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THE LAW GOVERNING ARBITRATION AGREEMENTS: *BCY V BCZ* AND BEYOND

Determining the law governing the arbitration agreement has been a vexed question for arbitral tribunals and courts alike. The Singapore courts, following the footsteps of the UK courts, have clarified in recent decisions such as *BCY v BCZ* that the parties will be presumed to have impliedly chosen the proper law of the underlying contract as the law of the arbitration agreement. This article examines these decisions, with an emphasis on what has come to be known as the validation principle.

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I. Introduction

1 The choice of law governing an arbitration agreement is a critical preliminary question to be answered in many situations, for instance, when a tribunal's jurisdiction is challenged. This law governs numerous grounds of challenge, including those relating to the validity and scope of the arbitration agreement, the identity of the parties to the agreement, as well as the question of whether the parties have been discharged from any obligation to arbitrate further disputes.[1] Yet, many Singapore decisions have not dealt with this question in detail.[2] It is therefore refreshing that in *BCY v BCZ*[3] ("*BCY*"), this question was revisited at length, and the prevailing Singapore position on this choice-of-law question was restated. The reasoning in *BCY* will be scrutinised below, but for present purposes, it should be noted that *BCY* was a departure – a volte-face, in fact – from *FirstLink Investments Corp Ltd v GT Payment Pte Ltd*[4] ("*FirstLink*"), a decision just two years prior. That

1 Sir Michael J Mustill & Stewart C Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989) at p 62.

2 This is likely because it would be unnecessary to embark on this inquiry if the application of the competing system of law would lead to the same result: *BCY v BCZ* [2017] 3 SLR 357 at [39].

3 [2017] 3 SLR 357.

4 [2014] SGHCR 12.

such a departure occurred within such a short span of time is indicative of how thorny this choice-of-law question is.

2 This article will begin by discussing the recent developments in Singapore. It then looks at the feasibility of recognising the validation principle – a principle which prefers a law of the arbitration agreement that would not render the arbitration agreement invalid – in Singapore jurisprudence, given that this principle has not yet been considered in local decisions. This article proposes that the principle be incorporated into the second stage of the *Sulamérica*[5] analysis (that is, as a factor in determining the parties' implied choice of law). This article will then turn to issues concerning the *express* choice of the governing law of the arbitration agreement, including what constitutes an "express" choice of the law of the arbitration agreement and what happens where the underlying contract contains no express choice-of-law provision.[6]

II. Developments in Singapore

A. FirstLink

3 It is apposite to begin the discussion with *FirstLink* for it marks the first occasion on which the Singapore courts have considered this issue at length. In *FirstLink*, the arbitration agreement was in favour of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"). The arbitration agreement contained no express choice of law. The underlying contract, however, provided that the contract be governed by and interpreted under the laws of SCC – an aberration, since parties usually choose national laws to govern the substantive terms of the contract.

4 In order to determine the law governing the arbitration agreement, the learned assistant registrar in *FirstLink* began by accepting that the three-stage enquiry in *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA*[7] ("*Sulamérica*") ought to apply. The *Sulamérica* enquiry first looks at whether an express choice had been made by the parties and, in the absence of an express choice, whether an

5 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102; see also para 4 below.

6 This article will not be focusing on issues such as formal validity, capacity or arbitrability. For views on these issues, see, *eg*, Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 597–635; David Joseph QC & David Foxton QC, *Singapore International Arbitration: Law & Practice* (LexisNexis, 2014) at pp 39–44; Bernard Hanotiau, "The Law Applicable to Arbitrability" (2014) 26 SAcLJ 874.

7 [2013] 1 WLR 102.

implied choice had been made; and finally, where the parties had not made any choice (express or implied), the proper law would be the law that the arbitration agreement had the closest and most real connection with. After examining a few English decisions post-dating *Sulamérica*, the assistant registrar observed that this line of authorities boils down to the following principle:[8]

> [I]n a competition between the chosen substantive law and the law of the chosen seat of arbitration, all other facts being equal (in a situation where there are no sufficiently strong indications to the contrary), the law will make an inference that the parties have impliedly chosen the substantive law to be the proper law applicable to the arbitration agreement …

In other words, the law of the arbitration agreement presumptively follows the law of the underlying contract.

5 The assistant registrar made clear that he was departing from these authorities, including *Sulamérica*. He took the view that the implied choice of law should presumptively be the law of the seat instead. He based his decision on two reasons. First, he challenged the view that commercial parties would want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the separate relationship of resolving disputes when problems arise. In relation to the latter, he reasoned that having abandoned their initial positions relating to the primary obligations of the contract, parties would desire neutrality above all else and accordingly, primacy ought to be accorded to the neutral law selected by the parties to govern the dispute resolution proceedings.[9]

6 Secondly, the assistant registrar reasoned that parties would impliedly choose the law of the seat to be the law governing the arbitration agreement so as to ensure that any subsequent arbitral award obtained would be given effect to and enforced.[10] On this note, he referred to Art V(1)(*a*) of the Convention on the Recognition and

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8 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [12].

9 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [13].

10 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [14]. The law of the arbitration agreement is conceptually different from the law of the law of the seat. The law of the arbitration agreement covers issues pertaining to the arbitration *agreement*, such as issues of validity (including whether there exists a defence such as duress) and interpretation. The law of the seat, on the other hand, applies to issues relating to the *arbitration* itself, such as which national legislation would apply, the relationship between the court and tribunal (including the court's power to grant provisional measures in aid of arbitration), and the internal procedures of the arbitration such as timelines: see Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 594–597, 1398, 1576–1587, 2053 and 2088–2089.

Enforcement of Foreign Arbitral Awards[11] ("New York Convention"), as well as Arts 34(2)(*a*)(i) and 36(1)(*a*)(i) of the UNCITRAL Model Law on International Commercial Arbitration[12] ("Model Law"). Under these provisions, the enforcement of an award may be refused, or an award may be set aside, if the arbitration agreement is not valid – either under the law to which the parties have subjected it or, in the absence of any such indication, under the law of the seat. This second reason, that the parties would not have chosen a law to govern the arbitration agreement that would jeopardise the enforcement of the eventual arbitration award, bears some resemblance to the validation principle.[13] He also observed that since the law of the seat applies to circumscribe the supervisory powers of the courts at the seat of the arbitration, it would be entirely conceivable that parties would demand to have consistency between both the *law* and the *procedure* of determining the validity of the arbitration agreement.[14]

B. BCY

7 Slightly more than two years later, in *BCY*, Steven Chong J (as his Honour then was) reconsidered the presumptive position taken in *FirstLink*, and adopted the view espoused in *Sulamérica* instead – that is, the parties' implied choice of law would presumptively be the substantive law of the underlying contract instead. In *BCY*, the parties expressly chose Singapore to be the seat of the arbitration, and for the main contract to be governed in accordance with New York law. Chong J's comments on the parties' implied choice of law for the arbitration agreement were *obiter* given that the parties agreed that there was no difference between Singapore and New York law when applied to the facts.[15] Nonetheless, Chong J considered the issue since the parties had furnished full and well-developed arguments on this point.

8 Chong J considered the authorities and found that the proper law of the contract was to be preferred as a matter of both precedent and principle. On precedent, Chong J referred to the High Court decisions in *Piallo GmbH v Yafriro International Pte Ltd*[16] and *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd*,[17] both of which preferred this position as well. These cases, however, merely stated that

11 New York, 1958.
12 UNCITRAL Model Law on International Commercial Arbitration GA Res 40/72, UN GAOR, 40th Session, Supplement No 17, Annex 1, UN Doc A/40/17, UN Sales No E.95.V.18 (1985).
13 See para 22 below for definition.
14 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [15].
15 *BCY v BCZ* [2017] 3 SLR 357 at [39].
16 [2014] 1 SLR 1028.
17 [2016] 1 SLR 79.

the law of the arbitration agreement would follow the parties' express choice of law for the main contract, without fully addressing the tenability of adopting such a position.[18]

9 Apart from precedent, Chong J supplemented his decision by explaining why the *Sulamérica* position was preferable in principle as well. Following *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*[19] ("*Arsanovia*"), an English decision which pre-dated *FirstLink* but which the assistant registrar in that case did not consider, Chong J found that where the contract stipulates that the "agreement" is to be governed by one system of law, the natural inference is that the parties intended for the *express* choice of law to govern all the clauses in the contract, including the arbitration agreement contained within.[20] The term "agreement" is wide enough to cover both primary and secondary obligations, and there is no reason why the parties would want to artificially constrain its plain meaning.[21] This plain meaning should be further upheld especially since such clauses are typically negotiated as part of the main contract and are unlikely to be negotiated independently.[22] However, Chong J also accepted that should the arbitration agreement be a freestanding one, then the seat law would be indicative as there would be no governing law of the contract to refer to.[23]

10 Chong J then addressed the arguments made in *FirstLink*. First, on the issue of consistency across arbitration issues, Chong J found that Arts 34 and 36 of the Model Law merely prescribed the seat law as the default fall-back position when the parties had not made a choice; hence, the question that remains unanswered is the prior question of what the parties' implied choice of law is.[24] Second, Chong J disagreed with the analysis on neutrality because while parties may desire neutrality when disputes arise, it does not necessarily follow that the seat law will take precedence. The parties may have selected the substantive law for reasons of neutrality as well.[25] Finally, Chong J in *BCY* also pre-emptively noted that the doctrine of separability could not be used

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18 *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 at [20] and [24]; *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 at [76].

19 [2012] EWHC 3702 (Comm).

20 *BCY v BCZ* [2017] 3 SLR 357 at [59], citing *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [22]; see also *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [11]: the correct solution will be found in the construction of the agreement.

21 *BCY v BCZ* [2017] 3 SLR 357 at [59].

22 *BCY v BCZ* [2017] 3 SLR 357 at [61].

23 *BCY v BCZ* [2017] 3 SLR 357 at [67].

24 *BCY v BCZ* [2017] 3 SLR 357 at [64].

25 *BCY v BCZ* [2017] 3 SLR 357 at [63].

to justify preferring the seat law over the substantive law. This is because separability is a limited doctrine which goes no further than saying that any challenge that the arbitration agreement is invalid does not, in itself, affect the validity of the arbitration agreement. It does not mean that the arbitration agreement is distinct from the main contract for all intents and purposes once the main contract has been formed.[26] Chong J's reasons will be examined later in this article.

C. BMO v BMP

11 The final case this article would examine is Belinda Ang Saw Ean J's decision in *BMO v BMP*[27] ("*BMO*"). In *BMO*, Ang J was confronted with a situation where there was a mandatory arbitration agreement for arbitration in accordance with the SIAC[28] Rules 2013. Rule 18.1 states that the seat would be Singapore if the parties do not agree on the seat of arbitration, unless the tribunal determines that another seat is more appropriate. There was no express choice of law for the arbitration agreement and there was also no express choice of law indicated for the underlying contract (which was a company constitutional document). Instead, several provisions within the underlying contract made reference to Vietnam law, although no clause purported to state the governing law for the entire agreement.

12 Ang J affirmed the propositions set out in *BCY*. Unlike *Sulamérica* and *BCY*, there was no express choice of the law governing the main contract. Ang J found that the parties had *impliedly* chosen Vietnam law for the underlying contract, and since parties would have intended the arbitration agreement to be governed by the same system of law, Vietnam law was the parties' implied choice of governing law for the arbitration agreement as well. Ang J followed *BCY* in preferring the substantive law of the contract to govern the arbitration agreement, and she also cited the High Court decision of *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd*,[29] where Vinodh Coomaraswamy J held that it would be "unduly parochial" for the seat law to apply instead.[30]

26 *BCY v BCZ* [2017] 3 SLR 357 at [60]–[61].
27 [2017] SGHC 127.
28 Singapore International Arbitration Centre.
29 [2017] 3 SLR 267.
30 *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 at [31].

III. Examining the Singapore position

A. The contractual choice-of-law approach to arbitration agreements

13 While both *BCY* and *FirstLink* gave rise to different results, it is clear that the Singapore courts have consistently affirmed the *Sulamérica* three-stage choice-of-law analysis, which is the framework used for determining the governing law for contracts.[31] It is also significant that it was expressed in both the Model Law and the New York Convention that parties' choice would take precedence over the law of the seat. Hence, even in cases such as *FirstLink*, where the law of the seat was found to also be the law of the arbitration agreement, it was only because the parties would have intended for the law of the seat to apply. To recapitulate, the point raised by the learned registrar in FirstLink was that the parties' implied choice for the governing law of the arbitration agreement should presumptively be the seat. Indeed, in *XL Insurance Ltd v Owens Corning*[32] ("*XL Insurance*"), an English case where the law governing the arbitration agreement was also found to be the seat law, Toulson J (as he then was) had held that:

> An arbitration clause in a contract is an agreement within an agreement … It is a general principle of English private international law that it is for the parties to choose the law which is to govern their agreement to arbitrate and the arbitration proceedings, and that English law will respect their choice.

14 In other words, even the cases which have found that the law of the arbitration agreement should presumptively be the seat law have done so by applying the *Sulamérica* three-stage choice-of-law analysis. This approach for selecting the seat law is preferable to the "procedural approach", under which arbitration agreements are regarded as procedural and therefore inevitably subject to the law of the seat. The *Sulamérica* approach is more coherent with the principle of party autonomy underpinning the international arbitral process,[33] and more pertinently, it emphasises that parties' intentions form the key enquiry in this choice-of-law question.

31 *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [36].
32 [2001] 1 All ER (Comm) 530 at 540.
33 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 512–513.

B. Presumptive implied choice of the substantive law of the contract to govern the arbitration agreement

15 The nub of the distinction between *BCY* and *FirstLink* lies in the second stage of the three-stage choice-of-law analysis: in determining the parties' implied choice of law, should the law governing the arbitration agreement follow the seat law or the law of the main contract? *BCY* preferred the law of the main contract and in so doing realigned itself with *Sulamérica*. This realignment marks the first occasion on which a High Court judge (and present judge of appeal) has dealt with the question of the parties' implied choice of governing law for the arbitration agreement in some detail. *Sulamérica* was then reaffirmed in *BMO*. This article takes the view that the realignment with *Sulamérica* is the better position to adopt.

16 In *FirstLink*, the assistant registrar supported his preference for the presumptive choice to be the seat law by the parties' desire for neutrality and consistency with the provisions of the Model Law and the New York Convention. These have been dealt with in *BCY*. First, the desire for neutrality may not necessarily be a strong enough reason for favouring the law of the seat over the law of the main contract because the choice of the law governing the main contract could equally be driven by a preference for neutrality.[34] It should be added that the seat could have been selected due to other reasons. Perhaps one party allowed the other to choose the seat so that the concession could be used as a bargaining chip.[35] The arbitration agreement, being a "midnight clause", could also have been drafted without much thought or advice from specialist arbitration lawyers. Since the motivations behind the parties' selection of the seat differ from case to case, neutrality should not be regarded as a universal overriding consideration weighing on the minds of all commercial parties. By extension, neutrality alone cannot, in and of itself, lend support to a presumptive rule as to parties' intent.

17 Secondly, the provisions of the Model Law and the New York Convention cannot support a presumption in favour of the law of the seat as well. Chong J referred to how Arts 34(2)(*a*)(i) and 36(1)(*a*)(i) of the Model Law merely "[give] effect to any express or implied choice-of-law by the parties and, failing such agreement, prescribing a default rule, [select] the law of the arbitral seat".[36] Hence, the argument circuitously leads back to the question of what the implied choice of law ought to be.

34 *BCY v BCZ* [2017] 3 SLR 357 at [63].

35 This was described as a "horse-trade" over dispute resolution provisions in Philippa Charles, "The Proper Law of the Arbitration Agreement" (2014) 80(1) *Arbitration* 55 at 56.

36 *BCY v BCZ* [2017] 3 SLR 357 at [64], citing Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at p 526.

The same can be said of Art V(1)(*a*) of the New York Convention, which similarly provides for the primacy of the parties' choice of law. Under this provision, recognition and enforcement may be refused if the arbitration agreement is determined to be invalid "under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made". Like its counterpart provisions in the Model Law, the first prong of Art V(1)(*a*) of the New York Convention refers to either an express or implied choice.[37]

18 At this juncture, it would be useful to point out that these provisions suggest that the seat law would, instead, come into play in the third stage of the *Sulamérica* choice-of-law analysis, that is, in the absence of parties' choice, the seat law would apply because it would be the law that the arbitration agreement has the closest and most real connection with. This is mirrored in several English authorities. In *C v D*,[38] Cooke J framed the issue as "whether, if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the law of the seat of arbitration".[39] He then held, and this holding was cited with approval in *FirstLink*, that it would be rare for the proper law to be different from the law of the seat because an arbitration agreement has a closer and more real connection with the place where the parties have chosen to arbitrate rather than with the place of the law of the main contract.[40] Similarly, in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd*[41] ("*Habas Sinai*"), Hamblen J had held that in the absence of parties' choice, the significance of the choice of seat of the arbitration would be "overwhelming" because the seat's system of law shares the closest and most real connection with that of the arbitration agreement.[42] These pronouncements make clear that the seat law is the go-to system of law only because of the significance of the arbitral seat *vis-à-vis* the arbitration agreement. The seat is, as said in *FirstLink*, the "juridical centre of gravity which gives life and effect to an arbitration agreement".[43] But this only shows that, objectively, the arbitral seat is

37 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at p 495.

38 [2008] 1 All ER (Comm) 1001.

39 *C v D* [2008] 1 All ER (Comm) 1001 at [22].

40 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [14] ("*FirstLink*"); *C v D* [2008] 1 All ER (Comm) 1001 at [26]. While the assistant registrar in *FirstLink* had cited *C v D* to support his view that the seat law should be the presumptive implied law, this article takes the view that *C v D* should be rationalised as a case relating to the third stage of analysis instead.

41 [2013] EWHC 4071 (Comm).

42 *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm) at [101].

43 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [14].

intricately linked with the arbitration process. It does not necessarily follow that the parties would make the implied choice for the same law to govern the arbitration agreement.

19 Finally, although this point was not raised in *FirstLink*, the doctrine of separability cannot justify the conclusion that the parties' presumptive implied choice would be for the seat law to govern the arbitration agreement. As noted by Chong J in *BCY*, this doctrine is a narrow one which exists to grant the tribunal jurisdiction to consider its own jurisdiction. It does so by isolating the arbitration agreement where there are challenges to its validity. This does not mean that the arbitration agreement is separate for all purposes. Indeed, Art 16(1) of Model Law stipulates that an arbitral clause which forms part of a contract shall be treated as an independent agreement, but only *for the purpose of allowing the tribunal to rule on its own jurisdiction*. For all other purposes, such as the assignment of the entire contract[44] or the interpretation of the contractual clauses, the arbitral clause continues to be part of the main contract. Otherwise, this would subvert the legitimate expectations of the parties who had expressly inserted the arbitral clause as part of the main contract, and not as two separate documents. As Moore-Bick LJ noted in *Sulamérica*, separability provides no "easy answer to the question … which turns primarily on the relative importance to be attached to the parties' express choice of proper law and their choice of London as the seat of the arbitration".[45]

20 The above analysis deals with the question of whether the parties' presumptive implied choice of law to govern the arbitration agreement should be the seat law. On the flipside, the arguments for the substantive law to govern the arbitration agreement instead is as follows: since the arbitration agreement is an agreement within an agreement (as described in *XL Insurance*),[46] the parties would have intended for the same body of law that already governs the underlying contract to govern the arbitration agreement as well. In *Sulamérica*, the court cited Sir Michael Mustill and Stewart Boyd's *Commercial Arbitration*[47] for the proposition that as a general rule, the arbitration agreement should be governed by the substantive law since it is "part of the substance of the

44 Renato Nazzini, "The Law Applicable to the Arbitration Agreement: Towards Transnational Principles" (2016) 65(3) *International & Comparative Law Quarterly* 681 at 684.

45 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [18].

46 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [26]; *BCY v BCZ* [2017] 3 SLR 357 at [59]; *BMO v BMP* [2017] SGHC 127 at [39].

47 Sir Michael J Mustill & Stewart C Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989).

underlying contract".[48] This also accords with practical reality: as Chong J noted, parties rarely specify the law applicable to the arbitration agreement as distinct from the main contract.[49]

21 This presumptive position is not set in stone and can be rebutted. In both *Sulamérica* and *XL Insurance*, the courts appeared to support the substantive law of the main contract in principle but ultimately concluded that the seat law (and not the substantive law of the main contract) governed the arbitration agreement. The factor rebutting the presumptive position, which some commentators have referred to as one of the "driving forces" behind these decisions, was the courts' reluctance to invalidate the arbitration agreement.[50] This reluctance was also one of the assistant registrar's reasons in *FirstLink* for preferring to presume that the law governing the arbitration agreement is the seat law.[51] This consideration was not dealt with in any of the other local cases, and is an issue that this article will tackle next.

C. Recognising the validation principle as part of the implied choice-of-law analysis

22 The existing Singapore jurisprudence has yet to articulate whether the validation principle should be adopted. The validation principle provides that, if an international arbitration agreement is substantively valid under *any* of the laws that may potentially be applicable to it, then its validity will be upheld, even if it is not valid under any of the other potentially applicable laws.[52] The underlying rationale of this principle is that the parties' overriding objective in entering into an arbitration agreement is to make an agreement that is valid and enforceable. This allows the arbitration agreement to provide an effective means of neutrally resolving international disputes without regard to technicalities or differing choice-of-law and substantive law rules. In order to do so, the arbitration agreement must be rendered valid as far as possible.[53] The principle is also a reflection of the

48 Sir Michael J Mustill & Stewart C Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989) at p 63; *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [17].

49 *BCY v BCZ* [2017] 3 SLR 357 at [59]; see also Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at p 580.

50 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 162.

51 See para 6 above.

52 Gary B Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at para 51.

53 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 542–549.

well-established contract law doctrine whereby a clause in a contract must be construed in a manner such that the clause is given effect to instead of being invalidated.[54] As the House of Lords held in *Hamlyn & Co v Talisker Distillery*,[55] "[i]t is more reasonable to hold that the parties contracted with the common intention of giving effect to every clause, rather than of mutilating or destroying one of the most important provisions"; hence, an arbitration agreement should be construed in a manner such that it is valid and enforceable lest it becomes "mere waste paper".[56]

23 The validation principle has never been considered by the Singapore courts in any of its decisions. However, as evident from the analysis above, *Sulamérica* has consistently been cited by the Singapore courts, and the choice of law question in *Sulamérica* turned on a consideration that underlies the validation principle. The dispute in *Sulamérica* centred around two insurance policies. These policies contained a London arbitration clause, but also an express choice of Brazil law as the law governing the contract and an exclusive jurisdiction clause in favour of the courts of Brazil. The law governing the arbitration agreement was an issue that the English Court of Appeal had to decide. Since the parties had expressly chosen Brazil law to govern the insurance policy, it should have followed that Brazil law would apply to the arbitration agreement contained within the insurance policy as well.

24 However, under Brazil law, the arbitration agreement was only enforceable with both parties' consent. Moore-Bick LJ found that there was at least a serious risk that a choice of Brazil law would significantly undermine the arbitration agreement – it would "[tend] to suggest that the parties did not intend the arbitration agreement to be governed by that system of law".[57] Ultimately, his Lordship decided that while one may start from the assumption that parties would have intended for the same law to govern the whole contract, including the arbitration agreement, specific factors may lead to the conclusion that this cannot in fact have been their intention. Moore-Bick LJ described the potential invalidity of the arbitration agreement under Brazil law in this case as a

54 Renato Nazzini, "The Law Applicable to the Arbitration Agreement: Towards Transnational Principles" (2016) 65(3) *International & Comparative Law Quarterly* 681 at 700–701.

55 [1894] AC 202 at 215.

56 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at p 545.

57 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [30].

"powerful factor"[58] that caused him to find that English law governed the arbitration agreement.

25 In coming to this decision, the court in *Sulamérica* relied on *XL Insurance* for the proposition that the effectiveness of the arbitration agreement was a relevant factor that might rebut the parties' presumptive implied choice (that the law governing the arbitration agreement was the substantive law).[59] *XL Insurance* similarly concerned claims under an insurance policy with a London arbitration clause, and a clause stipulating that the policy "be construed in accordance with the internal regulations of the State of New York (USA)". It then transpired that if the arbitration agreement was governed by the "internal regulations" of New York, the US Federal Arbitration Act ("FAA") would apply, and it would be strongly arguable that the arbitration clause would be formally invalid for failing to meet the "agreement in writing" requirement expressed in the FAA. Toulson J held that the arbitration agreement would be governed by English law instead as "[an] arbitration clause in a contract is severable, and there is therefore nothing to prevent parties to it from agreeing that the proper law of the parent agreement shall not apply to it if it would be invalid according to that law".[60]

26 Leading commentators have also espoused the validation principle. The authors of *Mustill & Boyd* stated in their treatise that "[if] the choice lies between two systems of law, under one of which the arbitration agreement would be invalid, this is a factor in favour of choosing the other".[61] Gary Born took the view that the validation principle "[gives] effect to the parties' genuine commercial intentions and [establishes] a pro-arbitration enforcement regime, consistent with the objectives of the New York Convention, that overcomes the complexities and uncertainties of traditional choice-of-law analysis".[62]

27 Finally, arbitral awards and national laws have also recognised the validation principle.[63] In ICC Case No 11869, a sales contract case in

58 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [30].

59 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [26].

60 *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530 at 542.

61 Sir Michael J Mustill & Stewart C Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989) at p 63.

62 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at p 542.

63 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 545–547.

2011,[64] it was stated that "arbitration agreements should be interpreted in a way that leads to their validity in order to give effect to the intention of the parties to submit their disputes to arbitration".

28 In terms of national laws, Art 178(2) of the Swiss Law on Private International Law provides:[65]

> Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

The provision evidently affords the Swiss courts maximum opportunity to uphold the validity of the arbitration agreement,[66] and is seemingly an implicit acceptance of the validation principle.

29 The upshot of the above analysis is that the validation principle finds ample support in international arbitration law. It is also sound in principle because the law that rational commercial parties expect an international arbitration agreement to be governed by, and the law which best accomplishes the purposes of such an agreement, is the system of law that gives effect to the arbitration agreement.[67] This principle is particularly relevant in the Singapore context, for *Sulamérica* – an oft-cited authority in Singapore jurisprudence – has, arguably, applied the validation principle.[68] By affirming *Sulamérica*, have the Singapore courts accepted the validation principle to be applicable in Singapore as well? It remains to be seen whether the Singapore courts would go so far, but this article takes the position that in both principle and on authority, the validation principle is sound.

30 A thornier question is how this validation principle is to be assimilated into existing jurisprudence. We noted earlier that Born endorsed the validation principle.[69] But in fact, Born went one step further to say that the "better view" to adopt is that Arts II and V(1)(*a*) of the New York Convention "mandate application of a validation

64 International Chamber of Commerce (ICC) – Award in Case No 11869 (2011) 36 Yearbook Comm Arb'n 47 at 57.

65 Pierre A Karrer, "The Law Applicable to the Arbitration Agreement: A Civilian Discusses Switzerland's Arbitration Law and Glances Across the Channel" (2014) 26 SAcLJ 849 at 852, para 18.

66 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th Ed, 2015) at p 165.

67 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 543–545.

68 Gary B Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at para 72.

69 See para 26 above.

principle to determination of the substantive validity of international arbitration agreements".[70] Arts II(1) and II(3) provide:

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

31 Born took the view that Art II *requires* Contracting States to recognise the material terms of arbitration agreement and give effect to the parties' intentions, and in doing so, to establish a rule of presumptive validity applicable to all agreements falling within the scope of the New York Convention's wide coverage.[71] He said that Art V(1)(*a*) does not preclude the application of this uniform international rule. It allows the non-recognition of an award where the rule in Art V(1)(*a*) is engaged, but there is nothing in Art V(1)(*a*) that would prevent a Contracting State from granting a broader and more favourable recognition to an arbitral award resulting under the Convention's choice-of-law rule.[72] Born added that the same analysis would apply to Arts 34(2)(*a*)(i) and 36(1)(*a*)(i), given the substantially identical provisions and objectives of the two instruments.[73]

32 This article proposes that the validation principle should be incorporated into the second stage of the *Sulamérica* analysis as an indicator of the parties' implied intentions instead. To begin with, the validation principle as envisioned by Born was not intended to apply universally to all issues pertaining to the arbitration agreement. For other questions, such as the interpretation or waiver of the arbitration agreement, the validation principle may not pinpoint the exact law to be

70 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at p 475.

71 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at p 494.

72 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 501–502.

73 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 526–527.

applied, since the arbitration agreement may be valid under competing laws. Moreover, Born's suggestion would overhaul how the Singapore courts deal with the parties' implied choice of governing law[74] – that is, by identifying presumptive implied choices. In contrast, this article's proposal coheres better with existing Singapore jurisprudence, is consistent with *Sulamérica*, and averts potential difficulties that may arise when substantive validity is not the issue at hand. It also retains the focus on the parties' intentions (albeit their implied intentions), which is the bedrock upon which arbitration is founded.

33 This is an appropriate juncture to briefly discuss a close cousin of the validation principle: the non-discrimination principle. The non-discrimination principle essentially forbids the application of idiosyncratic or discriminatory national law rules that would affect the validity and enforceability of international arbitration agreements.[75] Commentators espousing the application of the non-discrimination principle draw support from US case law.[76] In *Ledee v Ceramiche Ragno*[77] ("*Ledee*"), an arbitration agreement governed by Puerto Rican law was argued to be invalid based on a rule invalidating arbitration clauses in dealership contracts (a rule intended to protect Puerto Rico distributors from the allegedly exploitative practices of foreign suppliers).[78] The court held that Art II(3) of the New York Convention should only be interpreted to encompass situations like fraud, mistake, duress and waiver – doctrines that can be applied neutrally on an international scale.[79] *Ledee* was subsequently applied in *Rhone Mediterranee Compagnia Francese v Lauro*,[80] where an arbitration clause governed by Italy law was argued to be null and void because it called for an even number of arbitrators.[81] The Third Circuit court held that signatory nations to the New York Convention have jointly declared a general policy of enforceability of agreements to arbitrate; hence, only internationally recognised doctrines can render an arbitration

74 Gary B Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at para 50; *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at pp 546–548.

75 Gary B Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at para 10.

76 Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2nd Ed, 2014) at p 547; Renato Nazzini, "The Law Applicable to the Arbitration Agreement: Towards Transnational Principles" (2016) 65(3) *International & Comparative Law Quarterly* 681 at 697–699.

77 684 F 2d 184 (1st Cir, 1982).

78 *Ledee v Ceramiche Ragno* 684 F 2d 184 (1st Cir, 1982) at [5].

79 *Ledee v Ceramiche Ragno* 684 F 2d 184 (1st Cir, 1982) at [17].

80 712 F 2d 50 (3rd Cir, 1983).

81 *Rhone Mediterranee Compagnia Francese v Lauro* 712 F 2d 50 (3rd Cir, 1983) at [15].

agreement null and void. Since "[t]he rule of one state as to the required number of arbitrators does not implicate the fundamental concerns of either the international system or forum … the agreement is not void" under Art II(3) of the Convention.[82]

34 These authorities, however, never involved a choice-of-law analysis. It is also uncertain how the non-discrimination principle has any scope for application outside of the validation principle at the second stage of the *Sulamérica* analysis. In a situation where a party seeks to rely on an idiosyncratic rule under the proper law of the contract to invalidate the arbitration agreement, the validation principle will point the parties to some other system of law instead, such as the seat law.

D. What constitutes an express choice of law governing the arbitration agreement?

35 Thus far, we have dealt with the parties' implied choice of law governing the arbitration agreement. However, the sequential nature of the three-stage analysis means that the parties' implied choice is an enquiry to be pursued only if parties have not made an express choice of law governing the arbitration agreement. Hence, a related issue is when the Singapore court will find that parties had made such an express choice. A finding of an express choice would end the *Sulamérica* inquiry without the need to go further.

36 In *BCY*, there is some suggestion that where there is an express choice of law to govern the underlying contract, that choice would extend to the arbitration agreement contained within the underlying contract as well, as the word "agreement" contemplates all the clauses in the main contract. The material passage is as follows:[83]

> When a choice of law clause (such as the one here) stipulates that the 'agreement' is to be governed by one country's system of law, the natural inference should be that parties intend the express choice of law to 'govern and determine the construction of all the clauses in the agreement which they signed *including the arbitration agreement*' (see *Arsanovia* at [22]) … To say that the word 'agreement' contemplates all the clauses in the main contract save for the arbitration clause would in fact be inconsistent with its ordinary meaning. [emphasis in original]

82 *Rhone Mediterranee Compagnia Francese v Lauro* 712 F 2d 50 (3rd Cir, 1983) at [21].

83 *BCY v BCZ* [2017] 3 SLR 357 at [59].

Chong J's reference to the "express choice of law" in this passage appears to encompass not only the express choice of law governing the substantive terms of the contract, but also an express choice of the law governing the arbitration agreement.

37 In coming to this conclusion, Chong J cited the case of *Arsanovia*, which contained an uncommon arbitration agreement. In *Arsanovia*, the parties entered into joint-venture agreements to develop slum areas in Mumbai, India. Both joint-venture agreements contained similar governing law clauses (in favour of India law) and arbitration agreements which provided:[84]

> LCIA Arbitration. Any dispute arising out of or in connection with the provisions of this Agreement, including any question regarding its validity, existence or termination, shall be referred to and finally settled by arbitration under the London Court of International Arbitration Rules ('Rules'), which rules are deemed to be incorporated by reference into this Clause … The seat or legal place of the arbitration shall be London, England … Notwithstanding the above, the Parties hereto specifically agree that they will not seek any interim relief in India under the Rules or under the Arbitration and Conciliation Act, 1996 (the 'Indian Arbitration Act'), including Section 9 thereof. *The provisions of Part 1 of the Indian Arbitration Act are expressly excluded.* For the avoidance of doubt, the procedure in this Clause 21 shall be the exclusive procedure for the resolution of all disputes referred to herein.
>
> [emphasis added]

38 Smith J in *Arsanovia* found that the law of the arbitration agreement was governed by India law. He reasoned that where parties had expressly excluded specific statutory provisions of a law, the natural inference would be that the parties had understood and intended that otherwise, that law would apply.[85] He also noted that Pt 1 of the Indian Arbitration and Conciliation Act, 1996 ("ACA") had been judicially interpreted to apply to international arbitrations as well. Hence, not only were the governing law clauses of the joint-venture agreements persuasive, the wording of the arbitration agreement itself reinforced the conclusion that the parties had intended India law to apply.[86] As Smith J went on to elaborate, *Arsanovia* was probably a case where an express choice of law had been made – after all, "[e]xpress terms do not stipulate only what is absolutely and unambiguously explicit" and a finding that

84 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [3].

85 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [20].

86 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [21].

India law applied was "the ordinary and natural meaning of the parties' express words".[87]

39 Smith J also distinguished previous cases like *C v D* and *Sulamérica*. Unlike those cases, where the governing law clauses used the phrases "this Policy" and "this policy", the governing clause in *Arsanovia* used the phrase "this agreement", and the point Smith J made is that the word "policy" is more naturally taken to connote to obligations and rights directly relating to insurance-related matters, as opposed to the arbitration agreement.[88] Conversely, when the word "agreement" is used, that could apply to all forms of agreements, including the arbitration agreement. Hence, according to Smith J, this reading accords with "what the parties' language naturally connotes or more precisely what … it would have connoted to foreign businessmen such as [the contracting parties at the time of contracting]".[89] It should be noted that Smith J was careful not to rule on this point. He concluded that the parties had evinced an intention for the arbitration agreement to be governed by India law, and that it was unimportant whether this choice was express or implied.[90]

40 Smith J's reasoning is sound in principle. Although it has been said that arbitration agreements should be treated as having been "separately concluded",[91] separability should not be used to insulate the arbitration agreement in situations removed from the preservation of a tribunal's jurisdiction when the validity of the underlying contract is challenged. For all other intents and purposes, the arbitration agreement is very much an agreement within the underlying contract,[92] and if the choice-of-law clause in the underlying contract uses words such as "agreement", "contract" or "obligations", it is arguable that the starting point ought to be an exercise of contractual interpretation.[93]

41 Interestingly, in *Sulamérica* itself, Lord Neuberger MR (as his Lordship then was) had, with remarkable clairvoyance, referred to the

87 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [22].
88 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [22].
89 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [22].
90 *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm) at [23].
91 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] Bus LR 1719 at [19].
92 See para 20 above.
93 Alexander Trukhtanov, "The Proper Law of Arbitration Agreement – A Farewell to Implied Choice?" (2012) 15(4) Int ALR 140 at 142–143.

rules of contractual interpretation as a way to determine what the parties had intended:[94]

> Given the desirability of certainty in the field of commercial contracts and the number of authorities on the point, it is, at least at first sight, surprising that it is by no means easy to decide in many such cases whether the proper law of the arbitration agreement is (i) that of the country whose law is to apply to the contract or (ii) that of the country which is specified as the seat of the arbitration. However, once it is accepted that that issue is a matter of contractual interpretation, it may be that it is inevitable that the answer must depend on all the terms of the particular contract, when read in the light of the surrounding circumstances and commercial common sense.

That said, it is posited that Lord Neuberger did not apply the rules of contractual interpretation in *Sulamérica*. If Lord Neuberger had interpreted the express choice-of-law provision in *Sulamérica* to apply to the arbitration agreement as well, his Lordship would have concluded that there was an express choice of Brazil law and the enquiry would be complete since nothing can be implied into a contract if it contradicts an express term. Yet, his Lordship went on to consider the "pretty strong argument" that English law should apply to give effect to the "apparently mandatory and plainly unqualified provision for arbitration",[95] and eventually reached the same conclusion as Moore-Bick LJ.[96]

42 Indeed, neither *Arsanovia* nor *BCY* was decided purely on the basis of contractual interpretation or an express choice of governing law. As mentioned, in *Arsanovia*, Smith J emphasised that he did not have to characterise whether the choice of governing law for the arbitration agreement should be characterised as express or implied. In any case, *Arsanovia* was a case amenable to contractual interpretation – a weighty consideration in *Arsanovia* was the explicit indication that certain parts of the ACA would be excluded. An interpretation of this reference to this piece of Indian legislation led Smith J to find that Indian law applied to the arbitration clause and *Arsanovia* is better rationalised on that basis. Smith J's conviction on the interpretation point may not have been as strong if the only factors indicating the parties' express intentions were the words "agreement" as opposed to "policy". Moreover, in *BCY*,

94 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [51].

95 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [61].

96 See Alexander Trukhtanov, "The Proper Law of Arbitration Agreement – A Farewell to Implied Choice?" (2012) 15(4) Int ALR 140 at 143, where the author lamented that "no attention was given to the proper interpretation of the governing law clause in order to determine just what the ambit of the expression 'this policy' used there is under the law of Brazil and whether it might include the arbitration clause".

Chong J had held that the starting presumption was that New York law, the parties' choice of law for the underlying contract, applied to the arbitration agreement and nothing sufficed to displace this presumption.[97] If the approach he took was truly one of contractual interpretation, and if he had found that the parties had made an express choice of law, Chong J would have stopped at the first stage of the *Sulamérica* analysis instead of considering whether other factors could rebut that initial position.

43 In addition, Smith J's point that *Arsanovia* could be distinguished from *C v D* and *Sulamérica* because the words "policy" or "Policy" were used in those cases may not be tenable. The insurance policies were not reproduced in full in the grounds of decision but if "policy" or "Policy" had been defined in a section of the insurance policies in *C v D* and *Sulamérica* to refer to the insurance policies in their entirety, Smith J's point on interpretation would be weakened.

44 All said, as a matter of precedent, the position in both the UK and in Singapore is that the parties' express choice of law governing the arbitration agreement only kicks in where they have explicitly designated this law. In all other cases, the implied choice-of-law analysis continues to govern. This article takes the view that this approach is sound. While the "contractual interpretation" approach offends neither contract law nor the principle of separability, the tethering of the governing law of the arbitration agreement to that of the main contract in the first stage of the *Sulamérica* analysis reduces flexibility and leaves the courts hamstrung when the arbitration agreement is invalid under the law governing the main contract. Where the parties were not so explicit in preferring a certain law to govern the arbitration agreement, the more defensible approach is also to look at the other factors available in the implied choice-of-law analysis.

E. What if there is no express choice of substantive law?

45 The analysis thus far has been on the basis that there is an express choice of substantive law (and indeed, a choice of seat law). But this is not always the case. The case of *BMO* is one such example. There, the underlying contract did not explicitly state a substantive law. Neither did the parties explicitly choose a seat law; the parties only chose the SIAC Rules 2013, which in turn presumed Singapore to be the seat. As mentioned above,[98] Ang J eventually found that the parties' implied choice of substantive law was Vietnam law, relying on several provisions within the main agreement that made reference to Vietnam law. Ang J

97 *BCY v BCZ* [2017] 3 SLR 357 at [72].
98 See para 11 above.

applied *BCY* and found that the law of the arbitration agreement was also Vietnam law.

46 At first blush, there seems to be some discrepancy between the position stated in *BMO* and *Habas Sinai*, where Hamblen J relied on *Sulamérica* and found that:[99]

> Where the matrix contract does not contain an express governing law clause, the significance of the choice of seat of the arbitration is likely to be 'overwhelming' … because the system of law of the country seat will usually be that with which the arbitration agreement has its closest and most real connection.

Applying this principle,[100] Hamblen J held that since there was no express choice of law in the matrix contract in *Habas Sinai*, "the [*Sulamérica*] decision is clear authority that the applicable law will be that of the country of seat".

47 To the extent that *Habas Sinai* is suggesting a definitive rule that the seat law would apply under the third stage of the *Sulamérica* analysis whenever an express choice of substantive law is absent from the matrix contract, *Habas Sinai* would have strayed from the three-stage *Sulamérica* analysis. The second stage of the *Sulamérica* inquiry should not be skipped when parties explicitly select the seat law but not the substantive law.

48 It is true that Moore-Bick LJ in *Sulamérica* observed that in practice, the second stage often "merges into" the third stage because identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties had made an implied choice of law.[101] The learned authors of *Mustill & Boyd* had also commented that the second and third stage "tend to involve exactly the same factual enquiry, and as a result the distinction between the two stages, although sound in theory, is frequently of little practical importance".[102] But just because the second and third stages *often* concern the same factors does not mean that they merge into each other. Rather, as Chong J posited in *BCY*, albeit in the context of freestanding arbitration agreements:[103]

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99 *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm) at [101].

100 *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm) at [103].

101 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [25].

102 Sir Michael J Mustill & Stewart C Boyd, *Commercial Arbitration* (Butterworths, 2nd Ed, 1989) at p 63.

103 *BCY v BCZ* [2017] 3 SLR 357 at [67].

> If an arbitration agreement is freestanding in that sense, then I agree that when determining the proper law of this freestanding arbitration agreement, if there is no express choice of law, the law of the seat would most likely be the governing law of the arbitration agreement. This accords with the broader principle that if there is no express choice of law for any contract, the law of seat can be an indicator of the implied choice of its governing law (see *Habas* at [102]).

49 Another possibility is that Hamblen J considered that the *presumptive* implied choice of the proper law of the contract would only kick in when there is an express choice of law clause. In other words, where there is no direct conflict between the substantive law and the seat law because only one of the two were explicitly chosen, then there is no need for a presumptive position and the law governing the arbitration agreement simply follows whichever is explicitly selected. It is unclear whether this is supported by precedent.

50 The vast majority of the precedents discussed thus far (save for *FirstLink*) concerned a contract containing an express governing law clause. In *Sulamérica*, the rule was so framed:[104]

> In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely … to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion …

This passage appears to support the notion that should only one of the substantive and seat laws be chosen, the explicitly chosen law would likely also be the law governing the arbitration agreement.

51 This interpretation is not inconsistent with Ang J's conclusion in *BMO*. It will be recalled that in *BMO*, Ang J found that the parties had impliedly chosen Vietnam law to be the substantive law. But the seat was not explicitly selected. It was only presumed to be Singapore through the application of the SIAC Rules 2013. Since the substantive law was implied and the seat presumed, the reasoning from *Habas Sinai* described above would arguably not apply and Ang J therefore followed the presumptive position in *Sulamérica*. This, however, raises the issue of whether the choice of institutional rules which contain rules on seat selection is any different from a more direct choice of the seat.

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104 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [26].

52 Another open question is the choice between seat and substantive law when the substantive law is selected by way of the parties' implied choice, but the seat has been expressly specified by the parties. In such cases, *Habas Sinai* stands for the proposition that the seat law would apply.[105] This article takes the position that this would be a principled approach. On one hand, while it can scarcely be said that an implied intention is any less indicative of the parties' intentions,[106] express indications of intent should trump what can be implied in the circumstances.[107] Indeed, since the law of the arbitration agreement governs issues that could potentially be litigated at the seat court and the seat court is best-placed to apply the seat law, this is a factor that points towards the seat where the parties have only impliedly chosen the substantive law.

53 Hence, when the parties have expressly chosen the substantive law but not the seat law, then the substantive law would also be the law of the arbitration agreement (subject to the validation principle, as discussed above). But where the parties expressly chose the seat law and not the substantive law, then the presumption in *Sulamérica* would not apply. The law of the arbitration agreement would simply follow the law of the seat.

54 On a final note, it was observed above that there could be a situation where neither the substantive law nor the seat law was chosen.[108] If no law at all was specified, then the parties could not have impliedly "chosen" the law of the arbitration agreement by choosing either the substantive law or the seat law. The analysis should then defer to stage three of the *Sulamérica* analysis to find the law with the closest connection to the arbitration. In this regard, the law with the closest connection with the arbitration would be the law of the seat, as the seat has supervisory jurisdiction over the arbitration. *BCY* repurposed *FirstLink* as an example for such a scenario. As explained in *BCY*,[109] there was no "direct competition" between the law of the main contract and the law of the seat as neither was explicitly chosen to begin with. To recapitulate, the parties in *FirstLink* had chosen the "laws of Arbitration

105 *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd* [2013] EWHC 4071 (Comm) at [103].

106 *Hellenic Steel Co v Svolamar Shipping Co Ltd (The Komninos S)* [1991] 1 Lloyd's Rep 370 at 374.

107 This is embodied in the *Sulamérica* three-stage analysis. It is also illustrative that where there is already an *express* term covering the situation at hand, the court will *not imply* a term which *contradicts* that particular *express* term: see *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267 at [35].

108 See para 45 above.

109 See *BCY v BCZ* [2017] 3 SLR 357 at [54].

Institute of the Stockholm Chamber of Commerce"[110] as the substantive law. They did not choose a national law, and in that sense, they did not choose an express substantive law. Neither did they choose the seat expressly, since even the reference to the rules of SCC does not necessarily mean that the seat of arbitration was Sweden. Chong J commented that even though he disagreed with the assistant registrar's reasoning in *FirstLink*, the outcome would not have been any different because "the application of the third stage of the choice-of-law analysis would probably have pointed to Swedish law as the law with which the arbitration agreement had the closest connection".[111]

IV. Conclusion

55 This article has sought to give an overview of the recent developments in Singapore as regards the question of the law governing arbitration agreements. To recapitulate, this article has also taken the position that the following propositions are sound in precedent and principle:

(a) The best approach to determining the law of the arbitration agreement is to follow the three-stage analysis in *Sulamérica*, namely, to consider the parties' express choice, then their implied choice, and in the absence of both, the law with the closest and most real connection to the arbitration agreement. The law governing the arbitration agreement is not merely procedural and should not blindly follow the law of the seat without reference to the parties' intentions.

(b) It is possible to interpret an express choice of the law governing the substantive provisions of the underlying contract as an "express choice" of the law governing the arbitration agreement where the choice-of-law clause uses words like "agreement". But this argument is so thin that it is better used as one of the factors in an "implied choice" analysis. Express choices of the law of the arbitration agreement are better reserved for situations where the parties explicitly state the law of the arbitration agreement.

(c) In looking at the parties' implied choice of the law governing the arbitration agreement, the presumptive position should be that the law governing the arbitration agreement follows the law governing the substantive terms of the contract and not the seat law. The various arguments for following the seat law are not convincing: the parties do not necessarily desire

110 *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 at [9].
111 *BCY v BCZ* [2017] 3 SLR 357 at [54].

neutrality in selecting the dispute resolution clause (and even if they do, the choice of substantive law could also reflect neutrality); the doctrine of separability was never meant for this purpose; and consistency with the provisions of Model Law and the New York Convention is circuitous since these provisions ask the court to consider the parties' intentions before presuming that the seat law applies. On the flipside, the argument to follow the substantive law coheres better with practical reality since parties rarely conduct standalone negotiations for an arbitration clause; such clauses are more often inserted as "midnight clauses".

(d) The upshot of the reasoning just described is that it does not apply to standalone arbitration agreements, that is, arbitration agreements negotiated apart from any main contract and are (usually) only entered into when the prospect of arbitration arises. Since such arbitration agreements would not contain a choice of substantive law (as they are not attached to any main contract), the seat law should be indicative. Such arbitration agreements are, however, rare.

(e) This analysis also only applies where the parties have expressly selected both the substantive law and the seat law (if parties have only chosen the substantive law, then it would apply *a fortiori*). If the parties have selected the seat law but not the substantive law, it is arguable that this express choice of the seat would give rise to a finding that the law of the arbitration agreement would be the seat law.

(f) If neither the substantive law nor the seat law was selected and there are sufficient indicators to conclude that the parties had made an implied choice of law for the substantive contract, then this implied choice would extend to the law of the arbitration agreement. But if the parties did not "choose" – expressly or impliedly – any law to govern the arbitration agreement, the analysis naturally defers to the third stage, that is, which law is most closely connected with the arbitration agreement. This law would usually (though not indubitably) be the law of the seat.

(g) Finally, the validation principle is a powerful factor in determining the parties' implied choice of law because parties are taken to enter into an arbitration agreement with the expectation that the arbitration agreement is valid. But this principle cannot go so far as to take centre stage since this would usurp the original intention behind the validation principle – to ascertain what the parties intended. Instead, it is better conceptualised as one factor in the implied choice analysis.

56 Though *BCY* has shed light on the Singapore position, there are still swathes of grey area that require clarification. In particular, the recognition of the validation principle and a clarification as to whether the choice-of-law approach premised on contractual interpretation in *Arsanovia* can be adopted. The answer to the second will have implications on the implied choice-of-law analyses adopted in *Sulamérica*, *BCY* and *BMO*. These issues aside, what is clear is that barring a pronouncement from the Court of Appeal to the contrary, the presumption in favour of the proper law of the underlying contract is here to stay, as *FirstLink* begins to recede into the background.