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Doctrine of Separability and Its Effect on the Arbitration Clause

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ABSTRACT

The following paper discusses about the doctrine of separability in the international arbitration. There has always been a debate whether an arbitration clause's legality is constrained by the terms of the main contract. The idea of separability is a cornerstone of international arbitration, contract law, and many other international legal systems. According to the idea of separability, an arbitration provision contained in a contract should be viewed as a stand-alone agreement distinct from the main contract. As a result, the arbitration clause is not immediately rendered null or ineffective if the underlying contract is void or terminated.

The research provides a comparison of how the concept is used in various international legal systems. Different jurisdictions have taken different stances on the concept, with some interpreting it as a rigid law and others treating it as just a presumption of separability. The analysis of judicial precedent and statutory legislation clarifies the disparate applications and interpretations of the concept across jurisdictions. This paper shall discuss in detail what exactly is the doctrine of separability? What is competence-competence? Also look at the position of this doctrine under different countries. The research has been broad in order to incorporate as much data as possible.

INTRODUCTION

One of the most important concepts to be discussed regularly in international arbitration is the doctrine of separability. In the current scenario where there are so many legal tussles between individuals or between companies, parties therefore if possible prefer solving their differences through arbitration rather than going for litigation. However what is important is that there should be intent on part of the parties to go for arbitration as intent of the parties is a fundamental element of arbitration.

In the international commerce arbitration is considered as the most prevalent method of resolving disputes between private parties. Arbitration clauses are now regularly included in international commercial contracts. According to Richard Garnett, "arbitration is a dispute resolution mechanism where private parties, by way of agreement, submit their existing or future disputes for binding resolution by an appointed arbitrator or arbitrators."[1] It can be said that there is no such thing as a perfect dispute settlement dispute method, however there are few matters which one takes into consideration in choosing arbitration. The primary concern with any dispute settlement method would be its enforceability and with arbitration there is no such issue as the enforcement of international commercial arbitration awards is possible through the New York convention under which the countries agree to let their domestic courts be used for enforcement of arbitral awards. Other advantages of choosing arbitration as the dispute settlement method are that the process is much quicker than litigation and it also allows the parties to choose their language in which they would like the dispute to be heard.

ARBITRATION AGREEMENT

An arbitration agreement is quite essential for arbitration because if there is no such agreement then the parties cannot choose or adopt arbitration. The agreement is the legal basis through which the parties submit their disputes to the arbitral tribunal. The agreement is equally important for the tribunal as it helps in determining not

[1] Garnett, Gabriel, Waincymer, Epstein, 'A Practical Guide to International Commercial Arbitration', (First Edition, Oceana Publications, INC., New York, United States, 2000), p. 1.

just the issues but the jurisdiction of the tribunal as well. An arbitration agreement is a written contract between the parties to settle their disputes. Hence if a dispute arises between the parties then they are under an obligation to resolve their disputes according to the agreement. It can be said that in an international commercial arbitration, the arbitration agreement fulfils several important functions.

In the context of dispute resolution and business transactions, the arbitration agreement is extremely important. Parties exercise their autonomy and select arbitration as their preferred method of dispute resolution by putting such an agreement in their contract. Arbitration offers a more private and discreet setting for resolving disputes than court processes, which are typically open to the public.

Through international treaties like the New York Convention, it offers a neutral forum for resolving disputes between parties from various jurisdictions, assisting in the avoidance of potential jurisdictional problems and assuring enforceability across international borders. Particularly in complex commercial disputes, arbitration can frequently be speedier and less expensive than litigation. Thanks to international agreements like the New York Convention, the final arbitral ruling is typically enforceable in many nations. Also Arbitral awards often have little grounds for appeal or dispute and are final and binding on the parties. This lessens the possibility of drawn-out legal disputes by giving the parties closure once a decision is made.

DOCTRINE OF SEPARABILITY

Till now it has been understood that an arbitration agreement is very much necessary for the parties in order to go for arbitration, apart from that it is also important to know that such an arbitration agreement is separate from the original contract in which they appear or are a part of, this can be understood through the doctrine of separability.

Doctrine of separability provides that an arbitration clause is "separable" from the contract containing it and thus may survive a successful challenge to the validity of the contract. As a result of this doctrine even if the original contract of the parties is invalid it shall not invalidate the arbitration agreement between the parties. Thus the arbitral tribunal would have full jurisdiction to hear the parties' dispute and the arbitral award given for such dispute shall also not be invalid. As per Article 16(1) of UNCITRAL Model Law on International Commercial Arbitration:

"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".[2]

The principle of separability has been accepted by the English courts, one of the landmark judgements in this regard came in the case of *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*, [3] in which it was held "that the principle of the separability of the arbitration clause or agreement from the contract in which it was contained, existed in English law and that, provided the arbitration clause itself was not directly impeached, the arbitration agreement was capable of surviving the invalidity of the contract, so that the arbitrator could have jurisdiction under the clause to determine the initial validity of the contract." Another recent case law in regards to this doctrine *is Fiona Trust & Holding Corporation &Ors v Yuri Privalov & Ors,* [4]in which the court of appeal held that the doctrine of severability applied, even in cases where the parent contract has been induced by bribery, so that the arbitration clause may continue to survive even when the parent contract has been validly rescinded. It was held that questions whether parent contracts have been induced by bribery are disputes which can fall for determination under the arbitration clauses contained therein.

[2]Article 16(1), UNCITRAL Model Law on International Commercial Arbitration (1985)
[3][1993] 2 All ER 897
[4] [2011] EWHC 664 (Comm)

DOCTRINE OF COMPETENCE-COMPETENCE

Apart from the doctrine of separability there is another doctrine which has been considered as the foundation stone of international arbitration which is the doctrine of competence-competence. According to this doctrine an arbitral tribunal may decide questions given to it on its own jurisdiction, the main reason why this doctrine is considered so much beneficial is because it helps in avoiding additional costs and burdens which the parties generally have to bear during the process of litigation. This doctrine is based on Article 16 of the model law which provides that:

"If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."[5]

DEVELOPMENT OF SEPARABILITY AND COMPETENCE- COMPETENCE UNDER U.S LAW

Both the doctrines have been given a lot of importance under the U.S laws and there have been many cases involving the two. In regards to doctrine of separability the Supreme Court first adopted it under the Federal Arbitration Act*in Prima Paint Corp. v. Flood & Conklin Mfg. Co,* [6]in which the court held that "[A] federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue." Another significant case came four decades later when the doctrine had extended from voidable contracts to void contracts. This happened in *Buckeye Check Cashing, Inc. v. Cardegna,*[7]where the court of appeals had reversed the decision of district court and held that "the Federal Arbitration Act, as interpreted by the Supreme Court of the United States, allows valid arbitration clauses to be severed from invalid contracts and enforced." The Supreme Court later had distinguished between the both cases on the fact that the original contract in *Prima Paint* was only voidable whereas the contract in *Cardegna* was null and void under Florida law.

Even in competence-competence there have been recent case laws which have added growth to the doctrine under U.S laws. In *Rafferty v. Xinhua Finance Limited,* [8]the U.S district court in Manhattan held:

"that the arbitrator, not a court, should decide whether particular disputes are within the scope of an admittedly valid arbitration clause, when (1) the language of the clause is very broad, encompassing "*any and all disputes*" or "*any controversy*" or similar language, and (2) the parties have agreed to arbitrate under rules that empower arbitrators to resolve issues of their own jurisdiction."

However the doctrine has also been criticized, in *Sphere Drake Insurance Ltd. V. All American Insurance Co,* [9] it was held that:

"Courts have jurisdiction to determine their jurisdiction not only out of necessity (how else would jurisdictional disputes be resolved?) but also because their authority depends on statutes rather than the parties' permission. Arbitrators lack a comparable authority to determine their own authority because there is a non-circular alternative (the judiciary) and because the parties do control the existence and limits of an arbitrator's power."

DEVELOPMENT OF SEPARABILITY AND COMPETENCE- COMPETENCE UNDER ENGLISH LAW

The doctrine of separability under English law has always been under the debate. There have been arguments whether an arbitration clause's legality can be decided independently of the terms of the main contract. In

[5]Article 16(3), UNCITRAL Model Law on International Commercial Arbitration (1985)
[6] 388 U.S. 395(1967)
[7] 546 U.S. 440 (2006)
[8]9628 U.S (2011)
[9] 256 F.3d 587 (7th cir. 2001)

*Heyman and another v. Darwins limited, [10]*lord Macmillan said that the arbitration clause is quite different from other clauses in the contract as unlike other clauses the arbitration clause does not impose on one of the parties an obligation in favour of the other. Thus if any dispute arises with regard to the obligations which one party undertakes to the other such dispute shall be settled by a tribunal of their own constitution. He also stated that the appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement.

In a recent case law The Supreme Court issued a ruling that clarifies the application of the competence-competence doctrine, this decision which was given by Lord Collins described it as "an issue of international importance." *In Dallah real estate and tourism holding company v. Ministry of religious affairs, Government of Pakistan,*[11] the Supreme Court highlighted that how the doctrine of competence-competence is misrepresented in the sense that the tribunal's word on the jurisdiction is the last word to which the court had firmly denied. The Supreme Court held "that the tribunal's decision is subject to scrutiny by the courts of the seat of the arbitration as well as those of the place of enforcement, and the former have no greater investigatory rights than the latter." Lord Collins in his view had stated that "the last word will lie with a court, either in a challenge brought before the courts of the arbitral seat, or in a challenge to recognition or enforcement abroad."

DEVELOPMENT OF SEPARABILITY AND COMPETENCE- COMPETENCE UNDER INDIAN LAW

Similar to US and UK, the doctrine of separability and competence- competence has also found a significant place under the Indian Laws. The Arbitration and Conciliation Act of 1996 in India recognizes and upholds the notion of separability. The Act's Section 16 deals explicitly with the arbitral tribunal's authority to make decisions on its jurisdiction. It stipulates that any challenges to the existence or legality of the arbitration agreement are subject to the tribunal's ability to decide. The Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law, recognized and included the principle of separability.

As it gives the arbitration process clarity and uniformity, the notion of separability is crucial. It enables parties to uphold their dedication to arbitration even in the event of disagreements or problems with the principal contract. Additionally, it makes sure that disagreements relating to the principal contract do not automatically halt the arbitration process, enabling parties to arbitrate disputes in accordance with their agreement.

The foundation for this doctrine was laid down in the landmark case of *Renusagar Power Co. Ltd. v. General Electric Co*[12] in which the Supreme Court held that "A contract's arbitration provision is a separate agreement from the main contract. The court noted that the presence and enforceability of the arbitration provision are unaffected by the main contract's legality". This was further reaffirmed in the case of *Enercon (India) Ltd. v. Enercon GMBH* [13] where the Court ruled that "The arbitral tribunal has the power to decide on its own jurisdiction, including any challenges connected to the existence or validity of the arbitration agreement:. It further held that "the arbitration clause is not automatically rendered illegal by a party's challenge to the main contract".

Over the course of time the separability of the arbitration agreement has been highlighted in various judgments of the Supreme Court, in *Ayyasamy v. A. Paramasivam*[14] the Court stressed on the separability theory once more, highlighting that even if the arbitration clause is unlawful or voidable because of fraud or lack of consent, the arbitration clause will still be in effect. The court concluded that a key tenet of Indian arbitration law is the severability of the arbitration agreement.

[10][1942] 1 All ER 337
[11] [2010] UKSC 46
[12] AIR 1994 SC 860
[13] (2014) 5 SCC 1
[14] (2016) 10 SCC 386

The Indian law similar to separability also recognized the concept of competence-competence through various landmark judgements. In the case of *Bhatia International v. Bulk Trading S.A*[15] even if the arbitration was held outside of India, the Supreme Court ruled that "Indian courts could give interim relief in international commercial arbitrations". The court acknowledged the Kompetenz-Kompetenz principle insofar as it related to the ability of Indian courts to award temporary relief. However this was overruled by legislative changes that were brought in the year 2012. In *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc. (BALCO*[16] the court overruling the earlier judgement of Bhatia International held that, "that any dispute over the arbitral tribunal's authority must be brought up in front of the tribunal. Initially, judicial interference should be avoided, and parties should only turn to the courts once the tribunal has determined that it has jurisdiction".

Even though Kompetenz-Kompetenz was not an explicit objective of the 2015 and 2019 modifications to the arbitration and conciliation legislation, the measures proposed were meant to increase arbitration's efficiency and lessen judicial intervention. These modifications indirectly helped India adopt the Kompetenz-Kompetenz principle by streamlining the arbitration procedure and giving arbitral tribunals more authority. The Indian judiciary's pro-arbitration stance, which is seen in cases like BALCO, further, strengthens the inherent power of arbitral tribunals to decide issues within their own jurisdiction.

CONCLUSION

After looking in depth at both the doctrines that is doctrine of separability and competence-competence under different laws it can be said that both are moreover similar. Like both U.S and English law permit a greater degree of judicial control over arbitral proceedings, thus inhibiting the effectiveness of international arbitration which is quite different in comparison to the law of France which promotes the public policy goal of encouraging the use of arbitration agreements in international commerce. The mechanism known as separability is used to ensure that an arbitration clause will remain in effect as long as it does not conflict with the parties' agreement, what is reasonable for them, or public policy. The English arbitration act instead of adopting the classic doctrinal conception of *Kompetenz-kompetenez* adopted its own formulation of *Kompetenz-kompetenez* by taking both section 7 as well as section 30 of the English arbitration act into consideration.

There has always been a debate whether English law strikes the best balance between acceptable judicial oversight of the international arbitral process and the interests of party autonomy and the efficient and flexible resolution of international disputes. In *Azov shipping company v. Baltic shipping company*, [17] justice Rix held that *"[u]l*timately, a question of justice, where it conflicts with a modest prejudice to expedition or increase in cost, must be given greater weight." It can be concluded that a separate law than the one that governs the main contract will apply to the arbitration provision. The arbitration agreement contained in the primary contract is still legal even if the main contract is ruled invalid.

The 1996 Indian and English Arbitration Acts were passed in order to bring the arbitration law in these two countries up to date with international changes. One such example of a clause that was later acknowledged in the 1996 Acts but was before unrecognized in the arbitration laws of India and England is the rule of competence-competence. Although it is clear that the lawmakers understood the significance of inserting this clause in the new Arbitration Acts, each did so only after making the revisions required to satisfy the interests and requirements of their own State. It appears that the legislators in India, where there are millions of unresolved cases in the courts, tried to limit the use of the legal system to contest the tribunal's ruling on the jurisdictional question.

It is noteworthy that India like other legal establishments has made substantial and conscious efforts to update its arbitration laws and bring them into compliance with global best practices. The judiciary has also taken a pro-arbitration attitude by maintaining the enforceability of arbitration agreements and verdicts. Overall, India improves its arbitration framework, making it more effective, appealing, and consistent with international

[15] (2002) 4 SCC 105
[16] (2012) 9 SCC 552
[17][1999] 1 All ER (comm) 716

standards for resolving business disputes, by incorporating separability and competence-competence clauses in arbitration agreements.

In a fast paced world where development and disputes rather go hand in hand, it becomes imperative upon the judicial systems across the globe to come up with an effective mechanism which deals with party's autonomy and the interventions by the court. Competence-competence is a step in that regard striking a balance between the two. Similarly the doctrine of separability helps in ensuring the independence of the arbitration process and the parties' right to arbitrate. It is a cornerstone of contemporary international arbitration since it promotes effective and private conflict settlement and strengthens the enforcement of arbitration agreements.