DOCTRINE OF SEPARABILITY

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Dedicated with deepest love and greatest affection to

Abah and Mak,

Aliman Musri and Fuziyah Mamad…

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ABSTRACT

Arbitration is one of the mechanisms to resolve disputes. Parties that want to arbitrate their dispute, must have an arbitration agreement. Arbitration agreement can be a clause and forming part of the main contract or parties may opt to have a separate agreement. The importance of having an arbitration agreement is that it can preserve one party's choice of the favourable forum to settle if dispute arises. There were cases where, despite having arbitration agreement, one of the parties continued to bring the dispute straight to court. Doctrine of separability ensures that parties' intent to arbitrate notwithstanding a party challenging the validity of the parties' contract or the arbitration clause it contains. Hence, the objective of this research is to identitfy the application of the doctrine of separability in Malaysia. Analysis of the various cases is conducted to see how the court tackles such challenge. From the analysis, it is found that the unenforceability of the contract that contains the arbitration clause does not automatically redeem the arbitration clause unenforceable.

ABSTRAK

Timbang tara adalah salah satu mekanisma untuk mendamaikan pertelingkahan. Bagi pihak-pihak yang ingin merujuk pertikaian mereka kepada penimbang tara, mereka mesti mempunyai perjanjian timbang tara. Perjanjian tinbang tara boleh menyerupai klausa dalam penjanjian antara pihak-pihak ataupun pihak-pihak boleh memilih untuk memasuki satu perjanjian khas timbang tara. Kepentingan mempunyai penjanjian timbang tara adalah pihak-pihak bebas menentukan forum bagi menyelesaikan pertelingkahan antara mereka, sekiranya ada. Terdapat kes di mana walaupun mempunyai perjanjian timbang tara, satu pihak telah memfailkan terus permohonan untuk menyelesaikan pertelingkahan ke mahkamah. Doktrin pemisahan memastikan kehendak pihak-pihak untuk bertimbang tara terpelihara walaupun ada kemungkinan pihak yang ingin mencabar kesahihan perjanjinan timbang tara tersebut. Oleh itu, kajian in dijalankan untuk megenalpasti aplikasi doktrin pemisahan di Malaysia. Analisis yang dijalankan terhadap kes-kes adalah untuk melihat bagaimana mahkamah mengatasi cabaran tersebut. Hasil kajian mendapati kontrak yang tidak dapat dikuatkuasakan tidak bermakna klausa perjanjian timbang tara itu terbatal.

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LIST OF ABBRIEVIATIONS

AIAJ	Asian International Arbitration Journal
All ER	All England Law Reports
AM. REV. INT'L ARB.	American Review of International Arbitration
AMR	All Malaysia Reports
Arb. Intl.	Arbitration International
Austl. B. Rev	Australian Bar Review
CIDB	Construction Industry Development Board
CLJ	Current Law Journal
CLR	Commonwealth Law Reports
COA	Court of Appeal
Comm	Commercial
Const LR	Construction Law Reports
FC	Federal Court
FIDIC	Fédération Internationale Des Ingénieurs-Conseils or International Federation of Consulting Engineers
FMSLR	Federated Malay States Law Reports
HC	High Court
HKIAC	Hong Kong International Arbitration Centre
HL	House of Lords
ICC	International Chamber of Commerce
KB	King’s Bench
KLRCA	Kuala Lumpur Regional Centre for Arbitration
J. Int'l Arb	Journal of International Arbitration
LCIA	London Court of International Arbitration
Lloyd’s Rep	Lloyd’s List Reports
MLJ	Malayan Law Journal

MLJA	Malayan Law Journal Article
MLJ	Malayan Law Journal Unreported
PAM	Pertubuhan Arkitek Malaysia or Malaysian Institute of Architects
PC	Privy Council
PWD	Public Work Department or Jabatan Kerja Raya
QB	Queen's Bench
S.Ac.L.J	Singapore Academy of Law Journal
SCR	Session Cases Report
SIAC	Singapore International Arbitration Centre
SLR	Singapore Law Report
WASC	Supreme Court of Western Australia
WLR	Weekly Law Report
Y.B. Arb. Inst. Stockholm Chamber Commerce	Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce

CHAPTER 1

INTRODUCTION

1.1 Background

Arbitration is one of the dispute resolution processes of obtaining a final and binding decision on a dispute, or series of disputes, without reference to the court. According to Stuyt, "arbitration is the oldest method for the peaceful settlement of international disputes."[1]

Parties generally refuse to seek the solution for conflicts in the traditional judicial settlement which is the court because the legal procedure itself is complex and time-consuming. An arbitral award, is often enforceable in most part of the world by virtue of the New York Convention[2]. The enforceability aspect has to be considered when one of

[1] A. Stuyt. (1990). Survey of International Arbitrations 1794-1989 vii

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention 1958') plays a major role in the international arbitration arena. Prior to it, there was a lack of a procedural mechanism for an award from one state to be registered and enforced by a court of another state.
See more *The New York Convention*. *New York Arbitration Convention*. Retrieved 22 July 2016, from http://www.newyorkconvention.org/

the disputing parties is, for example, is a foreign or multinational corporation and their assets are kept in their home country[3]. Besides that, arbitration stands out from the other dispute resolution process[4] since party has the autonomy to agree on a prescribed arbitration process and procedure of their choice[5]. This is supported by a 2015 survey on arbitration practices and trends worldwide[6].

For example, Malaysia is one of the states which have signed the Trans-Pacific Partnership Agreement (TPPA). The objective of the agreement is to establish a regional free trade agreement (FTA) across the Pacific Rim countries[7]. The investment chapter of TPPA provides that any disputes must be through investor-state dispute settlement **(**ISDS). Under that provision, disputes between investors and the host state would go before an international panel of arbitrators instead of before the domestic courts.[8] This mechanism is widely used in international commercial contracts, particularly international investment agreements as it offers legal protection and credible assurance by countries with domestic legal systems perceived as not meeting international standards for protecting foreign investors.[9]

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[3] *Resolution of Construction Industry Disputes: Arbitration, Statutory Adjudication or Litigation in the Construction Court? – Azman Davidson & Co*. (2014). *Azman Davidson & Co.* Retrieved 5 August 2016, from http://www.azmandavidson.com.my/news-publications/resolution-of-construction-industry-disputes-arbitration-statutory-adjudication-or-litigation-in-the-construction-court/

[4] For instance, conciliation, mediation, and dispute review board.

[5] Pryles, M. (2008). Limits to Party Autonomy in Arbitral Procedure. International Council for Commercial Arbitration (ICCA). Retrieved 21 April 2016, from http://www.arbitration-icca.org/media/4/48108242525153/media012223895489410limits_to_party_autonomy_in_international_commercial_arbitration.pdf

[6] *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*. (2016). *Queen Mary University of London*. Retrieved 2 August 2016, from http://www.arbitration.qmul.ac.uk/research/2015/

[7] MITI FTA. (2016). Fta.miti.gov.my. Retrieved 20 April 2016, from http://fta.miti.gov.my/index.php/pages/view/246

[8] Samra, H. & Juchawski, A. (2015). Investor-state dispute settlement in the newly signed Trans-Pacific Partnership | Insights | DLA Piper Global Law Firm. DLA Piper. Retrieved 20 April 2016, from https://www.dlapiper.com/en/asiapacific/insights/publications/2015/12/international-arbitration-newsletter-q4-2015/investor-state-dispute-settlement/

[9] Malintoppi, L. (2015). Is there an "Asian Way" for Investor-State Dispute Resolution. KLRCA Newsletter, (19), 12-20.

The genesis of arbitration in Malaysia was the 1809's Arbitration Ordinance XIII. Later, Arbitration Act 1952 came into picture which followed closely the Arbitration Act 1950 of the United Kingdom[10]. Currently, the arbitration process in Malaysia is governed by the Arbitration Act 2005 based on the United Nations Commission on International Trade Law (UNCITRAL)[11] Model Law.

The Court of Appeal case of ***Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd***[12] had this to say:

> The Arbitration Act 2005 (Act 646) was enacted on 30.12.2005 and it brought about wholesale reform of the arbitral regime. It was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The Arbitration Act 2005 (Act 646) repealed and replaced the Arbitration Act 1952 (Act 93) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) which enacts the New York Convention dealing with the recognition and enforcement of international awards.

In the Malaysian context, matters referred to arbitration including construction contract, maritime, insurance, finance and trade, aviation, oil and gas and commodity supply disputes[13].

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[10] Bukhari, K. *Arbitration and Mediation in Malaysia*. *Asean Law Association*. Retrieved 2 August 2016, from http://www.aseanlawassociation.org/docs/w4_malaysia.pdf

[11] UNCITRAL is the abbreviation for United Nations Commission on International Trade Law. The Model Law complements the New York Convention 1958 for effective supervision of arbitral proceeding as well as registration and enforcement of an award. Unlike the New York Convention, adoption of the UNCITRAL Model Law is not a treaty obligation. Nevertheless, states are highly recommended to adopt it and they are at liberty to amend it to suit their own needs.
See more Davidson, W. & Rajoo, S. (2006). *The Malaysian Bar - Arbitration Act 2005: Malaysia Joins the Model Law*. *The Malaysian Bar*. Retrieved 2 August 2016, from http://www.malaysianbar.org.my/adr_arbitration_mediation/arbitration_act_2005_malaysia_joins_the_model_law.html

[12] [2010] 7 CLJ 785

The basis for parties to refer their disputes to arbitration is based on the arbitration agreement or arbitration clauses. These agreements or clauses are unique in a way that they are presumptively 'separable' or 'severable' from the 'main' contract within which they are found (sometimes termed as the 'underlying' or 'principle' or 'substantive' contract). The arbitration clauses are independent from the main contract in which it is contained.[14]

As such, the UNCITRAL Model Law cemented the separability doctrine and effectively grants arbitrators the authority (competence-competence) to consider their own jurisdiction as illustrated in its Article 16(1)[15]. The separability of arbitration agreements can also be found in section 7 of the United Kingdom's Arbitration Act 1996[16]. In the Malaysia's Arbitration Act 2005, the doctrine of separability has been codified under section 18.

1.2 Problem Statement

As highlighted above, arbitration is unique in its own way whereby it can survive the death of the main contract regardless the validity of the main contract. Another example, in the case of ***Susu Lembu Asli Marketing Sdn Bhd v Dutch Lady Milk***

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[13] Zakaria, A. (2013). *Officiating Speech of the CIARB International Arbitration Conference 2013*. *Kehakiman*. Retrieved 2 August 2016, from http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/speech%20tun%2022%20august.pdf

[14] Born, G. (2014). International commercial arbitration. Alphen aan den Rijn: Wolters Kluwer Law & Business.

[15] Article 16, UNCITRAL Model Law. Retrieved 1 April 2016, from http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

[16] Section 7, United Kingdom's Arbitration Act 1996. Retrieved 1 April 2016, from http://www.legislation.gov.uk/ukpga/1996/23/section/7

Industries Bhd[17], the issue deliberated was whether the disputes between the Plaintiff and the Defendant would come within the terms of the arbitration clause as provided under the production agreement even though there was an allegation that the production agreement was affected by fraud or misrepresentation. The Court held that even if the production agreement was *void ab initio* for the various reasons alleged by the Plaintiff, the arbitration clause will survive and remain effective. The arbitration clause is an autonomous agreement independent from the production agreement.

Besides that, the case of ***Fiona Trust* & Holding Corp *v* *Privalov*** [18] has reaffirmed the principle of the doctrine of separability in English jurisdiction. In lower courts, the arbitration agreement was successfully challenged on the basis of defects relating to the contract. At appeal, the court overturned the lower court decision and decided that if a contract is alleged to be invalid for reasons such as bribery, unless that bribery relates specifically to the arbitration clause, the clause survives and the arbitrator should determine the validity of the contract as a whole, not the court.[19]

The question posed here is how does the doctrine of separability as applied or raised in those cases relate to the arbitrator's or the arbitral tribunal's competency to decide his or its own jurisdiction based on case laws? A party may not honor their part of the bargain and go to the court challenging the arbitral tribunal's jurisdiction by questioning the validity of the agreement they entered to on the very first place. A party may also attempt to question whether there is in existence a valid arrangement and agreement that provides the justification for the arbitral tribunal to act. At what point of time or upon what stage in the arbitration process does the doctrine of separability really applies?

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[17] [2004] 2 MLJ 230

[18] [2007] UKHL 40. Also known as Premium Nafta Products Ltd Fili Shipping Co. Ltd. [2007] UKHL 40

[19] Shore, L. & Maxwell, I. (2007). Fiona Trust v Privalov: English Court of Appeal all but ends separability debate. Global Arbitration Review, 2(1). Retrieved 1 April 2016, from http://globalarbitrationreview.com/journal/article/16437/fiona-trust-v-privalov-english-court-appeal-ends-separability-debate/

1.3 Objective

The purpose of this study is to identify the application of the doctrine of separability in the arbitration process.

1.4 Scope

The approach that will be adopted in this study is to review the common law jurisdiction, which is of persuasive authority in Malaysia, is useful and indicative. Thereafter, a thorough analysis will be done to see how the Malaysian courts apply this doctrine of separability in determining the jurisdiction of the arbitrator or the arbitral tribunal. The selection of cases will not be restricted to construction law cases only. However, limit to the cases chosen in terms of time frame is set to be from the year 2005 onwards to reflect the adoption of section 18 of the Arbitration Act 2005.

1.5 Significance

Arbitration is an important mode of dispute resolution, particularly in business transaction mainly due to the privacy that it can afford as opposed to litigation. The preference became even more pronounced in the past several decades as international commerce and trade have risen rapidly. The gist of this study is to give an overview and better understanding of the doctrine of separability in the arbitration process, particularly

in Malaysia. According to Samuel, separability is now largely a matter of historical interest[20].

It is humbly submitted that it is still relevant to be studied as its development and theoretical underpinnings are relevant to an understanding of arbitration in Malaysia. This is important as in if an arbitrator or an arbitral tribunal decides that there is no a valid agreement to arbitrate, then the basis for his or its authority disappears.

1.6 Research Methodology

As a means to achieve the objective, a systematic research process has been drawn up and to be adhered to as illustrated in Figure 1.1. This is important to smoothen the process of the research.

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1.6.1 Stage 1: Initial Study

Stage 1 is to identify the area of study and problem related to it. It involved reading on a myriad of materials. Discussions with potential supervisors are conducted simultaneously to obtain feedback and thoughts. The outline idea for the topic of this study is obtained and the next is formulating a suitable objective and designing the scope the study.

[20] Samuel. A. Book Review - International Arbitration: Three Salient Problems. 1988 5(1) *J. Int*'l *Arb.* 119

1.6.2 Stage 2: Data Collection

Stage 2 involves the collection of data and information. Data would be collected primarily through documentary analysis and browsing through the online databases. Relevant cases concerning the research topic would be sorted out from the databases. Additionally, secondary data is also collected from books, articles, and seminar reports.

1.6.3 Stage 3: Data Analysis

Stage 3 involves analysing and interpreting the data collected. ideas, Opinions and commentaries were also elicited. With regards to the case laws retrieved, after summarising facts and issues of each case, a thorough discussion was done in order to achieve the objective of this study.

1.6.4 Stage 4: Writing Up and Completion

Stage 4 involves primarily the writing of the analysed data. Conclusion will be made based on the findings of the case analysis.

1.7 Research Flow Chart

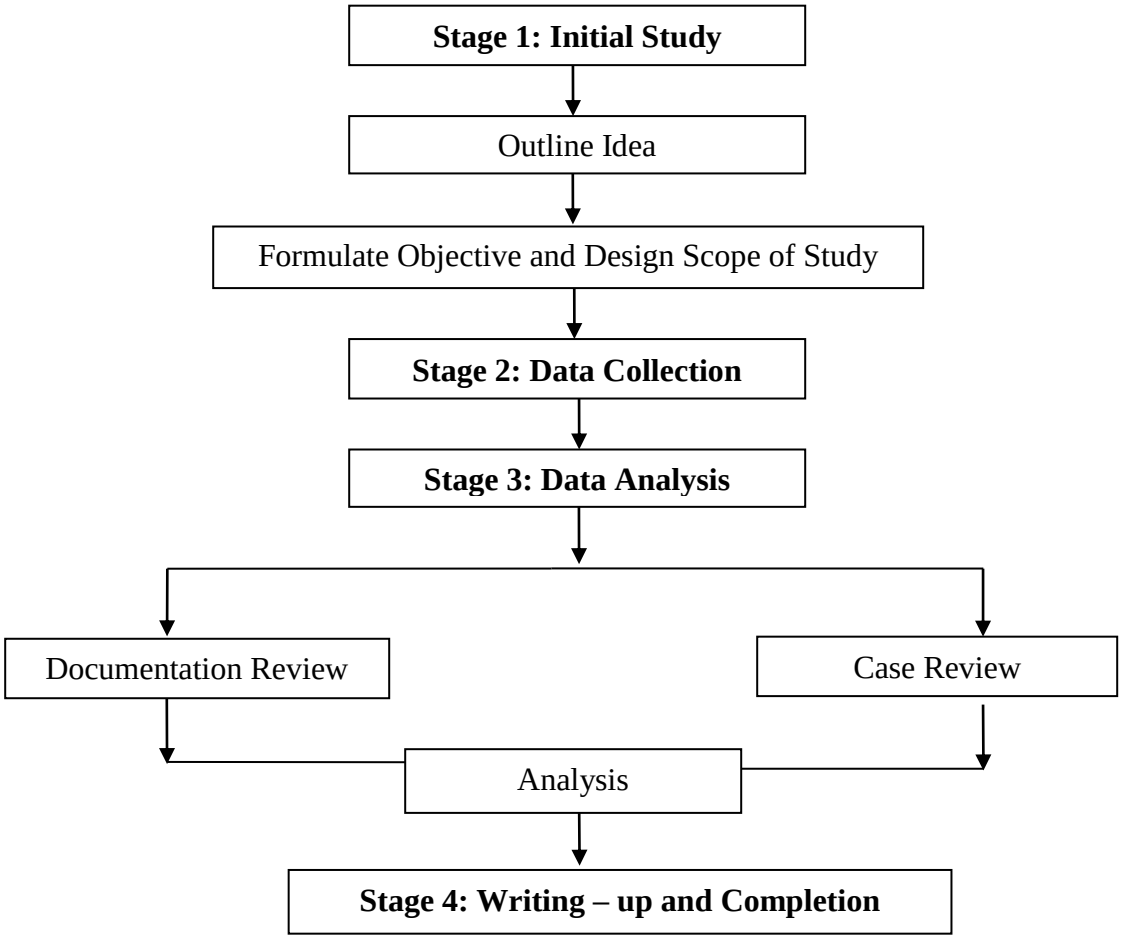

Figure 1.1 Flowchart of the research process

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