

THE LAW(S) OF THE ARBITRATION
AGREEMENT

Ronald A. Brand

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Ronald A. Brand*

ABSTRACT

A study by the Law Commission of England and Wales resulted in amendments in 2025 to the Arbitration Act 1996 that include a default rule that an arbitration agreement will be governed by the law of England and Wales if the arbitration is seated in that territory. Given the importance of London as an arbitration center, this has implications for many international commercial contracts. In this Article, I challenge the premise behind the amendment that there is a single “law of the arbitration agreement.” Instead, I demonstrate that there are multiple laws applicable to an arbitration agreement. I explain this multiplicity of applicable laws by considering the possible grounds for challenge of jurisdiction of an arbitral tribunal based on the arbitration agreement. Such an analysis demonstrates that very different laws may apply to questions of the existence, formal validity, substantive validity, scope, and exclusivity of an arbitration agreement. I review these issues in the broader context of choice of forum clauses generally, including both arbitration and choice of court agreements. I then consider a hypothetical international commercial transaction in which questions might arise about the first four of these five jurisdictional questions—demonstrating both the problems with the idea of a single “law of the arbitration agreement,” as well as the practical impact and

* Chancellor Mark A. Nordenberg University Professor and Academic Director, Center for International Legal Education, University of Pittsburgh School of Law. I thank Cariana Jones and Zahid Omarzai for excellent research and content assistance in the preparation of this Article and Alberto Pomari for comments. This Article builds on my prior work that includes a keynote presentation I made at the Pax Moot Private International Law Conference held in Ljubljana, Slovenia, on April 26, 2024, sponsored by the Centre for Private International Law at the University of Aberdeen Faculty of Law. See Ronald A. Brand, *2024 PAX Moot Half-Day Conference: The Law Applicable to the Arbitration Agreement*, UNIV. OF ABERDEEN (Aug. 2, 2024), <https://www.abdn.ac.uk/law/blog/2024-pax-moot-halfday-conference-the-law-applicable-to-the-arbitration-agreement/> [https://perma.cc/QC97-MEH2]. This work also uses and updates my prior work. See *id.*; see also RONALD A. BRAND, TRANSACTION PLANNING USING RULES OF JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS (2014); see also RONALD A. BRAND, INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS (2d ed. 2019).

importance of well-drafted choice of forum agreements, including provisions on choice of law. Although prompted by the proposed change in English law, this discussion has implications for the law in every jurisdiction regarding agreements to arbitrate, indicating that both transaction planners and dispute resolution lawyers need to be cognizant of the laws applicable to arbitration and choice of court agreements.

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INTRODUCTION

Arbitration clauses in international commercial contracts are routinely drafted alongside choice of law clauses that apply to the larger contract in which the arbitration clause is included. The choice of law clause determines the substantive law applicable to the larger contract, which may or may not be considered to include the arbitration clause which is a part of that contract. A well-drafted arbitration agreement will also include a choice of a “seat” or “place” of arbitration. That language does not determine where the arbitration will physically be held. Rather, it serves as a choice of law clause that determines the “*lex arbitri*,” the procedural (sometimes called “curial”) law that applies to questions both during the course of arbitration and in courts when they are asked to oversee, review, or assist the arbitral tribunal. Particularly when the seat differs from the jurisdiction selected in the substantive choice of law clause, this creates potential for uncertainty regarding the law governing a series of questions about the arbitration clause itself.

Decisions of the Supreme Court of the United Kingdom have established a framework for determining the law applicable to specific questions about the arbitration agreement that go beyond procedural matters related to the arbitration itself. Significantly, these cases presented a methodology for determining the law to govern the validity and effect of the arbitration agreement. This methodology has been seen by some as too complex, resulting in an amendment to the UK Arbitration Act 1996.¹ That amendment applies when the parties have not expressly chosen the law applicable to the arbitration agreement, and provides that issues concerning the arbitration agreement will be governed by the substantive law of the United Kingdom when England or Wales is the seat of arbitration (i.e., when English procedural law is chosen to govern the arbitration—even when the substantive law of another state is chosen to govern all other provisions of the larger contract).²

Four points are basic to the discussion that follows:

- 1) Good contract drafting should prevent the need to apply what is otherwise a default rule of the type included in the Arbitration Act amendment—but good contract drafting requires a clear understanding of dispute resolution practice and process.
- 2) Questions of applicable law arise in both courts and arbitral tribunals when the jurisdiction of an arbitral tribunal is challenged based on some

¹ Gordon Bell, Tom Price & Christopher Richards, *Arbitration Act 1996—Evolution Not Revolution*, GOWLING WLG (Sept. 29, 2023), <https://gowlingswg.com/en/insightsresources/articles/2023/arbitration-act-1996-evolution-not-revolution> [<https://perma.cc/6ZHQ-EQRZ>].

² *Id.*

defect or ambiguity in the arbitration clause—meaning that, in addition to the question of *what law* applies, there is the question of *what forum* applies that law.

- 3) The list of possible defects (or ambiguities) in an arbitration agreement requires reference to more than one source of applicable law. Some defects are governed by provisions of arbitration laws, others are governed by substantive contract law, and still others may be governed by a variety of other sources of law.
- 4) The multiple possible types of laws that may apply to resolve a defect or clarify an ambiguity in an arbitration clause in an international contract raise questions about a default rule that relies on a single “law of the arbitration agreement.”

In Part I, I begin with a brief discussion of the process initiated in the Law Commission for England and Wales that resulted in the proposed amendment to the Arbitration Act 1996. In Part II, I discuss the UK Supreme Court cases that have established a methodology for determining the law applicable to an arbitration agreement. These are the cases that led to the proposed addition of an autonomous default rule on the choice of substantive law for arbitration agreements in the Arbitration Act 1996. In Part III, I provide a deeper analysis of just what “the law of the arbitration agreement” can mean when questions are raised about that agreement, particularly in challenges to the jurisdiction of an arbitral tribunal. I also include discussion of the other principal type of choice of forum clause—a choice of court agreement—in order to demonstrate common elements and similar laws.

After demonstrating the transactional and dispute resolution contexts for consideration of arbitration agreements, in Part IV, I consider the law and commentary on the question of law(s) applicable to the arbitration agreement, noting how cases and commentators often have failed appropriately to break down the group of possible legal questions that might arise. I clarify further the five categories of legal questions that can arise in jurisdictional challenges to arbitral tribunals based on the language of an arbitration clause—each of which requires its own determination of applicable law. In doing so, I again note the necessary similarities between arbitration agreements and choice of court agreements as choice of forum agreements generally, and the importance of those similarities to the analysis of the law applicable to both types of choice of forum agreements. The categories are:

- 1) the *existence* of the agreement (did both parties *consent* to a specific forum?);
- 2) the *formal validity* of the agreement;

- 3) the *substantive validity* of the agreement;³
- 4) the *scope* of the agreement; and
- 5) the *exclusivity* of the agreement.

In Part V, I turn to various international and regional legal instruments to demonstrate how they acknowledge that different categorical issues are governed by different laws. I do this in order to demonstrate that a clear delineation of categories of legal questions provides a framework for analysis that can assist courts and arbitral tribunals, as well as inform legislatures in dealing with questions about the laws applicable to arbitration agreements. This includes a reminder that the multiple types of possible challenges to an arbitration agreement require multiple sources of applicable law and thus require a more careful analysis than that which results from reference to a single “law of the arbitration agreement.”

In Part VI, I use a hypothetical international sale of goods transaction to explore the implications of a default rule leading to a single state’s “law of the arbitration agreement.” While this analysis raises questions about changes in UK law, like the rest of the analysis, it provides an opportunity to consider more generally questions of applicable law when the jurisdiction of an arbitral tribunal or court is challenged based on the relevant choice of forum agreement, as well as how those questions should be considered at the transaction planning stage.

I conclude that a clearer understanding of the multiple legal questions and multiple sources of law applicable to arbitration and choice of court agreements is required, and that such an understanding must begin with consideration of the five basic questions of applicable law that can arise in a jurisdictional challenge to all choice of forum agreements and to arbitration agreements in particular.

I. THE LAW COMMISSION PROCESS AND PROPOSAL

A. *The Process*

In March of 2021, the UK Ministry of Justice asked the Law Commission to conduct a review of the Arbitration Act 1996.⁴ Specifically, the Law Commission was asked to determine “whether any amendments to the Act were needed to ensure

³ The substantive validity category may include questions normally referred to as capacity and arbitrability.

⁴ L. COMM’N, REVIEW OF THE ARBITRATION ACT 1996: FINAL REPORT AND BILL ¶ 1.8, at 2 (2023), https://webarchive.nationalarchives.gov.uk/ukgwa/20250109103833mp_/https://cloud-platfarm-e218f50a4812967ba1215eaccede923f.s3.amazonaws.com/uploads/sites/30/2023/09/Arbitration-final-report-with-cover.pdf [<https://perma.cc/6LEZ-ZRSR>].

that it remains fit for purpose and continues to promote England and Wales as a leading destination for commercial arbitration.”⁵ The review led to two Consultation Papers and a Final Report.⁶ The last document included a proposed Bill for amendment of the Arbitration Act 1996.⁷

The first Law Commission Consultation Paper (“CP257”) was issued in September 2022 and included proposed changes to the Arbitration Act 1996.⁸ At that stage, there was no proposal for a rule concerning the law governing arbitration agreements, but comments on CP257 included suggestions that the proposed changes include such a rule.⁹ This led to the second Consultation Paper (“CP258”) in March 2023¹⁰ in which the Law Commission provisionally proposed “that a new rule be included in the Arbitration Act 1996 to the effect that the law of the arbitration agreement is the law of the seat, unless the parties expressly agree otherwise in the arbitration agreement itself.”¹¹ This recommendation was included in the Final Report of the Law Commission of September 6, 2023, and the draft Bill that accompanied that Report was later introduced in Parliament.¹² The resulting Article 1 of House of Lords Bill 59 (2024) provides for the insertion of a new Article 6A in the Arbitration Act as follows:

Law applicable to arbitration agreement

(1) The law applicable to an arbitration agreement is—

⁵ *Id.*

⁶ See generally L. COMM’N, *supra* note 4.

⁷ *Id.* ¶ 1.16.

⁸ L. COMM’N, REVIEW OF THE ARBITRATION ACT 1996, A CONSULTATION PAPER iii (2022) [hereinafter CP257] (“The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.”), https://webarchive.nationalarchives.gov.uk/ukgwa/20250109094438mp_/https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2022/09/Arbitration-Consultation-Paper.pdf [https://perma.cc/KGR9-N8KF].

⁹ L. COMM’N, REVIEW OF THE ARBITRATION ACT 1996, RESPONSES TO FIRST CONSULTATION PAPER 2 (2022), https://webarchive.nationalarchives.gov.uk/ukgwa/20250109121459mp_/https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2022/09/CP1-compiled-responses-complete.pdf [https://perma.cc/UU5N-SRY7].

¹⁰ L. COMM’N, REVIEW OF THE ARBITRATION ACT 1996, SECOND CONSULTATION PAPER (2023), https://webarchive.nationalarchives.gov.uk/ukgwa/20250109095303mp_/https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/03/Arbitration-CP2.pdf [https://perma.cc/A2PL-PKMZ].

¹¹ *Id.* ¶ 2.6.

¹² L. COMM’N, *supra* note 4, ¶ 12.15.

- (a) the law that the parties expressly agree applies to the arbitration agreement, or
 - (b) *where no such agreement is made*, the law of the seat of the arbitration in question.
- (2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not constitute express agreement that that law also applies to the arbitration agreement.¹³

The Arbitration Bill has been enacted as Arbitration Act 2025 and received Royal Assent on February 24, 2025.¹⁴

B. *The Result and Potential Effect*

CP258 provided a useful review of the UK case law that developed a framework for determining the law applicable to substantive questions regarding an arbitration agreement when an arbitration clause is included in a larger contract (referred to as the “matrix contract” in CP258).¹⁵ However, it did not discuss the full impact of adding a rule of applicable law to the Arbitration Act 1996 and just how such a rule might affect issues that arise at the time arbitration is pursued. Those issues in turn implicate important questions that should be addressed when drafting an arbitration clause. The amendment is likely to have an impact on multiple questions about an arbitration agreement, including the (1) existence, (2) formal validity, (3) substantive validity, (4) scope, and (5) exclusivity of the arbitration agreement.

The problems addressed by the proposed amendment to the Arbitration Act 1996 regarding “the law of the arbitration agreement” have a rather simple solution:

¹³ Arbitration Bill 2024-26, UKHL Bill [59] cl. 1 (UK) (emphasis added).

¹⁴ Press Release, United Kingdom, Boost for UK Economy as Arbitration Act Receives Royal Assent (Feb. 24, 2025), <https://www.gov.uk/government/news/boost-for-uk-economy-as-arbitration-act-receives-royal-assent> [https://perma.cc/FGU4-BREQ]. Conservative Prime Minister Rishi Sunak’s decision to call a general election in July of 2024 halted all parliamentary action on the Bill. The new Parliament, under Labour Prime Minister Keir Starmer, began its work later in July 2024. The Arbitration Bill was re-introduced by the new Labour government in July 2024. It was passed in the House of Lords and presented to the House of Commons on November 6, 2024. *Arbitration Bill Completes Lords Stages*, UK PARLIAMENT (Nov. 7, 2024), <https://www.parliament.uk/business/news/2024/october/arbitration-bill-to-complete-stages-in-lords/> [https://perma.cc/MA42-H5Y8]. The new Bill added language to Section 6A to deal with specific issues of investor-state arbitration but did not otherwise change the language concerning the law of the arbitration agreement. *Arbitration Bill Passes Report Stage*, UK PARLIAMENT (Oct. 31, 2024), <https://www.parliament.uk/business/news/2024/october/further-scrutiny-of-the-arbitration-bill/> [https://perma.cc/3H4Y-SPDJ] (providing updates on the Bill).

¹⁵ L. COMM’N, *supra* note 10, ¶ 2.8.

any well-drafted arbitration clause contained in a larger contract should include a clear and express choice of the law or laws governing the arbitration agreement. The amendment addresses only those cases in which “no such agreement is made.”¹⁶ Thus, careful contract drafters may avoid the problems being addressed in the proposal. Thus, the Amendment is intended to apply only when careful and effective drafting has not occurred.

But the analysis provided by the Law Commission, and the solution provided in the proposed amendment, fail to consider clearly all of the concerns that can arise when there is a challenge to an arbitral tribunal’s jurisdiction based on alleged defects or ambiguities in the arbitration agreement. That is the context in which questions of the applicable law regarding the arbitration agreement arise, and complete consideration of the potential problems and issues must give attention to that context and address all of the applicable law (and applicable forum) questions that can be raised by such challenges.

In the discussion below, my purpose is to demonstrate that a simple rule of applicable *substantive* law embedded in the statutory law governing arbitration *procedure* is not likely to solve all of the problems that might arise in questions of the *substantive* laws applicable to arbitration agreements. The unintended consequences may create more problems than the amendment to the Arbitration Act 1996 will solve. Moreover, any discussion of such a proposal should consider more than how the rule would work at the time of litigation or arbitration, but also should include clear consideration of just what the rule means for those drafting to avoid the new default rule. For this reason, my discussion below includes consideration of the impact of the amendment at the contract drafting stage as well as at the litigation stage.

II. THE ENGLISH COMMON LAW CONTEXT FOR A STATUTORY RULE OF APPLICABLE LAW

While a number of cases in UK courts have contributed to the development of the jurisprudence on the law governing the arbitration agreement when parties make no explicit selection, three cases have had particular impact. The first is the 2012 Court of Appeals decision in *Sulamérica v. Enesa*.¹⁷ That case set the stage for two

¹⁶ L. COMM’N, *supra* note 4, ¶ 12.78(1)(b).

¹⁷ *Sulamérica Cia Nacional de Seguros v. Engenharia* [2012] EWCA (Civ) 638 (Eng.). In *Sulamérica*, the judgment of Moore-Bick LJ, with which the other members of the court agreed, stated: “It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate.” *Id.* ¶ 11.

UK Supreme Court cases that were the focus of the Law Commission discussion in CP258.¹⁸ Those cases are *Enka v. Chubb* in 2020,¹⁹ and *Kabab-Ji v. Kout* in 2021.²⁰ *Enka* set out the Supreme Court's framework for determining the applicable law,²¹ and *Kabab-Ji* then followed that framework.²² This makes *Enka* the proper focus for consideration of any amendment to the Arbitration Act 1996.

In *Enka v. Chubb*, the UK Supreme Court began its analysis with acknowledgment that:

[w]here an international commercial contract contains an agreement to resolve disputes by arbitration, at least three systems of national law are engaged when a dispute occurs. They are:

- the law governing the substance of the dispute;
- the law governing the agreement to arbitrate; and
- the law governing the arbitration process.²³

The specific arbitration clause in the contract being addressed provided that:

- the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
- the Dispute shall be settled by three arbitrators appointed in accordance with these Rules,
- the arbitration shall be conducted in the English language, and
- the place of arbitration shall be London, England.²⁴

There was no clause choosing the substantive law applicable to either the larger contract or to the arbitration clause separately.²⁵ Applying the rules of the Rome I Regulation as indicative of English common law, the Court determined that the main contract (a contract for construction of facilities in Russia) was governed by Russian

¹⁸ L. COMM'N, *supra* note 8, ¶ 2.12–2.36.

¹⁹ *Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb* [2020] UKSC 38 (UK).

²⁰ *Kabab-Ji SAL (Lebanon) v. Kout Food Grp. (Kuwait)* [2021] UKSC 48 (UK).

²¹ *Enka*, [2020] UKSC 38, ¶ 292, at 113.

²² *Kabab-Ji*, [2021] UKSC 48, ¶ 36, at 13.

²³ *Enka*, [2020] UKSC 38, ¶ 1, at 2.

²⁴ *Id.* ¶ 10, at 4.

²⁵ *Id.* ¶¶ 148–149, at 51–52.

law.²⁶ Thus, the substantive law of the main contract and the procedural law of the seat were different.

When Chubb brought suit in Russia, Enka unsuccessfully sought to have the case dismissed in favor of arbitration under the agreement.²⁷ Enka brought an arbitration claim in the Commercial Court in London, requesting an anti-suit injunction in order to restrain Chubb from pursuing the Russian litigation²⁸ and filed a request for arbitration with the International Chamber of Commerce.²⁹ The ability to get the UK injunction depended on whether the arbitration agreement was valid and whether the action in the Russian court was within the scope of the agreement, both of which first required a determination of what law governed the arbitration agreement for each of those issues.³⁰ That matter moved quickly up the English courts to the Supreme Court.³¹

In *Enka*, the Supreme Court summarized the “principles which in [their] judgment govern[ed] the determination of the law applicable to the arbitration agreement” in nine points:

- i) Where a contract contains an agreement to resolve disputes arising from it by arbitration, the law applicable to the arbitration agreement may not be the same as the law applicable to the other parts of the contract and is to be determined by applying English common law rules for resolving conflicts of laws rather than the provisions of the Rome I Regulation.
- ii) According to these rules, the law applicable to the arbitration agreement will be (a) the law chosen by the parties to govern it or (b) in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected
- iii) Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.

²⁶ *Id.* ¶ 161, at 56.

²⁷ *Id.* ¶¶ 14–15, at 5–6.

²⁸ *Enka*, [2020] UKSC 38, ¶ 17, at 6.

²⁹ *Id.* ¶ 20, at 7.

³⁰ It is important to note that there was no dispute about the existence of the arbitration agreement, only about its validity under the applicable law and its scope. *See generally Enka*, [2020] UKSC 38.

³¹ *See id.* ¶¶ 23–24, at 7.

- iv) Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.
- v) The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.
- vi) Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.
- vii) Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.
- viii) In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.
- ix) The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it.³²

The question in *Enka* was what law governed the *validity and scope* of an arbitration agreement.³³ The Court determined that the main contract, in which the arbitration clause was a part, was governed by Russian law³⁴ even though there was no express choice of law provision in the contract.³⁵ Thus, the substantive law of the main contract was Russian, and the “curial law” determined by the choice of the seat of arbitration was English law. This focused the Court on the question of which law

³² *Id.* ¶ 170, at 58–59.

³³ *Id.* ¶ 2, at 2.

³⁴ *Id.* ¶ 161, at 56.

³⁵ *Enka*, [2020] UKSC 38, ¶ 208, at 36–37.

governs the arbitration agreement itself for purposes of the questions of validity and scope.³⁶

A year after *Enka*, the UK Supreme Court decided *Kabab-Ji SAL (Lebanon) v. Kout Food Group*.³⁷ While the concern in *Enka* was with the validity and scope of the arbitration agreement, the question in *Kabab-Ji* was limited to “the *validity* of an arbitration agreement” and differed from *Enka* because the matter arose “in the different context where an arbitration has already taken place and proceedings [were] brought in England to enforce an award made by the arbitral tribunal.”³⁸ “As in *Enka* [however], the first question [was] to identify which system of law the English court must apply to decide whether there is an enforceable arbitration agreement.”³⁹

While in *Enka* there had been no choice of substantive law clause in the construction contract involved, in *Kabab-Ji* the franchise agreements involved were expressly governed by English law.⁴⁰ The seat of arbitration, however, was Paris, France.⁴¹ The challenge to validity was raised under Article V(1)(a) of the New York Convention and the relevant Arbitration Act 1996 provision implementing it into English law (Section 103(2)(b)), which authorizes non-recognition of an award if the arbitration agreement was “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.”⁴²

Because the *Kabab-Ji* contract had an express choice of substantive law clause, the situation differed from *Enka*, and the court acknowledged its admonition in *Enka* that “a general choice of law to govern a contract containing an arbitration clause should normally be sufficient to satisfy the first rule in article V(1)(a)” that validity of the arbitration agreement be determined by that law.⁴³ So, like in *Enka*, the Court found that the validity of the arbitration agreement was governed by English law—but for very different reasons. In *Enka*, the Court ultimately found the applicable law to be that of the seat of arbitration (London), but in *Kabab-Ji*, the Court found the

³⁶ *Id.* ¶ 69, at 24.

³⁷ *Kabab-Ji SAL (Lebanon) v. Kout Food Grp. (Kuwait)* [2021] UKSC 48 (UK).

³⁸ *Id.* ¶ 2, at 2 (emphasis added).

³⁹ *Id.*

⁴⁰ *Id.* ¶ 3, at 2.

⁴¹ *Id.* ¶ 37, at 14–15.

⁴² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(a), *opened for signature* June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

⁴³ *Kabab-Ji*, [2021] UKSC 48, ¶ 33, at 12 (noting *Enka*, [2022] UKSC 38, ¶ 129, at 44–45).

applicable law to be that of the state of the explicitly-stated substantive law governing the larger contract in which the arbitration agreement was contained, and not the law of the seat.⁴⁴ This language raises questions about whether the real issue was one of the *existence* of the agreement to arbitrate, rather than of validity. The discussion that follows this language, however, appears to indicate that it goes to the question of *formal validity*, and whether there existed a written agreement to arbitrate as required by both the New York Convention and the Arbitration Act 1996. The Court specifically focused on a variety of no-oral-modification clauses in the agreement containing the arbitration clause, determining that those provisions prevented the party from having become a party to the arbitration agreement.⁴⁵ In both cases, the English Court found that English law applied.

One other UK case deserves mention. *UniCredit Bank GmbH v. RusChemAlliance LLC* was decided by the UK Court of Appeal (Civil Division) on February 2, 2024.⁴⁶ Performance bonds were issued by UniCredit to guarantee performance of a construction contract, were explicitly governed by English law, and

⁴⁴ “Clause 15 of the FDA is a typical governing law clause, which provides that ‘this Agreement’ shall be governed by the laws of England. Even without any express definition, that phrase is ordinarily and reasonably understood (for the reasons given at paras 43 and 53 of our judgment in *Enka*) to denote all the clauses incorporated in the contractual document, including therefore clause 14. If there were otherwise any room for doubt about its meaning—which we cannot see that there is—the phrase is in this case for good measure specifically defined by clause 1, which spells out that ‘[t]his Agreement consists of . . . the terms of agreement set forth herein below . . .’. The ‘terms of agreement set forth herein below’ manifestly include clause 14. There is no good reason to infer that the parties intended to except clause 14 from their choice of English law to govern all the terms of their contract. The ‘law to which the parties subjected’ the arbitration agreement in clause 14 is therefore English law.” *Id.* ¶ 39, at 15. The *Kabab-Ji* decision involved two contracts and the question of what the Court referred to as the validity of the second contract. The Court concluded that, under the applicable English law, “there is no real prospect that a court might find at a further evidentiary hearing” that the relevant party had become “a party to the arbitration agreement” in the second contract. *Id.* ¶ 93, at 33. While the Court referred to the question as one of validity of the arbitration agreement, its full discussion makes it not entirely clear that it was a question of validity rather than existence of the arbitration agreement in the second contract. In discussing whether a choice of law validation principle should apply, the Court appropriately stated that the validation principle “presupposes that an agreement has been made” and “is not a principle relating to the formation of contracts which can be invoked to create an agreement which would not otherwise exist.” *Id.* ¶ 51, at 19. According to the Court, “[i]t follows that the validation principle does not apply to questions of validity in the expanded sense in which that concept is used in article V(1)(a) of the Convention and section 103(2)(b) of the 1996 Act to include an issue about whether any contract was ever made between the parties to the dispute.” *Id.* ¶ 52, at 19.

⁴⁵ *Id.* ¶¶ 55–59, at 20–22.

⁴⁶ *UniCredit Bank GmbH v. RusChemAlliance LLC* [2024] EWCA (Civ) 64 (Eng.).

called for ICC arbitration in Paris.⁴⁷ Economic sanctions resulted in the termination of the contract and a dispute arose over payment on the bonds.⁴⁸ RusChemAlliance (RCA) began judicial proceedings in Russia and UniCredit applied for an interim anti-suit injunction to restrain RCA's further pursuit of that action.⁴⁹

The *UniCredit* court parsed the nine elements of the *Enka* analysis, concluding that:

[I]t is clear that the general rule, in a case such as the present where the main contract is expressly governed by English law, and the arbitration agreement contained within that contract provides for arbitration with a foreign seat but does not say anything specific about the governing law of the arbitration agreement, is that the parties are taken to have made a choice of English law as the law applicable to the arbitration agreement.⁵⁰

The question then was whether the particular facts displaced *Enka*'s general rule that an explicit choice of law for the larger contract will govern the arbitration agreement included in that contract. This question resulted in a focus on the sixth *Enka* principle, allowing divergence from the general rule when "additional factors" imply intent to have the arbitration clause governed by the law of the seat.⁵¹ Noting that the goal is to determine the intent of the parties through a "process of construction," either through express language or by implication,⁵² the Court focused on the language of the sixth rule that provides an exception that infers party intent "whereby the governing law of the arbitration agreement will be the law of the seat when the law of the seat so provides."⁵³ Males LJ, with agreement from Lewis LJ and Bean

⁴⁷ The choice of law and choice of forum language in the performance bond in question stated: "This Bond and all non-contractual or other obligations arising out of or in connection with it shall be construed under and governed by English law. [] In case of dispute arising between the parties about the validity, interpretation or performance of the Bond, the parties shall cooperate with diligence and in good faith, to attempt to find an amicable solution. All disputes arising out of or in connection with the bond which cannot be resolved amicably, shall be finally settled under the rules of arbitration of the International Chamber of Commerce, the ICC, by one or more arbitrators appointed, in accordance with the said ICC's Rules. The place of arbitration shall be Paris and the language to be used in the arbitral proceedings shall be English." *Id.* ¶ 9.

⁴⁸ *Id.* ¶¶ 10–12.

⁴⁹ *Id.* ¶¶ 14–16.

⁵⁰ *Id.* ¶ 46.

⁵¹ *Id.* ¶ 47.

⁵² *UniCredit Bank GmbH*, [2024] EWCA (Civ) 64, ¶ 53.

⁵³ *Id.* ¶ 57.

LJ, found French law leading in this direction, not in a statute or code, but in case law from the French *Cour de cassation*.⁵⁴ Finding such a reference to fall “considerably short of what the Supreme Court contemplated would be sufficient for the exception to apply,” Males concluded that “French law does not contain a provision ‘which indicates that, where arbitration is subject to that law, the arbitration will also be treated as governed by that country’s law.’”⁵⁵ With that, the common law Court in England concluded that the common law of France was not clear enough and that “the arbitration agreement in the bonds was governed by English law.”⁵⁶

The February 2, 2024, decision of the Court of Appeal was quickly appealed to the UK Supreme Court, with the Supreme Court’s decision announced on April 23, 2024, and issued in written form on September 18, 2024.⁵⁷ Lord Leggatt, writing for the UK Supreme Court, described the “sole issue” before the Court as “whether the English court has jurisdiction over UniCredit’s claim,” which, in turn, depended on whether “the Court of Appeal was right to decide . . . that the arbitration agreements in the bonds are governed by English law.”⁵⁸

The *UniCredit* case reached the courts during the Law Commission process, and the UK Supreme Court was invited by RusChem to adjust the *Enka* analysis in accordance with the proposed amendment to the Arbitration Act 1996.⁵⁹ That invitation was rejected as not raising a point of law appropriate for consideration “at this time.”⁶⁰ Thus, the Court continued to follow the *Enka* principles. As a result, the Supreme Court affirmed the Court of Appeal decision that English law applied to the arbitration clause, reasoning as follows:

[T]he answer to the question is just as clear here as it was in *Kabab-Ji*. The governing law clause in the bonds is framed in particularly wide terms and covers not only the bond itself but “all non-contractual or other obligations arising out of or in connection with it”. Even if the obligations created by the arbitration

⁵⁴ *Id.* ¶ 61.

⁵⁵ *Id.* ¶ 63. Males LJ further noted that his conclusion was supported by the fact that the UK Supreme Court in *Kabab-Ji* had not mentioned this line where the agreement also chose Paris as the seat of arbitration. *Id.* ¶ 64.

⁵⁶ *Id.* ¶ 70.

⁵⁷ *UniCredit Bank GmbH v. RusChemAlliance LLC* [2024] UKSC 30 (UK).

⁵⁸ *Id.* ¶ 15.

⁵⁹ *Id.* ¶ 29.

⁶⁰ *Id.*

agreement were regarded as separate from the bond contract for this purpose, they are on any view “obligations arising . . . in connection with” the bond. But those additional words are not critical. Even if they are disregarded, the term “this Bond” in clause 11 is reasonably understood to mean the whole bond including clause 12 (the arbitration clause). There is nothing in the wording of the bonds which excepts clause 12 from the choice of English law as the governing law. As was held in *Enka*, the choice of a different country for the seat of the arbitration does not justify reading “this Bond” as excluding the arbitration agreement in clause 12. The arbitration agreements are therefore governed by English law.⁶¹

The *UniCredit* opinion spends a good deal of time discussing the argument that, by choosing arbitration in Paris, the parties should have been assumed to understand French law, including the decisions of the *Cour de Cassation*, and thus the arbitration clause should be governed by French law as the implied choice.⁶² This position was arguably supported by the decision in *Carpatsky Petroleum Corp. v. PJSC Ukrnafta*,⁶³ but was rejected by the Court on the grounds that, while it would achieve consistency if all countries adopted it, there was no showing that other jurisdictions had done so.⁶⁴ Thus, following the *Enka* principles, at least under the *UniCredit* facts, was seen as clearer and simpler to apply:

At least as desirable as transnational consistency—and best calculated to promote it—is to have a rule which is clear and simple to apply. A rule which treated the arbitration agreement as governed by whichever law the courts of the seat would regard as the law governing the arbitration agreement would be neither clear nor simple to apply. It would have the consequence that, in every case where the parties have chosen a foreign seat for the arbitration, evidence of that country’s law would have to be obtained in order to know what law governs the arbitration agreement.⁶⁵

While earlier determining that it would be inappropriate in the case to read into the common law the proposed amendment to the Arbitration Act 1996, Lord Leggatt’s opinion goes on seemingly to create an argument against the amendment, stating that “a rule which treats the arbitration agreement as governed by whatever law the courts

⁶¹ *Id.* ¶ 31.

⁶² *See id.* ¶ 51.

⁶³ *Carpatsky Petroleum Corp. v. PJSC Ukrnafta* [2020] EWHC (Comm) 769, [2020] Bus. L.R. 1284.

⁶⁴ *UniCredit Bank GmbH*, [2024] UKSC 30, ¶ 54.

⁶⁵ *Id.* ¶ 55.

of the seat would treat as the law which governs it would in fact be a very unsatisfactory rule for any legal system to adopt.”⁶⁶ The Court notes, however, that its decision is “not engaged in a legislative exercise of deciding what would be an optimum rule. That is for the Law Commission and Parliament.”⁶⁷ The Court’s role was confined to determining the intent of the parties from the language of the contract in accordance with the *Enka* principles.

The Law Commission, in its Final Report, referred to the nine-factor *Enka* test as “complex and unpredictable,”⁶⁸ a conclusion that weighed heavily in the recommendation to add a much simpler rule to the Arbitration Act 1996.⁶⁹

III. FUNDAMENTALS OF PRIVATE INTERNATIONAL LAW AND APPLICABLE LAW QUESTIONS FOR FORUM SELECTION CLAUSES⁷⁰

So far, like other commentary on private international law questions (here, questions of applicable law), my focus has largely been on the dispute resolution context through case analysis. This is natural as commentators tend to respond to judicial decisions. This indicates the importance of courts to the arbitration process and weighs heavily against a blind adherence to an overly broad application of concepts of competence-competence and separability in arbitration practice. It also makes it useful to turn to the transaction planning (contract drafting) stage in addressing questions raised about choice of forum clauses generally, and arbitration

⁶⁶ *Id.* ¶ 56.

⁶⁷ *Id.* ¶ 57.

⁶⁸ L. COMM’N, *supra* note 4, ¶ 12.20, at 137.

⁶⁹ *Id.* ¶ 12.74, at 147.

⁷⁰ The following materials provide the foundation for this section. RONALD A. BRAND, *Understanding Legal System Differences in Rules on the Recognition and Enforcement of Foreign Judgements*, in TRANSACTION PLANNING USING RULES OF JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS 114 (2014); Ronald A. Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts* (U. Pitt., Working Paper No. 2009-35, 2009); Ronald A. Brand, *2024 PAX Moot Half-Day Conference: The Law Applicable to the Arbitration Agreement*, UNIV. OF ABERDEEN (Aug. 2, 2024), <https://www.abdn.ac.uk/law/blog/2024-pax-moot-halfday-conference-the-law-applicable-to-the-arbitration-agreement/> [<https://perma.cc/QC97-MEH2>]. The blogpost summarized a panel at the Pax Moot Private International Law Conference held in Ljubljana, Slovenia on April 26, 2024, sponsored by the Centre for Private International Law at the University of Aberdeen Faculty of Law. I want especially to thank my fellow panelists, Dr. Tsvetelina Dimitrova, a partner at the law firm of Georgiev, Todorov & Co. in Sofia, Bulgaria, and Dr. Dora Zgrabljic Rotar, who is an Assistant Professor at the University of Zagreb Faculty of Law, to the extent that portions of the text here come from that blogpost.

clauses in particular.⁷¹ We are, after all, working at the dispute resolution stage to determine the intent of the parties, and that intent is best considered *ex ante* rather than *ex post*. Thus, while rules of private international law are most often considered in the dispute resolution (mostly litigation) context, those rules are of fundamental importance to the transaction planner (the contract drafter).

A. Analysis of Party Intent Through a Transaction Planning Lens

Any consideration of how rules of private international law relate to jurisdiction based upon consent, whether in courts or in arbitration, begins with the text of an agreement. Thus, an understanding of rules of private international law when that agreement is drafted is fundamental. The good contract drafter should draft to prevent litigation of issues regarding the jurisdiction of the relevant court or arbitral tribunal wherever possible.

The dispute resolution lawyer has a rather easier job than does the transaction planning lawyer. The dispute resolution lawyer knows what the issues in dispute are, can (or should be able to) find the facts relevant to those issues, and should be able to determine the law applicable to those issues. All of this provides clearer focus for the work of the dispute resolution lawyer.

The transaction planning lawyer, on the other hand, has a much more difficult job. They must be able to predict, as well as possible, all of the disputes that might arise; determine, as well as possible, what law will apply to the issues created by those disputes; and then use words, as well as possible, that will mean the same thing to everyone who reads them if and when a dispute arises. They must create a clear, exhaustive, and exclusive set of contract terms that will mean the same thing to everyone involved and make outcomes predictable enough that dispute resolution by courts and arbitral tribunals should be unnecessary.

B. The Role of the Transaction Planning Lawyer

Transaction planning places the lawyer in the middle of an existing business relationship. That has consequences. The transaction planning lawyer's role can be summarized in one word: *risk*. The better the relationship the lawyer is asked to deal

⁷¹ Some commentators use the term "forum selection clause" to refer only to choice of court. *See, e.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 5 (3d ed. 2021) (generally distinguishing between "forum selection clause" for choice of court and "arbitration clause"); Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 AM. U. L. REV. 325, 327–28 (2019). Arbitration is a forum for dispute resolution, so it makes sense to use "choice of forum agreement" or "forum selection clause" to refer to the larger category of which "choice of court agreement" and "arbitration agreement" are subcategories. This is particularly so after the 2005 completion of the Hague Convention on Choice of Court Agreements, which provides the term that fits best with that type of choice of forum.

with, the lower the risk. The relationship lesson for the businessperson bringing the contract drafting assignment to the lawyer is simple: begin by developing good business relationships. But the lawyer must deal with much more.

1. Identifying and Addressing Risk

The transaction planning lawyer must know how to deal with risk in the international business relationship. The first step is to *identify* all of the legal risks that are possible in the business relationship. At that point, there are three basic steps that define the lawyer's approach to risk:

- 1) *elimination* of the risk if that is possible;
- 2) *reduction* of the risk if it cannot be eliminated; and
- 3) *reallocation* of any remaining risk to the other party if it cannot be fully eliminated.

2. Sources of Protection from Risk

The transaction planning lawyer has three sources for tools to be used in addressing risk. The first is *institutional protection*. This requires a clear and comprehensive understanding of the legal framework in which the transaction is situated. At base, it requires an understanding of all of the default rules of law that will apply if no changes are made in the contract. This begins with rules of private international law—rules of applicable law. Those rules will lead to various sources of substantive and procedural law. Those sources may come in the form of a treaty or in the form of the domestic law (statute and case law) of one or more possible states. The lawyer must know from where those sources arise and what they provide. To the extent that rules in the law that applies in the absence of a contract are also mandatory rules, the lawyer must know what the limits are on the exercise of party autonomy in contract drafting.

The second source of tools for addressing risk is *purchased protection*. In a simple sale of goods transaction, for example, this may include a letter of credit.⁷² In both sales and more complicated investment transactions, it may include the purchase of various kinds of insurance, from either private or public sources.⁷³

⁷² See RONALD A. BRAND, INTERNATIONAL BUSINESS TRANSACTIONS FUNDAMENTALS 3 (2d ed. 2019).

⁷³ Public sources for such insurance in the United States include various options. See EXPORT-IMPORT BANK OF THE UNITED STATES, <https://exim.gov/> [<https://perma.cc/2E4G-UHPF>] (last visited Oct. 28, 2025); see also *OIG Oversight: Overseas Private Investment Corporation Overview*, OFF. OF INSPECTOR GEN.: U.S. AGENCY FOR INT'L DEV., <https://oig.usaid.gov/OPIC> [<https://perma.cc/7FPT-3XPM>] (last visited Feb. 15, 2026).

Purchased protection is particularly important for zero-sum risks that can be neither fully eliminated nor reduced through contract drafting. Some zero-sum risks will fall on one party or the other, and the availability of insurance against that risk is an important tool to have available.

The third source of tools for addressing risk is *negotiated protection*. This is where the transaction planning lawyer's role becomes most important. Negotiations will determine the words of the contract, and the lawyer must be able to plan and draft the words that best protect their client in the transaction. This may require reallocation of risk to the other party through the contract provisions.

C. Choice of Forum as Negotiated Protection from Risk

A good transaction planning lawyer will necessarily understand private international law from a dispute resolution context. They must be aware of the types of problems that arise when contract terms are not well drafted. For private international law purposes, this presents a focus on drafting the choice of forum (whether litigation or arbitration) and the choice of law clauses in the contract. The focus here is on drafting the choice of forum clause, but as *Enka*, *Kabab-Ji*, *UniCredit*, and the Law Commission recommendations demonstrate, arbitration clauses (as choice of forum clauses) are closely tied to choice of law clauses, and this requires particular attention to the law *governing* the choice of forum clause, whether that forum is a court or an arbitral tribunal.

1. Reverse Engineering the Choice of Forum Agreement

Drafting a good choice of forum clause requires a process of reverse engineering. Thus, the lawyer must look to the dispute resolution phase and identify how and when choice of forum issues can and do arise and how those issues are presented in challenges to a choice of forum clause.

Professor Peter Nygh famously stated that “freedom of contract is an essential part of the market economy. . . . [n]o State can hope effectively to control international contracts.”⁷⁴ But the law often limits just what parties may accomplish in a choice of forum clause, even when they might otherwise be in complete agreement on the choice of forum.

Negotiated protection in the form of a choice of forum clause necessarily begins with *institutional protection*. One must first understand the default rules found in the otherwise applicable law in order to properly exercise party autonomy in order to draft an effective choice of forum clause. Those default rules may well include some mandatory rules that limit the ability to exercise party autonomy by prohibiting

⁷⁴ PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 2 (1999).

drafting out of those rules. Thus, it is necessary to understand the limitations on the exercise of party autonomy and just what cannot be done by contract.

a. Arbitration Clauses as Choice of Forum Agreements

Drafting an effective arbitration clause begins with an understanding of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)—the fundamental source of institutional protection provided for arbitration agreements and awards.⁷⁵ That treaty currently has more than 170 contracting parties, making it applicable in most of the trading world.⁷⁶ It provides for both recognition and enforcement of the arbitration agreement,⁷⁷ and for recognition and enforcement of a resulting arbitral award.⁷⁸

b. Choice of Court Clauses as Choice of Forum Agreements

On the choice of court side of the choice of forum options, the 2005 Hague Convention on Choice of Court Agreements provides the opportunity to draft effective choice of court agreements in a manner similar to that found for arbitration agreements in the New York Convention.⁷⁹ The Choice of Court Convention currently has only thirty-four contracting parties (twenty-eight of which are the European Union and its Member states, which have overriding internal rules for the issues governed by the Choice of Court Convention).⁸⁰ It is much more recently available than the New York Convention, but holds the possibility of providing a level playing field for arbitration and choice of court agreements, thus providing the transaction planning lawyer with a clear choice based on the better type of forum given the specific transaction involved. Like the New York Convention, it provides

⁷⁵ New York Convention, *supra* note 42.

⁷⁶ *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”)*, UNITED NATIONS COMM’N ON INT’L TRADE L., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 [https://perma.cc/KGQ2-HY9Y] (last visited Feb. 15, 2026).

⁷⁷ New York Convention, *supra* note 42, art. II.

⁷⁸ *Id.* art. III.

⁷⁹ Convention of 30 June 2005 on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention].

⁸⁰ The contracting parties include the European Union and its Member States, plus Mexico, Moldova, Montenegro, Singapore, Ukraine, and the United Kingdom. *Convention of 30 June 2005 on Choice of Court Agreements Status Table*, HAUGE CONVENTION ON CHOICE OF CT. AGREEMENTS (Mar. 13, 2025), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> [https://perma.cc/6ZWP-5B5P].

for honoring the parties' choice of court,⁸¹ as well as for recognition and enforcement of any resulting judgment.⁸²

c. Choice of Forum Law and Transaction Planning

While the New York Convention currently provides a marked advantage for arbitration agreements in international contracts given its much wider global effect, it is likely this singular advantage will diminish in the future as more states become party to the Choice of Court Convention. While arbitration has many advantages, it may not be the best choice for every international commercial contract. When the choice is thus more balanced between arbitration and litigation, lawyers will necessarily be required to make more nuanced decisions between these two basic types of choice of forum.

2. Challenges to Jurisdiction and Choice of Forum

As transaction planning lawyers necessarily consider the dispute resolution stage and its possibilities, they find that there are five basic categories of challenges to a choice of forum clause in an international contract. Each of those categories can be governed by a different source of law, and thus requires separate attention. Those five categories on which a choice of forum clause may be challenged are:

- 1) the *existence* of the agreement (did both parties *consent* to a specific forum?);
- 2) the *formal validity* of the agreement;
- 3) the *substantive validity* of the agreement;⁸³
- 4) the *scope* of the agreement; and
- 5) the *exclusivity* of the agreement.

The five categories can be grouped in several ways, one of which considers existence, effectiveness, and extent, as follows:

Existence of the agreement (consent):

1. The *existence* of the agreement (party *consent*)

Effectiveness of the agreement (validity):

2. The *formal validity* of the agreement
3. The *substantive validity* of the agreement

⁸¹ Hague Convention, *supra* note 79, arts. 5–6.

⁸² *Id.* art. 8.

⁸³ The substantive validity category may include questions normally referred to as capacity and arbitrability.

Extent of the agreement (interpretation):

4. The *scope* of the agreement
5. The *exclusivity* of the agreement

a. Existence of the Choice of Forum Agreement

The existence of a choice of forum agreement is a matter for substantive contract law. This is a basic contract formation question. Every domestic legal system has a set of rules governing contract formation.⁸⁴ Moreover, the United Nations Convention on Contracts for the International Sale of Goods (CISG) contains contract formation rules that apply when the requirements of Article 1(1) of that Convention are met.⁸⁵ This means that the CISG contains its own rules of applicable law. When the CISG does not apply, the lawyer must use the relevant rules of applicable law to determine which set of domestic contract formation rules will apply.⁸⁶

b. Effectiveness of the Choice of Forum Agreement

In order to determine the effectiveness of a choice of forum agreement, we must consult multiple sources of law. Formal validity and substantive validity require reference to different sets of legal rules. At base, these are rules that prevent or invalidate certain agreements even when the parties have consented to them. Formal validity is governed by treaty in the drafting of both arbitration and choice of court clauses. Both the New York Convention, in Article II, and the Choice of Court Convention, in Article 3, contain formal validity requirements. Each of them requires the equivalent of a writing signed by the parties or other similar indicia of formal representation of party consent so that the information demonstrating consent is accessible to be used for subsequent reference.⁸⁷

Each of the New York and Hague Conventions also requires that the choice of forum agreement be substantively valid.⁸⁸ The New York Convention has no rule on

⁸⁴ See, e.g., U.C.C. §§ 2-201–2-210 (AM. L. INST. & UNIF. L. COMM'N 1997).

⁸⁵ United Nations Convention on Contracts for the International Sale of Goods arts. 14–24, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

⁸⁶ For a discussion of when the CISG applies to the formation of an arbitration agreement, see Boris Praštalo, *CISG as the (Rules of) Law Applicable to the Arbitration Agreement: Exploration from an English Perspective*, KLUWER ARB. BLOG (June 3, 2024), <https://arbitrationblog.kluwerarbitration.com/2024/06/03/cisg-as-the-rules-of-law-applicable-to-the-arbitration-agreement-exploration-from-an-english-perspective/> [https://perma.cc/LQM7-TS3E].

⁸⁷ New York Convention, *supra* note 42, art. II(2); Hague Convention, *supra* note 79, art. 3(c).

⁸⁸ New York Convention, *supra* note 42, art. II(1), (3); Hague Convention, *supra* note 79, arts. 5–6, 9.

what law will determine substantive validity, so reference to external rules of applicable law is required. The Choice of Court Convention, in Articles 5, 6, and 9, requires substantive validity to be determined by the law of the state of the chosen court (even though that choice is putatively ineffective unless and until it is determined that the agreement both exists and is valid).⁸⁹

Various states prevent agreement to a pre-dispute binding choice of forum agreement, especially when one party to a transaction is seen as being a weaker party in the negotiation relationship.⁹⁰ Thus, in the European Union, the Brussels I (Recast) Regulation prohibits binding pre-dispute choice of court in insurance, consumer, and employment contracts.⁹¹ Other legal rules may prevent pre-dispute binding choice of court or arbitration,⁹² for example, in franchise or distributorship contracts. Such legal rules can be found in a variety of types of law.

c. Extent of the Choice of Forum Agreement

When it comes to determining the extent of a choice of forum agreement, we necessarily revert once again to contract law. Both scope and exclusivity of a choice of forum agreement are questions of contract interpretation. As with the existence (consent/contract formation) question, this requires reference to the applicable contract law, whether that be domestic contract law or a treaty such as the CISG. Every contract law has rules for determining the intent of the parties,⁹³ which are rules of contract interpretation.

Both the New York Convention and the Choice of Court Convention provide a gloss on the otherwise applicable rules of contract interpretation for purposes of determining questions of scope and exclusivity. In many jurisdictions applying the New York Convention, judicial application of the Convention and the accompanying domestic arbitration law have resulted in (1) a strong policy favoring arbitration,⁹⁴

⁸⁹ Hague Convention, *supra* note 79, arts. 5–6, 9.

⁹⁰ Ronald A. Brand, *UNCITRAL, Access to Justice, and the Future of Online Dispute Resolution* 87–102 (U. Pitt., Working Paper No. 2024-16, 2023).

⁹¹ Regulation 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, arts. 15, 19, 23, 2012 O.J. (L 351) 1, 8, 10 [hereinafter Brussels I (Recast) Regulation].

⁹² See generally Brand, *supra* note 90, at 90.

⁹³ See, e.g., CISG, *supra* note 85, arts. 8–9.

⁹⁴ See, e.g., *Indus. Steel Constr., Inc. v. Lunda Constr. Co.*, 33 F.4th 1038, 1041 (8th Cir. 2022) (“The Supreme Court has long recognized that the Federal Arbitration Act (FAA) ‘establishes “a liberal federal policy favoring arbitration agreements.”’”) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

and (2) a resulting presumption in favor of interpreting any arbitration agreement to have broad scope because parties are assumed to want all issues determined in a single forum.⁹⁵ The Choice of Court Convention has a rule that deems any choice of court agreement choosing a court in a Contracting State to be an exclusive choice of court agreement unless clearly drafted otherwise.⁹⁶

*D. Summing Up the Transaction Planning Analysis of
Applicable Law to Choice of Forum*

Transaction planning lawyers must have a clear understanding of rules of private international law as well as the default rules of substantive law that govern a transaction in the absence of party choice. They must also have a clear understanding of the limits on party autonomy and freedom of contract. While institutional protection can be understood by knowing the law (including knowing *which* law applies), it is also necessary to know just how the law limits what can be done by contract to change default rules.

The transaction planning lawyer drafting a choice of forum agreement must begin by knowing the governing law for each of the five issues on which jurisdiction may be challenged in either arbitration or litigation. Questions of agreement existence, formal validity, substantive validity, scope, and exclusivity may well each be governed by a different source of law. The transaction planning lawyer must be familiar with each of those sources and understand just when and how they apply, and when and how they can be adjusted to the needs of an individual international transaction.

Once the available institutional protection is clearly understood by knowing (1) what law will apply as the default law, (2) just how parties may choose the

⁹⁵ See, e.g., *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (“[I]nsist upon clarity before concluding that the parties did *not* want to arbitrate a related matter.”); *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986) (“[[I]n] the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.”) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584–85 (1960)); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]”); *Fiona Tr. & Holding Corp. v. Privalov* [2007] EWCA (Civ) 20 [18], [2007] UKHL 40 (appeal taken from Eng.) (“[A]ny jurisdiction or arbitration clause in an international commercial contract should be liberally construed.”); *Premium Nafta Prods. Ltd. v. Fili Shipping Co.* [2007] UKHL 40, [2007] 4 All ER 951 (appeal taken from Eng.) (“It serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly. Otherwise they will be taken to have agreed on a single tribunal for the resolution of all such disputes.”).

⁹⁶ Hague Convention, *supra* note 79, art. 3(b).

governing law, and (3) what limits there may be on that choice, the transaction planning lawyer then can engage in useful negotiated protection by choosing the words that will produce the best situation for a given party to a transaction. Given that those words must be chosen when the agreement is first formed, and when the parties likely are in a positive relationship, this is not an easy task and requires the ability to project all of the possible types of disputes that might arise, the limits on changing the otherwise applicable default rules, and the words that should mean the same thing to everyone who reads them in determining the outcome of each such possible dispute.

IV. EXISTING THEORETICAL APPROACHES TO THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

The nine-point *Enka* analysis propounded by the UK Supreme Court suggests a number of alternative sources of law when an arbitration agreement is challenged.⁹⁷ Other courts, arbitral tribunals, and commentators have often taken a more direct approach, suggesting a preference for one of four sources of law.⁹⁸ Those four sources generally can be described as:

- (1) the law of the seat;
- (2) the law of the main (matrix) contract;
- (3) the validation principle; and
- (4) a supra-national or a-national principle.

Unfortunately, like the Law Commission Reports, commentators have generally failed to make clear the specific issues to which their preferred source of law is to apply, sometimes appearing to assume that all issues that can be raised in a challenge to an arbitration agreement should or would be governed by the same State's laws. Most often, the discussion focuses primarily on questions of validity,

⁹⁷ *Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb* [2020] UKSC 38 (UK).

⁹⁸ See, e.g., GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 66–68 (3d ed. 2021); Gary B. Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 SING. ACAD. L.J. 814, 818 (2014); NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 156–59 (6th ed. 2015); Maxi Scherer & Ole Jensen, *Towards a Harmonized Theory of the Law Governing the Arbitration Agreement*, 10 INDIAN J. ARB. L. 1, 1 (2021); Andrew Ling, *Neither Express Nor Implied: Rethinking Governing Law of the Arbitration Agreement*, 39 ARB. INT'L 401, 402 (2023); Renato Nazzini, *The Law Applicable to the Arbitration Agreement: Towards Transnational Principles*, 65 INT'L & COMPAR. L.Q. 681, 681–83 (2016); Katharina Plavec, *The Law Applicable to the Interpretation of Arbitration Agreements Revisited*, 4 U. VIENNA L. REV. 82, 97–113 (2020); Anano Kuparadze, *Consequences of the Separability Presumption for the Choice of Law Applicable to Arbitration Agreements*, 4 J. SOC. SCI. 71, 72 (2015).

but not clearly separating formal validity from substantive validity. The lack of clear delineation of issues makes discerning a clear methodology or result difficult. Nonetheless, some conclusions can be drawn from existing commentary.

A. The Law of the Seat

The law of the seat is the approach chosen by the Law Commission and contained in the proposed amendments to the Arbitration Act 1996.⁹⁹ Even though the Law Commission chose this direct and simplified approach, it acknowledged that the approach is not perfect:

We accept that there is no conclusive argument in favour of our proposal. Any approach to governing law will have its strengths and weaknesses. However, we think these concerns against our proposal are outweighed by the problems we have identified with the current approach, and by the potential gains from our proposal.¹⁰⁰

In the end, the Law Commission justified its proposed new rule on the bases that it would “see more arbitration agreements governed by the law of England and Wales, when those arbitrations are also seated here,” in England and Wales;¹⁰¹ “preserve party autonomy in the choice to arbitrate, without that express choice being undermined by an implied choice of foreign governing law with potentially less generous provisions on arbitrability, scope, and separability”;¹⁰² and “have the virtues of simplicity and certainty” when compared to the *Enka* principles.¹⁰³

Other proponents justify the law of the seat approach by reference not to arbitration procedure or agreements, but rather by the New York Convention rules on recognition and enforcement of arbitral awards.¹⁰⁴ Article V(1)(a) of the New York Convention states:

⁹⁹ L. COMM’N, *supra* note 4, ¶ 12.2, at 134.

¹⁰⁰ *Id.* ¶ 12.29, at 138.2.

¹⁰¹ *Id.* ¶ 12.72, at 147.

¹⁰² *Id.* ¶ 12.73, at 147.

¹⁰³ *Id.* ¶ 12.74, at 147.

¹⁰⁴ *See, e.g.*, Born, *supra* note 98, at 829; Ling, *supra* note 98, at 419, 422; Nazzini, *supra* note 98, at 685; Plavec, *supra* note 98, at 85; Scherer & Jensen, *supra* note 98, at 5.

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, *failing any indication thereon, under the law of the country where the award was made.*¹⁰⁵

The seat is, of course, the state “where the award was made.”¹⁰⁶ But Article V(1)(a) applies only to award recognition (after the proceedings are completed) and applies only to questions of incapacity and substantive validity (suggesting that capacity is a subset of substantive validity).¹⁰⁷ Thus, even at the stage of award recognition, this provision does not lend support for applying the law of the seat to other questions. Nonetheless, proponents of this approach suggest that the law of the seat of arbitration should be applied to “all questions relating to the arbitration agreement.”¹⁰⁸

The seat is, of course, an incredibly significant element because it determines the law applicable to procedure during the course of arbitration and determines the courts that will be available to assist during and after the arbitration process.¹⁰⁹ As Professor Nazzini notes, not only does justifying applying the law of the seat conflict rule fit uncomfortably with a reading of Article V(1)(a), but it fails to result in a rule that can easily provide results across legal systems:

[E]xtending the application of the conflict rule under Article V(1)(a) of the New York Convention to all cases in which the existence, validity or effectiveness of the arbitration agreement is in issue does not answer [all] the questions Nor could Article V(1)(a) of the New York Convention ever achieve full harmonization, even only at the enforcement stage.¹¹⁰

¹⁰⁵ New York Convention, *supra* note 42, art. V(1)(a) (emphasis added).

¹⁰⁶ U.N. Comm’n on Int’l Trade L., UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(a), ¶ 34, (Sept. 2016).

¹⁰⁷ *Id.* art. V(1)(a), ¶ 1.

¹⁰⁸ Plavec, *supra* note 98, at 107.

¹⁰⁹ Born, *supra* note 98, at 40.

¹¹⁰ Nazzini, *supra* note 98, at 685–86.

The law of the seat approach becomes particularly troublesome as a theoretical matter when no seat has been chosen by the parties. “[A]s a matter of construction, it becomes difficult to argue that the intention of the parties was that the law of the seat would apply to the arbitration agreement if they did not choose the seat, presumably either because the seat was a matter of indifference or they could not agree on it.”¹¹¹

B. *The Law of the Main (Matrix) Contract*

The UK Supreme Court in *Enka* found that “considerations of principle” favor the application of the law of the main contract to an arbitration agreement that is part of that contract.¹¹² There, the Court found that this approach “provides a degree of certainty,”¹¹³ “achieves consistency,”¹¹⁴ “avoids complexities and uncertainties,”¹¹⁵ “avoids artificiality,”¹¹⁶ and “ensures coherence.”¹¹⁷ This led naturally to the Court’s fourth principle in its conclusions on applicable law: “Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.”¹¹⁸

The law of the main contract approach has been applied by the Indian Supreme Court in *National Thermal Power Corp. v. Singer Co.* (“NTCP”).¹¹⁹ The award debtor brought an action in India to set aside the award rendered in London, and resulting from a contract in which there was no agreement on the arbitral seat.¹²⁰ In order to rule on setting aside the award, the Indian Court had to determine that India was appropriately the seat and that the award was domestic to India.¹²¹ It did so, finding that an award rendered in the territory of a foreign state could be enforced as a domestic award if the law of the enforcing state governed the arbitration

¹¹¹ *Id.* at 693.

¹¹² *Enka Insaat Ve Sanaya AS v. OOO Ins. Co. Chubb* [2020] UKSC 38 [53] (UK).

¹¹³ *Id.* ¶ 53(i), at 18.

¹¹⁴ *Id.* ¶ 53(ii), at 18.

¹¹⁵ *Id.* ¶ 53(iii), at 18.

¹¹⁶ *Id.* ¶ 53(iv), at 18.

¹¹⁷ *Id.* ¶ 53(v), at 19.

¹¹⁸ *Enka*, [2020] UKSC 38, ¶ 170(iv), at 59.

¹¹⁹ *Nat’l Thermal Power Corp. v. Singer Co.* (1992) 3 SCR 106, 129 (India).

¹²⁰ *Id.* at 113–114, 116–17, 131.

¹²¹ *Id.* at 121, 128.

agreement.¹²² The Court focused on the choice of law clause in the main contract as demonstrating that the parties intended that Indian law govern the arbitration agreement.¹²³ The Court held that “[t]he proper law of the arbitration agreement is normally as the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties.”¹²⁴

The recent completion by the American Law Institute of the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration includes support for applying the law of the main contract to the arbitration clause in the contract, at least in investor-state relationships.¹²⁵ In Section 4.10(c), the Restatement begins with the law chosen by the parties to govern the arbitration agreement, followed by the law of the main contract, and then by the law of the seat of arbitration:

(c) In determining the validity of the arbitration agreement referred to in subsection (a), a court applies the law to which the parties have subjected the arbitration agreement or, if no such law has been selected, by the law identified in the general choice-of-law clause in the underlying contract or, in the absence of such a clause, by the law of the seat of arbitration.¹²⁶

Like other authorities, the Restatement deals only with the question of validity, and not with the other questions that can arise in a challenge to an arbitration agreement.¹²⁷

¹²² *Id.* at 125.

¹²³ *Id.* at 123–24, 128, 131.

¹²⁴ *Nat'l Thermal Power Corp.*, (1992) 3 SCR at 121.

¹²⁵ See RESTATEMENT OF THE U.S. LAW OF INT'L COM. ARB. AND INV.-STATE ARB. § 4.10(c) (AM. L. INST. 2023); *id.* § 4.10 cmt. b; *id.* § 4.10 cmt. c.

¹²⁶ *Id.* § 4.10(c).

¹²⁷ In comment (b) to Section 4.10, the Restatement makes clear the need for consideration of different laws to different questions in challenges to arbitration clauses: “b. Nonexistence or invalidity of arbitration agreement. The existence of an arbitration agreement raises basic questions of contract formation—that is, whether the parties have assented to arbitration (including issues presented by nonsignatories to the arbitration agreement, see § 2.3), either by agreeing to a freestanding arbitration agreement or by agreeing to an arbitration clause in a contract. The validity of an arbitration agreement is determined by reference to standard defenses to contract enforcement, such as duress, mistake, fraud and fraudulent inducement, illegality, and unconscionability. (The extent to which courts may review arbitral findings on these

The language of the *Enka* decision by the UK Supreme Court supported the law of the main contract as an implied choice of law by the parties when there exists no express choice of law for the arbitration agreement clearly stated in the contract:

A number of further considerations confirm the reasonableness of, as a general rule, construing a choice of law to govern the contract as applying to an arbitration agreement set out in a clause of the contract, even where the law chosen to govern the contract differs from that of the place chosen as the seat of the arbitration:

-
- iv) It avoids artificiality. The principle that an arbitration agreement is separable from the contract containing it is an important part of arbitration law but it is a legal doctrine and one which is likely to be much better known to arbitration lawyers than to commercial parties. For them a contract is a contract; not a contract with an ancillary or collateral or interior arbitration agreement. They would therefore reasonably expect a choice of law to apply to the whole of that contract.
 - v) It ensures coherence. It is consistent with the treatment of other types of clauses whose validity is also insulated from challenges to the contract, such as choice of law or choice of court clauses. Such clauses are generally presumed to be governed by the law of the contract of which they form part.¹²⁸

Commentary has also recognized an implied agreement foundation for the law of the main contract approach.¹²⁹ Like the assumption that an arbitration agreement is broad in scope in order to determine all disputes in one forum,¹³⁰ this approach assumes the parties want all issues governed by the same law.¹³¹

defenses is discussed in Comment *d* of this Section.) Analogous issues arise when courts decide whether to enforce an arbitration agreement (see § 2.13), although a different law might apply in that context. A contention that the arbitration agreement is unenforceable because arbitration of the dispute is not permitted by law is addressed under § 4.15, rather than under this Section.” *Id.* § 4.10 cmt. b.

¹²⁸ *Enka Insaat Ve Sanaya AS v. OOO Ins. Co. Chubb* [2020] UKSC 38 [53iv], [53v] (UK) (citing DICEY, MORRIS & COLLINS, *THE CONFLICT OF LAWS* ¶¶ 12-103, 12-109 (15th ed. 2012)).

¹²⁹ *See, e.g.,* Ling, *supra* note 98, at 414–15; Scherer & Jensen, *supra* note 98, at 9–10.

¹³⁰ *See, e.g.,* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]”); BORN, *supra* note 71, § 9.02[A] (“In many jurisdictions, courts hold that parties’ intentions, in concluding an agreement to arbitrate in an international commercial setting, are presumptively to resolve all disputes related to their business relationship in a single, centralized proceeding, rather than in separate and potentially inconsistent proceedings.”).

¹³¹ BORN, *supra* note 71, § 9.02[A].

The law of the main contract approach is sometimes criticized as being inconsistent with the doctrine of separability, which assumes the arbitration clause is to be treated as a separate agreement from the main contract, and is considered to be a “foundational element of international arbitration law.”¹³² But the doctrine of separability is generally stated as applying to questions of validity,¹³³ not questions of contract formation or scope interpretation, and thus does not transfer easily to providing an answer to determining the multiple laws that apply to an arbitration agreement.¹³⁴

C. *The Validation Principle*

The validation principle’s most prominent early champion was Professor Russell Weintraub. In the third edition of his *Commentary on Conflict of Laws*,¹³⁵ he referred to the “party autonomy rule” of the Restatement (Second) Conflict of Laws and the Uniform Commercial Code, stating that the purpose of party autonomy:

is far better served by a rebuttable presumption that the contract will be valid under the local law of any contact state provided that the validating policies underlying that law will be advanced by application to the interstate transaction in issue. This presumption gives the parties all the benefits that they could legitimately claim under a rule allowing the parties power to choose the governing law and does not limit the search for validating law to a single state named in a choice-of-law clause. Moreover, the rebuttable presumption of validity has the merit of focusing on a policy that all states share—making commercial transactions convenient and

¹³² Scherer & Jensen, *supra* note 98, at 7; *see also* Plavec, *supra* note 98, at 99–101; Ling, *supra* note 98, at 409–10; Nazzini, *supra* note 98, at 684; Kuparadze, *supra* note 98, at 71.

¹³³ *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (holding that claim of fraud in inducement of the main contract could be determined by arbitrators); *Harbour Assurance Co. (UK) v. Kansa Gen. Int’l Ins. Co.* [1993] 1 Lloyd’s Rep. 455, 459–60, 462 (Eng.) (holding that the arbitration agreement survived even when the underlying contract was void for illegality); John Douglas Stiner, *Arbitration: Shaffer v. Jeffery: The Oklahoma Supreme Court Rejects the Separability Doctrine and Takes a Step Back in the Enforcement of Arbitration Clauses Under Oklahoma Law*, 50 OKLA. L. REV. 243, 245 (1997) (“The court will separate the arbitration clause from the main contract so that its validity is not at issue and thus compel arbitration on the question of the validity of the contract as a whole. This is known as the separability doctrine.”).

¹³⁴ *See Prima Paint Corp.*, 388 U.S. at 403; *Harbour Assurance Co. (UK)*, 1 Lloyd’s Rep. at 461; Stiner, *supra* note 133, at 247–48.

¹³⁵ RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 7.4A (3d ed. 1986).

reliable by enforcing commercial contracts in the absence of compelling countervailing considerations articulated in a particular invalidating rule.¹³⁶

This approach has been picked up by those considering the law applicable to arbitration agreements, and supported by suggesting that “it is unthinkable that parties would choose a law that leads to the invalidity of the arbitration agreement.”¹³⁷ Some have gone so far to support the validation principle by suggesting it fits a concept of “uniform principles of international law.”¹³⁸ As Gary Born explains,

Faced with the complexities and uncertainties of the various choice-of-law approaches . . . , some authorities have held that international arbitration agreements are governed by uniform principles of international law, or, alternatively, by a specialised validation principle. This validation principle provides that, if an international arbitration agreement is substantively valid under any of the laws that may potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable choices of law. Application of this validation principle is a more principled and effective approach to the choice-of-law analysis, which better effectuates the parties’ objectives and is more consistent with the New York Convention.¹³⁹

Consistency of the validation principle with the New York Convention is found in suggesting the “presumptive validity” of arbitration agreements under Article II(1) & (3) of the Convention.¹⁴⁰ In addition, it is perceived that Article V(1)(a) of the New York Convention upholds the application of the validation principle as it is thought to be parties’ implied choice to apply the law to their arbitration agreement which makes it effective and enforceable.¹⁴¹

Like the law of the seat and law of the main contract approaches, the validation principle does not work well when extended to all of the five major issues that can lead to challenges to arbitral jurisdiction based on an arbitration agreement. By its very nature, it is focused only on questions of substantive validity. It has no logical

¹³⁶ *Id.*

¹³⁷ Plavec, *supra* note 98, at 111.

¹³⁸ Born, *supra* note 98, at 834.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 823–24.

¹⁴¹ *Id.* at 825.

application to questions of contract formation or, in particular, questions of scope or exclusivity—the questions necessarily governed by substantive contract law. The validation principle “is the reflection of a well-established contract law doctrine whereby a clause in a contract must be construed so as to be given effect instead of being invalidated.”¹⁴²

D. *A Supra-National or A-National Principle*

A fourth approach, developed primarily in France, would find the existence and validity of an arbitration agreement to be determined by mutual intention of the parties—without any necessity of referring to a national law.¹⁴³ In 1993, the French Cour de cassation held in *Municipalité de Khoms El Mergeb v. Société Dalico*, that, as a substantive principle of international law, the existence and validity of an international arbitration agreement depends only on the intent of the parties when no express choice of law is stated and that it is not necessary to apply any national law.¹⁴⁴ This approach avoids determining whether there is any implied choice of law or any specific factor connecting the case to a national legal system.¹⁴⁵ Thus, the court will “directly apply a substantive rule according to which it is only decisive whether, as a matter of fact, the parties intended to arbitrate and whether their agreement is in line with French mandatory law and international public policy.”¹⁴⁶

This principle has been criticized as “unpredictable and arbitrary,”¹⁴⁷ with commentators suggesting that an arbitrator faced with a question of validity (or any of the other categories of challenges) will find it difficult to find an answer based only on transnational legal principles,¹⁴⁸ and as creating problems if the principles so deduced are not recognized in the enforcement forum.¹⁴⁹

¹⁴² Nazzini, *supra* note 98, at 700–01.

¹⁴³ Plavec, *supra* note 98, at 95; Scherer & Jensen, *supra* note 98, at 2–3.

¹⁴⁴ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Bull. civ. I, No. 1675, 1994 Rev. Arb. 116, 117 (Fr.) (“By virtue of a substantive principle of international arbitration law, an arbitration clause is legally independent from the main contract in which it is contained, directly or by reference, and its existence and effectiveness are assessed, within the limits of the mandatory rules of French law and international public policy, by reference to the common intentions of the parties, without the need to refer to a national law.”).

¹⁴⁵ Scherer & Jensen, *supra* note 98, at 2–3.

¹⁴⁶ *Id.*

¹⁴⁷ Nazzini, *supra* note 98, at 696.

¹⁴⁸ Plavec, *supra* note 98, at 95–96.

¹⁴⁹ Nazzini, *supra* note 98, at 695–96.

E. Considering the Existing Theoretical Approaches

The four theoretical approaches all share the problem: they seem designed to deal with some, but not all, of the possible questions raised in challenges to arbitration agreements. For the most part, they (and the cases and commentary supporting them) are focused on the question of substantive validity. As one commentator has framed it, the law applicable to substantive validity:

can be distinguished from other laws that might be of relevance during the arbitral proceedings. Most importantly, the law governing the substance of the dispute, also called the *lex causae*, is not always the same as the law applicable to the arbitration clause Similarly, the law at the seat of the arbitration (the *lex arbitri*) is governing the conduct of the proceedings but does not necessarily apply to the arbitration clause. The question of objective arbitrability, *i.e.* whether a particular claim is capable of settlement by arbitration, also needs to be assessed by applying one or several distinct law(s). Different laws might be applicable to further aspects of the arbitration, for instance concerning the formal validity of the arbitration agreement and the subjective capacity of the parties involved to conclude said agreement.¹⁵⁰

Scherer and Jensen have described the same problem: “At the gateway to arbitral proceedings, a myriad of questions can arise as to the arbitration agreement’s validity, scope and effects. These questions must be answered based on the law(s) governing the arbitration agreement.”¹⁵¹

V. PARTY AUTONOMY AND THE LAWS APPLICABLE TO FORUM SELECTION

While the laws applicable to forum selection agreements are important at both the contract drafting and dispute resolution stages, the focus of the Law Commission amendment is on the dispute resolution stage. That is the principal focus of the discussion here. As noted above, however, the discussion remains especially important to the transaction planning stage as well.

Arbitration agreements are agreements to avoid courts—to the extent that is possible. The enforcement of such agreements requires both clear party intent to enter into such an agreement and sovereign consent to such agreements. Prior to the mid-twentieth century it was often held that the jurisdiction of a court could not be

¹⁵⁰ Plavec, *supra* note 98, at 84.

¹⁵¹ Scherer & Jensen, *supra* note 98, at 1.

“ousted” in favor of another court,¹⁵² and that parties could not avoid courts by agreeing to private forms of dispute settlement.¹⁵³ Increasing respect for party autonomy and freedom of contract throughout the twentieth century resulted in the legal acceptance of party choice both of the forum for dispute settlement—whether that be a court or an arbitral tribunal—and the law applicable to the contractual relationship.¹⁵⁴ While public policy and other limitations on choice of forum continue to acknowledge sovereign authority, that authority is now generally stated through exceptions to the ability of parties to choose a forum and applicable law, with consent being a fundamental basis of jurisdiction in courts and *the* basis of jurisdiction in arbitral tribunals.¹⁵⁵ Thus, both the contract law that governs the formation of a legally enforceable agreement (a question of consent establishing the existence of the contract) and other laws that limit party autonomy based on

¹⁵² See, e.g., *Carbon Black Export, Inc. v. The S.S. Monroe*, 254 F.2d 297, 300–01 (5th Cir. 1958), cert. dismissed, 359 U.S. 180 (1959) (“[A]greements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.”).

¹⁵³ In the United States, this position remained for arbitration until the Federal Arbitration Act of 1925, 9 U.S.C. § 1 *et seq.* In England, it fell earlier, but not without substantial difficulty. See Ernest G. Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 YALE L.J. 716 (1934). “The development of commercial arbitration in England was particularly affected by a dictum of Lord Coke in *Vynior’s Case*, decided in 1609, where plaintiff was permitted to recover on a bond given for the faithful performance of an arbitration agreement. Lord Coke explained that where there is an agreement to submit to arbitration, a party ‘might countermand it, for a man cannot by his act make such authority, power, or warrant not countermandable which is by the law and of its nature countermandable’; but the bond is thus forfeited because the condition of the bond is broken by such revocation. With the enactment of the Statute of Fines and Penalties, in 1697, the use of a bond in submission was no longer effective, but the fact that the method of making the agreement effective had been abrogated did not induce the courts to abandon the revocability rule. There resulted the irrational situation that a valid agreement was utterly ineffective, for the courts would give only nominal damages for breach of the agreement on the theory that there could be no actual injury in forcing people to litigate in the King’s own courts of justice. The view that courts cannot approve irrevocability of arbitration agreements because it ‘ousts the jurisdiction of the court’ did not appear in the early cases, and is not to be found until the case of *Kill v. Hollister*, decided in 1746. It was created perhaps to justify the maintenance of the revocability rule which could no longer be mitigated by the use of bonds after the passage of the Statute of Fines and Penalties. The doctrine has also been credited to the judicial jealousy of the English courts, whose judges and court officers in early times were paid by fees on the volume of business which came to them. The English Parliament and courts started early to modify this situation. The first arbitration act, passed in 1698, provided that the parties might agree to make their submission agreement a rule of court, whereby the party who revoked should be subject to imprisonment for contempt of court. However, this did not prevent the parties from revoking the authority of the arbitrator at any time before an award was made. In 1833, however, it was provided that where the submission agreement had been made a rule of court under the Act of 1698, the authority of the arbitrators appointed should be irrevocable, except by leave of court, and the arbitrators might proceed to make a binding award.” *Id.* at 716–17 (citations omitted).

¹⁵⁴ See Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, *supra* note 70, at 549.

¹⁵⁵ *Id.* at 542.

sovereign interests (including substantive validity rules often not found in general contract law) are of fundamental importance to challenges to arbitral jurisdiction.

A. Consent, Validity, and Interpretation: Separation of the Laws Applicable to Party Autonomy and Sovereign Control

When the jurisdiction of an arbitral tribunal is challenged based on questions about the arbitration clause, it is of course necessary to know what law governs those questions. Because different laws may govern different questions that can arise in such a challenge, it is important to understand the full set of possible questions and the various sources of law that might be applicable to each question. Thus, the question of “the *law* of the arbitration agreement” really is the question of “the *laws* of the arbitration agreement.”

1. Separability and Competence-Competence: What Law and What Forum?

The central role of consent to choice of forum through the exercise of party autonomy makes the question of whether the parties have properly consented to arbitration fundamental to the jurisdiction of an arbitral tribunal. This question constitutes a subpart of the question of when a choice of forum agreement successfully grants jurisdiction to a court or an arbitral tribunal. Obviously, if there is no agreement (i.e., if there is no mutual consent) to a choice of forum clause, that clause cannot be effective and the forum cannot claim jurisdiction as a result of consent. This is the party autonomy element of the analysis that necessarily focuses on the question of party consent and whether an arbitration “agreement” exists.

There is also a sovereign element in any challenge to the jurisdiction of an arbitral tribunal, resulting in laws expressing limitations on the ability of parties to consent to arbitration.¹⁵⁶ This is the validity element. Various legal rules may prevent a choice of forum agreement from being effective even where the parties have reached mutual consent to its terms. The party autonomy (consent) and sovereign authority (validity) elements are separate and distinct and require separate determinations of applicable law.

a. Separability

In arbitration, two doctrines provide the foundational context for analysis of the existence of (consent to) and effectiveness of (validity of) choice of forum agreements. The first of these is the doctrine of separability. The Arbitration Act 1996 clearly embraces the doctrine of separability, which provides that, for certain purposes, a choice of forum agreement is to be considered as separate from the

¹⁵⁶ *Id.* at 543.

remainder of a contract in which it may be included.¹⁵⁷ The fundamental role of the separability doctrine is routinely acknowledged in arbitration laws and sets of institutional arbitration rules.¹⁵⁸ The doctrine allows a court or arbitral tribunal to consider challenges to the validity of a choice of forum clause prior to hearing challenges to the validity of the larger contract in which the choice of forum clause is contained.¹⁵⁹

The question of what law governs matters concerning the choice of forum clause requires consideration of both what state's law governs and what law of that state governs. The doctrine of separability thus may require that a challenge to the larger contract be brought in the forum selected in a choice of forum provision contained within that contract.¹⁶⁰ On the other hand, the initial question of whether there *is an agreement* (i.e., whether there is mutual consent to the choice of forum) logically cannot be brought in a "chosen" forum because, unless and until that consent has been established, there simply cannot be a chosen forum.

¹⁵⁷ See, e.g., Arbitration Act 1996, § 7 (UK) ("Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.").

¹⁵⁸ See, e.g., MODEL L. ON INT'L COM. ARB., art. 16 (UNCITRAL 2005); ARB. RULES, art. 21(1) (UNCITRAL); RULES OF ARB., art. 6(4) (ICC); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."). The Hague Choice of Court Convention applies the same rule to choice of court agreements. Hague Convention, *supra* note 79, art. 3(d).

¹⁵⁹ See Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, *supra* note 70, at 543.

¹⁶⁰ See, e.g., *Deutsche Bank AG v. Asia Pac. Broadband Wireless Commc'ns Inc.*, [2008] EWCA (Civ.) 1091, [2008] 2 Lloyd's Rep. 619, [25] (Eng.) (allowing, under Article 23 of the Brussels I Regulation, a party to amend its complaint to allege a failure to conclude the underlying contract while at the same time relying on that contract's exclusive choice of forum clause). "The importance of this concept of separability is that it shows that it cannot be the case that every claim made on the basis that a contract is void or has never come into existence must fall outside the terms of a jurisdiction clause expressed as widely as that in the present case. If for example, a prepayment has been made pursuant to a supposed building contract which is subsequently held to be void or never to have existed, the court so holding (by virtue of the exclusive jurisdiction clause) must, in my view, be able to order the return of the payment made. It would be absurd if that court had to decline all further jurisdiction and require the claimant to go, for that purpose, to the courts of the defendant's domicile. . . . That these propositions are uncontroversial as a matter of English law is shown by *Caterpillar Finances v SNC Passion* [2004] 2 Lloyds Rep 99, 103 para 16 where Cooke J held that a claim for the return of the principal (if the contract was invalid) was a claim in connection with the loan agreement 'since without that agreement no sum would have been advanced at all.'" *Id.* ¶ 25.

b. Competence-Competence

Closely related to the separability doctrine is the second foundational arbitration doctrine: the doctrine of competence-competence. Competence-competence provides that a tribunal has the jurisdiction to determine its own jurisdiction (i.e., to decide whether it is the appropriate forum for hearing the dispute).¹⁶¹ This doctrine is routinely applied by both courts¹⁶² and arbitral tribunals.¹⁶³ Its relationship to the separability doctrine is particularly important in the arbitration context, where it allows the arbitral tribunal to determine its own jurisdiction, even when one party challenges the effectiveness of the agreement to arbitrate.

The United States Supreme Court, when considering the existence question, has stated that “who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.”¹⁶⁴ This highlights the question of *what forum decides* the existence/consent question.

Most modern sets of institutional arbitration rules, and the UNCITRAL Model Law, state clearly that the arbitral tribunal has the authority to decide not only questions of validity and interpretation of an arbitration agreement, but also questions of its existence.¹⁶⁵ This results in a commonly-held assumption that arbitral tribunals can decide the first question in the five categories of jurisdictional challenge, the question of consent (i.e., the existence *vel non* of an agreement to arbitrate).

While unquestioning acceptance of the competence of arbitral tribunals to decide the existence of the arbitration agreement has become a basic tenet of arbitration theology, it has not been so readily accepted by the courts, and there is good reason to question whether it is the right approach. It has very important

¹⁶¹ See Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, *supra* note 70, at 543.

¹⁶² In courts, this inquiry consists of the initial determination of jurisdiction necessary to any judicial proceeding. *Id.*

¹⁶³ See, e.g., BORN, *supra* note 98, at 870.

¹⁶⁴ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995).

¹⁶⁵ See, e.g., MODEL L. ON INT’L COM. ARB., *supra* note 158, art. 16(1) (“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”); Arb. Rules 2020, art 23.1 (LCIA) (“The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.”), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2023 [<https://perma.cc/HJ3X-S9SK>].

implications for contracting parties, but even more so for parties who really have not entered into such a contract.

c. The Doctrinal Effect on *Who Decides*

Cases in both the UK and the United States have served to emphasize the limitations on arbitral competence, particularly for the gateway question of the *existence* of an arbitration agreement. In the United States, the 1967 decision in *Prima Paint* commented on the relationship of the question of separability to the question of competence-competence by holding that:

if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.¹⁶⁶

Notably, a challenge to the existence of the arbitration agreement was seen as clearly in the province of the courts, not of the arbitral tribunal.¹⁶⁷ A challenge to the existence of the larger contract in which the arbitration agreement may be found was a matter for the tribunal.¹⁶⁸

In its 2006 decision in *Buckeye Check Cashing*, the U.S. Supreme Court discussed the application of the competence-competence doctrine to the different questions of the existence and the validity of an arbitration agreement.¹⁶⁹ There, the question addressed was whether “the contract as a whole (including its arbitration provision) [was] rendered invalid by the usurious finance charge[,]” allegedly imposed by *Buckeye Check Cashing*.¹⁷⁰ In its footnote 1, the Court made a clear distinction between questions of existence and validity:

The issue of the contract’s validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold

¹⁶⁶ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

¹⁶⁷ See Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, *supra* note 70, at 552.

¹⁶⁸ See *id.* at 551.

¹⁶⁹ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

¹⁷⁰ *Id.* at 444.

that it is for courts to decide whether the alleged obligor ever signed the contract¹⁷¹

The Court held that the claim that the larger contract was void because of illegally usurious finance charges was a matter for the arbitral tribunal, clearly giving the *validity* question to arbitration, but not disturbing existing case law giving the *existence* question to the courts.¹⁷²

In the United Kingdom, the allocation of competence between courts and arbitral tribunals through the combined doctrines of separability and competence-competence was addressed in particular by Lord Hope of Craighead in the 2007 decision of the House of Lords in *Premium Nafta Products, Ltd. v. Fili Shipping Co. Ltd.*¹⁷³ In his discussion of the case, Lord Hope stated:

As everyone knows, an arbitral award possesses no binding force except that which is derived from the joint mandate of the contracting parties. Everything depends on their contract, and if there was no contract to go to arbitration at all an arbitrator's award can have no validity.¹⁷⁴

This statement addresses the question of competence-competence, making sense only if the question of *existence* is decided by the courts prior to having other questions determined by the arbitral tribunal. It is followed in Lord Hope's discussion by a statement on the question of separability, noting that "where the arbitration agreement is set out in the same document as the main contract, the issue whether there was an agreement at all may indeed affect all parts of it."¹⁷⁵ This is consistent with the proper application of separability doctrine to questions of validity, but not to questions of existence of an arbitration agreement. Lord Hope's comments are directly in line with the positions taken by the U.S. Supreme Court in *Prima Paint* and *Buckeye Check Cashing* on the separability and competence-

¹⁷¹ *Id.* at 444 n.1.

¹⁷² *Id.* at 449; *see also* *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942–44 (1995) ("[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.").

¹⁷³ [2007] UKHL 40, ¶ 8–10 (appeal taken from Eng.).

¹⁷⁴ *Id.* ¶ 34 (Lord Hope of Craighead).

¹⁷⁵ *Id.*

competence questions and their relationship to the question of *who decides* matters of the existence and validity of arbitration agreements.

2. Practical Implications of Blind Competence-Competence: Why Form Matters to Applicable Law

The seemingly unquestioned drafting of arbitration rules and model laws that state that arbitral tribunals have the competence to decide on the existence of an arbitration agreement—and the contradictory consideration of that question by courts determined to keep to the judiciary the question of *existence* of an arbitration agreement—clearly has implications for what law governs that question. Related provisions in institutional arbitration rules often give arbitral tribunals great discretion in determining the applicable law for a myriad of purposes.¹⁷⁶

As important courts have indicated, there is good reason to question the idea that arbitral tribunals should decide the question of whether an arbitration agreement exists (i.e., whether the parties have properly consented to arbitration as a matter of contract). Consider, for example, Party A from State A and Party B from State B. Party A is a manufacturer and seller of widgets, and Party B is a user and buyer of widgets. Party A and Party B have discussions about the sale of a quantity of widgets from Party A to Party B, and emails are exchanged, including references to the vastly different Party A general conditions of sale and Party B general conditions of purchase. A dispute arises and Party B claims that Party A agreed to ship 1,000 widgets at a given price. Party B's general conditions of purchase contain an arbitration clause calling for arbitration in State C under the rules of a specified arbitral institution. Party A's general conditions of sale contain a choice of court clause calling for all disputes to be settled in the courts of State A. Party B files for arbitration with the institution and notice of the proceedings is served on Party A. If the arbitral tribunal has the sole competence to decide the existence of an arbitration agreement (something Party A denies completely), then Party B has been able to unilaterally take from Party A Party A's basic right of access to courts. Is that not a denial of justice matter? Is it consistent with provisions such as Article 6 of the European Convention on Human Rights that has been interpreted to zealously protect a person's right of access to courts?

A total capitulation to arbitral tribunal jurisdiction over the question of basic consent to arbitrate too easily gives one party a unilateral ability to take away the other party's right to have legal matters considered in the courts. It is precisely

¹⁷⁶ See, e.g., MODEL L. ON INT'L COM. ARB., *supra* note 158, art. 21(1) ("The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.").

because consent is the fundamental basis of jurisdiction for arbitral tribunals that the question of consent cannot be unilaterally directed to an arbitral tribunal. This is the conundrum of an unfettered extension of the doctrine of competence-competence. Because that doctrine is so closely tied to the doctrine of separability—which is fundamentally a doctrine focused on *validity* (sovereign questions), not *existence* (party autonomy questions)—an overbroad extension simply is inappropriate.

B. Applicable Law Distinctions: Multiple Issues Covered by Multiple Laws

As this discussion indicates, when a contract drafter, a court, or an arbitral tribunal considers potential or actual challenges to an arbitration clause, it must consider not just *the law* governing the arbitration agreement, but rather *the full set of laws* that may govern the various questions that might arise about the arbitration agreement.¹⁷⁷

In order to fully understand the full set of laws that might require consideration in a challenge to an arbitration agreement, I return to the question of *what challenges* might be raised. As already noted above, challenges to choice of forum clauses, whether that forum be a court or an arbitral tribunal, can be placed into one of five categories:

- 1) challenges to the *existence* of the choice of forum agreement (i.e., whether the parties have consented to the choice of forum—and thus formed a contract regarding the applicable forum);
- 2) challenges to the *formal validity* of the choice of forum agreement (i.e., compliance with rules such as a writing requirement that must be met);
- 3) challenges to the *substantive validity* of the choice of forum agreement (i.e., challenges based on substantive law limitations on party autonomy for sovereign purposes);
- 4) challenges to the *scope* of the choice of forum agreement (i.e., whether the agreement covers the specific issues brought before the relevant forum); and
- 5) challenges to the *exclusivity* of the choice of forum agreement.

¹⁷⁷ Ronald A. Brand, *Drafting Choice of Court and Arbitration Agreements: Private International Law from a Transaction Planning Perspective*, UNIV. OF ABERDEEN SCH. OF L. (Aug. 2, 2024), <https://www.abdn.ac.uk/law/blog/2024-pax-moot-halfday-conference-keynote-drafting-choice-of-court-and-arbitration-agreements-private-international-law-from-a-transaction-planning-perspective/> [https://perma.cc/Y3KE-2LAA].

As noted earlier, one way to further group these five categories of jurisdictional challenges is a distinction among the existence, effectiveness, and extent of the arbitration agreement.¹⁷⁸ *Existence* of the agreement raises the consent issue, generally governed by the contract formation rules found in general contract law.¹⁷⁹ *Effectiveness* deals with sovereign limitations through concepts of validity (both formal and substantive).¹⁸⁰ *Extent* deals with interpretation of the agreement for purposes of determining its scope and exclusivity (once again commonly governed by the rules of contract formation (i.e., contract law) and the resulting doctrines by which a tribunal interprets party intent from the words and conduct of the parties).¹⁸¹

Validity of a choice of forum agreement is thus a different matter from the existence of a choice of forum agreement. It is not enough just to ask: “is there a valid agreement to arbitrate?” as a singular question because the question raises the two distinct issues of whether there is an “agreement” and whether that agreement, once it is proved to exist, is “valid.” The question of existence rests on the determination of mutual consent of the parties to the terms of the agreement. This is a matter of party autonomy (freedom of contract) and is governed by the law applicable to contract formation, sometimes augmented by special rules from other sources.¹⁸² The question of validity arises only after it can be determined that an “agreement” exists, and normally involves the imposition of sovereign authority to limit party autonomy. Thus, validity limitations prevent an arbitration agreement from being effective regardless of whether the parties have consented to its terms.

C. *Recognition of Applicable Law Distinctions in Regional and International Rules on Choice of Forum*

1. International Commercial Law

The consent/validity distinction is demonstrated explicitly in the CISG, which was developed to provide a uniform law for sale of goods contracts throughout the world.¹⁸³ The CISG provides clear rules of contract formation in Articles 14 through

¹⁷⁸ See *supra* note 72, and accompanying text.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ For a case considering both scope and validity (and largely eliminating scope inquiries in future cases regarding arbitration agreements in the United Kingdom), see *Premium Nafta Products, Ltd. v. Fili Shipping Co.*, [2007] UKHL 40 (appeal taken from Eng.).

¹⁸² CISG, *supra* note 85, art. 6.

¹⁸³ *Id.* art. 4.

24.¹⁸⁴ Thus, when the CISG applies, it provides the rules governing the question of consent in order to determine whether the parties have concluded a contract.¹⁸⁵ Courts, arbitral tribunals, and commentators have recognized that the contract formation rules of the CISG apply to an arbitration agreement contained in a sales contract, as well as to the sales contract generally.¹⁸⁶

Recognizing that different states exert sovereign authority over questions of contract validity in different ways, CISG Article 4 specifically provides that the Convention “in particular . . . is not concerned with . . . the validity of the contract or of any of its provisions.”¹⁸⁷ Even in the international context then, the CISG recognizes that the validity of a contract (or of any choice of forum agreement contained in a provision within that contract) is to be determined by a source of law different from that governing the existence of that contract.¹⁸⁸

2. Regional and International Instruments with Rules on Choice of Forum

Three important legal instruments dealing with choice of forum demonstrate the acknowledgment of different sources of law for different questions regarding party choice of forum. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) provides this acknowledgment in the arbitration context.¹⁸⁹ Two other instruments, the Brussels I (Recast) Regulation,¹⁹⁰ and the 2005 Hague Convention on Choice of Court Agreements (“Choice of Court Convention”),¹⁹¹ provide similar acknowledgment in litigation rules addressing choice of court as choice of forum.¹⁹² Each of these three

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* art. 8.

¹⁸⁶ Juan Pablo Hernández, *Arbitration Agreements Under the CISG*, 1 TREATY EXAMINER 24, 28 (2020).

¹⁸⁷ CISG, *supra* note 85, art. 4(a).

¹⁸⁸ *Id.*

¹⁸⁹ New York Convention, *supra* note 42.

¹⁹⁰ Brussels I (Recast) Regulation, *supra* note 91.

¹⁹¹ Hague Convention, *supra* note 79.

¹⁹² Commentators on arbitration tend at times to collapse the issues of existence (consent) and effectiveness (validity) of arbitration agreements when considering *what forum* should decide an issue. See, e.g., MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 18–19 (3d ed. 2008); John J. Barceló III, *Who Decides the Arbitrators’ Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT’L L.

instruments contains provisions recognizing party autonomy in the selection of the forum for resolution of a dispute. Each of them also recognizes the distinction between rules of formation of the choice of forum agreement and rules on the validity of the choice of forum agreement once party consent to its terms exists.

a. The New York Convention

Article II of the New York Convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.¹⁹³

By its terms, Article II does not apply unless and until there is “an agreement.” Thus, the *existence* of an agreement to arbitrate is a necessary gateway predicate to the application of Article II. Without an agreement, none of the rest of the Article applies. Moreover, Article II contains no rules that would govern questions of contract formation and the determination of whether such an agreement exists. Those are rules of substantive contract law and require a conflict of laws analysis in order to determine just what contract law provisions govern the question of agreement existence.¹⁹⁴

Once the existence of an agreement to arbitrate is established, the language of Article II has implications for both *formal validity* and *substantive validity*—but

1115 (2003). Even so, on the question of consent, the position generally is that the law (including rules of applicable law) of the forum seized applies, and the decision should not go to the forum named in the arbitration agreement. *See, e.g., id.* at 1119 (“A party should be entitled to its day in court unless it has agreed to arbitrate.”).

¹⁹³ New York Convention, *supra* note 42, art. II.

¹⁹⁴ *See* Hayk Kupelyants, *Conflict of Laws Before International Arbitral Tribunals*, BRIT. Y.B. INT’L L. 1, 1 (2024) (analyzing how and what international laws apply in a conflict of law analysis).

leads to different sources for the law applicable to each. The requirement of an “agreement in writing” in paragraph (1) and its definition in paragraph (2) set out both the source and rule on formal validity. In order for an arbitration agreement to be *formally valid* under the New York Convention, it must be in writing, i.e., either in an “arbitral clause in a contract or arbitration agreement” or in “an exchange of letters or telegrams.” This requirement has created questions about what constitutes a “writing” in a digital age, with UNCITRAL establishing options in its 2006 amendments to the UNCITRAL Model Arbitration Law to be considered for enactment into domestic arbitration law,¹⁹⁵ but a “writing” remains a requirement of the treaty.

Article II of the New York Convention also addresses questions of *substantive validity* in two places. Paragraph (1) requires that the arbitration agreement must concern “a subject matter capable of settlement by arbitration.” This is the arbitrability question. If an agreement is made to arbitrate a “matter” that, under the applicable law, cannot be the subject of arbitration, then that agreement is invalid. This is a question of sovereign limitation on party autonomy. The New York Convention does not have an autonomous applicable law rule that tells us what law applies to the question of arbitrability, leaving that matter to the applicable rules of private international law.

Article II(3) contains the second reference to issues of substantive validity. A court of a Contracting State must decline jurisdiction and send the parties to arbitration “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”¹⁹⁶ This and the paragraph (1) arbitrability requirement provide the only explicit exceptions to the obligation to recognize and give effect to an agreement to arbitrate.¹⁹⁷ Like the arbitrability rule in Article II(1), Article II(3) does not dictate the source of the substantive law rule to be applied in determining whether an agreement “is null and void, inoperative or incapable of being performed.”¹⁹⁸ Thus, a court will apply its own law, including its own rules on

¹⁹⁵ See MODEL L. ON INT’L COM. ARB., *supra* note 158, art. 7.

¹⁹⁶ New York Convention, *supra* note 42, art. II(3).

¹⁹⁷ Article V of the New York Convention provides grounds for refusal to recognize and enforce a resulting arbitral award. *Id.* art. V. It is important to note, however, that those grounds affect only the Article III obligation to recognize and enforce awards, and not the Article II obligation to uphold the agreement to arbitrate. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (citing art. V(2)(b)) (dismissing an argument that arbitration in Japan should not be compelled on the basis of public policy, and stating that the “Convention reserves to each signatory country the right to refuse enforcement of an award where the ‘recognition or enforcement of the award would be contrary to the public policy of that country.’”).

¹⁹⁸ New York Convention, *supra* note 42, art. III(3).

conflict of laws (private international law), in determining the availability of any of the substantive validity grounds for refusing effectiveness to the agreement to arbitrate.

Notably, the New York Convention Article II rules on both formal and substantive validity, which help determine the *effectiveness* of an agreement to arbitrate, can be applied only after the relevant tribunal first determines the *existence* of that agreement.¹⁹⁹ As Article II(1) states, the language of the Article applies only when there is an “agreement.” Article II contains no language specifically addressing the consent issue that determines the existence of an agreement. There is thus no autonomous rule of the New York Convention on this issue, and the matter is left to the law applicable in the forum state, including that state’s relevant rules on conflict of laws.²⁰⁰ The law governing the issue of consent (existence of an agreement) is, of course, the set of contract formation rules contained in the applicable contract law, which can be domestic law or, as we have seen, international rules such as those found in the CISG.²⁰¹

b. The Brussels I (Recast) Regulation

Article 25 of the Brussels I (Recast) Regulation of the European Union states:

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- (a) in writing or evidenced in writing; or
- (b) in a form which accords with practices which the parties have established between themselves; or
- (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

¹⁹⁹ *Id.* art. II.

²⁰⁰ *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”).

²⁰¹ CISG, *supra* note 85.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.²⁰²

This provision is the successor to Article 17 of the Brussels Convention,²⁰³ and Article 23 of the original Brussels I Regulation,²⁰⁴ and the interpretations of these two earlier versions of the instrument by the European Court of Justice continue to apply to the interpretation and application of the Brussels I (Recast) Regulation.²⁰⁵

The European Court of Justice provided an early acknowledgment of the separation of questions of existence and validity in applying Article 17 of the Brussels Convention:

By making such validity subject to the existence of an "agreement" between the parties, Article 17 [now Article 25] imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction

²⁰² Brussels I (Recast) Regulation, *supra* note 91, art. 25.

²⁰³ Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 17, Sept. 27, 1968, O.J. (L 299) 32 [Brussels Convention] (consolidated version and updated version of the 1968 Convention and the Proposal of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden).

²⁰⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 23, Jan. 16, 2001, O.J. (L 12) 1, [Brussels I Regulation] (repealed on Sept. 1, 2015).

²⁰⁵ *See, e.g.*, Brussels I (Recast) Regulation, *supra* note 91, recital 34 ("(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol (5) should remain applicable also to cases already pending when this Regulation enters into force.").

upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.

The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.²⁰⁶

While this language makes clear reference to rules of formal validity in Article 17 (now Article 25), it does so to indicate that compliance with those rules helps to provide evidence of consent, not to demonstrate that those rules are substitutes for the rules of consent. Thus, the formal validity rules are a check on the more general (contract law) question of whether an agreement has been formed with the requisite consent.²⁰⁷

The Court of Justice has ruled that validity questions regarding a choice of forum clause are to be governed by what is now the Brussels I (Recast) Regulation, while validity questions regarding the underlying contract in which that clause exists are to be governed by the substantive law applicable under the appropriate rules of private international law.²⁰⁸ This approach is clearly consistent with the fundamental doctrine of separability. Nonetheless, the fact remains that there is no “agreement” (whether on choice of forum or otherwise) without the consent of the parties, and elements of consent to commercial relationships are governed by the law of contract formation, not by rules on jurisdiction or dispute resolution procedure.²⁰⁹ The separability doctrine is based on a policy favoring party choice of forum (particularly

²⁰⁶ Case 24/76, *Estasis Salotti di Colzani Aimo e Gianmario Colzani v. RÜWA Polstereimaschinen GmbH*, 1976 ECR 1831, ¶ 1.

²⁰⁷ Professor Ulrich Magnus, in the Magnus-Mankowski treatise on the Brussels I (Recast) Regulation states that “[t]hrough the wording of Art. 23 is not very supportive in this respect it is widely accepted that the basic requirement of the consensus can be inferred from the Article through an autonomous interpretation.” ULRICH MAGNUS & PETER MANKOWSKI, *EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW: BRUSSELS I REGULATION*, ¶ 78 (2007). It goes on to state that “[t]he basic requirement of a true consensus on the jurisdiction agreement can . . . , and has to, be determined according to the yardstick of Art. 23 alone and needs no redress to the applicable national law.” *Id.* ¶ 79. Nonetheless, the “grounds for the material invalidity of the consent . . . have to be determined in accordance with the applicable national law.” *Id.* ¶ 80. Magnus conclude this discussion by stating that “the precise demarcation line between the autonomous scope of Article 23 and the field covered by the applicable national law still remains rather vague.” *Id.*

²⁰⁸ Bundesgerichtshof [BGH] [Federal Court of Justice] July 3, 1997, Case C-269/95, *Benincasa v. Dentalkit Srl.*, I-3788, I-3797 ¶ 25 (Ger.) (“A jurisdiction clause, which serves a procedural purpose, is governed by the provisions of the Convention, whose aim is to establish uniform rules of international jurisdiction. In contrast, the substantive provisions of the main contract in which that clause is incorporated, and likewise any dispute as to the validity of that contract, are governed by the *lex causae* determined by the private international law of the State of the court having jurisdiction.”).

²⁰⁹ *Utley v. Donaldson*, 94 U.S. 29, 47 (1876).

arbitration) and functions to *validate* an otherwise existing choice of forum agreement.²¹⁰ It does not, however, replace the need for an “agreement,” which is a matter governed not by rules on validity but by rules on contract formation. Thus, the separability doctrine does not play the same role in questions of agreement existence as it does in questions of agreement validity.

The explicit language of Article 25 of the Brussels I (Recast) Regulation does not provide a rule governing consent to a choice of court agreement, and a 1997 decision of the Court of Justice states that this matter is to be decided by national courts applying an analysis of “practice in force in the area of international trade or commerce in which the parties in question are operating.”²¹¹ This places the consent issue in the realm of national law, even though evidence of consent may be found in the indicia of formal validity required by Article 25.

c. The Hague Convention on Choice of Court Agreements²¹²

The basic prorogation and derogation of jurisdiction rules in the 2005 Hague Convention on Choice of Court Agreements are found in Articles 5 and 6:

[Article 5: Jurisdiction of the chosen court]

1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.
2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

²¹⁰ See *supra* note 133 and accompanying text.

²¹¹ See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 20, 1997, Case C-106/95 Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravieres Rhenanes SARL, I-911, I-940, I-942 ¶¶ 20, 25 (Ger.) (“The fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice . . . It is for the national court to determine whether such a practice exists and whether the parties to the contract were aware of it.”).

²¹² For further discussion of the Hague Convention, see RONALD A. BRAND & PAUL HERRUP, THE 2005 CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS (2008); HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.text&cid=98 [<https://perma.cc/N46K-U6XM>].

3. The preceding paragraphs shall not affect rules—
- a) on jurisdiction related to subject matter or to the value of the claim;
 - b) on the internal allocation of jurisdiction among the courts of a Contracting State.

However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

[Article 6: Obligations of a court not chosen]

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless—

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
- e) the chosen court has decided not to hear the case.²¹³

Like Article II of the New York Convention and Article 25 of the Brussels I (Recast) Regulation, Article 5 of the Choice of Court Convention promotes party autonomy by stating that the forum chosen by the parties shall have jurisdiction. Also like both of the other instruments, the Choice of Court Convention provides rules of formal validity, requiring that an exclusive choice of court agreement be documented “in writing,” or “by any other means of communication which renders information accessible so as to be usable for subsequent reference.”²¹⁴ And, like the New York

²¹³ Hague Convention, *supra* note 79, art. 5, 6.

²¹⁴ *Id.* art. 3(c)(ii). Article 3 governs the question of whether a given choice of court agreement is exclusive, and reads as follows:

For the purposes of this Convention—

- a) “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts;
- b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting

Convention, it provides that a court may choose not to respect the choice of forum clause if that clause is “null and void.”²¹⁵ Here, however, there arises an important distinction between the New York and Hague Convention approaches to the source of the law applicable to the question of substantive validity.

Article V of the New York Convention provides no rule for determining what law governs the question of whether an arbitration agreement is null and void.²¹⁶ Thus, the question of substantive validity (as compared to the question of formal validity, which is dealt with through the writing requirement) is left to be determined by the national law applicable under the relevant rules of private international law. A decision was made in the negotiation of the Hague Convention to have a different rule.²¹⁷ In the Hague Convention, the determination of substantive validity requires the application of the law of the state of the forum chosen in the choice of court agreement.²¹⁸ This same rule applies whether the question is being addressed by the chosen court,²¹⁹ by a court not chosen,²²⁰ or by a court asked to recognize and enforce

State shall be deemed to be exclusive unless the parties have expressly provided otherwise;

c) an exclusive choice of court agreement must be concluded or documented—

i) in writing; or

ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference;

d) 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. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.

Id. art. 3.

²¹⁵ Article 6 of the Hague Convention provides further bases for non-recognition of a choice of court agreement that go beyond the bases provided in the New York Convention. *See generally id.* art. 6.

²¹⁶ New York Convention, *supra* note 42, art. V.

²¹⁷ For further discussion of this distinction in approach, see Trevor Hartley & Masato Dogauchi, Explanatory Report: Convention of 30 June 2005 on Choice of Court Agreements, 2, 75 ¶ 205 (2007) [hereinafter Hague Convention Explanatory Report]; *see also* BRAND & HERRUP, *supra* note 212, at 80–82.

²¹⁸ Hague Convention, *supra* note 79, art. 8(1)–(3).

²¹⁹ *Id.* art. 5(1).

²²⁰ *Id.* art. 6(a).

a judgment from the chosen court.²²¹ A similar rule was added to the Brussels I Regulation when it was Recast in 2012.²²²

²²¹ *Id.* art. 9(a).

²²² Brussels I (Recast) Regulation, *supra* note 91, art. 25(1). Some commentators have taken the position that both validity and existence are to be governed by the autonomous choice of law rule found in Articles 5, 6, and 9 of the Choice of Court Convention. *See, e.g.*, MAGNUS & MANKOWSKI, *supra* note 207; Paul Beaumont & Mary Keyes, *Choice of Court Agreements, in A GUIDE TO GLOBAL PRIVATE INTERNATIONAL LAW*, ch. 28 (Paul Beaumont & Jayne Holliday eds., 2023). Professor Beaumont played a significant role in the inclusion of this choice of law rule in both the Choice of Court Convention and the Brussels I (Recast) Regulation, so his opinion would seem to have some weight. That position is clearly contradicted, however, by the clear language of the text of the rule in each of the three Articles in which it appears, and by the Explanatory Report. *See generally* Hague Convention Explanatory Report, *supra* note 217. The Beaumont and Jane chapter, written after completion of both the Choice of Court Convention and the Brussels I Recast was the subject of an interchange between Professor Beaumont and Paul Herrup (a co-author of BRAND & HERRUP, *supra* note 212). Herrup expressed clearly what I believe to be the correct approach in his response to Beaumont and Jane in an email exchange with Professor Beaumont:

I was delighted, of course, to see in a book whose first listed objective is to support future work in the Hague Conference that this chapter devotes almost one quarter of its length to taking issue with what, fundamentally, is our gloss on the scope of one subordinate clause of one sentence in one article of a convention that now is over fifteen years old, and on a clause likely to give rise to dispute only in very specific, limited circumstances. Seldom does a simple, bare-foot West Virginia country court house litigator receive such a testimonial.

COCA is a litigation convention, not an abstract exercise. The significance of an issue must be evaluated first and foremost by identifying it in its litigation context. The real-world crux of the divide is the last clause of Article 5.1—the rest is commentary, as a great Rabbinic scholar stated. Procedurally, we are talking about the situation in which a person A brought a claim against person B in Forum I, and person B contested the jurisdiction of Forum I under the Convention by interposing a purported choice of forum clause in favour of Forum II. Person A counters on the grounds that there was no meeting of the minds—no consent—on relevant aspects of the purported choice of forum clause. Operationally, the question is whether, in these circumstances and under the Convention, the existence or not of a meeting of the minds to create a choice of forum clause must be determined by the law of the purportedly chosen forum. Our answer is that the law of the purported forum is not necessarily the law applicable, and that the Convention does not require such a result. This conclusion is rooted in the language of the specific text, logic, fundamental fairness, and litigation practicality.

Language

Article 5.1 is the specific textual provision at play. It addresses jurisdiction over disputes to which an exclusive choice of forum clause applies, and contains a choice of law clause at the tail end “. . . unless the agreement is null and void under the law of that state.” The agreement. No consent, no agreement. On its face, this clause requires an agreement for its operation. The

antecedent issue of consent, of a meeting of the minds that brings an agreement into existence, is prior to the operation of the clause and falls outside its scope on its own terms.

Logical Foundation

Something that purports to be a choice of forum agreement is simply a set of marks strung along some medium in which words are discerned and meaning is derived from those words. Nothing more, nothing less. The string of marks in itself only receive such binding force as they may be given by virtue of an underlying agreement, a meeting of the minds, consent that certain disputes should be adjudicated by a specific forum. The point at issue is the law of the place in which the initial question—the existence or not of a meeting of the minds—is to be decided. Unless and until that meeting of the minds is established under some criterion or another, the invocation of a purported choice of forum clause is, at most, a unilateral assertion, an imposition of an obligation on another without foundation. The question becomes where and under what set of criteria is this preliminary inquiry to be conducted. Absent establishment of the meeting of the minds, the forum purportedly designated by a set of marks classified as a choice of forum agreement has no claim of privilege greater than any forum that may be found in some 231 other recognized sovereign states. Yet, in this situation, in which at least one party has had recourse to a forum not designated by that set of marks, some law has to be found that will provide the rule of decision on the existence vel non of an agreement that then gives force to the purported choice of forum clause and gives it a binding effect. Resolution of the issue should not and cannot be determined by unilateral boot-strapping by one party to foist a forum on another (see next).

Fundamental Fairness and Systematic, Pernicious Effects

The law of the purportedly chosen forum rule has systematic, pernicious effects because it approaches the past, current, and future realities of international commerce with eyes wide shut. Due to undeniable exponential increases in efficiencies in transportation and communication—precisely the point made in the introduction to this chapter—the transaction costs of engaging in commerce across borders has plummeted. This has allowed the entry into transnational commerce of a rapidly increasing number of small operators, lacking personal legal knowledge and acting without prior legal advice (the cost of which might eliminate their margins and, thus, prevent the transaction). Especially with the advent of electronic contracting, and particularly with contracts of adhesion or the like created by more sophisticated persons with choice of forum clauses buried multiple layers down in the electronic documents, smaller operators may well be unaware of the legal provisions interred in the bowels of these arrangements. They will be drafted by the more sophisticated party, armed with phalanxes of lawyers. The forum designated will be a forum with the law most favourable to that sophisticated party. On the other side of the ledger, the only identifiable benefit to a rule applying the law of the purported choice of forum is greater uniformity of result. But there will be near uniform results for choice of forum clauses resulting from bargaining between experienced businesses with advice of counsel; such clauses will be difficult to attack on the basis of a failure of meeting of the minds in courts in major commercial states—and not worth the

litigation costs. (I also note that non-uniform results forum to forum does not rob the rule of either predictability or certainty, especially when the likely fora are limited. Within each forum, the results may be as predictable and certain as litigation allows. In these cases, the alternative forum is highly likely to be the home forum of the small operator—a forum known in advance.) Thus, the real-world concern arises in situations involving weaker parties faced with clauses by fiat sending them to a forum whose laws are unfavourable. Transnational litigation already favors the big battalions of lawyers. This raises the important issue of whether chasing an often chimerical uniformity in result in all circumstances justifies increasing the probability of oppression of weaker parties. Hague Conventions need not be in the business of putting a thumb on the scale to further reinforce the existing advantages of the more powerful.

Use of Sources

Shorn of support in language, logic, fairness, and common sense, the chapter seeks refuge in extra-textual sources, such as remarks made at various points (and with the text in various stages of development) in the Diplomatic Conference or Special Commission that are asserted to be “indications” of what some delegates understood the text to mean. Indication by intervention at various points in a negotiation process is weak reed on which to lean, and cannot trump final text. But there is another fundamental point here: COCA is a consensus document, the product of a consensus process. In appealing to sources other than its text, it is important to take into account the significance of consensus in its various aspects. There was a consensus that the final text be adopted by the Diplomatic Conference. There was a consensus on the form of words of each article of that final text. There was not necessarily a consensus on the import and proper interpretation of each word or clause in every article. The words chosen narrowed the possible interpretive differences, but did not and could not pretend to eliminate them. This and similar issues will be resolved by time and practice—precisely as should be the case (see below). The difference on this particular point was open, notorious, continuous, and adverse—from the beginning of the process up through and including comments on the draft explanatory report. In such circumstances, citing various statements or documents that assert one interpretation does not establish that there was a consensus on that interpretation—only that there was support for it at a particular point in time by a specific intervenor with a particular version of text—including the totality of the remainder of the articles—before them.

Solutions

The preferred solution in the chapter—inclusion of issues of consent within the choice of law rule but use of public policy as an escape from “exceptional” “bad” results—is inadequate for a global convention operating on a global level. On a global stage, it is both over-broad and not broad enough. On the latter point, it simply will not work for a number of countries. Experts and delegations from around the world and from a variety of legal systems made the point generally that their states have very narrow concepts of public which severely limit or even prevent application of the doctrine. And there is little merit to adding—predictably—yet another layer of litigation in some countries over what public policy is and the limits of its adaptability in a particular country. On the other hand, for states with broad concepts of public policy,

The Explanatory Report to the Choice of Court Convention clearly indicates the distinction between the law governing issues of consent and the law governing issues of validity in applying the Convention rules.²²³ The Convention's autonomous choice of law rule is found in Articles 5(1), 6(a), and 9(a). These provisions recognize that a court need not honor a choice of forum agreement that is "null and void," providing that all courts are to apply the law of the state of the chosen court.²²⁴ This includes the application of the choice of law rules of that state.²²⁵

Thus, if the chosen court considers that the law of another State should be applied under its choice-of-law rules, it will apply that law. This could occur, for example, where under the choice-of-law rules of the chosen court, the validity of the choice

reliance on public policy creates a dynamic to appeal to it and a temptation to resort to it and expand it to catch undesirable results, setting in train a dynamic in which public policy can become a sink-hole that swallows rules. The prospect of interminable argumentation on a case-by-case basis over operations of public policy exceptions should give serious pause due to the consequent great unpredictability of results—although the unpredictability will be predictable. Once again, we should not lose sight that this, fundamentally, is a litigation convention. From a litigator's perspective the law of the forum before which a claim is presented (including its choice of law rules) provides the most sensible, efficient legal sword to cut through this particular Gordian knot: the claim is there, the parties are there, the court knows the law, the class of transactions in which this issue will arise and the alternative fora are predictable, easily ascertained, and limited. We should heed experience here. The New York Convention has a similar "null and void provision" in Article II.3—without a choice of law reference as to any aspect of "null and void." The absence of the reference seems not to have wreaked wide-spread havoc.

Role of Commentaries

The chapter at another point chides us for failing in our duties as commentators by not making a specific recommendation among possible applications. This assumes that a commentary should and must do so. Such an attitude in general is rather imperial, and, in these circumstances, again keeps its eyes wide shut to the dynamism of both the litigation and of the commercial world.

Email exchange between Paul Herrup and Paul Beaumont (Oct. 4–5, 2024) (on file with the author).

²²³ Hague Convention Explanatory Report, *supra* note 217, ¶ 125.

²²⁴ Hague Convention, *supra* note 79, arts. 5(1), 6(a), 9(a).

²²⁵ Hague Convention Explanatory Report, *supra* note 217, ¶ 125.

of court agreement is decided by the law governing the contract as a whole—for example, the law designated by the parties in a choice-of-law clause.²²⁶

Finally, like both the New York Convention and the Brussels I (Recast) Regulation, the Choice of Court Convention contains no rules on contract formation that determine the question of the existence of a choice of court agreement. All three instruments leave that question to be determined by the substantive contract law that is, in turn, determined by the rules of private international that otherwise apply.

D. Possible Overlap in the Process of Separating Applicable Law Analysis

Questions regarding the interpretation of contractual text generally are easily distinguished from other questions that may arise in challenges to choice of forum agreements. It may be that questions of textual interpretation overlap with questions regarding whether consent exists in order to form an agreement to arbitrate—a matter of particular concern in questions of third-party consent to arbitration. It also may not always be easy to separate questions of consent and validity (existence and effectiveness).²²⁷ Nonetheless, they are separate issues representing differing interests in the process of contract formation and analysis. They require separate consideration and the application of clear rules whenever they are at issue. It is not enough simply to ask whether there “is a valid arbitration agreement.” That question

²²⁶ *Id.* ¶ 125; see also BRAND & HERRUP, *supra* note 212, at 20 (“Although the Convention includes an autonomous choice of law rule on the question of validity, found in Articles 5(1), 6(a), and 9(a), such a determination may not be made until there exists an agreement, and an agreement will not exist absent consent of the parties. The Convention thus leaves the matter of consent to the law of the forum. This necessitates a clear understanding of the distinction between validity and consent. Questions of validity and consent often overlap in substantive contract law, and this no doubt will raise issues for future determination in Convention cases. At base, consent deals with whether there is a meeting of the minds such that an agreement has been formed. This is an issue of party autonomy and it is the intent of the parties that should be determinative. Validity, on the other hand, deals with state interests and limitations on the ability of private parties to enter into agreements that will be recognized by the state. Such limitations may be based on the subject matter of the obligations assumed or on the status of the parties. It is the state interest issue—the question of validity—that is the subject of the autonomous choice of law rule found in Articles 5(1), 6(a), and 9(a) of the Convention.”).

²²⁷ An excellent example of the type of overlap problem in challenges to jurisdiction based on issues surrounding the arbitration clause is found in the 30th Vis International Commercial Arbitration Moot problem, where the question of whether there existed a “valid arbitration agreement” contained both questions of existence and substantive validity, and raised the question of whether issues of proper authority to enter an agreement were governed by the law applied to contract formation or to substantive contract validity. *30th Vis Moot*, WILLEM C. VIS INT’L COM. ARB. MOOT, <https://www.vismoot.org/previous-moots/30th-vis-moot/> [<https://perma.cc/65DF-V2XY>].

requires consideration of three of the five basic issues: consent/existence, formal validity, and substantive validity.

The House of Lords demonstrated the importance of the consent/validity distinction in *Premium Nafta Products, Ltd. v. Fili Shipping Co. Ltd.*²²⁸ When an arbitration agreement was challenged on the basis that one party had bribed the agent of the other to sign the arbitration agreement, the House of Lords upheld the decision of the Court of Appeal that the matter of whether the party alleging bribery could rescind the contract was for the arbitral tribunal, and not for the courts.²²⁹ The case deals, at base, with issues of separability and competence-competence within the focus on *what forum* should decide, rather than *what law* should be applied. Nonetheless, even though the opinions in the case use the words “effectiveness,” “existence,” and “validity” at times almost interchangeably,²³⁰ the opinion of Lord Hope of Craighead ultimately provides clarity on the distinction between questions of consent and validity:

As everyone knows, an arbitral award possesses no binding force except that which is derived from the joint mandate of the contracting parties. Everything depends on their contract, and if there was no contract to go to arbitration at all an arbitrator’s award can have no validity. So, where the arbitration agreement is set out in the same document as the main contract, the issue whether there was an agreement at all may indeed affect all parts of it.²³¹

Lord Hope’s statements demonstrate first that the doctrine of separability is a limited doctrine and applies to validity questions, but not to the initial question of whether an arbitration agreement exists. This distinction between issues of consent and issues of validity is both logical and practical. Consent is fundamental to arbitration. Without it, no agreement to arbitrate can exist, and no arbitral tribunal may have authority over the parties.

Despite the strong contemporary international policy in favor of arbitration of international commercial relationships, it would be wholly unacceptable if a party were able to derail any effort to resolve a dispute in the courts simply by claiming an agreement to arbitrate, no matter how unfounded. To do so would deny the other party its basic right to a judicial forum for purposes of dispute resolution, contrary to

²²⁸ *Premium Nafta Products, Ltd. v. Fili Shipping Co.*, [2007] UKHL 40 (appeal taken from Eng.).

²²⁹ *Id.* ¶ 35.

²³⁰ *See id.* ¶ 32 (Lord Hope of Craighead).

²³¹ *Id.* ¶ 34.

the well-accepted right to a fair trial and access to justice found in many international legal instruments.²³² No legal doctrine should lead to such results.

The distinction between the New York Convention's absence of an autonomous applicable law for questions of substantive validity and the Hague Convention's and Brussels I (Recast) Regulation's inclusion of an autonomous rule on the law applicable to a choice of forum agreement is not an insignificant one. Under the New York Convention, a court seised with the question of the validity of an arbitration agreement may apply its own choice-of-law rules.²³³ Under the Hague Convention and Brussels I (Recast) Regulation, an autonomous rule requires that every forum that may have the issue of validity before it applies the law of the state of the chosen court.²³⁴ As a colleague and I have stated elsewhere:

While the Hague Convention approach on the validity issue may appear to provide greater predictability, it also forces courts more often to engage in the application of foreign law (including foreign conflicts rules). In addition, the blanket subordination of state interests to private agreement (especially the interests of a state whose courts are asked to recognize and enforce a judgment) may lead to an expansion of the public policy exception in ways that cut against the general thrust of the Convention. Whether this is an improvement on the New York Convention will not be entirely clear until courts have had the opportunity to demonstrate its application.²³⁵

Of course, in arbitration, there are no choice of law (private international law) rules that naturally come along with the arbitral tribunal as they do with the choice of national courts.²³⁶ Thus, it may make sense for the New York Convention to differ

²³² See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”).

²³³ New York Convention, *supra* note 42, art. VII(1).

²³⁴ See Hague Convention Explanatory Report, *supra* note 217, ¶ 125; see also Brussels I (Recast) Regulation, *supra* note 91, ¶ 20.

²³⁵ BRAND & HERRUP, *supra* note 212, at 20 n.47.

²³⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985) (“[An] international arbitral tribunal owes no prior allegiance to the legal norms of particular states[.]”). *But see* Franco Ferrari & Friedrich Rosenfeld, *Applicable Law in Commercial Arbitration*, in CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 482, 484 (Stefan Kröll, Andrea K. Bjorklund & Franco Ferrari eds., 2023) (“[A]rbitral tribunals are bound by the same conflict

from instruments governing court determinations. The result, however, is that (1) rules of applicable law remain important, and (2) there remains a need to understand the differences between the law applicable to each of the questions of agreement existence, effect, and extent.

Even though questions of the existence of a forum selection agreement and the validity of that agreement are separate issues, and thus require the application of separate sets of rules, they have a relationship that has been acknowledged in cases and commentary. A prime example of this relationship is the impact of formal rules of validity contained in all three instruments discussed above (e.g., the writing requirement) on the issue of consent.²³⁷ The existence of a written document which includes a choice of forum agreement provides both evidence of compliance with a rule of formal validity and evidence of consent by the parties whose signatures are affixed to it. It may be that the same evidence will help prove different requirements under different legal rules. That fact should not, however, prevent a clear understanding that different rules may apply to each substantive determination and that different legal instruments may require different rules for the same determination.

VI. THE LAWS APPLICABLE TO THE ARBITRATION AGREEMENT: A PRACTICAL ANALYSIS

So far, this discussion and analysis has been to some extent abstract. Drawing from legal texts, cases, and commentary, while it has stressed the importance of practical contract drafting, it has analyzed the theoretical and policy reasons for the distinctions the discussion supports. More practical consideration of the issues involved, however, also supports the conclusions being reached. Thus, I turn here to analysis of a hypothetical international commercial contractual relationship that raises questions of existence, effect, and extent of an agreement to arbitrate.

A. *The Test Hypothetical*

Consider the following hypothetical: On January 2, 2024, Paris Sore Bones (“PSB”), incorporated and having its only place of business in Paris, France, sent an email request for a price quotation to purchase 1,000 widgets from Penn Widgets (“PW”). The request for a quotation included a copy of PSB’s “standard terms and

of laws rules as state courts at the arbitral seat.”). While Ferrari and Rosenfeld state that “[o]ver a long period of time, there was support for the proposition that arbitral tribunals are bound by the same conflict of laws rules as state courts at the arbitral seat[,]” in a footnote they cite multiple recent authorities that have clearly rejected this proposition. *Id.* at 484, 485 n.15.

²³⁷ New York Convention, *supra* note 42, art. II; Hague Convention, *supra* note 79, art. 5; Brussels I (Recast) Regulation, *supra* note 91, art. 25.

conditions of purchase.” PW is incorporated and has its only place of business in Pittsburgh, Pennsylvania, USA. On January 8, PW responded in an email with a quote of \$100 per widget “CIP Paris (Incoterms 2020)” and referencing PW’s “standard terms and conditions of sale.” On January 15, PSB sent a further email with a purchase order, again incorporating its “standard terms and conditions of purchase,” and providing that payment would be due ten days after receipt of the goods in Paris. On February 15, 2024, PW shipped 1,000 widgets to CIP Paris and forwarded its invoice by email to PSB. The invoice included language explicitly incorporating PW’s “standard terms and conditions of sale,” and a copy of those terms were attached.

The PSB standard terms and conditions of purchase include the following choice of forum clause and choice of law clause:

Any contract dispute shall be settled by binding arbitration in accordance with the Rules of the International Chamber of Commerce (ICC Rules). The seat of arbitration shall be London. The language of arbitration shall be English. There shall be a single arbitrator selected in accordance with the ICC Rules.
This contract shall be governed by the law of France.

The PW standard terms and conditions of sale include the following choice of forum clause and choice of law clause:

Any and all disputes arising out of or relating to this sale shall be submitted to the exclusive jurisdiction of the Court of Common Pleas for Allegheny County, Pennsylvania.
This contract shall be governed by the law of Pennsylvania.

On February 19, PSB employees informed the PSB CEO that the widgets received from PW were not suitable for the use to which they would normally be applied. PSB has not paid the purchase price. The parties were unable to come to any negotiated resolution of the matter. On May 1, 2024, PSB filed for arbitration with the International Chamber of Commerce. On May 8, 2024, PW filed an action for payment of the purchase price in the Court of Common Pleas for Allegheny County, Pennsylvania. In the Pennsylvania case, PW has alleged both non-payment as a breach of contract and fraudulent misrepresentation by PSB of information that induced PW to enter the contract.

Assume that a pre-dispute arbitration agreement in a contract for the sale of widgets is prohibited by law in the United Kingdom, but not prohibited in any of French, Pennsylvania, or U.S. federal law.

Questions: Is there an agreement to arbitrate?

If so, is the arbitration agreement formally valid?

If so, is the arbitration agreement substantively valid?

If so, are the issues in dispute within the scope of the arbitration agreement?

B. *The Jurisdictional Challenge Questions*

1. Consent

Normally, a contract for the sale of goods between a party having its place of business in the United States and a party having its place of business in France would be governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG), under Article 1(1)(a) of that Convention.²³⁸ The CISG includes both rules governing the formation of such contracts (Articles 14–24) and rules for interpreting party intent (i.e., rules of contract interpretation—Articles 8 and 9). So, the question of *whether* the parties have agreed to an arbitration agreement would be governed by the CISG.

But the UK is not a party to the CISG.²³⁹ Does this mean that, under the new default rule in the amendment to the Arbitration Act 1996, a party from Pittsburgh and a party from Paris will have questions of contract formation governed by the English Sale of Goods Act? Or does the “law of the arbitration agreement” in that default rule only apply to questions of validity? The answer is not clear under the text of the amendment. There currently is a debate about the application of the CISG to the formation of an arbitration agreement that is within a sale of goods contract.²⁴⁰ Moreover, courts, including the United States Supreme Court, have ruled that “[b]efore referring a dispute to an arbitrator . . . the court determines whether a valid arbitration agreement exists.”²⁴¹ Thus, questions of formation (i.e., whether the parties have consented to the arbitration agreement) not only are subject to a law that must be determined *before* other questions (formal validity, substantive validity,

²³⁸ CISG, *supra* note 85, art. 1(1) (“This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States[.]”).

²³⁹ *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)*, UNITED NATIONS, https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status [https://perma.cc/R52D-U5DJ].

²⁴⁰ See Boris Praštalo, *CISG as the (Rules of) Law Applicable to the Arbitration Agreement: Exploration from an English Perspective*, KLUWER ARB. BLOG (June 3, 2024), <https://arbitrationblog.kluwerarbitration.com/2024/06/03/cisg-as-the-rules-of-law-applicable-to-the-arbitration-agreement-exploration-from-an-english-perspective/> [https://perma.cc/MB6Q-47D6].

²⁴¹ *Coinbase, Inc. v. Suski*, 602 U.S. 143, 149 (2024), (*quoting* *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019)).

scope, exclusivity) may be considered, but also before the matter can even reach an arbitral tribunal—and necessarily before the law of the seat would be applied.

2. Formal Validity

Questions of formal validity are governed by both treaty and statute in every state that is party to the New York Convention, which includes France, the United Kingdom, and the United States. Article II of the Convention requires an “agreement in writing” that is “signed by the parties” or other exchange of writings between the parties.²⁴² That is a treaty obligation common to all of the more than 170 states party to the Convention, and cannot be changed by domestic law. Thus, there are questions about just how the proposed amendment to the Arbitration Act 1996 deals with this issue. But in the hypothetical set of facts, the law of any state involved would lead to the New York Convention, so its Article II rules apply. In the hypothetical, there is no single document that is in writing and signed by the parties and contains an arbitration agreement. The only arbitration agreement is in the buyer’s standard terms and conditions of purchase, which was proposed by the buyer but never explicitly accepted by the seller. In fact, under Article 19 of the CISG, the buyer’s initial response containing different dispute resolution terms constituted a rejection of any offer, as did its inclusion of differing dispute resolution terms in the documents contained with the invoice.²⁴³

While the CISG explicitly excludes questions of contract validity from its scope,²⁴⁴ its rules of contract formation deal with the traditional “battle of the forms” issues through the mirror image rule of Article 19. The formal validity question may hinge on whether the applicable arbitration law includes something like one of the Article 7 options found in the 2006 amendments to the UNCITRAL Model Law that would extend the New York Convention writing requirement or “exchange of documents” to include electronic communication by email.²⁴⁵ The question of just

²⁴² New York Convention, *supra* note 42, art. II(2).

²⁴³ “(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.” CISG, *supra* note 85, art. 19.

²⁴⁴ *Id.* art. 4(a).

²⁴⁵ MODEL L. ON INT’L COM. ARB., *supra* note 158, art. 7(4).

what act was a mirror image acceptance, or acceptance by conduct,²⁴⁶ would necessarily be a prerequisite preliminary determination to then determining whether the formal validity requirements are met.

3. Substantive Validity

Questions of substantive validity are questions of sovereign authority, expressed in numerous sources, including laws regarding consumer protection, distributorship agreements, franchise contracts, insurance contracts, and employment contracts, among others.²⁴⁷ This raises the question of whether substantive limitations on (or prohibitions of) pre-dispute agreements to arbitrate found in UK law should be applicable to the validity of choice of forum agreements between parties, all of whom have their places of business in other states. If the initial decisions are that (1) the parties did consent to arbitration, and (2) the arbitration agreement is formally valid, would the new default rule in an amended Arbitration Act 1996 require the application of UK law in order to invalidate an arbitration agreement between Pennsylvania and French parties that would be valid under both Pennsylvania (U.S.) and French law?

4. Scope

The facts of the hypothetical likely raise only claims of non-conformity of the goods and non-payment as contract breach issues. The fraudulent inducement claim can be seen as either a contract or tort claim and raises the question of whether it falls within the scope of an arbitration agreement providing that “[a]ny contract dispute shall be settled by binding arbitration.” Does the new default rule in an amended Arbitration Act 1996 require the application of UK law on fraudulent inducement in order to determine whether the parties have agreed to arbitrate that claim? What if some of the states involved allow claims of fraudulent inducement and others don’t, is the amendment a proper source of a rule of applicable law on the question of interpretation of the proper scope of the arbitration agreement?

5. Exclusivity

The question of exclusivity is one more likely to arise when the choice of forum is a choice of court. It is not common for an arbitration agreement to be challenged as non-exclusive, and both courts and arbitral tribunals generally presume exclusivity.²⁴⁸

²⁴⁶ See CISG, *supra* note 85, art. 19.

²⁴⁷ BRAND & HERRUP, *supra* note 212, at 20.

²⁴⁸ *Id.* at 82.

CONCLUSION

When the jurisdiction of an arbitral tribunal is challenged based on alleged defects in the arbitration agreement, or based on limited interpretations of that agreement, the analysis must begin with a determination of the law that governs the question that is raised by the challenge. A Report of the Law Commission of England and Wales has led to a bill to amend the Arbitration Act 1996 to include a default rule that an arbitration agreement will be governed by the law of England and Wales if the arbitration is seated in that territory. That amendment is designed to provide simplicity and clarity in determining the law governing the arbitration agreement when the parties have not made it clear in their agreement. The problem with the amendment is that multiple laws necessarily apply to multiple issues when an arbitration agreement is challenged.

The need to determine the applicable law to issues raised in such challenges is not unique to arbitration, but arises as well when parties have concluded a choice of court agreement as part of their contract. Nor is it a problem that arises only at the dispute resolution stage. Because the proposed amendment to the Arbitration Act 1996 is a default rule, parties can and should prevent any question of applicable law when they draft their contract. Good contract drafting will avoid litigation or arbitration of the question of applicable law.

Because the problem of applicable law can arise at both the transaction planning and the dispute resolution stage of a relationship, it is necessary to think in terms of both contexts when addressing how that problem can best be addressed. If we begin at the dispute resolution stage, we find that most all challenges to jurisdiction based on the choice of forum (whether arbitration or litigation) fall into five distinct categories: existence, formal validity, substantive validity, scope, and exclusivity. Each of those five categories raises distinct legal questions and requires the application of differing sources of law. Some require the application of contract law rules of formation and interpretation, some require the application of rules with their genesis in treaties like the New York Convention and the Hague Choice of Court Convention, and some require the application of rules found in various laws that impose sovereign limitations on the ability of parties to agree to a forum for dispute resolution. Beginning with an analysis at the dispute resolution stage then helps the contract drafter provide better contract language at the transaction planning stage.

The multiple issues and resulting multiple sources of law that must be addressed in order to ensure the existence, effectiveness, and extent of a choice of forum agreement make it misleading to suggest that a single “law,” or even the law of a single state, can and should govern all such issues. Thus, it is the “laws of the arbitration agreement” that must be considered at both the transaction planning and dispute resolution stages of a relationship.

