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Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There Is None

Darius CHAN* & Teo JIM YANG**

The common law choice of law principles for determining the proper law of an arbitration agreement previously thought to be settled by the English Court of Appeal's decision in Sulamérica v. Enesa [2013] 1 W.L.R. 102 have now been thrown into disarray after a recent string of three judgments: starting with the Singapore Court of Appeal's decision in BNA v. BNB [2019] S.G.C.A. 84, followed by two decisions from the English Court of Appeal in Kabab-Ji v. Kout Food Group [2020] EWCA Civ 6 and Enka Insaat Ve Sanayi A.S. v. OOO 'Insurance Company Chubb' [2020] EWCA Civ 574.

This article undertakes a comparative analysis of English and Singapore case law and argues that the common law should take party autonomy more seriously by ascertaining whether the parties have a clear and real intent to choose a particular system of law to govern their arbitration agreement. The current reliance on presumptions or inferences of what the parties must have intended is in reality an artificial arrogation to judges and arbitrators on what 'commercial' sensibilities businessmen should be taken to have. In the absence of a clear and real intent, arbitrators and state signatories to the New York Convention ought to apply the law of the seat as the default choice of law rule in the New York Convention.

Keywords: governing law, proper law, arbitration agreement, choice of law, conflict of laws, Sulamérica, Kabab-Ji, Enka, BNA, separability, validation principle, Article V(1)(a), New York Convention.

1 INTRODUCTION

Over five months, the common law world has seen three decisions – one from the Singapore Court of Appeal and two from the English Court of Appeal – taking differing positions to ascertain the proper law of an arbitration agreement, with the latter two English decisions departing from what was arguably thought to be settled law following *Sulamérica v. Enesa*.[1]

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[1] *Sulamérica CIA Nacional de Seguros S.A. & ors v. Enesa Engenharia S.A. & ors* [2013] 1 W.L.R. 102.

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Sulamérica took the common-sensical view that the proper law of an arbitration agreement is determined under established common law choice-of-law rules as with any contract: the court must give effect to the parties' choice of proper law, express or implied, failing which the system of law with which the contract has the closest and most real connection will then be identified. The English Court of Appeal observed that while parties commonly make an express choice of law to govern their contract, it is unusual for them to make an express choice of law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract to also govern the agreement to arbitrate.[2] However, this inference was displaced in *Sulamérica* because there was at least a serious risk that the proper law chosen to govern the substantive contract – Brazilian law – would render the arbitration agreement invalid. The court ultimately applied English law on the basis that, as the system of law at the chosen seat of arbitration, it had the closest and most real connection with the arbitration agreement.[3]

Recently, in *Enka Insaat Ve Sanayi A.S. v. OOO 'Insurance Company Chubb',*[4] the English Court of Appeal turned the *Sulamérica* presumption on its head, holding that in the absence of express choice, there is a strong presumption that the parties have impliedly chosen *the law of the seat of arbitration* as the law governing the arbitration agreement. This mirrors ironically the Singapore decision of *FirstLink Investments Corp. Ltd. v. GT Payment Pte. Ltd.*[5] back in 2014, which was subsequently overruled in a series of decisions – culminating in the Singapore Court of Appeal decision of *BNA v. BNB*[6] – that endorsed the *Sulamérica* approach.

2 *BNA:* THE RELEVANCE OF A GOVERNING LAW'S INVALIDATING EFFECT

BNA provides a fascinating example where, though the test in *Sulamérica* was purportedly applied, the outcome was opposite from that in *Sulamérica*. The arbitration agreement provided for 'arbitration in Shanghai' administered by the Singapore International Arbitration Centre (SIAC), but did not itself contain any express indication of governing law. Influenced by the arbitration agreement's apparent invalidity under the laws of the People's Republic of China

[2] *Ibid.,* para. 11.
[3] *Ibid.*, paras 30–32.
[4] *Enka Insaat Ve Sanayi A.S. v. OOO 'Insurance Company Chubb' & ors* [2020] EWCA Civ 574.
[5] *FirstLink Investments Corp. Ltd. v. GT Payment Pte. Ltd.* [2014] S.G.H.C.R. 12.
[6] *BNA v. BNB* [2019] S.G.C.A. 84.

(PRC)[7] which expressly governed the main contract, both the majority arbitrators and the Singapore High Court concluded that the parties must have intended to seat the arbitration in Singapore, and subject the arbitration agreement to Singapore law. The Singapore Court of Appeal reversed, applying a presumption that the parties intended the proper law expressly chosen to govern the substantive contract – PRC law – to govern the arbitration agreement, despite the outcome of invalidity.[8] The court rightly found that 'arbitration in Shanghai' meant that Shanghai was the arbitral seat.[9] Since the law of the seat was not materially different from the law governing the main contract, the presumption that PRC law governed the arbitration agreement was not displaced.

BNA was an easy case insofar as most connecting factors pointed to the PRC, with the only connection to Singapore being the express choice of SIAC as the arbitral institution. In these circumstances, one can appreciate the tenuous link Singapore law had with the arbitration agreement. Suppose instead the arbitration agreement in *BNA* expressly provided for arbitration seated in Singapore. This moves us squarely into *Sulamérica* territory, where the law of the seat had the advantage of ensuring the validity of the arbitration agreement, as opposed to the law governing the main contract. Critically, the Singapore Court of Appeal in *BNA* emphasized that the potential invalidating effects of any governing law are only relevant where the parties were at least aware of those consequences, which was not the case on the available evidence.[10] This imparts a uniquely Singaporean flavour to the *Sulamérica* test. In *Sulamérica*, there was no indication that the parties were aware of the potential invalidity of the arbitration agreement under Brazilian law. Rather, the English Court of Appeal found that the parties could not have intended to choose Brazilian law to invalidate their arbitration agreement.[11]

This Singaporean gloss is interesting considering that the judge who delivered the judgment in *BNA*, Steven Chong, J.A., had, sitting as a High Court judge in *BCY v. BCZ*, earlier endorsed the proposition in *Sulamérica* that the governing law of the main contract could be displaced if it would effectively negate the parties' clear intention to arbitrate.[12] *BNA* also implicitly rejects the teleological reasoning of the validation principle advanced by Gary Born, i.e. that a court should give effect to a governing law that would ensure the validity of the agreement to arbitrate.[13] At its core, *BNA* neatly showcases how the Singapore court strives to

[7] *See* generally Hee Theng Fong, *Arbitration in China and Singapore*, SAL Practitioner 28 (2019).
[8] *BNA v. BNB* [2019] S.G.C.A. 84, para. 62.
[9] *Ibid.,* para. 102.
[10] *Ibid.,* para. 90.
[11] *Sulamérica Cia Nacional de Seguros, supra* n. 1, para. 32.
[12] *BCY v. BCZ* [2017] 3 S.L.R. 357, para. 74.
[13] Gary Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 SAcLJ 814–848 (2014).

ascertain the parties' actual intentions while staving off judicial imputations disguised as implied party intent, a theme which we will return to.

3 KABAB-JI AND ENKA: THE RELEVANCE OF SEPARABILITY FOR THE PROPER LAW OF AN ARBITRATION AGREEMENT

Moving back to England, what followed *BNA* was *Kabab-Ji S.A.L. v. Kout Food Group*.[14] The main contract was a franchise agreement expressly governed by English law, but there was no explicit choice of law in the arbitration clause, which instead provided for 'arbitration … in Paris, France' administered under the International Chamber of Commerce Rules of Arbitration. In the judgment delivered by Flaux, L.J. (with whom Sir Bernard Rix and McCombe, L.J. concurred), much attention was placed on the words used in the governing law clause of the contract: it stipulated that '*[t]his Agreement* shall be governed by [English law]' (emphasis added) and the same capitalized phrase '[t]his Agreement' was defined in the main contract to include all terms of agreement. Although the court carefully acknowledged that not all governing law clauses in a contract would necessarily extend to the arbitration clause, in its view the governing law clause in *Kabab-Ji* should be properly construed as an *express* choice of English law for *all* provisions of the contract including the arbitration clause.[15] Applying English law, the English Court of Appeal refused enforcement of the arbitral award in question on the basis that the non-signatory respondent was not a proper party to the arbitration agreement.

Kabab-Ji's approach can be usefully contrasted against an earlier Singaporean approach in *BCY*, where Chong, J. (as he then was), just stopping short of finding an *express* choice, preferred the view that the governing law clause in the main contract was a 'strong indicator' of the governing law of the arbitration agreement because it referred to the 'agreement', whose ordinary meaning was a reference to all provisions in the contract including the arbitration clause.[16] On this premise the choice of governing law in the main contract constitutes an *implied* choice of the governing law of the arbitration agreement. Indeed, it has been pointed out that a general choice of law clause using the language of 'this agreement' as in *Kabab-Ji* and *BCY* is ambivalent at best – it can be interpreted as the contractual document and the terms contained therein, including the arbitration clause, or as the legal concept of a contract which the parties understood, as distinct from the arbitration agreement under the doctrine of separability.[17]

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[14] *Kabab-Ji S.A.L. (Kuwait) v. Kout Food Group (Lebanon)* [2020] EWCA Civ 6.
[15] *Ibid.,* para. 62.
[16] *BCY v. BCZ* [2017] 3 S.L.R. 357, para. 59.
[17] Myron Phua, *An Ameliorative Interpretation of Sulamerica*, LCMLQ 203–210, 210 (2020).

Insofar as implied choice is concerned, *Kabab-Ji* suggested that the business efficacy test under English contract law for implying terms in fact was applicable to ascertaining an implied choice of law for an arbitration agreement.[18] This is likely *obiter* but one could speculate whether the court's readiness to find an express choice was driven by a desire to avoid the rigours of the business efficacy test that was thought to exist under an implied choice route. More importantly, one would wonder whether the court would have construed the express choice of law provision in the same way if, as in *Sulamérica* or *BNA*, the provision stipulated a governing law that could potentially invalidate the arbitration agreement.

Enka arrived shortly after *Kabab-Ji*, and the stage was set for *Enka* to elaborate on precisely how the business efficacy test would apply when ascertaining an implied choice of law. However, any such expectations were thwarted. In *Enka*, the claimant ('Enka') had subcontracted for certain works relating to a power plant construction project in Russia. The subcontract contained an agreement to refer all disputes to arbitration seated in London, but unlike as in *BNA* and *Kabab-Ji*, contained no express choice of law for both the subcontract and the arbitration clause therein. A fire at the power plant caused significant damage, for which the power plant owner managed to recover under its insurance policy with the first defendant ('Chubb Russia'). Despite the arbitration agreement, Chubb Russia commenced proceedings in Moscow against Enka and ten co-defendants (the 'Russian Proceedings'). In response, Enka sought from the English courts a declaration that Chubb Russia was bound by the subcontract's arbitration agreement, and an injunction restraining Chubb Russia from continuing the Russian Proceedings. The proper law of the arbitration agreement became relevant to decide whether injunctive relief can and should be granted against Chubb Russia.

In a judgment delivered by Popplewell, L.J. (with whom Males and Flaux, L.JJ. concurred), the court first confirmed the views on express choice in *Kabab-Ji*: it is possible to find an express choice of law for the arbitration agreement in the terms of the main contract, as long as this results from a proper construction of the particular terms of the main contract and arbitration clause. Crucially, Popplewell, L.J. held that, where no express choice of law governed the main contract, there is generally a strong presumption that the parties have impliedly chosen the law of the seat of arbitration as the law of the arbitration agreement, unless there were 'powerful countervailing factors in the relationship between the parties or the circumstances of the case' suggesting otherwise.[19] Although both parties accepted that the subcontract was governed by Russian law, insofar as the law of the arbitration agreement was concerned, the court found nothing to rebut the presumption in favour of the law of the seat (i.e. English law).

[18] *Kabab-Ji S.A.L. (Kuwait) v. Kout Food Group (Lebanon), supra* n. 14, para. 53.
[19] *Enka Insaat Ve Sanayi A.S. v. OOO, supra* n. 4, para. 105.

Enka ruled that a choice of law in the terms of the main contract generally *cannot* be relevant in ascertaining an *implied* choice of law for the arbitration clause because the arbitration clause is separable from the main contract.[20] This is a remarkable *volte-face* from *Sulamérica*, where Moore-Bick, L.J. held that separability only serves to ensure the arbitration agreement's validity from vitiations of the main contract and does not 'insulate the arbitration agreement from the substantive contract for other purposes', [21] which was later approved in Singapore in *BCY*.[22]

Enka's logic on separability is oddly inconsistent: if one accepts the view in *Kabab-Ji* that separability does not prevent an express choice of law in the main contract from being construed in a way that extends to the arbitration agreement, it should in principle be equally possible to refer to the main contract when ascertaining an implied choice of law.

Rather, *Enka's* affirmation of separability's relevance at the implied choice stage appears designed to support the broader point that the curial law was more likely than the main contract law to be impliedly intended as the law governing the arbitration agreement. Since many provisions of the English Arbitration Act 1996 relating to both the parties' procedural *and* substantive rights would automatically apply to any arbitration seated in England, Popplewell, L.J. opined that the seat of arbitration chosen by the parties has a closer connection to the arbitration agreement and therefore is more indicative of the law which they most likely would have intended to govern their arbitration agreement.[23] This mirrors the arguments advanced by Glick and Venkatesan (whom *Enka* cites),[24] but where Popplewell, L. J. parts ways from Glick and Venkatesan is that, according to the latter two, separability is simply irrelevant to the *entire* choice of law analysis. Instead, *dépeçage* (rather than separability) is the real reason why the law chosen to govern the main contract does not *ipso facto* govern the arbitration agreement – that parties may intend for different systems of law to govern different parts of a single contract.[25] On that basis, there is 'good commercial reason' to expect parties to choose a different law to govern their dispute resolution clause because they seek a neutral forum to 'insulate the dispute resolution mechanism from the national law of either party'.[26] Consequently, according to Glick and Venkatesan, the same

[20] *Ibid.*, paras 92–95.
[21] *Sulamérica CIA Nacional de Seguros, supra* n. 1, para. 26.
[22] *BCY v. BCZ* [2017] 3 S.L.R. 357, para. 61.
[23] Ian Glick QC & Niranjan Venkatesan, *Choosing the Law Governing the Arbitration Agreement*, in *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, 141–147 (Neil Kaplan & Michael J. Moser eds, Kluwer Law International 2018).
[24] *Enka Insaat Ve Sanayi A.S. v. OOO, supra* n. 4, paras 69 and 93. *See also FirstLink Investments Corp. Ltd. v. GT Payment Pte. Ltd., supra* n. 5, para. 13.
[25] *Enka Insaat Ve Sanayi A.S. v. OOO, supra* n. 4, paras 136–141.
[26] *Ibid.*, para. 145.

inference that a choice of seat should be naturally construed as a choice of law for the arbitration agreement applies equally even where there is an express choice of law in the main contract. Glick and Venkatesan's reasoning has the merit of avoiding the contradiction behind *Enka*'s inconsistent treatment of the separability doctrine between the express choice and implied choice stages.

Nonetheless, it is less clear whether English law fully embraces Moore-Bick, L.J.'s narrow conception of separability. On one hand, it is consistent with how separability is expressed under section 7 of the English Arbitration Act 1996 and by the House of Lords in *Fiona Trust v. Privalov*.[27] Yet, other English authorities are more equivocal on the issue than may first appear[28]: the arbitration agreement has been described as a 'secondary, or collateral, contract' for resolving any disputes arising from the parties' primary obligations in the main contract by arbitration.[29]

Glick and Venkatesan's view that the proper law of an arbitration agreement arises as a distinct issue on the basis of parties' intention for *dépeçage* misses the point that, in the first place, separability is ultimately a legal fiction that is sustained for the policy objective of preventing parties from impeding legal proceedings by attacking the arbitration agreement.[30] That an arbitration clause is very much part of the main contract within which the clause resides was recognized in Singapore, where Steven Chong, J. (as he then was), held that it 'would be reasonable to assume' that contracting parties intend their entire relationship to be governed by the choice of law clause in the main contract.[31]

In *Kabab-Ji* and *Enka*, the proper law of the arbitration agreement did not fall to be decided for establishing the validity of the arbitration agreement. In contrast, cases like *Sulamérica* and *BNA* show how provisions in the main contract, including a choice of law clause, might potentially operate to invalidate the arbitration agreement. Since separability is ultimately a legal fiction driven by policy concerns, there is much to commend Coomaraswamy, J.'s suggestion in the first instance decision of *BNA*. In Coomaraswamy, J.'s view, separability should apply equally in the following manner: it should prevent a choice of law for the main contract from being construed to govern the arbitration clause therein, where this would effectively allow the parties to evade their express obligation to arbitrate at their convenience.[32]

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[27] *Fiona Trust & Holding Corp. v. Privalov* [2007] Bus. L.R. 1719, para. 17. *See also Enka Insaat Ve Sanayi A.S. v. OOO, supra* n. 4, para. 92.

[28] Phua, *supra* n. 17, at 209.

[29] Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* 104 (6th ed. Oxford Univ. Press 2015).

[30] *Ferris v. Plaister* [1994] 34 N.S.W.L.R. 474, 491.

[31] *BCY v. BCZ* [2017] 3 S.L.R. 357, para. 59.

[32] *BNA v. BNB* [2019] S.G.H.C. 142, paras 73–76.

In any event, Glick and Venketasan's reliance on *dépeçage* is premised on an inference that a choice of seat, 'whose law would govern many aspects of the arbitration agreement',[33] should be treated as a choice of law for the arbitration agreement. As discussed below, this might shade into a blurred distinction between interpreting the actual intention of the parties, and imputing one to them on the basis of presumptions.

4 PARTY AUTONOMY IN INTERNATIONAL ARBITRATION AGREEMENTS: INTERPRETING OR IMPUTING PARTIES' INTENTION?

More fundamentally, *Enka* reaches into the English toolbox for imputing intention, finding that, as a matter of 'commercial common sense', one would not expect businessmen to choose two different systems of law – the law of the seat and the law governing the arbitration agreement – to govern their 'arbitration package'.[34]

There is well-known debate on whether an implied choice is more similar to the first stage of express choice, or the third stage involving the 'closest connection' test.[35] Under the former view, implied choice involves inferring the parties' *actual* intention from surrounding circumstances, in the absence of any express provision. This is the Australian position as expressed in *Akai Pty Ltd. v. The People's Insurance Co. Ltd.*,[36] as well as transnational choice-of-law instruments like the Rome Convention (a choice must be 'express or demonstrated with reasonable certainty')[37] and the Hague Principles on Choice of Law in International Contracts ('Hague Principles') (a choice 'must be made expressly or appear clearly from the provisions of the contract or the circumstances').[38] In contrast, the latter view admits the reality that such 'inferred intention' is often, in substance, the result of an *imputed* intention which the parties had not in fact formed.

On one hand, the English courts accept that the Rome Convention's more stringent stance towards implied/tacit choice requires the court 'to infer a "real" as opposed to an imputed intention'.[39] However, *Enka* confirms that English

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[33] Glick & Venkatesan, *supra* n. 23, at 142–143.

[34] *Enka Insaat Ve Sanayi A.S. v. OOO, supra* n. 4, para. 99.

[35] Brooke A. Marshall, *Reconsidering the Proper Law of the Contract*, 13 Melb. J. Int'l L. 505–539, 511–513 (2012).

[36] *Akai Pty. Ltd. v. The People's Insurance Co. Ltd.* (1999) 141 A.L.R. 374, 390–391.

[37] Convention on the Law Applicable to Contractual Obligations (19 June 1980), 80/934/EEC, Art. 3(1).

[38] Hague Conference on Private International Law, Principles on Choice of Law in International Contracts (19 Mar. 2015), Art. 4; *see Commentary on the Principles on Choice of Law in International Contracts*, para. 4.6.

[39] *Lawlor v. Sandvik Mining & Construction Mobile Crushers & Screens Ltd.* [2013] EWCA Civ 365, paras 26–29; Peter Nygh, *Autonomy in International Contracts* 110 (Clarendon Press 1999).

common law appears generally inclined towards the latter view permitting judicial imputation.[40] In particular, *Kabab-Ji*'s incorporation of English contract law's business efficacy test for implying a contractual term in fact allows the court to fill a contractual gap by imputing what the parties may be presumed to have intended regarding an issue to which they did not address their minds at the time of agreement.[41] In short, *judicial* imputation has been artificially characterized as an implied choice made by *parties*.[42]

In contrast, *BNA* suggests that an implied choice of proper law still involves the parties' actual intention, determined by 'a process of construction which critically gives the words of the arbitration agreement their natural meaning, unless there are sufficient contrary indicia to displace that reading'.[43] It is only at the third stage of the analysis where the court may take 'the extraordinary step of imputing a choice of proper law' on the basis that the law with the closest and most real connection with the arbitration agreement would have been selected by the parties if they had considered the issue at the time of agreement.[44] This arguably better preserves the distinction between interpreting the parties' true intentions and imputing their presumed intentions.

The more critical point is that this is consistent with the New York Convention, which obliges Member States under Article V(1)(a) to apply the law of the seat as the law governing the arbitration agreement, unless the parties have 'subjected' the arbitration agreement to a particular law (whether expressly or impliedly).

To the extent that some commentators such as Born have argued that Articles II and V(1)(a) of the New York Convention *oblige* contracting states to apply a pro-validation approach to always effectuate the parties' intention to arbitrate,[45] that is doubtful. The language used in those provisions is hardly unequivocal, nor does the *travaux* demonstrate that the drafters had contemplated this specific issue. A pro-validation approach is arguably inconsistent with the express provision for the law of the seat as the default governing law in the absence of party choice contained in Article V(1)(a): even if the parties had included an arbitration clause in their main contract, the fact remains that they may not have reached any agreement on the proper law of the arbitration clause, in which case contracting states to the New York Convention are obliged to apply the law of the seat, rather than imputing an agreement to the parties. More critically, the validation principle would have

40 *Enka Insaat Ve Sanayi A.S. v. OOO, supra* n. 4, para. 70.
41 *Sembcorp Marine Ltd. v. PPL Holdings Pte. Ltd.* [2013] 4 S.L.R. 193, paras 93–101; *Marks & Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey) Ltd.* [2015] UKSC 72, paras 21–30.
42 Compare *Sulamérica CIA Nacional de Seguros, supra* n. 1, para. 57.
43 *BNA v. BNB* [2019] S.G.C.A. 84, para. 104.
44 *Ibid.*, para. 48, approving *BNA v. BNB* [2019] S.G.H.C. 148, para. 56, per Coomaraswamy, J.
45 Born, *supra* n. 13, at 834–837.

nothing to say about whether a party has agreed to be bound by the arbitration agreement (as in *Kabab-Ji*), or whether a party has breached the arbitration agreement (as in *Enka*), because the principle is engaged only where the issue concerns the validity of the arbitration agreement. Even then, it begs the question of whose yardstick should be applied to ascertain the validity of the arbitration agreement in the first place, since different laws will yield different answers to the same set of facts.[46] As the parties' actual, rather than imputed, intent should take centre stage, it could make good sense to prefer *BNA*'s approach of taking into account the invalidating effect of a particular governing law on the arbitration agreement only where the parties were aware of that fact at the time of agreement.

Nevertheless, this distinction between implication and imputation becomes murky when one considers *both* the Singapore and English courts' reliance on *inferences* or *presumptions* of implied choice, whether in favour of the law of the main contract or the law of the seat. A *presumption* of choice rebuttable by actual evidence of choice of another system of law effectively circumscribes the possibility that the parties have simply not contemplated the issue of proper law of the arbitration agreement at all (which should not be surprising given their characterization as 'midnight clauses' which are often neglected).[47] The same logic applies to Glick and Venkatesan's argument that a choice of seat should be ordinarily taken to *infer* a choice of law for the arbitration agreement.[48] A possible assessment of the circumstances in *BNA* might be that the parties had simply failed to consider specifically which law should govern their arbitration agreement, which would still have led the court to apply PRC law, except on the different basis that it had the closest and most real connection with the arbitration agreement.[49] Put simply, a presumption of implied choice wades dangerously close to the shores of imputed intention and risks undermining the default choice-of-law rule that applies in the absence of actual party choice. Indeed, Neuberger, M.R., in his concurring judgment in *Sulamérica*, provides a useful reminder that it may be necessary to cut right through the feverish contest between the law governing the main contract and the law of the seat, and instead:

> accept that there are sound reasons to support either conclusion as a matter of principle. Whichever course is adopted, it is necessary to consider whether there is anything in the other provisions of the contract or the surrounding circumstances which assist in resolving the conundrum.[50]

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[46] *See* the conflicting judgments between the English and French courts in both the *Dallah v. Pakistan* and *Kabab-Ji S.A.L. v. Kout Food Group* litigations, as discussed *infra* at Part V.

[47] Blackaby et al., *supra* n. 29, at 72–73.

[48] Glick & Venkatesan, *supra* n. 23, at 143.

[49] *Sulamérica CIA Nacional de Seguros, supra* n. 1, paras 31–32.

[50] *Ibid.*, para. 61.

It is suggested here that a better route which truly respects the primacy of party autonomy would be to eschew the use of presumptions, and refrain from arrogating to ourselves whatever 'commercial' sensibilities businessmen may have to justify those presumptions.[51] Fundamentally, parties are allowed to make an express choice of law governing the arbitration agreement, whether expressed through the clauses of the main contract (such as *Kabab-Ji*), in the arbitration clause, or indeed in a separate free-standing agreement. In the absence of an express choice, one turns to look for an implied choice.

In relation to implied choice, resorting to domestic concepts for implication of terms that exist under the *lex fori* as *Kabab-Ji* would have us do is not ideal, not least because international tribunals who have to grapple with the same issue do not have the luxury of a *lex fori*. Instead, following the Hague Principles, parties can make an implied choice of law ascertained through the main contract or the circumstances of the case, but there must be a clear and real intention by both parties that a certain law shall be applicable. A presumed intention imputed to the parties should not suffice.

For instance, in *Arsanovia v. Cruz City*, besides the main contract's express stipulation that 'this agreement' was governed by Indian law, the arbitration clause expressly excluded certain provisions of the Indian Arbitration Act.[52] One can easily appreciate why the English court held that Indian law (less the excluded provisions) governed the arbitration agreement, without resorting to the use of presumptions. Conversely, the fact that a governing law candidate may invalidate the arbitration agreement is a negative indication of intention – that the parties probably did not intend to choose that law – but critically it would not conclusively establish *per se* a positive intention to choose a particular governing law candidate (cf. an *in favorem validitatis* rule of construction).[53]

Short of sufficient evidence to establish that the parties had a clear and real intent to choose a proper law for the arbitration agreement, courts at least in New York Convention contracting states should apply the default rule under Article V (1)(a), i.e. the law of the seat. This approach would achieve the same result reached in *Sulamérica, BNA*, and *Enka*, preserve harmony between common law choice of law rules and the choice of law rules embodied in the New York Convention, arrive at a common set of choice of law rules that both courts and international

[51] *See* e.g. *Pacific Recreation Pte. Ltd. v. S. Y. Technology Inc.* [2008] 2 s. L.R.(R.) 491, para. 47; Myron Phua, *Resolving the Difficulties of Determining What Law Governs the Validity of an Arbitration Agreement – A Critique Erga Omnes*, 28 Am. Rev. Int'l Arb. 335–366, 360–363 (2017).

[52] *Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), para. 20.

[53] Phua, *supra* n. 51, at 357–360; Victor Leong & Tan Jun Hong, *The Law Governing Arbitration Agreements: BCY v. BCZ and Beyond*, 30 SAcLJ 70–96, 95 (2018).

arbitrators alike can apply, and avoid distortions caused by judicially imputing intentions when there might be none.

5 'PRO-ARBITRATION' POLICY IN THE CHOICE OF LAW ANALYSIS?

Practically, leaving aside fine doctrinal schisms over choice of law rules, insofar as litigation strategy is concerned, the trend of modern English authorities (including *Sulamérica, Kabab-Ji*, and *Enka*)[54] have ultimately displayed a pattern in favour of English law governing the arbitration agreement, except in the clearest of indications otherwise as in *Arsanovia*. A similar forum preference approach in the English courts has also been observed in the context of determining the parties' choice of the seat of arbitration.[55]

On that basis, it may be interesting to understand the case law against the policy objectives that would be served by its finding on the proper law of the arbitration agreement. In holding that English law applies to the arbitration agreement, *Kabab-Ji* may have sought to skirt the same controversy engaged during the *Dallah v. Pakistan*[56] litigation concerning how an English court would decide whether French law considers a non-signatory to be bound to an arbitration agreement.[57] Indeed, this potential conundrum materialized. After *Kabab-Ji* was decided by the English Court of Appeal, the seat court in Paris held that the arbitration agreement was governed by French law, and applying French law, the non-signatory respondent in question was a proper party to the arbitration agreement. In so doing, it arrived at the opposite conclusion from the English Court of Appeal.[58] Like in *Dallah*, the conflicting decisions resulted in an award that was enforceable at the seat in France, but not in England. As for *Sulamérica* and *Enka*, these two decisions could represent the English courts' readiness to issue an injunction restraining foreign proceedings in breach of a London-seated arbitration agreement[59] as a matter of protecting the country's reputation as an arbitral seat. Indeed, the UK Supreme Court previously hinted at this policy consideration in the course of affirming the English courts' inherent jurisdiction to grant injunctive

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54 *See also C. v. D.* [2007] EWCA Civ 1282; *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi A.S. v. VSC Steel Co. Ltd.* [2013] EWHC 4071 (Comm).

55 Jonathan Hill, *Determining the Seat of an International Arbitration: Party Autonomy and The Interpretation of Arbitration Agreements*, 63 ICLQ 517–534, 534 (2014).

56 *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 A.C. 763.

57 *See* Jacob Grierson & Mireille Taok, *Dallah: Conflicting Judgments from the UK Supreme Court and the Paris Cour d'Appel*, 28 J. Int'l Arb. 407–422 (2011).

58 Cour d'appel, Paris, 23 June 2020.

59 Note that this includes both foreign court proceedings pursuing a substantive claim in breach of an agreement to arbitrate (e.g. in *Enka*), and foreign proceedings pursuing procedural remedies such as an anti-arbitration injunction in the face of a valid agreement to arbitrate (e.g. in *Sulamérica*).

relief – that it would otherwise be 'a radical diminution of the protection afforded by English law to parties to such an arbitration agreement'.[60]

Unlike in England, Singapore has not yet revealed any similar inclination towards forum preference – *BNA* and *BCY* are prime examples, where foreign law was applied as the law governing the arbitration agreement.

Whilst there may be some immediate attraction to applying a governing law which would ensure the validity of an arbitration agreement, any so-called pro-validation approach would in reality be motivated by a state sending a policy signal that it will refer parties to arbitration as long as parties have included an arbitration clause in their contract.

Even then, that can only be half the story: is it ultimately better for the arbitral system by always applying a validating proper law of the arbitration agreement, or to ensure that the parties can get an enforceable award at the end of the day? If tribunals are allowed to affirm their own jurisdiction by finding that the arbitration agreement is always governed by a law under which the agreement is valid, any eventual award may well be refused enforcement in another forum when the enforcing court applies a different governing law to the arbitration agreement. This may explain the decision in *BNA*: if the tribunal's jurisdiction was affirmed, the award creditor would have likely faced an uphill battle in enforcing the award in the PRC courts, which could conceivably take a less generous position given PRC law's current restrictions on foreign arbitration institution-administered arbitration agreements. The same argument holds true from the perspective of the enforcing court – as the *Kabab-Ji* litigation demonstrates, an arbitral award may be refused enforcement outside the seat of arbitration, despite being fully capable of enforcement at the seat.

6 CONCLUSION

As *Enka* is scheduled to be heard on appeal by the UK Supreme Court, the English Court of Appeal's approach in *Enka* will surely not be the last word. A close examination of the case law (as at the time of writing) on determining the proper law of an arbitration agreement reveals a strong tension between the need to give effect to party autonomy on choice of law, on one hand, and broader policies regarding the regulation and promotion of arbitration which are especially acute in major arbitration centres, such as England and Singapore.

To this end, rather than a reliance on presumptions or inferences or a principle of validation, what may be ultimately beneficial for the entire arbitral system is for

[60] *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 W.L.R. 1889, para. 58.

tribunals and state signatories to the New York Convention to hew to the choice of law rules under Article V(1)(a) of the Convention to ascertain the governing law of an arbitration agreement, and apply those rules in the manner described above: short of sufficient evidence to establish that the parties had a clear and real intent to choose a proper law for the arbitration agreement, tribunals and courts should apply the default rule of the law of the seat.