

The Proper Law of the Arbitration Agreement

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Abstract

The law of the agreement to arbitrate has divided the English Court of Appeal with C v D and SulAmerica apparently incapable of reconciliation. The latter is, however, being treated by the lower courts (and jurisdictions such as Singapore) as the definitive statement of the law and, in consequence, the substantive law of the contract will generally be the law of the agreement to arbitrate, rather than the law of the seat. Whilst the result in both C v D and SulAmerica is unobjectionable (on the facts both concluding that the law of the seat prevailed), this article seeks to analyse the process of reasoning to reach the results and consider the wider context especially challenges to awards under the 1958 New York Convention. Viewed with that, and other, international contexts the arguments in favour of the law of the seat are, it is suggested, far more persuasive.

1. Introduction

The Arbitration Act 1996 s 46(1) provides that:

“The arbitral tribunal shall decide the dispute—

- (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
- (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.”

It is immediately apparent that this is concerned only with the law applicable to the substance of the dispute. It is not concerned with the law applicable to the arbitration agreement, nor is it concerned with the law applicable to the arbitral procedure. The Act makes no provision for these matters (and nor does the Model Law). The only jurisdictions that make express provision are Sweden and Scotland.

The Swedish Arbitration Act 1999 provides:

“Section 48

Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place.

The first paragraph shall not apply to the issue of whether a party was authorised to enter into an arbitration agreement or was duly represented.”

The Arbitration (Scotland) Act 2010 provides:

“6 Law governing arbitration agreement

Where—

- (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but

(b) the arbitration agreement does not specify the law which is to govern it,
then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law.”

It can be seen that both arrive at the same result: that the seat dictates the law of the agreement to arbitrate.

Two sets of rules from institutions or associations have specifically addressed the point: The LCIA Rules 2014 art 16.4 provides:

“The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.”

The LMAA Terms 2017 art 6 provides:

“In the absence of any agreement to the contrary, the parties to all arbitral proceedings to which these Terms apply agree: (a) that the law applicable to their arbitration agreement is English and; (b) that the seat of the arbitration is in England.”

Again it can be seen that the institutions also favour the seat dictating the law of the agreement to arbitrate, absent express choice. The fact that such legislation and rules that address the point speak with one voice is not, of course, an answer to the question of what the common law rules conclude, or should conclude, on the same question. The question is, however, an international question: there ought to be the same answer in London as in New York, Paris or Singapore.

The importance of the proper law of the arbitration agreement (whether the individual agreement to refer or the, more typically, clause in a host or matrix contract—in this paper, this will be termed the “host” contract) is that it will determine a number of important questions. Furthermore, it would be anomalous if an arbitration agreement in exactly the same form were to be governed by a different law depending on whether it (a) is a clause within a host contract; (b) is a stand-alone agreement to refer—whether against the historical background of contract otherwise identical to the host contract in (a); or (c) a physically separate contract entered into simultaneously with a substantive contract otherwise identical to the host contract in (a).

Under the Rome I Regulation, the proper law of a contract governs all matters relating to the substance of the dispute between the parties arising under it, including: (a) existence, validity (and conversely illegality or invalidity) and formation (including special considerations concerning questions of disputed incorporation¹; (b) interpretation, effect or construction; (c) performance; (d) consequences of breach (ie remedies, including the recoverable heads of damage); (e) termination and discharge; (f) limitation periods; (g) nullity; and (h) the validity of any assignment of contractual rights.^{2, 3} It ought not, in general terms, to be determinative of the parties to the arbitration agreement.⁴ These may be significant battlegrounds.

¹ Regulation 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I Regulation) art 10.1.

² Rome I Regulation art 14.

³ Of course, the agreement to arbitrate is typically a bilateral agreement between the original contracting parties. On the appointment of the tribunal, a trilateral agreement comes into being between the original parties (whether the original contracting parties or their successors) and the tribunal. As ever, it is open to the parties (and tribunal) to agree a yet further law might govern that agreement, but absent such an express choice there is no sensible debate that it will be governed by the same law as the original agreement to arbitrate.

⁴ The question of parties arose in *Egiazaryan v OJSC OEK Finance* [2015] EWHC 3532 (Comm), [2016] Lloyd’s Rep 295. In that case, the tribunal had decided that since English law governed the arbitration agreement, that extended to who was a party to the arbitration agreement. Burton J considered that that was too simplistic an analysis. Even if the arbitration agreement is expressly or implied subject to English law, there will be cases where a question may

The last decade has seen this seemingly modest point of the governing law of agreements to arbitrate, exercise the English courts. In agreements to arbitrate, it is rare for there to be an express choice of the governing law of that, separate, agreement. Of course, in many circumstances, the law applicable to the arbitration agreement will be entirely unimportant or there will be no issue. There will be no need to know what it is.

In some cases, it may be necessary to identify the applicable law of the arbitration agreement separately from the law applicable to the host contract. It may, on analysis, be the case that both the law of the host contract and the law of the arbitration agreement, one or other of them or neither of those laws will be the same as the legal system of the seat of the arbitration.⁵

There are those who consider that to start from a presumption that the arbitration agreement has an applicable law entirely independent of the host contract of which it forms part is taking the doctrine of separability too far⁶; even though for some purposes the arbitration agreement necessarily must be treated as “separable” from the main contract (if any), that does not mean it is “separate” in every respect. This is addressed below.

The parties’ freedom of choice must generally be respected, there is nothing objectionable or unlawful about a host contract being expressly subject to the law of State A and the arbitration agreement being expressly subject to the law of State B, and larger contracts now often expressly provide for an entirely different law applicable to the arbitration agreement.⁷

2. Basic principles

Nevertheless, in terms of the treatment by the common law (given the exclusion of arbitration agreements from Rome I), some basic principles are fairly uncontroversial. These are derived from English authorities and represent the principles of conflict of laws under English common law relevant to the issue.⁸

arise that involves a consideration of a foreign law (to which English conflict principles would direct us) to determine whether a party is bound by the arbitration agreement. The evidence before the arbitrators was that the parent of the subsidiary was liable for the subsidiary’s breaches of contract (as a matter of Russian law), and that that extended to the subsidiary’s obligation to arbitrate any dispute. The tribunal considered, however, that the law of the arbitration agreement was English, and there was no room for the application of Russian tort law to determine whether the parent would also be treated as a party to the arbitration. The court disagreed, holding that Russian law was applicable to determine whether the parent could be joined into the arbitration. This was simply the application of well-established principles. The leading case is *MacMillan Inc v Bishopsgate Investment Trust* [1996] 1 WLR 387 at 391–392, [1996] 1 All ER 585, and see also *Raiffeisen Zentralbank v An Feng Steel* [2001] CLC 843 at [27]. The proper approach is to decide what system of law should be applied to the issue (*lex causae*). That involves a three-stage process: (a) Characterise the relevant issue; (b) Select the rule of conflict of laws which lays down a connecting factor for that issue; and (c) Identify the system of law which is tied by that connecting factor to that issue. Furthermore, as Auld LJ said in *MacMillan*: “the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and the defence”. Further as Mance LJ said in *Raiffeisen*: “The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised ...”

⁵ The 1958 New York Convention provides for the possibility that the substantive law of the host contract and the law of the agreement to arbitrate might be different. Article 5 provides that a party can resist enforcement of a Convention award if it can prove “that the [arbitration] agreement is not valid *under the law to which the parties have subjected it*” (emphasis added).

⁶ See, eg Briggs *Civil Jurisdiction and Judgments* (6th edn, Routledge Informa Law 2015) para 8.09.

⁷ As in *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd* [2007] EWHC 1713 (Comm), [2008] 1 Lloyd’s Rep 93 (Cooke J), where the host agreement was subject to Indian law, but the arbitration agreement (and the arbitration procedure) was expressly subject to English law. See also *UST-Kamenogorsk Hydropower Plant JSC v AES UST-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889, where the arbitration clause was made expressly subject to English law, and the overriding contract to Kazakh law.

⁸ Although, in theory, tribunals seated in England may not feel obliged to apply English conflict of law principles, and may consider that they have a free hand, *Habas Sinai* is a good example of a case where the issue was decided *de novo* by the court (under a s 67 challenge on jurisdiction), so whatever the tribunal decides, the court on such occasions will have no alternative but to apply English law principles. That is one good reason why it would be

First, as regards the seat:

- every arbitration must have a juridical “home”⁹;
- if not expressly referred to as a seat the geographical place of an arbitration is its seat or juridical “home”¹⁰;
- if not expressly provided otherwise, the procedural or curial law will be that of the seat¹¹;
- the agreement to refer disputes to arbitration, albeit typically a clause in a “host” contract, is a separate agreement¹²; and
- the law that applies to arbitration agreements is not governed by the Rome Convention.

Secondly, it is worth having in mind the historical evolution of the law on two key aspects: (a) in relation to the proper law of the arbitration agreement; and (b) in relation to the separability of the arbitration agreement. Both of these reached maturity at about the same time, in the 1990s, but having taken separate paths. It is the doctrine of separability that expressly or impliedly raises the prospect of a separate law governing the agreement to arbitrate. It is the symbiotic coalescing of these two building blocks of arbitration law that is crucial to a proper understanding of the issues.

Thirdly, although the parties are free to choose the applicable law to an arbitration agreement, more or less without restraint, it must be the law of a country.¹³

Fourthly, and although Rome I is irrelevant, the common law follows a similar pattern of enquiry, that is: (i) what (if any) is the applicable law as expressly chosen by the parties; (ii) if none, what (if any) is the applicable as impliedly chosen by the parties; and (iii) if none, with which legal system does the arbitration agreement have its “closest and most real connection”¹⁴

Fifthly, if there is a dispute as to whether the arbitration clause is valid, the approach adopted by the English courts is to apply the putative applicable law, ie to determine which law would apply if the clause was valid, and then to apply the rules of that law to determine

prudent for any tribunal seated in England to apply English conflict of laws principles when determining any issues of applicable law.

⁹ *Bank Mellat v Hellinki Techniki* [1984] 1 QB 291 at 301 and *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 at 65, [1983] 3 WLR 241.

¹⁰ The fixing of a venue (albeit with a different governing substantive law) will usually be a designation of the seat: “an arbitration clause which provides for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that the venue of the arbitration shall be London ... does amount to the designation of a juridical seat. The parties have not simply provided for the location of hearings to be in London for the sake of convenience and there is indeed no suggestion that London would be convenient in itself, in the light of the governing law ..., the nature and terms of that agreement and the nature of the disputes which were likely to arise and which did in fact arise”: *Shashoua v Sharma* [2009] EWHC 957 (Comm), [2009] 2 Lloyd’s Rep 376 at [27] (even though the governing substantive law was Indian) and see also *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd’s Rep 48; note also *Naviera Amazonica Peruana v Cie Internacional de Seguros del Peru* [1988] 1 Lloyd’s Rep 116 at 121, [1988] 1 FTLR 100 (the legal seat of the arbitration will remain the same even if the physical location of certain hearings move from place to place as a matter of convenience).

¹¹ *Whitworth Street Estates v Miller* [1970] AC 583, [1970] 2 WLR 728.

¹² *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyd’s Rep 455, [1993] QB 701; Arbitration Act 1996 s 7 and *Fiona Trust v Privalov* [2007] UKHL 40, [2007] 4 All ER 951. This is also the law of the US: *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 at 402–403—(finding that separability stems from the Federal Arbitration Act 1925 9 USC §4). Indeed it is now a universally recognised doctrine of separability of the arbitration agreement.

¹³ *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 HL, [1983] 3 WLR 241, as applied in the case of arbitration agreements by Christopher Clarke J (as he then was) in *Halpern v Halpern* [2007] EWCA Civ 291, [2007] 2 Lloyd’s Rep 56 (at [52]) and Richards J in *Musawi v R E International (UK) Ltd* [2008] 1 Lloyd’s Rep 326 (at [81]).

¹⁴ *SulAmérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2012] 1 Lloyd’s Rep 671 CA at [25], where Moore-Bick LJ noted that in practice the enquiry into implied choice of law often merges into the enquiry into the closest connection. “because identification of the system with which the [arbitration] agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of law”.

whether or not it is valid.¹⁵ There may on occasion be more than one putative proper law. In *Dornoch Ltd v Mauritius Union Assurance Co Ltd*,¹⁶ it was held that the only option in such circumstances was to apply the law of the forum (meaning, in an arbitral context, the law of the seat of the arbitration).

One thing that is fairly clear and where the authorities have come out with something approaching unanimity is the enquiry as to the legal system with which the arbitration agreement has its closest and most real connection in the absence of an express or implied choice of law.

3. The question posed

For the overall question of the proper law of the arbitration agreement, there are only two real possibilities that emerge: the law is either the same as that of the host contract (despite the arbitration agreement being separable), or it is the law of the seat.

This gives rise, in essence, to two rival theories: the “seat” theory that states that the governing law follows the geographical location of the seat of the arbitration provided for, and, secondly, the “host” theory that states that the governing law of the agreement to arbitrate is the same as the governing (or substantive) law of the contract in which, typically, the agreement to arbitrate is a clause. The modern Court of Appeal cases, that are seemingly irreconcilable, are *C v D*¹⁷ and *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA (Sulamérica)*.¹⁸ Two highly experienced and respected commercial judges gave the leading judgments in these cases in the Court of Appeal, Longmore LJ in *C v D* and Moore-Bick LJ in *Sulamérica* and are plainly at odds.

In *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*¹⁹ (*Arsanovia*), Andrew Smith J grappled with the tensions between, and questions left unanswered in, the two Court of Appeal cases. As Andrew Smith J, rather politely observed in *Arsanovia*, it is “impossible not to detect in the judgment of Moore-Bick LJ ... that he was uncomfortable with the reasoning of Longmore LJ ...”.

In each of *C v D*, *Sulamérica* and *Arsanovia* there were governing law clauses for the substantive contract so the “host” theory could be argued. It is perhaps instructive to consider the position had there been no governing law clause. The position is clearly set out in *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)*.²⁰ The case concerned a charter for a ship. The arbitration clause provided for disputes to be “referred to arbitration in Beijing or London in defendant’s option”²¹ and there was no governing law clause. Lloyd LJ said:

“Where the arbitration clause provides for a single situs ... [t]he arbitration clause then provides a strong, although not conclusive, indication of what the parties intended as the proper law of the contract, including the arbitration agreement ... The presumption cannot operate if no place of arbitration is agreed ...”²²

¹⁵ *Compania Naviera Micro SA v Shipley International Inc The Parouth* [1982] 2 Lloyd’s Rep 351; *Marc Rich & Co AG v Societa Italiana Impianti PA The Atlantic Emperor* [1989] 1 Lloyd’s Rep 548 CA, [1991] ILPr 562; *Egon Oldendorff v Libra Corp* [1995] 2 Lloyd’s Rep 64 (Mance J, as he then was; this was a case under the Rome Convention art 8, now recast as Rome I art 10; *The Heidberg* [1994] 2 Lloyd’s Rep 287 (HH Judge Diamond QC). The putative proper law test is also contained in Rome I art 10.1, which of course does not apply to arbitration agreements.

¹⁶ *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] EWCA Civ 389, [2006] 2 Lloyd’s Rep 475 CA.

¹⁷ *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001.

¹⁸ *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638.

¹⁹ *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 2 All ER (Comm) 1.

²⁰ *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd’s Rep 445.

²¹ *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd’s Rep 445 at 446.

²² *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd’s Rep 445 at 448.

4. The cases

In *Tzortzis v Monark Line A/B*,²³ the Court of Appeal held that when a contract contained a London arbitration clause, the resulting implication was that the parties intended that the substantive law applicable to the host contract should be English law and that that could only be rebutted by an express provision to the contrary. It must be noted, however, the date when the case was decided: at a time when the distinction between the proper law of a contract and the law governing the arbitration agreement was not fully developed.

Two years later saw the first appellate judicial recognition of the possibility of the parties choosing one system of law for the proper law of the contract and another for the curial law of the arbitration. In *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA*,²⁴ Lord Diplock said:

“The fact that [the parties] have expressly chosen to submit their disputes under the contract to a particular arbitral forum of itself gives rise to a strong inference that they intended that their mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar.”²⁵

In *Naviera Amazonica Peruana v Compania Internacional de Seguros del Peru*,²⁶ Kerr LJ referred to three different potential relevant legal systems: the law of the host contract, the law of the arbitration agreement, and the law applicable to the arbitral procedure.

In a decision that has not received the attention it might deserve in this area, *Deutsche Schachtbau-Und Tiefbohr-Gesellschaft MBH v Shell International Petroleum Co Ltd*²⁷ in the Court of Appeal,²⁸ Sir John Donaldson MR held:

“The intention of the parties that the agreement to arbitrate shall be an independent and collateral contract could not be more clearly indicated. Looking at the arbitration agreement in isolation, there can only be one answer, namely, that it is governed by [the law of the seat]. Of course it is not permissible to do this and regard must also be had to the surrounding circumstances, including the proper law governing the substantive contract and to the fact that the contract was to be performed [in another state] ... Giving the fullest possible weight to any argument favouring the law [of the state where performance was to take place] ... I find myself in complete agreement ... that the proper law of the arbitration is [the law of the seat].”

In *Black Cawson International Ltd v Papierwerke Waldorf-Aschaffenburg AG*,²⁹ the then Mustill J said:

“It is by no means uncommon for the proper law of the substantive contract to be different from the lex fori, and it does happen, although much more rarely, that the law governing the arbitration agreement is different from the lex fori.”

Lord Mustill (as he had become) in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*³⁰ said:

²³ *Tzortzis v Monark Line A/B* [1968] 1 WLR 406, [1968] 1 All ER 949.

²⁴ *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572, [1970] 3 WLR 389.

²⁵ *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572 at 604–5 but this parochial approach has less weight in the light of the truly international nature of international arbitration.

²⁶ *Naviera Amazonica Peruana v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116 at 119, [1988] 1 FTLR 100.

²⁷ *Deutsche Schachtbau-Und Tiefbohr-Gesellschaft MBH v Shell International Petroleum Co Ltd* [1990] 1 AC 295, [1988] 3 WLR 230.

²⁸ The appeal to the HL was allowed on a different point and did not question the Court of Appeal on this point.

²⁹ *Black Cawson International Ltd v Papierwerke Waldorf-Aschaffenburg AG* [1981] 2 Lloyd's Rep 445 at 453.

³⁰ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, [1993] 2 WLR 262.

“It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the ‘curial law’ of the arbitration, as it is often called. Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible.”

As Toulson J (as he then was) was to later explain in *XL Insurance* (see below):

“I take the sentence beginning with the words ‘Less exceptionally it may also differ’ to mean that it is less exceptional to find the proper law of an arbitration clause differing from the proper law of the parent contract where the curial law differs from that of the parent contract.”

Following on, in *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission*,³¹ Potter J (as he then was) summarised four potential laws applicable in an international arbitration.³² These are:

- the law of the host agreement;
- the law of the arbitration agreement (meaning the underlying agreement);
- the law of the individual “agreement to refer”; and
- the curial law, ie the law of the seat, governing the procedure of the reference.

The contract had provided for Indian governing law with ICC arbitration in London. Potter J expressed the view obiter that the choice of law to govern the substantive contract will usually be decisive in determining the proper law of the arbitration agreement. In that case, the proper law of the host contract was Indian law, but the arbitration clause provided that “the proceedings shall be held in London”. Potter J ruled that this was a sufficiently express choice of London as the seat of the arbitration, and therefore of English law as the “procedural law” of the arbitration, but left the arbitration agreement governed by Indian law.³³

In *ABB Lummus Global Ltd v Keppel Fels Ltd*,³⁴ Clarke J had before him a contract governed by English law, but that any disputes would be referred to LCIA arbitration “in accordance with Singapore law”. One of the issues he considered was as to the law applicable to the agreement to arbitrate (the main issue being whether it had been repudiated by the conduct of one party in taking court proceedings). He concluded, obiter, that the parties had agreed that the law of the host contract (English law) would apply to the entirety of the contract, including the arbitration clause, despite the reference to the law of Singapore.

In *XL Insurance Ltd v Owens Corning*,³⁵ Toulson J (as he then was) considered that the choice of seat (London) was determinative of the proper law governing the arbitration clause. He reasoned:

“Arbitration law is all about a particular method of resolving disputes. The substance and processes are closely intertwined. The Arbitration Act contains various provisions

³¹ *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission* [1994] 1 Lloyd’s Rep 45.

³² *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission* [1994] 1 Lloyd’s Rep 45 at 56–57.

³³ *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission* [1994] 1 Lloyd’s Rep 45 at 57–59.

³⁴ *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd’s Rep 24.

³⁵ *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530, [2001] CP Rep 22.

that could not readily be separated into boxes labelled substantive arbitration law or procedural law, because that would be an artificial division.

An arbitration clause in a contract is severable, and there is nothing therefore to prevent parties to it from agreeing that the proper law of the parent should not apply to it ... The parties cannot have intended ... that all aspects of the arbitration agreement should be governed by New York law [the governing law of the host contract], for that would be inconsistent with the stipulation in the arbitration clause that any dispute should be determined in London ‘under the provisions of the Arbitration Act 1996’ ... litigation of the decision in the absence of serious irregularity under section 68 ... cannot have meant that such irregularity should be judged otherwise than under English law ... I conclude that by stipulating for arbitration in London under the provisions of the Act ... the parties chose English law to govern the matters which fall within those provisions ... and by implication chose English law as the proper law of the arbitration clause.”

In *Peterson Farms Inc v C & M Farming Ltd*,³⁶ Langley J assumed that the proper law of an arbitration agreement concerning a London arbitration was the law of the host contract (Arkansas law) but he did so without any reasoning as to whether this was an express or implied choice, or the “closest connection” test. Morison J thought likewise in *Tonicstar Ltd v American Home Assurance Co*.³⁷

In *Leibinger v Stryker Trauma GmbH*,³⁸ the host contract was subject to German law, but provided for ad hoc arbitration in London. A challenge to the arbitrators’ award was made in the German courts, which was rejected as a matter of German law. Cooke J regarded it as an abuse of process for the unsuccessful party to bring a challenge in England (under s 67) when the factual basis for the challenge had already been determined against them. He concluded however (obiter) that since the arbitration clause formed part of the wider agreement subject to German law, he regarded the inference of German law being the applicable law to the arbitration agreement as “overwhelming”.³⁹ This comment, however, needs to be seen in context: (1) London was expressly only a “venue”; (2) claimant who contended for English law had previously sought a declaration that the arbitration was ‘inadmissible’ from the German courts; and (3) the judge remarked that it had never occurred to the claimant to contend for English law. The entire discussion is in a six-line paragraph.

After his decision in *Leibinger*, Cooke J had cause to consider the issue again in *C v D*,⁴⁰ in the context of an award made in London in an ad hoc arbitration proceeding between two US corporations. The host contract (an insurance policy) was expressly subject to New York law. The losing party sought to challenge the award in the New York courts, on the basis of “manifest disregard” of New York law (a defence which exists in respect of domestic awards). The winner applied to injunct the New York proceedings. As to the first and fourth of Potter J’s categories (host law and curial law), Cooke J was emphatic that these were, respectively, New York and English law.⁴¹

Although his view was not determinative of the issue (and so his comments were strictly obiter), it had been argued that the second and third categories (law applicable to the arbitration agreement and reference respectively) were subject to New York law.⁴²

Cooke J inclined to the view: (i) that it would be rare for the law of the arbitration agreement and the law of the agreement to refer to differ; and (ii) that the “broad thrust” of

³⁶ *Peterson Farms Inc v C & M Farming Ltd* [2004] 1 Lloyd’s Rep 603, [2004] EWHC 121 (Comm).

³⁷ *Tonicstar Ltd v American Home Assurance Co* [2004] EWHC 1234 (Comm), [2005] Lloyd’s Rep IR 32.

³⁸ *Leibinger v Stryker Trauma GmbH* [2006] EWHC 690 (Comm).

³⁹ *Leibinger v Stryker Trauma GmbH* [2006] EWHC 690 (Comm) at [38].

⁴⁰ *C v D* [2007] 2 Lloyd’s Rep 367; affd [2008] 1 Lloyd’s Rep 239.

⁴¹ *C v D* [2007] 2 Lloyd’s Rep 367 at [22].

⁴² It was essential for the challenger to get home on this point, since the argument was that the proper law of the arbitration agreement and the contract to refer was New York law, which impliedly but necessarily governed the obligation to pay.

the authorities (by which he meant *Black Clawson*, *Naviera Amazonica*, *Channel Tunnel* and *XL Insurance*, but notably with the exception of *Sumitomo*) suggested that where the host law and curial law differed, there was “an increased likelihood” that the law of the arbitration agreement and the law of the agreement to refer would both “tally” with that of the curial law.⁴³

When the matter came to the Court of Appeal, Longmore LJ took a slightly different approach. He considered (again this was strictly obiter) that where there was no express choice of law for the arbitration agreement, the law with which that agreement had its closest and most real connection was more likely to be the law of the seat than the law of the host contract.⁴⁴ That approach was followed by Cooke J in two decisions: *Shashoua v Sharma*,⁴⁵ and *SulAmérica Cia Nacional de Seguros SA v Enesa Engenharia SA*.⁴⁶

In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*⁴⁷ it was common ground that French law applied (being that of the seat). It will be recalled that the issue for the court was whether to enforce an award against a party that claimed it was not a party to the agreement to arbitrate. The court considered New York Convention art V—under which recognition and enforcement of an award may be refused if the arbitration agreement is not valid “under the law to which the parties have subjected it or, failing any indication thereon, under the laws of the country where the award was made ...” (and the equivalent provision in the Arbitration Act 1996 s 103). However, Lord Collins did say “... there was no ‘indication’ by the parties of the law to which the arbitration agreement was subject, French law as the law of the country where the award was made, is applicable ...”. There was no express choice and it is instructive that the “indication” which might be taken to be analogous to an implied choice was dismissed so readily and Lord Collins accepted that the locus of the award (analogous to closest and most real connection) prevailed.

In *SulAmérica*, the dispute resolution clauses in two insurance policies were complex. They each contained a London arbitration clause, but the underlying contracts also contained Brazilian law and jurisdiction clauses. After the insurers had begun arbitration proceedings in London, the insured applied to the Brazilian courts seeking to injunct the insurers from continuing with the arbitration and obtain a declaration that the insurers were bound by the Brazilian jurisdiction clauses. The insurers then applied to the Commercial Court in London for an “anti-anti-suit” injunction restraining the insured from continuing with the Brazilian proceedings. In those proceedings, the insured argued that since under Brazilian law, their consent to arbitration was a necessary pre-condition, the arbitration proceedings had not been validly commenced. Cooke J held that notwithstanding the Brazilian law clause in the policy, the arbitration agreement was a separate contract and was subject to its own law, which he did not consider had been implicitly chosen as Brazilian law merely by reason of that having been the law of choice governing the insurance policy.⁴⁸ On the contrary, applying the “closest connection” test referred to above, Cooke J relied on the fact that the parties had chosen England as the seat.

Shortly after Cooke J’s judgment in *SulAmérica*, Hamblen J (as he then was) delivered a judgment on precisely the same issue in *Abuja International Hotels Ltd v Meridien SAS*.⁴⁹ He came to precisely the same conclusion as Cooke J, and for almost precisely the same reasons, ie applying the “closest connection” test and identifying English law because the

⁴³ *C v D* [2007] 2 Lloyd’s Rep 367 at [43].

⁴⁴ *C v D* [2008] 1 Lloyd’s Rep 239 at [26].

⁴⁵ *Shashoua v Sharma* [2009] 2 Lloyd’s Rep 376 at [31], albeit in *Shashoua*, Cooke J was not being asked to determine the issue as to the applicable law governing the arbitration agreement.

⁴⁶ *SulAmérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd’s Rep 275, affirmed [2012] 1 Lloyd’s Rep 671 CA.

⁴⁷ *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763.

⁴⁸ *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 at [10]–[16].

⁴⁹ *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm), [2012] 1 Lloyd’s Rep 461.

seat of the arbitration was England, despite the host agreement being subject to Nigerian law.⁵⁰

Giving the lead judgment in the Court of Appeal upholding the decision of Cooke J in *SulAmérica*,⁵¹ Moore-Bick LJ accepted that it was probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship (ie host contract and arbitration agreements) to be governed by the same system of law.⁵² Nevertheless, applying the separability principle enshrined in *Fiona Trust & Holding Corp v Privalov*,⁵³ he made the point that, if the arbitration clause were void under the law applicable to the substantive agreement, that law cannot have been intended to be the law applicable to the arbitration agreement. Left only with the fact that the arbitration was seated in London, it did not take much to conclude that the closest connection was likely to be dictated by the choice of the seat.⁵⁴

In *AES Ust-Kamenogorsk v Ust-Kamenogorsk JSC*⁵⁵ the contract was governed by Kazakh law, with a London arbitration clause. It was common ground that the agreement to arbitrate was governed by, and construed in accordance with, English law (ie the seat). The Supreme Court did not, therefore, need to grapple with *C v D* and *SulAmérica*.

In *Union Marine Classification Services LLC v Cormoros*,⁵⁶ where there was no law chosen for the host contract, Leggatt J (as he then was) (obiter) chose English law as the law of the seat on the basis either of an implied choice or closest connection.

In *Habas Sinai v Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd*,⁵⁷ Hamblen J (as he then was) followed the reasoning in *SulAmérica* and determined that the law applicable to an arbitration agreement (the host contract had no expressly chosen governing law) was English law, being the law of the seat. In the course of doing so, he considered that the “guidance” provided by the authorities (principally *SulAmérica* and *Arsanovia*) could be summarised as follows⁵⁸:

- Even if an arbitration agreement forms part of a matrix contract (as is commonly the case), its proper law may not be the same as that of the matrix contract.
- The proper law is to be determined by undertaking a three-stage enquiry into: (i) express choice; (ii) implied choice; and (iii) the system of law with which the arbitration agreement has the closest and most real connection.
- Where the host contract does not contain an express governing law clause, the significance of the choice of seat of the arbitration is likely to be “overwhelming”. That is because the system of law of the country of the seat will usually be that with which the arbitration agreement has its closest and most real connection.
- Where the matrix contract contains an express choice of law, this is a strong indication or pointer in relation to the parties’ intention as to the governing law of the agreement to arbitrate, in the absence of any indication to the contrary.

⁵⁰ *Abuja International Hotels Ltd v Meridien SAS* [2012] 1 Lloyd’s Rep 461 at [21]–[22]

⁵¹ *SulAmérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd’s Rep 671.

⁵² *SulAmérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd’s Rep 671 at [11] and [15].

⁵³ *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd’s Rep 254.

⁵⁴ Hallett LJ agreed with Moore-Bick LJ, but Lord Neuberger MR (as he then was) considered that it was certainly an open question as to whether to follow *C v D* [2007] 2 Lloyd’s Rep 367, noting that that decision had been subject to some criticism, referring to Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd edn, 2010) paras 6.33 to 6.41, suggesting that the Court of Appeal did not have the benefit of full citation of authority, and in which the author suggests other reasons why there was a closer connection between host agreement law and arbitral agreement law, which Lord Neuberger MR considered “certainly merits consideration” ([58]; the same passage from Mr Joseph’s book was also mentioned by Moore-Bick LJ at [24]).

⁵⁵ *AES Ust-Kamenogorsk v Ust-Kamenogorsk JSC* [2013] UKSC 35, [2013] 1 WLR 1889.

⁵⁶ *Union Marine Classification Services LLC v Cormoros* [2013] EWHC 5854 (Comm).

⁵⁷ *Habas Sinai v Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2014] 1 Lloyd’s Rep 479.

⁵⁸ *Habas Sinai v Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2014] 1 Lloyd’s Rep 479 at [101].

- The choice of a different country for the seat of the arbitration is a factor pointing the other way. However, it may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the matrix contract.
- Where there are sufficient factors pointing the other way to negate the implied choice derived from the express choice of law in the matrix contract, the arbitration agreement will be governed by the law with which it has the closest and most real connection. That is likely to be the law of the country of seat, being 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.

5. The issues

The questions that have to be answered, and which cannot seriously be doubted in light of *Sulamérica* and many earlier authorities,⁵⁹ is whether the parties expressly, or impliedly, chose a law applicable to the arbitration agreement.⁶⁰ If they did, the court gives effect to that choice. If they made no choice, the court identifies the system of law with which the arbitration agreement has its closest and most real connection.

The seat theory

The argument in favour of the seat theory is simple and generally focuses on the closest and most real connection. Certainly that appears to be the basis put forward by Longmore LJ in his obiter comments and he said:

“The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.”⁶¹

But, the better argument might be for consistency. Longmore LJ’s ratio in *C v D* was that “by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law” and “the choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award”.⁶² It is respectfully suggested that Longmore LJ was plainly correct to so hold, although he does not really explain in his judgment why that is the case. It may have been obvious to the parties and the court why that was the case but it can be supported by being perfectly in accordance with the New York Convention and the Model Law.

Under the Model Law, an action for setting aside an award may only be brought in respect of an award made within the territory of the state concerned. It must be brought before the designated court of that state and it may only be brought on the grounds set out in the Model Law. These grounds are taken from the New York Convention (NYC) art V. There is a consistency: the NYC, in art V, sets out the grounds on which recognition and enforcement of an international award may be refused and art 34 (and 36) of the Model Law sets out the

⁵⁹ See *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50.

⁶⁰ The development of choice of law can be traced back to *Robinson v Bland* 96 ER 141, (1760) 1 Bl. W. 257 at 259 and any debate was put to rest in *Whitworth Street Estates* [1970] AC 583, [1970] 2 WLR 728. The view in the US is that in the absence of a choice of law by the parties, the applicable law is the law that has the most significant relationship to the transaction and the parties: *Restatement (Second) of Conflict of Laws* §188. The basic principle of party autonomy was enshrined in the Rome Convention and represented the law in all EU Contracting States and applies in most other countries.

⁶¹ *C v D* [2007] EWCA Civ 1282 at [26].

⁶² *C v D* [2007] EWCA Civ 1282 at [16] and [17].

same grounds (albeit with slight differences of language) as the grounds on which such an award may be set aside. The consistent feature is that the venue for these challenges is the seat of the arbitration.

The NYC art V(1)(e) provides that an award can be set aside by “a competent authority of the country in which, or under the law of which, that award was made”.

The Model Law art 36(1)(a)(v) has, for all practical purposes, identical language. The ability to set aside therefore generally rests in the courts where the award was made, ie the courts of the seat. There is a theoretical⁶³ exception: if the parties chose a procedural law other than that of the location where the arbitration is held (but that will be a very rare case).

The Model Law (of course, this is, in practice, the laws of the jurisdiction where the seat is located so, for example, the Arbitration Act 1996 in England) will be the curial law of the arbitration. The curial law governs the relationship between the parties, the arbitral tribunal and the supervising courts. It will govern, for example, the constitution of the tribunal, its entitlement to rule on its own jurisdiction, and the grounds of challenge to the jurisdiction of the arbitral tribunal on the substantive award. All this amounts to at least a primary jurisdiction vested in the courts of the seat.⁶⁴ If therefore, there were a London-seated arbitration, any attempt to set aside the award should be to the courts of England.

The challenges permitted are often of a “due process” nature and include that the arbitration agreement is not valid “under the law to which the parties have subjected it”⁶⁵; “the award ... contains decisions on matters beyond the scope of the submission to arbitration”⁶⁶; and “the arbitral procedure was not in accordance with the agreement of the parties”⁶⁷.

Take the situation of a London seat and Indian governing law (not unusual in the cases discussed above). There is a challenge arising from the jurisdiction of the arbitral tribunal. The London seat dictates that English law is the curial law. The arbitral tribunal’s power to rule on its own jurisdiction derived from the Arbitration Act 1996 and the challenge is also on the grounds permitted under that Act. The English court will consider these issues, therefore, from an English perspective. The governing law of the agreement to arbitrate will, however, determine the actual jurisdiction of the arbitral tribunal as the effect or construction of the agreement to arbitrate, is a matter for the governing law of that agreement.

It is suggested that the NYC and the Model Law must presuppose that the courts of the seat will, in the vast majority of cases, apply the law of the seat (ie as both the curial law and the governing law of the agreement to arbitrate) to all issues concerning, for example, questions of due process.

It would be bizarre and anachronistic for challenges on the award to be mandated to be in England, to have English law determine the ability of the arbitral tribunal to rule on its own jurisdiction and the grounds of that challenge also to be subject to English law, and yet have the principal issue of the jurisdiction of the tribunal to be under a law other than England’s. Nobody would devise such a system. If, therefore, challenges in England as to due process concerning the effect or construction of the agreement to arbitrate are logically under English law it follows that the governing law of the agreement to arbitrate must be English law.

Thus, save in exceptional circumstances and absent express choice, there is a powerful argument that there should be an implied choice that the governing law of the agreement to arbitrate is the same as that of the seat: the weight to be given to the choice of seat should

⁶³ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 284 (in none of the cases under the NYC have the parties designated a law of procedure foreign to that of the place of the arbitration; and he suggests, sensibly, that this provision should be regarded as a “dead letter”).

⁶⁴ *U & M Mining Zambia Ltd v Konkola Copper Mines Plc* [2013] EWHC 260 (Comm), [2013] 2 Lloyd’s Rep 218.

⁶⁵ Model Law art 34(2)(a)(i).

⁶⁶ Model Law art 34(2)(a)(iii).

⁶⁷ Model Law art 34(2)(a)(iv).

be increased, such that it is an implied choice in the vast majority of cases. If the choice is not implied, then it is sufficient to displace other pointers towards the “host” theory such that there is no implied choice. It is now broadly accepted that under the third test, of closest and most real connection, the “seat” theory will usually prevail. If that third test has all but merged with the second test of implied choice, it is consistent, at the very least, that they should arrive at the same result.

The “host” theory

The arguments in favour of the “host” theory can be broadly summarised as follows:

- **Construction:**

the reference to a system of law governing a contract means the entire contract (including the arbitration clause). This found favour with Andrew Smith J in *Arsanovia* and some earlier cases have taken the same view.⁶⁸ The counter-argument is that the arbitration agreement is a separable agreement and must be considered separately from the host contract, and the counter to the counter is that it is not necessarily separable for all purposes. Neither *C v D* nor *Sulamérica* seriously advances or discusses this argument and it is suggested that it runs so counter to modern orthodoxy on separability that it has little future but this raises the extent of separability (see below).

- **Consistency:**

the governing law of the substantive agreement and the arbitration clause should be the same, save in exceptional cases. The high watermark of the consistency argument is Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Ltd*⁶⁹ and that it would be “exceptional” for the law governing the agreement to arbitrate to be different from the governing or substantive law. It would be less exceptional for the governing or substantive law to differ from the procedural law of the arbitration. The cases that are said to support or illustrate the application of the *Channel Tunnel* principle, include *Union of India v McDonnell Douglas*,⁷⁰ but with regard to the law of the arbitration agreement (the case also considers the procedural or curial law) it is really an application of the construction principle:

“The parties may make an express choice of law to govern their commercial bargain and that choice may also be made of the law to govern their agreement to arbitrate. In the present case ... the parties have chosen the law of India not only to govern the rights and obligations arising out of their commercial bargain but also the rights and obligations arising out of their agreement to arbitrate.”⁷¹

That is the extent of the reasoning and it fails for the reasons given above on construction. *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission*⁷² is another case, as is *Sonatrach Petroleum Corp v Ferrell International*.⁷³ The comments in *Sumitomo* were obiter and again essentially

⁶⁸ See, eg *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd’s Rep 48.

⁶⁹ *Channel Tunnel Group Ltd v Balfour Beatty Ltd* [1993] AC 334 at 357–8, [1993] 2 WLR 262.

⁷⁰ *Union of India v McDonnell Douglas* [1993] 2 Lloyd’s Rep 48 at 49–50.

⁷¹ *Union of India v McDonnell Douglas* [1993] 2 Lloyd’s Rep 48.

⁷² *Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission* [1994] Lloyd’s Rep 45 at 47.

⁷³ *Sonatrach Petroleum Corp v Ferrell International* [2002] 1 All ER (Comm) 627 at [31]–[32]. Colman J considered that where the host agreement contained an express choice of law but the arbitration clause referred to no separate applicable law, the law of the underlying contract would usually apply to the arbitration agreement. In that case, the relevant clause provided for some disputes to be resolved by the courts in London, and others by arbitration in Japan.

amount to a construction argument. *Sonatrach* restates the reasoning without adding to it but contains a useful summary of the “host” theory:

“Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.”

- **Presumption:**

This is because the parties must be presumed to have intended to subject all their disputes to a single system of law. This may be regarded as an extension of the principle in *Fiona Trust v Privalov*,⁷⁴ holding that the parties are treated as having intended to resolve their disputes in one forum. It is certainly supported by the most recent appellate dicta, being that of Moore-Bick LJ in *SulAmérica*.⁷⁵

The proponents of the “host” theory criticise the *C v D* “seat” theory on the basis that the closest and most real connection does not point to the seat for two additional reasons.

First, the connection between the arbitration agreement and the seat are more readily expressed through the procedural or curial law rather than the governing law. Whilst this is undoubtedly correct that the agreement to arbitrate and the curial law have a close connection, it does not follow that there cannot also be a close connection between the seat and the governing law of the agreement to arbitrate.

Secondly, multi-tiered dispute resolution clauses (which are becoming increasingly popular) providing, for example, for mediation in advance of any arbitration, make it important that substantive rights, as opposed to procedural matters, are governed by one system of law. Again, this is a valid argument but it should not impact the analysis of the law of the arbitration agreement merely because there is a yet further agreement to mediate.

The extent of separability

Many commentators highlight that an agreement to arbitrate is not separate for all purposes⁷⁶ and that the fact that it is a clause within a host contract cannot be ignored for all purposes.⁷⁷ The high-point of this argument is Arbitration Act 1996 s 7 which provides:

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for *that purpose* be treated as a distinct agreement.” (emphasis added)

Colman J also assumed that, where there was no express choice of law of either the host contract or the arbitration clause, the choice of a seat would “normally, but not invariably” mean that the law of the seat would apply, not only to the arbitration agreement, but also to the host agreement.

⁷⁴ *Fiona Trust v Privalov* [2008] 1 Lloyd’s Rep 254.

⁷⁵ *SulAmérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd’s Rep 671 at [11] and [15].

⁷⁶ Note that whilst the vast majority of legal systems recognise separability, not all do. The principle is approved by the US Supreme Court in *Buckeye Check Cashing Inc v Cardegna* 546 US 440 (2006) and in Australia: *Comandante Marine Corp v Pan Australia Shipping Pty Ltd* (2006) FCAFC 192, 157 FCR 45.

⁷⁷ The issue of the law governing the issue of separability was before Burton J in *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2016] EWHC 510 (Comm), [2016] 2 Lloyd’s Rep 146. The host contract was subject to Iranian law, and contained an ad hoc arbitration agreement with no specified seat (London was finally agreed upon, hence the matter coming to the court, on a challenge to the award under s 67). The underlying dispute included an issue as to the host contract having been “tainted” by an attempted bribe, and that in the light of the corruption, as a matter of Iranian law the contract was unenforceable, as was the arbitration agreement (it being said that Iranian law did not recognise separability). Burton J held that the question of separability was within the Tribunal’s jurisdiction and was thus governed by English law (that being the seat). The agreement was not affected by the attempted bribe.

The argument goes that the statutory separability is invoked only when the host contract is invalid, non-existent or ineffective. In all other cases, the agreement to arbitrate is not separate and simply forms a clause in the host contract. That makes the host theory all the more persuasive.

This raises the issue of whether there is a difference between statutory separability and common law separability. At common law, an arbitration agreement has a separate and independent existence from that of the host contract in which it is found. It was described in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp*⁷⁸ by Lord Diplock as “a *self-contained* contract collateral or ancillary to” (emphasis added) the shipbuilding contract in which it was to be found in that case. Lord Scarman⁷⁹ described it as “a *separate* contract ancillary to the main contract” (emphasis added).

Lord Diplock further described it as “an arbitration clause is collateral to the main contract in which it is incorporated and it gives rise to collateral primary and secondary obligations of its own”.⁸⁰

In the landmark decision in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*, in which Steyn J’s reasoning was approved on appeal,⁸¹ the doctrine was applied to an issue of illegality which would render void *ab initio* the host contract. On the appeal Ralph Gibson LJ held:

“An arbitration clause, in ordinary terms—that is to say, without special words to ensure survival—is usually, and has been held to be, a *self-contained contract* collateral to the containing contract. As with any other contract, it must be construed according to *its terms* in and with regard to the relevant factual situation. I see no reason to establish a principle of this nature which would require special words to be inserted in order to secure that which the parties would probably suppose was covered by the ordinary words.”⁸² (emphasis added)

The principle was upheld by the House of Lords in *Fiona Trust and Holding Corp v Privalov*.⁸³ There is nothing in these statements that indicates that the common law view of separability is limited in the manner that the statutory definition is. If that is correct, then the arguments that separability should always be limited to the statutory definition falls away. With that also goes the force of any argument that separability is only for specific purposes or only applies in the event that the host contract is invalid, non-existent or ineffective.

6. *C v D* and *Sulamérica* reprised

In neither *C v D* nor *Sulamérica* did the court find there to be a choice by the parties (whether express or implied) and in both cases, the court found the law of the arbitration agreement by the application of the closest and most real connection test.⁸⁴ Furthermore, both cases also acknowledged the fine line between an implied choice and closest and most real connection.⁸⁵

⁷⁸ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909, [1981] 2 WLR 141.

⁷⁹ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909 at 998.

⁸⁰ *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 917, [1982] 3 WLR 1149.

⁸¹ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, [1993] 3 WLR 42.

⁸² *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 at 711.

⁸³ *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40.

⁸⁴ This test was adopted in *Bonython v Commonwealth of Australia* [1951] AC 201 at 219, 66 TLR (Pt 2) 969. The same concept had been expressed as objective presumed intention: see *Lloyd v Guibert* (1865–66) LR 1 QB 115.

⁸⁵ And it was not novel to do so. It had been recognised in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50 at 61. In practice, the same result could usually be achieved by the application of either the implied choice or closest and most real connection: the tests had in effect merged: at 69. eg in *Armadora Occidental SA v*

C v D concerned the Bermuda form, which has a New York governing law clause and a London seat. Longmore LJ gave the only reasoned judgment and held “by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law”⁸⁶ and “a choice of a seat for the arbitration must be a choice of forum for the remedies seeking to attack the award”.⁸⁷ Obiter, he posed the question, if there is no express law of the arbitration agreement whether the law with which the agreement has its closest and most real connection is that of the “host” contract or the seat.⁸⁸ He considered that the “answer is more likely to be the law of the seat ...”.⁸⁹ Longmore LJ relied upon Mustill J’s observation in *Black Clawson International v Papierwerke Waldhof-Aschaffenburg*⁹⁰: “In the great majority of cases, [the *lex causae*, the law applicable to the arbitration agreement, and the *lex fori*] will be the same”.⁹¹

Of course, there is a close and real connection between the governing law of the host contract and that of the agreement to arbitrate as there is between the governing law of the agreement to arbitrate and the laws of the seat, albeit that the latter can, perhaps, be better expressed by the procedural law.

Sulamérica was also an insurance case and had a Brazilian governing law clause and a London seat. The main judgment was given by Moore-Bick LJ. He was critical of Longmore LJ proceeding directly from finding no express choice to closest and most real connection without first considering implied choice. Moore-Bick LJ said that the express choice of Brazilian law for the “host” contract was a “strong pointer towards an implied choice of the law of Brazil as the proper law of the agreement [to arbitrate]”.⁹² But it is important to note that the pointer was not sufficient for Moore-Bick LJ to find an implied choice in light of the choice of the London seat with the “inevitable acceptance”⁹³ of English law to govern the conduct and supervision of the arbitration coupled with a peculiarity of Brazilian law that required consent to enforce the arbitration agreement. These latter factors outweighed the “pointer” and the presumption that the parties must be taken to have intended one law to govern their relationship. Finally, Moore-Bick LJ relied upon Lord Mustill’s statement in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*⁹⁴ that it was only “exceptionally” that the governing law of the ‘host’ contract differed from that of the agreement to arbitrate.

Lord Neuberger MR gave a short judgment and rejected the possibility of treating Longmore LJ’s obiter dicta in *C v D* as wrong and held that there were two options: to follow *C v D* or accept that there are sound policy reasons to accept either the “host” theory or the “seat” theory. As both gave the same result, he found it was unnecessary to decide between them. He did, however, place greater emphasis on principles of contractual construction.⁹⁵

Horace Mann Insurance Co [1977] 1 WLR 520, [1977] 1 All ER 347, the judge decided by the implied choice and the Court of Appeal affirmed the result but on the closest and most real connection test: [1977] 1 WLR 1098 at 1100.

⁸⁶ *C v D* [2007] EWCA Civ 1282 at [16].

⁸⁷ *C v D* [2007] EWCA Civ 1282 at [17].

⁸⁸ *C v D* [2007] EWCA Civ 1282 at [22].

⁸⁹ *C v D* [2007] EWCA Civ 1282.

⁹⁰ *Black Clawson International v Papierwerke Waldhof-Aschaffenburg* [1981] 2 Lloyd’s Rep 446 at 453.

⁹¹ More than a decade before offering his thoughts (as a law lord) in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, the then Mustill J so held in that “in the ordinary way” the arbitration agreement’s applicable law would be “likely to follow the law of the substantive contract”. However, he considered obiter that by nominating Zurich as the seat of arbitration, the parties indicated a sufficient intention that Zurich law should govern the agreement to arbitrate.

⁹² *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 2 CLC 216 at 230.

⁹³ *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 2 CLC 216.

⁹⁴ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 357–358.

⁹⁵ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 357–358 at [51] and see *Dicey, Morris & Collins* (15th edn, Sweet and Maxwell 2018) para 16-018.

7. Express choice

If the parties make a true express choice of the law of the agreement to arbitrate, effect will be given to that choice and irrespective of an express choice of law for the host contract. There is normally no difficulty in determining express choice as the parties use express words: *Dicey*⁹⁶ para 32-047. In *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA*,⁹⁷ Lord Wilberforce approved the following passage from the 7th edition of *Dicey*:

“Where the intention of the parties to a contract with regard to the law governing the contract is not expressed in *words*, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.” (emphasis added)

Any express choice of the law of the arbitration agreement must, therefore, be expressed in words and that expression in words must be within the self-contained ambit of the relevant contract, ie the separate agreement to arbitrate.⁹⁸ Any other formulation would be a recipe for chaos. The express choice of law for the host contract is not an express choice of law for the arbitration agreement because of the doctrine of separability at least as defined in the common law.

Neither the Court of Appeal in *C v D* nor in *Sulamérica* considered there to be an express choice of the law governing the agreement to arbitrate. Although it was not submitted to him, in *Arsanovia*, Andrew Smith J thought it would have been open to submit that there was an express choice. His reasoning was that the governing law clause provided that “This agreement” was governed by Indian law. *C v D* and *Sulamérica* had clauses referring to “the” or “this” “policy.” Andrew Smith J reasoned that the reference to “policy” was more naturally related to the insurance aspects rather than the agreement to arbitrate and reference to the “agreement” was apt to include all clauses in the “host” contract including the agreement to arbitrate.⁹⁹ Andrew Smith J’s construction of “agreement” against “policy” is a “fussy distinction” of a kind deprecated in *Fiona Trust v Privalov*¹⁰⁰ and, it is suggested, ought not to be followed. It is clear that the real scope for future debate, and one which the Court of Appeal (or Supreme Court) must resolve, is what amounts to an implied choice. For the future, clear drafting by making an express choice of law is clearly desirable.

Notwithstanding that approach it is perhaps still necessary to have a true express choice¹⁰¹ in the same manner as the governing law of the “host” contract is chosen.¹⁰²

⁹⁶ *Dicey, Morris & Collins* (15th edn, Sweet and Maxwell 2018).

⁹⁷ *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572 at 595, [1970] 3 WLR 389.

⁹⁸ “Arbitration under the conditions and laws of London” was held to be an express agreement on the governing law in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd’s Rep 116 at 119. And see *The Mariannina* [1983] 1 Lloyd’s Rep 12.

⁹⁹ This view derives some support from *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd’s Rep 24 at 35: “A better view seems to me to be that ... the parties agreed that the whole contract, including the arbitration agreement, should be governed by ... English law. Thus, the proper law of the whole contract, including the arbitration agreement, was English law. However, this is not a finally concluded view and may, indeed, be a matter for the arbitrators.” And see *Union of India v McDonnell Douglas* [1993] 2 Lloyd’s Rep 48.

¹⁰⁰ *Fiona Trust v Privalov* [2007] UKHL 40 at [27].

¹⁰¹ This is normally by reference to words such as “governed by” “to be construed in accordance with” or “subject to.”

¹⁰² In that event the choice is “conclusive”: *R. v International Trustee* [1937] AC 500 at 529, [1937] 2 All ER 164 and “where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.” *Vita Food Products Inc v Unus Shipping Co Inc* [1939] AC 277 at 12, [1939] 1 All ER 513.

8. Implied choice

Where there is no express choice of governing law for both the host contract and the agreement to arbitrate, then the governing law of the agreement to arbitrate (and the procedural law of the arbitration) will invariably be that of the seat.¹⁰³

The retrospective focus of the analysis of *C v D* has been on Longmore LJ's obiter comments (quoted above). The ratio (also quoted above) contains the words "must be taken to have so agreed" and "a choice of seat ... must be a choice of forum ..." both of which appear to indicate that the ratio was that there had been an implied choice albeit that it is clear that it was on the closest and most real connection. This just illustrates the near merger of the tests.

The highpoint of the implied choice argument in favour of the "host" theory is Moore-Bick LJ's "pointer", "powerful factors", "natural inference" or "strong indication" that the express choice of the governing law of the "host" contract is an implied choice of the agreement to arbitrate. On the facts, these indications were displaced by the London seat and a peculiarity of Brazilian law that would have rendered the agreement to arbitrate nugatory. It is unclear from Moore-Bick LJ's judgment whether a London seat alone would have been sufficient but presumably not. The facts of *Sulamérica* have a similarity with *Hamlyn & Co v Talisker Distillery*¹⁰⁴: an arbitration clause in a contract between an English company and a Scottish company referred to arbitration by members of the London Corn Exchange. The House of Lords there found the arbitration agreement governed by English law on what we would now call the "seat" theory and on the basis that it would be inoperable if Scottish law applied.

However, to find an implication merely by a substantive governing law clause would generally run contrary to express Court of Appeal authority. Steyn LJ (as he then was) in *The Star Texas*¹⁰⁵ considered the possibility of implication¹⁰⁶ arose out of a "constructional implication" from the arbitration clause itself which was more correctly viewed as implication by law:

"Such an implication is ... contrary to the general approach of our law ... It is clear from *Compagnie Tunisienne* that even an express choice of jurisdiction does not by itself give rise to an implied choice of law. It may do so together with other factors. But more realistically it will play an important role in the next inquiry, that is the determination of the system of law with which the contract has the closest connection."¹⁰⁷

As has been seen above, Andrew Smith J in *Arsanovia* was plainly attracted by the "host" theory and came close to finding an express choice based on that. Ultimately, he decided on an implied choice by the combined effect of the "host" theory and the wording of the arbitration agreement that provided:

"LCIA Arbitration. Any dispute ... shall be referred to and finally settled by arbitration under the [LCIA] Rules ('Rules') ... The seat or legal place of the arbitration shall be London, England ... Notwithstanding the above, the Parties hereto specifically agree

¹⁰³ *Hamlyn & Co v Talisker Distillery* [1894] AC 202 per Lord Herschell LC at 208 and Lord Ashborne at 215 (governing law of the arbitration agreement), (1894) 21 R (HL) 21. *James Miller v Whitworth Estates* [1970] AC 583 (governing procedural law of the arbitration).

¹⁰⁴ *Hamlyn & Co v Talisker Distillery* [1894] AC 202.

¹⁰⁵ *The Star Texas* [1993] 2 Lloyd's Rep 445. Note also the words of Lord Collins in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46.

¹⁰⁶ It should be recalled that the arbitration clause provided for one of two geographical locations "at the defendant's option" and the question was whether the arbitration agreement was governed by an ascertainable proper law. The court rejected the argument that an express choice of forum amounted to an implied choice of applicable law and the argument continued as to whether an implied intention could be gathered from the contract as a whole and the surrounding circumstances.

¹⁰⁷ *The Star Texas* [1993] 2 Lloyd's Rep 445 at 452.

that they will not seek any interim relief in India under the Rules or under the Arbitration and Conciliation Act, 1996 (the ‘Indian Arbitration Act’), including Section 9 thereof. The provisions of Part 1 of the Indian Arbitration Act are expressly excluded.”¹⁰⁸

The “negative application” of the Indian Act was held to be an implication that but for pt 1 of the Act, it, and indeed Indian law as a whole, applied. For the reasons discussed below¹⁰⁹ that reasoning seems flawed.

The facts of *Arsanovia* concerned a slum clearance project in Mumbai, India. There were two relevant agreements but both were in materially identical terms so far as law and dispute resolution were concerned and both were made on the same day in June 2008. The arbitration agreement provided for arbitration under the LCIA Rules, a seat in London and a “negative application” of parts of the Indian Arbitration and Conciliation Act 1996 (ie the parties agreed not to seek interim relief under the Indian Act). Both agreements were governed by Indian law.

In the circumstance of *SulAmérica*, where the arbitration clause was “pathological”, it is not difficult to see how the reasoning of the Court of Appeal is intellectually justifiable and commercially sensible, as Brazilian law would otherwise (apparently) have regarded the arbitration clause as ineffective.¹¹⁰

The terms of the agreement to arbitrate may itself connote an implied choice of law. As Hamblen J (as he then was) pointed out in *Habas Sinai*¹¹¹ the terms of the agreement to arbitrate can be an implied choice of the host contract and if it can be an implied choice for the host contract it must be capable of being an implied choice for the agreement to arbitrate itself. Furthermore, under s 46 the parties can choose a non-national system of law to govern the substance of their contract but that choice is not open for the law of the agreement to arbitrate: it must be a national legal system.¹¹²

9. Closest and most real connection

In *C v D* and *Sulamérica*, the Court of Appeal applied the closest and most real test and concluded that the law of the arbitration agreement was English: in accordance with the seat theory. Had the point been relevant in *Arsanovia*, Andrew Smith J would also have found English law on the *C v D* “seat” reasoning. It appears clear that if there is no express or implied choice the “seat” reasoning will, therefore, prevail in the vast majority of cases as it seems that the judges are agreed that the arbitration agreement has the closest and most real connection with the seat rather than the host contract.

¹⁰⁸ *Arsanovia Ltd v Cruz City I Mauritius Holdings* [2012] EWHC 3702 (Comm) at [3].

¹⁰⁹ It will be recalled that the agreements in *Arsanovia* were in June 2008. In 2002, the Indian Supreme Court had decided in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 that the Indian Arbitration and Conciliation Act 1996 pt 1 applied to arbitrations that did not have an Indian seat. That decision was widely criticised and was overruled in 2012 by the *Balco* decision (*Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc* Civil Appeal No 7019 of 2005 at <<http://www.supremecourtindia.nic.in/outtoday/ac701905p.pdf>> accessed 21 May 2019) (albeit only prospectively—an aspect of the *Balco* decision that has also been widely criticised). In light of *Bhatia*, it is entirely unsurprising that the parties, by contract, expressly excluded the right to apply under the Indian Act. However, Andrew Smith J disagreed with the *Bhatia* explanation. He considered that having expressly excluded a provision “the natural inference is that they understood and intended that otherwise that law would apply” *Arsanovia Ltd v Cruz City I Mauritius Holdings* [2012] EWHC 3702 (Comm) at [20]. Further, the “notwithstanding the above” in the *Arsanovia* arbitration clause logically applies only to the seat and hence both the curial law and the governing law of the arbitration (ie English) and not the substantive governing law which was below (i.e. in a following clause).

¹¹⁰ The references to this in the reports are sketchy, but it was suggested that invoking the arbitration required (as a matter of Brazilian law) the consent of both parties: see, eg *SulAmérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] 1 Lloyd’s Rep 671 at [6].

¹¹¹ *Habas Sinai v Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm) at [102].

¹¹² *Dicey, Morris & Collins* (15th edn, Sweet and Maxwell 2018) para 16-019, *Halpern v Halpern* [2006] EWHC 603 (Comm).

10. Balancing factors

It is quite clear from the authorities that there will, in all probability, be factors pointing toward the laws of the seat and the host contract in seeking out whether there is an implied choice or the closest connection. It does no violence to the established choice of law discussed here to weigh particular factors differently. It is respectfully suggested that greater weight should be given to seat and less to the host contract.

The primary reasons for affording greater weight to the seat are separability (the limited extent of separability under the Act should not impact on the proper law rather a wider common law separability should apply) and consistency derived from, in particular, the New York Convention. If challenges are to be made at the seat under the NYC; the curial law is that of the seat and the curial law (here the Arbitration Act) does not readily compartmentalise substantive and procedural law—then having the agreement to arbitrate governed by the same law as the curial law reduces any scope for differing approaches to substantive and procedural law under the laws of different states, makes the supervising court's role much easier and gives a consistency of approach.

Dicey states:

“in light of the pervasive reach of the New York Convention in modern times, this rule, although not prescribing a choice of law rule of general application, nevertheless provides a strong indication of one, since invalidity of the of the arbitration agreement under the applicable law may render the resulting award unenforceable.”¹¹³

Dicey also states: “... the parties express choice of law for the main contract may be held not to apply to the arbitration agreement, where there are, as a matter of construction, contrary indications in favour of the law of the seat”.¹¹⁴ The passage goes on to cite *XL Insurance* in support of the proposition.

11. Private international law

The Rome Convention art 3(1) provides that the choice of law by the parties must be “expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case”. The Giuliano-Lagarde Report¹¹⁵ says that this “recognizes the possibility that the court may, in the light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract” but it “does not permit the court to infer a choice of law that the parties might have made where they had no clear intention of making a choice”.

The Giuliano-Lagarde Report gives a number of examples of implied choice. All are, fairly plainly, drawn from English common-law cases. The report states:

“In some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum, but this must always be subject to the other terms of the contract and all the circumstances of the case”

and the report adds that:

“[o]ther matters that may impel the court to the conclusion that a real choice of law has been made might include ... the choice of a place where disputes are to be settled

¹¹³ *Dicey, Morris & Collins* (15th edn, Sweet and Maxwell 2018) para 16-014.

¹¹⁴ *Dicey, Morris & Collins* (15th edn, Sweet and Maxwell 2018) para 16-018.

¹¹⁵ Mario Giuliano and Paul Lagarde, “Report on the Convention on the law applicable to contractual obligations” [1980] Official Journal of the European Communities C282/1. The report by Professors Giuliano and Lagarde was published with the Convention and has a special status in the interpretation of the Convention.

by arbitration in circumstances indicating that the arbitrator should apply the law of that place.”

Of course, it must be remembered that the Rome Convention and the Giuliano-Lagarde Report have no direct bearing and are, at best, of persuasive effect only. Nevertheless, they do reflect an international consensus and due regard ought to be had to that learning.

Moreover, it was once thought that an arbitration clause raised an irresistible inference to the effect that the seat dictated the choice of law for the arbitration agreement.¹¹⁶ That strictness has been abated to “weighty indication” or “strong inference” by *Compagnie Tunisienne de Navigation SA v Compagnie d’Armement Maritime SA*.¹¹⁷ The weight therefore given to the pointers towards an implied choice by having an arbitration clause with a named seat might be thought to, at least, balance out the factors identified by Moore-Bick LJ in *Sulamérica* as pointing to an implied choice of the governing law of the “host” contract.

There are some cases that indicate that merely stipulating a geographical seat without also stipulating that the arbitrators will be chosen from among the jurists or businessmen of that seat lessens the implication.¹¹⁸ The more modern approach is more consistent, as would be expected, with the truly international nature of modern arbitration and places less weight on the nationality of the arbitral tribunal.¹¹⁹

Occasionally, there will be some reference to a “foreign” law or aspects of “foreign” law. There is a clear difference between the choice (whether express or implied—but here we are likely to be considering an express choice) or reference to a system of law to govern a relationship on the one hand, and incorporation of some provisions of a system of law as a term of the contract on the other hand. This distinction is recognised in the Rome Convention. It is, of course, open to parties to agree that a particular part of their relationship is governed by a particular system of law (perhaps different from the governing substantive law). In such a case the “foreign” system of law becomes a source of law upon which the governing law may draw.¹²⁰ The effect is not to make the “foreign” law referred to, the governing law of the contract but rather to incorporate the “foreign” law as contractual terms into the governing law contract. This is simply a route of convenient shorthand¹²¹ and the “foreign” law has effect only as a matter of contract, but like all contractual terms it must be sufficiently certain, ie the parties must have sufficiently identified the provisions of the “foreign” law that are to be incorporated. An illustration of this concept at work is *Union of India v McDonnell Douglas Corp*.¹²² The facts concerned services to launch a space satellite. The arbitration agreement provided for a London seat and for it to be “conducted in accordance with the procedure” in the Indian Arbitration Act 1940.¹²³ There was an Indian governing law clause and the question for the court was the law governing the arbitration proceedings. Saville J held that:

“[T]here can be no question in this case [where there is an express choice of London seat] that the English Courts would be deprived of all jurisdiction over the arbitration ... the choice of a procedural law different from the law of the place of the arbitration

¹¹⁶ *Tzortzis v Monark Line AB* [1968] 1 WLR 406 at 413 CA, [1968] 1 All ER 949.

¹¹⁷ *Compagnie Tunisienne de Navigation SA v Compagnie d’Armement Maritime SA* [1971] AC 572 at 596, 604. Interestingly, the case was cited in *C v D* but not *Sulamérica* (although *C v D* was, of course, cited in *Sulamérica* and *C v D* refers to the case, *C v D* does not have citations from it).

¹¹⁸ *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co Ltd* [1927] AC 604; *The Njegos* [1935] All ER 863; *NV “Vulcaan” v A/S J Ludwig Mowinckels Rederi* [1938] 2 All ER 152 at 156, (1938) 60 Ll L Rep 217.

¹¹⁹ Indeed the modern trend is away from arbitrators being jurists of the law of the seat and in favour of a truly international make up. Institutional rules positively favour this: eg LCIA Rules art 6 and ICC Rules art 13.

¹²⁰ An example is *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] 1 AC 50. In that case, there was evidence that the definitions used in the (English) Marine Insurance Act, to which the standard Lloyd’s policy was scheduled, were used as a source of law in this sense by continental courts.

¹²¹ See, eg *Stafford Allen & Sons Ltd v Pacific Steam Navigation Co* [1956] 1 WLR 629 CA, [1956] 2 All ER 716 and *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 2 WLR 688.

¹²² *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd’s Rep 48.

¹²³ *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd’s Rep 48 at 49.

will ... necessarily mean that the parties have actually chosen to have their arbitral proceedings at least potentially governed both by their express choice and by the laws of this country. Such a state of affairs is clearly highly unsatisfactory ... there is a way of reconciling the phrase [‘conducted in accordance with the procedure’] with the choice of London as the seat ... namely by reading that phrase as referring to the internal conduct of the arbitration as opposed to the external supervision of the arbitration by the Courts.”¹²⁴

The judge accepted that the consequence was that only very limited parts of the Indian Act would apply:

“the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law.”

The Giuliano-Lagarde Report also discusses references to parts of a “foreign” law. It concludes that it is possible that it indicates either reference or incorporation: where parties have chosen a law to govern only part of the contract there should be no presumption that that law was intended to govern the contract in its entirety. Where there is a partial choice, recourse should be had to the closest and most real connection test. This would seem an entirely logical approach. If the parties have, for example, chosen a “foreign” act (as opposed to “foreign” law) to apply, it must be presumed that the choice is deliberate: they could have chosen the entire “foreign” law to apply but did not—they consciously adopted only part of that law: a particular act. The “negative application” of the Indian Act in *Arsanovia* is surely more consistent with “and for the avoidance of doubt neither party will make an application under Part 1 of the Indian Act” than “Indian law applies save for this part of the Act” both as a matter of construction and context. This is all the more so for the likely reasons for the inclusion of the negative application of the Indian Act, as discussed above. The same would apply if, for example, the parties said that any compensation payable under cl X shall be ascertained in accordance with the laws of country Y. There is, therefore, usually no implied choice by a partial reference to a “foreign” law.

12. International perspective

Out of completeness, mention should be made of the approach of the French courts, which is to apply substantive rules independent of any applicable laws. The theory proceeds on the assumption that the agreement to arbitrate is autonomous and independent of the host contract (consistent with the separability doctrine) and from any national legal system. Clearly, the former assumption is valid but the latter is, with respect, plainly not correct in England. Agreements to arbitrate are plainly not independent from legal systems and simply because the search for the appropriate legal system might not be straightforward it is no excuse to abandon the search. Admittedly, under the substantive rule the existence and validity of the agreement to arbitrate are assessed subject to mandatory rules of the seat (which appears to be an acknowledgement of the “seat” theory, but subject to those mandatory rules, on the basis of the parties common intention, the parties legitimate expectations at the time of the agreement and principles of good faith). Whether this is so different from the closest and most real connection (the English test) or the most significant relationship to the transaction and the parties (*Restatement* §188) must be debatable.

The approach taken in other jurisdictions seems to point towards finding the law of the seat to be the appropriate law governing the arbitration agreement.

¹²⁴ *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd’s Rep 48 at 51.

In Singapore, in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd*,¹²⁵ the court followed *C v D* but in the later case of *BCY v BCZ*,¹²⁶ the court followed the consistency argument in *SulAmerica* holding that the implied choice of the law of the agreement to arbitrate was the law expressly chosen as the proper law of the host contract.

In *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*,¹²⁷ the Swedish Supreme Court held that the arbitration agreement was governed by Swedish law, being the law of the seat of arbitration. That was so even though the host contract, containing the arbitration agreement as a clause, was governed by Austrian law. The Supreme Court held that, as there was no provision concerning the applicable law of the arbitration agreement, the issue of the validity of the arbitration clause should be determined in accordance with the law of the place in which the arbitration took place.

In *Matermaco SA v PPM Cranes Inc*,¹²⁸ the Tribunal de Commerce in Brussels held that questions of arbitrability were to be decided under the law of the place of arbitration (Belgium), rather than the law of the host contract (Wisconsin law).

The position in the US takes a different route. Where the seat is in the US, the Federal Arbitration Act 1925 (the FAA) controls arbitrations involving interstate or foreign commerce and maritime transactions: such terms being very broadly defined and hence almost all commercial arbitration agreements that involve transactions connected to the US are subject to the FAA. The scope of the FAA is such that it appears, of itself, to constitute the law governing the arbitration agreement.¹²⁹ This might be thought to be the ultimate extension of the “seat” theory but where the parties have expressly chosen a governing law of the host contract (or the arbitration agreement) that law will, generally, be applied¹³⁰ alongside the FAA. In *Graves v BP America Inc*,¹³¹ the FAA was held to govern questions of arbitrability once it had been established that there was a valid agreement to arbitrate determined under the substantive law governing the host contract.

If parties have made no express choice, then the courts of New York apply a conflicts of law principles to determine the relevant substantive law that will be used to supplement, when necessary, the FAA.¹³² The New York approach is an “interest analysis” which seeks to apply the law of the jurisdiction that has the greatest interest in the outcome of the dispute¹³³: this considers the domicile of the parties, the place of execution of the agreement and the place of performance among other factors.

Due to the international nature of arbitrations, the commonality of laws based on Model Law and the near universal application of the NYC, it is plainly in the interests of consistency and certainty to have an international consensus for this issue.

¹²⁵ *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12.

¹²⁶ *BCY v BCZ* [2016] SGHC 249 and see also *Piallo GmbH v Yajiro International Pte Ltd* [2014] 1 SLR 1028 and *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79.

¹²⁷ *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc* XXVI YB COMM ARB 291 (2001).

¹²⁸ *Matermaco SA v PPM Cranes Inc* XXV YB COMM ARB 673 (2000).

¹²⁹ The FAA constitutes federal substantive law: *JSC Surgutneftegaz v President and Fellows of Harvard College* 2005 WL 1863676 (SDNY 3 August 2005) and requires supplementing where there is no substantive law on the point: eg *Chelsea Square Textiles Inc v Bombay Dyeing and Mfg Co Ltd* 189 F 3d 289, 295 (2d Cir 1999).

¹³⁰ See, eg *Telenor Mobile Communications AS v Storm LLC* 584 F 3d 396, 411 (2d Cir 2009), subject to two exceptions where it is sought to apply the arbitration [award] against a non-party and where the chosen law is more adverse to arbitration than the policy embodied in the FAA. Thus, if the parties chose New York state law, the Courts apply substantive New York law to general contractual interpretation while ignoring the less arbitration friendly aspects of New York law: *Mastrobuono v Shearson Lehman Hutton Inc* 514 US 52, 63 (1995); see also *Volt Information Sciences Inc v Board of Trustees of the Leland Stanford Junior Univ* 489 US 468, 476 (1989) (Federal law may also yield to state law, in this case Californian law, where that state’s law better furthers “the federal policy towards favouring arbitration”).

¹³¹ *Graves v BP America Inc* 568 F 3d 221, 222–23 (5th Cir 2009) (citing *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473, US 614, 626 (1985)). See also *Pedcor Mgt Co Inc Welfare Benefit Plan v Nations Personnel of Texas* 343 F 3d 355 (5th Cir 2003); *Milos Sovak v Chugai Pharmaceutical Co* 280 F 3d 1266 (9th Cir 2002) and *Chloe Z Fishing v Odyssey Re* 109 F Supp 2d 1236 (SD Cal 2000), No 99-2521-IEGRBB.

¹³² See, eg *Progressive Casualty Insurance Co v CA Reaseguradora Nacional de Venezuela* 991 F 2d 42, 45–46 (2d Cir 1993).

¹³³ *Intercontinental Planning Ltd v Daystrom Inc* 24 NY 2d 372, 382 (1969).

13. Conclusions

Those national laws that address the issue provide for the law of the agreement to arbitrate to be that of the seat. Those institutional rules that address the same issue arrive at the same result. The international case law is split (broadly with Singapore following host and civil law countries following seat). There ought to be a common international solution to an international problem. The NYC (and to a lesser degree) the Model Law point towards the conclusion that the courts where the challenge to an award is made, at the seat, ought logically to apply, absent express choice to the contrary, the laws of that nation.

A genuine express choice will be rare (although it is hoped that draftsmen will, for the future, make express provision) and in light of *Compagnie Tunisienne*, any thoughts of an express choice by the parties having stipulated an express choice of governing substantive law of the host contract should be consigned to the bin of an interesting but ultimately misconceived thought process.

Cases of implied choice ought to be considered with greater care. The implication must clearly arise from the wording of the arbitration agreement itself or the surrounding circumstances. It is accepted that the host contract is a surrounding circumstance—but it is no more than that. Again, *The Star Texas* ought to rule out most thoughts of implied choice and it must be recalled that in neither *C v D* nor *Sulamérica* did the court find an implied choice. As explained above, the implied choice and closest and most real connection tests have, for most practical purposes, merged: *Amin Rasheed Shipping Corp v Kuwait Insurance Co*. If any implication is to be drawn, then in light of the Model Law, NYC and orthodox private international law, the implication should favour the “seat” theory rather than the “host” theory.

It will also be recalled that those cases that have reached the Supreme Court have proceeded on the basis of the law of the seat being the law of the agreement to arbitrate, seemingly without objection, and perhaps even endorsement by Lord Collins in *Dallah*.

It follows that, in most cases, the law will be ascertained by the closest and most real connection and that will, or at least ought to, invariably result in the governing law being that of the country where the seat is. Such a result has sound policy reasons to support it and is consistent with the majority approach in other countries and institutions and has support from the courts of many countries.