The Law of the Arbitration Agreement: A Non-Issue

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Introduction

The idea for this paper was born out of the debate around the state of English law on the question of the law governing an arbitration agreement in the wake of two UK Supreme Court decisions, *Enka v Chubb*[1] and *Kabab-Ji v Kout Food Group.*[2] I thought that it would be useful to discuss in this forum whether there really was a problem with the English common law on this issue and, if there was, whether it affected maritime arbitration. When I submitted my proposal in March this year, I could not have predicted that what I considered to be a "non-issue" would become an even hotter topic in international arbitration circles in London at the time I came to write the paper in September.

On 6 September 2023, the Law Commission published its final report on its review of the Arbitration Act 1996, which applies to arbitration in England, Wales, and Northern Ireland.[3] Its report and draft bill, proposing a small number of amendments to the Act, have been widely welcomed. Maritime arbitration practitioners have been relieved to find that various stand-out features of the Act, such as the availability of appeals on points of law in section 69, have been left untouched. However, one reform, which the Commission had not highlighted in its first consultation, grabbed headlines in the international arbitration community in London: the introduction of a statutory default rule to determine the governing law of the arbitration agreement.[4]

The Law Commission's proposal is that the nine principles summarised by Lords Hamblen and Leggatt in *Enka*[5], and which prioritise the law of the matrix contract, should be replaced by a rule that the law applicable to an arbitration agreement is the law that the parties expressly agree applies to it or, in default, the law of the seat.[6] This is a simple rule and answers calls for English law to be more user friendly on this issue. However, it would alter the nuanced approach under the common law. Most responses to the proposal have been positive but there have been dissenting voices, notably Professor Adrian Briggs, who has complained that the rule would lead to argument about whether particular words amounted to an express choice and about the law that governed their interpretation. He concludes, "The law was settled, whether one likes it or not, in Chubb v Enka, and the best advice would have been, and still is, to leave well alone."[7]

My paper may become something of a lament for the Supreme Court's decision in *Enka* but its purpose remains to query the importance of the law of the arbitration agreement as an issue, particularly in maritime arbitration. I shall begin with an outline of matters which the law of the arbitration agreement may cover and for which it may need to be identified. I shall then look at the problems thrown up in *Enka* and *Kabab-Ji* and at arbitration rules which offer their own solutions. Finally, I shall consider the proposed legislative solution from the Law Commission and whom it might really help.

The law of the arbitration agreement and what it is for

The typical dispute resolution clause in a shipping contract identifies its governing law and designates a place of arbitration. It does not say anything about the law which governs the arbitration agreement contained in that clause. There should rarely be any need to add wording to deal with this. Firstly, the governing law of the contract will often be the same as the law of the seat of the arbitration, so that a different law would be unlikely to come into play for the arbitration agreement. [8] Secondly, the arbitration rules may fill the gap, as the LMAA Terms do at paragraph 6:

> "In the absence of any agreement to the contrary, the parties to all arbitral proceedings to which these Terms apply agree:
>
> (a) that the law applicable to their arbitration agreement is English and;
>
> (b) that the seat of the arbitration is in England."

Parties and their lawyers in maritime arbitrations rarely have to think about the law of the arbitration agreement. If they did, their starting point would be the separability principle, the presumption that an arbitration agreement is separable from the matrix contract with which it is associated or in which it is incorporated. This principle is enshrined in section 7 of the Arbitration Act 1996:

> "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."

In the *Fiona Trust* case, the House of Lords held that an inference that an agent acting for owners had been bribed so that eight charterparties were validly rescinded did not show that he was bribed to enter into the arbitration agreements in those contracts.[9] The House of Lords concluded that an arbitration agreement can only be voidable on grounds which relate directly to it and can be valid even though the main agreement is invalid, non-existent or ineffective. It reviewed the terms of the standard Shelltime 4 Form dispute resolution clause as only "the agreement can tell you what kind of disputes they intended to submit to arbitration".[10] There was nothing in the arbitration clause to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else.

Its validity and scope are two of the issues which could be governed by the law of the arbitration agreement. However, validity may fall to be determined instead under the *lex arbitri* of the seat, whatever law might be found to govern the arbitration agreement. In one of the leading pre- *Enka* cases, *Sulamerica v Enesa*, the courts had to grapple with, or at least convinced themselves that they had to grapple with, the question of whether Brazilian law, the law of the matrix contract, might require a post-dispute submission to arbitration and thus render the arbitration agreement enforceable only with the consent of the respondent.[11]

In a hard-hitting article, challenging the consensus in this area and entitled "Much Ado About… The Law of the Arbitration Agreement: Who Wants to Know and for What Legitimate Purpose?", Jeff Waincymer argues that the courts in *Sulamerica* had no need to opine on the law of the arbitration agreement if they simply classified stipulated preconditions to arbitration as matters to be determined under the law of the seat, which in that case was London.[12] He notes, "Validity of an arbitration agreement in the context of stipulations in arbitration law should be resolved by the arbitration law applicable. This should always be the arbitration law of the seat."[13]

Similarly, in relation to the scope of the arbitration agreement and the question of arbitrability, Waincymer argues, "If the parties have chosen a seat which would not accept the particular dispute as arbitrable, the clause is inoperable for that dispute and should not be recognized under Article II of the New York Convention. Parties cannot, by any express or implied agreement as to applicable law, force a seat to support arbitration over issues the seat does not believe to be appropriate for arbitration."[14]

In his monumental three-volume treatise, *International Commercial Arbitration*, Gary Born has a non-exhaustive list of 13 issues which could potentially be governed by the law of the arbitration agreement.[15] Some of these issues will more readily fall to be determined instead under the law of the seat, the law of the matrix contract or a different law entirely. For example, the capacity of parties to conclude an arbitration agreement is a matter for the "law applicable to them", according to Article V(1)(a) of the New York Convention 1958. The law applicable to a party, or their "personal law", will usually be the law of their nationality in civil law jurisdictions and the law of their domicile in common law jurisdictions.[16] For a corporation, capacity is governed by the law of the place of its seat or place of incorporation.[17]

Born mentions that it is occasionally suggested that various issues, such as the procedural law governing the arbitral proceedings, are governed by the law of the arbitration agreement. As he notes, "…it is relatively non-controversial that different choice-of-law analyses, and potentially different substantive laws, may apply to these issues than apply to the arbitration agreement."[18]

The upshot of this brief survey is that in a particular case in which the law of the seat and the substantive law of the contract are different, it might be considered necessary to consider the law governing the separable arbitration agreement but this could turn out to be a non-issue.

The problems in *Enka* and *Kabab-Ji*: a lacuna in the ICC Arbitration Rules

The law of the arbitration agreement became an issue in *Enka v Chubb* and in *Kabab-Ji v Kout Food Group*.

In *Enka*, the English courts had to decide whether they had power to issue an anti-suit injunction to restrain court proceedings in Moscow. The contract related to the construction of a power plant in Russia. It contained no express choice of law but provided for arbitration in London. Following a fire, Chubb Russia, brought a subrogated claim against Enka in the commercial court in Moscow. The Supreme Court held that where the parties have chosen a

system of law to govern the main contract, that choice will generally apply to the arbitration agreement which forms part of the contract and where they have not, the applicable law will generally be the law of the seat of the arbitration. On this analysis, the arbitration agreement was governed by English law and anti-suit relief was appropriate.

In *Kabab-Ji*, the English courts were concerned with an application to enforce an arbitration award made in Paris in a dispute under a contract governed by English law. The arbitration had been commenced by Kabab-Ji SAL, a Lebanese company, under a franchise development agreement (FDA) made not with Kout Food Group (KFG) but with a subsidiary of KFG. The tribunal, on which only one member was qualified in English law, decided, with that member dissenting, that KFG had become a party to the arbitration agreement by virtue of its involvement in the performance of the FDA and that, as a matter of English law, and taking account of the UNIDROIT Principles, KFG had become the main franchisee as a result of a novation and was in breach of the FDA. The tribunal awarded substantial damages, leading KFG to seek to have the award set aside in France and to resist enforcement in England.

Applying the *Enka* principles, the UK Supreme Court, in a decision of 27 October 2021, held that the parties' choice of English law as the governing law of the FDA extended to the law governing the validity of the arbitration agreement. The court went on to hold that, in English law, there was no real prospect of a court finding that KFG became a party to the arbitration agreement and that the Court of Appeal had been right to give summary judgment refusing recognition and enforcement of the award.

In a decision of 28 September 2022, 11 months later, the French Cour de Cassation confirmed that, in a Paris-seated arbitration, substantive rules of French arbitration law will govern the validity, effectiveness, transfer or extension of the arbitration clause, even where the contract is governed by English law. According to these rules, the court confirmed, the arbitration clause is legally independent of the main contract and its existence and validity are to be assessed on the basis of the common intent of the parties without it being necessary to refer to a state law, unless the parties have expressly agreed on the application of such a law (the *Dalico* doctrine).[19] That decision brought to a close KFG's attempt to set the award aside at the seat.

The arbitrations which gave rise to these court battles had something in common: they were both submitted to and administered by the International Chamber of Commerce (ICC) under its institutional arbitration rules. The ICC Arbitration Rules do not contain a default provision specifying the law of the arbitration agreement or how it should be identified. They differ in this respect from the LMAA Terms mentioned above and from the rules of the major London based institution, the London Court of International Arbitration (LCIA).

Article 16.4 of the LCIA Rules 2020 provides:

> "…the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat."

This rule was introduced in the 2014 version of the LCIA Rules in the wake of English court decisions, notably *Sulamerica*, favouring the law of the seat as the law with which the

arbitration agreement would have a closer and more real connection. The Law Commission's proposed default rule is effectively the same.

International trade associations, headquartered in London and Liverpool, administer arbitrations in disputes arising under their standard form contracts. The arbitration service of the International Cotton Association, which was founded in 1841, has been described as the "blueprint for the modern arbitral institution".[20] Interestingly, a study of international arbitration awards submitted to Chinese courts for enforcement between 2012 and 2022 found that awards made under the International Cotton Association rules were in second place, with 30 awards, after the Singapore International Arbitration Centre (SIAC) with 36 and just ahead of the LMAA in third place with 28; the ICC came fourth with 13.[21]

In the words of Lord Goff, the trade associations' standard forms are "our modern commercial codes, which achieve uniformity across national boundaries without any of the trauma and complexity of international conventions".[22] Trauma and complexity are precisely what the UNIDROIT Principles introduced into the FDA in *Kabab-Ji*. Contracts on the associations' standard forms are governed by English law and the associations' arbitral rules will usually specify that the seat of the arbitration is in England, making it unnecessary to add a specific provision about the law of the arbitration agreement.

The arbitration rules of the Refined Sugar Association (RSA) contain no provision in relation to the law of the arbitration agreement but Rule 8 leaves no room for doubt as to what that law might be:

> "For the purpose of all proceedings in arbitration, the contract shall be deemed to have been made in England, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise, not-with-standing, and England shall be regarded as the place of performance. Disputes shall be settled according to the law of England wherever the domicile, residence or place of business of the parties to the contract may be or become. The seat of the Arbitration shall be England and all proceedings shall take place in England. It shall not be necessary for the award to state expressly the seat of the arbitration. Unless the contract contains any statement expressly to the contrary, the provisions of neither the Convention relating to a Uniform Law on the International Sale of Goods [UNIDROIT], of 1964, nor the United Nations Convention on Contracts for the International Sale of Goods [CISG], of 1980, shall apply thereto. Unless the Contract contains any statement expressly to the contrary, a person who is not a party to the Contract has no right under the Contract (Rights of Third Parties) Act 1999 to enforce any term of it."

With default provisions as robust as these, firmly anchoring both the contract and the arbitration in England, the law of the arbitration agreement is not an issue that will arise in an RSA arbitration.

The dispute resolution (DR) clause in the FDA in *Kabab-Ji v KFG* could not be more different. The FDA was governed by English law. A separate governing law clause confirmed this. However, the DR clause stipulated, inter alia:

> "The arbitrator(s) shall apply the provisions contained in the Agreement. The arbitrator(s) shall also apply principles of law generally recognised in international transactions…"

This wording led the majority on the arbitral tribunal to apply the UNIDROIT Principles of International Commercial Contracts. As noted by the Supreme Court, these are "a set of principles formulated by a group of international scholars and published by the Governing Council of the International Institute for the Unification of Private Law ("UNIDROIT")".[23] The ICC Rules expressly recognise the parties' freedom to direct the tribunal to apply such principles. Rule 21(1) provides:

> "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."

The Supreme Court noted that "rules of law" could include non-state rules such as the UNIDROIT Principles. However, it went on to say that the case before it was not concerned with rules of law to be applied by arbitrators to the merits of the dispute. The issue was what law governed the validity of the arbitration agreement for the purpose of deciding whether enforcement of the award might be refused pursuant to section 103(2)(b) of the Arbitration Act 1996. It concluded that the provisions which brought international principles in did not detract from the choice of English law as the law which the English court must apply to determine whether KFG became a party to the arbitration agreement in the FDA.

It is clear that the original parties to this one-off contract were seeking a balance or compromise. They agreed English law to govern the contract, including the arbitration clause, as the Supreme Court found, but brought international principles in as well, and they chose to submit disputes to an international arbitration institution, based in Paris, and to make Paris the seat of their arbitration. They thus inevitably brought French and other elements into the resolution of disputes otherwise governed by English law. This might look like a hazardous endeavour but the parties were entitled to make these choices.

While rules for trade association and ad hoc arbitration, such as the RSA rules and the LMAA Terms, seek to reduce or even eliminate the involvement of different and multiple laws and rules of law, the ICC Rules, and those of other institutions, make room for them. Practitioners who focus on ICC arbitration, and scholars who study it, revel in treating international arbitration as comparative law in action. For Joshua Karton,

> "…comparativism is pervasive in international arbitration. Comparative law methods are employed at every stage, even where the circumstances do not require a comparative analysis or assessment. Comparative law goes beyond merely a method of deriving rules; it constitutes an ethos of the field, a core aspect of its professional culture. That is, comparative law is not just something that is *used* in international commercial arbitrations, it is an essential constituent of the field."[24]

This view is contentious. It assumes that the field is essentially composed of what Dezalay and Garth called the "ICC community".[25] It ignores non-institutional arbitration, as Emmanuel Gaillard did in his 2014 Freshfields Lecture, "Sociology of international arbitration".[26]

According to Gary Born,

> "Although there is room for debate, most international practitioners fairly decisively prefer the more structured, predictable character of institutional arbitration, and the benefits of institutional rules and appointment mechanisms, at least in the absence of unusual circumstances arguing for an *ad hoc* approach."[27]

Born has a table of caseloads of "leading arbitral institutions" for the 26 years 1993 to 2018.[28] He erroneously includes the LMAA, which is not an institution and which promulgates rules for use in ad hoc arbitrations. The LMAA is the only "institution" in his table whose case numbers are consistently in the thousands. It regularly has a caseload twice the size of the ICC's. However, this is the LMAA's only appearance in Born's treatise. He does not examine the reasons for the success of its arbitration rules. If he had done so, he might have had cause to query his assertion quoted above. The absence of a default rule to identify the law of the arbitration agreement is one example of the ways in which the ICC Rules fail to provide structure and make arbitrations unpredictable.

Whatever the preferences of international practitioners might be, parties in international commerce fairly decisively vote with their feet, choosing trade association and ad hoc rules which fill gaps left open by institutional rules. In disputes which are already replete with international aspects, these rules help them to avoid comparative law issues.[29]

The Law Commission's proposal for a default rule

In the report for its initial public consultation, the Law Commission included the law of the arbitration agreement in the chapter, "Other stakeholder suggestions not short-listed for review".[30] The Commission noted that the drafters of the 1996 Act had deliberately omitted conflict of laws provisions. It was not persuaded that the Act needed to introduce a new regime which departed from *Enka v Chubb*. In any case, the majority on the Supreme Court had said that if there was no choice of law for the main contract, then the arbitration agreement would be governed by the law with which it was most closely connected, usually the law of the seat. So the common law already had a default rule in favour of the law of the seat.

Some international arbitration practitioners in London were not satisfied with this treatment of the issue. They included members of the ICC community. For them, the common law rules were not as clear as they should be and risked causing difficulties in arbitrations seated in London concerning disputes arising under contracts with a foreign governing law. According to one submission,

> "The default applicability of the *lex contractus* arising from *Enka v Chubb* means that in a vast number of London seated arbitrations (in which the parties have expressly or impliedly chosen a foreign law as the applicable law of the main contract), all aspects of the arbitration agreement, from arbitrability to the scope of the arbitration clause will be governed by that foreign law. This creates considerable substantive legal uncertainty as well as practical issues for parties which choose London as a seat for their arbitration and it goes against the evidence of market practice."[31]

There was an element of exaggeration in such submissions. It is doubtful that a 'vast number' of London arbitrations deal with contracts governed by a foreign law. Almost all LMAA and trade association arbitrations, which form the majority of London seated arbitrations, deal with English law contracts. The LCIA reports that in 85% of its 293 arbitrations under its rules filed in 2022 the parties chose English law to govern their contracts.

The campaign for a statutory default rule was highly successful. Arbitral bodies which already had default rules were unlikely to oppose it, though they were not necessarily impressed by the argument that a choice of a foreign governing law for a contract might override their rules.[32]

However, there were dissenting voices, notably amongst solicitors who advised international parties. In the view of one leading law firm, "commercial parties typically expect that the law of the matrix contract will govern all aspects of their agreement."[33] They considered that the usual choice of law rules should apply. From the perspective of commercial users, they contended, the system of law most closely connected with the arbitration agreement was usually the governing law of the matrix contract in which it was embedded.

The Law Commission decided that a new default rule in favour of the law of the seat,

> "would ensure the applicability of the doctrine of separability, along with its practical utility. It would give effect to the more generous rules on arbitrability and scope which our courts have seen fit to develop…[It] would have the virtues of simplicity and certainty. In contrast, the approach in *Enka v Chubb* is legally complex and can be unpredictable in its application to the facts."[34]

A proposal that the new default rule should only apply to arbitration agreements entered into before the day on which the new statute comes into force is likely to be rejected in favour of universal applicability from that date. The rules in *Enka v Chubb* will then have had a relatively short life.

Conclusion

The analysis set out by the Supreme Court in *Enka v Chubb* may be complex but it is not difficult. It caters for different scenarios. It is part of the rich tapestry of English common law on international arbitration, which attracts commercial parties from all corners of the world. The international arbitration community in London may come to regret its hasty demise.

During my writing of this paper, reports have been published of anti-suit injunctions obtained from the Commercial Court in London in support of ICC arbitrations seated in Paris.[35] In the absence of express provisions in the contracts or in the ICC Rules, the court applied the principles in *Enka v Chubb*, finding that the parties' separable arbitration agreement was governed by English law. Such decisions in support of ICC arbitrations may ironically no longer be available in London after the new statutory default rule in favour of the seat is introduced.

Nor would the new rule necessarily help if the *Kabab-Ji* scenario was to be repeated. An English court may find again that the parties had expressly agreed that English law applied to the arbitration agreement.

The law of the arbitration agreement is a non-issue in most international arbitrations. Time will tell if statutory reform will cure the problems which have arisen in a few exceptional cases under institutional rules which do not contain their own default provisions. It may turn out to have been preferable to leave the law where it sat in *Enka v Chubb.*

James Clanchy, FCIArb
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[1] *Enka Insaat ve Sanayi AS v Insurance Company Chubb* [2020] UKSC 38, [2020] 2 Lloyd's Rep 449

[2] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2022] 1 Lloyd's Rep 24

[3] The Law Commission's reports, consultation papers, and related documents may be found on its website: https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/ (accessed 27 September 2023).

[4] Mayer Brown, "Law Commission Proposes Seat of Arbitration as the Default Law of the Arbitration Agreement", https://www.mayerbrown.com/en/perspectives-events/publications/2023/09/law-commission-proposes-seat-of-arbitration-as-the-default-law-of-the-arbitration-agreement (accessed 27 September 2023); Pinsent Masons, "Arbitration Act amendments put forward by Law Commission – New legislation to clarify which law governs an arbitration agreement forms part of a range of proposals…", https://www.pinsentmasons.com/out-law/news/arbitration-act-amendments-put-forward-by-law-commission (accessed 27 September 2023)

[5] *Enka Insaat ve Sanayi AS v Insurance Company Chubb* [2020] 2 Lloyd's Rep 449, 483

[6] Draft Bill, clause 1, at p176 of the Law Commission's Final Report, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2023/09/Arbitration-final-report-with-cover.pdf

[7] Comment on Alex Mills, "Online Symposium on the Law Governing Arbitration Agreements: A View from Bloomsbury" in EAPIL (The European Association of Private International Law) Blog, 11 September 2023, https://eapil.org/2023/09/11/online-symposium-on-the-law-governing-arbitration-agreements-a-view-from-bloomsbury/#comments , accessed 27 September 2023

[8] For example, English law/London arbitration, US law/New York arbitration in BIMCO Law and Arbitration Clauses 2020; French law/Paris arbitration in Synacomex 2000 grain charterparty form

[9] *Fiona Trust & Holding Corporation and Ors v Privalov and Ors* [2008] 1 Lloyd's Rep 254

[10] *Ibid*, 256 per Lord Hoffmann

[11] *Sul América Cia Nacional de Seguros SA and Others v Enesa Engenharia SA and Others* [2012] 1 Lloyd's Rep 671

[12] Jeff Waincymer, "Much Ado About… The Law of the Arbitration Agreement: Who Wants to Know and for What Legitimate Purpose?" in *Journal of International Arbitration*, Vol 40, Issue 4, 361, 423

[13] *Ibid*

[14] *Ibid*, 425

[15] Gary B Born, *International Commercial Arbitration* (3rd Edn, Kluwer, 2021) 523

[16] Reinmar Wolff, ed., *New York Convention: Article-by-Article Commentary* (2nd Edn, Hart Publishing, 2019) 285

[17] *Ibid*, 286

[18] Born, *op cit.*, 525

[19] See Lord Mance, "Arbitration: a Law unto itself?", *Arbitration International*, 2016, 32, 223, 230: "Whatever the law of the seat or elsewhere might provide, French law judges the validity and effect of international arbitration agreements by transnational standards of its own creation. …the French approach is a mix of parochialism and universalism – parochialism since French law looks at international arbitration only through its own eyes, universalism since it insists that its own standards apply to all international arbitrations. In terms of the comity of nations, this approach is a large step backwards. And it cannot claim a consensus."

[20] Sundaresh Menon CJ, SIAC Congress 2018, Keynote Address, https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-keynote-address-delivered-at-the-siac-congress-2018 , accessed 28 September 2023. See also Anthony Connerty, "International Cotton Arbitration" (2013) 29(2) Arbitration Intl 295-318

[21] Sam (Ronghui) Li et al., "Recognition and Enforcement of Foreign Arbitral Awards in China Between 2012-2022: Review and Remarks (Part I)", Kluwer Arbitration Blog, 12 September 2023, https://arbitrationblog.kluwerarbitration.com/2023/09/12/recognition-and-enforcement-of-foreign-arbitral-awards-in-china-between-2012-2022-review-and-remarks-part-i/ , accessed 28 September 2023

[22] Foreword to Derek Kirby Johnson, *International Commodity Arbitration* (Lloyds of London Press, 1991)

[23] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2022] 1 Lloyd's Rep 24, 33

[24] Joshua Karton, "International Arbitration as Comparative Law in Action", *Journal of Dispute Resolution*, Vol 2020, 293, 295

[25] Yves Dezalay & Bryant G *Garth*, *Dealing in Virtue,* Chicago, University of Chicago Press, 1996, 129: "The English legal profession has had to come to grips with the global practice of law and disputing, and with international commercial arbitration as recognized by the ICC community."

[26] Emmanuel Gaillard, "Sociology of international arbitration", *Arbitration International*, 2015, 31, 1, 5 Gaillard lists various institutions, including the ICC, LCIA and DIAC as social actors but omits the LMAA and other associations which publish arbitration rules.

[27] Born, *op cit*, 192. I quoted this passage in my ICMA XXI paper, 'Ad hoc arbitration and its enemies', March 2020. The opening words, 'Although there is room for debate' were added by Born in his 3rd edition in 2021 and may be regarded as a welcome step.

[28] *Ibid*, 93

[29] See comments by James Clanchy on Joshua Karton's blog post, "Comparative Law in International Arbitration, Comparative Law as International Arbitration", 5 November 2020 in *The Social and Psychological Underpinnings of Commercial Arbitration in Europe*, https://commercialarbitrationineurope.wordpress.com/2020/11/05/comparative-law-in-international-arbitration-comparative-law-as-international-arbitration/ , accessed 30 September 2023. "The core of international arbitration is formed of disputes arising from, and related to, the buying, selling and transportation of goods across borders, i.e. international commerce. Most arbitrations in this core take place outside the institutions and under standard form contracts and arbitration rules, which have been honed over

decades to avoid the risk and expense of comparative law analyses. In my own practice as a dual qualified lawyer (England & Wales, France, but without having acquired a law degree in either jurisdiction), I found that the invocation of the possibility that French law might apply to the contract at issue, and that it might incorporate a Paris arbitration clause from another contract [(e g a Synacomex charterparty)], could help to prompt a settlement, i.e. I reached for my comparative law toolkit to avoid an arbitration, not to assist in an arbitration after it commenced. Far from being essential, comparative law is an expensive risk which commercial parties prefer to avoid. The success of international commercial arbitration is built on efforts to steer away from comparative law."

[30] See fn3

[31] Responses to Consultation Paper 1 by members of Brick Court Chambers

[32] The LMAA in its response to Consultation Paper 1 said, "We do not accept the validity of any such argument: we think the better view is that, where the LMAA Terms apply, there is an express choice of law which should prevail over any implied choice. Nevertheless, it would be useful to place the position beyond doubt."

[33] Responses to Consultation Paper 2 by Clifford Chance. Similar objections were raised by Linklaters LLP

[34] Final Report, p147

[35] "Foreign-seated arbitration agreement", 22 September 2023, on Essex Court Chambers website: https://essexcourt.com/foreign-seated-arbitration-agreement/ , accessed 30 September 2023

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