TOWARDS A HARMONIZED THEORY OF THE LAW GOVERNING THE ARBITRATION AGREEMENT

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Abstract

The agreement to arbitrate is foundational to the arbitral process. At the gateway to arbitral proceedings, a myriad of questions can arise as to the arbitration agreement's validity, scope and effects. These questions must be answered based on the law(s) governing the arbitration agreement. For decades, the question how those laws should be determined has engaged courts and scholars around the world. It continues to do so. World-wide, four main approaches have developed, whereby the arbitration agreement may be governed by: (i) an "a-national" rule of substantive law that is solely based on the parties' intent; (ii) any relevant law that confirms the validity of the arbitration agreement; (iii) the law governing the merits of the dispute; or (iv) the law of the seat of the arbitration. Globally, the latter two approaches appear to dominate. Although, by and large, they are based on the same legal principles across jurisdictions, results diverge. Taking the Indian approach as an example, this editorial reviews where and why such divergence occurs, including whether the parties' choice of law for the main contract applies to the arbitration agreement and to which law the arbitration agreement is most closely connected. It is submitted that a stronger focus on objective criteria in answering these questions increases legal certainty and promotes a more harmonised approach across jurisdictions.

I. Introduction

The fundamental prerequisite for any arbitration is the parties' consent to arbitrate. Without such consent, parties resolve their disputes before state courts, not arbitral tribunals. As a gateway matter of jurisdiction, arbitration agreements are therefore regularly scrutinised as to their validity and scope: did the parties validly conclude their agreement? Did they have capacity to do so? Did they adhere to applicable form requirements? How should the agreement be interpreted? What is its scope? Does it extend to non-signatories? The answers to these and other questions are found in the law(s) governing the arbitration agreement.

Which conflict of laws rule should apply to an arbitration agreement is a true evergreen issue of international arbitration theory and practice;[1] and, by any measure, this topic remains one of the hot

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[1] *See, e.g.,* Ardavan Arzandeh & Jonathan Hill, *Ascertaining the Proper Law of an Arbitration Clause Under English Law*, 5(3) J. PRIV. INT. L. 425 (2009); Klaus Peter Berger, *Re-Examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, 13 ICCA CONGRESS SERIES (Albert Jan van den Berg ed., 2007) [*hereinafter* "Berger"]; GARY B BORN, INTERNATIONAL COMMERCIAL ARBITRATION 507–674 (3d ed. 2021) [*hereinafter* "BORN"]; Mark Campbell, *The Law Applicable to International Arbitration Agreements: The English Court of Appeal Departs from Sulamerica*, 23(3) INT'L ARB. L. REV. 193 (2020); Darius Chan & Teo Jim Yang, *Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There Is None*, 37(5) J. INT'L ARB. 635 (2020) [*hereinafter* "Chan & Jim Yang"]; Dietmar Czernich, *The Law Applicable to the Arbitration Agreement*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2015 (Christian Klausegger, Peter Klein, Florian Kremslehner, Alexandre Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser & Gerold Zeiler eds. 2015) [*hereinafter* "Czernich"];

issues today.[2] In the past two years alone, the question of the proper law of the arbitration agreement has engaged appellate and supreme courts in Austria, Canada, France, Hong Kong, Germany, Singapore, Sweden, the United Kingdom and elsewhere.[3]

The authors have taken the recent decisions as a cue to review the approaches of courts and legislators world-wide. Globally, four main approaches exist to determine the law governing the arbitration agreement. While many jurisdictions follow similar conflict of laws rules at the macro level, the application of these rules fundamentally differs at the micro level. In addition, some key arbitration jurisdictions follow entirely different approaches. This divergence in approaches continues to prevent the emergence of a harmonized approach across jurisdictions **[Part II]**. It is the purpose of the present editorial to identify where specifically these differences exist **[Part III]**, and to analyse how they can be harmonized to achieve more international uniformity **[Part IV]**.

II. Taking Stock of Approaches World-Wide: Some Convergence at the Macro Level

To identify which approaches currently exist with respect to determining the law applicable to the arbitration agreement, the authors have surveyed how courts in over 80 jurisdictions address the most prevalent situation in international commercial contracts: the parties have chosen the law applicable to their main contract and have selected a seat of the arbitration, but have not expressly provided for the law governing the arbitration agreement. As shown on the map reproduced in the Annex. to this editorial, four main approaches exist.[4]

First, a number of jurisdictions adopt an approach developed by the French courts and that may be described as *a-national*. In the famous *Municipalité de Khoms El Mergeb* v. *Société Dalico* decision of 1993, the French Cour de cassation held that in the absence of an express choice of law by the parties, the existence and validity of international arbitration agreements depend only on the parties' common intent, without it being necessary to apply any national law.[5] French courts neither assess whether

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Stelios Koussoulis, *Zur Dogmatik des auf die Schiedsvereinbarung anwendbaren Rechts*, *in* GRENZÜBERSCHREITUNGEN: FESTSCHRIFT FÜR PETER SCHLOSSER (Birgit Bachmann, Stephen Breidenbach, Dagmar Coester-Waltjen, Burkhard Heß, Andreas Nelle & Christian Wolf eds., 2005); Julian M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA CONGRESS SERIES (Albert Jan van den Berg ed., 1999) [*hereinafter* "Lew"].

2 *See also* Maxi Scherer & Ole Jensen, *The Law Governing the Arbitration Agreement: A Comparative Analysis of the United Kingdom Supreme Court's Decision in Enka v Chubb*, 41(2) IPRAX 2021, 177 (2021) [*hereinafter* "Scherer & Jensen"]; Maxi Scherer & Ole Jensen, *Of Implied Choices and Close Connections: Two Pervasive Issues Concerning the Law Governing the Arbitration Agreement*, *in* FESTSCHRIFT GEORGE A. BERMANN (Julie Bedard & Jack Busby eds., forthcoming 2021).

3 *See, e.g.,* Oberster Gerichtshof [OGH] [Supreme Court] May 15, 2019, 18 OCg 6/18 (Austria); Uber Technologies Inc v. Heller, 2020 SCC 16 (Can.) [*hereinafter* "Uber Technologies"]; Kout Food Group v. Kabab-Ji [2020] EWCA Civ. 6 (Eng.); Cour d'appel [CA] [regional court of appeal] Paris, June 23, 2020, 17/22943, Kout Food Group v. Kabab-Ji (Fr.); OCBC Wing Hang Bank Ltd. v. Kai Sen Shipping Co. Ltd., [2020] H.K.C.F.I. 375 (H.K.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 26, 2020, I ZR 245/19, 2021 SCHIEDSVZ 97 (Ger.); BNA v. BNB [2019] SGCA 84 (Sing.); Svea Hovrätt [Svea Court of Appeal] Dec. 19, 2019, T 7929-17 (Swed.); Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb [2020] UKSC 38 (appeal taken from Eng.) [*hereinafter* "Enka"]. *See also* Oberlandesgericht Frankfurt am Main [OLG Frankfurt am Main] [Higher Regional Court of Frankfurt am Main] Sept. 7, 2020, 26 Sch 2/20, juris, ¶ 31 (Ger.).

4 The data underlying the survey is on file with the authors and available upon request. As with any comparative survey of legal approaches, uncertainties persist. The authors are grateful for corrections of any errors and guidance on filling the remaining blank spots on the below map.

5 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Bull. civ. I, No. 1675, 1994 REV. ARB. 116, 117 (Fr.) ("By virtue of a substantive principle of international arbitration law, an arbitration clause is legally

there was an implied choice of law, nor do they apply an objective connecting factor such as the law of the seat or the arbitration agreement's closest connection. Instead, they directly apply a substantive rule according to which it is only decisive whether, as a matter of fact, the parties intended to arbitrate and whether their agreement is in line with French mandatory law and international public policy.[6] Today, corresponding rules also exist in other jurisdictions, including Mauritius,[7] and the member states of the Organisation for the Harmonization of Business Law in Africa (OHADA).[8]

Second, several other jurisdictions follow the so-called "*validation principle*" (*in favorem validitatis*). According to Article 178(2) of the Swiss Law on Private International Law, for instance, "*an arbitration agreement is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law.*"[9] Similar rules are found in Dutch, Portuguese, and Spanish law.[10] This solution is commendable because it ensures that the parties' intent to arbitrate is upheld to the greatest extent possible under one of several relevant legal systems. Based on this "*pro-arbitration*" approach, several authors propose that the validation principle should be adopted more widely as the ideal solution to determining the law governing the arbitration agreement.[11] However, the validation principle is limited in scope as it only provides satisfactory results where the issue requires a simple 'yes' or 'no' answer, such as validity.[12] Yet, there is a plethora of issues determined by the law applicable to the arbitration agreement,[13] including the scope and effects of an arbitration agreement, and the principle and amount of damages for its breach.[14]

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independent from the main contract in which it is contained, directly or by reference, and its existence and effectiveness are assessed, within the limits of the mandatory rules of French law and international public policy, by reference to the common intentions of the parties, without the need to refer to a national law.").

6 *See, e.g.,* Cour d'appel [CA] [regional court of appeal] Paris, May 12, 1997, Renault v. Société V. 2000 (Jaguar France), 1997(4) REV. ARB. 537–543 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, May 30, 2004, Société Uni-Kod v. Société Ouralkali, 2005(4) REV. ARB., 959–960 (Fr.); Cour d'appel [CA] [regional court of appeal] Paris, Feb. 24, 2005, Société Sidermetal SRL v. Société Arcelor International Export, 2006(1) REV. ARB., 2010–2013 (Fr.).

7 Cruz City 1 Mauritius Holdings v. Unitech Ltd., 2014 SCJ 100, at 20 (Mauritius) ("For us the issue is a factual one which depends on the common intention of the parties.").

8 *See* Acte Uniforme relatif au Droit de l'Arbitrage [Uniform Act on Arbitration], Dec. 15, 2017, JOURNAL OFFICIEL DE L'OHADA [J.O. OHADA], Mar. 15, 2018, art. 4 ("The arbitration agreement shall be independent of the main contract. Its validity shall not be affected by the nullity of the contract, and it shall be interpreted in accordance with the common intention of the parties, without necessarily referring to national law.").

9 LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW], Dec. 18, 1987 effective Feb. 1, 2021, art. 178(2) (Switz.).

10 *See* art. 10:166 BW (Neth.); Arbitration Act art. 9(6) (R.D. Ley 60/2003) (Spain); Portuguese Voluntary Arbitration Law art. 51 (2011) (Port.).

11 Fan Yang, *The Proper Law of the Arbitration Agreement: Mainland Chinese and English Law Compared*, 33(1) ARB. INT'L 121, 135 (2017); Johannes Koepp & David Turner, *A Massive Fire and a Mass of Confusion: Enka v Chubb and the Need for a Fresh Approach to the Choice of Law Governing the Arbitration Agreement*, 38(3) J. INT'L ARB. 377, 387–393 (2021).

12 DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES ¶ 362 (3d ed. 2016).

13 *See also* BORN, *supra* note 1, at 523 ("[a] formal validity of an arbitration agreement; [b] capacity of parties to conclude an arbitration agreement; [c] authority of parties' representatives to conclude an arbitration agreement; [d] formation and existence of an arbitration agreement; [e] substantive validity and legality of an arbitration agreement; [f] "nonarbitrability" or "objective arbitrability"; [g] identities of the parties to an arbitration agreement; [h] effects of an arbitration agreement; [i] means of enforcement of an arbitration agreement; [j] interpretation of an arbitration agreement; [k] termination and expiration of an arbitration agreement; [l] assignment of an arbitration agreement; and [m] waiver of right to arbitrate.").

14 On this issue, *see* JAN FROHLOFF, VERLETZUNG VON SCHIEDSVEREINBARUNGEN (2017) [*hereinafter* "FROHLOFF"].

Proponents of the validation principle would argue that the "*pro arbitration*" solution in these cases is to apply the law that provides for the widest possible scope of the arbitration agreement, assuming that the parties wanted to arbitrate any and all disputes between them. But is that really a blanket truth, applying in all cases, including for instance, with respect to antitrust follow-on damages claims?[15] And which law would govern where a party seeks damages for an alleged breach of the arbitration agreement: the law providing for maximum or minimum liability? It is submitted that the validation principle does not provide satisfactory answers to these questions. This means that for certain issues concerning the arbitration agreement, a single system of law must be identified.

The third and fourth approaches do so, pointing to the *law of the seat* and *law governing the main contract* respectively. The legal systems following these approaches by and large provide for similar conflict of laws rules: they accept that parties may expressly or impliedly choose the law applicable to the arbitration agreement, and provide for an objective connecting factor in the absence of a choice. These approaches also appear to be the most predominant solutions internationally, making up 85% of those reviewed jurisdictions that yielded a clear result:

Law of the seat	51%
Law of the main contract	34%
Validation principle	9%
A-national approach	6%

Comparing these four approaches, it is accepted in all reviewed jurisdictions—including those following the a-national approach and validation principle—that the parties may expressly choose a law governing their arbitration agreement. However, approaches diverge from there. While most jurisdictions also accept that the parties' choice of law may be implied, the a-national approach directly applies a rule of substantive law where an express choice does not exist. In addition to subjective connecting factors, the majority of jurisdictions rely on objective factors: in absence of a choice by the parties, either the law of the seat, the law of the main contract or the arbitration agreement's closest connection will determine the law that applies to it. In the case of the validation principle, it may also be a combination of these laws.

While the four approaches will thus often lead to different conclusions, there appears to be some consensus about the rough design of the conflict of laws rule governing arbitration agreements in the majority of jurisdictions: on a subjective level, the parties' intent is decisive; absent any indication thereon, the law applicable to the arbitration agreement is determined by an objective connecting factor, such as the so-called "*closest connection test*." There is thus at least some convergence at the macro level.

One emanation of this archetypical conflict of laws rule is found in the major arbitration conventions and instruments: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"], Inter-American Convention on International Commercial Arbitration,

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[15] *See* Aren Goldsmith, *Arbitration and EU Antitrust Follow-on Damages Actions*, 34(1) ASA BULL. 10, 20–23 (2016).

European Convention on International Commercial Arbitration and United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

Today, most international commentators agree that Article V(1)(a) of the New York Convention—and equivalent provisions in other instruments[16]—contains an authoritative conflict of laws rule to determine the proper law of the arbitration agreement.[17] Article V(1)(a) provides, in relevant part, that an arbitral award may be refused recognition and enforcement if the arbitration agreement "*is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*." Thus, an arbitration agreement is governed by the law the parties have expressly or impliedly chosen, and otherwise by the law of the seat of the arbitration, where the award is deemed to have been made.

It is often understood that the rule in Article V(1)(a) should apply throughout the lifecycle of the arbitration—i.e., not only at the post-award stage, but also prior to the constitution of the tribunal and during the proceedings before it.[18] However, not all contracting states of the New York Convention follow this approach and apply the rule contained in Article V(1)(a) and equivalent instruments uniformly. This is one of the main forks in the road where, at the micro level, the undesirable divergence of approaches occurs.

III. Identifying Divergences at the Micro Level

This leads to the emergence of questions regarding where and why approaches diverge specifically and how these inconsistencies can be overcome. There are two particularly controversial issues causing divergence: first, whether a choice of law clause in the main contract extends to the arbitration agreement **[Part III.A]**;[19] and, second, to which legal system an arbitration agreement is most closely connected **[Part III.B]**. As will be argued, a stronger focus on objective criteria results in a more consistent solution to determining the law governing the arbitration agreement.

A. Does an Express Choice of Law for the Main Contract Apply to the Arbitration Agreement?

Whether a choice of law clause for the main contract determines the law applicable to the arbitration agreement is one of the most controversial issues concerning the law governing the arbitration agreement. Courts in different jurisdictions readily apply choice of law clauses to the arbitration

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16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(a), June 10, 1958, 330 U.N.T.S 38 [*hereinafter* "New York Convention"]; Inter-American Convention on International Commercial Arbitration art. 5(1)(a), Jan. 30, 1975, 1438 U.N.T.S. 245; European Convention on International Commercial Arbitration art. VI(2)(a)–(b), Apr. 21, 1961, 484 U.N.T.S. 7041; United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, arts. 34(2)(a)(i) & 36(1)(a)(i), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "UNCITRAL Model Law"].

17 *See, e.g.,* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 291 (1981) ("It has never been questioned that these conflict rules are to be interpreted as uniform rules which supersede the relevant conflict rules of the country in which the award is relied upon.") [*hereinafter* "VAN DEN BERG"]; Berger, *supra* note 1, at 316 ("It is fair to say that today, the conflict rule contained in Art. V(1)(a) New York Convention […] has developed into a truly transnational conflict rule for the determination of the law governing the substantive validity of the arbitration agreement.").

18 *See, e.g.,* Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 26, 2020, I ZR 245/19, 2021 SCHIEDSVZ 97, 102 (Ger.) (Article V(1)(a) applies directly in enforcement proceedings and by analogy in other contexts).

19 *See also* Berger, *supra* note 1, at 318 ("The only question that is still disputed is whether the choice of law clause of the main contract also extends to the arbitration clause contained therein.").

agreements, often without further analysis.[20] Yet, this issue is less clear than might appear at first blush. Instead, it is necessary to determine: (i.) whether the choice of law clause for the main contract "*extends to*" or "*comprises*" the arbitration agreement; and, if it does not, (ii.) whether the choice of law clause for the main contract indicates an implied choice of law for the arbitration agreement.

i. Choice of Law for the Main Contract as an Express Choice of Law 'Extending' to the Arbitration Agreement

Courts in Austria, Canada and Germany have readily assumed that a choice of law for the main contract applies to the entire contract in which the arbitration agreement is contained.[21] The Supreme Court of India followed a similar approach in *National Thermal Power Corp.* v. *Singer Co.* ["**NTPC**"].[22] In that case, the parties had "*expressly stated that the law which governs their contract, i.e., the proper law of the contract is the law in force in India.*"[23] Before the Supreme Court of India, the party applying for set aside of the resulting award argued that this choice of law for the main contract also determined the law governing the arbitration agreement:

> "*[T]he proper law of the contract is the law in force in India. The arbitration agreement is contained in a clause of that contract. In the absence of any stipulation to the contrary, the contract has to be seen as a whole and the parties must be deemed to have intended that the substantive law applicable to the arbitration agreement is exclusively the law which governs the main contract […].*"[24]

The Supreme Court of India agreed, holding as follows:

> "*The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties.*"[25]

In subsequent decisions, the Supreme Court of India confirmed this decision, clarifying that "*when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself.*"[26] Similar approaches exist in the United States, and England and Wales. The proposed final draft of the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration provides that, in the absence of a specific choice of law, the arbitration agreement is governed "*by the law identified in the general choice-of-law clause in the underlying contract.*"[27] And in *Kabab-ji* v. *Kout Food Group*, the English Court of Appeal relied on the wording of the relevant choice of law clause and its interplay with other provisions of the contract to conclude that the parties' choice of law comprised

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20 *See, e.g.,* Uber Technologies, 2020 SCC 16, ¶ 50 (Can.); Oberster Gerichtshof [OGH] [Supreme Court], May 15, 2019, 18 OCg 6/18h, ¶ 5.3 (Austria); Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 8, 2018, I ZB 24/18, juris, ¶¶ 12–13 (Ger.).

21 *See* Oberster Gerichtshof [OGH] [Supreme Court], May 15, 2019, 18 OCg 6/18h, ¶ 5.3 (Austria); Uber Technologies, 2020 SCC 16 ¶ 50 (Can.); Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 8, 2018, I ZB 24/18, juris, ¶¶ 12–13 (Ger.).

22 National Thermal Power Corp. v. Singer Co., (1992) 3 SCC 551 (India) [*hereinafter* "NTPC"].

23 *Id.* ¶ 6.

24 *Id.* ¶ 9.

25 *Id.* ¶ 23.

26 Indtel Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd., (2008) 10 SCC 308, ¶ 36 (India). *See also* Yograj Infrastructure Ltd. v. Ssangyong Engineering and Construction Co. Ltd., (2011) 9 SCC 735, ¶ 51 (India); Aastha Broadcasting Network Ltd. v. Thaicom Public Company Ltd., (2011) SCC OnLine Del 5145, ¶¶ 10, 12 (India) [*hereinafter* "Aastha"].

27 RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION, § 4.10(c) (AM. LAW INST., Proposed Final Draft 2019).

the arbitration agreement.[28] Thus, according to a widely held view, the express choice of law for the main contract extends to the arbitration agreement.

Regularly invoked against this view is the doctrine of separability. Pursuant to this foundational element of international arbitration law, "*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*"[29] Accordingly, because the main contract and the arbitration agreement are independent from each other, a choice of law clause for one should not automatically "*extend to,*" "*comprise*" or otherwise apply to the other. Therefore, if the choice of law clause refers to the law governing "*the agreement,*" such choice is tantamount to "*the agreement with the exception of the arbitration clause.*" On this basis, several scholars vehemently object that a choice of law clause in the main contract applies to the arbitration agreement.[30]

Similarly, in *NTPC*, the party opposing the setting aside of the award submitted as follows:

> "*[T]he arbitration agreement is a separate and distinct contract, and collateral to the main contract. Although the main contract is governed by the laws in force in India, as stated in the General Terms, there is no express statement as regards the law governing the arbitration agreement. In the circumstances, the law governing the arbitration agreement is not the same law which governs the contract, but it is the law which is in force in the country in which the arbitration is being conducted.*"[31]

To this, the first group of courts and scholars retort that the doctrine of separability has a very distinct scope of application and does not apply in regards to determining the law applicable to the arbitration agreement. As Bermann puts it, "*[t]he fact that an arbitration agreement survives the demise of the main contract does not mean that the arbitration agreement and the main contract must be governed by distinct bodies of law.*"[32] Similarly, in *Enka Insaat Ve Sanayi A.S.* v. *OOO Insurance Company Chubb* ["**Enka**"], the U.K. Supreme Court held that "*the principle of separability is not a principle that an arbitration agreement is to be treated as a distinct agreement for all purposes but only that it is to be so treated for the purpose of determining its*

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28 *See* Kabab-Ji S.A.L. v. Kout Food Group [2020] EWCA Civ. 6, ¶ 62 (Eng.) (the contract contained a general choice of law stating that "[t]his Agreement shall be governed by and construed in accordance with the laws of England" and another provision clarifying that "[t]his Agreement" comprises the arbitration agreement.).

29 UNCITRAL Model Law, art. 16(1). *See also* Arbitration Act 1996, c. 23, § 7 (Eng.) [*hereinafter* "English Arbitration Act"] ("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."); Arbitration and Conciliation Act, No. 26 of 1996, § 16(1)(a)–(b) (India) ("(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.").

30 Pierre Karrer, *The Law Applicable to the Arbitration Agreement: A Civilian Discusses Switzerland's Arbitration Law and Glances Across the Channel*, 26 SING. ACAD. L. J. 849, 861 (2014) [*hereinafter* "Karrer"]; Czernich, *supra* note 1, at 80. *See also* GEORGE A BERMANN, INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW 132 (2017) [*hereinafter* "BERMANN"].

31 NTPC, (1992) 3 SCC 551, ¶ 10 (India).

32 BERMANN, *supra* note 30, at 152.

validity or enforceability."[33] This view dismisses the doctrine of separability as a "*rule of non-invalidation,*"[34] which has "*no bearing on governing law.*"[35]

The Supreme Court of India holds a similar view. It dismissed the view advanced by the party opposing the setting aside of the award, noting that "*though collateral or ancillary to the main contract, [the arbitration agreement] is nevertheless a part of such contract.*"[36] It therefore concluded:

> "*It is true that an arbitration agreement may be regarded as a collateral or ancillary contract in the sense that it survives to determine the claims of the parties and the mode of settlement of their disputes even after the breach or repudiation of the main contract. But it is not an independent contract, and it has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities. The law governing such rights and liabilities is the proper law of the contract, and unless otherwise provided, such law governs the whole contract including the arbitration agreement, and particularly so when the latter is contained not in a separate agreement but, as in the present case, in one of the clauses of the main contract.*"[37]

It is certainly correct that the doctrine of separability does not mean that the laws governing the main contract and the arbitration are "*necessarily*" distinct.[38] If the law governing the main contract is the same as the law of the seat, the arbitration agreement is very likely to be governed by that law as well. However, the ratio of the doctrine of separability also does not imply that the law of the main contract and the arbitration agreement are automatically identical. If the doctrine of separability prescribes that the main contract and the arbitration agreement are to be considered separate agreements for the purpose of determining the arbitration agreement's existence and validity, it is not immediately apparent why this should not *also* apply to the question of which law applies to determine that existence and invalidity. Neither is it extraordinary that different aspects of a commercial contract are governed by separate legal systems. In private international law, this phenomenon is known as *dépeçage.*

In *Reliance Industries Ltd* v. *Union of India*, the Supreme Court of India accepted as much with respect to an express choice of law governing the arbitration agreement.[39] In this case, the parties had agreed that "*[t]he arbitration agreement contained in this Article 33 shall be governed by the laws of England.*"[40] Nevertheless, the High Court of Delhi had held that Indian law would be applied to the arbitration agreement as it was the governing law of the main contract, and that the parties' choice of English

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33 Enka, [2020] UKSC 38, ¶ 41 (referring to wording of the English Arbitration Act, Section 7 ("for that purpose")), ¶¶ 232–233 (Lords Burrows and Sales concurring).

34 Myron Phua & Matthew Chan, *The Distinctive Status of International Arbitration Agreements in English Private International Law?*, 36(3) ARB. INT'L 419, 425 (2020) [*hereinafter* "Phua & Chan"].

35 Ian Glick & Niranjan Venkatesan, *Choosing the Law Governing the Arbitration Agreement*, *in* ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 138 (Neil Kaplan & Michael J Moser eds., 2018).

36 NTPC, (1992) 3 SCC 551, ¶ 25 (India). *See also* Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305, ¶ 15–16 (India); Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722, ¶ 16 (India).

37 NTPC, (1992) 3 SCC 551, ¶ 45 (India).

38 *See* Aaron Yoong, *Of Principle, Practicality, and Precedents: The Presumption of the Arbitration Agreement's Governing Law*, ARB. INT'L 1, 6 (2020) [*hereinafter* "Yoong"].

39 Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 (India).

40 *Id.* ¶ 7.

law only related to "*curial law matters i.e. conduct of the arbitral proceedings.*"[41] The Supreme Court of India vacated that decision, holding as follows:

> "*[T]he High Court […] has failed to distinguish between the law applicable to the proper law of the contract and proper law of the arbitration agreement. The High Court has also failed to notice that by now it is settled, in almost all international jurisdictions, that the agreement to arbitrate is a separate contract distinct from the substantive contract which contains the arbitration agreement. […] This principle of separability permits the parties to agree: that law of one country would govern to the substantive contract and laws of another country would apply to the arbitration agreement.*"[42]

It remains to be seen whether the Supreme Court will revisit its decision in *NTPC* and also affirm separability for the purposes of determining the applicable law to the arbitration agreement where the parties have not expressly specified that law. Indeed, it is submitted that the doctrine of separability should be taken seriously in all circumstances. It should be understood as also applying to the question of which law governs the validity and existence of the arbitration agreement where parties have chosen the law governing their main contract, but not the arbitration agreement. As several authors note, this solution acknowledges that the purpose and content of the two agreements are fundamentally different:[43] whereas the main contract establishes substantive rights and obligations regarding the parties' commercial transaction, it is the purpose of the arbitration agreement to determine the type and mode of resolving any disputes arising from that transaction. Since the main contract and the arbitration agreement are thus legally distinct agreements, an express choice of law intended for the main contract neither automatically "*extends to*" nor "*comprises*" the arbitration agreement.

ii. Choice of Law for the Main Contract as Indicating an Implied Choice of Law for the Arbitration Agreement

If the express choice of law clause for the main contract does not automatically constitute an express choice of law for the arbitration agreement, it may nevertheless indicate the parties' *implied* intent for the arbitration agreement to be governed by the same law. Several courts and authors agree that businesspeople "*must be taken to have intended a single system of law to apply to their entire relationship*"[44] and that "*it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law.*"[45] In the words of the U.K. Supreme Court:

> "*[C]onstruing a choice of law to govern the contract as applying to an arbitration agreement set out in a clause of the contract […] avoids artificiality. The principle that an arbitration agreement is separable from the contract containing it is an important part of arbitration law but it is a legal doctrine and one which is likely to be much better known to arbitration lawyers than to commercial parties. For them a contract is a contract;*

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41 *Id.* ¶ 23.

42 *Id.* ¶¶ 64-65.

43 VAN DEN BERG, *supra* note 17, at 293; Karrer, *supra* note 30, at 858; Phua & Chan, *supra* note 34, at 425.

44 Yoong, *supra* note 38, at 8.

45 BCY v. BCZ [2016] SGHC 249, ¶ 59 (Sing.). *See also* Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA [2012] EWCA Civ. 638, ¶¶ 26–27 (Eng.) [*hereinafter* "Sulamérica"]; Lew, *supra* note 1, at 144; Winnie Jo-Mei Ma, *Conflicting Conflict of Laws in International Arbitration? Choice of Law for Arbitration Agreement in Absence of Parties' Choice*, *in* SCHOLARSHIP, PRACTICE AND EDUCATION IN COMPARATIVE LAW: FESTSCHRIFT HISCOCK 148 (John H Farrar, Vai Io Lo & Bee Chen Goh eds., 2019).

> *not a contract with an ancillary or collateral or interior arbitration agreement. They would therefore reasonably expect a choice of law to apply to the whole of that contract.*"[46]

This general presumption would only be reversed "*where parties (or their lawyers) positively knew that the choice-of-law clause in the main contract does not extend to the arbitration clause.*"[47]

Others favour a more nuanced approach. According to them, it is decisive how the choice of law clause in the main contract is drafted. If that clause contains "*broad language*" (for example, "*the parties' entire legal relationship shall be governed by the law of X*" or "*all aspects of the contract shall be governed by the law of X*"), this constitutes an implied choice of law for the arbitration agreement; whereas more narrow language (for example, "*the contract is subject to the law of X*" or "*this agreement shall be interpreted under the law of X*") would be refined to the main contract.[48]

There is no question that business realities are an important consideration. After all, one of the fundamental advantages of international commercial arbitration is its flexibility to accommodate the needs and expectations of the business community. A solution that complies with these expectations certainly has its appeal. Yet, it is doubtful whether parties really would understand their general choice of law to also have an effect on their arbitration agreement. Is it not more likely that they considered their selection of the seat of the arbitration as decisive for all issues relating to the arbitration agreement?[49] Given that "*parties rarely, if ever, consider the arbitration clause when negotiating the choice of law clause in the contract,*"[50] would the matter even cross their minds? If the parties' presumed business realities are to be considered, one cannot discard the "*distinct possibility that they omitted to choose anything at all for the arbitration clause.*"[51] Ultimately, the truism remains that both choice of law and arbitration clauses are often neglected during contract negotiations, degrading them to "*midnight*" or "*champagne*" clauses.

Is it thus possible to know, in the abstract, which is true for individual parties to a given case? Were they (or their advisors) aware of the doctrine of separability? Did they give the scope of their choice of law clause any deep thought or did they simply adopt boilerplate language intended for contracts without an arbitration agreement? Did they consider their choice of seat or choice of law for the main contract as decisive? It is submitted that the honest answer to these questions is that we cannot know. Accordingly, rather than presuming too much about the parties' hypothetical expectations, wishes and intent, the cleaner approach is that neither a general choice of law clause for the main contract nor their selected seat should, without specific indications as to the parties' actual intent, be understood as an implied choice of law for the arbitration agreement. In that case, there simply

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46 Enka, [2020] UKSC 38, ¶ 53(iv).
47 Czernich, *supra* note 1, at 80–81.
48 Dietmar Czernich, *Das auf die Schiedsvereinbarung anzuwendende Recht*, ECOLEX 2019, 771, 773 [*hereinafter* "Czernich"]. *See also* VAN DEN BERG, *supra* note 17, at 293.
49 *See* Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb, [2020] EWCA Civ. 574, ¶¶ 90–91, 109 (Eng.); VAN DEN BERG, *supra* note 17, at 293.
50 Berger, *supra* note 1, at 320.
51 Phua & Chan, *supra* note 34, at 427.

is no indication as to the parties' will regarding the law governing the arbitration agreement. The answer is thus found in an objective, not a subjective, connecting factor.[52]

B. What is the Arbitration Agreement's 'Closest Connection'?

Where Article V(1)(a) of the New York Convention applies, this objective connecting factor is straight-forward: the seat of arbitration. However, several common law jurisdictions do not apply Article V(1)(a), but instead rely on the common law rule on conflict of laws: in the absence of an express or implied choice of law, the arbitration agreement's "*closest and most real connection*" must be determined.[53] As the U.K. Supreme Court noted in *Enka*, this is an objective exercise:

> "*[T]he court must in these circumstances determine, objectively and irrespective of the parties' intention, with which system of law the arbitration agreement has its closest connection. This exercise is different in nature from the attempt to identify a choice (whether express or implied), as it involves the application of a rule of law and not a process of contractual interpretation.*"[54]

Similarly, the closest connection of the arbitration agreement is also invoked as the decisive connecting factor in a number of civil law jurisdictions.[55]

Determining the system of law to which a legal relationship is most closely connected is, of course, the very purpose of private international law.[56] At the same time, this formula alone does not provide much guidance. Indeed, the closest connection test has been described as a "*non-rule*"[57] that must be filled with meaning by providing either a concrete connecting factor or rules of presumption. Where both are missing because the closest connection test serves as a fall-back connecting factor, what is required is a "*grouping of contacts*" by which points of contact to different legal systems are collected and weighed against each other.[58]

Some have raised concerns whether this exercise provides satisfactory results with respect to arbitration agreements. For instance, the French and German delegations to the 1980 Rome Convention on the Law Applicable to Contractual Obligations had considered the closest connection test problematic, concluding that "*the concept of 'closest ties' [is] difficult to apply to arbitration*

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52 *See also Id.*; Chan & Jim Yang, *supra* note 1, at 645–646. This approach has the additional appeal that it avoids conflicting decisions between jurisdictions that consider parties' pre-contractual negotiations when discerning their intent and those that prohibit extrinsic evidence. A famous example in this regard is the *Dallah* saga. *See* Scherer & Jensen, *supra* note 2, at 184.

53 Enka, [2020] UKSC 38, ¶ 36. *See also* NTPC, (1992) 3 SCC 551, ¶ 50 (India).

54 Enka, [2020] UKSC 38, ¶ 118.

55 *See, e.g.,* Bundesgerichtshof [BGH] [Federal Court of Justice], June 8, 2010, XI ZR 349/08, 2011 SCHIEDSVZ 46, 48–49 (Ger.); Czernich, *supra* note 48, at 774 (on Austrian Law on Private International Law, Section 1).

56 *See* CHRISTIAN VON BAR & PETER MANKOWSKI, INTERNATIONALES PRIVATRECHT: BAND 1 – ALLGEMEINE LEHREN ¶ 7.92 (2d ed. 2003) [*hereinafter* "VON BAR & MANKOWSKI"]. *See also* BUNDESGESETZ ÜBER INTERNATIONALES PRIVATRECHT [FEDERAL CODE ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, § 1 (Austria) ("[1] In private law, matters involving foreign countries shall be judged in accordance with the legal system with which there is the strongest connection. [2] The special provisions contained in this Federal Act on applicable law [reference provisions] shall be regarded as an expression of this principle.").

57 Kurt H Nadelmann, *Impressionism and Unification of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 24 AM. J. COMP. LAW 1, 10 (1976); Friedrich K Juenger, *Parteiautonomie und objektive Anknüpfung im EG-Übereinkommen zum Internationalen Vertragsrecht: Eine Kritik aus amerikanischer Sicht*, 46 RABELSZ 57, 72 (1982).

58 VON BAR & MANKOWSKI, *supra* note 56, ¶ 7.108.

agreements."[59] Indeed, not surprisingly, diverging approaches have developed as to which pointers are considered decisive. As Bermann notes:

> "*Among the choice of law criteria that have been proposed are (a) the law of the place where the arbitration agreement was concluded, (b) the law of the place of contract performance, (c) the law of the arbitral situs (which is in effect the law of the place of performance of the arbitration agreement itself), and (d) the law of the place of judicial enforcement of the eventual award.*"[60]

Others suggest the geographical location of the designated arbitral institution[61] or the habitual residence of the arbitrators as potentially most closely connected to the arbitration agreement.[62]

Most of these points of contact do not weigh heavily and are unlikely to provide convincing results. The law of the place where the arbitration agreement was concluded can be entirely arbitrary,[63] and where the contract is concluded across borders, it does not point to a single system of law. Similarly, reference to the place where the award is likely to be enforced fails, since awards may typically be enforced in more than one jurisdiction.[64] Today's major arbitral institutions are chosen irrespective of where they are headquartered and tend to operate in more than one jurisdiction. Additionally, it is very rare to see all members of a tripartite international arbitral tribunal living in the same jurisdiction—if busy arbitrators have a "*habitual residence*" at all.

More authoritative points of contact are therefore again the main contract and the seat of the arbitration. The majority and minority of U.K. Supreme Court justices were divided in *Enka* as to which of these laws was more closely connected to the arbitration agreement. Noting that "*the place where the transaction is to be performed is the connecting factor to which the common law has long attached the greatest weight,*" the majority held that arbitration agreements are performed at the seat of the arbitration, with whose law they thus had their closest connection.[65] The minority, by contrast, considered it a "*general rule*" that arbitration agreements are most closely connected to the law governing the merits, citing an alleged "*expectation of business people*" that the main contract and the arbitration agreement are subject to the same law.[66] Similarly, German courts have repeatedly—but not uniformly—held that "*as a rule,*" the arbitration agreement is most closely connected to the main contract, albeit without providing any explanation of this rule.[67]

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59 Mario Giuliano & Paul Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282 1), at 11–12; *See also* BERMANN, *supra* note 30, at 155 ("Determining which jurisdiction has the closest connection or most significant relationship to the arbitration agreement is not necessarily a simple matter.").

60 BERMANN, *supra* note 30, at 156.

61 Stefan Münch, *10. Buch*, *in* MÜNCHENER KOMMENTAR ZPO ¶ 38 (Thomas Rauscher & Wolfgang Krüger eds., 5th ed. 2017) (with reference to Bayerisches Oberstes Landesgericht [Bavarian Regional Supreme Court] Sept. 17, 1998, BayObLG 4 Z Sch 1/98, NJW-RR 1999, 644, 645 (Ger.)) [*hereinafter* "Münch"].

62 Monika Anders, *10. Buch*, *in* ZIVILPROZESSORDNUNG § 1029, ¶ 11 (Monika Anders & Burkhard Gehle eds., 78th ed. 2020).

63 BERMANN, *supra* note 30, at 156.

64 *Id.*

65 Enka, [2020] UKSC 38, ¶¶ 118–123 (citing Sulamérica, [2012] EWCA Civ. 638; C v. D [2007] EWCA Civ. 1282 (Eng.)).

66 *Id.* ¶ 286 (Lord Sales), ¶¶ 257(iii), 260 (Lord Burrows concurring).

67 Bundesgerichtshof [BGH] [Federal Court of Justice] June 8, 2010, XI ZR 349/08, 2011 SCHIEDSVZ 46, 48–49 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 21, 2005, III ZB 18/05, 2005 SCHIEDSVZ 306, 307–308 (Ger.); Oberlandesgericht Düsseldorf [OLG Düsseldorf] [Higher Regional Court of Düsseldorf] Nov. 15, 2017, VI-U

Conversely, scholars in different jurisdictions assume, without going into much more detail themselves, that an arbitration agreement is most closely connected to the law of the seat of arbitration.[68] According to Karrer, for instance, the law most closely connected to the arbitration agreement is "*[o]bviously*" the substantive law of the seat, as there is no law that has a closer connection with the arbitration than the *lex arbitri*.[69] In the (in)famous case of *Pechstein* v. *International Skating Union*, the German Federal Court of Justice had also considered the law of the seat of the arbitration as most closely connected to the arbitration agreement, citing (without clarifying) the presumption that the closest connection exists with the "*country where the party required to effect the characteristic performance of the contract has his habitual residence.*"[70] It has been rightly noted that this rule is hardly helpful with regard to arbitration agreements for which no one party performs the characteristic performance (the arbitrators not being party to the arbitration agreement).[71]

Nevertheless, much speaks in favour of the seat, rather than the main contract, as most closely connected to the arbitration agreement. The arbitration agreement's only point of contact to the main contract is that it serves to resolve disputes originating from that contract. Admittedly, this is a powerful connection, as there would not be an arbitration agreement without the main contract.[72] However, there is a plethora of contacts with the law of the seat that together outweigh the singular connection to the main contract: the arbitral award is deemed to be made at the seat, and the seat's courts fulfil important supporting and supervisory functions, including assisting in the constitution of the arbitral tribunal and in the taking of evidence, as well as deciding on challenges to arbitrators, the jurisdiction of the tribunal and the validity of the award.[73] Put differently, there is an intrinsic link between the arbitration agreement and the *lex arbitri*, with the latter providing the framework for the arbitral proceedings.[74] Moreover, the fact that Article V(1)(a) of the New York Convention and several other instruments use the law of the seat to determine the existence and validity of the arbitration agreement may in itself be considered a persuasive indication of the arbitration agreement's closest connection. Ultimately, considering the law of the seat as most closely connected with the arbitration agreement also has the benefit of creating international uniformity amongst courts and tribunals directly applying the conflict of laws rule in Article V(1)(a).

In the absence of a determinable choice of law by the parties, the Supreme Court of India also arrives at the law of the seat as governing the arbitration agreement:

(Kart) 8/17, juris, ¶¶ 60–61 (Ger.). Notably, the German BGH has recently clarified that rather than the closest connection test, Article V(1)(a) of the New York Convention applies as the decisive conflict of laws rule. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 26, 2020, I ZR 245/19, 2021 SCHIEDSVZ 97, 101–102 (Ger.).

68 Münch, *supra* note 61, § 1029, ¶ 37; Czernich, *supra* note 48, at 774; FROHLOFF, *supra* note 14, at 252; JENS-PETER LACHMANN, HANDBUCH FÜR DIE SCHIEDSGERICHTSPRAXIS ¶ 270 (3d ed. 2008).

69 Karrer, *supra* note 30, at 860–861.

70 Bundesgerichtshof [BGH] [Federal Court of Justice] June 7, 2016, KZR 6/15, juris, ¶ 68 (Ger.) (citing defunct Article 28(2) of the EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCHE [EGBGB] [INTRODUCTORY ACT TO THE CIVIL CODE] Jan. 1, 1900, RGBl. at 604 (Ger.)).

71 Münch, *supra* note 61, § 1029, ¶ 38; Czernich, *supra* note 48, at 772.

72 *See also* NTPC, (1992) 3 SCC 551, ¶ 45 (India) ("[The arbitration agreement] has no meaningful existence except in relation to the rights and liabilities of the parties under the main contract. It is a procedural machinery which is activated when disputes arise between parties regarding their rights and liabilities").

73 *See, e.g.,* UNCITRAL Model Law, arts. 6, 11(3), 11(4), 13(3), 14(1), 16(3), 27, 31(3), 34(2).

74 *See also* Katharina Plavec, *Neues zum auf die Schiedsvereinbarung anwendbaren Recht*, ECOLEX 2019, 330, 331.

> "*Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption.*"[75]

Although some authors consider this a result of the closest connection test,[76] it appears that the Indian courts do not apply the law of the seat as an objective connecting factor, but as the parties' (subjective) implied choice of law:

> "*Where there is no express choice of the law governing the contract as a whole, or the arbitration agreement in particular, there is, in the absence of any contrary indication, a presumption that the parties have* ***intended*** *that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held.*"[77] (emphasis added)

While recourse to an objective connecting factor such as the direct application of the law of the seat has the advantage of avoiding the need to seek for hidden meanings that might reverse the presumption as to the parties' intent, the result is likely the same in many cases. This means that the Indian approach of presuming that parties intend for their arbitration agreement to be governed by the law of the seat if they do not otherwise specify the applicable law yields identical results to an application of the conflict of laws rule in Article V(1)(a) of the New York Convention and the closest connection test. This promotes the international uniformity of decisions.

Only where the seat has not been determined (yet) does the closest connection not point to the law of the seat, and neither Article V(1)(a) of the New York Convention nor the Indian approach provide a clear answer. Something that does not exist (yet) is not connected to anything. In that case, the only plausible (and therefore closest) connection of the arbitration agreement is to the law of the contract in which it is contained or to which it refers.[78] When the seat is determined subsequently,[79] however, the question of the closest connection arises anew. It is submitted in that regard that the (subsequent) determination of the seat of the arbitration leads to a change in the applicable law, i.e., the law governing the arbitration agreement changes from the law of the main contract to the law of the seat.[80] While it is unfortunate that this change of law creates a measure of legal uncertainty, such hypothesis will be rare in practice. In those rare instances, a change of law is justified, since the strong connection between the seat and the arbitration agreement does not become weaker merely because the seat had not been selected from the outset.

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75 NTPC, (1992) 3 SCC 551, ¶ 23 (India).

76 Nakul Dewan, *The Laws Applicable to an Arbitration*, *in* ARBITRATION IN INDIA 112–14 (Dushyant Dave, Fali Nariman, Marike Paulsson & Martin Hunter eds. 2021).

77 NTPC, (1992) 3 SCC 551, ¶ 25 (India). *See also* Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc., (2003) 9 SCC 79, ¶ 7 (India); IMAX Corp. v. E-City Entertainment (I) Pvt. Ltd., (2017) 5 SCC 331, ¶ 24 (India) ("[W]here the parties have not expressly chosen the law governing the contract as a whole or the arbitration agreement in particular, the law of the country where the arbitration is agreed to be held has primacy."); Aastha, 2011 SCC OnLine Del 5145, ¶ 10 (India).

78 *See also* Bundesgerichtshof [BGH] [Federal Court of Justice] June 8, 2010, XI ZR 349/08, 2011 SCHIEDSVZ 46, 48–49 (Ger.).

79 UNCITRAL Model Law, art. 20(1).

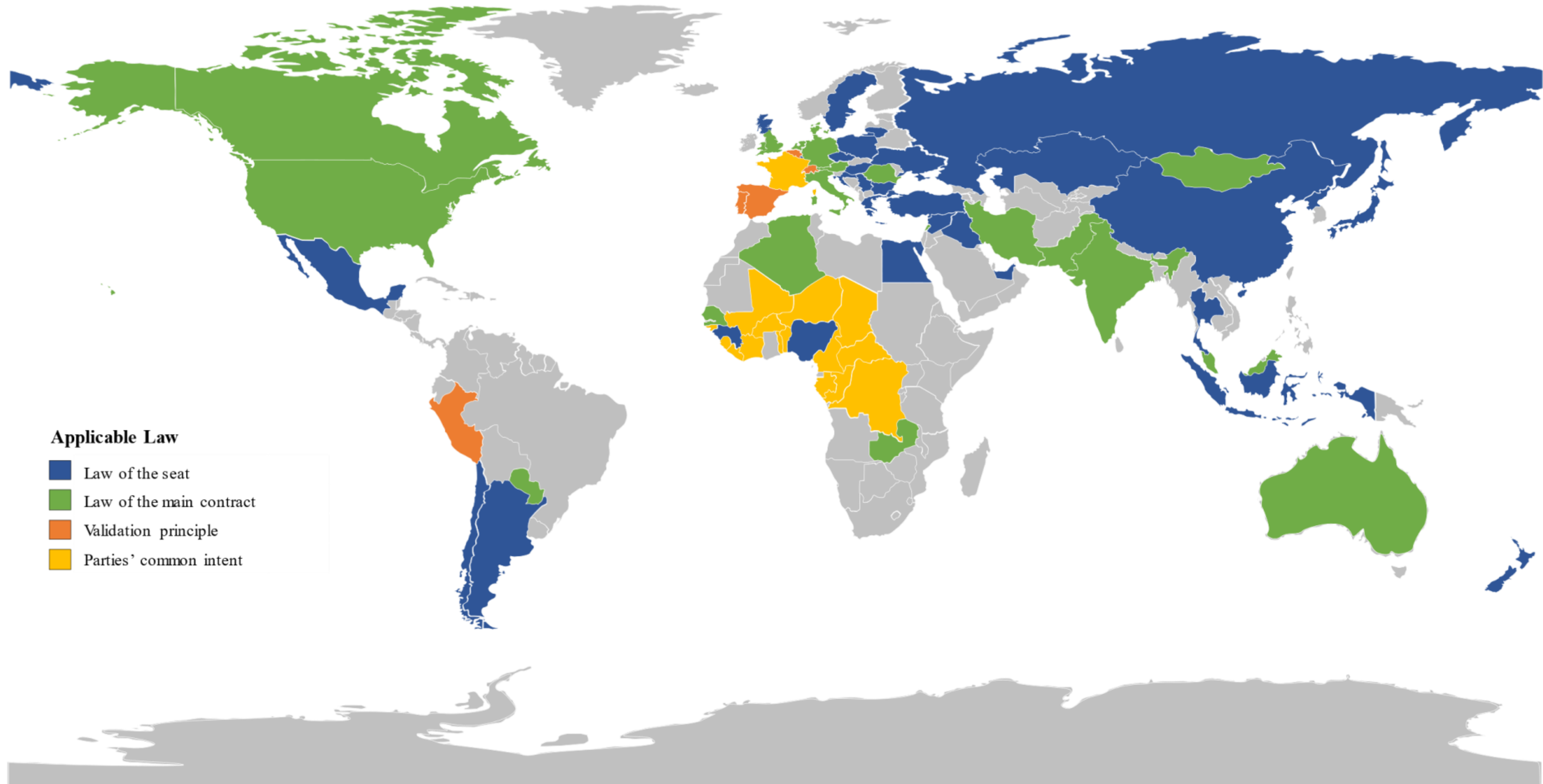
80 *See also* Berger, *supra* note 1, at 320–322.

IV. Conclusion: Increased Harmony by a Focus on Objective Criteria

Though notable exceptions remain, the majority of jurisdictions today provide for similar conflict of laws rules to determine the law governing the arbitration agreement: in the absence of an express or implied choice of law by the parties, an objective connecting factor is decisive. It is at the micro level—when assessing whether there has been an implied choice of law, and which law is most closely connected to the arbitration agreement—where results nevertheless, continue to diverge.

The authors suggest that a more uniform approach can be achieved by dispensing with presumptions and hypotheticals, and focusing on objective circumstances instead. If the parties have not included an express choice of law regarding the arbitration agreement, second-guessing the parties' hypothetical intent with regard to their implied choice of law is often a vain exercise. Rather, courts and arbitral tribunals should accept that the parties simply have not dealt with the question of the applicable law to their arbitration agreement and, therefore, should apply an objective connecting factor. This objective connecting factor should be the law of the seat—either directly because Article V(1)(a) of the New York Convention applies or indirectly as the system of law that is most closely connected to the arbitration agreement.

Annex: World Map of Approaches to the Law Governing the Arbitration Agreement



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