

Fine margins: Examining the minority-majority divide in  
*Enka v Chubb*

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**ABSTRACT**

*The question of how to determine the law of the arbitration agreement has long been a bothy debated topic in the field of international commercial arbitration. While this contentious issue was addressed by the UK Supreme Court in Enka v Chubb, the majority and minority judges disagreed on the appropriate approach to take when an express choice of law governing the main contract is absent. In this article, the author examines the diverging opinions and argues that the majority's framework is preferable on both public policy and theoretical grounds.*

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## INTRODUCTION

The law governing an arbitration agreement is highly relevant in the practice of international arbitration. It is therefore crucial to understand how the law is determined. Recently, the UK Supreme Court (UKSC) in *Enka v Chubb* (*Enka*)<sup>1</sup> has provided some clarity with regards to ascertaining the law governing an arbitration agreement. Nonetheless, disagreement emerged in *Enka* when an express choice of law was absent from the main contract, with the dissenting judges favouring the law of the main contract over the law of the seat<sup>2</sup> as the law governing the arbitration agreement. This article first seeks to examine and explain this divide among the judges. Following this, it is argued that the majority's opinion in *Enka* should be the way forward for English law as it is more aligned with international practice and would therefore reduce the likelihood of a foreign court reaching a conflicting decision on the same case. Moreover, the majority's approach is theoretically sound and reflects the prevailing 'hybrid' theory of arbitration. In contrast, the minority's approach focuses excessively on contractual freedom which risks the imputation of parties' intention.

### I. RELEVANCE OF THE LAW GOVERNING THE ARBITRATION AGREEMENT

Amongst other things, the law governing the arbitration agreement determines its validity.<sup>3</sup> This is important because a valid agreement is the fundamental starting point for the commencement of arbitral proceedings; it records parties' consent to arbitration.<sup>4</sup> Without a valid agreement, the

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<sup>1</sup> *Enka Insaat Ve Sanayi A.S. v OOO. Insurance Company Chubb* [2020] UKSC 38.

<sup>2</sup> The law of the seat of arbitration is the governing procedural law of the arbitration and the enforceability of the award. The seat of arbitration differs from the place of hearing, which is the physical location where the hearing is held.

<sup>3</sup> Gary Born, *International Commercial Arbitration* (2<sup>nd</sup> edn, Kluwer 2014) 489.

<sup>4</sup> Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6<sup>th</sup> edn, Oxford University Press 2015) 1.40, 2.01.

recognition and enforcement of awards may be refused.<sup>5</sup> It is thus desirable to devise a consistent approach for determining the law of the arbitration agreement. Moreover, having clear guidance on this area provides certainty for businesspeople.<sup>6</sup>

Yet, identifying the law governing the arbitration agreement is challenging as parties seldom include an express choice of law within the arbitration agreement itself.<sup>7</sup> Additionally, an arbitration agreement embedded within the main contract is capable of being governed by a different law from the rest of the contract.<sup>8</sup> Courts and tribunals are thus forced to rely on choice of law rules that often confuse rather than clarify.<sup>9</sup>

## II. *ENKA V CHUBB*: FINE MARGINS

Pre-*Enka*, the framework for finding the law of the arbitration agreement was unclear due to conflicting decisions rendered by the Court of Appeal. In *C v D*, Longmore LJ expressed in obiter that in the absence of an express law of the arbitration agreement, the said agreement will ‘normally have a closer connection with the [law of the seat] than with [the law of the underlying contract]’.<sup>10</sup>

Subsequently, in *Sulamérica v Enesa* (*‘Sulamérica’*), Moore-Bick LJ declined to follow the obiter in *C v D*.<sup>11</sup> Surveying the authorities presented, his Lordship observed that the law governing the arbitration agreement is ascertained through undertaking a three-stage inquiry into (i) express choice, (ii) implied choice, and (iii) closest and most real connection. When searching for implied choice, parties are generally presumed to have intended the arbitration agreement to be governed by the expressly chosen law of the main contract (the *‘Sulamérica*

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<sup>5</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 3 My 1956, entered into force 7 June 1959) 330 UNTS 3 (New York Convention), art V(1)(a); see also Arbitration Act 1996, s 67.

<sup>6</sup> *Enka Insaat Ve Sanayi A.S. v OOO. Insurance Company Chubb* [2020] EWCA Civ 574 [89].

<sup>7</sup> Peter Ashford, ‘The Proper Law of the Arbitration Agreement’ (2019) 85(3) International Journal of Arbitration, Mediation and Dispute Management 276, 278.

<sup>8</sup> Redfern and others (n 4) 3.10.

<sup>9</sup> Born (n 3) 473.

<sup>10</sup> *C v D* [2007] EWCA Civ 1282 [22].

<sup>11</sup> *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia* [2012] EWCA Civ 638 [24].

presumption’).<sup>12</sup> It is only where the court is unable to deduce an implied choice that the ‘closest connection’ should be considered. While both *C v D* and *Sulamérica* agree that the law of the seat has the closest connection to the arbitration agreement, Longmore LJ failed to consider the possibility that parties had made an implied choice of law.<sup>13</sup>

This confusion was amplified by the Court of Appeal in *Enka*, where Popplewell LJ rejected the *Sulamérica* presumption and held that in the absence of an express choice of law, there is a strong presumption that parties have impliedly chosen the law of the seat as the law of the arbitration agreement.<sup>14</sup> Recognising the uncertainty created, the UKSC in *Enka* sought to provide clearer guidance. First, the three-stage inquiry in *Sulamérica* was affirmed as the starting point.<sup>15</sup> Next, if a law governing the arbitration agreement was not specified, the *Sulamérica* presumption would apply, and the express choice of law for the main contract would be extended to the arbitration clause as an implied choice.<sup>16</sup> Popplewell LJ’s decision was thus overruled.

Nevertheless, this was the extent to which the Lordships agreed, and the opinion of the court ultimately resulted in a 3:2 vote. Specifically, the main contract which bound the respondent, Chubb, did not include a choice of law clause. On the majority’s view, there was thus neither an express nor an implied choice of law governing the arbitration agreement. Accordingly, the majority found it necessary to ‘identify the system of law with which the arbitration agreement is most closely connected’.<sup>17</sup> It was held that this would generally be the law of the seat, which was consistent with *C v D* and *Sulamérica*.<sup>18</sup>

The dissenting judges were unconvinced. According to Lord Burrows, it was not necessary to determine which system of law was the most closely connected to the arbitration agreement.<sup>19</sup> Contrary to the majority’s opinion, an

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<sup>12</sup> *ibid* [25]-[26].

<sup>13</sup> *Enka* (UKSC) (n 1) [48].

<sup>14</sup> *Enka* (EWCA) (n 6) [105].

<sup>15</sup> *Enka* (UKSC) (n 1) [27].

<sup>16</sup> *ibid* [43]-[52].

<sup>17</sup> *ibid* [156].

<sup>18</sup> *ibid* [104], [123], [156].

<sup>19</sup> *ibid* [228].

implied choice of law for the main contract could amount to an implied choice of law for the arbitration agreement. His Lordship then proceeded to conclude on the basis of Art. 3 of the Rome I Regulation that the main contract was governed by Russian law through an implied choice. Accordingly, this constituted an implied choice of Russian law for the arbitration agreement.<sup>20</sup> Moreover, even if there was no implied choice of law for the main contract (as the majority had held), both Lord Burrows and Lord Sales contended that the arbitration agreement had the closest connection with the law of the main contract, rather than the law of the seat.<sup>21</sup> The disagreement between the majority and minority is therefore twofold:

- (1) For the majority, an implied choice of law for the arbitration agreement can only be found if there is an express choice of law for the main contract. However, Lord Burrows disagrees, and finds that even an implied choice of law for the main contract can amount to an implied choice of law for the arbitration agreement.
- (2) If there is no implied choice of law, the majority finds that the closest connection to the arbitration agreement is the law of the seat. However, Lord Burrows and Lord Sales argue that the closest connection is the law of the main contract.

### III. THE DIVERGENCE IN *ENKA* EXPLAINED

#### A) The majority's approach

For the majority led by Lord Hamblen, when an express choice of law for the arbitration agreement or the main contract is absent, deference is given to the law of the seat which has the 'closest connection' to the arbitration agreement.<sup>22</sup> This was justified based on principle and policy reasons which included examining the place of performance, fulfilling commercial purpose, and achieving legal certainty.<sup>23</sup> In particular, the majority placed emphasis on the place of performance.

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<sup>20</sup> *ibid* [260].

<sup>21</sup> *ibid* [256], [286].

<sup>22</sup> *Enka* (UKSC) (n 1) [118].

<sup>23</sup> *ibid* [121] – [146].

According to their Lordships, when determining the system of law with which the contract has its closest connection to, the common law attaches the most weight to the contract's place of performance. This is because the place of performance has the greatest interest in regulating the contract, since the performance occurs within its territory. Consequently, it must be the laws of the place of performance which the said contract is subject to.<sup>24</sup>

For arbitration agreements, the seat of arbitration was proposed as its place of performance.<sup>25</sup> Citing Cooke J in *C v D*, Lord Hamblen explained that an agreement as to the seat of arbitration is 'akin to an exclusive jurisdiction clause'.<sup>26</sup> Parties effectively submit to the supervisory jurisdiction of the courts of the seat to decide on the validity of their arbitration agreement. The agreement to arbitrate is therefore 'performed' at the seat of arbitration. Since the place of performance is a decisive factor, it is the seat that is most closely connected to the arbitration agreement.

## **B) The minority's approach**

In contrast, according to Lord Burrows, when an express choice of law in the arbitration agreement is absent, there is a presumption that the parties made an implied choice that the law of the main contract would also be the law governing the arbitration agreement.<sup>27</sup> Unlike the majority's approach, this rule would apply regardless of whether the law of the main contract was expressly or impliedly chosen.

Referring to this as the 'main contract' approach,<sup>28</sup> his Lordship argued that insufficient weight was given to the implied choice of law of the main contract by the majority. It made 'no rational sense' for the majority to hold that an express choice of law in the main contract meant that parties wished for the same law to govern the arbitration agreement, yet completely disregard party autonomy when there is an implied choice in the main contract.<sup>29</sup> Simply put,

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<sup>24</sup> *ibid* [121].

<sup>25</sup> *ibid*.

<sup>26</sup> *C v D* [2007] EWHC 1541 [29]

<sup>27</sup> *Enka* (UKSC) (n 1) [230]-[255].

<sup>28</sup> *ibid* [187].

<sup>29</sup> *ibid* [245].

the distinction between an express and implied choice of law for the main contract is arbitrary. Lord Sales concurred and pointed out that the majority had acknowledged the expectations of businesspeople that their contractual arrangements are internally coherent and thus the entire contract should be governed by the same law.<sup>30</sup> As such, English law must strive to give effect to such expectations even if the choice of law for the main contract was implied.

Conversely, the majority placed excessive weight on the seat of arbitration. Choosing a seat determines the *lex arbitri* and grants the courts of the seat supervisory jurisdiction, but it does not follow that this has any connection to the law governing the arbitration agreement.<sup>31</sup> Similar reasons were given by the dissenting judges for justifying that the closest connection to the arbitration agreement is law of the main contract.

The two opposing views thus demonstrate that there remain some points of contention at the highest appellate court. While the majority's approach is now the leading authority and has provided much-needed clarification, the minority's reasoning highlights that there are strong arguments for an alternative framework, especially since it is supported by some precedents. In *Channel Tunnel Group*, Lord Mustill held that it would be 'exceptional' for the law governing the arbitration agreement to differ from the law governing the main contract.<sup>32</sup> Nonetheless, on both public policy and theoretical grounds, this essay will argue that the framework used by the majority is preferred.

#### IV. PUBLIC POLICY: CONSISTENCY WITH APPROACHES ACROSS OTHER JURISDICTIONS

First, this article contends that the majority approach in *Enka* is normatively preferable as it is more consistent with how other civil and common law jurisdictions identify the law governing the arbitration agreement. Such alignment with international practice is desirable based on public policy grounds. As argued by Paulsson, cross-border arbitration is pluralistic in nature;

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<sup>30</sup> *ibid* [286].

<sup>31</sup> *ibid* [241], [287].

<sup>32</sup> *Channel Tunnel Group v Balfour Beatty Construction Ltd* [1993] AC 334, 357.

‘a multiplicity of legal orders may ensure the efficacy of arbitration.’<sup>33</sup> Hence, consistency is of paramount importance since different rules on ascertaining the law of the arbitration agreement across jurisdictions increases the likelihood of conflicting judgments. For example, in *Kabab-Ji*, the English and French courts were both deciding on the validity of the same arbitration agreement.<sup>34</sup> The decision turned on the question of the agreement’s proper law, with the courts coming to opposite conclusions. The Paris Court of Appeal found that the arbitration agreement was governed by French law and upheld the validity of an arbitration award on the basis that the tribunal had jurisdiction over a third-party. However, six months earlier, the English courts had refused to enforce the award, finding that English law applied to the arbitration agreement, and the tribunal had wrongly asserted its jurisdiction.<sup>35</sup> Such outcomes are undesirable as they defeat parties’ trust in arbitration as a ‘worldwide authoritative mechanism’,<sup>36</sup> creating fear that awards upheld in one state will not be enforced in another due to different jurisdictions finding that different laws govern the arbitration agreement. Thus, consistency with international practice and the prevention of conflicting decisions is key to deciding which approach in *Enka* is ideal.

Beyond this, consistency also ensures that the most pragmatic solution is achieved. When different jurisdictions adopt similar approaches, it avoids significant confusion and uncertainty. This is especially important for ascertaining the law governing the arbitration agreement, since most cross-border arbitration cases will often involve multiple jurisdictions attempting to deal with such conflict of laws questions.

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<sup>33</sup> Jan Paulsson, ‘Arbitration in Three Dimension’ (2010) LSE Law, Society and Economics Working Papers 2/2010, 10 <[http://eprints.lse.ac.uk/32907/1/WPS2010-02\\_Paulsson.pdf](http://eprints.lse.ac.uk/32907/1/WPS2010-02_Paulsson.pdf)> accessed 14 March 2022.

<sup>34</sup> *Kabab-Ji v KFG* [2020] EWCA Civ 6; CA Paris, pôle 1-ch.1, 23 juin 2020, n°17/22943.

<sup>35</sup> Debevoise & Plimpton, ‘Kabab-Ji and the Law of the Arbitration Agreement: French and English Courts Clash Once Again’ (*Debevoise in Depth*, 9 July 2020) <<https://www.debevoise.com/insights/publications/2020/07/kabab-ji-and-the-law-of-the-arbitration-agreement>> accessed 3 April 2021.

<sup>36</sup> Stavros Brekoulakis, ‘The Effect of An Arbitral Award and Third Parties in International Arbitration’ (2005) 16(1) *American Review of International Arbitration* 177.

In concluding that the majority approach is more compatible with international practice, approaches in Singapore and continental Europe will be examined in detail. Singapore, Paris, and Geneva are leading seats of arbitration in the world.<sup>37</sup> As popular seats of arbitration, there will be a greater likelihood of their respective national courts hearing disputes over the law of the arbitration agreement. The Singapore and continental Europe approaches are therefore of great value when determining general international practice. Additionally, Singapore judgments in international arbitration are of persuasive authority to English judges. For example, when justifying that the *Sulamérica* presumption aligned with international perspectives, the majority opinion in *Enka* cited Singapore as an ‘instructive example’.<sup>38</sup>

### A) Singapore

In *BNA v BNB*,<sup>39</sup> Singapore’s Court of Appeal endorsed the three-stage inquiry in *Sulamérica*, first adopted by Chong J in *BCY v BCZ* (*BCY*).<sup>40</sup> *BCY* is a landmark decision in the Singapore High Court dealing with the question of determining the law of the arbitration agreement. However, as the parties expressly chose New York law to govern the main contract, Chong J did not address the situation where an express choice of law in the main contract was absent. Nonetheless, certain inferences can be drawn from *BCY* that suggest the *Enka* majority’s approach will be favoured in the future.

At first glance, there is a possibility that the law of the main contract will be prioritised. In *BMO v BMP* (*BMO*), there was no express choice of law for the arbitration agreement and the main contract.<sup>41</sup> Ang J hence observed that the case did not fit neatly into the *Sulamérica* presumption that the parties’ implied choice would be the *expressly* chosen law of the main contract. In an approach akin to Lord Burrows’, Ang J highlighted that undergirding the *Sulamérica* presumption is the consideration that ‘parties intended the arbitration

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<sup>37</sup> ‘2021 International Arbitration Survey: Adapting arbitration to a changing world’ (*Queen Mary University of London*) <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf)> accessed 16 July 2021.

<sup>38</sup> *Enka* (UKSC) (n 1) [57], [58].

<sup>39</sup> *BNA v BNB* [2019] SGCA 84 [44] (Singapore Court of Appeal)

<sup>40</sup> *BCY v BCZ* [2016] SGHC 249 (Singapore High Court).

<sup>41</sup> *BMO v BMP* [2017] SGHC 127 (Singapore High Court).

agreement to be governed by the same law as the main contract<sup>42</sup>. It thus followed that an implied choice of Vietnamese law to govern the main contract also constituted the parties' implied choice of law for the arbitration agreement.

However, *BMO* can be distinguished from *Enka* on the basis that a seat of arbitration was not specified in *BMO* – it was presumed to be Singapore through applying the SIAC Rules.<sup>43</sup> As such, it is arguable that Ang J may have decided the case differently and in accordance with *Sulamérica* and the *Enka* majority if the parties had explicitly chosen the law of the seat. This was the position advanced by Leong, who contended that an examination of the three-stage framework in *Sulamérica* indicates that an express choice of the seat should trump what can be implied.<sup>44</sup> The enquiry thus moves beyond implied choice and focuses on the 'closest connection' test. In a nod to the argument by Lord Hablen, Leong argues that since the seat court has supervisory powers over the validity of the arbitration agreement and is best placed to apply the seat law, it is the seat of arbitration that must have the closest connection to the arbitration agreement.<sup>45</sup>

Thus, it seems likely that the Singapore courts will take a similar approach to the *Enka* majority. In addition to the aforementioned reasons, Chong J in *BCY* emphasised that the *Sulamérica* presumption would only apply when parties had made an *express* choice of law in the main contract.<sup>46</sup> Furthermore, his Honour endorsed Hablen J's (as he then was) decision in *Habas v VSC Ltd*, where he held that when an express choice of law in the main contract is absent, the law of the seat will be the law of the arbitration agreement, either as the 'closest connection' or as an implied choice.<sup>47</sup>

## B) Europe

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<sup>42</sup> *ibid* [37] – [39].

<sup>43</sup> *ibid* [40].

<sup>44</sup> Victor Leong and Tan Jun Hong, 'The Law Governing Arbitration Agreements: *BCY v BCZ*' (2018) 30 *Singapore Academy of Law Journal* 70, 92.

<sup>45</sup> *ibid* 93.

<sup>46</sup> *BCY* (n 40) [49].

<sup>47</sup> *ibid* [67]; *Habas v VSC Ltd* [2013] EWHC 4071 [101]-[103].

In the absence of an express choice of law governing the arbitration agreement, the French courts practice a ‘delocalised’ approach, without referring to national laws.<sup>48</sup> Pursuant to international law principles, arbitration agreements are autonomous from any legal system and their validity is determined by parties’ common intention.<sup>49</sup> Known as the French ‘third-way’,<sup>50</sup> such a practice gives effect to Gaillard’s transnational theory of arbitration.<sup>51</sup> In this light, arbitration is not attached to any national order, but rather ‘anchored in the collectivity of legal systems’ with arbitrators applying supranational laws yielded by a broad agreement of states.<sup>52</sup>

While this principle is established in France, it lends no assistance to our present enquiry as it is not accepted by other jurisdictions. Indeed, the transnational vision of arbitration does not reflect legal reality, since judges outside of France are unlikely to show fealty to a ‘transnational’ order over their State’s own system.<sup>53</sup> Additionally, contracts simply cannot be governed by the parties’ common intention – they are only legally-binding by virtue of a national legal regime.<sup>54</sup>

Beyond France, an analysis of authorities in other civil law jurisdictions highlights two approaches to finding the law of the arbitration agreement. First, some courts such as the Dutch follow the *Sulamérica* presumption, holding that parties submit the validity of the arbitration clause to the same law as the main contract that has been expressly selected.<sup>55</sup> Second, similar to Longmore LJ in *C v D*, judges have also chosen to apply the law of the seat to ‘separable’ arbitration agreements even where a choice of law clause for the main contract

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<sup>48</sup> Emmanuel Gaillard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer 1999) para 437.

<sup>49</sup> *Municipalité de Khoms El Mergeb v Société Dalico*, 1994 *Revue de l'Arbitrage* 116.

<sup>50</sup> Redfern and others (n 4) 3.34.

<sup>51</sup> Emmanuel Gaillard, ‘Commercial Arbitration as a Transnational System of Justice’ in Albert Jan van den Berg (ed.), *Arbitration: The Next Fifty Years* (Kluwer 2012).

<sup>52</sup> *ibid* 69.

<sup>53</sup> Paulsson (n 33) 13.

<sup>54</sup> Born (n 3) 556; *Amin Rasheed Shipping Corporation v Kuwait Insurance Company* [1984] AC 50, 65.

<sup>55</sup> *Onerri Commercial v Dielle Srl*, Dutch Court of Appeal, 4 August 1993, XIX YBCA 703, 706.

exists.<sup>56</sup> It is therefore clear that the minority's opinion in *Enka* is anomalous to international practice, as judicial approaches tend to follow either the *Sulamerica* presumption or apply the law of seat regardless of whether an explicit choice of law of the main contract exists. Lord Burrows' proposition to construe an implied choice of law in the main contract as an implied choice for the arbitration agreement stands alone.

## V. MINORITY APPROACH LACKS THEORETICAL SOUNDNESS

Evidently, the majority's approach is more consistent with international practice and should be adopted based on public policy grounds. Beyond this, it also reflects the widely accepted hybrid theory of arbitration,<sup>57</sup> as opposed to the minority's approach which appears to endorse the lesser-known contractual theory of arbitration.

At first blush, the majority's focus on the seat of arbitration in the 'closest connection' stage appears to advocate for the jurisdictional theory of arbitration which emphasises the importance of state sovereignty. Arbitration agreements do not exist in a territorial vacuum and are only allowed with a state's permission.<sup>58</sup> For example, when parties choose England and Wales as the seat of arbitration, their right to opt for arbitration over court proceedings stems from the government-enacted Arbitration Act 1996. Per Patten LJ in the Court of Appeal, this right is not unlimited, and 'the scope of even the most widely drafted arbitration agreement will have to yield to restrictions derived from other areas of the law'.<sup>59</sup> As argued by Mann, this means that 'the local sovereign does not yield...except as a result of freedom granted by himself'.<sup>60</sup>

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<sup>56</sup> Born (n 3) 584; *Bulgarian Bank v Al Trade Finance* (2000) T 1881-99 (Swedish Supreme Court).

<sup>57</sup> Julian Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978).

<sup>58</sup> Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 33.

<sup>59</sup> *Fulham Football Club (1987) Limited v Sir David Richards and The Football Association Premier League Limited* [2011] EWCA Civ 855 [41].

<sup>60</sup> Frederick Alexander Mann, 'Lex Facit Arbitrum' (1986) 2(3) *Arbitration International* 214, 246.

The state thus has the right to control all activities within its territory. Consequently, questions relating to arbitration agreements are completely supervised by the courts of the seat, and subject to its mandatory rules.<sup>61</sup> This theory appears to form the foundation of the majority's view which focuses on the pre-eminence of the state.

Yet, the 'closest connection' test is only one component of the three-stage inquiry and the courts will first seek to ascertain whether parties have made an express or implied choice of law governing the arbitration agreement. In this sense, freedom of contract supersedes sovereignty. The majority's framework therefore recognises that the arbitration agreement is rooted in party autonomy, but potentially influenced by national laws. From this perspective, it is more appropriate to deem that the majority has adopted the hybrid theory of arbitration which views arbitration as a 'mixed juridical institution that is both contractual and jurisdictional'.<sup>62</sup>

In contrast, the minority's 'main contract' approach reflects a contractual understanding of arbitration. The underlying rationale of the minority's approach focuses on respecting freedom of choice and business expectations. This is closely tied to the contractual theory premised on the notion that party autonomy is the bedrock of arbitration. Proponents of this thesis contend that arbitration is purely contractual in nature such that the state has 'nothing to do with any international arbitration proceedings conducted within its territory'.<sup>63</sup> Support is drawn from the fact that all arbitral proceedings emanate from a contractual agreement submitting to arbitration, highlighting the primacy of the parties' choice. By emphasising the implied choice of law in the main contract to govern the arbitration agreement, Lord Burrows gives maximum effect to party autonomy and the contractual theory of arbitration.

From a theoretical standpoint, the hybrid theory of arbitration adopted by the majority judges is characteristic of modern-day arbitration. Indeed, it is generally acknowledged that arbitration contains both contractual and jurisdictional elements.<sup>64</sup> While arbitration emanates from a private, contractual

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<sup>61</sup> Hong-lin Yu, 'Explore the void - an evaluation of arbitration theories' (2004) 7(6) *International Arbitration Law Review* 180.

<sup>62</sup> Onyema (n 58) 39.

<sup>63</sup> *ibid* 36.

<sup>64</sup> Redfern and others (n 4) 1.92.

agreement, it is not completely delocalised from any national legal order. For example, the courts oversee enforcement and recognition, and also hear challenges on limited points of law. Arbitration agreements are also subject to mandatory statutory requirements under the law of the seat.<sup>65</sup> Conversely, the overreliance on party autonomy by the minority cannot adequately explain the role that the seat of arbitration continues to play and lacks theoretical soundness.

A further criticism is that the minority focuses excessively and artificially on the idea of ‘implied’ choice which risks the imputation of intention rather than an inference of actual intention.<sup>66</sup> By referencing ideas of ‘commercial common sense’ and ‘business expectations’ to justify an implied choice of law for the arbitration agreement where there is no express choice of law for the main contract, the reality of the situation is ignored. Indeed, if the parties did not include a choice of law for the main contract, it is likely that they did not even contemplate what the law governing the arbitration agreement would be.

## CONCLUSION

A comparative evaluation reveals that most jurisdictions either defer completely to the law of the seat or adopt a nuanced test that will only extend an *express* choice of law of the main contract to the arbitration agreement (rather than an implied choice of law of the main contract). Moreover, common law systems such as Singapore tend to adopt the latter approach, aligning with the *Enka* majority. Ultimately, as far as the author is aware, no landmark decision on the law of the arbitration agreement in the jurisdictions analysed has gone to the lengths the *Enka* minority did. The majority’s decision is thus more harmonised with international practice and is desirable since consistency reduces the likelihood of conflicting outcomes in cross-border transactions. Beyond the benefits of confidentiality and procedural flexibility, parties choose arbitration as their preferred form of dispute resolution because arbitral awards are easily enforceable across jurisdictions. If the English courts were to adopt an approach

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<sup>65</sup> *Onyema* (n 58) 39. For example, see Arbitration Act 1996, s 4(1).

<sup>66</sup> Darius Chan and Teo Jim Yang, ‘Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There Is None’ (2020) 37(5) *Journal of International Arbitration* 635, 642.

that is unique, it would lead to anomalous results that may render awards being set aside or refused recognition in other jurisdictions.

In addition, it is also clear that the minority approach in *Enka* lacks theoretical soundness as opposed to the majority approach which endorses the prevailing hybrid theory of arbitration. While party autonomy must be respected, there is an overemphasis on implied choice by Lord Burrows.