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AN ANALYSIS OF THE DECISION IN *ARSANOVIA LTD AND OTHERS v CRUZ CITY 1 MAURITIUS HOLDINGS* [2012] EWHC 3702 (COMM); [2013] 1 LLOYD'S REP. 235 AND ITS POSSIBLE IMPACTS ON THE DOCTRINE OF SEPARABILITY IN ENGLISH ARBITRATION LAW

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TABLE OF CONTENTS

TABLE OF CASES

- *Jureidini v National British and Irish Millers Insurance Company Ltd* [1915] AC 499
- *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43
- *Musawi v R E International (UK) Ltd* [2007] EWCH 2981 (Ch)
- *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep.116
- *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei* [1977] 1 WLR 713
- *Peterson Farm Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603
- *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals* [2004] 2 Lloyd's Rep 1
- *Shashoua v Sharma* [2009] EWHC 957 (Comm); [2009] 2 Lloyd's Rep 376
- *Sul America Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2012] 1 Lloyd's Rep 671
- *Sumimoto Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45
- *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No:2)* [2005] EWHC 2437 (Comm)
- *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd* [2007] EWCH 1713
- *The Amazonia* [1990]1 Lloyd's Rep 236
- *The Mariannina*[1983] 1 Lloyd's Rep 12 (CA)
- *The Marques de Bolarque* [1984] 1 Lloyd's Rep 652
- *Toller v Law Accident Insurance Society Ltd* (1936) 55 L1 LR 258
- *Union of India v Mc Donnell Douglas Corp* [1993] 2 Lloyd's Rep 48
- *XL Insurance v Owens Corning* [2001] All ER (Comm) 530

INTRODUCTION

As a dispute resolution mechanism, arbitration is based on an agreement which is essentially a "*consensus contrahitur*".[1] Parties may either agree to arbitrate their existing disputes by drafting a submission agreement, or refer to it in an arbitration clause which is included in their substantive contract for possible future disputes. [2]

When parties agree on arbitration after a dispute has arisen, they usually choose the governing law of the submission agreement. If they did not do so, general principles with respect to the choice of law apply. However, if the parties agree on arbitration in their substantive contract in the form of a clause in it and not specifically decide upon the law governing it, the issue becomes more complicated. The reason for this is the "separability doctrine" which regards the substantive contract and arbitration agreement as two different contractual undertakings although the agreement to arbitrate is included in that substantive contract as a clause.

This article aims to analyze the reasoning of the recent case, *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*[3], in which the issue was determining the law of arbitration agreement included in the substantive contract as a clause in the absence of an express choice, in terms of its affects on the separability doctrine. In doing so, first of all, the outline of the separability doctrine and the main function of the law governing the arbitration agreement will be discussed and then the background of the approach adopted in English law will be stated. Especially, decisions in the cases of *C v D*[4] and *Sul America*[5] which are prominent in this respect by virtue of their importance in terms

[1] J. Hill and A.Chong: *International Commercial Disputes Commercial Conflicts of Laws in English Courts*,(4th edn), Hart Publishing, Oxford, (2010), p. 764
[2] Ibid 764
[3] [2012] EWCH 3702, [2013] 1 Lloyd's Rep 235
[4] [2008] 1 All ER (Comm) 1001, [2008] 1 Lloyd's Rep2009
[5] [2012] EWCA Civ 638, [2012] 1 Lloyd's Rep 671

of the approaches they reflect in order to find out the law applicable to the arbitration agreement in the absence of an express choice will be mentioned in detail. Finally, the article will come to the conclusion reached with regards to the decision and its reasoning of *Arsanovia* and its possible effects on the separability doctrine.

DOCTRINE OF SEPARABILITY and ITS RELATION WITH THE LAW GOVERNING THE ARBITRATION AGREEMENT

A. Doctrine Of Separability

It is now well established in English law that an agreement to arbitrate between parties is a separate agreement from the substantive contract to which it is related.[6] The doctrine of separability denotes that the arbitration agreement is treated as a distinct contractual undertaking and constitutes the obligation to go to arbitration which is different from the main contract.[7] Although it has common law background, the doctrine is included in section 7 of the Arbitration Act 1996 which provides:

> "*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."*[8]

Section 7 of the Act, as can be seen from the opening words, is not a mandatory rule and thus parties may exclude it with a contrary agreement in writing.[9] Additionally, according to section 2 (5) of the Act, the doctrine of separability applies where the law governing the arbitration agreement is the law of England and Wales or Northern

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[6] T.D. Grant: "International Arbitration and English Courts", The International and Comparative Law Quarterly, Vol: 56, No:4, p. 872

[7] R. Merkin: *Arbitration Law* (Service Issue No:55), Informa, London, (2010), p. 5-32/1

[8] Separability doctrine is also widely accepted by both national legislations and institutional rules. For instance, United States Federal Arbitration Act s. 4; Civil Procedure Code of France s. 1447; German Code of Civil Procedure s. 1040; Swiss Private International Law Act s. 178; ICC Rules Article 6, UNCITRAL Arbitration Rules Article 21 and LCIA Rules Article 23

[9] R. Merkin: *Arbitration Law* (Service Issue No:55), Informa, London, (2010), p. 5-36 It should also be noted that, the agreement to exclude separability must be clearly expressed in order to make it above suspicion that the parties intention had been to reserve to the court the right to hear the claims regarding the substansive contract. (R. Merkin and L. Flannery: *Arbitration Act 1996*, (4th edn), Informa, London, (2008) p. 35)

Ireland, even though the seat of the arbitration is outside those territories or has not been designated or determined.

Although the earlier approaches by the courts were not in favour of the separability of the agreements in case law, the doctrine evolved in common law prior to its codification.[10] The starting point which demonstrated the pragmatic and intellectual justifications of separability[11] was the landmark decision of Steyn J (as he then was) in *Harbour Assurance Co (UK) Ltd v Kansa General International Co Ltd*[12] which was ratified by the Court of Appeal. In that case, the separability was regarded as a fundamental issue in order to provide freedom to parties to arbitrate their disputes.[13] So much so that, in *Lesotho Highlands Development Authority v Impregilo SpA*[14] by referring to the *Harbour v Kansa* it is clearly emphasised by Lord Steyn that the separability doctrine is "*part of the very alphabet of the arbitration law*".[15]

In the light of the decisions above and after the codification of the doctrine, the House of Lords in *Fiona Trust & Holding Corporation v Privalov (Premium Nafta Products Ltd v Fili Shipping Ltd)*[16] reiterated that an arbitration agreement is a distinct agreement so that the invalidity of the substantive contract does not necessarily cause the invalidity or rescission of the agreement to arbitrate and it can only be void or voidable only due to direct impeachment of the arbitration agreement.[17] As Lord Hope stated:

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[10] See for non-separability decisions, *Jureidini v National British and Irish Millers Insurance Company Ltd* [1915] AC 499; *Heyman v Darvis Ltd* [1942] AC 356; *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 Lloyd's Rep 181; *Toller v Law Accident Insurance Society Ltd* (1936) 55 L1 LR 258

[11] R. Merkin and L. Flannery: *Arbitration Act 1996*, (4th edn), Informa, London, (2008) p. 34

[12] [1993] 1 Lloyd's Rep 455

[13] See the first instance judgement at [1992] 1 Lloyd's Rep. 81,91,92

[14] [2005] UKHL 43

[15] at p. 21

[16] [2007] UKHL 40, [2007] All ER 951. Detailed analysis for the case *Fiona Trust v Privalov,* see, A.Briggs: "Construction Of An Arbitration Agreement; Deconstruction Of An Arbitration Clause *Fiona Trust v Privalov*", LMCLQ, Issue 2008/1

[17] at p.17 and 35

"The appellants' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract was induced by bribery. Allegations of that kind, if sound may affect the validity of the main agreement. But they do not undermine the validity of the arbitration clause as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do".[18]

The doctrine of separability lays emphasis on the potential width of an arbitration agreement.[19] In short, one of the consequences of the doctrine is that, it enables the disputes being arbitrated regarding the scope, validity or even the existence of the substantive contract.[20] In other words, as a result of the doctrine, an agreement to arbitrate can still be valid, effective and existing notwithstanding the invalidity, inexistency or inefficiency of the substantive agreement in which it is contained.[21] On the other hand, the recognition of the seperability doctrine and treating the arbitration agreement as a distinct agreement from the main contract brings about another issue apart from the arbitrability of the validity or the existence of the substantive contract. As a corollary of the separability doctrine, the law governing the arbitration agreement may also be different from the main contract.[22] It means that, the validity, scope and

[18] at p. 35 Also see, *Abuja International Hotels v Meridian SAS* [2012] EWCH 87 Comm, [2012] 1 Lloyd's Rep 461; *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Limited and Others* [2013] EWCH 1063; *JSC v Berezovsky* [2013] EWCA Civ 784

[19] D.St. J. Sutton; J.Gill and M. Gearing: *Russel on Arbitration* (23rd edn), Sweet & Maxwell, London, (2007), p. 33

[20] R. Merkin: *Arbitration Law* (Service Issue No:55), Informa, London, (2010), p. 5-32/1

[21] D.Joseph Q.C.: *Jurisdiction and Arbitration Agreements and Their Enforcement*, (2nd edn), Sweet & Maxwell, London, (2010), p. 123

[22] R. Merkin: *Arbitration Law* (Service Issue No:55), Informa, London, (2010), p. 7-11

applicability of the arbitration agreement itself might be governed by a law different from the law governing the substantive contract.

B. The Law Governing The Arbitration Agreement

The arbitration agreement is defined in section 6 of the Arbitration Act 1996 as: "*an agreement to submit present or existing disputes (whether these are contractual or not) to arbitration*". Just as the obligations arising out of an agreement are ruled by the law of that agreement, the validity of the arbitration agreement in conjunction with its scope, interpretation and the jurisdiction of the arbitrators is a matter of law which governs it.[23] Additionally, in order not to be denied being allowed to enforce the arbitration award internationally under the rules of New York Convention[24], the arbitration agreement must be pursuant to the law governing it.[25] Therefore, the choice of law governing the arbitration agreement is of vital importance.

As stated above, one of the consequences of the seperability doctrine shows itself in the law governing the agreement to arbitrate. Whereas it is usually thought that the law governing the arbitration agreement would be the same as the governing law of the substantive contract, there is no obstacle for the law applicable to the arbitration agreement to be governed by the law of a country different from the law of the substantive contract.[26] So much so that, both the laws of agreement to arbitrate, law of

[23] A.Briggs (edited by P.Rees): *Civil Jurisdiction and Judgements*, (5th edn), Informa, London,(2009), p. 805 See "*The Amazonia*" [1990]1 Lloyd's Rep 236; *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603; *Grupo Torras SA v Sheikh Fahad Muhammed al Sabah* [1995] 1 Lloyd's Rep 374; *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei* [1977] 1 WLR 713

[24] Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, 10 June 1958; entered into force, 7 June 1959 United Nations, Treaty Series, vol. 330, p. 38, No. 4739 (1959)

[25] For general reasons to refuse the recognition and enforcement, see Article V of the Convention

[26] J. Hill and A.Chong: *International Commercial Disputes Commercial Conflicts of Laws in English Courts*, (4th edn), Hart Publishing, Oxford, (2010), p. 784

the main obligations of the parties-substantive contract- and law of the arbitration process might be different.[27]

Given the autonomous characteristics of arbitration, parties are free to determine the law applicable to the arbitration agreement.[28] For the aims of this autonomy and principle, the chosen law must be a national system of law.[29] If there is an express choice of law regarding the arbitration agreement, that choice becomes conclusive even though it has no connection with the substantive contract which it relates to.[30] Moreover, it is not very important to use any specific formula to stress on the choice of law so long as the parties goal is understandable.[31] However, in the absence of such a choice or a non-national choice of law (such as Jewish law or Sharia law) the issue may become very complicated.

Unless otherwise agreed, in arbitrations between parties in England and Wales the problem of the law applicable to the arbitration agreement does not usually arise by reason of the domestic nature of it.[32] However, in international arbitration, it is not easy to say the same thing.[33] Although the Arbitration Act 1996 sets out both the rules applicable to the matter of the dispute and on determining the seat of arbitration in sections 46 and 3 in turn, it does not give any guidance in determining the law applicable to the arbitration agreement.[34]

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[27] *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 588
[28] *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep.116; *Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd* [2007] EWCH 1713
[29] J. Hill and A.Chong: *International Commercial Disputes Commercial Conflicts of Laws in English Courts*, (4th edn), Hart Publishing, Oxford, (2010), p. 784. See, *Musawi v R E International (UK) Ltd* [2007] EWCH 2981 (Ch); *Amin Rasheed Corporation v Kuwait Insurance* [1984] AC 50; *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals* [2004] 2 Lloyd's Rep 1
[30] R. Merkin: *Arbitration Law* (Service Issue No:55), Informa, London, (2010), p. 7-9
[31] D.Joseph Q.C.: *Jurisdiction and Arbitration Agreements and Their Enforcement*, (2nd edn), Sweet & Maxwell, London, (2010), p. 182. See, "*The Mariannina*"[1983] 1 Lloyd's Rep 12 (CA)
[32] D.St. J. Sutton; J.Gill and M. Gearing: *Russel on Arbitration* (23rd edn), Sweet & Maxwell, London, (2007), p. 78
[33] Ibid, 78
[34] Ibid, 82

With regards to the international law, The Rome I Regulation,[35] which governs the choice of law rules in the European Union, can not be a remedy for determining the law applicable to the arbitration agreement since the article 1.2(d) excluded the "*arbitration agreements and agreements on the choice of court*" from its scope. Under these circumstances, it is clear that the law governing the arbitration agreement is to be determined in accordance with the national laws of the EU countries, and as far as English law is concerned by common law conflict of law rules.[36]

In the absence of express choice of law governing the arbitration agreement, English Law is traditionally inclined to determine the law of the arbitration agreement, irrespective of taking into account the choice of law of the seat of arbitration but by taking into consideration the law of the substantive contract.[37] In other words, the perception has been that, the law of the arbitration agreement will often pursue the proper law of the substantive contract.[38] This approach can even be seen in the decisions after the recognition of the doctrine of separability.[39] The observation of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Constrution Ltd*[40] clearly stresses the

[35] Regulation (Ec) No 593/2008 Of The European Parliament And Of The Council

[36] See for some European conflict of law rules with respect to the determining law governing the arbitration agreement in the absence of an express choice: P. Leboulanger: "The Arbitration Agreement :Stil Autonomous?" International Arbitration 2006: Back to Basics? ICCA Congress Series 2006 Montreal 13 (Kluwer Law International 2007) p. 7 and 8. http://law.queensu.ca/international/globalLawProgramsAtTheBISC/courseInfo/courseOutlineMaterials2012/internationalCommercialArbitration/Leboulanger2006.pdf(accessed on 09.09.2013)

[37] A. Arzandeh: "The Law Governing Arbitration Agreements In England", LMCLQ 2003/1, p.31. There are many cases regarding that approach. For instance see, *Black Clawson International Ltd v Papierwerke Walfhpof- Aschaffenbur AG* [1982] 2 Lloyd's Rep 446; *The Marques de Bolarque* [1984] 1 Lloyd's Rep 652; *International Tank & Pipe SAK v Kuwait Aviation Fuelling Co KSG* [1975] QB 224; *Union of India v Mc Donnell Douglas Corp* [1993] 2 Lloyd's Rep 48; *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (No:2) [2005] EWHC 2437 (Comm)

[38] D.St. J. Sutton; J.Gill and M. Gearing: *Russel on Arbitration* (23rd edn), Sweet & Maxwell, London, (2007), p. 82

[39] J. Hill and A.Chong: *International Commercial Disputes Commercial Conflicts of Laws in English Courts*,(4th edn), Hart Publishing, Oxford, (2010), p. 784. See, *Sumimoto Heavy Industries Ltd v Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45; *Peterson Farm Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603

[40] [1993] A.C. 334

approach by emphasising the exceptional nature of designating the law governing the arbitration agreement which is different from a substantive contract as:

> "*It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship between themselves and the arbitrator in the conduct of the arbitration: the "curial law" of the arbitration as it is often called.*"[41]

The approach adopted in English Courts for determining the applicable law of the arbitration agreement in the absence of an express choice of law has not always been the same and some cases pointed out a shift away from the traditional approach.[42] The case of *XL Insurance v Owens Corning*[43] and its confirmation by the court of Appeal in *C v D* are prominent in this respect.[44] In the *C v D*, the substantive contract was governed by New York law, whereas the seat of arbitration was chosen as London. By the reason of the fact that no express choice had been made regarding the law governing the arbitration agreement, the dispute arose with respect to the jurisdiction of the arbitrators. The Court of Appeal stated that the separability between the substantive contract and the agreement to arbitrate does not allow the assumption that the law of the arbitration agreement has been implied by the choice of the law of the substantive

[41] at p. 357
[42] A. Arzandeh: "The Law Governing Arbitration Agreements In England", LMCLQ 2003/1
[43] [2001] All ER (Comm) 530
[44] Also see, *Abuja International Hotels v Meridian SAS* [2012] EWCH 87 Comm, [2012] 1 Lloyd's Rep 461; *Shashoua v Sharma* [2009] EWHC 957 (Comm); [2009] 2 Lloyd's Rep 376

contract[45]. Therefore, by accepting that the law of the seat of arbitration has the closest and most real connection with the law of the arbitration agreement but rather the law governing the substantive contract, the Court of Appeal determined the law of the seat as the law governing the arbitration agreement.[46] According to the Court, by choosing the law of the seat of arbitration as London, the parties must be considered "*to have agreed that proceedings on the award should be only those permitted by English law*".[47] The justification for that view is stated by Longmore LJ as:

> "*The reason is that an agreement to arbitrate 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 in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.*"[48]

The approach adopted by the Court of Appeal has been considered controversial.[49] So much so that, it was argued that the cases of "*XL Insurance*" and "*C v D*" left the English Law in a muddle in terms of determining the law governing the arbitration agreement in the absence of express choice of law.[50] However the reign of the approach adopted in *C v D* was eventually amended after five years by the Court of Appeal in *Sul America v CIA Nacional de Seguros SA v Enesa Engenharia SA*.

In the *Sul America*, the substantive contract was governed by the law of Brazil whereas the seat of arbitration was London. Since there was no choice of law governing the arbitration agreement, the jurisdiction of the arbitrators was challenged on the basis

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[45] R. Merkin: *Arbitration Law* (Service Issue No:55), Informa, London, (2010), p. 7-13
[46] Ibid, p. 7-13
[47] at p. 16
[48] at p. 26
[49] D.Joseph Q.C.: *Jurisdiction and Arbitration Agreements and Their Enforcement*, (2nd edn), Sweet & Maxwell, London, (2010), p. 185-187
[50] A. Arzandeh: "The Law Governing Arbitration Agreements In England", LMCLQ 2003/1, p. 32

of the validity of the arbitration agreement. The crucial point in the dispute was that, if the Brazilian law is regarded as the law governing the arbitration agreement, the arbitration agreement would not be enforceable.

The Court of Appeal, instead of merely paying attention to the closest and most real connection test adopted in *C v D*, generated a three stage enquiry to consider:

i) express choice,

ii) implied choice and

iii) the closest and most real connection[51]

Although the three stages must be followed individually and in order, it was also stated that, stage (ii) often merges into stage (iii) due to the fact that the law which has the closest and most real connection with the agreement to arbitrate is most probably the most important factor to consider if the parties had made an implied choice of law governing the arbitration agreement.[52]

By way of referring to the cases regarding the approach adopted in order to determine the law governing the arbitration agreement prior to the *XL Insurance* and the *C v D*, the Court of Appeal stated that the express choice of law governing the substantive contract is a "*strong pointer*" for the implied choice of law governing the arbitration agreement[53]. In other words, although the Court of Appeal stated that "*the significance of the choice of London as the seat of arbitration would be overwhelming*", it found that the chosen law governing the substantive contract is "*an important factor to take into account*" in order to find out the implied choice of law governing the arbitration agreement.[54] Moreover, the Court of Appeal did not see that the separability

[51] at p. 25
[52] at p. 25
[53] at p. 27
[54] at p. 26

doctrine is merely sufficient to assume that the law of the arbitration agreement is implied from that of the seat of arbitration. As Lord Justice Moore- Bick stated:

> *"The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes."*[55] *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 (as the dicta in the earlier cases indicate) 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. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract.*[56]

However, by acknowledging the powerful factors in favour of the implied choice of Brazilian law, the Court of Appeal found that the parties could not have implied Brazilian law under which the agreement to arbitrate becomes void. Therefore, by applying the third stage, the Court of Appeal decided that the arbitration agreement has the closest and most real connection with the law of England which had been chosen expressly as the *lex arbitri*. The reasons behind that were the ineffectiveness of the

[55] at p. 26
[56] at p.26

arbitration agreement under the law of Brazil and the fact that the parties choice of another country as the seat of arbitration for the *lex arbitri* to supervise and conduct the arbitration process.[57]

To sum up the outcome of the decision in *Sul America*, it can be said that, although the presumption would be in favour of the law of the substantive contract in order to determine the law governing the arbitration agreement, that presumption may be ousted in some specific circumstances due to the characteristics of each case which may contain strong indications for the law governing the arbitration agreement, different from the substantive contract.[58] Moreover, the efforts to reconcile the approaches adopted in *C v D* and prior to that it can be seen in the statement of the Master of the Rolls[59]:

> "*.....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*".[60]

The guidance set out in *Sul America,* in order to determine the law governing the agreement to arbitrate in the absence of an express choice of law, has affected the ensuing decisions. In *Arsanovia* the Commercial Court applied the approach adopted in *Sul America* and found an "*evinced intention*" of the parties from the facts of the case.

[57] at p. 29 and 30
[58] R. Merkin: *Arbitration Law* (Service Issue No:55), Informa, London, (2010), p. 7-11
[59] A. Arzandeh: "The Law Governing Arbitration Agreements In England", LMCLQ 2003/1, p. 34
[60] at p. 51

However, the reasoning of the Commercial Court can highly likely raise the questions-criticises regarding the separability doctrine.

C. *Arsanovia Ltd And Others v Cruz City 1 Mauritius Holdings* And Its Possible Impacts On The Doctrine

In *Arsanovia*, the Commercial Court dealt with the jurisdiction of the arbitral tribunal which had been challenged under s. 67 of the Arbitration Act. In short, the facts before the Commercial Court were these, the substantive contract –the shareholder's agreement- was governed by Indian law and the parties agreed on London as the seat of arbitration. Additionally, the parties agreed to exclude part of the Indian Arbitration and Conciliation Act in the arbitration agreement. By virtue of the importance given by the Court to the wordings of both clauses concerned with the governing law of the substantive contract and arbitration, it is worth stating that the clauses regarding the governing law of the substantive contract and agreement to arbitrate in the shareholders agreement were in these terms:

> "*Governing Law. This agreement shall be governed by and construed in accordance with laws of India, without regard to the conflict of law rules thereof that would require the application of the laws of another jurisdiction*.
>
> *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 number of arbitrators shall be three. The seat or legal*

place of the arbitration shall be London, England. The language to be used in the arbitral proceedings shall be English. 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."

In order to determine the law governing the arbitration agreement, the Commercial Court –Andrew Smith J- approached the issue parallel with the system adopted -*three stage enquiry*- in *Sul America* by the Court of Appeal. Accordingly, he stated that the court firstly have to decide whether the parties expressly or impliedly chose a law governing the agreement to arbitrate, and unless there is such a choice, the court then would find the law which the arbitration agreement had the closest and most real connection to.[61] Eventually, Andrew Smith J found that the parties, by excluding certain parts of the Indian and Arbitration and Conciliation Act, had "*evinced the intention*" to the law of India as the law governing the arbitration agreement.[62] Unlike *Sul America*, the court did not invoke the third stage which is the "closest and most real connection" by reason of the fact that the parties "*evinced the intention*" for the choice of law governing the arbitration agreement.

As the reasoning, Andrew Smith J stated by accepting the *Sul America* case as an authority that, the law governing the substantive contract is "*at least a strong pointer*" to the parties' intention regarding the law applicable to the arbitration

[61] at p. 8
[62] at p. 20

agreement, and express choice of *lex arbitri* does not constitute an implied choice of the law of the agreement to arbitrate.[63] However, apart from the fact that the law of arbitration agreement was found by way of the "closest and most real connection test" in *Sul America* since the other stages could not have been a remedy, Andrew Smith J held that the parties had already "*evinced the intention*" to the law governing the agreement to arbitrate. According to him, one of the reasons behind that "*evinced intention*" was the exclusion of certain parts of Indian Arbitration and Conciliation Act when agreeing on the arbitration as a dispute resolution method. In other words, Andrew Smith J considered the exclusion as an intention to evince the law governing the arbitration agreement. As he stated:

> "*....where parties have expressly excluded specific statutory provisions of a law, the natural inference is that they understood and intended that otherwise that law would apply. Therefore to my mind the reference to IACA[64] in the arbitration agreement supports the claimants' contention that the parties evinced an intention that the arbitration agreement should be governed by Indian Law (except in so far as they agreed otherwise)*."[65]

Given the statement of Andrew Smith J above, it might be said that the expression of "*evinced an intention*" is equal or at least akin to the meaning of the word "*implied*". However, from the inference of the whole judgement, it is not easy to say so. Andrew Smith J approached the issue starting from the wordings of the arbitration clause stated above. According to him, "*the wording of the arbitration agreement itself reinforces the conclusion that parties intended Indian law to govern it*".[66] He explains

[63] at p. 21
[64] Indian Arbitration and Conciliation Act 1996
[65] at p. 20
[66] at p. 21

this by stressing on the meaning that might have been given to the expression of "This Agreement" which is contained in the arbitration clause. As Andrew Smith J put it:

> "*When the parties expressly chose that "This Agreement" should be governed by and construed in accordance with the laws of India, they might be thought to have meant that Indian law should govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement. Express terms do not stipulate only what is absolutely and unambiguously explicit, and it seems to me strongly arguable that this is the ordinary and natural meaning of the parties express words (notwithstanding relatively recent developments in the English law about the separability of arbitration agreements from the substantive contract in which it was made and assuming that assuming that these foreign companies are to be taken to have known the developments in 2008 when they concluded the SHA.*"[67]

It can be said on the face of these opinions that, the mainstay of the consideration of Andrew Smith J was the interpretation of the parties' intention in terms of their mode of articulation. He gave a strong hint that the choice of law governing the substantive contract would constitute an express choice of law governing the arbitration agreement when there is such an expression of "This Agreement".[68] Although he found that the argument is not for him to decide since it had not been contented by the parties, he stated that it is unimportant for him to characterise the choice whether it is expressed or implied.[69] To put it another way, controversially, the express choice of Indian law to

[67] at p. 22
[68] at p. 22 and 23
[69] at p. 22 and 23

govern ”This Agreement” has been considered as being enough to encompass both the substantive contract and the agreement to arbitrate by Andrew Smith J.[70]

The importance given to the “*evinced intention*” of the parties no matter that it is expressed or implied can also be inferred from the paragraph that Andrew Smith J stated by referencing the cases of *C v D* and *Sul America* as:

> “*Had I had to decide which system of law has the closest and most real connection with the arbitration agreement, I would have concluded that it is English law for the reasons that Longmore LJ concluded that the English Law had the closest and most real connection with the arbitration agreement made between C and D and that Moore-Bick LJ similarly decided in the Sul America se. But in view of my decision about the parties' choice of an applicable law, that question does not arise.*”[71]

The statements regarding the perception of the wordings of the arbitration clause can easily spark the debate on the separability of the arbitration agreement. Given the background of the cases in which it has been decided on how to determine the law governing the arbitration agreement in the absence of an express choice after the recognition of the separability doctrine, this case in question differs from the others. Andrew Smith J has considered the arbitration agreement as merely one of the clauses of the substantive contract by arguing that the express choice of law of the substantive contract can amount to an express choice of law governing the arbitration agreement.

The most recent cases, which have given guidance with respect to the determination of the law of the arbitration agreement in the absence of an express choice, are concerned with the answers or methods to find out a solution by paying

[70] R. Merkin: “Jurisdiction: applicable law and third parties”, Arbitration Law Monthly, Issue 13, No:6 (22 March 2013). http://www.arbitrationlawmonthly.com/arbitration/jurisdiction/jurisdiction-applicable-law-and-third-parties-63347.htm?origin=internalSearch (accessed on 14.09.2013)
[71] at p. 24

attention to the separability doctrine. Beyond the debate on which judgement between the two is the most logical one in terms of the approaches adopted and besides this, it can be thought that Andrew Smith J followed the solution method adopted in *Sul America*, the underlying reason of the decision in *Arsanovia* differs from both the *C v D* and *Sul America*. The decision distinguishes with its approach towards the arbitration agreement.

It is tenable to evaluate the express choice of law governing the substantive contract as a "*strong pointer*" or an "*important factor to take into account*" as English law has traditionally approached the issues except in *C v D*. Nevertheless, without making any mention to the separability doctrine, codified in section 7 of the Arbitration Act apart from the recognition in common law, and considering the wording of the arbitration clause which contains an expression of "This Agreement" as an intention to make a choice of law for all clauses in the agreement, would be contrary to the aim of the separability doctrine. Although Andrew Smith J acknowledged that his point of view might be considered as "*fussy distinction of the kind deprecated in Fiona Trust v Holding Corporation*",[72] his argument was without any regard to the statutory provision with respect to the separability of the arbitration agreement in the Arbitration Act.[73]

It can easily be seen from the cases prior to *XL Insurance* and *C v D*, and in *Sul America* that the express choice of law governing the substantive contract is given importance to by the reason that it can imply or point the law of the arbitration agreement unless other important factors indicate so. The foundations of this approach can be seen in the statement of Lord Mustill in *Channel Tunnel Group Ltd,* in which he stressed the exceptional nature of the situation where the arbitration agreement is being

[72] at p. 22

[73] R. Merkin: "Jurisdiction: applicable law and third parties", Arbitration Law Monthly, Issue 13, No:6 (22 March 2013). http://www.arbitrationlawmonthly.com/arbitration/jurisdiction/jurisdiction-applicable-law-and-third-parties-63347.htm?origin=internalSearch (accessed on 14.09.2013)

governed by the law different from that of the substantive contract.[74] However, even assuming that the traditional approach does not constitute any conflict with the separability doctrine as it considers the circumstances from the perspective of an implied choice and even assuming that, as explained by Moore Brick J in Sul America, the doctrine "*simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective"*[75], the concept of separability can not be compatible with the interpretation of the wording "This Agreement" as an "*evince of intention*". Otherwise the separability doctrine would be nothing but a remedy to arbitrate in the event of the assertion regarding the validity or existence of the substantive contract. However, the doctrine brings about another consequence as stated above and the separability of the laws between the agreement to arbitrate and substantive contract is one of them.

It can also be argued and propounded that "*express terms do not stipulate only what is absolutely and unambiguously explicit*" as Andrew Smith J has done. Accordingly, it can be assumed that the parties do not have to absolutely and unambiguously state their choice. However, so long as the approach adopted in *Sul America* applies to determine the law applicable to the arbitration agreement, this argument and assumption would be of no value. The reason for this is the importance that has already been given to the implied terms. To put it another way, no matter what constitutes an express choice and no matter if the parties have not absolutely and unambiguously made an express choice, there would be an additional remedy remaining for parties to invoke in order to substantiate the genuine preference of them on the basis of an "implied term" according to the case of *Sul America*. Therefore, interpreting the

[74] See footnote 36
[75] at p. 26

express choice of law governing the substantive agreement very widely and reaching a conclusion by propounding that the parties had evinced to intent that Indian law applies to all clauses of "This Agreement", constitute a contrast with the aim behind the recognition of the separability doctrine which is well established in English law.

To look at the argument of Andrew Smith J from another standpoint, for an instant, it may be thought that the parties might have intended to exclude the principle of separability of the arbitration agreement by typing the specific word "This Agreement", and therefore Andrew Smith J might have approached the issue from that perspective. However, given the fact that the seat of arbitration is determined expressly as London, the parties can not exclude the principle of the separability of the arbitration agreement unless they otherwise clearly express so.[76] In other words, without any clear expression to exclude the separability of the arbitration agreement; considering the word "This Agreement" as a choice of law for all clauses in the substantive contract would also not be in line with the spirit of the separability doctrine.

In the light of these facts stated above, it can easily be said that the approach adopted by Andrew Smith J is, although on one hand aiming to resolve the issue by way of paying attention to the parties' intention, contrasting with the statutory provision which recognises the separability doctrine in section 7 of the Arbitraton Act. Apart from the fact that the separability doctrine is recognised in common law, the statutory provision sets out that the agreement to arbitrate and the substantive contract which contains the arbitration clause are different contractual undertakings. Therefore, the reasoning of Andrew Smith J becomes nothing more than an extravagant interpretation of the *Sul America*; by reason of the fact that it causes disregarding of the separability doctrine. This can be inferred from the consideration of the potential implied choice of

[76] R. Merkin and L. Flannery: *Arbitration Act 1996*, (4th edn), Informa, London, (2008) p. 35, see footnote 4

the parties regarding the law governing the arbitration agreement as a possible express choice of law governing the arbitration agreement due to the wording of “This Agreement” in the arbitration clause.

CONCLUSION

It should be acknowledged that, in the absence of an express choice of the parties' regarding the law governing the arbitration agreement; it is not easy to determine the applicable law and thus various indicators might be used to find out the best solution by the courts. Especially, in international arbitration, given the fact that both the Rome I Regulation and the Arbitration Act 1996 do not provide any remedies, the issue becomes more complicated for English law.

However, from the perspective of English law, the solution has so far been found either by paying more attention to the law of the contract as it has traditionally been accepted; or considering the law of the procedure as the closest and most real connected one, just as it has been paid attention to in *C v D*. All the approaches adopted, although distinguishable in standpoint, have one thing in common. That is the awareness of the separability of the arbitration agreement and the substantive contract pursuant to the aim behind its recognition and codification. However, in *Arsanovia,* Andrew Smith J approached the substance of the arbitration agreement as one of the clause of the substantive contract by way of stating that the expression of "This Agreement" requires so.

Given both the statutory nature of the separability doctrine and the fact that the Court in *Arsanovia* has not made any mention of it, interpreting the letter of the arbitration clause to the extent which takes the arbitration agreement as one of the clauses amongst others, can not be acceptable when taking into account the aim of the Arbitration Act. Therefore, although determining the law of the substantive contract as the law of the arbitration agreement accords with the traditionally held decisions in English law when the facts of the case are considered, the reasoning of Andrew J Smith is unlikely to have any effect on the separability doctrine.

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