Private International Law in Commercial Arbitration Through the Lens of National Interest

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A dynamic force that shapes private international law is national interest.[1] Countries make concessions in private international law to promote particular interests.[2] The prime example is the common practice of applying foreign law to further international trade. Similarly, countries defer jurisdiction to foreign courts through doctrines such as *forum non conveniens* and enforce foreign judgments to facilitate international transactions. Conversely, countries also make use of private international law to seek expansion of their jurisdiction. These phenomena have been termed "weaponization."[3]

The theory of national interest is premised on two assumptions: first, the basic unit of analysis is a sovereign state; and second, the forum of the dispute is always a national court.[4] However, in private international law, a "country" may not necessarily be a sovereign state, but may instead be a "law district" that forms part of a sovereign state while possessing its own legal system and private international law rules.[5] Secondly, modern commercial disputes do not always proceed before national courts.[6] Over the past few decades, there has been a vast increase in the use of private courts in the form of commercial arbitration, particularly in light of the success of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[7] These two features are in fact interrelated. Many so-called international arbitration centers are themselves law districts within a larger sovereign state.[8]

Two issues in private international law therefore have not been specifically addressed from this national interest perspective. First, what if the "country" in question is not a

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[1] *See* KING FUNG TSANG, NATIONAL INTEREST AND STRUCTURE OF PRIVATE INTERNATIONAL LAW (forthcoming [month and year]) [hereinafter TSANG, NATIONAL INTEREST]; King Fung Tsang, *Weaponization of Private International Law: The Battle Between the United States and China*, [volume number if available] U. PA. J. BUS. L. (forthcoming 2026) [hereinafter Tsang, *Weaponization*]

[2] TSANG, NATIONAL INTEREST, *supra* note 1.

[3] Tsang, *Weaponization*, *supra* note 1, at 3.

[4] TSANG, NATIONAL INTEREST, *supra* note 1.

[5] ALBERT VENN DICEY ET AL., DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS ¶¶13-003–14 (16th ed. 2022).

[6] GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1353 (7th ed. 2023).

[7] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]. As of 28 February 2026, 172 states are parties to the Convention.

[8] *See* Enka Insaat Ve Sanayi AS v. OOO Ins. Co. Chubb [2020] UKSC 38, [143]; *see also* NORAH GALLAGHER ET AL., 2025 INTERNATIONAL ARBITRATION SURVEY: THE PATH FORWARD: REALITIES AND OPPORTUNITIES IN ARBITRATION 2 (Queen Mary University of London & White & Case LLP, 2025) (finding that the five most preferred seats for arbitration are London, Singapore, Hong Kong, Beijing and Paris).

sovereign state? New York in the United States and Chinese Hong Kong in China are prime examples.[9] These law districts have their own interests, particularly in the promotion of arbitration, which can bring substantial economic benefits.[10] Secondly, what if the context is arbitration rather than litigation before a national court? As arbitration is, in effect, litigation before a private court, the relevant considerations are clearly different. For example, a national court is not deferring to another nation's court through mechanisms such as *forum non conveniens*, and thus does not have a foreign sovereign in its consideration. The exact relationship between private international law and arbitration remains understudied despite their apparent connections.[11] Exploring this dimension tests the national interest theory in its broader application, deepens our understanding of the discipline, and generates predictions that are useful for policymakers. It is a natural sequel to the national interest theory. This article also serves as an endeavour to illustrate how an abstract theory on national interest can apply to the dynamics of private international law rulemaking.

Although the question as to how private international law should be developed for court litigation to serve the best interests of a country has been discussed,[12] a different question is asked here: how should private international law in commercial arbitration be developed so as to best promote the interests of these law districts within a nation? The combination of these two features leads us to conduct the present case study. How should a jurisdiction like Hong Kong design its private international law rules in a way that best promotes its interests in the commercial arbitration setting?

Hong Kong is chosen as this case study for three reasons. First, as a jurisdiction that has its own laws, including private international law, and a legal system independent of Mainland China, it fits squarely within the category of law districts described above. Secondly, Hong Kong has long been an international dispute resolution centre and a major promoter of international commercial arbitration, providing a rich set of

[9] FG Hemisphere Assocs. LLC v. Democratic Republic of the Congo, [2011] 14 H.K.C.F.A.R. 395; First Laser Ltd v. Fujian Enters. (Holdings) Co., [2012] H.K.C.F.A. 63 (per Lord Collins) ("Although the HKSAR and the Mainland PRC are part of one country, for the purposes of the conflict of laws they are separate law districts.").

[10] LAW COMM'N, REVIEW OF THE ARBITRATION ACT 1996: FINAL REPORT AND BILL ¶ 1.4 (2023), https://cdn.websitebuilder.service.justice.gov.uk/uploads/sites/54/2025/12/Arbitration-final-report-with-cover.pdf ("Arbitration is a major area of activity in England and Wales. In a 2021 survey, London was ranked as the most preferred seat for international arbitration.1 In our first consultation paper, we estimated that there are at least 5000 domestic and international arbitrations in England and Wales every year, potentially worth at least £2.5 billion to the economy, although the actual figures may be much higher.").

[11] GEORGE A. BERMANN, INTERNATIONAL ARBITRATION AND PRIVATE INTERNATIONAL LAW 17 (2017) ("[i]nternational arbitration… will always be closely associated with private international law – at least as much as it is associated with any classical division of the law. Indeed, given arbitration's international character and its core mission of resolving disputes between private parties, arbitration may fairly be regarded as the quintessential private international law endeavour.").

[12] Tsang, *Weaponization*, *supra* note 1, at 2-4.

arbitration-related issues and case law for study. Thirdly, as part of the common law family, Hong Kong has inherited much of its private international law from England. A comparison with other common law jurisdictions, each with their own interests, can therefore illuminate the role played by interests in shaping private international law. For the purposes of this study, we will mainly compare Hong Kong's rules with their counterparts in the United States, England, Australia, and Singapore. At the same time, as Hong Kong is part of China, many cases will inevitably involve a Chinese element and therefore the Mainland courts.

The timing of this research is also particularly apt. Over the past few years, courts in several common law jurisdictions have adopted different approaches to private international law in a number of important arbitration-related cases. These include cases on jurisdiction, choice of law, and enforcement of arbitral awards, otherwise known as the three core questions of private international law.[13] It should be emphasized that this article does not aim to provide a comprehensive review of all private international law rules relating to arbitration. Rather, the selected issues are the most representative and serve as examples to illustrate the interaction between private international law, arbitration, and the interests of law districts. As will be seen below, the selected issues are also the most controversial among the different jurisdictions under the study.

This article is arranged as follows. Section I sets out the general theory of national interest, showing both how national interest influences a country to make concessions and how it may also drive jurisdictional expansion in private international law. The reiteration of the general theory at the outset sets the stage for the discussion of how it can be extended to arbitration and law districts. Section II then explores four cutting-edge issues in private international law in the context of commercial arbitration across common law jurisdictions. In relation to choice of law, we examine which choice-of-law rule a law district should adopt for an arbitration agreement in the absence of an express governing law clause for that agreement. It then proceeds to discuss two issues in judicial jurisdiction: (i) whether a law district should defer insolvency jurisdiction to arbitration, and (ii) whether a law district should issue anti-suit injunctions (ASI) to protect arbitration proceedings. Finally, this section investigates how a law district should design the public policy exception in the enforcement of foreign arbitral awards so as best to serve its interests. Section III concludes by summarizing several taxonomies that may be derived from the study. It should be emphasized that although the analysis centres on a handful of jurisdictions such as Hong Kong, the theoretical framework developed in this article is intended to be applicable to other prominent law districts as well.

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[13] PETER HAY ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 3 (6th ed. 2018). Note however that the focus of this article on the third question is the enforcement of arbitral award instead of foreign judgment.

I. The National Interest Theory

The theory of national interest aims to explain how national interest shapes the historical development of private international law and to use that theory to predict the future of the discipline.[14]

First, national interest has always been a core driving force of private international law. Since modern nation-states emerged in the seventeenth century, private international law has been shaped by the interests of these nations.[15]

Secondly, since private international law consists of national laws, it is natural for these laws to serve the interests of the nation, just like any other branch of law. However, because private international law deals with cases involving foreign elements, it has more opportunities, and therefore greater importance, in influencing not only the interests of the nation enacting the rules, but also those of other countries.[16]

Thirdly, national interests are reflected in the three major questions of private international law, as summarized in the following table:[17]

	Concessions	**Expansion**
Jurisdiction	Forum non conveniens/ Lis pendens/ Foreign jurisdiction clause	Long arm jurisdiction/ ASI
Choice of Law	Foreign law application	Extraterritorial application of federal statutes
Enforcement of Foreign Judgment	Enforcement of Foreign judgment	Freezing injunction/ Turnover Order

Concessions constitute the majority of private international law cases. Due to the need to promote international transactions and interactions, countries have long found that making concessions in private international law, such as applying foreign law to give effect to private parties' choices, deferring to a foreign court that is the most appropriate forum to resolve the parties' disputes, and enforcing foreign judgments to avoid repeated litigation, promotes not only private parties' interests but also national interests in the form of increased trade.[18] This explains why many private international law rules are unilateral, without requiring foreign countries to reciprocate (the notable

[14] TSANG, NATIONAL INTEREST, *supra* note 1.
[15] Tsang, *Weaponization*, *supra* note 1, at 5-6.
[16] TSANG, NATIONAL INTEREST, *supra* note 1.
[17] *Id*.
[18] *Id*.

exception being reciprocity in the enforcement of foreign judgments, although that practice has increasingly been abandoned internationally),[19] and are traditionally not the product of international treaties. In other words, countries often act on their own initiative without asking anything from other countries in return. As a result, it has been observed that private international law has often flourished historically in major international trade centres.[20]

On the other hand, beyond concessions, there are also occasions where countries actively seek to undermine other countries' territorial jurisdiction by expanding their own judicial jurisdiction, imposing their law on conduct that takes place overseas, and indirectly enhancing the enforceability of their judgments against assets located in foreign countries.[21] These expansions are also the result of national interest. It is observed that expansion is more common among major countries with strong economic power, as they have greater capacity, often in the form of assets located within their borders, to substantiate such expansion.[22]

Accordingly, the protection of private parties' interests, while occupying a very important place in private international law, particularly in concession cases,[23] cannot explain all aspects of private international law, especially expansion, which often occurs at the expense of some private parties and foreign countries.[24] Public interests, which are another form of national interest, also form part of the equation.

This theory of national interest does not aim to weigh competing national interests in a given case in order to resolve a conflict, as in Currie's governmental interest analysis.[25] Instead, it is a theory that seeks to explain how rules come into existence in the first place and how they can be modified to maximize national interest. It is therefore a macro theory that explains the formation and development of the law, rather than a micro theory that explains the outcome of a particular case, since the latter is often influenced by idiosyncratic considerations that go beyond the broad interests captured by the former.[26] This is both a strength and a limitation of the national interest theory. It

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[19] Béligh Elbalti, *Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite*, 13 J. PRIV. INT'L L. 184 (2017).

[20] TSANG, NATIONAL INTEREST, *supra* note 1.

[21] Tsang, *Weaponization*, *supra* note 1, at 7-8.

[22] *Id.*

[23] *See* DICEY ET AL., *supra* note 5, at 5 ("The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence.").

[24] Tsang, *Weaponization*, *supra* note 1, at 3.

[25] For an introduction to Currie's governmental interest analysis, *see* Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242–43 (1963).

[26] By analogy, Kenneth Waltz in the field of international relations distinguishes between systemic theory and foreign policy theory. For a discussion, *see* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 72 (1979) ("System theories, whether political or economic, are theories that explain how the organization of a realm acts as a constraining and disposing force on the interacting units within it… From them, we can

is a strength because it is a high-level theory that can apply to all countries across different private international law issues. There is a limitation because it is not designed to explain the result of every individual case.

While the interests of a nation are broad and difficult to define, the national interest theory hypothesizes that there exists a hierarchy of interests for any nation:

(a) national security (level-one interest);
(b) strategic interests that influence long-term competitiveness (for example, high technology) (level-two interest);
(c) general commercial interests (level-three interest); and
(d) other interests (level-four interest).[27]

Under this hypothesis, national security and strategic interests are the most fundamental interests of a country, as all countries are assumed to care about their present and future security.[28] Due to the private nature of private international law, as compared with public international law, cases involving these high-level interests are rare, particularly the highest level national security. However, with the rise of high technology, there is a growing trend of cross-border disputes involving high-technology industries, and in turn conflicts implicating the second level of interest. General commercial interest occupies the third level.[29] It is the most common interest in private international law and consists of various commercial considerations such as the protection of private parties' expectations and autonomy.[30] It is safe to say that it is the main driving force behind the existence of private international law. However, where it conflicts with a higher-level interest, it is hypothesized that general commercial interest will yield.[31] Finally, other interests are also taken into account by countries in making private international law, but they are ranked lower than the higher-level interests. These include, for example, non-commercial interests such as those implicated in family law,[32] as well as more general considerations such as harmony with other countries and the effective use of judicial resources.

A theory built on these premises is useful in making predictions. For example, it predicts that countries are more likely to engage in the weaponization of private

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infer some things about the expected behavior and fate of the units: namely, how they will have to compete with and adjust to one another if they are to survive and flourish… How do we expect… states to [respond] differently [to] differently structured international-political systems? [This question is] answered by reference to the placement of the units in their system and not by reference to their internal qualities… Conversely… [a] theory about foreign policy is a theory at the national level.").

27 TSANG, NATIONAL INTEREST, *supra* note 1.

28 *Id*.

29 *Id*.

30 *See supra* note 5.

31 TSANG, NATIONAL INTEREST, *supra* note 1.

32 *Id*.

international law when national security and strategic interests are involved. By contrast, cooperation and harmony are more likely when non-commercial interests are involved, such as in family law.[33]

However, the national interest theory in its current form has yet to be utilized in the following situations.

First, how will the hierarchy of national interest guide the specific rulemaking when there are multiple national interests involved and they go beyond the simple case of a higher ranked national interest trumping a lowered ranked national interest?

Although the previous research on national interest theory sets a hypothetical hierarchy of national interests, to put it on an operational level may be more complicated than one may expect. While the theory can clearly predict which private international law rule a country will adopt when one of the two approaches furthers a higher interest, other scenarios are less clear. For example, what will happen if there are competing interests at the same level of interest? What if it is not clear which of the competing approaches further the single interest involved? There may be logical answers to these questions, but putting them to test on multiple real issues where countries are split on them will further harness the theoretical strength of the theory. As will be seen in Section II below, four specific scenarios are created to test the theory.

Secondly, what if the private international law in question belongs to one of the legal districts within a country that has multiple such law districts?

A simple example is instructive. In the classic case of *Hilton v Guyot*,[34] the US Supreme Court refused to enforce a French judgment due to the lack of reciprocity, that is, because France at that time would not enforce US judgments. In reaching this decision, the Court compared the enforcement practices of multiple major countries and concluded that reciprocity represented the international practice. It also established that comity is never an obligation.[35] Implicit in this reasoning, from a national interest perspective, is the idea that reciprocity helps promote the enforcement of US judgments overseas, a position that is still advocated by the American Law Institute in its latest proposal.[36] However, the requirement of reciprocity was not followed by the State of New York shortly after *Hilton v Guyot*.[37] The New York courts formally justified this position by distinguishing the enforcement of foreign judgments from matters of diplomacy, which fall within the exclusive domain of the US Supreme Court. From the perspective of the interest theory, New York, which was already the largest trading state

[33] *Id.*

[34] Hilton v. Guyot, 159 U.S. 113 (1895).

[35] *Id.* at 163–164.

[36] AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7(a) (2006).

[37] Johnston v. Compagnie Générale Transatlantique, 152 N.E. 121, 122–24 (1926).

at the time,[38] concluded that the enforcement of foreign judgments without reciprocity better promoted private parties' interests and therefore better served the interests of the State of New York. In other words, the interests of a law district are not necessarily identical to the national interest. This episode suggests that not all national interests are applicable to all law districts within a nation in the context of private international law. Occasionally, there may be conflict between the law district's interest and national interest as a whole.

The situation examined in this study, Hong Kong, is even more intriguing, given that the legal systems of Hong Kong and Mainland China differ far more substantially than those of New York and the federal system of the United States. Since the return of Hong Kong to China, a number of cases have concerned this constitutional relationship.[39] However, the precise implications of this relationship for private international law have not been fully explored by courts or scholars. Hong Kong, as a law district, preserves its own legal system subject to the Basic Law.[40] In the context of private international law, its conception of public policy may not be identical to that of a sovereign state, since matters of diplomacy and national defence fall within the exclusive domain of China.[41]

Thirdly, what if the body handling the cross-border dispute is not a foreign court, but a tribunal created voluntarily by the parties, namely an arbitral tribunal?

In the context of arbitration, a national court defers not to a foreign court, but to a private adjudicative body usually agreed upon by the parties *ex ante*. This creates a very different dynamic that may shape private international law in a different way.

In relation to judicial jurisdiction, the court does not have to examine whether there exists an alternative foreign court with jurisdiction over the dispute. The analysis is instead focused simply on whether there is a valid arbitration agreement. If such an agreement exists, the court is highly likely to defer to the arbitral tribunal, retaining only supervisory jurisdiction, without the broad discretion it exercises in *forum non conveniens* cases.[42]

The same is true of expansion in jurisdiction, for example in the case of ASIs. Unlike ASI in litigation, where courts distinguish between (i) cases involving an exclusive

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[38] BUREAU OF STAT., U.S. DEP'T OF THE TREASURY, STATISTICAL ABSTRACT OF THE UNITED STATES: 1896, at 110 table 39 (1897).

[39] *See, e.g.,* Ng Ka Ling v. Dir. of Immigration, [1999] 1 H.K.L.R.D. 315 (CFA); HKSAR v. Ng Kung Siu, [1999] 2 H.K.C.F.A.R. 442 (CFA); Lau Kong Yung v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 300 (CFA).

[40] XIANGGANG JIBEN FA (H.K.).

[41] *Id*. art. 19. Under Article 19, the courts of the HKSAR have no jurisdiction over acts of state such as defence and foreign affairs. Accordingly, Hong Kong's conception of public policy in private international law may differ from that of the PRC as a sovereign state, since diplomatic and national defence matters fall within the exclusive domain of the Central People's Government.

[42] New York Convention, *supra* note 7, art. II(3); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2237 (3d ed. 2021).

jurisdiction clause, in which case an injunction is likely to be granted on the basis of party autonomy, and (ii) cases without such a clause, in which case an injunction is granted only where the foreign proceedings are vexatious or oppressive and comity is a significant factor, in arbitration there is effectively only the former category.[43] An ASI will usually be issued when a party breaches an arbitration agreement by commencing litigation in a foreign court.[44]

Because the validity of the arbitration agreement plays such a significant role in the threshold question of jurisdiction, it also gives rise to a distinctive choice-of-law issue, namely the law governing the arbitration agreement. The arbitration agreement is severable from the rest of the contract.[45] As such, the governing law clause of the main contract does not automatically apply to the arbitration agreement. The determination of this governing law, particularly in the absence of an express choice-of-law clause for the arbitration agreement, is a controversial issue in private international law.[46]

Finally, since an arbitral award is the product of party autonomy, it enjoys a much higher likelihood of being enforced worldwide than a national court judgment, both in theory and in practice.[47] This is guaranteed by the New York Convention. Assuming the arbitration agreement is valid and enforceable, the only major exception is the public policy defence contained in that Convention.[48] By contrast, reciprocity, which is often found in the enforcement of foreign judgments in civil law jurisdictions including Mainland China,[49] has no place in the enforcement of arbitral awards under the New York Convention.[50] Moreover, while public policy is also a common exception in the enforcement of foreign judgments, the centrality of party autonomy in arbitration suggests that the public policy exception under the New York Convention should be interpreted much more narrowly.[51]

Having laid out these unexplored dimensions of the national interest theory, the following section uses Hong Kong arbitration as a case study to illustrate how the

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[43] *See* THOMAS RAPHAEL, THE ANTI-SUIT INJUNCTION ¶ 7.18 (2d ed. 2019) (noting that some commentators argue that breach of a contractual exclusive forum clause is in itself vexatious and oppressive, thereby treating the contractual basis for anti-suit injunctions as a specialized application of the general equitable principles governing such relief, rather than as a distinct and independent ground).

[44] Aggeliki Charis Compania Maritima S.A. v. Pagnan S.p.A. [1995] 1 Lloyd's Rep. 87 (CA) [hereinafter *The Angelic Grace*]; Enka [2020] UKSC 38.

[45] *See* BORN, *supra* note 42, at 375-376.

[46] *Id.*

[47] HAY ET AL., *supra* note 13, at 695.

[48] New York Convention, *supra* note 7, art. V(2)(b).

[49] Mínshì Sùsòng Fǎ (民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 24, 2021, effective Jan. 1, 2022) art. 288 [volume number, page number, and edition of Falü Huibian needed].

[50] Arguably though, reciprocity is embedded in the New York Convention. *See* New York Convention, *supra* note 7, art. I(3) (permitting a reciprocity reservation).

[51] *See* BORN, *supra* note 42, at 4005.

national interest theory can help refine the private international law rules applicable to commercial arbitration. In particular, Hong Kong arguably has a stronger interest in further developing itself as an arbitration hub than the rest of China.

II. Case Study: Hong Kong Private International Law Rules for Arbitration

Given the limited space of this article, it is not practicable to analyse every private international law rule governing arbitration. This section therefore focuses on four cutting-edge private international law issues that have arisen in common law jurisdictions, with particular focus on Hong Kong, and examines how the national interest theory may be applied to them.

Here we discuss four scenarios, each representing a distinct interaction between national interest and private international law approaches in the context of arbitration. As explained above, the national interest theory posits a hierarchy of four levels of national interest. In the first scenario, we examine a case in which one clear national interest supports a particular choice-of-law approach, while no equivalent interest supports the competing approach. We conclude that the approach aligned with the clear national interest should be preferred. In the second scenario, we analyse the ASI rule, where a higher-ranked national interest prevails over a lower-ranked one. The third scenario considers a more complex situation in which two competing interests at the same level collide, each supporting a different jurisdictional approach. Finally, the fourth scenario addresses a difficult enforcement problem in which a single national interest is clearly identified, yet it remains uncertain which of two competing approaches to the enforcement of arbitral awards best advances that interest. While these scenarios are examined in detail below, the following table summarizes them in mathematical form for presentation purposes.

Scenario	Situation	Mathematical Expression	Decision Rule	Determinacy
1	Interest vs No Interest	I_i vs I_0 where $i \in \{1,2,3,4\}$	$I_i \succ I_0$ always	**Determinate**
2	Higher vs Lower Interest	I_i vs I_j where $w_i > w_j$	$I_i \succ I_j$	**Determinate**
3	Same-Level Competing Interests	I_i vs I_i where $w_i = w_i$	$I_i \sim I_i^{(\ )}$(incomparable)	**Indeterminate** - requires external criteria
4	Single	Maximize I_i	$max(U(I_i))$where U i	**Indeterminate**

Scenario	Situation	Mathematical Expression	Decision Rule	Determinacy
	Interest Optimizati on		s utility function	- requires substantive analysis

Note: "$I_{interest\ level}$" represents one of the four national interests in the hierarchy of the national interest theory, where "I_0" denotes no national interest is at stake and "w" denotes the notional value of the interest at stake (i.e. interest level 1-4).

1. Governing Law of the Arbitration Agreement

The governing law of the arbitration agreement presents a distinctive issue that arises specifically in arbitration, and has no direct equivalent in the context of jurisdiction agreement in cross-border litigation before national courts. This peculiarity stems from the principle of severability, namely that the arbitration agreement is legally separable from the main contract.[52] As a result, the arbitration agreement must have its own governing law, and the governing law of the main contract does not necessarily extend to it.

In addition to the clear connection between the arbitration agreement and the governing law of the underlying contract, another law has a significant connection: the law of the place of arbitration, often referred to as the curial law, which governs the arbitral procedure.[53]

Among common law jurisdictions, it is generally accepted that parties may expressly choose the governing law of the arbitration agreement.[54] In practice, however, arbitration agreements rarely contain such an express provision.[55] This leaves courts to determine the governing law in the absence of express choice, with the debate largely centred on whether priority should be given to the governing law of the main contract or to the curial law. Historically, this question has generated considerable debate in common law courts.[56]

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[52] *See* BORN, *supra* note 42, at 375-376.

[53] *See* BORN, *supra* note 42, at 2822.

[54] *See* Enka [2020] UKSC 38 [257(ii)] (England); Anupam Mittal v Westbridge Ventures II Investment Holdings [2023] SGCA 1 [62(a)] (Singapore); China Railway (Group) Ltd v. Chung Kin Holdings Ltd [2023] HKCFI 132 [35] (Hong Kong); Rinehart v. Welker [2012] NSWCA 95 (Australia).

[55] *See* HKIAC statistics, *infra* note 72 and accompanying text.

[56] Enka [2020] UKSC 38, [45]–[52]; *see* also Michael Hwang et al., *The Enka v. Chubb/Anupam Mittal v. Westbridge Controversies: Why Not the Hong Kong (Partial) Solution?*, 41 J. INT'L ARB. 531–532 (2024).

The national interest theory offers a helpful perspective on this debate. As will be shown below, the competing approaches primarily engage three general commercial interests: (i) party autonomy, (ii) the promotion of arbitration and (iii) certainty. It is submitted that the curial law advances all three of these interests, and in two of them, more effectively than the governing law of the main contract. It should therefore be preferred.

The most prominent articulation of the approach favouring the main contract's governing law is found in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*, decided by the UK Supreme Court. Under the *Enka* rule, in the absence of express choice, the governing law of the arbitration agreement is determined by implied choice, with a presumption that the law governing the main contract also governs the arbitration agreement. This presumption is rebuttable. Where no implied choice can be identified, the court turns to the law with the closest connection, with a further presumption that this is the curial law.[57]

The rationale of the *Enka* approach lies in party autonomy. The court assumes that parties would ordinarily have intended the law governing the main contract to govern the arbitration agreement as well.[58] Party autonomy is undeniably a central concept in private international law, as well as in contract and commercial law more broadly.[59] The underlying rationale is that parties are best placed to determine their own interests, and that giving effect to their agreement facilitates commerce. Under the national interest theory, this promotes national commercial interests, again a third level interest.

However, while there is an obvious connection between the governing law of the main contract and the arbitration agreement, it is not the only plausible connection. It is equally arguable that the parties, by selecting a particular seat of arbitration, have implicitly chosen the curial law to govern the arbitration agreement. Reasonable parties, when asked which law they would have chosen in the absence of express provision, could well have chosen the law of the place of arbitration.[60] Accordingly, the curial law can arguably represent party autonomy to the same extent as the governing law of the main contract. In fact, the United Kingdom reformed its Arbitration Act 1996 in August 2025, following *Enka*'s decision. The Arbitration Act 2025 ("Arbitration Act") now

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[57] Enka [2020] UKSC 38, [170].

[58] Enka [2020] UKSC 38, [286]. ("[s]o that if the parties have chosen the proper law of the main contract they would ordinarily expect the same proper law to apply in relation to an arbitration agreement contained within it").

[59] BORN, *supra* note 42, at 64; Vita Food Prods. Inc. v. Unus Shipping Co. [1939] AC 279 (PC); ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 1 (2018).

[60] Enka [2020] UKSC 38, [143] ("As discussed earlier, it is reasonable to assume that parties who have chosen to settle their disputes by international arbitration want an arbitration that resolves all (and not only some) disputes through an award that is binding and enforceable and which is immune from collateral attacks, particularly in the home country of one of the parties. As a general rule, applying the law of the chosen seat of arbitration is calculated to achieve that purpose.")

designates a default rule of the governing law of the arbitration agreement to be the seat of the curial law.[61] This proposed default rule has been stated to have preserved party autonomy as well.[62]

Beyond this equivalence in relation to party autonomy, there are at least two additional general commercial interests that make the curial law approach preferable.

The first is the promotion of arbitration within the forum. Arbitration generates substantial economic benefits for the legal services sector.[63] Jurisdictions such as England, Hong Kong, and Singapore have actively sought to position themselves as leading international arbitration centres.[64] Adopting the curial law as the default governing law of the arbitration agreement significantly facilitates this objective of promoting arbitration within the forum. One of the primary functions of the governing law of the arbitration agreement is to determine its validity and scope.[65] Given that these arbitration centres have adopted strongly pro-arbitration substantive laws,[66] a curial law approach increases the likelihood that those pro-arbitration laws will apply, thereby enhancing the validity and effectiveness of arbitration agreements. In this sense, the curial law approach is inherently more pro-validity than the *Enka* approach.[67]

The second additional commercial interest is certainty. The *Enka* rule has been criticised for generating uncertainty, a concern noted by practitioners in the consultation process leading to the reform of the Arbitration Act.[68] Certainty is a crucial commercial interest in international transactions and dispute resolution. A rule that clearly prioritises the curial law provides a simpler and more predictable solution.[69]

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[61] Arbitration Act 2025, c. 4 (UK).

[62] LAW COMM'N, *supra* note 10, ¶ 12.53.

[63] Hong Kong Trade Dev. Council, *Enhancing Hong Kong's Position as the Leading International Arbitration Centre in Asia-Pacific* 6 (Nov. 2016) ("In 2014, the total Gross Value Added (GVA) of arbitrations (both direct and induced contribution) into Hong Kong was approximately HK$1.964 billion, which contributed to 13% of the legal sector's GDP, or around 0.09% of Hong Kong's total GDP").

[64] *See supra* note 8.

[65] *See* Luca G. Radicati di Brozolo, *Arbitration, International Commercial*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 93 (Jürgen Basedow et al. eds., 2017).

[66] *See* Jae Hee Suh & Harrison Chung, *A Tale of Two Seats: How Do Legislations on Arbitration in Hong Kong and Singapore Differ, and Do These Differences Matter?*, KLUWER ARB. BLOG (Apr. 7, 2024), https://legalblogs.wolterskluwer.com/arbitration-blog/a-tale-of-two-seats-how-do-legislations-on-arbitration-in-hong-kong-and-singapore-differ-and-do-these-differences-matter/.

[67] The validation principle is based on the assumption that contracting parties cannot have intended to apply a law to their arbitration agreement that would substantively invalidate it. *See* Enka [2020] UKSC 38, [251].

[68] LAW COMM'N, *supra* note 10, ¶ 12.22.

[69] BORN, *supra* note 42, ch. 4 §4.04[A][2][j] ("The Commission reasoned that the new "default rule" introduced by §6A would, by contrast, introduce "simplicity and certainty").

These considerations were also expressly recognised in the consultation process for the reform of the Arbitration Act,[70] which ultimately led to the adoption of the curial law as the governing law of the arbitration agreement in the absence of express choice. It is suggested that the same approach should be adopted in jurisdictions such as Hong Kong, which appears to lean towards the *Enka* rule, even though no clear case has adopted *Enka* on choice-of-law issue in the context of arbitration agreement.[71] The application of national interest theory in the choice-of-law context is summarized by this formula:

Scenario	Situation	Mathematical Expression	Decision Rule	Determinacy
1	Interest vs No Interest	$I_{lv3\ interest}$ vs I_0	$I_{lv3\ interest} \succ I_0$ always	**Determinate**

Empirical data from the HKIAC further underscore the significance of this issue.[72]

Summary of 759 cases registered with HKIAC from 2019 - 2022

Category	Number
Total cases registered (2019-2022)	759
Cases with at least one governing law for underlying agreement	730
Cases with two governing laws for underlying agreement	5
Cases with no governing law for underlying agreement	29
Cases with separate governing law clause for arbitration agreement	74
Cases with Hong Kong law chosen for arbitration agreement only	68
Cases with no explicit governing law for arbitration agreement	667
Cases with incomplete/unclear governing law clause	18

[70] LAW COMM'N, *supra* note 10, ¶¶ 12.10–12.20.

[71] *See* China Railway (Group) Ltd v. Chung Kin Holdings Ltd, [2023] H.K.C.F.I. 132 (citing *Enka* in the context of jurisdiction agreement, and as such did not apply *Enka* on the choice-of-law issue regarding arbitration agreement). For pre-Enka Hong Kong position, *see* OCBC Wing Hang Bank Ltd v Kai Sen Shipping Co Ltd, [2020] H.K.C.U. 408 (applying Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd, [2016] H.K.L.R.D. 1032; Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd [2011] 4 H.K.L.R.D. 262).

[72] *See* Hwang et al., *supra* note 56, at 546–547.

Cases with separate governing law clause for arbitration agreement

Governing Law	Number of Cases
Hong Kong law	68
English law	4
Philippines law	1
California law	1

First, the data shows that most arbitration agreements seated in Hong Kong do not contain an express governing law for the arbitration agreement, highlighting the practical importance of the default choice-of-law rule in the absence of choice. Second, the majority of the underlying contracts contain a choice-of-law clause. Generally, it is expected that a substantial proportion of these clauses designate foreign laws as the governing law.[73] Under the *Enka* approach, this would frequently result in the arbitration agreement being governed by foreign law rather than Hong Kong law (which is usually a more pro-arbitration law), even where the arbitration is seated in Hong Kong. This risks undermining the application of Hong Kong's pro-arbitration legal framework to arbitrations conducted in Hong Kong. For example, a Hong Kong arbitration may be invalidated as a result.

Accordingly, both the English experience and the current situation in Hong Kong suggest that the curial law approach is preferable. It is equally consistent with party autonomy as the governing law of the main contract, while being more supportive of arbitration and offering greater certainty. These latter considerations are general commercial interests at the third level of the hierarchy, and there are no higher-level interests favouring the main contract's governing law.

From the perspective of the national interest theory, this issue leads to a clear conclusion. It demonstrates that the theory is capable of generating useful predictions in the arbitration context, notwithstanding arbitration's distinctive features. It also shows that the theory applies equally to Hong Kong as a law district. At least in relation to the governing law of the arbitration agreement, Hong Kong's position should be no different from that of sovereign states such as England.

[73] Many international contracts are governed by law other than the law of the seat of the arbitration. This is certainly the case for the UK, *see* LAW COMM'N, REVIEW OF THE ARBITRATION ACT 1996: SECOND CONSULTATION PAPER—SUMMARY ¶ 1.19 (Mar. 2023) ("many international contracts, despite providing for an arbitration to be seated in England and Wales, have a foreign choice of law clause in the matrix contract.").

2. Jurisdiction — Anti-Suit Injunctions and Deference to Arbitration Agreements

Like governing law, jurisdictional rules are driven by national interest. Unlike litigation before national courts, however, where jurisdictions may derive authority on multiple bases, arbitration jurisdiction is founded entirely on party agreement.[74] From a national interest perspective, arbitration therefore always implicates party autonomy, which generally promotes commercial interests. Courts thus typically defer to arbitral tribunals, which function as private courts constituted by the parties' consent.[75]

The more intriguing questions arise where courts either (i) issue ASI in response to foreign proceedings commenced in breach of such arbitration agreements, or (ii) decline to defer to arbitration seated in a foreign jurisdiction despite the presence of a valid arbitration agreement. Although these two phenomena appear distinct, they are clearly related and can both be examined through the same national interest framework. This section begins with the comparatively easier case of ASI, before turning to the more complex question of resisting deference to arbitration.

a. ASI

By definition, an ASI is among the most intrusive remedies in private international law. Although formally *in personam* and directed at the litigant rather than the foreign court,[76] a successful ASI typically results in the termination or suspension of foreign proceedings, thereby indirectly encroaching upon the foreign court's jurisdiction. The issuance of ASI is fundamentally driven by national interest.

In ASI cases, two general national interests are typically at stake. The first is a commercial interest in facilitating dispute resolution in the forum regarded as appropriate, often described as the "natural forum," and in restraining unconscionable conduct. The second is the national interest in avoiding potential retaliation by foreign courts or governments, commonly described as "comity." Although comity is often framed as consideration for the interests of foreign states, it is understood herein as an assessment of how foreign courts or governments may respond to the ASI in ways that could harm the forum's own interests under the national interest theory.

In practice, the most common foreign response is the issuance of an anti-anti-suit injunction (AASI), which restrains enforcement of the ASI.[77] Such a response is largely defensive and does not enjoin the main proceeding in the forum. It therefore does not

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74 BORN, *supra* note 42, at 259–262.

75 New York Convention, *supra* note 7, arts. II(1), II(3).

76 RAPHAEL, *supra* note 43, ¶ 3.42.

77 Yongrui (Raymond) Zhu et al., *The Trend and Implication of China's Anti-Suit Injunctions*, in THE ASIA-PACIFIC ARBITRATION REVIEW 2026 (Global Arbitration Review 2026).

typically harm the forum's interests. Strong diplomatic reactions are rare and tend to occur only where the dispute implicates strategic or national security interests.[78] Since the first interest, if established successfully, is a general commercial interest, whereas comity generally falls within the category of "other interests" in the hierarchy, English law and jurisdictions following the English approach have traditionally permitted ASI, subject to a case-by-case assessment in which comity remains a relevant consideration.[79] This can be illustrated by the formula below:

Scenario	Situation	Mathematical Expression	Decision Rule	Determinacy
2	Higher vs Lower Interest	$I_{lv3\ interest}$ vs $I_{lv4\ interest}$	$I_{lv3\ interest} \succ I_{lv4\ interest}$	**Determinate**

The case for issuing ASI is even stronger where the foreign proceedings are brought in breach of an arbitration agreement or an exclusive jurisdiction clause designating arbitration or litigation in the forum. In such cases, there is a clear commercial interest in protecting party autonomy, alongside the interest in safeguarding the local forum for dispute resolution. Accordingly, since *The Angelic Grace*,[80] English courts have generally held that comity considerations do not arise where foreign proceedings are commenced in breach of an exclusive jurisdiction clause or arbitration agreement.[81]

Formally, this rule is justified by reference to party autonomy: where parties have freely agreed to arbitrate, restraining foreign proceedings does not offend comity.[82] From a national interest perspective, however, this explanation is incomplete. The very fact that a foreign court has assumed jurisdiction indicates that it does not regard party autonomy as determinative in that particular case. Even where foreign courts generally respect party autonomy, their interpretation of an arbitration or jurisdiction clause may

[78] *See infra* footnote 92.

[79] Société Nationale Industrielle Aérospatiale v. Lee Kui Jak [1987] AC 871 (PC); Airbus Industrie GIE v. Patel [1999] 1 AC 119 (HL).

[80] The Angelic Grace, *supra* note 44.

[81] Some commentators argue that where a contractual forum clause has been held to apply, the Angelic Grace tests sufficiently account for comity from all perspectives, such that comity considerations cannot amount to strong reasons to refuse an injunction. However, while comity has reduced importance in the context of contractual forum clauses, it remains relevant to contractual anti-suit injunctions, and where the circumstances create specific tensions with the demands of comity beyond those inherent in any injunction restraining foreign proceedings, this should be capable of amounting to "strong reasons" not to grant an injunction. Further, the demands of comity may be of sufficient importance that, in appropriate cases, they should be capable of displacing the Angelic Grace tests altogether. *See* RAPHAEL, *supra* note 43, ¶ 8.24.

[82] UniCredit Bank GmbH v. RusChemAlliance LLC [2025] EWCA Civ 99 [79] (CA) ("Secondly, when the obligation to refer the dispute to arbitration is the subject of international agreement among the states concerned, considerations of comity have little, if any, role to play.").

differ.[83] Further, an ASI may be issued without requiring an application to be made first to the foreign court to decline jurisdiction under the doctrine of *forum non conveniens*,[84] even though doing so will be clearly more in the spirit of "comity."[85] A more convincing explanation is that, in the presence of an arbitration agreement, held to be valid by the forum, the forum's commercial interest in promoting trade by enforcing the parties' bargains is regarded as outweighing any concern about potential foreign retaliation.

This dynamic is illustrated by *Bank A v Bank B*[86] in Hong Kong and its English counterpart *UniCredit Bank GmbH v RusChemAlliance LLC*,[87] both arising from Russian courts' assuming jurisdiction in breach of foreign arbitration agreements.

Following the outbreak of the Russo-Ukrainian war, the European Union (EU) imposed economic sanctions on Russia.[88] One consequence of these sanctions concerned the enforceability of contracts between Russian and European entities, particularly in the energy sector. Anticipating these economic sanctions, Russia amended its Code of Arbitrazh Procedure in June 2020 to provide, *inter alia*, that: (1) Russian courts would have exclusive jurisdiction over disputes involving "discriminated" Russian companies subject to foreign litigation or arbitration; and (2) Russian courts could issue ASI and anti-arbitration injunctions against foreign proceedings.[89] Since the imposition of sanctions, Russian courts have treated many Russian companies involved in the relevant transactions as "discriminated," even where they were not directly sanctioned by the EU.[90]

In *Bank A v Bank B*, the Hong Kong court was asked to issue an ASI restraining Russian proceedings commenced pursuant to the amended Russian Code of Arbitrazh Procedure in breach of a Hong Kong arbitration agreement. Consistent with long-

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[83] For an example of a foreign court not agreeing to the interpretation of an exclusive jurisdiction agreement, *see* Compania Sud Americana De Vapores S.A. v. Hin-Pro International Logistics Ltd (FACV 1/2016, 14 Nov. 2016) (CFA).

[84] *See* The Angelic Grace, *supra* note 44, at 95 ("I can think of nothing more patronising than for the [domestic court] to adopt the attitude that if the [foreign court] declines jurisdiction, that would meet with the approval of the [domestic court], whereas if the [foreign court] assumed jurisdiction, the [domestic court] would then consider whether at that stage, to intervene by jurisdiction. That would be not only invidious but the reverse of comity."), cited in approval by Hong Kong court in China City Construction (International) Co., Limited, [2025] H.K.C.F.I. 710, ¶ 51.

[85] Such is clearly the view of Professor Lowenfeld even though he did not use the term "comity," *see* Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314 (1997).

[86] Bank A v. Bank B, [2024] H.K.C.F.I. 2529.

[87] UniCredit Bank GmbH v. RusChemAlliance LLC [2024] UKSC 30.

[88] *Id.*, at 4.

[89] Irina Varyushina, *Baker McKenzie International Arbitration Yearbook 2020–2021 – Russia*, GLOB. ARB. NEWS (Jan. 1, 2021), https://www.globalarbitrationnews.com/2021/01/01/baker-mckenzie-international-arbitration-yearbook-2020-2021-russia/.

[90] UniCredit Bank GmbH [2024] UKSC 30, [664].

established English and Hong Kong authorities, the court did not consider comity concerns vis-à-vis Russia to be a barrier to granting relief.[91]

Although the court did not frame its reasoning explicitly in terms of national interest, the decision aligns closely with a national interest analysis. Two clear commercial interests supported the issuance of ASI: first, the protection of party autonomy; second, the protection of arbitration seated in Hong Kong. The first has already been discussed in the governing law context. The second operates somewhat differently here. Whereas the governing law analysis seeks to ensure the validity of arbitration agreements, ASI seeks to prevent foreign courts from undermining ongoing or contemplated arbitration. Both, however, serve the same objective of preserving the forum's arbitration. A similar approach has been adopted in Singapore, where courts have recently issued ASI restraining Indian proceedings brought in breach of arbitration agreements designating Singapore as the seat.[92]

This interest contrasts with the position in Australia. Although Australian courts have inherited ASI doctrine from England, they have historically issued ASI sparingly. This might be explained by the comparatively weaker national interest in promoting Australia as an arbitration hub, relative to England, Hong Kong, and Singapore. While this explains Australian practice, it does not undermine the general justification for ASI based on party autonomy alone.

It is also important to note that an ASI issued by a Hong Kong court restrains only the foreign proceedings. Even without ASI, the Hong Kong arbitration could theoretically continue. In practice, however, the threat of parallel proceedings may coerce settlement and undermine the very purpose of arbitration, which is to eliminate such duplication.

At the other end of the spectrum lies the interest in avoiding infringement of foreign national interests. In most commercial disputes, this interest is weak. As mentioned above, retaliation by foreign states with teeth is rare unless the dispute implicates national security or strategic concerns. The well-known diplomatic protests following *Laker Airways*[93] illustrate this point, as that case involved aviation competition and the

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[91] Bank A [2024] HKCFI 2529, [97] ("As explained in the earlier parts of this judgment, I do not accept the Defendant's proposition that the Hong Kong Court, in exercising its discretion in this case, has to 'work in harmony with the executive' with regard to the foreign policy and foreign affairs of the PRC with regard to sanctions. There is no question of this Court giving effect to the EU Sanction merely by granting the anti-suit injunction and anti-enforcement injunction and associated relief on the basis of the Arbitration Clause in the TSA made between and agreed to by the Defendant, and no question of the Court acting against the public policy of Hong Kong as a result. The relevant public policy in play on the facts of the present case is that of upholding the parties' autonomy and their agreement to submit their disputes to arbitration in Hong Kong.").

[92] Anupam Mittal v. Westbridge Ventures II Inv. Holdings [2023] SGCA 1.

[93] Laker Airways Ltd v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

extraterritorial application of US antitrust law.[94] More commonly, foreign courts respond with AASI, which merely restrains enforcement of ASI and does not prevent parallel proceedings.[95] In such circumstances, the worst outcome for the forum court is the ineffectiveness of the ASI.[96]

Accordingly, the Hong Kong court's approach accords with national interest analysis. As noted earlier, the national interest theory is better suited to evaluating the soundness of rules rather than their application in individual cases, which may turn on idiosyncratic considerations beyond the theory's scope.[97]

The more controversial development arises from the UK Supreme Court's decision in *UniCredit*. That case similarly involved Russian courts assuming jurisdiction in breach of a foreign arbitration agreement, but the arbitration was seated in France. Because French law does not recognise ASI, *UniCredit* sought relief from the English courts. The central question was whether an English court could issue ASI in support of *foreign* arbitration instead of the usual arbitration seated in England.[98]

The UKSC considered that it had jurisdiction to issue ASI based on (i) the then-prevailing *Enka* approach (finding that the arbitration agreement was governed by English law due to the English governing law clause in the underlying agreement);[99] and (ii) the English court was the proper forum to hear the ASI claim.[100] Relying on such jurisdiction, the UKSC found it appropriate to issue ASI against the Russian proceedings.[101] Although it did not consider comity concerns in relation to Russia, it did examine comity vis-à-vis France, which had supervisory jurisdiction over the arbitration. Finding no evidence that French courts would object, the court concluded that comity was not infringed.[102] It has since been argued that the UKSC in *UniCredit* adopted a novel approach, viewing the claim as one for breach of contract and that the contractual goal of enforcing an

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[94] Robert Cannon, Laker Airways and the Courts: A New Method of Blocking the Extraterritorial Application of U.S. Antitrust Laws, 7 J. COMP. BUS. & CAP. MKT. L. 63 (1985).

[95] *See supra* note 77 and accompanying text.

[96] UniCredit Bank GmbH [2025] EWCA Civ 99 (CA) (varying the ASI following the Russian AASI).

[97] *See supra* note 26 and accompanying text.

[98] UniCredit Bank GmbH [2024] UKSC 30.

[99] *Id.*, [21].

[100] *Id.*, [112].

[101] *Id.*, [113].

[102] *Id.*, [101] ("This is not a case where the French court is already, or is likely to be, seized of the matter, nor where the exercise by the English court of its power to grant an anti-suit injunction would or might produce a clash with any exercise of jurisdiction by the French courts so as to give rise to any issue of comity. There is in fact no possibility that the French courts could be seized of the matter. Not only, as is agreed, do the French courts have no power to grant anti-suit injunctions, but uncontradicted evidence which was before the judge shows that the French courts would not have jurisdiction to determine a claim of any kind brought by UniCredit complaining of a breach by RusChem of the arbitration agreements in the bonds.").

arbitration agreement displaced the private international law principles of comity and territorial connection.[103]

From a national interest perspective, however, the outcome in *UniCredit* is not exactly novel. Not only is it defensible on the facts of the case, but it should also be adopted by other pro-arbitration jurisdictions such as Hong Kong. Although arbitration may not be seated in the forum in such cases, making the local arbitration interest therefore weaker, party autonomy remains a core general commercial interest. Where countervailing foreign interests are limited, there is no principled reason at the level of rule design to deny courts the power to issue ASI in support of foreign arbitration proceedings.

It may be argued that *UniCredit* was influenced by the broader geopolitical context, given the United Kingdom's national security interests in the Russo-Ukrainian conflict (a level-one interest). Issuing ASI could be viewed as a symbolic response to Russian courts' systematic disregard of foreign arbitration agreements. That said, the UKSC did not rely on national security considerations in the judgment, and the reasoning remains persuasive even absent such interests.

One factor that merits closer attention is effectiveness. Following issuance of ASI, Russian courts promptly issued AASI threatening significant penalties.[104] When it became apparent that the Russian entity held no assets in England, the English Court of Appeal permitted withdrawal of the ASI upon request by the original applicant of the ASI in view of the Russian AASI.[105] From a national interest perspective, an ineffective ASI yields little benefit (failing to address level-three commercial interest) while consuming judicial resources (which are level-four interests). Had ineffectiveness been apparent at the outset, ASI should not have been granted from the perspective of the national interest theory.

Accordingly, the *UniCredit* approach (granting ASI in aid of foreign arbitration proceedings) should be adopted by Hong Kong courts where jurisdiction exists. While a forum will ordinarily have a stronger interest in protecting arbitration seated within its

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[103] Commentators have expressed their views on this novel decision by the UK Supreme Court in *UniCredit*. *See* Richard Fentiman, *Enforcing Foreign Arbitration Agreements*, 84 CAMBRIDGE L.J. 47, 47–50 (2025) (the UK Supreme Court has been criticised for overextending its jurisdictional reach by prioritising contractual enforcement over established private international law principles. The sole connection to England — that English law governed the arbitration agreements — is considered too weak a basis for jurisdiction, particularly as this was not expressly agreed and raised no difficult questions of English law. *See also* RAPHAEL, *supra* note 43, ¶ 7.50–7.51 (suggesting that the English court does not, in general, have a sufficient interest to intervene by injunction in favour of a foreign arbitration clause, and that some specific good reason beyond mere residence of the injunction defendant within the court's jurisdiction should be required to justify such intervention, as the inability of a foreign arbitral tribunal to protect itself does not, without more, provide adequate justification for the English court to assume the role of enforcer).

[104] UniCredit Bank GmbH [2025] EWCA Civ 99, [3].

[105] *Id.*

territory, the national interest theory supports a general rule enabling courts to issue ASI to protect arbitration, whether local or foreign, where higher-level commercial interests outweigh lower-level concerns relating to comity.

Lastly, regarding national security, it must be added that a higher level of security interest should not be invoked lightly. In *Bank A v Bank B*, the defendant argued that the granting of the ASI by a Hong Kong court would be contrary to the foreign policy or affairs of China by essentially giving effect to the EU sanction.[106] The court rightfully rejected this argument, noting that no sanctions were imposed on any Chinese entity or assets.[107]

b. Resisting Deference to Arbitration Agreements

In contrast to the issuance of ASI, decisions on whether to resist deference to arbitration agreements engage a wider range of interests and therefore produce more varied outcomes under the national interest theory.

The easier case is again illustrated by *UniCredit*, where Russian courts permitted sanctioned Russian entities to litigate in Russia notwithstanding foreign arbitration agreements. As a matter of general observation, Russia is regarded as supportive of arbitration, reflecting its commercial interests.[108] The shift following the outbreak of the Russo-Ukrainian war reflects a recalibration of interests: national security, a level-one interest under the national interest theory, was prioritised over the level-three general commercial interest in respecting arbitration agreements. From this perspective, Russia's anti-arbitration stance, as well as its deployment of ASI, anti-arbitration injunctions, and AASI, is internally coherent within its own national interest framework.

Formally, the Russian judiciary claims that international arbitration must be premised on the principle of 'equality of arms,' which necessitates that parties possess comparable capabilities to retain counsel, discharge procedural costs, and present their case.[109] As sanctions materially impair these capabilities, Russian courts perceive such restrictions as effectively depriving sanctioned parties of access to justice in

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[106] Bank A, [2024] H.K.C.F.I. 2529, [88].

[107] *Id.*, [90].

[108] See Daria Astakhova, *Introduction to Russian Private International Law*, in PRIVATE INTERNATIONAL LAW IN RUSSIA 13 (Anton Asoskov et al. eds., 2024) ("The history of the development of the Russian concept of PIL shows that it was conditioned by the progressive opening of the Russian state to cooperation with other states, the expansion of international trade, and the increasing involvement of Russian nationals in legal relationships with their foreign counterparts. According to Mikhail Boguslavsky, the interest in PIL in Russia is explained in particular by the access of Russian companies to the international market, the expansion of labour migration processes, the expansion of various contacts between Russian and foreign citizens, the accession of Russia to a number of international organisations, and an increasing number of cases involving foreign parties examined in the courts and by way of arbitration.").

[109] Sebastiano Nessi & Elena Murashko, *The Battle for Jurisdiction: Navigating the Irreconcilable Divide Between UK and Russian Courts in Disputes Involving Sanctions and Arbitration Agreements*, 43 ASA Bull. 259 (2025).

foreign jurisdictions.[110] Whether this view is convincing or not, there is no question that the Russian rule is formulated to address a broader issue of national security and for that high level of interest, the choice is an easy one.

The more difficult scenario arises where competing interests operate at the same level. This is exemplified by the question whether a court should defer its insolvency jurisdiction in favour of foreign arbitration proceedings, or instead resist such deference in order to assert insolvency jurisdiction. This issue will be examined next, followed by enforcement of foreign arbitral awards, which presents a further complex challenge for the national interest theory.

Among common law jurisdictions, there is currently a divergence of approaches as to whether, and to what extent, insolvency proceedings should be stayed or deferred in favour of arbitration.

Broadly speaking, three approaches may be identified. At one end of the spectrum is a strong preference for deference to arbitration, represented by the former English position and the current Singaporean approach.[111] At the other end is a strong preference against deference, represented by the current English and Cayman position following the Privy Council's decision in *Sian Participation Corporation (In Liquidation) v Halimeda International Ltd*.[112] In between lies an intermediate approach, represented by Hong Kong law. The discussion begins with the recent decision of the Hong Kong Court of Final Appeal in *Re Guy Kwok-hung Lam*,[113] which has set the tone for subsequent Hong Kong cases on the interaction between insolvency jurisdiction and arbitration agreements.

<u>The Hong Kong Approach</u>

The facts of *Guy Lam* were relatively straightforward. The debtor, a Hong Kong resident, was subject to a bankruptcy petition in Hong Kong. He argued that the Hong Kong court should decline to exercise its bankruptcy jurisdiction and defer to the New York courts, on the basis that the underlying debt was subject to an exclusive jurisdiction clause (EJC) in favour of New York. This argument was rejected at first instance by Madam Justice Linda Chan, who held that while a foreign exclusive jurisdiction clause was a relevant factor in the court's exercise of its bankruptcy jurisdiction, it was not binding on the court.[114] That decision was reversed by the Court of Appeal, which held that the Hong Kong court should generally defer to the foreign court designated by the exclusive

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[110] *Id.*

[111] Salford Estates (No.2) Ltd v. Altomart Ltd [2014] EWCA Civ 1575; AnAn Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Stock Co.) [2020] SGCA 33.

[112] Sian Participation Corp v. Halimeda Int'l Ltd. [2024] UKPC 16.

[113] Re Guy Kwok-Hung Lam, [2023] 26 H.K.C.F.A.R. 119 (CFA).

[114] Re Guy Kwok-Hung Lam, [2021] H.K.C.U. 3397 (CFI).

jurisdiction clause.[115] The Court of Appeal's decision was subsequently upheld by the Court of Final Appeal.[116]

Importantly, however, the Court of Final Appeal left room for exceptions. It emphasised that the discretion to defer bankruptcy proceedings may not be exercised where there is a higher interest in protecting creditors, such as in cases involving multiple creditors rather than a single-creditor petition as in *Guy Lam*.[117] The distinction between single-creditor and multi-creditor cases was later highlighted by Mr Justice Johnson Lam PJ, another Permanent Judge of the Court of Final Appeal, in a paper presented at a judicial symposium:[118]

> "In a multi-creditor scenario, there is obviously a greater interest in having a liquidator or trustee in bankruptcy appointed to ensure orderly *pari passu* distribution of the debtor's assets. When there are other creditors who have interests in the orderly distribution of assets, a creditor whose debt is not subject to an EJC or arbitration clause can support the petition or apply to be substituted as the petitioner in winding-up proceedings... Therefore, the question of how much weight is to be accorded to a parties' EJC or arbitration clause assumes less significance in cases where there are other creditors."

In addition, the Court of Final Appeal stressed in *Guy Lam* that there must be a genuine attempt to invoke the EJC. In a subsequent decision, *Re Simplicity & Vogue Retailing (HK) Co., Limited*,[119] the Court of Appeal confirmed that the *Guy Lam* approach applies equally to arbitration agreements.[120]

<u>The Singaporean Approach</u>

Prior to *Guy Lam*, the Singapore Court of Appeal had adopted a broadly similar, but more arbitration-friendly, approach in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*.[121] Under what it described as a "*prima facie*" standard, the Singapore courts will generally defer to an arbitration agreement if there is a *prima facie*

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[115] Re Guy Kwok-Hung Lam, [2022] HKCU 4201 (CA).

[116] Re Guy Kwok-Hung Lam, [2023] 26 H.K.C.F.A.R. 119 (CFA).

[117] *Id.*, [102]-[103] ("...The significance of the public policy of the legislative scheme for bankruptcy jurisdiction is much diminished where the petition is brought by one creditor against another and there is no evidence of a creditor community at risk. Where that factor exists it may be evidenced by another creditor presenting a petition... While there may be some effect on the timing of the instigation of any consequential bankruptcy proceedings in Hong Kong, the absence of other creditors pursuing the Respondent is an indicator that the public interest is unlikely to be adversely affected by such a delay.").

[118] Johnson Lam PJ, The Relevance or Irrelevance of Party Autonomy in Insolvency Proceedings, Address at the Asia-Pacific Judicial Colloquium 27–28 (Mar. 24–26, 2025).

[119] Re Simplicity & Vogue Retailing (HK) Co., [2024] H.K.C.A. 299.

[120] *Id.,* [47]. In fact, the Court of Appeal was in the opinion that the public policy in favour of deferring to arbitration agreement is even stronger given the statutory framework protective of arbitration, *see id.*, [37].

[121] AnAn Group [2020] SGCA 33.

case that the clause is valid and that the dispute falls within its scope.[122] Unlike the Hong Kong approach in *Guy Lam*, the Singaporean standard does not require courts to weigh competing interests on a case-by-case basis. Instead, the "*prima facie*" standard imposes minimal scrutiny on the merits of the case in dispute and is willing to decline insolvency jurisdiction once such minimal standard is satisfied.[123] This may therefore be regarded as even more favourable to arbitration and an approach with more certainty when compared to the approach in *Guy Lam*.

<u>The English Approach</u>

In contrast, subsequent to *Guy Lam*, the Privy Council declined to adopt that approach in *Sian*, an appeal from the Cayman Islands. The Privy Council acknowledged at the outset that the relevant authorities in common law jurisdictions reflect a tension between two competing public policies: party autonomy embodied in arbitration agreements, and the insolvency jurisdiction, which seeks to ensure the orderly distribution of a company's (or an individual's) assets among creditors.[124] Although described as public policies, these considerations are more accurately understood as interests of the forum. That is, from the point of view of the forum, two competing, if not mutually exclusive interests.

Rather than weighing these competing interests, as in *Guy Lam*, the Privy Council resolved the conflict on a technical ground. It held that in determining whether a debt exists for the purpose of insolvency proceedings, the court is not resolving a dispute on the merits.[125] In the words of the court, "this is because [a winding up] petition or

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[122] *Id.*, [56] ("In our judgment, when a court is faced with either a disputed debt *or* a cross-claim that is subject to an arbitration agreement, the *prima facie* standard should apply, such that the winding-up proceedings will be stayed or dismissed as long as (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in abuse of the court's process.").

[123] *Id.*, [100] ("Thus, in determining whether an applicant for a stay or dismissal of the winding-up application is guilty of an abuse of process, the court must be wary that it does not engage in examining the merits of the parties' dispute, since the court is not the proper forum to adjudicate the dispute between the parties.").

[124] Sian [2024] UKPC 16, [1] ("This appeal is about the dividing line between two areas of public policy in the British Virgin Islands ('the BVI'), namely insolvency and arbitration. Put in the broadest terms, it is in the public interest that there should be a relatively simple means whereby a company which is insolvent, because it is unable to pay its debts in full as they fall due, should (unless it can be reconstructed) be placed without undue delay into an insolvency process whereby its assets are divided fairly (mainly pari passu) between all its creditors. At the same time there is a public policy that those who agree together to resolve their disputes by arbitration should be held to that agreement without interference from the courts."); for similar observation on the competing interests by Singapore court, *see* Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] 3 SLR 414, [1]: "Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, arbitration embodies the principles of party autonomy and the decentralization of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralization of disputes so as to achieve economic efficiency and optimal returns for creditors.").

[125] *Id.*, [92].

application does not seek to, and does not, resolve or determine anything about the petitioner's claim to be owed money by the company. Nor is the existence or amount of the debt a matter or issue for resolution in those proceedings."[126] Accordingly, the presentation of an insolvency petition does not breach an arbitration agreement, and the existence of such a clause therefore plays no role in the court's discretion to stay insolvency proceedings.[127] The effect of *Sian* is to leave no room for exceptions based on the presence of an arbitration agreement. Despite its technical reasoning, the decision effectively signals a preference for preserving the insolvency jurisdiction of the court. Accordingly, the Privy Council opts for the public policy (or in our terminology, national interest) of creditors' protection over party autonomy.

These different approaches have generated extensive debate among practitioners, judges, and academics as to the proper approach to the interaction between insolvency proceedings and arbitration agreements. For example, it has been suggested that there are good reasons for adopting *Sian* in Hong Kong by certain commentators, arguing *inter alia*, that the *Sian* approach prevents delay and abuse by insolvent debtors using arbitration agreements as a tactical delay to generate unnecessary litigation. In the meantime, that the *Sian* approach, despite as it may seem, is not "anti-arbitration" in the sense that if a debt is truly disputed, the petition will be dismissed and arbitration will prevail.[128] This again follows the technical analysis regarding the nature of the insolvency proceedings in *Sian*. On the other hand, Mr. Justice Johnson Lam PJ argued that the *Guy Lam* approach properly recognizes party autonomy while maintaining necessary flexibility for legitimate insolvency concerns, whereas *Sian* takes an overly restrictive view that fails to account for how insolvency proceedings actually interfere with agreed dispute resolution mechanisms.[129] From a technical perspective, it is difficult to resolve this debate as there are clearly pros and cons of the different approaches. While there may not be a one-size-fits-all answer, the national interest theory provides an additional lens on the better approach based on the interest profiles of a given jurisdiction.

From the perspective of the national interest theory, this line of cases illustrates a conflict between two camps of competing interests, all of which fall within the category of general commercial interests at the third level of the hierarchy. On one hand, there are two general commercial interests from the pro-arbitration camp. The first is the interest in party autonomy. By designating a foreign court through an exclusive jurisdiction clause or choosing arbitration through an arbitration agreement, parties have made an *ex ante* choice as to the forum for dispute resolution. Respecting that

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[126] *Id.*, [88].
[127] *Id.*, [121].
[128] Justin Ho & Danny Tang, *The Hong Kong and English Approaches to Arbitrable Petition Debts After* Sian *Participation: Diametrically Opposed or Fundamentally Similar?*, 20 ASIAN INT'L ARB. J. 157, 169 (2024).
[129] Johnson Lam PJ, *supra* note 118, at 32.

choice is thought to promote international commerce by enhancing certainty and predictability.[130] In addition, the jurisdiction designated by the clause, whether a court or an arbitral seat, may derive economic benefits from the resulting dispute resolution activity.[131] While this latter consideration does not directly factor into the Hong Kong court's reasoning in *Guy Lam*, it is relevant to understanding the broader incentives at play. Hong Kong has long sought to strengthen its position as an international arbitration centre, and its arbitration law is widely regarded as pro-arbitration. Deference to arbitration in insolvency contexts is consistent with that interest. If this is in the interest of Hong Kong, the legislature should intervene as well.

Set against the pro-arbitration camp is the competing interest in protecting creditors through the orderly distribution of assets.[132] This is also a significant commercial interest, as "an attractive insolvency regime for debtors can serve as a valuable tool to promote entrepreneurship and innovation[, and] help [creditors] maximize their recoveries if their debtors eventually become insolvent."[133] Although insolvency protection is formally available to both local and foreign creditors, it should be noted that the principal beneficiaries are often local creditors engaged in local business activities. This is illustrated by *Kam Leung Siu Kwan v Kam Kwan Lai*,[134] the leading Hong Kong authority on insolvency jurisdiction over foreign companies, in which the Court of Final Appeal reaffirmed that limitation on such jurisdiction. It restated a three-factor test on the exercise of the jurisdiction: (i) a sufficient connection with Hong Kong, with the presence of assets being a *prima facie* indicator; (ii) whether creditors would benefit from insolvency proceedings in Hong Kong; and (iii) whether the creditors are subject to Hong Kong jurisdiction.[135] These factors underscore the local orientation of insolvency jurisdiction, particularly where local assets and local creditors are involved. Put differently, exercising jurisdiction over foreign companies with no local assets nor local creditors is likely to be futile.

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[130] PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 2 (1999). ("No State can hope effectively to control international contracts … Even if parties were denied any freedom to choose the applicable law, they could not be denied the freedom to 'localise' their contract by choosing such connecting factors as the place of contracting, the place of performance, of payment and the currency of the contract. Any attempt therefore to restrict the autonomy of the parties beyond internationally accepted parameters would be worthy of King Canute.")

[131] See *supra* note 63.

[132] *See* Geoffrey Ma, *Recognition, Relief and Enforcement of Schemes, Plans and Judgments: Towards a Transnational System of Justice in Cross-Border Insolvency*, 55 HKLK 299, 302 (2025) ("the responsibility lies with the courts to ensure that interest of all creditors are duly and fairly taken into account, and for there to be an orderly administration of an insolvent person's affairs. It is this approach that has been at the heart of the development of many courts, whether civil or common law, in this area.").

[133] *See* Aurelio Gurrea-Martínez, *Building a Restructuring Hub: Lessons from Singapore*, 62 AM. BUS. L.J. 271, 271 (2025).

[134] Kam Leung Siu Kwan v. Kam Kwan Lai, [2015] 18 H.K.C.F.A.R. 501 (CFA).

[135] *Id.*, [20].

Where both camps of interests fall within the same category of general commercial interest, the national interest theory does not yield a definitive answer as to which should prevail. Adopting the English approach in *Sian* favours local creditor protection but risks injecting uncertainty into arbitration. The Hong Kong and Singapore approaches favour arbitration but potentially at the expense of insolvency objectives. Nevertheless, the theory still generates useful hypotheses.

First, the more arbitration-oriented a country or region is, the more likely it is to adopt a pro-arbitration approach such as those seen in Hong Kong and Singapore, rather than the English approach. While precise quantification of the competing interests is difficult, arbitration represents an expandable economic interest that can be promoted through favourable rules, whereas insolvency interests are largely static and local. This is particularly evident in the "reverse" scenario of local arbitration and foreign insolvency proceedings. In *Hyalroute Communication Group Limited v Industrial and Commercial Bank of China (Asia) Limited*,[136] the Hong Kong Court of Appeal indicated its willingness, applying *Guy Lam* and *Re Simplicity*, to issue an anti-suit injunction to restrain foreign insolvency proceedings in order to protect Hong Kong arbitration.[137] Although the injunction was ultimately refused on the specific facts,[138] the case illustrates Hong Kong's pro-arbitration orientation and the potential economic benefits associated with protecting local arbitration activity.

On the other hand, insolvency jurisdiction is subject to inherent territorial limitations.[139] Although common law courts may assert insolvency jurisdiction over foreign companies,[140] the effectiveness of such jurisdiction is largely confined to assets located within the forum. Any extraterritorial effect depends on recognition and enforcement by foreign courts,[141] which is far from assured where connections are tenuous.[142] Insolvency therefore remains a mainly local interest despite the

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[136] Hyalroute Communication Group Ltd v. Industrial & Commercial Bank of China (Asia) Ltd, [2025] H.K.C.A. 936 (CA).

[137] *Id.*, [21]. ("in light of Guy Lam and Simplicity, the law of Hong Kong, in simple terms, is that an ASI would normally be granted in respect of winding-up proceedings brought in breach of an arbitration agreement in the absence of strong reasons.").

[138] *Id.*, [23].

[139] *See* IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 179 (2d ed. 2005)("it must be conceded that all questions of international recognition ultimately depend upon the rules and practice observed in the country before whose courts such questions arise for determination…").

[140] Kam Leung Siu Kwan, [2015] 18 H.K.C.F.A.R. 501.

[141] *See supra* note 139, at 184 ("Thus, the international effects of an English winding up in relation to the company's foreign assets are subject to the control of the positive law of the *situs*.").

[142] UNCITRAL Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998), arts. 15–17, 21–22.

extraterritorial jurisdiction, in contrast to arbitration, which is capable of expansion through favourable design of pro-arbitration private international law.[143]

Secondly, the national interest theory may explain the shift in English law from the pro-arbitration stance in *Salford* to the pro-insolvency stance in *Sian*. As a macro-level theory, it does not assume static outcomes. The shift simply indicates that England now values the insolvency interest at a higher priority over arbitration. It is entirely possible that, over time, experience with the *Sian* approach may prompt reconsideration, such as that the interest in protecting creditors in England overrides the interest in promoting arbitration for *England*. At the same time, this also indicates the limitation of the theory. The national interest theory cannot perform this calculation of interest for a given jurisdiction. All it could do is to suggest that the more pro-arbitration a jurisdiction, the more likely that it will adopt a pro-arbitration approach.

Moreover, it should be added that courts may not be institutionally well-suited to weigh competing commercial interests, a point reflected in the Privy Council's decision to resolve *Sian* on technical grounds rather than through explicit balancing. It is entirely possible that the UK Parliament could revert to the *Sian* approach upon gathering evidence on such balancing. This has been experienced in the choice of law discussion above when the UK Parliament replaced the *Enka* approach with curial law in the Arbitration Act amendment.[144]

Finally, between the Hong Kong and Singapore pro-arbitration approaches, the Singapore approach is arguably preferable. The key difference lies in the Hong Kong courts' willingness to weigh case-specific factors, such as the distinction between single-creditor and multi-creditor cases. However, the national interest theory is not a micro-level theory designed to guide the court's decision in individual cases. As mentioned above, the most prominent micro theory is Brainerd Currie's governmental interest analysis.[145] Even within micro-level interest analysis, such use of interest-weighing has been tried and criticized by many, with Currie himself famously rejecting judicial weighing of interests, calling it a "political function of a very high order... that should not be committed to courts in a democracy."[146] As the Singapore Court of Appeal observed in *AnAn Group*, the *prima facie* approach offers greater certainty,[147] which is itself crucial to international arbitration and may be regarded as a fourth-level systemic interest.

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[143] Kam Leung Siu Kwan, [2015] 18 H.K.C.F.A.R. 501.

[144] LAW COMM'N, *supra* note 10, ¶ .

[145] *See supra* note 25.

[146] BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 182 (1963).

[147] AnAn Group [2020] SGCA 33, [84]–[85] ("the evaluation of the merits of a defense does not afford parties with much certainty that their dispute will be resolved in the agreed forum... Second, allowing parties to argue on the merits despite an EJC in favour of another jurisdiction can cause parties to expend significant costs at the interlocutory stage, and this delays the resolution of disputes.").

Scenario	Situation	Mathematical Expression	Decision Rule	Determinacy
3	Same-Level Competing Interests	$I_{lv3\ interest}$ vs $I_{lv3\ interest}$	(incomparable)	**Indeterminate** - requires external criteria

In summary, as the formula above illustrates, the national interest theory cannot determine with precision which approach is to be preferred when each approach represents a competing interest at the same level. The theory remains useful in predicting that jurisdictions with stronger arbitration interests are more likely to favour pro-arbitration approaches, such as those adopted in Hong Kong and Singapore, than the pro-insolvency approach articulated in *Sian*. Between the Hong Kong and Singapore models, the Singapore approach is likely to be preferred due to its stronger pro-arbitration orientation and its avoidance of case-by-case interest-weighing, a task for which courts are not particularly well suited.

3. Enforcement of foreign arbitral awards

The final scenario concerns the enforcement of foreign arbitral awards. This issue presents another difficult, but qualitatively different, challenge for the national interest theory. Two interrelated issues concerning the enforcement of foreign arbitral awards will be examined in this section: (i) whether a country or region should adopt the *ex nihilo nil fit* principle, and (ii) the extent to which a country or region should apply the public policy exception. Each issue presents competing enforcement approaches that may be argued to serve a single national interest, namely the promotion of arbitration. As will be shown, however, this scenario makes it difficult to identify a single approach that most effectively advances that interest.

a. *Ex nihilo nil fit* principle

The *ex nihilo nil fit* principle, translated as "nothing comes of nothing," refers to the view that an enforcing court must automatically refuse enforcement of an arbitral award once it has been annulled by the court exercising supervisory jurisdiction.[148] In other words, the annulment by the supervisory jurisdiction shall have worldwide effect.[149]

[148] Yukos Capital Sàrl v. OJSC Oil Co. Rosneft [2014] EWHC 2188.

[149] Steven Levy, *The Yukos Award and the Debate over the New York Convention*, 41 YALE J. INT'L L. ONLINE 2 (2016).

Jurisdictions worldwide remain divided on whether to adopt this principle. Some jurisdictions accept it, whereas others, including England and Hong Kong, do not.[150]

Technical debates surrounding the interpretation of the wording in the English version of Article V of the New York Convention (particularly the meaning of the word "may" in the article)[151] are well known and need not be repeated here.[152] What remains clear is that no international consensus exists, and in the absence of a centralised enforcement mechanism, each jurisdiction must ultimately determine its own position.

The national interest theory has potential application in this context. The predominant interest at stake is the promotion of arbitration which is again a general commercial interest. Amongst the two competing approaches, if one approach could be shown to serve this interest more effectively than the other, the debate could in principle be resolved. Proponents of the *ex nihilo nil fit* principle argue that it helps bring arbitration to a definitive end. Once the supervisory court annuls an award, the award creditor can no longer engage in forum shopping to secure enforcement elsewhere.[153] From this perspective, the principle may be regarded as pro-arbitration and particularly attractive to jurisdictions that seek to present themselves as authoritative arbitration centres. Parties, it is argued, may prefer to select *ex ante* jurisdictions capable of delivering finality.

Conversely, it may be argued that rejecting the *ex nihilo nil fit* principle is itself more pro-arbitration. Non-adoption increases the likelihood that an arbitral award will ultimately be enforced. If a supervisory court were to annul an award arbitrarily, enforcing courts that retain discretion would still be able to give effect to it. This is the approach currently adopted by England and Hong Kong,[154] both leading arbitration centres.

At first glance, this divergence in enforcement approaches poses a difficulty for the national interest theory. Unlike the insolvency context discussed above in Section II(2)(b), the issue does not involve competing interests. Instead, it involves competing doctrinal approaches, each claiming to advance the same pro-arbitration interest.

At the margin, given the current fragmentation of global practice, non-adoption of the *ex nihilo nil fit* principle is arguably the more pro-arbitration position. For the principle to achieve its purported goal of conclusively ending arbitration, widespread international adherence would be required. In a world where jurisdictions remain divided, an award

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[150] Yukos Capital Sàrl [2014] 2 CLC 162; Dana Shipping and Trading SA v. Sino Channel Asia Ltd, [2016] H.K.C.U. 1776.

[151] See Malicorp Ltd v Government of the Arab Republic of Egypt [2015] EWHC 361 (Comm), [21].

[152] Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT'L 227 (1998); *see also supra* note 149, at 3.

[153] Levy, *supra* note 149, at 3-4.

[154] *Id*.

annulled in one country may still be enforced elsewhere. Thus, even if adoption of the principle limits forum shopping in certain jurisdictions, the collective action problem reduces its overall effectiveness. In this sense, the *ex nihilo nil fit* principle may ultimately prove less supportive of arbitration than its proponents suggest.

b. Public Policy

Recent developments, including the amendments to the Russian Code of Arbitrazh Procedure discussed above, have renewed attention on the scope of the public policy exception to enforcement under the New York Convention. This section therefore focuses on the public policy exception, which is widely regarded as the most controversial aspect of the enforcement regime.[155] As will be seen below, divergence in the public policy exception approaches is another difficult issue for the national interest theory.

As of today, 172 nations and regions have acceded to the New York Convention.[156] Its principal attraction lies in the relative ease and security with which arbitral awards may be enforced worldwide, particularly in jurisdictions where foreign judgments are not readily enforceable. This objective is achieved primarily by tightly circumscribing the grounds on which enforcement may be refused. However, the most significant refusal ground—public policy—is not defined in the Convention.[157] This omission leaves scope for divergence in interpretation and, potentially, for states to retreat stealthily from their enforcement commitments. Unsurprisingly, the application of the public policy exception has been inconsistent across jurisdictions.[158] How far a court should be permitted to invoke public policy is ultimately a judgement as to what best serves the interests of arbitration.

Two preliminary observations may be made. First, the interpretation of public policy is clearly a matter within the discretion of each Convention member.[159] The question is therefore not whether a court *can* refuse enforcement on public policy grounds, but whether it *should*. Secondly, although it is generally accepted that the public policy exception should be interpreted narrowly and reserved for truly exceptional cases,[160] disagreement persists as to how narrow that interpretation should be.[161] Should courts adopt a "race to the top" approach, emphasising judicial integrity and procedural propriety even at the cost of refusing enforcement? Or should they favour a "race to the

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[155] BORN, *supra* note 42, 3999-4000.

[156] New York Convention, *supra* note 7.

[157] BORN, *supra* note 42, 4008 (3d ed. 2021).

[158] *Id.*

[159] INT'L BAR ASS'N SUBCOMM ON RECOGNITION & ENFORCEMENT OF ARBITRAL AWARDS, REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION 2 (Oct. 2015).

[160] BORN, *supra* note 42, 4005.

[161] BORN, *supra* note 42, 4008.

bottom” approach, tolerating certain procedural imperfections in order to facilitate enforcement? In the language of the national interest theory, the question is which interpretive approach of the public policy grounds better serves the pro-arbitration interest. The recent case of *Song Lihua v Lee Chee Hon*[162] illustrates this divergence, particularly when contrasted with the approaches taken by courts in Hong Kong, Mainland China and the United States. It may also be viewed as the reverse of the *ex nihilo nil fit* problem: rather than enforcing an annulled award, the Hong Kong court was asked to refuse enforcement of an award that had been affirmed by the supervisory court.

In *Song Lihua*, the Hong Kong court was asked to enforce an arbitral award rendered in an online arbitration seated in the Chinese Mainland. Enforcement was resisted on public policy grounds, on the basis that one of the arbitrators appeared not to have participated properly in the hearing.[163] The arbitrator was reportedly outdoors at times, drove during the hearing, and experienced intermittent loss of internet connection.[164] However, when counsel were invited at the conclusion of the hearing to raise any objections, none were made.[165]

The Hong Kong court adopted a stringent approach and refused enforcement on public policy grounds. It regarded the arbitrator’s conduct as manifestly unprofessional and considered that, notwithstanding its own acknowledgment that the public policy exception should be applied only in exceptional circumstances,[166] this case fell within that category.[167] The court further held that enforcing the award would reflect adversely on the public image of the judiciary,[168] and rejected the argument that counsel’s silence constituted a waiver.[169]

By contrast, both Mainland Chinese court and United States court reached the opposite conclusion when the same arbitral award was sought there. While similarly affirming

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[162] Song Lihua v. Lee Chee Hon, [2023] H.K.C.F.I. 2540.

[163] *Id,* [38] (“In gist, Lee’s complaint is that Q had not meaningfully participated in the 2nd Hearing of the Arbitration. For at least the second half of the hearing, Q was moving from one location to another, indoors and outdoors, and had eventually left his premises, and traveled in a car, without giving his undivided attention to the hearing. He was off- line for periods of time from the second half, and obviously could not hear what was being said by the parties’ lawyers or by the other members of the tribunal.”).

[164] *Id.,* [38].

[165] *Id.*, [22].

[166] *Id.,* [10]. The Court also considered Hebei Import & Export Corp v. Polytek Engineering Co. [1999] 2 H.K.C.F.A.R. 111 (CFA), the leading CFA authority on the public policy exception in Hong Kong.

[167] *Id*, [60].

[168] *Id.*, [49] (“it is not only important for there to be justice and fairness in the process of a trial or a hearing, but that it is just as, if not more, essential that an objective and reasonable third-party observer should see that there was fairness and impartiality in the process. Only then can there be confidence in and respect for the system whereby a party and his case is judged.”).

[169] *Id.*, [55].

that the public policy exception should be narrowly construed,[170] the US court in particular undertook a more detailed analysis. It concluded that the interruptions to the arbitrator's connection were minimal and that, in any event, counsel's failure to object at the conclusion of the hearing amounted to a waiver.[171] Meanwhile, the Chinese court, acting as the supervisory court, affirmed the award and decided that there is no procedural or public-policy basis to refuse enforcement. In particular, any hearing irregularities were not outcome-affecting or were waived by participation without objection, and there was no proven arbitrator misconduct.[172]

This case illustrates the difficulty of determining which private international law approach best advances a jurisdiction's arbitration-related interests. On one view, the Hong Kong approach, by applying the public policy exception more robustly to procedural irregularities, may be said to promote arbitration by ensuring that courts do not lend their authority to awards tainted by serious procedural defects. On the opposing view, arbitration users may place greater value on the free circulation of arbitral awards and expect courts to exercise maximum restraint in invoking public policy, particularly in light of the Convention's enforcement oriented design. The issue is further complicated by the fact that *Song Lihua* concerned online arbitration, an area of growing importance for arbitration centres worldwide. Both the "race to the top" and the "race to the bottom" approaches can therefore plausibly be defended as pro-arbitration.

At the margin, it may be argued that there may be a fourth level interest, namely, conformity with the international standard that can serve as the tiebreaker, if it can be determined that one of these approaches is indeed practiced by more jurisdictions. However, the *Song* case is just one case involving three jurisdictions, and it is hard to draw such a conclusion at this stage.

This scenario also poses particular difficulties for the national interest theory because it approaches the boundary between macro-level rule design and micro-level adjudication. The public policy exception operates as a standard rather than a bright-line rule, deliberately leaving room for case-specific judgment. In such circumstances, courts are required to assess idiosyncratic factual features rather than apply clear structural preferences between competing interests.

Recognising this limitation does not undermine the explanatory value of the national interest theory. Rather, it underscores its nature as a macro-theoretical framework.

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[170] Lihua Song v. Que, No. 23-cv-02159-RFL, 2024 WL 2853983 (N.D. Cal. May 31, 2024), at *2 ("the public policy defense is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice.") (internal citation omitted).

[171] *Song*, 2024 WL 2853983, at *3-4.

[172] Case No. (2023) Chuan 01 Zhi Yi No. 24 (Chengdu Interm. People's Ct.) (2023)川 01 执异 24 号 [Chinese case name needed]

While such a theory is best suited to explaining the formation and orientation of private international law rules in cases involving clearly identifiable interests, it cannot, and does not purport to, account fully for all case-specific applications.[173] What it lacks at the micro level is offset by its capacity to explain and predict legal developments across a broad range of contexts, as demonstrated in the preceding sections.

In any event, *Song Lihua* highlights an important point concerning Hong Kong's interests as distinct from those of a sovereign state. Diplomatic and other sovereign interests fall within the domain of China rather than Hong Kong,[174] and no such interests were implicated in this case. It is therefore in Hong Kong's interest to articulate and apply its own public policy standard, even where that standard diverges from the approach adopted by courts in the Mainland. Such differentiation is both necessary and commendable, provided that it operates within the constitutional framework governing the relationship between Hong Kong and the Mainland. This contrasts with the case where Hong Kong was asked to adopt a doctrine of state immunity from that practiced by China, which the Hong Kong Court of Appeal answered negatively in *Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC*.[175] Such a scenario may trigger higher level interest and should be reserved to the nation to decide rather than a law district.

III. Conclusion

This article has examined the interaction between private international law, arbitration, and national interest through the lens of Hong Kong as a law district. By extending national interest theory beyond sovereign states and traditional court litigation, it has demonstrated how the theory operates in the face of competing and overlapping interests within arbitration-related rulemaking.

The four scenarios discussed above illustrate that national interest theory is capable of generating meaningful predictions in some contexts while revealing indeterminacy in others. Where a clear hierarchy of interests exists, such as in the protection of arbitration agreements through anti-suit injunctions, the theory provides relatively determinate guidance. By contrast, where competing interests operate at the same level, or where a single interest may be advanced through multiple approaches, the analysis exposes the limits of purely interest-based reasoning. These limitations do not undermine the theory. Like any abstract theory, the national interest theory must be capable of being proven wrong.[176] The more significant point is that it continues to

[173] TSANG, NATIONAL INTEREST, *supra* note 1.

[174] *See supra* note 40, art. 19.

[175] *See supra* note 9.

[176] KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 36 (1963) ("A theory which is not refutable by any conceivable event is non- scientific. Irrefutability is not a virtue of a theory (as people often think) but a vice.").

generate useful predictive insights, as demonstrated across the scenarios examined. Even in the context of enforcement, the theory suggests that the *ex nihilo nil fit* principle is less likely to be pro-arbitration, illustrating how national interest analysis can contribute to rulemaking across divergent jurisdictional practices.

Beyond the four scenarios, the article further tests national interest theory in two contexts not previously explored: the interests of law districts and the institutional dynamics of arbitration. The case study of Hong Kong demonstrates that law districts may pursue interests that do not fully coincide with those of the sovereign state to which they belong. In particular, Hong Kong's stronger emphasis on general commercial interests in maintaining its position as an international arbitration centre helps explain the evolution of its private international law rules. Arbitration-related interests are shaped by economic incentives associated with dispute-resolution services, as well as by the institutional objective of preserving an arbitration-friendly legal environment. At the same time, the analysis confirms that national security and strategic interests operate as threshold considerations that are rarely triggered in private international law, although they may reshape doctrinal outcomes when genuinely engaged.

Rather than offering an exhaustive account of arbitration-related doctrine, this article has focused on selected issues to illustrate how national interest theory can inform the design and evolution of private international law. The analysis shows that the theory is capable of accommodating the distinctive interests associated with arbitration within its existing hierarchy while still producing analytically useful predictions.

Ultimately, national interest theory should not be understood as merely descriptive of past developments; it provides a framework for thinking about future rule design. By examining arbitration through the perspective of law districts such as Hong Kong, this study demonstrates that private international law evolves through processes of institutional optimisation, as courts and policymakers navigate competing interests. The broader implication is that the future development of private international law, including in arbitration, will likely be shaped less by abstract doctrinal coherence than by the strategic positioning of legal systems seeking to balance commercial competitiveness, institutional legitimacy, and international cooperation.