I. Introduction

1. It is common that an arbitration agreement forms part of a matrix contract as a clause therein. In such a situation, parties often expressly choose the law governing the matrix contract. Parties often also expressly choose the seat of the arbitration. However, parties frequently fail to expressly choose the law governing the arbitration agreement (as distinct from the law governing the matrix contract).[1]

2. This is reflected in the model arbitration clauses of the top five preferred arbitral institutions.[2] Only one (i.e. HKIAC) prompts parties to choose the law governing the arbitration agreement.[3] The remaining four (i.e. ICC, LCIA, SIAC and SCC) do not – even though their model clauses contain provisions reminding the parties to choose the seat of arbitration and/or the law governing the matrix contract.[4]

3. The situation described at [1] above (i.e. where parties expressly choose the arbitral seat and law governing the matrix contract, but not the law governing the arbitration agreement) has resulted in a string of conflicting decisions in Singapore and England. The divergence concerns which law the parties should be presumed to have impliedly chosen as the law governing the arbitration agreement (the "**Presumption**"). Specifically, whether the Presumption should favour: (1) the law of the matrix contract; or (2) the law of the seat of arbitration.

4. This conflict is embodied in the recent decisions of *BNA v BNB* [2019] SGCA 84 ("***BNA v BNB***") and *Enka Isaat Ve Sanayi AS v OOO "Insurance Company Chubb*" [2020]

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[1] Gary Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 ("***Born***"), [34].

[2] Based on a survey in 2018: see Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* ("**QMUOL 2018 International Arbitration Survey**"), p 13 (namely, and in order of decreasing preference: (1) the ICC; (2) the LCIA; (3) the SIAC; (4) the HKIAC; and (5) the SCC).

[3] 2018 HKIAC Administered Arbitration Rules, p 2 (which suggests including a provision that "*The law of this arbitration clause shall be… (Hong Kong law)*." In its model clause).

[4] Although the LCIA model clause does not prompt parties to choose the law governing the arbitration agreement, it does provide that it would be the law applicable at the seat of the arbitration unless there is a contrary agreement in writing: LCIA Arbitration Rules (2014), Rule 16.4.

EWCA Civ 574 ("***Enka v Chubb***"). In *BNA v BNB*, the Singapore Court of Appeal endorsed the the earlier Singapore High Court decision of *BCY v BCZ* [2017] 3 SLR 357 ("***BCY v BCZ***") and held that the Presumption should be in favour of the law of the matrix contract.[5] In contrast, the English Court of Appeal in *Enka v Chubb* held that the Presumption should favour the law of the seat.[6] The United Kingdom Supreme Court may also soon voice its opinion following its recent hearing of the expedited appeal against *Enka v Chubb* in July 2020 (and may even have delivered a decision by the time this essay is read).

5. The question posed is which approach to the Presumption should be preferred in the situation described at [1] above. Contrary to the inherent assumption, it is argued that neither should be adopted – and there should be no Presumption at all.

6. This is "*not done just out of a spirit of rebellion*".[7] Rather, it is because both approaches each make significant inferences from a single feature of the contract (i.e. the express choice of law governing the matrix contract and arbitral seat) which, when considered together and in totality, should be regarded as equivocal vis-à-vis the parties' intentions. Without anything more to tip the balance, parties should instead be deemed to have <u>not</u> made an implied choice of the law governing their arbitration agreement.

7. This result is arguably a more accurate reflection of the parties' presumed intentions – or, more precisely, the lack thereof. Moreover, this would also not lead to any legally problematic outcome of having no law governing the arbitration agreement, as that would simply fall to be determined by the third stage of the framework in *Sulamerica Cia*

[5] *BNA v BNB,* [47], [60] and [61]

[6] *Enka v Chubb,* [91].

[7] To echo Gary Born in the opening paragraph of his article (coincidentally) also about the law governing arbitration agreements, when explaining why he had not addressed the specific topic asked of him: *Born,* [1].

Nacional de Seguros SA v Enesa Engelharia SA [2013] 1 WLR 102 ("***Sulamerica***") – i.e. the law having the closest and most real connection to the arbitration agreement.

8. This essay develops this position in three parts. First, by setting out the relevant differences between the *BNA v BNB* and *Enka v Chubb* positions. Second, by arguing that there is no convincing basis for the Presumption if this is based solely on the parties' express choice of arbitral seat and matrix contract's governing law – without anything more. Last, by explaining why there is no need for the Presumption at all, and why that may lead to a better overall outcome (in an increased number of cases).

II. Defining the difference between *BNA v BNB* and *Enka v Chubb*

9. The *BNA v BNB* and *Enka v Chubb* decisions were aligned on two key points. Both decisions agreed that the law governing the arbitration agreement is determined by the *Sulamerica* three-stage framework, namely: (1) the parties' express choice; (2) if none, the parties' implied choice; and (3) if none, the system of law which the arbitration agreement has its closest and most real connection to.[8] Both decisions also agreed that the Presumption concerns the second stage of the *Sulamerica* framework – i.e. what the parties' implied choice as to the law governing the arbitration agreement should be presumed to be.[9]

10. Where they parted ways was in what they ascribed to the parties' express choice of the law governing the matrix contract and the arbitral seat. Consequently, they arrived at different conclusions as to the parties' implied choice.

11. *BNA v BNB* (and various cases similarly deciding that the Presumption should favour the law governing the matrix contract) placed significant weight on how the arbitration

[8] *BNA v BNB,* [44]-[48] (endorsing *BCY v BCZ*, which it regarded as mirroring the decision in *Sulamerica*); and *Enka v Chubb,* [70(2)].

[9] *BNA v BNB,* [47], [60] and [61]; and *Enka v Chubb,* [91].

agreement was a clause in the matrix contract. Given this, these cases regarded the natural inference as being that the parties had intended the express choice of law clause to "*govern and determine the construction of all the clauses in the agreement… including the arbitration agreement*".[10]

12. In contrast, and temporarily putting aside the separability doctrine (addressed at [18] below), *Enka v Chubb* principally placed weight on the fact that the parties' choice of the arbitral seat entails the application of the *lex arbitri* – and that there is an "*overlap between the scope of the curial law and that of the [arbitration agreement's] law*".[11] In particular, while the law of the arbitration agreement is most relevant to questions as to formation, validity, effect and discharge of the arbitration agreement[12], the *lex arbitri* may also concurrently govern the same or similar questions. For example, the *lex arbitri* can: (1) impose requirements for the formal validity of an arbitration agreement for certain purposes (e.g. requiring it to be in writing or evidenced in writing[13]); (2) provide for the separability of an arbitration agreement for the purposes of a challenge to its validity, existence and/or effectiveness[14]; and/or (3) stipulate the number and manner of appointment of arbitrators (if not specified by the parties)[15].

13. In light of the overlap, the English Court of Appeal considered that parties would have impliedly intended for the law governing the arbitration agreement to coincide with the

[10] *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER (Comm) 1 ("***Arsanovia***"), [22], cited with approval by *BCY v BCZ,* [59] *BCY v BCZ* was in turn endorsed in *BNA v BNB* at [44]-[48]. See also *Sulamerica,* [11].

[11] *Enka v Chubb*, [96].

[12] David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (2015), [6.53].

[13] E.g. English Arbitration Act 1996 ("**AA 1996**"), s 5(1) and (2); Singapore's International Arbitration Act ("**IAA**"), s 2A; and UNCITRAL Model Law on International Commercial Arbitration (with the 2006 amendments) ("**Model Law**"), art 7 (option I).

[14] E.g. AA 1996, s 7; and Model Law, art 16(1).

[15] E.g. AA 1996, ss 15 and 16; IAA, ss 9 and 9A; and Model Law, art 10 and 11.

curial law to avoid different systems of laws determining "*aspects of the substantive rights of the parties under their arbitration agreement*".[16] As explained in *Enka v Chubb* at [99]:

> … businessmen should not be taken to have intended that different systems of law should apply to their relationship; or perhaps more pertinently, that they should not be taken to have intended that different systems of law should apply to two closely related aspects of their relationship [i.e. the lex arbitri and the law governing the arbitration agreement], even where a different system does apply to a third aspect [i.e. the law governing the matrix contract]… Put another way, as a matter of commercial common sense, one would not expect businessmen to choose two different systems of law to apply to their arbitration package.

14. In short, if the Presumption favours the law governing the matrix contract, this gives greater weight to the parties' treatment of the arbitration agreement (i.e. since it is a clause in the matrix contract, it was meant to be treated like other clauses and governed by the matrix contract's express choice of law). In contrast, resolving the Presumption in favour of the law of the arbitral seat means the decisive factor is the legal result of the arbitration agreement's putative governing laws (i.e. parties intended their "*arbitration package*" to be governed by a single legal system – rather than multiple systems[17]).

III. There is no convincing basis for the Presumption to favour either of the putative governing laws

15. Based only on the express choice of the matrix contract's governing law and the seat of arbitration, can it be fairly inferred that parties had impliedly chosen the law governing their arbitration agreement?

16. The answer should be no.

17. At the outset, the parties' treatment of the arbitration agreement and the legal result of the arbitration agreement's putative governing laws (see [14] above) both reasonably

[16] *Enka v Chubb,* [96].

[17] *Enka v Chubb,* [99].

indicate which law the parties intended to govern their arbitration agreement. Unfortunately, these indicators point in opposite directions – and it is not clear which indicator should have greater weight:

a. On one hand, placing weight on the law of the seat of arbitration may be too presumptive of the parties' intentions. After all, only 12% of the respondents to the QMUOL 2018 International Arbitration Survey had even ranked the seat of arbitration's law as one of the four most important reasons for their choice of arbitral seat.[18] This suggests that little (if anything) can be inferred from the chosen arbitral seat about the parties' implied choice of law.

b. On the other hand, it is arguable that the legal result of the arbitration agreement's putative governing laws should take precedence (i.e. the law of the seat of arbitration was intended since it avoids multiple laws applying to determine the parties' rights under the arbitration agreement). After all, the analysis concerns the second stage of the *Sulamerica* framework, which means the parties' intention for the matrix contract's choice of law clause to apply to the arbitration agreement was not clear enough to conclude that there was an express choice as part of the *Sulamerica* first stage (unlike what occurred in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] 1 Lloyd's Rep 269). Consequently, less weight should be accorded to any inference drawn from the matrix contract's choice of law clause (and the arbitration agreement being a clause in the matrix contract).

18. Furthermore, the separability doctrine does not help resolve the issue of which putative governing law the Presumption should favour. Specifically, it has been suggested that since the separability doctrine requires "*parties… to be treated as having contracted on the basis that the main contract and the arbitration clause are separate and distinct*

[18] QMUOL 2018 International Arbitration Survey, p 11.

agreements for the purposes of the latter's validity… [and] so they should be taken as having contracted on the same basis in respect of the governing law of the arbitration agreement which determines its validity, existence and effectiveness".[19] This has then been used to diminish the weight of any inference that the matrix contract's choice of law clause was impliedly intended to apply to an arbitration clause therein.[20] However, this is a wide notion of separability that is problematic and unhelpful:

a. First, it imputes a more expansive intention to the parties than typical articulations of the doctrine. For example, Article 16(1) of the Model Law specifically limits the application of the doctrine of separability to situations when the arbitration agreement's existence or validity is challenged (i.e. not for all purposes).[21] Similarly, Section 7 of the Arbitration Act 1996 is expressed in comparable terms[22], and expressly included "*for that purpose*" in order to make clear that it was not meant to become a "*freestanding principle*" of arbitration law applicable in all circumstances.[23]

b. Second, using the separability doctrine to infer parties' intentions "*does not reflect commercial reality*".[24] After all, where the arbitration agreement is a clause in a matrix contract, there is reason to assume the parties had treated it like any other clause therein.[25] Thus, further indicators are arguably needed to conclude otherwise (e.g. the governing law clause stating that it does not apply to the

[19] E.g. *Enka v Chubb*, [94].

[20] *Enka v Chubb*, [92]-[95].

[21] Model Law, art 16(1) (specifying that the doctrine of separability is only "*[f]or that purpose*").

[22] Arbitration Act 1996, s 7 ("*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.*").

[23] Departmental Advisory Committee Report on the Arbitration Bill (1996), [44]. See also Glick & Venkatesan, "Choosing the Law Governing the Arbitration Agreement", in Kaplan & Moser, *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum: Michael Pryles* (2018) ("**Glick & Venkatesan**"), p 137-138.

[24] *BCY v BCZ*, [61].

[25] *Arsanovia*, [21].

arbitration agreement). However, such indicators (while relevant) are assumed to be absent for the purposes of determining which law the Presumption should favour.

c. Third, all of this is consistent with the fact that the arbitration agreement is not regarded as separate from the matrix contract for all purposes. For example, in *JSZ Zestafoni G Nikkoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245 (Comm), the court rejected an argument that the arbitration agreement in a matrix contract was a separate agreement to which a clause requiring variations to be reduced to writing did not apply.[26]

d. Last, and in any event, the doctrine of separability does little to assist the inquiry. Apart from suggesting that the governing law clause might not have been intended to apply to the arbitration agreement, it does not say what the law governing the arbitration agreement should be – and if it must be different from that governing the matrix contract. As one commentary puts it, "*this has no bearing on governing law: … [the doctrine of separability] says nothing about whether they intend that agreement to be governed by the same law which governs the matrix contract*".[27]

19. Other reasons relied upon are similarly unpersuasive. This includes the assumed neutrality of the law of the seat of arbitration, which has been cited as a reason to favour that law for the purposes of the Presumption[28] – but ignores the fact that the law chosen to govern the matrix contract "*could equally be driven by a preference for neutrality*".[29]

[26] *Ronly Holdings*, [30]-[31].

[27] Glick & Venkatesan, p 138.

[28] *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 ("***FirstLink***"), [13]-[15].

[29] *BCY v BCZ*, [63].

20. In light of this difficulty determining what the parties impliedly intended for the law governing the arbitration agreement (without more), it is unsurprising that there are numerous conflicting court decisions on which law the Presumption should favour.[30]

21. In light of the foregoing reasons, it would be a strain to say that there are convincing reasons for the Presumption to favour either of the arbitration agreement's putative governing laws. As Lord Neuberger MR recognised in *Sulamerica*, it is possible "*to accept that there are sound reasons to support either conclusion as a matter of principle*".[31]

IV. <u>There can and should be no Presumption</u>

22. Given the difficulties in resolving the Presumption in favour of either of the putative governing laws, it begs the question: should there be a Presumption in the first place?

23. The answer to this should similarly be no.

24. First, the Presumption is unnecessary. The *Sulamerica* second stage is still able to operate without it – save that more indicators are required. This could include, for example: (1) the use of the validation principle (i.e. favouring the law which would validate rather than invalidate the arbitration agreement) since parties might be presumed to have intended for effect to be given to their arbitration agreement – rather than being subject to the "*jurisdictional and choice-of-law uncertainties of transnational litigation*"[32]; and/or (2) evidence of the parties' knowledge that a certain law may impact the validity of their arbitration agreement.[33] In any event, even if the *Sulamerica* second stage provides no answer, there still remains the third stage to resolve the arbitration agreement's

[30] A number of which were set out in *Enka v Chubb* at [71]-[87].

[31] *Sulamerica*, [57].

[32] *Born,* [8].

[33] *BNA v BNB,* [90].

governing law (i.e. the system of law which the arbitration agreement has its closest and most real connection to).

25. Second, having no Presumption is arguably a more accurate reflection of the hypothetical parties' intentions (or lack thereof). After all, an arbitration agreement taking the form of a clause in a contract is possibly a 'midnight clause' "*included… very late in the day*", and without parties considering "*the attendant specifics of the dispute resolution process*".[34] This suggests that little – if nothing – should be inferred about the parties' intentions in relation to their arbitration agreement's governing law based only on the parties' choice of the matrix contract's governing law and arbitral seat.[35]

26. Finally, the absence of the Presumption will increase the likelihood of the law of the arbitral seat being found to be the governing law of the arbitration agreement. This is because the arbitration agreement "*will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract*" – and so the law of the arbitral seat would apply pursuant to the *Sulamerica* third stage.[36] In other words, it is more likely that the same commercially sensible result as the *Enka v Chubb* Presumption will achieve (i.e. a single system of law applying to the parties' "*arbitration package*": see [12]-[13] above) – without unnecessary inferences from the parties' choice of the arbitral seat and/or matrix contract's governing law.

[34] *FirstLink*, [1] (this was a point which on which *BCY v BCZ* did not disagree (at [61]) – albeit disagreeing on others).

[35] The latter especially in light of the law of the arbitral seat not being an important reason for parties' choice: see [17.a] above.

[36] *C v D* [2008] 1 All ER (Comm) 1001), [26].

V. Conclusion – nothing is (sometimes) better than something

27. In conclusion, the Presumption should be abolished.

28. As argued, in the situation described at [1] above (and without further factors), there is no convincing basis for the making the inferences necessary to resolve the Presumption in favour of either of the two putative governing laws. Rather than entrenching a legal presumption that unnecessarily speculates what the hypothetical contracting parties' impliedly intended, the better position (which accords more with reality) may be to simply accept that there had been no implied choice by the parties.

29. Moreover, the Presumption is unnecessary since there are other ways of determining the arbitration agreement's governing law (e.g. other indicators of an implied choice, or the *Sulamerica* third stage).

30. Ultimately, this may also be preferable since the *Sulamerica* third stage will apply more often. As such, there will likely be more situations where the law of the arbitral seat is found to apply – which means that a single system of law being found to govern the parties' entire "*arbitration package*" more often (which is arguably the more commercially sensible result: see [12]-[13] above).

31. Contrary to the proverb, nothing is (sometimes) better than something.
