



APPLICABILITY AND CHALLENGES OF THE DOCTRINE OF SEVERABILITY IN THE OIL AND GAS INDUSTRY IN NIGERIA

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ABSTRACT

The doctrine of severability, a legal principle enabling courts to preserve valid provisions of contracts or statutes while discarding invalid provisions, holds significant importance in the intricacies of the oil and gas industry. This paper examines the application and challenges associated with this doctrine within the complex and heavily regulated landscape of the oil and gas industry.

Within the oil and gas industry, contracts are elaborate, covering diverse phases from exploration to production. The doctrine of severability emerges as a critical tool for salvaging enforceable components when confronted with legal issues. Its role as a risk mitigation mechanism prevents the wholesale nullification of contracts due to the invalidity of specific provisions. Additionally, the doctrine operates within the confines of the legislative framework, allowing for the preservation of compliant provisions in the face of legal scrutiny.

Nevertheless, challenges stem from the interconnected nature of these contracts, where the interdependence of clauses complicates the process of excising invalid parts without distorting the original intent. Ambiguity in contract language adds complexity, fostering subjective interpretations and potential disputes. This paper will also discuss the doctrine of severability as a tool for protecting the arbitration clause from the illegality of the container contract. Considerations of public policy may impede severability when the removal of a fundamental provision undermines the contract's intended purpose. Operational disruptions pose an additional challenge, as severing vital clauses may impact the integrated and complex operations of the industry. While the doctrine of severability remains a valuable legal instrument in the oil and gas industry, its application necessitates meticulous consideration of contractual intricacies, potential disputes, and the broader operational landscape of the industry.

Keywords: severability, contract, arbitration clause, applicability, challenges.



INTRODUCTION

When a contract contains a clause that appears to be illegal or not enforceable, the doctrine of severability enables the court to invalidate that clause while enforcing the remainder of the contract's terms. Where the doctrine of severability is applied, it helps to avoid the necessity to renegotiate the whole contract, which can be expensive and time-consuming. In the oil and gas industry, the doctrine of severability is a legal principle that allows an invalid or unenforceable clause to be separated from the other contract provisions so that the remaining provisions can be enforced. This idea is frequently applied in contracts with complicated and interrelated responsibilities, such as those in the oil and gas industry.

The doctrine of severability is particularly significant in contracts involving exploration, production, and transportation of oil and gas. These contracts frequently include complex terms that are subject to several legal and regulatory requirements, and the doctrine of severability can help ensure that these contracts remain enforceable even if the complex terms are deemed to be invalid or unenforceable.

The doctrine of severability expresses the generally accepted notion that the judicial remedy ought to match the constitutional infringement, ensuring that perfectly lawful legislative enactments are not invalidated.¹ This doctrine of severability also reflects core separation of powers principles, which require courts to respect the legislature's work. Thus, the doctrine states that a court must save the legitimate provisions of a statute, save in the unusual circumstances when the statute has been so compromised that the legislature would have preferred no statute at all to the parts that remain.²

Originally proposed as the 'Doctrine of Blue Pencil', the **Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd**³ is regarded as the genesis of this principle. In cases where a section of a legal document is affected by illegality, invalidity, or unconstitutionality, if such issues can be separated, that specific portion should be removed and deemed void. Meanwhile, the remaining content of the document should be upheld and enforced. Applying this concept to the enforcement of arbitral awards provides a practical resolution for situations where awards may be partially compromised.

The doctrine has been applied to several legal contexts, including the oil and gas industry. The Supreme Court of West Virginia in the case of **SWN Prod. Co., LLC v. Long**⁴ invoked the doctrine of severability to enforce a lease's arbitration provision, notwithstanding other provisions contemplating action in court. The Court stated that⁵:

"the Federal Arbitration Act (FAA), recognizes that an agreement to arbitrate is a contract ... if the parties have entered into a contract to arbitrate a dispute, then the FAA requires courts to honour parties' expectations and compel arbitration ... However, under the FAA, ... parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.

In determining whether a motion to compel arbitration should be granted, courts are required under the FAA to apply the doctrine of "severability" or "separability," which this Court has explained as follows: The gist of the doctrine is that an arbitration clause in a larger contract must be carved out, severed from the larger contract, and examined separately.

The doctrine "treats the arbitration clause as if it is a separate contract from the contract containing the arbitration clause, that is, the 'container contract.'" Under the doctrine, arbitration clauses must be severed from the remainder of a contract, and must be tested separately under state contract law for validity and enforceability."

1. M. Carroll, 'To Save and Not to Destroy: Severability, Judicial Restraint, and the Affordable Care Act, American Constitution Society, 2020. <https://www.acslaw.org/issue_brief/briefs-landing/to-save-and-not-to-destroy-severability-judicial-restraint-and-the-affordable-care-act/> Accessed 10th February, 2024.

2. Ibid

3. [1894] AC 535

4. 2017 W. Va. LEXIS 892

5. ConstructLaw, 'West Virginia Supreme Court Applies Doctrine of Severability to Enforce Lease's Arbitration Provision, Despite Other Provisions Contemplating Litigation in Court' <<https://www.constructlaw.com/wp-content/uploads/sites/766/2017/12/swn-prod-co-llc-v-long-2017-w-va-lexis-892.pdf>> Accessed 10th February, 2024.

2.0 JUSTIFICATION FOR THE DOCTRINE OF SEVERABILITY

The doctrine of severability is important for several purposes. Primarily, it permits the courts to retain as much of the legislature's work as possible, preserving the legislature's liberty to innovate.⁶ That is because it stipulates that courts are not required to invalidate a complicated, comprehensive piece of legislation just because one part is unconstitutional. Disconnecting a portion of the statute certainly modifies the statutory framework in some way. However, rather than invalidating the entire statute, the doctrine requires courts to invalidate as little of it as possible. For example, without severability, a court might be forced to declare the entire U.S. Code unconstitutional because it contained a single invalid provision.⁷

6 M. Carroll, 'To Save and Not to Destroy: Severability, Judicial Restraint, and the Affordable Care Act', American Constitution Society, 2020. <https://www.acslaw.org/issue_brief/briefs-landing/to-save-and-not-to-destroy-severability-judicial-restraint-and-the-affordable-care-act/> Accessed 10th February, 2024.

7 M. C. Dorf, 'Fallback Law' Columbia Law Review, Vol. 107, No. 303, 2007, <<https://ssrn.com/abstract=2212929>> Accessed 11th February, 2024.

The doctrine is often discussed in connection with the doctrine of constitutional avoidance, which requires courts to avoid answering constitutional questions if they can. However, in constitutional adjudication, the two doctrines have fundamentally different functions. Constitutional avoidance is an instance of statutory construction that comes before the court's determination of the merits of the constitutional issues, although one that is shaped by constitutional considerations.⁸ To avoid answering a constitutional question raised in a case, the court looks closely at the text to see if it can legitimately interpret the statute. On the other hand, the doctrine of severability is corrective. It is considered at the last step of a court's analysis, after the court has construed the statute, found no way to avoid the constitutional question, and found a provision or application of the statute unconstitutional.⁹ The doctrine of severability, unlike avoidance, is not about interpreting a statutory provision, but how to remedy a law's constitutional defect.

The Court's severability precedents revolve around four key principles. Firstly, a plaintiff typically has a right to the most limited remedy possible—one that rectifies the constitutional violation without invalidating other sections of the law. Echoing the Court's stance, the approach involves "limiting the solution to the problem" when addressing a constitutional flaw in a statute by excising any "problematic portions while leaving the remainder intact." Essentially, the court is obligated to preserve rather than dismantle a partially valid law.¹⁰

Secondly, when formulating a remedy, a court is obligated to uphold the legislature's work, emphasizing the importance of discerning legislative intent. The examination of legislative intent is central to this principle. According to the legislative intent test, a court cannot utilize its remedial authority to bypass the intended purpose of the legislature.¹¹ Thirdly, and in connection with this, the court should be cognizant of the separation of powers and the judicial role. While courts have the authority to declare provisions unconstitutional, they should refrain from altering the legislation or introducing new terms. Lastly, the inclination towards favouring severability is particularly robust when a statute includes a severability clause. While such a clause may not be deemed conclusive, courts give considerable weight to a legislature's "explicit textual instruction" to preserve the valid aspects or applications of a law.¹²

3.0 ARBITRATION AND THE DOCTRINE OF SEVERABILITY

Arbitration is an alternative method for resolving disputes in international commercial relationships, contingent upon the mutual agreement of the involved parties.¹³ The option to pursue arbitration is available if the subject matter of the dispute is deemed arbitrable. An arbitration agreement can take the form of a distinct agreement or exist as a clause within the contract executed between the parties. Typically, the majority of arbitration agreements are articulated as arbitration clauses. Despite being a component of the overarching contract, the arbitration clause stands independently of other clauses within the agreement. This concept is known as the "separability of the arbitration clause."¹⁴

A party seeking to evade its obligation to engage in arbitration might assert that if the primary agreement is deemed invalid, the arbitration clause, being an integral part of the main agreement, should also be invalidated.¹⁵ Acceptance of this assertion could result in the termination of the arbitration process. Consequently, the parties would be compelled to resort to litigation, contradicting the fundamental principle for which they initially opted for arbitration. The doctrine serves as a safeguard against such arguments.¹⁶

8 M. Carroll, 'To Save and Not to Destroy: Severability, Judicial Restraint, and the Affordable Care Act', American Constitution Society, 2020. <https://www.acslaw.org/issue_brief/briefs-landing/to-save-and-not-to-destroy-severability-judicial-restraint-and-the-affordable-care-act/> Accessed 10th February, 2024.

9, 10, 11, 12 Ibid

According to the principle of separability, the nullification of the main underlying agreement does not impact the validity of the arbitration clause, and conversely, the invalidity of the arbitration clause does not render the main underlying agreement invalid.¹⁷ This implies that the criteria for the validity of the arbitration agreement differ from those required for the underlying primary agreement. In essence, even if the main agreement is declared invalid, the arbitration clause remains in force. Conversely, if the arbitration clause is found to be invalid, the underlying contract retains its validity. It is important to note, however, that the separability principle does not mandate a consistent divergence in the outcomes of these two agreements. In certain situations, specific reasons that invalidate the underlying agreement may also impact the validity of the arbitration agreement.¹⁸

3.1 Context for Arbitration in The Nigerian Oil and Gas Industry

Several factors contribute to the extensive utilization of arbitration in the global oil industry.¹⁹ These factors encompass the highly technical aspects of the oil sector, the professional nature of oil contracts, and other business interests. Additionally, the longstanding business relationships between international oil companies and host countries play a significant role in this widespread adoption of arbitration. Typically, international oil companies incorporate arbitration clauses into their contractual engagements with host oil governments. Historically, host national governments hesitated to enter into arbitration agreements, viewing them as encroachments on their rights and incompatible with the principle of permanent sovereignty over natural resources outlined in United Nations General Assembly Resolution 1803.²⁰

Under the Nigerian legal system, arbitration is recognized as an effective mechanism of dispute resolution as national laws have been enacted to incorporate arbitration in the country's legal system. These laws give recognition to arbitration as a prominent mechanism for the settlement of disputes in the Oil and Gas industry in Nigeria. Some of the national laws generally give room for voluntary arbitration by parties whilst some other statutes mandate compulsory arbitration.²¹ The notional domestic statutes that provide for arbitration in the Nigerian Oil and Gas sector include the Petroleum Industry Act (PIA),²² Oil Pipelines Act,²³ the Nigerian Investment Promotion Commission Act²⁴ and the Nigeria LNG (Fiscal Incentives, Guarantees and Assurance Act).²⁵ Section 11(1) of the Petroleum Act, of 1969 provided that

“whereby any provision of this Act or any regulations made thereunder a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration in the appropriate State and the provision shall be treated as a submission to arbitration for the purposes of that law...”

The Petroleum Industry Act, 2021 (PIA) introduces a comprehensive legal, governance, regulatory, and fiscal framework for the industry. The PIA establishes two regulatory bodies—the Nigerian Upstream Petroleum Regulatory Commission (NUPRC) and the Nigerian Midstream and Downstream Petroleum Regulatory Authority (NMDPRA). These entities are responsible for overseeing technical and commercial regulations in their respective sectors.

The Nigerian Midstream and Downstream Petroleum Regulatory Authority is responsible for making regulations concerning dispute resolution and consumer protection.²⁶ The model license or model lease for each bid round should include clauses which contain the rules for the resolution of disputes including arbitration, mediation, conciliation or expert determination.²⁷

Where a licensee or lessee fails to abide by an arbitration award set forth in the license, lease or the Act, the minister may revoke such license or lease.²⁸

Any disputes as to whether a delay was due to causes beyond the control of licensee/lessee shall be settled by agreement between the Minister and the licensee/lessee or in default of agreement by arbitration.²⁹ Also, any dispute as to price of petroleum products taken by the Minister at port of delivery pursuant to his preemptive right is to be settled by agreement between the Minister and the licensee/lessee or in default of agreement by arbitration.³⁰

13 G. Sahasrabudhe, 'Arbitration and the Doctrine of Severability', White Code Arbitration and Mediation Centre, <<https://viamediationcentre.org/readnews/ODMx/ARBITRATION-AND-DOCTRINE-OF-SEVERABILITY>> Accessed 12th February, 2024.

14, 15, 16, 17, 18, 20 Ibid

19 C. A. Obi, M. A. Eluozor, N. G. Akaniwo, L. U. Ikwuni, 'Evaluating Arbitration as A Dispute Resolution Mechanism in The Nigerian Oil and Gas Industry' African Journal of International Energy and Environmental Law, <<https://ajieel.com/index.php/a/article/download/54/55>> Accessed 10th February, 2024

21 M. Ukeche, 'A Legal Perspective for ICSID Arbitration Reforms: the Benefits for Nigeria Oil & Gas Sector' Faculty of Law, Baze University, Abuja, <<https://portal.bazeuniversity.edu.ng/student/assets/thesis/202105041326131579595152.pdf>> Accessed on 11th February 2024.

The Nigerian Courts have at some point supported arbitration with the enforcement of arbitration agreements and arbitral awards. In **Onward Enterprises LTD V. MV Matrix**,³¹ the Court of Appeal held that “once an arbitration clause is retained in a contract which is valid and the dispute is within the contemplation of the clause, the court will give regards to the contract by enforcing the arbitration clause. It is therefore the general policy of the court to hold parties to the bargain which they freely entered.” The Court has no right to set aside the awards of arbitration. Section 34, Arbitration and Mediation Act 2023³² provides that, “a court shall not intervene in any matter governed by this act, except, where so provided in this act”. However, the Court may set aside an arbitral award, if the award contains decisions on matters which are beyond the scope of the submission for arbitration.³³ Also, the Court can set aside an arbitral award where the arbitral proceedings award has been improperly procured.³⁴ All of these are subject to the application of one of the parties to the arbitral proceeding.

22 Petroleum Industry Act, 2021. | 23 Oil Pipeline Act, Cap 07 LFN 2004.

24 Nigerian Investment Promotion Commission Act, Cap NI17 LFN, 2004.

25 Fiscal Incentives, Guarantees and Assurance Act, Cap N 38 LFN, 2004. | 26. Section 33 (t) PIA, 2021

27 Section 70 (1) (f) PIA 2021 | 28. Section 76 (1) PIA 2021 | 29. Section 4, First Schedule, made pursuant to Section 3 (3) PIA

30 Section 5 (b), made pursuant to section 3(3) of the PIA | 31. 2010 2 NWLR (Part 1179) at 530.

32 Cap A18, Laws of the Federation of Nigeria, 2004 | 33. Section 55(2) Arbitration and Mediation Act 2023

3.2 The Doctrine of Severability in International Arbitration of Oil Investment Disputes

In international arbitration for oil investment disputes, the doctrine of severability assumes a crucial role, influencing how tribunals navigate instances where certain provisions of an investment treaty or contract are considered invalid or unenforceable. The doctrine of severability in the context of international arbitration for oil investment disputes refers to the principle that the validity of an arbitration clause remains intact even if other parts of the overall contract are deemed invalid or unenforceable. In essence, the arbitration clause is considered separately from the rest of the contract, allowing it to survive and be enforced independently. This doctrine underscores the autonomy of the arbitration agreement, ensuring that issues affecting the main contract do not necessarily undermine the arbitration provision within it. It means the arbitration clause should have a life of its own, independent, separate and distinct of the main contract of which it forms a part.³⁵

International conventions and practices have recognized the application of the doctrine of severability to arbitration agreements. Article 16(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration³⁶ states that:

“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.”

Also, Article 23(1) of the UNCITRAL Arbitration Rules, 2010³⁷ provides that:

“the arbitral tribunal shall have the power to 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 that 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 shall not entail automatically the invalidity of the arbitration clause.”

The principle also has in several cases received judicial support. In the case of **Sapphire International Petroleum Ltd v. National Iranian Oil Company**,³⁸ the court held that the termination of the contract did not in any way stop the initiation of the arbitral process. In **Libyan American Oil Company v. Libya**,³⁹ the court stressed that the arbitration clause survives the unilateral determination of a contract by a state. And that the clause continues to live long after the contract is terminated. In **Reliance Industry Ltd v. Union of India**,⁴⁰ where the Supreme Court of India refused to consider an application brought by one of the parties, reaffirming the principle that an agreement to arbitrate is a different contract from the main contract entered into by the parties.

34. Section 30 Arbitration and Mediation Act 2023

35. L. Atsegbua, Oil and Gas Law in Nigeria, Theory and Practice. 4th Ed Four Pillars Publishers, 2021, 332

36. United Nations Commission on International Trade Law, ‘UNCITRAL Model Law on International Commercial Arbitration’, 1985
https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf Accessed on 12th February, 2024

37. United Nations Commission on International Trade Law, ‘UNCITRAL Arbitration Rules’, 2010
<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf> Accessed 12th February, 2024

However, the doctrine although it is widely accepted as a general principle of arbitration both at national and international levels would be regarded as ineffective in the following circumstances:⁴¹

- (a) where the arbitration clause was inserted into the contract by fraud by one of the parties to the contract without the knowledge of the other.
- (b) where no valid contract exists in the first between the parties.
- (c) where the use of arbitration is not recognized under the law which the parties have chosen to regulate their contract.

3.0 APPLICABILITY OF THE DOCTRINE OF SEVERABILITY IN THE OIL AND GAS INDUSTRY IN NIGERIA

The applicability of the severability doctrine for arbitration clauses is rooted in the fundamental notion that contracting parties originally intended to submit disputes to arbitration.⁴² It is crucial to highlight that the universal acknowledgement of the severability doctrine underscores its significance, with a consensus that its absence could undermine the efficacy of the arbitral process. It is now firmly established that the arbitration clause is independent and distinct from the primary contract.

Like in other legal jurisdictions, severability clauses are standard features in Nigerian oil and gas contracts. These clauses explicitly state that should a particular provision be deemed invalid or unenforceable, the remaining portions of the contract retain their validity and binding nature. In the oil and gas industry, contracts are often intricate, encompassing multiple facets like exploration, drilling, production, transportation, and marketing. The doctrine of severability provides the legal means for courts to preserve valid elements within these complex contracts, even if certain portions are deemed unenforceable. This ensures the overall agreement's viability and continuity.

The doctrine of severability is acknowledged in Nigerian law even though there is no explicit legislation directly addressing it. Nevertheless, its application is substantiated by pertinent legal principles and established case law. The doctrine finds applicability in the arbitration clause of international oil investment disputes. Dispute settlement is a fundamental aspect of any legal system and arbitration is one of the most respected techniques of dispute settlements.⁴³

The doctrine remains pertinent in diverse scenarios within the Nigerian oil and gas industry, encompassing:

Risk Management

The oil and gas industry continually grapples with unpredictability and inherent volatility. From fluctuating consumer demand and price variations to ongoing geopolitical tensions where various global suppliers may contemplate supply cuts, each day brings unexpected challenges and risks.⁴⁴ Considering the significant financial and operational risks inherent in oil and gas projects, the doctrine of severability offers a form of risk mitigation. If a particular provision is deemed invalid or in violation of the law, this doctrine enables the parties to preserve the enforceability of the remaining provisions, thereby averting the complete nullification of the entire contract.

Invalidity of Clauses

In cases where a specific clause, such as a pricing mechanism, is deemed unfair or unlawful, the remaining clauses might still retain enforceability. The invalidity of clauses and the doctrine of severability play a significant role in the oil and gas industry. Despite the acknowledgement of stabilization clauses as legally binding under international law, doubts persist regarding their legality under domestic or national law within the host state. Legal challenges primarily arise in two main areas.⁴⁵ Firstly, stabilization clauses encounter hurdles due to constitutional limitations. Typically, the constitution requires that all actions of the host state government align with legal and constitutional provisions. Secondly, international law acknowledges the authority of host states to expropriate in the pursuit of public interest, environmental protection, health and safety, and human rights concerns. Consequently, the legislative powers of host states are constrained by international obligations to uphold environmental standards, health, safety, and human rights. In summary, while stabilization clauses are legitimate and legal, they cannot supersede those pertaining to human rights and environmental standards under both domestic and international law.⁴⁶

38. (1960) 35 ILR, 137 | 39. (1981) 62, ILR, 178 | 40. unreported | 41. C. A. Obi, M. A. Eluozor, N. G. Akaniwo, L. U. Ikwuni, 'Evaluating Arbitration as A Dispute Resolution Mechanism in The Nigerian Oil and Gas Industry' African Journal of International Energy and Environmental Law, <<https://ajieel.com/index.php/a/article/download/54/55>> Accessed 10th February, 2024. | 42. Ibid
43. L. Atsegbua, 'Oil and Gas Law in Nigeria, Theory and Practice' (4th Ed Four Pillars Publishers 2021)
44. KPMG Insights 'Top risks facing the oil and gas industry in 2022 - and what you can do about it' <<https://kpmg.com/xx/en/home/insights/2022/04/top-risks-facing-the-oil-and-gas-industry-in-2022.html>> Accessed 13th February, 2024.
45. F. Mwinibanzora 'Stabilization Clauses in Petroleum Agreements: Limitations and Legal Implications of a Breach' International Journal of Science and Research <https://www.academia.edu/52037009/Stabilization_Clauses_in_Petroleum_Agreements_Limitations_and_Legal_Implications_of_a_Breach> Accessed 13th February, 2024

This involves addressing situations where specific clauses within contracts or agreements may be deemed invalid, and the doctrine of severability comes into play by allowing the remaining valid portions of the contract to stand independently. In the context of the oil and gas sector, navigating the implications of invalid clauses and applying the doctrine of severability is crucial for ensuring the enforceability and effectiveness of contractual arrangements.

Partial Fulfillment

In instances where one party falls short of meeting a specific obligation, the doctrine may empower the other party to pursue compensation or alternative fulfilment without nullifying the entire contract. According to the doctrine of severability, an arbitration agreement is treated as separate from the underlying contract. Even if other parts of the contract are invalid, the arbitration clause remains enforceable. The presence of an arbitration clause in a contract or agreement between parties doesn't preclude or restrict their rights or remedies; rather, it establishes a framework through which the parties can resolve their disputes.⁴⁷

Governmental Intervention

Generally, when government regulations make certain aspects of the contract unfeasible, the doctrine of severability can assist in preserving the remainder of the agreement. The doctrine of severability proves beneficial when government regulations render specific aspects of a contract unfeasible. In such instances, this doctrine aids in preserving the remaining portions of the agreement, allowing for the continued enforceability of those unaffected by regulatory challenges.

A crucial requirement outlined in the Petroleum Industry Act⁴⁸ is that holders of pre-2021 oil prospecting licences (OPL) or oil mining leases (OML) have the option to either remain under the existing regime or voluntarily convert to the fiscal framework established by the PIA. While opting for voluntary conversion allows licensees or lessees to enjoy the advantageous fiscal provisions of the PIA, the conversion contract must include a termination clause addressing all ongoing arbitration or court proceedings related to the respective OPL or OML. This statutory provision implies that contractual agreements, including arbitration clauses, cannot impede the Nigerian government from exercising its right to modify or invalidate contracts with multinational oil companies (MNOCs).⁴⁹ Although liability for breach of contract may arise, monetary damages can be awarded in appropriate circumstances.⁵⁰

4.0 CHALLENGES OF THE APPLICABILITY OF THE DOCTRINE OF SEVERABILITY IN THE OIL AND GAS INDUSTRY

Severability concerns can arise in various situations. For instance, they may arise when⁵¹ :

- a party contests the entirety of a statute, asserting that if any part of it is unconstitutional and cannot be severed, the entire statute becomes ineffective;
- a party claims that a statutory provision is invalid because it cannot be separated from another allegedly unconstitutional provision within the statute;
- a party argues that the application of a statutory provision is invalid because it cannot be severed from other unconstitutional applications of the statute;
- a party contends that a statute is non-severable, meaning that another party's constitutional challenge to one provision of the statute would prevent that party from obtaining relief from other provisions of the statute; and
- a party challenges a statute as being constitutionally either underinclusive or overinclusive. This list is not exhaustive but illustrates some scenarios in which severability becomes a pertinent issue in legal cases.

In the Nigerian oil and gas industry, the doctrine of severability has been integrated into the realm of oil and gas contracts. This integration aims to safeguard the integrity of contracts and guarantee that the involved parties are not impeded by unforeseen obstacles.

Nevertheless, hurdles exist in utilizing arbitration within the Nigerian oil and gas sector. These challenges encompass drawbacks linked to court litigations, such as delays, exorbitant costs, and undesirable interference from political entities. The implementation of the severability doctrine in Nigeria's oil and gas industry might also be impacted by the industry's technical complexity, the global scope of operations, and the utilization of intricate contracts that necessitate arbitrators possessing specialized knowledge.

46. Ibid | 47. E. M. Akpambang 'Oil and Gas-Related Disputes Resolution: Trajectory under the Nigerian Petroleum Industry Act 2021' American International Journal of Contemporary Research, 2022 <https://www.researchgate.net/publication/371038081_Oil_and_Gas-Related_Disputes_Resolution_Trajectory_under_the_Nigerian_Petroleum_Industry_Act_2021> Accessed 13th February, 2024

48. PIA, 2021 | 49. Section 92(3) of the PIA

While the doctrine of severability acts as a safeguard for a contract, it also holds the potential for termination.⁵² If a crucial provision is deemed illegal, unenforceable, or against public policy, the doctrine might pave the way for the complete termination of the contract. Hence, it functions as both a defensive shield and a possible instrument of termination, contingent on the court's decision.⁵³

Many African countries exhibit limited support for the international arbitration system in resolving disputes related to oil investments. This reluctance stems from the fact that sovereign states or their entities are contractual parties, intertwining the dispute with the state's policy objectives.⁵⁴ The failure of international arbitration to effectively resolve oil investment disputes can be attributed to the endeavour to control the resources sector of developing nations through unequal contracts, including traditional concession agreements. International arbitration has played a role in supporting this regime in favour of foreign investors.⁵⁵

Therefore, while the doctrine of severability can provide a valuable tool for preserving contracts in the oil and gas industry, its application is not without challenges.

Environmental Concerns

Amidst global efforts to decrease reliance on fossil fuels, aligning oil and gas activities with environmental sustainability becomes a formidable challenge. The doctrine of severability, when applied to contracts within this industry, must navigate the intricate balance between energy demands and environmental preservation. The challenge lies in crafting agreements that are not only legally sound but also environmentally responsible. Striking this balance requires innovative approaches, incorporating eco-friendly practices, and addressing the broader environmental impact of oil and gas operations.

Host Community Engagement

Another critical challenge involves the application of the doctrine of severability concerning host community involvement. Prioritizing fair and equitable benefits for communities hosting oil and gas operations is essential. The doctrine must be considered within the framework of community concerns, ensuring that valid issues are addressed effectively. In doing so, the industry must move beyond mere legal compliance and actively engage with host communities, fostering positive relationships, open communication, and initiatives that contribute to the overall well-being of the local population. The challenge lies in integrating the legal nuances of severability with a genuine commitment to social responsibility and community development.

Interpretation and Extent

The doctrine of severability mandates that courts discern legislative intent. It necessitates courts to determine if the legislature had been aware of the constitutional invalidity of certain parts of a statute, they would have still enacted it. However, it is important to note that no legislature enacts a statute with the anticipation that some of its provisions might be constitutionally objectionable. This places the courts in the challenging position of ascertaining an intent that never truly existed. Since there is no concrete evidence regarding the actual intent of the legislature, the hypothetical intent is constructed solely based on the courts' perspectives.

Interconnected Clauses

In oil and gas contracts, there is often an intricate web of interconnected clauses and provisions. The complexity arises when the invalidity of one clause affects the operation or interpretation of other clauses, posing a challenge for the court to isolate the invalid part without distorting the contract's original intent. Reflecting global situations, the interdependence of clauses within a contract can be problematic. If an invalid clause is closely tied to the overall agreement, removing it may result in the entire contract losing its meaning. In other words, despite the presence of a severability clause, a breach categorized as "material" or one that significantly impacts the "core" of the contract might still lead to the nullification of the entire agreement. The evaluation of such a scenario depends on the unique facts and circumstances surrounding each case.

50 E. M. Akpambang 'Oil and Gas-Related Disputes Resolution: Trajectory under the Nigerian Petroleum Industry Act 2021' *American International Journal of Contemporary Research*, 2022

<[https://www.researchgate.net/publication/371038081_Oil_and_Gas-](https://www.researchgate.net/publication/371038081_Oil_and_Gas-Related_Disputes_Resolution_Trajectory_under_the_Nigerian_Petroleum_Industry_Act_2021)

[Related_Disputes_Resolution_Trajectory_under_the_Nigerian_Petroleum_Industry_Act_2021](https://www.researchgate.net/publication/371038081_Oil_and_Gas-Related_Disputes_Resolution_Trajectory_under_the_Nigerian_Petroleum_Industry_Act_2021)> Accessed 13th February, 2024.

51. J. C. Nagle 'Severability' Notre Dame Law School https://scholarship.law.nd.edu/law_faculty_scholarship/153 Accessed 13th February, 2024.

Negotiation and Drafting

Effective application of the doctrine necessitates careful crafting of severability clauses, anticipating possible future disputes, and ensuring explicit clarity regarding the envisioned outcomes in case of invalidity. A profound understanding of legal intricacies is imperative to successfully navigate through this intricate process. This involves the strategic structuring of contract language to clearly outline the separability of clauses and the intended legal ramifications if certain portions are deemed invalid. It underscores the importance of legal expertise in constructing agreements that can withstand legal scrutiny and maintain enforceability even in the face of potential challenges.

Ambiguity and Uncertainty

Assessing the severability of a contract is often a subjective matter, contingent upon the precise language incorporated into the agreement. This inherent ambiguity can potentially give rise to disputes among involved parties, requiring judicial interpretation to delineate the scope of severability. The lack of clarity in the contractual language regarding separability can result in disagreements about which provisions can be severed independently and how such severance impacts the overall enforceability and validity of the contract. Consequently, court intervention becomes essential to decipher the intended effect of severability clauses and resolve any conflicts stemming from the interpretative uncertainties.

Considerations of Public Policy

The doctrine of severability may face hurdles when confronted with public policy considerations in certain instances. If a provision that is considered invalid holds fundamental significance for the entire contract, and removing it would jeopardize the overall purpose of the agreement, the court might be reluctant to invoke severability. In such cases, the court may weigh the potential consequences of severing the provision against the broader public policy objectives and the original intent of the parties. The decision to apply severability becomes a delicate balancing act, considering both the enforceability of the contract and the overarching legal principles governing public policy.

Disruptions in Operations

The complex and interlinked nature of operations within the oil and gas industry gives rise to challenges. A Court's ruling mandating the severance of a crucial provision, has the potential to disrupt the seamless functioning of the parties involved, thereby giving rise to operational and financial difficulties. This disruption may stem from the interdependence of various aspects of oil and gas operations, where the removal or alteration of a vital provision can create a ripple effect, impacting not only the contractual dynamics but also the overall operational efficiency and financial stability of the entities involved. The consequences highlight the need for a nuanced approach to legal decisions in this industry to mitigate potential disruptions.

5.0 UNDERSTANDING SEVERABILITY: ITS ROLE AND IMPLICATIONS IN OIL & GAS CONTRACTS

Price Escalation Clauses

Price escalation clauses aim to protect International Oil Companies (IOCs), against cost increases due to inflation, currency fluctuations, or other factors. Examples of such clauses are indexing prices to specific indices or incorporating fixed escalation rates and they grant IOCs excessive profits, especially during periods of high oil prices. They also limit the government's ability to renegotiate terms or capture a fair share of windfall profits during booms. The doctrine of severability allows the court to uphold the remaining provisions of a contract even if specific clauses are deemed invalid or unenforceable. Also, if a price escalation clause is challenged for being unfair or exceeding legal limits, severability might allow the rest of the contract to stand, potentially preserving the core agreement while addressing the problematic clause.

52. M. Brebbia, 'The Legal Safety Net: The Enigmatic Severability Clause' < <https://www.linkedin.com/pulse/legal-safety-net-enigmatic-severability-clause-massimo-brebbia/> > Accessed 13th February, 2024. | 53. Ibid

54 L. Atsegbua, 'Oil and Gas Law in Nigeria, Theory and Practice' (4th Ed Four Pillars Publishers 2021)331 | 55. Ibid

Climate change

Climate change is one of today's most pressing challenges, and the oil and gas industry is directly affected. As countries throughout the world work to limit carbon emissions, activists have filed lawsuits against oil and gas companies for their involvement in causing climate change.⁵⁶ Some of these lawsuits seek to compel corporations and their governing bodies to compensate for the harm caused by their conduct, while others seek to compel them to adopt more aggressive environmentally friendly practices. Legal battles over climate change are expanding beyond individual suits. In the US, a unique development sees cities and states taking oil companies to court, arguing they failed to warn the public about the harmful effects of their products on the environment. In Nigeria, the National Oil Spill Detection and Response Agency (NOSDRA) Act⁵⁷ establishes a national operational organization to ensure a safe, timely, effective and appropriate response to major or disastrous oil pollution for coordinating and implementing the National Spill Contingency Plan; and a mechanism to monitor, assist and direct the response to save lives, protecting threatened environment and cleaning up impacted sites.⁵⁸ It mandates oil industry operators to report oil spills to NOSDRA within 24 hours of occurrence. Responsible parties are obligated to undertake cleanup operations promptly and effectively. Failure to comply with the Act's provisions can incur significant fines and penalties. NOSDRA has the authority to investigate oil spills, impose sanctions, and prosecute offenders. The Act allows individuals and communities affected by oil spills to seek compensation for damages

Stabilization clauses

Production Sharing Agreements (PSAs) often include stabilization clauses promising fixed tax rates or other fiscal terms for the duration of the agreement.⁵⁹ While these clauses aim to attract investment by offering predictability and security to International Oil Companies (IOCs), they can also create a conflict between investment security and sovereign rights.⁶⁰ For IOCs, the clauses protect against future tax increases or legal changes that could reduce profits; ensure clear and stable fiscal terms which encourage investment in potentially risky ventures and often include provisions for independent arbitration in case of disagreements with the host government.

For Host Governments, the clauses give them limited fiscal flexibility as they lose the ability to adjust tax rates or regulations based on changing economic needs or resource management strategies; and there are potential revenue loss as fixed tax rates might deprive the government of a fair share of future profits, especially if oil prices rise significantly.

The clauses protecting against government interference in contracts might be challenged for breaching international law. Severability provides the opportunity to allow the rest of the contract to stand while addressing the problematic clause.

Force majeure clauses

Non-performance resulting from market failure is one of the most frequent, yet most contentious, events covered by a contractual force majeure clause.⁶¹ The oil and gas markets are typically volatile. Both price and supply fluctuate substantially. These market fluctuations have an especially substantial impact on states that are heavily dependent on production. Volatile market conditions warrant force majeure clauses to address potential concerns. Oil and gas industry participants typically include failure of market provisions in their leases to give a remedy in the case of market failure.

Courts view force majeure as a modifier to both the primary and secondary terms of a habendum clause within an oil and gas agreement.⁶² In **Beardslee v. Inflection Energy, LLC**,⁶³ following the installation of a hydraulic fracturing prohibition, producers attempted to utilize force majeure to extend the initial term of their lease. The force majeure clause, the court determined, did not alter the lease's initial term.

56. T. Comprés, Oilman Magazine, 'Possible Legal Challenges the Oil and Gas Industry could face in 2023' <<https://oilmanmagazine.com/article/possible-legal-challenges-the-oil-gas-industry-could-face-in-2023/>> Accessed 19th February, 2024

57. National Oil Spill Detection and Response Agency (NOSDRA) Establishment Act, 2006

58. Section 5 (c) of the NOSDRA Act

59. N. Tsormetsri, 'Legal Issues in Oil and Gas' <https://www.researchgate.net/publication/314565835_Legal_Issues_in_Oil_and_Gas> Accessed 19th February, 2024. | 60. Ibid

Where the interpretation of force majeure events is found overly broad or ambiguous, severability can help uphold the overall contractual obligations while clarifying the specific events triggering force majeure provisions.

5.0 RECOMMENDATION AND CONCLUSION

For parties involved in an oil and gas dispute to opt for arbitration as a method of resolution, it is essential to include an arbitration clause in their oil contract. Once incorporated, an arbitration clause, as a fundamental principle supported by judicial authority, possesses a distinct and autonomous existence separate from the main contract in which it is embedded.

In adherence to the doctrine of severability, the arbitration agreement is recognized as a distinct pact, independent of the underlying agreement. This principle safeguards the validity of one agreement from being compromised by the other, although they may be considered jointly. Consequently, the formulation of dispute resolution clauses should be approached with meticulous attention and prudence.⁶⁴ Nigerian political and oil industry leaders must navigate challenges such as bureaucratic inefficiencies and vested interests when entering into oil contracts.

61. P. Hampton, 'Finding Our New Normal: Reevaluating Force Majeur Within Oil e Within Oil and Gas Contracts in the Wake of COVID-19' Oil and Gas, Natural Resources and Energy Journal, 2021 <<https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1315&context=onej>> Accessed 19th February, 2024. | 62. Ibid

63. No.12-4897 (2d Cir. 2015)

64 G. Sahasrabudhe, 'Arbitration and the Doctrine of Severability', White Code Arbitration and Mediation Centre, <<https://viamediationcentre.org/readnews/ODMx/ARBITRATION-AND-DOCTRINE-OF-SEVERABILITY>> Accessed 12th February, 2024.