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Avoiding Hybrid Clauses Pitfalls: An Applied Framework

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This paper sets out a multi-dimensional approach that parties drafting a "hybrid clause" for their arbitration agreement can adopt, for purposes of maximizing enforceability, taking into account the multi-jurisdictional interplay between the seat Court, the governing law and the enforcement Court(s), as well as mandatory rules that can be present in the lex arbitrii, the governing law, and/or the law of the enforcement for a. This paper draws on both the co-authors' practice experience, as well as first principles of party autonomy in light of mandatory rules, based predominantly on the scholarship of Briggs and Nygh.

Key Words : Hybrid Clauses, Arbitration Agreements, Arbitral Awards, Limits to Party Autonomy, Enforceability, Drafting for Enforceability, Briggs, Nygh, Alstom, Invista, HKL, Legal Modelling, Setting Aside, Refusal of Enforcement

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Ⅰ. Introduction

The purpose of this paper is to set out a multi-dimensional approach that parties drafting a "hybrid clause" for their arbitration agreement can adopt, for purposes of maximizing enforceability, should they really need to enter into such hybrid arrangements. This is especially important in a scenario where the seat Court, the governing law, the enforcement Court(s), all originate from different jurisdictions. A hybrid clause is an arbitration agreement in which parties agree to have one arbitration institution administer an arbitral proceedings using the rules of another institution.

This paper seeks to plug a gap in the literature, which hitherto has largely been practitioner-driven, with few scholarly contributions. The current commentary has focused on how Courts treat hybrid clauses, whether they are enforceable or not, and why.[1] Yet Courts around the world differ in their approaches to such clauses – a trite observation[2] – and given the differing treatment, the same hybrid clause could be held enforceable by Jurisdiction A's Courts, but not by Jurisdiction B's Courts. Much of the commentary also does not cover the multi-jurisdictional interplay in the construction of a hybrid clause, which may have a governing law that is different from the seat law, both of which may be in turn be foreign to a Court enforcing the award that is produced. A focus on whether and why one seat jurisdiction views a certain hybrid clause as valid does not say much about how an enforcement Court elsewhere would treat the same clause. Nor, for that matter, how that Court may consider the interplay of seat law and governing law. A multi-dimensional analytic framework is thus required to take the interplay into account.

At the outset, we caution that hybrid arbitration agreements should be entered into only sparingly. This chiefly is because of the danger that a slip in administration, or in procedural orders, may give rise to grounds that the administering institution's rules are used rather than the procedural rules of the other arbitral institution, giving rise to grounds for refusal of enforcement under the New York Convention[3] that the

1) See for example Christopher Lau and Christin Horlach, "Party Autonomy – A Turning Point?" 4 *Disp. Resol. Int'l*, 2010, 121

2) But see nonetheless Christopher Lau and Christin Horlach, *op cit*, discussing diverging approaches taken by the Singapore and US Courts

3) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), art. V(1)(d).

procedure adopted was not in accordance with parties' agreements. In addition, the language that such clauses are couched in may run foul of mandatory rules of law. One example is People's Republic of China ("PRC") law's requirement that a valid arbitration agreement requires a specified arbitral institution to administer the arbitratio n[4] which can be interpreted as a valid arbitration agreement requires there to be only one specified administering institution. If the rules chosen contain a deeming provision that parties agreeing to the rules also agree that the administering institution which devised the rules be the administering institution, there could be an argument (capable of leading to satellite disputes) that on the language of that clause, there are two administering institutions. Another example (albeit quasi-mandatory in nature, for the reasons given in the discussion in Section 2) is the ICC's introduction of amendment to Rule 1(2) and the addition of Rule 6(2) that effectively prohibits another institution from administering under ICC Rules.[5]

Given this clear danger, why is it that sophisticated commercial parties still enter into such agreements – if they are not outright mistakes in drafting? Anecdotal experience from practice suggests that there are two main drivers. The first is that transactional counsel advising on the drafting of the arbitration agreement are interested in sending a dispute, when it occurs, to disputes lawyers within their own firm. These disputes lawyers may be more conversant with the rules of one particular arbitral institution.

Article V

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

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.

4) Arbitration Law of the People's Republic of China (1994), Article 16 and 18.

Article 16 An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise. An arbitration agreement shall contain the following particulars:

(1) an expression of intention to apply for arbitration;

(2) matters for arbitration; and

(3) a designated arbitration commission.

Article 18 If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void.

5) See Section 3 below.

The counter-party (or its lawyers), on the other hand, may make administration by another arbitral institution a compulsory condition. In order to avoid a deal-breaker, a common solution is the hybrid clause, whereby the counter-party's preferred arbitral institution is named the administering institution, while the first party's preferred arbitral institution's set of rules is stipulated as the procedural rules governing the arbitration.[6] The second is that both parties' (and/or their transactional lawyers) may want different arbitral institution to administer. A compromise (often more commercial than legal) is reached whereby one institution is named the administration institution, while the other institution's rules are to be applied.

This paper proceeds as follows. Section II is a literature review. In the absence of doctrinal writings on hybrid clauses as such, we draw predominantly on Peter Edward Nygh's[7] and Adrian Briggs'[8] separate bodies of work on contractual freedom on choice of law, and party autonomy in the face of mandatory rules, respectively. Section III reviews the recent case-law that has prompted a flurry of commentary: Invista,[9] HKL[10] and Insigma[11].

Building on Sections II and III, Section IV draws on the authors' practice experience, and sets out a matrix of pertinent legal considerations, and their interplay, that form the core of this paper. It sets out a basic checklist of questions for the transactional lawyer drafting a hybrid clause. Section V concludes, and sets out avenues for further work that can be done to advance scholarship on hybrid clauses further. It draws further on Briggs' scholarship on severability, and sketches out how this doctrine can be applied to the validation of a choice of procedural rules that are from a different institution as that of the administering institution stipulated.

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6) This is from the first author's personal experience in earlier work as a Tribunal Secretary. The Tribunal he worked with sounded out parties about why hybrid clauses were agreed to in certain arbitrations, as they had drafted an Alstom-type hybrid clause (see Section III), and the Tribunal was trying to persuade parties to substitute that with a more orthodox arbitration agreement.

7) Peter Edward Nygh, *Autonomy in International Contracts*, OUP, 1999

8) Adrian Briggs, *Agreements on Jurisdiction and Choice of Law*, OUP, 2008

9) 中华人民共和国浙江省宁波市中级人民法院民事裁定书（2012）浙甬仲确字第4号

10) *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5

11) *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24

Ⅱ. Literature Review

There is a dearth of scholarly writings on the construction and enforceability of hybrid arbitration clauses *as such*. Much of the commentary is practitioner-driven, rather than academic-driven. The most sustained discussion in the literature found on hybrid arbitration clauses, apart from standard international arbitration tomes (such as those by Redfern and Hunter,[12] and Gary Born),[13] is Paul D. Friedland's Chapter 3 in *Arbitration Clauses for International Contracts*.[14] In recent years hybrid arbitration clauses have been heavily litigated. Yet the commentaries – largely from law firms, rather than scholars - have an internal focus only on the decisions.

Given the paucity of scholarly writings on hybrid arbitration agreements as such, in order to advance the scholarship in this area, we localise the discussion with reference to two strands of related scholarship. Firstly, contractual freedom in choice of substantive governing law. Secondly, limits of party autonomy in light of mandatory rules. These two strands have been chosen for the following reasons. Choice of substantive governing law, we argue from first principles, is analogous in principle to choice of procedural governing rules, and the parameters and limits that inform autonomy of substantive choice must surely have a bearing on the parameters and limits that should inform procedural choice. What the limits of party autonomy are in light of mandatory rules is pertinent because the very choice of a set of procedural rules that is different from those of the administering institution's speaks of an active exercise of parties' intentions, which could run into conflict with the seat law, the governing law of the arbitration agreement, and the procedural rules chosen.

1. Contractual Freedom in Choice of Substantive Governing Law

Nygh's monograph *Autonomy in International Contracts*,[15] published in 1999,

12) Alan Redfern, J. Martin Hunter, Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration (Fifth Edition)*, OUP, 2009

13) Gary B. Born. *International Commercial Arbitration (Second Edition)*, Kluwer Law International, 2014

14) Paul D. Friedland, *Arbitration Clauses for International Contracts (Second Edition)*, JurisNet, 2007

15) Peter Edward Nygh, *op. cit.*

remains the *locus classicus* of this strand of scholarship. Jonathan Harris, in his excellent review[16] of Nygh's monograph, sets out a succinct structure for understanding Nygh's arguments, which is adopted here. Nygh argues that: (1) The right to choose is logically prior to the choice of law. Thus the determination of the right to choose must be governed by the *lex fori*. (2) Autonomy rests in the parties if they are free to choose the forum. Having made a choice of forum, the parties must take the forum's law, including its conflict of laws rules, as they find it. (3) After considering various limits to autonomy, Nygh appears to take the position that the limits on autonomy should be few. (4) Nygh then moves from the realm of the normative to the prescriptive, setting out the following factors that would inform the scope of autonomy: (i) validity of the clause; (ii) changing the applicable law; (iii) contract splitting, i.e. subjection of issues normally governed by the same law to different laws; and (iv) capacity. (5) Nygh then devotes a substantive discussion to mandatory rules, which also would be of relevance to our discussion on the limits of party autonomy.

For purposes of this paper, arguments (2), (4)(ii) and (5) above deserve further exposition. Argument (2) is the argument that parties after having chosen a forum must take the forum's law, including its conflict of laws rules, as they find it, which is instructive to the question of whether parties having chosen an administration institution, must use that institution's rules exclusively, or (in the case of ICC Rules) whether parties having chosen an institution's rules which preclude other institutions from administering the arbitration must abide by that. However, we take the position that this argument would not be applicable from the perspective of international arbitration, which widely[17] allows for parties freely to choose the substantive governing law, even though they have no connection with the contract. Argument 4(ii) pertains to changing the applicable law, which mirrors the act of changing the governing rules. Nygh argues that the freedom should be a widespread one, as long as no third party rights are prejudiced. However, he appears to qualify it with the

16) Jonathan Harris, "Contractual Freedom in the Conflict of Laws", 20(2) *Oxford Journal of Legal Studies*, 2000 p. 247

17) Save for some limited jurisdictional exceptions, such as the PRC which in practice requires contracts between PRC entities, which are devoid of any foreign element ("涉外因素") to be governed only by PRC law.

notion that a precondition is that the lex fori should permit choice in principle. Applying these notions to the arbitration context, on Nygh's argument, parties should be free to enter into hybrid clause-type arbitration agreements as long as the chosen administering institution does not prohibit a different institution's rules to be applied.

For argument (5), Nygh sets out a useful distinction between *domestic mandatory rules* on the one hand - rules that are found only within the forum's laws, which would not be applied by the forum should the foreign governing law not contain that rule - and *international mandatory rules* on the other - rules that are international and binding even in many other jurisdictions outside the forum, which would be applied by the forum even if the foreign governing law not contain that rule.

We now apply the above to the arbitration context. Art 19(1) of the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") deserves mention at this point:

> *Article 19. Determination of rules of procedure*
> *(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.*

The first limb of Art 19(1) – "subject to the provisions of this Law" – is not in issue as there is nothing in the Model Law that prohibits hybrid clauses. Art 19(1) thus seems to give parties the full ability to set out hybrid clauses. Indeed, UNCITRAL's Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration ("**Analytical Commentary**") explains as follows:

> *Paragraph (1) **guarantees** the freedom of the parties to determine the rules on how their chosen method of dispute settlement will be implemented. This allows them to tailor the rules according to their specific needs and wishes… **The freedom of the parties is subject only to the provisions of the model law, that is, to its mandatory provisions.** (Emphases added)*

Given the purpose of Art 19(1) of the Model Law, as elucidated in the language of

the Analytical Commentary, it appears to be a mandatory rule guaranteeing freedom to parties to choose their procedural rules, and this guarantee must arguably extend to the stipulation of a hybrid clause. Art 19(1) is arguably an international mandatory rule, because of its provenance, and the fact that it has been incorporated into the arbitration legislation of numerous states worldwide.

What of ICC Rules 1(2) and 6(2), then? Our analysis is as such. The short answer appears to be that to the extent that it restricts a hybrid clause that includes ICC Rules, they fall foul of Art 19(1) of the Model Law, and Rules 1(2) and 6(2), being *lex inferiori*, must be invalidated. However, Art 19(1) is a double-edged sword – we foresee an equally plausible counter-argument that since parties are free to choose whatever governing rules they wish, then the logical conclusion must be that if they choose the ICC Rules with its restrictions, then the restrictions must be taken as they stand. Even though the parties' intent in agreeing to the hybrid clause is impliedly a choice of the ICC Rules with the restrictions in Art 1(2) and 6(2) carved out, if such a carve-out is not expressly stated, it could give rise to satellite disputes based along the lines of the counter-argument. It is also untested, at this point, as to whether a carve-out would be enforceable.

2. Limits on Party Autonomy in International Arbitration

Adrian Briggs' contribution to the scholarship comes in the form of a trenchantly-argued analysis of two types of potential effects of agreements – *in personam and in rem* – before the Courts. English Courts represent the high water mark, giving effect to private, contractual effects of the agreement as between the parties, even when such agreement could not be effective against the world, such as when because a rule of exclusive jurisdiction purports to pre-empt access to any other Court. This is in contradistinction to civil law Courts, where effects in *personam* may not be distinguished from effects *in rem*.[18)]

Section IV will apply Briggs' analysis, such that when English law (or a variant of

18) See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law*, OUP, 2008, Sections 1.17, 13.04 and 13.15; and Horatia Muir Watt, "Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance, 6(3) *European Review of Contract Law*, 2010, 250 at 279. But *cf* Korean law as an exception to the civil law position argued by Briggs and Watt.

common law that follows the English position), rather than a civil law, is the substantive governing law of the arbitration agreement, hybrid clauses that run foul of a mandatory rule, such as ICC's Art 1(2) and 6(2) that purport to restrict administration of arbitrations under ICC Rules to and only to the ICC (and no other institution), would still likely be enforceable as between the parties to the arbitration agreement. However, during enforcement, when the *in rem* effects are very likely to be considered by the enforcement Court (often under the public policy exception to enforcement), should the enforcement Court be one from the civilian tradition, then refusal of recognition and/or enforcement may be likely.[19)]

In this regard, Adeline Chong's scholarship[20)] arguing that whether the law of a third country with a connection to the contract is or should be given effect as a restriction on party autonomy is especially apposite to a consideration of how an enforcement Court (from a different jurisdiction as that of the seat Court, and the governing law of the arbitration agreement) could – or should – approach this task. Chong succinctly sets out 3 factors: (1) in considering whether to give effect to a third country's mandatory rules, does it matter when a particular law is enacted; (2) what impact does the public policy of the third country have? (3) whether a distinction should be made between the public policy of a third country and its mandatory rules?[21)] Chong's answers to the three questions above are summarised as follow: (1) A court should give effect to the law of the place of performance whatever the governing law of the contract in cases of initial and supervening illegality; (2) A contract which is against the domestic public policy of the place of performance and the forum but valid according to the governing law of the contract should be enforced; and (3) The public policy of a third country holds less sway than its mandatory rules. If England is the forum and English law the governing law of the contract, the domestic public policy of the *lex loci solutionis* is only taken into account if it coincides with English domestic public policy; if the governing law of the contract is that of another country, an English Court will not take into account the domestic public policy of the *lex* loci *solutionis*; and there are practical and conceptual justifications not to enforce the international public policy of the *lex loci solutionis*.[22)]

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19) Adopting the argument made in the main text at note 18 above, drawing from the works cited *ibid*.

20) Adeline Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts", 2(1) *Journal of Private International Law*, 2006, p. 27

21) *Op cit*, at p. 61-62

Ⅲ. Recent Hybrid Clause Cases

1. *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24

In the case of *Insigma Technology Co Ltd v Alstom Technology Ltd*,[23] the Singapore Court of Appeal upheld a "hybrid" arbitration clause which provided that all disputes should be resolved "by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce".

On the facts, when Alstom initially referred the dispute for arbitration before the ICC under the ICC Rules of Arbitration (1 January 1998), Insigma disputed ICC's jurisdiction, arguing that parties had agreed to submit the dispute to the Singapore International Arbitration Centre ("**SIAC**") to administer the arbitration under the ICC Rules. Insigma also insisted that Alstom first withdraw the ICC-administered arbitration if they wanted to submit arbitration to SIAC. Alstom subsequently had the ICC-administered arbitration withdrawn and commenced arbitration at SIAC. Having had been duly constituted, the tribunal duly wrote to SIAC to ask if it would be prepared to administer the arbitration under ICC Rules. Notwithstanding this factual background, Insigma still argued before the tribunal, the Singapore High Court and Court of Appeal that the "hybrid" arbitration agreement was invalid for uncertainty.

While this important factual background was a significant factor in the outcome of this case, the Singapore Court of Appeal set out a number of observations on the legal validity of a hybrid form of international arbitration: (1) an arbitration agreement should be construed like any other commercial agreement. The fundamental principle of documentary interpretation is to give effect to the intention of the parties as expressed in the document;[24] (2) where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to that intention even if certain aspects of the agreement are ambiguous, inconsistent or incomplete. A commercially

22) *Op cit*, at p. 62-69

23) *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24.

24) *Ibid*, paragraph 30.

logical and sensible construction was to be preferred over another that was commercially illogical;[25] (3) there was no practical problem in why a clause providing for the rules of one arbitral institution to be applied by a similar institution should be too uncertain to be given effect to;[26] (4) both parties agreed to arbitration subject to the terms of arbitration agreement with knowledge of ICC arbitration and SIAC arbitration and under legal advice;[27] (5) a defect in an arbitration clause does not necessarily render it unworkable, since it may often be cured by the assistance of state courts, arbitral institutions and arbitrators, and in this case the clause was rendered workable by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules;[28] (6) a hybrid form of arbitration was a matter of agreement between the parties and was wholly consistent with Singapore's policy considerations.[29]

2. Existing Commentary

As Christopher Lau SC and Christin Horlach observed in their article:[30]

> *Following the universal acceptance of the principle of party autonomy, the past years and decades have witnessed 'a discernable shift in the courts' approach [...] in favour of party autonomy'. Often motivated by the intent of legislators to actively promote their respective jurisdictions as 'arbitration friendly', in such jurisdictions courts have adopted a liberal approach and gradually reduced restrictions imposed on party autonomy due to public policy considerations and by mandatory laws of the lex loci arbitri to a minimum in order to grant the parties a maximum of freedom when choosing how their disputes should be resolved, by whom, where and according to what rules and law.*

25) *Ibid*, paragraph 31-34.
26) *Ibid*, paragraph 35.
27) *Ibid*, paragraph 36.
28) *Ibid*, paragraph 37-40.
29) *Ibid*, paragraph 41-43.
30) Christopher Lau and Christin Horlach, "Party Autonomy – The Turning Point?", 4 *Disp. Resol. Int'l*, 2010, 121

> *The recent decision of the Singapore Court of Appeal in Insigma v Alstom mirrors this trend. Expressly acknowledging the basic principle of party autonomy, the Singapore Court of Appeal confirmed the validity of a hybrid arbitration clause providing that 'any and all such disputes shall be finally resolved by arbitration before the Singapore Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce then in effect and the proceedings shall take place in Singapore and the official language shall be English…'.*
>
> *The court pointed out that '[it] is necessary [when interpreting the arbitration agreement] to uphold the underlying and fundamental principle of party autonomy as far as possible in the selection of the kind of arbitration and the terms of arbitration [emphasis added]'. In so holding, it seems that the contractual freedom of the parties has been broadened again, allowing parties 'to mix and match rules and institutions to their liking. Indeed, the principle of party autonomy in its basic form provides that the parties are free to shape the arbitral proceedings according to their will and their will only, as long as the parties '[do not] agree to prevent any party from presenting its case or in any other way restricting fair hearing' or choose a procedure that is unacceptable to the administering institution. The decision to have the rules of an institution applied in a case administered by an institution other than the issuing institution.*

As Richard Hill also observed in a Kluwer Arbitration blog post: [31]

> *The potential controversy inherent in the Singapore Court's decision is whether or not the SIAC can truly administer an arbitration "under the ICC Rules" given that the ICC Rules specify steps to be taken by "the Court" which is a reference to the ICC's International Court of Arbitration. The Court's role under the ICC Rules includes scrutiny of*

31) Richard Hill, "Hybrid ICC/SIAC arbitration clause upheld in Singapore", (10 Jun 2009), Retrieved August 25, 2015, available at 〈http://kluwerarbitrationblog.com/blog/2009/06/10/hybrid-iccsiac-arbitration-clause-upheld-in-singapore/〉 (last visit on 25 August 2015), paragraph 5

> *the draft award under Article 27. In this case, the role of the International Court of Arbitration was performed by the SIAC Board of Directors. The Singapore Court of Appeal's decision however upheld the clause on this modified basis since it considered that to do so achieved a result that was closer to the intention of the parties than the alternative outcome of declaring the arbitration agreement unworkable. But while the Court of Appeal held that the clause "was rendered certain and workable in the present case by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules" can the uncertainty as to what the parties actually agreed by this clause really be solved by the SIAC unilaterally electing to play a role of its choice? That uncertainly is perhaps demonstrated by the SIAC first having interpreted the clause as providing for arbitration in accordance with the SIAC rules but with the essential features of ICC arbitration that the parties would like to see, such as terms of reference and scrutiny of the award, only for the tribunal later to invite the SIAC to conduct the arbitration "in accordance with the ICC Rules to the exclusion of the SIAC Rules" which the SIAC then agreed to do.*

Following the case, the ICC amended the ICC Rules (effective 1 January 2012). This was achieved through inserting the underlined words into Article 1(2) of the ICC Rules which, with effect from 1 January 2012, provided as follows:[32)]

> *"The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). **The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules.** It draws up its own internal rules, which are set forth in Appendix II (the "Internal Rules")".*

32) Shaun Lee, "Swedish Court of Appeal upholds pathological hybrid arbitration clause", (10 February 2015), Retrieved August 25, 2015, available at 〈http://singaporeinternationalarbitration.com/2015/02/10/swedish-court-of-appeal-upholds-pathological-hybrid-arbitration-clause/〉 (last visit on 25 August 2015).

Similarly, Article 6(2) provides that:-

> *"by agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the [ICC] Court."*

The wording of Article 6(2) of the ICC Rules provides that by agreeing to arbitration under the ICC Rules, the parties accept that no institution other than the ICC Court shall administer their dispute.

3. *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5

In *HKL Group Co Ltd v Rizq International Holdings Pte Ltd*,[33] the Defendant applied for a stay of court proceedings commenced by the Plaintiff, HKL Group Co Ltd based on parties' arbitration agreement providing that:

> *"Any dispute shall be settled by amicable negotiation between two Parties. In case both Parties fail to reach amicable agreement, all dispute (sic) out of (sic) in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce of which awards shall be final and binding (sic) both parties. Arbitration fee (sic) and other related charge (sic) shall be borne by the losing Party unless otherwise agreed".*

However, no "Arbitration Committee" exists in Singapore and the Court was aware that the said arbitration clause was drafted without legal assistance.[34] The Plaintiff resisted the Application on the ground that the arbitration agreement was inoperable on account of this defect.

The Defendant contended that Rizq Singapore submitted that although the arbitration

33) [2013] SGHCR 5.
34) *Ibid*, paragraph 2.

clause was defective, it was clear that the parties' intention was to arbitrate and that the court should rely on the principle of effective interpretation to find that parties could still agree to arbitrate the matter in Singapore, for instance, by referring the matter to the SIAC for ad-hoc arbitration and agreeing that the ICC rules are to apply.[35]

The Singapore High Court adopted the approach of *Insigma*[36]:

13 faced with a pathological arbitration clause, the court generally seeks to give effect to that clause, preferring an interpretation which does so over one which does not. As the Court of Appeal in Insigma stated (at [31]):

> *[W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars … so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. …*

The High Court eventually upheld the clause but imposed a condition providing that "*parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules, with liberty to apply should they fail to secure any such agreement. [The Court] will hear parties on the issue of the imposition of any other conditions*".[37]

Subsequently, the case reappeared before the same Assistant Registrar and parties agreed to a SIAC-administered arbitration and thereby avoided the problems of a hybrid arbitration clause.[38]

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35) *Ibid*, paragraph 9.
36) *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24.
37) *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5, paragraph 37.
38) *HKL Group Co Ltd v Rizq International Holdings Pte Ltd*, [2013] SGHCR 8, paragraph 4.

4. Existing Commentary

However, this case is not conclusive. Noted international arbitrator Michael Hwang SC observed that in the decision, "there was no discussion of Art 6(2) of the ICC Rules. It is therefore unclear whether CIETAC or any other arbitral institution will agree to administer an arbitration under the ICC Rules given the express provision in Art 1(2) that the ICC Court is the only body authorised to administer arbitrations under the ICC Rules."[39]

Practitioner Shaun Lee has amplified further:[40]

> *First, it is clear from the wording of this pathological arbitration clause that parties intended to submit the arbitration to the ICC Rules which, pursuant to Article 1(2) clearly stipulate that the ICC International Court of Arbitration is the only body authorised to administer arbitrations under the ICC Rules. Absent express words to the contrary, how likely is it that parties would have intended to contract outside of Article 1(2) and to agree to have another arbitral institution administer the ICC Rules?*
>
> *Second, is it even possible for parties to contract outside of Article 1(2) and if so, would it not lead to a host of complications in practice? Given the problems of construing the arbitration clause as a hybrid ICC arbitration in light of Article 1(2), perhaps the preferred interpretation should be one that construes the clause as a straightforward ICC arbitration clause rather than as a hybrid clause.*
>
> *In saying this, we do acknowledge that the clause was drafted before the introduction of the ICC Rules 2012 and its modified Article 1(2). Nevertheless, in our view, unlike the arbitration clause in Insigma v Alstom, the arbitration clause here did not clearly contemplate a hybrid arbitration.*

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39) Michael Hwang SC and Darius Chan, "Determining The Parties' True Choice of The Seat of Arbitration and Lex Arbitri", in Michael Hwang, *Selected Essays on International Arbitration*, Academy Publishing, 2013, at pp. 551- 563

40) Shaun Lee, "HKL v Rizq International: Pathological Arbitration Clause Case Update", (28 March 2013), Retrieved August 25, 2015, available at 〈http://singaporeinternationalarbitration.com/2013/03/28/hkl-v-rizq-international-pathological-arbitration-clause-case-update/〉 (last visit on 25 August 2015)

5. *Zhejiang Yisheng Pte Ltd v Invista Technologies*, S.À.R.L. [2012]

The dispute arose from two technology licence agreements between INVISTA Technologies, a company registered in United State ("**INVISTA**") and a Chinese company called Zhejiang Yisheng Petrochemical Co Ltd ("**Yisheng**"). Both agreements respectively contained an arbitration agreement stating that '[t]he arbitration shall take place at China International Economic Trade Arbitration Centre (CIETAC),[41] Beijing, People's Republic of China and shall be settled according to the UNCITRAL Arbitration Rules as at present in force' (the "**Arbitration Clauses**").

Pursuant to parties' arbitration agreement, INVISTA commenced CIETAC arbitration proceedings against Yisheng under the UNCITRAL Rules in 2012.

In light of Article 16 and 18 of the Arbitration Law of the People's Republic of China,[42] Yisheng challenged the validity of the Arbitration Clauses before the Ningbo Intermediate Court on the following grounds (the "**Application**"):

Ⅰ. the Arbitration Clauses did not stipulate an arbitration commission within the meaning of the Arbitration Law;
Ⅱ. the selecting of UNCITRAL Rules suggested the arbitration as an *ad hoc* arbitration, which is invalid under PRC law; and
Ⅲ. the procedure which the arbitration had followed since its commencement was consistent with *ad hoc* arbitration.

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41) Please note that CIETAC stands for China International Economic Trade Arbitration Commission.
42) Arbitration Law of the People's Republic of China (1994), Article 16 and 18.
Article 16 *An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise. An arbitration agreement shall contain the following particulars:*
(1) an expression of intention to apply for arbitration;
(2) matters for arbitration; and
(3) a designated arbitration commission.
Article 18 *If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void.*

INVISTA contested the application for three reasons. Firstly, the Arbitration Clauses referred to the term "CIETAC" which is a specific arbitration institution in China and therefore indicated parties' intention to resolve their disputes through institutional arbitration. Secondly, the UNCITRAL Rules are not a unique set of rules only adopted for *ad hoc* arbitration and it has been selected by arbitration institutions all over the world. Thirdly, the arbitration proceeding is consistent with institutional arbitration.

The Ningbo Intermediate Court initially upheld the application and declared the Arbitration Clauses invalid. The decision, subsequently, was referred to the Higher People's Court of Zhejing Province, which in turn reported to the Supreme Court in conformity with the 'reporting system' applicable to court rulings on the validity of foreign-related arbitration agreement.

Accordingly, on the basis of the Supreme Court's guidance, the Ningbo Intermediate Court overturned its original decision and upheld the Arbitration Clauses.

In its judgment, the Ningbo Intermediate Court held that the Arbitration Clauses providing the arbitration take place at CIETAC under the UNCITRAL Arbitration Rules in fact provided for administered rather than ad hoc arbitration.

While the use of 'at' in the Arbitration Clauses could arguably be understood to refer to the place of arbitration rather than the administering arbitral institution, the Ningbo Court found it was possible in these circumstances to interpret the clauses based on intention and purpose of parties so as to ensure a binding arbitration agreement under PRC law.

The Ningbo Intermediate Court also addressed the reference to the 'China International Economic Trade Arbitration Centre' ('Centre' rather than 'Commission') contained in the Arbitration Clauses and reinterpreted the provision to give effect to the clear intention of the parties. The Court concluded that the Arbitration Clauses had designated CIETAC as the administering institution.

However, having determined the above issues, the Ningbo Intermediate Court did not go on to address the issue of hybrid clause – CIETAC-administered arbitration under UNCITRAL Arbitration Rules under PRC law.

6. Existing Commentary

David Gu, an Allen and Overy practitioner, has the following comments on *Invista*:[43]

The Ningbo Court's decision is an example of the Chinese courts being unwilling to strike down an arbitration clause simply because of a technical defect. In order to respect the parties' true intentions to resolve their dispute by arbitration, a defect of the arbitration clause was cured and the arbitration clause was reconstructed and given effect.

On the other hand, the decision was made squarely within the PRC arbitration regime, namely that parties are required to select a specific arbitration institution in China to administer the arbitration proceedings and arbitration agreements providing for ad hoc arbitration remains invalid in China.

It is noteworthy that Article 4 (3) of the CIETAC Arbitration Rules (2012) provides that "where the parties agree to refer their dispute to CIETAC for arbitration but … have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law as it applies to the arbitration proceedings. Where the parties have agreed on the application of other arbitration rules, CIETAC shall perform the relevant administrative duties." In light of this provision, CIETAC is allowed to administer the arbitration proceedings between Yisheng and Invista as an arbitration institution under the UNCITRAL Rules.

Ⅳ. Hybrid Clauses: An Interplay of 5 Fundamental Considerations

Drawing on our experience in practice, the analytical frameworks set out in Section II and a broad sense of judicial temperament regarding hybrid clauses set out in Section III, we suggest that the below factors should always be considered by the transactional lawyer when drafting a hybrid clause:

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43) David Gu, "China – Yisheng V Invista", (2014), Retrieved August 25, 2015, available at 〈http://www.conventuslaw.com/archive/china-yisheng-v-invista/〉 (last visit on 25 August 2015).

1. Effects of the seat law
2. Effects of the governing law of the arbitration agreement
3. Practice of the Courts where enforcement is likely to take place
4. Whether the institution which is to be stipulated as administering has Rules or practice directions against the application of another institution's Rules
5. Whether the institution's whose rules are to be stipulated as applying (but which is not administering the case) contains any negative provision against administration by another arbitral institution

1. Effects of the Seat Law

There are at least two levels where the seat law plays an important role. Firstly, the seat is where the validity of the arbitration agreement can be determined, and where the award ultimately made can be set aside, both being functions of the Courts of the seat pursuant to their supervisory jurisdiction over the arbitration. Secondly, some (but not all) jurisdictions, deem the laws of the seat to be the governing law of the arbitration agreement, if the arbitration agreement does not carry its own governing law clause (separate from that found in the underlying contract). For example, China[44] and Singapore[45] take the position that the default governing law of the arbitration agreement is that of the seat, while England[46] takes the position that it generally follows the governing law of the underlying contract the arbitration agreement is contained in, although other factors can displace the presumption.

The law of the seat may have particular requirements, not found in other jurisdictions for the validity of an arbitral agreement. For example, in the People's Republic of China, it is the law that a valid arbitration agreement must make specific reference to administration by one arbitration institution[47]. Hence in the Supreme

44) Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Arbitration Law of the People's Republic of China, Fashi [2006] No 7, Article 16. "中华人民共和国最高人民法院公告", (2006), Retrieved August 25, 2015, available at 〈http://www.gov.cn/ziliao/flfg/2006-09/08/content_382267.htm.〉 (last visit on 25 August 2015).

45) *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12

46) *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors* [2012] EWCA Civ 638

47) Arbitration Law of People's Republic of China (Adopted at the Ninth Standing Committee Session

People's Court (the "SPC") decision of *Cangzhou Donghong*[48], an arbitration agreement which provided for the seat to be China, and for arbitration to be administered "in accordance with the Rules of the ICC", without specifying as such that the ICC is to administer the case, the SPC first held that the governing law of the arbitration agreement was Chinese law, following the seat. Based on this, the SPC refused enforcement ultimately because the language did not fulfil the requirements of the Chinese legislative provision – more specific language mandating the ICC to administer the case was required.

Buttressed by Nygh's arguments in Section 2 that if such requirements form international mandatory rules, then such requirements may not waived even if the substantive governing law of the arbitration agreement is a law foreign to the seat, and this foreign law does not have such particular requirements. It is a question of law in every case whether such particular features would be applied when the seat Court determines the validity of the arbitration agreement.

In addition, when the seat Court is a common law Court, it may have case-law pertaining to the Article 34 Model Law provisions on setting-aside, which forms part of the seat law as much as the provisions of Art 34 themselves. Such case-law has to be considered in order to determine if the language of the hybrid clause may give rise to setting aside grounds under Article 34.

2. Interaction with Governing Law of the Arbitration Agreement

An arbitration agreement is a separate agreement from the underlying agreement it is usually found in. As set out in the main text to notes 44 to 46 above, the governing law of the arbitration agreement cannot be assumed to be the same law as that which governs the underlying contract.

Consider now a hybrid clause where, for example, Beijing is provided to be the seat of the arbitration, CIETAC is provided to be the administering institution, and the ICC's

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of the Eighth National People₩'s Congress on August 31, 1994), Chapter III, Article 18.
Article 18. Where an arbitration agreement does not specify or clearly specify the items for arbitration or an arbitration commission, the litigants may reach a supplementary agreement. Where they fail to reach a supplementary agreement, the arbitration agreement shall be deemed invalid.

48) ≪最高人民法院关于沧州东鸿包装材料有限公司诉法国DMT公司买卖合同纠纷一案仲裁条款效力的请示的复函≫,[2006]民四他字第6号.

Rules are to be applied. It is further provided that the governing law of the arbitration agreement is PRC law. Article 6(2) of the ICC Rules[49] stipulates that only the ICC is to be capable of administering arbitrations under ICC Rules. There could immediately arise an argument that the ICC, by virtue of Art 1(2) and Art 6(2) of the ICC Rules, is also an administering institution alongside CIETAC. In such a case, there are two administering institutions. The edge of an argument thus arises (to the detriment of certainty of the arbitration agreement) that given that PRC law requires there to be *one* arbitration institution, this clause *ipso facto* is invalid.

Briggs' analysis set out in Section 2 above, setting out the distinction between common and civil law Courts in upholding the enforceability of a hybrid clause *in personam* as between the parties, even though there may be some invalidity when considered from the *in rem* perspective, leads us to warn that when the substantive governing law of the arbitration agreement is a civil law, rather than common law, hybrid clauses (which could easily run the risk of unenforceability) should be entered into with even greater caution.

3. Practice of the Courts Where Enforcement is Likely to Take Place

Even after covering seat Court considerations (which has jurisdiction over setting aside under Article 34 of the Model Law), the careful drafter also has to take into account the enforcement Court(s) (which has jurisdiction over refusal of enforcement under Article V of the New York Convention). There is very little positive empirical guidance provided in the case-law to set out across-the-board factors that an enforcement Court will take into account, save that if its sovereign is a signatory to the New York Convention (and there are currently more than 150 signatories worldwide), would apply Art V of the New York Convention in deciding whether to grant or deny enforcement. Art V of the New York Convention posits materially the same grounds as Art 34 of the Model Law, which governs setting aside. Different Courts, however, take

49) International Chamber of Commerce, Rules of the Court of Arbitration (1975), Article 6(2).
Article 6 Effect of the Arbitration Agreement
2 By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.

very different approaches to the threshold that is required before the grounds for refusal of enforcement are established. For example, it is clear from the recent SPC decision involving Alstom and Insigma[50] that the Chinese Courts would take a highly technical approach to Art V(1)(d) of the New York Convention, that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties. In that case, the appointment letters of the arbitrators erroneously stated that the Chairman of the SIAC appointed the Tribunal Members under a certain SIAC Rule, rather than the corresponding ICC Rule. Based on that the SPC found that the grounds giving rise to refusal of enforcement under Art V(1)(d) were established.

Again, the record of the enforcement Court in setting aside on public policy grounds has to be clearly considered by the drafter. An enforcement Court that has shown hostility to hybrid clauses should give pause to the drafter of the hybrid clause.

4. Whether the Institution Which is to be Stipulated as Administering has Rules or (More Importantly) Practice Directions against the Application of Another Institution's Rules

Most institutions do not expressly prohibit arbitration agreements whereby parties ask them to administer using the Rules of another institution. In fact some expressly permit it. For example, Article 4.3 of the China International Economic Trade Arbitration Commission Rules provides that parties to CIETAC-administered arbitration are free to agree the application of 'other arbitration rules'.[51] Article 2.4 of the China (Shanghai) Pilot Free Trade Zone Arbitration Rules has a similar provision suggesting that the Shanghai International Arbitration Centre can administer arbitration proceedings on the

50) 中华人民共和国浙江省杭州市中级人民法院民事裁定书（2011）浙杭仲确字第7号

51) China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules 2012, Article 4.3 provides that:

Article 4 Scope of Application

3. Where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law as it applies to the arbitration proceedings. Where the parties have agreed on the application of other arbitration rules, CIETAC shall perform the relevant administrative duties.

basis of other arbitration rules agreed by parties.[52)]

However, it is unclear whether the administering institution's rules would even apply in a hybrid clause; by definition, those rules have been disapplied in favour of another institution's rules. Therefore the practice directions (or equivalent instruments) of the administering institution, to the extent that they have not been disapplied in the hybrid clause, would be more dispositive.

5. Whether the Institution's Whose Rules Are to Be Stipulated as Applying (But Which is Not Administering the Case) Contains Any Negative Provision Against Administration by Another Arbitral Institution

To the authors' knowledge, the ICC is the only arbitral institution with such provisions – Art 1(2) and 6(2) of the 2012 version of the ICC Rules. Firstly, on an internal reference, when viewed against the governing law of the arbitration institution, the first level of analysis would have to be whether a hybrid clause applying ICC Rules but to be administered by another institution would survive scrutiny under the standards and doctrines of the governing law. The exercise is one of *contractual interpretation*.

Secondly, challenge of the hybrid clause before the Courts of the seat can take place on two different levels. Firstly, an invoking of the seat Court's jurisdiction to declare the hybrid clause invalid as an arbitration agreement. The standards of the *lex arbitrii* have to be considered in interplay with the substantive contractual interpretation according to the governing law. Secondly, a setting aside application on one of Art 34 grounds, when the award is made, is also a possibility.

6. Synthesis

Based on the foregoing analysis, the following offers an illustration of how the

52) China (Shanghai) Pilot Free Trade Zone Arbitration Rules (2004), Article 2.4.
Article 2 Institution and Functions
4. SHIAC shall perform the functions that should be performed by an arbitration institution referred to in other arbitration rules which are applicable upon parties' agreement.

drafter of a hybrid arbitration clause should approach the task. Assume that the drafter is acting for a Korean party, and following hybrid clause is proferred by the counter-party, which is from the People's Republic of China, which also has assets in France.

> *"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration by the International Chamber of Commerce International Court of Arbitration. And the arbitration proceedings will be held in Singapore, in accordance with the Rules of Singapore International Arbitration Centre then in force. This arbitration agreement shall be construed in accordance with the laws of England and Wales."*

Firstly, the drafter should, as a matter of priority, work with clients to determine where, should a dispute ultimately go to arbitration, would enforcement be likely to take place. It is not just the place of incorporation of the counter-party (though that must of course be taken into account). It could also be other jurisdictions where the counter-party has assets.

The drafter should then work backward and understand the practice of both the enforcement Court(s) and the seat Court, and possibly consult with lawyers from those jurisdictions as to factors to take into account, applying the framework above. The pertinent questions to ask are:

(1) Would the language of the hybrid clause pass muster with the Courts of the seat, should there be a challenge to the validity of the arbitration agreement after the commencement of the arbitration, or a setting-aside application when the award is made? Singapore is the seat Court here. While it is not the purpose of this article to provide full answers to how a Singapore Court would address this issue, it must be borne in mind that Singapore is a common law country, and the case-law pertaining to Art 34 of the Model Law (on grounds for setting aside) would be very instructive. In addition, in the International Arbitration Act of

Singapore, there are further grounds for setting aside apart from the Art 34 grounds. The validity of the arbitration agreement is construed with reference to English law, and we turn to the next question.

(2) Is the hybrid clause valid with reference to English law? Again, the case-law of England would have to be considered. As noted above, if the governing law is from the civilian tradition which is not as generous as the English Courts in allowing for enforceability *in personam* when there is invalidity in rem, even greater care has to be taken. A possibility (depending on negotiation leverage) is to change the governing law to one that is more well-disposed to hybrid clauses.

(3) What would the approach of the Courts of China and France (both potential places of enforcement) be to this clause? Would they be satisfied with validity under English law (the governing law of the arbitration agreement) or would they review the hybrid clause according to their own standards? What is their record on setting aside of problematic arbitration clauses on either procedural or public policy grounds?

The language should then be designed, to minimise the likelihood of a setting aside or refusal of enforcement arising from second order effects of any other extraneous language. Consider the language of the arbitration agreement below:

> *"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in Singapore* ***in accordance with the UNCITRAL Arbitration Rules*** *as at present in force.....*
> *The arbitration shall be administered by Singapore International Arbitration Center ("SIAC")* ***in accordance with its practice rules*** *and regulations…."*

"Practice rules" of the SIAC could be construed as the arbitration rules of the SIAC, in which case there would be two sets of arbitral rules governing the arbitration. This was a situation ripe for setting aside or refusal of enforcement, on the grounds that the arbitral procedure was not in accordance with parties' agreement. Parties ought to apply for a procedural order regularizing the language, to the effect that the parties intend for the UNCITRAL Rules to apply to the exclusion of the SIAC Rules.

The point to be made is that the drafter of a hybrid clause must take care to think through all second order effects of language he includes, in order to avoid complicating an agreement that is already fraught with difficulties.

Ⅴ. Conclusion

The "core" of this paper is to set out a framework integrating tacit practice experience of the authors with doctrinal thinking, largely that of Briggs and Nygh, in the fields of contractual freedom for choice of law, and limits to party autonomy in light of mandatory rules. The framework contains factors that operate in interplay with each other, which any transactional lawyer drafting a hybrid clause would do well to bear in mind. It is a pity that there is scant scholarship on hybrid clauses, for as the account above hopefully shows, they involve many difficult doctrines of private international law and commercial law reasoning that deserve further exposition and analysis. Further work on the practice front can take the form of a consideration of how institutions and arbitrators should interpret hybrid clauses in light of the first principles drawn out in Section II above, and the precedents in Section II above. Further work on the doctrinal front can take the form of a consideration of whether legislatures should take steps to make hybrid clauses more enforceable – as stated at the start of this paper, while some hybrid clauses are mistakes, there may be occasions arising from transactional give-and-take where hybrid clauses may actually be required by parties. It can also take the form of a deeper analysis of the doctrinal strands inherent in Briggs and Nygh's scholarship, which this paper, due to its scope, has covered only at a "bare essence" level. In particular, it can be considered whether the doctrine of severability can be further applied to an arbitral agreement per se, such

that its choice of arbitral forum and choice of applicable procedural rules can be deemed separate agreements. A normative argument[53] along this front can then be worked out, to be subsequently taken before the Courts and legislatures, to minimise the unenforceability of hybrid agreements.

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