THE DOCTRINE OF SEPARABILITY: THROUGH THE LENS OF DARWINISM

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Abstract

The doctrine of separability is a cardinal principle of arbitration. It allows an arbitration agreement to be treated independently of the contract that contains it. Traditionally, the arbitration agreement was viewed as divorced from the underlying contract only for the purpose of its existence and validity; however, over time, an evolved understanding of separability has allowed an arbitration agreement to be treated as separate for other purposes as well. For instance, as can be seen from English and Singapore decisions, arbitration agreements are treated as separate to determine the law governing the arbitration agreement as well. This article, in its limited scope, dissects separability in recent decisions to gain an updated understanding of the doctrine; it compares the present view with the traditional view in order to examine a possible evolution of the doctrine.

I. Introduction

The growing popularity of arbitration is attributable to its ability to accommodate parties' unique interests and transmute them into binding decisions. It affords parties the malleability to decide the dispute resolution procedure as per need—a characteristic that is witnessed in the arbitration agreement.[1] An arbitration agreement more often than not forms part of the contract that describes the commercial relation between the parties, their obligations and warranties.[2] Such a contract, as any other relationship, can suffer from defect, breach, or termination, which may consequently affect the entwined arbitration agreement. To salvage the arbitration agreement—the parties' intent to resolve disputes in the chosen manner—jurisprudence from contract law has been imported to arbitration law.[3]

Recently, as is discussed in the course of this article, the separability doctrine's scope of application has broadened beyond tradition affecting the choice of law, contractual validity, and competence-

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1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 81 (3d ed. 2020) [*hereinafter* "BORN"].

2 United Nations Comm'n on Int'l Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 7(1), U.N. Doc. A/40/17, Annex I (June 21, 1985) [*hereinafter* "UNCITRAL Model Law"] ("An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement"); *see* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(2), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("The term 'agreement in writing' shall include an arbitral clause in a contract […].").

3 BORN, *supra* note 1, at 377 ("Common law jurisdictions have historically referred to the 'separability' or 'severability' doctrine, reflecting a focus on the contractual origins of the doctrine […]."); HUGH BEALE, CHITTY ON CONTRACTS § 16-211 (32d ed. 2017) [*hereinafter* "BEALE"] ("Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable"); SIR JACKSON BEATSON, ANDREW BURROWS & JOHN CARTWRIGHT, ANSON'S LAW OF CONTRACT 433 (29th ed. 2010) ("The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.").

competence.[4] Although there is no uncertainty surrounding the vitality of separability, a uniform and reliable application of this supposed rudimentary doctrine is yet desired.[5] Perhaps it is this inconsistency that has allowed Darwin's theory of evolution[6] to manifest in the recent decisions that innocuously or consciously, ameliorate the doctrine of separability. Just as the Darwin's theory of evolution states that there is a constant tendency in the forms of life to supplant and exterminate the less divergent, the less improved, and preceding forms, this article explores whether the pro arbitration approach of Courts has led to the further refinement of the doctrine of separability, exterminating its less divergent forms.

This article, in Part II, examines the provenance of separability and highlights its treatment in different jurisdictions, as to explore its evolution is to understand its origin and development. It then coalesces the understanding of separability in various jurisdictions in Part III. Part IV discusses the application of the doctrine in determining the applicable law. To ensure that the article does not wander, the focus is to only trace a possible evolution of the doctrine and not on the inquiry to determine the law applicable to an arbitration agreement. After understanding the doctrine's limited role in determining the law applicable to an arbitration agreement, Part V, through distillation, determines if recent decisions have heralded a change in the doctrine, i.e., to understand whether the doctrine, as applied today, is more divergent and improved, over its preceding form. Part VI highlights the findings of the article and presents the conclusion.

II. Doctrine of separability

The doctrine of separability, a legal fiction, protects the arbitration agreement from any defects of the main contract,[7] to the extent that it even survives the termination of the main contract.[8] In its permanence, the doctrine provides a refuge for the parties' intent to refer disputes to arbitration.

Separability's contribution to commerce is certainly undeniable. As, barring its application, a mere challenge to the substantive contract would lead the parties down the road of unpredictability. For instance, despite agreeing to arbitration, upon a challenge to the contract, the parties may find themselves litigating before a state court or forum, which may not be commercial or neutral. They may be subject to a system of law which may be alien or archaic, and embroiled in the dispute for

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4 BORN, *supra* note 1, at 377 ("The separability presumption has substantial practical, as well as analytical, importance, and produces a number of closely-related consequences relating to the issues of choice of law, contractual validity and competence-competence.").

5 *Id.* ("Despite the practical and analytical importance of the separability presumption, there are significant uncertainties as to its basis, content and effects.").

6 CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE 359 (1859).

7 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 2.101 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 2015) [*hereinafter* "REDFERN & HUNTER"]; DAVID ST JOHN SUTTON, JUDITH GILL, MATTHEW GEARING, ANGELINE WELSH, KATE DAVIES & FRANCIS RUSSELL, RUSSEL ON ARBITRATION § 2–007 (24th ed. 2015) ("An arbitration agreement specifies the means whereby some or all disputes under the contract in which it is contained are to be resolved. It is however separate from the underlying contracts."); BORN, *supra* note 1, § 3.01.

8 *Id.*; REDFERN & HUNTER § 2.101; DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT § 4.36 (3d ed. 2015) ("An arbitration agreement is a separate and distinct agreement from the substantive contract and is not ordinarily impeached or rendered void if the substantive contract is discharged, frustrated, repudiated, rescinded, avoided or found to be void.").

years, considering the time many domestic systems take to resolve a dispute. Such an invidious outcome is a hinderance to commerce.[9]

It was the House of Lords' celebrated decision in *Heyman* v. *Darwins* ["**Heyman**"][10] that introduced this doctrine. The parties had entered into an agency agreement which contained a broadly worded arbitration clause. Following a dispute, the Appellant argued that the Respondent had repudiated the contract and filed a writ for damages. The Respondent relied on Section 4 of the Arbitration Act, 1889[11] to contend that the writ should be stayed and parties referred to arbitration. Section 4 of the English Arbitration Act 1889 provided Courts the discretion to stay proceedings in defiance of an arbitration agreement if the agreed will of the parties was for the dispute to be referred to arbitration.[12] The repudiation of the agreement did not limit the right of the parties to seek remedy against the repudiation.[13] Upholding this argument, the Court rejected the appellant's contention that the arbitration agreement stood terminated as a result of the termination of the main contract. Lord Macmillan's concurring speech explained the thought behind the Court's decision. Although his speech does not expressly refer to separability, it does contain a version of separability. In his view, the repudiation was of the obligations undertaken by one of the parties and not of the arbitration clause.[14] Lord Macmillan's speech brings out the separation of the arbitration clause from the agency contract, although not in absolute terms. Ultimately, the Court was persuaded in deciding so, considering the purpose of an arbitration clause which is independent of the purpose of the underlying contract.[15]

On the other hand, the United States Court of Appeals for the Second Circuit, around the same time in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.* ["**Kulukundis**"],[16] did not share the same view. It interpreted Section 2 of the Federal Arbitration Act, 1925 ["**FAA**"] to exclude arbitration agreements which referred disputes of existence and validity of underlying agreements to arbitration.[17] Stating American law, as it was then, an arbitration agreement was considered to be "*an integral part*"[18] of the main contract—the basis of the divergent view. The earlier position required courts to first determine the existence of the main contract before referring the parties to

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9 BORN, *supra* note 1, at 378; THOMAS WEBSTER, HANDBOOK OF UNCITRAL ARBITRATION, COMMENTARY PRECEDENTS AND MATERIALS §§ 23-27, 23-28 (2d ed. 2015) ("The principle that an arbitration agreement is to be treated as separable from any underlying contract is based on practical necessity and to a certain degree on common sense. The practical necessity arises from the fact that if potential respondents were able to avoid an arbitration agreement by alleging invalidity of the underlying contract, then it would reduce the effectiveness of international arbitration. In some instances, a recalcitrant debtor's strategy is to prolong any proceedings that might be brought against it with a view of requiring it to perform its obligations.").

10 Heyman v. Darwins [1942] 1 All ER 337 (HL) (appeal taken from Eng.) [*hereinafter* "Heyman"].

11 Arbitration Act, 1889, § 4, 52 & 53 Vict., c. 49 (Eng.).

12 Shri Patanjal & Anr v. M/s Rawalpindi Theatres Pvt Ltd., 1969 SCC OnLine Del 70 (India).

13 Heyman, [1942] 1 All ER 337 (HL).

14 *Id.* at 347 ("The repudiation being not of the contract but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation? I do not think that this is the result of what is termed repudiation.").

15 *Id.* ("The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.").

16 Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942) (U.S.).

17 *Id.* at 985.

18 *Id.*

arbitration. The arbitration clause did not enjoy an independent identity. This, however, could be attributed to the then restrictive language of Section 2 of the FAA.[19]

Since then, pro-commerce initiatives at the international and national levels brought about a remediating change, as the doctrine now enjoys wide recognition, and is applied by national courts and arbitral tribunals from both sides of the Atlantic.

A. International Recognition of Separability

The United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration ["**Model Law**"] recognises arbitration agreements as separate from the underlying agreement.[20] Article 16(1) provides that "*[a] decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*"[21] This ensures that any objection to the existence and validity of the underlying contract, if upheld, would not invalidate the arbitration agreement, as it did in *Kulukundis*. Article 23 of the UNCITRAL Arbitration Rules, 2010 ["**UNCITRAL Arbitration Rules**"] also endorses this position,[22] as do the rules of leading arbitration institutions.[23] For instance, Article 6(9) of the International Chamber of Commerce ["**ICC**"] Rules of Arbitration, 2021 ["**ICC Arbitration Rules**"] provides:

> "*Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.*"[24]

Like Article 23 of the UNCITRAL Arbitration Rules,[25] Article 6(9) of the ICC Arbitration Rules deals with severability and competence-competence.[26] This provision confirms the tribunal's

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19 *See* Federal Arbitration Act, 9 U.S.C. § 2.

20 UNCITRAL Model Law, *supra* note 2, art. 7(1) (""Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.").

21 *Id.* art. 16(1); *See* BORN, *supra* note 1, § 3.03[B](e).

22 UNCITRAL, Arbitration Rules, art. 23, U.N. Doc. A/Res/65/22, Annex. 1 (2010) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose*, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause." (emphasis added)).

23 *See* Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, r. 28.2; London Court of International Arbitration (LCIA), Arbitration Rules 2020, art. 23 ("23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement. 23.2 *For that purpose*, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.").

24 International Chamber of Commerce (ICC), Rules of Arbitration 2021, art. 6(9). Exclusive Agent v. Manufacturer, ICC Case No. 8938, Final Award, *reprinted in* 24 Y.B. COM. ARB. 174, 176 (Albert Jan Van den Berg ed., 1999).

25 CLYDE CROFT, CHRISTOPHER KEE & JEFF WAINCYMER, A GUIDE TO THE UNCITRAL ARBITRATION RULES 249 (2013).

26 MICHAEL W BÜHLER & THOMAS H WEBSTER, HANDBOOK OF ICC ARBITRATION: COMMENTARY AND MATERIALS 139 (4th ed. 2018) [*hereinafter* "WEBSTER & BÜHLER"].

authority notwithstanding a challenge to the underlying contract.[27] From the perspective of the arbitral tribunal's jurisdiction, it follows that separability protects the doctrine of competence-competence—the tribunal's jurisdiction to decide questions of validity of the main contract.[28] Further, on the strength of this provision, the tribunal continues to have jurisdiction even if there is a specific challenge to the arbitration agreement itself, provided that, in the end, the tribunal upholds the validity of the arbitration agreement.[29] The doctrines of separability and competence-competence, although not co-dependent, do have a material relationship.[30] The intersection of the two doctrines means that arbitral tribunals play an equally significant role as national courts in determining the validity of arbitration agreements.

B. Separability under English Law

The doctrine was recognized by English courts even before its codification in England,[31] for instance, by the Court of Appeals in *Harbour Assurance Co. (UK) Ltd.* v. *Kansa General International Insurance Co. Ltd.* ["**Harbour Assurance**"].[32] The primary issue before the Court was, notwithstanding separability, does initial invalidity of the substantive contract – and not its subsequent frustration, like in *Heyman* – defeat the arbitration agreement it contains. The Plaintiff argued that in *Heyman*, the Court drew a distinction between "*a contract which is alleged to have come to an end, and a contract which is alleged never to have been made and never to have been valid.*"[33] Separability, it contended, protected arbitration agreements in the former case and not the latter. This contention was rejected.[34] Lord Hoffmann, in his concurring speech, explained that barring some cases like

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27 *Id.* at 140.

28 BORN, *supra* note 1, at 1165 ("There are instances in which the separability presumption has consequences for the arbitrators' competence-competence. In many cases, purported challenges to the arbitrators' jurisdiction will in fact be nothing more than challenges to the existence, validity, or legality of the parties' underlying contract, not to the arbitration agreement. In these circumstances, the separability presumption provides an explanation for the conclusion that the arbitral tribunal has the authority to consider and decide such challenges.").

29 WEBSTER & BÜHLER, *supra* note 26, at 140; *see* BORN, *supra* note 1, at 1166 ("Importantly, however, the competence-competence doctrine also […] applies in cases where the existence, validity, or legality of the arbitration agreement itself […] is in fact challenged."); NEIL ANDREWS, ARBITRATION AND CONTRACT LAW: COMMON LAW PERSPECTIVES § 2.54 (2016) ("Combination of the principles of Kompetenz-Kompetenz and separability enables the arbitral tribunal to provide a preliminary opinion on whether the arbitration clause is valid […].").

30 Ronàn Feehily, *Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine*, 34(3) ARB. INT'L 355, 360 (2018) ("Due to the fact that the jurisdiction of the arbitral tribunal is not affected where a party challenges the validity of the matrix contract, the doctrine of separability sets the groundwork for the jurisdiction of an arbitral tribunal to decide issues concerning its own jurisdiction, and consequently interacts in an important way with the competence–competence doctrine. For example, separability facilitates arbitrators to find a matrix contract invalid in a context where the contract is predicated on bribery and therefor illegal, without destroying the arbitrators' power to issue an award pursuant to the arbitration clause.").

31 *See* Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corp. Ltd. [1981] AC 909 (HL) 998 (appeal taken from Eng.); Paal Wilson & Co v. Partenreederei Hannah, [1983] 1 All ER 34 (HL) 50 (appeal taken from Eng.).

32 Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd. [1993] 3 All ER 897 (Eng.) [*hereinafter* "Harbour Assurance"], *affirmed in* Deutsche Bank AG v. Asia Pacific Broadband Wireless Communications Inc. [2008] EWCA Civ 1091, ¶ 29 (Eng.) ("[There is no] requirement that [arbitration] clauses are not to apply if there is a (plausible) allegation that the contracts, in which such clause are contained, are vitiated by mistake, misrepresentation, illegality, lack of authority or lack of capacity. That would be to deny the concept of separability which is as much part of European law as English law. *Separability was indeed a doctrine in many European jurisdictions well before it was acknowledged in English law.* see *Harbour v Kansa* […]." (emphasis added)).

33 Harbour Assurance, [1993] 3 All ER 897, at 902 (Lord Ralph Gibson).

34 *Id.* at 907 (Lord Leggatt) ("I agree with the judge's conclusion that – 'the separability principle, as applicable also to cases of the initial invalidity of the contract, is sound in legal theory. It is also in the public interest that the arbitral

denial of a concluded agreement altogether or mistake as to the identity of the other contracting party, there is no reason why separability would not rescue the arbitration agreement from the substantive contract's initial invalidity.[35] The determinative question in his opinion was "*not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration agreement.*"[36]

Following this, the (English) Arbitration Act, 1996 was enacted which codified the doctrine under Section 7.[37] It provides that for the purposes of existence, validity and effectiveness, the arbitration agreement is "*a distinct agreement.*"[38] Lord Hoffmann, now armed by statute, built on his past decision of *Harbour Assurance*[39] in *Fiona Trust & Holding Corporation* v. *Yuri Privalov* ["**Fiona Trust**"].[40] He prefaced his speech by explaining the rationale underlying a broad construction of an agreement to arbitrate disputes: rational businessmen are more likely to want all questions, those of performance, as well as validity and enforceability of the contract, to be decided by one tribunal. This presumption is certainly rebuttable by very clear and specific language evidencing a contrary intent. After addressing the scope of the arbitration agreement, he proceeded to determine whether an arbitration agreement can be enforced in view of bribery allegations surrounding the making of the underlying contract. Writing for the House of Lords, Lord Hoffmann decided that it can be enforced. In his decision, he was guided by the principle of separability in Section 7 of the (English) Arbitration Act, 1996. He was convinced of his decision to enforce the arbitration agreement based on the nature of the allegation and the principle of separability. He did not equate an attack on the underlying contract to that on the arbitration agreement.[41]

C. Separability under the U.S. Federal Arbitration Act

In the U.S., arbitration is governed by the FAA, which is the "*principal law on arbitration*" and individual state laws.[42] As a matter of substantive federal law, an arbitration agreement is severable

process, which is founded on party autonomy, should be effective. There are strong policy reasons in favour of holding that an arbitration clause is capable of surviving the initial invalidity of the contract […].'").

35 *Id.* at 914 (Lord Hoffmann).

36 *Id.*

37 Arbitration Act 1996, ch. 23, § 7 (Eng.) ("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.").

38 *Id.*

39 Harbour Assurance, [1993] 3 All ER 897 (Eng.).

40 Fiona Trust & Holding Corp. v. Yuri Privalov [2007] 4 All ER 951 (HL) 959 (Eng.) ("The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. 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.") [*hereinafter* "Fiona Trust"].

41 *Id.* at 959, 960 ("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 [...]. 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.").

42 JAMES H. CARTER & JOHN FELLAS, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 2 (2d ed. 2010).

from the underlying contract.[43] The same has been reiterated in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* ["**Prima Paint**"][44] and *Buckeye Check Cashing Inc* v. *Cardegna* ["**Buckeye**"].[45]

Unlike in the United Kingdom, separability does not expressly feature in the FAA. However, Sections 2 and 4 of the FAA are considered to be the implicative source of the doctrine under federal law.[46] Section 2 holds an agreement to arbitrate on the same pedestal as any other contract. It gives statutory recognition to arbitration agreements, which are "*valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*"[47] According to Section 2, an arbitration agreement can only be challenged on contractual grounds that exist at law or in equity and not on the ground of any defect in the underlying contract.[48] By not permitting a challenge to the underlying contract to defeat the arbitration agreement, Section 2, in a sense, champions separability. Once the arbitration agreement is recognized under Section 2, Section 4 ensures compliance with the arbitration agreement. It makes it mandatory for a court to refer the parties to arbitration once it is clear that a valid arbitration agreement exists.[49] The only obvious precondition to reference is a valid arbitration agreement.[50] Therefore, statutorily, questioning the validity or enforceability of the underlying agreement would have no effect whatsoever on the arbitration agreement. It would not impede the reference. Two seminal decisions of the U.S. Supreme Court in *Prima Paint*[51] and *Rent-A-Center, W., Inc.* v. *Jackson* ["**Rent-A-Center**"][52] elaborate the separability design of Sections 2 and 4 of the FAA.

In *Prima Paint*, the Appellant principally alleged fraud on Respondent's part in the inducement of making the main contract and sought to stay the arbitration commenced by the Respondent. The Respondent opposed the application, arguing that the issue of fraud in the making of the main contract must be decided by the arbitrator and not the court. The Court accepted the Respondent's contention. It explained that according to Section 4 of the FAA, if the claim of fraud goes to the making of the arbitration agreement itself, then the court may adjudicate it, but this would not be the case if the claim lies against the contract generally. [53]

It predicated its decision on the congressional purpose behind Section 4 that arbitration procedure, when selected, should be speedy, and not subject to delay and obstruction in courts.[54] Cases

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43 *Id.* at 15.

44 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1976) [*hereinafter* "Prima Paint"].

45 Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 445, 449 (2006) [*hereinafter* "Buckeye Check"] ("Prima Paint resolved this conundrum -- and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

46 *Id.* at 442.

47 Federal Arbitration Act, 9 U.S.C. § 2, 43 Stat. 883 (U.S.).

48 *See* South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assur. Co., 840 F.3d 138, 143 (3rd Cir. 2016) (U.S.) [*hereinafter* "South Jersey"] (where "a wholesale fraud defense [did] not defeat a clear arbitration provision" as the challenge was not "arbitration-provision specific.").

49 Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 475, 476, 479 (9th Cir. 1991) (U.S.) [*hereinafter* "Standard Fruit"].

50 Republic of the Philippines v. Westinghouse Elec. Corp., 714 F. Supp. 1362, 1368 (1989) (U.S.).

51 Prima Paint, 388 U.S. 395 (1976).

52 Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010) (U.S.) [*hereinafter* "Rent-A-Center"].

53 Prima Paint, 388 U.S. 395 (1976).

54 *Id.* at 404.

decided in the wake of *Prima Paint*, confirmed it and blessed separability, making *Prima Paint* controlling.[55]

However, the U.S. Supreme Court in *Rent-A-Center*,[56] arguably travelled beyond this order. The Court was asked to determine a challenge to, what the court termed, a delegation provision of the arbitration agreement. The delegation provision stated that any threshold issue surrounding enforcement of the arbitration agreement would be referred to and decided by the arbitrator. The respondent challenged the enforceability of the arbitration agreement as a whole, and not specifically the delegation provision. The Court rejected this challenge and enforced the arbitration agreement. In the first instance, the Court relied on Section 2 of the FAA and *Buckeye* to reiterate that "*a party's challenge to another provision of the contract, or the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.*"[57] It then proceeded to build on this proposition to say that the delegation provision sought to be enforced is the agreement to arbitrate threshold issues, and the rest of the arbitration agreement, it considered as the underlying contract. In other words, the Court divided the arbitration agreement itself into two parts: the first being the agreement to arbitrate threshold issues, and the second being the remaining arbitration clause. In treating the delegation provision as the arbitration agreement and the arbitration agreement as the underlying contract, the Court applied separability to enforce the delegation provision. In its view, the "*[a]pplication of the severability rule does not depend on the substance of the remainder of the contract.*" This, Justice Stevens, writing for a plurality of dissenting justices, termed as a "*breezy assertion.*"[58] In his opinion, the majority's decision constitutes "*a new layer of severability.*" He stated:

> "*Today, the Court adds a new layer of severability – something akin to Russian nesting dolls – into the mix: Courts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator. […] In my view, a general revocation challenge to a standalone arbitration agreement is, invariably, a challenge to the 'making' of the arbitration agreement itself.*"[59]

Recently, *Rent-A-Center* was approvingly cited by the U.S. Court of Appeal of the Third Circuit in *S. Jersey Sanitation Co.* v. *Applied Underwriters Captive Risk Assur. Co.* Following *Rent-A-Center*,[60] the Court found that since South Jersey's purported challenges to the arbitration agreement applied to the parties' contract as a whole, rather than to the arbitration agreement alone, the parties' dispute was arbitrable. It highlighted the Congress' intent to enact the FAA to reverse the longstanding judicial hostility towards arbitration agreements, and to place them on the same footing as other

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55 *See* Buckeye Check, 546 U.S. 440 (2006); Union Mutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d 524, 528, 529 (1st Cir. 1985) (U.S.); ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24, 29 (2d Cir. 2002) (U.S.); MXM Constructions Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 399, 400, 401 (3rd Cir. 2020) (U.S.); Standard Fruit, 937 F.2d 469 (9th Cir. 1991), at 476 (U.S.).

56 Rent-A-Center, 561 U.S. 63 (2010).

57 *Id.* at 71.

58 *Id.* at 77 (Stevens, J., dissenting).

59 *Id.* at 85 (Stevens, J., dissenting).

60 South Jersey, 840 F.3d 138 (3rd Cir. 2016), at 143 (U.S.) ("The challenge, however, must focus exclusively on the arbitration provision, rather on than the contract as a whole. As the Supreme Court stressed in Rent-A-Center, 'only [an arbitration provision-specific] challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable.' [...] If the challenge encompasses the contract as a whole, the validity of that contract, like all other disputes arising under the contract, is a matter for the arbitrator to decide.").

contracts. Safe to state that the emerging legal position is that separability in the U.S. has faintly travelled beyond the English position by adding to it another 'layer'.

D. Separability under French Law

As in England, the doctrine of separability enjoys statutory recognition in France. In 2011, the French Code of Civil Procedure was amended to introduce provisions supporting arbitration. One of the amendments was the codification of the doctrine in Article 1447,[61] which provides, "*[t]he arbitration agreement is independent of the contract to which it relates. It is not affected by the ineffectiveness of it. When it is null, the arbitration clause is deemed unwritten.*" This is not to say that separability was not recognized prior to this amendment.

The doctrine was first applied by the French Cour de Cassation in *Etablissements Raymond Gosset* v. *Société Carapelli* ["**Gosset**"].[62] It protected the arbitration clause from a challenge to the underlying agreement. In the court's opinion, an arbitration agreement is "*completely autonomous in law, which excludes the possibility of it being affected by the possible invalidity of the main contract.*" Following *Gosset*, French courts continued to recognize the doctrine in subsequent decisions despite the absence of statutory support.[63] Even in cases in which the principal contract is void because it is contrary to French public policy, the arbitration clause remains effective and arbitrators still have jurisdiction to rule on a dispute which involves an alleged failure of performance.[64] The *Tardits* decision of the the Cour d'appel of Orleans lent invaluable support to the separability doctrine elaborated in *Gosset*, integrating it into French jurisprudence. This decision integrated separability into the mainstream of French jurisprudence.[65] In another case, the French Cour de Cassation applied the doctrine of separability while dismissing an appeal challenging the jurisdiction of an arbitration tribunal.[66] It observed that "*the parties' common intention is the fundamental condition of the existence and validity of an arbitration agreement,*"[67] and that the jurisdiction of the arbitrator can be hindered only in case of nullity or manifest inapplicability of the arbitration clause.

Under French law, the arbitration clause is autonomous as compared to the main convention in which it fits, and it is not affected by the ineffectiveness of the main convention.[68] The principle

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61 Décret n° 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage [Decree No. 2011-48 of Jan. 13, 2011 reforming arbitration], art. 2, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 13, 2011 (Fr.).

62 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 7, 1963, D. JUR. 545 (Fr.).

63 *See* Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 12, 1968, Bull. civ. V, No. 316 (Fr.) [*hereinafter* "Minoteries Lochoises"]; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 20, 1993, Municipalité de Khoms El Mergeb v. Société Dalico, 91-16.828, 1994 REV. ARB. 116, 117 (Fr.) [*hereinafter* "Khoms El Mergeb"] ("By virtue of a substantive rule of international arbitration, the arbitration agreement is *legally independent of the main contract containing or referring to it*, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law." (emphasis added)).

64 *See* Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1, 36–37 (1981) (citing Cour d'appel [CA] [reginal court of appeal] Orléans, Feb. 5, 1966, Tardits, (1966) D.S. Jur. 340 (Fr.)).

65 *Id.*

66 National Bank of Xanadu v. Company ACME, Final Award, ICC Case No. 17818, *reprinted in* 44 Y.B. COM. ARB. 47, ¶ 56 (Stephan W. Schill ed., 2019) [*hereinafter* "National Bank of Xanadu"].

67 *Id.*

68 Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 25, 2008, Bull. Civ. IV, No. 197 (Fr.).

only allows assessment of the validity of the arbitration agreement independent of any flaw in the underlying contract which would otherwise automatically taint the arbitration agreement.[69]

E. Separability under Singapore law

Separability of an arbitration agreement has developed over time. The initial holding of the Singapore Court of Appeal in *New India Assurance Co. Ltd.* v. *Lewis*[70] reflected the orthodox position that the existence of an arbitration agreement depended on the existence of the main contract. The arbitrator could not be given the jurisdiction to decide a dispute if the agreement itself was in question.[71] Later, in *FirstLink Investments Corp Ltd.* v. *GT Payment Pte Ltd.*,[72] the Singapore High Court recognized that an arbitration agreement is shielded from the underlying contract by separability.[73]

Following this, in *BCY* v. *BCZ*,[74] the Singapore High Court elaborated that the doctrine of separability serves to give effect to the parties' expectation of upholding their chosen method of dispute resolution even if the main contract suffers from invalidity.[75] It ensures that parties do not avoid their obligation to submit to arbitration by merely denying the existence of the underlying contract.[76] Finding support in Article 16 of the Model Law, the Court explained that the doctrine does protect the arbitration agreement, but it can only be resorted to when the validity of the main contract is challenged.[77] The Court's findings, simply and effectively, capture the understanding of separability, at least at the relevant time. Separability has also received statutory recognition in Singapore with the adoption of the Model Law in the International Arbitration Act. As per Section 3 of the International Arbitration Act, the Model Law and, accordingly, separability under Article 16, has the force of law in Singapore.[78]

It is clear that separability has been explicated by courts to protect the arbitral process; a collective reading of the above decisions of courts from different countries, testifies to this. These decisions, which are supported by powerful commercial reasons, have been uniform to a large degree. For instance, the reasoning behind *Prima Paint*[79] and *Harbour Assurance*,[80] and indeed the findings themselves, are broadly a mirror reflection of one another. Suffice it to say that the doctrine has been successful in protecting arbitration agreements from the defects of substantive contracts.

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69 National Bank of Xanadu, *supra* note 66, ¶ 57 (French law, in its position is consistent with its counterparts. Although it is comparatively more flexible as it provides parties the freedom to opt out of the separability presumption through the insertion of an express stipulation to that effect.); *see* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 2, 2014, Bull. civ. I, No. 59 (Fr.).

70 New India Assurance Co. Ltd. v. Lewis [1966] SGFC 13 (Sing.).

71 Heyman, [1942] 1 All ER at 345.

72 FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd. [2014] SGHCR 12 (Sing.).

73 *Id.* ¶ 10. ("There is therefore an obvious curiosity as to how the parties' substantive obligations can be governed by the rules of an arbitral institution, but this is not in and of itself an issue in the present case given that the validity of the main contract is not in question before this court. The arbitration agreement is, at the moment, shielded by the doctrine of separability").

74 BCY v. BCZ [2017] 3 SLR 357 (Sing.) [*hereinafter* "BCY"].

75 *Id.* at 374.

76 *Id.* at 375.

77 *Id.*

78 International Arbitration Act, No. 24 of 1994, ch. 143A, § 3 (Sing.).

79 Prima Paint, 388 U.S. 395.

80 Harbour Assurance, [1993] 3 All ER 897.

However, its application is not restricted. As is discussed in Part IV below, the doctrine plays an important role in aiding the determination of the law applicable to arbitration agreements as well.

III. Coalesced Understanding of Separability

The doctrine has been afforded judicial and legislative recognition to safeguard and give effect to, the parties' intent to arbitrate disputes. In England, Section 7 of the (English) Arbitration Act, 1996 provides that the arbitration agreement would not be affected by a challenge to the validity or the effect of the main contract. And, "*it shall for that purpose [and that purpose only] be treated as a separate agreement.*"[81] This position was also reiterated in *Fiona Trust*.[82] The language of Section 7 and separability's scope of operation, is consistent with that of Article 23 of the UNICTRAL Arbitration Rules and Article 16 of the Model Law.

In the U.S., the doctrine enjoys implicit recognition in statute and has been judicially chiseled in federal and state law. Like in England, the courts in the U.S. would only oust the jurisdiction of an arbitrator if the challenge was directed specifically to the arbitration agreement and not the main contract. But the U.S. courts do not stop there. As discussed in Part II.C above, the U.S. Supreme Court in *Rent-A-Center* added another layer to the traditional version of separability. It stated that courts could pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator.[83] Following which, other decisions have followed suit.[84]

In France, separability was, and continues to be, used to protect the arbitration clause from a challenge to the underlying agreement. The unchanged scope of the doctrine is to protect the arbitration agreement from the possible invalidity of the main contract.[85] Likewise, in Singapore, the doctrine protects the arbitration agreement from a defect in the main contract. However, as the Singapore High Court clarified in *BCY* v. *BCZ* ["**BCY**"], it "*does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed*."[86]

So far, the courts and statutes have, in different ways and designs, somewhat been uniform in their recognition and application of the doctrine. This said, some of the following decisions involving determination of the applicable law of the arbitration agreement, (including one which reached the U.K. Supreme Court) explore a metamorphized separability.

IV. Separability and Determining the Law of the Arbitration Agreement

As stated above, separability has practical consequences for determining the choice of law of the arbitration agreement. Sometimes the arbitration agreement and the underlying contract expressly state which facet is to be governed by which law; yet in certain cases, the agreements are silent. In such an eventuality, one approach is to reasonably presume that the parties would prefer the

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81 Arbitration Act 1996, ch. 23, § 7 (Eng.).
82 Fiona Trust, [2007] 4 All ER 951 (HL) 959.
83 Rent-A-Center, 561 U.S. 63 at 85.
84 *See* sources cited *supra* note 55.
85 Minoteries Lochoises, 1968 Bull. civ. V, No. 316 (Fr.); Khoms El Mergeb, 1e civ., Dec. 20, 1993, 91-16.828, 1994 REV. ARB. 116, 117 (Fr.).
86 BCY, [2017] 3 SLR 357.

uniform application of a single law, i.e., the same law which the parties choose to govern the substantive contract would govern the arbitration agreement which forms part of it.[87]

Another approach is to extend the law of the chosen seat of the arbitration to that of the arbitration agreement. Considering that, by selecting a particular seat, parties intend for its law to govern all aspects of the arbitration, it only seems logical that the law of the seat should also govern the arbitration agreement. Courts and arbitral tribunals that advocate this approach distinguish between the laws applicable to the arbitration agreement and the law applied to the rest of the contract.[88] This autonomy of the arbitration agreement stems from the doctrine of separability.[89] An arbitration clause is taken to be independent of, and separable from, other clauses in the contract. If necessary, it may stand alone.

The English Court of Appeal introduced the celebrated three-stage inquiry to determine the arbitration agreement law and explained the role of separability in this exercise in its famous decision of *Sulamérica CIA Nacional de Seguros S.A.* v. *Enesa Engenharia S.A.* ["**Sulamérica**"].[90] This decision is not only applicable in the U.K., but is also greatly respected in other jurisdictions.[91] The Insured, Enesa Engelharia S.A., argued that by choosing Brazil as the law governing the insurance policy, the parties had impliedly chosen Brazilian law to govern the arbitration agreement. Opposing this view, the Insurer contended that the parties had chosen English law to govern the arbitration agreement by virtue of agreeing on London as the seat of the arbitration. The Court accepted the Insurer's position. To determine the law governing the arbitration agreement, it laid down the three-stage test: it asked three pointed questions to be answered in order. First, whether it was the parties' express choice for Brazilian law to govern the arbitration. Second, whether the parties made an implied choice in that regard. Third, with which system of law does the agreement have the closest and most real connection. This three-stage test is now routinely applied to identify the governing law of an arbitration agreement. It lays the foundation for the application of the doctrine of separability which plays a pivotal role at the second and third stage of the inquiry. Based on the third limb of this test, Moore-Bick LJ, with whom Neuberger and Hallett LJ agreed, held that English law (and not Brazilian law) would govern the arbitration agreement, as it was the

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87 BORN, *supra* note 1, § 4.04(A)(i) ("[A] number of common law judicial decisions have also concluded that a general choice-of-law clause presumptively applies to the parties' arbitration agreement."); Julian M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 9 ICCA CONGRESS SERIES 114 (Albert Jan Van Den Berg ed. 1999) (cited in REDFERN & HUNTER, *supra* note 7, § 3.12).

88 BORN, *supra* note 1, § 4.04(A)(ii) ("[A]nother substantial, and contradictory, body of authority has held that a general choice-of-law clause does not encompass an arbitration clause contained within the underlying contract and does not impliedly select the law applicable to the arbitration clause. [...] these authorities have concluded that a general choice-of-law clause applies only to the parties' underlying contract, and not to the 'separable' arbitration agreement.").

89 *Id.* ("The foregoing conclusion is described as a consequence of the separability presumption, as well as the particular characteristics of the arbitration agreement [...] and the intentions of rational commercial parties.").

90 Sulamérica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A. [2013] 1 WLR 102 (Eng.) [*hereinafter* "Sulamérica"].

91 *See, e.g.,* BCY, [2017] 3 SLR 357 at 371; BNA v. BNB [2019] SGHC 142, ¶ 16 (Sing.) [*hereinafter* "BNA"]; Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552, 617, 618 (India); Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603, 631 (India); Roger Shashoua v. Mukesh Sharma, (2017) 14 SCC 722, 753 (India); Cheung Shing Hong Ltd. v. China Ping An Insurance (H.K.) Ltd., [2020] HKCFI 2269, ¶ 33 (H.K.).

law of the seat of the arbitration, and not that of the insurance policies, that had the closest most real connection to the arbitration agreement.[92]

The insurer relied on separability to argue that since an arbitration agreement is distinct from the substantive contract, the arbitration agreement has the closest, most real connection with the law of the seat of the arbitration. The Court was not entirely convinced. Rather, in the first instance, it downplayed the importance of separability by stating that "*[it does] not think that separability provides an easy answer to the question that arises in this case, which turns primarily on the relative importance to be attached to the parties' express choice of proper law and their choice of London as the seat of the arbitration.*"[93] But, in the same breath, it did admit to a limited role the doctrine played in the exercise: the objective of separability is to simply respect the parties presumed intention to refer disputes to arbitration by effecting the agreed procedure for resolving disputes in circumstances that would render the substantive contract ineffective. Thus, "*[i]ts purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes.*"[94] The Court's illumination of this limited role the doctrine plays is arguably its most important contribution from the perspective of this subject. However, courts and tribunals have interpreted this statement rather differently.

The Arbitral Tribunal in *Alstom Brasil Energia E Transporte LTDA* v. *Mitsui Sumitomo Seguros S.A.* ["**Mitsui**"],[95] for example, extended the choice of law clause contained in the main contract to the arbitration agreement. In the ICC administered arbitration, the Claimant argued for application of New York law, the law of the seat, to the arbitration agreement to determine whether the Respondent was bound by it. The Respondent, on the other, advocated for Brazilian law, the choice of law contained in the main contract. Acknowledging the two approaches on the issue, the Tribunal was persuaded by the latter—the arbitration agreement is governed by the choice of law in the main contract. Granted the primary reason for the Tribunal for deciding so was the unique wording of the choice of law clause which encompassed any decision or award; the Tribunal did state that it would have reached the same conclusion even if the choice of law did not expressly cover the arbitration agreement.[96] In its view, separability allowed for such a conclusion. By implication, the doctrine permits an arbitration clause to be governed by a different law from the law governing the main contract. But this did not preclude a finding that the arbitration agreement and main contract are governed by separate laws.[97] Particularly since the doctrine "*does not mean that an arbitration agreement will necessarily be governed by a different law from the law governing the main contract*."[98]

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92 Sulamérica, [2013] 1 WLR 102, at 116 ("In my view an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective. Its closest and most real connection is with English law. I therefore agree with the judge that the arbitration agreement is governed by English law.").

93 *Id.* at 111.

94 Sulamérica, [2013] 1 WLR 102, at 114.

95 Alstom Brasil Energia E Transporte LTDA, Alstom Power Inc. v. Mitsui Sumitomo Seguros S.A., ICC Case No. 20686/RD, Final Award (July 10, 2015).

96 *Id.* ¶ 147.

97 *Id.* ¶ 158.

98 *Id.*

Upon careful examination of the reasoning in *Sulamérica* and *Mitsui*, the role of separability in determining the law governing the arbitration agreement is undeniable. But the extent of its influence on the determination and the outcome are demonstrably unpredictable.

V. Evolution of Separability

From the opening salvo in *Sulamérica*,[99] separability has been involved in a somewhat tortuous, genteel affair with the three-stage test to determine the law governing the arbitration agreement. For some, *Sulamérica*'s justification to rely on separability to give effect to parties' intent to arbitrate[100] has licensed an expansion of the doctrine's traditional boundaries. This is despite the restrictive language of Section 7 of the (English) Arbitration Act, 1996 (like Article 16 of the Model Law and Article 23 of the UNCITRAL Arbitration Rules), which allows separability to only salvage the arbitration agreement when the "*other agreement [the substantive or the main agreement] is invalid, or did not come into existence or has become ineffective.*"[101] In other terms, there is a statutory pre-condition for the application of the doctrine. But for this, by implication, the arbitration agreement and the substantive agreement, which it forms a part of, are not separate but one. It follows that there is tension between the expanded version of separability and the narrow statutory language.

This underlying tension was discussed by the Singapore High Court in *BNA* v. *BNB* ["**BNA**"],[102] a case involving issues rather similar to *Sulamérica*. The dispute arose from a takeout agreement which contained a critical dispute resolution clause. The parties had expressly chosen the law of the People's Republic of China ["**PRC**"] to govern the Takeout Agreement, but were silent as to the law governing the arbitration agreement. Guided by *BCY*, the Court embarked upon the *Sulamérica* three-stage inquiry. Considering both sides agreed that neither the Takeout Agreement, nor the arbitration agreement contained an express choice of law governing the arbitration agreement, the Court proceeded to the second limb of the three-stage inquiry: to determine the implied choice of law governing the arbitration agreement. The Plaintiff argued that by selecting PRC law to govern the Takeout Agreement, the parties had impliedly chosen PRC law to govern the arbitration agreement as well. A consequence of applying PRC law to the arbitration agreement was that the arbitration agreement would be rendered ineffective. The Defendant, on the other hand argued, for Singapore law to be the proper law of the arbitration agreement on the strength of separability and Singapore being the seat. Antithetical to the legal effect of applying PRC law, Singapore law would allow the arbitration agreement to be enforceable.

In the first instance, while addressing the plaintiff's advocacy for the more traditional doctrine of separability and the observations in *Sulamérica*, V. Coomaraswamy J., writing for the Court, acknowledged the statutory restriction on the operation of the doctrine under the (English) Arbitration Act, 1996. But, considering there was no equivalent provision under Singapore law, the Court did not find itself constrained from applying a broader version of separability. It justified:

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99 Sulamérica, [2013] 1 WLR 102.

100 *Id.* at 114 ("The concept of separability itself, however, simply reflects the parties' presumed intention that their agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes.").

101 Arbitration Act 1996, ch. 23, § 7 (Eng.).

102 BNA, [2019] SGHC 142.

> "*This section [(Section 7 of the (English) Arbitration Act, 1996)] is a statutory statement of the doctrine of separability in English arbitration law. It expressly makes the invalidity or ineffectiveness of the substantive contract a condition precedent to s 7 applying. To the extent that Moore-Bick LJ stated the doctrine of separability narrowly, he was constrained by a controlling statute to do so. We have no equivalent statutory provision in, Singapore. There is therefore in Singapore law no equivalent statutory constraint on the scope of the doctrine of separability or on its development.*"[103]

This statutory vacuum in Singapore law was the first of the three factors supporting the recognition and application of an evolved doctrine of separability.

The second was the observations made by the *Sulamérica* court.[104] The *BNA* court relied on these to catalytically add another dimension to separability i.e., the doctrine ensures that the "*arbitration agreement [remains] effective [even] if a provision of the substantive contract into which it is integrated could, in certain circumstances of fact or law, operate to render their arbitration agreement invalid.*"[105] It justified this evolution on the basis of the filament underlying the doctrine: "*the desire to give effect to a presumed intention of the parties that their arbitration agreement should remain effective.*"[106]

The third factor supporting this broader version of separability was, as per the Court, the *ut res magis valeat quam pereat* principle: words should be understood in a way that the matter is effective rather than ineffective.[107]

This is not to say that the Court in *BNA* did not define, rather re-define, the scope of separability. The Court was guided by the fundamental objective of separability–to give effect to parties' intent to resolve disputes through arbitration–to establish that "*the only limit […] is that it should go no further than is reasonable to give effect to the parties' intention to arbitrate their disputes.*"[108] In other words, the "*scope would not go so far as to supply a manifest intent to arbitrate where the parties have themselves to make that intent manifest in the words, they have chosen to express their arbitration agreement.*"[109] Following this eloquent discussion, the Court decided to apply Singaporean law, the law of the seat, to the arbitration agreement, thereby successfully protecting the intent to arbitrate.

It appears rather simplistic to justify such a broad approach to separability. But, a collective reading of past and present decisions, particularly the restrictive reading of the doctrine in *BCY*,[110] does

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103 *Id.* ¶ 70.
104 Sulamérica, [2013] 1 WLR 102 at 114.
105 BNA, [2019] SGHC 142, ¶ 73.
106 *Id.*
107 BEALE, *supra* note 3, § 12-081. ("If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void, ineffective or meaningless, the former sense is to be adopted. This rule is often expressed in the phrase *ut res magis valeat cum* [*sc quam*] *pereat*. Thus, if by a particular construction the agreement would be rendered ineffectual and the apparent object of the contract would be frustrated, but another construction, though by itself less appropriate looking to the words only, would produce a different effect, the latter interpretation is to be applied, if that is how the agreement would be understood by a reasonable man with a knowledge of the commercial purpose and background of the transaction. So, where the words of a guarantee were capable of expressing either a past or a concurrent consideration, the court adopted the latter construction, because the former would render the instrument void. If one construction makes the contract lawful and the other unlawful, the former is to be preferred […].").
108 BNA, [2019] SGHC 142, ¶ 74.
109 *Id.*
110 BCY, [2017] 3 SLR 357 at 374, 375.

allow for a compelling argument that the *BNA* court did in fact bend separability to convenience. Unfortunately, the Singapore Court of Appeal in *BNA* v. *BNB*[111] did not decide "*on the doctrine of separability and whether it applies even where the validity of the main or substantive contract is not impugned.*"[112] The Singapore High Court's decision was overturned to a limited extent as the Singapore Court of Appeals held that PRC, and not Singapore, was the seat of the arbitration. That said, its following concluding remarks are revelatory:

> "*The essential point we make is that the parties' manifest intention to arbitrate is not to be given effect at all costs. The parties did not only choose to arbitrate – they chose to arbitrate in a certain way, in a certain place, under the administration of a certain arbitral institution. Those all have to be given effect to by a process of construction which critically gives the words of the arbitration agreement their natural meaning, unless there are sufficient contrary indicia to displace that reading. If the result of this process of construction is that the arbitration agreement is unworkable, then the parties must live with the consequences of their decision.*"[113]

The Singapore Court of Appeal's observation could be perceived as disturbing the Singapore High Court's justification to stretch separability to protect the parties' intent to arbitrate at all costs.

As is clear, one of the most important factors permitting the Singapore High Court to venture into expanding separability was the absence of a restrictive statutory provision in Singapore. This suggests that such an expansive reading would not be permissible in the United Kingdom courtesy of the restrictive language of Section 7 of the (English) Arbitration Act, 1996. The apparent conflict with Section 7 undoubtedly makes an expansive reading a difficult problem, more difficult than what the *BNA* court faced. Notwithstanding this, the English courts have not shied away from arguably recasting separability and, at the same time, resolving this tension.

In *Kabab-Ji SAL* v. *Kout Food Group* ["**Kabab-Ji**"],[114] the England and Wales Court of Appeal, which was to decide whether to recognize and enforce the French award, had to preliminarily decide the question of the law governing the arbitration agreement: would the arbitration agreement be governed by French law, i.e., the law of the seat of the arbitration, or by English law, i.e., the law expressly chosen to govern the underlying contract, a Franchise Development Agreement ["**FDA**"]. Like in *BNA*, the Court proceeded with the *Sulamérica*[115] three-stage inquiry.

It found that the arbitration agreement forms part of the FDA and, therefore, the law governing the FDA, i.e., English law, also applies to the arbitration agreement. Conscious of Section 7 of the (English) Arbitration Act, 1996, the Court did not resort to separability to read the arbitration agreement de hors the substantive contract. In support of its finding, the Court relied on the seminal statement made in *Sulamérica*, i.e., "*[separability's] purpose is to give legal effect to that intention [intent to arbitrate], not to insulate the arbitration agreement from the substantive contract for all purposes.*"[116] It explained that separability "*does not preclude the arbitration agreement being construed with the remainder of*

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111 BNA v. BNB [2020] 1 SLR 456 (Sing.).
112 *Id.* at 483.
113 *Id.* at 485.
114 Kabab-Ji SAL v. Kout Food Group [2020] EWCA Civ 6 (Eng.) [*hereinafter* "Kabab-Ji"].
115 Sulamérica, [2013] 1 WLR 102.
116 Sulamérica, [2013] 1 WLR 102, at 114.

the main agreement as a whole."[117] This is so particularly "*where the clear intention is that the main agreement should be construed as a whole and where […] there is nothing in the wording of the arbitration agreement which suggests that it is intended to be construed in isolation from the remainder of the main agreement.*"[118]

What constitutes "*clear intention*"? There is no certain answer. It is entirely subjective and requires explication. It not only depends on the language of the contract, particularly the choice of law clause, as in *Kabab-Ji*, but also on the predisposition of the adjudicator. In *Kabab-Ji*, the main contract provided "*[t]his Agreement consists of the foregoing paragraphs,*" two of which were the arbitration agreement (which provided for Paris as the seat) and the choice of law clause. The choice of law clause read *"[t]his Agreement shall be governed by and construed in accordance with the laws of England.*"[119] Reading the terms harmoniously, the Court concluded that the main contract contained an express choice of law which extended to the arbitration agreement. One can compare this with the arbitral tribunal's views expressed in the interim award issued in *Property owner (US)* v. *Property manager (Germany)*.[120] Similar to the wording of choice of law clause in *Kabab-Ji*, the main contract provided, "*[t]his Agreement shall be governed by the laws of Belgium.*"[121] For the *Kabab-Ji* court, such language sufficiently indicated parties' clear intent to apply the choice of law to the arbitration agreement; but for the arbitral tribunal, it did not. The following observation clarifies this:

> "*If parties want to explicitly provide for a certain arbitration law […] to apply, they either refer to the 'law governing the arbitration clause' or the 'application of another law' (i.e., another than the law applicable to the main contract). They would certainly not just state that the laws of Belgium or Germany shall be applied as it has been the case with Article 19.2 of the Agreement. As a result, Articles 19.1 and 19.2 of the Agreement both address the law applicable to the main contract.*"[122]

The divergent outcomes obtained on rather similar choice of law clauses underscores the instrumentality of the language of the contract and the influence of the deciding bodies in discerning the parties intent and, consequently, in determining the law applicable to the arbitration agreement. Notwithstanding the detailed and labyrinthine reasoning in *Kabab-Ji*, and as consistent with Section 7 of the (English) Arbitration Act, 1996 and *Sulamérica* as it may appear, the decision is not dispositive and neither is it free from criticism.[123]

In contrast to *Kabab-Ji*, the England and Wales Court of Appeal in *Enka Insaat ve Sanayi AS* v. *OOO "Insurance Company Chubb*" ["**Enka Insaat**"][124] applied the law of the seat to the arbitration agreement as opposed to the law of the substantive agreement. This variance can be attributed, in part, to the construction of the particular contractual language.[125] In *Enka Insaat*, the Respondent, an insurance company, argued that the arbitration agreement, in the subcontracting agreement concerning Enka's participation in constructing a power plant, was governed by Russian law,

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117 Kabab-Ji, [2020] EWCA Civ 6, ¶ 66.
118 *Id.* (emphasis added).
119 *Id.* ¶ 8.
120 Property owner (U.S.) v. Property manager (Germany), ICC Case No. 14617, Interim Award on Jurisdiction, *reprinted in* 38 Y.B. COM. ARB. 111 (Albert Jan Van den Berg ed., 2013).
121 *Id.* ¶ 29.
122 *Id.* ¶ 32.
123 *See* BORN, *supra* note 1, at 572–573, 606.
124 Enka Insaat ve Sanayi AS v. OOO "Insurance Company Chubb" [2020] 3 All ER 577 (Eng.) [*hereinafter* "Enka Insaat"].
125 *Id.* at 611, 612.

which was the proper law of the substantive agreement. The Court rejected this argument. Popplewell LJ, writing for the Court of Appeal, concluded that it was English law, the law of the seat, that governed the arbitration agreement. The Court first admitted that "*it would be idle to pretend that English authorities speak with one voice*"[126] on the relative weight to be given to the law of the seat and the law of the substantive contract in discerning the law governing the arbitration agreement.

It then began, consistent with past precedents, by conducting the *Sulamérica* three-stage inquiry. It dissected *Sulamérica* to glean the underlying factors that led the Court to decide, as it did, that English law and not Brazilian law, governed the arbitration agreement. The two factors, in the Court's opinion, that rebutted the presumption that the proper law of the substantive agreement also applied to the arbitration agreement, were: (i.) by choosing another country as the seat of the arbitration, the parties were deemed to have accepted that the law of that country will govern the arbitration proceedings. This means that parties intended that the law of the seat would govern all aspects of the arbitration, including the formal validity of the arbitration agreement; and (ii.) the application of the law of the substantive agreement would possibly undermine the parties' intent to arbitrate disputes. It then turned to *Kabab-Ji*. Per the *Enka Insaat* court, since *Kabab-Ji* decided the proper law of the arbitration agreement based on an express choice of the parties, which is identified by interpreting the contract, including the arbitration agreement, it did not feel compelled to address *Kabab-Ji* in detail considering the distinguishing facts, i.e., absence of an express choice of the law governing the arbitration agreement in the case before it.

With the intent to restore some semblance of predictability and uniformity in English commercial law, the Court endeavoured to clarify this point. In cases where the parties have not expressly chosen the law governing the arbitration agreement, the Court, in a manner mimicking a rule of law, stated that the law of arbitration agreement should be the law of the seat as it constitutes an implied choice of the parties. Digressing from its past decisions, the Court underplayed the importance attached to the law of the substantive agreement. And, it did so on the comfort of separability. It explained, "*the law of the main contract is a system of law applicable to the terms of the main contract and the validity, interpretation and performance of those terms, other than the terms of the separate arbitration agreement and the validity, interpretation and performance of those separate arbitration terms.*"[127]

This is a slight departure from Section 7 of the (English) Arbitration Act, 1996, which predicates the invocation of separability on a challenge to the validity, enforceability of the substantive agreement or the main contract. Pertinently, the *Enka Insaat* court does not say that its understanding of separability is found in Section 7. What it does say, and note the emphasis, is that its statement "*follows from the doctrine of separability of the arbitration agreement recognized in section 7 […].*"[128] In other words, its understanding of separability is rather consanguineous with Section 7.

Enka Insaat arguably travelled beyond past decisions by holding that an express choice of law constitutes a choice of law to be applied to all terms apart from the separate arbitration agreements, barring cases where the parties have expressly stated their intention to treat the substantive agreement and the arbitration agreement it contains, as one like in *Kabab-Ji*. Since separability treats

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126 Enka Insaat, *supra* note 124, at ¶ 69.
127 *Id.* at 612 (emphasis in original).
128 *Id.* (emphasis added).

an arbitration agreement separate from the underlying agreement for one aspect covered by the arbitration agreement law, i.e., the purpose of its validity, existence and effectiveness, why should it then not, in the Court's opinion, isolate the arbitration agreement for determining the arbitration agreement law itself.[129] This statement may be read in light of not only the limiting language of section 7 of the (English) Arbitration Act, 1996, but also the observations made in *Sulamérica*, where the Court categorically stated that separability merely insulates the arbitration agreement from the substantive agreement to protect the parties' intent to resolve disputes through arbitration and not for all other purposes. Does this statement in *Enka Insaat* not transgress the inner circle of section 7 and the outer circle of *Sulamérica*, re-emphasized in *Kabab-Ji*?

As per the U.K. Supreme Court, it did. In *Enka Insaat Ve Sanayi AS (Respondent)* v. *OOO Insurance Company Chubb (Appellant)*,[130] Chubb renewed its argument for application of the Russian law, as it contended that a choice of law for the contract is, by implication, the choice of law for the arbitration agreement.[131] The majority, comprising of Lord Hamblen, Lord Leggatt and, Lord Kerr, writing for the U.K. Supreme Court, in the first instance, agreed: "*[w]here the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.*"[132] The Court then proceeded to carve out an exception to this rule, following from the validation principle—and not separability—that where there is a serious risk that the arbitration agreement would be ineffective if subjected to the law of the main contract, it may be implied that the arbitration agreement was intended to be governed by the law of the seat.[133] Lord Burrows and Lord Sales, the dissenters, also concurred with the majority on this issue.[134] Despite such concurrence, the Court rejected Chubb's plea for applying Russian law to the arbitration agreement. It agreed with the finding of the Court of Appeal that English law and not Russian law applied to the arbitration agreement, but concluded so for different reasons. The Court held that since the substantive contract did not contain a choice of law clause, the law applicable to the arbitration agreement was English law, the law of the seat of the arbitration which had the closest connection to the arbitration agreement.[135] Its summary of the principles governing determination of the applicable law of the arbitration agreement[136] is a valuable contribution to field guidance on the subject. From the perspective of separability, the Court rejected the expansive version. Expressing its agreement with Chubb's understanding of separability, it stated as follows:

> "*[T]he principle of separability is not a principle that an arbitration agreement is to be treated as a distinct agreement for all purposes but only that it is to be so treated for the purpose of determining its validity or enforceability. That is clear from the words 'for that purpose' in section 7 of the [(English) Arbitration Act, 1996]. Thus, the separability principle does not require that an arbitration agreement should be treated as a separate agreement for the purpose of determining its governing law.*"[137]

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129 *Id.* at 613.
130 Enka Insaat Ve Sanayi AS (Respondent) v. OOO Insurance Company Chubb (Appellant) [2020] 1 WLR 4117 (U.K.) [*hereinafter* "Insurance Company Chubb"].
131 *Id.* at 4123.
132 *Id.* at 4167.
133 *Id.* at 4146, 4147.
122 *Id.* at 4198 (Lord Burrows), 4200 (Lord Sales).
135 *Id.* at 4167, 4168.
136 *Id.*
137 *Id.* at 4131.

In the Court's view, the presumption of the Court of Appeal that the choice of law of the contract would not apply to the "*different and separate [arbitration] agreement,*"[138] "*puts the principle of separability of the arbitration agreement too high.*"[139] An arbitration agreement, the Court stated, is "*part of the bundle of rights and obligations recorded in the contractual document*."[140] Lord Burrows in his dissenting speech also shared this view. He reemphasized the language of Section 7 of the (English) Arbitration Act, 1996 whose "*wording makes clear that the separability doctrine has been devised for a particular purpose.*"[141] And it is for the purpose of safeguarding the validity of the arbitration agreement that it is severable from the main contract. Lord Burrows approvingly relied on Adrian Briggs' "*Private International Law in English Courts,*"[142] to echo that the arbitration agreement is severable for that purpose – but that does not mean it is separate and will still be governed by the law which governs the contract, even after any such fictional severance.[143]

In cases where it is necessary to impute the intention to apply the law of the seat to an arbitration agreement to avoid putative invalidity resulting from the application of the law of the contract, it can be done so on the basis of the validation principle: "*the contract should be interpreted so that it is valid rather than ineffective,*"[144] not on the grounds of separability. Following the clarity provided by the Supreme Court, at least in the U.K., for the foreseeable future, it appears that the understanding of separability has reverted to tradition. The lacunae in separability to safeguard the arbitration agreement in all cases (including where the application of the law of the contract would render it ineffective), has been addressed by the validation principle. Whether courts in other jurisdictions, including Singapore, are inspired by *Enka Insaat*, remains to be seen.

VI. Conclusion

This article began with the hypothesis that there may have been a judicial development of the doctrine of separability, and safe to say that based on the variances discussed above, the hypothesis is, to an extent, arguable. There are two contributing factors. The first, and primary factor, necessity. Through the vehicle of separability, courts and legislations have vindicated a principle that is elementary to arbitration: to protect the parties' intention to refer disputes to arbitration. Separability was created to protect this intent. However, based on the recent decisions, it would appear that separability, as it is understood in its traditional sense, at times, was not sufficient to fulfil its primary purpose: to protect parties' intent to arbitrate. This in turn compelled courts, like

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138 Enka Insaat, [2020] 3 All ER, at 612, 613.

139 Insurance Company Chubb, [2020] 1 WLR, at 4136, 4137.

140 *Id.* at 4137.

141 *Id.* at 4189 (Lord Burrows).

142 *See* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS § 14.37 (2014) ("If the agreement to arbitrate is a term of a larger contract, the law which governs the contract as a whole will generally determine the scope of the terms of that contract. For even though the arbitration agreement is for some important purposes notionally severable from the substantive contract, those purposes do not include the need for its governing law to be separate or different from that of the substantive contract in which the arbitration agreement is contained. It would be perverse to deduce from the principle of severability a rule that the law governing the agreement to arbitrate should be identified without reference to the substantive contract in which the parties included it as a term. The autonomy of the arbitration agreement is one thing; its hermetic isolation would be quite another. To put the point yet another way: the agreement to arbitrate is severable, but that does not mean it is separate. Prior to any severance it will have been governed by the law which governs the contract; after severance, it must remain governed by the same law, for otherwise 'it' is not being severed; something else is instead being created.").

143 *Id.* at 4189, 4190 (Lord Burrows), 4204 (Lord Sales).

144 *Id.* at 4146.

in Singapore and the England and Wales Court of Appeal in *Enka Insaat*, to adopt a more evolved, utilitarian version of the doctrine to safeguard this intent not unlike adopt more evolved version. Whereas in *Enka Insaat*, the U.K. Supreme Court allayed any such concerns by justifying reliance on the validation principle.

The second is the change in the courts' perception of arbitration. At first, courts were animus towards arbitration, but with the passage of time, owing to the ever-growing needs of commerce, their perception of arbitration has reversed. They advance arbitration, rather than impede it. This change in outlook has certainly contributed to the development, or, at the very least, divergent understanding and application of separability. Thus, we find that the natural tendency to supplant and exterminate the less improved, and preceding forms, has also percolated in the approach of Courts, leading to an arguable evolution of the doctrine of separability, which might exterminate its preceding forms.

The modification of the doctrine of separability, whether by default or design, can have significant consequences particularly relating to the choice of law, validity of the arbitration agreement and underlying contract, and competence-competence. It is therefore, more than ever before, imperative to address all aspects comprehensively whilst drafting an arbitration agreement. Arbitration, which is based on the agreement between parties, greatly depends on the interpretation of the agreement by and the predilection of, courts and arbitral tribunals. While it is custom to act in accordance with the intention of the parties as stated in the agreement, it is unclear what will happen when this intention is not clearly stated. The outcome, as can be seen from the above decisions, can vary depending on the jurisdiction in which the parties find themselves. In such a scenario, absent guiding, uniform principles, it is difficult to predict the result, rendering the proactive approach counter-productive. Undoubtedly the catalytic approach of courts in bending the doctrine to need is welcomed but it leaves something to be desired.

What emerges is that the nuances of the separability doctrine, are, in some cases, bordering evolution. In order to ensure that separability's understanding and application is not unruly, it is imperative to stem the tide signalled by the recent decisions, which, the *Enka Insaat* decision has, to a great degree, achieved in the U.K.