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SEPARABILITY DOCTRINE: PERSPECTIVES FROM CHINA, ENGLAND AND THE MODEL LAW[1]

In this article, the author compares the application of the separability doctrine in the People's Republic of China, England and Wales, and select Model Law jurisdictions (including Singapore and Hong Kong). This article argues that the proper scope of the doctrine must include situations of both contractual validity and existence are in question. Additionally, the doctrine should apply in finding that the law of the arbitration agreement is different from the law of the main contract. Finally, the doctrine must also serve to protect party autonomy to shield an arbitration agreement from self-defeating main agreements.

GOH Jia Jun Benjamin[2]
LLB, BBM (Summa Cum Laude) (Singapore Management University).

I. Introduction

1 The separability doctrine is perhaps one of the most important and fundamental cornerstones of arbitration.[3] Even though parties enter into a single contract containing the arbitration clause, courts treat the arbitration clause as a separate agreement from the main contract.[4] This has many practical implications. Most importantly, it ensures that the arbitration agreement remains enforceable even if the main contract is invalid or otherwise unenforceable. Without this doctrine, an arbitral grandfather paradox would arise.[5] If an arbitral tribunal were to rule

1 In this article, unless otherwise stated, "Model Law" refers to the UNCITRAL Model Law on International Commercial Arbitration (1985).

2 The author is deeply grateful to Judge Dr Kim Min Kyung (Judiciary of Korea, Incheon District Court) and Assoc Prof Darius Chan (Yong Pung How School of Law, Singapore Management University) for their invaluable guidance and insightful comments on this article. This article is written in the author's personal capacity; any opinions written are entirely the author's own views and all errors and mistakes remain the author's alone.

3 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 3, at p 523.

4 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 3, at p 523. See also *Granite Rock Co v Int'l Bhd of Teamsters* 561 US 287 at 299 (US SCt, 2010).

5 The grandfather paradox is a self-contradictory scenario: a hypothetical person travels back in time to kill her grandfather, but this would mean that she could never have been born and could not kill her grandfather.

that the main contract was invalid, that would mean that the arbitration clause would be invalid and the arbitral tribunal would have lacked jurisdiction to find the contract invalid in the first place.[6] By finding that the arbitration clause is separable from the main contract, arbitrators can decide on matters of contract validity without first seeking a declaration from the courts.[7]

2 Despite its importance, the true scope of the doctrine has been extremely uncertain: is the survival of the arbitration clause a consequence of the separability doctrine, or does it delineate its limits? In other words, does an arbitration clause survive an invalid contract because the clause is separable from the main contract, or is the clause separable from the main contract in so far as it ensures an arbitration clause remains valid? Such discussions are not merely theoretical. Indeed, a line of recent cases, including the decisions in *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd*[8] ("*DHL v Gemini*"), have directly challenged the limits of the doctrine, reigniting fresh discussions on its true boundaries.

3 This article explores three jurisdictions with varying broadness in their application of the separability doctrine: (a) the People's Republic of China[9] ("China"), where a broad application has been accepted; (b) England and Wales ("England"), where a narrow interpretation is applied; and (c) Model Law[10] jurisdictions, like Singapore and Hong Kong, which seem to have a conflicted approach, unbound by the plain reading of the Model Law. This article compares the specific language used in the legislation of each jurisdiction, as well as case law interpreting the legislation. It argues that the broad interpretation taken by China may be problematic as it allows separability to apply for situations where it should not. At the same time, the overly narrow application by England is complicated, does not reflect the realities of parties' intention, and leads to unprincipled indefensible positions. Lastly, although Model Law jurisdictions like Singapore and Hong Kong have taken a pseudo-middle-ground approach where separability is not confined by the statutory limits of the Model Law, such an approach is also problematic as the use of legal fiction departing from its statutory basis may lead to commercial uncertainty.

6 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 3, at pp 567–568.
7 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 3, at pp 567–568.
8 [2022] EWHC 181 (Comm); [2023] Bus LR 584 (CA).
9 Excluding Hong Kong SAR and Macao SAR.
10 UNCITRAL Model Law on International Commercial Arbitration (1985).

II. China: broad application of separability doctrine

4 China has adopted a broad interpretation of the separability doctrine. Under Chinese law, separability is a free-standing principle that allows the agreement to arbitrate to be entirely independent and separate from the main contract. The legal basis of the separability doctrine is Art 19 of the Chinese Arbitration Law,[11] which provides that:

> *An arbitration agreement shall exist independently*; and the amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement. [emphasis added]

5 At first glance, the language of Art 19 seems straightforward. However, a deeper look at the Article's bifurcated phrasing leads to two diverging interpretations of the statute. On the one hand, Art 19 could be interpreted broadly to mean that the first part – "an arbitration agreement shall exist independently" – is a free-standing and unequivocal statement about the nature of an arbitration agreement, with the second part merely emphasising certain situations where the validity of the arbitration agreement would not be affected. On the other hand, like the narrow conception of the separability doctrine, it could also be argued that the two must be read together, *ie*, that an arbitration agreement is *only separable in so far as* the amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement. If the second reading is taken, then the doctrine of separability cannot cover the non-existence of contracts, since the second sentence limits its application to amendment, rescission, termination and invalidity.

6 In Guiding Case 196,[12] the First International Commercial Court of the Supreme People's Court ("FICC") adopted the former interpretation of Art 19 and accepted a broad, free-standing separability doctrine.[13] The case facts are discussed below.

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11 Arbitration Law of the People's Republic of China Revised (promulgated by Order No 31 of the President of the People's Republic of China on August 31, 1994).

12 The Guiding Cases are selected cases marked by the Supreme People's Court of China to be noteworthy and important. China is largely a civil law jurisdiction, and it does not have the principle of *stare decisis*. Nevertheless, these Guiding Cases are considered to be extremely persuasive precedents.

13 Guiding Case No 196 of the Supreme People's Court: *Luck Treat Limited v Shenzhen Zhongyuancheng Commercial Investment Holdings Co, Ltd* (2023) 3 SPC Gazette at [13]–[16].

A. Guiding Case 196

7 In this case, two Chinese companies, Yunyu Limited ("Yunyu") and Shenzhen Zhongyuancheng Commercial Investment Holdings ("ZYC"), were negotiating a contract concerning the sale of shares.[14] Yunyu sent ZYC several draft contracts, containing arbitration clauses providing for arbitration at the Shenzhen Court of International Arbitration. These arbitration clauses were stamped and exchanged.[15] However, the parties were subsequently unable to reach a final agreement over the draft contracts. Yunyu delivered ZYC a letter to cancel the transaction and ZYC applied to the Shenzhen International Arbitration Court for arbitration. Yunyu then applied to the FICC for a declaration that there was no arbitration agreement since the contract was not concluded.[16]

8 In interpreting Art 19, the FICC held that the phrase "an arbitration agreement shall exist independently" was a general and overall expression about the nature of an arbitration agreement.[17] As such, the existence of the arbitration agreement was not dependent on the existence of a fully-formed main contract. In the FICC's view, a determination of whether the parties had reached an arbitration, separate from the main contract, was necessary to give effect to parties' intention to arbitrate.[18]

9 Applying Chinese contract law rules, the FICC held that the exchange of initialed arbitration terms was sufficient to form an agreement to arbitrate.[19] This was separate from the main agreement and was valid even though the parties did not reach a full and final main contract.

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14 Guiding Case No 196 of the Supreme People's Court: *Luck Treat Limited v Shenzhen Zhongyuancheng Commercial Investment Holdings Co, Ltd* (2023) 3 SPC Gazette at [1]–[3].

15 Guiding Case No 196 of the Supreme People's Court: *Luck Treat Limited v Shenzhen Zhongyuancheng Commercial Investment Holdings Co, Ltd* (2023) 3 SPC Gazette at [6].

16 Guiding Case No 196 of the Supreme People's Court: *Luck Treat Limited v Shenzhen Zhongyuancheng Commercial Investment Holdings Co, Ltd* (2023) 3 SPC Gazette at [7].

17 Guiding Case No 196 of the Supreme People's Court: *Luck Treat Limited v Shenzhen Zhongyuancheng Commercial Investment Holdings Co, Ltd* (2023) 3 SPC Gazette at [12].

18 Guiding Case No 196 of the Supreme People's Court: *Luck Treat Limited v Shenzhen Zhongyuancheng Commercial Investment Holdings Co, Ltd* (2023) 3 SPC Gazette at [13].

19 Guiding Case No 196 of the Supreme People's Court: *Luck Treat Limited v Shenzhen Zhongyuancheng Commercial Investment Holdings Co, Ltd* (2023) 3 SPC Gazette at [13].

10 As illustrated by Guiding Case 196, the Chinese position is extremely broad.[20] Separability is, both in the natural interpretation of Art 19 and as interpreted by the Chinese court, a free-standing principle, capable of dealing with issues relating to the *existence* of the contract.[21] Furthermore, because of the general principle that an "arbitration agreement shall exist separately", the application of the doctrine could go even beyond questions of the existence of the contract to matters such as choice of law.[22]

III. England: narrow application of separability doctrine

11 Unlike China, the separability doctrine in England is narrowly confined to s 7 of the English Arbitration Act 1996.[23] This is because, historically, English courts were hesitant to regard an arbitration clause as independent from the parties' underlying contract.[24] Instead, English courts viewed separability as a product of contractual interpretation, to give effect to parties' intention to arbitrate.[25] This position was later codified in the late 20th century in s 7 of the English Arbitration Act 1996, which has now become the legal basis for the separability doctrine in England. Section 7 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)

20 Interestingly, even if the First International Commercial Court of the Supreme People's Court were to apply the latter interpretation of Art 19, another potential legal basis for justifying this broad position could be Art 507 of the Civil Code of the People's Republic of China (Adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020) ("Chinese Civil Code"), which provides that: "Where a contract does not take effect, or is void, revoked, or terminated, the validity of a clause concerning dispute resolution shall not be affected." Whether a contract "takes effect" can be interpreted as encompassing situations of contractual formation by virtue of Art 502(1) of the Chinese Civil Code: "A contract formed in accordance with law becomes effective upon its formation, unless otherwise provided by law or agreed by the parties." Nevertheless, as it stands, the legal basis of the separability doctrine preferred by the Chinese courts remains Art 19 of the Chinese Arbitration Law.

21 This position is also supported by Art 10 of the Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, which further specifies: "Where the parties reach an arbitration agreement regarding a dispute when concluding a contract, the validity of the arbitration agreement shall not be affected if the contract is not established."

22 Guiding Case No 196 of the Supreme People's Court: *Luck Treat Limited v Shenzhen Zhongyuancheng Commercial Investment Holdings Co, Ltd* (2023) 3 SPC Gazette at [12].

23 c 23 (UK).

24 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 3, at pp 547–549.

25 Simon Camilleri, "Sense and Sensibility" (2023) 72 ICLQ 509 at 509–510.

> 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*. [emphasis added]

12 Unlike Art 19 of the Chinese Arbitration Law, s 7 of the English Arbitration Act 1996 does not state the separability doctrine as a free-standing principle. Instead, with the phrase "for that purpose", separability is narrowly limited. It can only be used to ensure that an arbitration agreement is not invalid because of an invalid underlying contract.[26] This narrow separability doctrine was applied in the landmark decision of *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA*[27] ("*Sulamérica*").

A. Sulamérica

13 This case concerned a dispute between insured companies and their insurers, relating to several insurance policies surrounding a construction project in Brazil.[28] The contract was governed by the law of Brazil and included an exclusive jurisdiction clause in favour of Brazilian courts. However, there was also an arbitration clause to arbitrate in London.[29]

14 The insured argued that the arbitration clause could only be exercised with their consent as this was a requirement under Brazilian law.[30] On the other hand, the insurers argued that such a requirement did not exist since the arbitration clause was governed by English law. Applying a three-stage inquiry, the Court of Appeal found that the law of the arbitration agreement was English Law.[31]

15 At first blush, it would seem that scrutiny of the separability doctrine would, in some form, apply here. After all, if an arbitration clause could be wholly separated from the main contract, then it must follow that the arbitration clause could also be governed by a law different

26 United Kingdom, Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) (Chairman: The Rt Hon Lord Justice Saville).
27 [2013] 1 WLR 102.
28 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [2].
29 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [3].
30 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [6]–[7].
31 *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 at [32].

from that of the main contract.[32] However, Moore-Bick LJ expressly held that the separability doctrine was irrelevant to the matter, as the doctrine in s 7 did not allow for the its application in an arbitration clause's choice of law. He stated:[33]

> 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 not to insulate the arbitration agreement from the substantive contract for all purposes.

16 According to Moore-Bick LJ, when parties enter a contract with an arbitration clause, they intend for any disputes arising out of the contract, including whether the contract is valid, to be decided through the specific dispute resolution clauses. The function of the separability doctrine is solely to ensure this purpose.

17 *Sulamérica* is significant for two reasons. First, in terms of the application of a three-stage inquiry to identify the choice of law of an agreement, *Sulamérica* stands for the principle that the main contract is a strong indicator of the governing law of the arbitration agreement unless there are clear indications to the contrary.[34] Second, however, the defensibility of this position lies in the fact that the separability doctrine, as limited by s 7, cannot be applied in such situations to neutralise the choice of law of the main contract. Applying a strict and narrow application of the doctrine of separability, an arbitration agreement should be *prima facie* part of the main contract, sharing the same governing law. However, if a different characterisation of separability were to be taken and one were to, *eg*, apply Art 19 of the Chinese Arbitration Law, the choice of law of the main contract would not be a strong indicator of the governing law of the arbitration agreement, especially since the agreement could be deemed wholly separable from the main agreement.

18 Nevertheless, as this decision illustrates, the statutory limits of s 7 clearly confine the separability doctrine "for the purpose" of ensuring that an arbitration clause survives an invalid main contract.[35] Indeed, under the limits of s 7, the English courts must refuse to apply the separability

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32 Simon Camilleri, "Sense and Sensibility" (2023) 72 ICLQ 509 at 519–520.

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

34 See, *eg*, the application of the principle in *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 in *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [69].

35 See also United Kingdom, Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) (Chairman: The Rt Hon Lord Justice Saville) at p 113.

doctrine for any other purposes. However, this does not mean that such an approach is desirable. Indeed, the strict limits on the doctrine of separability can lead to confusing, if not contradictory results, as will be explained in *DHL v Gemini* below.

B. DHL v Gemini

19 *DHL v Gemini* was a case where the court held that an arbitration agreement could not be separable from the main contract where the non-existence of the main contract is in issue. The case involved Gemini Ocean, the owner of a vessel, and DHL, which sought to charter the vessel for the transport of coal. During negotiations for the proposed charter, the broker of the transaction circulated a draft copy of the terms of the contract. Amongst the clauses was a governing law and arbitration clause which stipulated: "[A]rbitration to be in London, English law to be applied." Another clause provided that the vessel would be inspected by Rightship, which was a widely used vetting system which aimed to identify vessels suitable for the carriage of iron and coal. There was also a *pro forma* which included a provision that the vessel to be nominated should be acceptable to the charterer.[36]

20 Subsequently, as the vessel was set to sail, Rightship approval had not been obtained. DHL advised Gemini to "arrange for a substitute vessel".[37] Eventually, however, DHL decided to withdraw from the transaction and did not approve the *pro forma*. Consequently, Gemini commenced arbitration proceedings against DHL and called DHL to appoint an arbitrator.[38] However, the member of DHL's staff to whom the notice was sent failed to report the matter to his superiors, and the arbitration never came to the attention of the DHL's management. Because of this, the arbitration proceeded with a sole arbitrator, without DHL's participation.

21 After the arbitrator found in Gemini's favour, DHL issued an application under s 67 of the English Arbitration Act challenging the award on the ground that the arbitrator had no substantive jurisdiction. The High Court held that there was no substantive jurisdiction as DHL did not approve the *pro forma*, and no binding contract had been

36 The provision read: "subject shippers/receivers' approval within one working day after fixing main terms and receipt of all required/corrected certificates/documents such approval not to be unreasonably withheld".

37 *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] Bus LR 584 at [23].

38 *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] Bus LR 584 at [24].

concluded. Accordingly, Gemini submitted the matter for appeal to the Court of Appeal of England and Wales (the "English Court of Appeal").

22 At the English Court of Appeal, Males LJ held in DHL's favour – the arbitrator had no jurisdiction, and the doctrine of separability could not be invoked. To reach this decision, Males LJ identified two cases which had applied the separability doctrine, *Fiona Trust & Holding Corporation v Privalov*[39] ("*Fiona Trust*") and *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*[40] ("*Harbour v Kansa*"). He then distinguished those cases as disputes concerning issues of contract validity, where the parties have agreed to arbitration, but one party is contending that the agreement is invalidated.[41] Instead, he characterised the present case as a dispute of contract formation, where the question is whether parties had agreed to arbitrate at all.[42]

23 Importantly, Males LJ recognised that those cases were decided before the enactment of the English Arbitration Act in 1996. However, in light of the explicit reference to the nonexistence of a contract in s 7, he held that Parliament only intended for s 7 to codify the pre-Arbitration Act law on separability, not to expand its scope to situations where the existence of a contract is contested:

> The DAC Report on the Arbitration Bill at para 43 noted that the section 'sets out the principle of separability which is already part of English law (see *Harbour Assurance v Kansa* [1993] QB 701)', with the explanation that 'the doctrine of separability is confined to the effect of invalidity etc of the main contract on the arbitration agreement'. It is clear, therefore, that Parliament did not intend to go further than what *Harbour v Kansa* had already decided. The section is concerned with issues of contract validity, not contract formation.

24 Had Males LJ held that the separability doctrine applied, he would have found that there would have been *prima facie* a valid arbitration agreement. Like Guiding Case 196, the parties had entered into an arbitration agreement even though the final agreement had not concluded because of the lack of Rightship approval. Respectfully, Males LJ's reasoning is problematic for several reasons. First, this holding directly contradicts the plain wording of s 7, which states that separability applies for questions of "existence". Second, Males LJ, in finding that separability should not be applied where a contract's existence is in

39 [2007] Bus LR 1719.

40 [1993] QB 701. *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] Bus LR 584 at [48]–[49] and [54]–[58].

41 *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] Bus LR 584 at [54].

42 *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] Bus LR 584 at [54]–[58].

question, relied heavily on the proposition that without the existence of a contract, parties never agreed to anything, including whether to arbitrate.

25 However, some issues of contractual validity are also situations where parties argue that they did not agree to arbitrate; *eg*, in *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd*[43] ("*Fung Sang Trading*"), the officer who signed the contracted lacked authority, so the argument by the principal was that he never agreed to the contract and never agreed to arbitration. Therefore, using a distinction between validity and existence as a yardstick to whether the dispute goes towards the parties' agreement to arbitrate is superficial at best. It would be irreconcilable and confusing if courts were to accept that separability applies for such situations of contractual invalidity, but not contractual non-existence.

26 Of course, the application of the doctrine must still be identified on a case-by-case basis. Finding that the separability doctrine applies to contractual non-existence does not mean that every instance of contractual non-existence invokes the doctrine. For example, it would be inappropriate to apply the doctrine in situations where a contract containing an arbitration clause is wholly forged.[44]

IV. Model Law: a middle-ground approach

27 Under the Model Law, the separability doctrine is enshrined in Art 16(1), which states:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. [emphasis added]

28 The Explanatory Note to the 2006 amendments to the Model Law clarifies that Art 16(1) adopts the principle of *kompetenz-kompetenz* and separability of the arbitration clause.[45]

29 Like s 7 of the English Arbitration Act 1996, the second sentence of Art 16(1) is narrow and utilises the phrase "for that purpose".

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43 *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40. See discussion below at paras 32–34.

44 For a breakdown of where the doctrine should apply, see paras 63–66 below.

45 UNCITRAL Model Law on International Commercial Arbitration (1985), Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration at para 25.

The separability doctrine is only engaged when there is a challenge to the existence or validity of the contract and the arbitration agreement. In other words, the tribunal may rule on its own jurisdiction because the separability doctrine ensures that the non-existence or validity of the main contract does not taint the existence or validity of the arbitration agreement.

30 However, unlike s 7 of the English Arbitration Act 1996 which deals with the *substantive validity* of an agreement, a plain reading of Art 16(1) seems to only deal with *kompetenz-kompetenz*.[46] This is because the third sentence addresses the validity of the arbitration agreement only in situations where the main contract is found to be invalid by the tribunal. The doctrines of *kompetenz-kompetenz* and separability serve different functions. The former empowers tribunals to rule on their own jurisdiction without deference to the court, including issues of whether a valid arbitration agreement exists, while the latter principle tells us when the arbitration agreement should be viewed as separate from the main contract, and, as has been described in the above paragraphs, to ensure that it exists or is valid. To illustrate this difference, imagine a contract that is substantively null and void or rendered null and void by a court. In this case, while s 7 can be applied, Art 16(1) might not be applicable to save the arbitration agreement. This distinction is not a superficial one. If this plain and ordinary meaning of Art 16(1) is applied, parties may be able to avoid an obligation to submit the dispute to arbitration by denying the existence of the underlying contract.

31 As an additional complication, the judicial pronouncements on the application of the separability doctrine in Model Law jurisdictions seem to contradict the plain reading of Art 16(1), reading in a broader interpretation of the doctrine. Most courts, even applying the verbatim words of the Model Law, take the better view that the separability doctrine applies substantively to the validity of the arbitration agreement, beyond the *kompetenz-kompetenz* of the tribunal.[47] Nevertheless, even among these courts, the extent of the doctrine's application is unclear. In this

46 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 3, at p 405; Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Kluwer Law International, 4th Ed, 2019) at s 3.02.B.3.E.

47 Prof Born also offers another way to reconcile this, which is to view the text of Art 16 as granting arbitrators "competence-competence to consider challenges to consider their own jurisdiction, including challenges to the existence and validity of the arbitration agreement": Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 7, at p 1060.

article, three cases from Hong Kong and Singapore shall be scrutinised, where varying degrees of separability have been accepted.[48]

A. Fung Sang Trading

32 *Fung Sang Trading*[49] was one of the earliest cases interpreting the separability doctrine in the Model Law; the Hong Kong Court of First Instance held that the separability doctrine applied where the main contract was alleged to have been concluded by an agent with no authority. In this case, the plaintiff ("Fung Sang") alleged that it had entered into a contract with the defendant ("Kai Sun") for the sale of goods.[50] When the defendants failed to nominate a vessel in time, the plaintiff commenced arbitration proceedings, relying on this clause from the list of documents signed by the parties:

> Should any dispute arise between the contracting parties, it shall be settled through friendly negotiation. But if there is no agreement to be reached, the case in dispute shall be submitted for arbitration which shall take place in Hong Kong or governed by Hong Kong Laws and Court. The fees for arbitration or legal proceedings shall be borne by the losing party unless otherwise ordered.

33 The plaintiffs appointed an arbitrator but the defendants did not. Accordingly, the plaintiffs applied to the Hong Kong court to have an arbitrator appointed on behalf of the defendants. During these proceedings, the defendants argued that there was no binding contract since the person who had signed the contract had no authority to bind the party, and that the tribunal would have no jurisdiction to rule on whether a contract had been concluded.[51]

34 In applying Art 16(1) of the Model Law, Kaplan J allowed the application to appoint an arbitrator and refused to deal with the question of whether a valid contract had been concluded. He held that Art 16(1) encoded the pre-English Arbitration Act 1996 position of the doctrine of separability in English law.[52] Specifically, he relied on the English case of *Harbour v Kansa* and found that the doctrine of separability applied to cases where the substantive validity of the arbitration clause was in

48 In Hong Kong, the Model Law came into force in 1990, through Arbitration Ordinance (Cap 609) (HK). Similarly, in Singapore, the Model Law was effected in 1994, through the International Arbitration Act 1994 (Act 23 of 1994).

49 [1992] 1 HKLR 40.

50 *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40 at [30].

51 *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40 at [36].

52 *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40 at [57].

question, except in cases where illegality is raised to render the agreement containing the arbitration clause void *ab initio*.[53]

B. BCY v BCZ

35 In contrast to *Fung Sang Trading*, the court in *BCY v BCZ*[54] held that the separability doctrine did not apply in identifying the choice of law of the arbitration agreement, nor in disputing the non-existence of the main contract. *BCY v BCZ* is similar to Guiding Case 196 and *DHL v Gemini*, in so far as it was a dispute over an arbitration clause in negotiations. It involved a proposed sale of shares under a sale and purchase agreement ("SPA") between BCY (the "Seller") and BCZ[55] (the "Buyer"). During negotiations, draft agreements were circulated. There was also an arbitration clause, which stated:[56]

> This Agreement and any non-contractual obligations arising out of or in connection with it are governed by and shall be construed in accordance with the Laws of the State of New York of the United States of America.
>
> All disputes (including a dispute, controversy or claim regarding the existence, validity or termination of this Agreement – a 'Dispute') arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules, such arbitration to take place in Singapore. The seat of the arbitration shall be Singapore.

36 When the Seller decided not to proceed with the sale, the Buyer commenced arbitration proceedings in the International Commercial Court ("ICC") based on the arbitration clause in the SPA drafts. The Seller raised a preliminary objection to the arbitrator's jurisdiction, arguing that no ICC arbitration agreement had been concluded. Notably, the Buyer relied on the arbitration agreement located in the sixth draft of the negotiated SPA, to argue that the seventh draft of the SPA amounted to a valid and concluded contract.[57] Eventually, the arbitrator found that a valid arbitration agreement had been concluded between the parties since mutual assent to the arbitration agreement could be inferred from the exchange of drafts. The Seller then applied to the Singapore courts to set aside the award, on grounds that the arbitrator had no jurisdiction.

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53 *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40 at [58]. See also *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 3 WLR 42.

54 [2017] 3 SLR 357.

55 *BCY v BCZ* [2017] 3 SLR 357 at [2].

56 *BCY v BCZ* [2017] 3 SLR 357 at [14]. Note: the reference to the seat was only included in later drafts (see *BCY v BCZ* [2017] 3 SLR 357 at [16]).

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

37 First, in identifying the applicable law to the arbitration agreement, Stephen Chong J affirmed the approach taken in *Sulamérica* and found that the separability doctrine should not be applied to justify a different choice of law from the main contract. Specifically, he held that:[58]

> The suggestion that the arbitration agreement is a distinct agreement with a governing law distinct from that of the main contract is often justified by the doctrine of separability. However, *the doctrine of separability serves to give effect to the parties' expectation that their arbitration clause – embodying their chosen method of dispute resolution – remains effective even if the main contract is alleged or found to be invalid.* It does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed. This is clear from Article 16 of the UNCITRAL Model Law on International Commercial Arbitration set out in the First Schedule of the IAA ('Model Law').
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> …
>
> *Separability serves the narrow though vital purpose of ensuring that any challenge that the main contract is invalid does not, in itself, affect the validity of the arbitration agreement.* This is necessary because the challenge to the validity of the arbitration agreement often takes the form of a challenge to the validity of the main contract … It is one thing to say that under the doctrine of separability, a party cannot avoid the obligation to submit a dispute to arbitration by merely denying the existence of the underlying contract; it is quite different to say that because of this doctrine, parties intended to enter into an arbitration agreement independent of the underlying contract.
>
> [emphasis added]

38 Second, in identifying whether there was a valid and binding arbitration agreement, Chong J attempted to sidestep the doctrine of separability.[59] He reasoned that since the Buyer relied on the arbitration agreement of the sixth draft, and this was already separate from the seventh draft, there was no need to rely on the doctrine to artificially separate the agreement to arbitrate from the main contract.[60] Accordingly, the validity of the sixth draft arbitration agreement could be scrutinised separately without looking at the validity of the seventh draft contract.

39 Nevertheless, Chong J eventually found that there was no binding arbitration agreement, by evaluating the existence of a contract, and holding that the sixth draft of the arbitration agreement was not concluded. He held:[61]

58 *BCY v BCZ* [2017] 3 SLR 357 at [60]–[61]. This passage was also quoted in *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2023] Bus LR 584 at [66].
59 *BCY v BCZ* [2017] 3 SLR 357 at [79].
60 *BCY v BCZ* [2017] 3 SLR 357 at [80].
61 *BCY v BCZ* [2017] 3 SLR 357 at [90].

> [A]greeing to the wording of the arbitration clause does not *per se* equate to an intention to be contractually bound to arbitrate absent the conclusion of the contract under which the arbitration clause was negotiated.

40 In other words, like *DHL v Gemini*, *BCY v BCZ* stands for the proposition that separability only applies to questions of contractual validity and not to questions of choice of law or contractual formation.

41 Putting aside the question of whether limiting the doctrine to validity is consonant with the statutory basis of Art 16(1), *Fung Sang Trading* and *BCY v BCZ* take very different approaches. *Fung Sang Trading* applied separability and refused to rule on whether there had been a binding agreement between the parties, whereas *BCY v BCZ* refused to apply separability to constrain the court's power.

42 In reconciling the cases, one might contend that, in *Fung Sang Trading*, it would have been inappropriate for Kaplan J to rule on the existence of the contract anyway, regardless of the applicability of the separability doctrine. Kaplan J was faced with a question of whether to appoint an arbitrator, and the respondent had the opportunity to raise the question of jurisdiction again, under Art 16(3) of the Model Law, at a later stage. At that stage, perhaps, the doctrine of separability would not apply, and the court would be obliged to scrutinise the existence of the contract to determine the jurisdiction of the tribunal.

43 Nevertheless, taken at face value, the two cases illustrate the divergence of attitudes towards the scope of the separability doctrine, especially concerning contractual non-existence. Indeed, in subsequent commentaries on Hong Kong arbitration law, Art 16(1) has been expressed as enshrining "total separability of the arbitration agreement".[62]

C. BNA v BNB

44 Lastly, *BNA v BNB*[63] was a case where the Singapore High Court accepted that the separability doctrine could be invoked for questions of choice of law, to salvage a defective arbitration agreement. *BNA v BNB* involved a sale and purchase agreement for industrial gas.[64]

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62 Stephen Mau, *International Commercial Arbitration in Hong Kong: A Guide* (Hong Kong University Press, 2019) at p 98. See also Hong Kong Trade Development Council, *Enhancing Hong Kong's Position as the Leading International Arbitration Centre in Asia-Pacific* (November 2016) <https://www.doj.gov.hk/tc/legal_dispute/pdf/InternationalArbitrationCentre.pdF> (accessed 29 August 2024).

63 [2019] SGHC 142.

64 *BNA v BNB* [2020] 1 SLR 456 at [9].

The agreement entered into by the parties contained the following dispute resolution clause:[65]

> This Agreement shall be governed by the laws of the People's Republic of China.
>
> With respect to any and all disputes arising out of or relating to this Agreement, the parties shall initially attempt in good faith to resolve all disputes amicably between themselves. If such negotiations fail, it is agreed by both parties that such disputes shall be finally submitted to the Singapore International Arbitration Centre for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules. The arbitration award shall be final and binding on both parties.

45 Subsequently, a dispute arose between the parties. One party, BNC, filed a notice of arbitration but another, BNA, challenged the tribunal's jurisdiction. BNA argued that the *lex arbitri* was Chinese law, which prohibited domestic disputes from being administered by foreign arbitration institutions like the Singapore International Arbitration Centre[66] ("SIAC"). Furthermore, the seat of arbitration was chosen as Shanghai and Chinese law also prohibited foreign arbitration institutions like the SIAC from administering arbitrations seated in China. BNA referred to the cases of *Sulamérica* and *BCZ v BCY* and submitted that BNC could not rely on the separability doctrine to protect the parties' arbitration agreement from invalidity since separability only operated to protect an arbitration agreement from being rendered invalid because of an invalid main contract.[67]

46 In the High Court, Vinodh Coomaraswamy J dismissed BNA's application. Coomaraswamy J held that the English position and its narrow application of the separability doctrine in *Sulamérica* was only because Moore-Bick LJ had been constrained by s 7 of the UK Arbitration Act 1996, whereas there was "no equivalent statutory constraint" in Singapore.[68] Coomaraswamy J held that the separability doctrine's function was to give effect to the parties' intention to arbitrate. This function would not be achieved if it did not insulate the arbitral clause from other voiding factors such as a problematic choice of law clause in the main contract. He stated:[69]

> The core of the doctrine's scope is no doubt insulating an integrated arbitration agreement which makes manifest the parties' intention to arbitrate their disputes from invalidity arising only from the invalidity of the substantive contract into which it is integrated. *But the scope must also include insulating*

65 *BNA v BNB* [2019] SGHC 142 at [3].
66 *BNA v BNB* [2019] SGHC 142 at [6].
67 *BNA v BNB* [2019] SGHC 142 at [67].
68 *BNA v BNB* [2019] SGHC 142 at [70].
69 *BNA v BNB* [2019] SGHC 142 at [74].

> *any such arbitration agreement from invalidity arising from the manner in which a provision in the substantive contract into which it is integrated operates on the arbitration agreement.* [emphasis added]

47 As for the earlier quoted passage from *BCY v BCZ*,[70] Coomaraswamy J held:

> I do not read these passages as an attempt by Chong J to define the limits of the doctrine of separability. I read them instead as describing the situation in which the doctrine is most commonly invoked. It is simply the case that the doctrine of separability is most commonly invoked where the parties' substantive contract is invalid, in order to avoid that invalidity nullifying the arbitration agreement. But there is no reason in principle why the doctrine of separability cannot have a broader scope, consistent with the *ut res magis* principle,[71] operating to give effect to the parties' manifest intention to arbitrate their disputes when a provision of the parties' substantive contract might operate to defeat that intention. Indeed, Chong J in *BCY* accepts that the doctrine of separability can operate in tandem with the three-stage inquiry to allow the court to select a proper law for the parties' arbitration agreement which is not the proper law of the parties' governing contract … [reference added]

48 As illustrated, Coomaraswamy J's application of the doctrine was premised on upholding party autonomy. Interestingly, Coomaraswamy J made no reference to Art 16(1) of the Model Law, adopted by the International Arbitration Act 1994, which would have potentially been the "equivalent statutory constraint" to s 7 of the English Arbitration Act 1996.

49 Additionally, invoking the doctrine of separability to imply a different choice of law to the arbitration agreement expands the doctrine significantly. This goes beyond a question of validity or non-existence and seems to affirm a broader doctrine of total separability, subject to the justices of protecting party autonomy. Simply, if the plain reading of Art 16(1) had been applied, the separability doctrine would not apply here.

50 Although Coomaraswamy J seemed to affirm a broader doctrine of separability, this may not necessarily conflict with *BCY v BCZ*. If the general principle to be drawn from *BCY v BCZ* is that separability serves to "give effect to parties' expectation to arbitrate", applying the doctrine in this case would certainly promote said expectations. Though the case

70 [2017] 3 SLR 357 at [60]–[61]. See para 37 above.

71 The legal maxim "*ut res magis valeat quam pereat*" means it is better for something to be given effect, than to be rendered null and void.

eventually went on appeal, the scope of the separability doctrine was not addressed.[72]

D. Significance

51 Taking these judgments as the most recent judicial guidance on the separability doctrine, it seems that Model Law jurisdictions apply the separability doctrine differently, in a way that potentially departs from its Model Law basis. *BCY v BCZ* rejected the application of the doctrine when the issue related to the existence of the main contract, *Fung Sang Trading* allowed it, and *BNA v BNB* applied it in a non-conventional way, to insulate the arbitration clause from other clauses of the main contract which would have invalidated it.[73]

52 In all cases, the position is greatly different from that envisioned by a strict reading of Art 16(1), which only allows for application of the doctrine to ensure that the *competence* of the tribunal is not self-defeating. For example, the application of the doctrine in *BCY v BCZ* only makes sense if the court were applying the scope of separability under s 7 of the English Arbitration Act 1996 as interpreted by the English courts. Similarly, the refusal in *Fung Sang Trading* to deal with the issue cannot be a result of Art 16(1) since the plain text of the rule itself is silent on whether a court, as opposed to a tribunal, may invalidate an arbitration agreement.

72 *BNA v BNB* [2020] 1 SLR 456 at [95]. The Court of Appeal held that Coomaraswamy J erred in the interpretation of "arbitration in Shanghai". The natural meaning of the phrase designated Shanghai as the seat of arbitration and Chinese law as the *lex arbitri*. However, it did not espouse its views on the application of the separability doctrine: "Moreover, it is also unnecessary for us to express a view on the doctrine of separability and whether it applies even where the validity of the main or substantive contract is not impugned."

73 Apart from the three cases, the separability doctrine has also been applied in other situations, such as in the Singapore case of *Reliance Infrastructure Ltd v Shanghai Electric Group Co Ltd* [2024] SGHC(I) 3, where the doctrine was invoked in holding that an applicant had waived its jurisdictional objection because its challenge of the validity of the main contract did not amount to an attack on the arbitration agreement. While the holding that a party's objections to the validity of the main contract may in some cases not amount to an objection to the jurisdiction of the tribunal may be correct, this should be analysed as an interpretation of the words of Art 16(2); it cannot be said that this is because of the operation of the separability doctrine enshrined in Art 16(1).

53 Furthermore, it is now trite under both Singapore and Hong Kong law that the three-stage inquiry is used to identify the governing law of the arbitration agreement and, following *Sulamérica*, the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are clear indications to the contrary; the choice of a seat different from the law of the substantive contract would not in itself be sufficient to displace that starting point.[74] However, as discussed earlier,[75] the position reached by the court in *Sulamérica* in formulating such a principle is only logical because of the limits of s 7. If we accept the *BNA v BNB* position that the Model Law does not provide constraints on the separability doctrine and, instead, acts as a mere blush on a common law concept, then, in the absence of an "equivalent statutory limitation", it is difficult to understand why the separability doctrine should not be invoked where the choice of seat is different from the law governing the main contract.

54 In fact, applying the doctrine of separability would lead to more commercial certainty. In the course of ascertaining an implied choice of law through the *Sulamérica* test, different courts might give weight to different factors that lead to different applicable laws, and this causes uncertainties. National courts may even have a homeward tendency in exercising this analysis. Commercially, these uncertainties increase costs. It would be simpler, cheaper and more principled to find that the separability doctrine applies and consequently, the law of the seat takes precedence.

74 Note: The position in England has now changed with the proposed 2023 amendments to the English Arbitration Act 1996. The new default rule provides that an arbitration agreement shall be governed by the law of the seat unless the parties expressly agree otherwise. See: Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No 413, 2023) (Chairman: The Right Honourable Lord Justice Green) at paras 12.72–12.77.

75 See para 17 above.

V. Comparison, implications and analysis

<table>
<tr><th>Jurisdiction</th><th>Applicable Law</th><th>Approach</th></tr>
<tr><td>China</td><td>Article 16 of the Chinese Arbitration Law</td><td>Broad approach: the doctrine of separability is a general principle
<table><tr><th colspan="2">Applies to preserve the arbitration agreement in cases of:</th></tr><tr><td>Non-existence of contract</td><td>✓</td></tr><tr><td>Invalidity of contract</td><td>✓</td></tr><tr><td>Choice of law problems</td><td>✓</td></tr><tr><td>Others</td><td>✓</td></tr></table></td></tr>
<tr><td>England</td><td>Section 7 of the English Arbitration Act 1996</td><td>Narrow approach: limited to s 7 of the English Arbitration Act 1996
<table><tr><th colspan="2">Applies to preserve the arbitration agreement in cases of:</th></tr><tr><td>Non-existence of contract</td><td>? (Arguably, yes, but rejected by DHL v Gemini)</td></tr><tr><td>Invalidity of contract</td><td>✓</td></tr><tr><td>Choice of law problems</td><td>×</td></tr><tr><td>Others</td><td>×</td></tr></table></td></tr>
<tr><td>Strict interpretation of the Model Law</td><td>Article 16 of the Model Law</td><td>Applies to preserve the arbitration agreement in cases of:
<table><tr><th colspan="2">Applies to preserve the arbitration agreement in cases of:</th></tr><tr><td>Existence of contract</td><td>×</td></tr><tr><td>Validity of contract</td><td>×</td></tr><tr><td>Choice of law</td><td>×</td></tr><tr><td>Kompetenz-Kompetenz</td><td>✓</td></tr><tr><td>Others</td><td>×</td></tr></table></td></tr>
</table>

<table>
<tr><th>Jurisdiction</th><th>Applicable Law</th><th colspan="2">Approach</th></tr>
<tr><td>Model Law jurisdictions (Singapore and Hong Kong)</td><td>Article 16 of the Model Law</td><td colspan="2">Potentially broad approach: although inconsistent with strict interpretation of the Model Law

<table><tr><td colspan="2">Applies to preserve the arbitration agreement in cases of:</td></tr><tr><td>Existence of contract</td><td>Rejected in BCY v BCZ; approved in Fung Sang Trading</td></tr><tr><td>Validity of contract</td><td>✓</td></tr><tr><td>Choice of law</td><td>Rejected in BCY v BCZ; approved in BNA v BNB</td></tr><tr><td>Others</td><td>?</td></tr></table></td></tr>
</table>

Table 1: Comparison of the separability doctrine in China, England and Model Law jurisdictions.

55 As described in paras 4–26, the approaches taken by various jurisdictions differ greatly for this simple doctrine. However, this author submits that none of these approaches taken are truly satisfactory.

56 First, the interpretation taken by China is too broad. This is problematic as it may mean that separability could apply even for situations of fraud or illegality of underlying contract.[76] For example, if an underlying contract is found to be null and void on the grounds of illegality, a broad application of the separability doctrine would mean that the arbitration clause, as a separate contract, is not *ipso facto* illegal and void as well. Allowing such contracts to survive seriously undermine public policy as parties may be compelled to arbitrate disputes arising from a fundamentally unlawful contract. If the courts are not willing to

76 Arguably, challenges posed by illegal contracts could be cured by rules on arbitrability, or by holding that the arbitration agreement itself is void because of illegality. Nevertheless, this could lead to dissonance between the two principles, and it would simply be easier to say that the separability doctrine does not apply where there are claims of illegality. See Gary Born, *International Commercial Arbitration: Commentary and Materials* (Kluwer Law International, 2nd Ed, 2001) ch 2, at p 71.

allocate authority to arbitral tribunals to consider claims of illegality, then a broad doctrine of separability would simply not be ideal.[77]

57 On the other hand, the overly narrow application by England does not reflect the realities of the parties' intentions and could lead to contradictory positions which are difficult to defend. For instance, in *Sulamérica*, Moore-Bick LJ refused to apply the separability doctrine to the question of choice of law; yet, by finding that the arbitration clause was governed by a law different than that of the main contract, he seemed to have impliedly accepted a version of the separability doctrine. Had the arbitration clause been truly inseparable from the main contract, it would have applied the same law, as a matter of principle.[78]

58 Similarly, a strict reading of Art 16(1) of the Model Law seems to be even narrower than the s 7 position; the doctrine of separability only applies for the purposes of *kompetenz-kompetenz*. In other words, jurisdictional challenges may even be mounted by arguing that the contract is invalid. This is also problematic because it vexes the parties' intention to arbitrate the disputes arising out of the contract. When crafting an arbitration clause, parties expect arbitration to resolve their dispute, irrespective of whether it is for breach of contract, invalidity or formation.[79] Furthermore, separability is necessary in situations of alleged non-existence to prevent a party from avoiding arbitration by simply declaring that the contract did not exist. Simply, a broader approach would lead to a more coherent and consistent application of the doctrine.[80]

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77 The Chinese court's stance on the issue of illegality is a strict one and all contracts violating imperative provisions of a law or contracts which are contrary to public order and good morals are generally deemed to be void: Civil Code of the People's Republic of China (Adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020) Art 153; for general application of Art 153, see Guiding Case No 170 of the Supreme People's Court: *Rao Guoli v Supply Station*. However, a broad application of the doctrine would mean that the arbitration agreement would survive even such illegality. For the English position, see also *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm).

78 Furthermore, Moore-Bick LJ's conclusion in *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 was that the law of the arbitration agreement was English law, the law of the seat. Were one to accept the separability doctrine to apply in this case and say that the law governing the seat would also govern the arbitration agreement, legal niceties would be avoided and certainty would be promoted. See Simon Camilleri, "Sense and Sensibility" (2023) 72 ICLQ 509 at 512–513.

79 *Fiona Trust & Holding Corporation v Privalov* [2007] Bus LR 1719.

80 *Fiona Trust & Holding Corporation v Privalov* [2007] Bus LR 1719.

59 Lastly, the approaches taken by the Model Law jurisdictions appear to depart from their statutory bases. As such, the approach adopted by Singapore and Hong Kong, even if sensible, is not strictly correct.

A. Recommendations

60 In determining the appropriate scope of the doctrine of separability, drafters must consider several questions about the goal of separability and what it aims to address.

(1) Doctrine of separability should apply such that invalidity of main contract does not ipso jure *render arbitration agreement invalid*

61 This is a relatively straightforward issue. Most jurisdictions agree that an arbitration agreement should still be substantively valid, separable from the invalid main contract. Even though a plain reading of the Model Law seems to depart from this position, Model Law jurisdictions have still refused to rule on the validity of an arbitral agreement on grounds of invalidity of the main contract.

62 Of course, such a position is correct. Doing so upholds the parties' intentions to resolve disputes through arbitration, even if disputes arise concerning the validity of the main contract or any repudiatory factors. Allowing courts to invalidate arbitration agreements based on the invalidity of the main contract would also undermine the function of arbitration as an alternative dispute resolution mechanism; a party to an agreement containing an arbitration clause would always be able to vitiate his or her arbitration obligations by declaring the agreement void.[81]

(2) Doctrine of separability should apply to questions of non-existence of main contract

63 Next is the question at the heart of the dispute in *DHL v Gemini*. This author submits that the doctrine of separability should apply to issues of non-existence and should not be merely limited to questions of contractual validity.

64 As earlier described, the distinction between the "validity" and "existence" of a contract is also difficult to justify and analyse categorically. This is always a fact-specific inquiry. It has been suggested that for certain categories of cases, where the main contract is deemed

81 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) ch 3, at p 213; Stephen M Schwebel, *International Arbitration: Three Salient Problems* (Grotius, 1987) at pp 3–6.

"void *ab initio*", such as cases involving a lack of authority, the doctrine of separability should not apply, since an attack on the one necessarily constitutes an attack on the other.[82] However, categorically concluding that certain challenges to the underlying contract, such as a lack of authority or forgery, would necessarily void the arbitration agreement, is problematic. Categorisation fails to consider that separability is always a fact-sensitive issue. For example, a party could, in theory, have authority to bind the company to arbitration agreement, but not the authority to conclude the underlying contract. Similarly, for a situation like duress, it could apply to the underlying agreement only (where one party forces the counterparty at gunpoint to sign the final agreement, even though they agreed in negotiations to submit disputes to arbitration); it could apply to the arbitration agreement only (where a party, after having validly concluded an agreement, forces the counterparty to sign an arbitration agreement); it could also apply to both the arbitration agreement and the underlying contract (where a party forces the counterparty to sign the agreement, which contains the arbitration agreement).

65 Of course, this author does not suggest that the application of the doctrine of separability means that all arbitration agreements survive contractual non-existence; it is simply that a non-existent contract should not categorically result in an invalid arbitration agreement. Whether the arbitration agreement also exists is a fact-based inquiry. For the facts of *DHL v Gemini*, *BCY v BCZ* and Guiding Case 196, the application of the doctrine means that circulated drafts including an arbitration clause may also constitute separate and binding arbitration agreements. This is aligned with the *Fiona Trust* "presumption in favour of one-stop adjudication" where parties are deemed to have intended that any and all disputes arising between them will be decided by the same court or tribunal, unless there exists clear language to the contrary.[83] By including the arbitration clause in drafts, parties intend for disputes relating to whether a valid contract exists to also be adjudicated by the arbitration tribunal. Certainly, as stated by Chong J in *BCY v BCZ*, agreeing to the wording of an arbitration clause does not *per se* equate to an intention to be contractually bound to arbitrate. However, it does point heavily towards the parties' intentions if the tenor of the parties' communication indicates that they had agreed to the arbitration clause to enable further

82 Alexander Yean & Dexter Tan, "The Subtle Knife of Separability: Legal Fictions of Consent to Arbitration and the Problem of Conditions Precedent" (2024) 41(2) *Journal of International Arbitration* 207 at 211.

83 It is not suggested that a broader doctrine of separability should be accepted because of pro-arbitration policy reasons; whilst a broader doctrine would have the effect of being pro-arbitration, this does not form the principled basis for why an arbitration agreement should be deemed separate in those circumstances. Instead, what is important is legal consistency and preservation of the parties' intentions.

negotiations for the rest of the contract. Even though a trite contract law rule in most jurisdictions is that "nothing is agreed until everything is agreed", the separability of the arbitration agreement from the main contract means that it, by itself, forms the "everything" to be agreed. In the absence of evidence otherwise, such as explicit clarifications by parties that the agreement to arbitrate was not binding, then agreeing to an arbitration clause must lead to a valid agreement, even if it is during the negotiation stage. Similarly, this would also be the case for arbitration agreements which are subject to a condition precedent, since parties may be presumed to have intended the question of whether the conditions precedent have been fulfilled to be decided by arbitration.[84]

66 Lastly, the effect of the doctrine of separability is simply that the court must directly identify if the arguments raised by the parties challenge the arbitration agreement directly. Practically, most challenges to the underlying contract will seldom be capable of affecting the validity of the arbitration agreement. A defect in the underlying contract, such as frustration, unconscionability, uncertainty or fraud, would not have an effect on the validity of the arbitration agreement. However, if the parties' challenge goes directly to the arbitration agreement, *eg*, that the agreement had been forged, then a court may still find that there was no valid arbitration agreement that was entered into. Conversely, where a court finds that an arbitration clause is *prima facie* concluded, it should decline jurisdiction and refer the parties to arbitration.

(3) Doctrine of separability should apply to law governing arbitration agreement and potentially insulate agreement from potential defects of underlying contract

67 Third, this author finds the High Court position in *BCY v BCZ* highly persuasive. Arbitration agreements and other dispute resolution clauses are often described as "midnight clauses". When parties enter into an agreement to arbitrate, they often do not consider that other clauses of the main contract may accidentally invalidate the dispute resolution clause. What they do consider, is that they intend to refer disputes to arbitration. To give effect to this intention, and to protect parties' consent to arbitration, separability must apply to protect the arbitration agreement.

84 For example, the contract in *Cecrop Co Ltd v Kinetic Sciences Inc* [2001] BCSC 532 had an arbitration clause, as well as a clause stating that the contract would only be effective after completion of certain conditions precedent. The court found that the effective date of the main contract was irrelevant to the arbitration clause, which, as a separate agreement, was considered effective as of the date the parties signed the agreement. See Alexander Yean & Dexter Tan, "The Subtle Knife of Separability: Legal Fictions of Consent to Arbitration and the Problem of Conditions Precedent" (2024) 41(2) *Journal of International Arbitration* 207 at 222.

68 Furthermore, the application of the doctrine of separability in such situations is also aligned with the evolution of rules surrounding the governing law of the arbitration agreements. In the UK, the Law Commission has proposed a reform of the English Arbitration Act 1996,[85] such that the governing law of the arbitration agreement is the seat of the arbitration unless the parties provide otherwise. This overrides the *Sulamérica* position that the governing law of the underlying agreement is *prima facie* the governing law of the arbitration agreement.

69 Interestingly, the Law Commission stated that separability was about "whether the arbitration clause survives any invalidity of a matrix contract".[86] Yet, it recognised a concern that the law governing the matrix contract and the arbitration agreement is expected to be the same in jurisdictions which do not recognise the doctrine of separability.[87] In the same breath, the Commission also discussed a purportedly broader "common law doctrine" of separability.[88] Read together, the only justification for the new rule is that the doctrine of separability of an arbitration agreement is not solely confined to invalidity; it also applies to other issues, such as governing law. After all, only a separable arbitration agreement can have a different governing law.

70 On the other hand, for Model Law jurisdictions which still rely on the *Sulamérica* test, the rule that the choice of law of the underlying agreement is a neutral factor is inconsistent with an application of a broader doctrine of separability. In this respect, a closer look at the *Sulamérica* test could be warranted for such jurisdictions – to identify if it should be followed, since the applicable standard of separability in the Model Law should theoretically be broader than that applied in s 7. Otherwise, even applying the *Sulamérica* test, the courts should accept that separability can play a role in finding that a different governing law may apply; and where the construction of an arbitration clause threatens to invalidate itself, separability should apply to preserve parties' intentions, much like in *BNA v BNB*.

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85 Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No 413, 2023) (Chairman: The Right Honourable Lord Justice Green) at paras 12.71–12.77.

86 Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No 413, 2023) (Chairman: The Right Honourable Lord Justice Green) at para 12.18.

87 Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No 413, 2023) (Chairman: The Right Honourable Lord Justice Green) at para 12.32.

88 Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No 413, 2023) (Chairman: The Right Honourable Lord Justice Green) at para 12.33. See also Peter Ashford, "The Proper Law of the Arbitration Agreement" (2019) 85(3) *Arbitration* 276.

71 With these factors in mind, this author submits that, should the Model Law be revisited, Art 16(1) could be redrafted as such:

> For the following purposes, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract:
>
> (a) a tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement;
>
> (b) challenges to the underlying contract, including objections with respect to the existence or validity of the contract, shall not by itself result in the invalidity of the arbitration agreement;
>
> (c) an arbitration agreement may have a governing law, different from the governing law of the underlying contract; and
>
> (d) the operation of any provisions in the underlying contract cannot render the arbitration agreement invalid, if it would otherwise be valid.

VI. Conclusion

72 This article has evaluated three different applications of the doctrine of separability. As described, China's broad overarching principle should not be adopted. It provides no limits on this fiction and risks applying the doctrine where it would not belong. On the other hand, an overly narrow position like the English Arbitration Act or a plain reading of the Model Law is too restrictive, and does not accord with modern expectations of international arbitration. Yet, any approach taken must be consistent with statutory limits. With this view, the author concludes that more comprehensive legislative reform of the separability doctrine is in order for all three jurisdictions and the Model Law – one that does not separate itself from common sense and practicality.