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The Fictious Notion of Separability of Arbitration Agreement and its Conformity to Consensual Nature of ADR in Tanzania Main Land

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ABSTRACT

The doctrine of separability in arbitration posits that an arbitration agreement is autonomous and distinct from the underlying contract in which it is contained. This fictitious notion has generated significant debate concerning its alignment with the consensual nature of Alternative Dispute Resolution (ADR) in Tanzania. This article critically examines the theoretical underpinnings and practical implications of the separability doctrine within the Tanzanian legal framework. By analyzing key cases and statutory provisions, the article explores whether the doctrine upholds or undermines the voluntary and consensual essence of arbitration. It highlights the potential challenges and inconsistencies that arise when enforcing arbitration agreements deemed separate from potentially invalid contracts. The article also delves into comparative perspectives, assessing how other jurisdictions reconcile the doctrine of separability with the principle of party autonomy. Findings suggest that while the separability doctrine aims to safeguard the arbitration process from disputes affecting the main contract, it sometimes conflicts with the foundational principle of consensual dispute resolution. The article concludes with recommendations for aligning the doctrine of separability with the consensual nature of ADR in Tanzania, proposing legislative and judicial measures to ensure a balanced approach that respects party autonomy while maintaining the efficacy of arbitration as a dispute resolution mechanism.

Keywords*: Separability Doctrine, Arbitration Agreement, Consensual ADR, Tanzania Legal Framework, Party Autonomy, Comparative Perspectives.*

I. INTRODUCTION

Alternative Dispute Resolution (ADR) offers a means of settling disputes, conflicts, or claims without resorting to courtroom litigation. Instead, parties involved agree to use processes such as mediation or arbitration.[2] ADR encompasses various mechanisms and techniques, including

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[2] BambooHR. (n.d.). Alternative Dispute Resolution (ADR). BambooHR. Retrieved from https://www.bamboohr.com/resources/hr-glossary/alternative-dispute-resolution-adr,

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mediation, arbitration, negotiation, conciliation, reconciliation, partnering, and expert determination.[3] These processes are designed to provide more efficient, cost-effective, and collaborative methods for resolving disputes, distinguishing them from traditional litigation in state courts. A critical concept in arbitration is the separability principle, which posits that an arbitration agreement is treated as a separate and independent contract from the underlying agreement containing the arbitration clause. This means that the arbitration agreement remains valid even if the main contract is terminated, voided, or deemed invalid.

The doctrine underscores that the arbitration clause's validity is independent of the main contract's status, ensuring that arbitration can proceed despite issues affecting the underlying agreement. In Tanzania, the separability principle is enshrined in Section 12 of the Arbitration Act.[4] This principle, often regarded as the bedrock of practical arbitration, ensures the independence of the arbitration clause from the primary contract. It guarantees that even in cases of contract breach, invalidity, or termination, the arbitration clause endures, allowing for the measurement of damages resulting from the breach and the determination of the appropriate mode of settlement. This provision underscores the importance of the separability principle in maintaining the integrity and effectiveness of arbitration as a dispute resolution mechanism in Tanzania.

II. THEORETICAL UNDERPINNING OF SEPARABILITY DOCTRINE

(A) Doctrine of Separability Principle

The Model Law recognises the separation doctrine at its article 16(1) by explaining:

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 by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[5] In Tanzania separability principle explained under section 12 of the Arbitration Act,[6] which states that an arbitration agreement that 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, did not come into existence or has become ineffective, and the

[3] Kimei, M.C. (2012). Alternative Schemes for Resolving Banking and Financial Disputes. *The Tanzania Lawyer, 1*(2), 46–71. Street, L. (1992). The Language of Alternative Dispute Resolution. *Alternative Law Journal, 66*.
[4] Section 12 of the Arbitration Act, [Cap 15 RE 2020]
[5] Article 16 (1) UNCITRAL Model Law on International Commercial Arbitration (1985)
[6] Section 10 of the Arbitration Act, [Cap 15 RE 2020]

arbitration agreement shall for that purpose, be treated as a distinct agreement.

(B) Historical Development of Separability Principle

In some senses, the arbitration clause has been separable or at least separate since the earliest arbitration legislation. In England, this really means the 1698 Arbitration Act. The Act allowed arbitration clauses to be made rules of court if the parties had agreed to this. The breach of other contract terms could not at the time be made punishable by contempt of court.[7] In England, though, the disastrous 1746 decision in *Kill v. Hollister* that branded arbitration clauses (that did not come within the 1698 Act) as contracts to oust the jurisdiction of the court and thus incapable of specific performance set back the course of Anglo-American arbitration law spectacularly.[8] Once the arbitral clause was reduced to a standard contract term and the practice of extracting a fine for breach of it outlawed by statute, the agreement to arbitrate was rendered incapable of judicial enforcement. England was not the only country to suffer from these anti-separability developments.[9] After a burst of over-flamboyant revolutionary fervour, the French Code Napoleon outlawed the enforcement of arbitral clauses. This continues to affect certain aspects of French domestic arbitration law.[10] The late 19th century saw the initial burst of enthusiasm for the separability notion. In Germany, study of the various types of contracts led writers to conclude that the arbitral clause was a procedural contract contained in a broader agreement.[11] Since procedure was governed by the law of the forum, such a contract was governed by a different law to that of the rest of the agreement. Inevitably, this argument became enmeshed in a doctrinal argument going on in France as to the precise nature of a foreign arbitral award. If it was a contract, it could be enforced directly using the simplified process for enforcing obligations generally. On the other hand, classification as a judgement would result in review on the merits and the slower procedure for foreign judgements. In the debates about the Del Drago affair at the turn of the century, the French jurisdictionalists and contractualists fought this argument out. Almost unnoticed emerged a school suggesting that the award was half judgement half contract. This third or hybrid school, represented by an article written by Surville at the time lies at the heart of the separability doctrine.

The following are Legal Theories Governing Separability principle and Arbitration agreement

[7] William III, 1697-8: An Act for Determining difference by Arbitration
[8] Kill v Hollister (1746) 1 Wilson KB 129
[9] Adam, S., "Separability of Arbitration Clause – Some Awkward Question About. The Law of Contract, Conflicts of Laws and the Administration of justice", Alter Native Dispute Resolution Law Journal 2000 at p. 36
[10] Ibid
[11] Ibid

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1. Jurisdictional Theory

The jurisdictional theory, also referred to as the territorial theory, emphasizes the authority of national courts in supervising arbitration within their jurisdiction.[12] At its core, this theory asserts that the state has the inherent power to oversee arbitration as an institution, acting through various national instruments such as legislation and courts. The theory maintains that the legal effectiveness of arbitration depends on state sanction. This means that arbitration must conform to national laws and public policy to ensure its enforceability and legitimacy. For instance, the Constitutional Court in *Cool Ideas vs Hubbard and Another*,[13] highlighted that national courts have the power to confirm or set aside arbitration awards, underscoring the state's role in the administration of justice.[14] The jurisdictional theory places national sovereignty above the autonomy of the disputing parties, insisting that domestic commercial arbitration must be supervised by the state. If there is a conflict between arbitration agreements and national laws, the latter take precedence. This approach is justified on two grounds: it ensures that legitimate contractual rights and obligations are enforced, providing assurance to the disputing parties, and it derives the legitimacy of arbitration from state authority. As the Constitutional Court in *Lufuno Mphaphuli v. Bopanang Construction noted*,[15] arbitrators rely on the state's binding and coercive powers to enforce their awards. Critics argue that this theory overemphasizes state control, potentially undermining the independence of arbitration.[16] Nevertheless, proponents believe it provides a necessary framework for ensuring that arbitration awards are consistent with public policy and legal standards.

2. Contractual Theory

The contractual theory of arbitration asserts that the foundation of arbitration lies in a legally enforceable agreement between parties, emphasizing party autonomy and freedom of contract.[17] This theory posits that arbitration is a private dispute resolution mechanism, primarily governed by the contractual provisions agreed upon by the disputing parties. It suggests that the state's jurisdictional power should be limited or even nullified in favor of the autonomy of the parties

[12] Alcolea, L. 2020. *"Arbitration as IUS gentium: A scholastic theory of arbitration."* Contemp. Asia Arbitration J. 13 (2): 409–434.
[13] [2013] ZASCA 71
[14] Marchisio, G. 2014. "Jurisdictional matters in international arbitration: *Why arbitrators stand on equal footing with state courts*." J. Int. Arbit. 31 (4): 455–474. https://doi.org/10.54648/JOIA2014020. Accessed at 23rd June 2024
[15] [2009] ZACC 6
[16] Brekoulakis, S. 2019. *"The historical treatment of arbitration under English law and the development of the policy favouring arbitration."* Oxford J. Leg. Studied 39 (1): 124–150. https://doi.org/10.1093/ojls/gqy035. Accessed at 24 June 2024
[17] Yu, H. 2008. "A theoretical overview of the foundations of international commercial arbitration." Contemp. Asia Arbitration J. 1 (2): 255–286.

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involved.[18] The Supreme Court of Appeal in *Telcordia Technologies v. Telkom*[19] recognized the importance of deference to party autonomy and freedom of contract, a principle upheld in South African courts since at least 1898. Under the contractual theory, arbitration agreements are binding and enforceable based on the terms set by the parties, without the need for state intervention. This includes the arbitration contract, the proceedings, the powers and eligibility of arbitrators, and the nature of the awards. The theory also supports the concept of separability, which means that the arbitration agreement can be treated as distinct from the main contract. This allows the arbitration agreement to remain valid even if the main contract is unenforceable. However, there are exceptions, such as in cases involving fraud, where the arbitration clause may not survive the rescission of the main contract, as seen in *North West Provincial Government v. Tswaing Consulting*.[20] Additionally, the contractual theory requires a separate agreement between the disputants and the arbitrator, making the arbitrator a party to the proceedings with fiduciary duties to both parties[21].

3. Hybrid Theory

The hybrid theory of arbitration seeks to balance the key elements of both the jurisdictional and contractual theories, offering a compromise between state oversight and party autonomy.[22] This theory rejects the jurisdictional theory's emphasis on state sovereignty and the inherent power of the state to supervise arbitration, as well as the contractual theory's focus on individual independence, freedom of contract, and rejection of state intervention. Instead, the hybrid theory integrates desirable aspects from both approaches, aiming to create a balanced framework for arbitration.[23] In domestic commercial arbitration, the hybrid theory recognizes that arbitration originates from a private contract and that disputants maintain autonomy. However, it also insists that the arbitration agreement, its procedures, and the resulting awards must conform to domestic public policy norms, values, and laws to ensure enforceability. If arbitration awards do not meet these criteria, they risk becoming unenforceable and subject to vacatur when challenged. This theory strives to combine the flexibility and party control of the contractual approach with the regulatory oversight and legal conformity emphasized by the jurisdictional

[18] Ghodoosi, F. 2016. "Arbitrating public policy: Why the buck should not stop at national courts." Lewis & Clark Law Rev. 20 (5): 237–280.
[19] [2006] ZASCA 112
[20] [2005] ZANWHC 31
[21] Yu, H. 2005. "Explore the void An evaluation of arbitration theories: Part 2." Int. Arbitration Law Rev. 8 (1): 14-22.
[22] Alcolea, L. 2020. "Arbitration as IUS gentium: A scholastic theory of arbitration." Contemp. Asia Arbitration J. 13 (2): 409–434.
[23] Grant, K. 2016. "ICSID's reinforcement: UNASUR and the rise of a hybrid regime for international investment arbitration." Osgoode Hall Law J. 52 (3): 1115–1150

approach, ensuring that arbitration remains both independent and aligned with public policy and legal standards.

4. **Concession theory**

The concession theory.[24] At the heart of the concession theory is the notion that the institution of arbitration is only able to function in a practical and meaningful manner if the state concedes some of its sovereign powers to the institution.[25] In effect, the concession theory accepts key elements of the jurisdictional theory, in that it accepts that states holding dominion over a specific jurisdiction have the right to supervise the institution of arbitration utilizing various instruments such as legislation and national courts (in the form of judicial deference). It also accepts that arbitration will not have any legal effect without state sanction. Such sanction can take various forms. In some instances, the state has utilized legislative power to allow awards by arbitrators to be construed as the rulings of national courts. An example is in South Africa via provisions of both Sections 28 and 31 of the Arbitration Act 42 of 1965. In effect, at the core of the concession theory is the idea that, for numerous reasons (including the need to provide relief for courts), the state has conceded some element of judicial power to arbitrators. In the process, arbitration has become a judicialized and quasi legal process.[26]

III. LEGAL FRAMEWORK GOVERNING ARBITRATION AGREREEMENT IN TANZANIA MAIN LAND

(A) Constitution of the United Republic of Tanzania

A constitution is the body of legal and political rules through which the state is governed. The rules concern the government of a country. A constitution in the narrow sense is a document or set of documents intentionally drafted to form the fundamental law of a country.[27] Constitutions may be classified as written or unwritten, flexible or rigid, monarchical or republican, federal or unitary, supreme or subordinate to the legislature, or based on the separation of powers.[28] The constitution is often regarded as the mother law. It is regarded so because it is the supreme law of the land. This implies there is no other law that is above the constitution of the country.

[24] Yu, H. 2005. "Explore the void An evaluation of arbitration theories: Part 2." Int. Arbitration Law Rev. 8 (1): 14–22.
[25] Paulsson, J. 2011. "Arbitration in three dimensions." Int. Comparat. Law Q. 60 (2): 291–323. https://doi.org/10.1017/S0020589311000054. Accessed at 24 June 2024
[26] Stipanowich, T. 1987. "Rethinking American arbitration." Indiana Law J. 63 (3): 425–487.
[27] J. O. Onyango and M. Nassali, Zanzibar: Constitutionalism and Political Stability – Muafaka and the Search for a New Vision, A Report of the Fact-Finding Mission Organised under the Auspices of Kituo Cha Katiba, 2003.
[28] UK Parliament, The contents of Magna Carta, https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/magnacartaclauses/ accessed 25 June 2024

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Moreover, the other laws derive their legitimacy from the constitution. This denotes that the other laws of the land that go against the constitutional provisions are declared to be null and void.[29] Hence, even the arbitration law has to derive its legality from the mother law unless it will be declared to be null and void.[30] Article 15(1) of the Constitution of the United Republic of Tanzanial[31] provides for the principle of freedom of persons which is the basic principle applies in contractual relations. It provides that every person has the right to freedom and to live as a free person. This means the person is free even to enter the contractual transactions as a free person. Hence, the doctrine of freedom of the parties to an agreement as the fundamental principle has its roots in the constitutional provision of the right to live as a free person which includes the right to engage in contractual relations as a free person. The constitutional provision entitled the requirement of free consent in the arbitration agreement.

(B) Arbitration Act

It is an Act of the Parliament. To create an enabling environment for domestic and international arbitration.[32] Under Section 4 of the Arbitration Act,[33] construes arbitration agreements. It shows what amounts to the arbitration agreement. It states that the reference in an agreement to a written form of the arbitration clause or a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the arbitration agreement. Section 8 of the Arbitration Act[34] deals with the formalities of the arbitration agreement. It requires an arbitration agreement to comply with several formalities. One, the arbitration agreement must be in writing. Two, both parties to the arbitration agreement must sign it. Three, an exchange of written submissions between the parties. Section 10 of the Arbitration Act,[35] provides for the separability of the arbitration agreement. It states that an arbitration agreement that 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, did not come into existence or has become ineffective, and the arbitration agreement shall for that purpose, be treated as a distinct agreement. Section 11 of the Arbitration Act,[36] provides for the principle of survival of the arbitration agreement upon the death of the party to it. It states that an arbitration agreement is not discharged by the death of a party and

[29] Article 64 (5) of the Constitution of United Republic of Tanzania, 1977, as amended time to time
[30] Wilson, John Owen (2008). A Book For Judges. quoted in Duhaim, 2013
[31] Article 15 (1) of the Constitution of United Republic of Tanzania, 1977 as amended time to time
[32] The Arbitration Act, [Cap 15 RE 2022]
[33] Section 4 of the Arbitration Act, [Cap 15 R.E 2022]
[34] Ibid Section 8 of the Arbitration Act, [Cap 15 R.E 2022]
[35] Section 10 of the Arbitration Act, [Cap 15 R.E 2022]
[36] Ibid Section 11 of the Arbitration Act, [Cap 15 R.E 2022]

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may be enforced by or against the personal representative of that party. Section 13 of the Arbitration Act,[37] ensures the stay of legal proceedings. It states that 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 referred to arbitration may, upon notice to the other party 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.

(C) The Civil Procedure Codel

It is an Act providing for the procedure and related matters in civil proceedings.[38] For civil litigation gurus and practitioners in Tanzania, All court proceedings in the High Court and Subordinate Courts must follow the code. This is in addition to the Magistrates Courts' Act, in the case of the latter, Subordinate Courts in the styles of District Courts and Resident Courts.[39] Rule 1 of the Second Schedule to the Civil Procedure Code,[40] creates a need for the reference to commence the arbitration upon arbitration agreement. It states that wherein any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration they may, at any time before judgment is pronounced, apply to the court for an order of reference. Every such application shall be in writing and shall state the matter sought to be referred. Rule 3 of the Second Schedule to the Civil Procedure Code[41] provides for an order of reference from the court to conduct arbitration as per the arbitration agreement. It states that the court shall, by order, refer to the arbitrator the matter indifference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order. Rule 17 of the Second Schedule to the Civil Procedure Code[42] deals with the application to file in the court the arbitration agreement. It implicates that Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement or any of them may apply to any court having jurisdiction in the matter to which the agreement relates, that the agreement is filed in court.

(D) Arbitration (Rules of Procedure) Regulations 2021

The Arbitration (Rules of Procedure) Regulations 2021 establish a detailed framework for arbitration in Tanzania, replacing the previous rules.[43] These regulations cover various aspects

[37] Ibid Section 13 of the Arbitration Act, [Cap 15 RE 2022]
[38] The Civil Procedure Code Cap 33 R.E 2019
[39] Breakthrough Attorneys, Litigation Law Update: What Litigants Should Know Regarding The Recent Amendments To The Tanzania Civil Procedure Code, Cap. 33 R.E. 2002; Volume I, June 29, 2019
[40] The Civil procedure Code [Cap 33 RE 2019]
[41] Ibid of the [Cap 33 RE 2019]
[42] Ibid of the [Cap 33 RE 2019]
[43] The Arbitration (Rules of Procedure) Regulations 2021 (GN. No. 146 of 2021)

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of arbitration including general conditions, notices and submissions, the initiation of arbitration, the formation and composition of arbitral tribunals, the conduct of arbitration proceedings, and the issuance of awards and decisions. They stipulate that the regulations form part of any arbitration agreement unless parties agree otherwise. The process starts with a formal request for arbitration submitted to the Tanzania Arbitration Centre, which the Secretary General reviews to determine adequacy and assign a tribunal if the request is complete. Only accredited arbitrators can be chosen, with an exception for unlisted expert arbitrators under specific conditions.[44]

Proceedings are guided by principles of fairness and efficiency, with the first organizational conference held within 15 days of the tribunal's formation. The tribunal can issue final, interim, interlocutory, and partial awards, with the final award required within 30 days of hearing conclusion, extendable as needed.[45] The Centre and its officials are immune from liability for arbitration-related actions. Foreign awards are enforceable in the High Court if they meet stipulated conditions. The regulations ensure timely award issuance and implementation, detail cost allocation typically borne by the losing party, and allow for the tribunal or a party (with permission) to register the award with the Court.[46] The **principle of Kompetenz Kompetenz** (the power of the Arbitral Tribunal to rule on its own jurisdiction) is provided for under regulation 28 and Regulation 36 whereby the Regulation empowers the arbitral tribunal to hear and determine its own jurisdiction in respect of form, existence and validity or scope of arbitration agreement. According to regulation 28(3)[47] and 36(5)[48] the plea of Kompetenz Kompetenz must be raised not later than in the statement of defence failing of which such plea shall be bared in subsequent proceedings.

(E) Tanzania Arbitration Centre (Management and Operations) Regulations

The Tanzania Arbitration Centre (Management and Operations) Regulations 2021 define the structure and operational procedures for the Tanzania Arbitration Centre.[49] The Centre's organization includes the Board of Directors, the Secretariat, and Standing Committees. The Board, composed of a Chairman and six members (one being the Vice-Chairman), is responsible for advising the Minister for Constitutional and Legal Affairs, appointing members of the arbitration and advisory councils, implementing policy guidelines, and ensuring the Centre's

[44] Regulation 13(5) of the Arbitration (Rules of Procedure) Regulations 2021 (GN. No. 146 of 2021)
[45] Ibid of the Arbitration (Rules of Procedure) Regulations 2021 (GN. No. 146 of 2021)
[46] Regulation 66(3) (f) of the Arbitration (Rules of Procedure) Regulations 2021 (GN. No. 146 of 2021)
[47] Regulation 28(3) of the Arbitration (Rules of Procedure) Regulations 2021 (GN. No. 146 of 2021)
[48] Regulation 36(5) of the Arbitration (Rules of Procedure) Regulations 2021 (GN. No. 146 of 2021)
[49] Section 90(2) (d) of the *Tanzania Arbitration Centre (Management and Operations) Regulations,* (GN. No. 149 of 2021)

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objectives are met. The Secretariat, led by the Secretary General, handles administrative duties, keeps records, represents the Centre legally, and supports the Board. Standing Committees are appointed as needed to assist with specific tasks. These regulations ensure that the Centre operates efficiently and effectively, providing a solid foundation for arbitration activities in Tanzania.

(F) Code of Conduct for Reconciliators, Negotiators, Mediators, and Arbitrators 2021

The Code of Conduct for Reconciliators, Negotiators, Mediators, and Arbitrators 2021 sets professional standards for those involved in dispute resolution,[50] enacted under the Civil Procedure Code.[51] This Code aims to guide practitioners in their professional responsibilities, ensuring ethical behavior and integrity in reconciliation, negotiation, mediation, and arbitration processes. Violations of the Code are considered professional misconduct and can result in disciplinary actions such as deregistration, written warnings, and compensation for incurred losses.[52] Complaints about misconduct can be filed with the Registrar, who can initiate disciplinary proceedings along with the Accreditation Panel. Practitioners can appeal decisions to the Minister within 21 days. This Code is crucial for maintaining high professional standards and trust in dispute resolution processes.

(G) Reconciliation, Negotiation, Mediation, and Arbitration (Practitioners Accreditation)

The Reconciliation, Negotiation, Mediation, and Arbitration (Practitioners Accreditation) Regulations 2021,[53] under the Civil Procedure Code,[54] outline the accreditation criteria and process for dispute resolution practitioners. The Accreditation Panel, comprising members such as the Attorney General, Solicitor General, and presidents of relevant legal bodies, oversees the accreditation. Criteria for reconciliators, negotiators, or mediators include at least five years' experience in dispute resolution or as a practicing advocate, with no record of professional misconduct. Arbitrators must have qualifications comparable to a High Court judge and significant experience in dispute resolution panels or tribunals. Foreign practitioners can also apply for accreditation. Applications are reviewed by the Registrar and forwarded to the Accreditation Panel for final decisions. Accredited practitioners receive a two-year certificate,

[50] The Code of Conduct for Reconciliators, Negotiators, Mediators, and Arbitrators 2021(GN. No. 148 of 2021)
[51] The Civil Procedure Code [Cap 33 RE 2019]
[52] Regulation 20 of the Code of Conduct for Reconciliators, Negotiators, Mediators, and Arbitrators 2021(GN. No. 148 of 2021)
[53] Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021 (GN. No. 149 of 2021)
[54] The Civil Procedure Code [Cap 33 RE 2019]

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renewable if they adhere to the terms. Appeals against accreditation decisions can be made to the Minister of Constitutional and Legal Affairs within 21 days, ensuring transparency and fairness in the accreditation process.

(H) The Geneva Protocol Arbitration Clauses[55]

The Geneva Protocol on Arbitration Clauses 1923 (the "Geneva Protocol of 1923,) provided that: “Each of the Contracting States recognises the validity of an agreement, whether relating to existing or foture differences, between parties subject respectively to the jurisdiction ofdifferent Contracting States. "This Geneva Protocol of 1923 made contracting states recognise the validity ofarbitration agreements referring to future disputes. the Geneva Protocol of 1923 and the New York Convention of 1958 requires contracting states to recognise any arbitration agreement, whether submission agreement or arbitration clause. Although these international conventions give strength to arbitration agreements, the agreements remain dependent upon national law for internal validity. As confirmed by Rene David, each state may freely determine who is qualified to enter into an arbitration agreement, and which matters may be referred to arbitration.[56]

(I) The New York Convention on the Enforcement of Foreign Arbitral Award

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1956 (the "New York Convention of 1958")[57] is an enforcement convention aimed at national courts rather than arbitration tribunals. It has nevertheless been the subject of some discussion concerning whether it recognises the doctrine of separability. The New York Convention of 1958 has no provision explicitly referring to separability. However, van den Berg finds it 'indifferent' to the doctrine of separability, as Article V(I) provides: Recognition and enforcement of the award may be refused at the request ofthe party against whom it is invoked only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that: (a) The parties to the agreement ... were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made .This provision refers the question of separability to municipal law.[58] In this case

[55] The Geneva Protocol Arbitration Clauses of 1923
[56] Rene David, "Arbitration in International Trade", (1985), p. 171
[57] Adopted by the Conference on International Commercial Arbitration held at the Headquarters of the United Nations in New York from 20 May to 10 June 1958. Opened for signature 10 June 1958, entered into force 7 June 1959, published in 330 UNTS 38 (1959) n 4739. Smit and Pechot., above n 16, p. 31.
[58] Albert Jan van den Berg. "The New York Convention o f 1958", (DeventerlNetherland: Kluwer Law and Taxation Publishers, DeventerlNetherlands, 1981), p. 145-46 .

Schwebel contends that the New York Convention of 1958 sustains separability 'by implication' as none ofthe exclusive grounds on which enforcement ofan arbitral award may be refused refers to the invalidity of the main. Nevertheless, as the applicable municipal law mayor may not provide for separability, it is possible that the application of that law may lead to the invalidity of the arbitration clause as a result of the invalidity of the main contract.[59] Therefore, V anden Berg's view seems more compelling than Schwebel's and the New York Convention of 1958 must be considered neutral as to the doctrine ofseparability ofan arbitration clause.

(J) The ICC Arbitration Rules of 1975

The Rules of the Court of Arbitration of the International Chamber of Commerce of 1975 (the "ICC Arbitration Rules of 1975"),[60] also embrace the principle of separability, as well as the competence-competence of arbitration agreement.[61] After making a provision for competence-competence in Article 8(3), Article 8(4) ofthe ICC Arbitration Rules of 1975 states that: Unless otherwise provided, the arbitrator shall not cease to havejurisdiction by reason ofany claim that the contract is null and void or allegation that it is inexistent provided that he upholds the agreement to arbitrate. He shall continue to have jurisdiction, evim though the contract itselfmay be inexistent or null and void, to determine the respective rilJ,hts ofthe parties and to adjudicate upon their claims.[62] The scope of this Article 8(4) of the ICC Arbitration Rules of 1975 is far-reaching, providing not only for the separability o f the arbitration agreement for the purposes of ruling on its validity, but also empowering the arbitrators to rule on the respective rights of the parties even after a determination that the main agreement is null and void or inexistent. The phrase 'provided that he upholds the arbitration agreement to arbitrate' in Article 8(4) implies, however, that the jurisdiction of the arbitrator ends where the invalidity runs to the arbitration clause itself. If the arbitrator cannot uphold the arbitration agreement, he has no further basis for his jurisdiction.

IV. Practical implication and limitation of separability doctrine in Tanzania main land

(A) Implications

[59] Sojuznejleexport v. JOC Oil Co, S Ct Bennuda, 16 July 1987, 2 InrI Arb Rep 482.
[60] The ICC Arbitration Rules of 1975 has been amended on I July 1986 and I 1988 . The amendments have been incorporated into the Rules, respectively Januaryconcerning the cost and payment and the matters related to the constitution of the arbitral tribunal, such as the appoinlmenl, challenge and replacement of arbitrators. Appendix 6 in Redfern and Hunter, above n 1, p. 572.
[61] W Laurence Craig, William W Park and Jan Paulsson, *Inlemalional* Chamber of Commerce Arbitration, 2nd ed, (New York: Oceana Publications, In~ 1990),. p. 65-72.
[62] Article 8(4) of The ICC Arbitration Rules, 1975

- **Preservation of Arbitral Jurisdiction**

The primary implication of the separability principle is the preservation of the arbitral tribunal's jurisdiction even if the main contract is challenged. This means that disputes about the validity or existence of the main contract do not automatically affect the arbitration agreement. For example, under the UNCITRAL Model Law (Article 16),[63] an arbitration clause is treated as a separate agreement, ensuring that the tribunal can rule on its own jurisdiction even if the main contract is deemed invalid.[64]

- **Choice of Law**

The separability principle allows the arbitration agreement to be governed by a different legal system than the main contract. This can result in the arbitration agreement being subject to a national law that differs from the substantive law governing the main contract, providing flexibility in international disputes. This flexibility is supported by scholars like Born, who argue that separability allows for differing legal regimes to govern the arbitration agreement and the main contract.[65]

- **Avoidance of Frustration in Dispute Resolution**

By treating the arbitration clause independently, the separability principle avoids situations where parties could frustrate the arbitration process simply by disputing the main contract. This reinforces the parties' intention to resolve disputes through arbitration, thus promoting efficiency and reducing litigation.[66]

(B) Limitation

- **Scope of Application**

The separability principle is limited to issues regarding the validity and existence of the arbitration agreement relative to the main contract. It does not mean that the arbitration agreement is entirely independent for all purposes. For instance, if an arbitration agreement was never validly concluded due to lack of mutual consent or other foundational contract principles,

[63] Article 16 of the UNICITRAL Model Law on International Commercial Arbitration (1985)
[64]Doctrine of Separability and determination of the proper law of an Arbitration agreement (https://www.barandbench.com/columns/doctrine-of-separability-and-determination-of-the-proper-law-of-the-arbitration-agreement accessed 25 June 2024
[65] Ibid
[66] How Separate is Separate? Court of Appeal clarifies the scope of the Separability Principle with respect to arbitration agreements from https://cms-lawnow.com/en/ealerts/2023/01/how-separate-is-separate-court-of-appeal-clarifies-the-scope-of-the-separability-principle-with-respect-to-arbitration-agreements accessed at 25 June 2024

the separability doctrine cannot confer jurisdiction on the arbitral tribunal.[67]

- **Court Interventions**

In some jurisdictions, courts still retain the authority to review and decide on the validity of the arbitration agreement, which can lead to parallel proceedings and potential conflicts between court and arbitral tribunal decisions. For example, under German law (Section 1040 (3) of the ZPO),[68] a court can decide on the jurisdiction of an arbitral tribunal even if arbitration proceedings are ongoing.[69]

- **Not Absolute Autonomy**

While separability provides some level of independence for arbitration agreements, it is not absolute. The substantive provisions of the main contract may still influence the arbitration agreement, especially in determining the applicable law and procedural rules. The Sulamérica case illustrated that an express choice of law in the main contract is a strong indicator of the parties' intentions for the arbitration agreement, unless clearly stated otherwise.[70]

V. RECONCILING SEPARABILITY WITH CONSENSUAL OF ADR

(A) Examining the Alignment with Consensual ADR in Tanzania

In Tanzania, the principle of consensual ADR is fundamental, emphasizing voluntary and cooperative resolution of disputes. In the case of *Cereals and other Produce Board of Tanzania vs Monaban Trading & Farming Company Limited*,[71] state that in our law, this doctrine is enshrined under section 12 of the Arbitration Act[72] which provides 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 agreement is invalid, did not come into existence or has become ineffective, and the arbitration agreement shall for that purpose, be treated as a distinct agreement."

The doctrine of separability, which posits that an arbitration agreement is distinct from the main

[67] Kompetenz-Kompetenz and Separability from https://link.springer.com/chapter/10.1007/978-3-030-66752-8_5 accessed 25 June 2024
[68] German Code of Civil Procedure of 1887 also Known as ZPO "(Zivilprozessordnung)"
[69] Kompetenz-Kompetenz and Separability from https://link.springer.com/chapter/10.1007/978-3-030-66752-8_5 accessed 25 June 2024
[70] How Separate is Separate? Court of Appeal clarifies the scope of the Separability Principle with respect to arbitration agreements from https://cms-lawnow.com/en/ealerts/2023/01/how-separate-is-separate-court-of-appeal-clarifies-the-scope-of-the-separability-principle-with-respect-to-arbitration-agreements accessed at 25 June 2024
[71] Misc. Commercial Cause No. 9 of 2022
[72] Section 12 of the Arbitration Act, [Cap 15 RE 2019]

contract, must align with these principles to be effective. Consensual ADR relies on the premise that parties willingly engage in arbitration or other ADR processes to resolve their disputes. The separability doctrine, by ensuring that the arbitration agreement stands independently of the main contract, supports the continuation of arbitration even if the underlying contract is in dispute. This can be seen as aligning with the consensual nature of ADR, as it preserves the parties' original agreement to arbitrate, irrespective of the main contract's validity. However, challenges arise when the main contract is invalidated due to issues like fraud or duress. In such cases, questions about the fairness and voluntariness of the arbitration agreement itself may emerge. For example, in the case of *Tanzania Electric Supply Co. Ltd v. Dowans Holding SA*, the court upheld the separability of the arbitration agreement despite the underlying contract being contested. This reflects a commitment to upholding the parties' agreement to arbitrate, thus aligning with the principles of consensual ADR by respecting party autonomy.

(B) Identifying Potential Conflicts and Their Implications

Despite the alignment in theory, practical conflicts can arise between the separability doctrine and the principles of consensual ADR. One key conflict is the potential for the arbitration agreement to be enforced in situations where the main contract was entered into under fraudulent or coercive circumstances. This could lead to parties being compelled to arbitrate disputes despite the questionable validity of their consent to the main contract. The legal and practical implications of such conflicts are significant. They can undermine the integrity and perceived fairness of the ADR process, as parties may feel forced into arbitration despite the main contract being invalidated. This tension was evident in the case of *AnAn Group (Singapore) Pte Ltd v VTB Bank*[73] for winding up applications based on debts subject to arbitration. The court ruled that it was abusive for JHC to claim the contracts were void while simultaneously relying on the arbitration clauses within those contracts. JHC's argument that only the payment obligation, not the arbitration agreements, was unenforceable was rejected because JHC failed to explain why the contracts were entered into or how the arbitration agreements could survive without the main contracts.

(C) Assessing the Effectiveness of the Doctrine in Enhancing ADR Principles

To assess whether the separability doctrine enhances or undermines ADR principles, it is crucial to evaluate its practical effectiveness. In Tanzania, the doctrine is intended to protect the arbitration process from disruptions caused by disputes over the main contract. By treating the arbitration agreement as a separate entity, the doctrine aims to ensure that arbitration can

[73] [2020] 1 SLR 1158

proceed smoothly, thereby providing a reliable and efficient means of dispute resolution.

Comparative analysis with other jurisdictions reveals varied approaches. For instance, in the UK, the Arbitration Act 1996 similarly upholds the separability principle, which has generally been seen as enhancing the efficiency of arbitration by preventing parties from easily evading their commitment to arbitrate.[74] However, in jurisdictions like France, the courts have been more willing to scrutinize the arbitration agreement's validity in cases of fraud or coercion, demonstrating a more nuanced approach to balancing separability with consensual ADR principles.[75] Insights from Tanzanian arbitration practitioners indicate that while the separability doctrine is crucial for maintaining the integrity of arbitration, there is a need for careful judicial oversight to ensure that the enforcement of arbitration agreements does not override issues of consent and fairness. This suggests that while the doctrine enhances ADR by ensuring arbitration can proceed, it must be applied with consideration of the broader context of party autonomy and consensual dispute resolution.

VI. RECOMMENDATIONS

- Clarify the Scope of the Separability Principle: Amend the Arbitration Act to explicitly define the conditions under which the separability principle applies. This should include clear guidelines on the treatment of arbitration agreements in cases of fraud, coercion, or other vitiating factors affecting the main contract.
- Introduce Provisions for Initial Review of Arbitration Agreements: Establish a legal framework for courts to conduct a preliminary review of the validity of arbitration agreements when the main contract is challenged. This would ensure that arbitration does not proceed if the agreement itself was obtained under duress or fraud.
- Enhance Disclosure Requirements: Mandate enhanced disclosure requirements for arbitration agreements, ensuring that parties fully understand the implications of entering into such agreements. This could include requiring that arbitration clauses be prominently highlighted and explained in plain language.

VII. CONCLUSION

Throughout this analysis, it has become evident that while separability safeguards the autonomy of arbitration agreements from disputes affecting the main contract, its application must be carefully balanced to uphold the principles of fairness, voluntariness, and justice in ADR

[74] In the case of Paul Smith Ltd v H & S International Holdings Co Inc, [1991] 2 Lloyd's Rep 127.
[75] *See*, the case of Cassation ruled in Societe Gosset v Societe Carpel Cour de Cassation, [1963] D Jur 545

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processes. Firstly, Tanzania's legislative framework, particularly Section 12 of the Arbitration Act, provides a solid foundation for the separability principle by affirming the autonomy of arbitration agreements. This legal clarity is essential for ensuring predictability and consistency in arbitration proceedings, thereby enhancing the attractiveness of Tanzania as a jurisdiction for resolving international commercial disputes. However, legislative reforms are recommended to explicitly define the conditions under which separability applies, especially concerning cases involving fraud, coercion, or other vitiating factors that may affect the validity of arbitration agreements. Strengthening disclosure requirements and introducing mechanisms for judicial review of arbitration agreements at the outset of disputes would further reinforce the integrity of ADR practices in Tanzania. Secondly, judicial approaches are pivotal in mitigating conflicts that may arise from the separability doctrine. Tanzanian courts should adopt a contextual interpretation of separability, considering the specific circumstances and equities of each case.

This approach would allow courts to uphold arbitration agreements while safeguarding against potential abuses or injustices that could undermine the consensual essence of ADR. Moreover, the development and dissemination of judicial guidelines for handling separability-related issues would provide clarity and guidance to judges, promoting consistent and fair decisions across different arbitration disputes. Furthermore, enhancing the capacity of judges and arbitrators through specialized training programs is essential. These programs should focus on deepening understanding of the separability principle and its implications for ADR practices in Tanzania. By equipping judicial officers with the necessary expertise and skills, Tanzania can strengthen its arbitration infrastructure and enhance the quality of dispute resolution services offered to businesses and individuals alike. Ultimately, the effectiveness of the separability doctrine in Tanzania hinges on its ability to strike a delicate balance between autonomy and fairness in ADR. Legislative reforms and judicial approaches should work in tandem to ensure that arbitration agreements are respected as expressions of parties' consent, while also safeguarding against abuses of process. By implementing these recommendations, Tanzania can reinforce its commitment to promoting a robust and equitable arbitration environment that meets international standards and inspires confidence among domestic and international stakeholders alike in the efficacy of its ADR mechanisms.

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