THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT: TOWARDS TRANSNATIONAL PRINCIPLES

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Abstract This article examines the problem of the law governing the validity of the arbitration agreement. The cases of *Sulamérica* in the English Court of Appeal and of *FirstLink* in the High Court of Singapore demonstrate that leading arbitration jurisdictions around the world can come to diametrically opposite results. In particular, there are currently diverging views as to whether the law applicable to the arbitration agreement should be the law chosen by the parties to govern their substantive legal relationship or the law of the seat of the arbitration. The issue is unlikely to be settled soon at international level. However, without embracing extreme approaches that purport to determine the validity of the arbitration agreement without reference to any national legal system, a more 'transnational' approach should be encouraged. This may emerge, based on three structured principles which would be desirable for international convergence, namely the non-discrimination principle, the estoppel principle and the validation principle. These principles can be developed without conflicting with the conventional conflicts-of-laws approach which was adopted by the English Court of Appeal in *Sulamérica*.

Keywords: applicable law, arbitration agreement, comparative law, conflicts of laws, transnational approach.

I. INTRODUCTION

Parties rarely choose the law applicable to the arbitration agreement. This frequently gives rise to complexities. The obvious solution—but one that, for some reason, is not yet prevalent—is for arbitration clauses to make an express choice of the law applicable to the clause itself. It is difficult not to endorse this solution. If the parties choose the law applicable to the arbitration agreement, in all but rare cases, such a choice will be given effect by arbitrators and courts. The determination of the law applicable to the arbitration agreement will not be problematic. And this is the end of the matter.

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However, the existence of a drafting solution does not mean that the analysis of the legal solution in the absence of clear drafting on the point is unnecessary. The first reason is practical: not all arbitration clauses have an express choice of law provision concerning the law applicable to the clause itself. Indeed, this is currently the case for the vast majority of arbitration clauses. And even when there is general awareness of the need for such a choice, there will no doubt still be some arbitration clauses without an express choice of law provision concerning the clause itself because, for example, the parties could not agree on such a law or simply due to neglect or forgetfulness. After all, there is an enormous amount of literature on arbitration clauses and how to draft them. And yet there are still problematic clauses that give rise to disputes. The perfect world of perfectly drafted contracts with perfectly drafted arbitration clauses does not yet exist. So problems arise.

The second reason is theoretical: the study of the law applicable to the arbitration clause provides fertile ground for an analysis of the transnational dimension of international arbitration, that is, of the way in which international arbitration interacts with multiple national legal systems and multiple national legal systems interact with each other in framing internationally accepted solutions to legal problems. This article contributes to this debate by examining the problem of the law applicable to the existence, validity and effectiveness of the arbitration agreement when there is no express choice of such a law.[1] Its aim is to set out a framework for the development of a possible 'transnational'[2] solution to the problem so that convergence and predictability can, with time, be achieved.

This article is structured as follows. First, it explains why a separate inquiry into the law governing the arbitration agreement is necessary and discusses the implications of such a separate inquiry. Second, it reviews three possible approaches to determining the law governing the arbitration agreement, namely (1) the application of the law chosen by the parties to govern their substantive rights and obligations; (2) the application of the law of the seat of the arbitration; and (3) the application of 'transnational' rules. Finally, conclusions are drawn.

[1] The problem may arise in several procedural contexts: see L Collins, 'The Law Governing the Agreement and Procedure in International Arbitration in England' in J Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff 1987) 127. Furthermore, different laws may govern these different aspects of the arbitration agreement. For a useful explanation of the various nuances see KP Berger, 'Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?' in AJ van den Berg (ed), *International Arbitration 2006: Back to Basics*? ICCA Congress Series No 13 (Montreal 2006) (Kluwer Law International 2007) 301, 303–6.

[2] For the purposes of this article, it is proposed to give the adjective 'transnational' the widest possible (negative) meaning of anything that is different from the application of national rules applicable to domestic arbitration. The term 'transnational' is probably more correct than the widely used 'international' because the so-called 'international' arbitration is, in fact, an arbitration that transcends the boundaries of one given national legal system but is still governed by a set of national laws.

II. THE NEED FOR A SEPARATE INQUIRY INTO THE LAW GOVERNING THE ARBITRATION AGREEMENT

It is trite that a complex matrix of laws applies in international commercial arbitration. Generally, the expressions 'applicable law', 'proper law', 'governing law' are used as synonymous and interchangeable. In arbitration, the applicable law has three main aspects: (1) the law governing the substance of the dispute (*lex causae* or substantive law); (2) the law governing the arbitration agreement itself; and (3) the law governing the proceedings (*lex arbitri*). Thus, in the *Channel Tunnel* case, Lord Mustill famously explained:[3]

> 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.

While Lord Mustill considered it exceptional for the law applicable to the arbitration agreement to be different from the law applicable to the substantive rights and duties of the parties, it is now well established that these two laws may be different and that, whether in the end they are different or not, a separate inquiry into the law applicable to the arbitration agreement itself is necessary.[4] Three reasons may be given for this proposition.

The first is theoretical and is perhaps the least persuasive. The idea is that the arbitration agreement possesses its own specific nature and the nature of the arbitration agreement determines which law applies to it. So, if the nature of the agreement is procedural, it would follow that the law of the seat, as the curial law of the arbitration, should apply to the arbitration agreement. If the nature of the agreement is substantive, this would lead to the conclusion that the substantive law governing the main contract should apply to the arbitration agreement too. This approach does not solve the problem of the law applicable to the arbitration agreement but mutates it into a different question, that of the nature of the arbitration agreement itself. And this is, of course, a question on which there is no consensus among scholars[5] and

[3] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664, 682, [1993] AC 334, 357–358.

[4] P Bernardini, 'Arbitration Clause: Achieving Effectiveness in the Law Applicable to the Arbitration Clause' in A van den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No 9 (Paris 1998) (Kluwer Law International 1999) 197.

[5] According to some commentators, for example, the nature of the arbitration agreement is both substantive and procedural, which is rather unhelpful as a guide to determining the law applicable to

which the arbitral tribunals and courts, quite rightly, generally do not address. It is submitted that these metaphysical conjectures are not an efficient way of resolving the problem at hand. The arbitration agreement is, certainly, a contract and, as such, is subject to conflict of laws analysis as any other contract. The question is why the determination of the law applicable to the substantive rights and duties of the parties does not automatically, and without more, apply to the arbitration clause as it does to all clauses in the contract.

The second reason rests on the doctrine of separability, according to which the arbitration agreement must be treated as a separate contract from the main agreement, particularly for the purpose of assessing its existence, validity and effectiveness.[6] If the arbitration agreement is separate from the main contract, so the argument goes, then the law applicable to it may be different from the law governing the substantive rights and duties of the parties. Insofar as the proposition is that the law applicable to the arbitration agreement *may* be different from the law governing the main contract, it is difficult to disagree with it. Separability can today be considered a general principle of international commercial arbitration[7] and, in any event, the arbitration clause, even from a purely contractual perspective, has its peculiar scope and function, which justify a separate inquiry into the applicable law. This does not mean, however, that the arbitration clause must be treated as a completely standalone contract. The doctrine of separability means that the existence, validity and effectiveness of the arbitration clause must be assessed independently of the existence, validity and effectiveness of the main contract. For other purposes, for example, assignment, the arbitration clause continues to be considered an integral part of the main contract.[8] Thus, 'the autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other'.[9]

The third reason in favour of a separate enquiry is that, in the body of international and domestic arbitration law, special rules apply to the arbitration agreement, which does, therefore, have its own legal regime different from that of the main contract. Most importantly, Article II(1)–(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') sets out the requirement that, in

the agreement itself: see Bernardini (n 4) 199–200 and J Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' in van den Berg (n 4) 114, 117.

[6] *Fiona Trust v Privalov* [2007] UKHL 40, para 17; *Hecht v Busiman's* 4 July 1972, 99 Journal du Droit International (1972) 843 (French Supreme Court); *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US (1967) 395, 403–404.

[7] JF Poudret and S Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2002) 258; J Lew, L Mistelis and S Kröll, *Comparative International Arbitration* (Kluwer Law International 2003) 106.

[8] *Hussman (Europe) Ltd v Al Almeen Development and Trade Co* [2000] 2 Lloyd's Rep 83, para 1.

[9] Y Derains, 'ICC Arbitral Process: Part VIII. Choice of Law Applicable to the Contract and International Arbitration' (1995) 6(1) ICC International Court of Arbitration Bulletin 10, 16–17.

order to be recognized by the Contracting States, an arbitration agreement must be 'in writing'. This requirement applies regardless of the formal requirements applicable to the main contract. Article V(1)(a) of the same Convention provides that a ground on which a court of a Contracting State may refuse recognition and enforcement of an award is that '[…] the agreement referred to in Article II […] 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'. In this way, Article V(1)(a) sets out a conflict of laws rule specifically applicable to the arbitration agreement.[10]

Furthermore, it is not uncommon for domestic legislatures to provide their own conflict of law rules for determining the law governing the arbitration agreement. Article 178(2) of the Swiss Federal Private International Law Act provides that '[…] an arbitration agreement is valid if it conforms to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law'. Similarly, Article 6 of the Arbitration (Scotland) Act 2010, provides that '[w]here (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'. There are numerous other examples of domestic legislation making provision on this issue.[11] In many common law jurisdictions, the matter is addressed in case law and doctrine.[12] Arbitral tribunals have also consistently recognized that the arbitration agreement may be subject to a distinct legal regime.[13]

Thus, there is little doubt that a separate inquiry into the law applicable to the arbitration agreement is needed, if such a law is disputed, and it cannot be automatically assumed that the law governing the substantive rights and duties of the parties applies also to the arbitration agreement. The next question is how to determine which law applies to the arbitration agreement. The answer could be found, quite easily, in Article V(1)(a) of the New York Convention, which sets out a conflict of laws rule specifically applicable to the arbitration agreement. The same rule is adopted in Article 34(2)(a)(i) of the UNCITRAL Model Law on International Commercial Arbitration 2006 ('Model Law'). However, the

[10] Similar wording is used in the European Convention on International Commercial Arbitration 1961, art VI(2).

[11] Spanish Arbitration Act 2003, art 9(6), which follows Swiss law verbatim; Algerian Code of Civil Procedure, art 458 bis 1(3); Swedish Arbitration Act 1999, art 48.

[12] See eg the Indian Supreme Court judgment in *M/S Dozco India P Ltd v M/S Doosan Infracore Co* [2010] INSC 839, paras 12–13; *Thyssen Canada Ltd v Mariana Maritima SA* [2000] 3 FC 398, para 22 (Canada, CA); *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (Australian Fed Ct).

[13] Final Award in ICC Case No 6162 in (1992) 17 YBCA 153, 160–2; ICC Case No 8384 in KP Berger, *The Practice of Transnational Law* (Kluwer Law International 2002) 228; ICC Case No 8502, 1996, 10(2) ICC Bulletin 72; Final Award in ICC Case No 1507 in S Jarvin and Y Derains (eds), *Collection of ICC Arbitral Awards 1974–1985* (Kluwer Law International 1990) 216.

conflict rule in question is of limited usefulness in two ways: (1) formally, its application is confined to applications for enforcement under the New York Convention and to applications for setting aside under the Model Law. So, for example, it does not apply when an English court has to rule on an application for stay or for an anti-suit injunction;[14] (2) its meaning is, in itself, unclear. In particular, it is not clear whether 'the law to which the parties have subjected' the arbitration agreement must be a law expressly chosen in relation to an arbitration clause or can be a law impliedly chosen by the parties, for example, by choosing the law applicable to the main contract or by choosing the seat of the arbitration. The better view is probably that the choice may be implied.[15] So, the problem still arises as to what amounts to an implied choice of the law applicable to the arbitration agreement. Is the choice of the law governing the main contract an implied choice of such a law? And what about the choice of the seat of the arbitration? And could the law to which the parties have subjected the arbitration agreement be a set of transnational rules and principles or should it be a national law?

Therefore, extending the application of the conflict rule under Article V(1)(a) of the New York Convention to all cases in which the existence, validity or effectiveness of the arbitration agreement is in issue does not answer the questions asked in this article. Nor could Article V(1)(a) of the New York Convention ever achieve full harmonization, even only at the enforcement stage. Article VII of the Convention allows Contracting States to apply their national law rules if they result in the enforcement of an award the enforcement of which would be refused under the Convention. Therefore, under the Convention, approaches to the law applicable to the arbitration agreement *in favorem validitatis* coexist with the conflict rule under Article V (1)(a) in enforcement proceedings.

III. THE FIRST CANDIDATE APPROACH: THE LAW APPLICABLE TO THE MAIN CONTRACT

International commercial contracts usually contain a clause specifying the law governing the substance of the dispute.[16] The question is whether the choice of

[14] As will be explained later, English courts apply common law rules when determining the law applicable to the arbitration agreement other than under art V(1)(a) of the New York Convention, which is given effect in English law by section 103(2)(b) of the Arbitration Act 1996. However, some national courts apply the conflict of laws rule under art V(1)(a) of the Convention also at pre-enforcement stages: see eg *Della Sanara Kustvaart – Bevrachting & Overslagbedrijf BV v Fallimento Cap. Giovanni Coppola srl*, in liquidation, Corte di Appello [Court of Appeal], Genoa, Not Indicated, 3 February 1990 (1992) 17 YBCA 542–4 and *Insurance Company v Reinsurance Company*, Tribunal Fédéral [Swiss Supreme Court], Not Indicated, 21 March 1995 (1997) 22 YBCA 800–6.

[15] See eg *Consortium member A v Consortium member B* (Switzerland), Polimeles Protodikio [Court of First Instance, Multi-Judge Panel], Rodopi, Decision no 84 of 2005 (2008) 33 YBCA 552–4.

[16] Lord Collins of Mapesbury and others (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet and Maxwell 2012) Rule 64, para 16R-001.

law of the main contract applies, or should apply, to the arbitration agreement. Whereas the main authorities following the coming into force of the Arbitration Act 1996 had initially emphasized the importance of the seat,[17] English law appears now to have answered this question in the affirmative.[18] In *Sulamérica CIA Nacional de Seguros v Enesa Engenharia SA*, the Court of Appeal had to decide which law applied to an arbitration clause providing for arbitration under the ARIAS Rules in London. The arbitration clause was part of an insurance policy governed by Brazilian law. The validity of the arbitration clause was a relevant consideration to determining whether an anti-suit injunction should be maintained or discharged. The insured maintained that, under Brazilian law, the arbitration clause could be enforced only with their consent.[19]

It was common ground before the Court that that the proper law of the arbitration agreement was to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These require the court to recognize and give effect to the parties' choice of proper law, express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection.[20] There was no express choice of the law governing the arbitration agreement. The question was whether the parties had made an implied choice of such a law by choosing Brazilian law as the law applicable to the main contract or whether English law, as the law of the seat of the arbitration, governed the arbitration agreement, either by having been impliedly chosen by the parties or as the law having the closest connection with the arbitration agreement, in the absence of an implied choice.

Moore-Bick LJ, with whom Hallett LJ agreed, said:[21]

> In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention

[17] *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm), [2012] 1 Lloyd's Rep 461; *C v D* [2007] EWCA Civ 1282, obiter, applying the closest connection test to a London arbitration clause in a contract that was expressly governed by New York law; and *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530.

[18] In line with previous authorities leaning towards the extension of the choice of the law of the matrix contract to the arbitration clause: *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, paras 357–358; *Sumitomo Heavy Industries v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45; *Sonatrach Petroleum Corp v Ferrell International Ltd* [2002] 1 All ER (Comm) 627. English law is by no means alone in adopting this approach, for example see the Indian case of *National Thermal Power Corporation v The Singer Company, and Others*, Supreme Court, 1978, 7 May 1992 (1993) 18 YBCA 403–14; *Eitzen Bulk A/S v Ashapura Minechem Limited* AIR 2011 Guj 13 and *Aastha Broadcasting Network Limited v Thaicom Public Company Ltd* [2011]; *Enercon India v Enercon GMBH* [Civ App 2086/7 of 2014] (India). See also ICC Case No 2626 (1977) in S Jarvin and Y Derains (eds), *Collection of ICC Arbitral Awards, Vol I* (1974–1985) (Kluwer Law International 1994) 316; ICC Case No 6379 (1992) 17 YBCA 211–20; ICC Case No 6752 (1993) 18 YBCA 54–7.

[19] *Sulamérica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2013] 1 WLR 102, paras 1–6, 9 (Moore-Bick LJ). [20] ibid, para 9 (Moore-Bick LJ). [21] ibid, para 26.

> in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract … .

However, this was only a *rebuttable* presumption, which, on the facts, was displaced by two factors: (1) the choice of England as the seat of the arbitration; (2) the consequences that would follow if Brazilian law were to apply to the arbitration clause.[22] The second factor was particularly powerful. The arbitration clause was clearly drafted so as to bind both parties whereas, under Brazilian law, the clause would have bound only the insurers. Moore-Bick LJ said that this suggested that the parties did not intend Brazilian law to apply to the arbitration clause.[23] Having found that the presumption that the law applicable to the matrix contract also applied to the arbitration clause had been rebutted, Moore-Bick LJ did not, however, go on to consider whether the choice of London as the seat of the arbitration was an implied choice of English law as the law governing the arbitration clause. He assumed that there was no implied choice of such a law. As a consequence, he applied the closest connection test and found that the arbitration agreement 'has its closest and most real connection with the law of the place where the arbitration is to be held'.[24]

Lord Neuberger MR, as he then was, preferred not to decide, as a matter of general principle, the question whether the law of the arbitration clause is the chosen law of the contract or the law of the arbitration seat because, on the facts, under either approach the appeal would be dismissed.[25]

It has been argued that the decision in *Sulamérica* is correct on the facts of the case. There is no doubt that the ineffectiveness of arbitration clause under Brazilian law was a compelling reason against finding that the parties had, impliedly, chosen Brazilian law to govern their rights and obligations under the arbitration clause.[26] Others, however, are critical of the *Sulamérica* approach because of the unpredictability of the outcome of a full-fledged inquiry into the parties' implied choice of the law governing the arbitration clause.[27] When it comes to construction of contractual clauses, absolute certainty is hardly ever achievable. However, whether the approach in *Sulamérica* is correct or desirable in law or policy, its application is sufficiently clear. There is a presumption that an express choice of the law

[22] ibid, paras 29–31. [23] ibid, para 30. [24] ibid, para 32. [25] ibid, para 59.
[26] A Trukhtanov, 'The Proper Law of Arbitration Agreement – a Farewell to Implied Choice?' (2012) 15 International Arbitration Law Review 140.
[27] P Charles, 'The proper law of the arbitration agreement' (2014) 80 Arbitration 55, 59–60.

applicable to the main contract is an implied choice of the law governing the arbitration agreement, which can be rebutted on the facts of each individual case.

This approach was confirmed in the subsequent case of *Arsanovia Ltd & others v Cruz City 1 Mauritius Holdings*.[28] In this case, a dispute arose out of a slum clearance programme in India which was subject to considerable delay. There was a suite of contracts in relation to the programme, the relevant shareholders' agreement being governed by Indian law and providing for LCIA arbitration in London. In addition, the arbitration clause in the shareholders' agreement expressly excluded the application of certain provisions of the Indian Arbitration and Conciliation Act of 1996, in particular with respect to the seeking of interim relief in the Indian courts. Two sets of arbitral proceedings were commenced. The same arbitral tribunal was appointed in both sets of proceedings and found against Arsanovia, who challenged the awards under section 67 of the Arbitration Act 1996. Applying *Sulamérica*, Andrew Smith J decided that the arbitration agreement was governed by Indian law, that being the law governing the main contract. He even suggested, *obiter*, that the choice of the law of the main contract may be an express, rather than implied, choice of the law of the arbitration clause.[29]

The question is in fact not whether *Sulamérica* gives rise to uncertainties but whether it gives proper consideration to the expectations of the parties and to the importance that the seat plays in international arbitration. The law of the seat generally governs the arbitral procedure which, according to some, should include the substantive validity of the arbitration agreement given that such an agreement is more closely connected with the curial law than it is with the law governing the substantive rights and obligations of the parties.[30]

IV. THE SECOND CANDIDATE APPROACH: THE LAW OF THE SEAT

If the arbitration clause indicates the seat of the arbitration and, according to some commentators, even if the choice of seat is delegated,[31] there are good arguments for holding that the law of the seat applies to the arbitration agreement.[32]

Indeed, following the implementation of the Arbitration Act 1996, there appeared to be a trend of placing greater emphasis on the law of the seat.[33]

[28] *Arsanovia Ltd & others v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), [2013] 2 All ER (Comm) 1 (QB).
[29] ibid, paras 21–23.
[30] Bernardini (n 4) 200; Poudret and Besson (n 7) 258.
[31] Bernardini (n 4) 201.
[32] ibid, 200. See generally KP Berger (n 1) 301–34. On the importance of the seat in international arbitration and the problems relating to the determination of the seat, see J Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 ICLQ 517.
[33] Prior to the Arbitration Act 1996, it was considered rare for the proper law of arbitration agreement to differ from the express choice of substantive law. See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd; Sumitomo Heavy Industries Ltd v Oil and Natural Gas*

XL Insurance v Owen Corning is a prominent example.[34] A US company, XL Insurance Limited ('XL') agreed to insure Owens Corning ('Owens'), incorporated in Bermuda, against property damage, the contract being negotiated on Owens' behalf by a broker at Marsh & McLennan. The policy contained an arbitration clause stating that '[a]ny dispute, controversy or claim arising out of or relating to [the] Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Act 1996'. The governing law clause stated that the policy 'shall be construed in accordance with the internal laws of the State of New York, United States except in so far as such laws are inconsistent with any provision of this Policy'.

Owens brought an action against XL in Delaware, United States. XL applied to the English court for an order to restrain Owens from pursuing the claim in any forum other than arbitration in London, relying on the arbitration clause. The question was whether the arbitration clause was valid and enforceable. Toulson J, as he then was, noted that it was an established principle that the parties may choose the applicable law and that this may differ from the law governing their substantive obligations.[35] In contrast to the structured approach later adopted in *Sulamérica*, Toulson J directly considered the likely intentions of the parties. He regarded the reference in the arbitration clause to the Arbitration Act 1996 as indicative of the parties' intention to use the law of the seat to govern the arbitration agreement. This was particularly so given the provisions in the Arbitration Act which deal with matters of jurisdiction, such as section 30 and section 5. Thus it was held that the law of the seat was applicable to the arbitration agreement in this case.

The English courts have reached similar conclusions in other cases. *C v D*[36] concerned a dispute arising under a Bermuda form contract of insurance, which expressed New York law as the governing law of the contract and London to be the seat of any arbitration. In this case, following an arbitration award in favour of the claimant, the claimant sought to restrain the defendant from appealing the award in New York, on the basis of the US legal doctrine of 'manifest disregard of the law'. Longmore LJ devoted part of his judgment to considering the applicable law of the arbitration agreement. In his view, the question was whether, if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the law of the seat of arbitration.[37] Having reviewed the authorities on this issue, Longmore LJ answered this question in favour of the law of the seat.[38] Notably, the arbitration clause in this case

Commission, 57 (Potter J); *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446, 455. Following the Arbitration Act, see *XL Insurance Ltd v Owens Corning; C v D; Shashoua and others v Sharma* [2009] EWHC 957 (Comm); *Abuja Hotels Ltd v Meridien SAS*.

[34] *XL Insurance Ltd v Owens Corning*.

[35] Citing Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd; XL Insurance Ltd v Owens Corning*, 507–508.

[36] *C v D*.

[37] ibid, para 22.

[38] ibid, para 29.

contained strong indications that it would be governed by English law rather than New York law. Specifically, the contract provided that the arbitral decision would be 'a complete defence to any attempted appeal or litigation of such decision in the absence of fraud or collusion'. Longmore LJ considered that this provision would 'be rendered otiose if either party could say in New York that there had been a manifest disregard of New York law'.[39] Thus it was held that the law of the seat was applicable.[40] As a result of these authorities the position in England and Wales has been unclear, although this has been rectified to some extent by the judgment in *Sulamérica.*

The less controversial case is when there is no choice of the law governing the main contract. This approach has been adopted in England even after the decision of the Court of Appeal in *Sulamérica*, which clearly does not extend the rebuttable presumption of the applicability of the law of the main contract to the arbitration clause beyond cases in which there is an express choice of the law of the main contract. In *Habas Sinai Ve v VSC Steel Company Ltd*,[41] the claimant, Habas, a Turkish company, entered into a contract (through its agents, Charter Alpha Limited and Steel Park Limited) with the defendant, VSC, a Hong Kong company, for the sale by Habas of 15,000 mt of steel. No delivery was made and VSC commenced arbitration proceedings. The contract specified ICC arbitration in London but did not provide for a governing law. Hamblen J held that where the matrix contract does not contain an express governing law clause, the significance of the choice of seat of the arbitration is likely to be 'overwhelming' 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. On the facts, the arbitration agreement was therefore governed by English law even if the main contract was governed by Turkish law.[42]

But even when there is an express choice of the law of the main contract, the rebuttable presumption established in the *Sulamérica* case is by no means uncontroversial. In fact, Moore-Bick LJ himself in *Sulamérica* emphasized that the arbitration agreement is much more intimately intertwined with the procedural law than it is with the substantive law,[43] which casts doubt on the very foundation of the rebuttable presumption. After all, if the arbitration agreement is separable from the main contract and has much more to do with the procedure than with the substance of the dispute, why are the parties presumed to have chosen the law of the substance and not the law of the procedure to govern the arbitration clause?

Such arguments have persuaded the courts in other jurisdictions to diverge from the approach in *Sulamérica.* In *FirstLink Investments Corp Ltd v GT*

[39] ibid, para 28.
[40] This approach was cited with approval in *Abuja Hotels v Meridien SAS*, para 21.
[41] *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm).
[42] ibid, paras 101–103.
[43] *Sulamérica*, paras 29 and 32.

Payment Pte Ltd and others, Shaun Leong Li Shiong AR in the High Court of Singapore held that, when there is a choice of the law of the matrix contract and a choice of seat, the arbitration clause is likely to be governed by the law of the seat, even if this law is different from the law of the matrix contract.[44] Singaporean conflict of laws rules are, on this matter, the same as those of English law. Therefore, the Judge applied a three-stage inquiry, exactly as the Court of Appeal in *Sulamérica* had done. The conclusion was, however, that the choice of seat is an implied choice of the law governing the arbitration agreement. The reasons given by the Judge are the following: (1) there cannot be any inference that the parties want their rights and obligations under the arbitration clause to be governed by the same law that applies to the substance of the dispute because the two, potentially different, laws concern different legal relationships, namely the performance of the contract and the resolution of disputes when the substantive relationship breaks down;[45] (2) the natural inference would be that, when the substantive relationship breaks down, the parties' desire for neutrality comes to the fore and the law chosen as the procedural law of the arbitration takes precedence over the substantive law;[46] (3) 'the arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement';[47] (4) the importance of the seat is recognized internationally, in particular in Article V (1)(a) of the New York Convention and Articles 36(1)(a)(i) and 34(2)(a)(i) of the Model Law;[48] (5) the choice of seat determines the choice of remedies against the award, including the power of the courts to determine the jurisdiction of the arbitral tribunal and it would be reasonable for the parties to demand consistency between the substantive law and the procedure of determining the validity of the arbitration agreement.[49] *FirstLink* is but one of the many cases in different jurisdictions in which the choice of the seat is considered to prevail over the choice of the law of the matrix contract in this context.[50] The arguments supporting this approach will no doubt continue to influence courts and arbitration tribunals around the world.

While the bright-line seat test may be advantageous for the reasons given in *FirstLink*, there are many instances where the application of the law of the seat would not be appropriate. Importantly, the court may have to consider the validity of an arbitration agreement when the seat has yet to be determined or

[44] *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12.
[45] ibid, para 13. [46] ibid. [47] ibid, para 14. [48] ibid. [49] ibid, para 15.
[50] See *Matermaco SA v PPM Cranes Inc*, Legris Industries SA, Tribunal de Commerce [Court of First Instance] (2000) 25 YBCA 641–1164 (Belgium); *Owerri Commercial Inc v Dielle Srl, Gerechtshof* [Court of Appeal] The Hague, Not Indicated, 4 August 1993 (1994) 19 YBCA 703–7 and *Petrasol BV v Stolt Spur Inc*, Arrondissementsrechtbank [Court of First Instance] (1997) 22 YBCA 762–5 (Netherlands); *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*, Swedish Supreme Court, T 1881–99, 27 October 2000 (2001) 26 YBCA 291–8 (Sweden); *Insurance Company v Reinsurance Company, Tribunal Fédéral* [Supreme Court], Not Indicated, 21 March 1995 (1997) 22 YBCA 800–6 (Switzerland); *Government of the Republic of the Philippines v Philippine International Air Co* [2007] 1 SLR 278 (Singapore).

the seat can be changed in the course of arbitral proceedings even after, for example, the arbitral tribunal has ruled on the validity of the arbitration agreement. Furthermore, the argument that the choice of seat is considered to be an implied choice of law governing the arbitration agreement, is less persuasive where that choice is delegated to an arbitral institution or to the arbitral tribunal. Some argue that a delegated choice of seat is not totally divorced from the will of the parties, as they intended to delegate this choice, so that it can be imputed to the parties.[51] However, as a matter of construction, it becomes difficult to argue that the intention of the parties was that the law of the seat would apply to the arbitration agreement if they did not choose the seat, presumably either because the seat was a matter of indifference or they could not agree on it.[52] This argument also posits that the parties would have made an arbitration agreement not subject to any applicable law and, therefore, without being able to ascertain whether they were making a valid agreement. This would be absurd as it assumes that the parties made a conscious choice in favour of absolute uncertainty as to the effectiveness of their chosen method of dispute resolution. This is because, if the seat has not been agreed by the parties, it will be difficult, if not impossible, to predict with any degree of certainty where the seat will be as the institution or the tribunal can select a seat in almost any jurisdiction. It follows that the seat cannot determine the law applicable to the arbitration agreement if the choice of seat is delegated. In such a case, the law of the underlying contract arguably ought to apply, either because this is the implicit intention of the parties or because it is the one most closely connected to the arbitral agreement.[53]

V. THE THIRD CANDIDATE APPROACH: TRANSNATIONAL RULES

A third way of answering the question of the law governing the arbitration agreement is to disregard the application of a given State legal system determined on the basis of a conflict of laws analysis and to resort to transnational rules directly applicable to the arbitration clause.

In the context of arbitration, it is now widely accepted that parties may choose transnational principles to govern their substantive dispute.[54] In England and

[51] Bernardini (n 4) 200.

[52] E Gaillard and J Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 226–7; Berger (n 1) 321.

[53] This is the approach adopted in England and Wales: *International Tank and Pipe SAK v Kuwait Aviation Fuelling Co KSC* [1975] QB 224; *Mitsubishi Corporation v Castletown Navigation Ltd, The Castle Alpha* [1989] 2 Lloyd's Rep 383.

[54] Indeed, this is now expressly provided for in section 46(1)(b) of the Arbitration Act 1996. See also art 1496 of French Code of Civil Procedure, art 187(1) of the Swiss Federal Law on private international law and art 28 of the UNCITRAL Model Law. The International Law Association (ILA) expressly accepted such a choice in their 1992 Cairo Conference. ICC Case No 8502; Y Derains, *The ICC Arbitral Process Part VIII: Choice of the Law Applicable to the Contract and International Arbitration* (1995) 6 ICC International Court of Arbitration Bulletin 10, 14.

Wales, guidance was provided by the Court of Appeal in *Deutsche Schachtbau-und Tiefbohrgesellschaft v Ras al Khaimal National Oil Co*.[55] Sir John Donaldson MR, considered whether the choice was sufficiently certain and concluded that:[56]

> By choosing to arbitrate under the rules of the ICC and, in particular, article 13.3, the parties have left proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators' choice of proper law – a common denominator of principles underlying the laws of the various nations governing contractual relations – is outwith the scope of the choice, which the parties left to the arbitrators.

It follows that, if the parties can choose transnational principles to apply to the substantive contract, they can also choose such principles to apply to the arbitration agreement, which is undisputably also a contract, albeit one having as its subject matter the choice and regulation of a dispute resolution method rather than substantive rights and obligations. Indeed, the common law makes no distinction in principle between the confict of laws rules applicable to substantive contracts and to arbitration agreements.[57] What is, however, less clear is whether, in the absence of an express or implied choice by the parties, the court may apply transnational principles to determine the validity of an arbitration agreement.

In England and Wales, absent an express or implied choice of the parties, the courts have been particularly resistant to the possibility of applying rules other than those of a national legal system to arbitration agreements. The position was explained by Clarke J sitting in the High Court in *Halpern v Halpern*.[58] In that case, the court had to determine whether an arbitration agreement was governed by Jewish, English or Swiss law. There were strong indications that Jewish law was intended to apply, as it was chosen to govern both the substance of the dispute and the procedure of the arbitration. Clarke J decided that the common law principles 'require selection of the law of a country as the proper law of the agreement',[59] and thus ruled out the applicability of transnational Jewish law. This was considered to be an established rule and was thus not considered in detail, although it was partly justified on the grounds that 'the agreement to arbitrate should, itself, be enforceable under a national system of law'.[60] The English approach is an obstacle to the

[55] *Deutsche Schachtbau-und Tiefbohrgesellschaft v Ras Al-Khaimah National Oil Co* [1987] 3 WLR 1023.

[56] ibid, 1035. The judgment was subsequently reversed by the House of Lords in *DST v Rakoil* [1988] 3 WLR 230, however the choice of transnational principles to govern the substantive dispute was still accepted. [57] *Sulamérica* case, para 9. [58] *Halpern v Halpern* [2006] 2 Lloyd's Rep 83.

[59] ibid, para 52. This judgment was appealed successfully, however the Court of Appeal did not address this point in *Halpern v Halpern* [2007] EWCA Civ 291.

[60] *Halpern v Halpern* [2006] 2 Lloyd's Rep 83, para 51. This view was restated with approval in *Musawi v RE International (UK) Ltd* [2008] 1 All ER (Comm) 607, para 19.

application of transnational principles only to the extent that transnational principles are not part of a national legal system. In reality, any transnational rule, in order to be fully effective, must be recognized by the legal system which is called upon to determine the validity of the arbitration agreement. English law can, therefore, itself incorporate transnational principles and give effect to transnational principles adopted by other national legal systems.

That a transnational approach detached from any national legal system does not, currently, exist, is demonstrated by the experience of perhaps the most internationalist approach in the field of international commercial arbitration, that of French law. The French courts consider the validity of the arbitration agreement to be governed by *régles matèrielles* independent of any national legal system, even if the parties did not make any express or implied choice in this regard. In the *Dalico* case,[61] the Cour de Cassation ruled:

> … according to a substantive rule of international arbitration law, the arbitration clause is legally independent from the main contract in which it is included or which refers to it and, provided that no mandatory provision of French law or international public policy is affected, its existence and its validity depends only on the common intention of the parties, without it being necessary to make reference to a national law.

This approach has consistently been adopted in subsequent French authorities and has not been affected by recent amendments to the French Code of Civil Procedure.[62]

The international public policy referred to in *Dalico* is intended to reflect the consensus of the international business community, and includes public policy rules which, 'if not universal, [are] at least common to the various legal systems'.[63] A noteworthy example of this approach can be found in the interim arbitration award in *Dow Chemical Company v ISOVER Saint Gobain*.[64] In that case, the Tribunal with its seat in France held that the applicable ICC rules 'establish in particular, the principle of the complete autonomy of the arbitration clause […] and confer on the arbitrator the power to take any

[61] Judgment of 20 December 1993, *Municipalité de Khoms El Mergeb v Société Dalico*, 1994 Rev arb 116, 117 (French Cour de cassation civ 1e).

[62] Judgment of 8 July 2009, *Société d'études et représentations navales et industrielles v Société Air Sea Broker Ltd*, 2009 Rev arb 529 (French Cour de Cassation civ 1e); Judgment of 30 March 2004, *Société Uni-Kod v Société Ouralkali*, 2005 Rev arb 959 (French Cour de Cassation civ 1e); Judgment of 21 May 1997, *Renault v V* 2000, 1997 Rev arb 537 (French Cour de Cassation civ 1e); Judgment of 25 November 1999, *SA Burkinabe des ciments et matériaux v Société des ciments d'Abidjan*, 2001 Rev arb 165 (Paris Cour d'appel); *Société d'études et representations navales et industrielles v Société Air Sea Broker Ltd*, 2009 Rev arb 529 (French Cour de Cassation civ 1e); Judgment of 7 April 2011, 2011 Rev arb 747, 750 (Cour d'appel Paris).

[63] P Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in P Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) 257, 278.

[64] *The Dow Chemical Company v ISOVER Saint Gobain*, Interim Award, ICC Case No 4131, 23 September 1982 (1984) 9 YBCA 131.

decision as to his own jurisdiction upon the Court's determination that the arbitration will take place […] without obliging him to apply any national law whatever in order to do so'. Accordingly, the Tribunal referred only to the 'common intent' of the parties, in order to determine their jurisdiction. As such, the Tribunal applied the group of companies doctrine and considered Dow Chemical (France) and Dow Chemical (USA) to be party to the arbitration agreement by virtue of their being part of the same group of companies that had signed the agreement. In doing so, the Tribunal noted that it was not prohibited by the French legal system or by any rule of international public policy, and took into account the needs of international commerce.[65] This reasoning was expressly accepted by the Paris Court of Appeal.[66]

This approach is controversial. Some commentators criticize it because, in their view, the results are unpredictable and arbitrary.[67] Others, probably more correctly, point out that the 'transnational' principles of law do not represent an autonomous and standalone legal system but depend on their recognition by national law or public international law.[68] Indeed, the French *régles matèrielles* are rules of French law. They may be 'international' or 'transnational' because French law applies them only to international, and not domestic, arbitration and because their origin is, or is thought to be, in the practice and the requirements of the international business community, but this does not turn them into rules applicable across national legal systems regardless of their adoption by each national legal system according to its own rules of legal normativity.

Facts speak louder than words. If the French 'transnational' rules are not also recognized by the national courts having supportive or supervisory jurisdiction over the arbitration or the award, this may give rise to inconsistent results. In *Peterson Farms*, an ICC tribunal had awarded damages not only to the party to the contract, and, therefore, to the arbitration clause, but also to other companies belonging to the same corporate group. The tribunal proceeded on the basis that, even if the contract was expressly governed by Arkansas law, there was no choice of the law governing the arbitration agreement. Because the arbitration agreement is separate from the matrix contract, the tribunal would therefore determine its scope in light of the common intention of the parties. Applying the 'group of companies doctrine' adopted in *Dow Chemical*,[69] and subsequently applied in ICC awards[70] and upheld by the

[65] ibid, 136

[66] *Dow Chemical France v ISOVER Saint Gobain*, 21 October 1983, 110 (Cour d'appel Paris) Journal du droit international (Clunet) 899 (1983).

[67] M Blessing, 'Choice of Substantive Law in International Arbitration' (1997) 14 Journal of International Arbitration 39, 40–1.

[68] B Wortmann, 'Choice of Law by Arbitrators: The Applicable Conflict of Laws System' (1998) 14 Arbitration International 97, 101–2.

[69] *Dow Chemical* case, 131–137.

[70] ICC Case No 3131, award of 26 October 1979 (1984) 9 YBCA 109 and ICC Case No 5103 in S Jarvin, Y Derains and JJ Arnaldez (eds), *Collection of ICC Arbitral Awards, Vol II* (1986–1990) (Kluwer Law International 1995) 361.

French courts,[71] the tribunal found that an arbitration agreement expressed to be made between A and B could be relied upon by companies belonging to the same corporate group as A, provided that the common intention of the parties was to that effect. Langley J, however, considered that the law governing the main contract, that is, Arkansas law, also applied to the arbitration clause and that there was nothing in Arkansas law, which was in all material respects the same as English law, which justified the approach adopted by the tribunal. The principle of privity of contract meant that, unless there was an agency relationship, the tribunal had jurisdiction only on the signatory parties to the contract. On this ground, an application to set aside the award in part for lack of jurisdiction vis-à-vis non-signatory claimants was upheld under section 67 of the Arbitration Act 1996.[72]

In a similar vein, the German Federal Supreme Court held that, in order to determine whether an arbitration agreement extended to include a member of a group of companies who was a non-signatory to the agreement, the correct approach was to undertake a detailed conflict of laws analysis to determine the applicable *national* law.[73]

VI. OVERCOMING THE CHALLENGES OF A TRANSNATIONAL APPROACH

The current problems surrounding a 'transnational' approach do not mean that such an approach is not desirable as a matter of policy and principle and that, incrementally, it should not become more widely accepted.

While the French approach may currently be considered extreme and does not find favour in certain jurisdictions, including England, there are different ways of achieving the same result of excluding the unintended application of peculiar national rules invalidating arbitration agreements whereby the parties clearly intended to arbitrate.

A. The Non-Discrimination Principle

The first possibility may be defined as a non-discrimination principle. Under such an approach, a national law still applies to the arbitration agreement but with the exclusion of rules reflecting national policy interests that invalidate an arbitration agreement that would otherwise be valid as a matter of contract. Under this approach, an arbitration agreement may be invalidated only on grounds 'that can be applied neutrally on an international scale'.[74] In

[71] *KIS France SA v SA Société Générale* 31 October 1989, 1992 Rev arb 90 (Cour d'appel Paris); *Société Korsnas Marma v Société Durand-Auzias* 30 November 1988 (Cour d'appel Paris) and *Société Ofer Brothers v The Tokyo Marine and Fire Insurance Co Ltd et autres* 14 February 1989, 1989 Rev arb 691 (Cour d'appel Paris).

[72] *Peterson farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603.

[73] German Federal Supreme Court dated 8 May 2014 (Case Reference No III ZR 371/12).

[74] *Ledee v Ceramiche Ragno* 684 F2d 184 (1st Cir 1982), 187.

other words, the courts may not find that an arbitration agreement is not existent, valid or effective based on rules that are applicable solely to arbitration agreements as opposed to contracts in general. A body of decisions in the United States may be interpreted as an application of this principle. For example, in *Ledee v Ceramiche Ragno*, the US courts refused to apply a rule of Puerto Rican law, which specifically invalidated arbitration contracts in automobile dealer contracts.[75]

The case of *Rhone Mediterrannee v Lauro* is particularly instructive.[76] This case involved an appeal of an order staying litigation in favour of arbitration with its seat in Italy. The claimant, Rhone, argued that the law applicable to the arbitration agreement was the law of the seat, in Italy. An expert on Italian law claimed that an arbitration agreement calling for an even number of arbitrators, as was the case here, was null and void under this law. The US District Court noted there was considerable uncertainty in determining the applicable law in this context. However, what was clear was that 'the meaning of Article II section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is "null and void" only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, […] or (2) when it contravenes fundamental policies of the forum state. The "null and void" language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate'.[77] As such, the appeal was dismissed and proceedings were stayed in favour of arbitration. This approach to international agreements mirrors the application of the Federal Arbitration Act (FAA) in the United States, which is said to pre-empt the parochial policy interests of individual federal states. The prevailing view in the United States is that the arbitration agreement is governed by a 'body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act'.[78] This precludes the application of individual state laws, which specifically create higher standards for the validity, existence or effectiveness of arbitration agreements.

This more conservative, but still 'transnational' approach could be generalized: it is still necessary to determine a national law that governs the validity of the arbitration agreement but this is subject to minimum international standards which negate specific national policies which would invalidate an otherwise clear agreement to arbitrate. *Sulamérica* itself can be seen as an example of this approach. The Court of Appeal, having set out a presumption according to which the arbitration clause is governed by the choice of law of the matrix contract, was quick to rebut it on the ground that

[75] ibid.
[76] *Rhone Mediterranee v Achille Lauro,* 444 F Supp 481 (DVI 1982), 712 F2d 50 (3d Cir 1983).
[77] ibid, para 19.
[78] *International Paper Co v Schwabedissen Maschinen & Anlagen GmbH*, 206 F 3d 411, 417 n 4 (4th Cir 2000).

the law of the matrix contract would have made the arbitration agreement ineffective. While this has similar results to the French approach in cases such as *Dalico*, it differs in that it does not purport to require a body of international law directly applicable to the arbitration agreement. It still applies national law, provided that such laws do not create additional hurdles for the arbitration agreement to be valid. Thus, it does not suffer from the current absence of clear and definable international rules in this area.[79]

B. The Estoppel Principle

A second possibility can be described as the estoppel approach. Under this approach, a party to an arbitration agreement may be precluded from arguing that the law applicable to the arbitration agreement is one that would render the agreement non-existent, invalid, or ineffective. This can be justified as part of an overriding duty of good faith or as part of the court's inherent powers to prevent an abuse of process. These are principles recognized by virtually every major legal system, even if the precise scope and content of these principles varies across States.[80] Several US cases can be interpreted as applying this reasoning to disapply a law applicable to the arbitration agreement. The first is *Scherk v Alberto-Culver Co*. In that case, the court noted that to invalidate an arbitration agreement made with full knowledge of the facts would 'allow the respondent *to repudiate its solemn promise*'.[81] This supported the court's decision to uphold the validity of the agreement under the United States Federal Arbitration Act. These *dicta* were relied on in the controversial decision in *Chromalloy v Egypt*, where the Columbia district court ordered enforcement of an award that had been annulled at the seat of the arbitration in Egypt. The court found the argument that Egypt should not be able to 'repudiate its solemn promise to abide by the results of the arbitration' to be 'persuasive'.[82]

Subsequent decisions such as *Termo Rio*[83] and *Baker Marine*'[84] have established that the discretion to enforce an award in these circumstances is, in fact, a narrow one, and the test is whether refusing enforcement in these circumstances would violate basic notions of justice and fairness. This may be the case when the conduct of a party is incompatible with the invalidity of the arbitration agreement. In *COMMISA v Pemex*, the courts followed the approach in *Chromalloy* and upheld the validity of an arbitration agreement

[79] G Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 552–9. [80] BM Cremades, 'Good Faith in International Arbitration' (2013) 27 AmUIntlRev 761.
[81] *Scherk v Alberto-Culver Co*, 417 US 506, 519, 94 S Ct 2449, 2457, 41 L Ed 2d 270 (1974) (emphasis added).
[82] *In Re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F Supp 906 (DC Cir 1996)
[83] *Termo Rio SAESP v Electranta* SP 06–7058, 2007 WL 1515069 (DC Cir 25 May 2007)
[84] *Baker Marine Ltd v Chevron Ltd* (1999) 14(8) Mealey's International Arbitration Report D-1–D-2.

after the award had been annulled at the seat by the courts of Mexico.[85] A significant factor in the decision was that Pemex's conduct 'showed that it considered itself subject to arbitration' and that none of their initial objections to jurisdiction reflected the domestic law that was eventually applied to invalidate the agreement. The court considered that this helped to give 'COMMISA the "settled expectation" that its dispute could be arbitrated'. To deny the validity of the arbitration agreement at a later stage would therefore violate basic notions of justice and fairness.

While these cases do not cite the principle of estoppel explicitly, the language used, for example the references to 'fairness', 'promise' and 'expectations', betray an estoppel-type reasoning. Certain French decisions also reveal hints of this reasoning. For example, in *Ministry of Public Works v Société Bec Frères*, Bec Frères had sought enforcement of an award in France, despite it being annulled at the seat in Tunisia on the basis of a domestic statute prohibiting arbitration clauses in domestic public contracts. As we have seen, the French courts adopt a transnational approach to the arbitration agreement, and therefore it was not strictly necessary to apply the estoppel approach. Nonetheless, the court noted that 'by stipulating an arbitration clause, the Ministry of Public Works, which has subjected itself to the jurisdiction of the arbitrators, has also accepted that their award may be granted leave for enforcement and has waived its immunity from jurisdiction'.[86] It could be argued that the party was effectively estopped from going back and claiming the arbitration agreement was invalid under domestic law, having accepted the jurisdiction of the tribunal by signing the arbitration agreement.

The effect of these decisions was much the same as the examples of the non-discriminatory principle provided above—peculiar domestic laws used to invalidate the arbitration agreement were disapplied by the enforcing court.

C. *The Validation Principle*

The third option is well known and is generally referred to as the validation approach. Arbitral tribunals and courts around the world, being presented with an agreement clearly evidencing an unequivocal intention of the parties to arbitrate, will be slow in finding that the agreement is invalid based on the technicalities of the applicable law. When one potentially applicable law has this effect, they will look for another applicable law under which the agreement is valid. This approach is often called the validation principle and is the reflection of a well-established contract law doctrine whereby a clause in a contract must be construed so as to be given effect instead of being

[85] *Corporación Mexicana de Mantenimiento Integral, S De RL de CV v Pemex-Exploración y Producción*, No 10 Civ 206 (AKH), 2013 WL 4517225, (SDNY 27 August 2013).

[86] *Ministry of Public Works v Société Bec Fréres* (Cour d'Appel de Paris) (1997) 22 YBCA 682, 686.

invalidated.[87] A statutory example of such an approach is Article 178(2) of the Swiss Federal Private International Law Act, which provides: 'As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law.' This approach is increasingly popular with national courts as well as arbitral tribunals. For example, in the Award in ICC Case No 11869 it was stated that, 'arbitration agreements should be interpreted in a way that leads to their validity in order to give effect to the intention of the parties to submit their disputes to arbitration'.[88] The decisions in the United States courts in this area can also be interpreted as an unstated application of the validation principle. For example, in *Rhone Mediterranee v Lauro*, it was said that 'the policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate'.[89] In Austria, the courts have expressly relied on the validation principle, stating that 'if the wording of the declaration of intent allows for two equally plausible interpretations, the interpretation which favours the validity of the arbitration agreement […] is to be preferred'.[90] *Sulamérica* is most consistent with this approach.[91] While the Court of Appeal applied an orthodox common law conflicts analysis, one of the key factors it considered in choosing English law was that this gave effect to the arbitration agreement and displaced the law that invalidated it.

VII. CONCLUSIONS

The problem of the law governing the validity of the arbitration agreement is more acute than ever. The cases of *Sulamérica* in the English Court of Appeal and of *FirstLink* in the High Court of Singapore demonstrate that leading arbitration jurisdictions around the world can come to diametrically opposite results. In particular, the alternative between the law chosen by the parties to govern their substantive legal relationship and the law of the seat of the arbitration is unlikely to be settled any time soon at international level. This article suggests that, without embracing extreme approaches that purport to determine the validity of the arbitration agreement without reference to any national legal system, a more 'transnational' approach should be encouraged and may emerge based on principles on which international convergence would be desirable:

[87] See extensively Born (n 79) 541–8 and Berger (n 1) 312–13.

[88] Award in ICC Case No 11869 (2011) 36 YBCA 47, 57; see also J Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' in van den Berg (n 4) 114, 139–40.

[89] *Rhone Mediterranee v Achille Lauro*, para 21.

[90] Judgment of 2 August 2008 (Austrian Oberster Gerichtshof) (2009) 34 YBCA 404, 405.

[91] S Pearson, '*Sulamérica v Enesa*: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement' (2013) 29 Arbitration International 115.

(1) when the parties choose the seat of the arbitration in the arbitration agreement, there are strong arguments to hold that the law of the seat should apply to the arbitration agreement. In *Sulamérica*, the Court itself took the view that the arbitration agreement is more closely connected with the seat of the arbitration rather than with the substantive contract, which begs the question as to why parties who have expressly chosen the seat are instead presumed to have chosen, as the law applicable to the arbitration agreement, a law which has a weaker relationship with the arbitration agreement. This approach applies, *a fortiori*, when the arbitration agreement contains a choice of seat but there is no choice of the main contract;
(2) when the parties have not chosen the seat of the arbitration, the *Sulamérica* approach is correct. In the absence of a choice of seat in the agreement, the closest connection factor points to the law applicable to the main contract, whether this is chosen by the parties or determined by the court under other conflict of laws rules;
(3) national laws should develop a non-discrimination principle, whereby courts should refuse to apply those rules of the law applicable to the arbitration agreement which specifically invalidate arbitration agreements in a way that goes beyond general principles of contract law that can be applied neutrally on an international scale;
(4) further, or in the alternative to the non-discriminatory approach, courts should develop, or apply more robustly, the estoppel principle, whereby a party whose conduct has been incompatible with the invalidity of the arbitration agreement should be precluded from relying on such invalidity at a later stage;
(5) further, or in the alternative to the non-discriminatory and/or the estoppel approach, courts should develop, or apply more robustly, the validation principle. There is a presumption that the parties intended their choice of law to uphold the validity of the arbitration agreement. Therefore, among several potentially applicable laws, the arbitration agreement should be governed by a law under which it is valid and most effective rather than by a law under which it is invalidated or rendered less effective.

The rules described above are, and will remain, rules of national law. Their transnational nature depends on their being developed in a dialogue among arbitral tribunals and courts around the world and being shared, over time, by more and more jurisdictions. Party autonomy has a fundamental role to play in this process of international convergence. If parties more and more often choose the law applicable to the arbitration agreement itself, this will give rise, incrementally, to a recognizable and well-established body of jurisprudence in the few jurisdictions the laws of which will be most frequently chosen. Other courts may take guidance from this jurisprudence, which will in turn

promote harmonization and convergence of the approach of national courts to this issue. This is precisely what happened in the well-known case of *Fiona Trust*, where the House of Lords noted that 'the trend of recent authority has risked isolating the approach that English law takes to the wording of [arbitration] clauses from that which is taken internationally'. It therefore considered that 'it makes sense in the context of international commerce for decision about [arbitration clauses'] effect to be informed by what has been decided elsewhere'.[92] The court went on to look at cases from Germany and the United States in order to provide guidance as to the true intention of the parties in their agreement. This, together with tighter and clearer drafting, will in itself facilitate the emergence of rules and principles that could over time converge and give more meaningful substance and more precise contours to the admittedly still vague and underdeveloped transnational principles applicable to the validity of the arbitration agreements.

[92] *Fiona Trust v Privalov*, paras 29–33.