THE LAW GOVERNING INTERNATIONAL ARBITRATION AGREEMENTS: AN INTERNATIONAL PERSPECTIVE*

The article analyses the choice of law governing the substantive validity of international arbitration agreements from an international perspective. It examines the evolution in approach of judicial and arbitral decisions rendered over the last century on the issue in chronological order – by looking at the past and the present of the choice-of-law analysis first, before addressing its future. The article reviews the various existing approaches to the choice of law governing the substantive validity of international arbitration agreements, including the historical application of the law of the judicial enforcement forum; the law of the arbitral seat; the law applicable to the parties' underlying contract; and more recently, the law with the "closest connection" or "most significant relationship" to the parties' arbitration agreement. The article discusses the deficiencies in these traditional choice-of-law analyses, which led to inconsistent and unpredictable results. The article proposes to remedy these insufficiencies by a proper application of the principles set out in the New York Convention and the UNCITRAL Model Law, which provide for the application of uniform international principles mandating the presumptive validity of international commercial arbitration agreements and a validation principle applicable to the choice of the law governing such agreements. The article concludes that the future of this choice-of-law analysis is the application of an international two-part rule comprising: (a) a uniform international rule prohibiting discrimination against arbitration agreements; and (b) a validation principle, selecting that national law which will give effect to the parties' agreement to arbitrate. This approach is not merely sound choice-of-law policy; it also effectuates the parties' intentions and objectives in selecting a neutral, efficient means of resolving their commercial disputes, and is mandated by the New York Convention's text and pro-arbitration purposes, as well as the text and purposes of the UNCITRAL Model Law.

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I. Introduction

1 The author was asked to address the common law perspective on the law governing the arbitration agreement but has taken the liberty of departing from this direction. This was not done just out of a spirit of rebellion, but because a division between a "common law perspective" and a "civil law perspective" in selecting the law governing international arbitration agreements is artificial, and fosters an incorrect view that the arbitral process has different objectives, and deploys different means to achieve those objectives, in civil law and common law jurisdictions. Such an approach is inconsistent with the objective of the international arbitral process, which is to provide a system for resolving international disputes that transcends domestic choice-of-law complexities, and with the text and purpose of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] ("New York Convention"), which seeks to establish a single uniform set of international legal standards for recognition and enforcement of international arbitration agreements (and arbitral awards).[2]

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959) ("New York Convention").

2 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 106. See also A J van den Berg, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (Kluwer, 1981) at pp 1 ("the significance of the New York Convention for international commercial arbitration makes it even more important that the Convention is interpreted *uniformly* by the courts" [emphasis in original]), 6, 54–55, 168–169, 262–263, 274 and 357–358, available at <http://www.newyorkconvention.org/publications/nyac-i> (accessed 1 August 2014); P Patocchi & C Jermini in *International Arbitration in Switzerland* (S Berti *et al* eds) (Kluwer Law International, 2000) Art 194 at para 20; Landau, *The Requirement of A Written Form for An Arbitration Agreement: When "Written" Means "Oral" in International Commercial Arbitration: Important Contemporary Questions* (A J van den Berg ed) (ICCA Congress Series No 11 2003) (Kluwer Law International, 2003) p 19 at p 65 (the New York Convention "has given rise to a relatively harmonized and uniform regime – or at least the means to work towards relative harmonization").

2 A distinction between a common law approach, on the one hand, and a civil law approach, on the other hand, may reflect historical differences among jurisdictions in addressing the issues of the law governing international arbitration agreements. Nonetheless, this distinction should be regarded as a relic of the past, rather than a feature of the future. As explained below, the choice of the law governing international arbitration agreements should be approached from an international perspective, which is characterised by the application of a validation principle and of an international non-discrimination rule, with the aim of facilitating recognition and enforcement of international arbitration agreements.[3]

3 The choice of the law governing an international commercial arbitration agreement is a recurrent and vitally important issue in the arbitral process. It is a complex subject which arises in most disputes over the existence, validity and interpretation of international arbitration agreements. The subject has given rise to extensive commentary, and almost equally extensive confusion, which does not comport with the ideals of international commercial arbitration – *ie*, the objective of simplifying, expediting and rationalising transnational dispute resolution.

4 In addressing the substantive validity of international commercial arbitration agreements, this article first approaches the matter chronologically, by examining the past and the present of the choice-of-law analysis, before addressing its future. As discussed below, review of judicial and arbitral decisions rendered over the last century shows that there have been substantial advances in the choice-of-law rules governing international arbitration agreements, aimed at achieving the purposes of those agreements – namely, providing efficient, neutral and expert means of resolving international disputes in a single, centralised forum. Although there were hesitations and, in some cases, hostility regarding that objective, existing choice-of-law rules have gone far in effectuating this basic objective of the arbitral process.

5 As explained in greater detail below, courts in a number of jurisdictions historically applied the law of the judicial enforcement forum to the substantive validity of arbitration agreements. This analysis, premised on the remedial nature of arbitration, has been largely abandoned, in favor of choice-of-law rules based on specified connecting factors, such as the law of the arbitral seat or the law

3 The article addresses international commercial arbitration agreements, as distinguished from State-to-State and arbitration agreements contained in investor-State treaties. Both these categories of arbitration agreements are generally governed by international law, rather than national law.

applicable to the parties' underlying contract. More recently, courts in some jurisdictions have developed more flexible approaches based on the determination of the law with the "closest connection" or "most significant relationship" to the parties' arbitration agreement.

6 Despite significant advances in the choice-of-law analysis over the past century, contemporary choice-of-law approaches rest on arbitrary distinctions and have often produced inconsistent and unpredictable decisions. These deficiencies and inconsistencies make it clear that substantial room for improvement remains on the issue of the law applicable to international commercial arbitration agreements.

7 As discussed below, the uncertainties that persist in contemporary choice-of-law rules governing international arbitration agreements could be remedied by a proper application of the principles set out in the existing international instruments – in particular, the New York Convention and the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("Model Law").[4] These instruments provide for application of uniform international principles mandating the presumptive validity of international commercial arbitration agreements and a validation principle applicable to the choice of the law governing such agreements.

8 A validation principle looks to the purposes of international arbitration agreements and provides for application of the law that will give effect to the parties' agreement. This principle rests on the premise that parties generally intend application of that law which will give effect to their agreement to arbitrate and provide safeguards against the peculiar jurisdictional and choice-of-law uncertainties of transnational litigation. Notably, and unlike some national law systems, the validation principle is mandated by the New York Convention and the Model Law and applies to all international arbitration agreements, regardless where the arbitral seat is located.

9 The thesis of this article is that the proper choice-of-law analysis for the substantive validity of international arbitration agreements is a two-part rule, which finds its basis in the text and objectives of the New York Convention and the Model Law. As discussed below, this analysis requires application of: (a) a uniform international rule prohibiting discrimination against arbitration agreements; and (b) a validation principle, selecting that national law which will give effect to the parties' agreement to arbitrate.

4 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (GA Res 40/72, UN GOAR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17 (1985)) ("Model Law").

10 The foregoing analysis has not received meaningful attention from commentators. Nonetheless, a number of national arbitration statutes, domestic court decisions and international arbitral awards have – either expressly or implicitly – applied a validation principle. Similarly, courts in some jurisdictions have also directly applied substantive principles of international law to the issues of substantive validity of international arbitration agreements. In particular, some decisions have interpreted the New York Convention as requiring the application of a non-discrimination principle, forbidding the application of idiosyncratic or discriminatory national law rules that would affect the validity and enforceability of international arbitration agreements. These decisions confirm both the benefits and practical utility of the choice-of-law analysis suggested in this article.

II. Choice-of-law rules applied to international arbitration agreements: An imperfect solution

11 Courts in various jurisdictions and arbitral awards have historically adopted a number of different approaches to selecting the law governing international arbitration agreements. These approaches have ranged from application of the law of the judicial enforcement forum to the contemporary choice-of-law approaches based on application of the law of the arbitral seat, the law of the underlying contract, or the law with the "closest connection" or "most significant relationship" to the arbitration agreement. As discussed below, none of these approaches has proven fully satisfactory.

A. Choice-of-law analysis and the separability presumption

12 Discussion of the choice-of-law principles governing international arbitration agreements necessarily begins with the separability presumption. That doctrine provides that an international arbitration agreement is (at least presumptively) separable from the underlying instrument with which it is associated.[5]

13 One of the consequences of the separability presumption is that it is theoretically possible, and common in practice, for the parties' arbitration agreement to be governed by a law different from the law

5 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 360. See also *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 at 402 (1967); *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254 at [17]; s 7 of the English Arbitration Act 1996 (c 23); and Art 16(1) of the First Sched to the Singapore International Arbitration Act (Cap 143A, 2002 Rev Ed).

governing their underlying contract.[6] As one arbitral award observed, "an arbitration clause in an international contract *may perfectly well* be governed by a law different from that applicable to the underlying contract"[7] [emphasis added]. Or, in the words of an English judicial decision, "[i]t has long been recognised that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole".[8]

14 The presumptive separability of the arbitration agreement, and therefore the possibility that a different law may govern the parties' arbitration agreement than the underlying contract, is recognised, *inter alia*, by both the New York Convention and the Model Law.[9] The New York Convention rests on the premise that the arbitration agreement is a separable agreement, subject to specialised international rules of both substantive and formal validity, which are set forth in Arts II(1), II(2) and II(3) of the New York Convention. Article II of the New York Convention does not contain an express choice-of-law rule; rather, it sets forth substantive international rules of presumptive substantive and formal validity, directly applicable to international arbitration agreements.[10] The necessary consequence of these substantive rules of international law is that the arbitration agreement will be subject, at least in part, to a different substantive legal regime than the parties' underlying contract.[11]

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6 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 464 ("the separability presumption means that an arbitration agreement can be governed by a different national law from that (or those) applicable to the parties' underlying contract").

7 *Final Award in ICC Case No 1507* in *Collection of ICC Arbitral Awards 1974–1985* (Sigvard Jarvin & Yves Derains eds) (Kluwer, 1990) at p 216.

8 *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [11] (CA, UK).

9 The separability presumption only means that an arbitration agreement *may* be governed by a law different from that governing the underlying contract. See *Final Award in ICC Case No 3572* (1989) XIV YB Com Arb 111 (applying the law chosen by the parties to govern the underlying contract to the arbitration agreement). It does not mean, however, that the law governing the arbitration agreement *necessarily* differs from that governing the underlying contract. See *Interim Award in ICC Case No 4131* IX YB Com Arb 131 (1984) ("the sources of applicable law for determining the scope and the effects of an arbitration clause, which is the basis of an international arbitration, are *not necessarily* the same as the law applicable to the merits of the dispute referred to this arbitration" [emphasis added]). Yet, there is the possibility of divergence between the two results in a large proportion of cases where the law applied to the arbitration agreement was distinct from that applied to the underlying contract. See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 464 ("[t]he essential point, however, is that, where the arbitration clause is a separate agreement, a separate conflict of laws analysis must be performed with regard to that agreement").

10 See paras 52–63 below.

11 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 477–479. Both Arts II and V(1)(a) of the New York

(*cont'd on the next page*)

15 Consistent with the New York Convention's provisions, national arbitration legislation and judicial decisions in most jurisdictions recognise, either expressly or impliedly, that the parties' arbitration agreement may be subject to different substantive laws than the underlying contract. For example, Art 8 of the Model Law – like Art II of the New York Convention – sets forth a substantive rule that international arbitration agreements are presumptively valid and enforceable, and therefore subject to a specialised legal regime not applicable to other contracts.[12] Similarly, Art 16 of the Model Law expressly provides for the presumptive separability of international arbitration agreements – and implicitly recognises the possibility that a different national law will apply to the arbitration agreement than the underlying contract.[13]

16 National and international tribunals have applied the separability presumption in part to safeguard international arbitration agreements from challenges to their validity based on idiosyncratic or discriminatory rules of national law. The separability presumption has permitted national courts to uphold the validity of international arbitration agreements, notwithstanding these rules of law, by applying a different law to the arbitration agreement than the underlying contract. In this manner, the separability presumption has contributed significantly to the enforceability of international arbitration agreements and the efficacy of the arbitral process.[14]

17 Despite these benefits, the possibility that different legal systems may apply to the arbitration agreement and the underlying contract also creates complexities and uncertainties. This is because national courts,

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Convention impliedly treat arbitration agreements as separable from underlying contracts. Article II(1) refers to an arbitration agreement as "*an agreement* in writing under which the parties undertake to submit to arbitration all or any differences" [emphasis added] arising between the parties. More clearly, Art II(2) of the Convention defines a written agreement to arbitrate as including "*an arbitral clause in a contract* or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" [emphasis added]. Similarly, Art V(1)(a) of the Convention presumes the separability of arbitration agreements. Among other things, it provides for an exception to the enforceability of arbitral awards where "the said [arbitration] agreement is not valid under the law to which the parties *have subjected it* or, failing any indication thereon, under the law of the country where the award was made" [emphasis added]. This provision clearly contemplates the application of a specific national law to the arbitration agreement itself (as distinct from the underlying contract). See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 355–357.

12 See Art 8 of the Model Law and G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 375, n 16. See para 62 below.

13 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 388–392.

14 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 478–479.

arbitral tribunals and commentators have developed a variety of rules for choosing the law governing the substantive validity of international arbitration agreements, including the law of the judicial enforcement forum, the law chosen by the parties to govern the parties' underlying contract, the law of the arbitral seat, the law of the State with the "closest connection" or "most significant relationship", and a "cumulative" approach looking to the law of all possibly relevant States.[15] As explained below, no consensus has developed favouring any of these various choice-of-law rules and, as a result, the choice of the law governing international arbitration agreements is often subject to unfortunate uncertainty.[16]

18 Moreover, choice-of-law issues relating to international arbitration agreements frequently arise in multiple forums, including arbitral proceedings, judicial enforcement forums requested to enforce arbitration agreements under Art II of the New York Convention, and judicial enforcement forums requested to decide on annulment or recognition of arbitral awards under Arts III and V of the New York Convention. Each of these various forums may apply different choice-of-law rules and, consequently, reach different results regarding the law applicable to an international arbitration agreement. These discrepancies and the uncertainty they produce are inconsistent with the New York Convention's objective of establishing a uniform specialised regime applicable to international arbitration agreements and the parties' objective of resolving their dispute in an efficient, neutral and predictable manner.

B. The past: Historic application of the law of the judicial enforcement forum to international arbitration agreements

19 Historically, some jurisdictions were hostile to international arbitration agreements, enacting anti-arbitration procedural and substantive rules. In some jurisdictions, this hostility took the form of rules invalidating all agreements to arbitrate future disputes.[17] In other jurisdictions, such rules have included requirements that arbitrators be named specifically in the agreements to arbitrate, which made

15 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 487–489 and 568–578.

16 This uncertainty is exacerbated by the possibility that different issues relating to international arbitration agreements (such as formal validity, substantive validity, capacity, interpretation, assignment, waiver of international arbitration agreements, non-arbitrability) may be subject to different laws. Questions of characterisation further complicate the choice-of-law analysis. However, these issues are beyond the scope of this article, which focuses on the law governing substantive validity of international commercial arbitration agreements.

17 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 40, 46–48 and 61.

agreements to arbitrate future disputes extremely rare and difficult to enforce.[18]

20 At the same time, the historic choice-of-law rules provided that the law of the judicial enforcement forum governed the substantive validity of international arbitration agreements.[19] This rule rested on the (mis)conception that the validity of an arbitration agreement should be characterised as a matter of "remedies".[20] In the words of one US court:[21]

> Arbitration agreements relate to the law of remedies, and their enforcement, whether at common law or under the broader provisions of the arbitration acts, is a question of remedy to be determined by the law of the forum, as opposed to that of the place where the contract was made or is to be performed.

This approach was also reflected in early English decisions and the decisions of courts in other common law jurisdictions.[22]

21 Application of the law of the judicial enforcement forum was unsatisfactory.[23] This choice-of-law approach necessarily led to the application of different national laws to the arbitration agreement in different forums. There were as many laws governing the arbitration agreement as there were forums in which one party or the other might wish to litigate, which necessarily subjected international arbitration agreements to a multiplicity of different substantive rules.[24] In time, the

18 This was the case, for example, for Scots law. See paras 68 and 69 below.

19 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 506.

20 See G Graham, *To Validate Certain Agreements for Arbitration* HR Rep No 68-96 at 1 (1924) ("[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made").

21 *Theofano Maritime Co v 9,551.19 Long Tons of Chrome Ore* 122 F Supp 853 at 858 (D Md, 1954).

22 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 506–507. This choice-of-law rule focused on the negative effects of arbitration agreements in precluding litigation, as opposed to the positive effect of committing the parties to arbitrate in good faith. It was said that the proper approach was to look to the law governing remedies – *ie*, that of the forum where the arbitration agreement had its negative effect.

23 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 508.

24 See B Foerster, *Arbitration Agreements and the Conflict of Laws: A Problem of Enforceability* (1966) 21 Arb J 129 at 132; E Lorenzen, *Commercial Arbitration – International and Interstate Aspects* (1933–1934) 43 Yale LJ 716 at 751–757.

defects in this choice-of-law approach became apparent and it was subjected to increasing criticism.[25]

C. The present: Contemporary choice-of-law rules

22 The contemporary approach to the choice of law governing international arbitration agreements is better than the past, although it is not perfect and substantial work remains to be done. To understand the present, one needs to consider two instruments in particular – the New York Convention and the Model Law.

(1) Background: New York Convention and the Model Law

23 As noted above, Art II of the New York Convention sets forth uniform, specialised international rules of presumptive validity of international arbitration agreements.[26] Article II does not contain any express choice-of-law rule for selecting the law governing an international arbitration agreement. Rather, it sets forth substantive international rules of presumptive substantive and formal validity and enforceability, directly applicable to arbitration agreements.

24 In particular, with respect to substantive validity, Art II(1) of the New York Convention establishes a basic rule of substantive validity of international arbitration agreements:

> Each Contracting State *shall recognize* an agreement in writing under which the parties undertake to submit to arbitration all or any

25 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 508–509. See also *Judgment of 2 October 1931* DFT 57 I 295 at 304 *ff* (Swiss Federal Tribunal):

> It is true that the opinion [that] the validity of an arbitration clause must be appreciated pursuant to the law of the state whose jurisdiction is excluded by that clause, has been expressed several times in the German doctrine … [Some] authors consider … that the validity of the arbitration agreement must generally be judged pursuant to the law of the place where the contract is to deploy its effects. Now, the principal effect of an arbitration agreement is not to exclude the jurisdiction of the state courts, but to transfer the right of decision to an arbitral tribunal: this positive effect of the contract is legally realized in the state where the seat of the arbitral tribunal is located pursuant to the contract. The negative effect, that is the exclusion of the state courts' jurisdiction, only constitutes a consequence of the positive effect … It shall be added that, in international relations, an arbitration agreement normally excludes the jurisdiction of the courts of several states, so that such a contract should fulfill the requirements of the respective legislation of all these states, if the question of its validity, examined as a result of a request for enforcement of the arbitral award, was to be decided pursuant to the law of the state or states whose jurisdiction is excluded by that of the arbitral tribunal. This would constitute an unsatisfactory legal situation.

26 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 504–505 and 642–646; see paras 14–15 above.

> differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. [emphasis added]

25 Article II(1) imposes a mandatory obligation that Contracting States "*shall* recognize" agreements by which parties have undertaken "to submit to arbitration" specified disputes.[27] As explained below, this obligation extends to all material terms of the parties' arbitration agreement, including the parties' agreement on the law governing their arbitration agreement.[28]

26 Article II(1)'s rule is elaborated, and provided with an enforcement mechanism, in Art II(3) of the Convention, which requires the courts of Contracting States to refer parties to international arbitration agreements to arbitration, except where the arbitration agreement is "null and void, inoperative or incapable of being performed".[29] Unless one of those enumerated grounds for non-recognition is applicable, Arts II(1) and II(3) mandatorily require recognition of the arbitration agreement and reference of the parties to arbitration.[30]

27 Read in conjunction, these two provisions establish a uniform international rule that international arbitration agreements are presumptively valid and enforceable, subject only to defined exceptions determined by reference to generally-applicable rules of contract law, without reference to national rules which subject international arbitration agreements to special, discriminatory or idiosyncratic burdens or treatment.[31] Similarly, Arts II(1) and II(2) prescribe a uniform international standard governing the formal validity of international arbitration agreements; that rule imposes a "maximum" form requirement for international arbitration agreements, which

27 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 640. See also R Wolff, "Article II: Recognition of Arbitration Agreements" in *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (R Wolff ed) (CH Beck/Hart/Nomos, 2012) at p 182.

28 See para 59 below and G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 493.

29 Article II(3) of the New York Convention. See G Born, *International Commercial Arbitration* (2nd Ed, 2014) at p 232.

30 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 232.

31 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 106 and 839.

Contracting States may not exceed (by imposing heightened form requirements).[32]

28 In contrast to Art II's attention to standards of substantive and formal validity, nothing in Art II addresses the choice of the national law, if any, to be applied to international arbitration agreements: Art II is entirely silent with respect to choice-of-law rules. Nonetheless, the New York Convention does address the choice of the law governing international arbitration agreements. It does so, oddly, in Art V, which deals with the recognition of foreign arbitral awards. Article V(1)(a), which provides that a foreign arbitral award may be refused recognition, among other things, if "the said [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

29 Article V(1)(a) prescribes a two-part choice-of-law rule. First, Art V(1)(a) gives effect to the parties' autonomy, providing for application of the law chosen by the parties (expressly or impliedly) to govern their agreement to arbitrate.[33] Second, where there is no express or implied choice of law, Art V(1)(a) prescribes a specialised default rule, pursuant to which the arbitration agreement will be governed by "the law of the country where the award was made".[34]

30 There is debate regarding the relationship between Art II and Art V of the New York Convention, and the relevance of Art V(1)(a)'s choice-of-law rule under Art II. Some authorities have concluded that Art V's choice-of-law rule applies to awards in the recognition context, but not to agreements to arbitrate, and that Contracting States are free to apply their own national choice-of-law rules in determining whether agreements to arbitrate are null and void, inoperative or incapable of being performed.[35] Other authorities reason that the provisions of the New York Convention should be applied systematically and import the Art V(1)(a) choice-of-law rule into the analysis of international arbitration agreements under Art II.[36]

32 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 667.

33 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 506.

34 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 478 and 506–507.

35 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 565–568.

36 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 503–504. Although the New York Convention does not expressly address the relationship between Arts II (setting forth substantive international standards for the validity of arbitration agreements) and V(1)(a) (setting forth choice-of-law rules providing for application of national law rules to

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31 The Model Law tracks the New York Convention in this regard. Article 8(1) of the Model Law is for all intents and purposes identical to Art II of the Convention. Like Art II of the Convention, Art 8 of the Model Law sets forth a substantive rule that international arbitration agreements are presumptively valid and enforceable, but does not expressly address choice-of-law issues.[37] Similarly, Art 34(2)(a)(i) (in the annulment context) and Art 36(1)(a)(i) (in the recognition context) of the Model Law parallel Art V(1)(a) of the Convention. Like Art V of the Convention, Arts 34(2)(a)(i) and 36(1)(a)(i) permit non-recognition (or annulment) of an arbitral award if "a party to the arbitration agreement … was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of [the country where the award was made]".[38] The same interpretative questions that arise with regard to the relationship between Arts II and V(1)(a) of the Convention also apply to Arts 8, 34(2)(a)(i) and 36(1)(a)(i) of the Model Law.[39]

(2) Multiplicity of contemporary choice-of-law approaches

32 The uncertainties resulting from Arts II and V(1)(a) of the New York Convention, and parallel provisions of the Model Law, have resulted in a multiplicity of approaches to the law governing international arbitration agreements. Commentators have variously identified three, four, or as many as nine rules for selecting the law governing international arbitration agreements.[40] Some of the main contemporary choice-of-law approaches are outlined below.

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such agreements), it is clear that the purpose of both of these provisions was to enhance the validity and enforceability of international arbitration agreements.

37 Article 8 of the Model Law.

38 Articles 34(2)(a)(i) and 36(1)(a)(i) of the Model Law. See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 479–480.

39 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 552–553.

40 G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 487–489, n 80 on p 488. See the following chapters in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (A J van den Berg ed) (ICCA Congress Series No 9 (Paris 1998)) (Kluwer Law International, 1999): P Bernardini, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause" p 197 at pp 200–202 ("the international arbitrator may take at least three different approaches in order to determine the substantive law of the arbitration clause"); M Blessing, "The Law Applicable to the Arbitration Clause and Arbitrability" p 168 at pp 168–169 ("in addition to the above four approaches [mentioned by other commentators], five further solutions have been advocated in international arbitration practice … All these nine solutions have also been advocated (and indeed practiced) regarding arbitrability … Are we thus faced with a magnificent confusion?"); and J Lew, "The Law Applicable to the Form and Substance of the Arbitration Clause" p 114 at pp 141–144 ("[t]here are four main conflict rules for determining the applicable law to govern the arbitration agreement").

(a) Choice-of-law rules providing for application of substantive law governing the underlying contract

33 One contemporary approach to selecting the law governing an international arbitration agreement is application of the law governing the parties' underlying contract. This approach is most frequently encountered in cases where the parties have made an express choice of law in their underlying contract. In these circumstances, a number of authorities have held that the parties' express choice-of-law provision extends to the separable arbitration agreement.[41] These authorities have reasoned that, when entering into a contract, businessmen and businesswomen do expect that the law they choose to govern their contract will also apply to the arbitration clause contained within their contract.[42]

34 This reasoning has considerable practical significance, given that parties virtually never expressly specify the law applicable to their arbitration agreement, as distinct from their underlying contract.[43] Ordinarily, international commercial contracts only contain general choice-of-law clauses, without separate reference to the arbitration clause associated with that contract.[44]

35 A choice-of-law rule prescribing application of the law governing the underlying contract was adopted with particular clarity in some English court decisions. In the words of the English Court of Appeal in *Sonatrach v Ferrell*:[45]

> Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.

41 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 535–538.

42 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 580.

43 See S Bond, "How to Draft an Arbitration Clause (Revisited)" (1990) 1(2) ICC Ct Bull 14.

44 See G Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Kluwer Law International, 4th Ed, 2013) at p 160 (providing a typical choice-of-law clause).

45 *Sonatrach Petroleum Corp (BVI) v Ferrell International Ltd* [2002] 1 All ER (Comm) 627 at [32]. See also, *eg*, R Merkin, *Arbitration Law* (Informa Law, 1991 & Update August 2013) at para 7.12 ("a choice of law clause for the entire agreement is likely to be construed as expanding to the arbitration clause"). See also *Svenska Petroleum Exploration AB v Lithuania* [2005] EWHC (Comm) 2437 at [76]–[77] (QB) ("[i]n the absence of exceptional circumstances, the applicable law of an arbitration agreement is the same as the law governing the contract of which it forms a part").

As stated in another recent English decision, "an express choice of law governing the substantive contract"[46] operates as a "strong indication of the parties' intention in relation to the agreement to arbitrate".[47]

36 The same basic analysis – applying the substantive law governing the underlying contract to the arbitration agreement – is also sometimes applied in the absence of a choice-of-law clause in the underlying contract.[48] In these circumstances, some authorities reason that, although the arbitration agreement may be governed by a different law than the underlying contract, it need not be; where generally-applicable choice-of-law rules provide for application of one jurisdiction's law to the parties' underlying contract, these authorities conclude that the same law should apply to the arbitration clause associated with that contract.[49]

37 This approach has been adopted in a number of other common law jurisdictions, including Australia,[50] India[51] and the US,[52] as well as a considerable body of arbitral authority applying both common law and civil law rules.[53] In the words of one arbitral tribunal, "it is reasonable

46 *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [26].

47 *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 at [26]. It is noteworthy that in most recent English decisions, the conclusion that the law applicable to the arbitration agreement is the law governing the underlying contract is reached within the rubric of the "closest and most real connection" conflicts analysis. See paras 41–43 below for a discussion of the "closest and most real connection" approach.

48 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 536.

49 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 515.

50 *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 175 ALR 725 (applying Iowa law, chosen by the choice of law clause in the underlying contract to the validity of the arbitration clause).

51 *National Thermal Power Corp v Singer Co* [1992] INSC 146 at [8] ("where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract"); *Aastha Broadcasting Network v Thaicom Public Co Ltd* [2011] INDLHC 3674 at [31] ("[w]here the proper law of contract is expressly chosen by the parties, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement").

52 See §4-14, comment b (draft) of the *Restatement (Third) US Law of International Commercial Arbitration* ("[i]f the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly), a general choice-of-law clause in the contract that includes the arbitration agreement determines the applicable law").

53 See, *eg*, *Final Award in ICC Case No 6840* in *Collection of ICC Arbitral Awards 1991–1995* (J-J Arnaldez, Y Derains & D Hascher eds) (Kluwer Law International, 1997) at pp 75 and 467.

and natural … to submit the arbitration clause to the same law as the underlying contract".[54]

(b) Choice-of-law rules providing for application of substantive law of arbitral seat to arbitration agreement

38 A second contemporary choice-of-law approach involves application of the law of the arbitral seat as the law governing the arbitration agreement (absent an express choice of law by the parties). A number of national courts have applied this rule in recent decades, arriving at this result on the basis either of the default rule of Article V(1)(a) of the New York Convention, or by an independent choice-of-law analysis.[55]

39 This approach is again (and ironically) illustrated by a number of recent decisions of English courts.[56] In the words of the English Court of Appeal:[57]

> [I]t would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration.

Some decisions have arrived at the application of the law of the arbitral seat by way of an implied choice of law. This analysis is based on the observation that the arbitration agreement "will normally have a closer and more real connection with the place where the parties have chosen to arbitrate",[58] and therefore this law will govern the arbitral proceedings and any annulment proceedings. Or, according to another recent English High Court decision, the "arbitration agreement provides for arbitration in London and is implicitly governed by English law. It has its closest and most real connection with England because the seat of arbitration is here".[59]

54 *Final Award in ICC Case No 6840* in *Collection of ICC Arbitral Awards 1991–1995* (J-J Arnaldez, Y Derains & D Hascher eds) (Kluwer Law International, 1997) at pp 75, 467 and 469.

55 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 527.

56 See *C v D* [2007] EWCA Civ 1282 and *XL Insurance v Owens Corning* [2001] CLC 914. As noted above regarding the approach applying the law governing the underlying contract to the parties' arbitration agreement, the conflicts rule applying the law of the seat has also generally been adopted as part of the "closest and most real connection" analysis conducted by the English courts. See paras 41–43 below for a discussion of the "closest and most real connection" approach.

57 *C v D* [2007] EWCA Civ 1282 at [26].

58 *C v D* [2007] EWCA Civ 1282 at [26].

59 *Abuja International Hotels Ltd v Meridien SAS* [2011] EWHC 87 (Comm) at [20]–[24].

40 This approach is supported by some commentators,[60] and there is a substantial body of authority from other common law jurisdictions (including Singapore) adopting this analysis.[61] Similarly, a number of arbitral awards have applied the substantive law, or, occasionally, the choice-of-law rules, of the arbitral seat.[62]

(c) Choice-of-law rules providing for application of substantive law of the State with closest connection or most significant relationship to arbitration agreement

41 A third contemporary approach, which is consistent with more general choice-of-law developments, involves application of the law of the State which has the "closest connection", or "most significant relationship", to the arbitration agreement. This approach is more nuanced and flexible than earlier approaches, which are based on application of a single connecting factor. The closest connection, or most significant relationship, approach has been applied frequently in recent decades.[63]

60 See, *eg*, *Dicey, Morris and Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 16-020 ("the law of the seat of the arbitration will apply if the circumstances point to an implied intention to choose the law of that place to govern the arbitration agreement").

61 *Citation Infowares Ltd v Equinox Corp* [2009] (7) SCC 220 at [15] ("[t]here is, in the absence of any contrary intention, a presumption that the parties have intended that the proper law of [the] contract as well as the law governing [the] arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held"). In addition, the application of the law of the seat to govern the arbitration agreement is also the approach in a number of civil law countries through legislative enactment and case law. See, *eg*, s 48 of the Swedish Arbitration Act ("[w]here the parties have not reached [a choice of law] agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place"). For example, Swiss courts recognise that "in the absence of a choice-of-law provision, the validity of the arbitral clause must be decided according to the law of the seat of the arbitral tribunal". *Judgment of 26 May 1994* XXIII YB Comm Arb 754 at 757 (1998) (*Bezirksegericht Affoltern am Albis*).

62 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 510 *ff*.

63 For example, it has been adopted in the Rome Convention; Rome I Regulation; and §§188 and 218 of the International Law Association's Restatement on the Conflict of Laws. See Art 4 of the 80/934/EEC Convention on the Law Applicable to Contractual Obligations dated 19 June 1980; Art 4 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I); §188 and §218, comment a of the Restatement (Second) Conflict of Laws (1971) (US) ("[w]hether a judicial action may be maintained in violation of the provisions of an arbitration agreement should be determined *not by the local law of the forum but rather by the law selected by application of* [the generally-applicable choice-of-law principles in §§187 and 188]" [emphasis added]).

42 This approach is also reflected in a number of recent decisions by the English courts. The predominant contemporary English choice-of-law approach with respect to the arbitration agreement is a three-step process that parallels the "established common law rules for ascertaining the proper law of any contract".[64] Under these rules, a court will recognise and give effect to the parties' choice of proper law, express or implied, failing which it will seek to identify the system of law with which "the contract has the *closest and most real connection*"[65] [emphasis added].

43 Other decisions by national courts have also adopted this analysis.[66] Similarly, a number of arbitral awards have applied either a closest connection or most significant relationship standard in determining the validity of the arbitration agreement.[67]

(3) Criticism of contemporary choice-of-law approaches

44 As with the application of the law of the judicial enforcement forum, the more recent choice-of-law approaches discussed above have significant shortcomings. In particular, these approaches rest on flawed conceptual premises and produce uncertain and unsatisfactory results. Application of the law of the arbitral seat is based upon an exclusive focus on the procedural aspects of arbitration and ignores the contractual character of the agreement to arbitrate.[68] Automatic application of the law of the seat also mistakenly conflates the law governing the arbitration agreement with the law governing arbitral proceedings, which do not necessarily coincide.[69] An exclusive focus on the law of the arbitral seat also disregards the intimate connection (both textual and functional) between the arbitration agreement and the underlying contract.[70]

64 *Sulamérica Cia Nacional v Enesa Engelharia* [2012] EWCA Civ 638 at [9].

65 *Sulamérica Cia Nacional v Enesa Engelharia* [2012] EWCA Civ 638 at [9]. Certain commentators have suggested that English courts in reality apply the validation principle, discussed below. See paras 71–75 below.

66 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 544–547.

67 See, *eg*, *Partial Award in ICC Case No 6719* 121 JDI (Clunet) 1071 at 1072 (1994).

68 See I Bantekas, *The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy* (2010) 27 *Journal of International Arbitration* 1 at 8 ("the prevailing orthodoxy according to which the law of the seat (the *lex arbitri*) determines the law of the arbitration clause must no longer be viewed as engraved in stone").

69 *Fouchard Gaillard Goldman on International Commercial Arbitration* (E Gaillard & J Savage eds) (Kluwer Law International, 1999) at p 424.

70 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 518.

45 Similarly, an exclusive focus on the law governing the underlying contract is unsatisfactory. There are instances where the arbitration agreement is integrally related to the parties' underlying contract (for example, some joint venture agreements or corporate articles of association). In those cases, the application of the law governing the contract to the arbitration clause may appear difficult to resist.[71] Nevertheless, there are factors that render the automatic application of the law of the underlying contract inappropriate in many cases. In particular, this approach disregards the separability presumption (discussed above), and the parties' intention to choose a neutral forum in which to resolve their disputes.[72] This approach is also difficult to reconcile with the default choice-of-law provision of Art V(1)(a) of the New York Convention (and Arts 34 and 36 of the Model Law) which provides for the application of the law of the arbitral seat, absent contrary agreement of the parties.[73]

46 The closest connection, or most significant relationship, approach has also produced unpredictable and conflicting results. That is because the closest connection analysis ultimately entails choosing either the law of the arbitral seat or the law governing the main contract. The courts and tribunals applying a closest connection analysis typically recite various connecting factors, in an effort to select one or the other factor as that having the closest connection with the arbitration agreement. The resulting choice is often arbitrary and unpredictable: there is seldom any principled basis for concluding that the choice of the arbitral seat is, or is not, a more meaningful connection, or a better indicator of the parties' intentions, than the law chosen to govern the underlying contract.

47 Decisions applying a closest connection rule therefore suffer from a fundamental defect – being the courts' consistent inability to explain why their decisions prioritise one connecting factor over another and to provide predictable guidance for future decisions.[74] Indeed, the closest connection approach takes the worst of both worlds, because it is characterised by an *ex ante* uncertainty coupled with an *ex post* unprincipled and arbitrary choice between the law of the seat or that governing the underlying contract.

71 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 517.

72 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 72–73.

73 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 499 and 526.

74 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 543.

48 The defects of the closest connection approach are illustrated by the shift in English case law, over a relatively short span of time, from a choice-of-law rule that the law chosen to govern the underlying contract governs the arbitration agreement to a choice-of-law rule prescribing an equally strong presumption that the law of the arbitral seat governs the arbitration agreement.[75] Thus, as outlined above, over some 20 years, English courts have been able to adopt two almost completely opposed views as to which of the two main connecting factors should apply.[76]

49 This difficulty in applying a closest connecting rule in international arbitration agreements is not confined to the UK; other jurisdictions (including Singapore) have also reached conflicting results.[77] The same ambivalence is reflected in the divergent results of US lower court decisions considering the law applicable to international arbitration agreements.[78]

75 Compare *Abuja International Hotels Ltd v Meridien SAS* [2011] EWHC 87 (Comm) at [20]–[24] ("the arbitration agreement provides for arbitration in London and is implicitly governed by English law") and *C v D* [2007] EWCA Civ 1282 at [22]–[26] (international arbitration agreements "are more likely" to be governed by "the law of the seat of arbitration than the law of the underlying contract") with *Svenska Petroleum Exploration AB v Lithuania* [2005] EWHC 2435 (Comm) at [76]–[77] ("[i]n the absence of exceptional circumstances, the applicable law of an arbitration agreement is the same as the law governing the contract of which it forms a part") and *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [21] ("[t]he governing law clause is, at the least, a strong pointer to their intention about the law governing the arbitration agreement and there is no contrary indication other than choice of London seat for arbitrations").

76 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 545–546; and see paras 32–49 above.

77 See, *eg*, *National Thermal Power Corp v Singer Co* [1992] INSC 146 at [8] ("where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract") with *Citation Infowares Ltd v Equinox Corp* (2009) 7 SCC 220 at [15] ("[t]here is, in the absence of any contrary intention, a presumption that the parties have intended that the proper law of [the] contract as well as the law governing [the] arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held").

78 Compare cases applying the law of the seat: *AO Techsnabexport v Globe Nuclear Serv and Supply Ltd* 656 F Supp 2d 550 at 558 (D Md, 2009), affirmed 404 F Appx 793 (4th Cir, 2010) (applying Swedish law, the law of the arbitral seat, to validity of the arbitration agreement); *Steel Corp of Philippines v International Steel Services Inc* 354 F Appx 689 at 692–693 (3d Cir, 2009) (presumption that the law of the arbitral seat will apply to the arbitration agreement); and *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 364 F 3d 274 at 292, n 43 (5th Cir, 2004) ("[c]ertain sections and comments of the Restatement … support a determination that Swiss law applied to the arbitration agreement") with cases applying the law of the underlying contract: *Motorola Credit Corp v Uzan* 388 F 3d 39 at 51 (2d Cir, 2004) ("if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the Swiss choice-of-law clauses that govern those agreements"); *Sphere Drake Insurance Ltd v Clarendon National Insurance Co* 263 F 3d 26 at 32, n 3 (2d Cir, 2001) (the Federal Arbitration

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III. The better approach: Application of a validation principle and an international non-discrimination rule

50 The inconsistencies that arise from the application of the various choice-of-law rules discussed above – to a greater or lesser extent – do not comport with the objectives of the arbitral process or the purposes of the New York Convention and the Model Law. There is a need for a more consistent, principled solution, which is more in harmony with the purposes of these international instruments and the parties' objectives in concluding international arbitration agreements.

51 Faced with the complexities and uncertainties of the various choice-of-law approaches discussed above, some authorities have held that international arbitration agreements are governed by uniform principles of international law, or, alternatively, by a specialised validation principle. This validation principle provides that, if an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable choices of law. As explained below, application of this validation principle is a more principled and effective approach to the choice-of-law analysis, which better effectuates the parties' objectives and is more consistent with the New York Convention and the Model Law.

A. Application of the validation principle effectuates the parties' intentions and is required by the New York Convention and the Model Law

52 The fundamental defect in existing choice-of-law rules is that they mechanically select the law of a single jurisdiction, based on a single connecting factor, with little or no regard to the real objectives and commercial expectations of the parties.[79] The arbitrary nature of those choice-of-law rules and the results that are achieved by their application is highlighted by the divergent national court decisions, even within a single national legal system, on the same issue.[80]

53 The parties' purposes and commercial expectations in concluding international arbitration agreements are not connected

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Act (9 USCA) "does not preempt choice-of-law clause"); and *Progressive Casualty Insurance Co v CA Reaseguradora Nacional de Venezuela* 991 F 2d 42 at 45–46 (2d Cir, 1993) (applying state contract law to the formation of an international arbitration agreement).

79 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 543.

80 See paras 32–49 above.

abstractly to one particular national jurisdiction. Rather, the parties' overriding objective is to enter into an agreement that is valid and enforceable, and provides an efficient, neutral means of finally resolving commercial disputes without the jurisdictional and choice-of-law complexities inherent in court litigation.[81] This objective is not served, but on the contrary is frustrated, by formulaic, and ultimately arbitrary and unpredictable, application of choice-of-law rules based on abstract connecting factors, such as the law of the arbitral seat or the law of the underlying contract.[82]

54 Rather than applying arbitrary connecting factors to select the law governing international arbitration agreements, national courts or arbitral tribunals should look expressly at the parties' intention in concluding arbitration agreements, namely, to submit disputes to resolution by arbitration.[83] When focusing on the parties' real intentions, it is difficult to avoid the conclusion that there is an implied intention to submit the arbitration agreement to the law that validates and gives effect to it.

55 More specifically, it does not make sense to assume that parties intended the law of their underlying contract to extend to the presumptively separate arbitration agreement if the consequence of such an extension would be to invalidate the arbitration agreement.[84] The opposite is equally true: it does not make sense to assume that a choice of seat implies a choice of law governing the arbitration clause which would invalidate that clause.[85] Parties do not draft, negotiate and conclude arbitration agreements, choosing a neutral, expert and efficient dispute resolution mechanism, only to have that mechanism invalidated by an implied choice-of-law or "closest connection" rule.

56 The better view is that courts and tribunals should apply the law that validates the arbitration agreement, rather than the law that invalidates it. That is because that is the best – and only – way to fully give effect to the parties' true intentions. It is also the approach that is mandated by the New York Convention and the Model Law.

81 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 545.

82 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 544.

83 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 542.

84 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 545.

85 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 545.

57 One of the basic purposes of the New York Convention is to facilitate the recognition and enforcement of international arbitration agreements.[86] The drafters of the Convention aimed at making arbitration agreements more readily enforceable in accordance with uniform international standards.[87] In the words of one leading decision, the Convention was designed to:[88]

> … encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory nations.

58 Similarly, one commentator correctly described the intention of the New York Convention's drafters as seeking to establish "a completely new legal regime regulating the recognition and enforcement of … arbitration agreements … and providing uniform standards on an international level".[89]

59 As explained above, Art II of the New York Convention establishes uniform international standards of presumptive validity and enforceability of international arbitration agreements, subject only to defined exceptions determined by reference to generally-applicable rules of contract law (to the exclusion of national rules which subject international arbitration agreements to discriminatory or idiosyncratic treatment).[90] These standards apply to all material terms of arbitration agreements, which encompass the parties' choice of the law applicable to such agreements. Put simply, Art II of the Convention requires Contracting States to recognise and give effect to the parties' agreement on the law governing their agreement to arbitrate, regardless of whether this choice is explicit or implied.[91]

86 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 230.

87 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 231. See also Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Universal Judicial Interpretation* (Kluwer, 1981) at pp 6–10 and 135 and *Scherk v Alberto-Culver Co* 417 US 506 at 520, n 15 (US S Ct, 1974) (the New York Convention is designed to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory nations").

88 *Scherk v Alberto-Culver Co* 417 US 506 at 520, n 15 (US S Ct, 1974). See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 106 and 640.

89 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary* (R Wolff ed) (CH Beck/Hart/Nomos, 2012) "Preliminary Remarks" at para 50.

90 See paras 23–30 above and G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 106 and 839.

91 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 567.

60 As noted above, the real, if implied, intention of parties that conclude international arbitration agreements is to obtain an enforceable, neutral, expert and efficient means of resolving their commercial disputes. Article II of the New York Convention requires recognition of the parties' implied choice of law, by way of the validation principle, providing for application of the national law that will give effect to the parties' agreement to arbitrate, rather than treating their agreement as what one national court termed "mere waste paper".[92]

61 Similarly, Art V(1)(a) of the New York Convention is fully consistent with, and requires application of, the foregoing validation principle. When Art V(1)(a) provides for application of the "law to which the parties have subjected" their arbitration agreement, it encompasses implied choices of law,[93] including the parties' implied agreement that the law governing their international arbitration agreement is the law that makes their agreement work and that will enforce it effectively. Where the first prong of Art V(1)(a) applies, giving effect to an implied choice of law, there is no need to, and no basis to, apply Art V(1)(a)'s default rule (of the law of the arbitral seat).

62 The same textual and purposive analysis applies to Arts 8, 34 and 36 of the Model Law. Textually, these provisions adopt the same two-prong standard as Art V(1)(a) of the New York Convention, giving effect to any express or implied choice of law by the parties and, failing such agreement, prescribing a default rule, selecting the law of the arbitral seat. Given the substantially identical text of the Convention and the Model Law, the same analysis that applies under the Convention, including its treatment of the validation principle, applies equally under the Model Law. That is confirmed by the substantially identical objectives of the two instruments, and by well-reasoned authority concluding that the two instruments should be interpreted consistently and uniformly.[94]

63 In sum, the purpose of the validation principle is to give effect to the parties' genuine commercial intentions – to provide an effective and workable international dispute resolution mechanism. This principle is not only required by a sound choice-of-law analysis, but also by the terms and purposes of Arts II and V(1)(a) of the New York Convention and Arts 8, 34 and 36 of the Model Law.

92 *Hamlyn & Co v Talisker Distillery* [1894] AC 202 at 215 (H L). For the discussion of this decision, see paras 68–70 below.

93 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 506.

94 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 552–553.

B. Authorities applying the validation principle and substantive international law rules to substantive validity of international arbitration agreements

64 In part because of dissatisfaction with both historic choice-of-law standards and contemporary "closest connection/most significant relationship" approaches, national legislatures and courts, as well as arbitral tribunals, have increasingly embraced application of a validation principle to international arbitration agreements. Alternatively, some authorities have directly applied principles of international law to the validity of international arbitration agreements, instead of engaging in a choice-of-law analysis.[95]

(1) Authorities applying the validation principle

65 Switzerland was one of the first jurisdictions expressly to adopt a validation principle in the context of international arbitration agreements. In particular, a validation principle is prescribed by Art 178(2) of the Swiss Law on Private International Law, as follows:

> As regards its substance, an arbitration agreement shall be valid if it conforms either to the *law chosen by the parties* or to the *law governing the subject matter of the dispute*, in particular the *law governing the main contract*, or if it conforms to *Swiss law*. [emphasis added]

66 Under Art 178(2), Swiss law will give effect to the parties' choice-of-law agreement in the first instance, in order to uphold the arbitration clause.[96] In contrast, where the parties' chosen law invalidates the arbitration agreement, Swiss law will not give exclusive application to that choice and will instead apply either the law governing the underlying contract or Swiss law, in order to uphold the parties' agreement to arbitrate.[97] The rationale for this approach is that it is the law which gives effect to the parties' agreement to arbitrate that reflects their real, most authentic choice (in preference to a law that would invalidate that agreement). Similar legislation has also been enacted in Algeria and Spain.[98]

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95 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 542–543.

96 See *Judgment of 16 October 2003* (2004) 22 ASA Bull 364 at 387 (Swiss Federal Tribunal).

97 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 575. This is in line with the idea that the parties' putative choice of law that invalidates the arbitration agreement is ordinarily not considered to be an authentic choice, but rather a mistake, that ought not to be given effect in enforcing the parties' more fundamental agreement, namely, to submit disputes to arbitration.

98 Article 9(6) of the Spanish Arbitration Act 2011 (adopting *verbatim* Art 178(2) of the Swiss Law on Private International Law) and Art 458 bis 1, at para 3 of the

(*cont'd on the next page*)

67 Numerous judicial and arbitral authorities have also applied a validation principle to international arbitration agreements, either expressly or in practice.[99] A number of decisions by national courts and arbitral tribunals rest on the conclusion that the law which rational commercial parties expect an international arbitration agreement to be governed by, and which best accomplishes the purposes of such an agreement, is the law of the jurisdiction which gives effect to the parties' objectives in entering into that agreement.[100]

68 An early example of application of this choice-of-law approach, predating the New York Convention, is a decision by the English House of Lords in *Hamlyn & Co v Talisker Distillery*.[101] That case involved a contract for the purchase of grain, to be entirely performed in Scotland, but providing for arbitration seated in London.[102] Under English law, the arbitration agreement was valid; under Scots law, the arbitration agreement was invalid, because it failed to specifically name the arbitrators. The House of Lords applied English law, validating the arbitration agreement.

69 Both Lord Herschell and Lord Ashbourne made reference to what amounted to a validation principle in their reasoning.[103]

Algerian Code of Civil Procedure (same). See F Mantilla-Serrano, "The New Spanish Arbitration Act" (2004) 21 *Journal of International Arbitration* 367. See also, for example, a 1989 Resolution of the International Law Institute which declared that:

> Where the validity of the agreement to arbitrate is challenged, the tribunal shall resolve the issue by applying one or more of the following: the law chosen by the parties, the law indicated by the system of private international law stipulated by the parties, general principles of public or private international law, general principles of international arbitration, or the law that would be applied by the courts of the territory in which the tribunal has its seat. *In making this selection, the tribunal shall be guided by the principle in favorem validitatis*. [emphasis added]

Institute of International Law, Santiago de Compostela, *Resolution on Arbitration Between States, State Enterprises or State Entities and Foreign Entities*, *12 September 1989*, *Article 4* XVI YB Comm Arb 236 at 238 (1991); A F M Maniruzzaman, "Choice of Law in International Contracts: Some Fundamental Conflict of Laws Issues" (1999) 16(4) *Journal of International Arbitration* 141 at 155, n 94. See also G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 547.

99 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 542 *ff*.

100 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 545.

101 [1894] AC 202 at 215 (HL).

102 The arbitration clause in the contract provided for "arbitration by two members of the London Corn Exchange, or their umpire, in the usual way": *Hamlyn & Co v Talisker Distillery* [1894] AC 202 at 203.

103 *Hamlyn & Co v Talisker Distillery* [1894] AC 202 at 208, *per* Lord Herschell, and 215, *per* Lord Ashbourne.

Lord Herschell noted that the arbitration clause "would have been absolutely null and void if it were to be governed by the law of Scotland", and reasoned that this "c[ould] not have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed".[104] Similarly, Lord Ashbourne reasoned that "the arbitration clause becomes *mere waste paper* if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed"[105] [emphasis added]. As his judgment put it, in order to give "due and full effect to every portion of the contract", it is "more reasonable to hold that the parties contracted with the *common intention of giving entire effect to every clause*, rather than of *mutilating or destroying one of the most important provisions*"[106] [emphasis added].

70 The House of Lords' reasoning applies equally today, including under the New York Convention and the Model Law. Properly conceived, the choice of law governing an international arbitration agreement should be drawn from the fundamental commercial purposes of parties to international arbitration agreements and from the underlying objectives of the international arbitral process.[107] That approach makes particular sense given the very clear, and equally serious, deficiencies in alternative choice-of-law rules which are outlined above.[108]

71 More recently, the English Court of Appeal adopted an analogous approach in *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia*[109] ("*Sulamérica*"). There, the court refused to apply Brazilian law (although Brazilian law was expressly chosen in the parties' general choice-of-law clause agreed in an insurance contract) because "[t]he possible *existence of a rule of Brazilian law* which would *undermine* that position tends to *suggest that the parties did not intend* the arbitration agreement to be governed by that system of law"[110] [emphasis added]. The court reasoned as follows:[111]

104 *Hamlyn & Co v Talisker Distillery* [1894] AC 202 at 208. Lord Herschell added at 209 that he saw "no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England".

105 *Hamlyn & Co v Talisker Distillery* [1894] AC 202 at 215.

106 *Hamlyn & Co v Talisker Distillery* [1894] AC 202 at 215.

107 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 544.

108 See paras 32–49 above.

109 [2012] EWCA Civ 638.

110 *Sulamérica Cia Nacional v Enesa Engelharia* [2012] EWCA Civ 638 at [30].

111 *Sulamérica Cia Nacional v Enesa Engelharia* [2012] EWCA Civ 638 at [31].

> I do not think that in this case the parties' express choice of Brazilian law to govern the substantive contract is sufficient evidence of an implied choice of Brazilian law to govern the arbitration agreement, because … there is at least a serious risk that a choice of Brazilian law would significantly undermine that agreement … *I do not think that the parties can have intended to choose a system of law that either would, or might well, have that effect.* This, it seems to me, reflects the fact that, although one may start from the assumption that the parties intended the same law to govern the whole of the contract, including the arbitration agreement, specific factors may lead to the conclusion that *that cannot in fact have been their intention*. In the end, therefore, I am unable to accept that the parties made an implied choice of Brazilian law to govern the arbitration agreement. [emphasis added]

The court then went on to apply English law (the law of the seat of the arbitration), referring to the "closest and most real connection" analysis in arriving at that result.[112]

72 As other commentators have correctly noted, the *Sulamérica* decision is properly understood as an application of the validation principle.[113] In its reasoning, the court first conducted the general conflict-of-laws analysis, which led to the law that would invalidate the arbitration agreement. Having arrived at such an undesirable outcome, the court avoided it by applying a different law that validated the arbitration agreement.[114]

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112 See *Sulamérica Cia Nacional v Enesa Engelharia* [2012] EWCA Civ 638 at[32].

113 See S Pearson, "*Sulamérica v Enesa*: The Hidden Pro-Validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement" (2013) 29(1) *Arbitration International* 115. See also G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 543–544.

114 Other recent English court decisions also provide examples of implicit implementation of the validation principle. For example, a similar approach was adopted in an earlier English case, *XL Insurance Ltd v Owens Corning* [2001] CLC 914. In this case, the dispute arose out of an insurance policy. XL applied for an order to restrain Owens Corning from pursuing an insurance claim in the court of Delaware, US. XL argued that such action was a breach of the arbitration agreement contained in the policy, which provided that "any dispute … shall be finally and fully determined in London, England under the provisions of the *Arbitration Act* 1996 …" (at 916). Owens Corning argued that the policy's choice-of-law clause covered the arbitration clause; thus, in the absence of a signed written agreement containing the arbitration clause, such clause was unenforceable under the chosen New York law. The court reasoned that since the arbitration clause explicitly provided that arbitration was under the "provisions of the *Arbitration Act* 1996", the parties "cannot have intended by [the choice of law clause] that all aspects of the arbitration agreement should be governed by New York law, for that would be inconsistent with the stipulation in the arbitration clause" (at 924). The court also highlighted two features of the Arbitration Act (c 23) (UK) which persuaded the court to apply English law. First, the court suggested that since the arbitral tribunal has the authority to rule on its own jurisdiction under s 30, the fact that the arbitration clause excluded application of ss 45 and 69 but not 30

(*cont'd on the next page*)

73 Judicial decisions in other jurisdictions are to the same effect, in either expressly or impliedly applying a validation principle to international arbitration agreements.[115] In the words of one Austrian decision, "[i]f the wording of the declaration of intent allows for two equally plausible interpretations, the interpretation which favors the validity of the arbitration agreement and its applicability to a certain dispute is to be preferred".[116] Another Austrian decision held that "[w]hen interpreting an arbitration and court agreement, the interpretation which leaves the validity of the expressly agreed arbitration agreement … unaffected should be preferred".[117]

74 Likewise, a recent Singapore High Court decision expressly relied on *Sulamérica*, and endorsed the *Sulamérica* three-prong test for determining the law applicable to the parties' arbitration agreement, stating that:[118]

> … the general methodology pronounced in *SulAmérica* would be welcomed in Singapore's jurisprudence for determining the proper law of an arbitration agreement.

75 The court then proceeded to determine the law impliedly chosen by the parties, deciding in favour of the application of the law of the seat, rather than the law governing the underlying contract, on the basis of the parties' implied intention to choose the law of the seat which validates their arbitration agreement:[119]

> Given that rational businessmen must commonly intend the awards to be binding and enforceable …, their attention with regard to the validity of their arbitration agreements would primarily be focused on the law of the seat (as, in this context, opposed to the substantive law). Seen from this light, the very choice of an arbitral seat presupposes parties' intention to have the law of that seat recognise and enforce the arbitration agreement. This must necessarily be so because *parties would not intend to have an arbitration agreement be valid under other*

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means that s 30 is not excluded. Second, more importantly for this article, the court specifically highlighted that the formal requirement of a valid arbitration clause under s 5 is "*less stringent*" than under New York law. By applying the law that was "*less stringent*", the court has implicitly applied the validation principle. By applying the lower threshold with respect to formal requirements, the court sought to give full effect to the parties' agreement to arbitrate. The application of the law that was "*less stringent*" allowed the court to achieve the desired result, *ie*, application of the law that validated the arbitration agreement rather than invalidated it.

115 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 547.

116 *Judgment of 26 August 2008* XXXIV YB Comm Arb 404 at 405 (2009) (Austrian *Oberster Gerichtshof*).

117 See *Judgment of 5 February 2008* 10 Ob 120/07f (Austrian *Oberster Gerichtshof*).

118 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [11].

119 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [14].

> *laws, including the chosen substantive law, only for it to be declared invalid under the law of the seat, for that would run a serious risk that the law of the seat would invalidate the agreement*, or if they had not intended the laws of that seat to give life to the agreement in the first place. [emphasis added]

Thus, the court gave primacy to the law which validates the parties' arbitration agreement, rather than invalidates it.

76 Similarly, a number of arbitral tribunals have applied some version of the validation principle in their decisions, in order to give effect to – rather than invalidate – international arbitration agreements.[120] Under this approach, where different potentially-applicable national laws have produced different results with regard to the existence or validity of an arbitration agreement, tribunals have applied that national law which would uphold the agreement.[121] For example, one tribunal concluded that "an arbitral clause has a closer relationship to the law that upholds its existence than to the law that denies it".[122]

(2) Authorities applying substantive principles of international law

77 Although not generally so characterised in express terms, judicial decisions in a number of other developed jurisdictions are also properly understood as applying an unstated validation principle, by consistently applying the law that gives effect to international arbitration agreements.[123] For example, this is the case in the US and

120 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 546.

121 See, *eg*, *Award in ICC Case No 11869* XXXVI YB Comm Arb 47 at 57 (2011) ("arbitration agreements should be interpreted in a way that leads to their validity in order to give effect to the intention of the parties to submit their disputes to arbitration"); *Partial Award in ICC Case No 7920* XXIII YB Comm Arb 80 (1998) (applying the validation principle to uphold the validity of an ambiguous arbitration clause); *Partial Award on Jurisdiction and Admissibility in ICC Case No 6474* XXV YB Comm Arb 279 (2000); *Final Award in ICC Case No 6162* in *Collection of ICC Arbitral Awards 1991–1995* (J-J Arnaldez, Y Derains & D Hascher eds) (Kluwer, 1997) p 75 at p 84 (considering the fact that Egyptian law governing the substantive dispute would have invalidated the arbitration agreement); *Final Award in ICC Case No 5485* XIV YB Comm Arb 156 (1989); and *Preliminary Award in Zurich Chamber of Commerce of 25 November 1994* XXII YB Comm Arb 211 (1997).

122 *Award in ICC Case No 7153* 121 JDI (Clunet) 1059 at 1061 (1994).

123 See, *eg*, *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v Lauro* 712 F 2d 50 at 54 (3d Cir, 1983) ("[n]either the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption [that international arbitration agreements are valid.] The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate"); *Farrell v Subway International BV* 2011 WL 1085017 (SDNY) (refusing to apply the choice-of-law

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France, where the direct application of international principles – notwithstanding otherwise applicable national laws that would invalidate or restrict the parties' arbitration agreement – can be seen as a variation of the validation principle.[124]

78 Recent decisions by French courts have generally eschewed traditional choice-of-law analyses.[125] Thus, for the past two decades, French courts have held that international arbitration agreements are "autonomous" from any national legal system and, as a consequence, are directly subject to general principles of international law. In particular, the French *Cour de cassation*'s landmark *Dalico* decision adopted the principle that "according to a substantive rule of international arbitration law", the existence and validity of an international arbitration agreement "depends only on the common intention of the parties, without it being necessary to make reference to a national law".[126]

79 Other French decisions, as well as authorities in several other jurisdictions, are to the same effect.[127] The same is true of a substantial line of arbitral authority, particularly in international arbitrations seated in France.[128] In the words of one award, the arbitration agreement's "existence and validity are to be ascertained, taking into account the

provision where doing so would invalidate the arbitration agreement); *Apple & Eve, LLC v Yantai N Andre Juice Co* 499 F Supp 2d 245 at 251 (EDNY, 2007) ("no United States federal cases where a court has applied the law of the foreign country and declared that an arbitration clause would be invalid under that country's law"); *Westbrook International LLC v Westbrook Technologies Inc* 17 F Supp 2d 681 at 684 (ED Mich, 1998) (refusing to apply the general choice-of law clause to validity of the arbitration agreement, as applied to tort claims, absent a clear statement that this was intended; application of the chosen law would have invalidated the arbitration clause as applied to the dispute in question); *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500 at 506–508 (QB) (UK HC) (giving effect to English law, as the law of the arbitral seat, which validated the agreement, rather than New York law, which appeared to invalidate it); *Judgment of 24 February 1994, Ministry of Public Works v Société Bec Frères* XXII YB Comm Arb 682 (Paris *Cour d'appel*) (1997) (refusing to apply Tunisian law, under which the arbitration agreement would be void, in order to give effect to the parties' agreement); and *Judgment of 16 October 2003* 22 ASA Bull 364 (Swiss Federal Tribunal) (2004).

124 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 547.

125 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 474 and 481; see also *Judgment of 21 May 1997, Renault v V 2000* 1997 Rev Arb 537; *Fouchard Gaillard Goldman on International Commercial Arbitration* (E Gaillard & J Savage eds) (Kluwer Law International, 1999) at p 436.

126 *Judgment of 20 December 1993, Municipalité de Khoms El Megreb v Société Dalico* (*Cour de Cassation civ 1e*, France), 1994 Rev Arb 116 at 117.

127 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 549–550.

128 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 551.

mandatory rules of national law and international public policy, in the light of the common intention of the parties, without necessarily referring to a state law".[129]

80 A comparable, albeit more limited, analysis has been adopted by US courts, which have held that the New York Convention gives rise to a substantive international rule of non-discrimination.[130] The basic premise of the US courts' analysis is that the rules of national law applicable to international arbitration agreements are subject to international limitations that preclude application of discriminatory or idiosyncratic national law provisions. These decisions rest on the premise that Art II of the Convention is self-executing (or directly-applicable) in national courts and that it prescribes substantive rules of international law applicable to the formation and validity of international arbitration agreements; in turn, these principles of international law preclude the application of national law rules that discriminate against international arbitration agreements or that adopt idiosyncratic rules of invalidity that are not applied neutrally on an international scale.

81 Thus, in *Ledee v Ceramiche Ragno*,[131] a US appellate court rejected a challenge to an arbitration agreement based upon a Puerto Rican law invalidating arbitration clauses in automobile dealer contracts. Relying on Art II(3) of the New York Convention, the court refused to apply the Puerto Rican law, reasoning:[132]

> … by acceding to and implementing the [New York Convention], the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation. Rather, the clause [Art II(3)] must be interpreted to *encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale*. [emphasis added]

82 Similarly, in *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v Lauro*,[133] another US appellate court relied on Art II(3) in deciding that:

> … an agreement to arbitrate is 'null and void' only (1) *when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver*, (2) when it contravenes fundamental policies of the forum state. The 'null and void' language must be read narrowly, for

129 *Final Award in ICC Case No 8938* XXIV YB Comm Arb 174 at 176 (1999).

130 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 544 and 551–552.

131 684 F 2d 184 at 187 (1st Cir, 1982).

132 *Ledee v Ceramiche Ragno* 684 F 2d 184 at 187 (1st Cir, 1982).

133 *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v Lauro* 712 F 2d 50 at 53–54 (3d Cir, 1983).

> the signatory nations have jointly declared a *general policy of enforceability of agreements to arbitrate*. …
>
> … [S]ignatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. *Neither the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate.*
>
> [emphasis added]

83 A number of other US lower courts have adopted the same approach, relying on substantive rules of international law, derived from Art II(3) of the New York Convention, to give effect to international arbitration agreements, notwithstanding otherwise applicable rules of national law that either single out such agreements for the imposition of rules of invalidity or that impose idiosyncratic limitations on the validity of such agreements.[134]

84 In concept, the approach of the US courts is similar to that of the French courts. Both French and US courts have eschewed traditional choice-of-law analyses, instead looking principally to rules of international law to govern the validity of international arbitration agreements. Although there are (non-trivial) differences between the US and French conceptions of international law, both approaches rest on an effort to avoid the application of national law rules denying effect to international arbitration agreements and to instead give maximum effect to the parties' intentions in concluding international arbitration agreements.

C. Future of choice-of-law rules for international commercial arbitration agreements: The validation principle and international non-discrimination rule

85 Instead of the current multiplicity of choice-of-law approaches, a better approach would be one which effectuates the parties' intentions in entering into international arbitration agreements and comports with the pro-enforcement objectives of the New York Convention and the Model Law. This approach would involve application of an international rule grounded in the Convention, and therefore mandatorily applicable for all the Convention's Contracting States.

86 The foregoing analysis would require application of the validation principle. As explained above, this principle is necessary in

134 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at p 552.

order to give effect to Arts II and V of the New York Convention in a manner consistent with the Convention's pro-enforcement objectives. This approach would require Contracting States to give effect to international arbitration agreements if they are made valid under the law of any State with a connection to that arbitration agreement. As also explained above, this principle would be fully consistent with – and indeed mandated by – the terms and the objectives of the Convention.[135]

87 The foregoing analysis also requires application of a uniform international principle of neutrality and non-discrimination. As explained above, the application of this non-discrimination rule is grounded in the New York Convention, as recognised by well-considered US judicial decisions and other authorities.[136] The non-discrimination rule would require recognition of the validity of international arbitration agreements, except where such agreements are invalid under generally-applicable, internationally-neutral contract law defences. Under this standard, a Contracting State could not avoid its obligations to recognise and enforce international arbitration agreements under Art II of the Convention by adopting special rules of national law that make such agreements invalid (or "null and void, inoperative or incapable of being performed").[137] Much the same analysis would apply if a Contracting State applied idiosyncratic national law requirements applicable to domestic arbitration agreements, but out-of-step with approaches of other Contracting States, to international arbitration agreements.[138]

135 See paras 52–63 above.

136 See paras 77–84 above.

137 For example, national legislation that imposed unusual notice requirements (*eg*, particular font or capitalisation), consent requirements (*eg*, that arbitration agreements be specifically discussed and approved or established by heightened proof requirements), regulatory approval requirements (*eg*, executive or legislative approval), procedural requirements (*eg*, only institutional arbitration agreements are permitted), or invalidity rules (*eg*, arbitration agreements applicable to future disputes, fraud claims or tort claims are invalid) would all be impermissible and ineffective under this international rule. See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 599–600.

138 For example, this would preclude legislative requirements for particular arbitrator appointment mechanisms (*eg*, requirements for naming the arbitrator in the arbitration agreement), qualifications of arbitrators (*eg*, local nationality, religion), institutional arbitration requirements (*eg*, forbidding *ad hoc* arbitration agreements), or language requirements (*eg*, requiring use of a specified language). These local requirements would not qualify as internationally-neutral contract law defences, but would instead constitute idiosyncratic local rules. As the US courts in *Ledee v Ceramiche Ragno* 684 F 2d 184 (1st Cir, 1982) and *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v Lauro* 712 F 2d 50 (3d Cir, 1983) explained, these sorts of defences contradict the purposes of the New York Convention and should not be given effect in the context of international arbitration agreements. See paras 80–83 above and G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 552–559.

IV. Conclusion

88 Traditional and contemporary choice-of-law rules applicable to international arbitration agreements suffer from grave deficiencies. These choice-of-law rules are not only impossible to justify conceptually, but produce unpredictable and arbitrary results. Given this, the better approach is one which would give full effect to the parties' intentions in concluding international arbitration agreements and the pro-enforcement objectives of the New York Convention. The foregoing approach involves application of a uniform international choice-of-law rule to international arbitration agreements under this analysis – *ie*, a validation principle – that would be applied to select that national law which would give effect to (rather than invalidate) the parties' international arbitration agreement. Second, an international rule of non-discrimination would be applied to preclude application of idiosyncratic or discriminatory national law rules. This approach is not merely sound choice-of-law policy; it also effectuates the parties' intentions and objectives in selecting a neutral, efficient means of resolving their commercial disputes, and is mandated by the Convention's text and pro-arbitration purposes, as well as the text and purposes of the Model Law.