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Public Policy as an exception in International Commercial Arbitration

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ABSTRACT :

An arbitration clause is usually a single term in a much larger commercial contract, yet it performs a role unlike every other term, because it decides who will resolve disputes about the contract. A party seeking to avoid arbitration may allege that the main contract is void and argue that the clause has fallen with it. The doctrine of separability answers this argument by treating the arbitration clause as a distinct agreement that survives challenges to the main contract. This paper examines how the doctrine operates under the Arbitration and Conciliation Act, 1996, with particular reference to Section 16 and the principle of competence-competence, the limited role of courts under Sections 8, 11, 34 and 37, and the leading decisions of the Supreme Court of India. It further discusses the three laws that may govern an international arbitration, namely the law of the main contract, the law of the arbitration agreement and the law of the seat, and the approach of English courts in Enka and Sulamerica. The paper argues that separability protects the clause only from attacks on the main contract and not from direct challenges based on consent, capacity, legality or arbitrability. It concludes with practical drafting suggestions intended to ensure that the promise to arbitrate holds when tested, including at the stage of enforcement under the New York Convention.

Keywords: Separability, Arbitration Agreement, Competence-Competence, Governing Law, Enforcement.

I. INTRODUCTION

When companies from different countries enter into a contract, one concern arises early: if a dispute occurs, who will decide it? Most commercial parties are reluctant to litigate in the courts of the other party's country, and they therefore agree to arbitrate. They select a neutral venue, appoint arbitrators with suitable expertise, and obtain a decision that can generally be enforced in many countries.[1] In India, the governing statute is the Arbitration and Conciliation Act, 1996, which regulates domestic arbitration, international commercial arbitration and the enforcement of foreign awards.[2]

Every arbitration begins with an arbitration agreement. In most business transactions this agreement is not a separate document but a single clause embedded in a much larger contract, placed among the payment terms and delivery dates.[3] It appears to be just another term, yet legally it performs a role quite unlike the rest. The other terms set out what the parties must do for one another, whereas the arbitration clause determines who will decide if a dispute arises about those obligations.

That distinction lies at the core of the doctrine of separability. A party who wishes to avoid arbitration may allege that the main contract is void, for example because it was induced by fraud, and may argue that the arbitration clause has fallen with it. If that argument succeeded, a promise to arbitrate would be worth very little. This paper examines how separability prevents that result. It discusses the meaning and rationale of the doctrine, its statutory basis in Section 16 of the Indian Act, the role of courts at the referral and award stages, the question of which law governs the arbitration agreement, the limits of the doctrine, and its operation in cross-border enforcement. The paper adopts a doctrinal method based on statutes, international instruments and judicial decisions, and the law is stated as of October 2026.

II. CONCEPT OF SEPARABILITY

1. Meaning

Separability means that an arbitration clause is regarded as a distinct agreement even though it is written within the main contract. It possesses a life of its own and does not cease to exist merely because the main contract is challenged. The point is not that there are two unrelated agreements. The point is

[1]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, art. II, 330 U.N.T.S. 3.

[2]The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).

[3]The Arbitration and Conciliation Act, 1996, s. 7(2).

practical: a dispute over the main contract should not destroy the very clause that gives the tribunal authority to decide that dispute. The doctrine therefore keeps two questions apart, namely whether the main contract is valid and whether there is a valid arbitration agreement between the parties. The tribunal can consider the first question without first losing the power to do so, and the second question can still be assessed on its own terms.

2. Rationale

The rationale becomes clear if the doctrine is imagined to be absent. A buyer who wishes to evade arbitration need only assert that the contract was obtained by fraud, that it is therefore void, and that the arbitration clause is void as well. If such an assertion sufficed, any party could escape arbitration by challenging the contract, and the agreement to arbitrate would offer little certainty. Separability closes this route and protects the parties' choice of forum.

3. International recognition

The idea is not unique to India. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the United States Supreme Court held that a complaint directed at the main contract does not by itself prevent an arbitration clause from being enforced.[4] The UNCITRAL Model Law likewise provides that an arbitration clause forming part of a contract is to be treated as an agreement independent of the other terms,[5] and the New York Convention proceeds on the footing that the written arbitration agreement is a separate legal instrument which Contracting States must recognise.[6] Separability is therefore a common foundation of modern international arbitration and not a local peculiarity.

III. STATUTORY BASIS: SECTION 16 AND COMPETENCE-COMPETENCE

1. Separability under Section 16(1)(b)

Separability becomes significant when one party asserts that something went wrong with the main contract. Commonly raised claims include fraud, mistake, misrepresentation, illegality, frustration, termination, or total failure of consideration. If the main contract is held to be void, rescinded or brought to an end, the arbitration clause does not simply fall away with it. Section 16(1)(b) of the Indian Act states this expressly by providing that a decision of the tribunal that the contract is null and void does not by itself entail the invalidity of the arbitration clause.[7]

The Supreme Court has repeatedly affirmed the rule. In *SBI General Insurance Co. Ltd. v. Krish Spinning* (2024), the Court reiterated that the arbitration agreement may survive even after the parties' main relationship has come to an end.[8] The earlier decision in *National Agricultural Co-operative Marketing Federation of India Ltd. v. Gains Trading Ltd.* adopted the same position: the clause remains alive in order to resolve disputes arising from the contract.[9] The doctrine is best understood as a way of thinking rather than a magic shield. It does not mean that every arbitration clause is valid. It requires only that the clause itself be examined, and not merely the contract that surrounds it.

2. Competence-competence

Section 16 accomplishes two related things. First, it lays down the separability rule, under which the arbitration clause is treated as an agreement independent of the other terms of the contract. Second, it empowers the tribunal to rule on its own jurisdiction, including objections concerning the existence or validity of the arbitration agreement.[10] This principle is known as competence-competence, or *kompetenz-kompetenz* in its German form.

The two ideas operate together. Separability shields the clause from the troubles of the main contract, while competence-competence gives the tribunal the first opportunity to decide whether it has the power to hear the case. Together they make it difficult to halt an arbitration merely by lodging an objection. The procedure is also straightforward. A plea that the tribunal lacks jurisdiction must generally be raised no later than the filing of the statement of defence, and a plea that the tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond its authority arises. A delayed plea may still be admitted if the tribunal considers the delay justified.[11]

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[4]Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[5]UNCITRAL Model Law on International Commercial Arbitration, 1985 (with amendments as adopted in 2006), art. 16(1).

[6]Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, arts. II and V, 330 U.N.T.S. 3.

[7]The Arbitration and Conciliation Act, 1996, s. 16(1)(b).

[8]SBI General Insurance Co. Ltd. v. Krish Spinning, Civil Appeal No. 7821 of 2024 (Supreme Court of India, July 18, 2024).

[9]National Agricultural Co-operative Marketing Federation of India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692.

[10]The Arbitration and Conciliation Act, 1996, s. 16(1).

[11]The Arbitration and Conciliation Act, 1996, s. 16(2)–(4).

IV. ROLE OF COURTS IN THE ARBITRAL PROCESS

1. At the outset: Sections 8 and 11

Separability does not exclude courts from the picture. They play a role at the beginning and at the end of the process. At the beginning, the Indian Act relies on two provisions. Section 8 applies when a party approaches a court despite the existence of an arbitration agreement, and the court must refer the parties to arbitration unless it finds that no valid arbitration agreement exists or that the dispute is plainly not arbitrable.[12] Section 11 applies when the parties need assistance in constituting the tribunal, for instance when they cannot agree on the arbitrator. The role of the court under this provision is even more limited, since it asks only whether an arbitration agreement exists on a *prima facie* view.[13]

In both situations the court functions as a gateway and not as the primary judge. Debatable questions, such as fraud, whether the contract was properly stamped, whether the matter has already been settled, or whether the dispute is arbitrable, are typically left to the tribunal under Section 16. In *Vidya Drolia v. Durga Trading Corp.* (2021), the Supreme Court explained that the tribunal can decide questions concerning the existence, validity or termination of the main contract without a court first ruling on them.[14] *Krish Spinning* again emphasised that a court at the referral stage should undertake only limited scrutiny.[15] This approach is consistent with India's policy of minimal judicial interference and respect for the parties' choice.

2. At the conclusion: Sections 34 and 37

If the tribunal concludes that it has jurisdiction and proceeds, the party that objected cannot ordinarily return to court immediately. As a rule it must await the final award and challenge it under Section 34, which is the primary route for setting aside an award in India. At that stage a party may contend that the tribunal lacked jurisdiction because the arbitration agreement was invalid, that the dispute was not arbitrable, or that the award conflicts with the public policy of India. Public policy covers the fundamental policy of Indian law, the most basic notions of morality or justice, and patent illegality appearing on the face of the award.[16]

Section 34 is nevertheless not an appeal. The court does not re-examine the evidence or correct ordinary errors of fact or law. Section 37 permits a limited further appeal in specified circumstances, but it too does not make the appellate court a second judge of the merits; it examines only whether the court hearing the Section 34 application stayed within the bounds of that provision.[17] The outcome is a balance. Arbitration can move forward without repeated interruption, yet a tribunal that acted wholly beyond its authority does not produce an award that is beyond challenge.

V. LAW GOVERNING THE ARBITRATION AGREEMENT

1. Three different laws

Separability becomes more complex in international transactions, because a single contract may involve several laws. These are the law governing the main contract, the law governing the arbitration agreement itself, and the law of the seat, meaning the legal home of the arbitration, which usually governs procedure and court supervision. The three may point to different countries. It is important to recognise that separability does not by itself mean that the arbitration agreement is governed by a different law from the main contract. It means only that the clause can be examined on its own.

2. Approach of the courts

Courts generally follow a three-step approach. The first step is an **express choice**. If the parties have clearly specified a law for the arbitration agreement, that is the strongest indication of their intention, although courts read the whole clause with care, and a reference to a national law, to institutional rules or to a seat does not by itself amount to a clear choice for the arbitration agreement. The second step is an **implied choice**. Where there is no express statement, courts look at the contract and the surrounding circumstances. In *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb* (2020), the UK Supreme Court held that a choice of law for the main contract will ordinarily apply to the arbitration agreement as well, and that where there is no choice at all the arbitration agreement is generally governed by the law with which it is most closely connected, usually the law of the seat.[18] The earlier English decision in *Sulamerica v. Enesa Engenharia* (2012) shows that the question calls for its own analysis and not a mechanical adoption of the law of the main contract.[19] The third step is the **closest and most real connection**. If no choice can reasonably be identified, a court may ask which legal

[12]The Arbitration and Conciliation Act, 1996, s. 8.

[13]The Arbitration and Conciliation Act, 1996, s. 11.

[14]Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1.

[15]SBI General Insurance Co. Ltd. v. Krish Spinning, supra note 8.

[16]The Arbitration and Conciliation Act, 1996, s. 34(2), s. 34(2A) and Explanation 1 to s. 34(2)(b)(ii).

[17]The Arbitration and Conciliation Act, 1996, s. 37.

[18]Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb, [2020] UKSC 38.

[19]Sulamerica Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A., [2012] EWCA Civ 638.

system has the closest connection to the arbitration agreement. The seat carries considerable weight here, but it does not always resolve the question.

3. The Indian position

The Supreme Court of India has likewise emphasised how the parties' choices take effect. In *Gains Trading*, the explicit selection of the Indian Act was treated as governing the appointment of arbitrators, the referral of disputes and the entire arbitral process.[20] These cases show that although the arbitration clause is legally distinct, its practical operation still depends on the framework the parties selected and on the law of the seat. Keeping the three laws apart increases predictability and reduces later disputes over jurisdiction.

VI. LIMITS OF SEPARABILITY

It is easy to exaggerate what the doctrine achieves. Some describe it as though an arbitration clause could withstand any conceivable problem, which is inaccurate. Separability guards the clause against challenges to the main contract, but not against a direct challenge to the clause itself. If a party contends that it never consented to arbitrate, that the signatory lacked authority, that it lacked legal capacity, that the clause was never properly formed, or that a statute prohibits it, the challenge is directed at the arbitration agreement. The tribunal must examine such a challenge, and a court may do so at the appropriate stage.

Nor does the doctrine mean that every dispute is arbitrable. In *Vidya Drolia*, the Supreme Court clarified that non-arbitrability remains a question of jurisdiction. Certain disputes are reserved for public courts, such as particular matters involving rights enforceable against the world at large and not merely between the parties, and an arbitration clause cannot bring them within the tribunal's authority.[21] Allegations of fraud raise distinct questions. In *A. Ayyasamy v. A. Paramasivam* (2016), the Supreme Court accepted that arbitral tribunals can resolve many civil disputes even where the facts are complex and fraud is alleged, but a tribunal cannot assume the criminal powers of a court merely because fraud has been pleaded.[22] The doctrine thus keeps the clause alive against attacks on the contract, while the clause must still satisfy its own requirements of consent, capacity, legality and arbitrability.

VII. CONSEQUENCES OF DEFECTS AND CROSS-BORDER ENFORCEMENT

1. Consequences of a defect

Since arbitration is a civil process, the consequences that follow when a defect is discovered are not criminal penalties. They include declining to refer the parties to arbitration, dismissing claims, cost orders, setting aside an award, or refusing to enforce it. The result depends on the type of defect and the stage the case has reached:

(i) where only the main contract is invalid, arbitration typically proceeds;

(ii) where the arbitration clause itself is invalid, the tribunal may lack jurisdiction, and the award may later be set aside or left unenforced; and

(iii) where the dispute is not arbitrable, the matter may be referred back to the appropriate court or forum.

2. Enforcement under the New York Convention

An arbitral award is only as valuable as its enforceability, frequently in a foreign country. The New York Convention of 1958 obliges Contracting States to recognise written arbitration agreements and permits only limited grounds for refusing enforcement. Under Article V, enforcement may be refused where, for instance, the arbitration agreement was invalid under the applicable law, the tribunal exceeded the scope of the submission, a serious procedural unfairness occurred, or the subject matter is not arbitrable under the law of the enforcing State.{fn:nycV}

Separability is helpful at this stage as well. A claim that the main contract was void or breached does not by itself invalidate the arbitration agreement or prevent enforcement. The enforcing court instead examines whether the arbitration agreement is valid and whether the award is lawful, without revisiting the merits. This ensures that awards remain effective across borders.

VIII. PRACTICAL ISSUES AND SUGGESTIONS

Several practical problems continue to arise. The first is **inadequate drafting**: many contracts specify a governing law for the contract but say nothing about the arbitration agreement, which leaves room for debate about the law that determines the clause's validity. The second concerns the **seat and the governing law**: a clause may place the arbitration in one country while the contract is governed by the law of another, and without clear wording the parties may later disagree about which system governs the clause. The third is **excessive reliance on the word "separability"**, since the clause must still

[20]National Agricultural Co-operative Marketing Federation of India Ltd. v. Gains Trading Ltd., supra note 9.

[21]Vidya Drolia v. Durga Trading Corp., supra note 14.

[22]A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386.

be able to stand on its own. The fourth is the **timing of court involvement**: early intervention may stop a tribunal from acting without authority, but excessive intervention causes delay and undermines the parties' choice. The division of functions between Sections 16 and 34 attempts to allocate these questions between tribunal and court in a controlled manner.[23]

A few straightforward steps can reduce these risks:

(iv) the law of the arbitration agreement should be specified expressly where it is intended to differ from the law of the main contract, since a single short sentence can avert lengthy disputes;

(v) the essentials should be stated clearly, namely the seat, whether the arbitration is institutional or *ad hoc*, the number of arbitrators, the language and the rules;

(vi) courts and tribunals should keep attacks on the contract distinct from direct attacks on the clause, without letting a preliminary stage become a full trial; and

(vii) enforcement should be considered from the outset, and the clause drafted with the New York Convention and the likely enforcing country in mind.

IX. CONCLUSION

Separability ranks among the principal foundations of modern international arbitration. It enables the arbitration clause to function even when the surrounding contract is under challenge. In India, Section 16 of the 1996 Act gives the doctrine a firm legal footing and links it to the tribunal's authority to rule on its own jurisdiction, while the Supreme Court has consistently supported it and has confined courts to limited scrutiny at the referral stage.

The doctrine does not, however, resolve every dispute on its own. A valid arbitration agreement must still exist, a governing law must still be determined, and the dispute must still be arbitrable. Depending on the nature of the defect and the stage at which it arises, the outcome may be that the arbitration proceeds, that a reference is declined, or that an award is set aside or left unenforced. The practical lesson for businesses and lawyers is to treat the main contract, the arbitration agreement and the arbitral procedure as three distinct things and to draft with each in mind. If that is done, the promise to arbitrate is much more likely to hold when it is put to the test.

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[23]The Arbitration and Conciliation Act, 1996, ss. 8, 11, 16, 34 and 37.