INTRODUCTORY ESSAY

Lawrence **COLLINS**
Rt Hon Lord Collins of Mapesbury,
LLD, FBA,
formerly Lord of Appeal in Ordinary,
former Justice of the UK Supreme Court.

1 Honoured as I am to have been asked to contribute this introductory piece to a distinguished and scholarly collection, I hope I will be forgiven if I begin on a personal note by mentioning that I was fortunate enough to have worked with some of the pioneers in the development of the law of international arbitration, and some of the leading figures in the major controversies in the field. Some of those controversies still resonate but others are now dead and buried. I worked with Dr F A Mann, the leading proponent of the view that de-localised arbitration was a heresy, over a continuous period of some 25 years until his death in 1991, including our joint work on the famous (or infamous) award in the *British Petroleum v Libya*[1] arbitration in 1973. I was assistant to Professor Berthold Goldman (the prime proponent – with Professor Clive Schmitthoff – of the adoption of the *lex mercatoria* in international arbitration) when he gave his General Course at the Hague Academy of International Law in 1975, and I had a long academic and professional relationship with Professor Pierre Lalive, perhaps the leading arbitration practitioner of his generation and a highly learned and sophisticated scholar.

2 Until the seventh edition of Dicey's *Conflict of Laws* in 1958, arbitration merited only a few pages in that work on the enforcement of arbitral awards, and even with the coming of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] ("New York Convention") applicable law issues were treated as part of the law of enforcement of awards until the 11th edition in 1987, when I attempted to restate the English law on the applicable law in arbitration. Then I was able to say, with apparent confidence, that the procedural law of the arbitration determined what law the arbitrators were to apply, and that English law rejected delocalised arbitration. At the same period Battifol and Lagarde's *Droit international privé*[3] also devoted just a few pages to arbitration, concentrating on enforcement of awards, and with just a paragraph[4] on applicable law and the internationalisation of contracts.

1 (1973) 53 ILR 297.
2 (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959).
3 H Battifol & P Lagarde, *Droit international privé* (Paris: LGDJ, 7th Ed, 1983).
4 H Battifol & P Lagarde, *Droit international privé* (Paris: LGDJ, 7th Ed, 1983) at para 578.

3 The traditional view in England (and other common law countries) was that an arbitrator was bound to apply English law, including the English conflict of laws rules, to decide the substance of any dispute. That was because arbitrators in England were bound to apply the law.[5] Many of the most important cases in the conflict of laws arose by way of recourse to the courts on matters of law from arbitral awards. Prior to the English Arbitration Act 1996[6] ("AA 1996"), an English arbitrator could only apply a national legal system, designated as applicable by the relevant choice of law rule. The tribunal could not apply non-national rules, still less decide the dispute *ex aequo et bono* or as an *amiable compositeur*, on the basis of general principles of justice and fairness.

4 F A Mann's view was that there was in effect no such thing as "international arbitration" because:[7]

> Every arbitration is a national arbitration, that is to say, subject to a specific system of law … even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects.

5 By contrast, other legal systems (such as French law) permitted the development of much greater flexibility in the approaches of arbitrators to determining the applicable substantive law. This trend was another aspect of the development of "delocalised arbitration", which saw the mandatory application of the choice of law rules of the forum as an unnecessary fetter on party autonomy. The fullest expression of this approach was found in the development of a doctrine of a new *lex mercatoria*. This doctrine contemplated that there was a set of rules developed from the practice of merchants and from international codifications, which might be applied directly by the arbitrators, either as a result of an express choice by the parties, or in the absence of any express choice of law.

6 What are the relevant rules of the conflict of laws? Section 46(3) of the AA 1996 provides that where there is no choice of the applicable law, and no agreement as to the application of other considerations the

5 *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478 at 488, *per* Scrutton LJ.

6 c 23.

7 F A Mann, "*Lex Facit Arbitrum*" in *International Arbitration: Liber Amicorum for Martin Domke* (P Sanders ed) (The Hague: Martinus Nijhoff, 1967) at pp 159–160. See on this subject generally N Blackaby *et al*, *Redfern & Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at paras 3.71 *ff*; G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) vol II at pp 1587 *ff*; *Fouchard Gaillard Goldman on International Commercial Arbitration* (E Gaillard & J Savage eds) (Kluwer Law International, 1999) Pt V; J Lew, *Applicable Law in International Commercial Arbitration* (Oceana Publications, 1978); and Grigera Naon (2001) 289 *Recueil des Cours* 9.

tribunal is to "apply the law determined by the conflict of laws rules which it considers applicable". It has been suggested that the possible options are the conflicts rules of the seat, or the conflicts rules most closely connected with the subject matter, or the cumulative application of relevant conflicts rules, or general principles of the conflict of laws.[8]

7 In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*[9] I referred to:

> … the controversial question of delocalisation of the arbitral process which has been current since the 1950s. It started with the pioneering work of Professor Berthold Goldman, Professor Pierre Lalive and Professor Clive Schmitthoff, which was mainly devoted to the question of disconnecting the substantive governing law in international commercial arbitration from national substantive law. It expanded to promotion of the notion that international arbitration is, or should be, free from the controls of national law, or as Lord Mustill put it in *SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38, 52, 'a self-contained juridical system, by its very nature separate from national systems of law' ….

8 This battle is now for all practical purposes over. All of the leading arbitral institutions allow the parties to choose rules of law, and not necessarily a legal system, to govern their contract, and allow the tribunal to apply rules of law in the absence of choice by the parties.

9 The International Chamber of Commerce ("ICC") Rules of Arbitration[10] provide that: "The parties shall be free to agree upon the *rules of law* to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the *rules of law* which it determines to be appropriate." [emphasis added] The London Court of International Arbitration ("LCIA") Arbitration Rules[11] allow the tribunal to apply "the law(s) or rules of law which it considers appropriate" and the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules[12] provide that in the absence of choice "the arbitral tribunal shall apply the law which it determines to be appropriate".

8 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 16-058.

9 [2010] UKSC 46; [2011] 1 AC 763 at [117].

10 Article 21(1) of the International Chamber of Commerce ("ICC") Rules of Arbitration (2012).

11 Article 22.3 of the London Court of International Arbitration ("LCIA") Arbitration Rules (1998). But see now Art 16.4 of the LCIA 2014 Rules.

12 Article 35(1) of the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules (2010).

10 As Professor Doug Jones shows in his article in this collection[13] these rules represent a move away from an express direction to apply a system of the conflict of laws to find the applicable law (*voie indirecte*). The UNCITRAL Arbitration Rules (1976)[14] provided that: "Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

11 The UNCITRAL Model Law on International Commercial Arbitration ("Model Law") permits the parties to choose *rules* of law. But, in the absence of choice, it provides that: "… the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable".[15] Where, therefore, the parties have not exercised their right to make an express choice of law, the arbitrator is bound to apply a national legal system to the resolution of the dispute, and is bound to apply such legal system as is designated by a system of conflict of laws rules. That is the approach substantially adopted by s 46(3) of the AA 1996, which provides.

> (1) The arbitral tribunal shall decide the dispute –
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> (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
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> (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
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> …
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> (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

12 It follows that the parties have the freedom to apply a set of rules or principles which do not in themselves constitute a legal system. Such a choice may thus include a non-national set of legal principles (such as the 1994 International Institute for the Unification of Private Law ("UNIDROIT") Principles of International Commercial Contracts), or, more broadly, general principles of commercial law or the *lex mercatoria*. Whether they would be wise to do so is of course another matter.

13 Doug Jones, "Choosing the Law or Rules of Law to Govern the Substantive Rights of the Parties" (2014) 26 SAcLJ 911.

14 Article 33(1) of the UNCITRAL Arbitration Rules (1976).

15 Article 28 of the UNCITRAL 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)).

13 In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,[16] the main construction contract to build the cross-Channel rail link had a governing law clause in the contract, requiring its interpretation "in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals". This choice of law was treated as valid and enforceable by the House of Lords. In that case, the seat of the arbitration was Belgium.

14 Professor Doug Jones cites as an example of the *voie indirecte* approach s 46(3) of the AA 1996, because it requires the express application of the conflict of laws principles. The best known example of a statutory adoption of the *voie directe* is Art 1151 of the French Code of Civil Procedure: where no choice of law has been made, the arbitral tribunal should render its award "in accordance with the rules of law it considers appropriate".

15 It is clear that there has been a movement away from the application of national conflict of laws rules, or even any conflict of laws rules. It is also clear that what evidence there is of arbitral practice supports this approach. But two qualifications must be made. The first is that for obvious reasons the correctness of these approaches has very rarely been the subject of examination by national courts. The second qualification is that most contracts which are the subject of international arbitration contain, sensibly, an express choice of law to govern the contract and that choice is normally a choice of national law. Sometimes of course there is a choice of public international law as the governing law or as a secondary supplemental body of law, but commercial parties would normally be most unwise to choose "rules of law" without ties to a national or international legal system. Normally the chosen law would apply to any likely area of contention, although it is of course possible to identify areas (capacity, compliance with formalities, statute of limitations, illegality) where the chosen law would not in fact be applicable under some systems of the conflict of laws.

16 The debate about whether it is possible to adopt the *lex mercatoria* is over. It cannot now be doubted that it is possible. Whether it is useful or desirable to do so is quite another question.[17] As Professor Cuniberti shows,[18] data collated by the ICC shows that parties

16 [1993] AC 334.

17 See C Drahozol, "Contracting Out of National Law: An Empirical Look at the New Law Merchant" (2005) 80 Notre Dame L Rev 523; G Cuniberti, "Three Theories of *Lex Mercatoria*" (2013) 52 *Columbia Journal of Transnational Law* 369.

18 G Cuniberti, "Three Theories of *Lex Mercatoria*" (2013) 52 *Columbia Journal of Transnational Law* 369 at 399.

choose the law governing their contract in 80–85% of cases, and choose a national law in all but 1–2% of the cases, and even that figure may overstate the number of times it is chosen in practice, and that figure includes choice of the United Nations Convention on Contracts for the International Sale of Goods[19] ("CISG"), and the choice of "general principles of law" and public international law. Such a choice would be a certain recipe for uncertainty and disagreement.

17 In December 1971, on the day before British protection over the Gulf states was due to end, Iran occupied three islands in the Gulf, including Abu Musa.[20] In what it said was a response to Britain's failure to prevent the occupation, the Libyan government announced on 7 December 1971 the nationalisation of all of the interests and properties in Libya of BP and about two years later Libya announced the nationalisation of 51% of the interests and properties of nine international oil companies, and in February 1974 the nationalisation of the remaining 49%. This led to the three famous awards in *British Petroleum Co (Libya) v Libya*,[21] *Texaco Overseas Petroleum Co v Libya*[22] ("*Texaco*") and *Libyan American Oil Co (Liamco) v Libya*.[23] A detailed account of the many important questions of the relationship between international law and arbitration which were raised by the three awards (of Lagergren, Dupuy and Mahmassani) is outside the scope of this piece. BP failed in its principal objective notwithstanding that Libya failed to appear.

18 The concessions provided that they were to be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals. Each of the concessions contained an arbitration clause providing for appointment by the President of the International Court in the event of default. A vital aspect of the BP claim was for a declaration that it had a property interest in the oil extracted from a concession area. This reflected its tactics in the Iranian nationalisation in the 1950s when cargoes of Iranian crude oil were the subject of litigation in Venice, Rome and Tokyo, and in a successful outcome in *The Rose Mary*[24] in Aden. The captain claimed that he had been forced to put into Aden by a threat from the RAF to bomb his ship. Once the ship was there, Sir Hartley Shawcross QC (later

19 (11 April 1980) 1489 UNTS 3 (entered into force 1 January 1988).
20 For the background see *Buttes Gas & Oil Co v Hammer (Nos 2 & 3)* [1982] AC 888.
21 (1979) 53 ILR 297.
22 (1982) 62 ILR 140.
23 (1982) 17 ILM 14.
24 *Anglo-Iranian Oil Co v Jaffrate (The Rose Mary)* [1953] 1 WLR 346.

Lord Shawcross) and Eli Lauterpacht (now Sir Elihu Lauterpacht QC), who were probably more menacing than the RAF, appeared for Anglo-Iranian. By asserting ownership of the oil exported from Iran, the Anglo-Iranian Company was able to deter buyers from acquiring Iranian crude. That was why BP relied so heavily on international law as the governing law of the concession, and in particular on the famous pronouncement in the *Chorzów Factory* case that:[25]

> [R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of the sum corresponding to the value which a restitution in kind would bear ….

19 Judge Lagergren rejected the submission that public international law applied, because the choice of law clause did not so stipulate. The governing system of law was what the clause expressly provided, *ie*, in the absence of principles common to the law of Libya and international law, the general principles of law, including such of those principles as may have been applied by international tribunals. Public international law had a secondary role because its principles were to apply only insofar as they were common to the principles of Libyan law. Although restitution was a principle of international law, the remedy was not available to a party suffering a wrongful breach by a co-contracting party. In particular he minimised the authority of the *Chorzów Factory* case by treating it as a special case dealing with treaties.

20 In *Texaco*, Professor Dupuy interpreted the clause as being primarily a choice of public international law. It was the standard by which the application of Libyan law was to be determined and the reference to the general principles of law was in effect a reference to public international law. Professor Dupuy decided that restitution was in principle the preferred remedy both under the principles of Libyan law and under the principles of international law as being the normal sanction for non-performance of contractual obligations.

21 It is plain that which law governs the validity, scope and interpretation of the agreement to arbitrate is a matter of great practical importance. It is one of the most litigated issues in international arbitration, not least because the nullity of the arbitration agreement is a ground for resisting a stay of court proceedings by virtue of Art II(3) of the New York Convention and for resisting the enforcement of an award by virtue of Art V(1)(a). Article II(3) provides that a court shall stay proceedings brought in breach of an arbitration agreement unless it finds, *inter alia*, that the agreement is "null and void", but has no choice

25 *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits)* (1928) PCIJ Rep, Ser A, No 17 at p 47.

of law provision, whereas Art V(1)(a) contains, as a ground for resisting enforcement of an award, that the "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".

22 As Gary Born says,[26] the relationship between Art II(3) and Art V of the New York Convention, and the relevance of Art V(1)(a)'s choice of law rule under Art II gives rise to difficulties. Does Art V's choice of law rule apply to awards in the recognition context, but not to agreements to arbitrate, and are Contracting States 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? Or should the Art V(1)(a) choice of law apply to the validity of arbitration agreements under Art II?[27]

23 What law governs the arbitration agreement is not a new problem. In 1892, Hamlyn & Co of London agreed to supply to the Talisker Distillery in the Isle of Skye, Scotland, a patent drying machine which was to be worked by the distillery company, which was to bag up and deliver to Hamlyn & Co dried grain. The agreement provided: "Should any dispute arise out of this contract the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." The distillery sued Hamlyn & Co in Scotland, and Hamlyn & Co sought a stay on the ground of the arbitration clause. Under Scots law the arbitration agreement was invalid because the arbitrators were not named. Under English law it was valid.

24 In language which still resonates today, Lord Herschell LC confirmed the separability of the arbitration clause and said:[28]

> Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be 'settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way', it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties, thus indicated by the contract they entered into, being

26 Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814.

27 See G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) vol I at pp 494 *ff* and 565 *ff*.

28 *Hamlyn & Co v Talisker Distillery* [1894] AC 202 at 208.

> carried into effect … the contract with reference to arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and, for the reasons which I have given, I see 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.
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> …
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> But then it is argued that an agreement to refer disputes to arbitration deals with the remedy and not with the rights of the parties, and that consequently the forum being Scotch the parties cannot by reason of the agreement into which they have entered interfere with the ordinary course of proceedings in the Courts of Scotland … but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the Courts in Scotland not to adjudicate upon the merits of the case, but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty; and the argument that to give effect to this arbitration clause would interfere with the course of procedure in the forum in which the action is pending seems to me entirely to fail.

25 There is, however, no international consensus on the choice of law rule applicable to an arbitration agreement. The New York Convention provides that the recognition and enforcement of an award may be refused where "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": Art V(1)(a).

26 In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*,[29] on an application for enforcement of a New York Convention award in England, the question whether a valid arbitration agreement had been entered into between the parties was determined according to French law, the award having been made in France. Dallah was a Saudi Arabian company providing services for pilgrims travelling to the Holy Places in Saudi Arabia. In July 1995, Dallah signed a memorandum of understanding ("MoU") with the Government in relation to the construction of certain housing for Pakistani pilgrims. In September 1996, Dallah entered into a contract with the Awami Hajj Trust, a body which had been established by an Ordinance promulgated by the President of Pakistan. The contract contained an arbitration agreement, under which all disputes were to be referred to ICC arbitration in Paris. The Government was not a signatory to the contract. The contract referred to a guarantee to be

29 [2010] UKSC 46; [2011] 1 AC 763.

provided by the Government. Subsequently, the Trust ceased to exist as a legal entity because under Pakistani law its existence was to lapse if not renewed by legislation. Dallah commenced ICC arbitration proceedings against the Government. The arbitral tribunal decided that it had jurisdiction over the Government, and awarded Dallah some US$20m in damages and legal costs. Dallah then endeavoured to enforce the final award in England. The Government opposed enforcement and in the course of those proceedings commenced proceedings for the annulment of the award before the Paris Court of Appeal.

27 The English courts, applying what they understood to be French law, decided that the Government, which was not a signatory to the contract, should not be considered a party to the arbitration agreement. The UK Supreme Court held that, under the New York Convention, the court is bound to "revisit the tribunal's decision on jurisdiction". The obvious rationale for not treating the tribunal's views as determinative is that the tribunal's decision ought not to be binding on an alleged party which claims it never agreed to arbitration. The court "may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them".[30] The UK Supreme Court, in applying French law, endeavoured to apply the reasoning of the French Court of Cassation in *Municipalité de Khoms El Mergeb v Société Dalico*[31] to the extent that it analysed the common intention of the parties. The conclusion was that there was no material sufficient to justify the tribunal's conclusion that the Government was a party to the arbitration agreement.

28 Subsequently applying the same principles, in February 2011, the Paris Court of Appeal rejected the application by the Government to set aside the award delivered in Paris, on the basis that the arbitral tribunal was correct in finding it had jurisdiction over the Government despite its not being a signatory to the arbitration agreement. The basis of the French court's decision was that the Government had behaved as if it was a party to the contract. It paid no attention to the fact that the Government was plainly not an actual party to the contract, which drew a clear distinction between the Trust and the Government, and on which Dallah had been advised by the leading law firm in Pakistan, which plainly knew the distinction between the Trust and the Government.

29 But determination of the law governing the arbitration agreement has been a difficult and controversial area, as is illustrated by the recent English authorities.

30 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763 at [31] and [160].

31 (20 December 1994) (Cour de Cassation, France), 1994 Rev Arb 166.

30 Over 30 years ago, Mustill J had said in *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg SA*[32] that in the great majority of cases, the *lex causae*, the law applicable to the arbitration agreement, and the *lex fori* will be the same. But that would not always be so. It was not uncommon for the proper law of the substantive contract to be different from the *lex fori*; and much more rarely, the law governing the arbitration agreement was also different from the *lex fori*.

31 *C v D*[33] concerned the Bermuda form, which provides that "[t]his policy shall be governed by and construed in accordance with" the internal laws of New York (subject to exceptions) but also provides for arbitration in London of disputes arising from the policy. The insurers threatened to challenge under US federal arbitration law in a federal court an award in favour of the insured in a London arbitration, and the insured obtained an anti-suit injunction from the Commercial Court.

32 On appeal, the insurers argued that the choice of England as the seat of the arbitration, and therefore English law as the curial law of the arbitration, did not exclude a challenge under the law of New York, which had been expressly chosen to govern the parties' obligations. The insured argued that, because the parties had chosen London as the seat of the arbitration and therefore English law as the curial law, the law of the arbitration was English and an award could be challenged only in the English courts.

33 The Court of Appeal decided that "by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law" and "the choice of a seat for the arbitration must be a choice of forum for the remedies seeking to attack the award".[34] The governing law of the underlying insurance contract was distinct from that of the arbitration agreement, because the latter was a separable and separate agreement. The question was this: if there was no express law of the arbitration agreement, whether the law with which that agreement had its closest and most real connection was that of the seat of the underlying contract or the law of the seat of the arbitration. Longmore LJ thought the answer was more likely to be the law of the seat of the arbitration than the law of the underlying contract.

32 [1981] 2 Lloyd's Rep 446 at 453.
33 [2007] EWCA Civ 1282; [2008] Bus LR 883.
34 *C v D* [2007] EWCA Civ 1282; [2008] Bus LR 883 at [16]–[17], *per* Longmore LJ.

34 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA*[35] ("*Sulamérica*") is the latest appellate authority. In *Sulamérica*, the insurance policy provided that "this Policy is governed exclusively by the laws of Brazil". The arbitration agreement provided that, if the parties did not resolve what was to be paid under the policy through mediation that the parties agreed first to undertake, the dispute would be referred to arbitration and the seat of the arbitration was to be in London. The substantive judgments were delivered by Moore-Bick LJ and Lord Neuberger MR.

35 Moore-Bick LJ's approach was that the court should first consider whether the parties made an implied choice of a law applicable to it and considered that, while the express choice of a law to govern the insurance policy was not an express choice of the law applicable to the arbitration agreement, it was a strong pointer towards an implied choice of the law of Brazil as the proper law of that agreement. Although there were powerful factors in favour of an implied choice of Brazilian law as the governing law of the arbitration agreement, two other considerations indicated otherwise: the choice of the seat of arbitration, coupled with the inevitable acceptance of English law to govern the conduct and supervision of arbitration; and the fact that, according to the insured, under Brazilian law the arbitration agreement was enforceable only with their consent and the perceived improbability that the parties intended it to be governed by a law that made the arbitration agreement so one-sided. His conclusion was that these two considerations outweighed the indication in the choice of Brazilian law to govern the policy as to an implicit choice by the parties of the law applicable to the arbitration agreement, notwithstanding a starting assumption that they intended the same law to govern the whole of the contract. Therefore, since the governing law of the arbitration agreement was not determined by either an express or an implied choice of the parties, Moore-Bick LJ identified the system of law which had the closest and most real connection with it as English law.

36 Lord Neuberger MR said that he agreed with Moore-Bick LJ's conclusion and reasoning but also said:[36]

> Given the desirability of certainty in the field of commercial contracts and the number of authorities on the point, it is, at least at first sight, surprising that it is by no means easy to decide in many such cases whether the proper law of the arbitration agreement is (i) that of the country whose law is to apply to the contract or (ii) that of the

35 [2012] EWCA Civ 638; [2013] 1 WLR 102. See also Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814.

36 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102 at [51].

> country which is specified as the seat of the arbitration. However, once it is accepted that that issue is a matter of contractual interpretation, it may be that it is inevitable that the answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense.

37 Lord Neuberger recognised that *C v D* had taken a different approach from earlier cases, and said:[37]

> Accordingly, (i) there are a number of cases which support the contention that it is rare for the law of the arbitration to be that of the seat of the arbitration rather than that of the chosen contractual law, as the arbitration clause is part of the contract, but (ii) the most recent authority is a decision of this court which contains clear dicta (albeit obiter) to the opposite effect, on the basis that the arbitration clause is severable from the rest of the contract and plainly has a very close connection with the law of the seat of the arbitration.
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> Faced with this rather unsatisfactory tension between the approach in the earlier cases and the approach in *C v D*, it seems to me that, at any rate in this court, we could take one of two courses. The first would be to follow the approach in the most recent case, given that it was a decision of this court, namely *C v D*. The alternative course would be to accept that there are sound reasons to support either conclusion as a matter of principle. Whichever course is adopted, it is necessary to consider whether there is anything in the other provisions of the contract or the surrounding circumstances which assist in resolving the conundrum.

38 Lord Neuberger rejected the possibility of treating the *obiter dicta* in *C v D* as wrong, and then said that each of the two other possible courses that he had identified led to the conclusion that the arbitration clause was governed by English law, and therefore it was unnecessary to choose between them and he did not do so.

39 The result of this decision is that the Court of Appeal emphasised that, in the absence of an express choice of law to govern the arbitration agreement, where the governing law of the main contract and the seat of the arbitration differ, the court must determine the law governing the arbitration agreement by asking first whether the parties' choice of law can be implied and, failing that, determining the legal system with which the arbitration agreement had its closest and most real connection. On the facts in *Sulamérica*, the arbitration agreement was construed as governed by the law of the seat (English law), in part because it might have been unenforceable at the suit of the claimant if the *lex causae* of the main contract were applicable.

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37 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102 at [56]–[57].

40 By contrast, in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*[38] ("*Arsanovia*"), Andrew Smith J found sufficient evidence of the parties' implied agreement to subject the arbitration agreement to the law governing the main contract from the language of the agreement itself. He subjected Lord Neuberger's judgment in *Sulamérica* to close analysis, and questioned Lord Neuberger's starting point that the question of which law governed an arbitration agreement was a matter of contractual interpretation, notwithstanding that the decision in *C v D* and conclusion of Moore-Bick LJ depended not upon any express or implied choice of the parties but upon which system of law had the closest and most real connection with the arbitration agreement because the parties had made no choice in their contracts properly interpreted. But Andrew Smith J thought it was clear that the court should consider whether the parties have (impliedly, if not expressly) chosen an applicable law before considering which system of law has the closest and most real connection with the arbitration agreement, and of the judgments only that of Moore-Bick LJ discussed the proper approach to that anterior question.

41 In *Arsanovia* the contract was governed by Indian law, and London was the place of arbitration. Andrew Smith J decided that because of the choice of Indian law to govern the contract, the parties were to be taken to have evinced an intention that the arbitration agreement in it be governed by Indian law. The governing law clause was, at the least, a strong pointer to their intention about the law governing the arbitration agreement and there was no contrary indication other than choice of a London seat for arbitrations. Had the judge had to decide which system of law had the closest and most real connection with the arbitration agreement, he would have concluded that it is English law for the reasons that Longmore LJ concluded that the English law had the closest and most real connection with the arbitration agreement in *C v D* and that Moore-Bick LJ similarly decided in *Sulamérica*. But in view of his decision about the parties' choice of an applicable law, that question did not arise.[39]

42 In Singapore, the decision in *Sulamérica* has been the subject earlier this year of careful consideration in *Firstlink Investments Corp Ltd v GT Payment Pte Ltd.*[40] The court was critical of the assumption in *Sulamérica* that commercial parties want the same system of law to

38 [2012] EWHC 3702 (Comm); [2013] 1 Lloyd's Rep 235.

39 In *AES Ust-Kamengorsk Hydropower Plant LLP v Ust-Kamengorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 WLR 1889 at [6], the Supreme Court noted the authorities, but did not need to decide on the correct approach to choice of law, as the parties had agreed that English law, as the law of the seat, governed the arbitration agreement. See also *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm).

40 [2014] SGHCR 12.

govern the substantive contractual relationship and the dispute mechanisms. The court said that "when commercial relationships break down and parties descend into the realm of dispute resolution, parties' desire for neutrality comes to the fore".[41]

43 What of contracts which have an internationalised element? Here the search will be for a national system of law to govern the arbitration agreement. In *Deutsche Schachtbau v Shell International Petroleum Co Ltd*,[42] it was held that an arbitration agreement providing for ICC arbitration in Geneva was governed by Swiss law, notwithstanding that the contract, which was to be performed in R'As Al Khaimah, had been held by the arbitral tribunal to be governed by general principles of law. In *Svenska Petroleum Exploration AB v Lithuania (No 2)*,[43] the choice of law clause in the agreement provided for the application of the law of Lithuania "supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania". The Republic of Lithuania sought to rely on general principles of law applied by international tribunals, rather than its own law, as grounds for a submission that it was not bound by an arbitration agreement. The Court of Appeal held that effect had to be given to both parts of the clause in interpreting the arbitration agreement. It upheld the finding at first instance that the agreement did bind the State as a matter of Lithuanian law, and found no general principle of law applied by international tribunals which was inconsistent with that conclusion.

44 The thesis of Gary Born's article[44] 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 he says, 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. This is of course not new, as he readily recognises. The expression "rule of validation" is sometime attributed to Ehrenzweig.[45] The underlying principle is found in *Sulamérica*, and in the very context of the validity of arbitration agreements it goes back to the 19th century case of *Hamlyn & Co v*

41 *Firstlink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [13], *per* Shaun Leong Li Shiong AR.

42 [1990] 1 AC 295 at 310 (CA) (reversed on other grounds).

43 [2006] EWCA Civ 1529; [2007] QB 886.

44 Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814.

45 A Ehrenzweig, *Conflict of Laws* (West Publishing Co, 1959).

Talisker Distillery.[46] A striking example is found in Art 178 of the Swiss Federal Private International Law Statute, discussed by Pierre Karrer in this collection,[47] which provides that an arbitration agreement is valid if it conforms with the law chosen by the parties, or the law governing the subject matter of the dispute (in particular the main contract) or with Swiss law.

45 There are a number of questions which arise in relation to the law which governs the procedure of an arbitration. Even if the consensus is that matters of procedure are governed by the law of the seat, there will still be questions such as: what is the seat? What are matters of procedure? What does it mean to say that procedure is governed by the law of the seat?

46 The procedural law[48] of an arbitration deals with two sets of issues: (a) the internal procedure of the arbitration itself: commencement of the arbitration, appointment of arbitrators, pleadings, provisional measures, evidence, hearings and awards; and (b) the external intervention of national courts in the arbitral process. Such intervention may itself have two distinct purposes: a supportive role by which the court assists the arbitration, such as by the appointment of arbitrators in default of agreement, or the ordering of provisional measures or collection of evidence where the arbitral tribunal is unable to do so; and a supervisory role, consisting of those rules of national law which define the extent to which a court may intervene in an arbitration, or review an award on grounds of procedural or substantive error.

47 All of the major international arbitral institutions have their own procedural rules, which will apply to arbitrations conducted under their auspices (save to the extent that the parties expressly provide otherwise). From the perspective of the parties to an international arbitration (and of the arbitral institution), these rules will form the primary procedural code. Even where the parties have chosen *ad hoc* rather than institutional arbitration, the parties may select a set of procedural rules such as the UNCITRAL Arbitration Rules.

48 The other source of procedural law for arbitration is those provisions of national law which deal specifically with arbitration (the *lex arbitri*). These rules may be directory, providing a source of arbitral rules which may be applied to the extent that the parties have

46 [1894] AC 202.

47 Pierre A Karrer, "The Law Applicable to the Arbitration Agreement: A Civilian Discusses Switzerland's Arbitration Law and Glances Across the Channel" (2014) 26 SAcLJ 849.

48 The following account is based on *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at paras 16-029 *ff*.

not expressly chosen their own rules of procedure (whether by drafting specific rules into their arbitration agreement, or, more commonly, by choosing a set of standard procedural rules, such as those of the ICC or LCIA or the UNCITRAL Arbitration Rules); or they may be mandatory, placing mandatory limits on the autonomy of the parties in arbitration, by prescribing certain matters of arbitral procedure from which no contracting out is permitted; or they may be supportive, extending the support of national court processes to arbitration, by making available to the parties judicial procedures to deal with matters which are outside the scope of the arbitrators' authority, since they require the coercive powers of the State. This arises especially where the procedural measures affect the position of third parties, who are not subject to the jurisdiction of the arbitrators, such as, for example, in the taking of evidence under compulsion or the ordering of provisional measures.

49 In England, the seat is defined by s 3 of the AA 1996 to mean the juridical seat of the arbitration designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers to fix the seat, or (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances. These provisions are more complex and comprehensive than the corresponding provision of the Model Law, which states that the parties are free to agree on the place of arbitration and that, in the absence of such agreement, the place of arbitration shall be determined by the arbitral tribunal: Art 20(1). In practice, the choice of a place of arbitration by contract is common. In the absence of choice by the parties, arbitral rules may provide for its determination by the arbitral institution (as in the ICC Rules of Arbitration) or by the tribunal (as in the UNCITRAL Arbitration Rules).

50 In the typical case, the parties will have identified the place of the arbitration, and that will normally be the seat,[49] but that will not necessarily be so. Thus in *U&M Mining Zambia Ltd v Konkola Copper Mines plc*,[50] the arbitration clause provided that disputes were to be referred to LCIA arbitration in London, the place of arbitration would be England, the contract was to be construed in accordance with and

49 It is of course necessary to distinguish the seat from the convenient place for holding hearings. In *Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* [2001] UKPC 34; [2001] 5 LRC 376, the Privy Council decided, on appeal from the Turks and Caicos Islands Court of Appeal, that the holding of arbitration hearings in Miami had been simply for convenience, and that the addition to the contract of an agreed term that disputes were to be resolved by the laws of the Turks and Caicos Islands amounted to an express choice of the same curial law as the proper law of the contract. Although the reasoning is not cast in terms of the "seat" of the arbitration being in the Turks and Caicos Islands, that is the effect of the decision.

50 [2013] EWHC 260 (Comm); [2013] 2 Lloyd's Rep 218.

governed by the laws of Zambia, and that "[t]he High Court of Zambia shall have exclusive jurisdiction". It was held that England was the seat of the arbitration. Blair J relied in particular on these matters: the clause providing for exclusive jurisdiction of the Zambian courts did not appear in the part of the agreement with the heading "Dispute Resolution/Arbitration", and appeared under a different heading, "Governing Law and Jurisdiction". He adopted the statement of principle in *Dicey*:[51]

> This 'seat' is in most cases sufficiently indicated by the country chosen as the place of the arbitration. For such a choice of place not to be given effect as a choice of seat, there will need to be clear evidence that the parties (or the arbitrators if so authorised by the parties) agreed to choose another seat for the arbitration; and that such a choice will be effective to endow the courts of that country with jurisdiction to supervise and support the arbitration.

51 It is not necessary to dwell at length on the extent to which there may be "de-localised arbitration", disconnecting international commercial arbitration altogether from the control of national law, both as to procedure and as to applicable substantive law.

52 The traditional English view is that English law "does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law": *Bank Mellat v Helleniki Techniki SA*.[52] It is, of course, well known that courts in other countries have expressed different views. Thus the French Cour de Cassation has held that "… an international arbitral award – which is not anchored to any national legal order – is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought";[53] and the Supreme Court of Canada has held that: "Arbitration is part of no state's judicial system … The arbitrator has no allegiance or connection to any single country … In short, arbitration is a creature that owes its existence to the will of the parties alone."[54] But statements in favour of de-localised arbitration must be read in context. Apart from the special problem of recognition and enforcement of awards which have been set aside by the courts at the seat (which in reality raises a question of public policy rather than de-localisation), there is no support for the view that, apart from truly international arbitrations under public international law (and it is possible to have such arbitration to which entities other than States are

51 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 16-035.

52 [1984] QB 291 at 301.

53 *PT Putrabali Adyamulia v Est Epices* (2008) 24 Arb Int 293 at 295.

54 *Dell Computer Corp v Union des consommateurs* (2007) 284 DLR (4th) 577 at [51].

parties – International Centre for Settlement of Investment Disputes ("ICSID") arbitrations being the main, but not the only, example), it is possible to have an arbitration wholly divorced from the control (which may include virtually no control) of the court of the *lex arbitri*.[55] That is because the arbitral process is an exercise of party autonomy, which nevertheless can only proceed (and subsequently be enforced) to the extent permitted by national law. But there has been an acceptance in many modern arbitration laws of a much wider scope for the operation of party autonomy to choose the procedures applicable to an international commercial arbitration. Where the law of the seat accords considerable freedom to the parties to choose their procedure and imposes few mandatory provisions upon it, the control of the law of the seat will be in practice limited, and its provisions are unlikely to be brought into conflict with arbitration procedures chosen by the parties. Nevertheless, the law of the seat will still perform vital functions: in supplementing the procedural rules chosen by the parties where these are incomplete; in supporting the arbitral procedure when the coercive powers of the State are needed; and in providing a forum for challenging arbitral awards, especially where they are said to exceed the jurisdiction given to the arbitrators by the parties under the arbitration agreement, or where there has been a serious irregularity in the arbitral procedure. It is the law of the seat which endows the arbitral award with its binding character upon which enforcement may be sought internationally under the provisions of the New York Convention.

53 An example of a case in which the law of the seat can be crucial is in the power to grant interim measures. But, looked at from the conflict of laws perspective, it is not simply a question of the *lex arbitri* or the law of the seat. There is a threshold question: does the tribunal possess the authority to order provisional measures? There are three possible sources for the tribunal's power: (a) any applicable international convention; (b) any applicable national laws; and (c) the parties' arbitration agreement (including any institutional rules they have incorporated).

54 As regards international conventions, the New York Convention is silent on awards of provisional measures by arbitrators or their power to make such orders. The European Convention 1961 addresses at Article VI(4) the possibility of seeking interim relief from a national court. It provides that a request for such measures shall not be deemed incompatible with the arbitration agreement or regarded as a submission of the substance of the case to the court, *ie*, it permits recourse to a national court to seek provisional measures without waiver

55 See Nigel Blackaby *et al*, *Redfern & Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 3.79.

of the right to arbitrate. The ICSID Convention[56] provides in Art 47 that "[e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party". The "recommendation" of an ICSID tribunal is binding on the parties.[57]

55 As regards applicable national laws, the law of the seat is the starting point for the tribunal's authority. A tribunal would be unwise to grant interim relief if the law of the seat does not allow it to do so. Any relief that is ordered will not be enforceable in a national court unless the law governing the arbitral proceedings permits that relief to be granted by a tribunal. Many jurisdictions have now adopted legislation that expressly recognises, at least in the absence of the parties' contrary agreement, that the arbitral tribunal has power to order provisional relief, although the contours of this grant of power will obviously vary from jurisdiction to jurisdiction.[58]

56 The arbitration agreement, and the institutional rules which it incorporates, is crucial. Those rules will determine the power of the tribunal to order interim relief. Many leading institutional rules provide that the tribunal will have power to order interim relief.[59]

57 As Gary Born has noted, relatively little attention has been devoted to the question of what law applies to determine an arbitral tribunal's power to grant provisional measures in an international arbitration.[60] In most cases it is likely that the law applicable to the tribunal's power to grant interim relief will be the procedural law of the arbitration – which will in turn generally be the law of the seat of the arbitration. But that does not mean that the tribunal must apply national standards to the grant of provisional measures. As Gary Born notes, there are at least three possible choices for the law governing the granting of provisional measures: (a) the law of the arbitral seat; (b) the law governing the parties' contract; or (c) international standards. He considers that the better view is that international sources provide the appropriate standards by which to consider the grant of provisional

56 Convention on the Settlement of Investment Disputes between States and Nationals of other States (18 March 1965) 575 UNTS 159 (entered into force 14 October 1966).

57 See, *eg*, *Occidental Petroleum Corp v Republic of Ecuador (Decision on Provisional Measures)* ICSID Case No ARB/06/11 (2007).

58 See, *eg*, s 38 of the Arbitration Act 1996 (c 23) (UK).

59 See, *eg*, Art 28 of the ICC Rules of Arbitration (2012); Art 25 of the LCIA Arbitration Rules (1998); R-34(a) of the American Arbitration Association Commercial Rules; and r 26 of the Singapore International Arbitration Centre Rules (2013).

60 G Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) vol II at p 2457.

measures. He dismisses option (a) on the basis that no national arbitration statute (other than the 2006 revisions to the Model Law) provide meaningful standards, beyond stating that the tribunal has the power to grant such relief as it considers "necessary" or "appropriate". The law governing the contract is also, in his view, inapposite because those laws generally contain "no corpus of law providing standards for international arbitral tribunals". The 2010 UNCITRAL Arbitration Rules set out specific guidelines applicable to a tribunal when considering the grant of interim measures.[61]

58 The international trend for the grant of interim measures by a tribunal is that (a) the applicant must be likely to suffer a harm not adequately reparable by an award of damages; (b) the applicant must demonstrate that such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; (c) the applicant must persuade the tribunal that relief is required as a matter of urgency; and (d) the applicant must show that it has a reasonable possibility of success on the merits of the claim.

59 As is now notorious, in *West Tankers Inc v Allianz SpA*, a vessel collided with a jetty owned by charterers. The charterparty provided for arbitration of disputes in London. The charterers began arbitration proceedings to recover the losses not covered by their insurers, the insurers exercised their statutory right of subrogation under Italian law to commence proceedings against the shipowners in Italy for the insured losses. The shipowners responded with proceedings in England, seeking a declaration that, as the dispute being litigated in Italy arose out of the charterparty, the insurers inherited the obligation to refer it to arbitration, and sought an injunction that the insurers not pursue the claim further except by way of arbitration, and in particular that they discontinue the Italian proceedings.

60 Colman J held[62] that the insurers' claim was subject to the arbitration clause and that the court had jurisdiction to grant the injunction because arbitration was excluded from the Brussels I Regulation.[63] The House of Lords referred to the European Court the question whether it was consistent with the Brussels I Regulation for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings were in breach of an arbitration agreement. Lord Hoffmann (with whom all the other members agreed)

61 Article 26 of the UNCITRAL Arbitration Rules (2010).

62 *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257.

63 Regulation (EC) 44/2001.

expressed the view that an injunction would be consistent with the Regulation. But the European Court ruled that it was incompatible with the Brussels I Regulation for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.[64] The proceedings before the Italian court came within the scope of the Regulation, and therefore the effect of the arbitration agreement, including its validity, was an incidental question, which also came within the scope of the Regulation. Consequently, it was the Italian court which had the exclusive power under the Regulation to rule on the effect of the arbitration agreement on its jurisdiction. Proceedings, such as the English proceedings, which did not come within the scope of the Brussels I Regulation, might have consequences which undermined its effectiveness, in particular where such proceedings prevented a court of another Member State from exercising the jurisdiction conferred on it by the Regulation. The use of an anti-suit injunction to prevent a court of a Member State, which normally had jurisdiction to resolve a dispute under Art 5(3) (tort/delict) of the Regulation, from ruling, on the applicability of the Regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under the Regulation. The proceedings for the anti-suit injunction were contrary to the general principle that every court was seised to determine for itself whether it had jurisdiction to resolve the dispute before it, and that in general the Brussels I Regulation did not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State. In no case was a court of one Member State in a better position to determine whether the court of another Member State had jurisdiction. In obstructing the court of another Member State in the exercise of the powers conferred on it by the Brussels I Regulation to decide whether the Regulation was applicable, the anti-suit injunction also ran counter to the trust which the Member States accorded to one another's legal systems and judicial institutions and on which the system of jurisdiction under the Regulation was based. If, by means of an anti-suit injunction, the Italian court were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement, and the applicant, which considered that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Art 5(3) of the Regulation and would therefore be deprived of a form of judicial

64 *West Tankers Inc v Allianz SpA* Case C-185/07 [2009] ECR I-663; [2009] 1 AC 1138; on a reference from the House of Lords *sub nom West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA (The Front Comor)* [2007] UKHL 4; [2007] 1 Lloyd's Rep 391.

protection to which it is entitled. The conclusion was said to be supported by Art II(3) of the New York Convention, under which it was the court of a Contracting State, when seised of an action in a matter in respect of which the parties had made an arbitration agreement, which would, at the request of one of the parties, refer the parties to arbitration, unless it found that the agreement was null and void, inoperative or incapable of being performed.[65]

61 Subsequently the arbitrators appointed under the charterparty made an award declaring that West Tankers were under no liability to subrogated insurers in respect of a collision. While the arbitration was pending, the insurers had brought proceedings against West Tankers in the Italian court in respect of the same incident. West Tankers obtained permission to enforce the award under s 66(1) of the AA 1996 and to enter judgment in terms of the award under s 66(2), on the basis that once the award had been entered as a judgment any subsequent Italian judgment obtained by the insurers would not be recognised in England by virtue of Art 34 of the Brussels I Regulation. The Court of Appeal held that judgment could be entered on the negative declaratory award. The phrase "enforced in the same manner as a judgment to the same effect" in s 66 was not confined to enforcement by one of the normal forms of execution of a judgment but could include other means of giving judicial force to the award on the same footing as a judgment.

62 In the English arbitration the tribunal considered that although the Brussels I Regulation did not apply to arbitration, the principle of effectiveness, or effective judicial protection, protecting the insurers' right to sue West Tankers in Italy circumscribed its jurisdiction to grant damages for breach of the obligation to arbitrate or an indemnity. The Commercial Court held that that was wrong. The European Court had expressly recognised that the Regulation did not apply to decisions of arbitral tribunals and that the tribunal might reach decisions regarding the scope of the agreement to arbitrate, and the merits, inconsistent with the decision of the Italian court without falling foul of any principle enshrined in the Regulation. Arbitration fell outside the Regulation and an arbitral tribunal was not bound to give effect to the principle of effective judicial protection. The principle of effectiveness and effective judicial protection were not free-standing but existed to protect rights under European Union law which, in the instant case, were the rights of the insurers under Art 5(3) to commence court proceedings against an alleged tortfeasor in the courts of the place where the harmful event occurred. That right was only engaged before courts of the Member States and not before arbitral tribunals. There was

65 But nothing in the ruling affects the power of the English court to grant an injunction to restrain proceedings in a court outside the Member States: *Shashoua v Sharma* [2009] EWHC 957 (Comm); [2009] 2 Lloyd's Rep 87 at [39].

no reason why it did not have jurisdiction to grant equitable damages or an indemnity.[66]

63 It is worth mentioning that there is another important case in this area pending before the European Court.[67] An arbitral tribunal decided that the Ministry of Energy of Lithuania was in breach of the arbitration agreement in a shareholders agreement with Gazprom by bringing certain claims in court proceedings in Lithuania. The arbitral tribunal ordered the Ministry to limit its claims in the Lithuanian courts to matters which were outside the jurisdiction of the arbitral tribunal. Gazprom sought enforcement of the award in the Lithuanian courts. The Lithuanian Supreme Court has referred these questions to the European Court: (a) Where an arbitral tribunal issues an anti-suit injunction and thereby prohibits a party from bringing certain claims before a court of a Member State, which under the rules on jurisdiction in the Brussels I Regulation has jurisdiction to hear the civil case as to the substance, does the court of a Member State have the right to refuse to recognise such an award of the arbitral tribunal because it restricts the court's right to determine itself whether it has jurisdiction to hear the case under the rules on jurisdiction in the Brussels I Regulation? (b) Should the first question be answered in the affirmative, does the same also apply where the anti-suit injunction issued by the arbitral tribunal orders a party to the proceedings to limit his claims in a case which is being heard in another Member State and the court of that Member State has jurisdiction to hear that case under the rules on jurisdiction in the Brussels I Regulation? (c) Can a national court, seeking to safeguard the primacy of European Union law and the full effectiveness of the Brussels I Regulation, refuse to recognise an award of an arbitral tribunal if such an award restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the jurisdiction of the Brussels I Regulation?

64 The European Commission accepted that the ruling in the *West Tankers* case created a real risk of the abuse of litigation tactics and put forward proposals for changes to the Brussels I Regulation as part of the general review of the Regulation, but the result was a very weak provision in the recitals to the recast Brussels I Regulation.[68] Recital (12) states that the Regulation is not to apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or

66 *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm); [2012] 2 Lloyd's Rep 103.

67 *Gazprom OAO and Republic of Lithuania* Case C-536/13 (pending).

68 Regulation (EU) 1215/2012.

enforcement of an arbitral award. It is not likely that this would be interpreted to treat an anti-suit injunction as an ancillary proceeding relating to arbitration.

65 I am sure that the essays in this collection will stimulate much further thought on the many areas which are still controversial in a subject which has undergone enormous changes since I was first involved in it.
