

Abstract of Thesis

The Separability Doctrine in English Arbitration Law

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Submitted to the Board of the Faculty of Law of the University of Oxford for the
Degree of Doctor of Philosophy, Trinity 2002

The purpose of this thesis is to determine the scope and consequences of the separability doctrine in English law. It reveals a tension which hitherto has not been explored or understood between the desire to widen the separability doctrine so as to promote commercial arbitration and the need for that doctrine to rest on sound principle and policy.

The thesis seeks to convince the reader that: (i) English arbitration law is, and should continue to be, based on a contractual theory of arbitration; (ii) the separability doctrine, as applied in England, is consistent with a contractual theory of arbitration; (iii) the best way for the English doctrine of separability to develop, for reasons of policy and principle, is to recognise two main exceptions to separability, these being for non-existent and for illegal contracts; and (iv) the competence-competence principle can, and should, be utilised in order to mitigate some possible drawbacks of the above-mentioned exceptions to the separability doctrine.

In developing the above arguments the thesis tackles issues of great importance that have tended to be overlooked, in particular the relationship between the separability doctrine and general theories of arbitration and the relationship between the separability doctrine and the competence-competence principle.

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LAW**

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OF ORIEL COLLEGE, OXFORD

SUBMITTED TO THE BOARD OF THE FACULTY OF LAW OF THE
UNIVERSITY OF OXFORD FOR THE DEGREE OF DOCTOR OF PHILOSOPHY,
TRINITY TERM 2002.

This thesis is 99, 589 words long.

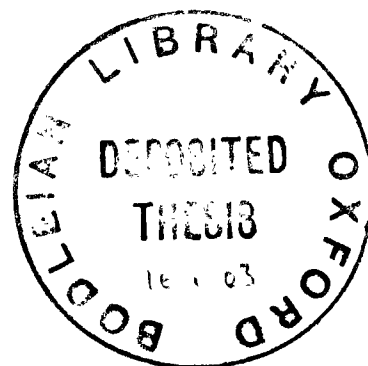


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INTRODUCTION

In the past two decades, national lawmakers have shown a remarkable tendency to favour commercial arbitration as a method for the resolution of disputes. This tendency has even given rise to a competition between some national legislatures in making arbitration laws.¹ In addition to relieving overloaded courts,² international commercial arbitration has a great economic value for the country hosting it. This economic value derives from the increasing use of arbitration by participants in the commercial world because it furnishes them with a neutral, confidential forum,³ and is expected to be cheaper and speedier than national courts, although this advantage is not always true.⁴ Therefore, when making arbitration laws, national lawmakers take into account the benefit of attracting users of arbitration to arbitrate in their countries by providing arbitration-friendly laws. A consequence of this pro-arbitration attitude is that, for better or worse, some aspects of arbitration have been regulated on pragmatic and political bases.⁵ In other words, it seems that theory and principle have sometimes not been sufficiently considered when adopting solutions for certain arbitration problems.

¹ R Goode 'The Adaptation of English Law to International Commercial Arbitration' (1992) 8 *Arbitration Intl* 1, 1-2; KP Berger *International Economic Arbitration* (Studies in Transnational Economic Law Volume 9 Kluwer Law and Taxation Deventer 1993) 1, 5-6.

² W Twining 'Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *MLR* 380.

³ C Borris 'The Reconciliation of Conflicts between Common Law and Civil Law Principles in the Arbitration Process' in SN Frommel and BAK Rider (edd) *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (Studies in Comparative Corporate and Financial Law Volume 4 Kluwer Law International London 1999) 1, 2.

⁴ R Luzzatto 'International Commercial Arbitration and the Municipal Law of States' (1977) 157 *Reueil des Cours* 9, 17; R Goode 'Dispute Resolution in the Twenty-First Century' (1998) 64 *Arbitration* 9, 9-10; AT Von Mehren, J Barceló and T Varady *International Commercial Arbitration: A Transnational Perspective* (West Group Minnesota 1999) 23-24; P Sanders *Quo Vadis Arbitration: Sixty Years of Arbitration Practice* (Kluwer Law International The Hague 1999) 2-8.

⁵ Twining (n 2 above) 380-381.

One of these solutions is the acceptance and wide interpretation of the separability doctrine. The separability doctrine is concerned with the question of whether the termination, invalidity or non-existence of a contract containing an arbitration clause (the main contract) affects the arbitration clause. To accept the separability doctrine means that the ineffectiveness of the main contract does not render the arbitration clause ineffective. A cause of invalidity must strike directly at the arbitration clause. This is explained by treating an arbitration clause as being a separate agreement even though it appears as a part of the main contract. The separability doctrine therefore aims to protect the arbitration clause if the validity of the main contract is attacked.

The separability doctrine is important to commercial arbitration because it reduces the circumstances in which the arbitral process may be delayed or halted. This is achieved because the separability doctrine preserves arbitrators' jurisdiction (which rests on the arbitration clause) while the validity of the main contract is being attacked. Similarly, the separability doctrine allows arbitrators' decisions on the validity of the main contract to be final (subject only to the minimal judicial review of all arbitration awards). Since such decisions do not pertain to arbitrators' jurisdiction, they are not subject to the full review by the courts of an arbitrator's decision on jurisdiction. Further, the separability doctrine enables arbitrators to continue with arbitration even if they find the main contract to be ineffective.

However, in some situations the separability doctrine has been accepted and widened, because of its practical advantages in promoting arbitration, at the expense of sound countervailing principles and policies. It is a purpose of this thesis to examine this tension which, hitherto, has not been explored or understood.

While the separability doctrine has been accepted by English courts for decades, it has recently been widened by the courts. Thus, it now applies even in relation to illegal contracts. This step was taken by the Court of Appeal in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*.⁶ Further, section 7 of the English Arbitration Act 1996 (the 1996 Act) states the separability doctrine in even broader terms so that, on the face of it, separability will give effect to arbitration clauses even in non-existent main contracts. It will be a major theme of this thesis that English law should return to recognising the illegality exception to separability and should also continue to recognise (despite the wording of section 7) a 'non-existent contract' exception.

One argument that will be put forward is that to accept the application of the separability doctrine in relation to illegal and 'non-existent contracts' does not reflect a consistent approach to arbitration agreements. The separability doctrine in relation to illegal contracts enlarges the autonomy of parties beyond limits that apply to other contracts. On the other hand, to apply this doctrine despite the actual or alleged non-existence of the main contract undermines the role of the intention of the parties and

⁶ [1993] QB 701(CA).

hence undermines the autonomy of parties. This inconsistency as to ‘party autonomy’ shows that the separability doctrine is being applied to achieve a pro-arbitration policy regardless of whether its application is consistent with the prevailing contractual view of arbitration.

This thesis therefore explores issues that have rarely previously been addressed by commentators or judges in relation to the separability doctrine in English law. It will seek to tackle issues of great difficulty that have tended to be overlooked, in particular the relationship between the separability doctrine and general theories of arbitration and the relationship between the separability doctrine and the competence-competence principle. It will seek to convince the reader that:

- (1) English arbitration law is, and should continue to be, based on a contractual theory of arbitration;
- (2) the separability doctrine, as applied in England, is consistent with a contractual theory of arbitration;
- (3) the best way for the English doctrine of separability to develop, for reasons of policy and principle, is to recognise two main exceptions to separability, these being for non-existent and for illegal contracts;

(4) the competence-competence principle can, and should, be utilised in order to mitigate some possible drawbacks of the above-mentioned exceptions to the separability doctrine.

The structure and main contents of this thesis will now be outlined.

1. The Contractual Theory of Arbitration in English Law

This study takes a contractual approach to justify the separability doctrine and possible exceptions to it, namely illegal and non-existent contracts. It is necessary, therefore, to explain the general contractual theory in comparison with other theories of arbitration and to demonstrate that English arbitration law accepts this theory. Chapters I and II deal with this aspect of the thesis.

Chapter I will explain that the contractual theory is capable of providing a consistent approach to arbitration that ensures respect for ‘party autonomy’ while, at the same time, striking a proper balance between the promotion of arbitration and public policy. It will be argued that, compared to what is termed ‘the autonomous theory,’ the contractual theory can provide clearer guidance as to what rules govern arbitration and reflects ‘party autonomy’ more closely. Two other theories of arbitration (labelled the jurisdictional and mixed theories) are also examined but rejected.

Chapter II will examine briefly landmarks in the development of English arbitration law. This examination is aimed to show that English law has increasingly become ‘wedded’ to the contractual theory of arbitration. Special emphasis will be placed on the 1996 Act in order to demonstrate that, contrary to the view of some commentators (for example, Mustill and Boyd), it does not depart from the contractual theory of arbitration.

2. The Separability Doctrine in England

Chapter III traces the separability doctrine in English case law. Landmark cases will be used to expose the material in a chronological way, which helps us to analyse changes in the attitude of English courts to the separability doctrine. Chapter III will examine whether English courts have applied the separability doctrine as an imposed rule of law or as a consequence of the intentions of the parties. We shall see that the *Harbour Assurance* case rejected an ‘illegal contracts’ exception but that in a quartet of recent English cases, most importantly *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd*,⁷ the courts have struggled to determine satisfactorily how one should deal with arbitration clauses in illegal contracts. As regards a ‘non-existent contracts’ exception, it will also be asked whether section 7 of the 1996 Act states the separability doctrine in the same terms as it has been understood and applied by the English courts.

⁷ [2000] 1 QB 288 (CA).

3. The Competence-Competence Principle

Chapter IV argues that the *Harbour Assurance* case which accepted the separability doctrine in relation to illegal contracts could have been decided in the same way (ie allowing arbitrators to decide on the legality of the main contract) but on the basis of the competence-competence principle (by which arbitrators have the power to decide on their own jurisdiction). It will be asked when this principle became well established in English law. This involves an examination of the basis of the competence-competence principle and its scope at common law. It will also be explained that acceptance of such an argument would help to mitigate possible dilatory tactics aimed to delay arbitration by attacking the legality (or existence) of the main contract, which could ensue from the two suggested exceptions (illegality and non-existent contracts) to the separability doctrine.

4. The Separability Doctrine in other Jurisdictions and Arbitration Rules

Having examined English law on the separability doctrine, chapter V will examine the separability doctrine in other jurisdictions and arbitration rules. This will help us to ascertain whether this doctrine applies in the same way elsewhere.

It will be asked whether the separability doctrine is stated in similar terms in a number of arbitration rules, such as the rules of the International Chamber of Commerce (ICC) and UNCITRAL Model Law on international commercial arbitration.

We shall also look at a number of international conventions on international arbitration to which the United Kingdom is a party.

The comparative analysis of the separability doctrine in national jurisdictions other than England will reveal the theoretical and practical differences that exist between them. The separability doctrine will be explored in two common law jurisdictions, Australia and the United States. It will be asked whether there exists a consistent approach to the separability doctrine in common law jurisdictions.

Moreover, chapter V will examine the separability doctrine in France. It will be explained that French courts take a distinctive approach to this doctrine. This will help us to clarify the theoretical difference between, on the one hand, the contractual analysis of the separability doctrine in the common law and, on the other hand, the French position. It will be asked whether the separability doctrine could really apply in France even if the dispute pertains to the consensus *ad idem* between parties as to the main contract, as some French commentators assert. This question will be linked to the novel dimension of separability in France, ie the separability of an arbitration agreement from all national laws. This is the principle of the 'full autonomy' or 'self-effectiveness' of the arbitration clause that the French courts have worked out as a consequence of the 'traditional' separability doctrine which applies in relation to the main contract.

5. The Separability Doctrine and ‘Non-Existent Contracts’

Having analysed the state of the separability doctrine in England and other jurisdictions, the thesis will turn to clarify and justify two exceptions to this doctrine. The first is the exception for non-existent contracts. This exception is examined in chapter VI. While it may seem to be axiomatic that the separability doctrine cannot apply where either party denies its consent to the main contract, this is not borne out by the wording of section 7 of the 1996 Act. There is also a need to clarify the meaning of the non-existence of the main contract. Particular situations will be examined so as to determine whether they fall within the category of non-existent contracts. This exception will be justified applying the contractual analysis of the separability doctrine.

6. The Separability Doctrine and Illegal Contracts

While the non-existent contract exception to the separability doctrine aims to ensure that a proper test of parties’ consent to arbitration is not impeded, the suggested exception for illegal contracts rests on the necessity of ensuring respect for public policy. However, one should at the same time seek a proper balance between the promotion of arbitration and public policy. Chapter VII will justify the suggested illegality exception, taking into account these considerations.

Apart from the ‘best interpretation’ of pre-*Harbour Assurance* authorities (which has been set out in chapters III and IV), chapter VII examines the illegality exception to

the separability doctrine in terms of both policy and principle. As a matter of policy, it will be argued that, contrary to the effect of the separability doctrine, it is the courts not arbitrators who should make the final decision on the legality of contracts.

As a matter of principle, it will be explained how the 'ouster of jurisdiction' principle can be utilised so as to protect the role of the courts in controlling the enforcement of illegal contracts. In addition, it will be argued that an arbitration clause meets the requirements for the application of the 'tainting principle,' which means that the illegality of a contract affects another agreement relating to it.

Chapter VII also explains how the suggested illegality exception ensures a proper balance between, on the one hand, the promotion of arbitration and, on the other, the respect for public policy. This will be demonstrated in two ways. The first is to explain the exact effect of the suggested exception. This requires us to explain that it leaves intact the power of arbitrators to apply rules of public policy because of the combined effect of the competence-competence principle and the concept of arbitrability in English law. In addition, it will be clarified that, on the basis of the pre-*Harbour Assurance* law, the illegality exception applies in relation to contracts that are illegal when made as opposed to other types of illegality.

The second way to show that the illegality exception ensures respect for public policy is to examine critically how the separability doctrine has been a significant factor in favour of the finality of arbitral awards on the legality of contracts, which thus

largely attenuates the courts' control over illegal contracts. This problematic consequence of the separability doctrine will be mainly illustrated through the *Westacre Investments* case. Given the unsatisfactory outcome of the current state of the separability doctrine in relation to illegal contracts, chapter VII will argue that the suggested illegality exception (coupled with the suggested approach to the competence-competence principle) provides a better solution than that put forward in the *Westacre Investments* case.

CHAPTER I

THEORIES OF ARBITRATION

1. Introduction

Arbitration is not easy to define, and its inherent nature is difficult to ‘pin down.’¹ For, while it is based on the agreement of the parties, it invokes semi-judicial powers, and it results in a binding decision – the award – that may be enforced as a judgment.

Given the difficulty of defining it, arbitration is usually explained by identifying its major characteristics.² Mustill and Boyd point out a number of characteristics that must be present in order for a process to be an arbitration. These characteristics include the existence of an agreement contemplating an impartial determination of disputes by a chosen tribunal in a binding manner.³ Thus, arbitration differs from mediation or conciliation mainly because it results in a binding resolution of disputes.⁴ It is also different from valuation, which is aimed at avoiding disputes by the completion of an agreement.⁵

¹ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 30, 34-38.

² JD Lew *Applicable Law in International Commercial Arbitration* (Oceana Publications New York 1978) 12; J Parris *Arbitration: Principles and Practice* (Granada London 1983) 7.

³ Lew (n 2 above) 12; Mustill (n 1 above) 39, 41-42.

⁴ Mustill (n 1 above) 42.

⁵ Mustill (n 1 above) 43.

However, the distinct characteristics of arbitration do not provide sufficient guidance for determining the appropriate rules that should regulate it.⁶ Instead, one needs to turn to deeper theories of what arbitration is about. Jurists have put forward a number of such theories. One can label these: the contractual theory, the jurisdictional theory, the mixed theory, and the autonomous theory.

These theories have been developed and debated in continental Europe, but have been insufficiently studied in England. This may be because English judges have tended to apply a practical approach, working out solutions for arbitration that are thought fair and practical without being too concerned about coherent principle. In Mustill's words, 'courts have never looked behind the [arbitration] legislation in search of an underlying theoretical structure.'⁷ However, at least since the Arbitration Act 1979, some English commentators have started to discuss limited aspects of arbitration theories, and English judges have made some relevant contributions.

It is important for this thesis to set out those theories of arbitration. Their study will help us to understand the separability doctrine and other relevant principles. More particularly, their study may help us to arrive at satisfactory solutions – consistent with other aspects of arbitration law – for the problems examined in this thesis.

⁶ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 31-32.

⁷ MJ Mustill 'Transnational Arbitration in English Law' (1984) 37 CLP 133, 134.

2. The Contractual Theory

The consent of the parties is the basis for voluntary arbitration, and it is the source of arbitrators' powers and arbitral procedure.⁸ A number of jurists, including initially Merlin⁹ and Foelix,¹⁰ promoted the contractual nature of arbitration as a basis for a general theory of arbitration, which has been later adopted by many others, such as Klein and Ballador-Pallieri.¹¹

The contractual theory gives prominence to the consent of the parties, placing arbitration on the same footing as all other contracts. Thus,¹²

[w]hereas the jurisdiction of courts is imposed upon private persons by the public laws of States, arbitration roots in the principle of party autonomy. The conflicting parties themselves determine the jurisdiction of an arbitral tribunal, the appointment of the arbitrators, the procedural rules to be followed, and the substantive laws and standards according to which their dispute is to be decided.

According to this theory, not only is the arbitration process based on the agreement of the parties, but also all the aspects of that process should be treated as

⁸ R Luzzatto 'International Commercial Arbitration and the Municipal Law of States' (1977) 157 *Recueil des Cours* 9, 32; M Bagheri *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration* (Studies in Comparative Corporate and Financial Law Volume 11 Kluwer Law International The Hague 2000) 108-109.

⁹ M Merlin *Recueil Alphanatique de Questions de Droit* (4th edn Tarlier Brussels 1829).

¹⁰ J Foelix *Traité du Droit International Privé* (2nd edn Joubert Paris 1847).

¹¹ G Ballador-Palliere 'L'Arbitrage Privé dans les Rapports Internationaux' (1935) 51 *Recueil des Cours* 285; F-E Klein *Considerations sur l'Arbitrage en Droit International Privé* (Helbing & Lichtenhahn Bâle 1955) 181-204; F-E Klein 'Du Caractère Autonome de la Clause Comprimissoire- Congrès de l'Arbitrage International' [1961] *Revue de l'Arbitrage* 48; A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 40.

¹² P Behrens 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits' in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 14.

contractual.¹³ Arbitrators' powers and status depend on the agreement of the parties. The award, too, is binding as a contract, since the arbitration agreement implies mutual promises between the parties thereto to abide by the award;¹⁴ by making an award, arbitrators fulfill the agreement of the parties.¹⁵

While the function of arbitrators resembles that of judges, the contractual theory rejects the notion that arbitrators have 'jurisdiction' in the ordinary sense of that term. Instead, it interprets the powers and status of arbitrators on a consensual basis resting on an agreement between the parties and their arbitrator. At one time, proponents of this theory suggested that arbitrators were agents of the parties.¹⁶ This view could be traced back to some judicial decisions.¹⁷ However, important differences distinguish an arbitrator from an agent. In particular, the former acts impartially, and aims at making a binding decision that changes the legal position of the parties, whereas the latter serves the interests of the principal.¹⁸

¹³ F-E Klein *Considerations sur l'Arbitrage en Droit International Privé* (Helbing & Lichtenhahn Bâle 1955) 202-204; O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 10.

¹⁴ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 43.

¹⁵ P Lalive 'Problèmes Relatifs à l'Arbitrage International Commercial' (1967) 120 *Recueil des Cours* 569, 584.

¹⁶ Samuel (n 14 above) 34, citing M Merlin *Recueil Alphanatique de Questions de Droit* (4th edn Tarlier Brussels 1829) 145; Chukwumerije (n 13 above) 10; cf E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) para 1115 at 605.

¹⁷ *Vynior's case* 8 Coke Report 81b, 77 ER 595, 597-599; *Kill v Hollister* 1 Wilson King's Bench 129, 95 ER 532.

¹⁸ Samuel (n 14 above) 37.

It has been submitted that the original arbitration agreement becomes trilateral once the arbitrator accepts that he will decide the parties' dispute.¹⁹ According to Hobhouse J, 'it is the arbitration contract that the arbitrators become parties to by accepting appointment under it. All parties to the arbitration are ... bound by the terms of the arbitration contract.'²⁰ However, Thomas Clay takes the view that the agreement to which an arbitrator is a party is an agreement concluded subsequently to the original agreement.²¹ 'The contract upon which he [the arbitrator] acts is not the arbitration agreement, whose object is only to remove the dispute from state courts;' it is a subsequent 'jurisdictional contract.'²² As such, arbitrators' powers derive from the latter contract, which is presumed to incorporate the terms of the original arbitration agreement in order to determine the task of the arbitrators with certainty.²³

At the heart of the contractual theory is the principle of the autonomy of the parties, which militates against judicial intervention.²⁴ However, it is of central importance to my thesis – as we shall see – that this does not mean that parties' freedom to control arbitration is absolute, or that courts have no role in the arbitral process. As Jeffrey Stemple suggests,²⁵

¹⁹ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 8.1. cf M Rubino-Sammartano *International Arbitration Law and Practice* (2nd edn Kluwer Law International The Hague 2001) 307-312.

²⁰ *Compagnie Européenne de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301, 306.

²¹ T Clay *L'Arbitre* (Daloz Paris 2001) 37; cf Rubino-Sammartano (n19 above) 195-197.

²² Clay (n 21 above) 37; FP Davidson *Arbitration* (W Green Edinburgh 2000) 175.

²³ ML Smith 'Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment' (1992) 8 *Arbitration Intl* 17, 34-36; K Lionnet 'The Arbitrator's Contract' (1999) 15 *Arbitration Intl* 161, 165.

²⁴ O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 11.

²⁵ JW Stemple 'Bootstrapping and Slouching toward Gomorrah: Arbitral Infatuation and the Decline of Consent' (1996) 62 *Brooklyn L Rev* 1381, 1388.

[o]ne can have both a judiciary meaningfully committed to consent jurisprudence and a set of regulations designed to achieve desired substantive policy for parties who consent to dispute via arbitration rather than litigation. The two concepts are inconsistent only if the nation adopts a public policy that prefers arbitration far more than it prefers consent.

Peter Behrens adds that, 'since party autonomy is subject to certain inherent limitations, the freedom to arbitrate must be equally limited.'²⁶ Therefore, public policy restrictions may be accepted where the settlement of the dispute affects interests or values other than those which concern the parties, or where the legal principle at issue has aims other than promoting justice between the parties.²⁷ Parties cannot evade these restrictions by their arbitration agreement any more than they may do so by other terms of a contract. According to Behrens,²⁸

there is nothing special in international commercial transactions that would justify an extension of the scope of party autonomy beyond its proper limits. [] Therefore, contracts as well as arbitration proceedings may be properly controlled in order to make them compatible with the fundamental principles of private law.

At first blush, an analysis of this contractual theory suggests that it is inconsistent with other features of the arbitral process. In particular, this theory seems inconsistent with the judicial nature of an arbitrator's function. Failing to give weight to this aspect,

²⁶ P Behrens 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits' in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 15.

²⁷ C Carabiber 'L'Evolution de l'Arbitrage Commercial International' (1960) 99 *Recueil des Cours* 119, 141-142; D Jones 'Arbitration and Party Autonomy – How Free is the Choice to Arbitrate?' in GMB Hartwell (ed) *The Commercial Way to Justice* (Kluwer Law International The Hague 1997) 121, 127; WW Park 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 *Tulane L Rev* 647, 650.

²⁸ P Behrens (n 26 above) 37.

the contractual theory may not be sufficient to distinguish arbitration from other private institutions, such as valuation.²⁹ Further, contrary to what supporters of this theory assume, awards are not enforced as contracts in many jurisdictions. Unlike contracts, an award can be challenged by a setting aside procedure only in the country where it was made,³⁰ which procedure requires a form of public regulation of arbitration. As one commentator argues,³¹

[i]t is a limited view of arbitration that projects the consensual nature of arbitration as the most fundamental essence of the process. It should not be forgotten that arbitration, as a method of dispute resolution, is a process that is ultimately regulated in some form by society to ensure that it meets society's notions of fair play and justice. [] Thus, the consensual nature of arbitration can only help in explaining the nature of arbitration when it is viewed within the context of the national legal systems that allow the consent of the parties and the award of the arbitrator(s) to be productive of legal consequences.

Supporters of the contractual theory may counterargue that, while the function of arbitrators is to adjudicate, this is private adjudication. According to Professor Sturges, the similarities between arbitrators and judges are 'based on remote resemblances. [] Arbitrators exercise no constitutional jurisdiction or like role in the judicial systems-state or national.'³² These 'remote resemblances' do not preclude the fact that parties control arbitration by their agreement. 'The arbitrator is not a public official rendering

²⁹ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 45-46.

³⁰ Samuel (n 29 above) 47-49.

³¹ O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 11.

³² WA Sturges 'Arbitration – What Is It?' in MC Beastein (ed) *Private Dispute Settlement* (Free Press New York 1968) 19, 23.

justice in the name of the State. To the contrary, the arbitrator is a private person whose jurisdiction depends on the will of the parties.³³

Further, Peter Behrens points out that the general freedom of contract enables parties to create binding rules *inter se*. 'Contracting thus means rule making, and the principle of party autonomy must be regarded as the delegation by a legal order of rule making powers to private individuals.'³⁴ Suggesting that arbitration is just a procedural variety of the general freedom of contract, Behrens states that,³⁵

[t]he normative order created by the parties to a contract must fit with the overall legal order of which it is a part. Private rule making must conform to the basic function the legal order fulfills by granting freedom of contract. This basic function is to provide the institutional framework for an economic order that is characterised by decentralised decision making. Party autonomy must then be seen as a constituent principle of a system that may be called in economic terms a 'market economy', or in legal terms a 'system of private law'.

Therefore, while the core of this theory is that arbitration is a contractual mode of alternative dispute resolution, judicial intervention – constituting public control over arbitration – may be accommodated as '[r]evueing, enforcing, and policing arbitration agreements according to the quality of consent evidenced in the matter,' just as courts

³³ PE Nygh *Choice of Forum and Laws in International Commercial Arbitration* (Forum Internationale no 24 Kluwer Law International The Hague 1997) 1, 4.

³⁴ P Behrens 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits' in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 15; SJ Ware 'Default Rules from Mandatory Rules: Privatizing Law through Arbitration' (1999) 83 *Minnesota L Rev* 703, 705.

³⁵ Behrens (n 34 above) 16.

adjudicate contract matters.³⁶ The main concern that supporters of the contractual theory may have is that the desire to promote commercial arbitration may jeopardise consent, whereas³⁷

even in the purported heyday of classical contract doctrine and the objective theory of contract, courts policed agreements on the bases of the parties' understanding of the stakes and of the bargain, as well as issues of consent and fairness. [Therefore,] these traditional concepts [are] unlikely to add significantly to the judicial burden [in arbitration]. An initial upsurge in judicial resources devoted to this richer review of arbitration contracts is likely to be temporary, with judicial precedents subsequently requiring parties to establish adequate contracting norms and procedures and to conform their behavior to the standards enunciated by the courts.

Peter Behrens stresses the point that,³⁸

until the protection of private parties against the normative implications of economic power has been made an integral element of international commercial arbitration – by the proper application of national public policies /or by developing a 'truly international public policy' – national legislatures and courts must insist that they continue to be able to exercise the necessary control over international commercial arbitration.

The contractual theory is, therefore, consistent with there being a judicial role in arbitration to ensure the absence of a violation of the applicable national public policy; and that national public policy may be concerned to prevent arbitration from

³⁶ JW Stemple 'Bootstrapping and Slouching toward Gomorrah: Arbitral Infatuation and the Decline of Consent' (1996) 62 Brooklyn L Rev 1381, 1401-1402.

³⁷ Stemple (n 36 above) 1403.

³⁸ P Behrens 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits' in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 37.

jeopardising specific third parties, the general public, or even the autonomy of the parties themselves.³⁹

3. The Jurisdictional Theory

Proponents of the jurisdictional theory suggest that the nature of arbitration stems from the function of the arbitrator, which is to judge. Consequently, Lainé, a leading advocate of this theory, suggests that an arbitrator should be regarded as a judge, and his award should be treated as a judgment.⁴⁰ Although an arbitrator is not appointed by a state, arbitration denotes 'a jurisdiction' that corresponds to courts. According to this jurisdictional theory, 'jurisdiction' identifies with an organ (public or private) judicially empowered to ascertain the availability of a legal remedy for a given claim.⁴¹

While recognising that arbitration depends on the agreement of the parties, Motulsky suggests that the adversary nature of arbitration and the power of arbitrators to render a binding decision distinguish arbitration from other consensual concepts, such as valuation.⁴² In addition, the jurisdictional theory can be supported by the fact that requirements of natural justice, including the impartiality of arbitrators, are

³⁹ P Behrens 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits' in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 16, 21.

⁴⁰ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 51; cf C Carabiber 'L'Evolution de l'Arbitrage Commercial International' (1960) 99 *Recueil des Cours* 119, 148-150.

⁴¹ Samuel (n 40 above) 53.

⁴² P Fouchard 'Henry Motulsky et l'Arbitrage' [1992] *Revue de l'Arbitrage* 523, 528.

inherent in the arbitral process. Since an award can be challenged on grounds of bias or procedural irregularities, it is nothing but a judgment.⁴³

Apart from the nature of an arbitrator's task, a strand of the jurisdictional theory, promoted by Motulsky and Pillet, views the source of an arbitrator's power as being the state rather than the agreement of the parties.⁴⁴ This view assumes that the law precedes the existence of arbitration.⁴⁵ This results in a territorial approach to arbitration, since arbitration has to be valid within the particular legal system.⁴⁶ According to Professor Mann, 'even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law.'⁴⁷

The state delegates to arbitrators part of its power to dispense justice *within its territory* in the belief that it is in the public interest to allow them to do so when parties agree to arbitrate.⁴⁸ Consequently, the law of the place of arbitration is afforded a central role in determining the powers of arbitrators, the validity of the arbitral

⁴³ cf F-E Klein *Considerations sur l'Arbitrage en Droit International Privé* (Helbing & Lichtenhahn Bâle 1955) 43-53.

⁴⁴ Klein (n 43 above) 185-186; A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 55.

⁴⁵ T Clay *L'Arbitre* (Daloz Paris 2001) 226, citing H Motulsky *Écrit, Études et Notes Sur L'Arbitrage* (Daloz Paris 1974) and C Jarosson *La Notion d'Arbitrage* (Librarie Générale de Droit et de Jurisprudence Paris 1987).

⁴⁶ FA Mann 'International Arbitration and State Contracts' (1967) 42 *British Ybk of Intl L* 1; O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 11.

⁴⁷ FA Mann 'Lex Facit Arbitrum' in P Sanders (ed) *International Arbitration Liber Amicorum for Martin Domke* (Martinus Nijhoff The Hague 1967) 157, 160.

⁴⁸ Samuel (n 44 above) 55; M Bagheri *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration* (Studies in Comparative Corporate and Financial Law Volume 11 Kluwer Law International The Hague 2000) 106-107.

procedure, and even the validity of the arbitration agreement.⁴⁹ According to Craig, '[d]rafters of arbitration agreements must accept that the state where arbitration is held has legislative jurisdiction to dictate procedural rules for arbitral proceedings in that state, and that the state's courts have the power to enforce such provisions.'⁵⁰ Therefore,

[o]ne implication of this theory is that arbitrators are constrained to follow the conflicts of law rules of the seat of arbitration in trying to select the law to apply to the arbitral proceedings and the substance of the dispute. Also an award may be set aside if the arbitration does not comply with the law of the seat of arbitration. As A. Hirsch notes, 'What should be undisputed ... is the fact the parties and arbitrators are to be governed by the *lex arbitri*. If they adopt a solution that is not allowed by the *lex arbitri*, the award may be set aside.'⁵¹

By corollary, this theory regards judicial intervention in the arbitral process as more important than respecting 'party autonomy.'⁵² Courts will also apply their national public policy to every arbitration conducted on their territory, at least as regards what matters can be arbitrated. 'Since the right to arbitrate disputes is given by the municipal authorities where the arbitration takes place, by way of a concession, those same authorities must be entitled to set the limits of the delegation made by

⁴⁹ P Lalive 'Problèmes Relatifs à l'Arbitrage International Commercial' (1967) 120 *Recueil des Cours* 569, 585. The jurisdictional theory also requires arbitrators to apply the conflict of laws rules of the place of arbitration: B Goldman 'Les Conflits de Lois dans l'Arbitrage International de Droit Privé' (1963) 109 *Recueil des Cours* 347, 367-371; R Luzzatto 'International Commercial Arbitration and the Municipal Law of States' (1977) 157 *Recueil des Cours* 9, 51-52.

⁵⁰ WL Craig 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Texas Intl LJ* 1, 11.

⁵¹ O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 12, citing A Hirsch 'The Place of Arbitration and the *Lex Arbitri*' (1979) 34 *Arbitration J* 43, 45.

⁵² CM Shmitthoff 'The Supervisory Jurisdiction of the English Courts' in P Sanders (ed) *International Arbitration, Liber Amicorum for Martin Domke* (Martinus Nijhoff The Hague 1967) 289, 291-2, 296-7; A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 59; FA Mann 'Private Arbitration and Public Policy' (1985) 4 *Civil Justice Q* 257, 259.

them.’⁵³ According to Mann, the arbitrator’s duty to respect the agreement of the parties follows from the fact that the *lex loci arbitri* requires him to do so.⁵⁴ Therefore, it has been noted that,⁵⁵

[t]he jurisdictional theory is the one that can most easily recognise the power of states to control and regulate arbitration, although only on a territorial basis. The effect of this theory is to allow arbitrators no greater freedom in the application of substantive law than the judges have. It requires that an award conform to the national law of the state in which it is made.

Some commentators relate the jurisdictional theory to the American concept of ‘state action.’ According to that concept, even if an activity is carried out by a private body, constitutional demands on state authorities apply to it if that activity satisfies the following test: private conduct amounts to state action where the private actor performs a public function, or performs a private function that has a close nexus to the government, and if the claimed constitutional violation has resulted from the exercise of a right or privilege having its source in state authority.⁵⁶ (This doctrine has been

⁵³ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 55. While acknowledging that the state is the source of an arbitrator’s power, Hong-Lin Yu and Eric Sauzier suggest that the state should make concessions to arbitration on the basis of its ‘commercial benefits;’ by such concessions the state should relinquish its control over arbitration. H-L Yu and E Sauzier ‘From Arbitrator’s Immunity to the Fifth Theory of International Commercial Arbitration’ (2000) 3 Intl Arbitration L Rev 114, 120-121; H-L Yu ‘Total Separation of International Commercial Arbitration and National Court Regime’ (1998) 15 J Intl Arbitration 145, 154-156.

⁵⁴ FA Mann ‘Lex Facit Arbitrum’ in P Sanders (ed) *International Arbitration Liber Amicorum for Martin Domke* (Martinus Nijhoff The Hague 1967) 157, 165.

⁵⁵ P Behrens ‘Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits’ in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 21.

⁵⁶ *Lugar v Edmondson Oil Co Inc* 457 US 922, 937, 102 S Ct 2744 (1982); RC Reuben ‘Public Justice: Toward a State Action Theory of Alternative Dispute Resolution’ (1997) 85 California L Rev 577, 611-612.

developed by the Supreme Court of the United States as a judicial response to private discrimination, subjecting private businesses to constitutional protection.⁵⁷⁾

Richard Reuben argues that arbitration is, according to that test, a 'state action.' Therefore, it is subject to constitutional standards, such as 'fair hearing' requirements. In addition, arbitrators should be treated as 'state actors,' who are subject to the requirement of impartiality.⁵⁸ Reuben suggests that, while arbitration is traditionally regarded as 'private litigation' emulating 'state courts,' arbitration and litigation 'represent two different spheres within the single galaxy of public dispute resolution.'⁵⁹ This view rests on the jurisdictional theory, since it relates arbitration to the jurisdiction of the state.

However, the jurisdictional theory marginalises the role of the agreement of the parties in controlling the arbitration process. The arbitration agreement puts arbitration in motion but it has no further role to play; arbitrators will proceed according to the procedural law of the place of arbitration. Thus,⁶⁰

[t]he arbitration agreement is necessary to give the arbitrators their authority, but once that authority has been conferred on them, provided they keep within the limits of the task given to them, their freedom is absolute and the arbitration agreement has no influence on their award which is based on quite different matters.

⁵⁷ *Burton v Wilmington Parking Authority* 365 US 715, 81 S Ct 856 (1961); *Heart of Atlanta Motel Inc v United States* 379 US 241, 85 S Ct 348 (1964); RC Reuben 'Public Justice: Toward a State Action Theory of Alternative Dispute Resolution' (1997) 85 California L Rev 577, 609.

⁵⁸ Reuben (n 57 above) 613, 615.

⁵⁹ Reuben (n 57 above) 589.

⁶⁰ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 52.

This approach ignores the fact that the choice of the place of arbitration may be fortuitous.⁶¹ In addition, it is difficult to dissociate the way arbitration is conducted from the arbitration agreement. 'The arbitrators must clearly conduct the hearing in accordance with any agreement of the parties concerning procedure. Right up to the delivery of the final award, the arbitral agreement exerts a powerful influence on the proceedings.'⁶² Parties could, for example, agree to remove the arbitrator.

Further, this theory assumes the correctness of the controversial view, which is adopted by Mann, that the state has a monopoly over the administration of justice. The extreme counter-argument is, as René David put it, that recourse to arbitration is 'an innate right of man.'⁶³ A less extreme counter-argument, favoured by David, is that, while the state may be endowed with the power to administer justice, this does not mean that 'the sovereign should in all circumstances administer justice himself or through his Courts. The prerogative of justice is satisfied as long as the sovereign retains the ability to control how justice is administered by other bodies within his borders.'⁶⁴

⁶¹ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 56, 59; C Carabiber 'L'Evolution de l'Arbitrage Commercial International' (1960) 99 *Recueil des Cours* 119, 150; B Goldman 'Les Conflits de Lois dans l'Arbitrage International de Droit Privé' (1963) 109 *Recueil des Cours* 347, 371-372.

⁶² Samuel (n 61 above) 54.

⁶³ R David *Arbitration in International Trade* (Kluwer Law and Taxation Deventer 1985) 56; T Kitagawa 'Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective' in P Sanders (ed) *International Arbitration Liber Amicorum for Martin Domke* (Martinus Nijhoff The Hague 1967) 133, 138; cf R Luzzatto 'International Commercial Arbitration and the Municipal Law of States' (1977) 157 *Recueil des Cours* 9, 21, stating that 'arbitration should be regarded as a social institution, which is not created as such by the law of the States[;] it is certain that [the role of the State] always follows the self-organisation taking place within social entities and bodies where arbitration has been born.'

⁶⁴ David (n 63 above) 57.

4. The Mixed Theory

What one may term the 'mixed theory' attempts to reconcile the contractual and jurisdictional theories by drawing on the strengths, and rejecting the weaknesses, of both. This theory is attributed to Professor Sauser-Hall, whose view was adopted by the report of the Institute of International Law, following its session in 1952.⁶⁵ It attaches central importance to both the parties' consent and the procedural law of a particular jurisdiction. Parties' consent creates the arbitration agreement and sets the arbitral process in motion. On the other hand, it is the law of civil procedure that applies to the removal of a national court's jurisdiction and the judging of the dispute referred to arbitration.⁶⁶ 'Although the arbitration agreement, as any other agreement, is consensual, within its limited compass, it is also, in varying degree, dependent on the law of the particular jurisdiction.'⁶⁷ In Poznanski's words,⁶⁸

[a]n arbitrator's authority is actually hybrid in nature, consisting of a contractual basis for the creation and restriction of his powers, coupled with a jurisdictional authority as permitted to exist or as assisted by state authority.

⁶⁵ C Carabiber *L'Arbitrage International de Droit Privé* (Librarie Générale de Droit et de Jurisprudence Paris 1960) 29; cf P Sanders 'Trends in the Field of International Commercial Arbitration' (1975) 145 *Recueil des Cours* 204, 233-234; J-P Ancel 'French Judicial Attitudes towards International Arbitration' (1993) 9 *Arbitration Intl* 121.

⁶⁶ Carabiber (n 65 above) 61; O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 13; B Oppetit 'Arbitrage Juridictionnel et Arbitrage Contractuel: A Propos d'une Jurisprudence Recente' [1977] *Revue de l'Arbitrage* 315.

⁶⁷ KS Carlston 'Theory of the Arbitration Process' (1952) 17 *Law and Contemporary Problems* 631, 635; cf C Carabiber 'L'Evolution de l'Arbitrage Commercial International' (1960) 99 *Recueil des Cours* 119, 150-153.

⁶⁸ BG Poznanski 'The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration' (1987) 4 *J Intl Arbitration* 71, 72.

Or as Bagheri has put it,⁶⁹

these two apparently conflicting approaches [ie the contractual and jurisdictional theories] are reconcilable if the whole process of adjudication is looked upon from a broader perspective of a dialectical interaction between autonomy and welfare aspects of the adjudication. From a dialectical point of view, the dichotomy is artificial and illusionary, as each represents part of a whole, which can be understood if we agree that the enterprise of arbitration could not exist without a portion of each ingredient.

This theory may be regarded as assimilating arbitration agreements to exclusive jurisdiction clauses, which remove national courts' jurisdiction by consent.⁷⁰ While jurisdiction clauses remove this jurisdiction in favour of another court, arbitration agreements remove this jurisdiction in favour of a 'private jurisdiction,' an arbitrator, rather than another national court.

The main criticism of this mixed theory is that the arbitration agreement cannot be really separated from the arbitral process, since the agreement is a source for arbitrators' powers and operates up to the time the award is enforced.⁷¹ It is true that the arbitral procedure and award attract substantive and procedural principles of public policy, such as the requirement of fair hearing but, as we have seen, the contractual theory can accommodate these aspects in the same way that public policy restricts the private aspect of any contract. That is, allowing parties to agree to arbitrate disputes

⁶⁹ M Bagheri *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration* (Studies in Comparative Corporate and Financial Law Volume 11 Kluwer Law International The Hague 2000) 109.

⁷⁰ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 61.

⁷¹ F-E Klein *Considerations sur l'Arbitrage en Droit International Privé* (Helbing & Lichtenhahn Bâle 1955) 199-202; Samuel (n 70 above) 61.

does not empower them to ignore the limits on their freedom to contract by discarding otherwise applicable rules of public policy. In addition, the mixed theory preserves the most controversial aspect of the jurisdictional theory, which places great weight on the power of the state, where the arbitration takes place, to control the administration of justice.⁷²

5. The Autonomous Theory

So far, we have examined theories that focus on different elements of arbitration, whether contractual or judicial. However, a more recent theory (first propounded in the 1960s) has attempted to dispense with this structural analysis of arbitration, at least in respect of international arbitration. It argues that arbitration should be considered as a whole, with due regard being had to its purposes.⁷³ Arbitration is a legal institution that is independent from national laws; it should be governed by such rules that promote its objectives, without adhering to ordinary concepts of contract and civil procedure.

This theory was proposed by Jacqueline Rubellin-Devichi, who referred to it as the 'autonomous theory,' connoting the notion that arbitration has its own legal system. According to Rubellin-Devichi, the elements of arbitration do not belong entirely to contract or jurisdiction. Therefore, she suggests that inconsistency will result if one

⁷² B Goldman 'Les Conflits de Lois dans l'Arbitrage International de Droit Privé' (1963) 109 *Recueil des Cours* 347, 368-369.

⁷³ O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 13.

defines arbitration according to one element rather than the other.⁷⁴ Instead, arbitration should be treated according to its function. She argues that⁷⁵

[a]rbitration has a unique function both in domestic and international law. Parties submitting to arbitration seek a solution to their dispute other than that otherwise provided by courts applying the law. This special role makes arbitration an autonomous institution repugnant to contract and jurisdiction. Recognising its unique nature helps avoid inconsistencies.

Arbitration should not, therefore, be encapsulated in existing concepts of contract and jurisdiction. 'The autonomous theory, breaking away from the trend to focus on either the contractual or jurisdictional nature of arbitration, examines the arbitration process itself – its role, its objectives, its methodology.'⁷⁶

Proponents of this theory submit that no distinct element of arbitration can be strictly treated as contractual or jurisdictional. 'Even the award, the jurisdictional feature of arbitration [par] excellence, betrays its contractual origins when, as is often the case, the giving of reasons is dependent on the agreement of the parties.'⁷⁷

Further, international arbitrators cannot be considered as a manifestation of the power of the state. The search for a source of arbitral authority that is consistent with

⁷⁴ J Rubellin-Devichi *L'Arbitrage: Nature Juridique, Droit Interne et Droit International Privé* (Librarie Générale de Droit et de Jurisprudence Paris 1965) 17.

⁷⁵ Rubellin-Devichi (n 74 above) 364.

⁷⁶ O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 13.

⁷⁷ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 68.

the nature of international arbitration leads inexorably, so it is argued, to an autonomous, non-national system.⁷⁸

This theory draws attention to a number of distinct characteristics of arbitration that distinguish it from both contracts and judgments. In particular, an arbitrator may have powers that judges often lack, such as modifying the terms of the contract or ruling in accordance with extra-legal principles.⁷⁹ (Another example in England is the power to award compound rather than merely simple interest.⁸⁰) Further, the validity of the arbitration agreement can be subject to requirements that are not common to other contracts. For example, special rules of capacity may apply in respect of the arbitration agreement.⁸¹ Such special requirements are justified on the grounds of the jurisdictional effect this agreement creates.

It has been suggested that the jurisdictional and the contractual theories could restrict the expansion of international commercial arbitration.⁸² Legal regimes governing contracts or procedure should not prevent arbitration from developing

⁷⁸ J Paulsson 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358, 362.

⁷⁹ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 69.

⁸⁰ The Arbitration Act 1996, s 49. By contrast, in the absence of an agreement to that effect or in certain situations in equity, courts do not have the power to award compound interest: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL). Thus, the courts can award compound interest only in exceptional cases: MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 45; The Supreme Court Act 1981, s 35A.

⁸¹ Samuel (n 79 above) 68.

⁸² O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 13

international commercial law.⁸³ Therefore, arbitration should be analysed 'not in terms of contract and jurisdiction but in light of the expectations of the parties.'⁸⁴ Consequently, the rules by which arbitration is governed continue to be worked out through the practice of arbitration in seeking to meet the needs of the parties and furthering arbitration as an international, indeed 'supra-national,' institution.⁸⁵

The autonomous theory accepts, therefore, different aspects of the delocalisation of international arbitration (ie detaching it from national laws) on the assumption that national laws are inadequate for international arbitration.⁸⁶ In the first place, it discards the application of the law of the place of arbitration.⁸⁷ This is the delocalisation of the arbitration procedure; parties can choose another law, or construct their own rules of procedure. Consequently, the rules governing arbitration become an emerging regime that evolves from one case to another. Under this theory, arbitration should be a self-contained system that is subject to its own rules. As William Craig writes,⁸⁸

[m]embers of the business community think of their agreement to arbitrate as the submission to a generally accepted regime for dispute resolution. To that extent, their intentions are universalist

⁸³ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 72; O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books Connecticut 1994) 14.

⁸⁴ P Behrens 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits' in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 21.

⁸⁵ Samuel (n 83 above) 72-73.

⁸⁶ Samuel (n 83 above) 72; Behrens (n 84 above) 21-22; Chukwumerije (n 83 above) 14; H-L Yu 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 *J Intl Arbitration* 145, 149, 158.

⁸⁷ JG Frick points out that 'legal scholars have often been unaware' of all the aspects of delocalisation that are discussed in the text: JG Frick *Arbitration and Complex International Contracts* (Kluwer Law International The Hague 2001) 272-273.

⁸⁸ WL Craig 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Texas Intl LJ* 1, 16.

in nature. They do not consciously envisage their submission as being to one of a hundred or more different national arbitral regimes depending on the choice of the place of arbitration and the national law applicable there; nor do they envis[age] that the procedures within the arbitral process, or the results to be obtained, may be varied because of that choice. It is both as a reaction to such sentiments from the business community and as a promotion of a universal arbitral remedy that international arbitration institutions have provided arbitration rules designed to be self-contained, of general applicability, and to obviate reference to local arbitration practices, resulting from national arbitration laws, which vary from place to place.

This theory also affects the rules governing the merits in international arbitration.⁸⁹ Arbitrators are not obliged to apply a national law to the dispute, where parties have empowered them to apply another set of rules. This ‘substantive delocalisation’ results from the view that arbitrators have no forum, and, consequently, no rules of conflict of laws. Arbitrators may, therefore, apply international commercial law, the *lex mercatoria*. Apart from the controversy over the existence of such law merchant, the practice of arbitrators applying this concept shows that they tend to apply it even if it involves ignoring national public policies of countries closely connected to the transaction.⁹⁰ These effects of the delocalisation of arbitration are generally said to derive from the *complete* autonomy of the parties, which is advocated by the autonomous theory. Thus, it has been noted that,⁹¹

[m]any writers, particularly in France, have regarded [party autonomy] as having a generative force of its own and have

⁸⁹ JG Frick *Arbitration and Complex International Contracts* (Kluwer Law International The Hague 2001) 275.

⁹⁰ P Behrens ‘Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits’ in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 27.

⁹¹ JG Wetter ‘Arbitral Tribunals’ in H Smit, NM Galston and SL Levitsky (edd) *International Contracts* (Bender New York 1981) 271, 272-273.

sought to deduce further propositions and rules from it []. Hence they have formulated theories to the effect that the international arbitral process is autonomous and independent of the laws of national jurisdictions, and have launched the concept of a modern *lex mercatoria*.

According to Peter Behrens,⁹²

[d]espite its realism, this theory has very important normative implications. It has been correctly observed that the effect of recognising arbitration as an autonomous institution is to acknowledge the denationalization of arbitration as a reality and unlimited party autonomy as the controlling force.

However, it is questionable whether the users of arbitration prefer such a delocalised regime of arbitration, the contents of which are only defined in the final award, to the regulation of arbitration according to pre-defined legal principles. Arbitration users, it has been submitted, prefer the latter regime.⁹³ Further, Mustill questions whether the role of national law and courts can be dispensed with. He writes,⁹⁴

it is undeniable that an 'ordinary' arbitration agreement involves mutual promises to submit disputes to the decision of an arbitral tribunal, and to honour the resulting award [,] and if [the

⁹² P Behrens 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits' in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 21.

⁹³ FA Mann 'Private Arbitration and Public Policy' (1985) 4 Civil Justice Q 257, 259. The autonomous theory would tolerate the application by arbitrators of extra-legal principles in the absence of an explicit choice of law, even without parties' authorisation. See FA Mann 'Lex Facit Arbitrum' in P Sanders (ed) *International Arbitration Liber Amicorum for Martin Domke* (Martinus Nijhoff The Hague 1967) 157, 172-173; R Goode 'Dispute Resolution in the Twenty-First Century' (1998) 64 Arbitration 9, 15-16; H-L Yu 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 J Intl Arbitration 145, 149; cf R Goode 'Usage and its Reception in Transnational Commercial Law' (1997) 46 ICLQ 1, 28-29, 32.

⁹⁴ MJ Mustill 'Transnational Arbitration in English Law' (1984) 37 CLP 133, 139-140.

promises] are to be legally enforceable, this must be through the medium of the domestic courts. Thus, if the theory is right, transnational arbitrations are to be subtracted from the main body. How is this to happen? [If this were to be achieved] by way of interpreting the arbitration agreement, the mechanism must be an implied term, for in practice even multinational companies and state trading agencies do not contract out of domestic arbitration law. Can such an implication be justified? I suggest not.

Delocalisation becomes even more contentious in respect of its further effect on arbitration, which is to deprive the courts of the place of arbitration from their jurisdiction to set aside awards. International awards are thus 'set adrift, freed from the overly-protective restraints of national law.'⁹⁵ To appreciate this aspect, it should be realised that most national laws allow the courts of the place of arbitration (ie the country of origin) to set aside awards on grounds of national public policy, be it procedural or substantive. Moreover, the New York Convention for the Enforcement and Recognition of Foreign Arbitral Awards of 1958 permits courts to refuse to enforce awards that had been set aside by the courts of the country of origin. By contrast, proponents of delocalisation reject the jurisdiction of the courts of the place of arbitration to set awards aside; the losing party may only resist the enforcement of the award, which courts will examine as an 'anational' award.⁹⁶

It follows that the validity of the award does not depend on the law of the place of arbitration; it receives its legal value from the legal system where enforcement is

⁹⁵ JM Lookofsky *Transnational Litigation and Commercial Arbitration* (Transnational Juris Publications New York 1992) 575.

⁹⁶ J Paulsson 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30 ICLQ 358.

sought.⁹⁷ Once the award is made, its effects will be controlled by ‘no other authority than its (unvarying) contractual foundation and the (varying) requirements of the particular jurisdictions in which it may be sought to be relied on.’⁹⁸ Arbitration is thus ‘stateless.’

An example where a national court declined jurisdiction to set aside an award rendered within its jurisdiction – thereby accepting, apparently, the delocalisation approach – is the French case of *Libyan General National Maritime Transport Co v Société Götaverken Arendal AB*.⁹⁹ In this case, the Court of Appeal of Paris reasoned that, since the nature of the arbitration was international and the procedure governed by the ICC Rules, it did not matter that the location of the proceedings was in France.¹⁰⁰ However, this case could be interpreted on the basis that the law of the country of origin affords international arbitration favourable treatment; it did not explicitly refer to stateless arbitration, and did not preclude parties’ having power to agree to apply a particular national law to the arbitral procedure.¹⁰¹ According to William Park,¹⁰²

[a]n international arbitration, rather than being ‘detached from its country of origin,’ receives substantially greater autonomy, and is subject to fewer constraints, than a domestic arbitration. The award in *Gotaverken* was not annulled. Rather, the French court found the award not subject to a challenge procedure (*appel en nullité*) available only to French awards.

⁹⁷ R Goode ‘The Role of the *Lex Loci Arbitri* in International Commercial Arbitration’ (2001) 17 *Arbitration Intl* 19, 21.

⁹⁸ J Paulsson ‘Arbitration Unbound: Award Detached from the Law of its Country of Origin’ (1981) 30 *ICLQ* 358.

⁹⁹ Ct of App of Paris, 21 February 1980 [1980] *Revue de l’Arbitrage* 524.

¹⁰⁰ Paulsson (n 98 above) 359.

¹⁰¹ Goode (n 97 above) 26.

¹⁰² WW Park ‘The *Lex Loci Arbitri* and International Commercial Arbitration’ (1983) 32 *ICLQ* 21, 26.

The French New Code of Civil Procedure of 1981 has made international arbitration awards rendered in France subject to setting aside procedure.¹⁰³ Therefore, the implications of that case have been short-lived. On the other hand, French courts have recently declined to treat awards that have been annulled abroad as unenforceable in France.¹⁰⁴ According to Professor Roy Goode, this approach is correct, since ‘the New York Convention gave a discretionary power to the court of enforcement to refuse to recognise an award that had been set aside by the competent authority of the state where it was rendered,’ preserving ‘the right of an interested party to rely on the more favourable provisions, if any, of that state’s domestic law.’¹⁰⁵ However, this does not necessarily entail that the New York Convention endorses the notion of stateless awards. To the contrary, the prevailing view is that the Convention recognises the role of the law of the place of arbitration, although it may allow the disregard of the setting aside of an award where it was rendered.¹⁰⁶

By understating national public policies, the delocalisation approach may fail to recognise the ‘interdependence between the principle of private law and a competitive order in the world market.’¹⁰⁷ As explained above, arbitration has significant implications for the free market and should, therefore, be subject to certain public

¹⁰³ WW Park ‘The *Lex Loci Arbitri* and International Commercial Arbitration’ (1983) 32 ICLQ 21, 32-33; MJ Mustill ‘Transnational Arbitration in English Law’ (1984) 37 CLP 133, 147; the French New Code of Civil Procedure 1981, Article 1504.

¹⁰⁴ *Hilmarton Ltd v Ominium de Traitement et de Valorisation*, Cassation civil 23 March 1994 [1994] Revue de l’Arbitrage 327.

¹⁰⁵ R Goode ‘The Role of the *Lex Loci Arbitri* in International Commercial Arbitration’ (2001) 17 Arbitration Intl 19, 26-27.

¹⁰⁶ Goode (n 105 above) 23; AJ Berg *The New York Arbitration Convention of 1952* (Kluwer Law and Taxation Deventer 1981) 37.

¹⁰⁷ P Behrens ‘Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits’ in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 37.

policy limits in relation to arbitral procedure and to the determination of the substantive dispute. While in reality arbitration may be autonomous,

the problem is whether this should be accepted as a matter of law. If the international economic order is to be governed by law and not by nature (where law is non-existent), international commercial arbitration must be regulated as a legal phenomenon. It must, therefore, by necessity be subject to the limitations inherent in the principle of party autonomy itself. Even though the theory of arbitration as an autonomous institution may be sociologically true, as a normative proposition it is unacceptable. There is nothing in the theory that would retain minimal standards of public policy as limiting factors.¹⁰⁸

Further, William Park argues that the delocalisation of arbitration purports to create an obligation (the award) without a specific legal system serving as its foundation. Thus,¹⁰⁹

it requires a conceptual leap to a document labelled 'obligation' enforced without respect to whether the document constitutes a valid obligation under the legal system normally selected by the enforcement forum's choice of law principles. In other words, the document receives contractual force from the enforcement forum itself regardless of the otherwise governing law.

Therefore, this theory has been criticised as 'extending to an illogical extreme the notion of a *contrat sans loi*, [characterising] an international contract as one detached from a governing procedural or substantive national law.'¹¹⁰ Although 'the most

¹⁰⁸ P Behrens 'Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits' in D Friedmann and E Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 22.

¹⁰⁹ WW Park 'The *Lex Loci Arbitri* and International Commercial Arbitration' (1983) 32 ICLQ 21, 26.

¹¹⁰ HP De Vries 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 Tulane L Rev 42, 72; T Rensmann 'A-national Arbitral Awards: Legal Phenomenon or Academic Phantom?' (1998) 15 J Intl Arbitration 37, 38.

important principle of international commercial law is the freedom of the parties to facilitate the process in accordance with their own expectations, the process cannot be fully detached from any national law.’¹¹¹ It is noteworthy that, while Belgium amended its law so that awards made in it could be stateless, abolishing courts’ jurisdiction to set awards aside, unless a party to the arbitration is Belgian (ie like the apparent position of the French court in the above-mentioned *Götaverken* case),¹¹² it has recently retreated, allowing parties to choose whether to retain judicial review in Belgium in order to protect parties who may prefer to keep judicial protection.¹¹³ It has been suggested that the Belgian latter amendment is due to the fact that the former rule ‘has dissuaded rather than encouraged parties to choose Belgium as the seat of their arbitration.’¹¹⁴ William Park rightly points out that ‘[a]spirations toward delocalised dispute resolution collide with the national norms that must sometimes be invoked if an arbitration clause is to be more than a piece of paper.’¹¹⁵

It has also been suggested that delocalisation may be inconsistent with ‘party autonomy.’ Professor Goode points out that, while the purported justification for

¹¹¹ HP De Vries ‘International Commercial Arbitration: A Contractual Substitute for National Courts’ (1982) 57 *Tulane L Rev* 42, 72; R Luzzatto ‘International Commercial Arbitration and the Municipal Law of States’ (1977) 157 *Recueil des Cours* 9, 24; R Goode ‘The Role of the *Lex Loci Arbitri* in International Commercial Arbitration’ (2001) 17 *Arbitration Intl* 19, 29.

¹¹² Belgian Judicial Code as amended on 20 January 1985, Article 1717(4).

¹¹³ Belgian Judicial Code, Article 1717(4), as amended by the Arbitration Act of 19 May 1998 s 51; P Mayer ‘The Trend towards Delocalisation in the Last 100 Years’ in M Hunter, A Marriott and VV Veeder (edd) *The Internationalisation of International Arbitration* (Graham and Trotman London 1995) 45; Goode (n 111 above) 30.

¹¹⁴ B Hanotiau and G Block ‘The Law of 19 May 1998 Amending Belgian Arbitration Law’ (1999) 15 *Arbitration Intl* 97, 99.

¹¹⁵ WW Park ‘The Interaction of Courts and Arbitrators in England: The 1996 Act as a Model for the US?’ (1998) 1 *Intl Arbitration L Rev* 54, 55.

delocalisation is the autonomy of the parties, it in fact ignores parties' choice of a particular law to govern their arbitration, including that of the place of arbitration.¹¹⁶

Even proponents of delocalisation seem driven to accept the inevitable need for a national system to enforce awards, but they argue that the enforceability of awards should not depend on the judgment under the law of the place of arbitration. According to Jan Paulsson,¹¹⁷

[t]o seek completely to avoid national jurisdictions would be misguided. Indeed, the international arbitral system would ultimately break down if no national jurisdictions could be called upon to recognise and enforce awards. The question is rather whether in certain situations international arbitration may be liberated from the local peculiarities of a place of arbitration chosen either fortuitously or for reasons of neutrality having nothing to do with the parties' attachment to local rules of arbitration.

But by relying on the law of the enforcing court, the autonomous theory does not provide specific legal standards according to which the award can be assessed. This theory explains the nature of arbitration in a negative way, saying that it is neither a contract nor a jurisdiction, and is not subject to any extent to the law of the place of arbitration. The defect of this, as explained by Mustill and Boyd, is that such

¹¹⁶ R Goode 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 *Arbitration Intl* 19, 27, 31. In *Hilmarton Ltd v Omnium de Traitement et de Valorisation*, Cassation civil 23 March 1994 [1994] *Reveu de l'Arbitrage* 327, the French Court of Cassation treated an award as being stateless despite the fact that the relevant arbitration agreement referred to arbitration in Switzerland under the law of the Canton of Geneva. The Court of Cassation went as far as saying that the award was not integrated into the legal of the state in which it was made. Likewise, in *Républic Arab d'Egypt v Chromalloy Aero Services*, Ct App of Paris 14 January 1997 [1997] *Revue de l'Arbitrage* 395, the Court of Appeal of Paris ignored the parties' choice of Egypt as the 'seat' of arbitration.

¹¹⁷ J Paulsson 'Delocalisation of International Commercial Arbitration: When and Why It Matters' (1983) 32 *ICLQ* 53, 54.

delocalisation does not allow the award to have objective validity; its validity will depend on the jurisdiction in which the winner elects to seek enforcement.¹¹⁸

It should be added that the autonomous theory is even more controversial if it is interpreted as detaching even the arbitration agreement (the consent of the parties) from any national law, since consent must be sanctioned by a national law.¹¹⁹ (This potential consequence will be returned to in Chapter V.)

6. Conclusion

It is submitted that the contractual theory is, on close examination, the most satisfactory explanation of arbitration. It can explain different aspects of arbitration in such a way that ensures both consistency and certainty. Thus, while the jurisdictional theory concentrates on the judicial function of arbitrators, it overlooks the control that parties have over the powers arbitrators may exercise. Further, it encapsulates arbitration within the procedural law of the place of arbitration, favouring certainty over flexibility. This, however, could hinder the development of arbitration to meet the requirements of international trade. The 'mixed theory' shares this shortcoming.

¹¹⁸ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 77; S Jarvin 'The Sources and Limits of the Arbitrator's Powers' in JD Lew (ed) *Contemporary Problems in International Arbitration* (Centre for Commercial Law Studies London 1986) 50, 66.

¹¹⁹ P Mayer 'Note' [1990] *Revue de l'Arbitrage* 681; J Rideau *L'Arbitrage International Public et Commercial* (Colin Paris 1969) 24-25.

On the other hand, while resorting to the principle of the autonomy of the parties, which allows them to control arbitration by agreement, the autonomous theory detaches arbitration from national procedural laws, and precludes the control of the courts of the place of arbitration. This approach detracts from the certainty required in arbitration, since it does not offer specific standards to govern procedural arbitration and the validity of awards.

The jurisdictional and autonomous theories seem to understate the fact that the status of arbitrators is both relational and temporary. That is, unlike judges, arbitrators' authority binds only the parties who have agreed to submit to arbitration; and a person sits as an arbitrator once the parties' agreement is put into play by the actual reference to arbitration. As such, there should be no element of imposition upon parties by prescribing a particular law governing their procedure and the powers of their arbitrator (the jurisdictional theory) or by ruling out the role of national laws in this connection (the autonomous theory).

Unlike these theories, the contractual theory seems consistent in deriving arbitration rules from the agreement of the parties. As we have stressed above, even the restraints of public policy may apply in line with the ordinary limits of the freedom to contract.

The contractual theory is capable of ensuring certainty, since it refers to general principles of contract, which provide adequate guidance on the relation between

parties' consent and public policy. It can also maintain sufficient flexibility. Parties may be afforded wide latitude in controlling the arbitral procedure, and to exclude the law of the place of arbitration. Thus some of the consequences of the autonomous theory (the exclusion of national laws governing procedure and substance in arbitration) may be achieved in practice, but as a variation of the contractual theory. They depend on the actual agreement of the parties. As Peter Nygh suggests,¹²⁰

[t]he starting point must be that the autonomy of the parties is sovereign. In principle the arbitrator's powers and jurisdiction derive from their will and not from national laws. The parties may choose, however, to have their arbitration conducted according to, and under the control of, national laws ... But they may not[.] Then it is true to say that the international arbitration has no forum.

However, since the contractual theory recognises restraints of national law, it does not detach arbitration entirely from the legal system of the place of arbitration. Unlike the autonomous theory, awards are subject to the courts of the country of origin. In fact, the nature and practice of international arbitration indicate the very dependence of arbitration on the support of states.¹²¹

This entails the rule that a national court may refuse to enforce awards that have been set aside in the country of origin. It has been suggested that this is inconsistent with the contractual theory; unlike contracts, if an award is annulled in the country of

¹²⁰ PE Nygh *Choice of Forum and Laws in International Commercial Arbitration* (Forum Internationale no 24 Kluwer Law International The Hague 1997) 1, 6.

¹²¹ M Bagheri *International Contracts and National Economic Regulation: Dispute Resolution through International Commercial Arbitration* (Studies in Comparative Corporate and Financial Law Volume 11 Kluwer Law International The Hague 2000) 116.

origin, it cannot be enforced elsewhere.¹²² However, there is no necessary inconsistency with the contractual theory. That rule should be treated as an externality to arbitration, which does not depend on a particular theoretical approach. It applies on grounds of fairness; the award debtor will not have to resist enforcement in every jurisdiction. Rather, the losing party should be allowed to challenge the award through setting aside procedure, without waiting for the winner to seek the enforcement of the award.¹²³

The contractual theory, therefore, should be preferred to other approaches. We shall therefore rely on this approach in interpreting, and assessing, the principles and policies that concern this thesis.

¹²² A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 49.

¹²³ WW Park 'The *Lex Loci Arbitri* and International Commercial Arbitration' (1983) 32 ICLQ 21, 32.

CHAPTER II

A BRIEF HISTORICAL ACCOUNT OF ENGLISH ARBITRATION LAW

1. Introduction

This chapter briefly examines the development of English arbitration law culminating in the Arbitration Act 1996 (the 1996 Act). We shall focus on the degree of courts' control over arbitration and the limits on the autonomy of the parties. This will reveal that, in line with what has been argued in chapter I, a contractual analysis of arbitration has been taken in English law.

The primary source of English arbitration law is the common law. English legislation on arbitration, which started in 1889, usually adopted and consolidated common law principles.¹ In addition, English Arbitration Acts (including the 1996 Act) apply only to arbitration agreements in writing, leaving oral agreements as being subject only to common law. Moreover, the successive Acts did not provide a comprehensive system of arbitration law; several aspects of arbitration, including confidentiality and the classification of arbitrable disputes, have never been dealt with in legislation. It remains true to say that 'it is to the reported cases rather than to the Act that reference must be made for an exposition of the law on arbitral procedure.'² But,

¹ SC Boyd and VV Veeder 'Le Développement du Droit Anglais de l'Arbitrage depuis la Loi de 1979' [1991] *Revue de l'Arbitrage* 209, 210.

² MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 54. cf Same authors *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 121.

having said that, the 1996 Act has gone further than previous statutes in consolidating many aspects of arbitration law.

The 1996 Act is not, however, a mere consolidation of existing arbitration law. It provides for a number of new rules, and sets out general principles behind the Act. Indeed, it has been argued, for example by Mustill and Boyd, that the Act departs from the contractual analysis of arbitration. This view will be critically assessed and rejected later in this chapter.

We will first consider briefly how English courts treated arbitration agreements before the first arbitration legislation was enacted in 1889. Then, landmark changes in judicial practice in applying the Arbitration Acts 1889-1979 will be highlighted. Finally, we will examine the 1996 Act.

2. Arbitration Law before the Arbitration Act 1889

Until the sixteenth century, courts did not lend their coercive powers to compel arbitration under agreements to arbitrate, although they would intervene in the arbitral process if arbitration was in fact commenced voluntarily.³ In particular, the existence of an arbitration agreement did not constitute a defence to an action. In the seventeenth century, however, parties developed the practice that, after an action in court had been commenced, they could, by consent, obtain an order referring some or all of the issues

³ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 432.

in suit to the decision of an arbitrator, who was substituted for the jury as the tribunal of fact. This type of arbitration, which took place by a rule of court, was subject to close judicial control, since the arbitrator's mandate derived from the court,⁴ whereas courts had no inherent powers over voluntary arbitration, in which arbitrators could even decide not to apply the law.⁵

Subsequently, an Act of 1698⁶ allowed enforcement of arbitration agreements, even before the court was involved, if the arbitration agreement expressly provided that it might be made 'a rule of court,' whereby either party could apply to the court for an order compelling arbitration. The failure of a party to honour the order of the court was treated as being contempt of court. However, parties could not obtain such an order, unless the arbitral tribunal was constituted. It was still possible to obstruct arbitration by never appointing an arbitrator. Further, either party could revoke the authority of the appointed arbitrator before the order of the court was obtained.⁷

Then, under the Civil Procedure Act of 1833 the power and authority of the arbitrator became irrevocable except with the leave of the court.⁸

⁴ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 433-434.

⁵ J Steyn 'Arbitration and the Courts: Arbitration Systems in England and Wales and Recent Changes in Arbitration Law' (1980) 46 *Arbitration* 147; J Parris *Arbitration: Principles and Practice* (Granada London 1983) 5; Hong-Lin Yu 'Amiable Composition – A Learning Curve' (2000) 17 *J Intl Arbitration* 79, 89-90.

⁶ 9 & 10 Will III c. 15.

⁷ Mustill (n 4 above) 436.

⁸ Mustill (n 4 above) 436.

Courts retained inherent powers to control arbitration. In particular, they had the power to set an award aside for error of law, whether the error was admitted by the arbitrator or was apparent on the face of the award. However, courts had either to enforce the award or set it aside entirely; they could not remit the award to the arbitrator. A practice was developed to remedy this situation by including in submissions to arbitration a provision empowering the court to remit the award.⁹ Parties also tended to ask the arbitrator to include an alternative decision in the award, which was to take effect if the court found the original decision to be erroneous.¹⁰

The Common Law Procedure Act 1854 reinforced arbitration agreements, allowing any written agreement to arbitrate to be made 'a rule of court' without the need for an explicit agreement to that effect. Although a written arbitration agreement was no bar to an action in court, the Act gave the courts discretion to stay an action brought in breach of such an agreement.¹¹ The Act also empowered arbitrators to state a special case for the opinion of the court.¹² It should be noted that, while this rule was to become one of the most controversial aspects of English arbitration law, it had its origin in the consensual practice of the parties.

⁹ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 438; J Steyn, 'Arbitration and the Courts: Arbitration Systems in England and Wales and Recent Changes in Arbitration Law' (1980) 46 *Arbitration* 147, 148.

¹⁰ Mustill (n 9 above) 7, 440.

¹¹ Mustill (n 9 above) 442-443; MJ Mustill 'Vers une Nouvelle Loi Anglaise sur l'Arbitrage' [1991] *Revue de l'Arbitrage* 383, 386-389. However, in *Scott v Avery* (1856) 5 HLC 811, 10 ER 1121, the House of Lords recognised agreements that made arbitration a condition precedent to an action.

¹² Mustill (n 9 above) 443.

3. Arbitration Law 1889-1996

The Arbitration Act 1889, the first special Act in this field, provided that any written agreement to arbitrate had the same effect as if it were made 'a rule of court.' Thus, parties no longer needed to apply to the court for a rule. The Act retained the judicial power to set awards aside for errors of law and the power of arbitrators to state a special case.¹³ However, the Arbitration Act 1934 made it obligatory on arbitrators to state a case if parties directed them to do so, and it was not possible for parties to contract out of this provision.¹⁴ Judicial powers to annul awards for errors of law and the arbitrators' duty to state a special case led courts to require arbitrators to apply the law.¹⁵

This position remained virtually intact under the 1950 Act, which was designated as a consolidating statute.¹⁶ The 1975 Act, which implemented the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, brought about a change in relation to non-domestic arbitration agreements (which are defined below) to the effect that a stay of proceedings was compulsory.¹⁷

The role of English courts in relation to arbitration was controversial, especially because of the special case procedure and the review of errors of law. English arbitration law was recognised as favouring the concept of legality (ie that arbitrators

¹³ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 448-449.

¹⁴ Mustill (n 13 above) 448.

¹⁵ J Steyn 'Arbitration and the Courts: Arbitration Systems in England and Wales and Recent Changes in Arbitration Law' (1980) 46 *Arbitration* 147, 148; J Parris *Arbitration: Principles and Practice* (Granada London 1983) 105.

¹⁶ Mustill (n 13 above) 445.

¹⁷ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 1.7.

must apply the law correctly) at the expense of the finality of awards and parties' intentions to arbitrate rather than to go to courts.¹⁸ Reform was called for so that English law would show even greater deference to arbitration and the autonomy of the parties.¹⁹

Despite the criticisms made, English courts adopted pragmatic workable solutions which were acceptable to, and reflected the practice of, arbitration users.²⁰ This reflected the courts' implicit adherence to the contractual theory of arbitration. According to Adam Samuel,²¹

the courts categorised arbitration as being made of a series of interlocking contracts. Even in recent times, the English courts have been unable to temper this approach to take into account the jurisdictional aspects of arbitration. Repeatedly, the legislature had to intervene to resolve difficulties created by the common law's inability to find a set of arbitral rather than contractual principles.

In subsequent chapters, it will be shown how numerous reported cases demonstrate that courts (even prior to the Arbitration Act 1979) deferred to the parties' agreement in respect of important aspects of arbitration. Mustill and Boyd endorse this view, saying that,

¹⁸ J Steyn 'Arbitration and the Courts: Arbitration Systems in England and Wales and Recent Changes in Arbitration Law' (1980) 46 *Arbitration* 147, 149.

¹⁹ SC Boyd and VV Veeder 'Le Développement du Droit Anglais de l'Arbitrage depuis la Loi de 1979' [1991] *Revue de l'Arbitrage* 209, 210.

²⁰ J Steyn 'Arbitration and the English Courts' (1982) 47 *Arbitration* 162, 163.

²¹ A Samuel 'Arbitration Statutes in England and the USA' [1999] *Arbitration and Dispute Resolution LJ* 2, 3.

since arbitration is a consensual process, the parties should in principle be free to prescribe the rules by which the process is to be operated. The courts have recognised this, in numerous reported cases. There are, however, limits to the parties' power to prescribe their own rules of procedure.²²

Many trades have developed their own, often idiosyncratic, ways of conducting arbitrations. *The courts have shown themselves consistently willing, subject always to the dictates of natural justice, to recognise and sanction these individual practices, by implying a term in the arbitration agreement that the reference will be conducted in accordance with the practice usual in the trade. It is submitted that this is the correct explanation for the recognition of such special procedures.* Some authorities use the word 'custom,' but this is misleading. Custom is a species of localised law. The practices followed by the various trade tribunals are recognised by the courts, not because they are part of the law relating to that trade, but because the parties are taken to have agreed that their disputes shall be resolved according to the procedures usual in the trade. [] *The practices of individual trades have thus become gradually accommodated into the general framework of the law of arbitration.*²³

The courts explicitly analysed the relations between the participants in arbitration proceedings as being contractual. Thus, 'in the opinion both of common law and equity judges the award is to be regarded as merely the working out of a term of the original agreement of submission.'²⁴ Likewise, it was held that '[t]he award of an arbitrator differs materially from a judgment. The plaintiff's right to sue and the court's right to give judgment for him if he proves his case are not derived from the agreement of the parties and the judgment when given is an entirely fresh departure. The award of an

²² MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 56 (emphasis added).

²³ Mustill (n 22 above) 57-58 (emphasis added).

²⁴ *Bremer Oeltransport GMBH v Drewry* [1933] 1 K B 753 (CA).

arbitrator on the other hand cannot be viewed in isolation from the submission under which it was made.²⁵

English arbitration law moved even more clearly towards upholding the autonomy of the parties by reducing judicial intervention through the Arbitration Act of 1979 which amended the 1950 Act. The major changes made under this Act were the abolition of the special case procedure, and an altered form of judicial review of errors of law.²⁶ Courts could no longer set an award aside for an error on the face of it, but awards were subject to an appeal. Parties, in return, were allowed to exclude the right to appeal, in non-domestic agreements, whereas in domestic arbitration parties could only exclude that right after arbitration had been commenced.²⁷

Courts also took steps to limit their intervention in the arbitral process, showing reluctance to allow appeals on points of law.²⁸ Thus, in *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema*,²⁹ the first case decided under the 1979 Act, the Court of Appeal emphasised that the conditions for allowing appeals on points of law were to be applied strictly, and that leave to appeal should normally be refused. Likewise, in *Bremer*

²⁵ *FJ Bloemen Pty Ltd (formerly Canterbury Pipelines (Aust) Pty Ltd) v The Council of the City of Gold Coast* [1973] AC 115 (PC).

²⁶ J Steyn 'Arbitration and the Courts: Arbitration Systems in England and Wales and Recent Changes in Arbitration Law' (1980) 46 *Arbitration* 147, 151-153; M Kerr 'Commercial Dispute Resolution: The Changing Scene' in M Bos and I Brownlie (edd) *Liber Amicorum for the Rt Hon Lord Wilberforce* (Clarendon Press Oxford 1987) 111, 122-128; MJ Mustill 'Vers une Nouvelle Loi Anglaise sur l'Arbitrage' [1991] *Revue de l'Arbitrage* 383, 390.

²⁷ The Arbitration Act 1979, s 3. The policy of the 1979 Act derives from the *Commercial Court Committee Report on Arbitration 1978* Cmnd 7284; DR Thomas *The Law and Practice Relating to Appeals from Arbitration Awards* (LLP London 1994) para 1.3.1.

²⁸ SC Boyd and VV Veeder 'Le Développement du Droit Anglais de l'Arbitrage depuis la Loi de 1979' [1991] *Revue de l'Arbitrage* 209, 224-227.

²⁹ [1980] 1 QB 547 (CA) 565, upheld by the House of Lords [1982] AC 724 (HL); Thomas (n 27 above) paras 1.5.1-1.5.5.

Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd,³⁰ the majority of the House of Lords rejected the view that courts could intervene in arbitration to strike out claims for want of prosecution, where a party had caused inexcusable delay in the arbitral process.³¹ However, the House of Lords recognised the possibility of allowing a contractual claim for damages for the failure by either party to abide by the arbitration clause.³² The emphasis on the contractual nature of arbitration, which distinguishes it from litigation, underpins the decision in that case.

Further, a number of cases decided under the 1979 Act analysed the contractual relation between parties to an arbitration clause as involving two agreements. The first is the arbitration clause itself, whereas the second is an agreement resulting from the *actual* reference of a dispute to an arbitrator who, accepting the task assigned to him, becomes a party to the latter agreement.³³ Saville J illustrated this in *Fal Bunkering of Sharjah v Grecale Inc of Panama*,³⁴ where he said that the relation between the parties and the arbitrators is governed by the terms upon which the arbitrators agree to act. Thus,³⁵

³⁰ [1981] AC 909 (HL).

³¹ The Courts and Legal Services Act 1990 added section 13A to the Arbitration Act 1950, empowering arbitrators to dismiss a claim for want of prosecution. This power has been affirmed by section 41 of the Arbitration Act 1996 subject to parties' agreement.

³² *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd* [1981] AC 909 (HL) 932-933 (Roskill LJ), 982 (Lord Diplock); DR Thomas *Default Powers of Arbitrators* (LLP London 1996) 18.

³³ Same case; *Black-Clawson Intl Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446, 455; *Japan Line Ltd v Himoff Maritime Enterprise Ltd, The Kehara* [1983] 1 Lloyd's Rep 29, 33.

³⁴ [1990] 2 Lloyd's Rep 369.

³⁵ *Fal Bunkering of Sharjah v Grecale Inc of Panama* [1990] 2 Lloyd's Rep 369, 373. Thomas points out that, on the contractual analysis of arbitration, no power of an arbitrator derives from a status; DR Thomas *The Law and Practice Relating to Appeals from Arbitration Awards* (LLP London 1994) para 1.2.1.7.1.

[i]f a proposed arbitrator makes clear that his acceptance of appointment is on the basis that the [particular terms] are to apply to the reference, then the party seeking the appointment must either accept this condition or look elsewhere. If nothing more is said or done but the appointer treats the appointment as duly made, he will doubtless be taken to have accepted the condition, at least as between him and his arbitrator. If the other party has, by this or other means, also agreed the same with his arbitrator, then it would be but a short step to conclude that the reference was governed by the terms [...] on the basis that [, *inter alia*,] each arbitrator was respectively vested with authority to agree with the other on behalf of his respective appointer that the arbitration was to be conducted in accordance with [these terms].

To conclude, the relation between the parties, and between the parties and the arbitrators, was largely based on the contractual analysis of arbitration.

4. The Arbitration Act 1996

While the significant changes brought about by the 1979 Act were widely welcomed, it was felt that English arbitration law should be further developed both in terms of content and form.³⁶ English arbitration law ‘was not codified and could be inaccessible; where statements of the law were found in legislation, the wording was often outmoded and far from user-friendly; and the law remained too interventionist, with the result that businessmen looking to arbitration for speed and finality were often thwarted.’³⁷

³⁶ M Rutherford and JHM Sims *Arbitration Act 1996: A Practical Guide* (FT Law & Tax London 1996) 9-11; D Fraser ‘Arbitration of International Commercial Disputes under English Law’ (1997) 8 *American Rev Intl Arbitration* 1, 3.

³⁷ R Merkin *Arbitration Law* (looseleaf LLP London 1991) para 1.16. A private sector working group under the chairmanship of Arthur Marriot put forward a proposal for a draft Bill for a new arbitration Act. This task was then taken over by the Departmental Advisory Committee on Arbitration Law; R Merkin ‘Reform of Arbitration Law – The Arbitration Bill 1994’ [1994] *The Intl J of Insurance Law* 156, 156-157.

One option to develop English arbitration law was to adopt the Model Law on international commercial arbitration prepared by the United Nations Commission on International Trade Law (UNCITRAL). However, in its report of June 1989,³⁸ the Departmental Advisory Committee on Arbitration law (the Mustill Committee) recommended against the adoption of the Model Law, and this was supported by some commentators.³⁹ The Committee reasoned that it was undesirable to follow the Model Law in making one arbitration law for international commercial arbitration, while providing another regime for domestic arbitration. Further, despite its merits, the Model Law 'does not offer a regime which is superior to that which ... exists in [England].'⁴⁰ Several solutions provided in the Model Law were recognised as being inconsistent with long legal tradition and practice in English arbitration, which could cause difficulties since 'a good deal of new law and procedure would have to be learned.'⁴¹ This was a consequence of the Model Law being influenced by civil law concepts.⁴²

Instead of adopting the Model Law, the 'Mustill Committee' therefore recommended that new legislation be enacted, ensuring that new arbitration legislation⁴³

³⁸ Departmental Advisory Committee *A New Arbitration Act for the United Kingdom: The Response of the DAC to the UNCITRAL Model Law* (June 1989) paras 89-90 reprinted in (1990) 6 *Arbitration Intl* 3, 29.

³⁹ G Hermann 'For an UNCITRAL Model Reinstatement of Arbitration Law in the United Kingdom' (1988) 4 *Arbitration Intl* 62; J Steyn 'England's Response to the UNCITRAL Model Law of Arbitration' (1994) 10 *Arbitration Intl* 1, 3.

⁴⁰ Steyn (n 39 above) 29; R Merkin 'Reform of Arbitration Law – The Arbitration Bill 1994' [1994] *The Intl J of Insurance Law* 156, 156-157; FP Davidson *Arbitration* (W Green Edinburgh 2000) 7.

⁴¹ J Steyn 'Towards a New English Arbitration Act' (1991) 7 *Arbitration Intl* 17; R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 1.16.

⁴² WL Craig 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 *Texas Intl L J* 1, 30.

⁴³ Departmental Advisory Committee (n 38 above) para 108.

- (1) should comprise a statement in statutory form of the more important principles of English statutory and common law arbitration law;
- (2) should be limited to those principles whose existence and effect are uncontroversial;
- (3) should be set out in logical order, and expressed in language sufficiently clear and free from technicalities to be readily comprehensible to the layman;
- (4) should apply to domestic and international arbitration alike;
- (5) should not be limited to the subject matter of the Model Law [international commercial arbitration].

The 1996 Act, which came into force on the 31st of January 1997, was enacted taking into account these formal and substantive points.⁴⁴ It repeals all previous arbitration statutes, replacing them with a consolidated statement of the more important principles of English arbitration law.⁴⁵ In examining the 1996 Act, we shall first consider the scope of the application of the Act. Then, we shall look at how the Act promoted the autonomy of the parties and thereby adhered to the contractual theory of arbitration.

(1) The Scope of the Application of the 1996 Act

Part I of the 1996 Act deals with arbitration based on an agreement which, according to section 5 of the 1996 Act, must be made in writing. The corner-stone in the application

⁴⁴ English courts may consider the Model Law in interpreting the 1996 Act: *Patel v Patel* [2000] QB 551 (CA) 556; C Ambrose and K Maxwell *London Maritime Arbitration* (LLP London 1996) 15.

⁴⁵ For a general review of the Act, see: M Saville 'The Origins of the New English Arbitration Act 1996: Reconciling Speed with Justice in the Decision-Making Process' (1997) 13 *Arbitration Intl* 237; A Redfern 'The Arbitration Act 1996: A Major Opportunity for the International Arbitrator' [1997] *Arbitration and Dispute Resolution LJ* 172; R Morgan 'The Arbitration Act 1996 and the Law Reform in Hong Kong and Singapore: A Brave New World?' [1997] *Arbitration and Dispute Resolution LJ* 177; VV Veeder 'La Nouvelle Loi Anglaise sur l'Arbitrage de 1996: La Naissance d'un Magnifique Eléphant' [1997] *Revue de l'Arbitrage* 3; C Reymond 'L'Arbitration Act 1996: Convergence et Originalité' [1997] *Revue de l'Arbitrage* 45.

of the Act (Pt I) is the concept of the seat of arbitration. Thus, section 2(1) provides that ‘The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland.’ (For brevity we shall throughout simply refer to arbitration in England.)

The concept of the seat of arbitration is not a territorial criterion depending on the place where arbitration is actually conducted.⁴⁶ ‘The seat is the legal, rather than the physical, place of arbitration proceedings.’⁴⁷ In a leading case decided prior to the 1996 Act, *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*,⁴⁸ the Court of Appeal held that, while arbitration could be conducted in Peru, the procedural law as well as its seat were English. By section 3 of the 1996 Act,

In this Part ‘the seat of the arbitration’ means the juridical seat of the arbitration designated –

- (a) by the parties to the arbitration agreement, or
- (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
- (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances.

In *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc*,⁴⁹ Aikens J emphasised that arbitration must have a *juridical* seat, saying that ‘the “juridical seat of

⁴⁶ D Fraser ‘Arbitration of International Commercial Disputes under English Law’ (1997) 8 *American Rev Intl Arbitration* 1, 5.

⁴⁷ D Sutton, J Kendall and J Gill (edd) *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) para 2-097 at 75; MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 129.

⁴⁸ [1988] 1 Lloyd’s Rep 116 (CA).

⁴⁹ [2001] 1 Lloyd’s Rep 65.

the arbitration” means the state or territory where, for legal purposes, “the arbitration” is to be regarded as situated.’⁵⁰

It follows that parties can designate the ‘nationality’ of their arbitration, irrespective of the place, or places, in which arbitration is conducted. While the parties are allowed to choose to hold their arbitration in one country but subject to the procedural law of another, the Act does not go as far as delocalising arbitration awards, which continue to be subject to the supervisory role of the courts of the seat.⁵¹ Further, in the absence of an express choice by the parties of the procedural law, the law of the seat is likely to be applied by courts. In *ABB Lummus Global Ltd v Keppel Fels Ltd*,⁵² Clarke J held that there was a link between the seat and the procedural law, finding that the choice of English law to govern the arbitration indicated that England was the seat of the arbitration.⁵³ (However, if the seat is abroad, while the Act is the parties’ chosen law, English courts will not generally be able to exercise their powers to support the arbitral process.⁵⁴)

Although some special rules for domestic rather than international arbitration are laid down in sections 85-87 of the 1996 Act, these have not been brought into force

⁵⁰ *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 Lloyd's Rep 65, 72.

⁵¹ English courts reject the delocalisation of international arbitration: H-L Yu ‘*Minmetals Germany GmbH v Ferco Steel Ltd – A Step Further than Localisation*’ (1999) 2 Intl Arbitration L Rev 83, 84-86.

⁵² [1999] 2 Lloyd's Rep 24.

⁵³ The seat of arbitration is significant over and beyond the fact that it is the basis for the application of the Act. Firstly, it determines where the award has been made (the Arbitration Act 1996, ss 53, 103(2)(b)) for the purposes of the application of the New York Convention, which applies to awards made abroad; R Merkin *The Arbitration Act 1996* (2nd edn LLP London 2000) 25. Secondly, the seat of arbitration is a significant factor in distinguishing domestic from non-domestic arbitration. However, as explained in the text, this distinction is immaterial under the 1996 Act.

⁵⁴ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 1.28.

and, as we shall see, apparently never will be. So the 1996 Act, as enacted, applies the same rules to domestic as to international arbitration (as the Mustill Committee had recommended).

In contrast, a number of jurisdictions, such as France, Switzerland and Belgium, adopt a dual structure of arbitration law, providing for special rules in relation to international arbitration.⁵⁵ The justification for this is that international arbitration, which is presumed to have a remote connection to the state where it takes place, should not be subject to the often strict regime aimed at protecting national interests in domestic arbitration. As René David suggests,

[t]he absence of any law that is truly international law implies the duty for each national law to acknowledge that some relations are subject to special rules because they involve an international element. [...] To insist on the application of uniform rules for domestic and international relations is to run the risk that justice will not be done in certain cases.⁵⁶

The Model Law deals only with international commercial arbitration, since it was felt that the harmonisation of arbitration laws was mostly needed in relation to

⁵⁵ KP Berger *International Economic Arbitration* (Studies in Transnational Economic Law Volume 9 Kluwer Law and Taxation Deventer 1993) 29; E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) para 105 at 54. French courts have shown a tendency to create special rules for international arbitration, and the French legislature has adopted the same approach (the New Code of Civil Procedure 1981, Articles 1492-1507); AT Mehren 'International Commercial Arbitration: The Contribution of the French Jurisprudence' (1986) 46 *Louisiana L Rev* 1045, 1048.

⁵⁶ R David *Arbitration in International Trade* (Kluwer Law and Taxation Deventer 1985) 71; WL Craig, W Park and J Paulsson *International Chamber of Commerce Arbitration* (3rd edn Oceana New York 2000) 516-518.

international arbitration.⁵⁷ A model law for international arbitration was expected to ensure wider acceptance among national legislatures who were not ready to alter their rules governing domestic arbitration.⁵⁸

However, the distinction between domestic and international arbitrations is by no means universal. A number of countries, such as Germany and Netherlands, have enacted one arbitration regime for national and international arbitrations.⁵⁹ For example, according to Berg, '[t]he Dutch legislator did not consider it necessary to provide for a separate law dealing with international arbitration. It was felt that a well conceived regulation for domestic arbitration would be equally appropriate for international arbitration.'⁶⁰

This is also the position in England. English courts have historically developed principles governing arbitration regardless of its nature. According to Mustill,⁶¹

apart from the exceptions imposed by international treaties, English law has never differentiated between internal and international arbitration. It is clear that most developments, which have been made in arbitration law over the past decades, have their origin in [cases involving] important foreign elements.

⁵⁷ HM Holtzmann and JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation The Hague 1989) 28.

⁵⁸ Holtzmann (n 57 above) 28; P Fouchard 'La Loi-Type de la CNUDCI sur l'Arbitrage Commercial International' (1987) 114 *Journal du Droit Intl* 861, 873.

⁵⁹ KP Berger *International Economic Arbitration* (Studies in Transnational Economic Law Volume 9 Kluwer Law and Taxation Deventer 1993) 35, 52; English translation of the New German Arbitration Law (1998) 14 *Arbitration Intl* 1.

⁶⁰ AJ Berg 'The Netherlands' in AJ Berg (ed) *ICCA International Handbook on Commercial Arbitration* (Looseleaf Kluwer Law and Taxation Deventer 1984) Volume III, Netherlands-1.

⁶¹ MJ Mustill 'Vers une Nouvelle Loi Anglaise sur l'Arbitrage' [1991] *Reveu de l'Arbitrage* 383, 397.

[Therefore,] the principles that have been thus developed have, consequently, been applied to all arbitration, internal as well as international arbitration. [Thus,] international arbitration is just as any other arbitration, including that which has foreign parties – just as all actions before the commercial court which are the same, even if the great majority of these actions involve foreign parties.

In its consultative document on the Model Law, the Departmental Advisory Committee (DAC) observed that,⁶²

It [the Model Law] applies only to international commercial arbitration. This fact reflects the proposition which is now treated as axiomatic in many legal systems, that international commercial arbitration possesses quite different rules, from ordinary domestic arbitration. This distinction has never been recognised in English law, save only to the limited extent that consequent upon the accession of the United Kingdom to certain international conventions the Arbitration Acts 1975 and 1979 have created separate regimes for domestic and non-domestic arbitrations, as regards the enforcement of arbitration agreements and awards, and the availability of a right to make agreements excluding the right of appeal.

Michael Kerr, at the stage of considering the adoption of the Model Law for England, said that⁶³

[w]e should on no account accept the highly unsatisfactory attempt in Article 1 [of the Model Law] to define ‘international commercial arbitration’ by reference to various [criteria]. This is

⁶² Departmental Advisory Committee *The United Kingdom and the UNCITRAL Model Law on International Commercial Arbitration* (Consultative Document October 1987) 4 reprinted in (1987) 3 *Arbitration Intl* 278, 281-282.

⁶³ M Kerr ‘Arbitration and the Courts: The UNCITRAL Model Law’ (1985) 34 *ICLQ* 1, 16-17. cf MJ Mustill ‘Transnational Arbitration in English Law’ (1984) 37 *CLP* 133, 141.

confusing, unworkable and unnecessary, and will merely give rise to litigation at the outset. We should only have one law of arbitration...

Subsequently, the DAC took the view that a new English Arbitration Act should 'in general apply to domestic and international arbitrations alike, although there may have to be exceptions to take account of treaty obligations.'⁶⁴ Thus, while sections 85 through 87 of the 1996 Act provide for more extensive court intervention in proceedings resulting from domestic arbitration agreements than in international arbitrations, 'these provisions have not entered into force and probably never will, as the government is concerned that they would violate the principles of non-discrimination and freedom of movement of goods and services set forth in Articles 6 and 59 of the Treaty of Rome.'⁶⁵ Therefore, this thesis deals with English arbitration law principles on the assumption that they apply to both domestic and international arbitration.

(2) The Autonomy of the Parties under the 1996 Act

The Act reinforces the concept of the autonomy of the parties, who are afforded wide latitude in determining how their arbitration is to be conducted.⁶⁶ It follows that

⁶⁴ Departmental Advisory Committee *A New Arbitration Act for the UK? The Response of the DAC to the UNCITRAL Model Law* (June 1989) para 108, endorsed by the Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 1.

⁶⁵ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) para 105 at 53-54.

⁶⁶ JD Lew 'Achieving the Potential of Effective Arbitration' (1999) 65 *Arbitration* 283, 285.

[t]he underlying themes of the Act – party autonomy and judicial non-intervention – mean that the role of the courts in arbitrations has been reduced from that under the Arbitration Act 1950. The court no longer exercises a general supervisory jurisdiction over arbitrations and is confined to its specific statutory powers.⁶⁷

These themes have been set out in section 1 of the Act, according to which the provisions of the Act are to be interpreted, as follows:

- (1) The provisions of this Part [part I of the Act dealing with arbitration under an arbitration agreement] are founded on the following principles, and shall be construed accordingly –
 - (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
 - (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
 - (c) in matters governed by this Part the court should not intervene except as provided by this Part.

In its report on the bill preceding the 1996 Act, the DAC explained that the first principle represented the aspects of justice that are required of a dispute resolution system.⁶⁸ Regarding the second principle, the DAC stated that⁶⁹

[t]he second principle is that of party autonomy. This reflects the basis of the Model Law and indeed much of our own present law. An arbitration under an arbitration agreement is a consensual process. The parties have agreed to resolve their disputes by their own chosen means. Unless the public interest otherwise dictates, this has two main consequences. Firstly, the parties should be held to their agreement and secondly, it should in the first instance be for the parties to decide how their arbitration should be conducted.

⁶⁷ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 1.26.

⁶⁸ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 18.

⁶⁹ Same work para 19.

‘Party autonomy’ is manifested in the Act by allowing parties to contract out of most its provisions, providing their own rules, or choosing another law to govern the arbitral process. Thus, ‘[t]he bulk of the 1996 Act takes effect as fallback provisions, operating only where the parties have failed to reach express written agreement on the point in question: those parts of the Act are referred to as “non-mandatory”.’⁷⁰

This accentuates the contractual nature of arbitration. According to one commentator, ‘[t]he high place accorded to the will of the parties is in large part a recognition of the fact that arbitration is a private system of dispute resolution. The system is organized to effectuate the parties’ desire for a private and self-designed process of dispute resolution.’⁷¹

The non-intervention by the courts – the third principle – strengthens the second principle. It is aimed at protecting ‘party autonomy’ and saving time and cost in seeking more efficient arbitration.⁷²

The 1996 Act lays down additional principles the effect of which is to reduce judicial intervention in arbitration. While these principles existed at common law, the Act sets them out in a way that may not be identical to previous judicial practice. These principles include, most importantly for this thesis, the separability doctrine in section

⁷⁰ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 1.24.

⁷¹ O Chukwumerije ‘Reform and Consolidation of English Arbitration Law’ (1997) 8 *American Rev Intl Arbitration* 21, 25.

⁷² *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER (Comm) 264; *Groundshire Ltd v VHE Construction Plc* [2001] Building LR 395.

7; there is also the competence-competence principle (section 30) and the principle that parties may exclude the application of the law (section 46).

Section 7 reads that

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether in 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.

The separability doctrine reduces the intervention by the courts in that it excludes matters affecting the effectiveness of the main contract from the grounds for challenging the jurisdiction of arbitrators. It also ensures the finality of arbitrators' decisions on such matters, which are subject to minimal review by the courts. In proposing the enactment of the separability doctrine, the DAC appeared to assume that its version of this doctrine (section 7) conforms to the practice of English courts, and emulates the acceptance of the doctrine in France, Switzerland and the United States.⁷³

However, the DAC did not provide a detailed account of this doctrine. In particular, it had apparently no evidence that the separability doctrine was applied in the same way in other jurisdictions. It briefly pointed out that section 7 'sets out the principle of separability which is already part of English law ... which is also to be found in Article 16(1) of the Model Law, and which is regarded internationally as

⁷³ Departmental Advisory Committee *Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill* (February 1994) reprinted in (1994) 10 *Arbitration Intl* 189, 227.

highly desirable.’⁷⁴ As we shall see in later chapters of this thesis, the DAC may have fallen into error both in assuming that section 7 merely enacted the existing English law on separability and in assuming that all jurisdictions adhere to the same concept of separability.

The competence-competence principle, which is enacted in section 30 and will be explored in detail in chapter IV, empowers arbitrators to decide on their own jurisdiction, thereby reducing judicial intervention. This principle also allows arbitrators to decide which approach to take to determine jurisdictional questions; they can either decide these questions, refer them to courts and continue with the merits of the dispute, or suspend the arbitration.

The power of the parties to exclude the application of the law (section 46) has the advantage that, in addition to endorsing ‘party autonomy,’ it precludes subsequent appeals on points of law. It results, therefore, in a reduction of judicial control over awards.

However, according to section 1(2), party autonomy is not absolute; it is subject to the constraints of public interest. A question arises as to what is here meant by the ‘public interest.’ Some commentators suggest that ‘public interest’ restrictions should

⁷⁴ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 43.

be interpreted in the light of the (procedural) mandatory provisions of the Act, from which parties may not contract out.⁷⁵ In *Russell on Arbitration*, it is stated that⁷⁶

[e]qually significant is the emphasis on party autonomy, which is 'subject only to such safeguards as are necessary in the public interest.' There is no definition of the words quoted in the previous sentence, so they must be considered in the light of the mandatory provisions of the Arbitration Act 1996...

But it is submitted that public interest should be widely construed and that it includes normal contractual principles of public policy (in particular the rules on illegal contracts) that restrict the freedom to contract. The DAC recognised this, albeit tacitly, saying that, '[i]n some cases, of course, the public interest will make inroads on complete party autonomy, *in much the same way as there are limitations on freedom of contract.*'⁷⁷ Thus, it has been suggested that,⁷⁸

[t]he mandatory provisions of the Act [] restrict party autonomy. These restrictions are limited, but concern both matters of substance and form. The central restriction on form is the requirement in s. 5 that agreements be made in writing. The words '*public interest*' are not defined in the Act, but refer to public policy, and would, for example, prevent the enforcement of an agreement to perform an unlawful act.

⁷⁵ O Chukwumerije 'Reform and Consolidation of English Arbitration Law' (1997) 8 *American Rev Intl Arbitration* 21, 26; M De Boissésou 'The Arbitration Act 1996 and the New ICC Rules 1998 – A Comparative Approach' (1998) 1 *Intl Arbitration L Rev* 68, 69; B Harris, R Planterose and J Tecks *The Arbitration Act 1996: A Commentary* (2nd edn Blackwell Science Oxford 2000) 5.

⁷⁶ D Sutton, J Kendall and J Gill (edd) *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) para 1-002 at 4.

⁷⁷ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 19 (emphasis added).

⁷⁸ M Hunter and T Landau *The English Arbitration Act 1996: Text and Notes* (Kluwer Law International The Hague 1998) 9 n 3.

It is submitted that one should interpret section 1(2) as including principles of substantive public policy in order to ensure a proper balance between promoting arbitration and public policy. Party autonomy should be promoted but not at the expense of jeopardising public policy. This can be supported by reference to section 81(1)(c) of the Act which preserves common law principles pertaining to the refusal of recognition or enforcement of an award on grounds of public policy. Although it does not expressly mention *substantive* public policy, section 81 alludes to it by referring to ‘matters which are not capable of settlement by arbitration’ (section 81(1)(a)). To similar effect, Mustill and Boyd assume that the Act refers to ‘public policy at large and not confined to the specific public policy embodied in the Act.’⁷⁹

While the Act empowers the parties to an arbitration agreement to choose or construct rules to govern the procedure and the merits in their arbitration, it is not based on the delocalisation theory of arbitration. In contrast to the delocalisation theory, arbitration must have a seat,⁸⁰ and parties cannot entirely detach arbitration from the law of the seat.⁸¹ Where the seat of arbitration is in England, the mandatory provisions of the Act will apply. As such, the Act preserves the traditional position of English law, which ‘does not recognise the possibility of “delocalised” arbitral procedure which does not have a connection with any national system.’⁸² As Robert Merkin notes,⁸³

⁷⁹ MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 27. To similar effect, see M Rutherford and JHM Sims *Arbitration Act 1996: A Practical Guide* (FT Law & Tax London 1996) 239.

⁸⁰ O Chukwumerije ‘Reform and Consolidation of English Arbitration Law’ (1997) 8 *American Rev Intl Arbitration* 21, 29.

⁸¹ WL Craig ‘Some Trends and Developments in the Laws and Practice of International Commercial Arbitration’ (1995) 30 *Texas Intl L J* 1, 24.

⁸² D Sutton, J Kendall and J Gill *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) para 2-097 at 75.

[p]rior to the 1996 Act, the English courts refused to recognise an arbitration which did not have a seat but which was regarded as ‘floating’ or ‘delocalised’, and this position is unaffected by the 1996 Act. Under the Act, the recognition of delocalised arbitration is confined to the situation in which the seat has not been ascertained at the time when the application for assistance is made to the English court [to determine the seat according to section 2(4)].

Even where parties choose a foreign law to govern their arbitration in England, this choice is valid by virtue of English law, which is the law of the seat, and its mandatory provisions will still hold. The chosen foreign law will not exclude that of the seat, ‘but rather would constitute a contractual incorporation of agreed rules.’⁸⁴

The approach of the Act is, therefore, to endorse the autonomy of the parties subject to the requirements of the law of the seat and certain principles of public policy rather than entirely detaching arbitration from national laws. As Peter Nygh points out, ‘the parties only exercise such autonomy as the statute [the 1996 Act] allows.’⁸⁵ He adds that, in English law,⁸⁶

arbitration is an exception to the non-ouster rule. It must therefore be controlled by the law and policy of a national forum which can determine the conditions under which it shall operate ... Those conditions have been considerably broadened by statute [and] judicial intervention has been reduced. But the fundamental policy remains.

⁸³ R Merkin *The Arbitration Act 1996* (2nd edn LLP London 2000) 24.

⁸⁴ WL Craig ‘Some Trends and Developments in the Laws and Practice of International Commercial Arbitration’ (1995) 30 *Texas Intl L J* 1, 40.

⁸⁵ PE Nygh *Choice of Forum and Laws in International Commercial Arbitration* (Forum Internationale no 24 Kluwer Law International The Hague 1997) 1, 3.

⁸⁶ Nygh (n 85 above) 5.

It follows that the approach of the 1996 Act is best interpreted as being in line with the contractual theory of arbitration. The Act affords parties wide latitude in determining how their dispute will be resolved. It allows them to detach certain aspects of their arbitration from national laws by, for example, choosing a set of rules to govern the arbitral procedures instead of a national law. However, the Act does not go as far as detaching arbitration from national laws altogether.⁸⁷ It retains the requirement that an arbitration has to identify with a national legal system by preserving the concept of the seat and the relevance of national public policy.

It is central to this thesis to demonstrate that the scheme of the 1996 Act is best interpreted as being in line with the contractual theory of arbitration. This is because, as we shall see in later chapters, the nature and scope of the separability doctrine depends on whether it is based on ‘party autonomy.’

However, in contrast to the analysis of the 1996 Act set out above, Mustill and Boyd take the view that the 1996 Act is not intended to preserve the contractual theory of arbitration. They argue that the Act constitutes ‘a movement towards status’ of the arbitrators, who now have powers stemming from their jurisdictional duties in resolving disputes in an efficient, fair and speedy manner.⁸⁸ Arbitrators, it is argued, can have such powers as to enable them to fulfill these duties regardless of what the parties have

⁸⁷ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 27.

⁸⁸ MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 60; MJ Mustill ‘La Nouvelle Loi Anglaise sur l’Arbitrage de 1996: Philosophie, Inspiration, Aspiration’ [1997] *Revue de l’Arbitrage* 29, 40-43.

agreed to (ie the powers of the arbitrators do not stem solely from the agreement of the parties and can even overcome it). Therefore, the status of the arbitrators limits the autonomy of the parties.

Mustill and Boyd state that, while '[t]he arbitral process is still consensual to the extent that the proceedings would not take place but for the agreement to arbitrate[,] the parties contract into a framework, not chosen by themselves but imposed by Parliament.'⁸⁹ As such, there is no need to rely on a contractual analysis of the relationship between the parties and their arbitrators. The scheme of the 1996 Act determines the duties and powers of the arbitrators, which could overcome the agreement of the parties: 'From the moment of the arbitrator's appointment the dispute no longer "belonged" to them [the parties].'⁹⁰ 'No longer are the internal rules'⁹¹ to be derived by analysing the contracts between the parties *inter se* and between themselves and the arbitrators.'⁹²

Mustill and Boyd give prominence to the duties of arbitrators and parties under sections 33(1)(a) and 40(1), which are mandatory provisions.⁹³ The former provides that 'The tribunal shall (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his

⁸⁹ MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 60.

⁹⁰ Mustill (n 89 above) 27.

⁹¹ By 'internal rules' Mustill and Boyd mean the rules governing the relations between the parties to the arbitral process as opposed to the relation between the state and the participants in an arbitration; Mustill (n 89 above) 52.

⁹² Mustill (n 89 above) 60.

⁹³ The Arbitration Act 1996, s 4, Sch 1.

opponent.’⁹⁴ Section 40(1) provides that ‘The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.’ Thus, arbitrators must have such necessary powers as to fulfill these duties regardless of the agreement of the parties, who will have to abide with the requirements of expeditious arbitration.

Acknowledging that their observations as to ‘a radical change of direction’ in arbitration law are not ‘generally shared,’ Mustill and Boyd indicate that the 1996 Act does not expressly refer to such a change, and that this analysis will depend on the attitude of the courts. They point out that they ‘are far from proposing that the Act demands a complete abandonment of the contractual theory, but suggest that if the question comes before the court again it will merit a closer analysis than it has so far received.’⁹⁵

One can draw together three main arguments that Mustill and Boyd rely on to support their approach to the 1996 Act.

(a) They criticise the contractual theory generally on the ground that the contractual analysis of the relation between the parties and the arbitrators is unclear.⁹⁶

⁹⁴ Section 33(1)(b) of the 1996 Act provides that arbitrators shall ‘adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.’

⁹⁵ MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 61.

⁹⁶ Mustill (n 95 above) 61.

(b) While ‘party autonomy’ has constituted the cardinal principle in English law, it is now but one of the general principles underlying the 1996 Act. In particular, ‘[t]he immediate juxtaposition with general principle (a), [of section 1 that has been examined above] and more especially sections 33(1)(a) and 40(1) show that the parties were not intended to have a completely free hand to determine the conduct of their dispute.’⁹⁷

(c) While the 1996 Act contains ‘non-mandatory provisions’ which parties can contract out of, these provisions govern the arbitration procedure in the absence of any contrary agreement. In practice, the power of parties to contract out is not used because arbitration clauses usually say nothing about procedure; and it is unlikely that parties will agree to the contrary while arbitration is in motion. Consequently, even the ‘non-mandatory provisions’ of the 1996 Act seem to operate at least as ‘semi-mandatory provisions’ – for practical purposes they are imposed on the parties.⁹⁸

With respect, it is submitted that Mustill and Boyd’s three arguments are unsound. As regards the first, while the nature of the contract between the parties to the arbitration process is not definitively determined and is not clarified by the 1996 Act, this does not necessarily negate its existence.⁹⁹ After all, the courts have accepted the existence of a contract between the participants in arbitration in a long line of cases

⁹⁷ MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 27.

⁹⁸ Mustill (n 97 above) 59.

⁹⁹ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) para 1114, stated that the contract between the parties and the arbitrators ‘must ultimately be recognised as being a *sui generis* contract on which is difficult to pin a name, despite the fact that its content is quite clear.’ See also same work, paras 1106, 1122-1125.

which, as Mustill and Boyd concede, ‘does undoubtedly support an undiluted contractual theory.’¹⁰⁰ The courts have also attempted to clarify this contract. For example, Hobhouse J took the view that ‘it is the arbitration contract that the arbitrators become parties to by accepting appointment under it. All parties to the arbitration are ... bound by the terms of the arbitration contract.’¹⁰¹ In *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd*,¹⁰² the Court of Appeal endorsed this contractual analysis of arbitration in respect of an arbitrator’s right to remuneration.¹⁰³ Sir Nicolas Browne-Wilkinson VC held that,¹⁰⁴

[t]he arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract ... Under that trilateral contract, the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration.

The second and third arguments are linked to each other. They represent the view that ‘party autonomy’ is restricted by the requirements of efficient arbitration, which is achieved by empowering arbitrators to do what they deem fit and appropriate to resolve disputes without delay or excessive expense.

¹⁰⁰ MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 61.

¹⁰¹ *Compagnie Européenne de Cereals SA v Tradax Export SA* [1986] 2 Lloyd’s Rep 301, 306. To similar effect, *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1991] 1 Lloyd’s Rep 260, 266 (Phillips J).

¹⁰² [1992] QB 863 (CA).

¹⁰³ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 8.1; ML Smith ‘Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment’ (1992) 8 *Arbitration Intl* 17, 20-22.

¹⁰⁴ *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1992] QB 863 (CA) 585.

As explained in the previous subsection, section 1 of the 1996 Act sets out the general principles which inform its provisions. It does not give prominence to one principle over the other, and the provisions of the Act should be interpreted in such a way that harmonises these principles. However, Mustill and Boyd favour the first principle (ie the objective of arbitration) over the second principle ('party autonomy'). As such, 'party autonomy' is treated as being subservient to the former. So much so that Mustill and Boyd argue that arbitrators should now be able to disregard parties' instructions if they lead to unnecessary delay and expense. There is, however, no sufficient reason why section 1 should be read in this way rather than as being in favour of 'party autonomy.'

The duty of arbitrators under section 33(1), ie to act fairly and impartially, applies in respect of the exercise of all powers conferred on them.¹⁰⁵ It requires arbitrators to comply with the powers conferred on them by the parties, and to fulfill them in the best manner. It can, therefore, be justified on the basis of the general duty to fulfill obligations in good faith, which harmonises with the contractual analysis of the relationship between parties and arbitrators. And it would be inconsistent if this duty meant that arbitrators can ignore the agreement of the parties.

Section 33 was not intended to give arbitrators 'the power to override the will of the parties as that would have meant a fundamental departure from existing law and

¹⁰⁵ The Arbitration Act 1996, s 33(2).

from internationally accepted principle of party autonomy.’¹⁰⁶ Thus, ‘[i]n the exercise of this autonomy, the parties could (in theory) agree to a procedure which would cause the tribunal to breach its duty under s 33 [...] If any such agreement were in fact made, the tribunal would be free to resign;’¹⁰⁷ but it cannot impose another procedure on the parties. Further, Saville LJ (as he then was) points out that ‘[i]t can hardly be suggested that the court should be given powers to order that the parties’ agreement should not prevail, for even then the parties could simply remove the tribunal.’¹⁰⁸ Similarly, in its report of 1996, the DAC rejected the view that section 33 was inconsistent with party autonomy, stating that¹⁰⁹

it is neither desirable nor practicable to stipulate that the tribunal can override the agreement of the parties. It is not desirable, because the type of arbitration we are discussing is a consensual process which depends on the agreement of the parties who are surely entitled (if they can agree) to have the final say on how they wish their dispute to be resolved. It is not practicable, since there is no way in which the parties can be forced to adopt a method of proceeding if they are agreed that this is not the way they wish to proceed. [...] In circumstances such as these, the tribunal (assuming it has failed to persuade the parties to take a

¹⁰⁶ B Harris, R Planterose and J Tecks *The Arbitration Act 1996: A Commentary* (2nd edn Blackwell Science Oxford 2000) 171; Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 173; M Saville ‘An Introduction to the 1996 Arbitration Act’ (1996) 62 *Arbitration* 165, 167.

¹⁰⁷ M Hunter and T Landau *The Arbitration Act 1996: Text and Notes* (Kluwer Law International The Hague 1998) 32 n 52; M Rutherford and JHM Sims *Arbitration Act 1996: A Practical Guide* (FT Law & Tax London 1996) 21, 41-43; D Sutton, J Kendall and J Gill *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) paras 5-065 – 5-069; cf Saville (n 106 above) 166-167; R Merkin *The Arbitration Act 1996* (2nd edn LLP London 2000) 80-81.

¹⁰⁸ M Saville ‘The Arbitration Act 1996’ [1997] *LMCLQ* 502, 517; Sutton (n 107 above) para 5-051.

¹⁰⁹ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) paras 157-163, also pointed out that the main purpose of section 33 is to ensure that arbitrators are not required to adopt rigid procedure followed in litigation. At paras 158 and 161, the DAC pointed out that, as between the parties and the arbitrators, it was irrelevant whether an agreement departing from section 33 could be legally enforced by a party against the other; if an arbitrator followed the parties’ agreement, they would not be able to challenge the award under section 68 of the 1996 Act: C Ambrose and K Maxwell *London Maritime Arbitration* (LLP London 1996) 170-171; Hunter (n 107 above) 32 n 52.

different course) has the choice of adopting the course preferred by the parties or of resigning. [...] In summary, therefore, we consider that the duty of the arbitrators under [section 33] and the right of the parties to agree how the arbitration should be conducted do fit together.

Likewise, section 40, which requires the parties to comply with the arbitrators' orders, is subject to 'the consideration that the arbitrators may exercise only those powers open to them either by default under section 34 (procedure and evidence) or conferred upon them by the parties.'¹¹⁰ It follows that '[a]ny attempt by the arbitrators to go beyond their express authority in issuing orders and imposing obligations can, therefore, be ignored – section 40 is plainly to be construed as extended only to those matters which the arbitrators are entitled to decide in the absence of contrary agreement – and may well amount to serious irregularity.'¹¹¹

Further, parties are allowed to contract out of numerous provisions of the 1996 Act. Their chosen procedure may be less efficient than the rules applicable under the Act. Yet, it is binding, even if it removes non-mandatory powers from the arbitrators. The reliance by Mustill and Boyd on the practice of arbitration, whereby parties do not draw detailed arbitration agreements so as to exclude non-mandatory provisions of the

¹¹⁰ R Merkin *The Arbitration Act 1996* (2nd edn LLP London 2000) 94. In *John Downing v Al Tameer Establishment, Shaikh Khalid Al Ibrahim* (CA 22 May 2002), a recent case decided under the 1996 Act, the Court of Appeal made, albeit in general terms, an unreserved reference to *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd* [1981] AC 909 (HL) as an authority for the application of general principles of contract to arbitration agreements – in this case to the relationship between the parties. The Court of Appeal did not consider the impact of section 40 on the mutual duties of the parties.

¹¹¹ Merkin (n 110 above) 94; C Ambrose and K Maxwell *London Maritime Arbitration* (LLP London 1996) 174; M Hunter and T Landau *The Arbitration Act 1996: Text and Notes* (Kluwer Law International The Hague 1998) 32 n 52.

1996 Act, is not sufficient to treat such provisions as being imposed on the parties. It is submitted that they are intended to apply as implied terms in the agreement of the parties. In addition, parties can contract out of the non-mandatory provisions with relative ease without writing down a detailed arbitration agreement; they may simply choose the rules of an arbitration institution (eg, ICC rules) or a foreign law to govern their procedure. Such a choice is deemed to exclude all non-mandatory provisions of the 1996 Act that are inconsistent with the parties' chosen rules.

The object of arbitration as spelt out in section 1(a) (fair resolution by impartial tribunal without unnecessary delay or expense) need not be interpreted as detracting from 'party autonomy.' Rather, it can be construed as giving guidance to arbitrators and the courts as to how to interpret the applicable provisions. It helps them to determine the best choice of procedure, where competing choices are open to them.¹¹² For example, the courts derive from this principle the desirability of reducing their intervention in arbitration – this does not bear on the nature of arbitration or the relation between the participants in arbitration proceedings. Thus, in respect of the role of the courts, Judge Bowsher pointed out that '[t]he 1996 Act was intended to change the law. It was not merely a codifying statute. [Thus,] the court may be required to enforce or decline to disturb an arbitrator's decision even when the court discerns an element of unfairness.'¹¹³

¹¹² cf M Saville 'An Introduction to the 1996 Arbitration Act' (1996) 62 *Arbitration* 165, 166; DR Thomas *Default Powers of Arbitrators* (LLP London 1996) 34; HG Brown and AL Marriot *ADR Principles and Practice* (2nd edn Sweet and Maxwell London 1999) 51-54.

¹¹³ *Groundshire Ltd v VHE Construction Plc* [2001] Building LR 395; cf *R Durtnell and Sons Ltd v Secretary of State for Trade and Industry* [2001] 1 All ER (Comm) 514.

Indeed, as between parties and arbitrators, the parties' agreement binds the arbitrators, and may leave them no discretion to choose the manner of arbitration. Section 34(1) provides that '[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.' The DAC took the view that the right of the parties to agree any matter for themselves under section 34(1) necessarily qualifies their duty to adhere to the procedure fixed by the arbitrators.¹¹⁴ An illustration of this is to be found in section 31(4) of the 1996 Act, which reads:

Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may –

- (a) rule on the matter in an award as to jurisdiction, or
- (b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

This provision shows that arbitrators have a discretion as to the manner of determining their jurisdiction, which should be exercised in the light of the section 1(a) object of arbitration as well as section 33(1).¹¹⁵ This discretion, however, may be removed by the parties' express choice of a specific manner. While the courts will not assess whether the manner chosen by arbitrators who exercised their discretion was

¹¹⁴ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 175; R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 12.2; M Rutherford and JHM Sims *Arbitration Act 1996: A Practical Guide* (FT Law & Tax London 1996) 112.

¹¹⁵ cf MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 307.

expeditious so as to achieve the objective of arbitration,¹¹⁶ they will set an award aside if arbitrators failed to comply with the parties' chosen manner.¹¹⁷ On the other hand, Mustill and Boyd's view would entail that there should be a form of judicial assessment of arbitrators' choice of procedure so as to ensure respect for the section 1(a) object of arbitration. The courts, however, have declined to do so and assess the arbitrators' compliance with their duty under section 33(1) in the context of misconduct (eg, whether they complied with parties' agreement and the requirements of fair hearing) in line with the pre-1996 case law.¹¹⁸

Therefore, the scheme of the 1996 Act does not envisage any tension between the general principles spelt out in section 1. Each principle can apply in its own sphere: the agreement of the parties is the source of the powers of the arbitrators, and arbitrators should exercise any discretion they may have (whether under this agreement or by virtue of the Act) with due regard being had to the stated object of arbitration. Thus, while 'party autonomy' is of cardinal importance, there is sufficient room for creativity by arbitrators in conducting the arbitration proceedings.¹¹⁹ The view of Mustill and Boyd would, in contrast, lead to internal incoherence in the operation of the 1996 Act.

In conclusion, therefore, the 1996 Act is not in conflict with the contractual analysis of arbitration. Not only is 'party autonomy' the basis for the commencement of

¹¹⁶ *Kalmneft JSC v Glencore International AG* [2002] 1 All ER 76. cf R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 12.10, pointed out that courts would generally intervene only if the arbitrator's exercise of power amounted to injustice.

¹¹⁷ The Arbitration Act 1996, s 68(2)(c).

¹¹⁸ *Pacol Ltd v Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep 109.

¹¹⁹ cf R Goode 'Dispute Resolution in the Twenty-First Century' (1998) 64 *Arbitration* 9, 14.

arbitration, but it is still the source of the powers of arbitrators. 'Party autonomy' is not restricted by powers stemming from a special status of arbitrators.

5. Conclusion

The development of English arbitration law shows that it has constantly adhered to, and indeed over the years has become increasingly 'wedded to,' the contractual theory of arbitration. The autonomy of the parties is paramount. English courts have worked out many solutions in arbitration by relying on commercial practice. Successive arbitration Acts have adopted many of these solutions over the past two centuries. A landmark in this development was the 1979 Act, which reduced judicial intervention in arbitration by abolishing the special case procedure and the power of courts to set awards aside for errors of law.

The 1996 Act repealed all previous arbitration Acts, and provided a new consolidated restatement of most English statutory and common law arbitration principles. It sets out clearly that promoting the autonomy of the parties and reducing courts' intervention are its main purposes. It lays down a number of principles that are aimed to reduce judicial intervention, particularly the separability doctrine and the competence-competence principle. It also allows parties to choose the law governing the procedure and the merits in arbitration, empowering them to choose non-national rules. However, the Act does not endorse delocalised arbitration; it retains the juridical

concept of the seat of arbitration, which attaches arbitration and awards to a national legal system. Whether the substance and procedure in a particular case is 'delocalised' depends on the will of the parties.

It is submitted, therefore, that the 1996 Act is best interpreted as being in line with the contractual theory of arbitration. Contrary to the view of Mustill and Boyd, the scheme of the 1996 Act does not endorse a movement towards the status of arbitrators, which could assign to them powers not deriving from the agreement of the parties. The view of Mustill and Boyd is inconsistent with the history of the legislation of the 1996 Act. It also does not fit with the internal scheme of the Act. There is no inconsistency between the 1996 Act and the traditional contractual analysis of arbitration adopted by the English courts.

CHAPTER III

THE SEPARABILITY DOCTRINE IN ENGLAND

1. Introduction

Section 7 of the Arbitration Act 1996 (the 1996 Act) has statutorily enacted the separability doctrine. However, the separability doctrine was accepted prior to 1996 by the English courts, subject to a ‘non-existent contract’ exception. It is arguable that section 7 is wider than the common law approach. But that possibility has not so far been addressed by the courts who have continued to apply the separability doctrine in the same way as they did pre-1996. In the bulk of this chapter, we will therefore examine the English common law approach to the separability doctrine, both before and after 1996. In the final section, we will briefly examine the argument that section 7 has altered, by widening, the English common law approach to the separability doctrine.

It will be shown in this chapter that, at an earlier stage in the development of the separability doctrine in England, the courts accepted not only a ‘non-existent contract’ exception but also an ‘illegal contracts’ exception. It is a central argument of this thesis that English law should return to recognising these two exceptions.

It is generally taken for granted by commentators that the separability doctrine developed gradually in English law starting with *Heyman v Darwins Ltd*¹ and culminating in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*.² Tracing the separability doctrine in English case law will help us understand its precise meaning, consequences and the exceptions to it. This chapter, therefore, addresses these issues.

The structure of this chapter is as follows. First, it will deal with English cases decided before *Heyman v Darwins Ltd*. It will be asked whether the separability doctrine was rejected, or unknown, at this stage. Secondly, the above mentioned case will be studied in order to explain to what extent, if at all, it recognised the separability doctrine. Then, we will look at the application of that case by the courts prior to the *Harbour Assurance* case. Next, that leading case will be explained to determine in what ways it altered the previous practice. Subsequent cases will also be considered in order to highlight the consequences of that judgment. Finally, we will examine the argument (so far untested in the courts) that section 7 of the 1996 Act has widened the separability doctrine applied at common law.

¹ [1942] AC 356 (HL).

² [1993] QB 701(CA); R Merkin *Arbitration Law* (Looseleaf LLP London 1991) paras 4.34-4.35, 21.8; HG Brown and AL Marriot *ADR Principles and Practice* (Sweet and Maxwell London 1993) 70; D Sutton, J Kendall and J Gill *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) para 2-009; J Hill *The Law Relating to International Commercial Disputes* (2nd edn LLP London 1998) para 21.4.4 at 607.

2. The Position before *Heyman v Darwins Ltd*

The position of the law at this stage is to be deduced from those cases which dealt with disputes arising in respect of, or contained observations regarding the existence,³ validity⁴ or termination,⁵ of contracts containing arbitration clauses. Since there was no explicit reference to the separability doctrine, we shall explain the general approach of the English courts in such cases. Then, we will highlight the circumstances in which the separability doctrine was indisputably inapplicable.

It should be noted at the outset that courts seemed to accept that an arbitration clause could be governed by a law other than that which applied to the main contract.⁶ However, since there is no general principle precluding the application of different laws to different parts of a single contract, this practice was not conclusive on its own as an indication of the separability doctrine.

³ *Maunsell v The Midland Great Western (of Ireland) Railway Co* (1863) 32 LJ Ch 513, 71 ER 58; *Caerleon Tinplate Co Ltd v Hughes* (1891) 60 LJQB 640; *Baker v Yorkshire Fire and Life Assurance Co* [1892] 1 QB 144; *Payne & Routh v Hugh Baird & Sons* (1921) 9 LI L Rep 167 (CA); *May and Butcher Ltd v The King* [1934] 2 KB 17 (HL); *Foley v Classique Coaches Ltd* [1934] 2 KB 1 (CA); *Toller v Law Accident Insurance Society Ltd* [1936] 2 All ER 952 (CA).

⁴ *Wood v Fenwick* (1842) 10 M & W 195, 152 ER 439. Many cases dealt with voidable contracts: *Trainor v The Phoenix Fire Assurance Co* (1892) 45 LT 825; *Monro v Bognor Urban District Council* [1915] 3 KB 167 (CA); *Stebbing v Liverpool and London and Globe Insurance Co Ltd* [1917] 2 KB 433; *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL); *Golding v London and Edinburgh Insurance Co Ltd* (1932) 43 LI L Rep 487 (CA); *Stevens & Sons v Timber and General Mutual Accident Insurance Association Ltd* (1933) 102 LJKB 337 (CA).

⁵ *Jureidini v National British and Irish Millers Insurance Co Ltd* [1915] AC 499 (HL); *Champsey Bhara & Co v Jivraj Balloo Spinning & Weaving Co Ltd* [1923] AC 480 (PC); *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497 (PC); *De La Garde v Worsnop & Co* [1928] Ch 17; *Taylor v Warden Ins Co Ltd* (1933) 45 LI L Rep 218 (CA).

⁶ *Hamlyn & Co v Talisker Distillery* [1894] AC 202; PM North and JJ Fawcett (edd) *Cheshire and North's Private International Law* (12th edn Butterworths London 1992) 240; A Samuel 'Separability of Arbitration Clauses – Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice' [2000] *Arbitration and Dispute Resolution* LJ 36, 38.

(1) *The Courts' General Approach towards Arbitration Clauses Contained in Ineffective Contracts*

As Lord Mustill has indicated,⁷ English courts have traditionally reached practical answers in cases concerning arbitration without applying a doctrinal or theoretical explanation for their decisions. This is well-exemplified by cases bearing on the separability doctrine. When deciding on the existence or effectiveness of an arbitration clause, English courts did not refer to the doctrine of separability; instead they decided each case on the basis of its facts. However, there were two features that emerged from the courts' approach: first, the courts relied on the particular wording of the arbitration clause in question; and, secondly, they relied on the exercise of their discretion to enforce arbitration agreements (ie to stay the legal proceedings in favour of arbitration).

(i) The wording of the arbitration clause

As regards the effect of the termination (or invalidity) of the main contract on an arbitration clause, the courts referred to the wording of the particular arbitration clause. By construing the clause, courts sought to ascertain whether or not the parties intended that disputes over the termination (or validity) of the contract were to be arbitrated. If

⁷ MJ Mustill 'Transnational Arbitration in English Law' (1984) 37 CLP 133, 134-135. See chapter II above at 50-51.

so, then the arbitration agreement would continue to be effective notwithstanding the termination (or invalidity) of the contract.⁸

In *Jureidini v National British and Irish Millers Insurance Co Ltd*,⁹ an arbitration clause referred to disputes over the amount of any loss under an insurance policy. The House of Lords, comprising Lords Haldane, Dunedin, Atkinson, Parker and Parmoor, held the arbitration clause to be ineffective, since the insurers repudiated the policy. However, the grounds for this ruling were not identical in the three main speeches delivered. Viscount Haldane LC and Lord Dunedin took the view that the effect of the repudiation of the policy was that all benefits under the policy were forfeited and that the arbitration clause was one of these benefits.¹⁰ Lord Atkinson, however, preferred what he described as a ‘short ground,’ that is that the arbitration clause covered only disputes about the amount of any loss. Therefore, it had no application when the dispute arose about the repudiation of the contract.¹¹ It could be argued that this case rested on the inseparability of arbitration clauses,¹² or, by contrast, that it was based on the special terms of the arbitration clause.¹³

⁸ Authors followed this approach, too: RS Bacon *Commercial Arbitrations as Governed by the Law of England* (H Jenkins Ltd London 1925) 79; WE Watson (ed) *Redman's Law of Arbitrations and Awards* (5th edn Butterworths London 1931) 80; ED Wetton and E Cave (edd) *Russell on Arbitration* (13th edn Stevens and Sons Ltd London 1935) 76. cf R Merkin *Arbitration Forms and Precedents* (LLP London 2000) paras IB.2-IB.3.

⁹ [1915] AC 499 (HL).

¹⁰ Same case 505, 507.

¹¹ Same case 507, 508.

¹² R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 4.55.

¹³ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 111 n 16.

Similar to Lord Atkinson's view was a statement of Lord Sumner who, delivering the Privy Council's opinion in *Hirji Mulji v Cheong Yue Steamship Co*,¹⁴ said that, 'the arbitration clause is but part of the contract and, *unless it is couched in such terms as will except it out of the results*, which follow from frustration, generally, it will come to an end too.'¹⁵ Despite his Lordship's reference to possible effects of particular wording of arbitration clauses, a leading textbook suggested that this decision laid down that, where a contract was terminated by frustration, the arbitration clause fell with the termination.¹⁶

However, commenting on judicial practice relating to the effectiveness of arbitration clauses, Sealy pointed out that decided cases were 'nothing more than generalisations based on the commoner forms of arbitration clause; they [were] not rules of law at all.'¹⁷

(ii) The judicial discretion to grant a stay

The fact that the courts referred to their discretionary power to stay the legal proceedings, even where the main contract was terminated or voidable, suggests that the separability doctrine was, at least sometimes, being applied. In *Trainor v The*

¹⁴ [1926] AC 497 (PC).

¹⁵ Same case 505 (emphasis added). However, Lord Sumner doubted this possibility at p 511.

¹⁶ ED Wetton and E Cave (edd) *Russell on Arbitration* (13th edn Stevens and Sons Ltd London 1935) 92.

¹⁷ LS Sealy 'Arbitration – Contract Alleged Void – Jurisdiction of Arbitrator' (1962) 20 CLJ 14, 15.

Phoenix Fire Assurance Co,¹⁸ Lord Coleridge CJ and Collins J, sitting in the Queen's Bench Division, granted a stay on the basis of an arbitration clause, despite allegations that the policy was voidable on grounds of fraud. Their Lordships were agreed that whether a stay should be granted depended on the court's discretion.¹⁹

Conversely, in some cases it was said that it was *proper* for disputes over the effectiveness of the contract to be decided by the courts rather than by arbitrators.²⁰ As such, the refusal to enforce an arbitration clause did not necessarily denote a rejection of the separability doctrine; rather it again indicated that judicial discretion would be exercised in each individual case.

(2) *Cases where the Separability Doctrine was Ruled Out: Illegal Contracts*

While cases where the main contract was terminated or voidable could be interpreted as consistent with the separability doctrine, English courts took the view that an arbitration clause contained in an illegal contract was ineffective.²¹

¹⁸ (1892) 45 LT 825.

¹⁹ Same case 828, 829.

²⁰ *Jureidini v National British and Irish Millers Insurance Co Ltd* [1915] AC 499 (HL); *Toller v Law Accident Insurance Society Ltd* [1936] 2 All ER 952 (CA).

²¹ *Steers v Lashley* (1794) 1 Espinasse 166, 170 ER 315; *Zinc Corp Ltd v Hirsch* [1916] 1 KB 541 (CA); *Smith, Coney & Barrett v Becker, Gray & Co* [1916] 2 Ch 86 (CA), in which Lord Cozens-Hardy stated at p 91 that 'if it [the main contract] was illegal, then any question of arbitration under the contract would fall with it.' However, on the facts of that case the contract was not illegal and the relevant arbitration clause was enforced; *Re Boks & Co v Peters, Ruston & Co Ltd* [1919] 1 KB 491 (CA).

In *Joe Lee Ltd v Lord Dalmeny*,²² the plaintiff sought an injunction restraining the defendant from proceeding with an arbitration which was commenced on the basis of an arbitration clause in an illegal gaming transaction. This case appears to be the first English case in which it was contended that the arbitration clause constituted ‘a separate agreement.’ Eve J rejected this contention. He held that the arbitration clause was ‘an integral part of the terms upon which alone the plaintiffs were willing to do business.’²³ Therefore, as the contract was illegal and void, so was the arbitration clause. Eve J did not refer to any general principle in English law against the separability of arbitration clauses; he confined his observations to the case of illegal contracts. Hence, his decision does not indicate that the separability doctrine was being rejected for all cases.

This leaves the cases where the main contract never came into existence, and where it was ‘void’ for reasons other than the illegality. There does not appear to have been any reported case before *Heyman v Darwins Ltd* that dealt directly with the fate of arbitration clauses in such circumstances. A number of cases, however, contained dicta that were inconsistent with the separability doctrine.²⁴ In *Caerleon Tinplate Co Ltd v Hughes*,²⁵ it was said that, since the exchanged letters between the parties contained conflicting terms, parties were never *ad idem*, and the arbitration clause could not apply. Likewise, in *May and Butcher Ltd v The King*,²⁶ the House of Lords took the

²² [1927] 1 Ch 300.

²³ Same case 306.

²⁴ See the cases cited in footnotes 3-4 above at 85.

²⁵ (1891) 60 LJQB 640.

²⁶ [1934] 2 KB 17 (HL).

view that, as the parties' agreement failed to provide with sufficient certainty for an essential term (the price), the contract and its arbitration clause were never binding. It seems that courts did not distinguish between cases where the failure of the contract to come into being was due to a matter of fact (whether parties were *ad idem*) on the one hand, and, on the other hand, those cases where the parties reached an agreement but the law did not recognise their agreement as binding.

3. The Decision in *Heyman v Darwins Ltd*

In *Heyman v Darwins Ltd*,²⁷ the House of Lords explicitly considered the uncertainty of the law on the fate of arbitration clauses contained in ineffective contracts. Viscount Simon LC observed that the appeal to the House of Lords in this case was allowed largely 'because of the uncertainty said to result from certain pronouncements in previous cases decided in the House of Lords and the Judicial Committee.'²⁸ As such, their Lordships had in mind that they needed to clarify the earlier cases.

The question which was put to the House of Lords was whether an arbitration clause could survive the termination for repudiatory breach of the main contract. Their Lordships held that it could, and a stay of the proceedings was granted. Viscount Simon LC explained the ruling on the basis that the arbitration clause was broad enough to

²⁷ [1942] AC 356 (HL).

²⁸ Same case 360.

include a dispute about the repudiation of the contract.²⁹ Lord Macmillan, with whom Lord Russell agreed, similarly said that the ruling depended on whether the dispute was one within the terms of the arbitration clause.³⁰ The other two members of the House of Lords, namely Lord Porter and Lord Wright, also agreed that the arbitration clause was operative in respect of the dispute about repudiation on the basis of the construction of the arbitration clause.³¹

The emphasis on the construction of the agreement is consistent with the view that *Heyman v Darwins Ltd* endorsed the separability doctrine. That is, provided the arbitration clause covered the situation, it could be given effect to even though the main contract was terminated for repudiatory breach. Viscount Simon LC explained the decision in *Jureidini v National British and Irish Millers Insurance Co Ltd*,³² on the basis that the repudiation there fell outside the scope of the arbitration clause.³³

Moreover, their Lordships in *Heyman v Darwins Ltd* explicitly referred to the arbitration clause as being a separate agreement from the main contract.³⁴ Explaining the nature and function of the arbitration clause, Lord Macmillan said that:

²⁹ *Heyman v Darwins Ltd* [1942] AC 356 (HL) 360.

³⁰ Same case 370.

³¹ Same case 384, 392.

³² [1915] AC 499 (HL) above p 87.

³³ *Heyman v Darwins Ltd* [1942] AC 356 (HL) 365.

³⁴ In *Horton v Sayers* (1860) 4 H & N 643, 157 ER 993, an arbitration clause that purported to oust the jurisdiction of the courts (as opposed to merely making arbitration a condition precedent to an action: *Scott v Avery* (1856) 5 HLC 811) was held illegal and was described as an 'independent covenant.' While the illegality of such a clause did not affect the main contract, this did not contribute to the development of the separability doctrine because general principles of contract law allow a clause to be invalidated, leaving intact the rest of the contract. See n 86 below p 106.

[i]t is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde*, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.³⁵

Lord Porter, too, said that the arbitration clause was 'a severable agreement',³⁶ and, in the words of Lord Wright, the arbitration agreement contains 'a collateral agreement' which is merely procedural and ancillary.³⁷

It appears, therefore, that the House of Lords was here creatively recognising a separability doctrine, which had not previously been articulated in the case law or by commentators.³⁸ Most commentators accept that the separability doctrine was inherent in the ratio decidendi of this case.³⁹ However, it has been argued by some that the House of Lords was merely applying the principle of approbation and reprobation,⁴⁰ the effect of which is that a party cannot deny a contract and, at the same time, rely on part of it. According to this view, their Lordships were merely observing that the repudiation of the contract does not render it void but rather wipes it away for the

³⁵ *Heyman v Darwins Ltd* [1942] AC 356 (HL) 373-374.

³⁶ Same case 400.

³⁷ Same case 377.

³⁸ 'Note' (1942) 58 LQR 435; R Powell 'The Independent Validity of Arbitration Clauses' (1954) 7 CLP 75.

³⁹ 'Note' (1942) 58 LQR 435; MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 111; J Hill 'The Scope of the Doctrine of Separability' [1992] LMCLQ 306, 307; P Gross 'Separability Comes of Age in England: *Harbour v Kansa* and Clause 3 of the Draft Bill' (1995) 11 *Arbitration Intl* 85, 88; EA Marshall *Gill: The Law of Arbitration* (4th edn Sweet and Maxwell London 2001) 25-26; and see references cited in n 2 above p 84.

⁴⁰ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 169; WL Craig, W Park and J Paulsson *International Chamber of Commerce Arbitration* (2nd edn Oceana New York 1990) 69.

future.⁴¹ Thus, the arbitration clause was effective just as would be an exception clause if the contract was terminated for breach.

On that interpretation, the separability doctrine was irrelevant, since there was no ‘approbation and reprobation,’ the contract being terminated for the future, not *ab initio*. According to Adam Samuel, that interpretation could dispense with the separability doctrine and could treat this and other relevant cases as resting ‘on the basis that the arbitral clause is part of the main contract, and that English contract law is flexible enough to give arbitral clauses the distinctive treatment they require without resort to the fiction of a collateral contract.’⁴²

However, the House of Lords did not adopt the principle of approbation and reprobation as the basis of their ruling. In addition, the view based on the ‘approbation and reprobation’ principle seems to contradict the reference by their Lordships to the arbitration clause as a distinct agreement, which enabled them to explain previous cases on the basis of the terms of the relevant clause. This separability distinguishes an arbitration clause from terms like exemption clauses, which represent ‘secondary obligations’ resulting from the breach of the ‘primary obligations,’ the contract being the source of both types of obligations.⁴³ By contrast, an arbitration clause is neither part of the main purpose of the contract nor a ‘secondary obligation.’ It is a designated

⁴¹ *Heyman v Darwins Ltd* [1942] AC 356 (HL) 360, 373, 400.

⁴² A Samuel ‘Separability in English Law – Should an Arbitration Clause be Regarded as an Agreement Separate and Collateral to a Contract in which it is Contained?’ (1986) 3 J Intl Arbitration 95.

⁴³ *Photo productions Ltd v SecuricorTransport Ltd* [1980] AC 827 (HL), cf *Port Jackson stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd*, *The New York Star* [1981] 1 WLR 138 (PC).

procedure for enforcing and determining parties' substantive rights and obligations, including their 'secondary obligations.'

Indeed, not only did their Lordships appear to apply the separability doctrine where the contract was terminated for repudiatory breach, but they went on to consider whether it applied in other circumstances. Thus, it was unanimously agreed that arbitration clauses could survive the frustration of the main contract.⁴⁴ Lord Porter took the view that the apparently contrary decision of the Privy Council in *Hirji Mulji v Cheong Yue Steamship Co*,⁴⁵ was to be explained on the grounds that there the dispute about frustration was not a dispute 'under the contract' in the terms of the relevant arbitration clause.⁴⁶ Viscount Simon LC took a similar view, saying that that case should not be taken as establishing a general rule.⁴⁷

In discussing the case so far, it has been assumed that there was no disagreement between the members of the House of Lords. However, their Lordships appeared to diverge regarding whether an arbitration clause could be effective where the underlying contract was non-existent or invalid *ab initio*. It is useful to set out the views of their Lordships on this question, and then to examine whether they are really inconsistent.

⁴⁴ *Heyman v Darwins Ltd* [1942] AC 356 (HL) 368, 373, 394.

⁴⁵ [1926] AC 497 (PC) above p 88.

⁴⁶ *Heyman v Darwins Ltd* [1942] AC 356 (HL) 395.

⁴⁷ Same case 366. In the fourteenth edition of *Russell on Arbitration* (Sweet and Maxwell London 1949), at p 65, it is stated that a dispute whether a contract has been frustrated falls within the arbitration clause, and that *Hirji Mulji v Cheong Yue Steamship Co* is to be restricted to its special facts. This departs from the general principle of ineffectiveness of arbitration clauses deduced in the earlier edition, above p 88, text attached to n 16. This shows the impact of *Heyman v Darwins Ltd* on the explanation of earlier decisions, ie that these decisions were not based on the rejection of the separability doctrine.

(1) *Did 'Separability' Apply Where the Contract was Non-Existent, Initially Invalid or Voidable?*

The majority of the House of Lords (Lord Simon and Lord Macmillan with whom Lord Russell agreed) explicitly answered this question in the negative.⁴⁸ These Lordships adopted what seems to be a narrow doctrine of separability according to which the existence of a valid contract means that an arbitration clause contained therein would continue to be effective, despite any subsequent event that brings that contract to an end. On the other hand, an arbitration clause could not be given effect (ie separability did not apply) where the contract was non-existent or initially invalid. The majority took the view that this was also the case in respect of illegal contracts, the illegality being an instance of initial invalidity. The majority did not clearly explain what the non-existence or initial invalidity meant, and appeared to include in this category even contracts that could be avoided *ab initio*, eg a contract that was voidable for misrepresentation. Their Lordships did not distinguish between the non-existence of the contract resulting from factual circumstances or from purely legal considerations (eg illegality or formalities). According to the majority's reasoning, there could be no arbitration clause where there is no contract.

Lords Wright and Porter, however, said that disputes over the existence or the validity of a contract could be referred to arbitration provided that the arbitration

⁴⁸ *Heyman v Darwins Ltd* [1942] AC 356 (HL) 366, 370-371.

clause, depending on its terms, covered them.⁴⁹ Lord Wright pointed out that, generally, parties to an arbitration agreement limit its scope to disputes arising on or under the contract so that, as a matter of construction, it does not cover such disputes.⁵⁰ This is perhaps why Lord Porter remarked that ‘it may require very clear language to effect this result,’ ie that the arbitration clause covers disputes about the existence and initial validity of the main contract. To Lord Porter these disputes related to the jurisdiction of the arbitrator; hence, parties who wished to arbitrate these disputes needed to refer *the question of the arbitrator’s jurisdiction* to arbitration.⁵¹ If parties did so, stated Lord Porter, ‘it may be true to say that such a contract [the arbitration agreement] is collateral to the agreement supposed to have been made.’⁵²

Equally, although Lord Wright did not explicitly characterise disputes over the existence or initial validity of the contract as jurisdictional issues, this characterisation may be inferred from his Lordship’s view that the arbitrator’s decision on the aforementioned disputes would not be binding, so that it would be subject to full judicial review.⁵³ By contemplating that the arbitrator’s decision would be subject to full judicial review, Lord Wright appeared to equate the existence and the initial validity of the contract with issues pertaining to the arbitrator’s jurisdiction, which courts review afresh.

⁴⁹ *Heyman v Darwins Ltd* [1942] AC 356 (HL) 384, 392.

⁵⁰ Same case 385.

⁵¹ Same case 398.

⁵² Same case 392.

⁵³ Same case 385.

The view of Lords Wright and Porter suggests that an arbitration clause may be effective where the main contract is non-existent or invalid *ab initio*. In this sense, their Lordships seemed to adopt a wide doctrine of separability in contrast to the majority's view. However, the Lordships expressed no disagreement with, or arguments against, each other's view.

As section 4 below shows, courts subsequently applied the majority's view without referring to the apparently conflicting view of Lords Porter and Wright. Marcus Jacobs suggests that the speeches of their Lordships are not easily reconcilable.⁵⁴ Mustill and Boyd doubt that the obiter dicta of Lord Wright and Lord Porter endorsed the separability of arbitration clauses. They submit that their Lordships were referring to *ad hoc* arbitration agreements concluded after a dispute has arisen.⁵⁵ Mustill and Boyd prefer the majority's view on grounds of logic, since there can scarcely be an agreement to arbitrate anything at all unless there is a contract.⁵⁶ This interpretation of *Heyman v Darwins Ltd* seems to have been generally adopted.⁵⁷ However, the view of Lords Porter and Wright cannot be so lightly dismissed not least because what they said was explicitly addressed to arbitration clauses not *ad hoc* arbitration agreements.

⁵⁴ M Jacobs 'The Separability of the Arbitration Clause: Has the Principle been Finally Accepted in Australia?' (1994) 68 *The Australian LJ* 629, 632.

⁵⁵ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 110 n 11.

⁵⁶ Mustill (n 55 above) 110.

⁵⁷ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 4.34; A Rogers and R Launders 'Separability – The Indestructible Arbitration Clause' (1994) 10 *Arbitration Intl* 77, 83.

(2) *The Competence-Competence Principle as a Ground for Reconciling the Two Views*

It is submitted that the views of their Lordships as to whether an arbitration clause can be effective where the underlying contract is non-existent or invalid *ab initio* may be reconciled on the ground of the competence-competence principle, that is the power of arbitrators to decide their own jurisdiction.

The meaning of this principle should be briefly explained (a full discussion follows in Chapter IV). The competence-competence principle vests arbitrators with the power to decide their jurisdiction. Jurisdictional issues that arbitrators can decide include, but are not limited to, the existence, validity, scope and duration of the arbitration agreement upon which they purport to act.⁵⁸ The separability doctrine is irrelevant to many of the aspects of an arbitrator's jurisdiction.⁵⁹ However, where a party challenges the existence or the validity of an arbitration agreement as such, the separability doctrine facilitates the arbitrator's inquiry into that issue by excluding the validity of the main contract (ie the contract apart from the arbitration clause) from the scope of that inquiry.

The fact that the separability doctrine can facilitate the operation of the competence-competence principle does not mean that the former is a necessary pre-requisite to the latter. This is because, while rejecting the separability doctrine would

⁵⁸ P Schlosser 'The Competence of Arbitrators and of Courts' (1992) 8 *Arbitration Intl* 189, 200.

⁵⁹ K Böckstiegel 'Public Policy and Arbitrability' in AJ Berg and P Sanders (edd) *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress 3rd Series Kluwer Law International The Hague 1987) 177, 186.

widen the scope of the jurisdictional inquiry by bringing matters affecting the main contract within its scope, it would not negate the arbitrator's power to undertake that inquiry. Where a party disputed the existence or the validity of the main contract, an arbitrator might treat that issue as a jurisdictional matter since, rejecting separability, it would go to the root of his jurisdiction (the arbitration clause).

The competence-competence principle determines whether it is the judge or the arbitrator who decides the validity of an arbitration clause; the separability doctrine determines whether the one deciding that issue will have to declare an arbitration clause invalid where the main contract is invalid. It follows that the ruling by an arbitrator on the existence of the main contract may be treated as an application of the competence-competence principle, assuming that the separability doctrine does not apply.⁶⁰

How, then, is the competence-competence principle relevant to the discussion of *Heyman v Darwins Ltd*? It must be remembered here that Lords Wright and Porter referred to disputes over the existence or the validity of the main contract as 'the question of the jurisdiction of the arbitrator.' It follows that, their Lordships' view is best interpreted as akin to the competence-competence principle. Arbitrators may decide such disputes by virtue of their power to rule on their jurisdiction. Therefore, contrary to what their Lordships' view appears at first sight to indicate, it is submitted

⁶⁰ P Sanders 'Trends in the Field of International Commercial Arbitration' (1975) 145 *Recueil des Cours* 204, 277. In some cases, arbitrators dealt with the existence and validity of the main contract in the course of examining their jurisdiction. For example, the *ad hoc* award of April 1982 (delivered by Professor P Lalive, Professor B Goldman and Professor J Robert) (1983) VIII *Ybk Commercial Arbitration* 94.

that they were not accepting a wide doctrine of separability. On this interpretation of the view of Lords Wright and Porter, the House of Lords was unanimous on the scope of the separability doctrine as explicitly set out by the majority.

Our conclusion, that *Heyman v Darwins Ltd* rejected the separability doctrine where the contract is non-existent or invalid *ab initio*, has also been adopted by commentators and courts. However, they have based their reasoning solely on the explicit view of the majority of the House of Lords. Here, we rest the same conclusion on the views of all their Lordships, utilising the competence-competence principle to resolve the apparent contradiction between them. This latter approach will also help us in examining subsequent cases, particularly the *Harbour Assurance* case, and in ascertaining whether the subsequent widening of the separability doctrine is justifiable.

4. The Application of *Heyman v Darwins Ltd* Prior to the *Harbour Assurance* Case

In subsequent cases, English courts accepted that *Heyman v Darwins Ltd*⁶¹ established a separability doctrine in English law provided that the existence or initial validity of the main contract was not in dispute.⁶²

⁶¹ [1942] AC 356 (HL).

⁶² A Baron 'The Australian International Arbitration Act – The Fiction of Severability and Claims for Restitution' (2000) 16 *Arbitration Intl* 159, 176.

(1) *Cases where the Existence or Initial Validity of the Contract was not in Dispute*

These cases involved allegations that the contract had been terminated by frustration (including supervening illegality), deviation or repudiatory breach. For example, in *Woolf v Collis Removal Service*,⁶³ the Court of Appeal held that an alleged deviation from the main contract did not affect the arbitration clause therein. Asquith LJ, delivering the judgment of the Court of Appeal, drew on *Heyman v Darwins Ltd* to hold that deviation, like repudiation, did not render the arbitration clause ineffective.⁶⁴ Moreover, his Lordship took the view that an arbitration clause was not on the same footing as exception clauses, which could be terminated by the deviation.⁶⁵ This view is in line with the view put forward above, that the separability doctrine, not the consequences of the principle of approbation and reprobation,⁶⁶ underpinned the effectiveness of arbitration clauses in similar earlier cases.

Similarly, the courts followed the view expressed in *Heyman v Darwins Ltd*, that whether an arbitration clause could be effective where the main contract had been frustrated or terminated depended on the interpretation of that clause, holding arbitration clauses valid despite the frustration or alleged termination of the main

⁶³ [1948] 1 QB 11 (CA).

⁶⁴ *Woolf v Collis Removal Service* [1948] 1 QB 11 (CA) 16.

⁶⁵ Same case 15.

⁶⁶ Above pp 93-94.

contract.⁶⁷ Thus, the courts refrained from following the apparently contrary view expressed in *Hirji Mulji v Cheong Yue Steamship Co.*⁶⁸

(2) *Non-Existence, Initial Invalidity and voidability of the Contract*

There were obiter dicta in a number of cases to the effect that, on the authority of *Heyman v Darwins Ltd*, arbitration agreements were not effective where the contract never came into existence, or was initially invalid.⁶⁹ A distinction was also drawn between voidable contracts, and contracts that were initially invalid or non-existent, arbitration clauses being regarded as effective in the former, but ineffective in the latter two categories.⁷⁰ This elaboration is contrary to the majority's view in *Heyman v Darwins Ltd*.⁷¹

An apparently contrary view was taken in *Mackender v Feldia AG*.⁷² This concerned a jurisdiction clause. The Court of Appeal held that, where parties agreed in fact to the contract containing a jurisdiction clause, this clause would be enforced

⁶⁷*Kruse v Questier & Co* [1953] 1 QB 669; *Government of Gibraltar v Kenney* [1956] 2 QB 410; *Société Anonyme Hersent v United Towing Co Ltd, The Tradesman* [1962] 1 WLR 61; *Prodexport State Company For Foreign Trade v ED & F Man Ltd* [1973] 1 QB 389; *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA).

⁶⁸ [1926] AC 497 (PC) above p 88.

⁶⁹*Luanda Exportadora SARL v Tamari & Sons Ltd* [1967] 2 Lloyd's Rep 353; *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 (CA); R Powell 'The Independent Validity of Arbitration Clauses' (1954) 7 CLP 75, 76; WH Gill 'UK' (1977) II Ybk Commercial Arbitration 90, 96.

⁷⁰*Société Anonyme Hersent v United Towing Co Ltd, The Tradesman* [1962] 1 WLR 61; J Steyn 'England' (1983) VIII Ybk Commercial Arbitration 3, 11.

⁷¹ Above p 96.

⁷² [1967] 2 QB 590 (CA).

regardless of whether the agreement reached by the parties was binding.⁷³ The same view was assumed to be applicable to arbitration clauses. Thus, where parties were *ad idem* as a matter of fact, there was an ‘agreement’ irrespective of whether it amounted to a ‘contract’ in law. Unlike *Heyman v Darwins Ltd*, this decision laid down a distinction between the non-existence of the contract (the absence of consensus *ad idem* between parties) and the invalidity of the contract for pure legal reasons (eg the lack of required formalities or consideration).

However, courts did not generally adhere to this distinction. Courts reaffirmed the view that *Heyman v Darwins Ltd* ruled out the validity of an arbitration clause if the main contract was initially invalid or non-existent. Citing *Heyman v Darwins Ltd*, in *Ashville Investments Ltd v Elmer Contractors Ltd*,⁷⁴ May LJ said that⁷⁵

it has been decided and is a principle of law that an arbitrator does not have jurisdiction, nor can the arbitration agreement be construed to give him jurisdiction to rule upon the initial existence of the contract. On the other hand, given an appropriate arbitration clause, an arbitrator does in general have jurisdiction to rule upon the *continued existence* of the contract.

Courts also retained the illegality exception. In *David Taylor & Son Ltd v Barnett Trading Co*,⁷⁶ the Court of Appeal refused to enforce an award made on an illegal contract. Although the Court did not consider *Heyman v Darwins Ltd* – nor did it refer

⁷³ *Mackender v Feldia AG* [1967] 2 QB 590 (CA) 601, 604.

⁷⁴ [1989] QB 488 (CA).

⁷⁵ *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 (CA) 494.

⁷⁶ [1953] 1 WLR 562 (CA).

explicitly to the separability doctrine or the competence-competence principle – the ruling of the Court of Appeal can be interpreted as recognising the latter principle without basing it on the former. Singleton LJ said that ‘if an arbitrator recognises that *a contract is illegal*, and thereafter proceeds to *make an award on a dispute arising under that contract*, he is guilty of what in law is misconduct.’⁷⁷ Hodson LJ referred to the issue in question as being ‘want of jurisdiction in the arbitrator.’⁷⁸ These statements show that, where the main contract was illegal *ab initio*, an arbitration clause therein was void (rejecting separability), whereas the courts did not object to the arbitrator deciding that issue (competence-competence principle).

While it was implicit in the *David Taylor* case that arbitrators had jurisdiction to examine the legality of contracts, it did not follow that they could decide on the matter in a final way. Indeed, the implication of the fact that awards could be annulled on the basis of the illegality of the main contract was that the decision of arbitrators on the matter could not be final; they had the power to decide it only initially. It follows that this case is better interpreted on the basis of the inseparability of the arbitration clause, while the legality of the main contract could be examined by arbitrators initially pursuant to the competence-competence principle.

The courts did not rule out the possibility that arbitrators might decide the legality of the main contract as a ruling on their jurisdiction, this ruling being reviewable by

⁷⁷ *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 WLR 562 (CA) 566 (emphasis added).

⁷⁸ Same case 572.

courts.⁷⁹ It was thus observed that parties could refer disputes over the existence or initial validity of a contract to arbitration.⁸⁰

At this stage in the development of the law, explicit reference to 'separability' rarely appeared.⁸¹ A principal exception was *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd*⁸² in which the House of Lords referred to arbitration clauses as separate agreements. The House of Lords considered the nature of the arbitration clause while dealing primarily with the procedural powers of arbitrators and courts. Lord Diplock, citing *Heyman v Darwins Ltd*,⁸³ said that the arbitration clause constituted a self-contained contract collateral to the main agreement.⁸⁴ Lord Scarman, too, said that an arbitration clause was 'in strict analysis, a separate contract, ancillary to the main contract.'⁸⁵ On the basis of this analysis, the House of Lords recognised the possibility of terminating an arbitration clause for a repudiatory breach or frustration independently from the main contract.⁸⁶

⁷⁹ *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63. Chapter IV will explore the basis on which courts allowed this to happen.

⁸⁰ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA); *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 (CA) 506 (Bingham LJ).

⁸¹ cf *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA) 238, 241 (Kerr J).

⁸² [1981] AC 909 (HL).

⁸³ [1942] AC 356 (HL).

⁸⁴ *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd* [1981] AC 909 (HL) 980.

⁸⁵ Same case 998.

⁸⁶ To similar effect, see: *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854 (HL) 218-219 (Lord Diplock). It should be realised, however, that the possibility of bringing an arbitration clause to an end without affecting the rest of the contract is not a conclusive indication of separability. This is because under ordinary principles governing contracts one can treat a clause as invalid, while leaving the rest of the contract intact. Indeed, section 24(2) of the Arbitration Act 1950 allowed the courts to strike out an arbitration clause. This was never deemed to affect the main contract. cf *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81, 89; *EJ Lovelock Ltd v Exportles* [1968] 1 Lloyd's Rep 163 (CA), where an arbitration clause was invalid for uncertainty of its terms. Put another way, the separability

Another reference to separability was made by Steyn J in *Paul Smith Ltd v H & S International Holding Inc*,⁸⁷ which preceded his views at first instance in the *Harbour Assurance* case.⁸⁸ Steyn J held that a dispute over the termination of the contract was within the terms of the arbitration clause because of the 'evolution of the doctrine of the separability and independence of an arbitration agreement which forms part of a written contract.'⁸⁹ The effect of this doctrine, explained Steyn J, was that '[r]escission, termination on the ground of fundamental breach, breach of condition, frustration and subsequent invalidity of the contract, have all been held to fall within arbitration clauses.' However, according to Steyn J, there was no binding precedent deciding the fate of the arbitration clause where the contract was invalid *ab initio*.⁹⁰

It should be mentioned that courts also relied on the distinct nature of the arbitration clause as a collateral agreement to apply a law to it other than that governing the main contract.⁹¹ Thus, while this practice seemed to go back even prior to *Heyman v*

doctrine is aimed to protect the validity of the arbitration clause when the main contract is ineffective and not the other way round. Hence, it is common ground that the latter situation does not rest on the separability doctrine and is non-conclusive on the recognition of the doctrine. RF Dole 'Note on *Robert Lawrence v Devonshire*' (1960) 45 Cornell LQ 795; A Samuel 'Separability in English Law – Should an Arbitration Clause be Regarded as an Agreement Separate and Collateral to a Contract in which it is Contained?' (1986) 3 J Intl Arbitration 95; M De Boissésou *Le Droit Français de l'Arbitrage Interne et International* (GLN-éditions Paris 1990) 75-76; P Mayer 'The Limits of the Severability of the Arbitration Clause' in AJ Berg (ed) *International Dispute Resolution: Towards an International Arbitration Culture* (ICCA Congress Series 8 Kluwer Law International The Hague 1998) 261, 262.

⁸⁷ [1991] 2 Lloyd's Rep 127.

⁸⁸ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81.

⁸⁹ *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127, 130.

⁹⁰ Same case 130-131; CM Svernlöv 'The Evolution of the Doctrine of Separability in England: Now Virtually Complete?' (1992) 9 J Intl Arbitration 115, 116-119.

⁹¹ *Black-Clawson Intl Ltd v Papierwerke Waldhof-Aschaffenburg* [1981] 2 Lloyd's Rep 446; *Deutsche Schachtbau-Und Tiefbohr-Gesellschaft MBH v Shell Intl Petroleum Co Ltd* [1990] 1 AC 295 (HL); A

Darwins Ltd,⁹² courts more recently based it on the separability of the arbitration clause. Further, courts took the view that, whether parties could draw their arbitration clause in such terms that would survive the main contract, depended on whether the law governing the arbitration agreement accepted the separability doctrine.⁹³

In conclusion, the courts continued to rest their decisions on the construction of the arbitration clause, and implicitly or, more rarely, explicitly accepted the separability doctrine. However, it was a narrow version of that doctrine that was applied because it was commonly accepted that, in circumstances where the main contract was non-existent or invalid *ab initio*, the arbitration clause would be void. In other words, the courts accepted the separability doctrine subject to exceptions for non-existent contracts and contracts that were invalid *ab initio*.

5. The Decision in the *Harbour Assurance* Case

The *Harbour Assurance* case⁹⁴ was the first binding authority to the effect that arbitration clauses survive the initial invalidity or illegality of the main contract. The plaintiffs agreed to reinsure the defendants in respect of risks for the period from 1980 to 1982. Later, they sought a declaration that the agreement was illegal on the grounds

Samuel 'Developments in English Arbitration Law since the 1984 *Antaios* Decision' (1988) 5 J Intl Arbitration 9.

⁹² Above p 85.

⁹³ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223.

⁹⁴ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701(CA).

that the defendants were not authorised to carry on insurance or reinsurance business in England under the Insurance Companies Acts 1974 and 1981. The defendants applied for a stay of proceedings on the basis of the arbitration clause.

At first instance,⁹⁵ Steyn J put forward the view that there was no reason of principle or policy why arbitration clauses could not cover disputes as to the illegality of the main contract. Rationalising this view, he said that there was no logical basis for treating arbitration clauses in illegal contracts as being void, while recognising the validity of *ad hoc* arbitration agreements concluded after the dispute as to the initial validity of the main contract had arisen, or before that time but after the main contract had been concluded. Steyn J also noted that rejecting separability in cases of initial invalidity or illegality of the main contract would seriously detract from the usefulness of arbitration as a method of dispute resolution at the time when the process of arbitration was most needed.⁹⁶ The autonomy of the parties, ie their power to agree on how their disputes should be resolved, underpinned Steyn J's view. He also pointed out that the separability doctrine should be broadened in order not to 'imperil London's position as a major centre of international commercial arbitration.'⁹⁷

To this end, Steyn J said that – subject to initial illegality – any comments to the contrary in previous cases were obiter dicta; there was no binding authority to the effect that an arbitration clause was void where the contract was void *ab initio*. However,

⁹⁵ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81.

⁹⁶ Same case 87.

⁹⁷ Same case 91.

Steyn J adopted, with reluctance, the view that the ratio decidendi of the *David Taylor* case was that the arbitration clause could not survive the initial illegality of the contract.⁹⁸ But it should be noted that Steyn J did not consider whether this case precluded only the power of arbitrators to make final decisions on the legality of contracts or negated the jurisdiction of arbitrators altogether.

The Court of Appeal upheld Steyn J's view that, as a matter of principle and policy, the separability doctrine should apply in cases where the main contract was initially invalid. Moreover, it reversed his decision on the illegality issue. Leggatt LJ adopted the view that the *David Taylor* case was decided on the basis of misconduct not the want of jurisdiction in the arbitrator, and that, therefore, it did not follow that the arbitration clause in an illegal contract was void.⁹⁹ Equally, Ralph Gibson LJ took the view that it was not part of the ratio decidendi of *Heyman v Darwins Ltd* that arbitration clauses could not survive illegal contracts.¹⁰⁰ Hoffmann LJ, stressing the separability of the arbitration clause, said that unless the illegality directly affected the arbitration clause, this clause would remain valid.¹⁰¹ His Lordship also relied on the parties' presumed intention to have 'one-stop adjudication' by referring all disputes to an arbitrator.¹⁰² Their Lordships held that the arbitration clause covered the illegality issue, and the proceedings were stayed.

⁹⁸ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81, 95.

⁹⁹ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 (CA) 718.

¹⁰⁰ Same case 709.

¹⁰¹ Same case 723-724.

¹⁰² Same case 724.

However, while pointing out that the arbitration clause was a collateral agreement, the Court of Appeal did recognise some limits on the separability doctrine. Hoffmann LJ expressed the view that a claim that no contract had come into existence necessarily entailed denying that there was any agreement to arbitrate. Examples of such cases included claims of mistake as to the identity of the other contracting party and the denial that there was consensus between the parties.¹⁰³ In addition, the Court of Appeal did not rule out the possibility that, in certain circumstances, the illegality of the main contract might invalidate the arbitration clause.¹⁰⁴ In particular, Ralph Gibson LJ said that arbitration clauses in illegal gaming agreements would be void, and pointed out that *Joe Lee Ltd v Lord Dalmeny*¹⁰⁵ could still be decided in the same way.¹⁰⁶

The *Harbour Assurance* case was welcomed by commentators,¹⁰⁷ who supported the reasons set forth by Steyn J.¹⁰⁸ The decision of the Court of Appeal, it was said, corrected the anomaly that, while the illegality of the main contract could be referred to arbitration pursuant to an *ad hoc* agreement, an arbitration clause could not have this

¹⁰³ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701(CA) 723.

¹⁰⁴ Same case 712, 718, 724.

¹⁰⁵ [1927] 1 Ch 300 above p 90.

¹⁰⁶ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701(CA) 712.

¹⁰⁷ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) paras 4.35, 4.41; A James, 'Arbitration' [1993] All ER Annual Rev 11; G Willsher 'The Doctrine of Separability: The Last Stand of Orthodoxy: *Harbour v Kansa and ors*' (1993) 1 Intl Insurance L Rev 345; A Rogers and R Launders 'Separability – The Indestructible Arbitration Clause' (1994) 10 Arbitration Intl 77, 83; P Gross 'Separability Comes of Age in England: *Harbour v Kansa* and Clause 3 of the Draft Bill' (1995) 11 Arbitration Intl 85, 89.

¹⁰⁸ Above p 109.

effect.¹⁰⁹ The ultimate effect of that decision was thought to be that ‘whether an arbitrator can consider a claim of initial illegality will depend on the terms of the arbitration clause.’¹¹⁰

However, while the Court of Appeal decided this case in terms of the separability doctrine, the effect of this ruling, as appears from the decision as well as from the interpretation of the case by commentators, was to enable the illegality issue to be decided by the arbitrator. We have already noted that *Heyman v Darwins Ltd* can be interpreted as recognising the power of the arbitrator to rule on the illegality issue, as a reviewable ruling on his own jurisdiction, regardless of the separability doctrine. The Court of Appeal, however, did not consider this interpretation.¹¹¹

As to the authority of the *David Taylor* case, the Court of Appeal accepted the implication that arbitrators could decide on the legality of contracts, and concluded that that power resulted from the separability doctrine. Again, the court did not recognise the distinction between the power of arbitrators to decide the matter initially or finally. While the former power was sufficient for the Court of Appeal to let arbitration proceed, it went as far as applying the separability doctrine, which logically entails the latter power.

¹⁰⁹ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 4.41.

¹¹⁰ A Rogers and R Launders ‘Separability – The Indestructible Arbitration Clause’ (1994) 10 *Arbitration Intl* 77, 86.

¹¹¹ The next chapter demonstrates that, despite doubts about the existence of the competence-competence principle before the 1996 Act, it existed sufficiently at common law.

The Court of Appeal in the *Harbour Assurance* case appeared to be misled by the fact that that case was argued on grounds of misconduct. Questions of misconduct arose in that case because the illegality issue had in fact been decided by the arbitrators. However, the judges deciding the *David Taylor* case characterised the question as one of the jurisdiction of the arbitrator.¹¹² Moreover, Denning LJ in that case said that ‘it may be that the umpire did not realise that the contract was illegal, in that sense there was no misconduct, but, nevertheless, the award cannot stand.’ This statement shows that, regardless of any question of misconduct, the illegality issue is reviewable by courts, since it goes to the root of the jurisdiction of the arbitrator, that issue being decided by arbitrators pursuant to the competence-competence principle.

Failing to consider and draw the distinction between the separability doctrine and the competence-competence principle, the Court of Appeal felt that, for the validity of the main contract to be decided by arbitrators, an arbitration clause therein had to be treated as a separate agreement. Therefore, while the case could have been decided in the same way on the basis of the competence-competence principle, the Court deemed it necessary to establish a wide separability doctrine to enable the arbitrator to decide the illegality issue. This resulted in the arbitrator’s decision on that issue being as conclusive as any other element of his decision on the merits.¹¹³ Consequently, ‘the court cannot, other than in exceptional cases, refuse to enforce the award on the basis

¹¹² Above pp 104-105.

¹¹³ WL Craig, W Park and J Paulsson *International Chamber of Commerce Arbitration* (3rd edn Oceana New York 2000) 48-51.

that the underlying contract was illegal.’¹¹⁴ In other words, by not treating the illegality of the contract as going to the arbitrator’s jurisdiction, the courts committed themselves to allowing only a minimal, rather than a full, judicial review of an arbitrator’s decision as to the illegality of the contract. This issue will be developed further in chapter VII. Suffice it to say here that this thesis argues that there should be an exception to the separability doctrine for illegal contracts (as well as non-existent contracts). And that the reasoning of the *Harbour Assurance* case should therefore be rejected.

6. Cases Decided after the *Harbour Assurance* Case

Applying the *Harbour Assurance* case, the English courts have on the face of it accepted the application of the separability doctrine, even where the main contract is illegal. But there has been some inconsistency in judges’ views on this issue. In reality, the *Harbour Assurance* case has sometimes been outflanked.

In contrast, courts have clearly maintained the view that the non-existence of the contract affects its arbitration clause, (ie that non-existent contracts are an exception to the separability doctrine). This has been so even in cases decided after the 1996 Act (albeit that there has been no argument before the courts that section 7 has changed the English common law).

¹¹⁴ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 4.41.

(1) *The Non-Existence of the Main Contract*

The courts have maintained the view that the non-existence of the contract affects its arbitration clause. While chapter VI will explain why this position of the courts is justified, it is appropriate here to set out the relevant recent cases.

In *Birse Construction Ltd v St David Ltd*,¹¹⁵ the defendants applied for a stay under section 9 of the 1996 Act, while the plaintiffs denied the existence of any contract. The non-existence of the contract was based on the claim that negotiations between parties did not reach an agreement, ie there was no meeting of minds between parties on the terms of the alleged contract. Judge Humphrey Lloyd QC, deciding the case at first instance, said that, 'it is highly desirable that an issue as to the formation of a contract incorporating an arbitration agreement should be determined by the court before the arbitration commences and before time and money is expended on an assumption which might turn out not to be valid.'¹¹⁶ While the separability doctrine was not expressly referred to, the formation of the contract was treated as necessarily affecting its arbitration clause. Similarly, in *Ahmad Al-Naimi (T/A Buildmaster*

¹¹⁵ [1999] Building LR 194; the courts take a similar approach to jurisdiction clauses: *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261, 280; *IFR Limited v Federal Trade SPA* (QBD, 19 September 2001). cf *Bankers Trust Company Bankers Trust International plc v PT Mayora Indah* (QBD, 20 January 1999), where Colman J upheld an arbitration clause despite the fact that the main contract was made ultra vires the powers of a company. This turns on the meaning of the non-existence of the contract which will be clarified in chapter VI.

¹¹⁶ [1999] Building LR 194, 204. While the Court of Appeal did not consider the separability doctrine, it referred the case because it was not open to the judge to decide that there was (or was not) a contract on the affidavit evidence. The decision of the Court of Appeal is reported at [2000] Building LR 57 (CA).

*Construction Services) v Islamic Press Agency Inc*¹¹⁷ (a case dealing mainly with the ambit of an arbitration clause) it was observed that the question whether parties agreed to an arbitration clause involved determining whether the contract existed.

One may also refer to *Galliard Homes Ltd v J Jarvis & Sons Plc*,¹¹⁸ which was decided under the Arbitration Act 1950. Jarvis carried out building works for Galliard and claimed payment on a quantum meruit basis, assuming there was no building contract between the parties. However, Galliard argued that the work for which Jarvis was claiming remuneration was done under the terms of a contract containing an arbitration clause, and applied for a stay of the proceedings.

The determination of this point turned on whether negotiations, meetings and exchanged 'letters of intent' gave rise to the conclusion of a building contract. The Court of Appeal found that the letters of intent evinced no more than a non-binding agreement 'subject to contract.' It was mere negotiation preliminary to, or subject to, a contract which was never made. Galliard failed to establish a meeting of minds between parties with the intention to create an immediate binding contract, which could be superseded by some later contract if the parties so wished. Consequently, the Court held that 'no contract for carrying out the works ever came into existence ... It follows from

¹¹⁷ [2000] 1 Lloyd's Rep 522 (CA).

¹¹⁸ (1999) 71 Construction LR 219. This case was decided under the Arbitration Act 1950 because the action was brought before the 1996 Act came into force on the 31st of January 1997; cf *Great Ormond Street Hospital NHS Trust v Secretary of State for Health* (1997) 56 Construction LR 1, 23-25.

this that Galliard cannot rely on an arbitration clause contained in any such contract, because no such contract existed.’¹¹⁹

This view entails that the award of arbitrators on the existence of the main contract is non-conclusive, since it is treated as being a jurisdictional decision. Thus it is open to full review by the court. This is illustrated by *LG Caltex Gas Co Ltd v China National Petroleum Corp.*¹²⁰ The dispute involved allegations that the negotiations preceding the supposed contract containing an arbitration clause did not end with the conclusion of any contract between the parties. The decision of the arbitrator on the existence of the main contract was treated as being jurisdictional.

The same position holds even if a contract containing an arbitration clause does exist as between certain parties, but the dispute is whether a third party has become bound by the arbitration clause. The implication is that, although an arbitration clause is separate in principle, the courts do not examine the consent of such a third party in relation to the arbitration clause as such. Rather, they inquire into whether that party was bound by the whole contract. For example, in *Azov Shipping Co v Baltic Shipping Co*,¹²¹ several shipping companies entered into an agreement to regulate the use of their

¹¹⁹ *Galliard Homes Ltd v J Jarvis & Sons Plc* (1999) 71 Construction LR 219, 243. cf *John Downing v Al Tameer Establishment, Shaikh Khalid Al Ibrahim* (CA 22 May 2002), where the Court of Appeal affirmed that a general denial of the existence of a contractual relationship between parties necessarily included an arbitration clause inserted in the disputed contract, even though no specific denial of that clause was being made; however, the Court of Appeal held that, by virtue of the separability doctrine, a general acceptance of the repudiation of the main contract did not terminate the arbitration clause inserted in it; and an unequivocal intention to accept such a repudiation as to the arbitration clause was required.

¹²⁰ [2001] 1 WLR 1892 (CA).

¹²¹ [1999] 2 Lloyd's Rep 159.

containers, and the agreement was to be administered by a joint venture set up by these companies. The plaintiff, a shipping company, had already an agreement for the same purpose with that joint venture, but denied that it had also become a party to the subsequent multiparty agreement, which contained an arbitration clause, although it participated in the relevant negotiations. Therefore, it sought to set aside an award that held it bound by the agreement and its arbitration clause. Colman J reviewed the whole issue and found that the plaintiff never agreed to the main contract and, therefore, was not bound by the arbitration clause.

(2) *Illegal Contracts*

Despite the acceptance of the separability doctrine in the *Harbour Assurance* case, there has been inconsistency in the judges' views on the fate of an arbitration clause contained in an illegal contract. Four cases fall to be discussed: *O'Callaghan v Coral Racing Ltd*,¹²² *Soleimany v Soleimany*,¹²³ *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*,¹²⁴ and *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*.¹²⁵

In *O'Callaghan v Coral Racing Ltd*, an award was made by an arbitrator in favour of the defendants pursuant to an arbitration clause contained in a betting transaction.

¹²² CA 19 November 1998.

¹²³ [1999] QB 785 (CA).

¹²⁴ [2000] QB 288 (CA).

¹²⁵ [1999] 2 Lloyd's Rep 222.

Subsequently, the plaintiff sought an order for the remission of the award to the arbitrator under the Arbitration Act 1950. Toulson J refused that application on the grounds that the arbitration clause was void by reason of the illegality of the betting agreement. The plaintiff appealed arguing that, following the *Harbour Assurance* case, an arbitration clause remained in force notwithstanding the illegality of the main contract.

The Court of Appeal, unanimously dismissing that appeal, held that an arbitration clause in an illegal contract was void. While Hirst LJ agreed that the *Harbour Assurance* case allows arbitrators to decide the illegality issue, his Lordship was reluctant to find that an arbitrator could make a valid award on an illegal contract, since the arbitration clause was devoid of any legal consequences. According to May LJ, 'since the [betting transaction] is not in law a contract, the decision [of an arbitrator] can not make any determination of rights, obligations or incidents of the transaction.'

The Court of Appeal therefore appears to have taken the extreme view in respect of gaming transactions that no arbitration could take place in respect of such a transaction and no question of the remission of the award to the arbitrator could arise. In the words of Hirst LJ, 'illegal or immoral dealings which are, from an English law perspective, incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law.' Hirst LJ rejected the view that the *Harbour Assurance* case empowered arbitrators to decide disputes under

an illegal contract. In other words, the Court of Appeal in reality here appears to have rejected the separability doctrine in relation to gaming transactions.

The Court of Appeal relied on *Joe Lee Ltd v Lord Dalmeny*,¹²⁶ in which an arbitration clause contained in a gaming transaction was held to have been tainted with the illegality of the main contract. The Court also took the view that the *Harbour Assurance* case did not rule out the possibility that the illegality of the main contract could taint the arbitration clause but no clear criterion was put forward by the Court to draw the line between different cases.

The decision in *Soleimany v Soleimany* is close to the above examined case. Disputes arose between the parties over the division of the proceeds of sale of smuggled carpets. The parties submitted to arbitration before the Beth Din, which, applying Jewish law, made an award in favour of the plaintiff despite the illegality of the agreement. Waller LJ, delivering the judgment of the Court of Appeal, held that the arbitrator had jurisdiction by virtue of the arbitration agreement which was concluded after the dispute had arisen. The determining factor of the validity of this arbitration agreement was not so much the separability doctrine as the divisibility of the disputes.¹²⁷ The court accepted that the arbitration agreement concerned an accounting for proceeds from the sale of the carpets not the proceeds of a joint venture of smuggling. It was only during the arbitration that the arbitrator became aware of the

¹²⁶ [1927] 1 Ch 300 above p 90.

¹²⁷ SR Shackleton 'Global Warming: Milder Still in England: Part 3' (2000) 3 Intl Arbitration L Rev 59, 78.

illegality of the main contract. Waller LJ then examined whether the illegality was of such a kind that would allow the court to discard the finality of the award.

Waller LJ held that an award would be unenforceable if it was based on an illegal contract that had ‘the commission of illegal acts as its object.’¹²⁸ Stating the principle that prevents the enforcement of an English illegal contract, or a contract that is illegal under its foreign proper law or under the law of its place of performance, his Lordship concluded that the same principle ‘applies as much to the enforcement of an award as to the direct enforcement of a contract in legal proceedings.’ Despite the separability doctrine therefore, ‘the interposition of the award does not isolate the successful party’s claim from the illegality which gave rise to it.’¹²⁹

While the award stated on its face that the contract was illegal, which could be a sufficient ground to make the award *per se* contrary to public policy, Waller LJ laid down a general principle that would affect not only the enforceability of the award, but also the arbitration agreement. Waller LJ said that there would be ‘illegal or immoral dealings which are, from an English law perspective, incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law.’ This would be so regardless of whether the arbitration agreement is inserted in the contract or concluded separately. An example of such an illegal contract is ‘an agreement between highwaymen to arbitrate their differences.’

¹²⁸ *Soleimany v Soleimany* [1999] QB 785, 794, 799.

¹²⁹ Same case 800.

While Waller LJ's view amounts to a qualification of the separability doctrine, it seems that he had in mind the case of non-arbitrable subject matters, which may not be referred to arbitration.¹³⁰

The Court of Appeal adopted a wider interpretation of the separability doctrine in the *Westacre Investments* case. The Court of Appeal allowed an award based on an allegedly illegal contract to be enforced without reviewing the arbitrators' decision on the illegality issue. By virtue of the separability doctrine, the jurisdiction of the arbitrators was not in question. Here, the defendants challenged the enforcement of an award rendered in Geneva under the ICC Rules for Arbitration, on the grounds that the contract, and the arbitration clause, was illegal, since the parties intended to perform the contract by means of bribes and corruption.

At first instance, Colman J held that the award was enforceable on the grounds that there was no general principle in English law that if the main contract was illegal, then the arbitration clause therein was incapable of conferring jurisdiction on arbitrators to determine disputes arising under that contract.¹³¹ This suggests that the arbitrator's decision on the 'substantive dispute' under an illegal contract can be final. The corollary of this view is that the arbitration clause is separable, since the finality of an arbitrator's decision on that dispute follows from the separability doctrine.

¹³⁰ cf R Merkin *Arbitration Forms and Precedents* (LLP London 2000) para IB.3.

¹³¹ *Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* [1999] QB 740, 767.

The majority of the Court of Appeal upheld Colman J's decision.¹³² Mantell LJ, with whom Sir David Hirst agreed, said that the seriousness of the alleged illegality was irrelevant to the question whether it tainted the arbitration agreement.¹³³ On the other hand, Waller LJ, dissenting, said that *corruption was of such a nature as to invalidate the contract and its arbitration clause*.¹³⁴ He also emphasised that if it were the mutual intention of the parties to perform the contract illegally, the contract would be illegal *ab initio*, which was sufficient to taint the arbitration clause and to justify full review of the matter.¹³⁵

The majority's and Waller LJ's approaches are difficult to reconcile. Waller LJ's view appears to accept stricter limits to the separability doctrine than does the view of the majority.¹³⁶ The majority, accepting the separability doctrine, gave prominence to the policy favouring the finality of arbitral awards. As such, they treated the illegality issue as being unreviewable. Waller LJ's approach, by contrast, allows for judicial review of the illegality issue on the substantive ground of the seriousness of the illegality. But he left unclear the degree of seriousness required which means that one is left on his approach with a rather vague qualification of the separability doctrine.

¹³² *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288 (CA).

¹³³ Same case 317.

¹³⁴ Same case 314-315.

¹³⁵ Same case 298-299. cf *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] 2 Lloyd's Rep 337 (CA), where Waller LJ took the view that the main contract was not illegal when made and the relevant arbitration clause was not affected by the failure of a party to comply with the law of the place of performance. The view that the illegal contract exception to the separability doctrine relates to contracts that are illegal when made will be explained in chapter VII.

¹³⁶ S Wade 'Westacre v Soleimany: What Policy? Which Public?' (1999) 2 Intl Arbitration L Rev 97, 99.

The decision in the *Omnium de Traitement* case affirms the separability doctrine, despite the illegality of the main contract. Walker J held that an arbitration clause or award was detached from the main contract, which was illegal under English law. The parties entered into a consultancy agreement governed by Swiss law, and aimed at procuring a contract with the government of Algeria. The plaintiffs resisted the enforcement of an award on the ground that the consultancy agreement was prohibited by Algerian law, and its enforcement would therefore be contrary to public policy in England. Walker J held that, regardless of whether the main contract would have been enforceable in England, the award was enforceable because the court was not 'adjudicating upon the underlying contract [, but] on whether or not an arbitration award should be enforced in England.'¹³⁷

While accepting that English public policy prevented the enforcement of contracts that were illegal in the place of performance, Walker J even played down the fact that the award stated that the contract was prohibited under Algerian law, saying that the illegality was not serious. As such, Walker J adhered to the detachment of the arbitration clause and award from the main contract, which is the direct consequence of the separability doctrine.

This decision shows how the separability doctrine displaces some principles of English public policy, such as those relating to the illegality of the contract in its place of performance. Professor Jonathan Hill argues that this case was wrongly decided

¹³⁷ *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222, 224.

because ‘the policy of not enforcing a contract which is entered into with the object of breaking the laws of a friendly country (or an arbitration award upholding such a contract) does not depend on the illegality being [serious].’¹³⁸ While Hill did not examine the decision in the context of the separability doctrine, it is submitted that this doctrine underscores the policy against the enforcement of illegal contracts on which he rested his criticism.

It is clear that, taken together, these four cases are unsatisfactory. They undermine public policy, albeit to varying degrees. They also show clear inconsistency in approach which jeopardises the predictability of the fate of arbitral awards. It is a main argument in this thesis that, for these sorts of reasons, the separability doctrine and its consequences are better discarded in respect of illegal contracts, ie that illegal contracts should be an exception to the separability doctrine. Chapter VII puts forward the full justification for this exception.

To conclude, in the *Harbour Assurance* case the Court of Appeal regarded the power of arbitrators to decide on the legality of a contract as relating solely to the separability doctrine. Therefore, it found it necessary to apply this doctrine even to illegal contracts. It is submitted that the Court could have decided the case in the same way on the basis of the competence-competence principle, which allows arbitrators to examine matters affecting the basis of their jurisdiction (the arbitration clause and the

¹³⁸ J Hill ‘Illegality under the Law of the Place of Performance and the Enforcement of Arbitration Awards’ [1999] LMCLQ 311, 315.

illegality of the main contract could be treated as going to the arbitrator's jurisdiction). The next chapter explains this principle in detail and demonstrates that it was open to the Court of Appeal to interpret past cases using that principle.

Further, the separability doctrine limits the courts' power to review the legality of a contract. It thereby undermines considerations of public policy.¹³⁹ The Court of Appeal treated illegal contracts like other invalid contracts, assuming that there was no principle or policy against the application of the separability doctrine to illegal contracts. However, the illegality of a contract calls for the application of certain principles that do not apply to other reasons for the invalidity of a contract. Cases decided after the *Harbour Assurance* case, reveal that the courts are uncertain on the exact effect of the separability doctrine in the context of an illegal contract, ie they are unsure whether it detaches the arbitration clause and award from the illegality of the main contract.

7. Section 7 of the 1996 Act

As we have noted in chapter II, unlike previous arbitration Acts, the 1996 Act provides for the separability doctrine. The motivation for this is not entirely clear. Certainly, some commentators called for the separability doctrine to be enshrined in statute, so that English arbitration law would better satisfy the requirements of international

¹³⁹ A Rogers and M Kaley 'The Impact of Public Policy in International Commercial Arbitration' (1999) 65 *Arbitration* 326, 334.

arbitration.¹⁴⁰ It has even been suggested that that was needed in order to avoid any future decision of the House of Lords departing from the doctrine.¹⁴¹ The main question to be addressed here, however, is whether in statutorily enacting the separability doctrine, section 7 has actually altered, by widening, the English common law approach to the doctrine.

In proposing the enactment of the separability doctrine, the Departmental Advisory Committee (DAC) appeared to assume that its version of this doctrine (section 7) conforms to the practice of English courts, and emulates the acceptance of the doctrine in France, Switzerland and the United States.¹⁴² Section 7 of the Act provides that

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether in 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.

The DAC did not provide a detailed account of this doctrine in its reports. In particular, it had apparently no evidence that the separability doctrine was applied in the same way in other jurisdictions. It briefly pointed out that section 7 'sets out the principle of separability which is already part of English law ... which is also to be

¹⁴⁰ R Goode 'The Adaptation of English Law to International Commercial Arbitration' (1992) 8 *Arbitration Intl* 1, 14.

¹⁴¹ J Steyn 'England's Response to the UNCITRAL Model Law of Arbitration' (1994) 10 *Arbitration Intl* 1, 6.

¹⁴² Departmental Advisory Committee *Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill* (February 1994) reprinted in (1994) 10 *Arbitration Intl* 189, 227.

found in Article 16(1) of the Model Law, and which is regarded internationally as highly desirable.¹⁴³ It has been suggested, therefore, that the enactment of the separability doctrine was ‘based on the need to be in line with the UNCITRAL Model Law, rather than on any legal rationale.’¹⁴⁴

Although the courts have not yet had to deal with any argument specifically on the effect of section 7, it is submitted that (1) on its face, section 7 broadens the separability doctrine that has been applied by English courts; and (2) although section 7 does not explicitly refer to the illegality of the main contract, it affirms the application of the separability doctrine in this respect.

(1) The Broad Scope of the Separability Doctrine under Section 7

On the face of it, section 7 extends the common law separability doctrine to the case in which the existence of the main contract is in question. It has been suggested that,¹⁴⁵ compared to the statement of the separability doctrine under the UNCITRAL Model Law (as will be examined in Chapter V), which does not explicitly refer to the non-existence of the contract, ‘the autonomy [separability] principle in England could,

¹⁴³ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 43.

¹⁴⁴ C Chatterjee ‘Legal Aspects of Severability of Arbitration Clauses: An English Perspective’ [1996] *Arbitration and Dispute Resolution* LJ 297, 311.

¹⁴⁵ O Chukwumerije ‘Reform and Consolidation of English Arbitration Law’ (1997) 8 *American Rev Intl Arbitration* 21, 35 (emphasis added); VV Veeder ‘La Nouvelle Loi Anglaise sur l’Arbitrage de 1996: La Naissance d’un Magnifique Eléphant’ [1997] *Revue de l’Arbitrage* 3, 13-14.

depending on the scope of the arbitration agreement, now extend to cases where *the substantive contract “did not come into existence.”*”

Several commentators seem to accept that that is indeed the effect of section 7. Comparing the 1996 Act to the common law position, Peter Nygh states that the Act ‘is even more explicit: in s. 7 it affirms the separate status of the arbitration agreement even if the principal contract was invalid or did not come into existence.’¹⁴⁶ Under the heading ‘*What if, it is alleged, there never was a contract at all?*’ Nygh adds that ‘there is now [ie under section 7] a strong argument that ... the issue of whether the contract has come into existence should be left to the arbitral tribunal.’¹⁴⁷

Richard Lord and Simon Salzedo state that the 1996 Act ‘says that the arbitration agreement is separate for the purpose of retaining its validity regardless of the validity *and even the existence of the underlying contract.*’¹⁴⁸ In *Russell on Arbitration*, it is added that¹⁴⁹

[t]he evolution by the courts of this doctrine has now been taken one stage further by statute. This enables the arbitration agreement to survive other more serious defects in the contract. Unless otherwise agreed by the parties, it survives as a distinct

¹⁴⁶ PE Nygh *Choice of Forum and Laws in International Commercial Arbitration* (Forum Internationale no 24 Kluwer Law International The Hague 1997) 1, 8.

¹⁴⁷ Nygh (n 146 above) 10.

¹⁴⁸ R Lord and S Salzedo *Guide to the Arbitration Act 1996* (Cavendish London 1996) xi (emphasis added); J Hill *The Law Relating to International Commercial Disputes* (2nd edn LLP London 1998) 607.

¹⁴⁹ D Sutton, J Kendall and J Gill *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) para 2-061 at 57 (emphasis added).

agreement despite the main contract being regarded as invalid, *non-existent* or ineffective.

Pointing out the discrepancy between section 7 and the common law, Professor Robert Merkin suggests that, '[t]he arbitrability of a dispute as to the existence or otherwise of an agreement to which an arbitration clause relates *is now beyond all doubt ... Earlier dicta to the contrary effect are now incorrect.*'¹⁵⁰

Although the DAC report appears to have been intended merely to re-enact the separability doctrine as recognised by the English courts, Mustill and Boyd argue that the 1996 Act should be read as being intended to change the law and not only to consolidate it. To them, 'it is not legitimate to assume that the effect of a provision is simply to reproduce the old law.'¹⁵¹ As such, they interpret each word without being necessarily limited to the previous practice of the courts. This approach explains their view that the reference to the existence of the contract in section 7 is intended to remove the distinction between non-existent contracts and those which are invalid *ab initio*.¹⁵² In other words, since the Act does not make a distinction between cases where the conclusion of the contract turns on the facts and the intentions of the parties, and those cases in which the agreement does not amount to a binding contract for mere legal considerations, they appear to assume that section 7 applies to the former.

¹⁵⁰ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 4.39.

¹⁵¹ MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 69.

¹⁵² Mustill (n 151 above) 266. For example, Clare Ambrose and Karen Maxwell suggest that, by referring to an arbitration agreement that *was intended to form part of* another contract, section 7 of the 1996 Act recognises that 'the doctrine of separability is based on the parties' presumed preference for "one-stop adjudication."' C Ambrose and K Maxwell *London Maritime Arbitration* (LLP London 1996) 55. The implication of this view is that section 7 may be susceptible of a policy-based interpretation that gives effect to an arbitration clause regardless of whether the purported main contract came into existence.

This view assumes that '[t]he 1996 Act was intended to change the law. It was not merely a codifying statute. [Thus,] the court may be required to enforce or decline to disturb an arbitrator's decision even when the court discerns an element of unfairness.'¹⁵³ This is because '[t]he policy of the 1996 Act is to make it more difficult to question the decisions of arbitrators, not to make challenges easier.'¹⁵⁴ As Judge Humphrey Lloyd points out, '[a]ny other approach might deprive arbitration of one of its perceived attributes namely that a final decision may be given more quickly than would be the case with other forms of dispute resolution, including litigation.'¹⁵⁵

While the DAC did not elaborate on the scope of the separability doctrine, it expressed the view that the separability doctrine was not to be treated as an absolute principle, saying that 'the doctrine of separability is confined to the effect of invalidity etc of the main contract on the arbitration agreement, *rather than being ... a free-standing principle*.'¹⁵⁶ For example, the separability doctrine was regarded as having no implications on the assignment of the arbitration clause.¹⁵⁷ Explaining this position, Lord Saville, who presided over the DAC, pointed out that 'the Act does not make the arbitration agreement separate for all purposes; for if it did, then all sorts of problems

¹⁵³ *Groundshire Ltd v VHE Construction Plc* [2001] Building LR 395.

¹⁵⁴ Same case.

¹⁵⁵ *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER (Comm) 264, 279.

¹⁵⁶ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 44.

¹⁵⁷ Same work para 44.

would arise, as for example the question of whether the assignment of the main agreement carried with it the assignment of the arbitration clause.’¹⁵⁸

Interpreted as broadly as it on its face appears to be, section 7 disturbs not only the English common law approach to the separability doctrine but also, at a deeper level, the English approach favouring the contractual theory of arbitration. Thus, parties may be bound even though they have *ex hypothesi* made no contract. Chapter VI will explain how the separability doctrine rests on ordinary contractual principles that do not permit its application in such a case. The widening of the doctrine would deprive it of any proper basis. Instead it would rest on the imputed intention of the parties, which is nothing more than a legal fiction.

(2) The Affirmation of the Separability Doctrine in Respect of Illegal Contracts

It is assumed that the illegality of the main contract falls within the invalidity of the contract referred to in section 7. Indeed, the DAC relied on the *Harbour Assurance* case in enacting the separability doctrine. While English courts used to treat the illegality of the underlying contract as precluding enforcement of the award based on it, ‘[s]uch reasoning may now be inconsistent with sections 7 (separability of the arbitration

¹⁵⁸ M Saville ‘The Arbitration Act 1996’ [1997] LMCLQ 502, 508.

agreement) and 30 (competence of tribunal to rule on its own jurisdiction) of the Act.¹⁵⁹

Although the Act reinstates a number of headings for judicial control, such as public policy, it does not provide specific guidance on the impact of the illegality of the contract. Considering the policy of reducing the intervention of the courts in arbitration, it seems that the scheme of the Act gives prominence to the finality of awards even where the legality of the main contract is in dispute. As Judge Bowsher pointed out – in a quotation that bears further repetition – ‘[t]he 1996 Act was intended to change the law. It was not merely a codifying statute. [Thus,] the court may be required to enforce or decline to disturb an arbitrator's decision even when the court discerns an element of unfairness.’¹⁶⁰ On the other hand, it should be stressed that in none of the four cases on illegality and separability discussed above was any mention made of section 7. This was so even though all four cases were decided after the enactment of the 1996 Act (although, admittedly, they were not decided under the provisions of that Act with the exception of the *Omnium de Traitement* case which was decided under section 103 respecting the enforcement of awards).

¹⁵⁹ R Lord and S Salzedo *Guide to the Arbitration Act 1996* (Cavendish London 1996) 64.

¹⁶⁰ *Groundshire Ltd v VHE Construction Plc* [2001] Building LR 395.

8. Conclusion

It is generally accepted that *Heyman v Darwins Ltd* applied the separability doctrine. This case applied the doctrine to the case of the repudiation of the contract, and explained that it could apply to other cases save where the main contract was non-existent or initially invalid. However, it has been submitted that this case did not preclude the power of arbitrators to decide the existence or validity of the main contract as jurisdictional matters.

However, the separability doctrine was extended in the *Harbour Assurance* case to cases in which the main contract is invalid, even if the cause of invalidity is the illegality of the contract. This decision raises questions as to the Court of Appeal's approach to previous authority as well as in relation to principle and policy. As for authority, the Court of Appeal decided the case on the basis of 'separability or no separability;' it did not consider the view that previous cases left open the possibility that arbitrators could have jurisdiction to decide the illegality issue initially. As a matter of principle and policy, the Court assumed (incorrectly as we shall see in chapter VII) that the illegality of the contract raised no more concerns than other reasons of invalidity. Cases decided after the *Harbour Assurance* case show that there has been inconsistency in judges' views regarding the application of the separability doctrine in relation to illegal contracts. This detracts from the certainty of the fate of arbitration clauses and awards.

It has been suggested that the *Harbour Assurance* case is better interpreted on the basis of the competence-competence principle not the separability doctrine. In other words, the separability doctrine should not apply where the main contract is non-existent or illegal *ab initio*, but the arbitrator can still be empowered to rule on the existence of the contract or the illegality issue (ie whether there is a valid contract containing an arbitration clause) as a jurisdictional question.

However, not only has the 1996 Act endorsed the separability doctrine, but it appears to have extended it to cases in which the dispute relates to the existence of the main contract. While the DAC assumed that section 7 of the Act reflected the *Harbour Assurance* case, some commentators accept the broader doctrine appearing on the face of this section. We have seen that, while not addressing the interpretation of section 7 specifically, the courts appear to have continued to apply the separability doctrine in the same way as it operated prior to the 1996 Act.

Excluding the non-existence of the contract and illegal contracts from the scope of the separability doctrine need not hamper the arbitral process. Arbitrators can still decide these questions, albeit initially, pursuant to the competence-competence principle. In order to ascertain how this can happen, and how it was available for the court in the *Harbour Assurance* case, the next chapter will study the competence-competence principle in more depth.

CHAPTER IV

THE COMPETENCE-COMPETENCE PRINCIPLE

1. Introduction

This chapter elaborates on the argument that *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*¹ could have been decided in a similar way – allowing arbitrators to examine the legality of the main contract, albeit in a non-binding manner – without widening the separability doctrine. It aims to demonstrate that, since English law has long recognised the power of an arbitrator to decide on his own jurisdiction (the competence-competence principle²), it was open to the Court of Appeal to stay its legal proceedings on the basis of its inherent power to do so. This would have enabled the Court to retain an illegal contract exception to the separability doctrine; and it would not have had to depart from previous case law in this respect (as has been explained in chapter III). This argument, however, presupposes the existence of the competence-competence principle in English at the time when the *Harbour Assurance* case was decided.

This chapter, therefore, explores the development of the competence-competence principle in English law. It will examine how a court that is seized first of the dispute

¹ [1993] QB 701(CA).

² The German name, *kompetenz-kompetenz*, is often used, and it may be thought that it denotes the principle, whereby the jurisdictional decision by arbitrators is final. On the other hand, the French name, *compétence de la compétence*, is not associated with this consequence. In order to avoid confusion in the examination of the state of this principle in English law, it will be referred to as the competence-competence principle. cf A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 179.

can stay its proceedings so as to afford an arbitrator the initial opportunity to examine his jurisdiction. This is an aspect of the competence-competence principle that was overlooked by the Court of Appeal in the *Harbour Assurance* case. This may reflect doubts about the state of the competence-competence principle in English law before the Arbitration Act 1996 (the 1996 Act). Judges and commentators appeared to be uncertain about whether this principle should be recognised, at least in respect of matters affecting the validity and existence of the arbitration agreement (which include the illegality and non-existence of the main contract, assuming the separability doctrine does not apply). Even under the 1996 Act, while section 30 recognises the power of arbitrators to decide on their own jurisdiction, it does not refer to the '*Harbour Assurance*' situation, in which the court is seized first with the dispute. Consequently, doubt may persist in respect of such a case.

This chapter will show that the competence-competence principle can co-exist with the exceptions to the separability doctrine that have been suggested in Chapter III. It will be argued that the competence-competence principle can be treated as having its basis outside the arbitration agreement that is being disputed. As such, the suggested exceptions to the separability doctrine would not necessarily delay the commencement of arbitration if either party attacks an arbitrator's jurisdiction in a court on the basis of the illegality or non-existence of the main contract.

We will examine the competence-competence principle from the point-of-view of the separability doctrine, without deep examination of irrelevant aspects of the former.

Section 2 will examine briefly, with reference to other jurisdictions, the meaning and forms of the competence-competence principle and the distinction between that principle and the separability doctrine. In section 3, we will look at the English courts' approach to that principle in general. Section 4 explains the central point of this chapter, namely how a court, if seized first with the dispute, should utilise the competence-competence principle in a way that obviates any possible practical disadvantages of a narrow separability doctrine. It will be shown how this could have been done in the *Harbour Assurance* case as a substitute for the widening of the separability doctrine. Finally, section 5 will consider in broad terms how an arbitrator's jurisdictional decision is treated so as to ascertain whether this treatment is in line with the suggested exceptions to the separability doctrine for non-existent and illegal contracts.

2. The Competence-Competence Principle in General

The competence-competence principle means essentially that arbitrators can decide on their jurisdiction, ie they have 'jurisdiction to decide on their jurisdiction.' It regulates the relationship between the courts and arbitrators in respect of the determination of the jurisdiction of the arbitrators. However, it exists in different procedural forms, which determine when and how arbitrators may decide on their jurisdiction, and when the courts may, if at all, review such a decision.

The competence-competence principle is usually associated with the separability doctrine,³ although it may also be regarded as independent therefrom.⁴ Historically, the separability doctrine was introduced in order to preserve the arbitration clause which, in turn, enables arbitrators to decide on the validity of the main contract and their jurisdiction.⁵ However, the better view is that the two principles are distinct, although they may functionally overlap.⁶

Both principles ensure the effectiveness of arbitration agreements. The separability doctrine preserves the arbitration clause where the main contract is ineffective; the competence-competence principle empowers arbitrators to decide their own jurisdiction. The former, which is a substantive rule, transforms issues relating to the validity of the main contract into substantive not jurisdictional matters.⁷ As such, it does not explain the power of arbitrators to decide on jurisdictional questions pertaining

³ WL Craig, W Park and J Paulsson *Annotated Guide to the 1998 ICC Arbitration Rules* (Oceana Publications New York 1998) 59; M Rubino-Sammartano *International Arbitration Law and Practice* (2nd edn Kluwer Law International The Hague 2001) 225-231.

⁴ The 1931 ICC Rules did not adopt the competence-competence principle, but changed position in the Rules of 1955, article 13 of which accepted this principle together with the separability doctrine (now enshrined in article 6 of the 1998 Rules). Ever since, the principle has gained widespread acceptance. See Y Derains and EA Schwartz *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International The Hague 1998) 79-80. The competence-competence principle is adopted, without reference to the separability doctrine, by Article V (3) of the European Convention of 1961 and Article 41(1) of the Washington Convention of 1965. By contrast, both principles are jointly recognised by Article 21 of the UNCITRAL Rules for arbitration; Article 16(1) of the UNCITRAL Model Law; Article 15(1)(2) of the 1997 Rules of the American Arbitration Association; and Article 23(1) of the 1998 Rules of London Court of International Arbitration.

⁵ R David *Arbitration in International Trade* (Kluwer Law and Taxation Deventer 1985) 154; HM Holtzmann and JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation The Hague 1989) 485; R Goode 'The Adaptation of English Law to International Commercial Arbitration' (1992) 8 *Arbitration Intl* 1, 5.

⁶ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 213.

⁷ P Schlosser 'The Competence of Arbitrators and of Courts' (1992) 8 *Arbitration Intl* 189, 199; Departmental Advisory Committee *Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill* (February 1994) reprinted in (1994) 10 *Arbitration Intl* 189, 225-228; D Sutton, J Kendall, and J Gill (edd) *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) para 2-061.

to an arbitration agreement. It is the procedural competence-competence principle which enables arbitrators to do so.

Further, and very importantly for this thesis, since an arbitrator's decision on the effectiveness of the main contract belongs to the merits of the case pursuant to the separability doctrine, it is treated as final (subject to minimal review by the courts).⁸ In contrast, an arbitrator's decision on the basis of his jurisdiction (the arbitration agreement itself) is a provisional one that is subject to full review by the courts.⁹ Thus, '[t]he primary importance of the [separability doctrine] is that an arbitral tribunal may retain jurisdiction – *and issue a binding decision on the merits* – even though the contract is null and void, as long as the grounds for nullity do not affect the arbitration clause itself.'¹⁰

However, the two principles intersect where an arbitrator purports to decide his jurisdiction in spite of allegations that the main contract is non-existent or invalid *ab initio*. An arbitrator can decide his jurisdiction by examining the arbitration clause alone, the validity of the main contract being excluded from the jurisdictional inquiry

⁸ SM Schwebel *International Arbitration: Three Salient Problems* (Grotius Cambridge 1987) 5; WM Reisman, WL Craig, WW Park and J Paulsson *International Commercial Arbitration* (The Foundation Press Inc New York 1997) 525-526; WL Craig, W Park and J Paulsson *International Chamber of Commerce Arbitration* (3rd edn Oceana Publications New York 2000) 48-51, 515-516; cf *Sanghi Polyesters Ltd (India) v The International Investor (KCFC)(Kuwait)* [2000] 1 Lloyd's Rep 480, 482.

⁹ P Gross 'Competence of Competence: An English View' (1992) 8 *Arbitration Intl* 205, 206-207.

¹⁰ HM Holtzmann and JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation The Hague 1989) 480 (emphasis added); C Ambrose and K Maxwell *London Maritime Arbitration* (LLP London 1996) 48-50.

by virtue of the separability doctrine.¹¹ The latter doctrine thus facilitates the operation of the competence-competence principle. That is, it facilitates the jurisdictional inquiry conducted by arbitrators, relieving them from examining the validity of the main contract as part of that inquiry.¹²

This interaction between the two principles does not necessarily suggest that the separability doctrine is a prerequisite to the competence-competence principle.¹³ This is because ‘inseparability’ would widen the scope of the jurisdictional inquiry (by treating the invalidity of the main contract as a cause of the invalidity of the arbitration clause), but would not bar arbitrators from undertaking that inquiry.

As a procedural device, the competence-competence principle determines what role courts have in respect of the arbitrators’ decision on their jurisdiction. It involves

¹¹ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 214.

¹² A Broches *Commentary on The UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Deventer 1990) 76; HM Holtzmann and JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation The Hague 1989) 480. On the other hand, if separability is rejected, arbitrators can examine the effectiveness of the main contract provisionally by virtue of the competence-competence principle: E Mezger ‘Note under *Compagnie Continentale France*’ [1975] *Revue de l’Arbitrage* 315, 317; P Sanders ‘Trends in the Field of International Commercial Arbitration’ (1975) 145 *Recueil des Cours* 204, 277; ICC case number 7626 of 1995 (1997) XXII *Ybk Commercial Arbitration* 132, 137; ICC case number 6268 of 18 May 1990 (1991) XVI *Ybk Commercial Arbitration* 119, 120. Article V(3) of the European Convention on Commercial Arbitration 1961, which will be considered in chapter V below, applies the competence-competence principle, not separability, to the existence and validity of the main contract.

¹³ Gaillard (n 11 above) 214. The *travaux préparatoires* of Article 16(1) of the Model Law, which refers to both the competence-competence principle and the separability doctrine, intimates that the former was treated as a consequence of the latter. Cf A Redfern and M Hunter *Law and Practice of International Commercial Arbitration* (3rd edn Sweet and Maxwell London 1999) 263; FP Davidson *International Commercial Arbitration: Scotland and the UNCITRAL Model Law* (W Green Edinburgh 1991) 85; T Clay *L’Arbitre* (Daloz Paris 2001) 153. The question, whether a model law on international commercial arbitration should adopt the separability doctrine, was referred to a working group which recommended that the separability doctrine be adopted, and also that the competence-competence principle be adopted accordingly: A/CN.9/216 paras 34, 81; *Sixth Secretariat Note: Analytical Complication of Government Comments A/CN.9/263* (19 March 1985).

the time at which courts intervene to consider the jurisdiction of arbitrators; whether there are any jurisdictional matters that are reserved for courts; and whether the jurisdictional decision of the arbitrators is to be subject to judicial review. The practical value of the competence-competence principle depends mainly on the timing of judicial intervention in arbitration. Going to court at the beginning of the proceedings can save expense for a defendant improperly joined to the arbitration. On the other hand, judicial resources may be conserved by delaying review until the end of the process.¹⁴ Such conflicting practical considerations give rise to different forms of the competence-competence principle.¹⁵

(1) *The Timing for Judicial Intervention*

The issue here is whether arbitrators should be afforded the opportunity to make the initial ruling on their jurisdiction. Under French law,¹⁶ for example, as far as international commercial arbitration is concerned, courts cannot examine arbitrators' jurisdiction pending arbitration, until after an award has been made.¹⁷ Where arbitrators are not seized of the dispute, French courts have to refer the parties to arbitration, unless the arbitration agreement is 'manifestly void.'¹⁸ They undertake only a 'prima

¹⁴ KP Berger *International Economic Arbitration* (Studies in Transnational Economic Law Volume 9 Kluwer Law and Taxation Deventer 1993) 364; WW Park 'Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators' (1997) 8 *American Rev Intl Arbitration* 132, 141; A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 184.

¹⁵ WM Reisman, WL Craig, WW Park and J Paulsson *International Commercial Arbitration* (The Foundation Press Inc New York 1997) 524-526.

¹⁶ Samuel (n 14 above) 190-191; WW Park 'The Arbitrability Dicta in *First Options v Kaplan*: What Sort of *Kompetenz-Kompetenz* Crossed the Atlantic?' (1996) 12 *Arbitration Intl* 147, 150.

¹⁷ The French New Civil-Procedure Code 1981, Article 1458.

¹⁸ P Fouchard 'Note under the *Métu* Case' [2000] *Revue de l'Arbitrage* 98, 102.

facie' test of the validity of the arbitration agreement, leaving the full inquiry into this question for arbitrators, subject to review by the courts. In domestic arbitrations, however, French courts examine the arbitrators' jurisdiction, at least where arbitration has not yet been commenced.¹⁹

Under article VI(3) of the European Convention on International Commercial Arbitration 1961 (the European Convention), if courts of Contracting States are asked to decide on arbitrators' jurisdiction, after arbitration proceedings have been initiated, they must decline to do so until the arbitral award is made, unless they have good and substantial reasons to retain the action.

Another model of the competence-competence principle, which may be found in Florida,²⁰ requires courts to decide the jurisdiction of the arbitrators when they are asked to, while also accepting the power of the arbitrators to decide it. Consequently, an award is not void merely because an arbitrator examined his jurisdiction. Arbitrators could consider their own jurisdiction without waiting for a court to do so. However, arbitrators' findings on their jurisdiction can be subject to review by the courts, either in the context of parallel judicial proceedings on the merits of the dispute, or when the court is asked to enforce, or set aside, an award.

¹⁹ Y Derains 'France' (1981) VI Ybk Commercial Arbitration 1.

²⁰ The Florida International Arbitration Act, Florida Statutes, Chapter 684, para 684.06(2), cited in WW Park 'The Arbitrability Dicta in *First Options v Kaplan*: What Sort of *Kompetenz-Kompetenz* Crossed the Atlantic?' (1996) 12 *Arbitration Intl* 147, 150 n 33.

Article 16(1) of the UNCITRAL Model Law on Arbitration (the Model Law) leaves the timing of judicial intervention to be determined by national laws.²¹ However, in one case,²² the Ontario Court of Justice interpreted this article in a different way, reading it together with article 8 of the Model Law, as requiring courts to stay their proceedings *unless the arbitration agreement is null and void*.²³ The Court concluded that, in cases governed by the Ontario International Arbitration Act of 1988, which adopts the Model Law, courts have to decide the validity of the arbitration agreement before they stay their proceedings.²⁴ Therefore, the role that courts have in respect of international commercial arbitration is to decide the validity of the arbitration agreement (article 8), leaving other issues for arbitrators (article 16).

(2) *What Jurisdictional Matters may be Considered by Arbitrators*

Matters relating to arbitral jurisdiction include:²⁵ 1) total challenges to jurisdiction (ie, denying the existence or validity of an arbitration agreement); 2) partial challenges to the arbitrator's substantive jurisdiction (ie, disputing the scope of the relevant arbitration agreement); 3) objections relating to the *ratione personae* of the arbitration

²¹ HM Holtzmann and JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation The Hague 1989) 485-486.

²² *Rio Algom Ltd v Sami Steel Co Ltd & Sami Steel (Canada) Inc* (1991) 47 CPC (2nd) 251; C Branson 'The Enforcement of International Commercial Arbitration Agreements in Canada' (2000) 16 *Arbitration Intl* 19, 29-30.

²³ However, an interpretation that favours the competence-competence principle would be that, like the law in France, the words 'null and void' refer to manifest invalidity of the arbitration agreement. This seems to be the common interpretation of Article 2 of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958. See: AJ Van Den Berg *The New York Arbitration Convention 1958* (Kluwer Law and Taxation Deventer 1981) 158.

²⁴ For a similar interpretation, see P Neill 'New Zealand and the UNCITRAL Model Law' (1990) 6 *Arbitration Intl* 271, 278.

²⁵ P Schlosser 'The Competence of Arbitrators and of Courts' (1992) 8 *Arbitration Intl* 189, 200.

agreement; 4) procedural challenges to jurisdiction (ie, objections based on time limits for claiming arbitration, or the duration of the arbitration agreement); and 5) challenges based on matters the determination of which depends on facts external to the relevant arbitration agreement as such (eg, conditions precedent to the commencement of arbitration, the proper constitution of the arbitral tribunal, and stipulated qualifications of arbitrators).²⁶

The Model Law allows arbitrators to decide any objection to their jurisdiction.²⁷ However, national laws may exclude the power of an arbitrator to decide on the existence or validity of the arbitration agreement. Such matters are usually raised in respect of arbitration clauses contained in contracts: as a matter of practice, the existence of an arbitration agreement that is formed in a separate document, normally after a dispute has arisen, is far less vulnerable to denial by either party.²⁸

However, in the United States, courts refuse, as a matter of principle, to refer disputes over the existence or validity of an arbitration agreement to arbitrators.²⁹ This is because courts seem to rest the power of arbitrators to decide their jurisdiction on the arbitration agreement itself,³⁰ therefore rejecting that power where that agreement is being denied.

²⁶ The classification in the text of jurisdictional challenges is for the purpose of exposition, and some categories may overlap.

²⁷ KP Berger *International Economic Arbitration* (Studies in Transnational Economic Law Volume 9 Kluwer Law and Taxation Deventer 1993) 352.

²⁸ A Redfern and M Hunter *Law and Practice International Commercial Arbitration* (3rd edn Sweet and Maxwell London 1999) 262; N Wyss 'First Options of Chicago Inc v Kaplan: A Perilous Approach to Kompetenz-Kompetenz' (1997) 72 Tulane L Rev 351, 355 fn 26.

²⁹ HM Holtzmann 'USA' (1984) IX Ybk Commercial Arbitration 60.

³⁰ *AT&T Technologies Inc v Communications Workers of America* 475 US 643, 106 S Ct 1415 (1986).

(3) *The Effect of Arbitrators' Rulings on their Own Jurisdiction*

Generally, arbitrators' rulings on their jurisdiction are not conclusive. Under French law, Article 16(3) of the Model Law, and Article V(3) of the European Convention, such a ruling is subject to subsequent review by the courts. By contrast, it was thought at one time that German courts accepted the finality of arbitrators' jurisdictional decisions.³¹ However, the new German arbitration law of 1998 has adopted the Model Law approach.³² It appears that commentators also tend to support the view that arbitrators' decisions on their jurisdiction should not be final.³³

³¹ WW Park 'The Arbitrability Dicta in *First Options v Kaplan*: What Sort of *Kompetenz-Kompetenz* Crossed the Atlantic?' (1996) 12 *Arbitration Intl* 147, 151; KP Berger *International Economic Arbitration* (Studies in Transnational Economic Law Volume 9 Kluwer Law and Taxation Deventer 1993) 359; CH Petrus 'Spanish Perspectives on the Doctrines of *Kompetenz-Kompetenz* and Separability: A Comparative Analysis of Spain's 1988 Arbitration Act' (2000) 11 *American Rev Intl Arbitration* 397, 405-406.

³² F-B Weigand 'The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden' (1995) 11 *Arbitration Intl* 397, 405. It has been suggested that there is no sound reason to deprive courts of the power to rule conclusively on the arbitrators' jurisdiction should one of the parties have recourse to the court prior to its opponent commencing arbitration proceedings, P Schlosser 'The Competence of Arbitrators and of Courts' (1992) 8 *Arbitration Intl* 189, 203.

³³ Clive Schmittoff seems to support the finality of arbitrators' jurisdictional decision, arguing that parties may agree to this effect; this view is considered in P Mayer 'L'Autonomie de l'Arbitre International dans l'Appreciation de sa Propre Compétence' (1989) 217 *Recueil des Cours* 319, 390; CE Alfaro and F Guimarey 'Who should Determine Arbitrability? Arbitration in a Changing Economic and Political Environment' (1996) 12 *Arbitration Intl* 415; WW Park 'Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators' (1997) 8 *American Rev Intl Arbitration* 132, 141-142. In contrast, Kitagawa takes the view that the (old) German position was wrong, since [t]here is no contractual autonomy which can be released from the court review. The parties cannot give such an authority to the arbitrator or arbitration tribunal.' T Kitagawa 'Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective' in P Sanders (ed) *International Arbitration Liber Amicorum for Martin Domke* (Martinus Nijhoff The Hague 1967) 133, 140.

American courts have traditionally retained the power to make the final decision on arbitral jurisdiction.³⁴ However, in an important recent decision,³⁵ the Supreme Court of the United States said that, in appropriate cases, courts should not disturb arbitrators' decisions on their own jurisdiction. Commentators disagree whether this dictum ought to be followed.³⁶ It will be shown later that this disagreement turns on the basis of the competence-competence principle, which could determine in what circumstances the finality of arbitral decisions is acceptable in principle.

3. The Competence-Competence Principle in English Law

Prior to section 30 of the 1996 Act, the approach of English courts to the competence-competence principle was not entirely clear. In *Willock v Pickfords Removals Ltd*,³⁷ the plaintiff resisted successfully the application for a stay by the defendants on the grounds that it never entered into a contract containing an arbitration clause with them. Roskill LJ, citing *Heyman v Darwins Ltd*,³⁸ held that an arbitrator could not in English law decide the question whether an arbitration clause existed (the question which goes to the root of arbitral jurisdiction).

³⁴ JS McClendon and REE Goodman *International Commercial Arbitration in New York* (World Arbitration Institute New York 1986) 33.

³⁵ *First Options of Chicago Inc v Kaplan* 515 US 938, 115 S Ct 1920 (1995).

³⁶ WW Park 'The Arbitrability Dicta in *First Options v Kaplan*: What Sort of *Kompetenz-Kompetenz* Crossed the Atlantic?' (1996) 12 *Arbitration Intl* 147; cf N Wyss 'First Options of Chicago Inc v Kaplan: A Perilous Approach to *Kompetenz-Kompetenz*' (1997) 72 *Tulane L Rev* 351.

³⁷ [1979] 1 Lloyd's Rep 245 (CA). To the same effect, see *Lanelly Railway & Dock Co v London & North-Western Railway Co* (1873) 8 LR Ch App 942.

³⁸ [1942] AC 356 (HL).

This decision may be treated as a consequence of *Heyman v Darwins Ltd* which rejected the separability doctrine, where the main contract was non-existent. It was, therefore, argued by some commentators that the competence-competence principle did not exist at common law.³⁹ It was said that ‘if the claim based on fraud has been left to the arbitrator he would have been asked in reality to adjudicate upon his own jurisdiction, which is never permissible.’⁴⁰ It has also been observed recently that ‘under the old law (until changed by s 30 of the Arbitration Act 1996) an arbitrator had no power to rule on his own jurisdiction. Since he could not pull himself up by his own boot straps, he could not decide whether a valid arbitration agreement had ever come into existence.’⁴¹ Similarly, René David suggests that, in English law, arbitrators’ power to decide their jurisdiction arose only in an action to set an award aside. He goes as far as stating that the competence-competence principle was not recognised in English law.⁴²

However, the Departmental Advisory Committee on Arbitration Law, while accepting that there was inconsistency in English case law with regard to the competence-competence principle, said that the principle was recognised, ‘though this

³⁹ WH Gill ‘UK’ (1977) II Ybk Commercial Arbitration 90, 96; JA Rose ‘Arbitration under Private International Law: The Doctrine of Separability and *Compétence de la Compétence*’ (1994) 17 Fordham Intl LJ 599, 636; SC Boyd ‘Innovation and Reform in the Law of Arbitration’ [1983] Civil Justice Q 148, 158; I Dore *The UNCITRAL Framework for Arbitration in Contemporary Perspective* (Graham & Trotman London 1993) 155-156.

⁴⁰ *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 (CA) 499 (May LJ). Likewise, in *Payne & Routh v Hugh Baird & Sons* (1921) 9 Ll L Rep 167 (CA), it was assumed that if arbitrators purported to make a decision on their jurisdiction (the existence of the main contract), such an attempt would have made the award bad.

⁴¹ *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 (HL) 271 (Lord Lloyd of Berwick).

⁴² R David *Arbitration in International Trade* (Kluwer Law and Taxation Deventer 1985) 286

has not always been the case.’⁴³ Others suggest that the common law, while to some extent recognising the principle, did not go as far as the approach now established in section 30(1) of the 1996 Act: in particular, the common law did not recognise that arbitrators had the power to decide on the validity of its constitution.⁴⁴ Section 30(1) provides that

Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

However, the best view of English arbitration law is that the competence-competence principle has long been recognised at common law. The next paragraphs demonstrate this view. It should be borne in mind that, since one is concerned with the state of the competence-competence principle at the time the *Harbour Assurance* case was decided, reference will be made to the position of the common law rather than under the 1996 Act. It should also be remembered that this section deals with the common law recognition of the competence-competence principle in general, whereas the next section will consider this principle in relation to the particular situation that arose in the *Harbour Assurance* case, ie where the court is seized first with the dispute.

⁴³ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 137. Support for the adoption of article 16 of the Model Law by English law was based by some on the advantage of incorporating the competence-competence principle in English law. ‘We should wholly agree with Article 16, although the present law does not empower an arbitrator to decide on the limits of his own jurisdiction,’ wrote M Kerr ‘Arbitration and the Courts: The UNCITRAL Model Law’ (1985) 34 ICLQ 1, 17 (emphasis added).

⁴⁴ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 7.4.

(1) *The Recognition of the Competence-Competence Principle at Common Law: Its Scope*

English courts used not to refer explicitly to the competence-competence principle.⁴⁵ However, one can fairly infer the principle from the legal consequences that courts have drawn from arbitrators deciding matters relating to their jurisdiction. The courts have upheld an award on the merits, if satisfied that the arbitrators have decided on their jurisdiction correctly. Thus, the examination by arbitrators of their jurisdiction has not been a sufficient ground for treating their award as being invalid, and arbitrators have not been obliged to re-start the arbitral process.⁴⁶ This practice reveals that arbitrators have not been treated as committing a procedural error in considering jurisdictional questions.⁴⁷ However, as noted by Lord Porter, ‘the principle by which the arbitrator’s jurisdiction is to be determined cannot be decided by asking whether he came to a right or wrong conclusion.’⁴⁸ Therefore, an arbitrator must, in the first place, have had jurisdiction to decide his own jurisdiction; otherwise, courts would not be bound by an arbitrator’s finding on the facts.

⁴⁵ The first reference is to be found in *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd’s Rep 223 (CA). Kerr J, who decided that case at first instance, said at p 233 that ‘competence-competence’ was the term sometimes used by Continental jurists to denote the ‘problem of an arbitrator’s jurisdiction to decide on his own jurisdiction.’ However, even in other jurisdictions, explicit reference to that principle seems to have appeared only in recent decades. cf A Broches *Commentary on The UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Deventer 1990) 74-75.

⁴⁶ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd’s Rep 223 (CA).

⁴⁷ MJ Mustill ‘Vers une Nouvelle Loi Anglaise sur l’Arbitrage’ [1991] *Revue de l’Arbitrage* 383, 388.

⁴⁸ *Heyman v Darwin Ltd* [1942] AC 356 (HL) 394.

Courts allowed arbitrators to examine the scope of their jurisdiction.⁴⁹ Lord Selborne LC once held that the question ‘what is it that [the parties] are to refer to arbitration?’ was to be answered by the arbitrators because it was within the terms of the arbitration agreement.⁵⁰ Lord Selborne’s view lies behind the decision in *Piercy v Young*.⁵¹ Here the Court of Appeal decided the scope of the arbitration clause because parties did not refer that issue to arbitration but accepted that ‘persons can agree to refer to arbitration not merely disputes between them, *but even the question whether the disputes between them are within the arbitration clause.*’⁵² Likewise, in *Produce Brokers Co Ltd v Olympia Oil & Cake Co Ltd*,⁵³ the House of Lords held that arbitrators had the power to decide on the scope of the reference to arbitration.

Arbitrators have also been allowed to decide other challenges to arbitrators’ jurisdiction, such as the question whether arbitration was time-barred⁵⁴ as well as the continuing effect of an arbitration agreement.⁵⁵

⁴⁹ *Heyman v Darwins Ltd* [1942] AC 356 (HL); WE Watson (ed) *Redman’s Law of Arbitrations and Awards* (5th edn Butterworths London 1931) 78; RS Bacon *Commercial Arbitrations as Governed by the Law of England* (H Jenkins Ltd London 1925) 48; E Wetton *Russell on Arbitration* (14th edn Stevens and Sons London 1949) 77; MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 115.

⁵⁰ *Willesford v Watson* [1873] LR 8 Ch 473.

⁵¹ (1879) 14 Ch D 200 (CA).

⁵² Same case 208 (Jessel MR, emphasis added).

⁵³ [1916] 1 AC 314 (HL).

⁵⁴ *Pinnock Bros v Lewis and Peat Ltd* [1923] 1 KB 690; *Smeaton Hanscomb & Co Ltd v Sassoon I Setty, Son & Co (No 1)* [1953] 1 WLR 1468; *Aktibolaget Legis v V Berg and Sons Ltd* [1964] 1 Lloyd’s Rep 203.

⁵⁵ *Plews v Baker* (1873) 16 LR Eq 564, applying *Willesford v Watson* [1873] LR 8 Ch 473. However, it seems that English courts denied the competence-competence principle in respect of the determination of conditions precedent to arbitral jurisdiction: C Ambrose and K Maxwell *London Maritime Arbitration* (LLP London 1996) 46; D Sutton, J Kendall and J Gill (edd) *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) para 2-065; MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 114, 575; *Smith v Martin* [1925] 1 KB 745 CA; *Getreide-Import-Gesellschaft mbh v Contimar SA Compania Industrial Comercial y Maritima* [1953] 1 WLR 793 (CA); *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

At the award-enforcement stage, the practice of the courts has been to review an arbitrator's finding on its jurisdiction, and to uphold the award on the merits if jurisdiction was decided correctly by the arbitrator.⁵⁶ Awards have not been treated as being invalid merely because arbitrators examined their jurisdiction. Moreover, courts accepted that an arbitrator 'must, no doubt, come to a determination as to whether a matter is within the submission [ie the arbitration agreement] or not.'⁵⁷

Courts have taken the same approach to jurisdictional challenges that are based on denying the existence or validity of an arbitration agreement.⁵⁸ In *Christopher Brown Ltd v Genossenschaft Oesterreichischer*,⁵⁹ Devlin J agreed that arbitrators are 'entitled to inquire into the merits of the issue whether they have jurisdiction or not;'⁶⁰ and the award 'is not destroyed because the arbitrators themselves went into the matter and came to the same conclusion [as that reached by the court] which, *ex hypothesi*, was the right one.'⁶¹

⁵⁶ *The Companie Du Senegal v Wood & Co* (1883) 53 LJ Ch 166; *May v Mills* (1914) 30 TLR 287; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314 (HL); *Attorney-General For Manitoba v Kelly* [1922] 1 AC 268 (PC); *HE Daniels Ltd v Carmel Exporters and Importers Ltd* [1953] 2 QB 242; *Astro Vencedor Compania Naviera SA of Panama v Mabanafi GmbH* [1971] 2 QB 588 (CA); *Standard Ocean Carriers SA v Union De Remor Quage et De Sauvetage SA, The Neptone C* [1986] 2 Lloyd's Rep 609.

⁵⁷ *Faviell v Eastern Counties Rly Co* (1848) 17 LJ Ex 297, 297.

⁵⁸ *Oil Products Trading Co Ltd v Société Anonyme Société de Gestion D'Entreprises Coloniales* (1934) 150 LT 475; *M Golodetz v Schrier* (1947) 80 Ll L Rep 647.

⁵⁹ *Christopher Brown Ltd v Genosseaschaft Oesterreichischer Waldbesitzer Holzwirt-Schaftsbetriebe Registrierte Genossenschaft Mit Beschränkter Haftung* [1954] 1 QB 8.

⁶⁰ Same case 12-13.

⁶¹ Same case 13. However, at page 12, Devlin J expressed doubts about the viability of arbitrators' jurisdictional decisions if they decide solely on their own jurisdiction because the matter would be reviewed fully by courts. In one case, Lord Goddard and Devlin J explained that the jurisdictional question that can be decided by arbitrators is collateral to the main question which they have to decide, *Rex v Fulhan, Itammer Smith and Kensington Rent Tribunal, ex p Zerex* [1951] 2 KB 1, 6, 10.

Indeed, even in the *Harbour Assurance* case, Steyn J observed that an arbitrator, if faced with a jurisdictional challenge, could make a non-binding decision on the matter.⁶²

(2) *The Form of the Competence-Competence Principle in English Law*

The English form of the competence-competence principle has allowed arbitrators to decide on their jurisdiction in a provisional manner without having to await for judicial determination of the question. However, in contrast to the law in France, courts have not been bound to refer jurisdictional matters to arbitration if they have been seized first with the question.⁶³ This English form of the principle which has been developed through the practice of the courts has been enshrined in the 1996 Act.⁶⁴ Again, reference will generally be made to the position at common law, since we are concerned with the state of the competence-competence principle at the time when the *Harbour Assurance* case was decided. (The Act, however, introduces a more specific framework for raising jurisdictional challenges before arbitrators and courts as will be examined in section 5.)

⁶² *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81, 83.

⁶³ For a general assessment of different forms of the competence-competence principle, see: A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 177; and for a view on the English model, see P Gross 'Competence of Competence: An English View' (1992) 8 *Arbitration Intl* 205, 207-213; R Goode *Commercial Law* (2nd edn Butterworths London 1995) 1189-1191.

⁶⁴ R Merkin *The Arbitration Act 1996* (2nd edn LLP London 2000) 74-75; MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 135.

English courts have retained the power to decide arbitrators' jurisdiction before or during arbitration proceedings. This position does not necessarily suggest hostility to arbitrators' autonomy. Rather, it is the solution that English courts worked out in response to certain features of arbitration law. In particular, as chapter II has shown, the arbitrators' authority can, at common law, be revoked by either party at any time before the publication of the award.⁶⁵ Courts, therefore, could not devise a *binding* rule empowering arbitrators to decide their jurisdiction.

However, courts did not assume exclusive jurisdiction to decide the matter. 'The arbitrator must, no doubt, come to a determination as to whether a matter is within the submission or not; but that depends on the construction of the submission, *which is also for the court*.'⁶⁶ Therefore, the power of the courts meant only that they were not bound to await the delivery of an award before they could examine the arbitral jurisdiction. However, section 32 of the 1996 Act introduced restrictions on parties' resort to the court for the determination of a jurisdictional question if arbitration has been commenced. Thus, an application to the court for the determination of a jurisdictional question has to be made with the written agreement of all the parties to the arbitration proceedings or with the permission of the arbitral tribunal. In the latter case, the court must be satisfied that the application was made without delay, that the determination of

⁶⁵ D Hay (ed) *Halsbury's Laws of England* (4th edn Butterworths London 1994) para 608; *Lord v Lee* (1868) LR 3 QB 404; *Re Rouse Co & Meier & Co* (1871) LR 6 CP 212; *Doleman and Sons v Ossett Corp* [1912] 3 KB 257; *Fleming v J S Doij (Grimsby) Ltd* (1921) 38 RPC 57.

⁶⁶ *Faviell v The Eastern Counties Rly Co* (1848) 17 LJ Ex 297, 297-298 (Alderson B).

the question is likely to save time and costs, and that there is good reason why it should be decided by the court.⁶⁷

Likewise, the competence-competence principle has meant that an arbitrator has not been obliged to halt the arbitration procedure while a jurisdictional question was being decided by the court. The courts have accepted that, where an arbitration process has been set in motion, it is for the arbitrators to decide whether to proceed with the arbitration despite challenges to their jurisdiction. In *Christopher Brown Ltd v Genossenschaft Oesterreichischer*,⁶⁸ Devlin J said⁶⁹

[i]t is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which has power to determine it. They might then be wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not ...

⁶⁷ Under the 1996 Act, the courts also take the view that a party asserting the existence and validity of an arbitration agreement has to commence arbitration without applying for a declaration from a court that another party is bound by the arbitration agreement, this being a jurisdictional question that ought to be raised before the arbitrator. *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Baosteel Ocean Shipping Co)* [2000] 2 All ER (Comm) 70, 85.

⁶⁸ *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirt-Schaftsbetriebe Registrierte Genossenschaft Mit Beschränkter Haftung* [1954] 1 QB 8.

⁶⁹ Same case 12. In *Graham Stephenson Grammer v Alan Nicholas Lane* [2000] LTR 264 (CA) at 283, the view of Devlin J was approved as stating the position of English law.

In line with this autonomy of arbitrators, courts have not compelled arbitrators to stay the arbitral process where their jurisdiction was being challenged;⁷⁰ it is for the arbitrators to decide whether to halt arbitration pending judicial determination of their jurisdiction.⁷¹ Thus, courts were minded to avoid 'undesirable judicial intrusion in the arbitral process during the course of the reference.'⁷²

In addition, arbitrators may elect to decide the jurisdictional issue or to proceed with the arbitration, leaving that issue to be decided by the court.⁷³ These options for the arbitrator have been enacted in sections 31(4) and 32(4) of the 1996 Act. However, since courts can also decide the arbitral jurisdiction before arbitration is commenced, the question whether that matter is referred to arbitration may, in practice, depend on whether the party resisting arbitration goes first to a court.⁷⁴

As regards the effect of an arbitrator's jurisdictional decision, English courts have frequently stated that an arbitrator cannot make a *final* decision on his jurisdiction. As Steyn J observed in *Harbour Assurance Co (UK) Ltd v Kansa General International*

⁷⁰ *Turk Gemi Kurtama v Ithaka (Owners), The Ithaka* [1939] 3 All ER 630; *Industrie Chimiche Italia Centrale v Alexander G Tsaviliris and Sons Maritime Co Pancristo Shipping Co SA and Bula Shipping Corp, The Choko Star* [1978] 1 Lloyd's Rep 508 (CA).

⁷¹ *Luanda Exportadora v Tamari & Sons* [1967] 2 Lloyd's Rep 353; *Kaukmarkkinat O/Y v "Elbe" Transport-Union GmbH, The Kelo* [1985] 2 Lloyd's Rep 85.

⁷² *Comdel Commodities Ltd v Siporex Trade SA* [1987] 1 Lloyd's Rep 325. Courts could restrain arbitrators from exceeding their jurisdiction under the courts' power to restrain a breach of a contract; this was independent of arbitration law. R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 7.2; MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 572-574; *Fountain Manufacturing Co (Bury) Ltd v Fish & Co* (1921) 8 Ll L R 363; *Freeman & Sons v The National Benefit Assurance Co* (1922) 13 Ll L R 270; *Altco Ltd v Sutherland* [1971] 2 Lloyd's Rep 515. Similarly, the Judicature Act of 1894 allowed courts to restrain arbitration if it was frivolous and vexatious.

⁷³ *M Golodetz v Schrier* (1947) 80 Ll L Rep 647; Mustill (n 72 above) 575-576.

⁷⁴ *The Republic of Liberia v Gulf Oceanic Inc* [1985] 1 Lloyd's Rep 539 (CA) 541-542. The right of a party that does not take part in arbitration proceedings is preserved by section 72 of the 1996 Act.

Insurance Co Ltd,⁷⁵ an arbitrator is allowed to decide on his own jurisdiction *as a matter of convenience and practicality, but his ruling is in no way final*.

In *Dalmia Dairy Industries Ltd v National Bank of Pakista*,⁷⁶ Kerr J, who decided this case at first instance, accepted the view that an arbitrator's decision on its jurisdiction could be final provided that, *inter alia*, the jurisdictional question did not relate to the existence or initial validity of the arbitration agreement, or the contract containing an arbitration clause.⁷⁷ However, the Court of Appeal took the view that the law did not allow arbitration agreements to authorise arbitrators to decide their jurisdiction in a binding and final way.⁷⁸ Therefore, the obiter dicta in that case that, on the face of it, reject the power of arbitrators to decide on their jurisdiction should be interpreted as meaning that arbitrators cannot make *final* decisions on the matter and not as rejecting the competence-competence principle.

Similarly, the Departmental Advisory Committee (the Mustill Committee 1987) assumed that the competence-competence principle applied to the validity of a contract containing an arbitration clause but emphasised that English courts, not arbitrators, had the power to make a *binding* decision on the validity of the main contract.⁷⁹

⁷⁵ [1992] 1 Lloyd's Rep 81, 83.

⁷⁶ [1978] 2 Lloyd's Rep 223 (CA).

⁷⁷ Same case 243.

⁷⁸ *Dalmia Dairy Industries Ltd v National Bank of Pakista* [1978] 2 Lloyd's Rep 223 (CA) 292-293; R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 7.6. The *Dalmia Dairy* case was decided under Indian law which was assumed to be the same as English law.

⁷⁹ Departmental Advisory Committee *The United Kingdom and the UNCITRAL Model Law on International Commercial Arbitration* (October 1987) 6, reprinted in (1987) 3 *Arbitration Intl* 278, 282.

Finally, while there was no specific procedural framework for the application of this principle (now sections 31-32, 67 and 73 of the 1996 Act have filled this gap), the courts provided the essential elements for the exercise of this principle. Thus, the courts did not entertain a challenge to arbitrators' jurisdiction, where the party raising it failed to do so before the arbitrators.⁸⁰

(3) *The Legal Basis for the Competence-Competence Principle*

The question arises as to the basis upon which the English courts have rested the power of an arbitrator to decide on his own jurisdiction. It is submitted that this is best viewed as based on the agreement of the parties. That is, English courts accept the power of arbitrators to examine their jurisdiction if the matter arises before them on the basis that an agreement emerges between parties as regards that matter.⁸¹ Such an agreement may well be explicit.⁸² However, it may also emerge by conduct.⁸³ It may also be based on the signing of the 'Terms of Reference'⁸⁴ by the parties.⁸⁵

⁸⁰ *Westminster Chemicals & Produce Ltd v Eichholz & Loester* [1954] 1 Lloyd's Rep 99.

⁸¹ Some commentators take the view that the power of an arbitrator to decide on his own jurisdiction is inherent in the judicial function of the arbitrator: KS Roskison 'The Sources and Limits of the Arbitrators' Powers in England' (1986) 52 *Arbitration* 219, 220, 222; A Broches *Commentary on the UNCITRAL Model Law on International Arbitration* (Kluwer Law and Taxation Deventer 1990) 74. According to this view, the competence-competence principle does not depend on the agreement of the parties and need not even be enacted: Z Stalev 'The Arbitral Tribunal vis-à-vis the Arbitration Agreement' (1989-90) 42-43 *Revue Hellénique de Droit Intl* 233, 234-235. However, this view links with a jurisdictional theory of arbitration and can be criticised on the same grounds as that theory, which has been examined in chapter I above pp 21-27.

⁸² *Astro Valiente Compania Naviera SA v Government of Pakistan, Ministry of Food & Agriculture (No 2) 'The Emmanuel Colocotronis'* [1982] 1 WLR 1096.

⁸³ *Luanda Exportadora v Tamari & Sons* [1967] 2 Lloyd's Rep 353.

⁸⁴ The 'Terms of Reference' is the document arranged by an arbitrator, and signed by him and the parties, which define the arbitrator's task, particularly, the respective claims of the parties. See ICC Rules for Arbitration 1998, Article 18. For a very recent examination of the relevance of the Terms of Reference to the competence-competence principle, see: S Greenberg and M Secomb 'Terms of Reference and Negative Jurisdictional Decisions: A Lesson from Australia' (2002) 18 *Arbitration Intl* 125, 129-132.

In *Westminster Chemicals & Produce Ltd v Eichholz & Loester*,⁸⁶ Devlin J held that arbitrators had been authorised to decide on the existence of a contract containing an arbitration clause by virtue of an *ad hoc* agreement that emerged from the conduct of the parties (appointing an arbitrator, and asking him, through claims and counter claims, to decide jurisdictional objections).⁸⁷ His Lordship noted that such an *ad hoc*⁸⁸ agreement was valid, even assuming that there was, in fact, no prior main contract containing an arbitration clause. This is because, as Devlin J pointed out, the jurisdiction of an arbitrator depends on what parties in fact ask him to do.⁸⁹ Consequently, no logical problem would arise if the arbitrator found that no main contract containing an arbitration clause existed.

⁸⁵ However, signing the 'Terms of Reference' does not deprive parties from their right to challenge the award later on grounds of lack of jurisdiction: *Dalmia Dairy Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA) 233 (Kerr J). Arbitrators also rely on the 'Terms of Reference' so as to assume the power to decide on their jurisdiction: ICC case number 6162 of 1990 (1992) XVII Ybk Commercial Arbitration 153; ICC case number 6531 of 1991 (1992) XVII Ybk Commercial Arbitration 221; ICC case number 7626 of 1995 (1997) XXII Ybk Commercial Arbitration 132, 137; ICC case no 6474 (2000) XXV Ybk Commercial Arbitration 279, 280-281.

⁸⁶ [1954] 1 Lloyd's Rep 99.

⁸⁷ *Westminster Chemicals & Produce Ltd v Eichholz & Loester* [1954] 1 Lloyd's Rep 99, 102; *Aktiebolgate Legis v V Berg & Sons Ltd* [1964] 1 Lloyd's Rep 203.

⁸⁸ It should be realised that an '*ad hoc*' arbitration agreement is usually used to denote a non-institutional arbitration. However, English judges use the same term to mean an arbitration agreement concluded in relation to an existing dispute as opposed to an arbitration agreement (usually an arbitration clause) concluded in respect of future disputes.

⁸⁹ *Westminster Chemicals & Produce Ltd v Eichholz & Loester* [1954] 1 Lloyd's Rep 99, 106. To rest the power of arbitrators to decide on their own jurisdiction on the basis of a special agreement that emerges, albeit implicitly, through the conduct of the parties is generally accepted by arbitrators. In ICC case number 5485 of 18 August 1987 (1989) XIV Ybk Commercial Arbitration 156, at 159-160, an arbitral tribunal held that parties did not contest its authority to decide its jurisdiction; the claimant was asking the tribunal to assume jurisdiction, while the defendant sought a negative declaration from the tribunal. The tribunal found, therefore, that the conduct of the parties evinced the recognition of its power to decide on its own jurisdiction. Other examples include: ICC case number 6363 of 1991 (1992) XVII Ybk Commercial Arbitration 186; ICC case number 7263 of 1994 (1997) XXII Ybk Commercial Arbitration 92, 100; ICC case number 3493 of 1983 (1984) IX Ybk Commercial Arbitration 111, 112. Similarly, an agreement was established on the basis of an exchange of memorials by the parties: *ad hoc* award of 1982 (1983) VIII Ybk Commercial Arbitration 94, 95.

However, in order for the arbitrator's decision not to be final, an agreement empowering arbitrators to decide on their own jurisdiction in a provisional way must be coupled with a reservation by the party resisting arbitration of its right to challenge the arbitrators' decision in a court.⁹⁰ Such a reservation makes the *ad hoc* agreement resulting from the actual reference to arbitration 'a competence-competence agreement,' whereby parties agree to refer a jurisdictional question initially to arbitrators without being obliged to abide by the decision of arbitrators. If such reservation is not made, the parties may be deemed to have accepted the finality of the arbitrators' decision.⁹¹ As Devlin J put it,⁹² if a party

protests against the jurisdiction of the arbitrator, which is merely an elaborate way of saying: "I have not agreed to abide by your award," if he protests in that form it is held that he can take part in the arbitration without losing his rights, and what he is doing, in effect, is that he is merely saying: "I will come before you, but I am not, by my conduct in coming before you and arguing the case, to be taken as agreeing to accept your award, because I am not going to do so."

The 1996 Act does not affect this consensual basis of the competence-competence principle. Unlike article 16(1) of the UNCITRAL Model Law, section 30 allows arbitrators to decide their jurisdiction 'unless otherwise agreed by the parties.' Section

⁹⁰ *Dalmia Dairy Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223; R Merkin *Arbitration Law* (Looseleaf LLP London 1991) paras 7.16-7.20.

⁹¹ P Gross 'Competence of Competence: An English View' (1992) 8 *Arbitration Intl* 205, 207; *Jones Engineering Services Ltd v Balfour Beatty Building Ltd* (1992) 42 *Construction LR* 1; DM Cato *Arbitration Practice and Procedure, Interlocutory and Hearing Problems* (2nd edn LLP London 1997) 41.

⁹² *Westminster Chemicals & Produce Ltd v Eichholz & Loester* [1954] 1 Lloyd's Rep 99, 102.

30 is not mandatory; it envisages that arbitrators' power to decide their jurisdiction rests on the agreement of the parties.⁹³

This is well-illustrated by the very recent decision of the Court of Appeal in *LG Caltex Gas Co Ltd v China National Petroleum Corporation*.⁹⁴ A dispute arose over the conclusion of the main contract between the parties, who appointed an arbitrator to decide the matter. The parties denying the existence of the main contract reserved their right to object to the jurisdiction of the arbitrator. Finding that the conduct of the parties amounted to an *ad hoc* arbitration agreement in respect of the dispute over the existence of the contract, Aikens J held at first instance that such an agreement authorised the arbitrator to make a final decision on the existence of the contract. Reversing the decision of Aikens J, the Court of Appeal reasoned that the arbitrators made their decision on the existence of the contract under section 30, and that there was no *ad hoc* agreement as to arbitrating the matter finally. The decision of the Court of Appeal should, therefore, be interpreted as finding that the parties had entered into a mere 'competence-competence agreement' because of the reservation of the right to challenge the arbitrator's jurisdiction in a court.⁹⁵ To deprive the parties from their right to challenge the jurisdiction of an arbitrator requires a clear agreement to that effect.⁹⁶

Therefore, the approach of the English courts to the basis of an arbitrator's power to decide on his own jurisdiction does not invoke the original arbitration agreement,

⁹³ Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 139.

⁹⁴ [2001] 1 WLR 1892.

⁹⁵ cf R Merkin *Arbitration Law* (Looseleaf LLP London 1991) paras 7.33-7.35.

⁹⁶ Merkin (n 95 above) para 3.12.

which is being disputed.⁹⁷ This approach avoids the logical difficulty that if arbitrators find that there is no original arbitration agreement, they would be destroying the basis on which they purport to act and their decision would not qualify as an award.⁹⁸

In the light of this analysis, it is surprising that some commentators have argued that the separability doctrine should be widened *so as to allow the competence-competence principle to operate*. This incorrectly assumes that that principle derives from the original arbitration agreement.⁹⁹ For example, Philippe Fouchard suggests that the separability doctrine is ‘the first stage of the process which results in the arbitrators being able to determine their own jurisdiction.’¹⁰⁰ In other words, this view incorrectly assumes that the competence-competence principle is a consequence of the separability doctrine;¹⁰¹ and it undermines the conceptual distinction between the separability doctrine and the competence-competence principle, which has been clarified above.¹⁰²

⁹⁷ However, if the jurisdictional question does not relate to the existence or validity of the relevant arbitration agreement, the courts may rely on whether the wording of that agreement includes the particular jurisdictional question. Thus, in *Produce Brokers Co Ltd v Olympia Oil & Cake Co Ltd* [1916] 1 AC 314 (HL), the House of Lords held that a jurisdictional question that had been decided by an arbitrator (whether the arbitration clause covered a dispute over the existence of a custom) fell within the ambit of the arbitration agreement.

⁹⁸ This difficulty lies behind the criticism of *First Options of Chicago Inc v Kaplan* 515 US 938, 115 S Ct 1920 (1995), in which the Supreme Court of the United States said at 1923 that if the arbitration clause was wide enough, courts could refer the dispute over the existence of the main contract to arbitration on the basis of *that clause contained in the disputed contract*. See, for example, JW Stempel ‘A Better Approach to Arbitrability’ (1991) 65 TLR 1377, 1447; WW Park ‘When and Why Arbitration Matters’ in GMB Hartwell (ed) *The Commercial Way to Justice* (Kluwer Law International The Hague 1997) 73, 83-85; JJ Coe *International Commercial Arbitration: American Principles and Practice in A Global Context* (Transnational Publishers New York 1997) 140.

⁹⁹ SC Boyd ‘Innovation and Reform in the Law of Arbitration’ [1983] Civil Justice Q 148, 158; J Hill ‘The Scope of the Doctrine of Separability’ [1992] LMCLQ 306.

¹⁰⁰ E Gaillard, and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 214. However, Fouchard acknowledges that, despite the tendency to consider the competence-competence principle and the separability doctrine as being intertwined, they must be conceptually distinguished.

¹⁰¹ J-P Ancel ‘L’Actualité de l’Autonomie de la Clause Compromissoire’ in *Travaux du Comité Français de Droit International Privé* (Daloz Paris 1991-1992) 75, 84-86, 95; Gaillard (n 100 above) 214; A Redfern and M Hunter *Law and Practice International Commercial Arbitration* (3rd edn Sweet

The Departmental Advisory Committee clearly distinguished the two principles by regulating them in separate sections. It justified the enactment of the competence-competence principle on the basis of its practical advantages and not as a consequence of the separability doctrine.¹⁰³

4. Staying an Action despite Challenges to an Arbitrator's Jurisdiction

So far, the English approach to the competence-competence principle has been examined in relation to the situation where an arbitrator is faced in fact with a challenge to his jurisdiction. This section will demonstrate that an English court, if seized first with the dispute, can and should stay its proceedings so as to enable an arbitrator to examine his jurisdiction initially. This, in turn, will explain how the *Harbour Assurance* case could have been decided without the widening of the separability doctrine (ie by treating the dispute over the legality of the main contract as a jurisdictional issue).

and Maxwell London 1999) 156, 263, stated that 'the separability doctrine provides a legal basis for the appointment of an arbitral tribunal'; CM Svernlöv 'The Evolution of the Separability Doctrine in England: Now Complete?' (1992) 9 J Intl Arbitration 115, 119; C Blanchin *L'Autonomie de la Clause Compromissoire: Un Modèle Pour la Clause Attributive de Jurisdiction?* (Librairie Générale de Droit et de Jurisprudence Paris 1995) 35; S Jarvin 'The Sources and Limits of the Arbitrator's Powers' in JD Lew (ed) *Contemporary Problems in International Arbitration* (Centre for Commercial Law Studies London 1986) 50, 65.

¹⁰² Above pp 139-141.

¹⁰³ The Departmental Advisory Committee *Report on the Arbitration Bill* (February 1996) para 138, stated that '[t]he great advantage of this doctrine is that it avoids delays and difficulties when a question is raised as to the jurisdiction of the tribunal ... to deprive a tribunal of a power ... to rule on its own jurisdiction would mean that a recalcitrant party could delay valid arbitration proceedings indefinitely by making spurious challenges to its jurisdiction.'

As section 2 has shown, in French law, the courts have to await an arbitrator's decision on his jurisdiction if arbitration has been commenced. If a French court is seized first with the dispute, the jurisdictional question must be referred to the arbitrator unless the relevant arbitration agreement is 'manifestly null and void.'¹⁰⁴ In contrast to this, the American courts rule out the possibility that an action may be stayed if the existence or validity of an arbitration agreement is in dispute.¹⁰⁵ As far as English law is concerned, it appears to have been assumed that a court could not give an arbitrator the initial opportunity to examine its own jurisdiction if the court were seized first with the matter.¹⁰⁶

However, unlike their American counterparts, the English courts do not rule out the possibility of staying an action despite a challenge to an arbitrator's jurisdiction being raised. This possibility rests on the English courts' firm assertion that their inherent power to stay legal proceedings is not ruled out if the case also concerns an application for a stay under the Arbitration Act.¹⁰⁷ Thus, although the inherent power of courts is 'a residual one principally confined to dealing with cases not contemplated by the statutory provisions,'¹⁰⁸ that power can be exercised in arbitration cases. In *Société*

¹⁰⁴ Above pp 142-143.

¹⁰⁵ Above p 146.

¹⁰⁶ R David *Arbitration in International Trade* (Kluwer Law and Taxation Deventer 1985) 286; A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 180-181; P Gross 'Competence of Competence: An English View' (1992) 8 *Arbitration Intl* 205, 208; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81, 83.

¹⁰⁷ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 6.51; D Hay *Halsbury's Laws of England* (4th edn Butterworths London 1992) para 618; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) 352; *Roussel-UCLAF v G D Searle & Co Ltd & GD Searle & Co* [1978] 1 Lloyd's Rep 225; *OTM Ltd v Hydranautics* [1981] 2 Lloyd's Rep 211.

¹⁰⁸ *Etri Fans Ltd v NMB (UK) Ltd* [1987] 1 WLR 1110 (CA) 1114.

Anonyme Hersent v United Towing Co Ltd, The Tradesman,¹⁰⁹ Karminski J held that he was bound under the Arbitration Act 1950 to stay proceedings because the relevant (alleged) arbitration agreement fell within the Geneva Protocol, although the initial validity of the contract and the arbitration clause was being denied. However, he pointed out that even if the stay was discretionary, he would also stay the proceedings (despite the denial of the validity of the whole contract) *because the facts of the case showed that a stay could save the time of the parties if the dispute was decided first by arbitrators*.

In *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd*,¹¹⁰ the dispute concerned the legality of a contract containing an arbitration clause. While treating this issue as a jurisdictional matter (because separability was not then accepted in relation to illegal contracts), the court accepted the agreement of the parties that a ruling on the issue at an interlocutory stage would not be finally binding on the parties, who would remain free to raise and argue the issue in the substantive proceedings, whether before arbitrators or before the Court. As such, the court accepted that the dispute over the legality of the main could be referred to arbitration for a provisional decision by arbitrators. Although the court relied on the agreement of the parties to have the issue examined in an interlocutory proceedings, this case shows that it is possible for the court to stay an action without making a final determination of the validity of the relevant arbitration agreement.¹¹¹

¹⁰⁹ [1962] 1 WLR 61.

¹¹⁰ [1988] 2 Lloyd's Rep 63.

¹¹¹ Although the court doubted whether it could refer the jurisdictional question to arbitrators without the agreement of the parties, it did not rule out this possibility. This approach also derives support from those cases in which courts refused to entertain an action challenging arbitrators' jurisdiction before an

In principle, therefore, the English courts come close to the French approach to the competence-competence principle by affording an arbitrator the first opportunity to decide on his jurisdiction. However, unlike the law in France, the English courts may, but are not bound to, stay their proceedings. Therefore, while the English courts usually decide jurisdictional questions rather than referring them for a provisional decision by arbitrators, they justify their practice on grounds of convenience, without ruling out the possibility of staying an action in respect of these matters. Thus, it has been said that ‘it is *highly desirable* that the question whether or not there was a concluded contract, and, if there was, whether or not there was an arbitration clause included in it *should be decided before costs are incurred in that arbitration.*’¹¹²

While the 1996 Act does not refer to the situation where the court is seized first with the jurisdictional challenge to arbitration, Waller LJ said recently that,¹¹³

on a proper construction of section 9 [of the 1996 Act] it can be said with force that a court should be satisfied *a)* that there is an arbitration clause, and *b)* that the subject of the action is within that clause, before the court can grant a stay under that section ... *But a stay under the inherent jurisdiction may in fact be*

award was made, although the courts do not have to do so pursuant to the English form of the competence-competence principle examined above, eg *Industrie Chimiche Italia Centrale v Alexander G Tsaviliris and Sons Maritime Co Pancristo Shipping Co SA and Bula Shipping Corp, The Choko Star* [1978] 1 Lloyd’s Rep 508 (CA).

¹¹² *Metal Scrap Trade Corp Ltd v Kate Shipping Co Ltd, The Gladys* [1990] 1 WLR 115 (HL) 117 (Lord Mackay, emphasis added). To similar effect, see: *Union Transport Plc v Continental Lines SA* [1992] 1 WLR 15 (HL) 17 (Lord Goff).

¹¹³ *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Services Inc* [2000] 1 Lloyd’s Rep 522 (CA). The apparent requirement of the court to stay proceedings under section 9(4) of the 1996 Act, unless the arbitration agreement is null, void or inoperative, and the power of the court to exercise its inherent power are reconcilable by interpreting section 9(4) as referring to circumstances of clear nullity. See n 24 above p 144; *John Downing v Al Tameer Establishment, Shaikh Khalid Al Ibrahim* (CA, 22 May 2002); cf R Merkin *Arbitration Law* (Looseleaf LLP London 1991) paras 6.22.1-6.22.2.

sensible in a situation where the court cannot be sure of those matters, but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first.

Again, in *Azov Shipping Co v Baltic Shipping Co*,¹¹⁴ while Colman J indicated that it would be better for the parties to refer jurisdictional questions to the court, this was based on considerations of expedience and practical convenience (ie saving time and costs) and not on a principle denying arbitrators the power to decide on the validity and existence of an arbitration agreement.

It is submitted, therefore, that courts may rely on their inherent power so as to stay legal proceedings despite allegations that the main contract containing an arbitration clause is non-existent or illegal. As such, courts need not apply the separability doctrine or necessarily decide initially on the jurisdiction of an arbitrator before a stay is granted.

Since the power of the court to stay its proceedings in the above manner is discretionary, it depends on weighing various factors that go to whether it would be better for parties to have the jurisdictional question decided provisionally by an arbitrator.¹¹⁵ These factors should include: a) whether there is 'a prima facie' valid agreement or a contract containing an arbitration clause; b) whether the determination

¹¹⁴ [1999] 2 Lloyd's Rep 159, 178.

¹¹⁵ The reluctance of the courts to exercise their inherent power in respect of arbitration might have developed for historical reasons. In particular, the courts were discouraged to refer jurisdictional questions to arbitration because these questions could, in some cases, be returned to the court under the old special case procedure. See for example: *Rex v Fulhan, Hammer Smith and Kensington Rent Tribunal, ex p Zerex* [1951] 2 KB 1, 11 (Devlin J); *Getreide-Import-Gesellschaft mbh v Contimar SA Compania Industrial Comercial Y Maritima* [1953] 1 WLR 793 (CA) 805, 808.

of the existence or legality of a contract also embraces the determination of the scope of the contract and its ingredients; c) the interests of the parties and the avoidance of unnecessary delay or expense, eg whether the dispute involves substantial evidential matters,¹¹⁶ and d) the likelihood of the challenge to an award on jurisdiction under section 67.¹¹⁷ Where these factors militate in favour of arbitration, an action can be regarded as an abuse of legal proceedings, which should be prevented by the exercise of the inherent power of the court to stay its proceedings.¹¹⁸

How, then, could the *Harbour Assurance* case have been decided without the widening of the separability doctrine?

Had the Court of Appeal considered the interpretation of previous cases that is based on the competence-competence principle and the possibility of exercising the inherent power of the court to stay its proceedings, it would have been possible to stay the action in the *Harbour Assurance* case on the basis set out above. In other words, since the competence-competence principle was well established at the time that case was decided, the Court of Appeal could have stayed its proceedings so as to enable the arbitrators to decide initially on their jurisdiction, ie to decide whether the contract containing an arbitration clause was legal. This would have satisfied the need for preventing delay in arbitration while, at the same time, preserving the power of the

¹¹⁶ *Azov Shipping Co V Baltic Shipping Co* [1999] 2 Lloyd's Rep 159, 161.

¹¹⁷ As far as relevant, section 67 of the Arbitration Act 1996 reads: '(1) A party to arbitral proceedings may (upon notice to other parties and to the tribunal) apply to the court (a) challenging any award of the tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no force, in whole or in part, because the tribunal did not have substantive jurisdiction. ... (2) the arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.'

¹¹⁸ *Etri Fans Ltd v NMB (UK) Ltd* [1987] 1 WLR 1110 (CA) 1114.

court to carry out later a full review of the legality of the contract as a jurisdictional issue.

Indeed, the Court of Appeal observed that it was unlikely that the contract was illegal. At worst, the contract was likely to be only unenforceable by the defendant. This indicates that the action was brought in breach of an apparently valid arbitration clause, and could have been treated as being an abuse of the court's proceedings. It also seems that no unreasonable delay and expense would have been incurred by reason of a subsequent judicial review had the matter been decided initially by the arbitrators.

Given this alternative basis for deciding the *Harbour Assurance* case, the widening of the separability doctrine was not necessary. As Mark Kanto has recently observed a court that rejects the separability doctrine in relation to illegal contracts need not bar arbitration but could refer the matter to arbitrators so as to enable them to decide on the legality of the contract as a jurisdictional matter.¹¹⁹

The failure by the Court of Appeal to consider that solution may be because of doubts about the existence and precise meaning of the competence-competence principle in English law. It may also be due to the fact that courts are generally reluctant to exercise their inherent power to stay legal proceedings, especially if the

¹¹⁹ M Kanto 'International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?' (2001) 24 Fordham Intl LJ 1122, 1163. Thus, Mark Kanto criticises a recent decision of the Supreme Court of Pakistan in *Hubco v WAPDA*, civil appeal number 1399 of 1999 (2000) 16 Arbitration Intl 439, where the Court treated an arbitration clause relating to an allegedly illegal contract as being invalid and ignored the possibility of referring the matter to arbitration as a jurisdictional question. Kanto suggests that the Court could and should have allowed arbitration to proceed so that arbitrators would decide on their jurisdiction (ie whether the contract was illegal), albeit provisionally.

case is otherwise governed by a statute.¹²⁰ In *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Services Inc*,¹²¹ the Court of Appeal observed that its inherent power should not be exercised where the issue is whether there is a contract or not, *unless the court considers that it is virtually certain that there is an arbitration agreement*. The Court assumed that courts, rather than arbitrators, would normally decide this issue if they are seized first with it.¹²²

It is suggested that this is the wrong approach. Courts should, in general, use their inherent power to stay proceedings where the issue is whether an agreement to arbitrate or a contract containing it existed. The same approach can also be applied to allegations of the illegality of the main contract. In order to breathe new life into the exercise of courts' inherent power in relation to jurisdictional challenges to arbitration, a statutory amendment to the 1996 Act should be introduced allowing courts to stay their proceedings, *on the basis of their inherent power*, where the existence of an arbitration agreement is in doubt. Thus, a court should exercise this power unless satisfied that it is in the best interest of the parties to have the jurisdiction of arbitrators decided first by the court, taking into account the factors considered above.

The courts should be willing to exercise this power if a party resisting arbitration brings an action for a declaration that the contract is illegal or non-existent, or where a defendant claims that the subject matter of the action arose under a contract containing

¹²⁰ *Etri Fans Ltd v NMB (UK) Ltd* [1987] 1 WLR 1110 (CA) 1114; *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540.

¹²¹ [2000] 1 Lloyd's Rep 522 (CA).

¹²² R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 6.22.3.

an arbitration clause, which the claimant denies. Courts should also consider exercising their discretion if a party who takes no part in arbitration challenges the jurisdiction of the arbitrators under section 72(1) of the 1996 Act.¹²³ The exercise of courts' discretion in such a case can help to prevent the duplication of proceedings.

This approach is consistent with party autonomy¹²⁴ and derives support from the policy of the 1996 Act.¹²⁵ It was the intention of the drafters of the 1996 Act 'that the basic rule was to be that the tribunal would make the rulings on jurisdiction in the first place rather than recourse being had to the courts.'¹²⁶ It is also consistent with the view that the English courts do not have to make a final decision on the existence and validity of an arbitration agreement on every occasion where the enforcement of that agreement is sought (for example, an application to appoint an arbitrator under section 18 of the 1996 Act).¹²⁷ As such, it is acceptable that a court can exercise its inherent power to stay an action without making a final decision on the validity of an arbitration agreement (or of the existence and legality of the main contract). Such a final decision can be made at a later stage, eg when the enforcement or setting aside of an award is sought.

¹²³ Section 72(1) of the 1996 Act provides that 'A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.'

¹²⁴ R Merkin *The Arbitration Act 1996* (2nd edn LLP London 2000) 38.

¹²⁵ This has been reflected in CPR 1998, PD 49G, para 6(2) which empowers the court to grant a stay 'where, a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement...' See for example: *Birse Construction Ltd v St David Ltd* [1999] BLR 194; *John Downing v Al Tameer Establishment, Shaikh Khalid Al Ibrahim* (CA, 22 May 2002).

¹²⁶ *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Baosteel Ocean Shipping Co)* [2000] 2 All ER (Comm) 70, 83.

¹²⁷ Same case 85.

To conclude, the suggested approach dispenses with the need for the widening of the separability doctrine so as to enable courts to refer disputes over the legality or existence of the main contract to arbitration. At the same time, it obviates the risk of dilatory allegations aimed at taking the dispute to the court instead of arbitration, while protecting the interest of a party resisting arbitration, who will not be bound to a final decision by arbitrators on the matter. That approach should be utilised so as to prevent possible delaying of arbitration based on the exceptions to the separability doctrine for non-existent and illegal contracts.

5. Possible Finality of an Arbitrator's Jurisdictional Decision

An arbitrator's jurisdictional decision may become final. For the sake of completeness, it is appropriate to explain the circumstances in which such a decision becomes final in order to ascertain whether this finality clashes with the object of the exceptions to the separability doctrine for non-existent and illegal contracts, whose effect is to make arbitrators' relevant decisions fully reviewable by the courts. The justification for these exceptions is set out in chapters VI and VII respectively. Suffice it to say here that the non-existent contract exception rests on the necessity of ensuring parties' consent to arbitrate, whereas the illegal contract exception is based on public policy considerations.

The 1996 Act requires parties to raise jurisdictional objections within prescribed time limits, which apply at two stages.¹²⁸ The first is when arbitration is commenced, urging parties to raise jurisdictional objections before taking a step in the proceedings.¹²⁹ The courts applied this restriction even before the 1996 Act, and a party who failed to comply with this restriction was treated as having waived its right to challenge the jurisdiction of arbitrators' in the court.¹³⁰

The second time limit runs from the delivery of the award, requiring jurisdictional challenges to be made within a prescribed time in courts. The 1996 Act also provides that a party may challenge in a court 'any award of the arbitral tribunal as to its substantive jurisdiction' or apply to it for setting aside an award 'because the tribunal did not have substantive jurisdiction,'¹³¹ provided such an application or challenge is made within 28 days of the date of the award.¹³² A party may lose his right to such a challenge if he fails to raise these objections within 'such time as is allowed by the arbitration agreement or the tribunal or [the 1996 Act]' or fails to exhaust 'any available arbitral process of appeal or review or [for challenging the award in courts]' within the relevant time limits.¹³³

¹²⁸ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 7.8.

¹²⁹ The Arbitration Act 1996, s 31.

¹³⁰ *Westminster Chemicals & Produce Ltd v Eichholz & Loester* [1954] 1 Lloyd's Rep 99; MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 579-582.

¹³¹ The Arbitration Act 1996, s 67(1).

¹³² The Arbitration Act 1996, s 70(3).

¹³³ The Arbitration Act 1996, s 73.

Moreover, parties may agree to arbitrate a dispute over the validity of the arbitration agreement in a final manner. That is, the parties may agree that the arbitrator's decision shall be final.

The finality of arbitrators' decisions on the existence of the main contract containing an arbitration clause (which is treated as a jurisdictional question) that may result from the non-compliance with the above time limits does not undermine the justification for the non-existent contract exception to the separability doctrine. This is because it is under the control of the parties to allow these time limits to expire. As such, parties' consent is not jeopardised. Likewise, if parties agree to arbitrate a dispute over the existence of an arbitration agreement or a contract containing an arbitration clause the finality of the arbitrator's decision on the matter does not clash with the non-existent contract exception to the separability doctrine. However, the finality of arbitrators decisions on the existence of the contract must be based on a clear and explicit agreement between the parties that constitutes more than 'a competence-competence agreement,' whereby a party resisting arbitration reserves the right to challenge the decision of the arbitrator in a court. This has been explained above.¹³⁴

As regards the illegality exception to the separability doctrine, the interposition of public policy in the jurisdictional question of the legality of the main contract should

¹³⁴ Above pp 158-162. cf R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 7.38, doubting whether an *ad hoc* agreement could ensure the finality of an arbitrator's decision on its jurisdiction given the mandatory nature of section 67 of the 1996 Act that provides for the right of the parties to challenge such a decision in a court. However, section 67 would still apply although the jurisdictional issue would shift to the existence and scope of an *ad hoc* agreement. See: D Altaras 'Ad Hoc Agreements to Jurisdiction and Arbitration Act 1996 s 67(1)(a)' (2002) 68 *Arbitration* 165, 166-167.

prevent the finality of an arbitrator's decision on the matter regardless of time limits or the agreement of the parties. That is, the courts should always be able to review the legality of the main contract on the basis of sections 1(b) and 81(1)(c) of the 1996 Act. The former provides for restrictions of 'public interest' on the autonomy of parties.¹³⁵ Section 81(1)(c) reads:

Nothing in this Part [Pt I] shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to ... the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

Thus, it is generally accepted that a public policy defence in arbitration can, and should be allowed to, be raised at any stage precisely because such a defence does not relate merely to the protection of a party's private interest.¹³⁶ This, in turn, would encourage arbitrators to inquire into the legality of contracts on their own motion.¹³⁷

It should be finally noted that the framework of the competence-competence principle applies to an arbitrator's decision upholding its jurisdiction as well as to a negative ruling that denies jurisdiction.¹³⁸

¹³⁵ Chapter II above pp 66-68.

¹³⁶ P Mayer 'La Sentence Contraire a l'Ordre Public au Fond' [1994] *Revue de l'Arbitrage* 615, 626; C Seraglini 'Note under the CCI Case' [2001] *Revue de l'Arbitrage* 781, 785-786.

¹³⁷ A Redfern and M Hunter *Law and Practice of International Commercial Arbitration* (3rd edn Sweet and Maxwell London 1999) 153; C Seraglini 'Note under the CCI Case' [2001] *Revue de l'Arbitrage* 781, 787-789.

¹³⁸ It is noteworthy that an arbitrator's negative ruling on its jurisdiction is a valid award respecting its reasons, eg the non-existence or illegality of the main contact: J-B Racine *L'Arbitrage Commercial International et L'Ordre Public* (Librairie Générale de Droit et de Jurisprudence Paris 1999) 125; see also R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 7.39. It has, however, been suggested that a negative ruling by an arbitrator on his jurisdiction should not be subject to review by the courts because, on the one hand, it is no threat to a party that resists arbitration and, on the other hand, a party that asserts the jurisdiction of arbitrators should be treated as having waived its right to

6. Conclusion

It is submitted that, despite doubts about the existence of the competence-competence principle in English law before the 1996 Act, the courts did accept it.

The competence-competence principle operates, where an arbitrator is faced with a challenge to his jurisdiction, on the basis of the agreement of the parties. This agreement is made under the reservation of the right to challenge the jurisdiction of arbitrators in a court ('a competence-competence agreement'). English courts usually find such an agreement to have been concluded through the actual reference of the dispute to arbitration.

Moreover, not only have English courts accepted arbitrators' power to examine their jurisdiction when faced with the matter, but they have also recognised the possibility of staying an action by virtue of their inherent power so as to afford arbitrators with the opportunity to make an initial ruling on their jurisdiction. While this inherent power is not regulated in the 1996 Act, the framework of the competence-competence principle under the Act does not deny the existence of that power.

The *Harbour Assurance* case could have been decided on the basis of the competence-competence principle without widening the separability doctrine.

challenge the outcome of arbitration in the court: IND Wallace 'Arbitration: No Contract, No Jurisdiction?' (2002) 118 LQR 175, 179.

Assuming that the dispute over the legality of the contract raises a jurisdictional issue (ie separability is inapplicable), the Court of Appeal could have exercised its inherent power to stay its proceedings. This is especially because the facts and observations of the judges in that case show that a stay would have been in line with the relevant factors considered in a number of cases (eg the main contract was likely to be legal and a stay would save parties' time). In short, the widening of the separability doctrine in that case was unnecessary.

It has been argued that, along with the exceptions to the separability doctrine for illegal and non-existent contracts, English courts should, in principle, exercise their inherent power to stay proceedings in respect of the existence and legality of the main contract unless satisfied that it would be in the best interest of the parties not to grant a stay. Indeed, the policy of the 1996 Act seems to encourage such an approach. However, a statutory provision should be introduced so as to alleviate the hesitation of the courts in this respect. The suggested approach to the competence-competence principle will mitigate the risk of dilatory allegations of the illegality and non-existence of the main contract.

CHAPTER V

THE SEPARABILITY DOCTRINE – A COMPARATIVE APPROACH

1. Introduction

Although the separability doctrine has been widely recognised, there seems to be no evidence that it has the same meaning, or has the same basis, in all jurisdictions that accept it.¹ Yet, the Court of Appeal, in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*,² and the draftsmen of the English Arbitration Act 1996 assumed that the separability doctrine was a general principle of arbitration without indicating possible practical or theoretical differences between different jurisdictions.

This chapter examines the separability doctrine in other jurisdictions for two main purposes. The first is to ascertain whether, in all jurisdictions, it denotes the same specific circumstances in which an arbitration clause subsists regardless of the fate of the main contract. The second purpose is to analyse the basis of the separability doctrine in other jurisdictions, ie is it based on the agreement of the parties or is it a rule of law? While English courts derived the doctrine from the consensual nature of arbitration (Chapter III), other jurisdictions may see it as founded on another basis, leading to

¹ A Broches *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Deventer 1990) 75.

² [1993] QB 701(CA).

different consequences. This will help us relate this doctrine to the various theories of arbitration explained in chapter I.

The comparative study of the separability doctrine will also lead us to examine a novel dimension which seems to be accepted only by the French courts. This novel dimension is the separability of the arbitration clause from all national laws, which the French courts call 'the full autonomy' or 'the self-effectiveness' of the arbitration clause and which they apply to any international arbitration agreement, whether or not it is contained in another contract. While this is not a necessary consequence of the separability doctrine, the French courts rest it on this doctrine. In particular, it will be asked whether this novel French approach to separability affects whether an arbitration clause survives despite the non-existence of the main contract.

Throughout this chapter, the English version of the separability doctrine (as examined in chapter III) should be borne in mind. It should be remembered that the current position of English law is that the separability doctrine applies, *inter alia*, in respect of the illegality of the main contract. However, on the basis of the continuing practice of the English courts based on the *Harbour Assurance* case, the separability doctrine, despite section 7 of the Arbitration Act 1996, does not lead to arbitration clauses being upheld in non-existent contracts (ie where the parties never reached consensus *ad idem*).

The structure of this chapter is as follows. Section 2 will examine the separability doctrine under a number of selected international rules and conventions on arbitration. Section 3 will study the separability doctrine in two common law jurisdictions other than England, namely Australia and the United States. This will help us to discern whether there is a consistent common law approach to this doctrine. In section 4, we will study the situation in French law, which appears to present a particularly distinctive approach to the separability doctrine.

2. The Separability Doctrine under International Arbitration Rules and Conventions

The first explicit recognition of the separability doctrine appeared in the arbitration rules of the International Chamber of Commerce (ICC) of 1955, and was reinstated in subsequent ICC rules, virtually in the same wording.³ The UNCITRAL arbitration rules of 1976 and the UNCITRAL Model Law on international commercial arbitration also refer specifically to that doctrine.⁴

Relevant international conventions, however, do not regulate the separability doctrine directly. These conventions include the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York

³ Y Derains and EA Schwartz *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International The Hague 1998) 79.

⁴ See, generally, M Blessing 'The Major Western and Soviet Arbitration Rules: A Comparison of the Rules of UNCITRAL, UNCITRAL Model Law, LCIA, ICC, AAA and the Rules of the USSR Chamber of Commerce and Industry' (1989) 6 *J Intl Arbitration* 8.

Convention);⁵ the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 (the Washington Convention);⁶ and the European Convention on the Enforcement of Arbitration Awards of 1961 (the European Convention).

(1) *The UNCITRAL Model Law on Arbitration*

The UNCITRAL Model Law is not a set of ‘consensual rules’ that parties can incorporate into their arbitration agreement; it is not a convention either. It was devised as a model for states to follow in making their respective arbitration laws, with a view to harmonising national arbitration laws.⁷ Article 16(1) thereof recognises the separability doctrine. It reads as follows:

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.

While this article regulates the case of invalid contracts, it does not refer explicitly to the case where the main contract never came into existence; the first sentence

⁵ New York, 10 June 1958; TS 20 (1976); Cmnd 6419.

⁶ Washington, 18 March 1965; TS 25 (1967); Cmnd 3255.

⁷ The Model Law for International Arbitration was adopted by the United Nations Commission on International Trade Law on 21 June 1985, UN.doc A/40/17. See, generally, G Herrmann ‘The UNCITRAL Model Law – Its Background, Salient Features and Purposes’ (1985) 1 *Arbitration Intl* 6.

concerns the existence of an arbitration agreement as such.⁸ Some commentators suggest that this case remains outside the scope of the separability doctrine under Article 16(1). For example, Aron Broches submits that⁹

[a] particular question which [Article 16(1)] raises is whether the last sentence (“A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause”) has the effect of maintaining the arbitration clause in force even though the agreement of which it forms part never came into being or was null and void *ab initio*. I believe that it is common ground that the first situation [the agreement never came into being] constitutes an exception to the principle [the separability doctrine].

Equally, Pierre Sanders points out that ‘[i]f there is no contract at all, the legal basis of the arbitrator’s powers which reside in the arbitration clause found in the contract, is also missing.’¹⁰

This interpretation may be sound, since article 6(4) of the ICC Rules (which will be examined later) mentions the non-existence of the contract in addition to it being ‘null and void.’ Thus, it indicates that the former case is not included within the latter. This interpretation of Article 16(1) of the Model Law is consistent with the version of the separability doctrine that was applied in the *Harbour Assurance* case, ie separability

⁸ Y Derains and EA Schwartz *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International The Hague 1998) 105.

⁹ A Broches *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Deventer 1990) 78.

¹⁰ Broches (n 9 above) 78. Aron Broches also doubts whether article 16(1) applies if the main contract is initially invalid, as opposed to non-existent contracts. cf CH Petrus ‘Spanish Perspectives on the Doctrines of *Kompetenz-Kompetenz* and Separability: A Comparative Analysis of Spain’s 1988 Arbitration Act’ (2000) 11 *American Rev Intl Arbitration* 397, 404.

subject to an exception for non-existent contracts (lack of a meeting of minds between parties).

By contrast, some commentators argue that Article 16(1) applies even where no contract existed. As such, Article 16(1) is assumed to be as broad as section 7 of the Arbitration Act 1996 appears on its face to be (ie to apply separability even if the dispute turns on the meeting of minds between parties). While recognising that the Model Law is not clear on this aspect, Berthold Goldman contends that it covers, albeit implicitly, the case where there is no contract so that an arbitrator can determine the existence of the contract, and his negative finding will not necessarily entail the nullity of the arbitration clause. Thus,¹¹

international sources to which one may refer in order to ascertain the existence of a transnational customary rule in respect of our question [the scope of the separability doctrine] are not all clear. [] The text [of Article 16(1)] says nothing regarding the power of arbitrators to determine the existence of the main contract, but we can assume that, by referring to the nullity of the contract, *this power is implicitly recognised*, since the last sentence envisages that this issue may be raised. However, no reference is made to the consequences of determining that the main contract is non-existent in relation to the arbitration clause. We can assume that, generally, the non-existence of the main contract entails the non-existence of the arbitration clause, *but the case may not necessarily be as such*.

The enactment of Article 16(1) varies in countries that have adopted the Model Law; as has the interpretation by the courts of the particular country's equivalent clause to Article 16(1). This can be illustrated by reference to Hong Kong.

¹¹ B Goldman 'Note under the *Navimpex Case*' [1989] *Revue de l'Arbitrage* 642, 646-647.

The UNCITRAL Model Law was adopted by Hong Kong for international arbitration in 1989,¹² and Article 16 was reproduced without any change. Interpreting this article, the High Court of Hong Kong held that the separability doctrine applied where the main contract was alleged to be *non-existent*.¹³ In *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd*,¹⁴ while the plaintiffs sought to compel arbitration, the defendants denied that they ever agreed to the contract containing the arbitration clause. Kaplan J held that, because the arbitration clause was separable under Article 16, arbitrators could decide the existence of the main contract, but subject to subsequent judicial review. It has been suggested, therefore, that Article 16 'applies the doctrine of *total* separability of the arbitration agreement from the underlying contract of which it forms part.'¹⁵ This interpretation is 'bold indeed, given that the basis of the arbitrator's jurisdiction is ultimately consensual.'¹⁶

Commenting on this decision, Kaplan J explained that the separability doctrine under Article 16 (which applies to international arbitration in Hong Kong) was broader than what had been recognised in the *Harbour Assurance* case (which remains applicable to domestic arbitration in Hong Kong); the latter excluded the case of the

¹² Arbitration (Amendment) No 2 Ordinance 1989, which came into force in 1990, see (1990) 6 *Arbitration Intl* 358.

¹³ A different view is to be found in Australia, which will be examined in section 3 below. cf P Sanders *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (Kluwer Law International The Hague 1999) 174-175, saying that the case of non-existent contract is unclear in jurisdictions that have adopted the Model Law.

¹⁴ (1992) XVII *Ybk Commercial Arbitration* 289.

¹⁵ N Kaplan and R Morgan 'Hong Kong' in AJ Van Den Berg (ed) *ICCA Handbook for International Commercial Arbitration* (Looseleaf Kluwer Law and Taxation Deventer Volume II supp 29 December 1999) 24.

¹⁶ FP Davidson *Arbitration* (W Green Edinburgh 2000)197.

non-existence of the main contract. Thus, referring to Steyn J's view at first instance in that case – which in this respect was subsequently upheld by the Court of Appeal – that 'separability' applied where the contract was initially invalid, Kaplan J wrote that¹⁷

so far as the doctrine of separability is concerned, it seems strange to have a *complete doctrine of separability* as enshrined in Article 16 for international arbitrations but a slightly more modified form of the doctrine for domestic cases, that is, of course, if Hong Kong were to follow the *Harbour Assurance* decision in relation to domestic arbitrations.

But it should be noted that Steyn J himself interpreted Article 16 as including a 'non-existent contract' exception. After the English Court of Appeal's decision in the *Harbour Assurance* case, which explicitly excluded the non-existence of contracts from the scope of 'separability' as chapter III has shown, Steyn J wrote that 'England has now adopted the approach of the Model Law.'¹⁸ Thus, Steyn J assumed that Article 16 of the Model Law does not apply separability where the contract is non-existent.

It is submitted that the High Court of Hong Kong was in fact applying the competence-competence principle, allowing arbitrators to decide their jurisdiction (ie whether a contract containing an arbitration clause existed). This is because the Court conceded that the arbitrators' decision would be subject to subsequent (full) judicial review, whereas the substantive effect of the separability doctrine would clothe their

¹⁷ N Kaplan 'The Model Law in Hong Kong – Two Years On' (1992) 8 *Arbitration Intl* 223, 229-230.

¹⁸ J Steyn 'England's Response to the UNCITRAL Model Law of Arbitration' (1994) 10 *Arbitration Intl* 1, 6.

decision with finality (subject to the minimal review applicable to all arbitration awards).

Marcus Jacobs, on the other hand, approves Kaplan J's view. According to Jacobs, this view was affirmed in *Shenzhen Nan Da Industrial & Trade United Co Ltd v FM Intl Ltd*.¹⁹ In this case, Kaplan J held that an arbitrator could decide whether an arbitration clause existed, where parties exchanged conflicting contractual documents referring to arbitration both in China and Hong Kong. Jacobs cites this case as a rare authority supporting the contention that the separability doctrine applies to 'those cases where there is a denial that either the principal contract or the arbitration clause was ever concluded.'²⁰ However, while the basis of this decision is Article 16 of the Model Law, it is submitted again that it concerns the competence-competence principle, especially because the allegations related to the arbitration clause as such. (Both principles may have been confused because Article 16 regulates them in one paragraph. The interrelation between those two principles has been examined in chapter IV.)

It is submitted that Article 16(1) is best interpreted as including a 'non-existent contract' exception to the separability doctrine. As Professor Davidson points out, Article 16(1) can be interpreted as aiming to 'allow the tribunal merely to rule on the existence of the [main] agreement, where it is alleged that it is legally non-existent, as being void ab initio. In other words, it confers the same kind of jurisdiction as *Harbour*

¹⁹ (Supreme Court of Hong Kong, 2 March 1991), cited in MS Jacobs 'The Separability of the Arbitration Clause: Has the Principle been Finally Accepted in Australia?' (1994) 68 *The Australian LJ* 629, 638 footnote 72.

²⁰ Jacobs (n 19 above) 630, 638.

Assurance, but like that case stops short of conceding jurisdiction to the arbitrator where there is no agreement.²¹

(2) *The UNCITRAL Arbitration Rules*

Article 21(2) of the UNCITRAL arbitration rules of 1976 reads:

The arbitral tribunal has the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules 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.

This provision is clearer than Article 16(1) of the Model Law in that it empowers arbitrators to decide on *the validity or existence of the main contract*.²² However, it does not refer to this question in the last sentence, which appears to deal with the *final* decisions that arbitrators can make by virtue of the separability doctrine. One can interpret Article 21(2) as laying down that arbitrators may decide the existence of the contract in a non-binding manner pursuant to the ‘competence-competence’ principle; and that it does not dictate that separability applies even if the contract is non-existent.

²¹ FP Davidson *Arbitration* (W Green Edinburgh 2000) 198.

²² Article 23(1) of the 1998 arbitration rules of the London Court of International Arbitration is almost the same as Article 21(2) of the UNCITRAL Rules. cf the London Maritime Arbitration Association Terms 1994 (1st Sch) which exclude the power of an arbitrator to decide on the validity or existence of the main contract.

The alternative interpretation is that Article 21(2) makes no distinction between invalid and ‘non-existent’ contracts.²³ Some think that this is clearly so. For example, Pierre Sanders observes that ‘[t]he view of the Rules on this famous question of separability [...] could hardly have been more clearly expressed.’²⁴ And according to another commentator, Article 21 ‘ensures that the arbitral tribunal may determine the existence or validity of the contract of which the arbitration agreement forms a part, and *may decide that the main contract is invalid or non-existent, without necessarily coming to the conclusion that consequently it lacks jurisdiction.*’²⁵ The italicised phrase reveals the consequence of the separability doctrine.

The former interpretation, however, also has its supporters. For example, Berthold Goldman points out that, ‘like Article 16 of the Model Law, Article 21 is silent as to *the consequences of the non-existence of the contract* in relation to the arbitration clause.’²⁶ In other words, if the finding by an arbitrator that the main contract never existed affects the arbitration clause, then Article 21 is not so much concerned with the separability doctrine as it is with the competence-competence principle.²⁷

²³ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 201.

²⁴ P Sanders ‘Commentary on UNCITRAL Arbitration Rules’ (1977) II Ybk Commercial Arbitration 172, 200.

²⁵ JJ Van Hof *Commentary on the UNCITRAL Arbitration Rules* (Kluwer Law and Taxation Deventer 1991) 143.

²⁶ B Goldman ‘Note under the *Navimpex* Case’ [1989] *Revue de l’Arbitrage* 642, 647.

²⁷ cf the award of 17 November 1994 (1996) XXI Ybk Commercial Arbitration 13; *ad hoc* awards of 27 October 1989 and 30 June 1990 (1994) XIX Ybk Commercial Arbitration 11.

(3) *The ICC Arbitration Rules*

The ICC rules of arbitration of 1998 reaffirm the separability doctrine. Article 6(4) provides that

Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or any allegation that it is non-existent, provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.

This is a far clearer formulation than the previous two we have looked at. It plainly lays down a broad separability doctrine that applies even to non-existent contracts. ‘As compared with many other arbitration rules and laws, the separability principle is formulated in Article 6(4) in very broad terms.’²⁸ It applies in cases of invalidity or non-existence of the contract so that an arbitration clause will persist, enabling the arbitrator to determine the respective rights of the parties. Commenting on a similar provision in a previous version of the ICC Rules (article 8(4) of ICC Rules 1975), Berthold Goldman suggests that ‘ICC Rules are ... crystal clear[;] *no distinction is made between the nullity and non-existence of the contract*, regarding the jurisdiction of the arbitrator or its scope.’²⁹ Consequently, Philippe Fouchard suggests, ‘there is no

²⁸ Y Derains and EA Schwartz *A Guide to the New ICC Rules of Arbitration* (Kluwer Law International The Hague 1998) 105.

²⁹ B Goldman ‘Note under the *Navimpex Case*’ [1989] *Revue de l’Arbitrage* 642, 647.

doubt that if the arbitrators held the main contract to be *void or even non-existent*, they must rule accordingly without prejudicing their jurisdiction by the same token.³⁰

Despite the clear wording, Redfern and Hunter, however, do not acknowledge the rejection of the non-existent of the non-existent contract exception. They suggest that ‘although many institutional rules and national laws draft their separability rules to preserve the validity of arbitration clauses that are part of “non-existent contracts,” this non-existence cannot mean “never existed,” but must mean “ceased to exist.”’³¹

Arbitral tribunals applying the ICC rules do not seem to have pronounced specifically on whether the separability doctrine applies to ‘non-existent’ contracts.³² One arbitral tribunal observed that ‘if there is a binding agreement to arbitrate between the parties, this must be based on a substantive agreement.’³³ But another did not seem to require the main contract to be initially valid.³⁴

³⁰ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 200.

³¹ A Redfern and M Hunter *Law and Practice of International Commercial Arbitration* (3rd edn Sweet and Maxwell London 1999) 267.

³² eg ICC case 1526 of 1968 (1974) 101 *Journal du Droit Intl* 915; ICC case 1507 of 1970 (1974) 101 *Journal du Droit Intl* 913; First preliminary award in ICC case no 1512 of Decemebr 18, 1967 (1980) V *Ybk Commercial Arbitration* 170, 173-4; Preliminary award of 14 January 1982, *Intl Law Reports*, Volume 96, 252, 268-269; ICC case 1512 in Y Derains and S Jarvin *Collection of ICC Arbitral Awards 1974-1985* (Kluwer Law and Taxation Deventer 1990) 33, 36; ICC case 5485 in Y Derains, S Jarvin and J Arnaldez *Collection of ICC Arbitral Awards 1986-1990* (Kluwer Law and Taxation Deventer 1994) 199, 203; Interim award in case no 7263 of 1994 (1997) XXII *Ybk Commercial Arbitration* 92.

³³ ICC case number 7626 of 1995 (1997) XXII *Ybk Commercial Arbitration* 132, 137; ICC case number 6268 of 18 May 1990 (1991) XVI *Ybk Commercial Arbitration* 119, 120.

³⁴ ICC case no 5485 of 18 August 1987 (1989) XIV *Ybk Commercial Arbitration* 156; ICC case number 4145 of 1983 (first interim award) (1987) XII *Ybk Commercial Arbitration* 97.

(4) *International Conventions on Arbitration*

Relevant international conventions do not regulate the separability doctrine directly. The New York Convention is silent as to the relationship between an arbitration clause and the main contract. The fate of that clause will, therefore, depend ultimately on the position of the applicable law.³⁵ By contrast, Schwebel contends that the convention recognises separability 'by implication,' since it does not provide for the invalidity of the main contract as a ground for refusing to recognise or enforce an award.³⁶ However, one ground to refuse to enforce an award is the invalidity of the arbitration clause, and the convention leaves open the question of the impact of the invalidity of the main contract on the arbitration clause. Therefore, the former view is consistent with the scheme of the convention which leaves separability to be determined under the applicable law.³⁷

The same can be said of the Washington Convention. However, since article 41 of this Convention provides for the power of arbitrators to decide on their own jurisdiction, some commentators suggest that it implicitly recognises the separability doctrine.³⁸ But this view assumes that the power of arbitrators to determine their

³⁵ AJ Van Den Berg *The New York Arbitration Convention* (Kluwer Law and Taxation Deventer 1981) 145-6; R David *Arbitration in International Trade* (Kluwer Law and Taxation Deventer 1985) 195.

³⁶ SM Schwebel *International Commercial Arbitration: Three Salient Problems* (Grotius Cambridge 1987) 22.

³⁷ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 203.

³⁸ Schwebel (n 36 above) 15-16; M Hirsch *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Martinus Nijhoff Dordrecht 1993) 51; Gaillard (n 37 above) 203.

jurisdiction pre-supposes the separability doctrine (a view which has been scrutinised and rejected in chapter IV).³⁹

The European Convention also does not expressly refer to separability. Article V(3) of this convention provides that 'subject to any subsequent judicial control ... under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to ... rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement, *or of the contract of which the agreement forms part.*' The italicised phrase allows arbitrators to decide on the validity of the main contract, and it is possible to interpret this as recognising the separability doctrine.

However, the Convention makes no express reference to that doctrine. On its face, Article V(3) deals with the power of arbitrators to decide on their jurisdiction subject to 'subsequent judicial control.' Moreover, since the provision for judicial review is inconsistent with the separability doctrine, the best interpretation of Article V(3) is that it regulates only the power of arbitrators to determine their jurisdiction.⁴⁰

Finally, it should be mentioned that the European Convention Providing A Uniform Law on Arbitration prepared within the framework of the Council of Europe in 1966, which never came into force,⁴¹ provides that 'a ruling that the contract is invalid

³⁹ Above 139-141, 162.

⁴⁰ DT Hascher 'The European Convention on International Commercial Arbitration – Commentary' (1990) XV Ybk Commercial Arbitration 624, 643.

⁴¹ H Smit and V Pechota *International Arbitration Treaties* (Juris Publishing 1998) 159.

shall not entail *ipso jure* the nullity of the arbitration agreement contained in it.⁴² It has been suggested that this provision ‘seems narrower than the UNCITRAL and ICC rules. The use of the term “invalid” rather than the stronger “void” or “null” leaves open the question of whether the arbitrators have the right to rule on the substantive issue of the dispute after a determination that the original contract is void.’⁴³

In conclusion, while most international arbitration rules – unlike relevant international conventions – have purported to lay down the separability doctrine, the scope of the provisions is not necessarily the same and is, to varying degrees, unclear. In particular, the case of non-existence remains contentious. In his brief review of the separability doctrine in several arbitration rules and laws, Carl Svernlöv summarises the position accurately when he writes ‘it is unclear whether the separability of an arbitration clause in agreements alleged never to have existed has been accepted in international commercial arbitration.’⁴⁴

3. The Separability Doctrine in Other Common Law Jurisdictions

There seems to exist a similar approach to the separability doctrine across the common law jurisdictions. Indeed, courts of common law countries followed relevant English

⁴² SM Schwebel *International Commercial Arbitration: Three Salient Problems* (Grotius Cambridge 1987) 20.

⁴³ CM Svernlöv ‘What Isn’t, Ain’t? The Current Status of the Doctrine of Separability’ (1991) 8 J Intl Arbitration 37.

⁴⁴ Svernlöv (n 43 above) 37.

case law as it evolved over the decades. In order to demonstrate this, we will look at Australia and the United States.

(1) *The Separability Doctrine in Australia*

It is useful to examine Australian law not only as an example of a common law jurisdiction, but also because it has adopted the Model Law by enacting the International Arbitration Amendment Act No. 25 of 1989, which amended and renamed the International Arbitration Act of 1974 (hereinafter: the 1989 Act). This Act applies to international commercial arbitration as defined under the Model Law.⁴⁵

Australian arbitration law has moved from a position similar to *Heyman v Darwins* towards the application of the separability doctrine in relation to initially invalid (including illegal) contracts. The Australian courts, however, distinguish non-existent contracts, ie which are disputed on the ground of the absence of consensus *ad idem* between parties. As such, the Australian courts adopt the same position as the English Court of Appeal in the *Harbour Assurance* case.

(i) Early recognition of the separability doctrine: applying *Heyman v Darwins*

⁴⁵ MC Pryles 'Australia' in AJ Van Den Berg (ed) *ICCA Handbook for International Commercial Arbitration* (Looseleaf Kluwer Law and Taxation Deventer Volume 1 Supp 13 September 1992).

The Australian courts initially followed (as they were then bound to do) the ruling of the House of Lords in *Heyman v Darwins Ltd*,⁴⁶ accepting that an arbitration clause could not be effective where the main contract was invalid or non-existent. The separability doctrine applied only to supervening events affecting the effectiveness of the main contract (eg frustration). In *York Air Conditioning and Refrigeration (A/Sia) Pty Ltd v The Commonwealth*,⁴⁷ a dispute arose as to whether the price fixing under the contract satisfied the requirement of certainty. Citing *Heyman v Darwins*, Williams J held that it did, and a relevant arbitration clause could apply. Thus,⁴⁸

[t]he submission [ie the arbitration clause] would not include a dispute as to whether there is a concluded contract or not (*Heyman v Darwins Ltd* (1942) AC 356). But the presence of [that clause] in the conditions points strongly to an intention of the parties that the standard conditions should be complete without further agreement, and that any disputes or differences that might arise in their performance should be settled by arbitration or by the Court.

This view was affirmed in *Codelfa Construction Pty Ltd v State Rail Authority*.⁴⁹ Holding that a dispute over the frustration of the main contract could be referred to arbitration, the High Court of Australia went on to explain the general principle applying in such cases, saying that⁵⁰

[i]n *Heyman* their Lordships drew a distinction between a contract void *ab initio*, in which event there is no valid

⁴⁶ [1942] AC 356 (HL). See above pp 91-101.

⁴⁷ (1949) 80 CLR 11.

⁴⁸ Same case 29-30, upheld by the High Court of Australia at (1949) 80 CLR 46.

⁴⁹ (1982) 149 CLR 337.

⁵⁰ *Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337, 364-365 (emphasis added).

submission to arbitration, and a valid contract which is subsequently repudiated, where acceptance of the repudiation leaves the contract, including the arbitration clause, on foot for the purpose of enforcement, though performance of the contract is at an end. [...] *In its application to an arbitration clause the distinction between a contract which is void ab initio and a contract which is valid but subsequently repudiated is well taken...*

The separability doctrine has been enshrined in the 1989 Act, at least in respect of international arbitration. Article 16(1) of the Model Law, which is stated above, has become part of Australian arbitration law. However, the Act did not have immediate influence on the position of Australian courts regarding the scope of the separability doctrine. In *IBM Australia Ltd v National Distribution Services*,⁵¹ the Court of Appeal of New South Wales decided whether claims under a particular Act (the Trade Practices Act 1974) were arbitrable. In examining the powers of arbitrators, the court considered that arbitrators could not decide on the validity of the main contract. Saying that only courts had this power, Clarke JA added that '[t]he significance of this power is that the effect of a declaration that a contract, which contains an arbitration clause, is void *ab initio* is that there never was a contractually valid submission to arbitration.'⁵² Handley JA, too, pointed out that an arbitrator acting on the basis of an arbitration clause contained in a contract 'cannot exercise a power to avoid that contract *ab initio*.'⁵³

Although this case did not fall within the ambit of the 1989 Act governing international arbitration, critics of this decision argued that the Act broadened the

⁵¹ (1991) 22 NSWLR 466 (The New South Wales Court of Appeal).

⁵² *IBM Australia Ltd v National Distribution Services* (1991) 22 NSWLR 466, 485 (The New South Wales Court of Appeal).

⁵³ Same case 487.

separability doctrine, and, therefore, the court should have extended this doctrine in domestic arbitration as well. According to Andrew Rogers QC,⁵⁴

[t]he legislation is clear evidence of acceptance in Australia of the principle of separability. Thus, at least for international commercial arbitrations, the statements in *IBM* do not accurately represent the law. It is submitted that Australian courts should adopt the principle in domestic arbitrations also. [...] Even though *IBM* was not an international arbitration, *it was open to the Court of Appeal to endorse the principle of separability in a domestic context.*

Noting that judicial views restricting the separability doctrine were obiter, Andrew Rogers QC went on to say that ‘[i]t is submitted that the view expressed in *Codelfa* is ripe for reconsideration. It is preferable to adopt a domestic law which accords with [the 1989 Act]. That Act shows that the Legislature *accepts in full the principle of separability in an international context.*’⁵⁵

(ii) The widening of the separability doctrine in line with the *Harbour Assurance* case

Andrew Rogers’ view is in line with *QH Tours Ltd and Sazalo Pty Ltd v Ship Design & Management (Aust) Pty Ltd and Charles Russel Gibbons*.⁵⁶ The plaintiffs sought an order that a contract for the construction of a ship be declared void *ab initio* or from some later time on grounds of false representations that induced them to enter

⁵⁴ A Rogers and R Luders ‘Separability – The Indestructible Arbitration Clause’ (1994) 10 *Arbitration Intl* 77, 81 (emphasis added).

⁵⁵ Rogers (n 54 above) 88 (emphasis added).

⁵⁶ (1991) 33 FCR 227 (The Federal Court of Australia).

into it. Accepting the application of the defendants for a stay of the proceedings on the basis of an arbitration clause contained in the contract, Foster J held that the separability doctrine applied, where the contract was void, even in domestic arbitration. His Honour gave no reasons for this view other than that the statements of Clarke and Hadley JJA in the *IBM* case were obiter, since ‘there was no issue [in that case] as to the arbitrator’s power to declare the contract in question void *ab initio*.’⁵⁷ He also observed in separate brief statements that it was ‘highly undesirable that [] the litigation should be split’ between courts and arbitrators, ‘having regard to the most desirable increase in the use of arbitration for the speedy determination of commercial disputes.’⁵⁸

Foster J took the view that *Heyman v Darwins* was not determinative on the relevant issue. Having considered lengthy passages from that case, his Honour concluded that, ‘one could not derive from [it], any firm rule that there was a legal prohibition upon parties to a submission to arbitration granting to the arbitrator the power to declare their agreement void *ab initio*.’⁵⁹

This decision was warmly accepted by the Court of Appeal of New South Wales in *Ferris v Plaister*,⁶⁰ where an arbitration clause was given effect to despite allegations that the contract containing the arbitration clause had been induced by fraud. Adopting the same view as Foster J on judicial dicta to the contrary, Kirby P also based his

⁵⁷ *QH Tours Ltd and Sazalo Pty Ltd v Ship Design & Management (Aust) Pty Ltd and Charles Russel Gibbons* (1991) 33 FCR 227, 233 (The Federal Court of Australia) followed in *Graham John Morton and Valfont Pty Ltd v David Lewis Baker* (Federal Court of Australia, 25 March 1993).

⁵⁸ Same case 235.

⁵⁹ Same case 240.

⁶⁰ [1994] 34 NSWLR 474 (Court of Appeal of New South Wales).

decision on ‘the modern trend’ in arbitration, citing the *Harbour Assurance* case. In addition, his Honour referred to reasons of ‘practicality,’ that the separability doctrine promotes speed in arbitration.⁶¹ Further, his Honour reflected the influence of the 1989 Act, saying that ‘it is highly desirable that, in the field of arbitration (both international and national), a common approach should be adopted by the courts.’⁶²

Agreeing with Kirby P, Clarke JA relied on the *collateral* nature of the arbitration clause, which justified treating it as if it were concluded in a separate document. Thus,⁶³

[c]learly enough, if two parties enter into a building contract and a separate arbitration agreement and one party asserts that it was induced to enter into the building contract because of a fraudulent misrepresentation, the question whether the resulting dispute fell to be decided in accordance with the terms of the arbitration agreement would depend upon those terms. Where, then, an arbitration agreement appears as a clause in the principal agreement, but is nonetheless treated by the law as a separate collateral agreement, there seems to be no reason why the same principle should not apply.

The *QH Tours* case and the *Ferris* case were followed, albeit with reluctance, by Lockhart J in *John Prospher Cullen and Peter Thomas Walsh Rinbridge Pty Ltd (Cross-Claimant) v Rinbridge Marketing Pty Ltd*.⁶⁴ Accepting that an arbitration clause applied to a dispute over the initial validity of a contract, his Honour said that

⁶¹ *Ferris v Plaister* [1994] 34 NSWLR 474, 485 (Court of Appeal of New South Wales).

⁶² Same case 491, see also Mahony JA at 497.

⁶³ Same case 504.

⁶⁴ The Federal Court Of Australia, 23 October 1995.

[n]otwithstanding some reservations which I have about the correctness of the conclusions reached in *QH Tours* and *Ferris* on this point, sitting as a single judge, I must follow the judgments in those two cases in the interest of ensuring the certainty of the law.⁶⁵

In contrast, subsequent cases have applied this approach with enthusiasm. Affirming the *Ferris* case, the Federal Court of Australia said that '[t]he decision of the Court of Appeal [in the *Ferris* case] is an important one because it gives authoritative support to the view that an arbitration clause constitutes a separate contract; a conclusion that the building contract is void does not deprive the arbitrator of power to so declare.'⁶⁶ Likewise, in *Elkateb v Lawindi*,⁶⁷ the court accepted the separability doctrine in respect of illegal contracts, citing the *Harbour Assurance* case.

Commentators have also welcomed this approach.⁶⁸ Marcus Jacobs asserts that '[t]here can no longer be any doubt in New South Wales that an arbitrator has jurisdiction to determine whether or not the main contract was void *ab initio* or voidable because of an alleged illegality, or for any other reason.'⁶⁹

(iii) Rejecting the separability doctrine in relation to 'non-existent contracts'

⁶⁵ In *The State of New South Wales v Coya (Constructions) Pty Ltd* (The Supreme Court of New South Wales, 4 August 1995), the facts of which are irrelevant, obiter dicta of Cole J cast doubt about the scope of the separability doctrine. He said that 'if it be the law that an arbitrator cannot declare that the contract under which he functions was void *ab initio*, it is because of the circularity inherent in him denying the existence of the contract under which he purports to speak.'

⁶⁶ *Trade Practices Commission v Collings Construction Co Pty Ltd* (1994) 53 FCL 137, 141 (Federal Court of Australia).

⁶⁷ (1997) 42 NSWLR 396 (Supreme Court Of New South Wales).

⁶⁸ A Rogers and R Luders 'Separability – The Indestructible Arbitration Clause' (1994) 10 *Arbitration Intl* 77, 90.

⁶⁹ MS Jacobs 'The Separability of the Arbitration Clause: Has the Principle been Finally Accepted in Australia?' (1994) 68 *The Australian LJ* 629, 640.

Nevertheless, Australian courts clearly apply an exception to the separability doctrine for non-existent contracts. And this has remained so even after the Model Law was enacted. The non-existence of the contract turns on the actual meeting of minds between parties. In *Multiplex Constructions Pty Ltd v Trans Australian Constructions Pty Ltd*,⁷⁰ the defendant sought a stay of proceedings on the basis that the exchange of letters with the plaintiff amounted to two sub-contracts including an arbitration clause. The plaintiff contended that parties had exchanged letters in the course of negotiations, but ultimately no sub-contract containing an arbitration was concluded subsequently to a previous contract, which admittedly did not provide for arbitration. While accepting the separability (severability) of arbitration clauses in principle, Thomas J considered that,

I do not consider the issue of severability of the arbitration clause is the issue in this case before me. In this matter the real issue raised by the plaintiff is the argument that *no agreement existed at all* between the plaintiff and the defendant that included an arbitration agreement. I accept [] that the arbitrator does not have jurisdiction when the existence of the contract to arbitrate is contested.

Consequently, Thomas J examined whether any contract containing an arbitration clause had been concluded. He found that there was no such contract, and the application for a stay was refused.⁷¹

⁷⁰ [1995] NTSC 14 (The Supreme Court of the Northern Territory of Australia).

⁷¹ In two recent cases decided by the Industrial Relations Commission of New South Wales, in court session, the separability doctrine has been reaffirmed, but relevant authorities were distinguished on the basis that the allegations of invalidity related to the arbitration clause itself apart from the main

Adrian Baron accepts that the separability doctrine should not apply where the contract never existed.⁷² He criticises the decision of the Supreme Court of Victoria in *Abigroup Contractors Pty Ltd v Transfield Pty Ltd*,⁷³ in which the court referred to arbitration a restitutionary claim on a *quantum meruit*, which involved the non-existence of the main contract. Baron submits that this decision is ‘not founded upon logic or principle [, but] founds its support upon policy considerations in the form of commercial expedience and “an element of legal fiction”.’⁷⁴

However, the *Abigroup Contractors* case did not extend the separability doctrine to non-existent contracts. The parties were in fact *ad idem*, but their agreement was not binding in law. Thus, the Supreme Court of Victoria laid down that, where there is a meeting of minds between the parties, the arbitration agreement can be upheld regardless of whether it amounts to a binding agreement in law; if the relevant claim falls within its scope, it may be referred to arbitration.⁷⁵

(iv) The separability doctrine is not a strict rule of law

contract: *Electronic Tracking Systems Pty Ltd v Pronet Inc* [1999] NSWIRComm 325; *Metrocall Inc v Electronic Tracking Systems Pty Ltd* [2000] NSWIRComm 136. cf *Dodwell & Co (Aust) Pty Ltd v Moss Security Ltd* (Federal Court of Australia, 11 April 1990), (1994) XIX Ybk Commercial Arbitration 615.

⁷² A Baron ‘The Australian International Arbitration Act – The Fiction of Severability and Claims for Restitution’ (2000) 16 Arbitration Intl 159.

⁷³ Supreme Court of Victoria, 16 October 1998.

⁷⁴ Baron (n 72 above) 183.

⁷⁵ In *TransAustralian Construction Pty Ltd v Northern Territory of Australia* (1991) 104 FLR 358, the Supreme Court of the Northern Territory referred a *quantum meruit* claim to arbitration because it was a claim ‘arising out of the contract’ within the meaning of the relevant arbitration clause.

The Australian courts apply the separability doctrine if the relevant arbitration clause evinces the intention of the parties to treat it as separate. Such an intention is ascertained through the scope of the relevant clause. If it is wide enough to include the given dispute over the effectiveness of the main contract, it is the parties' intention to apply it despite such a dispute. Thus, while accepting the distinct nature of an arbitration clause, the application of the separability doctrine depends on whether it is properly worded.⁷⁶ Equally, in *O'Connor v Leaw Pty Ltd Formerly Known as Mac-Corp Pty Ltd*,⁷⁷ Rolfe J, said that Australian authorities 'make it clear that the arbitration clause stands apart from the agreement to the extent that, *provided it is appropriately worded*, it allows the arbitrator to determine matters which may vitiate the contract.'⁷⁸ As such, the separability doctrine does not apply as a strict rule of law that is imposed on the parties solely to promote commercial arbitration.

In giving prominence to the intention of the parties, the Australian courts apply separability in a way which harmonises with the contractual analysis of arbitration. Thus, 'separability' is not a rule that is imposed on the parties, and the powers of arbitrators ensuing from it (ie to decide finally on matters pertaining to the effectiveness of the main contract) derive from the agreement of the parties.

To conclude, the Australian courts now apply the separability doctrine in the same way as it has been applied in England after the *Harbour Assurance* case. That is, there

⁷⁶ *Ferris v Plaister* [1994] 34 NSWLR 474, 504 (Court of Appeal of New South Wales).

⁷⁷ (1997) 42 NSWLR 285. To similar effect, see *Savcor v State of NSW* [2001] NSWSC 596 (The Supreme Court of New South Wales – Equity Division).

⁷⁸ (1997) 42 NSWLR 285, 305.

is an exception for non-existent contracts.⁷⁹ This has been applied even after the 1989 Act which enacts Article 16(1) of the UNCITRAL Model Law.

(2) *The Separability Doctrine in the United States*⁸⁰

As in England and Australia, the American courts apply the separability doctrine subject to an exception for 'non-existent contracts.' The scope of this doctrine will be examined in subsection (i). In subsection (ii) it will be asked whether the separability doctrine is a creation of the courts or whether it has been initiated by the Federal Arbitration Act of 1925 (FAA), which is the current federal statute regulating arbitration. While the best view is that the separability doctrine has been developed by the courts, subsection (iii) raises a question as to the impact of policy considerations deriving from the FAA on the application of the separability doctrine. In other words, it will be asked whether the separability doctrine is an imposed rule of law. This question bears on whether the separability doctrine applies in relation to 'non-existent contracts.'

(i) The scope of the separability doctrine

⁷⁹ It is, perhaps, possible to generalise that in South Africa, too, the trend is to prefer the *Harbour Assurance* case to *Heyman v Darwins*. The latter was followed in *Allied Mineral Development Corp (Pty) Ltd v Gembok Vlei Kwartsiet (Edms) Bpk* [1968] 1 SA 7; *Van Heeden v Sentale Kunsmis Korporasie (Edm) Bpk* [1973] 1 SA 17; and in *Wayland v Everite Group Ltd* [1993] 3 SA 946. However, the Law Commission for South Africa has recommended that a new arbitration Act for international arbitration should reverse this approach in favour of the *Harbour Assurance* case: Law Commission of South Africa *Project 94, An International Arbitration Act for South Africa* (July 1998) 72-73; and the same has been proposed for a domestic arbitration Act: *Project 94, Domestic Arbitration* (29 October 1999) 39-40, confirmed in the Commission's report of May 2001 para 3.136.

⁸⁰ See, generally, HM Holtzmann and DF Donovan 'The United States' in AJ Van Den Berg (ed) *ICCA Handbook for International Commercial Arbitration* (Looseleaf Kluwer Law and Taxation Deventer Volume III Supp 28 January 1999).

Early American cases seemed to apply the same approach as in *Jureidini v National British & Irish Millers Ins Co Ltd*,⁸¹ in which an arbitration clause was held to have been repudiated with the contract. For example, in *Cheney Bros v Joroco Dresses Inc*,⁸² a claim of fraud in the inducement of the main contract was treated as affecting the arbitration clause as well, ie this clause was not viewed as being a separate agreement.

However, in *Kulukundis Shipping Co SA v Amtorg Trading Corp*,⁸³ a case decided before *Heyman v Darwins*, the court took the view that, where the main contract did not come into existence, there could be no question of arbitration, but it referred a claim of repudiation of the contract to arbitration. The distinction between the existence and repudiation of the main contract rested on the fact that, in determining that the parties agreed to the arbitration clause, the court had necessarily first to establish that the main contract existed.⁸⁴ Therefore, the court took the view that if arbitrators ‘found that [the contract] was never made, they would, unavoidably (unless they were insane), be obliged to conclude that the arbitration agreement had never been made [, and] destroy the arbitrators’ authority to decide anything and thus make their decision a nullity.’⁸⁵

Subsequently, while retaining the view that there can be no arbitration clause if no contract existed, American courts started applying the separability doctrine, explicitly

⁸¹ [1915] AC 499 (HL). See above p 87.

⁸² 219 NYS 96 (S Ct of New York, 1926); *Rederiaktiebolaget Atlanten v Aktieselskabet Korn-og Foderstof Kompagniet, The Atlanten* 252 US 313, 40 S Ct 332 (1920).

⁸³ 126 F2d 978 (US Ct of Apps (2nd Cir), 1942).

⁸⁴ Same case 985.

⁸⁵ 126 F2d 978, 986 (US Ct of Apps (2nd Cir), 1942).

or implicitly, in other circumstances, such as duress, frustration or the repudiation of the main contract.⁸⁶ It has also been held that an arbitration clause could be enforced despite allegations of fraud or illegality respecting the main contract.⁸⁷

The Supreme Court of the United States affirmed the separability doctrine in *Prima Paint Corp v Flood & Conklin Mfg Co.*⁸⁸ The majority of the Court held that an arbitration clause could not be avoided on grounds disputing the validity of the main contract.⁸⁹ Ever since, the separability doctrine seems to have been consistently applied subject to a ‘non-existent contract’ exception.⁹⁰

As in England and Australia, the American courts explained that the non-existence of a contract means the absence of ‘a meeting of the minds between the parties.’ As such, it is well settled that ‘[t]he question whether there was a binding

⁸⁶ *Petition of Prouvost Lefebvre of Rhode Island Inc* 105 F Supp 757 (D Ct NY, 1952); *Batter Bldg. Materials Co v Kirschner* 142 Conn 1, 110 A 2d 464 (S Ct of Conn, 1954); *De Lillo Construction Co v Lizza & Sons Inc* 195 NYS 2d 825, 164 NE 2d 95 (Ct Apps NY, 1959); *US Insulation Inc v Hilro Construction Co Inc* 146 Ariz 250, 705 P 2d 490 (Ct Apps Ariz, 1985); *Bosinger v Phillips Plastics Corp* 57 F Supp 2d 986 (D Ct Cal, 1999).

⁸⁷ *Robert Lawrence Company Inc v Devonshire Fabrics Inc* 271 F2d 402 (US Ct of Apps (2nd Cir), 1959).

⁸⁸ 388 US 395, 87 S Ct 1801 (1967).

⁸⁹ The separability doctrine is still not accepted by some state laws, such as Louisiana, Minnesota, Tennessee and Oklahoma, according to JD Stiner ‘Arbitration: *Shaffer v Jeffery*’ (1997) 50 Oklahoma L Rev 243, 250, 261-266; RC Peterson ‘International Arbitration Agreements in United States Courts’ (2000) 55 Dispute Resolution J 44, 55-56. cf TJ Heinsz ‘The Revised Uniform Arbitration Act: An Overview’ (2001) 56 Dispute Resolution J 28 n 21 at 31.

⁹⁰ *Interocean Shipping Co v National Shipping & Trading Corp* 462 F2d 673 (US Ct of Apps (2nd Cir), 1972); *AS Custodia v Lessin International Inc* 503 F2d 318 (US Ct of Apps (2nd Cir), 1974); *Comprehensive Merchandising Catalogs Inc v Madison Sales Corp* 521 F2d 1210 (US Ct Apps (7th Cir), 1975); *Pollux & Marine Agencies Inc v Louis Dreyfus Corp* 455 F Supp 211 (DC NY, 1978) affirmed on appeal 595 F2d 1209 (US Ct of Apps (2nd Cir), 1979); *Sauer-Getriebe KG v White Hydraulics Inc* 715 F2d 348 (US Ct of Apps (7th Cir), 1983); *Belship Navigation Inc (Liberia) v Sealift Inc (US)* (US D Ct NY, 28 July 1995), [1996] XXI Ybk Commercial Arbitration 799; *Malarky Enterprises v Healthcare Technology Ltd* 962 F Supp 1427 (D Ct Kan, 1997); *Burden v Check into Cash of Kentucky, LLC* 267 F 3d 483 (US Ct of Apps (6th Cir), 2001); *Sphere Drake Ins Ltd v Clarendon National Ins Co* 263 F 3d 26 (US Ct of Apps (2nd Cir), 2001).

arbitration clause is quite possibly inextricably bound with the underlying merits of the case – that is, the question whether the parties entered into the underlying contract.⁹¹ In *Pollux Marine Agencies Inc v Louis Dreyfus Corp*,⁹² the Court of Appeals held that the separability doctrine did not apply ‘where the defendant denied ever agreeing to (a charter party). Naturally such a question had first to be settled before arbitration could be directed.’ Likewise, in *Canconon v Smith Barney, Harris, Upham & CO*,⁹³ an allegation of *non est factum* was treated as an allegation of ineffective assent to the main contract and, therefore, ruled out the separability doctrine. As Ware observes, the separability doctrine has been applied in relation to ‘voidable contracts’ (eg on the ground of duress or misrepresentation) but not in cases concerning whether the main contract came into existence.⁹⁴ According to one commentator,⁹⁵ non-existent contracts include cases concerning allegations that the main contract has been forged or made without authority.

However, the Court of Appeals in one case appeared to accept the separability doctrine even where a dispute arose as to whether a contract containing an arbitration clause ever existed. In *Teledyne Inc v Kone Corp*,⁹⁶ the parties signed a negotiated document clearly labeled ‘Draft (to be finalised by Kone legal department),’ which contained an arbitration clause. After a breakdown in relations ensued, Teledyne sued and Kone applied for a stay of proceedings on the basis of that arbitration clause.

⁹¹ *Sandvik AB v Advent Intl Corp* 220 F 3d 99, 104 (US Ct of Apps (3rd Cir), 2000).

⁹² 455 F Supp 211 (DC NY, 1978).

⁹³ 805 F 2d 998, 1000 (US Ct of Apps (11th Cir), 1986).

⁹⁴ SJ Ware *Alternative Dispute Resolution* (West Group Minnesota 2001) 49.

⁹⁵ RC Peterson ‘International Arbitration Agreements in United States Courts’ (2000) 55 *Dispute Resolution J* 44, 56-57.

⁹⁶ 892 F 2d 1404 (US Ct of Apps (9th Cir), 1989).

Teledyne resisted that application on the ground that the existence of the main contract was being denied. The Court of Appeals granted a stay on the basis of the separability doctrine, saying that the defendant ‘attacked the contract as a whole without making an “independent challenge” to the arbitration provision.’⁹⁷ To interpret this decision as widening the separability doctrine is inconsistent with a long line of cases rejecting the separability doctrine in relation to non-existent contracts.⁹⁸ Subsequently, however, the Court of Appeals clarified this decision so as to bring it in line with the ‘non-existent contract’ exception to the separability doctrine. Thus, it has been held that *Teledyne Inc v Kone Corp* is a rare case and should be interpreted on the basis that the plaintiff brought an action for a breach of contract, asserting the validity of the main contract, and that, when signing the relevant document, the parties gave thought to the arbitration clause and agreed to arbitrate future disputes.⁹⁹

In *Three Valleys Municipality Water Dist v E F Hutton & Co*,¹⁰⁰ the majority of the Court of Appeals reaffirmed that the separability doctrine did not apply in situations concerning ‘challenges going to the very existence of a contract that a party claims never to have agreed to. A contrary rule would lead to untenable results. Party A could forge party B’s name to a contract and compel party B to arbitrate the question of the

⁹⁷ *Teledyne Inc v Kone Corp* 892 F 2d 1404, 1406 (US Ct of Apps (9th Cir), 1989); cf *Republic of Nicaragua v Standard Fruit Co* 937 F 2d 469 (US Ct of Apps (9th Cir), 1991). According to Mehren, such cases give rise to the question of whether some courts occasionally go beyond reasonable limits of separability. AT Von Mehren, J Barceló and T Varady *International Commercial Arbitration: A Transnational Perspective* (West Group Minnesota 1999) 137-140.

⁹⁸ RC Peterson ‘International Arbitration Agreements in United States Courts’ (2000) 55 *Dispute Resolution J* 44, 56-57.

⁹⁹ *Three Valleys Municipality Water Dist v E F Hutton & Co* 925 F 2d 1136 (US Ct of Apps (9th Cir), 1991); *Sandvik AB v Advent Intl Corp* 220 F 3d 99, 104 (US Ct of Apps (3rd Cir), 2000).

¹⁰⁰ 925 F 2d 1136 (US Ct of Apps (9th Cir), 1991).

genuineness of its signature.’¹⁰¹ Thus, the court rejected the separability doctrine where the dispute arose as to whether the alleged contract was signed with authority. It rested its decision on the view that the separability doctrine would fly in the face of the consensual basis of arbitration if applied in relation to non-existent contracts. The court said that ‘[i]f the dispute is within the scope of an arbitration agreement, an arbitrator may properly decide whether a contract is “voidable” because the parties have agreed to arbitrate the dispute. But, because an “arbitrator’s jurisdiction is rooted in the agreement of the parties,” ... a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate’ this matter.¹⁰² (The dissent in this case will be discussed in subsection (iii) since it turns on the basis of the separability doctrine.)

The Supreme Court of the United States has also affirmed ‘the non-existent contract’ exception to the separability doctrine. In *First Options of Chicago Inc v Kaplan*,¹⁰³ the Supreme Court held that a dispute over the existence of the main contract containing an arbitration clause was a matter to be determined by the courts.

(ii) The separability doctrine as a judicial creation

A number of commentators and decided cases rest the separability doctrine on the policy and interpretation of the Federal Arbitration Act of 1925 (FAA). This raises the

¹⁰¹ *Three Valleys Municipality Water Dist v E F Hutton & Co* 925 F 2d 1136, 1140 (US Ct of Apps (9th Cir), 1991).

¹⁰² Same case 1140-1141; *Stinson v America’s Home Place Inc* 108 F Supp 2d 1278 (D Ct Ala, 2000).

¹⁰³ 515 US 938, 115 S Ct 1920 (1995).

question as to whether, in contrast to England and Australia, the separability doctrine is not the creation of the courts in the United States.

Before the separability doctrine was clearly established by the courts, some commentators argued that the FAA treated arbitration clauses as separate agreements, albeit implicitly.¹⁰⁴ Section 2 of the FAA provides that an arbitration clause contained in a contract 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' According to Professor Sturges, section 2 deals solely with an arbitration agreement, aiming at ensuring its effectiveness; therefore, the word 'contract' should be interpreted as referring to the arbitration clause itself as opposed to the main contract. Thus, the policy of the FAA is to make arbitration clauses 'enforceable regardless of whether the accompanying commercial bargain is or is not specifically enforceable.[] In other words, it is submitted that the Arbitration Law should be held to make written arbitration contracts or provisions *severable* from the general bargain which they may accompany.'¹⁰⁵

American courts have also interpreted the provisions of the FAA as endorsing the separability doctrine. It has been generally accepted that section 2 concerns the arbitration clause itself; therefore, arbitration cannot be resisted by attacking the main contract. Thus, in *Robert Lawrence Company Inc v Devonshire Fabrics Inc*,¹⁰⁶ the

¹⁰⁴ WA Sturges 'Fraudulent Inducement as a Defense to the Enforcement of Arbitration Contracts' (1927) 36 Yale LJ 866; RK Parsell 'Arbitration of Fraud in the Inducement of a Contract' (1927) 12 Cornell LQ 351.

¹⁰⁵ Sturges (n 104 above) 872.

¹⁰⁶ 271 F2d 402 (US Ct of Apps (2nd Cir), 1959).

Court of Appeals held that an arbitration clause applied to allegations that the main contract had been induced by fraud: ‘[t]hat the Arbitration Act envisages a distinction between the entire contract ... and the arbitration clause of the contract ... is plain on the face of the statute. Section 2 does not purport to affect the contract as a whole.’¹⁰⁷

In *Prima Paint Corp v Flood & Conklin Mfg Co*,¹⁰⁸ the majority of the Supreme Court adopted the same interpretation of section 2 of the FAA as in *Robert Lawrence v Devonshire*. The Court also relied on section 4, which provides in part that ‘[t]he court shall hear the parties, and upon being satisfied that *the making of the agreement for arbitration or the failure to comply therewith is not in issue*, the court shall make an order directing the parties to proceed to arbitration...;’ allegations pertaining to the contract generally do not implicate ‘the making of the agreement to arbitrate.’¹⁰⁹

In contrast to this, Black J, dissenting in *Prima Paint Corp v Flood & Conklin Mfg Co*,¹¹⁰ doubted that the FAA could be fairly interpreted as endorsing the separability doctrine, since section 4 raises the question as to *what reasons* throw ‘the making of the arbitration agreement’ into dispute – one could still argue under section 4 that the validity of the main contract belongs to such reasons.¹¹¹ Adam Samuel prefers not to rest the separability doctrine on the FAA, since the drafting of the FAA ‘is

¹⁰⁷ *Robert Lawrence Company Inc v Devonshire Fabrics Inc* 271 F2d 402, 409-410 (US Ct of Apps (2nd Cir), 1959).

¹⁰⁸ 388 US 395, 87 S Ct 1801 (1967); *Southland Corp v Keating* 465 US 1, 104 S Ct 852 (1989); *Kelsey Maye v Smith Barney Inc* 877 F Supp 100 (D Ct NY, 1995); *Aviall Inc v Ryder System Inc* 913 F Supp 826 (D Ct NY, 1996).

¹⁰⁹ 388 US 395, 403-404, 87 S Ct 1801, 1806 (1967).

¹¹⁰ Black J was joined by Douglas and Stewart JJ.

¹¹¹ 388 US 395, 410, 87 S Ct 1801, 1809 (1967).

consistent with the view that [it] applies only to valid agreements.’ ‘It is, therefore, best to see separability as a piece of judicial legislation.’¹¹²

It is submitted that the separability doctrine is best viewed as a creation of American courts. This is because the FAA does not refer expressly to this doctrine and provides no guidance as to the circumstances in which it should apply. After all, it is the courts which have determined the scope of this doctrine. The courts refer to the Act only to justify their attitude by showing that it is consistent with the general pro-arbitration policy of the Act.

(iii) Whether the separability doctrine is an imposed rule of law

The above examination of the source of the separability doctrine in the United States, however, leads to the question of whether the policy considerations underpinning the separability doctrine prevail over the intentions of the parties. Put another way, is the separability doctrine treated in the United States as an imposed rule of law or is it based on the parties’ intentions?

To begin with, although the majority in *Prima Paint Corp v Flood & Conklin Mfg Co*¹¹³ observed summarily that the separability doctrine applies ‘except where the

¹¹² A Samuel ‘Separability of Arbitration Clauses – Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice’ [2000] *Arbitration and Dispute Resolution* LJ 36, 42; RF Dole ‘Note on *Robert Lawrence v Devonshire*’ (1960) 45 *Cornell LQ* 795, 802.

¹¹³ 388 US 395, 87 S Ct 1801 (1967).

parties otherwise intend,' it appeared to apply the doctrine as a fixed rule, without sufficient consideration of the intention of the parties. It is this apparent feature of the decision that caused Black J to dissent, taking the view that the majority based its decision on policy considerations, instead of verifying the intention of the parties, an approach which would clash with the consensual basis of arbitration.

The view that the separability doctrine applies in the United States as an imposed rule of law has its supporters. In *Three Valleys Municipality Water Dist v E F Hutton & Co*,¹¹⁴ while the majority ruled out the separability doctrine in relation to non-existent contracts as explained above, the minority judge (Judge Hall) took a strong policy-based view in favour of separability. Thus, it was said that the separability doctrine should apply to every arbitration clause on the ground that 'arbitration's potential as an alternative dispute resolution mechanism [would otherwise be] substantially limited.'¹¹⁵ Further, the minority argued that the policy of the FAA in reinforcing arbitration agreements constitutes a 'Congressional support' for such an approach to the separability doctrine. In response to the majority's emphasis on the consensual basis of arbitration, the minority said that the concern about the lack of genuine consent to arbitrate 'is counterbalanced by the contradictory federal policy that arbitration of contract disputes is to be encouraged.'¹¹⁶ After all, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'¹¹⁷

¹¹⁴ 925 F 2d 1136 (US Ct of Apps (9th Cir), 1991).

¹¹⁵ *Three Valleys Municipality Water Dist v E F Hutton & Co* 925 F 2d 1136, 1146 (US Ct of Apps (9th Cir), 1991).

¹¹⁶ Same case 1146.

¹¹⁷ Same case 1145.

The view of the minority is that the separability doctrine is designated for ‘severing under federal law a facially applicable arbitration clause from an allegedly nonexistent contract [and not only] severing it from an allegedly fraudulently induced one.’¹¹⁸ As such, the minority endorsed the controversial view that the separability doctrine should apply even where the dispute relates to parties’ consent to the main contract as a whole. Underscoring parties’ consent and intentions, this view claims that ‘the potential scope of contract arbitration will be severely limited by a rule that requires a judicial determination that a contract exists before the arbitration clause of such a contract can be effective.’¹¹⁹ Thus, as an imposed rule of law, the separability doctrine should apply in relation to ‘the question whether a purported contract is actually a contract or is a mere preliminary negotiation’ as well as to a case ‘in which an agent is said to have lacked authority to bind her purported principal.’¹²⁰

This extreme view of the separability doctrine, however, does not represent the position of American law. The courts do relate the application of the separability doctrine to the interpretation of the relevant arbitration clause. The little regard that was had to this aspect in some cases could be due to the fact that ‘the technical argument about separability or non-separability has often obscured the main goal of the court’s inquiry, which is to discern the parties’ intent.’¹²¹ In *Sandvik AB v Advent Intl Corp*,¹²²

¹¹⁸ *Three Valleys Municipality Water Dist v E F Hutton & Co* 925 F 2d 1136, 1146 (US Ct of Apps (9th Cir), 1991).

¹¹⁹ Same case 1145.

¹²⁰ Same case 1145.

¹²¹ *Comprehensive Merchandising Inc v Madison Sales Corp* 521 F2d 1210 (US Ct of Apps (7th Cir), 1975).

the Court of Appeals held that ‘arbitration would ... be ordered on all issues arising within the scope of the arbitration clause,’ including matters relating to the effectiveness of the main contract but not allegations that it never came into existence.¹²³ According to Domke,¹²⁴

[u]nder the separability rule, the only test of what may be arbitrated is the measure of the scope of the arbitration clause. Thus, responsibility for arbitrability of any issue is, first of all, in the hands of the draftsmen of the arbitration clause. Whether a clause is sufficiently broad will be decided on a case-by-case basis by the Court.

The fact that the application of the separability doctrine depends on the intention of the parties lies behind the decision of the Court of Appeals in *El Hoss Engineer & Transport Co Ltd v American Independent Oil Co.*¹²⁵ In this case, the Court of Appeals held that an arbitration clause was not effective because a condition precedent to the contract (testing the quality of goods which were to be sold) was not fulfilled. The court reasoned that, despite the separability doctrine, *the interpretation of the relevant arbitration clause* evinced the intention of the parties that it should not come into effect unless the contract did. While Adam Samuel treats this decision as ‘a step back’ from the acceptance of the separability doctrine,¹²⁶ it is actually in line not only with the ‘non-existent contract’ exception but also with the contractual approach to the separability doctrine.

¹²² 220 F 3d 99, 104 (US Ct of Apps (3rd Cir), 2000).

¹²³ *Sandvik AB v Advent Intl Corp* 220 F 3d 99, 104, 111 (US Ct of Apps (3rd Cir), 2000).

¹²⁴ M Domke *The Law and Practice of Commercial Arbitration* (Callaghan Illinois 1968) 59.

¹²⁵ 289 F2d 346 (US Ct of Apps (2nd Cir), 1961).

¹²⁶ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989)167.

The prominence of the contractual element in arbitration is also revealed by the fact that American courts explicitly refer to 'ordinary principles governing contracts,' in interpreting the relevant arbitration clause before the separability doctrine applies.¹²⁷ Therefore, courts do not presume readily the separability of the arbitration clause. To the contrary, in *First Options of Chicago Inc v Kaplan*,¹²⁸ the Supreme Court stated that 'there is no strong arbitration-related policy favoring' a presumption that a party to an arbitration agreement agreed to refer a particular dispute to arbitration. Thus,¹²⁹

[a]fter all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes but to ensure that commercial arbitration agreements, like other contracts, "are enforced according to their terms," and according to the intentions of the parties.

Therefore, courts should consider the intention of the parties. Richard Dole suggests that, '[t]he doctrine of separability, however, whatever its merits, should not be adopted as an inflexible rule of law;'¹³⁰ disputes over the fate of the main contract should 'only be arbitrated when the arbitration clause is broad enough to encompass it.'¹³¹ Indeed, this attitude is reinforced by the consistent application of a non-existent contract exception to the separability doctrine as already explained. Again, as in English and Australian law, this attitude harmonises with the contractual analysis of arbitration.

¹²⁷ *Dean Witter Reynolds Inc v Byrd* 470 US 213, 219-220, 105 S Ct 1238, 1241-1242 (1985); *First Options of Chicago Inc v Kaplan* 515 US 938, 944, 115 S Ct 1920, 1924 (1995); *AT&T Technologies Inc v Communications Workers of America* 475 US 643, 649, 106 S Ct 1415, 1418 (1986).

¹²⁸ 515 US 938, 115 S Ct 1920 (1995).

¹²⁹ Same case 1925.

¹³⁰ RF Dole 'Note on *Robert Lawrence v Devonshire*' (1960) 45 Cornell L Q 795, 803.

¹³¹ Dole (n 130 above) 801 fn 41.

4. The Separability Doctrine under French Law

French law takes a clearly distinctive approach to the separability doctrine.¹³² It will be shown that, unlike the courts in common law jurisdictions, the French courts do not base their approach on the intention of the parties. Moreover, the separability of the arbitration clause links with the French ‘full autonomy’ principle which applies to all international arbitration agreements. This principle is sometimes referred to as the ‘self-effectiveness’ of the arbitration agreement. This name will be adopted here so as to avoid confusion with references to the ‘autonomous theory’ of arbitration.¹³³ This principle of ‘self-effectiveness’ separates the arbitration agreement from national laws, as a new aspect of the delocalisation of arbitration, and may facilitate the application of the separability doctrine, even where the dispute is over the existence of the main contract (*consensus ad idem*).

These aspects of French law will now be examined in detail. Subsection (1) studies the separability doctrine. Subsection (2) examines the self-effectiveness principle and asks whether it could be applied in England given the contractual analysis of arbitration.

(1) The Separability of the Arbitration Clause in Relation to the Main Contract

¹³² See, generally P Bernard and AB Blumrosen ‘France’ [1993] Intl Financial L Rev 7; Y Derains ‘France’ in AJ Van Den Berg (ed) *ICCA Handbook for International Commercial Arbitration* (Looseleaf Kluwer Law and Taxation Deventer Volume II 1999).

¹³³ See above pp 29-41.

(i) The recognition and scope of the separability doctrine in France

French courts' acceptance of the separability doctrine followed jurisprudential work.¹³⁴ For example, the international arbitration congress, assembling in Paris in 1961, called for the recognition of the separability doctrine. In his report to the congress, F-E Klein pointed out that the procedural nature of the arbitration clause justified its autonomy. The consequences of this autonomy included, according to Klein, the possibility that an arbitration clause and the main contract could be subject to different laws; that the invalidity of the main contract did not necessarily affect the arbitration clause; and that arbitrators have power to decide the validity of the main contract. Thus,

[s]aying that the arbitration clause is independent because of its distinct function reveals, in the first place, that in terms of international private law it can be subject to a law other than the law that applies to the contract concluded between the parties.¹³⁵ Being independent in terms of the governing law, the arbitration clause is not necessarily affected by the invalidity or voidability of the main contract. [] However, the preservation of the arbitration clause, where the main contract is null, assumes that the parties did not, explicitly or implicitly, make its validity dependent upon the validity of the main contract.¹³⁶

¹³⁴ These works include the practice of arbitration institutions, such as the International Chamber of Commerce in Paris.

¹³⁵ F-E Klein 'Du Character Autonom de la Clause Comprimissoire- Congres de l'Arbitrage International' [1961] *Revue de l'Arbitrage* 48.

¹³⁶ Klein (n 135 above) 51.

The call for the separability doctrine was well received by the French Court of Cassation. In the leading *Gosset* case,¹³⁷ the Court held that ‘in international arbitration, the arbitration agreement, whether concluded separately or included in the contract to which it relates, shall, save in exceptional circumstances ... have full legal autonomy, and shall not be affected by the fact that the aforementioned contract may be invalid.’¹³⁸ Thus, an award was enforced despite allegations that the underlying contract (a contract for importation of goods from Italy into France) was illegal *ab initio* by reason of the French-law prohibition of the purported importation.¹³⁹

The *Gosset* case was, in one sense, revolutionary but, in another sense, restrictive. It was revolutionary because it departed from French arbitration law, attributing to an arbitration clause ‘full legal autonomy.’ On the other hand, the *Gosset* case recognised the separability doctrine only for international commercial arbitration.¹⁴⁰ Further, the Court appeared to leave open the limits of this doctrine, providing that it applied ‘save in exceptional circumstances.’

¹³⁷ *Reymond Gosset v Carapelli*, Cassation civil 7 May 1963 (1963) 90 *Journal du Droit International* 82.

¹³⁸ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 198-199.

¹³⁹ P Francescakis ‘Le Principe Jurisprudential de l’Autonomie de l’Accord Compromissaire après l’Arrêt *Hetcht* de la Cour de Cassation’ [1974] *Revue de l’Arbitrage* 67.

¹⁴⁰ Y Derains ‘France’ (1981) VI *Ybk Commercial Arbitration* 1, 7-8; B Goldman ‘Note under the *Navimpex* Case’ [1989] *Revue de l’Arbitrage* 642, 647. Under French law, international arbitration is defined as including any arbitration that ‘affects interests in international trade.’ According to Ancel, ‘the international character of an arbitration proceeding is determined – excluding any criteria involving the parties’ nationalities or the governing law – by the international character of the economic transaction in question, which involves a cross-border flow of goods, persons or services.’ J-P Ancel ‘French Judicial Attitudes towards International Arbitration’ (1993) 9 *Arbitration Intl* 121.

It seems that the reference to ‘exceptional circumstances’ was merely precautionary as the Court was putting forward a novel principle.¹⁴¹ Indeed, the separability doctrine has been applied constantly with no reference to that general limitation,¹⁴² and has been applied, even where the main contract was invalid *ab initio*. It should be mentioned that the new French code of civil procedure of 1981 (which contains the current regulation of arbitration) does not deal with the separability doctrine. According to Mattheieu de Boissésou, while ‘the law of 1981 is silent ... as to the principle of the validity of the arbitration clause in international cases,’ this principle is referred to explicitly ‘by the statement in the report of the minister of justice to the prime minister, which affirmed judicial decisions on this principle.’¹⁴³

The French courts apply the separability doctrine where the main contract is initially invalid, ie it does not amount to a binding contract although parties have actually agreed to its terms. A clear illustration of this is the situation in which the main contract never was binding because it lacked prescribed formalities.¹⁴⁴ The separability doctrine also applies where the main contract is allegedly or actually illegal.¹⁴⁵

¹⁴¹ P Francescakis ‘Le Principe Jurisprudential de l’Autonomie de l’Accord Compromissaire après l’Arrêt *Hecht* de la Cour de Cassation’ [1974] *Revue de l’Arbitrage* 67; Y Derains ‘Les Tendances de la Jurisprudence Arbitrale Internationale’ (1993) 120 *Journal du Droit Intl* 829, 832; A Samuel ‘Separability of Arbitration Clauses – Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice’ [2000] *Arbitration and Dispute Resolution LJ* 36, 40-41.

¹⁴² J Robert *L’Arbitrage: Droit Intern, Droit International Privé* (6th edn Dalloz Paris 1993) 250.

¹⁴³ M De Boissésou *Le Droit Français de l’Arbitrage Interne et International* (GLN-éditions Paris 1990) 485.

¹⁴⁴ *Sonetex v Charphil*, Cassation civil 3 March 1992 [1993] *Revue de l’Arbitrage* 273. This decision reversed the position of the Court of Cassation in *L&B Cassia v Pia Investments*, Cassation civil 10 July 1990 [1990] *Revue de l’Arbitrage* 851. cf *Société CIC Intl Ltd v Ministre de la Défense de la République d’Allemagne*, Ct of App of Paris 19 January 1999 [1999] *Revue de l’Arbitrage* 601, 603.

¹⁴⁵ *Reymond Gosset v Carapelli*, Cassation civil 7 May 1963 (1963) 90 *Journal du Droit International* 82; J-B Racine *L’Arbitrage Commercial International et L’Ordre Public* (Librairie Générale de Droit et de Jurisprudence Paris 1999) 126.

As regards the case of non-existent contracts, the position of the French courts is not entirely clear. They use the term 'non-existent contract' to refer to the cases in which the parties in fact agreed but their agreement did not become binding – the separability doctrine can and should apply in such a case. But the French courts state in broad terms that the separability doctrine applies to any case of non-existence. Hence, the view that the separability doctrine could apply even if the dispute is over whether there has been factual agreement between parties.

In the *Navimpex* case,¹⁴⁶ the Court of Cassation held that an arbitration clause was effective, although the main contract did not come into force because a condition precedent thereto (providing a guarantee) had not been fulfilled. The Court reasoned that the separability of 'the arbitration clause allows it [the lower court] to give effect to this clause even where the contract signed by the parties did not come into force, since their dispute relates to its conclusion.'¹⁴⁷ The conclusion of the contract may include the existence of meeting of minds between parties. Berthold Goldman took the view that this could allow the separability doctrine to apply where no contract existed. He suggested that the decision could be interpreted in two ways:¹⁴⁸

Either that [the failure of the condition precedent] to the coming into force of the contract did not affect the fact that *the contract*

¹⁴⁶ *Navimpex Centrala Navala v Wiking Trade*, Cassation civil 6 December 1988 [1989] *Revue de l'Arbitrage* 641.

¹⁴⁷ Same case 642.

¹⁴⁸ B Goldman 'Note under the *Navimpex* Case' [1989] *Revue de l'Arbitrage* 642, 650.

had been concluded by the initial agreement of the parties; or that, failing to enter into force, *the contract was not concluded*, but the arbitration clause empowered the arbitrators to determine the responsibilities arising out of the fact that the contract did not come into force.

The Court of Appeal of Paris appeared to adopt Goldman's latter interpretation. In the *Ducler* case,¹⁴⁹ it was said in obiter dicta that 'in international arbitration, the arbitration clause enjoys *full autonomy in relation to the main contract, the non-existence or the nullity of which has no effect on that clause*, as well as in relation to the law governing that contract.'

Philippe Fouchard argues that the French courts should apply the separability doctrine even where the dispute is over the consensus *ad idem* between parties. He writes that,¹⁵⁰

[t]o reject the autonomy of the arbitration agreement on the ground that one of the parties has claimed that the main contract never came into existence would be to run the risk of facilitating the delaying tactics which the principle of autonomy aims to prevent. This is because it is difficult to distinguish between a contract which is void and one which never came into existence. Further, the concept of a contract which never existed is both hard to define and rarely encountered. A mere allegation that a main contract never existed should not therefore suffice for an arbitrator's jurisdiction to be denied. The arbitrators must examine the allegation, and if they indeed decide that the main contract never existed – as in the case of total absence of consent, for example – then they must apply the consequences of that finding to the merits of the dispute.[] The distinction

¹⁴⁹ *Coumet et Ducler v Société Polar-Rakennusos & Keythio*, Ct App of Paris 8 March 1990 [1990] *Revue de l'Arbitrage* 675.

¹⁵⁰ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 211.

between void and non-existent contracts is thus seldom found in court decisions concerning the validity of the arbitration agreement.

Yves Derains, too, takes the view that an arbitration clause contained in negotiation instruments would be valid and empower an arbitrator to decide on whether the parties have reached an agreement. Thus, where negotiations break down¹⁵¹

the presence of an arbitration clause in the pre-contractual documents will generally be a sufficient basis for the jurisdiction [of an arbitrator] unless it can be established that this clause was the subject of the disagreement of the parties. Due to the autonomy [separability] of the arbitration clause, the arbitrators will be empowered to decide whether a contract – preliminary or final – was concluded and, as the case may be, to decide on the pre-contractual liability of one of the parties.

It is submitted that, while the French courts have not so far accepted this view unequivocally, their approach to the validity of arbitration clauses is capable of applying the separability doctrine, even where the dispute relates to the meeting of minds between parties with the intention to create a legally binding contract. As such, it can be treated as being wider than the common law approach to the separability doctrine which accepts an exception for non-existent contracts. That this is the best interpretation of French law is supported by two reasons.

The first reason is that the French courts do not generally rest the application of the separability doctrine on the intention of the parties. Rather, this doctrine applies

¹⁵¹ Y Derains *Some Special Features of the Law of Civil Law States Relevant for the Practice of Arbitration* (Supplement to ICCA Congress Series 7 Kluwer Law International The Hague 1996) 5-6.

directly, ie without interpreting the particular arbitration clause in order to ascertain the intentions of the parties. Indeed, the French courts take the view that the interpretation of the relevant arbitration clause belongs to the arbitrators not to the courts.¹⁵² In a rare case,¹⁵³ the Court of Appeal of Paris referred to the wording of the arbitration clause to justify its separability. It said that the separability doctrine could apply if the relevant arbitration clause was worded ‘in very broad terms that include[d] in its scope of application the disputes relating to the existence of the main contract.’ This decision has been criticised precisely because, unlike the approach of the Court of Cassation, it invoked the intentions of the parties in relation to the separability doctrine. As regards the non-existence of the contract in particular, Yves Derains argues rightly that ‘accepting that the non-existence of the main contract affects the existence of the arbitration clause, one cannot conceive how the content of the latter allows it to preserve its effectiveness.’¹⁵⁴ Nevertheless, he submits that, in line with the attitude of the Court of Cassation, the separability doctrine should be applied directly not on the basis of parties’ intention but in order to avoid dilatory tactics by parties resisting arbitration.¹⁵⁵

The second reason is the principle of the self-effectiveness of the arbitration agreement. As will be explained below, while the facts of the particular case may not satisfy the test of consent under the law governing the main contract, the self-

¹⁵² E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 255.

¹⁵³ *Gefimex v Transgrain*, Ct App of Paris 14 November 1996 [1997] *Revue de l'Arbitrage* 434.

¹⁵⁴ Y Derains ‘Note under the *Gefimex* Case’ [1997] *Revue de l'Arbitrage* 434, 436.

¹⁵⁵ Derains (n 154 above) 435.

effectiveness principle may still uphold ‘a consent’ respecting the arbitration clause. It has been said that, by utilising the self-effectiveness principle, ‘French courts have already *imposed* its [the arbitration clause’s] validity independently from the law governing the relation in question.’¹⁵⁶ In other words, the self-effectiveness principle interacts with the separability doctrine so as to remove the exception for non-existent contracts. If so, the widening of the separability doctrine in France rests on a ground that does not exist in England.

It is necessary to explain the test of parties’ consent that applies by virtue of the self-effectiveness principle in order to understand how it enables one to separate ‘a facially applicable arbitration clause from an allegedly nonexistent contract’ – to use the words of the minority in *Three Valleys Municipality Water Dist v E F Hutton & Co.*¹⁵⁷ Under the French approach, the courts rely on circumstances that are not sufficient to establish parties’ consent to other contracts. Thus, they refer to the knowledge of the parties of the existence of an arbitration agreement or clause as being a presumption of their intention to arbitrate.¹⁵⁸ Moreover, this knowledge has in a number of cases been

¹⁵⁶ X Boucobza ‘La Clause Compromissoire par Référence en Matière d’Arbitrage Commercial International’ [1998] *Revue de l’Arbitrage* 495, 499 (emphasis added).

¹⁵⁷ 925 F 2d 1136 (United States Ct of Apps (9th Cir), 1991).

¹⁵⁸ For example, the courts refer to the full autonomy principle as the basis for binding persons who are not signatories to the main contract with the arbitration clause contained in it but do not examine specifically whether such persons are in fact parties to the main contract: J-P Ancel ‘L’Actualité de l’Autonomie de la Clause Compromissoire’ in *Travaux du Comité Français de Droit International Privé* (1991-1992) 72, 99; Y Derains ‘Les Tendances de la Jurisprudence Arbitrale Internationale’ (1993) 120 *Journal du Droit Intl* 829, 837. Thus it was held that ‘the party invoking the arbitration agreement [must] prove that the other party knew about the arbitral clause at the time it entered into the main agreement’: E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 275; *Société Bomar Oil NV v Entreprise Tunisienne d’Activités Pétrolières*, Cassation civil 9 November 1993 [1994] *Revue de l’Arbitrage* 108. This is in contrast to the ordinary rule, whereby the interpretation of the relevant documents and arbitration clause is necessary to establish that parties could reasonably envisage the

based on a circumstantial presumption rather than on an actual awareness of the arbitration clause.¹⁵⁹

The above test is, therefore, capable of imposing an arbitration agreement on persons who did not even consent implicitly to arbitration.¹⁶⁰ Indeed, some French cases do not refer to ‘an expression of party’s implied consent; rather a party’s substantial involvement in the negotiation and performance of the contract and the knowledge of the existence of the arbitration clause have a standing of their own, as a substitute for consent.’¹⁶¹

The tendency of the Court of Cassation to utilise the self-effectiveness principle, instead of referring simply to separability, shows that the separability doctrine has itself

application of the relevant clause to their disputes. The French courts leave this interpretation to be decided finally by arbitrators who, in turn, have a discretion in determining it; Gaillard (as above) 255, 287. However, the self-effectiveness principle does not contain a full set of rules that govern all aspects of validity, and these rules continue to be worked out by the french courts on a case-by-case basis; C Blanchin *L’Autonomie de la Clause Compromissoire: Un Modèle Pour la Clause Attributive de Jurisdiction?* (Librairie Générale de Droit et de Jurisprudence Paris 1995) 31-33.

¹⁵⁹ It is sufficient if the respective situations of the parties ‘raise the presumption that they were aware of the existence and scope of the arbitration clause’: *Korsnas Marma v Durand-Auzias*, Ct App of Paris 30 November 1988 [1989] *Revue de l’Arbitrage* 691; *SMABTP v Société Stationor*, Ct App of Paris 22 March 1995 [1997] *Revue de l’Arbitrage* 550. Such a presumption has also been derived from the position of members of a group of companies involved in the execution of a contract: *Société Isov-Saint-Gobain v Société Dow Chemical France*, Ct App of Paris 21 October 1983 [1994] *Revue de l’Arbitrage* 98; *Société Bomar Oil NV v Entreprise Tunisienne d’Activités Pétrolières*, Cassation civil 9 November 1993 [1994] *Revue de l’Arbitrage* 108; and even where there is no such a group: *Renault v Societe V 2000 (Jaguar France)*, Cassation civil 21 May 1997 [1997] *Revue de l’Arbitrage* 537.

¹⁶⁰ P-Y Tschanz ‘Note under the *Korsnas* Case’ [1989] *Revue de l’Arbitrage* 698, 707; C Blanchin *L’Autonomie de la Clause Compromissoire: Un Modèle Pour la Clause Attributive de Jurisdiction?* (Librairie Générale de Droit et de Jurisprudence Paris 1995) 35.

¹⁶¹ B Hanotiau ‘Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties – Issues’ (2001) 18 *J Intl Arbitration* 251, 273. cf WL Craig, WW Park and J Paulsson *International Chamber of Commerce Arbitration* (3rd edn Oceana Publications New York 2000) 554, saying that ‘French case law has been generous with respect to proof of an arbitration agreement’s existence;’ M Rubino-Sammartano *International Arbitration Law and Practice* (2nd edn Kluwer Law International The Hague 2001) 273, describing the French courts’ approach as being ‘too liberal.’

become an aspect of the former.¹⁶² The French courts suggest that the self-effectiveness principle applies as a matter of law without carrying out an inquiry into parties' intentions. Thus, it has to be treated as 'a presumption of legality (*licéité*) of the arbitration clause in international cases; this presumption facilitates certainly the immediate acceptance of certain effects of the clause.'¹⁶³ As Jean Ancel puts it, the self-effectiveness principle 'affords the arbitration clause a dynamic effect' that allows it to be extended to non-signatories.¹⁶⁴ This pro-arbitration policy is summarised by Professor Mayer who writes that 'French courts have held that because the [arbitration] clause is "wholly autonomous", it must necessarily be valid.'¹⁶⁵

So far, we have looked at the separability doctrine in relation to international arbitration only. However, some commentators assume that the separability doctrine applies now to French domestic arbitration.¹⁶⁶ This view is based on article 1466 of the French new code of civil procedure of 1981, which empowers arbitrators to decide their jurisdiction.¹⁶⁷ Moreover, in a broad statement, a French judge ruled that¹⁶⁸

¹⁶² D Bureau 'Note under the *Thomson Case*' [1999] *Revue de l'Arbitrage* 122, 123; P Ancel and O Gout 'Note under the *Sam Case*' [1999] *Revue de l'Arbitrage* 354, 355. cf *Zanzi v J de Coninck*, Cassation civil 5 January 1999 [1999] *Revue de l'Arbitrage* 260, annotated by P Fouchard at 262.

¹⁶³ P Fouchard 'Note under the *Métru Case*' [2000] *Revue de l'Arbitrage* 98, 99.

¹⁶⁴ J-P Ancel 'L'Actualité de l'Autonomie de la Clause Compromissaire' in *Travaux du Comité Français de Droit International Privé* (1991-1992) 72, 101; at 100-101, Ancel argues that an arbitration clause can apply to 'third parties' because, by virtue of the full autonomy principle, an arbitration clause escapes all national laws, including their principle of privity of contract.

¹⁶⁵ P Mayer 'The Limits of the Severability of the Arbitration Clause' in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 261, 264.

¹⁶⁶ J-P Ancel 'L'Actualité de l'Autonomie de la Clause Compromissaire' in *Travaux du Comité Français de Droit International Privé* (1991-1992) 72, 79.

¹⁶⁷ Ancel (n 166 above) 79; M De Boissésou *Le Droit Français de l'Arbitrage* (GLN-éditions Paris 1990) 134.

¹⁶⁸ Tribunal de Grand Instance de Paris 12 February 1991, quoted in Ancel (n 166 above) 87.

in matters relating to international *or even domestic* arbitration, the arbitration clause constitutes a procedural agreement that is distinct and independent from the main contract [...] it must, therefore, be effective regardless of the determination of *the existence or validity of the main contract*, subject to public policy or manifest nullity.

However, the Court of Appeal of Paris has been inconsistent in its application of the separability doctrine in domestic arbitration. In *Société Pigadis v Société Prodim*,¹⁶⁹ an award was challenged on the basis that the arbitration clause was invalid because the main contract contradicted article 85 of the Rome convention (a rule of public policy in competition law). The Court held that ‘the arbitration clause or agreement can be rendered null as a consequence of the nullity of the main contract.’¹⁷⁰

By contrast, the same court applied the separability doctrine to domestic arbitration where the main contract had been terminated. In *Sam v Perrin*,¹⁷¹ the Court held in broad terms that ‘the arbitration clause constitutes a procedural agreement that is distinct and independent from the main contract ... and must be enforced *independently from the existence or validity of the main contract*.’ In addition to the distinct nature of the arbitration clause, the Court reasoned that, ‘the arbitration clause ... is drawn in very general terms’ that covered the dispute over the termination of the contract. Unlike the reasoning of the Court of Cassation in international cases, the Court of Appeal relied on the intention of the parties, as evidenced by the arbitration clause to found the separability doctrine. Therefore, in contrast to international arbitration, ‘[i]t seems

¹⁶⁹ Ct App of Paris 6 July 1995 [1997] *Revue de l'Arbitrage* 85.

¹⁷⁰ *Société Pigadis v Société Prodim*, Ct App of Paris 6 July 1995 [1997] *Revue de l'Arbitrage* 85.

¹⁷¹ Ct App of Paris 8 October 1998 [1999] *Revue de l'Arbitrage* 350.

certain that the separability of the arbitration clause cannot be applicable where no contract existed. [...] But, by referring to the non-existence of the contract, it is doubtless that the Court of Appeal must have had in mind a case where, as in [*Sam v Perrin*], the contract *ceased to exist*.¹⁷²

It seems likely that the Court of Cassation will ultimately endorse the separability doctrine in domestic arbitration. This is indeed what some commentators call for.¹⁷³ However, it seems that the separability doctrine will be subject to a ‘non-existent contract’ exception in domestic arbitration. If so, it will be similar in terms of scope to the common law position, whereas the French doctrine is wider for international arbitration.

- (ii) The main differences between the French and common law approaches to the separability doctrine

One can draw together the differences between the French and common law approach to the separability doctrine in the following five points.

First, the French courts distinguish between domestic and international arbitration. They first accepted the separability doctrine for international arbitration. The French Court of Cassation has not yet confirmed it in respect of domestic arbitration. On the

¹⁷² P Ancel and O Gout ‘Note under the *Sam* Case’ [1999] *Revue de l’Arbitrage* 354, 363. The Court of Appeal has reaffirmed its general statement of separability in domestic arbitration in *SA Barbot CM v Société Bouygues Bâtiment*, Ct App of Paris 11 May 2000 [2002] *Revue de l’Arbitrage* 180.

¹⁷³ C Jarrosson ‘Note under the *Labinal* Case’ [1993] *Revue de l’Arbitrage* 653, 659.

other hand, England and the other common law jurisdictions examined in this chapter do not make such a distinction. While Australia has enacted the Model Law for international arbitration, the Australian courts accepted the separability doctrine before this enactment and did not distinguish between domestic and international arbitration in this respect.

Secondly, French courts rarely consider the terms of the relevant arbitration clause in order to ascertain whether or not it covers the relevant dispute over the main contract; they apply the separability doctrine to every arbitration clause. Thus, in international arbitration, the separability doctrine is 'a principle of general application, being an international substantive rule.'¹⁷⁴ Consequently, arbitrators have the power to decide finally on matters pertaining to the effectiveness of the main contract with relatively little regard to what the parties agreed to.

Thirdly, unlike common law jurisdictions, the fact that French courts apply the separability doctrine as an imposed rule of law makes it difficult to relate this principle to the contractual theory of arbitration. The French position seems to be closer to the autonomous theory of arbitration¹⁷⁵ (which facilitates policy-based rules so as to

¹⁷⁴ *Ministère Tunisien de l'Équipement v Société Bec Frères*, Ct App of Paris 24 February 1994 [1995] *Revue de l'Arbitrage* 275.

¹⁷⁵ Paradoxically, while this approach *imposes* the self-effectiveness principle and the separability doctrine on the parties, it is thought to reinforce the freedom of the parties to decide how their arbitration will be conducted with minimal restrictions of law: M De Boissésou *Le Droit Français de l'Arbitrage Interne et International* (GLN-éditions Paris 1990) 683. However, the self-effectiveness principle seems to dispense with parties' chosen law. In *Société ETPM et Ecofisa v Société Gas del Estrado*, Cassation civil 4 December 1990 [1991] *Revue de l'Arbitrage* 81, the Court of Cassation held that a court need not refer to any national law in examining the validity or the interpretation of an arbitration clause, *even though 'the arbitration has been made subject to a particular law.'* cf R Goode

achieve the object of arbitration, while invoking the principle of ‘party autonomy’ as a theoretical justification).¹⁷⁶ In other words, French courts pay more regard to the separability doctrine as a special rule aimed to promote international arbitration than they do to the intentions of the parties. As Jean Ancel puts it, ‘the international arbitration clause benefits from a specific regime and has its own legal life.’¹⁷⁷ Thomas Clay, too, suggests that arbitration is an *institution* that has its own ‘juridical system,’¹⁷⁸ which embraces ‘an *absolute* autonomy of the arbitration clause in respect of both national laws and the main contract.’¹⁷⁹

Fourthly, the French separability doctrine is wider than the common law position which accepts an exception for non-existent contracts. While the decisions considered above did not definitively deal with cases where parties were not in fact *ad idem*, the French courts accept as a matter of principle that, in international arbitration, the separability doctrine applies in cases where the contract never existed. This is facilitated by the self-effectiveness principle.

‘The Role of the *Lex Loci Arbitri* in International Commercial Arbitration’ (2001) 17 *Arbitration Intl* 19, 31; chapter I above pp 39-40.

¹⁷⁶ See chapter I above 30-41.

¹⁷⁷ J-P Ancel ‘L’Actualité de l’Autonomie de la Clause Compromissoire’ in *Travaux du Comité Français de Droit International Privé* (Daloz Paris 1991-1992) 72, 106.

¹⁷⁸ T Clay *L’Arbitre* (Daloz Paris 2001) 215.

¹⁷⁹ Clay (n 178 above) 525. It might be said that the French approach is also consistent with the jurisdictional theory of arbitration under which the state affords arbitrators and/or parties such powers as it deems appropriate. However, this interpretation does not fit within the French arbitration law. According to Mehren, ‘[t]he jurisdictional theory of the nature of arbitration is ... vigorously rejected’ in French arbitration law: AT Von Mehren ‘International Commercial Arbitration: The Contribution of the French Jurisprudence’ (1986) 46 *Louisiana L Rev* 1045, 1058; at 1055, Mehren points out that the French courts tend to introduce elements of the autonomous theory of arbitration in French arbitration law.

The final difference also relates to the self-effectiveness principle. The separability doctrine applies in France regardless of the law governing the main contract or that which would apply to the arbitration clause according to ordinary rules of conflict laws. The next subsection examines the self-effectiveness principle and explains how it interacts with the separability doctrine.

(2) *The Self-Effectiveness of the Arbitration Clause (Separability in Relation to All National Laws)*

According to French courts, an arbitration clause is not only detached from the main contract (separability), but it is also detached from the conflict of law rules so that it is subject to no national law (*autonomie complète*, 'full autonomy').¹⁸⁰ An arbitration clause is subject to its '*loi propre*,' instead.¹⁸¹ In this sense, French courts speak of *la validité propre de la clause compromissoire*, the principle of validity,¹⁸² or *efficacité propre*, the self-effectiveness of the clause.¹⁸³

While this self-effectiveness principle can be regarded as being distinct from the separability doctrine, French courts and commentators treat it as being one of its

¹⁸⁰ J Robert *L'Arbitrage: Droit Intern, Droit International Privé* (6th edn Dalloz Paris 1993) 251.

¹⁸¹ Decisions of the French Court of Cassation of 14 November 1991 and 17 December 1991, cited in J-P Ancel 'L'Actualité de l'Autonomie de la Clause Compromissoire' in *Travaux du Comité Français de Droit International Privé* (Dalloz Paris 1991-1992) 72, 91. See also cases cited in B Goldman 'Note under the *Vamipex* Case' [1989] *Revue de l'Arbitrage* 642, 645.

¹⁸² E Loquin 'Note under the *Bomar* Case' (1994) 121 *Journal du Droit Intl* 692, 697.

¹⁸³ *Société Chambon v Société Thomson CSF*, Ct App of Paris 10 September 1997 [1999] *Revue de l'Arbitrage* 121.

consequences.¹⁸⁴ In the following subsections, we will look at (i) the purported justification for this principle; (ii) whether this principle is one of international arbitration law; and (iii) whether this principle should be applied in England.

(i) The purported justification for the self-effectiveness principle

The self-effectiveness principle is argued to be the best method, whereby the validity of an arbitration agreement can be assessed with adequate certainty. This is because it dispenses with the application of the rules of conflict of laws altogether. These rules would result in the application of a national law on the basis of different competing factors, and the outcome would often be artificial and unpredictable.¹⁸⁵ To avoid the problem of the conflict of law rules, the self-effectiveness principle discards the idiosyncrasies of domestic laws.¹⁸⁶

Noting that the practical advantages of the principle could justify the separability doctrine, Jean Ancel suggests that the full autonomy principle, on the other hand, requires a different theoretical basis. Thus,¹⁸⁷

¹⁸⁴ C Blanchin *L'Autonomie de la Clause Compromissoire: Un Modèle Pour la Clause Attributive de Jurisdiction?* (Librairie Générale de Droit et de Jurisprudence Paris 1995) 30; P Mayer 'Note' [1990] *Revue de l'Arbitrage* 681, 683; E Gaillard 'Note under the *Dalico* Case' (1994) 121 *Journal du Droit Intl* 433, 434, 436-7; A Samuel 'Separability of Arbitration Clauses – Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice' [2000] *Arbitration and Dispute Resolution LJ* 36, 38.

¹⁸⁵ E Gaillard and J Savage (edd) *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International The Hague 1999) 235, 369.

¹⁸⁶ B Oppetit 'Note under the *Hecht* Case' (1972) 99 *Journal du Droit Intl* 843, 845.

¹⁸⁷ J-P Ancel 'L'Actualité de l'Autonomie de la Clause Compromissoire' in *Travaux du Comité Français de Droit International Privé* (Dalloz Paris 1991-1992) 72, 82-83.

the theoretical basis of the separability doctrine should be found in the distinct nature of the arbitration clause, which is a *procedural agreement* having a subject matter that differs fundamentally from the main contract ... This [, in turn,] implies conferring on the judge the power to create norms, which are substantive rules “*règles matérielles*,” ... at the expense of the conflict of law rules ... [Therefore,] we can say that, while the practical requirements of international arbitration have led to the “separability” of the arbitration clause in relation to the main contract, the distinct nature of this clause, which gives rise to a special jurisdiction, resulted in affirming the autonomy in its fullest sense [self-effectiveness] in order to escape the law governing international contracts.

This justification shows that the self-effectiveness principle aims to allow the courts to develop special rules to govern the international commercial arbitration without the need to refer to any national law. Thus, the French courts utilise the self-effectiveness principle in order to avoid restrictions of national laws on the arbitrability of the given dispute. In the *Hecht* case,¹⁸⁸ the Court of Cassation held that the French law prohibition on referring the relevant subject matter to arbitration did not apply to the arbitration clause, since this clause was separate from national laws. Thus, the court avoided the French law so as to preserve the particular arbitration clause which would have otherwise been viewed as relating to a non-arbitrable matter and, therefore, invalid.

- (ii) Is the self-effectiveness principle a substantive rule of international arbitration law?

¹⁸⁸ *Hecht v Société Buisman's*, Cassation civil 4 July 1972 (1972) 99 *Journal du Droit Intl* 843.

In the *Dalico* case,¹⁸⁹ the Court of Cassation held that, ‘by virtue of a substantive rule of international arbitration law (*règle matérielle*), the arbitration clause is legally independent from the main contract,’ and that ‘its existence and effectiveness is determined ... according to the common will of the parties, without reference to any national law.’¹⁹⁰ This decision reveals that the French courts regard the self-effectiveness principle (and thus the separability doctrine) as being a substantive rule of international arbitration law. It is necessary to determine the meaning and source of ‘a substantive rule.’

By classifying a rule as a substantive rule, the French courts denote that it applies directly to international arbitration. Explaining the effect of the French legal concept of *règles matérielles* (substantive rules), Veeder says that it¹⁹¹

applies to an international arbitration in France regardless of the application of French substantive or French procedural law – even where, for example, the parties have expressly chosen English or German law ... A *règle matérielle* expresses the will

¹⁸⁹ *Comité Populaire de la Municipalité de Khoms El Mergeb v Société Dalico Contractors*, Cassation civil 20 Decembre 1993 (1994) 121 *Journal du Droit Intl* 432.

¹⁹⁰ See also *Société Romanian Air Transport v Société The Levont Shipping Company*, Ct App of Paris 1 June 1999 (2000) 127 *Journal du Droit Intl* 370; *Gatoil v National Iranian Oil Co*, Ct App of Paris 17 December 1991 [1993] *Revue de l'Arbitrage* 281. In some cases, French courts refer to ‘international public policy’ as the only potential rules to affect the validity of an arbitration agreement: *Hecht v Société Buisman's*, Cassation civil 4 July 1972 (1972) 99 *Journal du Droit Intl* 843; *Menicucci v Malieux*, Ct App of Paris 13 December 1975 (1977) 104 *Journal du Droit Intl* 106; *Epoux Convert v Société Droga*, Cassation civil 14 December 1983 (1984) *Revue de l'Arbitrage* 483; *Coumet et Ducler v Société Polar-Rakennusos & Keythio*, Ct App of Paris 8 March 1990 [1990] *Revue de l'Arbitrage* 674.

¹⁹¹ VV Veeder ‘Towards a Possible Solution: Limitation, Interest and Assignment in London and Paris’ in Y Derain and AJ Van Den Berg (edd) *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, Some Special Features of the Law of Civil Law States Relevant for the Practice of Arbitration* (ICCA Congress Series 7 Kluwer Law International The Hague 1996) 268, 271.

of the French courts and of the French legislator to elaborate special rules for international commercial arbitration in France, operating independently from any national law.

The direct application of this rule entails that the French courts ignore any national law that may not recognise the self-effectiveness principle or the separability doctrine. This is because '[t]he conflict of laws method is clearly discarded: the French judge does not refer to any rule of conflict of laws to determine whether the law that governs the arbitration clause accepts the self-effectiveness principle.'¹⁹²

The French courts justify this position by referring to an international source for this substantive rule.¹⁹³ As Eric Loquin suggests¹⁹⁴ 'the principle of the autonomy of the arbitration clause is a rule belonging "to international arbitration law", and not to French law of arbitration. [French courts] explicitly impose this "international arbitration law" on national laws.' Thus, in line with the French courts' tendency to delocalise international arbitral awards,¹⁹⁵ they purport to introduce a new element in the delocalisation of arbitration by holding that the arbitration agreement is subject to no national law.

¹⁹² H Gaudemet-Tallon 'Note under the *Dalico* Case' [1993] *Revue de l'Arbitrage* 118; cf AT Von Mehren 'International Commercial Arbitration: The Contribution of the French Jurisprudence' (1986) 46 *Louisiana L Rev* 1045, 1052; J-P Ancel 'French Judicial Attitudes towards International Arbitration' (1993) 9 *Arbitration Intl* 121, 123.

¹⁹³ A Dimolitsa 'Separability and *Kompetenz-Kompetenz*' in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 217, 226.

¹⁹⁴ E Loquin 'Note under the *Bomar* Case' (1994) 121 *Journal du Droit Intl* 692, 700.

¹⁹⁵ cf R Goode 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 *Arbitration Intl* 19, 27.

Some international arbitration awards appear to support the French approach. They appear to assume that, in international arbitration, not only can an arbitration clause be governed by a law other than the proper law of the main contract (which is the normal effect of separability), but it may also be governed by international commercial usages and general principles of law. In other words, the separability doctrine results in the independence of the arbitration clause from national laws.¹⁹⁶ According to Yves Derains,¹⁹⁷

[t]his approach, which does not refer explicitly to the principle of the autonomy of the arbitration clause in relation to the main contract and all national laws, seems to put forward a principle of validity of the arbitration clause [the self-effectiveness principle] if it is inserted in an international contract.

Resting this approach on the separability doctrine, an arbitral tribunal decided that ‘the parties have referred to the ICC rules ... *which recognise the autonomy of the arbitration clause* and empower arbitrators to decide on their jurisdiction ... *without requiring the application of a national law whatever.*’¹⁹⁸

But the French approach has not generally been applied and certainly it is difficult to derive the self-effectiveness principle from an international source. It is not laid down in any international arbitration rules or national laws. A number of arbitral awards have specifically ruled that the separability doctrine does not preclude the application of

¹⁹⁶ ICC case no 3572 of 1982 (1989) XIV Ybk Commercial Arbitration 111; ICC case number 5721 of 1990 (1990) 117 Journal du Droit Intl 1026.

¹⁹⁷ Y Derains ‘Observation under ICC case no 5721’ (1990) 117 Journal du Droit Intl 1026, 1027.

¹⁹⁸ ICC case no 4381 of 1986 (1986) 113 Journal du Droit Intl 1102, 1104; ICC cases no 4131 of 1982 (1983) 110 Journal du Droit Intl 899; ICC case no 5065 of 1986 (1987) 114 Journal du Droit Intl 1039.

a national law to arbitration clauses.¹⁹⁹ Further, national laws may in general be discarded only where the law of the seat allows it, and where parties made no choice of law.²⁰⁰ Professor Bernardini points out that to ignore the application of all national laws may be 'contrary to the law prevailing at the seat of arbitration, should the latter provide for mandatory rules regulating form and other conditions of validity of the arbitration agreement.'²⁰¹ Indeed, the awards mentioned above that appeared to recognise the self-effectiveness principle were made in France, where the courts condone such an approach.²⁰²

The best view, therefore, is that the self-effectiveness principle is a rule of French law applying to international arbitration.²⁰³ As Matthieu de Boissésou suggests 'it is the

¹⁹⁹ ICC case 4145 (1987) XII Ybk Commercial Arbitration 97, 100, saying that 'separability' derives from the proper law of the contract; ICC case 5730 of 1988 (1990) 117 Journal du Droit Intl 1029, refusing the application of the separability doctrine to avoid the national law governing the arbitration clause.

²⁰⁰ ICC case 8910 of 1998 (2000) 127 Journal du Droit Intl 1085; ICC cases 2626 and 6379 cited in JDM Lew 'The Law Applicable to the Form and Substance of the Arbitration Clause' in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 114, 143; ICC case 6474 (2000) XXV Ybk Commercial Arbitration 279, 322; WL Craig, WW Park and J Paulsson *International Chamber of Commerce Arbitration* (3rd edn Oceana Publications New York 2000) 53.

²⁰¹ P Bernardini 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause' in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 187, 202.

²⁰² A Dimolitsa 'Separability and *Kompetenz-Kompetenz*' in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 217, 246.

²⁰³ cf R Goode 'Usage and its Reception in Transnational Commercial Law' (1997) 46 ICLQ 1, 3, stating that 'transnational commercial law' includes 'principles and rules ... which are common to a number of legal systems.'

French judge who recognised this rule in the name of the legal system that he represents.’²⁰⁴

(iii) Should the self-effectiveness principle be applied in England?

In English law, the separability doctrine depends on the intention of the parties. Further, it depends on whether the law governing the arbitration clause, which is determined according to the ordinary rules of conflict of laws of the forum, allows parties’ intention to have the effect of separability. This position harmonises with the contractual analysis of arbitration. Nevertheless, it is interesting to ask whether the self-effectiveness principle, which seems to shift towards the autonomous theory of arbitration by delocalising the arbitration agreement, should be applied in England.

In other words, can and should the English courts apply the separability doctrine directly to every arbitration clause and assess the validity of such a clause without reference to any national law?

²⁰⁴ M De Boissésou *Le Droit Français de l'Arbitrage Interne et International* (GLN-éditions Paris 1990) 494; C Blanchin *L'Autonomie de la Clause Compromissoire: Un Modèle Pour la Clause Attributive de Jurisdiction?* (Librairie Générale de Droit et de Jurisprudence Paris 1995) 29. The application of the self-effectiveness principle regardless of any otherwise applicable law may be explained on the basis of an implicit French rule of conflict of laws that requires the application of the law of the forum to the validity of the arbitration agreement. E Loquin ‘Note under the *Cassia* Case’ (1992) 119 *Journal du Droit Intl* 170, 175; VV Veeder ‘Towards a Possible Solution: Limitation, Interest and Assignment in London and Paris’ in Y Derain and AJ Van Den Berg (edd) *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, Some Special Features of the Law of Civil Law States Relevant for the Practice of Arbitration* (ICCA Congress Series 7 Kluwer Law International The Hague 1996) 268, 270, 274.

It is submitted that the application by English courts of the self-effectiveness principle cannot be reconciled with the contractual analysis of arbitration in English law. It results in the finality of arbitrators' decisions on the consent of the parties to arbitrate. Noting that the self-effectiveness principle 'has carried the autonomous nature of the arbitration clause to the extreme,' Professor Bernardini suggests that it²⁰⁵ 'may bring about results going beyond the parties' expectations in view of the wide discretion left to the arbitrator in determining the parties' common intent.' This, in turn, would undermine the reason for 'the non-existent contract' exception to the separability doctrine, which is mainly aimed to protect the parties against arbitrators' decisions which bind them incorrectly to the main contract and thus to the arbitration clause.

However, arbitrators can and should be allowed to apply the self-effectiveness principle *provided parties have explicitly conferred this power on them*. If so, arbitrators may apply the separability doctrine and assess the validity of the relevant arbitration clause without reference to any national law. In the absence of such an authorisation, the courts should review the validity of the arbitration clause according to the applicable law, and arbitrators might be guilty of misconduct for applying the self-effectiveness principle without authority.

²⁰⁵ P Bernardini 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause' in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 187, 202.

Indeed, that this should be possible derives support from the approach of the Arbitration Act 1996 to the power of arbitrators not to apply any national law to the merits of the dispute. Section 46(1) of the Act reads:

The arbitral tribunal shall decide the dispute –
(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

This power,²⁰⁶ which denotes the substantive delocalisation of arbitration, depends on parties' agreement. Likewise, the power to disregard national laws in respect of the arbitration clause should derive from the agreement of the parties. The courts can uphold such an agreement, since there seems to be no policy against agreements to dispense with the application of the law in arbitration.²⁰⁷

The possibility of allowing arbitrators to apply the self-effectiveness principle in the above manner differs from the French approach to the principle. The suggested manner applies as a variation of the contractual theory of arbitration and not as a rule that is imposed on the parties.

5. Conclusion

²⁰⁶ See chapter II above at 66.

²⁰⁷ *Deutsche Schachtbau- Und Tiefbohr Gesellschaft MBH v Shell International Petroleum Co Ltd* [1991] 1 AC 295 (HL). It should also be realised that the Rome convention on the law applicable to contracts does not apply to arbitration agreements.

The separability doctrine is accepted in many jurisdictions and arbitration rules. However, the limits of the separability doctrine are still contentious, and its nature is not the same in all jurisdictions that accept it.

It has been shown that the separability doctrine is not stated in the same terms under arbitration rules, such as the ICC rules, UNCITRAL rules and the Model Law. The main consequence of the difference of the statement of this doctrine is the uncertainty as to whether it applies despite the dispute being over the existence of the main contract.

As regards Australia and the United States, it has been shown that the courts in these countries accepted initially the version of the separability doctrine that was applied in *Heyman v Darwins Ltd*. Subsequently, they widened the separability doctrine in line with the *Harbour Assurance* case. The courts in these jurisdictions apply the separability doctrine on the basis of the intentions of the parties which is ascertained through the interpretation of the relevant arbitration clause. The separability doctrine is not applied as an imposed rule of law. This is also in harmony with the position of the English courts. It has also been noted that, while Australia enacted the Model Law for international commercial arbitration, the courts' interpretation of the separability doctrine thereunder did not affect the courts' attitude to the doctrine. As such, one can assert that there exists a consistent common law approach to the separability doctrine.

A distinctive approach to the separability doctrine exists in France. The French courts have accepted this doctrine only for international arbitration. The French courts state the separability doctrine in very broad terms regarding international arbitration, accepting in principle that it applies despite the non-existence of the main contract. Not only is the French version of the separability doctrine distinct in terms of its scope, but it is also different as to its basis. Unlike the courts in common law jurisdictions, the French courts hardly consider the interpretation of the arbitration clause so as to ascertain the intentions of the parties respecting the application of the separability doctrine. The French courts also apply the separability doctrine regardless of the law governing the arbitration clause. As such, the French courts apply the separability doctrine as an imposed rule of law. The French approach to the separability doctrine is closer to the autonomous theory of arbitration than the contractual theory.

It has been shown that the French approach to the separability doctrine is linked to a novel application of 'separability'. That is the separability of the arbitration clause from all national laws: the self-effectiveness principle. This means that the validity of an arbitration clause (or arbitration agreements in general) must be assessed without any reference to national laws. The French courts assume that this principle is a substantive rule that belongs to international arbitration law and applies directly to arbitration.

It has been submitted that the English courts should not discard the national law that applies to the arbitration agreement according to the conflict of laws rules, since

these rules can in appropriate cases indicate the applicable law that is reasonably expected by the parties. Further, there is no reason to assume that parties in international relations prefer the self-effectiveness principle to the diversity of legal systems that could apply to their arbitration agreement. However, if the court is asked to uphold arbitrators' application of the self-effectiveness principle, the matter should depend on parties' authorisation to the arbitrators. Only if parties have authorised the arbitrators to assess the validity of the disputed arbitration agreement on the basis of the self-effectiveness principle should the court uphold the decision of the arbitrators. This is consistent with the solution adopted in the Arbitration Act 1996 respecting the power of arbitrators to disregard national laws as to the merits of the dispute.

This chapter has shown that, contrary to the view of some commentators, the separability doctrine may differ from jurisdiction to jurisdiction in terms of scope and basis. The common law approach to this doctrine rests on the contractual theory of arbitration. But that is not so in relation to French law. The judges in the *Harbour Assurance* case and the draftsmen of the Arbitration Act 1996 incorrectly assumed that the separability doctrine was a general uniform principle of arbitration. In so doing they did not give sufficient regard to the fact that differences do exist between the doctrine in different jurisdictions. It follows that the precise scope of the separability doctrine cannot simply be assumed but must be specifically articulated and justified in terms of a coherent theory of arbitration. In the light of this lesson from comparative law, the next two chapters seek to justify the scope of the separability doctrine in English arbitration law.

CHAPTER VI

JUSTIFYING AND CLARIFYING NON-EXISTENT CONTRACTS AS AN EXCEPTION TO THE SEPARABILITY DOCTRINE

1. Introduction

Chapter III has shown that, while the English courts have not yet applied the separability doctrine to arbitration clauses contained in ‘non-existent contracts,’ section 7 of the Arbitration Act 1996 has on the face of it widened the doctrine so as to remove the non-existent contracts exception. That this is indeed the correct way to interpret section 7 has the support of several commentators.

It is submitted that such a widening of the separability doctrine would be unacceptable because it is based on a pro-arbitration policy, which does not give sufficient regard to the intentions of the parties. This chapter aims at justifying an exception to the separability doctrine for non-existent contracts by focusing on the dependence of this doctrine, at least in English law, on the intention of the parties. It will also clarify the meaning of the non-existence of contracts in seeking to explore whether section 7 can be interpreted in such a way as to reconcile its apparent broad scope with the common law exception for non-existent contracts.

While many proponents of the separability doctrine posit that it is a fictional policy device, which is needed to promote arbitration as a method for the resolution of disputes, English courts have tended to regard it as resting on ordinary contractual

principles governing the consent of the parties. That is, they base it on the intentions of the parties, which is usually ascertained through the interpretation of the relevant arbitration clause. This approach harmonises the separability doctrine with the contractual analysis of arbitration. That is, arbitration is based on the agreement of the parties rather than on a legal policy-based fiction.

A final preliminary point should be made. It is the argument of this thesis that the retention of ‘the non-existent contracts’ exception to the separability doctrine does not prevent arbitrators from examining the existence of the contract pursuant to the competence-competence principle. As chapter IV has shown, arbitrators have the power to decide on the existence of the main contract as a jurisdictional question subject to subsequent review by the courts. Further, it was argued in that chapter that if the courts are seized with the dispute, they can and should afford arbitrators with the opportunity to make the first decision on it. Thus, they should be willing to stay the legal proceedings, where a party denies the existence of the main contract, in order to discourage tactical allegations aimed at delaying arbitration.

2. The Widening of the Separability Doctrine Flies in the Face of the Intention of the Parties

The English courts have based the separability doctrine on the general principles governing the parties’ consent to contracts, ie the general principles of contract law. By not applying the separability doctrine as a rule of law, or as ‘a free standing principle,’ the English courts’ approach is consonant with the contractual theory of

arbitration.¹ This respects the autonomy of the parties. Since ‘party autonomy’ is a central theme in the 1996 Act, the traditional position of the courts should continue after the 1996 Act, especially because section 7 allows parties to exclude this doctrine (section 7 starts with the words ‘unless otherwise agreed by the parties’). In line with the emphasis on the consent and autonomy of the parties, it follows that where the dispute is as to whether the parties have reached any agreement at all (ie whether there is any contract between them) the separability doctrine does not, and should not, apply. The essential elements of this argument will now be considered in detail.

While accepting the distinct nature of an arbitration clause,² the English courts emphasise that its application, despite the failure of the main contract, depends on the intention of the parties. Unlike the practice of the French courts (which has been explored in the previous chapter), the English courts interpret the arbitration clause in order to ascertain the intention of the parties as to its fate if the main contract is allegedly tainted with a cause of ineffectiveness. As such, the separability doctrine does not mainly rest on the policy of promoting commercial arbitration. Indeed, this explains why similar reasoning has been applied to jurisdiction clauses.³ Although courts do not generally refer to jurisdiction clauses as ‘separate agreements,’ Rix J has observed that the separability doctrine is, in effect, assumed to be applicable to jurisdiction clauses.⁴ And it is accepted that, like ‘the non-existent contract’ exception to the separability doctrine, ‘if the issue was whether there ever had been

¹ A Marriott ‘The Categorical Imperatives of Pateley Bridge’ (1999) 65 *Arbitration* 278, 279.

² *Heyman v Darwins Ltd* [1942] AC 356 (HL) 373-374, 377.

³ *Mackender v Feldia AG* [1967] 2 QB 590 (CA).

⁴ *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261, 280.

any contract at all ... then the foreign jurisdiction clause might not apply at all.’⁵ In *IFR Limited v Federal Trade SPA*,⁶ Colman J affirmed that a jurisdiction clause is separable depending on its wording. He concluded that ‘there is no conceptual basis for distinguishing the policy applicable to the effect of the jurisdiction agreement from that applicable to an arbitration agreement, and that in English law the same principle of separability therefore applies to a jurisdiction clause as to an arbitration clause.’

Some commentators accept that the separability doctrine is, and should be based on the intention of the parties.⁷ Others prefer a policy justification for the separability doctrine. Thus, it has been suggested that⁸

it is difficult to maintain that the autonomy principle [ie the separability doctrine] is satisfactorily justified by reference to the parties’ presumed intent ... In this light, the theoretical construct that an arbitration clause is to be viewed as a second and independent agreement ... is not in fact a justification for the autonomy principle but simply a way of describing the result one wishes to reach. In other words, the true justification for the autonomy principle is practical rather than theoretical.

As chapter V has shown, this policy-based justification for the separability doctrine led some judges and commentators in France and the United States to accept that the separability doctrine should apply so as to give effect to an apparent arbitration agreement regardless of whether parties reached consensus *ad idem* as to

⁵ *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261, 280; *Mackender v Feldia AG* [1967] 2 QB 590 (CA).

⁶ (QBD, 19 September 2001).

⁷ SM Schwebel *International Arbitration: Three Salient Problems* (Grotius Cambridge 1987) 3.

⁸ WL Craig, WW Park and J Paulsson *International Chamber of Commerce Arbitration* (3rd edn Oceana Publications New York 2000) 50. To similar effect, see: P Lalive ‘Problèmes Relatifs à l’Arbitrage International Commercial’ (1967) 120 *Recueil des Cours* 569, 594; cf Schwebel (n 7 above) 9-10.

the main contract. This view has recently provoked some commentators to reject the separability doctrine altogether on the basis that it flies in the face of the contractual theory of arbitration. Stephen Ware argues that⁹

[t]he separability doctrine is a legal fiction pretending that when a party alleges it has formed a contract containing an arbitration clause, that party actually alleges it has formed two contracts. In addition to the contract really alleged to have been formed, the separability doctrine pretends that the party also alleges a fictional contract consisting of just the arbitration clause, but no other terms. Enforcing this fictional contract deprives arbitration of its basis in voluntary consent, because the fictional contract lacks a basis in voluntary consent.

The major concern about the separability doctrine is that its application in relation to non-existent contracts ‘prevents courts from ensuring that arbitration is consensual at all.’¹⁰ However, Ware also objects to the separability doctrine in relation to unenforceable contracts that have been formed. Thus, ‘courts should decide whether the [main] contract has been formed and if so, whether there is a defense to its enforcement.’¹¹ On the basis that, with the exception of the separability doctrine, the Federal Arbitration Act of the United States rests on the contractual theory of arbitration, Ware suggests that ‘the Supreme Court should overrule [the separability doctrine]. If the Supreme Court does not do so, the FAA should be amended to do so.’¹² Acknowledging that this would make arbitration slower and allow courts to decide issues intimately intertwined with the merits that would go to

⁹ SJ Ware ‘Employment Arbitration and Voluntary Consent’ (1996) 25 Hofstra L Rev 83, 131. See also: SJ Ware ‘Arbitration and Unconscionability after *Doctor’s Associates Inc v Casarotto*’ (1996) 31 Wake Forest L Rev 1001, 1010-1011; T Baker ‘Arbitration: Arbitration in the 21st Century: Where We’ve Been, Where We’re Going’ (2000) 53 Oklahoma L Rev 653, 667.

¹⁰ SJ Ware ‘Employment Arbitration and Voluntary Consent’ (1996) 25 Hofstra L Rev 83, 130.

¹¹ Ware (n 10 above) 135.

¹² Ware (n 10 above) 135; Baker (n 9 above) 679.

the arbitrator, Ware argues that this is a price that ‘must be paid to make the law well-suited to ensure that arbitration is based on consent.’¹³

Contrary to the above two extreme positions, it is submitted that the separability doctrine can be applied according to ordinary contractual reasoning provided that it rests on the interpretation of the relevant arbitration clause and does not apply in relation to non-existent contracts.¹⁴ It may be asked, however, whether the interpretation of an arbitration clause ensures that the application of the separability doctrine matches the state of mind of the parties in fact and is not a legal fiction. This issue depends on the test that the courts apply in order to ascertain the intentions and consent of parties. The contractual analysis of the separability doctrine is satisfied if it is applied in accordance with the test applicable to contracts in general.

The general principle¹⁵ is that the determination of whether the parties have reached an agreement (*consensus ad idem*) depends on an objective test. Applying this, the courts may hold parties to be bound even though either party subjectively believed that he would not be bound. The courts also attach weight to the importance of the agreement to the parties, and to the fact that one of them has acted in reliance on it. This test enables one to apply separability if the relevant arbitration clause can be interpreted as evincing the parties’ intention to arbitrate disputes relating to the

¹³ SJ Ware ‘Employment Arbitration and Voluntary Consent’ (1996) 25 *Hofstra L Rev* 83, 137.

¹⁴ CM Svernlöv ‘The Evolution of the Doctrine of Separability in England: Now Virtually Complete?’ (1992) 9 *J Intl Arbitration* 115, 120.

¹⁵ HG Beale (ed) *Chitty on Contracts* (28th edn Sweet and Maxwell London 1999) Vol I, paras 2-002 – 2-003, 2-148, noting that, if the parties have in fact reached an agreement, they will be presumed to have intended to create a legally binding relationship; and the onus to prove the contrary is a heavy one.

effectiveness of the main contract. The courts are not required to ascertain with certainty the *actual* intention of parties. As Saville J said in *Fal Bunkering of Sharjah v Grecale Inc of Panama*,¹⁶ what parties agreed to in their arbitration clause ‘is not to be answered by seeking to discover their actual intentions but by deciding what each party was reasonably entitled to conclude from the attitude of the other.’¹⁷

The importance of ascertaining that the parties have reached an agreed intention to arbitrate is well-illustrated by the extreme cases where the main contract and the arbitration clause are, indisputably, independent. This, however, does not depend on the separability doctrine. Rather, it turns on an arbitration agreement that is, self-evidently, concluded independently from the main contract. Illustrations of this situation include:

(a) If either party proves that an arbitration agreement has been entered into after the dispute over the existence of the main contract has arisen. The separability doctrine is irrelevant in respect of such a post-dispute agreement.¹⁸

¹⁶ [1990] 2 Lloyd’s Rep 369. To similar effect, see: *Athletic Union of Constantinople v The National Basketball Association, The Phoenix Suns, Federation Internationale de Basketball EV* [2002] 1 All ER (Comm) 70.

¹⁷ An illustration of this can be gathered from *Capital Trust Investment Limited v Radio Design AB* [2002] 2 All ER 159 (CA), where the Court of Appeal rejected the argument that an arbitration could not be enforced in respect of allegations of misrepresentation on the basis that parties did not actually envisage such a dispute when making the contract. The Court of Appeal held that, ‘[t]he parties would be likely to have in mind the possibility of claims for negligent misrepresentation . . . , not because [the plaintiff] was aware of such a claim at the time it signed the form or at the time the contract was made but because experience suggests that such claims do sometimes arise out of prospectuses where the investment proves less advantageous than the investor had hoped.’ See also *Harbour Assurance Co (UK) Ltd v Kansa General Intl Assurance Co Ltd* [1993] QB 701 (CA) 711 (Ralph Gibson LJ).

¹⁸ eg *Westminster Chemicals & Produce Ltd v Eichholz & Loester* [1954] 1 Lloyd’s Rep 99; *Almare Societa di Navigazione SpA v Derby & Co Ltd, The Almare Prima* [1989] 2 Lloyd’s Rep 376.

(b) If an arbitration clause has been agreed independently in the course of the negotiations preceding the disputed contract. In such a case, the separability doctrine need not be invoked. In fact, when a party fails to establish the existence of the main contract, it may usually argue that an arbitration agreement has nonetheless been concluded independently, although such an agreement is rarely established.¹⁹

In these cases, an arbitration agreement rests on a full inquiry into the consent of parties to it. By contrast, if the separability doctrine were to be applied to 'non-existent' contracts it would undermine a defence to arbitration that is based on the non-existence of the main contract without requiring an evident arbitration agreement to be established.²⁰ It would simply separate out the arbitration clause that is apparently agreed to and justify this on the policy of promoting commercial arbitration.²¹

It is submitted that generally the intention of the parties is that there is no arbitration agreement unless the main contract is finally concluded. This can be supported by at least the following two facts:

¹⁹ eg *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 159; *LG Caltex Gas Co Ltd v China National Petroleum Corporation* [2001] 1 WLR 1892.

²⁰ This view was indeed accepted by a lower American court in *Pennsylvania Data Entry Inc v Nixdorf Computer Corp* 762 F Supp 96, 101 (DC, 1990). In this case, it was suggested obiter that arbitration could not be resisted on the ground that there was no meeting of minds between parties as to the main contract. Rather, the court required a specific attack against the arbitration other than the non-existence of the main contract. Certainly, this decision is inconsistent with the position of the courts of the United States which has been explored in the previous chapter. The dicta referred to were obiter because the case dealt mainly with allegations of rescission of the main contract. But see the minority's view in *Three Valleys Municipality Water Dist v E F Hutton & Co* 925 F 2d 1136 (US Ct of Apps (9th Cir), 1991) examined in chapter V above pp 213-215.

²¹ cf the position in French law explored in chapter V above pp 222-225. The threat such an approach presents to consent has been pointed out by some commentators, eg JW Stempel 'A Better Approach to Arbitrability' (1991) 65 Tulane L Rev 1377, 1384-1386; WW Park 'The Arbitrability Dicta in *First Options v Kaplan*: What Sort of *Kompetenz-Kompetenz* Crossed the Atlantic?' (1996) 12 Arbitration Intl 147.

(a) An arbitration clause is accepted at the same time as the main contract. There is no separate offer and acceptance respecting an arbitration clause contained in the main contract. This underpins the essential difference between a non-existent contract and an invalid contract. As one commentator puts it, '[w]hile separating an arbitration clause from an allegedly non-existent contract strains logic, separating an arbitration clause from an allegedly invalid contract is practically and theoretically justifiable as a means of promoting the perceived intention of the parties to arbitrate their disputes.'²²

(b) While an arbitration clause can be treated as a separate agreement, it is not entirely detached from the main contract; it remains dependent on the existence of the main contract. Such a clause exists for the sole purpose of resolving disputes under a specific contract that contains it. This dependence of the arbitration clause on the main contract is recognised by those judges who refer to such a clause as being *collateral* to the main contract.²³ In *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd & Orion Insurance Co Plc*,²⁴ Colman J considered *Heyman v Darwins* and concluded that it revealed that 'the survival of the arbitration clause in the face of an accepted repudiation [was] attributable to its having a contractual function *ancillary to the subject-matter of the*

²² A Gardner 'The Doctrine of Separability in Soviet Arbitration Law: An Analysis of *Sojuznetexport v Joc Oil Co*' (1989) 28 Columbia J Transnational L 301, 326-327; SM Schwebel *International Arbitration: Three Salient Problems* (Grotius Cambridge 1987) 11.

²³ eg *Heyman v Darwins Ltd* [1942] AC 356 (HL) 377 (Lord Wright) 392 (Lord Porter); *Bremer Vulkan Schiffbau und Maschinenfabrik Respondents v South India Shipping Corporation Ltd* [1981] AC 909 (HL) 980 (Lord Diplock). See chapter III above at 92-93, 106.

²⁴ [1995] QB 174.

contract, namely the resolution of disputes as to the parties' rights and obligations attributable to pre-existing events.'²⁵

Therefore, one should not simply assume that the intention of the parties is to arbitrate, where the main contract has not been concluded. Indeed one should start from the opposite assumption. Unlike other circumstances in which the separability doctrine applies, the application of this doctrine despite the actual or alleged non-existence of the contract flies in the face of the need for the parties to consent to arbitrate their disputes.²⁶ It exceeds the contractual justification adopted by the courts, and operates in reality as a fictional policy-based rule of law.

It has, however, been counter-argued that an arbitration clause does not depend on the existence of the main contract, since it has its own consideration.²⁷ Thus, 'the consideration for the arbitration agreement will ordinarily be the reciprocating promises of each party to it, that, in the event of a certain dispute arising between them, they will [...] submit the dispute to resolution by arbitration.'²⁸ This view is misleading. While the consideration relating to the arbitration agreement is distinct (promise to arbitrate), it cannot be valid unless it sufficiently specifies the existing or future subject matter of arbitration.²⁹ Hence, a promise to arbitrate cannot be entirely detached from the main contract. As Professor Pierre Mayer puts it, '[o]ne cannot provide for arbitration in a vacuum. The subject matter of the arbitration contemplated by the clause is any dispute (or sometimes, specific disputes) likely to

²⁵ *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd & Orion Insurance Co Plc* [1995] QB 174, 190 (emphasis added).

²⁶ FP Davidson *Arbitration* (W Green Edinburgh 2000) 195, 197.

²⁷ J Baily 'The Jurisdiction of an Arbitrator' (1999) 73 *The Australian LJ* 139.

²⁸ Baily (n 27 above) 142.

²⁹ R David *Arbitration in International Trade* (Kluwer Law and Taxation Deventer 1985) 184.

arise in connection with the other clauses of the agreement. The subject matter of an arbitration clause is the rest of the agreement.’³⁰

The above justification for an exception to the separability doctrine in the case of non-existent contracts paradoxically derives support even from the approach of those who call for the application of the separability doctrine despite the non-existence of the main contract. This is because they do not rest their view on effecting the intention of the parties. On the contrary, they would accept that their view may contradict the parties’ intention. Instead they rest their view on policy irrespective of the intention of the parties.³¹ Any reference to parties’ intention in this context should be recognised to be fictional or imputed intention.³²

However, the policy of promoting arbitration should not outweigh the duty of the courts to ascertain the intention of the parties. As with other agreements, the role of the court asked to enforce an arbitration clause is to ‘maintain a firm grip upon reality in deciding what was intended [by parties] and what it should do.’³³ As the

³⁰ P Mayer ‘The Limits of the Severability of the Arbitration Clause’ in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 261, 262.

³¹ Y Derains ‘Note under the *Gefimex* Case’ [1997] *Revue de l’Arbitrage* 434, 436. Indeed, a policy-based approach to the separability doctrine links with a strand of legal thought that is not concerned about ensuring consent to arbitration. For example, Alan Rau and Edward Sherman question ‘whether it is really productive to worry too much about the existence of true “consent” to arbitration.’ They suggest we might ‘change the focus of our thinking and ... approach arbitration as a question of economic regulation of certain disputes rather than as a means of giving effect to private ordering.’ Thus, rather than focusing on contract formation, the law should ‘place the highest priority on regulating the arbitration process itself.’ AS Rau and E Sherman ‘Arbitration in Contracts of Adhesion’ (unpublished manuscript, on file with the Hofstra Law Review 3 September 1994) at 6-7, quoted in SJ Ware ‘Employment Arbitration and Voluntary Consent’ (1996) 25 *Hofstra L Rev* 83, n 96 at 105.

³² A Baron ‘The Australian International Arbitration Act – The Fiction of Severability and Claims for Restitution’ (2000) 16 *Arbitration Intl* 173, 183.

³³ *Ferris v Plaister* (1994) 34 *NSWLR* 474, 497 (Ct of App of New South Wales).

Supreme Court of the United States said in one case,³⁴ ‘there is no strong arbitration-related policy favoring’ a presumption that a party to an arbitration agreement agreed to refer a particular dispute to arbitration. Thus,³⁵

[a]fter all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes ... but to ensure that commercial arbitration agreements, like other contracts, “are enforced according to their terms,” and according to the intentions of the parties.

Therefore, the enforcement of an arbitration clause, where the dispute arises over the existence of the main contract, should depend on whether arbitration has been accepted by both parties.³⁶

It is submitted that this analysis is consistent with the general tenor of the 1996 Act, especially because section 1 enshrines the principle of respecting the autonomy of parties in arbitration. In addition, section 7 is subject to the power of parties to agree otherwise. As such, the courts are expected to continue to apply the test of the intention of the parties and not to apply the separability doctrine as a policy-based rule of law. The Act does not require parties’ agreement to exclude or limit the separability doctrine to be explicit and specific.³⁷ Consequently, the application of the doctrine will depend on the interpretation of the relevant arbitration clause.³⁸

³⁴ *First Options of Chicago v Kaplan* 515 US 938, 115 S Ct 1920 (1995).

³⁵ Same case 947.

³⁶ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 174.

³⁷ MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 59.

³⁸ It is still, therefore, a valid approach to treat certain arbitration clauses as being narrower than others in respect of the circumstances affecting the validity or effectiveness of the main contract. As Professor Robert Merkin points out, an arbitration clause referring to disputes ‘under the contract’ should generally be treated as being narrower than clauses relating to disputes ‘arising out of the contract;’ the latter not the former may be capable of surviving the initial invalidity of the contract; R

To conclude, an arbitration clause should only be upheld if that is the intention of both parties. An arbitration clause is dependent on the existence of the main contract. Apart from the cases in which, indisputably, a separate arbitration agreement independently exists, the separability doctrine should not be deployed so as to give effect to an arbitration clause contained in the disputed contract. To ignore the dependency of the arbitration clause on the existence of the main contract clause will tend to clash with the parties' intentions. Given the ensuing finality of an arbitrator's decision on the existence of the main contract, the danger is that a party will be bound by an arbitrator's decision when he did not agree to that. While arbitrators can be authorised to fill in gaps in contracts or to modify them, they should not make new contracts for the parties.³⁹ Allowing this to happen would allow the wishes of one party (who demands arbitration) to be given prominence over the other (who does not want arbitration).

3. Clarifying the Meaning of Non-Existent Contracts

While the English courts may often use the terms void, invalid and non-existent contract interchangeably, the relevant cases dealing with the separability doctrine enable one to classify 'a contract' as non-existent *if there is no meeting of minds*

Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 4.37. However, the interpretation of a clause in one case does not generally constitute part of the ratio decidendi of the case; *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 (CA). See also: CM Svernlöv 'The Evolution of the Doctrine of Separability in England: Now Virtually Complete?' (1992) 9 J Intl Arbitration 115, 119-120; JG Wetter 'The Importance of Having a Connection' (1987) 3 Arbitration Intl 329, 334-336, warning against paying insufficient attention to the actual wording and construction of arbitration agreements before separability could be applied.

³⁹ R David *Arbitration in International Trade* (Kluwer Law and Taxation Deventer 1985) 65.

between parties in contrast to other cases of invalidity.⁴⁰ In line with the general principles governing contract, and in order for the meeting of minds not to become a mere technicality, the non-existence of the contract should be taken to mean the absence of a meeting of minds between parties to create a binding relationship. This should be distinguished from cases in which parties agree in fact, but the law does not give binding effect to their agreement – such cases involve the initial invalidity of the contract to which the separability doctrine does, and should, apply. In other words, if parties have in fact reached consensus *ad idem*, the separability doctrine can and should apply regardless of whether the law ever recognised parties' factual agreement as binding.⁴¹

As chapter III has shown, commentators who regard section 7 of the 1996 Act as a widening of the separability doctrine have not clarified what the non-existence of the contract means. They just assume that the distinction drawn in the cases between invalid and non-existent contracts has been removed.

The better view, however, is that the distinction between 'non-existent contracts' and initially invalid contracts is sound and militates against treating both situations in the same way for the purpose of the separability doctrine. However, the

⁴⁰ *Mackender v Feldia AG* [1967] 2 QB 590 (CA); *Harbour Assurance Co (UK) Ltd v Kansa General Intl Assurance Co Ltd* [1993] QB 701 (CA). The factual meeting of minds in respect of an initially invalid agreement has also been distinguished from the non-existence of the contract for the purpose of the service of a writ abroad: *Enimont Overseas AG v Ro Jugotanker Zadar (The "Olib")* [1991] 2 Lloyd's Rep 108, where Webster J said that 'I do not think that it is possible to contend that, in the present case, the plaintiffs personally made no contract or that there was no contract at all as a matter of fact, even though the declaration claimed by the plaintiffs would have the effect that there had been no valid contract in law.'

⁴¹ SM Schwebel *International Arbitration: Three Salient Problems* (Grotius Cambridge 1987) 11; A Gardner 'The Doctrine of Separability in Soviet Arbitration Law: An Analysis of *Sojuznetexport v Joc Oil Co*' (1989) 28 Columbia J Transnational L 301, 326-327; RC Peterson 'International Arbitration Agreements in United States Courts' (2000) 55 Dispute Resolution J 44, 55.

distinction between invalid and non-existent contracts is not always clear. The next subsections seek to provide that missing clarity. The cases concerning non-existent, rather than initially invalid, contracts will be divided into two groups. The first includes those cases which have been clearly identified by English courts. The second group includes additional cases that should also be viewed as concerning non-existent contracts.

(1) *Group 1: Cases Identified by English Courts*

English courts identify ‘extreme cases’ of lack of parties’ assent to the main contract as typical examples of ‘non-existent contracts’ to which the separability doctrine does not apply. As we shall see, these cases turn on the existence of consensus *ad idem* between parties as a matter of fact. In such cases, the test of separability does not obtain, ‘[e]ven if the arbitration clause appears to give the [arbitrator] jurisdiction to rule on the existence of the contract, [since] it is difficult to see how the hurdle that the clause itself is not binding can be surmounted.’⁴²

In *Harbour Assurance Co (UK) Ltd v Kansa General Intl Assurance Co Ltd*,⁴³ Hoffmann LJ said that ‘[t]here will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of *non est factum* or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples.’⁴⁴ Applying the *Harbour Assurance* case to a jurisdiction clause, Rix J has

⁴² FP Davidson *Arbitration* (W Green Edinburgh 2000) 195.

⁴³ [1993] QB 701 (CA).

⁴⁴ Same case 723, 725.

held that, where the dispute concerns a mutual mistake as to the main contract, '[f]or the purposes of the doctrine of the *Harbour Assurance* case, the jurisdiction clause is impeached by the lack of consent, rather than by informal invalidity.'⁴⁵ In a more recent case,⁴⁶ while dealing also with a jurisdiction clause, Colman J took the view that, unlike invalid contracts,

where the issue is the more fundamental one, whether any matrix contract was ever entered into in the first place, for example, on the grounds of absence of consensus or mistake or in a case of *non est factum*, no amount of scope in the jurisdiction expressed in an arbitration clause is capable of conferring jurisdiction on arbitrators, for, *ex hypothesi*, neither the matrix contract nor the agreement to arbitrate have ever been entered into. Thus, in the field of arbitration agreements the principle of separability insulates such agreements from the consequences of the voidability of the matrix contract, but not from the consequences of the non-existence of the matrix contract.

In all these cases, an arbitration clause is necessarily affected by the actual or alleged non-existence of the main contract, since the dispute relates to whether 'the assent of one of the parties is lacking.'⁴⁷ It should be realised that it is a unilateral mistake which goes to the root of the making of the contract, ie the offer and acceptance. 'Unilateral mistake' *negates* parties' consent.⁴⁸ In addition to Hoffmann LJ's example of mistake as to the identity of the other contracting party, examples of mistake negating consensus *ad idem* include⁴⁹ mistake as to the offer to contract which negates the coincidence between the terms of the offer and those of the

⁴⁵ *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261, 281.

⁴⁶ *IFR Limited v Federal Trade SPA* (QBD, 19 September 2001).

⁴⁷ P Mayer 'The Limits of Severability of the Arbitration Clause' in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 261, 264.

⁴⁸ GH Treitel *The Law of Contract* (10th edn Sweet and Maxwell London 1999) 273.

⁴⁹ For illustrations from typical contract law cases, see for example: J Beatson (ed) *Anson's Law of Contract* (27th edn OUP Oxford 1998) 306-322; Treitel (n 48 above) 273-279.

acceptance; mistake as to the promise which is known to the other party; and mistake in relation to a written document, which constitutes an instance of *non est factum*. In these situations ‘there is no genuine agreement between parties, or, as is commonly said ... the parties are not *ad idem* [and thus] there is no contract.’⁵⁰

In contrast to this, English contract law generally treats ‘common mistake’ as not affecting offer and acceptance albeit rendering the contract void or voidable. For example, mistake invalidates a contract, although parties are genuinely *ad idem*, if parties contract under the mistake as to the existence of the subject matter.⁵¹ Thus, an arbitration clause contained in a contract vitiated with such mistake is separable and enforceable.⁵² The reason why the separability doctrine applies in relation to such contracts is that, if the mistake affects only ‘a substantive aspect of the subject matter of the agreement [, it] has nothing to do with whether the parties intended to refer disputes to arbitration.’⁵³

An ‘incomplete’ contract should also be regarded as a ‘non-existent contract’ so that a dispute over an ‘incomplete contract’ also prevents the application of the separability doctrine. In typical contract cases, a party may argue that no contract

⁵⁰ J Beatson (ed) *Anson’s Law of Contract* (27th edn OUP Oxford 1998) 306.

⁵¹ Beatson (n 50 above) 300. As P Atiyah put it ‘[t]here is a world of difference between a plea of “we never agreed because our intentions were different” and a plea of “our intentions were the same and we agreed, but because one or both of us were mistaken, the agreement should not be treated as a binding contract.” The first plea denies the very existence of the agreement, while the second admits it.’ PS Atiyah *An Introduction to the Law of Contract* (5th edn Clarendon Press Oxford 1995) 81.

⁵² *Harbour Assurance Co (UK) Ltd v Kansa General Intl Assurance Co Ltd* [1993] QB 701 (CA).

⁵³ P Mayer ‘The Limits of Severability of the Arbitration Clause’ in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International The Hague 1999) 261, 265. Even Stephen Ware, who rejects the separability doctrine altogether, concedes that in such circumstances there is room for the argument that parties’ intention to arbitrate is not affected: SJ Ware ‘Default Rules from Mandatory Rules: Privatizing Law through Arbitration’ (1999) 83 *Minnesota L Rev* 703, n 203 at 751. Similarly, duress is treated as rendering the contract avoidable without negating parties’ intention to contract. As such, it does not fall within the category of non-existent contracts: *IFR Limited v Federal Trade SPA* (QBD, 19 September 2001).

came into existence because the supposed contract lacked one or more of its essential terms;⁵⁴ or that the parties reached only ‘an agreement to agree.’⁵⁵ Thus, either party may contend that the letters exchanged between parties did not conclude an agreement, and negotiations have either broken down or been intended to continue. For example, a letter that is supposed to communicate the acceptance of an offer to contract may be found to be non-conclusive, ie it does not evince the intention of the respective party to accept the offer.⁵⁶ In such a case, despite the outward manifestation of the agreement, there is no intention to create a legally binding agreement, and an arbitration clause contained in the offer should not be binding.

As stated in *Anson’s Law of Contract*, ‘[t]hese cases turn rather on the meaning to be given to the words of the parties than on rules of law.’⁵⁷ Therefore, one cannot extract an arbitration clause from the letters exchanged by the parties without regard to the essential question in the formation of contracts, ie the determination of whether there has been a meeting of minds between parties. In these cases, the dispute requires the determination of the existence of a factual meeting of minds between parties and not solely whether the law recognises the supposed agreement.

An illustration of an ‘incomplete contract’ containing an arbitration clause provided by *Galliard Homes Ltd v J Jarvis & Sons Plc*,⁵⁸ which was decided under the Arbitration Act 1950. Jarvis carried out building works for Galliard and claimed

⁵⁴ *May and Butcher Ltd v The King* [1934] 2 KB 17 (HL); *Foley v Classique Coaches Ltd* [1934] 2 KB 1 (CA).

⁵⁵ *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284.

⁵⁶ eg *Burridge v Kennedy* (CA, 21 October 1999), where a letter of acceptance was not unequivocal.

⁵⁷ J Beatson (ed) *Anson’s Law of Contract* (27th edn OUP Oxford 1998) 67.

⁵⁸ (1999) 71 Construction LR 219. To similar effect, see *LG Caltex Gas Co Ltd v China National Petroleum Corporation* [2001] 1 WLR 1892 (CA) and other cases examined in chapter III above 115-118.

repayment on a quantum meruit basis, assuming there was no building contract between the parties. However, Galliard argued that the work for which Jarvis was claiming remuneration was done under the terms of a contract containing an arbitration clause, and applied for a stay of the proceedings.

The determination of this point turned on whether negotiations, meetings and exchanged 'letters of intent' gave rise to the conclusion of a building contract.⁵⁹ The Court of Appeal found that the letters of intent evinced no more than a non-binding agreement 'subject to contract.' It was mere negotiation preliminary to, or subject to, a contract which was never made. And Galliard failed to establish a meeting of minds between parties with the intention to create an immediate binding contract, which could be superseded by some later contract if the parties so wished. Consequently, the Court held that 'no contract for carrying out the works ever came into existence ... It follows from this that Galliard cannot rely on an arbitration clause contained in any such contract, because no such contract existed.'⁶⁰ Although this case was decided under the Arbitration Act 1950, it should be treated as laying down a correct statement of the law on the separability doctrine.

The courts, therefore, determine whether the main contract is sufficiently certain and therefore exists. In *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude*

⁵⁹ A strict application of the broad definition of an agreement 'in writing' under section 5 of the 1996 Act may validate an arbitration clause exchanged in this manner. For example in *LG Caltex Gas Co Ltd v China National Petroleum Corporation* [2001] 1 WLR 1892 (CA), Aikens J held that a written agreement emerged through the correspondence between solicitors (but this decision was reversed by the Court of Appeal). If the separability doctrine were to be applied as a policy-based rule, 'a facial agreement' would be enforced according to some, eg the minority judge in *Three Valleys Municipality Water Dist v E F Hutton & Co* 925 F 2d 1136 (US Ct of Apps (9th Cir), 1991) examined in chapter V above 213-215.

⁶⁰ (1999) 71 Construction LR 219, 243.

Oil Refinery AD,⁶¹ the Court of Appeal held that, while the price had not been specified in the disputed contract, there was an implied term referring to a reasonable price, with the arbitration clause serving as a possible mechanism to determine it. The Court of Appeal relied on an implied term to save the certainty of the contract so that the arbitration clause could then operate.⁶² While this case appears to be inconsistent with *May & Butcher v The King*⁶³ as to when the terms of a contract can be deemed certain, these cases agree that the court must determine this question before an arbitration clause could be given effect to; in no case have the courts enforced an arbitration clause on the basis of the separability doctrine without determining that parties were *ad idem* as regards the main contract.⁶⁴

(2) *Group 2: Additional Situations that should be Treated as Concerning Non-Existent Contracts*

In addition to the cases identified by English courts, two particular situations should be viewed as concerning non-existent, rather than initially invalid, contracts: (i) the failure of a condition precedent to the main contract and (ii) the lack of authority to make the main contract.

⁶¹ [2001] 2 Lloyd's Rep 76 (CA).

⁶² (2001) 1 Arbitration L Monthly 1, 2. See also *Foley v Classique Coaches Ltd* [1934] 2 KB 1 (CA).

⁶³ [1934] 2 KB 17 (HL). See above pp 90-91.

⁶⁴ One should not be misled by the fact that the courts consider the fact that an arbitration clause could operate in order to resolve disputes about an essential term of a contract, eg the price in a contract of sale. This is because the courts tend to regard the contract as being certain on the basis of an implied term to fill in the gap on the basis of what is just and reasonable. Indeed, in *Mamidoil-Jetoil Greek Petroleum SA v Okta Crude Oil Refinery AD* [2001] 2 Lloyd's Rep 76 (CA), Rix LJ took the view that, even if there was no arbitration clause, the court would determine what a reasonable price was. Again, the crucial point that ensues from this case and the like is that the preliminary question of the existence of the main contract is decided by the courts despite the separability doctrine. See: PS Atiyah *An Introduction to the Law of Contract* (5th edn Clarendon Press Oxford 1995) 114; R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 4.49; the Sale of Goods Act 1979, s 8.

(i) The failure of a condition precedent to the main contract

Another situation in which the contract may be treated as having never come into existence arises upon the failure of a condition precedent to the existence of the contract. Looking at the outward actions of the parties, one may conclude that there is initially a meeting of minds between the parties, which is not negated by the subsequent failure of the condition precedent. However, this analysis treats the 'meeting of minds' between the parties as being a mere technicality. This is because parties may not intend to be legally bound at all, unless the stipulated condition has been fulfilled.

Adam Samuel suggests that the separability doctrine applies in such a case. He rests his view on the argument that⁶⁵

there are in substance two contracts. The first takes the form of an agreement to be bound by the principal or second contract in the event of the condition being fulfilled and to do nothing to prevent that eventually from occurring. The arbitral clause is certainly in the first agreement and will become part of the second if it ever comes into force.

However, while general principles of contract do not preclude the possibility that a binding agreement may be established at the time of making the contract containing the condition precedent, this is not generally so. Under standard principles of contract, the intention to create a legally binding agreement will usually be ruled out before the fulfillment of that condition.⁶⁶ Therefore, the courts should decide

⁶⁵ A Samuel *Jurisdictional Problems in International Commercial Arbitration* (Schulthess Polygraphischer Verlag Zürich 1989) 173.

⁶⁶ HG Beale (ed) *Chitty on Contracts* (28th edn Sweet and Maxwell London 1999) para 2-137.

(finally) whether an agreement exists (ie separability should be rejected). While there appears to be no binding precedent on the point, the view taken here is in line with *Payne & Routh v Hugh Baird & Sons*,⁶⁷ in which the Court of Appeal assumed that the failure of a condition meant there never was any contract between parties and an arbitration clause contained in the supposed contract would not be effective.⁶⁸

(ii) The lack of authority to make the main contract

One should distinguish, on the one hand, the situation where a person purports to make a contract intended to bind a principal, while that person has no authority to do so and, on the other hand, the situation in which an agent, while being authorised to make certain contracts and to arbitrate, makes an unauthorised contract containing an arbitration clause. The former situation is similar to the cases identified by English courts and the separability doctrine should not apply. This is because the lack of authority affects the contract and the arbitration clause simultaneously.⁶⁹ However, the latter situation is a borderline case, since it supposes that an agent is authorised to

⁶⁷ (1921) 9 LI L Rep 167 (CA).

⁶⁸ In a recent Canadian case, *Cecrop Co Ltd v Kinetic Sciences Inv* (Supreme Court of British Columbia, 9 April 2001), it was held that, since the arbitration clause was separable and broad enough, it applied notwithstanding the dispute as to whether a condition precedent to the main contract had been fulfilled. The court reasoned that the case depended on 'whether or not the arbitration clause is considered part of the [main contract] or a separate agreement altogether. If it is a separate agreement, the effective date of the overall Agreement is irrelevant to the arbitration clause. The arbitration clause, as a separate agreement, would be considered effective as of the date the parties signed the [main contract].' It is submitted, however, that by relying on the separability doctrine as such, and the wording of the relevant arbitration clause, the court overlooked the fact that, at the time the contract was signed, the parties did not intend to create a binding agreement, unless the stipulated condition was met. The court also did not give sufficient regard as to whether the parties intended the condition precedent itself to restrict the arbitration clause. The court utilised the separability doctrine so as to give validity to the arbitration clause and avoided inquiring into the intentions of the parties. Thus, the court did not consider the fact that the relevant condition precedent was as broad as affecting 'all the rights, duties and obligations of the Parties set forth in this Agreement.'

⁶⁹ *Maunsell v The Midland Great Western (Of Ireland) Railway Co* (1863) 32 LJ Ch 513; *Kalmneft v Glencore International AG* [2001] 1 All ER 76; *Capital Trust Investment Limited v Radio Design AB* [2002] 2 All ER 159 (CA), where the Court of Appeal examined whether the relevant agreement containing an arbitration clause was signed on behalf of the defendant.

make an arbitration agreement, which might suggest that this clause should be upheld regardless of the main contract.⁷⁰

The best view is that the lack of authority to make the main contract affects the arbitration clause, even if the supposed agent is authorised to arbitrate in respect of other contracts. This is because, while an agent may have authority to make an arbitration agreement, this authority exists within the mandate given to him by the principal – it is not an authority to make arbitration agreements in a vacuum. Therefore, if a dispute arises as to whether the main contract has been made with authority, the principal should not be bound to the arbitration clause, which would enable arbitrators to decide finally on the scope of the agent's authority to contract. Since the separability doctrine rests on the intention of the parties, this intention is lacking on the side of the principal, who did not envisage arbitration of agreements exceeding the mandate of his agent. In other words, the factual meeting of minds between the agent and the other party to the main contract cannot be attributed to the principal. As such, the principal should not be compelled to arbitrate the dispute over the existence of the main contract in a binding manner.

⁷⁰ In *Harbour Assurance Co (UK) Ltd v Kansa General Intl Assurance Co Ltd* [1993] QB 701(CA), the Court of Appeal interpreted the decision of the Supreme Court of Bermuda in *Sojuznefteexport (SNE) (USSR) v Joc Oil Ltd (Bermuda)*, 7 July 1989 (1990) XV Ybk Commercial Arbitration 384, on this basis. However, in that case, the Supreme Court of Bermuda applied the separability doctrine, holding that the dispute over the main contract related to formal requirements of validity (that it should have been signed by two officials and not only by one). As such, the issue was not about the consensus *ad idem* of the parties, or whether it was made by an authorised person, but whether it satisfied the formal requirements under the applicable (Russian) law. See: A Gardner 'The Doctrine of Separability in Soviet Arbitration Law: An Analysis of *Sojuznetexport v Joc Oil Co*' (1989) 28 Columbia J Transnational L 301; AT Von Mehren, J Barceló and T Varady *International Commercial Arbitration: A Transnational Perspective* (West Group Minnesota 1999) 135-136; A Redfern and M Hunter *Law and Practice of International Commercial Arbitration* (3rd edn Sweet and Maxwell London 1999) 267.

It is perhaps worth emphasising here, for completeness, that the position of a person lacking capacity to make the main contract differs from that of a principal in relation to an unauthorised contract. Thus, provided a person has capacity to make an arbitration agreement,⁷¹ the main contract can still be attributed to that person as a matter of fact. In *Bankers Trust Company, Bankers Trust International Plc v PT Mayora Indah*,⁷² an application was made to prevent the defendant from pursuing proceedings in the Indonesian courts on the ground that it would amount to a breach of an arbitration clause contained in a contract between the parties. The defendants argued that the company ‘Mayora’ acted ultra vires in accepting the contract and that, therefore, the arbitration clause would not be binding as no contract came into existence. Colman J said that the case turned on ‘whether the arbitration clause would be a free standing and viable and enforceable agreement notwithstanding that the underlying agreement was entered into without the powers of the company.’ Colman J concluded that the company had authority to arbitrate, and ‘the agreement to refer to arbitration would indeed be *intra vires* and not tainted by the possible *ultra vires* character of the underlying agreement, even if it were ultimately proved that the entire transaction was *ultra vires*.’ Colman J also relied on the broad wording of the arbitration clause, which referred to ‘Any dispute, controversy or claim howsoever arising out of or in connection with this Agreement or the breach hereof, including any questions regarding its existence, validity or termination.’

⁷¹ Arbitration agreements are subject to the ordinary rules relating to the capacity of parties to contract: R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 2.16; D Sutton, J Kendall and J Gill *Russell on Arbitration* (21st edn Sweet and Maxwell 1997) paras 3-004 – 3-006. It should also be realised that contracts made ultra vires a company or a public authority have generally become enforceable against the company or public authority. Thus, such contracts are neither non-existent nor initially invalid. See: Merkin (as above) para 2.15; Local Government (Contracts) Act 1997, s 5; the Companies Act 1985, s 35(1). cf P Mayer ‘The Limits of the Severability of the Arbitration Clause’ in AJ Van Den Berg (ed) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series 9 Kluwer Law International 1999) 261, 265.

⁷² (QB, 20 January 1999 (Colman J)).

(3) *Conclusion on the Meaning of Non-Existent Contracts*

Apart from the examples examined above, defects that do not *negate* parties' assent to the agreement (ie, do not throw into question issues relating to the offer and acceptance) but entail that the purported contract was never binding should be treated as pertaining to invalid contracts rather than non-existent contracts. The separability doctrine should therefore apply. Thus, '[t]he distinction made is between the nullity [initial invalidity] of a contract and its non-existent[:] where there is a main contract, even if it was always a legal nullity, the arbitration clause that it contains constitutes a genuine juridical "platform" upon which the arbitral tribunal may stand to judge the validity of the body of the main contract.'⁷³ Invalid contracts include lack of formalities of the main contract⁷⁴ and lack of consideration.⁷⁵ (While an illegal contract is also an invalid rather than non-existent contract, the next chapter explains why an illegal contract should nevertheless be an exception to the separability doctrine.) Voidable contracts (eg contracts induced by misrepresentation, duress or undue influence) are also different from non-existent contracts (because until rescinded they indisputably exist⁷⁶) and the separability doctrine applies, and should apply, to them.⁷⁷

⁷³ A Redfern and M Hunter *Law and Practice of International Commercial Arbitration* (3rd edn Sweet and Maxwell London 1999) 267. The authors noted that section 7 appears to remove this distinction.

⁷⁴ J Beatson (ed) *Anson's Law of Contract* (27th edn OUP Oxford 1997) 85.

⁷⁵ Beatson (n 74 above) 98. cf *Goldsack v Shore* [1950] 1 QB 708 (CA) in which the Court of Appeal held that an arbitration under the Agricultural Holdings Act 1948, s 2, could not take place unless the court decided that the contract was made with consideration and was binding in law.

⁷⁶ *Mackender v Feldia AG* [1967] 2 QB 590 (CA); *IFR Limited v Federal Trade SPA* (QBD, 19 September 2001).

⁷⁷ It should be realised that separability would in such circumstances justify a separate enquiry into the enforceability of the arbitration clause and the voidability of the main contract. That is, in contrast to the non-existence of the main contract, the ineffectiveness of the main contract is not a sufficient

4. Section 7 Revisited

Can section 7 be interpreted in such a way as to accommodate ‘a non-existent contract’ exception to the separability doctrine, despite its apparent broad wording? It is suggested that, if the point were to be raised before the courts, section 7 might be interpreted as referring to the legal, rather than factual, non-existence (ie initial invalidity) of contracts.⁷⁸ As such, the exception set out above could still apply because it turns on the factual non-existence of agreements. In other words, section 7 should not be subject to a policy-based interpretation favouring arbitration like the French position or the (non-binding) view of some American judges examined in chapter V.

This clarification of the meaning of the non-existence of contracts would reconcile the broad wording of section 7 with the position advocated in this chapter. It would also mean that English courts would not need to change their present approach despite section 7.

5. Conclusion

It has been submitted that a widening of the separability doctrine, so that it would apply where the existence of the main contract is in dispute, is inconsistent with the basis of this doctrine in English law. While accepting the distinct nature of an

ground to avoid the arbitration clause contained in it. Rather, it has to be shown how that clause is itself affected by the alleged ground of ineffectiveness.

⁷⁸ To similar effect as regards the interpretation of article 16(1) of the UNCITRAL Model Law, see: FP Davidson *Arbitration* (W Green Edinburgh 2000) 197-198.

arbitration clause, the English courts rely on the intention of the parties to determine whether it survives the contract containing it. This issue depends on the test that the courts apply in order to ascertain the intentions and consent of parties. The contractual analysis of the separability doctrine is satisfied if it is applied in accordance with the test applicable to other contracts. This ensures that the powers of arbitrators ensuing from the separability doctrine derive from the agreement of the parties.

An important factor in determining the intention of the parties is the fact that an arbitration clause is collateral to, ie dependent on, the existence of the main contract. The main contract is the reason for agreeing to an arbitration clause. Therefore, unless parties have clearly formed an arbitration agreement, they should not, by the separability doctrine, be presumed to have intended to arbitrate even if no contract existed.

To ignore this analysis would transform the basis of the separability doctrine. It would be founded upon policy considerations favouring arbitration and commercial expedience. This reasoning is not valid, unless one accepts a policy of promoting arbitration in preference to consent.

The non-existence of the contract denotes the absence of a meeting of minds between parties with the intention to create a legally binding contract. It has been explained that this situation can be distinguished from the initial invalidity of the contract on the basis of whether there exists a factual meeting of minds between parties. The separability doctrine can have a contractual basis if there is a factual

agreement between parties. Therefore, it has been suggested that section 7 could be interpreted as referring to the legal, not factual, non-existence of contracts (ie initial invalidity).

'Non-existent contracts' include cases depending on the investigation of the facts pertaining to the fate of the negotiations preceding the supposed contract, the interpretation of the words and the intentions of the parties. English courts have identified a number of examples, such as cases of *non est factum* or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party. Likewise, it has been submitted that the situation in which a dispute arises over the failure of a condition precedent to the main contract should fall outside the separability doctrine. The case of the lack of authority to make the main contract should also fall within the non-existent contract exception to the separability doctrine. This is because the authority to make an arbitration agreement in the name of the principal is to be exercised within the boundaries of the mandate to bind him to the main contract.

CHAPTER VII

**JUSTIFYING ILLEGAL CONTRACTS AS AN EXCEPTION TO THE
SEPARABILITY DOCTRINE**

1. Introduction

It is submitted that, in addition to the exception relating to non-existent contracts which English courts still accept (despite the wording of section 7 of the Arbitration Act 1996), there should be another exception to the separability doctrine, namely illegal contracts. In other words, contrary to the broad separability doctrine applied in *Harbour Assurance Co (UK) Ltd v Kansa General Intl Assurance Co Ltd*,¹ the doctrine should not apply where the main contract is illegal. Unlike the case of the non-existence of the contract, the illegality of the contract does not preclude the existence of a meeting of minds between parties as to the contract and its arbitration clause. However, there are good reasons for an illegality exception and hence for returning to a narrower separability doctrine, which would require an amendment to section 7 of the 1996 Act. This chapter explains why.

Section 2 will first specify what the suggested exception entails. As chapter III has shown, the Court of Appeal assumed in the *Harbour Assurance* case that the widening of the separability doctrine was needed in order to enable arbitrators to examine the question of whether the main contract was illegal. However, the Court considered whether arbitrators could decide that issue finally or not (ie subject to the standard minimum review of all arbitral awards). It did not examine the possibility

¹ [1993] QB 701 (CA).

that arbitrators could consider the matter in a provisional manner, subject to full review by the courts. In other words, the Court decided the jurisdiction of arbitrators on an all-or-nothing basis.² This chapter will show that the suggested exception would remove only the power of arbitrators to decide *finally* on the legality of contracts. The exception would leave intact the arbitrator's power to decide whether the contract was illegal or not in a provisional manner, ie subject to full review by the courts. As chapters III and IV have shown, the decision of an arbitrator on whether a contract is illegal or not should be treated as jurisdictional pursuant to the competence-competence principle. In addition, it will be shown that, in line with the *pre-Harbour Assurance* cases, the suggested illegality exception applies in relation to contracts that are illegal when made (rather than, for example, contracts that are discharged by a frustrating supervening illegality).

In section 3, it will be explained that, as a matter of policy, the courts and not arbitrators must have the final decision on the legality of contracts. The non-enforcement of illegal contracts is vital to the public interest, and it is the courts, not arbitrators, which are duty-bound to ensure that such contracts are not enforced. Section 3 will demonstrate that arbitrators are required to apply principles of public policy *correctly*. Incorrect decisions on the legality of contracts, which result from erroneous findings of law as well as of fact, should take arbitrators outside their jurisdiction. It will be submitted that the principle relating to the legality of contracts should be distinguishable from the general application of the law, which (as is well-

² It should be remembered that, in addition to the justification set out in this chapter, there is an argument based on 'the best interpretation' of cases decided before the *Harbour Assurance* case. This interpretation, which has been examined in chapter III and supported by chapter IV, shows that this case did not approach the authorities accurately.

established in the law of arbitration) need not be legally correct, and is not subject to full review by the courts.

Section 4 examines two ‘contractual’ principles that preserve the control of the courts over the enforcement of illegal contracts. These are the ‘ouster of jurisdiction’ and the ‘tainting’ principles. These principles, which apply to illegal contracts, explain why arbitration clauses in illegal contracts are distinguishable from other invalid contracts. This will reveal that the view adopted in the *Harbour Assurance* case, ie that the illegality of the contract was not different from other causes of the invalidity of contracts, is inexact. Moreover, the above-mentioned principles are capable of application to any arbitration agreement, even if indisputably separate from the illegal contract. These principles will demonstrate that the suggested illegality exception does not rest solely on contrasting the policy of non-enforcement of illegal contracts with the finality of awards. Rather, it is a matter of contractual principle.

Section 5 will raise the ancillary question of whether the analysis set out in sections 3 and 4 is affected by the power of arbitrators not to apply the law. Arbitrators can have such a power by virtue of what English courts call ‘equity clauses,’ and the Arbitration Act 1996 enshrines this power. The impact of ‘equity clauses’ on public policy has not been definitively determined. Therefore, it will be asked whether it is still a requirement that public policy should be applied correctly to the legality of contracts in arbitration, despite the discretion that arbitrators may have in deciding disputes other than in accordance with the law. It will be submitted

that this discretion is subject to public policy and, therefore, the above analysis of policy and principle is not undermined.

Section 6 will demonstrate the difference between the review by the courts of the legality of contracts under the broad separability doctrine on the one hand, and the review ensuing from the suggested illegality exception on the other hand. It will be asked whether the courts can have a sufficient power to ensure respect for public policy if the broad separability doctrine is applied. It will be shown how, as a matter of policy, the suggested exception to the separability doctrine ensures a proper balance between the promotion of commercial arbitration and public policy. In addition, it will be argued that the current attitude of the courts to arbitration clauses in illegal contracts, as exemplified in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd*,³ is unsatisfactory. This should be contrasted with the suggested illegality exception, which enables the courts to review the legality of contracts fully (review of fact and law), while at the same time ensuring the predictability of the fate of awards.

2. The Effect of the Suggested Exception for Illegal Contracts

It is appropriate first to set out the intended effect of the suggested exception (illegal contracts) to the separability doctrine. By excluding illegal contracts from the scope of the separability doctrine, arbitrators' decisions on the question whether a contract is illegal would not be treated as final. This is because the illegality of the contract would be a ground to challenge the effectiveness of the arbitration clause contained

³ [2000] QB 288 (CA).

in it and would, therefore, go to the root of the jurisdiction of the arbitrator. Consequently, the courts would be able to carry out a full review of that question. This review is broader than the ordinary minimal review of arbitral awards applicable to matters falling within the undisputed jurisdiction of arbitrators. In other words, the suggested exception treats illegal contracts as not being capable of final disposition by arbitrators.

The suggested exception, however, does not affect (1) the power of arbitrators to examine their jurisdiction, ie to decide in a non-final way whether a contract is illegal. In addition, (2) it applies in respect of a specific category of contracts, ie contracts that are illegal when made.

(1) The Suggested Exception does not Affect the Power of Arbitrators to Examine their Jurisdiction

Arbitrators may decide initially whether they have jurisdiction subject to subsequent full review by the courts. In the present context, this means that arbitrators may decide in a provisional way whether a contract is illegal, since the illegality of the contract also affects (ie is not separate from) the arbitration clause. Such a decision can be made pursuant to the competence-competence principle, which has been studied in chapter IV.

To recap briefly on the role of the competence-competence principle, this principle allows arbitrators to decide initially on objections to their jurisdiction that involve the validity of the arbitration clause. Assuming the separability doctrine

does not apply, attacking the main contract on grounds of illegality affects automatically the arbitration clause. Hence, the illegality issue would fall within the realm of the competence-competence principle (in the same way as the question of the existence of the main contract)⁴. This is the meaning of this principle as it has been adopted and applied by courts, arbitral tribunals and a number of arbitration rules. It has already been shown in chapter IV that this principle did exist in English law, and was sufficiently well-established for the Court of Appeal in the *Harbour Assurance* case to allow the illegality issue to be decided initially by arbitrators.

As the competence-competence principle can still apply, the suggested exception would not result in the extreme and unacceptable position, whereby arbitrators would not be able to consider the question of the legality of the contract. This is consistent with there traditionally being no principle of non-arbitrability in English law.⁵ In other words it has never been the law that the mere fact that arbitrators considered the legality of the contract was a sufficient ground to annul an award or condemn arbitrators with misconduct.

While arbitration statutes have required the matter referred to arbitration to be capable of settlement by arbitration, 'English courts have not [in practice] recognised any restrictions on the rights of individuals to resolve disputes between

⁴ See chapter VI above p 246.

⁵ A Samuel 'Developments in English Arbitration Law since the 1984 *Antaios* Decision' (1988) 5 J Intl Arbitration 9. This position is not absolute. 'English law does recognise that there are matters which cannot be decided by means of arbitration.' Non-arbitrable disputes include matters governed by criminal law, see D Sutton, J Kendall and J Gill (edd) *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) paras 1-028, 8-028.

themselves by arbitration.’⁶ According to *Russell on Arbitration*, this may be due to ‘the huge range of different disputes that are referred to arbitration in England and the procedures adopted to determine them, which inhibit any attempt to limit arbitrability at least in the commercial field.’⁷ As Mustill and Boyd state,⁸

English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. The general principle is, we submit, that any dispute or claim concerning legal rights, which can be the subject of an enforceable award, is capable of being settled by arbitration.

As Mustill and Boyd suggest, in practice, ‘the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has given rise to an enforceable award.’⁹ Thus, while a dispute may be referred to arbitration, it is another question whether arbitrators’ decision thereon is final. The 1996 Act reflects that practice, since it does not require an enforceable arbitration agreement to relate to a matter capable of settlement by arbitration, while it does provide for non-arbitrability as a ground for challenging the enforcement of the award.¹⁰

⁶ Philips ‘England’ in M Ball (ed) *Competition and Arbitration Law* (ICC Paris 1993) 307. Thus, the suggested illegality exception to the separability doctrine does not result in the extrem rule, whereby the illegality issue is non-arbitrable in the sense that it may not be referred to arbitration, and arbitrators have to decline jurisdiction without examining it. cf the recent decision of the Supreme Court of Pakistan in *Hubco v WAPDA*, civil appeal number 1399 of 1999 (2000) 16 *Arbitration Intl* 439; ICC case 1110 (1996) XXI *Ybk Commercial Arbitration* 47; JG Wetter ‘Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No 1110’ (1994) 10 *Arbitration Intl* 277.

⁷ D Sutton, J Kendall and J Gill (edd) *Russell on Arbitration* (21st edn Sweet and Maxwell London 1997) para 1-026.

⁸ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 149.

⁹ Mustill (n 8 above) 149.

¹⁰ The Arbitration Act 1996, ss 9 and 103(3).

However, the arbitrability of the question of whether a contract is illegal need not entail the finality of the decision of the arbitrator. As chapter III explained, the decision in *David Taylor & Son Ltd v Barnett Trading Co*¹¹ is best interpreted on the basis that, while arbitrators could examine the legality of a contract, their decision on the matter would not be final: the court did not object to the arbitrators' examination of the contract, but retained the power to carry out a full review of the matter. The implication is that the separability doctrine was not being applied in this case, while arbitrators could initially examine the illegality. This is because the separability doctrine would place the illegality of the contract within the realm of the minimal review of awards, treating the decision of arbitrators as being final.

However, it seems that the illegality of the contract, as a matter affecting the jurisdiction of the arbitrator, has been confused by some commentators and judges with non-arbitrable matters. For example, in *Halsbury's Laws of England* it is stated that

[t]he dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction. Thus an indictment for an offence of a public nature cannot be the subject of an arbitration, *nor can disputes arising out of an illegal contract*, nor disputes arising under agreements void as being by way of gaming or wagering.¹²

¹¹ [1953] 1 WLR 562 (CA).

¹² D Hay (ed) *Halsbury's Laws of England* (4th edn Butterworths London 1991) 503 (emphasis added).

This lies behind *O'Callaghan v Coral Racing Ltd*,¹³ where an arbitration clause in a betting transaction was held invalid and the matter incapable of being referred to arbitration. According to Hirst LJ, an arbitration clause in such a transaction 'establishes a procedure which is devoid of any legal consequences whatsoever, and which lacks most of the key characteristics identified by the text books.' Consequently, it does not qualify as an arbitration agreement. Likewise, May LJ took the view that, 'since the transaction is not in law a contract, the [arbitrator's] decision cannot make any determination of rights, obligations or incidents of the transaction which has any effect in law.'¹⁴

(2) *The Suggested Exception Applies in Respect of a Specific Category of Contracts:*

Contracts that are Illegal When Made

The suggested illegality exception would not preclude the finality of arbitration awards in every case where either party argues that the claim of the other contravenes public policy. Rather, it applies in cases where the contract itself is made in breach of public policy and is therefore illegal. The explanation for this is that the latter case is particularly offensive to public policy. The following paragraphs illustrate this position and provide a number of judicial examples.

As with contracts and foreign judgments, in the context of commercial arbitration, the English courts draw a distinction between different categories of illegality that may invalidate a contract, referring to 'initial illegality,' 'supervening

¹³ CA, 19 November 1998. See above pp 118-120.

¹⁴ cf MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 150; same authors *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 211-212.

illegality,' and 'illegality by performance.'¹⁵ While rules of public policy apply to all of these types, what is relevant to the separability doctrine is the first type, which means that the main contract has been illegal from the outset.¹⁶ By contrast, 'supervening illegality' of the main contract, which occurs upon a change in the law affecting a valid contract, does not affect an arbitration clause contained in it; it is treated as an instance of frustration of the contract. Likewise, the 'illegality by performance' (which is committed by a party, but has not been intended by both parties) relates to a defence of illegality arising not on the basis of the invalidity of the contract, but on the ground that either party has committed an illegal act in the course of its performance of the contract and should not benefit from it.

It can be seen from this categorisation that the first category constitutes the most offending category to public policy. This is because it rests on a prohibition of the very making of the contract or on the fact that both parties hold a guilty intent. An additional reason distinguishing a contract that is illegal when made from a contract performed, or intended to be performed, unlawfully by one party is that the rejection of separability in respect of the latter would enable a party to escape its arbitration agreement with an innocent party by purporting to act unlawfully.

¹⁵ cf J Hill *The Law Relating to International Commercial Disputes* (2nd edn LLP London 1998) paras 15.4.39-15.4.48; HG Beale (ed) *Chitty on Contracts* (28th edn Sweet and Maxwell London 1999) Vol I paras 17-007-17-009.

¹⁶ Philips 'England' in M Ball (ed) *Competition and Arbitration Law* (ICC Paris 1993) 308. For example, 'competition law' disputes between members of co-operative societies can be decided finally through arbitration: *Bellshill and Mossend Co-Operative Society Ltd v Dalziel Co-Operative Society Ltd* [1960] AC 832.

In *Prodexport State Co for Foreign Trade v ED & F Man Ltd*,¹⁷ an award was challenged on the ground that the contract had become illegal under a subsequent law in the place of performance, Rumania. Deciding this case on the basis of the pre-*Harbour Assurance* position, Mocatta J pointed out that the illegality which affected the arbitration clause was that which affected the main contract from the time it had been made. By contrast, claims of illegality based on a subsequent change in the applicable law did not affect the jurisdiction of arbitrators to make final decisions on the contract.¹⁸ Thus, he held that if¹⁹

the contract can be said to have been void from the moment it was signed [,] no arbitrators or umpire appointed under the arbitration clause in the contract could ever have had jurisdiction. If, on the other hand, there is during the life of a contract some change in the law, particularly if that can only affect partial performance of the clause, it is difficult if not impossible to say that arbitrators appointed under an arbitration clause in the contract have no jurisdiction.

In *Soleimany v Soleimany*,²⁰ Waller LJ distinguished initial and supervening illegality of contracts, saying that²¹

we should make it clear that we have been considering only initial illegality, present when the underlying contract was made. Nothing that we have said touches on supervening illegality. That is, in the ordinary way, a defence either as constituting frustration or an allied topic under its own name. Arbitrators without doubt have jurisdiction to consider it.

¹⁷ [1973] 1 QB 389.

¹⁸ cf *Zinc Corp Ltd v Hirsch* [1916] 1 KB 541 (CA); *Smith, Coney & Barrett v Becker, Gray & Co* [1916] 2 Ch 86 (CA).

¹⁹ [1973] 1 QB 389, 696. See also *Dalmia Dairy Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA). Arbitrators can also decide finally disputes arising where either party commits unlawful acts in the course of the performance of the contract, if it is not alleged that it was the common intention of the parties to perform the contract unlawfully: *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] 2 Lloyd's Rep 337 (CA).

²⁰ [1999] QB 785 (CA).

²¹ Same case 803.

This position has been articulated by Mustill and Boyd. They state that,²²

[i]f the [supervening] illegality arises under English law the arbitrator must take note of the point and rule upon it. But he is not deprived of jurisdiction, unless the effect of the illegality is not merely to make performance of the contract unlawful but to render the whole contract void *ab initio*.

As Professor Carbonneau suggests, the powers of arbitrators in relation to illegal contracts concern only the consequences of the illegality, such as a 'dispute which involves an alleged failure of performance entitling one of the parties to compensatory damages.'²³ Thus, arbitrators' can 'establish the consequences of a lack of performance of a contract which would be null and void if a rule of public policy were applied.'²⁴ In other words, because in such a case the illegality of the contract is admitted, arbitrators are not asked to enforce the contract. They determine the respective rights and obligations of parties that may arise out of the illegality of the contract (eg restitutionary claims). Arbitrators' decisions on such matters constitutes no threat to public policy, since they do not run the risk of enforcing the relevant illegal contract.

The intended effect of the suggested illegality exception can be summarised as follows. Arbitrators' decisions on the initial legality of contracts should be in principle fully reviewable by the courts. Again, this applies in respect of contracts that are illegal when made, since they represent the most objectionable case from the

²² MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths 1989) 113.

²³ TE Carbonneau 'The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity' (1980) 55 *Tulane L Rev* 1, 37.

²⁴ Carbonneau (n 23 above) 37 n 113.

point of view of the English courts. Having said that, we turn now to set out the justification for the suggested exception to the separability doctrine.

3. Courts Not Arbitrators Must Determine Finally the Legality of Contracts

The position of the law pre-*Harbour Assurance* rests on a vital policy. It is that the courts are the state authority which is entrusted to deny the enforcement of illegal contracts. Therefore, in contrast to the separability doctrine which aims at securing the finality of arbitrators' decisions on the legality of contracts, the courts should make the final decision on this matter. While the courts control the proper application of public policy in general, the case of contracts that are illegal when made is treated as being of most importance to the public interest. Both parties are treated as guilty in making such contracts. Therefore, they cannot, by choosing to arbitrate, avoid the control of the courts over their contract. The aim of this control will be frustrated if parties can, by an arbitration agreement, authorise arbitrators to decide the legality of contracts in a final manner.

The dispute over the legality of contracts should not be equated with ordinary private disputes. It affects interests or values other than those which concern the parties, and the relevant legal principles have aims other than promoting justice between the parties.²⁵ Therefore, parties cannot by agreement transfer to arbitrators the role of the courts to ensure the proper application of such principles and respect for public policy. In order for arbitrators to have the power to make final decisions,

²⁵ WW Park 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 *Tulane L Rev* 647, 650; D Jones 'Arbitration and Party Autonomy – How Free is the Choice to Arbitrate?' in GMB Hartwell (ed) *The Commercial Way to Justice* (Kluwer Law International The Hague 1997) 121, 127.

the dispute 'must entail rights and duties which can be seen as inevitably arising by virtue of the parties' standing as autonomous contractors.'²⁶ The illegality of contracts does not belong to this category of disputes. Therefore, courts not arbitrators are, and should be, the final decision-makers in relation to public policy relating to the legality of contracts.

This view derives support from the fact that arbitrators are not the guardians of public policy. Even when they examine matters of public policy, they do so on a functional basis, ie because the matter is being argued before them; they do not assume that they are guardians of public policy.²⁷ In particular, international arbitrators may not regard themselves as being bound to apply any national public policy. This is because, as some commentators argue, arbitrators should not apply rules of public policy other than those belonging to the law chosen by the parties.²⁸ Consequently, where parties have empowered arbitrators not to apply any national law, arbitrators will be restricted by only the principles of international public policy, especially because the award cannot be treated as violating an identifiable system of law.²⁹ Further, since an arbitrator is not the guardian of the public policy of any state, 'he retains his powers of appreciation. Even if the applicability of a

²⁶ EM Morgan 'Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question' (1987) 60 Southern California L Rev 1059, 1070.

²⁷ P Mayer 'Le Contrat Illicite' [1984] *Revue de l'Arbitrage* 205, 215; P Mayer 'La Sentence Contraire à l'Ordre Public au Fond' [1994] *Revue de l'Arbitrage* 615, 630.

²⁸ P Mayer 'Mandatory Rules of Law in International Arbitration' (1986) 2 *Arbitration Intl* 274, 280; Y Derains 'Public Policy and the Law Applicable to the Dispute in International Arbitration' in P Sanders and AJ Berg (edd) *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress 3rd Series Kluwer Law International The Hague 1987) 227, 239.

²⁹ O Lando 'The *Lex Mercatoria* in International Commercial Arbitration' (1985) 34 *ICLQ* 747; S Jarvin 'The Sources and Limits of the Arbitrator's Powers' (1986) 2 *Arbitration Intl* 140, 158; I Fadlallah 'L'Ordre Public dans les Sentences Arbitrales' (1994) 249 *Recueil des Cours* 369, 420; KR Davis 'When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards' (1997) 45 *Buffalo L Rev* 49, 124.

mandatory rule of law is perfectly evident, he may hold the rule in question to offend his conscience, and refuse to apply it.’³⁰

Since different principles of public policy may be applied in different jurisdictions, and as arbitrators may apply their own views on which public policy should be applied, ‘national legislatures and courts must insist that they continue to be able to exercise the necessary control over international commercial arbitration.’³¹ It has been submitted that ‘an English court is concerned to see that English public policy is not infringed. An international arbitrator is unlikely to consider illegality by English law, unless that is the governing law of the underlying contract.’³²

The English courts do expect arbitrators to apply relevant principles of public policy to the legality of contracts subject to judicial review. This is the corollary of the fact that arbitrators are not entitled to enforce illegal contracts. It has been held recently that ‘it is contrary to public policy for an English award (ie an award following an arbitration conducted in accordance with English law) to be enforced if it is based on an English contract which was illegal when made.’³³ The implication is that no arbitration agreement could preclude the examination of the illegality of *the contract* by the court. Excluding the finality of awards on the legality of

³⁰ P Mayer ‘Mandatory Rules of Law in International Arbitration’ (1986) 2 *Arbitration Intl* 274, 291.

³¹ P Behrens ‘Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits’ in D Friedmann and EJ Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 37.

³² J Harris and F Meisel ‘Public Policy and the Enforcement of International Arbitration Awards: Controlling the Unruly Horse’ [1998] *LMCLQ* 568, 573.

³³ *Soleimany v Soleimany* [1999] *QB* 785 (CA) 799 (Waller LJ).

contracts, which ensues from the separability doctrine, is consistent with this analysis.

The English courts, therefore, should ensure that the principles pertaining to English public policy are respected, instead of relying on the views of arbitrators, no matter how qualified and sophisticated they may be. The courts should make final decisions on such a matter of legal import as the legality of contracts and provide authoritative guidance (including for arbitrators) on the principles by which this matter should be decided. This would also enable the courts to contribute to the formalisation of the content of international public policy instead of leaving this task to the discretion of arbitrators.

It is hard to accept that arbitrators should be allowed to enforce an illegal contract by their incorrect findings of fact or law. Therefore, arbitrators' decisions on the legality of the contract should be treated as jurisdictional, ie their error takes them out of jurisdiction to enforce the contract. It is illegitimate to presume that parties intended to confer this jurisdiction on arbitrators. A commonsense consequence is that the courts should ensure the correctness of arbitrators' decisions on the legality of contracts. The review by the courts must, therefore, cover the whole dispute of fact and law. The verification of the correct application of public policy necessarily involves the examination of factual matters.³⁴ To dispense with such a full review would render the protection of public policy an illusion, since an

³⁴ J-B Racine *L'Arbitrage Commercial International et L'Ordre Public* (Librairie Générale de Droit et de Jurisprudence Paris 1999) 548, 551.

arbitrator would be able to avoid the annulment of his award by declaring that the contract does not violate the relevant rules of public policy.³⁵

That the courts should retain the power to make the final decisions on the legality of contracts through a full review of the matter has the support of several commentators.³⁶ As Professor Carbenneau points out, ‘an antidote to an expansive concept of arbitrability requires a form of merits review.’³⁷ Likewise, Professor Park takes the view that ‘[j]udicial review of the contents of awards, at least for their conformity with public policy, is the cost for letting the dispute go to arbitration.’³⁸

Further, it has been submitted³⁹ that it is the reasonable, and legitimate, expectation of the parties to have judicial review of the decision of arbitrators on the legality of contracts. A contrary interpretation of the expectations of the parties runs counter to the limits of ‘party autonomy.’ The unsatisfied party expects to have a remedy in such a case through a subsequent judicial verification of the jurisdiction of the arbitrator. The contrary view would not only jeopardise the public interest, but would also transform arbitration into ‘a scheme in which the autonomy of one

³⁵ C Seraglini ‘Note under the *CCA Case*’ [2001] *Revue de l’Arbitrage* 781, 796, 800.

³⁶ J-B Racine *L’Arbitrage Commercial International et L’Ordre Public* (Librairie Générale de Droit et de Jurisprudence Paris 1999) 551-552; K-H Böckstiegel ‘Public Policy and Arbitrability’ in P Sanders and AJ Berg (edd) *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress 3rd Series Kluwer Law International The Hague 1987) 178, 183; SJ Ware ‘Default from Mandatory Rules: Privatizing Law through Arbitration’ (1999) 83 *Minnesota L Rev* 703, 751; E Loquin ‘Note under *A v X, Y & Z*’ [1999] *Revue de l’Arbitrage* 74, 78; P Ancel ‘Arbitrage et Ordre Public Fiscal’ [2001] *Revue de l’Arbitrage* 269, 285; C Seraglini ‘Note under the *CCA Case*’ [2001] *Revue de l’Arbitrage* 781, 799-800.

³⁷ TE Carbonneau ‘Mitsubishi: The Folly of Quixotic Internationalism’ (1986) 2 *Arbitration Intl* 116, 127.

³⁸ WW Park ‘National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration’ (1989) 63 *Tulane L Rev* 647, 669.

³⁹ KR Davis ‘When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards’ (1997) 45 *Buffalo L Rev* 49. cf Ware (n 36 above) 739, saying that ‘The essence of a mandatory rule is that it trumps freedom of contract.’

party is simply sacrificed for the benefit of the other [who benefits from the award].⁴⁰

It is submitted, therefore, that the separability doctrine *per se* is not an answer to the need for the courts to control the enforcement of illegal contracts as a matter of public policy. While the exercise of this power may be delayed until arbitrators consider the legality of the contract in the course of the examination of their jurisdiction, it may not be removed or reduced by an arbitration clause authorising arbitrators to dispose of the illegality issue finally.

In contrast to the above policy, the separability doctrine has been utilised as a significant factor to favour the finality of awards over the review by the courts of the legality of the main contract. As section 6 below will show, the courts assume that, since the separability doctrine allows arbitrators to decide on the legality of the main contract as a question of the merits, which does not affect their jurisdiction, this jurisdiction should be honoured so as to promote commercial arbitration.⁴¹ However, not only is this balance of policy contentious, but the courts have also overlooked the fact that there are standard contractual principles which can preclude the application of the separability doctrine as a basis for the finality of arbitral awards on the legality of contracts. The next section examines these principles.

4. Standard Contractual Principles Affecting the Validity of an Arbitration

Clause Contained in an Illegal Contract

⁴⁰ KR Davis 'When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards' (1997) 45 Buffalo L Rev 49, 87.

⁴¹ *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] QB 740.

Standard principles of English contract law operate so as to preclude the validity of an arbitration agreement that purports to authorise arbitrators to decide the illegality issue finally.⁴² The separability doctrine, if applied to illegal contracts, clashes with these principles. In other words, not only does the separability doctrine give rise to the theoretical difficulty of treating private actors (the arbitrators) as being able to make conclusive pronouncements on a vital public policy matter, but it is also in conflict with standard principles that are aimed at protecting the authority of the courts and the integrity of their proceedings.

These principles are (i) ‘the ouster of jurisdiction principle,’ which outlaws agreements to remove certain powers from the courts; and (ii) the ‘tainting principle,’ which extends the effect of the illegality of the main contract to other agreements relating to it.

The ‘ouster principle,’ which will be examined in subsection (1), restricts the parties’ freedom of contract by preventing parties from obstructing or removing powers that the courts have, unless specifically allowed to do so by statute. It will be shown that it is still valid to apply this principle, where the main contract is illegal. As such, it prevents parties from removing or reducing the power of the courts to deny the enforcement of illegal contracts. Subsection (2) examines the ‘tainting principle,’ which operates so as to prevent parties from undermining the policy behind the illegality of the main contract through the formation of another agreement enforcing it.

⁴² The consensual basis of the competence-competence principle is not affected, since it refers the illegality issue to arbitration only for a provisional decision. This has been explained in chapter IV.

The above principles constitute restraints of public policy, which delimit the autonomy of parties. On the other hand, if one applies the separability doctrine to arbitration clauses contained in illegal contracts one is enlarging the autonomy of parties at the expense of public policy. It thus elevates arbitration agreements above other agreements. However, it is submitted that the contractual theory of arbitration, which prevails in English law, should not have such a consequence. As with other contracts, public policy restraints on the freedom of contract apply to arbitration agreements.⁴³ As Professor Arthur Nussbaum suggests, ‘there are no bounds to the separability doctrine save public policy.’⁴⁴

(1) *The ‘Ouster of Jurisdiction’ Principle*

(i) The ‘ouster principle’ in general

In *Czarnkow v Roth Schmidt & Co*,⁴⁵ Bankes LJ said that ‘no one has ever attempted a definition of what constitutes an ouster of jurisdiction. Each case must depend on its own circumstances. Each agreement needs to be separately considered.’⁴⁶ While the ‘ouster principle’ has not been defined precisely by the courts, it has been applied to agreements the effect of which is to evade the

⁴³ P Behrens ‘Arbitration as an Instrument of Conflict Resolution in International Trade: Its Basis and Limits’ in D Friedmann and EJ Mestmacker (edd) *Conflict Resolution in International Trade* (Nomos Verlagsgesellschaft Munich 1993) 13, 15.

⁴⁴ A Nussbaum ‘The “Separability Doctrine” in American and Foreign Arbitration’ (1940) 17 *New York ULQRev* 609, 616.

⁴⁵ [1922] 2 KB 478.

⁴⁶ Same case 485.

jurisdiction or control of the courts. The English courts apply this principle in order to prevent parties from reallocating the jurisdiction of the courts.

In the past, the courts applied the ouster principle to invalidate arbitration agreements that purported to avoid the judicial review of the correct application of the law. This was due to the fact that arbitrators were required to apply the law. However, while that requirement has been abolished, arbitrators still have to respect relevant rules of public policy. By analogy with the old practice in respect of the application of the law, an arbitration agreement that avoids the review by courts of the illegality issue is an invalid ouster of jurisdiction. In other words, the latitude afforded to parties and arbitrators to disregard the application of the law, thereby removing the judicial control over the correct application of the law, does not dispense with the need for judges to control the legality of the contract.

The ouster principle is still well-established as a principle of English law. In *West of England Shipowners Mutual Insurance Association (Luxembourg) v Cristal Ltd, The Glacier Bay*,⁴⁷ while not dealing with the illegality of the contract, Neill LJ affirmed that, despite the relaxation of the ouster principle in respect of the general application of the law, '[i]t remains the general rule of common law that an agreement wholly to oust the jurisdiction of the Courts is against public policy and void.' Thus, although an arbitration agreement is not in itself an ouster of jurisdiction, it would constitute an invalid ouster if it purports to remove invalidly powers from the courts to control arbitration.

⁴⁷ [1996] 1 Lloyd's Rep 370 (CA).

- (ii) The application of the 'ouster principle' in respect of the power of the courts to control the enforcement of illegal contracts

Since an arbitration clause contained in an illegal contract purports to authorise arbitrators to make final decisions on the legality of the contract, thus largely reducing the control of the courts over the enforcement of illegal contracts, it can be regarded as an invalid 'ouster of jurisdiction.'⁴⁸ The control of the courts over illegal contracts depends on a full review of fact and law. Therefore, while the ouster of jurisdiction principle is usually applied to protect the role of the courts in relation to the determination of points of law,⁴⁹ it should operate so as to reinforce the power of the court to carry out a full review of the legality of main contract.

Neither the courts nor the 1996 Act have dealt with the problem raised by this principle. In the *Harbour Assurance* case, the Court of Appeal simply equated the illegality of the contract to other reasons of invalidity, overlooking the public policy concerns arising from the logical consequence of the separability doctrine, ie the finality of awards on the legality of the main contract.

⁴⁸ Professor Pierre Mayer emphasises that arbitration does not remove the power of the courts to refuse to enforce illegal contracts: P Mayer 'La Sentence Contraire à l'Ordre Public au Fond' [1994] *Revue de l'Arbitrage* 615, 630. In *Chitty on Contracts* (28th edn Sweet and Maxwell London 1999) Vol I, para 17-045, it is stated that, '[t]he court will set aside an arbitrator's award if it seeks to give effect to a contract which is illegal or contrary to public policy.' Likewise, it has been suggested that '[i]f the English court would not directly enforce the contract because of illegality neither will it enforce an arbitration award based on such a contract.' PM North and JJ Fawcett (edd) *Cheshire and North's Private International Law* (13th edn Butterworths London 1999) 528. These statements, which are based on the practice of the courts before the *Harbour Assurance* case and the 1996 Act, endorse the duty of the court to ensure that the executive power of the state is not abused: J Beatson (ed) *Anson's Law of Contract* (27th edn OUP Oxford 1998) 381; J Hill 'Illegality under the Law of the Place of Performance and the Enforcement of Arbitration Awards' [1999] *LMCLQ* 311, 315.

⁴⁹ *West of England Shipowners Mutual Insurance Association Luxembourg v Cristal Ltd, The Glacier Bay* [1996] 1 *Lloyd's Rep* 370 (CA).

It should be remembered that referring the illegality issue to arbitration as a jurisdictional matter does not oust the power of the courts to control the enforcement of illegal contract through full review of the question. This is because arbitrators' power to decide on their jurisdiction is concurrent to the role of the courts – it may only delay judicial control, but does not remove or reduce it. The separability doctrine, on the other hand, affects the power of the court by securing the finality of arbitrators' decisions on the legality of contracts, relegating the role of the courts to minimal review of the award *per se*. Therefore, the ouster principle operates.

(2) *The Tainting Principle*

The 'tainting principle' operates under the doctrine of illegality. It is an ordinary principle of contract law. Pursuant to this principle, not only do English courts refuse to enforce an illegal contract, but also they decline to enforce agreements linked to it. This is because the policy behind the illegality of the main contract may be offended if that illegal contract could be enforced indirectly through another agreement. An example of this is the leading case of *Fishers v Bridges*,⁵⁰ where a separate deed executed to secure the payment of the price for land conveyed to the defendant for an illegal purpose was held to be illegal. In *Mansouri v Singh*,⁵¹ the Court of Appeal refused to enforce payment under a cheque on the ground that this would give effect to an illegal exchange contract, although the cheque was a legally autonomous obligation. As Staughton LJ said in *Group Josi Re v Walbrook*

⁵⁰ (1854) 3 E & D 642.

⁵¹ [1986] 1 WLR 1393 (CA).

Insurance Co Ltd,⁵² 'an autonomous obligation will be tainted by illegality, or at least unenforceable, if it is used to carry out an illegal transaction.'⁵³

The question whether the 'tainting principle' could affect arbitration clauses appears never to have been raised. The courts' application of the separability doctrine, where the main contract is illegal, overlooks the fact that the tainting principle operates in respect of separate agreements.

That the tainting principle should apply to arbitration agreements, where the main contract is illegal, is an argument that is strengthened when one recalls (as has been explained in chapter VI) that an arbitration agreement even if separate is dependent to a certain degree on the substance of the main contract. This provides the 'legal connection,'⁵⁴ or proximity,⁵⁵ which is required between contracts so that the illegality of one taints the other. In *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd*,⁵⁶ Donaldson J held that a legal connection, as opposed to a merely commercial connection, is required for the tainting principle to operate. It is generally assumed that a sufficient connection between an illegal contract and another agreement exists if, for example, the two contracts aim at achieving the same illegal objective (eg a guarantee securing payment under an illegal contract).⁵⁷ According to Treitel, collateral agreements are tainted with the illegality of the main contract, not only if they help to perform the latter, but also 'if they would, if valid,

⁵² [1996] 1 WLR 1152.

⁵³ Same case 1164. To similar effect, see: *Bank fur Gemeinwirtschaft v City of London Garages Ltd* [1971] 1 WLR 149 (CA).

⁵⁴ *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd* [1969] 1 WLR 1877. cf MP Furmston (ed) *Cheshire, Fifoot and Furmston's Law of Contract* (13th edn Butterworths London 1996) 437.

⁵⁵ *Redmond v Smith* (1844) 7 Mann & G 457; 135 ER 183.

⁵⁶ [1969] 1 WLR 1877.

⁵⁷ *Spector v Ageda* [1973] 1 Ch 30.

make possible the indirect enforcement of an illegal contract.’⁵⁸ A sufficient connection between an agreement and an illegal contract also exists where *the illegal contract is the subject matter* of another contract (eg an insurance policy relating to an illegal voyage).⁵⁹

It is difficult to ignore the fact that the illegal contract provides the arbitration clause with its subject matter.⁶⁰ An arbitration clause also makes possible the indirect enforcement of an illegal contract. Hence, the tainting principle should strike at any arbitration agreement that purports to authorise arbitrators to make finally binding awards on the legality of contracts (as opposed to empowering arbitrators to make an initial decision on that matter).

5. The Impact of ‘Equity Clauses’ on the Relevant Policy and Principles

In order to support the analysis of policy and principles set out in sections 3 and 4, it has to be demonstrated that the importance of an arbitrators’ duty to apply public policy has not been reduced by the power of arbitrators not to apply the law. This is because if it were the law that arbitrators are afforded discretion in the application of public policy, or if this application is obviated by the arbitrators’ authority not to apply the law, then the courts would not have to verify the proper application of public policy. Consequently, a review of an arbitrator’s findings of fact relating to

⁵⁸ GH Treitel *The Law of Contract* (10th edn Sweet and Maxwell London 1999) 471.

⁵⁹ *Redmond v Smith* (1844) 7 Mann & G 457, 135 ER 183; at 474 (135 ER 183, 190) it is stated that ‘[a] policy on an illegal voyage cannot be enforced; for it would be singular, if, the original contract being invalid and therefore incapable to be enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that, where a voyage is illegal, an insurance upon such voyage is invalid.’

⁶⁰ This fact has been emphasised in *O’Callaghan v Coral Racing Ltd* (CA, 19 November 1998) above 281-282, and *Soleimany v Soleimany* [1999] QB 785 (CA) 800. See chapter III above pp 118-122.

the legality of the main contract would also be ruled out. It is submitted, however, that arbitrators are still required to apply the relevant principles of public policy correctly.

Arbitrators can have the power not to apply the law by what is known to the English courts as 'equity clauses.' The impact of such clauses on public policy has not been determined.⁶¹ From a historical point of view, English courts and Arbitration Acts used to require arbitrators to apply the law correctly. It followed that the courts had to have the power to review arbitrators' decisions. In *Czarnikow v Roth Schmidt & Co*,⁶² Scrutton LJ said that 'no British court would recognise or enforce an agreement of British citizens not to raise a defence of illegality by British law.'⁶³ This position was enshrined by the 'special case' procedure, which empowered courts to scrutinise questions of law referred to arbitration. Agreements to the contrary were treated as illegal under the ouster principle.

Subsequently, the importance of this requirement has been reduced through courts' recognition of agreements that enabled arbitrators to avoid the strict application of the law, 'equity clauses,' and through the 1979 Act that abolished the 'special case procedure.' Moreover, section 46 of the 1996 Act provides, as far as relevant, that

- (1) The arbitral tribunal shall decide the dispute
- (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or

⁶¹ SC Boyd "Arbitrator not to be Bound by the Law" Clauses' (1990) 6 *Arbitration Intl* 123.

⁶² [1922] 2 KB 478 (CA).

⁶³ Same case 488.

(b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

Parties' agreement to the application of such considerations also amounts implicitly to the exclusion of the right to appeal to courts on points of law. Thus,⁶⁴

[s]ub-section (1)(b) recognises that the parties may agree that their dispute is not to be decided in accordance with a recognised system of law but under what in this country are often called "equity clauses", or arbitration "*ex aequo et bono*", or "*amiable composition*" ie general considerations of justice and fairness etc. [...] However, it is to be noted that in agreeing that a dispute shall be resolved in this way, the parties are in effect excluding any right to appeal to the Court (there being no "*question of law*" to appeal).

To what extent, then, do 'equity clauses' affect the duty of arbitrators to apply the relevant principles of public policy, where the dispute involves the legality of the main contract? In the *Harbour Assurance* case, Steyn J pointed out that an equity clause existed in the relevant contract, but assumed that it was irrelevant to the issue of the separability of the arbitration clause and arbitrators' powers in determining the legality of the contract.⁶⁵ Neither did the Court of Appeal, in staying the action, consider the clause. One has, therefore, to discern the effect of such a clause from previous cases.

While English courts recognised 'equity clauses,' they decided each case on the basis of the relevant agreement, without putting forward a general principle

⁶⁴ Departmental Advisory Committee Report on the Arbitration Bill (February 1996) para 223.

⁶⁵ *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81, 84.

regarding arbitrators' powers under them.⁶⁶ Generally, the courts accept 'equity clauses' that can be interpreted as relieving arbitrators from 'all judicial formalities'⁶⁷ or 'the strict application of the law.'⁶⁸ Thus, the courts upheld only clauses that could be interpreted other than as relieving arbitrators from applying the law altogether.⁶⁹ Indeed, if an equity clause purported to exclude the law altogether or to leave the determination of the terms of the contract entirely to arbitrators' discretion, it would jeopardise the certainty of the contract.⁷⁰ This interpretation of 'equity clauses' seems narrower than the effect of arbitration *amiable composition* in continental jurisdictions in that it does not allow arbitrators to depart from the rule of law if they deem it inequitable.⁷¹ Mustill and Boyd argue against the view that 'equity clause' could free arbitrators from the duty to apply the law altogether, especially public policy constraints of the place of arbitration.⁷²

One can fairly infer that, while 'equity clauses' have been examined by courts in relation to the application of the law, nothing indicates that they envisaged that such clauses could also affect the application of public policy by arbitrators. To the

⁶⁶ SC Boyd "'Arbitrator not to be Bound by the Law" Clauses' (1990) 6 *arbitration Intl* 123, 125-127. For a general survey of relevant case law, see H-L Yu 'Amiable Composition – A Learning Curve' (2000) 17 *J Intl Arbitration* 79, 89-95.

⁶⁷ *Orion Compania Espanda de Seguros v Belfort Maatschappij Voor Algemene Verzekeringeen* [1962] 2 *Lloyd's Rep* 257. For a similar ruling regarding a foreign contract see *Norske Atlas Insurance Co Ltd v London General Insurance Co* (1927) 28 *Lloyd's Rep* 104; MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 68-69.

⁶⁸ *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 *Lloyd's Rep* 357 (CA).

⁶⁹ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) paras 5.45, 5.51; R Goode *Commercial Law* (2nd edn Butterworths London 1995) 1185-1187.

⁷⁰ *Deutsche Seutsche Schachtban- Und Tiefbohr Gesellschaft MBH v Shell International Petroleum Co Ltd* [1991] 1 *AC* 295 (HL) 315 (Donaldson MR).

⁷¹ O Chukwumerije 'Reform and Consolidation of English Arbitration Law' (1997) 8 *Am Rev Intl L* 21, 37; H-L Yu 'Amiable Composition – A Learning Curve' (2000) 17 *J Intl Arbitration* 79, 83.

⁷² MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) 77. In MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) at 127, the authors point out that the enactment of 'equity clauses' may remove old concerns about the impact of such clauses on the certainty of contracts.

contrary, in *David Taylor & Son Ltd v Barnett Trading Co*,⁷³ Singleton LJ took the view that an arbitrator could not ignore the illegality of the contract by deciding the dispute on equitable grounds.

Moreover, English courts seem to take the same view where international arbitration is concerned. In *Deutsche Schachtban-Und Tiefbohr Gesellschaft MBH v Shell International Petroleum Co Ltd*,⁷⁴ the defendants challenged the enforcement of an ICC award in England on the ground that, *inter alia*, the arbitral tribunal had exceeded its authority by applying 'internationally accepted principles of law governing contractual relations' instead of a national legal system of law. The Court of Appeal rejected this argument, which was not raised in a subsequent appeal to the House of Lords, holding that arbitrators had that power under the ICC arbitration rules. However, the Court pointed out that the award would have been set aside if it were shown that 'there [was] some element of illegality or that the enforcement of the award would be clearly injurious to the public good...'⁷⁵

Adam Samuel suggests that 'an element of illegality' refers to directing parties to commit illegal acts rather than to the merits of the dispute.⁷⁶ However, it makes more sense to say that the reference to an 'element of illegality' envisages an illegality relating to the underlying contract, whereas directing parties to commit illegal acts falls within the case where the enforcement of the award itself is 'clearly injurious to the public good.' In other words, the public interest in not enforcing

⁷³ [1953] 1 WLR 562 (CA).

⁷⁴ [1991] 1 AC 295 (HL).

⁷⁵ *Deutsche Schachtban- Und Tiefbohr Gesellschaft MBH v Shell International Petroleum Co Ltd* [1991] 1 AC 295 (HL) 316.

⁷⁶ A Samuel 'Developments in English Arbitration Law since the 1984 *Antaios* Decision' (1988) 5 J Intl Arbitration 9.

illegal contracts is better protected by treating the illegality of the main contract as affecting the arbitration clause, and not merely the validity of the award (which is otherwise final in principle).

Consequently, whatever the effect of 'equity clauses' in relation to the application of the 'general' law, the application of public policy principles relating to the legality of the contract is a restriction on such clauses.⁷⁷ In other words, the fact that the correct application of the law by arbitrators is no longer regarded as central in England does not change the position respecting the need for the correct application of English law on illegality. This conforms to the contractual analysis of the power of parties and arbitrators, which is restricted by public policy.

The non-finality of arbitrators' decisions on the legality of contracts can be accommodated by section 46(1)(b) of the 1996 Act. While the Act does not use the term 'equity clause,' it is clear from the DAC report quoted above⁷⁸ that section 46 is an enactment of 'equity clauses.' The avoidance of the term is because of the desire to avoid technical language so that the Act is user-friendly.⁷⁹ Further, the 1996 Act defers to common law rules and principles on arbitration insofar as they are not inconsistent with its provisions. Section 81 of the Act provides that

(1) Nothing in this Part [Part I of the Act] shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to-

...

⁷⁷ RH Christie 'Amiable Composition in French and English Law' (1992) 58 *Arbitration* 259, 265.

⁷⁸ Above 299.

⁷⁹ M Rutherford and JHM Sims *Arbitration Act 1996: A Practical Guide* (FT Law & Tax London 1996) 158.

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

6. The Suggested Illegality Exception is a Better Method of Ensuring Respect for Public Policy than either Applying Separability or Cutting Back Separability in other Ways

Since the separability doctrine results in the finality of the arbitrators' decision on the legality of the contract, their decision becomes subject only to the minimal substantive judicial review. That is, the courts review only the compliance of the content of the award itself with public policy (ie, the award must not direct parties to commit unlawful acts, and its performance must not be offending against public policy). The courts may also examine points of law that a party may raise in appeal, subject to the limited right of appeal. The courts, however, cannot re-open the findings of facts made by the arbitrators or look behind the award in order to ensure the correct application of principles relating to the illegality of contracts. This minimal review is aimed at promoting commercial arbitration by securing the finality of awards, and saving time and cost. However, where the legality of the main contract is in dispute, this minimal review compromises public policy.

The broad separability doctrine, therefore, gives rise to conflict between the policy underpinning the promotion of arbitration and respect for public policy. Thus,

[o]n the one hand, strong considerations of public policy as well as, in some cases, legislation, restrict very narrowly the reviewability by a court of an international arbitral award. On the other hand, it is unacceptable and contrary to public policy that an arbitral award procured by the incorrect rejection of the

defence of illegality and violation of public policy should be permitted to be enforced.⁸⁰

Commenting on the *Harbour Assurance* case, Colman J said that this case did not 'establish any general principle, that wherever the underlying contract [was] illegal and void under a statute or at common law, an arbitration agreement in respect of disputes arising under it [would] necessarily be valid or that awards made under such agreement [would] be enforceable.'⁸¹ However, while excluding the principles governing the enforcement of contracts, the courts have not put forward clear principles to determine when an award may not be enforced on such a ground. This, in turn, detracts from the predictability and certainty of the fate of arbitral awards, which is important to the commercial world.

Under the old law, pre-*Harbour Assurance*, when the separability doctrine was ruled out where the contract was illegal, courts used to review the illegality issue.⁸² In *RE Boks & Co v Peters, Ruston & Co Ltd*,⁸³ after an award had been made in favour of sellers under a contract of sale of palm nut, it turned out that a government order prohibiting such contracts was in force when the contract was made. Therefore, the buyer brought an action to reverse an order enforcing the award. Reversing that order, Swinden Eady MR held that '[w]here there are matters which

⁸⁰ A Rogers and M Kaley 'The Impact of Public Policy in International Commercial Arbitration' (1999) 45 *Arbitration* 326, 332.

⁸¹ *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] QB 740, 758.

⁸² *Smith, Coney & Barrett v Becker, Gray & Co* [1916] 2 Ch 86 (CA); *David Taylor & Son Ltd v Barnett Trading Co* [1953] 1 WLR 562 (CA); *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63.

⁸³ [1919] 1 KB 491 (CA).

may gravely affect the validity of the award, then it is proper that they should be dealt with by an action in which the facts can be fully ascertained.’⁸⁴

In contrast to this, since the separability doctrine protects the arbitration clause against the illegality of the main contract, it places the legality of contracts within the ambit of the power of arbitrators to make final decisions. Such a decision will not be subject to full judicial review. This is because it is a settled principle that courts may not set an award aside, or refuse to recognise and enforce an award, on the sole ground that an arbitrator decided a question of fact or law wrongly. Therefore, courts do not, in an ordinary case, review the merits of an award; they are largely concerned with the requirements of justice and due procedure.

The suggested illegality exception to the separability doctrine can remedy this situation. On the one hand, it allows the courts to review the legality of contracts referred to arbitration, while, on the other, it depends on clearer principles to determine when such review can be carried out (ie the principles which determine whether or not the main contract is enforceable). In order to demonstrate this, it is appropriate to look again at the *Westacre Investments* case. This case was introduced in chapter III to which reference should be made for a description of the facts and basic reasoning.⁸⁵

In this case, the Court of Appeal was unanimous on the standard of review that applied to the content of the award itself, ie the review of the award on the face of it. There was agreement that an award would be unenforceable if it revealed on its face

⁸⁴ *RE Boks & Co v Peters, Ruston & Co Ltd* [1919] 1 KB 491 (CA) 496.

⁸⁵ See above pp 122-123.

that it gave effect to an illegal contract (as with the award in *Soleimany v Soleimany*⁸⁶). Such an award is itself contrary to public policy, and the separability doctrine is irrelevant to the question of its enforcement. However, this doctrine lies behind the difference between the members of the Court as to whether the courts could review the legality of the contract, if the issue is not raised on the face of the award or if the award finds that the contract was legal.

We will explain the effect of the separability doctrine in favouring arbitration over public policy through the decision of the majority of the Court of Appeal. Then, this position will be contrasted with the effect of the suggested exception. Finally, we will consider the view of the minority judge (Waller LJ), who seemed to prefer a mid-position. Yet, it will be argued that Waller LJ's view results in the uncertainty of the fate of awards and, like the majority's view, is inconsistent with the ouster of jurisdiction and tainting principles examined above.

(1) *The Majority's View: Minimal Review of the Legality of Contracts*

The majority of the Court of Appeal (Mantell LJ, with whom Sir David Hirst agreed) upheld the decision of the trial judge (Colman J), favouring the finality of the award against the full review of the legality of contracts. Mantell LJ was even doubtful about the suggestion that a 'preliminary inquiry short of a full scale trial should be embarked upon whenever "there [was] a prima facie evidence from one side that the award is based on an illegal contract".' He said he had 'some difficulty with the concept and even greater concerns about its application in practice.' In any

⁸⁶ [1999] QB 785 (CA). See chapter III above pp120-122.

event, his Lordship took the view that where the legality of the contract had been examined and affirmed by arbitrators through due procedure, the issue of the legality of the contract should not be reopened.

The majority's view marks a significant shift in the balance between public policy and arbitration in favour of the latter and disposes of the legality issue on the basis of unsatisfactory grounds. In order to explain this and show how the broad separability doctrine influenced the majority's view, it is important to look at the elaborate judgment of Colman J at first instance.

Colman J stated at the outset that, because of the separability of the arbitration clause, arbitrators had jurisdiction to decide on the legality of the contract. Therefore, his Lordship accepted, *inter alia*, the following two principles⁸⁷

(v) If the Court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, *prima facie* the Court would enforce the resulting award.

(vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that [] the contract was indeed illegal, the enforcement Court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing policy in support of the finality of awards...

According to this view, the starting point in the inquiry is the finality of the award. Very little scope is allowed for the possibility that public policy (ie, the illegality of the main contract) might overcome this finality. This finality cannot be

⁸⁷ *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] QB 740, 767-768.

rebuffed by merely showing that the main contract is illegal. Rather, it has to be demonstrated that there is a policy outweighing the finality of the award. However, this possible exception is effectively undermined by procedural considerations relating to the regularity of the arbitral procedure. In justifying the finality of the award in the *Westacre Investments* case, Colman J referred to such considerations saying that⁸⁸

the parties selected arbitration by an impressively competent international body, the ICC. The English Court would be entitled to assume that arbitrators appointed were of undoubted competence and ability, well able to understand and determine the particular issue of illegality arising in this case.

But, with respect, these procedural considerations do not provide in principle a satisfactory justification for abandoning the role of the courts to review the illegality of contracts. In addition, the procedural considerations invoked to justify such finality may not help develop clear rules that ensure predictability regarding the enforceability of arbitration agreements and the scope of judicial review of awards. This is because arbitrations are 'conducted in a wide variety of situations; not just before high-powered tribunals in international trade, but in many other circumstances.'⁸⁹

Colman J took the view that if a contract were contrary to public policy, an award enforcing it 'could only be consistent with public policy if the interposition of the dispute resolution machinery provided by the arbitration agreement in principle displaced that aspect of public policy which would treat enforcement of the

⁸⁸ *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] QB 740, 769.

⁸⁹ *Soleimany v Soleimany* [1999] QB 785 (CA) 800.

underlying contract as offensive.’⁹⁰ However, applying the contractual analysis of arbitration, an award results from a set of contractual arrangements between private players (the arbitration agreement and the agreement between the parties and their arbitrator). Therefore, the award should be treated pursuant to the ordinary principles governing contracts.⁹¹ This is because, like parties’ agreement, the award is a private act that does not reduce the courts’ control over the legality of contracts.

Colman J’s view detaches the award from the illegality of the main contract, which is the logical consequence of treating its basis (the arbitration clause) as being separate from this contract. As Nelson Enonchong points out in his criticism of this case, its effect was ‘to allow a foreign award, in most cases, to shield the illegality of the underlying contract and to put it beyond the reach of the enforcement judge.’⁹²

The trial judge (Judge Langan QC) who decided *Soleimany v Soleimany* took the view that illegality did not matter ‘if the *procedural law* of the arbitration attached no significance to the illegality,’⁹³ (ie the arbitrator was not required under that law to give effect to the illegality of the contract, despite the relevance of English public policy). It might be that, if the award considered in that case did not recognise the illegal nature of the underlying contract, the Court of Appeal could have found it difficult to refuse to enforce it. A case like *Westacre Investments* may show that ‘in carrying out the balancing exercise between the public policy of

⁹⁰ *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] QB 740, 755.

⁹¹ P Mayer ‘Le Contrat Illicite’ [1984] *Revue de l’Arbitrage* 205, 209.

⁹² N Enonchong ‘The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts’ [2000] *LMCLQ* 495, 496.

⁹³ *Soleimany v Soleimany* [1999] QB 785 (CA) 785 (emphasis added).

sustaining international arbitration awards and public policy in discouraging international commercial corruption, [judges] preferred form to substance.⁹⁴ As Professor William Park points out, it is uncertain whether the judicial review of awards at the enforcement stage amounts to ‘a broad examination of whether the arbitrator properly applied the law [relating to public policy], or merely involves a mechanical examination of whether the arbitrator in fact considered [it].’⁹⁵

The policy favouring the finality of awards is, therefore, usually preferred. As with foreign judgments, English courts are generally reluctant to support public policy defences to the enforcement of arbitral awards. In *Minmetals Germany GmbH v Ferco Steel Ltd*,⁹⁶ a case concerning procedural requirements of public policy, the court relied on the *Westacre Investments* case to conclude that the finality of awards was a prime consideration limiting review of public policy matters. Review is ‘likely to be ineffectual, destined to act as the shadow of a safeguard rather than as a genuine means of protection.’⁹⁷ Professor Carbonneau states that while the minimal review ‘has the great virtue of falling within the consensus on non-merits review, it operates as a ploy – a meaningless token by which to give the semblance of protection to national interests where no such safeguard in fact exists.’⁹⁸

⁹⁴ A Rogers and M Kaley ‘The Impact of Public Policy in International Commercial Arbitration’ (1999) 65 *Arbitration* 326.

⁹⁵ WW Park ‘National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration’ (1989) 63 *Tulane L Rev* 647, 669.

⁹⁶ [1999] 1 *All ER (Comm)* 315.

⁹⁷ TE Carbonneau ‘Mitsubishi: The Folly of Quixotic Internationalism’ (1986) 2 *Arbitration Intl* 116, 135.

⁹⁸ Carbonneau (n 97 above) 128.

It is clear, therefore, that the separability doctrine applied to illegal contracts reduces the courts' application of public policy considerations. It transforms the role of courts into one of merely verifying the requirements of due procedure. Nelson Enonchong criticises the narrow review of public policy considerations (albeit, without relating it to the separability doctrine). He argues that⁹⁹

in narrowing down the field within which illegality will defeat enforcement of a foreign award, the *Westacre* decision might have gone too far, and developments in the international sphere indicate that the range of instances when illegality may defeat enforcement should be a shade wider than the *Westacre* case affects to tolerate.

In practical terms, courts are now likely to set an award aside, or refuse to enforce it, in one of these two limited situations:

(a) Where either party has raised the illegality defence before the arbitrator, who ignored it. In such a case, section 102 of the 1996 Act would be sufficient to challenge the arbitrator's award on the ground that he did not offer that party an opportunity to present its case.

(b) Where the illegality issue had been examined by the arbitrator, but he made an award on the contract, stating – on the face of the award – that he was awarding on the contract despite its illegality, or directing a party to perform the contract, even

⁹⁹ N Enonchong 'The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts' [2000] LMCLQ 495, 496.

though the performance would involve the commission of illegal acts. This was the case in *Soleimany v Soleimany*.¹⁰⁰

This ‘formalistic’ attitude towards the review of the legality of contracts seems to require ‘misconduct’ on the side of arbitrators in order to justify the review of the matter or to refuse to enforce the award. However, as Philips J pointed out, misconduct has been applied ‘in a very technical way and is largely restricted to procedural misconduct. It is not misconduct to make a mistake of fact or law, however obvious.’¹⁰¹ While this may be justified on the basis that having agreed to arbitrate parties should accept the outcome of their chosen procedure, the illegality of contracts should not be treated in the same way because it affects the public interest.

(2) *The Suggested Illegality Exception*

The illegality exception to the separability doctrine suggested in this thesis entails that the illegality of the main contract affects the relevant arbitration clause. Since the validity of this clause is itself implicated by the illegality, it does not give arbitrators the power to make a final ruling on the question of whether the contract is illegal. The decision of arbitrators on this matter rests on the principle of competence-competence, which has been examined in chapter IV. As a matter of law, the award is valid as a jurisdictional decision based on the competence-

¹⁰⁰ cf MJ Mustill and SC Boyd *Commercial Arbitration* (Companion volume to the 2nd edn Butterworths London 2001) 210-211. Even in these two cases, Nelson Enonchong suggests that courts may require the illegality to be recognised by the proper law of the contract, unless it is of a ‘universal’ nature, such as terrorism, regardless of English principles of public policy that apply otherwise to the main contract. See Enonchong (n 99 above) 499.

¹⁰¹ Philips ‘England’ in M Ball (ed) *Competition and Arbitration Law* (ICC Paris 1993) 307.

competence principle, but it is not final. Consequently, the question which arises at the stage of the enforcement of an award is whether the main contract is in fact illegal, and not whether the award itself is valid. As with other jurisdictional matters, the courts are required to review the illegality issue afresh.

To be accepted, this approach would require an amendment to section 7 of the 1996 Act, which applies separability in respect of invalid contracts, so as to exclude illegal contracts from the ambit of the separability doctrine.

On this approach, the fact that an award has been made does not alter the courts' control over the illegality of the main contract. Unlike the majority's view, the principles underlying this approach do not depend on how the award was made.

As Waller LJ, (correctly) said in *Soleimany v Soleimany*¹⁰²

[w]here public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it ... The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.

However, the suggested illegality exception does not treat the whole arbitration process as being devoid of any legal value. Rather, the award made on the basis of the competence-competence principle will be upheld in respect of the determination of the rights and obligations of the parties, if the illegality issue has

¹⁰² [1999] QB 785 (CA) 800. Waller LJ made a similar statement in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [2000] QB 288 (CA) 315-316.

been decided correctly by arbitrators. In short, the model of the review by the courts of jurisdictional matters, such as the existence of the main contract, is to be applied.

Under the suggested illegality exception, therefore, the court should ask first, not whether the award itself offends against public policy, but whether the alleged illegality of the main contract invokes the English law on illegality. If so, the English court should fully review the question of legality in order to ensure compliance with that law. If English law on illegality is irrelevant, the court would not review the allegations of illegality, not because of the separability doctrine, but because there is no issue of illegality from the point of view of the court. The validity of the contract and its arbitration clause would not be in issue.

To investigate the principles under which a contract may be illegal in English law is outside the scope of this study.¹⁰³ Suffice it to say that, contrary to the reasoning adopted in the *Westacre Investments* case, the views of foreign courts on the legality of the award will not be material, since the English court is concerned with the legality of the main contract from the point of view of English principles.¹⁰⁴ Thus, unlike the majority's view, since commercial corruption offends against

¹⁰³ It is appropriate to provide examples of such principles. In MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths London 1989) at 78, the authors state that the English courts should take into consideration at least '[t]he rules of criminal law and those statutory provisions of the civil law out of which it is impossible to contract. But where foreign law is concerned, we suggest that the English courts would have regard only to those rules which make a transaction "illegal," under those systems of law to whose criminal law the English court, according to English principles of the conflict of law, will have regard when called on to enforce a contract. These include those rules which are created by the place of performance.' This last category has been examined in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, where Phillips J explained that, if a contract is not governed by English law, an English rule of public policy that had only domestic purposes could not apply in the international sphere unless it is shared by the other relevant state. 'In such a situation international comity combines with English domestic public policy to militate against enforcement.'

¹⁰⁴ N Enonchong 'The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts' [2000] LMCLQ 495, 497-498.

English public policy, and is a reason for the illegality of the contract, it should be deemed to affect the arbitration clause regardless of how the arbitration had been conducted.¹⁰⁵

(3) *Waller LJ's View: A Mid-Position*

While accepting in principle that an arbitration clause is separable from the illegal contract containing it and that arbitrators' decisions on the legality of contracts are final, Waller LJ in the *Westacre Investments* case took the view that some types of illegality could permit the court to reopen the facts examined by arbitrators, as if the separability doctrine did not apply.

To determine whether a full review of the legality of the contract should be carried out, Waller LJ accepted the procedural considerations adopted by the majority. Recalling his decision in *Soleimany v Soleimnay*, his Lordship said that a judge should ask, *inter alia*, the following questions. 'Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry?'¹⁰⁶ However, crucially, Waller LJ added a substantive factor, namely the seriousness of the alleged illegality. According to this factor, a judge should determine whether the alleged illegality is serious enough to invalidate the arbitration clause. The test of the seriousness of the relevant illegality

¹⁰⁵ This is a legitimate position under the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958, Article V(2); P Mayer et al 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' in *Report of the Sixty-Ninth Conference of the International Law Association* (International Law Association London 2000) 340, 347.

¹⁰⁶ *Soleimany v Soleimany* [1999] QB 785 (CA) 800.

is aimed at classifying awards into two categories: reviewable and unreviewable types. It does not invalidate arbitration agreements as a matter of principle. Rather, it is the extent of the relevant illegality that counts.

Apart from the procedural factors that (as explained in respect of the majority's view) conceal the consideration of relevant public policy, the seriousness of the relevant illegality is an unclear criterion, and makes it difficult to predict what may or may not be finally arbitrated as a result of the alleged illegality. For example, according to Colman J, commercial corruption was not such a serious type of illegality as to preclude arbitrators' jurisdiction. By contrast, Waller LJ, having already decided that smuggling was an illegality that could taint the award,¹⁰⁷ was alone in finding that commercial corruption was no less objectionable, since 'the principle against enforcing a corrupt bargain [was] based on public policy of the greatest importance and almost certainly recognised in most jurisdictions throughout the world.'¹⁰⁸

It is submitted, therefore, that, while Waller LJ's view is an attempt to strike a balance between the enforcement of awards and public policy, it is ultimately unsatisfactory because of its lack of clarity. It does not provide sufficient guidance as to what reasons for the illegality of the contract will preclude the finality of awards. It has been suggested that these reasons should be deemed to include indisputable illegality or cases of an overriding public policy that prevents any reference to arbitration altogether.¹⁰⁹ This, however, confuses the illegality issue,

¹⁰⁷ *Soleimany v Soleimany* [1999] QB 785 (CA).

¹⁰⁸ *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [2000] QB 288 (CA).

¹⁰⁹ R Merkin *Arbitration Law* (Looseleaf LLP London 1991) para 4.41.1.

which should be treated as jurisdictional, with the concept of non-arbitrability. Further, if one accepts that the courts will refuse to enforce awards only if the illegality is admitted one is excluding the judicial review of the illegality issue when needed, ie when it is in dispute.

The uncertainty as to what is meant by serious illegality arose in *Omnium de Traitement et de Valorisation S A v Hilmarton Ltd*¹¹⁰ (examined in chapter III). Although the award conceded that the main contract was made in breach of the law of the place of performance, Algeria, the court enforced it, saying that the illegality involved (breach of statutory prohibition of agreements with middlemen) was not serious. Professor Jonathan Hill argues that this case was wrongly decided because ‘the policy of not enforcing a contract which is entered into with the object of breaking the laws of a friendly country (or an arbitration award upholding such a contract) does not depend on the illegality being [serious].’¹¹¹

Moreover, Waller LJ’s view is inconsistent with the ouster of jurisdiction and tainting principles examined above. Although his Lordship accepts the duty of the court to ensure that illegal contracts are not enforced, and that its legal process is not abused, he makes a distinction between different types of illegality, depending on the test of seriousness and a number of practical considerations pertaining to the arbitration procedure. Such a distinction is not well principled, not least because the legal requirements for the application of the principles examined in the previous

¹¹⁰ [1999] 2 Lloyd’s Rep 222.

¹¹¹ J Hill ‘Illegality under the Law of the Place of Performance and the Enforcement of Arbitration Awards’ [1999] LMCLQ 311, 315.

section are present in cases involving illegal contracts regardless of the factors relied on by Waller LJ.

7. Conclusion

The consequence of the illegality exception to the separability doctrine suggested in this chapter is that arbitrators' decisions on the illegality issue (ie whether the main contract is illegal when made) are not final. This is because they are to be based on the competence-competence principle instead of the separability doctrine. The courts will, therefore, review the matter fully. Thus, the courts will ask whether the alleged illegality is relevant to the English law of illegality. If so, they will review it to ensure the correctness of the arbitrators' decision.

The full review by the courts of the legality of contracts is justified because it is the courts not arbitrators who must be the final decision-makers on this matter. This is because the policy of the non-enforcement of illegal contracts is vital to the public interest, and should not be treated on the same footing as the private interest of the parties. Both in theory and practice, arbitrators do not purport to act as the guardians of national public policy. Therefore, the courts should retain the final decision on the legality of contracts in order to ensure that their relevant public policy is properly applied.

It has been shown that the duty of arbitrators to decide on the legality of contracts correctly has not been affected by their power not to apply the law.

Moreover, the suggested exception is consistent with the standard contractual principles of ouster of jurisdiction and tainting.

It has been submitted that the suggested illegality exception ensures respect for public policy. By allowing full review by the courts of the legality of contracts, it is preferable to the current attitude of the courts, which looks only at the content of the award and the procedure, whereby it has been procured. This attitude relegates the review of public policy considerations to a formal exercise, with emphasis being placed on the procedure and not on the relevant principles.

Further, Waller LJ's suggestion that only serious types of illegality should taint the arbitration agreement and allow full review of the matter is inconsistent with the relevant principles, which do not depend on the seriousness of the illegality of the main contract. In addition the 'seriousness of the illegality' is an unclear factor, and would not provide sufficient guidance as to when an award is fully reviewable.

It should also be remembered that, as we have seen in chapter III, before the *Harbour Assurance* case the suggested illegality exception applied. This thesis is therefore not proposing a change that is revolutionary and has no 'track-record.' On the contrary, that exception used to work well and what is here being proposed is merely a return to it. This, however, would require an amendment to section 7 of the 1996 Act. Finally, it should be reiterated that under the suggested exception arbitrators can still make initial rulings on the illegality issue, pursuant to the competence-competence principle. This, in turn, ensures that arbitration may proceed in most cases, despite allegations of the illegality of the contract. It follows

that, not only is the suggested exception justified in principle, but it also plays a substantial role in ensuring a proper balance between the promotion of arbitration and respect for public policy.

CONCLUSIONS

In examining the separability doctrine, this thesis has sought to convince the reader of four main arguments. These are: (i) English arbitration law is best interpreted on the basis of a contractual theory of arbitration; (ii) the separability doctrine, as applied in England, is consistent with a contractual theory of arbitration; (iii) the separability doctrine should be subject to two exceptions for non-existent and illegal contracts; and (iv) the competence-competence principle should be used to mitigate some possible drawbacks of those two exceptions to the separability doctrine. This final part will draw together the major conclusions relating to these four main arguments.

1. English Arbitration Law is, and should be, Based on a Contractual Theory of Arbitration

A contractual theory of arbitration should be supported because it respects ‘party autonomy’ while, at the same time, ensuring a proper balance between promoting arbitration and respect for public policy. As chapter I has shown, a contractual theory treats an arbitration agreement like other contracts and, therefore, accepts that ‘party autonomy’ is subject to ordinary limits of public policy applying to parties’ freedom of contract. In addition, a contractual theory of arbitration allows the parties to decide how their arbitration should be conducted, treating their agreement as the source of an arbitrator’s powers. In contrast to this, the jurisdictional and mixed theories of arbitration minimise the importance of ‘party autonomy’ and place greater weight on the law and courts of the seat of arbitration. Curiously, while

purporting to give prominence to 'party autonomy,' the 'autonomous theory,' which treats arbitration as being an autonomous institution that need not depend on a national legal system, gives rise to objective standards and rules for international commercial arbitration that may or may not rest on 'party autonomy.'

English courts have traditionally adopted a contractual analysis of arbitration. In chapter II, we explained some aspects of this analysis. While this thesis did not attempt to provide a comprehensive contractual interpretation of arbitration, it has been submitted that, contrary to the views of some commentators, the 1996 Act is, in general terms, consistent with the traditional position of English courts.

2. The Separability Doctrine as Applied in England is Consistent with a Contractual Theory of Arbitration

It has often been assumed that separability is applied in the same way in all jurisdictions that accept it. However, the examination of the separability doctrine in England (chapter III) and in other jurisdictions (chapter V) shows that this is not entirely correct. In particular, France adopts a very different approach to the doctrine.

Chapter III has shown that, before *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*¹ and section 7 of the Arbitration Act 1996, English courts gave due regard to party autonomy. While recognising the distinct nature of an arbitration agreement, English courts relied on the interpretation of the

¹ [1993] QB 701(CA).

relevant arbitration clause in order to ascertain whether parties intended to treat it as a separable agreement. They also clearly ruled out separability where the main contract containing an arbitration clause was non-existent (an exception that has continued despite the apparently contrary wording of section 7 of the 1996 Act). They also did not apply separability where the main contract was illegal (an exception that was discarded by the *Harbour Assurance* case). Exploring the separability doctrine in Australia and the United States, chapter V has shown that a largely consistent approach to the separability doctrine has been taken in common law jurisdictions. While the courts in Australia and the United States accept the *Harbour Assurance* case version of separability, they still apply a non-existent contract exception to separability and rest this doctrine on the interpretation of the relevant arbitration clause. This approach is, in general terms, consistent with a contractual theory of arbitration.

In contrast to this, the French courts rarely consider the interpretation of the particular arbitration clause to ascertain whether the parties intended it to be separable. As such, separability applies as an imposed rule of law. As chapter V has shown, this approach to separability links with the French principle of the ‘full autonomy’ or ‘self-effectiveness’ of international arbitration agreements that detaches such agreements from all national laws. This novel approach (which is treated as being a consequence of separability) has given rise to the view of the French courts and commentators that separability can apply even where a dispute arises as to the existence of the main contract. The French approach to the separability doctrine is best interpreted on the basis of the autonomous theory of

arbitration: it rests on the delocalisation of arbitration agreements and applies directly as a policy-based rule aimed at promoting commercial arbitration.

3. There should be Two Exceptions to the Separability Doctrine for Non-Existent and Illegal Contracts

While the separability doctrine is important for commercial arbitration and is usually justified on an independent policy of promoting arbitration, it should rest on a contractual basis so as to ensure consistency in arbitration law as well as a proper balance between promoting arbitration and respect for public policy.

Treated like other contracts, an arbitration clause is interpreted so as to ascertain the intentions of the parties according to the general test of parties' consent to contract. As chapter VI has shown, the application of this test presupposes the existence of a meeting of minds between parties as to the terms of the arbitration clause. Therefore, if either party denies that the parties ever reached consensus *ad idem* as to the main contract, the separability doctrine cannot, and should not, apply. This is because the reasonable intention of the parties is that an arbitration clause is not made in a vacuum. Rather, an arbitration clause is collateral to, ie dependent on, the existence of the main contract. Parties should not, by the separability doctrine, be presumed to have intended to arbitrate even if no contract existed. Applying the separability doctrine in such a situation transforms its basis; it would be founded upon a policy-based legal fiction favouring arbitration over consent. That the separability doctrine rests on a contractual analysis in English law, and not on a

policy favouring arbitration, has been demonstrated through cases that apply separability in the same way to jurisdiction clauses.

Chapter VI has explained a number of circumstances identified by English courts as concerning non-existent contracts, as opposed to initially invalid contracts. It has been suggested that some additional circumstances, which have not yet been considered directly by English courts, should also be treated as involving non-existent contracts.

English courts continue to accept a non-existent contract exception to the separability doctrine, although they have not dealt specifically with the apparent broader scope of separability respecting this exception under section 7 of the 1996 Act. However, while some commentators assume that section 7 is broader than the ‘common law’ separability, section 7 may be susceptible of an interpretation that would not require the courts to change their approach to separability.

Turning to the illegality exception, this was rejected in the *Harbour Assurance* case. As chapter III has shown, English courts accepted that an arbitration clause inserted in an actually or allegedly illegal contract could not be effective, and if the illegality issue had been decided by an arbitrator, the courts would carry out a full review of the matter. Therefore, the Court of Appeal should have treated the illegality issue as being a jurisdictional matter that affects the arbitration clause. As such, the Court of Appeal could have decided the case in the same way (ie granting a stay), albeit on a different basis. Not only is the *Harbour Assurance* case out of

line with previous case law, but also cases subsequent to it show an inconsistent approach to arbitration clauses in illegal contracts.

At a deeper level, the application of the separability doctrine in relation to illegal contracts flies in the face of the contractual theory of arbitration. It enlarges party autonomy beyond its limits, allowing parties to remove from the courts the power to control the enforcement of illegal contracts. As chapter VII has shown, it is the courts, not arbitrators, who should be the final decision-makers on the legality of contracts. Indeed, an erroneous decision of an arbitrator, whether on a point of law or of fact, that the main contract is legal takes him out of his jurisdiction to enforce the contract. Therefore, in order to preserve the control of the courts over the enforcement of illegal contracts, courts should remain able to carry out a full review of the legality of the main contract.

Chapter VII has also argued that two contractual principles support the illegality exception. The first is the 'ouster of jurisdiction principle.' This principle has not been exactly defined by courts. Its application and scope depend on the particular power of courts, or right of the parties, that it operates to preserve. Thus, the ouster of jurisdiction principle links with the duty of a court to prevent its proceedings from being abused through the enforcement of illegal contracts.

The second is the tainting principle, which operates so as to prevent enforcement of an agreement connected to an illegal contract. Chapter VII has demonstrated that the requirements of the application of this principle are met in the case of an arbitration clause. To avoid such principles by demanding stricter

conditions for them to apply to an arbitration clause is inconsistent with the contractual analysis of arbitration that treats an arbitration agreement like other contracts.

Moreover, chapter VII has shown that, as a matter of policy, the illegal contract exception – acceptance of which would require an amendment to section 7 of the 1996 Act – helps to ensure a proper balance between promoting commercial arbitration and respect for public policy. It applies only to contracts that are illegal when made and does not prevent arbitrators from deciding on other aspects of public policy. In contrast to this, cases decided after the *Harbour Assurance* case show that, by accepting the separability doctrine, English courts treat the finality of arbitration awards on the legality of contract as being the rule. A case like *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*² reveals that the separability doctrine results in a significant and unwelcome shift in favour of arbitration, compromising an already attenuated public policy. As a matter of principle, the *Westacre Investments* case is problematic because of its vague implications as to a possible application of an illegal contract exception to separability. In addition, as a matter of policy, it put forward a controversial standard of review of the legality of the main contract, assuming separability is applied.

² [2000] 1 QB 288 (CA).

4. The Competence-Competence Principle can and should be Applied in order to Mitigate Some Possible Drawbacks of the Exceptions to the Separability Doctrine

If the illegal and non-existent contracts exceptions to the separability doctrine were applied, it could be possible for a recalcitrant party to raise more challenges to an arbitrator's jurisdiction in a court so as to delay arbitration. While this was one reason why the Court of Appeal felt it was necessary to widen the separability doctrine in the *Harbour Assurance* case, it is submitted that it was open to the Court to deal with the matter on the basis of the competence-competence principle, which is now enacted in section 30 of the 1996 Act. This view assumes that the competence-competence principle was well established in English arbitration law before the 1996 Act. Chapter IV has explained that this assumption is true.

It has been explained that, not only did the competence-competence principle apply where an arbitrator was in fact faced with a challenge to his jurisdiction, but also where a court was seized first of the dispute. Thus, it is open to an English court to stay its proceedings without deciding on the jurisdiction of the arbitrator. The court will review the matter fully when an award is sought to be enforced or challenged on the basis of lack of jurisdiction.

It has been shown that, while English courts rest the competence-competence principle on a special 'competence-competence agreement,' where an arbitrator is faced with a challenge to his jurisdiction, they rely on their inherent power to stay an action if they are seized first of the dispute. This power is exercised on the basis of

factors, including the likelihood of the validity of the arbitration clause, the legality or the existence of the main contract. A statutory regulation of this aspect of the competence-competence principle would encourage the courts to exercise this power with less caution. This approach obviates the risk of delaying arbitration as a consequence of the suggested exceptions to the separability doctrine. The suggested illegality approach, coupled with the suggested approach to the competence-competence principle, can be seen to provide a better solution to the problem of arbitration clauses in illegal contracts than that put forward by either the majority or Waller LJ in the *Westacre Investments* case.

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