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Putting the Principle of Severability in the Dock: An Analysis in the Context of Choice of Law for Arbitration and Jurisdiction Agreements

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A. Introduction

My first encounter with Professor Briggs was through his book, *Civil Jurisdiction and Judgments* (1993),[1] the first of many in his name. I was at that time writing a PhD thesis in London and the book was among the very few materials shedding useful light on the niche area of my research. Much excited, I approached him with a list of queries. The generosity and hospitality with which he received my visit in Oxford are still vivid in my memory.

Years later, after I had returned to my home country, Japan, I invited Professor Briggs to give seminars at my university. Writing in an article subsequently published from my university's law journal, he explained the ambitious goal of his trip as follows:[2]

> It is sometimes said of the common law conflict of laws that it lacks a fundamental theory, or that it develops pragmatically rather than in developing in accordance with a grand scheme. It did not generate jurists of the stature of Savigny; it did not produce treatises of abstract theory. The purpose of my coming to Japan is to explain how wrong and misconceived this criticism is. My intention is to lay before you an account of certain aspects of the English conflict of laws, and to seek to show you the really profound theory which explains it all.

[1] Adrian Briggs and Peter Rees, *Norton Rose on Civil Jurisdiction and Judgments* (1st edn, Lloyd's of London Press 1993).

[2] Adrian Briggs, 'Distinctive Aspects of the Conflict of Laws in Common Law System: Autonomy and Agreement in the Conflict of Laws' (2005) 57–3 同志社法学 [Doshisha Law Review] 21 [3].

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Anyone curious to find out how Professor Briggs successfully accomplished this task should consult the article. He recalled the experience as a 'challenge for all concerned' in the preface of his book, *Agreements on Jurisdiction and Choice of Law*.[3] One of the distinguishing features of the book is its thorough discussion of damages for breach of jurisdiction agreements. It is in fact a topic I specifically requested him to address in his seminars in Japan as the granting of that remedy was to my mind characteristic of the common law approach. Inspired by his analysis, I myself managed to write a set of articles on the same topic.[4] In theoretical terms, the remedy of damages brings to light the substantive character of jurisdiction agreements of which attention is usually centred on the procedural character.[5] The appreciation of the substantive character of such dispute resolution agreements further stimulated me to write an article, 'Autonomy of Arbitration Agreements and Choice-of-Court Agreements: Re-evaluation in Choice-of-Law Context'.[6] It was written in Japanese, using primarily Japanese materials and caused some heated debate in Japan. This essay will examine the same topic, using materials drawn primarily from the common law and European law.

B. Purpose and Structure of This Essay

The principle of severability (or separability) is a principle widely accepted in the legislation and case law on arbitration agreements and jurisdiction agreements (hereafter 'arbitration and jurisdiction agreements' for short).[7] It signifies that these agreements should be treated as being severable from the contract in which they are contained (hereinafter 'matrix contract').

[3] Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) (hereafter Briggs, *Agreements*).

[4] Koji Takahashi, 'Damages for Breach of a Choice-of-Court Agreement' (2008) 10 Yearbook of Private International Law 57; and Koji Takahashi, 'Damages for Breach of a Choice-of-Court Agreement: Remaining Issues' (2009) 11 Yearbook of Private International Law 73.

[5] See further Edwin Peel's essay in this collection (ch 12).

[6] 「仲裁合意・管轄合意の独立性原則—準拠法決定プロセスにおける再検討」(2012) 147-3 民商法雑誌 255.

[7] With respect to arbitration agreements, see eg Art 21(2) of the Arbitration Rules of the United Nations Commission on International Trade Law (UNGA Res 31/98 (15 December 1976) UN Doc A/31/98), Art 16 of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNGA Res 40/72 and 61/33 (11 December 1985, as amended 4 December 2006) UN Doc A/40/17, annex I and A/61/17, annex I) (hereafter UNCITRAL Model Law), s 1040 of the German Code of Civil Procedure (ZPO) and s 7 of the English Arbitration Act 1996; also *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2007] 4 All ER 951 [17], [18] (hereafter *Fiona Trust*). With respect to jurisdiction agreements, see eg Art 3(d) of the Hague Convention on Choice of Court Agreements (2005) (hereafter Hague Choice of Court Convention) and Art 25(5) of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (hereafter Recast Brussels I Regulation); also *Benincasa v Dentalkit Srl* Case C-269/95 [1997] ECR 1-3767 and *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2009] 2 All ER (Comm) 129 [24].

The principle of severability also has the potential of influencing the choice of law analysis for determining the law applicable to arbitration and jurisdiction agreements. While this essay will accept that this principle is useful and defensible in the sphere of substantive law (Section C), it will challenge the assumption, often formed on the basis of this principle, that arbitration and jurisdiction agreements should be treated as a distinct contract severed from the matrix contract for the sake of determining their governing law[8] (Section D). This essay will, however, accept that arbitration and jurisdiction agreements are, like any other terms in the same matrix contract, subject to the choice of law technique known as *dépeçage* (splitting), though it will be suggested that the possibility of involuntary *dépeçage* should be circumscribed (Section E). After the summing up of the preferred choice of law approach based on the preceding analysis (Section F), an illustration will be given to show how it will operate in different scenarios in comparison with a rival approach (Section G). After giving an analysis to English cases on arbitration agreements (Section H), the essay will conclude by examining the compatibility of the preferred approach with existing instruments (Section I).

C. Substantive Law Sphere

In this section, we will observe how the principle of severability operates in the sphere of substantive law before proceeding to the next section where we will consider whether this principle should be extended to the sphere of choice of law analysis.

The principle of severability, that arbitration and jurisdiction agreements should be treated as being severable from the matrix contract, means in the sphere of substantive law that these agreements can only be found invalid on grounds which relate directly to them and not merely as a consequence of the invalidity of the matrix contract. This proposition is accepted in many jurisdictions[9] and adopted by various instruments. The UNCITRAL Model Law, for example, provides, 'A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause' (Art 16(1)). The Hague Choice of Court Convention also provides, 'The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid' (Art 3(d)). The Recast Brussels I Regulation contains essentially the same provision (Art 25(5)).

[8] This essay will not address the relevance of an arbitration or jurisdiction agreement to the determination of the law applicable to the matrix contract. For this question, see eg *Compagnie d'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572.

[9] In England, see eg *Fiona Trust* (n 7).

The principle of severability is useful since a challenge to the jurisdiction of an arbitral tribunal or, as the case may be, the court chosen by a jurisdiction agreement often takes the form of an allegation that the matrix contract is invalid for fraud, mistake, misrepresentation, duress, or the like.[10] In the event that the tribunal or, as the case may be, the chosen court comes to accept that the matrix contract is indeed invalid, it would lose its competence if the validity of the arbitration agreement or, as the case may be, jurisdiction agreement (hereafter 'arbitration (or jurisdiction) agreement') automatically followed that of the matrix contract. However, by virtue of the principle of severability, it is open for the tribunal (or the chosen court) to form the view that the arbitration (or jurisdiction) agreement is validly concluded and proceed on that basis to hear the disputes consequent upon the finding of invalidity of the matrix contract. In many instances, the parties to an arbitration (or jurisdiction) agreement intend to have such issues resolved in their chosen forum. They may make it plain by stating along the lines that 'any disputes arising in connection with this contract, including any issues consequent upon the finding of invalidity of this contract, shall be referred to arbitration'. Such an agreement can be given effect thanks to the principle of severability.

The principle of severability is defensible as it leaves open for the tribunal (or the chosen court) to come to the conclusion that the given arbitration (or jurisdiction) agreement is invalid on the same ground that renders the matrix contract invalid. In *Fiona Trust*, a leading case which confirmed the severability of arbitration agreements in English law, Lord Hoffmann acknowledged[11] that an arbitration agreement might be hit by the same ground of invalidity as the matrix contract where, for example, a forged signature was used or the agent who concluded the contract lacked any authority to contract on the principal's behalf. This is unsurprising since an arbitration agreement is usually negotiated at the same time as other terms in the same contract and included in the same signed document. In *Harbour Assurance Ltd v Kansa General International Insurance Ltd*,[12] a case predating *Fiona Trust* in which the principle of severability was established for the first time in English law, Hoffmann LJ acknowledged[13] that the cases of *non est factum* and mistake as to the identity of the other contracting party were examples of cases in which a claim that no matrix contract came into existence would necessarily entail a denial that there was any agreement to arbitrate. It follows that in terms of outcomes, arbitration and jurisdiction agreements are not always 'severed' from the matrix contract but are only 'severable'.[14] While the word 'autonomy' is sometimes used to denote

[10] *BCY v BCZ* [2016] SGHC 249 [61] (Steven Chong J) (hereafter *BCY*).
[11] *Fiona Trust* (n 7) [17]. Lord Hope made the same point at [34] and [35].
[12] [1993] QB 701 (CA) (hereafter *Harbour Assurance*).
[13] Ibid 723.
[14] Adrian Briggs, *Private International Law in English Courts* (OUP 2014) [14.37] (hereafter Briggs, *Private International Law in English Courts*).

the same principle,[15] the expression 'severability' better captures this nuance.[16] It should, however, be noted that in terms of analytical methodology, these agreements are treated as being severed from the matrix contract since only the grounds for invalidity which relate directly to them may be taken into account.

The principle of severability should not be confused with its twin principle, Kompetenz-Kompetenz, which allows an arbitral tribunal to rule on its own competence. It is a principle just as widely accepted. The UNCITRAL Model Law, for example, provides that '[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement' (Art 16(1)). In contrast to the principle of severability which operates in the sphere of substantive law, the principle of Kompetenz-Kompetenz operates in the sphere of procedural law.[17] Since a tribunal derives its competence solely from an arbitration agreement,[18] it ought in theory to have no power to rule on the validity of the agreement. The Kompetenz-Kompetenz principle is a convenient fiction since an arbitral process could otherwise be sabotaged too easily by a spurious claim that the arbitration agreement is invalid. The fiction is defensible as the arbitral tribunal's ruling on its own competence is only provisional: while the tribunal has the initial competence to rule on its own competence, the final determination is reserved with a State court. The UNCITRAL Model Law, for example, provides that if a tribunal rules that it has jurisdiction, any party may request the local court to decide the matter (Art 16(3)).

D. Extension to the Sphere of Choice of Law Analysis?

Let us now come to the core question of this essay. If, as observed in Section C, the principle of severability is useful and defensible in the sphere of substantive law, should it also guide the choice of law analysis? To borrow a line from one author,[19] should we assume that 'there are two separate contracts ... for which an applicable law must be selected, ie, the arbitration agreement and the substantive or main contract'?

[15] Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) [389] (hereafter *Fouchard Gaillard Goldman*) notes that it is the accepted terminology in continental Europe.

[16] Pierre Mayer, 'The Limits of Severability of the Arbitration Clause' (1999) 9 ICCA Congress Series 261 (hereafter Mayer, 'The Limits of Severability').

[17] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) [3.1(c)]. For a further comparison between these two principles, see *Fouchard Gaillard Goldman* (n 15) [416].

[18] A State court, by contrast, does not need the principle of Kompetenz-Kompetenz to rule on its competence since a jurisdiction agreement is not the only source of its competence. That a court is competent to examine its bases of jurisdiction including an agreement on its jurisdiction is, therefore, beyond question.

[19] Julian David Mathew Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' (1999) 9 ICCA Congress Series 114, 136.

It is suggested that for the purpose of choice of law analysis, arbitration and jurisdiction agreements should not be treated as a distinct contract severed from the matrix contract save in exceptional cases where the given arbitration (or jurisdiction) agreement is concluded as a free-standing agreement. This suggestion rests on the following grounds.

First, since these agreements are usually negotiated and accepted as a vital part of the matrix contract, the parties would expect them to be treated in the same way as the other terms of the same contract.

Secondly, these agreements are not the only terms in a contract which are severable from the rest of the contract. Substantive terms may also survive the finding of invalidity of other terms of the same matrix contract. Yet, no suggestion is made that such terms should be treated as a distinct contract severed from the matrix contract for the purpose of choice of law analysis.

Thirdly, it is a matter for the governing law of an arbitration (or jurisdiction) agreement to determine, in the course of evaluating its validity, whether the principle of severability is accepted in the sphere of substantive law. It would accordingly be wrong to start from the assumption that arbitration and jurisdiction agreements are a priori severed from the matrix contract when embarking on the choice of law analysis.

Fourthly, whether the principle of severability should be a guiding principle depends on the purpose for which it is invoked. It is not anomalous to reject it in the context of choice of law analysis and then apply the governing law which, in the sphere of substantive law, endorses it.

Fifthly, the procedural character of arbitration and jurisdiction agreements does not warrant referring their validity to a law different from that which governs the matrix contract.

Finally, the proposition that arbitration and jurisdiction agreements should be treated as a distinct contract could not be ultimately sustained unless we could satisfactorily answer the difficult question of what generally constitutes a single contract for choice of law purposes. This question does not confront us if we argue for the opposite proposition supported by this essay since it should be sufficient to show that there are no good reasons to sever arbitration and jurisdiction agreements from the matrix contract.

These grounds will be elaborated in turn in the remainder of this section. Parenthetically, it should be noted that the mere mentioning of 'the law governing an arbitration (or jurisdiction) agreement' does not imply an admission that such an agreement should be treated as a distinct contract since that expression leaves open the question of how that law should be determined.

1. Expectation of the parties

Sometimes called 'midnight clauses',[20] arbitration and jurisdiction agreements are often negotiated as a vital part of the matrix contract and accepted without additional formality. The method of dispute resolution is an important element of the rights and obligations negotiated in a contract. Severability would be far from the minds of the ordinary parties engaged in negotiation. They would expect these agreements to be treated in the same way as the other terms in the same contract.[21]

Could the same be said if the given arbitration (or jurisdiction) agreement is concluded at a time or place different from the contract it relates to? A *compromis*, a post-dispute arbitration agreement, is a typical example of such an agreement. But a *clause compromissoire*, a pre-dispute arbitration agreement, could also be concluded at a time or place different from the contract it relates to. The temporal or spatial difference does not, however, detract from the fact that the arbitration (or jurisdiction) agreement is related to the specific contract in respect of which it is concluded.[22] It is, therefore, possible to view it as forming part of that contract. It is no different from the situation where substantive terms are separately negotiated. Take, for example, a term on the place of delivery of goods concluded after the contract of sale to which it relates. That term will no doubt be treated as forming part of the sale contract for the purpose of choice of law analysis.

It is a different story if the given arbitration (or jurisdiction) agreement is concluded as a free-standing agreement. Consider a jurisdiction agreement which reads, 'Should any dispute arise between the parties, irrespective of whether it arises in connection with this contract, each party may submit it to the courts of State X'. Such an agreement does not specify the disputes which it purports to cover. While it is rare to encounter a free-standing arbitration (or jurisdiction) agreement like this, it is not unknown.[23] Since there is no specific contract with which it is associated, a free-standing arbitration (or jurisdiction) agreement can only be treated as a distinct contract for the purpose of choice of law analysis. At the end of the day, however, such agreements may not be given effect. The UNCITRAL Model Law, for example, only gives effect to an agreement to arbitrate disputes arising 'in respect of a defined legal relationship' (Options I and II of Art 7). The Recast Brussels I Regulation likewise only gives effect to a jurisdiction agreement for disputes arising in connection with 'a particular legal relationship' (Art 25(1)).

[20] See *BCY* (n 10) [61] (per Steven Chong J).

[21] Edwin Peel, 'The Proper Law of an Arbitration Agreement' (2020) 136 LQR 534, 539.

[22] Arbitration and jurisdiction agreements concluded solely for non-contractual disputes are outside the purview of this essay since they do not raise the question whether they should be treated as being severed from the matrix contract.

[23] eg a jurisdiction agreement featured in the case of the Tokyo District Court's judgment on 15 February 2016 (available on Westlaw Japan at 2016WLJPCA02156001).

The expression 'free-standing arbitration (or jurisdiction) agreement' is often used in a broader sense. In a Singapore case, *BCY v BCZ*,[24] Chong J noted that there were two types of free-standing arbitration agreements: the first type was an arbitration agreement related to several contracts constituting a highly complex transaction and the second type was a post-dispute arbitration agreement.[25] The judge considered that an arbitration agreement of either type was free-standing because it was 'not intended to be a term of any other contract'. On that basis, the judge concluded that there was 'no question of any express choice of governing law of a main contract to govern the arbitration agreement'. As discussed, however, an arbitration agreement of the second type does relate to a specific contract, albeit on an *ex post facto* basis. An agreement of the first type, too, is associated with a specific contract, namely each of the constituent contracts. It is, therefore, suggested that an agreement of these types should also be treated as forming part of the contracts to which it relates for the purpose of choice of law analysis.[26]

2. Severability of substantive terms

Though the principle of severability has particular significance for arbitration and jurisdiction agreements, severability is not unique to them. A contract may contain a clause known as a 'severability clause' which reads something like 'If any term of this contract is found to be invalid or unenforceable, the remaining terms shall remain valid and enforceable, unless the invalid or unenforceable term is essential to either party'. Even without such a clause, some terms in a contract may remain valid and enforceable even if other terms in the same contract are found to be invalid or unenforceable. Thus, under the Consumer Rights Act 2015, where an unfair term of a consumer contract is not binding on the consumer, the contract continues, so far as practicable, to have effect in every other respect (s 67). More generally, in the English case law, where illegality renders part of a contract unenforceable, the remainder of the contract may be enforceable.[27] In *Tillman v Egon Zehnder Ltd*, a leading case concerning restraint of trade, the Supreme Court observed that '[w]here part of a contract is unenforceable, the enforceability of the remainder represents an issue which arises far more widely than in contracts of employment'.[28]

[24] *BCY* (n 10) [66].

[25] An agreement of the second type is also considered to be free-standing in Briggs, *Private International Law in English Courts* (n 14) [14.42].

[26] If it is feared that this might create complexity, the parties to a complex transaction should be vigilant to avoid the fragmentation of the governing law of the constituent contracts or care to make, by means of voluntary *dépeçage*, a specific choice of law for the arbitration agreement. As regards voluntary *dépeçage*, see discussions below at Section E.

[27] Jack Beatson, Andrew Burrows, and John Cartwright, *Anson's Law of Contract* (OUP 2020) 423.

[28] [2019] UKSC 32, [2020] AC 154 [54] (Lord Wilson).

Despite the severability of substantive terms, no suggestion is made that such terms should be treated as a distinct contract severed from the matrix contract for the purpose of choice of law analysis. It is true that these terms may, by virtue of *dépeçage*, be referred to a law different from that governs the matrix contract. However, as will be explored in the following Section E, splitting up terms within a contract by means of *dépeçage* is not the same, in terms of a choice of law methodology, as treating a term as a distinct contract severed from the matrix contract.

3. Dependence on the applicable law

While the principle of severability has come to be accepted widely, it does not necessarily mean that every legal system has embraced it. English law, for instance, had long been reluctant to do so[29] until the Court of Appeal accepted it in 1993 in *Harbour Assurance*.[30] Whether the principle of severability is accepted depends, therefore, on its governing law.[31]

What, then, is the governing law of the principle of severability? As we have seen in the preceding Section C, this principle concerns the question whether the validity of an arbitration (or jurisdiction) agreement could only be challenged on the grounds which directly relate to that agreement and not merely on the ground that the matrix contract is invalid. This question arises in the course of addressing whether the given arbitration (or jurisdiction) agreement is validly concluded, a question which is answered by the law applicable to the agreement in question. It follows that the governing law of the principle of severability is the law applicable to the arbitration (or jurisdiction) agreement in question. This suggestion is consistent with the English Arbitration Act 1996: its provision on severability (s 7) applies where English law is applicable to the arbitration agreement even if the seat of the arbitration is outside England (s 2(5)).

One author argues that both the severability principle and the Kompetenz-Kompetenz principle should be subject to the law of the country of the arbitral seat, reasoning that both principles address the kind of allocation-of-authority questions and pertain directly to the arbitral process.[32] It does make sense that the Kompetenz-Kompetenz principle, being a principle of procedural law, should

[29] See eg *Overseas Union Insurance v AA Mutual International Insurance* [1988] 2 Lloyd's Rep 63, 66, in which Evans J cited an earlier case as establishing the rule that 'arbitrators can never have jurisdiction to decide whether there was or was not a valid contract under which, if it exists, that jurisdiction arises' and commented that 'This rule owes as much to logic as it does to authority'. The quoted rule appears to reject both the principle of Kompetenz-Kompetenz and the principle of severability.

[30] *Harbour Assurance* (n 12).

[31] Briggs, *Agreements* (n 3) [3.10]; Trevor Hartley and Masato Dogauchi, 'Explanatory Report on the 2005 Hague Convention on Choice of Court Agreements' (2007) [115] (hereafter Hartley and Dogauchi, 'Explanatory Report').

[32] George Bermann, *International Arbitration and Private International Law* (The Hague Academy of International Law 2017) [135] and [137] (hereafter Bermann, *International Arbitration*).

be subject to the curial law of arbitration, which is normally the law of the seat.[33] A distinction should, however, be made with the principle of severability which, as noted in the preceding Section C, operates in the sphere of substantive law.

Another author argues that in order to decide whether an arbitration agreement is severed from the matrix contract in a given case, a preferable course is to ascertain the parties' intent rather than conducting an analysis through the prism of the governing law.[34] There is a lot of sense in this argument as many legal systems will in any event look to the parties' intent. If, however, there is no common intent between the parties, a solution could only be found in the applicable law. Where, for example, the matrix contract is procured by bribe and found to be invalid for illegality, it will not always be possible to ascertain the parties' common intent as to whether an arbitration (or jurisdiction) agreement contained in that contract should also be rendered invalid for the same reason.

4. Purpose specificity

Whether the principle of severability should be a guiding principle depends on the purpose for which it is invoked. This proposition seems widely accepted by various instruments and in the case law.

Some instruments which enshrine the principle of severability use words like 'independent' and 'distinct' to describe the relationships between an arbitration (or jurisdiction) agreement and the matrix contract. The UNCITRAL Model Law, for example, provides that 'an arbitration clause which forms part of a contract shall be treated as an agreement *independent* of the other terms of the contract' (Art 16(1) (emphasis added)). The English Arbitration Act 1996 provides that 'an arbitration agreement which forms or was intended to form part of another agreement ... shall ... be treated as a *distinct* agreement' (s 7 (emphasis added)). And the Hague Choice of Court Convention provides that 'an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement *independent* of the other terms of the contract' (Art 3(d) (emphasis added)). The Recast Brussels I Regulation contains a similar provision (Art 25(5)). These words may strengthen the impression that an arbitration (or jurisdiction) agreement is severed from the matrix contract.

A closer reading, however, reveals the drafters' intention to qualify the operation of the principle of severability. In the UNCITRAL Model Law, Art 16(1) begins with an endorsement of the principle of Kompetenz-Kompetenz by providing that

[33] *Dallal v Bank Mellat* [1986] 1 All ER 239, 252 ('The curial law is normally, but not necessarily, the law of the place where the arbitration proceedings are held').

[34] Mayer, 'The Limits of Severability' (n 16) 267. The author accepts that in theory, there is a merit in identifying the governing law.

an arbitral tribunal may rule on its own jurisdiction even where the existence or validity of the arbitration agreement is called into question. It then continues that 'For that purpose', the arbitration agreement must be treated as independent. The same words 'for that purpose' appear in s 7 of the English Arbitration Act 1996. It is no coincidence. The Departmental Advisory Committee which prepared the draft stated in its report:[35]

> [W]e have redrafted [what is now s 7] in order to follow the relevant part of Art 16 of the UNCITRAL Model Law more closely, and to make clear that the doctrine of separability is confined to the effect of invalidity etc of the main contract on the arbitration agreement, rather than being, as it was in the July 1995 draft, a free-standing principle.

It is, accordingly, possible to say that these instruments do not purport to extend the principle of severability to the sphere of choice of law analysis. The intention of the drafters of the Hague Choice of Court Convention is less clear. But the provision quoted above is immediately followed by the sentence which reads, 'The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid'. And it would be possible to interpret this sentence as qualifying the context in which to treat a jurisdiction agreement as independent. The same may be said of the Recast Brussels I Regulation.

The proposition that the principle of severability is not an all-purpose principle is also accepted in the case law. In *Harbour Assurance*, Hoffmann LJ acknowledged that an arbitration agreement might form part of the matrix contract for some purposes and might constitute a separate agreement for other purposes.[36] For instance, where an assignment is made under a contract, Colman J held in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA*[37] that the duty to submit to arbitration is an 'inseparable' component of the subject matter assigned. Similarly, the Court of Justice of the European Union held in *Cartel Damage Claims (CDC) Hydrogen Peroxide v Evonik Degussa*[38] that where a party not privy to the original contract had succeeded to an original contracting party's rights and obligations, that third party could nevertheless be bound by a jurisdiction clause to which it had not agreed.

Since the principle of severability is purpose-specific, it is not anomalous to reject it in the context of choice of law analysis and then apply the governing law

[35] The Departmental Advisory Committee on Arbitration, 'Report on the Arbitration Bill' (1996) [44].

[36] *Harbour Assurance* (n 12) 722.

[37] [2005] EWHC 454, [2005] 2 All ER (Comm) 240 [33]. Also *Sea Master Shipping Inc v Arab Bank Ltd* [2018] EWHC 1902 (Comm), [2018] Bus LR 1798 [28].

[38] Case C-352/13 [2015] ECLI:EU:C:2015:335 [65], citing its own judgment in *Coreck Maritime GmbH v Handelsveem BV* Case C-387/98 [2000] ECR I-9337.

which, in the sphere of substantive law, endorses it. Thus, even if an arbitration (or jurisdiction) agreement is considered to be subject to the same law that governs the matrix contract, that law may see the validity of the agreement unaffected by the factor invalidating the matrix contract.

Many authors accept that the principle of severability should not be extended to the sphere of choice of law analysis.[39] One author[40] agrees that this principle is purpose-specific but draws a distinction within the sphere of choice of law analysis depending on the way the jurisdiction of an arbitral tribunal is challenged. In cases where the respondent contends that the dispute falls outside the scope of the arbitration agreement, he considers that the principle of severability is inapplicable, with the result that an express choice of law for the matrix contract constitutes a choice of law for the arbitration agreement. Where, on the other hand, the respondent contends that there is no valid, existent, or effective arbitration agreement, he considers that the principle of severability is applicable, resulting in the opposite outcome. As the author himself admits, these are absurd results since the respondent would be able to influence how the governing law of an arbitration agreement is determined by the vagaries of jurisdictional challenges. A better approach would be to reject the extension of the principle of severability to the sphere of choice of law analysis altogether, irrespective of the way in which jurisdiction is challenged.

5. The dual character of arbitration and jurisdiction agreements

The procedural character of arbitration and jurisdiction agreements is sometimes cited as a ground for giving them a special treatment in the choice of law analysis. For example, the Rome I Regulation[41] excludes these agreements from its scope of application (Art 1(2)(e)). It inherited this position from its predecessor, the Rome Convention,[42] which similarly excluded these agreements from its scope (Art 1(2)(d)). According to the Report of Professors Giuliano and Lagarde on the Convention,[43] the exclusion was based in part on the view that the matter

[39] See eg Ian Glick and Niranjan Venkatesan, 'Choosing the Law Governing the Arbitration Agreement' in Neil Kaplan and Michael Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (Kluwer Law International 2018) 131 [9.02] (hereafter Glick and Venkatesan, 'Choosing the Law') and Briggs, *Private International Law in English Courts* (n 14) [14.37].

[40] Blake Primrose, 'Separability and stage one of the *Sulamerica* inquiry' (2017) 33 Arbitration International 139.

[41] 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) [2008] OJ L177/6 (hereafter Rome I Regulation).

[42] Rome Convention on the law applicable to contractual obligations (1980) (consolidated version [1998] OJ C27/34) (hereafter Rome Convention).

[43] Mario Giuliano and Paul Lagarde, 'Report on the Convention on the law applicable to contractual obligations' [1980] OJ C282/11 (hereafter Giuliano and Lagarde Report).

lay within the sphere of procedure. Procedure was excluded from the scope of the Convention (Art 1(2)(h)) and is likewise under the Regulation (Art 1(3)).[44] As will be discussed later in this essay (Section I), the exclusion of arbitration and jurisdiction agreements from the scope of these instruments does not preclude the possibility for the courts of Member States to treat these agreements as forming part of the matrix contract for the purpose of choice of law analysis.

There is no doubt that arbitration and jurisdiction agreements have procedural character since they concern the method of dispute resolution and hence possess procedural dimensions. The fact that an agreement has a procedural character, however, does not warrant the assumption that each and every issue pertaining to it is a procedural issue since the agreement also has substantive dimensions. As put by one author:[45]

> [A] choice-of-court agreement has a hybrid nature. On the one hand, it is a private-law contract: to this extent it falls under the law of contract; on the other hand, it has procedural (jurisdictional) consequences: to this extent, it falls under the law of procedure. In order to be valid, it must comply with the normal requirements for a private-law contract. If it is not valid as a contract, it can have no jurisdictional effects. However, once it is decided that it is valid, we then move from the law of contract to that of procedure to determine what its effects are ...

It is, therefore, unhelpful to pin a procedural label on arbitration and jurisdiction agreements. For the purpose of determining applicable laws, a better approach would be to consider which issues are procedural and which are substantive. Only the issues which directly implicate the resources of the forum State in the administration of justice should be characterised as procedural and be submitted to the *lex fori* (the law of the forum) in accordance with the maxim '*forum regit processum*' (the law of the forum governs procedure). Other issues should be characterised as substantive and be submitted to the *lex causae* (the governing law of the agreement) as ascertained by the normal choice of law analysis.

In fact, arbitration and jurisdiction agreements are not the only agreements possessing both procedural and substantive characters. Other agreements, such as an anti-suit agreement (ie an agreement not to sue), an agreement to discontinue an action, an agreement to desist from executing a judgment, an agreement to abstain from disputing particular facts, and an agreement to refrain from adducing

[44] When consulted on a draft text of the Regulation, the European Economic and Social Committee also observed that the exclusion of arbitration and jurisdiction agreements was based on the same reasoning as the exclusion of procedure: Opinion of the European Economic and Social Committee on the Proposal for a Regulation on the law applicable to contractual obligations (Rome I) [2006] OJ C318/58 [3.1.4].

[45] Trevor Hartley, *Choice-of-court Agreements under the European and International Instruments* (OUP 2013) [7.01].

particular evidence, possess the dual characters. It may, therefore, be said generally that with respect to any agreement, the appropriate question to ask is which, if any, are procedural issues and which are substantive issues.[46]

Among the issues pertaining to arbitration and jurisdiction agreements, their effects of conferring or depriving jurisdiction are obviously procedural issues and should accordingly be subject to the *lex fori* (the law of the forum where a suit is brought pursuant to or, as the case may be, regardless of an arbitration (or jurisdiction) agreement). The formation, validity, and interpretation of these agreements, on the other hand, have less direct implications for the resource of the forum State and should, therefore, be regarded as substantive issues, in view also of the fact that they do not pertain uniquely to arbitration and jurisdiction agreements but can be relevant to any contract. These issues should accordingly be submitted to the *lex causae*.

As a side note, a distinction should also be made between the curial law of arbitration and the law applicable to arbitration agreements.[47] The curial law of arbitration means the law applicable to arbitral proceedings, which may hardly be described as an aspect of arbitration agreements. It governs both the tribunal's conduct of arbitral proceedings and the national court's supervision, support, and control of arbitral proceedings.[48] There is a broad consensus that the curial law is normally the law of the country where the arbitration is seated.[49]

While reference to the *lex fori* or the law of the seat would automatically sever arbitration and jurisdiction agreements from the matrix contract, reference to the *lex causae* would not. It may, therefore, be concluded that the procedural character of these agreements is not a sufficient reason for treating them as a distinct contract severed from the matrix contract for the purpose of choice of law analysis.

6. Question of what generally constitutes a single contract for the choice of law purposes

If we were to argue for the proposition that arbitration and jurisdiction agreements should be treated as a distinct contract, we would be confronted with

[46] For further analysis, see Koji Takahashi, 'Law Applicable to Choice-of-Court Agreements' (2015) 58 Japanese Yearbook of International Law 384, 391–4.

[47] cf *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574, [2020] 3 All ER 577 (hereafter *Enka* (CA)). The Court of Appeal's decision and reasoning in this case will be discussed in Section H below. Work on this essay was completed before the UK Supreme Court delivered its own ruling in the case ([2020] UKSC 38) in October 2020. That ruling is addressed separately in Section K (Postscript) below.

[48] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1531 (hereafter Born, *International Commercial Arbitration*).

[49] Ibid 1604.

the question of what generally constitutes a single contract for choice of law purposes. That proposition could not be ultimately sustained unless we could satisfactorily answer this question, which is theoretically difficult. Where, for example, an agreement for the sale of goods and an agreement for the provision of services are concluded in the course of the same transaction and their terms are set out in the same document, do they constitute a single contract or two distinct contracts? The Rome I Regulation sets forth a rule for determining the governing law of a contract containing multiple elements such as those of sale of goods and the provision of services (Art 4(2)). The Regulation would not, however, exclude the treatment of those elements as two distinct contracts especially if in the circumstances one may be performed independently of the other. This is apparent from the listing of these two categories of contracts in sub-paras (a) and (b) of Art 4(1).

If one argues, as this essay does, for the opposite proposition, namely that arbitration and jurisdiction agreements should be treated as forming part of the matrix contract, it is unnecessary to answer the question what generally constitutes a single contract for the choice of law purpose. Since arbitration and jurisdiction agreements are, save those concluded as a free-standing agreement, related to a specific contract, it suffices to show that there is no good reason to treat them as a distinct contract. This much has been attempted throughout this section.

E. Possibility of *Dépeçage*

In the last section (Section D), it has been suggested that arbitration and jurisdiction agreements should be treated, for the purpose of choice of law analysis, as forming part of the matrix contract. This means submitting these terms to the choice of law analysis in the same way as other terms of the same matrix contract. It follows that to the extent the applicable choice of law rules employ the technique of *dépeçage*, it is possible for an arbitration (or jurisdiction) agreement to be referred to a law different from that which governs the matrix contract.[50] But splitting up terms within a contract by means of *dépeçage* is not the same as treating a term as a distinct contract in terms of choice of law methodology. In this section, we will first explain the difference and then consider to what extent *dépeçage* should be embraced in principle.

[50] See also Glick and Venkatesan, 'Choosing the Law' (n 39) [9.02].

1. *Dépeçage* distinguished from treating a term as a distinct contract

The word 'severability' is sometimes used to indicate that parts of a contract are severable for the sake of *dépeçage*. The Rome Convention, for example, provided that 'a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country' (Art 4(1)).[51] It should be noted, however, that splitting up terms within a contract by means of *dépeçage* is not the same as treating a term of a contract as a distinct contract severed from the matrix contract. The question of what constitutes a contract logically precedes the question of whether the splitting up of terms within a contract for choice of law purposes is permissible.

For an illustration of the point, consider a typical scenario where the parties make no specific choice of law for an arbitration (or jurisdiction) agreement. If the agreement is treated as a distinct contract severed from the matrix contract, its governing law would have to be ascertained independently of the matrix contract and the possibility of *dépeçage* would not arise for consideration. If, on the other hand, the agreement is treated as forming part of the matrix contract, it would be governed by the same law as the latter, subject to the possibility of involuntary *dépeçage* with all its limitations as suggested below.

2. Voluntary and involuntary *dépeçage*

There are two types of *dépeçage*: voluntary and involuntary. Voluntary *dépeçage* allows the parties to a contract to choose the law applicable to a part or parts only of the contract. It is in the form of either a partial choice of law or multiple choices of law.[52] Involuntary *dépeçage* (or objective *dépeçage*) allows the court to apply different laws to different parts of a contract.

Voluntary *dépeçage* is widely accepted. The Rome I Regulation, for example, provides that '[b]y their choice the parties can select the law applicable to the whole or to part only of the contract' (Art 3(1)). Involuntary *dépeçage* is less widely accepted. The possibility existed under the Rome Convention, which contained a provision permitting involuntary *dépeçage* (Art 4(1), quoted above in Section E.1). But the Giuliano and Lagarde Report on the Convention states that 'the court must have recourse to severance as seldom as possible'.[53] Citing this Report, the European Court of Justice took a strict stance to involuntary

[51] Giuliano and Lagarde Report (n 43) 17 also makes mention of 'the question whether severability (*dépeçage*) was to be allowed'.

[52] See Art 2(2)(a) and (b) of the Hague Principles on Choice of Law in International Commercial Contracts (2015) (hereafter Hague Choice of Law Principles).

[53] Giuliano and Lagarde Report (n 43) 23.

dépeçage, holding in one case[54] that 'the possibility of separating a contract into a number of parts in order to make it subject to a number of laws runs counter to the objectives of the Convention', by which the Court meant raising the level of legal certainty. The Rome I Regulation did not inherit from the Rome Convention the provision permitting involuntary *dépeçage*.

Voluntary *dépeçage* makes sense as a logical extension of the party autonomy, a principle which enjoys near-universal acceptance in the field of contract law. It should, therefore, be possible, by means of voluntary *dépeçage*, to refer an arbitration (or jurisdiction) agreement to a law different from that which governs the matrix contract.

Then, what about involuntary *dépeçage*? Should it be accepted at all and in what circumstances? The main objection to involuntary *dépeçage* is its unpredictability. It is all very well to say that a severable part of a contract *may* be referred to a law different from that which governs the contract. But it is not clear when it *should* or *must* be so referred. The test under the Rome Convention of 'a severable part of the contract' having 'a closer connection with another country' (Art 4(1)) was too general and too vague. It is suggested in principle that the court should only be allowed to resort to involuntary *dépeçage* if the applicable choice of law rules provide in clear language what specific terms are referred, separately from the remainder of the matrix contract, to what laws. Thus, the applicable choice of law rules may provide that an arbitration agreement should be subject to the law of the country of the arbitral seat or that a jurisdiction agreement should be subject to the law of the country of the chosen court. Only if there is such a clear and specific provision in the applicable choice of law rules, should the court be allowed to resort to involuntary *dépeçage* to refer an arbitration (or jurisdiction) agreement to a law different from that which governs the matrix contract.

It is suggested that there should be a further limitation to the operation of involuntary *dépeçage*: the court should only be allowed to resort to it where the parties have made no choice of law for the matrix contract. Where the parties have chosen a law to govern the matrix contract, it appears hardly defensible to refer a part of it to a different law by means of involuntary *dépeçage*. The Rome Convention, too, only permitted involuntary *dépeçage* where the parties made no choice of law for the matrix contract

[54] *Intercontainer Interfrigo v Balkenende Oosthuizen and MIC Operations* Case C-133/08 [2009] ECR I-9687 [43]–[47].

F. Preferred Choice of Law Approach

From the foregoing analysis, it is suggested that the following choice of law approach should be adopted to ascertain the governing law of arbitration and jurisdiction agreements.

Arbitration and jurisdiction agreements should not be treated as a distinct contract severed from the matrix contract. The principle of severability, which is useful and defensible in the sphere of substantive law, should not be extended to the sphere of choice of law analysis. These agreements should be treated as forming part of the matrix contract.

It should, however, be accepted that arbitration and jurisdiction agreements may, by virtue of *dépeçage*, be referred to a law different from that which governs the matrix contract. Accordingly, the parties should be allowed to make a specific choice of law for such agreements by means of voluntary *dépeçage*. The court, on the other hand, should be allowed to resort to involuntary *dépeçage* only where the parties have not made a choice of law for the matrix contract and only if the applicable choice of law rules contain a clear and specific provision for such agreements.

G. Illustrations of the Contrasting Approaches

This section will illustrate how the preferred approach, summarised in the last section (Section F), will operate in different scenarios. In the course of analysis, comparison will be made with the rival approach, that is, the approach of treating arbitration and jurisdiction agreements as a distinct contract severed from the matrix contract.

At its most basic level, the difference between the contrasting approaches lies in whether the governing law of the matrix contract, in and of itself, constitutes the governing law of the arbitration (or jurisdiction) agreement contained therein. The question is answered affirmatively if we follow the preferred approach of treating arbitration and jurisdiction agreements as forming part of the matrix contract, whereas it is answered negatively if we follow the rival approach.

The following analysis will illustrate these contrasting approaches more fully with the implications of *dépeçage*. It will examine (1) the cases where the parties have made, expressly or impliedly, a choice of law for the matrix contract, and (2) the cases where the parties have made no choice of law for the matrix contract. But before embarking on the analysis, it is necessary to set out the analytical premise regarding the applicable choice of law rules.

1. Analytical premise

The analysis in this section will illustrate the operation of the contrasting approaches based on a certain premise with respect to the applicable choice of law rules. Rather than proceeding on the basis of any concrete example of choice of law rules, this section will, with a view to retaining a wider relevance, base its analysis on hypothetical choice of law rules sharing the following traits with the conventional and mainstream choice of law rules.

First, it is presupposed that the applicable choice of law rules for contracts in general consist of (i) a rule giving effect to the parties' express choice of law, if any; (ii) in the absence of any express choice, a rule giving effect to the parties' implied choice of law, if any; and (iii) in the absence of any choice, a rule specifying the governing law by objective connecting factors. This set of rules reflects the near-universal acceptance of party autonomy as the primary choice of law principle for contracts. It is also consistent with the common law choice of law rules for contracts[55] and the Rome I Regulation.

Secondly, it is presupposed that the rule giving effect to the parties' implied choice of law (rule (ii) above) may only be triggered if the choice is actually made at the time the parties concluded the contract. It does not give effect to a fictional choice, namely a choice which the parties did not actually make but would have made if they had addressed their minds to the choice of law issue at the time of the conclusion of the contract. This presupposition should be supported since confounding an implied choice with a fictional choice would make rule (ii) an objective rule in all but name, leading to the confusion of rules (ii) and (iii). Properly confined to an actual choice, rule (ii) would only be different from rule (i) on the point of whether the choice is expressed or tacit. It would be safe to say that this presupposition is widely supported and consistent with the common law[56] and the Rome I Regulation[57] as well as the Hague Choice of Law Principles.[58]

Thirdly, it is presupposed that the applicable choice of law rules for contracts also guide the determination of the law applicable to arbitration and jurisdiction agreements. Comparatively, this is the mainstream methodology,[59] though there are, on

[55] Lord Collins of Mapesbury and others (eds), *Dicey, Morris & Collins: The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) [32-006].

[56] Ibid [32-007], though it is also observed that 'before the objective close connection test became fully established, the test of inferred intention was in truth an objective test designed not to elicit actual intention but to impute an intention which had not been formed'.

[57] Giuliano and Lagarde Report (n 43) 17 stated that the courts were not permitted 'to infer a choice of law that the parties might have made where they had no clear intention of making a choice'.

[58] Hague Choice of Law Principles (n 52). Its official commentary states at [4.6] that 'the choice must be a real one although not expressly stated in the contract.... A presumed intention imputed to the parties does not suffice'.

[59] As is the case in England and Singapore, as observed in *BNA v BNB* [2019] SGCA 84 [45] (Steven Chong JA). The English case law applies the common law choice of law rules, rather than the rules of the Rome I Regulation (See Art 1(2)(e)).

the other hand, States adopting special rules for such agreements. Switzerland, for example, has special choice of law rules for arbitration agreements, with its Federal Act on Private International Law setting forth alternative connecting factors (Art 178.2).[60] The Civil Code of Quebec does likewise (Art 3121).[61] The French courts, for their part, apply a substantive rule of international arbitration ('règle matérielle du droit international de l'arbitrage'), instead of engaging in the normal choice of law analysis, to assess the validity of arbitration agreements.[62] The evaluation of such approaches is beyond the scope and purpose of this essay.

2. Where there is a choice of law for the matrix contract

(a) Preferred approach

Where the parties have made, expressly or impliedly, a choice of law for the matrix contract, if we follow the preferred approach of treating an arbitration (or jurisdiction) agreement as forming part of the matrix contract, the choice of law for the matrix contract, in and of itself, constitutes the choice of law for the arbitration (or jurisdiction) agreement. This conclusion is subject to the possibility of voluntary *dépeçage*: the parties may choose a separate law for the arbitration (or jurisdiction) agreement.

An express choice of a separate law is, however, hardly ever made in practice.[63] This is because the parties do not usually address their minds to the law applicable to arbitration and jurisdiction agreements when they conclude the matrix contract.[64] It is, therefore, unlikely for the parties to resort to voluntary *dépeçage* by means of an express choice.

What is commonly done in an arbitration agreement is to specify the seat of arbitration.[65] The seat is sometimes specified in a country other than the country whose law is chosen as the governing law of the matrix contract. Since voluntary *dépeçage* may be implemented by way of an implied choice, this begs the question whether it is possible to elicit an intention to choose the law of the seat as the governing law of the arbitration agreement. The choice of an arbitral seat is generally made to anchor the arbitration in a trusted jurisdiction supportive of arbitration.

[60] It reads, 'Die Schiedsvereinbarung ist im Übrigen gültig, wenn sie dem von den Parteien gewählten, dem auf die Streitsache, insbesondere dem auf den Hauptvertrag anwendbaren oder dem schweizerischen Recht entspricht'.

[61] It reads, 'En l'absence de désignation par les parties, la convention d'arbitrage est régie par la loi applicable au contrat principal ou, si cette loi a pour effet d'invalider la convention, par la loi de l'État où l'arbitrage se déroule'.

[62] Judgment of the French Cour de cassation in *Municipalite de Khoms El Mergeb v Societe Dalico* [1994] 1 Rev Arb 116.

[63] Born, *International Commercial Arbitration* (n 48) 580.

[64] Bermann, *International Arbitration* (n 32) [164].

[65] Born, *International Commercial Arbitration* (n 48) 497.

It is, therefore, a reliable indicator of the parties' intention to choose the curial law of arbitration. But it is not a good indicator of their intention to choose the law governing the validity of their agreement to arbitrate.[66] Similarly, sometimes a jurisdiction agreement specifies the courts in a country other than the country whose law is chosen for the matrix contract. The choice of courts is a reliable indicator of the parties' intention to submit to the procedural rules of the chosen forum but is not a good indicator of their intention to choose the law governing the validity of their jurisdiction agreement. As noted above, the parties do not usually address their minds to the law applicable to arbitration and jurisdiction agreements when they conclude the matrix contract. As an implied choice may only be founded on an actual intention, it may be concluded that the parties to an arbitration (or jurisdiction) agreement are unlikely to make, by means of voluntary *dépeçage*, an implied choice of law for the agreement.

It is true that when the parties make a choice of law for the matrix contract, they are just as unlikely to have an actual intention to extend the coverage of the law to an arbitration (or jurisdiction) agreement contained therein. For that reason, one author observes that the application of the law governing the matrix contract to the arbitration agreement would be no less arbitrary than the application of the law of the seat.[67] However, on the proposition that an arbitration (or jurisdiction) agreement should be treated as forming part of the matrix contract, it is a matter of course that a choice of law made by the parties for the matrix contract constitutes the choice of law for the arbitration (or jurisdiction) agreement.

Where the applicable choice of law rules contain rules for the protection of presumptively weaker parties, the approach of treating an arbitration (or jurisdiction) agreement as forming part of the matrix contract would be helpful for such parties. Suppose that a consumer wishes to challenge the validity of an arbitration (or jurisdiction) agreement contained in a contract he has concluded with a professional trader. If the applicable choice of law rules allow the consumer to rely on the mandatory rules of the law of the country where he has his habitual residence,[68] he may do so not only to challenge the validity of the matrix contract but also to challenge the validity of the arbitration (or jurisdiction) agreement[69] because, under this

[66] Briggs, *Private International Law in English Courts* (n 14) [14.41].

[67] Jonathan Hill, 'The law governing an arbitration clause' (University of Bristol Law School Blog) <https://legalresearch.blogs.bris.ac.uk/2017/03/the-law-governing-an-arbitration-clause> accessed 23 August 2020. For a similar view, see *Fouchard Gaillard Goldman* (n 15) [425].

[68] eg Art 6(2) of the Rome I Regulation.

[69] A consumer may invoke such rules as Art 3(1) and Annex 1(q) of the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95/29. This is extra ammunition in the armoury of a consumer, who may in addition be able to rely on the law of the forum if there are any rules denying effect to an arbitration agreement, such as s 91(1) of the English Arbitration Act 1996 (which is applicable 'whatever the law applicable to the arbitration agreement' (s 89(3))).

approach, the arbitration (or jurisdiction) agreement would be subject to the same law that governs the matrix contract.[70]

(b) Rival approach

Where the parties have made, expressly or impliedly, a choice of law for the matrix contract, if we follow the rival approach, that is, the approach of treating an arbitration (or jurisdiction) agreement as a distinct contract severed from the matrix contract, the choice of law for the matrix contract does not, in and of itself, constitute a choice of law for the arbitration (or jurisdiction) agreement. This is so even where, as is often the case, the choice of law clause uses all-embracing language purporting to cover all terms in the matrix contract, unless there is a specific indication that the arbitration (or jurisdiction) agreement is also covered.[71]

Treated as a distinct contract, an arbitration (or jurisdiction) agreement is subject to the law chosen by the parties, if any. In practice, though, hardly ever do they make an actual choice of law specifically for these agreements. This is because, as noted earlier, very rarely do the parties address their minds to the law applicable to these agreements when they conclude the matrix contract.

In the absence of choice of law by the parties, the governing law will have to be determined by objective connecting factors. The connecting factors adopted by the general choice of law rules for contracts may be either too vague or ill-suited to be used to designate the governing law of an arbitration (or jurisdiction) agreement. It would, therefore, be useful for the applicable choice of law rules to set out specific connecting factors for such agreements. This, however, leaves a difficult question of what the appropriate connecting factors are. It might be thought that an arbitration agreement should be subject to the law of the country of the arbitral seat or that a jurisdiction agreement should be subject to the law of the country of the chosen court. But these connecting factors are not entirely persuasive since at issue here is the validity of the agreement rather than the procedure of arbitration (or litigation).[72]

Where the applicable choice of law rules contain rules for the protection of presumptively weaker parties, the approach of treating an arbitration (or jurisdiction) agreement as a distinct contract would not be helpful for such parties. Suppose that a consumer wishes to challenge the validity of an arbitration (or jurisdiction) agreement contained in a contract he has concluded with a professional trader. If

[70] As the Rome I Regulation excludes arbitration and jurisdiction agreements from its scope of application (Art 1(2)(e)), Art 6(2) is only applicable to the matrix contract. The exclusion from the scope does not, however, preclude the possibility for the courts of Member States to deem these agreements to be subject to the same law that applies to the matrix contract (see the discussion of this point in Section I).

[71] As in the case of *Kabab-JI SAL v Kout Food* [2020] EWCA Civ 6, [2020] 1 Lloyd's Rep 269. Flaux LJ held, 'Governing law clauses do not necessarily cover the arbitration agreement. This one does because of the correct construction of the terms' [62].

[72] Briggs, *Private International Law in English Courts* (n 14) [14.40].

the choice of law rules allow the consumer to rely on the mandatory rules of the law of the country where he has his habitual residence,[73] he may do so to challenge the validity of the matrix contract but may not do so to challenge the validity of the arbitration (or jurisdiction) agreement because the governing law of the arbitration (or jurisdiction) agreement would, under this approach, have to be determined separately. Moreover, arbitration and jurisdiction agreements, treated as a distinct contract, may not qualify as a consumer contract since their procedural purposes do not easily square with the substantive considerations on which the definition of a consumer contract depends.[74]

3. Where there is no choice of law for the matrix contract

Having examined the scenario where the parties have made a choice of law for the matrix contract, let us now turn to the scenario where the parties have made no choice. In that scenario, the governing law of the matrix contract is determined by objective connecting factors.

If we follow the rival approach, that is, the approach of treating an arbitration (or jurisdiction) agreement as a distinct contract severed from the matrix contract, the law governing the matrix contract does not constitute the governing law of the arbitration (or jurisdiction) agreement. One consequence is that where the applicable choice of law rules contain rules for the protection of presumptively weaker parties,[75] the law specified by such rules may not be relied upon by such parties to challenge the validity of the arbitration (or jurisdiction) agreement. Under this approach, in order to find out what is the governing law of an arbitration (or jurisdiction) agreement, a separate analysis is necessary. As noted earlier, rarely in practice do the parties make an actual choice, expressed or implied, of law specifically for an arbitration (or jurisdiction) agreement. It makes it necessary to rely in virtually all cases on the objective connecting factors. As also noted earlier, the objective connecting factors adopted by the general choice of law rules for contracts may be either too vague or ill-suited to be used to designate the governing law of an arbitration (or jurisdiction) agreement. It would, therefore, be useful for the applicable choice of law rules to set out specific connecting factors for such agreements. This, however, leaves a difficult question of what the appropriate connecting factors are.

[73] eg Art 6(2) of the Rome I Regulation.

[74] The definition of a consumer contract under the Rome I Regulation, for example, depends on whether it is concluded by a natural person for a purpose outside his trade or profession with another party acting in the exercise of his trade or profession (Art 6(1)).

[75] eg Art 6(1) of the Rome I Regulation.

If, on the other hand, we follow the preferred approach, that is, the approach of treating an arbitration (or jurisdiction) agreement as forming part of the matrix contract, the law governing the latter, ascertained by objective connecting factors including those under any protective rules for the presumptively weaker parties, would in and of itself constitute the governing law of the arbitration (or jurisdiction) agreement. This conclusion is subject to the possibility of voluntary and involuntary *dépeçage*. In practice, it is unlikely for the parties to resort to voluntary *dépeçage* by means of either an express or implied choice. This is because, as noted earlier, they rarely address their minds to the law governing an arbitration (or jurisdiction) agreement when they conclude the matrix contract. As noted earlier in a different context, the court should only be allowed to resort to involuntary *dépeçage* where the applicable choice of law rules contain a clear and specific provision for an arbitration (or jurisdiction) agreement.

4. Observation

The above illustration has revealed some drawbacks of the approach of treating arbitration and jurisdiction agreements as a distinct contract severed from the matrix contract. That approach makes it necessary to tackle the difficult question of what the objective connecting factors should be for determining the governing law of these agreements. That approach is also not helpful for presumptively weaker parties as it does not allow them to rely on the law specified by the protective choice of law rules in challenging the arbitration and jurisdiction agreements. The preferred approach of rejecting severance excels in simplicity while, combined with the possibility of voluntary *dépeçage*, allowing for necessary flexibility. It is also conducive to appropriate results, including the protection of presumptively weaker parties. These advantages offer further support to the preferred approach along with its theoretical underpinnings examined in an earlier Section (Section D).

H. Analysis of English Cases on Arbitration Agreements

In this Section, we will examine some English cases on the law applicable to arbitration agreements to see which approach—the preferred approach or the rival approach—is favoured. The English authorities contain a number of irreconcilable decisions and statements.

Although the Supreme Court's decision is expected shortly, the most recent ruling at the time of writing is the Court of Appeal's decision in *Enka*.[76] Writing

[76] *Enka* (CA) (n 47). The Supreme Court delivered its ruling in the case on 9 October 2020 (see the postscript in Section K below).

for the court, Popplewell LJ held that the governing law of the matrix contract was generally not applicable to the arbitration agreement contained therein. His Lordship relied on the principle of severability to insulate the arbitration agreement for choice of law purposes.[77] His decision accordingly lends support to the rival approach. Based on the observation that the law applicable to an arbitration agreement is more closely connected with the curial law than with the law governing the matrix contract,[78] his Lordship asked rhetorically, where the parties have chosen 'the curial law of the arbitration agreement', why the governing law of the matrix contract should have anything to say about 'the closely related aspect of the very same arbitration agreement'.[79] But the expression 'the curial law of the arbitration agreement' strikes one as odd. The curial law of arbitration means the law applicable to arbitral proceedings, which may hardly be described as a closely related aspect of an arbitration agreement. His Lordship considered that there was an overlap between the curial law and the law applicable to arbitration agreements in terms of their scope. In his reasoning, 'the scope of the curial law is not limited to the exercise of purely procedural powers' but 'involves the curial court determining aspects of the substantive rights of the parties under their arbitration agreement by reference to the curial law'.[80] Though it is certainly true that the curial law affects the right to pursue arbitration in many ways, this reasoning merely confirms that the curial law is applicable not only to the tribunal's conduct but also to the national court's supervision, support, and control of arbitral proceedings. It does not seem to entail that there is an overlap of the scope of the curial law with that of the law applicable to arbitration agreements. It should also be noted that his Lordship's reasoning appears to presuppose that an implied choice of law may be made on a fictional basis. This is indicated by his statement that 'there is a strong presumption that the parties have impliedly chosen the curial law' as the law applicable to arbitration agreements and that this presumption could only be displaced 'where there are powerful countervailing factors'.[81] Such a presumption would be untenable if we take the position that an implied choice of law may only be ascertained by eliciting an actual intention rather than by imputing a fictional intention. As we have seen in Section G.1, confounding an implied choice with a fictional choice is difficult to defend in principle.

Prior to *Enka*, the leading English case was *Sulamérica CIA Nacional De Seguros SA v Enesa Engenharia SA*.[82] In this case, Moore-Bick LJ acknowledged that the concept of severability did not insulate an arbitration agreement from the matrix contract for all purposes. Yet, for the purpose of ascertaining the governing law of

[77] Ibid [92] and [94].
[78] Ibid [99].
[79] Ibid [94].
[80] Ibid [96].
[81] Ibid [105]. See also [100].
[82] [2012] EWCA Civ 638, [2013] 1 WLR 102 [26]–[32].

an arbitration agreement, his Lordship effectively treated the agreement as being severed from the matrix contract. This is indicated by his apparent acceptance of the appellants' concession that the express choice of law for the matrix contract did not amount to an express choice of law for the arbitration agreement.[83] His Lordship proceeded, after finding that the parties had made no choice of law for the arbitration agreement, to consider the law with which the agreement had the closest and most real connection.[84] Had the arbitration agreement been treated as forming part of the matrix contract, it would not have been necessary to do so; it should rather have been sufficient to say that the arbitration agreement was subject to the law chosen for the matrix contract. It was in a narrower context of ascertaining an implied choice of law for the arbitration agreement that his Lordship refused to insulate the arbitration agreement from the matrix contract. He took 'the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law'.[85] Taken as a whole, the choice of law approach followed by this decision may be described as a half-hearted rejection of the principle of severability (or a lukewarm embracement of it, if viewed from the opposite end). The result is a lack of clarity: whether the said assumption 'the parties intended the whole of their relationship to be governed by the same system of law' may be maintained is not clear where the parties made no choice of law for the matrix contract or where they made a choice only impliedly.

In *C v D*,[86] a case which predated *Sulamérica*, Longmore LJ took an unwavering stance in favour of treating an arbitration agreement as severed from the matrix contract. His Lordship held in *obiter* that '[i]t is necessary to distinguish between the proper law of the underlying insurance contract ... and the arbitration agreement which is ... a separable and separate agreement'[87] and that 'an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract'.[88] These remarks clearly support the rival approach. His Lordship's dicta was later explained by the Master of the Rolls in *Sulamérica* as resulting from 'the growing awareness of the importance of the principle that an arbitration agreement is separable from, in some ways almost juridically independent of, the underlying contract of which it physically is part'.[89]

In earlier cases, it is possible to find remarks in support of treating an arbitration agreement as forming part of the matrix contract. Thus, in *Sumitomo Heavy*

[83] Ibid [27].
[84] Ibid [32].
[85] Ibid [11], [26]–[27].
[86] [2007] EWCA Civ 1282, [2008] 1 Lloyd's Rep 239.
[87] Ibid [22].
[88] Ibid [26].
[89] Ibid [55].

Industries Ltd v Oil & Natural Gas Commission,[90] Potter J stated in *obiter* that 'since the arbitration agreement is part of the substance of the underlying contract', the proper law of the latter would 'usually be decisive' as to the proper law of the former 'in the absence of an express contrary choice'. This statement echoes the preferred approach.

As surveyed, the English case law shows a growing tendency in favour of the rival approach. But the signal is by no means uniform. It is hoped that in the shortly expected decision in *Enka*, the Supreme Court will see the sense of taking the preferred approach

I. Compatibility with Existing Instruments

This section will examine the compatibility of the preferred approach, as summed up in Section F, with existing instruments. This exercise is important since theories incompatible with established instruments risk being consigned to irrelevance. To this end, the following analysis will first examine the Rome I Regulation, a choice of law instrument for contracts generally. It will then turn to major international instruments on arbitration and jurisdiction agreements, respectively.

1. Rome I Regulation

Under the Rome I Regulation, arbitration and jurisdiction agreements are excluded from its scope of application (Art 1(2)(e)). At first sight, it might be thought that the preferred approach, that is, the approach of treating these agreements as forming part of the matrix contract, is inconsistent with the Regulation.

The Regulation follows its predecessor, the Rome Convention, which similarly excluded arbitration and jurisdiction agreements from its scope of application (Art 1(2)(d)). The background to the exclusion is explained in the Giuliano and Lagarde Report for the Convention.[91] With respect to jurisdiction agreements, the Report refers to two opposing views: the view that 'the matter lies within the sphere of procedure' and the view that jurisdiction agreements should be governed by the same law as the matrix contract. With respect to arbitration agreements, the Report again juxtaposes the view that 'severability is accepted in principle ... and the arbitration clause is independent' with the view that 'an arbitration agreement does not differ from other agreements as

[90] [1994] 1 Lloyd's Rep 45, 57.
[91] Giuliano and Lagarde Report (n 43) 11–12.

regards the contractual aspects'. The Report then mentions the adoption of the proposal that 'this matter should be studied separately'. The exclusion of arbitration and jurisdiction agreements should, accordingly, not be taken as indicating an approval of the proposition that they should be treated as a distinct contract severed from the matrix contract. Rather, it should be taken as leaving the matter to each Contracting State due to the failure to reach a consensus. Accordingly, it is open for the courts of each Member State to apply to arbitration and jurisdiction agreements the same law that governs the matrix contract as ascertained by the rules of the Rome I Regulation,[92] including protective rules for presumptively weaker parties such as those contained in Art 6. Put differently, the Regulation determines the governing law of the matrix contract which it is open for the courts of each State to deem also applicable to arbitration and jurisdiction agreements.[93] The possibility of treating these agreements as forming part of the matrix contract in this way is not precluded by their exclusion from the scope of application of the Regulation. It may, therefore, be concluded that the preferred approach of treating arbitration and jurisdiction agreements as forming part of the matrix contract is compatible with the Rome I Regulation.

2. Instruments on arbitration agreements

The New York Convention[94] provides that the recognition and enforcement of a foreign arbitral award may be refused if an 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' (Art V(1)(a)). The UNCITRAL Model Law provides for virtually the same choice of law rules for two contexts, namely the context of annulment as well as the context of the recognition and enforcement of awards (Arts 34(2)(a)(i)[95] and 36(1)(a)(i)).

These choice of law rules should, it is suggested, be applied both by national courts and by arbitral tribunals and irrespective of the context in which the issue arises, be it before the commencement of an arbitration, during the course

[92] For the same view in relation to arbitration agreements, see Adrian Briggs, *The Conflict of Laws* (4th edn, OUP 2019) 199; and in relation to jurisdiction agreements, see Francisco Garcimartin, 'Prorogation of Jurisdiction' in Andrew Dickinson and Eva Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) [9.68] (hereafter Garcimartin, 'Prorogation of Jurisdiction')

[93] It should be noted that this is not what the English courts are actually doing. The recent cases proceed on the basis that the common law choice of law rules apply to determine the law applicable to arbitration agreements.

[94] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (hereafter New York Convention).

[95] It refers, failing any indication on the law to which the parties have subjected the arbitration agreement, to 'the law of this State', which in the context of annulment points to the law of the country where the award was made (See Art 1(2)).

of an arbitration, or after the conclusion of an arbitration.[96] Otherwise, the same arbitration agreement may be found valid under one law in one context and invalid under another law in another context. This could not only make the time and money spent in arbitral proceedings wasteful but possibly also deprive the parties of the opportunity to resolve the dispute.

The following analysis will show that the preferred choice of law approach of treating an arbitration as forming part of the matrix contract is compatible with the Convention and the Model Law. We will look at the two expressions from the above-quoted choice of law rules in turn: 'the law to which the parties have subjected it' and 'the law of the country where the award was made'. Incidentally, it will be recalled that the principle of severability enshrined elsewhere in the Model Law (Art 16(1)) operates, as seen in an earlier section (Section C), in the sphere of substantive law.

(a) 'The law to which the parties have subjected' the arbitration agreement

The expression 'the law to which the parties have subjected it' may be interpreted in two ways.

On one reading, this expression only refers to the law chosen specifically for the arbitration agreement.[97] The law chosen for the matrix contract would not, on this reading, constitute a choice of law for the arbitration agreement. This reading is consistent with the approach of treating an arbitration agreement as a distinct contract severed from the matrix contract.

On another reading, this expression refers to either the law chosen for the matrix contract[98] *or* the law specifically chosen for the arbitration agreement. This reading is consistent with the preferred approach of treating an arbitration agreement as forming part of the matrix contract while accepting the possibility of voluntary *dépeçage*. It is suggested that this reading should be supported since it is possible to interpret the follow-up phrase 'failing any indication thereon', by reading it with an emphasis on 'any', as referring to the cases where there is absolutely no indication of a choice of law, not even in the guise of a choice of law for the matrix contract.

[96] For the same view, see eg Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation 1981) 126 (hereafter van den Berg, *The New York Arbitration Convention*); and Ardavan Arzandeh and Jonathan Hill, 'Ascertaining the Proper Law of an Arbitration Clause Under English Law' (2009) 5 Journal of Private International Law 425, 426 (hereafter Arzandeh and Hill, 'Ascertaining the Proper law').

[97] See eg Hans-Viggo von Hülsen, *Die Gültigkeit von Internationalen Schiedsvereinbarungen* (J Schweitzer Verlag 1973) 100; van den Berg, *The New York Arbitration Convention* (n 96) 293 (It is, however, admitted that the wording of the Convention is somewhat ambiguous); and Arzandeh and Hill, 'Ascertaining the Proper law' (n 96) 441; Peter Schlosser, 'Rechtswahlvereinbarung für den Hauptvertrag auch gültig für die Schiedsvereinbarung?' [2020] 3 IPRax 222, 224.

[98] See apparently, Mayer 'The Limits of Severability' (n 16) 267.

(b) 'The law of the country where the award was made'

The expression 'the law of the country where the award was made' refers to the law of the country of the arbitral seat.

If we follow the approach of treating an arbitration agreement as a distinct contract severed from the matrix contract, this expression would be seen as simply specifying, by an objective connecting factor, the law applicable to an arbitration agreement.

On the other hand, if we follow the preferred approach, that is, the approach of treating an arbitration agreement as forming part of the matrix contract while accepting, where the parties have made no choice of law for the matrix contract, the limited possibility of involuntary *dépeçage* for an arbitration agreement, this expression would be seen as permitting the court to resort to involuntary *dépeçage*. It has been suggested earlier that the court should only be permitted to refer an arbitration agreement to a law different from that which governs the matrix contract where the applicable choice of law rules permit involuntary *dépeçage* for an arbitration agreement in clear and specific terms. The choice of law rules of the New York Convention and the UNCITRAL Model Law may be considered to be doing just that by means of this expression.

(c) Protective choice of law rules

It has been seen earlier that the preferred choice of law approach would allow presumptively weaker parties, such as consumers, to rely on the law ascertained by the protective choice of law rules for the matrix contract in challenging the validity of an arbitration agreement. Is it possible to derive this result under the New York Convention and the UNCITRAL Model Law?

The choice of law rules of the Convention and the Model Law should be seen as representing the *lex specialis* for arbitration agreements which overrides the *lex generalis*, the general choice of law rules for contracts such as those contained in the Rome I Regulation and the common law choice of law rules. Outside the scope of the *lex specialis*, the *lex generalis* is applicable. Since the Convention and the Model Law contain no special choice of law rules designed to protect presumptively weaker parties to a contract, the general choice of law rules for contracts are applicable to that extent. Suppose that a consumer has concluded a contract with a professional trader in which an arbitration agreement is contained. If the applicable general choice of law rules for contracts allow the consumer to rely on the mandatory rules of the law of the country where he has his habitual residence (as under Art 6(2) of the Rome I Regulation), he may do so not only to challenge the validity of the matrix contract but also to challenge the validity of the arbitration agreement because, under the preferred approach, the arbitration agreement would be subject to the same law that applies to the matrix contract. It should, therefore, be possible to derive, under the Convention and the Model Law, the result mentioned in the preceding paragraph.

3. Instruments on jurisdiction agreements

The Hague Choice of Court Convention grants jurisdiction to the courts of a Contracting State designated in a jurisdiction agreement (Art 5(1)), requires the courts of other Contracting States to suspend or dismiss proceedings (Art 6(a)), and provides that a judgment given by a court of a Contracting State designated in a jurisdiction agreement is recognised and enforced in other Contracting States (Art 8(1)). But it makes an exception where the jurisdiction agreement is null and void under the law of the State of the chosen court (Art 5(1), 6(a) and 9(a)), though this exception does not apply in the context of the recognition and enforcement of a judgment where the chosen court has determined that the agreement is valid (Art 9(a)).

At first sight, the reference to the law of the State of the chosen court might be considered to be incompatible with the preferred approach of treating a jurisdiction agreement as forming part of the matrix contract. But a closer examination reveals that it is not. The Explanatory Report, by Professors Hartley and Dogauchi, explains that the reference to the law of the State of the chosen court is meant to include its choice of law rules.[99] The Convention thus ensures that the same choice of law rules are applied to determine the law applicable to a given jurisdiction agreement irrespective of the Contracting State in which the issue arises. The aim is to ensure the same result among different fora. The Convention does not, however, seek to unify choice of law rules. It rather leaves each Contracting State to devise its own rules. Consequently, it is open for the courts of each State to take the approach of treating a jurisdiction agreement as forming part of the matrix contract for choice of law purposes. The preferred approach is, therefore, compatible with the Convention. Incidentally, it will be recalled that the principle of severability enshrined elsewhere in the Convention (Art 3(d)) operates, as seen in an earlier section (Section C), in the sphere of substantive law.

The same may be said of the Recast Brussels I Regulation. The Regulation refers the validity of a jurisdiction agreement to the law of the Member State designated by the agreement (Art 25(1)). It explains in the Recital that the reference to the said law is meant to include the choice of law rules (Recital (20)). This recital was introduced to align with the position of the Hague Choice of Court Convention.[100] It may, therefore, be concluded that the preferred approach is compatible with the Regulation. It will be recalled, incidentally, that the principle of severability enshrined elsewhere in the Regulation (Art 25(5)) operates in the sphere of substantive law.

[99] Hartley and Dogauchi, 'Explanatory Report' (n 31) [125] and [149].
[100] Garcimartin, 'Prorogation of Jurisdiction' (n 92) [9.62].

J. Concluding Remarks

The discussion in this essay bears a heavy theoretical overtone but has a practical significance. Take a typical scenario where the parties to a contract make a choice of law for the contract but make no specific choice of law for an arbitration (or jurisdiction) agreement contained in it. Such scenarios raise the question whether the arbitration (or jurisdiction) agreement is subject to the same law that governs the matrix contract. As views are genuinely divided and the text of existing instruments could accommodate both views, a principled approach to resolving this question is called for.

A key to providing an answer by a principled approach is to consider whether the principle of severability should be extended to the sphere of choice of law analysis. It is also important to reflect on the implications of *dépeçage*, a choice of law methodology for splitting up terms within a contract. This essay has suggested a preferred approach comprising these two major elements of consideration. It is hoped that it will stimulate further debate in this field.

K. Postscript

After the final manuscript of this essay was submitted, the UK Supreme Court delivered its judgment in *Enka*.[101] The Court dismissed the appeal by a majority (3–2) but renounced the Court of Appeal's approach of determining the law applicable to arbitration agreements.[102]

There is significant common ground between the majority and the dissenting judges in their reasoning on the latter issue. Most fundamentally, both refused to invoke the principle of severability to treat the arbitration agreement as a distinct contract severed from the matrix contract. Thus, the majority, led by Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed), held that 'the separability principle does not require that an arbitration agreement should be treated as a separate agreement for the purpose of determining its governing law'.[103] Similarly, the dissenting judges, led by Lord Burrows (with whom Lord Sales agreed), held that the purpose for which the principle of severability had been devised did 'not extend to working out the conflict of laws rules applicable to an arbitration agreement' and that 'in deciding on the proper law of the arbitration agreement, the arbitration agreement should be regarded as part of the main contract'.[104] These remarks

[101] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (hereafter *Enka (SC)*). The Court of Appeal's decision is discussed at Section H above.
[102] Ibid [59]–[94].
[103] Ibid [41]; also [61].
[104] Ibid [233].

strongly support the preferred approach suggested by this essay.[105] A common ground also exists between the majority and the dissent in their basic acceptance of the possibility of *dépeçage*,[106] a position which again accords with the preferred approach.[107] Accordingly, both the majority and the dissent accept that the parties may, if they so wish, refer an arbitration agreement to a law different from the governing law of the matrix contract.[108]

The majority and the dissentients differed, however, in their conclusions: the majority held that the arbitration agreement in this case was governed by the law of the seat whereas the dissent held that it was governed by the governing law of the matrix contract. This disagreement stemmed primarily from their differing findings on whether the parties had made any choice of law for the matrix contract: the majority answered it in the negative but the dissentients' construction of the contract led them to the opposite finding.[109] Their disagreement in conclusion is also attributable to differing perspectives on *dépeçage*: while the dissentients stressed the exceptional nature of it,[110] the majority put a more positive gloss on it in relation to arbitration agreements, noting that the difficulty which could entail from applying different laws to different parts of a contract would be alleviated by the principle of severability: in their view '[a]n arbitration clause may ... more readily than other clauses be governed by a different law'.[111]

Had the majority found, as did the dissenting judges, that the parties had made a choice of law for the matrix contract, it is clear that they would have come to the same conclusion as the dissent, that the governing law of the matrix contract would serve as the law applicable to the arbitration agreement.[112] According to the dissentients, 'it is natural, rational and realistic' to regard the choice of law for the matrix contract as 'encompassing, or carrying across to, the arbitration agreement'.[113] Likewise, the majority held in *obiter* that a choice of law made by the parties for the matrix contract would constitute the choice of law for the arbitration agreement both as a matter of principle[114] and as a matter of interpretation of Article V(1)(a) of the New York Convention.[115] The majority considered that the choice of a different country as the seat of the arbitration would not be sufficient to displace this

[105] As an aside, a jurisdiction agreement was held in *obiter* to be generally governed by the same law as that governs the matrix contract by both the majority (ibid [53(v)]) and the dissentients (ibid [254]), a view which also accords with the preferred approach.

[106] For the majority's view, see ibid [38]. For the dissent's view, see ibid [193 (iii)].

[107] See Section E.1.

[108] For the majority's view, see esp *Enka (SC)* (n 101) [38]–[42], [170(iv)–(vi)]. For the dissentients' views, see ibid [193(iii)], [231], [257(ii)–(iv)]. See further text to nn 110–111.

[109] Ibid [155] (majority) and [205] (dissent). These findings are not a point of concern of this essay.

[110] Ibid [193] and [231].

[111] Ibid [40]–[41].

[112] Ibid [46], [53]–[54], [129], [170(iv)–(v)].

[113] Ibid [228].

[114] Ibid [53]–[54].

[115] Ibid [129].

conclusion.[116] The views of both the dissenting judges and the majority are consistent with the suggestion of this essay that where the parties have made a choice of law for the matrix contract, the court should not be allowed to resort to involuntary *dépeçage* to refer an arbitration agreement to a different law.[117]

Had the dissenting judges found, as did the majority, that the parties had made no choice of law for the matrix contract, they would still have differed with the majority in their conclusions: the majority concluded that the arbitration agreement was governed by the law of the seat whereas the dissent would have concluded that it was governed by the governing law of the matrix contract. Their disagreement in conclusion may be explained by their differing perspectives on *dépeçage*. The majority considered the law of the seat to be the law with which the arbitration agreement was most closely connected.[118] Given their rejection of the submission that an arbitration agreement should be treated as a separate contract, this reasoning, read in context, appears to rest on involuntary *dépeçage*. The dissenting judges, on the other hand, held in *obiter* that the governing law of the matrix contract, even if it had not been chosen by the parties, would also govern the arbitration agreement.[119] They would not allow the court to resort to involuntary *dépeçage*. The views of both the majority and the dissent—though disagreeing with each other in conclusion—are compatible with the suggestion of this essay[120] that the courts should be allowed to resort to involuntary *dépeçage* where the parties have made no choice of law for the matrix contract only if the applicable choice of law rules clearly provide what specific terms are referred, separately from the remainder of the matrix contract, to what laws. The majority apparently saw such choice of law rules in Article V(1)(a) of the New York Convention while the dissenting judges did not.[121] Thus, the majority prayed in aid that provision as a compelling reason for referring an arbitration agreement to the law of the seat where the parties had made no choice of law for the matrix contract.[122] The dissent, on the other hand, did not read the same provision as prescribing a mandatory choice of law rule separately referring an arbitration agreement to the law of the seat.[123]

From the foregoing analysis, it would be safe to conclude that the preferred approach suggested by this essay has found substantial favour with both sides of the Supreme Court in *Enka*.[124] The clarity of the Court's analysis would have been

[116] Ibid [46], [170(v)].
[117] Section E.2.
[118] *Enka* (SC) (n 101) esp [120]–[122] and [170(viii)].
[119] Ibid [256] and [260] (Lord Burrows); also ibid, [288], [292] (Lord Sales).
[120] Section E.2. and Section I.2.(b).
[121] Compare *Enka* (SC) (n 101) [125]–[141] (Lords Hamblen and Leggatt) with ibid [250]–[253] (Lord Burrows) and [289]–[291] (Lord Sales).
[122] Ibid [125].
[123] Ibid [251]–[253] and [260].
[124] The Court also gave consideration to other issues falling outside the scope of this essay, including the common law's so called 'validation principle' (ibid [95]–[109] (Lords Hamblen and Leggatt), [198], [251], [257(iv)] (Lord Burrows), [266], [276]–[279], [284]–[285], [291] (Lord Sales)).

aided if, as attempted in this essay, a clearer presentation had been made of the two-tier scheme of analysis consisting, first, of the consideration whether an arbitration agreement should, by virtue of the principle of severability, be treated as a distinct contract severed from the matrix contract for choice of law purposes and, second, of the consideration whether an arbitration agreement should be split within the matrix contract by means of *dépeçage*. The clarity of the Court's analysis would also have been aided if, adopting the approach of this essay, a conscious distinction had been drawn between voluntary and involuntary *dépeçage* with the use of these expressions.