
Kluwer Arbitration Blog

2023 Vietnam ADR Week Recap: Comparison of the Interplay of the Separability Doctrine and Questions Relating to Formation and Validity of Arbitration Agreements across Various Jurisdictions

Nguyen Do (YKVN) · Saturday, July 8th, 2023

The inaugural Vietnam ADR Week (“VAW”) took place in Ho Chi Minh City from 9 to 12 May 2023. As a sponsor of VAW, Vietnamese law firm YKVN organized a discussion panel on 10 May 2023 on a comparison of the interplay of the separability doctrine and questions relating to formation and validity of arbitration agreements across various jurisdictions. Panelists included Daryl Chew (Three Crowns, Singapore), Jennifer Lim (Sidley Austin, Singapore), Jonathan Lim (Wilmer Hale, London), Thomas Parigot (Gaillard Banifatemi Shelbaya Disputes, Paris), and Mahesh Rai (Drew & Napier, Singapore). The panel was moderated by Nguyen Do, a YKVN partner based in Singapore.

The Vietnamese Law Position

Mr. Do set the stage for the initial discussion by providing an overview on the interplay of the separability doctrine and questions of validity of arbitration agreements under Vietnamese law.

Mr. Do explained that Vietnamese law essentially takes a two-step approach:

1. The starting point under Vietnamese law is that if there is an arbitration agreement between the parties, such arbitration agreement is “absolutely independent” from the underlying contract (Art. 19 of the Vietnamese Law on Commercial Arbitration (the “LCA”). The meaning of “absolutely independent” is illustrated by the second sentence in Art. 19 which provides that “[a]ny modification, extension, cancellation, invalidity or non-performance of the contract will not invalidate the arbitration agreement.”
2. Questions of validity of the arbitration agreement are then considered solely with reference to Art. 18 of the LCA, which provides a list of six circumstances in which an arbitration agreement will be found invalid, e.g., if the person signing the arbitration agreement lacks legal authority to do so, or if the arbitration agreement was not in writing.

The English Law Position

Mr. Do then turned the floor over to Mr. Lim and Mr. Rai to discuss the English courts' application of the separability doctrine to issues of contract formation with reference to a recent English Court of Appeal decision, *DHL Project & Chartering Ltd v. Gemini Ocean Shipping Co Ltd*. [2022] EWCA Civ 1555 (“*DHL*”). In *DHL*, the English Court of Appeal was asked to consider whether an arbitration agreement was binding on the parties in circumstances where a pre-condition to the effectiveness of the main contract had not been satisfied. The separability doctrine came up because the English High Court had set aside the arbitral award on the basis that there was no valid arbitration agreement, and Gemini Ocean Shipping Co. Ltd appealed the English High Court decision *inter alia* on the basis that the High Court judge had failed to give proper effect to the separability doctrine.

According to both panelists, the English Court of Appeal concluded in *DHL* that:

1. There existed a pre-condition of the contract that prevented a binding contract from coming into existence, and the pre-condition had not been fulfilled;
2. There is a distinction between disputes concerning “contract formation,” such as whether there had been valid offer and acceptance and intention to create legal relations, and “contract validity,” where the parties did agree to arbitration, but one party is contending that the agreement is invalidated. The separability principle as enshrined in Section 7 of the English Arbitration Act 1996¹⁾ was not relevant to disputes concerning contract formation, as distinct from disputes concerning contract validity. In the case of the former, (i) usual contract formation rules must be satisfied because if there is no binding arbitration agreement in the first place, there is nothing to which the separability principle can apply; and (ii) defects in contract formation pertaining to the main contract are generally likely to impeach the arbitration clause; and
3. In this case, which concerned “contract formation,” there was no valid arbitration agreement because all that the parties had agreed was that if a binding contract was concluded, then that contract would contain an arbitration clause. Since no binding contract was concluded, there was likewise no binding arbitration agreement between the parties.

The Singapore Law Position

Continuing the discussion, Mr. Chew and Ms. Lim presented the Singapore law perspective based upon the leading case of *BCY v. BCZ* [2016] SGHC 249 (“*BCY*”), previously discussed [here](#). *BCY* concerned a dispute over a share purchase agreement (“*SPA*”) that was never signed even though seven drafts had been exchanged between the parties. The drafts all provided for New York law as the governing law of the *SPA*, and later iterations of the draft consistently provided for ICC, Singapore-seated arbitration. When one party refused to execute the *SPA* and proceed with the sale, the other party initiated an ICC arbitration. The respondent in the arbitration objected to the Tribunal’s jurisdiction on the basis that no arbitration agreement (or *SPA*) had been concluded between the parties. The Singapore High Court was asked to determine whether there was a valid and binding arbitration agreement between the parties.

The defendant’s case was that a binding ICC arbitration agreement was concluded before the conclusion of the *SPA*. Specifically, the defendant argued, relying on the doctrine of separability, that the arbitration clause is separate from and independent of the *SPA* and therefore the parties intended to enter into an arbitration agreement independent of the underlying contract. Therefore, even if the court should find that there was no valid *SPA* between the parties, the court could still

find that the parties intended to and did enter into an arbitration agreement independent of the underlying contract.

The Singapore court held that the separability doctrine is relevant only where an arbitration agreement forms part of a main contract as it serves the narrow purpose of ensuring that any challenge that the main contract is invalid does not, in itself, affect the validity of the arbitration agreement. The doctrine of separability was therefore irrelevant to the question of whether a valid arbitration agreement between the parties had been concluded prior to the SPA. The Singapore court then proceeded to decide the question of whether there was a valid arbitration agreement between the parties, applying the usual requirements for the formation of a contract under the applicable law.

Mr. Chew contrasted *BCY* with a Vietnamese court case (Hanoi People’s Court Decision No. 03/2020/QD-GQKN dated 28 May 2020) in which the parties had also failed to agree on the main terms of and execute a construction contract, but had in the negotiations process signed one set of meeting minutes to record agreement on an arbitration clause. When the negotiations failed, the owner drew on the bid bond and the contractor initiated arbitration. The owner successfully challenged the jurisdiction of the tribunal in the arbitration. However, the contractor appealed to the courts and prevailed because the Vietnamese courts found that the signed minutes were sufficient evidence of a valid and binding arbitration agreement.

The French Law Position

Next, Mr. Parigot provided the French and civil law perspective, noting that the principle of separability of the arbitration agreement in international arbitration was first articulated in *Etablissements Raymond Gosset v. Freres Carapelli S.P.A.* (Court of Cassation, Decision No. 323/1963). In 2011, the principle of separability and independence of the arbitration agreement was enacted in Art. 1447 of the French Code of Civil Procedure in words remarkably similar to Art. 19 of the LCA.

French case law confirms that the doctrine of separability is relevant even when the existence of the main contract is disputed. For instance, the French Court of Cassation recently held in *Société Leplatre & Cie v. Etablissement Trescarte* (Court of Cassation, Decision No. 22-14.708 dated 12 April 2023) that “the arbitration agreement is independent of the main contract, and is not affected by the mere non-existence of that contract” and that the French Court of Appeal should have enquired into whether the parties had agreed to arbitrate “irrespective of whether the main contract was formed.”

Conclusion

The panel discussion was illuminating on how various national courts have interpreted the purpose and applicability of the doctrine of separability, one of the conceptual and practical cornerstones of international arbitration. As summarized by Mr. Do in his concluding remarks, there appears to be a dichotomy between, on the one hand, the English and Singapore courts’ view, and on the other hand, the Vietnamese and French courts’ view on whether the doctrine of separability is relevant where a dispute regarding the arbitration agreement is intertwined with questions of contract

formation.


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References

Section 7 of the English Arbitration Act 1996 provides that: “Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement **?1** (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”

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