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Doctrine of Separability

Abstract

In the domestic and international law, the doctrine of separability, meaning the independent existence of an arbitration clause has been accepted as a cornerstone of the whole system of arbitration. According to this principle, firstly, contract arbitration shall be without any effect of the fate of the original contract. Secondly, the arbitrator shall have jurisdiction in matters relating to the existence or validity of an arbitration clause. Indeed, the theory of separation lead to the conclusion that arbitrator should individually decide about their jurisdiction. We tried to consider the theory of competence- competence relates to the principle of the separation of the arbitration.

Keywords: Doctrine, Separability,Provision.

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Introduction

An arbitration agreement specifies the means whereby some or all disputes under the matrix contract in which it is contained are to be resolved. It is however separate from the matrix contract: "an arbitration clause in a commercial contract... is an agreement inside an agreement. The parties make their commercial bargain... but in addition agree on a private tribunal to resolve any issues that may arise between them." [1] This is known as the doctrine of separability and s . 7 of the Arbitration Act 1996 provides a statutory codification of the previous case law on this subject.[2] As the House of Lords noted in Lesotho Highlands v. Impreglio SpA, "it is part of the very alphabet of arbitration law as explained in Harbour Assurance Co(UK) Ltd v. Kansa General International Insurance Co. Ltd... and spelled out in Section 7 of the Act, the arbitration agreement is a distinct and separate agreement from the underlying or principal contract.".[3]

Aim of the Study

This paper seeks to deal with the principal problems involved where disputes as to the existence or extent of the arbitrator's jurisdiction. In this work concentration is on the separability doctrine and competence – competence principle, as these rules are we speak first when we speak about arbitration.

The object of this research paper is also to try and understand how courts have used the Doctrine of Separability.

Statutory Provision for Separability

Section 7 provides that "unless otherwise agreed by the parties, an arbitration agreement which forms part 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."[4] This provision confirm by statute the separability doctrine which had evolved in the earlier case law. In particular the use of the words " or was intended to form part of another agreement" make clear that even if the matrix contract never came into existence, the arbitration agreement may still be binding.[5] Similarly, the fact that the matrix contract subsequently fails or is found to be invalid or never to have come into existence will not of itself mean that the arbitration agreement is necessarily undermined also. Section 7 of the Arbitration Act 1996 also applies where the law applicable to the arbitration agreement is the law of England and Wales or Northern Ireland even if the seat of the arbitration is outside England and Wales or Northern Ireland or has not been designated or determined.[6]

Consequences of Separability

The doctrine of separability underlines the potential width of an arbitration agreement because it establishes that an arbitration agreement because it establishes that an arbitration agreement has a separate life from the matrix contract for which it provides the means of resolving disputes. This enables the arbitration agreement to survive breach or termination of the matrix contract of which it forms part. The consequence

of this separate existence is that even if the matrix contract has been brought to an end, for example by accepted repudiation or frustration, the arbitration, the arbitration agreement continues in being in order to deal with any disputes in respect of liabilities under the matrix contract arising before or after termination.[7]

Invalidity of matrix contract

Section 7 of the Arbitration Act 1996 enables the arbitration agreement to survive not just termination or breach of the matrix contract but also more serious defects. Unless otherwise agreed by the parties, the arbitration agreement may survive as a distinct agreement even if the contract in which it is contained is regarded, non-existent or ineffective.[8] The validity of the matrix contract may therefore be determined by arbitration in accordance with the arbitration agreement, and the resulting award will be enforceable, even if the tribunal determines that the matrix contract is invalid.

Void Contracts

Similarly, even where the matrix contract is held to be void, the arbitration agreement which forms part of it may still be upheld as a valid and independent agreement, so that any disputes must be referred to arbitration.[9] As Colman J. put it in Vee NL v. EWIL: "If, in accordance with s.7, an arbitrator determines that the matrix contract is, for example, void ab initio by reason of illegality and it is not in issue whether the arbitration agreement is also illegal and void, the tribunal can continue to exercise such jurisdiction under the arbitration agreement as its scope permits. For example, if there were an alternative claim in tort or for restitution which was within the scope of the clause, the tribunal would continue to have jurisdiction conclusively to determine that claim." [10]

Invalidity of arbitration agreement

The position differs however where the arbitration agreement itself is impeached[11] or the existence of an arbitration agreement is disputed.[12] In the circumstances, if the matter comes before the court,[13] the question of jurisdiction may never reach the arbitrators because it will be determined by the court.[14]

In this regard the court draws a distinction between disputes as to existence of the arbitration agreement, which are likely to be for the court, and disputes as to the existence of its validity, which wherever possible should be left for the tribunal. However if the argument that there is no jurisdiction because the arbitration agreement itself is invalid or non-existent, the tribunal may decide that question[15] but that decision will not be conclusive and can be reviewed by court.[16] It is only in exceptional circumstances however that the arbitration agreement will be impugned and, as stated above, attacks on the matrix contract will not generally suffice to prevent the arbitration agreement being upheld as conferring jurisdiction on the tribunal to determine the parties' disputes. For example, in Fionna Trust v. Pricolov [17] allegations of bribery were raised in general terms but not so as to specifically impugn the arbitration agreement. The court upheld the application of the arbitration agreement by declining to decide the question of jurisdiction itself and referring the matter instead to the arbitrators:

"If the arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure. Illegality is a stronger case than bribery which is not the same as non est factum or the sort of mistake which goes to the question of whether was any agreement ever reached. It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular."[18]

By contract, where it was alleged that the signature of one of the parties to the matrix contract had been forged, and hence no matrix contract or agreement to arbitrate had been reached, then this was a questioning going to whether there was any agreement ever reached and would be decided by the court.[19]

Illegality affecting the contract

This question of invalidity of the arbitration agreement has arisen in a number of cases concerning contracts alleged to be void by virtue of illegality, and the courts examine whether the particular form of illegality renders not just the matrix contract but also the arbitration agreement void. This involves a consideration of the purpose and policy of the rule of illegality and whether this would be defeated by allowing the issue to be determined by arbitration.[20] In Soleimany v. Soleimany [21] Waller L.J. noted[22] that: "There may be illegal or immoral dealings which are, from an English law perspective, incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English Law." However, in that case the Court of Appeal found the arbitration agreement to be valid notwithstanding that the resulting award upholding the contract was unenforceable due to illegality.[23] In contrast, in *O'Callaghan v. Coral Racing Ltd*,[24] the same court was faced with a clause in a gaming contract under the which disputes were to be referred for arbitration to the editor of the Sporting Life. The court held that the illegality of the contract meant that any claim was bound to fail owing to the transaction being null and void under s. 18 of the Gamin Act 1845, and the 'arbitration clause' would not survive independently.

Application of terms of matrix contract

The doctrine of separability does not prevent the application to the arbitration agreement of provisions in the matrix contract which are stated to apply to all clauses of the matrix contract.[25] So for example if variations of any clause in the matrix contract are required to be in writing, that will apply equally to the arbitration clause as to other provisions of the matrix contract.[26]

Rules under New York Convention

Both article II and Article v(1)(a) of the New York convention impliedly treat arbitration agreements as separable from underlying contracts. Article II(1) refers to an arbitration agreements as separable from

underlying contracts. Article II(1) referes to an arbitration agreement as " an agreement in writing under which the parties undertake to submit to arbitration all or any diofferences" arising between the parties. More clearly, Article II(2) defines a written agreement to arbitrate as including " an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

Both Articles rest on the same assumption that an " arbitral clause in a contract" is itself an "agreement", dealing with the subject of arbitration.[27] Neither provision requires that such agreements always be treated as "separable," or even assumes that this will necessarily be the case. On the other hand, both provisions are most naturally understood as assuming that arbitration clauses will presumptively be separate agreements, capable of being treated as such, notwithstanding their relation to another contract between the parties. More importantly, these agreements also attract specific legal rules (e.g., Article II(1)'s "writing" requirement and Article II's presumption of substantive validity) that do not apply to the parties' underlying contract.

Similarly, Article V(1)(a) of the New York convention presumes the separability of arbitration agreements. Among other things, it provides for an exception to the enforceability of arbitral awards where "the said [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country here award was made."[28] This provision clearly contemplates the application of a specific national law to the arbitration agreement itself (as distinct from the underlying contract).[29] Even more clearly than Article II, Article V(1)(a) rests on the premise that international arbitration agreements are presumptively separate from the parties' underlying contract, and thereby susceptible of being subject to different national laws and legal rules than the underlying contract.

Commentators have reached divergent conclusions regarding the question whether these provisions of the New York Convention compel recognition of the separability doctrine. Some authors take the view that the Convention is "indifferent" to the existence of the separability doctrine.[30] Others conclude that the Convention adopts or requires application of the separability doctrine "by implication."[31]

Both of these positions are mistaken. In reality, the New York Convention neither "adopts" nor is "indifferent to" the separability doctrine. Rather, Articles II and V(1)(a) of the Convention rest on the premise that arbitration agreements and that these agreements therefore will often be treated differently from, and subject to the different rules of validity and different choice-of-law rules than, the parties' underlying contracts.

The presumption of separability is not dictated or required by the convention, but was instead accepted by the Conventions' drafters based upon their understanding of commercial parties' intentions and expectations, developed and interpreted in light of the needs and objectives of the international arbitral process. The Convention then takes these ordinary intentions and expectations of separability into account in the rules it articulates with regard to arbitration agreements. Simply put, the Conventions rests on the premise that parties may, and ordinarily do, intend their arbitration agreements to be separable, and it therefore sets forth specialized legal rules (of substantive and formal validty, and governing choice-of-law issues) that operate on the basis of this premise and that apply specifically (and only) to arbitration agreements.

Finally, the New York Convention also gives effect, and requires national courts to give effect, to the parties' agreement to treat their arbitration clause as separable. This obligation arises from Article II(1)'s basic requirement that arbitration agreements – including constituent elements of such agreements, such as their separable character – be recognized.[32] In this manner, Article II does not mandate separability, but it does mandate recognition of agreements to treat arbitration clauses as separable.

The separability Presumption does not provide a Basis for the Competence-Competence Doctrine

It is sometimes asserted or assumed that the separability presumption requires or implies the existence of the competence-competence doctrine Thus, it is often suggested, the separability of the arbitration clause enables an arbitral tribunal to consider the existence and scope of its own jurisdiction.[33] However, the separability presumption does not in fact explain the competence-competence doctrine. Although the competence competence doctrine arises from the same basic objectives as the separability presumption (e.g., enhancing the efficacy of international arbitration as a means of dispute resolution) it is not logically dependent upon, nor explicable by reference to, the separability presumption.

Rather, the competence-competence doctrine permits an arbitral tribunal to consider and decide upon its own jurisdiction even where the existence or validity of an arbitration agreement (as distinguished from the underlying contract) is disputed. That is made explicit, for example, in Articles V(3) and VI(3) of the European Convention, [34] Article 16(1) of the UNCITRAL Model Law[35] and judicial authority in all developed jurisdiction. Accordingly, an arbitral tribunal's jurisdiction to consider its own jurisdiction cannot depend on the separability of the arbitration clause from the underlying contract, but must instead rest on other considerations.[36]

Put simple, the competence-competence doctrine could very readily exist without a separability presumption and, conversely, the separability presumption could be accepted without also adopting a rule of competence-competence. Thus, national law can (and, in some jurisdictions such as France and India,) does grant arbitral tribunals competence-competence to consider and decide all jurisdictional objections, whether directed to the underlying contract or the arbitration agreement. Conversely, national law could recognize the separability presumption, and

thereby provide that challenges only to the underlying contract are not jurisdictional challenges to the arbitrators' power, but that, where true jurisdictional objections to the validity or existence of the arbitration agreement are made, there is no rule of competence-competence and the objections must be resolved by national courts.

Nonetheless, there are material relationships between the separability presumption and the competence-competence doctrine. One consequence of the separability doctrine is that many allegations that would otherwise potentially impeach the validity of the arbitration agreement do not do so and therefore must be submitted to the arbitral tribunal for resolution. That is, because of the separability doctrine, certain claims regarding the underlying contract simply do not impeach or question the validity of the arbitration agreement, and therefore must be resolved by the arbitrators.[37]

Despite these complexities, the separability presumption serves a very significant function in the international arbitral process. It permits analysis of jurisdictional objections to be focused specifically- and properly- on the arbitration agreement itself, rather than the underlying contract. Even if the parties' underlying contract is invalid or non-existent, this will often not affect the associated arbitration agreement, which will remain fully effective as a means to resolve the parties'disputes. The separability presumption also enables the arbitrators to consider and resolve dispute about the existence, validity, legality and termination of the underlying contract, regardless whether the competence-competence doctrine is accepted, while requiring arbitration of disputes that concern only the existence, validity, or legality of the underlying contract (and not the arbitration agreement). In all these respects, the separability presumption is essential to preventing delays and disruption in the international arbitral process arising from litigation in national courts.

When Illegality Can Impeach an Arbitration Agreement as well as Contract[38]

Two recent cases have illustrated when illegality can impeach the arbitration agreement as well as the underlying contract. In Soleimany v. Soleimany, the Court of Appeal refused to enforce an award in respect of a dispute arising out of an illegal contract to smuggle carpets out of Iran. Waller LJ held that: [39] 'where the making of the contract will itself be an illegal act… the court would be driven nolens volens to hold that the arbitration clause was itself void'. Similarly, in O'Callaghan v. Coral Racing Ltd.[40] The Court of Appeal held that an arbitrationclause, contained in a bookmaker;s conditions of acceptance, was void and could not be treated as distinct or separate from the other clause. The Court of Appeal noted that the contract was covered by the Gaming Act 1854, which provides that gaming transactions are null and void. The Court of Appeal stated that as the arbitration clause in this case was an integral part of the void agreement it could therefore not survive. The court of appeal also held that the hallmark of arbitration was that it was a process to determine judicially, and with binding effect, the legal rights and obligations of the parties. A gaming contract was a process ddevoid of legal consequences and therefore a gaming transaction was not a subject capable of settlement by arbitration. The court further stated that to hold that there was a valid arbitration clause would stretch concept of arbitration 'past breaking point'.

Separability and the UNCITRAL Model Law

The autonomy of the arbitration agreement is considered as being one of the cornerstones of the UNCITRAL model Law. Article 16(1) of the the UNCITRAL Model Law provides, inter alia, that 'an arbitration clause which forms part of contract shall be treated as an agreement independent of the other terms of the contract'. The provision of the UNCITRAL Model Law was considered by Kaplan J in the High Court of HongKong in Fung Sang Trading Ltd v. Kai Sun Sea Products & Food Co. Ltd.[41] Kaplan J held that the doctrine of separability, as set out in Article 16 of the UNCITRAL Model Law, extende3d to claims of initial invalidity of the contract. This, he stated, reflects 'commercial reality is to be preferred to logical purity'.[42] Kaplan J then cited with approval Arson Broches' commentary on the issues of separability within the UNCITRAL Model Law:[43]

Conclusion

The second principle in paragraph in paragraph (1) is 'separability'. It must be carefully distinguished from 'competence-competence'. While the latter, as we have just seen, recognizes the power of an arbitrator to rule, at least initially, on his own jurisdiction, separability of the arbitration clause is intended to have the effect that if an arbitrator who has been validly appointed and who stays within the limits of the jurisdiction conferred upon him by the arbitration clause concludes that the contract in which the arbitration clause is contained is invalid, he does not thereby lose his jurisdiction. This concept which is relatively new has been accepted by judicial decisions or by doctrine in a large number of countries.

References

Books

Anthony Lehlohonolo Ditedu "The Doctrine of Separabilty n respect of the Arbitration Clause of a Contract", 2014

Andrew Tweeddale, Keren Tweeddale, "Arbitration Of Commercial Disputes", 2019

Gary B. Born, "International Commercial Arbitration", IInd Edition, Gray B. Born, 2014

"Russell on Arbitration", Sutton, Gill and Gearing, 24th Edition, London Sweet and Maxwell 2015

Articles

https://indiancaselaws.wordpress.com/2015/02/26/doctrine-of-separability-in-india/ last visited 18th December 2018

http://www.lawyersclubindia.com/articles/Arbitration-and-Doctrine-of-Separability-8515.asp last visited 10th December 2018

https://corporate.findlaw.com/human-resources/the-separability-doctrine-the-continuing-impact-of-prima-paint.html last visited 5th December 2018

http://pure.au.dk/portal/files/2372/000126197-126197.pdf last visited 28th November 2018

Endnotes

1. *Per Saville j. in Union of India v McDowell Douglas Corp[1993] 2 lloyd's Rep 23*
2. *Heyman v. Darwins Ltd[1942] A.C. 356*
3. *[2006] 1 A.C. 221 at [21]*
4. *Section 7 of Arbitration Act 1996: cf. Model Law, Art. 16(1)*
5. *In Glaxo Smith Klime Ltd v. Department of Health [2007] EWHC 1470 it was alleged that the parties had entered into a purely non-binding and voluntary agreement such that there was no intention to create legal relations.*
6. *Section 2(5) of the Arbitration Act 1996*
7. *See generally DDT Truck of North America LTd v. DDT Holdings Ltd [2007] EWHC 1542*
8. *PNFL v. Fili Shipping Co Ltd [2007] UKHL 40*
9. *Vee Networks Ltd v. Econet Wireless International Ltd [2004] EWHC 2909*
10. *[2004] EWHC 2909*
11. *Harbour Assurance Co(UK) Ltd v. Kansa General Insurance Co Ltd [1993] 1 Lloyd's Rep. 455*
12. *Cigna Life v. Intercaser SA [2002] 1 All ER (Comm.) 235*
13. *For example on an application to stay under s.9 of the Arbitration Act 1996*
14. *As in Albon Naza v Motor Trading Sdn Bhd [2007] EWHC 327*
15. *Under s. 30 of the Arbitration Act 1996*
16. *Under s. 67 of the Arbitration Act 1996 which is mandatory provision pursuant to s. 4(1) and Sch. 1 of the Arbitration Act 1996*
17. *[2007] EWCA Civ 20*
18. *Fiona Trust & holding Corp & Ors v. Yuri Privalov & Ors [2007] EWCA Civ 20 at [29]*
19. *As in Albon v. Naza Motor Trading Sdn Bhd (No. 3) [2007] EWHC 327*
20. *Per Hoffman L.J. in Harbour Assurance Co. (UK) Ltd v. Kansa Genereal Insurance Co. LTd [1993] 1 Lloyd's Rep. 455 at 469*
21. *[1999] Q.B. 785*
22. *At 797*
23. *The contract was found to be contrary to the revenue laws and export controls of the country of performance.*
24. *The Times, November 26, 1998.*
25. *FSC Zestafoni G Nikoladze Ferroalloy Plant v. Romly Holdings Ltd [2004] EWHC 245*
26. *FSC Zestafoni G Nikoladze Ferroalloy Plant v. Romly Holdings Ltd [2004] EWHC 245*
27. *As one authority puts it, "the very concept and phrase'arbitration agreement' itself imports the existence of a separate or at any rate separable agreement agreement, which is or can be divorced from the body of the principal agreement if needs be." S. Schwebel, International Arbitration: Three Salient Problems 3-6 (1987). Compare A.van den berg, The New York Arbitration convention 146(1981) ("The New York Convention does not contain express provision concerning the separability of the arbitral clause. It is suggested that the convention would imply the separability of the arbitral clause.*
28. *New York Convention, Art. V(1)(a)*
29. *It does so either by operation of a specific choice of the parties or by application of a default choice-of-law rule.*
30. *A. van den Berg, the New York Arbitraion of 1958 145-46 (1981).*
31. *S. Schwebel, International Arbitraion: Three Salient Problems 22 (1987).*
32. *New York convention, Art. II(1) ('Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them…")*
33. *D. Caron*
34. *European Convention, Arts V(3) , VI(3) (national courts ordinarily "shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made")*
35. *UNCITRAL Model Law, Art. 16(1) ("The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement")*
36. *These considerations include the views adopted in most developed legal systems, that it is procedurally efficient to permit at least some challenges to arbitral jurisdiction to be considered and decided initially by the arbitrators. These considerations also include the general international acceptance by national legislatures and courts, as well as business enterprises, of the principle that an arbitral tribunal possesses a separate category of jurisdiction to consider and decide issues concerning its own jurisdiction, separable from its jurisdiction to resolve substantive disputes. This conception of the "separability" of a tribunal's jurisdiction is conceptually related to the separability doctrine, but involves additional and distinct considerations.*
37. *Further, there will also be cases where the separability presumption and competence-competence principle intersect: in particular, an arbitral tribunal may be competent to initially consider allegations that impeach both the underlying contract and the arbitration agreement.*
38. *Andrew Tweeddale, Keren Tweeddale, "Arbitration of commercial disputes",*
39. *[1988] 3 WLR 811, at p 823*
40. *The Times, 26 November 1998, CA*
41. *(1992) XVII Ybk Comm Arbn 289-304*
42. *Ibid at 301.*
43. *Commentary on the UNCITRAL Model Law, first published in the companion publication to the Yearbook, ICCAs International Handbook on Commercial Arbitration in Supplement 11 of January 1990, 74-5*