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Citation

CHAN, Darius and TEO, Jim Yang. Re-formulating the test for ascertaining the proper law of an arbitration agreement: A comparative common law analysis. (2022). *Journal of Private International Law*. 17, (3), 439-472.

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Published in Journal of Private International Law, 2022, 17 (3), 439-472.
DOI: 10.1080/17441048.2021.1967621

Re-formulating the test for ascertaining the proper law of an arbitration agreement: a comparative common law analysis

Darius Chan* and Jim Yang Teo**

Following two recent decisions from the apex courts in England and Singapore on the appropriate methodology to ascertain the proper law of an arbitration agreement, the positions in these two leading arbitration destinations have now converged in some respects. But other issues of conceptual and practical significance have not been fully addressed, including the extent to which the true nature of the inquiry into whether the parties had made a choice of law is in substance an exercise in contractual interpretation, the applicability of a validation principle, and the extent to which the choice of a neutral seat may affect the court's determination of the proper law of the arbitration agreement. We propose a re-formulation of the common law's traditional three-stage test for determining the proper law of an arbitration agreement that can be applied by courts and tribunals alike.

Keywords: proper law of arbitration agreement; law of the main contract; law of the seat; *Enka v Chubb*; *BNA v BNB*; validation principle; *ut res magis valeat quam perat*; arbitration agreement; choice of law; Article V (1)(a) of the New York Convention

A. Introduction

Although arbitration clauses are often included in international commercial contracts, parties should but typically do not state the law governing the arbitration agreement. Much time and effort are often spent in disputes concerning the proper law of the arbitration agreement, which governs various critical issues affecting arbitral jurisdiction such as the existence, validity and scope of the arbitration agreement.

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In *BNA v BNB*,[1] the Singapore Court of Appeal affirmed the general approach in *Sulamérica v Enesa*[2] which was previously adopted by the Singapore High Court in *BCY v BCZ*.[3] Where the arbitration agreement does not state a choice of law, the law chosen to govern the main contract is presumed to apply as an implied choice for the arbitration agreement. This may be displaced if the law of the seat is materially different from the law of the main contract and there are contrary indications that the parties had impliedly chosen the former and not the latter to govern the arbitration agreement.

Any newly found sense of stability in Singapore following *BNA* was quickly washed away by further developments at English law. In *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors*,[4] the English Court of Appeal deviated from its earlier position in *Sulamérica* by preferring a general rule in favour of the law of the seat as the parties' implied choice of law for the arbitration agreement. After some months of renewed uncertainty over the English approach, an answer from the UK Supreme Court reverted to what it called the "main contract approach" rather than the "seat approach" urged by the lower court.[5] While it might appear at first blush that English and Singapore law have now converged on this issue, there remain some differences and uncertainties of conceptual and practical significance which have yet to be fully resolved.

Section B of this article summarises the prevailing positions in England and Singapore respectively as a result of *Enka* and *BNA*. Section C of this article addresses the view held by four of the five UK Supreme Court judges in *Enka* that the true nature of the inquiry into whether the parties had made a choice of law is in substance an exercise in contractual interpretation. Section D of this article compares *Enka*'s keen affirmation of the validation principle against the more circumspect position in Singapore. Section E examines *Enka*'s views on the extent to which the parties' choice of a neutral seat may or may not point away from the law of the main contract as a contrary *indicium*, an issue which has yet to be fully ventilated before the Singapore courts.

B. Comparing the English and Singapore approaches after *Enka v chubb*

1. The decision in *Enka v chubb*

Enka concerned the claimant Enka's application for an anti-suit injunction to restrain the respondent Chubb Russia from pursuing Russian court proceedings against Enka, on the ground that the Russian claim fell within the scope of the

[1] [2020] 1 SLR 456.
[2] [2012] EWCA Civ 638.
[3] [2017] 3 SLR 357. See also *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267; *BMO v BMP* [2017] SGHC 127.
[4] [2020] EWCA Civ 574.
[5] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38.

arbitration clause found in the construction contract. Through subrogated rights accrued to it under an insurance policy, Chubb Russia was claiming under the contract for losses suffered by the policy owner from a fire for which Enka was alleged to be partly responsible. Enka's anti-suit injunction application rested heavily on a finding that the arbitration agreement was governed by English law because (a) it appeared more likely that the Russian claim would fall within the scope of the arbitration agreement, given that English law tends towards a wider interpretation of the scope of arbitration clauses; and (b) it was less clear whether an English court could grant an anti-suit injunction based on an arbitration agreement not governed by English law.

The UK Supreme Court applied the established common law principles by searching for an agreement by the parties on a choice of law for the arbitration agreement, failing which the law most closely connected to the arbitration agreement would apply as its governing law. The Court unanimously agreed that where the parties have made a choice of governing law for their contract, this would most naturally be construed as intended to apply equally to the arbitration agreement found in the main contract because commercial parties are most likely to have expected their choice of law to govern all aspects of their agreement.[6] This affirms the so-called "main contract approach" and thereby repudiates the conflicting line of authorities at English law (most significantly in the lower court's decision)[7] which had supported the "seat approach".[8]

This general rule or presumption in favour of the law of the main contract may however be rebutted if there are contrary indications that the parties had chosen the law of the seat to govern the arbitration agreement instead. Perhaps the most important contrary *indicium*, on which all five judges agreed, is where the arbitration agreement would be invalid under the law chosen to govern the main contract. In such cases, English law applies a "validation principle"[9] based on the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat* – that an interpretation of the contract which would preserve the transaction should be preferred over one which would destroy it. Therefore, the existence of "at least a serious risk" that the arbitration agreement would be invalid or ineffective if governed by the law chosen to govern the main contract militates against a construction or presumption

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[6] *Enka* (SC), *ibid*, [43]-[58] per Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed); [231]-[255] per Lord Burrows; [266]-[275] per Lord Sales.

[7] *Enka* (CA), *supra* n 4. See also *C v D* [2007] EWCA Civ 1282. To the extent that Lord Burrows thought at [221]-[226] that the High Court judgment of Hamblen J (as he then was) in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm) also supported the seat approach, with respect this is probably not correct.

[8] *Enka* (SC), *supra* n 5, [59]-[94].

[9] See Gary Born, "Choice of Law Governing International Arbitration Agreements" in *International Commercial Arbitration* (Kluwer Law International, 3rd edn, 2021). See however Part E on the precision of the terminology adopted by the Supreme Court.

that the parties had made such a choice of law because it would have defeated their clear intention to arbitrate.[10] However, the Court's endorsement of this "validation principle" stands only as *obiter dictum*, since the issues pleaded did not implicate the validity of the arbitration agreement.[11]

The UK Supreme Court parted ways on two points – one of fact and one of law. The majority led by Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) held that the construction contract did not contain any choice of law. On that premise, they affirmed and applied the long-standing assumption at common law that in the absence of a choice of proper law, the arbitration agreement would be governed by the law of the seat which was chosen by the parties on the basis that it is most closely connected to the arbitration agreement. Thus, the majority concluded that the arbitration agreement was governed by English law, which was the law of the chosen seat.

In contrast, the two dissenting judges Lord Burrows and Lord Sales were of the view that, the parties did make an implied choice of Russian law to govern the main contract. This triggered a presumption that Russian law was impliedly intended to govern the arbitration agreement as well.[12] This presumption was unrebutted on the facts.

Even if the parties had made no choice of law, the dissenting judges considered that it was the law of the main contract as determined according to Article 4 of the Rome I Regulation (and not the law of the seat) which should apply by default at the closest connection stage. Lord Burrows reasoned that this should mirror the position where there had been an implied choice of law for the main contract, given the thin distinction between the implied choice and closest connection stages.[13] Lord Sales agreed with this.[14] In his view, ensuring that the contract and the arbitration agreement are governed by the same system of law would produce such coherence and certainty for commercial parties that their entire contract be governed by the same system of law on substantive contractual issues like validity and interpretation.[15] This would also

[10]*Enka* (SC), *supra* n 5, [95]-[109] per Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed); [198] per Lord Burrows; [276]-[278] per Lord Sales. The "serious risk" threshold is derived from Moore-Bick LJ's judgment in *Sulamérica*, *supra* n 2, [31].

[11]*Enka* (SC), *ibid*, [179], [197]-[199] and [279]. The appellant did raise a new argument in the appeal that the validation principle was applicable because of a Russian decision that an arbitration agreement of the same type concerned in the case was too uncertain to be enforceable under Russian law. However, the Court considered that it was unable to hear arguments on this issue because it was not pleaded below. Editor's note: The article was written before the decision of the UK Supreme Court in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, but on the limits of the validation principle see paras 49-52.

[12]*Enka* (SC), *ibid*, [255] and [269].

[13]*Enka* (SC), *ibid*, [256]-[257] and [260].

[14]*Enka* (SC), *ibid*, [281]-[292].

[15]*Enka* (SC), *ibid*, [286].

produce more consistent results with the express and implied choice stages of the analysis.[16] Either way, the two minority judges agreed that it was Russian law that governed the arbitration agreement, whether as an implied choice or in the absence of any choice at all.

2. *Comparison with the Singapore approach*

After the recent decisions of their respective apex courts, the overall state of English and Singapore law can be summarised as follows. Both have converged on two key broad propositions on determining the proper law of an arbitration agreement. First, where the arbitration agreement contains no express choice of law, the law of the main contract is *prima facie* the parties' implied choice of law for the arbitration agreement, subject to sufficient proof to the contrary which justifies an inference that the law of the seat was the implied choice, or that no choice of law had been made at all. Second, where no choice of law for the arbitration agreement can be discerned, the law of the seat will most likely apply at the closest connection stage.

The former hopefully puts to rest the long-standing contest between the "main contract approach" and the "seat approach". After a brief sojourn towards the "seat approach" in the Court of Appeal, the Supreme Court's *Enka* decision heralds the return of English law to the "main contract approach" as with the earlier *Sulamérica* position. This is not unlike the Singaporean experience where the decisions in *BCY* and *BNA* have reaffirmed the principle that the law chosen for the main contract is likely to govern the arbitration agreement as well.[17] The reasons relied upon by the English and Singapore courts for doing so are largely similar – that (a) given the narrowly defined rationale of the separability doctrine in English and Singapore law, one cannot begin with the assumption that the arbitration agreement is a distinct agreement from the main contract with its own governing law;[18] (b) on matters regarding the substantive aspects of the agreement to arbitrate, the law of the main contract is more significant because the obligation to arbitrate constitutes part of the "package of rights and obligations created by and set out in the main contract";[19] and (c) the seat is usually chosen for its neutrality[20] or whatever reputation the curial law and the supervisory

[16] *Enka* (SC), *ibid*, [283].
[17] *BCY*, *supra* n 3, [49]-[65]; *BNA* (CA), *supra* n 1, [47]. Cf *FirstLink Investments Corpn Ltd v GT Payment Pte Ltd* [2014] SGHCR 12.
[18] See *Enka* (SC), *supra* n 5, [92] per Lord Leggatt and Lord Hamblen (with whom Lord Kerr agreed), with reference to the separability doctrine as defined in s 7 of the English Arbitration Act; and *BCY*, *supra* n 3, [60]-[61], with reference to the doctrine as embodied in Singapore law under Art 16(1) of the Model Law.
[19] *Enka* (SC), *supra* n 5, [40] and [269].
[20] But one should not assume that a seat is necessarily chosen for its neutrality: see *BNA* (CA), *supra* n 1, [86].

jurisdiction of the courts in that country might have, such that a mere choice of seat cannot ordinarily provide sound basis for any inference on the parties' choice of law for the main contract or the arbitration agreement.[21]

Effectively, the law of the main contract has gained ascendancy over the law of the seat – and justifiably so. While the separable nature of an arbitration agreement means that it *might* be governed by a different law from the main contract,[22] the law should not keep any pretences that ordinary commercial parties are in fact more likely than not to choose a governing law with the legal fiction of separability firmly in mind. This is especially so given the little attention often paid to dispute resolution clauses in the transactional process.[23] It accords far better with commercial reality to have a general rule that the parties are more likely to have chosen a single law to govern their entire contractual relationship, rather than have a split proper law.[24]

The second proposition might present a new frontier for contention. Despite a strong dissent from Lord Burrows and Lord Sales, *Enka* did ultimately preserve the existing common law position that the law of the seat would be "overwhelming" as the law most closely connected to the arbitration agreement. The same position has also been applied in Singapore.[25]

The principal justification is that the law of the seat is "the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective."[26]

The *Enka* court was divided over the significance of Article V(1)(a) of the New York Convention, which stipulates that the validity of the arbitration agreement should, if the parties have not indicated a choice of law, be governed by "the law of the country where the award was made", i.e. the law of the seat. While the majority accepted that Article V(1)(a) in principle only applied in enforcement proceedings, they preferred the views of Professor Albert van den Berg that

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[21]*BCY*, *supra* n 3, [62]-[63]; *Enka* (SC), *supra* n 5, [110]-[117] per Lord Leggatt and Lord Hamblen (with whom Lord Kerr agreed); [240]-[244] per Lord Burrows; [271]-[273] per Lord Sales. However, the *Enka* majority did accept at [170(iv)] that a mere choice of seat could *reinforce* the presence of other factors weighing significantly against the ordinary inference that the law chosen to govern the main contract was also intended to apply to the arbitration agreement.

[22]N Blackaby, C Partasides *et al.*, *Redfern and Hunter on International Arbitration* (Kluwer Law International, 6th edn, 2015), [3.13].

[23]*International Commercial Arbitration*, *supra* n 9, 572; *Redfern and Hunter on International Arbitration*, *ibid*, [3.10]. The Singapore courts have also explicitly recognised this point: see *BCY*, *supra* n 3, [61].

[24]This also reflects the more general position that the court will be not readily conclude that the parties intended to split the contract and subject different laws to each part: *Kahler v Midland Bank Ltd* [1950] AC 24, 42; *Centrax Ltd v Citibank NA* [1999] 1 All ER (Comm) 559, 561-562. See *Enka* (SC), *supra* n 5, [269] per Lord Sales.

[25]*BCY*, *supra* n 3, [44]; *BNA* (CA), *supra* n 1, [119]; though the Court of Appeal in *BNA* did not express a view.

[26]*Sulamérica*, *supra* n 2, [26] and [32] per Moore-Bick LJ.

from an international perspective it would be undesirable if different conflict rules are applied at different stages of the proceedings.[27] The dissenting judges preferred not to elevate Article V(1)(a) to the status of an international uniform conflicts rule. Lord Sales emphasised that the closest connection stage at common law aligns itself with the likely result that the parties would have wished to achieve to produce reasonable coherence across their whole contractual relationship. This requires consideration of "how the parties are likely to have approached matters themselves", which the majority had already established should start from the assumption that reasonable commercial parties would have expected their entire relationship to be governed by a single system of law.[28] Furthermore, where an arbitration agreement would not be valid under the law of the country where the award was made, the common law would have applied the validation principle to find a different proper law under which the arbitration agreement is valid.[29] Lord Burrows opined that this may be achieved despite Article V(1)(a) because the court can and should exercise its residual discretion under Article V(1) (which provides that enforcement *may* be refused) to accommodate the validation principle.[30]

On one hand, there is some authority for the view that, in the absence of a choice of law, the court imputes to the parties what just and reasonable persons ought to have intended if they had thought about the matter when they made the contract.[31] This might have given some force to Lord Sales' argument that the law of the main contract should generally apply, especially since the UK Supreme Court had unanimously affirmed that the arbitration clause is not to

[27] *Enka* (SC), *supra* n 5, [125]-[141].

[28] *Enka* (SC), *ibid*, [292], referring to the majority's observations at [53].

[29] *Enka* (SC), *ibid*, [291].

[30] *Enka* (SC), *ibid*, [251]-[253] per Lord Burrows, citing A Arzandeh and J Hill, "Ascertaining the Proper Law of an Arbitration Clause under English Law" (2009) 5 *Journal of Private International Law* 425, 441–2. But it should be noted that Arzandeh and Hill themselves ultimately recommended that English law should apply the law of the seat as the default rule, including though not limited to the fact that this would be consistent with Art V(1)(a) of the New York Convention: see 443-445.

[31] *Mount Albert Borough Council v. Australasian Mutual Life Assurance Society* [1938] AC 224, 240 per Lord Wright; *The Assunzione* [1954] 1 P. 150, 179 per Singleton LJ, cited with approval in *Las Vegas Hilton Corp (trading as Las Vegas Hilton) v Khoo Teng Hock Sunny* [1996] 2 SLR(R) 589, [42] per Chao Hick Tin J and *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491, [49]. Whereas these Singapore cases clearly interpreted Singleton LJ's *dictum* as directed towards the closest connection stage under the modern three-stage analysis, whether this was truly what he meant is far more uncertain: see A Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018), 318. Nevertheless, this should not detract from the conceptual distinction between inferred intention (ie inferring an implied choice) and imputed intention (ie the system of law with the closest connection): see Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th edn, 2012), [32-060].

be treated as a separate agreement from the main contract, save for the narrow purposes of the separability principle. However, it bears reminding that the closest connection test eventually developed into a more objective exercise based on connecting factors, as opposed to a divination of the parties' presumed or imputed intentions.[32]

More importantly, while the *Enka* minority is correct that commercial parties value internal coherence and certainty within their contract, there is a distinct, external dimension of reasonable commercial expectations which takes into account the broader commercial and legal environment of international arbitration.[33] The common law should hew to the default rule expressed in Article V (1)(a) in light of the state of international arbitration today and its popularity as a mechanism for resolving cross-border disputes. This should be the case not only as a matter of legal policy concerning arbitration agreements, but also that the Convention obliges the courts of Contracting States to apply the same default rule under Article V(1)(a) uniformly at both the pre- and post-award stages.[34] As for Lord Burrows' invocation of the court's residual discretion under Article V(1)(a), we argue in Part D that it is conceptually problematic to apply the validation principle at the closest connection stage.

As we have argued elsewhere, treating Article V(1)(a) as an international, uniform conflicts rule also means that the law should take more seriously the actual intentions of the parties as to a choice of governing law, rather than arrogating to itself what businessmen are likely to have thought in the circumstances.[35] With that in mind, we turn to examine the nature of a choice of proper law for the arbitration agreement.

C. Ascertaining a choice of proper law for the arbitration agreement – an exercise in contractual interpretation?

What is conceptually significant is the *Enka* majority's decision to diminish the terminological distinction between "express choice" and "implied choice". In its view, the court's task is simply to ascertain whether the parties have agreed on a choice of law, whether manifested expressly or impliedly.[36] To this

[32] *Bonython v Commonwealth of Australia* [1954] AC 201, 219. See *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583, 603–604 per Lord Reid; FA Mann, "The Proper Law in the Conflict of Laws" (1987) 36 *International and Comparative Law Quarterly* 437, 444. Cf *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196, [65]-[71].

[33] *Enka* (SC), *supra* n 5, [136].

[34] *Enka* (SC), *ibid*, [125]-[141].

[35] D Chan and J Teo, "Ascertaining the Proper Law of an Arbitration Agreement: The artificiality of inferring intention where there is none" (2020) 37 *Journal of International Arbitration* 635.

[36] *Enka* (SC), *supra* n 5, [35], cf [193] per Lord Burrows. The same view is taken in *Dicey, Morris & Collins*, *supra* n 31, [16-017]. For completeness, there appears no reason why the

end, the majority approved *Cie Tunisienne de Navigation SA v Cie d'Armement Maritime SA* that an English court should apply English rules of construction to determine whether the parties had agreed on a choice of law.[37] Only where no choice of law can be ascertained from that process of contractual interpretation will the court apply the system of law with which the agreement has its closest and most real connection. Lord Sales agreed with the majority's emphasis on contractual interpretation,[38] though the other dissenting judge Lord Burrows continued to adopt the express/implied choice terminology.[39]

By uniting both inquiries under the banner of contractual interpretation, *Enka* appears to advocate for a two-stage analysis as opposed to the usual three-stage framework – not dissimilar to the approach advanced in the High Court of Australia decision of *Akai Pty Ltd v People's Insurance Co Ltd*. The majority in that case, comprising Toohey, Gaudron and Gummow JJ, took the view that express and implied choice: "are but species of the one genus, that is concerned with giving effect to the intention of the parties", and that is a question "of whether, upon the construction of the contract and by the permissible means of construction, the court properly may infer that the parties intended their contract to be governed by reference to a particular system of law".[40] In so doing, *Akai* apparently jettisoned the "three-tiered approach" which was thought "needlessly to complicate matters".[41]

1. *Hidden complexities in the process of ascertaining an express or implied choice of law*

In a sense, both express and implied choice are fundamentally concerned with the same question – have the parties reached an agreement – or *consensus ad idem* – on a choice of law to govern their contract?[42] This is also embodied in the scheme

limitations under the common law on contractual choice of law as established in *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 should not apply equally in the context of arbitration agreements, namely, that the choice of law must be *bona fide*, legal and not against public policy.

[37] *Enka* (SC), *ibid*, [29]-[30], citing *Cie Tunisienne de Navigation SA v Cie d'Armement Maritime SA* [1971] AC 572, 603 per Lord Diplock.

[38] *Enka* (SC), *ibid*, [267] per Lord Sales.

[39] *Enka* (SC), *ibid*, [193] per Lord Burrows.

[40] *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 141 ALR 374, 390-391. See also Lord Diplock's judgment in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] 1 AC 50, 61.

[41] *Akai*, *ibid*, 391. See P Nygh, *Autonomy in International Contracts* (Clarendon, 1999), 107–109 (put another way, "either the parties have expressed a choice, or they have not"); *Party Autonomy in Private International Law*, *supra* n 31, 324-325; B Marshall, "Reconsidering the Proper Law of the Contract" (2012) 13 *Melbourne Journal of International Law* 505, 513.

[42] *Autonomy in International Contracts*, *ibid*, 87–90 and 92.

of the Rome I Regulation, where Article 3 houses both concepts of express choice and tacit choice within a single provision. In that respect, *Enka*'s attempt to amalgamate express and implied choice emphasises, laudably in our view, that the core inquiry at both the express and implied choice stages is to ascertain and carry out the actual will of the parties.

However, whether these two stages should be amalgamated into a single question of construction is not a straightforward issue.

An express choice is usually understood as a specific statement in the terms of the contract that the contract is to be governed by a certain law.[43] For arbitration agreements, this was recently complicated by the English Court of Appeal's decision in *Kabab-Ji v Kout Food Group*, where a choice of law clause in the *main contract* in the form "This Agreement shall be governed by … " was considered an express choice of law for the arbitration agreement.[44] This was initially received with some surprise because an express choice of law for an arbitration agreement was generally assumed to be one that could be located from the very terms of that agreement.[45] However, this latest English approach simply follows from what may be called the narrow conception of separability: that the doctrine as codified in section 7 of the Arbitration Act 1996 is confined to treating the arbitration agreement as separable from the contract "for the purpose of determining its validity or enforceability".[46] It is strongly arguable section 7 was deliberately drafted to clarify that separability was not a freestanding principle, but rather a doctrine whose application is confined to ensuring the efficacy of the arbitration agreement where the validity of the main contract is impugned.[47] Thus, it

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[43] *Dicey, Morris & Collins*, *supra* n 31, [32-047]; A Diamond, "Harmonization of Private International Law relating to Contractual Obligations" (1986) 199 *Hague Collected Courses* 255.

[44] *Kabab-Ji S.A.L. (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6, [62]-[70].

[45] For instance, the Singapore Court of Appeal in *BNA* considered this "uncontroversial" and therefore quickly concluded, from the arbitration clause's lack of mention of a governing law, that the parties had not made an express choice of law for the arbitration agreement: *BNA* (CA), *supra* n 1, [46]. See also *BCY, supra* n 3, [41] where the judge quickly concluded that the arbitration agreement did not contain an express choice of law, even though the main contract did specify an express choice of New York law. Likewise, prior to *Enka*, English law took this narrow view of an express choice of law for the arbitration agreement: see, eg *Habas Sinai*, *supra* n 7, [101]-[103].

[46] *Enka* (SC), *supra* n 5, [41]; *Sulamérica*, *supra* n 2, [26].

[47] Lord Justice Saville, *Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill* (1997) 13 *Arbitration International* 275, 284, showing that s 7 of the Arbitration Act 1996 was intended to implement the doctrine of separability at common law as set out in *Harbour Assurance Co (UK) Ltd v Kansa General International* [1993] QB 701. See also R Merkin and L Flannery, *Merkin and Flannery on the Arbitration Act 1996* (Informa Law, 6th edn, 2020), 153. This might be distinguished from another oft-used description that an arbitration clause is "collateral" to the main contract, which could potentially be construed more widely as a freestanding principle: see A Samuel, "Separability in English law – Should an Arbitration Clause Be Regarded as an Agreement

should have no application for the purpose of determining the proper law of an arbitration agreement.[48]

In other words, applying the narrow view of separability, where an arbitration agreement is found as a clause integrated into the substantive contract (as opposed to a "free-standing" arbitration agreement),[49] the entire contract should be read together with the arbitration agreement found therein.[50] If there is an express choice of law clause in the main contract, it should generally be interpreted to include the entire contract including the arbitration agreement as a matter of proper construction, unless there are other indications which militate against that interpretation.[51] Interestingly, Lord Sales in *Enka* commented that this should have been the correct analysis in *Sulamérica*. The main contract there was expressly governed by Brazilian law, but the arbitration agreement itself was silent on whether it was governed by a different proper law. Whereas Moore-Bick LJ in *Sulamérica* concluded that the express choice of Brazilian law for the main contract would be a presumptive indication of an implied choice of the same for the arbitration agreement, Lord Sales thought that the true question was, simply put, whether an express term in the main contract should be *construed* as applying to the arbitration agreement as well.[52]

To be sure, this raises a difficult antecedent question of the law applicable to the separability of an arbitration agreement, which merits a separate discussion entirely. There are conflicting authorities on whether this is a procedural issue governed by the *lex fori* or a substantive issue governed by the law of the arbitration agreement.[53] In any event, it may be possible under the applicable law for parties to vary by agreement the doctrine of separability.[54]

Separate and Collateral to a Contract in Which It Is Contained?" (1986) 3 *Journal of International Arbitration* 95. This broader view of separability (or "autonomy" as commonly termed in the civil law tradition) may require a different analysis: *Redfern and Hunter on International Arbitration*, *supra* n 22, [3.13].

[48]*Enka* (SC), *supra* n 5, [41]. See also [232]-[234] per Lord Burrows, citing A Briggs, *Private International Law in English Courts* (Oxford University Press, 2014), [14.37]-[14.38] who colourfully describes that an arbitration agreement is not "separate" but only "separable" or "severable" for the specific purposes defined in s 7.

[49]*Sulamérica*, *supra* n 2, [26]; *BCY*, *supra* n 3, [66]-[67]; *Enka* (SC), *supra* n 5, [230] per Lord Burrows.

[50]*Enka* (SC), *ibid*, [43]; *Kabab-Ji*, *supra* n 44, [62]-[67].

[51]*Kabab-Ji*, *ibid*, [62]-[70]. Cf *Enka* (CA), *supra* n 4, [90] where Popplewell LJ thought that it would be rare that "the language and circumstances of the case demonstrate that the main contract choice is properly to be construed as being an express choice of AA law" for *Kabab-Ji*'s express choice analysis to be suitable for application.

[52]*Enka* (SC), *supra* n 5, [267].

[53]*National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 510 (Comm), [7], in favour of the procedural view; cf *Soujuznefteexport v Joc Oil* [1989] Bda LR 11, [31]-[36] for the substantive view.

[54]*National Iranian Oil Company*, *ibid*, [7], observing that the doctrine of separability as embodied under s 7 of the English Arbitration Act 1996 is not a mandatory provision and may be varied by an agreement of the parties.

At least for Model Law jurisdictions, it would appear that Article 16(1) expresses the doctrine of separability in much the same way as section 7 of the Arbitration Act 1996.[55] The narrow conception of separability indeed appears to be the prevailing position in Singapore. Chong J (as he then was) in *BCY v BCZ* agreed that separability was confined to the manner described by Moore-Bick LJ in *Sulamérica*.[56] In the Singapore High Court decision of *BNA v BNB*, Coomaraswamy J did read Chong J's statements in *BCY* as simply "describing the situation in which the doctrine is most commonly invoked … [i.e.] where the parties' substantive contract is invalid, in order to avoid that invalidity nullifying the arbitration agreement".[57] In his view, separability could have a broader scope, such as to uphold the arbitration agreement when a provision of the main contract might operate to defeat the parties' manifest intention to arbitrate.[58] Even then Coomaraswamy J was not advocating that the arbitration agreement would be completely insulated from the main contract. More specifically, Coomaraswamy J's view does not mean that an express choice of law clause in the main contract can never extend to the arbitration clause within that contract.

Whereas express choice can be quite safely characterised as a question of contractual interpretation, the precise nature of an implied choice is less clear.

For a start, the early common law cases adopted varying terminologies on whether it is an "implied" or "presumed" choice of the parties which should apply where there is no express choice of law.[59] Eventually, an implied choice became understood to arise out of an inference of what the parties had actually intended from the terms of the contract and the surrounding circumstances, as opposed to an exercise where the court objectively determines what the parties presumably would have intended based on the connecting factors present and not the will of the parties.[60] This is similar to the Rome

[55]In fact, the Departmental Advisory Committee had drafted s 7 of the Arbitration Bill in order to mirror the narrow doctrine of separability as it thought was reflected in Art 16(1) of the Model Law.

[56]*BCY*, *supra* n 3, [60]-[61], citing Moore-Bick LJ in *Sulamérica* that the separability principle "serves the narrow though vital purpose of ensuring that any challenge that the main contract is invalid does not, in itself, affect the validity of the arbitration agreement … [but it] does not 'insulate the arbitration agreement from the substantive contract for all purposes'".

[57]*BNA v BNB* [2019] SGHC 142, [76].

[58]This finds some support in *Merkin and Flannery*, *supra* n 47, 157; and *International Commercial Arbitration*, *supra* n 9 at 611. The Court of Appeal did not express a view because it was not necessary to do so: *BNA* (CA), *supra* n 1, [95].

[59]*Party Autonomy in Private International Law*, *supra* n 31, 316–319 and the cases cited therein. See also *Autonomy in International Contracts*, *supra* n 41, 104-108; Marshall, *supra* n 41, 511.

[60]Eg L Collins (gen ed), *Dicey & Morris on the Conflict of Laws* (Sweet & Maxwell, 11th edn, 1987), 1162. Lord Sales referred to this jurisprudential evolution in his judgment: *Enka* (SC), *supra* n 5, [281].

instruments, where a tacit choice of law must be "clearly demonstrated by the terms of the contract or the circumstances of the case".[61] Even so, courts regularly accept the second and third stages in reality "merge into each other" because ultimately the same connecting factors are considered when inferring an intention of the parties or imputing to them an intention which they had not formed.[62] The difference, it is said, lies merely in the weight to be accorded to the relevant connecting factors.[63]

On its face, the test for implied choice appears broader than the common law's contextual and objective approach to the construction of contracts. True as it is that the court is required to have regard to all the surrounding circumstances when construing a contract,[64] its ultimate task remains to "ascertain the objective meaning of the language which the parties have chosen to express their agreement" for which business common sense and the surrounding circumstances may assist but cannot supplant.[65] In contrast, inferences of a choice of law are regularly drawn directly from the surrounding circumstances (as distinguished from assisting with the contextual interpretation of certain contractual *words*), such as the form of the documents used in the transaction, a connection with a preceding transaction, the currency of the contract, the places of residence or business of the parties, and the commercial purpose of the transaction.[66] At least insofar as the common law is concerned, it appears unclear whether inferring an implied choice of law would necessarily be a question of "pure construction".[67]

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[61] Art 3(1), Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) ("Rome I Regulation"); see *Lawlor v Sandvik Mining Ltd* [2013] EWCA Civ 365, [25].

[62] *Lawlor*, *ibid*, [26]; *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] SGCA(I) 1, [73]-[75]; see also *Dicey, Morris & Collins*, *supra* n 31, [32-060]. This view is influenced by Lord Wilberforce's *dicta* in the decisions of *Cie Tunisienne*, *supra* n 38, 595-596; and *Amin Rasheed*, *supra* n 40, 69.

[63] *Pacific Recreation*, *supra* n 31, [47]-[48].

[64] *Rainy Sky SA v Kookmin Bank Ltd* [2011] UKSC 50, [21] per Lord Clarke.

[65] *Wood v Capita Insurance Ltd* [2017] AC 1173, [10] per Lord Mance, describing the nature of construction under English law; see also *Arnold v Britton* [2015] UKSC 36, [17] per Lord Neuberger. The Singapore Court of Appeal in *Y.E.S. F&B Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd* [2015] 5 SLR 1187 confirmed at [44]-[57] that Singapore takes the same position on contractual interpretation. See also *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, [131]; *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219, [38]-[40].

[66] *Las Vegas Hilton*, *supra* n 31, [39] per Chao Hick Tin J; H Beale (gen ed), *Chitty on Contracts* (Sweet & Maxwell, 33rd edn, 2020), [30-012]. Similarly, under the Rome Convention: see M Giuliano and P Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* (31 October 1980), [1980] OJ C282/1 ("Giuliano-Lagarde Report"), 17.

[67] This same point was argued by counsel in *Whitworth*, *supra* n 32, 593.

Further still, some authorities suggest that an implied choice of law is essentially a term implied in fact into the contract.[68] This would see the application of the common law tests of whether such a term is necessary for business efficacy, or whether it went without saying that the parties must have thought the contract contained such a term. This proposition made a recent reappearance in the *Kabab-Ji* decision,[69] which concerned the specific context of a choice of law for an arbitration agreement no less.[70] Certainly, this view is attractive particularly in the context of arbitration agreements. For one, the common law courts frequently observe that having the same system of law expressly chosen to govern the main contract apply equally to the arbitration agreement makes eminent commercial sense, whether by the *Kabab-Ji* method of construing the express choice of law clause generously to cover all provisions of the contract including the arbitration agreement, or by the *Sulamérica* method of having the courts apply a general rule or presumption that commercial parties are likely to have impliedly chosen the same system of law to govern the arbitration agreement. It is not difficult to see how the same result might be reached by a third technique: that having the main contract and the arbitration agreement governed by the same system of law is necessary for business efficacy or must have been what the parties would have thought had they contemplated the issue at the time of contracting.[71]

There is, however, considerable discomfort with this approach. First, there is a debate on whether implying a term in fact is simply part of a single exercise in contractual interpretation.[72] The apex courts in England and Singapore have maintained the implication of terms in fact as a distinct inquiry from the construction of terms.[73] The same conceptual difficulties should apply in amalgamating the question of implied choice of law into a singular process of construction (as suggested by the majority in *Enka*).[74] Second, at least in

[68]See, eg *Star Shipping AS v China National Foreign Trade Transportational Corporation ("The Star Texas")* [1993] 2 Lloyd's Rep 445, 451–452 per Steyn LJ; *Pick v Manufacturers Life Insurance Company* [1958] 2 Lloyd's Rep 93, 97 per Diplock J.

[69]*Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [23]-[24].

[70]*Kabab-Ji*, *supra* n 44, [53] per Popplewell LJ citing the seminal authority on implied terms in fact at English law, *Marks & Spencer*, *ibid*, [14]-[32].

[71]Consider, for instance, the various reasons offered by the *Enka* majority at [53] which "confirm the reasonableness of, as a general rule, construing a choice of law to govern the contract as applying to an arbitration agreement set out in a clause of the contract" and how these factors, taken together, may even support the threshold of necessity under the business efficacy test.

[72]*Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, [21] per Lord Hoffman.

[73]*Marks & Spencer*, *supra* n 69.

[74]Eg the extent to which evidence of the parties' pre-contractual negotiations is admissible: see Janet O'Sullivan, "Silence is golden: implied terms in the Supreme Court" (2016) 75 *Cambridge Law Journal* 199, 202.

Singapore, the exercise of implying contractual terms in fact has sometimes been understood as a gap-filling exercise where the court considers what the parties would be *presumed* to have intended, and not what the parties had *actually* intended.[75] According to the Singapore Court of Appeal, a term should only be implied in fact into the contract where there is a "true" gap, ie that "the parties did not contemplate the issue at all and so left a gap".[76] Where the parties had contemplated the issue but simply chose not to provide a term for it, the court's task is simply to ascertain objectively whether the parties had reached an agreement on the issue or whether they were simply unable to agree. On this reasoning, once the court reaches the conclusion that the parties had contemplated the issue but were simply unable to agree on the question of governing law, the court should proceed to the closest connection stage of the choice of law inquiry.[77]

Having said that, not all courts may be prepared to insist upon a clear distinction between the parties' actual and presumed intentions because this is mostly likely a very fine line in practice[78] – in the choice of law context, this is duly reflected in the view that the implied choice and closest connection stages often merge into each other.[79] But this leads to the third point – the English courts have expressly accepted that the Rome instruments draw a bright line between inferred and imputed intentions: because Article 3 specifically states that a tacit choice must be "demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case", there is arguably no room to apply English principles of implication of terms in fact when ascertaining

[75]*Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, [29]-[33]; *Marks & Spencer*, *supra* n 71, [28]-[29].
[76]*Sembcorp Marine*, *ibid*, [93]-[96].
[77]See the judgment of Lord Sales in *Enka* (SC), *supra* n 5, [281]: the object of the closest connection stage is where "the parties have not made a choice of proper law themselves – perhaps because they did not think about it or they chose to leave matters unclear in the interests of arriving at an agreement without having to argue about it and in the hope that a dispute might never arise which required a determination of the issue" – and in such situations, the court applies the law with the closest connection to the contract as "the answer which it is plausible to think businesspeople in the position of the parties, acting reasonably, would have been likely to have chosen for themselves if they had to confront the issue."
[78]Goh Yihan, "A New Framework For The Implication Of Terms In Fact" (2013) 13 *Oxford University Commonwealth Law Journal* 379 at 383 commenting on *Sembcorp Marine*'s emphasis on finding a "true" gap in the contract. See eg *The Komninos S* [1991] 1 Lloyd's Rep 370, 374 per Bingham LJ: that in determining the existence of an implied choice of law, the task is "to ascertain the parties' contractual intention (meaning their actual, not their imputed, intention: what they would have said if asked at the time)."
[79]*Lawlor*, *supra* n 61, [26]; *Lew, Solomon*, *supra* n 62, [73]-[75]; see also *Dicey, Morris & Collins*, *supra* n 31, [32-060]. This view is influenced by Lord Wilberforce's *dicta* in the decisions of *Cie Tunisienne*, *supra* n 37, 595-596; and *Amin Rasheed*, *supra* n 40, 69.

a choice of law.[80] Harmonisation between the common law and Rome I regimes would be a sensible course because an English court will inevitably have to grapple with both when dealing with an arbitration clause which is integrated into the main contract.[81]

Of course, the Rome I Regulation has no application in other common law jurisdictions like Singapore, where the same common law rules are applied to determine the law applicable to all contractual obligations. But if one accepts – as the *Enka* majority did – that the New York Convention expresses a mandatory conflicts rule, it is arguable that, as with the courts of EU member states in relation to the Rome I Regulation, the courts of a Contracting State to the New York Convention are obliged to clearly delineate between the second and third stages of the modern 3-stage test in respect of arbitration agreements on the basis that the closest connection test should hew to the default rule applicable in the absence of a choice of law pursuant to Article V(1)(a) – namely, the law of the seat.[82] The result is that, even at common law, an implied choice of law should only be found where it is "clearly demonstrated" by the circumstances of the case that the parties had actually made such choice.[83] Where a court realises that it is straining to find what the parties had actually intended, it is arguably more appropriate to simply proceed on the conclusion that the parties had made no choice at all and the law of the seat therefore applies by default. In any event,

[80]*Lawlor*, *ibid*, [25]-[33]; *Aeolian Shipping SA v ISS Machinery Services Ltd* [2001] EWCA Civ 1162, [15]-[16]. The same should apply to the Rome I Regulation, which replaces the phrase "demonstrated with reasonable certainty" with "clearly demonstrated" but was not intended as a substantive change of law: see *Lawlor* at [3]. But it appears that old habits die hard. Even in *Lawlor* Lord Toulson later lapsed into language reminiscent of the officious bystander test under English law on implied terms in fact: that the claimant had not "established with reasonable certainty that *it went without saying* that the contract was intended to be governed by English law [emphasis added]" (at [34]).

[81]One can thus understand the anxiety in *Enka* to draw a close parallel between the choice of law rules at common law and under the Rome I Regulation: see, eg *Enka* (SC), *supra* n 5, [28] and [35] per majority; [267]-[268] per Lord Sales. See also *Egon Oldendorff v Libera Corporation* [1996] 1 Lloyd's Rep 380, 389 per Clarke J, commenting that inferring an implied choice at common law is very similar to demonstrating a tacit choice under Art 3 of the Rome Convention; though cf *Lawlor*, *supra* n 62, [30] per Lord Toulson, pointing out that the two regimes are ultimately different especially with respect to the Rome Convention's distinction between inferred and imputed intention.

[82]See the discussion in the previous section. At its highest, imputed intention is completely superseded by virtue of Art V(1)(a) of the Convention, which the *Enka* majority thought should apply at the pre- and post-award stages. Cf the minority's view that the default rule under Art V(1)(a) is confined to enforcement proceedings and in any event may be dispensed with under the court's residual discretion.

[83]This is consistent with the meaning of express and tacit choice under Art 4 of the Hague Principles on Choice of Law in International Contracts, requiring a choice of law to be "made expressly or appear clearly from the provisions of the contract or the circumstances". See L Gama Jr, "Tacit Choice of Law in the Hague Principles" (2017) 22 *Uniform Law Review* 336.

it is arguable that the law of the seat enjoys the closest connection to the arbitration agreement, so regardless of whether one applies the closest connection test or Article V(1)(a) one would (happily) get to the same result.

2. *The applicable rules of contractual interpretation for the purpose of ascertaining the existence of a choice of law for the arbitration agreement*

Given the hidden complexities in pinning down the true nature of the exercise in ascertaining express and implied choices of law, it seems that the answer might ultimately lie with the law applicable to the process of interpreting the contract for the purpose of ascertaining a choice of law. This would determine, for instance: whether the court looks for the parties' objective or subjective intentions when construing the terms of the contract; to what extent is evidence extrinsic to the written contract admissible of the parties' intentions as to a choice of law; and whether there is recourse to methods such as the business efficacy and officious bystander tests to find an implied choice of law.

To the *Enka* majority, the answer to this additional layer of conflict of laws appeared clear: as Lord Diplock had done in *Cie Tunisienne*, the court simply applies English rules of interpretation to construe the choice of law clause. Although the putative proper law of the contract ordinarily governs substantive issues affecting that contract such as validity, the *lex fori* may apply only as an exception "[a]t the prior stage of determining what is the applicable law or putative applicable law of the contract". Notably, the High Court of Australia in *Akai* took the same position.[84] The majority also referred to a second House of Lords decision *Whitworth Street Estates v James Miller*, where English rules on the admissibility of subsequent conduct as an interpretive aid were applied.[85]

Whitworth in particular resembles the *BNA* decisions in Singapore, to the extent that the Singapore High Court and Court of Appeal appeared to apply domestic rules concerning the admissibility of extrinsic evidence as an aid to construction to conclude that evidence of the parties' pre-contractual negotiations should be excluded.[86] The Singapore courts have not been entirely consistent but apparently consider the admissibility of extrinsic evidence in contractual interpretation as a procedural issue governed by the *lex fori*.[87] But Coomaraswamy J in *BNA* did

[84] *Akai*, *supra* n 40, 390–391 where the majority referred to Australian principles of construction of contracts. This issue is discussed more directly in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 225 per Brennan J and 260–261 per Gaudron J; approved in *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6, [32]-[46] per Greenwood J and [128]-[152] per Beach J.
[85] *Enka* (SC), *supra* n 5, [31]-[34], referring to *Cie Tunisienne*, *supra* n 37, and *Whitworth*, *supra* n 32.
[86] *BNA* (HC), *supra* n 57, [29]-[44]; *BNA* (CA), *supra* n 1, [71]-[88].
[87] *BQP v BQQ* [2018] SGHC 55, citing *Sembcorp Marine*, *supra* n 75. Cf *JVL Agro Industries v Agritrade International Pte Ltd* [2016] 4 SLR 768. See also P Ostendorf, "The

also refer more directly to the general principles of contractual interpretation under Singapore law in ascertaining the proper law of the arbitration agreement, notwithstanding the fact that the main contract was expressly governed by PRC law.[88] Coomaraswamy J's approach therefore mirrors *Cie Tunisienne*'s *lex fori* approach to the extent that the substantive contract law rules of the forum were applied.

With respect however, case law on this issue is more troubled than *Enka* would suggest.[89] Lord Diplock's statement in *Cie Tunisienne* should be properly understood as an instance of the more general question of which law should govern the question of whether there exists an agreement between the parties on a choice of law. While many cases did adopt *Cie Tunisienne*'s *lex fori* approach,[90] there is also a conflicting line of authorities which determined the existence of a choice of law agreement according to the putative proper law of the contract.[91] Not only is the latter prescribed by the Rome Convention and its successor,[92] it is also arguably more precise and faithful to the will of the parties. In one of his earlier High Court cases pre-dating *Cie Tunisienne*, it was Diplock J himself who observed perceptively that in principle one could consider whether the other putative applicable laws prescribe different rules of construction from the *lex fori*. The point was ultimately moot in that case because no evidence was tendered as to whether the other putative governing laws differed from English law on the relevant question.[93] In his later judgments as an appellate judge in *Mackender v Feldia AG*[94] and eventually a Law Lord in *Cie*

exclusionary rule of English law and its proper characterisation in the conflict of laws – is it a rule of evidence or contract interpretation?" (2015) 11 *Journal of Private International Law* 163, opining that the common law's exclusionary rule should be considered a substantive issue of contractual interpretation rather than a procedural issue of evidence.

[88]*BNA* (HC), *supra* n 57, [31], referring to the contextual approach to contractual interpretation under Singapore contract law as established in *Zurich Insurance*, *supra* n 65.

[89]A comprehensive discussion of this issue can be found in *Autonomy in International Contracts*, *supra* n 41, 92-97; and *Trina Solar*, *supra* n 84, [32]-[46] per Greenwood J and [128]-[152] per Beach J.

[90]See, eg *The Heidberg* [1994] 2 Lloyd's Rep 287 at 303; *Oceanic Sun Line*, *supra* n 84, 225 per Brennan J and 260–261 per Gaudron J.

[91]See, eg *Compania Naviera Micro SA v Shipley International Inc (The "Parouth")* [1982] 2 Lloyd's Rep 351; cf *Mackender v Feldia AG* [1967] 2 QB 590, 602 where Diplock LJ expressly rejected this approach as "confusing". See *Dicey, Morris & Collins*, *supra* n 31, [32-066] which appears to prefer the *lex fori* approach; *Chitty on Contracts*, *supra* n 66, [30-007], suggesting that the putative proper law approach is "the better view"; cf *Trina Solar*, *supra* n 84, [139]-[149] where Beach J opined that the English authorities which ostensibly support the putative proper law approach are actually of little assistance.

[92]See Art 8(1) of the Rome Convention and Art 10(1) of the Rome I Regulation. See Giuliano-Lagarde Report, *supra* n 66, 28.

[93]*Pick*, *supra* n 68, 97. However, it is hardly safe to proceed on this footing today, given the prevalence of cross-border disputes and the regularity with which proof of foreign law is tendered before national courts and arbitral tribunals: see *Enka* (SC), *supra* n 5, [117] and [272].

[94]*Mackender*, *supra* n 91, 602-603.

Tunisienne,[95] he preferred to directly apply the *lex fori* to bootstrap the choice of law analysis whenever the proper law of the contract remained yet undetermined. The simplicity and practicality of this approach can be easily appreciated. As the *Enka* majority reasoned, to consider the position under each putative governing law "would introduce an additional layer of complexity into the conflict of laws analysis without any clear justification and could produce odd or inconsistent results".[96]

Some commentators offer a compromise via a two-stage approach: that the law of the forum should first determine whether there is a *prima facie* agreement and, if so, there is now a putative proper law that should be applied.[97]

Leaving aside these general issues for now, where the question is the existence of a choice of governing law of an arbitration agreement which is integrated into the substantive contract, the problem becomes quite different.[98] Even where one is concerned with construing certain words used in the arbitration agreement rather than in the main contract, one still has recourse to the substantive contract, and save for convenience, there appears to be no principled reason to resort to the *lex fori* immediately. If the proper law of the main contract is fully capable of being determined, it is at least arguable that the putative applicable law[99] should govern questions concerning the interpretation of all its terms including the arbitration clause.[100] This applies *a fortiori* where the English courts, as in *Enka*, have consistently reiterated that an arbitration clause is not a truly separate agreement from the rest of the contract but is actually "part of the bundle of rights and obligations recorded in the contractual document"[101] – the consequence being that the law chosen to govern the

[95]These decisions no doubt proved to be quite influential for the English courts in later cases to continue applying the *lex fori* approach.

[96]*Enka* (SC), *supra* n 5, [33]. See also *Trina Solar*, *supra* n 84, [149]; *Autonomy in International Contracts*, *supra* n 41, 93.

[97]See, eg *Autonomy in International Contracts*, *ibid*, 92–98 and 113; A Briggs, "The Formation of International Contracts" [1990] *Lloyds Commercial and Maritime Law Quarterly* 192, 197–8; J Harris, "Does Choice of Law Make Any Sense?" (2004) 57 *Current Legal Problems* 305, 316–24.

[98]Cf a "freestanding" arbitration agreement: see *BCY*, *supra* n 3, [66].

[99]This is most likely the substantive law (and not the conflict of laws rules) of the putative *lex contractus* – otherwise, questions of *renvoi* may arise.

[100]It is again instructive to refer to *Enka* (SC), *supra* n 5, [31] where the majority recognised that the validity of a contract must be determined according to its putative proper law except that the *lex fori* has a residual role to be applied at the prior stage of determining the putative proper law. Some consideration may also be had to the Singapore Court of Appeal's recent decision in *Lew, Solomon*, *supra* n 62, where the Court held that the question of whether a contract had been formed must be determined according to the putative governing law of the contract and that "there is no room for the *lex fori* to apply" even in a fallback role.

[101]*Enka* (SC), *ibid*, [61]-[62].

main contract ought arguably to be the putative proper law of the arbitration agreement.[102]

BNA provides an apt example. Most of the connecting factors, and especially the law expressly chosen to govern the main contract, pointed clearly towards the PRC. The only connection with Singapore was that Singapore happened to be the putative seat of arbitration.[103] Under these circumstances, it does not appear entirely satisfactory for the Singapore courts in *BNA* to have applied Singapore law in construing the relevant contract and/or the arbitration clause therein, especially since Singapore law also embraces the narrow conception of separability. Of course, in the absence of proof of foreign law, the court may refer to its *lex fori* on this issue. But the point remains that the Singapore courts ought to have considered in the first instance whether, under PRC law, the express choice of law clause in the main contract should be construed to apply to the arbitration clause.[104]

For English law, it may seem trickier to apply the *lex contractus* as the putative proper law of the arbitration agreement because the former is governed by the Rome I Regulation and the latter by common law rules. It is sometimes thought that the Rome I Regulation (and its predecessor) requires a more progressive approach towards choice of law in contract than at common law. In *Samcrete Egypt Engineers and Contractors v Land Rover Exports Ltd*, Potter LJ rejected the notion that an English court should be bound to apply English rules of contractual interpretation in ascertaining a choice of law pursuant to Article 3 of the Rome Convention, ie being "confined to considering the terms of the contract itself, construed against the background of the [contract] with its express choice of English law, and eschewing all reference to the negotiations between the parties".[105] Amongst other things, the Rome regime permits the English courts to take into account pre-contractual negotiations and subsequent conduct

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[102]This assumes that the law applicable to the separability of an arbitration agreement is characterised as an issue of substantive (rather than procedural) law: see fn 53 above.

[103]*A fortiori* following the Singapore Court of Appeal's decision that the arbitral tribunal and Singapore High Court had erred in finding that Singapore was the arbitral seat chosen by the parties.

[104]We argue later in this Part that, consistent with *Enka* and *BNA* and their endorsement of the "main contract approach", the common law should take the position that an express choice of law clause in the main contract should be interpreted to apply to the entire contract including the arbitration clause therein, unless there are clear indications to the contrary.

[105]*Samcrete Egypt Engineers and Contractors Sa.e v Land Rover Exports Ltd* [2001] EWCA Civ 2019, [23] per Potter LJ (with whom Thorpe LJ agreed). The quote can be easily recognised as a reference to the contextual approach to contractual interpretation under English law as set out by Lord Hoffman in the seminal case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. See also *Aeolian Shipping*, *supra* n 80, [14]-[18] where Potter LJ hinted at this same point which he would later address more explicitly in *Samcrete Egypt*.

more liberally than in interpreting a contract under English law.[106] On that basis, the authors of Dicey, Morris and Collins take the view that, under the Rome I Regulation, "[i]n determining whether the parties have made a choice of law, the court should adopt a broad Regulation-based approach, *not constrained by national rules of contractual interpretation* [emphasis added]".[107] Somewhat ironically, the *Enka* majority themselves referred precisely to this view before citing and applying the common law position in *Cie Tunisienne*.[108]

But such a difficulty is arguably more apparent than real. Both the common law and Article 3 of the Rome I Regulation are clear in that a choice of law may also be inferred from the surrounding circumstances. Accordingly, Potter LJ would have been correct to say that the court is not constrained to construing the contractual terms and is fully permitted to look at the parties' pre-contractual negotiations and other sources of evidence – except that these are used as direct evidence of an implied or tacit choice of law, and not extrinsic evidence to aid in the construction of the contractual text. It should be immaterial that the arbitration agreement happens to be governed by a different legal framework (ie, common law) from the rest of the contract (ie, Rome I Regulation).

3. *The revised approach: relevant indicators of a choice of law for the arbitration agreement*

The process of determining whether the parties had made a choice of proper law for the arbitration agreement can now be summarised as follows.

The search begins with construing any language in the entire written contract which deals with a choice of law. If there is a clause stating that the contract is governed by a certain law, this can and generally should be construed as an express indication by the parties that the chosen law governs the arbitration agreement insofar as it is simply a specific part of that contract. However, as far as possible, any process of construction ought to be governed by the law which has been chosen to govern the substantive contract, and not the *lex fori*. If the contract does not contain a choice of law clause or any other language on such matters, the terms of the contract and the surrounding circumstances as a whole may still point towards an implied choice of governing law, though an implied choice

[106] F Ferrari (ed), *Concise Commentary on the Rome I Regulation* (Cambridge University Press, 2nd edn, 2020), 95–96 citing *Aeolian Shipping*, *ibid*; *Autonomy in International Contracts*, *supra* n 41, 112, arguing that post-contractual behaviour should be admissible when ascertaining a tacit choice of law under the Rome Convention.

[107] *Dicey, Morris & Collins*, *supra* n 31, [32-048]. See also the discussion in *Concise Commentary on the Rome I Regulation*, *ibid*, 72-73. Even though these authorities relate to the choice of law rules under Art 3 of the Rome I Regulation and not under the common law rules, they would have been equally applicable if one accepts the *Enka* majority's opinion that the rules under both regimes are not materially different.

[108] *Enka* (SC), *supra* n 5, [26].

ought ultimately to be an actual choice made by the parties (as distinct from a presumed choice). Where an implied choice of *lex contractus* can be identified, this should also lend itself to a strong inference that the same law was impliedly intended to govern the arbitration agreement. This is based on the same reasoning that commercial parties generally do not have the doctrine of separability in mind and hence do not view the arbitration clause as a separate agreement from the main contract.

Whether or not the main contract contains an express or implied choice of law, careful consideration must also be had to other possible indicators of the parties' implied intentions.[109] An inference of implied choice may also be drawn from the use of standard form contracts, the parties' previous course of dealing, and industry practice.[110]

One factor that warrants some comment here is the significance of a choice of forum. Traditionally, jurisdiction clauses and arbitration clauses were regarded as strong connecting factors for an implied choice of law of the main contract. It was typically reasoned that the parties' selection of a particular forum to resolve their disputes, through an arbitration or jurisdiction clause, would lead to the inference that the *lex contractus* must be the same as the law of that place.[111] But the *Enka* majority has now reversed that view insofar as arbitration clauses are concerned.[112] In their judgment, times have changed – the place of arbitration is now usually chosen for its attractiveness as a forum to arbitrate international disputes, without necessarily an expectation that an arbitrator from that country would be chosen for his expertise in the laws of that jurisdiction. It has become commonplace for international arbitrators to be asked to apply systems of law other than their own.[113] Modern commentaries generally agree that whether a choice of *lex contractus* can be inferred from an arbitration clause should depend on the circumstances. Such an inference requires something more: for instance, where it is clear that the parties contemplated a particular kind of arbitration where the arbitrators would be called upon to deal with domestic laws (eg, London arbitration by arbitrators appointed by the London Maritime Arbitrators' Association).[114]

In the particular context of arbitration agreements, perhaps the most significant *indicium* is the *ut res magis* or validation principle – we turn to this next.

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[109]See also *Dicey, Morris & Collins*, *supra* n 31, [32-065].

[110]Giuliano-Lagarde Report, *supra* n 66, 17; *Dicey, Morris & Collins*, *ibid*, [32-060]-[32-061].

[111]A more extensive discussion in favour of this view can be found in O Lando, "The Conflict of Laws Contracts General Principles" (1984) 189 *Hague Collected Courses* 306-314.

[112]See, eg *Cie Tunisienne*, *supra* n 37, 596 per Lord Wilberforce and 609 per Lord Diplock.

[113]*Enka* (SC), *supra* n 5, [113], citing *Egon Oldendorff*, *supra* n 81, 389–390 per Clarke J. The Hague Principles on Choice of Law in International Commercial Contracts explicitly takes the same position in Art 4, which stipulates that a jurisdiction or arbitration clause "is not in itself equivalent to a choice of law": see Gama, Jr., *supra* n 83, 346-348.

[114]*Dicey, Morris & Collins*, *supra* n 31, [32-064]. See also *Enka* (SC), *supra* n 5, [114].

D. The *ut res magis* or validation principle as a relevant contrary *indicium*

1. *Nature and effect of the validation principle*

Enka's acceptance of the validation principle is a landmark development in the international arbitration jurisprudence. But this is not without controversy.

The Singapore courts appear to be more circumspect with the validation principle. On one hand, Chong J in *BCY* directly affirmed[115] Moore-Bick LJ's reasoning in *Sulamérica* that the presence of "a serious risk that a choice of Brazilian law [which] would significantly undermine that [arbitration] agreement" was a powerful factor pointing away from taking the law of the main contract as the parties' implied choice of law for the arbitration agreement, for that consequence "cannot in fact have been their intention".[116] But *BCY* is not binding authority under Singapore law for this point because the law chosen to govern the main contract was not said to have an invalidating effect on the arbitration agreement.

Such a situation did present itself in *BNA* and received a surprisingly different analysis. In the High Court, Coomaraswamy J was swayed by the potential invalidity of the arbitration agreement under PRC law, which was the law expressly chosen to govern the substantive contract. He thus took what was later criticised as a strained interpretation of the arbitration agreement that the parties had chosen Singapore as the seat of arbitration by virtue of their choice of SIAC Rules, despite the fact that the clause had also stipulated for "arbitration … in Shanghai".[117] In an uncanny foreshadowing of *Enka*, Coomaraswamy J reasoned that arbitration agreements should be interpreted according to the general principle of construction *verba ita sunt intelligenda ut res magis valeat quam pereat*:

> which requires every contract to be construed fairly and broadly, in order to preserve the subject-matter of the contract rather than to destroy it. … Indeed, the *ut res magis* principle is especially suited to arbitration. It is simply an aspect of the policy manifest in the second and third *Insigma*[118] principles to uphold the reasonable commercial expectations of counterparties to an arbitration agreement wherever possible and as far as possible, rather than to defeat them. Further, the *ut res magis* principle is party-oriented rather than outcome-oriented. It places the emphasis correctly on ascertaining and giving effect to the parties' intention rather than on achieving a prescribed outcome without regard to their intention. The *ut res magis* principle is therefore aligned with the primacy of party autonomy in arbitration.[119]

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[115] *BCY*, *supra* n 3, [44]-[45] and [74].
[116] *Sulamérica*, *supra* n 2, [31].
[117] *BNA* (HC), *supra* n 57, [94]-[117]; rejected on appeal in *BNA* (CA), *supra* n 1, [64]-[95].
[118] *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936, where the Court of Appeal laid down the principle that Singapore law will favour a generous interpretation of arbitration agreements to give effect to the parties' clear intention to arbitrate as far as possible.
[119] *BNA* (HC), *supra* n 57, [62]-[64].

This allowed Coomaraswamy J to conclude that the law of the seat was different from the law governing the main contract. As a result, PRC law was displaced by Singapore law as the proper law of the arbitration agreement, since the parties' clear intention to arbitrate their disputes would have otherwise been defeated.

On appeal, the Singapore Court of Appeal rejected Coomaraswamy J's finding that Singapore was the chosen seat of arbitration. In the Court of Appeal's view, the natural meaning of the expression "arbitration … in Shanghai" was, quite plainly, a choice of Shanghai as the arbitral seat. Insofar as the law of the seat did not differ from that of the main contract, the Court of Appeal concluded that there was nothing to displace PRC law as the implied choice of law for the arbitration agreement. In light of that finding, the Court of Appeal observed that it did not have to decide on the applicability of the validation principle under Singapore law.[120] At the same time, Chong JA, delivering the judgment of the Court, observed that the invalidating effect of PRC law on the arbitration agreement could only be taken into account where:

> [it is shown] that the parties were, at the very least, *aware* that the choice of proper law of the arbitration agreement could have an impact upon the validity of the arbitration agreement [emphasis in original]. But [on these facts] there is nothing in the evidence to show that the parties were sensitive to the interplay between PRC law and choosing the SIAC as the administering institution, much less the invalidating effect of this particular combination of choices. Instead, the evidence suggests that this consideration did not operate in their minds at all.[121]

This suggests a far more restrained approach towards any pro-validation rule. The parties cannot be *presumed* to have known about the invalidity of the arbitration agreement if it were governed by the law of the main contract – the party which seeks to rely on it must prove actual knowledge of such matters at the time of agreement on a balance of probabilities.[122] Chong JA's suggestion does however create some tension with his earlier *dictum* in *BCY.* If Moore-Bick LJ's reasoning were applied in *BNA*, could it not have been concluded that the parties most likely did not make any choice of governing law for their arbitration agreement? This would have yielded the same outcome except on a different footing – that the arbitration agreement was governed by PRC law as the law of the chosen seat at the closest connection stage, and not by reason of an unrebutted presumption that the parties had made an implied choice of PRC law. The outcome in the *Sulamérica* case might have been quite different had the court required proof that the parties actually knew that Brazilian law might invalidate the arbitration agreement.

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[120] *BNA* (CA), *supra* n 1, [95].
[121] *BNA* (CA), *ibid*, [90].
[122] See also Chan and Teo, *supra* n 35, 637.

The problem may be broken down into at least two levels. First, as mentioned in the passage cited earlier, Coomaraswamy J drew a keen distinction between the validation principle as a teleological, "outcome-oriented" proposition, and as a manifestation of the "party-oriented" *ut res magis* principle of construction.[123] The learned judge rejected the "validation principle" as defined by Gary Born:

> [Born argues that] the objective of the validation principle is nakedly instrumental. Its explicit purpose is to achieve a prescribed outcome, ie the validation of an arbitration agreement. That, to my mind, fundamentally misstates the objective of the exercise which a court undertakes when construing an arbitration agreement in order to ascertain its proper law. That objective, insofar as the parties have made it possible by the words they have chosen, is to ascertain and give effect to the parties' intention. The purpose is not, and should not be, to divert the parties to arbitration come what may, without addressing directly the intentions of the parties. … [To that extent], I therefore do not consider that *BCY* is any authority for a validity principle in the terms formulated by Professor Born.[124]

Coomaraswamy J's analysis suggests that *Enka*'s endorsement of the so-called "validation principle" as a matter of English law could have been done with greater disambiguation. The majority's emphasis on contractual interpretation as the fundamental inquiry points towards the "party-oriented" conceptualisation, as does Lord Sales' keen reference to party intent.[125] Lord Burrows' judgment is harder to discern, though his brief analysis did refer to Born among others.[126] The position would be quite different if the UK Supreme Court had relied on Born's argument that the UNCITRAL Model Law and New York Convention should be properly interpreted as containing a rule of presumptive validity whereby, among the laws that may potentially apply to an arbitration agreement, parties should be presumed to have intended the arbitration agreement to be governed by the law that would validate it.[127]

But this is not the case as the Supreme Court took reference from what reasonable commercial parties are likely to have intended. Much of the Supreme Court's exposition of the *ut res magis* principle appeared to involve taking judicial notice of what reasonable commercial sensibilities those engaged in business are likely to have when they enter into contracts. This is most apparent in Lord Sales' reasoning that an arbitration agreement should be construed *ut res magis*

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[123] *BNA* (HC), *supra* n 57, [62]-[64].
[124] *BNA* (HC), *supra* n 57, [53]-[61]. For instance, see G Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 *Singapore Academy of Law Journal* 814, [51]: "if an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable choices of law."
[125] *Enka* (SC), *supra* n 5, [277].
[126] *Enka* (SC), *ibid*, [198].
[127] *International Commercial Arbitration*, *supra* n 9, §4.04[A].

because "[t]he parties are presumed to know the state of the law at the time they contract" and therefore could not have intended a governing law which would invalidate their agreement.[128] For this reason, Lord Sales thought that the inference to be drawn from the validation principle is that "the parties *intended* that a different law should govern the arbitration agreement in order to uphold its validity and effect [emphasis added]".[129]

In contrast, Moore-Bick LJ's view in *Sulamérica* was less ambitious: the fact that the law chosen to govern the main contract would invalidate the arbitration agreement means that the parties had simply not made any choice of law regarding the arbitration agreement.[130] This makes sense especially where the seat was not chosen by the parties but was instead determined by default.[131] If the parties had not even addressed their minds on where to seat their arbitration, the validation principle should at best be applied to *negate* the inference that the arbitration agreement should be governed by the law of the main contract.

Put simply, there are two possible effects of the validation principle: one, that the putative invalidity of the arbitration agreement positively supports an inference that it was intended to be governed by a different law from the main contract law, or two, it only negates any inference that the law governing the main contract was intended to apply to the arbitration agreement.[132]

A closer scrutiny of the common law precedents on the validation principle provides little assistance either way. While it is no doubt correct that cases such as *In Re Missouri Steamship Co* and *Hamlyn v Talisker Distillery* appeared to apply a validation principle in determining the proper law of a contract,[133] the precise basis of the inferences drawn in those cases leaves much room for speculation. Insofar as the court assumes that the parties could not have intended to destroy their transaction, is one giving effect to a choice of law which the parties have actually made, or simply imputing such a choice to the parties? The ambiguity is unsurprising given that, as explained above, English law

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[128] *Enka* (SC), *supra* n 5, [277].
[129] *Enka* (SC), *ibid*, [277] per Lord Sales.
[130] *Sulamérica*, *supra* n 2, [31]; *BCY*, *supra* n 3, [74]. Cf *Enka* (SC), *supra* n 5, [278] per Lord Sales, who thought that the correct analysis in *Sulamérica* should have been an express or implied choice of English law to govern the arbitration agreement, not that "the parties had formed no intention regarding what was to be the proper law of the arbitration agreement".
[131] See, eg *BMO*, *supra* n 3, where Belinda Ang J found that the parties had not made a choice of seat and the seat was therefore Singapore as a result of Rule 18.1 of the SIAC Rules 2013. However, this case concerned the scope, breach and waiver of the arbitration agreement, rather than validity.
[132] *Enka* (SC), *supra* n 5, [97].
[133] These two cases were cited heavily in support by the Supreme Court: see *Enka* (SC), *ibid*, [96] and [98]-[100] per Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed); [198] per Lord Burrows; [276] per Lord Sales. See also *Chitty on Contracts*, *supra* n 66, [30-012] and the cases cited in fn 61; cf the cases cited in fn 60.

struggled with drawing a clear distinction between these two inquiries at least until the *Cie Tunisienne* case.[134] This is best illustrated in the English Court of Appeal decision of *Coast Lines Ltd v Hudig*.[135] Lord Denning MR found it significant that the contract contained an exemption clause which would be valid under English law, but not under Dutch law. This pointed towards English law as the proper law of the contract because "it cannot be assumed that the Dutch charterers put their signatures to a contract which they did not intend to honour".[136] What makes this striking is that the *ut res magis* principle was being applied not to discern an implied choice of law of the parties, but to determine which law had the closest connection to the contract.[137] But after the court already accepts that the parties did not make any choice of law, it is then deciding *artificially* from the relevant connecting factors which law would the parties have likely intended if they had thought about the issue.[138] To the extent *Enka* similarly left open the possibility that the *ut res magis* principle may apply at the closest connection stage, this detracts from the "party-oriented" understanding described by Coomaraswamy J.[139]

The other two judges in *Coast Lines* were more discerning and gave less weight to the *ut res magis* argument: Megaw LJ, for instance, commented that it only went so far as to negate any contention "that the terms of the contract show an actual intention of the parties that Netherlands law should govern".[140] There are also other common law precedents which similarly treat the validating or invalidating effect of a putative governing law as "only evidence and not conclusive evidence as to the intention of the parties".[141]

That being said, Coomaraswamy J did acknowledge the realist view that the distinction might turn out to be more apparent than real – it might ultimately be said that "the three-stage inquiry is simply Professor Born's wider validation principle in disguise, with the latter at least having the merit of being honest about its objective and transparent in its operation."[142] The point remains, however, that *BNA* does demonstrate how the application of the *ut res magis* principle as a "pro-arbitration"[143] policy may not always be as straightforward as *Enka* might suggest.

[134] See Part C above.
[135] [1972] 2 QB 34, cited with support in *Enka* (SC), *supra* n 5, [198] per Lord Burrows.
[136] *Coast Lines*, *ibid*, 44 per Lord Denning MR.
[137] See *Coast Lines*, *ibid*, 44B-44G per Lord Denning MR and 46C per Megaw LJ.
[138] *Coast Lines*, *ibid*, 51 per Stephenson LJ.
[139] *Enka* (SC), *supra* n 5, [146] per Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed), [251] per Lord Burrows and [285] per Lord Sales.
[140] *Coast Lines*, *supra* n 135, 48 per Megaw LJ; see also Stephenson LJ's judgment at 51.
[141] *Chitty on Contracts*, *supra* n 66, [30-012], citing *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch. 502, 513; *Sayers v International Drilling Co NV* [1971] 1 WLR 1176, 1184.
[142] *BNA* (HC), *supra* n 57, [123].
[143] *Enka* (SC), *supra* n 5, [107].

This leads to the second and more practical issue. To what lengths will an English or Singapore court go to ensure the validity or effectiveness of an arbitration agreement? Given the emphasis placed by the *Enka* majority on both reaching a proper construction of the arbitration agreement and promoting a pro-arbitration stance in the English courts, the question arises as to how *BNA* might have been decided under English law.[144] Whereas Coomaraswamy J was sufficiently persuaded to locate a seat outside of the phrase "arbitration in Shanghai" in order to avail himself of a curial law different from the law of the main contract, the Singapore Court of Appeal was clearly unimpressed by that valiant but ultimately strained attempt to save the arbitration agreement. Instead, Chong JA emphasised that "the parties' manifest intention to arbitrate is not to be given effect at all costs … If the result of this process of construction [of the arbitration agreement] is that the arbitration agreement is unworkable, then the parties must live with the consequences of their decision."[145] By requiring proof that the parties had actual knowledge of the invalidating effect of a putative governing law on the arbitration agreement (or a "serious risk" of such an outcome), the Singapore Court of Appeal's approach arguably does not fall prey to the realist's critique because it stays true to the party-oriented inquiry of whether they could have intended to choose that putative governing law at the time of agreement.[146]

While it is true that commercial sense would dictate that the parties could not have intended to agree on an arbitration clause (or any agreement for that matter) which was invalid under its proper law, commentators have made it painfully clear that commercial common sense cannot be used to rewrite the parties' bargain with the benefit of hindsight.[147] It is perhaps in this context that *BNA* should be properly understood. Because the *ut res magis* principle is only used where the words used in the contract are susceptible of two or more

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[144] To some extent, this dilemma mirrors the one which has arisen more generally regarding the extent to which a court should be prepared to save a pathological arbitration agreement by giving it a generous interpretation: see *Insigma*, *supra* n 118; noted in J Kirby, "*Insigma Technology Co. Ltd v Alstom Technology Ltd*: SIAC Can Administer Cases under the ICC Rules?!?" (2009) 25 *Arbitration International* 319. See also KP Berger, "Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?" in AJ van den Berg (gen ed), *International Arbitration: Back to Basics?* (ICCA Congress Series No. 13, 2006), 312–314 on the widely accepted principle that international arbitration agreements should be interpreted *in favorem validitatis* and how it should equally apply to conflict of laws questions.

[145] *BNA* (CA), *supra* n 1, [104]. This echoes Lord Neuberger's caution in *Arnold*, *supra* n 65, [19]-[20] on the debate over contractual interpretation; see also N Andrews, "Interpretation of Contracts and 'Commercial Common Sense': Do Not Overplay This Useful Criterion" (2017) 76 *Cambridge Law Journal* 36, 56–9.

[146] Ultimately, the Shanghai No. 1 Intermediate People's Court held that the arbitration agreement in *BNA v BNB* was valid under PRC law.

[147] *Arnold*, *supra* n 65, [19]-[20]; cited with approval in *Y.E.S. F&B*, *supra* n 65, [51]-[57]. See generally Andrews, *supra* n 145.

meanings,[148] it arguably could not and should not have been invoked to contradict the natural and unambiguous meaning of the phrase "arbitration in Shanghai".[149] When viewed in this way, Chong JA's *dictum* is not necessarily inconsistent with his *BCY* decision nor the *ut res magis* principle because there was arguably no latent ambiguity in the arbitration agreement to be resolved – indeed the Court of Appeal did not think that it was dealing with the validation principle considered by the court below.[150]

The question which now looms over the Singapore courts is less one of principle, but of legal policy – should Singapore as a leading seat for international arbitration follow *Enka*'s lead and incorporate a pro-validation choice of law analysis which strives to uphold agreements to arbitrate *as far as reasonably possible*? Ultimately, a validation principle serves to protect the commercial purpose of an arbitration agreement in the interests of securing arbitral efficacy as a policy objective.[151] If the Court of Appeal's *dictum* in *BNA* is interpreted too literally such that evidence must be adduced in every case to prove whether the parties knew about the invalidating effect at the time of agreement, the practical utility of having a limited form of "validation principle" is arguably neutered. Importantly, unlike other common law rules like those pertaining to the admissibility of extrinsic evidence to aid the construction of contracts, there is greater international support for the *ut res magis* principle.[152] The Singapore Court of Appeal's approach in *BNA* could be confined to its facts: the *ut res magis* principle could not be invoked to override the plain words of a clause. But, in an appropriate case, a Singapore court may apply the *ut res magis* principle to infer the parties did not intend to apply the law governing the main contract to the arbitration clause.

2. *Scope of the validation principle*

Enka also raises a nascent sub-issue concerning the precise scope of the validation principle. Recall that the substantive issue in *Enka* was whether the respondent's claim against the appellant in the Russian courts fell within the scope of the arbitration agreement such that the respondent should be restrained from pursuing

[148] *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494, 503–504 per Lord Wright; *Chitty on Contracts*, *supra* n 66, [13-078].
[149] This is the type of situation described in *Y.E.S. F&B*, *supra* n 65, [52]-[54].
[150] *BNA* (CA), *supra* n 1, [95].
[151] *Enka* (SC), *supra* n 5, [106]-[109]. See also M Phua, "Resolving the Difficulties of Determining What Law Governs the Validity of an Arbitration Agreement – A Critique *Erga Omnes*" (2017) 28 *American Review of International Arbitration* 335, 357–60.
[152] See, eg French Civil Code 2016, Art 1191; *BGH NJW 1999, 3704* (German Federal Court of Justice); Restatement (Second) of Contracts §203(a). See also E Gaillard and J Savage (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), 825–6. For this reason, it arguably makes little practical difference whether the validation principle is applied as a conflict of laws rule or a rule of construction under the substantive law.

those proceedings. Counsel for the respondent argued that because English law is more inclined than Russian law to interpret the arbitration agreement as having a wide enough scope to cover claims in both tort and contract, the validation principle should also be applied on the facts to ensure that the respondent's tort claims against the appellant fell within their agreement to arbitrate. This would be consistent with the celebrated principle in *Fiona Trust v Privalov* that arbitration agreements should be interpreted in a manner that reflects the assumption that commercial parties usually intend for all disputes arising out of their relationship to be decided by the same tribunal.[153]

The *Enka* majority tentatively accepted this argument – that commercial parties are "inherently less likely" to choose a governing law which failed to recognise *Fiona Trust*'s pro-arbitration presumption.[154] Lord Burrows was less impressed with the respondent's submission. He held that the validation principle had no application to determining the correct interpretation or scope of the arbitration agreement. It would require "results-based reasoning" to assume that the parties must have desired a governing law which takes a wider rather than narrower approach towards the interpretation of arbitration agreements.[155]

When applied to issues of validity, the validation principle makes sense because, as embodied in the *ut res magis* principle, commercial parties do not enter into agreements in vain and are very unlikely to have chosen a governing law which would invalidate their transaction. But can the validation principle also be applied to choice-of-law issues beyond the validity of the arbitration agreement? Whether or not a contractual obligation to arbitrate is interpreted as having a broad or narrow scope of application is of a different order from the fundamental question of whether the parties' consent to arbitrate is legally enforceable and effective in the first place. The same question falls to be answered in relation to the application of the validation principle towards other issues such as the joinder of non-signatories to an arbitration agreement.[156] The extension of the validation principle will likely depend on the strength of the inference that can be drawn from the differences in the content of the different putative governing laws on issues of scope, joinder etc.

E. The chosen curial law as a relevant contrary *indicium*

With *Enka*'s re-emphasis on the law governing the main contract, has the law of the seat fallen to the wayside as a connecting factor for the proper law of the

[153] *Fiona Trust & Holding Corpn v Privalov* [2007] UKHL 40, [13] per Lord Hoffman.
[154] *Enka* (SC), *supra* n 5, [107]-[108].
[155] *Enka* (SC), *ibid*, [199].
[156] *International Commercial Arbitration*, *supra* n 9, §10.05[C][1]. Editor's note: After the article was written the UKSC decided that the validation principle does not apply to cases where the issue in dispute is whether the relevant party to the litigation is a party to the arbitration agreement, see *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 at paras 49-52.

arbitration agreement? In many ways, it is probably a more equivocal indicator of the parties' choice of law to govern both their contract and the arbitration agreement.

As mentioned earlier, the validation principle may – but does not necessarily – lead to the inference that the parties intended another law, such as the chosen curial law, to govern the arbitration agreement, instead of the law governing the main contract. Further, commercial parties may often choose a seat or curial law for its neutrality, but that desire for neutrality does not necessarily extend to the application of a neutral law to govern the arbitration agreement. However, the *Enka* court did reserve such a possibility in exceptional cases.[157]

Further, the majority in *Enka* did suggest that there might be unusually strong indications that the curial law (or seat) chosen by the parties justifies an implication that the parties intended the same system of law to govern the arbitration agreement. In their view, this would usually "depend on the content of the relevant curial law."[158] In most cases, a mere choice of curial law will not be strong enough to infer an implied choice of law for the arbitration agreement because, at least in England, the curial law specifically gives precedence to the autonomy of the parties to choose a foreign law to govern their arbitration agreement, which would be effective to trump all non-mandatory provisions of the curial law.[159] However, the majority observed that other national arbitration laws may of course differ from the English Arbitration Act 1996. In particular, the English High Court case of *Carpatsky Petroleum Corporation v PKSC Ukrnafta* was cited as an example where a choice of a particular curial law may, in view of its legal provisions, justify an inference that the parties intended to subject their arbitration agreement to that same system of law.[160] The substantive contract was expressly governed by Ukrainian law and the parties later entered into an addendum agreement which contained an agreement to refer disputes to arbitration administered by the Arbitration Institute of the Swedish Chamber of Commerce under UNCITRAL Arbitration Rules. In holding that Swedish law governed the arbitration agreement, Butcher J reasoned that the parties should be assumed to have known about section 48 of the Swedish Arbitration Act, which applies Swedish law by default where the parties had not reached an

[157] *Enka* (SC), *supra* n 5, [114] and [273], referring to *Egon Oldendorff v Libera Corpn (No 2)* [1996] 1 Lloyd's Rep 380 as an example.
[158] *Enka* (SC), *ibid*, [69].
[159] *Enka* (SC), *ibid*, [73]-[94] referring to s 4(5) of the Arbitration Act 1996. This addressed the so-called "overlap argument" which had been accepted by the court below, ie that there is such a significant overlap between the scope of the curial law and that of the law governing the arbitration agreement that a designation of the former should be presumed as an implied choice of the latter: see *Enka* (CA), *supra* n 4, [96]-[99] citing *XL Insurance Ltd v Owens Coming* [2001] 1 All ER (Comm) 530.
[160] *Enka* (SC), *ibid*, [70]-[71].

agreement on the proper law of the arbitration agreement.[161] The majority in *Enka* thought that the same could apply to arbitrations seated in Scotland because the Arbitration (Scotland) Act contained a similar default provision.[162]

This proposition appears quite novel and is not unproblematic. A plain reading of section 48 of the Swedish Arbitration Act (and its equivalent under Scots law) suggests that the default rule applies only where the parties have not made a choice of proper law for the arbitration agreement. If the court has reached the conclusion that there is no choice of law, it is arguably circular to refer to the curial law chosen by the parties and then re-conclude that the parties *did in fact* make an implied choice of law for the arbitration agreement as evinced by their agreement to the application of (for instance) section 48 of the Swedish Arbitration Act. It is this kind of reasoning which was rejected by the Singapore Court of Appeal in *BNA*. In its view, the lower court wrongly reasoned that the parties' choice of SIAC Rules could be construed as an implied choice of Singapore as the arbitral seat, insofar as SIAC Rule 18.1 provided that, in the absence of an agreement of the parties on the seat or a contrary determination by the tribunal, the seat of arbitration will be Singapore.[163] As this default rule only had application after it has been determined that the parties had not agreed on a choice of seat, it could not be incorporated as a competing reference to a second geographical location in addition to Shanghai.[164]

In fact, *Carpatsky* was decided on the basis of expert evidence that section 48 applies as long as there is no *express* choice of law for the arbitration agreement.[165] Crucially, this gave room for Butcher J's conclusion that Swedish curial law could deem an implied choice of Swedish law to govern the arbitration agreement. To the extent that many arbitration laws will give maximum autonomy to the parties to choose their own law in an express or implied manner, cases like *Carpatsky* will probably be rare.[166]

Arguably, more explicit indications should be required to warrant an inference that the chosen curial law was the parties' implied choice of law to govern the arbitration agreement. One example is *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*.[167] The arbitration agreement specified England as the seat of arbitration, but yet expressly excluded certain non-mandatory provisions of the Indian

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[161] *Carpatsky Petroleum Corporation v PKSC Ukrnafta* [2020] EWHC 769 (Comm), [70 (2)], cited with approval in *Enka* (SC), *ibid*, [70].
[162] *Enka* (SC), *ibid*, [71].
[163] *BNA* (HC), *supra* n 57, [104].
[164] *BNA* (CA), *supra* n 1, [64].
[165] *Carpatsky*, *supra* n 161, [70(2)].
[166] One of these rare examples may be the People's Republic of China, where Chinese private international law rules appear to permit only an express choice of law to govern the contract: see, eg F Yang, "The Proper Law of the Arbitration Agreement: Mainland Chinese and English Law Compared" (2017) 33 *Arbitration International* 121, 122–3.
[167] [2012] EWHC 3702 (Comm).

Arbitration and Conciliation Act. Since construing the reference to Indian arbitration law as a choice of curial law would conflict with the clear designation of England as the arbitral seat, "the natural inference is that [the parties] understood and intended" that Indian law, less the excluded provisions, would apply to the arbitration agreement.[168]

F. Conclusion

This article has attempted a comparative dissection of the two seminal common law decisions in *Enka* and *BNA*. Arising out of the foregoing analysis, this article suggests that the common law test for ascertaining the proper law governing the arbitration agreement, which can be applied by both courts and tribunals alike, should be re-formulated thus:

1. Stage 1: Express Choice
    a. If the arbitration agreement expressly states a choice of governing law, the court must give effect to that choice regardless of whether the agreement would be invalid under that law. Otherwise, consider scenarios (b) and (c) below.
    b. If the main contract expressly states its governing law, that choice of law clause ought to be construed according to the *lex contractus* against the whole contract in order to ascertain whether the clause was also intended to cover the arbitration agreement. Ordinarily, because commercial parties generally do not treat the arbitration agreement as a separate contractual agreement from the main contract, it is arguable that, under the common law, an express choice of law clause in the main contract should be interpreted to apply to the entire contract including the arbitration agreement, unless there are clear indications to the contrary such as:
        i. where that clause expressly states on its terms that it does not apply to the arbitration agreement; or
        ii. where that choice of law would have the effect that the arbitration agreement is invalid.
    c. If neither the main contract nor the arbitration agreement contains an express choice of law clause, proceed to Stage 2.
2. Stage 2: Implied Choice
    a. The court should consider whether there are clear indications from all the circumstances of the case that the parties intended a particular law to apply to the arbitration agreement. To the extent that there are

[168] *Arsanovia*, *ibid*, [20]. See also *XL Insurance*, *supra* n 159, where Toulson J held that although the main contract was expressly governed by New York law, the arbitration agreement was more likely governed by English law insofar as it stated that disputes should be referred to arbitration in London "under the provisions of the Arbitration Act 1996".

clear indications from all the circumstances of the case that the parties impliedly chose a particular law to govern the main contract, that arguably should be a strong indication that the parties intended that law to apply to the arbitration agreement as well.

b. If the parties' intentions cannot be clearly discerned from the terms of the contract or the circumstances of the case, the court should not impute any intentions to the parties – instead, the analysis should proceed to Stage 3.

3. Stage 3: Closest connection – law of the seat.

   Courts should apply the law of the seat as the law with the closest connection to the arbitration agreement. This applies *a fortiori* in New York Convention signatory states, where the default choice of law rule under Article V(1)(a) is the law of the seat.

Disclosure statement

No potential conflict of interest was reported by the author(s).