The doctrine of separability in respect of the arbitration clause of a contract: A comparative study of English law and South African law

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ABSTRACT

Most jurisdictions have over the past two decades experienced reforms with regard to arbitration law. These include England, America, France, Germany and the Netherlands. These reforms were necessary as the trend in the modern era shows that businessmen situated in different countries usually prefer to have their disputes resolved by arbitration as opposed to court litigation. To have disputes resolved effectively, it is surely a desirable thing to have laws that would promote the use of arbitration as an alternative dispute resolution. This would also ensure progressive international trade which is an important aspect of development in the South African constitutional state.

One aspect of the law that would ensure a speedy and effective resolution of dispute by means of arbitration is the incorporation of the doctrine of separability in a country's law. The doctrine of separability provides that an arbitration agreement is a separate and independent contract from the main contract in which it is incorporated. In light of the above, the primary purpose of this study is to compare and analyse the English legal system with that of South Africa with specific focus on the doctrine of separability.

OPSOMMING

Meeste jurisdiksies het oor die laaste twee dekades heen hervormings met betrekking tot arbitrasiereg ondergaan. Voorbeelde sluit in Engeland, Amerika, Frankryk, Duitsland en die Nederlande. Hierdie hervormings is genoodsaak deur die moderne neiging dat besigheidsmanne wat oor landsgrense heen handel dryf wat gewoonlik verkies om hulle dispute op te los deur middel van arbitrasie in plaas van ‘n hofgeding. Om sodanige dispute effektief op te los, is dit verseker wenslik om wette te hê wat die gebruik van arbitrasie as alternatiewe dispuutoplossing bied. Dit verseker progressiewe internasionale handel, wat ‘n belangrike deel uitmaak van die ontwikkeling van Suid-Afrika as grondwetlike staat.

Een aspek van die reg wat spoedige dispuutoplossing deur middel van arbitrasie sal verseker is die insluiting van ‘n doktrine van ‘skeidbaarheid’ in die gegewe land se wette. Die doktrine van skeidbaarheid voorsien dat ‘n arbitrasie ooreenkoms ‘n aparte en onafhanklike kontrak is buite die hoofkontrak waarin dit geinkorporeer is. In die lig van die bogenoemde is die primêre doelwit van hierdie studie om die Engelse regstelsel te analiseer en te vergelyk met sy Suid-Afrikaanse eweknie met spesifieke fokus op die doktrine van skeidbaarheid.

KEY WORDS

The doctrine of separability

The independence of the arbitration agreement

Competence de la competence

Repudiation

Invalidity/voidness

South Africa

England

SLEUTELWOORDE

Die doktrine van skeidbaarheid

Die onafhanklikheid van die arbitrasie ooreenkoms

Competence de la competence

Repudiasie

Ongeldigheid/nietigheid

Suid-Afrika

Engeland

INDEX

Abstract……i

Opsomming……ii

Keywords……iii

Sleutelwoorde……iv

List of abbreviations……1

Chapter 1……2

1 Introduction……2

Chapter 2……7

2 The scope and nature of arbitration……7

***2.1 Introduction*……7**

***2.2 Defining features of Arbitration*……7**

2.2.1 Arbitration as a quicker alternative method of resolving disputes……7

2.2.2 Arbitration is pursuant to an agreement between parties……9

2.2.3 The arbitrator must adjudicate in an impartial manner……10

2.2.4 The arbitrator's decision is final and binding……11

***2.3. Arbitration agreement and common law*……12**

***2.4. Arbitration agreement and contract law*……13**

***2.5 Conclusion*……15**

Chapter 3……16

3 English Law with regard to the doctrine of separability……16

***3.1 Introduction*……16**

***3.2 A brief history of the English law of arbitration*……16**

***3.3 The doctrine of separability*……18**

***3.4 The evolvement of the doctrine of separability*……29**

3.4.1 Heyman v Darwins Ltd 1942 AC 356……20

3.4.1.1Background……20

3.4.1.2 The court's *ratio*…… 21

3.4.1.3 The contribution of the *Heyman* case on the application of the doctrine of separability……..22
3.4.2 Ashville Investments Ltd v Elmer Contractors Ltd 1988 2 All ER 577…….24
3.4.2.1 Background……24
3.4.2.2 The court's *ratio*……..25
3.4.2.3 The contribution of the *Ashville* case on the application of the doctrine of separability……..26
3.4.3 Overseas Union Inc v AA Mutual International Ltd 1988 2 Lloyd's Rep 63…….26
3.4.3.1 Background…….. .26
3.4.3.2 The court's *ratio*……..27
3.4.3.3 The contribution of the *Overseas Union* case on the application of the doctrine of separability……..28
3.4.4 Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd 1993 QB 701……30
3.4.4.1 Background ……...30
3.4.4.2 The court's *ratio*……..31
3.5 The acceptance of the doctrine of separability ……31
3.5.1 Statutory provision for the doctrine of separability……...32
3.5.2 The Interpretation of section 7 post the Harbour Assurance case……....33
3.5.2.1Fiona Trust & Holding Corporation v Yuri 2007 APP .LR 01/24……33
3.5.2.2 Background……33
3.5.2.3 The decision of the court *a quo*……..34
3.5.2.4 The court of appeal decision……...35
3.5.3 Lessons from the court of appeal decision……...36
3.6 The effect of the doctrine of separabilty……37
3.6.1 Independence of the arbitration agreement……..38
3.6.1.1 The advantages and disadvantages of the independence of an arbitration agreement…… 39
3.6.2 Competence-competence or *Competence de la competence*……40
3.6.2.1 The advantages and disadvantages of the principle of *Competence-competence* or *Competence de la competence*……..42

***3.7 Conclusion*……44**

Chapter 4……45

4 The application of the doctrine of separability in South Africa……45

***4.1 Introduction*……45**

***4.2 The history of the South African law of arbitration*……..45**

4.2.1 Arbitration Act of 1965…… 47

***4.3 Repudiation*……48**

4.3.1 Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical 1992 1 SA 296 (A)……..51

4.3.1.1 Background of the Atteridgeville case……51

4.3.1.2 Approach of the court……...53

***4.4 The application of the doctrine of separability in the Atteridgeville decision*……..56**

4.4.1 Independence of the arbitration agreement……56

4.4.2 The problem with having regard to the intention of the parties……57

4.2.2.1Uncertainty of separability of the arbitration agreement from the main agreement……57

***4.5 Invalidity or voidness*……...59**

4.5.1 Background of the Wayland v Everite Group Ltd 1993 3 SA 946 (W)……60

4.5.1.1 Approach of the court……...60

4.5.2 The effect of the Wayland case on the application of the doctrine of separability……..61

4.5.2.1 Non-independence of the arbitration agreement from the main contract…….61

4.5.2.2 Frustration of *competence competence* principle……62

***4.6 Conclusion* ……65**

Chapter 5……66

5 The comparison of the English legal position and the South African legal position with regard to the application of the doctrine of separability…….66

5.1 Introduction……66

***5.2 The South African legal position*……...66**
***5.3 The English legal position*……...69**
5.3.1 The recognition and respect of the contractual aspect of an arbitration agreement.....70
5.3.2. The independence of the arbitration agreement……71
5.3.3 Competence de la competence……..71
***5.4 Conclusion*……..72**

Chapter 6……73
6 Conclusions and recommendations……73
***6.1 Introduction*……73**
***6.2 The two legal systems with regard to the doctrine of separability*……..73**
***6.3 Recommendations*……74**
6.3.1 Adopting the English legal position with regard to the application of the doctrine of separability……...74
6.3.2 Adopting the UNCITRAL Model Law ……75
***6.4 Conclusions*……76**

Bibliography……..78

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
Adel L Rev	Adelaide Law Review
Contemp Asia Arb J	Contemporary Asia Arbitration Journal
CILSA	Comparative and International law journal of southern Africa
EDI Law review	Electronic Data Interchange Law review
Eur JL Reform	European Journal of Law Reform
ICLQ	The international and Comparative law Quarterly
Int'l Trade & Bus L Rev	International Trade & Business Law Review
Law & Pol'y Int'l Bus	Law and Policy in International Business
N Z L Rev	New Zealand Law Review
PER/PELJ	Potchefstroom Electronic Law Journal
Penn St L Rev	Penn State Law Review
S Afr Mercantile LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SAcLJ	Singapore Academy of Law Journal
SMU Law Review	South Methodist University Law Review
UNCITRAL	United Nations Commission on International Trade Law
Transnat'l Law	Journal of Transitional Law
Tul Eur & Civ LF	Tulane European & Civil Law Forum
Tul L Rev	Tulane Law Review
Tul J Int'l & Comp L	Tulane Journal of International and Comparative Law
Tul Mar LJ	Tulane Maritime law Journal
U Pa L Rev	University of Pennsylvania Law Review
UNSWLJ	University of New South Wales Law Journal
Unif L Rev	Uniform law review
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
Yale L J	Yale law journal

Chapter 1

1 Introduction

As states began to engage more frequently in international trade and commercial activities the occurrence of disputes increased too.[1] International trade brought along movement of goods from one continent to the other which meant that different entities (people, institutions, corporations and organizations) all governed by different legal systems became more involved in trade business.[2] Because of these different legal systems and policies,[3] as well as other factors such as technology[4] disputes between traders intensified and became more complex.[5] As a result of this, an alternative and effective dispute resolution system other than court litigation became necessary. One of the dispute resolutions that emerged is arbitration.

Litigation has been in existence for a long time serving as a formal and more recognised method of resolving disputes.[6] One of the reasons that possibly provided more recognition was the fact that a court of law has always had coercive powers.[7] That is, a court of law is able to enforce its orders.

Notwithstanding the effectiveness of court litigation, parties situated in different countries usually prefer to have their disputes resolved by arbitration as opposed to court litigation.[8] One of the reasons can be attributed to the fact that arbitration provides neutrality and equality between the parties.[9] In some instances neither party may be willing to submit to the jurisdiction of the national court of the other party.[10] Arbitration in

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1 Tweeddale and Tweeddale *A Practical Approach to Arbitration Law* 2.
2 Ramsden *The Law of Arbitration South African and International Arbitration* 1.
3 Herrmann 1988 *Uniform Law Review* 486. See also Milotic Arbitration: *Competence of Roman Arbiter in Rendering the Decision* 2.
4 Eiselen 1995 *S. Afr. Mercantile L. J* 2. See also Eiselen 1995 *EDI Law Review* 9. See also Eiselen 1999 *EDI Law Review* 21. Eiselen 2007 *PER/ PELJ* 3. See also Martin 2008*Tul. J. Int'l and Comp L* 472. See also Van der Merwe *"Law and Electronic Commerce*" 99-126.
5 Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 56.
6 De Vries 1982-1983 *Tul. L. Rev.* 46.
7 Garnett, *et al A practical Guide* 17.
8 Ramsden *The Law of Arbitration South African and International Arbitration* 1.
9 St John Sutton Gill and Gearing *Russell on Arbitration* 12.
10 Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 163.

this situation offers them neutrality in the choice of law, venue, procedure and the tribunal.[11] This is due to the fact that the parties may agree upon the law and procedure of a third country or the choice of a tribunal.[12]

However, the law governing arbitration is different in every jurisdiction.[13] For example, arbitration law in England differs from that in South Africa. One of those differences is with regard to the doctrine of separability.[14] The doctrine of separability provides that an arbitration agreement is a separate and independent contract from the main contract in which it is incorporated.[15] For various reasons (to be discussed in this study), the doctrine of separability is seen as an ideal aspect of arbitration law. It is because of this that many jurisdictions such as England, America, France, Germany and Netherlands have fully incorporated the doctrine of separability as part of their respective arbitration law.[16]

The doctrine of separability of the arbitration clause is a complicated phrase.[17] This is probably because it is understood differently by most jurisdictions in the world. In England for example, the doctrine of separability was not accepted until 1993.[18] In 1942 the House of Lords in *Heyman v Darwins Ltd*[19] had an occasion to deal with this issue of the doctrine of separability.

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11 Malloy 2002 *Transnat'l Law* 47. See also *Yalova Universitesi Hukuk Fakultesi Dergisi* 163. See also Carbonneau 2009 *Penn St. L. Rev* 1343.

12 *Lancaster v Wallace* 1975 1 SA 844 (W) 847.

13 Carbonneau 2009 *Penn St. L. Rev* 1343.

14 *Wayland v Everite Group Ltd* 1993 3 SA 946 (W). See also *North East Finance v Standard Bank* 2013 (5) 1 SCA 5. See also *North West Provincial Government and Another v Tswaing Consulting CC and Others*2007 (4) SA 452 (SCA).

15 *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701,704 C-D. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 347. The just mentioned authors trace the acceptance of the doctrine of separability in English law through the *Harbour Assurance Co* case until it was codified in the *English Arbitration Act* of 1996. The authors also discuss the interpretation of the English Act through case law. For further discussion of the interpretation of the Act See *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also *Beinjing Jianlong Heavy Industry Group v Golden Ocean Limited and ors* 2013 EWHC (Comm).

16 Poudret and Besson *Comparative Law* 134. See also Tsen- Ta 1995 *S.Ac.L.J.* 430.

17 Tweeddale and Tweeddale *A Practical Approach to Arbitration Law* 73.

18 *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701,704 C-D.

19 1942 AC 356.

The gist of this decision was that if the main agreement is itself void or for some other reason unenforceable, a party to such a contract is precluded from relying on the arbitration clause, and consequently could not have the dispute resolved by arbitration. This was due to the fact that the clause formed part of the main contract which incorporates an arbitration clause. As a result, the arbitration clause could not survive independently of the main contract.

For a long time this was the position of the English law up until the 1993 decision of the Court of Appeal in *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd.*[20] In this case, the court observed that the arbitration agreement is a separate and independent contract from the main contract. This decision has led to the inclusion of the section dealing with the doctrine of separability in section 7 of the *Arbitration Act of 1996*.[21] In South Africa the evolution of this doctrine may be traced as far back as 1917 in the case of *Hurwitz's Trustee v Magdeburg Fire Insurance Co.*[22] The *ratio* in this case was that a party may not repudiate a contract relying on some matter outside the contract itself and at the same time claim the benefit of the arbitration clause. The issue of the doctrine of separability also re-surfaced in 1993 in the decision of *Wayland v Everite Group Ltd.*[23] In the just mentioned case, the court observed that the validity of an arbitration clause must stand or fall with the validity of the main contract in which it is incorporated.

The above position of the law in *Wayland v Everite Group Ltd* was also confirmed in the recent case of *North East Finance v Standard Bank*.[24] The Supreme Court of Appeal held that a clause embodied in a contract requiring parties to refer their disputes to arbitration is not as a rule enforceable if the contract itself is invalid.[25] The court held that the issue as to whether the clause is separable from the contract depends on an

20 1993 QB 701,704 C-D.
21 Section 7 provides; 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 shall for that purpose be treated as a distinct agreement.
22 1917 TPD 309.
23 1993 3 SA 946 (W).
24 2013 (5) 1 SCA 5.
25 2013 (5) 1 SCA 5 E-H.

interpretation of the contract as a whole and the context in which it was concluded.[26] Unlike the English *Arbitration Act*[27] which provides for the doctrine of separability, the South African *Arbitration Act*[28] is silent with regard to this doctrine.

Against this background, the primary purpose of this study is to compare and analyse the English legal system with that of South Africa with specific focus on the doctrine of separability. This comparative study is influenced by the fact that the arbitration law of South Africa is based on the English arbitration law. This study is also based on a literature study of pertinent and relevant textbooks, legislation and law journals, case law and Internet sources reflecting and discussing the doctrine of separability.

In light hereof the research question addressed by this study is: to what extent does the invalidity/voidability and repudiation of the contract with an arbitration clause affect the obligations of the parties to arbitrate disputes arising under such contract?

The doctrine of separability stems from the law of arbitration. As such, the study in the second chapter aims at providing an outline of the principles of the law of arbitration in general. That is, the definition of arbitration and characteristics thereof. Since the interpretation of arbitration agreements is subject to legislation,[29] common law[30] and the principles of contract law,[31] it is also in the second chapter that, an arbitration agreement *vis- a-vis* legislation common law and the principles of contract law will be discussed. The intention is to pave a way for the third chapter which in general encompasses the doctrine of separability with regard to English law. In this chapter, the historical background of this doctrine is discussed through different case law(s) until its inception in the English *Arbitration Act of* 1996. The chapter also analyses the consequences of the doctrine of separability.

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26 2013 (5) 1 SCA 5 E-H.
27 *Act* of 1996.
28 *Act* 42 of 1965.
29 *Arbitration Act* 42 of 1965.
30 Jacobs *The Law of Arbitration in South Africa* 6. See also *Pretoria City Council v Blom and Another* 1966 (2) SA 139 (T). See also *Nkuke v Kindi* 1912 CPD 529, 531.
31 *Cone Textile (Pvt) Ltd v Ayres* 1980 (4) SA 728 (ZA), 732 E-F.

In Chapter Four, the doctrine of separability is discussed with regard to South African law. To demystify this doctrine, reference is made to instances where the main agreement is void, illegal and repudiated. A comparison of the English legal system with regard to the application of the doctrine of separability with the South African one is made in the fifth chapter. The sixth chapter, being the last, covers the final conclusions drawn from the discussion and the analysis made in the foregoing chapters. This chapter contains brief summaries of all the discussions and conclusions drawn in the entire work, from which all recommendations follow.

Chapter 2

2 The scope and nature of arbitration

2.1 Introduction

Disputes between individuals and even between entities are a feature of everyday life in society.[32] Over time alternative methods of resolving disputes have been developed due to litigation becoming a costly as well as a lengthy process.[33] One of those methods is known as arbitration. Arbitration may be understood as:[34]

> a process whereby the parties to the dispute enter into a formal agreement that an independent and impartial third party, the arbitrator chosen directly or indirectly by the parties, will hear both sides of the dispute and make an award which the parties undertake through the agreement to accept as final and binding.

2.2 Defining features of Arbitration

From the definition of arbitration above four distinct characteristics may be deduced namely, (i) arbitration is an alternative method of resolving disputes, (ii) arbitration is pursuant to an agreement between parties, (iii) the arbitrator will adjudicate on the dispute in an impartial manner and finally (iv) the arbitrator's decision shall be final and binding.[35] These characteristics are discussed below.

2.2.1 Arbitration as a quicker alternative method of resolving disputes

Arbitration is an alternative method used to solve disputes between parties in respect of their rights as contained in their commercial contract.[36] As an alternative method of

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32 Ginnings *Arbitration: A Practical Guide* x.

33 Faris 2008 *De Jure* 504. See also Malloy 2002 *Transnat'l Law* 43. See also *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175 (CA).

34 *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673 E.

35 *Section 28 of Arbitration Act* 42 of 1965. See also *Amalgamated Clothing & Textile Workers Union of SA v Veldspun* (Pty) Ltd 1994 1 SA 163 (A) 169G. See also *Dutch Reformed Church v Town Council of Cape Town* (1898) 15 SC 14-20. See also *Lancaster v Wallace* 1975 1 SA 844 (W) 847. See also Butler 1994 *CILSA* 121.

36 Sternlight 2000 *Journal of Dispute Resolution* 108. See also Greenberg, Kee and Weeramantry *International Commercial Arbitration* 2. See also *Telecall (Pty) Ltd v Logan*

dispute resolution, arbitration is known to be quicker in comparison to litigation.[37] One of the reasons why arbitration may be considered to be more expeditious is that there is generally no avenue for appeal.[38] There are however instances where the parties have the arbitrator's award reviewed and this will be discussed later in this chapter.

As a dispute resolution mechanism, arbitration is subject to the rules of natural justice; however the arbitrators are not required to act in a judicial manner.[39] Generally the arbitrators do not follow the same procedure as a court of law. For example, arbitrators are not bound by the doctrine of *stare decisis.* This is an opposing view from some authors (such as Stipanowich,[40]Sternlight[41] and Faris[42]) who argue that arbitration has lost its association as forming part of Alternative Dispute Resolution (ADR) like other disciplines i.e. mediation and negotiation. Faris[43] argues that arbitration may be understood in its conventional form, meaning arbitration emulates judicial proceedings and henceforth has lost its association as forming part of ADR. Stipanowich[44] observed that, it is common to speak of business arbitration in terms similar to civil litigation as it is judicialised, costly, time consuming and subject to advocacy.

2000 2 SA 782 (SCA) 786 C-J. See also Buttler and Finsen *Arbitration in South Africa Law and Practice* 1. See also Faris 2008 *De Jure* 506.

37 Faris 2008 *De Jure* 522. See also Sternlight 2000 *Journal of Dispute Resolution* 102. See also *Amalgamated Clothing & Textile Workers Union of SA v Veldspun* (Pty) Ltd 1994 1 SA 163 (A) 169G. See also *Lancaster v Wallace* 1975 1 SA 844 (W) 847. See also Butler 1994 *CILSA* 121. See also Ramsden *The Law of Arbitration South African and International Arbitration* 6. See also Stipanowich 2010 *University of Illinois Law Review* 26.

38 Stipanowich 2010 *University of Illinois Law Review* 26. See also Moses *The Principles and Practice of International Commercial Arbitration* 2. See also Ramsden *The Law of Arbitration South African and International Arbitration* 6. See also Section 28 *Arbitration Act* 42 of 1965. Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms. Another reason why arbitration is seen to be quicker is because arbitration has proven to be less expensive when compared to litigation. For further discussion see *Dutch Reformed Church v Town Council of Cape Town* (1898) 15 SC 14-20. Secondly, arbitration proceedings take less time than court proceedings. For further discussion see *Amalgamated Clothing & Textile Workers Union of SA v Veldspun* (Pty) Ltd 1994 1 SA 163 (A) 169G. See also *Lancaster v Wallace* 1975 1 SA 844 (W) 847. See also Stipanowich 2010 *University of Illinois Law Review* 26.

39 Buttler and Finsen *Arbitration in South Africa Law and Practice* 2.

40 Stipanowich 2010 *University of Illinois Law Review* 8.

41 Sternlight 2000 *Journal of Dispute Resolution* 102.

42 Faris 2008 *De Jure* 509.

43 Faris 2008 *De Jure* 509.

44 Stipanowich 2010 *University of Illinois Law Review* 8.

2.2.2 Arbitration is pursuant to an agreement between parties

The referral of a dispute to arbitration is dependent upon the existence of a prior arbitration agreement between the parties.[45] If the parties do not specify that any or all matters that may arise in relation to their contract will be subject to arbitration, either party has the option of utilising a court of law[46] or other alternative dispute resolution methods such as mediation,[47] conciliation[48] or negotiation.[49]

In light of the fact that the parties have to agree to refer a dispute to arbitration, the parties are seen to have party autonomy.[50] This is due to the fact that contracting parties are free (through their agreement) to enter into a contract on their preferred contractual terms and conditions. For example, the parties may through their arbitration agreement agree on the applicable law, place and the language used during the arbitration proceedings.[51] This principle of party autonomy is recognised by the UNCITRAL Model Law.[52]

Generally, an arbitration agreement may be in three forms. Firstly, an arbitration agreement which refers an existing dispute to arbitration. Secondly, an arbitration

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45 *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673 F-H. See also Ramsden *The Law of Arbitration South African and International Arbitration* 6.

46 In litigation parties take claims or their dispute to court. For further elaboration see Ramsden *The Law of Arbitration South African and International Arbitration* 2.

47 Mediation is a process whereby parties to a dispute with the assistance of the mediator identify the disputed issues, develop options, and consider alternatives in order to reach an agreement that is best suitable for the parties. The mediator's role is not to adjudicate but rather to facilitate mediation proceedings to enable parties to listen to and understand the other part's arguments. For further elaboration see Ramsden *The Law of Arbitration South African and International Arbitration* 2. See also Faris 2008 *De Jure* 509. See also Sternlight 2000 *Journal of Dispute Resolution* 97. See also Stipanowich 2010 *University of Illinois Law Review* 26.

48 In most jurisdictions mediation and conciliation mean the same thing. For further elaboration see Ramsden *The Law of Arbitration South African and International Arbitration* 2. See also Stipanowich 2010 *University of Illinois Law Review* 26.

49 Through negotiation, parties to the dispute attempt to reach a settlement personally without the assistance of an independent person. For further elaboration see Ramsden *The Law of Arbitration South African and International Arbitration* 2.

50 Rosen 1994 *Fordham International Law Journal* 599. See also Roodt 2010 *Tul Eur & Civ LF* 76. See also Christie 1994 *SALJ* 144.

51 Malloy 2002 *Transnat'l Law* 47. See also Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 163. See also Carbonneau 2009 *Penn St. L. Rev* 1343.

52 Roodt 2010 *Tul Eur & Civ LF* 76. UNCITRAL Model Law is discussed later in Chapter Three.

agreement which relate to disputes which may arise in the future and finally an arbitration agreement which refers to both existing and possible future disputes.[53] For purposes of the present study, the discussion will be confined to an arbitration agreement relating to disputes which may arise in the future. This type of an arbitration agreement often takes the form of a clause inserted in the contract.[54] Such an arbitration agreement creates rights and duties which in the event of a dispute, the disputants will be subject to in arbitration.[55] The interpretation and application of both of these types of agreements is subject to legislation,[56] common law[57] and the principles of contract law,[58] and this is discussed later in this chapter.

2.2.3 The arbitrator must adjudicate in an impartial manner

The parties may elect the most appropriate neutral, third party to adjudicate on their dispute. This neutral third party is known as an arbitrator.[59] The arbitrator has to make a decision after receiving and considering evidence and submissions from the parties by following a procedure which is equally fair to both parties.[60] This essentially means that there must be a measure of independence and impartiality on the part of the arbitrator. The arbitrator is expected to observe the common rules of natural justice.[61]

According to Fombard[62] the rules of natural justice were originally applied only by courts of law but now extend to any person or body deciding issues affecting the rights or interests of others. The reason why rules it became necessary for the rules of natural justice to be applied by any person or a body deciding an issue affecting the rights and

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53 Mustill and Boyd *Commercial Arbitration* 6. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24.
54 Mustill and Boyd *Commercial Arbitration* 6.
55 Mustill and Boyd *Commercial Arbitration* 6.
56 *Arbitration Act* 42 of 1965.
57 Jacobs *The Law of Arbitration in South Africa* 6. See also *Pretoria City Council v Blom and Another* 1966 (2) SA 139 (T). See also *Nkuke v Kindi* 1912 CPD 529, 531.
58 *Cone Textile (Pvt) Ltd v Ayres* 1980 (4) SA 728 (ZA), 732 E-F.
59 *Cf Chelsea West (Pty) Ltd v Roodebloem Investements* (*Pty) Ltd* 1994 1 SA 837 (C) 8949 B-C.
60 *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673 G. See also Butler 1994 *CILSA* 121.
61 Buttler and Finsen *Arbitration in South Africa Law and Practice* 2.
62 Fombad and Quansah *The Botswana Legal System* 8.

interests of others is, as Fombard[63] put it, to ensure that fairness and procedural rules by which legal rules are to be considered are applied. As Lord Hewart CJ[64] rightly pointed out:

> It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done

From, the foregoing, it is clear that when adjudicating, the arbitrator must ensure that justice is done. It is therefore submitted that it is through the observance of rules of natural justice that justice may be served.

2.2.4 The arbitrator's decision is final and binding

The definition of arbitration also encapsulates that an arbitration award is intended to be final and binding.[65] This is to ensure that arbitration serves its purpose of resolving disputes by bringing them to an irrevocable end;[66] otherwise one of the advantages of arbitration to wit a speedy dispute resolution method[67] may be defeated.

The courts are usually reluctant to set aside the arbitrators award. On this point, Moses[68] points out that generally under most jurisdictions the grounds for setting aside the arbitrators award are usually narrow. The author argues that the only grounds for setting aside the award would be where there has been a defect in arbitration

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63 Fombad and Quansah *The Botswana Legal System* 8. See also Buttler and Finsen *Arbitration in South Africa Law and Practice* 2. See also *Ebner v Official Trustee* (2000) 176 ALR 644. See also Dingake *Adminstative law in Botswana: Cases and Commentaries* 67.

64 *R v Sussex Justices, Ex parte McCarthy* 1924 1 KB 256, 259.

65 *Section 28 of Arbitration Act* 42 of 1965. See also *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673 F. See also *Amalgamated Clothing & Textile Workers Union of SA v Veldspun* (Pty) Ltd 1994 1 SA 163 (A) 169G; See also *Dutch Reformed Church v Town Council of Cape Town* (1898) 15 SC 14-20. See also *Lancaster v Wallace* 1975 1 SA 844 (W) 847. See also Butler 1994 *CILSA* 121. See also Stipanowich 2010 *University of Illinois Law Review* 28.

66 *Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC* 2006 SA 91 (C) 98 I-J. See also Buttler and Finsen *Arbitration in South Africa Law and Practice* 271.

67 Stipanowich 2010 *University of Illinois Law Review* 26. *Amalgamated Clothing & Textile Workers Union of SA v Veldspun* (Pty) Ltd 1994 1 SA 163 (A) 169G. See also *Lancaster v Wallace* 1975 1 SA 844 (W) 847.

68 Moses *The Principles and Practice of International Commercial Arbitration* 3.

proceedings, a situation where the arbitrator has exceeded his powers and where the arbitrator has decided issues that were not placed before him.[69] This position is the same in the South African jurisdiction. In South Africa the possibility of setting aside an arbitration award is only limited to issues such as where any member of an arbitration tribunal has misconducted himself in relation to his duties as an arbitrator; there has been gross irregularity in the conduct of the arbitration proceedings or he has exceeded his powers and finally where an award has been improperly obtained.[70]

2.3. Arbitration agreement and common law

The non mention of unwritten arbitration agreements by the Act presupposes that oral agreements are not subject to the provision of the Act.[71] This is in line with the maxim *expressio unius est exclusion alterius*, translated as the express mention of the thing is the exclusion of the other.[72] As a result, oral agreements continue to be governed by common law[73] in which parties may appoint an arbitrator through an oral agreement promising that they will abide by the arbitrator's decision. So as to ensure that the parties do abide by the arbitrator's decision, the agreement has a penalty. If the penalty has not been promised in the agreement or the promise was made conditionally, the arbitrator is entitled to refuse commencement of arbitration proceedings.[74]

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69 Moses *The Principles and Practice of International Commercial Arbitration* 3.

70 *Section 33 (1) (a-c) Arbitration Act* 42 of 1965. See also *Lufuno Mphaphuli & Associates v Nigel Anthol Andrews and Bopanang Construction* 2009 4 SA 529.

71 *Cone Textile (Pvt) Ltd v Ayres* 1980 (4) SA 728 (ZA), 732 E-F. See also McKenzie *The Law of Building and Engineering Contracts and Arbitration* 160.

72 Fombad and Quansah *The Botswana Legal System* 227.

73 Jacobs *The Law of Arbitration in South Africa* 6. See also Ramsden *The Law of Arbitration South African and International Arbitration* 25. See also *Pretoria City Council v Blom and Another* 1966 (2) SA 139 (T). See also *Nkuke v Kindi* 1912 CPD 529, 531.

74 Ramsden *The Law of Arbitration South African and International Arbitration* 25.

2.4. Arbitration agreement and contract law

Arbitration agreement is a creature of a contract. It is therefore a contract like any other and governed by the principle of contract law.[75] That is, there must be an agreement to contract between the contracting parties. As observed by Christie[76] a person cannot contract with himself alone. In essence, there must be an offer and acceptance of the offer. In order for the agreement to be effective, the acceptance of this offer must be unconditionally and unqualifiedly made.[77] If there is no proper acceptance, the effect is that there is no binding agreement to submit to arbitration.[78] As stated above, to ensure that the arbitration agreement is unconditionally made, section 1 of the *Arbitration Act*[79] lists the requirements that the arbitration agreement has to meet.

As a contract is governed by the principles of contract law, a number of consequences arise with regard to the arbitration agreement. One of these consequences is the manner of discharging the obligations in the arbitration agreement. In contract law the most common method of discharging a party's obligations in terms of a contract is by performance.[80] Alternatively, a contract may be discharged by agreement to terminate the contract.[81]

One can therefore translate the above principles of releasing the obligations under a contract in an arbitration contract. The parties to an arbitration contract may sometime after the conclusion of the arbitration contract become disinterested in submitting their possible future dispute to arbitration. As such they might opt to terminate their

75 Malloy 2002 *Transnat'l Law* 47. See also *Cone Textile (Pvt) Ltd v Ayres* 1980 (4) SA 728 (ZA), 732 E-F. See also *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673 F-H. See also Ramsden *The Law of Arbitration South African and International Arbitration* 6.
76 Christie *The Law of Contract in South Africa* 21.
77 Jacobs *The Law of Arbitration in South Africa* 26-27.
78 *Raphaely v Stephan* 1915 CPD 6.
79 *Arbitration Act* 42 of 1965.
80 Christie *The Law of Contract in South Africa* 403.
81 Christie *The Law of Contract in South Africa* 446.

arbitration contract. This was observed by Lord MacMillan in the English case of *Heyman v Darwins Ltd*[82] where it was stated: [83]

> ...that parties to a contract may agree to bring it to an end to all intents and purposes and treat it as if it had never existed.

Alternatively, the parties to an arbitration contract may both perform their duties and obligations under the arbitration contract. The parties may submit to arbitration as initially agreed and when this happens usually no problems arise unless one of the parties is disgruntled with arbitration proceedings. In this case under South African law the disgruntled party would seek to set aside the arbitration agreement.[84]

Where one of the parties to an arbitration contract has either repudiated, or for one or another reason the main contract which contains the arbitration contract is invalid or illegal, there is most often a problem. The problem relates to whether the validity of the arbitration contract should be dependent upon the main contract. Put differently, should an arbitration agreement be treated as part of the main contract to the extent that when the main contract is invalid, illegal or repudiated the arbitration agreement also becomes invalidated?

This problem requires an extensive discussion which will be covered in Chapters Three and Four below. This discussion outlines in detail why the parties to an arbitration contract have the primary purpose of resolving their dispute by means of arbitration. If the arbitration agreement is treated as part of the main contract then the intention of the parties to submit their dispute to arbitration is defeated. This is due to the fact if the main contract is rendered void illegal or repudiated then the arbitration contract also

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82 1942 AC 356.

83 1942 AC 356, 371.

84 *Section 33 (1) (c) Arbitration Act* 42 of 1965. See also *Lufuno Mphaphuli & Associates v Nigel Anthol Andrews and Bopanang Construction* 2009 4 SA 529. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). See also *Steeledale Cladding (Pty) Ltd v Parsons NO & Another*2001 (2) SA 663 (D).

becomes ineffective.[85] On the other hand, if the arbitration contract is treated as a separate and independent contract the intentions of the parties to submit to arbitration may be met. This is known as the doctrine of separability.

2.5 Conclusion

The primary intention of the parties to an arbitration agreement is to submit themselves to a dispute mechanism which is not similar to court proceedings. One of the reasons why the disputants would want to avoid court proceedings is to have a speedy dispute resolution. However, from the discussion above, it would not be entirely correct to conclude that arbitration as a dispute resolution method is speedy. This is due to the fact that at times (as shown in section 2.2.4 above), the court may intervene in arbitration proceedings and this can be viewed as causing unnecessary delays in said proceedings. Most importantly, unnecessary and unanticipated delays may arise where the main contract which contains the arbitration agreement is repudiated or is invalid. This is discussed in Chapter Three below.

85 *Wayland v Everite Group Ltd* 1993 3 SA 946 (W). See also *North East Finance v Standard Bank* 2013 (5) 1 SCA 5.] UKHL 43.

Chapter 3

3 English Law with regard to the doctrine of separability

3.1 Introduction

The doctrine of separability was not always accepted in English law.[86] However, to date it forms an integral part of the English law of arbitration. Therefore the history of English law of arbitration and the evolvement of the doctrine of separability, its advantages and the use thereof in English law will form the focus of this chapter.

3.2 A brief history of the English law of arbitration

Over the years arbitration has become a popular mechanism for resolving disputes.[87] In fact, it can be traced back to family disputes where elders adjudicated over family issues and devised amicable solutions.[88] As such, it is not clear exactly when arbitration came into existence. According to Buttler and Finsen,[89] it is not agreed whether arbitration preceded the organised courts (as it is even referred to in the Bible) or whether courts of law and arbitration developed in parallel.

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86 *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701,704 C-D. (For further discussion on the acceptance and evolution of the doctrine of separability in England see the following sources). Dekaney and Lewis 2008 *U.N.S.W.L.J.* 344. See also Grant 2007 *ICLQ* 871. See also Williams and Kawharu 2009 *N.Z.L Rev* 107. See alsoTownsend 2009 *Unif. L. Rev* 555. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also *Beinjing Jianlong Heavy Industry Group v Golden Ocean Limited and others* 2013 EWHC (Comm).

87 Tweeddale and Tweeddale *A Practical Approach to Arbitration Law* 2. For further discussion on why arbitration has become more fashionable as opposed to other dispute resolution mechanisms see also Faris 2008 *De Jure* 504. See also Malloy 2002 *Transnat'l Law* 43. See also Butler 1994 *CILSA* 121. See also Hill 1997 *ICLQ* 274. See also Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 161.

88 Tweeddale and Tweeddale *A Practical Approach to Arbitration Law* 2. See also Ginnings *Arbitration: A Practical Guide* x. (discussing typical arbitration at family level). See also Milotic Arbitration: *Competence of Roman Arbiter in Rendering the Decision* 2. (discussing typical arbitration in the Roman Empire).

89 Buttler and Finsen *Arbitration in South Africa Law and Practice* 4.

In England, the first recorded arbitrations to be found on paper were located in the Mayor's Court of the City of London in 1424.[90] Recorded arbitration was later found in the yearbooks and cases from the reigns of Elizabeth I and James I.[91] To this end, the development of arbitration law in England, from which South African law derives its own arbitration law, may be described as falling into six distinct periods,[92] namely (i) Common law until the *Arbitration Act of* 1698 [93] (ii) from *Arbitration Act of 1698*[94] *to the Common Law Procedure Act* 1854[95] (iii) *from Common Law Procedure Act to* 1854 *Arbitration Act* 1889[96] (iv) the *Arbitration Acts* 1889 to 1934[97] (iv) the *Arbitration Acts* 1950[98] to 1979[99] and (v) the *Arbitration Act* of 1996 until present.[100]

The *Arbitration Act* of 1996 codified principles established by the case of *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd*.[101] This case laid down the principle in English law that an arbitration agreement is a separate agreement from the main contract.[102] It is through the *Arbitration Act* of 1996 that the doctrine of separability,

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90 Tweeddale and Tweeddale *A Practical Approach to Arbitration Law* 3.

91 Tweeddale and Tweeddale *A Practical Approach to Arbitration Law* 2.

92 Tweeddale and Tweeddale *A Practical Approach to Arbitration Law* 1.

93 The first parliamentary Act on arbitration.

94 Through the *Arbitration Act of* 1698, the English parliament realised the importance of arbitration as a method of resolving disputes. See the preamble: Whereas it hath been found by experience that references made by the Rule of Court have contributed much to the ease of the subject, in the determination of controversies, because the parties become thereby obliged to submit to the award of arbitrators...now, for... rendering the award of arbitrators more effectual be it enacted.

95 The purpose of this Act was to amend the process and practice of arbitration by enlarging the jurisdiction of superior courts of common law at Westminster.

96 The 1889 *Arbitration Act* became the principal statute for arbitration in England. It was celebrated as it showed the successful utilisation of arbitration on commercial cases

97 The 1934 *Arbitration Act* of 1934 was enacted in order to improve the law of arbitration in United Kingdom. This was done so as to make the law to be on par with the changes of time i.e. under the 1889 Act, foreign awards could not be enforced in England.

98 The 1950 Act was to consolidate prior legislation on arbitration

99 The primary purpose of this Act was to abolish the setting aside of awards for errors of fact or law.

100 The purpose of the Act (as per the preamble) is to restate and improve the law relating to arbitration pursuant to an arbitration agreement and to make other provisions relating to arbitration and arbitration awards and for connected purposes.

101 1993 QB 701

102 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406. See also *Beinjing Jianlong Heavy Industry Group v Golden Ocean Limited and others* 2013 EWHC (Comm). This case affirms the decision in *Harbour Assurance Co* case. See also Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 168. See also Grant 2007 *ICLQ* 871. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also Williams and Kawharu 2009 *N.Z.L Rev* 107. See also Townsend 2009 *Unif. L. Rev* 555. See also Dekaney and Lewis 2008 *U.N.S.W.L.J*. 347.(The

which forms the basis of this study, was incorporated in the English Arbitration statute.[103] The *Arbitration Act* of 1996 Act also adopted part of the Model law.

3.3 The doctrine of separability

The doctrine of separability requires that an arbitration agreement be treated as a separate and independent contract from the main contract in which it is incorporated. Put differently, the main commercial contract is viewed as the primary contract and the arbitration agreement is considered to be secondary to this.[104] As such, the invalidity of the main contract does not affect the validity of the arbitration agreement.[105] According to Dursun,[106] the main aim of this doctrine is to provide sustainability of arbitration agreements.[107] The reason for this is due to the fact that the parties are considered to have concluded not one but two agreements.[108]

In light hereof Luttrell[109] argues that an arbitration agreement becomes an autonomous contract within the main contract. Therefore, this has the effect that the arbitration contract may be governed by a different body of law to the rest of the main contract (although not necessarily).[110] The author explains that the primary objective of subjecting the arbitration clause to a different body of law from that of the main contract is to ensure that the arbitration clause is more readily enforceable in the preferred

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just mentioned sources demystify the *ratio* in *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701 and *Beinjing Jianlong Heavy Industry Group v Golden Ocean Limited and others* 2013 EWHC (Comm)).

103 *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24.

104 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406.

105 Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 168. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701,704 C-D.

106 Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 168.

107 Townsend 2009 *Unif. L. Rev* 555. See also Dekaney and Lewis 2008 U.N.S.W.L.J. 347. See also Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 168. See also Grant 2007 *ICLQ* 871. See also Thomas 2010 http://www.clients.squareeye.net. See also Williams and Kawharu 2009 *N.Z.L Rev* 107. See also Alway Associates 2007 http://alway-associates.co.uk.

108 Poudret and Besson *Comparative Law* 132.(citing the writings of Schwebel) See also Tsen-Ta 1995 *S.Ac.L.J.* 422. (also citing the writings of Schwebel)

109 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406

110 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406.See also Poudret and Besson *Comparative Law* 141-142.

jurisdiction.[111] In this regard, the author cites an example of how it would be advisable for an English businessman contracting with another businessman in Kuwait to subject their arbitration clause to English law so as to avoid the application of the Kuwaiti arbitration law which has Sharia informed proscriptions. According to Luttrell[112] these would ensure that the validity of the arbitration clause is not put at risk of the undesirable Kuwait laws.

This would mean that in the above situation the main contract may be governed by the law of Kuwait (also known as the *lex contractus*) whereas the arbitration clause would be governed by English law. However, if the parties to the contract do not expressly specify the law governing the arbitration clause usually the law governing the arbitration tribunal and proceedings (commonly known as the *lex arbitri*) would also govern the arbitration clause.[113] This means that if the parties choose South Africa as the place where the arbitration proceedings will be conducted, then the law of South Africa will apply to the arbitration clause.[114] These possibilities depend on the terms of the contract and the type of the dispute.[115]

In light of the above, essential features emerge, namely: that the arbitration clause survives the termination of the main contract in which it is incorporated and that the arbitration clause stays alive upon the termination of the main contract. These features are collectively known as the doctrine of separability.

3.4 The evolvement of the doctrine of separability

The doctrine of separability was not always accepted in English law. The resistance to the recognition thereof was due to the fact that the wording used in an arbitration agreement was not always wide enough to survive the termination of the main

111 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406.
112 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406.
113 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406.
114 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406.
115 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406See also Poudret and Besson *Comparative Law* 141-142.

agreement.[116] This was illustrated in the *Heyman v Darwins Ltd*[117] *(hereinafter Heyman* case). The House of Lords held that one would be prevented from relying on the arbitration clause if the main agreement itself was void or for some other reason unenforceable.[118] It was the court's decision that generally the arbitration agreement itself, which formed part of the main agreement, could not survive independently from the main contract.[119]

However, where the main contract is repudiated and the other party has accepted repudiation, then the arbitration agreement would survive for purposes of assessing claims arising out of the main contract.[120] The courts in England progressively moved to a complete doctrine of separability as is illustrated through certain court cases.[121] Therefore, it is necessary to discuss and trace the practical interpretation and application of the doctrine of separability through case law.

3.4.1 Heyman v Darwins Ltd 1942 AC 356

3.4.1.1Background

On 19th February 1938 the respondents, who were in the business of manufacturing steel, appointed the appellants to be the sole selling agents of their steel tools in the

116 *Heyman v Darwins Ltd* 1942 AC 356,371-372. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344. See also Chan 2009 http:// www.en.kyushu-u.ac.

117 1942 AC 356. This case is discussed in the next heading. See also Indornigie *The Legal Regime of International Commercial Arbitration* 59

118 *Heyman v Darwins Ltd* 1942 AC 356. See also the following two cases discussing the decision of *Heyman v Darwins* case; *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also *Beinjing Jianlong Heavy Industry Group v Golden Ocean Limited and others* 2013 EWHC (Comm).

119 *Heyman v Darwins Ltd* 1942 AC 356,371-372. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344.

120 *Heyman v Darwins Ltd* 1942 AC 356,361. See also Chan 2009 http:// www.en.kyushu-u.ac. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344.

121 *Overseas Union Inc v AA Mutual International Ltd* [1988] 2 LIoyd's Rep 63. See also *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701. See also *Fiona Trust & Holding Corporation v Privalov* 2007 Bus L R 1719. Note however that this is just a selective few to be discussed in this paper. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344.

Western hemisphere specifically in New Zealand, Australia and India.[122] The agreement contained an arbitration clause which stated that:[123]

> If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act of 1889 or any then subsiding statutory modification thereof.

In July 1939 the respondent complained that the appellants were selling the respondent's steel in violation of the contract by selling steel tools to other countries not mentioned in the contract. As a result the respondents were faced with the risk of having to meet claims from unforeseen dissatisfied buyers. The respondents refused to compensate the appellants for claims made by these unforeseen buyers. The appellants alleged that the respondent had repudiated and/or demonstrated an intention not to perform in terms of the contract.[124] The respondents admitted the existence of the contract but denied that they had repudiated it and applied to have the action stayed out of court in order for the dispute to be dealt with in terms of the arbitration clause.[125] The House of Lords was asked to construe the aforementioned arbitration agreement and determine if it would survive repudiation of the main contract.[126]

3.4.1.2 The court's *ratio*

The court held that in construing arbitration agreements it is important to have regard for the words used. Lord Viscount Simon L.C observed that an arbitration clause can be broadly worded in order to cover issues of avoidance of contracts.[127] He noted that

122 1942 AC 356,357. For further discussion of this decision see Chan 2009 http:// www.en.kyushu-u.ac. See also Thomas 2010 http://www.clients.squareeye.net.

123 1942 AC 356,357. For further discussion of this decision see also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344.

124 1942 AC 356,358. F.

125 1942 AC 356,358.

126 1942 AC 356,359.

127 1942 AC 356, 364. Referred to in *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. See also Chan 2009 http:// www.en.kyushu-u.ac.Discussed also in Merkin *Arbitration Act 1996: An Annotated Guide* 22. Referred to in *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701. See also

wording such as 'all disputes' or 'all disputes arising out of' or 'in connection with this contract' would give the contract an effect that the issues of voidness, voidability and illegality would ensure that the arbitration agreement survives the end of the main contract.[128] Conversely, words such as 'any dispute arising under this contract' are *prima facie* not interpreted as being wide enough to give the arbitration agreement the separability effect.[129] Therefore, the court held that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed.[130] All the members of the House of Lords agreed that even on the basis that the appellants had rescinded the contract for a repudiatory breach by the respondents the arbitration clause still applied.[131]

3.4.1.3 The contribution of the *Heyman* case on the application of the doctrine of separability

The *Heyman* case is the root of partial acceptance of the doctrine of separability in English law.[132] Although the case did not outline a complete doctrine of separability, it shall however be observed that the case took some tentative steps to the complete acceptance of the doctrine of separability.[133] The *Heyman* decision discarded the argument originally accepted by the House of Lords in *National British and Irish Millers*

Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 295. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24.

128 *Heyman v Darwins Ltd* 1942 AC 356, 364. Referred to in *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. Discussed also in Merkin *Arbitration Act 1996: An Annotated Guide* 22. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 295. Referred to in *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701.

129 1942 AC 356, 358. See the effect of *Heyman v Darwins* decision in the English arbitration law in *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 295. See also *Beinjing Jianlong Heavy Industry Group v Golden Ocean Limited and others* 2013 EWHC (Comm).

130 1942 AC 356, 358.

131 1942 AC 356, 402. See also Chan 2009 http:// www.en.kyushu-u.ac.

132 Merkin *Arbitration Act 1996: An Annotated Guide* 22. See also further discussion of *Heyman v Darwins* decision in Indornigie *The Legal Regime of International Commercial Arbitration* 62. Also discussed in Trebilcock 1967-1970 *Adel.L. Rev* 109.

133 Merkin *Arbitration Act 1996: An Annotated Guide* 22. See also Thomas 2010 http://www.clients.squareeye.net. See also Malloy 2002 *Transnat'l Law* 47. See also Townsend 2009 *Unif. L. Rev* 555. See also Alway Associates 2007 http://alway-associates.co.uk.

Insurance Co[134] which ruled that a breach of contract which led to the termination of that contract precluded reliance on the arbitration clause. [135]

The result of the *Heyman* decision is that an arbitration agreement may survive the termination of the main contract.[136] The effect of the statement of law stated by Lord Viscount Simon LC referred to above is that, where the main contract has come to an end due to repudiation it does not mean that the arbitration agreement becomes invalid or is rendered ineffective.[137] In essence this means that the arbitration agreement survives in order to resolve disputes arising out of the main contract. What is of crucial importance to remember is that in order for the arbitration agreement to survive the termination of the main contract, the words used in the arbitration agreement have to be wide enough to ensure that the arbitration agreement survives the termination of said main agreement.[138]

According to Trebilcock[139] the primary impact of this decision illustrates that in 1942 the English courts already recognised the need to give effect to the intention of the parties to have their dispute decided by means of arbitration. It is therefore submitted that the

134 [1915] AC 499. See also Merkin *Arbitration Act 1996: An Annotated Guide* 22. See also Thomas 2010 http://www.clients.squareeye.net.

135 Merkin *Arbitration Act 1996: An Annotated Guide* 22.

136 GLW 1942 *The Modern Law Review* 78. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701. See also Thomas 2010 http://www.clients.squareeye.net. See also *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. See also *Fiona Trust & Holding Corporation v Privalov* 2007 Bus L R 1719. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344.

137 Indornigie *The Legal Regime of International Commercial Arbitration* 59. See also Chan 2009 http:// www.en.kyushu-u.ac. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344. See also *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 295. See also *Overseas Union Inc v AA Mutual International Ltd*1988 2 LIoyd's Rep 63.

138 1942 AC 356, 364. Referred to in *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. See also Chan 2009 http:// www.en.kyushu-u.ac.Discussed also in Merkin *Arbitration Act 1996: An Annotated Guide* 22. Referred to in *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 295. See also Thomas 2010 http://www.clients.squareeye.net.

139 Trebilcock 1967-1970 *Adel.L. Rev* 108.

Heyman case laid down the foundation of the complete doctrine of separability in English law.[140]

3.4.2 Ashville Investments Ltd v Elmer Contractors Ltd 1988 2 All ER 577

3.4.2.1 Background

The appellant Ashville Investment Ltd entered into a contract with Elmer Contractors for the construction of six warehouse units in Workingham. Negotiations for this work began in April 1982. Thereafter, Ashville invited Elmer Contractors to tender based on a specification dated 9 December and drawings dated 21 December 1982. Elmer Contractors quoted a price for the building works referred to above. Subsequently thereafter Elmer Contractors alleged that there was some inconsistency between the specifications on which they had tendered, on 9 December, and those included in the building contract of 21 December 1982. It was Elmer Contractors contention that they had been unaware of this inconsistency until the construction of the six warehouses had commenced.[141] Ashville, on the other hand, alleged that Elmer Contractors had been notified of these inconsistencies at a meeting held on 22 December 1982 before the contract was signed.[142] Because of this Elmer Contractors invoked arbitration proceedings under the arbitration clause contained in the contract. Elmer Contractors claimed rectification of the contract on the ground of mistake and compensation for fraudulent misrepresentation by Ashville. It was Elmer Contractor's contention that they were induced to execute the agreement in question.[143] The relevant part of the arbitration agreement provided as follows:[144]

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140 Thomas 2010 http://www.clients.squareeye.net. See also Merkin *Arbitration Act 1996: An Annotated Guide* 22. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 295. See also Poudret and Besson *Comparative Law* 133.See also Rosen 1994 *Fordham International Law Journal* 606. See also Indornigie *The Legal Regime of International Commercial Arbitration* 61.

141 1988 2 All ER 577, 579. See also Chan 2009 http:// www.en.kyushu-u.ac. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344.

142 1988 2 All ER 577, 579.

143 1988 2 All ER 577, 579.

144 1988 2 All ER 577, 581.

> …in the case of any dispute or difference ... as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith ... such dispute or difference shall be and is hereby referred to the arbitration and final decision of ...

The primary issue that the court had to decide upon was whether the dispute fell within the scope of the arbitration clause.[145] The court held that the question as to whether a dispute between the parties to a contract fell within the ambit of an agreement to arbitrate was primarily a question of construction of the arbitration clause.[146]

3.4.2.2 The court's *ratio*

The decision in *Ashville Investments Ltd v Elmer Contractors Ltd*[147] (hereinafter *Ashville* case) was primarily based on the *ratio decidendi* in the *Heyman* case.[148] As previously observed the *ratio decidendi* in the *Heyman* case is that that an arbitration clause can be broadly worded in order to cover issues of avoidance of contracts.[149] Lord Viscount Simon L.C in the *Heyman* case observed that wording such as 'all disputes' or 'all disputes arising out of' or 'in connection with this contract' would ensure that the arbitration agreement survives the end of the main contract.[150]

145 1988 2 All ER 577, 581.
146 1988 2 All ER 577, 581.
147 1988 2 All ER 577.
148 Chan 2009 http:// www.en.kyushu-u.ac. See also Merkin *Arbitration Act 1996: An Annotated Guide* 22.
149 *Heyman v Darwins Ltd* 1942 AC 356, 364. Referred to in *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. Discussed also in Merkin *Arbitration Act 1996: An Annotated Guide* 22. Referred to in *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344. See also Chan 2009 http:// www.en.kyushu-u.ac.Discussed also in Merkin *Arbitration Act 1996: An Annotated Guide* 22. Referred to in *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 295.
150 *Heyman v Darwins Ltd* 1942 AC 356, 364. Referred to in *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344. Discussed also in Merkin *Arbitration Act 1996: An Annotated Guide* 22. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 295. Referred to in *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701.

3.4.2.3 The contribution of the *Ashville* case on the application of the doctrine of separability

Although the court affirmed the decision in the *Heyman* case, the court in the *Ashville* case went a step further and observed that in construing an arbitration agreement the court has to inform itself by having regard for the circumstances of each case.[151] The court reasoned that in seeking to construe a clause of an arbitration contract, there was no scope for adopting either a liberal or a narrow approach.[152] Rosen[153] argues that this is to ensure that the court does not construe the words used in an arbitration agreement the same way as in other decided cases because although the words may have the same meaning they may be used in a different context.

3.4.3 Overseas Union Inc v AA Mutual International Ltd 1988 2 Lloyd's Rep 63

3.4.3.1 Background

The defendant, AA Mutual International Insurance Co Ltd, was a subsidiary of the South African insurer AA Mutual Insurance Association Ltd. In November 1981 AA Mutual International Insurance Co Ltd concluded a reinsurance agreement with the plaintiff, Overseas Union Insurance Ltd, a Singaporean company.[154] In terms of this agreement Overseas Union Insurance Ltd, as reinsurers, undertook to pay all claims in excess of £150 000 against AA Mutual International Insurance Co Ltd. AA Mutual International Insurance Co Ltd as the reinsured agreed to pay Overseas Union Insurance Ltd a premium of £20 000 for this cover. The agreement contained the following arbitration clause: [155]

151 1988 2 All ER 577, 581. See also the discussion of the judgment by Rosen 1994 *Fordham International Law Journal* 628.
152 1988 2 All ER 577, 581. See also the discussion of the judgment by Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 344.
153 Rosen 1994 *Fordham International Law Journal* 628.
154 1988 2 LIoyd's Rep 69.
155 1988 2 LIoyd's Rep 69. See also Niekerk1990 *S. Afr. Mercantile L.J* 88.

> All disputes or differences between the Company and the Reinsurer hereon in respect of this Reinsurance shall be referred to two Arbitrators…The Arbitrators ... shall interpret this Reinsurance as an honourable engagement and they shall make their award with a view of effecting the general purpose of this Reinsurance in a reasonable manner, rather than in accordance with a literal interpretation of the language, the true intention of the parties being that the Reinsurance shall follow the fortunes of the Company…

On the same day a further agreement was concluded between Overseas Union Insurance Ltd and Plummer on behalf of AA Mutual Insurance Association Ltd. In terms of this retrocession agreement AA Mutual Insurance Association Ltd as reinsurers undertook to pay Overseas Union Insurance Ltd all the amounts paid by it in terms of its reinsurance agreement with AA Mutual International Insurance Co Ltd and/or to indemnify it for all losses arising out of that agreement. Overseas Union Insurance Ltd as reinsured, agreed to pay a premium of £20 000.[156]

The parties had different views on the interpretation and purpose of the conclusion of this two-stage reinsurance arrangement.[157] In March 1987 AA Mutual International Insurance Co Ltd had a claim on the reinsurance agreement and it referred the claim to arbitration. Overseas Union Insurance Ltd in turn, instituted the action to seek a declaratory order establishing that it was not liable under the reinsurance agreement. In reply AA Mutual International Insurance Co Ltd applied for the action to be stayed in terms of section 1 of the English *Arbitration Act*.[158] Overseas Union Insurance Ltd had two contentions namely; the scope and interpretation of the arbitration clause, and its legality. [159]

3.4.3.2 The court's *ratio*

Judge Evans held that that whether or not a particular dispute falls within the arbitration agreement is primarily a question of the proper interpretation of the agreement in light of

156 Niekerk1990 *S. Afr. Mercantile L.J* 89.
157 Niekerk1990 *S. Afr. Mercantile L.J* 89.
158 *Act of* 1975.
159 Niekerk1990 *S. Afr. Mercantile L.J* 89.

its surrounding circumstances.[160] *Prima facie* the decision in the *Overseas Union Inc v AA Mutual International Ltd*[161] (hereinafter *Overseas Union* case) was primarily based on the *ratio decidendi* in the *Ashville* case. Judge Evans agreed with the rejection that was discussed by Judge May in the *Ashville* case.[162] Niekerk[163] is of the view that the rejection was based on the notion that a broad and liberal approach rather than a narrow and legalistic approach is to be adopted in the interpretation of arbitration clauses.[164] The court observed that the question is merely one of interpretation and there is no scope for adopting any particular approach in this regard.[165]

3.4.3.3 The contribution of the *Overseas Union* case on the application of the doctrine of separability

The above approach of the court is indicative of some development in the interpretation of arbitration clauses. This development is to ensure that the court does not construe the words used in an arbitration agreement in the same way as other decided cases because the words may have the same meaning but are used in a different context.[166]

The second contribution made by the *Overseas Union Inc v AA Mutual International Ltd*[167] relates to the legal significance of the last sentence of the aforementioned arbitration clause.[168] The last sentence of the arbitration clause quoted above is referred

160 1988 2 Lloyd's Rep 63, 66-67. See also the discussion of the judgement in Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 345. Also discussed in *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40.

161 1988 2 LIoyd's Rep 63.

162 *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577.

163 Niekerk1990 *S. Afr. Mercantile L.J* 91. See also Herbst "Interpretation of Arbitration Agreements" 123.

164 *Ashville Investments Ltd v Elmer Contractors Ltd* 1988 2 All ER 577, 582. See also Niekerk1990 *S. Afr. Mercantile L.J* 91

165 *Ashville Investments Ltd v Elmer Contractors Ltd* 1988 2 All ER 577, 582. See also *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 345.

166 Rosen 1994 *Fordham International Law Journal* 628. See also *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577, 582. See also Indornigie *The Legal Regime of International Commercial Arbitration* 23.

167 1988 2 LIoyd's Rep 63.

168 The Arbitrators ... shall interpret this Reinsurance as an honourable engagement and they shall make their award with a view of effecting the general purpose of this Reinsurance in a reasonable manner, rather than in accordance with a literal interpretation of the language, the

to as an equity or honourable engagement clause and frequently appears in reinsurance contracts.[169] This sentence of the aforementioned arbitration clause gave the arbitrator the power to interpret the contract more leniently than a court of law.[170] It gave the arbitrator the power to draw upon his own experience and knowledge of commercial matters without the need for formal proof. Judge Evans stated that the precise legal effect of this last sentence of arbitration clause was doubtful.[171] He was of the view that it did not affect the scope of an arbitrator's jurisdiction.[172] He expressed his doubt that the arbitrator was entitled to embark upon any enquiry other than the one required by law.[173]

The observation of the court on the interpretation of the equity or honourable engagement clause appears to be convincing. This is because arbitrators are subject to the rules of natural justice.[174] It is submitted that the observance of the rules of natural justice would effectively render arbitrators to embark upon an enquiry required by law.

Most importantly, what ought to be observed from the *Overseas Union* case is that the court acknowledged the importance of observing the intention of the parties to arbitration. The court held that that the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen are more likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by arbitration.[175] It is therefore submitted that the court had in mind that it was time that English courts fully recognised the concept of the

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true intention of the parties being that the Reinsurance shall follow the fortunes of the Company…

169 Niekerk1990 *S. Afr. Mercantile L.J* 91. See also *Overseas Union Inc v AA Mutual International Ltd* 1988 2 LIoyd's Rep 63, 69-72.

170 *Overseas Union Inc v AA Mutual International Ltd* 1988 2 LIoyd's Rep 63, 69-72.

171 1988 2 LIoyd's Rep 63, 69-72.

172 1988 2 LIoyd's Rep 63, 69-72.

173 *Overseas Union Inc v AA Mutual International Ltd* 1988 2 LIoyd's Rep 63, 69-72.

174 Buttler and Finsen *Arbitration in South Africa Law and Practice* 2.(although discussing South African law, it is submitted that the principles are similar)

175 1988 2 LIoyd's Rep 69. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 345.

doctrine of separability. This, as Judge Evans stated would render arbitration as an alternative dispute resolution to be a speedy process.[176]

The English position in respect of the doctrine of separability changed in 1993 due to the decision of *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd*[177] (hereinafter *Harbour Assurance* case).

3.4.4 Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd 1993 QB 701

3.4.4.1 Background

The plaintiff in this case agreed to reinsure the defendant in respect of risks for the years 1980, 1981 and 1982. After, the contract had been concluded, the plaintiff alleged that the defendants were not registered or approved to carry any insurance business in Great Britain as provided for under the *Insurance Company Acts* 1974 and 1981. It was the plaintiff's argument that the agreement was void for illegality. The reinsurance contract between the plaintiff and the defendants contained an arbitration clause. The relevant terms of the clause were as follows:[178]

> All disputes or differences arising out of this agreement shall be submitted to the decision of two arbitrators one to be chosen by each party and in the event of the arbitrators failing to agree, to the decision of an umpire to be chosen by the arbitrators before entering upon the reference...

The court had to determine whether the dispute was a 'dispute arising out of this agreement' hence falling within the scope of the arbitration clause or not. [179]

176 *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175 (CA). See also Moses *The Principles and Practice of International Commercial Arbitration* 2. See also St John Sutton Gill and Gearing *Russell on Arbitration* 11.

177 1993 QB 701.

178 1993 QB 701,707.

179 1993 QB 701,707. See also Lin Yu 2010 *Contemp. Asia Arb. J.* 297. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 347. See also Thomas 2010 http://www.clients.squareeye.net. See also Williams and Kawharu 2009 *N.Z.L Rev* 110. See also Grant 2007 *ICLQ* 877.

3.4.4.2 The court's *ratio*

The court in this case held that even though the underlying contract was void for illegality, the arbitration clause could still survive as the illegality of the underlying contract did not impeach the arbitration agreement.[180] The observation of the court was that the arbitration agreement and the underlying contract need not rise and fall together.[181]

3.5 The acceptance of the doctrine of separability

In 1993 England saw the need to bring its law of arbitration on par with other jurisdictions[182] and the need to give full effect to the issue of the doctrine of separability of arbitration clauses. *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd*[183] (hereinafter *Harbour Assurance* case) gives effect to the words of Schwebel[184] that when parties conclude a contract containing an arbitration clause, they are considered as concluding not one, but two agreements.[185] As the court rightly pointed out, the basis of the development of separability was the desire to give effect to the intention of the parties to an arbitration agreement.[186]

The decision of the court is more convincing because it would be unreasonable to attribute to the parties' arbitration agreement an assumption that they intended to have

180 1993 QB 701, 704-705.
181 1993 QB 701, 704-705.
182 Poudret and Besson *Comparative Law* 140.
183 1993 QB 701. See also HSU 1995 *S.Ac.L.J* 287. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 343. See also Merkin *Arbitration Act 1996: An Annotated Guide* 22.
184 Townsend 2009 *Unif. L. Rev* 565.
185 As cited in Poudret and Besson *Comparative Law* 132. Also cited in Tsen- Ta 1995 *S.Ac.L.J.* 422
186 1993 QB 701, 704-705. . See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also *Lesotho Highlands Development Authority v Impregilo SPA & Others* [2005] UKHL 43. See also *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40.

their dispute be decided before the court when in fact they intended to have it resolved by an arbitrator.[187]

It may also be important to note that a further influence on the development of the doctrine of separability was Article 16(1)[188] of the UNCITRAL Model law.[189] To achieve uniformity in international commercial arbitration throughout the world, in 1996 the UN General Assembly drafted the UNCITRAL Model Law.[190] It was developed with the aim of providing a uniform standard in arbitral proceedings.[191] A number of advantages associated with the Model Law may be identified.[192] One of which is the separability of an arbitration clause from the main contract.

3.5.1 Statutory provision for the doctrine of separability

As previously stated in chapter two the decision of the *Harbour Assurance* case led to the introduction of section 7 of the *Arbitration Act*[193] dealing with the separability of arbitration clauses from the main contract. Section 7 of the *Arbitration Act*[194] states that:

> 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

187 Fiona Trust & Holding Corporation v Yuri 2007 APP .LR 01/24. See also Poudret and Besson *Comparative Law* 132. See also Tsen- Ta 1995 *S.Ac.L.J.* 422. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd*1993 QB 701, 704-705.

188 Article 16(1) provides; the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision of the arbitral tribunal that the contract is null and void shall not entail *ipsojure* the invalidity of the arbitration clause.

189 Mantilla-Serrano and Adam 2008 *U.N.S.W. Law Journal* 307-308. See also Herrmann 1998 *Uniform Law Review* 487.

190 Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 341

191 Mantilla-Serrano and Adam 2008 *UNSW Law Journal* 307-308.

192 Griffith and Mitchell 2002 *Melbourne Journal of International Law* 187.

193 *Arbitration Act* of 1996. Section 7 provides; 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 shall for that purpose be treated as a distinct agreement.

194 *Arbitration Act* of 1996.

> agreement is invalid, or did not come into existence or has become ineffective, and shall for that purpose be treated as a distinct agreement.

This provision in effect changes the previous principle that the separability of the arbitration clause is to be determined by the wording used in the arbitration agreement.[195] According to Merkin,[196] an arbitration agreement or an agreement to arbitrate may take two forms, namely (i) an arbitration clause within a main agreement or (ii) a distinct contract contained in a separate document.[197] However, section 7 has been drafted in wide terms. In this regard, section 7 does not differentiate between an arbitration clause contained within the main agreement and the arbitration clause contained in a distinct and separate document. Therefore, for section 7 to be applicable to an arbitration clause, it is not necessary for the agreement to arbitrate to be in a separate document or within the main agreement.

3.5.2 The interpretation of section 7 post the Harbour Assurance case.

3.5.2.1Fiona Trust & Holding Corporation v Yuri 2007 APP .LR 01/24

3.5.2.2 Background

Between February 2001 and September 2003, eight charter party contracts were concluded by ship-owning companies in the Russian Sovcomflot fleet as owners. [198] Each of these charter party contracts contained an arbitration clause in the following terms: [199]

> ...dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree...

195 Dekaney and Lewis 2008 *U.N.S.W.L.J*. 347.
196 Merkin *Arbitration Act 1996: An Annotated Guide* 22.
197 Poudret and Besson *Comparative Law* 133.
198 Townsend 2009 *Unif. L. Rev* 555. See also Williams and Kawharu 2009 *N.Z.L Rev* 107. See also Grant 2007 *ICLQ* 871.
199 Grant 2007 *ICLQ* 872.

The clause also gave either party the right to choose to have any dispute referred to arbitration.[200] In April 2006, it was alleged by the appellants that Mr Nikitin, Mr Privalov and other Russian individuals, resident in England, at the material time successfully bribed one or more directors or employees of Sovcomflot.[201] One of the allegations was that the contracts were tainted with bribery and contained terms which were highly favourable to the charterers.[202] As such the owners purported to rescind the eight charter party on the grounds of fraud.[203] Upon rescission of the contract on the part of the owners, the charterers decided to refer the dispute to arbitration.[204] The owners on the other hand applied to court pursuant to section 72[205] of the English *Arbitration Act*[206] for an injunction restraining the arbitration on the ground that the charter party and the arbitration agreements contained therein had been rescinded.[207] The material issue for determination was whether the word 'under' in the aforementioned arbitration clause covered disputes between the parties as to whether the charter party was void due to the alleged bribery.

3.5.2.3 The decision of the court *a quo*

Justice Morison found that there was in fact bribery which occurred between Mr Nikitin and Sovcomflot officials.[208] As such Justice Morison concluded that the owners had never truly agreed to enter into the contracts.[209] He therefore held that the arbitration clause had itself been rescinded along with the main charters. Furthermore the

200 Grant 2007 *ICLQ* 871. Also discussed in Thomas 2010 http://www.clients.squareeye.net. See also Townsend 2009 *Unif. L. Rev* 555. See also Alway Associates 2007 http://alway-associates.co.uk. See also Williams and Kawharu 2009 *N.Z.L Rev* 107.

201 Grant 2007 *ICLQ* 871.

202 Grant 2007 *ICLQ* 872.

203 Grant 2007 *ICLQ* 872.

204 Grant 2007 *ICLQ* 872.

205 Section 72(1) provides; A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.

206 *Arbitration Act* of 1996.

207 Grant 2007 *ICLQ* 872.

208 Townsend 2009 *Unif. L. Rev* 555. For further discussion of this judgement see also Williams and Kawharu 2009 *N.Z.L Rev* 107.

209 Williams and Kawharu 2009 *N.Z.L Rev* 107.

arbitration clause was not separable from the charters.[210] Accordingly Justice Morison refused the charterers application to a stay of proceedings and in turn granted the owners' application for an injunction restraining arbitration proceedings.

What may be observed from the judgement given by Justice Morison above is that, the court applied the law as it was before the decision in *Harbour Assurance Co* case[211] to the extent that the fact that the main agreement was itself ineffective or for some other reason unenforceable would consequently prevent reliance on the arbitration clause. Most importantly, Justice Morison stayed arbitration proceedings pursuant to section 72[212] of the English *Arbitration Act*[213] and declined to stay judicial proceedings under section 9[214] of the English *Arbitration Act.*[215] However, on appeal this decision was reversed.[216]

3.5.2.4 The court of appeal decision

The Court of Appeal held that on the true construction of the arbitration clause, a dispute whether the contract should be set aside or rescinded on the grounds of bribery fell within the arbitration clause.[217] Lord Justice Longmore observed that ever since the *Heyman v Darwins Ltd*[218] decision, the English common law has been evolving towards the recognition that an arbitration clause is a separate contract which survives the

210 Grant 2007 *ICLQ* 871.
211 1993 QB 701.
212 Section 72(1) provides; A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.
213 *Arbitration Act* of 1996.
214 Grant 2007 *ICLQ* 872. See also Thomas 2010 http://www.clients.squareeye.net. Section 9(1) provides; A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be refereed to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
215 *Arbitration Act* of 1996.
216 Townsend 2009 *Unif. L. Rev* 558.
217 Williams and Kawharu 2009 *N.Z.L Rev* 107.
218 1942 AC 356.

termination of the main contract.[219] Lord Hoffmann, agreeing with the other judges, held that the principle of separability incorporated in section 7 is that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement.[220] This as Townsend,[221] pointed out, means that the arbitration agreement must be treated as a separate agreement from the main agreement.

3.5.3 Lessons from the court of appeal decision

The decision of the *Fiona Trust* case illustrates two different extremes of the English law precedent namely, the position of the law prior to the 1996 Act and secondly the position of the law post the 1996 Act.[222] The first few pages of this chapter illustrated judicial precedent as it was prior to the enactment of the 1996 Act. It may be observed that prior to the 1996 Act the position of the law was to approach an arbitration clause with the aim of making a line of demarcation between disputes arising 'under' and disputes arising 'out of'. The holding of the courts was agreement that disputes arising 'out of' a contract should be regarded as a wider agreement than agreements which said disputes 'under' a contract. Mindful of the above, it may therefore be observed that the decision of Justice Morison in the court a quo was in essence based on the decisions delivered prior to the 1996 Act.

The Court of Appeal decision on the other hand illustrate judicial precedent as laid down in the *Harbour Assurance* case which held that even though the underlying contract was void for illegality, the arbitration clause could still survive as the illegality of the underlying contract did not impeach the arbitration agreement.[223] Lord Justice Longmore observed that the *Fiona Trust* case was a 'fresh start' to the effect that the

219 Townsend 2009 *Unif. L. Rev* 555. See also Williams and Kawharu 2009 *N.Z.L Rev* 107. See also Grant 2007 *ICLQ* 871. See also Thomas 2010 http://www.clients.squareeye.net. See also Alway Associates 2007 http://alway-associates.co.uk.
220 Grant 2007 *ICLQ* 871.
221 Townsend 2009 *Unif. L. Rev* 555.
222 Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 342. See also Townsend 2009 *Unif. L. Rev* 560
223 1993 QB 701, 704-705.

meaning of the phrases 'under' or 'out of' the contract was mutually interchangeable.[224] Unlike the decision of the court *a quo*, the approach of the Court of Appeal is much more liberal.

The above law may also be found in the most recent decision in the *Beinjing Jianlong Heavy Industry Group v Golden Ocean Limited and others*[225] where it was held that it was a common ground that an arbitration agreement is to be treated as a distinct and separate contract from the main contract of which it forms part. With this background, it is submitted that the decision of the Court of Appeal is more favourable to the parties to arbitration than that of the court *a quo*. This is because the Court of Appeal decision captures the intention of the parties to resolve their matter through arbitration.[226] In fact, it was observed by Justice Steyn in the *Harbour Assurance* case that it would be unreasonable to attribute to the parties' arbitration agreement an assumption that they intended to have their dispute decided before the court when in fact they intended to have it resolved by the arbitrator.[227] Therefore for uniform international arbitration and to give effect to the intention of the parties, it is proper for the court to treat the arbitration agreement and the main contract as two different contracts.

3.6 The effect of the doctrine of separabilty

Two important issues emanate from the discussion of the decision in the *Harbour Assurance* case, the influence of the UNCITRAL Model Law, the enactment of section 7 and the decision of the *Fiona Trust* case. Firstly, the principle of *competence-competence* or *Competence de la competence,* which provides that arbitrators are free to determine their own jurisdiction under the main agreement;[228] Secondly, the issue of

224 Townsend 2009 *Unif. L. Rev* 560. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 342.
225 2013 EWHC (Comm)
226 Tsen- Ta 1995 *S.Ac.L.J.* 422. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701, 704.
227 1993 QB 701, 704-705.
228 Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 341.

the independence of the arbitration agreement from the main contract is also provided for.[229]

The independence of the arbitration agreement from the main contract and *competence-competence* or *Competence de la competence* are two principles that have been associated with the doctrine of separability.[230] They are different but frequently linked for the reason that they share a common goal;[231] to prevent early judicial intervention from obstructing the arbitration process.[232] These two principles are discussed below.

3.6.1 Independence of the arbitration agreement

According to Luttrell[233] the doctrine of separability recognises that an arbitration agreement has a separate life from the main contract. The result of this is that the validity of each contract does not depend on each other's existence.[234] Therefore, the arbitration agreement may be able to survive the termination of the main contract. As a

229 Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 341. See also Grant 2007 *ICLQ* 873.

230 Grant 2007 *ICLQ* 873. See also the discussion of the doctrine of separability under the Singaporean jurisdiction in Tsen- Ta 1995 *S.Ac.L.J.* 422. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 242.(discussing *competence de la competence* under the South African jurisdiction). The author discusses the advantages of South Africa adopting the UNCITRAL Model Law and consequently a complete doctrine of separability).

231 Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 341. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1116. (The author discusses the concept of *competence de la competence* and the doctrine of separability under the American law. He points out that both the concept of *competence de la competence* and the doctrine of separability address the question 'who decides arbitrability- courts or arbitrators?. The author further divides the court arbitration process into three stages, namely; (a) litigation which addresses the issue as to whether the court should hear the dispute or send the parties to arbitration (b) decision making by arbitrators concerning whether to hear the dispute or decline jurisdiction and (c) court review of an award (set aside or recognition and enforcement)). This is the basic principles of the concept of *competence de la competence.*

232 Barcelo 2003 *Vand. J. Transnat'l L.* 1116. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 242. (The author argues that the South African position with respect to the doctrine of separability and *competence de la competence* promotes chances of frustrating an arbitration agreement. For further discussion of this argument, see Chapter Four below).

233 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 405.

234 Poudret and Besson *Comparative Law* 132. See also Tsen- Ta 1995 *S.Ac.L.J.* (The author argues that for this reason, Singapore should adopt the doctrine of separability as applied in English law so as to give effect to the intention of the parties).

result, parties to an arbitration agreement may still refer their dispute to arbitration in accordance with the main contract.[235]

3.6.1.1 The advantages and disadvantages of the independence of an arbitration agreement.

Although the doctrine of separability and the independence of the arbitration agreement may be celebrated for observing the intention of the parties to go for arbitration, the doctrine has however shown some disadvantages. As previously stated in Chapter Two, the arbitration agreement is a contract governed by the principles of contract law.[236] In this regard Reuben[237] argues that independence of the arbitration agreement and the doctrine of separability takes away the fundamental principle of contract law namely, the freedom of contract. The doctrine of separability elevates an arbitration clause above all other clauses in the main contract.[238] As a result, it makes it difficult for a defendant to put up as a defence that the main contract is illegal and ought not to be enforced.[239]

In light of the argument advanced by Reuben[240] the submission is that an arbitration agreement is not an ordinary clause in the main contract. It is a contract in its own right. Put differently, it is a contract within a contract. As in the words of Schwebel[241] when parties conclude a contract containing an arbitration clause, they are considered as concluding not one, but two agreements. The result of this therefore is that the legal validity of the arbitration agreement and the main contract do not depend on each other. Such being the case, the submission is that the independence of the arbitration

235 Malloy 2002 *Transnat'l Law* 47. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701, 704. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also *Lesotho Highlands Development Authority v Impregilo SPA & Others* [2005] UKHL 43. See also *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40.

236 *Cone Textile (Pvt) Ltd v Ayres* 1980 (4) SA 728 (ZA), 732 E-F.

237 Reuben 2003 *SMU Law Review* 845.

238 Reuben 2003 *SMU Law Review* 845.

239 *King v Michael Faraday and Partners Ltd* 1939 2 KB 753.

240 Reuben 2003 *SMU Law Review* 845.

241 As cited in Poudret and Besson *Comparative Law* 132. The writings of Schwebel were not accessed directly. For further discussions of Schwebel's ideas see also Tsen- Ta 1995 *S.Ac.L.J.* 422.

agreement and the doctrine of separability are advantageous as it gives effect to the intention of the parties to an arbitration agreement.[242] Due to the fact that the arbitration agreement is separate and independent from the main contract, the parties may refer their dispute to arbitration in accordance with their main contract.

3.6.2 Competence-competence or *competence de la competence*

Competence de la competence provides that arbitrators are free to determine their own jurisdiction.[243] Under this principle, arbitrators are free to determine issues of the existence and the validity of the arbitration agreement.[244] Therefore as Barcelo[245] rightly pointed out, *competence-competence* is more focused on resolving the policy tension between protecting arbitration from obstruction while at the same time preserving legitimate disputes over arbitrator jurisdiction for a prompt court hearing.

Although, it has been argued by Irani[246] that *competence de la competence* is not fully incorporated in English law, the argument as Tsen- Ta[247] pointed out is that this concept exists in English law. The rationale behind its existence is that when the jurisdiction of arbitrators is challenged the arbitrators may, if they wish; refuse to act until their jurisdiction has been determined by a court.[248] Alternatively, arbitrators can still choose to decide for themselves whether they have jurisdiction or not.[249] This was held in *Christopher Brown v Genossenschaft Osterreichischer Waldbesistzer Holzwirtschftsbetriebe Registrierte GmB.*[250]

242 *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701, 704.
243 Reuben 2003 *SMU Law Review* 836. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 242. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 341. See also Reuben 2003 *SMU Law Review* 836.
244 Barcelo 2003 *Vand. J. Transnat'l L.* 1122.
245 Barcelo 2003 *Vand. J. Transnat'l L.* 1122.
246 Irani 1993 *Asian Business Law Review* 17.
247 Tsen- Ta 1995 *S.Ac.L.J.* 428.
248 Tsen- Ta 1995 *S.Ac.L.J.* 428.
249 Tsen- Ta 1995 *S.Ac.L.J.* 428.
250 1953 2 Lloyds Rep 373, 376. (As cited in Tsen- Ta 1995 *S.Ac.L.J.* 428).

Although one may argue that this position is derived from an old case,[251] it has been shown that this is the correct position under English law as it was affirmed in the *Harbour Assurance* case[252] The court in the *Harbour Assurance* case explained that the approach in English law is that arbitrators may consider and decide whether they have jurisdiction or not.[253] In fact, this seems to be the correct approach as the opening words of Article 16 (1) of the Model Law provides that 'the arbitral tribunal may rule on its own jurisdiction'. The use of the word 'may' suggests that the act of ruling on their jurisdiction is not mandatory. It is a choice that the arbitrator may opt to excise or not.

Against this background, Roodt[254] advocates two approaches with regard *competence de la competence* namely negative *competence de la competence* and positive *competence de la competence.* The positive effect of the principle is that arbitrators have the power to decide challenges to their own jurisdiction.[255] The arbitrators are not required to stay the proceedings to seek judicial guidance.[256] Under the positive effect, the arbitrator determines the existence of the arbitration clause[257] and the question as to whether the agreement is void or illegal.[258] In its negative effect, *competence de la competence* dictates that the judge has to wait until arbitration proceedings come to an end before inquiring about the validity or effect of an arbitration clause.[259] The negative effect originated in French law and is known as proarbitration character.[260] It is encapsulated in the 1981 enactment of Article 1458 of the French New Code of Civil

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251 *Genossenschaft Osterreichischer Waldbesistzer Holzwirtschftsbetriebe Registrierte GmBH,*1953 2 Lloyds Rep 373, 376.

252 *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701. (As cited in Tsen- Ta 1995 *S.Ac.L.J.* 429). See also Barcelo 2003 *Vand. J. Transnat'l L.* 1123-1124.

253 Roodt 2011 *Eur. J.L. Reform* 418. See also Tsen- Ta 1995 *S.Ac.L.J.* 429. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1123-1124.

254 Roodt 2011 *Afr. J.Int'l & Comp. L.* 242.

255 Park "The Arbitrator's Jurisdiction to Determine Jurisdiction" 26. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1123-1124.

256 Barcelo 2003 *Vand. J. Transnat'l L.* 1124.

257 Rosen 1994 *Fordham International Law Journal* 608.

258 Merkin *Arbitration Act 1996: An Annotated Guide* 22. See also Park "The Arbitrator's Jurisdiction to Determine Jurisdiction" 26. See also Rosen 1994 *Fordham International Law Journal* 608.

259 Roodt 2011 *Afr. J.Int'l & Comp. L.* 242. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1123-1124. Park "The Arbitrator's Jurisdiction to Determine Jurisdiction" 26.

260 Poudret and Besson *Comparative Law* 132. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1124.

Procedure.[261] Although the negative effect concept concerns the domestic approach in France, the principle has been extended to international arbitration.[262]

However, the English Act which was influenced by the UNCITRAL Model Law[263] has varied the issue concerning the negative effect of *competence de la competence.*[264] Section 30(1)[265] allows the arbitrators to give a decision on jurisdiction either in a preliminary award or in the final award. [266] To circumvent the possibility of arbitrators refusing to render a preliminary award, section 31(5)[267] allows parties through an agreement to force the arbitrators to decide jurisdiction preliminary.[268]

3.6.2.1 The advantages and disadvantages of the principle of *Competence-competence* or *Competence de la competence*

Although, the principle of *competence de la competence* is justified, it may however lead to some doubtful results as illustrated by Reuben.[269] He explains this by arguing that the question as to whether a contract has in fact come into existence is a question

261 Barcelo 2003 *Vand. J. Transnat'l L.* 1124. See also Poudret and Besson *Comparative Law* 132.

262 Poudret and Besson *Comparative Law* 132. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1124.

263 Indornigie *The Legal Regime of International Commercial Arbitration* 27. See also Ramsden *The Law of Arbitration South African and International Arbitration* 19. See also Mantilla-Serrano and Adam 2008 *U.N.S.W. Law Journal* 307-308. See also Herrmann 1998 *Uniform Law Review* 487. See also Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 341. See also Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 168. See also Malloy 2002 *Transnat'l Law* 45. Roodt 2010 *Tul Eur & Civ LF* 76. See also Rosen 1994 *Fordham International Law Journal* 599. See also Christie 1994 *SALJ* 144.

264 Barcelo 2003 *Vand. J. Transnat'l L.* 1130.

265 Section 30(1) provides; Unless otherwise agreed by parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

266 Barcelo 2003 *Vand. J. Transnat'l L.* 1130.

267 Section 31(5) provides; The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32.

268 Barcelo 2003 *Vand. J. Transnat'l L.* 1130.

269 Reuben 2003 *SMU Law Review* 845.

of law which is the court's speciality. As arbitrators do not always have legal training, it may be possible for them not to appreciate such fundamental issues. [270]

Against the above submission, it is accepted that the question of whether a contract has in fact come into existence is a question of law which maybe the court's speciality. On the other hand it should be kept in mind that an arbitration agreement and the choice of the arbitrator are consensual. [271] The parties are free to choose any arbitrator of any specific speciality.[272] Therefore it would be unreasonable for an aggrieved party to attack the speciality or educational qualifications of the arbitrator when he has consented to his appointment. In the words of Christie,[273] arbitration is based on the principle of *pacta sunt servanda* and parties to arbitration make their own bed, therefore they should lie on it (so to speak). The words of Christie[274] cement what St John Sutton Gill and Gearing[275] pointed out that the parties to arbitration have the right to choose an arbitrator of any specific speciality. Consequently, it is submitted that, parties when agreeing to arbitration should be aware of the capabilities of their chosen arbitrator.

To elucidate the point above, the *competence de la competence* principle is based on the presumption that the parties through their arbitration agreement have conferred the power of arbitrators to determine their own jurisdiction[276] and ancillary questions that come along with jurisdiction. Additionally, the principle of *competence de la competence* is also justified as it is inherent in every judicial body.[277] Allowing judicial bodies to determine their own jurisdiction enables them to function well. This is due to the fact that

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270 Reuben 2003 *SMU Law Review* 845.
271 *Premium Nafta Products Limited & Others v Fili Shipping Company Limited &* Others 2007 UKHL 40.
272 St John Sutton Gill and Gearing *Russell on Arbitration* 11.
273 Christie 1994 *SALJ* 144. Although writing under South African law, what the author says sums up the English law position.
274 Christie 1994 *SALJ* 144.
275 St John Sutton Gill and Gearing *Russell on Arbitration* 11.
276 Reuben 2003 *SMU Law Review* 837. See also Rosen 1994 *Fordham International Law Journal* 608.
277 Roodt 2011 *Afr.J. Int'l & Comp. L.* 236.

the arbitrators are not required to stay the proceedings to seek judicial guidance.[278] As a result, arbitration becomes a speedy method of resolving disputes.[279]

3.7 Conclusion

It has been established that under English law the doctrine of separability affirms on the independence of an arbitration agreement. The discussion has also shown the importance of the ability of arbitrators to determine their own jurisdiction. Mindful of the arguments that the independence of the arbitration agreement and the principle of *competence de la competence* may have short falls, it is submitted that the English parliament has taken a step in the right direction by incorporating the doctrine of separability. England has shown its support of the doctrine of separability by incorporating it in the English *Arbitration Act*[280] in line with the Model Law. The independence of the arbitration agreement has been shown to respect the interests and intentions of the parties of an arbitration agreement.[281]

278 Barcelo 2003 *Vand. J. Transnat'l L.* 1124.

279 Roodt 2011 *Afr.J. Int'l & Comp. L.* 236. See also Butler 1994 *CILSA* 121. See also Ramsden *The Law of Arbitration South African and International Arbitration* 6.

280 *Arbitration Act* of 1996. Section 7 provides; 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 shall for that purpose be treated as a distinct agreement.

281 Malloy 2002 *Transnat'l Law* 47. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701, 704. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also *Lesotho Highlands Development Authority v Impregilo SPA & Others* [2005] UKHL 43. See also *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40.

Chapter 4

4 The application of the doctrine of separability in South Africa

4.1 Introduction

The doctrine of separability stipulates that an arbitration agreement is a separate and independent contract from the main contract in which it is incorporated.[282] The effect of this is that the arbitration agreement may be able to survive the end the main contract which is either in breach or has been terminated.[283] As a result, parties to an arbitration agreement may refer their dispute to arbitration in accordance with the main contract.[284]

This chapter will discuss the history of the South Africa law of arbitration until the implementation of the current South African *Arbitration Act*.[285] The chapter will also discuss the issue of the separability of the arbitration agreement with regard to the South African position with reference to case law. Specific focus will be placed on the effect of repudiation, voidness and illegality of the contract containing an arbitration agreement.

4.2 The history of the South African law of arbitration

The English *Arbitration Act* of 1889 influenced and formed the basis for the colonial legislation of South Africa.[286] It is as a result thereof that an organised or perhaps a more regulated arbitration procedure was introduced in South Africa. This was done in 1898 through the *Cape Arbitrations Act* 29 of 1898, *Natal Arbitrations Act* 24 of 1898

282 *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701,704 C-D.
283 Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 342.
284 Malloy 2002 *Transnat'l Law* 47. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701, 704. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also *Lesotho Highlands Development Authority v Impregilo SPA & Others* [2005] UKHL 43. See also *Premium Nafta Products Limited & Others v Fili Shipping Company Limited & Others* 2007 UKHL 40.
285 *Arbitration Act* 42 of 1965.
286 Faris 2008 *De Jure* 504. See also Buttler and Finsen *Arbitration in South Africa Law and Practice* 4. See also Ramsden *The Law of Arbitration South African and International Arbitration* 13.

and later a more organised *Transvaal Arbitration Ordinance* 24 of 1904.[287] The law reform committee under the chairmanship of the then Chief Justice later in around 1964 conducted a review of the colonial legislation referred to above which resulted in the *Arbitration Act* of 1965.[288] This Act is modeled on the English *Arbitration Act* of 1950.[289]

The 1965 Act[290] does not differentiate between domestic and international arbitrations.[291] Roodt[292] argues that in the absence of an agreement to the contrary the provisions of this Act apply to both the above types of arbitration conducted in the South African jurisdiction. The author submits that having the Act as regulating both domestic and international arbitration may be problematic because in some cases South Africa applies its rules of domestic law of arbitration in a matter which calls for the application of international rules.[293] The South Africa Law Commission (hereinafter SALC) has also published in its report Project 101 in 1998[294] and later its Project 94 report in 2001[295] that the Act is behind the times and that it is time that South Africa adopts the UNCITRAL Model Law so as to be on par with other jurisdictions. To circumvent this

287 Ramsden *The Law of Arbitration South African and International Arbitration* 14. See also Faris 2008 *De Jure* 504.

288 Buttler and Finsen *Arbitration in South Africa Law and Practice* 5.

289 Faris 2008 *De Jure* 504.

290 The purpose of this Act is to provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals. See the Preamble.

291 Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 349. See also Roodt 2010 *Tul Eur & Civ LF* 81. See also Faris 2008 *De Jure* 504. See also South African Law Commission Report Project 94 *Report on Domestic Arbitration*. Project 94 May 2001. See also South African Law Commission Report Project 107 *Report on an International Arbitration Act for South Africa.* Project 107 July 1998.

292 Roodt 2010 *Tul Eur & Civ LF* 81.

293 South African Law Commission Report Project 94 *Report on Domestic Arbitration*. Project 94 May 2001. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 273. See also Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 341.

294 South African Law Commission Report Project 107 *Report on an International Arbitration Act for South Africa.* Project 107 July 1998. See also Ramsden *The Law of Arbitration South African and International Arbitration* 18-19. See also Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 341.

295 South African Law Commission Report Project 94 *Report on Domestic Arbitration*. Project 94 May 2001. See also Ramsden *The Law of Arbitration South African and International Arbitration* 18-19. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 274.

problem the SALC recommended that the 1965 Act be amended to incorporate the UNCITRAL Model Law.[296] This recommendation has not yet been implemented.

In 1965 the South African *Arbitration Act*[297] effected some changes most particularly on the definition of an arbitration agreement.[298] What is defined in terms of the Act as an 'arbitration agreement' was previously termed a 'submission'.[299] As Judge Goldin pointed out in *Cone Textile (Pvt) Ltd v Ayres and Another*,[300] this modification in terminology was crucial for two important reasons.[301] The judge said the first reason was to stress the contractual nature of an agreement to go for arbitration and secondly to avoid confusion that sometimes existed when the term 'submission' was also used to signify what should properly have been termed 'a statement of matters in dispute.[302]

4.2.1 Arbitration Act of 1965

Section 1 of *Arbitration Act*[303] defines an arbitration agreement as:

> ...a written agreement providing for reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not.

In light of the above, in order for the arbitration agreement to be governed by the *Arbitration Act*,[304] five requirements have to be met namely; (i) there should be an agreement, (ii) the agreement should be in writing (iii) the agreement should be one that refers to any existing dispute or future dispute or (iv) relating to any matter specified in the agreement (v) regardless of whether or not the arbitrator is named or designated.

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296 Roodt 2011 *African Journal of International and Comparative Law* 273. See also Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 341. See also Ramsden *The Law of Arbitration South African and International Arbitration* 18.
297 *Arbitration Act* 42 of 1965.
298 Faris 2008 *De Jure* 505. See also *Cone Textile (Pvt) Ltd v Ayres and Another* (1980) (4) SA 728 (ZA) 732 A-H.
299 Section 2 *Cape Arbitrations Act* 29 of 1898. See also Faris 2008 *De Jure* 505.
300 1980 (4) SA 728 (ZA) 732 A-H.
301 *Cone Textile (Pvt) Ltd v Ayres and Another* 1980 (4) SA 728 (ZA) 732 A-H.
302 *Cone Textile (Pvt) Ltd v Ayres and Another* (1980) (4) SA 728 (ZA) 732 A-H.
303 *Arbitration Act* 42 of 1965.
304 *Arbitration Act* 42 of 1965.

The requirement that the agreement should be written is to ensure that the parties to an arbitration agreement are at *ad idem*.[305] This is because more often than not oral contracts are more difficult to prove.[306] On the other hand, although the arbitration agreement needs to be in writing in order to be governed by the Act, it seems that it need not be signed by the parties.[307] Jacobs[308] argues that the legislature assumes that the mere fact that the parties have reduced their agreement to writing would suffice that there has been a meeting of minds of the said parties.[309]

In light of the fact that the South African *Arbitration Act*[310] is modelled on the English *Arbitration Act* of 1950,[311] one may assume that the application of the doctrine of separability in the English jurisdiction would be the same as it is in South Africa. However, to a certain extent this is not the case. This is illustrated by the effect of repudiation, voidness and illegality of the contract containing an arbitration agreement as discussed below.

4.3 Repudiation

An arbitration agreement is a contract inside the main contract.[312] Therefore, it is possible that the main contract which incorporates an arbitration agreement may be repudiated by one of the parties to the contract. The question therefore would be whether the arbitration agreement is also repudiated when the main contract is repudiated.

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305 *Beattie v Beattie Ltd* 1938 3 AII ER 214 CA. See also *R v Anglo-Newfoundland Development Co* 1920 2 KB 214. See also Jacobs *The Law of Arbitration in South Africa* 25.

306 *Goldblatt v Freemantle* 1920 AD 123, 128. See also *Bitcon v Rosenberg 1936 AD 390 385. See also Lewis v Elske 1921 AD 36, 38.* See also Christie *The Law of Contract in South Africa* 403.

307 Jacobs *The Law of Arbitration in South Africa* 25.

308 Jacobs *The Law of Arbitration in South Africa* 25.

309 *R v Anglo-Newfoundland Development Co* 1920 2 KB 214.

310 *Arbitration Act* 42 of 1965.

311 Faris 2008 *De Jure* 504. See also Buttler and Finsen *Arbitration in South Africa Law and Practice* 4.

312 Refer to Chapter 2.4.

Repudiation has been defined as an absolute refusal to proceed with the contract.[313] This occurs where a party to the contract shows either by words or conduct that he is unable or unwilling to perform his side of the contract.[314] Judge Coetzee in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*[315] observed that the test as to whether the conduct amounts to repudiation is whether, if fairly interpreted, the conduct exhibits a deliberate and unequivocal intention that the contracting party is to no longer be bound by the contract.[316] If the conduct of one party to the contract is such that it would lead any reasonable man to conclude that he will not fulfil his obligations under the contract, the other party may treat such conduct as repudiation.[317] On the other hand, if the renunciation is not a clear refusal to perform then such conduct does not amount to breach of the contract.[318] Therefore, the test for concluding that one has repudiated the contract is an objective one.[319] The question of whether a contracting party has repudiated the contract depends on the terms of the contract and the general circumstances of the case. As such in order to conclude whether one is relieved from the future performance by the conduct of the other one must look at the circumstances of a case.[320]

313 *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 647 G-H.

314 Huyssteen, Van Der Merwe and Maxwell *Contract Law in South Africa* 163. See also *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294 I-J.

315 *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 648 A-B.

316 *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294 I-J. See also *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 648 A-B. See also *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 14 B-E.

317 Christie *The Law of Contract in South Africa* 518. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA. See also the judgement of Cobert JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) 22 (D-F). See also *Ponisammy & Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) 387 (A-C).See also *Stewart Wrightson (Pty)Ltd v Thorpe* 1977 (2) SA 943 (A) 953 (E-H). See also *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 14 B-E. See also *Van Schalkwyk v Griessel* 1948 (1) SA 380 (A) 387 B-C.

318 *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 648 B-C. *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294 I-J. See also *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd and Another* 1993 (3) SA 471 (A) 480C-481H.

319 Huyssteen, Van Der Merwe and Maxwell *Contract Law in South Africa* 163. See also Van Der Merwe and Du Plessis *Introduction to the Law of South Africa* 261. See also *Turkers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 648 A-B.

320 *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 648 B-C.

Judge Nienaber in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[321] observed that the effect of a contracting party repudiating a contract is that the other party[322] to the contract may choose to accept the repudiation and rescind the contract.[323] If he chooses to rescind the contract, then the contract ends upon communication of his acceptance of repudiation.[324] As such the effect of this arrangement is that the parties are released from their future obligations under the contract.[325]

In contract law repudiation has often been viewed as a serious matter requiring proper consideration. Perhaps this is because repudiation of a contract may take different forms.[326] For example repudiation may take the form where the party who repudiates the contract denies *consensus ad idem* or alleging *pactum de non petendo.*[327] Repudiation may also take place when the repudiating party alleges that the contract is not binding due to a condition in the contract, thus invalidating the contract.[328] This is what transpired in the *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical*[329] case (hereinafter *Atteridgeville* case*)*

321 2001 2 SA 284 (SCA).

322 Who is likely to be the defendant.

323 *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294 I-J. See also Christie *The Law of Contract in South Africa* 518. See also *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 385 (A) 845A-846G).

324 *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294 I-J. See also Christie *The Law of Contract in South Africa* 518. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA. See also the judgement of Cobert JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) 22 (D-F). See also *Ponisammy & Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) 387 (A-C).See also *Stewart Wrightson (Pty)Ltd v Thorpe* 1977 (2) SA 943 (A) 953 (E-H)

325 Andrews *Contract Law* 446. *Hirji Mulji v Cheong Yoe Steamship Co. Ltd* 1926 AC 497. See also *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A) 304 C-D. See also *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 14 B-E. See aslo *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 648 B-C.

326 *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 14 B-E. See also *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A) 304 B-D.

327 Christie *The Law of Contract in South Africa* 518.

328 *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 14 B-E. See also *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A) 304 B-D citing *Heyman v Darwins Ltd* 1942 AC 356, 378.

329 1992 1 SA 296 (A).

4.3.1 Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical 1992 1 SA 296 (A)

4.3.1.1 Background of the Atteridgeville case

In March 1998 the respondent Livanos t/a Livanos Brothers Electrical (hereinafter Livanos) an electrical contractor entered into a written contract with the first appellant Atteridgeville Town Council (hereinafter Atteridgeville) for the rewiring of houses.[330] The second appellant, Pretoria Regional Services Council (hereinafter PRSC), was to finance the contract referred to above. In particular, the contract provided for the supply, delivery and installation of materials necessary for the rewiring of 6500 houses belonging to the council.[331] Clause 49 of the contract provided that disputes pertaining to the execution of the works in terms of the contract be referred to arbitration.[332] This agreement provided the following: [333]

> It is agreed that any existing claims and/or disputes, the subject-matter of the pending litigation or otherwise, or claims which may arise which the contractor or the employer may have against each other of whatever nature will be submitted to the decision of J D Weyers ("the arbitrator"), whose decision in regard to such claims and disputes shall be final.

Disputes arose between Atteridgeville and Livanos which led to Atteridgeville evicting Livanos from the worksite in August 1988.[334] This dispute caused Livanos to make an urgent application to the High Court to have possession of the site restored to him. [335] However, before the matter was settled by the court, an interim settlement was reached by both parties. The interim settlement was to the effect that disputes between them be referred to arbitration as soon as possible.[336] PRSC became part of the negotiations between Atteridgeville and Livanos and they (PRSC) influenced a written agreement which was reached on 10th February 1989 to the effect that the contract between

330 1992 1 SA 296 (A) 300 D-E.
331 1992 1 SA 296 (A) 300 E.
332 1992 1 SA 296 (A) 300 H.
333 1992 1 SA 296 (A) 300 H-J.
334 1992 1 SA 296 (A) 301 A-B.
335 1992 1 SA 296 (A) 301 C-E.
336 1992 1 SA 296 (A) 301 F-G.

Atteridgeville and Livanos was to remain in force.[337] One of the important things to note is that the engineer originally appointed under the contract happened to be replaced as shown by Clause 2 of the agreement. Clause 2 recorded that the firm of Weyers, Botha & Hubee was appointed as engineers to the contract and that Mr JD Weyers had been appointed as the engineer.[338]

Livanos continued with the execution of the works as per the contract. Disputes arose between the parties, and arbitration proceedings began on 13th July 1989. However various issues were left unresolved and the disputes multiplied. Because of these unresolved issues, Atteridgeville called for tenders in October 1989. The work called for the replacement of overhead connections.[339] Livanos was unhappy about this arrangement arguing that all the work involved had already been awarded to him in terms of the contract. [340] On 11th October he wrote to the PRSC stating that he regarded the calling for tenders as repudiation by Atteridgeville of the contract between himself and Atteridgeville.[341]

The other issue for contention was that Weyers should recuse himself as an arbitrator.[342] The reason for this was that Livanos alleged that Weyers had by his conduct disqualified himself as such. The suggestion was that certain Mr SA Cilliers SC be appointed as an arbitrator to replace Weyers. As part of his mandate, Mr Cilliers SC was to arbitrate on whether there had been a repudiation of the contract by Atteridgeville as alleged by Livanos. PRSC agreed with the suggestion that Mr Cilliers SC be appointed as an arbitrator to replace Weyers but later required a condition to be attached to his acceptance.[343] Livanos refused such suggestion. Therefore, the issue for contention was whether or not Weyers had agreed to withdraw from his duties as an

337 1992 1 SA 296 (A) 301 F-G.
338 1992 1 SA 296 (A) 301 G-I.
339 1992 1 SA 296 (A) 301 A-B.
340 1992 1 SA 296 (A) 301 B.
341 1992 1 SA 296 (A) 301 C-D.
342 1992 1 SA 296 (A) 301 C-D.
343 1992 1 SA 296 (A) 301 F-G.

arbitrator.[344] When approached, Weyers denied that he had ever agreed to withdraw as an arbitrator.[345] On 7th March 1990 he gave notice to withdraw as an arbitrator.[346]

In light on the above background, on 6th March 1990 Livanos launched an application with the court seeking an order that Weyers appointment as an arbitrator be set aside and that Mr Cilliers SC be appointed as an arbitrator to replace Weyers.[347] One other important issue to be determined by the court was whether the contract and the agreement had been repudiated by either Atteridgeville or Livanos.[348] It was the contention of Atteridgeville that the arbitration clause did not survive the cancellation of the contract.[349] The court *a quo* held that the disputes and claims by Livanos may be referred to arbitration and further ordered that the parties appoint a new arbitrator.[350] Atteridgeville appealed. On appeal the issues were whether or not the arbitration clause survived the termination of the agreement[351] and whether or not the parties were free to appoint another arbitrator to fill the vacancy created by Weyers withdrawal. [352] The second issue is not material to this study and it is for this reason that it will not be discussed.

4.3.1.2 Approach of the court

Judge Smalberger assessed the actions leading to the dispute. He observed that there was mutual consent of repudiation of the contract by both parties concerned.[353] He observed that the parties were at *ad idem* that Atteridgeville repudiated the contract by calling for tenders for work already allocated to Livanos. [354] He also observed that Livanos on the other hand repudiated the agreements by ceasing operations and

344 1992 1 SA 296 (A) 301 G-H.
345 1992 1 SA 296 (A) 301 F-G.
346 1992 1 SA 296 (A) 302 E-F.
347 1992 1 SA 296 (A) 302 A-B.
348 1992 1 SA 296 (A) 302 B-C.
349 1992 1 SA 296 (A) 302 E-F.
350 1992 1 SA 296 (A) 303 B-D.
351 1992 1 SA 296 (A) 303 H-J.
352 1992 1 SA 296 (A) 306 C-E.
353 1992 1 SA 296 (A) 303 H-J.
354 1987 4 SA 569 A 588 A-G.

abandoning the site. [355] Relying on the decision of *Van Steepen & Germs (Pty) Ltd v Transvaal Provincial Administration*[356] Judge Smalberger held that generally where the contract is repudiated by mutual consent, the effect is that it brings to an end the rights and obligations of both parties to the contract.[357] Therefore the effect is that any submission to arbitration contained in the contract is dissolved or cancelled.[358]

Notwithstanding the submission made by Judge Smalberger above, the judge further noted that the facts in *Atteridgeville* case differed a slightly from that of the *Van Steepen & Germs (Pty) Ltd v Transvaal Provincial Administration*[359] decision referred to above.[360] He said the difference is that although the parties were *ad idem* about repudiation of the contract, they however sought to claim damages from the other arising from an alleged unlawful repudiation.[361] Judge Smalberger therefore held that there can be no question of consensual cancellation of the contract.[362] On this point he held that the mere assertion by both parties that they are at *ad idem* was uncertain.[363]

Against this background, Judge Smalberger took the approach in *Scriven Bros v Rhodesian Hides Produce Co Ltd and Others*[364] and *Heyman v Darwins Ltd*[365] where the court held that repudiation of the contract does not destroy the efficacy of an arbitration clause in situations where parties to such a contract are at loggerheads.[366] The approach of the court therefore was that the arbitration clause must be interpreted like any other contractual provision with the aim of ascertaining the intention of the

355 1987 4 SA 569 A 588 A-G.
356 1987 4 SA 569 A 588 I-J.
357 1992 1 SA 296 (A), 304 E-J.
358 *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294 I-J. See also Christie *The Law of Contract in South Africa* 518. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA. See also the judgement of Cobert JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) 22 (D-F). See also *Ponisammy & Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) 387 (A-C).See also *Stewart Wrightson (Pty)Ltd v Thorpe* 1977 (2) SA 943 (A) 953 (E-H)
359 1987 4 SA 569 A 588 I-J.
360 1992 1 SA 296 (A) 304 H-J.
361 1992 1 SA 296 (A) 304 H-J.
362 1992 1 SA 296 (A) 304 H-J.
363 1992 1 SA 296 (A) 305 A-B.
364 1943 AD 393.
365 1942 AC 356.
366 1992 1 SA 296 (A) 305 A-B.

parties and more especially having regard to the words used.[367] To determine the words used one should have regard to any admissible circumstances [368]

In this regard Judge Smalberger concluded that taking into account the words used, the arbitration agreement was couched in wide and general terms to cover disputes relating to breach of contract and whether or not there was a justifiable repudiation.[369] It was the court's reasoning that the real purpose of the arbitration clause was to provide machinery for the settlement of disputes between the parties arising from their agreement.[370] This finding is similar to the *ratio* found in the English case of *Heyman.* This was also observed in the more recent case of *Born Free Investments v Firstrand Bank Ltd*[371]and later in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*[372] (hereinafter *North East Finance* case)

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367 1992 1 SA 296 (A) 305 H-J. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 4 (G-H). See also *Cinema City (Pty) Ltd v Morgestern Family Estates (Pty) Ltd and Others* 1980 (1) SA 796 (A) 804 A-806 A.

368 1992 1 SA 296 (A) 305 H-J. See also *Cinema City (Pty) Ltd v Morgestern Family Estates (Pty) Ltd and Others* 1980 (1) SA 796 (A) 804 A-806 A. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 4 (G-H).

369 1992 1 SA 296 (A) 306 A-B. See also *Culverwell and Another v Brown* 1990 (1) SA 7 (A) 14 (B-E). See also *Heyman v Darwins Ltd* 1942 AC 356. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 4 (G-H).

370 1992 1 SA 296 (A), 304 (B). See also *Heyman v Darwins Ltd* 1942 AC 356.

371 (39068/2009) [2012] ZAGPJHC 139 (21 August 2012)para 29. Although the above case did not deal with the doctrine of separability, Judge Wepener observed that the termination of payment of the loan (primary obligations of the contract) does not terminate the secondary obligations such as the obligation to pay damages for breach or the obligation to abide by an arbitration clause in the contract. The court further observed that the obligation to pay damages for breach of contract remain and is capable of being enforced by the aggrieved party because it is a personal right under the contract.

372 2013 (5) 1 SCA. Judge Lewis held that in principle the question as to whether the validity of the arbitration agreement was to be determined by the arbitrator depends on the purposive construction of the arbitration clause itself and the arbitration agreement generally. He explained that one should have regard to the context of the agreement and what the parties probably intended.

4.4 The application of the doctrine of separability in the Atteridgeville decision

4.4.1. Independence of the arbitration agreement

The *Atteridgeville* case is seen as the *locus classicus* in South African law in respect of the application of the doctrine of separability; especially where the main contract is repudiated by either one of the parties to the contract.[373] The *Atteridgeville* case illustrates the fact that generally speaking mutual consent of repudiation of a contract by one of the parties to the contract leads to the termination of the arbitration agreement.[374] However, the arbitration agreement may survive the termination of the main agreement were there has been unlawful repudiation of the contract by either party.[375] The observation is that the arbitration agreement survives for the purposes of measuring the claims arising out of breach or repudiation and for determining the manner of the settlement of the claims in question.[376] This reflects the doctrine of separability which recognises the independence of the arbitration agreement from the main contract.

From the foregoing, it may be argued that in situations where the main contract is repudiated by either party to the contract, the intention of the parties to refer their dispute to arbitration is observed in South African law.[377] Notwithstanding the above, the law as illustrated by the *Atteridgeville* case shows that to a certain extent South African law with regard to the doctrine of separability is still lagging behind.[378] The position of

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373 *Born Free Investments v Firstrand Bank Ltd* (39068/2009) [2012] ZAGPJHC 139 (21 August 2012). See also Ramsden *The Law of Arbitration South African and International Arbitration* 47. See also Cockrell 1998 *S. African L.J* 295. See also *Aveng (Africa) Ltd formerly Grinaker-LTA Ltd t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* (3187/05) [2011] ZAKZDHC 14; 2011 See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA.

374 Cockrell 1998 *S. African L.J* 295. See also *Aveng (Africa) Ltd formerly Grinaker-LTA Ltd t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* (3187/05) [2011] ZAKZDHC 14; 2011.See also *Born Free Investments v Firstrand Bank Ltd* (39068/2009) [2012] ZAGPJHC 139 (21 August 2012).

375 1992 1 SA 296 (A) 304 H-J.

376 1992 1 SA 296 (A) 305 A-B.

377 1992 1 SA 296. See also Cockrell 1998 *S. African L.J* 295.See also *Gardens Hotel (Pty) Ltd Others v Somadel Investements (Pty) Ltd* 1981 SA 911 (W).

378 South African Law Commission Report Project 94 *Report on Domestic Arbitration*. Project 94 May 2001 124. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 272. See also Roodt 2010 *Tul Eur*

the law as illustrated by the *Atteridgeville* case is the position of the law as it was then in English law in 1942[379] when the *Heyman* case was decided. This has shown to be problematic.[380]

4.4.2 The problem with having regard to the intention of the parties

The South African position on the application of the doctrine of separability has proved to be problematic. One such problem is that there is usually an uncertainty as to whether or not the arbitration agreement became separable from the main contract.

4.4.2.1 Uncertainty of separability of the arbitration agreement from the main agreement

As the *Atteridgeville* case illustrates, to determine the intention of the parties' one should look at the wording of the arbitration agreement:[381] Specifically at whether or not the arbitration agreement was worded in sufficiently wide terms to survive the termination of the main contract.[382] From the foregoing, it becomes apparent that a draftsman who wishes to draft his arbitration clause in the widest possible way will have to use the phrases all disputes arising 'out of' in relation to or 'concerning' the contract.[383]

& Civ LF 87. See also *Lufuno Mphaphuli & Associates v Nigel Anthol Andrews and Bopanang Construction* 2009 4 SA 529 (CC) 597 A-D.

379 Roodt 2010 *Tul Eur & Civ LF* 81.

380 Farnsworth 1942 *Modern Law Review* 78.

381 1992 1 SA 296 (A) 305 H-J. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 4 (G-H). Judge Lewis held that in principle the question as to whether the validity of the arbitration agreement was to be determined by the arbitrator depends on the purposive construction of the arbitration clause itself and the arbitration agreement generally. He explained that one should have regard to the context of the agreement and what the parties probably intended.

382 *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Pbk* 1968 (1) SA 7 (C) 12 D-H citing *Heyman v Darwins Ltd* 1942 AC 356, 378. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA).

383 *Heyman v Darwins Ltd* 1942 AC 356, 360. See also *Overseas Union Inc v AA Mutual International Ltd* [1988] 2 LIoyd's Rep 63. See also *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701. See also *Fiona Trust & Holding Corporation v Privalov* 2007 Bus L R 1719. See also Farnsworth 1942 *Modern Law Review* 77.

Farnsworth[384] is of the opinion that having regard to the words used and possibly the intention of the parties may lead to different opinions as to whether the arbitration clause was wide enough or not. This is due to the fact that there is usually a difference of opinion as to the precise meaning of the wording of the arbitration clause.[385] The difference in opinions was illustrated in the *Heyman* case upon which both the *Atteridgeville* and the *North East Finance* decisions were based. Lord Porter was of the view that the word 'under' was a narrow expression[386] whereas Lord Wright was of the view that the words 'out of' and 'under' had the same results as the phrases arising 'out of' in relation to or 'concerning' the contract.[387]

Although the judgement in the *North East Finance* was unanimous, the argument is that having regard to the intention of the parties may lead to uncertainty of the doctrine of separability of the arbitration clause.[388] The uncertainty is whether or not the words used in the arbitration clause are wide enough to withstand the termination of the main agreement. As Farnsworth[389] argued, the issue of the court informing itself by having regard to the wording of the arbitration clause is usually simply treated. The author argues that it is not always easy to make a tentative conclusion by only having regard to the words used. [390] This is because the issue of separability also depends on the question of who is drafting the arbitration clause and the conduct that gives the other party the right to avoid the main contract.[391] As such it is submitted that having regard to the intention of the parties may create the possibility of cases with similar merits being decided differently hence creating uncertainty of the law. The observation is that upon realising the difficulty of ascertaining separability of the arbitration clause, the courts more often than not have taken a presumption that it would be reasonable to infer that

384 Farnsworth 1942 *Modern Law Review* 77.
385 Farnsworth 1942 *Modern Law Review* 77.
386 *Heyman v Darwins Ltd* 1942 AC 356, 360.
387 *Heyman v Darwins Ltd* 1942 AC 356, 352.
388 HSU 1995 *S.Ac.L.J* 278. See also *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24.
389 Farnsworth 1942 *Modern Law Review* 78.
390 Farnsworth 1942 *Modern Law Review* 78.
391 Farnsworth 1942 *Modern Law Review* 78.

the parties to the contract intended the provisions of the arbitration agreement to operate even after their primary obligations to perform had come to an end.[392]

4.5 Invalidity or voidness

The decision of the *Wayland v Everite Group Ltd*[393] *(hereinafter Wayland* case) illustrates a situation whereby the main contract which incorporates the arbitration agreement is invalid. The question may arise as to whether the validity of the arbitration clause should depend on the validity of the main contract. A contract may be invalid when its conclusion was prohibited by the law.[394] For instance, the legislature may make its intention plain when enacting a statute by stating that any contact which contravenes the statute or does not fulfil the statutory requirements shall be null and void or shall be of no force and effect.[395] In the same line, the invalidity of a contract may also extend to where contracts concluded are contrary to public policy.[396] Generally the effect of an invalid contract is that it is unenforceable.[397] This is illustrated by the *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Pbk* case[398](hereinafter *Allied Mineral Development Corporation* case).

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392 *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A) 305 (D-E). See also *Heyman v Darwins Ltd* 1942 AC 356, 378.

393 1993 3 SA 946 (W).

394 *Man Truck & Bus (SA) (Pty) Ltd v Dusbus CC & Others 2004 (1) 454 (W) 470 (H). See also Eastern Cape Provincial Government v Contractprops 25 (Pty)* 2001 4 SA (SCA) 148 E-G.

395 Christie *The Law of Contract in South Africa* 337.

396 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (A) 8-9.

397 Christie *The Law of Contract in South Africa* 337.

398 1968 (1) SA 7 (C). Note that unlike in *Wayland* case where the issue was one of invalidity, in *Allied Mineral Development Corporation* case the question was whether the arbitrator's award may be made an order of court notwithstanding that the main agreement in which the arbitration agreement is founded is void. However the effect of both these two cases is the same. For further reference see the judgement of Justice Lewis in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 5 E-G. See also *North West Provincial Government and Another v Tswaing Consulting CC and Others*2007 (4) SA 452 (SCA).

4.5.1 Background of the Wayland v Everite Group Ltd 1993 3 SA 946 (W)

The applicant had for all material purposes during the conclusion of the contract in question been a director of the respondent.[399] A resolution by the board was passed to alter the retirement packages of management staff.[400] The applicant was unhappy with the passing of this resolution: and it was his allegation that more than half of the members of the board were self-interested in the passing of the resolution.[401] The effect of the applicant's allegation was that the passing of the resolution be declared *ultra vires* as it fell outside the authority given to the managing director.[402] The applicant therefore sought an order that the dispute between himself and the respondent in connection with the formation, validity and enforceability of the terms of the agreement entered into between himself and the respondent be referred to and determined by arbitration.[403]

4.5.1.1 Approach of the court

Judge Levy held that where the signatures that validate the whole contract, (including the disputed clause), are challenged on grounds of invalidity the arbitration clause must stand or fall with the validity of the main contract notwithstanding any declaration by its signatories.[404] The court added that it is immaterial whether one of the disputants have otherwise made a declaration that such contract is separable from the main agreement in which it is incorporated or not.[405]

The approach of the court as was noted by Justice Lewis in the *North East Finance* case[406] was based on the decision of the *Allied Mineral Development Corporation*

399 1993 3 SA 946 (W) 949 F-G.
400 1993 3 SA 946 (W) 949 G-J.
401 1993 3 SA 946 (W) 950 A.
402 1993 3 SA 946 (W) 950 F.
403 1993 3 SA 946 (W) 950 E.
404 1993 3 SA 946 (W) 952 B-C. See also South African Law Commission Report Project 94 *Report on Domestic Arbitration* 124. Ramsden *The Law of Arbitration South African and International Arbitration* 38. See also Butler 1994 *CILSA* 124.
405 1993 3 SA 946 (W). 952 B-C.
406 2013 (5) 1 SCA 5 E-G.

case.[407] Judge Corbett in the *Allied Mineral Development Corporation* case[408] held that if the main contract which incorporates the arbitration agreement is in truth void, then the effect is that the arbitration clause will generally itself be void.[409] Consequently, if the arbitrator's jurisdiction is solely founded upon the arbitration clause, such jurisdiction shall have to disappear. [410] The same approach was enunciated in a later decision of *North West Provincial Government and Another v Tswaing Consulting CC and Others,*[411] where Judge Cameron observed that an arbitration clause embedded in a fraud-tainted agreement could not stand in a fraudulent contract.[412]

4.5.2 The effect of the Wayland case on the application of the doctrine of separability

4.5.2.1 Non-independence of the arbitration agreement from the main contract

It has been stated in both Chapter Three and introductory remarks of this chapter that the doctrine of separability stipulates that an arbitration agreement is a separate and independent contract from the main contract in which it is incorporated.[413] As such the

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407 1968 (1) SA 7 (C). Note that unlike in *Wayland* case where the issue was one of invalidity, in *Allied Mineral Development Corporation* case the question was whether the arbitrator's award may be made an order of court notwithstanding that the main agreement in which the arbitration agreement is founded is void. However the effect of both these two cases is the same. For further reference see the judgement of Justice Lewis in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 5 E-G. See also *North West Provincial Government and Another v Tswaing Consulting CC and Others*2007 (4) SA 452 (SCA).

408 1968 (1) SA 7 (C).

409 1968 (1) SA 7 (C)13 A-C.

410 1968 (1) SA 7 (C)13 A-C. However as the court noted, the mere contention of illegality by one party does not render the contract illegal or void. In situations where such a contention is made by one party and does not appear to be wholly unfounded, this may be a good ground for declining an application for a stay of action on the basis of the arbitration clause. One good reason for this is that there is a chance that if the matter proceeds to arbitration, the arbitrator may rule that the contract, together with the arbitration clause, is illegal and void. Not only would the proceedings then be nugatory but the arbitrator would be deciding that the very arbitration clause which funded his jurisdiction never existed and therefore he never could have had any jurisdiction to deal with that matter.

411 2007 (4) SA 452 (SCA).

412 2007 (4) SA 452 (SCA) 457 (I-J).

413 *Fiona Trust & Holding Corporation v Yuri* 2007 APP .LR 01/24. See also Grant 2007 *ICLQ* 872. See also St John Sutton Gill and Gearing *Russell on Arbitration* 33. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701,704 C-D. See also

arbitration agreement may be able to survive the end of a breach or termination of the main contract. The effect of the *Wayland* case is that the validity of an arbitration clause is dependent upon the validity of the main contract in which it is incorporated.[414] Put differently, the arbitration agreement is treated as part of the main agreement. Therefore, when parties conclude a contract containing an arbitration agreement, they are considered as concluding not two, but one agreement.[415] In light of the *Wayland* case, it is therefore argued that the intention of the parties (which is to have their dispute decided by the arbitrator) is frustrated.[416] This is observed by Judge Lewis in the *North East Finance* case.[417] The judge relying on the judgement of Lord Viscount LC in *Heyman case* said: [418]

> If the dispute is to as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for a party who denies that he has ever entered into the contract thereby denying that he has ever joined in the submission.

4.5.2.2 Frustration of *competence competence* principle

In light of Chapter Three above, *competence de la competence* provides that arbitrators are free to determine their own jurisdiction.[419] Under this principle, arbitrators are free to determine issues of the existence and the validity of the arbitration agreement.[420] This

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Townsend 2009 *Unif. L. Rev* 555. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 342. See also Carbonneau 2009 *Penn St. L. Rev* 1355.

414 1993 3 SA 946 (W) 952 B-C. See also South African Law Commission Report Project 94 *Report on Domestic Arbitration* 124. See also Butler 1994 *CILSA* 124. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA.

415 Poudret and Besson *Comparative Law* 132. See also Tsen- Ta 1995 *S.Ac.L.J.* 422

416 For further discussion of the judgment and its effect see Butler 1994 *CILSA* 147. The author further discusses and compares the judgement with the decision of *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701.

417 2013 (5) 1 SCA 5 E-G.

418 2013 (5) 1 SCA 4 I-5 (A-B).

419 Reuben 2003 *SMU Law Review* 836. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 242. See also Rosen 1994 *Fordham International Law Journal* 606. See also Indornigie *The Legal Regime of International Commercial Arbitration* 143. See also HSU 1995 *S.Ac.L.J* 288. See also Chan 2009 http:// www.en.kyushu-u.ac. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 341. See also Reuben 2003 *SMU Law Review* 836. See also HSU 1995 *S.Ac.L.J* 288. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1116. See also Grant 2007 *ICLQ* 873. See also Hill 1997 *ICLQ* 298. See also Luttrell 2011 *Int'l Trade & Bus. L. Rev* 405. See also Townsend 2009 *Unif. L. Rev* 559.

420 Barcelo 2003 *Vand. J. Transnat'l L.* 1122.

principle is aimed at preventing early judicial intervention from obstructing the arbitration process.[421] However, the effect of the *Wayland* case is that the arbitrator is unable to determine their jurisdiction and issues affecting the validity of the arbitration agreement. In fact this was stated by Judge Levy. He said:[422]

> If therefore there is some justification for respondent's allegations of invalidity and unenforceability of the contract, then, the arbitration clause being in doubt and the consequent jurisdiction of the arbitrator to proceed under it being doubtful, a reference to arbitration would in my view be an improper reference.

The above *dictum* frustrates the presumption that parties though their arbitration agreements have conferred to the arbitrators the power to determine issues relating to their contract.[423] Roodt[424] argued that with the current *status quo* of South African law on arbitration, efforts to frustrate an arbitration agreement have more chance to succeed than they should. This argument is convincing as the current position in South African law is not clear as to whether the arbitrators should establish or decline to rule on their jurisdiction.[425] This may be observed in the recent decisions of *Lufuno Mphaphuli & Associates v Nigel Anthol Andrews and Bopanang Construction*[426] (hereinafter *Lufuno Mphaphuli* case) and *Telcordia Technologies Inc v Telkom SA Ltd*[427] (hereinafter *Telcordia Technologies case)*

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421 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 405. See also St John Sutton Gill and Gearing *Russell on Arbitration* 33. See also Grant 2007 *ICLQ* 873. See also Townsend 2009 *Unif. L. Rev* 559. See also Thomas 2010 http://www.clients.squareeye.net. See also Alway Associates 2007 http://alway-associates.co.uk. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 341. See also Poudret and Besson *Comparative Law* 142. See also Hill 1997 *ICLQ* 151. See also Tsen- Ta 1995 *S.Ac.L.J.* 422. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1116. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 238.

422 1993 3 SA 946 (W) 952 B-C.

423 Roodt 2011 *Afr. J.Int'l & Comp. L.* 238. See also Reuben 2003 *SMU Law Review* 837. See also Rosen 1994 *Fordham International Law Journal* 608. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701.

424 Roodt 2011 *Afr. J.Int'l & Comp. L.* 240.

425 Roodt 2011 *Afr. J.Int'l & Comp. L.* 240. See also Roodt 2010 *Tul Eur & Civ LF* 87.

426 2009 4 SA 529 (CC).

427 2007 (3) SA 266 (SCA).

Both these cases illustrate the extent to which the South African courts should intervene in arbitration proceedings.[428] The judicial precedent set out by these decisions is that the courts should not be too quick to interfere in arbitration proceedings.[429] O'Regan ADCJ[430] in the *Lufuno Mphaphuli* case observed that the decision to refer a dispute to arbitration is voluntary and as such parties are entitled to determine what issues are to be decided by arbitration.[431] However, the court did not clear the position of the law with regard to the principle of *competence competence*.[432]

To be precise, the *Telcordia Technologies case* held that the court should not be too quick to be involved in arbitration proceedings. The *Lufuno Mphaphuli* case illustrates the importance of balancing the power of the courts to scrutinise arbitration awards without enabling dishonest litigants to use the courts in order to delay justice. In discussing the holdings of these two cases, it is important to appreciate that arbitration is a form of dispute resolution based on contractual agreements of both parties. Emanating from this is that, arbitration is based on the doctrine of party autonomy. Party autonomy is based on the doctrine of *competence-competence*, which recognises the power of the arbitrator to decide on his own jurisdiction, hence empowering the arbitrators with the power of jurisdiction. This would prevent the courts from having much interference in arbitral proceedings.[433]

However, with the current *status quo* that if the main contract which incorporates the arbitration agreement is void, then the effect is that the arbitration clause will generally itself be void, surely there is no way in which the arbitrators may have jurisdiction. This is due to the fact that the arbitrator's jurisdiction is solely founded upon the arbitration clause.

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428 Roodt 2011 *Afr. J.Int'l & Comp. L.* 240.

429 *Telcordia Technlogies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) 292 A. See also *Lufuno Mphaphuli & Associates v Nigel Anthol Andrews and Bopanang Construction* 2009 4 SA 529 (CC) 548 A-D. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 240.

430 2009 4 SA 529 (CC) 592 E-F.

431 2009 4 SA 529 (CC) 592 E-F.

432 Roodt 2011 *Afr. J.Int'l & Comp. L.* 240. See also Roodt 2010 *Tul Eur & Civ LF* 87.

433 Roodt 2011 *European Journal of Law Reform* 415.

4.6 Conclusion

Although the South African *Arbitration Act* is modelled on the English *Arbitration Act* of 1950, the application of the doctrine of separability in the two jurisdictions differs. This difference becomes especially apparent in situations where the contract which contains the arbitration agreement becomes void or illegal. This is due to the fact that as the SALC published, South Africa has not yet incorporated the UNCITRAL Model Law.

Lack of adopting the UNCITRAL Model Law or perhaps non recognition of a complete application of the doctrine separability has led to some writers labelling South Africa as a place which is not conducive for arbitration.[434] In fact Roodt[435] observed that the South African law on arbitration is tilted in favour of the courts as opposed to arbitration as a method of resolving disputes.[436] As such this has caused unnecessary delay of resolving disputes.[437] Although, the case of *Lufuno Mphaphuli* as referred to above was not addressing the issue of the application of the doctrine of separability, it may however be observed that the dispute between the parties developed around 21st July 2003 and was finally resolved on 20th May 2009.[438] This shows how the practice of not allowing arbitrators to rule on their jurisdiction may cause unnecessary delays and unfairness in arbitration proceedings. [439] Generally, arbitration proceedings take less time than court proceedings[440] a fact which has been observed by Ramsden.[441] The author argues that the courts are often booked years in advance and judicial proceedings are more often than not subject to other purposeful delays brought about by litigation tactics.

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434 Brand and Wewege 2009 http://www.practillaw.com. See also Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 342.

435 Roodt 2011 *Afr. J.Int'l & Comp. L.* 250.

436 Roodt 2011 *Afr. J.Int'l & Comp. L.* 250. See also Brand and Wewege 2009 http://www.practillaw.com.

437 Roodt 2011 *Afr. J.Int'l & Comp. L.* 274.

438 2009 4 SA 529 (CC). See the date of hearing.

439 Ramsden *The Law of Arbitration South African and International Arbitration* 18-19. See also Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 341. See also South African Law Commission Report Project 94 *Report on Domestic Arbitration*. Project 94 May 2001. See also Mantilla-Serrano and Adam 2008 *UNSW Law Journal* 307-308. See also Herrmann 1998 *Uniform Law Review* 487.

440 *Amalgamated Clothing & Textile Workers Union of SA v Veldspun* (Pty) Ltd 1994 1 SA 163 (A) 169G; *Lancaster v Wallace* 1975 1 SA 844 (W) 847.

441 Ramsden *The Law of Arbitration South African and International Arbitration* 7.

Chapter 5

5 The comparison of the English legal position and the South African legal position with regard to the application of the doctrine of separability

5.1 Introduction

This chapter is aimed at comparing the English legal position with respect to the application of the doctrine of separability with the South African legal position. The objective is to pave a foundation for the recommendations that would be made in Chapter Six to follow.

5.2 The South African legal position

The legal position of the South African law with respect to the application of the doctrine of separability is that the separability of the arbitration clause from the main contract depends on the intention of the parties to the contract.[442] The question of having regard to the intention of the parties has shown to be problematic at times.[443] This is illustrated by the *Atteridgeville* case[444] and the *North East Finance* case[445] cited in Chapter Four above.

The *ratio decidendi* in both cases is that to determine the intention of the parties one should look at the wording of the arbitration agreement: Specifically at whether or not the arbitration agreement was worded in broad enough terms to survive the termination of the main contract. The *Atteridgeville* case in particular shows that words such as 'all disputes' or 'all disputes arising out of' or 'in connection with this contract' will give the contract an effect that the issues of voidness, voidability and illegality would ensure that the arbitration agreement survives the end of the main contract. Conversely, words

442 *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 4 (G-H).
443 Farnsworth 1942 *Modern Law Review* 77.
444 *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A).
445 *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 4.

such as 'any dispute arising under this contract' are *prima facie* not interpreted as being wide enough to give the arbitration agreement the separability effect.

The finding in Chapter Four above is that having regard to the words used and the intention of the parties to an arbitration agreement may lead to different opinions as to whether or not the arbitration clause was wide enough to survive the termination of the main contract. This therefore may lead to the uncertainty of the law as to whether the arbitration agreement became separate from the main agreement.

One of the functions of the law is to regulate economic activities.[446] In modern law making, emphasis is focused on the creation of a stable regulatory framework within which global business may grow and prosper. In this modern era of globalisation, laws are not only aimed at ensuring fairness but also at ensuring certainty of the law. With the *status quo* in the law of having regard to the intentions of the parties to an arbitration agreement, surely there would be an uncertainty of the law leading to an unfairness dispute resolution.

The criterion used by the South African courts in informing itself by having regard to the wording of the arbitration clause has led to different conclusions by the judges of the House of Lords in England. The difference in conclusions was illustrated in the *Heyman* case upon which both the *Atteridgeville* and the *North East Finance* decisions were based. Lord Porter was of the view that the word 'under' was a narrow expression[447] whereas Lord Wright was of the view that the words 'out of' and 'under' had the same results as the phrases arising 'out of' in relation to or 'concerning' the contract.[448]

In light of the above, it is perhaps necessary for South African courts to do away with the criterion of having regard to the intentions of the parties to an arbitration agreement. It may create the possibility of cases with similar merits being decided differently hence creating uncertainty of the law. On this note, the observation is that upon realising the

446 Fombad and Quansah *The Botswana Legal System* 14.
447 *Heyman v Darwins Ltd* 1942 AC 356, 360.
448 *Heyman v Darwins Ltd* 1942 AC 356, 352.

difficulty of ascertaining separability of the arbitration clause, the courts more often than not have taken a presumption that it would be reasonable to infer that the parties to the contract intended the provisions of the arbitration agreement to operate even after their primary obligations to perform had come to an end.[449]

Although the SALC in its reports of 1998[450] and later in 2001[451] was not necessarily dealing with the application of the doctrine of separability in the South African jurisdiction, the comparison in this study of English law with South African law with regard to the doctrine of separability illustrates that perhaps it is time that South Africa adopts the UNCITRAL Model Law so as to be on par with other jurisdictions as recommended by the SALC. The South African legal position in situations where the main contract which contains the arbitration clause is either void or illegal is that the arbitration clause is also affected resulting in the arbitration clause becoming invalid. This has proved to be disadvantageous to the parties to arbitration as well as arbitration proceedings in general. This is illustrated by the decision of the *Wayland* case[452] and the *North East Finance* case in Chapter Four above.

The *ratio decidendi* in the *Wayland* case is that the arbitrator has been unable to determine their jurisdiction and issues affecting the validity of the arbitration agreement. This has led to unnecessary delays and court intervention in the arbitration proceedings due to the fact that at times the courts have had to intervene and rule on the issue as to whether or not the arbitrator has jurisdiction to arbitrate. The position that South Africa finds itself in with regard to this unnecessary court intervention is due to the non adoption of the UNCITRAL Model Law.[453]

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449 *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A) 305 (D-E). See also *Heyman v Darwins Ltd* 1942 AC 356, 378.

450 South African Law Commission Report Project 107 *Report on an International Arbitration Act for South Africa.* Project 107 July 1998.

451 South African Law Commission Report Project 94 *Report on Domestic Arbitration*. Project 94 May 2001. See also Ramsden *The Law of Arbitration South African and International Arbitration* 18-19. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 274.

452 *Wayland v Everite Group Ltd* 1993 3 SA 946 (W).

453 Roodt 2011 *Afr. J.Int'l & Comp. L.* 272.

The UNCITRAL Model Law has proved to reflect the best practice of arbitration law as it contributes towards the uniformity of the law of arbitral procedures and promotes the fair and efficient settlement of disputes.[454] The ideal approach of modern day arbitration law is in fact set out by Judge Wallis in *Aveng (Africa) Ltd (formerly Grinaker-LTA Ltd t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd* [455] he said:[456]

> ...the modern approach to arbitration clauses is to respect the parties' autonomy in concluding the arbitration agreement and to minimise the extent of judicial interference in the process. The historical desire of courts to protect their own jurisdiction, and their consequent suspicion of arbitration as a means of resolving disputes, has been replaced by recognition that arbitration is an acceptable form of dispute resolution.

This above ideal approach has been incorporated in English law and has been shown to be advantageous. The English legal position upon which the South African *Arbitration Act* is based is that the arbitration clause is treated as a separate and independent contract from the main contract in which it is incorporated. The main commercial contract is viewed as the primary contract and the arbitration agreement is considered to be a secondary contract.[457]

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5.3 The English legal position

The English legal position recognises that when parties conclude a contract containing an arbitration clause, they are considered as concluding not one, but two agreements.[458] This has the consequence that the invalidity of the main contract does

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454 Ramsden *The Law of Arbitration South African and International Arbitration* 18-19. See also Niekerk and Schulze *The South African Law of International Trade: Selected Topics* 341. See also South African Law Commission Report Project 94 *Report on Domestic Arbitration*. Project 94 May 2001. See also Mantilla-Serrano and Adam 2008 *UNSW Law Journal* 307-308. See also Herrmann 1998 *Uniform Law Review* 487.

455 2011 3 SA 631. KZD.

456 2011 3 SA 631 KZD 636 F-G. See also *Napier v Barkhuizen* 2006 4 SA 1 (SCA) 8 D-G. Cameron JA that courts should strike a balance between unacceptable access freedom of contract while at the same time seeking to permit individuals the dignity and autonomy of regulating their own lives.

457 Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406. See also Grant 2007 *ICLQ* 871. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701,704 C-D. See also Dekaney and Lewis 2008 *U.N.S.W.L.J*. 347.

458 Townsend 2009 *Unif. L. Rev* 565. As cited in Poudret and Besson *Comparative Law* 132. Also cited in Tsen- Ta 1995 *S.Ac.L.J.* 422

not affect the validity of the arbitration agreement.[459] As was illustrated in chapter three above, the English legal position with regard to the applicability of the doctrine of separability has shown some advantages when compared to the South African legal position. Firstly, the English legal position recognises and respects the contractual aspect of the arbitration agreement. Secondly, the English approach recognises the independence of the arbitration agreement and thirdly, that the arbitrators are able to rule on their own jurisdiction.

5.3.1 The recognition and respect of the contractual aspect of an arbitration agreement.

Arbitration agreement as discussed in Chapters Two and Three is a contract governed by the principles of contract law.[460] As a result, the termination and discharge of this agreement have to be at the consent of both parties arbitration. England has in 1993 through the *Harbour Assurance case*[461] given recognition to a complete application of the doctrine of separability. With this doctrine, the English law was able to give recognition to both the consensual and contractual nature of an arbitration agreement. The recognition of the contractual nature of the arbitration agreement arises as a result that the validity of the two contracts (arbitration agreement and the main contract) does not depend on each other. As was shown in Chapter Three above, this ensures a speedy dispute resolution because parties do not have to go to court for a declaration as to whether or not the arbitration agreement has survived the termination of the main agreement. As shown above, this is not the case in the South African legal position.

459 Dursun 2012 *Yalova Universitesi Hukuk Fakultesi Dergisi* 168. See also Dekaney and Lewis 2008 U.N.S.W.L.J. 347. See also Luttrell 2011 *Int'l Trade & Bus. L. Rev* 406. See also Grant 2007 *ICLQ* 871. See also *Harbour Assurance Co. (UK) Ltd v Kansa General Insurance Co Ltd* 1993 QB 701,704 C-D.

460 Malloy 2002 *Transnat'l Law* 47. See also *Cone Textile (Pvt) Ltd v Ayres* 1980 (4) SA 728 (ZA), 732 E-F. See also *Total Support Management (Pty) Ltd v Diversifield Health Systems (SA) (Pty) Ltd* 2002 4 SA 661 (SCA) 673 F-H. See also Ramsden *The Law of Arbitration South African and International Arbitration* 6.

461 1993 QB 701.

5.3.2. The independence of the arbitration agreement

Although some authors[462] argue that the independence of the arbitration agreement and the doctrine of separability take away the fundamental principle of contract law of freedom of contract due to the fact that it elevates an arbitration clause above all other clauses in the main contract,[463] the English law with regard to the application of the doctrine of separability recognises that an arbitration agreement has a separate life from that of the main contract. This has given the arbitration agreement an advantage that its validity does not depend on that of the main contract. This therefore means that the arbitration agreement may be able to survive the termination of the main contract. As a result, parties to an arbitration agreement may still refer their dispute to arbitration in accordance with the main contract upon the termination of said main contract. This differs from the South African legal position which hitherto is that the validity of the arbitration clause depends on the intentions of the parties and the words used.

5.3.3 Competence de la competence

From Chapter Three and Four above, it has been learnt that under the *competence de la competence* principle, arbitrators are free to determine their own jurisdiction under the main agreement.[464] The arbitrators are also able to determine the question as to whether the agreement is void or illegal or not.[465] The application of the doctrine of separability in English law ensures that although the arbitrators may elect not to rule on their own jurisdiction in arbitration proceedings they are however free to determine their jurisdiction. This has ensured a speedy and progressive resolving of disputes because a

462 Reuben 2003 *SMU Law Review* 845.
463 Reuben 2003 *SMU Law Review* 845.
464 Reuben 2003 *SMU Law Review* 836. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 242. See also Rosen 1994 *Fordham International Law Journal* 606. See also Indornigie *The Legal Regime of International Commercial Arbitration* 143. See also HSU 1995 *S.Ac.L.J* 288. See also Chan 2009 http:// www.en.kyushu-u.ac. See also Delaney and Lewis 2008 *U.N.S.W.U. L.J.* 341. See also Reuben 2003 *SMU Law Review* 836. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 242. See also HSU 1995 *S.Ac.L.J* 288. See also Barcelo 2003 *Vand. J. Transnat'l L.* 1116. See also Grant 2007 *ICLQ* 873. See also Hill 1997 *ICLQ* 298. See also Luttrell 2011 *Int'l Trade & Bus. L. Rev* 405. See also Townsend 2009 *Unif. L. Rev* 559.
465 Barcelo 2003 *Vand. J. Transnat'l L.* 1122.

dispute does not have to go to court for a declaration whether or not the arbitrators have jurisdiction on the matter. The South African application of the doctrine of separability as was shown in chapter five above frustrates the principle of the *competence de la competence.* This may be observed in the recent decisions of the *Lufuno Mphaphuli*[466] and *Telcordia Technologies cases*[467]

5.4 Conclusion

The application of the doctrine of separability as understood and applied in England is seen as an ideal aspect of modern day arbitration law. This is illustrated by the fact that amongst other reasons there is certainty of the separabilty of the arbitration agreement from the main contract. In fact, the application of the doctrine of separability as applied in England has been incorporated by the leading countries in international commercial trade such as America,[468] France,[469] Germany[470] and the Netherlands.[471] One may therefore argue that it would seem that this is an indication of the fact that these countries have seen the advantage of the complete application of the doctrine of separability.

466 *Lufuno Mphaphuli & Associates v Nigel Anthol Andrews and Bopanang Construction* 2009 4 SA 529 (CC).
467 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).
468 Poudret and Besson *Comparative Law* 136. See also Part II of *Federal Arbitration Act*.
469 Poudret and Besson *Comparative Law* 132. See also Tsen- Ta 1995 *S.Ac.L.J.* 430.
470 Tsen- Ta 1995 *S.Ac.L.J.* 430.
471 Tsen- Ta 1995 *S.Ac.L.J.* 430.

Chapter 6

6 Conclusions and recommendations

6.1 Introduction

If there is one theme of the law that has given rise to a discussion in arbitration law of South Africa it is the issue of the extent to which the courts of law should have judicial intervention in arbitration proceedings.[472] This discussion is promoted by the way the South African courts apply the doctrine of separability. The doctrine of separability which is the subject for this study may be recapitulated as two uncomplicated rules to wit the arbitration clause is a separate and independent contract from the main contract. Therefore, the invalidity of the main contract does not affect the validity of the arbitration clause.

6.2 The two legal systems with regard to the doctrine of separability

The legal position of South African law with respect to the application of the doctrine of separability is that this separability of the arbitration clause from the main contract depends on the intention of the parties to the contract.[473] This approach has proved to be problematic as was illustrated in Chapters Four and Five above. Firstly, it has sometimes lead to uncertainty of the separability of the arbitration clause. Secondly, the South African legal position in situations where the main contract which contains the arbitration clause is either void or illegal frustrates the power of the arbitrators to rule on their own jurisdiction.

On the other hand, the English legal position with regard to the application of the doctrine of separability is that the arbitration clause is treated as a separate and independent contract from the main contract in which it is incorporated. This approach

472 Roodt 2010 *Tul Eur & Civ LF* 85. See also Roodt 2011 *Eur. J.L. Reform* 418. See also Roodt 2011 *Afr. J.Int'l & Comp. L.* 274.

473 *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) 1 SCA 4 (G-H).

has shown to remedy the above problems as illustrated in Chapter Three, Four and Five above: as a result the following recommendations are made.

6.3 Recommendations

6.3.1 Adopting the English legal position with regard to the application of the doctrine of separability

As shown in the conclusion above, the South African legal position at present is that the validity of the arbitration agreement is dependent upon the contractual validity or lack thereof in the main contract. This may frustrate the intention of the parties to have their dispute resolved by arbitration. Consequently, this may hinder progressive international trade as the parties to arbitration would have to go for litigation. It is therefore recommended that South Africa adopts the doctrine of separability as applied in the English jurisdiction. Adopting the doctrine of separability as applied in England in the South African law may ensure that the contractual validity of the arbitration clause is not invalidated by the invalidity of the main contract.

The discussion in Chapter Four though the analysis of the *Lufuno Mphaphuli*[474] and *Telcordia Technologies cases*[475] illustrates the extent to which the South African courts should intervene in arbitration proceedings. However, the court in both of these cases did not clear the position of the law with regard to the principle of *competence competence*.[476] It has been established that with the current *status quo* of the South African law on arbitration, efforts to frustrate an arbitration agreement have more chance to succeed than they should.[477] For this reason, it is recommended that the applicability of the doctrine of separability of English law be incorporated into the South African law.

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474 *Lufuno Mphaphuli & Associates v Nigel Anthol Andrews and Bopanang Construction* 2009 4 SA 529 (CC).
475 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).
476 Roodt 2011 *Afr. J.Int'l & Comp. L.* 240. See also Roodt 2010 *Tul Eur & Civ LF* 87.
477 Roodt 2011 *Afr. J.Int'l & Comp. L.* 240.

6.3.2 Adopting the UNCITRAL Model Law

Arbitration as an alternative dispute resolution mechanism was developed with the aim of rescuing the courts from coming to a standstill. This as pointed out in Chapter Three is exemplified by the situation in England when the royal courts were unable to offer recourse to non-citizens of England.[478] It was as a result of this that England experienced a distinctive jurisprudence of commercial law governed by common law*, Arbitration Act* of 1698[479] and progressively the English *Arbitration Act*[480] which is modelled on the UNCITRAL Model Law. This development was necessitated to put England at par with other jurisdictions and to meet the requirements of progressive international trade. This study has illustrated that the current South African law on arbitration does not meet international standards and this was in fact observed by the SALC.

The SALC published in its reports Project 107 in 1998[481] and later its Project 94 in 2001[482] that it was about time that South Africa adopted the UNCITRAL Model Law so as to ensure that South African law of arbitration is at par with other jurisdictions. The 1998 report showed that South African legislation on arbitration law does not cover international commercial arbitration and as a result it has shown to be not conducive for modern day arbitration. To date, its recommendations have been ignored.

On this note, it is submitted that the South African law on arbitration needs improvement and therefore the recommendations as suggested by the SALC be implemented. Alternatively, it is recommended that the South African *Arbitration Act* incorporates in its provisions the doctrine of separability as shown in the UNCITRAL Model Law and

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478 Tweeddale and Tweeddale *A Practical Approach to Arbitration Law* 2.

479 Through the *Arbitration Act of* 1698, the English parliament realised the importance of arbitration as a method of resolving disputes. See the preamble: Whereas it hath been found by experience that references made by the Rule of Court have contributed much to the ease of the subject, in the determination of controversies, because the parties become thereby obliged to submit to the award of arbitrators...now, for... rendering the award of arbitrators more effectual be it enacted.

480 *Act* of1950.

481 South African Law Commission Report Project 107 *Report on an International Arbitration Act for South Africa.* Project 107 July 1998.

482 South African Law Commission Report Project 94 *Report on Domestic Arbitration*. Project 94 May 2001.

removes the principle that the separability of arbitration clause shall depend on the intention of the parties. This is likely to encourage progressive international trade.

6.4 Conclusions

The research question addressed by this study is to assess the extent to which the invalidity/voidability and repudiation of a contract with an arbitration clause affects the obligations of the parties to arbitrate disputes arising under such contract. The study has shown that in the English legal system, the invalidity/voidability and repudiation of the main contract does not affect the validity of the arbitration clause. However, in the South African legal system, where the main contract is void or illegal the arbitration clause is also affected with the result that it becomes invalid. Where the main contract which contains the arbitration clause is repudiated the criteria is that one has to look at whether or not the arbitration agreement was worded in broad terms to survive the termination of the main contract.

The way the South African law of arbitration or other jurisprudence of the legal system may develop depends on the policy that the legislature decides to adopt. To keep up with modern day arbitration, it is necessary and desirable for the legislature recognise and adopt new principles that reflect modern day daily situations and eventually either dispose of or at least develop the old principles. One of these new principles and policies includes *inter alia* the UNCITRAL Model Law and the doctrine of separability as applied in English law

The lack of adoption of the Model Law and consequently its doctrine of separability has placed South Africa in a poor light in terms of its arbitration laws when compared to other countries. South Africa is viewed as a place which is not conducive to arbitration proceedings, for example, parties who have subjected their dispute to arbitration and chose South Africa as the place for hearing are not likely to have their dispute resolved by means arbitration in the event that the main contract which incorporates the arbitration clause is illegal. This is illustrated by the *Wayland* case and is due to the fact that the courts situated at the seat of the hearing have to assume a supervisory role

over arbitration proceedings. In this regard, the South African would have to apply the unsuitable arbitration principles to any arbitration proceedings conducted within the jurisdiction hence frustrating the intention of the parties.

Looking at the fact that South Africa has one of the major ports in Africa as well as being the midway point for ships from west to east of the earth, it goes without saying that South Africa is a major player in international commercial trading. As discussed in the introductory remarks of Chapter One, it is because of the heavy involvement in international commercial trade that arbitration as an alternative dispute resolution developed. To improve and make South Africa's environment to make it more conducive to arbitration, it is important and more desirable for the adoption of the UNCITRAL Model Law and consequently the doctrine of separability. The doctrine of separability has hitherto proved to give recognition of the interests of the very parties of arbitration.

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