# Reappreciating the Composite Approach with Anupam Mittal v Westbridge II

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## I. INTRODUCTION

The debate surrounding the composite approach i.e., the approach of accommodating the application of both the law applicable to the substantive contract and the *Lex Fori* to the arbitration clause has recently resurfaced with *Anupam Mittal v Westbridge Ventures II* ("Westbridge"). In this case, the Singapore Court of Appeal paved way for application of both the law governing substantive contract and the *Lex Fori* to determine the arbitrability of the concerned oppression and mismanagement dispute. The same was based on principle of comity, past precedents and s 11 of the International Arbitration Act. The text of s 11 (governing arbitrability) does not specify and hence limit the law determining public policy to *Lex Fori*. In any event, the composite approach regardless of any provision, majorly stems from basic contractual interpretation that extends the law governing substantive contract to the arbitration clause unless the presumption is rebuttable. For instance, in the instant case, the dispute would have been rendered in-arbitrable with the application of Indian law (law governing substantive contract) and hence the Singapore law was inferred to be the implied choice.[1]

The test as initially propounded in *Sulamérica CIA Nacional de Seguros v Enesa Engenharia* ("Sulamerica") by the EWCA and later also adopted in Singapore[2] states that the law governing the substantive contract will also govern the arbitration clause unless there is an explicit/implicit choice inferable to the contrary. The sequence being 1) express choice, 2) determination of implied choice in the absence of an express one and 3) closest and the most real connection. The applicability of *Lex Fori* can only be inferred if the law governing

the substantive contract would completely negate the arbitration agreement. There have been multiple criticisms of the approach accumulated over a decade with the very recent ones being listed in (footnote 1). The aim of this article is to highlight the legal soundness and practical boons of the approach which the author believes has been missed out amidst the rampant criticisms.

To that end, the author will *first* discuss how the composite approach is the only legally sound approach in deriving the applicable law from the contract, which is also the source of everything to begin with. As long as the arbitration clause is a part of the main contract, it is subject to the same. To construe it as a separate contract under all circumstances would be an incorrect application of the separability doctrine. Continuing from the first point, the article will show how the various nuances within the composite approach provide primacy to the will and autonomy of the parties.

## II. TRUE APPLICATION OF THE 'SEPARABILITY' PRINCIPLE

The theory of separability envisages the arbitration clause to be separate from the main contract. The purpose of this principle is to immunize the arbitration clause from the invalidity of the main contract. There are various instances where the validity of a contract is contested on grounds of coercion, fraud, assent obtained through corruption, etc. This, however, does not render the arbitration clause inoperable but rather saves it to uphold the secondary obligation of resolving the dispute and measuring the claims arising out of the breach.[3]

It is imperative to note from the context set above that the doctrine has a specific set purpose. What was set as its purpose in seminal cases such as *Heyman v Darwins Ltd* has now been cemented into substantive law with Article 16 of the UNCITRAL Model law which has further been adapted by multiple jurisdictions such as India, Singapore and the UK also having a version in s 7. The implication of this development is that separability cannot operate in a vague and undefined space creating legal fiction in areas beyond its stipulated domain. Taking into consideration this backdrop, it would be legally fallacious to strictly follow the *Lex Fori* i.e., applying the substantive law of the seat to the arbitration clause as a default or the other extreme of the old common law approach of extending the law applicable to the substantive contract as a default. The author submits that the composite approach which was first taken in *Sulamerica* and recently seen in *Westbridge* to determine the law applicable to arbitrability at a pre-award stage,

enables the true application and effectuation of the separability doctrine.

### *A. Lex Fori*

To substantiate the above made assertion, the author will first look at the *Lex Fori* paradigm. Any legal justification for the same will first have to prove that an arbitration clause is not subject to the main contract. This is generally carried out using the principle of separability. However, when we examine the text of article 16, Model law or even the provisions of the impugned jurisdictions of India and Singapore (in reference to the Westbridge case), separability can only be operationalised when there is an objection to the validity or existence of the arbitration clause. It would be useful to borrow from Steven Chong, J's reading of the doctrine in *BCY v BCZ*, which is also a case of the Singapore High Court that applied the composite approach of *Sulamerica*. Separability according to them serves a vital and narrow purpose of shielding the arbitration clause from the invalidity of the main contract. The insulation however does not render the clause independent of the main contract for all purposes. Even if we were to examine the severability provision of the UK Arbitration Act (Sulamerica's jurisdiction), the conclusion remains that separability's effect is to make the arbitration clause a distinct agreement only when the main contract becomes ineffective or does not come into existence.

To further buttress this point, it would be useful to look at the other contours of separability. For instance, in the landmark ruling of *Fiona Trust and Holding Corp v Privalov* (2007), both Lord Hoffman and Lord Hope illustrated that an arbitration clause will not be severable where it is a part of the main contract and the existence of consent to the main contract in itself is under question. This may be owing to the fact that there is no signature or that it is forged, etc. To take an example from another jurisdiction, arbitration clauses in India seize to exist with the novation of a contract and the position remains even if the new contract does not have an arbitration clause. In these cases, the arbitration clause seized to be operational when the main contract turned out to be non-est. However, the major takeaway is that as a general norm and even in specific cases where the arbitration clause is endangered, it is subject to the main contract and that there are limitations to the separability doctrine. Hence, it would be legally fallacious to always detach arbitration clauses from the main contract and apply the law of the seat as this generalizes the application of separability, which in turn is contrary to

its scheme. It is also imperative to note that the Sulamerica test does not impute the law governing the substantive contract when the arbitration clause is a standalone one hence treating it as a separate contract where ever necessary.

### *B. Compulsory Imposition of Law of Substantive Contract*

Having addressed the Lex Fori approach, the author will now address the common law approach of imputing the law governing the main contract to the arbitration clause. The application and reiteration of which was recently seen in *Enka v Chubb* and *Kabab-ji v Kout Food Group.* If we were to just examine the legal tenability of a blanket imposition of the governing law on the main contract, the author's stand even at this end of the spectrum would be one that the approach is impeding the true effectuation of separability. While it is legally fallacious to generalize the application of separability, the remark extends when it is not operationalized to save an arbitration clause. There may be circumstances as seen in *Sulamerica* and *Westbridge* wherein the arbitration clause will be defunct if the law of the main contract is applied. In such circumstances the arbitration clause should be considered a distinct contract and the law of the seat should be applied using a joint or even a disjunctive reading of prongs 2 and 3 of the *Sulamerica* test i.e., 'implied choice' and 'closest and most real connection'. Although, in the words of Lord Moore-Bick, J, the two prongs often merge in inquiry as "*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 have made an implied choice of proper law*" [para 25]. In any event, when the law governing substantive contract is adverse, the default implication rendered by this inquiry is that the parties have impliedly chosen the law of the seat and the arbitration clause in these circumstances has a more real connection to the law of the seat. This is because the reasonable expectation of the parties to have their dispute resolved by the stipulated mechanism and the secondary obligation of resolving the dispute as per the contract (apart from the primary obligation of the contract) can only be upheld by applying the law of the seat.

When we specifically look at *Enka v Chubb* and *Kabab-ji,* it is imperative that these cases have still left room for the 'validation principle' which precisely is saving the arbitration clause in the manner described above. While the manner in which the principle was applied in Kabab-ji may be up for criticism, the same is beyond the scope of this article. A narrow interpretation of the validation

principle is nonetheless avoidable using the second and third prongs of the *Sulamerica* test as the inquiry there gauges the reasonable expectation of the parties. Irrespective, Kabab-ji is still of the essence for its reading of Articles V(I)(a) of the New York Convention("NYC") r/w Article II of the NYC. Arguments have been made that the composite approach (or the very idea of applying the law governing substantive contract) being antithetical to the NYC. However, the law of the seat is only to be applied to arbitral agreements referred to in Article II, 'failing any indication'. This phrase is broad enough to include not just explicit choices but also implicit choices of law. The applicability of *Lex Fori* is only mentioned as the last resort and what the courts after all undertake is finding necessary indications to decide the applicable law. Secondly, statutory interpretation should be carried out to give effect to international conventions only to the extent possible (para 31, *Kabab-ji*). An interpretation cannot make redundant the scheme of separability codified in the statute. Lastly, even if the approach were to be slightly antithetical to NYC, its domain of operation is at the enforcement stage and not the pre-arbitration stage. Hence, it can never be the sole determining factor of the applicable law at the pre-arbitral stage. While segueing into the next point of discussion, it would be imperative to mention amidst all alternatives and criticisms that the very creation of the arbitral tribunal, initiation of the various processes, etc is a product of the contract and hence its stipulation can never be discarded as a default.

## III. PLACING PARTY AUTONOMY & WILL ON A PARAMOUNT PEDESTAL

The importance of party autonomy in international arbitration cannot be reiterated enough. It along with the will of the parties constitute the very fundamental tenets of arbitration. As per Redfern and Hunter, it is an aspiration to make international arbitration free from the constraints of national laws.[4] There will always be limitations to the above stated objective, yet the aim should be to deliver on it to the most possible extent and it is safe to conclude that the composite approach does exactly that. Darren Low at the Asian International Arbitration Journal argues that this approach virtually allows party autonomy to override public policy. Although they state this in a form of criticism as the chronology in their opinion is one where the latter overrides the former. However, even they note that the arbitration in *Westbridge* was obviously not illegal. It is imperative to note that the domain of various limitations to arbitration such as public policy or comity needs to be restricted to a minimum. When the parties are

operating in a framework which provides self-determining authority to the extent that parties the freedom to decide the applicable substantive law, procedure, seat, etc, party autonomy is of paramount importance. The Supreme Court of India in *Centrotrade Minerals v Hindustan Copper* concluded party autonomy to be the guiding principle in adjudication, in consideration of the abovementioned rationale.

As stated in *Fiona Trusts,* the insertion of an arbitration clause gives rise to a presumption that the parties intend to resolve all disputes arising out of that relation through the stipulated mechanism. This presumption can only be discarded via explicit exclusion. An arbitration clause according to Redfern and Hunter gives rise to a secondary obligation of resolving disputes. Hence, as long as the parties intend to and have an obligation to resolve a dispute, an approach that facilitates the same to the most practicable extent is certainly commendable.

This can be further elucidated by taking a closer look at the line of cases on the topic. The common aspect in all these cases is that they have paved way for the application of laws of multiple jurisdictions which in turn has opened the gates to a very pro-validation approach. For instance, the SCA in *Westbridge* applied Singapore's law as the application of Indian law would have rendered the dispute in-arbitrable. There may also be circumstances wherein the *Lex Fori* may be rendering a dispute in-arbitrable. While the court in *Westbridge* stated that owing to the parallel consideration of the law of the seat, the dispute would be in-arbitrable, using the composite approach one could also pave the way for the arbitration of that dispute. This can be done by construing the place of the forum as a venue and not a seat. There are multiple reasons for parties to choose a particular place for arbitration, including but not limited to neutrality, quality of adjudication, cost, procedure applicable to arbitration, etc. And while it may be true that an award passed by a following arbitration may not be enforceable in the venue jurisdiction, it can still be enforced in other jurisdictions. There are 2 layers to be unravelled here – the first one being that it is a well settled principle in international arbitration that awards set aside in one jurisdiction can be enforced in the others as long as they do not violate the public policy of the latter jurisdiction. This was seen in *Chromalloy Aeroservices v Arab Republic of Egypt,* wherein the award was set aside by the Egyptian Court of Appeal yet it was enforced in the U.S.A. The same principle although well embedded in other cases was recently reiterated in *Compania De Inversiones v. Grupo Cementos de*

*Chihuahua* wherein the award for an arbitration seated in Bolivia was annulled there but enforced by the Tenth Circuit in the U.S.A. The second ancillary point to this is the practicality aspect. The parties generally select the law governing the substantive contract to be one where the major operations of the company, its assets related to the contract are based and hence that is also likely to be the preferred place of enforcement. This is a good point to read in Gary Born's proposal of imputing the law of a jurisdiction that has "*materially closer connections to the issue at hand*".[5]

Apart from the pro-validation approach which upholds the rational expectation of the parties, there are other elements of the composite approach that ensure the preservation of party autonomy and will. For instance, the courts will *firstly*, not interfere if it can be construed that the parties have expressly stipulated a law for the arbitration clause. *Secondly*, as has been mentioned above, the courts will impute the law governing the substantive contract as the applicable law when the arbitration clause is a standalone one. What can be observed from here is that the approach maintains a proper degree of caution even while inferring the applicable law. And *lastly*, the very idea of maintaining a presumption of the same law being applicable to both the main contract and the arbitration clause also aligns with upholding the will and autonomy of the parties. Various commentators have observed that parties in practice rarely stipulate a separate clause on the substantive law applicable to the arbitration clause. As observable, model clauses of the various major arbitral institutions do not contain such a stipulation and certain commentators have even gone as far as to conclude that the inclusion of such a clause would only add to the confusion. In light of this background, it was certainly plausible for Steven Chong, J in *BYC v BCZ* to conclude that "*where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law. If the intention is otherwise, I do not think it is unreasonable to expect the parties to specifically provide for a different system of law to govern the arbitration agreement*" [para 59]. However, it has been shown above that the composite approach has not left any presumption irrebuttable in the presence of appropriate reasoning, facts and will trigger separability if necessary to avoid the negation of the arbitration agreement.

## IV. CONCLUDING REMARKS

In a nutshell, what can be inferred from this article is that the composite

approach keeps at its forefront principles and characteristics of party autonomy and pro-arbitration. The approach is extremely layered and well thought out to preserve the intention of the parties to the most practicable extent. It delivers on all of this while truly effectuating the principle of separability and ensuring its correct application. Hence, despite all the criticisms it is still described as a forward-looking approach owing to its various characteristics.

**FOOTNOTES:**

[1] For recent literature and more detailed facts, See Darren Jun Jie Low, 'The Composite Approach to Issues of Non-Arbitrability at the Pre-Award and Post-Award Stage: Anupam Mittal v. Westbridge Ventures II Investment Holdings [2023] SGCA 1', in Lawrence Boo and Lucy F. Reed (eds), *Asian International Arbitration Journal* (Kluwer Law International 2023, Volume 19, Issue 1), 83 – 94; Khushboo Shahdapuri and Chelsea Pollard, 'Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable', *(Kluwer Arbitration*, 2023) < Dispute over Matrimonial Service Website: Singapore Adopts Composite Approach in Declaring Dispute to be Arbitrable – Kluwer Arbitration Blog>; Nisanth Kadur, 'Determining Arbitrability at the Pre-Award Stage: An Analysis of the Singapore Court of Appeal's "Composite Approach"', (*American Review of International Arbitration*, 2023) <Determining Arbitrability at the Pre-Award Stage: An Analysis of the Singapore Court of Appeal's "Composite Approach" – American Review of International Arbitration (columbia.edu)>

[2] See *BCY v BCZ* [2016] SGHC 249; *BNA v BNB* [2019] SGHC 142; *Anupam Mittal v Westbridge II* [2023] SGCA 1.

[3] Martin Hunter and others, *Redfern and Hunter on International Arbitration, (6th edn, 2015 OUP) [2.101 – 2.104].*

[4] Redfern and Hunter (n 1) [1.53].

[5] Gary Born, *International Commercial Arbitration*, (3rd Ed, Kluwer Law International 2021) §4.05 [C] [2].