen as the easy choice, since it is already there to be *'picked'* and then the preference for the *Sulamerica* presumption. However, the latter test did not address the lacuna that still persists in this area when it comes to determining the governing law of the arbitration agreement. This approach was taken by the courts because the law of the seat will have 'curial' jurisdiction over the arbitral tribunal when it comes to enforcement of certain orders or reliefs sought by one of the parties. Perhaps, this emphasis by the courts to select the law of the seat as being the 'closest connection or most significant relationship' to be the governing law of the arbitration agreement is cloaked by its real purpose, which is to show the pro-arbitration stand being taken by the domestic courts of a state. This approach is actually without taking into consideration whether the dispute is actually capable of being arbitrated upon and thus is not likely to be challenged by the opposite party on the issue of the arbitrator's jurisdiction. Thus in order to circumvent this defect, it is suggested that the validation principle be applied when it comes to determining what is the law to govern the arbitration agreement.

II ARBITRATION AGREEMENTS

A *Core Requirements*

An arbitration agreement is the foundation of every intended arbitration. Without this agreement, there cannot be a consensus between both the parties to have their dispute resolved by way of an arbitration. There must also be consent between both parties to have their dispute resolved by arbitration. Then, with the existence of an arbitration agreement, it is said that the jurisdiction of the arbitrators is established.

Another vital factor about the arbitration agreement is that the arbitration clause in the arbitration agreement is deemed to be separate from the main contract. This would indicate that the arbitration clause cannot be seen as being part and parcel of the main contract. In fact, this clause is independent and distinct from the main contract.

This distinction is crucial for a commercial arbitration because even if the main contract is contentious for reasons of it being terminated, vitiated, or if even its validity is called into question by one of the parties to the dispute, because of the doctrine of separability,[1] *inter alia*, the arbitration clause is seen as separate and distinct from the

[1] The doctrine of separability is now incorporated in most States which have adopted the UNCITRAL Model Law on International Commercial Arbitration, adopted 21 June 1985 (amended 7 July 2006) UN Doc A/40/17 annex 1 and A/61/17 annex 1 ('Model Law') as its procedural law/curial law in relation to the conduct of the arbitration. For instance, Article 16(1) of the Model Law states that: 'The arbitral tribunal may rule on its own jurisdictions, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause'. Section 7 of the *Arbitration Act 1996* (England & Wales) also recognises the concept of separability of an arbitration agreement wherein it ensures that dispute resolution procedures selected by the parties survives the main agreement. This principle was again further re-enforced

main contract. Thus the designated arbitrators can exercise or rely on the doctrine of *kompetenz-kompetenz* empowering them to decide on their jurisdiction and decide on the merits of the dispute in the main contract. From this principle, it can be inferred that it is common for the parties' arbitration agreement to be governed by a law different from the law governing their underlying contract, i.e. 'it has long been recognized that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole'.[2]

To recap, some of the core elements required for a valid arbitration agreement are, *inter alia*, it must be in writing, there must be consent by both parties and the arbitration clause is separate from the main contract. Of course, there are also other elements, such as there must be a defined contractual relationship between the parties to the dispute and the subject-matter must be arbitrable.

B *Applicable/Governing Law*

It is a normal assumption that the law that is applicable to the substance of the dispute (substantive law) will be the applicable law of the arbitration agreement. But this may not always be the case, because there could be a situation where the arbitration agreement is governed by a different law from that of the main contract. Therefore, where there is no express choice made in relation to the applicable law to govern the arbitration agreement, then it is incumbent upon the arbitral tribunal to determine what is the applicable law concerned.

The question that arises is how does one determine what is the applicable law governing the arbitration clause, if there is no express choice of law? In this situation, the arbitral tribunal will look for the *implied* choice of law. However, if both an express and implied choice of law is absent, then it will be left to only one possible scenario[3] as being the most common and preferred approach*,* namely to choose the law with the *'closest connection'* or *'most significant relationship'*. This approach is expounded below.

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in the case of *Fiona Trust & Holding Corp* v *Privalov* (2007) UKHL 40, where the House of Lords stated that, 'the principle of separability enacted in section 7 means that the invalidity of rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement'.

2 Gary Born, 'The Law Governing International Arbitration Agreements: An International Perspective' (2014) 26 *Singapore Academy of Law Journal* 819 ('Born, International Perspective').

3 Gary Born, *International Commercial Arbitration* (Wolters Kluwer Law and Business, 2nd ed, 2014) Vol 1, 487 ('Born, *International Commercial Arbitration*') – National courts, arbitral tribunals and commentators have adopted a wide variety of choice of law approaches to issues of substantive validity, ranging from application of the law of the judicial enforcement forum, to the law of the arbitral seat, to the law governing the underlying contract (substantive law), to a 'closest connection' or 'most significant relation standard', to a 'cumulative' approach looking to the law of all possibly relevant-states. This multiplicity of choice of law rules leads to delay and expense, resulting from the need to engage in choice of law debates, before both arbitral tribunals and national courts, when disputes arise concerning …validity of the arbitration agreements. Hence, this is inconsistent with parties' expectation of an efficient, centralized dispute resolution mechanism in entering into international arbitration agreements.

C *The Law of the Seat (*Lex Arbitri*)*

The law of the seat of the arbitration is the curial law, or rather it is the law of the place or venue of the arbitration. This would also mean that the domestic courts of the place of arbitration will have curial or supervisory role over the arbitration proceedings. Once the law of the seat is selected, then this will affect the law that governs the arbitration. Also, the law of the seat will determine the nationality of the award which is relevant for the enforcement of the award.

In many jurisdictions,[4] both the civil and common law jurisdictions have adopted the substantive law of the arbitral seat to the arbitration agreements. It is thus commented[5] that 'in the absence of a choice of law provision, the validity of the arbitral clause (arbitral agreement) must be decided according to the law of the seat of the arbitral tribunal'.

In the upshot, it has been commented[6] that, except in cases where the parties make an express choice concerning the law to govern the arbitration agreement, the choice of the place of arbitration generally implies a choice of the application of the arbitration law of that place. However, there is also another view for this contention, which is found in Article V(i)(a) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*[7] ('*New York Convention 1958*') wherein it is submitted that arbitration agreements are 'procedural' in nature and thus it is inevitably subject to the law of the arbitral seat. Further in some of the awards, it is also said that 'as a matter of principle, because of its autonomous character, the validity of the arbitration clause is governed by the law in force in the country of the arbitral seat'.

However, this view eventually lost favour because it runs counter to the principle of party autonomy (which affirms the parties' freedom to select the seat, the arbitral

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4 In the Indian case of *Citation Infowares Ltd., v Equinox Corp.* (2009) 7 SCC 220, where it was held that '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 of governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held'. Also in *National Thermal Power Corp. v Singer Co.* 1993 AIR 998, the Indian Supreme Court held that 'where …there is no express choice of law governing the contract as a whole, or the arbitration agreement as such, a rebuttable presumption may arise that the law of the country where the arbitration agreement is agreed to be held is the proper law of the arbitration agreement'. In *C v D* (2007) EWHC 1541 (Comm) – the Court of Appeal ruled that English law was the governing law of the arbitration agreement even though it appeared in a contract governed by New York law. The Court of Appeal decided this on the basis that London was the seat of the arbitration and so the parties had agreed that any challenge to an interim or final award would only be on the basis of English law and not New York law. Further it was also said in this case that 'an international arbitration agreement is 'more likely' to be governed by the 'law of the seat of the arbitration than the law of the underlying contract,' because the arbitration agreement 'will normally have a closer and more real connection' with the place of the seat. In a 1994 Tokyo High Court decision – the court held that 'if the parties' will is unclear we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply'.

5 Born, *International Commercial Arbitration* (n 3) 509.

6 Ibid 512.

7 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention 1958*'). Art V(i)(a): Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) the parties to the agreement referred to in the article II were, under the law applicable to them, under some incapacity, or that said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

procedure and the law to govern their arbitration agreement). Therefore, as a consequence the national courts and the arbitral tribunals accepted the theory that the parties' intention as to the law of the seat of the arbitration will govern their arbitration agreement.

In a nutshell, the implied choice of law analysis would usually result in the application of the law of the seat as the governing law of the arbitration agreement. However, it allowed the application of other laws to be also considered.[8] Hence, this approach of implied choice of law is the preferred approach rather than merely relying on the procedural approach because the former is more keeping in touch with the party autonomy principles and on which the international arbitral process is founded.

D *Law of the Contract (Substantive Law)*

This arises when the parties to the dispute include a choice of law clause in the underlying contract by selecting the law which governs the contract as the law applicable to the arbitration agreement.[9]

It has been noted that[10] that since an arbitration agreement is just one of the many clauses in a contract, therefore the assumption is that the law selected by the parties to govern the contract (substantive law) will also govern the arbitration agreement.

What this approach tells us is that, an arbitration agreement is generally governed by the same law as the rest of the contract. However, due to the separability nature of the arbitration agreement, this paves the way for the arbitration agreement to be governed by a different law from that which governs the main contract.

E *'Closest Connection or Most Significant Relationship'*

This approach is a more flexible one than the earlier two approaches discussed above which are based on the application of a single connecting factor. The courts[11] will recognise and

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8 In *Bulgarian Foreign Trade Bank Ltd. v Al Trade Finance Inc* (2001) XXVI Yearbook Commercial Arbitration 291, a Bulgarian Bank concluded a contract with an Austrian Bank. The contract contained am arbitration clause which expressed a choice of Austrian law. A dispute arose between both the parties and arbitration was held in Stockholm. The award was challenged by the Bulgarian Bank in Sweden (the seat of the arbitration) on basis that the arbitration agreement was void for breach of an allegedly implied term of confidentiality. The Supreme Court of Sweden held that the arbitration agreement was valid under the law of the seat, although the parties' choice of law is the Austrian law to govern the underlying contract. This ruling is consistent with the accepted norm that the arbitration clause is separate from the main contract agreement.

9 In *Sonatrach Petroleum Corp. (BVI) v Ferrell International Ltd* (2002) 1 All ER 627, the English High Court decided that: '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'.

10 'Chapter 3: Applicable Laws' in Nigel Blackaby et al, *Redfern & Hunter on International Arbitration* (Oxford University Press, 5th ed, 2009) 166-167 ('*Redfern & Hunter*').

11 *Sulamerica Cia Nasional v Enesa Engelharia* (2012) EWCA Civ 638 ('*Sulamerica*'). In this case, the Court of Appeal held that it agreed with the High Court's decision where the court refused to apply Brazilian law (although Brazilian law was expressly chosen in the parties' general choice of law clause in an insurance contract) because 'the possible existence of a rule of Brazilian law which would undermine that position tends to suggest that the parties did not intend arbitration to be governed by that system of law'. The court further reasoned, 'from the assumption, the parties intended the same law to govern the whole contract, including the arbitration agreement (i.e., the Brazilian law), but specific factors may lead to the conclusion that that cannot in fact have been their intention. So, this court is unable to accept that the parties implied choice of Brazilian

give effect to the parties' choice of proper law, express or implied, failing which it will seek to identify the system of law with which '[t]he contract has the closest connection or most significant relationship'. In almost all cases of such nature, the courts will conduct the general conflict of laws analysis to determine the validity of the arbitration agreement. Should this test lead to an undesirable outcome, then the court will avoid it by applying a different law which validates the arbitration agreement.[12]

In the case of *Arsanovia Ltd., & others* v *Cruz City 1 Mauritius Holdings*[13] (*'Arsanovia'*), the High Court of England overturned an arbitration award on the ground that the Tribunal did not have substantive jurisdiction over the arbitration. The court was to determine the law applicable to the arbitration agreement in the absence of an express choice of law clause. This was needed to ascertain which one of the claimants was a party to the arbitration agreement. The High Court relied on the test in *Sulamerica Cia Nasional* v *Enesa Engelharia*[14] *('Sulamerica')* and had to consider whether the parties had impliedly, if not expressly, chosen an applicable law before considering which system of law had the closest and most real connection with the arbitration agreement. The court was essentially required to decide whether the law of the main contract (Indian law) or the law of the seat (English law) was the applicable law of the arbitration agreement. In this case, two agreements (a joint venture agreement and the shareholders agreement) was governed by Indian law and contained arbitration agreements. Moreover, both the agreements also provided for LCIA arbitration seated in London and there was no express choice of law selected for the arbitration agreement. The High Court in this case decided that the terms of the arbitration agreement excluded parts of the Indian *Arbitration and Conciliation Act 1996*. This demonstrated a mutual intention of the parties to choose the law of India as the law of the agreement. The choice of an English seat did not mean that the parties were to have been taken to have impliedly chosen English law as the law applicable to the arbitration agreement. Therefore, Indian law was the governing law of the arbitration agreement. This governing law clause was a 'strong pointer' to the parties' intention about the law to govern the arbitration agreement. There was no contrary indication other than the choice of London being the seat of arbitration.

It was held that the parties to the dispute had actually made an implied choice that Indian law was the governing law of the arbitration agreement.

III WHEN DO ISSUES REGARDING THE ARBITRATION AGREEMENT ARISE?

Due to the separability nature of the arbitration agreement, the domestic courts must ask itself a fundamental question - whether such dispute should be referred to arbitration or it is for the courts to determine the dispute. This question becomes relevant when there are interim measures being sought by one of the parties in the arbitration proceedings, or when

law to govern the arbitration agreement'. Hence, the court applied English law (the law of the seat of the arbitration), on basis that it is the 'closest and most real connection'.

12 Born, International Perspective (n 2) 841.

13 (2012) EWHC 3702 (Comm).

14 *Sulamerica* (n 11).

the issue regarding the establishment of the arbitral tribunal is disputed. It also becomes relevant if the other party applies to the domestic court to sanction the appointment of an arbitrator. Then at the post award stage, proceedings are initiated in the domestic courts to have the award set aside, annulled or enforced.[15] All these issues relate back to the arbitration agreement itself and what choice of law governs it, be it the law of the seat *(lex arbitri)* or governing law of the underlying contract (substantive law). For instance, in *Arsanovia* case, the issue was regarding the correct law that is applicable to the arbitration agreement, namely, whether the shareholders agreement between Arsanovia and Cruz City also included Burley (a non-signatory). It was the contention of Arsanovia that the arbitral tribunal did not have the substantive jurisdiction to decide on the issue. This is because Burley was part of the shareholders' agreement and the applicable law was Indian law (and Burley did not agree to be bound under Indian law). Basically, the court held that the parties to the shareholders agreement had intended for the arbitration agreement to be governed by Indian law (and thus this would mean that Burley who is a non-signatory to the arbitration agreement in the shareholders agreement cannot be subjected to the jurisdiction of the arbitral tribunal).[16]

IV THE THREE-STAGE APPROACH IN SINGAPORE, UNITED KINGDOM AND MALAYSIA

A *Singapore*

In Singapore, the case of *FirstLink Investments Corp Ltd* v *GT Payments Pte Ltd*[17] ('*FirstLink Investments Corp*') relied on *Sulamerica* and endorsed the three-stage approach. In this case, the court proceeded to determine the law impliedly chosen by the parties, deciding in favour of the law of the seat, rather than the law of the underlying contract, on the basis of the parties' implied intention to choose the law of the seat which validates their arbitration agreement.[18] Then there is also the case of *BCY* v *BCZ*[19] *('BCY')*, where the High Court had to decide on the applicable law to govern the arbitration agreement, since there was no express choice of law on this. The dispute here related to a Sale & Purchase Agreement (SPA) for shares in a company. The SPA contained an arbitration clause providing for ICC arbitration seated in Singapore and the law of the underlying contract was New York law (but no law was specified to govern the arbitration agreement). The High Court relying on *Sulamerica* reiterated that to determine the governing law of

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15 'Chapter 6, Arbitration Agreements – Autonomy and Applicable Law' in Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Wolters Kluwer Law and Business, 2003) 109-110.

16 Shaun Lee, 'Case Update: (1) Lack of substantive jurisdiction in respect of one respondent affects award as against the other respondent; (2) Substantive jurisdiction not affected by finding of liability under a different agreement', *Singapore International Arbitration Blog* (Blog Post, 27 March 2013) <https://singaporeinternationalarbitration.com/2013/03/27/case-update-1-lack-of-substantive-jurisdiction-in-respect-of-one-respondent-does-not-affect-award-as-against-the-other-respondent-2-substantive-jurisdiction-not-affected-by-finding-of-liability/>.

17 (2014) SGHCR 12 ('*FirstLink Investments Corp*').

18 Born, *International Commercial Arbitration* (n 3) 842.

19 (2016) SGHC 249.

the arbitration agreement, the three-stage test is to be applied. The second stage, which is the asking what was the implied law of choice, was used to determine the applicable law to govern the arbitration agreement. The High Court applied the '*presumption test*' and held that since the whole relationship of both parties is to be governed by the same system of law, therefore the natural *inference* is that the proper law of the arbitration agreement should be the law of the underlying contract. Further, the governing law of the main contract is also a 'strong indicator' of the governing law of the arbitration.[20]

BNA v *BNB*[21] *('BNA')* is another relevant case on the issue of the proper law of the arbitration clause. The arbitration clause provided for submission of the dispute '[t]o the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai'. The Singapore Court of Appeal reversed the findings of the High Court [where the latter applied the *'three-stage approach'* as adopted in *Sulamerica* (in *lieu* of the absence of an express choice of law) to govern the arbitration clause in the Takeout Agreement (TA)]. The Court of Appeal held that from the arbitration clause, it can be inferred that Shanghai was the arbitral seat and the law of the People's Republic of China (PRC) was the applicable law of the arbitration agreement. In this case, the defendants commenced arbitration proceedings against the plaintiff. The plaintiff challenged the proceedings on grounds that the arbitration agreement was invalid under PRC law. This was because PRC law strictly prohibits a foreign arbitration institution (SIAC) to administer a PRC seated arbitration. The Singapore Court of Appeal applied the three-stage approach by endorsing *Sulamerica* but it arrived at a different decision from the High Court. The Court of Appeal's line of analysis was as follows.[22]

- Did the parties expressly choose the proper law to govern the arbitration agreement? In this case, there was none selected by the parties. If there was one selected, then this line of analysis would end here and there would be no need to go further.
- Did the parties make an implied choice regarding the proper law to govern the arbitration agreement? When there is *no* express choice of law stated in the arbitration clause, then the implied choice of law should presumptively be the proper law of the contract.[23] This is known as the '*Sulamerica* presumption'. In this case, PRC law was the governing law of the contract and thus PRC law applied to the arbitration agreement. The Court of Appeal also said that the word 'arbitration in Shanghai'

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20 Kabir Singh, Kartikey M. and Andrew Foo, 'Two Roads Diverged in a Clause – The Law of a Free Standing Arbitration Agreement vs. The Law of the Arbitration Agreement That Sits Within a Main Contract', *Kluwer Arbitration Blog* (Blog Post, 4 January 2017) <http://arbitrationblog.kluwerarbitration.com/2017/01/04/two-roads-diverged-in-a-clause-the-law-of-a-free-standing-arbitration-agreement-vs-the-law-of-an-arbitration-agreement-that-sits-within-a-main-contract/> ('Kabir Singh').

21 (2019) SGCA 84.

22 Samuel Koh, 'Unpacking the Singapore Court of Appeal's Determination of Proper Law of Arbitration Agreement in *BNA v BNB*', *Kluwer Arbitration Blog* (Blog Post, 19 January 2020) <http://arbitrationblog.kluwerarbitration.com/2020/01/19/unpacking-the-singapore-court-of-appeals-determination-of-proper-law-of-arbitration-agreement-in-bna-v-bnb/>.

23 The view taken here is different from the view taken in *FirstLink Investments Corp* (n 17), where the High Court in this case stated that the law of the seat is the presumed implied choice of law to govern the arbitration agreement.

should be interpreted in its natural meaning to mean that the seat of the arbitration is Shanghai.[24]

- What is the system of law with the 'closest connection or most significant relationship' with the arbitration agreement? This analysis only applies if the choice of law to govern the arbitration agreement by express and implied means, fails.[25]

B *United Kingdom*

We have discussed the *Sulamerica* case and the birth of the three-stage approach, and how it was applied in a common law jurisdiction (Singapore). Now returning to the jurisdiction of the courts in England and Wales, a relevant case is *Habas Sinai Vi Tibbi Istihsal Andustrisi AS* v *VSC Steel Company Ltd*[26] where the court again followed the guidance provided in *Sulamerica* and *Arsanovia* on the law to govern the arbitration agreement. In this case, the seat of the arbitration was in London, but there was no express choice of law clause governing the law of the arbitration agreement. Applying the three-stage approach, the court stated that under the implied choice (being the second test), the applicable law of the arbitration agreement was the law of the country of the seat (namely, the law of England and Wales).

Then, came the case of *Kabab-Ji S.A.L.* v *Kout Food Group*[27] *('Kabab-Ji')*. In this case, the Kabab-Ji entered into a franchise development agreement (FDA) with Kout Food Group. A dispute arose under the FDA and Kabab-Ji commenced arbitration proceedings against Kout Food Group, although the licensee of the franchise is Al Homaizi (which was acquired as a subsidiary by Kout Food Group). The crucial parts of the FDA (which contained an arbitration agreement) is as follows:

- the seat of arbitration is to be in Paris (but arbitral proceedings to be conducted in the English language);
- the ICC Rules on arbitration apply; and
- the laws of England was the law applicable to the underlying contract.

The arbitral tribunal held that French law (this being the law of the seat) is also the governing law of the arbitration agreement. The arbitral tribunal also decided that the issue whether Kout Food Group was a party to the arbitration agreement is governed under English law, and whether all rights and obligations of Al Homaizi was transferred to Kout Group Food. An award was made in favour of Kabab-Ji that Kout Food Group has breached the FDA. Enforcement of the award by Kabab-Ji was carried out in England. However, Kout Food Group successfully resisted the enforcement of the award at the High Court primarily on two grounds. First, it was argued that English law (and not French law) is the law governing the validity of the arbitration agreement. Therefore,

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[24] Kabir Singh (n 20). It is submitted that this makes sense because once the place or venue of seat is determined, then the legal significance is that the system of law at the seat of the arbitration is the curial law/supervisory jurisdiction and it will govern the arbitral process until an award is made.

[25] 'Supreme Court Judgements' *Supreme Court Singapore* (Web Site) <https://www.supremecourt.gov.sg> – Case Summaries.

[26] (2013) EWHC 4071.

[27] (2020) EWCA Civ 6.

an express choice of law was already made as to the governing law of the arbitration agreement. Secondly, it was contended that Kout Food Group was not a party to the arbitration agreement under English law. Both arguments were successful.

Kabab-Ji then appealed to the Court of Appeal. The appeal was dismissed and the decision of the High Court was upheld. The appellate court held that the law of the underlying contract is not necessarily also the law of the arbitration agreement because of the existence of the doctrine of separability, wherein an arbitration agreement is separable from the main contract (this also is embodied in s 7 of the *Arbitration Act 1996*). In this case, Article 14 of the FDA (which is the arbitration clause) expressly specified that the dispute resolution is to be governed by English law. Hence, on this basis alone, the appellate court concurred with the findings of the High Court when it stated that since English law governed the arbitration agreement, therefore Kout Food Group did not become a party to the arbitration agreement between Kabab-Ji and Al Homaizi.[28]

The Court of Appeal also stated that once an express choice of law regarding the governing law is made, then it cannot be substituted by a different curial law, i.e., the law of the seat.

From all the cases above, it can be inferred that the final determination of the law that governs an arbitration agreement is of utmost importance because as the *Kabab-Ji* case has demonstrated, this determination put to rest the question whether an entity (Kout Food Group) was party to the arbitration agreement.

In summary, it is submitted that if there is no express choice of law of the arbitration agreement, then the law which has the 'closest and most real connection' applies.

Hence, the test of a 'strong pointer' as in *Arsanovia* and *BCY* was followed. The test here is determine whether the parties had expressly selected the law to govern the arbitration agreement, or to follow the law which has the 'closest connection or most significant relationship' and this could be either the law of the seat of the arbitration or the law of the underlying contract. The other approach is in *Sulamerica*, where the express choice of law governing the substantive contract is a factor to be considered, that is, the parties intended the arbitration agreement to be governed by the same law as the substantive contract, unless other factors emerge and this presumption (*Sulamerica* presumption) is displaced.

What is important in determining the governing law of the arbitration agreement, is firstly, whether there is an express choice of law made by the parties to the dispute. If yes, then the courts will recognize this choice and not go beyond to examine further. In the *Kabab-Ji* case, English law was the governing law of the contract, so the court extended the operation of English law from the other clauses to the arbitration agreement. Secondly, if there is an absence of the express choice of law in the arbitration agreement, then the courts will examine whether the parties have made an implied choice of law

[28] Joe Rich, 'Kabab-Ji: The Effect Of No Oral Modifications Clauses On Non-Signatories Of Arbitration Agreements Under English Law', *Kluwer Arbitration Blog* (Blog Post, 21 February 2020) <http://arbitrationblog.kluwerarbitration.com/2020/02/21/kabab-ji-the-effect-of-no-oral-modification-clauses-on-non-signatories-of-arbitration-agreements-under-english-law/>.

governing the arbitration agreement. Under this scenario, the *Sulamerica* presumption[29] will apply and this presumption is rebuttable to the point that the governing law of the main agreement extends to the arbitration clause. If there is an absence of the implied and express choice of law, then the 'closest connection and most significant relationship' test will be applied. In most instances, the arbitral seat is most likely to be adopted to be the governing law of the arbitration agreement.

Up to now the area surrounding the application of the correct choice of law to govern the arbitration agreement is muddled or to put it simply, quite confusing especially when multi conflict of laws must be applied in order to determine which is the applicable or governing law.

Very recently, the English Supreme Court had the opportunity to re-visit the complexities surrounding this area of the law in the case of *Enka Insaat Ve Sanayi AS* v *OOO Insurance Company Chubb & Ors*[30] ('*Enka* (SC)'). Briefly, the facts of this case are as follows. On February 1, 2016, a power plant which was insured by Chubb Russia, was severely damaged by a fire. Chubb Russia had provided insurance cover in favor of the owner of the power plant against such damage. The owner of the power plant had entered into a contract with another company (the main-contractor) for construction works to be carried out at the plant. The main-contractor then engaged a sub-contractor (Enka) in this construction project. The contract between the main-contractor and Enka included an agreement that disputes between them would be resolved through arbitration proceedings in London. In May 2014, the main contractor had transferred its rights and obligations under the contract to the owner of the power plant. In this case, the contract had been executed in both Russian and English versions (the Russian version was to prevail in the event of inconsistency). However, the contract did not have an express choice of law clause to determine which law is to govern the arbitration agreement. The dispute resolution clause in the contract stated that all disputes were to be settled under the Rules of Arbitration of the ICC, London. Chubb Russia, by way of subrogation, acquired all the rights of the owner of the power plant to pursue a claim on liability against the party responsible for the fire. Chubb Russia alleged that Enka was responsible for the fire and commenced court proceedings in Moscow. Enka argued that since there was an arbitration agreement executed between itself and the owner of the power plant, this matter should be arbitrated. Enka further issued a notice to arbitrate and in the interim, sought an anti-suit injunction to restrain Chubb Russia from proceeding with the court proceedings in Russia.

The High Court refused the anti-suit injunction to Enka. On appeal to the Court of Appeal,[31] Enka's appeal was allowed. Further it was decided that the proper court to grant the anti-suit injunction was the English court. This is because the parties had selected London as the seat of the arbitration and thus it being the 'curial law' has the power to

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29 In *Sulamerica* (n 11), the choice of law of the main agreement was Brazilian law and the seat of the arbitration was in London and because under Brazilian law, the arbitration was at risk of being ineffective, the court held that the presumption that Brazilian law (being the law of the main agreement) to govern the main agreement was rebutted and thus law of the seat (London) was selected as the governing law of the arbitration agreement.

30 (2020) UKSC 38 ('*Enka* (SC)').

31 (2020) EWCA Civ 574 ('*Enka* (CA)').

determine on any remedies that a party is seeking. English law was also to be used to determine whether Chubb Russia was in breach of the arbitration agreement when it proceeded to commence court proceedings in Russia. The Court of Appeal applied the three-stage approach and conducted the following analysis to determine the applicable law to govern the arbitration agreement when the law governing the seat (London) is different from the law of the main contract (Russia).[32]

(a) The first question is whether there was an *express* choice of law clause in the arbitration agreement? If there is an express choice of law clause in the main contract, then this may amount to an express choice of law to the arbitration agreement as in *Kabab-Ji* (where the court held that the English law as the governing law of the main contract is also the express choice of law of the arbitration agreement).
(b) The next question is whether there is an *implied* choice of law for the arbitration agreement. The implied choice of law governing the arbitration agreement is the law of the main contract, and if this implied choice of law is absent, then the law of the seat is to be selected.[33] The test as in *Sulamerica* was followed (*Sulamerica* presumption).
(c) The general rule should be what is the 'curial law' (or law of the seat) that is applicable to the arbitration agreement and if this is determined, then this law will be the governing law of the arbitration agreement.[34]

It is submitted that the Court of Appeal's the reason for selecting the law of the seat as the governing law of the arbitration was to promote legal certainty because if the curial court ceded procedural questions around arbitration agreements to a foreign court, then this would create a risk of parallel proceedings. Lord Justice Popplewell in the Court of Appeal introduced a new line of analysis; firstly, whether there had been an express or implied choice of law and secondly, in the absence of such express or implied choice of law, the *Arbitration Act 1996* (England & Wales) is to be the same as the 'curial law' as a matter of 'implied choice' and thus the governing law of the arbitration agreement. This would mean that the governing law of the arbitration agreement need not be the law of the underlying contract. Finally, the Court of Appeal held that given the choice of a London seat in *Enka*, therefore the arbitration agreement was to be governed by English law.[35] This decision of the Court of Appeal was partly upheld by the Supreme Court on

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[32] Mihaela Maravela, 'Hold on to Your Seats, Again! Another Step to Validation in *Erika v Chubb Russia*?', *Kluwer Arbitration Blog* (Blog Post, 5 May 2020) <http://arbitrationblog.kluwerarbitration.com/2020/05/05/hold-on-to-your-seats-again-another-step-to-validation-in-enka-v-chubb-russia/>.

[33] *Sulamerica* (n 11) – Lord Justice Moore-Bick stated the fact 'that the seat of the arbitration was in a different country from the country whose law governed the main agreement was an 'important factor' pointing away from the law governing the agreement'.

[34] *Enka* (CA) (n 31) – Lord Justice Popplewell said that 'supervisory jurisdiction was somewhat a misleading label, as the court of the chosen seat has a raft of powers, even when there is technically no arbitration to supervise. The term curial law, being the procedural law of the arbitration proceedings, was to be preferred'.

[35] *C v D* (2017) EWCA Civ 1282 – Lord Justice Longmore said 'by choosing London as the seat of arbitration, the parties must be taken to have agreed that proceedings on the award should only be permitted by English law and the choice of a seat for the arbitration must be a choice of forum for the remedies seeking to attack the award.' Lord Justice Longmore also went on to recognize the 'doctrine of separability' between the law of the underlying insurance contract and the arbitration agreement and added that 'if there is no express choice

October 9, 2020.[36] The Supreme Court arrived at the same conclusion as the Court of Appeal but via a different approach. The Supreme Court's decision on what is the proper law to govern the arbitration agreement can be summarized as follows:

(a) The law applicable to the arbitration agreement will be as what the parties to the dispute have chosen and in the absence of such choice, then it is the system of law to which the arbitration agreement is *'most closely connected'*.
(b) If the parties have not specified the applicable law to the arbitration agreement but they have chosen the law to govern the main contract containing the arbitration agreement, then this choice of law will apply to the arbitration agreement.
(c) Where the parties have made no choice of law to govern the arbitration agreement, or the contract as a whole, the court must determine the law with which the arbitration agreement is most closely connected. In most circumstances, it will be the law of the seat of the arbitration.

This third approach mentioned above is the default rule and it is supported by the following considerations; (i) the seat is where the arbitration is to be performed, (ii) it maintains consistency with international law and legislative policy, (iii) the law of the seat is likely to uphold the reasonable expectation of contracting parties who specified a location for the arbitration without choosing the law to govern the contract and lastly (iv) this approach provides legal certainty, allowing parties to predict easily which law the court will apply in the absence of a choice.

The majority of the Supreme Court held as follows,

> … the contract in this case contains no choice of law that is intended to govern the contract or the arbitration agreement within it. In these circumstances the validity and scope of the arbitration agreement is governed by the law of the chosen seat of arbitration, as the law with which the dispute resolution clause is most closely connected. We would therefore affirm - albeit for different reasons – the Court of Appeal's conclusion that the law applicable to the arbitration agreement is English law.[37]

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of law of the arbitration agreement, then choice of law is limited to whether the law with which that agreement (arbitration agreement) has its closest and most real connection is that of the seat of the underlying contract or the law of the seat of the arbitration'. To this question, Lord Justice Longmore replied that 'the answer is more likely to be the law of the seat of the arbitration than the law of the underlying contract'. The ratio in this case further supports the contention that the 'curial law' is always the mush preferred choice of law for the arbitration agreement, when there is no express choice of law stated. Lord Justice Neuberger also agreed with the Lord Justice Moore-Bick and held that, 'accordingly, (i) there are a number of cases which support the contention that it is rare for the law of arbitration agreement to be that of the seat of the arbitration rather than that of the chosen contractual law, as the arbitration clause is part of the contract, but (ii) the most recent authority is a decision of this court which contains clear dicta (albeit obiter) to the opposite effect, on the basis that the arbitration clause is severable from the rest of the contract and plainly has a very close connection with the law of the seat of the arbitration'.

36 *Enka* (SC) (n 30).

37 Ibid [171].

It has been commented[38] that the majority of the Supreme Court stated that for commercial parties, 'a contract is a contract and that they would reasonably expect a choice of law to apply to the whole of that contract, is sensible'. This majority view of the Supreme Court is also consistent with the principle affirmed by the House of Lords in *Fiona Trust & Holding Corpn* v *Privalov.*[39] However, the majority of the Supreme Court did not agree with the Court of Appeal's argument in this case 'that the doctrine of separability is relevant because due to its separable nature of the arbitration agreement, thus this led to the distancing of the arbitration agreement from the underlying contract'.

The Supreme Court also confirmed the 'validation principle' in cases where the arbitration agreement would be deemed to be invalid by relying on the principle of contractual interpretation i.e., that the contract should be interpreted properly so that it is valid rather than ineffective (*'verba its sunt intelligenda ut res magis valeat quam pereat'*). This is done to ensure that the commercial purpose of the arbitration clause is upheld because the parties are unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is a risk that that choice of that law would undermine that agreement.

It can be said that the Supreme Court applied the default rule and then concluded that the arbitration agreement is governed by English law, since English law is the system of law with which the arbitration agreement is most 'closely connected', the seat being in London.

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There is no automatic principle that the law of the seat of the arbitration will determine the choice of law for the arbitration agreement or clause. When the parties have failed to expressly state the choice of law to govern the arbitration agreement, then there will not be an easy determination process to determine the applicable law for this. It has been commented[40] that, the situation could be much worse if for some unknown reason or by an accidental omission, the parties do not select the law of the seat as well. This would be challenging because arbitral tribunals will then be faced with the problem of whether they can ignore mandatory provisions and public policy applicable to the place with the 'closest connection or most significant relationship'.

In Malaysia, ss 18(1) and 18(2) of the *Arbitration Act 2005*[41] fortifies the view that an arbitral tribunal can decide on its jurisdiction based on the doctrine of *kompetenz-*

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38 Mihaela Maravela, '*Enka* v *Chubb* Revisited: The Choice of Governing Law of the Contract and the Law of the Arbitration Agreement', *Kluwer Arbitration Blog* (Blog Post, 11 October 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/>.

39 (2007) UKHL 40: House of Lords held that the 'construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute to be decided by the same tribunal'.

40 Belden Premaraj, 'The Choices of Law – Better Safe Than Sorry The Malaysian Arbitration Perspective', *beldenlex.com* (Web Page) <http://beldenlex.com/training/publications/The%20Choices%20of%20Law%20-%20Better%20Safe%20Than%20Sorry.pdf>.

41 Act 646 ('*Arbitration Act 2005*'). Section 18(1) reads 'The arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement' and s 18(2) reads

kompetenz and that an arbitration clause which forms part of an agreement is independent and separable from the main agreement itself. Hence the doctrine of separability is followed in Malaysia.[42] This would mean that one of the core elements required to find the governing law of an arbitration clause incorporated in the main agreement will be governed by the same arbitral principles applied in Singapore and in England and Wales.

Then, there is s 9(1) of the Act which states an 'arbitration agreement' means 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen …'. This provision however is silent on the issue of what law is to govern the arbitration clause in the main agreement. The law governing the arbitration agreement is important as it will eventually determine whether the dispute is arbitrable[43] in Malaysia, should the law be selected by way of implied choice or the law having 'closest connection or most significant relationship'.

Lastly, there is s 22 of the *Arbitration Act 2005*.[44] This provision concerns the seat of arbitration. This provision is important because it provides that once the seat of the arbitration is decided, then the governing law would be the arbitral law of the State where the seat is located. Further, from this determination, it is also *inferred* that the Malaysian courts will have supervisory jurisdiction over the arbitration that is taking place in its jurisdiction.

On the issue of substantive law, there is s 30 of the *Arbitration Act 2005*[45] which deals with the applicable law to the substantive dispute (or the law of the contract). Simply put, this is the law that will govern the relationship between both the parties to the dispute in relation to the entire contract and not the arbitration agreement.

At this juncture, it is pertinent to consider the case of *Thai-Lao Lignite Co Ltd & Anor* v *Government of The Lao People's Democratic Republic*[46] *('Thai-Lao Lignite')* which was decided by the Federal Court. The Federal court coined a single question of law for its consideration, namely, where the governing and substantive law of the contract is foreign law and the seat of the arbitration is in Malaysia, does the parties' stipulation of Malaysia as the seat constitute an express choice of law for the arbitration agreement. To

'(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement and (b) a decision by the arbitral tribunal that the agreement is null and void shall not invalidate the arbitration clause'.

42 *Chut Nyak Isham Nyak Ariff v Malaysian Technology Development Corporation Sdn Bhd* (2009) 9 CLJ 32, where Apandi Ali J, held that '… s 18 of the Arbitration Act 2005, which touches on the competency of the arbitrator itself to decide on the validity of any arbitration agreement'. Also in the Federal Court case of *Press Metal Sarawak v Etiqa Takaful Bhd* (2016) 9 CLJ 1, on the issue of reliance on the Canadian Supreme Court case in *Dell Computer Corporation v Union des Consommateurs* (2007) SCJ No. 34, it said that, 'in a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence-competence principle …'.

43 *Arbitration Act 2005* (n 41), s 4(1) states that 'any dispute which the parties have agreed to submit to arbitration under an arbitration may be determined by arbitration unless the arbitration agreement is contrary to public policy or the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia'.

44 Ibid s 22: '(1) The parties are free to agree on the seat of the arbitration' and '(2) Where the parties fail to agree under subsection (1), the seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.'

45 Ibid s 30(1): 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute'.

46 (2017) 9 CLJ 273.

answer this question, the Federal Court undertook its own analysis wherein it said that the law of the main contract is Laotian law. Further, the Federal Court also held that there is a separate arbitration agreement in the form a project development agreement (PDA). Since there was no express choice of law being designated to govern this arbitration agreement and the seat of the arbitration was in Kuala Lumpur, therefore the courts in Malaysia will have supervisory jurisdiction and/or act as the 'curial law'. Lastly, it was held the UNCITRAL Rules is the applicable rules to be applied in the conduct of the arbitration.

The single issue relating to this case was what is the express choice of law governing the PDA when it is a separate agreement from the main agreement. Jeffrey Tan FCJ, stated as follows,

> …by applying the conflict of law rules, the law that has the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement. In this case, the arbitration was conducted in Kuala Lumpur and thus the Arbitration Act 2005 was the lex arbitri because the seat of the arbitration was Kuala Lumpur. This would also mean that the Arbitration Act was also the curial law. This would mean that New York law had no connection to the arbitration agreement. The PDA required the arbitral tribunal to be trained in New York law. But that was because New York law governed the substance of the dispute. The parties submitted on New York law. But that was to address the third-party beneficiary issue. Only the law of Malaysia had the connection, the closest and the most real at that, to the arbitration agreement. Hence, under the conflict of laws rules, the law applicable to the arbitration agreement should be the law of Malaysia.[47]

The Federal Court also mentioned that the three-stage test espoused in *Sulamerica* was applied when it arrived at the decision that Malaysian law should be the governing law of the arbitration agreement and this was because there was no express choice of law made here. These findings by the Federal Court were based on its understanding that although there was an agreement on the law applicable to the substance of the dispute in an international arbitration (governing the law of the contract), then the governing law of the agreement shall still be determined by the conflict of laws rules. The Federal Court also held that s 37(1)(a)(ii) of the *Arbitration Act 2005*[48] is crucial when determining this issue as to the governing law of the arbitration agreement. This provision requires a consideration of the question whether an arbitration agreement is valid under the law which the parties have subjected it to.

The *Sulamerica* presumption was not applied in this case. If it was applied then the rebuttable presumption will indicate that New York law, being the law of the substantive dispute (or contract) is the applicable law to the arbitration agreement. Be that as it may,

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47 Ibid [187].

48 *Arbitration Act 2005* (n 41). Section 37(1)(a)(ii) concerns an application to set aside an award of the arbitral tribunal at the High Court (being the supervisory and/or curial court of the seat of the arbitration), provided 'the party making the application provides proof that the arbitration agreement is not valid under the law to which parties have subjected it…'.

it is commented that the Federal Court's findings in this case can be subjected to much debate, for the following reasons.

(a) There is no necessity to apply the conflict of laws rule to determine the governing law applicable to the arbitration agreement since because of party autonomy, i.e., both parties had actually selected New York law as the law of the contract and this was stated in Article 18 of the PDA.
(b) If such is the situation, then the parties have already determined that the governing law of the arbitration agreement is New York law. This is because New York law is mentioned in Article 18 of the PDA, whereas Kuala Lumpur is only selected as the law of the seat to provide 'curial' services to the conduct of the arbitration.
(c) The test of 'closest and most real connection' need not be applied yet, unless the three-stage approach is used in an analytical way to determine the governing law of the arbitration agreement. If this was used, then the outcome may have been different.
(d) There was no express choice made by the parties.
(e) Implied choice, applying the *Sulamerica* presumption, can be rebutted since the parties have mentioned in Article 18 of the PDA that New York law is to govern the law of the contract. Applying the 'strong pointer' principle as in *Arsanovia* and *FirstLink Investments Corp*, it is submitted that New York law is the law of the arbitration agreement.
(f) Following from the above, there is no need to discuss the issue of 'closest connection or most significant relationship'.

It is unclear why the Federal Court rushed to apply the 'closest and most real connection' principle in this case. Perhaps the Federal Court was mindful of Malaysia being a Model Law[49] State and also a signatory of the *New York Convention 1958* that it placed emphasis on s 37(1)(a)(ii) of the *Arbitration Act 2005*, and may have applied the validation principle.[50] This principle goes beyond the law of a single jurisdiction, as it diminishes the inconsistencies that arise in a choice of law clause rules and it is more in harmony with the purposes of international instruments and also parties' objectives in concluding international commercial agreements.

In a more recent case of *Arch Reinsurance Ltd* v *Akay Holdings Sdn Bhd*[51] *('Arch Reinsurance')*, the Federal Court held that the dispute resolution clause in both a Subscription Agreement and Bond Agreement contained an arbitration clause but there was no such clause in the Charge, which merely stated that (i) parties submit to the non-

[49] Model Law (n 1) art 34(2)(a)(i) – 'Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) …an arbitral award may be set aside by the court … only if the party making the application furnishes proof that …the said agreement is not valid under the law to which the parties have subjected it …'

[50] Born, International Perspective (n 2) 834 – this validation principle provides that, if an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, its validity will be upheld, even if it is not valid under any of the other potentially applicable choices of law. This validation principle better effectuates with the parties' objectives and also consistent with the *New York Convention 1958* (n 7) and the Model Law (n 1).

[51] (2019) 1 CLJ 305.

exclusive jurisdiction of the Malaysian courts and (ii) Malaysian law as the governing law. Arch proceeded to issue foreclosure proceedings, which is statutory in nature in the Malaysian court for the sale of the land (under the *National Land Code 1965*) that was charged to it by Akay. Akay filed an anti-suit injunction to halt or stay the civil proceedings in the national court and contended that the underlying dispute must first be resolved by arbitration before Arch could commence foreclosure proceedings. The High Court dismissed Akay's application. On appeal to the Court of Appeal, the findings of the High Court were reversed. The matter proceeded to the Federal Court. One of the issues before the Federal Court was whether the dispute underlying the Charge fell within the scope of the arbitration agreement. Another issue was whether statutory foreclosure proceedings is arbitrable under the Malaysian *Arbitration Act 2005*. However, what is relevant here is whether the Federal Court was correct in applying Malaysian law as being the choice of law to determine the dispute relating to the scope of the arbitration agreement. This is because in *Thai- Lao Lignite* case, the Federal Court held that in the absence of an express choice of law to govern an arbitration agreement, then the applicable law of the arbitration agreement will be the law of the seat, which is Malaysia.

In the *Arch Reinsurance* case, the arbitration agreement provided for Singaporean law as the seat of the arbitration and the governing law. Therefore, if it is accepted that this is the parties' express and implied intention as to their commercial efficacy, then it can be argued that the curial law (the law of Singapore) is the right forum to decide on this dispute. It will then be for the courts in Singapore to decide on the arbitrability of the remedy sought by Arch against Akay. This is one of the shortcomings in the choice of law approach if the test of closest and most real connection is applied, which will depend on the substantive law of the underlying contract as being the law of the arbitration agreement.

V THE CURRENT APPROACH

In Malaysia, it appears from the *Thai-Lao Lignite* case that the validation principle will be applied to give effect to the arbitration agreement. The Federal Court applied the conflicts of law rule when it decided that the law of the seat is also the law of the arbitration agreement, when the dispute resolution clause was silent on this.

The Singapore Court of Appeal's decision the *BNA* case that PRC law which was the law of the seat should be the governing law of the arbitration agreement is now doubtful because it said that the invalidating effect of PRC law on the arbitration agreement was *not* a relevant consideration in determining the proper law of the arbitration agreement. However, the Court of Appeal suggested that if there was evidence of the parties' awareness of the effect of PRC law on the arbitration agreement, then the invalidating effect would be considered. This approach is contrary to what was decided in *Sulamerica* and also in the *BCY* case.

The courts are now embarking upon the *validation principle* in an attempt to prevent the arbitration agreement from being ineffective or invalid under the law of the seat. This was the approach taken in *Enka* by the Court of Appeal. It is also commented[52]

[52] Born, International Perspective (n 2) 848.

that the traditional choice of law approach suffers from grave deficiencies in the form of unpredictable and arbitrary results. The validation principle is the way to move forward to select the national law which would give effect to the parties' arbitration agreement.

When one looks closely at *Sulamerica*, it will be noticed that it actually involved an application of the validation principle because the Court of Appeal conducted the general choice of law analysis which led to the law (Brazilian law) that would invalidate the arbitration agreement. Rather than arriving at an undesirable outcome, the Court of Appeal avoided it by applying the law of the seat (London) which validated arbitration agreement. London as the seat of the arbitration entailed acceptance by the parties that English law would apply to the conduct and supervision of the arbitration. It can be inferred that the parties intended English law to govern all aspects of the arbitration agreements.

In the United States of America, the law of the seat is important. The *Federal Arbitration Act 1925* (FAA) basically controls arbitrations involving interstate or foreign commerce and also implements the *New York Convention 1958*. This would mean that the scope of the FAA is such that it appears to constitute the law governing the arbitration agreement when there is an express choice of state (or foreign law) in relation to the arbitration agreement itself that is inconsistent with the FAA's policies. In *Pedcor Mgt Co. Inc. Welfare Benefit Plan* v *North American Indemnity*,[53] the arbitration agreement expressed a choice of Texan law but the court took the position that 'it is well established that the FAA pre-empts state laws that contradict the purpose of the FAA by requiring a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'

The decisions in cases from the United States indicate that the *Sulamerica* presumption is the preferred choice. Further in the case of *AT&T Mobility LLC* v *Concepcion*,[54] the US Supreme Court held that the rule under California state law was an obstacle to the full purposes and objectives of Congress, so the application of California state law to the arbitration agreement was pre-empted by the FAA.

Moreover, it has been commented[55] that the FAA creates a body of federal substantive law of arbitrability and pre-empts contrary state law policies because once the dispute is covered by the FAA, the federal law applies to all questions of interpretation, construction, validity, revocability and enforceability. The United States courts have taken a way out to resolve the dilemma of what law to apply in relation to the arbitration agreement by looking at an Act passed by Congress because there is a pre-emptive power enshrined in it. In most common law jurisdictions, the approach on how to deal with the proper law of the arbitration agreement is still to look at the substantive law of the main contract and the law of the seat when implying the proper law of the arbitration agreement, and with a caveat that the presumptive law may be rebutted if it invalidates the arbitration agreement.

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53 343 F 3d 355 (5th Circuit, 2003).

54 131 S.Ct 1740, 1753 (2011).

55 *Redfern & Hunter* (n 10) 163.

VI *SULAMERICA* PRESUMPTION vs VALIDATION PRINCIPLE

In advancing the argument for the usage of the validation principle, it is prudent to look into the relevance of the *Sulamerica* presumption and whether this accords with the *New York Convention 1958*. The reasoning[56] behind this proposal is because one ought to remember that the validation principle in essence expressly aims to validate the arbitration agreement. This also gives the parties the commercial intention to agree to an effective and workable international dispute resolution mechanism.

The *Sulamerica* presumption actually deviates from the *New York Convention 1958*, especially Article V(1)(a) where the said Article states that in the absence of the express or implied choice of law, the *New York Convention 1958* provides for the default selection of the law of the seat and not the law which has the 'closest and real connection'. In *Kabab-Ji*, the Court of Appeal relied on English contract law as the law of the arbitration agreement, although the principles of the contract law conflicted with the choice of law principles of the *New York Convention 1958*. Then in *Enka*, the Court of Appeal endorsed the three-prong test in *Sulamerica* and said that the parties had selected the law of the seat as the proper law of the arbitration agreement. The court's reasoning was based on two primary grounds: (i) due to the separability doctrine, the arbitration agreement is viewed as being separate and distinct from the main contract, therefore the governing law should also be treated as separate and (ii) the jurisdiction of the arbitral tribunal to rule on its own on the application of the choice of law (when there is an overlap between the governing law of the arbitration agreement and the main agreement).

There is also an argument that the separability doctrine, (which is advocated as being one of the reasons for the distinction between the arbitration agreement and the main agreement itself, especially on what choice of law is applicable) is just to reflect the parties' presumed intention that their agreed procedure for resolving disputes should remain effective. Otherwise in such circumstances, this would render the substantive contract ineffective. It is also further commented[57] that the purpose of the doctrine is to give legal effect to that intention and not to insulate the arbitration agreement from the substantive contract for all purposes.

In *Enka*, the court fell into the usual argument which is to give precedence as to the governing law of the arbitration agreement, whether it should be the law of the seat or the law of the main contract. The majority of the Supreme Court held that the arbitration agreement is most 'closely connected' with the law of the seat if the parties had chosen one. Also, it is consistent with international law and legislative policy, such as the *New York Convention 1958*. The other reason for treating an arbitration agreement as governed by the law of the seat of arbitration (in the absence of choice) is because under Article VI(a) of the *New York Convention 1958* – the applicable law of the arbitration agreement is the law of the seat in the absence of an agreement of the parties on this.

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[56] Steven Lim, 'Time to Re-Evaluate the Common Law Approach to the Proper Law of the Arbitration Agreement', *Kluwer Arbitration Blog* (Blog Post, 5 July 2020) <http://arbitrationblog.kluwerarbitration.com/2020/07/05/time-to-re-evaluate-the-common-law-approach-to-the-proper-law-of-the-arbitration-agreement/>.

[57] Ibid.

The Singapore case of *BNA* is another example where the High Court did not apply the validation principle and in fact found that its application could create problems at the enforcement stage because Article V(1)(a) of the *New York Convention 1958* contains choice of law provisions for determining the proper law of the arbitration agreement. This is in line with the parties' intention, whereas the validation principle seeks to validate an arbitration agreement without necessarily having regard to the parties' choice of law.

What then is the position when it comes to the choice of law as to the governing law of the contract? In order to answer this, Articles II and V(1)(a) of the *New York Convention 1958*[58] must be read together. Both these articles must be read together because Article V(1)(a) prescribes a choice of law rule and also gives effect to the parties' autonomy, providing for application of the law selected by the parties (either express or implied) to govern their agreement to arbitrate. This Article also prescribes a default rule, where the arbitration agreement will be governed by 'the law of the country where the award was made'.

It has to be borne in mind that the opposite position on the choice of law is the application of the law of the seat of the State with the 'closest connection or most significant relationship' to the arbitration agreement. It has been commented[59] quite extensively that the 'closest connection or most significant relationship' has its shortcomings. Firstly, this test produces uncertain and unsatisfactory results. Secondly, the law of the seat of arbitration is based upon an exclusive focus on the procedural aspects of arbitration and totally ignores the contractual character of the agreement to arbitrate. Thirdly, the law of seat also mistakenly converges the law of the arbitration agreement with the law governing the arbitral proceedings, which do not necessarily coincide. Fourthly, the law of the seat of the arbitration also disregards the close connection between the arbitration agreement and the main contract. Most importantly, this test of 'closest connection or most significant relationship' disregards the doctrine of separability when the parties intend to choose a neutral forum in order to resolve their disputes.

Enter the validation principle, which is consistent with the *New York Convention 1958*.[60] This principle is not connected to a single law of a jurisdiction and in fact it looks into the parties' intention in concluding arbitration agreements and thereafter submits disputes to resolution by arbitration. Therefore, Articles II and V(1)(a) of the *New York Convention 1958* requires recognition of the parties' implied choice of law by way of validation principle where there is a national law that will give effect to the parties' agreement to arbitrate, rather than to invalidate the arbitration agreement.

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58 *New York Convention 1958* (n 7). Article II: 'Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration'.

59 Born, International Perspective (n 2) 831.

60 Also consistent with arts 8, 34 and 36 of the Model Law (n 1).

VII CONCLUSION

The quest for the best approach in determining the law to govern the arbitration agreement has been going on for quite a while. The quest is likely to continue on, because not all national courts have grasped an accurate understanding as to how to ascertain the parties' core intention. If the choice of law rules still hang on to the notion of a single jurisdiction, then it will bring a disorderly situation to the doctrine of separability. This will also defeat the pro-enforcement objectives stand adopted in the *New York Convention 1958*. Therefore, it is submitted that the adoption of a uniform international choice of law rule for arbitration agreements, i.e. a validation principle, is to be lauded because it would be applied to select that national law which would give effect to (validate) rather than invalidate the parties' arbitration agreement. It is further submitted that the jurisdictions which choose this approach would stand out as being neutral and as selecting an efficient means of resolving commercial disputes.