A Comparative Study of Arbitration Practices in the US, UK, and Pakistan

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To begin, let's examine the operation of the New York Convention as a foundation before delving into English law. Under the 1958 New York Convention, the doctrine of separability clearly distinguishes the arbitration clause from the main contract. One commentator notes that:

"In an increasing number of countries, the arbitral clause is viewed as independent from the main contract. This doctrine-often referred to as severability in the United States or autonomy in France and Germany-does not imply that the arbitral clause is invalid. Thus, if a party claims that the arbitral clause is invalid due to the invalidity of the main contract, this argument does not hold under laws recognizing the separability of the arbitral clause. An exception exists when a party asserts that the contract never existed; in this case, the same applies to the arbitral clause."[1]

This extract succinctly outlines the doctrine of separability, emphasizing that challenges to the contract's validity do not prevent arbitration from proceeding. However, if a party argues that the contract was never valid, it imposes certain limitations on their ability to invoke the arbitration clause. The widespread acceptance of this doctrine is underscored by another commentator, who states:

"An international arbitration agreement is typically treated as presumptively 'separable' or 'autonomous' from the underlying contract. This is referred to as the 'separability doctrine' or more precisely, the 'separability presumption."[2]

The use of the term "presumption" suggests a broader acceptance of the concept compared to "doctrine." While "doctrine" implies competition among various concepts for validation, "presumption" indicates a bias toward acceptance, akin to what is often termed "universal acceptance."

This understanding is further supported by the common law case *Westcare Inv. Inc. v. Jugoimport SDPR Holdings Co. Ltd.*, where the court observed:

"The characteristics of an arbitration agreement are, in some respects, independent of the underlying contract and have often led to its classification as a 'separate contract.' An arbitration agreement serves as an ancillary component, providing a mechanism to resolve disputes regarding primary and secondary obligations arising from the contract."[3]

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[1] Albert Jan Van Den Berg, The *New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*., 145

[2] Gary Born. *International Commercial Arbitration*, 312

[3] [1998] 4 All E.R. 570 (Q.B.)

Section 7 of the English Arbitration Act 1996 articulates:

"Unless otherwise agreed by the parties, an arbitration agreement that forms part of another agreement shall not be considered invalid or ineffective due to the invalidity of that other agreement, and it shall be treated as a distinct agreement."

A critical examination of this provision reveals that it is not absolute. Section 7 applies only if the parties have not explicitly agreed otherwise. Notably, such provisions must meet specific criteria:

1. Express Terms: The agreement must be clear, as courts are reluctant to interpret ambiguous language.
2. Main Contract Inclusion: The separability clause must be included in the main contract, not in unrelated documents.
3. "Whether or Not in Writing" Clause: This phrase allows for exceptions to the general requirement for express terms.

The English legal system prioritizes arbitration as an efficient means of resolving commercial and civil disputes for several reasons:

a. It alleviates court backlogs, a significant issue in countries like India, where the judicial system is often overwhelmed.
b. It conserves state resources by diverting frivolous litigation to arbitration, where disputes can be resolved more efficiently.
c. Ultimately, English courts maintain authority, as the Arbitration Act ensures that court decisions integrate arbitration outcomes into domestic law.
d. The English Parliament's commitment to arbitration is evident in the Arbitration Act 1979, which limits court jurisdiction over arbitration awards, reinforcing the validity of arbitration.[4]

Due to these factors, the focus of English legislation and court decisions has been to uphold arbitration awards and facilitate arbitration whenever possible. If Parliament had restricted the separability doctrine to written expressions, parties could evade oral agreements, undermining the legislation's intent. Consequently, parties cannot dismiss representations made regarding the separability doctrine, whether written or verbal, unless explicitly waived in the contract.

In the absence of clear and express language waiving the separability principle, it will be applied to sever the arbitration clause from the main contract. Some commentators argue that this emphasis on separability, as opposed to "autonomy," reflects the distinct approach taken in American jurisdictions. The courts and Parliament have leaned towards granting autonomy to the arbitration clause, allowing it to operate independently from the underlying contract.[5]

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[4] Arbitration Act, 1979, at Chapter 42 § 1 (1)

[5] It has been recorded in Samuel *Separability in English law – Should an Arbitration Clause be regarded as an agreement separate and collateral to a contract in which it is contained?* 3 (3) J. Int'l Arb. 95 (1986)

English courts have typically exhibited a degree of ambivalence regarding the autonomy of arbitration clauses, as recognizing them independently could undermine the courts' authority. They have sought to maintain jurisdiction over cases, often disregarding the parties' intentions to submit disputes to arbitration. In the U.S. case of *Scott v. Avery*,[6] it was noted that English courts' reluctance to extend jurisdiction to arbitration clauses is rooted in historical contests among courts over jurisdiction, with each court resistant to losing its authority.[7]

In the English Court of Appeal case *Harbour Assurance Co. (UK) v. Kansa General International Insurance Co.*, the court explored whether, under the separability principle, an arbitration clause in a contract claimed to be void ab initio could empower an arbitrator to determine if the contract was legally valid. The Court of Appeal, through three concurring judgments, concluded that the doctrine of separability allows an arbitrator to decide whether the underlying contract is void ab initio due to illegality. The judges uniformly dismissed the plaintiff's argument that a void contract could not contain a valid arbitration agreement. Justice Hoffmann criticized this reasoning as overly simplistic, highlighting the ambiguity in asserting that the arbitration clause was merely part of the broader agreement.[8]

The Geneva Protocol, the first international commercial arbitration convention, also embraced the separability doctrine in Article IV (1), stating that courts should refer disputes, including arbitration agreements, to arbitration if they are valid and enforceable. Additionally, Article IV (1) distinguishes between "arbitration agreements" and "contracts," assigning exclusive jurisdiction to arbitration tribunals for adjudicating the latter.

The International Chamber of Commerce (ICC) has similarly recognized this principle in Article 6, which stipulates that the arbitral tribunal has the authority to decide on its own jurisdiction, including questions about the existence or validity of the arbitration agreement. It emphasizes that the tribunal maintains jurisdiction even if the main contract is claimed to be non-existent or void, provided the arbitration agreement is deemed valid.[9]

Further United Nations Commission on International Trade Law (UNCITRAL) Model Law Article 16 (1) provides for separability doctrines as an aspiration of the UN for arbitration laws around the world. The said Article states:

“CHAPTER IV: JURISDICTION OF ARBITRAL TRIBUNAL

Article 16: Competence of arbitral tribunal to rule on its jurisdiction

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[6] [1856] 4 H.L. Cas. 811

[7] [1856] 4 H.L. Cas. 811, 815

[8] Tanya J. Monestier “*Nothing Comes of Nothing". . . Or does It??? A Critical Re-Examination of the Doctrine of Separability in American Arbitration*” 12 Am. Rev. Int'l Arb. 223, at page 233

[9] ICC Rules, Art. 6

(1) 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, and 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."[10] (Emphasis added)

Under New York Convention of 1958 there is no direct provision relating to the separability clause. In fact, like the Geneva Convention, it is implied from different Article of the New York Convention. If we read Article II and Article V (1)(a) together, we understand that the drafters wanted to treat the arbitration clause as different and differentiated from the main contract underlying the arbitration clause. Such an indifferent approach towards the separability doctrine, as it is not mentioned in as many words in the Convention, can be explained by referring to the widespread acceptance of the doctrine in municipal laws around the world, which leaves little need for the doctrine to be included expressly in the Convention.

If we refer to practitioners handbooks to which the courts rely commonly a similar situation also arises, where the arbitration clause is separated from the main contract. The book by Dicey of the Conflict of Laws is among the most reputed and trusted treatise of the Conflict of Laws, used by both practitioners and judges. The position by the learned authors on the said issue is presented in the following paragraphs extracted from the book:

"6-016 It is submitted that in most cases the correct solution will be found in the construction of the agreement as to the parties' choice of law. This respects the fact that what is in issue is a contractual question, on which the parties enjoy autonomy of choice of law, whether under the common law or under the Rome Convention. If no such choice, express or implied, can be discerned, then it will often be the case that the arbitration agreement will be found to be most closely connected with the law of the place where the arbitration has its seat, which is also the place where the award is to be treated as "made" for the purpose of the New York Convention."[11]

UK courts laid down the importance of a clearly defined arbitration clause as it would benefit both the domestic courts and international arbitration councils. In the words of a commentator:

"In Horton v. Sayer, Bramwell, B., says:

"The principle of the decision in Scorr v Avery is very intelligible, if a man covenants to do a particular act, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, that is, the case with reference to which the courts have used the unfortunate expression that 'their jurisdiction is ousted by the agreement of the parties' On

[10] UNCITRAL Model Law, Art. 16

[11] Dicey, Morris & Collins, The Conflict of Laws, 14th ed. Paragraphs 16-016

the other hand, if a man covenants to do a particular act, and that in the event of his doing it, the other party shall be entitled to receive such a sum of money as they shall agree upon, or if they cannot agree, such an amount as shall be determined by and arbitrator, - there is no debt which can be sued for until the arbitrator has ascertained what sum is to be paid"[12]

In Denmark, a comparative European Union jurisdiction, the practitioners are advised to draft clearly worded arbitration clauses which does not create any confusion or ambiguity in future and which can be clearly interpreted by the courts in order to remit the case for arbitration proceedings. This practice is reflected in an observation noted in a handbook for practitioners in the following words:

"However, whatever arbitration clause us used, the parties should always ensure that it is clearly drafted. Simply, clearly drafted clauses will avoid uncertainty and disputes as to their meaning and effect, whereas the ambiguous or badly phrased arbitration clauses cause delay and may impede the arbitration process. A clearly drafted arbitration clause will minimize the risk of time and financial resources being expended on disputes regarding, for example, the jurisdiction of the arbitration tribunal or the process of appointing arbitrators."[13]

The above extract from a comparative European jurisdiction lays down the principles which are equally applicable over England. In a treatise over dispute resolution authors note the importance of a clearly drafted arbitration clause in the following words:

"Frade's analysis shows that arbitration clauses are not as simple as heretofore in that they are becoming increasingly complex and multitier due to the detailed specification of a series of interrelated steps the parties need to go through before finally indicating a choice for arbitration. On the legal level, drafters should therefore make their best efforts to avoid ill-suited, equivocal or unhappily drafted clauses – also called 'pathological clauses' – which may result in another dispute and/or litigation between the parties (and even invalidity of the arbitration agreement by the arbitral tribunal) arising out of poor drafting. Furthermore, linguistic 'pathologies' and inadequate and/or inaccurate translation from multilingual versions to English versions may increase the cost and duration of arbitration due to misunderstandings, errors and ambiguities."[14]

The principle of autonomy is of course the first stage of the process which results in the arbitrators being able to determine their own jurisdiction. It is thanks to the autonomy of the arbitration agreement that any claim that the main contract is in some way void or voidable will have no direct impact on the arbitration agreement and hence on the jurisdiction of the arbitrators. That autonomy thus allows the examination by the arbitrators of jurisdictional challenges based on the alleged ineffectiveness of the disputed contract. In such a situation,

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[12] The Central Law Journal, Volume 33, 139

[13] Bommel Van Der. Bend, Marnix Leitjen, and M. Ynzonides. *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law*., 38

[14] V. K. Bhatia, Christopher Candlin, and Maurizio Gotti. *The Discourses of Dispute Resolution*., 233

the autonomy of the arbitration agreement and the "competence-competence" rule do overlap and are mutually supportive. In some respects, however, the principle of autonomy extends beyond the 'competence-competence' rule. The "competence-competence" rule allows arbitrators to examine their own jurisdiction. If they find the main contract to be ineffective, with only the principle of competence-competence they would have no option but to decline jurisdiction. However, the principle of autonomy enables arbitrators to declare the main contract ineffective and therefore declining jurisdiction. In other words, the decision of an arbitrator to retain jurisdiction and then declare a disputed contract ineffective must be founded on the principle of autonomy, and not solely on the "competence-competence" rule."[15]

The English Arbitration Act of 1996 explicitly incorporates this rule. Section 30 states:

"30 Competence of tribunal to rule on its own jurisdiction.

(1) Unless otherwise agreed by the 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.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part."[16]

The case of Arsanovia Ltd and others v Cruz City 1 Mauritius Holdings also demonstrates the application of this principle within English jurisdiction, reinforcing the internationally recognized rule of competence-competence, which is enshrined in English law.

In Pakistan, the Arbitration Act of 1940 (a pre-partition statute still in force) outlines its arbitration framework, which includes three types: (a) arbitration without court intervention (Chapter II, sections 3-19); (b) arbitration with court involvement but no pending suit (Chapter III, section 20); (c) arbitration in ongoing suits through the court (Chapter IV, sections 21-25).

The Act also includes provisions common to all three arbitration types (Chapter V, sections 26-38). If one party refuses to arbitrate, the other can seek court intervention to compel arbitration (section 20).

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[15] Philippe Fauchard, Emmanuel Gaillard, Berthold Goldman, John Savage, and Philippe Fauchard. *Fauchard, Gaillard, Goldman on International Commercial Arbitration*. 214

[16] Arbitration Act, 1996

However, the Arbitration Act of 1940 is inadequate concerning procedural matters. While arbitrators must adhere to the principles of natural justice-failing which their awards can be overturned for misconduct (section 30)-the Act does not address various procedural stages.

In practice, arbitration follows these steps:
a. pleadings (statement of claim and defense)
b. framing of issues (if necessary)
c. submission of affidavits
d. oral evidence, and
e. arguments

The competent court to exercise powers under the Arbitration Act, 1940, is the civil court, which would be appropriate for any civil suit related to the arbitration cause of action.

An arbitrator must base their decisions solely on the evidence presented and avoid external influences. Misconduct occurs if the arbitrator:

a. Introduces personal knowledge into the decision
b. Holds private meetings with one party
c. Conducts private inquiries without the other party's knowledge
d. Listens to confidential information that adversely affects a party without allowing them the chance to address it
e. Communicates with one party without the other's awareness

Challenges to an arbitrator's decisions often arise when there is an erroneous conclusion on legal matters. Generally, the law can be summarized as follows:
(a) If a question of law is explicitly referred to the arbitrator, their ruling, as long as it is bona fide and free from other defects, cannot be challenged simply for being incorrect.
(b) If a legal question has not been specifically referred, the arbitrator's ruling on that issue, if it materially affects the outcome, may render the award void.

In situation (a), if the arbitrator interprets the agreement, this involves a legal question and their decision is not subject to challenge. In situation (b), an award can be overturned due to a legal error on its face, but the court cannot consider documents not included in the award.

Typically, questions of legal error arise only if the award includes reasoning. However, if the relief granted is illegal, the situation changes. An arbitrator cannot enforce specific performance for a service contract or compel the sale of movable property, except in exceptional cases.

An arbitrator must adjudicate based on legal rights rather than personal notions of fairness, though certain circumstances may allow for different interpretations of the parties' intentions. The rationale for court intervention in apparent errors lies in the principle that arbitrators are final judges of both fact and law. Their authority regarding factual questions is limited to instances of significant procedural violations that indicate breaches of natural justice.

Regarding legal errors, the court's authority-though not explicitly granted by section 30-assumes that if parties do not refer a question for arbitration, the court's general power to resolve legal issues remains intact. The courts are seen as the ultimate arbiters of legal questions, ensuring consistency.

In cases where the award lacks reasoning, the court cannot intervene due to errors within it. If the arbitrator provides reasons, the award can be challenged on legal grounds, but the reasonableness of those reasons cannot generally be contested.

The criticisms outlined in this paper can be categorized into three main points. First, it argues that to sustain the Government of Pakistan's pro-investment initiatives, the REAO (and any subsequent legislation) should be interpreted in the most 'pro-arbitration' manner possible. This includes broadening the REAO's scope to encompass a wide range of international commercial arbitral awards. Unfortunately, the REAO has created a gap in the law by failing to provide a comprehensive definition or clear criteria for identifying what constitutes a ‘foreign award’ under Pakistani law. This paper will address the consequences of this gap and advocate for the establishment of criteria to determine the nature of such awards, which is essential for facilitating arbitration in Pakistan.

Secondly, the Government of Pakistan has proactively sought to reform the law governing domestic arbitrations through the Committee on Updating and Development of Laws on Arbitration, which has commissioned the Draft Arbitration Act 2005 (the Draft Act) to replace the Pakistan Arbitration Act 1940. While the Draft Act draws heavily from the UK Arbitration Act 1996, this paper argues that it fails to:

1. provide a clear criterion for identifying foreign awards, and
2. enforce arbitral agreements effectively, thus regressing from the reforms introduced by the REAO.

Thirdly, the paper will comment on additional deficiencies within the Draft Act that impact the efficiency of the arbitral process. The REAO acknowledges Pakistan’s international legal obligations as outlined by the New York Convention (NY Convention) and emphasizes the need for compliance with its provisions. A significant effect of the REAO is its application to the enforceability of both arbitral agreements and awards. However, some issues persist within the scope of the REAO as currently enacted.

The REAO specifically applies to ‘foreign arbitral awards’ issued after its commencement, yet it does not provide a clear definition of what constitutes a ‘foreign arbitral award.’ According to § 2(d), a “Foreign arbitral award” refers to an award from a Contracting State to the Convention or a state notified by the Federal Government. This tautological definition fails to clarify the determining factors that qualify an award as ‘foreign.’ Numerous factors could influence this determination, such as the nationalities of the parties, the arbitration venue, the applicable substantive law, and the governing law of the arbitration procedure.

These factors can offer insights into the character of an award, yet the REAO does not specify which is most significant. Consequently, it appears that the development of a test for determining an award's character as foreign or domestic is left to judicial interpretation.

The Pakistani Supreme Court has found the notion of 'concurrent jurisdiction' unworkable and rejected the Lahore High Court's stance on the matter. However, it did not entirely dismiss the theory, suggesting that while the view of concurrent jurisdiction may theoretically hold, it is impractical. The Court indicates that the substantive law applicable to arbitration will largely influence the determination of an award's character. Nevertheless, due to the REAO's lack of clarity, it falls upon the Pakistani courts to establish a test for character determination that does not overly focus on the substantive law, which would align with NY Convention provisions.

In conclusion, the introduction of the REAO marks significant progress for Pakistan in the global economy. To build on this momentum, it is crucial to implement supplementary measures, particularly:

1. the prompt passage of NY Convention-compliant legislation through the National Assembly, and
2. the clear definition of foreign arbitral awards within Pakistani law.

If the latter is relegated to case law development, the risk of non-compliance with the NY Convention increases significantly. Establishing a definitive test for character determination of awards as foreign or domestic is essential to address the existing legal gaps in international commercial arbitration in Pakistan.

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