

**SEPARABILITY OF ARBITRATION CLAUSES - SOME AWKWARD QUESTIONS ABOUT THE LAW ON CONTRACTS, CONFLICT OF LAWS AND THE ADMINISTRATION OF JUSTICE**

**I: INTRODUCTION**

In this paper, we are going to look at the relationship between an arbitration clause and the other terms of a contract in which it is contained. Various labels have been placed on this relationship. Separability and severability are commonly used terms in the English-speaking world. The French who in the arbitration world are typically fond of the grand gesture prefer to speak of the “*autonomie de la clause compromissoire*”.<sup>1</sup>

Amongst arbitration lawyers, separability has been a broadly accepted concept in continental Europe and the USA since at least the time of glam rock and in the case of staid countries like Switzerland since before Louis Armstrong sold out.

The interest in this subject lies not in this fact but in what the development of this doctrine tells us about the unstable position of arbitration on the edge of contract, private international, civil procedure and even public law. By exploring that, we may end up learning more about those subjects than about arbitration itself. To what extent, is our image of a single contract consisting of a variety of interlocking contract terms governed by its proper law disturbed by the notion that some provisions of the agreement do not fit this model? What does that tell us about contractual obligations generally and the proper law doctrine? The special treatment given to jurisdictional contract provisions may even take us into some awkward issues relating to the nature of adjudication and its tie-up with political power. A way of analysing one of the leading Swiss cases on the subject is to see it as an attempt to preserve the cultural distinctiveness of judicial styles originating in the days when that country consisted of a series of inaccessible mountain passes!<sup>2</sup> What can we make of its partial if highly unconstitutional reversal by Parliament in 1987?<sup>3</sup>

Whatever doctrinal position one takes in this area, the arbitration clause is not a typical contract term. It provides for the establishment of the rights provided in the rest of the agreement and typically some beyond its scope. So, to use Lord Diplock’s famous

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<sup>1</sup> F.-E. Klein, “Du caractère autonome de la clause compromissoire, notamment en matière d’arbitrage international”, 50 *Rev. Crit.* 499 (1961). See in particular at p. 501. Although Swiss, Klein originally came from Strassbourg and was speaking at the famous 1961 Paris conference on the subject.

<sup>2</sup> *Jörg g/ Jörg*, ATF 41 II 534 (1915).

<sup>3</sup> LDIP, Cap 12.

classification,<sup>4</sup> it is certainly not a creator of primary obligations. It does not strictly speaking contain secondary duties. It contains the promises relating to both types of obligations and above all else their enforcement. We could call it a tertiary obligation. (Lord Diplock preferred to call it “an exceptional primary obligation”<sup>5</sup> or just treat as sui generis.<sup>6</sup>)

## II: THE ORIGINS OF SEPARABILITY

In some senses, the arbitration clause has been at least separate since the earliest arbitration legislation. In England, this really means the 1698 Arbitration Act. The Act allowed arbitration clauses to be made rules of court if the parties had agreed to this. The breach of other contract terms could not at the time be made punishable by contempt of court.<sup>7</sup>

In England, though, the disastrous 1746 decision in *Kill v. Hollister*<sup>8</sup> that branded arbitration clauses (that did not come within the 1698 Act) as contracts that oust the jurisdiction of the court and are thus incapable of specific performance set back the course of Anglo-American arbitration law spectacularly. Once the arbitral clause was reduced to a standard contract term and the practice of extracting a fine for breach of it outlawed by statute,<sup>9</sup> the agreement to arbitrate was rendered incapable of judicial enforcement. However, what brought this about was the refusal of the Courts to enforce a contract term specifically because of its jurisdictional nature: a form of separability in itself. Other contract terms were not treated in the same way.

England was not the only country to suffer from these anti-arbitration developments. After a burst of over-flamboyant revolutionary fervour,<sup>10</sup> the French Code Napoleon outlawed the enforcement of arbitral clauses.<sup>11</sup> This continues to affect certain aspects of French domestic arbitration law.<sup>12</sup> Again, it was precisely the judicial nature of the clause that led the French legislature to treat the clause compromisoire in this hostile manner, a hostility not reflected in the enforcement of other terms. From these examples, one can see that a

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<sup>4</sup> *Moschi v. Lep Air Services Ltd.* [1973] A.C. 331 at p. 350; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827.

<sup>5</sup> *Moschi v. Lep Air Services Ltd.* [1973] A.C. 331 at p. 350.

<sup>6</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at pp. 848 & 850.

<sup>7</sup> William III, 1697-8: An Act for determining Differences by Arbitration.

<sup>8</sup> *Kill v. Hollister* (1746) 1 Wilson KB 129; G Williams, “The Doctrine of Repugnancy - II: In the Law of Arbitration”, 60 *LQR* 69 (1944). There are concerns about the accuracy of the reporting of *Kill v Hollister*. What is very obvious from the cases that followed it was subsequent judgements were influenced by the Wilson report to reach the conclusion mentioned here.

<sup>9</sup> Statute of Fines and Penalties 1687.

<sup>10</sup> Loi sur l'organisation judiciaire, 24 August 1790, Art. 1.

<sup>11</sup> Code Civil, Art. 2061 which has been reduced in scope over time.

<sup>12</sup> Art. 1006; *L'Alliance c/ Prunier*, Cour de cassation, 10 July 1843, [1843] *Sirey* 561; J. Boitard, *Leçons de procédure civile*, 10th ed. by G. Colmet-Daage, Vol. 2, Cotillon, Paris 1868 at p. 601.

recognition of the “otherness” of the arbitration clause is not necessarily a recipe for its enforcement.

The late 19th century saw the initial burst of enthusiasm for the separability notion. In Germany and Switzerland, study of the various types of contracts led writers to conclude that the arbitral clause was a procedural contract<sup>13</sup> contained in a broader agreement. Since procedure was governed by the law of the forum, such a contract was governed by a different law to that of the rest of the agreement. This fitted the approach of some of their Lordships in the *Hamlyn v. Talisker* case<sup>14</sup> where enforceability of the arbitration clause rather than the contract was the focus of attention and where Scottish law would have invalidated the clause unlike English law.

Inevitably, this argument became enmeshed in a doctrinal argument going on in France as to the precise nature of a foreign arbitral award. If it was a contract, it could be enforced directly using the simplified process for enforcing obligations generally. On the other hand, classification as a judgement would result in review on the merits and the slower procedure for foreign judgements. In the debates about the Del Drago affair at the turn of the century, the French jurisdictionalists and contractualists fought this argument out.<sup>15</sup> Almost unnoticed, there emerged a school suggesting that the award was half judgement half contract. This third or hybrid school, represented by an article written by Surville at the time lies at the heart of the separability doctrine.<sup>16</sup>

### III: SEPARABILITY AND CONFLICTS OF LAW

The German approach seems to have influenced some obiter dicta of the House of Lords in the Anglo-Scottish *Hamlyn v. Talisker* case which indicated that the arbitration clause could be governed by a different law to the main contract, typically the law of the place of arbitration.<sup>17</sup> Lord Watson begins his discussion of the case by saying: “The first question in this appeal is whether the law of England or the law of Scotland applies to the interpretation

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<sup>13</sup> A. Nussbaum, “The Separability Doctrine in American and Foreign Arbitration”, 17 *N.Y.U.L.R.* 609 (1940); *Jörg g/ Jörg*, ATF 41 II 534 (1915); *S. Paperconsult AG g/ Cepal und Mitbeteiligte*, 88 ATF I 100 (1962), Consid 1.

<sup>14</sup> *Hamlyn & Co. v. Talisker Distillery* [1894] AC 202.

<sup>15</sup> A. Lainé, “De l’exécution en France des sentences arbitrales étrangères”, 26 *Journal du droit international: Clunet* 641 (1899); A Weiss, “De l’exécution des sentences arbitrales étrangères en France”, [1906] 1 *Revue Lapradelle* 34. See for more on this subject see A. Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law*, Schulthess, Zurich 1989 at pp. 32-33.

<sup>16</sup> F. Surville, “Jurisprudence française en matière de droit international et de législation comparé”, 29 *Revue critique de législation et de jurisprudence* 129 at pp. 145-152 (1900).

<sup>17</sup> *Hamlyn & Co. v. Talisker Distillery* [1894] AC 202.

of the clause of reference.”<sup>18</sup> Lord Ashbourne equally starts: “The substantial question to be determined is whether the law of Scotland or the law of England is to be applied to the interpretation of the arbitration clause.”<sup>19</sup> Note that their Lordships are considering the clause and not the contract as a whole. Indeed, Lord Ashbourne favours England entirely because of the place of arbitration in a contract that he would otherwise have concluded was governed by Scottish law and the fact that Scottish law would have invalidated the clause.<sup>20</sup>

It is possible even that the *Don v. Lippmann*<sup>21</sup> case of 1838 which considered matters of limitation as belonging to procedure and therefore to the law of the forum had even more of an impact. *Don* proceeds from the assumption that the resolution of disputes about a bill of exchange is something quite different and definitely subject to a different law to or from the bill itself.

Either way, the Germanic procedural contract view received its most resounding support in the 1915 Swiss Federal Supreme Court ruling in *Jörg g/ Jörg*.<sup>22</sup> At issue was whether the arbitration clause was governed by federal law like the rest of the contract or by cantonal law. The court opted for the latter on the basis that matters of procedure were attributed by the constitution to the cantons.<sup>23</sup> This had some intriguing by-products. The Swiss international arbitration industry could not provide a uniform set of laws to its foreign users. It had to rely on an Intercantonal treaty (Concordat) which came into force in 1972 and to which Zurich did not adhere for quite some time.<sup>24</sup> An arbitration clause providing for arbitration in Switzerland, as opposed to any particular location could create significant problems!<sup>25</sup> A canton or location within one should be named.

When the Concordat started to fray at the edges, those trying to produce federal international arbitration legislation had to overcome powerful opposition from some cantonal supporters who rightly argued that the statute was unconstitutional.<sup>26</sup> Switzerland, though, has a curious doctrine of federal parliamentary sovereignty which prevents federal

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<sup>18</sup> At p. 212.

<sup>19</sup> At p. 215.

<sup>20</sup> At p. 215.

<sup>21</sup> (1837) 5 Cl and F 1.

<sup>22</sup> *Jörg g/ Jörg*, ATF 41 II 534 (1915).

<sup>23</sup> See also *S. Paperconsult AG g/ Cepal und Mitbeteiligte*, 88 ATF I 100 (1962), Consid 1.

<sup>24</sup> 1 July 1985.

<sup>25</sup> P. Lalive, J.-F. Poudret & C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989 at pp. 297-298 although the distinguished authors suggest that a cantonal court could resolve the problem. The issue was more serious with the Concordat because the absence of a choice of a seat in Concordat canton could remove the application of the Concordat itself: P. Lalive, J.-F. Poudret & C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989 at pp. 34-35.

<sup>26</sup> P. Lalive, J.-F. Poudret & C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989 at p. 268.



legislation from being challenged.<sup>27</sup> So, for international cases, the Swiss Private International Law Act reversed the decision in *Jörg*. (The Swiss Constitution was subsequently changed to allocate matters of procedure to the Federal Government.<sup>28</sup>)

Ironically, as the Swiss were removing one of the earliest frontier posts of separability, the US Supreme Court was unwittingly applying the approach in *Jorg g/ Jorg* to produce the reverse result. The Federal Arbitration Act 1925 overruled *Kill v. Hollister*<sup>29</sup> and the view that the arbitrator's authority could be revoked for most contracts involving interstate commerce. At the time, though, it was assumed that the Act only applied to cases in federal courts. In a string of decisions starting in the late 1950s, the Second Circuit and then in the 1980s the Supreme Court has forced the state courts to apply the Federal Act to contracts the main provisions of which are governed by local state laws.<sup>30</sup> In so doing, it has prevented the state Governments from legislating to undermine this policy of universal enforcement.

Gradually, separability for conflicts of law purposes has been accepted amongst the key arbitration countries. Some simply apply by statute the law of the seat to all cases proceeding on their territory. Others allow the parties to choose a law to govern the arbitral clause other than the proper law of the main contract. (There are also some hybrid solutions that we do not need to discuss here.) A good example of this is the US Supreme Court decision in *Mastrobuono*.<sup>31</sup> There, the parties agreed to arbitrate in Illinois. The contract said that it was governed by New York law. That state's highest court, the Court of Appeals, had previously ruled that an arbitrator could not award punitive damages. The Supreme Court concluded that the parties' choice of New York law only related to the substantive agreement and did not relate to the arbitral clause. Since a New York court could award punitive damages, the arbitral tribunal could do so too. This overall approach has been followed in a number of cases notably in *Preston v. Ferrer*.<sup>32</sup> State law does not apply to arbitration clauses except to the ordinary questions of contract law which determine whether a binding valid agreement exists. The states, though, cannot erect limitations to the right to arbitrate in cases governed by the Federal Arbitration Act.

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<sup>27</sup> Article 113 of the 1874 Swiss Constitution which was then in force.

<sup>28</sup> Article 122 of the current Constitution led to the 2011 adoption of the Federal Code of Civil Procedure which replaced the Concordat.

<sup>29</sup> *Kill v. Hollister* (1746) 1 Wilson KB 129.

<sup>30</sup> *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (C.A.2d Cir. 1959) (*Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) explains the historical problem or weakness in the argument); *Southland Corporation v. Keating*, 465 U.S. 1 (1984); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (essentially pre-empting an Alabama statutory provision based on *Kill v Hollister*).

<sup>31</sup> *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 56 (1995).

<sup>32</sup> 552 U.S. 346 (2008).

The French have taken all this a step further. Relying on the notion of the autonomy of the arbitration clause, the Cour de cassation has concluded that, in international cases, no municipal law applies to arbitral clauses except basic rules relating to the existence and scope of the agreement and international public policy. These are deemed to be supra-national principles. Actually, they represent French law. A striking feature of this autonomy is the way in which French restrictions on the arbitral process enshrined in statute and going back to the Code Napoleon have been swept away in international cases.

Yet, this drastic separation of arbitral clause from its main contract may have its limits. English courts have been left floundering where the place of arbitration has not been selected<sup>33</sup> and where there is an express choice of law to govern the contract<sup>34</sup>. In *Enka v Chubb*, the Supreme Court made two important statements. Where a contract contains an express choice of a law to govern it from the which the arbitration clause is not excepted, that law will govern the arbitration clause. This was the conclusion reached by the Supreme Court in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*.<sup>35</sup> In the absence of any choice of law to govern the contract as a whole or the arbitration agreement in particular, the Supreme Court concluded that “where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties’ substantive contractual obligations”.<sup>36</sup> While *Enka v Chubb* has preserved the notion of “applicable law separability”, by ensuring that the arbitration clause can be governed by a different law to the contract in which it is contained, it has unnecessarily compromised the concept by assuming that an express choice of law extends to the arbitration clause. The result is that parties will now have to stipulate clearly the choice of law to govern their arbitration agreement, particularly where there may be a dispute as to the identity of the parties to the contract. This was the problem in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* where the English courts refused to enforce an award valid under the law of the seat (France) on the basis of an express choice of English law to govern the merits.<sup>37</sup>

The English approach can be contrasted with that set out by the French Cour de Cassation in *Kabab-Ji*:<sup>38</sup>

“7. By virtue of a substantive rule of international arbitration law, the arbitration clause is legally independent of the main contract which contains it expressly or by

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<sup>33</sup> *International Tank and Pipe S.A.K. v Kuwait Aviation Fuelling Co. K.S.C.* [1975] Q.B. 224 where there was also an express choice of law to govern the merits that the court extended to the arbitration clause.

<sup>34</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48; *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

<sup>35</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 at para. 170(iv).

<sup>36</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 at para. 170(viii).

<sup>37</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48

<sup>38</sup> Cass Civ 1er, 28 septembre 2022, Pourvoi n° 20-20.260.



reference and its existence and effectiveness is to be interpreted, subject to the mandatory rules of French law and international public policy, in accordance with the common intention of the parties without it being necessary to refer to a national law, unless the parties have expressly submitted the validity and effects of the arbitration agreement itself to such a law.

8. The choice of English law as the law governing the contracts and the provision under which it was forbidden to the arbitrators to apply rules which would contradict the contracts does not demonstrate the parties' agreement to submit the scope of the arbitration agreement to English law as opposed to the substantive rules of the seat of arbitration expressly selected in the contract. KFG has supplied no evidence to show in an unequivocal way the common intention of the parties to designate English law as that governing the scope, transfer or extension of the arbitration clause. In reaching this conclusion, the Court of Appeal, has, without distorting the terms of the agreement, legally justified its decision to determine the existence and scope of the arbitration agreement, not under English law, but the substantive rules of French law in international arbitration."

Basically, unless the parties have referred to the arbitration clause in the choice of law provision, the law governing the agreement to arbitrate will be that of the seat. This approach makes much more sense in practice. The parties have selected a French arbitration, they expect the arbitration agreement to be governed by that law. It is also much easier for the local courts at the seat of arbitration to apply its own arbitration law accurately.<sup>39</sup>

The Swiss have largely dispensed with the problem that beset the English and French courts in *Kabab-Ji* at least where the seat of arbitration is in Switzerland. Article 178(2) of the LDIP makes valid any agreement that complies with the law selected by the parties, the law governing the matter in dispute, notably the law governing the main contract or Swiss law. The Swiss TF upheld an award applying French law to the arbitration clause on that basis.<sup>40</sup>

The US Supreme Court has had to rule that state contract law must govern the validity of the agreement to arbitrate and then been unable to reverse an erroneous application of this rule by the California Supreme Court in *Volt* which made an arbitration clause subject to the law chosen to apply to the main contract. The Courts in *Volt* concluded that the state courts had the ultimate authority to decide which law governed the arbitral clause.<sup>41</sup> How that can sit with the more recent *Preston v. Ferrer*<sup>42</sup> is difficult to see. The US issue is complicated by

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<sup>39</sup> *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46; *Gouvernement du Pakistan v. Société Dallah Real Estate & Tourism Holding Co*, Cour d'appel de Paris, 17 February 2011.

<sup>40</sup> ATF 129 III 727(2003) cursorily rejecting what might have been a problematic argument about formal validity.

<sup>41</sup> *Volt Inf. Sciences v. Stanford Univ.*, 489 U.S. 468 (1989).

<sup>42</sup> 552 U.S. 346 (2008).

the fact that there is no US Federal contract law and so state law has to be used to determine whether there is a binding agreement to arbitrate. The Supreme Court, though, has been adamant that state law cannot be used to block the enforcement of arbitration agreements that meet ordinary state law requirements for the creation of a contract. The use of concepts such as unconscionability which form part of state contract law must not be utilised by courts to prevent arbitration when the unconscionability lies exclusively in the very enforcement of the type of clause concerned.<sup>43</sup>

Most important arbitration centres have rejected any significant influence of the choice of the place of arbitration over the law governing the merits. In *Enka v Chubb*, the English Supreme Court removed a last vestige of this by concluding: “Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place”.<sup>44</sup>

So, to what extent, do the conflict of laws aspects of separability have a message for private international lawyers generally? In 1980s, the English *Vesta* case<sup>45</sup> raised questions as to whether different parts of a contract had to be governed by the same law. Yet, the proper law doctrine is undoubtedly convenient in practice. It simplifies the task of lawyers considerably. The arbitration experience, though, does show the need at least to be a little flexible. At the same time, though, it raises the spectre of other contract provisions which may need to be treated as exceptions to the proper law doctrine. At that point, we may prefer to regard the arbitration clause as “sui generis”. Certainly, experiences with fragmented applicable laws (there are potentially four or five involved in an arbitration)<sup>46</sup> should be enough to deter more breaches in the proper law doctrine. A better approach would just be to make the arbitration clause (as opposed to the main contract) and everything that flows from it subject to the law of the place of arbitration and go no further.

As we have seen, applicable law issues in this area do not just relate to the correct identification of law districts. They relate to the distribution of legislative power within the modern state. We saw how separability allied to one type of constitution, the old Swiss one, could cause chaos. On the other hand, the US federal courts have used separability allied to the commerce clause of its Constitution to force some fairly unruly state legislatures to

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<sup>43</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>44</sup> At para. 170(vii). See also paras. 113-117.

<sup>45</sup> *Forsikringsaktieselskapet Vesta v. Butcher* [1989] A.C. 582.

<sup>46</sup> *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446; *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 at paras. 38-42.



enforce arbitration clauses in the same way as they provide for the execution of the most enforceable contract terms.<sup>47</sup>

More generally, no significant arbitration centre would suggest that an arbitration clause cannot be governed by a different law to the main contract. However, as the Anglo-French fight over *Kabab-Ji* shows, the question is now: to what extent is the agreement to arbitrate separate from the main contract as regards the applicable law?

#### **IV: SEPARABILITY - THE EFFECT OF INVALIDITY OF THE MAIN CONTRACT ON THE ARBITRATION CLAUSE CONTAINED IN IT**

In spite of all the arguments about its implications, the notion that the arbitration clause can be governed by a different law to the main contract has not itself given rise to much controversy at least until the recent Anglo-French *Kabab-Ji* case.<sup>48</sup> What has led to ferocious if sometimes meaningless arguments is the question of whether the validity of an arbitration clause can be determined separately to that of the main contract.

In the first part of this century, even though the English courts had clearly accepted that the arbitral clause could be governed by a different law to the rest of the agreement, they stuck fast to the notion that if the contract fell, the arbitral clause went with it. In the *Hirji Mulji*, the court held that frustration of the agreement removed the arbitrator's jurisdiction.<sup>49</sup> In *Joe Lee v. Lord Dalmeny*,<sup>50</sup> Eve J. ruled that an arbitrator had no jurisdiction to deal with an illegal gambling contract. The Court of Appeal ruled that the failure of a condition precedent would have the same impact.<sup>51</sup>

These three inter-war cases set the scene for the 1942 decision of the House of Lords in *Heyman v. Darwins*.<sup>52</sup> There, the question was whether the discharge by fundamental breach of the main contract discharged the arbitration clause. The House of Lords unanimously declined to follow the *Hirji Mulji*.<sup>53</sup> The ratio of the majority was that the discharge by breach of the performance obligations of the main contract had no effect on the arbitral clause. Since the House of Lords in *Photoproductions v. Securicor*<sup>54</sup> was to reach the same conclusion about limitations of liability, this result did not introduce separability

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<sup>47</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>48</sup> *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48; Cass Civ 1er, 28 septembre 2022, Pourvoi n° 20-20.260.

<sup>49</sup> *Hirji Mulji v. Cheong Yue Steamship Co. Ltd* [1926] A.C. 497.

<sup>50</sup> *Joe Lee Ltd. v. Lord Dalmeny* [1927] Ch. 300.

<sup>51</sup> *Payne & Routh v. Hugh Baird & Sons* (1922) 9 Ll.L.Rep. 167. The position on conditions precedents was always less clear because arguably they consist of an agreement separate from the main contract anyway.

<sup>52</sup> *Heyman v. Darwins* [1942] A.C. 356.

<sup>53</sup> *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497.

<sup>54</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

into English law. As Lord Porter said of the conclusion in the *Hirji Mulji*, frustration did not discharge the contract; it merely discharged the obligation to perform it.<sup>55</sup> It is easy to spot here the seeds of Lord Diplock's distinction between primary and secondary obligations.

The difficulty with this case is that two of *Heyman v Darwins* judges, Lord Wright<sup>56</sup> and Lord Porter<sup>57</sup> described the arbitration clause as being capable of surviving the invalidity of the main contract. Lords Simon<sup>58</sup> and Macmillan<sup>59</sup> espoused clearly the opposite position and Lord Russell simply agreed with the last two.<sup>60</sup>

Actually, it all did not matter very much in practice. Arbitration thrives mainly in England in the shipping and commodity fields where illegal contracts are rare. So long as a split between primary and secondary obligations existed, very few cases were ever likely to hinge on whether England had a separability doctrine. The blue pencil test sorted out cases of supervening illegality. There was a doubt about contracts avoidable for non-disclosure or misrepresentation. These were exacerbated by the Court of Appeal's meanderings in *Mackender v Feldia*<sup>61</sup> in relation to exclusive jurisdiction clauses. The court there seemed to confuse rescission with discharge for breach. Another route using the equitable rules requiring rescission to be made conditional on the survival of certain contract terms could have coped with this issue without the need to invoke separability.<sup>62</sup>

Switzerland seems to be the first major arbitration country to have acquired a fixed separability doctrine in this area. In 1931, the Federal Supreme Court declared that the invalidity of the main contract could not affect the arbitration clause.<sup>63</sup> This view has been consistently applied ever since and is enshrined in the Swiss Private International Law Act 1987.<sup>64</sup> The Swedish Supreme Court came out in favour of separability in relation to a contract voidable for fraud in 1936.<sup>65</sup> In 1976, it emphasised this view in an appeal where one party alleged that he had never agreed to the main contract.<sup>66</sup> The Dutch had a few meanderings before the Hoge Raad, its Supreme Court decided that an arbitrator had

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<sup>55</sup> At p. 400.

<sup>56</sup> At p. 377.

<sup>57</sup> At p. 392.

<sup>58</sup> At pp. 366-369.

<sup>59</sup> At p. 371.

<sup>60</sup> At p. 369.

<sup>61</sup> *Mackender v Feldia* [1967] 2QB 590 adopted by Lloyd J in *David Curtis Craig v. National Indemnity Company*, 8 Yearbook : Commercial Arbitration 410 (1983) in a case involving an arbitration clause.

<sup>62</sup> A. Samuel, "Separability in English Law - Is an Arbitration Clause an Agreement Separate and Collateral to the Contract in which it is Contained?", 3 *Journal of International Arbitration* 2, 95 at pp. 105-106 (1986).

<sup>63</sup> *Tobler g/ Justizkommission des Kantons Schwyz*, ATF 59 I 177 at p. 179 (1933).

<sup>64</sup> LDIP, art. 178(3).

<sup>65</sup> *Norköpings Trikefabrik v. AB Per Persson* NJA 1936 p. 521.

<sup>66</sup> *Hermansson v. AB Asfalt Beläggningar*, NJA 1976, p. 125.

jurisdiction to deal with the question of whether a contract was void because of the absence of a foreign currency export licence.<sup>67</sup>

France had an almost English-like hostility to separability in this area. The trigger for change seems to have been a well-publicised conference on the subject in Paris in 1961.<sup>68</sup> The Cour de cassation in the *Gosset* case<sup>69</sup> came up with the classic statement of the separability doctrine:

“In international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates, is always save in exceptional circumstances, which are not alleged to exist in this case, completely autonomous in law, which excludes the possibility of it being affected by the possible invalidity of the main contract.”

The *Gosset* case actually involved something more akin to force majeure or frustration than the invalidity of the main contract. So, one had to wait until the 1971 *Impex* decision<sup>70</sup> on illegality for an out-and-out adoption of separability. Article 1447 of the CPC now has a clear statement of separability which is applicable in international cases in the absence of the parties agreement.<sup>71</sup>

The “save in exceptional circumstances” remarks in *Gosset* aroused a certain amount of discussion in the literature and were promptly dropped from subsequent judicial statements on the subject. This in a way is a shame since there are two possible interpretations of this reservation. Both are important. First, it is possible to draft the arbitration clause in such a way that it becomes dependent on the main agreement. Separability is a presumption not a fixed rule of law. Secondly, it may come about that the reason for invalidating the main contract may render the enforcement of the arbitration clause contrary to public policy. In the Court of Appeal in the *Harbour Assurance*<sup>72</sup> case (discussed later in this paper) there was an attempt to distinguish the *Joe Lee*<sup>73</sup> case on just such a ground. More spectacularly, Judge Laergergren declined to arbitrate the famous *Argentinian Bribery* case<sup>74</sup> where he felt

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<sup>67</sup> Høge Raad 6 December 1963, [1964] *Nederlandse Jurisprudentie*, no. 43.

<sup>68</sup> The key paper was F.-E. Klein, "Du caractère autonome de la clause compromissoire, notamment en matière d'arbitrage international", 50 *Rev. Crit.* 499 at p.507 (1961).

<sup>69</sup> *Gosset c/ Carapelli*, Cour de cassation, 7 May 1963 [1963] *Rev. Arb.* 60.

<sup>70</sup> *Société Impex c/ Sociétés P.A.Z.*, Cour de cassation, 18 May 1971, [1972] *Rev. Arb.* 2.

<sup>71</sup> CPC, art. 1506(1).

<sup>72</sup> *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance* [1993] QB 701.

<sup>73</sup> *Joe Lee Ltd. v. Lord Dalmeny* [1927] Ch. 300.

<sup>74</sup> ICC Award No. 1110, Doc. No. 410/1056, 15 January 1963. This case is wrongly but fashionably disregarded as being a case where the arbitrator was ignorant of separability. This is simply incorrect. See *National Power Corporation c/ Westinghouse International Projects Company*, Tribunal fédéral, 3 September 1993, ATF 119 II 380 at 384 (1993) for an example of this.

that the main contract was void because its main purpose was corruption. This was not because he rejected separability but because he was not prepared to allow the arbitral process and its confidentiality to be abused by the parties. As we will see, the French and Swiss courts have tagged on a third “exceptional circumstance” where the main contract was never concluded although both countries’ courts seem to have abandoned the exception.<sup>75</sup>

There are some interesting lessons to learn from the first two exceptions to separability. Arbitration legislation, be it judicial or parliamentary, performs two important functions using two distinct techniques. First, it steers the parties in desirable directions by implying terms into the arbitral agreement that the parties will never have had the time to think about. The English 1889 Act was more brazen than most in this respect. It contained a schedule of terms to be implied into agreements to arbitrate.<sup>76</sup> Since the perfectly drafted arbitration clause would take longer to put together than quite a few contracts, this statutory service is invaluable. The parties can, though, always opt out of it. These statutory implied terms represent a difference in approach to ordinary contract law. There is no need to show that the contract needs these terms to have business efficacy for them to be incorporated into the agreement. Nor are they mandatory like the Unfair Contract Terms Act and the other similar legislation that followed it.

The second more classic function of legislation is the protection of public policy. The Belgian, Swiss and Austrian Supreme Courts have all mentioned the possibility that the subject-matter of a dispute might make its arbitration contrary to public policy.<sup>77</sup> This highlights the curious sensitivity of adjudicatory mechanisms. One finds this reflected in the presumption that all arbitration clauses involving consumers are unfair contained in the EU Unfair Contract Terms Regulations. These same sensitivities led the English courts mistakenly to apply the judicial review remedies for error on the face of the record to arbitration in the early 19th century thus disfiguring profoundly the English arbitral landscape ever since.

As we have already indicated, the German courts had applied separability as far back as the 1890s. However, it was not until 1970, that the Bundesgerichtshof put the question beyond

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<sup>75</sup> . See the *Cassia* case, Cour de cassation, 10 July 1990 [1990] *Rev. Arb.* 859 and the discussion under the apparently contradictory *Société Gefimex c/ société Transgrain*, Cour d’appel de Paris, 14 November 1996, [1996] *Rev. Arb.* 434 by Y. Derains. For Switzerland, see *National Power Corporation c/ Westinghouse International Projects Company*, Tribunal fédéral, 3 September 1993, ATF 119 II 380 at 384 (1993) & *G c/ X*, Tribunal fédéral, 20 December 1995 ATF 121 III 495 at p. 500 (1995). ATF 142 III 239 (2016) rejects this exception in Switzerland.

<sup>76</sup> Sch. 1 contains terms implied in any submission to arbitration.

<sup>77</sup> P Wautelet, “Arbitration of distribution disputes revisited: A comment on Sebastian International inc. v Common Market Cosmetics NV”, in *The Practice of Arbitration. Essays in Honor of Hans van Houtte*, Hart Publishing 2012.

doubt in relation to an illegality case.<sup>78</sup> Belgium started the fashion for putting the doctrine in its legislation in its 1976 enactment of the unsuccessful 1966 European Convention Providing a Uniform Law on Arbitration.<sup>79</sup> Holland, Switzerland and even England have followed suit.<sup>80</sup>

There is a tendency amongst liberal arbitration historians to depict the US adoption of separability as an automatic consequence of the Federal Arbitration Act 1925. Section 4 does famously begin:

“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration...”

However, this drafting is consistent with the view that this applies only to valid agreements. That was the line taken in the US Federal Courts until the late 1950s.<sup>81</sup> It is, therefore, best to see separability as a piece of judicial legislation.<sup>82</sup> There is certainly no trace of it in the travaux préparatoires of the Act.

Ironically, Section 4 of the 1925 Act has also been used by the US Supreme Court in recent years to bring the enforcement of arbitration clauses more into line with ordinary contracts. In a series of 1980s and 90s decisions which have continued into the “noughties” with the decision in *Preston v. Ferrer*,<sup>83</sup> the court has ruled that states can only prevent the enforcement of agreements to arbitrate on grounds used for declining to enforce ordinary contracts. State legislation designed to discriminate against arbitration clauses has been declared unconstitutional for cases involving interstate commerce on a regular basis.<sup>84</sup>

England was the big hold-out. A series of obiter dicta suggested a distinction between void contracts and voidable ones.<sup>85</sup> The former invalidated arbitration clauses. The latter did not. This was slightly awkward because Lord Macmillan in *Heyman v. Darwins* was sure that a

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<sup>78</sup> BGH, 27 November 1970, BGHZ 53, 315.

<sup>79</sup> Code judiciaire, art. 1690(1) (originally 1697(2)).

<sup>80</sup> Burgerlijke Rechtsvordering Burgerlijke Rechtsvordering, art. 1053, LDIP, art. 178(3), s 7 Arbitration Act 1996.

<sup>81</sup> *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (C.A.2d Cir. 1959) (*Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)); the old approach can be seen in *El Hoss Engineer. & Transport Co. v. American Ind. Oil Co.*, 289 F.2d 346 (C.A.2d Cir.1961) distinguished somewhat disingenuously in *Prima Paints* in its fn 9.

<sup>82</sup> *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (C.A.2d Cir. 1959) (*Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

<sup>83</sup> 552 U.S. 346 (2008).

<sup>84</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>85</sup> *Heyman v. Darwins* [1942] A.C. 356 at pp. 366 & 371; *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223 at p. 286; *Ashville Investments Ltd. v. Elmer Contractors Ltd.* [1989] Q.B. 488.

contract that was avoidable for misrepresentation would wipe out the arbitration clause.<sup>86</sup> However, as indicated, the difficult decision in *Mackender v. Feldia* was interpreted as reaching the opposite result.<sup>87</sup> Equitable doctrines could be used to explain this case and a decision applying it to arbitration without upsetting the idea of the arbitral clause and the rest of the agreement remaining one entity.

Rejection of “full separability” in England did not necessarily result in the invalidity of arbitration clauses. In the 1953 case, *Slade v. Metrodent*,<sup>88</sup> for example, a court upheld an arbitration clause in a minor’s contract on the basis that in combination with the apprenticeship agreement in which it was incorporated, it was for the overall benefit of the child. This was in spite of the fact that the clause on its own would not have survived in isolation. In the *Kelo*, the High Court in the 1980s affirmed that the assignment of the main contract would take the arbitration clause with it.<sup>89</sup>

The breach in the dyke strangely came from another direction altogether. In the 1970s and early 80s, the courts were faced with a rash of cases where the claimant had failed to pursue the arbitration for a number of years. This coincided with the development of dismissal for want of prosecution in English civil procedure. The House of Lords in *Bremer Vulkan* and the *Hannah Blumenthal* expressed the view that an arbitration clause or more likely the reference to arbitration could be terminated by the parties’ agreement without this impacting on the main contract.<sup>90</sup> Lord Diplock expressed the view that the arbitral agreement was separate and collateral to the main contract in which it was contained.<sup>91</sup>

The traditional view suffered a dent from these cases. Oddly enough, the view that the parties could agree to abandon the reference or the agreement to arbitrate<sup>92</sup> and that the invalidity of the arbitral agreement would have no effect on the main contract posed no particular problems.

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<sup>86</sup> At p. 371.

<sup>87</sup> *Heyman v. Darwins* [1942] A.C. 356 at pp. 366 & 371; *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan* [1978] 2 Lloyd’s Rep. 223 at p. 286; *Ashville Investments Ltd. v. Elmer Contractors Ltd.* [1989] Q.B. 488.

<sup>88</sup> [1953] W.L.R. 562.

<sup>89</sup> *Kaukomarkkinat O/Y v Elbe Transport-Union GmbH (The Kelo)* [1985] 2 Lloyd’s Rep. 85.

<sup>90</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909; *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854.

<sup>91</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909 at p. 980; *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854 at p. 917.

<sup>92</sup> *Allied Marine Ltd v Vale do Rio Doce SA (The Leonidas D)* [1985] 1 WLR 925.



Nevertheless, in every case where a problem with the main contract was used to challenge the arbitral clause, judges stuck fast to the void/ voidable distinction.<sup>93</sup> Those writing about the subject essentially had no choice but to repeat this while being aware that the House of Lords could wipe out that case law at any time it had the opportunity.<sup>94</sup> What people did not expect was that the Court of Appeal would do the job instead. The reason why it was able to do so relates to rarity of English cases where separability would have made any difference to the result, typically an initial illegality case, the only example of which predated *Heyman v Darwins*.<sup>95</sup> Essentially, this made it possible to say that *Heyman v. Darwins* had wiped out all the pre-war cases and that the judicial remarks in that case and subsequent decisions were just obiter.

Another element that made it easier for the Court of Appeal in *Harbour Assurance Co. (U.K) Ltd v. Kansa*<sup>96</sup> was the absence of any policy argument against separability. One can argue that certain issues of public importance should not be resolved by arbitration. That view, though, would strike down agreements to submit existing disputes to arbitration as easily as it takes out arbitral clauses in contracts.

Actually, it is perfectly arguable in academic circles that the *Harbour* case is entirely obiter. The court was faced with the reinsurance of a risk that had been insured illegally by a company not authorised to do the business under the Insurance Companies Act. As each judge pointed out, this almost certainly did not make the reinsurance contract invalid. The absence of an insurable interest merely prevents the party that does not have it from enforcing the contract. (The rule is designed to protect insurers against people bringing about the event insured so as to claim the insurance money.) Nevertheless, since the case has since been enshrined in the 1996 Arbitration Act, such talk is unhelpful. The case proceeds on the erroneous assumption that the relevant contract was void for illegality under the Insurance Companies Act.

Ralph Gibson LJ starts by observing that since there is no policy argument against separability, the courts ought to be in favour of it. He then looks to see if there are any precedential roadblocks in the way of adopting it.<sup>97</sup> On illegality, the only real case blocking the way was the *Joe Lee* decision<sup>98</sup> of Eve J. This could just be overruled. The court rightly concluded that *David Taylor v. Barnett Trading*<sup>99</sup> was decided on a different point, namely

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<sup>93</sup> *Ashville Investments Ltd. v. Elmer Contractors Ltd.* [1989] Q.B. 488.

<sup>94</sup> A. Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law*, Schulthess, Zurich 1989 at p. 171.

<sup>95</sup> *Joe Lee Ltd. v. Lord Dalmeny* [1927] Ch. 300.

<sup>96</sup> [1993] Q.B. 701.

<sup>97</sup> At pp. 710-711.

<sup>98</sup> *Joe Lee Ltd. v. Lord Dalmeny* [1927] Ch. 300.

<sup>99</sup> [1953] W.L.R. 562.

that an arbitrator instructed by the parties to apply English law committed misconduct when he failed to apply an English statute which made the contract illegal.<sup>100</sup> The jurisdiction of the arbitrator was not in question there.

Hoffman LJ coped with the precedents in a slightly different way. He wiped out the pre-1942 case law using the *Heyman v Darwins*<sup>101</sup> overruling of the *Hirji Mulji*,<sup>102</sup> quoted Lord Macmillan in the former case vastly out of context and then used the *Bremer Vulkan*<sup>103</sup> mis-citing of the *Heyman* case to support the view that he had already reached in favour of separability.<sup>104</sup>

Doctrinally, what he had to say was much more interesting. He attacked the one-contract view using logic rather than policy.

“The flaw in the logic, as it seems to me, lies in the ambiguity of the proposition that the arbitration clause ‘formed part’ of the retrocession agreement. In one sense of course it did. It was clause 12 of a longer document which also dealt with the substantive rights and duties of the parties. But parties can include more than one agreement in a single document. They may say in express words that two separate agreements are intended. Or the question of whether the document amounts to one agreement or two may have to be answered by reference to the kind of provisions it contains. In any case, it is always essential to have regard to the reason why the question is being asked. There is no single concept of ‘forming part’ which will provide the answer in every case. For some purposes a clause may form part of the agreement and for other purposes it may constitute a separate agreement. One must in each case consider the terms and purpose of the rule which makes it necessary to ask the question.”<sup>105</sup>

The awkward question raised by these comments is whether there are other contract provisions that could be separable. To some extent, we already have a degree of severability in contracts through the blue pencil test for illegal agreements. It is correct to say that a document may contain more than one agreement. However, the arbitration clause is not in any real sense a separate contract. It is commercially part of the overall bargain and sometimes will be a central part of it containing as it commonly does an express choice of law to govern the substantive agreement.

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<sup>100</sup> At p. 713.

<sup>101</sup> *Heyman v. Darwins* [1942] A.C. 356.

<sup>102</sup> *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497.

<sup>103</sup> *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909.

<sup>104</sup> At pp. 722-723.

<sup>105</sup> At p. 722.

Hoffman LJ is on sounder territory when he discusses the policy implications of separability:

“When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract”.<sup>106</sup>

The Lord Justice then enters some very murky waters when he talks about the parties’ intentions. He quotes the German Bundesgerichtshof’s reasonable comment that parties to contracts containing arbitration clauses do not intend their contracts to be adjudicated in court as well as by arbitration. Hoffman LJ refers to a “presumption in favour of one-stop adjudication”.<sup>107</sup>

Finally, in the judgement nobody reads, Leggatt LJ latches onto comments made by Stephen Schwebel, a judge of the International Court of Justice which seeks to justify separability almost entirely in terms of the parties’ intentions.<sup>108</sup> At this point, one has to query the limits of the parties’ intentions in this area. We can accept that the parties do not actively intend that their dispute will be resolved by two different tribunals. However, the ugly truth is that the parties rarely consider the breakdown let alone the invalidity of their agreement at the time of contracting. It is far more accurate to stick with Hoffman LJ’s presumption in favour of one-stop adjudication and leave it there. All we have here is an absence of any intention of the parties to reject this presumption.<sup>109</sup>

In 2007, the House of Lords gave separability the backing that perhaps it had always needed in England. *Premium Nafta*<sup>110</sup> is strictly authority for the proposition that an arbitration clause that does not refer to arbitration “all disputes arising out of or relating to arbitration”, just “any dispute arising under this charter” is wide enough to pick up disputes relating to the existence or legality of the contract. In truth, it goes much further.

“Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader’s understanding of the purpose for which the agreement was made. Businessmen in

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<sup>106</sup> At p. 724

<sup>107</sup> At p. 724

<sup>108</sup> At p. 716; International Arbitration: Three Salient Problems, cap 1, Grotius Publications Limited, Cambridge 1987; A Samuel, Review of “International Arbitration: Three Salient Problems” by S. Schwebel, 5 Journal of International Arbitration 1, 119 (1988).

<sup>109</sup> J. Gillis Wetter, “Salient Features of Swedish Arbitration Clauses” [1983] *Swedish and International Arbitration* 33 at pp. 33-34.

<sup>110</sup> *Premium Nafta Products Ltd (20th Defendant) v. Fili Shipping Company Ltd* [2007] UKHL 40 often referred to as the *Fiona Trust*.

particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause.

... section 7 of the Arbitration Act 1996... shows a recognition by Parliament that, for the reasons I have given in discussing the approach to construction, businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way.

In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

As Longmore LJ remarked...: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."<sup>111</sup>

Once Lord Hoffman applied the contextual interpretation of contracts to arbitration clauses, he was bound to reject the old caselaw on the different meanings of various clauses.

"With that background, I turn to the question of construction. Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes "arising under" and "arising out of" the agreement. In *Heyman v Darwins Ltd* [1942 ] AC 356, 399 Lord Porter said that the former had a narrower meaning than the latter but in *Union of India v E B Aaby's Rederi A/S* [1975] AC 797 Viscount Dillhorne, at p. 814, and Lord Salmon, at p. 817, said that they could not see the difference between them.

Nevertheless, in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63, 67, Evans J said that there was a broad distinction between clauses which referred "only those disputes which may arise regarding the rights and obligations which are created by the contract itself" and those which "show an intention to refer some wider class or classes of disputes." The former may be said to arise "under" the contract while the latter would arise "in relation to" or "in connection with" the contract. In *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) 26 Con LR 66, 76 Slade LJ said that the phrase "under a contract" was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to *Mackender v Feldia AG* [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that a clause in an insurance policy submitting disputes "arising thereunder" to a foreign jurisdiction

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<sup>111</sup> *Premium Nafta Products Ltd (20th Defendant) v. Fili Shipping Company Ltd* [2007] UKHL 40 at paras 6-10 & 13.

was wide enough to cover the question of whether the contract could be avoided for non-disclosure.

I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions "arising under this charter" in clause 41(b) and "arisen out of this charter" in clause 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at paragraph 17) that the time has come to draw a line under the authorities to date and make a fresh start."<sup>112</sup>

The new approach is to assume that an arbitration clause written without express exclusions will cover all disputes arising out of or relating to the contract, regardless of the precise words used. It also dispatches an argument about separability that its full scope may depend on the use of a standard unlimited arbitration clause covering all disputes arising out of or relating to the contract, something found in the first instance judgement here and the US Supreme Court in *Prima Paints v. Conklin*.<sup>113</sup>

This is not original. The House of Lords makes interesting and constructive use of the 1970 Bundesgerichtshof decision mentioned earlier in support of the one-stop shop approach, Lord Hoffman had already used in *Harbour*.<sup>114</sup> Lord Hope's concurring judgement also mentions the US Supreme Court decision in *AT & T Technologies Inc v Communications Workers of America*, 475 US 643 (1986) at p 650. There is an important distinction, though, between the English and US positions. In *AT&T* and a string of other US decisions, the Court approached the problem from the viewpoint of seeking to encourage arbitration. Lords Hoffman and Hope are not expressing their views as arbitration evangelists, just as proponents of sensible solutions for contracting parties.

Unless the alleged bribe led the parties to agree to arbitrate their dispute rather than resolve it in another way, it could not affect the validity of the arbitration clause in the light

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<sup>112</sup> *Premium Nafta Products Ltd (20th Defendant) v. Fili Shipping Company Ltd* [2007] UKHL 40 at paras. 11-12.

<sup>113</sup> *Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)

<sup>114</sup> At para. 14; BGH, 27 November 1970, BGHZ 53, 315



of section 7. Since charterparties habitually contain such provisions, it is impossible to detect the effect of any bribe on that choice. Lord Hoffman explains this:

“In the present case, it is alleged that the main agreement was in uncommercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. Mr Butcher QC, who appeared for the owners, said that but for the bribery, the owners would not have entered into any charter with the charterers and therefore would not have entered into an arbitration agreement. But that is in my opinion exactly the kind of argument which section 7 was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.”<sup>115</sup>

## V: SEPARABILITY - THE FINAL FRONTIER

One issue raised by Lord Hoffman has excited a certain amount of discussion - the limits of separability. The decision in the *Harbour Assurance* case is that just because an agreement is void for illegality does not make the arbitration clause invalid. It is also conceded that the subject-matter of a dispute may render it contrary to public policy to have it resolved by arbitration. However, the limits of that were not explored by the court in this case. Nor have they ever been properly in English law. Lord Hoffman did refer to contracts of adhesion as a possible example without considering the state of current English caselaw which suggests the contrary<sup>116</sup> and the Unfair Contract Terms Regulations, now Schedule 2 of the Consumer Rights Act 2015 which virtually outlaws the enforceability against consumers of agreements to submit disputes to arbitration.<sup>117</sup>

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<sup>115</sup> *Premium Nafta Products Ltd (20th Defendant) v. Fili Shipping Company Ltd* [2007] UKHL 40 at para. 19.

<sup>116</sup> *Willcock v. Pickfords Removals Ltd* [1979] 1 Lloyd's Rep. 244.

<sup>117</sup> Para. 20(a) although only consumers can enforce this.

Hoffman LJ goes further:

“There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial invalidity should have this consequence.”<sup>118</sup>

He then concludes the Bermudan *Joc Oil* case<sup>119</sup> would have been decided the same way under English law. There, one party was authorised only to enter into the arbitration clause and not the main contract. The Bermudan Court of Appeal applying Soviet law upheld the agreement to arbitrate.

The French and Swiss Supreme Courts have both stated that the separability doctrine is limited to cases where the parties have reached a concluded agreement on the main contract.<sup>120</sup> This contradicts a cantonal Basel Court of Appeal decision on non est factum<sup>121</sup> and the Swedish Supreme Court in the *Hermansson* case.<sup>122</sup> In more recent times, the French and Swiss Supreme Courts have rowed back from these positions, notably the Swiss in 2016.<sup>123</sup> In practice, these decisions may not make much difference. If the parties have not agreed on the main contract, it will almost invariably be true that the arbitration clause will have suffered the same fate. Nevertheless, it is reasonably clear that the failure of a condition precedent to the existence of the contract will have no effect on the agreement to arbitrate.<sup>124</sup> (There is an argument that conditions precedent involve the creation of two substantive contracts anyway - the second comes into operation by the effect of the first and the accomplishment of the condition.) The key to this, though, seems to be contained in Hoffman LJ’s remark that

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<sup>118</sup> At para. 723.

<sup>119</sup> *Sojuznefteexport v. Joc Oil Ltd.* (unreported), 7 July 1989; 15 Yearbook of Commercial Arbitration 384 (1990).

<sup>120</sup> See the *Cassia* case, Cour de cassation, 10 July 1990 [1990] *Rev. Arb.* 859 and the discussion under the apparently contradictory *Société Gefimex c/ Société Transgrain*, Cour d’appel de Paris, 14 November 1996, [1996] *Rev. Arb.* 434 by Y. Derains. For Switzerland, see *National Power Corporation c/ Westinghouse International Projects Company*, Tribunal fédéral, 3 September 1993, ATF 119 II 380 at 384 (1993) & *G c/ X*, Tribunal fédéral, 20 December 1995 ATF 121 III 495 at p. 500 (1995). It is highly arguable that these cases are obiter anyway. However, for a similar view, see *Three Valleys Municipal Water District v. E.F. Hutton & Co.*, 925 F. 2d 1136 (9th Cir. 1991).

<sup>121</sup> *K.K.G. v. M.S.A* 3 ASA Bulletin 19 (1995).

<sup>122</sup> *Hermansson v. AB Asfalt Beläggningar*, NJA 1976, p. 125.

<sup>123</sup> ATF 142 III 239 (2016).

<sup>124</sup> *Payne & Routh v. Hugh Baird & Sons* (1922) 9 Ll.L.Rep. 167 (where a condition precedent failure invalidated the arbitration clause); seemingly misread by Bingham J in *Saleh Farid v McKinnon MacKenzie & Co. Ltd (the “Sheba” and “Shamson”)* [1983] 2 Lloyd’s Rep. 500 at 505 to allow the survival of the clause.

“In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other, but, as we have seen, it may not.”<sup>125</sup>

One can have a dispute over whether a contract was ever concluded where it is clear that the parties agreed on the arbitration clause. This is quite possible, bearing in mind the fact that the approach to negotiating shipping contracts is to start with a basic contract and then discuss only the amendments to it in sequence. If the arbitration clause is not one of the clauses under discussion or the parties indicate their agreement to it before moving on to look at the other contract provisions, there is no reason why an arbitrator chosen under the clause cannot resolve a case about whether the parties concluded an agreement on the rest of the contract.

This type of negotiation was at the heart of the *Newcastle Express* Court of Appeal decision. The broker of a voyage charterparty sent a recap of what had been agreed by the parties. He included an arbitration clause. However, he also noted prominently that there was a “sub” about the vessel’s testing and acceptance by the charterer. The arbitrator interpreted the message to mean that the premature rejection of the vessel after it failed an inspection sounded in damages for breach of contract. The High Court and Court of Appeal both took the view that there was a failure of a condition precedent and that as a result, there was neither a contract nor an arbitration clause. The Court of Appeal contrasted the situation where the contract was void for illegality with that where there had never been a binding contract.<sup>126</sup> That seems to contradict the words of section 7 of the Arbitration Act 1996:

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement ... 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.”

The separability doctrine, as enshrined in English, Scottish, Swiss, German and other statutes around the world, states that the invalidity of the main contract will not of itself invalidate the arbitration agreement. So, the sole focus in arbitral jurisdiction cases needs to be on the agreement to arbitrate subject only to public policy concerns.

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<sup>125</sup> At p. 724.

<sup>126</sup> *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (Re "Newcastle Express")* [2022] EWCA Civ 1555

Lord Hoffman seemed to have extended this “purist” approach to English law. He said in *Premium Nafta*:

“The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But **the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.**

On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. **Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement.** If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.” Emphasis added.<sup>127</sup>

(The US Supreme Court in *Buckeye*<sup>128</sup> remained firmly on the fence on this one and stayed that way in *Preston v. Ferrer*.<sup>129</sup>)

Lord Hoffman, the Swedish and now the Swiss Supreme Court are right here. The only issue should be whether the agreement to arbitrate was properly concluded. If it was, the existence of any dispute about the conclusion or validity of the main contract is irrelevant. The emphasis on the agreement to arbitrate rather its separate status from the main

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<sup>127</sup> At paras, 17-18.

<sup>128</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) fn 1.

<sup>129</sup> 552 U.S. 346 (2008).



contract also avoids the trap that arises where a contract is assigned. There, the fate of the main contract actually determines the binding nature with regard to the assignee of the agreement to arbitrate.

The *Newcastle Express* illustrates the virtue of Lord Hoffman’s view in another way. The Court of Appeal asserted confidently that the words of what to the layman would appear to be a complex description of a negotiation were clear. Yet, the arbitrator from the shipping industry took a totally different view. The contractual test at least in English law is what a reasonable person in the relevant industry would have understood was intended by the parties – not a judge! At the very least, the court at first instance should have heard some expert evidence from the shipping industry before relying on previous cases to reach a conclusion about what was really objectively intended.

There is also a difficult discussion to be had about the nature of conditions precedent. When they are agreed between the parties, do they form a contract of their own or should an arbitrator or court conclude that from the behaviour of the parties and their negotiations? This is probably the better way to make sense of the arbitration award. The arbitral clause attaches to the condition precedent agreement and allows the tribunal to decide whether the parties are obligated to act in good faith to ensure that the condition precedent is met. The award set aside in the *Newcastle Express* seems to have followed this approach.

England is not the only country with a “condition precedent problem”. In the famous US *Prima Paints* case, the Supreme Court seems to have confused the reversed District Court’s ruling in *El Hoss* with the decision of the 2<sup>nd</sup> Circuit Court of Appeals to suggest wrongly that the latter was in favour of separability but had just concluded that the parties did not intend for the failure of the condition precedent to be subject to the arbitration clause.<sup>130</sup>

## VI CONCLUSION

We can describe separability as two fairly straightforward rules. The arbitration clause may be governed by a different law than the main contract. The invalidity of the main contract has no impact in and of itself on the validity of the agreement to arbitrate contained in it. The big questions going forward in this area are no longer whether courts and legislatures accept these rules. The battleground is the extent to which judges will resolve questions relating to the validity and scope of agreements to arbitrate by reference to choices of law and other features of the main contract.

With *Kabab-Ji* and the *Newcastle Express*, the question is becoming less a matter of “do you have separability?” but “how much”. In this respect, there is a peculiar parallel with

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<sup>130</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, (388 U.S. 395 (1967), fn 8; *El Hoss Engineer. & Transport Co. v. American Ind. Oil Co.*, 289 F.2d 346 (2d Cir.1961)

separability's sister doctrine of "competence-competence" with its huge variations on the timing and extent of judicial oversight of the arbitrator's jurisdiction.<sup>131</sup>

The interesting academic challenge is to understand why this should be so and what it tells us about our unitary image of contracts as a whole, dispute resolution in general and our techniques for making law to suit the practical needs of the business community.

One thing, though, needs to be kept in perspective. Separability has its origins in the different functions of the arbitration clause and much of the main contract. It is a device for ensuring both the sustainability of arbitration clause where this does no harm to the parties' agreement, what is sensible for them and public policy. This explains why separability has nothing to say about the effect of a contract assignment on the arbitration clause except that if the arbitration clause has been validly assigned, it is up to the arbitrator to decide if the same is true of the rest of the contract.<sup>132</sup> The sensible thing from virtually every angle is for the assignment to bring the clause with it.<sup>133</sup> Understanding the origins and reasons of a doctrine should not mean that one is blinded to the reality of the situation and the public policy concerns in a given case.

Equally, the idea of limiting the enforceability of an arbitration award through the Admiralty jurisdiction and the arrest of vessels by reference to separability is nonsense. The result in the *Bumbesti* case<sup>134</sup> may be justified as a matter of Admiralty law or policy restricting the arrest of vessels; it should not be based on separability. That is not separability's role.

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<sup>131</sup> A Samuel, "Competence-Competence, Kompetenz-Kompetenz – now just an excuse for confused thinking about arbitrator jurisdiction", 80 *Arbitration* 1, 67 (2014)

<sup>132</sup> *Société burkinabé des ciments et matériaux (Clmat) c/ société des ciment d'Abidjan (SCA)*, Cour de cassation, 28 May 2002; [2003] *Rev. Arb.* 397

<sup>133</sup> *Kaukomarkkinat O/Y v Elbe Transport-Union GmbH (The Kelo)* [1985] 2 *Lloyd's Rep.* 85

<sup>134</sup> [2000] *QB* 559. See also Note D Cohen note D Cohen 398 at 402.