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[39] Accord, e. g. as for Italian Law, Decision of 26 April, 1980, of the Court of Appeal of Venice, S. p. a. Carapelli (Italy) v. Ditta Otello Mantovani (Italy) 82 Diritto Marittimo, 1980, 256.

[40] Summarized in VII Yearbook 340 (1982) In India the High.

[41] Court of Calcutta in case Khaitan et Fils Ltd. v. Mury Exportation (Rev. arb. 1955, 26) has adopted this doctrine.

[42] 9 USC secs. 1-14

[43] Lawrence v. Comprehensive Business, serv., comp., 833 F. 2d. 1159 (1987).

[44] e. g. Etabl, Soules Feb. 19, 1958, Cass. Civ. 1958, D. Jur. 531.

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[46] J. c. p. 1963 II 13405, obs, Goldman, Rev. arb. 1963, 60.

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And finally, this doctrine is tacitly supported by conventions and the rules of several arbitration institutions[51, 52].

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4-Conclusion

It is important to stress that international commerce needs a denationalization of arbitration and that international businessmen look at arbitration as disconnected from any national law system[3, p. 617]. Parties to international contracts often include arbitration clauses in an attempt to protect their rights in the event of dispute. The reasons for this may be that each party, understandably, might think that courts in their opponent's country would be partial to its own citizen, and that the foreign judicial system would not offer sufficient procedural guarantees of neutrality and effectiveness[7, p.10].

Thus, in international commercial arbitration it must be accepted that, when the parties enter into a contract containing an arbitration clause, they really enter into two contracts, one regarding the main contract and one regarding the arbitration if a dispute arises. The two are completely separate from each other[11, p.176; 5].

There is a strong presumption in international commercial transactions that the will of the parties to resort to international arbitration carries the stipulation that it is completely severable even where the arbitration clause is written into the main contract.

As a result of this separability, a plea by one party that there is no valid contract can therefore be decided by the arbitrator[24, pp. 207-297]. For this reason, at the present time the doctrine of "separability of arbitration clause" in the modern international arbitration is uncontested[7, p. 193].

Futhermore, we find an explicit recognition of this doctrine in the wording of international arbitration courts (See Section3-1) as well as in the national courts[39-43; 50].

pp.1045-1059]. However, the Court de Cassation (French Supreme Court) has refused to incorporate this doctrine in domestic arbitration[7, p. 193]. The courts held that the arbitration clause in domestic arbitration is considered an accessory to main contract; as a result, its validity was dependent upon the validity of the main contract[44].

Indeed, in a leading case, Societe Gosset v. Societe Carpelli[20, pp. 545, 615; 45; 46] the French Supreme Court clearly recognized the doctrine of "autonomy of arbitration clause" stating: "In international arbitration matters, the arbitration agreement, whether concluded separately or included in the contract to which it relates is always, except in exceptional circumstances which are not alleged in the present case, completely autonomous judicial, which prevents the arbitration agreement from being affected by the possible invalidity of the contract".

The separability issue in Gosset arose in connection with an effort by an Italian company to enforce in France an award rendered in Italy against a French Company. However, the Court's approach indicates that the result would have been the same if the issue had arisen in connection with a party's effort to challenge an international arbitration proceeding in France on the ground that, the underlying contract being void, the arbitration clause necessarily falls. Gosset thus recognized for purposes of French law an institutional characteristic vital to international commercial arbitration, namely, the autonomy or separability of the arbitration clause[47, p.149, 48,49,7, p.194].

3-2- Decisions of National Courts

In general, the separability doctrine has found its recognition in court decisions in several parts of the world[39-41, p.340; 42]. In this study we will consider some court decisions in the United States and France.

3-2-1- Court Decisions in the United States

In a leading case "Prima Paint Corp. v. Flood and Conklin MFG Co."[35, pp.1270-1289], the Supreme Court of the United States clearly recognized the doctrine of "separability of the arbitration clause". This case involves the question whether the federal court or an arbitrator may resolve a claim of fraud in the inducement under a contract governed by the United States Arbitration Act of 1925[42] if there is no evidence that the contracting parties intended to withhold that issue from arbitration. The Supreme Court held that the arbitral tribunal was to decide the dispute stating:

"Except when the parties otherwise intend, arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that contract itself was induced by fraud".

So in the United States after the above supreme court decision many federal court decisions were referred to the above statement, thus recognizing the doctrine of "separability of arbitration clause"[43, p.1159].

3-2-2- Courts Decision in France

The French Courts recognized the autonomy or separability of the arbitration clause in matters relating to international commercial arbitration[1;2,

arbitrators. A Memorandum of the Libyan Government which was submitted to the President of the International Court of Justice on July 26, 1974, setting forth the reasons for which, in its opinion, no arbitration should take place in the present case. Although the Libyan government refused to appoint an arbitrator, the companies requested, as provided for in this situation by clause 28, the President of the International Court of Justice to designate a sole arbitrator.

On December 18, 1974 the President of the International Court of Justice appointed the French Law professor Rene-Jean Dupuy as sole arbitrator[37, p.178]. The sole arbitrator fixed Geneva as the place of the arbitration. The arbitration at the outset necessarily determined the competence of the arbitrator, and he held that he did have such competence[36, p.5].

Regarding the question that the nationalization of the oil fields had the effect of voiding the Deeds of Concession, this effect could conceivably be extended to the arbitration clause contained in the Deeds of Concession. In this matter, the arbitrator held that the hypothetical termination of the Deeds of Concession did not affect the arbitral clause itself. He referred to the doctrine of the autonomy or separability of the arbitral clause from the contract in which it is contained[37, p.179].

Thus, as we have seen in the above cases in the view of international arbitration, the doctrine of autonomy or separability of the arbitration clause has been upheld by several decisions of international case law and the arbitrator has referred to this doctrine in his decisions and awards[38].

in the "bank guarantee" is still binding on the parties and that the undersigned arbitrator has jurisdiction in the present case"[35, p.173] .

Finally, the arbitrator added that, "It is superfluous to stress the independent character of the arbitration clause, and the fact that the nature of the undertaking to arbitrate does not change because it happens to be included in a contract having a different object, such as contract of sale or of guarantee, rather than in a separate arbitration agreement"[35, pp.173-174].

In another case arbitrated by ad hoc referred to arbitration, the sole arbitrator accepted the doctrine of "separability of arbitration clause"[36, pp.3-37]. In this case the arbitration arises out of 14 Deeds of Concession concluded between 1955 and 1968 between the competent Libyan Authorities (Petroleum Commission or Petroleum Ministry depending on the date of the contracts) and two United States Companies, Texaco Overseas Petroleum Company and California Asiatic Oil Company.

By law No. 66 of 1973 (the Decree of Nationalization of 1 September 1973) 51 percent of the properties, rights and assets relating to the Deeds of Concession of the companies was nationalized[37, p.178]. In the following year by law No. 11 of 1974 (the Decree of Nationalization of 11 February 1974)[36,p.5] the totality of the properties, rights, assets and interests of two United States Companies was nationalized[37, p.178]. Under both decrees the companies were, at the same time declared (that) solely responsible and liable for all the liabilities and debts or obligations arising from their activities. Both decrees also provided for a committee to be appointed to determine the amount of compensation to be paid[37, p.178].

The two United States Companies notified the Government of the Libyan Arab Republic that pursuant to clause 28 of the Deeds of Concession, they intended to submit to arbitration their disputes and they had appointed their

defendant) under which the bank guaranteed the Pakistani Rupees for every ton of cement not delivered by the Pakistani cement manufacturer[35, p. 170]. The bank guarantee provided that all disputes in connection with the guarantee were to be settled under the Arbitration Rules of the ICC by a sole arbitrator.

When the Pakistani cement manufacturer failed to make any of the agreed-upon deliveries for the years 1965, 1966 and 1967, and the Pakistani Bank (defendant) failed to make payment under the bank guarantee, the plaintiff began arbitration proceedings in July 1966. Professor Peirre Lalive was appointed by the ICC court of arbitration as the sole arbitrator. The arbitration took place in Geneva Switzerland[35, p. 171].

The defendant (Pakistani Bank) raised the plea of lack of jurisdiction of the arbitrator as the arbitral clause contained in the bank guarantee agreement had automatically come to an end due to hostile acts and aimed attacks of the Indian forces on September 6, 1965, which according to defendant, created a "state of war"[35, p.171].

The sole arbitrator, after much consideration and extensive examination of the events of September 1965, in the preliminary award concluded (decided) under the rules of international law that' "for the reasons previously mentioned, I therefore find that the Indo-Pakistan hostilities of September 1965 although admittedly somewhat of a boarderline case presenting "special features" did not constitute or create a "state of war" in the sense of international law"[35, p.171].

The arbitrator after this consideration proved his jurisdiction in this case and decided that, "It follows that in the absence of a state of war, as far as the issue under consideration is concerned, the arbitration clause, contained

Since NIOC refused to appoint an arbitrator by the request of Elf, the president of the Danish Supreme Court appointed a sole arbitrator professor Bernhard Gomard[35, p.98].

The arbitrator fixed Copenhagen as the place of the arbitral tribunal and decided to apply Danish procedural law[34, p.98, 100]. NIOC objected that in accordance with the Special Committee. Because of the nullity of the agreement, the arbitrator did not have the competence to determine the plaintiff's claims (Elf's claims)[34, p. 102]. The arbitrator decided that, "it is a fundamental principle in international arbitration recognized in treaties dealing with arbitration, in several arbitral awards, and by writers on the law of arbitration that an arbitrator has competence over the competence"[34, p.101].

The arbitral tribunal in the preliminary award added that it is a generally recognized principle of the law of international arbitration that arbitration clauses continue to be operative, even though an objection is raised by one of the parties that the contract containing the arbitration clause is null and void. Because the autonomy of an arbitration clause is a principle of international law that has been consistently applied in decisions rendered in international arbitrations[34, p.102].

Another case where a sole arbitrator rendered a preliminary award is Case No. 1512 between an Indian Cement Company (plaintiff) and a Pakistani Bank (defendant)[35, pp.170-177].

By an agreement dated September 30, 1964, a Pakistani manufacturer and Mr. M. undertook to repay a debt owed to an Indian Cement Company (the plaintiff) in the form of a delivery to the latter of quantities of Cement over a period of years. This agreement was concluded together with a separate but adjacent agreement between the plaintiff and a Pakistani Bank (the

After 12 years research, two oil fields were discovered, and their commercial exploitation commenced in December 1978. Notwithstanding its contractual obligations, NIOC did not refund the exploration and development loans received from ERAP and refused to sell oil at the preferential price provided for in the agreement. On 8 January 1980, the Islamic Republic Revolution Council of Iran passed an act establishing a special committee to review oil agreement (the single Article Act). The texts of the single article act State that,[34, p.98] "All the oil agreements, which at the discretion of the Special Committee to be convened by the Ministry of Oil, may be found to be at variance with the provisions of the Act on Nationalization of the Oil Industry of Iran, shall be declared null and void, and all the claims arising from entering into and performance of such agreements, shall be settled according to the resolution of such committee. Such committee shall be held with participation of the representative of the Ministry of Foreign Affairs".

On 11 August 1980, NIOC informed Elf that the agreement of 27 August 1966 was declared null and void by the Special Committee[34, p.98]. If Elf wished to take further action, they had to contact with the Special Committee. Thereupon, Elf resorted to arbitration according to the Article 41 which had been included in the 1966 agreement. In accordance with the arbitration clause, each party may appoint an arbitrator and these two arbitrators were to appoint an umpire[34, p. 98, 102]. If the parties refused to appoint their arbitrators or the arbitrators failed to agree on the umpire, the president of the Danish Supreme Court was to appoint a sole arbitrator in the former case (former) or an umpire in the latter[34, p.98].

3-1- The Decisions of the International Arbitration Tribunal

The International Chamber of Commerce (ICC) founded in 1919 is one of the most important institutions for international arbitration in the world[1]. For this reason we shall cite decisions rendered by this institution or by ad Hoc (non - administered) arbitration(See Section 2). The following is a case on record:

In the preliminary award of January 14, 1982 professor Dr. Jur Bernhard Gomard made a decision on the following case[34]:

Parties: Claimant: Elf Aquitaine Iran (France)

Defendant: National Iranian Oil Company

Facts: On August 27, 1966 the National Iranian Oil Company (NIOC) signed in Tehran an exploration and production contracting agreement with the Enterprise de Recherches et d'Activites Petrolieres (ERAP), a French State Agency and the French company, Societe Francais de Petroles d'Iran (Sofiran). The agreement contained in Art. 41 a comprehensive arbitration clause.

Under the agreement, ERAP had the right to associate its affiliate, Societe Nationale des Petroles de Aquitaine (SNPA), with its activities, and ERAP and SNPA had a right to transfer their interests in the rights acquired and the obligations undertaken by them under the agreement to companies controlled by either ERAP or SNPA. During the period from 1967 to 1977, ERAP assigned all its interests to its subsidiary, Elf Iran; SNPA assigned all its interests in the agreement. Elf is the claimant in the present arbitration[34, p.97].

1. The International chamber of commerce (ICC) is the most important international institution in the world for arbitration.

otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas. also it appears in the UNCITRAL arbitration rules provide in article 21(1) "which are mentioned before.

This doctrine was further apparent in the European (Geneva) Convention of 1961 which provides in Article 5.3 which is mentioned before .

The London Court of International Arbitration Rules provides in the schedule of jurisdiction and powers of the arbitrator, para 8 that the arbitrator shall have jurisdiction to:

"a) determine any question as to the validity, extent or continuation in force of any contract between the parties ...

b) determine any question as to his own jurisdiction"[5, p.290].

3- Case Law Decisions

We have been shown that, in the present time, the doctrine of "separability of arbitration clause" is a basic judicial doctrine(See Section 2-2-2) Now let us see what the interpretation and decisions of the courts and tribunals, whether international or national, are in this matter.

First let us note the decisions of international arbitral tribunals, after that we shall consider the decisions of the same national court.

jurisdiction of arbitral tribunal in claiming that the main contract had been void, was rejected. Because the contract was, partially, performed by both parties, it is indeed indisputable that there was a ratification of this contract subsequent of its signature. As a result, the contract was valid and the arbitrator had jurisdiction over the case".

Also in the partial award of March 17, 1983 Case No. 4402 the arbitrators - with professor Frank Vischer Chairman - decided that, "there is no doubt that the Arbitral tribunal may decide on its own jurisdiction. Both the ICC Rules-Article 8(3) - and article 8 SIAC (the Swiss International Convention) provide for this power of a tribunal"[32, p.139].

2-2-2- Authority of the Arbitrator to Decide on Validity or Invalidity of Main Contract

One of the consequences of severability of an arbitration clause is that the arbitrator has power to determine the validity of the main contract[5, p. 291] since by the arbitration clause the parties have given the power of settlement of any future disputes to the arbitrators[5,p239; 11, pp.164,167]. This means that the parties in this agreement have accepted that all disputes arising in connection with, or regarding, this contract shall be settled by arbitration, even the claim regarding the validity or existence of the main contract[33, p.439].

In other words, when the parties have entered into an arbitration agreement they thereby demonstrate that they put their faith in arbitration. Thus it would be reasonable to refer the entire controversy to arbitration including the validity of the disputed contract[15].

This doctrine (authority of the arbitrator to decide on validity or invalidity of main contract) appears in the article 8(4) of ICC rules and "Unless

Consequently, the fact that in modern international arbitration, an arbitrator can express a view on his own jurisdiction and even give a ruling on it, is uncontested[29, p.135].

For this reason, the arbitrator is the judge of his own jurisdiction, if that jurisdiction is specifically challenged. ICC arbitral tribunals have the power given to them by the ICC Rules to determine jurisdictional questions[30]. For example, in ICC Case No. 1007 award rendered in 1959 between French and German parties[14, pp. 31-43], the sole arbitrator decided the validity of the main contract and arbitration clause on declaring his jurisdiction which was challenged by the defendant party.

In ICC Case No. 1955 award rendered on July 20, 1973[14, p.41] extracts in ICC Arbitration[31, p. 18] stated that, "In an ICC involving a sales contract in France, the contract would have been null under French law if the price had not been specifically fixed or determinable by objective reference. Despite an allegation of nullity based on the uncertainty of price in the contract, the ICC arbitral tribunal had no difficulty in determining that the arbitration clause was Severable and thus unaffected by the alleged nullity. It accordingly affirmed its own jurisdiction, and in fact went on to hold that the sales contract was null.

According to award rendered in ICC Case No. 4293/RP on January 24, 1983, the arbitrators stated that[1], "the objection of defendant regarding

1. This case involves COMURHEX, a French Company, as Claimant and Atomic Energy Organization of Iran (AEOI) as a defendant. The arbitrators (Dr. Claude Jung as a chairman Prof. Rene David and Professor Ali Moslehi as a arbitrators of the Parties) decided in response to the claim of defendant stating that the person who signed the contract had not been authorized to sign the contract. Therefore, the contract was stated to be void and consequently the arbitration clause provided therein over claim. The arbitrators finally decided that the contract which included an arbitration clause was valid and the arbitral tribunal had jurisdidiction over the case.

upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms a part.

This rule is further apparent in the 1965 convention on the settlement of investment disputes between states and nationals of other state (the Washington convention 1965) which provides in Article 41:

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that, that dispute is not within the jurisdiction of the Center, or for other reasons is not within the competence of the tribunal, shall be considered by the tribunal which shall determine whether to deal with it as a preliminary questions or to join it to the merits of the dispute.

We find similar provisions in the arbitration rules of many arbitration institutions as well, for example in the Arbitration Rules of the ECE (Article 18)[25, p.198] and the ECAFE (Article VI par 3)[5, 9 , 26].

Note that acceptance of this doctrine prevents one of the parties from attempting to delay arbitral proceedings. Usually, an objection of jurisdiction of the arbitral tribunal is not made in good faith[7, p. 285].

Furthermore, at the present time, the autonomy of the jurisdiction doctrine is upheld by the provisions made in many countries. A report made in 1961 by professor F. E. Klein at the Second International Congress of Arbitration disclosed that arbitrators' decisions concerning their jurisdiction was recognized in federal Germany, Italy, the Netherlands, Sweden, Zurich, Swiss Concordat, Greece, Belgium and France[27, pp. 48-47; 7, p. 286]. The new Code of civil procedure in France provides in Article 1466[28, pp. 298-300], "If one of the parties contests before the arbitrator on the jurisdictional power of the arbitrator whether in principle or scope it is within the power of the arbitrator to decide on the validity or scope, of his jurisdiction".

the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas.

Also, it conforms to Article 21 of the United Nations Commission on International Trade Law (UNCITRAL) Rules.

(1) The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

(2) The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms a part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail "ipso jure" the invalidity of the arbitration clause.

(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

(4)In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

We can, also, find the acceptance of the autonomy of the arbitrator to decide on his own jurisdiction in international treaties dealing with arbitration for example the European (Geneva) Convention of 1961 Provides in Article 5.3:

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

2-2-1 Authority of the Arbitrator to Decide on His Own Jurisdiction

It is an accepted principle in commercial international arbitration that the arbitrator has power to determine his own jurisdiction[14,]. This rule reflects the arbitration law and practice of most countries[23]. This is so because when the parties enter into an international transaction containing an arbitration clause, they, in fact, enter into two contracts, one regarding the international transaction and one regarding arbitration in case a dispute arises. It follows automatically that the parties confer on the arbitrator power to determine his own jurisdiction[14, pp. 33-34].

Thus, a plea by one party that there is no jurisdiction for the arbitrators since there is no valid arbitration agreement must be decided by the arbitrator[24, pp. 207-297]. In other words, it is the obligation of the arbitrator to decide whether there exists a valid agreement or not[11, pp. 163-185].

This rule conforms to Article 8(3)(4) of rules for the International Chamber of Commerce (ICC), court of Arbitration:

(3) Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the court be satisfied of the prima facie existence of such an agreement, the court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself.

(4) Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though

international transactions decide that they want all disputes arising under a contract to be settled by arbitration and not by the domestic court. It is they who establish the separability of the arbitration clause from the contract of which the arbitration clause forms a part. Thus we may define the separability of the arbitration clause as follows:

The severability of the arbitration clause means that the illegality of another part of the contract does not nullify an agreement to arbitrate "ipso jure" and the arbitrator shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part.

We can find the same idea in the court decision of the United States,[19, p. 566]France[20, p. 545] and in some of the provisions of international arbitration[21].

2-2- Scope and Effects of Separability of Arbitration Clause

Clearly, the power of an arbitrator is derived from the parties of the contract[22, p.530]. In cases of international business, it is generally accepted that all disputes regarding the matter will be settled by arbitration without any interference from another authority. As a result of the doctrine governing the "separability of arbitration clause", the arbitrator has authority to determine his own jurisdiction[5,14]. Futhermore, he has authority to decide on the validity or invalidity of the main contract[5,14]. We shall explain these points separately as follows:

Thus, there is a strong presumption in this matter that in every international commercial transaction, the will of the parties to resort to international arbitration and not to national or domestic court would be stated, with the stipulation that it is completely severable from the main contract even where the arbitration clause is written into the main contract. In other words, in international commercial trade the parties always enter into two contracts completely separate from each other: one regarding the main contract, and the other regarding arbitration.

2-1- Definition of Separability of Arbitration Clause:

A precise definition of this issue is not in the literature. Nevertheless, professor Clive M. Schmitthoff says[5, p.288], "when the arbitration clause is contained in the main contract, e. g., a contract of sale or construction, the arbitrator has the power to decide on the validity of the main contract if it is alleged that the contract is void "ab initio". I shall refer to this problem as that of the severability of the arbitration clause".

Another author says[18, p.14], "This doctrine now nearly universally approved, means that the arbitrator may rule on the validity of the contract. In other words, the fact that a contract may be invalid does not deprive an arbitrator of his jurisdiction - conferred by a clause deemed to be autonomous or separable from the rest of the contract - to decide the issue of invalidity and its potential consequences. Thus, an arbitrator may not concur with an agreement that a contract lacks an essential terms and therefore is nil; the point is that the decision is his to take".

As noted before, the power of the arbitrator derives from the parties involved in the contract[18, p. 23]. We can really say that parties in

of the contract are not part of the contract, and they would be completely separate from it even if they were stated in the contract.

Thus, in both forms of the arbitration clause - when the arbitration clause is part of the main contract, and when it is a separate agreement - the agreement of arbitration considers it as separate from the main contract. Therefore, as professor Clive M. Schmitthoff Said[5, p.291], "... Whether the arbitration clause constitutes a separate agreement and can be severed from the other terms of the main contract is a question of interpretation of the contract". Where the parties have expressly or implicitly opted for severability, e. g. by adopting the United Nations Commission on Trade Law (UNCITRAL), the International Chamber of Commerce (ICC) or the London Court of Arbitration, their consensus has to be respected and the arbitration clause is severable. Where they have not done so, there exists, in modern circumstances, a strong presumption in favor of severability.

This solution enables the arbitrator to determine the issue whether the main contract is invalid "ab initio".

In conclusion, at the present time, in international commercial transactions the will of the parties is of paramount importance, and must be given prime consideration[1], due to the fact that the parties, where there is a dispute regarding a contract, might wish to resort to arbitration rather than take the dispute to the courts. For this reason, the will of the parties - to have recourse to arbitration - must be clearly stated in the contract or in a separate agreement referring to the rule and provision of an international institution of arbitration.

1. We find the Same viwe in Federal Court decisions in the United States in the matter of domestic arbitration, p.530.

agreement to arbitrate issues in dispute, the entire controversy has to be referred to the arbitrator, including the validity of the disputed contract[15, p. 540].

But the position is more complex when the arbitration clause is part of the main contract. It has been argued that if the main contract is invalid "ab initio", the arbitration clause as a term of contract is also invalid[5, p]. The thrust of that argument is that the arbitrator has no jurisdiction to decide the issue because the power of arbitrator is derived from the main contract which is nonexistent[7, pp.192, 285, 14 , pp. 31-43].

The same view held in the traditional English laws when Lord Macmillan in Heyman v. Darwins Ltd[16, pp. 356-371]. decided that " if it appears that the dispute is whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less". But now, contrary to the above decision, in the recent decision of the House of Lords in the case of Bremer Vulkan Schiffbau und Maschinen Fabrik v. South India Shipping Corporation Ltd[17, pp.141-166], Lord Diplock decided that "such a contract is often to be found as an arbitration clause in a commercial, industrial or other type of contract. Where so found, it is in strict analysis, a separate contract ancillary to the main contract".

This decision implies that when a contract includes an arbitration agreement, this is separate from the main contract even if it is within the main contract[5, p.291]. The reasoning is that when parties enter into a contract, they include all things directly pertaining to this contract and relating to essentials of it. Other things that do not refer to essential elements

marked tendency to view the arbitration clause as independent from the main contract[12, pp. 285-293, 5].

The first part of this work will outline the basic doctrine of severability of the arbitration clause; and the second part will explain the opinion of jurisdiction.

2- The Basic Doctrine in the Matter of the Severability of the Arbitration Clause

The division of arbitration into international and domestic arbitration is a significant development in modern law[5, p. 285]. Many countries consider that international commercial arbitration requires different regulations from the domestic arbitration[5,12]. International regulations have to be more liberal than domestic[5, p. 287]. Each form of arbitration combines a consensual and judicial element. The consensual element appears in the arbitration clause which in every contract is founded on the autonomy of the parties will[3, p. 619].

In other words, when the parties enter into a contract concerning an international business containing an arbitration clause, they enter into not one agreement, but two agreements; one agreement regards the business transaction; the other regards arbitration in case a future dispute arises[5, p. 285]. Normally, an arbitration made after the main contract was entered into[5, p.290, 13, p. 290]. In the latter case there is, of course, no problem about severability of the arbitration clause[14, pp.31-43]. As a result, an arbitrator can decide whether the main contract has come into existence or was void "ab initio" e. g. on grounds of fraud, misrepresentation or relevant mistake. The reasoning is that, where parties to the agreement had binding

1- Introduction

During the second half of this century, international commercial arbitration has been increasingly successful among international traders as an alternative to national courts for the settlement of disputes[1-3, p.613-645]. Parties to international contracts often include an arbitration clause in an attempt to protect their rights and to eliminate uncertainties in the event of a dispute[4, pp.9-34]. From my experience as an arbitrator, I think one reason for this may be that each party understandably thinks that courts in their opponents' country would be partial to its own citizens; and that the foreign judicial system would not offer sufficient procedural guarantees of neutrality and effectivness[3, p.617]. Another reason is that arbitration proceedings are informal, flexible procedures in which the liberality of the norms of evidence is encouraged to afford the parties the amplest opportunity to arrive at the truth of the dispute[5, pp. 285-293,6]. Finally, arbitration is attractive because it is the less costly alternative to litigation in national courts, and proceeding are brought to this alternative forum without the delays often imposed by courts[7, p.10et. seq.].

The arbitration clause inserted in the contract between parties is the normal means by which the jurisdiction of a specific international tribunal is created[8, p.375, 9, 10].

Since the arbitration is a matter of contract and not of law, the jurisdiction of an arbitrator is contractually guaranteed by the parties. Therefore the arbitration clause is very important.

Note that unlike any national judge, the arbitrators powers derive solely from the agreement of the parties[11, pp.163-184]. Therefore, the problem of severability of arbitration clause has arisen from the main contract in which it has been stipulated. Today, in a great number of countries, there is a

Is an Arbitration Agreement Independent of the Validity of the Contract in Which It Is Included?: Separability of Arbitration Clause

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Abstract

During the second half of this century, international commercial arbitration has been increasingly successful among international traders as an alternative to national courts for the settlement of disputes. Parties to international contracts often include an arbitration clause in an attempt to protect their rights and to eliminate uncertainties in the event of a dispute.

The arbitration clause inserted in the contract between parties is the normal means by which the jurisdiction of a specific international teibunal is created.

Since the arbitration is a matter of contract and not of law, the jurisdiction of an arbitrator is contractually guaranteed by the parties. Therefore the arbitration clause is very important.

Today, in a great number of countries, there is a marked tendency to view the arbitration clause as independent from the main contract.

Keywords: Arbitration, Arbitration Clause, Main Contract, Validity of the Contract.