39 Essex CHAMBERS

OUTLOOK

NEWS AND VIEWS FROM THE
39 ESSEX COMMERCIAL AND CONSTRUCTION GROUP
July 2020

INTRODUCTION

David Hopkins

Welcome to the July 2020 edition of Outlook, a roundup of news and views from the 39 Essex Commercial and Construction Group.

Starting on Monday 27 July, the UK Supreme Court will hear, over two days, an expedited appeal from the Court of Appeal in *Enka v Chubb*. The first issue for determination by the court will be: What is the correct approach to determining the proper law of an arbitration agreement? Among other things, Lords Kerr, Sales, Hamblen, Leggatt and Burrows will also consider the role of the court of the seat of an arbitration and the circumstances in which an English court may permit a foreign court to determine whether proceedings before the foreign court give rise to a breach of an arbitration agreement. The case will, no doubt, be watched extremely closely by dispute resolution practitioners around the world, not only in common law jurisdictions.

In advance of the hearing, we are extremely pleased to present the articles in this month's newsletter, all on the topic of the proper law

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of an arbitration agreement. **Steven Lim, Ben Olbourne, Niraj Modha** and **Philippe Kuhn** first jointly consider several recent significant decisions from a number of jurisdictions. They then each separately consider the question normatively and offer some thoughts as to possible approaches and emphases. The articles have been adapted from a webinar, *The Proper Law of An Arbitration Agreement: Making Sense of A Muddle,* presented by Steven, Ben, Niraj and Philippe on 30 June 2020. A recording of the webinar can be viewed on our website.

QUARANTINE QUERIES

Although lockdowns are being relaxed around the world, many of us are still working from home, perhaps for the foreseeable future. The Commercial and Construction team continues to offer our new initiative which we hope will help those of you who are working away from the office. We have established a team of silks and juniors who will be available for up to half an hour – free of charge – to talk through the kind of issues that you would previously have mulled over with a colleague at the coffee machine. The discussion will be on a "no liability" and "no names" basis; however, you will be asked to provide some brief details of the query to our clerks so that they can make a barrister available.

If there is a matter that you would like to discuss (COVID-19 related or otherwise) please contact:

Niki Merison
niki.merison@39essex.com
+44 (0)7872 178 645

or

Mark Winrow
mark.winrow@39essex.com
+44 (0)7930 333 993

and book a slot with one of our barristers.

THE PROPER LAW OF AN ARBITRATION AGREEMENT

Steven Lim
Ben Olbourne
Niraj Modha
Philippe Kuhn

The proper law of an arbitration agreement is a complex topic. Partly this complexity is inherent in the interplay of the multiple laws that come into play in international arbitrations. It is also fair to say that recent English court decisions, and those in other jurisdictions following English law, like Singapore, have added to the complication and confusion. If one is clear and transparent about what one is trying to achieve when considering the proper law of the arbitration agreement, which must be to give effect to the parties' agreement to arbitrate, the law need not be as complex and confusing as it is now.

This is relevant for the wider international arbitration community, and not just for common law jurisdictions. There is clearly merit in a consistent approach across all jurisdictions. A typical international arbitration very likely involves two or more parties from different jurisdictions, agreeing to arbitrate in a yet different neutral jurisdiction, applying yet again a different neutral law to the substance of the dispute. These cases very often cross common law/ civil law borders. An example of this is the *Kabab-Ji S.A.L v Kout Food Group* [2020] EWCA Civ 6; [2020] 1 Lloyd's Rep 269 (***"Kabab-Ji"***) case involving parties from Kuwait and Lebanon, with arbitration in Paris, English law applying on the merits and where the English and Paris Courts of Appeal have disagreed on the proper law of the arbitration agreement – the English court finding it is English law and the

French court, French law. So, there is a need for rationalisation and consistency, not just within the English common law but also internationally.

At the outset, we consider briefly how it is that this issue of the proper law of an arbitration agreement arises and why it may be important. We make two important points. First, we start with the principle of separability (or severability) of the arbitration agreement. At its simplest, this provides that an arbitration agreement is independent of the contract within which it is found (**"the main contract"**): see, for example, *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2007] 4 All ER 951 (***"Fiona Trust"***) and section 7 of the Arbitration Act 1996 (**"the 1996 Act"**). The extent of this independence remains unclear. It is generally accepted that it means that an agreement to arbitrate will survive an allegation that the main contract is invalid, did not come into existence, or has become ineffective, with the consequence that it is the arbitral tribunal envisaged by the arbitration agreement that will be competent to determine those allegations rather than the courts of some place or other. It is not clear, however, whether it means more than that and, specifically, what should be the interplay so far as questions of contractual interpretation are concerned between the provisions of the main contract and the arbitration agreement. That said, and this is the starting point for the present discussion, it is accepted that, since it is a separate agreement, an arbitration agreement may have a different proper law from that of the main contract.

Secondly, identification of the proper law of the arbitration agreement is important because it is that law which will be applied principally to determine issues as to its validity and interpretation. Just to give a flavour of this: the proper law of the arbitration agreement will give answers to questions such as whether a party not originally a signatory to the main contract can become bound by its arbitration clause as a result of a course of conduct, whether any preliminary steps set out in an arbitration clause (e.g. negotiation or mediation) are mandatory before arbitration can be commenced, and how a tribunal might approach a very badly written arbitration agreement.

Over the following pages, we first jointly consider several recent significant decisions from a number of jurisdictions. We then each separately consider the question normatively and offer some thoughts as to possible approaches and emphases.

THE CURRENT POSITION ON THE PROPER LAW OF AN ARBITRATION AGREEMENT

Steven Lim, Ben Olbourne, Niraj Modha and Philippe Kuhn

English cases

The method of determining the proper law of an arbitration agreement has not yet been considered by the highest court in this jurisdiction. Two cases have touched on the issue.

In *Channel Tunnel Group v Balfour Beatty Construction* [1993] AC 334, Lord Mustill stated, obiter, that in international arbitration there may be *"more than one national system of law"* relevant to the determination of a dispute but it would be "exceptional" for the law governing the interpretation of an arbitration agreement to differ from the law of the main contract.[1]

Dallah Real Estate and Tourism Holding Company v Government of Pakistan [2010] UKSC 46; [2011] 1 AC 763 (***"Dallah"***) concerned the enforcement of a USD 20m award rendered by a French tribunal against the Government of Pakistan. Lord Collins referred to the 1996 Act and specifically section 103(2)(b). That sub-section gives effect to the principle in Article V(1)(a) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**"the NY Convention"**). It provides that a Court may refuse recognition or enforcement of an award where a person proves that the arbitration agreement was not valid *"under the law to which the parties subjected it, or failing any indication thereon, under the law of the*

1 At p 357F.

country where the award was made." [2] However, the Supreme Court was not required to consider the effect of the NY Convention in English law.

Sulamérica

Prior to the Court of Appeal's recent decision in *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574 (***"Enka"***), the leading English case on the proper law of an arbitration agreement was *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102 (***"Sulamérica"***).

Sulamérica concerned a dispute between a group of Brazilian construction companies and their insurers. The insurance policies, written in Portuguese, provided for Brazilian law as the exclusive governing law and for the Brazilian courts to have exclusive jurisdiction over disputes between the Brazilian parties. There was also an arbitration clause which provided for arbitration seated in London. The construction companies began litigation in Brazil. The insurers sought an anti-suit injunction in favour of London arbitration.

The Court of Appeal endorsed a three-stage test for determining the proper law of the arbitration agreement.[3] First, if there is an express choice of law, that is determinative. Second, if there is no express choice, the Court will consider whether the parties have impliedly chosen a law. At this stage it is assumed, in the absence of a contrary indication, that the law of the main contract applies to the arbitration agreement. Third, where it is not possible to establish the law by implication, it is necessary to consider what would be the law with the 'closest and most real connection' with the arbitration agreement.

In *Sulamérica*, despite the many connections to Brazil as described above, English law as the law of the seat was held to govern the arbitration agreement. The presumption in favour of the law of the main contract was rebutted. At stage three, the Court gave precedence to the choice of London as the seat in finding that English law had the closest and most real connection with the arbitration agreement.[4]

In an important passage, Moore-Bick LJ held that, usually, the implied choice of law for the arbitration agreement would be the law of 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 or the consequences for its effectiveness of choosing the proper law of the substantive contract"*.[5] Here, there was a *"serious risk"* that, if Brazilian law applied to the arbitration agreement, that would render the arbitration agreement nugatory.[6] Clearly the Court of Appeal had this concern firmly in mind, although it chose not to decide the case on this basis.

The *Sulamérica* test is unsatisfactory. The law of the main contract will usually apply to the arbitration agreement, except when it does not. The law of the seat may be implied, or it may have a closer connection to the arbitration agreement, whatever that may mean, except when it does not. There are real problems with the second and third stages of the *Sulamérica* test. It was accepted by Moore-Bick LJ that these two stages blur into each other.[7] In *Sulamérica*, there is no proper analysis of whether (or how) to imply a governing law for the arbitration agreement. Furthermore, at stage three, there is no guidance as to whether there is a hierarchy of factors which determine the "closest and most real connection". It is unsurprising that the case-law following *Sulamérica* has been confused.

2 [12]–[16].
3 [25].
4 [32].
5 [26].
6 [31].
7 [25].

Kabab-Ji

The issue arose again before the Court of Appeal in *Kabab-Ji*, this time in the context of a dispute as to whether the respondent in the arbitration was a party to the arbitration agreement in the main contract. The main contract had originally been concluded between the claimant and a third party that had subsequently come to be a subsidiary of the respondent who had (it was alleged) performed the main contract itself. The claimant contended that the respondent had succeeded to the third party's rights and obligations under the main contract including under the arbitration agreement. The main agreement contained an express provision or provisions that it was to be governed by English law. The arbitration clause did not contain an express choice of law but did provide for ICC arbitration in Paris. The Paris-seated tribunal issued an award in which it concluded that the law governing the arbitration agreement was French law and that, on application of that law, the Respondent was a party to the arbitration agreement. The claimant prevailed on the merits.

The successful claimant sought to enforce the award in England. The respondent sought to resist on the basis that the tribunal had not applied the law selected by the parties: it contended that the arbitration agreement was governed by English law. At the same time, the unsuccessful respondent sought to have the award set aside in Paris, on essentially the same basis.

In January 2020, the English Court of Appeal denied enforcement on grounds that the respondent ought not to have been found to have been a party to the arbitration agreement. On the issue of the proper law of that arbitration agreement, the decision rested on the finding that, as a matter of contractual interpretation, the combination of a broadly-worded governing law clause in the main contract, further provisions in the main contract, and an express stipulation in the arbitration agreement that the tribunal was to apply *"all provisions"* of the main contract amounted to an express choice of the proper law of the arbitration agreement. The Court further found that this express choice was not negatived by the express choice of Paris as the seat of the arbitration. The Court acknowledged the point that, if it were true in this case that the express proper law provisions in the main contract amounted to an express choice of proper law for the arbitration agreement as well, that could potentially be said of every contract containing an arbitration clause that also had a main contract proper law provision. However, the court resisted that as being a necessary conclusion by reference to the specific provisions at issue in this case.

On one reading, the Court of Appeal's decision involved nothing more than the application of straightforward and unexceptional principles of contractual interpretation. However, the readiness of the court to discern an express proper law for the arbitration agreement from the terms of the main contract has attracted comment. The Court of Appeal's decision will not, in any event, be the last word on the matter. In July 2020, the Supreme Court gave the claimant permission to appeal. At the same time, the proceedings in the French courts have continued.

Enka

As noted above, *Enka* is the most recent English decision in this area. The Supreme Court is due to hear this appeal on 27–28 July 2020, following the Court of Appeal's judgment delivered on 29 April 2020.

Enka is a Turkish construction and engineering company with substantial Russian operations. It was engaged as a subcontractor to provide works under a June 2012 contract relating to construction of the Berezovskaya power plant. Chubb was the subrogated insurer of Unipro, the employer for the project. Chubb paid out after a fire at the plant in 2016 and filed a claim in the Russian courts, alleging the fire and consequent damage was caused by Enka's defective work. Enka applied for an anti-suit injunction in the English Commercial Court to restrain the Russian proceedings. Importantly, Enka's contract

contained a London seat arbitration clause. There was a choice of Russian law, but the Court of Appeal considered this was not in very clear terms and not a general express choice of Russian law for the entire contract.[8]

Two main questions arose for the Court of Appeal:

a. Do *forum non conveniens* principles apply to the question of enforcement of a London-seated arbitration agreement by an anti-suit injunction?
b. What is the proper law of the arbitration agreement?

As to the first question, it was held that the English court, as the court of the seat of arbitration, is *necessarily* an appropriate court to grant an anti-suit injunction, and that *forum conveniens* considerations do not arise.[9] As to the second question, the Court of Appeal modified the approach in *Sulamérica*. Popplewell LJ restated the law in holding that there is a strong presumption in favour of the law of the seat absent express choice of the proper law of the arbitration agreement.[10] *Kabab-Ji* was confined as a decision on its own facts concerned with the first stage of the *Sulamérica* test.[11]

By way of brief comment (developed further in the following section), there is a strong link between the reasoning on the anti-suit injunction question and on the proper law question. The supervisory role of the law and the courts of the seat clearly influenced the proper law analysis. Further, the third stage of the *Sulamérica* test – i.e. closest and most real connection – was treated as being of residual importance. It was probably also not strictly necessary for Popplewell LJ to deal with the proper law question as fully as he did given his conclusion that the express provisions in the contract did not amount to *"an express general choice of Russian law."*[12] The contest of potential proper laws was thus arguably less pronounced than in *Sulamérica* or *Kabab-Ji*.

Singapore cases

Singapore law follows the *Sulamérica* approach. *Sulamérica* was first considered in Singapore in *First Link Investment Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 (***"First Link"***), a Registrar's decision of the High Court. The Registrar adopted the three-stage test in *Sulamérica* but found the law of the seat should be the presumptive implied law. Amongst the Court's reasoning was that businessmen must intend an award to be enforceable and so would focus on the law of the seat and whether that law recognises and enforces the arbitration agreement.

This not only imputes too much to businessmen, it is also misguided. Awards are likely to be enforced in jurisdictions outside the seat, so the law of the seat, while important, is not the only law of relevance. Further, this ignores that the NY Convention and the UNCITRAL Model Law on International Commercial Arbitration (**"the Model Law"**) provide for presumptive validity of the arbitration agreement, subject only to internationally accepted grounds of invalidity.[13] A NY Convention and Model Law seat is required to give effect to arbitration agreements, subject only to limited exceptions, and to accord maximum validity to the arbitration agreement.

Also, the NY Convention and the Model Law[14] recognise the parties' express and implied choices of proper law of the arbitration agreement. Therefore, Singapore law, as the law of the seat, only applies in the absence of indication of an express or implied choice.

8 [106]–[107].
9 [42].
10 [91].
11 [88].
12 [107].
13 Article II of the NY Convention and article 8 of the Model Law.
14 Article V(1)(a) of the NY Convention and articles 34(2)(a)(i) and 36(1)(a)(i) of the Model Law.

First Link was effectively overruled by a decision of a High Court judge in *BCY v BCZ* [2016] SGHC 249 (***"BCY"***). BCY adopted the *Sulamérica* test, agreeing there is a presumption the implied law of the arbitration agreement, contained in a contract, was the law of the main contract. The Court held that parties are assumed to have intended the whole of their relationship to be governed by the same system of law and the choice of a seat different from the law of the main contract would not in itself be sufficient to displace this. The law of the main contract would only be displaced if this would negate the arbitration agreement despite the parties' clear intention to arbitrate. In a freestanding arbitration agreement, the law of the seat was likely to be the proper law of the arbitration agreement. The Court of Appeal approved *BCY* in *BNA v BNB* [2019] SGCA 84 (***"BNA"***),[15] confirming the *Sulamérica* approach as law in Singapore.

In BNA, the High Court[16] applied the *Sulamérica/ BCY* three-stage test in finding the law of the main contract was displaced by the law of the seat because it would have invalidated the arbitration agreement. The Court found the law of the seat was the implied choice (therefore taking a similar position to Popplewell LJ in *Enka* and a different position from Moore-Bick LJ in *Sulamérica*, where the law of the seat was applied as the law with the closest and most real connection).

France

The Paris Court of Appeal arrived at a different conclusion from the English Court of Appeal on the proper law of the arbitration agreement in *Kabab-Ji*, upholding the award which the English Court refused to enforce. The Paris Court found:

a. The proper law of the arbitration agreement was French law. Being separable from the contract within which it is contained, the proper law of the arbitration agreement is to be determined according to mandatory rules of French law and international public policy, according to the will of the parties, without reference to any national law. The express choice of English law in the substantive contract did not establish the common will of the parties to subject the arbitration agreement to English law. As there was no express agreement on the proper law of the arbitration agreement, French law, being the law of the seat of the arbitration, was the proper law of the arbitration agreement.

b. The respondent was bound by the arbitration agreement under French law, without being a signatory to the contract within which it is contained, because it had accepted the arbitration agreement by its conduct with regard to the main contract. It was not, however, permissible for the Court to consider whether the respondent could have acceded to the substantive contract under English law (being the proper law of the substantive contract), as that would amount to a review of the merits of the case.

The outcome is that the English Court of Appeal refused to recognise and enforce a French award on grounds that the Paris Court of Appeal rejected. This 'conflict' is reminiscent of the decisions of the apex French and English courts in *Dallah* and may be, in part, why the Supreme Court recently gave leave to appeal.

15 The decision of the High Court and Court of Appeal in BNA is discussed in more detail in the article by Steven Lim, *Revisiting the Proper Law of the Arbitration Agreement,* in the May 2020 edition of this newsletter (https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/05/2020-05-39-Essex-Chambers-Commercial-and-Construction-Newsletter.pdf).

16 *BNA v BNB* [2019] SGHC 142.

WHAT APPROACH SHOULD BE TAKEN TO THE PROPER LAW OF AN ARBITRATION AGREEMENT?

Steven Lim, Ben Olbourne, Niraj Modha and Philippe Kuhn

In this section, we each provide brief thoughts in the lee of the Supreme Court's hearings of the appeals in *Enka* and *Kabab-Ji* [1] on various potential approaches, or emphases of approach, to the issue of determining the proper law of an arbitration agreement.

The validation principle

Steven Lim

It is time for the English common law, including Singapore, to reassess the *Sulamérica* test, and its confusing progeny, and realign with the NY Convention.[2]

The *Sulamérica* test does not conform with the NY Convention. The third stage of the *Sulamérica* test looks to the law with the closest and most real connection. The NY Convention has a similar three-stage test. It first looks to the express or implied law. In the absence of any indication of this, the Convention provides for the law of the seat to apply.

This may not in itself make much practical difference as in most cases the choice of law, if not express, is very likely resolved by an implied law, at the second stage. And in any event, the law with the closest and most real connection is quite often the law of the seat (as seen in *Sulamérica* and other cases).

However, as *Kabab-Ji* shows, the English courts' reliance on English contract precedent for determination of the proper law of the arbitration can potentially lead to greater divergence. The Court of Appeal questioned, but did not decide, whether the requirement for business efficacy in *Marks & Spencer v BNP Paribas* [2015] UKSC 72; [2016] AC 742 (***"Marks & Spencer"***) could be satisfied where the *Sulamérica* test or the NY Convention provided a fallback default choice of either the law of the country with the closest connection or the law of the place where the award was made. In other words, was there a necessity for an implied choice if there was a fallback default choice? Going down that route would be a significant departure from the NY Convention and English contract law principles on implied terms should not be applied to the determination of the proper law.

English authority has vacillated between giving primacy to the substantive law of the contract and the law of the seat. Instead of laying down a presumptive implied law, it makes more sense, and is more transparent, to apply the validation principle as required under Articles II and V(1)(a) of the NY Convention.

The validation principle gives effect to the parties' commercial intention to agree an effective and workable international dispute resolution mechanism. It provides that if an international arbitration agreement is substantively valid under any of the laws that may be potentially applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable laws. This is mandated under Article II of the NY Convention [3] which requires presumptive validity of arbitration agreements, subject only to defined generally applicable exceptions of contract law [4] without reference to national rules including special, discriminatory or idiosyncratic burdens or treatment.

1 Permission to appeal in *Kabab-Ji* was granted by the Supreme Court on 8 July 2020, but a hearing is yet to be fixed.

2 This is also discussed in Steven Lim's Kluwer Arbitration Blog post, *Time to Re-Evaluate the Common Law Approach to the Proper Law of the Arbitration Agreement* (http://arbitrationblog.kluwerarbitration.com/2020/07/05/time-to-re-evaluate-the-common-law-approach-to-the-proper-law-of-the-arbitration-agreement/?doing_wp_cron=1594541212.3820850849151611328125).

3 Reflected in Article 8 Model Law and section 9(4) English Arbitration Act.

4 It is null, void, inoperative or incapable of being performed.

Further, Article V(1)(a) NY Convention[5] provides a choice of law rule, looking to the law to which the parties have subjected the arbitration agreement, or failing indication thereon, under the law of the country where the award is made. While there is debate about this, there is a strong case that for consistency in the recognition of arbitration agreements and awards, the choice of law rules in Article V(1)(a) should also be applied in Article II. Therefore, Article II requires States to recognise and give effect to parties' agreement on the proper law of the arbitration agreement, whether express or implied. And the implied choice would be the law that gives effect to the parties' agreement to arbitrate.

However, the validation principle is unlikely to find favour with the Supreme Court. The validation principle does not get much mention in English common law cases. There is either an indifference or even antipathy towards it. This may be because it is not understood.
In BNA, the Singapore High Court expressly considered and rejected the validation principle on the grounds that it:

a. was impermissibly instrumental;
b. could be inconsistent with the parties' intentions;
c. was unnecessary because Singapore already endorsed the principle *verba ita sunt intelligenda ut res magis valeat quam pereat* i.e. words are to be understood in a manner that the subject matter be preserved rather than destroyed; and
d. could create problems at the enforcement stage because article V(1)(a) of the NY Convention contains choice of law provisions starting with the parties' intentions, whereas the validation principle seeks to validate an arbitration agreement without necessary regard to the parties' choice of law.

Even though the High Court rejected the validation principle, it applied a validation approach (reading *"arbitration in Shanghai"* as designating venue only and not seat). The validation principle is not inconsistent with the parties' intentions; it gives effect to the parties' agreement to arbitrate. And it is instrumental only in giving effect to the parties' agreement, which English contract law also strives to do. There is no conflict between the validation principle and Article V(1)(a) (and Article II) of the NY Convention as the validation principle is *derived* from the choice of law principles and pro-enforcement policy in both Articles II and V(1)(a).

It appears the Singapore High Court did not properly understand the validation principle and was resistant to it because it does not flow from English authority but is otherwise in sympathy with and acted in accordance with its aims. It may take some time yet before the Singapore or English courts expressly accept the validation principle.

Presumptive law of seat approach

Philippe Kuhn

This suggested approach is closely aligned with the reasoning of the Court of Appeal in *Enka*, albeit with a difference in emphasis and one more substantive departure from *Sulamérica*, namely abandoning the third stage (i.e. the *closest and most real connection stage*). On this approach, the English courts would (1) search for an express choice of law and, failing that, (2) apply a rebuttable presumption in favour of the law of the seat, as a matter of implication (by general imputed intention) or as a general English policy rule. The arguments in favour of this approach may be summarised as follows.

First, it is consistent with the "arbitration package" concept. The idea is that considerations of neutrality, certainty and the powers of the law of the seat (especially in relation to anti-suit injunctive relief and challenges to awards) would weigh heavily with international commercial parties.

5 Reflected in Article 34(2)(a)(i) and Article 36(1)(a)(i) of the Model law, and section 103(2)(b) of the 1996 Act.

In particular if they are contracting with counter-parties from unfamiliar or multiple jurisdictions. Popplewell LJ in *Enka* went as far as considering that the choice of a seat was arguably analogous to an exclusive jurisdiction agreement in the litigation context.[6] While it is correct to say that the proper law of the arbitration agreement would not itself impact the power of the seat court to issue injunctions or perform its supervisory role,[7] the parties' choice of the seat, with the requisite curial powers, is a strong ground for implication. If parties have chosen the English court's machinery, why would they not also want English law to govern questions like validity?

Secondly, it is sensitive to the principle of separability. That is of course now well-established in English arbitration law, given Fiona Trust and section 7 of the 1996 Act. This argument was emphasised by Popplewell LJ in *Enka*.[8] However, in my view, separability is a secondary factor reinforcing the arbitration package argument. There are notable discussions of this point in *Sulamérica*[9] and in *BCY*.[10] The reasoning in *Sulamérica* as to why parties would presume the arbitration agreement to be governed by the same law as the substantive contract is quite thin and reliant on pre-*Fiona Trust* cases and older commentary.[11] The NY Convention and negotiation-style reasoning in *BCY* is stronger. However, in an ever more international arbitration climate, a clearly chosen seat is generally more revealing than the substantive law of the contract, especially when dealing with international parties given neutrality considerations.

Thirdly, a clear presumption in favour of the law of the seat can enhance legal certainty without frustrating the parties' intentions, provided the presumption is truly *rebuttable*. A good example where the presumption was quite properly rebutted is *Arsanovia Ltd, Burley Holdings Ltd, Unitech Ltd v Cruz City Mauritius Holdings* [2012] EWHC 3702.[12] Such a presumption is particularly appropriate when dealing with ad hoc submission agreements entered into *after* a dispute has arisen or when dealing with other standalone arbitration agreements.[13]

It is accepted that a presumption in favour of the law of the seat does not come without difficulties. The main concern, acknowledged in *Enka*,[14] is that English law does not recognise the concept of a 'floating proper law' of the arbitration agreement. Consequently, there may be a circularity issue with the proposed presumption in cases where the parties have not clearly chosen a seat for the arbitration. For example, an arbitration clause may conflate the venue and the seat of the arbitration (as in *BNA*). That said, there are mechanisms for identifying the seat in most institutional rules.[15] Particularly where a seat is determined through such rules it is fair to concede that the law of seat presumption is based on general imputation.

The other valid criticism of this approach is consistency with the NY Convention. It is accepted that the more natural interpretation of that convention is that it applies the law of the seat by default *only* if there is no express or implied choice: see Article V(1)(a). However, the application of the NY Convention approach

6 [47]–[53].

7 [63].

8 [92]–[95].

9 [10]–[12], [18].

10 [60]–[61].

11 Moore-Bick LJ relied heavily on dicta in the *Channel Tunnel* case and comments in *Mustill & Boyd, The Law and Practice of Commercial Arbitration in England* (2nd ed., 1989).

12 In that case, Indian law was found to be the proper law of the arbitration agreement despite a London seat because of two combined factors: (1) Indian law as the substantive law of shareholders' agreement, together with (2) the express exclusion of *certain* provisions of the Indian Arbitration and Conciliation Act.

13 See further *Russell on Arbitration* (24th ed.) at [2-120]; *Sulamérica* at [26]; BCY at [66]–[67].

14 [103].

15 E.g. ICC Rules, article 18.1; LCIA Rules, article 16; UNCITRAL Rules, article 16. For discussion see *Russell on Arbitration* (24th ed.) at [2-127].

by the English courts is less straightforward given its indirect implementation and the long-standing approach of treating the proper law of the arbitration agreement as a contract law question. The Supreme Court is unlikely to depart radically from that paradigm.

A common law approach to interpretation and implied terms

Niraj Modha

The Supreme Court may decide that the proper law of an arbitration agreement is a matter of contractual interpretation and implication rather than rebuttable presumptions. At stage one, a court must consider whether there is an express selection of the applicable law. If not, at stage two, the court must consider which law should be implied in order to give effect to the parties' intention to arbitrate.

The rationale for this approach is straightforward. Whether it is comprised within a single clause in a lengthy document or a submission agreement, an arbitration agreement is a contract. It ought to be treated like any other contract. This approach respects the principle of party autonomy. It also avoids the knotty "closest and most real connection" test, on which there is little guidance, and for which there is no proper authority.

The processes of interpretation and implication are fundamentally distinct, even if they share similar features.[16] At the first stage of the suggested test, the court must interpret the arbitration agreement. In a series of decisions over the past decade, the Supreme Court has confirmed that both the contextual approach (giving significance to commercial considerations) and the textual approach (looking most carefully at the words used) are equally valid when interpreting a contract. In the context of arbitration agreements, the courts have adopted a purposive approach to interpretation.[17] This is uncontroversial.

It may be that the Court in *Kabab-Ji* adopted an impermissibly wide approach to interpretation at stage one of the *Sulamérica* test. Then again, if the arbitration agreement in *Kabab-Ji* was not binding because the respondent did not later become a party to it, then that does not necessarily demonstrate a defect in the exercise of interpretation. Not every arbitration agreement will be valid and binding in every circumstance.

At the second stage of the suggested test, the Court must consider the implication of a term. A term may only be implied into a contract in order to give that contract business efficacy.[18] At the time of contracting, the parties could not have sensibly decided to include an arbitration agreement which would be scuppered because there is no reference to the law which governs it, or the wrong law is applied to it. The implication of the appropriate law upholds the principle of party autonomy. Where there is a choice of several laws, a court might find that the parties must have intended for the arbitration agreement to result in a binding award which was enforceable at the seat, and therefore the law of the seat applies. Alternatively the principle of separability may lead to the same result. There is no need for a presumptive law. The question of which one of several national laws should be implied should be left to the court.

As with each of the other suggested approaches, there are criticisms which may be levelled. First, on what basis can the "closest and most real connection" test be discarded? If one is applying common law principles, and conflict of laws rules ordinarily apply where the substantive law is uncertain, there is an argument that these rules should apply to the arbitration agreement.[19]

16 *Marks & Spencer*, per Lord Neuberger at [26].

17 See *Fiona Trust*, per Lord Hoffmann at [8].

18 *Marks & Spencer*, per Lord Neuberger at [21].

19 Section 46 of the 1996 Act.

However, that is only a weak justification. In *Sulamérica* it was "common ground" that conflict of laws rules applied, but there is no higher authority which supports this.[20] Neither the NY Convention, nor the 1996 Act, nor the Rome I Regulation (which expressly does not apply to arbitration agreements) indicates that a conflict of laws test is appropriate.[21] Stages one and two should be exhaustive.

Second, is it artificial to require a court to imply or impute a term into an arbitration agreement? On this analysis the court's hands are tied: it *must* find a law, in order to save the arbitration agreement. Arguably, that is not an intellectually honest approach. Yet, one should not ignore the practical reality. Plainly an arbitration agreement must be governed by a national law. The court is not re-writing the bargain or improving it for one party. Invariably, the court simply is choosing between a law which maximises the workability of the arbitration agreement, as the parties must have intended, or one which undermines it.

Third, if the aim is to validate the arbitration agreement then why not adopt the validation principle? One of the criticisms of *Sulamérica* is that the Court of Appeal obliquely referred to the law which would maintain the "effectiveness" of the arbitration agreement but did not decide the case on that basis. There is a difficulty here, albeit possibly only one of nomenclature. The courts do apply a validation principle where there is ambiguity in the interpretation of an agreement. The principle provides that, where there are competing meanings of a clause, the court should prefer an interpretation which upholds its validity rather than invalidates it.[22] This pre-supposes that there is an express term which has more than one meaning. Arguably, at present there is no scope for deploying the validation principle as a tool of interpretation.

A final plea: do not be hesitant to find an express choice

Ben Olbourne

On any of the normative approaches that have been considered here, the starting point in every case remains that effect must first and foremost be given to a choice of law expressly adopted by the parties, if one can properly be discerned: this is the first stage of any two-part or three-part approach to ascertaining the proper law of an arbitration agreement. If the result of that express choice of law, after whatever sympathetic approach to interpretation may be appropriate in the particular case, is that the parties' arbitration agreement is void or incapable of being given effect to, that may be disappointing but that is the result of poor drafting and not any lacuna in the law of international arbitration, and it is not for a tribunal or a court to offer up a recourse to arbitration that the parties were unable to provide for themselves.

There ought not to be any tension here conceptually with the validation approach as analysed above: in each case, the aim is to give effect to the parties' intentions to the greatest extent possible, both as regards the proper law to be applied to the arbitration agreement and as regards their evident intention to submit their disputes to arbitration. This aim ought to be achievable in most cases, but it may not be so in every case. But in seeking to give effect to what is construed to be an agreement to arbitrate, one should not be too quick to forget that ultimately the task at hand is one of contractual interpretation and the case for a different set of rules to be applied to arbitration agreements or choice of law provisions as opposed to all other contract provisions is not necessarily made out.

When applying the first stage of the analysis, there are good grounds for contending that a court or tribunal should not be hesitant to discern

20 [9].

21 Article 1(2)(e) Regulation (EC) No. 593/2008 (Rome I).

22 *Tillman v Egon Zehnder* [2019] UKSC 32; [2020] AC 154 per Lord Wilson JSC at [38].

an express choice of law for the purposes of an arbitration agreement from express stipulations in its main contract. First, it is not clear that the principle of separability extends further than the minimum we identified earlier. It certainly is not the case that an arbitration agreement can be interpreted wholly in isolation from its main contract. Why, then, draw a sharp line between a choice of law provision in a main contract and the other provisions of the main contract when it comes to construing the terms of an arbitration agreement? Secondly, arbitration clauses, just like the main contracts containing them, are often drafted by commercial people or by lawyers without specialised arbitration law knowledge. In those circumstances, there is no reason to presume that, generally, the drafters were even alive to the issue that an arbitration agreement *might* have a proper law differing from that of the main contract. Accordingly there is no reason to approach an express choice of law provision in the main contract with the suspicion that it was not meant also to extend to the arbitration agreement. There is, plainly, some conceptual overlap here with the second-stage implied law or rebuttable presumption analysis. However, the plea here is to consider giving express words in the main contract their ordinary meaning when it comes to construing the terms of an arbitration agreement.

Like with other approaches, this 'gloss' is no panacea by itself. It does not assist at all where the main contract does not contain an express choice of law provision, and it does of course leave open the possibility of reasonable minds reaching different conclusions as to issues of contractual construction, particularly in cases where there are competing or ambiguous provisions. As to this last point, specifically, it would appear that the English Court of Appeal in *Kabab-Ji* had little difficulty in construing the particular provisions in the contract before it as amounting to an express choice of law for the purposes of the arbitration agreement. However, a number of commentators have taken the view that the court pressed the boundaries of contractual interpretation too far in that case and/or that the decision in that case represents the outer limit of the bounds for finding an express choice of law. Others may see nothing at all surprising in the result. Finally, this gloss of course does not assist at all where, on a proper construction, the express provisions of the main contract do not identify a choice of law for the purposes of the arbitration agreement. In those circumstances, one returns squarely to the *"muddle"* embodied in the cases considered above and the differences of approach that have been considered.

CONCLUDING REMARKS

We expect that the Supreme Court will clear away at least some of the muddle in its consideration of the appeals in *Enka* and *Kabab-Ji.* The Supreme Court's decisions ought, at the very least, provide some certainty as to the approach to be adopted. That would be welcomed by potential parties to arbitrations and those advising them, but it remains to be seen whether the Court will also resolve the conceptual debates. We eagerly anticipate those decisions and intend to publish a follow-up piece (or pieces) considering them shortly after they have been handed down.

CONTRIBUTORS

Steven Lim (1992)

steven.lim@39essex.com

Steven is an arbitrator and advocate with more than 25 years' experience in international dispute resolution and arbitration in Asia. Steven sits as presiding, sole, co-arbitrator and emergency arbitrator. He also appears as lead counsel in international arbitrations and has appeared as lead counsel in the High Court and Court of Appeal in Singapore. Prior to practising as an independent arbitrator and barrister, Steven practised as a Singapore advocate and solicitor and as an English solicitor advocate with leading Singapore and international firms in Asia.

Steven has extensive experience with disputes involving Asia-Pacific jurisdictions including Singapore, India, China, Hong Kong, Taiwan, South Korea, Japan, Thailand, Vietnam, Cambodia, Philippines, Indonesia, Malaysia, Brunei, Nepal, US and Australia. He is a panel arbitrator with the SIAC, HKIAC, ICDR, KCAB, AIAC, THAC, CAAI and has also sat in ICC, SCMA, LMAA, UNCITRAL Rules and ad hoc cases. He is a Fellow of the Chartered Institute of Arbitrators, the Singapore Institute of Arbitrators and the Asian Institute of ADR and is a Director of the Chartered Institute of Arbitrators Singapore Branch.

Steven has received recognition as a leading individual in international dispute resolution and arbitration in Chambers and Legal 500 where he has been noted as "hugely experienced", "a respected arbitrator with extensive experience handling commercial arbitrations in the construction, infrastructure and energy sectors". Steven was included in the inaugural list of the top 100 A-List lawyers in Singapore by Asia Business Law Journal in 2018. To view full CV click here.

Ben Olbourne (2003)

ben.olbourne@39essex.com

Ben Olbourne provides advisory and advocacy services across a broad range of international commercial disputes, in England and other jurisdictions, in relation to both court and arbitration proceedings. He has acted as sole or junior counsel before courts at all levels in England and in arbitrations under all of the principal sets of arbitral rules. He has particular experience working in Asia and for Asian clients, having lived and worked in the region for a number of years, and currently holds a License to Practise Foreign Law in Singapore.

His recent work has been principally in the general commercial, international trade and commodities, construction (infrastructure and vessels), insurance/reinsurance, energy, natural resources, and shipping/carriage of goods sectors. Ben also practises in public international law and human rights, and has advised and been involved in domestic and international proceedings in fields including investment law, treaty interpretation, immunities, sanctions, humanitarian law, human rights and refugee rights and obligations.

Ben accepts appointments as an arbitrator and has been appointed in more than 40 references under ICC, LCIA, LMAA and SIAC Rules, among others, and in ad hoc proceedings. Governing laws have included English, Australian, Malaysian, Singaporean, Indian, Russian and Cypriot. Seats have included Singapore, London, Hong Kong, Paris, Moscow, New Delhi and Hyderabad. He is a Fellow of the Chartered Institute of Arbitrators and is on the panel of arbitrators of ACICA, AMTAC, KLRCA and THAC. He is recommended as an arbitrator in the leading regional directories. To view full CV click here.

CONTRIBUTORS

Niraj Modha (2010)

niraj.modha@39essex.com

Niraj Modha specialises in commercial, construction, and property litigation and arbitration. He is ranked as a leading junior in Legal 500, which notes that "whilst always meticulously prepared, he is also extremely good on his feet".

Niraj has considerable experience in the Chancery and Queen's Bench Divisions of the High Court and the First-tier Tribunal (Property Chamber). He has appeared in the Court of Appeal as sole counsel and the Supreme Court as junior counsel.

Niraj is a Fellow of the Chartered Institute of Arbitrators and sits as an arbitrator. He has conducted more than 20 arbitrations since being appointed as a member of the ABTA arbitration panel. Niraj is also a panel member of the CIArb Business Arbitration Scheme. His arbitration practice is focussed mostly in Asia, Africa, and the Middle East.

Before he trained as a barrister, Niraj taught at a secondary school in East London. He often draws on his experiences as a teacher when presenting succinct arguments in document-heavy cases and dealing with urgent matters at short notice. To view full CV click here.

Philippe Kuhn (2017)

philippe.kuhn@39essex.com

Philippe is building a broad practice across all areas of Chambers' specialisms. He has a particular interest in commercial matters with an international dimension (including arbitration, construction, shareholder, civil fraud, jurisdiction and choice of law disputes) and cases at the intersection of private and public law (including Human Rights Act damages and equality rights claims). This builds on his international background, growing up in Switzerland and Sri Lanka, before reading law at the LSE and Oxford and qualifying as a barrister.

He joined Chambers after completing a third six pupillage in March 2020. He was previously a Judicial Assistant at the Supreme Court of the United Kingdom (2018/19), assigned to Lord Briggs, Lord Sumption and Lord Sales. He completed his pupillage at 11 KBW (2017/18) and maintains an interest in commercial and statutory employment matters. To view full CV click here.

Editorial team: Marion Smith QC, Hannah McCarthy, David Hopkins, James Bradford, Ruth Keating, Gethin Thomas