HKIArb Webinar: "Conflict of Laws in International Arbitration"

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General principles

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A survey of UK, French and key Asian jurisdictions

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Avoiding common pitfalls

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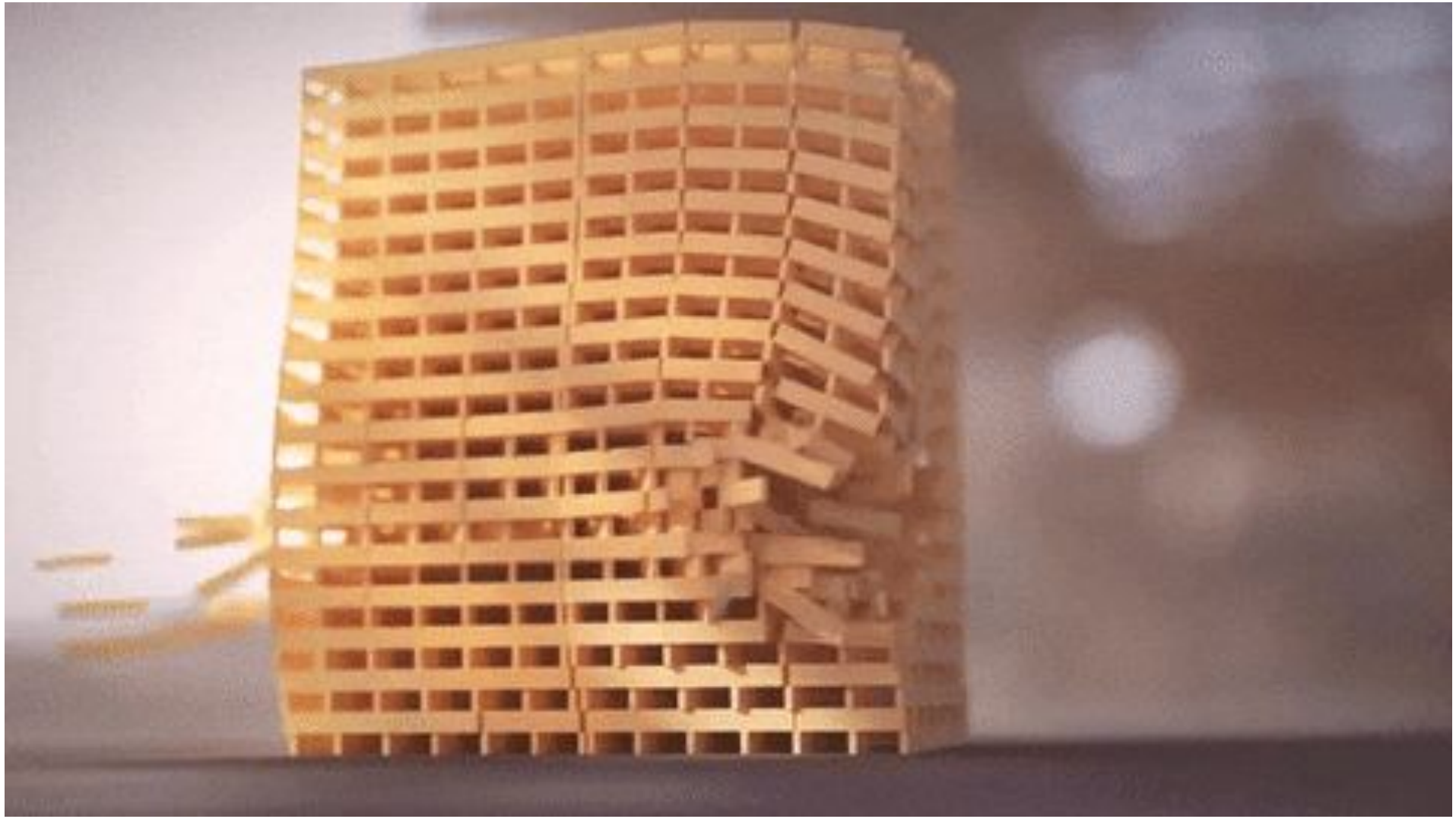
Applicable law to the arbitration agreement



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Comparative jurisdictions

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United Kingdom (1)

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb **[2020] UKSC 38, as applied in** ***Kabab-Ji SAL v Kout Food Group*** **[2021] UKSC 48 (at [28]-[36])**

"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".

"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 …".

In principle, section 103(2)(b) of the Arbitration Act 1996 should have the same meaning as Article V(1)(a) of the New York Convention and must "be applied by the Courts of the contracting states in a uniform way": at [31]-[32].

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United Kingdom (2)

Effect on enforcement of arbitral awards:

Considered in *Kabab-Ji*, at [69]-[75]:

- Article 24: Any "interpretation, change, termination, or waiver of any provision“ of the FDA would be ineffective unless made in writing.
- Article 26: FDA "may only be amended or modified by a written document executed by duly authorised representatives of both Parties". These were supplemented by several other provisions requiring any waiver or assignment also to be in writing.
- *Cf. MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119.

Court of Appeal correct to grant reverse summary judgment (*cf.* approach of Sir Michael Burton at first instance): at [80] & [88]-[90].

France

Cour de Cassation decision dated 28 September 2022 in *Kabab-Ji*:

8. Having supremely held that the choice of English law as the law governing contracts, as well as the stipulation that it was prohibited arbitrators to apply rules that would contradict contracts, were not sufficient to establish the common will of the parties to submit the effectiveness of the arbitration agreement to English law, notwithstanding the material rules of the seat of arbitration expressly designated by the contracts, and that KFG did not provide proof of any circumstance likely to unequivocally establish the will commonality of the parties to designate English law as governing effectiveness, transfer or extension of the arbitration clause, the court of appeal has, without distortion, legally justified its decision to assess the existence and effectiveness of the arbitration agreement, not with regard to the English law, but with regard to the substantive rules of French law in matters of international arbitration".

"It really is a big mess."

Louis Flannery KC

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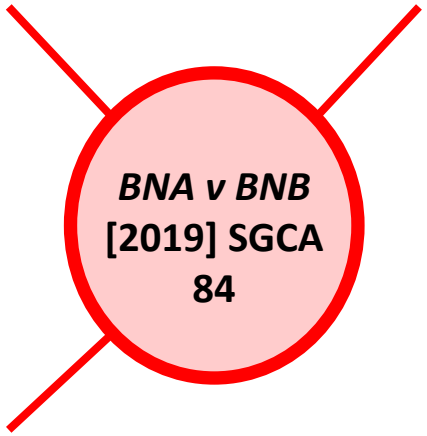
Singapore

- Held (at [61]–[63]), that a "this agreement"-type clause can only constitute an implied choice of law for the arbitration agreement.

- *Cf.* The English Court of Appeal decision in *Sulamérica, Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2013] 1 WLR 102.



Steven Chong JA (delivering the grounds of decision of the Court), at [61]:

- "[A]n express choice of the proper law of the main contract does not, in and of itself, also constitute the proper law of the arbitration agreement".

- "[B]ecause it is only a 'natural inference' – and not a legal conclusion in and of itself – that in the absence of such specific provision the law governing the substantive contract is also presumed to govern the arbitration agreement (*Sulamérica* at [11]), the express choice of the proper law of the main contract is only a 'strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary': *BCY* at [65]".

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Hong Kong

"If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat."

"But there is no rule that the *lex arbitri* must be the law of the seat of the arbitration."

Klockner (2011)

"It was only if agreement could not be found that the implication arose from the choice of seat, that the law of that place would be the *lex arbitri*."

"In the present case, the governing law, as stipulated in the purported arbitration agreement under the Charterparty, is English law, although the seat of arbitration is Hong Kong."

OCBC (2020)

"There is no express agreement between the parties as to the governing law of the arbitration agreement. The determination of that law is a question of construction, a matter of interpretation of the relevant clauses of the underlying contract and of the arbitration agreement itself, read in the light of the surrounding circumstances and commercial sense."

A v D (2020)

Sea Powerful (2016)

"[A]s the Clause specified the application of English law, English is the putative applicable law."

X v ZPRC (2020)

"Ascertain the express choice (if any), the implied choice and the presumed common intention of the parties.

The governing law of the underlying contract, and the law with the closest and most real connection with the agreement to arbitrate, such as the chosen seat of the arbitration, are all matters to be taken into consideration."

PRC

Draft amendments to PRC Arbitration Law

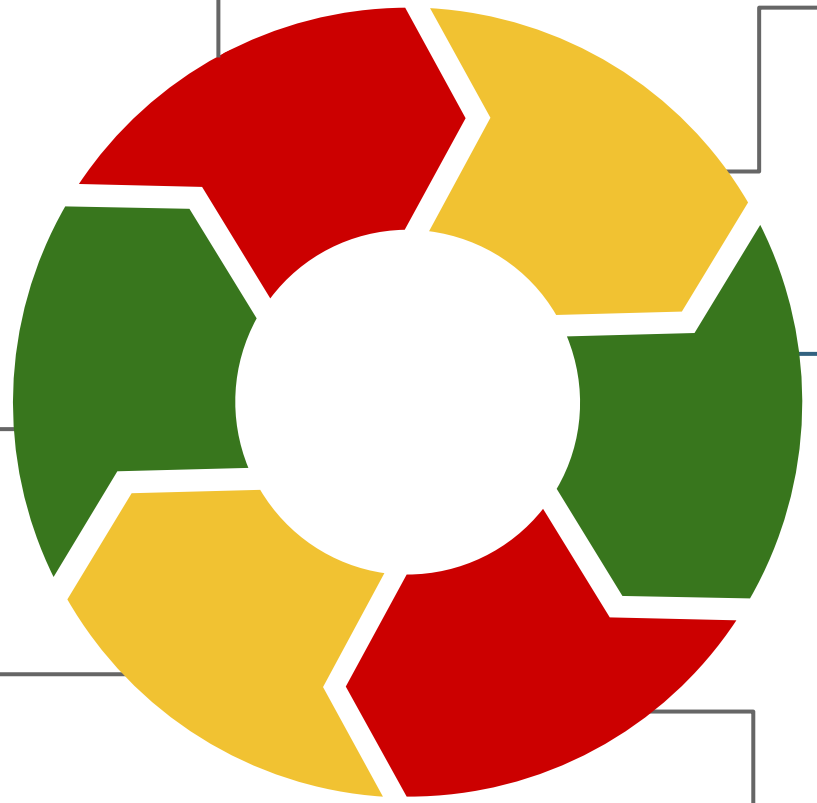
- Parties may agree on the place of arbitration.
- If they do not agree, or if it is unclear, the place of arbitration shall be the place "of the arbitral institution administering the case".

Other laws and SPC interpretations

Refer to the concept of a seat of arbitration.

Current PRC Arbitration Law

No concept of seat or place of arbitration.



Have the parties agreed on the law governing the arbitration clause?

The parties' express choice controls.

Default rules

- The law of the seat or the law at the place of the institution applies.
- If there is a conflict, the validity principle applies.
- The law of the forum applies.

Irrelevant factors

Generally, the law governing the main contract is not relevant.

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Jurisdiction: What is the correct standard of review?

United Kingdom Law Commission Consultation Paper on Review of the Arbitration Act 1996:

Summary, at [1.86]: "We provisionally propose that, where a party has participated in arbitral proceedings, and has objected to the jurisdiction of the arbitral tribunal, which has ruled on its jurisdiction in an award, any subsequent challenge under section 67 should be by way of an appeal and not a rehearing".

Reasons given in Consultation Paper:

- At [8.42]: "What we think a party should not be able to do, is ask a tribunal to issue an award, and for that party to insist that the award is binding, but only if the tribunal finds in its favour, and if not then to assert that the award can be ignored. It cannot be a case of 'heads I win, tails it does not count'".
- At [8.39]: "[I]f the hearing before the court is an appeal and not a rehearing, the court nevertheless remains the 'final arbiter' on the question of the tribunal's jurisdiction".
- At [8.40]: Although questions of jurisdiction might involve both fact and law, "the court might simply consider the evidence put before the arbitral tribunal, including witness statements or transcripts, and rely also on the arbitral tribunal's findings of fact".

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Comparative perspectives

JURISDICTION	PROCEDURE	REVIEW STANDARD
UNITED KINGDOM	• Section 67, Arbitration Act 1996 • Law Commission's proposal	• Rehearing • Appellate review?
SINGAPORE	• Section 10(3), International Arbitration Act • 30 days after jurisdiction ruling	• *De novo* basis, but new evidence admitted only in limited circumstances (*cf.* admission of new evidence on appeal)
HONG KONG	• Section 34, Arbitration Ordinance • 30 days after jurisdiction ruling	• *De novo* basis
PRC	• *Competence-competence*? • Amendments to the PRC Arbitration Law	• No "review" • Administrating arbitration commission / competent court

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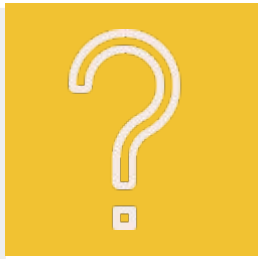
Drafting tips

GOVERNING LAW OF THE CONTRACT

- Law applicable to the contract, as well as any non-contractual claims (if included within scope).

LAW GOVERNING THE ARBITRATION AGREEMENT

- Governs the existence, scope, validity, interpretation and effects of the arbitration clause
- Choose the law of a pro-arbitration jurisdiction / match with the law of the seat or of the contract



SEAT

- Default procedural rules (supplementing any chosen arbitration rules)
- Governs challenges to jurisdiction, as well as awards

JURISDICTION

- Be clear about the scope of the claims submitted to the Tribunal (contractual, non-contractual, carve-outs)
- Special procedures
- Procedure/standard of review

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Q&A

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