The role of the *Enka* case in the English interpretation of the doctrine of separability and its potential impact on the validity of arbitration agreements

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I Introduction

Transnational interaction and rise of cross-border commercial contracts have stimulated a large demand for a dispute resolution method that can cater to its needs: international arbitration. The success of international arbitration is cornered on its successful enforcement regime built on the 1959 New York Convention[1]. The Convention has been signed and ratified by 172 countries[2] which makes it one of the most widely adopted international legal regimes which translates into the acceptance of arbitral awards.

The way for cross-border commercial parties to resort to international arbitration is to agree to an arbitration agreement either within their main contract or through a separate document. It is common for parties to include the agreement in their main contract in the form of a clause which covers a range of details including the arbitral rules, arbitral process, the seat of arbitration and the law governing the arbitration agreement. However, the range of specificity that parties agree to varies significantly, and this becomes an issue most prominently when there is no agreement between the parties on the governing law of the arbitration agreement.

In 2021, the final outcome of *Kabab-Ji SAL v Kout Food Group*[3], which centred around an arbitral award seated in Paris, triggered active discussion in the arbitration community because two major jurisdictions gave opposite conclusions on the same arbitral award based on their respective examination of what governs the arbitration agreement. The United Kingdom Supreme Court (UKSC) decided to refuse the enforcement of the award while the French Supreme Court enforced it. Because the claimant before the English courts was the party that wanted enforcement, and in the French courts the party that wanted annulment, it was a disappointing lose-lose situation for both parties.

Why did the English and French courts come to different conclusions? A key element behind this question lies in their respective interpretations of the doctrine of separability. The French interpretation of separability has shown consistency, rooted in its historical Civil Code[4] article

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959).
[2] New York Arbitration Convention "Contracting States" <https://www.newyorkconvention.org/countries>.
[3] *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48.
[4] Code Civil 1804 (France).

1447 and case law[5] which views arbitration agreements as an entirely separate agreement and that the AA law aligns with the law of the seat. On the other hand, the UK Supreme Court took a narrower interpretation that saw separability applicable only when the enforceability of the arbitration agreement is in jeopardy. The result was the French Supreme Court enforcing the award while the UK Supreme Court set it aside, refusing to enforce the award.

For the parties, the contrasting approaches and conclusions of these two jurisdictions were a lose-lose situation as they were handed down the exact opposite judgment each hoped for. But for the arbitration community, the decision was met with mixed responses: there was support of the English approach arguing that it promoted more certainty but there was also concern because it moved away from the well-established approach of favouring the law of the seat when it comes to determining the law governing the arbitration agreement[6].

Research Question

The response to *Kabab-Ji* raises two important lines of inquiry. First, were the English and French approaches similar before *Kabab-Ji* or were they unclear and *Kabab-Ji* simply became a trigger that revealed their differences? In contrast to the French, the English interpretation is not as straightforward. A key precedent that the Supreme Court in *Kabab-Ji* relied on was *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [7]. In *Enka*, the Court took the view that an AA (written as a clause) is a part of the contract that is primarily subject to the main contract law, and the separability doctrine exists only "for the purpose of determining its validity or enforceability"[8] as it is written in section 7 of the Arbitration Act 1996[9] (1996 Act). To support its reasoning, it adopted the test formulated in *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* ('*Sulamérica*')[10] to declare that the main contract law has precedence over the law of the seat.

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[5] James Casey and Vincent Carriou "Kabab-Ji and the governing law of the arbitration agreement: a comparison between England and France" (2023) 1 IBLJ 53 at 55. Also see: *Etablissement Raymond Gosset v Frère Carapelli S.P.A* [1963] Cour de Cassation JCP G II 13.
[6] Law Commission (UK) *Review of the Arbitration Act 1996* (UKLC R413, 2023) at [12.43].
[7] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.
[8] Above n 7 at [41].
[9] Arbitration Act 1996 (UK), s 7.
[10] *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638.

But this was not the only approach taken by English courts and the procedural history of *Enka* is a perfect example that highlights the complexity of the English approach. The Supreme Court and the Court of Appeal had come to the same conclusion but based on opposing reasonings. In the lower court, it was held that the law governing the arbitration agreement follows the law of the seat especially when the seat is different from the main contract law because the doctrine of separability renders the arbitration agreement as a separate agreement[11]. But the Supreme Court rejected this reasoning as well as its interpretation of separability although it would not be applied in this case because the legal issue at hand did not involve validity being at risk.

The final decision in *Enka* raises the second question: if this interpretation is to prevail, how would this impact future decisions on the validity or the enforcement of the arbitration agreement? An immediate response would be that *Enka* would save the arbitration agreement if it were at risk of becoming invalidated. However, a simple comparison between *Enka* and *Kabab-Ji* reveals the unpredictability of the *Sulamérica* test[12] and leaves the question of whether there are other situations where the main contract law could bypass separability to impact the enforceability of the arbitration agreement yet to be satisfactorily addressed.

Both of the two questions raised above point to *Enka* and its role around the interpretation of the separability doctrine within the English jurisprudence. This paper attempts to investigate the impact the *Enka* decision to answer these questions on the interpretation of the separability principle and the validity of the arbitration agreement. Using the two questions as a guide, the research question will be divided to into two parts: (i) whether *Enka* has either changed or crystallised[13] the English understanding of the doctrine of separability and (ii) whether it had an influence on determining the validity of arbitration agreements. These two sub-questions will be assessed by comparing pre- and post-*Enka* cases that engage with the issues of separability, the law governing the arbitration agreement and the validity of the arbitration agreement.

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[11] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574 at [92]-[93].
[12] Above n 7 at [35]-[37].
[13] Crystallisation is a process that "gives shape to what was previously shapeless, defining and giving significance to elements of the structure" Donal Casy and Colin Scott "Crystallization of Regulatory Norms" (2011) 38 Journal of Law and Society 76 at 77. It is a term often used in political and social sciences to describe the process of how an idea or a underdefined concept is clarified into a clearer form. This paper borrows from this description to depict how boundaries of interpretation on separability in England develop into a clearer form through case law.

The analysis reveals that (i) *Enka* cleared up the diverging interpretations of separability and crystallised the English approach through its judgment by consistently applying the English conflict of rules law and (ii) *Enka*'s influence in determining the validity of the arbitration agreement was insignificant because the impact rested not on *Enka* itself but the rationale that the main contract law should apply to the arbitration agreement. But this is followed by a new and more important finding: (iii) when the issue is shaped as being about contract formation rather than validity, the law governing the main contract penetrates the arbitration agreement and renders it 'non-existent'.

Case selection & Scope of research

Selection of cases pre- and post-*Enka* relied on cases involving the most relevant legal concepts as keywords – doctrine of separability, the law governing the arbitration agreement and the validity of the arbitration agreement. First, cases reviewed in each part of the analysis have been selected based on the degree of relevance among these keywords. For example, *C v D*[14] – a case that is important when discussing separability – becomes less relevant when addressing the question of whether the interpretation of separability in *Enka* influences the validity of arbitration agreements or awards.

Second, only cases from the English jurisdiction have been selected. The focus of the paper will be to trace and clarify the English interpretation of the doctrine of separability rather than provide a comparative analysis between other jurisdictions or attempt to provide an overview of the entire English jurisprudence on international arbitration.

Third, the analysis will cover cases that address the validity of both arbitration agreements and arbitral awards and use the meaning of validity interchangeably with the meaning of enforcement. Although the issue of determining the validity of the arbitration agreement and arbitral awards is not the same, the strong link between the validities of arbitration agreements and awards and their overlap is hard to deny; without a valid arbitration agreement there will be no valid awards, and a valid award will have a valid arbitration agreement. Also, by including cases that discuss both pre- and post-award situations and their enforcements, the paper can access a larger pool of judgments to draw its analysis from.

[14] *C v D* [2007] EWCA Civ 1282 at [23]-[29].

Fourth, this paper does not attempt to give a normative assessment on the interpretation of the doctrine of separability. The utility of the separability doctrine is widely acknowledged and accepted, but the degree and scope vary across different jurisdictions depending on their own legal developments and circumstances. Rather than purporting which interpretation is more sensible or useful, the paper will focus on describing the development of the English case law.

Blueprinting

Before engaging with pre- and post-*Enka* case analysis, Part II will first unpack the doctrine of separability in international arbitration, its relationship with the validity of arbitration agreements and study how it functions in the English legal context. Part III will introduce the *Enka* case in detail, outlining the key legal principles and their complex dynamics behind the decision. Part IV begins with case analysis on the issue of separability and outline the characteristics of cases before and after *Enka* in order to answer the first sub-question. In Part V, the pre- and post-*Enka* case analysis will also be applied to the second sub-question regarding the impact of *Enka* on the validity of arbitration agreements or arbitral awards and examine whether there were any instances where the separability doctrine was bypassed due to its narrow interpretation.

II Unpacking the Doctrine of Separability

The doctrine or principle of separability is interchangeably used with severability or autonomy of the arbitration agreement [15], but the core meaning is the same: the doctrine allows the arbitration agreement to survive the invalidity of the main contract[16]. What this means in practice is when the validity of the main contract is under question, the arbitration agreement included in that main contract may be separable or severable which would enable it to remain valid and allow the parties to resort to arbitration to resolve whatever dispute they have.

[15] Stephen M Schwebel, Luke Sobota and Ryan Manton "The Severability of the Arbitration Agreement" in *International Arbitration* (2nd ed, Cambridge University Press, 2020) 1 at 1.
[16] Law Commission (UK) *Review of the Arbitration Act 1996* (UKLC CP258, 2023) at [2.31]. A description of the doctrine or principle of separability is provided in a wealth of literature on the topic, but this particular description has been referenced from the Law Commission's Consultation Paper as it captures the purpose of the doctrine in a concise manner.

Separability is seen as a practical doctrine or principle that promotes international arbitration for mainly two reasons. First, it respects the intention of the parties to control how they resolve their disputes related to the contract through arbitration including disputes on the validity of the contract[17]. Second, in combination with the *Kompentenz-Kompetenz* rule, it prevents parties from avoiding their obligation to arbitrate and resorting to costly domestic court procedures[18]. These principles are coded together in Article 2(3) of the New York Convention[19]:

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

The effect of these functions combined enables the international arbitration process to become a highly effective method for parties that want a quick, flexible and enforceable way to settle their trans-border contractual disputes.

There is a reason behind the functional and practical characteristic of the separability doctrine coupled with *Kompentenz-Kompetenz*. The origin of separability of the arbitration agreement is understood to be in response to state indifference or hostility toward arbitration[20] and began with a strong procedural nature that gave the logic of dividing the main contract and the arbitration agreement are effectively two agreements the parties are agreeing to[21]. The consequences of the separability doctrine not only engage with *Kompentenz-Kompetenz* but

[17] Ronán Feehily "Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine" (2018) 34 Arbitration International 355 at 356.
[18] Above n 15 at 3-4; n 17 at 359-360.
[19] Above n 1, art 2(3).
[20] Philip Landolt "Inconvenience of Principle: Separability and Kompetenz-Kompetenz" (2013) 20 Journal of International Arbitration 511 at 512.
[21] Fabio Solimene "The Doctrines of Kompetenz-Kompetenz and Separability and their Contribution to the Development of International Commercial Arbitration" 80 International Journal of Arbitration 249 at 252.

also arbitral jurisdiction, the transfer of arbitral clauses and the enforcement of arbitral awards in which its practical benefits are felt[22].

The separability doctrine affects the governing law of the arbitration agreement and its validity. In an international commercial contract, parties can choose to have different laws applied to its main contract, arbitration agreement and arbitral procedures depending on how they craft their contract. As shown in the *Kabab-Ji* case, the separability doctrine can decide whether one law governs the arbitration agreement and by consequence the validity of the award, or as shown in *Enka*, the validity of the arbitration agreement.

Complexities in relation to validity

The importance of the doctrine of separability becomes most acute when it touches the issue of validity. This is because validity of the arbitration agreement is directly connected to enforceability. If the parties have not initiated the arbitration process yet, the validity of the arbitration agreement will determine whether the parties will be able to go to arbitration or not. If the parties are at the post-award stage, it may determine whether the parties will be able to have their award enforced or set aside.

However, issues related to validity in international commercial contracts, and especially in relation to the separability doctrine, are complex due to the different types of validity referenced in international arbitration which meanings are not clearly fenced in individual decisions. For example, a well-known complexity of the separability doctrine is the confusion on whether it should be seen as a matter of procedure or substantive validity[23]. It has also been acknowledged in *Enka* that a clear delineation between the two is "a difficult and complex exercise"[24] as well as being one of the underlying factors that led to the different reasonings between the Court of Appeal and the Supreme Court.

Although this paper sets its focus on investigating the link between the varying interpretations of the separability doctrine and the validity of the arbitration agreement or arbitral award –

[22] Above n 20 at 513.
[23] Alex Mills "Arbitration Agreements" in *Party Autonomy in Private International Law* (Cambridge University Press, 2018) 263 at 275.
[24] Above n 7 at [93].

whether it be procedural or substantive – it must be kept in mind that the term 'validity' in court decisions may not always refer to the same meaning.

Criticisms

The doctrine is described as a "cardinal principle of international arbitration"[25], but it is not without its criticisms. Dr Gillis Wetter described the separability doctrine as containing "a large element of legal fiction" because the idea of parties effectively agreeing to two separate agreements when entering into one contract is "almost always very far from their minds" [26].

But such criticisms are overtaken by the trend of acknowledging separability as it is supported both in principle and practice. Without the separability doctrine, arbitration agreements and the arbitration process will be rendered useless when faced with disputes involving arguments attacking the validity of the main contract. Therefore, as Camilleri finds in the descriptions by Lon Fuller on 'legal fiction', the separability doctrine may be a false statement but it has utility[27].

Acceptance in the English jurisprudence

In the English jurisprudence, the acceptance of the doctrine of separability has developed over decades. Early recognition for the need of separability of the arbitration agreement can be traced back to 1942 in *Heyman v Darwins Ltd.*[28] which bloomed in *Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd*.[29] These cases were critical in that it highlighted the importance of separability and offered the basis for codification of the doctrine of separability within the 1996 Act.

Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd and Others

[25] Above n 7 at [40].
[26] J. Gillis Wetter "Salient Features of Swedish Arbitration Clauses" (Address to the International Commercial Arbitration Symposium, Stockholm, March 5, 1982).
[27] Simon Camilleri "Sense and Separability" (2023) 72 ICLQ 509 at 517.
[28] *Heyman v Darwins Ltd* [1942] AC 356 (HL).
[29] *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd and Others* [1993] CA 701 (QB).

The *Harbour* case is a well-established case understood as confirming the status of the separability doctrine in English jurisprudence and establishing the foundation for the codification of the separability doctrine[30]. The case was initially heard by Steyn J whom concluded that the initial illegality of the underlying contract could not be determined by arbitration because the purported illegality would render the arbitration agreement void. When this decision was appealed, the Court of Appeal reversed the conclusion by Steyn J and established the separability doctrine to the scope closer to what we understand the doctrine covers today: for example, Leggatt LJ concurred that the separability doctrine would allow the issue of initial illegality to be determined by arbitration[31] while Hoffmann LJ also agreed that initial illegality does not affect the validity of the AA in support of the final decision[32].

The doctrine is now codified in English law through section 7 of the 1996 Act and reads as follows:

> 7 **Separability of arbitration agreement.** Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and *it shall for that purpose be treated as a distinct agreement* [Italianized added].

Separability is best understood as a last-resort-type safety net rather than a fix-it-all tool to keep the arbitration agreement alive under any circumstances. The separability principle as codified in section 7 ends by laying down the purpose for which the separability doctrine is to be applied. By outlining specific purposes of making the arbitration agreement separable from the main contract, it does not shelter the arbitration agreement outside those purposes. Known examples of when the invalidity of the main contract affects the validity of the arbitration agreement is signature forgery, problems with authority of the signing party or where the parties were deceived or mistaken about the character of the contract[33].

III The Enka case

[30] Above n 15 at 61.
[31] Above n 29 at 715.
[32] Above n 29 at 726.
[33] Above n 17 at 372.

Facts

In February 2016, a power plant in Russia was severely damaged by fire. The owner of the power plant, Unipro, had contracted with a Russian company CJSC Energoproekt regarding the design and construction of the power plant, who in turn subcontracted with Enka, a Turkey-based company, among others for the construction project. The dispute resolution clause in the contract between Energoproekt and Enka included an agreement on the arbitral rules of the International Chamber of Commerce (ICC), the number of arbitrators and the seat of arbitration as London. This clause became applicable between Unipro and Enka when Energoproekt transferred its rights and obligations to Unipro in May 2014. However, this contract did not include a specific governing law clause. After the fire, the insurance company for Unipro – Chubb Russia – paid for damages under its insurance policy and became subrogated to Unipro's rights to claim compensation from third parties.

Procedural history

Chubb Russia's first choice was to begin proceedings against Enka in the Russian courts in May 2019. But just after Chubb's claim was accepted by the Moscow Commercial Court in September, Enka filed proceedings before the London Commercial Court and sought an anti-injunction against Russian proceedings. In December 2019, however, the London Commercial Court ultimately dismissed Enka's claim. Enka appealed the decision and the Court of Appeal accepted Enka's claim in its decision in April 2020. Chubb subsequently applied for leave to appeal to the Supreme Court in May, and the Supreme Court granted leave to appeal and handed down its judgment in October 2020.

Decision of the Court of Appeal

On April 2020, the Court of Appeal (Popplewell LJ) confirmed English jurisdiction ('supervisory jurisdiction') over the issue. In its judgment, the Court also decided that the parties' choice of the seat of arbitration as London was the critical indicator that determined the law governing the arbitration agreement as English law. In the process of reaching this decision, the Court revealed its position on three important legal issues: 1) the scope of the seat of arbitration, 2) the connection between the main contract law and the arbitration agreement,

3) English approach to determining the law governing the arbitration agreement and 3) its interpretation of the separability doctrine.

First, the Court took a more comprehensive view regarding the seat of arbitration or curial law. Choosing a seat is considered as choosing a curial law which will govern and guide the arbitral process. Rather than dividing the arbitration-related issues in the contract as procedural or substantive, the Court viewed that the curial law encompasses both procedural or substantive characteristics and argued that when the seat is different from the main contract law, in most cases the curial law coincides with the law of the arbitration agreement or "overlaps"[34].

Second, the Court was not convinced that the main contract had an influence over the law of the arbitration agreement when parties chose a seat from a different jurisdiction. In such cases, the main contract law was "applicable to the terms of the main contract and the validity, interpretation and the performance of those terms, other than the terms of the separate arbitration agreement and the validity, interpretation and performance of those separate arbitration terms"[35]. The main contract law had little or no influence over the law of the arbitration agreement when the parties have chosen a different seat – even if the main contract law were to be construed as an explicit choice-of-law for the arbitration agreement, such situations would only be in minority[36].

Third, in applying the English conflict of laws rules, the Court interpreted the seat as an implied choice-of-law for the arbitration agreement. As briefly introduced in Part I, the conflict of laws rules is well-known as the *Sulamérica* test and is used to determine the law governing the arbitration agreement. Courts examine in three stages to find i) explicit choice, ii) implied choice or iii) the closest and most real connection to the arbitration agreement. Stemming from the Court's understanding of the relationship between the seat, the main contract law and the arbitration agreement, the Court interpreted the choice of seat as an implied choice of law governing the arbitration agreement in stage two. The decision that the law of the arbitration agreement follows the law of the seat was largely based on this interpretation.

[34] Above n 11 at [96].
[35] Above n 11 at [92].
[36] Above n 11 at [90].

Lastly, the Court's interpretation of the separability doctrine supported the view that the arbitration agreement is a separate agreement" from the main contract with good reason[37]. The separability of the arbitration agreement is acknowledged by parties in relation to situations where there is a dispute on the validity, existence or effectiveness of the arbitration agreement and this is a "powerful indication" for the arbitration agreement to be "isolated for the purposes of determining the law governing the arbitration agreement more generally"[38].

Decision of the Supreme Court

In its judgment handed down in October 2020, the decision of the Supreme Court was in line with the Court of Appeal; the Court determined that the law governing the arbitration agreement was English law based on the London seat of arbitration. However, the Court rejected the Court of Appeal's (CA) rationale and arrived at this conclusion by providing an opposite reasoning.

First, the Court rejected the CA's interpretation of the scope of the curial law. Dubbing the CA's rationale as the "overlap argument"[39], the Court argued that such overlap between the procedural and substantive characteristics of provisions related to the arbitration agreement are actually distinct concepts and that whether the choice of curial law determines the law of the arbitration agreement should depend on which curial law is being applied[40] which in this case is the 1996 Act.

The cornerstone of the Supreme Court's first point heavily relies on its interpretation of section 4(5) of the 1996 Act. By extension of the parties' choice of seat, the mandatory provisions of the 1996 Act applicable; but the non-mandatory provisions will be disapplied without evidence to the contrary[41]. The separability doctrine in section 7 is a non-mandatory provision that can be disapplied without the parties' intention to apply it to their contract[42]. In other words, the

[37] Above n 11 at [94].
[38] Above n 11 at [94].
[39] Above n 7 at [65]-[66].
[40] Above n 7 at [69].
[41] Above n 9, s 4(5).
[42] Above n 7 at [73].

curial law is the equivalent of mandatory provisions of the 1996 Act and choosing London as the seat will not translate into English law being applied to the arbitration agreement[43].

Second, the Court emphasised the strong relevance of the main contract law and its connection to the law of the arbitration agreement. In the simplest sense, it is natural to apply the main contract law when an arbitration agreement as a clause within that main contract is without a choice-of-law[44]. The Court argues this point further by providing domestic case law[45] supporting this interpretation as well as outlining legal benefits such as certainty, consistency and avoiding complexities of multi-tier dispute resolution clauses[46].

Third, the Court disagreed with the CA's interpretation when applying the *Sulamérica* test. The Court introduced the seat of arbitration as a 'default rule' which is identical to stage three of the *Sulamérica* test that investigates which system of law has the closest and most real connection to the arbitration agreement. At stages one and two, the Court found that the absolute absence of a choice-of-law in the contract led to the "obvious inference" that the parties have neither explicitly nor impliedly agreed to a main contract law[47]. Without success in finding a choice, the Court arrives at stage three and stresses that finding the closest connection is a distinct process from finding choice[48]. It involves the application of the rule of law supported by authority and endorsed by case law which is directed toward the law of the seat. Therefore, the Court arrives at the same conclusion as the Court of Appeal because the seat has the closest connection[49] to the arbitration agreement.

Lastly, the Court takes a stricter approach in interpreting the separability doctrine. While the distinct subject matter and purpose of the separability doctrine is acknowledged, the Court remains true to the wordings of section 7 and reiterates that separability is to be applied to the arbitration agreement "for the purpose of determining its validity or enforceability"[50]. The Court objected the interpretation of the CA that allowed the arbitration agreement to be seen as separate in a more general sense and that the separability doctrine has been put "too high"[51].

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[43] Above n 7 at [79].
[44] Above n 7 at [43].
[45] Above n 7at [45]-[46].
[46] Above n 7 at [53].
[47] Above n 7 at [155].
[48] Above n 7 at [118].
[49] *Compagnie Tunisienne De Navigation SA v Compagnie D'Armement Maritime SA* [1971] AC 572.
[50] Above n 7 at [41].
[51] Above n 7 at [61].

With the points above combined, the Court concluded that the separability doctrine was inapplicable in determining the law of the arbitration agreement in this case.

IV Interpretation of separability before and after Enka

The contrasting judgments leading up to the final decision in *Enka* already reflects a disorganised approach on how to interpret the separability doctrine. A closer look at the *Enka* case brings us back to the first segment of the research question: whether *Enka* has altered the English approach to the separability principle or revealed the already-diverging interpretations and triggered crystallisation? Part IV will investigate this question by first introducing sampled case law that interacted the most with the *Enka* case and then comparing the interpretations in cases before and after *Enka* to uncover any changes or indicators of crystallisation.

Key case law before Enka #1 – Sulamérica

Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA is one of the most significant precedents that was used by the Supreme Court in support of the final decision in *Enka*. The case was brought before the Court of Appeal in 2012 between an insurance company Sulamérica and its insured company Enesa after the insured (Enensa) first initiated proceedings in Brazil. The parties had agreed for Brazilian law to govern the contract and chose London as the seat of arbitration but had not agreed on the law governing the arbitration agreement.

Tasked with determining the law governing the arbitration agreement, the Court of Appeal summed up the English conflict of laws rules into a three-stage enquiry[52] and concluded that English law should be the proper law of the arbitration agreement following the law of the seat. However, the Court made it clear that it was of the view that the contract should be governed by a single legal system based on its general choice-of-law. Based on this rationale, the main contract law (Brazil law) would be "a strong pointer" for construing Brazil law as the implied choice for the arbitration agreement (stage two)[53]. Nonetheless, the Court found two reasons that directs the law of the arbitration agreement away from the main contract law: choosing London as the seat of arbitration would effectively import English law[54] into the arbitral

[52] Above n 10 at [25].
[53] Above n 10 at [26]-[27].
[54] Above n 10 at [29].

process and applying Brazilian law would betray the intention of the parties behind their agreement to arbitrate due to its condition of obtaining consent in order to go to arbitration[55].

Key case law before Enka #2 – C v D

C v D is a case before the *Enka* case that has been repeatedly cited across pre-*Enka* cases. The case came before the Court of Appeal in 2007 around a contract in the Bermuda Form – a liability insurance policy that is governed by New York law but seated in London. The form had been popularly used by insurers to apply favourable choice-of-law (New York law) but at the same time avoid American judges from adjudicating disputes due to their generous interpretations of liability[56] by choosing the seat of arbitration as London. In this case, the claimant commenced arbitration based on their arbitration agreement in May 2005 and the arbitral tribunal issued a Partial Award in March 2007 which was being challenged by the defendant[57].

The challenge was built around the argument that the arbitral award was wrong to determine the law of the arbitration agreement as English law because it was the law of the seat. Rather, the main contract law that governs the entire contract should be understood as having the closest connection with the arbitration agreement that is contained within that contract[58]. However, the Court interpreted section 7 as separability to distinguish the arbitration agreement from the main contract to be "a separable and separate agreement" and that the law of the seat had the closest connection to the arbitration agreement [59]. It also viewed that simply choosing a different law for the main contract from the seat is not a sufficient reason to apply the main contract law to the arbitral process and could not be understood as being an "agreement to the contrary" within the meaning in section 58 of the 1996 Act[60].

Key case law before Enka #3 – Fiona Trust

[55] Above n 10 at [30].
[56] Above n 14 at [1].
[57] Above n 14 at [3]-[6].
[58] Above n 14 at [14].
[59] Above n 14 at [22].
[60] Above n 9, s 58.

Premium Nafta Ltd and others v Fili Co Ltd and others[61] or also known as *Fiona Trust and Holding Corp v Privalov* is an important pre-*Enka* case that sheds light more specifically on the English interpretation of the separability principle and its relation to the validity of the arbitration agreement which underlines its value to both segments of the research question. This case heard by the House of Lords in 2007 was regarding a claim against the validity of the main contract and the arbitration agreement contained in that contract because the signature involved bribery. The other party argued that the construction of the contract and arbitration agreement did not allow issues of validity to be covered by the arbitration agreement and that the arbitration agreement should be declared void together with the main contract. The contract was governed by English law and London was agreed as the seat of arbitration but there was no agreed law governing the arbitration agreement.

The Court concluded that 1) the question of validity is to be governed by the same legal system as the arbitral process in general unless the parties have indicated otherwise[62] and 2) the invalidity of the main contract caused by bribery would not automatically invalidate the arbitration agreement. Firstly, the Court focused on the intention of the parties when they initially agreed to the arbitration agreement and pointed out how rational businessmen would not want the question of validity to be governed by one tribunal and other disputes by a different tribunal[63]. On the second issue, the Court was of the view that an attack on the main contract is not in itself an attack on the arbitration agreement [64] and for the challenge to validity to be successful, the claim must prove that it could directly impeach the arbitration agreement. This was based on its interpretation of the separability doctrine: the claim before the Court was exactly what section 7 was intended to prevent[65].

Features of Pre-Enka Cases

The defining feature of pre-*Enka* case law is the two interpretations on the scope of separability. The first two cases sampled above provides a snapshot of these two strands: 1) a narrow/strict interpretation of separability that prioritises the main contract law over the law of the seat and 2) a comprehensive interpretation that prioritises the law of the seat over the main contract law.

[61] *Premium Nafta Ltd and others v Fili Co Ltd and others* [2007] UKHL 40.
[62] Above n 61 at [13].
[63] Above n 61 at [7].
[64] Above n 61 at [16]-[18].
[65] Above n 61 at [19].

Having co-existed throughout the pre-*Enka* timeline, these two strands of interpretations have been used as valuable resources for the *Enka* case reflected in both the Court of Appeal and the Supreme Court's judgement in the *Enka* case.

The narrow/strict interpretation of the first strand is buttressed by the understanding that an arbitration agreement is "collateral"[66] or "ancillary"[67] to the main contract it is included within. Under this interpretation, it is natural for the arbitration agreement as a clause within the contract to be governed by the same system of law as other clauses if the parties have not agreed otherwise. Therefore, this strand stays loyal to the wording of section 7 and discourages giving any further meaning to the separability doctrine by interpreting the arbitration agreement as separable *only* to prevent it from becoming ineffective if the validity of the main contract is under question.

Sulamérica is a good example that follows the first view. It is reiterated by Moore-Bick LJ that the purpose of separability is "not to insulate the arbitration agreement from the substantive contract for all purposes" and only to give legal effect to the parties' intention to keep the arbitration agreement alive in situations where the main contract would be invalidated[68]. This rationale is supported by precedents both before and after the 1996 Act[69] as well as in judgments after *Sulamérica* most prominently in *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* ('*Arsanovia'*)[70] and *Habas Sinai Ve Tibbi Gazlar Istihsal v VSC Steel Co Ltd* ('*Habas Sinai*')[71]. These cases have been endorsed and absorbed in the Supreme Court's decision in *Enka*.

The comprehensive interpretation of the second strand places emphasis on the practical reasons behind the separability doctrine and the significance of the seat in arbitration. While case law in this strand does not completely deny that the separability doctrine is not a fix-it-all solution to challenges against the validity of the arbitration agreement, it allows separability to be interpreted in a way that best reflects its practical nature which includes a more expansive

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[66] *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854 at 917 per Lord Diplock.
[67] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 at 998 per Lord Scarman.
[68] Above n 10 at [26].
[69] *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45; *Leibinger v Stryker Trauma GmbH* [2005] EWHC 690 (Comm).
[70] *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).
[71] *Habas Sinai Ve Tibbi Gazlar Istihsal v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm).

understanding on how separable and distinct the arbitration agreement can be from the main contract. This explains the courts' view prioritising the law of the seat over the main contract law when determining the proper law of the arbitration agreement.

The case that reflects the interpretation of the second strand is *C v D*. Longmore LJ rejected the argument that the main contract should govern the arbitration agreement and therefore did not consider it to be an implied choice of law. This led to the stage three enquiry on finding the closest connection to the arbitration agreement which was the law of the seat[72]. This conclusion is repeated by precedents as well as cases that followed *C v D*[73] leading up to the interpretation of the Court of Appeal in *Enka*[74] where it further engaged with decisions from the first strand to provide its own analysis and critique[75].

On the other hand, *Fiona Trust* is a case that resembles a neutral ground between these two strands. The fact that the main contract law and the law of the seat were identical allowed the case to remain neutral as it did not necessitate discussion on which choice-of-law takes priority in determining the proper law of the arbitration agreement. But most importantly, the endorsement of *Fiona Trust* across both strands was possible due to its conformity with the separability doctrine as interpreted in the first strand but separation or independence of the arbitration agreement from the main contract regarding validity as well as leaving enough room for the argument that substantive matters of the arbitration agreement are to follow the curial law.

Key case law after Enka – The Newcastle Express

DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd[76] or *The Newcastle Express* is the most recent case after *Enka* to deal with the separability doctrine. In November 2022, the Court of Appeal heard the case disputing the conclusion of a charterparty and the arbitration agreement within that contract stating London as the seat of arbitration. The defendant had

[72] Above n 14 at [22].
[73] Key precedents: *XL Insurance Ltd v Owens Corning* [2001] 1 All E.R. (Comm) 530; *National Iranian Oil Co v Crescent Petroleum Co International Ltd* [2016] EWHC 510 (Comm); *Abuja International Hotel Ltd v Meridien SAS* [2012] EWHC 87 (Comm).
[74] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574.
[75] Above n 11 at [79]-[87].
[76] *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd, The Newcastle Express [2022] EWCA Civ 1555*.

challenged an arbitral award under section 67 of the 1996 Act which was commenced by the appellant without the defendant's participation and appealed when the lower court dismissed its claim[77]. The parties argued on whether the arbitration agreement in the contract had a binding effect and therefore whether the issue of disputing the conclusion of the contract would be arbitrable.

The decision of the Court was largely based on its robust comparisons with *Fiona Trust* to point out that the separability doctrine does not apply in the current case because while the former was about the validity of the main contract and the arbitration agreement, the current case was about contract formation[78]. Under this view, the arbitration agreement have failed to exist because the contract has not been formed or agreed to. In other words, there is no validity to determine as there was no agreement to begin with. The adoption of the narrow/strict interpretation of the *Enka* approach[79] added with this understanding shapes the issue as falling outside the scope of section 7 and therefore renders the separability doctrine inapplicable.

Features of Post-Enka Cases

Case law is less robust than pre-*Enka* due to its recentness, but among the relevant cases, it was found that they endorse the logic behind *Enka*. This logic is one that converges on the interpretation of the first strand in the pre-*Enka* analysis which views separability only within the purpose as codified in section 7 of the 1996 Act.

Furthermore, in contrast to pre-*Enka* cases, post-*Enka* cases rarely examined the relationship between the main contract and the arbitration agreement in light of the separability doctrine. With the sole exception of *Kabab-Ji* in this regard, other judgments such as *Port De Djibouti SA v DP World Djibouti FZCO*[80] or *The Newcastle Express*[81] either directly supported *Enka* without additional critique[82] or indirectly endorsed it by referencing other judgments that influenced *Enka*[83]. It must be noted that *Port de Djibouti* ultimately endorsed *Fiona Trust* but

[77] Above n 76 at [4].
[78] Above n 76 at [72].
[79] Above n 76 at [58].
[80] *Port De Djibouti SA v DP World Djibouti FZCO* [2023] EWHC 1189 (Comm).
[81] Above n 76.
[82] Above n 80 at [71].
[83] Above n 76 at [67]-[71].

did so in relation to determining the scope of the arbitration agreement [84] which should be distinguished from the issue of separability.

A significant development in the post-*Enka* analysis was that *Enka's* interpretation was further developed by the *The Newcastle Express*. Along with endorsing *Enka's* interpretation[85], it went further in saying that even such an interpretation is reserved for situations where the main contract containing the arbitration agreement has been validly formed. If the main contract has not been formed, the arbitration agreement in that contract equally could not have been formed to which separability cannot be applied[86].

Interpretation of Separability: Crystallised or Changed?

The enquiry into the interpretations of the separability principle has been raised by the contrasting decisions between English and French courts in the *Kabab-Ji* case. Unlike the French, the English courts' approaches have not been unified before the Supreme Court decision in the *Enka* case was handed down in 2020 and it was unclear whether that decision was an interpretation that broke with the past as a clean slate or clarified the complex and possibly conflicting interpretations from the past and developed it in order for it to become a more unified front. If the comparisons between cases before and after the *Enka* case revealed a picture closer to the first instance, *Enka* would be an anomaly that formulated its own interpretation. However, if it resembles more of the second instance, the argument that Enka was a catalyst for crystallising the English approach would become more convincing.

The analysis of pre- and post-*Enka* case law has shown that the *Enka* case examined case law across the two different branches of interpretations and effectively merged it into one which following decisions continued to endorse without falling back to the two-branch system – a clear indication of crystallisation. This observation is supported by mainly two reasons. First, the course of development of the two strands has been principled rather than individually different interpretations dispersed across the English case law. Second, the assessment of the *Enka* case and its legal impact as part of the current law reform of the 1996 Act by the UK Law

[84] Above 80 at [71].
[85] Above n 76 at [56].
[86] Above n 76 at [57].

Commission confirms that *Enka* is not an anomaly but a trigger that clarified the English approach leading to the discovery of legal issues around the current law warranting reform.

Firstly, the English courts have utilised common law principles across time as well as the different strands of interpretations. Crystallisation involves not only clarification but also development or the discovery of meaning that has presented itself during the process of clarification. In the lead up to the *Enka* decision, courts re-examine and re-interpret the same case law with a recurring set of legal principles, each case contributing to the development of this area of law by way of arguing the importance and relevance of either the first or second strand of interpretation. The formulation of the *Sulamérica* test and the *Fiona Trust* presumption developed in this process have influenced countless case law relevant to the discussion on separability and the law governing the arbitration agreement which laid the foundation for the Supreme Court's analysis in the *Enka* case.

The most prominent legal principles applied by the courts were the English or common law conflict of laws rules and the validation principle. The English conflict of laws rules have been applied before Moore-Bick LJ summed up the process as a 'three-stage enquiry' in *Sulamérica* and used by courts when determining the governing law of a contract or arbitration agreement. The two strands of interpretation were much easier to identify thanks to their consistent application of the conflict of laws rules: the first strand had a strong tendency to interpret implied choice (stage two) as the main contract law while the second strand either dismissed this interpretation or alternatively argued that implied choice is the law of the seat.

The validation principle[87] or the pro-validation approach[88] is to choose among the applicable law under which would render the arbitration agreement as valid or avoid the law that would invalidate the arbitration agreement [89]. Like the separability doctrine, the validation principle has a practical purpose to increase the chance of the arbitration agreement surviving a validity challenge and further the economic interest of the parties[90]. This principle is also known as *in favorem validitatis* and applied in Swiss and Spanish courts in the form of choosing either (i)

[87] Katharina Plavec "The Law Applicable to the Interpretation of Arbitration Agreements Revisited" (2020) 4 University of Vienna Law Review 82 at 110-111.
[88] Sabrina Pearson "The Hidden Pro-Validation Approach Adopted by the English Courts With Respect to the Proper Law of the Arbitration Agreement" (2013) 29 Arb Intl 115.
[89] Above n 87 at 111.
[90] Above n 87 at 111.

the parties' choice-of-law for the arbitration agreement, (ii) the law governing the underlying contract or (iii) Swiss or Spanish law respectively – whichever applicable law that would validate the arbitration agreement [91].

Although it is not in the form of how it is embraced in the Swiss or Spanish courts, the spirit of the validation principle can be easily found in English courts[92]. In *Enka*, the Supreme Court confirms the pro-validation approach to be "a well-established principle of contractual interpretation in English law"[93] and traces it back to *Hamlyn v Talisker*[94] in 1894. Therefore, it is not a surprise to find the principle to be endorsed across both strands, most notably in *XL Insurance*[95] and *Sulamérica*. For example, the Court of Appeal's decision that albeit Brazil law as the main contract law should be the governing law of the arbitration agreement, English law as the law of the seat is the proper law of the arbitration agreement because Brazil law would effectively invalidate the arbitration agreement.

Despite the interpretation being divided, the consistent application of these legal principles is the equivalent of methodology in comparative research which allowed the very analysis of finding patterned features of pre- and post-*Enka* cases. The opposite of this would be each individual case presenting different interpretations based on different reasonings, making it very difficult to find any meaningful development. It is important to note here that the conflicting aspects shown at times between the cases leading up to *Enka* are not obstacles to crystallisation. It was these competing interpretations that revealed the inconsistencies in interpreting the separability doctrine and enabled the Supreme Court in *Enka* to detect and further develop the English position adopted without additional challenges as seen in post-*Enka* cases.

Secondly, law reform work into the 1996 Act affirms that the *Enka* decision is not an anomaly or an erroneous case. In the Law Commission's second consultation paper, the Commission points out that the *Enka* case has drawn both positive and negative responses with some

[91] Johannes Keopp and David Turner "A Massive Fire and a Mass of Confusion: Enka v Chubb and the Need for a Fresh Approach to the Choice of Law Governing the Arbitration Agreement" (2021) 38 Kluwer Law International 377 at 387-388.
[92] Above n 87 at 112; Above n 55 (Pearson) at 125
[93] Above n 7 at [95].
[94] *Hamlyn & Co v Talisker Distillery* [1894] AC 202.
[95] Above n 73.

wanting to codify the *Enka* decision[96] and others criticising the lack of sufficient clarity or certainty[97]. But the Law Commission's assessment finds that *Enka* has been "orthodox"[98] in applying conflict of laws rules, and in the process, turned out to shed light on legal problems or complications with the English interpretation involving the separability doctrine[99] and its relationship with other aspects of the 1996 Act[100]. Furthermore, the Commission's proposal of an amendment to the 1996 Act supports the view that *Enka* was not a case that reflected a new or one-off interpretation but a case that presented an interpretation that cuts across the fabric of the legislation built up by preceding case law.

V Influence on the Validity of the Arbitration Agreement

Convincing indicators towards viewing the *Enka* case as a trigger for crystallisation rather than change to the English interpretation of the separability doctrine were found by comparing and analysing the case law before and after *Enka*. Based on this conclusion, the *Kabab-Ji* was an opportunity to present the approach refined in *Enka* and it was this type of case study that unveiled hidden legal problems. Then, with acknowledgment of the role *Enka* has played in the area of separability, how does this affect its relationship with the validity of the arbitration agreement or arbitral awards?

Part V will look deeper into this relationship by extending the comparison of case law before and after *Enka* to determine whether (i) *Enka* has influenced the outcome of the validity of the arbitration agreement or the enforcement of arbitral awards and (ii) whether *Enka*'s narrow/strict interpretation of the separability principle allowed a way for the main contract law to bypass the separability doctrine and directly influence the arbitration agreement or arbitral award.

Another important element that will be examined is how effective the narrow/strict interpretation is in terms of protecting the arbitration agreement from being invalidated. In *Enka*, the Supreme Court stresses that the purpose of the separability doctrine is only relevant

[96] Above n 16 at [2.49].
[97] Above n 16 at [2.28].
[98] Above n 16 at [2.51].
[99] Above n 16 at [2.54].
[100] Above n n 16 at [2.36].

when determining issues of validity or enforceability which is re-affirmed by how it is written in section 7 of the 1996 Act[101]. But if validity is a collateral effect of other issues – in the case of *Kabab-Ji* one of the main issues was about who was a party to the arbitration agreement, and as the answer to this question rendered the arbitration agreement as non-existent, the arbitration agreement was not only unenforceable but validation principle was also disapplied leaving the arbitration agreement completely vulnerable – the main contract law penetrates despite the fact that validity was involved in an indirect manner. Because this also has strong relevance to the topic of validity, the review in Part V will be a good opportunity to check that the purpose of separability is being upheld.

In terms of re-applying the pre- and post-*Enka* comparison, if the criteria used in Part IV were their interpretations of the separability doctrine, Part V will focus on the dynamics between (i) the Court's decision on the validity of arbitration agreements or awards and (ii) which law was chosen to be the applicable law behind those decisions.

Cases before Enka

Among the cases predating *Enka*, four cases have shown to be the most relevant: (A) *Arsanovia*, (B) *Habas Sinai*, (C) *XL Insurance* and (D) *Abuja International*[102]. As explained in the introduction, the aim is to select cases that are most relevant to the question being asked: despite *C v D* being a significant case in terms of the separability doctrine, it was not selected for review in Part V because it was a case concerning whether the award was reviewable under the main contract law (New York law) rather than disputing validity under the 1996 Act. The same logic applies to *Sulamérica*. In *Fiona Trust*, the case discusses the validity of the arbitration agreement but it does not include the Court's assessment on how its interpretation of the separability principle affects the law governing the arbitration agreement (whereas that logical connection is important especially when comparing to cases such as *Enka* or *Kabab-Ji*).

With the exception of (A) *Arsanovia*, a pattern has been found in cases (B) *Habas Sinai*, (C) *XL Insurance* and (D) *Abuja International*: the courts affirmed the validity of the arbitration agreement based on the law of the seat. By contrast, the Court in (A) *Arsanovia* endorsed the

[101] Above n 7 at [41].
[102] Above n 73.

logic of the *Sulamérica* case by adopting its interpretation of the separability doctrine and prioritising the main contract law over the law of the seat when determining the proper law of the arbitration agreement [103]. The final decision of the Court rendered one of the arbitral awards under its review invalid based on the law governing the main contract[104].

This observation leads to two interesting features of pre-*Enka* cases in terms of validity. First is that the law of the seat is more likely to lead to the validation of the arbitration agreement. Although the rationale that led to determining the law governing the arbitration agreement according to the law of the seat varies, courts in (B) *Habas Sinai*, (C) *XL Insurance* and (D) *Abuja International* all chose the law of the seat as the proper law of the arbitration agreement and subsequently affirmed its validity. On the other hand, (A) *Arsanovia* was the case that chose the main contract law by adhering to the first strand's interpretation of the separability doctrine which led to the Court invalidating the arbitral award based on the main contract's choice-of-law.

It is important to note here that whether the case was at the pre- or post-award stage is not a contributing factor. (A) *Arsanovia* and (D) *Abuja International* are both cases addressing a post-award situation but (D) *Abuja International* refused to set aside the arbitral award by validating the arbitration agreement based on the law of the seat while (A) *Arsanovia* did the opposite by invalidating the arbitration agreement based on the law of the main contract. This supports the conclusion that the law governing the arbitration agreement can be regarded as a controlling factor for validity.

Second, the interpretation of separability in the *Enka* case – emphasising the purpose of separability being limited to sheltering the arbitration agreement in situations where its validity is challenged – was not as effective than originally thought. Because the interpretation given in *Enka* on the separability doctrine was adamantly focused on how the doctrine's sole purpose was to protect the arbitration agreement from validity challenges, the idea of the main contract law penetrating the arbitration agreement to render it invalid seemed like a near-impossible scenario. However, (A) *Arsanovia* and (B) *Habas Sinai* are both cases which endorsed and applied the narrow interpretation of the separability principle eventually adopted by the

[103] Above n 70 at [23].
[104] Above n 70 at [35]-[36].

Supreme Court in *Enka* but rendered contrasting results in determining the law governing the arbitration agreement and its validity.

Cases after Enka

Two cases after the *Enka* decision were found to be most relevant: (E) *Kabab-Ji* and (F) *The Newcastle Express*. (E) *Kabab-Ji* was faced with whether there was a valid arbitration agreement between the parties to which the validity of the arbitral award depended on. To answer this question, the Court first had to determine the law that governed the arbitration agreement. The Court in (F) *The Newcastle Express* was also faced with a similar situation – it had to determine whether there was a valid arbitration agreement between the parties. Another post-Enka case, *Port de Djibouti*, has not been selected for this part of the analysis because it was a case with a focus on the scope and arbitrability rather than determining the validity of the arbitration agreement.

Observing the two post-*Enka* cases paint a more interesting picture compared to pre-*Enka* cases. Both (E) *Kabab-Ji* and (F) *The Newcastle Express* apply the rationale and interpretation in the *Enka* case that contributes to the refusal of enforcing the AA or arbitral award. At the same time, both cases use the logic of dismissing the application of a legal principle by framing the issue as one of 'formation'. In (E) *Kabab-Ji*, the Court dismisses the application of the validation principle by limiting its use for putatively valid AAs whereas in the current case the AA is deemed non-existent or invalid[105]. Similarly, (F) *The Newcastle Express* refused to apply the doctrine of separability because while it only applies to putatively valid and concluded arbitration agreements, this was not the case before the Court[106].

Did Enka impact the validity or enforceability of the arbitration agreement or arbitral award?

Based on the analysis above, can the question of whether the *Enka* case had an influence on the validity of the arbitration agreement or arbitral award be answered? The comparison between relevant cases in light of their decision and reasonings in relation to validity across pre- and post-*Enka* timelines uncovered two conclusions: (i) the *Enka* case itself was not a

[105] Above n 16 at [2.30].
[106] Above n 16 at [2.31].

factor influencing the validity or enforceability of the arbitration agreement but (ii) it was the interpretation and rationale adopted and refined in *Enka* which contributed to the outcome of arbitration agreement validity.

The reason why the Enka case itself is less likely to be a factor impacting validity is because cases matching the pattern of applying the main contract law to the arbitration agreement resulting in invalidity are found in cases before and after the *Enka* case. Before the *Enka* decision, (A) *Arsanovia* determined the arbitration agreement as invalid by applying the main contract law and both (E) *Kabab-Ji* and (F) *The Newcastle Express* repeated this pattern after *Enka*.

However, this exact pattern of applying the main contract law leading to invalidity or refusal of enforcement matches the logic of the first strand of interpretation of separability which was developed before *Enka* and survived until now with the endorsement from *Enka*. Therefore, it can be argued that while it is not the *Enka* 'decision' in itself being a factor, the 'interpretation' or rationale that was picked up and crystallised by the *Enka* decision provided the foundation rendering this outcome. That interpretation allowed for the main contract law to be the default implied choice-of-law for the arbitration agreement save certain exceptions which effectively prioritised it over the law of the seat.

Bypassing the Doctrine of Separability

But the most important finding of the analysis is that the crystallised approach in Enka opened up the problem of bypassing the separability doctrine. Bypassing the separability doctrine is a situation that directly engages with the second segment of the research question: whether the enforceability of the arbitration agreement has been negatively impacted post-*Enka*. The bypass occurs when the separability doctrine fails to be applied and allows for the main contract law to directly determine the fate of the validity and enforceability of the arbitration agreement. Under this scenario, the purpose of separability in protecting the arbitration agreement from invalidity becomes powerless as the main contract law rendering the main contract as invalid will equally apply to the arbitration agreement and greatly increases the chances of it becoming invalid too.

The analysis uncovered two types of separability bypass: (i) by operation of section 4(5) as identified in the *Enka* case and (ii) by framing the issue as contract formation as shown in *The Newcastle Express*. In the Supreme Court decision in *Enka*, one of the court's contributions was uncovering the relationship between sections 7 and 4(5). The effect of these sections' interaction was the disapplication of section 7 – the narrow interpretation of separability increases the application of the main contract law, and if that law is foreign law but the seat is London, it would render the mandatory provisions of the 1996 Act as the curial law which excludes non-mandatory provisions such as section 7. This reasoning was given to explain the Court's point that the choice of seat cannot be a decisive indication for parties' choice-of-law governing the arbitration agreement. Considering that the Court's approach to validity as being "conceptually distinct" from the curial law[107], disapplication of section 7 enables challenges against the validity of the arbitration agreement to be more likely to be governed by the same system of law that governs challenges to the main contract, greatly increasing the chance for both the main contract and the arbitration agreement to fall together.

In terms of *The Newcastle Express*, as briefly explained during the post-*Enka* analysis in Part IV, the Court re-shapes the issue at hand from being a question about contract validity into one of contract formation and finds that because the main contract was not formed, the arbitration agreement contained in that contract also failed to come to existence – effectively nipping the enforceability of the arbitration agreement in the bud. Therefore, in the Court's view, there was no need to apply the separability doctrine let alone find the law governing the arbitration agreement[108]. This contrasts with (E) *Kabab-Ji* where the Court delved into the question of determining what the AA law is as a step before the determination of validity.

Furthermore, a key rationale of *Fiona Trust* – that challenges to the validity of the underlying contract does not automatically apply to the validity of the arbitration agreement and that challenges to the arbitration agreement should be made on its own due to the separability doctrine – was dismissed in this process[109]. The Court found that because *Fiona Trust* was a case concerning questions of validity and not formation, its rationale does not apply to this case and the main contract law that determined the formation of the contract will directly determine the fate of the arbitration agreement. This is a development from the reasoning that first

[107] Above n 7 at [69].
[108] Above n 76 at [57].
[109] Above n 76 at [58].

appeared in *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd*[110] which consolidated with the crystallisation in the *Enka* decision. *Hyundai* also cited *Fiona Trust* but ignored its reasoning as well as the argument in support for the separability doctrine at the end by finding that the main contract and arbitration agreement "stand or fall together" when the issue involves a challenge to contract formation[111].

The bypassing of separability as shown in *The Newcastle Express* poses a number of problems. Camilleri critiques the decision of the Court by enquiring whether framing the issue as contract formation instead of validity really dismisses the separability principle. It challenges the Court's reasoning that saying "I never agreed to that" makes the issue one of contract formation[112]. It is pointed out that this assertion applies equally to issues of validity and formation alike – when a party's signature has been forged in a contract, that party would argue that it "never agreed to it" which would make that response the same for situations that impeach the arbitration agreement as invalid or render it non-existent. In this sense, the Court's division between issues of validity and issues of contract formation become an artificial one. The critique also extends the question to whether the situation in *The Newcastle Express* not correspond to "non-existent" among the purposes set out in section 7 of the 1996 Act[113].

VI Law Reform

In 2021, the UK Ministry of Justice initiated a review of the 1996 Act to enquire whether the Act remains fit for purpose or there were any issues needing of reform. The Law Commission in charge of reviewing the law and its reform[114] released its first consultation paper in September 2022, its second consultation paper in March 2023 and published its final report in September 2023. The recommendations in the final report are pending action from Parliament for it to become incorporated into English law and implemented.

Discussion on Separability and the Enka case

[110] *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The Pacific Champ)* [2013] EWHC 470 (Comm).
[111] Above n 110 at [36].
[112] Above n 76 at [46].
[113] Above n 27 at 523-525.
[114] Law Commissions Act 1965 (UK), s 3.

The first consultation paper discussed the separability doctrine as part of its minor reform recommendations and put forth its consultation question around whether the separability doctrine codified in section 7 should be made a mandatory provision[115]. Its initial concerns stemmed from a finding in the *Enka* case – the operation of section 4(5) effectively disapplying section 7 if a foreign law is determined as the law governing the arbitration agreement. The Commission acknowledged the importance and practical benefits of the separability doctrine and posed the question to attract views of the arbitration community.

As for other issues raised in *Enka*, the Commission considered a suggestion that because the decision in *Enka* was wrong, there should be a default rule favouring the law of the seat when determining the proper law of the arbitration agreement but concluded that it did not intend to push this suggestion further as it was not persuaded a departure from the approach in *Enka* was needed[116].

However, after receiving 31 responses[117] asking for a reconsideration around its assessment of *Enka*, the Commission revised its position in the second consultation paper. The Law Commission identified the problems related to the decision and rationale in the *Enka* case where it considered both separability and the Court's interpretation that led to the approach favouring the law of the main contract when determining the law governing the arbitration agreement[118]. While keeping the consultation question from the first paper on the separability doctrine (section 7), the Commission put forth its provisional proposal as a new consultation question: should there be a new rule in the 1996 Act to the effect that the law governing the arbitration agreement follows the law of the seat unless the parties agree otherwise?[119]

Arguments for and against reform

The Commission received responses from both sides of the argument regarding reform on the problems in the current law as crystallised in the *Enka* case. With regards to separability, the Commission received a total of 65 responses and 35 of those were in support of making section 7 a mandatory provision under the 1996 Act. Arguments for this change emphsised that

[115] Law Commission (UK) *Review of the Arbitration Act 1996* (UKLC CP257, 2022) at [10.3]-[10.11].
[116] Above n 115 at [11.8]-[11.12].
[117] Above n 16 at [2.3].
[118] Above n 16 at [2.52]-[2.62].
[119] Above n 16 at [5.1].

separability is a widely accepted and useful legal principle in arbitration[120] which is also acknowledged by English courts as well as in the United Nations Commission on International Trade Law (UNCITRAL) Model Law[121], other foreign legislation and other institutional rules[122]. On the other hand, 16 responses were against this idea. The main reason was that it undermines party autonomy by taking away the default position of allowing parties to disapply section 7 if they choose so[123]. Interestingly, 11 responses pointed out the interpretation in the *Enka* case as the issue rather than section 7 itself[124].

Another problem identified through *Enka* was on how *Enka* refined the English interpretation of separability resulting in courts leaning towards applying the main contract to the arbitration agreement as its proper law. Out of the 31 responses the Commission received after it published its first consultation paper, 22 preferred the law of the seat, 2 preferred the majority opinion while 1 preferred the minority opinion in *Enka*. This increased to a total of 52 responses after the second consultation paper: 36 agreed with the provisional proposal of a new rule on applying the law of the seat to the arbitration agreement – an interpretation more aligned with the second strand in Part IV. The primary reason supporting departure from the *Enka* decision was due to its complexity and unpredictability[125]. A narrower approach to separability as shaped via *Enka* further limits situations where separability can be applied which in turn decreases certainty and encourage the courts to apply section 4(5) to favour the law of the main contract – this is even further complicated if the courts are tasked with determining the governing law of the main contract as well. However, 10 responses against reform argued that *Enka* provides greater flexibility[126], the problems identified can be overcome[127], and that the change to the law of the seat would undermine parties' expectations that their choice-of-law for the contract would govern all their clauses including the arbitration agreement[128].

The Commission considered both arguments and concluded in its final report that it would not reform section 7 but recommended that the 1996 Act be amended to provide that the law governing the arbitration agreement is governed by the law of the seat unless agreed otherwise

[120] Above n 6 at [11.11].
[121] United Nations Commission on International Trade Law (UNCITRAL) Model Law, art 16(1).
[122] Above n 115 at [10.8].
[123] Above n 115 at [10.9].
[124] Above n 6 at [11.13].
[125] Above n 6 at [12.22].
[126] Above n 6 at [12.27].
[127] Above n 6 at [12.27]; Above n 16 at [2.68].
[128] Above n 6 at [12.32]; Above n 16 at [2.65].

by the parties[129]. Regarding section 7, the Commission notes that while it acknowledges the utility of separability, responses in favour of reform was a slim majority and that it was not persuaded that making the separability doctrine mandatory was necessary, especially when it is proposing an amendment to the 1996 Act so that the law of the seat will be the law of the arbitration agreement[130]. The effect of this amendment would be increasing the likelihood of arbitration agreements governed by English law rather than foreign laws (via the main contract law) when the seat is based in England and Wales. The recommendation for amendment is reflected in clause 1 of the draft Bill as below[131]:

> (1) The Arbitration Act 1996 is amended as follows.
>
> (2) After section 6 insert—
>
> "6A Law applicable to arbitration agreement
>
> (1) The law applicable to an arbitration agreement is—
>
> (a) the law that the parties expressly agree applies to the arbitration agreement, or
>
> (b) where no such agreement is made, the law of the seat of the arbitration in question.
>
> (2) For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not, of itself, constitute express agreement that that law also applies to the arbitration agreement.
>
> (3) This section does not apply in relation to an arbitration agreement that was entered into before the day on which section 1 of the Arbitration Act 2023 comes into force."
>
> (3) In section 2 (scope of application of provisions), in subsection (2) after the opening words insert—
>
> "(za) section 6A (law applicable to arbitration agreement),".

Impact of the Reform on the issue of Bypassing Separability

The conclusion of the Commission's law reform recommendations directly touches upon the topics of this paper and confirms its findings including how the *Enka* case has played a critical role in shaping and consolidating the English approach to interpreting the separability doctrine and such approach created problems regarding the disapplication of the doctrine. This paper

[129] Above n 6 at [12.77].
[130] Above n 6 at [11.16].
[131] Above n 6 at [12.78].

added its contribution by pointing out an additional question: the bypassing of the separability doctrine as observed in *The Newcastle Express*. With the changes proposed by the Commission, how much of these problems will be resolved?

The short answer is yes, but also no: yes, in that it resolves the problem of disapplying the separability doctrine by operation of section 4(5), but no in that it fails to relieve the separability bypass when the legal issue is shaped as one of contract formation rather than contract validity. The Commission's review of the *Enka* case in the second consultation paper provides its analysis of how section 4(5) could create extra complexities in determining the proper law of the arbitration agreement. Complexities arise when the main contract law is readily determined as the law governing the arbitration agreement as an implied choice of the parties which (i) renders the law of the seat to be interpreted as the curial law that only applies to procedural provisions and (ii) forces courts to categorise provisions of the 1996 Act as either substantive or procedural to decide which provisions do and do not apply[132]. Even if the arbitration is seated in England, it is through this process section 7 becomes readily disapplied by operation of section 4(5). By amending the 1996 Act to choose the law of the seat as the AA, the 1996 Act can be applied as a whole and allow the courts to avoid such course of action. This will significantly increase the chance of the separability doctrine to be applied in English courts (assuming cases come before the courts due to its English seat) and relieve with the bypass without making section 7 mandatory.

On the other hand, the amendments will not be effective in overcoming the separability bypass under situations like *The Newcastle Express* because the Commission's proposals do not directly engage with the fundamental issue – the interpretation of the separability doctrine in *Enka*. Choosing the law of the seat as the law governing the arbitration agreement will address the problems such as the disapplication of section 7 that makes the arbitration agreement or arbitral award to be invalidated which are symptoms of the narrow interpretation of separability. Even if section 7 is made mandatory, as long as the interpretation of separability limits its boundaries to issues only relating to the validity of the arbitration agreement, separability will remain avoidable.

[132] Above n 16 at [2.34].

Despite the result of *The Newcastle Express* being a case rejecting the enforcement of an arbitration agreement and subsequent arbitral award similar to situations of validity, the reason why this issue is not escalated further could be because treating a contract that has never been formed in the first place and a contract that was concluded but later determined void would be consistent with contract law principles[133]. However, maintaining the current position not only keeps it inconsistent with the separability doctrine but also removes the option for parties to resort to a cheaper, faster and more efficient dispute resolution mechanism. Although not recommended through the Commission's final report, a balance could be made between the current position in *The Newcastle Express* and the separability doctrine by asking the question twice as prescribed in *Fiona Trust* which would involve determining the law governing the arbitration agreement and asking whether the arbitration agreement has been formed under that law as opposed to jumping to apply the main contract law straight onto the arbitration agreement[134].

VII Conclusion

The separability doctrine, the applicable law to the arbitration agreement and its validity are indispensable topics in the subject of international arbitration. Inspired by the problems surfaced through *Kabab-Ji*, this paper attempted to ask questions that touch on all three of these legal concepts. The research question was comprised of two segments: (i) whether *Enka*, a key precedent of *Kabab-Ji*, had been either an anomaly or a trigger that crystallised the English approach to the separability doctrine and (ii) whether the *Enka* decision rendered it easier to invalidate or refuse enforcement of arbitration agreements or arbitral awards by bypassing the separability doctrine.

By implementing an analysis of comparing the relevant case law before and after the Enka decision, this paper came to the conclusion that (i) the *Enka* decision did not change but crystallise the English approach by merging the different interpretations and refining it, and (ii) the approach adopted and refined in *Enka* enabled situations where the separability doctrine was bypassed leading to the refusal to enforce the arbitration agreement or arbitral award.

[133] Above n 17 at 372.
[134] Above n 17 at 373.

The doctrine of separability and how the doctrine has been interpreted before and after Enka was the centre of the research question's first segment in Part IV. Analysing pre-*Enka* case law that engages with mainly the separability principle and the proper law of the arbitration agreement revealed that there were two strands of interpretations to the doctrine. The first strand took a narrow view of the doctrine which considered arbitration agreements to be ancillary and strictly limited the application of the separability to situations where the validity of the arbitration agreement was in jeopardy. On the other hand, the second strand had a comprehensive view that emphasised the importance of separability and its codification while also focusing on the close connection between the seat of arbitration and the arbitration agreement. This led to interpretations where the arbitration agreement was accepted as a distinct agreement although the issue was not about validity. Because the first placed emphasis on the main contract whereas the second emphasised the seat, the implied choice-of-law of the arbitration agreement in the former was the main contract law while the latter was the law of the seat.

The competing interpretations of these two strands came to an end with the final decision in *Enka*. As outlined in Part III, the Court of Appeal adopted the interpretation of the second strand and determined that the law governing the arbitration agreement was English law based on its London seat. Ultimately, the final decision of the Supreme Court matched that of the lower court but based on a very different reasoning. While the Court agreed the law of the arbitration agreement was English law based on the seat, the seat was only chosen as the 'next best thing'. The Court assumed the interpretation of the first strand and argued that the law governing the arbitration agreement should be the main contract law as this is the implied choice of the parties. It was only because the Court could not find the implied choice that it turned to the next step of the English conflict of laws rules to find the applicable law with the closest connection to the arbitration agreement: the law of the seat.

Examining post-*Enka* cases confirmed that the rationale of the Supreme Court in *Enka* survived and continued to be endorsed by following judgments without critique or further assessment. Furthermore, the *Enka* decision had refined the workings of separability in relation to other aspects of the 1996 Act which cleared up confusion around 'the overlap argument' and the operation of section 4(5).

On top of this observation of pre- and post-*Enka* cases, two reasons further support that *Enka* should not be understood as an anomaly but a pivotal case in materialising the English approach. First is the principled engagement from the courts that allowed the analysis to produce meaningful results. If the judgments did not show coherence in applying key legal principles such as the conflict of laws rules and the validation principle to function as the equivalent to methodology, it would have been a near-impossible task to control the varying factors that could have affected the outcome; instead, these principles have enabled the analysis to see more clearly the relationship between the interpretation of separability and its effect on the law governing the arbitration agreement. Secondly, ongoing law reform and recommendations of the Law Commission further confirmed that the *Enka* case is not an outlier. The need for a systematic review of the current law and amendments is a strong indication that the interpretation in *Enka* was not a one-off incorrect interpretation that led to the shocking result in *Kabab-Ji*.

After establishing that the *Enka* decision played a role in crystallising the English position on separability in Part IV, Part V dealt with the second segment of the research question which also compared the case law before and after *Enka* to find whether *Enka* had a sustaining impact on the topic of validity; in other words, the question was aimed at investigating whether conclusions similar to *Kabab-Ji* will reoccur. Studying pre- and post-*Enka* cases revealed that there was a pattern of invalidity of the arbitration agreement or arbitral award when the courts applied the law of the main contract across the timeline. This meant that the *Enka* case itself did not have a meaningful impact on the validity of the arbitration agreement but it was the narrow interpretation that led to the application of the main contract law onto the arbitration agreement and ultimately the refusal of enforcement.

In this process, the analysis detected two types of scenarios where the separability doctrine is bypassed, or where the main contract law is directly applied to the arbitration agreement without the consideration of the separability principle even in situations where its enforceability is affected. The first scenario was when section 4(5) of the 1996 Act disapplies section 7 (the separability doctrine) if the main contract law is foreign and applied to the law of the arbitration agreement based on the narrow interpretation consolidated by the *Enka* decision. The second scenario was observed in *The Newcastle Express* in which the issue at hand was re-framed as not one of contract validity but contract formation. Once the issue was about contract formation, the separability doctrine is inapplicable allowing for the main

contract law to be directly applied to determine the fate of both the main contract, and automatically, the arbitration agreement. These possibilities point to situations where the validity of the arbitration agreement is weak and vulnerable which has significant implications for the effectiveness of the international arbitration regime and its enforcement power. Last but not least, the analysis on the bypass of the separability also pointed out that the interpretation in the *Enka* decision seems like it will protect the validity of the arbitration agreement but does not protect the enforceability of the arbitration agreement or the arbitral award in practical terms.

Part VI informs an overview of the review on the 1996 Act more specifically around the Law Commission's assessment of the separability doctrine and its multifaceted effects in close relation to the *Enka* case. The reform on section 7 initially focused around whether it should be made mandatory in light of the possibility of disapplication raised via the *Enka* case. However, the complexities in the *Enka* case in addition to the separability doctrine has been actively raised by consultees which escalated the issue to expand as the review progressed. It is through this process that the problems with the rationale of favouring the main contract law when determining the law of the arbitration agreement was discussed. Arguments for both in favour and against the reforms have been considered by the Commission through two consultation papers. In its final report, the Commission recommended while it did not view that it was necessary for section 7 to become mandatory, it propose to amend the 1996 Act so that the law governing the arbitration agreement would follow the law of the seat. Under this amendment, the result in *Kabab-Ji* would have gone in the opposite direction.

But the recommendations relieve the problems of the separability bypass only in part. The proposal to amend the 1996 Act to choose the law of the seat as the law of the arbitration agreement addresses the issue of section 7 being disapplied by operation of section 4(5). This is because encouraging the alignment between the law of the seat and the law of the arbitration agreement ensures that both mandatory and non-mandatory provisions of the 1996 Act are applied which includes the application of the separability doctrine. However, this proposal fails to alleviate the problems raised by the separability bypass involving contract formation because it does not address the more fundamental issue of the narrow interpretation of the separability principle espoused in *Enka*. Unlike the bypass through section 4(5) – which is more of a symptom of this narrow interpretation – the latter problem persists as long as the separability doctrine is confined to serving purposes only relating to validity. As observable in *The*

Newcastle Express, framing the issue as contract formation easily prevents the application of legal devices protecting the arbitration agreement such as the separability principle, the validation principle as well as significant cases such as the *Fiona Trust*.

The Law Commission's recommendations included in its final report encompasses many other important aspects of the 1996 Act and is awaiting further action to progress its implementation. The Commission's proposal was published in September 2023 and is waiting to be reported to the UK Parliament every year through its implementation report[135] as the scope of this year's report was cut at January 2023. While the Commission's proposals have a relatively high rate of implementation[136], the speed of each recommendations vary and whether the government will accept the recommendation in full or in part is uncertain[137]. Further tracking and analysing cases post-*Enka* under the current legal settings in the meantime would be able to provide greater clarity on the sustaining impact of the *Enka* decision as well as how effective the proposed amendments will be.

An enquiry that began with questions around the *Kabab-Ji* decisions in the UK and France produced meaningful contributions to the discourse of the separability doctrine in the English jurisprudence. The main contribution of this paper is two-fold: (i) tracking and comparing the most relevant cases before and after the *Enka* decision to delineate the changes and developments to the interpretation of the separability doctrine and (ii) analysing whether the interpretation in the *Enka* decision had opened up a situation where the separability doctrine can be bypassed, and as a result, exposed to an unexpected vulnerability to its enforceability. Because the findings not only deepened the understanding of how the separability doctrine operates and influences other aspects of arbitration but also revealed some twists than what was preliminarily thought, the conclusion here will hope to serve as a good point to extend further studies on the relationship between the separability doctrine, the law governing the arbitration agreement and its validity.

[135] UK Government "Implementation of the Law Commission proposals" (20 July 2023) < https://www.gov.uk/government/publications/report-on-the-implementation-of-law-commission-proposals-january-2018-to-january-2023>.
[136] UK Law Commission "Implementation of our reports" <https://lawcom.gov.uk/our-work/implementation/>.
[137] UK Law Commission "Implementation Table" < https://lawcom.gov.uk/our-work/implementation/table/>.