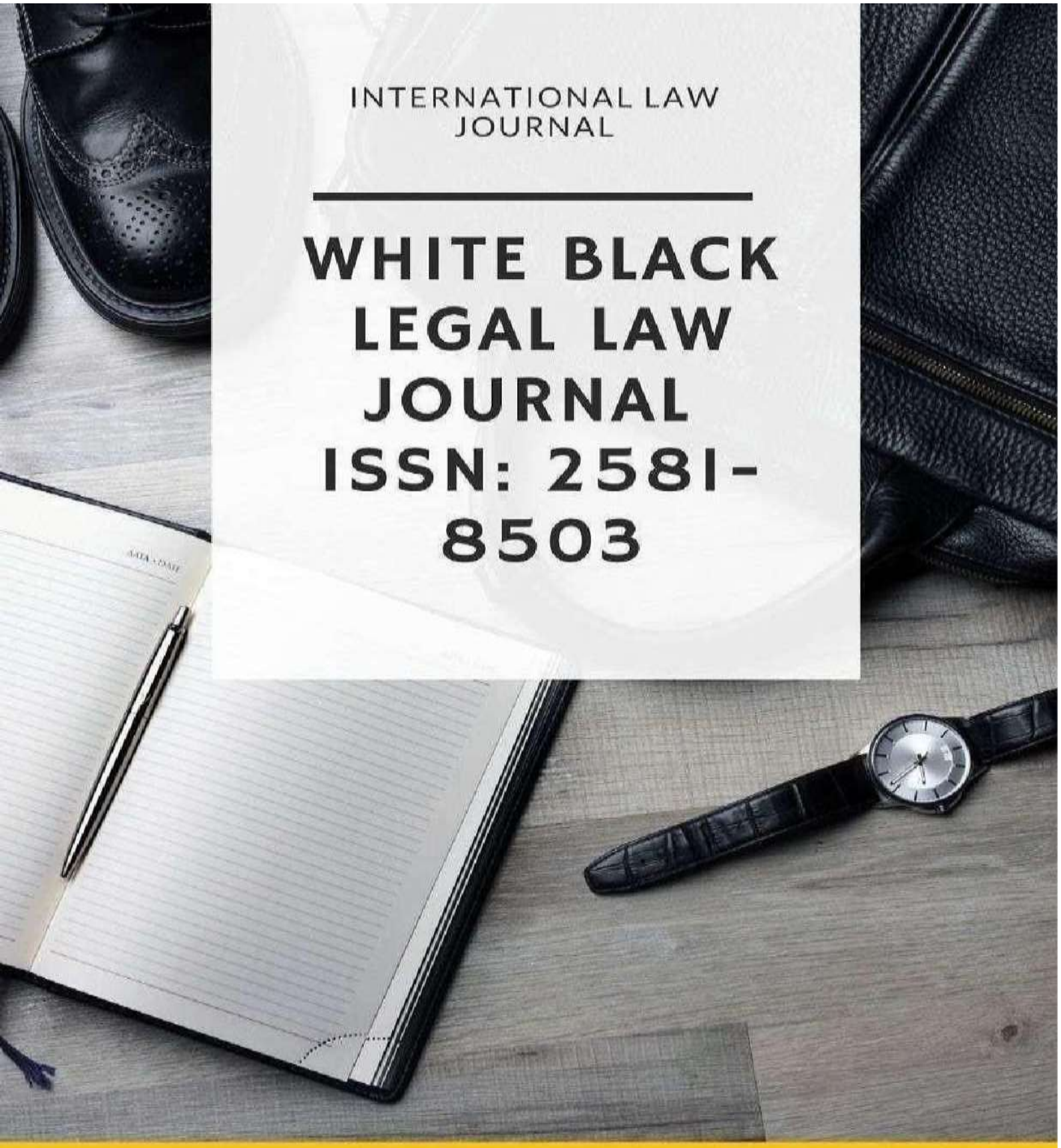

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INOPERABILITY OF ARBITRATION AGREEMENT IN INTERNATIONAL COMMERCIAL ARBITRATION

AUTHORED BY - AARYAKI SEWAL

When Arbitration Agreements Cease to Operate

The principle of separability of Arbitration clauses is a defining feature of International Commercial Arbitration, but it is not absolute. As recognised under Sections 8 and 45 of the Arbitration and Conciliation Act, 1996 (ACA) and Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, courts are generally required to refer parties to arbitration unless the agreement is "null and void, inoperative or incapable of being performed." Even though the term 'inoperative' is not defined explicitly in the ACA, Indian and foreign courts have interpreted it to mean that an arbitration agreement, although initially valid, has ceased to have legal effect between the parties. This may occur as a result of waiver, novation, settlement, termination, or other supervening circumstances, rendering the arbitration clause legally ineffective for resolving the dispute at hand. The paper undertakes critical examination of the recent judgment in Destin v Saipem, where the English High Court avouched Monde Petroleum v Westernzagros and applying Mozambique v Prinvest, held that subsequent settlement agreement containing an exclusive jurisdiction clause rendered earlier arbitration agreements inoperative under Section 9(4) of the English Arbitration Act 1996. Courts have sought to reconcile contractual sequencing, party autonomy, and legal coherence in deciding inoperability. Through doctrinal exploration and comparative analysis, this paper aims to flesh out the contours of inoperability and its doctrinal significance for the construction and enforcement of dispute settlement regimes in global commerce.

Part I: Substantive Inoperability of Arbitration Agreements

(a) Doctrinal Foundations of Inoperability

Despite its presumed validity under the doctrine of separability, an arbitration clause may be rendered ineffective by flaws at its inception, illegality, or lack of clarity or enforceability. In Dallah v Pakistan,[1] the UK Supreme Court declined to enforce where the signatory had no

[1]Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46, [2011] 1 AC 763

authority, clarifying that validity under applicable law is a threshold requirement under Article V(1)(a) of the New York Convention.[2]

Even if the original contract was void ab initio, inoperability can still apply. Fiona Trust v Privalov reaffirmed that arbitration clauses persist despite challenges to the principal agreement.[3] However, this approach fails in cases where the contract is void ab initio, such as forgery or duress. In Prima Paint, the U.S. Supreme Court distinguished between general contract challenges and specific clause challenges.[4] However, Buckeye Check Cashing clarified that separability does not apply when there is no clear consensus.[5]

Mandatory National provisions can also trump operability. In Mostaza Claro, the CJEU struck down an arbitration clause for consumers for violating EU Directive 93/13, and it decided that such clauses had to be examined by courts ex officio.[6] Ambiguously worded drafting can also lead to inefficacy in some clauses. In Mangistaumunaigaz Oil v United World Trading, a clause requiring arbitration "if any" dispute arose was held too ambiguous to constitute a binding contract under Section 6 of the Arbitration Act 1996 and Article 7 of the UNCITRAL Model Law.[7] Multi-level arbitration clauses can also fail on the grounds of vagueness. In Republic of Sierra Leone v SL Mining, a requirement to settle disputes "amicably" prior to arbitration was deemed to be unenforceable on grounds of vagueness in procedure.[8] Again, in ICC Case No. 8445 (1996), a tribunal upheld jurisdiction where a mediation clause was too vague to postpone arbitration.[9]

Differences between connected contracts can render arbitration ineffective. In UBS v HSH Nordbank, conflicting arbitration and litigation clauses led to potential inoperability, though arbitration finally won out.[10] In Insigma v Alstom, the Singapore Court enforced a hybrid clause but cautioned that sloppy drafting could make the contract void.[11]Lastly, statutory ineligibility makes a dispute non-arbitrable. In BGE 142 III 296, the Swiss Federal Tribunal

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), art V(1)(a).
[3] Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40, [2007] 4 All ER 951.
[4] Prima Paint Corp v Flood & Conklin Mfg Co 388 US 395 (1967).
[5] Buckeye Check Cashing, Inc v Cardegna 546 US 440 (2006).
[6] Mostaza Claro v Centro Móvil Milenium SL (Case C-168/05) [2006] ECR I-10421.
[7] Mangistaumunaigaz Oil Production Association v United World Trade Inc [1995] 1 Lloyd's Rep 617 (CA).
[8] The Republic of Sierra Leone v SL Mining Ltd [2021] EWHC 286 (Comm).
[9] ICC Case No. 8445 of 1996, in ICC International Court of Arbitration Bulletin Vol 10, No 2 (1999).
[10] UBS AG v HSH Nordbank AG [2009] EWCA Civ 585.
[11] Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24.

ruled that in rem property disputes were not arbitrable under Swiss law.[12] In Mitsubishi Motors, the U.S. Supreme Court allowed arbitration of antitrust disputes but mentioned that arbitrability was subject to local law, in line with Article V(2)(a) of the Convention.[13]

(b) Impecuniosity as a Ground for Inoperability in International Commercial Arbitration

The question of whether a party's financial incapacity can render an arbitration agreement inoperative engages fundamental tensions between party autonomy and access to justice. The Swiss Federal Tribunal in Fondation A v. Company X confronted this dilemma directly, acknowledging that while Swiss law generally excludes legal aid for arbitration, extreme cases might require intervention to protect fundamental due process rights under Article 6(1) of the European Convention on Human Rights.[14] This position finds support in academic commentary, with Gabrielle Kaufmann-Kohler arguing that "the principle of effective access to justice may in exceptional circumstances override the normal validity of arbitration agreements."[15]

Comparative jurisprudence reveals divergent approaches. The German Bundesgerichtshof in the seminal Plumber's Case recognized that severe financial hardship could render an arbitration agreement "incapable of being performed," establishing an important civil law precedent.[16] Conversely, the English Court of Appeal in Paczy v. Haendler & Natermann adopted a more restrictive approach, requiring proof that the respondent's conduct directly caused the claimant's impecuniosity.[17] This split reflects deeper philosophical divides, with civil law systems traditionally more receptive to equity-based arguments than their common law counterparts.

The systemic implications are particularly acute in consumer and employment arbitration. As documented in the ICCA-Queen Mary Task Force Report, mandatory arbitration clauses in adhesion contracts frequently create insurmountable barriers for impecunious parties.[18] Stavros Brekoulakis notes this creates an "access to justice paradox," where arbitration's theoretical

[12] Swiss Federal Tribunal, BGE 142 III 296 (2016).
[13] Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc 473 US 614 (1985).
[14] *Foundation A v. Company X* [2014] Swiss Federal Tribunal 4A_178/2014, [3.2].
[15] Gabrielle Kaufmann-Kohler, 'Arbitration and Access to Justice' (2015) 36 ICCA Congress Series 13, 27.
[16] BGH, NJW 2000, 1717 (*Plumber's Case*), [22].
[17] *Paczy v. Haendler & Natermann* [1981] 1 Lloyd's Rep 302 (CA), 308.
[18] ICCA-Queen Mary Task Force, *Report on Access to Arbitration* (2018) 45-47.

efficiency becomes a practical barrier for disadvantaged parties.[19]While some institutions like the Court of Arbitration for Sport have implemented legal aid schemes, these remain exceptional rather than systemic solutions.[20]

This analysis suggests that while most jurisdictions remain reluctant to invalidate arbitration clauses solely due to financial hardship, there is growing recognition that extreme cases may trigger the inoperability doctrine. As Gary Born observes, "The challenge for contemporary arbitration is to balance contractual autonomy with fundamental fairness concerns".[21]

(c) Inoperability Through Conduct: Waiver and Estoppel as Barriers to Arbitration

The principles of waiver and estoppel are firmly established pillars for the avoidance of arbitration agreements in international commercial arbitration. Case law in various jurisdictions consistently demonstrates that where a party engages actively in judicial proceedings without promptly asserting their arbitration rights, such conduct may amount to a waiver. This principle was succinctly encapsulated in Agility Public Warehousing Co. v. Supreme Foodservice GmbH, where the Southern District of New York ruled that widespread engagement in litigation activities—filing dispositive motions and actively engaging in discovery procedures, evinced an unmistakable intent to waive arbitration rights.[22]

Judicial finding of waiver involves a multifactor test with specific focus upon three considerations: passage of time in asserting arbitration rights, nature and scope of litigation activity engaged in, and prejudice demonstrably suffered by the other party.[23]The Fifth Circuit's holding in Grigsby & Associates v. M Securities Investment provided significant guidance for such inquiry, holding that passage of time alone, without corroborative litigation activity or concomitant prejudice, is insufficient to establish waiver.[24]

Parallel estoppel doctrines serve to preclude arbitration where the behaviour of a litigant in litigation leads to unfair disadvantage against its opposite. The Third Circuit case of Khan v. Dell Incorporated is a particularly strong illustration, wherein the court precluded arbitration

[19] Stavros Brekoulakis, 'Systemic Bias in International Arbitration' (2022) 38 Arbitration International 189, 203.
[20] Antonio Rigozzi, *International Arbitration in Sport* (2015) 412-415.
[21] Gary Born, *International Commercial Arbitration* (3rd edn, 2021) 1127.
[22] Agility Public Warehousing Co. v. Supreme Foodservice GmbH_ 2011 WL 3475458 (SDNY 2011).
[23] UNCITRAL Model Law on International Commercial Arbitration (2006) art 8.
[24] Grigsby & Associates v. M Securities Investment_ 664 F.3d 1350 (5th Cir 2016).

following the plaintiff's protracted three-year utilization of judicial process.[25] Scholarly writing, particularly as formulated in Gary Born's seminal treatise, cautions against the uniform application of these doctrines, observing that while they perform critical functions to curb procedural abuse, excessive use risks undermining the underlying pro-arbitration objectives of the New York Convention. This inherent tension between safeguarding against strategic forum manipulation and upholding the autonomy of arbitration continues to present complex challenges in contemporary arbitral practice.[26]

(d) ***Public Policy and Illegality as Grounds for Inoperability in International Commercial Arbitration***

It is imperative to note that one of the most notable exceptions to New York Convention's overall pro-enforcement inclination is the fact that an arbitration agreement may be deemed inoperative if it is in contravention of fundamental norms of public policy. Courts may decline to refer an agreement to arbitration under Article II(3) of the Convention if it is "null and void, inoperative or incapable of being performed," with public policy considerations playing a significant role in this determination.

English law strikes a balance between public policy exceptions and arbitral autonomy. The Court of Appeal's decision in Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. states that although arbitrators are ultimately in charge of deciding whether an arbitration agreement is unlawful, courts have the power to reject enforcement actions that go against global public policy.[27] The High Court used the UN Convention Against Corruption's transnational public policy to nullify a bribery agreement in the World Duty Free Co Ltd v. Republic of Kenya case, highlighting the significance of this strategy in cases involving corruption.[28]

The House of Lords maintained the integrity of arbitration in Fiona Trust & Holding Corporation v. Privalov but allowed for exceptions in situations where fraud directly targets the arbitration clause.[29]Similarly, Melli Bank plc v. Holbud Ltd demonstrated how arbitration

[25] Khan v. Dell Incorporated_ 669 F.3d 350 (3d Cir 2010).
[26] Gary Born, _International Commercial Arbitration_ (3rd edn, Kluwer Law International 2021) 1456-58.
[27] *Westacre Investments Inc v Jugoimport-SDPR Holdings Co Ltd* [2000] QB 288 (CA) 316.
[28] *World Duty Free Co Ltd v Republic of Kenya* [2006] EWHC 1093 (Comm) [138]; United Nations Convention Against Corruption (adopted 31 October 2003) 2349 UNTS 41, art 15.
[29] *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254 [17]-[20].

agreements could be voidable due to EU sanctions, highlighting the dynamic impact of geopolitics on dispute resolution.[30]

The manner in which courts assess public policy as a reason to deny arbitration enforcement may vary. The Swiss and Singaporean Courts take a fair stance that protects national values while upholding international commity, In PT Asuransi Jasa Indonesia v. Dexia Bank SA [2006] SGCA 41, the Singapore Court pointed out that public policy should not be used to reconsider the merits of arbitral awards.[31] In contrast, US courts require "overriding" public policy concerns to deny enforcement, as was shown in Mitsubishi Motors Corp v. Soler Chrysler-Plymouth 473 US 614 (1985), where antitrust claims were found to be arbitrable. Scholars caution that while public policy safeguards are crucial, their overuse may compromise the predictability that is necessary for international arbitration.[32]

Part II: Judicial and Procedural Dimensions of Inoperability

(a) Jurisdictional Gatekeeping: How Courts Address Pathological Clauses Without Undermining Arbitral Autonomy

The conflict between pathological arbitration clauses and the competence-competence doctrine is a sophisticated problem in international arbitration practice.[33] The competence-competence doctrine, which authorizes arbitral tribunals to decide on their own jurisdiction, encounters its boundaries when faced with essentially defective arbitration agreements.[34]

Courts have given sophisticated responses to this interaction. French Cour de cassation in Société PT Putrabali Adyamulia v Société Rena holding confirmed that the competence-competence doctrine does not call for courts to ignore clearly pathological clauses. According to the court, where an arbitration clause is "clearly inoperative" because of defects of drafting, judges can intervene on the referral stage without infringing the jurisdictional power of the tribunal.[35] This methodology reconciles deference to arbitral autonomy with the pragmatic

[30] *Melli Bank plc v Holbud Ltd* [2013] EWHC 1506 (Comm) [32]; Council Regulation (EU) No 267/2012 concerning restrictive measures against Iran [2012] OJ L88/1.
[31] *PT Asuransi Jasa Indonesia v Dexia Bank SA* [2007] 1 SLR(R) 597 (Singapore CA) [59].
Mitsubishi Motors Corp v Soler Chrysler-Plymouth 473 US 614 (1985) 638.[32]
[33] UNCITRAL Model Law on International Commercial Arbitration (2006), art 16(1).
[34] Frédéric Eisemann, 'La clause d'arbitrage pathologique' in *Mélanges offerts à Marcel Waline* (LGDJ 1974) 317.
[35] ibid [12]

recognition that certain clauses are so flawed that they cannot support any arbitral process.

In the same vein, the Singapore Court of Appeal in Insigma Technology Co Ltd v Alstom Technology Ltd[36] set out a two-stage test. Initially, courts are required to establish whether the clause is prima facie valid and capable of performance. Only if this hurdle is crossed does the competence-competence principle necessitate deference to the tribunal. The court stressed that "grossly pathological clauses fail at the first stage,"[37]excluding any arbitral consideration of jurisdiction.

Scholarly discussion is in accord. Jan Paulsson comments in 'The Idea of Arbitration' that although competence-competence enhances the independence of arbitration, it cannot generate jurisdiction where parties have not established it by means of an effective agreement.[38] Gary Born remarks equally that the majority of jurisdictions leave an exception to the doctrine in place for "patently defective" clauses no reasonable interpretation could uphold.[39]

(b) Substantive Inoperability and Mandatory Law

Inoperative" arbitration clauses are no longer simply a matter of consent, defect of procedure, or incapacity. In the UK, there has been recent concern in recent UK cases as to whether party autonomy to attempt to exclude EU mandatory law in arbitration clauses is something that itself may be set aside at the outset.

The Court of Appeal in Ratcliffes Ltd v. Prospect ruled that a Canadian arbitration clause in an English contract only applied to individual claims. It did not entail cancellation under section 103(2). The above finding is technically incorrect as it is in conflict with the rules of the Service Regulation and Brussels Regulation that were overlooked in the contract. Tugendhat J. ruled that any arbitration agreement trying to evade these important rules is "null and void" and "inoperative."

This was upheld obiter in Fern Computer Consultancy Ltd v. Intergraph [2014] EWHC 2908 (Ch), in which it was reaffirmed that EU mandatory rules prevail and any contract or clause

[36] *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, [2009] 4 SLR(R) 61.
[37] ibid [31].
[38] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 120-123.
[39] Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer 2021) 1129-1132.

that seeks to circumvent them are susceptible to being invalidated at the jurisdictional level. These decisions appear at odds with Eco Swiss v. Benetton, wherein the CJEU prioritized post-award public policy review over pre-award invalidation of the arbitration agreement. The difference raises an outstanding issue in international commercial arbitration: whether public policy is to be upheld by preventing the operation of the agreement or to be reviewed by the enforcement stage under the New York Convention, Article V(2)(b).

(c) Comparative Perspectives and Drafting Implications for Dispute Resolution Clauses

Section 9 of the Arbitration Act 1996 empowers English courts to stay proceedings where a valid arbitration agreement exists, unless the agreement is inoperative or incapable of being performed.[40] In *Destin*, the High Court refused to compel arbitration, holding the clause had been rendered inoperative by a subsequent settlement agreement that granted exclusive jurisdiction to the English courts.[41]The court treated the settlement agreement as a standalone contract that superseded the prior arbitration clause, particularly as it made no reference to preserving arbitration. The dispute—centred on fraudulent inducement—was also considered to fall outside the scope of standard arbitration clauses, which are typically confined to performance-related issues.

Comparatively, in *Tomolugen Holdings Ltd v Silica Investors Ltd*, the Singapore Court of Appeal upheld a broad arbitration clause even in a statutory minority oppression claim.[42]The decision reflects a strong pro-arbitration stance, contrasting with *Destin*'s prioritisation of subsequent jurisdictional terms. In the United States, the Supreme Court in *Prima Paint Corp v Flood & Conklin Mfg Co* held that arbitration must proceed unless fraud is directed specifically at the arbitration clause itself.[43] These decisions illustrate divergent judicial approaches: English courts favour the finality of later agreements, while Singaporean and U.S. courts emphasise the preservation of arbitration wherever possible.

Given these differences, careful drafting is essential in commercial practice. Where parties intend to preserve arbitration, they should expressly incorporate prior clauses into any new

[40] Arbitration Act 1996, s 9.
[41] *Destin Contracting Ltd v Lowry* [2022] EWHC 1236 (TCC).
[42] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] SGCA 57
[43] *Prima Paint Corp v Flood & Conklin Mfg Co* 388 US 395 (1967).

agreement. Conversely, where arbitration is to be displaced, this should be made explicit. Parties should also consider including language clarifying the scope of arbitrable issues, particularly with respect to fraud or statutory claims. In cross-border contexts, where courts may take differing views on the effect of subsequent agreements or the arbitrability of certain disputes, such clarity ensures procedural certainty and respects the principle of party autonomy.

(d) Smart Arbitration Clauses and Digital Contracts: Inoperability in a Technological Paradigm

The emergence of blockchain-based contracts and "smart arbitration clauses" adds new complexities to the inoperability debate. These electronic tools, frequently coded to automatically execute according to pre-established conditions, pose special difficulties when the language of the contract becomes unclear or when the supporting code fails. As Born and Šarević note, while smart contracts can improve procedural efficiency, they "cannot substitute the requirement of legal interpretation in cases where disputes exist regarding non-deterministic obligations."[44] In these instances, the arbitration clause—coded into the contract or embedded off-chain, may be made inoperable not because of party incapacity or statutory illegality, but because of the technical opacity or rigidity of the digital environment itself.[45] The ICC Commission has likewise warned that technology reliance must not undermine fundamental principles of fairness and due process, especially when smart systems preclude parties from access to traditional remedies or proceeding modification.[46]Blockchain-based arbitration must therefore still provide for the potential of inoperability where procedural failure or interpretative standstill renders effective dispute resolution legally or practically impossible.

In order to buffer these risks, increasing practice legitimates the hybridization of smart contracts with old-style arbitration platforms. Instead of trusting solely to self-executing code, increasingly parties include "off-chain fallback clauses" or human-arbitrator override mechanisms that intervene when code is faulty or vague.[47] Such hybrid provisions maintain the procedural autonomy provided by smart systems and provide assurance that interpretive- or

[44] Gary Born and Petar Šarčević, 'Arbitration in the Age of Smart Contracts' (2020) 36(1) *Arbitration International* 1, 25.
[45] ibid 23–26.
[46] ICC Commission on Arbitration and ADR, *Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings* (2022) para 36–41.
[47] Born and Šarčević (n 1) 29–30.

fairness-basing disputes will be able still to be adjudicated within arbitral forums under conventional design. As the ICC Commission stresses, such precautions are necessary to ensure that the advantages of technology do not come at the expense of arbitral usability and legal coherence.[48] This symbiotic approach mirrors a larger trend in international arbitration—one that balances technological advances with the core requirement that arbitration continue to be an accessible, equitable, and effective dispute-resolution tool.

Conclusion

The inoperability of arbitration agreements is a necessary counterbalance to the separability doctrine. Arbitration is based on party autonomy and judicial minimalism, but such autonomy is not unqualified. An agreement to arbitrate can be rendered inoperative on grounds like incapacity, statutory illegality, conflicting jurisdictional clauses, or subsequent waiver, novation, or settlement. Courts, especially under the Arbitration and Conciliation Act, 1996 and the UNCITRAL Model Law, have interpreted inoperability to encompass substantive defects as well as procedural breakdown. This article has illustrated that inoperability is not so much a theoretical exception but an effective tool for guaranteeing arbitration to be anchored in legal legitimacy and justice. It is critical that arbitration agreements remain adaptive to contextual shifts and shifting boundaries of enforceability and consent.

[48] ICC Commission (n 3) para 49–53.