

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

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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 or 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*.

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 contract provisions 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! What can we make of its partial if highly unconstitutional reversal by Parliament in 1987?

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 classification, 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 *sui generis*.)

II: THE ORIGINS OF SEPARABILITY

In some senses, the arbitration clause has been separable or 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.

In England, though, the disastrous 1746 decision in Kill v. Hollister that branded arbitration clauses (that did not come within the 1698 Act) as contracts to oust the jurisdiction of the court and 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, the agreement to arbitrate was rendered incapable of judicial enforcement.

England was not the only country to suffer from these anti-separability developments. After a burst of over-flamboyant revolutionary fervour, the French Code Napoleon outlawed the enforcement of arbitral clauses. This continues to affect certain aspects of French domestic arbitration law.

The late 19th century saw the initial burst of enthusiasm for the separability notion. In Germany, study of the various types of contracts led writers to conclude that the arbitral clause was a procedural contract 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. 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. Almost unnoticed 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.

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. 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 of the clause of reference." 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." Note that their Lordships 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.

It is possible even that the Don v. Lippmann 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 Jorg g/ Jorg. 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. 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. An arbitration clause providing for arbitration in Switzerland was in essence void for uncertainty! A canton or location within one had to 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. Switzerland, though, has a curious doctrine of federal parliamentary sovereignty which prevents federal legislation from being challenged. So, for international cases, the Swiss Private International Law Act reverses the decision in Jorg g/ Jorg.

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 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 1960s, 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. 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 recent US Supreme Court decision in Mastrobuono. 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 most recently in Preston v. Ferrer. 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.

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 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 has its limits. English courts have been left floundering where the place of arbitration has not been selected. 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. It concluded that the state courts had the ultimate authority to decide which law governed the arbitral clause.

While most important arbitration centres have rejected any significant influence of the choice of the place of arbitration over the law governing the merits, the English courts have retained the assumption that the law where the proceedings are will govern the merits. This can be explained by the curiously localised way in which shipping and commodity traders make their agreements through London and retain business and legal presences here. In that sense, although the parties may be foreign, their business and legal affairs are curiously localised around London. One does not find this phenomenon anywhere else and the new Act will reduce the number of occasions where the courts will have the opportunity to apply it. (It will not necessarily change arbitration practice.)

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 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 *asui generis*. Certainly, experiences with fragmented applicable laws (there are potential four or five involved in an arbitration) should be enough to deter more breaches in the proper law doctrine. A better approach would just be to make the arbitration clause 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 Swiss one, resulted in minor chaos. On the other hand, the US federal courts have

used separability allied to commerce clause of its Constitution to force some fairly unruly state legislatures to enforce arbitration clauses in the same way as they provide for the execution of the most enforceable contract terms. Lawyers from continental Europe and the USA have an atrocious record at assuming that English arbitration law applies to Scotland. To what extent, should the American and Swiss experience inform the way in which British lawyers think about the Act of Union?

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. 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 the 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. In Joe Lee v. Lord Dalmeny, 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.

These three 1920s cases set the scene for the 1942 decision of the House of Lords in Heyman v. Darwins. 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. 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 was to reach the same conclusion about limitations of liability, this result did not introduce separability 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. 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 judges, Lord Wright and Lord Porter described the arbitral clause as being capable of surviving the invalidity of the main contract. Lords Simon and Macmillan espoused clearly the opposite position and Lord Russell simply agreed with the last two.

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 not common. 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 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 could have coped with this issue without the need to invoke separability.

The Swiss seem 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. This view has been consistently applied ever since and is enshrined in the Swiss Private International Law Act 1987. The Swedish Supreme Court came out in favour of separability in relation to a contract voidable for fraud in 1936. In 1976, it emphasised this view in an appeal where one party alleged that he had never agreed to the main contract. The Dutch had a few meanderings before the Hoge Raad, its Supreme Court decided that an arbitrator had jurisdiction to deal with the question of whether a contract was void because of the absence of a foreign currency export licence.

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

An 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 on illegality for an out-and-out adoption of separability.

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 case (discussed later in this paper) there was an attempt to distinguish the Joe Lee case on just such a ground. More spectacularly, Judge Laergren declined to arbitrate the famous Argentinian Bribery case where he felt 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' in recent years, that where the main contract was never concluded.

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 had a schedule of terms to be implied into agreements to arbitrate. 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. A recent Swiss Tribunal federal case mentioned the possibility that the subject-matter of a dispute might make its arbitration contrary to public policy. 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 doubt in relation to an illegality case. 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. Holland, Switzerland and even England have followed suit.

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:

AA 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 1960s. It is, therefore, best to see separability as a piece of judicial legislation. 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 recent decision in Preston v. Ferrer, 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.

England was the big hold-out. A series of obiter dicta suggested a distinction between void contracts and voidable ones. The former invalidated their arbitration clauses. The latter did not. This was slightly awkward because Lord Macmillan in Heyman v. Darwins was sure that a contract that was avoidable for misrepresentation would wipe out the arbitration clause. However, as indicated, the difficult decision in Mackender v. Feldia was interpreted as reaching the opposite result. 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.

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 could be terminated by the parties' agreement without this impacting on the main contract. Lord Diplock expressed the view that the arbitral agreement was separate and collateral to the main contract in which it was contained.

The traditional view suffered a dent from these cases. Oddly enough, the view that the parties could agree to abandon the agreement to arbitrate and that the invalidity of the arbitral agreement would have no effect on the main contract posed no particular problems. The difficulties all came from discharge for breach and frustration. The doctrine of approbate-reprobate usually prevents a party from electing to be discharged from one part of the contract while insisting on the other part's performance. Likewise, there was only one reported case of partial frustration.

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. 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. What people did not expect was that the Court of Appeal would do the job instead. The reason why it was able to relate to rarity of English cases where separability would have made any difference, in particular an initial illegality case. 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.

What made it easier for the Court of Appeal in Harbour Assurance Co. (U.K) Ltd v. Kansa was the lack 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 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. On illegality, the only real case blocking the way was the Joe Lee decision of Eve J. This could just be overruled. The court rightly concluded that David Taylor v. Barnett Trading was decided on a different point, namely 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. 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 overruling of the Hirji Mulji, quoted Lord Macmillan in the former case vastly out of context and then used the Bremer Vulkan mis-citing of the Heyman case to support the view that he had already reached in favour of separability.

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.Ⓐ

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.

Hoffman LJ is on sounder territory when he discussed the policy implications of separability. In doing so, though, he may have blown a hole in the Phoenix v Halvanon case. He commented:

AWhen 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@.

The court in Phoenix reached its result precisely by rejecting that argument.

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".

Finally 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. 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.

In 2007, the House of Lords gave separability the backing that perhaps it had always needed in England. Premium Nafta 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 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."

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 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."

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*.

This is not original. The House of Lords makes interesting and constructive use of a

1970 Bundesgerichtshof decision. Lord Hope's concurring judgement also mentions the US Supreme Court decision in AT&T. 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 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."

V: SEPARABILITY - THE FINAL FRONTIER

One issue raised by Hoffman LJ 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 in English law. His Lordship did refer to contracts of adhesion as a possible example without considering the state of current English caselaw which suggests the contrary and the Unfair Contract Terms Regulations which virtually outlaws agreements to submit disputes in consumer agreements.

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. ⊕

He then concludes the Bermudan Joc Oil case 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 in recent years stated that the separability doctrine is limited to cases where the parties have reached a concluded agreement on the main contract. This contradicts a cantonal Basel Court of Appeal decision on non est factum and the Swedish Supreme Court in the Hermansson case. 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. (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

△ 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. ⊕

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 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.

The separability doctrine, as enshrined in English, Scottish, Swiss, German and other statutes around the world, only states that the invalidity of the main contract will not of itself invalidate the arbitration agreement. So, the focus in arbitral jurisdiction cases needs to be on the agreement to arbitrate and nothing else subject only to public policy concerns.

Lord Hoffman, as he now is, has extended this "purist" approach to English law. He says:

“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.

This disagrees with the approach of the French Cour de cassation and the Swiss Tribunal fédéral, both of whom have stated that separability finds its limits in questions about the formation of the main contract. (The US Supreme Court in Buckeye remained firmly on the fence on this one and stayed that way in Preston v. Ferrer.) Lord Hoffman and the Swedish 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 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.

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 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 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. The sensible thing from virtually every angle is for the assignment to bring the clause with it. A unitary view of minor's contracts may also justify the decision in *Slade v. Metrodent* although it could equally be used to strike down a highly offensive arbitration clause in the apprenticeship contract such as existed in that case. 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 recent *Bumbesti* case 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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