A CLOSER LOOK AT THE DOCTRINE OF SEPARABILITY IN ARBITRATION

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Abstract

In the ever-growing business world impacted by globalization, many commercial contracts nowadays contain an arbitration clause. This article focuses on the history behind arbitration as an alternative method of dispute resolution and its penetration to the forefront of mechanisms for resolving commercial disputes—with focus on England, France, and the United States. The article also delves into some of the key questions related to the relationship between an arbitration clause and the underlying contract in which it is contained. And those are the infamous separability and competence-competence doctrines. The author's conclusion is that the efficiency of an arbitration clause is feasible only if its autonomy is entrenched and safeguarded from preventative and baseless court intervention. In that regard, the author addresses the consequences, current challenges, judicial and academic discourse, and the need for improvement when it comes to these two arbitral principles—all with the goal to provide contracting parties with forethought as to what to consider when drafting their contracts as to avoid unwelcome consequences.

Keywords

International Arbitration · Separability Doctrine · Competence-Competence Doctrine · Historic Overview · Issues of Jurisdiction.

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1. Introduction

An international arbitration agreement is, nearly unfailingly, handled as "separable" or "autonomous" from the underlying contract in which it is included.[1] The consequence of this supposal is conventionally known as the "separability doctrine" or, more precisely, the "separability presumption"—which is one of the conceptual and pragmatic bedrocks of international arbitration.[2] Various jurisdictions, be it common or civil law, have given the doctrine different definitions. Yet, its aim is constant within the context of international arbitration—to provide for the autonomy and judicial independence from the main contract in which it is contained.[3]

Whatever its definition, the separability presumption unquestionably carries crucial importance in international commercial arbitration. Namely, the same is, as mentioned above,[4] one of the underpinnings of the current legal regimes relevant to international arbitration agreements. Nevertheless, despite its pragmatic and expository significance, the separability presumption gives rise to many heated debates, particularly when it comes to the questions relating to the choice of law, contractual validity, and competence-competence.[5] Even more to the point, the issues—all of which will be given a closer consideration—encompass:

(1) the potential application of a different national law, or substantive legal rules, to the arbitration agreement other than to the underlying agreement;
(2) the potential legality of an arbitration agreement, regardless of the non-existence, illegality, or invalidity of the underlying contract;
(3) the potential validity of the underlying contract, notwithstanding the issues related to an associated arbitration clause; *and*
(4) the analytical groundwork for the competence-competence doctrine, which recognizes the jurisdiction of an arbitral tribunal to rule on its own jurisdiction.[6]

[1] Gary Born, *International Commercial Arbitration*, vol. 1 (Kluwer Law International, 2009), 311-312.
[2] Ibid.
[3] *Final Award in ICC Case No.* 8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999).
[4] *See* Abstract, *supra* p. 3, para. 1.
[5] Born, *International Commercial Arbitration*, 312 (n. 3).
[6] Ibid., 313.

2. The Doctrine of *"Separability"* or *"Autonomy?"*

However undeterred by the aforementioned worth of the separability presumption, substantial ambiguities as to its basis, content, and impact still exist. Thus, for instance, the appropriate name of the separability doctrine is an ongoing puzzlement and varies across different legal systems.[7] Common law jurisdictions, on one hand, have talked about the "separability" or "severability" doctrine, emphasizing its *contractual origin* and the perspective of arbitration agreement being *severable* from the underlying contract.[8]On the other hand, civil law jurisdictions have spoken of the "autonomy" and "independence" of the arbitration clause, arguably pointing out the role of the *outer legal regime* applicable to international arbitration agreements. This distinction in nomenclature in the civilian tradition also suggests a greater degree of *legal distance* between an arbitration agreement and the underlying contract, than the one that is proposed by the separability doctrine.[9]

The debate over the adequate label—"autonomy" or "separability"—does not, however, result in any considerable gain, particularly because both characterizations can be subjected to inexactitude.[10] Yet, though the distinction is one of degree rather than nature, many would agree that "separability" would be a more appropriate epithet, for the following reasons:

(1) it would be wrong to describe an arbitration clause as either wholly or necessarily "autonomous" or "independent" from the underlying contract when the former prevails to exercise the supportive function to the latter and is, thus, still closely related to it;
(2) it correctly places the focus on the *parties' intentions*, as a contractual manner, in forming the arbitration agreement rather than on *external legal rules* imposing a specific understanding of an arbitration agreement upon the parties; *and*
(3) the term "autonomy" is vague and indecisive as it can be used to express the independence of the arbitration clause from *any national law*, whereas the "separability" nomenclature denotes solely the separability of the arbitration agreement from *the underlying contract*, without indicating any autonomy that the arbitration clause may have in relation with national legal systems.[11]

[7] Ibid.
[8] Ibid., 313-314.
[9] *See* Judgment of 7 May, 1963, Ets Raymond Gosset v. Carapelli, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1c), 354-404.
[10] Born, *International Commercial Arbitration*, 314 (n. 3).
[11] Ibid., 315-316.

3. Historic Origins and Evolution of the Separability Doctrine

Historically, some jurisdictions were reluctant to fully recognize agreements to arbitrate future disputes. But even the Roman law, written 1,500 years ago, provided that the arbitration clause was a separate contract (*promisum*) which could not be enforced unless conglomerated with another contract—to produce a *com-promisum.*[12] This position remained in force until the early twentieth century, particularly in England, France, and the United States.[13]Despite the fact that the public policy of each of these three countries resembles the aspiration to encourage arbitration as a form of alternative dispute resolution, each nation has established a distinct legal framework in response to this objective. The course and measure of growth and the status of arbitration law within each country goes hand-in-hand with the goal to incentivize the use of arbitration agreements and to augment that nation's rank and prominence as a favorable center for arbitration.[14] Hence, though the doctrine of separability is now an accepted principle in almost all advanced arbitral jurisdictions, its application still continues to vary—even within jurisdictions—under circumstances in which the container agreement is argued never to have come into existence at all.[15]

3.1 England

In English law, the doctrine of separability was established in the 1698 Arbitration Act which provided that arbitration clauses can be made rules of court if the parties had so chosen.[16] Violating contractual terms would not, at the time, bring about the contempt of court.[17] However, this was to be very short-lived as it was dismissed by the cataclysmic decision in *Kill* v. *Hollister*[18] in 1746, where it was found that the parties' agreement to arbitrate cannot "oust this Court" of its jurisdiction.[19] The courts' jealousy regarding their own jurisdiction resulted in a major setback as the arbitral clause was reduced to a "standard contractual term" which the courts were stubbornly refusing to enforce.[20] The reason behind the refusal of the only so-reduced contractual term (other contractual terms were not approached in the identical manner) was exactly its jurisdictional nature—"a form of separability in itself."[21]

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[12] Ibid., 321.
[13] Ibid.
[14] Janet A. Rosen, "Arbitration under Private International Law: The Doctrines of Separability and Competence de La Competence," *Fordham Int'l LJ* 17 (1993): 616-617.
[15] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004), 164.
[16] Adam Samuel, "Separability of Arbitration Clauses-Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice," *Arbitration and Dispute Resolution Law Journal* 36 (2000), http://www.adamsamuel.com/separabi.pdf.
[17] Ibid.
[18] Kill v. Hollister, 1 Wils. K.B. 129, 95 Eng. Rep. 532 (1746).
[19] Samuel, "Separability of Arbitration Clauses," (n. 18).
[20] Ibid.
[21] Ibid.

Still, in 1942, the decision reached by the House of Lords[22] in *Heyman*[23] re-instated the doctrine of separability by holding that an arbitration agreement included in a written contract may survive the termination of the contract. The question whether the discharge by a fundamental breach of the container agreement simultaneously discharged the arbitration clause as well was unanimously answered in the negative.[24] Half a century later, in the famous 1992 *Harbour Assurance*[25] decision, English judges expressly recognized the separability principle as part of English law. They stated, *inter alia*, that the said doctrine gives an arbitral tribunal the jurisdiction "to determine the validity or invalidity of the relevant contract provided that the arbitration clause itself was not directly impeached."[26] In that regard, even a successful attack on the contract's validity would not—in and of itself—negate the arbitral tribunal's jurisdiction unless the arbitral clause is thereby impugned.[27] This scheme eliminated the conundrum (not to say the absurdity) of the process as arbitrators were allowed to examine the issues of legality and were empowered to render the container agreement void for illegality without thereby eradicating their own jurisdiction so to render. The doctrine was subsequently enacted by Section 7 of the Arbitration Act 1996.[28]

3.2 France

England was not the only country facing anti-arbitration developments. Following a boom of the excitement in the revolutionary aftermath, the 1804 Napoleonic Code outlawed the enforcement of arbitral clauses.[29] This judicial hostility toward arbitration clauses had been impacting French domestic arbitration law for two centuries.[30] However, in the landmark 1963 *Gosset*[31] decision, the *Cour de Cassation*[32]

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[22] "House of Lords History," UK Parliament, 2021, https://www.parliament.uk/business/lords/lords-history/.
[23] Heyman v. Darwins, [1942] 1 All ER 337.
[24] Samuel, "Separability of Arbitration Clauses," (n. 18).
[25] Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd., [1992] 1 Lloyd's L.Rep. 81.
[26] *"Separability of Arbitration Agreements,"Arbitration Law Monthly,* October 2005, https://www.i-law.com/ilaw/ doc/view.htm?id=35136.
[27] Ibid.
[28] Ibid.
[29] Samuel, "Separability of Arbitration Clauses," (n. 18).
[30] Philippe Leboulanger, "The Arbitration Agreement: Still Autonomous?," in *International Arbitration 2006: Back to Basics?,* ICCA Congress Series, no. 13 (International Arbitration Congress, Alphen aan den Rijn: Kluwer Law International, 2007), 3–31.
[31] Cour de Cassation, 7 May 1963 (Ets. Raymond Gosset v. Carapelli), Juris Classeur Périodique, Ed. G., Pt. II, No. 13405 (1963).
[32] "Présentation," Cour de cassation, n.d., https://www.courdecassation.fr/#:~:text=La%20Cour%20de%20cassation%20est,interpr%C3%A9tation%20uniforme%20de%20la%20loi. As noted on the website of the *Cour de Cassation*,

re-introduced the doctrine of separability by ruling that the arbitration agreement, in international disputes, is separable from the main contract and judicially autonomous.[33] More precisely, the Court reasoned that, in cases of international arbitration, an arbitration agreement—be it in a separate document or as a part of the underlying contract—is always, absent exceptional circumstances, completely autonomous.[34] The Court went on to declare that the autonomy of the arbitral clause in an international contract (*Gosset* involved a contract between a French and an Italian company) is not affected even when the underlying contract may be invalid.[35]

The *Cour de Cassation* upheld this ruling in the subsequent cases shortly after *Gosset*, in 1968 and 1971.[36] About a decade later, in response to two executive degrees[37] of 1980 and 1981, the French Parliament promulgated the Nouveau Code de Procédure Civile,[38] Book IV of which expressly regulates all aspects of domestic and international arbitration. This was an indication that the French Parliament worked towards incentivizing settlement of disputes in international trade. As a fruit of combined efforts by the legislature and the judiciary—where French judges opted to restrict their dominion over international arbitration matters—France emerged as an occupier of a highly prominent position in the realm of international commercial arbitration.[39] What is more, not only was international arbitration afforded great deference in France, but the arbitration was generally encouraged, and it emerged as the most dynamic aspect of the French contract law.[40]

Be that as it may, it is still worth mentioning that this great advantage afforded to arbitration in France was by no means absolute or all-encompassing. Namely, despite the *in dubio pro arbitrarium*[41] approach that the French legal system has adopted in terms of honoring arbitral clauses, the same could—albeit on rare occasions—invoke the application of the French law. And the substantive provisions of the French domestic law provided for the non-arbitrability of a contractual subject matter in

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> La Cour de cassation est la plus haute juridiction de l'ordre judiciaire français. Siégeant dans l'enceinte du palais de justice de Paris, la juridiction suprême a pour mission de contrôler l'exacte application du droit par les tribunaux et les cours d'appel, garantissant ainsi une interprétation uniforme de la loi.

[33] Leboulanger, "The Arbitration Agreement: Still Autonomous?" (n. 32).
[34] Rosen, "Arbitration under Private International Law," 639-640 (n. 16).
[35] Ibid.
[36] Ibid., 641-642.
[37] Decree No. 80-354 of May 14, 1980, (1980) Journal Officiel de la RépubliqueFrançaise ("J.O.") 1238, (1980) D.S.L. 207 (Fr.) - established the extensive review of domestic arbitration law, while Decree No. 81-500 of May 12, 1981, (1981) J.O. 1380, (1981) D.S.L. 222 (Fr.) – set in motion a change in international arbitration rules. *See* Rosen, "Arbitration under Private International Law" (n. 16).
[38] Rosen, "Arbitration under Private International Law," 643-644 (n. 16).
[39] Ibid., 637-638.
[40] Ibid., 637.
[41] "When in doubt, for the [favor] arbitration."

instances when "court intervention is regarded as indispensable."[42] Those instances are mostly the ones that entail public policy matters, such as issues related to naturalization, immigration, tax, and administrative concerns.[43] Non-arbitrable cases also involve political legislation, such as laws regarding price controls, freedom of commerce, or economic organization of society.[44]

3.3 The United States

While the judiciary in the United Stated had been treating arbitration with a certain degree of hostility prior to the enactment of the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16) in 1925, the development of federal public pro-arbitration policy supervened the passing of the FAA.[45] The assurance that the private contracts will be enforced seems to have been the main stimulus behind the approval of and support for the arbitration process. That is why the United States Congress, in its attempt to surmount judicial resistance to arbitration, passed the FAA. The FAA, however, was silent on the issue of separability.[46] The FAA provisions are said to apply to the U.S. interstate and transnational commerce, meaning that the international commercial arbitration agreements may very well fall under the scope of the FAA.[47] Still, the international commercial arbitration agreements may also invoke the application of the New York Convention, discussed *infra,*[48] which was codified into the U.S. law almost 50 years after the FAA.[49] In any event, the FAA provides for the enforcement of written arbitral clauses by incorporating instruments with which courts may rule on issues involving both the arbitrability and validity of the arbitral clause.[50] Hence, pursuant to the FAA, a written agreement contained in a commercial contract is a "valid, irrevocable and enforceable agreement."[51]

A pro-arbitration initiative in the United States became notable in subsequent case law discussed by the U.S. courts. Specifically, the initial *favor arbitrandum* principle was established in the 1967 *Prima Paint*[52] case, a landmark decision credited with making the separability doctrine a part of the U.S. law by holding that separability was a principle of federal law applicable in state courts. The case involved a Maryland corporation, Prima Paint, which purchased a paint manufacturing business from a New

[42] Rosen, "Arbitration under Private International Law," 647 (n. 16).
[43] Ibid., 647-48.
[44] Ibid., 648.
[45] Ibid., 617-18.
[46] Leboulanger, "The Arbitration Agreement: Still Autonomous?" (n. 32).
[47] Rosen, "Arbitration under Private International Law," 619 (n. 16).
[48] *See* Sec. IV(2) The New York Convention and the FAA: Gap and Overlap.
[49] Rosen, "Arbitration under Private International Law," 619, 625 (n. 16).
[50] Ibid., 619.
[51] 9U.S.C. §2 – *Validity, irrevocability, and enforcement of agreements to arbitrate:*"[A] written [arbitration] provision in ... a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable."
[52] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (87 S.Ct. 1801, 18 L.Ed.2d 1270).

Jersey corporation, Flood & Conklin. The parties signed a Consulting Agreement which stated that Flood & Conklin were to advise Prima Paint on the questions of production, manufacturing, sales, and service of paint products over a period of six years.[53] Prima Paint, the plaintiff, subsequently claimed that the execution of the Consulting Agreement, in which the arbitration clause was incorporated, was fraudulently induced by false representations related to the defendant's financial condition.[54]

The U.S. Supreme Court found that the agreement in question involved interstate commerce and it, accordingly, applied the FAA (federal law) to hold that arbitration clauses can be *separable* from the contracts in which they are included.[55] Since the plaintiff here challenged the contract *generally* and not the arbitration clause *specifically*, the fact that the underlying agreement was fraudulently induced did not, without more, invalidate the arbitration clause.[56]However, the Court did point out that the outcome might have been different had the arbitration clause itself been claimed to be fraudulently induced. So, because the fraudulent inducement claim challenged the entire contract, rather than the arbitration clause itself, the Court concluded that the claim should be adjudicated by the arbitrators.[57] Nonetheless, it should be noted that the doctrine of separability as laid down by the U.S. Supreme Court in *Prima Paint* is a "rule of national substantive law" and was decided only with reference to the FAA, thereby giving force to the U.S. public policy of favoring arbitration agreement subject to the FAA.[58]

The FAA, now a ninety-plus-year-old statute, has been attacked by many legal scholars who think it is time for a complete reformulation of federal arbitration law, whether on interstate or international level.[59] In support of their claim, these legal experts allege that the FAA has been constantly disregarded by the U.S. Supreme Court, "which has recast arbitration in an activist set of cases that largely ignore careful legislative history and even the explicit wording of the FAA."[60] Notably, most of the critics are of the opinion that the Supreme Court has generally been unsuccessful in its pursuit to clarify and perfect the arbitration doctrine by employing the practice of setting forth rules in individual cases.[61] Legal experts also hold the Congress at fault for failing to address the issues of "age, fragmentation, and omission" that influenced the

53 Ibid., 397.
54 Ibid.
55 Ibid., 400.
56 Rosen, "Arbitration under Private International Law,"623-624, 627 (n. 16).
57 Paul T. Milligan, "Who Decides the Arbitrability of Construction Disputes," *Constr. Law.* 31 (2011): 24.
58 Edward Brunet et al., *Arbitration Law in America: A Critical Assessment* (Cambridge University Press, 2006), 92-93.
59 Ibid., 1.
60 Ibid.
61 Ibid.

implementation of federal arbitration law.[62] Put briefly, scholars argue for a new and improved FAA to take a form of legislation instead of a set of federal judicial cases.

4. The New York Convention and the Separability Doctrine

4.1 Overview

The *Convention* on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is the most momentous international treaty concerning international commercial arbitration.[63] Despite the fact that it may be very well regarded as a major step in the progress of arbitration as a method for resolving international disputes, the application of the Convention has not gone without functional complications and hardships.[64] This is not solely a result of a lack of coherent interpretation of the Convention by the courts of diverse signatory states, but also a consequence of reality that the Convention—adopted about six decades ago—is now starting to reveal its dotage.[65-66] Once again, in spite of that, it is still pivotal to remark that no other convention post 1958 has had the same impact in the shaping of modern commercial arbitration.[67]

For present concerns, what becomes relevant is that the 1958 New York Convention makes no direct reference to the principle of separability.[68] To begin with, Articles II(1)[69] and (2)[70] of the Convention merely grant the arbitration clause a title of an "agreement" but do not pose the requirement that such agreements be considered "separable." Conversely, arbitration agreements are understood to be "separate" agreements by virtue of the said Articles primarily because they introduce certain legal

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[62] Ibid.
[63] Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 69 (n. 17).
[64] Ibid.
[65] *See* Sec. III(3) The United States, at p. 13.
[66] Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 69 (n. 17).
[67] Ibid.
[68] Aiste Sklenyte, "International Arbitration: The Doctrine of Separability and Competence-Competence Principle," *The Aarhus School of Business*, 2003, 1–3.
[69] The New York Convention, Article II(1):

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

[70] The New York Convention, Article II(2):

> The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

rules which do not relate to the underlying agreement (e.g. the requirement for the agreement to be in writing, to have substantive validity, and so on).

Additionally, Article V(1)(a)[71] of the Convention speaks of the separable nature of the arbitration agreement by providing an exception to the enforceability of arbitral awards in cases when the arbitration agreement is invalid under "the law to which the parties have subjected it" or "where the award was made." The said clause transparently envisages the application of particular national law to the arbitration agreement itself. Moreover, it stands on the contention that international arbitration agreements are understandably separate from the main contract and are, therefore, open to be dealt with by different national laws and legal rules than the underlying contract.[72]

The question thus arises as to whether the stated Articles acknowledge the separability doctrine. Conclusions, needless to say, deviate to a great extent. While some legal scholars are of the opinion that the Convention is *silent* as to the subsistence of the separability doctrine, others share the belief that the doctrine is *impliedly* adopted by the Convention.[73] As revealed by Born, both of these thoughts are mistaken, for the Convention is neither silent nor does it adopt the said doctrine. Rather, it accepts that arbitration agreements can be—and usually are—separate agreements which, accordingly, call for application of different rules (of validity and choice-of-law rules) than the main contract.[74]

Treating arbitration clause and container agreement as presumptively separate from one another is not, as elaborated by Born, *required* by the Convention.[75] Instead, the drafters of the Convention accepted this presumption of separability in order to reflect what they understood commercial parties' intentions and expectations to be.[76] More precisely, the drafting of the Convention was guided by the thought that parties may, and usually do, intend their arbitration agreements to be separable. Hence, the Convention was designed to offer specialized legal rules applicable only to arbitration agreements. So, even though the Convention, pursuant to the requirement laid down in

[71] The New York Convention, Article V(1)(a):

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

[72] Born, *International Commercial Arbitration*, 318 (n. 3).
[73] Ibid.
[74] Ibid., 319.
[75] Ibid.
[76] Ibid.

Article II(1), does not *demand* separability of arbitration agreements, it *stipulates recognition* of agreements to treat arbitration clauses as separable.[77]

4.2 The New York Convention and the FAA: Gap and Overlap

Establishing homogenous standards for judicial review of arbitral awards bolsters the predictability, uniformity, and adeptness of the international arbitration regime. The New York Convention sets forth a systematic revision for enforcement proceedings in signatory jurisdictions, but it fails to devote effort to instituting standards for vacatur.[78] In instances when both vacating and enforcing an arbitral award are at issue before the rendering jurisdiction, the solidity and compactness of the relevant legal tools are exceptionally significant as they relate to the gravity of vacatur.[79] When setting aside and enforcing proceedings within the United States, there is an interplay between the FAA and the New York Convention in a sense that the grounds for vacatur provided by the former are in no way identical with the enforcement exceptions under the latter.[80]

According to the decisions reached in *Rent-A-Center*[81] and *Hall Street*,[82] discussed *infra*,[83] Sections 4[84] and 10(a)[85] of the FAA have been interpreted to suggest that the arbitrator's decision on jurisdiction is not reviewable if so chosen by the

[77] Ibid.
[78] Graves and Davydan, "Competence-Competence and Separability-American Style," 168 (n. 2).
[79] Ibid.
[80] Ibid.
[81] Rent-A-Center, Est, Inc. v. Jackson, 130 S.Ct. 2772 (2010).
[82] Hall Street Assoc v. Mattel, Inc., 552 U.S. 576 (2008).
[83] *See* Sec. V(1) Overview, *infra* p. 26, para. 2.
[84] 9 U.S.C. § 4 - *Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination:*

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement [...]

[85] 9 U.S.C. § 10(a) – *Same; vacation; grounds; rehearing:*

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;a
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing,upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that amutual, final, and definite award upon the subject matter submitted was not made.

parties.[86] If we suppose that a U.S. court has to decide whether or not to enforce and vacate a non-domestic award challenged on the ground of invalidity of the arbitration agreement containing such parties' choice, the problem becomes self-evident.[87] While on one hand Article V(1)(a) of the New York Convention unambiguously provides for a judicial review of such a challenge, Section 10 of the FAA—on the other hand—does not.[88] Even more to the point, bearing in mind that the FAA Section 10 provisions are *exclusive*, the courts are apparently not allowed to enforce the exceptions to vacate the award provided by the New York Convention.[89] Consequently, in cases when the validity of the arbitration agreement is disputed, an award cannot be vacated *but* the courts may refuse to enforce it.[90] Therefore, at least when it comes to challenging the arbitrators' jurisdiction, the FAA and the New York Convention leave a substantial lacuna which gives rise to quixotic outcomes. This is so because, with no vacatur apparatus, a party challenging arbitral jurisdiction must conceivably fight enforcement in more than one jurisdiction.[91]

The existence of any efficacious "fill in the gap" practices that could be employed for remedying or avoiding this issue remains an open question as reconciling these two instruments—the FAA and the New York Convention—may open the archetypal "Pandora's box" to arbitral awards' review on the merits.[92] Nonetheless, at first glance, it seems like the parties themselves could be able to avoid this issue by expressly choosing *state* arbitration law since eight states in the U.S. have adopted the UNCITRAL Model Law as their international arbitration statutes (California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas).[93] But, since Chapter VII Article 34 of the Model Law on Recourse Against Award is identical to the New York Convention enforcement exceptions—and thus provides the same standard of review—*and* since only four out of these eight states adopted the Model Law in its entirety (while others opted out of the Chapter VII which deals with the vacatur), state law is highly unlikely to be able to productively fill the gap.[94]

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[86] Graves and Davydan, "Competence-Competence and Separability-American Style," 170 (n. 2).
[87] Note: If a party alleges that the dispute is not arbitrable, the courts—rather than the arbitrator—would determine the issue of arbitrability; *i.e.,* unless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties had agreed to arbitrate is to be decided by the court, not the arbitrator. For more information, *see* B.M. Harges, *The Handbook on Louisiana Alternative Dispute Resolution Laws* (Esquire Books, 2011), 375. Citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).
[88] Graves and Davydan, "Competence-Competence and Separability-American Style," 170 (n. 2).
[89] Ibid., 170-71.
[90] Ibid.
[91] Ibid.
[92] *Status: UNICTRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.* United Nations Commission on International Trade Law, https://uncitral.un.org/en/texts/arbitration/ modellaw/commercial_arbitration/status.
[93] Graves and Davydan, "Competence-Competence and Separability-American Style,"at 172.
[94] Ibid.

Moreover, pursuant to the statutory interpretation of Chapter 2 Section 202[95] of the FAA and Article I(1)[96] of the New York Convention, U.S. courts would usually apply the latter to disputes of international nature arbitrated in the United States.[97] While Section 10 of the FAA, as previously mentioned,[98] has exclusive application for setting aside a proceeding, Article V of the New York Convention still applies to the enforcement—even in cases when the same is sought in the United States.[99] Unlike the UNCITRAL Model law which mirrors the non-enforcement grounds under the New York Convention, the FAA grounds for vacatur do not. Therefore, supposing, as before, that a U.S. court would have to decide whether or not to enforce and vacate a non-domestic award, before making such a determination—the court would have to mitigate the FAA Section 10 vacatur provisions with the non-enforcement provisions of the New York Convention.[100] The way in which the courts have opted to rectify the discrepancies between these two arbitral instruments is to interpret the FAA and the New York Convention as having an *"overlapping coverage"* to the extent they are not in conflict with one another.[101]

When it comes to this "overlap," after examining the legislative histories of both the FAA and the New York Convention, the court in *Lander v. MMP*[102] reached the conclusion that there is nothing to suggest that the New York Convention was meant to have exclusive application.[103] On the contrary, since Article VII(1)[104] of the New York

[95] 9 U.S.C. § 202 – *Agreement or award falling under the Convention:*

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

[96] The New York Convention, Article I(1):

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought [...]

[97] Graves and Davydan, "Competence-Competence and Separability-American Style," 169 (n. 2).
[98] *See* Sec. IV(2) The New York Convention and the FAA: Gap and Overlap, *supra* p. 19.
[99] Graves and Davydan, "Competence-Competence and Separability-American Style," 169 (n. 2).
[100] Ibid., 169, 170.
[101] Ibid.
[102] Lander Co. v. MMP Invs, Inc. (Lander II), 107 F.3d at 476, 478 (7th Cir. 1997).
[103] Lander II, 107 F. 3d at 481.
[104] The New York Convention, Article VII(1):

Convention provides that it will not deprive any interested party of any right to avail himself of an arbitral award as long as that is permitted by the law of the country where the award is sought to be relied upon, parties are essentially at liberty to choose either Article I of the New York Convention, Section 202 of the FAA, or both in seeking to have their arbitral awards enforced.[105]

The application of the New York Convention to a wider range of non-domestic awards brings about several advantages, including those related to a more pliable and efficacious enforcement. Three of such advantages stand out. First, the New York Convention invokes independent federal jurisdiction.[106] Second, whereas under the FAA[107] the enforcement proceedings should be initiated within a one-year period, the New York Convention allots the parties a three-year statute of limitations within which to act.[108] And third, while the FAA restricted the courts to compel arbitration only "within a district," the New York Convention permits the courts to order parties to arbitrate either in or outside of the United States' territory.[109] Therefore, in summary, by assigning the New York Convention a broader application, American parties will be given broader legal possibilities (both in local and foreign jurisdictions), which will in turn make the United States a more prominent arbitration forum. Foreign parties, of course, would find this appealing and would opt to arbitrate their disputes in the United States.[110]

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

[105] Lander II, 107 F.3d at 481-82.

[106] Christina Cheung, "The Enforcement Methodology of Non-Domestic Arbitral Awards Rendered in the United States & Foreign-Related Arbitral Awards Rendered in the People's Republic of China Pursuant to Domestic Law and the New York Convention," *Santa Clara Journal of International Law* 11, no. 1 (December 30, 2012): 246.

[107] 9 U.S.C. § 9 – *Award of arbitrators; confirmation; jurisdiction; procedure:*

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration ... then at any time within one year after the award is made any party to the arbitration may apply to the court ... for an order confirming the award, and thereupon the court must grant such an order [...]

However, in Sverdrup Corp. v. WHC Constructors, Inc.,989 F.2d 148 (4th Cir. 1993), the court held that this time period was permissive rather than mandatory. *See* Harges, *The Handbook on Louisiana Alternative Dispute Resolution Laws*, 387 (n. 89).

[108] Cheung, "The Enforcement Methodology of Non-Domestic Arbitral Awards," 246 (n. 108).

[109] Ibid.

[110] Ibid., 246-247.

5. The Competence-Competence Doctrine in a Nutshell

5.1 Overview

The principle of competence-competence equips an arbitral tribunal with the power to decide its own jurisdiction (which, however, is subject to a judicial review of competent jurisdiction in almost all legal systems). In light of this principle, the parties can circumvent waiting on a court's determination on the issue as the tribunal is allowed to act promptly and rule on the merits of the parties' broader contract challenge.[111] Thus, the competence-competence principle allows the arbitrators to discuss and rule on the existence of the arbitral clause, its scope and validity, without having to go through a national court. Though acknowledged in most modern legal systems in charge of arbitration, the doctrines of both competence-competence and separability are statutorily codified in a vast majority of countries, but neither one is expressly given mention anywhere in the FAA.[112] And, while the U.S. Supreme Court recognized the separability doctrine some five decades ago, any type of progress of the competence-competence doctrine has been incomparably more lethargic and has only started to take shape in recent years.[113]

Even though the jurisdictional decision of an arbitral tribunal is almost always subject to judicial review, the current U.S. law does not provide for such review on occasions when the parties had chosen to delegate the issue of jurisdiction to the arbitral tribunal.[114] The conclusions that the U.S. Supreme Court reached in *Rent-A-Center, West, Inc. v. Jackson,*[115] and *Hall Street Assoc. v. Mattel, Inc.*[116] clearly indicate that an arbitral tribunal does not only have the authority to rule on its own jurisdiction, but it also has the "final" word on the matter—without any posterior revision by the court.[117] This novel obstinate conflux seems to be the very picture of the German form of Kompetenz-Kompetenz that had existed in Germany before its adoption of the UNCITRAL Model Law in 1998.[118] The extreme scheme of Kompetenz-Kompetenz in Germany, which has since been abandoned, actually implied that if the parties entered into a second arbitral agreement allowing the arbitral tribunal to rule on its own jurisdiction in the first matter, the issue of the arbitral tribunal's jurisdiction could not come under the scrutiny of state courts so long as the second arbitral clause so providing

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[111] Graves and Davydan, "Competence-Competence and Separability-American Style," 157 (n. 2).
[112] Ibid., 158.
[113] Ibid.
[114] Ibid., 157.
[115] Rent-A-Center, Est, Inc. v. Jackson, 130 S.Ct. 2772 (2010). This decision, when read in combination with the *Hall Street Assoc.* decision, not only grants an arbitration tribunal the power to decide its own jurisdiction, but also gives the tribunal the "final" word on the issue, without any subsequent judicial review.
[116] Hall Street Assoc v. Mattel, Inc., 552 U.S. 576 (2008).
[117] Graves and Davydan, "Competence-Competence and Separability-American Style," 158 (n. 2).
[118] Ibid., 158-159.

was valid.[119] Stated differently, the parties had the power to efficiently forbid the state courts from deciding on the arbitral tribunal's jurisdiction and not merely until the tribunal itself had decided on its own jurisdiction.[120] Therefore, Germany was never bothered with the issue of whether the arbitral tribunal has the authority to rule on its own jurisdiction as the same was implied whenever there was a valid and binding arbitration agreement between the parties so providing.

5.2 Doctrinal Variations

Investing the arbitrator or arbitration tribunal with the power to rule on their own jurisdiction is, as it is widely asserted, one of the absolutely indispensable ramifications arising out of the nature of the autonomous and independent arbitral agreement. The source of this power that became known as the "competence-competence" doctrine is not to be found in the arbitral agreement itself or in the *pacta sunt servanda*[121] approach to the arbitral agreement (which mandates its binding character and enforceable prerogative). With that being taken into consideration, the principle of competence-competence has grown to have a few different adaptations varying across jurisdictions to the extent to which they opted to embrace and honor this principle in their respective legal regimes. In that regard, we can today speak of roughly four distinctive alterations of the competence-competence doctrine. What follows are the overviews of all four of them.

5.2.1 A party's challenge of the arbitral clause alone does not, in and of itself, preclude the arbitrator's power to move forward with the arbitration proceedings.[122]

Even in cases when one of the parties disputes the validity or the existence of the arbitration agreement, the core modicum of the idea behind the competence-competence principle still entitles the arbitrator or the arbitration panel to proceed with the process. This is so regardless of whether the party challenging the arbitration clause does so on the grounds related to the arbitration clause itself or on the grounds of voidability, ineffectiveness, or unenforceability of the underlying agreement. The reason behind that lies in the very purpose of the separability doctrine which, as previously established, provides for the autonomy of the arbitral agreement from the container agreement in which it is included and is insofar sufficient to fight off these allegations raised by one of the parties. However, the doctrine of separability allows only so much, so the capacity of the arbitrator or the arbitration panel to move forward with the arbitration process even when the disputed invalidity is directed at the arbitration agreement itself, stems from the competence-competence principle alone.

[119] Suyash Paliwal, "The More Favorable Regime within the 'Overlapping Coverage' of FAA Chapters One and Two," *American Review of International Arbitration* 23, no. 2 (2011), 47.
[120] Ibid.
[121] "Agreements must be kept."
[122] Paliwal, "The More Favorable Regime," 45-46.

5.2.2 Despite the fact that the arbitrator or arbitration panel is empowered to decide the disputes regarding the arbitration agreement, any such decision is subject to postliminary judicial review. In that sense, the arbitrator's power is concurrent with that of the judiciary.[123]

Generally speaking, the doctrine of competence-competence allows the arbitrators to rule on the claims raised regarding their jurisdiction in the arbitration proceeding. In other words, arbitrators or arbitration panels are allowed to determine and issue award on the formation, validity, and scope of the arbitral agreement concluded among the parties. The point to be made is that there is no law ordering arbitrators to suspend their action in cases when their jurisdiction is being disputed until such time when their authority to hear a case is determined by the court of competent jurisdiction.[124] Nor is there any law mandating that arbitrators proceed with ruling upon the merits of the dispute at hand without considering challenges concerning their jurisdiction, thus removing the jurisdictional issue from their agenda until the same is ruled upon by the relevant judiciary.[125] While one preference may lead to a substantial waste of time and resources, the other may prove itself as impracticable and subversive to the arbitration process itself. That exactly may be the reason behind the lack of any regulation providing for either course to be taken, allowing the arbitrators to look into the jurisdictional issue—not with the objective to render a final decision that would be binding on the parties (for that they cannot do under this variation of the competence-competence principle), but with the goal to serve as preliminary judges on whether or not to proceed with the arbitration. Nevertheless, the parties in jurisdictions embracing this doctrinal approach are entitled to seek either immediate or *ex post facto* judicial review on the issue or arbitrators' jurisdiction.

5.2.3 In certain instances, arbitrators are given the exclusive authority to be the preliminary decision-makers on challenges relating to the arbitral clause, but such decisions are still subject to review of the court with competent jurisdiction.[126]

The competence-competence principle, as invigorated by some legal systems, could equip the arbitrator or arbitration panel with exclusive power to preliminarily inquire and determine the claims raised with respect to their jurisdiction. According to this configuration, national courts are not permitted to consider the disputes concerning the arbitral clause until the arbitrator or relevant arbitration panel or tribunal makes such determination.[127] So, once the arbitrators had decided on the jurisdictional issue and rendered an award (either interim or final), the decision is subject to judicial review

[123] Ibid., 46.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.

under otherwise applicable standards of review.[128] Therefore, the only distinction between this and the previous doctrinal approach lies in the fact that the parties are not entitled to petition the courts and the courts are not allowed to engage in the arbitration process *concurrently* with the arbitrators or arbitration panels, and can only do so *ex post facto.*

5.2.4 Arbitrators and arbitration panels or tribunals have the exclusive power to rule on the challenges raised concerning the arbitral agreement.

Certain jurisdictions have interpreted the competence-competence principle in a way that provides for the exclusive authority of the arbitral body to inquire into and determine challenges to its jurisdiction, subject to little or no judicial review. More precisely, national courts would be prevented from examining the claims made in regard to the arbitral agreement until the arbitral body itself issues an award on the claims.[129] Once that occurs, a review by a court of competent jurisdiction would be made available only on the "highly-deferential grounds" that many legal mechanisms made applicable to non-jurisdictional arbitral awards.[130] The substructure for such effect of the competence-competence doctrine does not come from the arbitration agreement, but from the arbitration laws of the country where the arbitration proceeding is taking place as well as—more broadly—from laws of all jurisdictions inclined to recognize an award rendered by arbitrators or arbitration panels on the issue of their own jurisdiction.

5.3 Upsides and Drawbacks

Nowadays, it is vital to acknowledge the dual function of the competence-competence principle as it carries with itself both beneficial and unfavorable aspects. One of the upsides of this doctrine, as universally accepted by contemporary statutory codifications on international arbitration and international conventions, is to empower the arbitral tribunal to decide on its own jurisdiction. However, this is not to be achieved by empowering the arbitrators to act as *sole* judges, but simply by entitling them to act as *first* judges on the issue of their jurisdiction. More precisely, the advantage lies in granting them the right to reach a decision on their jurisdiction prior to any judicial authority, thus restricting the function that the judiciary has in reviewing the award. Hence, the competence-competence doctrine makes it mandatory for any judiciary dealing with a challenge of an arbitral tribunal's jurisdiction to desist hearing substantive argument as to the arbitrators' jurisdiction until the arbitrators themselves have had the opportunity to do so.[131] In that sense, the competence-competence doctrine is a principle of "chronological priority,"[132] and being of such legal nature where the

[128] Ibid.
[129] Ibid., 46-47.
[130] Ibid., 47.
[131] Ibid., 55.
[132] Ibid.

autonomy of the arbitral agreement amounts to the issue of *procedure*, it can be differentiated from the separability doctrine which amounts to the issue of *substance.* The purpose behind this principle seems to be to prevent a party from attempting to postpone arbitral proceedings by claiming invalidity or non-existence of the arbitral clause.

The paradox of the competence-competence doctrine could be noted in that its perks could also simultaneously be perceived as its defects, which is one of the reasons why its drawbacks have still not been fully acknowledged and why the topic has faced contentious debates. Namely, owing to the fact that the arbitral tribunal has the right to be the first in ruling on its own jurisdiction, the courts would get a chance to review such decision only in circumstances when an action is brought to set aside or enforce the arbitral award.[133] The act of challenging the validity or existence of the arbitral clause will not, however, preclude the arbitral tribunal from moving forward with the arbitration proceeding, determining its own jurisdiction, and—if it decides to retain jurisdiction—rendering an award on the substance of the issue at hand. And the arbitrators could perform all of these tasks without expecting to hear the outcome of any judicial action that may set aside the award on the jurisdictional issue.[134]

There is, of course, an exception. And that exception comes in the form of anti-arbitration injunctions—a tool that parties employ to prevent either the initiation or continuation of the arbitration proceedings. But because anti-arbitration injunctions attack the very essence of the competence-competence doctrine, the courts sitting in those countries that strictly adhere to the doctrine refuse to issue them.[135] Conversely, other courts find anti-arbitration injunctions necessary and their issuance justified. This stance is supported by the argument that (1) the competence-competence principle is not, by any means, absolute,[136] and (2) because a challenge of an arbitrator's jurisdiction will ultimately have to reach the court anyway, it would be more prudent for the court to rule on it at the beginning of the process and save the parties some time and costs along the way.[137] So certain courts—both in common and civil law jurisdictions—have been inclined to issue anti-arbitration injunctions and restrain arbitration proceedings when, for instance, the parties entered into no agreement to arbitrate, they initiated the arbitration proceeding before the wrong institution, the issue subject to

[133] Paliwal, "The More Favorable Regime," 56.
[134] Ibid.
[135] Jennifer L.Gorskie, "US Courts and the Anti-Arbitration Injunction," (2012), 28 Arbitration International, 296.
[136] *See, e.g.,* Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472, at para. 84 ("So also the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law. It is a principle which is connected with, but not dependent upon, the principle that the arbitration agreement is separate from the contract of which it normally forms a part. But it does not follow that the tribunal has the exclusive power to determine its own jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it…").
[137] Romesh, Weeramantry, "Anti-Arbitration Injunctions: The Core Concepts," 2.

arbitration was outside the scope of the arbitration agreement or was *res judicata*, and so on.[138] The overall sentiment, however, is that anti-arbitration injunctions are disruptive of the parties' agreement to arbitrate as well as the competence-competence principle, and that—even if their issuance were supported by legal authority—these injunctions "should be exercised with the utmost circumspections and only in rare circumstances."[139]

6. Consequences of the Doctrine of Separability

The separability doctrine, *i.e.*, the conclusion that an arbitral agreement is separate and independent from the underlying contract, gives rise to certain consequences which could be characterized as direct and indirect. One of the two direct consequences brought by the separability doctrine is that the arbitral agreement does not fall under the effect of the status of the underlying agreement. Rather, it suggests that—according to the paramount idea behind the doctrine of separability—the arbitral agreement is out of the scope of the events impacting the container contract since the validity of the former is not dependent on the validity of the latter.[140] The second direct consequence is that the law applicable to the underlying contract is not necessarily applicable to the arbitration agreement as well; in other words, the arbitration agreement may be governed by a different law, if so chosen by the parties.[141]

Conversely, there are four indirect consequences of the separability doctrine. The first one relates to one of the fundamental elements of arbitration law known as the "competence-competence principle" which is deemed to be a corollary of the doctrine of separability. As elaborated in the preceding paragraphs, the competence-competence principle gives arbitrators the power to decide on their own jurisdiction.

The second indirect consequence lies in the doctrine departing from its original purpose (secluding the arbitral clause from the laws governing the underlying agreement) and progressively amassing new objectives aside its initial one**.** Hence, certain countries began to use the separability doctrine as the authority for invalidating principles of international arbitration agreements.[142] That is, the argument is that the separability principle provides for the separation from the underlying contract as well as from all national laws.[143]

The third indirect consequence is the ability of the arbitral agreement to survive the termination or expiry of the underlying contract in which it is contained. It is thus

[138] Ibid.
[139] Gary B. Born, International Commercial Arbitration (Kluwer 2009), Vol I, 1054.
[140] Paliwal, "The More Favorable Regime," 39.
[141] Ibid.
[142] Ibid.
[143] Ibid.

not infrequent for the parties to initiate arbitration after their main contract has expired or been terminated.[144] Most jurisdictions pose no barriers to such claims so long as the disputes arise from the conduct that occurred during the term of the agreement.[145]

And the fourth and final indirect consequence is that the invalidity of the underlying agreement cannot deprive an arbitral award of validity. Stated differently, if an arbitral panel (or the court) determines that the parties' main agreement is void, that determination will not automatically deprive the parties' arbitral clause, and the arbitrator's award, of validity.[146]

These corollaries of the separability doctrine play a crucial role in practice and in the realm of arbitration law where a substantial majority of arbitration proceedings arise exactly under the arbitral clauses whose autonomy is addressed by the doctrine. Simply put, allowing a party to claim the invalidity of the arbitral clause whenever the underlying contract was terminated through performance or some other act would run against the very purpose of the clause, jeopardize business activities conducted on national and international levels, and undermine the confidence in the institution of arbitration law in general.

In sum, regardless of whether they are direct or indirect, some of the most influential and significant corollaries of the separability doctrine are as follows:

(1) the status of the underlying agreement does not impact the arbitration agreement;
(2) the substantive law governing the formation or the validity of the arbitration agreement may be different from that governing the main contract;
(3) the principle of competence-competence, which entitles an arbitral tribunal to determine, among other things, its own jurisdiction; and
(4) the pro-arbitration principle, which compels the national courts to refer a case to arbitration if the arbitration clause is prima facie valid.[147]

7. Conclusion

Essentially, the doctrine of separability, severability, or autonomy can be summarized by encompassing two extremely elementary rules. One, the arbitral clause does not have to be governed by the same law as the underlying agreement, *i.e.*, the

[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] Leboulanger, "The Arbitration Agreement: Still Autonomous?" (n. 32).

parties are free to choose which law will apply to their arbitral agreement (subject to certain exceptions). And two, the invalidity of the underlying agreement exercises no influence on the validity of the arbitral agreement included therein. Taking into consideration the deep impact these rudimentary rules have had within the sphere of arbitration law, it becomes apparent that the doctrine of separability is an interesting academic challenge and exceptional legal phenomenon. While observing its path of development from a mere novelty to one of the most important principles in international commercial arbitration, one cannot help but notice how the general conception of contracts and dispute resolution mechanism have served as gradual techniques for improving and molding laws as to bring them in conformity with the needs and ever-changing demands of the business world. Be that as it may, while the doctrine continues to prove itself pragmatically, academics are persistent in their efforts to discover why the same ought to be used and what its usage suggests regarding our universal comprehension of contracts, specifically, and the dispute resolution apparatus, generally.

Nowadays, the practical nature of the separability doctrine is one of its primal features making it a pillar of the whole international arbitration framework. As opposed to a few centuries ago, the current position is that entrusting the validity of the underlying contract to arbitration, instead of to the national courts, is indispensable in order to achieve the holism of arbitral decision-making and to ascertain a smooth, quick, and efficient process. As pointed out throughout this article, the fact is that the tussle between arbitral autonomy, on one hand, and judicial supervision of the arbitral body, on the other, has been prevalent since the doctrine's inception. Another fact is that discords in application of the separability doctrine are not completely eliminated. However, despite of these challenges, a rather robust inclination towards uniformity exists, convincing the international community to recognize the separable nature of the arbitration agreement.

The highlighted global importance of the position that the doctrine of separability assumes in both public and private affairs leaves no room for wondering about the autonomy of the arbitration agreement. The evidence of this significance can be found in the UNCITRAL Model Law on international commercial arbitration, adopted by the United Nations Commission on International Trade on June 21, 1985, which—as an embodiment of the current model of arbitration law—accepts the doctrine of separability.[148] Hence, scholars and national courts, acknowledging the doctrine of separability as a part of universal consensus among arbitration practitioners, ought to work on its further implementation by emphasizing its practical, legal, and procedural superiority.[149]

[148] Gerese, "Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960," 14 (n. 1).
[149] Ibid., 10.

LIST OF REFERENCES

- 9 U.S. Code §§ 2, 4, 9, 10, 202.
- Born, Gary. *International Commercial Arbitration*, vol. 1 (Kluwer Law International, 2009).
- Brunet, Edward et al. *Arbitration Law in America: A Critical Assessment*. Cambridge University Press, 2006).
- Cheung, Christina. "The Enforcement Methodology of Non-Domestic Arbitral Awards Rendered in the United States & Foreign-Related Arbitral Awards Rendered in the People's Republic of China Pursuant to Domestic Law and the New York Convention," *Santa Clara Journal of International Law* 11, no. 1 (December 30, 2012).
- Cour de Cassation, 7 May 1963 (Ets. Raymond Gosset v. Carapelli), Juris Classeur Périodique, Ed. G., Pt. II, No. 13405 (1963).
- Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472.
- Decree No. 80-354 of May 14, 1980, (1980) Journal Officiel de la République Française ("J.O.") 1238, (1980) D.S.L. 207 (Fr.); Decree No. 81-500 of May 12, 1981, (1981) J.O. 1380, (1981) D.S.L. 222 (Fr.) – set in motion a change in international arbitration rules.
- Final Award in ICC Case No. 8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999).
- First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
- Gerese, Emiru. *Comparative Analysis of Scope of Jurisdiction of Arbitrators under the Ethiopian Civil Code of 1960*. Central European University, 2009.
- Graves, Jack Michael and Yelena Davydan. "Competence-Competence and Separability-American Style," in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*. Wolters Kluwer, 2011.
- Hall Street Assoc v. Mattel, Inc., 552 U.S. 576 (2008).
- Harges, B.M. *The Handbook on Louisiana Alternative Dispute Resolution Laws*. Esquire Books, 2011.
- Harbour Assurance Co. Ltd. v. Kansa General International Insurance Co. Ltd., [1992] 1 Lloyd's L. Rep. 81.
- Heyman v. Darwins, [1942] 1 All ER 337.
- "House of Lords History," UK Parliament, 2021, https://www.parliament.uk/business/ lords/lords-history/.
- Gorskie, Jennifer L. "US Courts and the Anti-Arbitration Injunction," (2012), 28 *Arbitration International*.
- Judgment of 7 May, 1963, Ets Raymond Gosset v. Carapelli, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1c), 354-404.
- Kill v. Hollister, 1 Wils. K.B. 129, 95 Eng. Rep. 532 (1746).
- Lander Co. v. MMP Invs, Inc. (Lander II), 107 F.3d at 476, 478 (7th Cir. 1997).

- Leboulanger, Philippe. "The Arbitration Agreement: Still Autonomous?," in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, no. 13 (International Arbitration Congress, Alphen aan den Rijn: Kluwer Law International, 2007).
- Milligan, Paul T. "Who Decides the Arbitrability of Construction Disputes," *Constr. Law.* 31 (2011).
- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3.
- Paliwal, Suyash. "The More Favorable Regime Within the 'Overlapping Coverage' of FAA Chapters One and Two," *American Review of International Arbitration* 23 (2011).
- "Présentation," Cour de cassation, n.d. ,https://www.courdecassation.fr/institution_1/ presentation_2845/
- Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (87 S.Ct. 1801, 18 L.Ed.2d 1270).
- Redfern, Alan and Martin Hunter. *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell, 2004.
- Rent-A-Center, Est, Inc. v. Jackson, 130 S.Ct. 2772 (2010).
- Rosen, Janet A. "Arbitration under Private International Law: The Doctrines of Separability and Competence de La Competence," *Fordham Int'l LJ* 17 (1993).
- Samuel, Adam. "Separability of Arbitration Clauses-Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice," *Arbitration and Dispute Resolution Law Journal* 36 (2000), http://www.adamsamuel.com/separabi.pdf.
- *"Separability of Arbitration Agreements," Arbitration Law Monthly*, October 2005, https://www.i-law.com /ilaw/doc/view.htm?id=35136.
- *Status: UNICTRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.*United Nations Commission on International Trade Law, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.
- Sklenyte, Aiste. "International Arbitration: The Doctrine of Separability and Competence-Competence Principle," *The Aarhus School of Business*, 2003.
- Sverdrup Corp. v. WHC Constructors, Inc.,989 F.2d 148 (4th Cir. 1993).
- Weeramantry, Romesh. Anti-Arbitration Injunctions: The Core Concepts, *Ctr. for Int'l L.*, Nat'l Univ. of Sing., https://cil.nus.edu.sg/wp-content/uploads/2014/06/Note-on-anti-arbitration-injunctions.pdf."