Harmonising Judicial Approaches to Choice of Law in Arbitration Agreement

Winnie Jo-Mei Ma
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Parties’ express choice of law for arbitration agreement

The law of this arbitration clause shall be [Hong Kong] law.

Optional provision for HKIAC model arbitration clause:

◦ This provision should be included particularly where the law of the substantive contract and the law of the seat are different.

◦ The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause.
Legislative or institutional choice of law rules

- **Swedish Arbitration Act** s 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 the proceedings have taken place or shall take place.

- **PRC Applicable Law for Foreign-Related Civil Relations Act** Art 18: Where the parties have not made a choice, the laws in which the arbitration commission is located or the law of the seat of arbitration shall apply.

- **LCIA Rules** Art 16.4: 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 applicable of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.
The common scenario (and dilemma)

*The governing law of this contract shall be the law of [England].*

*The place of arbitration shall be [Singapore].*

◦ No express choice of law for the arbitration agreement (e.g. Slide 2).

◦ No applicable choice of law rules for the arbitration agreement (e.g. Slide 3).

**What is the law governing the arbitration agreement?**

◦ “the main contract approach”: the law of the *contract* (the law governing the main, substantive, underlying, principal or matrix contract)

◦ “the seat approach”: the law of the *seat* (the law of the place of arbitration)

◦ “the validation approach”: the law favourable to the validity of the arbitration agreement

2. W Ma, Presentation at 2019 Taipei International Conference on Arbitration and Mediation


   - Scherer/Jensen, The Law Governing the Arbitration Agreement: A Comparative Analysis of of the United Kingdom Supreme Court’s Decision in *Enka v Chubb*, IPRax 2021, Heft 2
Outline

1. Sources and causes of judicial disharmony:
   a) Different timing or context for determining the law of the arbitration agreement
   b) Disagreement on the application of New York Convention (especially Art V(1)(a)) vis-à-vis domestic choice of law rules
   c) Different types of arbitration agreement
   d) Disagreement on the application of the separability principle
   e) Different permutations of the parties’ chosen seat and chosen law of the contract
   f) Disagreement on implied choice of law and the law with the closest connection
   g) Disagreement on the application of the validation principle

2. Autonomous choice of law rule (or harmonised approach) based on New York Convention Art V(1)(a)
Poll No. 1

If (a) the parties have not expressly chosen any law for their arbitration agreement; (b) the parties have made different choices with respect to the law of the contract and the seat; and (c) the applicable laws or institutional rules do not provide a default choice of law for the arbitration agreement:

What would be your most preferred law for the arbitration agreement?

1. The law of the contract (without exceptions)
2. The law of the contract (with exceptions)
3. The law of the seat (without exceptions)
4. The law of the seat (with exceptions)
5. The law favourable to the validity of the arbitration agreement
<table>
<thead>
<tr>
<th>Scherer Survey of 75 jurisdictions</th>
<th>Maxwell Lecture Poll No. 1</th>
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<tbody>
<tr>
<td>Law of the contract: 34%</td>
<td>Options 1 + 2</td>
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<tr>
<td>Law of the seat: 51%</td>
<td>Options 3 + 4</td>
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<td>Validation approach: 9%</td>
<td>Option 5</td>
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<td>Parties’ common intent: 6%</td>
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1(a) **Timing or context for determining the law of the arbitration agreement**

- (Non-)enforcement of arbitration agreement under New York Convention Art II(3) or Model Law Art 8(1)
- Review of arbitral tribunal’s preliminary decision on jurisdiction under Model Law Art 16(3)
- (Non-)enforcement of arbitral award under New York Convention Art V(1)(a) or Model Law Art 36(1)(a)(i)
- Annulment of arbitral award under Model Law Art 34(2)(a)(i)

**Issues concerning arbitration agreement:** 51.5% substantive validity; 7% formal validity; 18% scope; 16.5% arbitrability; 13% extension to third parties; 3.5% interpretation (Scherer survey of 200 cases)
1(b) New York Convention vs common law choice of law

New York Convention Art V(1)(a)

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

Enka majority: The two limbs of Art V(1)(a) are intended to be treated as uniform international conflict of laws rules [128]. The court should apply the same conflict rules to identify the governing law irrespective of whether the arbitration has a domestic or foreign seat and irrespective of the stage at which an issue about the validity or scope of the arbitration agreement is raised [141].

Proper Law of Contract (Enka)

the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected

Enka minority: Art V(1)(a) sets out a very simple and inflexible default rule for the purposes of the Convention regime which is different from the more flexible and nuanced common law default rule of ‘closest and most real connection’ and should not be taken to displace that rule. The common law default rule has been established for a very long period of time, well before international policy arguably came to crystallise in line with Art V(1)(a), and it reflects different policy objectives [291].
1(c) Types (or form) of arbitration agreement

- **Arbitration clause within a contract** (Scherer’s survey):
  - 51% law of the seat
  - 34% law of the contract (including *Enka*)

- **Multi-tier dispute resolution clause** including the arbitration clause:
  - *Enka* majority would apply the same default rule (see Slide 15)
  - *Enka* minority: It would be very odd and inconvenient to apply one proper law to interpret the earlier sentences and a different proper law to interpret the later sentences. All these difficulties would be avoided if the proper law of the arbitration agreement were the same as the proper law of the main contract [235].

- **Freestanding arbitration agreement**: more likely to be the law of the seat?
1(d) Separability vs choice of law for arbitration agreement

Model Law Art 16: The arbitral tribunal may rule on its jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

- **Enka majority:** the separability principle does not require that an arbitration agreement should be treated as a separate agreement for the purpose of determining its governing law. Nevertheless, the principle is relevant to the conflict of laws analysis because it alleviates the difficulty in treating different parts of a contract as governed by different laws. [41]

- **Enka minority:** the separability doctrine has been devised for a particular purpose. That purpose does not extend to working out the conflict of laws rules applicable to an arbitration agreement. It follows that in deciding on the proper law of the arbitration agreement, the arbitration agreement should be regarded as part of the main contract. [233]
1(e) Permutations of the parties’ choices

- different choices with respect to the seat and law of contract:
  - *Enka* (unanimous): law of the contract (subject to the majority’s two exceptions: see Slide 14)
  - Recall Scherer’s survey: 34% law of the contract vs 51% law of the seat

- same choice with respect to the seat and law of contract

- choice of seat only:
  - *Enka* majority: law of the seat (default rule of closest connection: see Slide 15)
  - *Enka* minority: law of the contract (implied choice and closest connection)

- choice of law for contract only: law of the contract (express choice only?)

- no choice with respect to the seat and law of contract: depends on their determination?
Enka v Chubb [170]: different choices for seat & law of contract

- Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.

- The choice of a different seat is not, without more, sufficient to negate an inference that a choice of law to governing the law was intended to apply to the arbitration agreement.

- Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration will also be treated as governed by that country’s law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective.
Enka v Chubb [170]: choice of seat only

- Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.

- In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties’ substantive contractual obligations.

- The fact that the contract requires the parties to attempt to resolve a dispute through negotiation, mediation or any other procedure before referring its to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it.
1(f) Reconsidering “the proper law of contract”

Test with three OR two steps? subjective choice OR objective choice?
  ◦ 3-step: express choice $\rightarrow$ implied choice $\rightarrow$ default rule of closest connection
  ◦ 2-step: parties’ choice (express or implied) $\rightarrow$ default rule of closest connection

1. Can the parties’ choice of law for the arbitration agreement be implied from their choice of law for the contract OR choice of seat?

2. Are the parties more likely to intend the same law OR different laws to govern their contract and arbitration agreement?

3. Which has the closer/closest connection – law of the contract OR law of the seat?
   ◦ Proper law of the contract: connection with the contract / substance of dispute
   ◦ Proper law of the arbitration agreement: connection with the arbitration agreement / dispute resolution
1(f) Reconsidering “implied choice” of law

Implied choice borderlines with both express/subjective choice and default/objective choice of the closest connection.

- Choice of law of contract = implied choice of law for arbitration agreement?
  - Enka majority confines to the parties’ choice of law for contract, and adds two exceptions in which the law of the seat would apply
  - Enka minority extends to default choice of law for contract

- Choice of seat = implied choice of law for arbitration agreement?
  - Enka majority: default rule of closest connection where the parties have not chosen the law of the contract (Contrast other courts?)

Different choices with respect to law of contract and seat? Choice between two implied choices or closest connections, OR default rule based on New York Convention Art V(1)(a)?
“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 Art 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.”
1(g) Validation vs choice of law for arbitration agreement

- Does validation principle have the **positive function** of choosing a law that would validate an arbitration agreement (e.g. as a **choice of law rule**)?
  - **Swiss Law on Private International Law Art 178(2):** the arbitration agreement shall be valid if it conforms to the law chosen by the parties, or to the law applicable to the dispute, in particular the law governing the main contract, or to Swiss law.

- Does the validation principle merely serve the **negative function** of disregarding an otherwise applicable law that would invalidate the arbitration agreement (e.g. as an **exception to a default rule**)?

- Does the validation principle apply to New York Convention Art V(1)(a)?
New York Convention Art V(1)(a): Can its choice of law rule accommodate the validation principle?

- **Enka majority:** A case can be made for recognising an exception to the ordinary default rule where the arbitration agreement would be invalid under the law of the seat but not under the law governing the rest of the contract. Since the issue does not arise in the present case, it is not necessary to decide whether such an exception should be recognised. [146]

- **Enka minority:** Unless one is to accept the unfortunate conclusion that the legislative provision may (sometimes) override the validation principle, one will need to interpret the provision in such a way that, where the arbitration agreement would be invalid under the law of the seat but valid under the law of the main contract, the law of the seat will give way to the law of the main contract. Assuming there is such a discretion, it should be exercised to accommodate the validation principle. [250]
New York Convention Art V(1)(a): Can its choice of law rule accommodate the validation principle?

- Discretionary nature and permissive language of Art V: “Recognition and enforcement of the award may be refused”.
- New York Convention’s pro-arbitration policy in favour of enforcement of both arbitral awards and arbitration agreements.
- The more favourable provision of Art VII(1) can also extend its application to arbitration agreements.
New York Convention Art V(1)(a): *Does the reference to “the law to which the parties have subjected it” entail the parties’ *express *choice and *implied *choice?*

**Enka majority:** There is a division of opinion over whether the first limb of Art V(1)(a) applies only where there is an express choice of law to govern the arbitration agreement or whether it also encompasses a choice that is implied – for example from a choice of law to govern the contract in general. We think the latter view is the better view. [129]

- Party autonomy would respect both express and implied choice of law.
- The phrase “failing any indication” in Art V(1)(a) also supports the broader interpretation.

**Enka minority:** where the parties have chosen the proper law of the arbitration agreement, including impliedly, the law of the seat does not apply. [250]
New York Convention Art V(1)(a): Does its choice of law rule apply to issues other than the validity of arbitration agreement?

Art II(3): The court… shall refer the parties to arbitration, unless it finds that the [arbitration] agreement is null and void, inoperative or incapable of being performed.

Art V(1)(c): The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Enka majority: There is…, a strong and widely accepted argument that the Convention is to be interpreted as requiring the same conflicts rules to be applied in relation to Art II(3) as are specifically required at the stage of enforcement by Art V(1)(a) [130]. It is logical to apply the law identified by the conflict rules prescribed by Art V(1)(a) to questions about the scope or interpretation of the arbitration agreement as well as disputes about its validity [138].
New York Convention Art V(1)(a): Can its choice of law rule apply to issues other than the validity of arbitration agreement?

Art V(1)(a): The parties to the arbitration agreement were, under the law applicable to them, under some incapacity.

Art V(2)(a): The subject matter of the difference is not capable of settlement by arbitration under the law of the country where recognition and enforcement is sought.

“Arbitrability [of subject matter] should be untangled from the validity of the arbitration agreement and the capacity of parties in order to retain an autonomous characterisation [for choice of law purposes] and thereby avoid unnecessary application of multiple domestic laws to its determination.”

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<tr>
<th><strong>Enka formulation:</strong> the law chosen by the parties</th>
<th><strong>New York Convention Art V(1)(a):</strong> the law to which the parties have subjected it</th>
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<tr>
<td>the law with which the arbitration agreement is most closely connected</td>
<td>the law of the country where the award was made</td>
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<th><strong>Depecage:</strong></th>
<th><strong>Separability:</strong> the contract and arbitration agreement may have different governing laws (and different choice of law rules?)</th>
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<th><strong>Pro-enforcement:</strong> avoid applying the law of seat if it would invalidate the arbitration agreement?</th>
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<th><strong>Implied choice:</strong></th>
<th><strong>Default rule</strong> of law of seat (regardless of closest connection)</th>
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<td>law of contract more likely?</td>
<td>Party autonomy and legal certainty?</td>
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<tr>
<td><strong>Closest connection:</strong> law of seat more likely?</td>
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<tr>
<td>Party autonomy and commercial reality?</td>
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**Characterisation**

Same choice of law for issues other than validity of arbitration agreement (e.g. formation, interpretation, scope)?

Different choice of law rules for parties’ capacity of and subject matter arbitrability?

**Timing & Context**

Same choice of law from pre-arbitration (e.g. enforcement of arbitration agreement under Art II(3)) to post-award (e.g. enforcement of arbitral award under Art V(1)(a))?
Harmonising judicial approaches to New York Convention Art V(1)(a)

1. **Express choice** of law for the arbitration agreement? If no →

2. **Implied choice** of law for the arbitration agreement?
   - the **law of the contract** only if: (a) arbitration clause in a contract + (b) express choice of law for the contract + (c) no choice of seat or same choice.
   - If no →

3. Would the law of the seat **invalidate** the arbitration agreement?
   - If no → the **law of the seat** applies as the default choice of law for the arbitration agreement.
   - If yes → the **law of the contract** (or another law) applies to the arbitration agreement.
Poll No. 2

What would be your most preferred scope of application for the choice of law rule in New York Convention Art V(1)(a) (from the narrowest to the widest)?

1. Validity of arbitration agreement when determining an award’s enforceability
2. Validity of arbitration agreement for all judicial determinations
3. All issues concerning arbitration agreement (except for arbitrability and capacity) when determining an award’s enforceability
4. All issues concerning arbitration agreement (except for arbitrability and capacity) for all judicial determinations
Thank you!

winniema@arbiter.com.sg