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Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore

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SEPARABILITY, COMPETENCE-COMPETENCE AND THE ARBITRATOR'S JURISDICTION IN SINGAPORE†

The concepts of separability and competence-competence, which promote arbitral autonomy, exist in many jurisdictions. This article surveys the extent of their acceptance in Singapore's domestic and international arbitration law, and suggests that legislative refinements are necessary to remove doubts and resolve conflicts between the law and the SIAC Rules.

Does an arbitrator have the jurisdiction to determine his or her own jurisdiction under an arbitration agreement? This is a question that the law has long wrestled with. The law's response has been to develop two doctrines: separability and competence-competence. This article investigates their value and compares the current legal position in several jurisdictions with the local position. It is submitted that the two doctrines play an important role in promoting the arbitral process as a means of dispute resolution, and that legislative changes may be needed in Singapore to ensure that this process is not impeded.

I. SEPARABILITY AND COMPETENCE-COMPETENCE COMPARED

A. Scope and Purpose

The doctrines of separability[1] and competence-competence[2] are related, but distinct. The concept of separability means that the validity of the arbitration clause does not depend on the validity of the remaining parts of the contract in which it is contained. As long as the arbitration clause itself is validly entered into by the parties and worded sufficiently broadly to cover non-contractual disputes, an arbitrator may declare a contract invalid but still retain jurisdiction to decide a dispute as to the consequences of the invalidity.[3] By treating arbitration agreements as distinct from the main contract, separability rescues many arbitration agreements from failing simply because they are contained in contracts the validity of which is questioned.

Competence-competence picks up where separability ends. The doctrine has two aspects. Firstly, it means that arbitrators are judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if the validity of the arbitration agreement *itself* and thus the competence

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1 Also called severability or autonomy.

2 Known in French as *compétence de la compétence* and in German as *Kompetenz-Kompetenz*.

3 Marcus S Jacobs, "The Separability of the Arbitration Clause: Has the Principle Been Finally Accepted in Australia?" (1994) 68 ALJ 629 at 629.

of the arbitrator is impugned, he or she does not have to stop proceedings but can continue the arbitration and consider whether he or she has jurisdiction. Secondly, in some countries, the arbitration agreement ousts the initial jurisdiction of ordinary courts. If the *prima facie* existence of the arbitration agreement is objected to, a court must refer the dispute to arbitration.[4] But there is great variation where this second aspect is concerned. In civil law countries such as France, arbitrators appear to have a wide jurisdiction to determine their competence. The prevalent view in common law countries is that arbitrators have only a limited competence to rule on their jurisdiction, and that these rulings may be reopened and scrutinised by the courts.[5]

B. Justifications

Schwebel[6] justifies the separability doctrine on four grounds:

i. When parties enter into an arbitration agreement which is widely phrased, they usually intend to require that *all* disputes, including disputes over the validity of the contract, are to be settled by arbitration. This may be an implied term of the contract. For instance, applying the officious bystander test,[7] if the parties when concluding the agreement had been asked, "Do you mean, in providing that 'any dispute arising out of or relating to this agreement' shall be submitted to arbitration, to exclude disputes over the validity of the agreement?", surely they would have replied that they did not mean to exclude such disputes. Applying the separability doctrine thus gives effect to the will of the parties.[8]

ii. If simply by denying that the main contract is valid one party can deprive the arbitrator of competence to rule upon that allegation, this provides a loophole for parties to repudiate their obligation to arbitrate. This defeats one of the main advantages of choosing arbitration over litigation as a means of dispute settlement: speed and simplicity without the time and expense of the courts. The

4 Carl Svernlöv, "What Isn't, Ain't: The Current Status of the Doctrine of Separability" (1991) 8(4) JIA 37 at 37.

5 *Infra*, n 74–78, and the accompanying text.

6 Stephen M Schwebel, *International Arbitration: Three Salient Problems* (1987) ch 1,1–13.

7 *Reigate* v *Union Manufacturing Co (Ramsbotlom)* [1918] 1 KB 592 at 605; *Shirlaw* v *Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227.

8 This argument was approved by Leggatt LJ in *Harbour Assurance*, *infra*, n 32, at 464, Contrast Adam Samuel who criticises this argument in his review of Schwebel's book in (1988) 5(2) JIA 119 at 120–1. Samuel agrees with J Gillis Wetter that when two parties enter into a contract it is almost always very far from their minds and from the minds of their legal advisers that they are entering into two separate contracts: see Schwebel, *supra*, n 6, at 9. Samuel prefers to justify separability on the principle that the court applies a presumption in favour of separability of an arbitral clause to preclude unnecessary disruption of the arbitration (*cf* Schwebel's second justification in the main text).

problem is worse in international arbitration agreements, since there is no international court with compulsory jurisdiction to determine and enforce the validity of the contract.

iii. There is a well-established legal fiction that when parties enter into a contract containing an arbitration clause, they are really entering into two separate agreements: the principal agreement containing their substantive obligations, and the arbitration agreement which provides for the settlement of disputes arising out of the principal agreement. This legal fiction is perfectly justified if we consider what happens if the parties enter into two physically-separate contracts. In this situation, if the principal agreement is alleged to be void, there is no question about the validity of the arbitration agreement since it is an independent contract. Is it logical, then, to treat an arbitration agreement which appears as a clause in a contract differently?[9]

iv. It is a widespread practice that courts usually review only arbitral awards and not the merits of disputes which are meant to be arbitrated. However, if we do not accept the separability doctrine, courts would be forced to do this very thing.

The competence-competence doctrine is more controversial. As a matter of strict logic, it is hard to see how an arbitrator has the jurisdiction to determine his or her own competence since to do so presupposes that he or she already possesses competence under the very agreement which is doubted.[10] However, the doctrine has been justified on several grounds:[11]

i. There is a rebuttable presumption that such jurisdictional power has been conferred by the will of the parties when they entered into the arbitration agreement.[12] If it is presumed that the parties have conferred the arbitrator with the jurisdiction to decide his or her own jurisdiction in the same way that he or she deals with the other legal matters arising in the arbitration, the court should respect the contract of the parties so long as the arbitrator acts in good faith.[13]

ii. Since section 30 of the Arbitration Act (Cap 10, 1985 Rev Ed) allows exclusion agreements, *ie* agreements in which the parties

9 This reasoning was applied by Steyn J in *Paul Smith Ltd* v *H & S International Holdings Inc*, *infra*, n 30.

10 Alan Redfern, "The Jurisdiction of an International Commercial Arbitrator" (1986) 3(1) J1A 19 at 30.

11 Ibrahim FI Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (1965) 25–6, cited in Janet A Rosen, "Arbitration Under Private International Law: The Doctrines of Separability and Compétence de la Compétence" (1994) 17 Fordham Int'l LJ 599 at 608; Clive M Schmitthoff, "The Jurisdiction of the Arbitrator" in *The Art of Arbitration* (Jan C Schultsz & Albert Jan van den Berg eds, 1982) 285 at 292–3.

12 Shihata, *ibid*.

13 Schmitthoff, *ibid*.

exclude judicial review of the award completely, the parties must *a fortiori* be able to exclude the rule that the arbitrator cannot finally decide on his own jurisdiction.[14]

iii. Competence-competence power is inherent in all judicial bodies and is essential to their ability to function.[15]

Competence-competence is best seen as a rule of convenience designed to reduce unmeritorious challenges to an arbitrator's jurisdiction. It also promotes the arbitral process by giving arbitrators the competence to decide their own competence so that parties are not compelled to seek relief in the courts.

Separability and competence-competence are connected. It has been said that the competence-competence rule is a corollary of the separability doctrine since separability creates a need for the arbitrator to have jurisdiction to rule not only on the main contract's validity but also on the validity of the arbitration agreement.[16] Alternatively, separability can be seen as a principle of substantive law which enlarges the effective range of the procedural law principle of competence-competence.[17] Working in tandem, the two doctrines prevent attempts to thwart the parties' true intent, which is usually to have all disputes under the contract resolved by arbitration. They also promote the arbitral process generally by removing the need to resort to the courts to determine preliminary issues of jurisdiction.

II. THE JURISDICTIONS COMPARED

A. England

1. Separability[18]

For a long time, the arbitration clause and the other provisions in a contract were seen as an indivisible whole. If the contract was invalid, the arbitration

14 Schmitthoff, *ibid*, at 293.

15 Shihata, *ibid*. Schmitthoff, *ibid* at 291–2, is unconvinced by this justification: "The analogy with the position of the judge does not provide an answer. The judge has an inherent jurisdiction to rule on his own jurisdiction but the exercise of this jurisdiction is normally supervised by a court of appeal and it can, therefore, not be said that in this matter he is a judge in his own cause. Moreover, we have learnt from Lord Diplock's speech in *Bremer Vulkan* [*infra*, n 23] that there are considerable differences between the position of the judge and that of the arbitrator, who derives his jurisdiction from the contract of the parties. Nor does the analogy with arbitration in public international law help because, as already observed, in these cases the supervisory jurisdiction of a national court is absent."

16 Rosen, *supra*, n 11, at 609.

17 Aaron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990) at 76 para 9.

18 Svernlöv, *supra*, n 4; Jacobs, *supra*, n 3, at 632–4; Andrew Rogers & Rachel Launders, "Separability — the Indestructible Arbitration Clause" (1994) 10 Arb Int'l 77 at 82–6; Rosen, *supra*, n 11, at 627–35.

provisions never bound the parties, and hence no arbitrator appointed under the provisions had any authority to act. This is illustrated by *Smith, Corey & Barrett* v *Becker, Gray & Co*[19] in which the parties were held to be bound by an arbitration clause because the contract containing it was valid *ab initio*. The implication is that if the contract had been invalid, the arbitration clause would also have been invalid and of no effect.

It was in *Heyman* v *Darwins*[20] that the separability doctrine was clearly enunciated by the House of Lords. In *Heyman*, the defendant steel manufacturers alleged that the plaintiffs, who were their selling agents, had improperly involved them in certain liabilities. They refused to pay commission due to the plaintiffs. The plaintiffs instituted a court action against the defendants, but the defendants applied to court for the action to be stayed, contending that the dispute should be dealt with under the arbitration clause in the contract. The House of Lords found that the parties had entered into a valid and binding contract, and that the difference that had arisen related only to whether either side had breached the contract or whether circumstances had arisen which discharged one or both parties from further performance. In such a situation, the arbitration clause was valid and applicable. Lord Macmillan, with whom Lord Russell of Killowen agreed, approved the severability doctrine:

> I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other *him inde*, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.[21]

Said Lord Wright:

> [An arbitration agreement] is collateral to the substantial stipulations of the contract. It is merely procedural and ancillary, it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court. All this may be said of every agreement to arbitrate, even though not a separate bargain, but one incorporated in the general contract.[22]

This rule has been confirmed by many cases, including *Bremer Vulkan Schiffbau und Maschinefabrik* v *South India Shipping Corporation*,[23] in

19 [1916] 2 Ch 86 (CA).
20 (1942) 72 L1 L Rep 65 (HL).
21 *Supra*, n 20, at 75.
22 *Ibid*, at 77 col 2. See also Lord Porter's comments at 85.
23 [1981] 1 Lloyd's Rep 253 (HL), Lord Edmund-Davies and Lord Russell of Killowen concurring. See also *Black Clawson International Ltd* v *Papierwerke Waldhof-Aschaffenbufg AB* [1981] 2 Lloyd's Rep 446; *Paal Wilson & Co* v *Partenreederei (The*

which Lord Diplock cited *Heyman* as authority for the assertion that: "The arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself."

The separability doctrine was the *ratio decidendi* of *Heyman*, Yet a majority of the judges proceeded to make *obiter* statements which dominated English legal thinking for more than 50 years. Viscount Simon LC said:

> If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. *Similarly, if one party to the alleged contract is contending that it is void* ab initio *(because, for example, the making of such a contract is illegal), the arbitration clause itself also is void.*[24]

Lord Macmillan (and thus Lord Russell) remarked that:

> If it appears that the dispute is as to whether there has 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 a part of it an agreement to arbitrate; the greater includes the less. *Further, a claim to set aside a contract on such grounds as fraud, duress or essential error, cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside*.[25]

So great was the eminence of these pronouncements that they were accepted without question by both plaintiff and defendant in *Dalmia Dairy Industries* v *National Bank of Pakistan*,[26] and reaffirmed by a majority in *Ashville Investments Ltd* v *Elmer Contractors Ltd*.[27]

In contrast, Lord Porter[28] and Lord Wright[29] held that an arbitrator can have jurisdiction to hear a dispute in which one party alleges that the contract is void *ab initio* if the arbitration clause is phrased widely enough.

Hannah Blumenthal) [1983] 1 AC 854 (HL); *Compagnie Europeene de Cereals SA* v *Tradax Export SA* [1986] 2 Lloyd's Rep 301 at 306; *Furness Withy (Aust) Pty Ltd* v *Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep 236 at 244 (CA).

24 *Supra*, n 20, at 71 col 2 (emphasis added).

25 *Ibid*, at 73 col 2 (emphasis added).

26 [1978] 2 Lloyd's Rep 223 (CA).

27 [1988] 2 All ER 577, *per* May LJ at 586; *per* Balcombe LJ at 589: "an arbitrator cannot have jurisdiction to decide that the contract under which he is appointed is void or voidable, since by so doing he would be destroying the very basis of his own position." *Contra* Bingham LJ, at 591, who restricted himself to saying that an arbitrator cannot make a binding award as to the initial existence of the agreement from which jurisdiction is said to derive.

28 *Supra*, n 20, at 85.

29 *Ibid*, at 81 col 1.

This view gradually came to be preferred. In *Paul Smith Ltd* v *H & S International Holdings Inc*,[30] it was held, *obiter*, that while no court had yet ruled that an arbitration clause is wide enough to cover a dispute as to whether a contract is valid *ab initio*, an arbitration agreement separately executed at the same time as the principal contract is capable of conferring authority on an arbitrator to decide an issue as to the validity *ab initio* of the contract. If this is so, Steyn J queried, why should the same not apply to an arbitration agreement which physically forms part of the contract, if it is recognised as having a separate existence? Since it was "possible to say with confidence that the evolution of the separability doctrine in English law is virtually complete", this step was a logical and sensible one which an English court might be prepared to take if it arose.[31]

The opportunity arrived in *Harbour Assurance* v *Kansa General International Insurance*[32] All three judges of the Court of Appeal held that if the arbitration clause is not directly impeached, an arbitration agreement is, as a matter of principled legal authority, capable of surviving the invalidity of the contract so that the arbitrator has jurisdiction to determine the initial validity of the contract. Hoffmann LJ, for instance, rejected the argument that an arbitration clause contained in a contract which is void *ab initio* must necessarily be invalid:

> The flaw in the logic, as it seems to me, lies in the ambiguity of the proposition that the arbitration clause "formed part" of the retrocession agreement. In one sense of course it did. It was cl 12 of a longer document which also dealt with the substantive rights and duties of the parties. But parties can include more than one agreement in a single document. They may say in express words that two separate agreements are intended. Or the question of whether the document amounts to one agreement or two may have to be answered by reference to the kind of provisions it contains.[33]

Heyman was distinguished, the Court of Appeal treating the House of Lords' comments as mere *dicta*. The court was impressed by policy reasons such as (1) the need to disentitle one party from preventing arbitration simply by alleging that the contract is void for initial illegality;[34] (2) the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes; and (3) the practical advantages of one-stop adjudication which would avoid the inconvenience of having one issue resolved by the court, and further issues decided by the arbitrator based on the outcome.[35]

30 [1991] 2 Lloyd's Rep 127. See Carl M Svernlöv, "The Evolution of the Doctrine of Separability in England: Now Virtually Complete?" (1992) 9 JIA 115.
31 *Ibid*, at 130–1.
32 [1993] 1 Lloyd's Rep 455 (CA).
33 *Ibid*, at 467-8.
34 *Ibid*, at 464 col 2.
35 *Ibid*, at 469 col 1.

As leave to appeal to the House of Lords was refused,[36] *Harbour Assurance* represents the prevailing English position on the separability of arbitration agreements. Thus, an arbitration agreement contained in a main contract is severable and has a life of its own. If appropriately worded, it confers jurisdiction on the arbitrator even to rule that the main contract is void *ab initio*. The arbitrator only lacks jurisdiction if the arbitration agreement itself is alleged to be invalid or non-existent.[37]

2. Competence-Competence[38]

It has been alleged that English law does not recognise the competence-competence rule.[39] This statement is too sweeping. It is submitted that the rule exists, although in a limited form. In *Christopher Brown* v *Genossenschaft Österreichischer Waldbesitzer Holzwirtschaftsbetriebe, Registrierte GmBH*,[40] it was held that when the jurisdiction of arbitrators is challenged, they may, if they wish, immediately refuse to act until their jurisdiction has been determined by a court which has the power to make a final determination. But they can also choose to decide for themselves whether they have jurisdiction. In this case, their determination will not be binding; the losing party can challenge the ruling as of right in the courts

36 *Ibid*, at 470 col 2.

37 *Ibid*, *per* Hoffmann LJ at 468 col 2: "There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial invalidity should have this consequence." Jacobs, *supra*, n 3, at 630, remarks that some cases seem to suggest that the separability principle extends even to cases where one party seeks to avoid arbitration by denying that the principal agreement or the arbitration agreement was ever concluded. He cites as authority *Shenzhen Nan Da Industrial & Trade United Co Ltd* v *FM International Ltd*, unreported, 2 March 1991 (SC, Hong Kong); and *Sojuznefteexport (SNE) (USSR)* v *Joc Oil Ltd* (1989) 4 *Mealey's International Arbitration Report* 8, (1990) XV *Yearbook of Commercial Arbitration* 384 (CA, Bermuda). I am unable to comment on the *Shenzhen* case as it was unavailable, but the *Sojuznefteexport* case does not appear to support Jacobs' wide proposition. On the contrary, it is consistent with the general position at English law. In that case, the signatory to an agreement containing an arbitration clause had no authority to bind the plaintiff to substantive obligations but was authorised to sign an arbitration agreement. The court held that the arbitration clause was separable and binding. Hoffmann LJ in *Harbour Assurance*, *supra*, n 32, at 468–9, felt that: "The decision was reached under Soviet law as the proper law of the contract, but I think that the answer in English law would have been the same."

38 See Peter Gross, "Competence of Competence: An English View" (1992) 8 Arb Int'l 205.

39 Phiroze K Irani, "International Commercial Dispute Resolution Through Arbitration — I" *Asia Business Law Review*, January 1993 no 1,9 at 17 col 1; Rosen, *supra*, n 11, at 636, 660–1.

40 [1953] 2 Lloyd's Rep 373 at 376, [1954] 1 QB 8 at 13. See also *Golodetz* v *Schrier* (1947) 80 L1 L Rep 647 at 650; *Luanda Exportadora SARL* v *Wahbe Tamari & Sons Ltd* [1967] 2 Lloyd's Rep 353 at 364; *Dalmia Dairy Industries Ltd* v *National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 (CA); *Industrie Chimiche Italia Centrale* v *Alexander Tsavrilis and Sons Maritime Co (The Choko Star)* [1978] 2 Lloyd's Rep 508.

without having to satisfy the criteria necessary to bring an appeal.[41] The Queen's Bench Division in *Harbour Assurance*[42] agreed, stating:

> The approach in English law is simple, straightforward and practical. As a matter of convenience arbitrators may consider, and decide, whether they have jurisdiction or not: they may decide to assume or decline jurisdiction... But it is well settled in English law that the result of such a preliminary decision has no effect whatsoever on the legal rights of the parties. Only the Court can definitively rule on issues relating to the jurisdiction of arbitrators. And it is possible to obtain a speedy declaratory judgment from the Commercial Court as to the validity of an arbitration agreement before or during arbitration proceedings.

This was affirmed by the Court of Appeal. As Hoffmann LJ put it: "[i]t is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction, and therefore the validity of the arbitration clause is not an arbitrable issue."[43]

From these cases it can be seen that the competence-competence rule exists in England, but is not absolute. The arbitration agreement continues to be controlled by the courts.

B. Australia[44]

Obiter remarks by the High Court of Australia in *Codelfa Constructions Pty Ltd* v *State Rail Authority of New South Wales*[45] were applied in *IBM Australia Ltd* v *National Distribution Services Ltd*[46] by a two-to-one majority of the New South Wales Court of Appeal. This case held that arbitrators have no jurisdiction to determine whether or not a contract containing the arbitration clause under which they are appointed is void *ab initio* because the effect of a declaration that the contract is void is that there never was a contractually-valid submission to arbitration. However, these remarks were themselves *obiter* and were not followed by the Federal Court of Australia: see *QH Tours Ltd* v *Ship Design & Management (Australia) Pty Ltd*[47] and *Morton* v *Baker*.[48] Neither have state Supreme Courts taken such

41 In Singapore, under section 28(3) of the Arbitration Act (Cap 10,1985 Rev Ed), a party can only appeal against an arbitration award if the other parties to the arbitration consent, or with the court's leave. Under section 28(4), the court will not grant leave unless it considers that, having regard to all the circumstances, the determination of the question of law could substantially affect the rights of one or more of the parties to the arbitration agreement. See Gross, *supra*, n 38, at 210.

42 [1992] 1 Lloyd's Rep 81 at 83.

43 *Supra*, n 32, at 467 col 1.

44 Jacobs, *supra*, n 3; Rogers & Launders, *supra*, n 18.

45 (1982) 149 CLR 337.

46 (1991) 22 NSWLR 466 *per* Clarke JA at 485, Handley JA at 487.

47 (1991) 105 ALR 371.

48 Unreported, 25 March 1993.

a stand: *Thirteenth Telfab Pty Ltd v Dowsett*[49] and *Ferris* v *Plaister*.[50] The current position may be summarised in the words of Foster J in *QH Tours:*

> I am not satisfied that there is any rule of law which prohibits the empowering of an arbitrator to decide the initial validity of the contract containing the arbitration clause... I consider that, generally speaking, it [the arbitration clause] can be regarded as severable from the main contract with the result that, logically, an arbitrator, if otherwise empowered to do so, can declare the main contract void *ab initio* without at the same time destroying the basis of his power to do so.[51]

There does not appear to be any definitive decision on competence-competence from the Australian courts.[52]

C. Europe and the United States[53]

Many European countries, including France,[54] Germany, the Netherlands, Sweden, and Switzerland,[55] accept both the separability and competence-competence doctrines.

In *Prima Paint Corp* v *Flood & Conklin Manufacturing Co*[56] the United States Supreme Court affirmed the separability doctrine with reference to the Federal Arbitration Act,[57] which applies to interstate and transnational commerce. Under section 4 of the Act, a federal court must order arbitration in accordance with the terms of an arbitration agreement if the initial validity of the arbitration agreement is not itself in issue. The court applied section 4 in *Prima Paint* and held that an allegation of fraud in the inducement of the main contract did not touch the arbitration agreement, which was separable and thus applicable. *Prima Paint* was affirmed in

49 (1990) V Convr 54/366 (SC, Victoria), cited in Michael Pryles, "Current Issues in International Arbitration in Australia" (1992) 9(4) JIA 57 at 62.

50 Unreported, 6 May 1993 (SC, NSW).

51 *Supra*, n 47, at 384.

52 Marcus Jacobs points out that the issue arose on the facts of *James Wallace Pty Ltd* v *Abbey Orchard Property Investments Pty Ltd*, unreported, 21 October 1980 (SC, NSW), but Samuel J in that case found it unhelpful to categorise the question *(ie* whether the dispute fell within the ambit of the arbitration clause) as one which touched the arbitrator's jurisdiction. Jacobs submits that the judge was incorrect: Marcus S Jacobs, *Commercial Arbitration Law and Practice* (1990) vol 1A at 1785 para 5.90.

53 Rosen, *supra*, n 11, at 617-27; Jacobs, *supra*, n 3, at 636.

54 Rosen, *supra*, n 11, at 638–49.

55 Jacobs, *supra*, n 3, at 636-8.

56 (1967) 388 US 395. This case is consistent with *HW Moseley* v *Electronic & Missile Facilities Inc* (1963) 374 US 167 at 171–2.

57 9 USC sections 1-16 (1988 & Supp IV 1992).

Republic of Philippines and National Power Corp v *Westinghouse Electric Corp*[58] where the court stated:

> *Prima Paint* is alive and healthy... The challenge for the party who believes himself to be the victim of a fraud and wishes to fight it out in the court is to demonstrate that the fraud was specifically directed to the arbitration clause or to convince the court to craft some exception to the *Prima Paint* doctrine...

However, the power to decide jurisdictional issues such as the validity of the arbitration clause is reserved to the judiciary by section 4. As such, United States law does not espouse the doctrine of competence-competence.[59]

III. POSITION IN SINGAPORE AND MALAYSIA

A. Domestic Arbitration

1. Separability

In the context of domestic arbitrations, the separability doctrine is governed by case law as the Arbitration Act (Cap 10, 1985 Rev Ed) is silent on the issue. But it is unclear whether the doctrine has been accepted in Singapore. *New India Assurance Co* v *Lewis*[60] involved an expired insurance policy on a racehorse. The insurers required a veterinary certificate to renew the policy, but the insured party failed to send it to them. The horse died. The insurers repudiated liability and claimed that since no policy was in force, the arbitration clause in the policy could not be invoked. Speaking for the Federal Court of Malaysia on appeal from Singapore, Wee Chong Jin CJ said:

> It is settled law that where the dispute is as to whether a contract, which contains an arbitration clause in the widest and most usual form... was entered into at all cannot go to arbitration under the clause. The reason why such an issue cannot go to arbitration is because in the words of Viscount Simon LC in *Heyman* v *Darwins Ltd*[61] at page 343, "The party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission." In the words of Lord Macmillan, *ibid*, at page 345, "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."[62]

58 (1989) 714 F Supp 1362. See also *Sauer-Getriebe KG* v *While Hydraulics, Inc* (1983) 715 F 2d 348 at 350; *Peoples Security Life Insurance Co* v *Monumental Life Insurance Co* (1989) 867 F 2d 809; *Republic of Nicaragua* v *Standard Fruit Co* (1991) 937 F 2d 469.

59 Rosen, *supra*, n 11, at 623 n 141 (citations of cases establishing that competence-competence is not accepted in the United States), 627.

60 [1967] 1 MLJ 156.

61 *Supra*, n 20.

62 *Ibid*, at 157 col 1D-F.

Toller v *Law Accident Insurance Society*[63] was cited with approval. This case involved a dispute over the validity of a motor insurance policy containing an arbitration clause. The plaintiff claimed that the issue of whether the policy in fact existed or not fell within the arbitration clause. However, this was rejected by the court. In its opinion, if the arbitrator found that there was no contract of insurance, he would be confirming the non-existence of the very clause on which his jurisdiction was founded. Therefore he could not have had any jurisdiction to proceed with the matter in the first place.[64]

Jackman v *Culifrance Furniture Pte Ltd*,[65] an unreported 1992 decision of the High Court, reached a similar conclusion. The plaintiff in this case alleged breach of an employment contract and brought an action against the defendant. The defendant applied to the court to stay the proceedings pending arbitration, relying on an arbitration clause in the employment contract. The Assistant Registrar dismissed the application. The defendant appealed, but he inexplicably challenged the very existence and validity of the contract. Quoting the *obiter* remarks of Viscount Simon LC and Lord Macmillan in *Heyman*, and approving *New India Assurance*,[66] Rubin JC concluded:

> In the case at hand, the defendants' principal contention was that there was no contract in existence between the parties. That contention necessarily stymied their attempt to make use of the arbitration clause contained in the self-same Agreement. On the basis of the authorities I have just referred to, the defendant's arguments failed at the threshold and I therefore dismissed the defendant's appeal on stay pending arbitration.[67]

The most that can be said about *New India Assurance* and *Jackman* is that they are consistent with the separability doctrine. If what is disputed is the very existence of the contract (and thus the arbitration agreement), an arbitrator can only have jurisdiction under the competence-competence and not the separability doctrine.[68] The two cases say nothing about whether

63 (1936) 55 LI L Rep 258 (CA). See also *Produce Bakers* v *Olympia Oil and Cake* [1916] 1 AC 314 at 327.

64 *Toller*, *ibid*, at 259. *Toller* was also applied in *Lan You Timber Co* v *United General Insurance Co Ltd* [1968] 1 MLJ 181 (HC, Kuala Lumpur).

65 Unreported, Suit No 1590 of 1991, 30 September 1992 (HC). The case is available in the NUS Law Library's collection of unreported judgments: (1992) 20 *Singapore High Court Judgments* 4742.

66 The High Court in *Jackman*'s case was probably bound to follow *New India Assurance Co*, which was a decision of the Federal Court on appeal from Singapore: see the *dicta* in *Mah Kah Yew* v *PP* [1971] 1 MLJ 1 at 3 (HC) and *Ng Sui Nam* v *Butterworth & Co (Publishers) Ltd* [1987] 2 MLJ 10 at 17 (CA). See Walter Woon, "The Doctrine of Judicial Precedent" in *The Singapore Legal System* (Walter Woon ed, 1989) 239 at 257.

67 *Ibid*, at 21C para 33.

68 *Supra*, n 37, and the accompanying text.

an arbitration agreement may be given effect if the main contract is not non-existent but merely void, voidable or incapable of further performance.

In comparison, the separability doctrine has been implicitly adopted in Malaysia. In *Forest Development Sdn Bhd* v *Syarikat Permodalan dan Perusahaan Pahang Bhd*,[69] the defendant purported to terminate the contract entered into with the plaintiff. The plaintiff instituted a court action, but the defendant applied for a stay of proceedings in favour of the arbitration clause in the contract. The plaintiff resisted the stay on the ground that the defendant's purported termination of the agreement also terminated the arbitration clause in the agreement. George J found that since the act purporting to terminate the contract was *not per se* tantamount to demonstrating that the defendant was unwilling to arbitrate, the defendant was entitled to have the action stayed.[70] Though the court's remark on the defendant's "unwillingness" is puzzling, since a reluctance to arbitrate has never been held to justify rejection of a valid arbitration agreement, it is implicit in the judgment that the arbitration clause was severable from the main contract. Unfortunately, quoting Viscount Simon LC in *Heyman*,[71] the court also held that there was no suggestion that the agreement was void *ab initio* or had come to naught as a result of frustration, hinting that had these factors been present the decision might have gone the other way. English cases now show us that this assertion is inaccurate.[72]

It is submitted that since recent developments in most other jurisdictions point irresistibly towards the acceptance of separability, this doctrine will eventually be applied in Singapore. We need only wait for an authoritative decision from the Court of Appeal, preferably explaining the effect of *New India Assurance* and *Jackman*. Alternatively, an amendment to the Arbitration Act affirming the separability doctrine is welcome.

2. Competence-Competence

New India Assurance and *Jackman* may also suggest that the competence-competence rule does not apply in Singapore. In the former case, Wee Chong Jin CJ held:

> ... If the decision of Buttrose J appointing an arbitrator is right, then, if the arbitrator found there was no contract in existence at all and no right to sue on the policy... he would be deciding that the arbitration clause which founded his jurisdiction never existed and therefore *he never could have had any jurisdiction to deal with the matter*[73]

69 [1981] 2 MLJ 255 (HC, Kuantan).
70 *Supra*, n 69, at 287.
71 *Supra*, n 24.
72 *Supra*, n 37, and the accompanying text.
73 *Supra*, n 60, at 157 col 1I (emphasis added).

However, the point was not specifically addressed and must be considered open. No authoritative Malaysian cases on the point are evident. We have seen that English common law grants arbitrators a limited right to inquire into their own jurisdiction.[74] On the other hand, in some civil law countries the competence-competence rule is more far-reaching. For instance, under Article 1466 of the French Nouveau Code de Procedure Civile, it is the arbitrator who rules both on the limits of his or her jurisdictional power and on the merits of the matter. Under Article 1458, a court must, absent manifest nullity[75] of the arbitration clause, declare itself incompetent to render a decision on the merits. Therefore, arbitrators have exclusive competence to decide challenges to their jurisdiction whether based on an alleged invalidity of the arbitration agreement or the main contract containing it.[76]

Commentator Janet Rosen feels that the retention of judicial control over arbitration agreements in United States and English law inhibits the effectiveness of international arbitration by affording parties a means to avoid their obligation to arbitrate, negating certain advantages attributed to arbitration such as reducing the judicial workload and providing a less expensive dispute resolution mechanism, and detracting from the credibility of the arbitral process as an alternative dispute resolution mechanism. She praises and recommends the French approach.[77] In support of the English position, Peter Gross notes that in English law a party who wishes to challenge the arbitrator's jurisdiction can seek a declaration from the court *prior* to any decision on the matter by the arbitrator, raise objections to the arbitrator *during* the arbitration, or mount a challenge in court *after* the award has been made or during enforcement proceedings. He feels that this flexibility to conclusively resolve jurisdictional issues in the early stages has much to commend it since it can save time and costs.[78] Given Singapore's common law tradition, it is likely that our courts will adopt the limited competence-competence rule. But neither the common law nor civil law position is binding on us. For the sake of clarity, our legislature

74 *Supra*, n 38–43, and the accompanying text.

75 Not defined in the Nouveau Code de Procedure Civile, but one commentator has suggested that it may mean a literal contravention of one of the legal conditions imposed for the validity of the agreement under French law which does not require any interpretation to be established, *eg* a failure to designate an arbitrator or to prescribe any method of appointment: Christopher R Seppala, "French Domestic Arbitration Law" (1982) 16 Int'l Lawyer 749 at 762.

76 Seppala, *ibid*, at 761-2, 771-3. See also *Bai Line Shipping Co* v *Société Recofi*, 21 January 1992, Cass Com, Bull Civ IV, No 30, at 25, cited in Rosen, *supra*, n 11, at 645-7. *Cf Société Impex* v *Société PAZ*, 18 May 1971, Cass civ Inc, 1971 Bull Civ I, No 161, at 134, cited in Rosen at 642-3, in which the court declared itself incompetent to judge the dispute and referred the matter to arbitration under the contract because an arbitrator can judge all conflicts that arise even if the conflicts relate to the existence and validity of the arbitration clause. This case was decided before the Nouveau Code de Procédure Civile was promulgated.

77 Rosen, *supra*, n 11, at 651-66.

78 Gross, *supra*, n 38, at 211-2.

should decide which view it prefers and amend the Arbitration Act accordingly.

B. International Commercial Arbitration

The scope of the competence-competence rule in domestic arbitrations has an impact on international arbitrations. Such arbitrations are now regulated in Singapore by the International Arbitration Act 1994 ("IAA"),[79] which was recently enacted to give legal effect to the Model Law of the United Nations Commission on International Trade Law (UNCITRAL).[80] Article 16(1) of the Model Law reflects both the competence-competence and separability doctrines:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

According to Article 16(3), the arbitral tribunal may either rule on its jurisdiction as a preliminary question, or in an award on the merits. If it chooses to make a preliminary ruling, any party can refer the matter to the High Court for a final determination. Section 10 of the IAA modifies the Model Law by permitting further appeal to the Court of Appeal if leave is granted by the High Court.[81] However, Article 1(5) provides:

> This Law shall not affect any other law of this State[82] by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

This suggests that the elaborate scheme set up by the Model Law to give latitude to the arbitral tribunal to determine its own jurisdiction may be undermined if the English doctrine of limited competence-competence is adopted by our courts. To fix this problem, it is submitted that the common law competence-competence rule should be replaced by a suitable provision in the domestic Arbitration Act. Section 5(4) of the IAA will then ensure

79 No 23 of 1994, now Cap 143A, 1995 Ed. Note that the IAA and Model Law can be made applicable to domestic arbitrations by an agreement in writing between the parties: section 5(1) of the IAA. On the IAA generally, see Hsu Locknie, "The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Singapore" [1994] SJLS 387.

80 Section 3(1) of the IAA states: "Subject to this Act, the Model Law... shall have the force of law in Singapore."

81 This has been criticised by Hsu Locknie, *supra*, n 79, at 396–8.

82 Defined to be Singapore by section 3(2) of the IAA.

that the Arbitration Act is inapplicable to all international commercial arbitrations which are subject to the IAA.

C. Relation to the SIAC Rules

Further conflict becomes evident when we consider the interrelation between the Rules of the Singapore International Arbitration Centre (SIAC),[83] which parties may choose as the procedure governing their arbitrations, and the domestic Arbitration Act and lAA/Model Law respectively. Rule 25.1 of the SIAC Rules is *in pari materia* with Article 16(1) of the Model Law. Unlike the Model Law, though, under rule 31 there is no right of appeal to the courts. The intention is apparently to give absolute competence to arbitrators to finally determine their own jurisdiction. But if parties choose procedural rules which deviate from the law, the latter will prevail.[84] Furthermore, as commentator Phiroze Irani has pointed out,[85] according to rule 1.1 the SIAC Rules "shall govern the arbitration except where any of these Rules is in conflict with a provision of the law applicable to the arbitration which the parties cannot derogate". Article 16(3) of the Model Law and the limited competence-competence rule in domestic arbitrations (if applied to Singapore) may be such non-derogable laws. All this raises the possibility that parties to arbitrations under the SIAC Rules will still have recourse to the courts on questions of the arbitrator's jurisdiction, thus defeating the scheme laid down by the Rules. This is unfortunate because it limits the parties' freedom to choose the procedure to govern their arbitration.

IV. CONCLUSION

If there is one theme that characterises arbitration law, it is the tussle between arbitral autonomy and judicial supervision of the arbitral tribunal. The way our law develops will depend on the policy the legislature decides to adopt. Parliament must decide whether to further arbitral autonomy by employing the far-reaching French competence-competence rule, or judicial control through the limited English rule, and amend the domestic Arbitration Act accordingly to avoid uncertainty. Separability is less of a problem. In the domestic arbitration context Singapore has yet to recognise the doctrine, but it is probably only a matter of time before our courts adopt it as it has been affirmed in many civil and common law jurisdictions. Having said this, it is still preferable for Parliament to remove all ambiguity by adding a section to the Arbitration Act confirming that the separability doctrine exists in Singapore.

83 *Arbitration Rules of the Singapore International Arbitration Centre* (1991).
84 *Cf* Hsu Locknie, *supra*, n 79, at 409.
85 Irani, *supra*, n 39, at 17-8.

Where international commercial arbitration is concerned, the more absolute competence-competence rule in the Model Law suggests that it is Parliament's intention to grant arbitrators greater autonomy to finally determine their own jurisdiction than in domestic arbitrations. Parliament should therefore refine the Arbitration Act by stating that the common law competence-competence rule, if adopted in Singapore, only applies to domestic arbitrations and not to international commercial arbitrations. This will ensure that the more extensive competence-competence rule in the Model Law is not impaired.

Finally, the interplay between the Arbitration Act, the IAA, and other procedural rules such as the SIAC Rules has unintended effects. A policy choice is in order. The current state of law conforms to the judicial control model. But, it is submitted, there is much to be said for permitting parties to adopt a wider competence-competence rule.[86] If this view is accepted by Parliament, further revision of the domestic Arbitration Act and IAA is in order.

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86 *Supra*, n 77, and the accompanying text.

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