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## THE DOCTRINE OF SEPARABILITY AND THE INTERACTION BETWEEN THE MAIN CONTRACT AND THE ARBITRATION AGREEMENT

### Abstract

The doctrine of separability, also known as the principle of autonomy of arbitration agreement, is a fundamental concept in international arbitration law. It refers to the legal principle that an arbitration agreement, which is a clause or a separate agreement that provides for arbitration as the method of dispute resolution in a contract, is independent from the main contract. It means that even if the main contract is found to be invalid or terminated, the arbitration agreement remains enforceable, allowing the parties to resolve their disputes through arbitration.

This article aims to provide an in-depth analysis of the doctrine of separability. In this article, the essence, aim, rationales and importance of the doctrine of separability are discussed. Furthermore, it explores the interaction between the main contract and the arbitration agreement, including issues such as the effects of invalidity or termination of the main contract to the arbitration agreement.

**Keywords:** *arbitration agreement, arbitration clause, main contract, doctrine of separability, autonomy of arbitration agreement, UNCITRAL Model Law, New York Convention*

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### Müstəqillik doktrinası və əsas müqavilə ilə arbitraj sazişi arasında qarşılıqlı əlaqə

#### Xülasə

Arbitraj müqaviləsinin müstəqilliyi prinsipi kimi də tanınan müstəqillik doktrinası beynəlxalq arbitraj hüququnda əsas anlayışdır. Müstəqillik doktrinası arbitraj bəndi və ya ayrıca müqavilə formasında bağlanmasından asılı olmayaraq arbitraj müqaviləsinin əsas müqavilədən müstəqil olması prinsipinə istinad edir. Bu o deməkdir ki, əsas müqavilə etibarsız hesab edilsə və ya ona xitam verilsə belə, arbitraj müqaviləsi qüvvədə qalır və tərəflərə mübahisələrini arbitraj vasitəsilə həll etməyə imkan verir.

Bu məqalə müstəqillik doktrinasının ətraflı təhlilini təmin etmək məqsədi daşıyır. Bu məqalədə müstəqillik doktrinasının mahiyyəti, məqsədi, əsasları və əhəmiyyəti müzakirə olunur. Bundan əlavə, məqalədə əsas müqavilə ilə arbitraj müqaviləsi arasındakı qarşılıqlı əlaqə, o cümlədən əsas müqavilənin etibarsızlığının və ya xitamının arbitraj müqaviləsinə təsiri kimi məsələlər araşdırılır.

**Açar sözlər:** *arbitraj sazişi, arbitraj qeyd-şərti, əsas müqavilə, müstəqillik doktrinası, arbitraj sazişinin müstəqilliyi, UNCITRAL Model Qanunu, Nyu York Konvensiyası*

#### Introduction

International commercial arbitration has gained widespread acceptance as a preferred method for resolving cross-border disputes due to its flexibility and enforceability of awards. Reason for the effectiveness of arbitration is the principle of the autonomy of arbitration agreement.

The doctrine of separability is a fundamental principle that upholds the autonomy and independence of an arbitration agreement from the main contract. It ensures that the validity and

enforceability of the arbitration agreement are distinct from those of the main contract and any challenge or nullification of the main contract does not automatically affect the arbitration agreement. This doctrine is recognized in various international arbitration laws and conventions, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the UNCITRAL Model Law on International Commercial Arbitration (1985), and the ICC Arbitration Rules (2017).

#### ***Aim and justification of the doctrine of separability***

The aim of the doctrine of separability is to protect the arbitration agreement from invalidity of the main agreement and be described as to make arbitration more attractive compared to traditional court litigation.

The doctrine of separability is based on several rationales that justify its recognition and application in international arbitration law. One of the main rationales is that the doctrine allows the parties to have control over the dispute resolution process, independent from the validity or termination of the main contract. This promotes party autonomy and ensures that the parties' intention to resolve their disputes through arbitration is respected.

Another rationale is the need to ensure the effectiveness and enforceability of arbitration agreements. The doctrine of separability provides a legal framework that allows arbitration agreements to be enforced even if the main contract is found to be invalid or terminated. This ensures that the parties' choice of arbitration as their method of dispute resolution is not frustrated by the invalidity or termination of the main contract.

Other justification for the doctrine of separability is that it makes arbitration more effective. It has been stated that the speed and flexibility of the proceeding would suffer without the doctrine, especially if one of the parties tries to undermine the proceeding. The doctrine is regarded as an effective way to prevent abuses and bad-faith attempts by a party claiming that the tribunal lacks competence (Born, 2012: 50).

#### ***Doctrine of separability in International Commercial Arbitration***

The doctrine of separability has been reflected in most international documents. UNCITRAL Model Law determines the doctrine in the following manner: "Arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause" (UNCITRAL Model Law, 1985: 8).

It can be concluded that there are two important issues: the validity of the main contract; and the validity of the arbitration agreement (arbitration clause).

If the main contract is void, and the arbitration clause is valid, the arbitration clause remains its force. But some cases which affect the validity of the underlying contract could easily cause to invalidating of the arbitration clause. This issue is defined in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

So, Article II (3) of the New York Convention defines that the court of a Contracting State shall refer the parties of an action to arbitration, if there is a valid arbitration agreement between the parties relating with the subject matter of the dispute. On the other hand, the same provision also prescribes the exceptions of this rule. Accordingly, an arbitration agreement would be considered as invalid if it is "null and void, inoperative or incapable of being performed" (New York Convention, 1958: 8). Let's look through each of the mentioned cases separately:

##### ***1) "Null and void"***

Null and void arbitration agreements are defined as "intrinsically defective", which means that they are considered as void right from the beginning. The categories such as fraud or fraudulent inducement, unconscionability, illegality or mistake and incapacity or lack of power can be the ones which forms null and void arbitration agreement (ICCA's Guide to the Interpretation of the 1958 New York Convention, 2011: 52). This is a non-exhaustive list, which originates from the case law and the views of legal commentators, since the New York Convention does not provide with any examples.

## 2) “Inoperative”

Inoperative arbitration agreements are considered to have ceased their effect by the time of the request to refer parties to arbitration, although they were valid at the outset. That's why, an inoperative arbitration agreement is inapplicable to the parties and the dispute in question at the referral stage. The cases that render an arbitration agreement inoperative include waiver, novation, repudiation, evocation or termination of the arbitration agreement. Although novation of the contract can render the arbitration agreement inoperative, it will not always be the case because of the autonomous character of the arbitration agreement.

Besides that, if the arbitration agreement includes any time limit for the initiation of the arbitration proceedings or for the final award, it will cease to have effect with the expiration of this limit, since the parties' intent to be bound by the arbitration agreement only pertains to the mentioned time frame.

## 3) “Incapable of being performed”

This situation includes cases where the arbitration proceedings cannot be held because of physical or legal obstacles. The physical obstacles that prevent the arbitration from proceeding may include cases where the arbitrator named in the agreement is not able to perform his/her duties, the obstacles to the constitution of the arbitral tribunal, actions of either party at the referral stage, political circumstances at the seat of arbitration and inaccessibility of the seat of arbitration. On the other hand, the legal obstacles include cases of supervening domestic law and non-arbitrability of the dispute in question at the seat of arbitration (ICCA's Guide to the Interpretation of the 1958 New York Convention, 2011: 53).

## ***Doctrine of separability in Azerbaijani law***

The doctrine of separability is also defined in the legislation of the Republic of Azerbaijan The Republic. The Law “On International Arbitration” of the Republic of Azerbaijan was adopted in 1999. It is prepared on the basis of the UNCITRAL Model Law. The principle of separability is mentioned in the Article 16(1) of this Law (5).

In addition the Civil Code of The Republic of Azerbaijan contains article 352 defines that “invalidity of one part of the agreement shall not result in invalidity of the rest of agreement only in the event if agreement could have been concluded without the inclusion of its invalid part” (6). This article is accepted as argument supported the doctrine of separability by some authors (Mustafayeva, 2015: 97). According to the author if the main contract is declared invalid, the arbitration clause initially may be signed in the form of a separate agreement. This point of view is controversial and insufficiently substantiated. Because, without the main contract, the conclusion of an arbitration agreement is meaningless.

## **Conclusion**

If summing up all of the above, the arbitration agreement regardless of the form of conclusion in the form of an arbitration clause or a separate contract is accepted as a independent contract and the concept of the separability is necessary. The following consequences exist under this principle:

- The invalidity or non-existence of the main contract does not necessarily mean invalidity or non-existence of arbitration agreement;
- The invalidity or non-existence of the main contract does not necessarily deprive an arbitral award of validity;
- The invalidity of arbitration agreement does not necessarily invalidate the main contract;
- The law governing the arbitration agreement may be different from the law governing the main contract;
- The arbitration agreement may survive after termination or expiration of the main contract, as long as the claims arise from relations during the term of the agreement.

The doctrine of separability has significant implications for the validity, interpretation, and enforceability of arbitration agreements, and contributes to the promotion of party autonomy, enforceability of arbitration agreements and efficiency of arbitration proceedings.

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