

## Separability: How separate is “distinct”?

Graham Dunning QC  
Essex Court Chambers

### 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 (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”*

### Paragraph 43 of the DAC Report:

*“This Clause sets out the principle of separability which is already part of English law (see **Harbour Assurance v Kansa**) [1993] QB 701), which is also to be found in Article 16(1) of the Model Law, and which is regarded internationally as highly desirable. However, it seems to us that the doctrine of separability is quite distinct from the question of the degree to which the tribunal is entitled to rule on its own jurisdiction, so that, unlike the Model Law, we have dealt with the latter elsewhere in the Bill (Clause 30).”*

### Article 16(1) of the 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.”*

### English Court decisions on s.7:

Vee Networks v Econet Wireless International Ltd [2005] 1 Lloyd’s Rep.192 (Colman J.)

Fiona Trust & Holdings Corp. & Others v Privalov & Others [2006] EWHC 2583 (comm.) (Morison J.); [2007] EWCA Civ 20 (Court of Appeal, 24 January 2007).

### Leading cases elsewhere:

Prima Paint Corp v Flood & Conklin Mfg Co. 388 US 395 (Supreme Court of the United States)

Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd [2005] FCA 1152 (Federal Court of Australia)

### What reasons will suffice to impeach the arbitration agreement?

Vitiating factors independently affecting the agreement to arbitrate

Non est factum

Fundamental mistake

Sham or absence of intention to create legal relations