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ARTICLE 15—PLEAS AS TO JURISDICTION

Article 15

1. The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

3. A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection. The tribunal may rule on such objections as a preliminary matter or as part of the final award.

I. Introduction

15.01 An arbitral tribunal must consider whether it has jurisdiction over the subject matter of any dispute that comes before it. The tribunal's jurisdiction depends on whether a valid arbitration agreement exists, and if so, on whether the dispute falls within its scope. Article 15 provides the tribunal with authority to determine this preliminary question by deciding any objections to its jurisdiction relating to the 'existence, scope or validity of the arbitration agreement'.

15.02 Article 15(2) provides a mechanism to resolve meaningfully, through arbitration, the question of whether an underlying substantive agreement, which contains the

arbitration clause, is null, void, or incapable of being performed, and yet preserve the tribunal's jurisdiction. Article 15(2) is based on the doctrine (or presumption)[1] of separability, which presumes that parties to a contract containing an arbitration agreement intend for the arbitration agreement to be a separate agreement from the underlying contract. Without that presumption, a determination that an underlying contract is null or void might destroy the arbitration agreement that is contained in that underlying contract and thus deprive the tribunal's determination of a jurisdictional basis.

15.03 Under Article 15(3), jurisdictional objections must be made no later than the filing of the statement of defence (or in response to any counterclaim). Article 15(3) also provides that a tribunal may bifurcate proceedings regarding jurisdictional pleas into a jurisdiction and a merits phase, for example. This corresponds to the tribunal's discretion to conduct the proceedings as it sees fit (and in accord with the parties' agreement) under Article 16(3).

II. Textual commentary

A. Competence-competence (Article 15(1))

Article 15(1)

The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

15.04 Article 15(1) specifically recognizes that the tribunal has authority to decide disputes regarding its own jurisdiction, including disputes over the existence, validity, legality, and scope of the parties' arbitration agreement. This authority is usually referred to as the arbitrator's 'competence-competence' (also referred to as 'Kompetenz-Kompetenz'),[2] a term of art so-called because the presumption recognizes the tribunal's *competence* to decide upon its own *competence* to hear a particular dispute.[3] Under this doctrine, international arbitration tribunals are understood to

[1] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 311–407. Born states that '[a]n international arbitration agreement is almost invariably treated as presumptively "separable" or "autonomous" from the underlying contract within which it is found. This result is generally referred to as an application of the "separability doctrine", or, more accurately, the "separability presumption"' (311–12).

[2] Ibid, 854 ('In Germany, where the formula originated, the "Kompetenz-Kompetenz" doctrine was historically understood as recognizing an arbitral tribunal's jurisdiction to finally decide questions regarding its own jurisdiction . . .').

[3] *See eg Dell Computer Corp v Union des Consommateurs* [2007] 2 SCR 801 ('In a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the

have the power to decide the existence and extent of their own jurisdiction.[4] The ICDR Rules are not alone in stipulating that arbitrators may decide on their own jurisdiction. All major arbitral rules include a provision that gives effect to the competence-competence principle.[5] However, the principle of competence-competence often does not apply unconditionally: most national laws provide for some sort of review of the arbitrator's decision through the national courts, making those courts the final arbiter of the tribunal's jurisdiction.

15.05 It is undisputed that the arbitration agreement serves as the basis for the tribunal's jurisdiction.[6] The arbitration agreement indicates that the parties intended for a tribunal to hear and decide disputes arising out of or in connection with the

arbitrator in accordance with the competence-competence principle'); Cour de Cassation [Supreme Court], First Civil Chamber, 21 November 2006, Appeal No 05-21818, in AJ van den Berg (ed) *Yearbook Commercial Arbitration Vol XXXII—2007* (Kluwer Law International, The Hague, 2007) 294–96:

> According to French law, the combination of the principles of validity of international arbitration agreements and competence-competence prevents state courts from deciding on the existence, validity and scope of an arbitration clause before the arbitrator renders a decision on this issue, save in the case of nullity and manifest inapplicability of the clause.

[4] *Rogers Wireless Inc v Muroff* [2007] 2 SCR 921, 2007 SCC 35 ('An arbitrator has exclusive jurisdiction to undertake such an inquiry and for a court to do so would . . . deprive the arbitrator of jurisdiction to rule on its own jurisdiction'). *See also* E Gaillard and J Savage, *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 416 ('One of the fundamental principles of arbitration law is that arbitrators have the power to rule on their own jurisdiction'); J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 14–16 ('It is a legal fiction granting arbitration tribunals the power to rule on their own jurisdiction').

[5] LCIA Rules, Art 23(1) ('The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement'); 2010 UNCITRAL Rules, Art 23(1) ('The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'); ICC Rules, Art 6(4) ('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 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'); SIAC Rules, Art 25.2 ('The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement'); VIAC Rules Art 19(2) ('The sole arbitrator (arbitral tribunal) shall rule on its own jurisdiction').

[6] *First Options of Chicago v Kaplan*, 514 US 938, 943 (1995) ('[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration'). *See also* N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 5-85 ('[T]he authority or competence of the arbitral tribunal comes from the agreement of the parties; indeed, there is no other source from which it can come') and 5-94 ('[The arbitration clause] provides a legal basis for the appointment of an arbitral tribunal'); R Merkin, *Arbitration Law* (LLP, London, 2004) para 5-1 ('[T]he agreement to arbitrate . . . is the foundation of the principle that arbitrators may consider their own jurisdiction').

underlying contract.[7] The parties' selection of a particular set of arbitral rules reinforces the parties' choice for their disputes to be resolved by arbitration,[8] and incorporates the powers and duties of the arbitrators,[9] including the mechanism for arbitrators to determine their own jurisdiction, as in Article 15.[10]

15.06 As a matter of logic, any decision by the tribunal that a valid arbitration agreement does not exist would include, at the same time, a corollary finding that the tribunal lacked jurisdiction in the first place. The absence of a valid arbitration agreement means that there is no basis for the tribunal's jurisdiction. The doctrine of competence-competence overcomes the conceptual problems arising out of any decision by the arbitrator on his or her own jurisdiction.[11] It allows arbitrators to decide on

[7] According to Born, there is generally a pro-arbitration presumption that 'is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums)': GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 853; *Dell Computer Corp v Union des Consommateurs*, 2007 SCC 34, [51] (Canadian SCt) ('[A]rbitration is a creature that owes its existence to the will of the parties alone'); Suprema Corte de Justicia de la Nación [Federal Supreme Court of Justice], First Chamber, 11 January 2006, Appeal No 3836/2004 in AJ van den Berg (ed) *Yearbook Commercial Arbitration Volume XXXII—2007* (Kluwer Law International, The Hague, 2007) 410–21 ('The arbitrators receive their powers directly from the parties. They act as judges only in respect of the parties and may only decide the issues submitted by the parties . . . [T]he jurisdiction and competence of the arbitrators ensues from the autonomy of the will of the parties').

[8] *See eg Himpurna Calif Energy Ltd v PT (Persero) Perusahaan Listruik Negara,* Final Ad Hoc Award (4 May 1999), XXV YB Comm Arb 13, 26 (2000) ('the Arbitral Tribunal is bound to follow the agreement of the Parties, which in this case means the UNCITRAL Arbitration Rules to which their contract refers'); *Diemaco v Colt's Mfg Co*, 11 FSupp2d 228, 232 (DConn 1998) ('When parties agree to arbitrate before the AAA and incorporate the Commercial Arbitration Rules into their agreement, they are bound by those rules and by the AAA's interpretation'); *Judgment of Société, Philipp Brothers v S Société Icco*, 1990 Rev Arb 880, 883 (Paris Cour d'Appel) ('The choice of a professional arbitral institution of this kind implies that the parties intended to submit their disputes to the judgment of those members of the profession chosen by the arbitral institution').

[9] *See Contec Corp v Remote Solution, Co, Ltd* 398 F3d 205, 208 (2d Cir 2005) ('We have held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator'); cf J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) para 14-14 ('If the parties never entered into an arbitration agreement they also never agreed on the arbitration rules'). It is important to note, however, that the arbitration rules that are agreed upon by the parties must conform with the applicable legal systems. *See* E Gaillard and J Savage, *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 656 ('[U]nlike national laws, arbitration rules are contractual in nature and therefore cannot resolve the apparent contradiction which allows arbitrators to determine whether or not they have jurisdiction').

[10] *Clarium Capital Management LLC v Choudhury*, 2009 WL 331588 *5 (ND Cal 11 February 2009) ('In the instant case, the arbitration clause explicitly incorporates [Article 15 of the ICDR rules] . . . The incorporation of the AAA rules in the arbitration agreement is 'clear and unmistakable' evidence of the parties' intent to delegate the issue of arbitrability to the arbitrator').

[11] Lew, Mistelis, and Kröll, op cit, para 14-13.

all jurisdictional issues, and thus avoids the effect that jurisdictional objections have to be litigated in state courts.[12]

15.07 The competence-competence principle is also acknowledged in major international instruments that have set a framework for national arbitration legislation. Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration, an instrument that has been adopted by over 70 jurisdictions, states that '[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'.[13] Similarly, Article V of the European Convention on International Commercial Arbitration states:

> Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, 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.[14]

15.08 National laws have also recognized that the competence-competence principle is central to modern international commercial arbitration. The English Arbitration Act 1996 states that '[u]nless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction'.[15] Under the French New Code of Civil Procedure, '[i]f, before the arbitrator, one of the parties challenges the principle or scope of the arbitrator's jurisdiction, the arbitrator shall rule on the validity or scope of his or her jurisdiction'.[16] Even where the principle is not as clearly stated in national legislation (or the parties' agreement, including by reference to a set of institutional rules), national courts have given effect to the principle of competence-competence when construing their national arbitration laws. For example, in the US, even though the FAA does not expressly refer to the competence-competence principle, 'US courts have consistently acknowledged the power of arbitral tribunals to consider their own jurisdiction'.[17]

15.09 International arbitration awards also recognize the central importance of the doctrine of competence-competence. According to one award, '[t]he principle of

[12] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague 2009) 854 ('In Germany, where the formula originated, the "Kompetenz-Kompetenz" doctrine was historically understood as recognizing an arbitral tribunal's jurisdiction to finally decide questions regarding its own jurisdiction, *without the possibility of subsequent judicial review*') (emphasis added).

[13] UNCITRAL Model Law, Art 16(1).

[14] European Convention, Art 5.

[15] English Arbitration Act 1996, s 30(1).

[16] French New Code of Civil Procedure, art 1466.

[17] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 912. *See eg Howsam v Dean Witter Reynolds, Inc*, 537 US 79 (2002); *Pacificare Health Sys, Inc v Book*, 538 US 401, 407 (2003); *Oil, Chem and Atomic Workers v Am Petrofina Co*, 759 F2d 512, 515 (5th Cir 1988); *Butler Products Co v Unistrut Corp*, 367 F2d 733 (7th Cir 1966). For a full analysis of the development and debate under US law, *see* Born, op cit, 911–64.

"compétence-compétence" . . . is widely recognized by doctrine and jurisprudence'.[18] Another award proclaimed that, '[t]he principle of compétence/compétence is an accepted legal principle: it is well established that an arbitral, properly constituted, is competent to decide whether or not it has jurisdiction over a particular dispute or disputes'.[19]

15.10 Although a complete exposition of competence-competence is outside the scope of this commentary, this jurisdictional principle is important because, among other things, it allows arbitration proceedings to continue even while a party is challenging the tribunal's jurisdiction.[20] Crucially, it also permits jurisdictional decisions to be joined to merits, thereby allowing the tribunal the discretion to make decisions on when, during the course of a proceeding, to hear jurisdictional matters. This discretion allows the tribunal the flexibility to craft an efficient and fair arbitration proceeding that does justice to the individual requirements of the dispute and the parties.[21]

15.11 Although the arbitral tribunal has the power to rule on its own jurisdiction, any decision that the tribunal might make on jurisdiction will typically be subject to later challenge by the local courts of the seat of arbitration.[22] Because local courts do reserve this power to review the decisions of arbitral tribunals, it would be more

[18] Final Award in Case No 8938 of 1996, in AJ van den Berg (ed) *Yearbook Commercial Arbitration Volume XXIVa—1999*, (Kluwer Law International, The Hague, 1999) 174–81.

[19] Interim Award in ICC Case No 7929 (1995), in AJ van den Berg (ed) *Yearbook Commercial Arbitration Volume XXV—2000* (Kluwer Law International, The Hague, 2000) 11–432.

[20] For extensive commentary on the role that the doctrine of competence-competence plays in the arbitral process, *see* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 851, 851–1,001; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 5-99 ff; E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 650 ff.

[21] 'It is, for example, not uncommon for a tribunal to request separate briefing on the subject of jurisdiction, and to hear evidence and oral submissions, before issuing an interim award confined to jurisdiction': Born, op cit, 1,816. *See also* Gaillard and Savage (eds), op cit, 658:

> The competence-competence principle enables the arbitral tribunal to continue with the proceedings even where the existence or validity of the arbitration agreement has been challenged by one of the parties for reasons directly affecting the arbitration agreement, and not simply on the basis of allegations that the main contract is void or otherwise ineffective.

[22] GB Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Kluwer Law International, The Hague, 2001) 6. *See also* KH Schwab and G Walter (eds) *Schiedsgerichtsbarkeit* (7th edn, CH Beck, Munich, 2005) ch 6, s 9 ff; JF Poudret and S Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, London, 2007) para 457 ('[The tribunal's ruling on its own jurisdiction] is generally not final, but subject to the control of the courts of the seat of the arbitration'); R Merkin, *Arbitration Law* (LLP, London, 2004) para 5-40 (stating that a decision by the tribunal under the principle of competence-competence 'is provisional in the sense that either party has the right to apply to the court to have the jurisdictional matter reopened and reconsidered in full').

appropriate to replace the term of competence-competence with 'preliminary competence' of the arbitral tribunal to rule on its own jurisdiction.[23]

15.12 The US Supreme Court in *First Options of Chicago v Kaplan*, for example, recognized a long line of case law developing the competence-competence doctrine, noting that a court should defer to determinations on jurisdiction as long as this is in line with arbitral tribunals, parties' agreement, intent, and other circumstances.[24] US courts have refined the *First Options* analysis,[25] repeatedly holding that contracting for specific institutional rules evidenced the parties' intent to have the tribunal determine questions of jurisdiction in accord with the competence-competence doctrine.[26] In *Buckeye Check Cashing Inc, v Cardegna*, the US Supreme Court has more recently renewed its commitment to the competence-competence doctrine, holding that 'unless [a party's] challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the

[23] *First Options of Chicago, Inc v Kaplan*, 514 US 938, 943 (1995). *See* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 915:

> Ironically, and although not acknowledged by the US Supreme Court, its analysis in *First Options* closely tracked the historic approach of German courts to the question of competence-competence; perhaps more ironically, the German legislature was in the process, at the moment *First Options* was decided, of abandoning its historic Kompetenz-Kompetenz approach (permitting binding agreements to arbitrate jurisdictional objections) in favor of a modified version of the UNCITRAL Model Law, which prescribed in mandatory terms the allocation of jurisdictional competence between arbitral tribunals and national courts.

See also German *Bundesgerichtshof*, 13 January 2005, III ZR 265/03 Neue Juristische Wochenschrift 1125(2005) (stating that 'the parties will no longer be authorized to exclude the competence of the German courts' and that 'the arbitrator's decision on his competence is always provisional'); KP Berger, 'The New German Arbitration Law in International Perspective', 26 Forum Intl 1, 9 (2000); K-H Böckstiegel, 'An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law', 14(1) Arb Intl 19, 25 (1998); S Kröll, 'Recourse Against Negative Decisions on Jurisdiction', 20(1) Arb Intl 55 (2004); JP Lachmann, *Handbuch für die Schiedsgerichtspraxis* (3rd edn, Verlag Dr Otto Schmidt, Cologne, 2008) 187 ff.

[24] *First Options of Chicago v Kaplan*, 514 US 938 (1995) ('After 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'); *see also* ibid, 943 ('Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question [of] who has the primary power to decide arbitrability turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration?'). *See also* Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 911–60.

[25] The *First Options* analysis embraced the Supreme Court's earlier decision in *AT&T Technologies, Inc v Communications Workers*, 475 US 643, 649 (1986) (holding that courts should not assume that the parties agreed to arbitrate the existence, scope, and validity of an arbitration agreement unless there is 'clea[r] and unmistakabl[e] evidence that they did so'). Subsequent case law clarified that, among other things, the selection of institutional rules manifested 'clear and unmistakable' evidence of the parties' agreement to have the tribunal decide its own jurisdiction. *See* Born, op cit, 935–37.

[26] For a comprehensive discussion on 'broad' and 'narrow' arbitration clauses under US case law, and how they relate to jurisdiction, *see* ibid, 935–37. For specific cases, *see* ibid at nn 424–27.

first instance'.[27] This holding necessarily implicates the separability presumption under US law as well. The Supreme Court stated that 'only where a jurisdictional objection is directed "specifically" at the arbitration agreement itself, and not also "generally" at the underlying contract, does the US separability presumption permit initial judicial review of the objection'.[28]

15.13 These two US Supreme Court cases establish that US law certainly recognizes and applies the competence-competence doctrine. Nevertheless, they complicate, rather than clarify, the contours of the doctrine as it applies under US law. As one leading US commentator remarks:

> reconciling these various US competence-competence decisions is difficult and, in some instances, impossible. In turn, that confusion raises serious questions as to the usefulness of the US approach of linking questions of competence-competence tightly to the categorization of jurisdictional challenges (as directed 'specifically' or 'only' at the agreement to arbitrate).[29]

A comprehensive examination of the doctrine under US law is outside the scope of this commentary, but a recent US case provides some insight into how a US court might apply Article 15(1) of the ICDR Rules.

15.14 According to the court in *T Co Metals v Dempsey Pipe and Supply*:

> ICDR Article 15(1) more specifically empowers the arbitrator to decide questions of arbitrability, extending to the arbitrator 'the power to rule on [his or her] own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.[30]

Because the institutional rules that the parties selected in the underlying arbitration clearly include the doctrine of competence-competence, the court deferred to the decision of the tribunal on both (1) the issue of the existence, scope, and validity of the arbitration agreement, and (2) its own jurisdiction, noting that an 'arbitration agreement's incorporation of a rule containing substantially equivalent language constituted clear and unmistakable evidence of the parties' intent to arbitrate questions of arbitrability'.[31] Therefore, US case law indicates that the selection of the ICDR Rules is sufficient to ensure that arbitrators may rule upon their own jurisdiction both when the underlying contract is challenged in general and when specifically the existence of the arbitration agreement is disputed.

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[27] *Buckeye Check Cashing, Inc v Cardegna*, 546 US 440, 445–446 (2006).
[28] Born, op cit, 956.
[29] Ibid, 948.
[30] *T Co Metals v Dempsey Pipe and Supply*, 592 F3d 329, 345 (2nd Cir 2010).
[31] Ibid.

B. Separability (Article 15(2))

Article 15(2)

The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

15.15 Article 15(2) also recognizes specifically that 'an arbitration clause shall be treated as an agreement independent of the other terms of the contract'. As such, Article 15(2) expressly incorporates the doctrine of separability.[32] In international commerce, it is justified to assume that parties would have intended to resolve all of their disputes through arbitration, rather than by submitting certain disputes, such as disputes about the validity of the main contract, to the state courts. Thus commercial parties should be presumed to intend that an arbitration agreement remain valid and binding even though the underlying contract is claimed (or subsequently found) to be invalid, void, illegal, or that it has been terminated.[33] In line with this rationale and general commercial sensibility, the presumption of separability arises and refers to the principle that an arbitration agreement is, at the outset, treated as separate and distinct from its underlying contract.[34]

[32] N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 5-94 ('[The separability] doctrine is shorthand for regarding an arbitration clause as constituting a separate and autonomous contract').

[33] *See* UK Department of Trade and Industry, *Consultation Document on Proposed Clauses and Schedules for an Arbitration Bill*, reprinted in 10(2) Arb Intl 189, 227 (1994) ('Whatever degree of legal fiction underlying the doctrine, it is not generally considered possible for international arbitration to operate effectively in jurisdictions where the doctrine is precluded . . . [I]nternational consensus on autonomy has now grown very broad'). *See also* P Mayer, 'Les limites de la séparabilité de la clause compromissoire', Rev Arb 359, 362 [1997]:

> T]he choice-of-law clause escapes the nullity of the contract because it is its very purpose to specify the applicable law according to which the judge or arbitrator will decide whether the contract is void. And for the same reason, the arbitration clause must be respected if it implies the parties' will to confide the question of whether the contract is valid or void to an arbitrator.

[34] Final Award in Case No 8938 of 1996 in AJ van den Berg (ed) *Yearbook Commercial Arbitration Volume XXIVa—1999* (Kluwer Law International, The Hague, 1999) 174–81:

> [T]he arbitral clause is autonomous and juridically independent from the main contract in which it is contained either directly or by reference, and its existence and validity are to be ascertained, taking into account the mandatory rules of national law and international public policy, in the light of the common intention of the parties, without necessarily referring to a state law.

See also GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 347, n 186; R Merkin, *Arbitration Law* (LLP, London, 2004) para 5-40 ('[U]nder the concept of separability, the obligation to go to arbitration is distinct from the main contract').

15.16 Denying the presumption of separability would invite obstructive parties to avoid arbitration simply by declaring that the main contract, which contains the arbitration clause, is void. The subsequent risk of having to litigate the validity of the underlying contract not in the contractually agreed-upon setting of arbitration, but in a potentially inhospitable national court forum, with the attendant risks of delay and partisan decisions, is unacceptable in the context of international trade. Reasonable commercial parties cannot be presumed to desire such effects. Article 15(2)—which is, of course, incorporated into the parties' arbitration agreement by reference to the ICDR Rules—confirms that presumption.

15.17 Accordingly, treating the arbitration agreement as a separate agreement from the underlying contract has significant consequences. Above all else, it immunizes the arbitration agreement from challenges to the underlying contract, alleging that the contract at issue is invalid, void, or illegal.[35] Furthermore, the doctrine of separability recognizes that different substantive legal rules may be applicable to the arbitration agreement as opposed to the underlying contract.[36]

15.18 In international doctrine, the principle of separability is widely acknowledged. Article 16(1) of the UNCITRAL Model Law provides that 'an arbitration clause which forms part of the contract . . . shall be treated as an agreement independent of the other terms of the contract',[37] and both Article II and Article V(1)(a) of the European Convention treat arbitration agreements as distinct agreements that, at least implicitly, exist separately from the parties' underlying contracts.[38] Article V(3) of the European Convention authorizes arbitrators to examine the 'existence or the validity of the arbitration agreement or of the contract of which the agreement forms part', and Article VI(2) of the European Convention provides for specific choice-of-law rules for arbitration agreements.[39]

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[35] JF Poudret and S Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, London, 2007) 163 ('[S]eparability (or severability) means that the validity of the arbitration clause must be assessed separately from that of the main contract—or the legal relationship—of which it forms a part. As a result, the arbitrator has the authority to determine . . . the validity or existence of the contract'); J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) para 14-19 ('Any challenge to the main agreement does not affect the arbitration agreement: the tribunal can still decide on the validity of the main contract'); Merkin, op cit, para 5-40 ('[U]nder the concept of separability, . . . disputes as to the scope, or even the existence, of the main contract can be arbitrated').

[36] Poudret and Besson, op cit, 141, 178 ('The principle of separability not only entails that the validity of the contract and of the arbitration agreement must be determined separately, but also that they can—and often are—governed by different laws. This is a result both of their different natures and of the freedom generally conferred on the parties to choose the applicable law').

[37] UNCITRAL Model Law, Art 16(1).

[38] GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 311–408.

[39] European Convention on International Commercial Arbitration, Arts V(3) and VI(2).

Similarly, other institutional rules expressly acknowledge the principle of separability, including the ICC Rules,[40] LCIA Rules,[41] and the UNCITRAL Rules.[42] Likewise, Article 15(2)'s recognition of the separability doctrine also facilitates the doctrine of competence-competence by explicitly identifying that the 'arbitration clause shall be . . . independent of the other terms of the contract'.[43] The separability and competence-competence doctrines frequently overlap each time a tribunal determines the validity of an arbitration agreement while continuing the arbitration proceedings to determine a dispute over the validity of the underlying contract:[44] the separability presumption is the substantive principle that finds its procedural expression in the tribunal's power to decide its own jurisdiction, even where the underlying contract is said to be void.[45] In a similar way, courts have used the separability doctrine to consider an arbitration clause separately from the underlying contract so that they can resolve whether a court or tribunal must decide the jurisdictional issue.[46] **15.19**

[40] ICC Rules, Art 16(4):

> 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 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 please even though the contract itself may be non-existent or null and void.

[41] LCIA Rules, Art 23(1) ('[A]n arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement').

[42] 2010 UNCITRAL Rules, Art 23(1) ('For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause').

[43] N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) para 5-94 ('Closely linked to the question of who decides a total jurisdictional challenge is another issue, namely whether the arbitration clause can be regarded as having an independent existence of its own, or only as a part of the contract in which it is contained'); E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 416 ('[I]t is clear that while the two principles are closely linked and have a similar objective, they only partially overlap'); JF Poudret and S Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, London, 2007) 457 ('[Competence-competence] is frequently assimilated to the principle of separability, although it is not identical with it').

[44] Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 392.

[45] Gaillard and Savage (eds), op cit, 658 ('The principle that the arbitration agreement is autonomous of the main contract is sufficient to resist a claim that the arbitration agreement is void because the contract containing it is invalid, but it does not enable the arbitrators to proceed with the arbitration where the alleged invalidity directly concerns the arbitration agreement'); *see also* J Lew, L Mistelis, and S Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) para 14-19 ('Without the doctrine of separability, a tribunal making use of its competence-competence would potentially be obliged to deny jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract').

[46] *Prima Paint Corp v Flood and Conklin Mfg Co*, 388 US 395, 404 (1967) ('We hold, therefore, that . . . a federal court may consider only issues relating to the making and performance of the

15.20 Article 15(2) is based on the principle that, where there is an arbitration agreement within a contract, the parties to such a contract intended for disputes arising out of the contract to be submitted to arbitration.[47] Article 15(2) further embraces the separability doctrine by providing that an arbitration agreement may survive a determination that the underlying contract is invalid.[48] Courts in the US and in England, among other jurisdictions, acknowledge that arbitration clauses are separable from the underlying contract even if the contract itself is unconscionable or illegal.[49]

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agreement to arbitrate'); *Buckeye Check Cashing, Inc v Cardegna*, 546 US 440, 446–48 (2006) (reaffirming the severability doctrine, finding that arbitrators shall decide challenges to the validity of the contract as a whole, rather than courts); *Rent-A-Centre v Jackson*, 130 SCt 2772, 2778 (2010) ('[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate').

[47] *Redfern and Hunter*, op cit, para 5-94 ('By surviving termination of the main contract, the clause constitutes the necessary agreement of the parties that any disputes between them (even concerning the validity or termination of the contract in which it is contained) should be referred to arbitration'). See also the contractual construction underlying the ICDR award in ICDR Case No 379-04, 1990 WL 10559698 (ICDR).

[48] Ibid; *see also* LCIA Rules, Art 23.1 ('A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause'); 2010 UNCITRAL Rules, Art 21(2) ('A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause').

[49] *Rent-A-Center v Jackson*, 130 SCt 2772, 2779 (2010) ('Application of the severability rule does not depend on the substance of the remainder of the contract . . . Accordingly, unless Jackson challenged the [arbitration] provision specifically, we must treat it as valid . . . , leaving any challenge to the validity of the [underlying contract] as a whole for the arbitrator'); *Fiona Trust and Holding Corp v Privalov*, Court of Appeal (Civil Division), 24 January 2007, Case No 2006 2353 A3 QBCMF:

> It is in the light of these observations that the issue of severability should be viewed also. Sect. 7 of the Arbitration Act 1996 reproduces in English law the principle that was laid down by Sect. 4 of the United States Arbitration Act 1925. That Section provides that, on 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. Sect. 7 uses slightly different language, but it is to the same effect. The validity, existence or effectiveness of the arbitration agreement is not dependent upon the effectiveness, existence or validity of the underlying substantive contract unless the parties have agreed to this. The purpose of these provisions, as the United States Supreme Court observed in *Prima Paint*, is that the arbitration procedure, when selected by the parties to a contract, should be speedy and not subject to delay and obstruction in the courts.

See also House of Lords, 17 October 2007, in AJ van den Berg (ed) *Yearbook Commercial Arbitration Volume XXXII—2007* (Kluwer Law International, The Hague, 2007) 654–82:

> If arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure. Illegality is a stronger case than bribery which is not the same as non est factum or the sort of mistake which goes to the question whether there was any agreement ever reached. It is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular. There is no such reason here.

15.21 As recently as 2006, the US Supreme Court reinforced the presumption of separability in *Buckeye Check Cashing Inc v Cardegna*. At issue in *Buckeye* was a loan agreement that violated the state of Florida's usury laws and thus was void. The loan contract included an arbitration clause and the question arose as to whether the arbitration agreement contained within the void loan agreement was also void. Relying on an earlier decision that touched upon the issue of separability,[50] the Court in *Buckeye* reversed the Florida state law decision; instead, it held that there was a presumption of separability even when the underlying contract was void. Therefore, it found that the arbitration clause was valid and enforceable.[51] The *Buckeye* case reaffirmed the presumption of separability in the US.[52]

15.22 Properly analysed, then, the separability doctrine is a powerful conceptual tool available to parties that may find themselves confronted with a potentially invalid underlying contract. It also offers predictability, because nearly all jurisdictions recognize the presumption. In short, Article 15 adheres to the fundamental arbitral principles of party autonomy and deference to the parties' choices, allowing a tribunal to examine whether the parties actually consented to arbitrate if (or rather, even if) the validity of their main contractual relationship is in doubt.

15.23 Despite clarity surrounding the existence of and application of the presumption of separability, it is nevertheless inaccurate to describe the arbitration clause as entirely 'autonomous' or 'independent' from the parties' underlying contract. Article 15(2) has its natural limits. The parties' lack of consent to enter into an agreement can extend to the arbitration clause contained therein. In these cases, it is just and proper that the separability doctrine cannot cure the parties' lack of consent.[53] The separability

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[50] *Prima Paint v Flood and Conklin Mfg Co*, 388 US 395 (1967).

[51] *Buckeye Check Cashing, Inc v Cardegna*, 546 US 440, 448 (2006).

[52] *See* GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 331, n 100, citing *Ferro Corp v Garrison Indus, Inc*, 142 F3d 926 (6th Cir 1998) ('[T]he arbitration agreement is effectively considered as a separate agreement which can be valid despite being contained in a fraudulently induced contract'); *Matterhorn, Inc v NCR Corp*, 763 F2d 866, 868–69 (7th Cir 1985) ('An arbitration clause will often be 'severable' from the contract in which it is embedded, in the sense that it may be valid even if the rest of the contract is invalid'); *Torrance v Aames Funding Corp*, 242 FSupp2d 862, 868–69 (D Ore 2002) ('an arbitration clause may be enforced even though the rest of the contract is later held invalid by the arbitrator'); *Solar Planet Profit Corp v Hymer*, 2002 WL 31399601, *2 (ND Cal 2002) ('an arbitration clause in a voidable contract remains valid'); *Cline v HE Butt Grocery Co*, 79 FSupp2d 730, 732 (SD Tex 1999) ('Questions related to the enforcement of a contract as a whole are properly referable to an arbitrator; it is only when an attack is made on the arbitration clause itself that a court, rather than an arbitrator, should decide questions of validity. The arbitration clause itself is supported by valid consideration: each party promised to relinquish their legal right to have a judicial forum adjudicate their disputes'); *Hodge Bros, Inc v DeLong Co*, 942 FSupp 412, 417 (WD Wisc 1996); *Hydrick v Mgt Recruiters Intl, Inc*, 738 FSupp 1434 (ND Ga 1990) ('[I]f the arbitration clause is valid, the Court must enforce it, even if the underlying contract might be declared invalid').

[53] According to P Mayer, 'The Limits of Severability of the Arbitration Clause', 9 ICCA Congress Series 264 (Paris) (1999):

> The scenario in which an arbitration clause most clearly would not be severed, and hence would be invalid, is where the assent of one of the Parties is lacking. If the person to whom

doctrine, therefore, cannot provide any basis for the arbitrators' jurisdiction where the main contract is void for lack of consent, if that lack of consent is shown to extend to the arbitration clause as well.[54]

15.24 As a textual matter, Article 15(2) provides that arbitration agreements '*shall be treated*' as separate from the underlying contract. On the one hand, the use of the word 'shall' seems to indicate the mandatory nature of this provision, compelling the arbitrators, without leaving room for a contrary determination, to treat the arbitration agreement as a separate and independent contract. On the other hand, the words 'be treated as' (as opposed to 'actually is') indicate a presumption. The question arises, therefore, whether this presumption can be refuted in individual cases. This view would have very strong underlying reasons. Where there is compelling evidence, as a matter of contract interpretation under applicable law, that the parties did not intend to conclude the arbitration agreement as a separate contract and instead intended for the arbitration agreement to share the legal fate of the main contract, the tribunal should be free to so find.

C. Timely objection (Article 15(3))

Article 15(3)

A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection. The tribunal may rule on such objections as a preliminary matter or as part of the final award.

15.25 Article 15(3) balances the tension between the propensity for respondents to use jurisdictional objections to delay and obstruct the enforcement of the claimant's rights, and the maxim that no party can be forced into arbitration without its consent. As do all major institutional arbitration rules and modern arbitration laws, Article 15(3) therefore provides that a party must object to the jurisdiction of the tribunal (or to the arbitrability of a claim) no later than with its statement of defence under Article 3, or, if the claimant is objecting to the tribunal's jurisdiction

the offer is made does not accept it, then no contract has been formed, and the arbitration clause contained in the offer has not been agreed to any more than any of the other clauses, for there was no specific mutual agreement with respect to that clause.

See also P Schlosser, 'Der Grad der Unabhängigkeit einer Schiedsvereinbarung vom Hauptvertrag', in R Briner et al (eds) *Law of International Business and Dispute Settlement in the 21st Century in Liber Amicorum K-H. Böckstiegel* (Carl Heymanns Verlag, Cologne, 2001) 704, 706.

[54] P Sanders, 'L'autonomie de la clause compromissoire', in *Hommage à Frédéric Eisemann, Une initiative de la Chambre de Commerce International, Liber Amicorum* (ICC, Paris, 1978) 31, 33; P Jolidon, *Commentaire au Concordat Suisse sur l'Arbitrage* (Stämpfli Verlag, Bern 1984) 139; P Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (2nd edn, Mohr Siebeck, Tübingen, 1989) 393.

to hear a counterclaim, with its response to the counterclaim.[55] Absent a timely objection, subject to applicable arbitration law, the jurisdictional objection is deemed to have been waived.

15.26 The tribunal may make a decision as 'a preliminary matter or as part of the final award'.[56] Often, it is preferable for reasons of legal certainty and efficiency to address jurisdictional objections at the outset of the arbitration—and, in some instances, to order bifurcation of the jurisdictional and merits determinations. In some cases, however, the issue of jurisdiction is so closely intertwined with the merits of the case that due process and efficiency require that both be heard together. For such cases, the tribunal retains the discretion to address the issue of jurisdiction together with its final determination of the merits.

[55] *See eg* LCIA Rules, Art 23(3):

> A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to decide on the matter alleged by any party to be beyond the scope of its authority, failing which such plea shall also be treated as having been waived irrevocably. In any case, the Arbitral Tribunal may nevertheless admit an untimely plea if it considers the delay justified in the particular circumstances.

See also 2010 UNCITRAL Rules, Art 23(2) ('plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off').

[56] *See also* para 16.19.

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