Importance of the Law Governing the Arbitration Agreement

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Introduction

The foundation of any arbitral proceeding is grounded on the parties' mutual consent to submit their disputes to arbitration.[1] Quite simply, there can be no arbitration without a corresponding agreement to that effect.[2] Despite the fundamental role of the arbitration agreement, one of its key aspects is often overlooked by the parties, that being, the law governing the agreement.[3] With this in mind, this paper proposes to examine the importance of the choice of law in arbitration agreements. It is submitted that in the absence of an express choice of law, several problems arise regarding the validity and scope of the agreement.[4] Indeed, the nature of the arbitration agreement is unique from that of the substantive contract and this is recognised by the various legal doctrines and special rules developed to govern it, both in domestic and international jurisprudence.[5] It follows that a separate enquiry into the law governing the arbitration agreement is, from a theoretical and practical perspective, not only justified but also necessary.

The paper will be divided into three sections. The first section briefly defines what is meant by the term 'arbitration agreement'. This is accompanied by an analysis of the formal requirements necessary for concluding such a contract. The second section focuses on the governing law and how it is unique from the various other laws that are engaged in international arbitration proceedings. The third section aims to argue that the law governing the arbitration agreement is of paramount importance to the parties by using practical examples. These touch on the consequences parties face in omitting to select the law with respect to their agreement. As a result, the paper concludes that the parties should familiarise themselves with the laws

[1] Nigel Blackaby, Constantine Partasides, Alan Redfern, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International, Oxford University Press 2015) 71.
[2] ibid.
[3] Christophe Seraglini and Julien Fouret, 'The Arbitration Agreement: Legal Nature, the Contractual and the Jurisdictional Aspect' in Stefan Kröll, Andrea K. Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press 2023) 671.
[4] Gary B. Born, *International Arbitration: Law and Practice* (3rd edn, Kluwer Law International 2021) 54; Seraglini and Fouret (n 3) 671.
[5] Renato Nazzini, 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65(3) The International and Comparative Law Quarterly 681, 684.

governing arbitration agreements in any given country and agree on the appropriate form in line with their commercial expectations.

What is an Arbitration Agreement?

It is useful to begin the discussion by outlining what is meant by the term 'arbitration agreement'. The arbitration agreement is an agreement of the relevant parties to submit present or future disputes arising out of a legal relationship (whether contractual or not) to arbitration.[6] Resolving disputes through an arbitration agreement has both negative and positive effects.[7] The negative effect is that the parties forfeit their right to have their dispute adjudicated by national courts.[8] The positive effect, conversely, confers power to the arbitral tribunal to handle the dispute.[9] By virtue of the principle of party autonomy, the parties are free (and in certain cases required) to agree to a number of terms regarding the arbitration agreement and the wider process of the arbitration itself.[10] These include, but are not limited to, the applicable laws relating to the various aspects of the arbitration, choice of seat, location, language, the subject matter of the arbitration, and the nomination as well as the challenge of arbitrators.[11] To save time and resources on having to negotiate these matters, parties often opt for institutional arbitration or incorporate institutional rules such as the ICC Arbitration Rules into their agreement.[12]

In terms of formal requirements, the New York Convention (hereinafter referred to as the "Convention") prescribes that the agreement must be in writing, which has been generally adopted to accommodate electronic or any other means.[13] The Convention allows state courts

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "New York Convention") (New York, 10 June 1958) 330 U.N.T.S. 3; 21 U.S.T. 2517; T.I.A.S. No. 6997, entered into force 7 June 1959, art II(1); Arbitration Act 1996 (Eng.) (hereinafter "EAA 1996"), s 6(1).
[7] Born (n 4) 70-74.
[8] ibid.
[9] ibid.
[10] Blackaby, Partasides and Redfern (n 1) 16, 97; Born (n 4) 83-84.
[11] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006* (United Nations, 2006), arts 13, 20; EAA, ss 3, 15; Blackaby, Partasides and Redfern (n 1) 97-101; Born (n 4) 83-84.
[12] The parties are free to adopt institutional arbitration regulations such as the 2021 ICC Arbitration Rules to govern a number of matters in relation to the arbitration, for example, the procedures for the appointment, challenge, and replacement of arbitrators: see 2021 ICC Rules, arts 11-15.
[13] UNCITRAL, art 7, Recommendation regarding the interpretation of Article II(2), and Article VII(1); New York Convention, art II(2); EAA 1996, ss 5(1), (6); Decree No. 2011-48, art 1507 (France).

to refuse to refer the parties to arbitration if they find that the arbitration agreement is null and void, inoperative, or incapable of being performed.[14] Under many jurisdictions, a plea questioning the jurisdiction of the tribunal must be made prior to the statement of defence or as soon as the matter alleged to be beyond the scope of the tribunal's authority is raised during the arbitral proceedings.[15] Finally, the recognition and enforcement of the arbitral award may be refused by the state courts if the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where the award is made.[16]

The Law Governing the Arbitration Agreement

The parties are free to agree on what law should govern both the substantive contract and the arbitration agreement.[17] It is important to note that by virtue of the doctrine of separability, the substantive agreement and the arbitration agreement are distinct and separate from one another.[18] This means that the possible invalidity of the commercial contract does not warrant that the arbitration agreement is invalid.[19] Hence, Lord Hoffman held in *Fiona Trust v Privalov* that the arbitration agreement, being a distinct contract, can be void or voidable only on grounds directly related to the arbitration agreement.[20] Additionally, a recent judgment of the *Cour de Cassation* held that the existence of the arbitration agreement and substantive contract must be assessed independently.[21] It followed that the mere non-existence of the substantive contract did not preclude the finding of a validly constituted arbitration agreement as judged by the validity requirements under Article 1443 of the French Civil Code of Procedure.[22] The separability doctrine is seen to promote legal certainty by upholding the parties' intention to resolve their disputes by arbitration.[23] However, the inevitable effect of the separability doctrine is that the arbitration agreement and the underlying contract may be governed by

[14] New York Convention, art II(3).
[15] UNCITRAL, art 16(2); EAA, s 31; Arbitration Law of the People's Republic of China (hereinafter "PCR"), art 20.
[16] New York Convention, art V(2)(a).
[17] Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, art 3; *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38 [29].
[18] UNCITRAL, art 16(1); EAA 1996, s 7; PCR, art 19.
[19] *Fiona Trust & Holding Corporation and Ors v Priyalov and Ors* [2007] UKHL 40 – Scope, Separability (Eng.) [17].
[20] ibid.
[21] *Cour de Cassation* [Cass], 1e civ., Judgment of April 12, 2023, Decision No. 22-14.708 (France).
[22] ibid.
[23] *Fiona Trust* (n 19) [7].

different frameworks of law.[24] As we will see later, issues arise where the parties have not made an express choice of law in relation to the arbitration agreement and there is disagreement on whether the law of the contract, the law of the seat, or some other legal framework should govern it.[25]

It is also necessary to distinguish the law governing the arbitration agreement from the various other laws that may apply in the context of international arbitration proceedings.[26] As the UK Supreme Court outlined in *Enka v Chubb*, two additional systems of national law are applicable in international arbitration, these being, the procedural law and the law governing the substance of the dispute.[27] The procedural law is determined by designating the law of the seat (*lex arbitri*).[28] This is done by locating the seat in a particular jurisdiction, which can be distinct from the physical location of the hearings.[29] The procedural law governs issues concerning the internal procedure of the arbitration, for instance, evidentiary rules, examination of witnesses, and disclosure rules relating to arbitrators.[30] Further, it governs issues with respect to procedural fairness and external relations to the courts of the seat.[31] The law governing the substance of the dispute regulates issues such as the interpretation and validity, the rights and obligations, and liability under the substantive contract between the parties.[32] As noted above, this concerns matters related to the substantive contract that is being disputed, not the arbitration agreement, which is subject to a separate analysis.[33]

Pertinence of the Governing Law

Several observations are to be made from the preceding discussion. First, the arbitration agreement possesses its own unique nature, distinct from the substantive contract.[34] The arbitration agreement must, therefore, be treated as separate for the purposes of assessing

[24] Nazzini (n 5) 684; Born (n 4) 61.
[25] *Enka v Chubb* (n 17) [2].
[26] Nazzini (n 5) 683.
[27] *Enka v Chubb* (n 17) [1].
[28] Born (n 4) 125-126.
[29] UNCITRAL, arts 1(2), 20(2); EAA 1996, s 2(1).
[30] UNCITRAL, art 1(2); Born (n 4) 128-129.
[31] UNCITRAL, art 1(2).
[32] Blackaby, Partasides and Redfern (n 1) 185.
[33] See discussion on separability: (n 19, 21).
[34] Maxi Scherer and Ole Jensen, 'Empirical Research on the Alleged Invalidity of Arbitration Agreements: Success Rates and Applicable Law in Setting Aside and Enforcement Proceedings' (2022) 39(3) Journal of International Arbitration 331, 345; Nazzini (n 5), 683-685.

factors such as the formation, interpretation, validity, and scope of the agreement.[35] Moreover, the arbitration agreement is subject to special rules under international and domestic arbitration law.[36] For instance, this is demonstrated by the Convention, which mandates that the contracting state must refer the parties to arbitration as per the arbitration agreement unless the agreement is 'null and void, inoperative, or incapable of being performed'.[37] Whether the arbitration agreement is prone to any of these defects would be subject to the arbitral and contractual law of the jurisdiction that the parties have chosen to govern their agreement.[38] Article V(1)(a) of the Convention further provides that the recognition and enforcement of the award may be refused if the arbitration agreement is not valid under the law chosen to govern the agreement or, in the absence of choice, under the law of the country where the award was made.[39]

This lends to the argument that the law governing the arbitration agreement is not only a pertinent matter for parties commencing arbitration but also that a separate enquiry into the governing law is necessary.[40] Due to the distinct and crucial role of the arbitration agreement, it cannot be automatically assumed that the law of the substantive contract or the seat governs the arbitration agreement.[41] As author Nazzini points out, in a perfect world the parties have agreed on a choice of law to govern their arbitration agreement.[42] Yet, most arbitration agreements, whether it be due to forgetfulness or neglect, do not incorporate an express choice of law.[43] Lord Hamblen and Lord Leggatt emphasised in *Enka v Chubb* that this is what gives rise to complex issues when the validity or scope of the agreement is contested.[44] As Lord Mustill remarked in the *Channel Tunnel Case*, these issues are amplified by the fact that multiple systems of law may be engaged in international arbitration.[45] It may be, for instance, that while there is no express choice of law in the arbitration agreement, there is one for the

[35] Scherer and Jensen (n 34); Nazzini (n 5) 683-685.
[36] Nazzini (n 5) 683-685.
[37] New York Convention, art II(3).
[38] Nazzini (n 5), 683; Seraglini and Fouret (n 3) 671-672.
[39] New York Convention, art V(1)(a).
[40] Nazzini (n 5) 685-686.
[41] ibid.
[42] ibid 681-682.
[43] Issues may also arise where the substantive contract is ambiguous on the law applicable to the arbitration agreement, substantive contract, or the seat of arbitration – in such instances it is not necessarily clear that the law of the arbitration agreement should be governed by that of the contract or the seat, prompting the courts to undergo an analysis into the proper law: Jeff Waincymer, 'Much Ado About … The Law of the Arbitration Agreement: Who Wants to Know and for What Legitimate Purpose?' (2023) 40(4) Journal of International Arbitration 361, 370; Nazzini (n 5), 685-686; Seraglini and Fouret (n 3) 671.
[44] *Enka v Chubb* (n 17) [1].
[45] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334 (1993) 357-358.

substantive contract and the procedural law, but these are governed by different national laws.[46] In such circumstances, it may be the practice of the court to either apply the law of the seat or that of the substantive contract to the arbitration agreement.[47] Alternatively, certain jurisdictions undergo a conflict of laws analysis or apply transnational principles to determine the applicable law.[48] With this in mind, the paper will now turn to highlight the range of issues that may arise in the absence of an express choice of law in the arbitration agreement.

A. The Validity of the Arbitration Agreement

A good example of the types of issues that might arise is illustrated in *Sulamerica*.[49] In *Sulamerica*, the parties in question had agreed that any disputes arising under insurance policies were to be settled by arbitration under ARIAS Arbitration Rules with the seat of the arbitration located in London.[50] The contract itself was governed by Brazilian law but there was no choice of law made for the arbitration agreement.[51] The plaintiff commenced arbitration in London.[52] The respondent filed a countersuit in the Brazilian courts to restrict the plaintiff from lodging arbitration proceedings on the grounds that Brazilian law governed the arbitration agreement, which required the respondent's consent for arbitration.[53] As this requirement did not exist under English law, the Court of Appeal was asked to determine the law governing the arbitration agreement.[54] The court held that the agreement to resolve disputes in London, in accordance with English law, had the closest and most real connection to the place where the arbitration was held, England.[55] Furthermore, the existence of a Brazilian law, which would undermine the commencement of arbitral proceedings, indicated that the parties could not have

[46] Seraglini and Fouret (n 3) 672.
[47] ibid.
[48] France, for example, determines the applicable law via *transnational* principles – meaning that the agreement is subject to 'mandatory rules of French law and international public order without having to refer to a system of national law': *Kabab-Ji c. KFG, Cour de Cassation* [Cass] 1e civ., Judgment of September 28, 2022, Decision No. 20-20.260 (France); Maxi Scherer and Ole J. Jensen, 'Towards a Harmonized Theory of the Law Governing the Arbitration Agreement' (2021) 10(1) Indian Journal of Arbitration Law 1, 2; Blackaby, Partasides and Redfern (n 1) 164-165.
[49] *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638 – Governing Law (Eng.).
[50] ibid [1], [3], [5].
[51] ibid.
[52] ibid [1].
[53] ibid [3], [5], [6].
[54] ibid [1], [7].
[55] ibid [29]-[32].

contemplated it to apply to the agreement.[56] Accordingly, the correct law to govern the arbitration agreement was English law and an injunction was granted against the proceedings in Brazil.[57]

Sulamerica illustrates the type of challenge that might be lodged against the validity of the arbitration agreement when the parties have not made an express choice of law to govern their agreement.[58] In the absence of a choice of law clause, the parties should exercise caution in relying on or disputing the validity of the agreement as they may be incorrect about the proper law of the agreement and the courts in other jurisdictions may end up ruling against their action.[59] This was evident in *Sulamerica*, where the respondent relying on the invalidity of the arbitration clause under Brazilian law was, nevertheless, restricted by the English courts from lodging court proceedings in Brazil. That being said, the interaction of varying national laws can sometimes lead to a converse outcome. It could be the case that the courts will not find a way to enforce an arbitration award since the arbitration agreement is invalid according to the law of the forum state.[60] The Norwegian Court of Appeal, for instance, refused to enforce an arbitration award rendered in England on the basis that the formality requirements for concluding the arbitration agreement under the Convention had not been met.[61] Peculiarly, the Court outlined that the fact that the arbitration agreement was valid under English law was not sufficient to warrant enforcement in Norway as the question was to be assessed according to the rules of the country where enforcement is sought.[62] What remains clear in both these cases is that the parties could have avoided a great deal of uncertainty had they been clear on the applicable law and consulted the national law of the involved state jurisdictions.[63]

Scholars like Zarra argue that the tension in the cases above illustrates that some countries apply the so-called 'validation principle' (*favor arbitrati*) – the principle that it will be unlikely that the parties have intended the arbitration agreement as part of the substantive contract to be invalid and therefore, the contract should be interpreted in a manner that will (so far as is

[56] *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638 – Governing Law (Eng.) [29]-[32].
[57] ibid.
[58] Born (n 4) 53; Blackaby, Partasides and Redfern (n 1) 160.
[59] Nazzini (n 5) 681.
[60] New York Convention, art V(1)(a).
[61] Decision of the Halogaland Court of Appeal, 16 August 1999, (2002) XXVII YBCA 519 (Norway) as mentioned in Blackaby, Partasides and Redfern (n 1) 78-79.
[62] ibid.
[63] Blackaby, Partasides and Redfern (n 1) 78-79.

possible) give effect to the arbitration agreement.[64] This has been adopted in Switzerland, where the Private International Law Act (PILA) section 178(2) sets out that as long as the arbitration agreement is valid under 'the law chosen by the parties, the law governing the substantive contract, or Swiss law, then it will be considered substantively valid for the purposes of binding the parties'.[65] Applying this approach to the decision of the Norwegian Court of Appeal, the arbitration agreement in that case would have been valid because the formality requirements had been met under the law of the seat. But as the decision showcases, a degree of care is necessary as certain courts require that the arbitration agreement conforms *specifically* with the law of the country where the enforcement is sought.

B. Scope and Interpretation of the Arbitration Agreement

Issues regarding the scope and interpretation of the arbitration agreement are illustrated in *Enka v Chubb*. The case concerned a dispute about the quality of work done by a subcontractor, Enka.[66] It was accused of causing fire damage to the property of the party insured by Chubb. The parties had concluded an arbitration agreement, outlining that any dispute arising 'from or in connection' with the contract was to be referred to arbitration under ICC rules with England as the seat of arbitration.[67] Chubb filed an action against Enka in the Russian courts and Enka sought an anti-suit injunction against the Russian proceedings on the grounds that their dispute fell within the scope of the agreement and that the arbitration agreement should be upheld.[68] The issue for the UK Supreme Court was to determine whether the proper law governing the arbitration agreement was that of Russia or England and on that basis whether the tortious claim fell within the scope of the agreement.[69] It was held that the agreement was governed by the law of the seat, it having the closest and most real connection to the dispute resolution clause.[70] It followed that an anti-suit injunction against Chubb was properly granted under English law,

[64] Zarra observes that the policy approach in favour of arbitration (*favor arbitrati*) is so strongly diffused in national legal systems that it can be said to form a 'mandatory attitude' assumed by domestic judges: Giovanni Zarra, 'Separability and the Law Applicable to the Substantive Validity of Arbitration Agreements' (2024) 41(1) Journal of International Arbitration (2024) 29, 47; *Enka v Chubb* (n 17) [106].
[65] Federal Private International Law Act 1987, s 178(2) (Switzerland); Zarra (n 63) 48.
[66] *Enka v Chubb* (n 17) [7], [13].
[67] ibid [10].
[68] ibid [20]-[24].
[69] ibid [5]-[6], [20]-[22].
[70] ibid [171].

and the tort claims fell within the scope of the arbitration.[71] *Enka v Chubb* illustrates how the choice of law to govern the arbitration agreement is relevant to the scope and interpretation of the agreement. Issues of scope arise, for instance, when a party alleges that the arbitration agreement does not capture the parties' dispute.[72] This was part of the issue in *Enka v Chubb* as the tort issues were contested as part of the arbitrable matters in their agreement.[73]

The extent to which any court is willing to admit matters alleged to be beyond the scope of the agreement can largely depend on the jurisdiction.[74] Some jurisdictions are more 'arbitration-friendly' and seek to uphold the parties' intention to have their disputes resolved by arbitration, but others interpret arbitration agreements narrowly.[75] In England, for example, the principle that arbitration agreements should be construed narrowly was rejected in *Fiona Trust,* which held that courts should start from the assumption that the parties "as rational businessmen are likely to have intended any dispute arising out of the relationship…to be decided by the same tribunal…unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".[76] A party seeking to rely on the certainty of the wording of their agreement may want to opt for a jurisdiction with a restrictive interpretation of arbitration clauses.[77] For example, this approach has been adopted, in Russia, where emphasis is given to the written, formally expressed will of the parties, requiring that the agreement must be clear and unambiguous as to its scope.[78] However, this literal approach may undermine the effectiveness of the arbitration process.[79] Instead, liberal approaches, like that of France, where the scope of the arbitration agreement is interpreted in accordance with the common will of the parties instead of formal validity, may be more persuasive.[80] It follows that choosing the law of one jurisdiction may have significant implications when the scope or interpretation of the agreement is contested. It might be that the parties' arbitration agreement will not extend to certain elements of the agreement or, conversely, that matters outside of their contemplation will end up being arbitrated. For example, had the substantive contract in *Enka*

[71] *Enka v Chubb* (n 17) [171], [186].
[72] Born (n 4) 54.
[73] *Enka v Chubb* (n 17) [5]-[6].
[74] Matthew Parish, 'The Proper Law of an Arbitration Agreement' (2010) 76(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 661, 661.
[75] ibid.
[76] *Fiona Trust* (n 19) [13]; See also *Enka v Chubb* (n 17) [177].
[77] Derek P. Auchie, 'The liberal interpretation of defective arbitration clauses in international commercial contracts: a sensible approach?' (2007) 10(6) International Arbitration Law Review 206, 214-215.
[78] Irina Guerif and Andrey Loboda, 'Interpretation of the arbitration clause by state courts: comparative approach to Russian and French law' (2021) 3 International Business Law Journal 353, 362.
[79] ibid 381.
[80] Guerif and Loboda (n 77); Auchie (n 76) 216.

v Chubb provided for an express choice of Russian law to govern the arbitration agreement, the tort claims would have fallen outside of the jurisdiction of the arbitral tribunal.[81]

The scope of the agreement can also be affected by the concept of 'arbitrability'. As mentioned, the Convention requires that the subject matter of the dispute must be capable of settlement by arbitration.[82] The Arbitration Law of the People's Republic of China, for example, states that marital, succession, guardianship, and administrative disputes are not arbitrable.[83] This can be closely compared to Article V(2)(b) of the Convention which holds that courts may refuse the recognition and enforcement of an arbitral award if it would be contrary to the public policy of the country where the enforcement is sought.[84] Thus, it was held in *Mitsubishi v Soler* that the court will have an opportunity at the enforcement stage to ensure that the legitimate interests of the society (antitrust laws in this case) have been addressed.[85] According to author Makau, importantly, the Convention does not set out criteria for a court of law to determine questions of public policy, therefore, leaving it to the national courts to make interpretations according to their understanding and the nations' societal interests.[86] It is observed that whether the subject matter of the contract is capable of being arbitrated is, again, highly contingent on the jurisdiction governing the arbitration agreement as it is for the independent states to determine whether to exclude certain subject matters under their respective policy considerations.[87]

C. Non-Signatories

Another area that has received significant scholarly attention is the position of non-signatories who are alleged to have become parties to the arbitration agreement.[88] Generally, as per the doctrine of privity, only parties to a contract are bound by it.[89] However, the law governing the

[81] Andrew Ling, 'Neither express nor implied: rethinking governing law of the arbitration agreement' (2023) 39(3) Arbitration International 401, 415.
[82] New York Convention, art V(2)(a).
[83] PCR, art 3.
[84] New York Convention, art V(2)(b).
[85] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.* 473 US 614 (1985) 638.
[86] Stephen W. Makau, 'The Application of the Principle of Arbitrability and Public Policy in International Commercial Arbitration' (2022), 4 <http://dx.doi.org/10.2139/ssrn.4176183> accessed 6 December 2023.
[87] Seraglini and Fouret (n 3) 674-675; Makau (n 85).
[88] Born (n 4) 113-114.
[89] Historically the doctrine of privity was held to constitute a fundamental principle of English law. Nowadays, the law recognises that under certain circumstances third parties and non-signatories can benefit or be bound by a contract: *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* Lord Haldane [1915] AC 847, 853; Contracts (Rights of Third Parties) Act 1999 (Eng.), ss 1-2.

arbitration agreement recognises a body of principles under which non-signatories may become subject to an arbitration clause.[90] A fitting example is *Kabab-Ji v Kout Food*, where the plaintiff sought to arbitrate against the new parent company of the party it had originally contracted with, which had not signed the arbitration agreement.[91] In addition to this, there was also uncertainty regarding the correct law governing the arbitration agreement, it being, either English or French law.[92] The UK Supreme Court found that in the absence of an express choice of law, the choice of law to govern the substantive contract (English law) was a sufficient indication that the arbitration agreement was intended to be governed by the law of England.[93] However, under English law, there was not enough evidence to infer that the parent company had assumed the contractual rights and obligations of its predecessor as there was no consent or document to that effect.[94] Therefore, an arbitral award could not be enforced against it.[95] What is interesting about the case for the purposes of this paper, however, is that the issue was later litigated in the French courts, which arrived at an opposite conclusion.[96] The Paris Court of Appeal and *Cour de Cassation* determined the question by applying *transnational* principles, meaning that the existence and validity of the arbitration agreement were determined by the common intention of the parties without the need to refer to a system of national law.[97] Since the parent company was involved in various commercial matters related to the substantive contract, it was clear that it had the intention to participate in the performance of the contract, rendering it a party to the arbitration agreement.[98] On this basis, the arbitral award was enforceable against the parent company.[99]

Kabab-Ji is yet another example of how the courts may reach a different outcome based on the law applicable to the arbitration agreement. While both the English and the French courts were seeking to establish the common intention of the parties, the way that the common intention was determined varied significantly.[100] How any given national law deems a non-signatory to

[90] Born (n 4) 113-114.
[91] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48 – Governing Law (Eng.) [5]-[6].
[92] ibid [1].
[93] ibid [35]-[36].
[94] ibid [64]-[65], [75].
[95] ibid [93].
[96] James Casey and Vincent Carriou, 'Kabab- Ji and the governing law of the arbitration agreement: a comparison between England and France' (2023) 1 International Business Law Journal 53, 57-58.
[97] ibid 55.
[98] ibid 57-58.
[99] ibid.
[100] ibid 58.

have become part of an arbitration agreement may be based on a number of doctrines.[101] As we saw with *Kabab-Ji*, the rules for novation under English contract law would have required consent and formal requirements to be met in order for the parent company to become a party to the arbitration agreement.[102] The French courts sought to ascertain the common intention from the parent company's involvement in the performance of the contract as opposed to undergoing a contractual law analysis due to the independent treatment of the arbitration agreement.[103] Similar discrepancies are seen in relation to the other doctrines. American courts, for instance, have been reluctant to recognise the 'group companies' doctrine under which the arbitration agreement can extend to non-signatories in a group provided that the companies form a 'single economic entity', and the non-signatories have actively participated in the formation and performance of the substantive contract.[104] However, U.S. courts have been willing to extend arbitration agreements to non-signatories under other doctrines such as estoppel.[105] Other countries such as Sweden and Switzerland have also rejected the 'group companies' doctrine but have justified the inclusion of non-signatories under other doctrines such as implied consent.[106] Similar to the *Cour de Cassation*, the Supreme Court of Switzerland held that a third party's involvement in the performance of the contract can illustrate that it has implicitly accepted the arbitration agreement.[107] In *Norsk Hydro v Ukraine*, the Svea Court of Appeal in Sweden indicated that participating in arbitration without an objection can indicate the acceptance of the arbitration agreement, albeit, on the facts, Ukraine was found not to have

[101] Common bases for subjecting a non-signatory to an arbitration agreement include "agency; alter ego and veil-piercing; group companies; succession; assignment; and implied consent": Born (n 4) 114; cf. U.S. law recognises five doctrines under which a non-signatory can be subject to the arbitration agreement: *Thomson-CSF, S.A. v American Arbitration Association*, 64 F.3d 773 (2d Cir. 1995).

[102] *Kabab-Ji* (n 90) [64]-[65], [75].

[103] Casey and Carriou (n 95) 58.

[104] The 'group companies' doctrine was first recognised in the *Dow Chemical Case* (ICC Case No 4131). However, many authors have deemed the doctrine to be redundant and replaceable by other doctrines such as implied consent and veil-piercing: Pietro Ferrario, 'The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?' (2009) 26(5) Journal of International Arbitration 647, 651-652; Gizem Halis Kasap, 'Etching the Borders of Arbitration Agreement: The Group of Companies Doctrine in International Commercial Arbitration under the U.S. and Turkish Law' (2017) 2(1) University of Bologna Law Review 89, 92, 94.

[105] Under the estoppel doctrine, a non-signatory who knowingly exploits and in turn benefits from the primary contract is estopped from denying other parts of the contract such as the arbitration agreement: e.g. *E.I. Dupont de Nemours & Co. v Rhone Poulenc Fiber & Resin Intermediates, S.A.S.,* 269 F.3d 187, 195 (3d Cir. 2001) 195, 199-200, 202.

[106] Eduardo Silva Romero and Luis Miguel Velarde Saffer, 'The Extension of the Arbitral Agreement to Non-Signatories in Europe: A Uniform Approach' (2016) 5(3) American University Business Law Review 371, 377-380.

[107] *X. v Y. Engineering and Y. S.p.A.*, Tribunal Federal [TF] April 7, 2014, 4A_450/2013 (Switzerland), paras 3.2., 3.5.6.2.

participated in the arbitration in the first place.[108] In line with the other factors, it is evident that the analysis of non-signatories is largely jurisdiction-dependent.

Conclusion

This paper has sought to formulate an argument as to why the law governing the arbitration agreement is of paramount importance. The arbitration agreement possesses its own unique nature, distinct from the substantive contract. This is illustrated by the fact that it is subject to a number of special rules under domestic and international jurisprudence. Accordingly, it cannot be assumed that when issues of validity and scope arise in relation to the arbitration agreement, the law of the main contract or that of the seat forms the best point of analysis for resolving issues.

In the absence of an express choice of law, the parties will often face uncertainty as to the legal consequences of their agreement. The parties may, for example, have certain expectations as to the formality requirements of the arbitration agreement. In *Sulamerica,* the respondent expected that the plaintiff would seek its consent prior to commencing arbitration but this was not the standard required under the proper law of the agreement. Likewise, the parties may have specific expectations about the matters that can be arbitrated under the agreement. In *Enka,* the parties had conflicting opinions about whether the arbitration agreement extended to tort claims. While certain jurisdictions would have certainly ruled in favour of excluding tort issues, most have adopted a liberal approach in construing the scope of the agreements. Therefore, parties wanting to exclude certain matters from consideration should incorporate a clear provision to this effect. Finally, the law governing the arbitration agreement is highly relevant in the event that non-signatories are involved in proceedings. The absence of the governing law in *Kabab-Ji* resulted in opposing conclusions in the courts of England and France. Under the law of England, the parent company could become part of the agreement only if strict formality requirements had been met. In France, however, its mere involvement in the performance of the agreement rendered it liable to the arbitral award.

These cases illustrate that the legal rules concerning the arbitration agreement can vary indefinitely under different domestic laws. These rules are crucial for determining any issues

[108] *Norsk Hydro v State Property Fund of Ukraine & Others* [Svea Hovrätt] [Svea Court of Appeal] 2007-12-17 T 3108-06 (Sweden), 12.

arising out of the arbitration agreement. To avoid legal uncertainty or unexpected consequences, the parties to an arbitration agreement should agree on the system of law to govern their agreement in line with their commercial expectations and common intention.

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