CONFUSED SEAS: IDENTIFYING THE PROPER LAW OF ARBITRATION AGREEMENTS IN MARITIME CONTRACTS – ENGLAND, SINGAPORE AND AUSTRALIA

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The proper law of an arbitration agreement is crucial for the enforcement of arbitration clauses and arbitral awards but maritime contracts rarely make explicit their arbitration agreement's proper law. Complicating matters, several approaches have emerged for identifying the proper law. England and Singapore utilise similar frameworks, each of which broadly aligns with Australian conflict of laws rules. However, the tests' application diverges between, and within, England and Singapore. Meanwhile, it remains to be seen whether Singapore will follow recent changes to the English approach. As a result, the operation of arbitration agreements found in the leading maritime contracts examined in this article is uncertain. To ensure that arbitration agreements operate as intended, users of maritime contracts should specify the proper law of the arbitration agreement in each arbitration clause.

1 Introduction

International commercial arbitration is the preferred method for resolving maritime disputes.[1] Most charterparties and maritime contracts provide for arbitration[2] and in 2019 over 1600 arbitrations were initiated under the London Maritime Arbitrators Association Terms ('LMAA Terms') alone.[3] One of the appeals of international arbitration is that a network of international conventions and domestic legislation supports arbitral proceedings and the enforcement of awards.[4] At the heart of this system—and every arbitration—is the arbitration agreement.

An arbitration agreement records the parties' consent to submit a dispute to arbitration and, generally, their desire that the arbitration be seated in a certain jurisdiction and conducted under specific arbitral rules. The arbitration agreement is also a separable contract from the underlying contract in which the arbitration clause is set out.[5] As such, the proper law of the arbitration agreement may not be that of the underlying contract.[6] The upshot is that different systems of law can govern the formation, validity and scope of the underlying contract and the arbitration agreement as well as the parties to the agreements.

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[1] White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration* (Report, 2019) 5; Robert G Shaw, 'Embracing Maritime and International Arbitration' (2019) 50(1) *Journal of Maritime Law & Commerce* 123, 124 – 5; 249; Sarah C Derrington and James M Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, 2nd ed, 2016) 305; William Tetley, *International Maritime and Admiralty Law* (Éditions Yvon Blais, 2002) 442 – 3. See also Aldo Chircop et al, *Canadian Maritime Law* (Irwin Law, 2nd ed, 2016) 272 – 3; John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (Juta, 2nd ed, 2009) 43 – 4. Maritime arbitration is a 'species belonging to the "genus" of international commercial arbitration'. This article uses the terms interchangeably. International commercial arbitration is distinct from investor-state arbitration. Fabrizio Marrella, 'Unity and Diversity in International Arbitration: The Case of Maritime Arbitration' (2005) 20(5) *American University International Law Review* 1055, 1059.

[2] *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254, [19] (Lord Hoffmann) ('*Fiona Trust*') ('[i]t would have been remarkable for [a party] to enter into any charter without an arbitration agreement'); Tetley (n 1) 176. See, eg, BIMCO Voyage Charter Party for the Transportation of Chemicals in Tank Vessels (2008) cl 49; BIMCO Standard Ship Management Agreement (2009) cl 23.

[3] Holman Fenwick Willan, *The Maritime Arbitration Universe in Numbers* (Shipping Insight, July 2020) 1.

[4] White & Case (n 1) 7.

[5] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, 980 (Diplock LJ), 998 (Scarman LJ); *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, [343] (Allsop CJ, Besanko and O'Callaghan JJ) ('Hancock'); *Granite Rock Co v International Brotherhood of Teamsters*, 130 US 2847, 2857 (2010) (Thomas J). See also Gary B Born, *International Commercial Arbitration* (Kluwer, 3rd ed, 2020) 376 – 8 and authorities cited therein.

[6] See, eg, *Sul América CIA Nacionale de Seguros SA v Enesa Engenharia* SA [2012] 1 Lloyd's Rep 671, [25] (Moore-Bick LJ, Hallett LJ agreeing) ('Sul América'); *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] EWCA 574, [95] (Popplewell LJ, Males and Flaux LLJ agreeing) ('Enka Insaat'); *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533, [68] (Ward J) ('Cargill').

Curiously, despite frequent disputes over an arbitration agreement's proper law,[7] leading standard-form maritime contracts do not clearly identify the proper law of the arbitration agreement.[8] While parties may modify the terms of these contracts,[9] boilerplate arbitration clauses are rarely changed.[10] In practice this means that the proper law is discerned through conflict of laws analysis and contractual interpretation. This process is not straightforward: decisions pull in different directions while some jurisdictions have yet to formulate a 'correct' approach. Such heterogeneity does not enhance commercial certainty and raises the possibility of an unanticipated system of law governing the arbitration agreement's validity and operation.

This article distils practical guidance for drafting effective arbitration clauses by analysing English, Singaporean and Australian approaches to identifying the proper law of an arbitration agreement. In England and Singapore, the search for the proper law focuses on contractual construction and common law conflict of laws rules.[11] It is suggested that Australian courts—which have not set down a particular test for ascertaining the proper law of an arbitration agreement—will also apply common law choice of law rules for determining contractual relations. In England, however, the Supreme Court ('UKSC') recently reframed the approach following a split within the Court of Appeal as to the operation of the test in *Sul América*.[12] Just months before, in *BNA v BNB* ('*BNA*'),[13] Singapore's apex court had applied an approach based on an orthodox application of *Sul América*. There are important differences between the English and Singaporean approaches to *Sul América.* It remains to be seen whether Singapore or Australia will follow the changes in English law. Further, important differences between the English and Singapore approaches to *Sul América* have developed, especially for identifying an implied (inferred) choice of law. Singapore's emergence as a preeminent arbitral seat heightens the importance of these matters for other jurisdictions and parties in the Indo-Pacific. Moreover, it remains to be seen whether Singapore or Australia will follow the changes in English law. Since Singapore is a leading arbitration venue, these are important issues for other jurisdictions in the region. The complexity of this area of law highlights the need for clear arbitration agreements. The surest way to avoid uncertainty is to expressly state the arbitration agreement's proper law in the arbitration clause, a minor amendment to the standard forms.

The article begins by outlining the features of an arbitration agreement, including the simultaneous relevance of several systems of law and the separability doctrine, and the importance of the proper law. Section 3 examines English, Singaporean and Australian approaches to identifying the proper law of arbitration agreements. The section undertakes a practical analysis of recent case law to identify particular factors that can influence the identification of an arbitration agreement's proper law. Section 4 applies the approaches to arbitration agreements in common charterparties and suggests improvements to the clauses.[14]

2 The Arbitration Agreement: Labyrinthine Complexity

International commercial arbitration is a 'consensual' form of dispute resolution in that parties agree to submit their dispute to arbitration. The agreement to arbitrate records the parties' consent to resolve their dispute outside of national courts.[15] Typically, an arbitration agreement is a clause within an underlying contract.[16] There is no specific form for an arbitration agreement, but the Australian Maritime and Transport Arbitration Commission ('AMTAC') model arbitration clause is representative:

> Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the

[7] Born (n 5) 525. Such disputes arose in relation to maritime contracts in *The Star Texas* [1993] 2 Lloyd's Rep 445; *Compagnie Tunisienee de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572.
[8] See, eg, New York Produce Exchange Form (2015) cl 54; Ausgrain Form (2015) cl 42.1.
[9] James J Buckley, *The Business of Shipping* (Cornell Maritime Press, 8th ed, 2008) 60 ('[i]t is understood that individual clauses may be modified, rewritten or deleted as the negotiators decide'). But see Felix Sparka, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents* (Springer, 2010) 12 – 13.
[10] Manuel Alba, 'Maritime Arbitration in Spain: The Delocalization of Dispute Resolution and the Shrinking Recourse to Arbitration' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (Oxford University Press, 2016) 155, 156; Nigel Blackaby et al (eds), *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th ed, 2015) 70.
[11] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] UKSC 38, [30], [35], [57] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing) ('*Chubb*').
[12] Ibid [27] – [28], [170] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[13] *BNA v BNB* [2020] 1 SLR 456.
[14] Arbitration agreements in bills of lading are not considered as they are often subject to separate legal regimes. For recent consideration of arbitration agreements in bills of lading, see Melis Ödzel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where are We Now?' (2016) 33(2) *Journal of International Arbitration* 151.
[15] Blackaby et al (n 10) 12 – 13, 70.
[16] Born (n 5) 230.

> AMTAC Arbitration Rules. The seat of the arbitration shall be Sydney, Australia. The language of the arbitration shall be English.[17]

Several features of the AMTAC clause are immediately apparent. First, it explicitly designates an arbitral seat[18] which is the arbitration's legal domicile.[19] The law of the seat ordinarily governs significant aspects of the arbitration's procedure including judicial assistance in support of the arbitration (eg staying parallel court proceedings; retention of security in stayed admiralty proceedings)[20] and tribunal powers.[21] It is also relevant to the form and annulment (setting aside) of an award. In addition, the law of the seat may also apply to quasi-substantive aspects of the arbitration agreement (eg formal validity).[22]

Secondly, the AMTAC clause incorporates the *AMTAC Arbitration Rules*, binding the parties to those rules as a matter of contract.[23] Arbitral rules are generally concerned with procedural matters (eg the conduct of the proceedings; challenges to arbitrators) and compliment the law of the seat. Exceptionally, a few arbitral rules specify a default arbitral seat[24] or proper law of the arbitration agreement in the absence of party agreement.[25]

On its face, the AMTAC clause signals that multiple legal systems may be relevant to an arbitration's agreement effectiveness and identification of its proper law. Not all of these systems of law are readily apparent. For example, a *lex arbitri*, as distinct from the arbitral seat, may provide the procedural law.[26] In such a case, the interaction between the law of the seat and the *lex arbitri* is complex. Further, as in the AMTAC clause, it is rare for an arbitration agreement to explicitly state its proper law,[27] which can differ from the underlying contract's governing law.

2.1 Separability Principle

That different systems of law may govern the arbitration agreement and underlying contract is a corollary of the separability principle. The principle provides that the underlying contract and the arbitration agreement are severable contracts.[28] It is unsettled whether the two contracts are generally distinct or distinct only for a specific purpose such that the arbitration agreement is not a separate contract from the time of the formation of the underlying contract.[29] The conceptualisation adopted has direct relevance for interpretation of the arbitration agreement.

At this stage, though, it is sufficient to note the doctrine's widely-accepted practical implications. For example, the arbitration agreement is capable of operation despite the invalidity or termination of the underlying contract and *vice versa*.[30] Additionally, as there are two separate contracts, each has its own proper law. Further, different applicable laws can govern different aspects of the arbitration agreement (eg substantive validity; capacity).

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[17] Australian Maritime and Transport Arbitration Commission, *AMTAC Arbitration Rules* (2016) 8.

[18] Since Australia is a federation, selecting 'Sydney, Australia' as the seat raises a question as to whether the law of New South Wales or the Commonwealth governs the arbitration. It is suggested that Commonwealth law applies to an international commercial arbitration in light of *International Arbitration Act 1974* (Cth) ss 16, 21(1).

[19] There is a fundamental distinction between the location at which a hearing is conducted ('the venue') and the legal seat of the arbitration. It is now uncontroversial that an arbitration's substantive hearing may be held outside of the arbitral seat without affecting the legal status of the arbitral seat (also referred to as the 'place of arbitration'). See, eg, *Enka Insaat* [2020] EWCA 574, [46] (Popplewell LJ, Males and Flaux LLJ agreeing); *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR(R) 401, [35] – [39] (Chao Hick Tin JA); *Raguz v Sullivan* (2000) 50 NSWLR 236, [93] (Spigelman CJ and Mason P, Priestley JA agreeing).

[20] *Arbitration Act 1996* (UK) s 11; *Admiralty Act 1988* (Cth) s 29.

[21] Born (n 5) 371, 1703 – 9.

[22] See, eg, *Arbitration Act 1996* (UK) ss 5, 7; *National Iranian Oil Company v Crescent Petroleum Company International Ltd* [2016] EWHC 510, [13] – [17] (Burton J).

[23] Born (n 5) 1498.

[24] See, eg, Hong Kong International Arbitration Centre, *Administered Arbitration Rules* (2018) art 14.1. Compare Singapore International Arbitration Centre, *Arbitration Rules* (2016) art 21.1.

[25] London Maritime Arbitrators Association, *LMAA Terms* (2017) art 6; London Court of International Arbitration, *Arbitration Rules* (2020) art 16.2.

[26] *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1981] 1 Lloyd's Rep 116, 119 (Kerr LJ, Russell LJ and Sir Buckley agreeing); *Cargill* (2010) 78 NSWLR 553, [84] (Ward J); Born (n 5) 1727.

[27] A recent example of an arbitration agreement that included an express choice of its proper law is found in *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476, [39] (Lyons J).

[28] In England, see *Arbitration Act 1996* (UK) s 7; *Fiona Trust* [2008] 1 Lloyd's Rep 254, [17] (Lord Hoffmann). In Singapore, see *International Arbitration Act* (Cap 143A) ss 2A(2), 3(1), Sch I art 7(1). In Australia, see *International Arbitration Act 1974* (Cth) s 16, Sch 2 art 7(1); *Reinhart v Hancock Prospecting Pty Ltd* (2019) 366 ALR 635, [13] (Kiefel CJ, Gageler, Nettle and Gordon JJ) ('*Reinhart*'). See also Born (n 5) 377, 385 – 420.

[29] Anthony Kennedy, 'The Law Governing Arbitration Agreements: Where to Start?' [2020] 3 *Lloyd's Maritime and Commercial Law Quarterly* 393, 397 – 8.

[30] *Fiona Trust* [2008] 1 Lloyd's Rep 254, [17] (Lord Hoffmann); *Hancock* (2017) 257 FCR 442, [20] (Allsop CJ, Besanko and O'Callaghan JJ).

Therefore, a separate choice of law analysis must be undertaken for the underlying contract *and* the arbitration agreement.[31]

2.2 Compétence-Compétence

A key issue is *who* should undertake the analysis. Arbitration involves private dispute resolution but domestic courts remain relevant in a supervisory capacity and to aid the arbitral proceedings.[32] In effect, at least two forums may be concurrently capable of considering issues involving determination of an arbitration agreement's proper law. One such issue is a challenge to a tribunal's jurisdiction under the arbitration agreement, which raises the tricky question of whether the tribunal or a court is the appropriate forum to determine jurisdiction.

Most national arbitration legislation and arbitral rules recognise a permissive ('positive') *compétence-compétence* principle allowing a tribunal to 'rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'.[33] The basic rationale is that allowing the tribunal to determine its jurisdiction makes arbitration more efficient and prevents mischief.[34] Since the existence, validity and scope of contractual clauses are determined by reference to some system of law, the principle implicitly empowers tribunals to determine the arbitration agreement's proper law.

But permissive *compétence-compétence* does not preclude other forums from also determining the proper law. Nor does it entirely extinguish the prospect of conflicting decisions or dilatory tactics. In response, some jurisdictions, like France, also recognise a broad 'negative' aspect of *compétence-compétence* which bars domestic courts from considering jurisdictional challenges (and the proper law) prior to a tribunal except for in exceptional circumstances.[35] This is not the position in England. While generally 'arbitrators [should] be the first tribunal to consider whether they have jurisdiction to determine the dispute'[36] the *Arbitration Act 1996* (UK) ('*Arbitration Act*') 'does not require a party … to have that question decided by an arbitral tribunal'.[37] This includes interlocutory review of jurisdictional disputes.[38]

The Australian and Singapore international arbitration acts provide a middle path. Both acts require courts to refer to arbitration disputes that are the subject of a valid arbitration agreement while the tribunal is empowered to determine whether an arbitration agreement exists.[39] This power is not exclusive,[40] however, and non-intervention by the courts reflects a preference to 'give significant weight to the authority of the arbitrator'.[41] Further, when a party applies to the court to refer litigation to arbitration the court must still consider whether the arbitration agreement exists. In Singapore, this requires the court to identify (on a prima facie basis) and apply the arbitration agreement's proper law.[42] In Australia, on the other hand, the *lex fori* determines the existence of

[31] Born (n 5) 498. *Contra* Ian Glick and Venkatesan Niranjan, 'Choosing the Law Governing the Arbitration Agreement' in Neil Kaplan and Michael Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer, 2018) 131, 137 – 8.
[32] Sir Peter Gross, 'Courts and Arbitration' [2018] 4 *Lloyd's Maritime and Commercial Law Quarterly* 497. The allocation of power between a tribunal and domestic courts is a fundamental question in arbitration and the precise bounds are unsettled. For discussion, see generally Alan Scott Rau, *The Allocation of Power Between Arbitral Tribunals and State Courts* (Brill, 2018).
[33] *International Arbitration Act 1974* (Cth) sch 2 art 16(1). See also *International Arbitration Act* (CAP 143A) s 3(1); sch 1 art 16(1); *Arbitration Act 1996* (UK) s 30(1); London Court of International Arbitration, *Arbitration Rules* (2014) art 23(1); Hong Kong International Arbitration Centre, *Administered Arbitration Rules* (2018) art 19(1); Singapore International Arbitration Centre, *Arbitration Rules* (2016) art 25(2); Australian Centre for International Commercial Arbitration, *ACICA Rules* (2016) art 28.1.
[34] George A Berman, *International Arbitration and Private International Law* (Brill, 2016) 106 – 7.
[35] Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Kluwer, 1999) 407 – 8; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration*, tr Stephen V Berti and Annette Ponti (Thomson, 2nd ed, 2007) 392 – 3.
[36] *Fiona Trust* [2008] 1 Lloyd's Rep 254, [34] (Hope LJ).
[37] *Excalibur Ventures LLC v Texas Keystone Inc* [2012] 1 All ER 933, [57] (Gloster J).
[38] *Arbitration Act 1996* (UK) ss 32(2), 72.
[39] *International Arbitration Act 1974* (Cth) sch 2, arts 8, 16; *International Arbitration Act* (CAP 143A) sch 1 arts 8, 16. See also *International Arbitration Act* 1974 (Cth) s 7; *International Arbitration Act* CAP 143A) s 6.
[40] Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer, 1994) 479.
[41] *Hancock* (2017) 257 FCR 442, [141] (Allsop CJ, Besanko and O'Callaghan JJ).
[42] *Cassa di Risparmio di Parma e Piacanza SpA v Rals International Pte Ltd* [2015] SGHC 264, [74] – [88] (Vindoh Coomaraswamy J).

the arbitration agreement[43] while disputes as to the agreement's scope are left to the tribunal.[44] The benefit of the latter approach is that it more completely 'leave[s] the matter to the arbitrator as decision-maker of first instance'.[45]

A related question is which system of law is to be used to identify the proper law. Domestic courts generally use their own conflicts rules to identify the proper law.[46] But the 'choice of conflicts rules' is less clear under arbitral rules that give the tribunal discretion to apply the rules of law it determines to be appropriate, which may not be those of the seat.[47]

2.3 Importance of the Proper Law

Disputes over the proper law of an arbitration agreement also come before the courts in an application to stay court proceedings in favour of arbitration,[48] in respect of anti-suit or anti-arbitration injunctions,[49] or an application against an arbitral award.[50] Beyond issues of *compétence-compétence*, the importance of the proper law of the arbitration agreement in these contexts is two-fold. First, the proper law may determine the arbitration agreement's formal validity, formation, interpretation, substantive validity, and the parties to the arbitration agreement.[51] In turn, these issues bear on the arbitration agreement's existence and scope as well as the entities which may engage in the arbitration (eg third-parties).[52]

This leads to the second point. Different systems of law may govern these different aspects of the arbitration agreement depending on (a) the stage of the proceedings at which the aspects are considered and (b) the jurisdiction considering the clause. In the context of enforcement proceedings, the *New York Convention* provides that an award made in one jurisdiction may be enforced in any other jurisdiction party to the convention but recognition and enforcement of the award hinges on the existence of a valid arbitration agreement.[53] Under the *New York Convention* an arbitration agreement's validity is determined in accordance with arbitration agreement's proper law.[54] The position is the same under the UNCITRAL Model Law.[55]

The situation is more complex in respect to ongoing or prospective arbitrations. When parties seek the assistance of the courts at the arbitral seat, some courts apply the law of the *seat* to quasi-substantive issues like the interpretation or enforceability of an arbitration agreement and, as in England, require a 'valid' arbitration agreement to satisfy the seat's formal requirements.[56] Where courts are asked to assist a 'foreign' arbitration agreement, arbitration legislation in some jurisdictions is only enlivened when the arbitration agreement meets the jurisdiction's formalities requirements (eg writing requirements[57]).[58] In Australia, notably, issues of formation are determined according to the *lex fori* instead of the arbitration agreement's proper law.[59] As choice of law

[43] *Kennedy Miller Mitchell Films Pty Ltd v Warner Bros Feature Productions Pty Ltd* [2017] NSWSC 1526, [63] (Hammerschlag J); *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846, [214] (Beach J); *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1, [128] – [152] (Beach J) ('*Trina Solar*').
[44] *Rinehart v Rinehart* [2020] NSWSC 68, [200], [258] – [259] (Ward CJ).
[45] Malcolm Holmes and Chester Brown, *The International Arbitration Act 1974: A Commentary* (LexisNexis, 3rd ed, 2018) 215. Of course, this may lead to wasted costs where a tribunal makes a decision on jurisdiction that is subsequently overturned by a court but this potential shortcoming is offset by the avoidance of concurrent decisions on the proper law and fuller respect for party autonomy.
[46] Ozekie Chukwumerije, *Choice of Law in International Commercial Arbitration* (Quorum Books, 1994) 35.
[47] See, eg, Singapore International Arbitration Centre, *Arbitration Rules* (2016) art 31.1. See also Chukwumerije (above n 46) 36 – 7.
[48] *Sul América* [2012] 1 Lloyd's Rep 671; *International Arbitration Act 1974* (Cth) s 7; *International Arbitration Act* (Cap 143A) ss 6 – 7; *Arbitration Act 1996* (UK) s 9.
[49] *Chubb* [2020] UKSC 38. On anti-arbitration injunctions, see generally Richard Garnett, 'Anti-Arbitration Injunctions: Walking the Tightrope' (2020) 36(3) *Arbitration International* 347.
[50] *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 1 Lloyd's Rep 235 ('*Arsanovia*'); *International Arbitration Act* 1974 (Cth) s 8, sch 2 arts 34 – 35; *International Arbitration Act* (Cap 143A) ss 29, 31, sch 1 arts 34 – 35; *Arbitration Act 1996* (UK) ss 66 – 69, 101, 103.
[51] Born (n 5) 523 – 5; David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 3rd ed, 2015) 202.
[52] See, eg, the ability of non-signatories to an arbitration agreement to claim 'through or under' the agreement in seeking a stay of parallel litigation in favour of arbitration: *International Arbitration Act 1974* (Cth) s 7(4); *Contracts (Rights of Third Parties) Act 1999* (UK) s 8; *Contracts (Rights of Third Parties) Act* (Cap 53B) s 9.
[53] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) arts III, IV(1), V(1)(a).
[54] Born (n 5) 106 – 8, 529 – 34, 619 – 22; Reinmar Wolff (ed), *New York Convention: Article-by-Article Commentary* (Verlag C.H.Beck, 2nd ed, 2019) 104 – 5, 169 – 72. Where the parties have not impliedly or expressly chosen the proper law, the law of the seat generally applies by default.
[55] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006* (2006) art 34(2)(a)(i); 36(1)(a)(i).
[56] See, eg, *Arbitration Act 1996* (UK) ss 5, 7; *Sul América* [2012] 1 Lloyd's Rep 671, [29] (Moore-Bick LJ, Hallett LJ agreeing).
[57] *International Arbitration Act 1974* (Cth) ss 3, 7, 16, 21(1), sch 2 art 7. See *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 [148] – [156] (Allsop J, Finn and Finkelstein JJ agreeing) ('*Comandate Marine*').
[58] Reid Mortensen, Richard Garnett and Mary Keyes, *Private International law in Australia* (LexisNexis, 3rd ed, 2015) 171.
[59] *Trina Solar* (2017) 247 FCR 1. [128]-[152] (Beach J).

issues surrounding formation and capacity are relatively rare,[60] this article focuses on identification of the substantive proper law.

The extensive academic and judicial debate as to the correct approach for identifying the arbitration agreement's proper law[61] attests to its importance.[62] But the disparate approaches developed by courts and tribunals do not enhance international commerce and can lead to results which may not reflect party expectations.[63] As harmonisation is unlikely, it is vital to understand how particular jurisdictions identify the arbitration agreement's proper law.

3 State of the Law: England, Singapore and Australia

The approaches taken in England and Singapore are of particular importance for users of maritime contracts. Both are major maritime jurisdictions and the laws of England or Singapore are commonly chosen to govern maritime contracts. England and Singapore also are hubs for international commercial arbitration.[64] Hundreds of maritime arbitrations are seated in London each year[65] and Singapore is also a popular seat.[66] The position in Australia is of interest for slightly different reasons. Australia is heavily dependent on sea-borne imports of goods and commodities exports,[67] and Australian entities frequently use maritime contracts.

3.1 The English Position

In October 2020, the UKSC settled the English approach for determining an arbitration agreement's proper law. Prior to the *Chubb* decision, this area of law was particularly uncertain. Conflicting Court of Appeal decisions had created confusion around the 'correct' application of the three-step test set down by Moore-Bick LJ in *Sul América* ('*Sul América* Test') including, most notably, conflicting Court of Appeal decisions.[68] Rather than simply resolving the split within the Court of Appeal, the UKSC reframed the approach for identifying the proper law.

Notwithstanding the 'correct' English approach, the conflicting applications of the *Sul América* Test articulated by Moore-Bick LJ and Popplewell LJ have continued relevance in other common law jurisdictions. One of these is Singapore where in *BCY v BCZ*[69] the High Court endorsed Moore-Bick LJ's approach and which the Court of Appeal subsequently applied in *BNA*.[70] Thus, a looming question in Singapore is whether to continue to apply the *Sul América* Test as articulated by Moore-Bick LJ, to follow Popplewell LJ's revision of the test, or to endorse the UKSC's approach. The answer has great importance for Australian (and New Zealander) parties given Singapore's emergence as the leading arbitration destination in the Indo-Pacific and the influence of Singaporean arbitration jurisprudence.[71] With this in mind, this section first considers the competing English approaches.

[60] Born (above n 5) 660, 666.
[61] *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [96] (Gleeson J); *Chubb* [2020] UKSC 38, [3] (Lord Hamblen and Lord Leggatt, Lord Sales agreeing).
[62] See generally Peter Ashford, 'The Proper Law of the Arbitration Agreement' (2019) 85(3) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Resolution* 276, 277 – 8; Joseph (n 40) 198 – 204.
[63] But see Paul B Stephen, 'The Futility of Unification and Harmonization in International Commercial Law' (1999) 39(3) *Virginia Journal of International Law* 743, 747 – 8.
[64] White & Case (n 1) 9 – 11; Holman Fenwick Willan (n 3) 1.
[65] Holman Fenwick Willan (n 3) 1; Hare (n 1) 44 – 5; Tetley (n 1) 173 – 4.
[66] Holman Fenwick Willan (n 3) 1, 3. See also Loukas Mistelis, 'Competition of Arbitral Seats in Attracting International maritime Arbitration Disputes' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (Oxford University Press, 2016) 135, 144 – 7.
[67] Australian Government, Department of Infrastructure, Transport, Cities and Regional Development, *Maritime: Australian Sea Freight 2016-17* (Statistical Report, 2019) 1 – 16.
[68] *Enka Insaat* [2020] EWCA 574, [89] (Popplewell LJ) ('[T]he time has come to seek to impose some order and clarity on this area of the law. … The current state of the authorities does no credit to English commercial law which seeks to serve the business community by providing certainty'). For an overview of the English position immediately prior to *Chubb*, see Born (above n 5) 568 – 71.
[69] *BCY v BCZ* [2017] 3 SLR 357, [49] – [54], [59], [65] (Steven Chong J).
[70] *BNA v BNB* [2020] 1 SLR 456, [44] (Steven Chong JA).
[71] See, eg, *Sharma v Military Ceramics Corporation* [2020] FCA 216, [49] (Stewart J).

3.1.1 The Sul América Test

As explained by Moore-Bick LJ,[72] the three-step *Sul América* Test applies common law conflict of laws rules for ascertaining the proper law of any contract.[73] The first step is to identify the parties' express choice of the arbitration agreement's proper law. If no express choice is found, the inquiry turns to identifying an implied choice of the proper law. If neither an express nor implied choice can be identified, the proper law is that system of law with which the agreement has the closest and most real connection.[74] The first two steps involve identifying party choice through contractual construction while step three involves imputing a proper law based on factors surrounding the agreement.[75]

At the second step, where the parties have *expressly* chosen the governing law of the underlying contract but not made an express choice as to the arbitration agreement's proper law, the inquiry begins from the rebuttable presumption that parties intend for the *underlying contract's governing law* to apply to their entire legal relationship including the arbitration agreement.[76] That the presumption can be displaced is an effect of the separability doctrine. But Moore-Bick LJ construed the separability doctrine narrowly, holding that an arbitration agreement and underlying contract are not entirely separate until one of the contracts' validity is impugned.[77] Accordingly, the two agreements are interpreted in light of one another, at least where issues as to validity do not arise.

In *Sul América*, the court was not concerned with step one. Turning to step two, the express choice of Brazilian law to govern the underlying contract before the court was 'a strong indication' that the parties impliedly intended for Brazilian law to also govern the contract's arbitration agreement.[78] Against this, two 'powerful factors' pointed to English law being the arbitration agreement's proper law. First, the arbitration agreement expressly chose London as the arbitral seat. This indicated that the parties intended for English law to govern aspects of the arbitration agreement, including provisions in the *Arbitration Act* relating to its validity. This was so even though the arbitration agreement made no reference to the *Arbitration Act*.[79] Secondly, applying Brazilian law would result in a one-sided, non-binding arbitration agreement but there was no indication that the parties intended for such an arrangement.[80] It was also inconsistent with the contract's mediation clause which allowed *either* party to refer matters to arbitration should mediation prove unsuccessful.[81] Collectively, these factors meant that an implied choice of a proper law had not been made.[82]

Turning to the third step, Moore-Bick LJ considered that although the arbitration agreement had a close and real connection with the underlying contract, the nature and purpose of the two agreements were different. The underlying contract concerned rights of insurance while the arbitration agreement dealt with resolution of disputes. Viewed properly, the arbitration agreement was most closely related to the arbitral seat because this was the

[72] With whom Lady Justice Hallett agreed. In a separate judgment, Neuberger LJ agreed with the majority's reasoning and conclusion subject to limited exceptions. His Lordship emphasised that the exercise was fundamentally 'a matter of contractual interpretation' based on 'all the terms of the particular contract, when read in light of the surrounding circumstances and commercial common sense'. *Sul América* [2012] 1 Lloyd's Rep 671, [51], [61] - [62] (Neuberger LJ).

[73] Ibid [9] (Moore-Bick LJ, Hallett LJ agreeing). As distinct from the conflict of laws rules enacted by the *Contracts (Applicable Law) Act 1990* (UK) which brought the *Rome Convention* into force in the United Kingdom. Article 1(2)(e) of the *Rome I Regulation* also excludes arbitration agreements. For commentary on the *Rome Convention*, see Adrian Briggs, *The Conflict of Laws* (Clarendon, 3rd ed, 2013) ch 5.

[74] *Sul América* [2012] 1 Lloyd's Rep 671, [25] (Moore-Bick LJ, Hallett LJ agreeing).

[75] *Cie Tunisienne de Navigation SA v Cie D'Armement Maritime SA* [1971] AC 572, 603 (Diplock LJ); *Amin Rasheed Shipping Corporation v Kuwait Insurance Company* [1984] AC 50, 60 – 1 (Diplock LJ); Glick and Niranjan (n 31) 148.

[76] *Sul América* [2012] 1 Lloyd's Rep 671, [11], [26] (Moore-Bick LJ, Hallett LJ agreeing).

[77] Ibid [26] (Moore-Bick LJ, Hallett LJ agreeing): '[S]eparability … simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes'. Academic commentary supporting this narrow view of the doctrine includes Glick and Niranjan (n 31) 132.

[78] *Sul América* [2012] 1 Lloyd's Rep 671, [26] – [27] (Moore-Bick LJ, Hallett LJ agreeing) applying *XL Insurance Ltd v Owens Corning* [2001] 1 All ER 530, 542 – 3 (Toulson J).

[79] *Sul América* [2012] 1 Lloyd's Rep 671, [29] (Moore-Bick LJ, Hallett LJ agreeing).

[80] The underlying contracts between the parties were insurance contracts and the arbitration agreement contained in the contract was part of a multi-tiered dispute resolution mechanism that required reference of disputes to mediation before arbitration could be commenced. The assureds argued that under Brazilian law, the arbitration agreement was only enforceable with their consent after the insurer referred the dispute to arbitration.

[81] Ibid [30] (Moore-Bick LJ, Hallett LJ agreeing), [61] (Neuberger LJ).

[82] Ibid [31] (Moore-Bick LJ, Hallett LJ agreeing). Several factors that were not considered at the first or second step include arbitral rules or that the governing law clause and arbitration clause were in separate provisions. The choice of English as the language of the arbitration was also unimportant. This is undoubtedly correct in international arbitration where English is a convenient common language.

supervisory jurisdiction and English law would apply to the arbitral procedure.[83] Therefore, English law governed the arbitration agreement.

3.1.2 *Chubb*

Superior courts in England again considered the correct approach for identifying the proper law of an arbitration agreement in *Chubb*. The dispute arose out a works contract between Enka and Energoproekt and a later contract of assignment through which Unipro acquired Energoproekt's interest in the works. Neither contract contained an express choice of law.[84] The works contract's arbitration clause providing for arbitration in London under the *ICC Rules* was incorporated into the assignment contract.[85] Chubb was Unipro's insurer and, after a fire at the work site, subrogated Unipro's rights under the works contract and sought compensation from Enka for insurance monies paid to Unipro. Before the English courts there was no dispute that an arbitration agreement existed,[86] but the parties disagreed on the proper law of the arbitration agreement and, as a result, whether a related claim Chubb brought before the Russian courts fell within the scope of the arbitration agreement.[87]

Court of Appeal

At first instance, Baker J found it unnecessary to determine the proper law of the arbitration agreement, deciding on the basis of *forum non conveniens*.[88] In the Court of Appeal, though, the proper law was central to Popplewell LJ's analysis.[89] As a starting point, Lord Justice Popplewell affirmed the applicability of the *Sul América* Test's framework. His Lordship also agreed that an express choice of law in the underlying contract may amount to an express choice of the arbitration agreement's proper law.[90] This was to be ascertained by construction of the entire contract, including the arbitration agreement, in accordance with the principles of construction of the law of the underlying contract. However, where no express choice was found, step two began from the presumption that the parties impliedly chose the law of the *seat* to govern the arbitration agreement.[91] This presumption could be rebutted by 'powerful countervailing factors', namely the arbitration agreement being invalid at the seat.[92]

Two key considerations informed the reversal of the presumption. First, properly understood the doctrine of separability enshrined in the *Arbitration Act* and as explained by the House of Lords in *Fiona Trust*[93] meant that where the governing law of the underlying contract and the seat differ, the separability doctrine insulates the arbitration agreement from the effect of the underlying contract.[94] This is a much broader understanding of separability than that expressed by Moore-Bick LJ. Secondly, Popplewell LJ considered that the choice of an arbitral seat signalled intent for that system of law to govern the parties' relationship in relation to arbitration.[95] This was because in choosing a governing law and a different arbitral seat, the parties had clearly envisaged the application of separate systems of law to distinct parts of their relationship. Further, the law of the seat and the law of the arbitration agreement often overlap on matters relating to the parties' *substantive* rights under the arbitration agreement.[96] Pointing to the *Arbitration Act*, his Lordship considered that the law of the seat is not

[83] Ibid [32] (Moore-Bick LJ, Hallett LJ agreeing). Pearson suggests that the decision is indicative of a validation bias in England whereunder a court attempts 'to "save" the arbitration agreement from the law governing the underlying contract which threatened its existence'. Sabrina Pearson, '*Sulamérica v. Ensa*: The Hidden Pro-validation Approach Adapted by the English Courts with Respect to the Proper Law of the Arbitration Agreement' (2013) 29(1) *Arbitration International* 115, 124.
[84] *Enka Insaat* [2020] EWCA 574, [68] (Popplewell LJ, Males and Flaux LLJ agreeing).
[85] Clause 50.1 read, in pertinent part: [i]f the matter is not resolved within twenty (20) calendar days after the date of the notice referring the matter to appropriate higher management or such later date as may be unanimously agreed upon, the Dispute shall be referred to international arbitration as follows: the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, the Dispute shall be settled by three arbitrators appointed in accordance with these Rules, the arbitration shall be conducted in the English language, and the place of arbitration shall be London, England.
[86] *Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"* [2019] EWHC 3568, [11] (Baker J).
[87] Ibid [11] – [12] (Baker J).
[88] In obiter comments, his honour observed in regard to the proper law that choice of London as the arbitral seat carried little weight in the circumstances. This was because the parties had also chosen the 'delocalised' *ICC Rules* to apply to the proceedings and the ICC exercised oversight of the arbitration. In taking arbitral rules into account, his Honour broke with *Sul América* and subsequent High Court decisions. Ibid [64] (Baker J).
[89] With whom Males and Flaux LLJ agreed.
[90] *Enka Insaat* [2020] EWCA 574, [105] (Popplewell LJ, Males and Flaux LLJ agreeing).
[91] Ibid.
[92] Ibid [104] (Popplewell LJ, Males and Flaux LLJ agreeing).
[93] *Fiona Trust* [2008] 1 Lloyd's Rep 254, [12], [17] – [19] (Lord Hoffmann).
[94] *Enka Insaat* [2020] EWCA 574, [94] (Popplewell LJ, Males and Flaux LLJ agreeing). Interestingly, in *Kout Food* Flaux LJ endorsed the description of the separability doctrine set out in *Sul América*. See *Kabab-Ji SAL v Kout Food Group* [2020] 1 Lloyd's Rep 269, [66] (Flaux LJ, Sir Rix and McCombe LJ agreeing) ('*Kout Food*').
[95] *Enka Insaat* [2020] EWCA 574, [92], [94] (Popplewell LJ, Males and Flaux LLJ agreeing).
[96] Ibid [96], [98] (Popplewell LJ, Males and Flaux LLJ agreeing) citing *XL Insurance Ltd v Owens Corning* [2001] 1 All ER 530, 542 – 3 (Toulson J).

confined to procedural matters. Section 6, for instance, substantively defines 'arbitration agreement'; section 30 preserves *compétence-compétence*. It would not make commercial common sense for courts at the seat to apply two systems of law in exercising the same function (eg determining the parties to an arbitration agreement).[97]

Ultimately, the Court of Appeal held that English law was the proper law of the arbitration agreement and granted injunctions restraining the Russian proceedings. The decision's primary importance is the reversal of the starting presumption at step two of the *Sul América* Test. But it gives little guidance as to when the presumption may be rebutted: aside from invalidity at the seat, his Lordship does not identify another 'powerful reason' capable of ousting the seat.[98] To this point, selection of the *ICC Rules* did not point away from the seat but Popplewell LJ leaves open the possibility that other arbitral rules might.[99]

United Kingdom Supreme Court

Chubb appealed to the UKSC against the Court of Appeal's decision. There, Lords Hamblen and Leggatt, with whom Lord Kerr agreed, reframed the approach for determining an arbitration agreement's proper law. Their Lordships held that the proper test still involves common law conflicts rules and contractual interpretation[100] but it is two-limbed: (i) the proper law is that law expressly or impliedly chosen by the parties as a matter of inference of necessary implication; and (ii) in the absence of choice, the system of law with which the arbitration agreement has the closest and most real connection.[101]

A narrow understanding of separability underpins the test's recalibration. For their Lordships, an arbitration agreement was not a distinct agreement from the underlying contract for all purposes but only 'for the purpose of determining its validity or enforceability'.[102] As such, the underlying contract could inform construction of the arbitration agreement, including its proper law.[103]

This closeness led the majority to expand the circumstances in which an express choice of proper law is deemed to have been made. In *Arsanovia*, Smith J suggested in obiter that use of the phrase 'This Agreement' (capitalised) in an underlying contract and the arbitration agreement alongside a governing law clause referring to 'This Agreement' demonstrated express intent the governing law to apply to the entire contract. The Court of Appeal made a similar point about a content of agreement clause in *Kout Food*.[104] The majority took this a step further, stating that even without a content of agreement clause 'This Agreement' naturally meant the entire contract, including the arbitration agreement, and, therefore, mere inclusion of a governing law clause like 'This Agreement is to be governed by the law of [England]' could constitute an express choice of the arbitration agreement's proper law.[105]

Where an express choice of proper law is not made, a choice of *governing law* for the underlying contract will 'generally apply to an arbitration agreement'.[106] The rejection of Popplewell LJ's approach was based on two primary considerations. First, the main argument for a presumption in favour of the seat was based on an overlap of the law and the law of the arbitration agreement. Their Lordships agreed that the nature and scope of the laws at the seat were relevant to the choice of seat but that the procedural law of the seat and the proper law of the arbitration agreement are conceptually distinct.[107] Therefore, whether the choice of a seat supports an implication that the parties also intended for the same system of law to govern the arbitration agreement depends on the content of the law of the seat.[108] The *Arbitration Act*, however, did not support a conclusion that the parties impliedly intended for English law to govern the arbitration agreement. In particular, the *Arbitration Act* specifically envisions situations in which foreign law governs the arbitration agreement but English law governs the arbitral procedure. Further, where foreign law applies to the arbitration agreement, the non-mandatory

[97] *Enka Insaat* [2020] EWCA 574, [96], [99] (Popplewell LJ, Males and Flaux LLJ agreeing).
[98] Ibid [91], [104] (Popplewell LJ, Males and Flaux LLJ agreeing).
[99] Ibid [102] – [103] (Popplewell LJ, Males and Flaux LLJ agreeing).
[100] *Chubb* [2020] UKSC 38, [27], [30] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[101] Ibid [27], [170] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[102] Ibid [41] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[103] Ibid [41], [61] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[104] *Arsanovia* [2013] 1 Lloyd's Rep 235, [22] (Smith J). *Kout Food* [2020] 1 Lloyd's Rep 269, [62] (Flaux LJ, Sir Rix and McCombe LJ agreeing)
[105] *Chubb* [2020] UKSC 38, [43], [60] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[106] Ibid [43], [170] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[107] Ibid [68] – [69] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[108] Ibid [69] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).

provisions of the act do not apply.[109] Thus the major shortcoming of the 'overlap argument' was that the provisions upon which it was based are non-mandatory.[110]

Secondly, the general rule had the dual benefit of aligning with the approach taken by courts abroad, including Singapore,[111] and better providing certainty and consistency by submitting all of the parties' contractual relationship to the same system of law.[112] It also avoids uncertainties surrounding multi-tier dispute resolution clauses by subjecting all the dispute resolution provisions to the same governing laws.[113]

The general rule could be negated, however, by the potential invalidity of the arbitration agreement under the putative proper law because such invalidity would frustrate the commercial purpose of the agreement.[114] Here, invalidity is treated as a standard rule of contractual interpretation rather than embrace of a free-standing 'validation principle'.[115] The general rule could also be negated by a provision at the seat which stipulated that the seat provides the proper law of the arbitration agreement in the absence of express choice.[116]

In this case, though, there was no indication that the parties had made an express or implied choice of law to govern the underlying contract and the seat did not stipulate the proper law.[117] As such, their Lordships turned to the second limb and the system of law with the closest and most real connection to the arbitration agreement. The enquiry began from the starting presumption that the law of the seat has the closest and most real connection to the arbitration agreement because the seat is the agreement's place of performance and the presumption further aligned with articles II and V of the *New York Convention*.[118] Applying these principles, the majority held that English law was the proper law of the arbitration agreement.[119]

Functionally, the condensed two-limb approach is not much different than the *Sul América* Test since its application involves the same three sequential enquiries. Still, *Chubb* reorients the English approach towards a 'general rule' in favour of the governing law of the contract. Although strong arguments can be made in favour of a presumption in favour of the arbitral seat,[120] the decision does provide clear guidance. At the margins, however, their Lordships leave several issues.

One is whether the search for an implied (or inferred) choice of law looks to actual intent. In *Kout Food*, Flaux LJ (who agreed with Popplewell LJ in *Chubb*) said in obiter that at the step two of the *Sul América* Test 'a term will only be implied into a contract [as a matter of fact] if it is necessary for business efficacy'.[121] This suggests that business efficacy is a relevant consideration in identifying an implied choice of law and that the search involves the objective implication of a term.[122] Popplewell LJ's express reference to commercial common sense, which is predicated on the view of the 'reasonable person',[123] furthers this suggestion. This is, of course, in keeping with objective construction of a contract but does risk blurring the distinction between identifying an inferred choice by the parties and imputing (or implying) a term.

Another particularly important issue is whether their Lordships exhaustively listed the factors may negate the general rule are exhaustive. In applying the *Sul América* Test, previous English courts had considered additional factors that buttressed or weighted against the underlying contract's governing law being the proper law. In *Arsanovia*, for example, Smith J found that a specific agreement within the arbitration clause to exclude the *Arbitration and Conciliation Act 1996* (India) supported the presumption that the parties impliedly chose the law

[109] *Arbitration Act 1996* (UK) s 4(5).
[110] *Chubb* [2020] UKSC 38, [81], [94] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[111] Ibid [55] – [58] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[112] Ibid [53] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[113] Ibid [53] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[114] Ibid [109] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[115] Ibid [95], [97] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[116] Ibid [70] – [72], [170] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[117] Ibid [171] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing). Before the Court of Appeal, the parties had agreed that Russian law governed the underlying contracts.
[118] Ibid [119], [125] – [131] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[119] Ibid [171] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing). In separate dissents, Lord Burrows and Lord Sales applied the *Sul América* Test and endorsed a starting presumption in favour of the governing law of the underlying contract. Their Lordships each found that Russian law was the governing law of the contract and also was the proper law of the arbitration agreement: Ibid [257] (Lord Burrows), [265] (Lord Sales).
[120] See, eg, Glick and Niranjan (n 31) 141 – 7.
[121] *Kout Food* [2020] 1 Lloyd's Rep 269, [53] (Flaux LJ, Sir Rix and McCombe LJ agreeing).
[122] *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, [23] – [27] (Neuberger LJ, Sumption and Hodge LLJ agreeing).
[123] Andrew Robertson, 'Purposive Contractual Interpretation' (2019) 39(2) *Legal Studies* 230, 233; Neil Andrews, 'Interpretation of Contracts and "Commercial Common Sense": Do Not Overplay this Useful Criterion' (2017) 76(1) *Cambridge Law Journal* 36, 41 – 3.

of the contract (Indian law) to apply to the arbitration agreement despite a London seat.[124] On the other hand, reference to the Indian act was likely aimed at ensuring enforcement of an award in India, rather than the proper law.[125] Thus, specific reference in the arbitration agreement to legislation should be a relevant, but not conclusive, consideration given its potential to shed light on party intent.

A corollary of Smith J's reasoning is that a phrase like 'disputes shall be referred to arbitration in accordance with the *Arbitration Act 1996* (UK)' also indicates intent for arbitration to comply with a particular act. Where the governing law, seat and act belong to the same system of law, no difficulty arises. Matters are more complex, however, when the governing law and act belong to the same legal system but the seat does not or the governing law belongs to a different legal system than the seat and the act.[126] An argument can be made that in reference to a specific act evinces intent that the legislation's system of law also provide the proper law. Conversely, it may also only reflect a procedural consideration for future enforcement of awards. In contrast, their Lordships' rigid distinction between the law of the seat which they say governs procedural matters and the proper law of the arbitration agreement which goes to substantive matters,[127] sidesteps these complexities. This line of reasoning becomes difficult to sustain where the legislation referred to, or system of law to which it belongs, contains mandatory rules relevant to the proper law of the arbitration agreement.

3.1.3 State of the Law

UKSC Approach

The current English position ('UKSC Approach') is as follows. An arbitration agreement's proper law is determined by English common law rules for resolving conflict of laws. The first limb begins by seeking to identify an express choice of proper law through application of English contractual interpretation principles. Where the parties have provided that 'The Agreement' is to be governed by a particular system of law, this is likely to constitute an express choice of the arbitration agreement's proper law. If the proper law of the arbitration agreement is not expressly chosen, the enquiry moves to identifying an implied choice of law and the general rule is that the underlying contract's governing law is the arbitration agreement's proper law. The choice of seat alone is insufficient to negate the general rule but it can be negated by a contrary law at the seat or potential invalidity of the arbitration agreement under the governing law of the arbitration agreement. It is, however, unclear whether these are the only factors capable of displacing the general rule. Where no choice of proper law has been made, the general rules is that the law of the seat provides the proper law as the system of law with which the arbitration agreement has the closest and most real connection.

Moore-Bick LJ's Approach

Despite the UKSC decision, Lord Justice Moore-Bick's and Popplewell LJ's approaches have continued relevance in other common law jurisdictions. As developed by later courts, Moore-Bick LJ's approach first seeks to identify an express choice of the arbitration agreement's proper law by construing the underlying contract as a whole.[128] Mere inclusion of a governing law clause does not mean that it automatically applies to the arbitration agreement.[129] Further, bare reference to the 'Agreement' in a governing law clause and arbitration agreement may be *insufficient* indicate an express choice of the proper law.[130] On the other hand, though, inclusion of a content of agreement clause[131] linked with the arbitration agreement may demonstrate an express choice of the proper law.[132]

At step two, the starting presumption is that an express choice of law for the underlying contract is the arbitration agreement's proper law. The choice of seat alone will not rebut the starting presumption[133] nor are arbitral rules indicative of an implied choice.[134] Express exclusion of legislation under the law of the contract may be relevant,

[124] *Arsanovia* [2013] 1 Lloyd's Rep 235, [20] (Smith J).
[125] When the arbitration agreement was executed, the position (now rejected) under Indian law was that the *Arbitration and Conciliation Act 1996* (India) applied to arbitrations seated outside of India. See *Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc* (2012) 9 SCC 552 overturning *Bhatia International v Bulk Trading* (2002) 4 SCC 105.
[126] As discussed in Section III, cl 54(c) of the 2015 New York Produce Exchange Form envisions such a situation.
[127] *Chubb* [2002] UKSC 38, [68] (Lord Hamblen and Lord Leggatt, Lord Kerr agreeing).
[128] Ibid [67] (Flaux LJ, Sir Rix and McCombe LJ agreeing).
[129] Ibid [62] (Flaux LJ, Sir Rix and McCombe LJ agreeing); *Arsanovia* [2013] 1 Lloyd's Rep 235, [22] (Smith J).
[130] *Kout Food* [2020] 1 Lloyd's Rep 269, [63] (Flaux LJ, Sir Rix and McCombe LJ agreeing).
[131] For example, 'This Agreement shall be construed as a whole and each of the documents mentioned is to be regarded as an integral part of this Agreement and shall be interpreted as complementing the others'.
[132] Ibid [63] (Flaux LJ, Sir Rix and McCombe LJ agreeing).
[133] *Habas Sinai Ve Tibbi Gazlar Istihsal v VSC Steel Co Ltd* [2014] 1 Lloyd's Rep 479 ('*Habas Sinai*').
[134] See *Arsanovia* [2013] 1 Lloyd's Rep 235; *Kout Foods* [2020] 1 Lloyd's Rep 269.

however,[135] as is potential invalidity of the arbitration agreement under a putative proper law.[136] Where there is no express governing law, the inquiry goes to step three.[137]

Popplewell LJ's Approach

Lord Justice Popplewell's approach (Popplewell LJ's approach) utilises the *Sul América* framework and follows Moore-Bick LJ at steps one and three. Step two, however, begins from the presumption that the parties have impliedly chosen the law of the *seat* to govern the arbitration agreement.[138] Unlike *Habas Sinai*, step two operates whether there is an implied or express choice of the underlying contract's governing law.[139] The presumption can be rebutted by 'powerful countervailing factors', at least one of which is that the arbitration agreement is invalid under the law of the seat. The choice of arbitral rules may also be a relevant consideration. Further, an implied choice of the underlying contract's governing law may point away from the arbitral seat.

3.2 The Position in Singapore

The High Court of Singapore has endorsed a three-step framework modelled on the *Sul América* Test for identifying the proper law of an arbitration agreement.[140] As in England, there has been divergence over step two's starting presumption but the weight of High Court authority now favours a presumption in favour of the underlying contract's governing law. Strictly speaking, the Singapore Court of Appeal has not resolved the two strands of authority but in *BNA* the Court implicitly approved Moore-Bick LJ's approach as applied by the High Court of Singapore in *BCY v BCZ* ('*BCY*').

3.2.1 BCX v BCY

BCY is the touchstone decision in Singapore for identifying the arbitration agreement's proper law. In that case, Steven Chong J (as his Honour then was) applied a three-step test which mirrored Moore-Bick LJ's analysis in *Sul América*.[141] While the *BCY* test was not expressly couched as a conflict of laws analysis, Singapore's conflicts rules for contracts utilise the same steps.[142]

The dispute before his Honour concerned whether an arbitration agreement providing for ICC arbitration in Singapore had been concluded even though the underlying contract, governed by the law of New York, had not been executed.[143] Turning to step one, his Honour agreed with *Arsanovia* that where the underlying contract expressly chooses a governing law for 'the agreement' it is natural to infer that the parties intended this express choice to extend to the proper law of the arbitration agreement.[144] In addition, separability was properly viewed as serving the 'narrow purpose' of ensuring the survival of the arbitration agreement in the event the underlying

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[135] *Arsanovia* [2013] 1 Lloyd's Rep 235, [20] (Smith J).
[136] *Sul América* [2012] 1 Lloyd's Rep 671, [30] – [31] (Moore-Bick LJ, Hallett LJ agreeing).
[137] In *Habas Sinai*, Hamblen J (as his Lordship then was) applied Moore-Bick LJ's approach and suggested that in the absence of an implied choice of the governing law of the *underlying contract* the inquiry proceeds directly to the third step. It is unclear why an implied choice of the underlying contract's governing law should not be taken into account in the second stage of the test. This issue did not arise in *Sul América*. Hamblen J's approach appears based on Moore-Bick LJ's comments that the arbitral seat has 'overwhelming' significance where (a) the arbitration agreement was freestanding (ie in a separate agreement than the underlying contract) *and* (b) no express choice of the proper law was made. In such a case, it is sensible not to use the governing law of one agreement to inform the proper law of an entirely separate agreement. The arbitration agreement in *Habas Sinai* was not freestanding, however. Arguably, if the parties have impliedly chosen a governing law for the underlying contract, this choice and the parties' intent is relevant to the parties' choice of a proper law. Despite this, the Court of Appeal in *Kout Food* did not doubt Hamblen J's statement of the *Sul América* Test's applicable principles.
[138] *Enka Insaat* [2020] EWCA 574, [105] (Popplewell LJ, Males and Flaux LLJ agreeing).
[139] Ibid [100] (Popplewell LJ, Males and Flaux LLJ agreeing).
[140] *FirstLink Investments Corporation Ltd v GT Payment Pte* [2014] SGHCR 12, [11] (Shaun Leong Li Shiong AR) ('*FirstLink*'); *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267, [31] (Vinodh Coomaraswamy J) ('*Dyna-Jet*'); *BCY v BCZ* [2017] 3 SLR 257, [40], [65] (Steven Chong J).
[141] *BCY v BCZ* [2017] 3 SLR 257, [40] (Steven Chong J).
[142] *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491, [36] (VK Rajah JA) quoting *Overseas Union Insurance Ltd v Turegum Insurance* Co [2001] 2 SLR(R) 285, [82] (Judith Prakash J): There are three stages in determining the governing law of a contract. The first stage is to examine the contract itself to determine whether it states expressly what the governing law should be. In the absence of an express provision one moves to the second stage which is to see whether the intention of the parties as to the governing law can be inferred from the circumstances. If this cannot be done, the third stage is to determine with which system of law the contract has its most close and real connection.
[143] Article 9.13, titled 'Governing Law and Dispute Resolution' stated: 9.13.1 This Agreement and any non-contractual obligations arising out of or in connection with it are governed by and shall be construed in accordance with the Laws of the State of New York of the United States of America.9.13.2 All disputes (including a dispute, controversy or claim regarding the existence, validity or termination of this Agreement – a 'Dispute') arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with the said Rules, such arbitration to take place in Singapore. The seat of the arbitration shall be Singapore.
[144] *BCY v BCZ* [2017] 3 SLR 257, [59] (Steven Chong J).

contract was invalid.[145] Thus, the two agreements were only independent in certain circumstances and informed each other.[146] Ultimately, however, his Honour did not identify an express choice of proper law in this case.[147]

Analysing step two, Steven Chong J held that the earlier decision of *FirstLink*[148] – where the Assistant Registrar of the Singapore High Court adopted an approach similar to that later used by Lord Justice Popplewell – did not represent the law of Singapore.[149] Instead, his Honour endorsed a starting presumption in favour of the governing law of the underlying contract. This was preferred 'as a matter of principle' and 'supported by the weight of authority'.[150]

His Honour then looked to whether any factors displaced the presumption that New York was the proper law of the arbitration agreement. The choice of seat was in itself insufficient to do so.[151] One potentially decisive factor was the invalidity of an arbitration agreement under the governing law of the main contract.[152] On the other hand, selection of arbitral rules that did not provide for a default seat in the absence of party agreement gave no guidance as to the arbitration agreement's proper law.[153] In the end, his Honour found no reason to displace the starting presumption.[154]

Notably, in endorsing Moore-Bick LJ's starting presumption for step two, Steven Chong J commented that it was reasonable to expect that if parties intended for different systems of law to govern the underlying contract and the arbitration agreement, they would have specifically provided for this.[155] If correct, this elevates the threshold for rebutting the starting presumption, essentially requiring an express statement.

His Honour is undoubtedly correct, however, that where the parties have selected arbitral rules that allow a tribunal or arbitral institution to determine the arbitral seat in the absence of party agreement, these rules do not point to a particular arbitral seat. In such a case it is simply unknown which seat will be identified. This should be contrasted with arbitral rules that specify an arbitral seat or proper law in the absence of party agreement (eg *LCIA Rules*).[156] Where the parties have incorporated such rules, they should be given effect as express terms of the parties' agreement.

3.2.2 Later High Court Treatment

In *BMO v BMP*, Belinda Ang J endorsed the *Sul América* Test as explained in *BCY* but noted that the absence of an express choice of governing law meant that the case did 'not fit neatly into the *Sul América* analysis'.[157] However, unlike *Habas Sinai* this did not mean that the inquiry automatically proceeds to the third step of the test. Instead, the implied choice of governing law was a relevant consideration to be taken into account in step two.

Multiple references to Vietnamese law in the underlying contract led to the conclusion that this system of law governed the contract. This raised the presumption that Vietnamese law was the arbitration agreement's proper law. Against this, the only factor pointing to Singapore as the proper law was that it was the seat. Notably, the parties had not expressly provided for an arbitral seat and art 18.1 of the 2013 *Arbitration Rules of the Singapore International Arbitration Centre* ('*SIAC Rules*') (which the parties had chosen) operated to designate Singapore

[145] Ibid [61] (Steven Chong J) quoting *Sul América* [2012] 1 Lloyd's Rep 671, [26] (Moore-Bick LJ, Hallett LJ agreeing).
[146] *BCY v BCZ* [2017] 3 SLR 257, [61] (Steven Chong J).
[147] Ibid [71] – [72] (Steven Chong J).
[148] *FirstLink* [2014] SGHCR 12. For discussion of *FirstLink* see Nelson Goh, 'A More Valid Presumption in the Implied Choice of Law Governing Arbitration Agreements' [2015] 1 *Lloyd's Maritime and Commercial Law Quarterly* 162, 162.
[149] *BCY v BCZ* [2017] 3 SLR 257, [50] (Steven Chong J).
[150] Ibid [54], [59], [65] (Steven Chong J). In particular, his Honour considered that the fact that an award could be set aside at the seat due to the invalidity of an arbitration agreement under the seat's law was no reason to prefer a starting presumption in favour of the seat. His Honour also considered expectations of neutrality to be equivocal as regards the proper law: [63]. *Contra* Goh (n 148) 163.
[151] *BCY v BCZ* [2017] 3 SLR 257 [65] (Steven Chong J).
[152] Ibid [74] (Steven Chong J).
[153] Ibid [54] (Steven Chong J).
[154] Ibid [74] – [76] (Steven Chong J).
[155] Ibid [59] (Steven Chong J).
[156] London Court of International Arbitration, *Arbitration Rules* (2020) art 16.3. Compare London Court of Arbitration, *Arbitration Rules* (1998) art 16; London Court of Arbitration, *Arbitration Rules* (2014) art 16.
[157] *BMO v BMP* [2017] 2 Lloyd's Rep 57, [38] – [39] (Belinda Ang J). In *Dyna-Jet* [2017] 3 SLR 267, [31] Vinodh Coomaraswamy J also held that the *Sul América* Test was the appropriate framework for identifying the proper law of an arbitration agreement and to not use it would be 'unduly parochial'. His Honour found that where no express choice of proper law was made, there was no need to move beyond the presumption in favour of the governing law of the underlying contract.

as the seat.[158] In this respect, her Honour indicated that an implied choice of the seat is a weaker indicator of party intent than an express choice of seat.[159] Accordingly, the presumption was not rebutted.[160]

3.2.3 BNA v BNB

Singapore's Court of Appeal considered the correct approach for identifying the proper law of an arbitration agreement in *BNA*. The dispute arose out of a contract for the sale of industrial gas which was governed by the laws of the People's Republic of China ('PRC') and included an arbitration agreement providing for arbitration 'in Shanghai' under the *SIAC Rules*.[161] The proper law of the arbitration agreement was important because, it was said, PRC law did not allow for arbitrations seated in China to be administered by SIAC.[162] This would render the reference to arbitration invalid and deprive the tribunal of jurisdiction.

At first instance, Vinodh Coomaraswamy J noted that the *Sul América* Test as explained in *BCY* provided the framework for identifying the proper law of the arbitration agreement.[163] This test 'operates against the backdrop of the general principles of contact law' and Singapore's conflict of laws rules.[164] Moreover, at step two, the starting presumption was that the underlying contract's governing law provided the proper law of the arbitration agreement.[165] That the seat differed from the governing law did not itself displace the presumption. Applying the test to the facts, his Honour concluded that there was no express choice of law. At step two, the proper starting point was that PRC law governed the arbitration was displaced because the arbitration agreement would likely be invalid under that system of law.[166] Accordingly, Singapore law was the proper law of the arbitration agreement.

Before the Court of Appeal, the parties agreed that the *BCY* framework was the correct approach for identifying the arbitration agreement's proper law and the Court was content to proceed on that basis.[167] As such, it was unnecessary for the Court to directly opine on the differences between *FirstLink* and *BCY*. In effect, however, the Court indicated its preference.

As a starting point, Steven Chong JA described the *BCY* framework as according with the *Sul América* Test and established common law rules for ascertaining the proper law of contracts.[168] Turning to the first step, his Honour held that there was not an express choice of proper law. The 'mere fact' that the sub-clause containing the arbitration agreement (art 14.2) immediately followed the sub-clause setting out the governing law for 'This Agreement' (art 14.1) was 'insufficient' to constitute an express choice of the proper law.[169] Instead, it was only a 'strong indicator' of the arbitration agreement's governing law.[170]

Turning to step two, the implied choice of proper law is concerned with the *actual* intention of the parties and is determined through construction which 'gives the words of the arbitration agreement their natural meaning'.[171] In contrast, at step three the court may impute a choice of proper law.[172] Thus, at step two objective contractual interpretation tools for the implication of terms (eg business efficacy) may not override the parties' failure to actually consider the proper law.

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[158] *BMO v BMP* [2017] 2 Lloyd's Rep 57 [35], [38] – [40] (Belinda Ang J).
[159] Ibid [40] (Belinda Ang J).
[160] Ibid [39] – [40] (Belinda Ang J).
[161] Article 14 of the Takeout Agreement, titled 'Disputes' read:
14.1 This Agreement shall be governed by the laws of the People's Republic of China.
14.2 With respect to any and all disputes arising out of or relating to this Agreement, the [p]arties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both [p]arties.
[162] The parties later referred their dispute to the courts in Shanghai. In August 2020, the Shanghai No 1 Intermediate People's Court held that PRC law allowed for arbitrations to be conducted in Mainland China under the rules of foreign arbitral institutions like SIAC. Sebastian Perry, 'Chinese Court upholds "SIAC in Shanghai" clause', *Global Arbitration Review* (Web Page, 14 September 2020) <https://globalarbitrationreview.com/article/1230702/chinese-court-upholds-%E2%80%9Csiac-in-shanghai%E2%80%9D-clause>.
[163] *BNA v BNB* [2019] SGHC 142, [16] (Vinodh Coomaraswamy J).
[164] Ibid [16], [19], [27] (Vinodh Coomaraswamy J).
[165] Ibid [17(e)] (Vinodh Coomaraswamy J).
[166] Ibid [117] (Vinodh Coomaraswamy J).
[167] *BNA v BNB* [2020] 1 SLR 456, [33], [44] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[168] Ibid [45] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[169] Ibid [56], [59] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[170] Ibid [61] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing). Steven Chong JA held that this conclusion enjoyed parity of reasoning with his comments in *BCY*: [65].
[171] Ibid [104] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[172] Ibid [48] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).

With this in mind, his Honour applied the presumption that the underlying agreement's governing law (PRC law) was the proper law of the arbitration agreement. One factor that could point away from PRC law being the proper law—but not rebut the presumption on its own—would be an arbitral seat outside China.[173] The trial judge had construed the phrase 'arbitration in Shanghai' as referring only to the *venue* of the hearing and that the *SIAC Rules* operated to designate Singapore as the seat.[174] The Court of Appeal disagreed with this 'strained' reading and held that the natural meaning of the phrase was that Shanghai had been chosen as the arbitral seat.[175] For his Honour, this better aligned with reality (parties rarely specify the venue for arbitral hearings), academic commentary and decided cases.[176] Further, his Honour did not consider the potential effect of PRC law on the arbitration agreement to be a relevant factor in identifying the *arbitral seat* (as distinct from the proper law) because there was no evidence that the parties actually turned their minds to whether the choice of the proper law could affect the validity of the arbitration agreement.[177] Thus, having identified PRC as the presumptive proper law and finding insufficient factors to displace the presumption, the Court held that PRC law was arbitration agreement's proper law.[178]

Although not directly addressing the potential effect of an arbitration agreement's invalidity under the putative proper law, the Court of Appeal did not disturb the trial judge's conclusions on this point. At first instance, Coomaraswamy J held that potential invalidity was relevant to step two insofar as it aligned with the general contractual construction principle that 'every contract to be construed fairly and broadly, in order to preserve the subject-matter of the contract rather than to destroy it' and upheld the parties' reasonable commercial expectations.[179] This is broadly consistent with the holding in *BCY*. Collectively, this indicates that in Singapore potential invalidity is a relevant factor under step two. That said, the effect of invalidity must be viewed in light of the Court of Appeal's statement that there are limits to the court's ability to save a defective arbitration agreement.[180]

3.2.4 State of the Law

Although *BNA* does not explicitly resolve the divergence within Singapore's case law but the *BCY* framework is now well-established in Singapore. It is uncontroversial that (a) the proper law of an arbitration agreement is identified through application of conflicts rules and contractual interpretation[181] and (b) an express choice of the arbitration agreement's proper law is to be given effect.[182] Further, merely combining the governing law clause and the arbitration agreement in the same contractual provision or adjoining sub-clauses is insufficient to constitute an express choice of the proper law.

The test's second step looks for the parties' actual intent, beginning from the presumption that the parties intend the governing law of the underlying contract to be the arbitration agreement's proper law.[183] Unlike Moore-Bick LJ's Approach, the underlying contract's governing law may be express or implied. There is also a suggestion in Singapore that the starting presumption is more difficult to rebut than in England. *BCY* indicates that it is 'reasonable' to expect express statements in favour of a proper law other than the governing law.

The mere fact that the parties chose (expressly or by operation of arbitral rules) a seat different from the underlying contract's governing law is insufficient to oust the starting presumption. Reference to particular arbitral rules does not indicate that the parties had agreed on a seat where those rules allow for the arbitral institution or tribunal to determine the seat. That said, unlike the English courts, the recent Singapore authorities have not considered the relevance of a content of agreement clause. Nor have they considered the weight (if any) to give to references in an arbitration agreement to particular pieces of legislation. Still, as in England, invalidity of the arbitration

[173] Ibid [62] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[174] *BNA v BNB* [2019] SGHC 142 [109] – [110] (Vinodh Coomaraswamy J).
[175] *BNA v BNB* [2020] 1 SLR 456, [64] – [65], [69] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[176] Ibid [65] – [68] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[177] Ibid [90] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing). The appellant raised two grounds upon which it said Shanghai was not the seat. The first involved precontractual negotiations which the Court held to be inadmissible extrinsic evidence: [83], [88] – [90], [95], [103].
[178] Ibid [103] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[179] *BNA v BNB* [2019] SGHC 142 [62] – [64] (Vinodh Coomaraswamy J) quoting *Wartsila Singapore Pte Ltd v Lau Yew Choong* [2017] 5 SLR 268, [165] (Belinda Ang J) and *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936, [31], [36] (Chan Sek Keong CJ).
[180] *BNA v BNB* [2020] 1 SLR 456, [2], [104] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing). ('The essential point we make is that the parties' manifest intention to arbitrate is not be be given effect at all costs. The parties did not only choose to arbitrate – they chose to arbitrate in a certain way, in a certain place'). For further discussion, see Alan de Rochefort-Reynolds and Gianluca Rossi, 'Arbitration Agreements and Invalidity after BNA v BNB' (2020) 6(1) *Australian Alternative Dispute Resolution Law Bulletin* 17.
[181] *BNA v BNB* [2020] 1 SLR 456, [45] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[182] Ibid [46] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[183] There is a conceptual tension between looking for actual intent and relying on a starting presumption.

agreement under a potentially applicable proper law is relevant as a matter of contractual interpretation to the identification of an implied choice of the arbitration agreement's proper law.

3.3 An Australian Position?

Australian courts have not considered the *Sul América* Test, its treatment in England and Singapore or the UKSC Approach. Nor has a unique domestic approach for identifying the proper law of the arbitration agreement emerged beyond the *lex fori* determining issues as to formation.[184] Only a few decisions even consider the substantive proper law of the arbitration agreement.[185] This presents challenges in ascertaining how an Australian court might deal with a dispute as to an arbitration agreement's proper law. Still, some conclusions can be drawn.

The first is that an Australian court will consider the approaches used abroad for identifying the proper law.[186] English and Singaporean decisions on international commercial arbitration have particular resonance in Australia.[187] Whether foreign decisions will be followed is, of course, another matter.

Secondly, Australia recognises the separability principle.[188] As such, the arbitration agreement and the underlying contract are distinct contracts. It is also a principle of Australian law, however, that each contract must have its own governing law.[189] In *Akai*, the High Court of Australia ('HCA') set down the Australian approach for identifying a contract's proper law and it is suggested that Australian courts are unlikely to develop a separate conflicts rule solely for arbitration agreements.

The *Akai* test has two steps. The first involves identifying the parties' express or implied choice of law upon the proper construction of the contract using the forum's interpretation rules. Relevantly, Australian courts have held that the scope,[190] content and operation of arbitration agreements are matters of 'orthodox contractual interpretation' principles.[191] Party choice can be evidenced by direct (express) language or, where there is no express choice of law, the court looks to whether there is an implied choice of law can be inferred.[192] At this stage, the court does not imply a term into the contract but rather seeks to 'infer' the parties' intent.[193] In the absence of an express or implied choice, the enquiry moves to the second step and the governing law is that with which the contract has its closest and most real connection.[194] This involves the objective imputation of a term.

At first sight, *Akai* appears similar to the two-limb approach used by the UKSC. In practice, though, while the HCA referred to a three-step approach as 'needlessly' complicated,[195] the *Akai* test involves three distinct

[184] See *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846, [214] (Beach J). See also the confusion surrounding the law applicable for determining arbitrability for the purpose of s 7 IAA: *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420; *WDR Delaware Corp v Hydrox Holdings Pty Ltd* [2016] FCA 1164.

[185] In this respect, it is notable that the leading text on the *International Arbitration Act 1974* (Cth) does not refer to any Australian decision discussing the proper law of an arbitration agreement: Holmes and Brown (above n 45) 37 – 8. See also Mortensen, Garnett and Keyes (n 58) 171.

[186] See, eg, *TCL Air Conditioner v Castel Electronics* (2012) 232 FCR 361, [75] (Allsop CJ, Middleton and Foster JJ); *Comandate Marine* (2006) 157 FCR 45, [162] – [176] (Allsop J, Finn and Finkelstein JJ agreeing); *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157, [162] – [171] (Stewart J); *Sharma v Military Ceramics Corporation* [2020] FCA 216, [49] (Stewart J); *Mitchell Water Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2018] VSC 753 (Croft J). See also *Rinehart* (2019) 366 ALR 635 [18] – [21] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[187] Justice Stewart, 'The Role of Courts in Supporting Arbitration: a Review of Recent Developments in the Asia-Pacific' (Speech to the International Congress of Maritime Arbitrators, 9 March 2020) <https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/stewart-j-20200309>

[188] *Rinehart* (2019) 366 ALR 635, [13] (Kiefel CJ, Gageler, Nettle and Gordon JJ); *Hancock* (2017) 257 FCR 442, [343] (Allsop CJ, Besanko and O'Callaghan JJ).

[189] See generally Edward I Sykes and Michael C Pryles, *Australian Private International Law* (Law Book, 3rd ed, 1991) 594; Mortensen, Garnett and Keyes (n 58) 415 and authorities cited therein.

[190] *Comandate Marine* (2006) 157 FCR 45, [163] – [164], [173] (Allsop J, Finn and Finkelstein JJ agreeing).

[191] *Rinehart* (2019) 366 ALR 635 [18] (Kiefel CJ, Gageler, Nettle and Gordon JJ) citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, [35] (French CJ, Hayne, Crennan and Kiefel JJ). For commentary on *Rinehart*, see Albert Monichino and Monique Carroll, 'The Proper Approach to the Interpretation of Arbitration Agreements: Australian High Court Speaks Out (2019) 7(1) *ACICA Review* 8; Albert Monichino, 'Interpretation of Arbitration Agreements: View from Downunder' (2019) 31 *Singapore Institute of Arbitrators Newsletter*. Monichino observes that in so doing the HCA failed to resolve the conflicting positions between the Full Court of the Federal Court of Australia and the New South Wales Court of Appeal as to the applicability of the liberal presumptive approach to interpreting arbitration agreements set out by Lord Hoffmann in *Fiona Trust*.

[192] *Akai Pty Ltd v People's Insurance Company Ltd* (1996) 188 CLR 418, 441 (Toohey, Gaudron and Gummow JJ) ('*Akai*').

[193] Ibid 442 (Toohey, Gaudron and Gummow JJ). Of course, the second step is not without complications. Some lower courts have considered that where there is no express choice of law, the correct approach is to proceed directly to the closest and most real connection. See *Attorney-General of Botswana v Aussie Diamond Products Pty Ltd (No 3)* [2010] WASC 141; *Busst v Lotsirb Nominees Pty Ltd* [2003] 1 Qd R 447. Others have merged the search for an express and implied term: *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196, [61] (Edelman J).

[194] *Akai* (1996) 188 CLR 418, 440 (Toohey, Gaudron and Gummow JJ).

[195] Ibid 442 (Toohey, Gaudron and Gummow JJ).

enquiries. First, whether the contract contains an express choice of law. If so the process ends. If not, one looks to whether implied (inferred) intent as to the proper law can be inferred from the contract. If this cannot be found, the question is which system of law has (objectively) the closest and most real connection to the contract. With this in mind, the HCA's comments as to needless complexity appear to refer to previous imprecision as to the purpose of, and type of intent needed at, each step of the test. The upshot is that, properly understood, *Akai* lends itself to the *Sul América* framework *and* the UKSC's approach.

In particular, *Akai* makes explicit that the search for express and implied (inferred) choice is one which looks for the parties' *actual* intention, not objective intent.[196] That is distinguished from the implication of terms which is predicated on the parties' objective intent.[197] This mirrors the approach in Singapore.

In any event, adopting either the UKSC approach or the *Sul América* Test would be a welcome break with the tendency of Australian courts to assume that the underlying contract's governing law is also the proper law of the arbitration agreement. For example, in *Cape Lambert* the Western Australian Court of Appeal concluded without discussion that the proper law of an arbitration agreement was Western Australian law because a preceding sub-clause stated that 'this agreement is governed by the laws of Western Australia', notwithstanding that the arbitral seat was Singapore.[198] The Federal Court made a similar assumption in *Cosco Oceania* in respect of a stay application pursuant to an arbitration agreement in a time charterparty governed by English law.[199] Moving away from an automatic assumption that the governing law of the underlying contract is also the arbitration agreement's proper law is sensible. It both better reflects the separability doctrine—codified in the *International Arbitration Act 1974* (Cth) ('*IAA*')[200]—and respects party autonomy.[201]

Whether Australian courts utilise the UKSC approach or *Sul América* Test, it remains unclear how they would be applied - whether the court would follow the UKSC, Lord Justice Popplewell or Moore-Bick LJ and Singapore, or would forge a new approach. The need for clarity is especially needed in regard to an implied choice of proper law. A strong argument can be made that the seat should presumptively provide the proper law where an express choice has not been made. This aligns with *Akai* where the HCA gave muted support for an inference at step two that parties intended the law of the forum (seat) to govern the underlying contract.[202] An extension of this is that the seat is also indicative of the proper law of the arbitration agreement.[203] It also better reflects the different purposes of the underlying contract and an arbitration agreement as well as the fact that a choice of seat is fundamentally a choice of (procedural) law. That said, at first glance the *IAA* lends itself to a conclusion that the choice of an Australian seat is not an implied choice of Australian proper law on reasoning similar to that favoured by the UKSC. The *IAA's* few mandatory provisions[204] mirror those of the *Arbitration Act*. With the exception of s 7, these provisions have little relevance to the identification of the proper law.[205] Moreover, none mandate a conclusion that the selection of an Australian seat (its procedural law and supervisory jurisdiction) entails a choice as to the substantive law of the arbitration agreement. Crucially, though, the *IAA* lacks a provision equivalent to s 4(5) of the *Arbitration Act* (which exempts arbitration agreements governed by foreign law from non-mandatory provisions of the act) and contains s 21 (which prohibits parties in Australian-seated international arbitrations from 'opting out' of the UNCITRAL Model Law). As such, the *IAA* regime is less easily avoided. At the same time, s 7 (which enables stays in favour of foreign arbitration agreements which meet domestic formalities requirements) is not the only avenue for stays. While the *IAA* does not expressly save the operation of common law rules to arbitration agreements that do not comply with the legislation,[206] Australian courts retain inherent jurisdiction to stay litigation in favour of arbitral proceedings.[207] In exercising this jurisdiction, the court may not be bound by the *IAA's* choice of law rules. In sum, though, the UKSC's distinction between procedural and substantive law more difficult to sustain in Australia. Thus, a stronger argument can be made for Australian courts utilising a presumption in favour of the seat. Still, whether a presumption in favour of the seat (Popplewell LJ) or governing law (Moore-Bick LJ; UKSC; Singapore) will be applied remains a finely balanced question.

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[196] Ibid 440 (Toohey, Gaudron and Gummow JJ).
[197] Ibid 441 (Toohey, Gaudron and Gummow JJ).
[198] *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66, [6], [38] (Martin CJ, Buss J agreeing).
[199] *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd* (2008) 168 FCR 169, [11] (Finkelstein J). See also *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420, [22] (Merkel J).
[200] *International Arbitration Act 1974* (Cth) sch 2 art 16.
[201] *Comandate Marine* (2006) 157 FCR 45, [164] (Allsop J, Finn and Finkelstein JJ agreeing).
[202] *Akai* (1996) 188 CLR 148, 436 – 7 (Toohey, Gaudron and Gummow JJ).
[203] The corollary appears to be applied in *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co Pty Ltd* (1996) 133 FLR 417, 427 – 8 (Bainton J).
[204] Michael Pryles, 'Australia' in *International Handbook on Commercial Arbitration* (ICCA, Supplement 111, July 2020) 6 – 7.
[205] *International Arbitration Act 1974* (Cth) ss 7, 8, 21, sch 2 arts 18, 24(2), 35.
[206] Compare *Arbitration Act 1996* (UK) s 81(1)(b).
[207] *Hancock* (2017) 257 FCR 442, [332] – [335] (Allsop CJ, Besanko and O'Callaghan JJ).

In the interim, though, the broad outlines of an Australian approach can be observed. The substantive proper law of an arbitration agreement will be determined using established conflict of laws rules and contract interpretation principles which are broadly similar to those adopted by the UKSC and in Singapore. Further, different aspects of an arbitration agreement may be governed by different systems of law. [208] Beyond this, much is unclear.

4 Maritime Contract Arbitration Clauses

The multiplicity of approaches for identifying the proper law leaves shipowners, charterers and other users of maritime contracts in an unenviable position. A thread linking each of the English and Singapore decisions is that by not making the arbitration agreement's terms explicit, the existence, content and operation of such terms fall to be determined through extensive contractual construction. The danger here is two-fold. There are a range of approaches for identifying the proper law of an arbitration agreement, and not all of these approaches begin or end in the same place. But even within a particular approach, the process of interpretation is 'difficult'[209] and disputes often turn on fine points of construction.[210] This has been criticised[211] but it remains that the meaning of a contractual term is often a matter upon which 'legitimate views may differ'.[212]

With this in mind, the UKSC's approach, Moore-Bick LJ's approach, Popplewell LJ's approach and Singapore's approach are applied to three representative arbitration agreements found in maritime contracts to assess their operation on the clauses and to identify areas of uncertainty. Minor amendments to the boilerplate arbitration agreements are also suggested to clarify this complex area of the parties' contractual relationship.

4.1 Australian Wheat Charter

The Australian Wheat Charter is a voyage charterparty *without* a governing law clause. Its arbitration agreement, which does not expressly designate a seat or arbitral rules, provides:

> Any dispute arising under this Charterparty or any Bill of Lading issued hereunder other than [a dispute arising in Australia] shall be referred to arbitration in London, one arbitrator being appointed by each party, in accordance with the Arbitration Acts 1950 and 1979 or any Statutory modification or re-enactment thereof for the time being in force. On the receipt by a party of the nomination in writing of the other party's arbitrator, that party shall appoint its arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall apply. If arbitrators properly appointed shall not agree they shall appoint an umpire whose decision shall be final and binding.[213]

Notably, the absence of an express choice of governing law means that the Australian tradition of simply extending that choice of law to the arbitration agreement will be of little assistance.

4.1.1 UKSC Approach

As the UKSC emphasised that the choice of seat and curial law is not determinative of the proper law, their approach is unlikely to identify an express choice of proper law here. Further, without a clear implied or express choice of the underlying contract's governing law, the enquiry will proceed to the second limb. Here, the seat presumptively has the closest and most real connection with the arbitration agreement, which is likely to be English law given the reference to English legislation.

4.1.2 Moore-Bick LJ's Approach

Lack of an express choice of the underlying contract's governing law means that the inquiry turns to step three and the proper law is that with which the arbitration agreement has the closest and most real connection. Facing

[208] *Trina Solar* (2017) 247 FCR 1, [46] (Greenwood J), [133] (Beech J, Dowsett J agreeing). See also *Kennedy Miller Mitchell Films Pty Ltd v Warner Bros Feature Productions Pty Ltd* [2017] NSWSC 1526, [63] (Hammerschlag J); *Mond v Berger* (2004) 10 VR 534.
[209] Sir Bernard Elder, 'The Construction of Shipping and Marine Insurance Contracts: Why is it so Difficult?' [2016] *Lloyd's Maritime and Commercial Law Quarterly* 220, 221; Solène Rowan, 'Problems of Contractual Interpretation: English and French Law Compared' [2020] *Lloyd's Maritime and Commercial Law Quarterly* 273, 274.
[210] See, eg, *The Mandarin Star* [1969] QB 449 which considered the meaning of 'takings at sea'. See also *Stanley Kerr Holdings Pty Ltd v Gibor Textile Enterprises Ltd* [1978] 2 NSWLR 372.
[211] *Fiona Trust* [2008] 1 Lloyd's Rep 254, [6] – [7], [12] – [13] (Lord Hoffmann).
[212] Elder (n 209) 226. Compare *The Astra* [2013] 2 Lloyd's Rep 69 (Flaux J) and *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd* [2015] 2 Lloyd's Rep 407 (Popplewell J) which differed on whether an obligation to pay hire was a contractual condition.
[213] BIMCO Australian Wheat Charter (1990) cl 33(b). A similarly worded arbitration agreement in a bill of lading was at issue in *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649.

similar factors in *Sul América*, Lord Justice Moore-Bick emphasised the link between an arbitration and the supervisory jurisdiction as indicating that the arbitral seat had the closest and most real connection with the arbitration agreement. Therefore, English law will likely provide the proper law of the arbitration agreement.

4.1.3 Popplewell LJ's Approach

In *Chubb*, his Lordship held that the presence of a governing law clause and arbitration agreement referring to 'This Agreement' was not an express choice of proper law. Here no express choice of governing law is made – at most there is a suggestion that reference to the UK act is an express choice of proper law. As such, his approach is unlikely to find that this arbitration agreement contains an express choice. The enquiry then turns to step two, which begins from the presumption that the seat (London) provides the proper law but an implied governing law of the underlying contract may weigh against the presumption. If the implied governing law is not English law, the mere fact that the governing law differs from the seat will not oust the presumption. That said, a corollary of the holding in *Arsanovia* is that the arbitration agreement's clear reference to English legislation reinforces the presumption that English law applies. While his Lordship did not opine on *Arsanovia*,[214] the Court of Appeal applied the decision in *Kout Food*.[215] In any event, without substantive factors rebutting the presumption, English law is likely to be the proper law.

4.1.4 Singapore Approach

Singapore is also unlikely to find an express choice of proper law in this charterparty for similar reasons. Thus, it is necessary to turn to step two. Presuming that an implied choice of governing law can be identified and is not English law, the choice of a London seat alone is insufficient to displace the presumption that the governing law of the underlying contract is the arbitration agreement's proper law. Thus, in balancing the governing law and the law of the seat, much will turn on the weight given to the reference to English arbitration legislation.

The Singapore authorities do not address this issue; while *BCY* applied *Arsanovia*, it did not do so on this point.[216] Giving the words their ordinary meaning, the reference to English legislation supports a basic inference that the parties intend for English law to apply to the arbitration. But reference to the legislation arguably only evinces the parties' intent that the arbitration be conducted in accordance with the act. This goes to the procedure of the arbitration and most naturally corresponds to the arbitral seat, rather than the proper law which can differ from the seat. Moreover, it must be recalled that the court is looking for the parties' actual intent. Including the reference to legislation may only evince an actual intent to arbitrate in a certain way or observe procedural requirements (eg signature requirements) for likely places of enforcement of an award, rather than intent that that system of law be the proper law.[217] Another relevant factor at this stage will be the potential that the arbitration agreement may be invalid under a putative proper law. If the arbitration agreement would be rendered invalid, this would point away from that system of law being the proper law.

Should a Singapore court find it necessary to move to step three, attention would turn to the system of law with the closest most real connection to the arbitration agreement. This is likely to be English law since London is the seat. The express reference to English legislation is another connecting factor.

4.2 AusGrain Voyage Charter (2015)

This voyage charterparty updates the 'venerable' Australian Wheat Charter and contains a merged arbitration clause and governing law clause.[218] The arbitration agreement is a standard clause drafted by BIMCO which is used (except for cl 42.10) in several standard-form maritime contracts.[219] The clause states, in pertinent part, that:

> 42.1 This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

[214] *Enka Insaat* [2020] EWCA 574, [85] (Popplewell LJ, Males and Flaux LLJ agreeing).
[215] *Kout Food* [2020] 1 Lloyd's Rep 269, [62] (Flaux LJ, Sir Rix and McCombe LJ agreeing).
[216] *BCY v BCZ* [2017] 3 SLR 257, [56] – [57], [59] (Steven Chong J).
[217] The Court of Appeal observed in *BNA* '[t]he parties did not only choose to arbitrate – they chose to arbitrate in a certain way': [104].
[218] Grain Trade Australia, 'GTA Trade Rules, Contracts & Vendor Declarations' (Web Page) <https://www.graintrade.org.au/contracts>
[219] See, eg, BIMCO Standard Ship Management Agreement (2009) cl 23(a); Norwegian Shipbrokers' Association Ship Sale Agreement (2012) cl 16(a); BIMCO Voyage Charter Party for the Transportation of Chemicals in Tank Vessels (2008) cl 49(a); BIMCO Time Charter Party for Vessels Carrying Chemicals in Bulk (2005) cl 59(a); BIMCO Standard Bareboat Charter Party (2017) cl 33(a).

> 42.2 The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.
> […]
> 42.10 Any rights under the Contracts (Rights of Third Parties) Act 1999 (UK) or any Statutory modification or re-enactment thereof for the time being in force are expressly excluded.[220]

In October 2020, BIMCO updated its standard-form model arbitration clause. While the first two subsections are largely identical, reference to the English *Rights of Third Parties Act* has been removed.[221]

4.2.1 UKSC Approach

In light of the UKSC's endorsement of a broad reading of when an express choice of proper law is made, the express choice of English law as the governing law for 'This Contract' also likely constitutes an express choice of the arbitration agreement's proper law.

4.2.2 Moore-Bick LJ's Approach

The first issue is whether there is an express choice of the arbitration agreement's proper law.[222] The mere existence of a governing law does not mean that this is also the proper law. *Arsanovia*, however, suggests that reference to 'Contract' in the arbitration agreement and charterparty demonstrates express intent for the charterparty's governing law to be the proper law. *Kout Food* does not expressly endorse this obiter but does hold that where there is a governing law clause, arbitration agreement *and* a specific clause requiring the tribunal to apply the terms of the underlying agreement, there may be an express choice of law. It is evident from the charterparty's recital ('this Contract shall be performed subject to the conditions contained in this Charterparty') and the document's treatment of 'Contract' and 'Charterparty' as interchangeable,[223] that 'This Contract' does not refer only to the arbitration agreement. The question, then, is whether with reference to all the charterparty's terms the parties have expressly chosen English law as the arbitration agreement's proper law.

In this respect, the charterparty falls between the terms in issue in *Arsanovia* and *Kout Food*. Most notably, art 14.3 of the agreement in *Kout Food* required '[t]he arbitrator(s) shall apply the provisions contained in the Agreement'. On its face, this recital is less strident. However, whether the charterparty's general requirement that it be performed subject to its terms is sufficient to support an express choice of the proper law is a finely balanced issue.

Turning to the second step, that English law expressly governs the underlying contract raises the presumption that English law is also the arbitration agreement's proper law. Rather than rebutting the presumption, the reference to the specific exclusion of the *Contracts (Right of Third-Parties) Act 1999* (UK) should reinforce the presumption.[224] Meanwhile, the choice of the seat does not weigh against it. The choice of the *LMAA Terms* is unlikely to be considered under this approach, however.

4.2.3 Popplewell LJ's Approach

It is suggested that Popplewell LJ's approach is likely to identify English law as the proper law as an express choice. This is for two separate reasons. First, his approach at step one operates similarly to Moore-Bick LJ's approach regarding express choice and the Court of Appeal's holding in *Kout Food* remains good authority. Thus, the fundamental question is whether a positive but general obligation that the charterparty be performed subject to its terms, including the choice of governing law, is sufficient to support an express choice of the arbitration agreement's proper law. Separately, the incorporation of the *LMAA Terms* means that these rules operate as contractual terms including the designation of English law as the proper law unless the parties have agreed otherwise. This is properly viewed as an express choice of law.

Should the enquiry proceed to the second step, the London seat points to English law being the proper law. Further, the arbitration agreement does not contain countervailing factors that displace the presumption. Lord Justice Popplewell also accepts that arbitral rules may be relevant considerations in appropriate circumstances.

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[220] Grain Trade Australia Voyage Charter (2015) cl 42.
[221] BIMCO, 'BIMCO Adds Hong Kong to New Shortened Arbitration Clause' (Web Page) <https://www.bimco.org/news/priority-news/20201006-bimco-adds-hong-kong-to-new-shortened-arbitration-clause>
[222] This issue does not arise in the maritime contracts referred to in footnote 219 above due to more consistent drafting.
[223] Compare Grain Trade Australia Voyage Charter (2015) cll 2, 30.2, 42.
[224] Notably, this point will not arise in those charterparties that do not contain cl 42.10.

Whether the reference to English legislation is to be taken into account is not settled under this approach, but it does not weigh against the starting presumption in this case. Further, if the *LMAA Terms* are not viewed as evincing an express choice of proper law, they at least demonstrate an implied choice that English law be the proper law where, as here, the parties have not agreed otherwise.

4.2.4 Singapore Approach

Courts in Singapore have had less occasion to examine the identification of an express choice of proper law than the English courts. But it is clear that an express choice of the governing law clause does not amount to an express choice of proper law.[225] *BNA* further suggests that the proximity between the governing law phrase and the arbitration agreement is insufficient to denote an express choice of the proper law. Two separate arguments can be made, however, for an express choice of proper law. First, *BCY* and *BNA* indicate that the choice of arbitral rules may be relevant for the choice of proper law. The *LMAA Rules* specify that English law is the arbitration agreement's proper law in the absence of party agreement. Where no other express choice is evident, it is suggested that this may be viewed as constituting an express choice of proper law. it is clear that the contact is to be construed as a whole. Secondly, the arbitration agreement specifically refers to English legislation which suggests that the parties intended for English law to be the proper law - although this remains unsettled in Singapore.

If it is necessary to consider step two, this begins from the presumption that English law is also the arbitration agreement's proper law. It is again unclear how Singapore would treat the express reference to specific legislation. In this case, the legislation points towards the presumptive proper law, so it is difficult to construe as a countervailing factor. On the other hand, *BCY* indicates that the selection of the *LMAA Terms* will be a relevant consideration because they mandate both a seat (England) and proper law (English) if the parties do not provide otherwise. Accordingly, the *LMAA Terms* support the presumption that English law is the proper law. At the same time, there are no apparent factors pointing away from English law. This collectively entails that English law is likely to be the proper law.

4.3 NYPE (2015) & BIMCO Bunker Terms (2018)

The NYPE is the most widely-used dry cargo time charterparty[226] and the BIMCO Bunker Terms is a popular bunkering contracts. Both include materially identical arbitration agreements that contain three separate options between which users may select.[227] The third option is of particular interest:

> This Charter Party shall be governed by and construed in accordance with Singapore**/English** law.
> Any dispute arising out of or in connection with this Charter Party, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the Singapore International Arbitration Act (Chapter 143A) and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.
> The arbitration shall be conducted in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (SCMA) current at the time when the arbitration proceedings are commenced.
> […]
> **Singapore and English law are alternatives. [….] If neither or both are indicated, then English law shall apply by default.[228]

Difficulty arises if English law is selected as the governing law or applies by default.

4.3.1 UKSC Approach

Again, the wide understanding of express choice endorsed by the UKSC entails that the clear selection of English law to govern 'This Charter Party' extends to the proper law of the arbitration agreement. It is notable that such

[225] *BNA v BNB* [2020] 1 SLR 456, [59] (Steven Chong JA, Sundaresh Menon CJ and Judith Prakash JA agreeing).
[226] Shaw (n 1) 125.
[227] The same arbitration agreement is also one of the optional clauses in the BIMCO Standard Bareboat Charter Party (2017) cl 33(c).
[228] New York Produce Exchange Form (2015) cl 54(c). The Hong Kong International Arbitration Centre suggests a near identical model arbitration clause for maritime arbitration:

> This Contract shall be governed by and construed in accordance with English/ Hong Kong* law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in Hong Kong in accordance with the Arbitration Ordinance Cap. 609 or any statutory reenactment or modification thereof save to the extent necessary to give effect to the provisions of this clause. […]
> * - Delete as appropriate. If no deletion is made, Hong Kong law shall apply.

Hong Kong International Arbitration Centre, *Maritime Dispute Resolution in Hong Kong – A Practical Guide* (2014) 19 – 20.

a reading largely ignores the choice of seat and, perhaps more importantly, express reference to particular legislation which is not part of the of the governing law.

The reference to Singapore's legislation also raises complexities mainly in the event that an express choice of proper law is not found. In such a scenario, English law as the law of the underlying contract would as a 'general rule' provide the arbitration agreement's proper law. It is clear under the UKSC approach that a Singapore seat is insufficient by itself to negate the general rule but the UKSC does not directly consider whether an express reference to legislation at the seat is capable of negating the rule. If the UKSC's rigid distinction between the procedural law applicable to the arbitration and substantive law (including proper law) relating to the arbitration agreement, UKSC's approach, is followed, it may be possible to relegate the reference to the Singapore act as pertaining only to the conduct of the proceedings. There are difficulties with this approach, however. First, it requires reading such a limitation into the provision despite no express language indicating such limitation. Secondly, such a reading is problematic where the legislation at the seat contains mandatory provisions regarding the proper law of the arbitration agreement (eg Sweden). In Singapore, the mandatory provisions of the act apply automatically and the non-mandatory provisions apply unless the parties agree to the contrary.[229] Thus, ascertaining the proper law requires further consideration of whether the Singapore legislation contains mandatory provisions regarding the proper law and, if not, whether the parties have agreed otherwise.

4.3.2 Moore-Bick LJ's Approach

Under Moore-Bick LJ's approach, the first step requires assessing whether the arbitration agreement's proper law has been chosen. 'Charter Party' is not expressly defined, but its use throughout the document indicates that it is intended to refer to the entire document. Unlike *Arsanovia*, the NYPE contains more than a mere reference to the charterparty in both the governing law and arbitration clauses. Rather, the recital imposes a positive obligation that the document be performed in accordance with its terms.[230]

This moves the situation closer to *Kout Food* where the arbitration agreement specifically required the arbitrators to apply the provisions in the agreement. However, the NYPE does not contain a similar express obligation. Thus, the central question is whether a general requirement in the NYPE's recital is equivalent to a specific obligation that the arbitrators apply the provisions of the underlying contract including the governing law clause to the arbitration agreement. Again, this is a tricky question of contractual interpretation upon which minds may differ.

If an express choice is not identified, the issue becomes whether the presumption is rebutted that English law as the governing law of the underlying contract is also the proper law of the arbitration agreement. The choice of Singapore as a seat is a powerful indicator that English law is not the proper law, but is insufficient to rebut the presumption on its own. An additional consideration is the express reference to Singapore's legislation. If the corollary of *Arsanovia* is accepted, then this indicates the party's intent that that system of law provides the proper law of the arbitration agreement. This is a further factor pointing towards Singapore being the proper law of the arbitration agreement. The issue then arises as to whether those two factors together are sufficient to oust the presumption in favour of English law. *Sul América* demonstrates that this point is finely balanced and multiple factors pointing to Singapore may well be insufficient.

Thus, it is readily conceivable that the court would consider the third step of the test. Considering the factors taken into account by his Lordship in *Sul América*, Singapore is likely to provide the closest and most real connection. This is because the seat of arbitration (place of performance) is Singapore and there is a direct reference to the *International Arbitration Act* (Cap 143A).

4.3.3 Popplewell LJ's Approach

At the first step, Popplewell LJ's approach is similarly indeterminate, albeit for different reasons. Since his Lordship did not extensively consider the operation of the first step, conclusions must be drawn from other Court of Appeal decisions, namely *Kout Food*. However, applying *Kout Food* results in the same issue as on Moore-Bick LJ's approach. Further, the potential relevance of arbitral rules under Popplewell LJ's approach is not of assistance here because the *SCMA Rules* do not specify a proper law in the absence of party agreement.[231]

[229] Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation* (Informa Law, 2nd ed, 2016) 162.
[230] The same arbitration agreement is used in the BIMCO Bunker Terms. However, as the Bunker Terms do not contain a provision similar to the recital, it makes a weaker case for having an express choice of proper law.
[231] Rule 21 of the *SCMA Rules* states 'The Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'.

Turning to the second step, the starting point would be that Singapore, as the seat, provides the proper law of the arbitration agreement. On his Lordship's approach, mere choice of English law to govern the underlying contract does not displace that presumption—particularly in the absence of any other factors in the arbitration agreement pointing to English law. The express reference to Singapore's legislation may reinforce this conclusion, but the inclusion of the *SCMA Rules* does not.

4.3.4 Singapore Approach

This clause is also a lineball provision under Singapore law. An express choice of the governing law clause does not automatically amount to an express choice of proper law and proximity between governing law and arbitration clauses is not relevant. On the other hand, the arbitration agreement specifically refers to Singapore's *International Arbitration Act* and does not expressly purport to oust its non-mandatory provisions. It is arguable that this demonstrates express intent that Singapore law is the proper law of the arbitration agreement. However, the point remains unexamined in Singapore.

At the second step, the presumption that the law of the underlying contract is intended to be the proper law of the arbitration agreement may be rebutted, but *BCY* suggests that this requires an express statement to that effect. Such a statement is not apparent in the NYPE and English law would likely be the proper law. In the event that this higher threshold does not apply, one indicator pointing away from English governing law is the seat being Singapore. On its own this is not sufficient to displace the presumption. Another is the reference to Singapore legislation. The Singapore High Court has also indicated that arbitral rules may be relevant to this assessment but the *SCMA Rules* do not point away from the starting presumption. As such, much will again turn on the weight given to the express reference to the Singapore act.

The importance of this factor is heightened by the operation of the closest and most real connection step. If the court finds that there is no implied choice as to the proper law, Singapore is likely to be the proper law of the arbitration agreement. The factors which point to this are the status of Singapore as the seat and, potentially, the reference to the domestic legislation. The only factor pointing away from this is the choice of English law as the governing law. Thus, a strong case can be made that Singapore's law has the closest connection with the arbitration agreement as the law of the seat. As such, the application of the two steps may well lead to different proper laws. The divergent results underscore the unpredictable operation of arbitration agreements where crucial aspects of the clauses are left unstated.

4.4 Amendments

Regardless of the approach used, a proper law can be discerned for each arbitration agreement. In most instances, the approaches lead to the same conclusion albeit by different (and circuitous) routes. Where they do not, the difference between English or Singaporean law is, at first blush, not extensive. The two jurisdictions do, however, differ in several areas which have direct relevance to party rights in relation to arbitration agreements (eg when an arbitration agreement may be repudiated).[232] Moreover, in each case identifying the proper law requires a time consuming, and potentially uncertain, process of contractual interpretation. This is avoidable.

One area of agreement between the English and Singapore approaches is that an express choice of proper law is to be given effect. This is also a principle of Australian law.[233] Thus, where such an express choice is made explicit, there is no need to undertake further contractual construction. This offers users of maritime contracts a straightforward way to avoid potential uncertainty: an arbitration agreement should include provision providing for the proper law of the arbitration agreement. This need not be ornate. It may simply state, for example, 'The proper law of the Arbitration Agreement is the law of England'. Moreover, including such a provision does not create conflict or uncertainty with the underlying contract—even where the governing law and the proper law are different—because the two agreements are separable[234] and under general contractual interpretation principles a

[232] Compare *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* [2018] 2 SLR 1207, [54], [66] (Judith Prakash JA); *Lloyd v Wright* [1983] QB 1065; 1074 (Eveleigh LJ); *The Mercanaut* [1980] 2 Lloyd's Rep 183 (Lloyd J). But see *AES Ust-Kamenogorsk Hydorpower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889, [1] (Lord Mance JSC).

[233] See generally *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

[234] See *AXA Re v Ace Global Markets Ltd* [2006] EWHC 216; *Neo Intelligence Holdings Ltd v Giant Crown Industries Ltd* [2017] HKCFI 2088. This is a distinct point from where parties include in the same agreement both an exclusive jurisdiction clause or forum selection clause and an arbitration agreement. For discussion of that situation, see generally Richard Garnett, 'Coexisting and Conflicting Jurisdiction and Arbitration Clauses' (2013) 9(3) *Journal of Private International Law* 361; Joseph (n 40) 150 – 1; Simone Stebler, 'The Problem of Conflicting Arbitration and Forum Selection Clauses' (2013) 31 *ASA Bulletin* 27.

specific choice of law in the arbitration clause is likely to prevail over a general choice of law in the underlying contract. To this point, there are 'virtually no instances of awards refusing to give effect to agreements selecting the law governing the arbitration agreement'.[235]

This leads to another point. Best practice would be to set out the governing law of the underlying contract and the arbitration agreement in entirely separate clauses. Not only does this better reflect the relationship between the governing law clause and the two separable agreements, but it helps avoids the questionable assumption that a governing law clause automatically applies to the arbitration agreement. This assumption is often made where the governing law clause and the arbitration agreement are contained in the same provision or adjacent sub-clauses. This position has not been endorsed in England and has been rejected in Singapore, however.

One way parties might to seek to avoid proper law issues, without expressly providing for a proper law, is to ensure that the seat of arbitration and the governing law are the same. This still exposes the parties to the vagaries of contractual interpretation. Also, even if it leads to the 'desired' proper law it is a long way around to the same result. More importantly, this will not be a suitable option for all parties. Parties may prefer the law of, say, New York to govern the contract because of some perceived advantage under that law or familiarity with that system but wish for the arbitration to be seated in Singapore for other reasons.

Conceivably, another way to stipulate a particular proper law is to incorporate arbitral rules, like the *LMAA Terms*, that stipulate the proper law of the arbitration agreement in the absence of party agreement to the contrary. This has three considerable drawbacks. First, a court may conclude on the facts before it that the parties had impliedly chosen another system of law. Secondly, the parties would be limited to the few sets of arbitral rules that stipulate a proper law. Thirdly, the parties must be content to accept the particular system of law stipulated by the arbitral rules. Thus, the surest course of action is to expressly state the proper law of the arbitration agreement.

5 Conclusion

The proper law of an arbitration agreement is crucial for the enforcement of arbitration clauses and subsequent awards. Unfortunately, the proper law is not often made explicitly clear. In order to identify the proper law of an arbitration agreement, both Singapore and England utilise similar frameworks. Both align with Australian conflict of laws rules. However, the test's application diverges between, and within, England and Singapore. As a result, the operation of arbitration agreements found in common maritime contracts is uncertain. Even where the tests lead to the same result, the process of interpretation is time consuming and one upon which minds can differ. The best way for users of maritime contracts to ensure that their arbitration agreements operate as intended is to specifically include the proper law of the arbitration agreement in every arbitration clause.

[235] Born (above n 5) 637.