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So Far Yet So Close: Comparing Governing Laws in Arbitration Agreements under English and Chinese Laws

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ABSTRACT

The governing law of arbitration agreements determines the validity of an arbitration agreement and equally the entire arbitration. However, there is huge disagreement around the world as to the appropriate choice-of-law rules for deciding this governing law, particularly between rules favoring the governing law of the underlying contract (represented by the English approach) and the curial law (represented by the Chinese approach). By comparing the choice-of-law rules of these two jurisdictions, the authors argue that this disagreement is futile and unnecessary because both jurisdictions' choice-of-law rules are pro-validity in substance and likely lead to the arbitration agreement being upheld. There is, therefore, no urgency to change the status quo by asking one jurisdiction to follow another's choice-of-law approach. The authors conducted empirical research on relevant Chinese judicial decisions to add further depth to the comparison.

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I. INTRODUCTION

Deciding the governing law in an international arbitration agreement is one of the thorniest among all choice-of-law issues in contract disputes.[1] This is partly reflected by the possibility of having three different systems of laws applied to the same arbitration agreement.[2] The potential applicable laws to an agreement to arbitrate include (1) the law governing the underlying contract and the

1. *See* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS ¶ 14.04 (2014) ("[Q]uestions of how to proceed when the litigants are at odds on whether they are bound by an agreement to arbitrate are as difficult here as they are elsewhere in the private international law of contract, for the danger of assuming the conclusion is always lurking close to the path.").

2. *See id.* ¶¶ 14.10–14.12, 14.33–14.43; Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb, [2020] UKSC 38, [1]–[3] [hereinafter *Enka*]. These systems of laws do not have to be national law. For example, English law accepts non-national law, such as *lex mercatoria*, to govern the substantive matters of the main contract. *See* Arbitration Act 1996, c. 23 § 46(1)(b) (UK) [hereinafter Arbitration Act 1996]. However, the law governing the arbitration agreement must be national law. *See* DICEY, MORRIS & COLLINS ON THE CONFLICTS OF LAWS ¶ 16-019 (Lawrence Antony Collins & Johnathan Harris eds., 15th ed. 2012) [hereinafter DICEY, MORRIS & COLLINS].

substance of the dispute (general contract law), (2) the law governing the arbitration agreement (AA law), and (3) the law governing the arbitration proceedings (curial law).[3] AA law is arguably the most important as it governs the validity of the arbitration agreement, and therefore whether the arbitral tribunal in question has jurisdiction.[4] Hence, this is the threshold question to the entire arbitration.[5] Deciding AA law is controversial, with different countries adopting different choice-of-law approaches to the question. As undesirable as it is, "[t]here is . . . no international consensus on the choice-of-law rule applicable to an arbitration agreement."[6]

This Article seeks to shed light on this controversy by comparing the approaches of England and China. They represent the two major camps in the prevailing choice-of-law approaches on AA law internationally.[7] More recently, the UK Supreme Court has restated the choice-of-law approach in AA law in two comprehensive decisions: *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* (*Enka*) and *Kabab-Ji SAL v. Kout Food Group* (*Kabab-Ji*).[8] Under this restated approach, the English courts presume that an express choice of general contract law in the contract also governs the AA law.[9] In the absence of such an express choice, the English approach generally presumes the general contract law to be the AA law.[10] In contrast, the Chinese approach generally presumes the curial law to apply if the parties did not make an express choice.[11]

Beyond the theoretical significance, this comparison also has important practical value as there are many cases involving the two

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3. *See Enka*, [2020] UKSC 38, [1], [209].

4. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-008; *see also* BRIGGS, *supra* note 1, ¶ 14.03.

5. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶¶ 16-008, 16-013; *see also* BRIGGS, *supra* note 1, ¶¶ 14.03–14.04.

6. DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-014.

7. *See Enka*, [2020] UKSC 38, [3] ("On one side there are those who say that the law that governs a contract should generally also govern an arbitration agreement which, though separable, forms part of that contract. On the other side there are those who say that the law of the chosen seat of the arbitration should also generally govern the arbitration agreement."); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 547–66 (3d ed. 2021).

8. *See generally Enka*, [2020] UKSC 38; Kabab-Ji SAL v. Kout Food Grp., [2021] UKSC 48 [hereinafter *Kabab-Ji*].

9. *See Enka*, [2020] UKSC 38, [129]; *Kabab-Ji*, [2021] UKSC 48, [33]–[35].

10. *See Enka*, [2020] UKSC 38, [170].

11. *See* Zhōnghuá rénmín gònghéguó shèwài mínshì guānxì fǎlǜ shìyòng fǎ (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011), art. 18 [hereinafter *Choice of Law Act*].

countries.[12] England is clearly a top, if not the top, international arbitration center in the world.[13] It is thus common for these Sino-foreign transactions to provide for arbitration in London.[14] The English approach is also influential in other common law jurisdictions.[15] On the other hand, despite the significant development of the Chinese courts over the past few decades, arbitration remains the favored avenue of dispute resolution in sophisticated commercial transactions involving Chinese and foreign parties.[16] The larger the size of the transaction, the more likely that the parties will opt for arbitration.[17] To harmonize the choice-of-law rules worldwide, one could certainly make an argument that China should adopt the English approach, or at least modify certain components of its approach to resemble the model of England.[18] The comparison assesses the validity of this argument, and more generally how one should look at the conflicting choice-of-law approaches around the world. It concludes that the different approaches may end up reaching the same result, and that is the best one can hope for given dim prospects of a uniform international choice-of-law regime for AA law being adopted. Recognizing that the black letter law and how the law is implemented may not always be consistent in China,[19] we have conducted empirical

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12. *See e.g.*, Dàlián ruìfēng liánggǔ jiāgōng yǒuxiàn gōngsī sù zhōngxībù gǔfèn yǒuxiàn gōngsī gōngsī hétóng jiūfēn àn (大连瑞丰粮谷加工有限公司诉中西部股份有限公司公司合同纠纷案) [Company Contract Dispute Between Dalian Ruifeng Grain and Grain Processing Co., Ltd. and SKE Midwest Co., Ltd.] (Middle Level's Court of Liaoning Province 2015) (China); Starlight Shipping Co. v. Tai Ping Insurance Co., Ltd., [2007] EWHC (Comm) 1893 (Eng.); Crescendo Maritime Co. v. Bank of Commc'n [2015] EWHC (Comm) 3364 (Eng.) [hereinafter *Crescendo Maritime Co.*].

13. *See 2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, QUEEN MARY UNIV. OF LONDON, https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/ (last visited Jan. 30, 2023) [https://perma.cc/3C9P-SKJC] (archived Jan. 8, 2023).

14. *See e.g.*, Róngchéngshì wángdǎo dàyáng shuǐchǎn yǒuxiàn gōngsī sù lāwéi níyà gōngsī děng gōngsī hǎishàng huòwù yùnshū hétóng jiūfēn àn (荣成市王岛大洋水产有限公司诉拉维尼亚公司等公司海上货物运输合同纠纷案) [Dispute over Shipping Contract Between Rongcheng Wangdao Ocean Aquatic Products Co., Ltd. and Lavinia Corp. and other companies] (Higher People's Court of Shandong Province 2016) (China).

15. *See* BORN, *supra* note 7, at 571; Peter Tzeng, *Favoring Validity: The Hidden Choice of Law Rule for Arbitration Agreements*, 27 AM. REV. INT'L ARB. 327, 327 (2016).

16. *See* FAN YANG, FOREIGN-RELATED ARBITRATION IN CHINA: COMMENTARY AND CASES 0.01 (1st ed. 2016).

17. *See* King Fung Tsang, *An Empirical Study on Choice of Law in China: A Home Run?*, 21 WASH. UNIV. GLOB. STUD. L. REV. 339, 377 (2022) ("[F]oreign parties working on high-value transactions will usually opt for arbitration, whether in China or abroad.").

18. Commentators have consistently argued that China should adopt various aspects of the English choice-of-law rules on AA law. *See, e.g.*, Tzeng, *supra* note 15, at 330; Weidong Zhu, *The New Conflict Rules of Arbitration Agreements in China: The Old Wine in the New Bottle*, 11 CAMBRIDGE J. CHINA STUD. 25, 35 (2016); Fan Yang, *Applicable Laws to Arbitration Agreements Under Current Arbitration Law and Practice in Mainland China*, 63 INT'L & COMPAR. L.Q. 741, 752–53 (2014).

19. *See* Tsang, *supra* note 17, at 341–43.

research on the Chinese cases regarding the choice of AA law in arbitration agreements. This research provides additional justification for selecting the English and Chinese approaches as representative of the two main camps and adds to the depth of our comparison.

A. *The Controversy of AA Law*

The AA law is particularly controversial. This is due to five interrelated reasons. First, international arbitration presents tensions among the private agreement between the parties, national laws, and international law. AA law, as the threshold question of international arbitration, reflects the dilemma and conflicts between these three laws. The first two, private agreement and national law, are constant in all international contracts. Courts decide every day, through the application of national choice-of-law rules, the law applicable to international contracts. However, an arbitration agreement is different from general international contracts. It is usually a part, but an independent part, of the general international contract,[20] and its purpose is to take the dispute resolution outside of the ordinary litigation in national courts.[21] Yet, even in that case, national law is not entirely out of the picture. It retains a supervisory role and regulates aspects such as the enforcement of the arbitration agreement.[22] There is, therefore, an inherent tension between the private agreement and national law.[23] In addition, there is a tension between national law and international law. Conflicting choice-of-law rules in contracts among national laws is a constant (more on that below), but many nations are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and therefore adopt the rules of the New York Convention.[24] However, the New York Convention only sets out the default choice-of-law rules in the context of enforcing arbitral awards, and such rules do not explicitly apply to the pre-award context.[25]

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20. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-008.

21. *See* BRIGGS, *supra* note 1, ¶ 14.01.

22. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶¶ 16-031–16-034; *Enka*, [2020] UKSC 38, [174].

23. DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-033.

24. To date, there are 170 signatories to the New York Convention. *See Contracting States*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/countries (last visited Jan. 31, 2023) [https://perma.cc/RU3U-6FVU] (archived Jan. 8, 2023).

25. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(a), 10 June 1958, 330 U.N.T.S. 3 (entered into force June 7, 1959) [hereinafter *New York Convention*] ("The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement

Further, courts are known to interpret the New York Convention in various conflicting ways, and this causes confusion as to the applicability of the rules under the convention.[26]

Second and more specific to the tensions between national laws, since arbitration inherently deprives a court of its judicial jurisdiction, the nature of international arbitration and the uncertainties of the New York Convention further widen the gaps between the national choice-of-law approaches.[27] Each country can thus view the extent to which the parties may deprive its courts of jurisdiction by agreeing to arbitration differently, and the same is true for the interpretation of the relevant provision of the New York Convention. [28] Despite widespread adoption around the world of the general approaches of the choice-of-law rules in commercial contracts, such as party autonomy and closest connection,[29] there are great differences in the choice-of-law rules when it comes to deciding the validity of the arbitration agreement.[30] While countries are largely in consensus that parties' express choice of the AA law should be given effect,[31] it is problematic where parties have not explicitly chosen a national law to govern the validity of the arbitration agreement.[32] Among the approaches, there are two main camps, as noted above.[33] The first camp advocates the application of the general contract law in the absence of express choice. This camp is represented by English law,[34] as restated in *Enka* and *Kabab-Ji*. The second camp advocates the application of the curial law in the absence of an express choice.[35] China, among others, represents this second camp.[36]

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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."); BORN, *supra* note 7, at 531–32.

26. *See* BORN, *supra* note 7, at 531–32; *New York Convention*, *supra* note 25, art. V(1)(a).

27. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶16-006 ("Many transnational commercial contracts contain clauses by which the parties choose to submit their disputes to international commercial arbitration, rather than to adjudication by a national court . . . . It takes the regulation of such disputes outside the operation of the ordinary rules of law applicable to private law . . . . Instead, it subjects them to a separate regime, which is partly the product of private regulation, and partly the result of developments in international treaties and national law.").

28. *See* BORN, *supra* note 7, at 529 ("Articles II and V(1)(a) [of the New York Convention] have given rise to a wide range of divergent interpretations and to considerable uncertainty.")

29. Tsang, *supra* note 17, at 342.

30. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶¶ 16-020–16-023.

31. *See* BORN, *supra* note 7, at 525.

32. *Id*. at 526.

33. *See Enka*, [2020] UKSC 38, [3].

34. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-010.

35. *See* BORN, *supra* note 7, at 547.

36. *See* ZHENG SOPHIA TANG, YONGPING XIAO & ZHENGXIN HUO, CONFLICT OF LAWS IN THE PEOPLE'S REPUBLIC OF CHINA ¶¶ 7.31–7.32 (1st ed. 2016); *see also* Tzeng, *supra* note 15, at 353.

Third, it is hard to argue that one approach decisively trumps the other. The reality is that most parties opting for arbitration *ex ante* have not put any thought into the AA law.[37] In the absence of an express choice, both laws have legitimate claims to be the implied choice,[38] or the law with which the arbitration agreement has the closest connection.[39] This makes the utilization of the traditional tools in contractual choice of law in this context very difficult. It is common to find judges and commentators casually linking the law identified by their favorite approaches as the "implied choice" or the law with the "closest connection" to the arbitration agreement without much elaboration.[40]

Fourth, the issue is not solely the choice of law. It extends to both jurisdiction and enforcement. For jurisdiction, the validity issue may arise in deciding whether the court has jurisdiction to adjudicate the matter.[41] If the arbitration agreement is valid under the governing law, the court must stay the case.[42] For enforcement, signatories of the New York Convention may refuse to recognize and enforce an arbitral award if the arbitration agreement is invalid according to Article V(1)(a). [43] Thus, the validity issue influences all three traditional questions of private international law.[44]

Fifth, beyond the great debates and theories lies the significant impacts these different approaches have on international commercial arbitration. The inconsistent choice-of-law approaches around the world are certainly not ideal as it means the same international arbitration agreement may be valid in one country but not another, which would unavoidably lead to forum shopping.[45] This discourages the use of international arbitration as an alternative to traditional court litigation. Table 1 below illustrates this problem:

Table 1: Possible Scenarios Due to the Multiplicity of Choice-of-Law Approaches

Scenario 1: F1 Valid/ F2 Valid	**Scenario 2:** F1 Valid / F2 Invalid
Scenario 3: F1 Invalid/ F2 Valid	**Scenario 4:** F1 Invalid/ F2 Invalid

37. *See* BORN, *supra* note 7, at 572.
38. *See id.* at 547, 553.
39. *See id.* at 562–63.
40. *See id.* at 564.
41. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-002.
42. *See id.*
43. *See* BORN, *supra* note 7, at 513.
44. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-008.
45. *See* BORN, *supra* note 7, at 533.

The most problematic scenarios will be Scenarios 2 and 3. In Scenario 2, even though the first forum that decides the validity of the arbitration agreement (F1) finds the agreement to be valid under the governing law identified by F1's choice-of-law rule, the agreement is held to be invalid under the governing law identified by the second forum in which the arbitral award is sought to be enforced (F2). Thus, the validity of the arbitration agreement found by F1 is ultimately meaningless. In addition, the problem goes beyond the enforcement in F2. Even if there are assets to satisfy the arbitral award fully or partially in F1, a litigant may interfere with the F1 arbitration by initiating a court proceeding in F2 on the same matter.[46] When this happens, it is not unprecedented for F1 to issue an antisuit injunction against the litigant to enjoin the F2 court from proceeding.[47]

In Scenario 3, the arbitration agreement is invalid under F1's choice of law, but valid under F2's choice of law, so technically there will not be a valid arbitral award in the first place. This seems to suggest that the validity of the arbitration agreement under F2 will have no relevance. However, the litigant who favors arbitration may seek to initiate an arbitration proceeding in F2 instead (assuming the seat of arbitration is not set in the arbitration agreement), and therefore convert the scenario into Scenario 2. In short, unless the choice-of-law rules of F1 and F2 align (i.e., Scenarios 1 and 4), it is possible for different fora to reach inconsistent decisions on the validity of the same arbitration agreement, potentially even leading to jurisdictional conflicts. These types of arbitration-induced jurisdictional conflicts are clearly not conducive to the idea of resolving disputes out of the court. It may also hurt comity between the national courts.[48]

This Article is organized as follows: Part II discusses the English approach as restated by *Enka*. In *Enka*, the UK Supreme Court examined the dividing precedents in the past and explained in detail why it favored the presumption of the general contract law in the absence of an express choice by the parties. In *Kabab-Ji*, the Court further elaborated on the kind of choice-of-law clause that would be regarded as an express choice on the AA law.[49] Part III then compares the English choice-of-law rules with those of China to illustrate their key differences and similarities. Having compared the two approaches, the authors believe that the argument that one jurisdiction must follow another jurisdiction's formal choice-of-law approach is unconvincing. Despite the differences on paper, we find plenty of similarities functionally, especially the pro-validity emphasis, an important aspect

46. *See, e.g.*, *Crescendo Maritime Co.*, [2015] EWHC (Comm) 3364.

47. *See generally id.*

48. *See* King Fung Tsang & Jyh-An Lee, *The Ping-Pong Olympics of Antisuit Injunction in FRAND Litigation*, 28 MICH. TECH. L. REV. 305, 317–21 (2022).

49. *Enka*, [2020] UKSC 38, [110]–[146]; *Kabab-Ji*, [2021] UKSC 48, [35].

of choice-of-law in arbitration agreements,[50] between the two countries' governing law approaches. Part IV shows the empirical findings. Based on these findings, the authors argue that the differences between the two approaches are even less significant in practice, as it is actually rare for the two approaches to reach different conclusions. Part V argues that while further harmonization of choice-of-law rules may be considered, harmonization of the substantive laws on the validity of arbitration agreements may render the former harmonization less urgent. Recent Chinese legislation has streamlined the validity requirements of arbitration agreements, which, if implemented as drafted, will have the effect of harmonizing the substantive laws between England and China, and renders the potential conflicts in the governing laws "false conflicts."[51] Part VI concludes by arguing that the current Chinese regime generally works well to promote validity despite reaching that goal through a different approach than the English regime.

II. ENGLISH LAW

Enka revolved around a construction project in Russia which was damaged by fire in 2016. The project belonged to PJSC Unipro, which engaged CJSC Energoproekt to construct a power plant. CJSC Energoproekt further engaged several subcontractors, one of them being Enka.[52] The construction contract between Enka and CJSC Energoproekt contained a dispute resolution clause that stipulated parties should arbitrate in London. However, the parties made no express choices regarding general contract law nor the AA law.[53] Chubb Russia, the project's subrogated insurer, sued Enka in Russia for the damage caused by the fire. In response, Enka filed an antisuit injunction at the English High Court of Justice, arguing that the dispute should be referred to arbitration in London pursuant to the arbitration clause.[54] Despite the lack of explicit choice in the contract, Chubb Russia contended that parties have chosen Russian law to govern their general contract as well as the arbitration agreement. Accordingly, the AA law was Russian law, under which the claim was

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50. *See* Tzeng, *supra* note 15, at 330.

51. *See generally* Sīfǎbù guānyú "zhōnghuá rénmín gònghéguó zhòngcái fǎ (xiūdìng) (zhēngqiú yìjiàn gǎo)" gongkāi zhēngqiú yìjiàn de tōngzhī (司法部关于《中华人民共和国仲裁法(修订)(征求意见稿)》公开征求意见的通知) [Notice by Department of Justice on Open Collection of Opinions on "Arbitration Law of People's Republic of China" (Amendments) (Draft for Collection of Opinions)] (promulgated by Department of Justice on Jul 30, 2021) [hereinafter *Consultation Draft*].

52. *See Enka*, [2020] UKSC 38, [8].

53. *Id.* [10], [38], [148].

54. *See id.* [17].

out of the arbitrable scope.[55] Enka accepted that the main body of the construction contract was governed by Russian law but contended that the arbitration agreement should be governed by English law.[56] The High Court of Justice sided with Chubb Russia and refused to grant the injunction. Enka appealed. Thus, the issue before the Court of Appeal was whether the AA law was English or Russian law.[57]

After reviewing prior authorities, the Court of Appeal observed that "[t]he current state of the authorities does no credit to English commercial law" and the "time has come to seek to impose some order and clarity on this area of the law."[58] The Court of Appeal unanimously departed from its previous position and held, *inter alia*, the curial law would be presumed to be the AA law when parties did not specify it in the agreement.[59] The Court of Appeal provided two justifications. First, the presumption favoring the general contract law does not sit well with the separability principle (i.e., different terms within a contract may be governed by different laws),[60] and therefore the arbitration agreement may be governed by a law different from the law governing the underlying contract. Second, substantive and procedural matters overlap in the Arbitration Act 1996 ("Overlap Argument").[61] By choosing London to be the seat of arbitration, the parties agreed to arbitrate under the regulation of the Arbitration Act 1996. The court thought it would be absurd to say that only part of the substantive requirements under the act applied but not those concerning the validity and scope of the arbitration agreement.[62] Thus, the court concluded that English law was the AA law because the parties chose to arbitrate in London. The court granted the injunction against Chubb Russia, which appealed to the UK Supreme Court.

Prior to *Enka*, English courts had developed two conflicting lines of authorities regarding the choice-of-law rules to determine the AA law,[63] one favoring the general contract law in the absence of express choice,[64] and the other favoring the curial law, which is the law governing the arbitration proceedings.[65] For example, a contract may provide New York law to govern the general contract but designate London as the place of arbitration. The camp favoring the general contract law will apply New York law as the AA law, while the camp

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55. *See id.* [18].
56. Enka Insaat Ve Sanayi A.S. v. OOO Ins. Co. Chubb, [2020] EWCA (Civ) 574, [24].
57. *Id.* [4].
58. *Id.* [89].
59. *See id.* [59].
60. *See* Fiona Trust & Holding Corp. v. Privalov, [2007] UKHL 40, [17].
61. *See* XL Insurance Ltd. v. Owens Corning, [2000] 2 Lloyd's Rep. 500, 541.
62. *Enka*, [2020] UKSC 38, [66].
63. *See* BORN, *supra* note 7, at 569.
64. *See* Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA, [2012] EWCA (Civ) 638, [11].
65. XL Insurance, [2000] 2 Lloyd's Rep. 500, 543; *see also* C v. D, [2007] EWCA (Civ) 1282, [25].

favoring the curial law will apply English law instead. The UK Supreme Court, dissatisfied with the chaos created by this conflict,[66] saw an opportunity to tackle it once and for all with a judgment over one hundred pages. In short, it opted to side with the approach favoring the general contract law.

Not long after *Enka* was decided, the UK Supreme Court had another chance to further elaborate its choice-of-law rules in *Kabab-Ji*, particularly in providing further guidance on what will constitute an express choice of AA law.[67] In this case, the claimant was Kabab-Ji, a Lebanese company which had entered into a franchise development agreement (FDA) with a Kuwait company, Al Homaizi Foodstuff Company.[68] It later entered into more franchise outlet agreements under the FDA. Both the FDA and franchise outlet agreements were expressly governed by English law, and the FDA contained an arbitration clause stipulating any disputes should be submitted to arbitration in Paris.[69] Subsequently, Al Homaizi became a subsidiary of Kout Food Group because of a corporate restructuring. The FDA and franchise outlet agreements were not amended. A dispute between Kout Food Group and Kabab-Ji later arose, and it was referred to arbitration in Paris.[70] An arbitral award was granted to Kabab-Ji, for which its recognition and enforcement was sought in England.[71] Kout Food Group, however, resisted enforcement on the ground that it was not a party to the arbitration agreement.[72] The case was brought eventually to the UK Supreme Court, which had to decide, among other things, the AA law of the arbitration agreement. Unlike *Enka*, *Kabab-Ji* involved an express choice-of-law clause, thus affording the UK Supreme Court a chance to clarify the principles in *Enka*, particularly on what would constitute an express choice on AA law.[73] The three-stage test set out by the majority of the court in *Enka* and supplemented in *Kabab-Ji* is restated below.

66. *See Enka*, [2020] UKSC 38, [3].
67. *See Kabab-Ji*, [2021] UKSC 48, [28]–[53].
68. *See id.* [3].
69. *See id.* [37].
70. *See id.* [4]–[5].
71. *See id.* [2].
72. *See id.* [6], [54].
73. *See Kabab-Ji*, [2021] UKSC 48, [28], [35].

A. *Three-Stage Test in* Enka

1. Express Choice

If the parties have made an express choice in the arbitration agreement, the national law chosen by them will be the governing law. If the arbitration agreement does not contain a specific clause on the AA law, a choice of the general contract law in a written contract in the arbitration agreement should normally be treated as the express choice of the AA law.[74]

2. Implied Choice

If the parties have not made an express choice under (1) above, it will be presumed that they wish to use the same set of laws to govern all aspects of their relationship, including both the substantive issues of contract law and the validity of the arbitration agreement.[75] The AA law will normally be the general contract law as a result. This is, however, subject to the following two exceptions.

a. Overlap Argument

Where the curial law has provided for a large number of mandatory substantive rules that are applicable to the arbitration agreement regardless of the AA law, it may imply that the parties wish the curial law, instead of the general contract law, govern their arbitration agreement.[76]

b. Pro-Validity Argument

Where the arbitration agreement is valid under the curial law but not the general contract law, it is reasonable to assume that the parties would have intended the curial law to apply,[77] instead of rendering the agreement to be "mere waste paper."[78] However, this pro-validity exception does not apply to the case in (1) above where there is an express choice of AA law.[79]

3. Closest Connection

If the parties have not made a choice on the AA law, whether express (under (1)) or implied (under (2)), the law with the closest

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74. *See id.* [35]; *Enka*, [2020] UKSC 38, [129].
75. *See Enka*, [2020] UKSC 38, [170].
76. *See id.* [70]–[71], [94].
77. *See id.* [95]–[109].
78. Hamlyn & Co. v. Talisker Distillery [1894] A.C. 202, 215.
79. *See Kabab-Ji*, [2021] UKSC 48, [50]–[52].

connection to the arbitration agreement will apply. Curial law will generally be the law with which the arbitration agreement has the closest connection.[80]

B. *Features of the English Three-Stage Test*

1. A Pro-Validity Test

It is easy to characterize the *Enka* approach as favoring the general contract law strongly.[81] However, as will be explained below, the English approach, as a whole, is a pro-validity test. Prior to *Enka* and *Kabab-Ji*, commentators had already argued the English approach was pro-validity.[82] This general position has not changed.

A favoring of the general contract law is undisputable in the first stage. After all, it is widely recognized that parties rarely specify the AA law in their agreements,[83] while more than 80 percent of international commercial contracts have specified the general contract law.[84] The first stage of the *Enka* test, as supplemented by the court in *Kabab-Ji*, made express choice much more common by subsuming choice of AA law, unless otherwise provided, under all express choice of general contract law clauses.[85] Although the UK Supreme Court stated in *Kabab-Ji* that the pro-validity exception only applies in the second stage (implied choice),[86] it is unlikely that parties will intentionally specify a law that will make any part of their agreement (including both the general commercial terms and the arbitration) invalid. Thus, the practical effect of the first stage is pro-validity.

Beyond the first stage, the pro-validity approach is even clearer. On the face of it, the majority in *Enka* held that the general contract law would be presumed to be the AA law at the second stage, which makes it appear to be a rule favoring the general contract law.[87] This is notwithstanding that the English courts have long adopted the principle of separability (i.e., that the arbitration agreement

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80. *See Enka*, [2020] UKSC 38, [43]–[54], [119], [170].

81. *See* Myron Phua & Matthew Chan, *Persistent Questions After* Enka v. Chubb, 137 L.Q. REV. 216, 217 (2021).

82. Tzeng, *supra* note 15, at 340–44; Yang, *supra* note 18, at 752.

83. *See* BORN, *supra* note 7, at 525.

84. *Id.* at 554.

85. *See Kabab-Ji*, [2021] UKSC 48, [50]; *see also* CHITTY ON CONTRACTS 34-028 (34th ed., vol. II 2022) ("However, the concept of separability does not preclude the arbitration agreement being construed with the remainder of the matrix agreement as a whole, especially where that is the parties' intention." (citing *Kabab-Ji*, [2021] UKSC 48)).

86. *See Kabab-Ji*, [2021] UKSC 48, [50]–[52].

87. *See Enka*, [2020] UKSC 38, [170].

constitutes a separate agreement from the main contract).[88] The majority reasoned, *inter alia*, that the presumption would provide certainty and consistency, and give effect to the reasonable expectation of the parties to have the same law to govern all their rights and obligations, including their arbitration agreements.[89] Additionally, it avoids artificiality because the separability principle might not be commonly known by commercial parties, and therefore they would not have known a different law could govern the arbitration agreement.[90]

A closer look at the test may lead to a different interpretation. As stated above, at the second stage, if the arbitration agreement in question would be valid under the curial law but not the general contract law, the curial law will likely be the AA law instead under the third stage. While this is termed an exception, it is only a matter of expression. Since the pro-validity rule takes priority over the general presumption of the general contract law, the second and third stages can be restated as follows:

> In the absence of express choice—the court must first examine whether the competing laws would produce different results regarding the arbitration agreement's validity. Where only the curial law would validate the arbitration agreement, it will generally be the AA law. In all other cases, the general contract law will be presumed to be the AA law. This stage is subject to the Overlap Argument.

Thus, in substance, when parties fail to make an express choice in the arbitration agreement,[91] the default rule may well be called a pro-validity test, instead of a test favoring the general contract law.[92] Although there is another exception in the second stage (i.e., the Overlap Argument), it is argued that its application is limited. The UK Supreme Court made it clear that it did not think the Arbitration Act 1996 provided enough mandatory rules for the Overlap Argument to apply in *Enka*.[93] Since the seat of arbitration is generally expressly provided and often happens to be England,[94] this makes the possibility

88. *See* Fiona Trust & Holdings Corp. v. Privalov [2007] UKHL 40, [2007] 4 All ER 951, [17] (appeal taken from Eng.).

89. *See Enka*, [2020] UKSC 38, [142], [144].

90. *See id.* [53].

91. In that case, the pro-validity rule has no application. *See Kabab-Ji*, [2021] UKSC 48, [49]–[52].

92. *See* BORN, *supra* note 7, at 571.

93. *Enka*, [2020] UKSC 38, [73].

94. The seat of arbitration is determined by Section 3 of the Arbitration Act 1996 which set out the test as follows: (i) choice by parties, (ii) if none, choice by any arbitral or other institution or person vested by the parties with powers in this regard, or (iii) if none, by closest connection. It is observed that the parties usually set out the seat of arbitration expressly. *See* Tzeng, *supra* note 15, at 331. Further, the English court will only have supervisory jurisdiction to enforce the arbitration agreement and hence being

of the Overlap Argument interfering with the pro-validity approach unlikely. Combined with the rare occasions for parties to make an express choice of law that invalidates arbitration, the English approach as a whole is pro-validity.

2. The Continued Relevance of the Curial Law

Second, putting aside the pro-validity nature of the *Enka* test, the *Enka* test reserves a large role for curial law despite its lower ranking than the general contract law. Thus, even if one may consider the *Enka* test as "favoring" the general contract law, it is in truth a composite choice-of-law rule.[95] The presumption of the curial law at the third stage is obvious since it will generally be the AA law in the absence of both express and implied choice of AA law. However, its relevance is not restricted to that. To start with, as mentioned above, the Overlap Argument in stage two requires the court to examine the curial law to determine whether the curial law has mandatory provisions that govern the substantive aspects of the arbitration agreement.[96] While this may be uncommon,[97] the court openly addressed the possibility that some foreign curial laws might have a larger number of mandatory rules so that the general contract law might be trumped.[98]

In addition, the more hidden relevance is the influence of curial law over the identification of the general contract law in the first place. The UK Supreme Court made a conscious effort to play down the relevance of the designation of London arbitration to the general contract law, highlighting that arbitrators in London are capable of applying different national laws to the dispute masterfully.[99] However, if the seat of arbitration is not London but a place with less established arbitration expertise, the traditional assumption that the parties would have intended the arbitrators at that seat to apply local law may still be valid.[100] This will lead to the same national law being applied to govern both the main contract and the arbitration procedures, and eventually for that law to be found as the AA law.

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the forum on the dispute of AA law. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-036. The seat of arbitration chosen by the parties in such cases litigated is therefore likely to be England.

95. *See* Tzeng, *supra* note 15, at 336.

96. *See Enka,* [2020] UKSC 38, [94].

97. *See, e.g.*, *id.* [73], [94].

98. *Id.* [70]–[72].

99. *Id.* [113].

100. *See* Cie Tunisienne de Navigation SA v. Cie d'Armement Maritime SA [1971] AC 572, 579.

3. An Emphasis on Certainty

The features above show an emphasis on certainty by the English Court. Essentially, the Court made the general contract law the presumed AA law in both the first and second stages of the implied choice test, and the curial law the presumed applicable law in the third stage of closest connection. These presumptions are contradictory to each other as well as to the general English choice-of-law approach in contract. Internally, the contradiction is clearly displayed by the Court blemishing the relevance of the seat of arbitration to parties' intention at stage two,[101] but relying on it to derive the AA law at stage three.[102] The majority justified the use of presumptions as they "[enable] the parties to predict easily and with little room for argument which law the court will apply by default."[103] However, this does not seem to sit well with the Court's above-mentioned reasoning that parties wish the same law to apply throughout their agreement.[104] The Court further stated that the benefit is enhanced since "the same law is applied irrespective of the country in which the proceedings are brought and whether the question of the validity or scope of the arbitration agreement is raised before or after an award has been made."[105] This internal inconsistency is well noted by Gary B. Born:

> English authorities have frequently applied a presumption that, where parties expressly choose the law governing the underlying contract in a general choice-of-law clause, they intend this law (usually impliedly) to apply to the arbitration agreement. That presumption is . . . in tension with the English court's closest connection analysis.[106]

Looking beyond this internal contradiction, the use of a presumption or general rule has long been disfavored in the general choice-of-law approach in contracts. For example, there used to be a presumption favoring the law of the place of execution.[107] However, this has long been abandoned by the English courts.[108] On the contrary, the courts have since emphasized the importance of considering all the circumstances of the case.[109] In addition, a strict

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101. *See Enka*, [2020] UKSC 38, [53].
102. *See id.* [120].
103. *Id.* [144].
104. *See Enka*, [2020] UKSC 38, [142], [144].
105. *Id.* [144].
106. BORN, *supra* note 7, at 553.
107. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 32-066 ("[W]hile it could be presumed that the parties intended a contract to be governed by the law of the place where it was to be performed, an express stipulation of the governing law could displace what was only a prima facie presumption.").
108. *See* J.H.C. MORRIS, THE CONFLICT OF LAWS 277–78 (3d ed. 1984) ("Until quite recently it was supposed that the ascertainment of the proper law could be assisted by presumptions in favour of the law of the place of contracting . . . But the modern practice is to weigh the relevant factors without the aid of any presumption.").
109. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 32-069.

distinction between the second and third stages has also been abandoned in modern English private international law. In the discussion of the three-stage test under the common law, the editors of *Dicey, Morris, & Collins on the Conflicts of Laws* have highlighted that the same factors usually will be relevant to both the second and third stages,[110] rendering the strict delineation of the two stages as artificial. In fact, one of the differences between the dissenting judgment and the majority in *Enka* is the disagreement over the presumption of the curial law at the third stage.[111] Thus, while the UK Supreme Court continues to discuss the choice-of-law rules for arbitration agreements in the format of the traditional three-stage test, the approach is much more mechanical than the usual choice-of-law rule in contract.

The justification for such mechanical approach is obvious—certainty. There is no doubt that the UK Supreme Court sought to reduce the uncertainties commonly associated with the use of implied choice and closest connection in the context of choice-of-law in arbitration agreements by adopting a more rule-based approach,[112] even at the cost of departing from the general choice-of-law practice in contract cases. This suggests that it places higher value on certainty in arbitration agreements than in general contracts. Having said that, certainty is always relative and a matter of degree. One does not need to look beyond the second disagreement between the majority and dissenting judges, that is, whether the parties in *Enka* have chosen Russian law impliedly in stage two.[113] Such a disagreement itself illustrates that the tests of implied choice and closest connection would produce even more uncertainty if they are not anchored by a presumption or general rule.

Kabab-Ji illustrates this emphasis on certainty further. The UK Supreme Court reaffirmed that the general choice-of-law clause should normally be the AA law,[114] highlighting that the arbitration clause was part of the main agreement.[115] It is, of course, a matter of contractual interpretation and does not mean subsequent cases would be necessarily so decided.[116] However, the clause in question is ordinary enough: "This Agreement shall be governed by and construed in

110. *See id.* ¶ 32-007.

111. *See Enka*, [2020] UKSC 38, [257].

112. *See* BORN, *supra* note 7, at 562–63 ("In practice, courts and tribunals have encountered substantial difficulties determining what connecting factors or indicators of an implied choice are decisive in selecting the law governing an arbitration agreement. In particular, it has proven difficult to choose in a principled manner between the law of the arbitral seat and the law selected by the parties to govern the underlying contract when these two formulae point in different directions.").

113. *See Enka*, [2020] UKSC 38, [205].

114. *Kabab-Ji,* [2021] UKSC 48, [35].

115. *See id.* [39].

116. *See id.* [35]; *see also* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 12-016.

accordance with the laws of England."[117] The court clearly intended to have such a "typical governing law clause" be interpreted as an express choice on AA law by the parties in the future. This lower standard for express choice is in contrast to the general perception in the past of courts' narrow interpretation of express choice on AA law, [118] particularly when the general governing law clause is in conflict with the curial law.[119] The implication of *Kabab-Ji* is therefore that stage two will usually apply only if there is no governing law clause on the general contract law, as in the case of *Enka*.[120] Thus, as mentioned above, with 80 percent of international commercial contracts containing an express choice of general contract law,[121] it must mean that 80 percent of arbitration agreement cases will have few choice-of-law issues on AA law.

4. The Reliance on the New York Convention

As a signatory of the New York Convention, there is no doubt that the English courts must give effect to the choice-of-law provision under Article V(1)(a) in the context of recognition and enforcement of arbitral awards.[122] That article has been enacted into English law by Section 103(2)(b) of the Arbitration Act 1996.[123] Article V(1)(a) provides that the recognition and enforcement of an arbitral award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." [124] Some commentators, such as Born, further argue that the same rule should apply in the enforcement of the arbitration agreement as well:

> The international arbitral process aspires towards a maximally uniform approach by national courts presented with disputes about the substantive validity of a particular international arbitration agreement . . . . A lack of uniformity on this issue would result in some courts referring parties to arbitration, and others refusing to do so, under the same arbitration agreement; that makes no sense and results in unnecessary litigation, forum shopping and uncertainty. Rather, insofar as possible, it is much more desirable for all national

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117. *Id.* [37].

118. *See* BORN, *supra* note 7, at 535 ("When parties do not include a choice-of-law provision in their underlying contract, there is no reason to extend that provision to the separatable arbitration agreement."); *see also id.* at 605.

119. For example, parties provide that all disputes should be submitted to arbitration in China, but the general contract law is English law. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-018 ("But the parties' express choice of a governing law for the main contract may be held not to apply to the arbitration agreement, where there are, as a matter of construction, contrary indications in favour of the law of the seat.").

120. *Enka*, [2020] UKSC 38, [205]–[206].

121. BORN, *supra* note 7, at 526.

122. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-099; *Kabab-Ji*, [2021] UKSC 48, [26].

123. *See* Arbitration Act 1996, § 103(2)(b).

124. *See New York Convention*, *supra* note 25, art. V(1)(a).

> courts to reach the same conclusion as to the validity (or invalidity) of a particular arbitration agreement.[125]

This argument was accepted by the UK Supreme Court, calling it "illogical" to have two separate sets of rules for the enforcement of arbitration agreement and the enforcement of arbitral award.[126] In fact, the quoted paragraph above was cited specifically in the judgment of *Enka*.[127] The New York Convention therefore forms the basis of the court's formulation of the *Enka* test whether the AA law issue arises before or after the arbitral process, and rightly so.[128] However, as mentioned above, the New York Convention has been interpreted differently among jurisdictions. Thus, even though two signatories have derived their choice-of-law rules from the New York Convention, it does not mean that they will have the same rules.

C. *The Influence of the English Approach*

English law has long influenced the other common law jurisdictions regarding their choice-of-law approach in arbitration agreements.[129] Among them are Hong Kong and Singapore, which are both also leading international arbitration centers and have developed a similar choice-of-law approach in arbitration agreements.[130] Hong Kong law, too, has a presumption favoring the general contract law and would only consider the implication arising from the choice of seat when there is no choice of AA law.[131] Similarly, Singaporean courts, citing support from *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA*,[132] have adopted a similar three-stage test in *BCY v. BCZ*.[133] This test was subsequently upheld by the Singaporean Court of Appeal in *BNA v. BNB*.[134]

Given the worldwide influence of the English approach and the limited harmonization mandated by the New York Convention, it is thus a legitimate question to ask whether the other camp (i.e., the jurisdictions adopting the curial law as a default rule in the absence of choice by the parties, such as China) should follow the lead of England

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125. BORN, *supra* note 7, at 533.
126. *Enka*, [2020] UKSC 38, [135].
127. *See id.* [136].
128. *See id.* [128]; *see also Kabab-Ji*, [2021] UKSC 48, [26].
129. *See* BORN, *supra* note 7, at 571.
130. *See* Tzeng, *supra* note 15, at 344–53 (detailing how English precedents influenced the courts in Singapore and Hong Kong).
131. *See* Klöckner Pentaplast Gmbh & Co. Kg v. Advance Technology (H.K.) Co. Ltd. [2011] HKCU 1340, [26]–[27].
132. *See* BORN, *supra* note 7, at 511–12.
133. BCY v. BCZ, [2017] 3 SLR 357, [40].
134. *See* BNA v. BNB, [2019] SGCA 84, [44].

and adopt the *Enka* approach in favoring the general contract law in deciding the AA law.[135]

III. CHINESE LAW

Unlike the back-and-forth changes in the choice-of-law approach in arbitration agreements in England,[136] China has long adopted a choice-of-law approach that favors the curial law as the AA law in the absence of an express choice.[137]

The Chinese Arbitration Act was enacted in 1995. At first, there were no choice-of-law rules regarding foreign-related arbitration agreements. This vacuum resulted in Chinese law, the *lex fori*, being applied blindly by the courts in deciding the validity of these agreements in the early days.[138] In 1999, the Supreme People's Court (SPC), in a jurisdiction dispute involving a foreign-related arbitration agreement, opined that the curial law should be applied to govern the arbitration agreement's validity when parties did not expressly agree on the AA law.[139] As will be discussed below, in reaching this decision, the SPC was heavily influenced by the New York Convention.[140] Finally, in 2005, the SPC issued the Second Nationwide Foreign-related Commercial and Maritime Trials Meeting Minute (the 2005 Minute).[141] Article 58 of the 2005 Minute provides that (i) parties may expressly provide the applicable law to their arbitration agreement; (ii) the law of the seat of arbitration shall apply in the absence of such choice; and (iii) when no choices were made or parties' choices are unclear, Chinese law may be applied.[142] These rules were later substantially transplanted into the 2006 SPC's Interpretation of the

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135. *See* Tsang, *supra* note 17, at 21–22.

136. *See* BORN, *supra* note 7, at 570–71.

137. *See* Tzeng, *supra* note 15, at 350 ("China . . . [has] effectively adopted a . . . rule favoring the law of the seat.")

138. *See* Weidong Zhu, *Conflicts Rules of Arbitration Agreements in China: Evolution and Reform*, 9 ASIAN BUS. L. 73, 75 (2012).

139. *See* Xiānggǎng sānlíng shāngshì huìshè yǒuxiàn gōngsī yǔ sānxiá tóuzī yǒuxiàn gōngsī, gězhōubà sānlián shíyè gōngsī, húběi sānlián jīxièhuà gōngchéng yǒuxiàn gōngsī gòuxiāo hétóng qiànkuǎn jiūfēn àn (香港三菱商事会社有限公司与三峡投资有限公司、葛洲坝三联 实业公司、湖北三联机械化工程有限公司购销合同欠款纠纷案) [Contractual Dispute between Hong Kong Mitsubishi Corp. Ltd. and SanXia Investment Co., Ltd., Gezhouba Sanlian Industrial Co., Ltd., and Hubei Sanlian Mechanization Engineering Co., Ltd.] (Sup. People's Ct. 1999) (China) [hereinafter *Hong Kong Mitsubishi Corp.*].

140. *See infra* Part III.B.2.e; *see also* Tsang, *supra* note 17, at 12–13.

141. *See* Zuìgāo rénmín fǎyuàn guānyú yìnfā "dìèrcì quánguó shèwài shāngshì hǎishì shěnpàn gōngzuò huìyì jìyào" de tōngzhī (Fa fā [2005] 26 hào) (最高人民法院关于印发《第二次全国涉外商事海事审判工作会议纪要》的通知) (法发〔2005〕26 号)) [Notice by the Supreme People's Court on Issuing the Minute of the Second Nationwide Foreign-Related Commercial and Maritime Trials Meeting] (promulgated by Sup. People's Ct., effective Dec. 26, 2005) [hereinafter *2005 Minute*].

142. *See id.* art. 58.

China Arbitration Act (2006 Interpretation),[143] and eventually the China Choice-of-Law Act in 2011.[144]

A. *Summary of Chinese Choice-of-Law Rules*

The current Chinese choice-of-law rules applicable to foreign-related arbitration agreements is set out in, among other judicial interpretations and regulations, Article 18 of the Choice-of-Law Act and Article 14 of the 2012 Interpretation on the Choice-of-Law Act.[145] Together, the choice-of-law rules can be restated as follows.

1. Express Choice: Parties may by an express agreement choose the AA law in their arbitration agreement.[146]

2. Curial Law: In the absence of an express choice, the court will apply either the law of the seat of arbitration or the law of the place of arbitration institution, if either one is provided in the arbitration agreement;[147] and

3. *Lex Fori*: If neither seat of arbitration nor place of arbitration institution is provided in the agreement, and the parties fail to reach a supplemental agreement, the arbitration agreement will be governed by Chinese law, the *lex fori*.[148]

B. *Comparison with the English Test*

On paper, the Chinese test is substantially different from the English test developed in *Enka* and *Kabab-Ji*. These differences are set

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143. *See* Zuìgāo rénmín fǎyuàn guānyú shìyòng "zhōnghuá rénmín gònghéguó zhòngcái fǎ" ruògàn wèntí de jiěshì (最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释) [Interpretation of the Supreme People's Court Concerning Several Matters on Application of the Arbitration Law] (adopted at the 1375th meeting of the Judicial Comm. of the Sup. People's Ct., Dec. 26, 2005, effective Sept. 8, 2006) art. 16 [hereinafter *2006 Interpretation*].

144. *See Choice of Law Act*, *supra* note 11, art. 18; Zuìgāo rénmín fǎyuàn guānyú shìyòng "zhōnghuá rénmín gònghéguó shèwài mínshì guānxì fǎlǜ shìyòng fǎ" ruògān wèntí de jiěshì (yī) (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释(一) [Interpretations of the Supreme People's Court on Several Issues Concerning Application of the 'Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships' (I)] (promulgated by the Judicial Comm. of the Sup. People's Ct., Dec. 10, 2012, effective Jan. 7, 2013), [hereinafter *2012 Interpretation*], art. 14.

145. *See Choice of Law Act*, *supra* note 11, art. 18; *2012 Interpretation*, *supra* note 144, art. 14.

146. *See Choice of Law Act*, *supra* note 11, art. 18.

147. *See id.*

148. *See 2012 Interpretation*, *supra* note 144, art. 14.

out below. However, the functional similarities between the tests will also be examined below, particularly in regard to their pro-validity approach.

1. Differences from the English Test

a. Stringent Requirements on Express Choice

Comparing the first stages of the two tests, the Chinese test appears to be more stringent on the interpretation of what may constitute an express choice on AA law, even though it similarly adopts the express choice by parties as the first priority. Chinese law does not set out a presumption for the governing law clause of the general contract to be the express choice. On the contrary, as early as 2005, the SPC made it clear that the general contract law could not be used to ascertain the AA law.[149] Article 13 of the Provisions on Several Issues Concerning Trying Cases of Arbitration-Related Judicial Review issued by the SPC in 2018 (the 2018 SPC Provisions) also stipulates that if parties agree to a choice of general contract law, it cannot be used to ascertain the AA law.[150] It is also observed by commentators that Chinese courts often held that parties did not agree on the AA law even if there was an explicit choice of general contract law.[151] Thus, unless in the rare case that the court finds the general contract law also expressly governs the arbitration agreement,[152] there is no express choice.

In contrast, as highlighted above, the majority in *Enka* was in favor of the view that the choice of general contract law should "naturally and sensibly" cover all clauses in the same agreement, including the arbitration clause.[153] In *Kabab-Ji*, the UK Supreme Court further opined that "any form of agreement will suffice" to be an indication of the AA law.[154] Thus, on paper, the English courts are more liberal in finding the existence of an express choice of the AA law.

b. The Lack of Implied Choice

At first glance, this difference clearly stands out. In the absence of parties' express choice, Chinese law does not seek to identify the

149. *See 2005 Minute*, *supra* note 141, art. 58.

150. *See* Zuìgāo rénmín fǎyuàn guānyú shěnlǐ zhòngcái sīfǎ shěnchá ànjiàn ruògàn wèntí de guiding (fǎ shì [2017] 22 hào) (最高人民法院关于审理仲裁司法审查案件若干问题的规定（法释〔2017〕22 号)) [Provisions of the Sup. People's Ct. on Several Issues Concerning Trying Cases of Arbitration-Related Judicial Review] (promulgated by Sup. People's Ct., Dec. 26, 2017, effective Jan. 1, 2018) art. 13 [hereinafter *2018 SPC Provisions*].

151. *See* TANG, XIAO & HUO, *supra* note 36, ¶ 7.32.

152. *See* BORN, *supra* note 7, at 525; *see also* Zhu, *supra* note 18, at 30.

153. *Enka*, [2020] UKSC 38, [60].

154. *Kabab-Ji*, [2021] UKSC 48, [35].

implied choice of the party, at least not in the same way English law does. The only route akin to an implied choice test is that the court will treat parties as having made an implied choice where parties have cited the same law during the trial.[155] In other words, the Chinese test bypasses the second stage of the English *Enka* test. Will it then be possible for the implied choice to be found through a liberal definition of "express choice"? The answer appears to be "no." Article 3 of the Choice-of-Law Act provides that parties may only choose the laws applicable to their foreign-related civil relations *explicitly*.[156] This extends to the choices of law in all foreign-related contracts, including prima facie foreign-related arbitration agreements. The phrase "explicitly" clearly does not encompass any implied choices of law.[157] In fact, Chinese law has never been in favor of using implied choice in identifying the governing law in foreign-related contracts. Since the SPC interpreted the application of the 1985 Foreign Economic Contract Law in 1987, it has been a well-settled law in judicial practice that all choices of law should be explicit rather than implied.[158] In other words, there will be no presumption for the general contract law to apply as implied choice because there is no implied choice at all under Chinese private international law. A wholesale adoption of the *Enka* test in form by China will be contrary to this traditional practice.

c. Curial Law in the Second Stage

Instead of adopting an implied choice test in stage two to decide the AA law, Chinese law states that the law applicable in the absence of such choice is either the law of the seat of arbitration or the place of the arbitration institution.[159] While it can be argued that this is similar to the third stage of the English test, which provides for a presumption for the curial law, curial law is defined differently. As stated in the test, there are two possible sources for curial law in China and neither is defined in the statutes. This is in contrast to English law, which has the seat of arbitration defined as the one designated by the parties, or failing that, the institution or person authorized by the parties, or where there is no designation at all, identified by closest

155. *See 2012 Interpretation*, *supra* note 144, art. 8 (where the parties invoke the laws of a same country and neither of them has raised any objection to the applicable law, the People's Court may determine that the parties have made choice-of-law applicable to the foreign-related civil relationship).

156. *See Choice of Law Act*, *supra* note 11, art. 3.

157. *See* TANG, XIAO & HUO, *supra* note 36, ¶ 8.07.

158. *See* Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings*, 37 N.C. J. INT'L L. & COM. REG. 83, 119 (2011).

159. *See Choice of Law Act*, *supra* note 11, art. 18.

connection.[160] In addition, English law also emphasizes that "[t]he concept of the 'seat' of the arbitration is a juridical concept. The legal 'seat' must not be confused with the geographically convenient place chosen to conduct particular hearings."[161]

Second, most commentators observed that in Chinese judicial practice, the place of the arbitration institution is usually where the arbitration institution is headquartered rather than the geographical location of the arbitration institution that handles the case.[162] This is counterintuitive. In the SPC's letter of reply to the Shanxi Higher People's Court regarding a refusal to enforce an arbitral award granted in Hong Kong's International Court of Arbitration of International Chamber of Commerce, the SPC opined that, although the award was made in Hong Kong, it was made by the International Chamber of Commerce which was headquartered in France, and therefore the arbitral award should be seen as made in France instead of Hong Kong.[163] Thus, the curial law was French law rather than Hong Kong law.[164]

Another issue is that Article 18 of the Choice-of-Law Act does not directly deal with the possibility of having conflicting laws of the seat of arbitration and the place of arbitration institution.[165] This once again stems from the possibility of having two different laws governing the same stage. Looking at stage two of the Chinese test as a whole, not only are Chinese and English laws different as to the applicable law at stage two, but their understanding of curial law is also fundamentally different.

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160. *See Enka*, [2020] UKSC 38, [73].

161. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-035.

162. *See* Yang, *supra* note 18, at 746; *see also* Lingbing Song & Haizhou Dong, *A Study of an Arbitral Award of International Chamber of Commerce – Starting From a Supreme People's Court's Letter of Reply*, 25 J. UNIV. SCI. & TECH. BEIJING 46 (2009).

163. *See* Zuìgāo rénmín fǎyuàn guānyú bùyǔ zhíxíng guójì shānghuì zhòngcáiyuàn 10334/AMW/BWD/TE zuìzhōng cáijué yīàn de qǐngshì de fùhán (最高人民法院关于不予执行国际商会仲裁院 10334/AMW/BWD/TE 最终裁决一案的请示 的复函) [Reply Letter of the Supreme People's Court to the Request for Non-enforcement of the Final Award of the ICC Court of Arbitration 10334/AMW/BWD/TE] (The Supreme People's Court 2004) (China) [hereinafter *Reply Letter of the Supreme People's Court*].

164. *See id*; *see also* Song & Dong, *supra* note 162, at 46–47. This practice has been criticized by Chinese commentators because it may lead to an arbitral award made by international arbitration institution in the mainland not capable of being recognized and enforced under the New York Convention. *See* Ruìxīn hǎiwài sīrén yǒuxiàn gōngsī yǔ qīngdǎo lóngténg shìjì guójì màoyì yǒuxiàn gōngsī guójì huòwù mǎimài hétóng jiūfēn yīshěn mínshì cáidìngshū (瑞昕海外私人有限公司与青岛龙腾世纪国际贸易有限公司国际货物买卖合同纠纷一审民事裁定书) [First Instance Civil Ruling of Sale of Goods Contractual Dispute between Ruixin Overseas Private Co., Ltd. And Qingdao Longteng Century International Trade Co., Ltd.] (Middle Level's Court of Shandong Province 2019) (China) (demonstrating that, as shown in recent court cases, the issue persists).

165. *See* Zhu, *supra* note 18, at 30.

d. *Lex Fori* as the Third Stage

The catch-all third stage is *lex fori* instead of the closest connection test. This has long been criticized because the Chinese substantive law, the *lex fori*, often led to invalidation of the arbitration agreement.[166] Articles 16 and 18 of the China Arbitration Act state that the arbitration agreement must have a designated arbitration institution.[167] Article 16 of the China Arbitration Act defines an arbitration agreement as an agreement that consists of "(1) the express intention of arbitration; (2) matters that may be submitted to arbitration; and (3) the Arbitration Commission appointed."[168] This rule in effect means that ad hoc arbitration is not recognized under Chinese law.[169] Such a requirement is unique to Chinese law and said to be a notorious feature.[170] Applying *lex fori* at the ultimate catch-all stage means that more arbitration agreements will be held invalid because the most frequent reason for invalidating arbitration agreements is the parties' failure to designate an arbitration institution.[171] Thus, there is at least one commentator who argues that the Chinese law should be amended at this stage to apply the general contract law or the *lex fori*, whichever is pro-validity.[172]

2. Similarities with the English Test

Despite the differences highlighted above, upon closer examination, there are plenty of similarities in substance. The similarity in the pro-validity approach is particularly important as it shows the two tests will likely reach the same result on the validity of the arbitration agreement functionally. In private international law terms, this is regarded as a type of "false conflict" since the national laws identified by the two tests will both likely uphold the validity of the arbitration agreement.[173] These suggest that the differences between these two

166. *See* Weixia Gu, *The Changing Landscape of Arbitration Agreements in China: Has the SPC-Led Pro-Arbitration Move Gone Far Enough?*, 22 N.Y. INT'L L. REV., 1, 5 (2009); *see also* Tzeng, *supra* note 15, at 354.

167. *See* zhōng huá rén mín gòng hé guó zhòng cái fǎ (中华人民共和国仲裁法) [Arbitration Law of People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995) arts. 16, 18 [hereinafter *China Arbitration Act*].

168. *Id.* art. 16.

169. *See* Yang, *supra* note 18, at 745.

170. *See* Gu, *supra* note 166, at 5.

171. *See id.*

172. *See* Zhu, *supra* note 18, at 35.

173. *See* Peter Kay Westen, *False Conflicts*, 55 CALIF. L. REV. 74, 105–16 (1967) (identifying various types of false conflict, among which, one of them being the absence of differing law).

approaches of English and Chinese laws may not be as big as one might have thought. The following five similarities can be identified, with the last four corresponding to the features highlighted in Part II above regarding English law.

a. An Identical First Stage

This is the most obvious similarity between the two approaches. According to Born, "[t]here is almost universal consensus that parties may select the law applicable to their international arbitration agreement."[174] Both Chinese and English tests are the same in this regard, recognizing parties' express choice of the AA law. However, as mentioned above, Chinese rules appear to be more stringent on what may constitute an express choice.[175] However, the interpretation of choice-of-law clauses always comes down to the specific wording and context of the arbitration agreement. It remains to be seen in practice whether the courts in China adopt a substantially more stringent approach than those in England in practice.

b. Pro-Validity

Before 2018, Chinese courts had often been criticized for the lack of a pro-validity or pro-enforcement rule.[176] This was summarized by Peter Tzeng in 2016 as follows:

> [The Chinese] rule actually runs counter to the notion of in *favorem validitatis* because it favors the application of Chinese law, which has stringent requirements for the validity of an arbitration agreement. The choice of law rule favors the application of Chinese law for three reasons: (1) in the absence of express party choice, the [AA law] is the law of the seat, which is often Chinese law, as the seat of arbitration for many if not most arbitration cases that come before Chinese courts is China; (2) in case there is no law of the seat, the [AA law] is the law of the judicial forum, which is necessarily Chinese law; and (3) the rule completely omits the law of the contract, which is more likely to be non-Chinese law. [177]

Institutionally, commentators have also noted that lower courts in China are not well qualified to properly adjudicate cases involving foreign-related arbitration agreements despite the SPC's effort in creating a pro-arbitration environment.[178] This narrative has been changed following new regulation promulgated in China.

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174. BORN, *supra* note 7, at 525.

175. *See 2005 Minute*, *supra* note 141, art. 58.

176. *See* YANG, *supra* note 16, at 4.1; *see also* Tzeng, *supra* note 15, at 354.

177. Tzeng, *supra* note 15, at 354.

178. *See* Wei Shen & Shu Shang, *Tackling Local Protectionism in Enforcing Foreign Arbitral Awards in China: An Empirical Study of the Supreme People's Court's Review Decisions*, 241 CHINA Q. 144, 164 (2020).

Although Chinese law does not have the same pro-validity rule as England that dictates the application of the pro-validity substantive law in stage two, the 2018 SPC Provisions did introduce a Chinese version of a pro-validity rule in the context of the abovementioned conflict between the law of the seat of arbitration and the law of the place of arbitration institution.[179] Under Article 14 of the 2018 SPC Provisions, if parties failed to make an express choice but have agreed on the seat of arbitration and arbitration institution, and the arbitration agreement is valid under one but invalid under the other, the validating law will be applicable.[180] Therefore, in effect, the arbitration agreement will be valid so long as it is valid under one of these two laws. Thus, in any one of the following scenarios, the arbitration agreement will be effective in the absence of an express choice:

> i. Arbitration agreement only provides for the seat of arbitration and the law of the seat upholds validity of the agreement;
>
> ii. Arbitration agreement only provides for the arbitration institution and the law of the place of such institution upholds validity of the agreement; and
>
> iii. Arbitration agreement provides for both the seat of arbitration and the arbitration institution, and at least one of the law of the seat and the law of the place of such institution upholds validity of the agreement.[181]

This substantially increases the chance of the arbitration agreement being regarded as valid at stage two, despite Article 14 never quite addressing which law will apply formally. It also means the reduction of the possibility of the case falling into the third stage and addresses the second reason made by Tzeng above. This, along with the strength of Tzeng's other two reasons, will be further examined in the empirical research in the next Part.

In addition, there are other measures under Chinese law to promote validity at stage two. In the past, Chinese courts used to interpret parties' arbitration agreements literally.[182] Thus, if parties made a mistake with the name of the arbitration institution or inconclusively designated one or more than one, chances were that the court would simply hold that the parties did not make a choice of seat of arbitration or arbitration institution, hence bypassing the second

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179. *See 2018 SPC Provisions*, *supra* note 150, art. 14.

180. *See id.*

181. *See id.* arts. 14, 15.

182. *See* Weixia Gu, *Judicial Review of Arbitral Awards in Hong Kong and the Mainland: Lessons and Convergence Between Two Jurisdictions in China*, 4 FAXUEJIA 106, 112 (2009).

stage and going straight to the third stage.[183] However, the 2006 Interpretation helps courts to ascertain arbitration institutions in such a case in order to salvage arbitration agreements. In particular, Article 3 stipulates that where the name of an arbitration institution as stipulated in the agreement for arbitration is inaccurate, but the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected.[184] More recently, in the 2021 Nationwide Foreign-Related Commercial and Maritime Trials Meeting Minutes, Article 93 further stipulates that, in accordance with Article 3 of the SPC's interpretation on the China Arbitration Act, the people's courts should adopt a pro-validity principle in finding whether parties have agreed to an arbitration institution.[185] Although Article 93 has yet to be applied in any case, it shall further reduce the occasions where Chinese courts refuse to apply foreign law because parties made a mistake as to the name of the foreign arbitration institution.

Since 1995, the SPC has established an internal supervisory system to ensure lower people's courts properly apply the choice-of-law rule and do not invalidate arbitration agreements without proper grounds.[186] The supervisory system was further refined in 2018 and 2021.[187] In essence, the current reporting system in place forbids lower

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183. *See, e.g.*, xīnjiāpō sānhé jiànzhù sīrén yǒuxiàn gōngsī, jiāngsū chūndōu gāngjiégòu gōngchéng yǒuxiàn gōngsī yǔ xīnjiāpō sānhé jiànzhù sīrén yǒuxiàn gōngsī, jiāngsū chūndōu gāngjiégòu gōngchéng yǒuxiàn gōngsī mínshì cáidìngshū (新加坡三和建筑私人有限公司、江苏春都钢结构工程有限公司与新加坡三和建筑私人有限公司、江苏春都钢结构工程有限公司民事裁定书) [Civil Ruling of the Dispute between Singapore Sanhe Construction Pte. Ltd., Jiangsu Chundu Steel Structure Engineering Co., Ltd. and Singapore Sanhe Construction Pte. Ltd., Jiangsu Chundu Steel Structure Engineering Co., Ltd.] (Higher People's Court of Jiangsu Province 2020) (China).

184. *See also 2006 Interpretation*, *supra* note 143, arts. 4 (stipulating that where an agreement for arbitration only stipulates the arbitration rules applicable to the dispute, it shall be deemed that the arbitration institution is not stipulated, unless the parties concerned reach a supplementary agreement or may determine the arbitration institution according to the arbitration rules agreed upon between them), 6 (stipulating that where an agreement for arbitration stipulates that the disputes shall be arbitrated by the arbitration institution at a certain locality and there is only one arbitration institution in this locality, the arbitration institution shall be deemed as the stipulated arbitration institution).

185. *See* quánguó fǎyuàn shèwài shāngshì hǎishì shěnpàn gōngzuò zuòtánhuì huìyì jìyào (全国法院涉外商事海事审判工作座谈会会议纪要) [Minutes of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of Courts] (promulgated by Sup. People's Ct., effective 2021) art. 93 [hereinafter *2021 Minute*].

186. *See* Zuìgāo rénmín fǎyuàn guānyú rènzhēn guànchè zhòngcáifǎ yīfǎ zhíxíng zhòngcái cáijué de tōngzhī (最高人民法院关于认真贯彻仲裁法依法执行仲裁裁决的通知) [Notice of the Sup. People's Court on Conscientiously Implementing the Arbitration Law and Enforcing Arbitral Awards in accordance with the Law] (promulgated by the Sup. People's Ct., effective Oct 4, 1995).

187. *See* Zuìgāo rénmín fǎyuàn guānyú zhòngcái sīfǎ shěnchá ànjiàn bàohé wèntí de yǒuguān guiding (最高人民法院关于仲裁司法审查案件报核问题的有关规定) [Relevant Provisions of the Supreme People's Court on Issues concerning Applications for

courts from invalidating or finding arbitration agreements not in existence or expired without the SPC's approval. This supervisory system may have led to lower courts taking a more stringent approach to the application of Article 18 of the Choice-of-Law Act as compared with the general contract cases. The reasons are two-fold. First, its establishment will ensure that the higher people's courts, which have better qualifications and specialize in dealing with cross-border transactions, can supervise the lower courts. Second, local protectionism, which is the most severe at the enforcement stage, will be minimized.[188]

On the other hand, the SPC is well aware that pro-validity and pro-arbitration cannot be achieved without qualified and experienced judges. In the 2006 Interpretation, the SPC required that any challenges to foreign-related arbitration agreements' validity must be brought before the people's courts at an intermediate level, hence equally any jurisdictional challenges on the basis of the existence of arbitration agreements.[189] Moreover, the SPC also requires the responsible people's courts to form a review panel and consult the parties involved when deciding arbitration agreements' validity.[190] These measures should reduce local protectionism and increase adjudication quality.

In short, while the Chinese rules are different from the English pro-validity rules, there is no question that the current Chinese law does have pro-validity as one of its guiding principles.

c. The Importance of Curial Law

In the absence of an express choice, the Chinese rule clearly focuses on the curial law, be it the law of the seat of arbitration or the place of the arbitration institution. This focus is more obvious when the Chinese rules bypass the English rule's implied choice test. As elaborated in Part II above, despite English law giving higher priority to the general contract law, the curial law remains influential.[191] Thus, even if the level of emphasis varies, curial law is important under both laws. It is worth emphasizing that whether it is the English or Chinese rules, they are both composite choice-of-law rules. Here, Chinese law

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Verification of Arbitration Cases under Judicial Review] (promulgated by the Sup. People's Ct., effective Jan 1, 2018), arts. 2, 8.

188. *See* Wei Shen, *Limited by Local Protectionism: Empirical Study of Centralized Judicial Control – From the Perspective of the Implementation of the Internal Reporting System Enforcement of Foreign-Related Arbitration Award*, 4 DANG DAI FA XUE 60, 67 (2019).

189. *See 2006 Interpretation*, *supra* note 143, art. 12.

190. *See id.* art. 15.

191. *See supra* Part II.B.2.

still combines *party-autonomy*, *curial law*, and *lex fori*. More importantly, the pro-validity focus of both trumps the differences in form.

d. An Emphasis on Certainty

Like English law's departure from the more flexible approach under the general choice-of-law rules in contract in favor of more certainty in the arena of choice of AA law, a similar preference for certainty can be found in the Chinese choice-of-law rules for foreign-related arbitration agreements. Both of them also achieve certainty through an approach that is in contrast to the relatively flexible choice-of-law rules in general contract.

Under Article 41 of the Choice-of-Law Act, the governing law of contract is generally identified by a two-stage test. First, if the parties have expressly chosen a law, it will be the governing law of the contract. Second, in the absence of such a choice, the court will resort to the law with the closest connection or the law with the characteristic performance.[192] However, Article 4 clarifies that this general choice-of-law rule does not apply to foreign-related arbitration agreements since a specific choice-of-law provision has been provided for arbitration agreements under Article 18. Despite sharing the same first stage, Article 18 does not require the court to apply the more elusive test of closest connection or apply the law identified by characteristic performance.[193] The uncertainty created by the poor drafting of Article 41 is well-documented.[194] The Choice-of-Law Act thus provides a more certain rule for the determination of AA law by referring to the curial law. This certainty was further enhanced after the implementation of the 2018 SPC Provisions, having resolved the issue of validity regarding the conflicts between the law of the seat of arbitration and the law of the arbitration institution.[195] Compared with English law, Chinese law appears to be more certain and mechanical on paper because it leaves very little room for judicial discretion. That said, it is again a matter of degree. Commentators often just focus on the difference in the formulation of the different choice-of-law rules, without focusing on the comparable ease of application, which is also important to parties in practice. Here, it is safe to say that both regimes

192. *See Choice of Law Act*, *supra* note 11, art. 41. Characteristic performance is not defined under Article 41. However, it generally refers to a number of presumptions set out in two previous SPC interpretations. For example, if the contract is regarded as a sale of goods contract, the performance that characterizes the contract will be the performance of the seller, that is, the delivery of goods, instead of the payment of money by the buyer. The law of the place of origin of the seller will be the applicable law accordingly.

193. *See id.*

194. *See* Tsang, *supra* note 17, at 353–54.

195. *See 2018 SPC Provisions*, *supra* note 150, art. 14.

seek to provide more certainty to the parties as compared to their respective choice-of-law rules for contract generally.

e. Reliance on the New York Convention

Like English law, Chinese law is consistent with and inspired by the New York Convention. Again, the design of Article 18 can be traced back to the New York Convention. In the abovementioned SPC case in 1999,[196] the SPC was tasked with determining whether an arbitration clause in a contract was valid so as to decide whether the Chinese court had jurisdiction to hear the case. Adopting a literal interpretation, it was decided that Article V(1)(a) of the New York Convention did not apply pre-award because the wording only covered the recognition and enforcement of arbitral awards.[197] However, the SPC held that even though Article V(1)(a) literally covered only recognition and enforcement, it enshrined an international standard of the choice-of-law rule to determine the AA law.[198] Thus, in the absence of an express choice, curial law should apply to govern the arbitration agreement. Effectively, the same set of Chinese choice-of-law rules applies equally to pre-award and post-award contexts. This reasoning is the same as the one adopted by the English courts.[199]

In short, despite being labelled as adopting vastly different approaches in the choice-of-law rule on AA law, these differences are mostly in form but not in substance. As discussed above, functionally, both English and Chinese laws are pro-validity, especially after the new Chinese amendment in 2018. Curial law also has a role to play under both laws despite different levels of emphasis. In addition, they are both specialized choice-of-law rules that emphasize certainty and efficiency and relied heavily on the New York Convention in their development. On the other hand, without a supranational court streamlining the interpretation of the relevant provisions, it is unlikely that worldwide choice-of-law practices will be perfectly harmonized in practice.[200] This is acknowledged by the UK Supreme Court in *Kabab-Ji*:

> [The] Convention's aim of establishing a single, uniform set of rules governing the recognition and enforcement of international arbitration agreements and awards. 32. In keeping with that aim, it is desirable that the rules set out in article V(1)(a) for determining whether there is a valid arbitration agreement should not only be given a uniform meaning but should be applied by the courts of the contracting states in a uniform way. If, therefore, there was a clear

196. *Hong Kong Mitsubishi Corp.*, *supra* note 139.
197. *See Hong Kong Mitsubishi Corp.*, *supra* note 139.
198. *See id.*
199. *See generally Kabab-Ji*, [2021] UKSC 48.
200. *See id.* [31]–[32].

> consensus among national courts and jurists about whether or when a choice of law for the contract as a whole constitutes a sufficient indication of the law to which the parties subjected the arbitration agreement, in particular where it differs from the law of the seat, that would provide a cogent reason for the English courts to adopt the same approach. It is apparent, however, that there is nothing approaching a consensus on this question. [201]

Harmonization of the choice-of-law rules is therefore difficult to achieve no matter how desirable it is on paper. Having regard to the above, it is submitted that the differences in the approaches may not be as wide as one might have thought. However, conventional wisdom suggests that one cannot understand Chinese law simply by referring to the black letter law. In addition, the comparison above does not inform us definitively as to whether China should follow the lead of England and apply the *Enka* test. These issues will be further addressed in the next Part where the findings of empirical research are set out.

IV. EMPIRICAL RESEARCH ON CHINESE LEGAL PRACTICE

To analyze Chinese courts' judicial practice in exercising the choice-of-law provisions regarding foreign-related arbitration agreements, the authors have conducted empirical research on Chinese cases. [202] These cases were mainly identified by the authors through conducting a key-word search on Bei Da Fa Bao, a widely used legal database affiliated with Peking University. [203] We utilized the search terms "Article 18" and "Choice-of-Law Act" ("第十八条" and "法律适用法"), the most relevant statutory provision, to identify relevant cases. [204] In addition, we also tried to maximize our database by including other relevant cases we are aware of. [205] The survey period was from April 1, 2011, when the Choice-of-Law Act was implemented, to July 18, 2022.

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201. *Id.*

202. Equivalent empirical research on the English regime cannot be done given that there are few English cases to date after *Enka*, it being a recent decision.

203. It is also called Chinalawinfo. Plenty of empirical research in China has been based on cases identified by this database. *See, e.g.*, Tsang, *supra* note 17 (identifying over 15,000 cases through Bei Da Fa Bao).

204. There are 114 such cases, accounting for 95 percent of the dataset.

205. There are six such cases, accounting for only 5 percent of the dataset.

A. *General Findings*

Chart 1: Number of Cases by Year

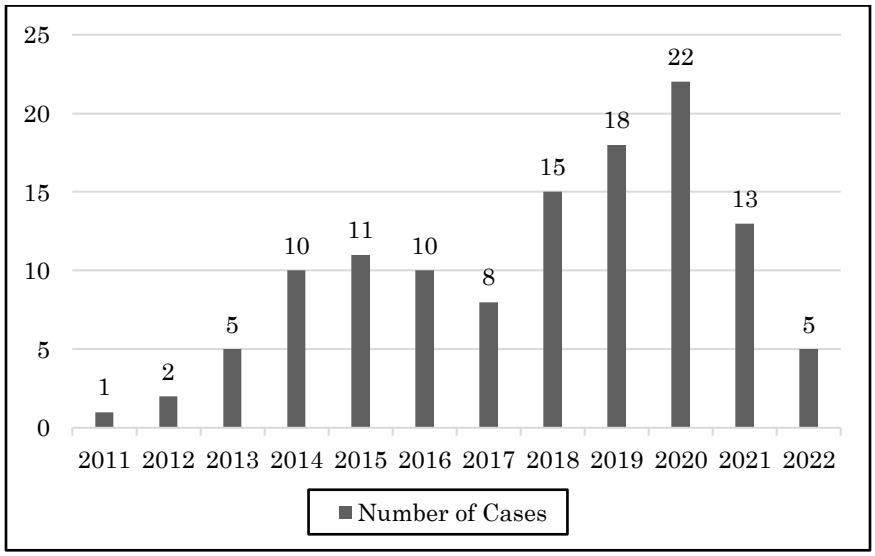

Chart 1 shows that there were 120 relevant cases involving the choice-of-law of arbitration agreements during the survey period. Over the years, the number of relevant cases has been gradually increasing in China. This is to be expected given the close relationship between arbitration and international commerce. Since 2018, this trend is even more prominent. The surge in the number of cases could be explained by the enactment of the 2018 SPC Provisions and the reporting system refined in 2018, which we shall introduce in more detail below. Although the number of cases seems to tail off following 2021, this probably has more to do with the time lag for the uploading of the relevant cases to the database.[206]

206. It is normal for the database to take time to upload cases and for it to produce fewer cases in the more recent years covered by empirical research. *See,* Tsang, *supra* note 17, at 359.

Table 2: Applicable Law by Countries

Applicable Law	Number of Cases (%)
Chinese Law	88 (73.33%)
Hong Kong Law	10 (8.33%)
English Law	7 (5.83%)
Singaporean Law	4 (3.33%)
Swiss Law	4 (3.33%)
French Law	1 (0.83%)
Russian Law	1 (0.83 %)
US Law	1 (0.83 %)
Canadian Law	1 (0.83 %)
Jordanian Law	1 (0.83 %)
Not Determined	2 (1.67%)
Total	**120 (100%)**

The choice-of-law approach of China yields a foreign law application rate of 25 percent. While this may suggest a homeward trend for Chinese courts to apply the *lex fori*, it is not the case if it is to be compared with the foreign law application rate generally. In another recent research conducted by one of us, Chinese courts only applied foreign law in 1.90 percent of cases involving international commercial contracts.[207] Chinese courts therefore have displayed a much more liberal attitude towards the application of foreign law in international arbitration cases. Apart from Hong Kong law, the most frequently applied foreign law is English law (5.83 percent). The laws of common law jurisdictions account for twenty-three of the thirty cases that applied foreign law (76.67 percent). This justifies this Article's focus on Chinese and English choice-of-law rules.

207. There were three hundred such cases out of 15,755. *See id.* at 361.

Table 3: Foreign Seat of Arbitration

Seat of Arbitration	Number of Cases (%)
China	26 (53.06%)
Hong Kong	7 (14.29%)
England	6 (12.24%)
Switzerland	4 (8.16%)
Singapore	2 (4.08%)
France	1 (2.04%)
USA	1 (2.04%)
Canada	1 (2.04%)
Jordan	1 (2.04%)
Total	**49 (100%)**

Table 3 shows that foreign arbitrations account for 46.94 percent of the forty-nine cases (where the parties agreed to one). Apart from Hong Kong, the most common foreign seat of arbitration was England, with all of these cases designating arbitration in London. Foreign seats that are common law jurisdictions further account for seventeen of the foreign arbitrations (73.91 percent). This again justifies the focus on Chinese and English choice-of-law rules.

B. *Pro-Validity*

As discussed in Part III, one of the strongest criticisms of the Chinese choice-of-law rule is the tendency of Chinese courts to apply Chinese law, which leads to a higher likelihood of invalidity.[208] We argue, however, that this is not the case anymore. Instead, Chinese law is pro-validity, just like English law (albeit in a different formulation). This part seeks to prove that Chinese law is pro-validity in judicial practice.

208. *See supra* notes 176–78 and accompanying text.

Table 4: Validity of Arbitration Agreements

	Number of cases	Percentage
Valid	96	80%
Invalid	21	17.5%
Validity Not Discussed	3	2.50%
Total	**120**	**100%**

The starting point of the pro-validity discussion is the validity rate. As shown in Table 4, Chinese courts found 80 percent of the foreign-related arbitration agreement cases to be valid after going through the choice-of-law analysis (i.e., valid under the system of law identified by the Chinese choice-of-law rules). This suggests strongly that the Chinese choice-of-law approach on AA law is pro-validity.[209]

Table 5: Validity by Year

Year	No. of Cases Found Arbitration Agreement Valid	Validity Percentage
2011	0	0%
2012	1	50%
2013	3	60%
2014	7	70%
2015	8	72.73%
2016	8	80.00%
2017	5	62.50%
2018	13	86.67%
2019	16	88.89%
2020	19	86.36%
2021	11	84.62%
2022	5	100%
Total	**96**	**N/A**

209. Only in a few cases was the arbitration agreements' validity not discussed. Notably, in two out of the three cases that validity was not discussed, one court referred the case to arbitration because the validity challenge had already been brought after the arbitration proceedings began, and the other court opined the challenge of arbitration agreement not in existence should be dealt with by arbitration institution. This means only in one true case that the issue of validity was not properly dealt with eventually.

Table 5 further shows that the validity percentage has been improving. The improvement of validity rate is even more pronounced since 2018. Not only has the number of cases involving foreign-related arbitration agreements increased sharply since 2018 from a single digit number, but the yearly validity percentage also exceeded 80 percent every year post 2018. Such improvement can be explained by the implementation of the 2018 SPC Provisions, as well as the reporting system refined in 2018.[210] As discussed in Part III, these measures set out to improve validity. and their successful implementations are backed up by the increased validity of arbitration agreements.

Table 6: Relationship between Governing Law and Validity

	No. of Valid AA (%)	**No. of Invalid AA (%)**	**No. of AA's Validity Not Determined (%)**	**No. of Cases (%)**
Chinese Law	65 (73.86%)	20 (22.73%)	3 (3.41%)	88 (100%)
Foreign Law	30 (100%)	0	0	30 (100%)
Not Discussed	1 (50%)	1 (50%)	0	2 (100%)
Total	96 (80%)	21 (17.5%)	3 (2.5%)	120 (100%)

Table 6 shows the relationship between governing law and validity. When the governing law applied by Chinese courts is foreign law, every arbitration agreement in question is found to be valid (100 percent). On the other hand, when the arbitration agreements are governed under Chinese law, the validity percentage falls to 73.86 percent. This shows the application of Chinese law does in fact lead to a lower validity percentage.

210. *See supra* notes 186–187 and accompanying text.

Table 7: Reasons of Invalidation

	No. of Cases	Percentage
Failure to Agree on Arbitration Institution	13	61.9%
Lack of Intention to Arbitrate	4	19.05%
Lack of Both Intention to Arbitrate and Precise Items for Arbitration	1	4.76%
Others	3	14.29%
Total	**21**	**100%**

Table 7 sets out the reasons for invalidating the arbitration agreement. Of the 21 cases that invalidated the arbitration agreement after the courts found the governing law to be Chinese law, the reason of invalidation in thirteen of them (61.9 percent) was the parties' failure to agree on arbitration institution.[211] This confirms the long-held view that the Chinese law requirement for arbitration institution is not conducive to the validity principle.[212] Since the prevailing practice in the international arbitration community allows ad hoc arbitration and does not have the same requirement,[213] it is more likely that arbitration agreements will be found valid when the AA law in question is foreign law. Thus, there appears to be a correlation between a higher application rate of foreign law and a higher probability of arbitration agreements being found valid. The question that then needs to be answered is what leads to a higher application rate of foreign law under the Chinese rules.

C. *Reasons for a Higher Foreign Law Application*

Having established the correlation of pro-validity and foreign law, the question turns to why the Chinese choice-of-law rules produce a much higher percentage of foreign law applications in choice of AA law. This question is particularly interesting given that the foreign law application rate in general contract cases is just 1.9 percent.[214]

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211. However, it should be noted that the situation has improved since the 2006 Interpretation. Out of a total of twenty cases that applied Chinese law and made an inaccurate and indefinite reference to an arbitration institution, or failed to make any references to it, five of those cases utilized the aforementioned articles in the 2006 Interpretation and validated the arbitration agreement.

212. *See* Gu, *supra* note 166, at 5.

213. *See id.* at 11.

214. *See supra* text accompanying note 207.

Table 8: Choice-of-Law Bases

Stages	Bases	No. of cases	Percentage
Stage One	Express Choice in Contract	12	10.00%
	Agreement during Trial	10	8.33%
Stage Two	Seat of Arbitration	25	20.83%
	Place of Arbitration Institution	57	47.50%
	Both Seat of Arbitration and Place of Arbitration Institution	8	6.67%
Stage Three	Chinese Law in Default	5	4.17%
Others	Not Discussed	1	0.83%
	Applicable Law not Determined	2	1.67%
	Total	**120**	**100%**

Table 8 shows the choice-of-law bases of the cases, breaking them down into the stages under the Chinese test and the specific bases. As noted above, Tzeng argued that the Chinese choice-of-law rules are not pro-validity because (i) the rules do not take into account the general contract law (relating to the stage one test), (ii) the arbitration institutions are often Chinese arbitration institutions (relating to the stage two test), and (iii) the default test is *lex fori* (relating to the stage three test).[215] These in turn lead to the application of the less validity-friendly Chinese substantive law. Table 8 addresses the third argument directly. The much-criticized stage three accounted for only 4.17 percent of all cases. The other stages will be addressed more specifically below.

215. *See* Tzeng, *supra* note 15, at 354.

1. Stage One—Express Choice

Table 9: Cases Applied Express Choice of AA Law

Governing Law	No. of Cases
Chinese Law	6
English Law	3
Swiss Law	1
Russian Law	1
French Law	1
Total	**12**

Although this is said to be rare, there are twelve cases where the Chinese court found an express choice of the AA law in the arbitration agreement, accounting for 10 percent of the cases.[216] Out of these twelve cases, the Chinese courts applied foreign law as the governing law of the arbitration agreement in six cases.

Table 10: Relationship between Express Choices and General Choice-of-Law Clause

	No. of Cases
Typical General Choice-of-Law Clause Covered Validity	6
Specific Choice-of-Law Clause Covered Validity	2
Provision of General Choice-of-Law Clause Unclear	4
Total	**12**

As mentioned above, Chinese courts are stringent in finding parties' express choice of the AA law on paper, even if there is an explicit choice of general contract law. However, upon closer examination, some Chinese courts might have adopted a more liberal standard in finding whether parties have agreed to an express choice in practice. In the judgments of eight out of the twelve express choice cases, the courts set out the specific choice-of-law provisions. Surprisingly, these express AA law clauses in six out of the eight cases are in fact typical general choice-of-law clauses, just like the one in *Kabab-Ji*. Accordingly, this suggests that the actual choice-of-law practice by some Chinese courts on interpretation of express choice

216. *See id.* at 330–33.

resembles the first stage of the English test (i.e., a presumption that the governing law clause of general contract law covers AA law as well).

There are two exception cases where specific governing law clauses on AA law were found.[217] For example, in *Meikesi Ocean Construction Equipment Limited v. Shanghai Jiachuan Mechanic Equipment Import and Export Limited*, the arbitration clause was "[t]his contract shall be governed and explained by English law. All disputes caused by and relating to this contract, including its continuance, validity and termination, shall be submitted to arbitration in London according to the London Maritime Arbitration Committee Rule."[218] The court ultimately interpreted that clause as one in which the parties had expressly agreed to choose English law as both the general contract law and the AA law. In reaching its decision, the court relied on another clause in the contract, which stipulates that "the validity and meaning of all clauses and each part of them shall be governed and interpreted by English law."[219] In the second exception, the arbitration agreement provides that "Chinese law shall apply to the contract's formation, validity, performance and dispute resolution."[220] Since the said clauses expressly covered validity, they are specific AA law clauses.

2. Stage One—Proof of Foreign Law

Another problem commonly found in the choice-of-law process in the general contract context is the difficulty of proving foreign law.[221] To date, despite heavy criticisms, proving foreign law in Chinese courts involves many difficulties because of the lack of a clear-cut standard for the proof.[222] Under Article 10 of the Choice-of-Law Act, the party who seeks to rely on foreign law has the burden of proving such law. If

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217. *See, e.g.*, Měikèsī hǎiyáng gōngchéng shèbèi gǔfèn yǒuxiàn gōngsī yǔ shànghǎi jiāchuán jīxiè shèbèi jìnchūkǒu yǒuxiàn gōngsī děng shēnqǐng quèrèn zhòngcái xiéyì xiàolì àn (美克斯海洋工程设备股份有限公司与上海佳船机械设备进出口有限公司等申请确认仲裁协议效力案) (Maritime Court of Shanghai 2018) [Meikesi Ocean Construction Equip. Ltd. v. Shanghai Jiachuan Mechanic Equip. Import and Export Ltd.] (Maritime Court of Shanghai) (China) [hereinafter *Meikesi Ocean Construction Equipment*]; Luóbótè fúláichè fùzǐ yǒuxiàn gōngsī, zhōngguó gōngshāng yínháng gǔfèn yǒuxiàn gōngsī jiāxìng fènháng shēnqǐng chèxiāo zhòngcái cáijué tèbié chéngxù mínshì cáidìngshū (罗伯特·弗莱彻父子有限公司、中国工商银行股份有限公司嘉兴分行申请撤销仲裁裁决特别程序民事裁定书) [Civil Ruling of Robert Fletcher & Sons Co., Ltd. and Industrial and Commercial Bank of China Co., Ltd. Jiaxing Branch Applying for Special Procedures for Revocation of Arbitral Award] (Middle Level's Court of Zhejiang Province 2019) (China).

218. *Meikesi Ocean Construction* Equipment, *supra* note 217.

219. *Id.*

220. *Id.*

221. *See* Tsang, *supra* note 17, at 367–68.

222. *See id.*

the court finds the party fails to do so, it will apply Chinese law.[223] However, this is not the practice in cases regarding the validity of arbitration agreements. Instead, courts would first determine the AA law, and then require the party challenging validity to prove the arbitration agreement is invalid under that AA law. The failure to prove foreign law will not lead to the application of Chinese substantive law but simply a presumption that the agreement is valid under such foreign law and capable of being submitted to arbitrate.

One court explained that the presumptive validity is required by Article 14 of the 2018 SPC Provisions. In *Ruixin Overseas Private Limited v. Qingdao Longteng Shiji International Trade Limited*, parties in their arbitration agreement stipulated that any disputes should be submitted to the International Court of Arbitration to arbitrate, and the seat of arbitration was Singapore.[224] The place of the arbitration institution was therefore in France while the seat of arbitration was in Singapore.[225] The plaintiff submitted evidence to prove that the arbitration agreement was invalid under Singaporean law. The court then required the plaintiff to prove that the arbitration agreement was invalid under French law as well, which it failed to do. It was therefore determined that Article 14 would invalidate an arbitration agreement only when it is invalid under *both* the law of the seat of arbitration and the law of the place of arbitration institution.[226] Accordingly, the court held that the arbitration agreement could not be regarded as invalid and should be submitted to arbitration.[227] This presumptive validity in proof of foreign law has evidenced an increasing pro-validity trend in the Chinese judicial practice.[228] It is also in line with the New York Convention which places the burden on the party challenging validity to prove arbitration agreements null and void.[229]

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223. *See Choice of Law Act*, *supra* note 11, art. 10.

224. Ruì xīn hǎi wài sī rén yǒu xiàn gōng sī yǔ qīng dǎo lóng téng shì jì guó jì mào yì yǒu xiàn gōng sī guó jì huò wù mǎi mài hé tóng jiū fēn yī shěn mín shì cái dìng shū (瑞昕海外私人有限公司与青岛龙腾世纪国际贸易有限公司国际货物买卖合同纠纷一审民事裁定书) [Ruixin Overseas Private Ltd. v. Qingdao Longteng Shiji Int'l Trade Ltd.] (Qingdao Intermediate People's Court of Chandong Province 2016) (China).

225. *Id.*

226. *See id.*

227. *See id.*

228. *See* YANG, *supra* note 16, at 4.1.

229. *See* BORN, *supra* note 7, at 530.

3. Stage Two—Curial Law

Table 11: Relationship between Seat of Arbitration/Place of Arbitration Institution and Foreign Law Application

	No. of Cases	No. of Cases Applying Foreign Law	Percentage
Seat of Arbitration in Foreign Jurisdiction	15	15	100%
Place of Arbitration Institution in Foreign Jurisdiction	13	8	61.54%
Both Places in Foreign Jurisdiction	8	7	87.5%
Total	**36**	**30**	**83.33%**

Table 11 addresses the second reason of Tzeng, namely that "many if not most" seats of arbitration are in China.[230] However, he did not cite any source for such claim. Of the ninety cases under stage two as shown in Table 8, thirty-two of them (35.56 percent) involved a foreign seat of arbitration, a foreign arbitration institution, or both. This is far from being a small number. In fact, there would have been thirty-six such cases if we were to categorize four more cases where either the seat of arbitration or place of arbitration institution was a foreign jurisdiction but the parties agreed to apply Chinese law instead at trial. These four cases were therefore categorized under "Stage One – Agreement during Trial" instead in Table 8. Table 11 included these four additional cases, which will further increase the relevant percentage from 35.56 percent to 40 percent.

More importantly, Table 11 shows that Chinese courts will not hesitate to apply foreign law when either the seat of arbitration or place of arbitration institution is a foreign jurisdiction, even if that will mean the application of foreign law. Altogether, the courts applied foreign law in thirty out of thirty-six cases (83.33 percent). Table 11 provides support to our speculation that validity of the arbitration agreement has been substantially improved by the 2018 SPC Provisions.

In addition, being the default position in the absence of express choice, curial law can usually be identified quite easily under the Chinese choice-of-law rule. Although the seat of arbitration is not defined and commentators usually argue that the term does not

230. *See* Tzeng, *supra* note 15, at 355.

necessarily have to be geographical,[231] the authors observe that Chinese courts usually regard the seat of arbitration simply as the geographic location specified in the arbitration clause.[232] Although this is not regarded as fitting with the general practice abroad, there is no question that the simplicity in the Chinese approach in finding that law facilitates the easy application of the rules. In fact, English law tends to have the same practice despite a different rule on paper. In *Shashoua v. Sharma*, the court held that "in the ordinary way . . . , if the arbitration agreement provided for a venue, that would constitute the seat."[233]

In short, if English law practically speaking equates the general governing law clause with express choice, Chinese law practically speaking equates choice of arbitration seat with express choice. More importantly, although it is possible that Chinese law may be even more pro-validity if China is to adopt the same second stage test as England,[234] it is pro-validity in its own right. If the parties specify either a foreign seat of arbitration or a foreign arbitration institution, it is very likely that the foreign law will apply, and the arbitration agreement will be found valid.

4. *Lex Fori*

As discussed, Table 8 shows that 4.17 percent of the cases applied Chinese law based on *lex fori*. This is because the only occasion of applying *lex fori* is where arbitration agreements fail to provide any information regarding the seat of arbitration or the place of arbitration institution, which is rare. After the 2018 SPC Provisions, only two cases were found to have provided neither.[235] This suggests that the

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231. *See* DICEY, MORRIS & COLLINS, *supra* note 2, ¶ 16-035.

232. *See, e.g.*, Guǎngzhōu mǎlìdé xìnxī zīxún yǒuxiàn gōngsī yǔ fóshānshì sēnlóng diànqì yǒuxiàn gōngsī mǎimài hétóng jiūfēn yīshěn mínshì cáidìngshū (广州玛栎德信息咨询有限公司与佛山市森龙电器有限公司买卖合同纠纷一审民事裁定书) [First Civil Ruling of Contract Dispute Between Guangzhou MaLide Information Consulting Co., Ltd. and Foshan Senlong Electric Co., Ltd.] (People's Court of Guangdong Province 2018) (China).

233. [2009] 1 C.L.C. 716, 724.

234. This is, however, speculative as validity may not be entirely certain under the English test either. Despite the pro-validity exception, there is another exception (Overlap Argument) which might lead to invalidity as well.

235. Shī Gōnglán 、Zhèng Xiàotài hétóng jiūfēn mínshì guǎnxiá shàngsù guǎnxiá cáidìngshū (施恭暕、郑孝太合同纠纷民事管辖上诉管辖裁定书) [Shi Gonghao and Zheng Xiaotai Contract Dispute Civil Jurisdiction Appeal Jurisdiction Ruling] (Middle People's Court of Guangzhou Guandong Province) (China); Zhūhǎi Huárùn Yínháng Gǔfèn Yǒuxiàn Gōngsī Shēnzhèn Fènháng Yǔ Guǎngzhōu Fēngcǎi Kuàiyìn Yǒuxiàn Gōngsī, Xiāngmíngxǐ Jīnróng Jièkuǎn Hétóng Jiūfēn Yīshěn Mínshì Pànjuéshū (珠海华润银行股份有限公司深圳分行与广州丰彩快印有限公司、香明禧金融借款合同纠纷一审民事判决书) [Civil Judgment of First Instance on the Loan Contract Dispute between Zhuhai Huarong Bank Co., Ltd. Shenzhen Branch and Guangzhou Fengcai Express Printing Co., Ltd. and Xiangmingxi Finance] (Higher People's Court of Guangdong Province) (China).

concern that this last stage will cause a homeward trend is exaggerated.

On the other hand, it may be argued that this stage can be further improved if a closest connection test similar to English law is installed instead. However, if experience of applying the closest connection test in the general contract cases is of any guidance, the adoption of such test will not promote validity. In general contract cases, it is close to impossible for the court to find a foreign law to be the most closely connected with the contract.[236] This is because of the common cherry-picking exercise by the Chinese courts in only taking into account China-related factors in the closest connection exercise.[237] Thus, applying the closest connection test in stage three is likely to lead to *lex fori* in any event, and arbitration agreements are equally likely to be found invalid. Thus, in order to keep the current pro-validity practice in China, it is in fact better not to adopt the English approach under *Enka*.

5. False Conflict

As mentioned above, false conflict can be defined as the two potentially applicable laws leading to the same result.[238] Table 12 below shows that it is in fact common for the governing law of the main contract to be the same as the curial law, whether it is the law of the seat of arbitration or the place of arbitration institution.[239] Out of forty-five cases where the courts set out both the general contract law and curial law, the two laws are the same national law in thirty-two of them. This proves that it may not be necessary to apply the English choice-of-law rules to arbitration agreements which favor the general contract law because the cases with real conflicts are limited.

Table 12: Relationship between Curial Law and General Contract Law

No. of Cases Revealing Both General Contract Law and Curial Law	No. of Cases Having the Same Curial Law	Percentage
45	32	71.11%

236. *See supra* text accompanying note 207.
237. *See id*.
238. *See* Westen, *supra* note 173, at 110–16.
239. *See Choice of Law Act*, *supra* note 11, art. 18.

In conclusion, after taking into account the implementation of the choice-of-law rules, it can be seen that the current Chinese test does promote the validity of arbitration agreements despite reaching there through a different pathway from that of England. We have seen a high validity rate of the arbitration agreement caused a correlation between the high validity and high application rate of foreign law, with the latter being a result produced by pro-validity judicial practice in every stage of the choice-of-law process. If anything, the implementation promotes validity, perhaps more than the black letter law suggests. The *Enka* case is probably the best example to illustrate the harmony existing between the two regimes. There was no choice-of-law clause in the case at all, thus bypassing the official presumption and practical presumption of the application of typical governing law clause, under both stage one of the Chinese and English tests respectively. If there is such a clause, the result will be the same under either regime. In stage two, the majority of the UK Supreme Court found that the parties did not make a choice of the general contract law, so the presumption under stage two did not apply.[240] They thus went to the closest connection test in stage three and concluded that English law, being the law of the seat of arbitration, was the AA law, which in turn upheld the validity of the arbitration agreement.[241] The result would be the same under Chinese law, despite reaching that result in stage two instead of stage three, relying similarly on the law of the seat of arbitration. The empirical exercise therefore suggests that the Chinese choice-of-law rules are not only similar to English rules in the comparison of the laws on paper, as discussed in Part III, but also in the actual implementation.

V. FALSE CONFLICT IN SUBSTANTIVE LAW

A key argument raised in the last Part is that different choice-of-law rules end up producing the same result—namely, the validity of the arbitration agreement.[242] Currently, the English and Chinese substantive arbitration laws on validity requirements are still different.[243] Despite inconsistent outcomes in the two courts are now rarer because of the pro-validity trend in Chinese courts, there could still be some scenarios where English and Chinese choice-of-law rules produce different outcomes. For example, rare as it may be, it is possible that the arbitration agreement in question expressly provides for neither the general contract law, the seat of arbitration, nor the arbitration institution. Under English law, it is still possible for the court to identify the general contract law through the general choice-of-law rule and apply that law as the AA law through stage two. This

240. *See Enka*, [2020] UKSC 38, [171].
241. *See id.* [172].
242. *See supra* Part IV.C.5.
243. *See* Tzeng, *supra* note 15, at 328–30.

was in fact the conclusion of the minority in *Enka*.[244] Even if the general contract law would invalidate the arbitration agreement, the validity exception could still apply to save the validity of the agreement. On the other hand, under Chinese law, the arbitration agreement is likely to be invalidated in that case, since the case will be decided by the *lex fori* in stage three, and Chinese law invalidates ad hoc arbitration agreements that do not specify an arbitration institution. Thus, in such a rare case, the conflict is still a real one, and parties to arbitration agreements could still get the homecourt advantage by starting proceedings in China if they wish to resist arbitration.

However, conflicts in these limited cases can be eliminated in the future because of the convergence of substantive laws on validity. In July 2021, the Ministry of Justice of the People's Republic of China published the Consultation Draft of Amendments to China Arbitration Act (Consultation Draft),[245] which has made significant changes to the substantive validity requirements under Chinese law. First and foremost, in the amended Article 21, an "arbitration agreement" means "a clause in a contract or a separate document in writing that intends to submit any disputes to arbitration."[246] It dispenses with the condition of the designation of an arbitration institution for a valid arbitration agreement. If this amendment is made into law, Chinese law will be in line with the prevailing international standard, including that of England.[247] Since the substantive law regarding validity converges, it does not matter anymore whether Chinese law or English law governs the issue of validity. In our example above, even if the case reaches stage three and the *lex fori* applies, the arbitration agreement will be valid under the new Article 21. Thus, the conflict will likely be a false one in the future and parties to an arbitration agreement will be unable to gain homecourt advantage. Nonetheless, further implementation will have to be seen in practice.

Secondly, the Consultation Draft also seems to tackle the potential conflict between the law of the seat of arbitration and the law of the place of arbitration institution. Designed exclusively for foreign-related arbitration agreements, Article 90 of the Consultation Draft stipulates that

> [t]he law agreed upon by the parties shall be used to determine the validity of a foreign-related arbitration agreement. In the absence of such an agreement, the law of the seat of arbitration shall apply. When parties make no such agreement

244. *See Enka*, [2020] UKSC 38, [228].
245. *See Consultation Draft*, *supra* note 51.
246. *Id.* art. 21.
247. *See* Gu, *supra* note 166, at 11.

> as to the seat of arbitration, or their agreement is unclear, Chinese law may be applied to determine the validity of the arbitration agreement.[248]

To supplement Article 90, Article 27 provides that "where parties did not agree on the seat of arbitration, the place of the arbitration institution that handles the case shall be the seat of arbitration."[249] It remains to be clarified if the place of arbitration institution shall be where the handling arbitration institution is located instead of where it is headquartered. However, where laws of the seat of arbitration and place of arbitration institution differ but have the same effect on validity, it seems clear now the former shall prevail. The Consultation Draft's potential impact also illustrates that pro-validity need not be achieved by changing the choice-of-law rules. Desirable as it may be, making national courts agree on a uniform choice-of-law rule is not practical. The English and Chinese regimes are the best illustration, given that they both derive their rules from the New York Convention.[250] Aligning validity requirements under the substantive law, however, would be equally effective technically but much more viable in practice.

VI. CONCLUSION

Both courts and commentators simply spend too much time arguing over matters such as whether implied intention is best reflected by the general contract law or the curial law.[251] However, the truth is that parties normally hardly pay any attention to the matter when they enter into the arbitration agreement.[252] Both laws also have strong claims to having a close connection with the arbitration. Saying one or the other has a closer connection tends to be equally artificial. Thus, all these debates between the two laws end up being futile and unconducive to clarifying the legal position. It will of course be ideal if countries can agree among themselves upon a uniform law and each of

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248. *Consultation Draft, supra* note 51, art. 90.

249. *Id.* art 27.

250. *See Enka*, [2020] UKSC 38, [129]; *Hong Kong Mitsubishi Corp.*, *supra* note 139.

251. *See, e.g.*, BORN, *supra* note 7, at 538 (arguing against the presumption of general contract law as the implied choice by the parties, saying that "[t]he presumptive intentions of commercial parties in agreeing to general choice-of-law provisions is to regulate their underlying commercial relationship, not their fundamentally different dispute resolution procedures; rather, those arbitral procedures are impliedly intended to be governed by the procedural law of the arbitration"); BRIGGS, *supra* note 1, ¶¶ 14.39–14.42 (arguing for the presumption of general contract law, saying that "if the law which governs the contract has been chosen by the parties and expressed by them, it will be surprising if the arbitration agreement were not to be held to be governed by the same law, for a choice of law expressed in customarily broad and general terms will draw no distinction between the substantive contract and the agreement to arbitrate contained, albeit severally, within it").

252. *See* BORN, *supra* note 7, at 572.

them will just apply the same choice-of-law rules regardless of the merits in the debates above.[253] That uniform law actually exists in the form of the New York Convention, at least partially. In fact, Born made a strong argument that Article V(1)(a) favors a strict interpretation of express choice and a default rule applying the curial law in the absence of choice.[254] This structure resembles Article 18 of the Chinese Choice-of-Law Act. [255] However, as discussed above, the various interpretations on the New York Convention and the lack of uniform enforcement thereunder made it practically impossible for such a uniform application. If anything, in light of the clear restatement of the English rule in *Enka* and *Kabab-Ji*, another shift back to a curial law-centric approach is highly unlikely.

However, this Article shows that the debates between the formally opposed approaches between general contract law and the curial law are unnecessary. These never-ending debates therefore were not elaborated here. Instead, having compared the English and Chinese choice-of-law rules in arbitration agreements, it is found that despite reaching the goal through different pathways, both sets of rules are similar in substance, particularly with both laws being pro-validity. They are also willing to part way with their traditional choice-of-law rules in contract to ensure certainty.

Through empirical research, one could further see that the similarities are not only on paper but are also reflected in a disciplined judicial practice. Both the increase in the number of cases submitted to Chinese courts to adjudicate and the consistent application of foreign law when the arbitration agreement points to a foreign seat of arbitration or arbitration institution are strong evidence that Chinese courts are now in a pro-validity trend. If the Consultation Draft is indeed made into law, any remaining conflict in the different choice-of-law approaches will likely be relegated to false conflicts. The authors are therefore optimistic that the Chinese choice-of-law approach will be even more conducive to protecting the validity of arbitration, and hence there is no need for China to follow the change of English rules under *Enka*. As a whole, the lessons from the comparison are not limited to just China and England. This research shows that the correct focus in assessing conflicting choice-of-law rules in AA law should be on validity, ideally to be backed up by empirical research. A superficial comparison between the formal rules, on the other hand, will lead to nowhere but futile, circulating arguments.

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253. *See id.* at 553.
254. *See id.* at 529–35.
255. *See* Zhu, *supra* note 18, at 28.