

CHAPTER 9

What Is the Governing Law of the Arbitration Agreement? A Comparison Between the English and Swedish Approaches

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Parties rarely make a specific choice of the governing law of the arbitration agreement. Which law is applicable can, however, have a considerable influence over the outcome of the arbitration. This issue was considered in detail by the UK Supreme Court in *Enka v. Chubb* [2020] UKSC 38, and it was also the subject of a fairly recent case in the Svea Court of Appeal (Judgment of the Svea Court of Appeal, 19 December 2019, Case T 7929-17).

This chapter compares and contrasts the English and Swedish approaches, which differ markedly from each other. The authors find fault with both approaches and suggest ways in which both could be improved. Meanwhile, it is suggested that parties would avoid potential issues by making clear that their choice of governing law in the main contract also relates to the arbitration agreement itself.

§9.01 INTRODUCTION

What is the governing law of the arbitration agreement? This seems at first glance to be a rather straightforward question. It may also initially seem to be a question of somewhat limited interest.

But first impressions can be misleading.

In fact, it is both a complex and important question. The question is complex since there are several different ways of approaching it. The question is important since the governing law of the arbitration agreement can have a considerable influence over the outcome of the arbitration.

This issue has been dealt with in particular depth over recent years by the English courts, most recently by the UK Supreme Court¹ in *Enka v. Chubb* [2020] UKSC 38.² This article will compare the English approach with the approach that applies in Sweden. Why England? – because the English approach has been widely publicised. Why Sweden? – because this comparison is a fitting subject for the Stockholm Arbitration Yearbook, and also because the English and Swedish approaches are markedly different from each other.

The reader is invited to consider which approach is preferable.

§9.02 SETTING THE SCENE – SOME BACKGROUND OBSERVATIONS

[A] Three Choices of Law in Arbitration

A standard lecture on choice of law in arbitration starts with the basic observation that there are three choices of law that need to be considered in the arbitration context:³

- (a) the choice of law of the main agreement between the parties, being the law that governs the contractual rights and obligations of the parties, i.e., the *lex contractus*;
- (b) the choice of law of the arbitration agreement; and
- (c) the procedural law that governs the arbitration (sometimes also referred to as the ‘curial law’), which in almost all cases is the arbitration law of the seat of arbitration, i.e., the *lex arbitri*.⁴

1. As many readers will know, but some may not, the UK Supreme Court is the highest court for all three jurisdictions of the United Kingdom (England & Wales, Scotland, and Northern Ireland).

2. Some minor changes were made to the UK Supreme Court’s judgment on 15 March and 12 July 2021, as noted on the Court’s website (<https://www.supremecourt.uk/cases/uksc-2020-0091.html>).

3. It is notable that Lords Hamblen and Lord Leggatt, who gave the judgment of the majority in *Enka v. Chubb*, also started their judgment with this observation.

4. Section 2(1) of the English Arbitration Act 1996 (referred to hereinafter as the ‘English Arbitration Act’) and section 46 of the Swedish Arbitration Act (SFS 1999:116) (referred to hereinafter as the ‘Swedish Arbitration Act’) provide that the provisions of those Acts apply where the seat of arbitration is in England and Sweden, respectively, although there are some additional details that ought to be mentioned for completeness:

- In the case of the English Arbitration Act 1996, it is Part I of that Act that applies, and Part I applies where the seat of arbitration is in England and Wales or Northern Ireland.
- In the case of the Swedish Arbitration Act, the previous wording provided that the Swedish Arbitration Act applied to arbitrations taking place in Sweden; this was interpreted by the Swedish Supreme Court as referring to the seat of arbitration (*see* NJA 2010 p. 508), but the wording was clarified in connection with the revisions to the Swedish Arbitration Act that were made in 2018 (*see* SFS 2018:1954 and Prop. 2017/18:257).

[B] The Doctrine of Separability: Why the Main Agreement and the Arbitration Agreement Are Two Separate Agreements

In most cases, of course, the main agreement and the arbitration agreement form part of the same written contract.⁵ In those circumstances, the arbitration agreement is generally found in the dispute resolution clause of the contract. However, as a legal fiction, the arbitration agreement is deemed to be a separate agreement; pursuant to the doctrine of the separability of the arbitration agreement, this fiction allows the arbitration agreement to remain in place even though the main agreement may be found to be invalid.⁶

It follows that the main agreement and the arbitration agreement should be considered separately.⁷ It also follows that the governing law of the main agreement may be different from the governing law of the arbitration agreement.

[C] Two Layers of Procedure: The Distinction Between the Arbitration Agreement and the *Lex Arbitri*

Before turning in more detail to the issues surrounding the governing law of the arbitration agreement, it is also relevant to consider the distinction between the arbitration agreement and the *lex arbitri*.

It is helpful to consider the arbitration agreement and the *lex arbitri* as two layers of arbitration procedure; the arbitration agreement provides the first layer of procedure that is chosen by the parties, while the *lex arbitri* provides the second layer of procedure, including both non-mandatory rules that apply in the absence of any such choice and mandatory rules that apply in any event.⁸

5. Sometimes, the parties enter into a separate arbitration agreement, but this is comparatively rare. It happens in particular when the parties agree to arbitrate after the dispute arises, or where there are several different agreements that are subject to a common arbitration agreement.

6. Both the English Arbitration Act and the Swedish Arbitration Act include express provisions confirming the separability of the arbitration agreement:

- English Arbitration Act, section 6: 'Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.'
- Swedish Arbitration Act, section 3: 'When the validity of an arbitration agreement which constitutes part of another agreement must be determined in conjunction with a determination of the jurisdiction of the arbitrators, the arbitration agreement shall be deemed to constitute a separate agreement' (in-house translation).

7. Whether they should be considered separately for all purposes is an issue that will be considered in more detail below.

8. The distinction between mandatory and non-mandatory provisions is particularly evident in the English Arbitration Act – see section 4 of that Act and the list of mandatory provisions in Schedule 1 of that Act.

[1] *The Arbitration Agreement*

The arbitration agreement is the parties' agreement to resolve their disputes by way of arbitration.

Some arbitration agreements are very brief.⁹ However, in most cases, the parties go further by regulating in some detail the scope of the arbitration agreement and the procedure. Thus, the arbitration agreement will typically deal with the following issues:

- the scope of the arbitration agreement, i.e., which issues are deemed to fall within the scope of the arbitration agreement;
- whether the arbitration will be administered by an arbitration institution;
- any agreed rules of arbitration;
- the number of arbitrators;
- the language to be used in the arbitration; and
- the seat of arbitration.

In some cases, the arbitration agreement will also include express (or implied) obligations of confidentiality as between the parties.

[2] *The Procedural Law of the Arbitration (The Lex Arbitri)*

As noted above, the procedural law of the arbitration is in most cases the arbitration law of the seat of arbitration.¹⁰ It follows, by choosing the seat of arbitration, the parties choose the procedural law of the arbitration. In most seats of arbitration, this arbitration law is to be found in a specific Arbitration Act, together with related case law and legal doctrine.

The procedural law of the arbitration fills in the gaps that may have been left open by the parties in their arbitration agreement. Thus, *inter alia*:

- the procedural law of the arbitration provides for the courts of the seat of arbitration to carry out some of the roles that would otherwise be taken by an arbitral institution,
- the procedural law of the arbitration includes default rules that apply in the absence of a choice by the parties of agreed rules of arbitration,

9. For example, in *Tritonia Shipping Inc v. South Nelson Forest Products Corp* [1966] 1 Lloyd's Rep 114, a clause providing merely for 'arbitration to be settled in London' was enforced.

10. The seat of arbitration is the legal or juridical place of arbitration (section 3 of the English Arbitration Act; section 47 of the Swedish Arbitration Act), but the parties can agree that the hearings can take place at a different location, including in a different country.

It is also possible for the parties to choose one country as the seat of arbitration but to make the arbitration subject to the procedural rules of another country. In such circumstances, the procedural rules of the seat of arbitration will apply insofar as they are mandatory, but otherwise the parties' choice of procedural law will prevail. To have the arbitration governed by two different procedural laws is, however, unsatisfactory and should be avoided.

- the procedural law of the arbitration includes default rules concerning the number of arbitrators,
- the procedural law of the arbitration sometimes also includes default rules concerning the language to be used in the arbitration, and
- in the absence of a choice by the parties of the seat of arbitration, parties can ask a court to determine the seat of arbitration.¹¹

As mentioned above, the seat of arbitration also provides mandatory rules of procedure that apply notwithstanding the parties' agreement. Such rules deal mainly with the role of the courts at the seat of arbitration, including rules concerning the challenge and set-aside of arbitral awards. Depending on the seat of arbitration, there can also be other matters that the legislature has considered to be mandatory.¹²

It is also important to note that the seat of arbitration determines the nationality of the arbitral award for the purposes of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Article I of that Convention provides for 'the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought'. It follows that, for example, where the seat of arbitration is in Sweden, the arbitral award will be deemed to be a Swedish award for the purposes of the New York Convention, and where the seat of arbitration is in England, the arbitral award will be deemed to be an English award for those purposes.¹³

11. Parties are particularly advised to choose a seat of arbitration since in the absence of such a choice it is unclear which court should determine this issue.

12. Such details vary from seat to seat. For example:

- Section 40 of the Swedish Arbitration Act provides that the tribunal is not permitted to withhold the award pending the payment of its fees. By contrast, section 56 of the English Arbitration Act gives express power to the tribunal to refuse to deliver an award to the parties except upon full payment of the fees and expenses of the arbitrators, subject to certain provisions that enable parties to apply to the court.
- Section 60 of the English Arbitration Act provides that an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen. There is no such provision in the Swedish Arbitration Act.

13. Such nationality is deemed to conform to the seat of arbitration, even where the arbitral award is actually signed in a different jurisdiction. There was previously some doubt about this issue, but at least in both England and Sweden this point is now settled:

- Section 53 of the English Arbitration Act provides that, unless otherwise agreed, where the seat of arbitration is in England & Wales or Northern Ireland, any award shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties. This section was expressly enacted in order to reverse the decision in *Hiscox v. Outhwaite* [1992] 1 AC 562 – see the DAC Report, para. 253.
- Section 52, para. 2 of the Swedish Arbitration Act provides that for the purposes of that Act an award shall be deemed to have been made in the country where the seat of arbitration is situated. See also the judgment by the Swedish Supreme Court in NJA 2010 p. 508, at para. 4 of the Supreme Court's judgment, criticising an earlier decision of the Svea Court of Appeal in RH 2005:1 ('Titan').

§9.03 GOVERNING LAW ISSUES GENERALLY

[A] A Typical Example

It is most common, and generally most appropriate, for the parties to choose the same law to govern both substantive and procedural issues in the arbitration.

For example, the parties might choose Swedish law as the governing law of the main agreement and Stockholm as the seat of arbitration. In this example, Swedish law is the *lex contractus* which governs the substantive rights and obligations of the parties, and Swedish law is also the *lex arbitri*, being the arbitration law of the seat of arbitration.¹⁴ It is generally appropriate to choose the same substantive and procedural law since that means that the lawyers and the arbitrators only need to concern themselves with one system of law (this situation will be referred to as ‘Example A’ below).

The situation becomes more complicated if the parties choose different laws. To change the example, the parties might choose English law as the *lex contractus* and Stockholm as the seat of arbitration. In this situation, English law is the *lex contractus*, governing the substantive rights and obligations of the parties, and Swedish law is the *lex arbitri*, being the arbitration law of the seat of arbitration. Here, the lawyers and the arbitrators need to be able to deal with two systems of law, which complicates the arbitration in a number of respects.¹⁵ (this situation will be referred to as ‘Example B’ below.)

[B] Express Choice of the Governing Law of the Arbitration Agreement?

Notably, in both of these examples, the parties have not expressly chosen the governing law of the arbitration agreement. As readers will know, it is in fact most unusual for parties to make an express choice of the governing law of the arbitration agreement.

By way of further explanation, parties often include a choice of law clause in their contract, but the choice of law in that clause is almost always worded in general terms as governing the contract as a whole. It is very rare for the choice of law clause to state that the parties specifically choose a governing law of the arbitration agreement. Another alternative would be for there to be a separate choice of law provision as part of the arbitration clause by which the parties choose the governing law of the arbitration agreement, but again it is very rare for parties to include such a provision in their contract.

14. See *supra* n. 4.

15. Although of course some disputes are determined entirely on the facts, both substantive and procedural legal issues can be determinative. In practice, if one party decides to take procedural points (in this situation, by involving Swedish lawyers regarding issues of Swedish arbitration law), then the other party is also required to respond to such points, although some parties make a deliberate choice to ignore the specifics of the *lex arbitri* in this situation.

[C] The Governing Law of the Arbitration Agreement in the Absence of an Express Choice

So, what is the governing law of the arbitration agreement in Example A? The answer in this example, clearly, is Swedish law, for the simple reason that there is no other law to choose from in these circumstances.

Example B is somewhat more complex since two systems of law have been chosen. As noted above, it is very rare for the parties to make an express choice of the governing law of the arbitration agreement, and it is accordingly necessary for the choice of law to be inferred. There are two main schools of thought as to which law is the governing law of the arbitration agreement in these circumstances:¹⁶

- A simple solution is to apply the agreed choice of law in the contract to both the main agreement and the arbitration agreement. Even if the parties have not expressly stated the governing law of the arbitration agreement, it may often be inferred that the parties intended their choice of law to apply to every clause of the contract, including the dispute resolution clause that contains the arbitration agreement. In Example B, this would mean that English law would be the governing law of the arbitration agreement. This can be referred to as the ‘main contract’ approach.
- Alternatively, it might be said that the governing law of the arbitration agreement should be deemed to be the same as the procedural law of the arbitration, i.e., the *lex arbitri*. The rationale for this approach is that both the arbitration agreement and the *lex arbitri* deal with procedural issues. In Example B, this would mean that Swedish law would be the governing law of the arbitration agreement. This can be referred to as the ‘seat’ approach.¹⁷

Broadly, English law adopts the first approach, while Swedish law adopts the second approach (although, as will be seen, the details in both jurisdictions are rather more complex). Thus, as was mentioned at the start of this article, the English and Swedish approaches are markedly different from each other.

[D] Why Is This Important?

The reader may be wondering at this point whether this somewhat esoteric choice of law issue is of largely academic importance, or whether in some circumstances it may be of real practical importance.

16. See, e.g., Julian Lew, ‘The Law Applicable to the Form and Substance of the Arbitration Clause’, in Albert Jan Van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, Volume 9, International Council for Commercial Arbitration (ICCA) Congress Series, 114, 142-143 (Kluwer Law International; ICCA & Kluwer Law International 1999).

17. The approach that the law of the seat of the arbitration shall govern the arbitration agreement has been adopted in the London Court of International Arbitration (LCIA) Rules. See LCIA Arbitration Rules, Article 16.4 (1 October 2020).

The answer is that there are various situations in practice where it is necessary to construe the meaning and effect of the arbitration agreement and where the choice of the governing law of the arbitration agreement can be determinative. For example:

- (a) It is quite often necessary to determine the scope, interpretation¹⁸ and effect of the arbitration agreement. This issue can arise *inter alia* where the arbitration agreement is invoked as a bar to court proceedings, or where a challenge is made to the arbitral tribunal's jurisdiction, or where a challenge is made to the arbitral award, or where enforcement proceedings are contested.¹⁹
- (b) Sometimes questions arise concerning the identity of the parties to the arbitration agreement, and (depending on the specific circumstances) this is also an issue that can be determined by the governing law of the arbitration agreement.²⁰
- (c) The choice of governing law is also particularly important if the arbitration agreement would be invalid under one law but not another.²¹
- (d) One unusual situation, which nevertheless features rather often in some of the cases in this area, is where the parties have chosen two different forms of dispute resolution – e.g., arbitration in Sweden and litigation in England – and where it is necessary to determine the meaning and effect of the parties' choice in the particular circumstances of the case at hand.²²
- (e) The governing law of the arbitration agreement can also be of importance in circumstances where the governing law includes an implied term – for example, an implied term of confidentiality.²³

18. This includes, in theory, the interpretation of any arbitration rules that are adopted by the parties and incorporated by reference into their arbitration agreement. It is interesting to note in this context, however, that the LCIA Rules of Arbitration 2020 provide that those rules 'shall be interpreted in accordance with the laws of England', notwithstanding that the arbitration agreement may be governed by a different law (see Articles 16.4 and 16.5 of the LCIA Rules of Arbitration 2020).

19. It is notable that this was the principal issue in the *Enka v. Chubb* case, discussed below. As the Supreme Court judgment makes clear, the parties appear to have accepted that English law interpreted the arbitration agreement more widely than Russian law, in particular since English law regarded tort claims as falling within the scope of the arbitration agreement. It was for this reason that the issue of whether the arbitration agreement was governed by English or Russian law was of such importance. See the Supreme Court's judgment, para. 194.

20. See, e.g., *Petersen Farms Inc v. C&M Farming Ltd* [2004] EWHC 121, which concerned the question of whether the 'group of companies' doctrine applied under English law.

21. This situation has occurred in some English cases, notably *Hamlyn & Co v. Talisker Distillery* [1894] AC 202 (where the arbitration clause was valid under English law but invalid under Scottish law), and *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia* [2012] EWCA Civ 638 (where the arbitration clause was valid under English law but invalid under Brazilian law).

22. This situation arose in the Svea Court of Appeal Case T 7929-17 of 19 December 2019, as discussed further below.

23. Under English law, there is an implied obligation of confidentiality arising out of the nature of arbitration itself not to disclose or use for any other purposes documents prepared for, used or disclosed during the course of an arbitration: *Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 WLR 314 (CA), *Emmott v. Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, *Glidepath BV v. Thompson* [2005] EWHC 818 (Comm), *Chartered Institute of Arbitrators v. B, C, D* [2019]

§9.04 THE ENGLISH APPROACH

[A] The General Approach

The English approach generally gives priority to the *lex contractus*.

There is substantial authority to support this ‘main contract’ approach. As Professor Julian Lew has explained:

There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause.²⁴

This view is also accepted by *Redfern & Hunter on Arbitration*, who state:

Since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause. If the parties expressly choose a particular law to govern their agreement, why should some other law – which the parties have not chosen – be applied to only one of the clauses in the agreement, simply because it happens to be the arbitration clause?²⁵

The answer to this rhetorical question is that the doctrine of separability treats the arbitration clause as a separate agreement. However, Professor Lew refers to a position stated by Yves Derains in which he explains:

[t]he autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other as evidenced by the fact that the acceptance of the contract entails acceptance of the clause, without any other formality.²⁶

EWHC 460 (Comm). It is clear from the case law that such confidentiality applies by reason of a term implied by law ‘as a necessary incident’ of the arbitration agreement (to quote from Potter LJ in the *Ali Shipping* case). It has also been suggested that this implied agreement is ‘really a rule of substantive law masquerading as an implied term’ (*Emmott v. Michael Wilson* per Lawrence Collins LJ at paras 84 and 106).

Under Swedish law, it is interesting to note NJA 2000 p. 538 (Bulbank) in this context. In that case, the contract was expressly governed by Austrian law, but there was no express agreement regarding the governing law of the arbitration agreement. The Swedish Supreme Court accordingly found that the arbitration agreement was governed by Swedish law, and the court went on to find that there was no implied obligation of confidentiality upon the parties to an arbitration agreement governed by Swedish law.

24. Lew, *supra* n. 16 at 143.

25. Blackaby, Partasides, Redfern and Hunter, *Redfern and Hunter on International Arbitration*, 158 (6th ed., Oxford University Press 2015).

26. Lew, *supra* n. 16 at 143.

The view that an arbitration agreement shall be governed by the law of the substantive contract also seems to have been adopted by the International Chamber of Commerce (ICC) arbitrators in a number of cases.²⁷

[B] *Enka v. Chubb – An Unusual Case*

[1] *Introduction*

As has already been noted, the UK Supreme Court recently had occasion to consider the law in this area, in the widely publicised decision of *Enka v. Chubb* [2020] UKSC 38.²⁸ The central issue in this case was which law governs the arbitration agreement when the governing law of the contract containing the arbitration clause differs from the law of the seat of the arbitration.²⁹

In short, the UK Supreme Court upheld the traditional English approach, finding that, where the law applicable to the arbitration agreement is not specified, a choice of the governing law of the main contract will generally be inferred to apply to an arbitration agreement which forms part of that contract. The UK Supreme Court further held that the choice of a different country as the seat of the arbitration is not, without more, sufficient to negate this general inference. On the other hand, if the parties have not chosen the governing law of the main contract, the UK Supreme Court held that the arbitration agreement should be governed by the law with which it is most closely connected, and that where the parties have chosen a seat of arbitration, this will generally be the law of the seat.³⁰

Interestingly, however, the Court of Appeal judgment, from which the appeal was made to the UK Supreme Court, took a very different approach in this case. As Lords Hamblen and Leggatt state in paragraph 4 of their majority judgment in the UK Supreme Court:

the Court of Appeal considered that ‘the time has come to seek to impose some order and clarity on this area of the law’ (para 89) and held that, unless there has been an express choice of the law that is to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat, as a matter of implied choice, subject only to any particular features of the case demonstrating powerful reasons to the contrary (para 91).

The appellant in the case argued that this conclusion was ‘heterodox and wrong’.³¹ The UK Supreme Court seem to have agreed.

27. For an account of relevant ICC Arbitral Awards see Lew, *supra* n. 16 at 143-144 in which he describes the following cases: Case No. 2626, Case No. 6379, Case No. 6752, Case No. 6840 and Case No. 5505.

28. *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38.

29. The UK Supreme Court judgment is over hundred pages long and it is impractical to give an account of all the complex details mentioned. Nevertheless, we will attempt to summarise the main issues discussed in the judgment.

30. It is notable that this part of the finding moves away from the traditional ‘main contract’ approach.

31. The judgment of Lords Hamblen and Leggatt, at para. 5.

[2] *The Background Facts and Circumstances*

The background of the case is as follows. Following a fire in a power plant in Russia, the insurer OOO Insurance Company Chubb ('Chubb Russia') acquired subrogated rights of the owner of the power plant to claim compensation against third parties, including *inter alia* Enka Insaat Ve Sanayi AS ('Enka'), a Turkish engineering company and a subcontractor in the construction project that was allegedly liable for the fire. Chubb Russia brought proceedings against Enka in the Russian courts. However, pursuant to an assignment agreement, the owner had been given rights to claim against Enka pursuant to a main contract between Enka and the main contractor, which included an ICC arbitration clause providing for arbitration in London. The governing law of the contract was not specified in the agreement, nor was the governing law of the arbitration agreement specified.

Thus, the English courts had jurisdiction by virtue of the parties' choice of London as the seat of arbitration,³² and English law was the *lex arbitri*,³³ but there was no choice of the governing law of the main agreement (the *lex contractus*) nor of the governing law of the arbitration agreement.

Enka filed a motion with the Russian court seeking dismissal of Chubb Russia's claim on the basis that the claim fell within the scope of the arbitration agreement. However, the Russian court refused to grant Enka's motion for dismissal. At the same time, the Russian court appears to have refused Chubb Russia's claims on the merits.³⁴

Both parties filed appeals in the Russian proceedings, but meanwhile Enka brought an arbitration claim³⁵ in the Commercial Court in London on 16 September 2019 seeking an anti-suit injunction to restrain Chubb Russia from further pursuing the Russian proceedings on the ground that these proceedings were in breach of the arbitration agreement. At first instance, the Commercial Court declined to grant an interim anti-suit injunction and instead ordered an expedited trial. In a judgment dated 20 December 2019, the judge, Andrew Baker J, dismissed Enka's claims on the basis that, in his opinion, the appropriate forum to decide whether Chubb Russia's claim fell within the arbitration agreement was the Moscow Arbitrazh Court.

On 29 April 2020, the Court of Appeal allowed Enka's appeal and issued an anti-suit injunction restraining Chubb Russia from continuing the Russian proceedings. On the governing law issue, the Court of Appeal held that, unless there has been an express choice of the law that is to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat, as a matter of implied choice. The Court of Appeal further held that there was no express choice of

32. Pursuant to CPR Rule 62.5(1)(c) of the Civil Procedure Rules, the court may give permission to serve an arbitration claim form out of the jurisdiction of England & Wales where the claimant seeks a remedy or requires a question to be decided by the court affecting an arbitration or an arbitration agreement and where the seat of arbitration is in England. *See also* paras 19-20 of the Court of Appeal judgment ([2020] EWCA Civ 574).

33. *See supra* n. 4.

34. These details are taken from the judgment of Lords Hamblen and Leggatt, at paras 13-15.

35. That is, a claim pursuant to Part 62 of the Civil Procedure Rules of the English courts, which provides a specific procedure for bringing claims before the court relating to arbitration matters.

law in this case and that the arbitration agreement was therefore governed by English law.

Meanwhile, Enka had commenced arbitration pursuant to the arbitration clause, seeking a declaration from the arbitral tribunal that Chubb Russia's claims fell within the scope of the arbitration agreement.

Chubb Russia appealed to the UK Supreme Court on 26 May 2020, and the appeal was expedited and heard on 27 and 28 July 2020, with judgment subsequently given on 9 October 2020. As Lord Hamblen and Leggatt stated in their joint judgment at paragraph 24, this timing was impressively quick:

It is a striking feature of the English proceedings that the trial, the appeal to the Court of Appeal and the appeal to the Supreme Court have all been heard in just over seven months. This is a vivid demonstration of the speed with which the English courts can act when the urgency of a matter requires it.

By a majority (three out of five judges, i.e., Lord Hamblen and Leggatt, with whom Lord Kerr agreed), the UK Supreme Court dismissed the appeal, but as will be seen below the UK Supreme Court came to a different view to the Court of Appeal on the central issues concerning the governing law of the arbitration agreement.

[3] *The UK Supreme Court's General Rule That the Arbitration Agreement Is Governed by the Lex Contractus*

The UK Supreme Court held that in such situations where the law applicable to the arbitration agreement has not been specified, but where the parties have chosen the law to govern the contract containing the arbitration agreement, this choice will generally apply to the arbitration agreement as an implied choice of law.³⁶

Under the heading 'Splitting the contract', the majority of the Supreme Court held that it is 'generally reasonable to assume that parties would intend or expect their contract to be governed by a single system of law', and that this assumption 'applies to an arbitration clause, as it does to any other clause of a contract'.³⁷ Furthermore, and crucially, the majority of the Supreme Court held that 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'.³⁸ The court added that the separability principle 'is a legal doctrine and one which is likely to be much better known to arbitration lawyers than to commercial parties'.³⁹ For commercial parties, 'a contract is a contract; not a contract with an ancillary or collateral or interior arbitration agreement', and they would therefore 'reasonably expect a choice of law to apply to the whole of that contract'.⁴⁰

36. The majority judgment, paras 43-54.

37. The majority judgment, paras 39-40.

38. The majority judgment, para. 41.

39. The majority judgment, para. 53.

40. The majority judgment, para. 53.

The Supreme Court also referred to leading commentaries and case law, as well as considerations of principle and some international authorities, all supporting the proposition that it is natural to interpret an express governing law clause in the contract as applying to the arbitration clause.⁴¹

[4] *Criticism of the Court of Appeal's Approach*

Against this background, the majority of the Supreme Court went on to criticise the approach of the Court of Appeal. As mentioned above, the Court of Appeal came to a contrary conclusion in the present case and held that there is a 'strong presumption' that the parties have, by implication, chosen the law of the seat of the arbitration to govern the arbitration agreement.⁴² This was said to be the general rule, 'subject only to any particular features of the case demonstrating powerful reasons to the contrary'.⁴³ The Court of Appeal justified its approach on the ground that a choice of law to govern the contract 'has little if anything to say about the [arbitration agreement] law choice because it is directed to a different and separate agreement'.⁴⁴ This was said to follow from the doctrine of separability.⁴⁵

The majority of the Supreme Court, however, did not agree with this finding, nor with the Court of Appeal's reliance on the principle of separability, which (in the opinion of the majority of the Supreme Court) '... puts the principle of separability of the arbitration agreement too high'.⁴⁶ The majority of the Supreme Court held that 'the assumption that, unless there is good reason to conclude otherwise, all the terms of a contract are governed by the same law applies to an arbitration clause, as it does to any other clause of a contract'.⁴⁷

Another argument presented by the Court of Appeal in support of the finding that the parties have impliedly chosen the law of the seat to govern the arbitration agreement is what the majority of the Supreme Court refers to as 'the overlap argument'.⁴⁸ However, the majority of the Supreme Court rejected this argument and held that any overlap between the scope of the curial law and that of the arbitration agreement does not justify a presumption that the parties have, by implication, chosen the law of the seat of the arbitration to govern the arbitration agreement.⁴⁹ The majority

41. The majority judgment, paras 43-58.

42. The majority judgment, para. 59.

43. The majority judgment, para. 59.

44. The majority judgment, para. 61.

45. The majority judgment, para. 61.

46. The majority judgment, para. 61.

47. The majority judgment, para. 40.

48. This argument was first mentioned in *XL Insurance Ltd v. Owens Corning* [2001] 1 All ER (Comm) 530, in which the Court of Appeal held that the parties had impliedly chosen English law to govern the validity of the arbitration agreement despite the choice of New York law as the governing law of the contract. The reasoning in that case was essentially that the substance and process of arbitration 'are closely intertwined' and that the 1996 English Arbitration Act 'contains various provisions which could not readily be separated into boxes labelled "substantive arbitration law" or "procedural law", because that would be an artificial division'.

49. The majority judgment, paras 64-94.

of the Supreme Court held that ‘... the curial law which applies to the arbitration process is conceptually distinct from the law which governs the validity and scope of the arbitration agreement’.⁵⁰ Additionally, the Supreme Court held that the content of the English Arbitration Act 1996 does not support such a general inference as suggested by the Court of Appeal.⁵¹

The Supreme Court, however, identified two exceptions where such an inference as suggested by the Court of Appeal could be made:

- (1) One of these exceptions is where the law of the seat of arbitration indicates that the arbitration agreement will also be treated as being governed by that country’s law. The Supreme Court gave, as examples, section 48 of the Swedish Arbitration Act⁵² and section 6 of the Arbitration (Scotland) Act 2010.⁵³ However, no provision similar to section 48 of the Swedish Arbitration Act or section 6 of the Arbitration (Scotland) Act 2010 is included in the English Arbitration Act.
- (2) The other exception mentioned by the Supreme Court applies to contracts where applying the principle that the law chosen to govern the contract should be applied to the arbitration agreement would mean that there is a significant risk that the arbitration agreement would be ineffective. It is a

50. The majority judgment, para. 69.

51. The majority judgment, paras 73-82. The majority of the Supreme Court noted the fact ‘that almost all the provisions of the English Arbitration Act relied on to support the overlap argument are non-mandatory and, where the arbitration agreement is governed a foreign law, by reason of section 4(5) the non-mandatory provisions of the Act which concern arbitration agreements do not apply to it’.

52. The majority judgment, paras 70-71. The Supreme Court referred in this regard to the case of *Carpatsky Petroleum Corp v. PJSC Ukrnafta* [2020] EWHC 769 (Comm), in which the claimant was seeking to enforce in England and Wales an arbitration award made in Sweden. Enforcement was resisted by the respondent, *inter alia*, on the ground that there was no valid arbitration agreement in the contract between the parties, an argument which was based on the assumption that the validity of the arbitration agreement was governed by the law of Ukraine. The contract provided for the ‘law of substance of Ukraine’ to apply ‘on examination of disputes’. The Court of Appeal found that the parties had not chosen Ukrainian law to govern the arbitration agreement. Instead, under the circumstances, the choice of Stockholm as the seat for any arbitration showed an implied choice that the validity and interpretation of the arbitration agreement should be governed by Swedish law. The following reasons were given for this conclusion: (i) that it was reasonable to conclude that the parties had deliberately chosen a neutral forum to resolve their disputes and hence ‘intended the law of that jurisdiction to determine issues as to the validity and ambit of that choice’; (ii) by choosing Sweden as the seat for the arbitration, the parties agreed to the application of the Swedish Arbitration Act, including section 48. Therefore, by providing for a Swedish seat, it followed that the parties were impliedly agreeing that Swedish law should govern the arbitration agreement.

53. Section 6 of the Arbitration (Scotland) Act 2010 provides:

Where –

- (a) the parties to an arbitration agreement agree that an arbitration under that agreement is to be seated in Scotland, but
- (b) the arbitration agreement does not specify the law which is to govern it, then, unless the parties otherwise agree, the arbitration agreement is to be governed by Scots law.

well-established principle of contractual interpretation in English law that an interpretation which upholds the validity of a transaction is to be preferred to one which would render it invalid or ineffective.⁵⁴ This is commonly referred to as the ‘validation principle’. The majority of the Supreme Court held that this principle ‘may apply if, in determining whether the parties have agreed on a choice of governing law, a putative governing law would render all or a part of the contract ineffective’.⁵⁵

[5] *The UK Supreme Court’s Position in Circumstances Where There Is No Express Choice of Law*

In light of these various observations, the majority of the Supreme Court held that, where there is no express choice of law to govern the contract, a choice of the seat of the arbitration does not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of the seat.⁵⁶

Thus, in the absence of an express or implied choice of law to govern the arbitration agreement, the court must objectively determine with which system of the law the arbitration agreement is ‘most closely connected’. The majority of Supreme Court held that, in general, the default rule will be that the arbitration agreement will be most closely connected with the law of the seat of arbitration if the parties have chosen the seat of arbitration.⁵⁷

The majority of the Supreme Court referred to four principal ‘reasons of principle and policy’ to justify this general rule that: (i) the seat of arbitration is the place of performance of the arbitration agreement; (ii) this general rule is consistent with international law and legislative policy; (iii) it gives effect to commercial purpose, by being ‘likely to uphold the reasonable expectations of contracting parties who have chosen to settle their disputes by arbitration in a specified place but made no choice of law for their contract’; and (iv) such a clear default rule is in the interests of legal certainty.⁵⁸

Under the second heading (‘Consistency with international law and legislative policy’), the majority of the Supreme Court referred particularly in this regard to the conflict of laws rule contained in Article V(1)(a) of the New York Convention, which states:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II [the arbitration agreement] were, under the law applicable to them, under some incapacity, or *the said agreement is not valid under the law to which the parties have subjected it or,*

54. The majority judgment, para. 95.

55. The majority judgment, para. 96.

56. The majority judgment, paras 110-117.

57. The majority judgment, paras 118-124.

58. The majority judgment, paras 120-146.

failing any indication thereon, under the law of the country where the award was made (emphasis added).

The Supreme Court held that, while this provision in the New York Convention only applies in enforcement proceedings, ‘it would be illogical to apply different conflict rules to determine which law governs the validity of the arbitration agreement where the arbitration is seated (and the award therefore treated as made) in England’.⁵⁹ Referring to Professor van den Berg, one of the leading authorities on the New York Convention, the majority of the Supreme Court also held that ‘it would be equally illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question of validity is raised before or after an award has been made’.⁶⁰ For these reasons, in order to ensure consistency and coherence, the same law should be applied in either case.⁶¹

Under the third heading (‘Giving effect to commercial purpose’), the majority of the Supreme Court noted that:

[i]n such circumstances [where the parties choose a popular neutral seat of arbitration without specifying the governing law of the contract], if the parties had been required to make a common choice of law to govern their arbitration agreement at the time of contracting, it is inherently unlikely that they would have agreed on either of their national systems of law and much more likely that they would have settled on the law of the place which they had chosen as the seat of arbitration.⁶²

Moreover:

[n]ot only does this provide a neutral choice of law but it is already the law of that place which – in countries which have implemented the Model Law or are parties to the New York Convention – will determine the validity of an award if an application is made to set it aside or if its enforcement in the other party’s home state is resisted.⁶³

[6] *Summary of the Principles for Choosing the Governing Law of the Arbitration Agreement, as Stated by the Majority of the Supreme Court*

The majority of the Supreme Court summarised its reasoning as follows:⁶⁴

- (i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be

59. The majority judgment, para. 135.

60. The majority judgment, para. 136.

61. The majority judgment, paras 126-127.

62. The majority judgment, para. 142.

63. The majority judgment, para. 142.

64. The majority judgment, para. 170.

determined by applying English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation.

- (ii) According to these rules, 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.
- (iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.
- (iv) 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.
- (v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.
- (vi) 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. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.
- (vii) 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.
- (viii) 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.
- (ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it 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.

Applying these principles, the majority of the Supreme Court found that the arbitration agreement in the case at hand was governed by English law, on the basis that the law of the chosen seat of arbitration was the law with which the arbitration agreement was most closely connected. It was common ground between the parties that, if English law was found to be the governing law of the arbitration agreement,

then the arbitration agreement was valid, the dispute between the parties fell within the arbitration agreement, and the injunction granted by the Court of Appeal to restrain Chubb Russia from proceedings against Enka in Russia was properly granted.⁶⁵

[7] *The Findings of the Minority of the Supreme Court*⁶⁶

Lord Burrows and Lord Sales were in the minority in the Supreme Court, and they each wrote dissenting judgments.⁶⁷

In the judgment of the minority, the governing or proper law of the main contract was ‘clearly demonstrated by the terms of the contract or the circumstances of the case’ as being Russian law.⁶⁸ In these circumstances, the minority considered that the governing or proper law of the arbitration agreement was also Russian law by reason of an implied choice.⁶⁹

The minority of the Supreme Court also considered that there was ‘a presumption (or general rule)’ ‘that the proper law of the main contract is also the proper law of the arbitration agreement; and there is no such presumption (or general rule) that the law of the seat is the proper law of the arbitration agreement’. Thus, in short, the minority favoured ‘the “main contract” rather than the “seat” approach’.⁷⁰

Lord Burrows set out eight reasons for favouring this approach:

- (i) Dépeçage (i.e., having different laws for different parts of a contract) is the exception, not the rule;
- (ii) The rationale of the separability doctrine is that it was devised for a particular purpose, namely to prevent arguments about the validity of the arbitration agreement in circumstances where there are arguments about the validity of the main agreement;
- (iii) Dividing the arbitration agreement from the rest of the contract may be problematic;
- (iv) In past cases, excessive weight has been given to the seat of arbitration;
- (v) In past cases, insufficient weight has traditionally been given to the implied choice of the parties;

65. The majority judgment, para. 186. On the other hand, it is notable that the majority of the UK Supreme Court nevertheless found that the main contract should be deemed to be governed by Russian law on the basis that, pursuant to Article 4(3) of the Rome I Regulation, it was ‘clear from all the circumstances of the case that the main body of the construction contract is manifestly more closely connected with Russia than with any other country’ (the majority judgment, para. 161).

66. It states at the top of the joint judgment of Lords Hamblen and Leggatt: ‘LORD HAMBLEN AND LORD LEGGATT: (with whom Lord Kerr agrees)’. Thus, the opinion expressed in the joint judgment of Lords Hamblen and Leggatt prevailed over the opinion expressed in the judgments of Lord Burrows and Lord Sales, but this was only because Lord Kerr apparently agreed with Lords Hamblen and Leggatt. It is somewhat unfortunate in these circumstances that Lord Kerr did not write a judgment of his own.

67. Lord Sales agreed with Lord Burrows’ judgment as well as writing a judgment of his own.

68. Lord Burrows’ judgment, para. 205.

69. Lord Burrows’ judgment, paras 227-228.

70. Lord Burrows’ judgment, paras 229-255.

- (vi) The curial law and curial jurisdiction can be separated out from the proper law of the arbitration agreement;
- (vii) Section 103(2)(b) of the Arbitration Act 1996 (codifying Article V(1)(a) of the 1958 New York Convention) is neutral – in other words, it is irrelevant where there has been an implied choice of law, and it also only concerns questions of invalidity, not questions of interpretation;
- (viii) By analogy, an exclusive jurisdiction clause is normally governed by the law applicable to the contract of which it forms a part.⁷¹

Furthermore, the minority considered that they would arrive at the same conclusion, i.e., that the proper law of the arbitration agreement was Russian law, even if there had been no implied choice of Russian law as the proper law of the main contract. This was because the minority considered that both the main contract and the arbitration agreement had the closest and most real connection with Russia:⁷²

256. I would arrive at the same conclusion – that the proper law of the arbitration agreement is Russian law – for the reasons that have been set out in paras 231-255 above, even if the proper law of the main contract was Russian under article 4, rather than under article 3(1), of Rome I Regulation at least if the reason for that was that Russia is the country with which the contract is most closely connected. That would then carry across to the third stage of the common law approach and would mean that, despite the seat for the arbitration being England, the arbitration agreement also has the closest and most real connection with Russia. That one arrives at the same result at common law whether applying the implied choice or the default rule is unsurprising. It has long been recognised that there is a thin distinction between those two stages: they represent the distinction between implied and imputed intention. In *Amin Rasheed Shipping Corp'n v Kuwait Insurance Co* [1984] AC 50 the majority, led by Lord Diplock, decided that English law was the proper law by necessary implication whereas Lord Wilberforce came to the same conclusion applying the closest and most real connection test while recognising, at p 69, that the two ‘merge into each other’. But although, in general terms, it is important to recognise that one would arrive at the same conclusion if one applied the third stage of the common law approach, this case can be decided without going beyond the choice of the parties. The proper law of the arbitration agreement is Russian because that is the law which they have impliedly chosen.

On the basis of this reasoning, Lord Burrows then summarised his view on how the proper law of the arbitration agreement should be determined, as follows:

257. The reasoning above enables me to state the common law on the proper law of an arbitration agreement (contained in a main contract) in the following straightforward and principled way which (had this view found favour) would have been easy to apply and would have been one way of providing the clarity that Popplewell LJ was rightly seeking:

- (i) The proper law of the arbitration agreement is to be determined by applying the three stage common law test. Is there an express choice of law? If not, is

71. Lord Burrows' judgment, paras 231-255.

72. Lord Burrows' judgment, para. 256.

there an implied choice of law? If not, with what system of law does the arbitration agreement have its closest and most real connection?

- (ii) Where there is an express proper law clause in the arbitration agreement (which is rare) that will be determinative.
- (iii) Where there is no such clause, there is a presumption or general rule that the proper law of the main contract is also the proper law of the arbitration agreement. That presumption or general rule can assist the enquiry at any of the three stages of the common law approach. (It is most appropriate to use the language of a presumption where one is considering the parties' choice at the first two stages of the enquiry – ie it is a presumption of the parties' intentions – and to use the language of a general rule where one is considering the third stage of the closest and most real connection.)
- (iv) That presumption may most obviously be rebutted, or there is an exception to that general rule, where the standard 'validation principle' (of the English conflict of laws) applies ie where the law of the seat (or another relevant jurisdiction) would treat the arbitration agreement as valid whereas the proper law of the main contract would treat the arbitration agreement as invalid (or, as in the *Sulamérica* case, not binding on one of the parties). In very rare cases that presumption would also be rebutted where it is clear that the parties have chosen the law of the seat as the proper law of the arbitration agreement even though there is no express proper law clause in the arbitration agreement.

[C] Some Conclusions Regarding the English Approach Following *Enka v. Chubb*

It was clearly the intention of the UK Supreme Court that *Enka v. Chubb* would provide an opportunity to clarify English law in this area. Some clarification has indeed been reached, but it must be said that the position would have been considerably clearer if the position of the minority of the UK Supreme Court in *Enka v. Chubb* had prevailed (since the minority was firmly in favour of the traditional 'main contract' approach).

As it is, we are left with a hybrid position following the decision of the majority of the UK Supreme Court in *Enka v. Chubb*, where the traditional English 'main contract' approach has been affirmed where the parties have expressly or impliedly chosen the governing law of the main contract, but where, in the absence of such a choice, the 'seat' approach is applied by default.

§9.05 THE SWEDISH APPROACH

[A] Summary of the Swedish Approach under Section 48 of the Swedish Arbitration Act

Under Swedish law, as has already been referred to, section 48 of the Swedish Arbitration Act (1999:116) governs which law is applicable to the arbitration agreement in international disputes. This section provides:

If an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. If the parties have not reached

such an agreement, the arbitration agreement shall be governed by the law of the country where, in accordance with the parties' agreement, the arbitration had or shall have its seat.

The first paragraph shall not apply to the issue of whether a party was authorised to enter into an arbitration agreement or was duly represented.⁷³

Thus, section 48 of the Swedish Arbitration Act provides that parties to an arbitration agreement with an international connection may agree on the law governing the arbitration agreement, and the text of the Swedish Arbitration Act does not state anything more about what might be required to constitute such an agreement between the parties on the choice of law. However, according to the Government Bill, a general choice of law clause in the main contract is not considered to be sufficient to constitute an agreement by the parties as to the law governing the arbitration agreement.⁷⁴ Instead, the Government Bill suggests that the choice of law clause must explicitly refer to the arbitration agreement in order to govern the law of the arbitration agreement.

In the absence of such an agreement between the parties, section 48 of the Swedish Arbitration Act provides that the arbitration agreement shall be governed by the law of the country where, in accordance with the parties' agreement, the arbitration had or shall have its seat.

As mentioned above, it is very rare for contracts to contain a specific choice of law clause with respect to the arbitration agreement. In practice, therefore, section 48 of the Swedish Arbitration Act provides that in almost all cases the governing law of the arbitration agreement shall be deemed to be the same as the *lex arbitri*.⁷⁵

In situations where the parties have made no choice of law and no agreement has been reached with respect to the place of arbitration, section 48 of the Swedish Arbitration Act provides no guidance on how to establish the law governing the arbitration agreement. In these circumstances, the Government Bill provides that the governing law should be established in accordance with the general conflicts of law rules.⁷⁶ Since both the Rome Convention and the Rome I Regulation exclude arbitration agreements from their scope of application, the centre of gravity test must be applied to establish the governing law.⁷⁷

[B] Further Explanation as Set Out in the Government Bill (Prop. 1998/99:35)

Guidance on how to interpret Swedish legislation is generally found by having regard to the detailed government bill that formed the basis for the legislation. In the case of

73. Unofficial translation by the SCC Institute (https://sccinstitute.se/media/1773096/the-swedish-arbitration-act_1march2019_eng-2.pdf).

74. Swedish Government Official Reports 1994:81 pp. 228-229 and Govt. Bill. 1998/99:35 p. 191.

75. Govt. Bill. 1998/99:35 p. 245.

76. Swedish Government Official Reports 1994:81 p. 306 and Govt. Bill. 1998/99:35 p. 245.

77. See Rome Convention on the Law applicable to Contractual Obligations, Title 1., Article 1.2d), and Rome I Regulation (Regulation (EC) No. 593/2008), Chapter 1., Article 1.2 e); see Stefan Lindskog, *Skiljeförfarande: En kommentar*, 1185 fn 4651 (3d ed., Norstedts Juridik 2020); Kaj Hobér, *International Commercial Arbitration in Sweden*, 79 (2d., Oxford University Press 2021).

the Swedish Arbitration Act, the relevant government bill is Prop. 1998/99:35 (the 'Government Bill'). On pages 190-195 of that Government Bill, there is a detailed explanation of the considerations that formed the basis of section 48 of the Swedish Arbitration Act.

In summary, the Government started from the approach taken in the New York Convention. Pursuant to Article V(1)(a) of the New York Convention, which relates to enforcement of arbitral awards, the agreement under which the award is made must be valid 'under the law to which the parties have subjected it or, failing any indication thereon, ... the law of the country where the award was made'. Thus, Article V(1)(a) of the New York Convention includes a choice of law rule that points to, first, the law chosen by the parties to govern the arbitration agreement, and second, in the absence of such a law, the law of the seat of arbitration.

It was noted that, although this rule in Article V(1)(a) of the New York Convention is only applicable in the context of the enforcement of a foreign arbitral award, it was desirable to have the same basic rule in all situations. In a purely national situation between Swedish parties, it was thought undesirable that such parties should be able to contract out of Swedish contract law as the governing law of the arbitration agreement. However, in any international situation, it should be possible for the parties to choose a law to govern their arbitration agreement.

The Government Bill posits a situation where a German arbitral award is being enforced in Sweden and where the parties have agreed that the contract shall be governed by Swiss law with arbitration taking place in Germany. In that situation, it is stated in the Government Bill:

The predominant view of the review committee appears to be that the choice of law in applying the Convention must explicitly concern the arbitration agreement. This means that, in the above example, German law should be applied in determining the validity of the arbitration agreement, while Swiss law should be applied to the rest of the contract. It could also be understood in this example that the parties have made an implicit choice of law by referring to arbitration in Germany.

The government considers that, in applying this general rule as sketched out above, concerning the governing law of the arbitration agreement, it should be a requirement that the parties' choice of law concerns the arbitration agreement itself.⁷⁸

On the other hand, if there is no such specific choice of law concerning the arbitration agreement itself, the Government Bill goes on to state that the validity of the arbitration agreement should be determined according to the law of the place where the arbitration takes place. The Government Bill expressly states that this should be the position both where the parties have chosen the seat and also where the seat has been chosen by the arbitrators or by an arbitration institute, since in this situation as well the seat can be said to have been chosen pursuant to the parties' agreement.

78. This is an in-house English translation of the Swedish text.

[C] Criticism of the Swedish Approach

The decision by the Government Bill to apply the law of the seat as the predominant decisive factor in determining the governing law of the arbitration agreement has been criticised by legal commentators. In particular, this is considered to be problematic where the seat is chosen not by the parties but by an arbitral institution, by the arbitral tribunal, or by a court. In these cases, it has been considered that the chosen seat is not a strong connecting factor and, thus, that this may come as a surprise for foreign parties.⁷⁹

Zettermarck argues that '[t]o say the least it is not evident that the language used in Section 48 of the Act (... by virtue of the agreement ...) covers the decision made by an arbitration institute with regard to the place of arbitration'.⁸⁰

Petrochilos argues that '[a]lthough any such choice is made on the strength of an explicit or implicit authority conferred by the parties, it would be entirely artificial to consider this a true choice by the parties'.⁸¹

Lindskog argues that the arbitrators may have a vested interest in the matter of the applicable law. He therefore suggests that the arbitrators should only be able to choose the law governing the proceedings if this is explicitly supported by the arbitration agreement. Applying this view, a general provision which suggests that the place of arbitration shall be decided by the tribunal should not be sufficient in this respect. Instead, such a provision should only be understood as allowing the tribunal to decide where the proceedings – strictly geographically – shall take place. Pursuant to Lindskog's argument, the law applicable to the proceedings should in such case be decided objectively based on other connecting factors.⁸² According to Lindskog, the same objections can, with some modifications, be raised with respect to an arbitration institute.⁸³ Further, and of particular interest here, Lindskog argues that the same objections can be raised in relation to the arbitration agreement.⁸⁴

It can also be questioned if the view expressed in the Government Bill applies in situations where a court already has determined the law applicable to the arbitration agreement prior to the arbitration proceedings. Questions concerning the applicable law can arise at an early stage before the place of arbitration has been decided, *inter alia*, when an arbitration agreement has been invoked as a bar to court proceedings or when a court or an arbitration institute is to appoint an arbitrator for the respondent and the respondent objects that the arbitration agreement is invalid. The law governing the arbitration agreement must in such cases be established in accordance with general

79. See, e.g., Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure*, 689-690 (Juris Publishing 2003); Claes Zettermarck, 'Determining the Applicable Law to an Arbitration Agreement', in Sigvard Jarvin and Lars Heuman (eds.), *Swedish Arbitration Act of 1999: Five Years on: A Critical Review of Strengths and Weaknesses*, 105, 107 (Juris Publishing 1999).

80. Zettermarck, *supra* n. 79 at 107.

81. Georgios Petrochilos, *Procedural Law in International Arbitration*, 29 (Oxford University Press 2004).

82. Lindskog, *supra* n. 77 at 1170-1171 fn 4594.

83. Lindskog, *supra* n. 77 at 1170-1171.

84. Lindskog, *supra* n. 77 at 1180-1187.

conflicts of laws rules. If such decision has been made by a court, it is questionable if an arbitral tribunal or an arbitral institute would be able to subsequently decide that another law shall apply to the arbitration agreement by choosing the seat of the arbitration.⁸⁵

If the parties have agreed on institutional arbitration, the institution will often determine the place of arbitration in accordance with the rules of the institution if the parties have failed to determine a place of arbitration.⁸⁶ Some commentators suggest that if the institution in question does not have provisions of this kind, the law of the country where the chosen arbitration institute has its seat shall be applied.⁸⁷ The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has in a number of cases determined the law applicable on the arbitration agreement on the basis of the seat of the arbitration institution.⁸⁸

Another solution is to extend a general choice of law clause in the contract to the arbitration agreement.⁸⁹ Hobér suggests that '[i]t could perhaps be argued that it would be natural to extend the choice of law clause in the main contract to the arbitration agreement' and that '[a]fter all, it would not be unreasonable to assume that this would be in conformity with the expectations of the parties and that the choice of law clause in the main contract should be viewed as an implied term of the arbitration agreement'.⁹⁰

Hjerner argues that '[i]f, however, both parties to the contract are foreigners and, particularly, if a place in Sweden was only later fixed as the venue, it is arguable that the arbitration clause is governed by the proper law of the main contract'.⁹¹

[D] The Svea Court of Appeal Case T 7929-17 – A Missed Opportunity

As was mentioned briefly above, issues concerning the governing law of the arbitration agreement arose in the Svea Court of Appeal Case T 7929-17.⁹²

In this case, the parties had included two conflicting dispute resolution clauses in their contract: one clause providing for disputes to be settled in the courts of Cyprus (the 'jurisdiction clause') and another clause providing for arbitration before 'the International arbitration court in Stockholm' (the 'arbitration clause'). The contract included a general choice of law clause by which the parties chose Cyprus law as the

85. See also Lindskog, *supra* n. 77 at 1171 fn 4600.

86. See, e.g., Articles 11 and 25 of the SCC rules according to which the SCC Board will determine the place of arbitration if the parties have failed to do so.

87. Hobér, *supra* n. 77, at 79-80.

88. See Stockholm International Arbitration Review 2007, vol. 2, p. 235 which describes SCC Case 10/2005, and Stockholm Arbitration Report 2004, vol. 1, p. 93 which describes SCC Case 12/2002.

89. Lars Hjerner, 'Choice of Law Problems in International Arbitration with Particular Reference to Arbitration in Sweden', in Ulf Franke (ed.), *Swedish and International Arbitration* 1982, 18, 24 (The Arbitration Institute of the Stockholm Chamber of Commerce 1982); Heuman, *supra* n. 79 at 690.

90. Hobér, *supra* n. 77 at 79.

91. Hjerner, *supra* n. 89 at 24.

92. Judgment of the Svea Court of Appeal, 19 December 2019, Case T 7929-17.

governing law of the contract. One of the principal issues for the arbitral tribunal, and also subsequently for the Svea Court of Appeal, was how to reconcile these two conflicting clauses.

It was common ground between the parties that the jurisdiction clause was governed by Cyprus law. It was also common ground that the interrelationship between the two clauses was a matter for Cyprus law. However, the claimant in the arbitration argued, pursuant to section 48 of the Swedish Arbitration Act, that the arbitration clause was governed by Swedish law. The respondent in the arbitration, on the other hand, argued that under Cypriot law the choice of law applied also to the arbitration clause, and thus the parties had chosen Cypriot law as the governing law of the arbitration agreement; alternatively, the parties had not made any choice of Stockholm as the seat of arbitration, Stockholm had been chosen by the SCC Institute, and thus the governing law of the arbitration agreement should be determined on the basis of the law with the closest connection, which in these circumstances would be Cypriot law.

This case was, accordingly, a good opportunity for the Svea Court of Appeal to consider these issues in detail. Sadly, however, the Svea Court of Appeal failed to take advantage of this opportunity. Instead, the court dealt with this part of the case in only a few paragraphs, noting first that under the doctrine of separability the arbitration agreement should be deemed to be a separate agreement.⁹³ Since the parties' choice of law clause did not specifically relate to the arbitration agreement, the Svea Court of Appeal found that the governing law of the arbitration agreement was the same as the law of the seat pursuant to section 48 of the Swedish Arbitration Act.

Despite the importance of this issue, the Svea Court of Appeal refused leave to appeal to the Supreme Court.⁹⁴

§9.06 DISCUSSION

What conclusions are to be drawn from a comparison of these two approaches? It seems to us that both approaches can be criticised.

[A] The English Approach

As will have become clear, the English approach, as stated by the majority of the UK Supreme Court in *Enka v. Chubb*, can hardly be said to be straightforward. Moreover,

93. The Svea Court of Appeal did not discuss the meaning and effect of the doctrine of separability in any detail, but simply noted that under that doctrine the arbitration agreement was deemed to be a separate agreement for the purpose of determining its validity. However, the court completely failed to address the argument raised by the respondent in the arbitration that 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 (a point that was accepted by the majority of the UK Supreme Court in *Enka v. Chubb* – see the majority judgment in that case, para. 41).

94. It should be noted, in the interests of full disclosure, that James Hope acted for the respondent in the arbitration and also in the Svea Court of Appeal.

the fact that there were such differences of opinion even within the members of the UK Supreme Court suggests that debates will continue to run within English law in relation to these issues.

It is notable that Lord Burrows, who was one of the judges in the minority in that case, is the first member of the UK Supreme Court to have been appointed directly from academia, and before his elevation to the Bench he was a distinguished Professor of Law at the University of Oxford. Lord Burrows' judgment is well reasoned and, in our humble opinion, the approach taken by the minority is preferable. It may be useful to quote paragraph 260 of Lord Burrows' judgment, in which he summarises his criticism of the majority:

260. It will be clear from all that I have said above that, while there are large measures of agreement between us (for example, that (at least in general) an express or implied choice of the proper law for the main contract carries across to be the proper law of the arbitration agreement, irrespective of the specified seat of arbitration) I cannot agree, with great respect, with the overall approach or conclusion in this case of my colleagues, Lords Hamblen and Leggatt (with whom Lord Kerr agrees). In their view, the proper law of the arbitration agreement is here English law because there has been no choice of law for the arbitration agreement, express or implied, and the arbitration agreement has the closest and most real connection to England as the seat of the arbitration. Their decision would have been different had the proper law of the main contract been Russian law by reason of an express or implied choice. But because the proper law of the main contract is, in their view, Russian law, only because it has the closest and most real connection to Russia, that means that the proper law of the arbitration agreement is English law. That is to rest crucially different consequences on a divide between the choice and default stages of the Rome I Regulation and between the second and third stages of the common law approach in a way that, with respect, I do not believe to be justified in principle. I also consider that that approach produces undesirable practical and unprincipled consequences (especially by forcing a division of the proper laws) such as those set out in paras 235-239 above. I also have misgivings about the idea that the English common law should depart from a principled solution on the basis of a supposed – but in my view unproven – consensus as to international arbitration policy favouring the seat approach (in the absence of choice). My view is that the proper law of the arbitration agreement is Russian. That is because the proper law of the main contract is Russian by implied choice and that implied choice encompasses, or carries across to constitute, an implied choice of Russian law for the arbitration agreement. Even if my reasoning on the proper law of the main contract is wrong and the proper law of the main contract is Russian by reason of Russia having the closest and most real connection rather than by implied choice – I would still regard the proper law of the arbitration agreement as being Russian law by reason of the arbitration agreement having the closest and most real connection with Russian law. This is to apply the general rule, to which there is here no exception, that the proper law of the main contract is also the proper law of the arbitration agreement.

Lord Burrows' approach, as set out here, has the considerable advantage of simplicity. It starts with the 'main contract' approach and continues with it.

[B] The Swedish Approach

Turning to the Swedish approach, here there is simplicity, in that the Swedish approach adopts almost entirely the ‘seat’ approach.

However, in deciding that a specific choice of law governing the arbitration agreement must specifically relate to the arbitration agreement itself, it seems to us that the Swedish approach goes too far. In practice, the first sentence of section 48⁹⁵ has been rendered inapplicable and superfluous. In practice, parties almost never make a specific choice of law in relation to the arbitration agreement itself.

On the other hand, commercial parties generally assume that their general choice of law will govern all parts of their agreement, including the arbitration clause. Thus, considerations of party autonomy strongly favour giving effect to such a general choice of law. Moreover, the doctrine of separability has a particular purpose – to prevent the arbitration agreement being considered invalid when issues of validity arise in relation to the main agreement – and it should not be used more generally to take precedence over the parties’ choice of governing law.

The fact that the Government Bill, more than twenty years ago, included a single sentence stating that the choice of law needed to relate specifically to the arbitration agreement should not prevent this issue from being reconsidered. Sadly, however, the Svea Court of Appeal in Case T 7929-17 failed to consider this issue in any detail, even though the point had been fully argued. It is unfortunate that the Svea Court of Appeal refused to allow the Swedish Supreme Court to consider these issues by denying leave to appeal.

Furthermore, as several commentators have stated, it is particularly questionable to apply the law of the seat of arbitration as determining the governing law of the arbitration agreement in circumstances where the seat has been chosen, not by the parties but by an arbitral institution, or by the arbitral tribunal or by a court.

[C] Concluding Remarks

It will be interesting to see how the law develops in this area, both in England and in Sweden. As can be seen from our comments above, it seems to us that the approach as set out in both jurisdictions could be improved.

In any event, it has to be said that, from the parties’ point of view, attempts should be made to avoid the more difficult issues that can arise in these situations. Parties should always include a governing law clause in their contract, and although it is unusual to do so, potential difficulties could easily be avoided if the governing law clause makes clear that it also relates to the arbitration agreement itself. In such circumstances, under both the English approach and the Swedish approach, the parties’ choice of law would generally be upheld.

95. ‘If an arbitration agreement has an international connection, the law agreed upon by the parties shall apply to the agreement’ (in-house translation).

