

SEPARABILITY OF THE ARBITRATION AGREEMENT/CLAUSE IN INTERNATIONAL COMMERCIAL ARBITRATION: HOW ABSOLUTE?*

Abstract:

One of the most remarkable trends in the international community is the acceleration in interactions between sovereign states and also between state entities and individuals or corporate bodies in terms of trade, investments, communications, e.t.c. A natural consequence arising from these interactions are disputes which require expert, independent and binding results. The parties oftentimes prefer to submit to a neutral, impartial and independent panel/person(s), which is not a national court of either parties for fear of bias. To maintain the integrity of the arbitration agreement or clause and protect the intention of the parties to submit to arbitration, the separability of the arbitration agreement or clause is a widely recognized principle which protects the agreement to submit to arbitration separate from the underlying contract. The objective of this paper is to assess the limits of the operation of the separability of the arbitration clause. It is against this background that the paper adopts the doctrinal methodology in examining the limits to the invocation of this doctrine, particularly when the invocation cannot serve to protect the arbitration agreement from the fate of the main contract.

Keywords: Arbitration, separability, autonomy, limitations

1.0 Introduction

Disputes or disagreements are a natural and foreseeable aspect of interactions between contracting parties in international relations. As such parties have a choice of dispute resolution mechanisms which they can have recourse to in any event of a disagreement. These include but not limited to negotiation, mediation, conciliation, inquiry, litigation and arbitration. Except for litigation and arbitration, the other listed methods fall within the category considered as diplomatic means of dispute settlement because parties retain control of the dispute and may accept or reject a proposed settlement.¹ In addition to arbitration, the listed methods have been also categorized as alternative dispute resolution mechanisms (ADRM). Parties however tend to resort to either arbitration or litigation where a binding decision enforceable at law is desired. Whereas litigation involves settlement in established courts of law of a State, arbitration requires the parties themselves to set up the machinery to handle the dispute thus allowing them set the parameters of the proceedings.²

2.0 International Arbitration As An Attractive Vehicle For Dispute Resolution In International Commercial Transactions

The UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade in 1985 and amended in 2006 delimits the scope of this instrument and specifically identifies when an arbitration is international and therefore within the ambit of the Model Law.³ Therefore an arbitration is international if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States,⁴ or the place of

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¹ JG Merrills, *International Dispute Settlement* (3rd edn, Cambridge: Cambridge University Press 1998) 88.

² Ibid.

³ UNCITRAL Model Law on International Commercial Arbitration 1985 (amended 2006), art 1(3).

⁴ Ibid. art 1 (3)(a)

arbitration if determined or pursuant to the arbitration agreement is outside the State in which the parties have their places of business;⁵ or the place where a substantial part of the obligations of the commercial relationship to be performed or the place with the closest connection to the subject matter of the dispute is located outside the State where the parties have their places of business;⁶ or where the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.⁷

Where one of the above criteria is met, then parties have the liberty to agree on the procedure to be followed under the party autonomy framework established under article 19 (1) of the UNCITRAL Model Law. This principle forms the heart of modern systems of arbitration as it expresses a profound confidence in the ability of the parties and arbitrators to conduct the arbitration in a fair and orderly manner.⁸ The party autonomy principle also allows the parties, especially when coming from different legal backgrounds to blend elements from their legal jurisdiction when drawing up the procedure for their arbitration proceedings.⁹ It is a principal conflict rule and ultimate power determining the form, system and other basic details of arbitration. This is even further buttressed by article V (1) (d) of the New York Convention on the Recognition and Enforcement of Arbitral Awards 1985 where recognition and enforcement of a foreign arbitral award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the procedure was not in accordance with the agreement of the parties.

Another appealing aspect of the party autonomy principle is that parties are not only free to choose the procedure of the arbitration, it also permits parties or gives them the freedom to choose the governing law of their agreement. Thus parties may exclude the application of any national laws or choose a national law even where that law has no connection with the subject matter of the arbitration.¹⁰ It derives its legal effects from legal systems of either national laws or international conventions.¹¹

Neutrality is an appealing quality that draws parties to arbitration. An arbitral tribunal comprises arbitrators nominated by the parties, or appointed by an authority chosen by the parties and this ensures a certain level of neutrality of the tribunal. This is especially the case in international arbitrations where neither party from different countries accepts the jurisdiction of the other party's country for fear of bias. Thus submitting to an international arbitration avoids this imbalance. Neutrality is also the reason behind the appointment of three arbitrators, one of whom is appointed by each party and the third is appointed by the two arbitrators.¹² In choosing a place of arbitration, the parties normally choose for themselves a neutral place that has no connection with either themselves or their commercial relationship.¹³

⁵ Ibid. art 1 (3)(b)(i)

⁶ Ibid. art 1(3)(b)(ii)

⁷ Ibid. art 1(3)(c)

⁸ HM Holtzman and JE Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (The Hague: TMC Asser Institut 1989) 564.

⁹ C Burring-Uhle, *Arbitration and Mediation in International Business* (USA: Kluwer Law International 1996) 91.

¹⁰ G Codero-Moss, *International Commercial Arbitration* (Cambridge: Cambridge University Press 1999) 150.

¹¹ Ibid.

¹² UNCITRAL Model Law (n3) art 11.

¹³ A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell 1999) 78.

Arbitration also affords the parties privacy if a private, final and binding settlement is the desire of the parties involved. This is more so since the arbitrators and place of arbitration are chosen by the parties. However it is advisable for the parties to expressly agree on issues of confidentiality of the arbitral proceedings. In addition the finality of the award is another attractive feature of arbitration. Binding arbitration is usually final as parties are not allowed to go to court to dispute the same matter again if they do not like the arbitral panel's decision except in unusual circumstances.¹⁴

3.0 Autonomy of the Arbitration Agreement or Clause- The Doctrine of Separability

The doctrine of the autonomy of the arbitration agreement or clause suggests that the arbitration agreement is distinct, independent and entirely severable from the main contract.¹⁵ It stands alone as a separate contract from the underlying contract and can be made subject to a governing law completely different from the governing law of the main contract. The effect of this doctrine therefore is that the arbitration agreement does not meet the fate of the main contract as it continues to exist even after the main contract is terminated and is not subverted where one of the parties decide to avoid arbitration by alleging the invalidity of the principal contract. According to Judge Stephen Schwebel of the International Court of Justice, 'the very concept and phrase 'arbitration agreement' itself imports the existence of a separate or at any rate separable agreement, which is or can be divorced from the body of the principal agreement if need be.'¹⁶

The UNCITRAL Arbitration rules 2013 by virtue of article 23 (1) recognize the doctrine of separability of the arbitration clause. It provides that:

The arbitral tribunal shall have the power to 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 that 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 shall not entail automatically the invalidity of the arbitration clause.¹⁷

In like vein, the UNCITRAL Model Law contain provisions that lend credence to the principle of separability in these words:

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 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.¹⁸

¹⁴ S Fishman, 'The Difference Between A Lawsuit, Mediation and Arbitration' < www.microsoft.com > accessed 16 March 2021.

¹⁵ S Verma and V Agrawal, 'Arbitration & The Principle of Separability' < www.mondaq.com > accessed 22 February 2021.

¹⁶ S Schwebel, *International Arbitration: Three Salient Problems* (Cambridge: Grotius Publications Ltd 1987) 21-22.

¹⁷ UNCITRAL Rules 2013 art. 23 (1).

¹⁸ UNCITRAL Model Law art 16 (1). Other recognition of the doctrine can be seen in article 6 (8) ICC rules amended in in 2012. This doctrine is widely recognized across jurisdictions in the world today.

There are a number of justifications for treating the arbitration agreement or clause as a separate agreement. The arbitration agreement embodies the intention of the parties and the extent of their intention can be ascertained upon the examination of the arbitration agreement.¹⁹ Thus where the parties choose to include a wide arbitration clause, it is construed that they intend all disputes connected to the main contract to be resolved by arbitration.²⁰ Besides the best proof of a party's consent to arbitrate a particular dispute is the production of a written arbitration agreement or clause.²¹ In addition the doctrine acts as a bar to prevent a party from avoiding arbitration simply by claiming that the principal agreement is invalid. The result is the preservation of the intention of the parties to save time and cost, in the first place by agreeing to arbitration.²² Furthermore, the absence of this doctrine implies that a court may have to decide on the merits of an award. To allow this presents a conflict with the rule that a court is precluded from reviewing an award on the merits as enshrined in the New York Convention of 1958.

The separateness of the arbitration agreement also serves to protect the jurisdiction of the arbitral tribunal. This is because the existence and validity of the tribunal stems from the arbitration agreement. As such the power of the tribunal to rule on its own jurisdiction is therefore preserved²³ even where there are allegations of the termination of the main contract either by performance or some intervening event.²⁴ The power of the arbitral tribunal is thus protected from any invalidity which may have effect on the main contract and the principle of separability is achieved.²⁵

In *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic*²⁶ the doctrine was considered essential if an arbitration clause is to have any real effect. Similarly, in *Robert Lawrence Co. Inc. v Devonshire Fabrics Inc.*²⁷ the United States Court of Appeal for the second circuit reinforced the separate nature of the clause from the rest of the contract and stated that illegality, breach or repudiation of the contract does not affect the arbitration clause. In *Prima Paint Corp. v Flood and Conkin Manufacturing Co.*²⁸ the United States Supreme Court also pronounced in favor of the separateness of the arbitration clause. Likewise the Swiss Supreme Court in *Sonatrach v KCA*²⁹ noted the nature of the arbitration clause as an independent clause which continued to have force after the parties had terminated the contract. Furthermore in *Harbour Assurance v Kansa General International Assurance Co. Ltd. and Others*³⁰ the English Court of Appeal held that the substantive contract and the arbitration agreement are two different and distinctive agreements.

4.0 Qualifications to the doctrine of separability of the arbitration agreement

The separate nature of the arbitration agreement is almost seen as an absolute principle- a rule of thumb. However there have been instances where despite the existence of this doctrine, the arbitration agreement has been held to fall with the underlying contract. The very existence of the arbitration

¹⁹ Codero-Moss (n10).

²⁰ *IBM Australia Limited v National Distribution Services Limited* (1991) 22 NSWLR 466.

²¹ E Onyema, 'The Doctrine of Separability Under Nigerian Law' [2009] (1) (1) *Apogee Journal of Business, Property & Constitutional Law* 68.

²² A Rogers and R Launder, 'Separability- The Indestructible Arbitration Clause' [1994] (10) (1) *Arbitration International* 77.

²³ UNCITRAL Model Law (n3) art 16 (1).

²⁴ Redfern and Hunter (13) 156.

²⁵ Onyema (n 17) 75.

²⁶ (1975) 53 ILR 393.

²⁷ 271 F.2d 402 (1959).

²⁸ 388 US 395 (1967).

²⁹ 116 BGE 1a 56, JT 1990 1 563.

³⁰ (1992) 1 Lloyd's Rep. 81.

tribunal is rooted in the arbitration agreement. Therefore where it is clearly established that there was never in existence a valid contract which contains the arbitration clause between the parties, the foundation on which the tribunal was supposedly built crumbles and the arbitration agreement or clause may not operate.³¹ That is to say where the existence of the principle contract is in question, the arbitration agreement cannot stand. To hold otherwise would result in place the arbitration agreement on nothing and expecting it to stand. However a mere allegation that the agreement was void does not affect the validity of the arbitration clause with the contract. Hence the European Court of Justice in *Benincasa v Dentalkit Srl*³² the clause was held to be effective despite the plaintiff's argument that the contract was contained was void.

Any factor which will ordinarily vitiate a contract will also vitiate an arbitration agreement or clause.³³ However such vitiating factor must affect the arbitration agreement or clause independently of the principal contract.³⁴ Thus where a party insists that a condition precedent to the commencement of the contract has not been met and thus the contract never came into effect, then the arbitration agreement which exists separately from the main contract is also affected.³⁵ Furthermore, an arbitration agreement or clause is a contract and like all contracts is subject to the general law of contract. Therefore where there is a lack of capacity to enter a contract, the arbitration agreement is void and the court of a contracting State by virtue of article II (3) of the New York Convention 1958 need not refer the parties to arbitration in this instance if seized of such matter.³⁶

Where the subject matter of the dispute itself cannot be settled by arbitration by virtue of the applicable law which may be either the law of the seat of arbitration or law of the place of enforcement or proper law of the principal contract or proper law of the arbitration agreement or the law of the parties. This is otherwise known as arbitrability of the subject matter of the dispute. Walter J. in *Soleimany v Soleimany*³⁷ applying English public policy reasoned 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. The English court would not recognize an agreement between highway men to arbitrate their differences any more than it would recognize the original agreement to split the proceeds.³⁸

Where one of the parties can clearly establish that it is not a party to the principal contract, and therefore not a party to the arbitration agreement, there can be no valid arbitration or an award.³⁹ This is because the arbitration agreement is a private agreement that binds only the parties that have agreed to it. The law of privity of contract thus precludes its application to third parties. In *The Arab Republic of Egypt*

³¹ J Collier and V Lowe, *The Settlement of Disputes in International Law* (Oxford: Oxford University Press 1999) 214.

³² [1998] All ER (EC) 135.

³³ *Onyema* (17) 72.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Redfern and Hunter* (n13) 144.

³⁷ [1999] QB 785

³⁸ *Ibid.* 797. This case was not arbitrable because it involved a dispute arising out of an illegal contract to smuggle carpet out of Iran.

³⁹ *Redfern and Hunter* (n13) 156.

v SPP Ltd,⁴⁰ the claim by the Egyptian Government that it was not a party to the contract was upheld and the award against it set aside. Also where the arbitration agreement is vitiated by fraud also, the arbitration is of no effect and the arbitration tribunal is not competent to rule upon it with definitive effect.⁴¹

5.0 Conclusion

Arbitration is increasingly becoming the dispute resolution mechanism of choice in international trade and commerce particularly where a final, binding and enforceable outcome is the desired result of the parties. It is not without its obvious benefits, particularly when juxtaposed with litigation. The separate nature of the arbitration clause or agreement also lends to the attraction arbitration holds in the international trade and commerce arena. It ensures that the intention of the parties to submit to arbitration is well protected. Also it sustains the arbitral tribunal's competence to rule on its own jurisdiction. As such the intention of the parties may not be easily subverted by an unscrupulous party who may seek litigation in the courts for meet its own goals without regard to mutually agreed submission to arbitrate.

But as with all principles or doctrines, there exist exceptions where the general rule may not hold sway. In the case of the doctrine of separability of the arbitration agreement or clause, instances such as the existence of the principal contract or lack thereof is an instance where the arbitration agreement cannot be given life to thrive. As earlier noted, one cannot place something on nothing and expect it to stand. It will certainly collapse. Other instances found to limit this doctrine include the capacity to contract, arbitrability of the subject matter of the dispute, illegality as well as fraud. Where any of these are found to exist, then the fate of the arbitration clause must meet that of the principal contract.

In answer to the topic question, whether the arbitration clause or agreement is at all times separable from the underlying contract in international commercial arbitration, the writer responds in the negative. The arbitration clause or agreement is considered a separate agreement from the principal contract unless any of the limiting instances discussed above exist.

⁴⁰ (1984) 23 I.L.M. 1048.

⁴¹ J. Lew, L. Mistelis and S.Kroll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International 2003) 370.